

COMPARATIVE DOUBLE JEOPARDY: NEW APPROACHES FOR UPHOLDING AN OLD PRINCIPLE

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“The history of the rule against double jeopardy is the history of criminal procedure. No other procedural doctrine is more fundamental or all pervasive.”¹

I. INTRODUCTION

Double jeopardy is an important principle, not just under American law, but throughout the world in protecting defendants’ rights. Its basic principle is that a defendant should not be tried twice for the same offense and that there should be some limit on how far the government may go in seeking a conviction against a defendant. Yet there are many exceptions to the principle that undercut its protection. This article examines how double jeopardy is applied in the United States and compares it with the approach in other nations. The goal of this article is to examine these approaches in order to suggest a better, more consistent approach to the doctrine.

The article starts with addressing the reason for a double jeopardy principle and its origins in British law. It then focuses on how exceptions have been routinely made to the rule and how those exceptions serve to undercut the promise of double jeopardy protection. During that

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1. MARTIN L. FRIEDLAND, *DOUBLE JEOPARDY* 3 (Clarendon Press, 1969).

examination, this article explores the extent to which an approach, like that used in England and the United States, that focuses on legal definitions of crimes can differ vastly from the naturalistic approach European Convention on Human Rights and in Italy that tend to provide more protection for the defendant while safeguarding the interests of the prosecution.

Examination of double jeopardy law is challenging because it frequently involves analyses of not just a single constitutional provision, but of other constitutional rights and key concepts in the law, such as collateral estoppel and *res judicata*. All of these are doctrines that were developed to protect against abuse of process. Thus, this article examines how laws can impact, and be impacted by, a variety of rights and interests, especially appellate rights, interlocutory appeals, and the need for finality of jury decisions.

The last part of the paper examines the preclusive effect of a final criminal decision handed down by a foreign court. How does that affect defendants' rights? Does it matter that the foreign court views double jeopardy differently than American courts? In this section, this article compares the American dual sovereignty doctrine with the experiences of other countries (Italy, The Netherlands, and England), noting striking differences in the balancing of various interests of both the sovereign and the accused.

There are many rights that affect the fairness and accuracy of criminal proceedings. Double jeopardy, a concept that has been around for centuries, is not frequently in the forefront of legal scholarship. Yet, a critical assessment of that right, especially in light of how other countries approach the issues, could have a dramatic impact on the fundamental fairness of criminal proceedings in the United States.

II. THE HISTORY OF DOUBLE JEOPARDY LAW

Like many of America's laws, the genesis of the right protecting a defendant from double jeopardy lies in the British legal system. Yet, other countries have also developed a similar right, and the United States has enshrined the right in the Fifth Amendment to the United States Constitution. Even civil law countries have a similar concept. In order to assess whether double jeopardy laws have been appropriately enshrined, it is important to understand the evolution of the doctrine.

A. *Origins and Purpose: Why Does Double Jeopardy Exist?*

Apart from basic concepts of due process, it is hard to imagine a more universal legal principle than double jeopardy.² Albeit with many differences, it is a rule common to almost all legal systems.³ In *civil law* countries⁴ it takes the name of *ne bis in idem* (“not the same thing twice”), but it still serves the same purpose: to protect the few from the punitive power of the many, represented by the State.

Scholars trace the origins of double jeopardy in *common law* to the famous dispute between the King of England Henry II and the Archbishop of Canterbury Thomas Becket.⁵ Pursuant to the Constitution of Clarendon, enacted in 1166, the King sought to punish under secular law those clerks who had already been convicted under canon law before ecclesiastical courts.⁶ Becket claimed that this second punishment would violate the consolidated maxim of canon law *nemo bis in idipsum puniri potest* (“the

2. The term jeopardy originates from the French *jeu –perdre*, namely, to lose a game, to later become *iupartii* in Middle English, meaning a “divided play or game, even game.” On this point, see 8 J.A. SIMPSON & E.S.C. WEINER, *THE OXFORD ENGLISH DICTIONARY* 215 (James A.H. Murray et al. eds., 2nd ed. 1989) (“A position in a game, undertaking, etc. in which the chances of winning and losing hang in balance; an even chance; an undecided state of affairs; uncertainty; chance.”). This is why it is now used to mean the risk of losing in one of the most dangerous “games,” a criminal trial. See also Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 *YALE L.J.* 1807, 1810 (1997).

3. The principle can be traced in over fifty national constitutions, as pointed out by M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 *DUKE J. COMPAR. & INT’L L.* 235, 289 (1993). In other jurisdiction where it is not expressly enshrined in the constitution, such as Italy, it is still considered a principle that “permeates the entire [legal] system.” Cass. Pen., Sez. Un. [Court of Cassation], 28 September 2005, n. 34655 (It.).

4. Civil law countries are countries where the legal system is generally based on codified statutes. These countries range from European countries, such as France and Germany, to other countries around the world, like China, Japan, Indonesia, Lebanon and even Kyrgyzstan. In the United States, Louisiana is considered a civil law state. See *What is Civil Law?*, LSU LAW, <https://law.lsu.edu/clo/civil-law-online/what-is-the-civil-law/> (last visited Mar. 10, 2025) (providing interactive map of civil law systems of the world).

5. See FRIEDLAND, *supra* note 1, at 326; Jay A. Sigler, *A History of Double Jeopardy*, 7 *AM. J. LEGAL HIST.* 283, 284 (1963); David S. Rudstein, *A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy*, 14 *WM. & MARY BILL OF RTS. J.* 193, 205 (2005); Isaac Amon, *The Heir to All the Ages: The Past, Present, and Future of Double Jeopardy*, 3 *TRENTO STUDENT L. REV.*, 17, 32 (2021).

