Double Jeopardy Law and the Separation of Powers

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I. INTRODUCTION

The Fifth Amendment to the United States Constitution provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb . . . ."1 Elegant and succinct in its constitutional codification, the real world application of double jeopardy law has often been confused and tedious; it has become "a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator."2 A great deal of the confusion involves the phrase "same offense." Clarity remains elusive in part because courts and

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1 U.S. CONST. amend. V.
commentators have adopted multiple, inconsistent analyses of offenses. Some approaches seem initially plausible but fail to address conceptual difficulties, while others are conceptually rich but involve complexities that are foreign to the judiciary.

This Note proposes that previous approaches share a fundamental flaw. To evaluate the flaw, it is critical to understand the entire, distinct structure of the judiciary. The judiciary’s distinctness is familiar through the principle of the separation of powers—a separation that will be shown to be much more profound and consequential than is usually supposed. The thesis of this Note is that the separation of powers—the specific legal processes and institutions that separate the judiciary from other legally relevant fora—frustrates traditional analyses of offense identity. The traditional analyses fail because they assume that the actors within the judiciary can and should step outside of the judiciary to determine offense identity, and, ultimately, criminal liability. The independence of the judiciary, as demonstrated by its rules, forms and objects, makes any attempt at crossing the separation between powers problematic. It is within the judicial proceeding that the fundamental institutions of judicial powers interact with the other branches of government to create the only meaningful context in which criminal offenses can be represented and in which criminal liability can be determined.

After a brief introduction, Part II of this Note will examine the existing double jeopardy precedential landscape. In Part III, the discussion will try to give order to the jurisprudence and logic that lies behind the case law by turning to the double jeopardy analyses developed by leading commentators. Part IV will consider the separation of powers in depth, building a case for a new understanding of how separate the judiciary really is. That new understanding will be applied to the existing law and the various scholarly approaches in Part V. Rejecting the existing approaches, the discussion will uncover the more serious fault in double jeopardy jurisprudence. The fault is a failure to appreciate the full scope of the judiciary’s separation from other branches of government and from other legally relevant parts of the world. This thesis is somewhat unorthodox, thus, arguments for and against it will be explored at length—but the effort is necessary to come to an understanding of a confused and inherently difficult area of law. In Part VI, the discussion will turn to possible remedies, noting the extent to which courts have adopted the suggested approach. The Note will conclude with the modest hope of having persuaded the reader that the suggested approach—recognizing the true independence of the judiciary and the

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4 See, e.g., Akhil Reed Amar, Double Jeopardy Law Made Simple, 106 YALE L.J. 1807 (1997), discussed infra Part III.A.

role of that independence in determining criminal offenses and liability – is necessary to explain the causes of some of the difficulties in double jeopardy analysis.6

II. BACKGROUND

A. Historical Background: Double Jeopardy History and Case Law

Laws against placing someone twice in jeopardy are ancient.7 In more modern times, Blackstone wrote of the "universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for the same offence."8 In American law,9 the Double Jeopardy Clause of the United States Constitution "protects against a second prosecution for the same offense after acquittal[,] . . . against a second prosecution for the same offense after conviction[,] . . . [a]nd it protects against multiple punishments for the same offense."10 In addition to the federal double jeopardy protection, made applicable to the states via the Fourteenth Amendment,11 all fifty states have either constitutional, statutory, or common law12 double jeopardy prohibitions.

The effectiveness of double jeopardy protections, however, often depends on how courts interpret "same offense."13 The law that currently governs the analysis of whether one offense is the same as another for double jeopardy purposes comes from the Supreme Court's decision in Blockburger v. United States.14 In Blockburger, the defendant was charged and convicted of both selling medical drugs that were not in their original, stamped packages and also

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8 4 William Blackstone, Commentaries 329 (1809). For a more thorough history, see THOMAS, supra note 5, at 46.
9 For an excellent historical analysis of the double jeopardy clause in American law, see United States v. Wilson, 420 U.S. 332, 339-42 (1975).
12 See Appendix A.
13 While some state courts define "same offense" differently in the successive and multiple prosecution contexts see infra notes 29-31, the Court in United States v. Dixon, 509 U.S. 688, 704 (1993), made the federal interpretation the same in every context. The distinction is largely irrelevant to this Note's approach. However, for a discussion of the difference between contexts see Ann Bowen Poulin, Double Jeopardy Protection from Successive Prosecution: A Proposed Approach, 92 GEO. L.J. 1183 (2004).
selling those drugs without a written order. The defendant challenged the convictions on the grounds that the two offenses were the same. The Court held that "the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." Since each offense required proof of different facts, the defendant could properly be convicted for both. By itself, the Blockburger test is seemingly straightforward. Though the test it announces has a lengthy pedigree, Blockburger stands together with subtle and not so subtle historical counter trends that make its application less clear. The Court has at times gone beyond Blockburger, and, as will be shown, has resolved double jeopardy cases in ways that suggest an alternate approach.

The most prominent example of the Court's addition to Blockburger came in 1990, in the case of Grady v. Corbin. In Grady, the defendant, Corbin, driving while intoxicated, struck an oncoming car and killed its driver. Later that evening, Corbin was given two tickets relating to the traffic violation. While the prosecution was preparing its homicide case against him, Corbin went to traffic court and pled guilty on the traffic violations. When the district attorney was ready to prosecute, Corbin argued that his previous guilty plea to the traffic charges barred the subsequent homicide prosecution. The Supreme Court agreed, holding that while the analysis must begin with the Blockburger test, another step is necessary. The additional step for the Grady Court was to determine if the subsequent prosecution "will prove conduct that constitutes an offense for which the defendant has already been prosecuted."

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15 Id. at 300-01.
16 Id. at 301.
17 Id. at 304. How exactly Blockburger deals with the issue of lesser included offenses is not clear. Blockburger's element test would seemingly prohibit prosecution on a lesser offense (e.g. robbery) that is included in a greater offense (e.g. armed robbery) that is also charged since the statutory elements of the robbery offense will not require any additional proof than that needed for the armed robbery offense. However, the Court in Garrett v. United States, 471 U.S. 773, 786 (1985) held that lesser included offenses were in fact distinct from the greater offense and could be charged and that convictions could be had on both.
18 Blockburger, 284 U.S. at 304.
20 See infra Part VI.
22 Id. at 511.
23 Id.
24 Id. at 512.
25 Id. at 514.
26 Id. at 516.
27 Id. at 521.
Because the homicide prosecution would make use of the conduct to which Corbin pled guilty at traffic court, the Court barred it. 28

The test for offense identity was expanded from Blockburger’s “proof of additional facts,” to include the larger context of the defendant’s conduct. Justice Scalia, in a vigorous dissent, complained that this addition to Blockburger was unprecedented and predicted its timely demise. 29

Indeed, three years later in United States v. Dixon, 30 a majority of the court rejected Grady and reaffirmed Blockburger’s status as the sole test for determining if offenses are the same for double jeopardy purposes. 31 Justice Scalia wrote:

We have concluded . . . that Grady must be overruled. Unlike Blockburger analysis, [which] has deep historical roots and has been accepted in numerous precedents of this Court, Grady lacks constitutional roots. The “same-conduct” rule it announced is wholly inconsistent with earlier Supreme Court precedent and with the clear common-law understanding of double jeopardy. 32

Since Dixon’s reaffirmation of Blockburger, the Dixon-Blockburger test comprises the Court’s controlling double jeopardy jurisprudence concerning the sameness of offenses. 33 Additionally, most states follow Blockburger analysis for their own double jeopardy provisions. 34 A few states go beyond Blockburger and approach a Grady style test. 35 At least two states use double jeopardy offense identity tests that differ from both Blockburger and Grady. 36

III. ALTERNATE APPROACHES TO OFFENSE IDENTITY IN DOUBLE JEOPARDY LAW

Despite Blockburger’s persistence as valid precedent, commentators have not spared its “same elements” test from critical analysis. 37 In trying to

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28 In this instance it was certain that the homicide prosecution would make use of the same conduct since the prosecutor submitted a bill of particulars that explicitly contained the same conduct. Id. at 513-14.
29 Id. at 543.
31 See infra Part V.B.
32 Dixon, 509 U.S. at 704.
33 United States v. Sessa, 125 F.3d 68, 72 (2d Cir. 1997).
34 See Appendix B.
35 Id.
36 Id.
37 Critique of double jeopardy jurisprudence has taken many different forms. For an outline of the different approaches, see Ross, supra note 3, at 257-65. This Note focuses on the most plausi-
improve on Blockburger, however, most commentators have missed the most serious difficulty. The approaches presented in this section highlight two different aspects of the same problem: a failure to appreciate the limitations of the judiciary.

A. The "Same Means Same" Approach

One straightforward approach to remedying confusion about what counts as the same offense is to demand a literal identity between statutory elements. This "same means same" approach is laudable for its simplicity. Under this approach, there is no question of differentiating lesser included offenses, for example, the robbery element of an armed robbery. The lesser included robbery is simply a different offense and the state can prosecute both.

This approach raises significant questions. Hypothetically, the "same means same" approach would allow the legislature to write several statutes, each with subtly differing elements that serve to increase a defendant's punishment. For example, the legislature, in addition to outlawing vehicular homicide, could write a law prohibiting vehicular homicide while driving over the speed limit, or, vehicular homicide between the hours of 2:00 am and 6:00 am. Obviously, each statute would have a different element and so a defendant could be punished for violating each statute. Technically, neither the "same means same" approach nor Blockburger would prohibit the second prosecution. Such results are not surprising since courts defer to legislative intent in this context. In fact, the Blockburger test has often been seen primarily as a rule for discerning legislative intent, yielding to a contrary legislative will when clearly announced.

ble approaches formulated post Blockburger. While other proposed approaches are often conceptually problematic, the approaches discussed herein are conceptually sound and well argued by their respective proponents. Finally, the approaches chosen serve to highlight better than others the central problem as developed infra Parts I-II.

38 This is the approach of Akhil Reed Amar. See supra note 4. Professor Amar would prevent some of the more blatant possible prosecutorial abuses by invoking due process principles. Amar, supra note 4, at 1812.

39 Amar, supra note 4, at 1814-15.

40 This is a problem that other commentators have also noticed, even if not ascribing to it the same importance as does this Note. See Poulin, supra note 13, at 1189; Claire Finkelstein, Positivism and the Notion of an Offense, 88 CAL. L. REV. 335, 352 (2000); Charles William Hendricks, 100 Years of Double Jeopardy Erosion: Criminal Collateral Estoppel Made Extinct, 48 DRAKE L. REV. 379, 402 (2000). For why this problem should be taken more seriously see infra notes 140-44 and accompanying text.

41 See Missouri v. Hunter, 459 U.S. 360 (1983) ("[W]here, as here, a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the 'same' conduct under Blockburger, a court's task of statutory construction is at an end and the prosecution may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial."); Albernaz v. United States, 450 U.S. 333, 340 (1981) ("The Blockburger test is a 'rule of statutory construction,' and because it serves as a means of discerning congressional purpose the rule should not be controlling where, for example, there is a clear indication of contrary legislative intent."). Yet this is another issue that the Dixon court failed to
Perhaps it is right to so defer; it is not the judiciary’s job – we prefer our elected legislature to codify our beliefs about what is worthy of punishment. Perhaps the legislature in the above hypotheticals found that vehicular homicide while driving over the speed limit was a sign of road rage that was on the increase in that jurisdiction, or that traffic fatalities related to drowsiness were most common between 2:00 am and 6:00 am. However, it is also possible there were no such findings. Perhaps the legislature in the above hypotheticals found that vehicular homicide while driving over the speed limit was a sign of road rage that was on the increase in that jurisdiction, or that traffic fatalities related to drowsiness were most common between 2:00 am and 6:00 am. However, it is also possible there were no such findings. The legislature may have acted irrationally or wrongfully by multiplying offenses. While one hesitates to encourage judges to adopt the legislator’s task of declaring what is worthy of punishment, an analysis of offense identity that would focus only on the literal identity of the statutory language would deprive the court of its ability to rationally test legislation.

B. The “Event Blameworthiness” Approach

The second type of scholarly approach would involve courts and law makers in a detailed analysis of offenses and events. This approach is considerably more complex, and by virtue of its complexity it asks the courts to do too much.

Professor Michael Moore’s book, Act and Crime, effectively demonstrates when offenses are the same and how statutes describe and punish offenses. In order to understand when offenses are the same, one must understand exactly what an offense is. For double jeopardy offense identity purposes,

explicitly address. Is Blockburger merely a tool for discerning legislative intent or does it define offense identity? In many cases the point will be moot since most states have adopted Blockburger type definitions for their interpretation of “same offense.” See Appendix B. Justice Scalia’s language in Dixon suggests that the Court indeed defined offense identity. See infra Part V.B. Additionally, in Texas v. Cobb, 532 U.S. 162, 173 (2001) (citing Blockburger), the court wrote: “[w]e see no constitutional difference between the meaning of the term ‘offense’ in the contexts of double jeopardy and of the right to counsel.” Though proceeding on the assumption that Blockburger via Dixon is more than a mere indicator of legislative intent, this Note will not be affected by the opposite assumption since on either assumption the more serious fault remains the same. See infra Part V.C.2.

