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A Blameworthy Act Approach to the Double Jeopardy Same Offense Problem

George C. Thomas III†

The Supreme Court has failed to articulate a clear standard for when conduct constitutes the “same offense” within the meaning of the Double Jeopardy Clause. At present, a bare majority of the Court favors the mechanical “distinct-element” test of same offense, but no majority exists on how to apply that test. This Article starts with the premise that offenses are the same for double jeopardy purposes when they manifest a single blameworthiness. The author suggests that the blameworthiness of an act should turn on legislative intent. The legislature defines “offenses,” and thus determines the meaning of “same offense.” In those rare instances where legislative intent is clear, it must control. More often, however, courts must infer whether the legislature intended to impose more than one conviction for the actor’s conduct. Given the historical distinction between the functions of civil damages and criminal penalties, the author identifies a strong presumption favoring the imposition of civil remedies in addition to criminal sanctions. To resolve the great majority of cases where the civil/criminal presumption offers no guidance, this Article draws on action theory to demonstrate that legislatures conceive of blameworthiness in terms of distinct blameworthy acts. Conversely, the author argues, when the same blameworthy act violates several statutes, the legislature probably intended to impose one conviction. Finally, drawing on the Court’s tradition of lenity, this Article identifies a presumption that legislatures intend to punish those act-tokens that manifest statutory harm in the same way only once.

INTRODUCTION

The Supreme Court has failed to achieve a stable interpretation of the Double Jeopardy Clause. The Clause provides: “[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb

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† Professor, Rutgers University School of Law, Newark, New Jersey. I thank all the participants at a University of Pennsylvania criminal law workshop and a Rutgers faculty colloquium. Both discussions proved extremely helpful. In addition, I thank Akhil Amar, Josh Dressler, Brian Gill, Nancy King, Susan Klein, Michael Moore, and Lloyd Weinreb. Special thanks to Doug Husak, who was very patient with my attempts to understand the philosophy of action.

. . . ."¹ The doctrinal instability exists largely because the Court has never had a satisfactory account of when two offenses constitute the "same offense" for double jeopardy purposes. The Court's basic approach is misguided, in my view, because it substitutes formalism for substance, a mechanical test for a test that asks whether the offenses are substantively the same.

In 1977, the Court began to express dissatisfaction with the prevailing mechanical test of same offense, which looked for differences in statutory elements.² In its place the Court developed a test that considered how the statutory elements would be proved in a particular case.³ If the state had already prosecuted drunk driving, for example, it could not later prosecute for vehicular homicide using that drunk driving conduct. What mattered under this test was not the statutory elements considered in the abstract, but rather, how they would be proved in a particular pair of prosecutions. The Court tried this approach for three years but in the end abandoned it for reasons I will discuss shortly.⁴ What remains is the mechanical test that compares statutory elements and is only sometimes related to substantive sameness.

In this Article, I will develop a substantive approach to defining same offense which, like Michael Moore's approach,⁵ utilizes a theory of action. Action theory is a metaphysical enterprise that seeks to state the conditions under which one act is distinct from another.⁶ It is a surprisingly difficult task, giving rise to a skeptical view that it is impossible. In a highly influential note about double jeopardy, Larry Simon drew on J. L. Austin to observe: "Whether any span of conduct is an act depends entirely upon the verb in the question we ask. A man is shaving. How many acts is he doing? Is shaving an act? Yes. Is changing the blade in one's razor an act? Yes. Is applying lather to one's face an act? . . . Yes, yes, yes."⁷

In the first two-thirds of *Act and Crime*, Moore develops and defends against skeptics like Larry Simon a general theory of action for criminal

1. U.S. CONST. amend. V.

2. For a discussion of this trend in the Court's opinions, see George C. Thomas III, *The Prohibition of Successive Prosecutions for the Same Offense: In Search of a Definition*, 71 IOWA L. REV. 323, 347-54 (1986) [hereinafter Thomas, *Prohibition of Successive Prosecutions*].

3. *Grady v. Corbin*, 495 U.S. 508 (1990), *overruled by* *United States v. Dixon*, 113 S. Ct. 2849 (1993). See *infra* notes 49-65 and accompanying text. I once argued that history supports using a conduct-based test of same offense in the following way: long before there were statutory or common law offenses, for example, there was the conduct of larceny. George C. Thomas III, *An Elegant Theory of Double Jeopardy*, 1988 U. ILL. L. REV. 827, 847-50 [hereinafter Thomas, *An Elegant Theory*]. Maybe the "offense" of larceny is the complex set of actions that we think of as larceny, rather than the statutory elements of larceny.

4. See *infra* notes 49-65 and accompanying text.

5. See generally MICHAEL S. MOORE, *ACT AND CRIME* (1993).

6. See generally DONALD DAVIDSON, *ESSAYS ON ACTIONS AND EVENTS* (1980); Jonathan Bennett, *Shooting, Killing and Dying*, 2 CAN. J. PHIL. 315 (1973); Judith Jarvis Thomson, *The Time of a Killing*, 68 J. PHIL. 115 (1971).

7. Larry Simon, Comment, *Twice in Jeopardy*, 75 YALE L.J. 262, 276 (1965).

law. In the last third, he uses his theory of action to define double jeopardy same offense. Though I find Moore's account incomplete, and disagree with parts, his insight that action theory is crucial in formulating a coherent account of same offense is both innovative and helpful.

Indeed, some form of action theory is deeply embedded in existing judicial approaches to defining same offense. The form it takes may constitute bad metaphysics, as Moore occasionally charges,⁸ but action theory is part of our intuitions about blame and responsibility. For example, if asked how many offenses it is to rob two victims standing next to each other, most people will say something about two "acts" of robbery. Similarly, the common law held burglary to be different from the larceny subsequently committed because the burglary "ends" when the threshold of a building is crossed, and the larceny is therefore a different "act."

The problem with existing accounts of same offense is that the role of action theory is submerged under other, less satisfying ways of structuring the analysis. Moore is unique in that he makes action theory central to his enterprise. Though I will also rely explicitly on action theory, I begin with a premise different from Moore or any other commentator.

I will argue that offenses are the same under the Double Jeopardy Clause when they manifest singular blameworthiness. Blameworthiness is singular when the legislature intended to authorize a single conviction for what occurred. Because legislatures rarely express intent on this question, my task is to structure a set of presumptions about what the legislature probably meant (or would have meant had it thought about the issue).

It is at this stage that action theory is useful. When X kills Y, there is only one homicide, even though that one offense may be described in several ways (premeditated murder, felony murder, second-degree murder, manslaughter, vehicular homicide, etc.). We would say that premeditated murder is more blameworthy than manslaughter, but we would still say that X's one act is only one homicide offense, however it is described under the various state statutes.

My working hypothesis, then, is that legislatures think in terms of different blameworthy acts when they think of distinct blameworthiness. Conversely, when the same blameworthy act proves more than one statutory offense, it is likely that the legislature intended to create singular blameworthiness. Courts should (and usually do) find only one double jeopardy offense when two criminal statutes proscribe the same blameworthy act. On my positivist view, however, action theory provides presumptions only. The legislature is the ultimate source of the meaning of "offense" and thus of "same offense."

8. See, e.g., MOORE, *supra* note 5, at 360 (noting a particular class of cases in which most courts have rejected the view Moore finds metaphysically correct because of "a moral insight (that they have not known how to conceptualize in terms of action-identity)").

What is needed on this view of double jeopardy is a way to infer legislative intent for each discrete same offense question among the almost limitless ways that statutory offenses and conduct can combine to produce more than one conviction. I will sketch such an account in this Article, and offer a defense of it that I hope advances the debate about the Court's failed same-offense project.⁹

I

SOME THOUGHTS ABOUT ACTS

The necessary relationship between an act and an "offense" has for centuries been one of the irreducible principles in substantive criminal law. The common law has long held that criminal liability requires proof of a voluntary act which is proscribed by law.¹⁰

Notice that the last sentence states two different kinds of act requirements. Proof of a voluntary act requires a showing that an actor did a particular act at a certain time and in a certain place. The second requirement is a showing that the particular act fits the act description contained in the criminal prohibition.

Action theory draws the same distinction between descriptions of acts, called "universals" or "act-types," and particular acts in the world, called "event-particulars" or "act-tokens." Act-types are found in statutory proscriptions. The offense of larceny consists, in part, of the act-type of taking and the act-type of carrying away. Each particular instance of an act-type is known as an act-token. For example, the larceny at the Watergate Hotel was an act-token.

Act-tokens have their own peculiar same offense difficulties, which may be referred to as "counting" problems. What appear to be multiple act-tokens may or may not support multiple convictions. This may be because appearances are deceiving, and only one act-token of a criminal act-type actually exists; or it may be that the legislature did not intend to count more than one act-token in certain situations. I reserve the act-token counting problem for Part V.

With respect to act-types contained in statutory descriptions, one problem is identifying which elements of a criminal offense proscribe act-types. Though it is easy to distinguish act-type elements from mens rea elements, it is more difficult to sort out act-type elements from those that proscribe circumstances and results. Consider, for example, the aggravated first-

9. My project is limited to the same-offense issue as traditionally understood. The separate doctrine of collateral estoppel provides that an acquittal estops the state from again litigating any fact necessarily determined in the acquittal. *Ashe v. Swenson*, 397 U.S. 436, 443-44 (1970). Assume D defends the charge of selling narcotics outside the original stamped package on the ground that he was not the seller. An acquittal of that charge would require dismissal of any subsequent charge requiring proof that D sold narcotics at that time and place. While I continue to believe it may be possible to "unify" collateral estoppel in an account of same offense, that goal is beyond the scope of this paper.

10. See MOORE, *supra* note 5, at 4.

degree murder offense of killing a police officer. What is the proscribed act-type? The death can be described as a result, and the victim's status can be described as a circumstance. But both also could be included in a description of the relevant act-type if it is described in a sufficiently rough-grained or inclusive way. Though one does not normally think of the result as part of the act, it is plausible to say that the act-type is killing a human being (murder is defined that way). From there, it is possible to say that the act-type is killing a human being who is a police officer.

The Model Penal Code distinguishes between conduct and what it calls "attendant circumstances," but offers no definition of either concept.¹¹ Part of the reason it is difficult to distinguish act-types from other elements is that many act-types are non-blameworthy, or much less blameworthy, when taken out of the context of their circumstances or results. The act-type "killing" is not criminally blameworthy, for example, unless we know that the being killed was a human. For this reason, the scope of the act-type must be construed to reflect the legislatively-created blameworthiness in the statute as a whole. I mean to capture this idea by distinguishing between blameworthy act-types proscribed by statutes and other elements that either (1) are not act-types or (2) have little or nothing to do with blameworthiness.

Applying this methodology to the aggravated murder statute, we would ask whether the status of the victim is even arguably an act-type. If the answer is yes, the next question is whether it is a *blameworthy* act-type. I think it unlikely that the status of the victim is an act-type; the standard account of act excludes all properties that cannot be brought about by the actor. When X kills Y, X can do nothing to bring about the property that Y is a police officer.

Assuming, *arguendo*, a non-standard account of act that includes the victim's status, the next inquiry is whether that element adds measurably to the blameworthiness that would be present in its absence. Removing the victim's status would leave killing a human being with murder *mens rea*, which is just as blameworthy as murdering a human being who happens to be a police officer. To be sure, the legislature created aggravated murder by specifying a particular victim status, but the legislative purpose is presumably to deter this form of murder by enhancing the penalty. It requires an unusual morality, or an unusual status, to find more blame based on the job classification of the victim.¹²

This approach produces the satisfying result that aggravated first-degree murder and other forms of first-degree murder proscribe the same blameworthy act-type (and, I will later argue, the same offense). This result

11. See MODEL PENAL CODE § 1.13(9) (1985).

12. Perhaps a statute limited to killing the President would manifest significantly greater blameworthiness than a generic murder statute. (The idea is Akhil Amar's). I am not sure I agree but, in any event, few jobs would be as unique and important as the Presidency.

is satisfying because, otherwise, we would be forced to say that the act-token of killing a police officer instantiates two act-types: killing, and killing a police officer. Indeed, tracking Blackstone, all homicide statutes prescribe the same blameworthy act-type.¹³

I will argue that the best conception of same offense can be found by comparing blameworthy act-types, and by asking how the legislature intended for courts to count the act-tokens that instantiate the act-type. First, however, I will detour briefly to examine other proposed solutions to the problem.

II

CRITIQUE OF SAME-OFFENSE TESTS

All is not well with same-offense doctrine. The Court's most recent same offense case contains a bare majority in favor of the mechanical "distinct-element" test. This test, first clearly articulated in 1932 in *Blockburger v. United States*,¹⁴ finds offenses to be different double jeopardy offenses if each requires proof of a statutory element that the other does not.¹⁵ Although the Court has embraced the venerable *Blockburger* test, no Court majority exists on how to apply the test.¹⁶ Moreover, the reasons the Court has been dissatisfied with the mechanical approach remain.

I believe that it is time to draw a breath, step back, and ask: "How did we get into this mess?" There is little doubt that double jeopardy is a fundamental protection. How could a judicial system operate without some limitation on the number of times the same issue produces a judgment? And how could a system operate justly without that limit being one? Demosthenes said in 355 B.C. that "the laws forbid the same man to be tried twice on the same issue"¹⁷ As the reference to Demosthenes suggests, the double jeopardy protection is ancient as well as fundamental. It first appeared in English history in 1164, in the confrontation between Henry II and St. Thomas Becket, and it has since been a fixture in the common law.¹⁸

Why, then, does the Court lack a clear conception of same offense? The answer to this question will help demonstrate the difficulty of the same-offense project. We have some idea what "compelled self-incrimination" means, or "cruel and unusual punishment," or even "unreasonable search and seizure." These phrases have cultural referents that give shape to the

13. See 4 WILLIAM BLACKSTONE, COMMENTARIES *336 (noting that murder and manslaughter are the same offense).

14. 284 U.S. 299 (1932).

15. *Id.* at 304; see *infra* Part II.B.

16. See *infra* Part II.D.

17. 1 DEMOSTHENES 589 (J.H. Vince trans., 2d ed. 1954).

