

DOUBLE JEOPARDY IMPLICATIONS OF THE USE OF VICARIOUS
LIABILITY IN THE SUCCESSIVE PROSECUTIONS OF
CONSPIRACY AND THE RELATED SUBSTANTIVE
CHARGE

United States v. Rosenberg, 888 F.2d 1406 (D.C. Cir. 1989), *reh'g denied*, 894 F.2d 1395 (1990)

In *United States v. Rosenberg*¹ the United States Court of Appeals for the District of Columbia Circuit held that double jeopardy² barred the government from pursuing a conviction for a substantive crime based on a theory of vicarious liability when the defendants were convicted in a previous proceeding of conspiracy to commit that crime.³

Rosenberg and her codefendants⁴ were convicted of conspiracy to pos-

1. 888 F.2d 1406 (D.C. Cir. 1989), *reh'g denied*, 894 F.2d 1395 (1990).

2. "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . .," U. S. CONST. amend. V, cl. 2. See generally M. FRIEDLAND, *DOUBLE JEOPARDY* (1969); Thomas, *An Elegant Theory of Double Jeopardy*, 1988 U. ILL. L. REV. 826; Comment, *Twice in Jeopardy*, 75 YALE L.J. 262 (1965).

3. Conspiracy to commit a crime and commission of a crime are distinct offenses. See *Ianelli v. United States*, 520 U.S. 770 (1975). The *Ianelli* Court stated that Congress intends, in the absence of express language to the contrary, that the distinction between the conspiracy and substantive offense be maintained. See also *Pereira v. United States*, 347 U.S. 1 (1954); *Pinkerton v. United States*, 328 U.S. 640 (1946); *United States v. Kalish*, 734 F.2d 194 (5th Cir. 1984), *cert. denied*, 469 U.S. 1207 (1985); *United States v. McCullah*, 745 F.2d 350 (6th Cir. 1984); *United States v. Brooklier*, 637 F.2d 620 (9th Cir. 1980), *cert. denied*, 450 U.S. 980 (1981); *United States v. Cruz*, 568 F.2d 781 (1st Cir. 1978), *cert. denied*, 444 U.S. 898 (1979); *United States v. Boyle*, 482 F.2d 755, 756 (D.C. Cir.), *cert. denied*, 414 U.S. 1076 (1973). The rationale for this principle is that the essential act in a conspiracy, the agreement to do the wrong, is at least as worthy of punishment as the substantive crime itself. See *Callanan v. United States*, 364 U.S. 587 (1961) (to remove the determination that cumulative punishment can be given for both conspiracy and the substantive crime would require specific statutory language to that effect); *Clune v. United States*, 158 U.S. 590 (1895) (legislature can make the punishment for conspiracy even more severe than that for the substantive act).

The Supreme Court established the vicarious liability doctrine in *Pinkerton v. United States*, 328 U.S. 640 (1946). The doctrine allows co-conspirators to be convicted of the underlying substantive offense solely on evidence of participation in the conspiracy when a co-conspirator is convicted of the substantive crime. See *infra* note 27 and accompanying text.

4. *Rosenberg*, 888 F.2d at 1407. Defendants Blunk and Rosenberg were arrested when police saw them unloading a large quantity of explosives into a storage area. *Id.* They were convicted in the District Court for the District of New Jersey on nine counts of conspiracy to possess unregistered firearms, explosives, and false identification along with several substantive counts related to the acts charged in the conspiracy. *Id.* They were sentenced to 58 years in prison. *Id.*

Defendant Berkman was arrested six months later on similar charges. He was convicted in the District Court for the Eastern District of Pennsylvania and sentenced to ten years in prison and five years probation. *Id.*

sess explosives, unregistered firearms, and false identification. The appellees later were indicted on four substantive counts of bombing.⁵ The government pursued the substantive charges under a theory of vicarious liability, based on the earlier conspiracy convictions.⁶