42 United States v. Wiltberger, 18 U.S. 76, 95 (1820) (Marshall, C.J.) (“It is the legislature, not the Court, which is to define a crime, and ordain its punishment.”).

43 But see FCC v. Beach Commc’ns, 508 U.S. 307, 315 (1993) (“[A] legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.”).

44 For a discussion of the judiciary’s ability to rationally test legislation, see infra Part V.C.1.

45 See Moore, supra note 5.

46 Id. at 60.
Moore subjects the acts and events that underlie criminal offenses to a philosopher’s discussion of properties and universals.\(^47\) Difficulties involved in singling out, or individuating, events give rise to the concern that only identically worded statutes can single out the same offenses.\(^48\)

The concern involves arbitrariness. Where does one draw the line in singling out an event from the larger context? For example, how distinct is the event that constitutes criminally reckless driving? One may consider it an event in and of itself, but its composition is unclear and its boundaries are made imprecise by the fact that it is an artifact of human behavior and not a “natural kind,” – that is, a distinct property of the world that does not depend on human conventions.\(^49\) An analysis of reckless driving involves essentially arbitrary conventions concerning speed limits, road conditions, car movements, as well as a piecemeal analysis of the smaller events that make up driving (pressing the accelerator, turning the wheel, checking the mirrors, etc.) and various other elements, none of which are found in the natural world independent of human convention.

In the double jeopardy context, problems arise when one considers exactly how to analyze the events constituting the offense. Where does the offense begin and end? Of how many smaller offenses was the larger offense composed? Is each composite action, for example, pulling a trigger five times during a shooting, a separate offense? Moore eventually answers the problems by showing that moral salience, the blameworthiness of a defendant’s acts, can properly define and individuate offense events for double jeopardy purposes.\(^50\) Blameworthiness is a real property that can be used to non-arbitrarily delineate event boundaries.\(^51\) Consider the prosecution of a defendant who crashed her car into another vehicle, killing its occupant. The prosecutor may charge the defendant with both vehicular manslaughter and negligent homicide. Under Blockburger, since each charge requires proof of something the other does not (the use of a vehicle in one, negligence in the other), both charges would be allowed.\(^52\) Not so under Moore’s analysis. For Moore, in order to determine how many offenses are present for double jeopardy purposes, the question to ask is how many homicidal or manslaughtering acts were present in the event. The

\(^{47}\) Id. at 328. Professor Moore performs a careful analysis of different theories of event individuation. See id. at 305-90.

\(^{48}\) Id. at 335. In this regard, Moore’s hypothetical skeptic who worries if events can ever be properly individuated by a given label very nearly approaches the “same means same” approach discussed supra in notes 38-44. See also infra notes 151-55 and accompanying text.

\(^{49}\) Moore, supra note 5, at 184-88. Moore’s examples of natural kinds are things like gold, water, whales, etc. Id. at 184.

\(^{50}\) Id. at 337-90.

\(^{51}\) See id. at 343 for Moore’s answer to those who are skeptical about moral properties.

\(^{52}\) Of course if the vehicular manslaughter charge requires the prosecution to prove negligence as an element of the offense, then, absent any other distinguishing elements, the charges would not be separate under Blockburger and one would bar the other.
answer is only one. The other aspects of the event as charged under the respective statutes (the use of the vehicle or the negligent behavior) are not as morally relevant and do not contribute to the blameworthiness analysis.

Asking courts to make decisions about the particulars of event identity or to determine units of moral blameworthiness is perhaps to ask too much. Both the “same means same” approach and the event-blameworthiness approach concern the interaction between the different actors involved in the legal process. What should be the respective roles of the legislature and the judiciary? The conceptual difficulties involved in double jeopardy analysis prohibit easy reliance on the roles of law maker versus law interpreter. Before we can allocate such responsibility, we must reach conceptual clarity regarding those roles.

Addressing this issue, Professor George C. Thomas expands on the moral blameworthiness approach to offense identity by making clear exactly whose job it is to individuate events according to blameworthiness. Thomas places responsibility for determinations of blameworthiness squarely on the legislature, stating that deference to the legislature is “what is historically true and institutionally required about double jeopardy.” In allocating responsibility for determinations of blameworthiness, commentators such as Thomas make certain assumptions about the nature of the judiciary and its role with respect to the other branches. These assumptions are widely held but ultimately problematic. The remainder of this Note will examine those assumptions and offer a different perspective on the judiciary and its institutional interactions.

IV. THE INDEPENDENCE OF THE JUDICIARY

As the discussion progresses, the structural faults relied upon by other approaches will become clear. Yet in order to elucidate those faults, this Note must raise a new and perhaps unfamiliar conceptual framework. This framework encompasses, but in many important respects extends beyond, the traditional notion of the judiciary as a separate branch of government. Accordingly, a thorough explanation of the proper framework for understanding the judicial world is vital. The goal is to see the judiciary in all its factual and institutional being. This world of the judiciary is created by grand legal concepts and also by the smaller, everyday workings of legal professionals. In sum, these factors

53 “Event identity” and “offense identity” are used interchangeably in the subsequent discussion because, in the double jeopardy context, the relevant event is a criminal offense. In some instances it will prove useful to refer to the spatiotemporal event as opposed to the criminal offense. It will also prove useful, in other instances, to combine the two aspects under the term “offense event.”
54 Thomas, supra note 5.
55 See id. at 272-275 for a helpful summary.
56 Id. at 275.
create a world the independence of which is noted in theory but seldom appreciated in fact.

A. Traditional Separation of Powers Analysis

The separation of powers is a familiar concept. The idea is present in the structure of the Constitution\(^57\) and explicitly referenced by writers who contributed to the creation of the Republic.\(^58\) From an early age, students learn about the careful checks and balances introduced by the framers to prevent tyranny.\(^59\) Each branch plays a distinct role and each role is reserved for that branch.\(^60\) The Supreme Court noted that:

> The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. So much is implied in the very fact of the separation of the powers of these departments by the Constitution; and in the rule which recognizes their essential coequality.\(^61\)

For example, it is the role of the judiciary to say what the law is.\(^62\) Determination of jurisdiction is ultimately a job for the courts.\(^63\) Judicial decisions cannot be overturned by another branch of government.\(^64\) If the judiciary were not truly independent, it would cease being a judiciary under the meaning of the Constitution.\(^65\) There is a design to this separation. The goal "is basic and vital . . . namely, to preclude a commingling of these essentially different powers of government in the same hands."\(^66\)

Yet, the Supreme Court, while often referring to the separation of powers doctrine, has never articulated a coherent, substantive jurisprudence on the

\(^{57}\) See, e.g., Buckley v. Valeo, 424 U.S. 1, 120 (1976) (per curiam) ("the Constitution was nonetheless true to Montesquieu's well-known maxim that the legislative, executive, and judicial departments ought to be separate and distinct").

\(^{58}\) See, e.g., THE FEDERALIST Nos. 47, 48 (James Madison).

\(^{59}\) "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." THE FEDERALIST NO. 47 (James Madison).

\(^{60}\) Id.; See also THE FEDERALIST Nos. 47, 48 (James Madison).


\(^{62}\) Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).


\(^{66}\) O'Donoghue v. United States, 289 U.S. 516, 530 (1933) (emphasis added).
Separation of powers decisions rest on a superficial level of analysis. The Court mentions branch roles and takes for granted their legal effects. The lack of analytic depth in separation of powers case law is striking. Two-hundred years of separation of powers decisions have provided only a few analytical nuances. Perhaps the most prominent development in separation of powers jurisprudence has been rise of the contrasting analytical approaches: formalism and functionalism.

The formalist approach to the separation of powers involves inquiring into the formal characteristics of each branch of government. The judiciary's form, for example, is given in Article III and questions of judicial power are, under the formalist approach, determined by reference to the constitutional assignments of power.

The functionalist approach stresses overlapping of branch roles, eschewing strict reliance on the textual forms in favor of the flexibility necessary to the operation of such a large and diverse government. For example, it is

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67 See, e.g., Bowsher v. Synar, 478 U.S. 714, 722 (1986) ("That this system of division and separation of powers produces conflicts, confusion, and discordance at times is inherent . . . ."); see also Rebecca L. Brown, Separated Powers and Ordered Liberty, 139 U. Pa. L. Rev. 1513, 1517 (1991) ("[T]he Supreme Court's treatment of the constitutional separation of powers is an incoherent muddle.").


69 Brown, supra note 67 at 1518 ("In the field of separated powers the Court has not really "gotten it" at all. It has adopted no theory, embraced no doctrine, endorsed no philosophy, that would provide even a starting-point for debate.").

70 M. Elizabeth Magill, Beyond Powers and Branches in Separation of Powers Law, 150 U. Pa. L. Rev. 603, 612 (2001) ("given that the doctrine and many theoretical approaches profess commitment to the separation of the three functions, the remarkable fact about the doctrine and literature is that very little of it is devoted to identifying their contours").

71 See, e.g., Elizabeth J. Cisar & Martin H. Redish, "If Angels Were to Govern": The Need for Pragmatic Formalism in Separation of Powers Theory, 41 DUKE L.J. 449, 450 (1991) ("The Court has gone from one extreme to the other, with the assertion of what are at best tenuous distinctions."). For a thorough demonstration of the historical analytical weakness of the separation of powers doctrine, see William B. Gwyn, The American Constitutional Tradition of Shared and Separated Powers: The Indeterminacy of the Separation of Powers in the Age of the Framers, 30 WM. & MARY L. Rev. 263, 264 (1989) ("Most late eighteenth-century American accounts of the separation of powers doctrine were very superficial. Rarely does one find an explanation for why such a separation is desirable beyond vague references to its necessity in achieving 'liberty' and avoiding 'tyranny'.").


74 U.S. CONST. art. III.

convenient and constitutionally permissible for non-Article III bodies to exercise traditionally judicial powers in some instances.\(^\text{76}\)

Yet, this most important distinction in separation of powers analysis amounts to little. Important separation of powers cases often seem to support both approaches.\(^\text{77}\) The Court, by not explaining which if any approach it favors,\(^\text{78}\) has left the state of the law unclear.\(^\text{79}\)

The apparent superficiality of the separation of power analysis may not be problematic, however, if not much can be said.\(^\text{80}\) If all one can do is to point to the respective branches of government and their roles and say that, in a particular instance, one branch acted impermissibly outside its bounds, the analysis need go no further.\(^\text{81}\) The familiarity of these bedrock civics principles may make deeper analysis unnecessary\(^\text{82}\) – the analysis is simple because everyone takes it for granted once the particular separation of powers violation is pointed out by the Court.\(^\text{83}\)

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\(^\text{76}\) See Commodity Futures Trading Comm’n v. Schor, 478 U.S. 833, 847-48 (1986) (“the constitutionality of a given congressional delegation of adjudicative functions to a non-Article III body must be assessed by reference to the purposes underlying the requirements of Article III. This inquiry, in turn, is guided by the principle that practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III.”) (citations and internal quotation marks omitted).


\(^\text{78}\) See, e.g., Peter L. Strauss, Formal and Functional Approaches to Separation-of-Power Questions – A Foolish Inconsistency?, 72 CORNELL L. REV. 488, 489 (1987) (“The Supreme Court has vacillated over the years between using a formalistic approach to separation-of-powers issues grounded in the perceived necessity of maintaining three distinct branches of government (and consequently appearing to draw rather sharp boundaries), and a functional approach that stresses core function and relationship, and permits a good deal of flexibility when these attributes are not threatened.”).

\(^\text{79}\) Schor, 478 U.S. at 847 (“our precedents in this area do not admit of easy synthesis”).

\(^\text{80}\) No less an authority than James Madison despaired of finding clarity in this field. See, e.g., THE FEDERALIST NO. 37 (James Madison) (“the science of government has [not] been able to discriminate and define, with sufficient certainty, its three great provinces - the legislative, executive, and judiciary”). See also Allen v. Wright, 468 U.S. 737, 766 (1984) (Brennan, J., dissenting) (“the Court focuses on ‘the idea of separation of powers,’ as if the mere incantation of that phrase provides an obvious solution to the difficult questions presented”) (citations and internal punctuation omitted).

\(^\text{81}\) Philip B. Kurland, The Rise and Fall of the “Doctrine” of Separation of Powers, 85 Mich. L. Rev. 592, 593 (1986) (“problems of separation of powers have more often been sought to be resolved by invoking one or the other of the classifications as a shibboleth”).

\(^\text{82}\) In re President’s Comm’n on Organized Crime etc., 783 F.2d 370, 375 (3d Cir. 1986) (“Separation of powers questions are relatively uncomplicated when they involve institutions within the three branches of government.”).

