Double Jeopardy Analysis Comes Home: The "Same Conduct" Standard in Grady v. Corbin

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**INTRODUCTION**

The fifth amendment’s protection against double jeopardy “for the same offense” has given rise to one of the most confused areas of constitutional law in the history of United States jurisprudence. The principal point of contention has been the meaning of the phrase “same offense.” Recently the Supreme Court decided *Grady v. Corbin*, a case that defined the standard for determining what constitutes double jeopardy in the context of successive prosecutions by the state on different charges arising out of the same incident. This Comment examines the significance of the decision in *Corbin*.

Part I of this Comment surveys the line of “same offense” cases leading up to *Corbin* and defines the issues addressed in the *Corbin* holding. Part II sets out the factual background and holding of *Corbin*. Part III considers the theoretical clarifications.

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1 U.S. Const. amend. V


5 This Comment does not address the issue of successive state and federal prosecutions for related offenses. For a discussion of the “dual sovereignty” doctrine, see Lee, *The Dual Sovereignty Exception to Double Jeopardy: In the Wake of Garcia v. San Antonio Metropolitan Transit Authority*, 22 New Eng. L. Rev. 31 (1987).

6 See infra notes 12-67 and accompanying text.

7 See infra notes 68-89 and accompanying text.
in the case,\textsuperscript{8} evaluates the holding from a policy standpoint,\textsuperscript{9} and addresses the questions raised by the dissenting opinions.\textsuperscript{10} This Comment concludes that although the broad protection afforded by Corbin may have some undesirable consequences in view of the public interest in law enforcement, the Court's decision is legally sound in light of recent precedent and historical understanding.\textsuperscript{11}

I. DOUBLE JEOPARDY BACKGROUND: "SAME OFFENSE"

The fifth amendment's double jeopardy clause\textsuperscript{12} has its origin in common-law pleas that barred a second prosecution after a prior conviction or acquittal on a charge identical in both fact and legal formulation.\textsuperscript{13} It is reasonable to suppose that "offense" as used by the drafters of the amendment referred to the rather static common-law offenses of which one might have been convicted in 1791.\textsuperscript{14} Such an interpretation of the Constitutional text, however, has long been out of favor with the Supreme Court,\textsuperscript{15} as the development of statutory crimes has significantly increased the state's ability to obtain convictions by defining new "offenses" through legislation that can provide for numerous "crimes with overlapping coverages."\textsuperscript{16}

A. Pearce: The Interests Protected by the Clause

In \textit{North Carolina v Pearce},\textsuperscript{17} the Court articulated three distinct interests protected by the double jeopardy clause. Two of

\begin{itemize}
\item \textsuperscript{8} See infra notes 90-104 and accompanying text.
\item \textsuperscript{9} See infra notes 105-21 and accompanying text.
\item \textsuperscript{10} See infra notes 122-59 and accompanying text.
\item \textsuperscript{11} See infra notes 160-161 and accompanying text.
\item \textsuperscript{12} "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb" U.S. Const. amend. V
\item \textsuperscript{13} See Grady v. Corbin, \textit{---} U.S. \textit{---}, 110 S. Ct. 2084, 2098-2100 (1990) (Scalia, J., dissenting) (discussion of pleas of autrefois convict and autrefois acquit).
\item \textsuperscript{14} Justice Scalia appears to make this assumption in his dissent. See \textit{id.} at 2098. Professor Thomas, however, points out that no historical evidence exists as to the ratifiers' actual intended meaning for "same offense." See Thomas, \textit{The Prohibition of Successive Prosecutions for the Same Offense: In Search of a Definition}, 71 Iowa L. Rev. 323, 330 (1986).
\item \textsuperscript{15} Thomas, \textit{supra} note 14, at 331.
\item \textsuperscript{16} \textit{Id.} at 397 (footnote omitted). In 1791, "[t]here was no need to distinguish between offense and conduct because the two were coextensive. Although it is unlikely that the drafters thought specifically in terms of prohibiting reProsecution based on the same conduct, that was the effect of common-law double jeopardy principles in the eighteenth century." \textit{Id.} at 397-99.
\item \textsuperscript{17} 395 U.S. 711 (1969) (overruled on other grounds by Alabama v. Smith, 490 U.S. 794 (1989)).
\end{itemize}
these recalled the common-law pleas, protecting “against a second prosecution for the same offense after acquittal [and] against a second prosecution for the same offense after conviction.” 18 The third interest insured “against multiple punishment for the same offense.” 19 The Court in a later case expressed a recognition that, in addition, “[w]here successive prosecutions are at stake, the guarantee serves ‘a constitutional policy of finality for the defendant’s benefit.’” 20 This enumeration of interests provides a “guiding light” by which to judge the Supreme Court’s evolving double jeopardy jurisprudence, but sheds no direct light on the meaning of “same offense.”

