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Constitutional Limitations on the Lesser Included Offense Doctrine

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CONSTITUTIONAL LIMITATIONS ON THE LESSER INCLUDED OFFENSE DOCTRINE

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In this Article, the author identifies and addresses three constitutional provisions that place limits on the doctrine of lesser included offenses. The analysis begins with a discussion of the doctrine itself and of how the courts have applied the doctrine in a variety of circumstances. The author then contends that the constitutional requirement of notice precludes the prosecution from obtaining an instruction on lesser included offenses in some cases. In addition, the author addresses the limitations that the double jeopardy clause places on the ability of the prosecution to convict a defendant on a lesser included offense. Finally, the author contends that due process may require the giving of an instruction on lesser included offenses in some cases, in order to maintain the reliability of the criminal fact-finding process.

The lesser included offense doctrine in criminal law generally allows the trier of fact to convict a defendant of an offense that is less serious than the offense with which he was charged in the accusatory pleading.[1] While historically the doctrine developed as an aid to the prosecution when there was insufficient evidence to convict on the charged offense,[2] today it is more often used by defendants seeking a conviction for an offense less serious than that actually charged.[3] Regardless of who invokes the doctrine in a criminal trial, however, its application has caused considerable confusion among courts and commentators alike.[4] The United States Court of Appeals for the District of Columbia Circuit has said that the lesser included offense doctrine "[is] not without difficulty in any area of the criminal law."[5] In a similar vein the Supreme Court of Florida has stated "The [doctrine of

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1. 4 R. ANDERSON, WHARTON'S CRIMINAL LAW AND PROCEDURE § 1888 (12th ed. 1957); Comment, *The Lesser Included Offense Doctrine in Iowa: The Gordian Knot Untied*, 59 IOWA L. REV. 684 (1974) [hereinafter cited as Comment, *Iowa Doctrine*].

2. United States v. Harary, 457 F.2d 471, 478 (2d Cir. 1972); Fuller v. United States, 407 F.2d 1199, 1230 n. 40 (D.C. Cir. 1967), *cert. denied*, 393 U.S. 1120 (1968); Kelly v. United States, 370 F.2d 227, 229 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 913 (1967); Barnett, *The Lesser-Included Offense Doctrine: A Present Day Analysis For Practitioners*, 5 CONN. L. REV. 255 (1972).

3. Barnett, *supra* note 2, at 255; *See also* United States v. Bey, 667 F.2d 7, 11 (8th Cir. 1982); United States v. Harary, 457 F.2d 471, 478 (2d Cir. 1972); United States v. Methvin, 441 F.2d 584, 585 (5th Cir. 1971); People v. Mussenden, 308 N.Y. 558, 562, 127 N.E.2d 551, 553 (1955).

4. Koenig, *The Many-Headed Hydra of Lesser Included Offenses: A Herculean Task for the Michigan Courts*, 1975 DET. C.L. REV. 41, 41-42; Barnett, *supra* note 2 at 256.

5. Fuller v. United States, 407 F.2d 1199, 1228 (D.C. Cir. 1967), *cert. denied*, 393 U.S. 1120 (1968).

lesser included offense] is one which has challenged the effective administration of criminal justice for centuries. It is as old as the common law."[6] Commentators have referred to it as a "Gordian Knot"[7] and a "many-headed hydra."[8]

The confusion over the lesser included offense doctrine is due to various causes. One certain cause is the existence of several definitions of a lesser included offense, sometimes even within the same jurisdiction.[9] If the definitional concept were the sole problem with the doctrine, it could perhaps be resolved by simply adopting a definition and then strictly applying it. Adding to the definitional confusion, however, is the fact that at least three different constitutional principles may interact, under certain circumstances, to limit how, and if, each lesser included offense theory may be applied.

Since a defendant has a constitutional right to notice of the charges against him, a problem can obviously arise in trying to convict a defendant of a lesser included offense of which he has not specifically been given notice.[10] A second problem confronting a court when it attempts to apply its chosen lesser included offense theory is the effect that the double jeopardy clause will have on the process. Because a conviction or acquittal of a greater offense may bar further prosecution or punishment on a lesser included offense, a court must determine what offenses are lesser included ones.[11] Finally, the Supreme Court has only recently raised the question of whether the failure to instruct a jury on a lesser included offense may unfairly invite the jury to convict on the greater offense by a standard of proof less than beyond a reasonable doubt, thereby violating the defendant's due process rights.[12]

The purpose of this Article is to examine the limitations that the constitutional protections of notice, double jeopardy and due process place on the application of the lesser included offense doctrine.[13] The Article will first set forth the

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6. Brown v. State, 206 So. 2d 377, 380 (Fla. 1968).

7. Comment, *Iowa Doctrine*, *supra* note 1.

8. Koenig, *supra* note 4.

9. Comment, *The Lesser Included Offense Doctrine in Pennsylvania: Uncertainty in the Courts*, 84 DICK. L. REV. 125, 134 (1979) [hereinafter cited as Comment, *Pennsylvania Doctrine*]. Pennsylvania courts apparently employ the statutory theory in which the greater offense must "necessarily involve the lesser." *Id.* They have, however, upon occasion departed from this theory and applied the "evidence approach," Commonwealth v. Nace, 222 Pa. Super. 329, 295 A.2d 87 (1972), and the "pleadings theory." Commonwealth v. Stots, 227 Pa. Super. 279, 324 A.2d 480 (1974).

10. *See infra* notes 40-68 and accompanying text (discussing how notice requirement impacts on choice of lesser included offense theory).

11. *See infra* notes 69-118 and accompanying text (discussing relationship between double jeopardy and lesser included offenses).

12. *See infra* notes 119-93 and accompanying text (discussing due process issues raised by lesser included offenses).

13. This Article does not purport to be an exhaustive analysis of all aspects of the lesser included offense doctrine. Other issues raised by the doctrine include:

1) whether the instruction need be given only when requested or whether the court must give it *sua sponte*, *see*, People v. Wickersham, 32 Cal. 3d 307, 323-26, 650 P.2d 311, 319-20, 185 Cal. Rptr. 436, 444-45 (1982) (trial court obligated to give instruction on lesser included offense when evidence raises question about whether all elements of charged offense present but not when there is no evidence that offense less than charged); Tarter v. State, 359 P.2d 596, 600-01 (Okla. Crim. App. 1961) (court should instruct on each degree of homicide, with or without request); Strader v. State, 210 Tenn. 669, 678, 362 S.W.2d 224, 230 (1962) (duty of trial judge to charge lesser included offenses without request by defendant);

various definitional approaches to the lesser included offense doctrine. The following sections will then discuss how the constitutional principles interact with those definitional approaches and, in some instances, actually dictate which approach must be adopted.

I. THE LESSER INCLUDED OFFENSE DOCTRINE

One major cause of the confusion surrounding the concept of lesser included offenses is the fact that at least three different approaches to the problem have been adopted by various jurisdictions in the United States. This problem is exacerbated in those jurisdictions which apply more than one approach, a situation made possible by the overlapping nature of the definitions.[14]

A. STRICT STATUTORY INTERPRETATION

Under the common law theory, better known as the strict statutory approach, all of the elements of the lesser included offense must be contained in the greater offense such that it is impossible to commit the greater offense without first having committed the lesser.[15] Theoretically, the strict statutory approach is the easiest of the different approaches to apply, because its application only involves comparing the elements of the individual offenses in the abstract. Difficulties, however, in statutory interpretation can arise, which makes application of the rule less than certain in many cases.[16]

The major problem with the strict statutory interpretation approach is its inherent inflexibility, which is best illustrated by a few examples. In *State v.*

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2) whether the instruction should only be given when there is sufficient evidence to support it, *see*, Hopper v. Evans, 456 U.S. 605, 611 (1982) (due process requires that lesser included offense instruction be given *only* where evidence warrants instruction); State v. Schoeder, 95 Ariz. 255, 259, 389 P.2d 255, 257-59 (1964) (instruction on lesser included offense justified only when evidence presented upon which jury could convict of lesser included offense and, at same time, find that state has failed to prove element of greater crime); and

3) whether the jury should be told that before it deliberates on the lesser included offense doctrine it must acquit on the greater offense, *see* Stone v. Superior Court of San Diego County, 31 Cal. 3d 503, 519, 646 P.2d 809, 820, 183 Cal. Rptr. 647, 658 (1982) (jury should be cautioned that if it finds defendant guilty of greater offense, or if it is unable to agree on that offense, it cannot return a verdict on lesser).

For a more detailed look at these issues and the general lesser included offense doctrine itself see Barnett, *supra* note 2; Koenig, *supra* note 4; Comment, *Pennsylvania Doctrine*, *supra* note 9; Comment, *Iowa Doctrine*, *supra* note 1; Comment, *The Lesser Included Offense Instruction—Problems With Its Use*, 3 LAND & WATER L. REV. 587 (1968) [hereinafter cited as Comment, *Lesser Included Offense Instruction*]; Comment, *Jury Instructions on Lesser Included Offenses*, 57 NW. U.L. REV. 61 (1962) [hereinafter cited as Comment, *Jury Instructions*].

14. *See* Comment, *Pennsylvania Doctrine*, *supra* note 9, at 134.

15. People v. Rosario, 625 F.2d 811, 812 (9th Cir. 1979); Theriault v. United States, 434 F.2d 212, 214 (5th Cir. 1970); Olais-Castro v. United States, 416 F.2d 1155, 1157-58 (9th Cir. 1969); Giles v. United States, 144 F.2d 860, 861 (9th Cir. 1944); Koenig, *supra* note 4, at 44; Comment, *Pennsylvania Doctrine*, *supra* note 9, at 129.

16. Comment, *Pennsylvania Doctrine*, *supra* note 9, at 129.

Zdiarstek,[17] the defendant was charged with and convicted of battery upon a peace officer after the defendant had injured a jailor while confined in the county jail.[18] At trial the defendant requested that the jury be instructed that it could convict on the lesser included offense of resisting or obstructing an officer.[19] The court refused to so instruct the jury, because the offense of resisting or obstructing an officer had as a requirement that the defendant knew or believed that he was resisting or obstructing an officer at the time of his arrest, while the offense of battery on a peace officer did not contain that element.[20] Thus, resisting or obstructing an officer was not a lesser included offense of battery upon a peace officer under the strict statutory interpretation approach. The latter offense did not include every element of the former offense, even though the facts of the case clearly showed the defendant knew that the jailor was an officer. The strict statutory approach is therefore concerned not with the facts of the case, but with the elements of the offenses.

Iowa met with equally inflexible results before it abandoned the strict statutory approach.[21] For example, in *State v. Everett*,[22] the Iowa Supreme Court held that the offense of operating a motor vehicle without the owner's consent was not a lesser included offense of larceny of a motor vehicle.[23] Because larceny of a motor vehicle could occur without anyone operating it, by being towed away, for example, the greater offense of larceny could not be said to contain all the elements of the lesser offense of operating a motor vehicle without the owner's consent.[24] The test for lesser included offenses under the strict statutory approach is therefore whether, under all the possible circumstances, the commission of the greater crime will also entail the commission of the lesser offense, regardless of whether or not any of these circumstances actually occurred in the case at bar.[25]

B. COGNATE THEORY

The rigid results mandated by the strict statutory interpretation theory conflict

17. 53 Wis. 2d 776, 193 N.W.2d 833 (1972).

18. *Id.* The elements needed to sustain a conviction for battery to a peace officer were:

(1) causing bodily harm to a peace officer or fireman;

(2) while peace officer or fireman is acting in his official capacity;

(3) reasonable knowledge that the victim is a peace officer or fireman;

(4) intent to cause bodily harm;

(5) without the consent of the injured person.

Id. at 785-86, 193 N.W.2d at 838. *See* WIS. STAT. § 940.205 (1982).

19. State v. Zdiarstek, 53 Wis. 2d at 778, 193 N.W.2d at 834. The elements of resisting or obstructing a peace officer are:

(1) resisting or obstructing an officer;

(2) while the officer was acting in his official capacity;

(3) knowledge or belief that defendant was resisting or obstructing an officer who was acting in his official capacity. WIS. STAT. § 946.41 (1982).

20. *See supra* notes 18-19 and accompanying text (setting forth elements of offenses).

21. In 1973 the Iowa Supreme Court abandoned the strict statutory approach in State v. Hawkins, 203 N.W.2d 555 (Iowa 1973), for an evidence approach stating, "[t]he evidence of the case must be considered in determining whether one offense is includable within another." *Id.* at 557.

22. 157 N.W.2d 144 (Iowa 1968).

23. *Id.* at 149.

