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I. INTRODUCTION

Last term, in *United States v. Dixon*,[1] the Supreme Court for the first time held that the Double Jeopardy Clause of the Constitution[2] attaches in *nonsummary* criminal contempt prosecutions just as it does in other criminal prosecutions.[3] The Court, however, expressly left open the question whether the guarantee against double jeopardy also applies to *summary* criminal contempt prosecutions.[4] This Article examines that question and concludes that the Double Jeopardy Clause applies to summary criminal contempt prosecutions. Nevertheless, it then concludes that the double jeopardy provision rarely will preclude the government from prosecuting an individual for a substantive criminal offense based upon the same act for which she previously had been convicted of contempt of court.

II. CONTEMPT OF COURT

Contempt of court involves the intentional obstruction of a court's orderly process, and hence of the orderly administration of justice, by word or deed.[5] It can be committed either directly or indirectly.[6] Direct contempt is "contemptuous conduct occurring

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1 113 S. Ct. 2849 (1993).

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

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

4 *Id.* at 2856 n.1. *See also id.* at 2873 n.4 (White, J., concurring in the judgment in part and dissenting in part).

5 Crozer-Chester Medical Center v. Moran, 560 A.2d 133, 136 (Pa. 1989). *See also* United States v. Wilson, 421 U.S. 309, 315-16 (1975); People v. Totten, 514 N.E.2d 959, 962 (Ill. 1987).

6 The Supreme Court has used the terms "in-court" and "out-of-court" to describe the different ways in which contempt can be committed. *See* Young v. United States *ex*

in the very presence of the judge"[7] in open court,[8] such as striking the prosecutor,[9] misrepresenting oneself to the court,[10] refusing to testify after being directed to do so by the judge,[11] knowingly giving false testimony,[12] fleeing from the courtroom after being convicted of an offense,[13] disregarding the judge's rulings on evidentiary or procedural matters,[14] or engaging in disrespectful conduct toward the judge.[15] Indirect contempt, on the other hand, is contemptuous conduct "committed beyond the court's presence,"[16] such as disobeying a court order or decree.[17]

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rel. Vuitton et Fils S.A., 481 U.S. 787, 798 (1987).

7 *Totten*, 514 N.E.2d at 961 (internal quotation marks omitted). *See also* United States v. Dixon, 113 S. Ct. 2849, 2870 n.1 (White, J., concurring in the judgment in part and dissenting in part) ("acts occurring in the courtroom and interfering with the orderly conduct of business"); *Crozer-Chester Medical Center*, 560 A.2d at 136 ("Direct contempt is obstruction [of a court's orderly process] by conduct, word or deed in the presence of the court . . . .").

8 Cooke v. United States, 267 U.S. 517, 534-36 (1925); *Ex parte* Terry, 128 U.S. 289, 307-10 (1888). *See also In re* Oliver, 333 U.S. 257, 274-76 (1948).

9 *Totten*, 514 N.E.2d 959; State v. Bowling, 520 N.E.2d 1387 (Ohio Ct. App. 1987) (per curiam). *See also* United States v. Rollerson, 449 F.2d 1000 (D.C. Cir. 1971) (throwing water pitcher at prosecutor); United States v. Mirra, 220 F. Supp. 361 (S.D.N.Y. 1963) (throwing chair at prosecutor).

10 People v. Heard, 566 N.E.2d 896 (Ill. App. Ct. 1991) (defendant represented himself to be his brother at the latter's trial for five felony offenses).

11 United States v. Wilson, 421 U.S. 309 (1975) (after defendants had been granted immunity from prosecution); Yates v. United States, 355 U.S. 66 (1957); State v. Warren, 451 A.2d 197, 198 (N.J. Super. Ct. Law Div. 1982).

12 Yarbro v. State, 402 So. 2d 599 (Fla. Dist. Ct. App. 1981), *overruled by* State v. Newell, 532 So. 2d 1114 (Fla. Dist. Ct. App. 1988); Maples v. State, 565 S.W.2d 202 (Tenn. 1978).

13 Commonwealth v. Warrick 609 A.2d 576 (Pa. Super. Ct. 1992), *appeal denied*, 626 A.2d 1157 (Pa. 1993); Commonwealth v. Warrick, 497 A.2d 259 (Pa. Super. Ct. 1985).

14 Taylor v. Hayes, 418 U.S. 488 (1974).

15 *Id.*

16 Crozer-Chester Medical Center v. Moran, 560 A.2d 133, 136 (Pa. 1989). *Accord* Commonwealth v. Allen, 486 A.2d 363, 368 (Pa. 1984), *cert. denied*, 474 U.S. 842 (1985).

17 United States v. Dixon, 113 S. Ct. 2849 (1993) (violation of pretrial release condition that defendant refrain from committing "any criminal offense"; violation of civil protection order requiring that defendant "not molest, assault, or in any manner threaten or physically abuse" his estranged wife); Frank v. United States, 395 U.S. 147 (1969) (violation of injunction restraining defendant from using interstate facilities in sale of certain oil interests without having filed registration statement with SEC); Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 (1968) (violation of injunction against, *inter alia*, "inflicting harm or damage upon the persons or property of [Taylor Implement Company's] employees, customers, visitors or any other persons"); Green v. United States, 356 U.S. 165 (1958) (willful disobedience of order requiring defendants to surrender to United States Marshal for execution of sentences following affirmance of convictions); People v. Totten, 514 N.E.2d 959 (Ill. 1987) (violation of civil protection order enjoining defendant from striking, threatening, harassing, or interfering with personal liberty of his estranged wife, from entering her home, and from initiating or attempting to initiate contact with her);

The power to punish contemptuous conduct is inherent in all courts.[18] Such power "is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice."[19] Nevertheless, the legislature can regulate the manner in which courts prosecute contempt[20] and can prescribe its penalties.[21]

There are two types of sanctions for contempt of court: civil contempt and criminal contempt. "Civil . . . contempt is a sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of noncompliance."[22] The sanction is remedial and for the benefit of the litigant or a private interest.[23] Moreover, a civil contempt sanction is

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Commonwealth v. Allen, 486 A.2d 363 (Pa. 1984) (violation of civil protection order requiring defendant "to refrain from abusing, striking or harassing" his estranged wife and their minor children), *cert. denied*, 474 U.S. 842 (1985); Commonwealth v. Aikins, 618 A.2d 992 (Pa. Super. Ct. 1993) (violation of civil protection order giving defendant's estranged wife exclusive possession of their marital residence); State v. Magazine, 393 S.E.2d 385 (S.C. 1990) (violation of civil protection order prohibiting defendant from communicating with or abusing his estranged wife in any way).

18 Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 795 (1987); Michaelson v. United States *ex rel.* Chicago, St. P., M., & O. Ry. Co., 266 U.S. 42, 65 (1924); Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 450 (1911); Bessette v. W.B. Conkey Co., 194 U.S. 324, 326 (1904); *Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 510 (1874).

19 *Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 510 (1874). *See also Young*, 481 U.S. at 795 ("It is essential to the administration of justice.") (quoting *Michaelson*, 266 U.S. at 65); *Gompers*, 221 U.S. at 450 ("[T]he power of courts to punish for contempts is a necessary and integral part of the independence of the judiciary, and is absolutely essential to the performance of the duties imposed upon them by law.").

20 *Young*, 481 U.S. at 799; *Michaelson*, 266 U.S. at 65-66.

21 *E.g.*, D.C. CODE ANN. § 23-1329(c) (1989) ("Any person found guilty of criminal contempt for violation of a condition of release shall be imprisoned for not more than six months, or fined not more than $1,000, or both."); PA. STAT. ANN. tit. 42, § 4136(b) (Supp. 1993) (except as otherwise provided, indirect criminal contempt for violation of restraining order or injunction may be punished by fine not exceeding $100, or imprisonment in county jail for up to 15 days, or both); TENN. CODE ANN. § 29-9-103(b) (Supp. 1993) ("Where not otherwise specially provided, the circuit, chancery, and appellate courts are limited to a fine of fifty dollars ($50.00), and imprisonment not exceeding ten (10) days, and, except as provided in § 29-9-108, all other courts are limited to a fine of ten dollars ($10.00).").

22 McComb v. Jacksonville Paper Co., 336 U.S. 187, 191 (1949). *See also* Local 28 of the Sheet Metal Workers' Int'l Ass'n v. Equal Employment Opportunity Comm'n, 478 U.S. 421, 443 (1986) (civil contempt sanctions are employed "'for either or both of two purposes: to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained.'") (quoting United States v. United Mine Workers, 330 U.S. 258, 303-04 (1947)).

23 Hicks *ex rel.* Feiock v. Feiock, 485 U.S. 624, 631 (1988); Gompers v. Bucks Stove

conditional in that the party can avoid the sanction by performing the affirmative act required by the court's order.[24] Criminal contempt sanctions, on the other hand, "are punitive in nature and are imposed to vindicate the authority of the court."[25] Such sanctions are unconditional in that they are not dependent upon future compliance with the court's order.[26] As the Supreme Court explained, "[t]he critical feature that determines whether [a particular contempt sanction] is civil or criminal in nature is . . . whether the contemnor can avoid the sentence imposed on him, or purge himself of it, by complying with the terms of the original order."[27]

& Range Co., 221 U.S. 418, 441 (1911).

24 *Hicks*, 485 U.S. at 632, 633 & n.6; Shillitani v. United States, 384 U.S. 364, 368 (1966); Maggio v. Zeitz, 333 U.S. 56, 68 (1948); *Gompers*, 221 U.S. at 442.

25 *Local 28*, 478 U.S. at 443 (quoting *United Mine Workers*, 330 U.S. at 302). *Accord Hicks*, 485 U.S at 631; Yates v. United States, 355 U.S. 66, 72 (1957); *Maggio*, 333 U.S. at 68; *Gompers*, 221 U.S. at 441.

26 *Hicks*, 485 U.S at 632, 633 & n.6; *Yates*, 355 U.S. at 72; *Gompers*, 221 U.S. at 442.

27 *Hicks*, 485 U.S. at 635 n.7. In addition, the *Hicks* Court stated:

> The character of the relief imposed [in a contempt proceeding] is . . . ascertainable by applying a few straightforward rules. If the relief provided is a sentence of imprisonment, it is remedial if "the defendant stands committed unless and until he performs the affirmative act required by the court's order," and is punitive if "the sentence is limited to imprisonment for a definite period." If the relief provided is a fine, it is remedial when it is paid to the complainant, and punitive when it is paid to the court, though a fine that would be payable to the court is also remedial when the defendant can avoid paying the fine simply by performing the affirmative act required by the court's order.

Id. at 631-32 (citation omitted).

The Court in *Hicks* also recognized that "[i]n contempt cases, both civil and criminal relief have aspects that can be seen as either remedial or punitive or both." *Id.* at 635. It continued:

> [W]hen a court imposes fines and punishments on a contemnor, it is not only vindicating its legal authority to enter the initial court order, but it also is seeking to give effect to the law's purpose of modifying the contemnor's behavior to conform to the terms required in the order. As was noted in *Gompers [v. Bucks Stove and Range Co.*, 221 U.S. 418, 443 (1911),]:
>
> > It is true that either form of [punishment] has also an incidental effect. For if the case is civil and the punishment is purely remedial, there is also a vindication of the court's authority. On the other hand, if the proceeding is for criminal contempt and the [punishment] is solely punitive, to vindicate the authority of the law, the complainant may also derive some incidental benefit from the fact that such punishment tends to prevent a repetition of the disobedience. But such indirect consequences will not change [punishment] which is merely coercive and remedial, into that which is solely punitive in character or *vice versa*.

Id. at 635-36 (first brackets added).

As a general matter, courts use a "totally different procedure"[28] to punish direct, as opposed to indirect, criminal contempt. In cases of indirect criminal contempt, the Constitution guarantees a defendant notice of the charges,[29] a hearing at which the prosecution presents evidence and at which the defendant can present a defense,[30] and, for serious contempts, trial by jury.[31] In cases of direct criminal contempt, however, an individual can be punished immediately,[32] without notice or a hearing,[33] and, if upon conviction the judge does not impose a sen-

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28 United States v. Mirra, 220 F. Supp. 361, 364 n.8 (S.D.N.Y. 1963).

29 *Hicks*, 485 U.S at 638 n.10; Cooke v. United States, 267 U.S. 517, 537 (1925); *Gompers* 221 U.S. at 446.

30 *In re* Oliver, 333 U.S. 257, 274-76 (1948); *Cooke*, 267 U.S. at 537.

31 *See* Frank v. United States, 395 U.S. 147, 148 (1969); Bloom v. Illinois, 391 U.S. 194, 202, 207-08 (1968). Where the legislature has authorized a maximum penalty of more than six months' imprisonment for a criminal offense, including contempt, the offense is deemed "serious" for jury trial purposes. Baldwin v. New York, 399 U.S. 66, 69 (1970) (plurality opinion); *id.* at 74-75 (Black, J., concurring in the judgment); *see also* Blanton v. City of North Las Vegas, 489 U.S. 538, 543 (1989) (where maximum authorized penalty does not exceed six months' imprisonment, offense presumed to be "petty"); Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216, 220 (1968) (no right to jury trial where maximum penalty authorized by statute for contempt was 10 days in jail and fine of $50). Where the legislature has not established a maximum penalty for an offense, the sentence actually imposed by the trial court is "the best evidence of the seriousness of the offense." *Bloom*, 391 U.S. at 211. *Accord Frank*, 395 U.S. at 150. Accordingly, under such circumstances, a sentence of imprisonment exceeding six months may not be imposed without a trial by jury. Muniz v. Hoffman, 422 U.S. 454, 476 (1975); *see also* Taylor v. Hayes, 418 U.S. 488, 495, 496 (1974) (sentence of up to six months' imprisonment can be imposed without jury trial).

32 Although a trial judge can immediately punish contemptuous conduct occurring in her presence, she need not do so. Instead, she can wait until the end of the ongoing trial. Sacher v. United States, 343 U.S. 1 (1952) (interpreting Fed. R. Crim. P. 42(a)). *See, e.g., Taylor*, 418 U.S. 488; Mayberry v. Pennsylvania, 400 U.S. 455 (1971).