B. Development of the Blockburger “Same-Offense” Test

Various tests have been suggested for defining “same offense” for double jeopardy purposes. The Supreme Court explicitly disavowed the “identical statutory offense” 21 test in Ex parte Nielsen, 22 rejecting the proposition that the malleable statutory crimes should be accorded the same definitional deference as the more rigid common-law offenses. 23 In its subsequent search for a standard to accommodate the shift toward the legislative definition of offenses, the Court decided Gavieres v United States 24 according to the “same evidence” 25 test. In Gavieres, the Court ruled that two

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19 Id. The Court has held, in the context of a single trial, that a legislature may impose cumulative punishments for violations of two separate statutes occurring in a single criminal transaction. Missouri v. Hunter, 459 U.S. 359, 365 (1983). This Comment does not directly address the issues presented in Hunter. For a thorough treatment of that case, see Thomas, supra note 2.
21 See Lee, supra note 5, at 34 (brief description of the “identical statutory offense” test and its failings).
22 131 U.S. 176 (1889).
23 “[W]here, as in this case, a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense.” Ex parte Nielsen, 131 U.S. 176, 188 (1889). Since neither of the two offenses in Nielsen consisted of conduct entirely included in the definition of the other, this early analysis tends to resemble the “necessary element” test. See infra note 62 and accompanying text.
24 220 U.S. 338 (1911) (affirming conviction for insulting police officer after prior conviction for indecent public behavior).
25 The Corbin Court points out that the term “same evidence” is misleading to the extent that the test it describes is not an “actual evidence” test [which] would prevent the government from introducing in a subsequent prosecution any evidence that was introduced in a preceding prosecution,” but rather focuses on statutory elements. Corbin, 110 S. Ct. at 2093 n.12.
offenses are the same only where the same evidence will sustain both convictions. The Court noted that "[w]hile it is true that the conduct of the accused was one and the same, two offenses resulted, each of which had an element not embraced in the other."\(^2\)

The \textit{Gavieres} formulation underlay the rule announced in \textit{Blockburger v United States}. In \textit{Blockburger}, a defendant was convicted of two related federal narcotics offenses at a single trial; cumulative sentences were imposed. The Court held that such cumulative punishment does not constitute double jeopardy\(^3\) and cited \textit{Gavieres} for the proposition that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test [for different offenses] is whether each provision requires proof of an additional fact which the other does not."\(^4\)

Thus, a single narcotics sale could be punished cumulatively under both a statute prohibiting the sale of drugs not in their original package and a statute prohibiting the sale of drugs not pursuant to a written order of the buyer. The former statute, and not the latter, would require proof that the drugs were not in their original package; the latter, and not the former, would require proof of the absence of a written order.

Under \textit{Blockburger}, if Statute I requires proof of elements A, B, and C, and Statute II requires proof of elements A, B, C, and D, there is a double jeopardy violation in imposing cumulative sentences. If, however, Statute I consists of A, B, and C, and Statute II of A, B, and D, a cumulative sentence for violating both statutes is not a violation. Thus, by declining to extend double jeopardy protection to cumulative punishments in all situations, the Court laid down a rule in \textit{Blockburger} that became the standard for cumulative-punishment cases in a single-prosecution setting.\(^4\)

\(^{26}\) \textit{Gavieres} v. United States, 220 U.S. 338, 343 (1911) (citing Burton v. United States, 202 U.S. 344, 381 (1906)).

\(^{27}\) \textit{Id.} at 345.

\(^{28}\) 284 U.S. 299 (1932).

\(^{29}\) \textit{Blockburger} v. United States, 284 U.S. 299, 301 (1932).

\(^{30}\) \textit{Id.} at 304.

\(^{31}\) \textit{Id.} (citing \textit{Gavieres}, 220 U.S. at 342).

\(^{32}\) \textit{Id.}

\(^{33}\) "The plain meaning of the provision is that each offense is subject to the penalty prescribed; and, if that be too harsh, the remedy must be afforded by act of Congress, not by judicial legislation under the guise of construction." \textit{Id.} at 305.

\(^{34}\) See, e.g., \textit{Corbin}, 110 S. Ct. at 2101 (Scalia, J., dissenting) (list of cases employing \textit{Blockburger} test).
C. Ashe v. Swenson: Another Protected Interest Discovered and a New “Same-Offense” Test Proposed

Less than a year after deciding to apply the double jeopardy restriction to prosecutions in state courts through the fourteenth amendment’s due process clause, the Court determined in Ashe v. Swenson that a federal principle of collateral estoppel “is embodied in the Fifth Amendment guarantee against double jeopardy” Without mentioning Blockburger, the majority held that a man who had been acquitted in a prosecution for robbing one of six poker players could not be prosecuted subsequently for the robbery of another player in the same poker game. The “issue of ultimate fact [previously] determined by a valid and final judgment” was involved in proving the defendant’s identity as one of the robbers in Ashe; an issue thus determined “cannot again be litigated between the same parties in any future lawsuit.” The Court concluded that “after a jury determined by its verdict that the petitioner was not one of the robbers, the State could [not] constitutionally hale him before a new jury to litigate that issue again.”

