University of Arkansas at Little Rock Law Review

Volume 17
Issue 2 *Symposium on Arkansas Law: The Arkansas Courts*

Article 6

1995

Constitutional Law—Goodbye Grady! Blockburger Wins the Double Jeopardy Rematch. United States v. Dixon, 113 S. ct. 2849 (1993).

Phillip Green

Follow this and additional works at: https://lawrepository.ualr.edu/lawreview

 Part of the Constitutional Law Commons, and the Criminal Law Commons

Recommended Citation

Phillip Green, *Constitutional Law—Goodbye Grady! Blockburger Wins the Double Jeopardy Rematch. United States v. Dixon, 113 S. ct. 2849 (1993).*, 17 U. ARK. LITTLE ROCK L. REV. 369 (1995).
Available at: https://lawrepository.ualr.edu/lawreview/vol17/iss2/6

This Note is brought to you for free and open access by Bowen Law Repository: Scholarship & Archives. It has been accepted for inclusion in University of Arkansas at Little Rock Law Review by an authorized editor of Bowen Law Repository: Scholarship & Archives. For more information, please contact mmserfass@ualr.edu.

CONSTITUTIONAL LAW—GOODBYE *GRADY! BLOCKBURGER* WINS THE DOUBLE JEOPARDY REMATCH. *United States v. Dixon*, 113 S. Ct. 2849 (1993).

I. INTRODUCTION

The term "double jeopardy" is familiar to everyone with experience in the criminal justice system. Yet beyond the familiarity, the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution[1] embodies a protection that is basic in concept, but difficult and complex in actual application.[2] There is nearly universal agreement with the general constitutional principle that an individual, once tried for an offense, should not be forced again to defend himself against the same charge. However, the application of that general principle to specific circumstances is where agreement on what protection is contained within the Double Jeopardy Clause ends.[3]

One problem exists in defining the term "same offence." Does a gunman who shoots ten people in a restaurant commit ten separate offenses, or one? Does the Double Jeopardy Clause prevent that gunman, once convicted of the shootings, from later being tried for weapons charges? On what should the double jeopardy protection focus, the statutory elements of the charged offense, the conduct of the defendant, or the evidence to be used? It is questions like these that have challenged our criminal justice system for decades. As the principal case will demonstrate, the challenge, as well as the debate, continues.

II. THE FACTS AND THE CONFLICT

United States v. Dixon[4] is the latest major United States Supreme Court decision in the double jeopardy field. In this case, the Court revisited the issue of how far the double jeopardy protection should extend, and what the focus of the inquiry should be. *Dixon* contained two factually separate cases that were related by the double jeopardy issues involved. This Note first examines the facts pertaining to Michael Foster; next, the Note discusses the facts regarding Alvin Dixon.

---

1. The Double Jeopardy Clause provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V.

2. *See* Eli J. Richardson, *Matching Tests for Double Jeopardy Violations with Constitutional Interests*, 45 VAND. L. REV. 273, 274 (1991).

3. *Id.*

4. 113 S. Ct. 2849 (1993).

A. Michael Foster

On August 12, 1987, the District of Columbia Superior Court issued a civil protection order against Michael Foster, ordering him not to molest, assault, or in any way abuse or threaten his estranged wife, Ana Foster.[5] Although Michael Foster consented to the order in writing,[6] he began to violate the order within a fairly short period of time.[7]

On November 6, 1987, Ana Foster reported to police that she had been beaten by her husband near her place of employment.[8] On May 21, 1988, Mrs. Foster was attacked at her apartment and beaten, suffering serious injuries to her head and face.[9] Mrs. Foster alleged that her husband threw her down the stairs to the basement of the complex, then kicked and beat her until she became unconscious.[10] Witnesses testified as to her injuries and placed Michael Foster at the complex at the time of the attack.[11] Mrs. Foster also alleged that, prior to and following both attacks, her husband had violated other provisions of the civil protection order by making threatening phone calls to her.[12] In all, Mrs. Foster alleged sixteen separate violations of the civil protection order.[13]

In August of 1988, Michael Foster was convicted of criminal contempt for violating the terms of the civil protection order.[14] The trial court based this finding on the two assaults and on two additional counts of threats that Foster made to his wife.[15] The court acquitted him of the remaining counts and sentenced him to a total of 600 days in jail.[16]

In addition to the criminal contempt trial, the United States Attorney's Office sought to charge Foster for assault with intent to kill based on the May 21st attack on his wife.[17] Foster's case was turned over to a grand jury, which subsequently returned a five-

---

5. United States v. Dixon, 598 A.2d 724, 725 (D.C. 1991), *aff'd in part and rev'd in part*, 113 S. Ct. 2849 (1993). The Court also issued a similar order for Ana Foster's mother. *Id.*
6. *Id.* at 726.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* at 727 n.10.
16. *Id.* at 725.
17. *Id.*

count indictment on January 19, 1989.[18] The indictment charged the defendant with simple assault based on the November 6, 1987 attack; assault with intent to kill based on the May 21, 1988 attack; and three additional counts of threatening Mrs. Foster.[19] By the time the indictment was handed down, the defendant had already been sentenced in the criminal contempt action based on the two assaults and acquitted of the threat allegations.[20]