6. The criminous clerk would be brought before secular courts and, after pleading his clerical status, he would be sent to ecclesiastical court to be tried, with a royal officer attending the proceedings. Upon conviction he would then lose his status and he could be punished as a layman by the temporal power. See 1 FREDERICK POLLOCK & FREDERICK WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 472-73 (Cambridge Univ. Press, 2nd ed.) (1898); 1 W. S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 615 (Methuen & Co., 3d ed. 1927) (noting the concept was that there would not have necessarily been a second trial, but merely a second punishment).

same person cannot be twice punished for the same thing”) stemming from St. Jerome’s commentary on the passage 1:9 of prophet Nahum’s book in the Old Testament.⁷ According to the King James version of this Biblical verse, when describing the destruction of the city of Nineveh, the prophet would specify that the Lord would “make an utter end,” also adding: “affliction shall not rise up the second time.”⁸ Jerome construed this phrase as to mean that those who had already been punished once would not be punished twice.⁹ In the end, after the famous murder of Becket in 1176 in the Canterbury Cathedral, Henry II conceded that convicted clerks could not undergo further punishment in secular courts.¹⁰ Since that time, the maxim made its way into the courts of the British Kingdom.¹¹

Although most scholars think this history of the right is accurate, another way to look at this history is as the Oklahoma Supreme Court did. That court candidly wrote that, “it is impossible to trace the doctrine to any distinct origin. It seems to have been always embedded in the common law of England, as well as in Roman law, and doubtless in every other system of jurisprudence, and, instead of having a specific origin, it simply always existed.”¹²

To be sure, double jeopardy was so ingrained in English law by the eighteenth century that it can be found in the most important English law treatises of that time. In 1721, William Hawkins, in his treatise of the *Pleas of the Crown*, affirmed the maxim for which a man could “not be brought into Danger of his Life for one and the same Offence, more than once.”¹³

7. FRIEDLAND, *supra* note 1, at 326-27.

8. *Nahum* 1:8, 1:9 (King James).

9. It should be noted that, much more probably, the prophet Nahum did not mean to ensure that a second punishment would not be imposed, but that the first punishment would be so disastrous that there would be no need for a second one; in this vein, *see* FRIEDLAND, *supra* note 1, at 327; *see also* JOHN EADIE, *THE HOLY BIBLE WITH THE COMMENTARIES OF SCOTT AND HENRY, AND CONTAINING ALSO MANY THOUSAND CRITICAL AND EXPLANATORY NOTES SELECTED FROM THE STANDARD AUTHORS OF EUROPE AND AMERICA* 894 (n.d.) (“He would therefore utterly destroy Niniveh and the Assyrian empire; and the calamity should be so complete, that it would not be necessary to repeat it.”).

10. FRIEDLAND, *supra* note 1, at 328; 1 POLLOCK & MAITLAND, *supra* note 6, at 472.

11. *See* FRIEDLAND, *supra* note 1, at 328 (“Becket’s martyrdom and Henry’s capitulation must surely have impressed the King’s judges – and it should be noted that bishops and archdeacons often presided in the lay courts – that the maxim which Becket was espousing was worthy of consideration.”).

12. *Stout v. State ex rel. Caldwell*, 130 P. 553, 557 (Okla. 1913).

13. *Kepner v. United States*, 195 U.S. 100, 126 (1904) (quoting 2 Wiliam Hawkins, *A Treatise of the Pleas of the Crown; Or a System of the Principal Matters Relating to that Subject, Digested Under Proper Heads* (7th ed. 1795)). The maxim is reaffirmed in 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 196 (Lonang Inst. 1769) (“this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for the same offence.”).

The maxim took the form of the so-called affirmative pleas in bar, later described in Blackstone's 1769 Commentaries on the Laws of England as *autrefois acquit* and *autrefois convict*. The pleas, still available in England at the present time, can be entered by a defendant already acquitted or convicted for the same offense. It is of paramount importance that, as Blackstone emphasizes, for a plea of *autrefois* to work, it had to be "upon a prosecution for the same identical act and crime."¹⁴ However, immediately before this affirmation, Blackstone explained that a conviction for manslaughter would also bar prosecution for murder of the same person because the fact prosecuted is the same in both, though the offences differ in coloring and in degree.¹⁵

Protection against double jeopardy, as set forth in the common law of England at the time, also developed in the colonies¹⁶ and culminated in the Fifth Amendment of the U.S. Constitution. The Fifth Amendment states: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."¹⁷ The basic formulation prohibiting a defendant from being put twice in jeopardy of life or limb was introduced by the Senate, after the House had approved the initial Madison's proposal ("No person shall be subjected, except in cases of impeachment, to more than one punishment, or one trial for the same offence."¹⁸ Even with the change in language, the Supreme Court held in *Ex parte Lange*¹⁹ that the Double Jeopardy Clause operates in all criminal cases – felonies or misdemeanors.²⁰

14. 4 BLACKSTONE, *supra* note 13, at 197.

15. See *id.* In reference to *autrefois acquit*, the same opinion can be found in 2 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 245 (1800) ("[I]f a man [. . .] be indicted of manslaughter, and be acquit, he shall not be indicted for the same death, as murder, for they differ only in degree, and the fact is the same."); see also 1 THOMAS STARKIE, TREATISE ON CRIMINAL PLEADING, WITH PRECEDENTS OF INDICTMENTS, SPECIAL PLEAS 344 (2nd ed. 1822).

16. See *Benton v. Maryland*, 395 U.S. 784, 795 (1969) ("As with many other elements of the common law, it was carried into the jurisprudence of this Country through the medium of Blackstone, who codified the doctrine in his Commentaries.").

17. U.S. CONST. amend. V. For an accurate description of double jeopardy in the former English colonies, see Sigler, *supra* note 5, at 298; LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS, 204 (Yale Univ. Press, 1999).

18. For a full report of the drafting of the Fifth Amendment, see NEIL H. COGAN, THE COMPLETE BILL OF RIGHTS. THE DRAFTS, DEBATES, SOURCES, & ORIGINS, (Neil H. Cogan ed., 2d ed. 1997).

19. *Ex parte Lange*, 85 U.S. 163, 173 (1873).