18. See 1 FREDERICK POLLOCK & FREDERIC W. MAITLAND, THE HISTORY OF ENGLISH LAW 448, 454-55 & n.1 (2d ed. 1898).

interpretational inquiry. But what does "same offense" mean in the Double Jeopardy Clause? Well, it means same offense. What is the nature and shape of the inquiry? Nothing in the text suggests a referent other than identical offense: for example, premeditated murder is the same offense as premeditated murder and nothing else. I begin my critique of the proposed tests of same offense with this notion of identity.

A. Identity

Akhil Amar and Jonathan Marcus recently proposed an identity test of same offense. "Same," on their account, means literally identical.¹⁹ They include within their test of identity the Court's implied acquittal doctrine—a prosecution for murder, for example, that results in a manslaughter conviction implicitly acquits that defendant of murder.²⁰ Amar and Marcus also supplement double jeopardy protection by creating a Due Process Clause prohibition of vexatious reprosecutions and locating the issue preclusion doctrine of collateral estoppel in the Due Process Clause as well.²¹

An identity test is not *Blockburger*, which is a test of element inclusion. *Blockburger* pronounces offenses A and B the same if A proscribes elements 1 and 2, while B proscribes 1. Moreover, A is also the same as C if C proscribes 2. There is a logical flaw here, which Amar and Marcus contend is proof that *Blockburger* "flunks" an "elementary test of sameness."²² A principal of logical identity is that if A is the same as B, and A is the same as C, then B must be the same as C. This is not the result under *Blockburger*, which causes it to "flunk."

But the Amar-Marcus analysis has its own problems. It fails to demonstrate why the word "same" in the Double Jeopardy Clause must entail logical identity. As an historical matter, double jeopardy sameness did not mean logical identity, and it is unclear why courts should rush to adopt that meaning today. Blackstone, for example, noted that manslaughter and murder were the "identical" crime, and a conviction under a manslaughter indictment was a jeopardy bar to a murder trial.²³ Obviously, Blackstone uses "identical" in a looser way than Amar and Marcus use it.

The only offense that can be like offense (1, 2, 3, 4) in the Amar-Marcus double jeopardy world is an offense that also proscribes 1, 2, 3, and 4. This means that, Blackstone notwithstanding, no Double Jeopardy Clause bar would arise when a murder conviction is followed by a man-

19. Akhil R. Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1, 28-38 (1995).

20. See, e.g., *Green v. United States*, 355 U.S. 184, 190-91 (1957) (holding that conviction for the lesser-included offense of second-degree murder implicitly acquitted the defendant of first-degree murder charge).

21. Amar & Marcus, *supra* note 19, at 30-37. Collateral estoppel is outside the scope of this paper. See *supra* note 9.

22. Amar & Marcus, *supra* note 19, at 30.

23. BLACKSTONE, *supra* note 13, at *336.

slaughter prosecution based on the same killing. Or if the state initially charged manslaughter, a conviction of manslaughter would not be a jeopardy bar to a murder prosecution.²⁴

One might contend that we can improve on Blackstone's understanding and that, in any event, prosecutors are rarely going to bring manslaughter and murder trials separately. However, I doubt that we can improve very much on Blackstone's understanding of double jeopardy, and the pragmatic response ultimately misses the point of finding the best conception of same offense. A test that considers a single killing to be the different offenses of murder and manslaughter may earn an "A" in logic, but it flunks the elementary test of common sense.²⁵

Presumably, the Amar-Marcus due process prohibition of vexatious prosecutions would forbid successive prosecutions for murder and manslaughter in most situations. But I would lodge a sort of Ockham's Razor objection: why should we relegate to the Due Process Clause a protection Blackstone located in the common law prohibition against double jeopardy?²⁶ A fundamental jurisprudential problem also exists: how to give reasonably definite content to "vexatious prosecutions." The rule since Blackstone has been that a greater offense is the same as all necessarily included offenses. The Court applied this clear understanding in *Brown v. Ohio*²⁷ to hold that auto theft and joyriding are the same offense because the lesser (joyriding) is necessarily included in the greater (auto theft). Amar and Marcus express uncertainty about whether the successive prosecutions in *Brown* were vexatious and thus barred by their due process test.²⁸ Do we really want to authorize successive prosecutions for greater and lesser offenses any time a judge thinks the situation non-vexatious?

We would get a more standard set of results with a test of inclusion for all cases rather than a test of identity for the obvious cases and a due process balancing test for all other cases. The results would, in my view, also be better. An inclusion test would permit us to agree with Blackstone about murder and manslaughter, and with the Court about auto theft and joyriding. At least four tests of inclusion can be differentiated from each other.

24. Amar and Marcus limit double jeopardy to the successive prosecution context and are content to let *Blockburger* function as a test of when the legislature intended more than one conviction. Amar & Marcus, *supra* note 19, at 28-29. For my theory, these questions are the same. See *infra* Part IV.

25. Amar and Marcus argue that the Court has departed from *Blockburger* on occasion. Amar & Marcus, *supra* note 19, at 37-38. But all this says is that *Blockburger* is a bad test of same offense which the Court often has to find a way to rebut.

26. Ockham's Razor is the philosophic principle holding that the simplest workable theory is the best. 8 ENCYCLOPEDIA OF PHILOSOPHY 307 (1967).

27. 432 U.S. 161 (1977).

28. Amar & Marcus, *supra* note 19, at 38 n.190. For my own favorable view of *Brown*, see *infra* notes 156-168 and accompanying text.

B. Blockburger *Element Inclusion*

Early this century, the Court held that disorderly conduct and insulting a public officer were different offenses, at least in part because each statute required proof of an element the other did not.²⁹ Later, the Court used this “distinct-element” test in *Blockburger*, holding that the sale of narcotics outside the original stamped package was a different offense from the sale of the same narcotics without a written order.³⁰

Justice Scalia vigorously supports the *Blockburger* test as a complete definition of same offense. Scalia is right about much in double jeopardy. He is right to reject the Court’s 1990 same offense test that focused on the actual conduct proved against a defendant.³¹ And he is mostly right about the role of double jeopardy in analyzing civil penalties.³² But he is wrong about *Blockburger*.

Scalia’s argument is that “if each [statute] contains an element the other does not, *i.e.*, if it is possible to violate each one without violating the other, then they cannot constitute the ‘same offence.’”³³ But there is less here than meets the eye. For example, as Scalia concedes, this understanding will not justify the Court’s application of *Blockburger* in the context of felony murder/underlying felony, an issue I will discuss shortly.

Blockburger also has nothing to say about counting violations of a single statute.³⁴ The earliest Supreme Court case interpreting same offense raised just this issue. In *In re Snow*,³⁵ the Court had to decide how many convictions of cohabitation could be imposed for a single thirty-five month period of living with the same women. That question cannot be decided by comparing two statutes, for there was only one statute.

Thus, at a minimum, *Blockburger* gives an incomplete account. More importantly, element distinction has no necessary link to distinct blameworthiness. Suppose a legislature passed an aggravated robbery statute that, in one section, proscribed robbery while wearing a white shirt, and, in another section, proscribed robbery on a Sunday. Those offenses would be different *Blockburger* offenses even if proved on the same act-token of robbery, a result that seems very unlikely to manifest the legislative intent behind creating different types of aggravated robbery.

29. *Gavieres v. United States*, 220 U.S. 338, 343-44 (1911).

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

31. *See infra* notes 49-52.

32. *See infra* Part IV.E.

33. *Grady v. Corbin*, 495 U.S. 508, 529 (1990) (Scalia, J., dissenting), *overruled by* *United States v. Dixon*, 113 S. Ct. 2849 (1993).

34. *Blockburger* states a threshold requirement of “where the same act or transaction constitutes a violation of two distinct statutory provisions.” 284 U.S. at 304. As Moore notes, this threshold same-act requirement must be satisfied before it makes sense to compare statutory act-types. MOORE, *supra* note 5, at 315 n.21. But *Blockburger* offers no guidance on how to determine when the act or transaction is the same. The *Blockburger* test has to do only with “two distinct statutory provisions.” The test is “whether each provision requires proof of a fact which the other does not.” 284 U.S. at 304.

35. 120 U.S. 274, 281-86 (1887).

Because any type of distinct element makes offenses different under *Blockburger*, and modern legislatures pass many overlapping statutes, real-life examples of *Blockburger*'s failure abound. For example, assault with intent to murder is a different *Blockburger* offense from assault with intent to rob while armed.³⁶ On this view, of course, the same assault can be punished as many times as the legislature articulates distinct intent requirements: to murder, to rape, to sodomize, to rob, to kidnap, to injure, to terrorize, to humiliate, to prevent voting, to prevent entering a voting place, etc.

Another example is the crime of diverting electric current, which is a different *Blockburger* offense from larceny because the former offense does not require intent permanently to deprive the owner of possession.³⁷ Misapplication of bank funds is a different *Blockburger* offense from loaning funds to a borrower known to have insufficient assets.³⁸ The Supreme Court in 1985 held that a currency reporting violation is a different *Blockburger* offense than making a false statement to a government agency, even though both convictions resulted from checking a single box.³⁹

But the best proof of *Blockburger*'s inadequacy is that sufficiently different descriptions will make a single homicide into different offenses. Felony murder, for example, is a different *Blockburger* offense from premeditated murder. Felony murder requires proof of the underlying felony; premeditated murder requires proof of premeditation. While this may seem an excessively technical application of *Blockburger*, it has been urged several times on the Michigan courts (unsuccessfully, so far.)⁴⁰

The Maryland Court of Appeals addressed the similar question of whether manslaughter by motor vehicle is different from homicide by motor vehicle while intoxicated.⁴¹ These offenses are different under *Blockburger*: manslaughter requires proof of gross negligence, while the more specific homicide offense requires proof of intoxication. In what may have been a warning to trial courts, the state appeals court noted that a person cannot be convicted of both offenses based on a single death. The court's explanation implicitly endorses action theory: "[I]t is manifestly impossible to kill or slay one person twice."⁴² To get around the *Blockburger* result, the court used a due process analysis: "[C]onviction of both charges, arising from the slaying of the same person amounts to piling

36. *People v. Bryan*, 284 N.W.2d 765, 772 (Mich. Ct. App. 1979).

37. *Selman v. State*, 406 P.2d 181, 187 (Alaska 1965).

38. *Commonwealth v. Kiley*, 367 N.E.2d 837, 841 (Mass. 1977).

39. *United States v. Woodward*, 469 U.S. 105, 106, 108-10 (1985).

40. *See, e.g., People v. Johnson*, 297 N.W.2d 713, 718 (Mich. Ct. App. 1980); *People v. Ramsey*, 280 N.W.2d 840, 842-44 (Mich. Ct. App. 1979); *People v. Sparks*, 266 N.W.2d 661, 665 (Mich. Ct. App. 1978); *People v. Crown*, 254 N.W.2d 843, 848-49 (Mich. Ct. App. 1977).

41. *Loscomb v. State*, 416 A.2d 1276, 1285 (Md. Ct. Spec. App. 1980) (dictum).

42. *Id.*; *see also Sparks*, 266 N.W.2d at 665 ("There was only one murder and hence one crime . . .").

punishment upon punishment. Fundamental fairness precludes such a practice.”⁴³ Later, the court said, “We think that point to be so obvious as not to need further comment.”⁴⁴ How much easier, and more satisfying, it is to include this prohibition within double jeopardy by defining same offense so that a single killing, a single act-type and act-token, can lead to but one conviction.⁴⁵

Indeed, it is the failure of *Blockburger* to erect a meaningful bar to multiple convictions that led the Court to seek a broader prohibition of successive prosecutions—the subject of the next three sections. Rather than remedy the deficiencies in *Blockburger*, the Court created a more protective test for the successive prosecution context, where the harm to the defendant is greater. While the concerns with the harm of successive prosecutions are valid, they are misplaced in the Double Jeopardy Clause context. They belong instead in a discussion of mandatory joinder.

C. Same Transaction Inclusion

The most robust same-offense test defines “offense” to mean “criminal transaction” when more than one trial is involved; thus “same offense” means “same transaction.” This is a constitutional act-type joinder requirement for criminal cases. The same-transaction test was tirelessly propounded by Justice Brennan, favored by Chief Justice Warren and Justices Douglas and Marshall, and recommended as a legislative solution by at least four advisory groups.⁴⁶

While an obvious problem exists in defining “transaction,” as Justice Brennan acknowledged, the general shape of the idea is clear enough. A defendant could not be tried for vehicular manslaughter following a conviction or acquittal of drunk driving, for example, if the traffic accident and the drunk driving are viewed as a single transaction. The entire transaction is treated as a single act-type, and any included act-type is the same offense.

Despite the many merits of compulsory joinder, the same-transaction test is an obviously flawed definition of same offense. Nothing in the text, history, or policy of forbidding more than one trial for the same offense remotely suggests that different offenses committed as part of a single transaction must be tried together or not at all. The constitutional question is whether offenses are the same, not whether the transaction is the same.

The two questions are not interchangeable unless the argument is that “offense” means “transaction,” an argument that has obvious linguistic and

43. *Loscomb*, 416 A.2d at 1285.

44. *Id.* at 1286.

45. The act-token question is different from the act-type question, and counting violations is sometimes different from both act-type and act-token questions, as Part V will seek to show. The *Loscomb* result is consistent with finding a single act-type; nonetheless, the court seemed to signal approval of two convictions of either act-type because two victims died in the car accident. *See id.*

46. *See Thomas, Prohibition of Successive Prosecutions, supra* note 2, at 332 n.52 (collecting authorities).

historical difficulties. The policy issue is more formidable; the equivalence of "offense" and "transaction" would preclude more than one conviction from the same transaction even if sought at a single trial. What this means, borrowing the words of Chief Justice Burger, is "that the second and third and fourth criminal acts are 'free'" if part of the same transaction, which "does not make good sense and . . . cannot make good law."⁴⁷ If one abandons the argument that double jeopardy "offense" equals "transaction," to avoid Burger's powerful critique, one is forced to defend the position that the Double Jeopardy Clause somehow contains a protection other than the one phrased in terms of "same offense."

The argument is untenable. Indeed, the same-transaction test diminishes the legislative power to create offenses. In effect, the criminal actor and the prosecutor define double jeopardy offenses by the manner in which the crimes are committed and charged. To state that proposition is to reject it.