The district court dismissed the indictments on double jeopardy grounds, reasoning that the bombing prosecution would consist of the "same actual evidence" presented at the conspiracy trial.⁷ The Circuit Court of Appeals for the District of Columbia agreed with the district court that double jeopardy bars the use of vicarious liability to prosecute a defendant for a substantive offense when the defendant was previously convicted of conspiracy.⁸ The D.C. Circuit, however, disagreed with the lower court's theory and reversed and remanded.⁹

The Supreme Court in *Brown v. Ohio*¹⁰ articulated the test to determine whether double jeopardy bars a prosecution. After a conviction for joyriding,¹¹ the defendant in *Brown* was indicted for auto theft, based on

5. 18 U.S.C. § 844(f) (1988 & 1989 Supp.). The defendants were also listed as unindicted co-conspirators in the conspiracy to commit the bombings. *Rosenberg*, 888 F.2d at 1408. The bombings occurred at the United States Capitol, the National War College Building at Fort McNair, and the Computer Center and Officer's Club at the Washington Navy Yard. *Id.*

6. *Id.* Apparently the government lacked evidence directly linking the defendants to the bombings. *Id.*

The previous conspiracy trials precluded the government from indicting the defendants for conspiracy to bomb. *Id.* The double jeopardy clause bars "pile on" applications of the conspiracy doctrine. *Id.* (citing *Braverman v. United States*, 317 U.S. 49 (1942) (a single agreement with multiple objects may only be prosecuted as a single conspiracy)). See generally Note, "Single vs. Multiple" Criminal Conspiracies: A Uniform Method of Inquiry for Due Process and Double Jeopardy Purposes, 65 MINN. L. REV. 295 (1981).

7. *United States v. Whitehorn*, 710 F. Supp. 803 (D.D.C. 1989).

8. The court noted that the government could prosecute the appellees under theories of direct participation or aiding and abetting the substantive crime. *Rosenberg*, 888 F.2d at 1413.

9. The court rejected the "same actual evidence" test and adopted a standard of whether proof of the substantive offense and proof of the conspiracy "in the abstract" required the same evidence. *Id.* at 1412 (emphasis in original).

10. 431 U.S. 161 (1977). The *Brown* Court expanded a test developed in *Blockburger v. United States*, 284 U.S. 299 (1932). In *Blockburger*, the defendant sold morphine not contained in its original packaging and without a written order. Both actions were separate statutory offenses. *Id.* at 301. The Court held that the appropriate double jeopardy test is whether one offense requires proof of an element that the other does not. Therefore, the defendant in *Blockburger* could be prosecuted on both of the charges because they contained different statutory elements. *Id.* at 304. See also *Gavieres v. United States*, 220 U.S. 338 (1911) (defendant guilty of insulting a public official even though he had previously been convicted of disorderly conduct arising out of the same occurrence).

The *Gavieres* and *Blockburger* Courts applied the same analysis even though *Blockburger* involved a single trial and *Gavieres* involved successive trials.

11. *Brown*, 432 U.S. at 162 n.1. The joyriding statute provided, "No one shall take or use an automobile without the consent of the owner." Joyriding was a misdemeanor. *Id.*

the same facts.¹² The Court held that the test is whether one offense requires proof of an element that the other does not.¹³ Because all the elements of joyriding are included in auto theft, joyriding is a lesser included offense of auto theft.¹⁴ The Court reasoned that when one offense includes another, the two are the same for purposes of a double jeopardy analysis; therefore, the second prosecution is barred.¹⁵

The Supreme Court in *Grady v. Corbin*,¹⁶ a case decided subsequent to *Rosenberg*, again addressed the problem of double jeopardy in successive prosecutions. The defendant in *Grady* caused a fatal traffic accident.¹⁷ He pled guilty to the misdemeanors of driving while intoxicated and failing to keep to the right of the median,¹⁸ and was later indicted for reckless manslaughter and other felony charges.¹⁹ The Court held, in a five to four decision,²⁰ that double jeopardy barred the prosecution of the felony charges.²¹

In reaching its conclusion, the Court announced a two step inquiry: 1) if the statutory elements are the same, the prosecution is barred and the inquiry proceeds no further;²² and 2) the second prosecution is barred if

12. The theft indictment was based on a felony statute that provided, "No one shall steal any automobile." *Id.* at 163 n.2.