20. The Court wrote,

If we reflect that at the time this maxim came into existence almost every offence was punished with death or other punishment touching the person, and that these pleas are now held valid in felonies, minor crimes, and misdemeanours alike, and on the difficulty of deciding when a statute under modern systems does or does not describe a felony when it defines and punishes an offence, we shall see ample reason for holding that the principle intended to be

While many support this interpretation,²¹ there are those who criticize this interpretation from an originalist perspective.²² They point to many factors that might suggest that at common law, double jeopardy would apply only to capital cases which were the vast majority of felony cases.²³ Beyond being supported by some case law,²⁴ such an interpretation is consistent with what is reported in the aforementioned English law treatises that refer to the danger or jeopardy of life. Thus, the framers may have purposely replaced the initial version that generally shielded a defendant from new punishment or a new trial, with language focused on protecting life or limb, so that the new formulation would further bear on the rule's application.²⁵ By the time of the ratification, the practice of cutting off limbs had already fallen into disuse, and the formulation "life or limb" likely derived from the expression "life or member," adopted by Lord Edward Coke in *The Second Part of the Institutes of the Laws of England*. There, Lord Coke explained that defining a "judgment de vie & de member" (from the French, "a judgment of life or limb") "is to say, he shall be attainted of felony."²⁶ Thus, "life or limb" was

asserted by the constitutional provision must be applied to all cases where a second punishment is attempted to be inflicted for the same offence by a judicial sentence.

Id.

21. See Amar, *supra* note 2, at 1810 (the phrase "life or limb" is just a "vivid and poetic metaphor for all criminal punishment"). In the same vein, see LEVY, *supra* note 16, at 208 ("The double jeopardy clause, for example, is inappropriately specific. Its Framers did not mean 'limb' when they referred to 'life and limb,' unless they contemplated the highly unlikely possibility that Americans might one day authorize tearing people apart as a punishment for crime or chopping off arms and legs. The constitutional phrase should be 'life or liberty' rather than 'life or limb.' The reference to jeopardy of limb is misleading or superfluous."). The distinction between felonies and misdemeanors is not even in force today in England and Wales, where it is indisputable that the pleas of *autrefois* can be entered for any offense. See *Criminal Law Act 1967*, c. 58 (UK).

22. See Stephen N. Limbaugh Jr., *The Case of Ex Parte Lange (Or How the Double Jeopardy Clause Lost Its "Life or Limb")*, 36 AM. CRIM. L. REV. 53, 61 (1999) (supporting the idea that *Ex parte Lange* is a policy decision rather than a correct interpretation of what the framers meant to do, namely, to constitutionalize the doctrine as it was then understood).

23. See also Sigler, *supra* note 5, at 285 ("By the eighteenth century, it was well settled that a distinction was to be drawn between capital and other offenses, double jeopardy applying largely to the former. One's 'life or limb' was not in danger in a trial for a misdemeanor.").

24. Limbaugh Jr., *supra* note 22, at 63 ("In one class of offences indeed, those greater than misdemeanors, no new trial can be granted at all. But in misdemeanors there is no authority to shew that we cannot grant a new trial in order that the guilt or innocence of those who have been convicted may be again examined into."); Sigler, *supra* note 5, at 285 (citing *King v. Mawbey*, 101 Eng. Rep. 736 (KB 1796), a case relating to a retrial for the same offense after an overturned conviction on appeal).

25. See Limbaugh Jr., *supra* note 22, at 63-64. Limbaugh recites the common law rules that prevented the joinder of misdemeanors and felonies even when stemming from the same criminal conduct, an acquittal on the ones not being a bar in a prosecution on the others and vice versa. This would prove that double jeopardy was not applicable to misdemeanors.

26. EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 434 (6th ed. 1681). See also EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF

considered “a term of art,”²⁷ not to designate how the rule would be applied to form of punishment, but to designate that capital punishment had been used in England for practically all felony cases.²⁸

If, assuming that this interpretation is correct, the Supreme Court in *Ex parte Lange* was then called upon to address double jeopardy in a completely different context. By that time, only a few felonies were classified as capital offenses, and if the Court had stuck to the original literal meaning, the Double Jeopardy Clause would have been too narrowly confined and no longer been able to fulfill its rationale, which has never changed—to protect the accused from the harassment of an overzealous prosecutor.²⁹

The concept of double jeopardy is so inherent in the sense of justice that judges have felt that it relates to a fundamental duty of fairness to the accused.³⁰ The concerns about fairness are significant and are articulated in Justice Black’s opinion in *Green v. United States*.³¹ In that case, Justice Black noted,

The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity.³²

A criminal trial is in itself a penalty and the prosecution, being unable to convict the defendant, may still be content to harass him endlessly. While the prosecutor, who could keep trying without risking anything, can lean on

ENGLAND 91 (1644) (“Judgment of life or member: those words do imply felony.”); see also U.S. DEP’T OF JUST., OFF. OF LEGAL POL’Y, REPORT NO. 6, REPORT TO THE ATTORNEY GENERAL: DOUBLE JEOPARDY AND GOVERNMENT APPEALS OF ACQUITTALS 6 (1987). The influence of this English early source on the framers should not be underestimated. See Katherine D. Bowen, *The Lion and The Throne*, 513, 514 (1957) (explaining how important they were for law students at that time, reports a passage of a letter written in 1779 by a John Rutledge of South Carolina to his brother studying in London: “In regard to particular law books – Cook’s *Institutes* seem to be almost the foundation of our law.”).

27. U.S. DEP’T OF JUST., *supra* note 26, at 6.

28. See Limbaugh Jr., *supra* note 22, at 65.

29. See *id.* at 77, 78 (“As the *Lange* Court predictably concluded, expansion of the doctrine was necessary to accommodate the changing classification of crimes.”). In addition, expanding double jeopardy to misdemeanors was justified by the fact that the procedural differences with felony proceedings had disappeared by that time. At common law, unlike those accused of a felony, an accused of a misdemeanor had the right to receive a copy of the indictment be assisted by counsel, and able to review a conviction. See *id.* at 80 (citing FRIEDLAND, *supra* note 1, at 173).

30. As Justice Black put it in his dissent in *Bartkus v. Illinois*, 359 U.S. 121, 151 (1959): “Fear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in western civilization.”