D. Case-Specific Act-Type Inclusion

A less robust variant of the same transaction test is whether act-type inclusion exists with respect to the offenses charged, rather than within an arbitrary construct called a transaction. A trial for manslaughter is forbidden on this test if the state must rely on an act-type that it has already prosecuted, not because both act-types happened to occur in a single transaction but because the state may not prosecute an act-type already manifested in a verdict. This test is not obviously flawed. "Offense" could be defined so that any inclusion of act-types would make offenses the same.

In 1980, the Court suggested that, notwithstanding a different *Blockburger* result, traffic convictions would constitute the same offense as manslaughter if the state proved the traffic offense as a necessary part of a subsequent manslaughter prosecution.⁴⁸ In 1990, the Court squarely held in *Grady v. Corbin*⁴⁹ that double jeopardy analysis must be accomplished by a two-tier inquiry when successive prosecutions are involved.⁵⁰ The first tier is *Blockburger*'s distinct-element test. If the offenses are the same under that test, the second trial is impermissible.

But if *Blockburger* is satisfied, a more fine-grained inquiry must be conducted into the relationship between the act-types charged. The inquiry is more fine-grained because it looks at the act-types *as charged*, rather than the relationship between them in the abstract. In *Grady*, the Court held that a conviction for the act-type of drunk driving barred a later prosecution

47. *Ashe v. Swenson*, 397 U.S. 436, 469 (1970) (Burger, C.J., dissenting).

48. *Illinois v. Vitale*, 447 U.S. 410, 419 (1980). For an early discussion of *Vitale*'s implications, see George C. Thomas III, *RICO Prosecutions and the Double Jeopardy/Multiple Punishment Problem*, 78 Nw. U. L. Rev. 1359, 1389-1404 (1984) [hereinafter Thomas, *RICO Prosecutions*].

49. 495 U.S. 508 (1990), *overruled by* *United States v. Dixon*, 113 S. Ct. 2849 (1993).

50. *Id.* at 521-22.

for reckless manslaughter that would require proof of that act-type, even though drunk driving is not a necessarily-included offense of reckless manslaughter.⁵¹

The *Grady* test is not only more fine-grained than *Blockburger* but also differs in the kind of element that will make offenses distinct. *Blockburger* finds offenses different if each requires a distinct element of whatever nature, which could involve circumstances, mens rea, or result. But *Grady*'s focus is on act-types, as the Court's statement of its holding makes clear: "[T]he Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove *conduct that constitutes an offense* for which the defendant has already been prosecuted."⁵² Because it finds offenses the same based on act-type inclusion, ignoring other forms of element distinction, *Grady* avoids some of the indefensible results that *Blockburger* produces. For example, *Grady* would not reach the *Blockburger* result that intentional murder is different from felony murder. The act-type is the same: killing.

The Court overruled *Grady* after only three years, holding in *United States v. Dixon*⁵³ that *Blockburger* supplies the only test of same offense.⁵⁴ The *Dixon* factual setting is unusual: the initial offense was criminal contempt, and the subsequent prosecution was for the crimes used to prove the contempt.⁵⁵ Justice Scalia wrote for the Court in overruling *Grady*, but only Justice Kennedy joined the part of Scalia's opinion applying *Blockburger* to the facts of the two cases. Chief Justice Rehnquist, joined by Justices O'Connor and Thomas, found Scalia's interpretation of *Blockburger* too generous.⁵⁶

What distinguishes the Scalia and Rehnquist applications of *Blockburger* is again a question of how fine-grained the approach should be. Scalia asked whether the particular contempt orders necessarily included the offenses for which the defendants were later prosecuted.⁵⁷ Rehnquist would apply *Blockburger* by asking the coarse-grained question of whether the statute prohibiting contempt necessarily included the offenses prosecuted later.⁵⁸ The answer to Scalia's question is yes and no; two of the criminal offenses were included in a contempt order, and two were not. The answer to Rehnquist's question is no as to all four offenses;

51. *Id.* at 522-23. I simplify the facts of *Grady* in the text. The Court actually held that convictions for drunk driving and failure to keep to the right of the median barred a later trial for reckless manslaughter, criminally negligent homicide, and third-degree reckless assault. *Id.*

52. *Id.* at 521 (emphasis added).

53. 113 S. Ct. 2849 (1993).

54. *Id.* at 2860.

55. *Id.* at 2853.

56. *Id.* at 2865 (Rehnquist, C.J., concurring in part and dissenting in part) (joined by O'Connor & Thomas, JJ.) (disagreeing with Scalia's application of *Blockburger* to two of the four charges).

57. *Id.* at 2857 (Scalia, J., joined in this Part only by Kennedy, J.).

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

the statute authorizing contempt of court makes no mention of criminal offenses. Meanwhile, four Justices defended *Grady's* two-tier approach to successive prosecutions.⁵⁹ But the Court was right to overrule *Grady*, as I shall demonstrate in the next Section.

E. A Critique of the Two-Tier Test of Same Offense

The fundamental problem implicit in *Grady* is the unexamined premise that a broader protection against successive prosecutions can be found in the Double Jeopardy Clause. The premise can be traced back to Justice Black's eloquent statement of the rationale for Double Jeopardy: "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."⁶⁰

Eloquent though it is, Black's statement begs the question of whether the definition of same offense should be different when two trials occur. The case that prompted Black's eloquence involved two trials for the identical statutory offense.⁶¹ There is no doubt that when offenses are the same, the consequences of two trials are more onerous, but this tells us nothing about when two offenses *are* the same.

As Michael Moore has recognized, if offenses are truly different, successive prosecutions cannot be vexatious.⁶² It would not, for example, be thought vexatious to try R separately for robbing W on Wednesday and T on Thursday because no one doubts that these offenses are different. R might very well move for separate trials if the state sought to try both robberies in a single trial. Thus, if the Court had a good account of when offenses are truly different, rather than superficially different, Moore would be right that successive prosecution of different offenses is, by definition, non-vexatious.

Because no perfect test of offense difference is possible, it makes sense to prefer one trial when the same conduct proves more than one crime, whether or not the crimes are the same double jeopardy offense. Rules of joinder currently permit one trial when offenses are based on the same act or transaction.⁶³ The Model Penal Code proposes mandatory joinder when various offenses are proved by the same conduct, and several states have

59. *Id.* at 2869 (White, J., concurring in the judgment in part and dissenting in part) (joined by Souter, J., as to Part I, and Stevens, J.) (supporting *Grady*); *id.* at 2880 (Blackmun, J., concurring in the judgment in part and dissenting in part) (supporting *Grady*); *id.* at 2881 (Souter, J., concurring in the judgment in part and dissenting in part) (joined by Stevens, J.) (supporting *Grady*). Oddly enough, the same offense test that commanded the most support in *Dixon*, with four Justices in favor, was *Grady*.

60. *Green v. United States*, 355 U.S. 184, 187-88 (1957).

61. The charge was first-degree murder in both cases. *Green*, 355 U.S. at 185.

62. MOORE, *supra* note 5, at 353.

63. *See, e.g.*, FED. R. CRIM. P. 8(a).

similar rules and statutes.⁶⁴ I do not deny the salutary effect of mandatory joinder; my claim is that mandatory joinder cannot be accomplished through a two-tier test of same offense grounded in the Double Jeopardy Clause.

To defend a two-tier approach, one must argue that the Double Jeopardy Clause permits a defendant to be twice convicted and punished in one trial for what would have been the same offense if the state had tried the charges separately. What was the same is not the same if tried in a single trial. But how can the Double Jeopardy Clause accomplish that result? How is it that same offense is a chameleon that changes meaning in different procedural contexts? It is more sensible, instead, to view constitutional sameness as a property of offenses, rather than of the method of prosecution.

A second problem with *Grady* is its overinclusiveness. It is doubtful that any act-type inclusion, however trivial, should make offenses the same. As Michael Moore has noted, if any inclusion were enough, then driving an overweight vehicle would be the same offense as driving while intoxicated, which would be the same as driving without a license, and so on.⁶⁵

A final problem with *Grady* is the fine-grained nature of its inquiry. Though I reject the Amar-Marcus test of identity, there is nonetheless a linguistic and conceptual reluctance to say that drunk driving is the same offense as vehicular homicide. Indeed, speeding could be the same *Grady* offense as vehicular homicide, creating the unsavory spectacle of a traffic ticket barring a trial for homicide.

These difficulties suggest a solution: a single test for successive prosecutions and single trials, one that utilizes the *Blockburger* rough-grained requirement that the greater must always prove the lesser, but also looks for the greater-lesser relationship only among blameworthy act-types. That is the solution I propose in the next Part.

III

BLAMEWORTHY ACT-TYPE INCLUSION

My premise is that same offense can be understood only in terms of whether the legislature meant to create singular or distinct blameworthiness. Given the lack of explicit legislative intent on this question, it will usually be answered with a presumption. *Blockburger* uses the right methodology for a presumption when statutory descriptions are at issue: compare the descriptions to see whether either offense includes the other. Inclusion is the right methodology, but inclusion should be limited to blameworthy act-

64. See MODEL PENAL CODE § 1.07(2) (1985); Thomas, *Prohibition of Successive Prosecutions*, *supra* note 2, at 378 n.333 (noting twelve state statutes and rules of procedure that create mandatory joinder based on same transaction).

65. MOORE, *supra* note 5, at 341.

types.⁶⁶ The issue for this Part is how to determine when blameworthy act-types are included within another blameworthy act-type.

A. General Principles of Inclusion

One way to test for this double jeopardy inclusion is to subtract the core or common act-type from both offenses, and then look at left-over elements. Assume that element 2 is a common blameworthy act-type element in offense A (1, 2) and offense B (2, 3). We would subtract 2—the common element—and ask whether element 1 and element 3 are both blameworthy act-types. If they are, then the two offenses describe different blameworthy act-types and thus presumptively describe different blameworthiness. Robbery consists of the conjunctive act-type of larceny and assault. A statutory conjunctive act-type of assault and battery would describe different blameworthiness despite the common act-type of assault because the left-over elements (larceny and battery) are themselves blameworthy act-types.

There are no left-over elements when robbery is compared to its included offenses of larceny and assault. The blameworthiness of an offense always includes that of any necessarily-included offenses,⁶⁷ making robbery the same for double jeopardy purposes as larceny, and the same as assault. This inclusion does not, of course, make larceny the same offense as assault, the logical flaw that Amar and Marcus identify.⁶⁸ But the same-offense relationships hold for a more fundamental reason than logical identity: larceny and assault have nothing to do with each other but both occur every time robbery occurs.

Another possibility is that any left-over elements are not blameworthy act-types. My test disregards this kind of left-over element. Robbery would thus include grand larceny because the value of the property stolen is a circumstance element and not an act-type. Disregarding elements will sometimes leave only one act-type. For example, in offense A (1,2) and offense B (2,3), if neither 1 nor 3 is a blameworthy act-type, then the blameworthy act-type in both offenses would be 2, making the blameworthy act-types identical. The narcotics offenses in *Blockburger* provide an example: sale of narcotics outside the original stamped package and sale of the same narcotics without a written order of the purchaser. The Court held these were different offenses because neither offense was included within the

66. I acknowledge my debt to Moore. Though I previously published a sketchy form of the argument that links proscribed conduct with double jeopardy offense, the present form is heavily influenced by Moore. My previous argument lacked precision, in part because it did not distinguish between conduct proved at trial and proscribed conduct. See Thomas, *An Elegant Theory*, *supra* note 3, at 847-50.

67. Moore uses the concept of partial identity to explain why offenses are the same when they bear this relationship to each other. See MOORE, *supra* note 5, at 338-42. I prefer to conceptualize the relationship as one act-type encompassing the blameworthiness of the other.

68. Amar & Marcus, *supra* note 19, at 30.

other. I would subtract the common act-type of selling narcotics from each of these offenses, leaving (1) outside the original stamped package; and (2) without a written order of the purchaser. Neither of these elements manifests a blameworthy act-type; neither is an act, as traditionally understood, and neither is blameworthy even if associated with an intentional act. That is, unless the act itself supplies blameworthiness, it is not wrongful to intend to do something without a written order of a purchaser or with disregard for the original stamped package. As a result, neither of these circumstances constitute a blameworthy act type, and both should be disregarded. Perhaps no circumstance element will ever be blameworthy in its own right. But that is the very point of my enterprise—to separate out blameworthy *acts* from elements that are not acts.

Nor would differences in mens rea elements ever make blameworthiness, and thus offenses, different. Consider *Gore v. United States*.⁶⁹ Two of the three offenses in *Gore* were the *Blockburger* offenses: sale of narcotics outside the original stamped package, and sale of narcotics without a written order. The third offense was sale with the knowledge that the narcotics had been unlawfully imported.⁷⁰ Is the knowledge of unlawful importation a blameworthy act-type? No, because knowledge is a mental element and not an act. On my account, therefore, the Court was wrong in *Gore* to hold that the mens rea element made the third offense different from the other two.

But my blameworthy-act test agrees with the result and reasoning in the Court's first same-offense case involving different statutes. Each statutory offense in *In re Nielsen*, required proof of an element the other did not—adultery required proof of marriage, and cohabitation required proof of living together as man and wife.⁷¹ The Court nonetheless held the offenses to be the same,⁷² a result that has caused much debate among commentators and, lately, on the Court. In *Dixon*, Scalia and Souter engaged in a spirited exchange about the meaning of *Nielsen*.

Souter found support in *Nielsen* for the *Grady* fine-grained act-type test.⁷³ Because the act-type of adultery could be proved by the act-type of cohabitation, they would be the same offense under *Grady* if charged so that cohabitation included adultery. Scalia, resisting that interpretation, argued that *Nielsen* simply interpreted the statutory offense of cohabitation always to require proof of adultery.⁷⁴

Scalia did not explain how cohabitation could plausibly be construed to include adultery in every case. After all, the defining quality of adultery

69. 357 U.S. 386 (1958).

70. *Id.* at 387.

71. 131 U.S. 176, 187-88 (1889).

72. *Id.* at 186-87.

73. *United States v. Dixon*, 113 S. Ct. 2849, 2885 (1993) (Souter, J., concurring in the judgment in part and dissenting in part).