Foster then filed a motion to dismiss, contending that the indictment constituted a violation of the Double Jeopardy Clause because these incidents had been the basis for the criminal contempt action.[21] The trial court denied his motion,[22] and Foster appealed.[23]

B. Alvin Dixon

Alvin Dixon was arrested in the District of Columbia on March 9, 1987 and charged with second-degree murder.[24] His bond was set at $1,500.[25] Dixon was directed, as one of the conditions of his bond release, not to commit another criminal offense while awaiting trial.[26] On January 15, 1988, before his trial, undercover officers witnessed his participation in a drug transaction.[27] The officers pursued and arrested Dixon, and recovered nineteen ziplock bags containing cocaine that Dixon had thrown down during the chase.[28] Dixon, like Foster, was subsequently tried for criminal contempt, and his trial court sentenced him to 180 days in jail.[29]

Dixon was then indicted for possession of cocaine with intent to distribute.[30] He also raised a defense based on double jeopardy.[31] Unlike the *Foster* court, Dixon's trial court granted dismissal based on the double jeopardy claim.[32] The government appealed this decision to the District of Columbia Court of Appeals.[33]

The appellate court consolidated the two actions to resolve the conflict.[34] Relying on the United States Supreme Court's then-recent

---

18. *Id.* at 727.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.* at 724.
24. *Id.* at 728.
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.* at 729.
31. *Id.*
32. *Id.*
33. *Id.* at 724.
34. *Id.*

decision in *Grady v. Corbin*,[35] the court affirmed Dixon's dismissal and reversed the denial of Foster's motion to dismiss.[36] The government appealed, and the United States Supreme Court granted certiorari[37] to address the question of whether the Double Jeopardy Clause bars prosecution of a criminal act based on the same conduct for which a defendant had previously been convicted of criminal contempt of court.[38]

III. The Development of the Double Jeopardy Clause

To aid in understanding the legal issues presented in *Dixon*, this Section of the Note discusses the historical development of double jeopardy protection. This Section also addresses the constitutional adoption of the common law concept, the specific contexts in which double jeopardy claims arise, and the influence that the modern decisions of the United States Supreme Court have had in defining the current scope of double jeopardy protection.

A. Historical Background

The guarantee of double jeopardy protection was adopted in this country as part of the Bill of Rights.[39] The concept of the protection, however, did not originate with the United States Constitution.[40]

The double jeopardy concept has roots going back at least to early Roman law.[41] Although the scope was much more limited, the Romans recognized that a person should be offered some protection against subsequent prosecution after an acquittal on a particular charge.[42]

---

35. 495 U.S. 508 (1990).

36. *Dixon*, 598 A.2d at 731. The appeals court applied the "*Grady* rule," which holds that if, in order to prosecute, the government must prove conduct for which the defendant has already been tried, then that prosecution is barred by the Double Jeopardy Clause. *Id.*

37. United States v. Dixon, 112 S. Ct. 1795 (1992).

38. United States v. Dixon, 113 S. Ct. 2849, 2853 (1993).

39. U.S. Const. amend. V.

40. For an in-depth examination of the origins of the double jeopardy rule, see Jill Hunter, *The Development of the Rule Against Double Jeopardy*, 5 J. Legal Hist. 3 (1963) and Jay A. Sigler, *A History of Double Jeopardy*, 7 Am. J. Legal Hist. 283 (1963).

41. The principle of double jeopardy is mentioned in the *Digest of Justinian*, where it is written that the same person, after acquittal of a crime, should not be accused again of the same crime. Sigler, *supra* note 40, at 283.

42. Sigler, *supra* note 40, at 283 (quoting Dig. 48.2.7.2 (Ulpianus, On the Duties of Proconsul 7)).

Examples of double jeopardy protection can be found in English common law dating back to the thirteenth century.[43] Through the common law, double jeopardy protection evolved as a form of pleading.[44] This protection was similar to that offered by the Romans, and perhaps was introduced to English law through the development of canon law following the close of the Roman Empire.[45]

A specific example of the mechanics of early double jeopardy application in English law is found in the often cited 1780 English decision of *Turner's Case*.[46] There, the defendant allegedly broke into a house, robbing both the master and servant.[47] He was first charged with burglary of the house and the robbery of the master.[48] After being acquitted of those charges, he was charged again with burglary and with robbing the servant.[49] The second robbery charge was allowed because it involved a different victim, but the subsequent burglary charge was barred as a violation of the double jeopardy rule, because the defendant had been previously acquitted of that charge.[50]

This notion, that a person could not be tried twice for the same act, was the common understanding of double jeopardy as adopted in the United States.[51] It is notable that the new nation found the protection important enough to enshrine it as a constitutional guarantee.[52] This heightened importance first took hold in the Massachusetts colony, which as early as 1641 enlarged the English application of the rule beyond capital offenses to cover all types of criminal and civil liabilities.[53] This recognition laid the groundwork for the expanded double jeopardy protection the Bill of Rights would ultimately provide.[54]

---

43. According to the writings of Bracton, c. 1250, an appeal concluded in favor of the defendant on the merits would bar a new proceeding based on the same facts. Hunter, *supra* note 40, at 7-9.

44. A defendant charged a second time for the same offense could, as a defense, enter a plea of "auterfoits convict" (prior conviction) or "auterfoits acquit" (prior acquittal). 4 WILLIAM BLACKSTONE, COMMENTARIES *330, 335-36.

