

DOUBLE JEOPARDY'S DEMISE

SUSAN R. KLEIN

Reprinted from
CALIFORNIA LAW REVIEW
Volume 88, Number 3, May 2000
Copyright © 2000 by California Law Review, Inc.

Review Essay

Double Jeopardy's Demise

DOUBLE JEOPARDY: THE HISTORY, THE LAW.

By George C. Thomas III.†

New York University Press, 1998. pp. 348. \$50.00 cloth.

Reviewed by Susan R. Klein††

INTRODUCTION

George C. Thomas's book on double jeopardy is, as his editor reveals on the inside jacket cover, the first on this subject in over a quarter century. It thus has the potential to play a key role in reviving a serious and sustained discussion of double jeopardy jurisprudence. Transformations in the substantive criminal law and criminal procedure areas over the last forty years make a renewed focus on the Double Jeopardy Clause of the Fifth Amendment absolutely critical; more so now, perhaps, than at any other time in our nation's history. A complete list of relatively recent changes in the criminal landscape that have the potential to subject a person to a second jeopardy for the same offense would take the bulk of the space allotted to me in this Review Essay. The most important changes include: state and federal legislators' penchant for enacting duplicative statutes proscribing identical misconduct; Congress's federalization of the criminal law, congressional enactment of vague and malleable criminal statutes; federal and state prosecutors' ability to double count and otherwise manipulate the quantity of punishment received under the Federal Sentencing Guidelines and their state counterparts; the advent of so-called "compound" criminal offenses; and federal and state legislators' move toward labeling serious sanctions "civil" rather than criminal. While Thomas does an outstanding job of presenting the competing double jeopardy positions, describing the common law antecedents of the Clause, and criticizing the Supreme

Copyright © 2000 California Law Review, Inc. California Law Review, Incorporated (CLR) is a California nonprofit corporation. CLR and the authors are solely responsible for the content of their publications.

† Distinguished Professor of Law, Rutgers University, Newark, New Jersey.

†† Baker and Botts Professor of Law, University of Texas at Austin. My thanks to Hans Baade, Robert Dawson, and Nancy Jean King for commenting on earlier drafts, and Katrina Blodgett and James Kirby for their research assistance. I am especially grateful to Douglas Laycock for providing the insight that one cannot be a criminal procedure scholar without also becoming a constitutional law scholar.

Court's inconsistent opinions in this area, he does not adequately acknowledge these changes that threaten the very core of double jeopardy protections. Perhaps because of this, he ultimately settles upon an interpretation of "same offense" and "twice put in jeopardy"¹ that is not only unhelpful in resolving current double jeopardy crises, but that has the potential to wrest all meaning from the Clause.

Thomas's thesis is that "since the legislature creates statutory criminal blameworthiness and the procedure for determining that blameworthiness, the legislature is the ultimate source of guidance on when offenses are the same and when the first jeopardy has ended" (p. 6). While Thomas defends this thesis primarily on a "theoretical level," he also claims it is "historically linked to the views of Sir William Blackstone" (p. 5). To convince the reader, he first details three competing double jeopardy models: (1) the substantive double jeopardy clause; (2) a partly substantive double jeopardy clause; and (3) a procedural/derivative double jeopardy clause. Second, Thomas attempts to demonstrate that the third model most faithfully tracks both the text of the Clause and the common law conception of double jeopardy; advances the policy preferences underlying the Clause; and produces "hard-edged" answers to double jeopardy questions that can guide the courts. Finally, he offers a set of presumptions to assist the court in divining legislative intent when confronted by double jeopardy issues.

I follow this same general outline, though I will criticize model three and champion my own variant of models one and two. Drawing on both history and modern practice, I argue that an interpretation that forces the judicial branch to independently define "offense" and "jeopardy" is necessary to foster the only sensible purpose underlying the Clause: protecting against harassing multiple prosecutions and convictions by securing finality of factual findings regarding blameworthiness. Whether Blackstone supports the position that a legislature can override common law double jeopardy protection at will is far from clear. Regardless, Blackstone was writing in the British system of Parliamentary Supremacy, and is not a useful source for interpreting a judicially-enforceable American Bill of Rights. Evidence of Framers' and ratifiers' intent regarding the Clause is essentially nonexistent. Moreover, the scarcity of common law felonies meant that colonial judges rarely confronted the issue of whether two offenses were the same, much less whether "sameness" was determined by the legislature or the court. If the clause had any meaning at all when ratified, it must have prevented the government from recharging a defendant with a particular theft because it was dissatisfied with an acquittal on that theft. Yet that is precisely what the government can do today as a result of the

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

plethora of duplicative and overlapping criminal statutes, if we accept either Thomas's interpretation of the Clause or the present "same statutory elements" test. Like every other provision in the Bill of Rights, the Double Jeopardy Clause should bind the legislative branch. I suggest that, in today's world, a conduct-based "same offense" test is necessary to prevent legislatures from authorizing, and prosecutors from bringing, repeated prosecutions because they are dissatisfied with the result of an initial prosecution, or because they desire a test run, rather than because the defendant has committed misconduct or caused harm that was not accounted for in an initial prosecution.

Before criticizing the book, I wish to make clear that my disagreement with Thomas's suggested interpretation of the Clause does not detract from the high quality of his work. His book is well written and useful. He does not merely bind together a collection of previously published law review articles or essays. Rather, Thomas accomplishes the prodigious task of synthesizing all scholarly, judicial, and historical literature on the subject, analyzing it, and presenting his own unique theory. He offers a conceptual framework that yields relatively consistent and predictable answers to the full range of double jeopardy issues—the meaning of "same offense," when jeopardy is "twice," the relationship between double jeopardy and collateral estoppel, whether civil sanctions can constitute jeopardy of "life or limb," and unit-of-prosecution problems. Along the way, he not only succinctly describes three complicated positions available regarding the Clause, but details the full legal and social ramifications of accepting each. Finally, his suggested presumptions for ascertaining legislative intent regarding whether offenses are the same and when jeopardy attaches would probably constitute an improvement over the Court's present tests, were Thomas willing to relabel his presumptions constitutional imperatives. The clarity and insight with which Thomas attacks the task of rationalizing double jeopardy jurisprudence unquestionably constitutes a valuable contribution to the field.

I

THREE DOUBLE JEOPARDY MODELS: A SYNOPSIS AND CRITIQUE

Thomas immediately focuses on the key issue in modern double jeopardy jurisprudence: Was the Clause designed solely to limit executive and judicial branch action, or is it, like the rest of the Bill of Rights, intended to place limits on the legislative branch? Here I am in complete agreement with Thomas. The Court's unwillingness or inability to decide whether the Clause protects against legislative incursions upon double jeopardy values accounts for most of the confusion in double jeopardy jurisprudence. For example, the Court has rightly been criticized for repeatedly shifting from one legal test for determining whether statutorily defined offenses are the

"same" to another.² Some of these, such as the "essence of offense" test,³ place strict limits on the legislature's ability to define a single bad act as more than one crime,⁴ while others, such as the "same statutory elements" test,⁵ allow the legislature to authorize as many criminal trials for the same misconduct as creative draftsmanship will permit.⁶ Likewise, the Court has vacillated on the question of what limits the Double Jeopardy Clause places on the legislature's ability to determine when a jeopardy is "second." For example, while the Court has absolutely forbidden prosecutorial appeals of acquittals,⁷ it has allowed the legislature to authorize prosecutorial appeals of sentences, reasoning that there could be no second punishment where the statutorily authorized appeal prevented a defendant from forming a legitimate expectation that the original sentence was "final."⁸

Thomas argues that clarification and consistency can be achieved only if the Court rejects any limits upon the legislature and selects his third double jeopardy model. I come to precisely the opposite conclusion. We will achieve consistency and protect double jeopardy values only by enforcing limits on the legislature's ability to authorize successive trials.

A. A Substantive Double Jeopardy Clause

Model One, which Thomas labels "a substantive double jeopardy clause" (p. 8), is both a straw man and a red herring. This model interprets

2. Thomas notes this trend, defining "same offense" and discussing a two tier test for "same offense" (pp. 52-57, 94-103). See also Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 YALE L.J. 1807, 1808-09 (1997); Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 657 (1999) (criticizing the Court's blatant rejection of *Grady v. Corbin*, 495 U.S. 508 (1990), in *U.S. v. Dixon*, 509 U.S. 688 (1993), as inconsistent with the principle of stare decisis).

3. See *In re Nielsen*, 131 U.S. 176 (1889) (holding that adultery and cohabitation are the same offense, though each has an element not contained in the other, because they are aimed at the same harm).

4. Pursuant to such a test, the legislature cannot authorize more than one prosecution for a slap on the face simply by calling one offense assault with intent to injure, and calling the other offense assault with a hand. The "essence" of each proscription is to protect the victim's bodily integrity from unwelcome physical intrusion.

5. See *Blockburger v. United States*, 284 U.S. 299, 304 (1932) (finding that cumulative punishments in single trial not barred when "each provision requires proof of a fact which the other does not").

6. Under this test, the two offenses described in note 4 could be successively charged. Moreover, the legislature could authorize a third criminal prosecution by drafting a statute proscribing assault on a day ending with "y."

7. See, e.g., *Sanabria v. United States*, 437 U.S. 54 (1978) (concluding that where the Court granted defendant's requested judgment of acquittal, there could be no retrial); *United States v. Ball*, 163 U.S. 662 (1896) (concluding that the Double Jeopardy Clause precludes further prosecution of a defendant who has been acquitted at his original trial).

8. See *United States v. DiFrancesco*, 449 U.S. 117, 138-39 (1980) (concluding that resentencing of dangerous special offenders after successful government appeal did not constitute a forbidden second punishment for the same offense).

the Double Jeopardy Clause as a substantive limitation on the legislature's ability to define crimes and fix punishments. The legislature is free to create crimes and authorize punishments only so long as the result is not impermissible multiple punishments. However, this assumes that the Clause has a substantive component that tells us when legislatively-authorized punishments are impermissibly multiple. The problem with this model, according to Thomas, is that the Clause gives absolutely no guidance as to when a punishment is multiple as opposed to single. For example, if the legislature authorizes both a fine and a jail term for a single criminal violation, can the court impose both, or is this impermissible multiple punishment for the same offense? It seems to me that one could go much further than Thomas does along this same vein. If legislative authorization is not the benchmark for how much punishment is appropriate for a single offense, then is a single jail sentence of ten years really multiple punishments (10 punishments of one year each, 120 punishments of one month each, and so on)?

The answer would depend upon how many years in jail (or other sanction) a "single" punishment for an offense should be. This, of course, is a question that is impossible to answer, even if the Court were to agree on a particular sentencing theory.⁹ There is nowhere to turn for a determination of how much or what type of punishment is the "right" amount or type for any particular offense. History will not assist us, as penalties for common law crimes have changed over time, and most of today's crime did not exist at common law. Precedent will not help, as the Court has regularly deferred to the legislative selection of the "right" punishment,¹⁰ outside of the extremely narrow check on the legislative authority embodied in the Eighth Amendment's Cruel and Unusual Punishment and Excessive Fines Clauses. Moreover, the Court's cruel and unusual punishment cases attempt to answer only the easier questions of what types or modes of punishment shock our conscience, and how much punishment is disproportionate to an offense,¹¹ rather than the impossible question of how much punishment is "correct" or "single." Even the comparatively easier endeavor of determining proportionality is so difficult that the Court has all

9. For example, incapacitation, special deterrence, and rehabilitation all require some flexibility in sentencing to take account of individual distinctions in blameworthiness of offenders.

10. Cf. *Lewis v. United States*, 518 U.S. 322, 327 (1996) ("[B]y setting the maximum authorized prison term at six months, the legislature categorized the offense of obstructing the mail as petty. The fact that the petitioner was charged with two counts of a petty offense does not revise the legislative judgment as to the gravity of that particular offense, nor does it transform the petty offense into a serious one, to which the jury trial right would apply.")

11. See, e.g., *Solem v. Helm*, 463 U.S. 277 (1983) (ruling that a sentence of life imprisonment without the possibility of parole imposed under a South Dakota recidivist statute was disproportionate to offense of writing a "no account" check); *Coker v. Georgia*, 433 U.S. 584 (1977) (holding that a sentence of death is grossly disproportionate for the crime of rape of an adult woman).

but forsaken it.¹² Model One is easy to criticize because it is a straw man. The Court has never suggested such an interpretation of the Clause, nor, to my knowledge, has any scholar ever championed this model. A "punishment" is the total package of sanctions authorized by the legislature for a single offense in a single trial, whether it be a single day in jail, ten years in jail, a fine, probation, community service, or any combination thereof.

I say that this argument concerning the appropriate amount of punishment for an offense is also a red herring, however, because one can champion a pure substantive double jeopardy model while, at the same time, agreeing that a single "punishment" for an offense is the total quantity of sanctions authorized by the legislature for that offense. There is nothing inconsistent about admitting that determining the amount of punishment for an offense is, unless so grossly disproportionate as to be irrational, entirely up to legislature, but that the Double Jeopardy Clause demands that defining what constitutes a single "offense," such that the authorized punishment can be imposed only a single time, is a task entirely for the Court. Admittedly, as explained below, this interpretation of the Clause places the focus squarely on the number of prosecutions, rather than the total amount of punishment. This is exactly as it should be. The Fifth Amendment does not prohibit, by its own terms, the total quantity of punishment imposed in a single criminal trial for a single offense. Rather it states that no person shall be "subject for the same offense to be twice put in jeopardy of life or limb."¹³ A sensible interpretation is that a defendant cannot be put at risk of a second criminal trial or conviction for the same offense, not that the legislature cannot authorize any punishment it deems appropriate upon the first jeopardy for a single offense. The total package of punishment legislatively authorized and judicially imposed for a single offense in a single trial is regulated, if at all, by the Eighth Amendment's Cruel and Unusual Punishment Clause and Excessive Fines Clause.

Thomas cites *Missouri v. Hunter*¹⁴ as support for the proposition that the Court has rejected what he calls Model One. The *Hunter* Court held that two convictions and two sentences in a single proceeding, one for robbery and a second for using a weapon to commit the robbery, were permissible despite the fact that the offenses were the "same" under the

12. See, e.g., *Harmelin v. Michigan*, 501 U.S. 957 (1991) (holding that life imprisonment without the possibility of parole is not disproportionate to the crime of cocaine possession, with two justices in the majority concluding that the Eighth Amendment contains no proportionality guarantee but protects only against particular "modes" of punishment, three justices in the dissent approving the *Solem* three factor test for determining proportionality, and three justices in the concurrence recognizing a "narrow" proportionality test).

13. U.S. CONST. amend. V.

14. 459 U.S. 359 (1983).

Court's double jeopardy test.¹⁵ While the Court continued to adhere to its position¹⁶ that the Double Jeopardy Clause protects against both successive prosecutions and multiple punishments for the same offense, it held that the protection against multiple punishments in a single trial is limited to preventing "the sentencing court from prescribing greater punishment than the legislature intended."¹⁷ Where two different statutes proscribe the "same offense" within the meaning of the Double Jeopardy Clause, there is a presumption that the legislature did not intend cumulative punishments. However, this is a rule of statutory construction, not a constitutional mandate, and the presumption can be rebutted by sufficient evidence that the legislature authorized multiple punishments.¹⁸ Though the Court clearly confined *Hunter* to multiple punishments for the same offense imposed in a single proceeding, Thomas believes its reasoning applies equally well to situations in which the punishments and convictions are imposed in two, three, or four trials. He states: "If double jeopardy is not a substantive limitation on the legislature when it defines crimes and creates penalties in the single-trial context (*Hunter*), symmetry and logic dictate that double jeopardy is never a limit on the legislature" (p. 14).

There is some inconsistency in holding that the Double Jeopardy Clause bars a second conviction and punishment in both single and successive proceedings, yet the legislature can override this double jeopardy bar in the single proceeding context. My response, however, would not be to achieve consistency by allowing the legislature to also override the Double Jeopardy Clause in the successive proceeding context. If one insists on consistency, there are two better responses. First, one could take the position, recently articulated by Justice Scalia, that the Clause is inapplicable in a single proceeding; it bars multiple punishment only if there is an attempt to impose them in multiple criminal proceedings.¹⁹ This interpretation of the Double Jeopardy Clause is certainly preferable to Thomas's,²⁰ and is

15. See *id.* (finding that robbery is a lesser-included offense of armed criminal action).

16. See *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

17. *Hunter*, 459 U.S. at 366 (noting that defendant was convicted of first degree robbery, for which he was sentenced to 10 years imprisonment, and armed criminal action, for which he was sentenced to a concurrent 15-year term).

18. See also *Rutledge v. United States*, 517 U.S. 292 (1996) (reversing a conspiracy conviction where defendant was convicted in a single trial of conspiracy to distribute drugs and operating a Continuing Criminal Enterprise, because the former is a lesser-included offense of the latter, and there was no evidence from Congress sufficient to overcome presumption that defendant not be punished twice for the same offense).

19. See *United States v. Ursery*, 518 U.S. 267, 297 (1996) (Scalia, J., joined by Thomas, J., concurring); *Witte v. United States*, 515 U.S. 389, 407 (1995) (Scalia, J., joined by Thomas, J., concurring); *Department of Revenue v. Kurth Ranch*, 511 U.S. 767, 798 (1994) (Scalia, J., joined by Thomas, J., dissenting).

20. I find it preferable only when coupled with a willingness to apply the successive prosecution prong of the Double Jeopardy Clause to bar successive criminal and civil proceedings, at least where the latter are brought by the government and impose punitive sanctions. See Susan R. Klein, *Civil In*

probably truer to history.²¹ It attains consistency—the Clause always limits the legislature from attempting to punish a defendant for the same offense in a second trial—and there is no legislative override, regardless of legislative intent. Moreover, this interpretation achieves consistency without much sacrifice. A double jeopardy bar against multiple punishments for the same offense in a single proceeding is entirely unnecessary, because the due process clause already prohibits a judge from imposing a sentence greater than that authorized by the legislature.²² In fact, the Court might even continue to use *Hunter*'s presumption as a method of divining unclear legislative intent in its Due Process analysis.

The second way to achieve consistency would be to reverse *Hunter*. Since a defendant could not have been convicted and sentenced for armed criminal action and robbery in two separate trials, he should not be subject to two convictions and sentences for what the Court has determined to be the "same offense" in a single proceeding. Such a holding would not infringe the legislative prerogative to determine the total amount of punishment to be imposed for misconduct. For example, the Court was probably correct in *Hunter* that the Missouri legislature wished to impose a total twenty-year sentence against an individual who robbed another while armed. The legislature is well aware that, under the Court's present "same offense" test, robbery will be considered a lesser-included offense of armed criminal action. To achieve its desired level of punishment, the legislature could simply draft the armed criminal action statute to provide for a twenty-year term of imprisonment, instead of providing for a ten-year sentence for robbery and a ten year sentence for armed criminal action (and hoping that it has spoken clearly enough to override the double jeopardy presumption against multiple punishments for the same offense).²³

I believe this approach is preferable to that taken by Justice Scalia for two reasons. First, it forces the legislature to speak clearly regarding the

Rem Forfeiture and Double Jeopardy, 82 IOWA L. REV. 183, 258 (1996). Justice Scalia's desire to eliminate the multiple punishment prong of the Double Jeopardy Clause is for precisely the opposite reason—to allow multiple punitive sanctions in successive proceedings so long as only one proceeding is labeled "criminal" by the legislature. See *Ursery*, 518 U.S. at 297; *Witte*, 515 U.S. at 407.