74. *Id.* at 2860-61.

is an offense against marriage. The more satisfying explanation lies in comparing the blameworthy act-types and disregarding the circumstance elements. When the *Nielsen* Court said the “material part of the adultery charged was comprised within the unlawful cohabitation,”⁷⁵ it meant sexual intercourse as the common act-type. “Living together as man and wife is what we decided was meant by unlawful cohabitation under the statute. Of course, that includes sexual intercourse. And *this was the integral part* of the adultery”⁷⁶ The Court noted that both cohabitation and adultery required proof of intercourse as an “essential and principal ingredient.”⁷⁷ Intercourse cannot be a blameworthy act-type, but intercourse outside of marriage can be.

Viewed in this light, both cohabitation and adultery describe the blameworthy act-type of intercourse outside of marriage. *Nielsen* was thus properly decided—not because the Court construed adultery to be included in a *Blockburger* sense, as Scalia would have it, or because the Court was applying a *Grady* fine-grained test of inclusion, as Souter would have it, but because both offenses proscribed the same blameworthy act-type. That one act-type required marriage of one party, and the other required living together as man and wife does not create distinct blameworthiness; these elements are simply different circumstances that make intercourse blameworthy. Similarly, selling narcotics without a tax stamp and selling not pursuant to a written order are different ways that selling narcotics can be blameworthy. But a single blameworthy act-type describes only one offense, regardless of the differences in circumstance elements, as the Court held in *Nielsen*.

The inclusion issue is more difficult, for *Blockburger* as well as for my test, when the statutes exist in a compound-predicate relationship. A compound statute is an aggravated offense that requires proof of another crime (the predicate), and an element that aggravates the predicate crime. In the federal crime of “continuing criminal enterprise,” for example, particular felony violations are predicate crimes, and the aggravating elements include the continuing nature of the violations.⁷⁸

B. Compound-Predicate Inclusion

Moore analyzes conjunctive act-types, like robbery, but not felony murder or any compound-predicate statute. Robbery can be noted as R =

75. *Nielsen*, 131 U.S. at 187.

76. *Id.* (emphasis added).

77. *Id.* at 189. There is, to be sure, also language supporting traditional act-type inclusion. For example, just prior to the remark about “essential and principal ingredient,” the Court referred to adultery as one of the “incidents included” within the greater offense of cohabitation. *Id.* at 188. My claim is not that identity of blameworthy act-types is the only way to understand *Nielsen* but, rather, that it is a better explanation of the Court’s continued reference to intercourse as the “principal” ingredient of both crimes.

78. See 21 U.S.C.A. § 848 (West Supp. 1995).

(A + L), where R is robbery, A is assault, and L is larceny. Felony murder takes the following form: $FM = [(F1 \text{ or } F2 \text{ or } F3 \dots Fn) + (K)]$, where K is a killing committed during the perpetration of any felony (F). Moore's view is that $R = (A + L)$ means $R = A$ and $R = L$, but I assume he would reject the equation $FM = F1$ because F1 is not an act-type in common with FM when F2 (or any F) would suffice along with K to prove FM.⁷⁹

The Supreme Court addressed this issue in *Whalen v. United States*.⁸⁰ The Court held only one conviction permissible for felony murder and rape when the particular felony murder required proof of the rape.⁸¹ This is the conception of *Blockburger* endorsed by Scalia and Kennedy in *Dixon* when the particular contempt order proscribed crimes that were later prosecuted. But the *Whalen* result seems wrong on a legislative-intent view of same offense. The notion that the legislature meant a conviction of rape to preempt a conviction of felony murder, or vice-versa, seems highly unlikely. Someone who rapes a woman and then kills her has committed two very different harms, for which the legislature likely intended separate penalties.

Same-offense tests do not work very well in the felony-murder context.⁸² In one sense, the Scalia-Kennedy sense, rape does not require proof of a different act than felony murder based on rape. Indeed, *Whalen* conceptualized felony murder as if it constituted six separate offenses: felony-murder-rape, felony-murder-robbery, etc. This makes a harder case for Moore (and for me) because now it *is* true that $FM = F$ (there is only one F in each species of FM) and thus F is included in FM. This seems the right way to approach a statute written in the alternative. As the Court noted in *Whalen*, Congress was, in effect, creating six separate offenses in a single statutory provision.⁸³ It could have created six statutes, and the difference in drafting should not be held to have substantive difference.

But F is *not* included in FM if proof of F is understood to function in felony murder as a substitute for mens rea. On that view, which I believe is both historically and functionally justified, rape and felony-murder-rape have no blameworthy act-type in common. The only element they share is rape, which does not function as an act-type in felony murder but, rather, as mens rea.

On any other reading of felony murder, it lacks a mens rea requirement. That the legislature meant to create a strict liability offense in felony murder seems unlikely; rather, the best inference is that one who acts with the mens rea of the underlying felony assumes the risk of a death that

79. Moore tentatively took that position during a December 12, 1994 criminal law workshop which I attended at the University of Pennsylvania.

80. 445 U.S. 684 (1980). The Court had previously decided this issue in a *per curiam* opinion that provides almost no analysis. See *Harris v. Oklahoma*, 433 U.S. 682, 682-83 (1977) (*per curiam*).

81. *Whalen*, 445 U.S. at 694-95.

82. I exclude from consideration *Grady*, because it has been overruled, and the same transaction test because it is not a test of "offense."

83. *Whalen*, 445 U.S. at 694.

results. But this view, in effect, reads the mens rea of the underlying felony into felony murder.

The structure of felony murder supports my mens rea argument. Any of a list of felonies will do, a list the legislature can expand or contract without worry about the resulting conjunctive act-type because they are not creating a conjunctive act-type. The *Whalen* felony-murder offense is typical:

Whoever, being of sound memory and discretion, kills another purposely, either of deliberate and premeditated malice or by means of poison, or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, *or without purpose so to do* kills another in perpetrating or in attempting to perpetrate any arson, . . . rape, mayhem, robbery, or kidnapping, or in perpetrating or attempting to perpetrate any housebreaking while armed with or using a dangerous weapon, is guilty of murder in the first degree.⁸⁴

It could not be clearer from the structure of this statute that the perpetration of the serious felonies of arson, rape, mayhem, robbery, or kidnapping is intended to replace the purposeful mens rea that attends the various ways first-degree murder can be accomplished in the part of the statute preceding the italics. This supports my view that the felony is not being added to the killing as a conjunctive act-type but is, instead, functioning as a mens rea element. So viewed, rape and felony-murder-rape have no act-type in common and, on my account, proscribe different blameworthiness. Rehnquist made a similar point in his *Whalen* dissent when he agreed with the lower court that cumulative penalties were permissible because rape and felony murder are designed to prevent different harms.⁸⁵

Rehnquist also noted that, in the context of compound-predicate statutes, the *Blockburger* test "is less satisfactory, and perhaps even misdirected."⁸⁶ The Court seemed to agree five years later when faced with the compound offense of "continuing criminal enterprise" (CCE).⁸⁷ The *Whalen* application of *Blockburger* would view each CCE violation as a separate statutory offense that contains the particular predicates as necessarily included offenses. Thus, as the Court conceded in the CCE case, *Blockburger* would define these offenses to be the same.⁸⁸

84. *Id.* at 710 (Rehnquist, J., dissenting) (quoting D.C. CODE ANN. § 22-2401 (1973)) (emphasis added).

85. *See id.* at 713 (Rehnquist, J., dissenting). Rehnquist also found the same result from *Blockburger*, strictly applied. Under the rape statute and the felony murder statute, "[o]ne can commit felony murder without rape and one can rape without committing felony murder." *Id.* at 710. This view of *Blockburger* also underlies Rehnquist's partial dissent in *Dixon*, in which he is joined by Justices O'Connor and Thomas. *See supra* notes 53-58 and accompanying text.

86. *Whalen*, 445 U.S. at 708.

87. *Garrett v. United States*, 471 U.S. 773 (1985).

88. *Id.* at 778-79.

My test of blameworthy act inclusion reaches a different result. Like felony murder, CCE is defined without mens rea. A person is guilty of CCE if he (1) violates any felony provision of specified subchapters; (2) the violation is "part of a continuing series of violations" of those subchapters; and (3) the person occupies a supervisory role over five or more persons, and obtains substantial income from the organization.⁸⁹

Of course, the requirements about organization, management, etc., require intent. But drawing money from organizing or managing five or more people is not criminal. What makes it criminal is that it is a criminal enterprise. The only way the statute requires intent to engage in a criminal enterprise is by the existence of the prior criminal violations. The legislative purpose for requiring proof of those violations is not to punish the actor again—what would be the point?—but to infer intent to engage in CCE. The predicates thus function here, as in felony murder, as a stand-in for mens rea.

Viewed in this manner, a predicate is not an *act-type* in common with CCE even if the predicate is part of the CCE proof. Thus, the crime that serves as a predicate is a different offense from CCE. The Court reached this result, using a labored analysis to conclude that the *Blockburger* result should be ignored because Congress meant to define CCE as a separately punishable offense from its predicates.⁹⁰ Of course. The wholly implausible contrary inference is that Congress created CCE for the narrow category of cases in which no prosecution on the predicate offenses had ever occurred.

Waiting in the wings is the issue of whether a RICO (Racketeer Influenced and Corrupt Organizations Act)⁹¹ violation and its predicate offenses define the same offense. Without belaboring the point, I note that the structure of RICO is the same as CCE. No independent mens rea is required to prove that the defendant intended to engage in a pattern of racketeering activity; the proof of predicates supplies this intent. Thus, on my view, RICO and its predicates have no act-type in common and are not the same offense.⁹²

The compound-predicate cases suggest that my test of blameworthy act inclusion is a better measure of legislative intent than *Blockburger*. The Court applied a version of *Blockburger* to felony murder, but then had to find legislative intent to rebut that same application when it came to CCE.⁹³ Presumably, the Court will follow the CCE approach in RICO. *Blockburger* thus has to be rebutted in two of three compound-predicate

89. 21 U.S.C.A. § 848(c) (West Supp. 1995).

90. *Garrett*, 471 U.S. at 777-86.

91. 18 U.S.C.A. §§ 1962, 1963 (West 1984 & Supp. 1995).

92. I suggested in 1984 that RICO might be the same offense as its predicates on the *Whalen* view of same offense. See Thomas, *RICO Prosecutions*, *supra* note 48, at 1377-86. I now see, however, that *Whalen* itself was in error.

93. *Garrett*, 471 U.S. at 779-86.

contexts, while my test presumes the same legislative intent with respect to felony murder, CCE, and RICO. As long as the legislature is using the predicate to supply mens rea, a predicate offense is not an included act-type in the compound offense. This analysis requires overruling *Whalen*, but I remain unconvinced that any legislature would intend a conviction of rape or robbery to render impossible a conviction of murder.

The difficulty with *Blockburger* (and *Grady*, for that matter) is the mechanical nature of the test. That is why the Court often finds *Blockburger* rebutted by fairly thin evidence of congressional intent.⁹⁴ A substantive test of same offense is preferable, as I discuss briefly in the next Section.

C. Substantive Sameness

In my view, courts have avoided the same-offense question at least since *Blockburger* was decided in 1932. Courts do not ask the only important question: whether offenses are substantively different. They do not ask that question, of course, because it is virtually impossible to answer as an unstructured inquiry. Is selling narcotics outside the original stamped package the same substantive offense as selling narcotics without a purchaser's written order? I think so, but the Court disagreed in *Blockburger* and *Gore*. Is rape the same substantive offense as felony-murder-rape? I do not think so, but the Court disagreed in *Whalen*.

Despite the difficulties, a substantive test of same offense is the only way to produce a satisfying account of when offenses are truly the same. Moore and I have sketched accounts that measure substantive sameness. There is one other approach that seeks a substantive solution, but it is only tenuously connected to an account of same offense. Peter Westen and Richard Drubel recommend balancing interests in each case to decide whether the outcome violates double jeopardy policies.⁹⁵ On this legal realist view, there is no reason to seek a definition of same offense.⁹⁶ Courts should recognize instead that the Double Jeopardy Clause generates a set of values that can be arranged in a hierarchical manner. Paying close attention to this hierarchy of values in the context of each case will lead judges to reach the right same-offense result.

94. See, e.g., *Prince v. United States*, 352 U.S. 322, 325-36 (1957) (avoiding use of *Blockburger* by relying on congressional intent, gleaned principally from a letter the Attorney General wrote to Congress).

95. Peter Westen & Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 Sup. Ct. Rev. 81, 84 (suggesting that the Double Jeopardy Clause protects three distinct interests and devising a theory that takes these interests into account); see also Simon, *supra* note 7, at 265-66.

96. In a later paper, after noting three separate double jeopardy purposes, Westen dismissed the necessity of having a same-offense definition. In a footnote, he wrote: "To try to formulate a single definition of 'same offense' for these three separate purposes would produce a statement of such abstract generality as to be of no usefulness in resolving actual cases." Peter Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentence*, 78 MICH. L. REV. 1001, 1004 n.12 (1980). Unfortunately, Westen does not even offer a definition for each separate purpose.

Moore has rejected this type of legal realist approach to double jeopardy. It is, Moore says, a "call for 'same offence' to be no more than the legal name put on the conclusion of an *ad hoc* balancing of values done in each double-jeopardy case."⁹⁷ I agree with that assessment.

Though my account of blameworthy act-types is similar to Moore's moral account, we begin from different premises. For Moore, the underlying purpose of achieving proportionate punishment for wrongdoing "demands an individuation of 'same offence' by morally wrong act-types."⁹⁸ For me, the underlying purpose of achieving proportionate punishment for wrongdoing demands individuating same offense by how the legislature intended the wrongdoing to be punished. The role of blameworthy act-types, in my scheme, is simply to create a presumption about what the legislature intended.

IV

THE LEGISLATIVE ROLE

The premise underlying my blameworthy-act theory is that legislatures create criminal blameworthiness. Legislative intent as to whether that blameworthiness is singular or distinct is therefore the sole meaning of double jeopardy offense. I can imagine a skeptic who would say this puts too much power in the hands of legislators who exist to get re-elected and who therefore pander to the public's fear of crime. The skeptic would say that to defer completely to the legislature somehow denies the Double Jeopardy Clause the independence that constitutional rights require.

The skeptic might argue that the power to define double jeopardy offense belongs to judges. Judges are charged with the responsibility to define "search," "seizure," "cruel and unusual punishment," and "coercion," to name a few difficult constitutional concepts. Why not "offense"? While judges admittedly have a role to play here, I believe it is limited to determining how the legislature meant to assign criminal blameworthiness.

