

Double Jeopardy Protection—Illusion or Reality?

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I. INTRODUCTION

Under what circumstances may a criminal defendant justifiably claim he has “for the same offence [been] twice put in jeopardy of life or limb”?¹ The simple language of the double jeopardy clause belies the difficulty courts have had in applying and scholars have had in discussing its protection.² Part of the confusion arises because the prohibition against double jeopardy applies in different but

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¹U. S. CONST. amend. V.

²The origins of the prohibition against double jeopardy may be traced as far back as Greek and Roman times. Canon law recognized the principles inherent in double jeopardy protection in its recognition that God does not punish twice for the same transgression. 1 F. POLLACK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 109 (2d ed. 1898).

Although failure to mention any kind of double jeopardy protection by such early common law scholars as Glanville and Bracton may suggest that such a prohibition was not commonly recognized, certainly double jeopardy principles were firmly entrenched by the time of Coke and Blackstone. Common law pleas such as *autrefois acquit* (former acquittal) and *autrefois convict* (former conviction), which prevented re prosecution after verdict, had definite double jeopardy overtones. Blackstone stated that “the plea of *autrefois acquit* or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence.” 4 W. BLACKSTONE, *COMMENTARIES* *335.

As early as 1641, colonists in Massachusetts declared that “[n]o man shall be twice sentenced by Civill Justice for one and the same Crime, offence, or Trespasse.” Colonial Laws of Massachusetts 43, *quoted in* *Green v. United States*, 355 U.S. 184, 200 (1957) (Frankfurter, J., dissenting). The common law concept of double jeopardy was given constitutional dimension in America in 1789, when James Madison proposed an amendment to the Constitution that “[n]o 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 (Gales & Seaton eds. 1789), *quoted in* *Green v. United States*, 355 U.S. at 201-02 (Frankfurter, J., dissenting). The change in language of Madison’s original proposal of “more than one punishment or one trial . . .” to the ultimate wording of the amendment, “twice in jeopardy . . .,” was prompted by a concern that Madison’s language might be understood to prohibit a criminal’s right to appeal. *See* 355 U.S. at 202 (Frankfurter, J., dissenting).

For an extensive discussion of the history of double jeopardy in England and America, *see* Sigler, *A History of Double Jeopardy*, 7 *AM. J. OF LEGAL HIST.* 283 (1963). *See also* *United States v. Wilson*, 420 U.S. 332, 339-42 (1975); *Green v. United States*, 355 U.S. 184, 199-205 (1957) (Frankfurter, J., dissenting); *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 168-73 (1874).

related situations. It protects a criminal defendant from a retrial for the same offense after either conviction or acquittal and from multiple punishment for the same offense at a single trial.³

Additionally, the prohibition against double jeopardy has definitional infirmities. For instance, what constitutes the "same offense" for purposes of invoking double jeopardy protection? A thief in one robbery takes several items belonging to different owners; is it one robbery or more? A man rapes his daughter; is it rape and incest? In which of these situations would the prohibition against double jeopardy prevent successive trials? In which would multiple punishments be prohibited if all charges were tried together? The answers to these questions depend upon the definition of "same offense."

This Article focuses generally on the meaning of "same offense" and specifically on the meaning of "same offense" in Indiana; the unusual evolution of offense defining tests in Indiana; the ultimate adoption of the federal definition by the Indiana Supreme Court; and the application of that definition in recent Indiana cases.

Although the United States Supreme Court made the double jeopardy clause of the fifth amendment mandatory on the states in 1969,⁴ Indiana courts have had considerable difficulty in determining the extent of that protection.⁵ As a result, the federal constitutional test for determining "same offense" has not been uniformly applied. The Indiana experience exemplifies the difficulties courts have had in grappling with the perplexing problems raised by the double jeopardy clause.

II. TESTS FOR DEFINING "SAME OFFENSE"

A. *In General*

All would agree that criminal conduct which violates one statute one time should result in one trial and one punishment. However, with the current proliferation of offense categories by modern legislatures,⁶ one act or one course of criminal conduct may violate a

³United States v. Wilson, 420 U.S. 332, 343 (1975); North Carolina v. Pearce, 395 U.S. 711, 717 (1969); Green v. United States, 355 U.S. 184, 187-88 (1957). See generally United States v. Benz, 282 U.S. 304, 307-09 (1931); United States v. Ball, 163 U.S. 662, 669 (1896); *In re Nielsen*, 131 U.S. 176, 182-84 (1889); *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 168-69 (1873).

⁴Benton v. Maryland, 395 U.S. 784 (1969), *overruling* Palko v. Connecticut, 302 U.S. 319 (1937).

⁵The Indiana Supreme Court recently recognized that federal double jeopardy standards should apply in Indiana. *Elmore v. State*, 382 N.E.2d 893 (Ind. 1978).

⁶*Ashe v. Swenson*, 397 U.S. 436, 445 n.10 (1970). See generally Comment, *Twice in Jeopardy*, 75 YALE L.J. 262, 279-80 (1965) [hereinafter cited as *Twice in Jeopardy*]; Comment, *Statutory Implementation of Double Jeopardy Clauses: New Life for a Moribund Constitutional Guarantee*, 65 YALE L.J. 339, 342 (1956).

number of criminal statutes. Therefore, the question is whether several offenses may be tried and punished separately, or must be tried and punished as one offense.

B. "Same Offense" and Legislative Intent

Although an act may be reprehensible per se, it is not *criminal* until it has been defined as such by a legislative body. Is it the act itself we try and punish, or is it the violation of a legislatively defined offense? Courts and commentators agree that the double jeopardy clause does not limit the legislature's capacity to define crimes and prescribe punishments.⁷ However, double jeopardy does prevent multiple trials or punishments if the legislature intended the offenses prosecuted or punished to be "the same." Thus, if the same conduct violates several legislatively defined offense categories, punishment for each offense is not violative of double jeopardy.

The difficulty lies in determining legislative intent. Too often, the passage of a new statute which overlaps an old statute is taken as a sufficient indication that the legislature intended punishment under both.⁸ Criminal codes, however, are often haphazardly changed or amended.⁹ For example, the legislature may enact a statute unaware that one with overlapping provisions exists. Similarly, obsolete statutes may not be repealed or harmonized with new statutes. Ambiguity also exists in the courts' interpretation of legislative intent. Some courts have found that the simultaneous creation of offense categories by the legislature indicates that both offenses should be punished;¹⁰ whereas other courts have determined that the creation of statutes at different times shows that the legislature intended all of the offenses to be separately triable and punishable.¹¹

C. Tests Defining "Same Offense"

Although federal double jeopardy was not obligatory on the states until 1969, most states had provided a similar protection in

⁷The United States Supreme Court recently reaffirmed this position in *Brown v. Ohio* in which it stated, "Because it was designed originally to embody the protection of the common law pleas of former jeopardy . . . the Fifth Amendment double jeopardy guarantee serves principally as a restraint on courts and prosecutors. The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments . . ." 432 U.S. 161, 165 (1977). See also *Bell v. United States*, 349 U.S. 81 (1955); *Twice in Jeopardy*, *supra* note 6, at 302-04.

⁸*Iannelli v. United States*, 420 U.S. 770, 785 n.17 (1975).

⁹*Kirchheimer, The Act, The Offense and Double Jeopardy*, 58 YALE L.J. 513, 515-16 (1949).

¹⁰*Dunkle v. State*, 241 Ind. 548, 551-52, 173 N.E.2d 657, 659 (1961).

¹¹*Gore v. United States*, 357 U.S. 386, 391 (1958).

their state constitutions.¹² However, because states could freely determine the scope of double jeopardy protection and the definition of "same offense," a variety of approaches emerged. Tests for defining "same offense" fall into two general categories—the evidentiary or "same evidence" test and the behavioral or "same transaction" test.¹³

1. "*Same Evidence*" Test.—"Same evidence" tests focus on the evidence necessary to convict for particular legislatively defined offenses.¹⁴ If the violations of two such offenses may be established by proof of the same evidence, they are the same offense. If, on the other hand, one offense requires proof of a fact which the other does not, they are not the "same offense" for purposes of double jeopardy. Thus, the emphasis of such a test is not on the nature of the acts but on the statutory definitions of the offenses.

The "same evidence" test rarely prevents retrial or multiple punishments in cases in which one act or course of conduct violates several statutes. If a prosecutor exercises his discretion to charge a criminal defendant with every possible offense arising out of one course of conduct, and, after conviction, the judge, unfettered by double jeopardy prohibitions, sentences on every conviction, a criminal defendant may find himself tried several times or punished several times for a single unlawful act. To the extent that this result reflects legislative intent, double jeopardy principles are not violated. However, the plethora of offense categories and potential for overlap which have developed create a likelihood that the spirit of the double jeopardy clause, as originally contemplated by the drafters of the fifth amendment, is not realized if the "same evidence" test is used.

Still, the "same evidence" test, although flawed, is easy to apply. An examination of the statutes involved will reveal whether the

¹²Sigler, *supra* note 2, at 307-08; *see also* Benton v. Maryland, 395 U.S. 784, 795 (1969); Brock v. North Carolina, 344 U.S. 424, 435 n.6 (1953) (Vinson, C.J., dissenting).

¹³*Twice in Jeopardy*, *supra* note 6, at 269-70.

¹⁴Three varieties of "same evidence" tests have been used. Courts espousing the *required* evidence test look to the elements of the criminal statutes under consideration. If the statutory definitions are the same in that they require proof of the same facts, the offenses are the same; if they require proof of different facts, they are not the same. *See, e.g.*, Blockburger v. United States, 284 U.S. 299 (1932). Courts adopting the *alleged* evidence test examine the allegations in the indictments to see if the offenses are the same. *See, e.g.*, People v. Brannon, 70 Cal. App. 225, 233 P. 88 (1924). Courts using the *actual* evidence test look to the evidence actually introduced at trial. *See, e.g.*, Estep v. State, 11 Okla. Crim. 103, 143 P. 64 (1914).