The Supreme Court in *Sacher* stated:

> If the conduct of these lawyers [the contemnors] warranted immediate summary punishment on dozens of occasions, no possible prejudice to them can result from delaying it until the end of the trial if the circumstances permit such delay. The overriding consideration is the integrity and efficiency of the trial process, and if the judge deems immediate action inexpedient he should be allowed discretion to [delay action until the end of trial].

Sacher, 343 U.S. at 10.

33 *Ex parte* Terry, 128 U.S. 289, 306-10 (1888); *Taylor*, 418 U.S. at 497.

In *Sacher*, the Supreme Court, in interpreting Federal Rule of Criminal Procedure 42(a) stated:

> We think "summary" as used in this Rule does not refer to the timing of the action with reference to the offense but refers to a procedure which dispenses with the formality, delay and digression that would result from the issuance of process, service of complaint and answer, holding hearings, taking evidence, listening to arguments, awaiting briefs, submission of findings, and all that goes

tence of more than six months' imprisonment, without a jury.[34] Thus, for example, Federal Rule of Criminal Procedure 42(a), which "reflects the common-law rule which is widely if not uniformly followed in the States,"[35] provides: "[a] criminal contempt may be punished summarily if the judge certifies that the judge saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court . . . ."[36]

Direct criminal contempt can be punished summarily because, in contrast to indirect criminal contempt, the judge has seen the offense and is personally possessed of all the facts necessary to conclude that a contempt has occurred.[37] Moreover, courts have deemed the summary power to punish for direct criminal contempt "'absolutely essential to the protection of the courts in the discharge of their functions.'"[38] "'Without it,'" the Supreme Court has stated, "'judicial tribunals would be at the mercy of the disorderly and violent, who respect neither the laws enacted for the

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with a conventional court trial.

Sacher, 343 U.S. at 9.

Nevertheless, "where summary punishment for contempt is imposed during trial, 'the contemnor has normally been given an opportunity to speak in his own behalf in the nature of a right of allocution.'" *Taylor*, 418 U.S. at 498.

34 Codispoti v. Pennsylvania, 418 U.S. 506, 514-15 (1974) (opinion of White, J.); *id.* at 522-23 (Blackmun, J., dissenting); *Taylor*, 418 U.S. at 495-97.

35 *Bloom*, 391 U.S. at 209. *See also* United States v. Wilson, 421 U.S. 309, 317 (1975).

36 In contrast, Federal Rule of Criminal Procedure 42(b), which governs cases of indirect criminal contempt, provides:

> A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court and in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. The defendant is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

37 *Sacher*, 343 U.S. at 9; Cooke v. United States, 267 U.S. 517, 534, 536 (1925); Crozer-Chester Medical Center v. Moran, 560 A.2d 133, 136 (Pa. 1989).

38 Yates v. United States, 355 U.S. 66, 70 (1957) (quoting *Ex parte* Terry, 128 U.S. 289, 313 (1888)); *see also* Harris v. United States, 382 U.S. 162, 164 (1965); Offutt v. United States, 348 U.S. 11, 14 (1954); *Sacher*, 343 U.S. at 8-9; *Cooke*, 267 U.S. at 534, 536.

vindication of public and private rights, nor the officers charged with the duty of administering them.'"[39]

III. THE GUARANTEE AGAINST DOUBLE JEOPARDY

The Fifth Amendment to the Constitution of the United States provides that no person "shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . . ."[40] This guarantee against double jeopardy, which incorporates "one of the oldest ideas found in western civilization,"[41] is "fundamental" to the Anglo-American system of justice.[42] As such, it applies to the states through the Due Process Clause of the Fourteenth Amendment.[43]

The guarantee against double jeopardy encompasses several related protections. As the Supreme Court stated in *North Carolina v Pearce*,[44] "[i]t protects against a second prosecution for the same

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39 *Yates*, 355 U.S. at 70-71 (quoting *Terry*, 128 U.S. at 313).

40 U.S. CONST. amend. V.

41 Bartkus v. Illinois, 359 U.S. 121, 151 (1959) (Black, J., dissenting).

The guarantee against double jeopardy can be traced from Greek and Roman times to the common law of England and into the jurisprudence of the United States. Benton v. Maryland, 395 U.S. 784, 795-96 (1969); *Bartkus*, 359 U.S. at 151-54 (Black, J., dissenting); *see also* United States v. Wilson, 420 U.S. 332, 339-42 (1975).

In *Bartkus*, Justice Black stated:

> Fear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in western civilization. Its roots run deep into Greek and Roman times. Even in the Dark Ages, when so many other principles of justice were lost, the idea that one trial and one punishment were enough remained alive through the canon law and the teachings of the early Christian writers. By the thirteenth century it seems to have been firmly established in England, where it came to be considered as a "universal maxim of the common law." It is not surprising, therefore, that the principle was brought to this country by the earliest settlers as part of their heritage of freedom, and that it has been recognized here as fundamental again and again. Today it is found in varying forms, not only in the Federal Constitution, but in the jurisprudence or constitutions of every State, as well as most foreign nations. It has, in fact, been described as a part of all advanced systems of law and as one of those universal principles "of reason, justice, and conscience, of which Cicero said: 'Nor is it one thing at Rome and another at Athens, one now and another in the future, but among all nations it is the same.'"

Bartkus, 359 U.S. at 151-54 (Black, J., dissenting) (footnotes omitted).

42 *Benton*, 395 U.S. at 794-96.

43 *Id.* at 794 (overruling Palko v. Connecticut, 302 U.S. 319 (1937)).

U.S. Const. amend. XIV, provides, in part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

44 395 U.S. 711, 717 (1969) (original footnotes omitted and new footnotes added); *accord* Grady v. Corbin, 495 U.S. 508, 516 (1990), *overruled by* United States v. Dixon, 113 S. Ct. 2849 (1993); Ohio v. Johnson, 467 U.S. 493, 498 (1984); Albernaz v. United States,

offense after acquittal.[45] It protects against a second prosecution for the same offense after conviction.[46] And it protects against multiple punishments for the same offense."[47] In addition, the guarantee also "protects against retrial after the declaration of a mistrial in certain circumstances."[48]

Several policy considerations underlie the guarantee against double jeopardy. In the context of successive prosecutions, "the guarantee serves 'a constitutional policy of finality for the defendant's benefit.'"[49] By barring reprosecution following an acquittal or a conviction, it "assures an individual that . . . he will not be forced, with certain exceptions, to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense."[50] As the Supreme Court explained in *Green v. United States*:[51]

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450 U.S. 333, 343 (1981); Justices of Boston Municipal Court v. Lydon, 466 U.S. 294, 306-07 (1981); Illinois v. Vitale, 447 U.S. 410, 415 (1980); United States v. DiFrancesco, 449 U.S. 117, 129 (1980); Brown v. Ohio, 431 U.S. 161, 165 (1977); *Wilson*, 420 U.S. at 343.

45 *E.g.*, Smalis v. Pennsylvania, 476 U.S. 140, 145-46 (1986); Sanabria v. United States, 437 U.S. 54, 78 (1978); United States v. Martin Linen Supply Co., 430 U.S. 564, 576 (1977); *Benton*, 395 U.S. at 796-97; Fong Foo v. United States, 369 U.S. 141, 143 (1962) (per curiam); Green v. United States, 355 U.S. 184, 190-91 (1957); United States v. Ball, 163 U.S. 662, 671 (1896); *see also* Arizona v. Rumsey, 467 U.S. 203, 211-12 (1984) (capital punishment sentencing hearing); Bullington v. Missouri, 451 U.S. 430, 445-46 (1981) (same); Hudson v. Louisiana, 450 U.S. 40, 44-45 (1981) (trial court's granting post-trial motion for new trial because evidence insufficient to support jury's guilty verdict); Burks v. United States, 437 U.S. 1, 19 (1978) (reversal of conviction on appeal for lack of sufficient evidence to sustain jury's verdict); Ashe v. Swenson, 397 U.S. 436, 445-47 (1970) (Double Jeopardy Clause incorporates doctrine of collateral estoppel).

46 *E.g.*, Harris v. Oklahoma, 433 U.S. 682, 682-83 (1977) (per curiam); *Brown*, 432 U.S. at 168-69 (1977); Breed v. Jones, 421 U.S. 519, 541 (1975) (following adjudication of delinquency); *In re* Nielsen, 131 U.S. 176, 187-90 (1889).

47 *E.g.*, United States v. Halper, 490 U.S. 435, 448-49 (1989); North Carolina v. Pearce, 395 U.S. 711, 718-19 (1969); *Ex parte* Lange, 85 U.S. (18 Wall.) 163, 176 (1874).

48 *Lydon*, 466 U.S. at 307 n.6. *See also* United States v. Jorn, 400 U.S. 470 (1971) (mistrial declared by trial judge *sua sponte* so prosecution witnesses could consult with attorneys about their constitutional rights); Downum v. United States, 372 U.S. 734 (1963) (mistrial declared at prosecution's request, and over defendant's objection, because prosecution's key witness not present).

49 *Brown*, 432 U.S. at 165 (quoting *Jorn*, 400 U.S. at 479 (plurality opinion)); *accord* United States v. DiFrancesco, 449 U.S. 117, 128 (1980); Crist v. Bretz, 437 U.S. 28, 33, 38 (1978); Arizona v. Washington, 434 U.S. 497, 503 (1978).

50 Abney v. United States, 431 U.S 651, 661 (1977); *accord* Smalis v. Pennsylvania, 476 U.S. 140, 143 n.4 (1986); *see also* Ohio v. Johnson, 467 U.S. 493, 498 (1984); *DiFrancesco*, 449 U.S. at 127, 136; *Breed*, 421 U.S. at 529-30, 532-33; Abbate v. United States, 359 U.S 187, 198-99 (1959) (separate opinion of Brennan, J.).

51 355 U.S. 184 (1957).

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that 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 . . . .[52]

Moreover, "[t]o permit a second trial after an acquittal, however mistaken the acquittal may have been, would present an unacceptably high risk that the Government, with its vastly superior resources, might wear down the defendant so that 'even though innocent he may be found guilty.'"[53] The guarantee therefore constitutes a "barrier to 'affording the prosecution another oppor-

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52 *Id.* at 187; *accord Lydon*, 466 U.S. at 307; Bullington v. Missouri, 451 U.S. 430, 445 (1981); *DiFrancesco*, 449 U.S. at 127-28; United States v. Scott, 437 U.S. 82, 87 (1978); *Crist*, 437 U.S. at 35; *Washington*, 434 U.S. at 504 n.13; *Abney*, 431 U.S. at 661-62; United States v. Dinitz, 424 U.S. 600, 606 (1976); Serfass v. United States, 420 U.S. 377, 387-88 (1975); United States v. Wilson, 420 U.S. 332, 343 (1975); *Jorn*, 400 U.S. at 479 (plurality opinion); Benton v. Maryland, 395 U.S. 784, 795-96 (1969).

53 *Scott*, 437 U.S. at 91 (quoting Green v. United States, 355 U.S. 184, 188 (1957)); *accord* Poland v. Arizona, 476 U.S. 147, 156 (1986); *see also Lydon*, 466 U.S. at 307; Tibbs v. Florida, 457 U.S. 31, 41 (1982); *DiFrancesco*, 449 U.S. at 130.

The Supreme Court in *DiFrancesco* explained:

> An acquittal is accorded special weight. "The constitutional protection against double jeopardy unequivocally prohibits a second trial following an acquittal," for the "public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though 'the acquittal was based upon an egregiously erroneous foundation.' If the innocence of the accused has been confirmed by a final judgment, the Constitution conclusively presumes that a second trial would be unfair ." . . .
>
> This is justified on the ground that, however mistaken the acquittal may have been, there would be an unacceptably high risk that the Government, with its superior resources, would wear down a defendant, thereby "enhancing the possibility that even though innocent he may be found guilty."

DiFrancesco, 449 U.S. at 129-30 (quoting Fong Foo v. United States, 369 U.S. 141, 143 (1962); *Washington*, 434 U.S. at 503 and *Green*, 355 U.S. at 188) (citations omitted). *See also* Bullington v. Missouri, 451 U.S. 430, 445-46 (1981) (capital punishment sentencing hearing)

As the Supreme Court pointed out in *Washington*, these considerations also apply where the defendant's first trial was prematurely terminated before a verdict:

> Even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted.

Washington, 434 U.S. at 503-04 (footnotes omitted).

tunity to supply evidence which it failed to muster in the first proceeding,'"[54] thereby preventing the prosecution from "gain[ing] an advantage from what it learns at the first trial about the strengths of the defense case and the weaknesses of its own."[55]

An additional purpose of foreclosing a second prosecution following a conviction "is to prevent a defendant from being subjected to multiple punishment[s] for the same offense."[56] Indeed, recognition of the injustice inherent in punishing a person twice for the same offense "has deep roots in our history and jurisprudence"[57] and produces an independent justification for the guarantee against double jeopardy.[58] As Justice Black stated, "[i]t is . . . an affront to human dignity and . . . dangerous to human

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54 *DiFrancesco*, 449 U.S. at 128 (quoting Burks v. United States, 437 U.S. 1, 11 (1978), and Swisher v. Brady, 438 U.S. 204, 215-16 (1978)).

55 *Id. See also* Grady v. Corbin, 495 U.S. 508, 518 (1990) ("Multiple prosecutions . . . give the State an opportunity to rehearse its presentation of proof, thus increasing the risk of an erroneous conviction for one or more of the offenses charged."), *overruled by* United States v. Dixon, 113 S. Ct. 2849 (1993); *Tibbs*, 457 U.S. at 41 ("This prohibition . . . prevents the State from honing its trial strategies and perfecting its evidence through successive attempts at conviction."); *Crist*, 437 U.S. at 52 (Powell, J., dissenting) ("At a retrial, for example, prosecution witnesses may be better prepared for the rigors of cross-examination.").

56 *Lydon*, 466 U.S. at 307. *See also* United States v. Martin Linen Supply Co., 430 U.S. 564, 569 n.6 (1977); North Carolina v. Pearce, 395 U.S. 711, 735-36 (1969) (Douglas, J., concurring); Bartkus v. Illinois, 359 U.S. 121, 154 (1959) (Black, J., dissenting); *Ex parte* Lange, 85 U.S. (18 Wall.) 163, 173 (1874).