45. Sigler, *supra* note 40, at 284.

46. 84 Eng. Rep. 1068, 1068 (K.B. 1708), *quoted in* Grady v. Corbin, 495 U.S. 508, 532 (1989) (Scalia, J., dissenting).

47. *Turner's Case*, 84 Eng. Rep. at 1068.

48. *Id.*

49. *Id.*

50. *Id.*

51. *See* Sigler, *supra* note 40, at 298-309 (discussing the adoption process of the double jeopardy rule in America beginning with the Massachusetts Colony through its constitutional commitment).

52. U.S. CONST. amend. V.

53. Sigler, *supra* note 40, at 298-99.

54. Sigler, *supra* note 40, at 298-99.

The original proposition for double jeopardy protection as part of the Bill of Rights was forwarded in June of 1789 by James Madison.[55] After approval by the House of Representatives, the proposal was reworded somewhat in the Senate.[56] On September 25, 1789, the final draft was sent to the states for approval.[57]

Despite the fact that the modern version was first adapted from the laws of the State of Massachusetts, the protection remained only as a federal right until 1968, when the Supreme Court applied the Double Jeopardy Clause to state court actions under the auspices of the 14th Amendment.[58] While most states over time came to adopt similar measures in their state constitutions, recognition of the federal scope of the right did not find universal acceptance among the states.[59]

B. The Contexts in which Double Jeopardy Claims Arise

A key to understanding double jeopardy protection is to recognize that there are distinct situations in which the protection might be claimed. For example, postacquittal protection arises when an acquittal of a particular charge bars a subsequent action on the same charge.[60] Another example is in the postconviction context, where a defendant is convicted of the original charge, thus barring later retrial for the same offense.[61] In practical application, both of the above examples,

---

55. Sigler, *supra* note 40, at 304.

56. The original phrase, as passed by the House, read: "[N]o person shall be subject, except in case of impeachment, to more than one trial, or one punishment for the same offense." The latter part of this proposal was struck by the Senate in favor of the words "be twice put in jeopardy of life or limb by any public prosecution." After referral to a conference committee to resolve the differences, the words "by any public prosecution" were eliminated, thus creating the final version. Sigler, *supra* note 40, at 306.

57. Sigler, *supra* note 40, at 306.

58. In Benton v. Maryland, 395 U.S. 784, 794 (1968), the Supreme Court overruled precedent and held that the Fifth Amendment should apply to the states because it "represents a fundamental ideal in our constitutional heritage." Until then, double jeopardy protection only applied to the states when it could be found that a defendant had been subjected to "a hardship so acute and shocking that our policy will not endure it." *Id.* at 793 (quoting Palko v. Connecticut, 302 U.S. 319, 328 (1937)).

59. Sigler, *supra* note 40, at 307-08.

60. *See, e.g.*, United States v. Ball, 163 U.S. 662 (1896). In *Ball*, three defendants were tried for murder; M. Fillmore Ball was acquitted and the other two were convicted. The convictions were later overturned, and the state retried all three defendants, who were subsequently convicted. *Id.* at 666. The Supreme Court overturned the conviction of defendant Ball, holding that he could not be deprived of the benefit of an acquittal on the basis of governmental error. *Id.* at 669.

61. *See, e.g.*, *In re* Nielson, 131 U.S. 176, 177 (1889). There, the defendant

though often cited separately,[62] can be treated the same for purposes of double jeopardy protection. Thus, the term "successive prosecution" as used here will refer to both postacquittal and postconviction prosecutions.[63]

In addition to successive prosecutions, double jeopardy protection could be claimed to guard against prosecutorial efforts to procure multiple punishments for the same act.[64] Many statutory offenses contain "lesser-included offenses," and a defendant convicted for the greater offense cannot later be convicted for one of the lesser-included offenses. For example, a conviction on first-degree murder bars a subsequent conviction of second-degree murder, manslaughter, or negligent homicide arising out of the same act.[65]

C. Double Jeopardy in the Twentieth Century

The basic rule for determining whether a defendant has twice been put in jeopardy for the same offense is known as the *Blockburger* rule.[66] Under that rule, there is no double jeopardy violation where separate offenses require proof of an element not contained by another.[67] The *Blockburger* rule focuses on the statutory elements

---

was indicted for unlawful cohabitation with a woman who was not his wife and for adultery committed with the same woman. The Supreme Court held that the state could not obtain a conviction for a single criminal act committed during the running of a "continuous offense" for which conviction had previously been had. *Id.* at 178.

62. *See, e.g.*, North Carolina v. Pearce, 395 U.S. 711, 717 (1968).

63. The primary difference is that for prior acquittals, the doctrine of collateral estoppel could be invoked. That doctrine was not raised as a defense in the *Dixon* case. For further information on how the doctrine might affect double jeopardy, see Ashe v. Swenson, 397 U.S. 436 (1970).

64. *See, e.g.*, *Pearce*, 395 U.S. at 717. The Supreme Court ruled in *Pearce* that when a defendant serves a portion of a sentence that is later set aside on appeal, the state upon reconviction cannot impose a harsher sentence than that which was originally imposed; also, the new sentence, when added to the previous time served, may not exceed the maximum allowable sentence. *Id.* at 718-19.