13. *Id.* at 166.

14. *Brown*, 432 U.S. at 168. The Court applied the *Blockburger* test and found that joyriding requires proof of no element beyond that required by the auto theft charge. *Id.*

15. *Id.* The court also stated that the order of the prosecutions makes no difference in the analysis. *Id.* (citing *In re Nielsen*, 131 U.S. 176, 188 (1889)).

16. 110 S. Ct. 2084 (1990)

17. The defendant's car crossed the center line and struck an oncoming vehicle. *Id.* at 2087. The collision killed the other driver and seriously injured her husband. *Id.*

18. The misdemeanor offenses arose from traffic tickets issued the night of the accident. *Id.*

19. The other offenses charged in the indictment were criminally negligent homicide and third degree reckless assault. The defendant moved to dismiss the felony charges on a double jeopardy theory. *Id.* at 2088-89.

20. Justice Brennan wrote the majority opinion. Justice Scalia, joined by Chief Justice Rehnquist and Justice Kennedy, dissented, reasoning that the Court should not look past the *Blockburger* test in determining whether the double jeopardy bar applies. The dissent asserted that the statutory definitions of the crimes should be the final determinative factor. *Id.* at 2097. Justice O'Connor issued a separate dissent. *Id.* at 2095. Justice Brennan's resignation from the Court creates doubt about the continuing vitality of the *Grady* decision. For a thorough discussion of *Grady* and its implications for the future, see Thomas, *A Modest Proposal to Save the Double Jeopardy Clause*, 69 WASH. U.L.Q. 195 (1991).

21. Under a *Blockburger* analysis the prosecutions would be allowable because the statutory elements of the offenses are clearly different. *Id.* at 2093.

22. *Id.* at 2090. This part of the inquiry is based on the Court's decision in *Brown*. See *supra* notes 10-15 and accompanying text.

the conduct the government will prove²³ constitutes an offense for which the defendant has previously been prosecuted.²⁴ The Court found the second prosecution survived the first inquiry because the statutory elements of the prior traffic offenses differed from the elements of the felony charges.²⁵ However, to convict the defendant of the felonies, the government would need to prove conduct that comprised the previous misdemeanor convictions. Therefore, the later charges were barred.²⁶

Few cases have specifically examined the double jeopardy implications of vicarious liability²⁷ for the acts of a co-conspirator. The Fifth Circuit addressed the issue in *United States v. Marden*.²⁸ Marden was indicted in two district courts both for conspiracy²⁹ to import drugs illegally into the United States³⁰ and related substantive offenses. In the first trial, Marden was convicted of the conspiracy charge but acquitted of the substantive charges. In the second trial, he moved to dismiss the substantive charge, arguing that the government would be forced to rely on the vicarious liability doctrine and re-establish the elements of the previous conspiracy conviction.³¹ Marden reasoned that the vicarious liability prosecution would constitute double jeopardy.³² The Fifth Circuit re-

23. The Court stressed that the conduct examined was not the actual evidence presented at the first prosecution. *Id.* at 2093.

24. The Court relied on dictum in *Illinois v. Vitale*, 447 U.S. 410 (1980), a case with facts almost identical to those in *Grady*. Justice White, writing for the majority in *Vitale*, recognized that because the defendant had already been convicted of conduct that formed a necessary element of the crime for which he was not indicted, he might have a strong double jeopardy claim. The Court did not, however, reach that question because of doubts regarding the nature of the applicable Illinois law. *Vitale*, 447 U.S. at 420.

For a discussion of the problems involved with successive prosecutions generally, including a discussion of the reasoning in *Vitale*, see Thomas, *The Prohibition of Successive Prosecutions for the Same Offense: In Search of a Definition*, 71 IOWA L. REV. 323 (1986).

25. *Grady*, 110 S. Ct. at 2094.