57 United States v. Halper, 490 U.S. 435, 440 (1989).
The Supreme Court in *Halper* stated:

> As early as 1641, the Colony of Massachusetts in its "Body of Liberties" stated "No man shall be twise sentenced by Civill Justice for one and the same Crime, offence, or Trespasse." American Historical Documents 1000-1904, 43 Harvard Classics 66, 72 (C. Elit ed. 1910). In drafting his initial version of what came to be our Double Jeopardy Clause, James Madison focused explicitly on the issue of multiple punishment: "No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence." 1 Annals of Cong 434 (1789-91) (J. Gales ed. 1834). In our case law, too, this Court, over a century ago, observed: "If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence." *Ex parte* Lange, 18 Wall. 163, 168 (1874).

Id. See also Pearce, 395 U.S. at 728-29 (Douglas, J., concurring).

58 *Halper*, 490 U.S. at 440; United States v. Ewell, 383 U.S. 116, 124 (1966); *Ex parte* Lange, 85 U.S. (18 Wall.) 163, 168-69 (1874).

The Supreme Court stated in *Halper*: "[W]hen the Government already has imposed a criminal penalty and seeks to impose additional punishment in a second proceeding, the Double Jeopardy Clause protects against the possibility that the Government is seeking the second punishment because it is dissatisfied with the sanction obtained in the first proceeding." *Halper*, 490 U.S. at 451 n.10. *See also Pearce*, 395 U.S. at 734 (Douglas, J., concurring) ("[T]he ban on double jeopardy] prevents the State, following *conviction* from retrying the defendant again in the hope of securing a greater penalty.").

freedom for a man to be punished twice for the same offense . . . ."[59]

Finally, by precluding a second prosecution in some circumstances after the premature termination of a defendant's trial, the guarantee also protects a defendant's "valued right to have his trial completed by a particular tribunal,"[60] that is, his interest in "being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate."[61]

By its very terms, the Double Jeopardy Clause guards only against being twice put in jeopardy for the "same offence." A single act or transaction, however, may violate two or more separate statutory provisions.[62] Consequently, courts frequently must ascertain whether, for purposes of double jeopardy analysis, there are two offenses or just one. The traditional test utilized in determining whether two separate statutory offenses constitute the "same offence" for double jeopardy purposes was announced by the Supreme Court in *Blockburger v. United States*.[63] The Court stated: "The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not."[64] This test focuses upon the elements of the two crimes.[65] "If each [offense] requires proof of a fact that the other does not, the *Blockburger* test is satisfied, not-

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59 Abbate v. United States, 359 U.S. 187, 203 (1959) (Black, J., dissenting).

60 Crist v. Bretz, 437 U.S. 28, 36 (1978) (quoting Wade v. Hunter, 336 U.S. 684, 689 (1949)). *Accord* Richardson v. United States, 468 U.S. 317, 324-25 (1984); Oregon v. Kennedy, 456 U.S. 667, 672 (1982); United States v. DiFrancesco, 449 U.S. 117, 127-28 (1980); Swisher v. Brady, 438 U.S. 204, 215 (1978); United States v. Scott, 437 U.S. 82, 100-01 (1978); Arizona v. Washington, 434 U.S. 497, 503, 509 (1978); United States v. Dinitz, 424 U.S. 600, 606 (1976); United States v. Jorn, 400 U.S. 470, 480, 484 (1971) (plurality opinion); Downum v. United States, 372 U.S. 734, 736 (1963).

61 *Washington*, 434 U.S. at 514 (quoting *Jorn*, 400 U.S. at 486 (plurality opinion)).

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

63 *Id.* at 299.

64 *Id.* at 304. *Blockburger* involved the question of when consecutive sentences can be imposed in a single trial for the violation of two different statutory provisions. Nevertheless, the Supreme Court subsequently held that if two offenses are the same for purposes of barring multiple punishments in a single trial, they necessarily are the same for purposes of barring successive prosecutions. Brown v. Ohio, 432 U.S. 161, 166 (1977). *Accord* Grady v. Corbin, 495 U.S. 508, 515-17 (1990), *overruled by* United States v. Dixon, 113 S. Ct. 2849 (1993); Illinois v. Vitale, 447 U.S. 410, 416 (1980).

65 *Brown*, 432 U.S. at 166.

withstanding a substantial overlap in the proof offered to establish the crimes."[66]

For example, under the *Blockburger*, or "same elements," test the offenses of joyriding, defined as taking or operating a motor vehicle without the owner's consent, and auto theft, defined as taking a motor vehicle without the owner's consent with the intent to permanently deprive the owner of possession, are the "same offence" for purposes of double jeopardy analysis. While auto theft requires an element not required for joyriding (intent to permanently deprive the owner of possession), joyriding, a lesser included offense of auto theft, requires no proof beyond that which is required for conviction of auto theft.[67]

On the other hand, the offenses of selling a narcotic drug not in or from its original stamped package and selling a narcotic drug not in pursuance of a written order of the purchaser are not the "same offence" for double jeopardy purposes because each requires proof of a fact that the other does not. Specifically, the former offense requires the prosecution to prove that the defendant sold a narcotic drug that was not in or from its original stamped package, an element not required for the latter offense, while the latter offense requires the prosecution to prove that the defendant sold a narcotic drug without receiving a written order from the purchaser on a form issued by the Internal Revenue Service, an element not required for the former offense.[68]

Under certain circumstances, two offenses can be the "same offence" for double jeopardy purposes even though the requirements of the *Blockburger* test are technically not met because one of the offenses incorporates the other offense without specifying the latter's elements.[69] In *Harris v. Oklahoma*,[70] for example, the Supreme Court held that a conviction for felony murder based upon a killing committed during an armed robbery barred a subsequent prosecution for robbery with a firearm even though the felony murder statute, on its face, did not require proof of armed robbery, but only of *some* felony, and robbery with a firearm did not require proof of a death.[71] As the Court subsequently ex-

66 *Id.* (quoting Ianelli v. United States, 420 U.S. 770, 785 n. 17 (1975)).

67 *Id.* at 169.

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

69 Harris v. Oklahoma, 433 U.S. 682, 682-83 (1977) (per curiam). *See also* Whalen v. United States, 445 U.S. 684, 693-94 (1980).

70 433 U.S. 682 (1977) (per curiam).

71 *Id.* at 682-83.

plained, it "treated a killing in the course of a robbery as itself a separate statutory offense, and the robbery as a species of lesser-included offense."[72]

Moreover, in *Grady v. Corbin*,[73] the Supreme Court recognized that "[e]ven when [the government] can bring multiple charges against an individual under *Blockburger*, a tremendous additional burden is placed on that defendant if he must face each of the charges in a separate proceeding."[74] The Court therefore concluded that the *Blockburger* test is not the sole test for determining whether two separate statutory offenses are the "same offence" for purposes of barring successive prosecutions.[75] It held that even if two successive prosecutions are not prohibited by the *Blockburger* test, "if in the course of securing a conviction for one offense the [government] necessarily has proved the conduct comprising all of the elements of another offense not yet prosecuted (a 'component offense'), the Double Jeopardy Clause . . . bar[s] subsequent prosecution of the component offense."[76] Under this "same conduct" test, the critical inquiry is the scope of the conduct the government will prove, not the evidence it will use to prove that conduct.[77]

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72 Illinois v. Vitale, 447 U.S. 410, 420 (1980).

73 495 U.S. 508 (1990). The Supreme Court overruled *Grady* in United States v. Dixon, 113 S. Ct. 2849 (1993). *See infra* notes 135-37 and accompanying text.

74 *Grady*, 495 U.S. at 519.

75 *Id.* at 521.

76 *Id.* at 521 n.11.

The Supreme Court also held 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." *Id.* at 521.

77 *Id.* Applying the "same conduct" test in *Grady*, the Supreme Court held that the state could not prosecute the defendant for the offenses of reckless homicide, negligent homicide, and reckless assault based upon his driving his automobile across the double yellow line of a highway and striking an oncoming vehicle, killing its driver and seriously injuring a passenger. The Court reasoned that the Double Jeopardy Clause barred the prosecutions because the state admitted in a bill of particulars that it would establish the essential elements of the offenses (recklessness or negligence) by proving conduct for which the defendant had already been convicted in a separate proceeding, namely, driving while intoxicated and failing to keep to the right of the median. *Id.* at 523. The Court acknowledged that the state could prosecute the defendant for the homicide and assault offenses if it sought to establish recklessness or negligence by relying solely on conduct for which the defendant had not already been convicted, such as driving too fast for conditions. *Id.*

The Court subsequently made it clear that if, in one prosecution, the government introduced evidence of acts of misconduct that might ultimately be charged as criminal offenses in a second prosecution, the guarantee against double jeopardy, even as inter-

While generally barring successive prosecutions for the same offense, the double jeopardy provision does not prohibit the government from prosecuting a defendant in a single trial for two or more statutory offenses based upon the same act or transaction.[78] If the defendant is convicted of more than one of the offenses, she can be sentenced to cumulative punishments even if the offenses constitute the "same offence" under the *Blockburger* test, so long as the legislature clearly expressed its intent to authorize cumulative punishment under the various statutes.[79] For, "[w]ith respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended."[80] As the Supreme Court has explained, "[t]his is so because the 'power to define criminal offenses and to prescribe the [sic] punishments to be imposed upon those found guilty of them, resides wholly with the [legislature].'"[81] The same principles apply with respect to cumulative punishment in those rare situations[82] where the government can prosecute an individual for a crime that constitutes the "same offence" for which he previously has been tried and convicted.[83]

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preted in *Grady*, does not preclude the latter prosecution, because "the introduction of relevant evidence of particular misconduct in a case is not the same thing as prosecution for that conduct." United States v. Felix, 112 S. Ct. 1377, 1382-84 (1992) (also concluding that *Grady* did not alter the long established rule that "a substantive crime, and a conspiracy to commit that crime, are not the 'same offense' for double jeopardy purposes").

78 Ohio v. Johnson, 467 U.S. 493, 500 (1984).

79 Missouri v. Hunter, 459 U.S. 359, 368-69 (1983). *See also* Jones v. Thomas, 491 U.S. 376, 381 (1989); United States v. Halper, 490 U.S. 435, 450 (1989); *Johnson*, 467 U.S. at 499 & n.8 (1984); Albernaz v. United States, 450 U.S. 333, 340 (1981); Whalen v. United States, 445 U.S. 684, 691-92 (1980).

80 *Hunter*, 459 U.S. at 366.

81 *Albernaz*, 450 U.S. at 344 (quoting *Whalen*, 445 U.S. at 689). *See also Johnson*, 467 U.S. at 499.

82 *E.g.*, Garrett v. United States, 471 U.S. 773, 790-93 (1985) (greater offense not completed when defendant charged with lesser included offense); Jeffers v. United States, 432 U.S. 137, 152-54 (1977) (defendant elected to have two offenses tried separately); Diaz v. United States, 223 U.S. 442, 448-49 (1912) (additional facts necessary to sustain more serious charge had not yet occurred when defendant tried for lesser included offense).

83 *Garrett*, 471 U.S. at 793-95.

IV. *UNITED STATES V. DIXON*

United States v. Dixon[84] involved two consolidated cases. In one, Alvin Dixon was arrested in the District of Columbia for second-degree murder and released on bond, subject to the condition that he not commit "any criminal offense."[85] While awaiting trial, he was arrested and indicted for possession of cocaine with intent to distribute. At a hearing to show cause why Dixon should not be held in contempt of court for violating the conditions of his pretrial release or have the terms of his pretrial release modified, the court concluded that the government had established "beyond a reasonable doubt that [Dixon] was in possession of drugs and that those drugs were possessed with intent to distribute."[86] The court then found Dixon guilty of criminal contempt under a statute allowing contempt sanctions after expedited proceedings without a jury,[87] and sentenced him to 180 days in jail. Dixon subsequently moved to dismiss the cocaine indictment on double jeopardy grounds, and the trial court granted his motion.

In the second of the two consolidated cases, Michael Foster's estranged wife, Ana, obtained a civil protection order ("CPO") against Foster in the Superior Court of the District of Columbia, based upon Foster's alleged physical attacks upon her.[88] The or-

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84 113 S. Ct. 2849 (1993).

85 See D.C. CODE ANN. § 23-1321(a) (1989), *amended by* D.C. CODE ANN. § 23-1321(a) (Supp. 1993) (authorizing a judicial officer to impose any condition that "will reasonably assure the appearance of the person for trial or the safety of any other person or the community").

86 *Dixon*, 113 S. Ct. at 2853 (quoting United States v. Dixon, 598 A.2d 724, 728 (D.C. 1991) (quoting judge at show-cause hearing)) (internal quotation marks omitted).

87 D.C. CODE ANN. § 23-1329 (1989) provides:

> (a) A person who has been conditionally released . . . and who has violated a condition of release shall be subject to revocation of release, an order of detention, and prosecution for contempt of court.
>
> * * *
>
> (c) Contempt sanctions may be imposed if, upon a hearing and in accordance with principles applicable to proceedings for criminal contempt, it is established that such person has intentionally violated a condition of his release. Such contempt proceedings shall be expedited and heard by the court without a jury. Any person found guilty of criminal contempt for violation of a condition of release shall be imprisoned for not more than six months, or fined not more than $1,000, or both.

88 *See* D.C. CODE ANN. § 16-1005(c) (1989) (allowing a CPO to be issued upon the showing of a "good cause to believe" that the subject "has committed or is threatening

der required that Foster not "molest, assault, or in any manner threaten or physically abuse" Ana Foster.[89] Over the course of eight months, Ana Foster filed three separate motions to have her husband held in contempt of court for violating the CPO. She alleged that Foster had made threats to her on, *inter alia*, November 12, 1987, March 26 and May 17, 1988, and that he had assaulted her on November 6, 1987, and May 21, 1988. Following a bench trial prosecuted by counsel for Ana Foster[90] and her mother,[91] the court acquitted Foster on various counts, including the alleged threats on November 12, 1987, and March 26 and May 17, 1988. The court found him guilty, however, of four counts of criminal contempt, two of which were based upon the November 6, 1987, and May 21, 1988, assaults;[92] and sentenced him to an aggregate 600 days' imprisonment.[93]

The United States Attorney's Office subsequently obtained an indictment charging Foster with one count of simple assault,[94] alleged to have occurred on November 6, 1987; three counts of threats to injure another person,[95] alleged to have occurred on November 12, 1987, March 26 and May 17, 1988; and one count of assault with intent to kill,[96] alleged to have occurred on May 21, 1988. Ana Foster was the complainant in all five counts. Foster moved to dismiss the indictment on double jeopardy grounds,[97] but the trial court denied his motion.