\(^\text{83}\) However, the lack of analytical depth in separation of powers cases should in no way suggest that the doctrine of separation of powers is any less important than commonly assumed. See, e.g., Cisar & Redish, supra note 71, at 472 (“if we have begun to take the value of separation of powers for granted, we need only look to modern American history to remind ourselves about
Apart from the most basic analysis, what does it mean for one governmental power to be separated from another? While traditional separation of powers discussions have not proven very substantive, "[t]he power inherent in a court by virtue of its _sheer existence_ is broader and more fundamental than the inherent power conferred by separation of powers."\(^{84}\) On either the formalist or functionalist approach, something more is taken for granted: a power is something that has a form or something that exercises a function. But if power is not merely an abstraction, then something more concrete must be presupposed.\(^{85}\)

**B. The Separation of Powers Reconsidered: Institutions and Presuppositions**

While it is uncontroversial to speak of the institutions embodying the respective powers of government,\(^{86}\) the notion of an institution is somewhat abstract.\(^{87}\) The actual functioning of judicial institutions, however, may demonstrate how exactly they give substance to the power that they embody.\(^{88}\)

Law exists in a world of facts and objects. Legal processes are shaped by clerks and court officials, documents, the specifics of pleadings, memos and copies, preliminary rulings and countless similar elements. These diverse processes and details are the factual elements of the legal environment—they combine with the abstractions of legal theory to constitute the judicial world.

In a double jeopardy case, the question of offense identity is similarly represented by various elements in the judicial world. The prosecution, in its


\(^{85}\) Buckley v. Valeo, 424 U.S. 1, 124 (1976) ("The principle of separation of powers was not simply an abstract generalization in the minds of the Framers . . . ."); Gen. Assembly of N.J. v. Byrne, 448 A.2d 438, 443 (N.J. 1982) ("we cannot decide what constitutes excessive legislative power merely by intoning the abstract principles of separation of powers").

\(^{86}\) See, e.g., U.S. CONST. art III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court and in such inferior Courts as Congress may from time to time ordain and establish."); Bates v. State, 197 S.W.2d 45, 48 (Ark. 1946) ("Courts are institutions wherein the State’s judicial powers repose.").

\(^{87}\) See Konikov v. Orange County, 410 F.3d 1317, 1325 (11th Cir. 2005) ("More formal is the definition of 'institution,' which is 'an established society or corporation: an establishment or foundation [especially] of a public character . . . .'") (citing BLACK'S LAW DICTIONARY 813 (8th ed. 2004)) (internal quotation marks altered).

The reconstructed offense event becomes part of a world that is complete in and of itself. Speaking perhaps allegorically, the Supreme Court has spoken of "the four corners of the federal judicial process . . . ." In a more practical sense, the judicial world is self-contained. The principles and structures governing the events of the judicial world are internal to it. This self-sufficiency is an important characteristic because it is a logical prerequisite for independence. The judiciary's independence would be compromised if it had to rely on external sources for the completion of its essential tasks. The judicial power would not be separate if Congress could control its essential and inherent functions.

The judiciary coheres, it is made consistent, by virtue of the familiar processes and institutions that operate within it. Stare decisis is one powerful

See People v. Walker, 519 N.E.2d 890, 893 (Ill. 1988) ("it is not within the legislature's power to enact statutes solely concerning court administration or the day-to-day business of the courts"). Though, the branches of government are not "hermetically sealed." Buckley v. Valeo, 424 U.S. 1, 121 (1976). This Note does not suggest that other branches cannot exercise some of the functions of the judicial world. That sort of cross-world identity of functions satisfies the various decisions holding that the separation is not total. See 16 C.J.S. Constitutional Law § 217 (2005). The overlapping powers contemplated by some courts are essentially overlapping functions. See Fla. Motor Lines v. R.R. Comm'rs, 129 So. 876, 881 (Fla. 1930) (equating separated powers with functions). That functional separation differs from the factual and substantive separation argued for in this Note.

Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) ("the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in [the prosecutor's] discretion").

See, e.g., United States v. Bolen, 136 Fed. Appx. 325, 329 (11th Cir. 2005) ("Comparing the indictment to the charged statute of violation, it is clear that the indictment sufficiently alleged each element of the offense . . . .").

The defendant will have contact with the extra-judicial world offense event only if he or she actually committed the crime or was otherwise present, of course.


This Note will examine how evidence, principles of law, legislative intent and other important and familiar elements are imported into the judicial world. See infra Part V.C.

See, e.g., U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.").

In re Furnishings and Equipment for Judge, Courtroom and Personnel for Courtroom Two, 423 N.E.2d 86, 88 (Ohio 1981) ("Courts possess all powers necessary to secure and safeguard the free and untrammeled exercise of their judicial functions.").
example, making the law predictable and the judgments reliable.97 Attorneys and other legal actors have established ways of practice that depend on orderly and well-defined procedures.98 When a client brings his case to an attorney, a new set of rules and a new type of life, at least for the duration of her case, await her. Judicial procedures sometimes depend on the interpretation of substantive law, but they are generally local processes and events. A story told to an attorney, the filing of a complaint or the execution of a writ – these are the events on which people within the system depend. They serve as benchmarks, as boundaries, sometimes delineating the bounds of coercive power, sometimes serving as points of entry into the judicial world with attendant hopes of justice or redress. These events provide the answers to the often pressing question “what should I do next?” They form the most real and important interaction that most people have with the judicial power. While jurisprudential announcements of law in appellate decisions are no less real for being abstract and difficult, such abstract legal principles are not the sole or even primary constituents of the legal world. The day to day realities of the legal profession and the abstract reasoning of appellate courts are both part of a larger judicial world.99

Failure to appreciate the actual, perhaps mundane, embodiment of judicial power is why abstract analyses of double jeopardy offense identity flounder. Specifically, the independence of the concrete embodiments of judicial power creates unique forms of practice that prohibit mechanically reliable translation from the external world of events and legislation into the judiciary. While foreign facts and objects are regularly and of necessity introduced into the judiciary, the introduction is not automatic or seamless. For example, to the extent that findings underlying legal policy are in the legislature’s domain,100 the judiciary is to that extent removed from the “real” facts underlying statutory law. But, as mentioned previously, there is another separation keeping the judicial branch from getting to the facts. The actual offense event itself occurs outside of the judicial proceedings.101 The event, being external to the proceedings, must be reconstructed for the court.102 This reconstruction is not necessarily a

98 See Vasquez v. Hillery, 474 U.S. 254, 265-66 (1986) ("[Stare decisis is] the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion. That doctrine permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact.").
99 Weir v. United States, 339 F.2d 82, 84 (8th Cir. 1964) (noting the “process of our applying and adapting abstract law to the concrete facts of moment in the instant appeal . . . ”).
100 Kealey Pharmacy & Home Care Serv., Inc. v. Walgreen Co., 539 F. Supp. 1357 (W.D. Wis. 1982) (citing Nebbia v. New York, 761 F.2d 345 (7th Cir. 1985), aff’d, 291 U.S. 502, 525 (1934)).
101 Of course, some offenses, such as perjury or contempt, occur in the courtroom during a judicial proceeding.
102 See, e.g., C R Williams, Burdens and Standards in Civil Litigation, 25 SYDNEY L. REV. 165, 166 (2003) (“The aim of a trial is to reconstruct the facts of a past event so that the tribunal may then apply the law to those facts.”).
distortion, nor is it necessarily truth preserving.103 The typical way an external
offense event will come to the court will be through the familiar methods of
evidence presentation, witnesses, documents, evidentiary objects and so forth.104
In addition to questions about perceptual reliability, first hand observers may be
biased or in conflict about what actually happened.105 Physical objects must be
authenticated following various rules.106 Though the rules are crafted to maxi-
mize a truthful connection between the object’s status in the external event and
its role in the proceedings, the rules themselves are internal to the proceedings.
To use a familiar phrase, objects are “entered into evidence.” Terms like “self-
authentication” hide the fact that evidence does not convey itself unassisted
from the extra-judicial setting into the court with transparent trustworthiness.107
This skepticism about offense events is succinctly captured by the notion that
there are at least two sides to every story and is demonstrated by instances of
misperception or faulty representation, intentional or otherwise.108

These reflections are evidence of the separation between the judicial
world and other legally relevant contexts; we can now begin to speak of the
offense event as it occurred in the world and the offense event as it is repre-
sented in the judicial proceedings.109 Reasoning from the facts of legal practice
has led to the conclusion that there is no guarantee of reliable representation.

The point of this discussion is not to search for an epistemic certainty by
looking for a necessary connection between the offense as represented in court
and the offense as it actually happened. Nor is the point to foster skepticism,
because such skepticism misses what is crucial—namely, that the judiciary is
independent, conceptually and factually, from legal events and processes that
take place in other branches of government or in the world outside.

If it is clear now that the contours of judicial power are importantly dif-
ferent from other parts of the legally relevant world, what more substantive ac-

103 Garcia v. Portuondo, 104 Fed. App’x 776, 780 (2d Cir. 2004) (“the passage of time may
impair a court’s ability to reconstruct events or to find relevant facts”).
104 United States v. Perry, 788 F.2d 100, 114 (3d Cir. 1986) (“In a criminal trial the factfinder is
required to reconstruct past events. Those events, which occurred in the exterior world, left their
own imprint on history and knowledge of them is attainable by methods within the common ex-
perience of mankind. Nevertheless our legal tradition surrounds the process of reconstructing past
events in a criminal trial with significant procedural safeguards.”).
105 For example, see infra notes 110-117 and accompanying text.
106 United States v. Diaz, 922 F.2d 998, 1005 (2d Cir. 1990) (“Courts frequently must recon-
struct events when there has been no recordation of the proceedings under review.”).
107 Paul H. Robinson & Barbara A. Spellman, Sentencing Decisions: Matching the Decision-
factfinding can be best characterized as story construction: People try to fit the evidence into a
plausible story of what happened. Evidence that does not fit a coherent story may be disbelieved
or devalued (that is, found not to be a ‘fact’).”).
108 Swisher v. United States, 572 A.2d 85, 96 (D.C. 1990) (“[L]awyers must try to reconstruct
in the courtroom, after the fact, events which occurred at a different time and place.”).
count can be given of them? The first and most obvious places to turn to learn more about the judicial world are to the various rules of that govern court proceedings. The Federal Rules of Evidence, for example, shape the judicial world by governing (often with the help of interpretive decisions) one of the key factors in the determination of criminal liability - the admissibility of evidence, the raw material from which the criminal offense is to be reconstructed. While the Rules further determine when something has been established for purposes of the judicial proceedings. Importantly, the Rules determine the scope of their own applicability. Allowing for exceptions that the Rules themselves define, the Rules "govern proceedings in the courts of the United States." In a similar spirit, the rules of civil, criminal, and appellate procedure create and shape the world of judicial proceedings. These rules in fact create some of the objects that are unique to the judiciary. There are many examples. Some of the most important include rules that govern the scope and applicability of the rules, the meaning of the terms within the proceedings, and the means by which the offense event is introduced into the court. In the double jeopardy context, for example, while the indictment has to reflect the statutory elements of the offense, a bare recital of required elements does not do justice to the subtle and contextualizing account of the offense that the prosecution will present.

The various rules help give form and substance to the judicial power, but each court itself is the ultimate instantiation of judicial power. The "powers are inherent in the sense that they exist because the court exists; the court is, therefore it has the powers reasonably required to act as an efficient court." While the judicial power inheres in different ways, "[i]t has long been under-

107 See, e.g., FED. R. EVID. 600 series for witnesses, 700 series for experts, 800 series for out of court statements.
111 See, e.g., FED. R. EVID. 900 series for authentication, 1000 series for best evidence.
112 FED. R. EVID. 1101.
113 See, e.g., FED. R. CIV. P. app. of forms.
114 FED. R. CIV. P. 1; FED. R. CRIM. P. 1(a); FED. R. APP. P. 1.
115 FED. R. CRIM. P. 1(b).
116 FED. R. CRIM. P. 7(c)(1).
117 See United States v. Standard Brewery, Inc., 251 U.S. 210, 220 (1920) ("An indictment must charge each and every element of an offense.") (citing Evans v. United States, 153 U.S. 584, 587 (1894)).
119 See infra Part V.A.
stood that ‘[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution,’ powers ‘which cannot be dispensed with in a Court, because they are necessary to the exercise of all others.’” 122 Courts possess many recognized inherent powers, ranging from purely legal decision-making powers, 123 to procedural matters, 124 to the power to provide for their own physical existence. 125 Relevant to double jeopardy cases, courts have the inherent power to compel the production of evidence necessary to reconstruct the offense event inside the judicial proceedings. 126 From a practical point of view, there is no other forum in which the offense event could be reconstructed.127

The full scope of the separation of the judicial power has not always been clearly understood. Nevertheless, it should not be doubted – the sheer physical existence of judicial institutions has resulted in unique institutions, objects and practices that separate the judiciary from other legally relevant settings.128

V. A NEW ANALYSIS

Appreciating the full scope of judicial independence makes it possible to offer a fuller account of the separation of powers doctrine and its implication for double jeopardy analysis. The separation of powers doctrine is offended not only when one branch of government intrudes, formally or functionally, upon the role of another branch, but also when the factual preconditions for judicial


123 See, e.g., NASCO, Inc. v. Calcasieu Television & Radio, Inc., 894 F.2d 696, 702 (5th Cir. 1990), aff’d, 501 U.S. 32 (1991) (“It is a given that federal courts enjoy a zone of implied power incident to their judicial duty. From the Judiciary Act of 1789 forward its functional necessity has not been seriously questioned. Rather, the task is one of defining its limits.”).