21. As Professor Thomas notes, multiple convictions in a single trial were unavailable in Blackstone's time, because a felony could not be joined with a misdemeanor, and because judges required prosecutors to elect one felony offense if the indictment showed more than one (p. 111).

22. As Justice Scalia noted in *Kurth Ranch*, 511 U.S. at 799, the Court's famous statement in *North Carolina v. Pearce*, 395 U.S. 71 (1969), that the Double Jeopardy Clause protects against both multiple punishments and successive prosecutions, was taken in part from *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1874). However, the *Lange* Court's holding that a judge could not impose both a fine and a jail term when the statute authorized only one of those sanctions rested on due process grounds.

23. Interestingly, in *Hunter* the defendant received no additional penalty for his convictions for first degree robbery and armed criminal action, as the sentences ran concurrently. Had the Court decided that the Double Jeopardy Clause is an absolute bar to a multiple punishment in a single proceeding and reversed the defendant's conviction for robbery, his 15-year sentence would not have changed. See *Missouri v. Hunter*, 459 U.S. 359, 362 (1983).

total punishment it wishes a defendant to receive, rather than reducing the Court to guessing legislative intent. For example, suppose Congress enacted three statutes concerning the sale of drugs: one proscribing the sale of drugs "in pursuance of a written order" of the person to whom the drugs were sold on the requisite treasury form;²⁴ one proscribing the sale and distribution of drugs not "from the original stamped package";²⁵ and one proscribing facilitating the concealment and sale of a drug with knowledge that the drug had been unlawfully imported²⁶—each with a sentence of five years.²⁷ Suppose further that these three offenses, when based upon a single drug sale, are the "same" under the Court's double jeopardy test.²⁸ Determining how much punishment Congress authorized (the issue one must resolve regardless of whether one is applying the Due Process Clause, as Justice Scalia suggests, or attempting to determine whether *Hunter*'s double jeopardy presumption against cumulative punishments for the same offense has been rebutted, as the Court majority mandates) is extremely difficult. One might argue that congressional intent to punish cumulatively is clear from the fact that the three statutes have "different origins both in time and design."²⁹ On the other hand, one might as persuasively argue that Congress drafted three statutes "to make sure that a prosecutor has three avenues by which to prosecute one who traffics in narcotics, and not to authorize three cumulative punishments for the defendant who consummates a single sale."³⁰ Applying a double jeopardy bar against multiple punishment and convictions for these three offenses in a single trial would force Congress to rewrite each statute to triple the length of punishment, if it is truly their intent to impose a fifteen-year term rather than a five-year term for a single sale.

A second argument in favor of treating the double jeopardy bar against multiple punishment as a constitutional mandate, rather than as a rebuttable presumption, is that this will eliminate multiple convictions in a single trial for the same offense, regardless of whether it reduces the absolute quantity of punishment imposed. This becomes important when one considers that there may be collateral consequences suffered by a defendant when he receives two criminal convictions for something that constitutes only one "offense" within the meaning of the Double Jeopardy

24. I.R.C. § 4705(a) (1994).

25. *Id.* § 4704(a).

26. See Narcotics Drug Import and Export Act, § 2(c), amended by Act of November 2, 1951, 65 Stat. 767.

27. These facts are taken from *Gore v. United States*, 357 U.S. 386 (1958).

28. These offenses are different under the Court's present "same offense" test (same statutory elements), but would be the same under a "same conduct" test.

29. *Gore*, 357 U.S. at 390 (holding that congressional intent was clear from the fact the three statutes have "different origins both in time and in design" and that each statute carried its own separate punishment).

30. *Id.* at 394 (Warren, C. J., dissenting).

Clause. For example, a prosecutor's ability to bring multiple charges for a single offense may increase the risk that a defendant will be convicted on at least one of these charges, on the theory that if you throw enough mud some of it will stick.³¹ Moreover, each conviction will bring a defendant closer to being found a habitual offender.³² While determining the amount of time spent in prison is a legislative prerogative, if California wishes to effectively transform its "three strikes and you're out" sentencing scheme into a "one strike and you're out" scheme by double or triple-counting "same" offenses, it should have to state explicitly that it intends a life sentence for the commission of a single particular crime. Even in our present law-and-order frenzy, political accountability may prevent the California legislature from explicitly punishing this harshly.

B. A Partly Substantive Double Jeopardy Clause

Model Two, which Thomas calls "a partly substantive double jeopardy clause" (p. 12), posits that the Clause limits the power of the legislature only in the context of successive prosecutions. Thomas's criticism of this position is that there is simply no standard by which a court can judge "whether the legislature had divided conduct too finely, created too many offenses out of one 'indivisible' course of conduct" (p. 12). The language of the Double Jeopardy Clause, after all, forbids more than one jeopardy for the same "offense," not for the "same conduct." An offense, in turn, can be created and defined only by the legislature. Thomas claims that while our legal and social culture give us a benchmark for determining when searches and seizures are "unreasonable," and gives us a rough idea of when a punishment is "cruel and unusual," it tells us "precisely nothing about when offenses are the same and when a jeopardy has become 'twice'" (p. 14).

I find these arguments unconvincing. First, I see nothing inconsistent in agreeing that while only the legislature can define what constitutes an "offense" for purposes of drafting and enacting a penal code,³³ only the Court can define whether offenses are the "same" within the meaning of the Double Jeopardy Clause. Likewise, I perceive no special difficulty in devising a test for dividing misconduct in "offenses" that may be different than that division announced by the legislature. It is true that, in a metaphysical sense, there is no platonic form of what constitutes the "same

31. See *Missouri v. Hunter*, 459 U.S. 359, 369 (1983) (Marshall, J., and Stevens, J., dissenting).

32. This danger might, at present, be more theoretical than real. Many states consider multiple convictions arising out of the same transaction as only one prior conviction, and others count as one those arising from the same trial. For a list of state practices, see 5 WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE* 800 nn.28-29 (2d ed. 1999).

33. Though some states still have reception statutes, allowing prosecutors to charge judge-made common law offenses. See JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* § 3.02 (2d ed. 1995).

conduct," "same transaction," or "same episode."³⁴ However, this same criticism can be leveled far and wide against tests in diverse areas of statutory law, common law, and constitutional law. The Court can and has developed a number of workable, though admittedly imprecise, tests that determine whether offenses are the "same" constitutionally. Most of these tests do not quite track the legislative definition.³⁵ For example, the "essence of the offense" test asked whether offenses were aimed at the same harm;³⁶ the "same evidence" test held that offenses were the same only when the same evidence sustained both convictions;³⁷ the "same statutory elements" test asked whether each offense contained an element not found in the other;³⁸ the "same conduct" test barred any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, would prove conduct that constitutes an offense for which the defendant had already been prosecuted;³⁹ and our present "species of lesser included offense" test bars a second prosecution for an offense incorporated in an offense for which the defendant was already prosecuted, even though not technically a lesser-included offense.⁴⁰

34. As Larry Simon wrote in the still seminal piece on double jeopardy, "[w]hether any span of conduct is an act depends entirely upon the verb in the question we ask. A man is shaving. How many acts is he doing? Is shaving an act? Yes. Is changing the blade in one's razor an act? Yes. Is applying lather to one's face an act? . . . Yes, yes, yes." Comment, *Twice in Jeopardy*, 75 *YALE L.J.* 262, 276 (1965).

35. Similarly, the Court has been able to determine when claims concern the "same transaction or occurrence" for purposes of joinder of claims and compulsory counter-claims in civil suits, despite the lack of assistance from the legislature. See *FED. R. CIV. P.* 13(a) (defining compulsory counter claims as those that "arise out of the [same] transaction or occurrence" as the main claim); *Federated Dep't Stores v. Moitie*, 452 U.S. 394 (1981) (explaining that common law principles of *res judicata* mandate that plaintiff join all claims arising out of the same transaction); *RESTATEMENT (SECOND) OF JUDGMENTS* § 24(2) (1982) (requiring that civil plaintiff join all claims arising from the same transaction or series of transactions); see also *FED. R. CIV. P.* 8(a) (allowing joinder of claims that arise from the same transaction); *FED. R. CIV. P.* 14(a) (extending the rules concerning compulsory counterclaims to third parties brought in by the defendants); *FED. R. CIV. P.* 18 (allowing joinder of claims and remedies).

36. See *In re Nielsen*, 131 U.S. 176, 187 (1889) (holding that conviction for unlawful cohabitation barred subsequent conviction for adultery "because the material part of adultery charge was comprised within the unlawful cohabitation").

37. See *Gavieres v. United States*, 220 U.S. 338 (1911) (upholding a conviction for insulting a public officer after a prior conviction for behaving in rude manner in public, though charges based upon same conduct, because each crime required proof of an additional fact not required by the other, and different evidence was used to prove these different facts).

38. See *Blockburger v. United States*, 284 U.S. 299, 301-05 (1932) (holding that multiple punishments in single trial for a single sale of morphine, which violated one statute forbidding the sale of drugs except in the original stamped package and a second statute prohibiting any sale of drugs not pursuant to a written order, did not violate double jeopardy).

39. See *Grady v. Corbin*, 495 U.S. 508, 523 (1990) (holding that prosecution of an automobile driver for homicide and assault of a passenger was barred by double jeopardy where the driver had previously pleaded guilty to DUI and failing to keep to the right of a median in the same incident).

40. See *United States v. Dixon*, 509 U.S. 688, 698-712 (1993) (holding that second prosecution for substantive criminal offense of possession of cocaine with intent to distribute was a species of

Many additional tests have been suggested by scholars,⁴¹ including Thomas's own "blameworthy act" test.

Likewise, state courts have developed a number of tests for determining whether offenses are the same for purposes of the state constitution's double jeopardy clause, the state's statutory regulation of double jeopardy, or state common law. While the majority follow federal law and adopt the legislatively deferential "same elements" test,⁴² a number of

lesser-included offense of a criminal contempt prosecution where the court order barred the defendant from committing any crime in the District of Columbia).

41. See, e.g., MICHAEL S. MOORE, *ACT AND CRIME* (1993) (promoting a theory of action); Amar, *supra* note 2, at 1814-15 (proposing a "same is same" approach); Susanah M. Meade, *Double Jeopardy Protection - Illusion or Reality?*, 13 *IND. L. REV.* 863 (1980) (describing a "gravamen-of-offense" test); George C. Thomas III, *A Blameworthy Act Approach to the Double Jeopardy Same Offense Problem*, 83 *CALIF. L. REV.* 1027 (1995) (outlining a "single blameworthiness" test).

42. States that have adopted the "same statutory elements" test for double jeopardy purposes include Alabama, *Ex parte Rice*, No. CC-97-2672, CR-97-1809, 1999 WL 1001213, at *2 (Ala. 1999) ("The established test for determining whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment was stated in *Blockburger* . . ."); Alaska, *Todd v. State*, 917 P.2d 674, 678 (Alaska 1996) (overruling *Tuckfield's* use of the "same facts" test, and establishing *Blockburger* as the exclusive test); Arizona, *Hernandez v. Superior Court*, 880 P.2d 735, 739 (Ariz. Ct. App. 1994) (interpreting the California Constitution, as codified in Penal Code section 1023, as identical to the Federal Constitution, and adopting *Dixon* for successive prosecutions); Arkansas, *Sherman v. State*, 931 S.W.2d 417, 424-25 (Ark. 1996) (adopting *Blockburger*); California, *People v. Scott*, 939 P.2d 354, 362 (Cal. 1997) (adopting *Dixon* for successive prosecutions); Colorado, *People v. Leske*, 957 P.2d 1030, 1036 (Colo. 1998) (en banc) (adopting *Blockburger*, as codified in Colorado state law); Delaware, *Forrest v. State*, 721 A.2d 1271, 1278 n.4 (Del. 1999) (holding that in multiple punishment in single trial situation, "the *Blockburger* test is consistent with 11 *Del.C.* 206."), *but see* *State v. Willis*, 673 A.2d 1233, 1236-37 (Del. Super. Ct. 1995) (recognizing that "the Delaware Supreme Court has not yet been required to determine whether the federal and state double jeopardy provisions are identical in scope in all respects"); District of Columbia, *Nixon v. United States*, 730 A.2d 145, 152 (D.C. 1999) (adopting *Blockburger*); Florida, *Gibbs v. State*, 698 So.2d 1206, 1207 (Fla. 1997) (interpreting West's Florida Statute Annotated § 775.021(4) as codifying *Blockburger*); Iowa, *State v. Taylor*, 596 N.W.2d 55, 56 (Iowa 1999) (adopting *Blockburger*); Kentucky, *Commonwealth v. Burge*, 947 S.W.2d 805, 811 (Ky. 1996) (adopting *Dixon* for successive prosecutions; departing from the earlier "same conduct" test and "single impulse" test, and returning to the *Blockburger* analysis); Maine, *State v. Fairfield*, 644 A.2d 1052, 1053 (Me. 1994) (applying the *Blockburger* test to multiple punishments and successive prosecutions); Maryland, *Gianiny v. State*, 577 A.2d 795, 797 (Md. 1990) (adopting *Blockburger* under name of "required evidence test"); Massachusetts, *Ariel A. v. Commonwealth*, 649 N.E.2d 735, 738 (Mass. 1995) (applying *Brown* to bar later prosecution on greater offense); Michigan, *People v. Mitchell*, 575 N.W.2d 283, 284 (Mich. 1998) (adopting *Blockburger*); Mississippi, *Thomas v. State*, 711 So.2d 867, 870 (Miss. 1998) (adopting *Blockburger* for multiple punishments and successive prosecutions); Missouri, *State v. Madison*, 997 S.W.2d 16, 21 (Mo. 1999) (en banc) (adopting *Blockburger* for multiple punishments in a single trial), *State v. Blackman*, 968 S.W.2d 138, 140 (Mo. 1998) (interpreting *Dixon* to allow a successive prosecution even for a greater offense under *Blockburger* where legislative intent to do so is clear); Nebraska, *State v. Spotts*, 595 N.W.2d 259, 261 (Neb. 1999) (adopting *Blockburger* for multiple punishment cases), *NEB. REV. STAT.* § 174.085 (codifying *Blockburger* for successive prosecution cases); Nevada, *Athey v. State*, 797 P.2d 956, 958 (Nev. 1990) (adopting *Blockburger*); New Mexico, *State v. Cleve*, 980 P.2d 23, 32 (N.M. 1999) (adopting *Blockburger*); New Hampshire, *State v. Jimenez*, 629 A.2d 785, 787-88 (N.H. 1993) (following *Dixon* Court and adopting *Blockburger* as the "sole embodiment of the fifth amendment's double jeopardy protections against successive prosecutions"); North Carolina, *State v. Raines*, 354 S.E.2d 486, 491 (N.C. 1987) (adopting *Blockburger* for successive prosecutions); North Dakota, *State v. Stewart*, 598 N.W.2d 773, 777 (N.D. 1999) (adopting *Blockburger* for successive criminal

states have chosen double jeopardy tests that define "offense" in a manner at odds with the legislative definition. These states presently use a "same facts" test,⁴³ a "same conduct" test,⁴⁴ an "indictment/pleading theory,"⁴⁵ a

prosecutions and multiple punishments); Ohio, *State v. Rance*, 710 N.E.2d 699, 702 (Ohio 1999) (adopting *Blockburger*); Oklahoma, *Mooney v. State*, 990 P.2d 875, 883 (Okla. Crim. App. 1999) (adopting *Dixon* for successive prosecutions); Pennsylvania, *Commonwealth v. Failor*, 734 A.2d 400, 402 (Pa. Super. Ct. 1999) (interpreting the state constitutional double jeopardy provision as applying *Blockburger* to successive prosecutions); Rhode Island, *In re Malik D.*, 730 A.2d 1070, 1074 (R.I. 1999) (adopting *Blockburger*); South Carolina, *State v. Easler*, 489 S.E.2d 617, 623 (S.C. 1997) (applying *Blockburger* in both multiple punishment and successive prosecution cases); South Dakota, *State v. Darby*, 556 N.W.2d 311, 317 (S.D. 1996) (adopting *Blockburger*); Texas, *Vick v. State*, 991 S.W.2d 830, 833 n.1 (Tex. Crim. App. 1999) (applying *Blockburger* and *Dixon* tests to successive prosecutions; interpreting the Texas Code of Criminal Procedure, Article 1.10); Vermont, *State v. Grega*, 721 A.2d 445, 458 (Vt. 1998) (adopting *Blockburger*); Washington, *State v. Gocken*, 896 P.2d 1267, 1273 (Wash. 1995) (en banc) (holding that Constitution Article I, Section 9 is given the same interpretation that the Supreme Court gives to the Fifth Amendment's Double Jeopardy Clause, and applying *Blockburger's* "same element" test to successive prosecutions); West Virginia, *State v. Easton*, 510 S.E.2d 465, 485-86 (W. Va. 1998) (adopting *Blockburger*); Wisconsin, *State v. Vassos*, 579 N.W.2d 35, 37 (Wis. 1998) (substantially enacting the *Blockburger* test in Wisconsin Statute section 939.71); and Wyoming, *State v. Keffer*, 860 P.2d 1118, 1130 (Wyo. 1993) (finding that determination of whether subsequent prosecution is barred by double jeopardy is made solely upon a comparison of the statutory elements).

43. These states are: Connecticut, *State v. Lonergan*, 566 A.2d 677, 681 (Conn. 1989) (holding that in successive prosecution cases, "if the same evidence offered to prove a violation of the offense charged in the first prosecution is the sole evidence offered to prove an element of the offense charged in the second prosecution, then the prosecution of the second offense is barred on double jeopardy grounds, regardless of whether either offense requires proof of a fact that the other does not"); Indiana, *Richardson v. State*, No. 67501-9910-CR-506, 1999 WL 784001, at *12 (Ind. 1999) (holding that two or more offenses are the "same offense" in violation of Article I, Section 14 of the Indiana Constitution, if, with respect to either the statutory elements of the challenged crimes or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense); Kansas, *State v. Barnhart*, 972 P.2d 1106 (Kan. 1999) (interpreting state double jeopardy statute to bar a second prosecution where evidence of that crime was introduced in a prior prosecution, if that crime could have been charged as an additional count in the prior case, and finding that statutory joinder rule permits additional counts where the crimes are of similar character, are based upon the same transaction, or are part of a common scheme); Louisiana, *State v. Miller*, 571 So.2d 603, 606 (La. 1990) ("The 'same evidence' test depends upon the proof required to convict, not the evidence actually introduced at trial. Thus, if the evidence necessary to support the second indictment would have been sufficient to support the former indictment, double jeopardy prohibits the second prosecution. . . . [T]his Court, in recent years, has principally relied on the 'same evidence' test when evaluating double jeopardy claims."); and Virginia, *Philips v. Commonwealth*, 500 S.E.2d 848, 850-51 (Va. Ct. App. 1998) (holding that double jeopardy as embodied in *VIRG. CODE ANN.* s. 19.2-294 (Michie 1950) prohibits a successive prosecution for a separate statutory offense based on the same act).