65. "The greater offense is therefore by definition the 'same' for purposes of double jeopardy as any lesser offense included in it." Brown v. Ohio, 432 U.S. 161, 168 (1979).

66. Adopted by the Supreme Court in Blockburger v. United States, 284 U.S. 299 (1932). The defendant in *Blockburger* was convicted of narcotics violations; two counts arose from the same narcotics sale. The first count alleged sale of narcotics outside the original stamped package, in violation of one provision; the other count alleged that the sale was made without a written order of the purchaser, which was required by another provision. *Id.* at 301-02. The Supreme Court held that one act can be an offense against two statutes. *Id.* at 304.

67. *Id.* at 304 (citing Gavieres v. United States, 220 U.S. 338, 342 (1911)).

that must be proved in order to gain a conviction.[68] Thus, under *Blockburger*, a single act can be an "offense" against more than one statute.[69] For example, a defendant can be convicted of a crime that includes elements A, B, C, and D, and then be later convicted, for the same act, of a crime involving elements A, B, and E. Applying the *Blockburger* rule, there is no double jeopardy bar because the second offense, though sharing two elements, requires proof of a third element not required by the first offense.[70]

Although the *Blockburger* test is often referred to as a "same evidence" test, it has nothing to do with evidence.[71] The focus of the same evidence test is on the elements required for conviction and the evidence required to prove those elements. It does not focus on the actual evidence used at any particular trial.[72] Therefore, it is important to remember that the *Blockburger* test deals strictly with the statutory elements that must be proven to gain a conviction.[73]

The *Blockburger* rule embodies the common understanding of double jeopardy based on the Court's historical double jeopardy decisions.[74] In 1977, however, the Court indicated that the future of the rule might be less than secure when it handed down a pair of decisions that opened the door for departure from *Blockburger*.[75]

In *Brown v. Ohio*,[76] the Court ruled that a prior conviction of

---

68. *Id.*

69. *Id.* (quoting Morey v. Commonwealth, 108 Mass. 433, 434 (Mass. 1871)).

70. *Id.*

71. For further reading on the problems this distinction presents, see Howard B. Eisenberg, *Multiple Punishments for the "Same Offense" in Illinois*, 11 S. ILL. U. L.J., 217, 219-20 (1987).

72. *Id.*

73. *Id.*

74. The *Blockburger* rule was derived from the earlier cases of Gavieres v. United States, 220 U.S. 338 (1911) (holding that defendant convicted for drunkenness and rude and boisterous langauge was properly convicted later for insulting a public officer, even though the conduct and language was the same for both offenses); Morey v. Commonwealth, 108 Mass. 433 (1871) (holding that defendant's convictions for "lewd and lascivious cohabitation" and for "adultery" proper, although arising out of the same act). *Blockburger*, 284 U.S. at 304; *see also* Burton v. United States, 202 U.S. 344, 379-81 (1906) (holding that defendant's acquittal of a charge of taking money from a specific individual was not a bar to later prosecution on a multiple indictment containing the same charge, because "the jeopardy is not the same when the two indictments are so diverse as to preclude the same evidence from sustaining both").

75. Brown v. Ohio, 432 U.S. 161 (1977); Harris v. Oklahoma, 433 U.S. 682 (1977).

76. 432 U.S. 161 (1977).

"joyriding"[77] barred a later prosecution for auto theft, because joyriding was, in effect, simply a lesser-included offense of auto theft.[78] The Court discussed the *Blockburger* rule but then suggested in a footnote that *Blockburger* was not the sole standard in judging successive prosecution cases.[79] Within three weeks of the *Brown* decision, the Court opened the door further. In deciding *Harris v. Oklahoma*,[80] the Court ruled that conviction of felony-murder barred a later prosecution of the underlying felony, even though the prosecution would be allowable under strict application of the *Blockburger* rule.[81] These cases signalled the Court's willingness to step beyond the bounds of *Blockburger* in determining the scope of double jeopardy protection.

IV. Separate Approaches—the Road to the Left Leads to *Grady*

A cursory reading of the Court's modern day double jeopardy decisions reveals disagreements that at first glance appear to be complex, based on technical arguments over definitions and factual circumstances. This Section of the Note examines those definitional disagreements and identifies the two basic underlying views of double jeopardy protection. In addition, this Section considers how those competing views have affected the major Supreme Court decisions of the past fifteen years.

A. Two Views of the Reach of the Double Jeopardy Clause

The footnote of *Brown v. Ohio* was not unanimously embraced by the members of the Supreme Court.[82] The decision itself came on a six-to-three vote.[83] During the next thirteen years, the differences of opinions among the Justices would become more pronounced.[84]

---

77. "Joyriding" is the crime of taking or operating a motor vehicle without the consent of its owner. *Id.* at 162.

78. *Id.* at 168.

79. The footnote suggested that "additional protection" might be available beyond the *Blockburger* rule. *Id.* at 166-67 n.6.

80. 433 U.S. 682 (1977).

81. *Id.* at 682. In *Harris*, the defendant was first convicted of felony murder, which required the murder to be committed during the commission of another felony. Specifically, Harris was convicted of a murder committed during a robbery. When the state later attempted to try him on the robbery charge, a double jeopardy claim was raised. *Id.* Under the traditional application of *Blockburger*, the robbery conviction would have been allowed because proof of felony murder does not, in every case, require proof of a robbery. However, the Court barred the robbery conviction, because "conviction of a greater crime of murder cannot be had without conviction of the lessor crime, robbery . . . ." *Id.*

82. Grady v. Corbin, 495 U.S. 508, 536-37 (1990) (Scalia, J., dissenting).

83. *Brown*, 432 U.S. at 161.