While the majority introduced this collateral estoppel principle into its constitutional analysis, Justice Brennan, in his concurring opinion, advocated the “same transaction” standard, a new test for the “same offense.” Brennan expressed his view that “the Double Jeopardy Clause requires the prosecution, except in most limited circumstances, to join at one trial all the charges against a
defendant that grow out of a single criminal act, occurrence, episode, or transaction." Calling the "same evidence" test "intolerable," Brennan argued for a policy "against vexatious multiple prosecutions" and in favor of judicial economy to support his version of the "same transaction" test. Under the "same-transaction" formula, a defendant who had already been prosecuted for Offense I (with elements A, B, and C) could not, if both offenses occurred in the same criminal transaction, thereafter be prosecuted for Offense II (with elements X, Y, and Z). Although some states have adopted similar formulations by judicial decision or by statute, the "same transaction" test has never commanded a majority of the Supreme Court.

D. Brown and Vitale: A Source of Fragmentation

In the years leading up to Corbin, Supreme Court precedent on successive prosecutions became difficult to follow. In Brown v Ohio, the Court, relying on the authority of Ex parte Nielsen and the Blockburger test, stated that the double jeopardy implications of prosecution for a lesser included offense remained the same even if the lesser offense were tried prior to the more serious offense. Thus, if a defendant were prosecuted first for the lesser included offense, a subsequent prosecution for the more serious offense would be barred because under Blockburger "each provision [would not require] proof of an additional fact which the other [did] not."

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44 Id. at 453-54.
45 See id. at 457.
46 See id. at 454.
48 See Thomas, supra note 14, at 377 n.332.
49 Id. at 378 n.333.
50 "We have steadfastly refused to adopt the 'single transaction' view of the Double Jeopardy Clause." Garrett v. United States, 471 U.S. 773, 790 (1985).
52 See id. at 168.
53 This proposition was mere dictum in Brown because the prosecutions occurred in the reverse order. Id.
54 Blockburger, 284 U.S. at 304. The Brown Court noted an exception where "the State is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence." Brown, 432 U.S. at 169 n.7.
Three years later, in *Illinois v. Vitale*, the Court declined an opportunity to extend the *Brown* reasoning to a broader protection. The defendant, a motorist, had been convicted of a careless failure to reduce speed. When the state prosecuted him on manslaughter charges arising from the same incident, the Supreme Court of Illinois found a double jeopardy violation in that “the lesser offense, failing to reduce speed, requires no proof beyond that which is necessary for conviction of the greater, involuntary manslaughter.” The United States Supreme Court disagreed, noting that the state never did “concede that its manslaughter charge will or must rest on proof of a reckless failure to slow. [but rather insisted] that manslaughter by automobile need not involve any element of failing to reduce speed.” Since the lesser offense was not “always a necessary element” of the greater, the Court held the offenses not necessarily the same for double jeopardy purposes.

Some confusion resulted from the *Vitale* opinion. One source of the confusion was a dictum in *Vitale* which stated that, if on remand the state should concede that it would “find it necessary to prove a failure to slow or to rely on conduct necessarily involving such failure,” then the conduct for which Vitale had been convicted would be a “necessary element” of the greater offense and therefore “his claim of double jeopardy would be substantial under *Brown* and our later decision in *Harris v Oklahoma*.”

It was suggested that the Court was developing a “necessary element” test along the lines of *Nielsen*, under which “offenses are the ‘same’ if the same conduct is required to satisfy a necessary

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58 *Vitale*, 447 U.S. at 418.
59 Id. at 419-20.
60 Over the objections of three dissenters, the Court declined to address and clarify *Vitale* in *Thigpen v. Roberts*, 468 U.S. 27, 33 (1984) (Rehnquist, J., dissenting) (petition for certiorari on double jeopardy issue granted; judgment affirmed on other grounds).
61 *Vitale*, 447 U.S. at 420. *Harris v Oklahoma*, 433 U.S. 682, 682 (1977), held that, where proof of the underlying felony is necessary to a conviction for felony murder, one convicted of felony murder cannot thereafter be prosecuted for the underlying felony. Justice Scalia rightly points out in *Corbin* that *Harris* gives no support to the dictum in *Vitale* because “[t]he felony murder statute by definition incorporated all of the elements of the underlying felony charged; thus the later prosecution (rather than, as in *Brown*, the earlier conviction) involved a lesser included offense.” *Corbin*, 110 S. Ct. at 2102 (Scalia, J., dissenting).
element of each crime." A disagreement arose among the lower federal courts interpreting Vitale: the Sixth Circuit held that a "modification of the Blockburger test" had occurred under which cumulative punishments could violate the double jeopardy clause if the "statutes have a single deterrent purpose"; the Ninth Circuit "read Vitale as a tacit endorsement of the view that the Blockburger test, and nothing more, governs all post-conviction prosecutions." Meanwhile, the Fifth Circuit ruled that Vitale had "changed governing double jeopardy law to permit a defendant to establish a substantial, and apparently dispositive, claim of double jeopardy merely by showing that the State actually relied on the same evidence to prove both crimes." Thus several contentious questions remained unanswered. What was the effect of Vitale on double jeopardy law? What, indeed, was the role of the Blockburger test in finding double jeopardy violations? Was the dominant double jeopardy analysis adequately protecting the interests served by the clause? What did the future hold for Justice Brennan's "same-transaction" test? In 1990, with substantial changes in Court membership after Vitale, it was uncertain what path double jeopardy jurisprudence would take.