The District of Columbia Court of Appeals,[98] after consolidat-

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an intrafamily offense.")

89 *Dixon*, 113 S. Ct. at 2854 (internal quotation marks omitted).

90 The government was not represented at the trial, although the United States Attorney apparently was aware of the action. The trial court was also aware of a separate grand jury proceeding on some of the alleged criminal conduct. *Id.*

91 The Superior Court previously had issued a separate CPO to protect Ana Foster's mother. *Id.*

92 The court also found him guilty of a third violation of Ana Foster's CPO and a violation of the CPO obtained by Ana Foster's mother. *Id.*

93 *See* D.C. CODE ANN. § 16-1005(f) (1989) (authorizing contempt punishment); Sup. Ct. of D.C. Intrafamily Rules 7(c), 12(e) (maximum punishment of six months' imprisonment and $300 fine).

94 *See* D.C. CODE ANN. § 22-504 (1989).

95 *See* D.C. CODE ANN. § 22-2307 (1989).

96 *See* D.C. CODE ANN. § 22-501 (1989).

97 Foster also claimed collateral estoppel with respect to the three counts based upon the alleged threats for which he was acquitted in the contempt proceeding, but the trial court did not rule on those claims. United States v. Dixon, 113 S. Ct. 2849, 2854 (1993).

98 The government appealed the double jeopardy ruling in Dixon's favor, and Foster appealed the trial court's denial of his motion to dismiss. *See* Abney v. United States, 431

ing the cases and rehearing them en banc, affirmed the judgment in *Dixon* and reversed the judgment in *Foster*.[99] Relying upon the Supreme Court's then-recent decision in *Grady v. Corbin*,[100] it held that the Double Jeopardy Clause barred the subsequent criminal prosecutions of both defendants.[101]

On *certiorari*, the Supreme Court held that the protection of the Double Jeopardy Clause attaches in nonsummary criminal contempt prosecutions.[102] The Court reasoned that "criminal contempt, at least the sort enforced through nonsummary proceedings is 'a crime in the ordinary sense'"[103] and that various other constitutional protections, including the presumption of innocence,[104] the proof beyond a reasonable doubt standard,[105] the

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U.S. 651 (1977) (holding "that pretrial orders rejecting claims of former jeopardy . . . constitute 'final decisions'" and are appealable immediately).

99 United States v. Dixon, 598 A.2d 724, 733 (D.C. 1991), *aff'd in part and rev'd in part*, 113 S. Ct. 2849 (1993).

100 495 U.S. 508 (1990). For a discussion of *Grady*, *see supra* notes 73-77 and accompanying text.

101 *Dixon*, 598 A.2d at 731 ("The Double Jeopardy Clause forever bars any further prosecution of either Dixon or Foster for the conduct which led to their contempt convictions or, in Foster's case, any conduct charged which the court, after hearing the evidence, held did not constitute contempt.").

102 United States v. Dixon, 113 S. Ct. 2849, 2856 (1993). Justice Scalia wrote the opinion for the Court on this issue, and was joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Thomas. Justice White, in a separate opinion joined by Justices Stevens and Souter, also concluded that the Double Jeopardy Clause applies to nonsummary criminal contempt prosecutions. *Id.* at 2868-74 (White, J., concurring in the judgment in part and dissenting in part). It is not entirely clear whether Justice Blackmun believed that the Double Jeopardy Clause applies to nonsummary criminal contempt prosecutions. He began his separate opinion by stating that contempt of court is not "the 'same offence' under the Double Jeopardy Clause as either assault with intent to kill or possession of cocaine with intent to distribute it." *Id.* at 2879 (Blackmun, J., concurring in the judgment in part and dissenting in part). In the body of his opinion, however, he implied that the double jeopardy provision does not apply to criminal contempt proceedings. *Id.* at 2880-81 ("If this were a case involving successive prosecutions under the substantive criminal law . . . , I would agree that the Double Jeopardy Clause could bar the subsequent prosecution. But we are concerned here with contempt of court, a special situation . . . . The purpose of contempt is not to punish an offense against the community at large but rather to punish the specific offense of disobeying a court order.").

103 *Id.* at 2856 (opinion of the Court) (quoting Bloom v. Illinois, 391 U.S. 194, 201 (1968)).

104 *Id.* at 2865 (citing Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 444 (1911)). The Due Process Clause of the Fourteenth Amendment guarantees a presumption of innocence to a criminal defendant in a state prosecution. Estelle v. Williams, 425 U.S. 501, 503 (1976). *See also In re* Winship, 397 U.S. 358, 363 (1970) (constitutionally mandated beyond-a-reasonable-doubt standard of proof "provides concrete substance for the presumption of innocence . . . ."). *See generally* Taylor v. Kentucky, 436 U.S. 478, 483-86 & n.12 (1978); Coffin v. United States, 156 U.S. 432, 453-56 (1895).

105 *Dixon*, 113 S. Ct at 2856 (citing *Gompers*, 221 U.S. at 444). The Supreme Court

Fifth Amendment privilege against self-incrimination,[106] the Sixth Amendment[107] rights to notice of the charges,[108] assistance of counsel,[109] and a public trial,[110] and the right to present a defense,[111] "apply in nonsummary criminal contempt prosecutions just as they do in other criminal prosecutions."[112] The Court, therefore, thought it "obvious"[113] that the double jeopardy protection applies to *nonsummary* criminal contempt prosecutions as well.[114]

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held in *Winship* that the Due Process Clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Winship*, 397 U.S. at 364.

106 *Dixon*, 113 S. Ct. at 2856 (citing *Gompers*, 221 U.S. at 444).

The Fifth Amendment to the Constitution provides, in part: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." This privilege against self-incrimination applies to the states through the Due Process Clause of the Fourteenth Amendment. Malloy v. Hogan, 378 U.S. 1, 6 (1964).

107 The Sixth Amendment to the Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; and to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI.

108 *Dixon*, 113 S.Ct. at 2856 (citing Cooke v. United States, 267 U.S. 517, 537 (1925)). Due process of law guarantees a criminal defendant, whether in a state or federal court, the right to notice of the specific charges against her. Cole v. Arkansas, 333 U.S. 196, 200 (1948). *Accord In re* Gault, 387 U.S. 1, 33-34 (1967) (juvenile delinquency proceeding in state court); *In re* Oliver, 333 U.S. 257, 273 (1948).

109 *Dixon*, 113 S. Ct. at 2856 (citing *Cooke*, 267 U.S. at 537). In Gideon v. Wainwright, 372 U.S. 342 (1963), the Supreme Court held the right to the assistance of counsel applicable to the states through the Due Process Clause of the Fourteenth Amendment.

110 *Dixon*, 113 S. Ct. at 2856 (citing *Oliver*, 333 U.S. at 278). The Court in *Oliver* applied the Sixth Amendment right to a public trial to a state court proceeding through the Due Process Clause of the Fourteenth Amendment.

111 *Id.* at 2856 (citing *Cooke*, 267 U.S. at 537). Under the Due Process Clause of the Fourteenth Amendment, a defendant in a state criminal prosecution "must be afforded a meaningful opportunity to present a complete defense." California v. Trombetta, 467 U.S. 479, 485 (1984). *Accord* Gilmore v. Taylor, 113 S. Ct. 2112, 2118 (1993); Taylor v. Illinois, 484 U.S. 400, 409 (1988); Crane v. Kentucky, 476 U.S. 683, 687 (1986); *Oliver*, 333 U.S. at 273; *Cole*, 333 U.S. at 200. *See also* Washington v. Texas, 388 U.S. 14, 18 (1967).

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

113 *Id.*

114 The Supreme Court noted, however, that it was not deciding whether the Double Jeopardy Clause applies to *summary* criminal contempt proceedings. *Id.* at 2856 n.1. *See also id.* at 2873 n.4 (White, J., concurring in the judgment in part and dissenting in part) (taking no position on whether the Double Jeopardy Clause applies "to conduct warranting summary proceedings").

Five justices, in three separate opinions, then agreed with the District of Columbia Court of Appeals that the double jeopardy provision barred the subsequent criminal prosecution of Dixon and the subsequent criminal prosecution of Foster for simple assault based upon the incident alleged to have occurred on November 6, 1987.[115]

Applying the *Blockburger* test, Justice Scalia, in an opinion joined by Justice Kennedy, concluded that in Dixon's case the underlying substantive offense of possession of cocaine with intent to distribute was the "same offence" for double jeopardy purposes as the contempt offense for which Dixon already had been prosecuted.[116] Justice Scalia reasoned that, under the Court's holding in *Harris v. Oklahoma,*[117] the cocaine offense constituted "'a species of lesser-included offense'"[118] of the contempt offense, because the court order imposing the conditions of Dixon's release had incorporated the entire governing criminal code[119] and, therefore, "did not include any element not contained in his previous contempt offense."[120] Justice Scalia applied the same analysis in Foster's case to the count of the indictment charging Foster with simple assault in violation of D.C. Code Ann. section 22-504, which was based upon the same event that was the subject of Foster's prior contempt conviction for violating the provision of the CPO forbidding him to commit simple assault under section 22-504.[121]

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115 Justice Scalia, joined by Justice Kennedy, wrote an opinion announcing the judgment of the Court on this issue. Justice White, joined by Justice Stevens, wrote an opinion concurring in the judgment on this issue, as did Justice Souter, who also was joined by Justice Stevens.

116 *Dixon,* 113 S. Ct at 2857-58 (opinion of Scalia, J.).

117 433 U.S. 682 (1977) (per curiam) (prosecution for robbery with a firearm barred by Double Jeopardy Clause because defendant already had been convicted of felony murder based upon same underlying felony). For a discussion of *Harris, see supra* notes 70-72 and accompanying text.

118 *Dixon,* 113 S. Ct. at 2857 (opinion of Scalia, J.) (quoting Illinois v. Vitale, 447 U.S. 410, 420 (1980)).

119 Justice Scalia stated: "[T]he 'crime' of violating a condition of release cannot be abstracted from the 'element' of the violated condition. The *Dixon* court order incorporated the entire governing criminal code in the same manner as the *Harris* felony-murder statute incorporated the several enumerated felonies." *Dixon,* 113 S. Ct. at 2857.

120 *Id.* at 2858.

121 *Id.* Justice Scalia acknowledged that "[i]t is not obvious that the word 'assault' in the CPO bore the precise meaning 'assault under § 22-504,'" but noted that "[t]he court imposing the contempt construed it that way" and that "the point has not been contested in this litigation." *Id.* n.3.

Justice White, in an opinion joined by Justice Stevens, believed that Justice Scalia's application of the *Blockburger*, or "same elements," test involved an "overly technical interpretation of the Constitution."[122] Justice White reasoned that "[b]ecause in a successive prosecution case the risk is that a person will have to defend himself more than once against the same charge"[123] the CPO, which triggered the court's authority to punish the accused for acts already punishable under the criminal laws, should be "put to the side"[124] in determining whether the successive prosecutions involved the "same offence." Instead, the substantive offenses of which the defendants stood accused in both prosecutions should be compared.[125] Using this approach, Justice White concluded that "the offenses at issue in the contempt proceedings were either identical to, or lesser included offenses of, those charged in the subsequent prosecutions,"[126] and that therefore

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122 *Id.* at 2869 (White, J., concurring in the judgment in part and dissenting in part).

123 *Id.* at 2876.

124 *Id.*

125 *Id.* Justice White stated:

> To focus on the statutory elements of a crime makes sense where *cumulative* punishment is at stake, for there the aim simply is to uncover legislative intent. The *Blockburger* inquiry, accordingly, serves as a means to determine this intent . . . . But . . . adherence to legislative will has very little to do with the important interests advanced by double jeopardy safeguards against *successive* prosecutions. The central purpose of the Double Jeopardy Clause being to protect against vexatious multiple prosecutions, these interests go well beyond the prevention of unauthorized punishment. The same-elements test is an inadequate safeguard, for it leaves the constitutional guarantee at the mercy of a legislature's decision to modify statutory definitions. Significantly, therefore, this Court has applied an inflexible version of the same-elements test only once, in 1911, in a successive prosecution case, and has since noted that "[t]he *Blockburger* test is not the only standard for determining whether successive prosecutions impermissibly involve the same offense." Rather, "[e]ven if two offenses are sufficiently different to permit the imposition of consecutive sentences, successive prosecutions will be barred in some circumstances where the second prosecution requires the relitigation of factual issues already resolved by the first."

Id. at 2876-77 (citations omitted) (quoting Brown v. Ohio, 432 U.S. 161, 166-67 n.6 (1977)).

126 *Id.* at 2874. Justice White explained:

> The contempt orders in *Foster* and *Dixon* referred in one case to the District's laws regarding assaults and threats, and, in the other, to the criminal code in its entirety. The prohibitions imposed by the court orders, in other words, duplicated those already in place by virtue of the criminal statutes . . . . [T]he *offenses* that are to be sanctioned in either proceeding must be similar, since the contempt orders incorporated, in full or in part, the criminal code.