125 See, e.g., Chief Judge of Eighth Judicial Circuit v. Bd. of County Comm’rs, 401 So. 2d 1330, 1332 (Fla. 1981) (“Generally, court claims to courthouse space necessary to the performance of official court functions are paramount.”). For a longer list of inherent powers, see Chambers, 501 U.S. at 43-45.

126 In re Superior Court Order Dated Apr. 8, 1983, 338 S.E.2d 307, 308 (N.C. 1986) (holding that a “judge has the inherent power to issue” an order directing “a banking corporation to disclose to the district attorney a customer’s bank account records upon finding that an examination of such records would be in the best interests of justice”).

127 See Robinson & Spellman, supra note 108, at 1138 (noting that “enormous costs of factfinding probably mean that it cannot realistically be done anywhere other than at trial and post-trial sentencing hearings before judge or jury”).

128 Of course, even the most institutionally entrenched judicial independence is not guaranteed. For historic threats to judicial independence, see Archibald Cox, The Independence of the Judiciary: History and Purposes, 21 U. DAYTON L. REV. 565, 574-83 (1996).
independence are encroached upon or weakened. When the judicial institutions that serve as the embodiment of abstract judicial power are undermined, the very ability to embody judicial power is lessened. It may be profitable for future courts to consider more explicitly the roles that seemingly mundane judicial processes and objects play in the manifestation and protection of judicial power. At the very least, appreciation of the full ontological inventory of the judiciary will enable a more sustained separation of powers analysis. Courts need not be arrested at the level of mentioning abstract separation of powers principles – the analysis can turn to the specific facts and objects of the judiciary in dispute since those facts and objects are the logical prerequisites for the exercise of otherwise abstract judicial power.

This understanding of the judiciary has significant implications for double jeopardy law. It follows that the offense event must be limited solely to its reconstruction in the judicial proceedings – courts can try a defendant only on the offense so recreated because there is no longer any other offense. Reliance on statutory definitions pursuant to 

Blockburger or legislative intent regarding blameworthiness pursuant to the best commentator approaches, becomes suspect when one realizes that statutes and legislative blameworthiness analyses are external to the independent world of the judicial proceedings – the only proceedings ultimately relevant to offense determination and criminal liability.

The previous section was descriptive, demonstrating the existence of an unsuspected and robust judicial independence. This section will be prescriptive – it will discuss reasons why double jeopardy analysis should take into account the full measure of that independence.

A. Individuals and Fairness: Why the Concepts Should Match the Practice

The judicial independence argued for herein is an explanatory fit with actual practice. For example, it provides a mechanism for individuating and identifying offense events. The offense in question is in a sense fixed by its introduction into the proceedings. The prosecution will set the initially controlling definition of the offense in the charging document. The adversarial nature of the proceedings, however, prevents the prosecution from having the final word. The defense is free to dispute the facts as the prosecution has defined them. In so doing, the defense will try to shape the framing of the offense event by denying the charges and putting on its own version of events. Ulti-

129 Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) ("[T]he decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in [the prosecutor's] discretion.").

130 See, e.g., Gerard E. Lynch, Our Administrative System of Criminal Justice, 66 FORDHAM L. REV. 2117 (1998) for an excellent account of the actual practice of prosecution and how it departs from "elegant model of procedure that applies in principle . . . " Id. at 2120.

131 See, e.g., State v. McGee, 83 S.W.2d 98, 107 (Mo. 1935) ("Photographs and diagrams purporting to reconstruct the surrounding conditions at the time of an offense are admissible in evi-
mately, the burden rests on the prosecution to establish the offense within the judicial proceeding.\textsuperscript{132} The prosecution’s failure to do so ends the proceeding and renders questions of offense identity moot as should be the case when the only legitimate stage for its existence has closed.\textsuperscript{133}

As noted previously, scholars give blameworthiness a prominent role in determining offense sameness.\textsuperscript{134} The real extent of judicial separation suggests, however, that blameworthiness accounts are not as intuitively plausible as they may seem. Legislatures create blameworthiness in the abstract. The individual to which the statute is supposed to apply is essentially a variable to be substituted into the statutory formula. Such blameworthiness is detached from the specific individual who will ultimately face judgment in a given case. In fact, it is beyond the scope of legislative competence to make individualized determinations of blameworthiness.\textsuperscript{135} Therefore, it is surprising to note the extent to which commentators would defer to legislative judgments of blameworthiness based on hypothetical defendants, when the judicial determination of blameworthiness, of moral responsibility, applies to individuals in particular cases.\textsuperscript{136} Legislatures may tailor statutes and sentencing guidelines to allow for sentences to accommodate the unique facts of each hypothetical case. But this is a far cry from recognizing that the actual judgment of blameworthiness comes solely in and through the judicial proceedings.\textsuperscript{137}

As demonstrated supra, the judicial proceedings create and contain the only reconstruction of the facts on which criminal liability can be established. Not only must any determination of blameworthiness be limited to the judicially

dence. Inaccuracies therein . . . are generally more properly matter for impeachment, going to the weight rather than the competency of the evidence.”).

\textsuperscript{132} See Fiore v. White, 531 U.S. 225, 228-29 (2001) (“We have held that the Due Process Clause of the Fourteenth Amendment forbids a State to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt.”).

\textsuperscript{133} “[I]t is a well recognized principle of the law that courts of record can speak only by their record and what does not so appear does not exist in law.” State ex rel. Browning v. Oakley, 199 S.E.2d 752, 753 (W. Va. 1973).

\textsuperscript{134} In addition to Thomas’s and Moore’s accounts, see Finkelstein, supra note 40, at 379 for an approach that would rely on identifying the relevant harm so as to justify and interference with liberty that should be avoided as a presumption. That article also in part anticipates the confusion on the part of judges in determining elements of blameworthiness. Id. at 394.

\textsuperscript{135} McFarland v. Am. Sugar Ref. Co., 241 U.S. 79, 86 (1916) (“[I]t is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime.”).

\textsuperscript{136} United States v. Brown 381 U.S. 437, 445 (1965) (“[T]he Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness of, and levying appropriate punishment upon, specific persons.”).

\textsuperscript{137} “An adjudication of guilt is more than a factual determination that the defendant pulled a trigger, took a bicycle, or sold heroin. It is a moral judgment that the individual is blameworthy.” United States v. Lyons, 739 F.2d 994, 994 (5th Cir. 1984) (Rubin, J., dissenting); see also State ex rel. Hilburn v. Staeden, 91 S.W.3d 607, 610 (Mo. 2002) (“The entry of a judgment remains ‘the quintessential function of a court.’”) (citing Carr v. N. Kan. City Beverage Co., 49 S.W.3d 205, 207 (Mo. Ct. App. 2001).
reconstructed facts out of necessity — there simply is no other forum — it must be so limited in order to make the determination of blameworthiness truly and fairly individualized. The reconstructed factual account is the record on which the defendant will be tried. Improper reliance on legislative formulas for guilt would be, in a very real sense, to try the defendant on something that is not in the record. 138 Even on the most conventional accounts of double jeopardy and the separation of powers, statutory schemata cannot comprehend the individual defendant — the facts of a specific individual’s offense do not exist in the statute.139 The defendant must be brought to trial by the executive who alleges that the alleged offense matches the statutory language and there must be a trial before a court to reconstruct the specific facts of the alleged offense. Abstract legislative determinations of blameworthiness give way to the concrete judicial proceedings which become the only legitimate forum for determinations of guilt.

The difficulties increase for the blameworthiness approach. Professor Thomas, as noted earlier, defers to legislative judgments about blameworthiness. Such legislative judgments, naturally, occur outside of the judicial world.140 Yet he acknowledges that the courts ultimately have to discern legislative intent about blameworthiness.141 This stands in some tension with his general deference towards the legislature.142 How is the court to tell which elements of a statute express judgments about blameworthiness and which do not — which constitute impermissible, bad faith legislative excess? It is problematic to grant total deference to the legislature on the core, morally salient, elements of the statute while requiring the court to identify legislative intent about what those elements are.143 The court’s judgment concerning whether or not a statutory element is morally salient will be informed by its own belief about moral

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138 See David P. Leonard, Different Worlds, Different Realities, 34 L.O.Y. L.A. L. REV. 863, 891 n.111 (2001) (“Accurate reconstruction of facts is not the only function of a trial, but it is surely the most important.”).

139 Whatever else will go wrong, a double jeopardy analysis that relies improperly on legislative formulas instead of relying solely on the records of the judicial proceedings will be conceptually confused. It will confuse the offense itself with its reconstruction — objects and events with words, descriptions and the documents of court. No matter how faithful judicial reconstructions are to the actual event, they are fundamentally different things. The approaches advocated by Professors Moore and Thomas, by trying to analyze the real event as opposed to the event reconstructed, would individuate or find blame in the wrong places — events rather than the judicial reconstruction of the events.

140 Bryan Dearinger, The State of the Nation, Not the State of the Record: Finding Problems with Judicial “Review” of Eleventh Amendment Abrogation Legislation, 53 DRAKE L. REV. 421, 471 (2005) (“For example, legislators make laws differently than a court parses through facts and records. Congress’s facts, cases, and controversies involve innumerable parties and exist outside the finite world of the judiciary.”).

141 THOMAS, supra note 5, at 198-200.

142 Id.

salience. The function of the judiciary is interpretation; it cannot be escaped, and it is present in every analysis of statutes and legislative history that comes before the court. This is not a radical power, merely the power of judicial review. To deny the courts plenary use of this power is to deny them an essential function.

The blameworthiness approach's problems are more than the denial of an essential judicial function to the judiciary. What the approach implies is not merely deference to legislative authority, but an all encompassing legal system in which the legislature has made judgments about blameworthiness to which the judiciary defers. However, there is no unifying authority that spans the divide between the legislature and the judiciary that can ensure continuity between judgments. Claims to the contrary presuppose a non-existent connection between the judiciary and the other branches, while neglecting the ground level barriers that make reliable coordination between the powers suspect. The record as created in and by the judicial proceeding is the only proper metric – factually and as a matter of fairness — for the determination of individual blameworthiness.

Though discussions of double jeopardy jurisprudence are not merely academic – one should not neglect that the selection of a particular double jeopardy approach will have potential consequences for a defendant's liberty – an interested reader will, as a general principle, want to come to an understanding of a complex and intellectually challenging area of law. In his dissent in Grady v. Corbin, Justice Scalia claimed that the court's holding would require too

144 To return to a previous example, the peripheral or non-morally salient elements might be the time element of a vehicular homicide statute that prohibited vehicular homicide while driving between 2:00 am and 6:00 am. Yet the time element could be something on which the legislature decided to speak. Whether or not the time element represents a legislative judgment of blameworthiness, strict liability, or merely legislative excess is something that the judiciary must interpret using its own moral reasoning. Thomas proposes that courts use presumptions about legislative intent, namely that "the same blameworthy act-type is only a single offense." THOMAS, supra note 5, at 199. But the problem appears again when considering when to use that presumption. It would only be used when legislative intent about blameworthiness is not clear, but how is clarity supposed to be determined at that earlier stage unless the court does some analysis of what is and what is not blameworthy.


146 See supra notes 62-65 and accompanying text.


148 Another problem faces the blameworthiness accounts. It is possible for a legislature to prohibit things that are not morally blameworthy. A legislature could criminalize an act on strict liability grounds or in expression of a widely shared aesthetic. A pure blameworthiness test would invalidate those laws. Of course the problems for commentators such as Thomas resurface: who is to decide and how can that decision be coordinated between the separate branches of government.
much of trial court judges. He assumed that their task is to determine what the prosecution showed.\textsuperscript{149} Indeed, a judge is likely to be the foremost expert on determining what the prosecution showed in the context of the judicial proceeding. But legislative intent and moral blameworthiness, the mainstays of the leading scholarly discussions, are not necessarily identical to what the prosecution shows.\textsuperscript{150}

The most careful double jeopardy commentary is devoted to principles of event individuation: how is one to decide when an offense is the same, not only under the law, but under criteria for event identity generally? An offense, after all, is an event (or series of events) that will have physical and temporal characteristics. Singling out that event with enough specificity to be able to identify it and only it is not always a simple matter. Professor Moore's book contains a detailed account of this sort of event analysis.\textsuperscript{151} The analysis focuses on several problems, from distinguishing between act-types (what \textit{kind} of event)\textsuperscript{152} and act-tokens (which \textit{particular} event),\textsuperscript{153} to giving criteria for event identity.\textsuperscript{154}

Moore's own proposal for event identity is, "For all things x and y, if x and y are events, then x is identical to y if and only if x and y are exemplifyings of the same property, by the same object, at the same time."\textsuperscript{155} On this view, events are basically properties of objects -- relationships, position or movement in space time, or other properties. When those properties are exemplified (i.e. when a specific instance of those properties occurs) by the same objects at the same time, they are identical.