31. See *Green v. United States*, 355 U.S. 184, 215 (1957).

32. *Id.* at 187.

the unlimited resources of the State, the defendant can only lean on their lawyer, usually as effective as deep the payer's pockets are. Second, there is a further risk that multiple trials will "enhance[e] the possibility that even though innocent he may be found guilty."³³ For example, the prosecution, unable to bear its burden of proof, could keep looking for a different jury, which sooner or later, by the law of large numbers, might be more inclined to convict.³⁴ Moreover, given the language of the Amendment, it helps to shield the defendant for multiple punishments for the same offense.³⁵

B. Incorporation of Double Jeopardy into American Law

In the United States the concept of double jeopardy has not always been recognized as a fundamental principle by court decisions. In *Palko v. Connecticut*, the Supreme Court upheld a Connecticut statute allowing the State to appeal a conviction for second degree murder upon an error of law, seeking a retrial for first degree murder.³⁶ The Court held that the prosecution's appeal would not violate the Due Process Clause of the Fourteenth Amendment.³⁷ This decision was limited to the specific circumstances of that case, as Justice Cardozo refused to address the situation of a fresh prosecution after a first trial free from error.³⁸ When the Double Jeopardy Clause was incorporated to the states in 1969, *Benton v. Maryland* expressly overruled *Palko*.³⁹ It then proceeded to define when there could be a subsequent prosecution without violating double jeopardy.

33. *Id.* at 188.

34. This is why the right to retain the first empaneled jury assumes a particular relevance. See *Crist v. Bretz*, 437 U.S. 28, 35 (1978); *Wade v. Hunter*, 336 U.S. 684, 688 (1949).

35. See *Ex parte Lange*, 85 U.S. 163, 173 (1873) ("[W]e do not doubt that the Constitution was designed as much to prevent the criminal from being twice punished for the same offence as from being twice tried for it."). See also *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

36. See *Palko v. Connecticut*, 302 U.S. 319, 320-22 (1937).

37. *Id.*

38. *Id.* at 328 ("A reciprocal privilege, subject at all times to the discretion of the presiding judge . . . has now been granted to the state. There is here no seismic innovation. The edifice of justice stands, its symmetry, to many, greater than before."). Letting the prosecution appeal against a tainted verdict may not be the same as letting the prosecution start all over after losing a fair trial, but it is a fundamental difference between the civil and common law traditions.

39. *Benton v. Maryland*, 395 U.S. 784, 795-96 (1969) (a defendant had been retried after a verdict of acquittal for the same offense); see also *Duncan v. Louisiana*, 391 U.S. 145 (1968) (affirming that the focus was no longer on an ideal system, but on an Anglo-American regime of ordered liberty). Thus, while a prosecutor in other systems might be able to appeal an acquittal or a conviction on a lesser count, that rule was rejected in the United States.

1. The “Same Offense”

Double Jeopardy generally protects against prosecution for the “same offense.” However, how that term is defined can have a profound effect on the scope of this protection. Construction of the term can reflect how much a jurisdiction is committed to the basic concepts of double jeopardy, or whether double jeopardy will be treated as just a technical rule that prohibits retrials in a narrow group of cases. As discussed in this paper, the American approach tends to limit the application of double jeopardy in a manner that stands in stark contrast to how double jeopardy law is used in other countries, including in British courts that where the rule originated.

a. The Pleas of Autrefois in England and Wales

In England, the common law test to establish the sameness of two offenses was set forth in *R v. Vandercomb*.⁴⁰ It created the so-called “same evidence” test. Under that test, “unless the first indictment were such as the prisoner might have been convicted upon by proof of the facts contained in the second indictment, an acquittal on the first indictment can be no bar to the second.”⁴¹ In addition, a plea of *autrefois* would not have covered simply the offense actually charged, but also any other offense of which the defendant might have been in jeopardy of conviction at the first trial.⁴² English law knew of the “ascending scale principle” expressed in *R. v. Elrington*,⁴³ where a defendant was prosecuted for assault causing actual and grave bodily harm after obtaining a dismissal of the complainant for common assault of the same person. In that case, the court wrote: “we must bear in

40. *R v. Vandercomb* (1796) 168 Eng. Rep 455; 2 Leach 708.

41. *Id.* at 461; *see also id.* at 460 (“In the present case, therefore, evidence of the breaking and entering with intent to steal, was rightly held not to be sufficient to support the indictment, charging the prisoner with having broke and entered the house, and stolen the goods stated in the first indictment; and if crimes are so distinct that evidence of the one will not support the other, it is as inconsistent with reason, as it is repugnant to the rules of law, to say that they are so far the same that an acquittal of the one shall be a bar to a prosecution for the other.”). This approach led to the American *Blockburger* test. It could also be found in HALE, *supra* note 15, at 245, where it is explained that an acquittal for larceny would not be a bar to an indictment of burglary and vice versa.

42. FRIEDLAND, *supra* note 1, at 101, defines it as the “in peril” test. *See* HALE, *supra* note 15 (“If a man be acquitted generally upon an indictment of murder, *autrefois acquit* is a good plea to an indictment of manslaughter of the same person . . .”). A jury may convict of manslaughter upon a charge of murder under *Mackalley’s Case* (1611) 77 Eng. Rep. 828; 9 Co. Rep. 65b. *See also* STARKIE, *supra* note 15; *R v. Barron* [1914] 2 KB 570, 574 (Eng.). The underlying rationale could be compared to the one in *Green v. United States*, 355 U.S. 184, 190-91 (1957) (stating that when a jury is given a choice on alternative counts and convicts on the most serious one, jeopardy for the lesser count comes to an end at the moment the jury is discharged).