"the subsequent prosecutions in both *Dixon* and *Foster* were impermissible as to *all* counts."[127]

Like Justice White, Justice Souter, in an opinion joined by Justice Stevens, focused upon the purposes underlying the Double Jeopardy Clause's prohibition against successive prosecutions.[128] Based on a series of precedents culminating with *Grady v. Corbin*,[129] he read that prohibition to "bar[] successive prosecutions for more than one statutory offense where the charges comprise the same act."[130] He concluded that the government could not prosecute Dixon for possession with intent to distribute cocaine because it previously had prosecuted him for contempt of court based upon the same incident in which he allegedly possessed cocaine with the intent to distribute it.[131] Similarly, he concluded that because the conduct at issue in the criminal prosecution of Foster was the same as that previously involved in the

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> Thus, . . . the offense for which Dixon was held in contempt was possession with intent to distribute drugs. Since he previously had been indicted for precisely the same offense, the double jeopardy bar should apply. In Foster's contempt proceeding, he was acquitted with respect to threats allegedly made on November 12, 1987, and March 26 and May 17, 1988. He was found in contempt of court for having committed the following offenses: assaulting his wife on November 6, 1987, and May 21, 1988, and threatening her on September 17, 1987. The subsequent indictment charged Foster with simple assault on November 6, 1987 (Count I); threatening to injure another on or about November 12, 1987, and March 26 and May 17, 1988 (Counts II, III, and IV); and assault with intent to kill on or about May 21, 1988 (Count V). All of the offenses for which Foster was either convicted or acquitted in the contempt proceeding were similar to, or lesser included offenses of, those charged in the subsequent indictment. Because "the Fifth Amendment forbids successive prosecution . . . for a greater and lesser included offense," the second set of trials should be barred in their entirety.

Id. at 2874-75 (footnote and citations omitted) (quoting Brown v. Ohio, 432 U.S. 161, 169 (1977)).

127 *Id.* at 2874.

128 *Id.* at 2882-90 (Souter, J., concurring in the judgment in part and dissenting in part).

129 495 U.S. 508, 510 (1990). *See supra* notes 73-77 and accompanying text. Justice Souter also relied upon *In re* Nielsen, 131 U.S. 176, 187-89 (1889); Harris v. Oklahoma, 433 U.S. 682, 682-83 (1977) (per curiam); (*see supra* notes 70-72 and accompanying text); Illinois v. Vitale, 447 U.S. 410, 419-20 (1980).

130 United States v. Dixon, 113 S. Ct. 2849, 2891 (1993) (Souter, J., concurring in part and dissenting in part).

131 *Id.* at 2890. Justice Souter agreed with Justice White, *see id.* at 2876 (White, J., concurring in the judgment in part and dissenting in part), that "the element of knowledge of a court order [in the contempt offense] is irrelevant for Double Jeopardy purposes." *Id.* at 2890 n.10 (Souter, J., concurring in the judgment in part and dissenting in part).

contempt proceedings against him, the Double Jeopardy Clause barred the criminal prosecution against Foster *in its entirety*.[132]

A majority, however, concluded that the Double Jeopardy Clause did not bar the subsequent criminal prosecution of Foster on the other charges contained in the indictment.[133] Five justices, in two separate opinions applying two different interpretations of the *Blockburger* test, found that neither the offense of assault with intent to kill nor the offense of threatening to injure another constituted the "same offence" as any of the contempt charges for which Foster had been tried.[134] Moreover, these justices, in an opinion written for the Court by Justice Scalia,[135] then overruled *Grady v. Corbin*,[136] under which the offenses of assault with intent to kill and threatening to injure another would have constituted the "same offence" as the contempt offenses for which Foster was prosecuted.[137]

Justice Scalia, in an opinion joined by Justice Kennedy, concluded that under the *Blockburger* test the offense of assault with intent to kill did not constitute the "same offence" as the criminal contempt offense for which Foster had been prosecuted. He reasoned that each of the two offenses required proof of an additional fact that the other offense did not require. The criminal contempt offense required proof of knowledge of the CPO, which the assault with intent to kill offense did not require. In addition, the

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132 *Id.* at 2890-91 (Souter, J., concurring in the judgment in part and dissenting in part).

133 Justice Scalia, joined by Justice Kennedy, wrote an opinion announcing the judgment of the Court on this issue. Justice Rehnquist, joined by Justices O'Connor and Thomas, wrote a separate opinion on this issue. In addition, Justice Blackmun, in a separate opinion, concurred in the judgment on this issue. It is not clear whether Justice Blackmun concluded that the Double Jeopardy Clause does not apply to nonsummary criminal contempt prosecutions or whether he concluded that criminal contempt was not the "same offence" as any of the substantive offenses involved in Dixon's and Foster's cases. *See supra* note 102.

134 *Dixon*, 113 S. Ct. at 2858 (opinion of Scalia, J.); *id.* at 2868 & n.3 (Rehnquist, C.J., concurring in part and dissenting in part).

135 Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Thomas joined this portion of Justice Scalia's opinion.

136 *Dixon*, 113 S. Ct. at 2864. In *Dixon*, Justices White, Blackmun, Stevens, and Souter dissented from the overruling of Grady v. Corbin, 495 U.S. 508 (1990). *Dixon*, 113 S. Ct. at 2879 (White, J., joined by Stevens, J., concurring in the judgment in part and dissenting in part); *id.* at 2880 (Blackmun, J., concurring in the judgment in part and dissenting in part); *id.* at 2881 (Souter, J., joined by Stevens, J., concurring in the judgment in part and dissenting in part).

137 *Dixon*, 113 S. Ct. at 2859-60 (opinion of Scalia, J.); *id.* at 2868 (Rehnquist, C.J., concurring in part and dissenting in part).

latter offense required proof of specific intent to kill, which the former offense did not require, because the conditions of the CPO merely prohibited simple assault as defined by the criminal code.[138] Similarly, Justice Scalia concluded that the offense of threatening to injure or kidnap another or to physically damage the property of another, under D.C. Code Ann. section 22-2307, did not constitute the "same offence" as any of the criminal contempt offenses. He reasoned that the former offense required proof of a threat to kidnap, to inflict bodily injury, or to damage property, which the contempt offenses for violating the CPO provision that Foster not "in any manner threaten" his estranged wife did not.[139] He also observed that the contempt offenses required willful violation of the CPO, which the offense under D.C. Code Ann. section 22-2307 did not.[140]

Chief Justice Rehnquist, in an opinion joined by Justices O'Connor and Thomas, concluded that under the *Blockburger* test the Double Jeopardy Clause did not bar *any* of the charges against either Dixon or Foster.[141] He argued that the *Blockburger* test required a comparison of the elements of the charged substantive criminal offenses with the *generic* elements of the crime of contempt of court, not "the terms of the particular court orders involved,"[142] as Justice Scalia had concluded. Making such a comparison, the Chief Justice concluded that the offense of contempt of court is not the "same offence" as either assault or drug distribution.[143] He reasoned that neither of the elements of contempt of court—a court order that is known to the defendant followed by a willful violation of that court order—is necessarily satisfied by proof that a defendant has committed the offense of assault or the offense of drug distribution, and that no element of either of those two substantive offenses is necessarily satisfied by proof that a defendant has been found guilty of contempt of court.[144]

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138 *Id.* at 2858-59 (opinion of Scalia, J.).

139 Unlike Justice White, *see id.* at 2875 n.7 (White, J., concurring in the judgment in part and dissenting in part), Justice Scalia refused to interpret this provision of the CPO as prohibiting only threats that violated the District of Columbia's criminal laws. Rather, he concluded that at a minimum the provision covered all threats to commit acts that would be tortious under District of Columbia law. *Id.* at 2859 n.8 (opinion of Scalia, J.).

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

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

142 *Id.*

143 Dixon, of course, was charged with possession of cocaine with intent to distribute, not "drug distribution." *Id.* at 2853.

144 *Id.* at 2866 (Rehnquist, C.J, concurring in part and dissenting in part). Chief Jus-

V. APPLICATION OF THE DOUBLE JEOPARDY CLAUSE TO SUMMARY CONTEMPT PROSECUTIONS

In *Dixon*, the Supreme Court did not decide whether the Double Jeopardy Clause applies to *summary* criminal contempt prosecutions.[145] Nearly every lower court that has considered the question has concluded that the protection against double jeopardy does not extend to summary criminal contempt prosecutions of a defendant for contumacious conduct committed in the presence of the court.[146] For example, in *United States v. Rollerson*,[147] the

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tice Rehnquist stated that Justice Scalia had mistakenly read Harris v. Oklahoma, 433 U.S. 682 (1977) (per curiam), too broadly. Noting that *Harris* was "a three-paragraph *per curiam* in an unargued case," the Chief Justice stated, that with respect to the cocaine possession offense in *Dixon* and the simple assault offense in *Foster*, Justice Scalia had "reject[ed] the traditional view—shared by every federal court of appeals and state supreme court that addressed the issue prior to *Grady*—that, as a general matter, double jeopardy does not bar a subsequent prosecution based on conduct for which a defendant has been held in criminal contempt." United States v. Dixon, 113 S. Ct. 2849, 2865 (1993) (Rehnquist, C.J., concurring in part and dissenting in part). Chief Justice Rehnquist concluded that he could not "subscribe to a reading of *Harris* that upsets this previously well-settled principle of law," *id.*, and that he "would therefore limit *Harris* to the context in which it arose: where the crimes in question are analogous to greater and lesser included offenses." *Id.* He then found *Harris* inapplicable because the crimes charged against Dixon and Foster bore no such resemblance to one another. *Id.* at 2867-68.

The Chief Justice nevertheless stated that if *Blockburger* required an examination of the terms of the particular court orders involved, Justice Scalia was correct in concluding that none of Foster's contempt offenses was the "same offence" as either assault with intent to kill or threatening to injure. *Id.* at 2868 n.3.

145 *Dixon*, 113 S. Ct. at 2856 n.1. *See also id.* at 2873 n.4 (White, J., concurring in the judgment in part and dissenting in part) (taking no position on whether the Double Jeopardy Clause applies "to conduct warranting summary proceedings").

146 United States v. Rollerson, 449 F.2d 1000, 1004-05 (D.C. Cir. 1971) (summary criminal contempt conviction for hitting federal prosecutor with ice-filled plastic water pitcher does not bar subsequent prosecution for assault with dangerous weapon and assault on federal officer engaged in performance of official duties, even though all three offenses based upon same act); United States v. Mirra, 220 F. Supp. 361, 365-66 (S.D.N.Y. 1963) (summary criminal contempt conviction for throwing chair at federal prosecutor does not bar subsequent prosecution for assault on federal officer engaged in performance of official duties, even though both offenses based upon same act); People v. Totten, 514 N.E.2d 959, 962-63 (Ill. 1987) (summary criminal contempt conviction for striking prosecutor in face with fist does not bar subsequent prosecution for four counts of aggravated battery, even though all five offenses based upon same conduct; although reasons articulated by court for its holding relate to question of whether double jeopardy protection applies to summary criminal contempt proceedings, court concluded that "aggravated battery and direct criminal contempt do not constitute the same offense for double jeopardy purposes"); People v. Heard, 566 N.E.2d 896, 898 (Ill. App. Ct. 1991) (summary criminal contempt conviction for defendant's representing himself to be his brother in criminal prosecution against brother does not preclude subsequent prosecution for obstructing justice, even though both offenses based upon same act); State v. Warren,

court held that the summary criminal contempt conviction of a defendant for hitting a federal prosecutor with an ice-filled water pitcher during trial did not bar the defendant's subsequent prosecution for either assault with a dangerous weapon or assault on a federal officer engaged in the performance of his duties, even though all three charges were based upon the same act.[148] Similarly, in *Commonwealth v. Warrick*,[149] the court held that a summary criminal contempt conviction of a defendant for fleeing the

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451 A.2d 197, 200-02 (N.J. Super. Ct. Law Div. 1982) (summary criminal contempt conviction for refusing to testify in murder trial after being directed to do so by trial judge does not bar subsequent prosecution for hindering prosecution of another, even though both offenses based upon same act); Commonwealth v. Warrick, 609 A.2d 576, 580 (Pa. Super. Ct. 1992) (summary criminal contempt conviction for fleeing courtroom after being found guilty of possession of narcotics does not bar subsequent prosecution for escape, even though both offenses based upon same act; indicating decision based on the ground that criminal contempt and escape are not "same offence" for double jeopardy purposes), *appeal denied*, 626 A.2d 1157 (Pa. 1993); Maples v. State, 565 S.W.2d 202, 204 (Tenn. 1978) (summary criminal contempt conviction for giving false testimony in divorce proceeding does not bar subsequent prosecution for perjury, even though both offenses based upon same act; but also stating that "[t]he elements necessary to sustain a conviction for the statutory crime of perjury are wholly different and distinct from those necessary to justify imposition of a contempt citation under T.C.A. § 23-902."). *See also* United States v. Lingo, 740 F.2d 667, 668 (8th Cir. 1984) (seeming to base its decision on the ground that criminal contempt for failing to comply with order of bankruptcy court to appear before it and substantive offense of misappropriating funds from bankruptcy estate are not "same offence" for double jeopardy purposes); O'Malley v. United States, 128 F.2d 676, 684 (8th Cir. 1942) ("Punishments for contempt of court and on conviction under indictment for the same acts are not within the protection of the constitutional inhibition against double jeopardy."), *rev'd on other grounds sub nom.* Pendergast v. United States, 317 U.S. 412 (1943). *But see* Piemonte v. United States, 367 U.S. 556, 567 (1961) (Douglas, J., dissenting) ("Criminal contempt is used to undermine not only the guarantees of an indictment by a grand jury and a trial by one's peers but also to destroy the protection of double jeopardy."); Yarbro v. State, 402 So. 2d 599, 601-02 (Fla. Dist. Ct. App. 1981) (summary criminal contempt conviction for "willful and deliberate perjury" in dissolution of marriage proceeding bars subsequent prosecution for perjury in an official proceeding, because both offenses based upon same false testimony), *overruled by* State v. Newell, 532 So. 2d 1114, 1114-15 (Fla. Dist. Ct. App. 1988); Dayton Women's Health Ctr. v. Enix, 589 N.E.2d 121, 129 (Ohio Ct. App. 1991) (in case involving indirect, nonsummary criminal contempt conviction, stating that "double jeopardy protections apply to *any* contempt which is determined to be criminal") (emphasis added), *appeal dismissed and jurisdictional motion overruled*, 583 N.E.2d 971 (Ohio), and *cert. denied*, 112 S. Ct. 3033 (1992); State v. Bowling, 520 N.E.2d 1387, 1389-90 (Ohio Ct. App. 1987) (per curiam) (apparently assuming that guarantee against double jeopardy applies to summary contempt proceedings, but concluding that contempt conviction for uttering profanity in courtroom, striking prosecutor, and biting court bailiff does not preclude subsequent prosecution for assault and felonious assault, based upon same incident, because neither assault offense constituted "same offence" as contempt for double jeopardy purposes).