The reader will note how far this style of analysis is removed from the usual subjects of legal studies. Further, consider how much this would ask of a judge using such an approach to decide offense identity. It is unrealistic to expect that judges will apply Moore's complex, philosophical analysis of events to a double jeopardy case. Nor do judges have to. Proper attention to the separation of powers principles in double jeopardy contexts allows for much simpler and familiar event individuation. The separation of powers and the resultant independence of the judiciary demands that offense identity for double jeopardy purposes be done within the judicial proceedings. As shown previously, the interaction of adversaries and powers within the judicial proceedings individuates events in the only relevant manner.\textsuperscript{156} The legislature writes the statute


\textsuperscript{150} See a fuller discussion of legislative intent \textit{infra} Part V.C.2.

\textsuperscript{151} In each chapter, Professor Moore slightly refines the analysis, but it is primarily an account of how to understand criminally relevant events.

\textsuperscript{152} Moore, \textit{supra} note 5, at 325-55.

\textsuperscript{153} \textit{ld.} at 356-90.

\textsuperscript{154} \textit{ld.} at 369.

\textsuperscript{155} \textit{ld.}

\textsuperscript{156} See \textit{supra} notes 129-133 and accompanying text.
which defines the offense in the abstract. The executive introduces the offense in court and offers the first application of the offense schema to the facts of the case. The defense will contest and recast the application of law to fact. The judiciary’s task of fact recreation and ultimate judgment cannot and should not be delegated to an authority more capable of implementing an event-blameworthiness analysis.157

B. Does Blockburger go beyond the Record?

Clearly, the approaches taken by commentators have failed to appreciate the role that the separation of powers plays in double jeopardy law. Courts, however, generally do not indulge in book-length philosophical explanations.158 Before condemning Blockburger-Dixon, it is worth taking a technical detour to determine if the governing test determines offense identity and criminal liability improperly by reliance on the statutory definition of an offense as opposed to the offense as recreated in the courtroom and contextualized to the judicial proceedings.

In Dixon, then Chief Justice Rehnquist dissented in part from Justice Scalia’s opinion, specifically on the point concerning from what source the defined offense should be gleaned. The Chief Justice found an unbroken history of the Court’s reliance on the statutory elements; whereas he accused Justice Scalia of looking towards the facts under the particular indictment.159 At least one commentator has noted this disagreement between the Justices and suggests, that in fact the Court now looks to the charging instrument as opposed to the statute book.160

Though it is tempting to conclude that the charging instrument is controlling for double jeopardy offense identity purposes, there are some difficulties with that conclusion.161 First, it is not clear if Justice Scalia meant to create a rule that necessarily incorporates the charging instrument. In Dixon, defendant Dixon was arrested and indicted for a drug offense.162 Based on that arrest and indictment, he was convicted for criminal contempt for violation of a condition of release regarding a previous, unrelated offense.163 The condition specified

157 Presumably factfinders could become educated about principles of event individuation, though, it seems unrealistic to assume that judges, let alone juries, will ever be in a position to adopt Professor Moore’s sophisticated analysis.
158 After all, “a page of history is worth a volume of logic.” N.Y. Trust Co. v. Eisner, 256 U.S. 345, 349 (1921) (Holmes, J).
160 Ross, supra note 3, at n.76.
161 It is tempting, of course, because it would show double jeopardy jurisprudential reliance on an important fact of the judicial proceedings. The charging instrument is indexed to the proceeding; indeed, it only exists because of and within the proceedings.
162 Dixon, 509 U.S. at 691.
163 Id. at 691-92.
that he was not to commit "any criminal offense." The trial for the drug offense was dismissed by the lower court believing that the contempt conviction barred the subsequent drug prosecution on double jeopardy grounds. The Supreme Court affirmed, holding that since the drug offense did not contain any elements other than those already present in the contempt conviction, Blockburger barred it.

Four of the five counts of defendant Foster's domestic assault offenses, however, were not barred by his previous conviction for violation of a civil protection order forbidding him from assaulting his former wife. Those four counts in the assault conviction specified elements that were not present in the violation of the civil protection order and thus passed Blockburger scrutiny. Under the particular facts of Dixon, the contempt citation lacked a list of statutory elements to which one could appeal. The Chief Justice noted the difference between statutory and contempt offenses and supposed that Justice Scalia had to then focus on a greater and lesser included offense analysis in order to avoid clear conflict with precedent. Yet, Justice Scalia's reasoning may be limited to the facts of the particular case since there were no clear statutory elements under which to analyze contempt (contempt requires a violation of a judicial order, not a statute). Justice Scalia addressed this point. He wrote: "[o]bviously, Dixon could not commit an 'offence' [sic] under [the statute authorizing contempt] until an order setting out conditions was issued. The statute by itself imposes no legal obligations on anyone." Accordingly, Justice Scalia's reliance on the indictment may reflect only these unusual circumstances.

However, even if we assume that Justice Scalia meant to change the focus from the statutory elements to the indictment, it is difficult to say which of the Dixon justices joined him in that opinion. Justice Scalia's opinion on this point, part III, was joined by only Justice Kennedy. Justices O'Connor and Thomas joined the Chief Justice's dissent from part III. In part IIB of his dissent, Justice White, joined by Justice Stevens rejected a focus on only the statutory elements, but did so with an eye towards restoring Grady's same conduct test, not while making a distinction between statutory elements versus facts from the indictment. The other Justices did not focus on the distinction. Therefore there were possibly four justices who may have allowed for the offense to

\[164\] Id. at 691.
\[165\] Id. at 692.
\[166\] Id. at 700.
\[167\] Id.
\[168\] Id. at 716-17 (Rehnquist, J., dissenting).
\[169\] See generally 12 A.L.R.2d 1059.
\[170\] Id. at 697.
\[171\] Id. at 735 (White, J., dissenting).
\[172\] Id. at 740 (White, J., dissenting) (stating that overruling Grady was "both unwarranted and unwise").
be defined by the indictment in this case in which there was no good statutory reference.

It seems unlikely that from this fractured opinion the Court departed from its historical reliance on the statutory elements. Therefore, the Blockburger-Dixon test, like the commentator approaches critiquing it, relies impermissibly on statutory abstractions for determination of offense identity and criminal liability. Ignoring the interaction of separate government powers and the adversarial reconstruction of offenses in favor of rote application of legislative formulas unjustly disadvantages a defendant who is bound by the judicial proceedings. It would be fairer for courts to realize that the legislative formula is, by institutional design, transformed by its introduction into the proceedings into a fact specific, individual test of justice.

C. Challenges

1. Rationality and Relativism

This Note’s focus on the judiciary’s true independence, though justified by a history of neglect, has the potential of erring in the opposite manner. The judiciary is institutionally distinct, and institutions, as shown previously, have logical prerequisites and consequences. However, that distinctness is not so radical that elements of the judiciary cannot interact with the rest of the world. The judiciary is composed of the same sorts of people and objects that make up other human institutions. Moreover, judicial judgment is not an unfamiliar power: it is the application of the fact finder’s reasoning ability to the particular facts before the judiciary.

The rationality of human actors extends across all legally relevant fora and into the heart of judicial institutions where judges routinely exercise a ra-

173 Illinois v. Vitale, 447 U.S. 410, 416 (1980) (“We recognized that the Blockburger test focuses on the proof necessary to prove the statutory elements of each offense, rather than on the actual evidence to be presented at trial.”). But see supra note 41 and accompanying text.
174 Some courts have taken steps in this direction. See infra Part VI.
175 The institutional analyses advocated by legal process theory and other theoretical approaches differ importantly from the institutional analysis presented in this Note. This Note is concerned with the narrower legal institutions (both physical and formal) and their structural impact on judicial proceedings. Other approaches are more concerned with broader philosophical biases or methodologies that result from institutional pressures on human actors within the judiciary. See, e.g., Edward L. Rubin, The New Legal Process, The Synthesis of Discourse, and the Microanalysis of Institutions, 109 Harv. L. Rev. 1393, 1403 (1996).
rionality that forestalls fears of relativism. For example, a familiar judicial power is the ability to rationally test legislation. Rationality tests are familiar in the due process and equal protection contexts and generally involve two parts: 1) asking about the legitimacy of the government’s goal, then 2) asking if its means of accomplishing that goal are rationally related to that goal. In the double jeopardy context, the ability to rationally test legislation plays an important role. A rational basis test suggests a way to limit the multiplication of elements: a court can test if the distinguishing elements of a particular homicide statute are rationally related to the legitimate governmental goal. This is one obvious check on legislative deference that doesn’t involve questions of blameworthiness or event individuation because rationality testing is well within the ability of the judiciary.

The institutional facts that shape the judicial proceedings do result in a world of practice and objects unique to the judiciary. However, the judiciary is not so alien as to be incomprehensible from the outside. It is ultimately a rational world that fits comfortably into the rest of the legal process.

Nor is there a slippery slope towards either an expansion of the judicial world or a multiplicity of other unique, independent legal forums. Although at first blush this Note may appear to offer an approach that is more radical than

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179 See, e.g., Johnson v. Daley, 339 F.3d 582, 598 (7th Cir. 2003) (Ripple, J., concurring) (“the well-known and frequently applied rational basis test of constitutional analysis”).

180 Gamble v. City of Escondido, 104 F.3d 300, 307 (9th Cir. 1997) (holding that the rationality test is in fact the same for both).


183 The particular offense may be vehicular homicide or negligent homicide, in which case the distinguishing element would be use of a vehicle or negligence, respectively. See supra notes 37-43 and accompanying text; Amar, supra note 4.

184 Another problem faces the blameworthiness accounts. It is possible for a legislature to rationally prohibit things that are not morally blameworthy. A legislature could criminalize something on strict liability grounds or in an expression of a widely shared aesthetic. A strict blameworthiness test would strike those laws down. Of course the problematic questions for commentators such as Thomas, supra note 5, resurface: who is to decide and how can that decision be coordinated between the separate worlds of the law.

185 See Susan R. Klein, Double Jeopardy’s Demise, 88 CAL. L. REV. 1001, 1048-50 (2000) for a review of Thomas’s book and an account that would ask the judiciary to check legislative determinations of blameworthiness by establishing its own determinations of blameworthiness. The author eventually settles on a “same conduct” and blameworthiness test that shares the problems of Thomas’s and Moore’s tests and is the opposite of the independence argued for in this paper. Id. at 1037.
need, history shows that such an approach is necessary.\textsuperscript{186} Double jeopardy law on the question of offense identity has been particularly confused; few people seem satisfied with \textit{Blockburger}, and alternative proposals abound.\textsuperscript{187} Importantly, the nature of the problem calls for recognition of the judiciary’s limits in certain areas; whereas, regarding other prominent constitutional questions, the judiciary is inherently suited to the task. The very phrase “due process” references the processes that are familiar to the judicial world and that the judiciary in large part creates.\textsuperscript{188} Courts are the arbiters of equal protection.\textsuperscript{189} Tests used in Fourth\textsuperscript{190} and Eighth Amendment\textsuperscript{191} contexts, being within the traditional, rationality-analysis powers of the judiciary, are perfectly amenable to judicial treatment.

Therefore, though judicial separation is a brute fact, its recognition need not be the primary analytical tool in every field of jurisprudence. The participants will likely work within the judicial proceeding and, finding no historical failures of analysis and interaction between powers similar to those present in double jeopardy contexts, will not have to invoke a thesis which their actions presuppose. In the double jeopardy context, however, such invocation is vital for understanding the historic failures of analysis.

2. Legislative Intent

Though, as discussed earlier, there is a danger of complete deference to the legislature,\textsuperscript{192} some deference seems reasonable. The statute will no doubt play a large role in the proceedings, and the court will be faced with the challenge of incorporating it into the world of the judicial proceedings.