44. Georgia uses this test. See *Rower v. State*, 472 S.E.2d 297, 298 (Ga. 1996). Code of Georgia section 16-1-7(a)-(b) provides that if several crimes "arising from the same conduct are known to the proper prosecuting officer at the time of commencing the prosecution and are within the jurisdiction of a single court, they must be prosecuted in a single prosecution" except where the interests of justice require otherwise. Code of Georgia section 16-1-8(b) provides that a prosecution is barred if an accused was formerly prosecuted for a different crime, if such former prosecution "[r]esulted in either a conviction or an acquittal and the subsequent prosecution is for a crime of which the accused could have been convicted on the former prosecution, is for a crime with which the accused should have been charged on the former prosecution (unless the court ordered a separate trial of such charge), or is for a crime which involves the same conduct, unless each prosecution requires proof of a fact not required

"same transaction" test,⁴⁶ or some conglomeration of various tests thus far proposed.⁴⁷ Outside of the constitutional arena, state courts regularly devise tests for determining whether one "offense" is a lesser-included offense of

on the other prosecution or unless the crime was not consummated when the former trial began." GA. CODE ANN. tit. 16, § 16-1-8(b)(1) (1998). This appears to be modeled upon similar Model Penal Code provisions, though it is slightly less defendant-friendly. See *infra* note 100. Other states that have adopted *Grady's* "same conduct" test include: Hawaii, *State v. Ake*, 967 P.2d 221, 224-25 (Haw. 1998) (adopting the "same conduct" test in the successive prosecution context, as the general standard under the double jeopardy clause of the Hawaii Constitution); Illinois, *People v. Stefan*, 586 N.E.2d 1239 (Ill. 1992) (adopting *Grady*); Minnesota, *State v. Gilbert*, 262 N.W.2d 334, 338 (Minn. 1977) (finding that state statute provides double jeopardy protection against successive prosecution when the conduct underlying the offenses was unitary rather than divisible).

45. The only state using this test is Idaho. See *State v. Pizzuto*, 810 P.2d 680, 694 (Idaho 1991) (holding that an offense is an included offense if it is alleged in the information as a means or element of the commission of a higher offense). But see *State v. Reichenberg*, 915 P.2d 14, 21 (Idaho 1996) (noting that the just-repealed state statute had previously provided greater protection than the Federal standard, but declining "in this case to interpret the double jeopardy provision of the Idaho Constitution in a manner different from the Fifth Amendment's double jeopardy provision of the United States Constitution").

46. Several states use this test: Montana, *State v. Sword*, 747 P.2d 206, 208 (Mont. 1987) (noting that Montana statute prohibits second prosecution based upon same transaction as former prosecution); and New York, *Abraham v. Justices of New York Supreme Court of Bronx County*, 338 N.E.2d 597, 600-01 (N.Y. 1975) (finding that the statutory double jeopardy provision, N.Y. CRIM. PROC. LAW section 40.20, bars a subsequent prosecution based on the same transaction as a former one); Corbin v. Hillary, 543 N.E.2d 714 (N.Y. 1989) (holding that even where legislature supersedes statutory double jeopardy provisions for traffic violations, federal double jeopardy clause prevents successive prosecution based upon same conduct as former prosecution), *aff'd*, *Grady v. Corbin*, 495 U.S. 508 (1990), *overruled by United States v. Dixon*, 509 U.S. 688 (1993); Oregon, *State v. Lyons*, 985 P.2d 204, 208 (Or. Ct. App. 1999) (holding that double jeopardy as contained in Article 1, Section 12 of the Oregon Constitution and codified at OR. REV. STAT. § 131.515 (1953), Subsection 1 bars successive criminal prosecutions not only for the same offense but for all known charges arising out of the same criminal episode). But see *City of Lake Oswego v. \$23,232.23*, 916 P.2d 865, 870 (Or. Ct. App. 1996) (adopting *Dixon* for successive prosecutions). In addition, UTAH CODE ANN. 1953 § 76-1-403 (1953) provides that a former prosecution resulting in an acquittal or conviction bars a subsequent prosecution for offenses arising out of the same episode.

47. Only two states use such a conglomeration. One is Tennessee. See *State v. Winghamam*, 958 S.W.2d 740, 742 (Tenn. 1997) ("Under the Tennessee Constitution, this Court inquires further than do federal courts in determining whether a defendant has been unconstitutionally subjected to double prosecution for the same conduct. Resolution of the double jeopardy issue requires the following: (1) a Blockburger analysis of the statutory offenses; (2) an analysis of the evidence used to prove the offenses; (3) a consideration of whether there were multiple victims or discrete acts; and (4) a comparison of the purposes of the respective statutes. None of these steps is determinative . . ."). The other is New Jersey. See *State v. Yoskowitz*, 563 A.2d 1 (N.J. 1989) (finding that the second prosecution for arson after filing false police reports was not barred by federal or state double jeopardy prohibitions because the elements of the two crimes are not identical, and the same facts are not used to prove the two offenses; that the second prosecution was also not barred by the statutory double jeopardy provision, see N.J. STAT. ANN. § 2C1:10a(3) (West 1979), which bars a second prosecution for the same conduct unless each crime requires proof of an additional fact and the law defining each crime is intended to prevent a different harm; and finally, that the second prosecution is not barred under the statutory mandatory joinder rule, see *id.* § 2C1:8b, which requires joinder of all criminal offenses arising out of the same conduct or the same episode, if known to the appropriate officer, and if within the jurisdiction and venue of a single court; but that the second prosecution may be barred by fundamental fairness).

another for purposes of instructing the jury.⁴⁸ Again, these tests often do not at all mimic the legislative parsing or definitions of offenses. For example, many states apply a "cognate theory" to permit a lesser-included offense instruction even though all of the statutory elements of the lesser offense are not contained in the greater offense, so long as the "overlapping elements relate to the common purpose of the statutes."⁴⁹ Under the "cognate-pleading" approach to this theory, the court considers the facts as pled in the indictment to determine whether a lesser-included offense instruction is permitted,⁵⁰ and under the "cognate-evidence" approach, the court considers the facts and evidence actually adduced at trial to determine whether a lesser-offense instruction is appropriate.⁵¹

Perhaps Thomas is not arguing that it is impossible for the Court to divide a course of conduct into a certain number of offenses, but simply that there is no objective standard for selecting among these various tests. This is undoubtedly true, but it is no more a criticism of the Double Jeopardy Clause than of many other provisions of the Bill of Rights. There is no objective meaning to the word "reasonable" in the Fourth Amendment, no objective criteria to determine when punishment is "cruel" pursuant to the Eighth Amendment, and no objective standard by which to measure whether one receives all the "process" due under the Fifth and Fourteenth Amendments. The best the Court can do is select an interpretation that protects the values underlying the Clause, yields relatively predictable results, and provides sufficient guidance to courts, legislatures, and law enforcement personnel. This, in fact, is what Thomas does in selecting his "blameworthy act" test⁵² under the guise of a presumption. He has selected a value—legislative supremacy—and developed a test he believes best furthers that value.

Thomas's claim that our legal and social culture is somehow better at giving us an answer as to when a search is "reasonable" and when punishment is "cruel" than to how many "offenses" have been committed does not ring true. There will in fact be large areas of agreement as to what searches are unreasonable and what punishments are cruel and unusual, but there will be at least equally large areas of disagreement at the margins. For example, my guess is that most Americans, if polled, would find that

48. For a useful classification of the various types of lesser-included offense instructions existing under state laws, see Christen R. Blair, *Constitutional Limitations on the Lesser Included Offense Doctrine*, 21 AM. CRIM. L. REV. 445 (1984).

49. *State v. Curtis*, 944 P.2d 119 (Idaho 1997).

50. See, e.g., *id.* at 121 (allowing instruction on inattentive driving as lesser-included offense of driving under the influence).

51. See, e.g., *Lilly v. State*, 649 A.2d 1055 (Del. 1994) (holding that in second-degree murder prosecution the lower court erred in failing to also instruct on lesser-included offense of vehicular homicide); *Moore v. State*, 969 S.W.2d 4 (Tex. Crim. App. 1998) (permitting voluntary manslaughter as lesser-included offense of capital murder).

52. See *infra* notes 54-57 and accompanying text for a description of this test.

body cavity searches conducted by opposite gender law enforcement officers without individualized suspicion are unreasonable. Likewise, most probably believe that state-sanctioned torture and dismemberment for shoplifting is disproportionate. However, there will be serious disagreement as to whether drug testing of all public school students engaged in extracurricular activities of any kind is reasonable, and disagreement as to whether "chain gang" work details of state prisoners is cruel. Similarly there is a cultural sense of what is a single morally bad act versus what is a number of morally bad acts, though again there will be large areas of disagreement at the margins. For example, there is probably some societal sense that the murder of an individual and arson of her house are different offenses, but a single sale of one joint of marijuana to one buyer at one time are not nine different "offenses," punishable in nine successive criminal trials.⁵³

C. A Procedural/Derivative Double Jeopardy Clause

Thomas calls Model Three "a procedural/derivative double jeopardy clause" (p. 14). This model posits that the Double Jeopardy Clause is a "procedural limitation on prosecutors and judges, but not a substantive limitation on the legislature" (p. 15). It limits how many convictions a prosecutor can seek and how much punishment a judge can impose to that authorized by the legislature. Only the legislature is institutionally competent to create substantive blameworthiness, so it controls how blameworthiness is to be parceled out (how many offenses) and when a procedure finally determines that blameworthiness (the end of jeopardy). The judicial function is simply to determine legislative intent regarding these two issues.⁵⁴

53. Thomas has characterized this as his "favorite example." George C. Thomas III, *A Modest Proposal to Save the Double Jeopardy Clause*, 69 WASH. U. L.Q. 195, 207 n.50 (1991). The example comes from Note, *Consecutive Sentences in Single Prosecutions: Judicial Manipulation of Statutory Penalties*, 67 YALE L.J. 916, 928 n.43 (1958).

54. Professor Thomas is not the only scholar to advocate this position. For example, Professor Nancy J. King has also argued for a "deference to legislative choice" approach, though only in regards to defining "same offense," not in regards to when jeopardy attaches. Nancy J. King, *Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties*, 144 U. PA. L. REV. 101, 114 (1995). She suggests that the court should instead turn to a combination of the Eighth Amendment's excessive fines and cruel and unusual punishment clauses to protect against successive and excessive punishment. Unfortunately, this solution comes too late to remedy the problem of an unwarranted prosecution. For further critique of King's argument, see Klein, *supra* note 20, at 267-69. Professor Akhil Amar goes even further than Professor King, arguing that the same offense means "exactly the same." Amar, *supra* note 2 at 1813 (suggesting that "the Double Jeopardy Clause imposes no limits on how the legislature may carve up conduct into discrete legal offense units," but suggesting due process and collateral estoppel as remedies for vexatious litigation). This position lacks support in both history and common sense. For further critique of Amar's position, see Susan R. Klein & Katherine P. Chiarello, *Successive Prosecutions and Compound Criminal Statutes: A Functional Test*, 77 TEX. L. REV. 333, 375-82 (1998).

Because the legislature rarely makes its intent known, Thomas offers a set of presumptions about when offenses are the same and when jeopardy ends. Thomas's presumption regarding when offenses are the same is that "each legislatively proscribed blameworthy act is one, and only one, double jeopardy offense" (p. 69). Drawing heavily from action theory,⁵⁵ Thomas distinguishes between the legislative description of acts, which he calls "act-types," and particular acts committed by defendants, called "act-tokens."⁵⁶ Where two statutory act-types are different they proscribe different offenses regardless of whether separate act-tokens have occurred. For example, Thomas posits, contrary to Supreme Court holdings,⁵⁷ that rape and felony murder based upon the rape are different offenses. This is because rape is a different act-type than murder, thus it does not matter that the act-token of the rape also caused the victim's death (p. 138). However, if "the statutory act-types are the same and only a single act-token of that act-type occurred, there is singular criminal blameworthiness and thus only one double jeopardy offense" (p. 138). Since larceny at night is the same act-type as larceny of a person, the single act-token of taking property from the victim's pocket at night can only be one offense. We can determine whether two statutorily described offenses are different act-types by asking whether they have noncommon elements that reflect the harm the legislature seeks to prevent. Harm is defined as "a wrongful setback to the interests of a person."⁵⁸ Thomas argues that this presumption best protects legislative prerogative because the proscription of acts, results, or attendant circumstances unconnected to blameworthiness is unlikely to signal legislative intent to create cumulatively punishable offenses.

Thomas's presumption about the end of jeopardy is that "jeopardy ends only with a formal verdict or an outcome that can fairly be characterized as an acquittal" (p. 69). Such outcomes include a mistrial obtained by the prosecutor to avoid an acquittal, the implied acquittal of a greater charge when a defendant is convicted on a lesser charge, an appellate reversal for insufficient evidence, and a dismissal that resolves the factual elements of the offense in the defendant's favor.

55. Thomas adopts these terms from MOORE, *supra* note 41. As one of my colleagues points out, this may provide for an interesting philosophical discussion. However, terms such as "act-type" and "act-token" cannot be helpful to judges or practicing attorneys.

56. Larceny committed on Tuesday is a different offense from larceny committed on Friday because although both offenses describe the same act-type, they are two act-tokens of that same act-type. This is a unit of prosecution problem, which I will not discuss in this Review Essay.

57. See *Whalen v. United States*, 445 U.S. 684 (1980) (holding that defendant cannot be successively convicted of a felony murder and rape when the felony murder was based on the felony of the same rape); *Harris v. Oklahoma*, 433 U.S. 682 (1977) (per curiam) (affirming that conviction of felony murder based upon proof that defendant's accomplice killed a clerk during a robbery precluded a second conviction for that robbery).

58. Thomas borrows this definition from JOEL FEINBERG, *HARM TO OTHERS* (1987).

A key feature of these presumptions is that they operate only in the absence of clear legislative intent. Thus, if the legislature intends robbery while waving a flag and robbery while singing the Star Spangled Banner to be two separate offenses, the defendant can be tried twice, despite the fact that both the act-types and act-tokens are the same, since the different attendant circumstance elements in the offenses are unconnected to blameworthiness.⁵⁹ Likewise, the legislature can authorize a second criminal prosecution for an identical offense, even after a formal jury verdict of "not guilty," by determining that one's exposure to jeopardy has not yet ended. The legislature would simply have to enact a statute authorizing state appeals of acquittals based upon legal error (p. 270).⁶⁰

I offer two criticisms of Model Three at this point. The first is that Thomas's "same offense" presumption belies his assertion that the only defensible account of "same offense" is the "legislative description of the prohibited conduct" (p. 33). His own test is perfectly defensible, yet it defines "offense" for purposes of the double jeopardy clause differently than does the legislature for purposes of drafting the penal code. That is just what Thomas told us, in his attack on Model Two, that we were incapable of doing. Thomas's intuition that the legislature does not really mean for two offenses to be different, even though they were enacted at different times, are given different names and code sections, and have different elements, is absolutely correct. But there is no escaping the fact that his ability to create a presumption to tell us when two "offenses" describe just one morally blameworthy act further refutes his claim that there is no cultural or legal referent for "same offense" outside the legislative description. Though he calls it a "presumption" of legislative intent rather than a constitutional mandate, he manages to find just such a referent. The creation of this presumption demonstrates that, at some level, Thomas embraces the antiharassment principle he claims to reject. His intuition, embodied in his presumption, that the legislature does not intend to cumulatively prosecute, convict, and punish for what he terms a "single blameworthy act" must be motivated by his perception that to do so would be needlessly vexatious and unfair to the defendant. Because Thomas's presumption makes it possible to determine, looking outside the legislative language, what constitutes a "single offense," it is sensible to discuss "harassing" prosecutions. This is what Thomas tells us we cannot do when he selects the legislative prerogative policy and rejects an antiharassment policy.

My second criticism of Model Three is more profound: It leaves us in precisely the position we would occupy if the Double Jeopardy Clause had

59. This is Thomas's example (p. 70).

60. Even if one were to accept Thomas's limitation of this legislative power to appeals of legal rather than factual errors, this will imperil most acquittals. Trials can only be as error-free as the humans conducting them.

never been ratified. What burden does the Clause shoulder, when in its absence judges would nevertheless be bound by legislative intent regarding whether a criminal charge can be brought and whether retrial can occur? Thomas recognizes this criticism. His response is that because Congress rarely makes its intent known, the presumptions will decide most cases, and thus "the role of courts is no less central in a double jeopardy world built on legislative prerogative than a world in which courts create the concepts of 'same offense' and 'jeopardy' out of thin air" (p. 41). This is not an answer. It may or may not be true that the role of the courts is no less central in a world utilizing Model Three than in the present world, but this does not respond to the criticism that a Model Three world operates exactly as would a world without the Double Jeopardy Clause. The outcome we now label "double jeopardy" issues would be identical under a Model Three approach and in a world where the Clause were erased. How central the courts would be depends upon whether Thomas has guessed congressional intent accurately. For example, if Thomas's presumptions do accurately reflect legislative intent, then the Court should use them to divine this intent on matters under the control of the legislature regardless of the existence of the clause.

If, on the other hand, Thomas is wrong that his presumptions reflect legislative intent, and the legislature begins to speak more clearly, then, again, the world under Thomas's interpretation of the Double Jeopardy Clause will be identical to a world without the Clause. For example, Congress might draft a global statute providing that all criminal offenses are different unless otherwise stated. Even more troubling, Congress might draft a global statute permitting government appeals of factually erroneous acquittals.⁶¹ What politician would vote against a statute allowing retrial of an acquitted murderer who later confesses his guilt? The legislature cannot be relied upon to protect verdict finality, particularly in an age of increasing hysteria over crime and criminals. My experience as a federal criminal prosecutor is that my colleagues believed that even acquitted defendants were, in fact, guilty. I predict that many prosecutors and investigative agents would attempt to find new evidence of guilt after an acquittal to correct the loss of a case in which they have become heavily invested and to vindicate their original decision to indict. For this reason, even a "narrow"

61. Thomas claims that the Sixth Amendment right to a jury trial would forbid the appeal of an acquittal infected with factual rather than legal error. He does not explain why this is so, and I am unconvinced. The Sixth Amendment simply guarantees the right to a jury trial in the state and district where the crime has been committed, it says nothing about limiting the number of such jury trials. So long as the defendant obtains a new jury trial after the reversal of his acquittal, the Sixth Amendment is not directly implicated. Moreover, Thomas would allow successive prosecutions for the same offense so long as this is what the legislature intends. This would potentially give us precisely the same scenario—a second jury finding a defendant guilty of the same offense after the first jury acquitted him, without the necessity of a government appeal of that acquittal.

exception for "erroneous" acquittals would soon swallow up the rule. Overall, it is impossible to see how the existence of the Clause, thus interpreted, makes any difference to a criminal defendant.