II. THE DECISION IN GRADY v. CORBIN

On October 3, 1987, Thomas J. Corbin drove his automobile across a double yellow line on a highway in New York and struck two oncoming vehicles. An assistant district attorney, called to the scene, immediately learned that two occupants of one of the oncoming vehicles had been injured, and later that evening learned that one of those injured had died. On the same evening, Corbin...
received traffic tickets for two violations of New York’s Vehicle and Traffic Law: driving while intoxicated and failure to keep right of the median. Corbin pleaded guilty to both tickets on October 27, 1987, resulting in a minimum sentence.

Meanwhile, on October 6, another assistant district attorney began preparing a homicide prosecution arising from Corbin’s accident. He failed to inform anyone connected with the traffic ticket prosecution of the investigation concerning the related death. The death went unmentioned in the traffic ticket prosecution’s pleadings, in court on October 27, and at the sentencing.

Three months later, after pleading guilty to the traffic offenses, Corbin was indicted on homicide and assault charges stemming from the October 3rd incident. The prosecution stated that it would rely on three reckless or negligent acts as proof: driving on a public highway while intoxicated, failure to keep right of the median, and driving too rapidly (45 to 50 miles per hour) in heavy rain. The Court of Appeals of New York held that the prosecution for homicide and assault violated the double jeopardy clause of the United States Constitution as well as New York’s statutory double jeopardy provision.

On writ of certiorari, the Supreme Court affirmed. In a 5-4 majority opinion, Justice Brennan announced the adoption of the “same conduct” standard, holding that “the 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.” Under the new rule, if conduct x constitutes Offense I, for which a defendant has been prosecuted, he cannot thereafter be prosecuted for Off-

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70 See N.Y. Veh. & Traf. Law § 1192(3) (McKinney 1986).
71 See N.Y. Veh. & Traf. Law § 1120(a) (McKinney 1986).
72 Corbin, 110 S. Ct. at 2088.
73 Id. at 2089.
74 Neither the court nor the assistant district attorney prosecuting the traffic offenses was informed. Id. at 2088-89.
75 Id.
76 Id. at 2089.
77 Id.
79 Corbin, 110 S. Ct. at 2089-90.
80 Id. at 2093.
fense II (with elements A, B, and C) if the government relies on proof of conduct x to establish A, B, or C.

The Court held that the dictum in *Vitale*, which stated that a prior conviction "for conduct that is a necessary element of the more serious crime" would occasion a "substantial" double jeopardy claim, governed Corbin's case and barred his prosecution. The holding reaffirmed the obligation of "due diligence" on the part of the state and again suggested the exception to the double jeopardy bar in cases where the state exercises such diligence. No due diligence was exerted here, the Court reasoned, in view of the early knowledge by one assistant district attorney that a death had occurred and the state's failure to act on that knowledge.

The Court drew a sharp distinction between the new "conduct" standard and a "true 'same evidence'" test. "[T]he presentation of specific evidence in one trial does not forever prevent the government from introducing that same evidence in a subsequent proceeding. On the other hand, a State cannot avoid [double jeopardy] merely by altering in successive prosecutions the evidence offered to prove the same conduct." The relevant factor under the *Corbin* analysis is what conduct the government must prove, not what items of evidence it will use to prove that conduct. Here, the Court explained, the state had set forth in its pleadings that it would "prove the entirety of the conduct for which Corbin was convicted—driving while intoxicated and failing to keep right of the median—to establish essential elements of the homicide and assault offenses," namely recklessness or negligence.