The primary challenge faced by the robust separation of powers solution to double jeopardy problems espoused in this Note is one of importation. This potential problem is perhaps best seen in judicial use of legislative intent, which suggests more of a removal from the judicial proceedings than other external

\textsuperscript{186} See discussion of the failings of traditional separation of powers analysis \textit{supra} Part IV.A-B.
\textsuperscript{187} Ross, \textit{supra} note 3, at 257.
\textsuperscript{189} \textit{See} Nation Magazine v. U.S. Dep’t of Def., 762 F. Supp. 1558, 1567 (S.D.N.Y. 1991) (“The historic competence of the federal judiciary to address questions of First Amendment freedoms and equal protection is clear.”) (citing Baker v. Carr, 369 U.S. 186, 226 (1962)).
\textsuperscript{190} Johnson v. United States, 333 U.S. 10, 13-14 (1948) (“The point of the Fourth Amendment [...] is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate . . . .”).
\textsuperscript{191} Rhodes v. Chapman, 452 U.S. 337, 346 (1981) (“To be sure, ‘the Constitution contemplates that in the end [a court’s] own judgment will be brought to bear on the question of the acceptability’ of a given punishment.”) (citing Coker v. Georgia, 433 U.S. 584, 597 (1977)).
\textsuperscript{192} See \textit{supra} Part V.A for a discussion about the impropriety of legislative determinations of blameworthiness.
items because legislative intent would, presumably, be as foreign to the judicial world as anything in the separation of powers context could be. Certainly the deference to the legislature is easy enough to explain under this model: the judiciary, exercising its own power, simply adopts its belief regarding what the legislature meant. More problematic is the suggestion that the intent can be directly incorporated. If it is possible for a court to adopt the legislative intent behind a double jeopardy offense-defining statute directly from the halls of the legislature, unreconstructed and unaltered through the barriers of the judicial proceedings, the case for the judiciary as a unique and independent forum for offense determination would be weakened.

One should therefore assume that a judge following Blockburger will compare the offense charged in the indictment with the statutory elements and not with the offense as reconstructed in court. But is there really any difference? The prosecutor will no doubt track the language of the statute faithfully. There is a difference, however, and it goes to the very heart of branch roles and interactions. The statutory language describing the offense in the abstract does not simply impose itself into the court proceedings. The statute is introduced into court by the prosecutor, the independent representative of the executive. The executive's contextualizing account is partisan and must be checked by the independent judiciary. Nor do courts simply, during the proceedings, ask the legislature its intent with the answer then becoming contemporaneously determinative – problems of statutory construction are well known. The various facts and documents presented in the proceedings transfer the intent to the court, and that intent is filtered through the rules and procedures of court just like every other item of relevance.

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193 See, e.g., Kansas v. Hendricks, 521 U.S. 346, 361 (1997) (deferring to legislative intent in classifying a proceeding as civil or criminal).

194 See supra Part V.B for a discussion of the Blockburger-Dixon approach's reliance on the statute.

195 State v. Iowa Dist. Court for Johnson County, 568 N.W.2d 505, 508 (Iowa 1997) ("[a] prosecutor is not subject to judicial supervision in determining what charges to bring and how to draft accusatory pleadings, but is protected from judicial oversight by the doctrine of separation of powers") (citing 63C Am. Jur. 2d Prosecuting Attorneys § 21, at 134 (1997)).


197 See, e.g., Shillaber v. Waldo, 1 Haw. 21, 23 (1847) ("It is, beyond all question, one of the most difficult tasks that man ever undertook to perform, to write a statute of any length, the meaning of which shall be capable of only one construction. It is a task so great, that perhaps it has never yet been fully accomplished. I remember to have heard that ripe scholar, and great expounder and teacher of the law, Judge Story, once say, that he had been the framer of a great many statutes, which he thought perfectly clear; but no sooner had they gone into operation than up sprung a multitude of disputes and difficulties concerning their meaning, and what was more wonderful, those disputes and difficulties were not without foundation. Such is the experience of the whole judicial world . . .").

198 The relevant physical pieces of evidence come into the court in the context of one of the parties' case. Their presentation and immersion in that context suffices to prove the point that they
Whatever case may be made for the original foreignness of legislative intent, its existence in the judiciary is governed by the same rules, objects and processes that have been shown to create and sustain the independent and institutionally distinct judicial power. Legislative intent, thus incorporated, does not diminish the robustness of judicial independence because by incorporation it becomes internal to the judicial proceedings.

VI. THE HISTORICAL RECORD

The proper approach to determining offense identity is one that recognizes the role of the judicial proceedings in creating the only relevant offense in the first place. This Note has argued that courts should consider the entirety of the proceedings, including the particular wording of the charging document, the factual record, the conduct of the parties, the depositions and pleadings, the trial testimony, the rulings below, the trial transcripts—in short: everything that makes up the world in which the offense is recreated and in which the defendant is tried.\footnote{199}

The general history of uncritical deference to the legislature has not prevented some courts from adopting standards that, either explicitly or implicitly, rely on a court’s robust independence. To the extent that courts have adopted such standards, the account presented herein receives a measure of empirical support.

There are numerous contexts where courts have recognized the boundaries and autonomy of the judicial world. In motion to dismiss contexts, “review is strictly limited to the four corners of the complaint.”\footnote{200} This is likewise the case with certain affidavits,\footnote{201} cases of effectiveness of counsel,\footnote{202} collateral attacks on sentencing,\footnote{203} and contracts.\footnote{204}

\footnote{199} However, this world does not include what the judge had for breakfast, pace a famous legal realist position. See Jerome Frank, Are Judges Human?, 80 U. Pa. L. REV. 17, 24 (1931). This Note’s approach is distinguishable from legal realism by not questioning that decisions are made in reference to legal principles or for sound legal reasons. It merely disputes where those legal principles and reasons are ultimately grounded. This Note claims that the relevant legal principles (in contrast to the moods of a judge) are grounded within the independent reality of the judicial proceeding. A legal realist approach would view those principles as stemming from other societal or philosophical bases. While the judicial world can certainly incorporate principles stemming from extra-judicial world sources, it is only through that incorporation into the framework of the judicial proceeding that the principles have any legal effect.


\footnote{201} United States v. Lazu-Rivera, Criminal No. 03-249(JAG), 2004 WL 3171128, at *12 (D.P.R. Dec. 29, 2004) ("judicial review of the wiretap affidavit ‘is limited to the four corners of the affidavit’") (citing United States v. Nelson-Rodríguez, 319 F.3d 12, 33 n.3 (1st Cir. 2003)).
On the appellate level, where double jeopardy jurisprudential determinations are made, there is equally a reliance on the facts of the judicial proceedings. Even in de novo review contexts, the record below is a limiting factor in that the proper presentations and objections determine the question presented for appellate consideration. Although the court may research case law, treatises, and the like in order to make legal determinations, evidence is neither taken on appeal nor is there the evidentiary representation of events, save what is discernable from the record below. These limitations demonstrate the role that the actual facts of the judicial proceedings play. This is an important step in giving substance to the separation of the judicial world which is ultimately problematic for double jeopardy purposes.

In analyzing the specifics of various double jeopardy cases, one should note the difference between what courts have said and what courts have actually done. Courts have refused to limit the defining context of an offense. In Texas v. Cobb, the Court, citing Blockburger, wrote that "we have recognized in other contexts [referring to Blockburger] that the definition of an 'offense' is not necessarily limited to the four corners of a charging instrument." The implications of the Court's statement are important. Not only does the Court recognize the relevance of the charging instrument, but it recognizes the larger context in which the charging instrument exists – implicitly looking to the proceedings in their entirety. As noted previously, adversarial give and take alters the offense definition set forth by the charging instrument which is further supplemented by every other piece of relevant evidence.

202 State v. Lewis, No. 04AP-1112, 2005 WL 3547961 at *8 (Ohio Ct. App. Dec. 29, 2005.) (Ohio App. 10 Dist. 2005) ("In determining whether trial counsel's assistance was ineffective, an appellate court's review is strictly limited to the record that was before the trial court.").
204 11 WILLISTON ON CONTRACTS § 32:5 (4th ed.).
205 Ullah v. State, 679 So. 2d 1242, 1244 (Fla. Dist. Ct. App. 1996) ("It is elemental that an appellate court may not consider matters outside the record, and when a party refers to such matters in its brief, it is proper for the court to strike same.").
206 State ex rel. Kaufman v. Zakaib, 207 W. Va. 662, 671 (2000) ("If the record does not reveal an error, a court will conclude that one does not exist: It will be presumed, where the record is silent, that a court of competent jurisdiction performed its duty in all respects as required by law.") (citations and internal quotation marks omitted).
209 Id. at 172-73.
210 See supra Parts V.A. and V.C.2 concerning definition setting by adversarial give and take.
Recall the controlling language of Blockburger: "[t]he test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." The history of interpretive emphasis has been on the phrase "additional fact," but the import of the need for proof should not be lost. As demonstrated by the centrality of the Rules of Evidence, proof, the method and elements of a presented case, is a fundamental part of the judicial world. The importance of proof gives substance to the claim that the judicial proceedings are an independent and separate world, ultimately determinative of offense identity for double jeopardy purposes. To prove something in a court of law is to bring it into existence for the purposes of the judicial world.

Consider, for example, the case *Diaz v. United States*. A month after Diaz was convicted of assault and battery, his victim died and the prosecution subsequently brought a homicide charge to which Diaz pled double jeopardy. Before stating its conclusion the Court went into a discussion of the facts of Diaz's homicide trial, what the record showed and what the attorneys presented. The Court affirmed his homicide conviction stating that: "[a]t the time of the trial for the [assault and battery] the death had not ensued, and not until it did ensue was the homicide committed . . . [t]hen, and not before, was it possible to put the accused in jeopardy for that offense." A plausible way to view *Diaz* is to see it as restricting jeopardy to what the prosecution could prove. Obviously, before the victim died, there was no way for the prosecution to prove murder. The prosecution's construction of the case defined whether the defendant was in jeopardy. But the prosecution's presentation and proof — its entire case — exists solely in the context of the judicial proceedings. Because the judicial proceedings determine something so central to double jeopardy cases, the relevance of the judicial world's reality and independence is clear: double jeopardy law depends on the facts and processes of an independent and separate judiciary.

To that end, even more suggestive is the language found in *Sealfon v. United States*. In this criminal *res judicata* case, the Court considered

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212 *Blacks Law Dictionary* 1251 (8th ed. 2004) ("Proof . . . 1. The establishment or refutation of an alleged fact by the evidence; the persuasive effect of evidence in the mind of a fact-finder . . . 2. Evidence that determines the judgment of a court . . . ").

213 Indeed, the truth of the thesis implies that the judicial proceedings are determinative of nearly all that is legally relevant within the judicial world. This Note's focus on double jeopardy should not be seen as a denial of the separation thesis's applicability to other areas of law. However, for the unique problem posed by double jeopardy jurisprudence, and for the manifest necessity of a separation thesis in explanation, see *infra* Parts IV and V.

214 223 U.S. 442 (1912).

215 *Id.* at 444.

216 *Id.* at 449.

whether a previous acquittal on conspiracy was a bar to a subsequent prosecution on the substantive offense. The Court held that “[t]he instructions under which the verdict was rendered, however, must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings.” Indeed, the Court spent most of its brief opinion considering the facts presented in the underlying proceedings. “All the circumstances of the proceedings” is precisely the measure for which this Note has argued.

The next step would be recognition of the independent and substantive reality of the judicial world by more explicitly and narrowly linking determination of offenses to the facts presented in the proceeding. Such an explicit linkage may be too much to ask of a Supreme Court that has never fully clarified its jurisprudence on this issue. However, some courts have adopted a test for offense identity that is determined by a standard inescapably indexed to the judicial proceedings, namely, the evidence presented at trial. This “same evidence” test is used by some courts and has been confused with the Blockburger test by others. This test holds that in order to determine whether a defendant is being prosecuted twice for the same act or transaction “[t]he proper standard . . . is to ask whether the actual evidence needed to convict the defendant in the first trial is the same as the evidence needed to obtain the second conviction.” In addition to the Sixth Circuit, several states have adopted the “same evidence” test.

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218 For the relationship between criminal res judicata and double jeopardy see E.H. Schopler, Annotation, Modern Status of Doctrine of res judicata in Criminal Cases, 9 A.L.R.3d 203 § 4[a], [b] & [c] (1966). In double jeopardy cases, the factual determinations of the proceedings would apply to the entirety of the offense and its definition. In res judicata contexts, however, the proceedings need not determine the totality of the offense since res judicata acts as a bar towards subsequent prosecution on smaller elements of the defense. State v. Thompson, 39 N.W.2d 637, 640-41 (Iowa 1949).

219 332 U.S. at 579.

220 Grady v. Corbin, 495 U.S. 508, 511 (1990), is worth mentioning again. To some extent, Grady’s “same conduct” test is suggestive of a more contextualizing standard. Though Grady would, like Blockburger, look to elements outside of the judicial proceedings (the same conduct for Grady in addition to the statutory elements for Blockburger), the same conduct test is more naturally aligned with the approach presented in this Note because proving the sameness of conduct would almost surely involve a more sustained engagement with the judicial proceeding – more would have to be shown and reconstructed for the court.


222 Rashad v. Burt, 108 F.3d 677, 680 (6th. Cir. 1997). How exactly the Sixth Circuit can depart from the holding of Dixon is not clear. Relying on pre-Dixon case law, the Court attempted to distinguish the successive prosecution issue presented from the multiple prosecution issue that it took to be Blockburger’s/Dixon’s sole concern. But see supra note 13.