Of the three evidentiary tests, the *required* evidence test has the largest following. Although the test has limitations, its one great advantage is that it can be applied prior to trial. If one of the purposes of the double jeopardy protection is to prevent retrial for the same offense, it is absurd to employ a test like the *actual* evidence test which cannot be applied until after the second trial is nearly over.

same or different proof is required. Statutes which require proof of the same facts meet the test for same offense; statutes which require proof of different facts do not.

2. "*Same Transaction*" Test. — The behavioral approach to double jeopardy includes such tests as the "same act" test, the "same transaction" test, and the "same intent" test.¹⁵ These tests focus not on the definitions of statutory offenses, but on the actual conduct of the actor.

Although these behavioral tests are obviously advantageous to the criminal defendant, they are often difficult and impractical to use. A primary drawback is semantic.¹⁶ "Act," "transaction," and "ultimate intent" are imprecise terms. How broadly can "act" be defined? How attenuated can a "transaction" be? How far removed from the criminal's conduct can his "ultimate goal" be?

The behavioral tests may also thwart legislative intent. Although a single act may constitute rape and incest, the statutes defining these crimes address discrete types of offensive behavior. Can it be said that the legislature did not intend to punish both? Similarly, in a single criminal transaction, diverse criminal statutes may be violated. Can the legislature have intended that such a transaction be only one offense?

D. *Inadequacy of Tests*

It is clear that neither of the tests devised to determine the meaning of "same offense" is adequate. The evidentiary tests may leave a criminal defendant with too little double jeopardy protection; whereas the behavioral tests may provide him with too much protection. Furthermore, although the inconvenience and potential harassment which attend multiple trials might justify the requirement that all crimes arising out of the same transaction be tried together, the legislature, by addressing different harms in defining various crimes may have intended to punish each separately. Balancing the needs of the defendant against those of the state has prompted much discussion by courts and commentators. Myriad solutions have been suggested,¹⁷ but none has satisfactorily solved the dilemma.

¹⁵*Twice in Jeopardy*, *supra* note 6, at 270. Under the "same act" test, offenses are the same if only one criminal act is involved, regardless of how many legislatively defined statutes are violated. *See, e.g.*, *Sexton v. Commonwealth*, 193 Ky. 495, 236 S.W. 956 (1922). Courts applying the "same transaction" test find only one offense if all the statutory violations occur as a part of one criminal transaction. *See, e.g.*, *Crumley v. City of Atlanta*, 68 Ga. App. 69, 22 S.E.2d 181 (1942). Courts applying the "same intent" test determine whether all offenses which lead to the criminal's ultimate intent or goal are the same. *See, e.g.*, *Smith v. State*, 159 Tenn. 674, 21 S.W.2d 400 (1929).

¹⁶For a discussion of the language problems inherent in the behavioral tests see *Twice in Jeopardy*, *supra* note 6, at 276-77; *Kirchheimer*, *supra* note 9, at 524-25.

¹⁷*See Kirchheimer*, *supra* note 9, at 534-42.

E. "Same Offense" and the United States Supreme Court

The United States Supreme Court early adopted the "same evidence" test¹⁸ for use in federal double jeopardy cases. It expressed the test most definitively in *Blockburger v. United States*.¹⁹ The defendant in *Blockburger* was charged with several violations of the Harrison Narcotics Act,²⁰ each involving a sale of narcotics to the same purchaser on successive days. He was convicted on three

¹⁸The "same evidence" test was developed originally to overcome a problem produced by common law pleading requirements. At common law any variance between the allegations and pleadings and the proof actually produced at trial resulted in a technical acquittal. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1173-74 & nn.76 & 77 (1960).

The defendant could then claim that the first acquittal bars a second trial. The actual pleading used was *autrefois acquit*. See note 2 *supra*. To prevent such injustice, the court in *Rex v. Vandercomb*, 2 Leach 708, 168 Eng. Rep. 455 (1796), held that because the evidence necessary to convict the defendant in the second correct indictment could not have convicted him on the first incorrect indictment, the offenses were not the same and the defendant could be retried. *Id.* at 717, 168 Eng. Rep. at 459-60.

Although the test originated as a means of allowing trial after technical acquittals, it has evolved into the test used for determining the "same offense" for all aspects of double jeopardy. In *Morey v. Commonwealth*, 108 Mass. (12 Browne) 433 (1871), the bedrock case in America on the "same evidence" test, the court found that a former conviction for lascivious cohabitation would not bar a later trial and conviction for adultery, although both charges were based on the same conduct. The court in *Morey* was not faced with a quirk in procedure, but with a question of substantive criminal law—can the same criminal act be the basis for more than one conviction and punishment? The *Morey* court answered unequivocally "yes."

A conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other. The test is not whether the defendant has not already been tried for the same act but whether he has been put in jeopardy for the same offense. A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.

Id. at 434.

This "same evidence" approach to double jeopardy has been approved with regularity by the United States Supreme Court. In *Gavieres v. United States*, 220 U.S. 338 (1911), the Court specifically adopted the "same evidence" test as articulated in *Morey*, *id.* at 343, noting that although the defendant's convictions of insulting a public official and exhibiting drunk and disorderly conduct were based on the same factual occurrence, the offenses charged were different because "evidence sufficient for conviction under the first charge would not have convicted under the second indictment." *Id.* at 343-44.

¹⁹284 U.S. 299 (1932).

²⁰Harrison Narcotic Act, Pub. L. No. 223, ch. 1, § 1, 38 Stat. 785 (1914), as amended by Revenue Act, Pub. L. No. 254, ch. 18, § 1006, 40 Stat. 1057, 1130 (1919) (codified at I.R.C. § 696).

counts at one trial and sentenced to a five year prison term on each, the terms to run consecutively.²¹

The defendant, claiming that the various charges based on a single sale of narcotics constituted one offense for which only one punishment could be imposed, specifically challenged the "same evidence" approach to double jeopardy protection.²² The Court unequivocally reiterated its position that conviction on each count did not violate double jeopardy even though the convictions arose from the same criminal act of selling narcotics. It stated:

Each of the offenses created requires proof of a different element. 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 a fact which the other does not.²³

Except for purposes of clarification, the Court has never deviated from this statement of the test.²⁴ Even a significant overlap in the

²¹284 U.S. at 301.

²²*Id.* at 304. In addition to settling this question, the Court also addressed the defendant's contention that the sales made to the same customer on two consecutive days constituted a single continuing offense. It held that Congress intended to penalize any sale made in violation of the Act, so each sale constituted a distinct offense. *Id.* at 303.

²³*Id.* at 304.

²⁴Although the restrictive *Blockburger* definition of "same offense" has remained firmly entrenched, the decision in *Bell v. United States*, 349 U.S. 81 (1955), indicated that the Court might take a more liberal view toward determining whether the legislature intended to punish more than once. In *Bell*, the defendant was convicted of simultaneously transporting two women across state lines in violation of the Mann Act, 18 U.S.C. § 2421 (1970). The issue presented to the Court was whether two separate offenses were committed. Recognizing that Congress has the power to determine the appropriate punishment for any criminal offense subject only to constitutional limitations on cruel and unusual punishment, U.S. CONST. amend. VIII, the Court established a rule of construction which should be applied in situations such as this one in which congressional intent is unclear. It held that "when Congress leaves to the judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity." 349 U.S. at 83.

Although this liberal attitude toward construing legislative intent in favor of the criminal defendant had potential for mitigating the harshness of the "same evidence" test, its effectiveness has been limited. The Court in *Gore v. United States*, 357 U.S. 386 (1958), retreated from the rule of lenity. Based on two sales of narcotics, Gore was convicted on a six count indictment charging violations of three different sections of federal narcotics statutes and was sentenced to three consecutive terms for each sale. In response to Gore's argument that all three sections were aimed at the same act and that his convictions therefore violated the double jeopardy clause, the Court answered by specifically adhering to its decision in *Blockburger*. *Id.* at 388. It distinguished *Bell* on the basis that in *Bell* only one statutorily defined offense was involved. "It is one thing for a single transaction to include several units relating to proscribed conduct

proof offered to establish the crimes will not make them the same offense for double jeopardy purposes, because the focus of the test is not on the proof offered, but on the statutory elements of each offense.

The Court is apparently satisfied that this test adequately determines legislative intent. In applying the "same evidence" test to uphold convictions on both conspiracy to violate a statute *and* violation of the statute itself, the Court in *Iannelli v. United States*²⁵ found that the *Blockburger* test

serves a . . . function of identifying congressional intent to impose separate sanctions for multiple offenses arising in the course of a single act or transaction. In determining whether separate punishment might be imposed, *Blockburger* requires that courts examine the offenses to ascertain "whether each provision requires proof of a fact which the other does not."²⁶

Thus, legislative intent supporting separate trials or separate punishment can be inferred from the mere fact that a legislative body has enacted more than one statute with different elements prohibiting the same behavior.

The Court's adoption of a strict "same evidence" test raises a question whether federal double jeopardy standards ever prevent multiple trials or multiple punishments where multiple statutes are involved. After the Court's decision in *Brown v. Ohio*,²⁷ the answer has to be yes, but not often.²⁸ In *Brown*, the defendant was convicted

under a single provision of a statute. It is a wholly different thing to evolve a rule of lenity for three violations of three separate offenses created by Congress at three different times . . ." *Id.* at 391.

²⁵420 U.S. 770 (1975).

²⁶*Id.* at 785 n.17 (quoting *Blockburger v. United States*, 284 U.S. at 304).

²⁷432 U.S. 161 (1977).