147 449 F.2d 1000 (D.C. Cir. 1971).

148 *Id.* at 1004-05.

149 609 A.2d 576 (Pa. Super. Ct. 1992), *appeal denied*, 626 A.2d 1157 (Pa. 1993).

courtroom after being found guilty of possession of narcotics did not bar his subsequent prosecution for escape, even though both offenses were based upon the same act.[150]

Courts have offered several justifications for holding the double jeopardy provision inapplicable to summary criminal contempt prosecutions. First, some have reasoned that application of the provision to such proceedings would place judges on the horns of "an unenviable dilemma"[151] when faced with contumacious conduct.[152] Summarily finding the contemnor guilty of criminal contempt would, in effect, be granting her immunity from prosecution for a substantive criminal offense based upon the same contumacious conduct—an undesirable result, especially since the substantive criminal offense is likely to be a more serious offense than criminal contempt.[153] On the other hand, refraining from summarily holding the individual in criminal contempt, because of the fear of immunizing her from prosecution for a substantive criminal offense, would lead to an equally undesirable result: judges would be unable to effectively maintain the dignity and decorum of the court and would be unable to prevent defendants, attorneys, and others from impeding the orderly administration of

150 *Id.* at 580 (although at one point indicating that its decision may have been based on the ground that criminal contempt and escape are not "same offence" for double jeopardy purposes).

The court previously had reached the same result in the defendant's pretrial appeal of the trial court's refusal to dismiss the charges on double jeopardy grounds. *Warrick*, 497 A.2d at 260.

151 State v. Warren, 451 A.2d 197, 200 (N.J. Super. Ct. Law Div. 1982).

152 *Id. Accord* United States v. Mirra, 220 F. Supp. 361, 364-66 (S.D.N.Y. 1963). *See also* People v. Totten, 514 N.E.2d 959, 962 (Ill. 1987); Commonwealth v. Warrick, 609 A.2d 576, 578 (Pa. Super. Ct. 1992), *appeal denied*, 626 A.2d 1157 (Pa. 1993); Maples v. State, 565 S.W.2d 202, 206 (Tenn. 1978).

153 *Mirra*, 220 F. Supp. at 366; *Warren*, 451 A.2d at 200; *Maples*, 565 S.W.2d at 206. To illustrate this point, the court in *Mirra*—where the defendant, while being tried for various drug offenses, threw a chair some fifteen feet at the Assistant United States Attorney who was cross-examining him, missing him but striking the jury rail about three feet away from the lectern at which he was standing—posed the following hypothetical: "Assume that Mirra's projectile had received more accurate a propulsion and had scored on its intended target—the Assistant United States Attorney. And assume further the grisly and morbid fact that the Assistant United States Attorney had sustained an injury which ultimately proved fatal." *Mirra*, 220 F. Supp. at 366. The court then stated that to sustain the claim that under the Double Jeopardy Clause a summary conviction for criminal contempt, based upon the same act, barred a subsequent prosecution for homicide "would, in effect, grant a summary contemnor immunity from a homicide prosecution—an unconscionable result," *id.*, and it concluded that "[m]erely to state the case suffices to reveal what must perforce be the answer to Mirra's theory." *Id.*

justice through unruly and disrespectful conduct.[154] As one court put it:

> To permit a defendant to escape the consequences of his contumacy via the Double Jeopardy route would be to countenance a state of affairs where judges could become ineffectual in restoring judicial decorum for fear that a contempt conviction would raise a constitutional bar to a subsequent prosecution of the same act.[155]

Second, some courts have indicated that the guarantee against double jeopardy does not apply to summary criminal contempt prosecutions because the crime of contempt and the underlying substantive offense protect distinct interests.[156] In the context of contumacious conduct committed in the presence of the court, the offense of contempt is aimed at protecting the dignity and decorum of the court, and hence the orderly administration of justice, while the purpose of the underlying substantive offense is

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154 *Id.* at 364-66; *Warren*, 451 A.2d at 200; *Maples*, 565 S.W.2d at 206.

155 *Mirra*, 220 F. Supp. at 365-66. *Accord Totten*, 514 N.E.2d at 962.

156 United States v. Rollerson, 308 F. Supp. 1014, 1018 (D.D.C. 1970), *aff'd*, 449 F.2d 1000 (D.C. Cir. 1971); Commonwealth v. Warrick, 497 A.2d 259, 261 (Pa. Super. Ct. 1985) (Tamilia, J., concurring); *Maples*, 565 S.W.2d at 203. *See also Mirra*, 220 F. Supp. at 365 ("[O]utrageous conduct destructive of the court's decorum can be an offense against the court's jurisdiction as well as an offense against the laws of the [state]."); *Totten*, 514 N.E.2d at 962 ("[D]irect criminal contempt is an offense against the court. Nevertheless, other courts have found that conduct which constitutes direct criminal contempt may also constitute violation of the criminal law."); *Warren*, 451 A.2d at 200 ("Conduct destructive of the court's decorum can also be an offense against the laws of the State."); State v. Yancy, 4 N.C. (Car. L. Rep.) 133, 134 (1814) (rejecting plea of *auterfoit convict* because "[o]ne offense violates the law which protects courts of justice and stamps an efficient character on their proceedings; the other is leveled against the general law, which maintains the public order and tranquility."). *Cf.* United States v. Dixon, 113 S. Ct. 2849, 2870 (1993) (White, J., concurring in the judgment in part and dissenting in part); *id.* at 2880-81 (Blackmun, J., concurring in the judgment in part and dissenting in part).

to protect the public from harmful conduct.[157] As one court reasoned:

> The separate interests of the . . . [c]ourt in itself protecting the dignity of the [c]ourt, and of the . . . prosecuting authority in initiating action to protect persons and property . . . have consistently been recognized by the [c]ourts. That separate interests in different governmental elements will support convictions under separate statutes making criminal the same acts which injure both interests was fully recognized by Justice Brennan in Abbate v. United States . . . ."[158]

Finally, several courts have reasoned that a criminal prosecution based upon the same conduct that served as the basis for a summary criminal contempt conviction does not offend the policy underlying the guarantee against double jeopardy.[159] As one court explained,

> "The basis of the Fifth Amendment protection against double jeopardy is that a person shall not be harassed by successive trials; that an accused shall not have to marshal the resources and energies necessary to his defense more than once for the same alleged criminal acts." A person held in summary contempt and then subsequently indicted does not suffer the ha-

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157 *Rollerson*, 308 F. Supp. at 1018; *Yancy*, 4 N.C. at 134 (1814) *Cf. Dixon*, 113 S. Ct. at 2870; *id.* at 2880-81 (Blackmun, J., concurring in the judgment in part and dissenting in part).

Based upon "[t]he necessity of providing a court with the immediate means to protect its dignity and its ability to properly conduct judicial proceedings . . . ," one court created an exception to the Supreme Court's holding in Grady v. Corbin, 495 U.S. 508, 521 (1990), that "the Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in the prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted." Commonwealth v. Warrick, 609 A.2d 576, 578 (Pa. Super. Ct. 1992), *appeal denied*, 626 A.2d 1157 (Pa. 1993). *See also* Commonwealth v. Aikins, 618 A.2d 992, 999 (Pa. Super. Ct. 1993) (Beck, J., dissenting). *Grady* of course has since been overruled by the Supreme Court in United States v. Dixon. *Dixon*, 113 S. Ct. at 2864. *See supra* notes 135-37 and accompanying text.

158 *Rollerson*, 308 F. Supp. at 1018. In Abbate v. United States, 359 U.S. 187 (1959), the Supreme Court held that the Double Jeopardy Clause does not bar a federal prosecution based upon the same act for which the defendant already has been prosecuted by a state, because the prosecutions are by separate sovereigns, each of which derives its power from a different source and each of which exercises its sovereignty when determining what conduct shall be an offense against its peace and dignity.

159 *Rollerson*, 449 F.2d at 1004; *Mirra*, 220 F. Supp. at 366; *Totten*, 514 N.E.2d at 962-63; People v. Heard, 566 N.E.2d 896, 898 (Ill. App. Ct. 1991); *Warren*, 451 A.2d at 200, 202; *Warrick*, 497 A.2d at 260 & n.2; Commonwealth v. Allen, 469 A.2d 1063, 1068 n.11 (Pa. Super. Ct. 1983) (dictum), *aff'd in part, rev'd in part*, 486 A.2d 363 (Pa. 1984), *cert. denied*, 474 U.S. 842 (1985). *See also Maples*, 565 S.W.2d at 204.

> rassment of successive trials . . . . [S]ince an adversary type proceeding does not precede the swift imposition of a summary contempt conviction, a criminal prosecution on a charge arising out of the contumacious conduct is the first trial-type harassment to which the contemnor is made subject.[160]

None of the justifications asserted for holding the Double Jeopardy Clause inapplicable to summary contempt proceedings can withstand analysis. The fear that judges will be forced to either, in effect, grant immunity to contumacious defendants and attorneys, or else lose control of their courtroom, seems "exaggerated."[161] Certainly "[i]t is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country."[162] And certainly the power summarily to convict an individual of criminal contempt is a powerful weapon that can be used by judges to maintain that dignity, order, and decorum.[163] Nevertheless, it is not the only weapon in a judge's arsenal. The Supreme Court in *Illinois v. Allen*[164] recognized that a trial judge has several different methods available to control an unruly defendant. The Court stated:

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160 *Mirra*, 220 F. Supp. at 366 (quoting *Abbate*, 359 U.S. at 199 (separate opinion of Brennan, J.)) (citation omitted). *Accord Rollerson*, 449 F.2d at 1004.

Similarly, in *State v. Warren*, the court reasoned:

> [I]n summary contempt cases the accused is not subjected to successive trials and prosecutions forbidden under the double jeopardy clause. It can hardly be argued that such an individual suffers the harassment of successive trials. Swift imposition of a summary contempt conviction is not preceded by an adversary-type proceeding. Simply stated, the prosecutor does not prosecute and the defense does not defend. [An alleged contemnor] does not have the option of having the issue of his contumacy resolved with the full panoply of rights accorded an accused in a criminal proceeding. In a similar vein, the prosecutor is not obliged to present evidence or, for that matter, to interfere with the proceedings. In a very real sense, the trial of the accused for the crime arising out of his contumacious conduct is the first trial-type "harassment" to which the contemnor is made subject.

451 A.2d at 200.

161 *Rollerson*, 449 F.2d at 1004 n.11.

162 Illinois v. Allen, 397 U.S. 337, 343 (1970).

163 "[C]iting or threatening to cite a contumacious defendant for criminal contempt might in itself be sufficient to make a defendant stop interrupting a trial." *Id.* at 345.

164 *Id.* at 337 (holding that "a defendant can lose his [Sixth Amendment] right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom").

> We believe trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case. No one formula for maintaining the appropriate courtroom atmosphere will be best in all situations. We think there are at least three constitutionally permissible ways for a trial judge to handle an obstreperous defendant . . . (1) bind and gag him, thereby keeping him present; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly.[165]

Therefore, a trial judge faced with a contumacious defendant whose conduct also constitutes a violation of the substantive criminal law need not choose between, on the one hand, summarily convicting the defendant of contempt thus, in effect, granting her immunity from prosecution for the substantive offense, and, on the other hand, allowing the accused to interfere with the orderly administration of justice. Rather, the trial judge can attempt to maintain order in her courtroom while continuing with the trial by either binding and gagging the unruly defendant or ordering the defendant removed from the courtroom until she is "willing to conduct [her]self consistently with the decorum and respect inherent in the concept of courts and judicial proceedings."[166] Alternatively, the trial judge can imprison the defendant for civil contempt and discontinue the trial until such time as the accused promises to behave herself.[167] In fact, in many circumstances

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165 *Id.* at 343-44. *See also id.* at 350 (Brennan, J., concurring).

166 *Id.* at 343 (opinion of the Court). The Court in *Allen* acknowledged that dealing with a disorderly defendant by binding and gagging her has "inherent disadvantages and limitations." *Id.* at 344. It explained that this technique might prejudice the defendant in the eyes of the jury and that it "is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold." *Id.* Furthermore, it greatly reduces the defendant's ability to communicate with her counsel, thereby interfering with one of the primary advantages an accused has in being present at her trial. *Id.* The Court therefore concluded that an unruly defendant should be bound and gagged only as a "last resort." *Id.*

167 *Id.* at 345. *See also id.* at 350 (Brennan, J., concurring).

The protection against double jeopardy is not implicated in civil contempt proceedings. United States v. Ryan, 810 F.2d 650, 653 & n.1 (7th Cir. 1987); *In re* Grand Jury Proceedings (Horak), 625 F.2d 767, 771 (8th Cir.), *cert. denied sub nom.* Horak v. United States, 449 U.S. 840 (1980); People v. Batey, 228 Cal. Rptr. 787, 789-93 (Ct. App. 1986), *cert. denied*, 480 U.S. 932 (1987); Mahoney v. Commonwealth, 612 N.E.2d 1175, 1178-79 (Mass. 1993). *See also* Yates v. United States, 354 U.S. 298 (1957).

The Supreme Court in *Allen* recognized that a defendant cited for civil contempt might, as a matter of calculated strategy, elect to spend a prolonged period of imprisonment for contempt in the hope that the prosecution's witnesses might become unavail-

these alternatives will be more effective in maintaining order than citing the defendant for criminal contempt of court. For example, a disruptive defendant being tried for a serious crime punishable by a severe sentence might not be affected by a mere contempt conviction and sentence.[168]

In addition to the summary contempt power, a trial judge has another strong weapon to use with attorneys who disrupt proceedings by engaging in contumacious conduct that also violates the substantive criminal law. When confronted with such conduct, a trial judge can refer the matter to the appropriate body charged with disciplining members of the bar. An attorney may be suspended or even disbarred for engaging in conduct that violates the applicable rules of professional responsibility or that tends to defeat the administration of justice.[169] Additionally, the double jeopardy provision clearly does not apply in attorney disciplinary proceedings. A sanction imposed in such a proceeding would not bar a subsequent criminal prosecution based upon the same act and *vice versa.*[170]

Moreover, current practice indicates that in those relatively rare circumstances where an attorney engages in this conduct in the presence of the court, there does not exist a compelling need for a trial judge to instantly exercise her summary contempt power in order to maintain control of her courtroom. It is quite common for a trial judge faced with a contumacious attorney to wait until the completion of the ongoing trial to deal with the

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able after a lapse of time. Illinois v. Allen, 397 U.S. 337, 345 (1970).