84. Compare Justice Scalia's dissenting opinion in *Grady*, 495 U.S. at 526-44

Before going further, it would be helpful to place these differences of opinion into context by examining the two basic viewpoints of double jeopardy protection. Joining the majority in the *Brown* decision was Justice Brennan, who expressed on several occasions during his Supreme Court career his desire to expand the scope of double jeopardy protection beyond *Blockburger*.[85]

In Justice Brennan's view, the *Blockburger* rule should have been limited in use as a rule of "statutory construction," rather than being used to define the full measure of constitutional protection.[86] According to Justice Brennan, the *Blockburger* rule should only be employed in multiple punishment cases, and then only to assure that defendants are not impermissibly punished twice for the same act.[87] Under this view, then, the *Blockburger* rule would not be the end of the analysis; it would only be the starting point.[88]

Reaching beyond *Blockburger*, Justice Brennan championed a "same transaction" approach.[89] Under this approach, the government would be required to bring all charges arising out of the same criminal transaction together in one proceeding.[90]

The traditional *Blockburger* approach to double jeopardy, meanwhile, has found an ardent spokesman in Justice Antonin Scalia.[91] Justice Scalia construes the *Blockburger* test as a constitutional standard, one which contains virtually the entire scope of the Fifth Amendment protection against double jeopardy.[92]

The difference between these approaches can best be understood when viewed as a philosophical difference over what the extent of

---

(Scalia, J., dissenting), to the equally strident dissenting opinions in the principal case, United States v. Dixon, 113 S. Ct. 2849, 2865-91 (1993) (various Justices concurring in part and dissenting in part).

85. *Brown*, 432 U.S. at 170 (Brennan, J., concurring).

86. See Justice Brennan's discussion of this application in his majority opinion in Missouri v. Hunter, 459 U.S. 359, 366-69 (1983).

87. *Id.*

88. *Id.*

89. Justice Brennan advocated this approach in several concurring opinions. *See, e.g.*, Ashe v. Swenson, 397 U.S. 436, 453-54 (1970) (Brennan, J., concurring). This approach never gained widespread acceptance on the Court until the *Grady* decision. *See* Grady v. Corbin, 495 U.S. 508, 515-21 (1990).

90. For example, in a case like *Grady*, a criminal defendant could not be tried separately for the misdemeanor of driving under the influence of alcohol in one court and the felony of negligent homicide in another court. The government would have to bring all charges together for a single proceeding in one court. *Ashe*, 397 U.S. at 454.

91. Justice Scalia wrote the sharply worded dissent in *Grady*, 495 U.S. at 526 (Scalia, J., dissenting); he also authored the majority opinion in the principal case, United States v. Dixon, 113 S. Ct. 2849, 2853 (1993).

92. *Dixon*, 113 S. Ct. at 2860.

the protection should be.[93] One commentator notes that, as is true of other constitutional protections, the scope of double jeopardy protection tends to remain narrow as courts adhere strictly to the literal language of the Double Jeopardy Clause, and likewise tends to broaden as courts become more willing to expand beyond the actual words contained within the Fifth Amendment.[94]

B. Paving the Way for *Grady—Illinois v. Vitale*

Three years after the *Brown* and *Harris* decisions, the Supreme Court addressed a further widening of the double jeopardy conflict in deciding *Illinois v. Vitale*.[95] The defendant in the case, John Vitale, was convicted of two traffic violations, including failure to reduce speed.[96] The charges arose out of an accident in which two children were killed.[97] After the traffic convictions, Vitale was charged with involuntary manslaughter.[98] On appeal, the Illinois Supreme Court barred the manslaughter prosecution, reasoning that the prior traffic charges were, in essence, lesser-included offenses of the manslaughter charge, and as such were to be treated the same for double jeopardy purposes.[99]

The United States Supreme Court agreed to hear the case[100] and concluded under the traditional *Blockburger* analysis that if manslaughter does not always require proof of failure to reduce speed as an element of the offense, then the two offenses are not the same for double jeopardy purposes.[101] But the majority opinion, written by Justice Bryon White, went further. In dicta, Justice White stated that Vitale's claim might have been more substantial had the state been required to prove the same conduct that it had earlier relied on in trying the traffic offenses.[102] Thus, for the first time, the Court raised the possibility of departing from the traditional "same elements" approach, and the passage paved the way for the adoption of a "same conduct" test.

---

93. For an excellent discussion on the difference between the Double Jeopardy "Clause" as opposed to the double jeopardy "concept," see Eli J. Richardson, *Matching Tests for Double Jeopardy Violations With Constitutional Interests*, 45 VAND. L. REV. 273, 292 n.133 (1991).

94. *Id.*

95. 447 U.S. 410 (1979).

96. *Id.* at 412.

97. *Id.* at 413.

98. *Id.*

99. *Id.* at 414.

100. Illinois v. Vitale, 444 U.S. 823 (1979).

101. *Vitale*, 447 U.S. at 419.

102. *Id.* at 420.