²⁸Although the Court's position on lesser included offenses and double jeopardy appeared clear after *Brown*, the Court inadvertently set a trap for the unwary in *Jeffers v. United States*, 432 U.S. 137 (1977). In *Jeffers*, the defendant opposed consolidation of the two charges against him, conspiring to distribute heroin and cocaine, and conducting a criminal drug enterprise with five or more people. Although the Court admitted, "[i]f the two charges had been tried in one proceeding, it appears that petitioner would have been entitled to a lesser-included-offense instruction," *id.* at 153, it nonetheless denied the defendant double jeopardy protection against his second trial, finding that if a defendant requests separate trials and "fails to raise the issue that one offense might be a lesser included offense of the other, another exception to the *Brown* rule emerges." *Id.* at 152. However anomalous, although double jeopardy did not prevent defendant's second trial for what was "the same offense," double jeopardy did prevent an additional punishment after conviction of "the same offense." *Id.* at 157.

A contingent of the United States Supreme Court led by Justice Brennan has consistently advocated mandatory joinder in one trial, of all charges arising out of "a single criminal act, occurrence, episode, or transaction"—in essence, a "same transac-

tion" test. *Ashe v. Swenson*, 397 U.S. 436, 453-54 (1970) (Brennan, J., concurring). Troubled by the "tendency of modern criminal legislation to divide the phases of a criminal transaction into numerous separate crimes," *id.* at 452 (Brennan, J., concurring), and the unfettered discretion of prosecutors to initiate separate criminal prosecutions, Justice Brennan argued that the "same evidence" test is inadequate in determining whether separate trials should be prohibited. Thus, he has suggested that a "same transaction" test be used to define "same offense" for the multiple trial situation. However, he has advocated that the "same evidence" test should be used to determine which offenses are the same for purposes of punishment. He justifies using different tests in the double jeopardy area because the "same evidence" test is not constitutionally required and because "the consolidation in one lawsuit of all issues arising out of a single transaction or occurrence best promotes justice, economy, and convenience." *Id.* at 454 (Brennan, J., concurring).

At the time Justice Brennan posed his solution to the multiple trial problem, the Supreme Court's position on what constituted the same offense in the multiple trial situation was not altogether clear. *Blockburger*, the case in which the Court firmly adopted the "same evidence" test, was a one trial situation. However, after the Court's decision in *Brown*, a two trial situation, the possibility that Justice Brennan's mandatory joinder idea will ever have constitutional dimension is remote.

This does not, however, foreclose the possibility of mandatory joinder being required by statute. Numerous recommendations have been made in this regard both at the federal and state levels. *See, e.g.*, NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, FINAL REPORT: A PROPOSED NEW CRIMINAL CODE §§ 703, 705(b) (1971); ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO JOINDER AND SEVERANCE § 1.3 (1968); MODEL PENAL CODE §§ 1.07(2), 1.09(1)(b) (Proposed Official Draft 1962). Furthermore, a number of states require mandatory joinder either by statute, *see, e.g.*, ILL. REV. STAT. ch. 38, §§ 3.3, 3.4(b)(1) (1972); 18 PA. CONS. STAT. § 110 (1973), or through interpretation of state constitutional double jeopardy. *See, e.g.*, *People v. White*, 390 Mich. 245, 212 N.W.2d 222 (1973); *State v. Gregory*, 66 N.J. 510, 333 A.2d 257 (1975).

Although hope that mandatory joinder might rise to a constitutional level has been effectively foreclosed, the criminal defendant may still, under appropriate circumstances, assert collateral estoppel as a means of preventing multiple trials. In *Ashe v. Swenson*, 397 U.S. 436 (1970), the defendant was accused of being one of three or four men who robbed several poker players. He was tried for robbing one of the players, but was acquitted after the prosecution could not establish his identity. At a subsequent trial for the robbery of one of the other players, the defendant was convicted. Reversing the second conviction, the United States Supreme Court based its decision not on the application of the "same evidence" test but on the principle of federal collateral estoppel. "[W]hen an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Id.* at 443. The Court found this rule to be embodied in the fifth amendment guarantee against double jeopardy, thus giving the doctrine of collateral estoppel constitutional dimension. *Id.* at 445.

The additional protection against multiple trials provided by collateral estoppel is limited at best. First, the doctrine applies only if the first trial ended in acquittal. It provides no protection against additional trials after conviction or against multiple punishment at a single trial. *Id.* at 446. Additionally, if the jury returns a general verdict, it is difficult to determine what issues of ultimate fact were decided in the defendant's favor. Finally, the decision in *Ashe* does not prevent retrial by a different sovereign, because a different party is involved, and collateral estoppel only estops relitigation between the same parties. Although it may have been the hope of the majority in *Ashe* that its decision would significantly expand double jeopardy protection against multiple trials, in practice, the protection is largely ephemeral.

of joyriding in one trial and of car theft in a later trial; both offenses were based upon the same factual incident. Applying the *Blockburger* "same evidence" test, the Court concluded that joyriding and car theft were the same offense, because joyriding was a lesser included offense of car theft.

[I]t is clearly *not* the case that "each [statute] requires proof of a fact which the other does not." . . . As is invariably true of a greater and lesser included offense, the lesser offense—joyriding—requires no proof beyond that which is required for conviction of the greater—auto theft. The greater offense is therefore by definition the "same" for purposes of double jeopardy as any lesser offense included in it.²⁹

Thus, traditional greater and lesser included offenses fulfill the "same evidence" requirement.

III. DOUBLE JEOPARDY AND THE "SAME OFFENSE" IN INDIANA

A. Introduction

Because the United States Supreme Court did not extend

Another significant protection against multiple trials for offenses arising out of the "same transaction" is the *Petite* policy. In *Petite v. State*, 361 U.S. 529 (1960), the case in which the Court first recognized the policy, the defendant had been indicted in two different federal courts for offenses arising out of the same transaction. The United States Supreme Court granted certiorari to consider the double jeopardy aspects of the case, but the Department of Justice filed a motion requesting the Court to direct the second district court to dismiss the indictment. The basis for the request was "that several offenses arising out of a single transaction should be alleged and tried together and should not be made the basis of multiple prosecutions, a policy dictated by considerations both of fairness to defendants and of efficient and orderly law enforcement." *Id.* at 530. The *Petite* policy also operates to prevent a subsequent federal trial of an offense arising out of the same transaction which had been the basis of a trial in state court. *Thompson v. United States*, 100 S.Ct. 512 (1980).

A strict adherence to this policy gives the criminal defendant protection against multiple prosecutions in federal courts and against a prosecution in federal court after a prosecution based on the same transaction in a state court. It does not, however, protect a defendant against multiple trials in state court or against a subsequent state court action after a federal trial based on the same transaction. However, many states have precluded state prosecutions after federal prosecutions for the "same offense." *See, e.g.*, MODEL PENAL CODE § 1.11 (Tent. Draft No. 5, 1956).

²⁹432 U.S. at 168 (quoting 284 U.S. at 304). The Court further clarified its position on lesser included offenses in *Harris v. Oklahoma*, 433 U.S. 682 (1977). The defendant had been convicted at one trial of felony murder, and at another trial of robbery with firearms, the underlying felony of the felony murder. The Court found that if "conviction of a greater crime, murder, cannot be had without conviction of the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime after conviction of the greater one." *Id.* at 682.

federal double jeopardy protection to the states until 1969,³⁰ the states were free to develop their own standards.³¹ Thus, double jeopardy protection in Indiana has evolved independent of, rather than as a result of, federal constitutional protection.³²

The major divergence between the development of Indiana and federal double jeopardy principles is that Indiana courts have historically focused on double jeopardy as a prohibition against multiple trials rather than as a prohibition against multiple punishment. In fact, the early courts used the term *former* jeopardy rather than *double* jeopardy to refer to the problem.³³ The Indiana Supreme Court's attitude was specifically articulated in *Kokenes v. State*,³⁴ in which the court stated, "The contention that the conviction on the first count bars a conviction on the second is untenable, since the convictions were simultaneous, and there was no *former* jeopardy."³⁵

The Indiana emphasis on double jeopardy as a multiple trial problem was perpetuated in the 1976 Indiana Penal Code which provides in pertinent part that future prosecutions are barred if a former prosecution was based on the same facts and for commission of the same offense.³⁶ This section constitutes the first attempt in In-

³⁰*Benton v. Maryland*, 395 U.S. 784 (1969). The Court had specifically refused to extend double jeopardy protection to the states at least twice. In the celebrated case, *Palko v. Connecticut*, 302 U.S. 319 (1937), the Court specifically found that federal double jeopardy protection was not applicable to the states unless the states' actions subjected a defendant to truly shocking treatment. The Court reiterated its stance in *Brock v. North Carolina*, 344 U.S. 424, 427 (1953). However, in the wake of such cases as *Gideon v. Wainwright*, 372 U.S. 335 (1963) (extending right to counsel to state criminal defendants), *Malloy v. Hogan*, 378 U.S. 1 (1964) (extending right against self incrimination to state criminal defendants), and *Duncan v. Louisiana*, 391 U.S. 145 (1968) (extending the right to trial by jury to state criminal defendants), the Court found in *Benton* that federal double jeopardy standards should apply to protect state criminal defendants.

³¹See note 12 *supra* and accompanying text.

³²The Indiana Constitution provides that, "[n]o person shall be put in jeopardy twice for the same offense." IND. CONST. art. 1, § 14.

³³See, e.g., *Ford v. State*, 229 Ind. 516, 98 N.E.2d 655 (1951); *Kokenes v. State*, 213 Ind. 476, 13 N.E.2d 524 (1938); *Arrol v. State*, 207 Ind. 321, 192 N.E. 440 (1934). *But see* *Pivak v. State*, 202 Ind. 417, 175 N.E. 278 (1931), where the defendant was charged by two affidavits which were tried together. The Court, however, spoke in terms of "two prosecutions." *Id.* at 421, 175 N.E. at 280.

³⁴213 Ind. 476, 13 N.E.2d 524 (1938).

³⁵*Id.* at 480, 13 N.E.2d at 526.

³⁶IND. CODE § 35-41-4-3 (Supp. 1979).