26. *Id.*

27. One conspirator's acts in furtherance of the conspiracy establish the intent and action requirements of the substantive crime for the co-conspirators. *Pinkerton v. United States*, 328 U.S. 640 (1946). Therefore, co-conspirators are responsible for the crimes of the acting conspirator, even in absence of any direct evidence linking the co-conspirators with the substantive crime. *Id.* at 647.

28. 872 F.2d 123 (5th Cir. 1989).

29. The conspiracy involved bringing two shipments of drugs into the country; one into Florida and the other into Louisiana. *Id.* at 124.

30. *Id.* Conspiracy and substantive charges were brought in both district courts. Conspiracy and substantive charges were also brought in the District Court for the Eastern District of Louisiana; the conspiracy charges were dropped after the conviction in the Florida court. *Id.* See *supra* note 23 and accompanying text.

31. *Marden*, 872 F.2d at 126.

32. *Id.*

jected Marden's argument, ruling that double jeopardy does not bar conviction of a substantive offense under the vicarious liability doctrine following a conspiracy conviction.³³

The Eighth Circuit reached a similar conclusion in *United States v. Cerone*,³⁴ a case involving a single prosecution. The defendants in *Cerone* were charged with conspiracy and substantive offenses based on vicarious liability.³⁵ They argued that conspiracy is an element of a substantive offense based on vicarious liability, and that therefore, conspiracy is a lesser included offense.³⁶ The court disagreed, and explained that double jeopardy does not bar such prosecutions.³⁷ The court reasoned that the elements of the *underlying offense* differed from the elements of conspiracy even though the substantive conviction was proven solely through the defendants' participation in the conspiracy.³⁸

In *United States v. Rosenberg*,³⁹ the D.C. Circuit held that conspiracy is a lesser included offense of the underlying substantive crime if the substantive charge is established under a theory of vicarious liability in successive prosecutions. Therefore, according to the court, double jeopardy bars the later prosecution of the substantive charge.⁴⁰ The *Rosenberg* court rejected the district court's use of the "same actual evidence" test to dismiss the charges against the defendants, ruling that the test used in *Brown* was appropriate—double jeopardy does not bar two prosecutions

33. *Id.* See also *United States v. Manzella*, 791 F.2d 1263 (7th Cir. 1986) (no double jeopardy bar to retrial of substantive charges based on vicarious liability after conviction on conspiracy charges). *But see* *United States v. Larkin*, 605 F.2d 1360 (5th Cir. 1979). In *Larkin*, the defendant was acquitted of substantive charges based on the vicarious liability doctrine, and the jury was hung on the conspiracy charge. The government wanted to re-prosecute the conspiracy charge. The Fifth Circuit did not reach the question of whether double jeopardy would bar the second prosecution of the conspiracy charge; however, the court stated that the conspiracy charge appeared to be a lesser included offense of the substantive offenses. *Id.* at 1367. If it were, the second prosecution would violate *Brown*.

34. 830 F.2d 938 (8th Cir. 1987).

35. The defendants in *Cerone* were charged with aiding and abetting violations of the Travel Act, 18 U.S.C. §§ 371, 1952 (1982), and conspiracy to violate the Act. *Id.* at 941.

36. *Id.* at 945.

37. *Id.*

38. *Id.* The court stated that the focus should be on the *Brown* test—whether each offense requires proof of an element that the other does not. *Id.* at 944. The court noted that the Travel Act violation and conspiracy did not consist of identical elements. *Id.* See *supra* notes 10-15 and accompanying text.

39. 888 F.2d 1406 (D.C. Cir. 1989).