24. *Id.*

25. *Id.*

with a principal function of the lesser included offense doctrine, which is to "[e]nable the jury to correlate more closely the criminal conviction with the act committed."[26] As a result, a majority of jurisdictions in the United States have developed a more liberal approach to lesser included offenses, known as the cognate theory.[27] Under the cognate theory, the court looks either to the facts alleged in the accusatory pleading or to the facts actually proven at trial to determine whether there is a lesser included offense.[28]

There are two approaches followed in applying the cognate theory. Under the pleadings approach to the cognate theory, the court looks to the facts alleged in the accusatory pleading, and not just to the statutory elements of the offense, to determine whether there exists a lesser included offense of the greater charged offense. For example, if an indictment for grand larceny of an automobile alleged that the automobile had been driven away, operating a motor vehicle without the owner's consent would be considered a lesser included offense of grand larceny.[29]

Because the prosecution, however, can control, to some extent, the language of the accusatory pleading, some jurisdictions have adopted a second approach to the cognate theory, focusing on the evidence supporting the charge. Under the cognate-evidence approach, the court looks at the evidence actually adduced in the case, rather than just to the statutory elements or the language of the accusatory pleading, to determine the existence of any lesser included offenses.[30] Consequently, under the cognate-evidence approach, if an indictment for grand larceny of an automobile failed to allege how the automobile was stolen, but the evidence at the trial showed it to have been driven away, the offense of operating a motor vehicle without the owner's consent would be considered a lesser included offense of grand larceny.

While the strict statutory interpretation theory has been criticized for being too inflexible, the cognate theory has been criticized as being too flexible.[31] Because

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26. Note, *Criminal Procedure-Recognizing the Jury's Province to Consider the Lesser Included Offense:* State v. Ogden, 58 OR. L. REV. 572, 577 (1980).

27. The cognate theory has been designated the majority view in Barnett, *supra* note 2, at 291, and in Koenig, *supra* note 4, at 43.

28. *See* Koenig, *supra* note 4, at 43; *see also*, Spencer v. State, 501 S.W.2d 799, 800 (Tenn. 1973) (joyriding lesser included offense of grand larceny since information showed that property taken was automobile driven away).

29. State v. Hawkins, 203 N.W.2d 555 (Iowa 1973); Koenig, *supra* note 4, at 43. Whether or not the court actually instructed the jury on the lesser included offense would still depend upon the evidence adduced at trial, because many jurisdictions require that there be a rational basis in the evidence justifying the instruction. *See* Hopper v. Evans, 456 U.S. 605 (1982); Comment, *Pennsylvania Doctrine*, *supra* note 9, at 132; Comment, *Jury Instructions*, *supra* note 13, at 62, 65 (1962). For an example of the pleadings approach, see Commonwealth v. Stots, 227 Pa. Super. 279, 324 A.2d 480 (1974) (grand jury indicted defendant for "attempt with intent to kill"; defendant subsequently convicted of "willfully and wantonly pointing a pistol").

The Connecticut Supreme Court, in describing the pleadings approach, stated that "[t]he lesser offense must not require any element which is not needed to commit the greater offense in the manner alleged in the information or bill of particulars." State v. Brown, 163 Conn. 52, 62, 301 A.2d 547, 553 (1972).

30. *See* Koenig, *supra* note 4, at 44.

31. Koenig, *supra* note 4, at 45; Comment, *Jury Instructions*, *supra* note 13, at 63.

the existence of the lesser included offense depends upon the facts which will be proven during the trial, it is sometimes difficult to ascertain the bounds of the cognate theory, thereby making its application more difficult than the more mechanical strict statutory approach. It has been argued that the cognate-evidence approach may, in cases in which the possible lesser included offenses could be numerous, put the defendant at an unfair disadvantage. He will either have to prepare to defend against all the possible lesser included offenses, or else take the risk of only preparing to defend against the charged offense.[32] This disadvantage, however, is not unique to the defendant. The prosecution must also in such cases be prepared for all the possible lesser included offenses, in the event the defense seeks to have the jury charged on one or more of them.

C. MODEL PENAL CODE APPROACH

Section 1.07(4)(c) of the Model Penal Code[33] has adopted a novel and broad test for determining when a lesser included offense exists. Under the Code, an offense is a lesser included offense of the charged offense when: "(c) it differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission."[34]

Although neither legislatures[35] nor courts,[36] have widely adopted this theory,

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32. Comment, *Jury Instructions*, *supra* note 13, at 63. Another problem raised by the possibility of numerous lesser included offenses is the adequacy of the notice of the charges to the defendant, which is discussed *infra* notes 40-68 and accompanying text. *See also* State v. Hooks, 69 Wis. 182, 33 N.W. 57 (1887) (state cannot compel defendant to contest any issue state is not bound to prove in order to convict him of offense charged).

33. MODEL PENAL CODE § 1.07(4) (Proposed Official Draft 1962) provides:

> A defendant may be convicted of an offense included in an offense charged in the indictment [or the information]. An offense is so included when:
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> (a) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or
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> (b) it consists of an attempt or solicitation to commit the offense charged or to commit an offense otherwise included therein; or
>
> (c) it differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission.

Paragraph (a) corresponds to either the strict statutory or cognate theory, depending on whether it is concerned with the facts actually proved or in the abstract. Paragraph (b) includes attempt and solicitation as lesser included offenses, although traditionally they have not been so considered, because they are not elements contained within the greater offense. *See* Comment, *Pennsylvania Doctrine*, *supra* note 9, at 130.

34. MODEL PENAL CODE § 1.07(4)(c) (Proposed Official Draft 1962).

35. *See* ALA. CODE § 13A-1-9 (1975); N.J. STAT. ANN. § 2C:1-8d (West 1982), for two states that have adopted the Model Penal Code language.

36. *But see* United States v. Whitaker, 447 F.2d 314 (D.C. Cir. 1971) (adopting Code approach).

the United States Court of Appeals for the District of Columbia Circuit has praised this general approach for providing a "more natural, realistic and sound interpretation of the scope of 'lesser included offense.' "[37] Utilizing this approach, the court held that an offense can be a lesser included offense when it is established by the evidence adduced at trial in proof of the greater offense, regardless of the legal elements of the two offenses or the language of the accusatory pleading.[38] The only limitation the court imposed is:

> [t]hat there must also be an "inherent" relationship between the greater and lesser offenses, i.e. they must relate to the protection of the same interests and must be so related that in the general nature of these crimes, though not necessarily invariably, proof of the lesser offense is necessarily presented as part of the showing of the commission of the greater offense. [39]

Since this theory is even broader than the cognate theory, the flexibility objection is greater. Because the elements of the offenses need not be the same, but need only have an "inherent" relationship, the possible range of lesser included offenses is even greater under this theory than under the cognate theory.

The next section of this Article will discuss the various constitutional principles that interact with the lesser included offense doctrine. It will discuss which lesser included offense theories operate best within those constitutional principles, and when those principles dictate which lesser included offense theory must be used.

II. CONSTITUTIONAL LIMITATIONS

The determination of the appropriate lesser included offense theory, and its subsequent application, does not complete the analysis of the problem. Having chosen and applied the appropriate theory, a court must next determine what further effect constitutional limitations may have on the application of the chosen theory. These limitations are notice, double jeopardy, and the due process concern for the reliability of the fact-finding process.

A. NOTICE

Perhaps the principle most basic to the notion of due process is the requirement that the defendant have notice of the charges made against him, in order that he have an opportunity to defend himself against the charges.[40] The lesser included

37. *Id.* at 319.

38. *Id.*

39. *Id.*

40. The sixth amendment states that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be informed of the nature and cause of the accusation." U.S. CONST. amend. VI. *See, e.g., In re* Oliver, 333 U.S. 257, 273 (1948) (right to reasonable notice of charges basic to our system of jurisprudence); Powell v. Alabama, 287 U.S. 45, 69 (1932) (notice is an essential element of due process);

offense doctrine, by definition, raises a due process notice problem, because no matter which particular theory of the doctrine is applied, the defendant must raise a defense against a charge for which he has not specifically been given notice.

The notice problem is therefore potentially raised in every case in which a lesser included offense instruction may be given. Some courts, however, have not had any difficulty in finding that the lesser included offense doctrine itself, through the accusatory pleading of the state, provides sufficient notice to the defendant. The United States Court of Appeals for the District of Columbia Circuit has held that "[t]he indictment is, for legal purposes, sufficient notice to the defendant that he may be called to defend the lesser included charge."[41] Similarly, the United States District Court for the Southern District of New York has stated, "[i]t is axiomatic that an indictment for one crime carries with it notice that lesser offenses included within the specified crime are also charged and must be defended against."[42]

While it is possible to read an indictment on one charge as notice that, in addition, *some* lesser included offense may also be charged, due process requires that the defendant have notice of *which* offense that is.[43] While the defendant will usually be able to determine what lesser included offenses are possible when those offenses are based on either the strict statutory interpretation theory or the cognate pleadings theory, the possible lesser included offenses become much more difficult to determine when the broader, more flexible cognate-evidence and inherent relationship tests are used. Because these theories may greatly expand the range of possible lesser included offenses,[44] in some cases the defendant may not have reasonable notice of the charges against which he is being forced to defend. This problem was recognized by the United States Court of Appeals for the Ninth Circuit when it adopted the inherent relationship test for ascertaining lesser included offenses in

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Holden v. Hardy, 169 U.S. 366, 389 (1897) (same). Because this right of notice is basic to our adversary system of criminal justice, it is part of the "due process of law" that is guaranteed by the fourteenth amendment to defendants in the criminal courts of the states. Faretta v. California, 422 U.S. 806 (1975).

41. Walker v. United States, 418 F.2d 1116, 1119 (D.C. Cir. 1969). In *Walker*, the court found as harmless error the trial judge's failure to inform defense counsel, before the latter's summation, of his intention to instruct the jury on a lesser included offense of larceny, in addition to the robbery and assault with a deadly weapon charges contained in the indictment. *Id.* at 1118. The court found this contravention of FED. R. CRIM. P. 30 not prejudicial in light of the defendant's own damaging testimony on the witness stand. *Id.*

42. Mildwoff v. Cunningham, 432 F. Supp. 814, 817 (S.D.N.Y. 1977). In *Mildwoff*, the court denied habeas corpus relief to a state prisoner convicted on a lesser charge of forcible sexual abuse, following an indictment for rape. *Id.* at 819. New York statutory law was deemed to provide sufficient notice to rape defendants that forcible sexual abuse is included in the rape charge. *Id.* The court also rejected petitioner's claim that the trial court's post-summation charge of the lesser offense deprived him of the opportunity to defend, finding defense counsel's failure to object in a timely manner a tactical decision that constituted waiver of any error. *Id.* at 821.

43. *See, e.g.*, Russell v. United States, 369 U.S. 749, 768 (1961) (indictment must set out specific offense with which defendant charged); United States v. Milk Distributors Ass'n, 200 F. Supp. 792, 802 (D. Md. 1961) (same).

44. *See supra* notes 26-39 and accompanying text (discussing flexibility of cognate-evidence and inherent relationship tests).

United States v. Johnson.[45] After accepting the inherent relationship test, the court stated in dicta that the lack of notice under the test would probably prevent the prosecution from seeking a lesser included offense instruction for some offenses.[46]

At least one commentator has suggested that, even though the Model Penal Code approach is quite flexible, it has the potential to provide adequate notice in at least two ways.[47] First, in the jurisdictions that have generally adopted the Model Penal Code, or some other equally systematized criminal code, offenses which differ from one another only in respect to degree or risk of injury or type of culpability are usually grouped together in that criminal code.[48] This grouping of related offenses would presumably make it relatively easy to determine which offenses are potential candidates for lesser included offense treatment, thus providing a defendant charged with one of the offenses in the group with adequate notice that he may be forced to defend against other offenses in that group.[49]

The second way the Model Penal Code approach can provide adequate notice occurs once the courts of that jurisdiction have decided which of the offenses are related or lesser and greater offenses. After these decisions are made, future defendants may be said to be under constructive notice.[50] It is further suggested, however, that a defendant convicted of an offense which is found to be a lesser offense of the offense charged, in a jurisdiction in which that determination is one of first impression, should be deemed not to have had adequate notice.[51]

Another possible solution to the problem would be to allow the defendant to seek a lesser included offense instruction, even though the prosecutor would be barred from obtaining such an instruction because of the inadequate notice provided the defendant. Because the notice requirement is the defendant's constitutional right, not the prosecutor's, and further, because the defendant is generally free to waive his constitutional rights,[52] this solution would at least avoid violating any constitutional limitations on the lesser included offense doctrine.[53] Florida adopted such an approach in *Anderson v. State*.[54] In *Anderson*, the Florida Supreme Court held that where the existence of a lesser included offense is determined by the language of the accusatory pleading, the prosecution is entitled to a lesser included offense instruction only if that offense was sufficiently included in the accusatory pleading to satisfy the due process notice requirement.[55] However, the court held that

45. 637 F.2d 1224 (9th Cir. 1980).

46. *Id.* at 1239.