A. A Limited Judicial Role

The reasons for a limited judicial role are historical, linguistic, and functional. Historically, the double jeopardy principle has always operated as a limitation on prosecutors and judges but not on the law-giver.⁹⁹

97. MOORE, *supra* note 5, at 355.

98. *Id.* at 354. Moore's emphasis on morality and my focus on positivism seem, in practice at least, indistinguishable. Moore broadens his account of morality to include instrumental as well as intrinsic wrongs. He seeks to uncover instrumental wrongs by "reconstruct[ing] the maximally efficacious act-types that serve each . . . statutory purpose." *Id.* at 340. That seems no different from my inquiry into what acts the legislature sought to make blameworthy. Thus, my use of "blameworthy acts" is roughly the same as Moore's use of "morally-salient acts."

99. A full proof of this statement is beyond the scope of this Article, but I provide the "book-ends" of the proof. Henry II's Assize of Clarendon (1166) imposed a penalty on some defendants who were acquitted. See ASSIZE OF CLARENDON para. 14 (1166), *translated in* SOURCES OF ENGLISH

Moreover, as noted earlier, concepts like "coercion" and "cruel" have cultural referents that exist independently of anything the legislature might do. A law defining coercion, for example, would not supplant the self-incrimination clause. But "offense" is different; there is no referent beyond what the offense-creating institution has done. We might say that it is immoral to lie or cheat. But we cannot say that it is an "offense," in the criminal law sense or the double jeopardy sense, until the appropriate institution has made it an offense.

In Blackstone's day, most criminal offenses were defined by judicial decision. Common-law judges refined the criminal "code" over the centuries, creating sub-categories of offenses as necessary—creating manslaughter as a crime distinct from murder, for example, to distinguish its lesser blameworthiness.¹⁰⁰ These overlapping crimes permitted more than one prosecution to be based on a single act-token; double jeopardy doctrine responded with an increased focus on act identity. When Blackstone gave murder and manslaughter as an example of "the same identical act and crime,"¹⁰¹ the most obvious identity is between the acts which prove the two seemingly non-identical crimes.

Judges eventually relinquished to the legislature the role of defining and refining the criminal law. With the role of defining crimes comes the role of defining jeopardy offenses. A test that looks at proscribed blameworthy act-types thus places the responsibility for defining double jeopardy offense with the legislature, where it belongs.

Important questions remain. There are at least two ways the legislature could be charged with the responsibility of defining double jeopardy offense. On Moore's account, the legislative choice of which elements to include in criminal statutes is the key moment. From there, presumably, Moore's metaphysics of morally wrong act-types does all the work of individuating double jeopardy offenses.¹⁰² On my account, however, action theory provides only a presumption about relevant legislative intent. A

CONSTITUTIONAL HISTORY (Carl Stephenson & Frederick G. Marcham eds. & trans., 1937). More than eight hundred years later, the Supreme Court would say that "the question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed." *Albernaz v. United States*, 450 U.S. 333, 344 (1981).

100. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* 605 (2d ed. 1986) (hornbook ed.) (noting that the common-law judges had "some help from the legislature" on this task).

101. BLACKSTONE, *supra* note 13, at *336.

102. I may be misinterpreting Moore on this point. In applying his metaphysics to the purposes of double jeopardy, he says that same offense should be interpreted to prevent disproportionate punishment. He continues: "Only by doing so can courts give a content [t]o the double jeopardy presumption that allows legislatures not to worry about the overlapping-prohibition problem." MOORE, *supra* note 5, at 351. I read this in context, however, as explaining *why* there is a double jeopardy presumption against multiple punishment for the same offense, not a description of *how* the analysis operates in individual cases. For example, Moore later says that same offense "means partial or full identity of those act-types that morality makes, intrinsically or instrumentally, wrong." *Id.* at 355.

clear statement of that intent should, therefore, rebut any contrary inference from action theory (or, indeed, any source).¹⁰³

B. Crystal-Clear Legislative Intent

The role of legislative intent was raised in its starkest form in *Missouri v. Hunter*.¹⁰⁴ Simplified somewhat, the Missouri statutes prohibited robbery and armed criminal action, the latter offense occurring every time a felony was committed with the use of a deadly weapon. As the state courts recognized, this is a compound-predicate statutory scheme indistinguishable from *Whalen*.¹⁰⁵ Thus, armed-criminal-action-robbery always proves robbery, in the same way that felony-murder-rape always proves rape. Despite repeated reversals for reconsideration by the United States Supreme Court, the state courts held that armed criminal action was the same offense as its predicates.¹⁰⁶ The Supreme Court had, after all, applied *Blockburger* in *Whalen* to hold that rape was the same offense as felony-murder-rape.

But no test of same offense was necessary in *Hunter*. The state court's reference to *Whalen*'s application of *Blockburger* simply missed the point of the role of same offense tests. The intent to cumulate penalties was clear in the *Hunter* armed criminal action statute: "The punishment imposed pursuant to this [statute] shall be in addition to any punishment provided by law [for any other crime committed with a firearm]."¹⁰⁷ For the Court, that was the end of the matter. Offenses are never the same, the Court held, when a "legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the 'same' conduct under *Blockburger*."¹⁰⁸ On this view, as in my account, same offense tests serve merely to presume relevant legislative intent.

Whether *Hunter* is right turns out to be a question about whether the Double Jeopardy Clause limits the form of punishment. If the rule were

103. An explicit finding by a state court of legislative intent to authorize (or forbid) multiple convictions would also be nonreviewable in federal court. As Justice Rehnquist has aptly observed, "For the question in such cases is not whether the lower court 'misread' the relevant statutes or its own common law, but rather who does the reading in the first place." *Whalen v. United States*, 445 U.S. 684, 706-07 (1980) (Rehnquist, J., dissenting); see also George C. Thomas III, *Multiple Punishments for the Same Offense: The Analysis After Missouri v. Hunter*, 62 WASH. U. L.Q. 79, 114-20 (1984) [hereinafter Thomas, *Multiple Punishments*].

104. 459 U.S. 359 (1983).

105. See, e.g., *Sours v. State*, 603 S.W.2d 592, 604 (Mo. 1980), cert. denied, 449 U.S. 1131 (1981).

106. The United States Supreme Court vacated and remanded over 100 Missouri cases that refused to permit dual convictions for armed criminal action and an underlying felony. For a discussion of the war of wills between the Missouri Supreme Court and the United States Supreme Court, see generally Thomas, *Multiple Punishments*, supra note 103. Ironically, some of the early reversals were for reconsideration in light of *Whalen*, which had reached the same result as the state supreme court. What the Supreme Court meant the state court to consider, however, was not the *Whalen* result but the *Whalen* analysis. Though only dicta, *Whalen* clearly relegated *Blockburger* to presumptive status; it was simply a way to arrive at the crucial fact—"what punishments the Legislative Branch has authorized." *Whalen v. United States*, 445 U.S. 684, 688 (1980).

107. *Hunter*, 459 U.S. at 362 (quoting Mo. REV. STAT. § 559.225 (Supp. 1976)).

108. *Id.* at 368-69.

that the legislature cannot turn a single blameworthy act-type into more than one offense, regardless of how clearly it speaks, the legislature could still achieve the same result through its punishing power. *Gore v. United States*, for example, involved three statutes which punished the act-type of selling narcotics.¹⁰⁹ The *Gore* majority noted that Congress could have created a three-tier sentencing scheme that authorized fifteen years in prison for selling narcotics (1) outside the original package; (2) without a written order; and (3) with knowledge of its unlawful importation.¹¹⁰ The authorized punishment could then be reduced by five years for each aggravating circumstance not present, creating a sentencing scheme indistinguishable from the statutes facing the Court in *Gore*.¹¹¹

To use this as evidence of congressional intent to cumulate penalties, as the Court did in *Gore*, is not helpful. Of course, Congress *could* have passed this statute, but it has not done so. As Larry Simon noted, the "statutes in *Gore* were *not* the functional equivalent of the Court's hypothetical statute"¹¹² because the legislative intent is clear only in the hypothetical statute. On the issue of whether legislative intent is the only determinant of same offense, however, the hypothetical statute is a powerful argument. Should the Double Jeopardy Clause forbid in one form what Congress can clearly accomplish in another?

If the legislative intent to cumulate penalties on the same blameworthy act-type is "crystal clear,"¹¹³ the difference between doing it in one statute or in multiple statutes is the existence of more than one conviction. Obviously, the legislature can authorize the same penalty either way. Though multiple convictions create more onerous collateral consequences (e.g., parole eligibility, habitual offender status),¹¹⁴ the clarity of the legislative intent makes this difference constitutionally irrelevant. If the legislature makes clear that it wants two convictions, then it wants whatever collateral consequences attend two convictions, and can have those consequences as long as the total punishment is not cruel and unusual under the Eighth Amendment.

So the question is whether there is anything in the Double Jeopardy Clause definition of "offense" that precludes the legislature from authorizing two convictions for the very same act-type. *Hunter* held there is not, and it is difficult to imagine what that something would be. Short of giving

109. 357 U.S. 386 (1958).

110. *Id.* at 392-93 (1958).

111. *Id.*

112. Simon, *supra* note 7, at 304.

113. This was the Court's characterization of the legislative intent in *Hunter*. 459 U.S. 359, 368 (1983).

114. See *Ball v. United States*, 470 U.S. 856, 865 (1985) (reaching the obvious conclusion that multiple convictions constitute multiple punishment whether or not a sentence has been imposed, in part because of these collateral consequences). I discuss the implications of *Ball* in George C. Thomas III, *Sentencing Problems Under the Multiple Punishment Doctrine*, 31 VILL. L. REV. 1351 (1986).

“offense” a transcendent quality, which was Justice Marshall’s strategy in his *Hunter* dissent,¹¹⁵ two offenses are always different if the legislature orders X conduct to be punished as offense A and offense B. For example, Congress could specify that it wants the sale of narcotics outside the original stamped package punished in addition to sale without a written order. On my account, this singular blameworthy act-type would nevertheless then be two offenses.¹¹⁶

The central premise of my account is the *Hunter* view that sufficiently clear legislative intent answers the same offense question. But the legislature almost never expresses its intent explicitly on any aspect of the blameworthy-act problem—i.e., how it wants act-tokens counted or overlapping act-types punished. Indeed, Moore argues that the function of double jeopardy is to relieve the legislature from having to express its intent with respect to each possible combination of act-types and with respect to each collection of act-tokens.¹¹⁷ The number of discrete situations requiring such an expression of legislative intent is in the billions.¹¹⁸

Thus, courts have to make two important decisions. First, they must decide what same offense presumption to follow. I have argued to this point that a blameworthy act-type presumption is better than the *Blockburger* presumption. The second decision is what clarity of legislative intent it takes to overcome that presumption, which is the focus of the next section.

C. *Implicit Indicia of Legislative Intent*

Gore contains a classic analysis of the role of legislative intent in multiple punishment doctrine. Though the Court sought evidence to support the *Blockburger* presumption, rather than to rebut it, the analysis provides a useful vehicle for discussing implicit indicia of intent. The *Gore* Court found evidence of congressional intent to cumulate penalties in the “three different enactments, each relating to a separate way of closing in on illicit distribution of narcotics, passed at three different periods, for each of which a separate punishment was declared by Congress.”¹¹⁹

The Court’s analysis is less compelling than it seems at first glance. Legislatures usually place different offense descriptions in different enact-

115. 459 U.S. at 373-74 (Marshall, J., dissenting).

116. Moore does not discuss *Hunter*, nor the role of explicit legislative intent as a way of creating more than one offense. But his account does not seem to contemplate a role for that kind of offense individuation.

117. MOORE, *supra* note 5, at 4-5, 351.

118. Moore notes that just on the act-type question alone, and assuming only two act-types are charged at one time, a typical criminal code would require forty-nine million pair-wise comparisons. *Id.* at 4. The total combinations must also include the different ways act-tokens can instantiate one (or more) act-types, and the possibility of three or more act-types being charged. A conservative estimate for total combinations is thus billions.

119. *Gore v. United States*, 357 U.S. 386, 391 (1958).

ments—auto theft and joyriding, for example, or murder and manslaughter. Of course a separate punishment for each offense was declared; this is inevitable with different offense descriptions. When has a legislature ever described a crime without authorizing a punishment?

The remaining evidence in *Gore* that Congress meant the same blameworthy act-type to be punished cumulatively is that the statutes were passed at different times. While this fact is at least responsive to the question of whether Congress intended to cumulate penalties, it cannot be dispositive. One can imagine any number of reasons Congress may later pass a statute proscribing the same act-type without intending it to be punishable in addition to the earlier statute.

In reference to *Gore*, it is easy to envision Congress, at different times, considering different aspects of the narcotics problem, and passing legislation to address those aspects, without intending the penalties to be cumulated. Two of the offenses in *Gore* were defined by Internal Revenue statutes designed to eliminate two ways of selling narcotics without paying the excise tax—selling without a written order of the purchaser and selling outside the original stamped package.¹²⁰ The third offense, sale with knowledge of unlawful importation, was in the dangerous drug section of the federal criminal code, designed to punish persons who encourage the importation of narcotics.¹²¹

While I am persuaded by Chief Justice Warren's dissent in *Gore*—that Congress did not authorize cumulative punishments¹²²—*Gore* remains inscrutable on the merits. Who knows what Congress was thinking on the issue of cumulative punishments. The evidence is sufficiently in equipoise that any same-offense presumption should prevail. It is critical, then, which presumption a court uses. *Blockburger* presumes that all three offenses are distinct. There is surely insufficient evidence of intent to rebut that presumption.

On my account, the three statutes proscribe the single blameworthy act-type of selling narcotics, thus presuming a singular blameworthiness. This presumption, based on the number of blameworthy acts, should not be easy to rebut. The number of wrongful acts is the most significant indicator of whether blameworthiness is singular or distinct. Perhaps rebutting an action theory presumption should require legislative intent that is as "crystal clear" as that in *Hunter*. It should not require much less.

The presence of different statutes, passed at different times, is not very clear evidence of intent to cumulate penalties. Indeed, the murky inferences the Court drew in *Gore* failed to persuade the four dissenters even to accept the *Blockburger* presumption. Giving even moderate weight to my blameworthy-act presumption means that the *Gore* evidence is insufficient to

120. *See id.* at 387.

121. *See id.*

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

rebut it. On my account, only a single double jeopardy offense was created by the three statutes, and only a single conviction should have been permitted.