40. Following the court's logic, it would not matter which offense was tried first. See *supra* note 15 and accompanying text.

when one offense requires proof of an element that the other does not.⁴¹

Next, the court found that the conspiracy to possess firearms and explosives was the same agreement as the conspiracy to bomb⁴² for the purposes of double jeopardy analysis.⁴³ In applying the *Brown* double jeopardy⁴⁴ test, the court looked at the evidence required to prove both convictions "in the abstract."⁴⁵ The court noted that the crimes of bombing and conspiracy to possess explosives were facially different.⁴⁶ However, the court found that the prosecution merely would prove every element⁴⁷ of the conspiracy again in order to prove the substantive charge.⁴⁸ Therefore, the court concluded, the conspiracy charge was a lesser included offense of the substantive charge⁴⁹ and double jeopardy barred the second prosecution.⁵⁰

The *Rosenberg* court noted that the activities that formed the basis of

41. *Rosenberg*, 888 F.2d at 1412. See *supra* note 10 and *infra* notes 54-57 and accompanying text.

42. *Id.* at 1412-13. The appellees had been listed in the second indictments as unindicted co-conspirators. *Id.* at 1408.

43. The court relied on *Braverman v. United States*, 317 U.S. 49 (1942) (government cannot prosecute for several conspiracies when only one agreement exists, regardless of how many offenses the conspirators agreed to commit). See *supra* note 6.

44. See *supra* notes 10-15 and accompanying text.

45. *Rosenberg*, 888 F.2d at 1412 (emphasis original). The court rejected the district court's standard of examining the actual evidence presented in the case. *Id.*

46. *Id.*

47. *Id.* The majority defined the term "element" differently from the dissent and the Fifth Circuit's analysis in *Marden*. See *infra* notes 58-63, *supra* notes 28-33, respectively, and accompanying text. The *Rosenberg* court went beyond the statutory definitions of conspiracy and the substantive charge. The conspiracy charge contains the element of agreement not present in the substantive charge; however, the court characterized the difference in statutory elements as mere "facial differences." *Id.*

48. In a brief opinion filed with the denial of the request for rehearing *en banc*, *United States v. Rosenberg*, 894 F.2d 1395 (1990) (*Rosenberg II*), Judge Williams, who wrote the concurrence in *Rosenberg*, explained that the court could look beyond the statutory elements of the crimes due to a judicial construction allowed under *United States v. Sabella*, 272 F.2d 206 (2nd Cir. 1959). *Sabella* held that the elements of a crime depended not only on the statutory elements, but also on judicial interpretations of the statute. Judge Williams stated that while judicial interpretations may be improper, once they have occurred courts must not allow a defendant to be tried twice for the same offense. *Rosenberg II*, 894 F.2d at 1396.

49. *Rosenberg*, 888 F.2d at 1413. In support of its conclusion, the court cited *United States v. Larkin*, 605 F.2d 1360 (5th Cir. 1979). See *supra* note 33. This support is questionable in light of the Fifth Circuit's later opinion in *United States v. Marden*, 872 F.2d 123 (5th Cir. 1989). See *supra* notes 28-33 and accompanying text. See also *Rosenberg*, 888 F.2d at 1425 (Edwards, J., dissenting) (questioning the majority's reliance on *Larkin*).

50. The court pointed out, however, that the government could pursue a theory that the defendants aided and abetted or directly participated in the substantive charges and could use the conspiracy as evidence to prove these theories. *Rosenberg*, 888 F.2d at 1413.

the charges involved a singular course of conduct.⁵¹ Therefore, the court concluded that the conspiracy and substantive charges were lesser and greater included offenses of each other.⁵² The court stressed that this result was consistent with *Cerone* because the instant case involved successive prosecutions, rather than a single trial.⁵³ The court did, however, acknowledge a split with the Fifth Circuit on the question.⁵⁴

The concurrence developed the idea that successive trials trigger the double jeopardy bar.⁵⁵ It pointed out that the policy of finality⁵⁶ makes successive prosecutions more vulnerable to double jeopardy than single proceedings involving multiple charges.⁵⁷

The *Rosenberg* dissent emphasized that every circuit addressing the issue found that double jeopardy does not bar prosecution for both conspiracy and the underlying substantive offense.⁵⁸ The dissent asserted that the bar applies only when no element of the substantive offense dif-