47. Comment, *Pennsylvania Doctrine*, *supra* note 9, at 145.

48. *Id.* For example, kidnapping, felonious restraint, false imprisonment, interference with custody and criminal coercion are crimes grouped together in the MODEL PENAL CODE § 212 (Official Draft 1962).

49. Comment, *Pennsylvania Doctrine*, *supra* note 9, at 145.

50. *Id.* While the first defendant to appeal a conviction based on a lesser offense might be deemed to have been without notice, subsequent defendants would be without a similar claim because both the indictment and case law would be sufficient constructive notice. *Id.*

51. *Id.*

52. Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

53. Whether the defendant should be sentenced on a conviction for a lesser included offense for which he has not been given adequate notice is a separate question. *See infra* notes 162–63 and accompanying text.

54. 255 So. 2d 550 (Fla. 1971).

55. *Id.* at 556.

because the prosecution's accusation constitutes only an ex parte claim, the defendant is entitled to such an instruction on any offense within the "general scope" of the crime charged, and of which there is sufficient evidence.[56] This is true even though the elements of the lesser included offense may not have been set forth in the accusatory pleading, because due process assures the defendant his full day in court.[57]

This approach to the notice problem cannot be used in those jurisdictions that adhere to the doctrine of mutuality.[58] The doctrine essentially requires that both parties have the identical right to request a lesser included offense instruction.[59] Thus, in *Kelly v. United States*,[60] the United States Court of Appeals for the District of Columbia Circuit stated that "[a]lthough the [lesser included offense] doctrine may also be invoked by [the] defendant, his right to invoke it does not extend beyond the limit of the prosecutor."[61] Likewise, in *Fuller v. United States*,[62] the same court stated that "[i]n general the chargeability of lesser included offenses rests on a principle of mutuality, that if proper, a charge may be demanded by either the prosecution or the defense."[63]

When the District of Columbia Circuit adopted the Model Penal Code, or "inherent relationship" approach to lesser included offenses in *Whitaker v. United States*,[64] it had to directly confront the issue of mutuality. Admitting, but without deciding, that the more expansive approach to lesser included offenses created a potential notice problem to the defendant, a problem which would limit the prosecution's request for such an instruction, the court held that "[d]espite the patina of antiquity, considerations of justice and good judicial administration warrant dispensing with mutuality as an essential prerequisite to the defense's right to a lesser included offense charge."[65] In *Keeble v. United States*,[66] the United States Supreme Court was presented with the opportunity to decide the mutuality issue, but declined to do so.[67]

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56. *Id.*

57. *Id.* For a discussion of this case see Barnett, *supra* note 2, at 268.

58. *See, e.g.*, United States v. Thompson, 492 F.2d 359, 362 (8th Cir. 1974) (mutuality condition to entitlement of lesser included offense instruction); State v. Selig, 635 P.2d 786, 743 (Wyo. 1981) (same).

59. The right of the prosecutor in the lesser included offense doctrine is "limited to the offense of which defendant has been given notice by the indictment." Kelly v. United States, 370 F.2d 227, 229 (D.C. Cir. 1966), *cert. denied,* 388 U.S. 913 (1967). By the doctrine of mutuality, the defense is subject to this same notice requirement as against the prosecutor. Whitaker v. United States, 447 F.2d 314, 321 (D.C. Cir. 1971). The test for mutuality, the *Whitaker* court said, is "whether the prosecutor could have rightly requested the lesser included offense charge; therefore, whether the defense was entitled to it on request." *Id.*

60. 370 F.2d 227 (D.C. Cir. 1966), *cert. denied,* 388 U.S. 913 (1967).

61. *Id.* at 229.

62. 407 F.2d 1199 (D.C. Cir. 1967) (en banc), *cert. denied,* 393 U.S. 1120 (1968).

63. *Id.* at 1230.

64. 447 F.2d 314 (D.C. Cir. 1971).

65. *Id.* at 321.

66. 412 U.S. 205 (1973).

67. *Id.* at 214 n.14. In *Keeble*, an American Indian defendant was charged with intent to commit serious bodily injury resulting in the death of another Indian on a reservation. *Id.* at 207. A lesser included offense instruction on simple assault was denied at trial and the denial was affirmed by the Eighth Circuit. *Id.* at 206. *See* United States v. Keeble, 459 F.2d 757 (8th Cir. 1972). The Supreme Court reversed,

Thus, the due process requirement of notice poses a potential limitation on which particular lesser included offense doctrine a jurisdiction can adopt. If a state adopts the cognate-evidence or inherent relationship theories, the prosecution may be barred from seeking a lesser included offense instruction if the accusatory pleading did not adequately inform the defendant that he would have to defend against such a charge.[68] If that same jurisdiction adheres to the principle of mutuality, the defendant would also be barred from such an instruction. The strict statutory interpretation and cognate pleading theories therefore comport more readily with the constitutional principle of notice. The next two sections, however, will illustrate how those two theories are essentially incompatible with other constitutional principles.

B. DOUBLE JEOPARDY

The fifth amendment provides, in part: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."[69] This guarantee has been held to protect against both multiple prosecutions and multiple punishments for the "same offense."[70] The determination of what is a "same offense" for double jeopardy purposes is related to the lesser included offense doctrine because it has been held that if an offense is a lesser included one of the offense charged, then a conviction or acquittal of that crime would bar a subsequent prosecution of the lesser offense.[71] Conversely, a conviction or acquittal of the lesser included offense would bar a subsequent prosecution of the greater offense.[72] Like the lesser included offense

holding that the federal statute under which the defendant was convicted, which imposed limitations on federal prosecutorial authority on Indian land, did not deprive Indians of a lesser offense charge when it was available to a non-Indian charged with the same offense. Keeble v. United States, 412 U.S. at 212. *See also* United States v. Pino, 606 F.2d 908 (10th Cir. 1979) (*Keeble* analysis followed to grant defendant lesser included offense instruction on new trial). Justice Brennan, writing for the *Keeble* Court, specifically chose not to address the *Whitaker* court's abandonment of the mutuality principle. Keeble v. United States, 412 U.S. at 214 n.14.

68. The prosecutor can almost always avoid this problem, however, by simply making sure the accusatory pleading does in fact provide sufficient notice.

69. U.S. CONST. amend. V.

70. North Carolina v. Pearce, 395 U.S. 711, 717 (1969). In *Pearce* the Court stated: "That guarantee has been said to consist of three separate protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense. And it protects against multiple punishments for the same offense." *Id.* at 717.

71. *In re* Neilsen, 131 U.S. 176, 188 (1889).

72. *Id.* The Court endorsed the rule that "[w]here... a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense." *Id.*.

In Brown v. Ohio, 432 U.S. 161 (1977), the Court stated that: "[t]he [*Neilsen*] opinion makes it clear that the sequence is immaterial." *Id.* at 168. The Court went on to hold that "[w]hatever the sequence may be, the Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser included offense." *Id.* at 169. The *Brown* opinion did leave open the possibility of an exception to this rule "[w]here the State is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence." *Id.* at 169 n.7 (citing Diaz v. United States, 223 U.S. 442, 448-49 (1912); Ashe v. Swenson, 397 U.S. 436, 453 n.7 (1970) (Brennan, J., concurring)).

doctrine, the concept of double jeopardy has equally confused both courts and commentators.[73] Justice Rehnquist has described the decisional law in the area as "a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator."[74]

The English case of *Rex v. Vandercomb*[75] has been cited as containing the first test for determining when two crimes constitute the same offense.[76] In that case, the court held that reprosecution after acquittal was not barred "[u]nless the first indictment were such as the prisoner might have been convicted upon proof of the facts in the second indictment...."[77] The first American case to confront the problem, *Morey v. Commonwealth*,[78] abandoned the *Vandercomb* approach, which was based on the allegations in the indictment, in favor of an approach based on the elements of the offenses.[79] The *Morey* test stated that "[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

73. This article does not purport to present an analysis of all double jeopardy problems. It only addresses those that are directly related to the doctrine of lesser included offenses. Other troublesome areas of double jeopardy law include:

1) the question of when jeopardy attaches; *see* Swisher v. Brady, 438 U.S. 204, 214-15 (1978) (jeopardy attaches before judgment becomes final and protection against double jeopardy embraces defendant's right to have his trial completed by particular tribunal); Crist v. Betz, 437 U.S. 28, 35 (1978) (jeopardy attaches when jury is empaneled and sworn); Green v. Massey, 437 U.S. 19, 24 (1978) (no second trial obtainable once reviewing court determines that evidence introduced at trial was insufficient to sustain guilty verdict);

2) the question of whether different jurisdictions or sovereignties may prosecute a person for the same offense; *see* United States v. Wheeler, 435 U.S. 313, 328-30 (1978) (Indian Territories have jurisdiction over members and power to punish tribal offenders without barring federal prosecution and punishment in addition to tribal punishment); Rinaldi v. United States, 434 U.S. 22, 24 & n.5 (1977) (Department of Justice policy precludes federal prosecution of defendant after state conviction, absent compelling reasons);

3) the question of when termination of a criminal proceeding after jeopardy attaches bars reprosecution for the same offense; *see* Crist v. Betz, 437 U.S. at 35 (jeopardy attaches after jury is empaneled and sworn, not after the first witness is sworn as provided in Montana statute, because defendant has right to retain a chosen jury); Arizona v. Washington, 434 U.S. 505, 516 (1978) (mistrial declared after defense counsel's opening statement will avoid a plea of double jeopardy if there was "manifest necessity" for granting of mistrial);

4) the question of whether appellate reversal of a conviction bars reprosecution for the same offense; *see* United States v. Scott, 437 U.S. 82, 100-01 (1978) (appeal by government from successful effort by defendant to have trial terminated without submission to judge or jury of issue of guilt or innocence not barred by double jeopardy clause); Sanabria v. United States, 437 U.S. 54, 75 (1978) (once acquitted defendant may not be retried on same offense even when ruling was "egregiously erroneous"); Green v. Massey, 437 U.S. 19, 24 (1978) (once reviewing court determines evidence introduced at trial insufficient to sustain guilty verdict, second trial on same offense barred); Burks v. United States, 437 U.S. 1, 15-16 (1978) (double jeopardy does not preclude government from retrying defendant whose conviction was set aside due to error in proceeding as distinguished from retrial for insufficiency of evidence).

For a general discussion of these aspects of double jeopardy, see Note, *Emerging Standards in Supreme Court Double Jeopardy Analysis*, 32 VAND. L. REV. 609 (1979).

74. Albernaz v. United States, 450 U.S. 333, 343 (1981).

75. 168 Eng. Rep. 455 (1796).

76. Schwartz, *Multiple Punishment for the "Same Offense": Michigan Grapples With the Definitional Problem*, 25 WAYNE L. REV. 825, 828 (1979).

77. Rex v. Vandercomb, 168 Eng. Rep. at 461.

78. 108 Mass. 433 (1871).

79. *Id.*

exempt the defendant from prosecution and punishment under the other."[80]

After a long period of confusion, the Supreme Court settled on a "same offense" test not unlike the *Morey* test. In the landmark case of *Blockburger v. United States*,[81] the defendant was charged with two separate offenses arising out of a single sale of narcotics.[82] The first involved selling drugs in other than their original container and the second selling the same drugs without a written order of the purchaser.[83] In upholding the two convictions, the Court fashioned the following rule: "[w]here 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."[84]

Although the *Blockburger* test for the "same offense" initially seems to parallel the strict statutory interpretation approach to lesser included offenses,[85] by emphasizing the elements of the offenses rather than the facts as either alleged or proven, several Supreme Court cases have applied the *Blockburger* "same offense" test in a way that is essentially the equivalent of the cognate-evidence approach to lesser included offenses.[86] In *Brown v. Ohio*,[87] the Court held that the double jeopardy clause barred prosecution and punishment for the offense of auto theft following prosecution and punishment for the lesser included offense of operating the same vehicle without the owner's consent.[88] As discussed previously, however, the offense of operating a vehicle without the owner's consent has not been considered a lesser included offense of the crime of auto theft or grand larceny in jurisdictions which adhere to the strict statutory approach.[89] Under the cognate-evidence theory, however, if the evidence at trial indicated that the car had been driven away, the offense of operating the same vehicle without the owner's consent would be a lesser included offense of the greater offense of auto theft, just as it would be the "same offense" under the *Blockburger* test as applied in *Brown*.

The recent Supreme Court opinion in *Missouri v. Hunter*,[90] also impliedly supports the similarity between the cognate-evidence theory and the "same offense" test for double jeopardy. In *Hunter* the defendant was convicted in a single trial of robbery, under a statute which required that the perpetrator put the victim "[i]n fear of some immediate injury to his person,"[91] and of armed criminal action, under a statute which punished an underlying felony, in this case robbery, committed

80. *Id.* at 434.

81. 284 U.S. 299 (1932).

82. *Id.* at 299.

83. *Id.*

84. *Id.* at 304.

85. *See supra* notes 15-25 and accompanying text (discussing strict statutory interpretation approach to lesser included offenses).