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81 Id. at 2090 (quoting Illinois v. Vitale, 447 U.S. 410, 420 (1980)).
82 Since no statutory elements were identical, *Blockburger* alone could not bar Corbin's prosecution. *Id.*
83 This obligation was earlier recognized in *Brown v. Ohio*, 432 U.S. 161, 169 n.7 (1977), as noted by the *Corbin* Court. *Corbin*, 110 S. Ct. at 2090 n.7.
84 *Corbin*, 110 S. Ct. at 2090 n.7.
85 *Id.*
86 "True 'same evidence'" is a term meant to distinguish the *Blockburger* test (sometimes called a "same evidence" test). *Id.* at 2093 n.12.
87 *Id.* at 2094.
88 *Id.*
89 The Court noted that this prosecution would not be barred if the bill of particulars had asserted that the state would not rely on the same conduct, but rather on Corbin's other conduct (driving too fast in heavy rain), to prove the element of recklessness or negligence. See *id.* The *Corbin* holding is thereby distinguishable from the imposition of a "single transaction" test, which would bar a prosecution framed as described. *Id.* at 2094 n.15.
III. THE IMPLICATIONS OF GRADY V. CORBIN

*Grady v. Corbin*\(^9\) represents a clarification of the double jeopardy standard and alleviates the confusion caused by conflicting interpretations of *Illinois v Vitale*\(^9\) in the lower courts.\(^9\) Furthermore, *Corbin* increases the power of the judiciary to define "same offense" in individual cases, since the new standard, defendant's "conduct,"\(^9\) is a matter determined in the courtroom rather than on the legislative floor. A legislature can announce *which* conduct it will prohibit in general, but the courts, independently of the statutory-element scheme, decide *when* an individual may constitutionally be prosecuted for that conduct in a fact-specific case.

Although this judicial empowerment reflects a separation of powers somewhat analogous to the scheme of common-law offenses and thus restores to the courts greater ability to protect the interests served by the clause,\(^9\) the analogy is not perfect and it is arguable that the double jeopardy interests are now overprotected.\(^9\) In addition, dissenting Justice O'Connor raises a question of how the protections of *Corbin* interrelate with the element of collateral estoppel in double jeopardy jurisprudence.\(^9\) Finally Justice Scalia, also in dissent, attacks the *Corbin* holding vigorously, warning that the Court has in effect imposed a "same-transaction" test\(^9\) and urging a more precedent-rooted interpretation of the double jeopardy clause.\(^9\)

A. The Function of Blockburger

In *Corbin*, the Court held unequivocally that *Blockburger* is chiefly "a test to determine the permissibility of cumulative punishments."\(^9\) That is to say, *Blockburger* is a rule of statutory

\(^9\) See *supra* notes 60-66 and accompanying text.
\(^9\) See *infra* notes 105-13 and accompanying text.
\(^9\) See *infra* notes 114-21 and accompanying text.
\(^9\) See *infra* notes 122-40 and accompanying text.
\(^9\) See *infra* notes 146-53 and accompanying text.
\(^9\) See *infra* note 141.
\(^9\) *Corbin*, 110 S. Ct. at 2091 n.8.
construction rather than "the exclusive definition of 'same offense' in the context of successive prosecutions."  

As such, Blockburger becomes a preliminary inquiry, based on statutory elements, that a subsequent prosecution must satisfy before the Corbin "conduct" standard is applied.

Double jeopardy, therefore, can arise in two ways. First, the prosecution can fail the Blockburger test because the arrangement of statutory elements makes cumulative punishments or successive prosecutions impermissible. Second, the prosecution can satisfy Blockburger and still be barred because the same conduct which was involved in a prior prosecution is to be proved. In Corbin, Justice Brennan emphasized the difference between successive prosecutions and the mere multiple-punishment situation found in Missouri v. Hunter. As a rationale for imposing the further inquiry into the defendant's conduct, Brennan observed the inequity of giving the state multiple opportunities to antagonize a defendant or allowing the prosecution "to rehearse its presentation of proof, thus increasing the risk of an erroneous conviction."

B. The Theoretical Integrity of Corbin

1. The Furthering of Protected Interests

The interests articulated in North Carolina v. Pearce and subsequent cases receive a vital boost from the central holding of

100 Id. Note 8 of the majority opinion lists eight cases on which the Scalia dissent relies in its defense of the exclusivity of the Blockburger test, showing how each case treats Blockburger merely as a rule for determining legislative intent. See also id. at 2101 (Scalia, J., dissenting) (list of the eight cases offered to show traditional use of Blockburger for "same offense"). The majority does not, however, address the fact that Gavieres v. United States, 220 U.S. 338 (1911), on which Blockburger relies, was decided in the context of successive prosecutions.