51. *Id.*

52. 888 F.2d at 1413. The court adopted an analysis used in *Garrett v. United States*, 471 U.S. 773 (1985). *Garrett* involved a prosecution under a continuing criminal enterprise statute after the defendant had been convicted of one of the offenses included within the criminal enterprise. *Id.* at 775. The Court, in its analysis of the double jeopardy claim, stated that the traditional lesser included offense arose from a single course of conduct. For that reason, the Court expressed doubts as to whether the earlier offense was a lesser included offense of the continuing criminal enterprise charge, which requires a showing of a pattern of criminal activity. *Id.* at 788. The Court in *Garrett* stressed that in *Brown*, both the lesser and greater included offenses existed during the entire course of conduct, whereas in *Garrett* the continuing criminal enterprise had not yet been established at the time of the earlier offense because of a lack of the necessary predicate offenses. *Id.* at 788-89.

Garrett does not necessarily support the conclusion of the *Rosenberg* court. Almost by definition, prosecutions for both conspiracy and the related substantive offense arise out of a singular course of conduct, yet it is well established law that conspiracy and substantive offenses are distinct crimes. *See supra* note 3.

53. *Rosenberg*, 888 F.2d at 1414. The court distinguished *Pinkerton* on the same grounds. *Id.*

54. *See supra* notes 28-33 and accompanying text.

The court rejected the government's claim that because of the venue, the prosecutor could not have raised the substantive charges in either of the first trials. *Rosenberg*, 888 F.2d at 1415. The court stated that the government could argue for a possible "due diligence" exception to double jeopardy on remand if it could show that it had not yet been able to find evidence linking the defendants to the bombings. *Id.*

55. *Rosenberg*, 888 F.2d at 1418 (Williams, J., concurring).

56. The constitutional policy of finality of judgment is one of the basic policy considerations underlying double jeopardy. *See Brown*, 432 U.S. at 165. *See also Thomas, supra* note 2. The policy is easier to reiterate than it is to administer. *See Rosenberg*, 888 U.S. at 1415; *Larkin*, 605 F.2d at 1361.

57. *Rosenberg*, 888 F.2d at 1418 (Williams, J., concurring).

58. *Id.* at 1419 (Edwards, J., dissenting). *See supra* notes 3, 28-38 and accompanying text. The dissent did not distinguish between cases involving vicarious liability and those in which the substantive charges are tried under a theory of direct participation.

fers from the elements of conspiracy.⁵⁹ The dissent reasoned that prosecution for separate offenses cannot constitute double jeopardy and stated that the prosecutor's method of establishing the offenses is irrelevant.⁶⁰

The dissent observed that the majority misconstrued the vicarious liability doctrine as transforming the elements of the substantive crime.⁶¹ The dissent saw the doctrine as merely a statement of the evidence sufficient to prove a substantive crime.⁶² The dissent asserted that the majority, in redefining the elements of the crimes, impermissibly intruded into the legislative function.⁶³

The *Rosenberg* court, although going against the reasoning and holdings of other circuits,⁶⁴ anticipated the holding of the Supreme Court in *Grady v. Corbin*.⁶⁵ In *Rosenberg*, as in *Grady*, the second indictment passed the *Brown* test.⁶⁶ The *Rosenberg* court stretched to find that conspiracy is a lesser included offense of the substantive crime when the vicarious liability theory is used.⁶⁷ The *Grady* rationale would have

59. *Rosenberg*, 888 F.2d at 1423. A commonly cited example is the substantive crime of adultery, which requires an agreement between the parties to commit the offense. See *In re Nielsen*, 131 U.S. 176 (1889).

60. *Rosenberg*, 888 F.2d at 1424. This reasoning parallels Justice Scalia's dissent in *Grady v. Corbin*. See *supra* note 20. Both dissents treat the *Blockburger* test as the prime determinant in deciding whether a successive prosecution is barred. Both also are unwilling to go beyond the statutory definition of the crime in applying the test.

61. *Rosenberg*, 888 F.2d at 1424.