(a) A prosecution is barred if there was a former prosecution of the defendant based on the same facts and for commission of the same offense and if:

(1) the former prosecution resulted in an acquittal or a conviction of the defendant (A conviction of an included offense constitutes an acquittal of

diana to codify double jeopardy rules, yet no mention is made of the double punishment aspects of double jeopardy. Of course, after *Benton v. Maryland*,³⁷ the scope of double jeopardy protection in Indiana must be commensurate with the federal protection. Therefore, double jeopardy certainly prohibits multiple punishment for the same offense in Indiana. However, the failure of the statute to identify multiple punishment as a double jeopardy problem may reinforce the focus on it as a prohibition only against multiple trials.

B. *Development of Offense Defining Tests in Indiana*

An examination of early Indiana case law in the area of double jeopardy reveals that Indiana courts used a variety of approaches to double jeopardy before ultimately settling for the traditional "same evidence" test. Although the state constitution forbade double jeopardy,³⁸ early courts frequently dealt with double jeopardy problems without ever identifying them as such.³⁹ Furthermore, the simultaneous evolution of disparate tests for determining when an additional trial would be prohibited led to considerable confusion.

1. *Gravamen of Offense Test.*—The first clearly articulated test in Indiana relating to double jeopardy was the "gravamen of offense" test. This test had the potential for striking a balance between the act and offense, because it focused on the conduct of the defendant as it related to the social interests sought to be protected, rather than on the identity of elements of the statutes. If the gravamen, or principle act, necessary to violate each statute was the same, then the offenses were the same for double jeopardy purposes.⁴⁰

the greater offense, even if the conviction is subsequently set aside.); or (2) the former prosecution was terminated after the jury was impaneled and sworn or, in a trial by the court without a jury, after the first witness was sworn, unless (i) the defendant consented to the termination or waived, by motion to dismiss or otherwise, his right to object to the termination, (ii) it was physically impossible to proceed with the trial in conformity with law, (iii) there was a legal defect in the proceedings that would make any judgment entered upon a verdict reversible as a matter of law, (iv) prejudicial conduct, in or outside the courtroom, made it impossible to proceed with the trial without injustice to either the defendant or the state, (v) the jury was unable to agree on a verdict, or (vi) false statements of a juror on voir dire prevented a fair trial.

(b) If the prosecuting authority brought about any of the circumstances in subdivisions (a)(2)(i) through (a)(2)(vi) of this section, with intent to cause termination of the trial, another prosecution is barred.

³⁷395 U.S. 784 (1969).

³⁸IND. CONST. art. 1, § 14.

³⁹See, e.g., *Hamilton v. State*, 36 Ind. 280 (1871).

⁴⁰See, e.g., *Wininger v. State*, 13 Ind. 540 (1859).

In *Wininger v. State*,⁴¹ an early Indiana case articulating the gravamen of offense test, the defendant, who had earlier been fined for assault and battery, appealed a conviction for participating in a riot. Because both charges arose from the same operative facts, the defendant claimed he had already been once in jeopardy. The court agreed, finding, "the true rule, in prosecutions for offenses of this character, is, that where the gravamen of the riot consists in the commission of an assault and battery, then, a conviction for that assault . . . would be a bar to a prosecution for a riot . . ." ⁴² The court distinguished this kind of situation from one in which the assault and battery might have been incidental to the riot.⁴³ The focus of this test was obviously not on the specific elements of proof required to establish each offense but on the more general social evil sought to be prevented.⁴⁴

Although it has much in common with the traditional "same evidence" test, the "gravamen of offense" test differs to the extent that if the main thrust or gravamen, or principal act of each offense is the same, double jeopardy will preclude retrial even if the offenses are not in all respects identical. It is not altogether clear from the cases at what point in the litigative process the "gravamen of offense" test was applied to see whether a second trial would be prohibited.⁴⁵ Although it would have been possible, *prior* to trial to

⁴¹13 Ind. 540 (1859).

⁴²*Id.* at 541.

⁴³*Id.*

⁴⁴The most definitive statement of the rationale behind the "gravamen of offense" test appears in *State v. Gapen*, 17 Ind. App. 524, 45 N.E. 678 (1896). The defendant was tried and convicted in separate trials of selling less than a quart of alcohol without a license and of selling alcohol to a minor. Both charges arose out of the same factual situation. The court noted that one act might offend a number of statutes and might be tried separately without subjecting the defendant to double jeopardy. The court engaged in the sophisticated discussion of the rationale behind the "gravamen of offense" test. Citing *Wininger*, it defined gravamen to mean "principal act." *Id.* at 526, 45 N.E. at 678. Recognizing that no act (here the sale of intoxicating liquor) is an unlawful act until made so "by force of statute," *id.* at 527, 45 N.E. at 679, the court found the sale to be an illegal act both because it was made without a license as required by one statute and because it was made to a minor as forbidden by another statute. *Id.* In its explanation of why the gravamina of the offenses were different, the court laid the groundwork for what could have been a just and workable test for determining when double jeopardy principles should apply to prevent retrial.

Whilst it is true that there is an identity in the charges and in the evidence up to a certain point, yet up to that point the sale is an innocent transaction. It is only when the criminal character of the transaction is sought to be made that the two offenses diverge, in the charge, and in the evidence necessary to a conviction. The purposes of the two statutes are entirely dissimilar. The one is to raise revenue and protect those who have obtained license. The other is to guard the young against intemperance. The appellee is in error in

evaluate the defendant's act in relation to the offenses violated, it is also possible that the determination was not made until the end of the second trial. If it was the latter, the "gravamen of offense" test would have been objectionable for the same reasons the "same evidence" test is objectionable.⁴⁶ Even if the determination were made prior to the second trial, there is another objection to the "gravamen of offense" test. Who decides what the gravamen or principle act of an offense is? Who decides what the purposes of the statutes involved are and whether they are similar or dissimilar? These questions were never fully answered, because the "gravamen of offense" test met an early end.⁴⁷

2. "*Identity of Offense*" Test. — Although one line of early cases followed the "gravamen of offense" test, another line followed the

assuming that the sale alone constitutes the criminal offense. In so far as the charges and the evidence are identical, the transaction is entirely innocent. The appellee might have been convicted, or acquitted of the charge of selling to a minor, and the fact he had no license be not even alluded to. The fact that he had no license was not an element in that offense. So on the other hand he might have been convicted or acquitted of the charge of selling without a license, and the age of the purchaser not have even been referred to, for his age is not an element of that offense.

Id. at 528, 45 N.E. at 679.

⁴⁶It is difficult to determine at which point the "gravamen of offense" test was applied because appeals are generally taken from a denial of double jeopardy protection which means both trials have already taken place.

⁴⁷*See* text accompanying note 14 *supra*.

⁴⁸*Woodworth v. State*, 185 Ind. 582, 114 N.E. 86 (1916). The defendant in *Woodworth* was charged with violations relating to the sale of intoxicating liquor. One provision under which *Woodworth* was convicted provided that an unlicensed person may not sell or barter intoxicating liquors and permit them to be drunk on the premises where sold. Another provision of the same section made it a misdemeanor for a person to keep, run, or operate a place where intoxicating liquors were sold in violation of law, or to have such liquor in his possession for such purpose.

The defendant claimed that evidence of a sale made in violation of the first provision could not be used as evidence at a trial for the later offense, because both offenses arose from the same sale and he had already been punished for it once. Although the court spoke in terms of gravamina of offenses, finding the gravamina of these offenses to be different, it significantly changed the test as it had been applied in earlier cases. *See, e.g., State v. Gapen*, 17 Ind. App. 524, 45 N.E. 678 (1896). The court found in this case "[e]vidence sufficient to convict a person of the first offense would not necessarily be sufficient to sustain a conviction of the second, and the converse of this proposition is equally true." 185 Ind. at 586, 114 N.E. at 87. Thus, the gravamen of offense test had metamorphosed into something much like the required evidence test. The *Woodworth* court essentially foreclosed a "same act" or "same transaction" test when it specifically disapproved language in earlier cases which had suggested that if the same conduct constituted two or more offenses, the state must elect which one to prosecute. The court specifically disapproved the language in *Fritz v. State*, 40 Ind. 18 (1872), but dicta in other early cases had suggested the same idea. *See, e.g., Fleming v. State*, 174 Ind. 264, 91 N.E. 1085 (1910); *Hamilton v. State*, 36 Ind. 280 (1871).

"identity of offense" test. In *State v. Elder*,⁴⁸ decided in 1879, the defendant claimed that an indictment charging him with procuring a miscarriage violated his double jeopardy protection,⁴⁹ because at an earlier trial he had been acquitted of the murder of the unborn child. After pointing out that an offense may not be subdivided into parts and charged separately⁵⁰ and that necessarily lesser included offenses could not be charged with the greater,⁵¹ the court nonetheless found that if the same facts constitute two or more offenses and the facts necessary to convict on a second prosecution would not necessarily have convicted on the first, a second prosecution would not be barred even though the offenses resulted from the same act.⁵² Applying these rules, the court found that procuring a miscarriage was not the same offense as the murder of the unborn child.⁵³ The court apparently found no inconsistency in the fact that procuring the miscarriage was the means by which the murder was committed. It was sufficient that

[t]he lesser offense [was] not involved in the greater; the offenses [were] not committed against the same person and [bore] no resemblance to each other, either in fact or intent; the facts necessary to support a conviction on the present indictment would not necessarily have convicted, nor would they have tended to convict, upon the former indictment.⁵⁴

In upholding separate trials and convictions on unlawfully appropriating estray property and the larceny of that same property, the court in *Smith v. State*⁵⁵ specifically focused on the elements of the statutes in question to determine whether the defendant had been subjected to double jeopardy.⁵⁶ It found "[t]he true test to determine the sufficiency or insufficiency of a plea of formal acquittal as a bar to the pending prosecution, is this: Would the same evidence be necessary to secure a conviction in the pending, as in a former, prosecution?"⁵⁷

In *Foran v. State*,⁵⁸ in which the defendant was retried for certain sales of intoxicating liquor, the court reiterated this test and

⁴⁸65 Ind. 282 (1879).

⁴⁹The defendant raised the defense of former acquittal by special answer. *Id.* at 283.