C. *Grady v. Corbin*

Through the *Brown, Harris*, and *Vitale* decisions, the Court was slowly moving away from the exclusive use of *Blockburger* in analyzing double jeopardy protection. In 1990, the Court took the final leap in *Grady v. Corbin*.[103]

The facts of the *Grady* case are strikingly similar to those in *Vitale*. The defendant in the case, Thomas Corbin, was involved in an accident in which he crossed the center line and struck an oncoming car.[104] The passengers of that vehicle, a husband and wife, suffered serious injuries, and the wife later died of her injuries.[105] Corbin was charged with, and pleaded guilty to, crossing the median and driving while intoxicated.[106]

Two months later, a grand jury indicted Corbin on several charges, including reckless manslaughter, second-degree vehicular manslaughter, and criminally negligent homicide.[107] The trial court rejected Corbin's double jeopardy defense, but on appeal the appellate court, relying in part on Justice White's *Vitale* dictum, upheld Corbin's claim.[108]

Upon further appeal the Supreme Court, in a five-to-four decision, officially adopted the "same conduct" approach.[109] The Court held that the double jeopardy clause bars a later prosecution when the government must prove conduct for which the defendant has previously been prosecuted.[110] Justice Brennan wrote the majority opinion.[111]

In reaching its conclusion, the Court limited the *Blockburger* rule to the multiple punishment context, ruling that it does not apply to successive prosecutions.[112] The Court also held that, rather than being the only standard for double jeopardy protection, *Blockburger* should be read only as a rule of statutory interpretation.[113] In his lengthy dissent, Justice Scalia argued that, for all practical purposes, the Court's decision effectively embraced the requirement that

---

103. 495 U.S. 508 (1990).
104. *Id.* at 511.
105. *Id.*
106. *Id.* at 511-13.
107. *Id.* at 513.
108. *Id.* at 514-15.
109. *Id.* at 515-21.
110. *Id.* at 521.
111. *Id.* at 510.
112. *Id.* at 516-17.
113. *Id.* at 518-19.

prosecutors bring all charges from a single criminal transaction together in one proceeding.[114]

V. ANALYSIS OF THE *DIXON* DECISION

In his *Grady* dissent, Justice Scalia suggested that survival of the "same conduct" approach would be unlikely.[115] That proved to be a prophetic position, for the *Grady* decision would only survive three years. In the interim, the composition of the Court changed. Justices Brennan and Marshall had retired and were replaced by Justices David Souter and Clarence Thomas. In 1993, the Court granted certiorari to consider the District of Columbia Court of Appeals' decision in the *Dixon* case.[116] In another five-to-four decision, the Court overruled *Grady* and returned double jeopardy analysis to its *Blockburger* roots.[117]

The *Dixon* decision was woven from a tangled web of concurring and dissenting opinions. Justice Scalia wrote the majority opinion, joined throughout by Justice Kennedy.[118] After setting forth the facts of the case and examining the double jeopardy discussion from a historical perspective, Justice Scalia determined in Part II of the Court's opinion that double jeopardy protection should attach to nonsummary criminal contempt proceedings.[119]

The majority opinion then moved on to first consider whether Dixon's cocaine charge and the five counts against Foster were barred under *Blockburger*'s statutory analysis.[120] The Court held in Part III-A that, since Dixon's release order incorporated the entire criminal

---

114. Justice Scalia argued: "We will thus have fully embraced Justice Brennan's 'same transaction' theory . . . . [P]rosecutors confronted with the inscrutability of today's opinion will be well advised to proceed on the assumption that the 'same transaction' theory has already been adopted." *Id.* at 543 (Scalia, J., dissenting).

115. Justice Scalia's actual quotation is quite pointed:

> Even if we had no constitutional text and no prior case law to rely upon, rejection of today's opinion is adequately supported by the modest desire to protect our criminal legal system from ridicule. A limitation that is so unsupported in reason and so absurd in application is unlikely to survive.

Id. at 542-43.

116. United States v. Dixon, 113 S. Ct. 2849, 2854-55 (1993).

117. *Id.* at 2860.

118. *Id.* at 2853.

119. *Id.* at 2856. In making this finding, Justices Scalia and Kennedy were alone among the nine Justices. The other Justices declined to concur with this determination. Justice Blackmun was the most vocal opponent of this finding. *Id.* at 2879-81 (Blackmun, J., concurring in part and dissenting in part). Justice Blackmun also noted the difference between "summary" contempt and "nonsummary" contempt. Summary contempt refers to contempt committed inside the courtroom, and nonsummary contempt refers to contempt committed outside the courtroom. *Id.* at 2880.