The blameworthy-act presumption is easier to rebut in two somewhat specialized double jeopardy contexts. Offenses in different jurisdictions have given rise to the “dual sovereignty” doctrine. Offenses that are formally non-criminal may operate as a criminal penalty if their purpose is punishment or deterrence rather than remediation.

The question in these contexts is not whether the blameworthy act-type is presumptively the same. It must be the same; otherwise, the offenses would be different according to my basic account, and no reason would exist to examine the question further. But assuming that the same blameworthy act-type is proscribed in more than one statute, the issue in these cases is whether the legislature nonetheless intended the act-type to be prosecuted twice.

D. Dual Sovereignty

As early as 1820, the Supreme Court recognized that both a federal and a state statute might proscribe the same offense.¹²³ The Court also recognized that this was a difficult problem in federalism. As Justice Story said in *Houston v. Moore*, “Questions of this nature are always of great importance and delicacy. They involve interests of so much magnitude, and of such deep and permanent public concern, that they cannot but be approached with uncommon anxiety.”¹²⁴

Story noted two possible outcomes when a defendant is convicted or acquitted under a state law that proscribes the same offense as a federal law. Either the federal authorities are thereby deprived “of their authority to try the same case, in violation of the jurisdiction confided to them by Congress,” or the defendant is “liable to be twice tried and punished for the same offence, against the manifest intent of the act of Congress, the principles of the common law, and the genius of our free government.”¹²⁵ As neither result was palatable to Story, he concluded that the state law at issue was void.¹²⁶

Justice Washington, delivering the Court’s judgment, agreed with Story that federal and state statutes could not both be given effect when they

123. *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 16 (1820).

124. *Id.* at 48 (Story, J., dissenting).

125. *Id.* at 72 (Story, J., dissenting). Story did not expressly include the Double Jeopardy Clause as an offended principle, probably because of his view that the state penalty at issue did not put the defendant’s “life or limb” in jeopardy. This long-ignored dimension of the jeopardy problem is beyond the scope of the present Article. For some preliminary, pre-*Dixon* thoughts about giving meaning to this part of the Clause, see generally George C. Thomas III, *A Modest Proposal to Save the Double Jeopardy Clause*, 69 WASH. U. L.Q. 195 (1991).

126. *Houston*, 18 U.S. (5 Wheat.) at 75-76 (Story, J., dissenting).

proscribed the same offense.¹²⁷ It is not clear whether Washington found this result compelled by double jeopardy principles or by general principles of federalism, but he did find the problem to be one of ascertaining legislative intent. He wrote that if the two legislative wills "correspond in every respect, then the latter is idle and inoperative; if they differ, they must, in the nature of things, oppose each other, so far as they do differ."¹²⁸ From this notion that the legislative wills should be construed to operate in harmony, Washington stated a presumption of singular blameworthiness—if one sovereign imposes a punishment for a certain offense, "the presumption is, that this was deemed sufficient, and, under all circumstances, the only proper one."¹²⁹

Justice Johnson's concurring opinion states a more formalist view: "Why may not the same offence be made punishable both under the laws of the States, and of the United States? Every citizen of a State owes a double allegiance; he enjoys the protection and participates in the government of both the State and the United States."¹³⁰ What is different here, of course, is the possibility that statutes identical in substance are not the same offense because they are not formalistically the same statutory offense. The Court has consistently followed Justice Johnson's formalist view. These offenses are not the same, the argument goes, because they were passed by legislatures which operate independently of each other, and which protect distinct interests by their criminal law. Thus, a conspiracy conviction in state court will not prevent a federal prosecution for the same conspiracy.¹³¹ Nor does collateral estoppel fare any better; an acquittal of bank robbery in federal court will not forbid a state prosecution for the same bank robbery.¹³²

Moreover, on the principle of legislative independence, each state is a separate sovereign from the other forty-nine states. A murder conviction in Georgia does not bar a murder prosecution in Alabama of the same defendant for the same killing.¹³³ The same analysis governs Indian tribal courts. A conviction in an Indian tribal court would not bar a federal prosecution.¹³⁴ But the principle of legislative independence would not justify dual prosecutions for state and municipal offenses.¹³⁵ As subdivisions of states, municipalities have no legislative independence.

127. *Id.* at 23-24.

128. *Id.* at 23.

129. *Id.*

130. *Id.* at 33 (Johnson, J., concurring). Johnson did not mean that the same offense could always be punished by the state and federal governments; he saw that as restrained by the Double Jeopardy Clause in appropriate cases. *Id.* at 34. Thus, it was left for later courts to expand Johnson's formalist view of sovereignty always to permit dual punishments. See *infra* notes 131-134.

131. *Abbate v. United States*, 359 U.S. 187, 195-96 (1959); see also *United States v. Lanza*, 260 U.S. 377, 382 (1922).

132. *Bartkus v. Illinois*, 359 U.S. 121, 136-39 (1959).

133. *Heath v. Alabama*, 474 U.S. 82, 92-94 (1985).

134. *United States v. Wheeler*, 435 U.S. 313, 330-32 (1978).

135. *Waller v. Florida*, 397 U.S. 387, 392-95 (1970).

In these cases, the Court's guiding principle is federalism, not the Double Jeopardy Clause. To conclude that separate sovereigns can *proscribe* the same blameworthy act-type is not to answer the question whether each sovereign intended to *prosecute* the act-type even if the other sovereign has already done so. Justice Washington found the answer to the latter question in a presumption about legislative intent: the two legislatures would not wish to oppose each other by enacting a punishment that could not "consist harmoniously together" with that of the other sovereign.¹³⁶

As the modern Court favors the formalistic federalism principle, the presumption today favors permitting both penalties. Thus, each sovereign bears the burden to rebut the presumption that it did not intend to prosecute following a verdict of the other sovereign. Nonetheless, choosing a presumption on this issue makes little practical difference. Either presumption is easily rebutted by a single, global expression of legislative intent.

Half the state legislatures have, in one form or another, rebutted the federalism presumption by barring a state trial for the same offense as that prosecuted by another sovereign.¹³⁷ At the federal level, Congress has never seen fit to rebut the presumption favoring dual prosecutions, but the Department of Justice has operated since 1959 under a self-imposed limitation that is, in some ways, far broader than my blameworthy-act presumption.¹³⁸ In sum, the federal government and most states have imposed strictures on the use of the power made available to them by the formalist federalism model. This development is quite persuasive evidence, in my view, that the presumption ought to favor prohibiting a second trial for the same blameworthy act-type even when different sovereigns prosecute.¹³⁹

However the presumption is structured, the point for my theory is that the double jeopardy analysis will turn on legislative intent. If the legislature

136. *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 23 (1820).

137. See Michael A. Dawson, Note, *Popular Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine*, 102 YALE L.J. 281, 294 n.94 (1992) (listing twenty-three state statutes); see also COLO. REV. STAT. ANN. § 18-1-303 (West 1994); KAN. CRIM. CODE ANN. § 21-3108(3) (Vernon 1993); NEV. REV. STAT. ANN. § 171.070 (Michie 1993). At least 26 states thus bar by statute a prosecution that follows a federal verdict for the same offense.

138. Though subject to a series of exceptions for cases in which the state prosecution leaves a "substantial federal interest demonstrably unvindicated," see UNITED STATES ATTORNEY'S MANUAL 9-2.142, at IV.B. (Dec. 14, 1994 revision), the policy is otherwise broader than any same-offense test the Court has ever used. Federal prosecutions which cannot be justified under one of the exceptions are barred if based on "substantially the same act(s), or transaction(s)" as the state case. *Id.* at I.C. This amounts to Justice Brennan's same-transaction test. See *supra* Part II.C. The current federal policy was enacted as a response to *Abbate v. United States*, 359 U.S. 187 (1959), in effect giving up the total freedom to re prosecute reiterated in that decision. See 27 U.S.L.W. 2509 (U.S. Apr. 7, 1959).

I do not claim that these self-imposed limitations have solved the problem created by the Court's dual sovereignty doctrine. For a skeptical view about the doctrine and how it plays out in drug cases, see Sandra Guerra, *The Myth of Dual Sovereignty: Multijurisdictional Drug Law Enforcement and Double Jeopardy*, 73 N.C. L. REV. 1159 (1995).

139. On this point, then, I agree with Amar and Marcus. See Amar & Marcus, *supra* note 19, at 21-25 (proposing a ban on state-federal and federal-state prosecutions, with an exception for federal prosecutions of state officials).

intends to punish the same blameworthy act-type in addition to what the other sovereign does, it need only say so. The next issue reinforces this point.

E. Penalties Denominated as "Civil"

Assume a civil fraud statute that prohibits the same blameworthy act-type as criminal fraud. Moreover, assume that the civil statute sets minimum liquidated damages that may far exceed the actual damages. Can the state prosecute this civil fraud following a conviction for criminal fraud?

For my theory, the answer is the same as in the dual sovereignty context: the legislature can have both a criminal and a civil penalty for the same blameworthy act-type as long as it intends that result. The categorization of penalties as "civil" or "criminal" makes no difference on my legislative-intent view of double jeopardy, though the fundamental distinction between civil and criminal is relevant when inferring legislative intent. In general, one would assume that the legislature intended civil damages to be available in addition to the criminal sanction, thus making them different double jeopardy offenses.

In *United States v. Halper*,¹⁴⁰ however, a unanimous Court held that sixty-five counts of civil fraud constituted a "criminal" penalty when it followed a criminal conviction for the same acts of fraud. The Court relied on the disparity between the actual damages caused by the fraud (\$585) and the minimum liquidated damages that would attend conviction on all counts (\$130,000) to conclude that the civil fraud prosecution was punitive and not remedial.¹⁴¹ Due to its punitive nature, the "civil" proceeding was substantively criminal and thus barred by the Double Jeopardy Clause.¹⁴²

Halper was an easy case in which to infer a punitive prosecutorial motive; the minimum statutory damages were 220 times the actual damages. But *Department of Revenue of Montana v. Kurth Ranch* illustrates the difficulties of making the civil/criminal distinction in other contexts.¹⁴³ The Court split 5-4 over the issue of whether a tax on the possession of illegal drugs is a criminal penalty and thus barred by a criminal conviction for the same drug possession. The *Kurth Ranch* majority concluded that the tax was a criminal penalty because it was punitive.¹⁴⁴ Justice Scalia argued in dissent that the punitive nature of the tax was irrelevant because no multiple punishment violation occurs when the additional penalty is authorized by the legislature.¹⁴⁵

140. 490 U.S. 435 (1989).

141. *Id.* at 446-48.

142. *Id.* at 452.

143. 114 S. Ct. 1937 (1994).

144. *Id.* at 1948.

145. Scalia would find the multiple punishment protection in the Due Process Clause, rather than the Double Jeopardy Clause, but he acknowledges that in most cases the source of the protection makes no difference. *Id.* at 1956-57 (Scalia, J., dissenting).

Justice Scalia's dissent in *Kurth Ranch* supports my view of the role of legislative intent. Because the Montana statute explicitly contemplated the imposition of a tax following criminal sanctions, the tax statute does not create the same legislatively-defined offense as the criminal statute. As Justice Washington noted in 1820, the legislature can have as many penalties for the same offense as it wants, subject to the constraints of the Eighth Amendment.¹⁴⁶ I add only that we must have good reason to believe the legislature intended more than one penalty. The statute in *Kurth Ranch* provides this assurance, and the tax should have been permitted.

Nancy King has argued that *Kurth Ranch* strikes a discordant note when compared to *United States v. Dixon*.¹⁴⁷ The *Dixon* Court permitted two avowedly criminal trials for the same conduct, based on an inference from the *Blockburger* test that the legislature intended to create separate offenses. Yet in *Kurth Ranch* the explicit legislative intent to create separate offenses was ignored, and a tax was held to be an impermissible criminal penalty.

This seems truly odd. Explicit legislative intent to create cumulative sanctions cannot justify a tax, but implicit intent can justify an additional prison term. Something is very wrong here, even though no one on the Court has seemed to notice, not even Scalia. What creates this oddity is the assumption that legislative intent cannot authorize successive prosecutions for what would be the same *Blockburger* offense.¹⁴⁸ On Michael Moore's insight, two offenses are the same (or different) regardless of how they are prosecuted. On my argument, clear legislative intent to punish cumulatively always creates different offenses. These insights together indicate that *Kurth Ranch* was wrongly decided.

However the difficult civil/criminal issues are decided, we see that the same offense question as it is usually posed—whether two criminal offenses in a single jurisdiction are the same offense—is a subset of a larger question about legislative authorization of sanctions generally. The larger question arises in the dual sovereignty context, where I would presume that the intent is *not* to authorize a penalty in addition to that imposed by the other sovereign. It arises in the civil/criminal context, where I would presume that the intent *is* to authorize separate applications. History supports

146. *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 23 (1820).

147. 113 S. Ct. 2849 (1993); Nancy J. King, *Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties*, 143 U. PA. L. REV. (forthcoming 1995) (draft manuscript on file with CALIFORNIA LAW REVIEW).

148. Though the claim is not essential to his main point, Scalia noted in *Kurth Ranch* that "legislatively authorized multiple punishments are permissible if imposed in a single proceeding, but impermissible if imposed in successive proceedings." 114 S. Ct. at 1957 n.1 (Scalia, J., dissenting). The *Kurth Ranch* majority held that the tax collection proceeding "was the functional equivalent of a successive criminal prosecution," and thus barred, regardless of the legislative intent to punish cumulatively. *Id.* at 1948. Scalia argued that a tax collection proceeding is not a criminal prosecution and thus not a successive criminal prosecution. *Id.* at 1959-60 (Scalia, J., dissenting). My view, argued in the text, is that this debate is pointless.

both presumptions. The ancient law drew no distinction between crime and tort, and private prosecutions were the only mechanism for redressing grievances.¹⁴⁹ When the king began to assert the right to prosecute felonies, the common law for centuries recognized a dual procedure that still included private prosecutions.¹⁵⁰ But this dual track did not imply dual outcomes. The common law generally recognized that a single outcome, whether obtained through private prosecution or the king's indictment, exhausted the wrongdoer's liability for felony.¹⁵¹

As late as Blackstone, roughly contemporary with the Bill of Rights, only a single statutory exception existed to this common law rule. Thus, Blackstone could confidently state that "when a man is once fairly found not guilty upon any indictment or other prosecution, before *any court* having competent jurisdiction over the offence, he may plead such acquittal in bar of any subsequent accusation for the same crime."¹⁵² Any doubt that Blackstone meant this rule to apply only to the king's prosecution is removed by the next three sentences, which make clear that an acquittal in a private prosecution barred the king's indictment and, again with a single exception, an acquittal on the king's indictment barred a private prosecution.¹⁵³

Blackstone also recognized, however, a distinction between civil wrongs and crimes. In this context, "the law has a double view, viz.: not only to redress the party injured . . . but also to secure to the public the benefit of society, by preventing or punishing every breach and violation of those laws which the sovereign power has thought proper to establish for the government and tranquillity of the whole."¹⁵⁴ Eighteenth century English law thus drew a distinction between criminal outcomes, only one of which was generally permitted, and a civil outcome, which permitted the citizen to seek redress independently of the king.