⁵⁰*Id.* at 285.

⁵¹*Id.*

⁵²*Id.*

⁵³*Id.* at 286.

⁵⁴*Id.*

⁵⁵85 Ind. 553 (1882).

⁵⁶*See id.* at 554-56.

⁵⁷*Id.* at 557.

⁵⁸195 Ind. 55, 144 N.E. 529 (1924).

labelled it the "identity of offense" test.⁵⁹ The court also found that to establish "identity of offense," the "second charge must be for the same identical act and crime as that charged by the first affidavit or indictment upon which defendant had been placed in jeopardy."⁶⁰

With little variation, the "identity of offense" test has remained the offense defining test for double jeopardy purposes in Indiana.⁶¹ Although this test is conceptually identical to the "same evidence" test adopted by the United States Supreme Court in *Blockburger*, the Indiana courts have generally not relied on or even mentioned United States Supreme Court cases in reaching their conclusions on double jeopardy issues.⁶²

3. *Rejection of the "Same Transaction" Test.*—Early Indiana cases indicated that the courts might edge toward a behavioral approach in defining "same offense" for purposes of double jeopardy protection. The emphasis on the act in the "gravamen of offense" test and the suggestion, in dicta in some early cases, that, if the same conduct offended two statutes, the state must elect which to prosecute, indicated a trend in that direction.⁶³ However, the courts in *Woodworth*,⁶⁴ *Elder*,⁶⁵ *Smith*,⁶⁶ and *Foran*,⁶⁷ specifically rejected the "same transaction" test.

C. "Merger of Offense" Doctrine

Even with a well established offense defining test as a beacon, the Indiana Supreme Court made a brief but fascinating detour from its usual double jeopardy analysis. Under the appellation "merger of offenses," the court adopted what was in essence a behavioral or

⁵⁹*Id.* at 60, 144 N.E. at 530.

⁶⁰*Id.*

⁶¹*See, e.g.,* *Ford v. State*, 229 Ind. 516, 521, 98 N.E.2d 655, 657 (1951); *Durke v. State*, 204 Ind. 370, 377-78, 183 N.E. 97, 100 (1932); *Buckley v. State*, 322 N.E.2d 113, 116 n.6 (Ind. Ct. App. 1975).

⁶²A notable exception to this is the decision in *Dunkle v. State*, 241 Ind. 548, 173 N.E.2d 657 (1961), in which the court relied on *Blockburger* for the proposition that the appropriate test for determining identity of offenses is the "difference or the lack of difference in the evidence necessary to establish one particular crime as compared with that required to establish the other crime." *Id.* at 551, 173 N.E.2d at 658. Oddly, the court mentioned no Indiana cases in its double jeopardy analysis. The court in *Buckley v. State* cited *Blockburger* and noted the similarities between the federal double jeopardy analysis and the Indiana approach. 322 N.E.2d 113, 116 n.6 (Ind. Ct. App. 1975).

⁶³*Flemming v. State*, 174 Ind. 264, 91 N.E. 1085 (1910); *Hamilton v. State*, 36 Ind. 280 (1871).

⁶⁴185 Ind. 582, 586-87, 114 N.E. 86, 87-88 (1916). *See* note 47 *supra*.

⁶⁵65 Ind. at 286-87.

⁶⁶85 Ind. 553 (1882).

⁶⁷195 Ind. at 60, 144 N.E. at 530.

"same transaction" test for determining the extent of punishment for several offenses in a single trial setting. Thus, if a series of criminal statutes were violated by a single transaction, the convictions of crimes with less severe punishments merged with the crime carrying the greatest penalty.⁶⁸ Explanations as to why this aberrant doctrine evolved in the midst of the "identity of offense" test in Indiana must remain largely conjectural, because the court never explained its rationale with any degree of specificity.⁶⁹

A reasonable explanation is that the doctrine is rooted in the court's failure to recognize multiple punishment as a double jeopardy problem. For instance, in *Thompson v. State*,⁷⁰ in which the defendant in one trial was convicted of both possessing and selling dangerous drugs, the court stated, "Since Appellant has been subjected to *only one judicial proceeding* for the offenses charged, his claim of double jeopardy is inappropriate."⁷¹ Notwithstanding the court's misconception that double jeopardy principles apply only to multiple trials, it apparently sensed an inherent injustice in the fact that the defendant received "in effect, double punishment for a single offense arising from but one set of operative circumstances."⁷² The court, using language reminiscent of double jeopardy vocabulary, held that "before the court may enter judgment and impose sentence upon multiple counts, the facts giving rise to the various offenses must be independently supportable, separate and distinct."⁷³ Although it is obvious that the court was talking about a double jeopardy situation, the focus of its language was not on the identity of the offenses the defendant was charged with, but on the identity of his acts.

⁶⁸See, e.g., *Jones v. State*, 267 Ind. 205, 369 N.E.2d 418 (1977) (theft conviction merged into second degree burglary); *Sansom v. State*, 267 Ind. 33, 366 N.E.2d 1171 (1977) (theft and automobile banditry merged into burglary); *Candler v. State*, 266 Ind. 440, 363 N.E.2d 1233 (1977) (robbery merged into felony murder).

⁶⁹A doctrine of merger existed at early common law. If the same conduct constituted both a misdemeanor and a felony, the misdemeanor was said to merge into the felony. See 2 W. RUSSELL, A TREATISE ON CRIMES AND MISDEMEANORS 1026 (9th am. ed. 1877). A few early Indiana cases employed a merger rule by which misdemeanors were merged into felonies if one act constituted both a misdemeanor and a felony. *State v. Hattabough*, 66 Ind. 223 (1879); *Wright v. State*, 5 Ind. 527 (1854). As early as 1871, however, the court in *Hamilton v. State*, 36 Ind. 280 (1871), expressed doubt as to whether the doctrine of merger existed in the state of Indiana. It pointed out that even if the doctrine did exist, "[i]t has never been held that offenses of equal grade can merge the one in the other." *Id.* at 286. In *Hamilton* the offenses were both felonies. Thus, it seems unlikely that the modern merger doctrine espoused by the Indiana Supreme Court had its origins in this early merger doctrine.

⁷⁰259 Ind. 587, 290 N.E.2d 724 (1972), *cert. denied*, 412 U.S. 943 (1973).

⁷¹*Id.* at 591-92, 290 N.E.2d at 726.

⁷²*Id.* at 592, 290 N.E.2d at 727.

⁷³*Id.*

Another case which fanned the fires of the merger doctrine was *Coleman v. State*.⁷⁴ In *Coleman*, the defendant was convicted of armed robbery, automobile banditry, assault and battery with intent to kill, kidnapping and kidnapping while armed with a deadly weapon. All charges arose from a single course of conduct. In a discussion aimed at the validity of Coleman's conviction of armed kidnapping as well as kidnapping, the court quoted the well-known test from *State v. Elder*⁷⁵ for determining when offenses are the same. Finding that the kidnapping was a lesser included offense of armed kidnapping, the court vacated the conviction for kidnapping.⁷⁶ Had the court stopped at this point, the case would have been consistent with double jeopardy cases even though the court did not frame the issues in double jeopardy terms. However, the court, for reasons which are not apparent in the opinion, found that if armed robbery were the felony supporting the charge of automobile banditry, the sentence for automobile banditry would also have to be vacated because "it rest[ed] upon the same criminal act supporting the greater offense of armed robbery."⁷⁷ The rationale behind this conclusion is not readily discernible. Automobile banditry is obviously not a lesser included offense of armed robbery or any other felony.⁷⁸ It was, however, an offense which by definition could not be committed except in conjunction with another felony.⁷⁹ Possibly the court was silently critical of multiple sentencing for offenses which depend for their existence on the commission of other offenses. However, militating against this interpretation is the court's suggestion that if automobile banditry did not rest on the same conduct as the robbery, the sentence might stand.⁸⁰

One of the most interesting cases to be handed down during the merger era was *Candler v. State*.⁸¹ The defendant, who had been charged with robbery and felony murder in the commission of a robbery, had objected to the trial court's instruction which implied that felony murder has no lesser included offenses.⁸² On appeal, the court

⁷⁴264 Ind. 64, 339 N.E.2d 51 (1975).

⁷⁵65 Ind. at 285.

⁷⁶264 Ind. at 70-71, 339 N.E.2d at 56.

⁷⁷*Id.* at 72, 339 N.E.2d at 57.

⁷⁸Although automobile banditry carried a less severe penalty than robbery, at one time, automobile banditry carried a lengthy sentence. *See* IND. CODE § 35-12-2-1 (1976) (repealed 1977). Thus, the felony supporting the automobile banditry could at one time have been a lesser included offense of automobile banditry. *See, e.g., Hatfield v. State*, 241 Ind. 225, 230, 171 N.E.2d 259, 261 (1961).

⁷⁹At the time the new Indiana Penal Code was enacted automobile banditry was repealed and not reenacted.

⁸⁰264 Ind. at 72, 339 N.E.2d at 57.

⁸¹266 Ind. 440, 363 N.E.2d 1233 (1977).

⁸²*Id.* at 457, 363 N.E.2d at 1243.

stated that the defendant's requested instruction, that robbery was a lesser included offense of felony murder, was not required;⁸³ nonetheless, the court concluded that the defendant could not be sentenced on both the murder and the robbery, citing the rule in *Thompson*.⁸⁴

Although the language in these merger cases indicates a new approach in managing closely related offenses, except for the court's treatment of automobile banditry, the decisions in each case can be justified on a traditional lesser included offense analysis.⁸⁵

However, in *Sansom v. State*,⁸⁶ the court took a giant step in the direction of a "same transaction" test. Sansom was convicted and sentenced on automobile banditry, theft and second degree burglary. The court of appeals found that automobile banditry merged with second degree burglary because "the same criminal act support[ed] both offenses,"⁸⁷ but allowed the convictions of theft and second degree burglary to stand. The supreme court granted transfer and vacated the judgment and sentence on the theft count, because it too "merged into the burglary, as the offense for which the greatest penalty [was] provided."⁸⁸ The court offered no explanation for this conclusion.⁸⁹

In *Jones v. State*,⁹⁰ decided soon after *Sansom*, the court further muddied the waters. It merged convictions of second degree burglary and theft based on the same incident because "[i]n this situation, theft was a lesser included offense of the burglary."⁹¹ No traditional approach to lesser included offenses would find that theft is a lesser included offense of burglary. Although the court no doubt meant that theft merged into burglary because it occurred during the same transaction and carried the lesser penalty, the use of the term "lesser included offense" added to the existing confusion.