101 Corbin, 110 S. Ct. at 2090-93.
103 Corbin, 110 S. Ct. at 2091 (citing Green v. United States, 355 U.S. 184, 187 (1957)).
104 Id. at 2091-92 (citing Tibbs v. Florida, 457 U.S. 31, 41 (1982)). Justice Scalia finds this rationale troublesome, pointing out that the same inequities obtain where "the second prosecution seeks to prove some, rather than all of [the facts involved in the first conviction]. If the Double Jeopardy Clause protects individuals against the necessity of twice proving (or refuting) the same evidence, then the second prosecution should be equally bad whether it contains all or merely some of the proof necessary for the first." Id. at 2103 (Scalia, J., dissenting) (emphasis in original). Scalia believes the "rehearsal" rationale is sufficiently vague to lead inevitably to an adoption, for practical purposes, of the "same transaction" test that Justice Brennan could never persuade a majority of the Court to adopt explicitly. See id. at 2102-04.
Grady v. Corbin, which redefined "same offense" in the double jeopardy clause to mean "same conduct." The protections "against a second prosecution for the same offense after acquittal [or] conviction" and "against multiple punishment for the same offense" are ultimately the responsibility of the courts. The same is true of the "policy of finality" and that variety of collateral estoppel which is addressed in Ashe v Swenson. When common-law offenses were the rule, the courts, as opposed to the legislatures, had the task of defining the "offense." Courts, therefore, seldom had difficulty in faithfully implementing the double jeopardy clause. The modern prevalence of statutory offenses, however, poses a serious danger to the fifth amendment interests because what the Framers would have understood as an "offense" no longer exists.

As the Court in Corbin finally confronts this change in the law directly, one is reminded of the plight of Homer's Odysseus when, "like a miserable beggar, an old man huddled in rags and leaning upon a staff, the master returned to his own home" to find his house and his wife beset by interlopers. Just as it would be mala-propos to let the suitors have their way with Penelope, the Court would forsake its duty and constitutional role of implementing the provisions of the Bill of Rights and insuring against their abuse if it deferred to countless overlapping legislative definitions of offenses. The ratifiers of the amendment could have foreseen neither the modern prevalence of statutory offenses nor the disappearance of the common-law approach. What the "same-conduct" standard does is to restore, as nearly as possible, the courts' power to define an "offense" for double jeopardy purposes.

2. A Proposed Exception Not Made

Grady v. Corbin may not provide for every interest worthy of the law's protection. Some would argue that the decision fails to

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107 Id.
108 Although legislators arguably have a constitutional duty not to offend the double jeopardy clause, it is in the court system that a defendant encounters the jeopardy and must seek his remedy in the absence of statutory protection.
111 Though the exact understanding of the Framers is not apparent, the meaning is at least so attenuated as to caution skepticism toward an exclusively "elements-based" analysis. Cf. Thomas, supra note 14, at 399.
vindicate the public interest in law enforcement. In Illinois v Zegart, the Court denied certiorari to a case with facts and a holding essentially identical to those in Corbin. Chief Justice Burger, joined by Justices Blackmun and Rehnquist, dissented in Zegart, insisting that “[o]ur cases, particularly Vitale and Brown, require the courts to look to the statutory elements of the first and second charges, not to the similarities of facts in the government’s proof.” Burger called the Zegart case an “example of judicial analysis carrying a sound principle beyond the outer limits of logic and producing an irrational result.”

At least one commentator shared Burger’s desire to protect a substantial law-enforcement interest and therefore advocated a so-called “jurisdictional exception” to what would become the Corbin rule. This exception “could allow a second prosecution if it proceeds in a different court [from] the first prosecution and if neither court has jurisdiction over both charges.” No such exception was carved out in Grady v Corbin. It may also be a miscarriage of justice that a fine for a minor traffic offense would shield a defendant from prosecution for homicide, such miscarriages are present in the broad wake of Corbin. It may also be a miscarriage of historical analysis that this result should occur; the fact that the double jeopardy clause applied only to felonies until 1873 militates in favor of a jurisdiction-based exception to the Corbin prosecution bar.

C. Challenges by the Corbin Dissenters

1. Justice O’Connor: Does Corbin Import a Lurking Inconsistency?

In her dissent, Justice O’Connor finds Corbin inconsistent with Dowling v United States, a case decided less than five

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116 Zegart, 452 U.S. at 951 (Burger, C.J., dissenting) (emphasis in original).
117 Id.
119 Id.
120 Id.
121 See Ex parte Lange, 85 U.S. (18 Wall.) 163, 172-73 (1873).
122 Corbin, 110 S. Ct. at 2095 (O’Connor, J., dissenting).
months earlier. She attacks the Corbin holding by pointing out an inconsistency the Court generates even as it settles other conflicts in the double jeopardy realm.\(^{124}\) In Dowling, a defendant was acquitted on charges of burglary, attempted robbery, assault, and weapons offenses arising from an incident in which a masked and armed man had entered a woman’s home.\(^{125}\) The jury could not identify Dowling as the perpetrator beyond a reasonable doubt.\(^{126}\) Two weeks before the home burglary had occurred, a man similarly masked and armed had robbed a bank in the same town.\(^{127}\) At Dowling’s trial for that bank robbery, the government introduced testimony from the woman in the earlier case, relating to the appearance of the man who had entered her home.\(^{128}\) Dowling challenged the admission of the testimony, using the "collateral estoppel component of the Double Jeopardy Clause"\(^{129}\) developed in Ashe v. Swenson.\(^{130}\) The Court distinguished Ashe by noting that Dowling’s "prior acquittal did not determine an ultimate issue in the present case."\(^{131}\) In the evidentiary context in which this testimony was introduced, the Court had previously held the standard for relevancy, and thus admissibility, to be whether "the jury can reasonably conclude that the act occurred and that the defendant was the actor."\(^{132}\) Declining to extend the fifth amendment version of collateral estoppel to these facts, the Court in Dowling held, consistent with precedent,\(^{133}\) that "an acquittal in a criminal case does not preclude the government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof."\(^{134}\)

Justice O’Connor found the rule articulated in Corbin difficult to reconcile with the outcome of Dowling.\(^{135}\) If the same fact

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\(^{124}\) Corbin, 110 S. Ct. at 2095-96 (O’Connor, J., dissenting).