In the absence of legislative intent on these questions, I would merely continue the historical preference for one criminal outcome and for both a civil and criminal remedy. On this view, the Court's dual sovereignty doctrine provides too little protection, and *Kurth Ranch* provides too much.

Having developed and defended an account of when two statutes prescribe the same offense, I next address the question of how to "count" putative multiple violations of a single statute. This requires an understanding of how act-tokens enter into the blameworthiness calculus.

149. 2 POLLACK & MAITLAND, *supra* note 18, at 499.

150. The private criminal prosecution was not abolished until 1819. See 59 GEO. III, c.46 (1819).

151. EDWARD COKE, THIRD INSTITUTES OF THE LAWS OF ENGLAND 212-13 (1817) (noting a single exception, created by statute, permitting private prosecutions to follow the king's indictment in murder cases) (citing 3 HEN. VII, c.1 (1487)).

152. BLACKSTONE, *supra* note 13, at *335 (emphasis added).

153. *Id.* at *335-36.

154. *Id.* at *7.

V
ACT-TOKEN IDENTITY

Based on my analysis, the Double Jeopardy Clause prohibits more than one punishment for the same legislatively-created blameworthiness. In the absence of clear legislative intent to the contrary, the same blameworthy act-type gives rise to singular blameworthiness. Blameworthy act-types are the same when they are identical or one is included in the other. For example, the act-type of larceny is included in the act-type of robbery. The act-type of killing is identical to the act-type of killing whether it is proscribed as premeditated murder, felony murder, manslaughter, reckless homicide, or negligent homicide. On the other hand, felony-murder is a different blameworthy act-type from any of its predicate felonies. I think this is right as far as we have gone, but a deeper understanding of how act-tokens instantiate act-types is now required.

The commission of an act-token of a proscribed act-type is what creates blameworthiness. But some principle must restrain prosecutors from subdividing the act-type too narrowly or exploiting repetitive act-tokens. How many joyriding offenses, for example, is it to keep a car for nine days and drive it many times? What if a thief steals 250 sheep at the same time? Can it really be consistent with double jeopardy principles to find 1800 violations of a statute forbidding the sale of beer without a certificate of inspection, based on sales during a single day?¹⁵⁵

Part of the analysis here is to understand how act-tokens instantiate the statutory blameworthy act-types. We turn to that task.

A. The Relationship Between Act-Types and Act-Tokens

*Brown v. Ohio*¹⁵⁶ is a good example of how the act-type and act-token questions interact. Brown was arrested on December 8 in possession of a car that had been stolen on November 29. Based on his unexplained possession of a car belonging to another, the police charged him with joyriding. He pleaded guilty and was sentenced to thirty days in jail and a fine.¹⁵⁷ After serving his time, he was later indicted by a grand jury for auto theft, based on the same taking.¹⁵⁸

As construed by the state courts, joyriding was a *Blockburger*-included offense of auto theft.¹⁵⁹ Justice Blackmun did not quarrel with this construction but nonetheless dissented on the ground that Brown must have committed more than one driving episode during the nine days.¹⁶⁰ In effect,

155. See *State v. Broeder*, 90 Mo. App. 169, 170 (1901) (holding that each sale was a separate offense).

156. 432 U.S. 161 (1977).

157. *Id.* at 162.

158. *Id.* at 162-63.

159. *Id.* at 163-64.

160. *Id.* at 171 (Blackmun, J., dissenting).

Justice Blackmun argued that regardless of the relationship between the act-types of auto theft and joyriding, Brown's liability for each act-type could be made to fasten on a different act-token.

It is obviously correct to say that relevantly different act-tokens create different offenses. If Brown criminally took property from V on Tuesday and Z on Wednesday, Brown committed relevantly different act-tokens (of whatever act-type), and he is guilty of two offenses; it makes no difference whether he is charged with larceny and robbery, or two counts of larceny. The key, of course, is figuring out when act-tokens are "relevantly different."

Justice Blackmun's view that Brown's driving episodes were different act-tokens is clearly right. The first and last episodes were separated by nine days. But the question is not whether Brown engaged in different act-tokens. It is, instead, whether he engaged in different act-tokens of the criminal act-types charged. The necessary distinction between act-tokens cannot be calculated until the scope of the criminal act-type is understood. The criminal taking of property is a different act-token of robbery or larceny from another taking that is distinct in time, place, and victim. But the number of times Brown got into and out of the car is irrelevant if the act-type proscribed by auto theft and joyriding is taking a car. Only a single car taking occurred.

Thus, the act-type question is necessarily antecedent to the act-token question.¹⁶¹ Justice Blackmun's common-sense view of the relevant act-tokens reflects common sense only if the majority was wrong to find that both statutes proscribed a single act-type of taking a car. The next question is whether the *Brown* majority was right as to the scope of the act-types.

B. Counting Act-Tokens: The Act-Type Scope Issue

The auto theft act-type in *Brown* was to "steal."¹⁶² "Steal" implies that a single act-token occurred regardless of how long Brown had the car. Thus, for purposes of theft liability, only one act-token occurred.

The joyriding act-type was to "take, operate, or keep."¹⁶³ "Take" and "keep" have the same scope as "steal." Once an actor has taken, kept, or stolen, there is no future act-token in continued possession or use of the property. "Operate" is murkier, perhaps lending itself to Blackmun's interpretation that each driving episode could be a separately punishable act-token. Since the joyriding act-type is stated in the alternative, "operate" could justify finding more than one act-token, based on separate operations.

161. Moore agrees, finding "no legally usable answer to the question 'How many acts?', until we know what morally-salient *type* of act is involved with a given statutory offence." MOORE, *supra* note 5, at 385. Morally-salient, on Moore's account, is roughly what I mean by blameworthy. See *supra* note 98.

162. *Brown*, 432 U.S. at 163 n.2.

163. *Id.* at 162 n.1.

But I would indulge a presumption, analogous to the Court's "rule of lenity," that when the legislature uses more than one act-type word to describe what is forbidden, the words should be understood, for purposes of counting act-tokens, as creating a conjunctive act-type.

The Court has long applied a rule of lenity in double jeopardy cases.¹⁶⁴ If it is somehow unclear whether Congress intended multiple convictions (the Court has never specified how this threshold lack of clarity is established),¹⁶⁵ then only a single conviction is permissible. In the Court's words, there is a "policy of not attributing to Congress, in the enactment of criminal statutes, an intention to punish more severely than the language of its laws clearly imports in the light of pertinent legislative history."¹⁶⁶ When the statute proscribes alternative act-types, we can be sure we are not punishing in excess of legislative intent if we count only act-tokens of the conjunctive act-type.

The value of this presumption can be seen in *Brown*. Assume the initial charge against Brown alleged three counts of joyriding on alternative theories involving the same taking: he took the car, he operated it, or he kept it. Only a single conviction can be entered on that indictment because of the very nature of alternative act-types. Brown is guilty if he took the car *or* if he kept it *or* if he operated it, but he is not guilty of three counts of joyriding if he did all three. The alternative act-types provide the prosecution with different ways of proving a single statutory offense.

In this way, counting act-tokens is different from asking if a single act-token has been committed. *Whether* an offense has been committed is different from *when* that offense ends and another begins. Though the relationship has never been stated in this manner, I think it uncontroversial to say that a single act-token can be proved on any of the alternative criminal act-types, but counting act-tokens requires that alternative statutory act-types be considered a conjunctive act-type.

On a conjunctive reading of the joyriding statute, the proscribed act-type is to "take, operate, *and* keep." Brown committed only a single act-token of that act-type, supporting the majority's conclusion that the prosecution had attempted to "divid[e] a single crime into a series of temporal or spatial units."¹⁶⁷ In justifying this conclusion, the Court noted that a law making each day of joyriding a separate criminal offense would present a different case.¹⁶⁸ In that hypothetical case, of course, each day would be a different act-type, thus permitting a division into temporal units of one day each.

164. See George C. Thomas III, *A Unified Theory of Multiple Punishment*, 47 U. PITT. L. REV. 1, 15-22, 37-44 (1985).

165. One indication of lenity which I have previously identified is the inclusion of related offenses in a single legislative enactment. *Id.* at 51-52, 69-70.

166. *Prince v. United States*, 352 U.S. 322, 329 (1957).

167. *Brown*, 432 U.S. at 169.

168. *Id.* at 169 n.8.

The next question is how to count statutory *violations* when we unquestionably have multiple act-tokens of a single criminal act-type, but when one act-token may have "consumed" the blameworthiness of the act-type. An example is selling beer without a certificate of inspection 1800 times in a single day.

C. Counting Act-Tokens: Consumption of Blameworthiness

There are two questions about the relationship between act-type and act-token, which courts fail to distinguish. The first question, which is more familiar to courts, is whether at least one act-token of a particular act-type is made out on the state's evidence. If not, of course, no conviction can be entered or sustained. But the question of whether one act-token is made out on the facts proved is *not* the same as the question of how many act-tokens should be counted as violations of the statutory act-type. The first question is a minimum, sufficiency-of-the-evidence question. The second question is a counting question: yes, we have more than one act-token on these facts, but should we count all the act-tokens as statutory violations?

The courts have struggled with this particular counting problem, and I can do no more here than sketch the outlines of a solution. In *Ebeling v. Morgan*,¹⁶⁹ the statute made it a crime to "tear, cut, or otherwise injure any mail bag . . . with intent to rob or steal any such mail."¹⁷⁰ Ebeling cut into six mail bags in a single transaction. Unlike Brown's ongoing possession of the car, Ebeling's first act-token was completed when his knife reached the second mail bag. This, however, does not necessarily mean we should count all six act-tokens. The scope question and the repetitive-counting question are not the same.

Insight into *Ebeling* can be gained by considering the question of how many batteries are committed in a single fray. Even though each offensive touching is clearly a different act-token of the act-type of battery, courts here tend to view all the act-tokens in a single fight as fungible, and thus only a single battery. To be sure, the question admits of degrees. A second blow the next day is obviously a different battery. And one court has held that two separate offenses may be shown when some blows cause bodily injury, while other blows create a risk of *serious* bodily injury.¹⁷¹ But it seems unlikely that the legislature intended ten battery convictions when the aggressor struck a similar blow ten times in succession. Ten blows (or a hundred) might turn simple assault into aggravated assault, but ten (or a hundred) convictions for simple assault overshoot the blameworthiness mark.

169. 237 U.S. 625 (1915).

170. *Id.* at 629 (quoting 18 U.S.C. § 189).

171. *People v. Berner*, 600 P.2d 112, 113 (Colo. App. 1979).

The Court made precisely that mistake in *Ebeling*, assuming that the question of what constituted the first act-token is no different than how best to count statutory violations. On that understanding, of course, Ebeling committed six statutory violations. The Supreme Court accordingly affirmed the six convictions and five consecutive maximum sentences imposed by the trial court,¹⁷² thus permitting a sentence five times longer than could have resulted from a single conviction.

Once the Court's category mistake is put to one side, a question still remains regarding Congress' intent. Phrasing the issue this way compels me to acknowledge the obvious: Congress surely had no intent at all about how many convictions should attend cutting six mail bags during a single transaction. So the real question is what would Congress have answered had the question been put to it.

The best answer will reflect an understanding of how tokens manifest the blameworthiness created by the act-type. Battery protects bodily integrity. The first blow is thus a greater violation than the second given in succession; the victim's bodily integrity was completely intact prior to the first blow but only marginally compromised by the tenth. The blow repeated the next day would, however, be a fresh violation of the victim's (now restored) bodily integrity.

Applying a model of consuming blameworthiness to larceny, consider a stack of 100 one-dollar bills. How many larcenies occur when those bills are stolen by 100 takings in rapid succession? Is this different blameworthiness than stealing 100 bills in a single taking? In a metaphysical sense, the multiplicity of bills taken (or blows given in a fight) can be seen as multiplying the number of harms. This would suggest that the Court reached the right result in *Ebeling* because each bag was harmed. The Court's language supports this view: the relevant congressional intent, according to the Court, was "to protect each and every mail bag from felonious injury and mutilation."¹⁷³

To conclude that each act-token should always be counted as a separate criminal violation is to conclude that action theory tells us all we need to know about same offense. But action theory is an incomplete account of same offense; intentions are sometimes crucial.¹⁷⁴ The number of bills taken may make no difference to the singularity of the blameworthiness

172. *Ebeling*, 237 U.S. at 629-30, 631.

173. *Id.* at 629.

174. By his comments at a University of Pennsylvania criminal law workshop (December 12, 1994), Stephen Morse helped me see the value of individuating by intentions in cases involving multiple, repetitive act-tokens. Michael Moore concedes that the individuation of intentions may be relevant to the same offense question but limits his analysis to action theory. MOORE, *supra* note 5, at 305 n.1. Despite his concession that intent may play a role in individuating offenses, Moore later rejects the "same-intent" test as having any philosophical validity or manifesting double jeopardy policies in any useful way. *Id.* at 381-83, 388-90. Thus, Moore seems to believe that action theory tells us almost all we need to know about same offense.

created by a statute that requires intent to steal. The legislature may think in terms of cohesion of result rather than fragmentation into separate act-tokens when the very same act-token is repeated, with the same intent, within a very short time span. Taking 100 one-dollar bills in a single motion is indistinguishable from taking a single 100-dollar bill. Why should it matter, as to blameworthiness, if the actor takes the 100 one-dollar bills in two motions? In ten? In one hundred?