⁸³*Id.* After *Harris v. Oklahoma*, 433 U.S. 682 (1977), robbery would be considered a lesser included offense of felony murder.

⁸⁴See text accompanying notes 70-73 *supra*.

⁸⁵Possession of dangerous drugs is a lesser included offense of a sale of dangerous drugs. *Thompson v. State*, 259 Ind. 587, 290 N.E.2d 724 (1972). Robbery is a lesser included offense of felony murder. *Candler v. State*, 266 Ind. 440, 457, 363 N.E.2d 1233, 1243 (1977).

⁸⁶267 Ind. 33, 366 N.E.2d 1171 (1977).

⁸⁷*Sansom v. State*, 354 N.E.2d 336, 338 (Ind. Ct. App. 1976), *rev'd*, 267 Ind. 33, 366 N.E.2d 1171 (1977).

⁸⁸267 Ind. at 35-36, 366 N.E.2d at 1172. Without mentioning any cases by name, the court apparently overruled earlier Indiana cases which had found burglary does not bar larceny, *Tungate v. State*, 238 Ind. 48, 147 N.E.2d 232 (1958), and larceny does not bar burglary. *Cambron v. State*, 191 Ind. 431, 133 N.E. 498 (1922).

⁸⁹267 Ind. at 36, 366 N.E.2d at 1172.

⁹⁰267 Ind. 205, 369 N.E.2d 418 (1977).

⁹¹*Id.* at 211, 369 N.E.2d at 421.

Cases such as *Sansom* and *Jones* indicated that the Indiana Supreme Court had adopted a "same transaction" test for certain criminal situations, but just what those situations were was never entirely clear.⁹²

In *Neal v. State*,⁹³ decided during the merger era, the defendant was convicted of both robbery and kidnapping. In concluding that it was not error to sentence on both convictions, the court focused on the act—offense problem. Quoting an earlier case, which held that crimes are seldom accomplished by single acts,⁹⁴ the court specifically noted:

While a series of acts must generally transpire to effect the commission of a given crime, the same series of acts may also effect two or more crimes. Although a crime usually involves a series of acts, each act in any given series is not necessarily an essential ingredient of the crime. It is only when two offenses require proof of the same fact or act that double jeopardy considerations bar a prosecution for both.⁹⁵

It is not surprising that this language when compared with language in cases such as *Coleman*, *Sansom*, and *Thompson*, caused considerable consternation among those responsible for administering justice.

D. "Same Offense" and *Elmore v. State*

The Indiana Supreme Court's decision in *Elmore v. State*,⁹⁶ the most extensive discussion of double jeopardy in Indiana since the court first articulated the rules pertaining to double jeopardy in

⁹²The offenses the court "merged" with regularity were automobile banditry into the pendent felony and theft into burglary. That the court would not merge just anything into burglary was exemplified by cases such as *Mitchell v. State*, 266 Ind. 656, 366 N.E.2d 183 (1977) (entering to commit a felony, rape and robbery did not merge); *Jenkins v. State*, 267 Ind. 543, 372 N.E.2d 166 (1978) (burglary, rape and robbery did not merge); and *Moore v. State*, 267 Ind. 270, 369 N.E.2d 628 (1977) (carrying a firearm in violation of the Firearms Act, armed robbery, and first degree burglary did not merge). Thus, the rationale behind the doctrine could not have been that burglary or entering to commit a felony merged with the felony which it was intended to accomplish. One explanation could be that the felony merged if it carried a lesser sentence than burglary but not if it carried a greater sentence. Another could be that no merger occurred if one of the crimes contained a threat of violence or personal injury.

⁹³266 Ind. 665, 366 N.E.2d 650 (1977).

⁹⁴*Id.* at 667, 366 N.E.2d at 651 (quoting *Walker v. State*, 261 Ind. 519, 523, 307 N.E.2d 62, 65 (1974)).

⁹⁵*Id.* at 667, 366 N.E.2d at 651.

⁹⁶382 N.E.2d 893 (Ind. 1978).

State v. Elder,⁹⁷ was an effort to alleviate the confusion caused by the merger doctrine. The defendants in *Elmore* were convicted of conspiracy to commit theft, and theft. The Indiana Court of Appeals, relying on *Thompson* and other merger cases, found that the convictions merged, because they arose out of the same transaction and were not, therefore, "independently supportable, separate and distinct."⁹⁸ Judge Buchanan, dissenting, noted how the court's recent merger cases diverged from established double jeopardy principles, and urged doctrinal consistency.⁹⁹

The Indiana Supreme Court granted the state's petition for transfer and reversed the court of appeals on the issue of merger of offenses. To dispel the confusion caused by the apparent inconsistencies in double jeopardy analysis, the court clarified the Indiana position in regard to the "same offense" aspect of double jeopardy. Finding that the United States Supreme Court's application of the double jeopardy clause of the fifth amendment to the states warranted bringing Indiana standards in line with federal standards,¹⁰⁰ the court solidly approved the *Blockburger* "same evidence" test and adopted it as the proper test for defining "same offense."¹⁰¹ The court resoundingly disapproved the "same transaction" aspect of the merger doctrine¹⁰² and reaffirmed earlier Indiana authority to the ef-

⁹⁷65 Ind. 282 (1879). The decision in *Elmore* has been the object of considerable attention. Raphael, *Criminal Law and Procedure, Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 187-89 (1980); Conour, *Criminal Justice Notes*, 23 RES GESTAE 32 (1979).

⁹⁸375 N.E.2d 660, 667 (Ind. Ct. App. 1978), *vacated*, 382 N.E.2d 893 (Ind. 1978). The Court of Appeals' decision to merge theft with conspiracy to commit theft was unusual in light of the well established view that conspiracy is distinct from the completed offense and that double jeopardy is not violated by sentences for both. *Iannelli v. United States*, 420 U.S. 770 (1975); *Pinkerton v. United States*, 328 U.S. 640 (1946).

Even though at one time conspiracy was a misdemeanor and merger might have occurred based on the common law merger doctrine, the trend has always been away from merger of conspiracy and the completed crime. *See* Annot., 37 A.L.R. 778 (1925); Annot., 75 A.L.R. 1411 (1931).

In addition, the Indiana Supreme Court handed down its decision in *Diggs v. State*, 266 Ind. 547, 364 N.E.2d 1176 (1977), during the "merger" era. In that case, the court did not merge delivery of a controlled substance and conspiracy to deliver a controlled substance. The dissent reasoned that the merger principle required that the two convictions merge. *Id.* at 553, 364 N.E.2d at 1179 (DeBruler, J., dissenting).

Finally, although *Elmore* was decided under prior law, the new Indiana Penal Code had been adopted. Although the Indiana Criminal Law Study Commission considered barring conviction for conspiracy and the completed crime, INDIANA CRIMINAL LAW STUDY COMMISSION INDIANA PENAL CODE: PROPOSED FINAL DRAFT 71-72 (1974), as finally adopted, the new Code permits convictions of both conspiracy and the completed crime. IND. CODE § 35-41-5-3 (Supp. 1979).

⁹⁹375 N.E.2d at 668 (Buchanan, C.J., dissenting in part).

¹⁰⁰382 N.E.2d at 896.

¹⁰¹*Id.* at 895.

¹⁰²*Id.* at 897.

fect that a single act can constitute more than one offense.¹⁰³ Furthermore, it specifically recognized that constitutional double jeopardy principles operate to prevent multiple trials *and* multiple sentences for the same offense.¹⁰⁴

Although the decision in *Elmore* largely settled the double jeopardy law in Indiana, it raised the puzzling problem of "when *cumulative punishments* may be properly imposed for multiple offenses arising from the same criminal act or course of conduct."¹⁰⁵ In partial explanation, the court said, "we have consistently refused to allow *cumulative* punishments to be imposed where defendants are convicted of both a greater and lesser included offense such as armed robbery and inflicting injury in the commission of a robbery."¹⁰⁶ If by these statements the court intended to suggest that double jeopardy prohibitions prevent multiple punishment only if sentences run consecutively, it has vastly changed the law in Indiana. Although the potential for cumulative sentencing certainly exists under the new Penal Code,¹⁰⁷ until recently, multiple convictions rarely resulted in cumulative sentencing.¹⁰⁸ The courts have generally considered each sentence to be an additional punishment regardless of whether the sentences ran concurrently or consecutively.¹⁰⁹ However, despite the court's interpretation of the constitutional mandate, the statute in Indiana preventing sentencing on both a lesser and greater offense will obviate the danger of multiple sentencing for the same offense.¹¹⁰

Although the cumulative punishment question is unanswered in *Elmore*, the approach in determining the "same offense" has been settled. Under the federal standard as adopted by *Elmore*, offenses are not the same if each statute which has been violated by a defendant's action requires "proof of an additional fact which the other does not."¹¹¹ To comply with this standard, courts need to focus only on the statutory definitions of crimes with which the

¹⁰³*Id.*

¹⁰⁴*Id.* at 894.

¹⁰⁵*Id.* (emphasis added).

¹⁰⁶*Id.* at 895 (emphasis added).

¹⁰⁷IND. CODE § 35-50-1-2 (Supp. 1979).