120. *Dixon*, 113 S. Ct. at 2856.

code, the statutory elements were identical in both proceedings, and therefore *Blockburger* barred the second prosecution.[121] The Court also applied that same reasoning to count one of Foster's indictment, which charged him with simple assault, because that offense's statutory elements were specifically contained within the provisions of the civil protection order.[122] This part of Justice Scalia's opinion was joined by Justices White, Stevens, Souter, and Kennedy.[123] Chief Justice Rehnquist, joined by Justices O'Connor and Thomas, dissented on several grounds, most notably by rejecting the argument that the indictments were analogous to lesser-included offenses.[124]

In Part III-B of its decision, the Court then considered the remaining four counts against Foster and held that they were not barred by the *Blockburger* rule.[125] The Court reasoned that the count five indictment for assault with intent to kill differed from the count one indictment for simple assault because it required proof of intent to kill, whereas the civil protection order only commanded that the defendant not "assault" his wife.[126] Therefore, count five required proof of an additional element beyond what was needed to prove violation of the protection order.[127]

The Court likewise held that counts two through four were not barred under the *Blockburger* analysis.[128] The civil protection order directed that the defendant not threaten his wife in any manner, while the criminal indictment required proof of a threat to kidnap, to injure, or to commit property damage.[129] Therefore, the elements necessary to prove the criminal counts were not the same as those required to show criminal contempt under the protection order.[130]

This section of the majority opinion garnered a different majority from that of Part III-A. Here, Justices Rehnquist, O'Connor, and Thomas, who had dissented from III-A, joined with Justices Scalia

---

121. *Id.* at 2857.
122. *Id.* at 2858.
123. Justice White concurred with this in his separate opinion. *Id.* at 2879 (White, J., concurring in part and dissenting in part).
124. *Id.* at 2868 (Rehnquist, C.J., concurring in part and dissenting in part). Chief Justice Rehnquist pointed out that "[a] lesser included offense is defined as one that is 'necessarily included' within the statutory elements of another offense." *Id.* (citing FED. R. CRIM. P. 31(c) and Schmuck v. United States, 489 U.S. 705, 716-17 (1989)).
125. *Dixon*, 113 S. Ct. at 2858-59.
126. *Id.*
127. *Id.*
128. *Id.* at 2859.
129. *Id.*
130. *Id.*

and Kennedy in agreeing that the remaining counts should not be barred.[131] Justices White, Souter, and Stevens, who had concurred in Part III-A, dissented from Part III-B.[132]

Next, the Court reached what would prove to be the critical portion of its inquiry. Having found that counts two through four of Foster's indictment were not barred by *Blockburger*, the Court then considered, in Part IV of its opinion, whether they should be barred under the new "same conduct" test of *Grady*.[133] Based on the determination that *Grady* did not have constitutional roots, as did *Blockburger*, the Court simply overruled *Grady*.[134] The Court also stated that *Grady*'s "same conduct" test was inconsistent with precedent, and also with the common-law notion of double jeopardy protection.[135] Justice Scalia contended that the *Grady* rule was a less than accurate statement of the law which was wrongly decided and unstable in actual application.[136] Again, Justices Rehnquist, O'Connor, and Thomas joined Justices Scalia and Kennedy in this part of the opinion.[137]

Justice White dissented from the majority decision, and Justices Stevens and Souter joined his dissent.[138] Justice White first argued that double jeopardy protection should not apply to contempt proceedings.[139] He went on to say, however, that courts should be hesitant to bring contempt proceedings in situations other than those required by necessity, in order to vindicate the court's authority or to prevent disruption of court proceedings.[140] Justice White also would have avoided reaching the question of whether *Grady* should be overruled, because he would have found all counts barred under

---

131. Officially, these Justices dissented from Justice Scalia's reasoning in reaching the holding of all of Part III, *id.* at 2865 (Rehnquist, C.J., concurring in part and dissenting in part), but agreed "with the result reached in Part III-B." *Id.* at 2868 n.3.

132. *Id.* at 2875 (White, J., concurring in part and dissenting in part).

133. *Dixon*, 113 S. Ct. at 2859.

134. *Id.* at 2860.

135. *Id.*

136. Justice Scalia described *Grady* as a "not only wrong in principal," but also "unstable in application," noting that fewer than two years after the decision, the Court was "forced to recognize a rather large exception to it." *Id.* at 2863. That exception was developed in United States v. Felix, 112 S. Ct. 1377, 1385 (1992), in which the Court found that a later prosecution for conspiracy to manufacture, possess, and distribute methamphetamine was not barred by a previous conviction for attempt to manufacture methamphetamine.

137. *Id.* at 2865 (Rehnquist, C.J., concurring in part and dissenting in part).

138. *Id.* at 2868 (White, J., concurring in part and dissenting in part).

139. *Id.*

140. *Id.*

the *Blockburger* rule.[141] Thus, Justice White would not have reached the question of whether the prosecutions met the *Grady* rule, and he argued that *Grady* should not be overruled.[142]

Justice Blackmun added a short dissent that essentially concurred with the two arguments of Justice White; double jeopardy protection should not attach to contempt proceedings, and *Grady* should stand.[143] Justice Souter also added a separate opinion, joined by Justice Stevens, in which he advocated Justice Brennan's "single transaction" approach.[144] He expressed concern that the government could conceivably manipulate the statutory elements of crimes in such a way that prosecutors could try defendants numerous times for commission of the same act.[145]

Through this tangled web emerged the final holding of the Court. Dixon's prosecution for possession of cocaine and count one of Foster's prosecution for simple assault were barred under *Blockburger*.[146] The district court's decision to bar the remaining counts against Foster was reversed and remanded, and *Grady v. Corbin* was overruled.[147]

VI. The Significance of the *Dixon* Decision

The *Dixon* case simplifies the approach courts may take in addressing the double jeopardy issue. Attempts to define "same conduct" had already begun to produce disparate results in the judicial system. For example, in Wisconsin, a defendant was charged with operating a motor vehicle without the owner's consent, a felony.[148] However, he had previously pleaded guilty to a traffic citation of operating a motor vehicle after revocation, which arose out of the

---

141. *Id.* Justice White would have reached this conclusion by comparing the substantive offenses without regard to the provisions of the civil protection order. *Id.* at 2876. Justice Scalia answered that the civil protection order could not be disregarded because it was "the centerpiece of the entire proceeding." *Dixon*, 113 S. Ct. at 2858 n.5.