86. *See* Missouri v. Hunter, 103 S. Ct. 673 (1983); Brown v. Ohio, 432 U.S. 161 (1977).

87. 432 U.S. 161 (1977).

88. *Id.*

89. *See supra* notes 22-24 and accompanying text (discussing strict statutory interpretation approach to determination of case).

90. 103 S. Ct. 673 (1983).

91. MO. ANN. STAT. § 560.120 (Vernon 1979).

"[w]ith, or, through the assistance, or aid of a dangerous or deadly weapon."[92] Because it would be possible to commit the offense of robbery by putting the victim in fear of immediate injury by some method other than through the use of a dangerous or deadly weapon,[93] armed criminal action could not be a lesser included offense of robbery according to the strict statutory interpretation theory. Under the cognate-evidence theory, however, because the robbery was proved at trial to have actually been committed with a deadly weapon, armed criminal action would be a lesser included offense of robbery. The Supreme Court agreed with the Missouri Supreme Court[94] that the two offenses were also the "same offense" for double jeopardy purposes.[95]

Thus, although the *Blockburger* test for determining the "same offense" is phrased in terms of the elements of the offenses, Supreme Court application of the test emphasizes the facts or evidence adduced at trial in support of the elements, rather than just the elements themselves, when determining whether offenses are the "same offense." Likewise, the cognate-evidence theory emphasizes the evidence adduced at trial in determining whether one offense is a lesser included offense of a greater offense.

This point becomes significant in jurisdictions utilizing a lesser included offense test other than the cognate-evidence theory,[96] for these jurisdictions cannot accurately apply that test to determine double jeopardy claims. For example, if Missouri adopted the strict statutory interpretation of lesser included offenses, armed criminal action would not be considered a lesser included offense of robbery. If a defendant were convicted of robbery in one trial, and the state attempted to prosecute him in another trial, a court would have to determine whether such multiple prosecutions violate double jeopardy. If the state court tried to resolve that issue by applying the basic rule that a conviction or acquittal of a greater or lesser included offense bars, as a violation of double jeopardy, a subsequent prosecution for the other offense,[97] the court would have to conclude that multiple prosecutions for robbery and armed criminal action were not barred by double jeopardy, because under the strict statutory interpretation theory the two offenses do not involve greater and lesser included offenses. That conclusion would, of course, be wrong because, as held in *Hunter*, the two offenses are the "same offense" for double jeopardy pur-

92. MO. ANN. STAT. § 559.225 (Vernon 1979).

93. One could merely threaten the victim with his fists or an object not considered to be a deadly weapon.

94. State v. Hunter, 622 S.W.2d 374, 375 (Mo. 1981).

95. Missouri v. Hunter, 103 S. Ct. at 676, 679. Additional authority in support of the proposition that the "same offense" test is the equivalent of the cognate-evidence theory may be found in Hopper v. Evans, 456 U.S. 605 (1982), in which the Court emphasized the importance of the *evidence* adduced at trial in determining whether due process requires that a lesser included offense instruction be given. Thus, it is the facts or evidence used to prove the elements of the offense, rather than just the elements themselves, that are of importance to the Supreme Court when determining what are "same offenses" and lesser included offenses. For more on the import of *Hopper v. Evans* and Beck v. Alabama, 447 U.S. 625 (1980), in which the Court first applied due process to the requirement of a lesser included offense instruction, see *infra* notes 125-40 and accompanying text.

96. *See supra* notes 15-39 and accompanying text (discussing strict statutory interpretation approach, cognate pleadings approach and Model Penal Code approach).

97. *See supra* notes 69-72 and accompanying text (discussing double jeopardy restrictions).

poses.[98] Thus, although the Supreme Court may use the term "lesser included offense" in fashioning its double jeopardy rule, it uses that term as defined by the cognate-evidence theory.

All courts deciding a "same offense" double jeopardy issue should now apply the *Blockburger* test, rather than state versions of a lesser included offense test. Courts which have adopted the cognate-evidence test will have no difficulty applying the *Blockburger* test, because the cognate-evidence approach would produce the same result. Whether the *Blockburger* test accurately describes the constitutional limits on multiple prosecutions and multiple punishments, however, has become the subject of some dispute in the Supreme Court. Although the *Blockburger* test has been termed a "[r]ule of statutory construction" for determining whether or not the legislative authority intended multiple punishment for two statutory offenses,[99] some Supreme Court Justices have equated that intent with the requirements of the double jeopardy clause.[100] Thus, even if two offenses are held to be the "same offense," such punishments would not be barred by double jeopardy, provided they were imposed at the same trial and the legislature intended multiple punishment. This view was expressed by Justice Rehnquist in *Albernaz v. United States,*[101] when he stated that "[t]he question of what punishments are constitutionally permissible is not different from the question of what punishment the Legislative Branch intended to be imposed. Where Congress intended, as it did here, to impose multiple punishment, imposition of such sentences does not violate the Constitution."[102] Justice Stewart, however, in a concurring opinion joined by Justices Marshall and Stevens, took issue with Justice Rehnquist's equating the two standards. Justice Stewart stated that Rehnquist's statement was a far cry from the previous characterization of the *Blockburger* rule[103] in *Whalen v. United States.*[104] In *Whalen*, the Court had said: "[t]he question whether punishments imposed by a court after a defendant's conviction upon criminal charges are unconstitutionally multiple cannot be resolved without determining what punishments the Legislative Branch has authorized."[105] "No matter how clearly it spoke," reasoned Stewart in *Albernaz*, "Congress could not constitutionally provide for cumulative punishment unless each statutory offense required proof of a fact that the other did not,"[106] under the *Blockburger* test.[107]

Missouri v. Hunter[108] has proven Justice Stewart wrong, by holding, in effect, that if the legislature does speak clearly enough, a defendant may constitutionally receive cumulative punishment at one trial for two offenses that are nonetheless the "same offense" under the *Blockburger* test.[109] In *Hunter* the defendant was convicted

98. Missouri v. Hunter, 103 S. Ct. at 679.

99. Whalen v. United States, 445 U.S. 684 (1980).

100. Albernaz v. United States, 450 U.S. 333 (1981).

101. *Id.*

102. *Id.* at 344.

103. *Id.* at 344-45 (Stewart, J., concurring).

104. 455 U.S. 684 (1980).

105. *Id.* at 688.

106. Albernaz v. United States, 450 U.S. at 345 (Stewart, J., concurring).

107. Under the *Blockburger* test, the offenses at issue in *Albernaz* were not the "same offense." Justice Stewart thus concurred in the holding that Albernaz had not been subject to double jeopardy.

108. 103 S. Ct. 673 (1983).

109. *Id.* at 678-79.

of first degree robbery and armed criminal action in the same trial.[110] He was sentenced to concurrent terms of ten years imprisonment for the robbery and fifteen years for armed criminal action.[111] Hunter claimed that the conviction and sentence for what was the "same offense" violated the double jeopardy clause.[112] The Court held that even though the two offenses were the "same offense" under the *Blockburger* test, the double jeopardy clause did not bar the imposition of cumulative punishments.[113] The Court reasoned that when convictions for the "same offense" occur at a single trial, the double jeopardy clause only bars the imposition of cumulative punishment in cases in which the legislature clearly intended not to provide for the cumulative punishment.[114] In so doing, the Court repeated the

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110. *Id.* at 675. Missouri's statute proscribing robbery in the first degree, MO. ANN. STAT. § 560.120 (Vernon 1979), provides:

> Every person who shall be convicted of feloniously taking the property of another from his person, or in his presence, and against his will, by violence to his person, or by putting him in fear of some immediate injury to his person; or who shall be convicted of feloniously taking the property of another from the person of his wife, servant, clerk or agent, in charge thereof, and against the will of such wife, servant, clerk or agent, in charge thereof, and against the will of such wife, servant, clerk or agent by violence to the person of such wife, servant, clerk or agent, or by putting him or her in fear of some immediate injury to his or her person, shall be adjudged guilty of robbery in the first degree.

Id.

MO. ANN. STAT. § 560.135 (Vernon 1979) prescribes the punishment for robbery in the first degree and provides in pertinent part: "Every person convicted of robbery in the first degree by means of a dangerous and deadly weapon and every person convicted of robbery in the first degree by other means shall be punished by imprisonment by the division of corrections for not less than five years. . . ." MO. ANN. STAT. § 559.225 (Vernon 1979) proscribes armed criminal action and provides in pertinent part:

> [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 the crime of armed criminal action and, upon conviction, shall be punished by imprisonment by the division of correction 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 of a dangerous or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of three calender years.

Id.

111. Missouri v. Hunter, 103 S. Ct. at 676. Hunter was also convicted and sentenced on an assault charge, *id.* at 675, but that charge is not pertinent to the double jeopardy issue raised by the case.

112. *Id.* at 677.

113. *Id.* at 679. Although the Court did not undertake to adopt our analysis of the two statutes vis-a-vis the *Blockburger* test, it did accept the Missouri Supreme Court's construction of the two statutes at issue as defining the same crime.

114. *Id.*

quotation from *Albernaz* that "the question of what punishments are constitutionally permissible is no different from the question of what punishment the Legislative Branch intended to be imposed."[115] Justices Marshall and Stevens, in dissent, adhering to their concurrence in *Albernaz*, stated that double jeopardy prohibits both multiple convictions and multiple punishments for the "same offense" no matter how clearly the contrary intent of the legislature has been expressed.[116]

After *Hunter*, it is clear that while a defendant cannot be subject to multiple prosecutions for the "same offense," a defendant can be subject to multiple punishments, provided they are imposed at the same trial and the legislature intended to actually impose multiple punishments. *Hunter*, then, obviously raises the question of when the legislature's intent to impose multiple punishments is clear. In *Hunter* itself, the Court accepted the Missouri Supreme Court's determination that the Missouri General Assembly intended that punishment for violation of the two statutes be cumulative.[117] In determining congressional intent, the court has generally relied on an analysis of the statutory scheme in issue as amplified by its legislative history.[118]

Presumably, another way a state could manifest its intent to impose cumulative punishments is by adopting a particular lesser included offense theory. For example, if by application of that theory it was determined that a particular offense was not a lesser included offense of a greater crime, arguably the legislature intended to impose cumulative punishments for violation of the separate statutes. Since the legislature would be presumed to know what lesser included offense theory was being applied by the state's courts, it could be assumed that the legislature, by defining offenses in a certain way, intended to make the two offenses separate, with separate punishments for each. Thus, even though the offenses might be the "same offense" under the *Blockburger* test, separate punishments could be imposed at the same trial, a result identical to *Hunter*. Even under *Hunter*, however, the legislative intent to create separate offenses still would not allow multiple conviction at separate trials for the "same offense," regardless of whether or not the lesser offense was actually a lesser included offense of the greater offense under whatever particular test the state happened to be using. The test for multiple conviction is still the "same offense" test,

115. Albernaz v. United States, 450 U.S. at 344.

116. Missouri v. Hunter, 103 S. Ct. at 679 (Marshall, J. and Stevens, J., dissenting).

117. *Id.* The Missouri Supreme Court based its conclusion about the General Assembly's intent on a simple reading of the statutes involved. MO. ANN. STAT. § 559.225 (Vernon 1979) (armed criminal action) provides in part: "The punishment imposed pursuant to the subsection *shall be in addition to any punishment* provided by law for the crimes committed by, with, or through the use, assistance, or aid of a dangerous or deadly weapon." *Id.* (emphasis added). *See* Sours v. State, 593 S.W.2d 208 (Mo. 1980). The court in *Sours* stated that giving concurrent sentences for the underlying felony of first degree robbery and the lesser included offense of armed criminal action gave effect to the legislative intent of authorizing one sentence "in addition to" another. *Id.* at 223 n.12.

The Fourth Circuit in United States v. Wilson, 721 F.2d 967 (4th Cir. 1983), recently emphasized the absence of any "in addition to" language in holding that multiple punishments were not intended under certain federal firearms statutes. *Id.* at 971. The court noted that since the statutory language was at best ambiguous and the legislative history silent, any doubts should be resolved in favor of lenity. *Id.*

118. *See, e.g.*, Blockburger v. United States, 284 U.S. 299 (1932); Whalen v. United States, 445 U.S. 684 (1980); Gore v. United States, 357 U.S. 386 (1958); American Tobacco Co. v. United States, 328 U.S. 781 (1946); Albernaz v. United States, 450 U.S. 333 (1981).

unencumbered by any notion of contrary legislative intent. Thus, while the state might be able to impose multiple punishment for the "same offense" through the adoption of a particular lesser included offense theory, it could not sanction multiple conviction for the "same offense" by the same method.