¹⁰⁸One interesting aspect of the Court's emphasis on cumulative punishment is that there is nothing to indicate that the defendants in *Elmore* were sentenced cumulatively. Under the law in effect at the time *Elmore* and his codefendants were sentenced, cumulative sentencing was only authorized if permitted by statute. *See, e.g.,* IND. CODE § 35-8-7-1 and § 35-8-7.5-1 (now codified at IND. CODE § 35-50-1-2 (Supp. 1979)).

¹⁰⁹*See, e.g.,* *Benton v. Maryland*, 395 U.S. 784 (1969); *Thompson v. State*, 259 Ind. 587, 592, 290 N.E.2d 724, 727 (1972), *cert. denied*, 412 U.S. 943 (1973).

¹¹⁰IND. CODE § 35-4.1-4-6 (Supp. 1979).

¹¹¹382 N.E.2d at 895 (quoting *Blockburger v. United States*, 284 U.S. at 304).

defendant is charged. Nothing in *Elmore* indicates that an examination of the evidence actually presented is an appropriate matter for inquiry in determining double jeopardy protection.

E. "Same Offense" after *Elmore*

Although the "same evidence" approach to double jeopardy taken in *Elmore* appears to be easily applied, Indiana courts addressing double jeopardy problems after *Elmore* have not always employed the test correctly. In fact, some courts have gone to unusual lengths to avoid the harsh results of a literal application of *Elmore*.¹¹² An apt example is *McFarland v. State*,¹¹³ one of the first double jeopardy cases to be decided after *Elmore*. In *McFarland*, the defendant was convicted of attempted armed robbery and assault and battery. After an extensive discussion of *Elmore*'s adoption of the "same evidence" test and double jeopardy protection in general,¹¹⁴ the court of appeals found attempted armed robbery and assault and battery to be the "same offense" for double jeopardy purposes.¹¹⁵ However, an examination of the elements of attempted armed robbery and assault and battery reveals that each requires proof of facts which the other does not.¹¹⁶ A strict application of the "same evidence" test would have justified conviction on both charges, because, according to the *Elmore* definition, the offenses are not the same. However, the court found that "[b]ecause the evidence that was necessary to prove this statutory element of attempted armed robbery also proved the statutory elements of assault and battery, the latter must be *deemed* a lesser included offense of attempted armed robbery and the two offenses must be

¹¹²For examples of the harsh application of *Elmore*, see *Pollard v. State*, 388 N.E.2d 496, 506 (Ind. 1979) (kidnapping and premeditated murder do not merge); *Patterson v. State*, 386 N.E.2d 936, 942 (Ind. 1979) (conspiracy and completed crime do not merge); *Adams v. State*, 386 N.E.2d 657, 661 (Ind. 1979) (rape, sodomy, and robbery do not merge); *Inman v. State*, 393 N.E.2d 767, 771 (Ind. 1979) (criminal confinement and resisting a law officer do not merge); *Mitchell v. State*, 382 N.E.2d 932, 934 (Ind. 1978) (robbery and felony murder merge because robbery is a lesser included offense); *Love v. State*, 383 N.E.2d 382, 386-87 (Ind. Ct. App. 1978) (voluntary manslaughter and aiming a firearm do not merge); *Fields v. State*, 382 N.E.2d 972, 977 (Ind. Ct. App. 1978) (assault and battery and disorderly conduct do not merge).

¹¹³384 N.E.2d 1104 (Ind. Ct. App. 1979).

¹¹⁴*Id.* at 1111-13.

¹¹⁵*Id.* at 1113.

¹¹⁶Although it is unclear from the opinion under what statute the jury convicted *McFarland* for assault and battery, that crime was defined as "[w]hoever in a rude, insolent or angry manner, unlawfully touches another, is guilty of an assault and battery. . . ." IND. CODE § 35-1-54-4 (1976) (repealed 1977). Therefore, to prove armed robbery, it is unnecessary to establish a touching; to prove assault and battery, it is unnecessary to establish a taking.

regarded as the same under *Blockburger*.¹¹⁷ Nevertheless, only traditional lesser included offenses which do not require proof of any fact different from that required to prove the greater can meet the definition of "same offense," because only they will have the necessary identity of statutory elements. No offense can be "deemed a lesser included offense" so as to satisfy the "same evidence" test of another if it "required proof of an additional fact which the other does not."¹¹⁸

Although it recognized that legislative intent is the key to determining whether double jeopardy principles have been violated, the court in *McFarland* specifically found no "legislative intent to impose more than one criminal sanction in *this situation*"¹¹⁹ even though the offenses by statutory definition were not "the same."¹²⁰ Distinguishing the situation in *Elmore*, the court found that "unlike the crime of conspiracy to commit theft and the substantive offense of theft which pose distinct dangers, the two offenses here address the same harm stemming from one act."¹²¹ This approach ignores the idea inherent in the "same evidence" test that if a legislative body created variously defined offenses, it intended each to be punished separately, regardless of whether one act violates more than one offense.¹²² Under this analysis, the legislature expressed its intent when it promulgated the two statutes involved. The court should not look to the factual circumstances of a particular case to determine legislative intent. However, the court in *McFarland* did just

¹¹⁷384 N.E.2d at 1113 (emphasis added). The court's statement, that the offenses are the same because the assault and battery "must be *deemed* a lesser included offense of attempted armed robbery," indicates a misunderstanding as to the manner in which the "same evidence" test applies to lesser included offenses. The United States Supreme Court's holding in *Brown v. Ohio* that joyriding and car theft satisfied the "same evidence" test because joyriding is a lesser included offense of car theft does not mean that all lesser included offenses, however defined, will satisfy the same evidence test.

The court's focus in *McFarland* was on the evidence presented rather than on the proof required to prove each statutorily defined offense. As the court pointed out, under the facts of *this case*, the assault and battery was the element of violence which had to be proved in order to convict on attempted armed robbery. However, under the "same evidence" test, the only appropriate inquiry is whether each *provision* requires proof of an additional fact which the other does not. In this case, because each charge requires proof of a fact which the other does not, they cannot be the same offense, regardless of how much overlap in evidence exists. If there is sufficient evidence to establish all of the elements under an *Elmore* analysis, the defendant may be convicted of and punished for both.

¹¹⁸284 U.S. at 304 (1932).

¹¹⁹384 N.E.2d at 1113.

¹²⁰*Id.* at 1111.

¹²¹*Id.* at 1113.

¹²²See note 8 *supra* and accompanying text.

that when it found that, although discrete statutory offenses could be proved, the legislature intended only one punishment because the two offenses "address the same harm stemming from one act."¹²³

The major difficulty with the court's approach in *McFarland* is not that it reached an unjust result. In fact, this approach gives meaning and vitality to the double jeopardy clause, qualities which are notably lacking in the "same evidence" approach. However, even though this approach may capture the spirit of double jeopardy protection and the intent of the drafters of the fifth amendment, it is *not* the approach taken by the Indiana Supreme Court in *Elmore* or by the United States Supreme Court in *Blockburger*. The court in *McFarland*, while purporting to apply a "same evidence" test has, in reality, applied a hybrid "same act/same transaction" test, emphasizing the fact that the offenses "address the same harm stemming from one act."¹²⁴ Thus, the court focused on the defendant's behavior, not on the evidence required to prove the offenses. To espouse one test, and apply a different test can only lead to confusion and uncertainty in an already confused and uncertain area of law.

The court of appeal's approach in *Pillars v. State*¹²⁵ indicated that the confusion had, in fact, taken hold. The court in *Pillars* following the *McFarland* lead, found that the state was barred from prosecuting the defendant for threatening to use a deadly or dangerous weapon and for aiming a weapon, because it should have discharged the defendant on assault with intent to kill. The court found that "*technically*, Counts II and III [threatening and aiming] were not lesser included offenses under Count I, the assault charge . . . [h]owever, Count II and III accused Pillars of committing the same criminal acts which the State alleged in support of the greater offense of assault with intent to kill."¹²⁶ Obviously, the court focused only on the acts of the defendant, not on the statutory definitions of the various offense categories his acts violated.

The *McFarland* method of avoiding the potentially harsh results of the *Elmore* "same evidence" test is not the only one Indiana courts have devised. The court in *Williams v. State*,¹²⁷ another post-*Elmore* case, demonstrated an unusual approach to the double jeopardy problem. In *Williams*, the defendant was convicted of armed rape and statutory rape based on the same conduct. The rape statute under which the defendant was charged defines several

¹²³384 N.E.2d at 1113.

¹²⁴*Id.*

¹²⁵390 N.E.2d 679 (Ind. Ct. App. 1979).

¹²⁶*Id.* at 684.

¹²⁷383 N.E.2d 416 (Ind. Ct. App. 1978).

distinct crimes.¹²⁸ The court recognized that the crimes defined by the statute do not contain identical elements and are therefore separate and distinct offenses.¹²⁹ However, in spite of the fact that the defendant had been charged with forcible rape *and* statutory rape, the court, relying on an aggravation theory, found that what the defendant had actually committed was armed statutory rape. Noting that if an identical crime is charged in two separate counts, "the only difference being that in one . . . the defendant . . . is charged with being armed with a deadly weapon," the defendant cannot be sentenced for both.¹³⁰ Thus, the court vacated the sentence for statutory rape because it found that statutory rape is a lesser included offense of armed statutory rape. In essence, the court, on appeal, modified the charges against the defendant in order to avoid punishing him twice for the same act.

Although in each of the above cases the court paid lip service to the *Elmore* rule, none applied it accurately. If these cases are any indication, it appears that the courts may have an instinctive repugnance to punishing more than once for the same conduct, regardless of the statutory definitions of the offenses. It may be that the scope of double jeopardy protection is so limited by the "same evidence" approach, that some courts are unwilling to apply it.

Cases in which *Elmore* has been properly applied exemplify the potentially harsh results which can occur. One such case is *Love v. State*¹³¹ in which the defendant was convicted of voluntary manslaughter and aiming a firearm. Relying on *Elmore*, the court found that the defendant was properly sentenced on both charges because aiming a weapon is not a lesser included offense of manslaughter,¹³² even though the manslaughter occurred as a result of aiming the weapon, and the two offenses in this situation did not pose distinct dangers.