II

DOUBLE JEOPARDY HISTORY, VALUES, AND HARD EDGES

Thomas offers three primary justifications for his interpretation of the Double Jeopardy Clause. First, his interpretation more closely tracks the common law view of double jeopardy, particularly as detailed in Sir William Blackstone's *Commentaries on the Laws of England*.⁶² Second, it rejects harassment as the double jeopardy policy and enshrines the true value underlying the Clause: protecting against an "unauthorized judgment of criminal blameworthiness" (p. 63). Third, it provides hard-edged rules. I find these justifications neither particularly relevant nor ultimately persuasive. In the following three Sections, I will refute Thomas's view of history, sing the praises of the antiharassment model of double jeopardy, and offer a conduct-based "same offense" test that provides rules hard enough to prevent harassment.

A. An Historical Account of Double Jeopardy

Though Thomas makes a valiant effort, neither a review of Blackstone's *Commentaries on the Laws of England*, an inquiry into the Framers' and ratifiers' intent, nor the study of historical practice regarding double jeopardy issues at the time of and shortly after ratification⁶³ offers much illumination as to how the Clause ought to be interpreted in modern times.⁶⁴ I will begin with Blackstone. Thomas can offer no evidence to support the position that Blackstone thought that Parliament could define "offense" any way it wished, because offenses were created solely by judges. The single section of Blackstone's *Commentaries* concerning the "same offense" issue provides:

62. 1-4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: A FACSIMILE OF THE FIRST EDITION OF 1765-1769 (Univ. of Chicago Press 1979) [hereinafter BLACKSTONE].

63. One might argue that we should look to 1791, the date the Amendment was ratified, only for federal crimes. For state crimes, we might look to 1868, the date the Fourteenth Amendment was ratified, or 1969, the date the Clause was incorporated from the Fifth into the Fourteenth Amendment in *Belton v. Maryland*, 395 U.S. 784 (1969). See Hans W. Baade, "Original Intent" in *Historical Perspective: Some Critical Glosses*, 69 TEX. L. REV. 1001 (1991) (exploring issue of whether originalism should refer to 1791, 1868, or some other date). Changing our date of reference, however, would not help much. Even after the switch from judicially- to legislatively-created criminal offenses, some states used a legislatively limiting test, some did not. The Court then, as at present, regularly switched from one to the other.

64. Textualism likewise does not assist us. As Thomas points out, the self-evident meaning of "same offense" as "identical offense" and "twice in jeopardy" as "a second criminal trial" must be rejected contrary to history and reason (pp. 1-2).

[H]ereupon it has been held, that a conviction of manslaughter, on an appeal, 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 offenses differ in coloring and in degree. It is to be observed, that the pleas of *auterfoits acquit*, and *auterfoits convict*, or a former acquittal, and former conviction, must be upon a prosecution for the same identical act and crime.⁶⁵

This recognition that lesser and greater offenses are the "same," as well as the casual interchangeability of "act" and "crime," appear to support my position; an offense is defined by its underlying bad conduct.

No doubt Thomas would respond that Blackstone believed that Parliament could authorize a second trial for an offense, regardless of a judicial finding that two offenses are the same. It is true that, of the four pleas in bar reviewed by Blackstone in his *Commentaries* (*auterfoits acquit*, or former acquittal; *auterfoits convict*, or former conviction; *auterfoits attain*, or former attainder; and pardon), two permitted retrials. For example, Blackstone noted that by the Henry VII statute, a plea of former acquittal on a homicide indictment did not bar the prosecution by appeal of the same offense.⁶⁶ This first example does not necessarily support Thomas's point. An indictment was brought by the King and an appeal by a private party. As Thomas noted, "[t]he individual victim of theft or robbery wanted his property returned; the king wanted the offender's lands and also wanted to rid the kingdom of the wrongdoer" (p. 77). Thus the modern analogy of an appeal is to a civil suit in tort rather than to a second prosecution. Few suggest today that the government's criminal prosecution bars a victim's civil suit for damages based upon the same misconduct. Yet it certainly does not follow from the common law exception or from our more modern distinction between tort and crime that the King or a legislature could authorize a second criminal prosecution by the same sovereign for the same offense.

A second example of the common law of double jeopardy permitting retrials is the plea of former attainder, a bar riddled with exceptions.⁶⁷ However, like the exception to former acquittals, the fact that there were exceptions to former attainder does not resolve the issue of Parliamentary Supremacy in Thomas's favor. This plea differed from former conviction in that judgment had been rendered, requiring forfeiture of all real and personal property, death or banishment, and corruption of blood ("which obstructs all descents to his posterity, wherever they are obliged to derive a title through him to a remote ancestor").⁶⁸ Moreover, a plea of former attainder barred an indictment or appeal on any felony, not just the one for

65. 4 BLACKSTONE, *supra* note 62, at 330.

66. *See id.*

67. *See id.* at 331.

68. *Id.* at 381.

which defendant had been attained, as a second prosecution would have been quite superfluous. Such a sweeping rule, barring second prosecutions for different and later-committed offenses, had to have exceptions where the prisoner was, for various reasons (primarily concerning reversals and pardons), not killed, his property not forfeited, and his blood not corrupted.

The more important point here is that even if Thomas is correctly interpreting Blackstone, we have no reason to believe that the drafters or ratifiers of the Double Jeopardy Clause intended to adopt his view of legislative supremacy, and much reason to believe that they did not. Despite much searching by Thomas and other scholars, evidence regarding the intent of the drafters or ratifiers of the Clause is essentially nonexistent.⁶⁹ Thus, we have no record as to whether they intended to enshrine Blackstone's four pleas in bar,⁷⁰ a more general protection against successive criminal prosecutions, or something else entirely.

It seems to me unlikely that the Framers intended to adopt Blackstone in whole cloth for two reasons. First, the two legal systems were simply too different for a sensible comparison. The colonies had neither an attainder bar against a trial on any other felony nor secular court judgment suspension by clergy in favor of judgment in ecclesiastical courts, and they did not recognize a dual system of private and public criminal prosecutions with the double jeopardy bar, depending on which system produced a verdict first. Second, if the history of our founding, and drafters' and ratifiers' intent regarding other provisions of the Bill of Rights are any guide, then the more likely answer regarding the Framers' intent would again be a more general acceptance of the values underlying a one trial limit, regardless of which branch of government attempted to commence a harassing second trial. The British System was one of Parliamentary Supremacy at the time Blackstone wrote his *Commentaries on the Law of England*,⁷¹ and

69. See, e.g., JAY A. SIGLER, *DOUBLE JEOPARDY: THE DEVELOPMENT OF A LEGAL AND SOCIAL POLICY* 32-39 (1969) (noting that because questions of its precise meaning rarely arose prior to the nineteenth century, there was no authoritative definition of "same offense" at the time the Bill of Rights was adopted); Charles L. Cantrell, *Double Jeopardy and Multiple Punishment: An Historical and Constitutional Analysis*, 24 S. TEX. L. REV. 735, 796 (1983) (noting that there is almost no record of the founders' views on double jeopardy); Donald Eric Burton, Note, *A Closer Look at the Supreme Court and the Double Jeopardy Clause*, 49 OHIO ST. L.J. 799, 801 (1988) (outlining the paucity of historical evidence regarding the Framers' interpretation of the Double Jeopardy Clause). My own search has added nothing to these earlier observations.

70. Though the language of the Double Jeopardy Clause is similar to that found in Blackstone, the Clause was enacted over 20 years after the publication of Book Four of Blackstone's commentaries, and there is simply no evidence that the Framers modeled the clause on Blackstone's understanding of double jeopardy at common law.

71. See 1 BLACKSTONE, *supra* note 62, at 156 ("The power and jurisdiction of Parliament . . . is so transcendent and absolute, that it cannot be confined, whether for causes or persons, within any bounds."); A.W. BRADLEY & K.D. EWING, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* 4-5 (12th ed. 1997) ("In those countries in which the constitution has overriding legal force . . . legislative or administrative acts may be held by the constitutional court to be without legal force where they conflict with the constitution. In this sense of the word, the United Kingdom of Great Britain and Northern

largely remains so to this day.⁷² We quite obviously rejected such a system, and enacted a Constitution and ratified a Bill of Rights that bind all branches of government. An interpretation of double jeopardy that allows Congress or state legislatures to determine its meaning is anomalous at a deep structural level—so anomalous that the proponent of this position assumes an extraordinary burden of proof. It is so obvious that the Bill of Rights binds the legislature that it is difficult to find serious discussion on this point.⁷³ The founders viewed majority will, as reflected by legislatures, as such a serious threat to liberty that the Constitution could not have been ratified without the promise of a Bill of Rights.⁷⁴ James Madison made the point best in his speech introducing the Bill of Rights in the First Congress. Madison warned that a Bill of Rights "must be leveled against

Ireland has no constitution. . . . Within the United Kingdom, there is no written constitution. . . . The resulting vacuum is occupied by the doctrines of the legislative supremacy of Parliament and the rule of law."); Charles Alan Wright, *A Bill of Rights: Does It Matter?*, 32 TEX. INT'L L.J. 381 (1997) (comparing Parliamentary Supremacy with "the full Bill," referring to rights that are judicially enforceable and cannot be overridden even by an Act of Parliament; and with "a half-way Bill," referring to rights enforceable against the executive but that do not give courts the power to invalidate an Act of Parliament).

72. Though Parliamentary Supremacy nominally remains the British system today, we are seeing some move toward a Bill of Rights. When Parliament adopted the European Communities Act of 1972, some claimed this effected a "constitutional revolution" in holding that Parliament did bind its successors. However, the more likely and narrower explanation is that the 1972 Act merely created a rule of construction requiring British courts to apply U.K. legislation consistently with Community law, except where an Act of Parliament expressly overrides Community law. See *R. v. Transport Secretary, ex parte Factortame Ltd.*, [1990] 2 A.C. 85; BRADLEY & EWING, *supra* note 71, at 2. More significantly, as a party to the European Convention on Human Rights, the U.K. is bound to implement decisions of the European Court of Human Rights. See G. Marston, *The United Kingdom's Part in the Preparation of the European Convention on Human Rights 1950*, 42 INT'L & COMP. L.Q. 796 (1993) (offering background of British participation in drafting the 1950 document, but not permitting the right of individual petition until 1966). This permits British subjects to take "constitutional" claims to Strasbourg. See, e.g., *Case of Lustig-Prean and Beckett v. United Kingdom*, Applications nos. 31417/96 and 32377/96, Judgment, Strasbourg, 9/27/99, available at <http://www.echr.coe.int>, HUDOC database (holding that the discharge of applicants from the Royal Navy on the ground that they were homosexual constituted a violation of their right to respect for their private lives, protected by Article 8 of the Convention). Most recently, the U.K. enacted the Human Rights Act of 1998, (Chapter 42, 1998), which, in substance, incorporated most of the European Convention on Human Rights into British positive law. However, this law does not allow British courts to strike down an act of Parliament as inconsistent with the Convention. See, e.g., Human Rights Act of 1998, §§ 3, 6 (providing that it will be unlawful for public authorities to act in ways that violate a "Convention right," except so far as their behavior is dictated by primary legislation which cannot be interpreted so as to be compatible with the right in question); JOHN WADHAM & HELEN MOUNTFIELD, *BLACKSTONE'S GUIDE TO THE HUMAN RIGHTS ACT OF 1998* (1999); David Feldman, *The Human Rights Act of 1998 and Constitutional Principles*, 19 LEGAL STUD. 165 (1999).

73. See generally Douglas Laycock, *Individual Liberty and Constitutional Architecture: The Founders' Prompt Correction of Their Own Mistake*, 77 HARV. J. L. & PUB. POL'Y 75 (1993) (arguing that constitutional architecture includes not only federalism, separation of powers, and checks and balances, but also judicially enforceable guarantees of the individual liberties contained in the Bill of Rights).

74. See Douglas Laycock, *Notes on the Role of Judicial Review, the Expansion of Federal Power, and the Structure of Constitutional Rights*, 99 YALE L.J. 1711, 1725 (1990).

the legislative [branch], for it is the most powerful, and most likely to be abused, because it is under the least control."⁷⁵ The means of enforcement would be judicial review, as "independent judges will be an impenetrable bulwark against every assumption of power in the legislative or executive [branch]."⁷⁶ This has certainly come to pass, and the Supreme Court, since *Marbury v. Madison*,⁷⁷ has regularly invalidated any legislation that is inconsistent with any provision of our Constitution or Bill of Rights.⁷⁸

Thus, Blackstone is essentially useless as a guide to many of the provisions in the Bill of Rights. Blackstone said that "[t]he power and jurisdiction of Parliament . . . is so transcendent and absolute, that it cannot be confined, whether for causes or persons, within any bounds."⁷⁹ This is not a promising starting point for an inquiry into whether a Bill of Rights binds Congress. As Stanley Katz said in his introduction to the University of Chicago Press edition of Blackstone's *Commentaries*: "By 1776, with their rejection of the king, the revolutionary colonists kicked away the last prop of Blackstone's system, and during the next eleven years they

75. 1 ANNUALS OF CONG. 454-55 (Joseph Gales ed., 1834) (remarks of James Madison, June 8, 1789).

76. *Id.* at 457. Even Alexander Hamilton extolled constitutional rights and independent judges as protection against "serious oppression of the minor party in the community." THE FEDERALIST NO. 78, at 469 (Alexander Hamilton) (C. Ross ed., 1961); see also THE FEDERALIST NO. 42 (James Madison).

77. 5 U.S. (1 Cranch) 137 (1803).

78. See, e.g., *Allegheny County v. ACLU*, 492 U.S. 573 (1989) (interpreting First Amendment Establishment Clause); *Furman v. Georgia*, 408 U.S. 238 (1971) (striking down Georgia statute, holding that Eighth Amendment forbids states from giving juries unfettered discretion in imposing death penalty); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (interpreting First Amendment free speech); *Duncan v. Louisiana*, 391 U.S. 145 (1968) (striking down provision in Louisiana Constitution providing trial by jury only in capital cases or where imprisonment at hard labor may be imposed, as Sixth Amendment guarantees trial by jury in state court if defendant would be entitled to jury trial for same criminal conduct in federal court); *Klopfer v. North Carolina*, 386 U.S. 213 (1967) (finding that North Carolina custom of allowing prosecutor to indefinitely *nolle prosequi* case violated Sixth Amendment guarantee of a speedy trial); *Pointer v. Texas*, 380 U.S. 400 (1965) (striking Texas rule allowing introduction of a transcript of a prosecution witness' testimony if witness is unavailable for cross-examination, as Sixth Amendment right to confront witnesses preserved for defendants in state as well as federal courts); *Sherbert v. Verner*, 374 U.S. 398 (1963) (interpreting First Amendment Free Exercise Clause); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (interpreting Sixth Amendment right to counsel); *Mapp v. Ohio*, 367 U.S. 643 (1961) (holding that state evidentiary rule allowing introduction, in criminal trial, of unlawfully seized evidence violated Fourth Amendment Search and Seizure clause); *DeJonge v. Oregon*, 299 U.S. 353 (1937) (holding that Criminal Syndicalism law of Oregon violated defendant's right to free assembly); *Weems v. United States*, 217 U.S. 349 (1910) (striking Criminal Code for Territory of Philippine Island minimum sentence of 12 years and one day at hard and painful labor for falsification of public and official documents, Eighth Amendment forbids legislation of and judicial imposition of punishments that are cruel and unusual); *Kilbourn v. Thompson*, 103 U.S. 168 (1880) (holding law requiring production of documents invalid under search-and-seizure provision of Fourth Amendment and the self-incrimination provision of the Fifth Amendment); *Justices v. Murray*, 76 U.S. (9 Wall.) 274 (1869) (finding that statute violated Seventh Amendment guarantee of trial by jury in civil cases).

79. BLACKSTONE, *supra* note 62, at 156.

constructed an alternative vision of constitutional government."⁸⁰ Not only was Blackstone stuck in a system of parliamentary supremacy, he was also defending British law and practice of the mid-eighteenth century, including some of the very abuses the Bill of Rights was intended to alleviate. For example, Blackstone notoriously claimed that freedom of speech consisted only in protection against prior restraints, that even truthful criticism of the government could be criminally punished as seditious libel, and indeed, that the greater the truth, the greater the libel. His view of seditious libel has, of course, been fully repudiated.⁸¹ As one eloquent amicus author wrote in 1919, Blackstone's views on free speech, "like his belief in witchcraft, have a historical interest, but there is no more reason for accepting his beliefs about one than about the other as a measure of liberty and freedom in this country today."⁸² Legislative supremacy is no more an appropriate or historically mandated double jeopardy value than a First Amendment one.

In the absence of any specific evidence of ratifiers' intent, one could plausibly maintain that "same offense" ought to mean whatever it meant in 1791; if it limited the legislature then, it should do so now. Unfortunately, an inquiry into colonial practice on this point yields no fruit. One reason for this is that common law judges, at both the federal and state levels, were principally responsible for defining "offenses" in the pre-1792 world.⁸³ Thus, the question of whether the clause limited a legislative

80. Stanley Katz, *Introduction to 1 WILLIAM BLACKSTONE, COMMENTARIES*, xii (Univ. of Chicago Press 1979).

81. See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (the First Amendment "prohibits a public official from recovering damages for a defamatory falsehood relating to his office conduct unless he proves that the statement was made with 'actual malice'"); David A. Anderson, *The Origins of The Press Clause*, 30 UCLA L. REV. 455 (1983); David M. Rabban, *The Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History*, 37 STAN. L. REV. 795 (1985).

82. Brief of Gilbert E. Roe, as Amicus Curiae, *Debs v. United States*, 249 U.S. 211 (1919) (upholding conviction of Eugene V. Debs, the Socialist Party's candidate for president, under the Espionage Act of 1917 for giving a speech promoting socialism). These cases are more fully described in DAVID M. RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS* 272-85 (1997).

Blackstone also vividly describes trial by ordeal (a man was adjudged innocent if he could take up a piece of red hot iron or plunge his arm into boiling water and escape unhurt). See BLACKSTONE, *supra* note 62, at 337. He also described punishments such as "embowelling alive, beheading, and quartering, and in murder, a public dissection. And, in case of any treason committed by a female, the judgment is to be burned alive. . . . a mutilation or dismembering, by cutting off the hand or ears." *Id.* at 370. Yet we do not find these practices binding today.