C. RELIABILITY OF THE FACT-FINDING PROCESS

While the constitutional limitations of notice and double jeopardy are primarily implicated when a lesser included offense instruction is given, the due process concern with reliability of the fact-finding process is primarily raised when such an instruction is *not* given.[119] The argument is that if a lesser included offense instruction is not given when warranted by the evidence, the jury may convict on the greater charged offense, even though not convinced of guilt beyond a reasonable doubt, just because the evidence indicates that the defendant was obviously guilty of *some* offense.[120] It is unfair to present the jury with this all or nothing choice when the evidence justifies another option.

The fear of a jury improperly convicting a person is certainly not new to the law. The law of evidence, for example, has long recognized the problem of jurors' being unduly influenced by evidence of uncharged and unpunished crimes and has remedied this problem by generally excluding such evidence except in specific circumstances.[121] When, in these specific circumstances, the evidence of lesser crimes is

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119. A few cases have suggested that the failure of a trial judge to instruct the jury on lesser included offenses, where justified, violates the defendant's constitutional right to trial by jury. *See* Henwood v. People, 54 Colo. 188, 199, 129 P. 1010, 1014 (1913) (failure to instruct jury on lesser included offense of manslaughter deprived defendant of right to have jury determine grade of offense); Strader v. State, 210 Tenn. 669, 362 S.W.2d 224 (1962) (trial judge's failure to instruct jury regarding lesser offenses as required by state statute is reversible error). Recent attention, however, has shifted from the right to a jury trial to the right to have the defendant's guilt determined by proof of every element of the offense beyond a reasonable doubt. *See In re* Winship, 397 U.S. 358, 364 (1970) (proof beyond a reasonable doubt standard constitutionally required under the due process clause for every element constituting the crime charged).

120. For further discussion on this point see Barnett, *supra* note 2, at 281; Comment, *Jury Instructions*, *supra* note 13, at 590-91.

121. FED. R. EVID. 404 (excluding evidence of other crimes or wrongs to infer criminal conduct). *See also* Michelson v. United States, 335 U.S. 469, 475 (1948) ("inquiry [into other criminal acts] is... said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge"); MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 188 (2d ed. 1972) (character evidence not admissible to prove criminal conduct); *cf.* United States v. Ling, 581 F.2d 1118 (4th Cir. 1978) (defendant who chooses to testify may be impeached by past misconduct not subject to conviction); United States v. O'Brien, 618 F.2d 1234 (7th Cir. 1980) (prior fraudulent acts admissible to show criminal intent).

Although juries are generally considered capable of following jury instructions, courts have recognized that under certain circumstances juries cannot be trusted and some other procedural device is necessary to assure the reliability of the fact-finding process. For example, Federal Rule of Evidence 105 requires the court, under appropriate circumstances, to instruct the jury that it should only consider evidence against one party and not another. The underlying premise of this rule seems to be that the jury is capable of following such an instruction. Despite the availability of the limiting instruction under Federal Rule of Evidence 105, the drafters of the federal rules have recognized that under certain circumstances a jury instruction is simply not an adequate safeguard. The Rules have thus empowered the judge with the discretion to exclude otherwise admissible evidence if it is considered highly prejudicial. *See*

before the jury and a lesser included offense instruction is not given when warranted by the evidence, the jury will be instructed that it must acquit the defendant if not convinced of his guilt beyond a reasonable doubt. This, however, is insufficient because it is precisely the suspected inability of the jury to follow such an instruction that has caused the law of evidence to generally exclude evidence of other crimes. The inability of the jury to follow instructions now raises the issue of the reliability of the fact-finding process when lesser included offense instructions, warranted by the evidence, are not given.

1. Basic Contours of the Right to a Lesser Included Offense Instruction

The United States Supreme Court first acknowledged the potential problem of lesser included offenses in *Keeble v. United States.*[122] The Court discussed the danger of the failure to instruct the jury on the lesser included offense:

> A defendant is entitled to a lesser offense instruction—in this context or any other—precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction.... We cannot say that the availability of a third option—convicting the defendant of [a lesser offense]—could not have resulted in a different verdict.[123]

Although the Court reversed the conviction on statutory grounds, it stated that "while we have never explicitly held that the Due Process Clause of the Fifth Amendment guarantees the right of the defendant to have the jury instructed on a lesser included offense, it is nevertheless clear that... to preclude such an instruction would raise difficult constitutional questions."[124]

In *Beck v. Alabama,*[125] the Supreme Court reached the issue in the context of a capital offense case. Beck had been charged with "[r]obbery or attempts thereof when the victim is intentionally killed by the defendant."[126] Felony murder was a

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FED. R. EVID. 105 advisory committee note (Rule 105 to be read in conjunction with Rule 403 to prevent unfair prejudice, confusion of issues or misleading jury).

See also Bruton v. United States, 391 U.S. 123 (1968) (defendant's conviction reversed where codefendant's confession, inculpating defendant, was introduced despite jury instruction not to consider confession in determining guilt or innocence of defendant); Jackson v. Denno, 378 U.S. 368, 386-87 (1964) (invalidated state procedure whereby jury determined admissibility of defendant's confession; even though jury instructed on law and jury's function, Court doubted jury could perform function reliably).

122. 412 U.S. 205 (1973). In *Keeble*, an American Indian was convicted of assault with intent to commit serious bodily injury after the court refused to instruct the jury on the lesser included offense of simple assault. *Id.* at 205-06.

123. *Id.* at 212-13.

124. *Id.* at 213.

125. 447 U.S. 625 (1980).

126. *Id.* at 627 n. 1 (quoting ALA. CODE § 13-11-2(a)(2) (1975)).

lesser included offense of the capital offense of robbery-intentional killing.[127] There was sufficient evidence to support a lesser included offense instruction.[128] The Alabama capital offense statute, however, prevented the jury from considering any lesser included offenses.[129] Instead the jury was given the choice of either convicting Beck of a capital crime and imposing the death penalty, or acquitting him and allowing him to escape all penalties for his alleged participation in the crime.[130]

The Supreme Court reversed Beck's conviction and death sentence, specifically holding that the death penalty may not be imposed constitutionally after a jury verdict of guilt of a capital offense when the jury was not permitted to consider a verdict of guilt of a lesser included offense.[131] The Court relied on the reservation expressed in *Keeble*, that when a lesser included offense instruction is not given, and "the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction."[132] Because such a possibility diminished "the reliability of the guilt determination"[133] and enhanced "the risk of an unwarranted conviction,"[134] the Court held that Alabama was constitutionally prohibited from withdrawing the lesser included offense option from the jury in a capital case.[135]

The Supreme Court carefully confined its holding in *Beck* to capital cases and specifically stated that it "need not and [does] not decide whether the Due Process Clause would require the giving of such instruction in a noncapital case."[136] Although the Court did not reach the issue of whether a lesser included offense instruction should be required in noncapital cases, it seems that the rationale of the case can be applied in noncapital cases.

One may attempt to refute this premise by arguing that procedural due process standards are different for capital and noncapital cases. Because "[d]eath is a

127. This is because, under the Alabama death penalty statute, the requisite intent to kill could not be supplied by the felony-murder doctrine. *Id.* at 628 n.2 (quoting ALA. CODE § 13-11-2(b) (1975)).

128. According to Beck's version of the facts, he and an accomplice entered the victim's home in the afternoon, and after he had seized the man, intending to bind him with a rope, his accomplice unexpectedly struck and killed the man. Beck consistently denied that he killed the man or that he intended his death. *Id.* at 629-30.

129. ALA. CODE § 13-11-2(a) (1975). In Jacobs v. State, 361 So. 2d 640, 642 (Ala. 1978), *cert. denied*, 439 U.S. 1122 (1982), the Supreme Court of Alabama upheld a jury verdict convicting the defendant of murder despite the inability of the jury to fix other punishment as provided by ALA. CODE § 13-11-2(a). This statute was invalidated by the United States Supreme Court in *Beck*. 447 U.S. at 638.

130. Beck v. Alabama, 447 U.S. at 628-29 n.3 (quoting ALA. CODE § 13-11-2(a) (1975) providing: "If the jury finds the defendant guilty, it shall fix the punishment at death when the defendant is charged by indictment with any of the following offenses and with aggravation, which must also be averred in the indictment, and which offenses so charged with said aggravation shall not include any lesser offenses").

The jury was specifically instructed that if Beck was acquitted of the capital crime of intentional killing in the course of a robbery, "he can never be tried for anything that he did to [the victim]." *Id.* at 630.

131. *Id.* at 638.

132. *Id.* at 634 (quoting Keeble v. United States, 212 U.S. at 212-13). *See supra* text accompanying note 123 (additional text of quotation).

133. Beck v. Alabama, 447 U.S. at 638.

134. *Id.*

135. *Id.*

136. *Id.* at 638 n.14.

different kind of punishment from any other which may be imposed in this country,"[137] the Court has held that capital cases may require some procedural safeguards that are not required in noncapital cases.[138] Therefore, one might argue that *Beck* does not apply to noncapital cases.

This argument is without merit because, for the most part, the cases on which this argument is based involved the death penalty and the sentencing process. They did not involve situations affecting the reliability of the initial fact-finding process. In other cases involving the integrity of the fact-finding process, as opposed to the sentencing process, the Court has not purported to distinguish between capital and noncapital cases.[139] Thus, because the Court in *Beck* seems to have been primarily concerned with the impact of the Alabama procedure on the reliability of the fact-finding process, rather than on the imposition of the death penalty and the sentencing process, the *Beck* holding should be equally applicable in noncapital cases.[140]

Despite the suggestions in *Keeble* and *Beck* that failure to give a lesser included offense instruction when warranted by the evidence may result in a due process violation, very few state and federal court cases have actually dealt with the problem.[141] The major reason the issue does not arise is that virtually all state and federal jurisdictions assume a right to a lesser included offense instruction.[142] Thus, in these jurisdictions, any alleged error in the failure to give a lesser included

137. Gardner v. Florida, 430 U.S. 349, 357-58 (1977) (Stevens, J., plurality opinion), *quoted in* Beck v. Alabama, 447 U.S. at 625.

138. *See, e.g.*, Lockett v. Ohio, 438 U.S. 586 (1978) (striking down Ohio death penalty statute for lack of mitigating factors necessary for sentencing as required by eighth and fourteenth amendments); Proffitt v. Florida, 428 U.S. 242 (1976) (upholding procedural safeguards in capital sentencing as provided by Florida statute); Gregg v. Georgia, 428 U.S. 153, 195 (1976) (requiring bifurcated trial for capital offense on issues of guilt and sentencing to prevent unfair prejudice); *cf.* Pulley v. Harris, 104 S. Ct. 871, 876 (1984) (proportionality review not indispensible although constitutional under some state statutes). The Court's concern in Furman v. Georgia, 408 U.S. 238 (1972), was that the jury was permitted unguided and unrestrained discretion in imposing the death penalty. Lockett v. Ohio, 438 U.S. at 598. The Court has never intimated, however, that such jury discretion is impermissible in noncapital cases. *Id.*

139. *See, e.g., In re* Winship, 397 U.S. 358 (1970) (juvenile defendant charged with larceny); Bruton v. United States, 391 U.S. 123 (1968) (improper jury consideration of co-defendant's confession); Parker v. Gladden, 385 U.S. 363 (1966) (remarks to jury by bailiff); Sheppard v. Maxwell, 384 U.S. 333 (1966) (inflammatory pretrial publicity); Estes v. Texas, 381 U.S. 532 (1965) (in-court television coverage); Turner v. Louisiana, 379 U.S. 466 (1965) (association between jurors and prosecution witnesses); Jackson v. Denno, 378 U.S. 368 (1964) (jury determination of voluntariness of confession).

140. For more on the difference in procedural due process between capital and noncapital cases, see Comment, *The Impact of a Sliding-Scale Approach to Due Process on Capital Punishment Litigation*, 30 SYRACUSE L. REV. 675 (1979). For more on the application of *Beck v. Alabama* to noncapital cases, see Comment, *Constitutional Law-Eighth Amendment-Capital Punishment-State Capital Punishment Statutes-Procedural Safeguards*-Beck v. Alabama, 19 DUQ. L. REV. 539 (1981); Beck v. Alabama: *The Right To A Lesser Included Offense Instruction In Capital Cases*, 1981 WIS. L. REV. 560.

141. *See, e.g.*, State v. Bourn, 139 Vt. 14, 421 A.2d 1281 (1980) (for defendant to be entitled to jury instruction on lesser included offense, elements of lesser offense must be included within greater offense); Johnson v. State, 265 Ind. 470, 474-75, 355 N.E.2d 240, 242 (1976) (weight of authority is that "if the defendant could not be convicted of a lesser-included offense, the instructions upon such offense are properly refused"), *cert. denied*, 430 U.S. 915 (1977); United States *ex rel.* Deflumer v. Mancusi, 443 F.2d 940, 942 (2d Cir.) (same), *cert. denied*, 404 U.S. 914 (1971); Holloway v. State, 362 So. 2d 333 (Fla. Dist. Ct. App. 1978) (same).