The situation in *Jones v. State*¹³³ illustrates the potential for abuse in allowing the prosecutor unfettered discretion in charging offenses based on the same conduct. In *Jones*, the defendant was charged and convicted of robbery and commission of a crime of violence while armed with a firearm. Applying *Elmore*, the court

¹²⁸One is "carnal knowledge of a woman forcibly against her will" and another is "carnal knowledge . . . of a female child under the age of sixteen (16) years." IND. CODE § 35-13-4-3 (1976).

¹²⁹The court found that, "[t]he proof necessary to establish one of these rape offenses would be at variance with the evidence and proof that would be required in order to establish another of the offenses." 383 N.E.2d at 418.

¹³⁰*Id.*

¹³¹383 N.E.2d 382 (Ind. Ct. App. 1978).

¹³²*Id.* at 386.

¹³³387 N.E.2d 93 (Ind. Ct. App. 1979).

correctly found that the defendant could be sentenced on each. Had the prosecutor charged the defendant with robbery and armed robbery, however, the "same evidence" test would have precluded punishment for both because robbery is a lesser included offense of armed robbery. Because the prosecutor in his discretion chose to charge the former, the defendant was exposed to the possibility of a longer sentence.¹³⁴

In *Inman v. State*¹³⁵ the defendant was convicted of criminal confinement and resisting a law officer based on the same conduct. Under the facts, the two charges were virtually the same offense, but because each statutorily defined offense required proof of different facts, the court, applying *Elmore*, found that the defendant was properly convicted of both.

Although it has in most cases strictly applied *Elmore*, the Indiana Supreme Court has, on occasion, indicated that examination of the facts might be an appropriate area of inquiry. For instance, in *Dragon v. State*¹³⁶ the defendant was convicted of rape and kidnapping. The court, applying *Elmore*, found that the offenses were not the same. However, it explained that "the record in the case at bar demonstrates that the kidnapping was *in fact* a separate offense."¹³⁷ It then related the evidence which supported each crime as a separate act. Theoretically, under *Elmore*, the determination whether two offenses are "the same" can be made by examining the statutory definitions of the offenses without evaluating any of the actual evidence.

IV. NONCONSTITUTIONAL DOUBLE JEOPARDY PROTECTION IN INDIANA

The new Indiana Penal Code contains good news and bad news for the criminal defendant who may be exposed to multiple trials and punishments for the same act or course of conduct.

A. *Good News*

Because the Indiana Penal Code is carefully drafted and unified, the overzealous prosecutor has fewer duplicative or overlapping

¹³⁴The court pointed out that a charge of commission of a crime of violence while armed with a firearm is an aggravation of the underlying felony and therefore, though an enhanced penalty is permissible, a separate conviction is not. *Id.* at 96. However, the maximum sentence for armed robbery would have been 30 years, IND. CODE § 35-12-1-1 (1976) (repealed 1977), whereas the maximum sentence for robbery and commission of a crime of violence while armed with a firearm would have been 35 years. IND. CODE §§ 35-13-4-6, -23-4.1-2, -18(b) (1976) (repealed 1977).

¹³⁵393 N.E.2d 767 (Ind. 1979).

¹³⁶383 N.E.2d 1046 (Ind. 1979), *cert. denied*, 442 U.S. 912 (1979).

¹³⁷*Id.* at 1048 (emphasis added).

statutes to choose from in charging a criminal defendant. Although it is likely that what overlap exists was actually intended by the legislature, the problem of overlap will continue because a certain amount of piecemeal amendment and unintentional duplication is inevitable.

A potentially major statutory protection against multiple punishment exists in the approach to lesser included offenses.¹³⁸ A sentencing provision in the Code provides that "[i]f a defendant is charged with both an offense and an included offense in separate counts, upon a verdict or finding of guilty judgment and sentence may be entered against the defendant only on one (1) of the counts."¹³⁹ This provision taken alone appears to parallel the constitutional requirement that a lesser included offense should be considered for double jeopardy purposes "the same" as the offense in which it is included.

However, the statutory definition of lesser included offense raises questions as to whether the drafters intended to enlarge the scope of lesser included offenses. The Code defines included offense as an offense that:

- (1) is established by proof of the same material elements or less than all the material elements required to establish the commission of the offense charged; (2) consists of an attempt to commit the offense charged or an offense otherwise included therein; or (3) differs from the offense charged only in the respect that a less serious harm or risk of harm to the same person, property, or public interest, or a lesser kind of culpability, is required to establish its commission.¹⁴⁰

The first definition states the traditional identity of elements concept of lesser included offenses. The second definition includes attempts as lesser included offenses. What the drafters meant to cover in the third definition is not clear, but the use of the disjunctive "or" indicates that something in addition to elementally identical offenses and attempts is now included in the definition of lesser included offenses. Thus, in some circumstances, an offense might be a lesser included offense even if it does not have an identity of elements.

The lack of legislative history and court interpretation of the

¹³⁸IND. CODE §§ 35-4.1-4-6, -41-1-2 (Supp. 1979).

¹³⁹*Id.* § 35-4.1-4-6.

¹⁴⁰*Id.* § 35-41-1-2. This provision is almost identical to the lesser included offense provision of the Model Penal Code. MODEL PENAL CODE § 1.07(4) (1962). Although no Indiana court has yet applied the statutory definition of lesser included offense in a double jeopardy setting, the drafters of the Model Penal Code contemplated such a use. See MODEL PENAL CODE § 1.07(1)(a) (1962).

provision make any guess at legislative intent largely conjectural. However, it may be that the drafters intended to include in the definition of lesser included offenses those offenses such as assault and battery in *McFarland*,¹⁴¹ threatening to use a deadly or dangerous weapon and aiming a weapon in *Pillars*,¹⁴² aiming a firearm in *Love*,¹⁴³ and resisting a law officer in *Inman*.¹⁴⁴ Though none of these was a traditional lesser included offense, each was part of the conduct which achieved the greater offense. Each was, in essence, a lesser included "act." If this is the kind of offense the legislature contemplated in the third definition, the protection against multiple punishment in Indiana goes far beyond the federal constitutional standard established by *Blockburger*. However, this would protect the defendant only against multiple punishment, not against multiple trials.

B. Bad News

The 1974 proposed final draft of the Indiana Penal Code included a section providing for mandatory joinder.¹⁴⁵ Had this provision been adopted, the prosecutor, at a single trial, would have been required to charge all offenses arising out of one transaction unless the defendant would not have been unduly prejudiced. If the prosecutor had inadvertently failed to assert a possible charge he could not have initiated another trial to press that charge.¹⁴⁶ However, the final version of the Code adopted in 1976 made joinder permissive rather than mandatory.¹⁴⁷ Although it must surely be in the state's as well as the defendant's best interest to consolidate all offenses

¹⁴¹See text accompanying notes 113-23 *supra*.

¹⁴²See text accompanying notes 125-26 *supra*.

¹⁴³See text accompanying notes 131-32 *supra*.

¹⁴⁴See text accompanying note 135 *supra*.

¹⁴⁵Prosecution for multiple related crimes.—When the same conduct or a series of acts connected together in or constituting parts of a single transaction of a defendant may establish the commission of more than one crime, the defendant may be prosecuted for each such crime. Provided, however, that a defendant shall not be subject to separate trials for such multiple related crimes based on the same conduct or a series of such acts, if such crimes are within the jurisdiction of the same court and known to the proper prosecuting officer, unless, the court may, in the interest of justice, order that one or more of such crimes shall be tried separately.

INDIANA CRIMINAL LAW STUDY COMMISSION, INDIANA PENAL CODE: PROPOSED FINAL DRAFT 64 (1974).

¹⁴⁶The Marion County Prosecutor has indicated that he would not favor mandatory joinder because errors and omissions in charging can occur in a large office. If a serious charge against a criminal defendant were not pressed at one trial, the prosecutor would "prefer to keep his option open" to recharge at a later time. Interview with Steven Goldsmith, Marion County Prosecutor, in Indianapolis (Jan. 28, 1980).

arising out of one transaction, repeated trials for closely related offenses arising out of the same transaction are still a possibility in Indiana.

One of the most significant changes in the new criminal code is the provision which allows for consecutive sentencing at the discretion of the trial judge.¹⁴⁸ This provision, coupled with the demise of the merger doctrine in *Elmore*, exposes the criminal defendant to more punishment than has previously been possible in Indiana.¹⁴⁹ Although such a result may shock the conscience, it does not violate double jeopardy.

V. CONCLUSION

The adoption of the "same evidence" test has markedly limited double jeopardy protection. Furthermore, the United States Supreme Court's unwillingness to modify the scope and content of the double jeopardy clause to keep pace with changing attitudes toward criminal justice indicates that redefinition of "same offense" at this point is remote. To increase double jeopardy protection, the individual states must do so by statute or through liberal interpretation of double jeopardy in state constitutions.

In Indiana, the adoption of the federal double jeopardy standards and "same evidence" test in *Elmore*, virtually precludes a liberal interpretation of the state constitutional provision. However, by statute, Indiana may have provided significant protection against multiple punishment.

¹⁴⁷IND. CODE § 35-3.1-1-9 (Supp. 1979) provides in part:

- (a) Two (2) or more offenses can be joined in the same indictment or information, with each offense stated in a separate count, when the offenses:
- (1) are of the same or similar character, even if not part of a single scheme or plan; or
 - (2) are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

¹⁴⁸*Id.* § 35-50-1-2.

¹⁴⁹If the prosecutor exercises his discretion to charge a defendant with all offenses his act or course of conduct violates, and if, after conviction the trial judge exercises his discretion to sentence consecutively, the criminal defendant could find himself serving several consecutive sentences for a single criminal act. It is the policy of the Marion County Prosecutor to press all possible charges arising out of one course of criminal conduct even if the same act has violated more than one statute. Interview with Steven Goldsmith, Marion County Prosecutor, in Indianapolis (Jan. 28, 1980).