If stealing 100 bills from a stack should be counted as a single larceny regardless of the number of takings, the number of cuttings Ebeling made in opening six mail bags may not tell us all we need to know about how many offenses he committed. The defendant's intent sometimes may be more important than the number of act-tokens because intent helps us see how much of the statutory blameworthiness is consumed by the first act-token.

The theft of X's horse from one pasture and Z's horse from a pasture ten miles away are two larcenies, at least in part because we would infer an intent to deprive two owners of their property. But stealing a saddled horse is one larceny, not one larceny of a horse and one of a saddle, at least in part because the intent was to steal a saddled horse. Similarly, stealing a purse is one larceny, not a different larceny for each object in the purse.¹⁷⁵

In these cases Moore's action theory would reach the same results. But consider stealing two of X's horses from different pastures. Though there are two act-tokens of larceny here, it could be counted a single larceny as long as the thief had the "single intent" to steal X's horses.¹⁷⁶ Indeed, a little-noted part of *Blockburger* uses this form of analysis. The Court quoted with approval the following distinction from *Wharton's Criminal Law*: "[W]hen the impulse is single, but one indictment lies, no matter how long the action may continue. If successive impulses are separately given, even though all unite in swelling a common stream of action, separate indictments lie."¹⁷⁷ Though separating "impulses" is difficult at best, the underlying notion does seem right.

175. The hypothetical is Heidi Hurd's.

176. By "single intent," I mean the thief formed a plan to steal two of X's horses prior to stealing the first one. It would be different if the thief stole the first one and then decided to steal the second one, an intent that would justify finding two larcenies. I put "single intent" in quotation marks because I am aware of the philosophical difficulties inherent in dividing or quantifying intent. See, e.g., MOORE, *supra* note 5, at 381-83; Philip Johnson, *Multiple Punishment and Consecutive Sentences: Reflections on the Neal Doctrine*, 58 CALIF. L. REV. 357, 369 (1970) (noting the "inconsistencies and ambiguities inherent" in the California "single intent and objective formula" for individuating offenses). As my account seeks inferences about how the legislature would want to count violations, however, I can make use of the commonsense notion of "single intent." Moore, perhaps less foolhardy than I, explicitly refused to consider individuation of intentions on the same offense issue. MOORE, *supra* note 5, at 305 n.1, 389 n.50.

177. *Blockburger v. United States*, 284 U.S. 299, 302 (1932) (quoting WHARTON'S CRIMINAL LAW § 34 (11th ed.)). This was relevant to the part of *Blockburger* that individuated act-tokens of selling narcotics. *Blockburger* sold one quantity of narcotics; the purchaser then paid for another quantity, to be delivered the next day. *Id.* at 301. The Court used Wharton's "impulse" test to decide that there were

I would go further and argue that the result is still only one larceny if one horse belongs to X and one to Y, as long as the thief intended to steal two horses in X's pasture. Moore argues otherwise, on the ground that the blameworthy act-type is the infringement of individual ownership.¹⁷⁸ Bishop concluded that the "better legal reason" supports finding only one offense here,¹⁷⁹ and I think Bishop is right. The history of larceny, defined as a crime rather than a tort, has focused on infringement of ownership as an abstract concept, and not on a particular owner's infringement.¹⁸⁰ If infringement on individual ownership were crucial to the legislative scheme for defining larceny, restitution would be the favored remedy; it is not.

Moore's individuation by the number of owners also produces counter-intuitive results. The theft of one horse belonging to a partnership with 100 partners is presumably 100 larcenies on Moore's view. If he rejects that example as a legal formalism, one of his own examples can be expanded; on Moore's view, the theft of a single gym bag is seven larcenies if it contains A's watch, B's ring, C's underwear, D's pencil, E's change, F's necktie, and G's wallet.¹⁸¹ It would only be one larceny, on my view, unless the thief knew that property belonging to others was in the bag and intended to steal it along with the bag.

Justice Holmes eventually saw this problem partly in terms of whether the defendant's intent was "single." In an earlier case, he had followed *Ebeling* in holding that each act of putting a letter in a mail box was a separate fraud violation, even though only a single scheme was involved.¹⁸²

two offenses of selling. *Id.* at 302. It then used the distinct-element test to conclude that one sale could be punished as two different statutory violations. *Id.* at 303-05.

178. See MOORE, *supra* note 5, at 364-65. Moore sees the single taking of items of property belonging to more than one owner as a single act-token of multiple act-types. See *id.* He argues that the act-type of stealing Abel's property is different from the act-type of stealing Baker's property, which is different from the act-type of stealing Carr's property, etc. See *id.* Moore is forced to this view by his coarse-grained view of act-tokens and by his commitment to action theory as the sole determinant of when offenses are the same. Whether or not Moore is right to say that the Oklahoma City bombing gave rise to 167 different act-types of homicide, I am not forced to that view. I can discard action theory in this context and say that the legislature meant to count as many homicides from a single bombing as there are victims, without worrying about whether these different countings are of act-types or act-tokens.

179. JOEL BISHOP, COMMENTARIES ON THE CRIMINAL LAW § 1061(3) (6th ed. 1877). Acknowledging that the rule might be different in England, Bishop concluded that the American authorities would find but a single larceny regardless of the number of different items stolen at one time. *Id.*

180. See Kathleen F. Brickey, *The Jurisprudence of Larceny: An Historical Inquiry and Interest Analysis*, 33 VAND. L. REV. 1101, 1141 (1980) (concluding that, under ancient law, "[p]roof of guilt was secondary to obtaining specific restitution," while the modern crime of larceny manifests the "interest of the sovereign in suppressing theft and punishing wrongdoers"); *id.* at 1128 (explaining that "[i]nstead of abolishing that ancient institution [of recovery], the crown created an alternative and strictly penal procedure" for the crime of larceny).

181. See MOORE, *supra* note 5, at 359 (assuming a bag containing property of two persons); *id.* at 364 (finding this single taking to be two thefts because it involved two act-types of larceny).

182. *Badders v. United States*, 240 U.S. 391, 394 (1916).

In that case, Holmes commented, "[T]here is no doubt that the law may make each putting of a letter into the postoffice a separate offense."¹⁸³

Of course, the law *may* make each letter a separate offense, but this assertion merely rephrases the issue: did Congress intend that each letter put into a mail box, as part of a single scheme, be counted as a separate violation? Holmes, following *Ebeling*, did not seem to think that these were different questions.

But over a decade later, in *United States v. Adams*,¹⁸⁴ Holmes saw the difference. Adams had made two false entries in bank books, both relating to a single deposit and credit.¹⁸⁵ The government charged the false entries as separate violations of the offense of making any false entry with intent to injure or defraud the bank.¹⁸⁶ "It is a short point,"¹⁸⁷ Holmes commented.

The Government contends for the most literal reading of the words, and that every such entry is a separate offense to be separately punished. But we think that it cannot have been contemplated that the mere multiplication of entries, all to the same point and with a single intent, should multiply the punishment in proportion to the complexity of the bookkeeping.¹⁸⁸

A test of whether the literal reading was "contemplated" is a recognition that the issue is controlled by congressional intent. Moreover, Holmes' rejection of "multiply[ing] the punishment in proportion to the complexity of the bookkeeping"¹⁸⁹ shows that his benchmark for inferring legislative intent was the blameworthiness of the sequence of act-tokens. Holmes thus stated a version of my principle of consuming blameworthiness. The first false entry, in effect, consumed the blameworthiness of the second entry done with the same intent and with respect to the same deposit.

Thus, the number of act-tokens is only one factor to consider when counting statutory violations. Stealing a gym bag with the intent to deprive A-G of their property would be seven larcenies, on my view, despite the single taking.¹⁹⁰ Stealing 100 one-dollar bills by 100 takings would, on the other hand, be a single larceny if the thief had formed the intent to steal all 100 prior to taking the first one.

The offense gravamen of the mail bag statute in *Ebeling* was not merely cutting mail bags, but cutting mail bags "with intent to rob or steal any such mail."¹⁹¹ I thus infer that Congress' principal concern was to pro-

183. *Id.*

184. 281 U.S. 202 (1930).

185. *Id.* at 203-04.

186. *Id.*

187. *Id.* at 204.

188. *Id.*

189. *Id.*

190. It is also seven larcenies on Moore's view. He avoids the singularity of act-token here by finding multiple act-types. See *supra* note 178.

191. *Ebeling v. Morgan*, 237 U.S. 625, 629 (1915) (quoting 18 U.S.C. § 189).

tect the contents of the mail bags, rather than the canvas bags themselves. If this is right, then why does it make a difference in blameworthiness that six mail bags were cut? Stealing all the valuables from a mansion is only one larceny. Why would stealing the contents of six mail bags be more than one larceny? If it is only one larceny, then why should it matter that the statute forbade cutting as well as stealing?¹⁹²

Using intent to help individuate a double jeopardy offense explains why it is a single offense to take two women across state lines in a single vehicle in violation of the Mann Act.¹⁹³ On Moore's account, this would be two act-types of violating the Mann Act, one for each victim. Individuation by intent explains why the Court held thirty-two counts under the Fair Labor Standards Act to state but three offenses; the Court treated "as one offense all violations that arise from that singleness of thought, purpose or action, which may be deemed a single 'impulse.'" ¹⁹⁴ As Moore does not individuate by intent, it is unclear how his account would treat multiple minimum wage violations, overtime violations, and record-keeping violations involving a total of eleven employees.¹⁹⁵

Individuation by intent suggests that the Court may have been wrong to find but a single assault offense for one shot that wounded two federal officers.¹⁹⁶ The key question should have been not whether a single shot was fired, but whether the actor had the relevant intent as to both officers.¹⁹⁷ Here, Moore would find two offenses without the equivocation I just gave. For Moore, there are two act-types because there are two victims of the assault.

In sum, the scope of act-tokens can be determined only by careful reference to the statutory scheme. Alternative act-type words should be construed as a conjunctive act-type when the issue is whether more than one act-token has been committed. Moreover, counting violations should not be an automatic process of determining whether each act-token would support a conviction if charged by itself. The question is more complex, requiring an inquiry into the relationship between the statutory blameworthiness and the act-tokens that manifest that blameworthiness. Legislative intent on the

192. If doubt exists that this imputed congressional intent is the way Congress would have answered the question about six mail bags in one spot, the rule of lenity resolves the question in favor of lenity. Because it is plausible to infer the intent to punish Ebeling's conduct just once, and because that inference results in a less harsh treatment, it must be accepted.

193. See *Bell v. United States*, 349 U.S. 81, 82-83 (1955).

194. *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 224 (1952).

195. It is clear, however, that Moore would individuate act-tokens by reference to the nature of the blameworthy act-type proscribed. See *supra* note 161.

196. See *Ladner v. United States*, 358 U.S. 169, 178 (1959) (dictum).

197. The statute did not explicitly require intent. *Id.* at 170 n.1. Common-law assault requires intent to commit a battery. See ROLLIN M. PERKINS & RONALD N. BOYCE, *CRIMINAL LAW* 161 (3d ed. 1982). Using this mens rea, the question would be whether Ladner intended to wound both officers with a single shot. If Ladner was aware of the presence of both officers, it seems likely that he intended the discharge of his shotgun to strike both.

counting issue can be inferred from how much blameworthiness is “consumed” by the initial act-token. One way of determining consumption is by examining the defendant’s intent in light of the relationship between the statutory mens rea and the proscribed harm.

CONCLUSION

The entire same-offense landscape can be viewed most usefully as a map of (probable) legislative intent. My premise is that the legislature can have as many double jeopardy offenses as it wants, subject to the limits of the Eighth Amendment. The easy part of the map, then, is honoring clear legislative intent to create distinct (or singular) blameworthiness. It is unnecessary to engage in further analysis if the legislature is clear enough about its intent to create distinct blameworthiness (or to authorize only one penalty). Similarly, the historic distinction between the functions of civil damages and criminal sanctions creates a heavy presumption that the legislature means civil remedies to be imposed in addition to any criminal sanction.

Where the map discloses no clear indication of intent, and there is no ready-made civil/criminal presumption—as in the vast majority of cases—a second presumption comes into play: the same blameworthy act-type is only a single offense. Blameworthy act-types are the same when they are identical or when one includes the other. For example, diverting electric current is identical to larceny; the only act-type in both is taking the property of another. Larceny is included in robbery, but larceny is not included in burglary because they share no blameworthy act-type.

As the act-type presumption can be rebutted only by clear intent to the contrary, the presumption is effectively irrebuttable at this stage of the analysis. If there is clear legislative intent to create distinct or singular blameworthiness, the case is resolved by the deference paid to legislative intent without regard to act-type analysis. Once the act-type analysis is reached, there is, by definition, no clear legislative intent. Thus, my account would disregard the kind of murky inferences of congressional intent that the Court found significant in *Gore*.

Keeping the focus on blameworthy acts also illuminates the act-token puzzle. The inquiry comes in two forms. One, typified by *Brown*, is determining the number of act-tokens of the criminal act-types. Here I would track the Court’s rule of lenity and presume the broadest plausible reading of the statutory act-type. The Court’s treatment of this issue in *Brown* was thoughtful and persuasive.

The second inquiry is deciding how many act-tokens to count as statutory violations when more than one relevant act-token occurs at the same time and place. Again, I would draw on the Court’s rule of lenity and presume that the legislature intended courts to count only once when repetitive act-tokens manifest the statutory harm in the same way. Cutting into six

mail bags with intent to steal the contents of all six should only be counted as one offense, as should the larceny of 250 sheep from a pasture. The Court's treatment of the counting issue in *Ebeling* was wooden and unpersuasive.

Ebeling and *Gore* are the best examples of what is wrong with the current mechanical test of same offense. While courts are right to affirm a single conviction on proof of the minimum act-token that instantiates the statutory act-type, courts should not mindlessly assume that the legislature intended to count each succeeding act-token as an independent violation. Furthermore, while offenses are different whenever the legislature intends them to be, courts should not mindlessly assume that the legislature intends different offenses when it varies elements that have nothing to do with blameworthiness.

Stating my blameworthiness idea and applying it to actual cases are, of course, two different enterprises. A blameworthy-act conception of same offense is no easier to apply than any of the other constructs discussed in this paper, but it is no more difficult either. And it offers the advantage of being connected with an essential ingredient of criminal liability: blame-worthy acts.