142. *E.g.*, Stevenson v. United States, 162 U.S. 313, 323 (1895) (defendant entitled to instruction if

offense instruction is usually decided on a nonconstitutional basis.[143] Some courts, on the other hand, have cited *Keeble* and *Beck* for the proposition that there is *not* a due process right to a lesser included offense instruction.[144]

2. Some Questions Raised by Applying Beck *to Noncapital Cases*

The prospect of applying the *Beck* holding to noncapital cases raises three threshold questions. First, because the holding is stated in terms of "lesser included offenses," should *Beck* be limited by a state's choice of a lesser included offense theory?[145] Second, should *Beck* be applicable to all lesser included offense situations, or are there some cases in which the reliability of the fact-finding process would not be compromised when a warranted lesser included offense instruction is not given? Third, should *Beck* be extended beyond the lesser included offense doctrine to any situation in which evidence of other crimes may effect the reliability of the fact-finding process?

In response to the first question, whether states should define lesser included offenses under *Beck*, the rationale of the decision should indicate that the due process requirement of a lesser included offense instruction should not be limited by the state's choice of a lesser included offense theory. Although the *Beck* holding is stated in terms of a "lesser included offense," a state should not be free to define that phrase in any way it desires. This is because the *Beck* Court was concerned with the effect of preclusion of lesser included offense instructions, rather than the reason or method of preclusion.[146] Thus, whether a state chooses to preclude an

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some evidence supports lesser included offense); Berra v. United States, 351 U.S. 131, 134 (1956) (entitlement to instruction not doubted); People v. Scarborough, 49 N.Y.2d 364, 402 N.E.2d 1127 (1980) (instruction given if reasonable view of evidence supports lesser included offense); State v. Troynack, 174 Conn. 89, 384 A.2d 326 (1977) (instruction given if information and bill of particulars contain lesser included offense); People v. Jones, 395 Mich. 379, 236 N.W.2d 461 (1975) (instruction given if sufficient evidence exists); FED. R. CRIM. P. 31(c) (federal defendant has right to instruction). *Contra* People v. Geiger, 35 Cal. 3d 310, ——, 674 P.2d 1303, 1307 (1984) (raising due process issue based on state constitution). *See, e.g.,* State v. Klimas, 94 Wis. 2d 288, 308, 288 N.W.2d 157, 167 (1979) ("[i]t is not clear that an issue of constitutional magnitude would never be presented by a trial court's failure to submit instructions on a lesser included offense"); *In re* Jordan, 390 So. 2d 584, 585 (Miss. 1980) (lesser included offense instruction appropriate if justified by evidence); Bishop v. Mazcurkiewicz, 634 F.2d 724, 726 (3d Cir. 1980) (in murder prosecution, involuntary manslaughter charge given only when requested and if supported by evidence); Gates v. State, 424 A.2d 18, 22 (Del. 1980) (lesser included offense instruction permitted if evidence so warrants); Brewer v. Overberg, 624 F.2d 51, 52 (6th Cir. 1980) (defendant may be deprived of due process right upon failure to instruct jury on lesser included offense); People v. Cramer, 85 Ill. 2d 92, 95,421 N.E.2d 189, 190 (1981) (citing *Keeble* and *Beck* as proper authorities for circumstances under which a lesser included offense instruction should be given).

143. Courts first ask whether the lesser offense is actually a lesser included offense, under the test used in the jurisdiction. *See supra* notes 15-39 and accompanying text (discussing various tests for determining lesser included offenses). Courts then ask whether the evidence warrants the instruction. *See* Beck v. Alabama, 447 U.S. at 636 (discussing uncertainty of state's case).

144. *See, e.g.,* State v. Piper, 261 N.W.2d 650, 653 (N.D. 1978) (no constitutional right guaranteeing defendant jury instruction on lesser included offense); Commonwealth v. Garcia, 474 Pa. 449, —— n.9, 378 A.2d 1199, 1213 n.9 (1977) (Nix, J., dissenting) (same).

145. This raises the possibility that the *Beck* principle may vary from state to state.

146. In *Beck*, by statutorily precluding the lesser included offense charge, Alabama could be said to

instruction by statute or by choice of a particular lesser included offense theory, if the effect of the preclusion is the same as in *Beck*, the state's method of preclusion is prohibited by *Beck*.[147]

Further, as used in *Beck*, the term "lesser included offense" is interpreted to be the equivalent of the cognate-evidence theory, and therefore that theory of lesser included offenses, with its emphasis on the evidence actually presented at trial, must be used to determine whether due process requires a lesser included offense instruction.[148] The *Beck* Court found a due process violation because of the effect that evidence establishing a lesser included offense had on the jury deliberations.[149] Thus, the lesser included offense instruction required by due process in *Beck* must be one that is determined on the basis of the evidence adduced at trial.[150] Because neither the strict statutory interpretation theory nor the cognate-pleading theory is based on the evidence,[151] a lesser included offense instruction, required by due process, cannot be limited by a state's adoption of either of those theories.

The *Beck* Court's prohibition on use of the strict statutory interpretation theory or cognate-pleading theory, was recognized by the Ninth Circuit Court of Appeals when it was confronted with a choice of lesser included offense tests in *United States v. Johnson*.[152] In adopting the inherent relationship test over the prosecution's suggested cognate-pleading test, the court stated that the artificiality of the

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have, in effect, adopted a policy that no lesser included offenses existed for capital offenses.

147. For example, in a trial for larceny of a motor vehicle, the evidence may indicate that the defendant clearly operated the motor vehicle without the owner's consent but also did not intend to permanently deprive the owner of the motor vehicle. In a jurisdiction using the strict statutory interpretation theory of lesser included offenses, operating a motor vehicle without the owner's consent is not a lesser included offense. An instruction, therefore, would not be given because the greater offense does not contain all the elements of the lesser offense. *See supra* notes 15–20 and accompanying text (describing strict statutory interpretation approach). *See, e.g.*, Brown v. Ohio, 432 U.S. 161 (1977) (defendant tried separately for "joyriding" and auto theft). The jury is thus put in the same position as the jury in *Beck*: either acquit on the greater charge and let the defendant go unpunished or convict on the greater charge even though not convinced beyond a reasonable doubt of the intent element.

148. The inherent relationship theory may also avoid due process problems. *See infra* notes 148–51 and accompanying text (discussing Ninth Circuit's adoption of inherent relationship test).

149. Beck v. Alabama, 447 U.S. at 642 (quoting Jacobs v. State, 361 So. 2d 640 (Ala. 1978) (Shores, J., dissenting), *cert. denied*, 439 U.S. 1122 (1979)) (evidence has subtle, unpredictable influence on jury).

150. Any doubt about this point was removed in Hopper v. Evans, 456 U.S. 605 (1982), in which the Supreme Court held that under *Beck* due process does not require a lesser included offense instruction if it is not warranted by the evidence. Hopper testified at a grand jury hearing that he had killed others, that he had no remorse for the murder for which he was now accused, and that he would kill again. *Id.* at 606. Later, at trial, Hopper testified that he had no intention of reforming and would return to a life of crime if released. *Id.* at 607. Such strong evidence did not warrant an instruction on the lesser included offense. Like *Beck*, *Hopper* was a capital offense case. *Id.*

151. The strict statutory interpretation theory requires that the charged offense contain all the elements of the lesser included offense. The cognate-pleading theory requires the accusatory pleading to allege the fact necessary to establish the lesser included offense. The strict statutory interpretation theory, then, focuses on the elements of the crime charged and the cognate-pleading theory focuses on the words of the pleadings; neither theory is particularly concerned with the actual evidence presented in the case. *See supra* notes 15–29 and accompanying text (discussing various theories).

152. 637 F.2d 1224 (9th Cir. 1980).

prosecution's test was "unresponsive to the underlying purpose of the lesser included doctrine."[153] The court recognized one of those purposes as preventing the conviction on the greater offense because the jury was convinced from the evidence that the defendant was guilty of some lesser offense.[154] Although the court did not specifically hold that the inherent relationship test was constitutionally required, it adopted that test precisely because the application of the cognate-pleading test would create the very situation which the *Beck* decision held violated due process.[155] The second question raised by *Beck* concerns whether due process requires that a lesser included offense instruction be given every time the evidence so warrants or whether the instruction should only be given when failure to give it is clearly prejudicial to the jury. Because *Beck* actually involved homicide, the most serious criminal activity, the *Beck* jury easily might have been influenced by the prospect of the defendant escaping punishment altogether.[156] However, with less serious offenses the possibility of the defendant going unpunished seems to have less of an effect on the jury. At some point, then, the effect of freeing the defendant diminishes to such an extent that no due process violation results from failure to give the lesser included offense instruction.[157]

Certainly a per se rule identifying when the instruction must be given would be easiest to apply. Given the Supreme Court's reluctance to adopt per se rules in the due process area,[158] however, the Court most likely will only require a lesser

153. *Id.* at 1238.

154. *Id.*

155. Although the Ninth Circuit adopted the inherent relationship test because it avoided the due process problem recognized in *Keeble* and *Beck*, the court could have reached the same result by adopting the cognate-evidence test. *See id.* at 1234–37. Thus, the decision does not stand for the proposition that only the inherent relationship test could pass muster under the rationale of *Keeble* and *Beck*.

The California Supreme Court relied in part on *Johnson* in People v. Geiger, 35 Cal. 3d 310, 674 P.2d 1303 (1984). The *Geiger* court held that a defendant is entitled to an instruction on a lesser related but not necessarily included offense. Such an instruction may be given when the lesser offense is closely related to the offense charged, the evidence of its commission is presented, and the defendant's theory of defense is consistent with such a finding. The California "lesser related" theory would seem to require an instruction on offenses that do not qualify as lesser included offenses under any of the three approaches discussed herein. The *Geiger* court's reliance on *Johnson* indicates that California may now simply adopt the inherent relationship test for lesser included offenses. *See id.* — —, 674 P.2d at 1309.

156. Beck v. Alabama, 447 U.S. at 642–43. *See* Jacobs v. State, 361 So. 2d 640, 652 (Ala. 1978) (jury unlikely to free defendant guilty of violent act).

157. *See infra* note 156 (crimes not inherently evil may have little impact on jury).

158. Unlike the application of other constitutional provisions, the Supreme Court has generally not adopted per se rules in the area of due process. For example, in Lassiter v. Department of Social Servs., 452 U.S. 18, 27 (1981), the Court employed a balancing test, rather than a per se rule, in the context of the right to counsel at parental status termination proceedings, to which the sixth amendment right to counsel does not apply. The Court held that due process does not require the appointment of counsel at every such proceeding involving indigent parents. Other cases in the right to counsel area illustrate the Court's use of a per se rule in the sixth amendment context, though not in the due process context. *Compare* Betts v. Brady, 316 U.S. 455 (1942) (due process requires balancing test to determine right to counsel for indigent state defendants) *with* Argersinger v. Hamlin, 907 U.S. 25, 37 (1972) (deprivation of liberty of defendant establishes per se sixth amendment right to appointed counsel) *and* Gideon v. Wainwright, 372 U.S. 335, 339 (1963) (establishing per se sixth amendment right to counsel for state defendants). Similarly, in the pretrial identification area, the Court has established a per se rule with respect to the

included offense instruction when there is a likelihood that the reliability of the fact-finding process would otherwise be compromised.[159] This is sensible because it likewise cannot be assumed that the jurors will always know that some offense other than the charged offense may have been committed. In the robbery-homicide situation in *Beck*, the jurors probably knew that Beck had committed some criminal wrong: if not homicide, at least robbery. Jurors, however, may not always know that the defendant's conduct is criminally wrong, because the evidence may indicate a technical lesser included offense.[160] Because the jurors may not realize that a technical crime was committed, it cannot be assumed that the reliability of the fact-finding process has been compromised. This is true irrespective of the seriousness of the greater crime. Thus, it would seem that a proper statement of the applicable standard in *Beck* must also be qualified by the requirement that the jury be likely to know that the defendant has committed some criminal wrong other than that for which an instruction has been given.

The third question raised by *Beck* is whether it should be extended beyond the lesser included offense doctrine to other situations in which evidence of other crimes, which are not lesser included offenses, may affect the reliability of the fact-finding process. Because the jury cannot be presumed to know what offenses are actually lesser included ones, it is logical to assume that a jury could be influ enced by evidence of any other possible offenses committed by the defendant, regardless of whether the offenses would be lesser included offenses under any theory. If the jury is not instructed that it can convict the defendant of such offenses, it may be more willing to find him guilty of the charged offense, rather than let him go unpunished, even though not convinced beyond a reasonable doubt of his guilt on the charged offense.[161] Although this danger may be most acute in the lesser included offense situation, logically, it is just as likely to arise whenever there is any evidence that the defendant committed some other uncharged and uninstructed offense.