223 See Appendix B; State v. Steele, 387 So.2d 1175, 1177 (La. 1980) (distinguishing between the evidence needed for conviction and the evidence presented at trial).
The record has established a clear countertrend to *Blockburger*’s mechanical, statutory test. Courts have been willing to link, both implicitly and explicitly, the determination of offenses and criminal liability to the actual proceedings. Recognition of the full significance of separation of powers – the role of the judiciary in offense reconstruction – will hopefully give impetus to this counterrtrend and further double jeopardy analyses that provide for truly individualized judgment.

VII. CONCLUSION

Governmental powers are separated in a different manner and to a different extent than traditional analyses have suggested. The separation has created unique and importantly autonomous legal institutions that provide the form and substance of judicial proceedings. These judicial proceedings are the only forum in which criminal offense events can be reconstructed, and, accordingly, the only forum in which an individual can be judged. Legislative determinations of guilt in the form of statutory formulas, must be properly incorporated into the judicial proceedings. The prosecutor’s account – the introduction and contextualization of the elements of the offense and the facts of the crime – replaces legislative abstractions as the relevant measure of criminal liability. The danger of ignoring the richer account of the judiciary in favor rote application of statutory or legislative intent tests is the danger of trying the individual defendant on something other than his individual facts – of trying the defendant on something outside the only possible record.

This Note has attempted to address two difficulties of contemporary jurisprudence – the paucity of separation of powers analytical depth and the confusion of double jeopardy law. The two are joined by an unwillingness to extend separation of powers discussions into a more detailed account of judicial institutions, their powers and presuppositions. Contrary to the alternate approaches discussed, this Note provides an explanation of the actual working of judicial processes and matches those processes to our best intuitions of structural fairness. While the arguments may have seemed unfamiliar at times, it is a mark in their favor that courts have arrived at similar conclusions. It is hoped that this Note will help interested readers reach similar conclusions in the future.

APPENDIX A: STATE DOUBLE JEOPARDY SURVEY

**Alabama:** “That no person shall, for the same offense, be twice put in jeopardy of life or limb; but courts may, for reasons fixed by law, discharge juries from the consideration of any case, and no person shall gain an advantage by reason of such discharge of the jury.” ALA. CONST. art. I, § 9.

**Alaska:** “No person shall be put in jeopardy twice for the same offense. No person shall be compelled in any criminal proceeding to be a witness against himself.” ALASKA CONST. art. I, § 9.
Arizona: “No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense.” ARIZ. CONST. art. II, § 10.

Arkansas: “[N]o person, for the same offense, shall be twice put in jeopardy of life or liberty; but if, in any criminal prosecution, the jury be divided in opinion, the court before which the trial shall be had, may, in its discretion, discharge the jury, and commit or bail the accused for trial, at the same or the next term of said court . . .” ARK. CONST. art. II, § 8.

California: “Persons may not twice be put in jeopardy for the same offense . . .” CAL. CONST. art. I, § 15.

Colorado: “No person shall . . . be twice put in jeopardy for the same offense. If the jury disagree, or if the judgment be reversed for error in law, the accused shall not be deemed to have been in jeopardy.” COLO. CONST. art. II, § 18.

Connecticut: “Although the Connecticut constitution contains no specific double jeopardy provision, the due process and personal liberty guarantees of articles first, §§ 8 and 9, of the Connecticut constitution include protection against double jeopardy . . . § 8, of the Connecticut constitution provides in relevant part: ‘No person shall be . . . deprived of life, liberty or property without due process of law . . . § 9, of the Connecticut constitution provides: ‘No person shall be arrested, detained or punished, except in cases clearly warranted by law.’” State v. Ferguson, 796 A.2d 1118, 1135 (Conn. 2002) (internal quotation marks altered and citations omitted).

Delaware: “[N]o person shall be for the same offense twice put in jeopardy of life or limb . . .” DEL. CONST., art. II, § 8.

Florida: “No person shall be . . . twice put in jeopardy for the same offense[. . .]” Fla. Const. art. II, § 9.

Georgia: “No person shall be put in jeopardy of life or liberty more than once for the same offense except when a new trial has been granted after conviction or in case of mistrial.” GA. CONST. art. I, § 1, ¶ XVIII

Hawaii: “[N]or shall any person be subject for the same offense to be twice put in jeopardy . . .” HAW. CONST. art. I, § 10.


Illinois: “No person shall be . . . twice put in jeopardy for the same offense.” ILL. CONST. art. I, § 10.

Indiana: “No person shall be put in jeopardy twice for the same offense.” IND. CONST. art. I, § 14.

Iowa: “No person shall after acquittal, be tried for the same offence.” I.C.A. CONST. art. I, § 12. See also State v. Daniels 588 N.W.2d 682, 683 (Iowa 1998) (“In several recent cases this court has observed that our merger statute, Iowa Code section 701.9, codifies the protection from cumulative punishment secured by the Double Jeopardy Clause of the United States Constitution.”).
Kansas: “No person shall . . . be twice put in jeopardy for the same offense.” KAN. CONST. B. OF R. § 10.

Kentucky: “No person shall, for the same offense, be twice put in jeopardy of his life or limb . . .” KY. CONST. § 13.

Louisiana: “No person shall be twice placed in jeopardy for the same offense, except on his application for a new trial, when a mistrial is declared, or when a motion in arrest of judgment is sustained.” LA. CONST. art. I, § 15. See also LA. Code Crim. Proc. Ann. art. 596 (2006).

Maine: “Section 8. No person, for the same offense, shall be twice put in jeopardy of life or limb. ME. CONST. art. I, § 8.

Maryland: Taylor v. State, 381 Md. 602, 610 (Md. 2004) (“despite the lack of a double jeopardy clause in the Maryland Constitution, the Maryland common law provides protection to individuals from being twice put into jeopardy.”).

Massachusetts: “In recent years, the Supreme Judicial Court has engaged in increased speculation as to whether the Massachusetts double jeopardy rule is simply a common law protection or rather has a State constitutional grounding.” Com. v. Arriaga, 691 N.E.2d 585, 587 n.1 (Mass. App. Ct. 1998);

Michigan: “Sec. 15. No person shall be subject for the same offense to be twice put in jeopardy.” MICH. CONST. art. I, § 15.

Minnesota: “No person shall be . . . put twice in jeopardy of punishment for the same offense . . .” MINN. CONST. art. I, § 7.

Mississippi: “No person’s life or liberty shall be twice placed in jeopardy for the same offense; but there must be an actual acquittal or conviction on the merits to bar another prosecution.” MISS. CONST. art. III, § 22.

Missouri: “[N]or shall any person be put again in jeopardy of life or liberty for the same offense, after being once acquitted by a jury; but if the jury fail to render a verdict the court may, in its discretion, discharge the jury and commit or bail the prisoner for trial at the same or next term of court; and if judgment be arrested after a verdict of guilty on a defective indictment or information, or if judgment on a verdict of guilty be reversed for error in law, the prisoner may be tried anew on a proper indictment or information, or according to the law.” MO. CONST. art. I, § 19.


Nebraska: “No person shall be twice put in jeopardy for the same offense.” NEB. CONST. art. I, § 12.

Nevada: “No person shall be subject to be twice put in jeopardy for the same offense . . .” NEV. CONST. art. I, § 8.

New Hampshire: “No subject shall be liable to be tried, after an acquittal, for the same crime or offense.” N.H. CONST. pt. I, art. 16.

only against reprosecution “after acquittal,” N.J. CONST. art. I, ¶ 11, but has been consistently interpreted to be co-extensive with, and to provide no greater protection than, the federal double jeopardy clause.)

**New Mexico:** “[N]or shall any person be twice put in jeopardy for the same offense; and when the indictment, information or affidavit upon which any person is convicted charges different offenses or different degrees of the same offense and a new trial is granted the accused, he may not again be tried for an offense or degree of the offense greater than the one of which he was convicted.” N.M. CONST. art. II, § 15.

**New York:** “No person shall be subject to be twice put in jeopardy for the same offense . . .” N.Y. CONST. art I, § 6. “This has been codified in CPL 40.20(1), which states that ‘a person may not be twice prosecuted for the same offense.’” People v. Brignoni, 701 N.Y.S.2d 253, 256 (N.Y. Crim. Ct. 1999) (internal quotation marks altered).

**North Carolina:** State v. Ezell, 582 S.E.2d 679, 682 (N.C.App. 2003) (“Article I, section 19 of the North Carolina Constitution does not expressly prohibit double jeopardy, but the courts have included it as one of the ‘fundamental and sacred principle[s] of the common law, deeply imbedded in criminal jurisprudence’ as part of the ‘law of the land.’” (internal quotation marks altered and citations omitted).

**North Dakota:** “No person shall be twice put in jeopardy for the same offense . . .” N.D. CONST. art. I, § 12. See also “No person can be twice put in jeopardy for the same offense, nor can any person be subjected to a second prosecution for a public offense for which he has once been prosecuted and convicted, or acquitted, or put in jeopardy, except as is provided by law for new trials.” N.D. CENT. CODE § 29-01-07.

**Ohio:** “No person shall be twice put in jeopardy for the same offense.” OHIO CONST. art. I, § 10.

**Oklahoma:** “Nor shall any person be twice put in jeopardy of life or liberty for the same offense.” OKLA. CONST. art. II, § 21.

**Oregon:** “No person shall be put in jeopardy twice for the same offence [sic] . . .” OR. CONST. art. I, § 12.

**Pennsylvania:** “No person shall, for the same offense, be twice put in jeopardy of life or limb . . .” PA. CONST. art I, § 10

**Rhode Island:** “No person shall be subject for the same offense to be twice put in jeopardy.” R.I. CONST. art. I, § 7.

**South Carolina:** No person shall be subject for the same offense to be twice put in jeopardy of life or liberty . . .” S.C. CONST. art. I, § 12.

**South Dakota:** “No person shall be . . . twice put in jeopardy for the same offense.” S.D. CONST. art. VI, § 9.

**Tennessee:** “That no person shall, for the same offence, be twice put in jeopardy of life or limb.” TENN. CONST. art I, § 10.

**Texas:** “No person, for the same offense, shall be twice put in jeopardy of life or liberty, nor shall a person be again put upon trial for the same offense,

Utah: “[N]or shall any person be twice put in jeopardy for the same offense.” Utah Const. Art. I, § 12.

Vermont: “Defendant also cited the Vermont Constitution, Chapter I, Article 10. This Court has previously declined to imply a double jeopardy provision therein . . . . Defendant did not refer to 13 V.S.A. § 6556 (statutory bar to subsequent prosecution for same offense after an acquittal on the merits), or to Vermont common law . . . .” State v. Ramsay, 499 A.2d 15, 17 (Vt. 1985) (internal citations omitted).


West Virginia: “[N]or shall any person, in any criminal case, be compelled to be a witness against himself, or be twice put in jeopardy of life or liberty for the same offense.” W. Va. Const. art. III, § 5.

Wisconsin: “[N]o person for the same offense may be put twice in jeopardy of punishment . . . .” Wis. Const. art. I, § 8.

Wyoming: “No person shall be . . . twice put in jeopardy for the same offense. If a jury disagree, or if the judgment be reversed after a verdict, or if the judgment be reversed for error in law, the accused shall not be deemed to have been in jeopardy.” Wyo. Const. art. I, § 11.

APPENDIX B: STATE DOUBLE JEOPARDY TEST SURVEY

STATES THAT FOLLOW BLOCKBURGER

Alabama: State v. Esco, 911 So.2d 48, 49-50 ( Ala. Crim. App. 2005) (“Alabama has applied the Blockburger test to determine whether two offenses are the ‘same’ under the Alabama Constitution.”).

Arizona: Hernandez v. Superior Court In and For County of Maricopa, 880 P.2d 735, 741-42 (Ariz. Ct. App. 1994) (“Arizona’s courts ordinarily interpret this clause in conformity to the interpretation given by the United States Supreme Court to the same clause in the federal constitution... [D]ecisions of the United States Supreme Court have great weight in interpreting those provisions of the state constitution which correspond to the federal provisions.) (internal quotation marks and citations omitted).

Arkansas: Nesterenko v. Arkansas Bd. of Chiropractic Examiners, 69 S.W.3d 459, 462 (Ark. Ct. App. 2002) (“In both the multiple punishment and multiple prosecution contexts, this Court has concluded that where the two offenses for which the defendant is punished or tried cannot survive the ‘same-elements’ test, the double jeopardy bar applies.”) (internal quotation marks altered).
California: People v. Sipe, 42 Cal. Rptr. 2d 266, 278 (Cal. Ct. App. 1995) ("To determine if a defendant is being punished twice for the same offense, we look to both statutory provisions to see if each "requires proof of an additional fact which the other does not.") (citing Blockburger).

Colorado: People v. Abiodun, 111 P.3d 462, 465 (Colo. 2005) ("In this jurisdiction, an accused may not be convicted of two offenses if one is included within the other, COLO. REV. STAT. § 18-1-408(1)(a) (2004); and an offense is so included if it is established by proof of the same or less than all the facts required to establish the commission of the other § 18-1-408(5)(a). We have on numerous occasions referred to this standard as the "statutory elements test," or the "Blockburger test," equating it with the test developed in Blockburger v. United States, 284 U.S. 299, 304 (1932), as a means of assessing whether separate statutory offenses will be considered the same in applying the constitutional protection against being twice placed in jeopardy for the same offense.")