Professor Allen summed up the point nicely: "[T]he views of the elite classes of earlier centuries bear no obvious relationship to contemporary problems. The idea that a modern, complex, urban culture like ours is explainable or should somehow be constrained or even influenced by the views of Coke, Hale and Blackstone borders on the ridiculous." Ronald J. Allen, *Forward: Montana v. Egelhoff—Reflections on the Limits of Legislative Imagination and Judicial Authority*, 87 J. CRIM. L. & CRIMINOLOGY 633, 691 n.28 (1997).

83. See *United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812) (holding that federal courts may not recognize and punish common law crimes unless defined by statute); MORTON J. HORWITZ, *THE*

definition of "offense" never arose; certainly the Framers could not have anticipated that Congress and state legislatures would, eventually, completely appropriate this heretofore judicial function. More importantly, colonial and early American judges rarely confronted the question of whether two offenses were the "same" under the federal Double Jeopardy Clause, state constitution double jeopardy clauses, or common law principles of double jeopardy, much less whether "sameness" ought to be determined by the legislature or the judiciary. Though there were a few legislatively enacted crimes⁸⁴ in addition to the few common law felonies⁸⁵ when the Constitution and Bill of Rights were adopted, each crime was distinct and specific enough that a defendant was unlikely to commit more than a single offense by his misconduct.⁸⁶ Thus, situations involving multiple prosecutions for the "same" offense or misconduct rarely arose. When they did arise, particularly in the few instances involving greater and lesser-included offenses, state courts could generally be counted upon to interpret "same offense" as same criminal act or same underlying factual transaction.⁸⁷ Likewise, in one of the first Supreme Court cases to reach the merits of a "same offense" claim under the Double Jeopardy Clause of the federal constitution, albeit over a century after ratification, the Court interpreted "same offense" to mean "same conduct," overriding the legislative definitions of adultery and cohabitation as different statutory crimes.⁸⁸

TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 9-16 (1977) (noting that it took nearly two centuries for judges to yield to legislatures their power to define crime).

84. See JAMES F. STEPHEN, CRIMINAL LAW OF ENGLAND 149-50 (Fred B. Rothman & Co. 1985) (1890) (explaining that the proliferation of statutory offenses was a reaction to the common law requirement that a theft must include a felonious taking).

85. Thomas notes that there were only six felonies at the end of the thirteenth century (p. 7). I have noted elsewhere that there were 14 felonies recognized by the common law of England in 1784, and about 160 common law and legislatively enacted crimes at the time of the adoption of the U.S. Constitution. See Klein & Chiarello, *supra* note 54, at 356-59.

86. Many of the statutory additions were property crimes that did not fall into the common law larceny category as they did not include a felonious taking, crimes such as embezzlement and false pretenses. Because of the fine distinctions between these new property offenses, however, a defendant was unlikely to violate more than a single legislative provision by his misconduct. See Comment, *Statutory Implementation of Double Jeopardy Clauses; New Life for a Moribund Constitutional Guarantee*, 65 YALE L.J. 339, 342 n.14 (1956). The few common law felonies in existence at the time of the adoption of the Bill of Rights had distinct and nonoverlapping elements. See Klein & Chiarello, *supra* note 54, at 356-57 n.94. Two exceptions were manslaughter and murder, and larceny and robbery. The former of these two sets were considered lesser-included offenses of the latter, and thus a trial on one barred a trial on the other. See *State v. Standifer*, 5 Port. 523, 528 (Ala. 1837) (acquittal for murder bars indictment for manslaughter of the same victim, but permits indictment for assault of different victim during same affray); *People v. M'Gowan*, 17 Wend. 386, 388-89 (N.Y. 1837) (acquittal on a charge of larceny bars indictment on a charge of robbery involving the same property). As Thomas notes, Blackstone clearly agreed with this result (p. 33).

87. See *Standifer*, 5 Port. at 528; *M'Gowan*, 17 Wend. at 388-89; 1 JOEL PRENTISS BISHOP, BISHOP ON CRIMINAL LAW § 1060 (9th ed. 1923) (noting that the "better judicial view" disfavored a finding of several criminal charges in one criminal act).

88. See *In re Nielsen*, 131 U.S. 176 (1889).

Thus it appears from my study, that history supports a conduct-based "same offense" test, both at the Framers' time as to the few traditionally recognized lesser and greater offenses, and 100 years later as to overlapping crimes. Regardless of whether Thomas's or my historical analysis is correct, our present criminal law landscape is radically different from the world of the Framers. What the Framers understood as an "offense" no longer exists.⁸⁹ Judges no longer create offenses, that task is assigned to the legislatures. As a consequence of this new legislative power, coupled with our move from an agrarian to a complex industrialized society, there are presently thousands of legislatively enacted felony statutes, both on the state and federal level.⁹⁰ Rather than being distinct, a large percentage of these statutes proscribe identical or nearly identical misconduct.⁹¹ It is difficult to predict how the ratifiers or colonial judges would have reacted to these transformations. Moreover, even an accurate prediction should not be binding. Our Constitution simply could not be preserved without a series of "translations" to changes in society.⁹²

B. The Protection Against Harassment

It is Thomas's rejection of the antiharassment policy underlying the Double Jeopardy Clause, more than his fealty to history, that ultimately leads him to accept the legislative prerogative position. In this Section, I will counter his criticism of this policy choice, explain why it is the only sensible value, and offer a competing double jeopardy "same offense" test that best prevents executive and legislative harassment in the form of

89. See, e.g., James M. Herrick, *Double Jeopardy Analysis Comes Home: The "Same Conduct" Standard in Grady v. Corbin*, 79 Ky. L.J. 847, 859 (1990-91); Comment, *Statutory Implementation of Double Jeopardy Clauses: New Life for a Moribund Constitutional Guarantee*, *supra* note 86, at 341-44 (describing the enormous difference between offenses at common law and in the early days of our Republic, and what we call "offenses" today).

90. The federal code now contains more than three thousand crimes. See Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 980 & n.10 (1995). By my rough count, the Texas Penal, Health & Safety, and Transportation Codes currently proscribe over 400 crimes.

91. This duplication is on two levels. First, federal and state criminal proscriptions are duplicative. See Beale, *supra* note 90, at 980-81 ("[T]he bulk of the federal criminal code now treats conduct that is also subject to regulation under the states' general police powers. The new federal criminal provisions do not preempt state law. Instead, they permit dual jurisdiction by both federal and state authorities."). These successive prosecutions are permitted by the dual sovereignty exception to the Double Jeopardy Clause. See *Bartkus v. Illinois*, 359 U.S. 121, 138-39 (1959) (permitting Illinois to prosecute a defendant for robbery after having been acquitted in a federal prosecution for that robbery). Second, within each jurisdiction there are duplicative statutes. See, e.g., Elizabeth T. Lear, *Contemplating the Successive Prosecution Phenomenon in the Federal System*, 85 J. CRIM. L. & CRIMINOLOGY 625 (1995); Thomas, *supra* note 53.

92. See John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87 (1999) (advocating the use of qualified immunity to limit money damages for civil rights violations as fostering the development of constitutional reform); Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993) (suggesting a theory of fidelity in constitutional interpretation as translation to accommodate changed circumstances).

vexatious successive prosecutions. Thomas admits that the Court has accepted preventing governmental harassment of a citizen as the primary value underlying the Double Jeopardy Clause (p. 50). As Justice Black wrote so famously and eloquently in *Green v. United States*,⁹³

[T]he State with all its resources and powers 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.⁹⁴

Thomas's fundamental criticism of harassment as a policy choice is that it is meaningless to talk about the "harassment" of a second trial. He argues that "[a] second criminal trial, like a first trial, is always unwanted and burdensome" (p. 52), but this tells us nothing about whether it is permitted by the Double Jeopardy Clause. The Clause protects "verdict finality and nothing else" (p. 54). Thomas concludes that since a verdict is not final until the legislature says it is, it can by definition never be harassing to bring a second trial when the legislature has announced that the first verdict was not final. Likewise, since offenses are the same only when the legislature says they are, Thomas believes that it can never be harassing to bring a second trial for an offense the legislature has pronounced "different" than the offense charged in the first trial.

Thomas's criticism of the antiharassment model is circular; one must accept the premise that the legislature has carte blanche to determine the meaning of "same offense" and the meaning of the "end of jeopardy" before one would agree that it can never be "harassment" to fulfill legislative intent on these issues. I reject this premise. First, we can meaningfully label a second trial or punishment "harassing" once the Court determines that a defendant has committed only one double jeopardy offense, regardless of how many criminal proscriptions he has violated. I believe we can pinpoint, with tolerable precision and reliability, when a defendant has committed only one wrong, as in the example of a single drug transaction. Second, we can isolate the type of government harassment we wish the Clause to guard against, and this, in turn, can inform our definition of "double jeopardy offense" in a modern world. Regardless of what the legislature calls "offenses" today, when the Clause was drafted bad acts were divided into a small number of felonies. Thus, regardless of the original purpose of the Clause, in practice it prevented "bad faith" reprosecutions of the facts or conduct underlying these felonies.

What I call "bad faith" has been well described by the Court. The Court has consistently held that a bar against a second prosecution after an

93. 355 U.S. 184, 187-88 (1957).

94. *Id.*

acquittal is necessary for verdict finality; it protects against the possibility of an erroneous conviction that might result from repeated prosecutions before many juries, either because the prosecution uses the initial trial as a dress rehearsal, or because the prosecutor eventually finds a compliant petit jury.⁹⁵ It also protects the more controversial interest in jury leniency or nullification.⁹⁶ The Court has consistently held that the bar against a second prosecution after a conviction protects guilty defendants from prosecutors who are dissatisfied with the perceived leniency of the initial conviction or sentence.⁹⁷ Both bars protect a defendant from the stress and cost of repeated trials, which may simply wear down or bankrupt the defendant until he can no longer fight the charge.⁹⁸ I believe it is foolish for Thomas to argue that "[i]f the Double Jeopardy Clause permits two verdicts for the same conduct, as the Court now concedes the legislature can authorize regardless of how similar the offenses may appear, why should it matter if those verdicts are obtained in one trial or two?" (p. 52). Defending a second or third trial will always be more burdensome. To suggest otherwise discounts the drain on resources and its effect on the willingness and ability of counsel to defend, to say nothing of the drain on the defendant's nerves and on his willingness and ability to undergo yet another trial. The government, given the opportunity to try and retry, will always win, no matter what the justice of the cause.

What kind of "same offense" test would prevent legislatures from authorizing, and prosecutors from bringing, repeated prosecutions either

95. See, e.g., *Tibbs v. Florida*, 457 U.S. 31, 41 (1982) (proclaiming that the Double Jeopardy Clause "prevents the State from honing its trial strategies and perfecting its evidence through successive attempts at conviction"); *Sanabria v. United States*, 437 U.S. 54, 75-78 (1978) (noting that Clause forbids retrial of acquitted defendant even when trial judge erroneously excluded evidence which might have led to conviction); *United States v. Ball*, 163 U.S. 662, 669 (1896) (holding that the Double Jeopardy Clause absolutely barred retrial for the same offense after defendant was acquitted of murder).

96. See Peter Weston & Richard Druble, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81, 84, 122-32; see also *United States v. Powell*, 469 U.S. 57, 69 (1984) (upholding inconsistent verdicts because the acquittal might have been the result of the "exercise of lenity"); Eric L. Muller, *The Hobgoblins of Little Minds? Our Foolish Law of Inconsistent Verdicts*, 111 HARV. L. REV. 771, 830 (1998) (suggesting that general verdict forms in criminal cases allow jury to compromise and nullify even where resulting verdict is unpopular).

97. See, e.g., *Ohio v. Johnson*, 467 U.S. 493, 499 (1984) (explaining that the bar against reprosecution after conviction prevents an impermissibly enhanced sentence).

98. See *Green v. United States*, 355 U.S. 184, 187-88 (1957). An even more insidious, yet thankfully less common, form of bad faith prosecution, unmentioned by the Court, is one motivated by a desire to crush a political opponent. Negative press will frequently curb such a tendency. However, some "victims" of such a scheme may generate little sympathy. For example, former Attorney General Meese intentionally used a multidistrict successive prosecution policy against targeted pornographers, exempting such prosecutions from the Petite Policy (an internal DOJ memorandum discouraging such practice). The stated aim of Meese's policy, undertaken by his National Obscenity Enforcement Unit of the Criminal Division of the Department of Justice, was to bankrupt defendants or force plea bargains. See Patrick Ingram, Note, *Censorship by Multiple Prosecution: "Annihilation, by Attrition if Not Conviction,"* 77 IOWA L. REV. 269 (1988).

because they are dissatisfied with the result of the initial prosecution, or because they desire a test run, rather than because the defendant has committed misconduct or caused harm that was not accounted for in the initial prosecution? I contend that such a test would focus on the morally blameworthy or harmful actus reus of the crime, and perhaps on any bad results achieved, rather than acts, results, or attendant circumstances that do not contribute to the blameworthiness or harmfulness of the proscribed act. Moreover, to prevent "dry runs," such a test would require that greater offenses be charged along with lesser ones, whenever possible. Finally, to protect finality of factual findings, such a test would determine whether an offense is a "greater" or "lesser" offense by considering the conduct underlying the offense, rather than the elements of the offense in the abstract. A test concerned with preventing government harassment, that is, bad faith reprosecutions, would not allow the legislature to authorize and the prosecutor to bring a second trial based on the fortuity of there being an additional statute proscribing identical, similar, lesser, or greater misconduct.

There are many possible candidates for a "same offense" test that achieves these goals. Which to select depends upon whether one wishes to grant extra leeway to the prosecution at the price of slightly less finality, or whether one tips the scales in the defendant's favor. However, the test would have to define "same offense" in a manner different from and superior to the legislative definition. I would select an expansive "same conduct" test to identify what is a single double jeopardy offense in a manner that most effectively prevents bad faith reprosecutions. One version of this test, advocated by a number of scholars,⁹⁹ and adopted by the drafters of the Model Penal Code,¹⁰⁰ one state legislature,¹⁰¹ and the United States

99. See Anthony J. Donofrio, *The Double Jeopardy Clause of the 5th Amendment—The Supreme Court's Curious Treatment of Underlying Conduct in Successive Prosecutions*, 83 J. CRIM. L. & CRIMINOLOGY 773 (1993) (advocating a stronger "same conduct" test); Herrick, *supra* note 89, at 859; Anne Bowen Poulin, *Double Jeopardy: Grady and Dowling Stir the Muddy Waters*, 43 RUTGERS L. REV. 889 (1991); *The Supreme Court, 1989 Term*, 104 HARV. L. REV. 129, 157 (1990). In fact, Professor Thomas himself originally advocated a conduct-based test even before the Court adopted it in *Grady*. See Thomas, *A Modest Proposal*, *supra* note 53; George C. Thomas III, *The Prohibition of Successive Prosecution for the Same Offense: In Search of a Definition*, 71 IOWA L. REV. 323, 398-99 (1986) (suggesting conduct-based test to fulfill the primary purpose of the Double Jeopardy Clause; to prevent vexatious multiple prosecutions).

100. See MODEL PENAL CODE § 1.07(2)-(3) (1986) (providing that a defendant cannot be subject to separate trials for multiple offenses based on the same conduct or arising from the same criminal episode, if such offenses are known to the appropriate prosecuting officer at the time of the commencement of the first trial and are within the jurisdiction of a single court, unless justice so requires); *Id.* § 1.09(1)(a)-(b) (barring subsequent prosecutions for offenses of which the defendant could have been convicted at the first trial or for which joinder was required under § 1.07); *Id.* § 1.09(1)(c) (barring subsequent prosecutions based upon the same conduct even where court ordered separate trials pursuant to section 1.07, unless the second offense requires proof of a fact not required for the first offense and is intended to prevent a different harm or evil).

101. See GA. CODE ANN. tit. 16, § 16-1-7(b) (1994).

Supreme Court (at least for the three years until it was overruled),¹⁰² "bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted."¹⁰³ I will demonstrate that my broader version of this "same conduct" test is preferable to the "gist of the offense" test, Thomas's presumption, and Justice Brennan's suggested "same transaction" test¹⁰⁴ by way of two examples.

Consider a \$100 check sent by a businessman and accepted by a Small Business Administration employee in exchange for a favorable disposition on a loan application. This violates at least three federal criminal

102. See *Grady v. Corbin*, 495 U.S. 508 (1990). This case was overruled by a 5-4 split in *United States v. Dixon*, 509 U.S. 688 (1993). The *Dixon* majority claimed that *Grady* was "unstable in application." *Id.* at 709. Initially, I note that the expanded *Blockburger* test the Court reverted to in *Dixon* was no easier to apply than the *Grady* test, as demonstrated by the fact that the Justices also split 5-4 and 6-3 on how to apply that test to each defendant's situation in *Dixon*. (*Dixon* involved two consolidated cases, *United States v. Dixon* and *United States v. Foster*.) The irony of the majority statement in *Dixon* is that any lower court confusion during the three-year experiment with the *Grady* test was generated by the Court. First, lower courts were unsure about *Grady*'s application to compound criminal offenses because of some unfortunate language in one pre-*Grady* case, *Garrett v. United States*, 471 U.S. 773 (1985). In that case, the Court implied that there might be a different "same offense" for crimes that are "multilayered." See discussion *infra* note 131 and accompanying text. Second, the Court generated confusion by an unfortunate decision in one post-*Grady* case. The Court refused to apply the *Grady* test to conspiracy actions in *United States v. Felix*, 503 U.S. 378, 391 (1992) (holding *Grady*'s "same conduct" test inapplicable to successive prosecutions for substantive drug offense and conspiracy to commit that offense because of the "longstanding authority" of the rule to the contrary). The Court believed that *Grady* would bar the second prosecution for the conspiracy because the attempt to manufacture the methamphetamine charge in the first prosecution was the same conduct the government would use to prove an essential element of the conspiracy offense; that charge comprised two of the nine overt acts alleged in the conspiracy indictment. As Justice Stevens pointed out in his concurrence, this was simply not true. See *id.* at 392 (Stevens, J., joined by Blackmun, J., concurring). The particular overt acts charged in the second prosecution, which concerned the substantive drug offense in the first prosecution, did not comprise an essential element of the conspiracy charge, because that conspiracy charged seven other overt acts. The prosecution simply could have eliminated the two overt acts that also formed the basis of the previous conviction and still have been left with a sufficient conspiracy charge. In fact, the drug conspiracy statute at issue in *Felix* does not have any overt act requirement. See 21 U.S.C. § 846 (1994).

103. *Grady*, 495 U.S. at 521.

104. See *Ashe v. Swenson*, 397 U.S. 436, 453-54 (1970) (Brennan, J., concurring) (suggesting adoption of the "same transaction" test, which would create a constitutional joinder requirement for all statutory offenses arising out of a single criminal episode).