43. *R v. Elrington* (1861) 121 Eng. Rep. 870, 873; 1 B. & S. 688, 696.

mind the well-established principle of our criminal law that a series of charges shall not be preferred, and, whether a party accused of a minor offence is acquitted or convicted, he shall not be charged again on the same facts in a more aggravated form.”⁴⁴

A major decision impacting England’s approach to double jeopardy came in the House of Lords’ decision in *Connelly v. D.P.P.*⁴⁵ Connelly had been accused of taking part in a robbery in the course of which a person was killed.⁴⁶ He was indicted for murder and robbery with aggravation.⁴⁷ According to British rules at that time, an indictment for murder could not include any other offense.⁴⁸ Connelly was then tried for murder, and the robbery count was ordered to remain on file but would not proceed without leave of the court or of the Court of Appeal.⁴⁹ The jury returned a verdict of conviction, which was set aside on appeal due to a faulty jury instruction.⁵⁰ At that time, the Court of Appeal had no power to order a retrial, and a defendant who was successful on appeal would stand acquitted as if he had been acquitted by a jury. The Court of Appeal, therefore, gave leave to proceed with the robbery.⁵¹ The matter went up to the House of Lords, Connelly claiming that he should have been able to enter a plea of *autrefois acquit* at the new trial.⁵² The Lords offered two different approaches to this issue.

Lord Morris of Borth-Y-Gest opted for a straightforward application of the *Vandercomb* test, even if the “incidents and occasions being examined” were the same.⁵³ Since the proof of robbery would not have been enough to prove murder or manslaughter (for which Connelly might have even been convicted at the first trial), he used the same evidence test, even for offenses that were only “substantially the same.”⁵⁴ From this standpoint, *Elrington* would have been nothing more than a corollary of the rule of *autrefois*, the

44. *Id.*

45. *Connelly v. D.P.P.* [1964] AC 1254 (HL) (appeal taken from Eng.).

46. *Id.* at 1255.

47. *Id.*

48. *R v. Jones* [1918] 1 KB 416, 417 (Eng.) (“The charge of murder is too serious a matter to be complicated by having alternative counts inserted in the indictment The proper course in a case like this is to have two indictments so that the second charge may be subsequently tried if the charge of murder fails and it is thought desirable to proceed upon the second charge.”).

49. *Connelly*, [1964] AC at 1255.

50. *Id.*

51. *Id.*

52. *Id.* at 1259.

53. *Id.* at 1309.

54. *Id.* at 1305.

elements to be proven for assault causing actual or grievous bodily harm being enough to establish common assault.⁵⁵

This position was countered by that of Lord Delvin. He came to the same result, but his reasoning was different. As Blackstone had stated, the offense must be the same “both in fact and in law” and robbery is not the same in law as murder or manslaughter.⁵⁶ Nevertheless, Lord Delvin contested whether the pleas could operate in case of *substantially* the same offense: “legal characteristics are precise things and are either the same or not.”⁵⁷ Thus, in the end, all five Lords agree that a plea of *autrefois* could not apply.

b. Beyond the Same Offense: Abuse of Process

Connelly had also claimed that the trial judge had wrongly held that he lacked discretion to stay the second indictment. As noted, even if the offenses stemmed from the same facts, they could not be joined in the same charging document. At common law there were several rules of practice preventing different crimes from being tried together: felonies and misdemeanors could not be tried together; on a charge of felony, the jury could not convict of a lesser included misdemeanor; if a trial for a misdemeanor disclosed liability for a felony, the defendant was acquitted for the misdemeanor so as to be tried for the felony; and the prosecution could just try one felony at a time.⁵⁸ As at that time the punishment for felonies was almost always death and the defendant was not assisted by counsel. Thus, these rules were created as a protection to the accused, particularly to let the jury focus on simple issues.⁵⁹

However, by 1915, the rule against the joinder of felonies had “outlived its usefulness,”⁶⁰ and Parliament enacted Schedule I, Rule 3 of the Indictment Act: It provided: “Charges for any offences, whether felonies or misdemeanors, may be joined in the same indictment if those charges are founded on the same facts, or form or are a part of a series of offences of the same or a similar character.”⁶¹ The only exception the courts kept alive was that in *R v. Jones*;⁶² i.e., in cases of murder.

55. *Id.* at 1315.

56. *Id.* at 1339-40.

57. *Id.* at 1340.

58. FRIEDLAND, *supra* note 1, at 170.

59. *Id.* at 180.

60. *Connelly*, [1964] AC at 1350.

61. *Id.* at 1351.

62. *R v. Jones* [1918] 1 KB 416 at 417 (Eng.) (“The charge of murder is too serious a matter to be complicated by having alternative counts inserted in the indictment . . . The proper course in

Devlin affirmed that the courts had inherent power to make rules of practice to protect their process from abuse and to stay the proceedings when they would be oppressive and vexatious to the accused. Anti-joinder rules, including those in *R v. Jones*, as well as the pleas of *autrefois*, were the fruits of this power.⁶³ Devlin, therefore, laid down a general rule for which all the charges founded on the same facts and, in general, triable together under the Indictment Act, should be put in the same charging document. This is because it would be oppressive to the accused to spread the case over more than one trial when all the charges could have been tried together. Otherwise, the Crown could start with a minor accusation to test the strength of their case or to compel the defendant to disclose their strategy, or they might even keep a lesser count to keep harassing the defendant after an acquittal on a greater offense. In addition, two inconsistent verdicts rendered by different juries on the same evidence would undermine the confidence of the public in the system of justice.⁶⁴ Devlin instructed that when a violation of this rule is detected, the trial judge should use their power to stay the proceedings for abuse of process.⁶⁵ But Lord Devlin left the door open for some special circumstances in which the new trial would not be oppressive; at that point, the judge should use their discretion to see if, in light of the specific case, a stay would be appropriate.⁶⁶ Based on this, the rule of practice expressed in *R v. Jones* amounted to a special circumstance and both the judge and the parties were compelled to stick to it, so on that basis Lord Devlin concluded that the appeal had to be dismissed, but that *R v. Jones* should have not been followed in the future as an exception to the Indictment Act.

Lord Devlin believed that *autrefois* and abuse of process should be kept distinct. On the one hand, there are special pleas, applicable only for *exactly* the same offense or any other offense for which the defendant could have been found guilty other than the one charged. However, there is no need to stretch the doctrine of *autrefois* to cover the *substantially* same offense under

a case like this is to have two indictments so that the second charge may be subsequently tried if the charge of murder fails and it is thought desirable to proceed upon the second charge.”).