168 *Allen*, 397 U.S. at 345. Indeed, in *Allen*, where the defendant was being tried for armed robbery, an offense for which he subsequently received a sentence of up to thirty years' imprisonment, the Supreme Court concluded that "the record demonstrate[d] that Allen would not have been at all dissuaded by the trial judge's use of his criminal contempt powers." *Id.* at 346. *See also* Foster v. Wainwright, 686 F.2d 1382, 1389 (11th Cir. 1982) (per curiam) (before being removed from courtroom, disruptive defendant charged with two counts of assault with intent to commit a felony, for which he subsequently received sentence of two consecutive terms of fifteen years' imprisonment, "demonstrated the likely ineffectiveness of [the contempt] sanction by announcing his willingness to speak at risk of a contempt citation"), *cert. denied*, 459 U.S. 1213 (1983); State v. Sweezy, 230 S.E.2d 524, 534 (N.C. 1976) (before being removed from courtroom, disruptive defendant charged with first-degree burglary, for which he subsequently received sentence of life imprisonment, was cited for contempt four times).

169 *E.g.*, Ill. Sup. Ct. R. 771.

170 *See, e.g.*, Attorney Grievance Comm'n v. Brown, 517 A.2d 1111, 1112 (Md. 1986); *In re* Disciplinary Action of McCune, 717 P.2d 701, 707 (Utah 1986); *In re* McDaniel, 470 N.E.2d 1327, 1328 (Ind. 1984); Fitzsimmons v. State Bar, 667 P.2d 700, 703-04 (Cal. 1983); *In re* Oxman, 437 A.2d 1169, 1173 (Pa. 1981), *cert. denied*, 456 U.S. 975 (1982).

attorney's misconduct so the judge can avoid prejudicing the attorney's client.[171] Once the trial judge has done that, there seems to be little need for immediately punishing the attorney for criminal contempt, and later trying her for a violation of the substantive criminal law based upon the same conduct, as opposed to waiting to try the attorney in a single proceeding for both criminal contempt and the substantive crime. This is especially true since, once the trial judge waits until the completion of the ongoing trial to deal with an attorney's contumacious conduct, the Constitution may require that a different judge sit in judgment of the alleged contemnor[172] and/or that the alleged contemnor have reasonable notice of the specific charges and opportunity to be heard in her own behalf.[173]

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171 *E.g.*, Taylor v. Hayes, 418 U.S. 488 (1974); Offutt v. United States, 348 U.S. 11 (1954); Sacher v. United States, 343 U.S. 1 (1952); *In re* Dellinger, 461 F.2d 389 (7th Cir. 1972).

The Supreme Court in *Sacher* explained:

> To summon a lawyer before the bench and pronounce him guilty of contempt is not unlikely to prejudice his client. It might be done out of the presence of the jury, but we have held that a contempt judgment must be public. Only the naive and inexperienced would assume that news of such action will not reach the jurors. If the court were required also then to pronounce sentence, . . . it would add to the prejudice. It might also have the additional consequence of depriving [the client] of his counsel unless execution of prison sentence were suspended or stayed as speedily as it had been imposed.

Sacher, 343 U.S. at 10 (footnote omitted).

As the Court in *Sacher* went on to note, such a procedure also may be fairer to the lawyer. For if summary punishment had to be imposed immediately after the contumacious conduct, "it would be an incentive to pronounce, while smarting under the irritation of the contemptuous act, what should be a well-considered judgment." *Id.* at 11. The *Sacher* Court thought it "less likely that unfair condemnation of counsel will occur if the more deliberate course be permitted." *Id.*

172 *Taylor*, 418 U.S. at 501-03 (trial judge became embroiled in running controversy with attorney and, as trial progressed, judge displayed unfavorable personal attitude toward attorney); Mayberry v. Pennsylvania, 400 U.S. 455, 466 (1970) (personal insulting attack by criminal defendant against trial judge). *See also Offutt*, 348 U.S. at 11 (pursuant to supervisory power).

173 *Taylor*, 418 U.S. at 499. The Supreme Court in *Taylor* held that as a matter of due process of law,

> before [one] is finally adjudicated in contempt and sentenced *after trial for conduct during trial*, he should have reasonable notice of the specific charges and opportunity to be heard in his own behalf. This is not to say, however, that a full-scale trial is appropriate. Usually the events have occurred before the judge's own eyes, and a reporter's transcript is available. But the contemnor might at least urge, for example, that the behavior at issue was not contempt . . . ; or, he might present matters in mitigation or otherwise attempt to make amends with the court.

Id. at 498-99 (emphasis added).

Similarly, a trial judge has an alternative weapon to deal with spectators who disrupt a trial by engaging in unruly conduct that also constitutes a violation of the substantive criminal law. In such circumstances, the trial judge can immediately order the unruly spectator removed from the courtroom.[174] The trial can then proceed unhindered and, in addition, the spectator can later be prosecuted for her conduct without giving rise to any double jeopardy problems.

As to the second justification asserted to deny application of the Double Jeopardy Clause to summary criminal contempt prosecutions, the Supreme Court has never held that the government can prosecute an individual twice for the same act merely because each trial involves an offense protecting a different interest than the other. Likewise, the Supreme Court has never held that the government can punish an individual twice for the same act merely because the two offenses for which he was convicted protect separate interests.[175] Indeed, in *United States v. Dixon*,[176] a majority of the Supreme Court rejected the "separate interests" argument in the context of multiple prosecutions.[177] Justice Scalia,

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174 Gannett Co. v. DePasquale, 443 U.S. 368, 439 (1979) (Blackmun, J., concurring in part and dissenting in part); United States *ex rel.* Orlando v. Fay, 350 F.2d 967, 971 (2d Cir. 1965), *cert. denied*, 384 U.S. 1008 (1966); Commonwealth v. Bohmer, 372 N.E.2d 1381, 1390-91 (Mass. 1978); State v. Browder, 486 P.2d 925, 939 (Alaska 1971).

175 The Supreme Court has held that the prosecution (and punishment) of an individual by one sovereign for a particular act does not bar a different sovereign from subsequently prosecuting (and punishing) that same individual for the same act, even though the Double Jeopardy Clause would have barred the second prosecution (and punishment) had it been brought by the same sovereign. Heath v. Alabama, 474 U.S. 82, 88 (1985); United States v. Wheeler, 435 U.S. 313, 316-18 (1978); Abbate v. United States, 359 U.S. 187, 196 (1959). This dual prosecution is allowed because "[w]hen a defendant in a single act violates the 'peace and dignity' of two sovereigns by breaking the laws of each, he has committed two distinct 'offences.'" *Heath*, 474 U.S. at 88. Moreover, the determination of whether two entities are separate sovereigns turns on whether they draw their authority to punish the individual from distinct sources of power, *id.*, and "not on whether they are pursuing separate interests." United States v. Dixon, 113 S. Ct. 2849, 2871 (1993) (White, J., concurring in the judgment in part and dissenting in part). Because a summary conviction for contempt of court and a prosecution for the underlying substantive offense both involve the same sovereign, the so-called "dual sovereignty" doctrine does not allow a court to punish an individual summarily for contempt in order to vindicate its authority and the government to subsequently prosecute the individual for the same act in order to vindicate the public's interest in protection. *Id.* at 2871-72.

176 113 S. Ct. 2849 (1993).

177 *See also* Grafton v. United States, 206 U.S. 333 (1907) (rejecting the government's argument that a defendant could be prosecuted for the same act in a civil court after being acquitted by a general court-martial because he "committed two distinct offens-

joined by Justice Kennedy, pointed out in an opinion announcing the judgment of the Court that "the text of [the Double Jeopardy Clause] looks to whether the *offenses* are the same, not the interests that the offenses violate."[178] Justice White, in a portion of his separate opinion joined by Justices Stevens and Souter, reached the same conclusion. He stated:

> The fact that two criminal prohibitions promote different interests may be indicative of legislative intent and, to that extent, important in deciding whether cumulative punishments imposed in a single prosecution violate the Double Jeopardy Clause. But the cases decided today involve instances of successive prosecutions in which the interests of the *defendant* are of paramount concern. To subject an individual to repeated prosecutions exposes him to "embarrassment, expense and ordeal," violates principles of finality, and increases the risk of a mistaken conviction. That one of the punishments is designed to protect the court rather than the public is, in this regard, of scant comfort.[179]

Although Justice White in *Dixon* focused upon a defendant's interest in avoiding successive prosecutions, an interest not at issue when a criminal prosecution follows a summary contempt conviction,[180] a defendant has a similar interest in avoiding multiple punishments for the same offense.[181] Indeed, just five years ago the Supreme Court stated that the Double Jeopardy Clause's proscription against multiple punishments safeguards "humane interests."[182] The defendant's interest in avoiding multiple punishments for the same offense, like a defendant's interest in avoiding multiple prosecutions for the same offense, should, therefore, be "of paramount concern." The fact that the crime of contempt protects the dignity, order, and decorum of the court, while the underlying substantive offense protects the public from harmful

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es—one against military law and discipline, the other against the civil law which may prescribe the punishment for crimes against organized society by whomsoever those crimes are committed").

178 *Dixon*, 113 S. Ct. at 2858 (opinion of Scalia, J.).

179 *Id.* at 2870-71 (White, J., concurring in the judgment in part and dissenting in part) (citations omitted). *See also* Abbate v. United States, 359 U.S. 187, 197-201 (1959) (Brennan, J., separate opinion).

180 *See supra* note 160 and accompanying text.

181 *See infra* notes 184-88 and accompanying text.

182 United States v. Halper, 490 U.S. 435, 447 (1989) (quoting United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 554 (1943) (Frankfurter, J., concurring)).

conduct, should not preclude application of the Double Jeopardy Clause in summary criminal contempt prosecutions.[183]

Finally, at least one of the policies underlying the guarantee against double jeopardy may be offended by a criminal prosecution based upon the same act for which the defendant already has been summarily convicted of contempt of court. It is true of course that an adversary-type proceeding does not precede the imposition of a summary contempt conviction and that therefore the defendant does not suffer the harassment of successive trials and does not twice have to marshal the resources and energies necessary to defend herself for the same alleged acts. Nevertheless, the Double Jeopardy Clause guards against more than successive prosecutions for the same offense. It also protects against being punished twice for the same offense. Over 120 years ago, in *Ex parte Lange*,[184] the Supreme Court stated that "[i]f there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence."[185] The Court in *Lange* continued:

> Why is it that, having once been tried and found guilty, he can never be tried again for that offence? Manifestly it is not the danger or jeopardy of being a second time found guilty. It is the punishment that would legally follow the second conviction which is the real danger guarded against by the Constitution.[186]

The Court then concluded that "the Constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it."[187]

Where a court summarily convicts an individual for contempt of court and sentences her for that contempt, she has been pun-

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183 *But see Abbate*, 359 U.S. at 197-201 (Brennan, J., separate opinion) (indicating that multiple punishments could be imposed on conviction for several offense at a single trial when the offenses protect "separate interests").

184 85 U.S. (18 Wall.) 163 (1874).

185 *Id.* at 168. *Accord Halper*, 490 U.S. at 440; North Carolina v. Pearce, 395 U.S. 711, 717 (1969).

186 *Lange*, 85 U.S. (18 Wall.) at 173. *Accord* United States v. DiFrancesco, 449 U.S. 117, 129 (1980); *id.* at 144 (Brennan, J., dissenting).

187 *Lange*, 85 U.S. (18 Wall.) at 173. *See also DiFrancesco*, 449 U.S. at 144 (Brennan, J., dissenting) ("An overriding function of the Double Jeopardy Clause's prohibition against multiple trials is to protect against multiple punishments . . . ."); *Pearce*, 395 U.S. at 728-29 (Douglas, J., concurring) ("It was established at an early date that the Fifth Amendment was designed to prevent an accused from running the risk of 'double punishment.'").

ished once for her contumacious act. If the government then convicts her for a substantive criminal offense based upon that same act, any punishment for that offense would be a second punishment for the same act. At that point the Double Jeopardy Clause's protection against multiple punishments becomes relevant.[188] Accordingly, the Double Jeopardy Clause must apply to summary criminal contempt prosecutions in order to protect individuals against multiple punishments for the same offense.

Concluding that the Double Jeopardy Clause applies to summary criminal contempt prosecutions does not, however, mean that it bars the government from prosecuting and punishing a person for a substantive criminal offense based upon the same act for which a court previously has summarily convicted and punished her for contempt. The guarantee against double jeopardy would not prevent the subsequent prosecution and punishment if the contempt of court and the substantive crime are not the "same offence." Moreover, even if the offenses are the "same" for double jeopardy purposes, the scope of the protection afforded by the Double Jeopardy Clause might not extend that far.

The applicable test for determining whether two separate statutory offenses are the "same offence" for double jeopardy purposes was articulated by the Supreme Court in *Blockburger v. United States*[189]: two separate statutory crimes constitute the "same offence" if "each . . . requires proof of an additional fact which the other does not."[190] Under a narrow reading of this "same elements" test, the contempt of court offense rarely would be the "same offence" as the substantive crime involved in the subsequent prosecution. To be punished summarily, criminal contempt of court must occur "in the presence of the court." Few, if any, substantive criminal offenses, however, require that particular element. Moreover, criminal contempt merely requires misbehavior that intentionally obstructs the court's orderly process. No specific

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188 This is not to say, however, that the second punishment would *violate* the Double Jeopardy Clause. To reach that conclusion, it first must be determined whether there are two separate offenses or only one, and, if only one, whether the clause precludes a second punishment where there were not multiple prosecutions.

189 284 U.S. 299 (1932).