A number of advisory groups have suggested mandatory joinder of all offenses arising from the same transaction as a legislative fix to vexatious prosecutions, and a number of states have adopted the mandatory joinder approach. See MODEL PENAL CODE § 1.07(2) (providing for mandatory joinder of offenses based on the same conduct or arising from the same criminal episode if the offenses are known to the prosecuting officer and within the jurisdiction of the court); Allan D. Vestal & Douglas J. Gilbert, *Preclusion of Duplicative Prosecutions: A Developing Mosaic*, 47 MO. L. REV. 1, 19-22 (1982) (comparing joinder approaches among the 23 states currently operating under some form of transaction rule). There is no mandatory joinder provision on the federal level. See, e.g., FED. R. CRIM. P. 8(a) (providing permissive joinder of offenses if both are of similar character or based on the same act or transaction, or acts or transactions connected by a common scheme or plan).

proscriptions: mail fraud,¹⁰⁵ extortion under color of official right,¹⁰⁶ and bribery.¹⁰⁷ It should be clear from this example that the single wrong committed by the federal employee is selling government favor; it is not more or less wrong depending upon whether the bribe was sent by mail rather than hand-delivered (necessary for mail fraud), whether the bribe affected commerce (necessary for extortion), or whether it was accepted by a federal rather than a state official (necessary for bribery). It seems to me relatively noncontroversial to say that on these facts a prosecutor would bring an action for extortion after the defendant received an acquittal on an earlier action for bribery solely because she was displeased with the results of the first trial.¹⁰⁸ Without a bar against a second trial in this situation, a defendant who is factually innocent may have to suffer through a second trial and may eventually be convicted. Likewise, a prosecutor would bring an action for extortion after the defendant was convicted for bribery solely because she was displeased with the length of imprisonment imposed after the first trial.¹⁰⁹ This legislative gift of duplicative statutes, whether or not

105. Section 1941 of Title 18 prohibits (1) using the mails (2) for the purpose of executing a scheme to defraud. See 18 U.S.C. § 1941 (1994). Section 1346 defines a "scheme to defraud" as a scheme to deprive another of the intangible right of honest services. See 18 U.S.C. § 1346 (1994). Congress enacted that definition in a 1988 Amendment designed specifically to overrule *McNally v. United States*, 483 U.S. 350 (1987), which held that the mail fraud statute protected only property rights, and therefore did not criminalize the scheme by the Democratic Party Chairman of Kentucky to defraud the citizens of the right to have the Commonwealth's affairs conducted honestly.

106. The Hobbs Act, codified at 18 U.S.C. § 1951, criminalizes (1) affecting interstate or foreign commerce (2) by extortion. See 18 U.S.C. § 1951(a) (1994). Extortion is "obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." *Id.* § 1951(b)(2). The Court has found this statute violated by the "passive acceptance of a benefit by a public official . . . if the official knows that he is being offered the payment in exchange for a specific requested exercise of his official power." *Evans v. United States*, 504 U.S. 255, 258 (1992). The Court noted that "[a]lthough the evidence in this case may have supported a charge of bribery, it is not a defense to a charge of extortion under color of official right that the defendant could also have been convicted of bribery." *Id.* at 267 n.18.

107. Section 201(b) of Title 18 prohibits (1) an employee of the United States from (2) corruptly receiving anything of value (3) in return for being influenced in the performance of any official act. See 18 U.S.C. § 201(b).

108. There would likely be no collateral estoppel bar to the second action. Collateral estoppel does not bar reuse of evidence, but only of issues of ultimate fact necessarily and finally decided between the same parties. See *Dowling v. United States*, 493 U.S. 342, 348-50 (1990). We generally will not know, after a general verdict of not guilty, which element the prosecutor failed to prove. A perusal of all written appellate opinions rendered between 1992 and 1997 revealed that courts have found it virtually impossible to determine which issues a jury actually and necessarily found in the defendant's favor, even when it seemed relatively clear to my coauthor and me. See *Klein & Chiarello*, *supra* note 54, at 379 n.235.

109. It is likely that, at least in the federal system, a subsequent sentence for a similar offense will run concurrently. See Sentencing Reform Act of 1984, 18 U.S.C. §§ 3551-3586 (1988). Even so, this may lead to a longer sentence if the second prosecutor is able to successfully argue that a "specific offense characteristic," such as being in a position of trust, requires a base offense level increase. Moreover, a second prosecution will not yield a concurrent sentence if it contains an offense with a mandatory minimum. Finally, if the subsequent indictment is returned for "political" reasons, the

enacted for this purpose, not only encourages a prosecutor to save a second charge in case of an initial acquittal or conviction with an inadequate sentence, but encourages prosecutors in different districts to file their own duplicative charges regarding the same misconduct. For example, after the federal prosecutor in the district in which the letter was received tried the public official for extortion and bribery, a second prosecutor in the district where the money was sent may prosecute the same federal official a third and fourth time for mail fraud and conspiracy.¹¹⁰ The advantages to the second prosecutor include the ease of achieving the third and fourth conviction, obtaining favorable press coverage, interdistrict rivalry, and rewarding the investigative agents in each district, who are promoted in part based upon the number of indictments they obtain.¹¹¹

Pursuant to a relatively expansive conduct-based "same offense" test, all successive prosecutions in the above example would be barred, because in all subsequent trials the prosecutor would need to prove conduct (the taking of money in exchange for an agreement to sell official favor) that constituted the offense for which the defendant had already been charged.¹¹² The "gist of the offense" test may lead to the same result. This

existence of the guidelines may actually increase the likelihood of a second indictment as the defendant will have little incentive to resist the second indictment. See *Lear*, *supra* note 91, at 643-44.

110. Section 371 of Title 18 criminalizes conspiring to violate any federal law. See 18 U.S.C. § 371 (1994). The crime in my hypothetical will probably constitute a conspiracy, using either the briber and bribee as the coconspirators (assuming the Court continues to limit Wharton's rule, providing that "an agreement by two persons to commit a particular crime cannot be prosecuted as a conspiracy when the crime is of such a nature as to necessarily require the participation of two persons for its commission," *Iannelli v. United States*, 420 U.S. 770 (1975)), or by additionally indicting some confederate, known or unknown, of the businessman. Under present doctrine, a conspiracy and a completed substantive offense are never the same for double jeopardy purposes. See *United States v. Felix*, 503 U.S. 378 (1992) (even under "same conduct" test of *Grady*, conspiracy and its object offense are not the same).

111. Such was my experience as a trial attorney in the Criminal Division of the United States Department of Justice, Washington, D.C., from 1990 through 1994. See also *Lear*, *supra* note 91 (noting federal prosecutors often bring successive and largely duplicative criminal charges, wasting resources that could be devoted to preventing crime and apprehending other lawbreakers, for no reason other than because they wish to protect their turf and win the statistics game; suggesting a statutory joinder requirement for the federal system for all criminal charges arising out of the same transaction).

112. There are two ways that one could look at the *Grady* bar against reusing conduct constituting an offense for which the defendant had already been prosecuted. A narrow reading of *Grady* would not bar any of the successive prosecutions in my example because the government, in the second trial, will not prove "the entirety of the conduct" for which the defendant was convicted in the earlier trial. See *Grady v. Corbin*, 495 U.S. 506, 523 (1990). For example, in the second action for extortion, the prosecutor would not have to prove all of the conduct constituting the earlier bribery charge, because extortion does not require that the defendant be a federal official, and bribery does. I advocate, instead, Justice Scalia's interpretation of the majority rule. Scalia argued there is no justification in reason or on policy grounds to limit *Grady* to situations in which the prosecutor will use all of the conduct constituting a prior crime to prove an essential element of a second crime, and exclude from its ambit second prosecutions where the prosecutor will use only some of the conduct establishing the first crime. A successive prosecution based upon some but not all of the conduct alleged in an initial prosecution "exposes the defendant to the burden and embarrassment of resisting proof of the same facts in multiple proceedings, and enables the State to 'rehearse its presentation of proof, thus

would depend upon whether the Court found the essence of bribery to be paying a federal official for an official act and the essence of mail fraud to be using the mails to perpetrate a scheme to defraud, or whether the Court was willing to label the "federal" and "mail" requirements jurisdictional hooks and consider selling the office as the essence of the offenses. Likewise, one utilizing Thomas's presumptions may decide these are different "modes" for reaching the same act-type, or could as easily conclude that the act-type of bribery has nothing in common with the act-type of mail fraud, and it is irrelevant if identical act-tokens are used to prove each. A "same conduct" test is preferable to the "same transaction" test, as it escapes the nasty problems inherent in determining the number and "relatedness" of transactions in which a defendant engaged.¹¹³ Suppose that the federal employee in the above hypothetical also used a government-issued computer to correspond with the businessman about the loan, and further that he used the \$100 he received to purchase a gram of cocaine, which he intended to share with his wife. If a prosecutor failed to join the theft of government property¹¹⁴ and possession with intent to distribute cocaine charges¹¹⁵ because of an erroneous prediction regarding whether the judge would find them to be part of the same "transaction" as the bribery charge, the defendant would escape punishment for these additional blameworthy acts that caused harm. In contrast, under a "same conduct"

increasing the risk of an erroneous conviction for one or more of the offenses charged." *Id.* at 540 (Scalia, J., dissenting).

Scalia offered two criticisms of such an expanded *Grady* rule. First, he believes it de facto reverses *Dowling v. United States*, 493 U.S. 342 (1990) (holding that the Double Jeopardy Clause does not prohibit the state from introducing evidence of a defendant's perpetration of a robbery committed in a similar fashion, of which he had been previously acquitted, to prove identity in a different armed robbery). See *Grady*, 495 U.S. at 525. Justice O'Connor also noted that *Grady* and *Dowling* are inconsistent and irreconcilable. See *id.* at 525 (O'Connor, J., dissenting). The majority's attempt to distinguish *Dowling* by stressing that the critical inquiry in *Grady* is "what conduct the State will prove, not the evidence the state will use to prove that conduct," may in fact be unavailing. *Id.* at 521. The line between "conduct" and the evidence used to prove such conduct is probably too difficult to draw. For instance, does the witness' testimony in the second *Dowling* trial prove conduct that constituted an offense for which that defendant had already been acquitted, as Justice O'Connor argued? Or is it merely one piece of evidence of the defendant's identity in the new robbery charge, as the majority argued? Scalia's second criticism is that the *Grady* test will degenerate into a same transaction test. See *id.* at 539. This criticism is probably not true. See *infra* notes 114-15 and accompanying text. Even so, a same transaction test would be an improvement over our present *Blockburger* test.

113. See Edward W. Cleary, *Res Judicata Reexamined*, 57 YALE L.J. 339 (1948) (criticizing various definitions of "cause of action" as mere incantations); Comment, *Twice in Jeopardy*, 74 YALE L.J. 262, 276 (noting that the "principle shortcoming of this approach is that any sequence of conduct can be defined as an 'act' or a 'transaction'"). Despite the difficulty of this endeavor, civil courts have managed to do this on a regular basis for some time. See *supra* note 35.

114. Section 641 of Title 18 proscribes the theft, embezzlement, or conversion of any thing of value of the United States. See 18 U.S.C. § 641 (1994).

115. Section 841 of Title 18 proscribes the possession of a controlled substance with the intent to distribute it, and 21 U.S.C. § 844 proscribes the simple possession of a controlled substance. See 21 U.S.C. §§ 841, 844 (1994).

test, a prosecutor will know in advance of trial what conduct she intends to use to prove the elements of each offense.

Moving from overlapping criminal offenses to lesser-included offenses, we can turn to the facts of *Grady* for our example. Mr. Corbin, while driving drunk, crashed into another car and killed the driver. He plead guilty to all charges (two traffic offenses) in local court.¹¹⁶ Corbin was then indicted by the district attorney on five more serious criminal charges.¹¹⁷ The defendant argued that a second trial was barred by his guilty plea to driving while intoxicated. Had the Court employed the "same statutory elements" test, the state would have been permitted to try Corbin in four consecutive trials for the same car accident.¹¹⁸ Utilizing the Court's standard lesser and greater offense analysis would yield the same result, as driving while intoxicated is not necessarily a lesser-included offense of manslaughter—there are countless ways one human can recklessly cause the death of another. However, the "same conduct" test employed by the *Grady* Court treated the driving while intoxicated prosecution as, in a sense, a form of lesser-included offense of the homicide charge, because the prosecutor intended to rely on the defendant's conduct of driving while intoxicated to prove that he recklessly caused the death, both essential elements of a manslaughter prosecution. Thomas's presumption would clearly allow all four prosecutions, as the act-type of drunk driving has nothing in common with the act-type of murder, despite the identical act-token used to prove the actus reus of both. Employing the *Grady* test, on the other hand, protects against "unnecessary" successive prosecutions. Because the prosecution must prove the conduct of driving while intoxicated in both trials, and because the defendant must refute this conduct in both trials, it is unnecessarily harassing for the defendant to have to defend against this "charge" twice. There is no legitimate reason for permitting the state two stabs at the defendant and two bites at the "driving while intoxicated offense" apple, either by using the first trial as a dry run, or by trying the defendant again because of dissatisfaction with the original result.

There are, admittedly, additional burdens such a test places on the government. A prosecutor may need to file a bill of particulars in response to a defendant's attempt to determine what conduct will be used to prove an element of an offense. Moreover, this test will force coordination among city, county, and state prosecuting attorney's offices, so that one law enforcement agency does not mistakenly prosecute solely on the

116. See *Grady*, 495 U.S. at 512 (failing to keep to the right of the median and driving while intoxicated).

117. See *id.* at 513 (indicting on reckless manslaughter, vehicular manslaughter, criminally negligent homicide, reckless assault, and driving while intoxicated).

118. See *id.* at 520 (noting that the *Blockburger* test would have permitted successive prosecutions for (1) failure to keep to the right of the median; (2) driving while intoxicated; (3) assault; and (4) homicide).

lesser-included offense (precisely what happened in *Grady*).¹¹⁹ I find these burdens upon the government minimal compared to the burden on the defendant of suffering through four trials and the risk that dress rehearsals may lead to the conviction of the innocent.

A "same offense" test providing that blameworthy conduct can be charged only once, regardless of how many different lesser-included or overlapping offenses contain that same conduct, thus has a number of advantages. It prevents the prosecutor and the legislature from attempting to circumvent an unfavorable jury verdict or judicial sanction. It eliminates the utility of a legislature enacting multiple overlapping criminal proscriptions with the specific intent to harass the defendant. Finally, it also forces the legislature to speak clearly regarding the quantity of punishment it desires for a particular bad act. Thus, if it desires a total of fifteen years imprisonment for the crime of killing a pedestrian while driving drunk, it must say so in a single statute, rather than providing for ten years imprisonment for killing a pedestrian while driving drunk and five years for driving drunk, thereby achieving its total fifteen year punishment via two convictions and two criminal prosecutions.

C. Hard-Edged Rules

Thomas's third justification for his legislative prerogative model is that it is a hard-edged rule, which he defines as one that has few close cases at the margin. He suggests that because predictability is a virtue in law, hard-edged doctrines should be favored. I believe Model Three will be either hopelessly hard-edged or as soft-edged as the test he criticizes, but in neither case will it be preferable to Model Two. If the legislature does make its intent regarding the double jeopardy effect of multiple charging known, then the model is hard-edged but rather useless: hard-edged because we will have definite answers, but useless because the legislature would be as free to provide these answers in the absence of the clause.

On the other hand, suppose legislatures decline to speak clearly and we are left to work under Thomas's presumption regarding when offenses are the same. We return to a rule at least as soft-edged as the rule I advocate, and much softer than the "same statutory element" test presently adopted by the Court. For example, Thomas tells us that under his presumption, selling narcotics not from the original package and selling narcotics not pursuant to a written order proscribe the same blameworthy act-type, and thus one act-token that violated both statutes would comprise but a single offense (p. 142). Which elements are blameworthy seems to be a judgment call. Is the blameworthiness located in the common element of selling the narcotics, or is selling narcotics an innocent activity,

119. See *id.* at 513. The prosecutor in traffic court did not realize that the other driver had been killed.

blameworthy only because sold illegally out of its original package or not pursuant to a written order? If the latter, then the two offenses are different act-types, and one act-token of selling narcotics would constitute two offenses. Is larceny from a person a different act-type than larceny at night, such that a single act-token of larceny results in two offenses? Thomas presumes they are a single offense, and I agree. However, under his model one could argue that larceny from a person violates the owner's interest in dignity and autonomy, but larceny at night impinges on the owner's separate interest in security. Finally, Thomas claims that although his theory would normally call lesser and greater offenses the same offense because they share an act-type, this is not true for felony murder and the lesser-included felony because proof of the felony is not required as part of the blameworthy act-type of murder but as a substitute for mens rea (pp. 146, 181). Again, one could just as easily argue that felony murder is a strict liability crime, at least as to any mens rea regarding the resulting death,¹²⁰ and it is, in fact, the underlying felony that provides the blameworthy act-type for both offenses.

Overall, I find his presumption much less determinate than the Court's present test. Pursuant to the Court's "same statutory elements" test, the larceny and narcotics offenses are different, because each has an element not contained in the other. The felony murder example is more difficult, but the Court has concluded that the felony is a lesser-included offense of the felony murder. Though they are not the same offenses if one examines the elements in the abstract (felony murder consists of causing the death of a human during the commission of one of a list of enumerated felonies, and rape at common law was the carnal knowledge of a woman not the spouse of the defendant without consent), the Court, sensibly enough, is willing to look at the felony murder indictment rather than solely at the statute to determine which predicate felony is charged.

Thomas's test is less determinate than the one I would choose, the "same conduct" test. The "same conduct" test forces the prosecutor and the legislature to examine the penal code and the defendant's conduct for overlapping and greater offenses, to make sure the full penalty desired is contained in the most serious offense, and the most serious offense is charged in the initial trial. Under Thomas's test, however, the prosecutor will know in advance what conduct he will use to prove a charge, but will not know in advance which elements of an offense the Court might find "blameworthy."

120. Many state courts so hold. See, e.g., *State v. Simon*, 737 A.2d 1 (N.J. 1999) (holding that felony murder is not death eligible in New Jersey because it is a strict liability crime); *People v. McCarroll*, 523 N.E.2d 150, 152 (Ill. App. Ct. 1988) ("[F]elony-murder is based on strict liability for one who kills or is responsible for a killing during commission of a felony.").