63. *Connelly*, [1964] at 1347 (Eng.) (“[N]early the whole of the English criminal law of procedure and evidence has been made by the exercise of the judges of their power to see that what was fair and just was done between prosecutors and accused. The doctrine of *autrefois* was itself doubtless evolved in that way.”).

64. *Id.* at 1353.

65. *Id.* at 1354.

66. Lord Devlin did not delve widely into the category of the special circumstances, giving just some examples: when the judge, had the charges been brought together, would have ordered a severance, or when, all the more so, the defendant succeeds in a motion for severance; the defendant accepts the prosecution’s choice to separate the charges, availing themselves of any advantage stemming from it.

Vandercomb, because relief would be available for abuse of process.⁶⁷ *Autrefois* would be a rigid rule, but abuse of process would pass through the filter of judges' discretion.

The implication of this approach is that *Etrington* does not stem from *Vandercomb*, but it is an early manifestation of the abuse of process doctrine that can operate when pleas cannot: if two offenses are on the ascending scale, one must have something more than the other and they cannot be the same. To go back to Blackstone's example, in a trial for manslaughter, a man cannot be in jeopardy of conviction for murder, but murder should be contested at the first trial, with manslaughter as a possible lesser included offense.

Lord Devlin's opinion was backed by Lord Pearce and Lord Reid⁶⁸ and, with a majority of three out of five, it represents the law of England and Wales at today. And since then, *Connelly* has been clarified by the Court of Appeal in *Beedie*.⁶⁹ In that case, a young tenant had died due to carbon monoxide emitted by a defective gas fire.⁷⁰ The landlord was prosecuted by the Health and Safety Executive for failing to maintain safe operations and he was fined.⁷¹ The landlord gave evidence to the coroner, who failed to inform him that he could not be compelled to incriminate himself, and with the false understanding that there could be no further prosecution for that incident.⁷² The landlord was then charged with manslaughter by the Crown Prosecution Service.⁷³ The trial judge correctly applied Lord Devlin's position, but he refused to stay the indictment due to special circumstances: the public interest in prosecuting serious crimes and the fact that there had been an overlap of different prosecutorial authorities, each of them starting their proceedings according to their functions.⁷⁴ The Court of Appeal affirmed that the public interest and concerns of the victim's family could be "good reasons" to prosecute, but they did not amount to special circumstances to split the case.⁷⁵ Moreover, had the Crown Prosecution Service been informed earlier, all the relevant charges could have been brought together in the same trial as offenses for failure to act under Health

67. *Connelly*, [1964] at 1340.

68. *See id.* at 1296.

69. *R v. Beedie* [1998] QB 356 (Eng.).

70. *Id.* at 356.

71. *Id.*

72. *Id.* at 359.

73. *Id.* at 360.

74. *Id.* at 362-63.

75. *Id.* at 366.

and Safety at Work Act.⁷⁶ The court believed that this lack of coordination between prosecuting authorities should not work to the detriment of the accused. It, therefore, affirmed that the new charge was brought in breach of *Elrington* on an ascending scale of gravity.⁷⁷

The outcome might have been different had the death ensued after the first proceedings were concluded. There was a consolidated line of decisions⁷⁸ denying the application of the rule of *autrefois* in case of a prosecution for murder after a previous conviction for assault or wounding when death later occurs. As written in *R. v. Friel*:

The indictment for manslaughter is not a charge in a new form based on the fact supporting a former charge, nor it is the former charge with the addition of matters of aggravation or of newly alleged consequences. The difference is not of degree merely. The characteristic new fact here is death. That death is a new fact, and not a mere aggravation or a mere consequence.⁷⁹

Since the offense had not yet occurred and could not have been charged, it probably would have been clearer for the court to rely on abuse of process in general, rather than on the more specific *Elrington* principle.

Thus, as these cases describe, British law has two mechanisms for addressing the piecemeal prosecution of defendants. One approach is *autrefois* to cover the same offense. The other approach is abuse of process, a doctrine that overlaps but does not mandate the same definitions of what was the same offense.

c. The “Same Offense” in New Zealand

As the “same offense” doctrine evolved, so did the scope of protection from double jeopardy. As we have seen, common law requires the same offense both in fact and in law for a plea of *autrefois* to be entered. This is the approach common law jurisdictions have adopted where the pleas are the instrument through which double jeopardy claims are raised. Yet, even among these common law traditions, there are exceptions. For example, in New Zealand, a 2011 legislative reform gave birth to the *Criminal Procedure Act* (CPA) that went into effect in 2013. According to sections 46 and 47 of the CPA, a plea of previous conviction or of previous acquittal can be entered if the defendant has been either convicted or acquitted for:

76. *Id.* at 365-66. See also *R v. Moxon-Tritsch* [1988] Crim. LR 46 (addressing another situation of separate charges in lack of the special circumstances); *Antoine v. R* [2014] EWCA (Crim) 1971 (a case where the special circumstances were recognized).

77. *Id.* at 366.

78. *R v. Miles* [1890] 24 QB 423 (Eng.); *R v. Friel* [1890] 17 Cox. C.C. 325 (Eng.); *R v. Thomas* [1950] 1 KB 26 (Eng.).

79. *R v. Friel* [1890] 17 Cox C.C. 325 at 327 (Eng.).