Justice White also made the distinction between the double jeopardy "concept" and the Double Jeopardy "Clause," stating that "[t]he distinction drawn by Justice Scalia is predicated on a reading of the Double Jeopardy Clause that is abstracted from the purposes the constitutional provision is designed to promote." *Id.* at 2876 (White, J., concurring in part and dissenting in part).

142. *Id.* at 2869.

143. *Id.* at 2879-81 (Blackmun, J., concurring in part and dissenting in part).

144. *Id.* at 2883 (Souter, J., concurring in part and dissenting in part).

145. *Id.* at 2890.

146. *Dixon*, 113 S. Ct. at 2864.

147. *Id.*

148. State v. Harris, 469 N.W.2d 207 (Wis. Ct. App. 1991).

same incident.[149] However, the trial court analyzed the defendant's actions as consisting of two separate courses of conduct; according to the court, the conduct of driving after revocation was separate conduct from operating a motor vehicle without the owner's consent.[150] *Blockburger*'s same elements test eliminates the need for such hair-splitting analysis.

By contrast, an Arizona defendant successfully challenged a manslaughter indictment in *Hovey v. Superior Court* because he had earlier pleaded guilty to leaving the scene of a fatal accident.[151] The court could have recognized that the conduct which caused the accident was separate from the conduct of leaving the scene afterwards. Instead, the court held that the state would have to again prove the defendant's recklessness in causing the accident and the resulting death, and therefore the manslaughter charge was barred.[152]

The waters were further muddied in the aftermath of the Supreme Court's *Felix* exception.[153] Despite Justice Scalia's contention that the *Felix* exception was based on longstanding authority concerning conspiracy charges, the United States Court of Appeals for the Eighth Circuit held in a 1992 decision that the *Grady* rule, as modified by *Felix*, only applies if the earlier charge is a "species of lesser included offense" of the later charge.[154]

The *Dixon* decision will save appeals courts, and eventually the Supreme Court, from resolving the inevitable conflicts that would have resulted from such various interpretations. Already, the Court has begun reversing the process, remanding cases for further consideration in light of the *Dixon* decision.[155]

The Court's decision to return to the *Blockburger* analysis will serve to simplify the problem of analyzing potential violations of the double jeopardy protection because the same element approach is easily understood and applied. Simplicity carries with it, however, the problem of rigidity. The *Blockburger* analysis appears to be a definite case of "one size fits all." Because of the recognition that

---

149. *Id.* at 208.
150. *Id.* at 210.
151. Hovey v. Superior Court, 798 P.2d 416, 419 (Ariz. Ct. App. 1990).
152. *Id.*
153. United States v. Felix, 112 S. Ct. 1377 (1992).
154. McIntyre v. Trickey, 975 F.2d 437, 443 (8th Cir. 1992), *cert. granted and vacated sub nom.* Caspari v. McIntyre, 114 S. Ct. 375 (1993) (mem.).
155. See, for example, the Court's memorandum decisions in Caspari v. McIntyre, 114 S. Ct. 375 (1993); Texas v. Parrish, 114 S. Ct. 41 (1993); Alabama v. Leighton, 113 S. Ct. 3027 (1993); and Ohio v. DeMuth, 113 S. Ct. 3025 (1993).

all cases are not alike, the *Blockburger* rule has, over the years, failed to provide the definitive answer to questions of double jeopardy protection.

Yet, the same conduct approach of the *Grady* rule does not satisfy either, nor does Justice Brennan's same transaction approach. The facts of the *Grady* case itself provides the proof, as does *Hovey*.[156] Justice Brennan himself pointed out in his majority opinion in *Grady* that "drunk driving is a national tragedy."[157] Yet, when such defendants are allowed to escape the consequences of their actions by pleading guilty to traffic offenses, the tragedy is greatly magnified.

Still, there is at least one legitimate concern regarding the *Dixon* decision, which was pointed out by Justice Souter.[158] Under *Blockburger*, the potential does indeed exist for prosecutorial abuse of fine distinctions and definitions in the elements of a crime, thus enabling a defendant to be repeatedly tried for the same offense.

But in the current environment of scarce criminal justice resources, such efforts are not likely to be forthcoming. Moreover, in the event that such efforts occur, the subject would likely be revisited. In fact, given the fractious positions of the current members of the Court, it would seem guaranteed that in settling the double jeopardy argument, much remains to be settled.

To a large extent, the double jeopardy debate presents an inevitable conflict between a constitutional protection that is intended to be preventive in nature and a judicial system designed to provide cures for past wrongs. As the recent decisions of *Grady* and *Dixon* so aptly demonstrate, resolving that conflict is a difficult balancing act indeed.

Phillip Green

156. Hovey v. Superior Court, 798 P.2d 416 (Ariz. Ct. App. 1990).
157. Grady v. Corbin, 495 U.S. 508, 524 (1990).
158. United States v. Dixon, 113 S. Ct. 2849, 2890 (1993).