Evidence of other crimes, not just lesser included offenses, can be introduced in a trial for a number of permissible purposes. Prior convictions may be introduced to impeach the defendant's credibility should he elect to testify.[162] Evidence of

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sixth amendment right to counsel, United States v. Wade, 388 U.S. 218, 236-37 (1967), but it has adopted a balancing approach with respect to the determination of the suggestiveness of the identification, Neil v. Biggers, 409 U.S. 188, 199 (1972).

159. *See* Hopper v. Evans, 456 U.S. at 610 (interpreting *Beck* to require lesser included offense instruction only when evidence supports such a verdict); Beck v. Alabama, 447 U.S. at 643 (irrelevant considerations introduce uncertainties and unreliability into fact-finding process).

160. Identifying those offenses that a jury is likely to know are crimes and which of these are likely to affect deliberations may be difficult. One possible distinction is between crimes that are inherently evil, that is, *mala in se*, and crimes that are not inherently evil but are prohibited by law, that is, *mala prohibita*. *See* W. LAFAVE AND A. SCOTT, CRIMINAL LAW § 6, at 29 (1972) (discussing distinction between inherently evil crimes and technical crimes). Jurors will probably be aware that inherently evil crimes are criminal offenses because of the character of the acts. Evidence of such offenses is likely to affect the jury's deliberations. Jurors, however, may not be aware, absent an instruction, that some technical crimes are criminal offenses. It is likely, though, that jurors will know that some technical crimes are illegal. Because the act is not inherently evil, the impact on the jury may be less. The jurors' knowledge that an offense has been committed may, however, be enough to violate the integrity of the fact-finding process.

161. Beck v. Alabama, 447 U.S. at 642 (unavailability of alternate charge encourages jury to convict).

162. *E.g.*, FED. R. EVID. 609 (prior convictions used for impeachment); CAL. EVID. CODE § 788 (West

other crimes may be admitted as part of the *res gestae*, to place the offense charged in context,[163] and to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.[164] Because evidence of other crimes traditionally has been admitted extensively in criminal trials, some limiting procedural device must be established to bring such practice into harmony with the due process problem raised by the *Beck* case.

Because the *Beck* principle may justify requiring instructions on crimes which are not lesser included offenses, but which may nevertheless prejudice the jury, some cut off line must be drawn to keep the doctrine within manageable limits. One solution is to confine application of *Beck* to lesser included offenses. This approach, however, ignores the due process problem inherent in the introduction of evidence of other crimes.

The next possible solution involves the use of the "same transaction test."[165] The prosecution would be required to prosecute all offenses arising out of the same transaction in one trial. The jury would, thus, not be confronted with evidence of offenses committed by the defendant on which they could not convict.

This suggested solution raises the question of whether the court should be able to sentence the defendant on convictions for lesser included offenses or "same transaction" offenses when a defendant requested the instruction and the jury voted to convict on these other offenses. The defendant would request the instruction on those offenses in order to protect his due process right not to have the reliability of the fact-finding process impaired. However, if the defendant had not been given adequate notice of those offenses through the pleadings, he could not have been convicted and sentenced on those offenses.[166] Thus, to sentence him because he has requested the instruction is, in effect, requiring him to give up the due process right to notice to protect the reliability of the fact-finding process.[167]

1966) (same); D.C. CODE ANN. § 14-35 (West 1981) (same); MINN. STAT. ANN. § 609 (West 1980) (same); N.Y. CRIM. PROC. LAW § 60.40 (McKinney 1981) (same). *See generally* MCCORMICK ON EVIDENCE § 43 (2d ed. 1972) (discussing use of prior convictions for impeachment).

163. *E.g.*, State v. Mincey, 130 Ariz. 389, 636 P.2d 637 (1981) (need complete circumstances of crime); State v. Klotter, 274 Minn. 58, 142 N.W.2d 568 (1968) (reasonably close relation in scheme or pattern). *See generally* MCCORMICK ON EVIDENCE § 190 (2d ed. 1972) (discussing use of evidence of other crimes).

164. *E.g.*, FED. R. EVID. 404(b) (proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident); State v. Atkins, 151 N.J. Super. 555, 377 A.2d 718 (1977) (other crimes refute defense of innocent intent or mistake); Green v. Uncle Don's Mobile City, 279 Or. 425, 568 P.2d 1375 (1977) (fraud or similar acts show motive, intent or scienter); Karsun v. Kelly, 258 Or. 155, 482 P.2d 533 (1971) (similar acts show continuing plan). *See generally* WIGMORE ON EVIDENCE §§ 300-305 (3d ed. 1940) (discussing use of evidence of other crimes).

165. This test was originally developed to protect the defendant against double jeopardy, but it is applicable to protecting the reliability of the fact-finding process. Justice Brennan in his concurrence in Ashe v. Swenson, 397 U.S. 436, 453-54 (1970), suggested that "the Double Jeopardy Clause requires the prosecution, except in most limited circumstances, to join at one trial all the charges against a defendant that grow out of a single criminal act, occurrence, episode or transaction." While this same transaction test would prohibit multiple prosecutions, it would not prevent multiple punishments at the same trial for the various individual offenses committed during the "same transaction." *Id.* at 460 n.14. The same transaction test has never been adopted by a majority of the Court.

166. *See supra* notes 40-68 and accompanying text (discussing notice limitation on lesser included offense doctrine).

167. In Simmons v. United States, 390 U.S. 377, 394 (1968), the Court stated that "we find it in-

One solution to this dilemma is to instruct the jury on the lesser included and same transaction offenses, but not allow the court to enter a conviction or to sentence the defendant when lack of notice would have otherwise barred a conviction and sentence. With regard to lesser included offenses, this suggested solution does not harm the state's administration of the criminal justice system. By not providing adequate notice of the lesser included offense in the pleadings, the state is already effectively barred from convicting on that offense at the first trial.[168] Because that offense would also be the "same offense" as the greater, charged offense,[169] double jeopardy would bar any subsequent prosecution.[170] However, with respect to the other "same transaction" offenses, the lack of notice normally would only bar a conviction in the first trial and double jeopardy would not bar subsequent prosecutions.[171] This solution makes the lack of notice also bar subsequent prosecutions. Denying the state an otherwise available opportunity to convict and sentence the defendant for the other same transaction offenses may seem too high a price to pay to protect the defendant's due process right to reliability of the fact-finding process, particularly when another solution may also protect that right. The second suggested solution, like the first, is thus inappropriate, at least with respect to same transaction offenses.

The final suggested solution is to instruct the jurors that even though they may have heard evidence of other offenses on which they have not been instructed, the jury should not assume that this defendant will escape punishment altogether if they acquit him on the charged offense(s) because the defendant may be tried on

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tolerable that one constitutional right should have to be surrendered in order to assert another." The question presented in *Simmons* was whether testimony of a defendant at a suppression hearing given to establish standing to object to illegally seized evidence could also be used against him at trial on the issue of guilt. The Court held that it could not be used at trial, because otherwise the defendant would be "obliged either to give up what he believed, with advice of counsel, to be a valid Fourth Amendment claim, or in legal effect, to waive his privilege against self-incrimination." *Id. See also* Brooks v. Tennessee, 406 U.S. 605 (1972) (invalidating rule requiring defendant to testify as first defense witness, if defendant was to testify at all); Griffin v. California, 380 U.S. 609 (1965) (states prohibited from using defendant's silence to infer guilt). *But see* Jeffers v. United States, 432 U.S. 137 (1977) (no double jeopardy in second trial when defendant opposed government's motion to consolidate lesser included offenses in first trial); United States v. Dinitz, 424 U.S. 600 (1976) (no double jeopardy in second trial when defendant requested mistrial at first trial); McGautha v. California, 402 U.S. 183, 212 (1971) (questioned *Simmons* rationale in holding constitutional rule allowing same jury to convict and sentence; defendant chose between asking for leniency and remaining silent on issue of guilt).

168. *See supra* notes 40–68 and accompanying text (discussing limiting factor of notice). The state, of course, is in control of the pleadings and can avoid the situation by drafting the charging instrument so that it provides sufficient notice. If it does, then the prosecution can request the lesser included offense instruction and the defendant can be convicted and sentenced. The state's failure to provide adequate notice is not harmful, then, because the defendant benefits from the lesser included offense charge and, at the same time, the court disallows conviction or sentence on that charge.

This solution would also require abrogation of the principle of "mutuality": because of the failure to provide notice, only the defendant, not the prosecutor, could request the instruction. *See supra* notes 58–67 and accompanying text (discussing mutuality doctrine).

169. *See supra* notes 85–98 and accompanying text (discussing application of "same offense" test).

170. *See supra* notes 69–74 and accompanying text (discussing double jeopardy).

171. As currently formulated, double jeopardy does not encompass offenses arising from the same transaction. *See supra* note 161 and accompanying text (discussing "same transaction" theory).

those other offenses at a later time.[172] A limiting instruction has long been the solution to undue prejudice resulting from introduction of evidence of other crimes.[173] The proposed instruction, however, must affirmatively inform the jury that the defendant may be tried on other offenses at a later time.[174] Any instruction short of this would amount to another instruction to disregard the evidence, a solution not considered sufficient in *Beck*.

3. Statutes of Limitations and the Right to a Lesser Included Offense Instruction

A potential due process violation, similar to that in *Beck*, arises when an otherwise valid lesser included offense instruction is precluded because a prosecution for that offense is barred by a statute of limitations. Most courts that have dealt with the issue have ignored the due process problem and instead have focused on whether a defendant can waive the statute of limitations defense in order to receive a lesser included offense instruction.[175] The majority rule is that a person cannot be convicted of a lesser included offense in a prosecution for a greater crime commenced after the statute of limitations on the lesser offense has run.[176] Based on this rule, most jurisdictions refuse to give an otherwise valid lesser included offense

172. Such an instruction should also be available for actual lesser included offenses for which adequate notice has not been given. If it were decided that a defendant would have to waive his right to notice in order to get the lesser included offense instruction, *see supra* notes 162–67 and accompanying text, he may choose this suggested instruction instead. If he does waive notice and obtains the instruction he runs some risk that the jury will convict him of the lesser crime, which the jury could not have done if the defendant had not waived notice. Thus, if the defendant is satisfied that this suggested instruction will alleviate the due process problem, he may desire this instruction as opposed to the possibility of a conviction on the lesser included offense.

Such an instruction, however, in the lesser included offense area would not literally be true. The defendant could not be tried on the lesser included offense at a later time because a subsequent prosecution would be barred by double jeopardy. *See supra* notes 81–95 and accompanying text (discussing "same offense" test for double jeopardy). Even though inaccurate, the instruction is still necessary to satisfy the due process problem recognized in *Beck*. An instruction that only tells the jury to disregard evidence of other crimes simply does not go far enough. The concern is that the jury will not follow such an instruction. Thus, it is necessary to go further and assure the jurors that the defendant may be tried on those other offenses at a later time even if that is not literally true.

173. *E.g.*, FED. R. EVID. 105 (evidence used for impeachment cannot be used for substantive issues); *see supra* notes 158–60 and accompanying text (discussing use of evidence of other crimes).

174. Such an instruction would be consistent with *Beck*. In *Beck*, a crucial factor was that the jury was specifically given the opposite instruction: if the defendant were acquitted he would go free. The jury may have been influenced by the possibility of the defendant going free. Suggesting to the jury that the defendant will not go free removes this prejudice. Beck v. Alabama, 447 U.S. at 630.

175. *See, e.g.*, Chaifetz v. United States, 288 F.2d 133 (D.C. Cir. 1960) (where defendant charged with felony not barred by statute of limitations, court not in error for failing to submit to jury lesser included offense where prosecution of lesser offense was barred by statute of limitations), *rev'd in part on other grounds*, 366 U.S. 209 (1961); Padie v. State, 557 P.2d 1138 (Alaska 1976) (in seeking time-barred instruction on manslaughter, defendant does not waive defense of statute of limitations); State v. Stillwell, 175 N.J. Super. 244, 418 A.2d 267 (App. Div. 1980) (defendant's conviction for manslaughter barred by statute of limitations even though he was indicted and tried for murder, for which there was no statute of limitations); Comment, *Waiver of Limitations in Criminal Prosecutions*, 90 HARV. L. REV. 1550 (1977) ("someone facing trial on a charge with a long statute of limitations might wish to waive the shorter statute on a lesser included offense") (footnote omitted) [hereinafter cited as Comment, *Waiver of Limitations*].