190 *Id.* at 304. The *Blockburger* test applies when determining whether two separate statutory offenses are the "same offence," both for purposes of barring multiple punishments in a single trial and for purposes of barring successive prosecutions. Grady v. Corbin, 495 U.S. 508, 515-17 (1990), *overruled on other grounds by* United States v. Dixon, 113 S. Ct. 2849 (1993); Illinois v. Vitale, 447 U.S. 410, 416 (1980); Brown v. Ohio, 432 U.S. 161, 166 (1977).

conduct is necessary. It therefore is likely that the substantive offense with which the contemnor subsequently is charged will require some element not specifically required for contempt.

To illustrate, in *State v. Bowling*,[191] a defendant charged with arson struck an assistant prosecutor and bit the court bailiff during a pretrial hearing. The trial judge instantly held the defendant in contempt and sentenced him to consecutive terms of one year's imprisonment for each offense.[192] The state subsequently obtained an indictment charging the defendant with the substantive offenses of assault and felonious assault for his role in the courtroom fracas. The defendant moved to dismiss the indictment on double jeopardy grounds, but the trial court denied his motion and the appellate court affirmed. The appellate court held that neither of the assault offenses constituted the "same offence" as contempt of court, because under the relevant statute, contempt of court required misbehavior "in the presence of or . . . near the court or judge" and obstruction of the administration of justice, neither of which were required for assault or felonious assault. Felonious assault required the infliction of serious bodily harm, and assault required the infliction or attempt to inflict physical harm, neither of which were required for contempt of court.[193]

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191 520 N.E.2d 1387 (Ohio Ct. App. 1987) (per curiam).

192 This sentence seems to have violated the defendant's constitutional right to trial by jury. *See* Bloom v. Illinois, 391 U.S. 194, 202, 207-08 (1968).

193 *Bowling*, 520 N.E.2d at 1389-90.

Similarly, in United States v. Rollerson, 449 F.2d 1000 (D.C. Cir. 1971), the defendant, while on trial for robbery, threw an ice-filled plastic water pitcher at the prosecutor, hitting him in the shoulder. Following a brief recess, the defendant's trial continued and the jury convicted him of robbery. A week later, in a summary proceeding immediately following the defendant's sentencing for robbery, the trial judge found the defendant guilty of criminal contempt under 18 U.S.C. § 401(1) and sentenced him to a jail term. On the basis of the same incident, a jury subsequently convicted the defendant of assault with a dangerous weapon and assault on a federal officer engaged in the performance of his official duties, and the court sentenced him to consecutive terms of one to three years' imprisonment on each count. The defendant moved to void the assault convictions and sentences on double jeopardy grounds, but the trial court denied his motion. Although the appellate court affirmed the convictions on the ground that the Double Jeopardy Clause does not apply in summary contempt proceedings, it indicated that even if the protection applied in such proceedings, the defendant could still be convicted of, and punished for, the assault charges because criminal contempt and the two assault offenses have different elements. *Id.* at 1003. The *Rollerson* court did not explain its conclusion. Nonetheless, it apparently reasoned that contempt of court under 18 U.S.C. § 401(1) required that the offending conduct have occurred in the presence of the court, an element required by neither of the assault offenses, *see id.* at 1003 n.6, while one assault offense required use of a dangerous weapon and the other required that the victim be a federal officer engaged in the performance of his official duties, elements

Indeed, in *United States v. Dixon*,[194] the Supreme Court indicated in dicta that it would reach the same result. In discussing application of the *Blockburger*, or "same elements," test, the Court stated:

> In a case . . . in which the contempt prosecution was for disruption of judicial business, the same-elements test would not bar subsequent prosecution for the criminal assault that was part of the disruption, because the contempt offense did not require the element of criminal conduct, and the criminal offense did not require the element of disrupting judicial business.[195]

It is of course possible that a substantive criminal offense could constitute the "same offence" as contempt of court under the *Blockburger* test. For example, if the legislature enacted a statute making it a criminal offense (not contempt of court) intentionally to obstruct court proceedings through misbehavior in the presence of the court, that offense would be the "same offence" as direct criminal contempt of court. Whether the defendant could be punished for the substantive offense in such circumstances on the basis of the same conduct for which he had been summarily punished for contempt of court depends upon the scope of the protection afforded by the Double Jeopardy Clause.

Turning to that question, the Supreme Court has held that when a defendant has been convicted of two separate statutory offenses, either in a single trial[196] or following permissible successive prosecutions,[197] the double jeopardy provision "does no

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not required for the crime of contempt of court. *See also* Commonwealth v. Warrick, 497 A.2d 259, 260-61 (Pa. Super. Ct. 1985) (Tamilia, J., concurring) (contempt and escape do not constitute "same offence," so defendant's contempt conviction did not bar subsequent prosecution for escape, even though both offenses based upon same act of fleeing courtroom after being found guilty of possession of narcotics); Maples v. State, 565 S.W.2d 202, 204 (Tenn. 1978) ("The elements necessary to sustain a conviction for the statutory crime of perjury are wholly different and distinct from those necessary to justify imposition of a contempt citation under T.C.A. § 23-902.").

194 113 S. Ct. 2849 (1993).

195 *Id.* at 2856.

196 Missouri v. Hunter, 459 U.S. 359, 366 (1983).

197 Garrett v. United States, 471 U.S. 773, 793 (1985).

Successive prosecutions for the "same offence" may be permitted in unusual situations, such as where the defendant elected to have the offenses tried separately, Jeffers v. United States, 432 U.S. 137, 152-54 (1977); where a greater inclusive offense was not completed at the time the defendant was charged with a lesser included offense, *Garrett*, 471 U.S. at 790-93; and when the additional facts necessary to sustain a more serious charge had not yet occurred at the time the defendant was tried for lesser included offense, Diaz v. United States, 223 U.S. 442, 448-49 (1912).

more than prevent the sentencing court from prescribing greater punishment than the legislature intended."[198] Thus, even if two separate statutory offenses constitute the "same offence," the Double Jeopardy Clause does not preclude a court from punishing a convicted defendant for both offenses if the legislature clearly expressed its intent to impose multiple punishments.

For example, in *Missouri v. Hunter*,[199] the state tried the defendant in a single proceeding for the separate statutory offenses of first-degree robbery and armed criminal action. Following the defendant's conviction for both offenses, the trial court sentenced him to concurrent terms of ten years' imprisonment for the robbery and fifteen years for armed criminal action. In sentencing him for both offenses, it relied upon the armed criminal action statute, which provided:

> [A]ny person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous or deadly weapon is also guilty of armed criminal action and, upon conviction, shall be punished by imprisonment . . . for a term of not less than three years. *The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid or a dangerous or deadly weapon* . . . .[200]

The Supreme Court held that even though the robbery and armed criminal action statutes defined the "same offence" under *Blockburger*, the defendant could be sentenced for each crime,[201] because the legislature "specifically authorize[d] cumulative punishment under [the] two statutes."[202]

On the other hand, where two separate statutory offenses define the "same offence" and the legislature has not clearly indicated its intent to impose cumulative punishments, the guarantee against double jeopardy precludes a court from punishing a convicted defendant for both offenses.[203] Thus, in *Whalen v. United States*,[204] the Supreme Court held that, because of the "absence of a clear indication of contrary legislative intent," cumulative pun-

198 *Hunter*, 459 U.S. at 366.
199 *Id.* at 359.
200 MO. REV. STAT. § 559.225 (1979), revised 571.015 (1992) (emphasis added).
201 *Hunter*, 459 U.S. at 368-69.
202 *Id.* at 368.
203 Whalen v. United States, 445 U.S. 684, 690-95 (1980).
204 445 U.S. 684 (1980).

ishments could not be imposed in a single trial for both the lesser included offense of rape and the greater inclusive offense of felony murder, based upon the killing of the same victim in the perpetration of the rape.[205]

Applying these principles to the situation where an individual has been convicted of direct contempt of court, one concludes that the government cannot *punish* her for a substantive crime that constitutes the "same offence" as the direct contempt of court, unless the legislature clearly has indicated its intent to allow cumulative punishments. This result should be achieved not only where the legislature has defined the crime of direct contempt of court,[206] but also when it has not done so. Although the latter situation does not involve two separate *statutory* offenses, the protection against multiple punishments afforded an individual by the Double Jeopardy Clause should be no less when the legislature has not acted with respect to the crime of contempt than when it has acted. Certainly the Double Jeopardy Clause would not allow a state that still recognizes common law crimes to punish an individual for both a lesser included *common law* crime and a greater inclusive *statutory* crime, following the defendant's conviction on both offenses in a single trial or in permissible successive trials, at least in the absence of a contrary legislative intent.

Moreover, if the double jeopardy provision bars the government from *punishing* an individual for a substantive criminal offense, it should also preclude the government from *prosecuting* that individual for the substantive offense. It is true, of course, that if the defendant were tried for the substantive offense and acquitted, she would not suffer multiple punishments for the same offense; nor would she have undergone successive prosecutions for the same offense, because her trial for the substantive criminal offense would have been her only real "trial." Nevertheless, in circumstances where a person has already been convicted and punished for a criminal offense, albeit in a nonadversary proceeding, the Double Jeopardy Clause should not allow the government to try the person for the substantive criminal offense, but simultaneously prohibit the imposition of any punishment upon her if convicted.[207]

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205 *Id.* at 692. *See also Hunter*, 459 U.S. at 367.

206 *E.g.*, 18 U.S.C. § 401 (1988); OHIO REV. CODE ANN. § 2705.01 (Anderson 1992); TENN. CODE ANN. § 29-9-102 (1993).

207 This is unlike the situation in Ohio v. Johnson, 467 U.S. 493 (1984), where a defendant charged with two greater inclusive offenses and two lesser included offenses pleaded guilty to the two lesser included offenses, over the objection of the prosecution.

As indicated above, however, in most situations the Double Jeopardy Clause will not preclude the government from prosecuting, convicting, and punishing an individual for a substantive crime, even though she previously has been summarily punished by a court for direct contempt based upon the same act, because under a strict application of the *Blockburger* test the two offenses are not the "same offence." Such a niggardly interpretation of the *Blockburger* test provides individuals with inadequate protection against multiple punishments for the same act or transaction.

Indeed, in *Harris v. Oklahoma*,[208] the Supreme Court applied the protection of the Double Jeopardy Clause where the *Blockburger* test was not met. The Court held that the Double Jeopardy Clause barred the prosecution of a defendant for robbery with a firearm because he previously had been convicted of felony murder based upon a killing committed during the same armed robbery. The Court reached this result even though the applicable felony murder statute did not on its face require proof of armed robbery, but only of *some* felony, and robbery with a firearm did not require proof of a death.[209] The Court treated felony murder based upon armed robbery as a separate statutory offense and armed robbery as "a species of lesser-included offense."[210]

The defendant then sought to have the two greater inclusive offenses dismissed on the ground that, having already been convicted of the lesser included offenses, he could not be punished for the two greater inclusive offenses. Thus, the defendant in *Johnson* was attempting to manipulate the guarantee against double jeopardy so he could avoid prosecution on the more serious charges. The situation being discussed in the text involves no such attempted manipulation.

208 433 U.S. 682 (1977) (per curiam).

209 *Id.* at 682-83. *See also* Whalen v. United States, 445 U.S. 684, 693-94 (1980) (Double Jeopardy Clause precludes imposition of cumulative punishment in single trial following defendant's conviction for rape and felony murder based upon killing of same victim in perpetration of rape, even though felony murder statute merely required killing of human being during any one of six specified felonies).

210 Illinois v. Vitale, 447 U.S. 410, 420 (1980). *See also* United States v. Dixon, 113 S. Ct. 2849, 2857 (1993) (opinion of Scalia, J.).

Justice Scalia, in his opinion announcing the judgment of the Court in *Dixon*, relied upon *Harris* to reach the same result in the context of prosecutions for possession with intent to distribute cocaine and simple assault following the defendants' convictions for indirect contempt of court based upon violations of court orders expressly incorporating all or part of the jurisdiction's criminal code. *Id.* at 2857-58. But, as indicated in the text — *see supra* notes 194-95 and accompanying text — Justice Scalia indicated in dicta that contempt of court based upon an assault committed during a court proceeding would not be the "same offence" as the substantive crime of assault based upon the same incident. *Id.* at 2856.

An argument can be made on the basis of *Harris* that the crime of direct contempt of court encompasses all misbehavior that intentionally interferes with the orderly administration of justice and implicitly incorporates all conduct proscribed by the applicable criminal code. Under this reasoning, contempt of court based upon a simple assault, for example, could be treated as a separate offense and the substantive criminal offense of simple assault as "a species of lesser-included offense" of that contempt offense. Cumulative punishment could be imposed for both offenses only if the legislature clearly expressed its intent to impose multiple punishments. If the legislature did not do so, the government should be barred from punishing, and hence prosecuting, a contemnor for the substantive offense.

In light of the various opinions in *United States v. Dixon*,[211] however, it is unlikely that the current Supreme Court would adopt such an approach. Justices Scalia and Kennedy, who relied upon *Harris* in a portion of their opinion in *Dixon*, indicated in dicta in another portion of that opinion that they would not read *Harris* as broadly as suggested here.[212] Chief Justice Rehnquist and Justices O'Connor and Thomas read *Harris* narrowly in *Dixon*,[213] and therefore could not be expected to read it any more broadly in the context of summary criminal contempt prosecutions. Finally, although Justice Blackmun's reasoning in *Dixon* is not entirely clear, his conclusion that the Double Jeopardy Clause did not bar the criminal prosecutions in *Dixon* indicates he would not accept the argument raised here.[214]

VI. CONCLUSION

Despite the contrary holdings of the lower courts that have considered the issue, the Double Jeopardy Clause of the Fifth Amendment should be held applicable to summary criminal contempt prosecutions so it can protect individuals against multiple punishments. As a practical matter, though, that provision will have little effect. Under the current test, contempt of court rarely, if ever, will constitute the "same offence" for purposes of double jeopardy analysis as a substantive criminal offense based upon the same act. Thus, in most cases, the Double Jeopardy Clause will not

211 113 S. Ct. 2849 (1993).

212 *See supra* notes 194-95 and accompanying text.

213 *See supra* note 144 and notes 141-44 and accompanying text.

214 *See supra* note 102.

preclude the government from prosecuting an individual for a substantive criminal offense based upon the same act for which she already has been cited for contempt of court.