\(^{126}\) Id. at 672.

\(^{127}\) Id. at 670.

\(^{128}\) Id. The evidence was introduced under FED. R. EVID. 404(b).

\(^{129}\) Dowling, 110 S. Ct. at 672.


\(^{131}\) Dowling, 110 S. Ct. at 672.


\(^{134}\) Dowling, 110 S. Ct. at 672.

\(^{135}\) Corbin, 110 S. Ct. at 2095-96 (O’Connor, J., dissenting). Dowling was decided over a bitter dissent by Justice Brennan, who accused the Court of "ignoring the principles upon which the collateral estoppel doctrine is based." See Dowling, 110 S. Ct. at 680 (Brennan, J., dissenting).
situation as in *Dowling* were to arise today, "a conscientious judge attempting to apply [Corbin] would probably conclude that the witness' testimony was barred by the Double Jeopardy Clause."

The evidence, after all, related to establishing Dowling's identity, "an essential element of an offense charged in [the subsequent] prosecution," [and] the testimony would likely 'prove conduct that constitutes an offense for which the defendant has already been prosecuted.'"

It is difficult to surmount the inconsistency Justice O'Connor brings to light if one assumes the "collateral estoppel component," as "a part of the Fifth Amendment's guarantee against double jeopardy," expands the scope of that protection. The protection afforded by collateral estoppel in *Dowling* seems quite small in comparison with the breadth of the *Corbin* holding. It may be, as Chief Justice Burger intimated in dissent, that *Ashe v. Swenson* was merely an activist decision, contrived to reach a desired result in a particular case. If Burger is correct, the combined holdings of *Dowling* and *Corbin* may represent the modern Court's attempt to eliminate some constitutional dead weight by rendering the "collateral estoppel component" unnecessary to double jeopardy protection. Since the *Corbin* shield makes it unlikely that any defendant will now invoke collateral estoppel, the Court will probably succeed in evading a direct examination of whatever differences exist between collateral estoppel and "other" double jeopardy principles.

2. *Justice Scalia: Is the Corbin Holding More than It Seems?*

The dissent of Justice Scalia, which is joined by Justices Rehnquist and Kennedy, makes an effort to characterize the *Corbin*
holding as an activist decision without legal or historical support. On the contrary, the majority draws its conclusions logically from precedent without serious leaps of faith, arriving at a rule that at least one commentator believes is compelled by both Illinois v. Vitale and the historical principle embodied in the fifth amendment.

Aside from that generalized misgiving and the contentions previously discussed, Justice Scalia's opinion raises some important questions about Corbin. These questions center around whether the principle will in practical effect impose the very "same transaction" test the Court has for so long rejected. As one example of how "same conduct" would function as "same transaction," Scalia offers a prosecution for burglary followed by a prosecution for murder occurring in the course of that burglary. "In the second trial the State will prove (if it can) that the defendant was engaged in a burglary—not because that is itself an element of the murder charge, but because by providing a motive for intentional killing it will be persuasive that murder occurred." Thus, Scalia concludes, proof of the burglary would cause the prosecution to violate the fifth amendment under the Corbin rule.

Corbin does not actually mandate Scalia's hypothetical result. Justice Scalia appears to ignore the majority's reliance on the fact that in Corbin the state alleged in the pleadings that it would use proof of the conduct for which Corbin had been convicted to establish recklessness or negligence. This fact would be immaterial to a "same transaction" test, since that test would be broad enough to bar the second prosecution even if the state did not rely on the already-prosecuted conduct to establish elements of the

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141 "The Court today [is] departing from clear text and clear precedent with no justification." Corbin, 110 S. Ct. at 2096 (Scalia, J., dissenting). "The principle the Court adopts today [is] radically out of line with our double jeopardy jurisprudence." Id. at 2102 (Scalia, J., dissenting).


144 Cf. Thomas, supra note 14, at 399. "The need for a conduct-based test is acute in today's world of overlapping and duplicative criminal statutes." In fact, Thomas would create an exception to what is now the Corbin rule for just such a fact situation as occurred in Corbin itself. See supra notes 115-21 and accompanying text.