The same criticism can be leveled at Thomas's second presumption, regarding when jeopardy is over. Thomas rightly criticizes the Court's present test for mistrials: No retrial is permitted unless the jury was discharged upon a finding of "manifest necessity."¹²¹ This is hopelessly confusing, and the Court does not really mean what it says.¹²² However, Thomas's suggestion, to bar second trials after mistrials when the mistrial appears to be an acquittal equivalent (meaning the defendant would likely have been acquitted had the trial gone to verdict), is at least as soft-edged, and would be almost impossible to implement. The earlier a trial ends, the harder it will be for a court to predict how the verdict might have come out. When there is no trial, witnesses cannot be evaluated for credibility. Proffers of proof on the prosecution's part and proffers of defenses on the defendant's part rarely live up to their billing. Similarly, it seems to me that, outside of the mistrial area, the Court's present test regarding the end of jeopardy is as hard-edged as Thomas's test. The Court's test—that an initial jury or bench acquittal¹²³ or undisturbed conviction¹²⁴ must always count as a final determination of blameworthiness regardless of legislative intent—prevents the government from harassing criminal defendants with repeated prosecutions for what are, even according to the legislature, the same offense. Thomas's presumption that jeopardy ends with a formal verdict, outside of the mistrial area, is almost identical to the Court's present rule. However, Thomas's test allows the legislature to declare that jeopardy

121. See *United States v. Perez*, 22 U.S. (9 Wheat.) 579 (1824); *Arizona v. Washington*, 434 U.S. 497 (1978).

122. Though the Court held in *Arizona v. Washington*, 434 U.S. 497 (1978), that a trial judge-ordered mistrial acts as jeopardy unless there was "manifest necessity" for declaring it, the Court rejected a literal interpretation of these words without providing an alternate meaning. For a complete criticism of this doctrine, and attempt to provide an alternative standard, see Stephen J. Schulhofer, *Jeopardy and Mistrials*, 125 U. PA. L. REV. 449 (1977) (reviewing hundreds of cases, finding high correlation between how late in the trial the mistrial occurs and the strictness of the scrutiny of manifest necessity, and suggesting a two-tiered standard).

123. See *Smalis v. Pennsylvania*, 476 U.S. 140, 145 (1986) (barring state appeal of acquittal); *Kepner v. United States*, 195 U.S. 100 (1904) (barring federal appeal of acquittal). One possible exception to this rule, not yet resolved by the Court, may be a bench acquittal achieved through fraud. These cases are discussed by Anne Bowen Poulin in *Double Jeopardy and Judicial Accountability: When is an Acquittal Not an Acquittal?*, 27 ARIZ. ST. L.J. 953 (1995). The rule for a trial judge's directed verdict, dismissal, or judgment of acquittal prior to submission of the case to a jury is less clear. Such a ruling acts as an acquittal "only when 'the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.'" *United States v. Scott*, 437 U.S. 82, 97 (1978) (holding that a dismissal during trial on ground of preindictment delay did not bar retrial).

124. Where a defendant is initially convicted but obtains an acquittal by an intermediate appellate court, a higher court can reinstate the conviction. See *Ball v. United States*, 163 U.S. 662 (1896) (explaining that when a defendant obtains a reversal of conviction on appeal the effect is as though the previous trial and judgment never existed, and the crime can be retried). The exception is a reversal of conviction on the grounds of insufficiency of the evidence to support a guilty verdict, as this is in effect a determination that the trial court should have entered a judgment of acquittal. See *Burks v. United States*, 437 U.S. 1 (1978).

has not ended, despite a formal verdict. Thus, while hard-edged, it offers no protection to defendants.

III

A DOUBLE JEOPARDY CLAUSE FOR THE MODERN WORLD

It is unquestionable that the proliferation of overlapping and duplicative criminal statutes vastly increases the opportunities for government harassment of defendants, regardless of how "harassment" is defined. Here, I will touch on two additional and more recent substantive changes in criminal and civil law that have paved the way for government harassment of criminal defendants in the form of multiple trials for identical or lesser-included offenses.¹²⁵ Both of these changes have come from the legislature, supporting my contention that, in order to have meaning in a modern world, the Double Jeopardy Clause must limit the legislative branch.

The first is the relatively recent creation of compound criminal offenses—statutes aimed at group or organizational crime which include, as one of their elements, proof of a "pattern" or "series" of violations of other criminal statutes. Since Congress enacted the Travel Act in 1961,¹²⁶ it has added the Gambling Business Statute,¹²⁷ the Continuing Criminal Enterprise and Racketeer Influenced and Corrupt Organization statutes in 1970,¹²⁸ and the Continuing Financial Crimes Enterprise statute in 1990.¹²⁹

125. Because of page constraints, I limit myself to two changes about which I have written previously. For an in-depth discussion of these criminal law transformations, see Klein, *supra* note 20 (arguing that parallel criminal and civil in rem forfeiture proceedings are brought by prosecutors to obtain strategic advantages and ought to be barred by the Double Jeopardy Clause); Susan R. Klein, *Redrawing the Criminal-Civil Boundary*, 2 BUFF. CRIM. L. REV. 679 (1999) (suggesting that the Court consider alternative conceptualizations of "civil" and "criminal" actions and the procedures that accompany them); Klein & Chiarello, *supra* note 54 (arguing in favor of a rebuttable presumption that compound criminal offenses and their potential predicates are the same offense).

However, the changes I fail to discuss in this Part are at least as important. For example, under a legislative prerogative model, the Federal Sentencing Guidelines, created by legislative delegation to the Sentencing Commission, clearly violate no double jeopardy principles. Yet, they authorize a judge to sentence a defendant to prison for conduct for which she had not been charged, or for which she had been charged and acquitted by a jury. See *United States v. Watts*, 519 U.S. 148 (1997). A substantive model should permit the judiciary to define "offense" and when jeopardy is "twice" in such as way as to eliminate this travesty.

126. 18 U.S.C. § 1952 (1994) (criminalizing interstate activity intended to promote or carry on the activities of a "business enterprise" involving gambling, drug, liquor, or prostitution offenses).

127. 18 U.S.C. § 1955 (1971) (amended 1994).

128. CCE was passed as part of the comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (codified at 21 U.S.C. § 884 (1994)) (criminalizing engagement in a continuing series of violations of the federal drug laws when such violations are undertaken by an individual acting in concert with at least five other persons over whom she occupies a position of supervisor and from which she obtains substantial income); RICO was passed as Title IX of the Organized Crime Control Act, Pub. L. No. 91-452, 84 Stat. 941 (1970) (codified at 18 U.S.C. §§ 1961-1968) (criminalizing the act of conducting the affairs of an enterprise through a pattern of racketeering activity).

The growth of federal compound criminal offenses over the last forty years has been mirrored by numerous state copycat versions of these offenses.¹³⁰

A legislative prerogative model of the Double Jeopardy Clause will always result in the finding that a compound criminal offense and its predicates are different. As the Court noted in *Garrett v. United States*,¹³¹ Congress quite clearly intended punishment for a CCE and its predicates to be cumulative.¹³² However, the *Garrett* Court did not answer the double jeopardy "same offense" question for successive prosecutions of compound criminal offenses and their predicates, dodging the issue by utilizing an exception that permits a second criminal prosecution when a greater offense had not occurred at the time of the first trial.¹³³

Thomas concludes that there is no double jeopardy bar to successive prosecutions for what look like lesser and greater offenses based both on congressional intent and on his presumption regarding when offenses are the same.¹³⁴ Thus, the government could bring the following sets of successive prosecutions: It could indict on a compound offense after an earlier conviction on one of the predicates;¹³⁵ it could indict on any number of

129. See 18 U.S.C. § 225 (criminalizing the act of organizing, managing, or supervising a continuing financial crimes enterprise while receiving \$5 million or more in gross receipts from such enterprise during any 24 month period).

130. Sixteen of the 50 states, 3 territories, and the District of Columbia, have, so far, enacted CCE statutes. Thirty-three of those 54 jurisdictions have enacted RICO statutes. See Klein & Chiarello, *supra* note 54, at 338 n.27.

131. 471 U.S. 773 (1995) (prosecution for continuing criminal enterprise after earlier conviction for the predicate crime of marijuana importation is not barred by Double Jeopardy Clause; the conspiracy underlying the continuing criminal enterprise charge continued until the second prosecution, thus triggering the subsequent conduct exception to the Double Jeopardy Clause).

132. See *id.* at 784 (quoting legislative history and noting that "[t]he intent to create a separate offense could hardly be clearer").

133. This exception originated in *Diaz v. United States*, 223 U.S. 442 (1912) (permitting a prosecution for homicide after conviction for assault, where victim died between the two trials). Although, absent the *Diaz* exception, a predicate appears to be a lesser-included offense of a compound statute pursuant to the *Blockburger* and *Brown* tests, the Court was unwilling to so hold. Instead, it intimated that there may be no double jeopardy protection against successive prosecutions of predicates and compound offenses, by warning against the "ready transportation of the 'lesser-included offense' principles of double jeopardy from the classically simple situation presented in *Brown* to the multilayered conduct, both as to time and to place, involved in this case." *Garrett*, 471 U.S. at 789.

134. Thomas states that a predicate and compound offense are different because they have no act-type in common. The act-type for the compound offense is engaging in the criminal enterprise, and the act-type for the predicate is committing a drug offense. Though the compound offense requires proof of the predicate, this is merely to infer the defendant's intent to engage in the enterprise (p. 182).

135. Collateral estoppel principles would probably bar the use of a previously acquitted predicate in a subsequent indictment on a compound offense. See, e.g., *United States v. Bailin*, 977 F.2d 270, 272 (7th Cir. 1992) (holding that acquitted crime in first trial could not be used as predicate for subsequent RICO charge because that second prosecution would rely on relitigation of issues settled in the first trial). Obviously, collateral estoppel does not help a defendant when the issue has been decided against him. However, the Sixth Amendment right to a jury trial would probably prevent the government from using collateral estoppel against the defendant to stop him from relitigating the issue of whether he committed a particular predicate, in either a subsequent trial on a predicate after an earlier conviction for a compound offense, or in a subsequent trial on a compound offense after an earlier conviction for a

predicate offenses even after such offenses had been used as predicates in an earlier conviction on a compound offense; and it could indict on any number of predicate offenses even after such offenses had been used as predicates in an earlier acquittal for a compound offense.¹³⁶

Why would the government indict on a compound offense in a second trial rather than joining it with the earlier indictment on the predicate, at least where the additional elements constituting the compound offense were known to the prosecutor? Likewise, why would a prosecutor indict on a predicate offense in a second trial rather than adding that predicate as a separate substantive charge to the indictment for the compound charge in the first trial? Katherine Chiarello and I attempted to answer these questions, as part of an earlier project, by sending surveys to the prosecutors for all reported cases in which a federal RICO or CCE charge was brought subsequent to a charge on one of its predicates, and vice versa.¹³⁷ Many of these responses included what I consider legitimate reasons for separate charging—reasons not associated with prosecutorial dissatisfaction with a verdict or punishment. The primary example is the case in which a second prosecution is brought for a compound offense after an initial prosecution for a predicate either because all of the elements of the compound offense had not yet been fulfilled or because they had not yet been discovered by the prosecutor despite due diligence on her part.¹³⁸ The second common legitimate reason for separate charging are cases in which a predicate charge is brought after an initial prosecution for the compound offense because the first prosecutor lacked venue to bring the predicate charge, and the defendant would not waive his venue claim.¹³⁹

However, many more responses to these surveys indicated that second trials were conducted for reasons difficult to categorize as anything other than harassing. For example, one prosecutor responded that different federal agencies investigated the predicate and compound offenses, and each desired its own indictment. Another prosecutor explained that he indicted for RICO based on two predicates, and another prosecutor in another district separately charged the two predicates, because both had been "after the defendant for a long time, because he was mean as a snake and sharp as

predicate. See *Simpson v. Florida*, 403 U.S. 384, 386 (1971) (per curiam) (affirming that a convicted defendant is not estopped in second trial from denying facts resolved against him in the first trial); *Ashe v. Swenson*, 397 U.S. 436, 443 (1970) (noting "lack of 'mutuality'").

136. Collateral estoppel would be unavailable in this situation as one would not generally know whether the prosecution failed to prove the predicate beyond a reasonable doubt in the initial prosecution for the compound offense or failed to prove one of the other elements required of a CCE or a RICO, such as the "in concert" or the "enterprise" elements. See, e.g., *United States v. DeVincent*, 632 F.2d 155, 156-57 (1st Cir. 1980) (holding that acquittal on RICO conspiracy did not collaterally estop subsequent prosecution for predicate of extortion).

137. See Klein & Chiarello, *supra* note 54, at 381 n.242.

138. See *id.* at 395 nn.304-05.

139. See *id.* at 382 n.245.

hell."¹⁴⁰ One prosecutor quite honestly told me that he initiated the subsequent prosecution because he was displeased with the defendant's initial acquittal.¹⁴¹ Another told me a newly appointed United States Attorney in a neighboring jurisdiction initiated a second prosecution to obtain favorable press for his campaign against organized crime.¹⁴²

Would the ratifiers of the Bill of Rights have believed that the Double Jeopardy Clause permitted such successive prosecutions based upon these justifications? Though I do not believe that the answer to this question should be dispositive on the issue, and my guess is that they would not have permitted it, we simply cannot know. Just as the ratifiers could not have anticipated thousands of overlapping and duplicative offenses, they could not have anticipated an offense that required a completed predicate.¹⁴³ If the only value underlying the Double Jeopardy Clause is conformity with legislative wishes, then one should be perfectly comfortable with the legislature giving prosecutors yet another tool to successively try criminal defendants for lesser and greater criminal offenses. If, however, one believes that the Double Jeopardy Clause protects a criminal defendant's ability to fully and finally resolve the issue of whether he has committed a certain prohibited act in a single proceeding, then one would opt for a more restrictive "same offense" test which curbs this relatively new form of prosecutorial and legislative overreaching.

A second and more troubling manner in which a legislature can authorize a second prosecution for an identical offense is to label the second proceeding a "civil" one. Over the last four decades, we have seen an explosion of government-initiated "civil" actions that impose what appear to be punitive sanctions on individuals and entities for behavior that is also proscribed by the criminal law. For example, relatively recent federal statutes permit federal criminal law enforcement agencies to bring civil in rem forfeiture proceedings against money and property which are the proceeds of, or involved in, controlled substance, money laundering, and currency reporting offenses either before, after, or in lieu of a criminal prosecution of the property owner.¹⁴⁴ Another example is the proliferation of civil

140. *Id.* at 382 n.245.

141. *See id.* at 383 n.251.

142. *See id.* at 382 n.250.

143. The closest analogy at common law was conspiracy and its object offense. However, conspiracy merged with its completed substantive offense, and thus multiple prosecutions for the conspiracy and the object offense could not be brought. *See* ROLLIN M. PERKINS, CRIMINAL LAW 618-19 (2d ed. 1969) (noting that when a conspiracy resulted in a perpetration of a felony, the former merged into the latter).

144. *See* 18 U.S.C. § 981 (1994) (providing for civil in rem forfeitures predicated upon violation of federal money laundering and currency transaction reporting laws) (originally enacted as the Money Laundering Control Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-35); 18 U.S.C. § 984(b) (providing for civil in rem forfeiture of cash, monetary instruments, or other fungible property where property owner has committed a money laundering or currency reporting violation, regardless of whether the forfeitable property was involved in the offense or is an identical replacement) (enacted as

actions undertaken by administrative rather than prosecutorial agencies, to enforce new and increasingly complex civil and criminal regulations in the areas of fraud against the government and business control.¹⁴⁵

Thomas's legislative prerogative account tells us that a civil and criminal offense can "never be double jeopardy for the same offense, no matter how much overlap in the offense definitions. The legislature, in enacting both a civil and a criminal sanction, must have wanted both to apply" (pp. 39-40). The Court has come close to agreeing with Thomas, holding in *United States v. Ursery*¹⁴⁶ and *Hudson v. United States*,¹⁴⁷ respectively, that neither a civil in rem forfeiture nor a fine and debarment from an occupation constituted a punitive sanction within the meaning of the Double Jeopardy Clause, because the legislature had clearly stated its preference for a civil "label." However, the Court left open the possibility that the Double Jeopardy Clause would bar a second proceeding on the "clearest proof that the statutory scheme is so punitive either in purpose or effect as to render the penalty criminal despite Congress' intent to the contrary."¹⁴⁸

The reason the Court has left open the possibility that double jeopardy might bar a civil proceeding, and the reason I favor an interpretation of the Clause that limits legislatures, is to prevent government harassment in the form of unnecessary duplicative civil and criminal trials. Such additional trials would be encouraged under Thomas's model. Let us begin with forfeitures. Statutory forfeitures in the early days of our Republic applied to two categories of items traveling the high seas: contraband and

part of the Annunzio-Wylie Anti-Money Laundering Act of 1992, Pub. L. No. 102-550, 106 Stat. 3681); 21 U.S.C. § 881 (1994) (providing for civil in rem forfeitures predicated upon violation of federal controlled substances laws) (originally enacted as the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1276); 31 U.S.C. § 5317(c) (1994) (providing for civil in rem forfeitures predicated upon failure to file or inaccurate filing of an international currency or monetary instrument report) (originally enacted as the Bank Records and Foreign Transaction Act of 1970, Pub. L. No. 91-508, 84 Stat. 1123).

145. *See, e.g.*, Financial Institutions Reform Recovery and Enforcement Act of 1989, 12 U.S.C. § 3349 (1994) (permitting administrative penalties of up to \$25,000 per day against covered financial institutions); Insider Trading Sanctions Act of 1984, 15 U.S.C. § 78u-1(a)(2) (1988) (providing for civil penalty of up to three times the profit made on a trade using illegal inside information); Civil False Claim Act, 31 U.S.C. §§ 3729-3731 (1994) (imposing double damages for government loss through fraud). *See generally* Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795 (1992).

146. 518 U.S. 267 (1996).

147. 522 U.S. 93 (1997).

148. *Ursery*, 518 U.S. at 297; *see also Hudson*, 522 U.S. at 103-04. In *United States v. Halper*, 490 U.S. 435 (1989), the Court did hold that a civil in personam fine for Medicaid fraud that was 220 times the government's actual loss was punitive and, because the defendant had already been punished for the same offense in a criminal trial, barred by the Double Jeopardy Clause. Prior to *Hudson's* emphasis on the legislative label, the *Halper* Court held that a "civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment." *Halper*, 490 U.S. at 449.

the ships used to transport contraband,¹⁴⁹ and goods imported or exported in violation of the custom or revenue laws.¹⁵⁰ The in rem designation was necessary because of the government's inability to identify or obtain personal jurisdiction over the ship owner, at a time when the government depended almost exclusively on custom duties for funding.¹⁵¹ There were no criminal forfeitures, and often no corresponding criminal proscription against the conduct leading to the civil forfeiture.¹⁵² Forfeitures today have almost nothing in common with their historical antecedents. Congress and the states have enacted unprecedented in rem forfeiture statutes which authorize confiscation of legal and legally acquired real and personal property tangentially related or even entirely unrelated to criminal wrongdoing.¹⁵³ These actions are generally brought against property belonging to owners who are subject to the jurisdiction of the court, in order to punish these owners for criminal misconduct.¹⁵⁴

149. See Act of Mar. 3, 1819, ch. 77, § 4, 3 Stat. 510, 513 (piracy); *Gelston v. Hoyt*, 16 U.S. (3 Wheat.) 246 (1818) (involving a statute that authorized forfeiture of ships for violation of the Neutrality Act).