(a) the same offence as the offence currently charged, arising from the same facts; or

(b) any other offence arising from those facts.⁸⁰

Thus, even though two offenses arise from the same facts, they can even be different in law. The case of *Rangitonga v. Parker* of the High Court of Rotorua helps explain how New Zealand courts have construed the phrase “arising from the same facts.”⁸¹ The defendant was spending an evening with a woman.⁸² The alleged victim claimed that at some point, he attacked her, punching her in the head, and that he had also strangled her until she became unconscious, at which point he sexually assaulted her.⁸³ He was charged with wounding with intent to cause grievous bodily harm and rape.⁸⁴ The prosecution then withdrew the wounding charge to enable the jury to focus on rape.⁸⁵ At trial, the prosecution used the timing of the alleged physical aggression only to prove the lack of consent to the sexual intercourse.⁸⁶ On the contrary, the defendant affirmed that the woman had consented to the intercourse and that he had assaulted her only later, in reply to her stealing his wallet.⁸⁷ The defendant was acquitted of rape, and a private prosecution was later brought upon a charge of injuring with intent to injure based on the alleged aggression.⁸⁸ He entered a plea of previous acquittal, but it was denied.⁸⁹

On a pretrial appeal, the Court ruled that two offenses arise from the same facts when they share the same “core punishable act” (or omission), but not when they are just “part of the same broad series of events.”⁹⁰ Since the *actus reus* for rape was sexual intercourse and the injury charge was punching and strangulation, the plea of previous acquittal could not work.⁹¹

80. Section 46 further provides that a plea of previous conviction cannot be entered when the evidence of a more serious offense arising from the same facts were not readily available at the time of the first charge. For a comment on the reform, see Richard Mahoney, *From the Same Offence to the Same Facts - The Criminal Procedure Act Suddenly Strengthens the Pleas of Previous Conviction and Previous Acquittal*, 2013 N.Z. L. REV. 171 (2013).

81. See *Rangitonga v. Parker* [2015] NZHC 1772, [2016] 2 NZLR 73 (N.Z.).

82. *Id.* at [7].

83. *Id.* at [8].

84. *Id.* at [9].

85. *Id.*

86. See *id.* at [14].

87. *Id.* at [10].

88. *Id.* at [12].

89. *Id.* at [13].

90. *Id.* at [86]. See also Mahoney, *supra* note 80 at 194-95 (discussing how a case involving multiple robberies of individual guests at a single party would fall within the second category). This fact pattern exactly resembles *Ashe v. Swenson*, 397 U.S. 436 (1979), which we will discuss in the relevant section.

91. *Rangitonga*, 2 NZLR at [86].

But, again, under the common law system, pleas are not the only relief. They are complemented by claims of abuse of process. Reiterating Lord Devlin's opinion, the New Zealand Court wrote: "Given the existence of that jurisdiction there is no need to give the special pleas an expansive interpretation in order to ensure that justice is done in an individual case."⁹² This tendency of the courts to construe the same offense as strictly as they can is justified by the fact that the pleas are absolute bars, while abuse of process is a flexible one. Abuse of process is all about when, for convenience reasons, two offenses must be tried together. To use the words of the Indictment Act in force at the time of *Connelly*, there is no doubt that rape and injuring were part of a series of offences of the same or a similar character, occurring consequently the same evening and on the same victim, which were convenient to try together. The prosecution had intentionally withdrawn one count without any special circumstance requiring it to do so and, as in England, the new proceedings should have been stayed. However, because the defendant did not raise specific grounds for appeal, the court could not address this point.

d. The "Same Offense" in the United States

In the United States, where there is no separate "abuse of process" rule, the double jeopardy rule has also been shaped by its changing approach as to what constitutes the "same offense." By narrowing what constitutes the same "offense," the courts have been able to limit how the Fifth Amendment double jeopardy rule will apply.

In *Blockburger v. United States*,⁹³ the Supreme Court restricted double jeopardy to the "same offenses," as defined by the elements of those crimes. Regardless of whether multiple charges could arise from the same criminal actions, the Double Jeopardy Clause only prohibits successive prosecutions for these offenses if each offense requires proof of a fact which the other does

92. *Id.* at [69]. For an application of abuse of process in New Zealand, see *Amery v. Solicitor-General* [1987] 2 NZLR 292 (NZ).

93. *Blockburger v. United States*, 284 U.S. 299 (1932). Before *Blockburger*, the Supreme Court, in exercising its authority over the Philippine Islands, then under United States jurisdiction, set forth the basis for a double jeopardy standard based upon the elements of the offense in *Diaz v. United States*, 223 U.S. 442 (1912). Defendant Diaz assaulted Cornelio Alcanzaren, resulting in Alcanzaren's death the following day. *Id.* at 444. Diaz was first tried for the assault and battery; after his victim's death, he faced a second charge of homicide. *Id.* Diaz argued that this constituted double jeopardy, because both charges were based on the same act. *Id.* The Supreme Court upheld the convictions because the charge of homicide was distinct from the initial assault and battery charge. *Id.* at 448-49. The death resulting from the assault introduced a new element, transforming the offense into homicide. *Id.* at 449. By distinguishing between separate offenses arising from a single act, the Court clarified that double jeopardy did not bar successive prosecutions when new elements emerge.

not.⁹⁴ Thus, the focus of the *Blockburger* “same element” test for determining what is the same offense focuses on the statutory elements of the offenses charged.⁹⁵ If the offenses charged have different elements, then it is not double jeopardy to charge and convict on both.

However, even this rule has a limited exception. If one offense is a lesser-included offense,⁹⁶ then under *Brown v. Ohio*, separate prosecutions are barred.⁹⁷ While a majority of the Supreme Court embraced the holding in *Brown v. Ohio*, Justices Brennan and Marshall advocated for a double jeopardy test that would focus more on what occurred during the crime, and not just the elements of each offense. Justices Brennan and Marshall wrote in their concurrence in *Brown*, “except in extremely limited circumstances . . . ‘all of the charges against a defendant that grow out of single criminal act, occurrence, episode, or transaction,’”⁹⁸ should be prosecuted in a single proceeding. Thus, the Court set up an ongoing debate as to whether the “same conduct” rule or “same elements” rule should be used to decide on the application of the double jeopardy prohibition. The “same elements” test was seen as having the benefit of providing clear lines as to when double jeopardy would apply, as well as deferring to the prosecution to determine when and what charges to bring. However, the “same conduct” rule represented a view of double jeopardy that went back to its roots—not bringing piecemeal charges against defendants.

In *Grady v. Corbin*,⁹⁹ the United States Supreme Court revisited which double jeopardy standard should apply. Thomas Corbin drove his car across

94. *Id.* at 304-05.