176. *E.g.*, Chaifetz v. United States, 288 F.2d 133 (D.C. Cir 1960), *rev'd in part on other grounds*, 366

instruction when requested by the defendant.[177] The effect of preclusion of such an instruction because of a statute of limitations is no different than the effect of the preclusion in *Beck*.[178] *Beck* therefore seems to require a lesser included offense instruction on a time barred offense when the instruction is requested by the defendant and warranted by the evidence.[179]

Analytically, the question of whether a lesser included offense instruction should be given should be kept separate from the question of whether courts have jurisdiction to convict and sentence on the lesser included offense.[180] Courts

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U.S. 209 (1961); Padie v. State, 557 P.2d 1138 (Alaska 1976); People v. Morgan, 75 Cal. App. 3d 32, 141 Cal. Rptr. 863 (1977); Holloway v. State, 362 So. 2d 333 (Fla. Dist. Ct. App. 1978); State v. Chevlin, 284 S.W.2d 563 (Mo. 1955); State v. Aircraft Supplies, Inc., 45 N.J. Super. 110, 131 A.2d 571 (1957); People v. Soto, 76 Misc. 2d 491, 352 N.Y.S.2d 144 (1974); Hickey v. State, 131 Tenn. 112, 174 S.W. 269 (1915); McKinney v. State, 96 Tex. Crim. 342, 257 S.W. 258 (1923); State v. Crank, 105 Utah 332, 142 P.2d 178 (1943); State v. King, 140 W. Va. 362, 84 S.E.2d 313 (1954).

177. *See, e.g.*, cases cited *supra* note 176.

178. In both instances, the reliability of the fact-finding process is compromised by the possibility that the jury may convict on the greater offense, not because it is convinced beyond a reasonable doubt that the defendant committed that offense, but because it is convinced that he committed some offense. *See supra* notes 119-21 and accompanying text (discussing effect of failure to give lesser included offense instruction).

179. In Spaziano v. State, 393 So. 2d 1119 (Fla.), *cert. denied*, 454 U.S. 1165 (1981), *cert. granted*, 52 U.S.L.W. 3509 (Jan. 9, 1984), involving a time-barred lesser included offense, the Supreme Court of Florida refused to apply *Beck* because "*Beck v. Alabama*... did not involve lesser included offenses for which the statute of limitations had run but instead concerned an express statutory prohibition on instructions for lesser included offenses when a defendant was charged with a capital offense." *Id.* at 1122. By the time this Article is published, the Supreme Court may have decided the issue of the time-barred lesser included offense. The Court granted certiorari in the *Spaziano* case on the question: "Does the death sentence imposed on petitioner violate the Eighth and Fourteenth Amendment principles of Beck v. Alabama, 447 U.S. 625 (1980), where the jury in this capital prosecution was not instructed as to any lesser included offenses because statute of limitations had run as to those lesser included offenses?" 52 U.S.L.W. 3540 (Jan. 9, 1984).

180. Justices Marshall, Brennan and Blackmun have suggested that the question of the ability of a court to sentence on the time barred offense must be kept separate from the question of whether the defendant has a due process right to actually receive the instruction. Spaziano v. Florida, 454 U.S. 1037, 1040 (1981) (Marshall, J., dissenting from denial of certiorari), *cert. granted*, 52 U.S.L.W. 3509 (Jan. 9, 1984). In his dissent from denial of certiorari in the case, which involved the failure of a trial court to give an instruction on a time-barred lesser included offense, Justice Marshall argued that a defendant "should not be penalized because the State did not bring him to trial within the time prescribed by the state legislature for lesser-included offenses." *Id.* The instruction should be given and

> [a]t this point, the court must decide as a matter of law whether the statute of limitations prevents it from sentencing the [defendant] for the lesser crime. The court should not be permitted to avoid this legal question by refusing to allow the jury to decide whether the defendant is guilty only of a lesser offense.

Id. Justice Brennan joined Justice Marshall's dissent in the denial of certiorari in *Spaziano*.

In a dissent from a denial of certiorari on a similar issue, Justice Blackmun, joined by

should first ask whether due process requires a lesser included offense instruction; if so, then courts must ask whether they have the power to convict and sentence on the lesser included offense. Once the issue is phrased in this manner, two questions must be addressed. First, must a lesser included offense instruction be given when the court cannot sentence on the lesser included offense? This question was raised in the Eighth Circuit in *Felicia v. United States*.[181] Felicia argued that while *Keeble* required that he receive a lesser included offense instruction, the fact that the lesser included offense was not listed in the Major Crimes Act deprived the court of jurisdiction to sentence him on the lesser offense.[182] The *Felicia* court held that the trial court had jurisdiction to impose the sentence, thereby avoiding a decision on whether the lesser included offense instruction would be required absent jurisdiction to sentence. The Fifth[183] and Ninth Circuits,[184] in contrast, have implied that an instruction might be required to protect the potential due process interest recognized in *Keeble*.

Once the first question is answered and due process requires a court to give a lesser included offense instruction, the second question must be addressed. If a jury convicts on the time barred lesser included offense, can the court then sentence the defendant? The answer to this question will influence the defendant's decision about whether he wants the lesser included offense instruction. The federal courts of appeals are split on the issue. Some hold that the statute of limitations is jurisdictional; others describe the statute of limitations as an affirmative defense that may be waived.[185] If a defendant is required to waive the statute of limitations when

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Justices Marshall and Brennan, stated that "[w]hether the trial court properly may enter a judgment of guilt should the jury convict for a [time-barred] lesser included offense seems to me a separate, *legal* matter with which the fact-finder need have no concern." Holloway v. Florida, 449 U.S. 905, 908 (1980) (emphasis in original).

181. 495 F.2d 353 (8th Cir.), *cert. denied*, 419 U.S. 849 (1974). The case involved a prosecution under the Major Crimes Act similar to that in *Keeble*. *Id.* at 355.

182. *Id.* at 354.

183. United States v. John, 587 F.2d 683, 688 (5th Cir. 1979).

184. United States v. Johnson, 637 F.2d 1224, 1244 (9th Cir. 1980).

185. The Sixth and the Tenth Circuits have held that the statute of limitations is a jurisdictional bar which may be raised at any time by a criminal defendant. Benes v. United States, 276 F.2d 99, 109 (6th Cir. 1960); Waters v. United States, 328 F.2d 739, 743 (10th Cir. 1964). The Second, Third, Fourth, Fifth, Seventh, Ninth and D.C. Circuits have held it to be an affirmative defense that may be waived. United States v. Doyle, 348 F.2d 715, 719 (2d Cir.), *cert. denied*, 382 U.S. 843 (1965); United States v. Walden, 253 F.2d 551, 555 (3d Cir.), *cert. denied*, 356 U.S. 973 (1958); Capone v. Aderhold, 65 F.2d 130, 131 (5th Cir. 1933); United States v. Franklin, 188 F.2d 182, 187 (7th Cir. 1955); United States v. Akmakjian, 647 F.2d 12, 14 (9th Cir.), *cert. denied*, 454 U.S. 964 (1981); United States v. Wild, 551 F.2d 418, 422 (D.C. Cir.), *cert. denied*, 431 U.S. 916 (1977).

In a recent decision, United States v. Williams, 684 F.2d 296 (4th Cir. 1982), *cert. denied*, 103 S. Ct. 739 (1983), the Fourth Circuit held that when the defendant requests and obtains a charge on a lesser included offense, he has waived the statute of limitation defense and can be sentenced on a conviction for that offense. The court reasoned that if the instruction had not been given "Williams would have been in the unenviable position of facing a verdict of guilty or not guilty on a capital offense." *Id.* at 299. *Beck*, however, requires an instruction as a matter of due process precisely because a defendant should not be placed in such an "unenviable" position.

he requests a lesser included offense instruction, the defendant is forced to choose between his due process right and the statute of limitations defense.[186]

A solution more in keeping with the spirit of *Beck* and the rationale behind the statute of limitations is simply to preclude the entry of a judgment of conviction on the time-barred lesser included offense. This solution does no violence to the criminal justice system because it retains the primary feature of that system, namely, determining what offense the defendant has committed. At the same time, it also protects the defendant's due process right by not inviting the jury to convict on the greater, charged offense because they are convinced that the defendant committed a lesser offense for which they may not now convict him. If the jury determines that the defendant only committed the time barred lesser included offense, no injustice results from the court's inability to sentence him. This is because the legislature, by establishing the statute of limitations, has already determined that after a certain period of time the crime should go unpunished.[187]

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186. Although it appears that a defendant need only give up a statutory right, the statute of limitations defense, to exercise his due process right, and the situation is thus unlike that prohibited in Simmons v. United States, 390 U.S. 377, 394 (1968) (exercise of one constitutional right required waiver of another constitutional right), this appearance is deceptive. On closer examination, the coerced waiver of the statute of limitations defense is analogous to an ex post facto law. U.S. CONST. art. I, § 9, cl. 3 (Congress prohibited from making ex post facto laws); *id.* at art. I, § 10, cl. 1 (states prohibited from making ex post facto laws). Now the coerced waiver is raised to the level of a constitutional violation.

Although the legislature can extend the period of limitation for an offense "without running afoul of the ex post facto clause, providing the period has not already run," United States v. Richardson, 512 F.2d 105, 106 (3d Cir. 1975), to extend the period of limitation *after* the statute has run is a violation of the ex post facto clause. *Id.*; United States v. Kurzenknabe, 136 F. Supp. 17, 23 (D.N.J. 1955). The effect of a coerced waiver of a statute of limitations defense is the same as the effect achieved when a legislature tries to extend the statute after it has run. Due process prohibits the courts from doing that which the legislature is prohibited from doing by the ex post facto clause. Bouie v. City of Columbia, 378 U.S. 347 (1964). Thus, to require a defendant to waive the statute in order to avail himself of his due process right to a lesser included offense instruction is to burden the exercise of one constitutional right by the required surrender of another.

This does not mean that there may not be other situations in which a defendant may validly waive a statute of limitations. United States v. Wild, 551 F.2d 418 (D.C. Cir.) (defendant executed valid waiver of statute of limitations to continue plea bargaining), *cert. denied*, 431 U.S. 416 (1977); *see* Comment, *Waiver of Limitations*, *supra* note 175, at 1557 (defendant may wish to waive statute of limitations to go to trial to clear his good name). Such waiver, even if made after the statute has run, does not involve the clash of two constitutional rights.

187. The two major policies underlying statutes of limitations in criminal cases are: 1) that a defendant should not be forced to defend against a charge after the evidence has grown stale and 2) that the government must move swiftly in criminal cases. United States v. Wild, 551 F.2d 418, 423-44 (D.C. Cir.), *cert. denied*, 431 U.S. 416 (1977). Another policy underlying statutes of limitations isto afford the defendant protection against the power of the state. Comment, *Waiver of Limitations*, *supra* note 175, at 1554. *See also* Developments in the Law, *Statutes of Limitation*, 63 HARV. L. REV. 1177, 1185-86 (1950).

Requiring a waiver of the statute perhaps does no violence to the first policy, stale evidence, because the defendant already must defend against the greater offense on equally stale evidence. Waiver, however, would clearly violate the other two policies. Because prosecution for the greater offense was not begun until after the statute had run on the lesser offense, the government has not moved swiftly. To require a waiver in this situation would not encourage the government to move swiftly, because the government could ignore the statute of limitations on the lesser offense, knowing that in a prosecution for the greater offense, the defendant will request a lesser included offense instruction and thus be forced to

CONCLUSION

The lesser included offense doctrine has several theories of application which contribute to the difficulty of ascertaining and applying any particular theory in a specific case. Despite this already difficult task, courts must be aware of the constitutional limitations upon the lesser included offense doctrine.

While a state may be free to define its own theory of lesser included offenses, a state is not free to contravene the constitutional limitations of notice, double jeopardy and due process. If a state, for example, uses the cognate-evidence or inherent relationship test the prosecutor may be barred from seeking a lesser included offense instruction unless the accusatory pleading provided sufficient notice. A later prosecution for lesser included offenses may also be barred by the double jeopardy clause when the lesser included offense is the "same offense" as the greater offense. In addition, the *Beck* due process principle may require that the defendant be given a lesser included offense instruction to which the prosecutor may not be entitled. Finally, *Beck* may require an instruction, when warranted by the evidence, on offenses that are not lesser included offenses.

Although the *Beck* due process concern with reliability of the fact-finding process is stated in terms of lesser included offenses, its rationale indicates that it cannot be limited to lesser included offenses. *Beck* should be extended to all situations in which evidence of same transaction offenses is presented to the jury when the jury is likely to know some criminal offense has been committed and the reliability of the fact-finding process is reasonably likely to be affected. The reliability of the fact-finding process can be protected by requiring, upon defendant's request, an instruction on actual lesser included offenses, under the cognate-evidence test, or an instruction that same transaction offenses be disregarded because the defendant may be tried on them at a later time.

Although these constitutional limitations may place extra burdens on the courts, such vitally important constitutional interests can be protected within manageable limits and without unduly interfering with the administration of the criminal justice system. In any event, the many important questions left open by the *Beck* decision should provide fertile ground for litigation in this area for many years to come.

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waive the statute of limitations. Perhaps most disturbing is the potential abuse states might exercise in their power if such waivers were required. For example, if a defendant probably only committed a time-barred lesser included offense, a prosecutor might be tempted to charge the greater offense in the hope of coercing the defendant into requesting an instruction on the lesser included offense, on which the prosecution could not have obtained a conviction without the defendant's waiver of the statute of limitations.