150. See, e.g., Act of July 31, 1789, ch. 5, § 12, 1 Stat. 29, 39 (providing for duties on imports and the forfeiture of goods unloaded without a customs permit, as well as the forfeiture of the ship if the smuggled goods were worth more than \$400).

151. See Matthew P. Harrington, *Rethinking In Rem: The Supreme Court's New (and Misguided) Approach to Civil Forfeiture*, 12 YALE L. & POL'Y REV. 281, 289-92 (1994); Klein, *supra* note 20, at 191-95.

152. See, e.g., *The Palmyra*, 25 U.S. (12 Wheat.) 1, 15 (1827) (noting that because no statute provided for the criminal punishment of pirates, requiring a criminal conviction as a prerequisite to a civil forfeiture action would defeat the enforcement of the forfeiture act).

153. See, e.g., *United States v. Hendrickson*, 22 F.3d 170 (7th Cir. 1994) (affirming that the government can confiscate currency acquired by sale of legal goods to a known drug dealer); *United States v. 1990 Toyota 4Runner*, 9 F.3d 651 (7th Cir. 1993) (holding that government can confiscate an automobile purchased with legal funds, and never used as a conveyance for drugs, if it was driven to a meeting where drugs were discussed); *United States v. 916 Douglas Ave.*, 903 F.2d 490 (7th Cir. 1990) (agreeing that the government can confiscate a residence purchased with legitimately earned funds because a telephone call regarding a drug sale was made there); *United States v. \$400,000*, 831 F.2d 84 (5th Cir. 1987) (holding that the government can confiscate contents of bank accounts containing solely unlauded and properly reported money where the account had contained tainted money within the last year, and any items eventually purchased with legally earned but unreported currency transported internationally); *United States v. \$84,000*, 717 F.2d 1090 (7th Cir. 1983) (permitting the government to confiscate legally earned assets intended to be, but never actually, given in exchange for a controlled substance); *United States v. Moultonboro*, 781 F. Supp. 830 (D.N.H. 1992) (holding that the government can confiscate real property purchased with legally earned currency if the transaction was structured to avoid a currency reporting requirement); *United States v. South Side Fin., Inc.*, 755 F. Supp. 791 (N.D. Ill. 1991) (holding that the government can confiscate entire contents of bank accounts because some laundered or unreported money was contained therein).

154. See, e.g., *Dep't of Revenue v. Kurth Ranch*, 511 U.S. 767 (1994) (affirming that civil marijuana tax proceeding after criminal conviction for distribution of marijuana was a second punishment in violation of the Double Jeopardy Clause); *Austin v. United States*, 509 U.S. 602 (1993) (finding that forfeiture of property that "facilitates" a drug offense constituted punishment of property owner for purposes of Eighth Amendment's Excessive Fine Clause); Klein, *supra* note 20, at 208-17; Marc B. Stahl, *Asset Forfeiture, Burdens of Proof and the War on Drugs*, 83 J. CRIM. L. & CRIMINOLOGY 274 (1992) (arguing that forfeiture constitutes criminal punishment and should be subject to constitutionally required criminal procedural guarantees).

Though the majority of civil forfeitures are not accompanied by criminal prosecutions and there are legitimate rationales for choosing the civil route,¹⁵⁵ the use of parallel criminal charges against a property owner and civil in rem forfeitures against her property is particularly pernicious, and the Double Jeopardy Clause ought to bar it. Many such successive actions are brought in order to reap the kinds of procedural benefits that the antiharassment model posits the Double Jeopardy Clause should prevent. The prosecutor cannot claim the civil action is necessary to confiscate the property, as today's most frequently used federal civil forfeiture statutes have criminal forfeiture counterparts.¹⁵⁶ Rather, the prosecutor brings successive civil and criminal actions to obtain tactical advantages in both trials, as well as to take a second stab at the criminal defendant. For example, if the civil action goes forward first, the claimant will have to answer the complaint and various interrogatories to meet his burden of proof.¹⁵⁷ If the claimant asserts his Fifth Amendment privilege against self-incrimination at this juncture, he is likely to sacrifice his property, as the factfinder is permitted to draw an adverse inference from the assertion.¹⁵⁸ On the other hand, if the claimant contests a forfeiture, waives his privilege, and answers the complaint, the statements can be used against him in the subsequent criminal trial.¹⁵⁹ If the criminal trial is brought first, the prosecutor can proceed on the later civil action even if the claimant is acquitted on the

155. The criticisms I offer against parallel proceedings do not apply when the civil in rem forfeiture is brought in lieu of a criminal prosecution. Though I agree with those who argue that there are due process problems with these proceedings' extremely low standard of proof, the shift in burden of proof to the claimant, and the potential abuse inherent in a situation where the law enforcement agency bringing the action keeps a share of the spoils, there are many legitimate reasons for bringing civil rather than criminal forfeiture actions. These include instances where the property owner is not the same individual as the person alleged to have committed the underlying offense with the property, the immediate need to stop the illegal use of property, the inability to locate the owner of such property, and the government's inability to obtain personal jurisdiction over the property owner. Moreover, a Double Jeopardy bar ought not to apply to civil forfeiture brought to destroy contraband and protect the public from dangerous items, as such forfeitures are properly labeled remedial.

156. For example, criminal forfeitures for violation of the money laundering and currency reporting statutes are codified at 18 U.S.C. § 982 (1994); criminal forfeitures for controlled substances offenses are codified at 21 U.S.C. § 853 (1994).

157. The burden of proof is on the claimant in civil forfeiture actions to prove, by a preponderance of nonhearsay evidence, that there was no underlying drug, money laundering, or currency reporting offense, that there was no nexus between the property and the specified offense, or that the claimant is an innocent owner. See 19 U.S.C. § 1615 (1994) (shifting burden of proof after the government establishes probable cause by use of hearsay evidence); *United States v. 303 W. 116th St.*, 901 F.2d 288 (2d Cir. 1990).

158. See *Baxter v. Palmigiano*, 424 U.S. 308, 316 (1996) (holding that the privilege against self-incrimination does not forbid adverse inferences against parties to civil actions); *Mercado v. United States Customs Service*, 873 F.2d 641, 644 (2d Cir. 1989) (claimant lacked standing to challenge CMIR forfeiture where he refused on Fifth Amendment grounds to allege any interest in the seized cash).

159. See, e.g., *United States v. Parcels of Land*, 903 F.2d 36, 44 (1st Cir. 1990); *In re Phillips, Beckwith & Hall*, 896 F. Supp. 553, 560 (E.D. Va. 1995).

underlying criminal charge.¹⁶⁰ Such a second action is brought precisely because the prosecutor is dissatisfied with the jury's assessment of guilt and criminal forfeiture in the first trial. The Framers simply would not have recognized present civil in rem forfeiture actions as forfeitures at all, and could never have anticipated successive forfeiture and criminal proceedings. Regardless of whether they would have approved or disapproved, such tactics do not comport with modern notions of fundamental fairness.

Likewise, the Framers could not have anticipated the blurring of the criminal-civil boundary, such that the government is both civil suitor against and prosecutor of the defendant. A Framers or ratifier reading Blackstone would have been informed that wrongs were divided into civil injuries infringing upon private rights and crimes which breached public duties.¹⁶¹ This neat division no longer exists.¹⁶² No one in the eighteenth century foresaw an administrative proceeding by federal banking authorities imposing monetary penalties and occupational debarment, followed by a criminal prosecution by the FBI for the same misconduct.¹⁶³ No one imagined license-revocation proceedings followed or preceded by criminal trials for the identical misconduct leading to the revocation.¹⁶⁴

What should a sensible interpretation of the Double Jeopardy Clause say about this development? Thomas's legislative prerogative model will allow the government to bring a civil proceeding after or prior to a criminal trial for the identical offense so long as the legislature intends this result. He bolsters his argument that the Double Jeopardy Clause does not apply to civil proceedings with a reference to the "life or limb" language of the Clause, which he believes refers solely to the possibility of imprisonment. However, Thomas admits that this language cannot be taken literally. Debate on the Clause made clear that "life or limb" did not mean the trial by battle envisioned by the Magna Carta, since death had replaced amputation and mutilation as a punishment for felons in the thirteenth century. Instead, the Framers appear to have added "limb" to "life" as a way of expanding the Clause to noncapital offenses (p. 125). Since they intended it to cover all punishment then imposed for an offense, I see no difficulty expanding it to include new punishments, such as fines,

160. Collateral estoppel is unavailing because the second action has a lower standard of proof, and the second action nominally establishes only the guilt of the property not the property owner. See *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 361-62 (1984); *United States v. Dunn*, 802 F.2d 646, 647-48 (2d Cir. 1986).

161. See 3 BLACKSTONE, *supra* note 62, at 2.

162. See, e.g., Klein, *supra* note 20; Carol S. Steiker, *Forward, Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775 (1997).

163. These are the facts in *Hudson v. United States*, 522 U.S. 93 (1997).

164. See, e.g., *Aiona v. Judiciary of Hawaii*, 17 F.3d 1244, 1246 (1994) (describing Hawaii legislation allowing for both administrative revocation of driver's license and criminal prosecution for DWI).

probation, and modern-day shaming sanctions. Under Thomas's model, the Clause would not bar a second trial for the same offense if only a fine or probation were imposed upon an individual defendant after a criminal trial. Moreover, this position would mean that corporations, who cannot be imprisoned, are offered no protection by the Clause.¹⁶⁵

I predict Thomas's rule would lead to an enormous increase in the number of proceedings receiving a "civil" appeal. Legislatures will turn to fines, probation, community service, and shaming sanctions to ensure that these "civil" proceedings are not covered by the Clause. Likewise, corrections departments may build more secure psychiatric wards, so that defendants soon to be released from (or not sentenced to a sufficient time within) a penal institution may be "civilly" placed there.¹⁶⁶ Finally, I note that Thomas's proposed limitation of his rule to civil sanctions that do not include imprisonment in a penal institution is a limitation by fiat. True consistency to his legislative prerogative principle would allow the legislature to provide for "civil" trials imposing imprisonment as a sanction, so long as their intent to do so was clear.

It is one thing to say that we may be forced to accept certain punitive sanctions in civil trials, conducted without criminal procedural guarantees, as necessary to ensure compliance with business regulations in a complex society. Perhaps the Framers would have supported this; it arguably makes sense as a policy matter. It is quite another thing, however, to say that once the government chooses to sanction an offense via a criminal indictment, it may still bring a parallel civil or in rem proceeding to impose additional sanctions for that same offense. The reason for bringing the parallel action rather than seeking all punishment in the criminal proceeding is to harass the defendant with multiple trials. Where the civil proceeding is brought first, the prosecutor wishes to gain tactical advantage she can use in the criminal trial; where the criminal trial is brought first, she reserves the opportunity for another bite at the apple should she be dissatisfied with the results. This conduct, regardless of whether it is authorized by the legislature, should not be tolerated in a just society.

CONCLUSION

Thomas, in his thoroughly enjoyable book, offers a concise and understandable description of various double jeopardy models, an informative foray into history, an insightful analysis of the tortured

165. Cf. *United Mine Workers v. Bagwell*, 512 U.S. 821 (1994) (fines of over \$64 million for contempt required jury trial). There is no Supreme Court answer to the question of whether corporations are protected by the Double Jeopardy Clause, but a survey by the First Circuit concluded that they are. See *United States v. Hospital Monteflores, Inc.*, 575 F.2d 332, 333-34 (1st Cir. 1978) (citing favorable decisions on this issue from four circuits, and unfavorable decisions from two circuits).

166. See *Kansas v. Hendricks*, 521 U.S. 346 (1997); see also Klein, *supra* note 20.

Supreme Court opinions in this area, and a glimpse at more modern double jeopardy problems. He selects a double jeopardy model that has the potential to provide consistent and predictable answers to every conceivable double jeopardy question. He may be technically correct when he tells us, in his final chapter, that his legislative prerogative model does not "allow the legislature to overrule the Double Jeopardy Clause" (p. 273). My criticism is not that his model overrules the Clause, but that it would allow the legislature to define the terms in the Double Jeopardy Clause in such a way as to deprive the Clause of any function. It amounts to the same thing. Thomas concludes that "[i]f I am right, the legislature can never act in a way inconsistent with the Double Jeopardy Clause. If I am wrong, it is . . . because there is a better conception of the Double Jeopardy Clause" (pp. 273-74). I believe there is a better conception of the Clause—one that preserves verdict finality against encroachment from any branch of the government.

Thomas predicts, or at least hopes, that the United States Supreme Court will extend *Hunter's* bow to legislative intent regarding when offenses are the same in a single proceeding to successive proceeding cases as well. I hope that the Court will continue to do the opposite. This issue is vitally important because of modern changes in criminal law, such as the advent of compound criminal offenses, the explosion of duplicative and overlapping statutes, and the destabilization of the criminal-civil divide. Further, answering whether the double jeopardy clause binds the legislative branch takes us only one step toward resolving more sweeping questions such as when is it appropriate for the legislature to circumvent constitutional criminal procedural guarantees via changes in substantive criminal law, and which branch, ultimately, ought to have the final work in interpreting constitutional criminal procedure.

The Court is cognizant of these larger questions, and, in many recent cases, has checked some such legislative attempts. For example, the Court has not allowed Congress to bypass the Court's application of due process guarantees of notice and an adversarial hearing¹⁶⁷ and Eighth Amendment prohibitions against excessive fines¹⁶⁸ by labeling a civil proceeding in rem rather than in personam; the Court has not permitted a state legislature to circumvent the Court's gloss on the Fourth Amendment's requirement that a search be "reasonable" by statutorily authorizing a "search incident to

167. See *United States v. James Daniel Good Real Property*, 510 U.S. 43, 62 (1993) (holding that landowner was entitled to notice and adversarial hearing prior to government seizure of real property in civil in rem forfeiture action despite statute to the contrary).

168. See *Austin v. United States*, 509 U.S. 602, 622 (1993) (finding that civil in rem forfeiture of property used to facilitate a drug offense acts as punishment of the property owner and is therefore limited by the Eighth Amendment's excessive fines clause).

citation"¹⁶⁹; and the Court has expressed "serious constitutional doubt" regarding whether Congress can evade the Fifth Amendment grand jury indictment clause and Sixth Amendment right to trial by jury by changing the substantive definition of a crime, labeling key factual determinations "sentencing enhancements" rather than elements of the criminal offense.¹⁷⁰ However, for every example where the Court limits a legislature's ability to circumvent constitutional criminal procedural guarantees, there are instances in which the Court permits it. For example, the legislature can punish an innocent property owner;¹⁷¹ the legislature can indefinitely curtail the liberty of those convicted of certain sex crimes without a criminal trial;¹⁷² and the legislature can authorize certain searches without a judicial warrant or probable cause.¹⁷³ Many equally important issues, such as whether Congress can statutorily "overrule" the *Miranda* decision, have yet to be resolved.¹⁷⁴

Thus, the conflict over double jeopardy's "same offense" test is one manifestation of this battle over who has the ultimate authority to interpret any particular clause of the Federal Constitution. I believe that judicial monitoring of legislative excess is particularly crucial in the criminal law area. Legislators will continue to enact more and tougher anticrime measures, and those accused of crimes will continue to constitute a politically powerless and disfavored group, so long as the vast majority of Americans correctly conclude that they are highly unlikely to be the target of a police

169. *Knowles v. Iowa*, 525 U.S. 113 (1998) (holding that the legislature cannot expand the search incident to arrest exception by statute).

170. *Jones v. United States*, 526 U.S. 227 (1999) (5-4 decision) (basing its decision on the doctrine of constitutional doubt, Court interpreted subsection of carjacking statute increasing punishment from 15 to 25 years based on serious bodily injury to be an element of the offense rather than a sentencing enhancement, that must be pled in the criminal indictment and proven to a jury beyond a reasonable doubt).

171. See, e.g., *Bennis v. Michigan*, 516 U.S. 442 (1996) (5-4 decision) (holding Michigan statute authorizing forfeiture of property used as a public nuisance defeats innocent owner's due process rights).

172. See, e.g., *Kansas v. Hendricks*, 521 U.S. 346 (1997) (affirming that the Kansas legislature can authorize indeterminate imprisonment in the psychiatric wing of a secure prison hospital for sexual predators in a civil proceeding, without running afoul of the Double Jeopardy or Ex Post Facto Clauses).

173. See, e.g., *New York v. Burger*, 482 U.S. 691 (1987) (permitting statutorily authorized warrantless searches of closely regulated businesses).

174. In 1968, Congress enacted the "post-*Miranda* act," 18 U.S.C. § 3501(b), which provides that the failure to give *Miranda* warnings is merely one factor to consider in determining whether a confession is involuntary and thus excludable. Though the Department of Justice has not seen fit to rely on this statute or argue for its enforcement, Justice Scalia has threatened to pass on the issue *sua sponte*. See *Davis v. United States*, 512 U.S. 452, 465 (1994) (Scalia, J., concurring). He will soon get his chance in *United States v. Dickerson*, 166 F.3d 667 (4th Cir. 1999) (finding that 18 U.S.C. § 3501 effectively overruled the *Miranda* decision for federal prosecutions), *cert. granted*, 120 S. Ct. 578 (1999), despite the fact that the government, again, did not rely upon nor argue for the enforcement of this provision.

investigation,¹⁷⁵ but much more likely to be the victim of a crime.¹⁷⁶ Regardless of one's position on other criminal law and procedure fronts, the protection against double jeopardy is one constitutional criminal procedural guarantee for which state and federal legislators ought not to be given the final word. Without the protection against harassing successive prosecutions, all other criminal procedural guarantees ultimately become meaningless. Given a sufficient number of attempts, the government will always prevail, even against innocent defendants. Because of this, while I appreciate Thomas's argument for legislative supremacy, I am rooting for the courts.

175. See Donald A. Dripps, *Criminal Procedure, Footnote Four, and The Theory of Public Choice; or, Why Don't Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079 (1993); Susan R. Klein, *The Discriminatory Application of Substantive Due Process: A Tale of Two Vehicles*, 1997 U. ILL. L. REV. 453 (1997). There is an exception to that conclusion for young black males. See MAUER AND HULING, *YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER*, WASHINGTON, D.C., THE SENTENCING PROJECT (1995) (determining that a 20- to 29-year-old African American male had a 30.2% chance of being under criminal justice control on any given day of 1994).

176. The 1998 FBI Uniform Crime Report indicates that there were 4,615.5 total crimes per 100,000 persons in 1998. Broken down by type of crime, one had a 0.6% chance of being the victim of a violent crime, and a 4.1% chance of being a victim of a property crime for any given year. See FEDERAL BUREAU OF INVESTIGATION, *CRIME IN THE UNITED STATES—1998, UNIFORM CRIME REPORTS* § 2, at 5-6 (1998), available at (visited Mar. 12, 2000) <<http://www.fbi.gov/ucr/98cius.htm>>.