62. *Id.* The dissent stated that the doctrine is nothing more than a theory of proof. *Id.*

63. *Id.* The dissent relied on a line of decisions holding that only the legislature may define a criminal act. See *Liparota v. United States*, 471 U.S. 419 (1985) (the legislature is entrusted with the definition of the elements of criminal offenses); *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812). The dissent asserted that the majority "reintroduce[d] the actual evidence test into double jeopardy analysis," a test which the majority agreed was improper. *Rosenberg*, 888 F.2d at 1424.

64. See *supra* notes 28-38 and accompanying text.

65. 110 S. Ct. 2084 (1990). See *supra* notes 16-25 and accompanying text. It is unclear what impact the *Grady* decision will have on the government's ability to prosecute conspiracy and the substantive offense in successive prosecutions. Justice Scalia, in his dissent, argued that the decision may prevent the government from pursuing a conspiracy charge after a conviction on the substantive charge. *Grady*, 110 S. Ct. at 2102-03 (Scalia, J., dissenting). The decision arguably will prevent the prosecution of a substantive charge after a conspiracy conviction. Proof of a conspiracy necessarily requires a showing of intent to commit a crime; the government must establish an agreement to commit the crime. Because intent would be an element of the substantive crime, it seems possible to argue that *Grady* prevents the prosecution of the substantive charge.

66. The *Rosenberg* court glossed over the fact that the elements of the two crimes were different. See *supra* note 46 and accompanying text. Nevertheless, it is clear that the conspiracy to possess explosives and the substantive charge of bombing have different statutory elements and thus pass the *Blockburger* test.

67. The court incorrectly asserted that the conspiracy is a lesser included offense of a substan-

allowed the court to invalidate the second prosecution because it involved proof of conduct which comprised a previous conviction.⁶⁸

Currently, two lines of thought on double jeopardy persist in the context of successive prosecutions: one, stated by Justice Scalia in his dissent in *Grady*, holds that the statutory elements of a crime are the only standard by which double jeopardy is judged; the other, represented by Justice Brennan's majority opinion in *Grady*, holds that if the conduct which the state must prove in a successive prosecution is the same conduct that served as the basis for a previous conviction, the state must prove in a successive prosecution is the same conduct which served as the basis for a previous conviction, the state may not pursue the second conviction under any theory. *Grady* reflects the Supreme Court's adoption of the idea that courts can look beyond the statutory definition of a crime in order to determine if double jeopardy bars successive prosecutions.⁶⁹ Therefore, it might seem that *Grady* sounds the death knell for the vicarious liability doctrine in successive prosecutions. However, *Grady's* stability is questionable, considering the close vote, Justice Scalia's spirited dissent, and Justice Brennan's retirement.⁷⁰

The *Rosenberg* court took an unfortunate step in disallowing the use of the vicarious liability theory in the context of successive prosecutions for conspiracy and the related substantive crime. Because conspiracy creates a different evil, a criminal agreement,⁷¹ the danger that someone will be put in jeopardy more than once for the same crime disappears. The *Rosenberg* court confuses the dangers involved: a criminal can and should be punished for those aspects of an action that are sufficiently threatening to society's interests to be criminalized. A course of conduct may have a number of different criminal aspects with differing societal repercussions. The government should be able to prosecute on the basis of the criminal aspects of an action in order to deter such activity. The state's interests in punishing and preventing both the conspiracy and the substantive crime are distinct; the vicarious liability doctrine does not erase this distinction. Therefore, the use of the doctrine should not come under the

tive charge when pursued under a vicarious liability theory. The court designed *Grady*, in part, to get around the fact that crimes with different statutory elements do not come within the scope of *Brown*. See *supra* notes 21-22 and accompanying text.

68. *Grady*, 110 S. Ct. at 2087.

69. See *supra* notes 48 and 16-25 and accompanying text.

70. See Thomas, *supra* note 20. Professor Thomas explains why *Grady* was "simultaneously right and wrong," and considers the future of the decision. *Id.* at 197.

71. See *supra* note 3.

purview of the double jeopardy clause.⁷²

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72. See *Rosenberg*, 888 F.2d at 1424 (Edwards, J., dissenting); *Grady*, 110 S. Ct. at 2096 (Scalia, J., dissenting).