145 See supra notes 61, 100 and 104 and accompanying text.

146 See supra notes 43-50 and accompanying text.

147 Corbin, 110 S. Ct. at 2103 (Scalia, J., dissenting) (emphasis in original).

148 Id. at 2094.
offense.149 Furthermore, “motive” is not an element of a crime, and that which is “persuasive” that a crime occurred is not always that which is necessary to establish an element of the offense.

In short, Justice Scalia fails to distinguish conduct required to be proved from conduct actually proved, the latter of which is not explicitly addressed in the majority opinion. This distinction, when recognized, tends to nullify the likelihood of the procedural “role-reversal” he envisions in trial practice150 along with his other fears.151 Most of Justice Scalia’s objections in Corbin amount to mere specters of what future decisions he suspects the Court will make toward adopting the “same transaction” test. He imagines, for example, that Corbin will soon be extended to find double jeopardy wherever evidence in a second prosecution tends to establish an element of a previously prosecuted offense. Scalia declares that “[t]he Court that has done what it has done today should find this lesser transmogrification easy.”152 Convinced that the integrity of double jeopardy analysis has gone out the window, Justice Scalia gives vent to rabid fears of inchoate judicial activism.153

Other concerns Scalia expresses in Corbin tend to reflect an inclination toward the original understanding154 of “same offense,”

149 Id. at 2094 n.15.
150 “Suppose [that on remand] defense counsel asks the witness on cross-examination, ‘When you said the defendant’s vehicle was “weaving back and forth,” did you mean weaving back and forth across the center line?’—to which the witness replies yes. Will this self-inflicted wound count for purposes of determining what the prosecution has “proved”? If so, can the prosecution then seek to impeach its own witness by showing that his recollection of the vehicle’s crossing the center line was inaccurate? [T]he prosecutor in the second trial will presumably seek to introduce as much evidence as he can without crossing that line [of ‘proving’ the prior offense], and the defense attorney will presumably seek to provoke the prosecutor into (or assist him in) proving the defendant guilty of the earlier crime. This delicious role-reversal, discovered to have been mandated by the Double Jeopardy Clause lo these 200 years, makes for high comedy but inferior justice.” Id. at 2104 (Scalia, J., dissenting).
151 Justice Scalia anticipates judicial determinations at the conclusion of trial as to whether particular conduct “‘has been proved’ (whatever that means).” Id. at 2104 (Scalia, J., dissenting). No such procedure is overtly required by Corbin.
152 Id. at 2105 (Scalia, J., dissenting). Scalia’s hypothetical holding is distinguishable from the Second Circuit’s decision in United States v. Calderone, 917 F.2d 717 (2d Cir. 1990). In that case, a prosecution for a “smaller” conspiracy followed an acquittal on another charge of a larger conspiracy. The government argued that since the actual agreement to distribute narcotics constituted the “offense” already prosecuted, it was not a double jeopardy violation to re-prove conduct from which that agreement could be inferred, so long as the agreement was not proved directly. The court rejected this argument, noting that conspiracy is almost never proved by direct evidence and that the government’s formulation recast Corbin as merely “an alternative formulation of Blockburger” Calde-
a formulation that would "permit a prosecution based upon the same acts but for a different crime." His long historical discussion may be occasioned by a similar motivation to maintain as close a temporal mooring as possible to that interpretation of the double jeopardy clause. Such a desire is misguided, however, in view of the fact noted by the Ashe Court that "at common law offense categories were relatively few and distinct. [Later] it became possible for prosecutors to spin out a startlingly numerous series of offenses from a single alleged criminal transaction." In order to protect the original interests involved to the original extent, it is necessary, when "offense" evolves away from a meaning synonymous with "conduct," to protect those interests by analyzing "conduct" instead.

CONCLUSION

As a matter of pure theoretical soundness, the ruling in Grady v Corbin makes reasonably coherent legal sense out of the existing precedent. Justice Scalia's fears that the "same conduct" test cannot be implemented are ill-founded in view of the express limita-
tions contained in the *Corbin* holding. On the whole, the case begins to alleviate the confusion in a doctrinal area once described by Justice Rehnquist as a "Sargasso Sea."160 *Corbin* settles a dispute among the circuit courts161 as to the level of double jeopardy protection afforded by the rule in *Vitale*, providing a much-needed uniformity in the application of the clause. From a standpoint of coherence and convenience, *Corbin* appears to pass juridical muster.

Due to the breadth of *Corbin*’s protection, it is unlikely that the unreconciled variance with the rule in *Dowling* will force further clarification on the collateral-estoppel issue. However, widespread dissatisfaction with the practical result (e.g., that paying a minor traffic fine can avert a homicide prosecution) will possibly lead to the carving out of exceptions to the general bar to prosecution articulated in *Corbin*. The basic rule is likely to prevail nonetheless, since only a "same conduct" standard can adequately protect defendants against potential legislative abuse of the power to define offenses. With "conduct" as the guide, the double jeopardy clause can more thoroughly embody the practical protections it was meant to afford.

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