The traditional test for determining whether two offenses are the same offense for double jeopardy purposes was set forth in Blockburger v. United States, 284 U.S. 299, (1932) ("[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not ... ").

Delaware: Poteat v. State, 840 A.2d 599, 605 (Del. 2003) ("This Court has previously stated that the Blockburger test is only an aid to statutory construction. It does not negate clearly expressed legislative intent and where ... a better indicator of legislative intent is available, it does not apply.") (internal quotation marks altered).


Florida: Gorday v. State, 907 So.2d 640, 643 (Fla. Dist. Ct. App. 2005) ("Legislative intent to authorize dual convictions and sentences may be expressly stated in a statute or discerned through the Blockburger statutory construction test, which has been codified in Section 775.021(4), Florida Statutes (2002)").

Georgia: Perkinson v. State, 542 S.E.2d 92, 95 (Ga. 2001) ("Unless each offense requires proof of an additional fact which the other does not the Double Jeopardy Clause prohibits successive prosecutions as well as cumulative punishment.") (citing Blockburger, internal quotations omitted).

Idaho: State v. Bryant, 896 P.2d 350, 355 (Idaho Ct. App. 1995) ("An included offense is one which is necessarily committed in the commission of another offense; or one whose essential elements are charged in the information as the manner or means by which the more serious offense was committed.").

Illinois: People v. Sienkiewicz, 802 N.E.2d 767, 771 (Ill. 2003) ("Thus, we take this opportunity to reject explicitly the Corbin test and to readopt the
Blockburger same-elements test as the proper means of examining potential violations of the Illinois double jeopardy clause.

Iowa: State v. Schmitz, 610 N.W.2d 514, 516 (Iowa 2000) ("In analyzing this type of double jeopardy claim, we look at the legislature's intent and frequently resort to the Blockburger "same-elements" test under which the elements of the two offenses are compared to determine whether one is a lesser-included offense of the other.").

Kansas: State v. Schoonover, 133 P.3d 48 (Kan. 2006) ("we hold that the test to determine whether charges in a complaint or information under different statutes are multiplicitous is whether each offense requires proof of an element not necessary to prove the other offense . . .").

Kentucky: Com. v. Burge, 947 S.W.2d 805, 811 (Ky. 1996) ("double jeopardy issues arising out of multiple prosecutions henceforth will be analyzed in accordance with the principles set forth in Blockburger v. United States, supra, and KRS 505.020.").

Maine: State v. Pineo, 798 A.2d 1093, 1097 (Me. 2002) ("As we have held numerous times, the right to be free from double jeopardy under the Maine Constitution is coextensive with the right under the U.S. Constitution.").

Maryland: Marquardt v. State, 882 A.2d 900, 931 (Md. 2005) ("The focus is on the elements of each offense; if all of the elements of one offense are included in the other offense, so that only the latter offense contains a distinct element or distinct elements, the former merges into the latter.") (internal quotation marks omitted).

Massachusetts: Com. v. Rabb, 725 N.E.2d 1036, 1041 (Mass. 2000) ("This test, which we have adopted as a rule of Massachusetts common law, was applied by the United States Supreme Court in Blockburger . . .").

Michigan: People v. Nutt, 677 N.W.2d 1, 11 (Mich. 2004) ("this Court more than one hundred years ago rejected the 'same transaction' approach and instead embraced the federal same-elements test as supplying the functional definition of 'same offense' under our Constitution's Double Jeopardy Clause").

Minnesota: State v. McAlpine, 352 N.W.2d 101, 103 (Minn. Ct. App. 1984) ("The applicable double jeopardy test is the so-called Blockburger test . . .").

Mississippi: Houston v. State, 887 So.2d 808, 814 (Miss. Ct. App. 2004) ("In determining whether double jeopardy attaches, we apply the same elements test.") (citing Blockburger).

Missouri: Yates v. State, 158 S.W.3d 798, 802 (Mo. 2005) ("[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not.") (quoting Blockburger).

Nebraska: State v. Winkler, 663 N.W.2d 102, 106 (Neb. 2003) ("protection provided by Nebraska's double jeopardy clause is coextensive with that provided by the U.S. Constitution.").
Nevada: Wilson v. State, 114 P.3d 285, 294 (Nev. 2005) ("Nevada uses the Blockburger test to determine whether multiple convictions arising from a single incident are permissible, or to the contrary, if the charges amount to a lesser-included offense that is barred by double jeopardy.").

New Hampshire: State v. Constant, 605 A.2d 206, 207 (N.H. 1992). ("Two offenses will be considered the same unless each requires proof of an element that the other does not.").

New Jersey: State v. Maldonado, 645 A.2d 1165, 1186 (N.J. 1994) ("If, however, the legislative intent to allow multiple punishment is not clear, the Court must then apply the test articulated in Blockburger . . . to determine whether the defendant is unconstitutionally faced with multiple punishment for the 'same' offense.") (internal quotation marks altered).

New Mexico: State v. Rodriguez , 116 P.3d 92, 96 (N.M. 2005) ("For purposes of double jeopardy, the phrase 'same offense' has a specific meaning. 'T]he test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.") (quoting Blockburger, internal quotation marks altered).

New York: People v. Lanahan, 714 N.Y.S.2d 605, 607 (N.Y. App. Div. 2000) ("The test for determining whether two offenses are the same within the meaning of the double jeopardy clause is whether two distinct statutory provisions each requires proof of a fact that the other does not.") (citations omitted)

North Carolina: State v. Gay, 434 S.E.2d 840, 853 (N.C. 1993) ("Defendant argues that although the two theories of accomplice liability under which she was convicted of first-degree murder do not violate double jeopardy under the test set forth in [Blockburger], this Court should find that they do violate the more flexible test announced in Grady . . . We decline to do so since the test announced in Grady has been rejected by the United States Supreme Court. U.S. v. Dixon . . .").

North Dakota: City of Fargo v. Hector, 534 N.W.2d 821, 823 (N.D. 1995) ("The framers of our state constitution and the legislature in enacting the statute did not intend an interpretation different than the Double Jeopardy Clause of the United States Constitution. . . . We apply the clause and statute in the same manner as the United States Supreme Court applies the federal constitution.") (citation omitted).

Ohio: State v. Sellers, No. 85611, 2005 WL 3030913, at *1 (Ohio Ct. App. Nov. 10, 2005) ("The applicable rule under the Fifth Amendment is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not. A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt a defendant from prosecution and punishment under the other.") (citation omitted).

P.2d 875, 883-84, and we now exclusively apply the Blockburger test for double jeopardy. Under the Blockburger test, two crimes are not the same crime for double jeopardy purposes if both crimes require proof of an element not required by the other.” (emphasis in original).

Rhode Island: State v. Bolarinho, 850 A.2d 907, 909 (R.I. 2004) (“The test that this Court has adopted for determining whether an accused stands in danger of being twice tried or punished for the same offense is often referred to as the same evidence test . . . and comes to us from Blockburger . . . .”) (internal quotation marks and citation omitted).

South Carolina: State v. Cuccia, 578 S.E.2d 45, 49 (S.C. Ct. App. 2003) (“The United States Supreme Court and the South Carolina Supreme Court have determined that in the context of criminal penalties, the Blockburger ‘same elements’ test is the sole test of double jeopardy in successive prosecutions and multiple punishment cases.”) (citation omitted and quotation marks altered).

South Dakota: State v. Weaver, 648 N.W.2d 355, 361 (S.D. 2002) (“Blockburger instructs that where the same act or transaction constitutes a violation of two distinct statutes, the Court must determine whether each statute requires proof of an additional fact that the other does not.”).

Texas: Cobb v. State 85 S.W.3d 258, 267 (Tex. Crim. App. 2002) (“Texas has long used the same Blockburger test to analyze Fifth Amendment double jeopardy issues that the Supreme Court used to decide this case”).

Utah: State v. Wood, 868 P.2d 70, 90-91 (Utah 1993) (“the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not”) (quoting Blockburger) (overruled on other grounds).

Vermont: State v. Parker, 189 A.2d 540, 542 (Vt. 1963) (“the same act may constitute two separate crimes, and, if they are not so related that one of them is a constituent part, or necessary element, in the other, so that both are in fact one transaction, a prosecution and conviction may be had for each offense.”).

Virginia: Com. v. Hudgins, 611 S.E.2d 362, 365 (Va. 2005) (“In applying the Blockburger test, the court considers the offenses charged in the abstract, without reference to the particular facts of the case under review.”) (citations omitted).

Washington: State v. R.A., No. 54102-1-I, 2005 WL 2271889, at *5 (Wash. Ct. App. Sept. 19, 2005) (“Washington courts apply a rule of statutory construction that has been variously termed the ‘same elements’ test, the ‘same evidence’ test, and the Blockburger test.’ Under this test, there is a double jeopardy violation if the defendant is convicted of offenses that are identical both in fact and law. But ‘[i]f there is an element in each offense which is not included in the other, and proof of one offense would not necessarily also prove the other, the offenses are not constitutionally the same and the double jeopardy clause does not prevent convictions for both offenses.’”) (internal quotation marks altered and citations omitted).
West Virginia: State ex rel. Games-Neely v. Sanders, 565 S.E.2d 419, 427-28 (W. Va. 2002) ("[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.") (quoting Blockburger) (citations and quotation marks omitted).

Wyoming: Longstreth v. State, 890 P.2d 551, 553 (Wyo. 1995) ("this court adopted the 'Blockburger test' or 'statutory elements test' as the foundation for double jeopardy protection in connection with both multiple prosecutions and multiple or cumulative punishments.") (internal quotation marks altered).

STATES THAT GO BEYOND BLOCKBURGER

Whether the following courts carefully distinguish between sameness of evidence as opposed to sameness of elements is not always clear.

Hawaii: State v. Feliciano, 107 Haw. 469, 477 (Haw. 2005) ("the Hawaii Constitution provides greater protection against 'successive prosecutions' than does the United States Constitution, and adopted the 'same conduct' test in 'successive prosecution' cases.") (internal quotation marks altered).

Indiana: Richardson v. State, 717 N.E.2d 32, 49 (Ind. 1999) ("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.").

Louisiana: State v. Cotton, 778 So. 2d 569, 573 (La. 2001) ("In evaluating claims of double jeopardy . . . Louisiana courts have used the same evidence test, which we have remarked is somewhat broader in concept than Blockburger . . . [and is] stated as follows: If the evidence required to support a finding of guilt of one crime would also have supported conviction of the other, the two are the same offense under a plea of double jeopardy, and a defendant can be placed in jeopardy for only one. The test depends on the evidence necessary for conviction, not all the evidence introduced at trial.") (internal citations and quotation marks omitted).

Montana: State v. Gazda, 82 P.3d 20, 22 (Mont. 2003) (pursuant to MONT. CODE ANN. § 46-11-504, a subsequent prosecution is barred when "]1) a defendant's conduct constitutes an offense within the jurisdiction of the court where the first prosecution occurred and within the jurisdiction of the court where the subsequent prosecution is pursued; (2) the first prosecution results in an acquittal or a conviction; and (3) the subsequent prosecution is based on an offense arising out of the same transaction.") (citation omitted).

Oregon: State v. Brown, 497 P.2d 1191, 1196 (Or. 1972) ("We are convinced that the 'same evidence' test does not provide adequate protection, under modern conditions, from the evils contemplated by the double jeopardy
guarantee. We hold that under Article I, Section 12, of our Constitution, statutory violations may be the ‘same offense’ for purposes of testing a second prosecution, even though each contains different elements and requires proof of different facts.”). See also Or. Rev. Stat. § 131.515 (2006).

Wisconsin: State v. Multaler, 632 N.W.2d 89, 102 (Wis. Ct. App. 2001) (“We have established a two-part test for analyzing multiplicity challenges. The first part consists of an analysis under Blockburger [. . .] to determine whether the offenses are identical in law and fact. . . . The second part, which we reach if the offenses are not identical in law and fact, is an inquiry into legislative intent.”) (citation omitted).

Statistics that have adopted different tests

Alaska: Whitton v. State, 479 P.2d 302, 312 (Alaska 1970) (“[T]o determine if two offense are the same for double jeopardy purposes] [t]he trial judge first would compare the different statutes in question, as they apply to the facts of the case, to determine whether there were involved differences in intent or conduct. He would then judge any such differences he found in light of the basic interests of society to be vindicated or protected, and decide whether those differences were substantial or significant enough to warrant multiple punishments.”).

Tennessee: State v. Denton, 938 S.W.2d 373, 381 (Tenn. 1996) (“resolution of a double jeopardy punishment issue under the Tennessee Constitution 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; rather the results of each must be weighed and considered in relation to each other.”).

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