95. *Id.*

96. See *Harris v. Oklahoma*, 433 U.S. 682 (1977) (*per curiam*). A key example of when all the elements of an offense are included within a greater offense is a case involving felony murder. In *Harris*, the defendant was convicted under the felony murder doctrine. *Id.* at 682. The underlying felony for the felony murder conviction was robbery. *Id.* The court wrote: “In a felony murder case, the proof of the underlying felony [here robbery with firearms] is needed to prove the intent necessary for a felony murder conviction.” *Id.*

97. See *Brown v. Ohio*, 432 U.S. 161, 162, 168 (1977). In *Brown*, the defendant stole a vehicle from a parking lot and drove it nine days without the owner’s consent. *Id.* at 162. He was charged initially with the misdemeanor or “joyriding,” which makes it an offense to drive a vehicle without the owner’s consent. *Id.* *Brown* pled guilty to that offense and was sentenced to thirty days in jail. *Id.* However, when he was released from jail, he was indicted for the felony of stealing the vehicle. *Id.* at 162-63. Under Ohio law, joyriding is included in the felony of auto theft. *Id.* at 163. The Supreme Court held that because the lesser offense—joyriding—required no proof beyond that which was required for the conviction of the greater offense of auto theft, it was the “same” offense for double jeopardy purposes, even under the *Blockburger* test. *Id.* at 168.

98. *Id.* at 171 (Brennan, J., concurring) (quoting *Ashe v. Swenson*, 397 U.S. 436, 453-54 n.7 (1970) (Brennan, J., concurring)).

99. *Grady v. Corbin*, 495 U.S. 508 (1990).

lines of traffic and hit and killed the driver of an oncoming car.¹⁰⁰ Corbin originally received two misdemeanor tickets—one for driving while intoxicated and the other for failing to keep to the right of the median. He pled guilty to both misdemeanors.¹⁰¹ The judge was unaware of the fatality the accident caused.¹⁰² Two months later, Corbin was charged with homicide, and he filed a motion to dismiss because of double jeopardy.¹⁰³ While the homicide charges had different elements and, therefore, could be brought under the *Blockburger* test, if the “same transaction” test were applied, double jeopardy would block the prosecution. Here, Justice Brennan carried the day. In a 5-4 opinion, the Supreme Court held that the Double Jeopardy Clause bars prosecution of the homicide charges because proof of those charges would require a relitigation of the same factual issues as the misdemeanor charges.¹⁰⁴ While not rejecting the same elements test, the Court adopted the “same conduct or same transaction” test to double jeopardy’s protections. Harkening back to common law, a single episode of criminal behavior should produce only one prosecution, even if there were many procedural rules preventing it.

The *Grady* approach did not last long. Three years later, in *United States v. Dixon*, the Court overruled *Grady*, and revived the traditional *Blockburger* “same elements” test as the governing standard for double jeopardy claims.¹⁰⁵ Dixon was convicted of contempt for violating a condition of his release by committing a criminal offense.¹⁰⁶ Although the several criminal assaults offenses he committed would be barred under the “same conduct” standard of *Grady*, Justice Antonin Scalia, who had dissented in *Grady*,¹⁰⁷ wrote that *Grady* needed to be overruled because it was inconsistent with the Court’s other precedents.¹⁰⁸ Moreover, *Grady* proved to be unworkable because there were too many questions about how broadly to view the “same conduct” of the offenses.¹⁰⁹

The “same offense” test in the United States is now firmly governed by the *Blockburger* “same element” test. This approach limits the protection of double jeopardy. Multiple prosecutions can be as prevalent as statutes prohibiting the defendant’s behavior. In balancing the interest of the State to

100. *Id.* at 511.

101. *Id.*

102. *Id.* at 512.

103. *Id.* at 513-14.

104. *Id.* at 510, 523.

105. *United States v. Dixon*, 509 U.S. 688 (1993).

106. *Id.* at 691.

107. *Grady*, 495 U.S. at 527 (Scalia, J., dissenting).

108. *Dixon*, 509 U.S. at 704.

109. *Id.* at 704-05.

be able to punish a defendant fully for his behavior, and the protections designed to protect a defendant from being harassed by multiple prosecutions, the United States has chosen an approach that limits the scope of Double Jeopardy protections. Moreover, it does so without having a companion “abuse of process” claim that can be made by a defendant, as is the case in Britain and other common law countries.

2. Double Jeopardy and Multiple Punishments

In the United States, double jeopardy also applies to punishment, but in a relatively restrictive way. In *Missouri v. Hunter*, the Supreme Court held that even though two criminal statutes may be construed to prohibit the same conduct under the *Blockburger* test, “in the absence of a clear indication of contrary legislative intent,” the prosecution may seek cumulative punishment for the same offenses in a single criminal trial.¹¹⁰ Thus, while the protections of the Double Jeopardy Clause, which explicitly prohibit a defendant from being “twice put in jeopardy,”¹¹¹ prohibit a defendant from the hazards of trial and possible conviction more than once for an alleged offense, it does not bar a court from imposing the sentence that the legislature prescribed. It is only when a court seeks to impose sentence greater than what the legislature intended that double jeopardy protection is triggered.¹¹²

The case of *Garrett v. United States*,¹¹³ reaffirmed that the Double Jeopardy Clause does not bar multiple punishments. The case posed the question of whether there is a double jeopardy issue when a defendant is convicted of an offense that is used to prove predicate offenses for more serious offenses, such as the Comprehensive Drug Abuse Prevention and Control Act.¹¹⁴ Predicate offenses and crimes for which they are the predicate are not the same offense and, therefore, do not violate the Double Jeopardy Clause.¹¹⁵ Again, the presumption is that Congress intends to permit cumulative punishments when Congress creates two distinct statutes with different punishments.¹¹⁶ To determine legislative intent, the Court may

110. *Missouri v. Hunter*, 459 U.S. 359 (1983). Hunter robbed a supermarket using a revolver. He was convicted of two offenses under Missouri law: first-degree robbery and armed criminal action. Both offenses provided punishment when a person uses a deadly weapon for a robbery. However, the Supreme Court allowed the cumulative sentences.

111. U.S. Const., amend V.

112. See *Hunter*, 459 U.S. at 366-67 (citing *Whalen v. United States*, 445 U.S. 684, 693(1980)).

113. *Garrett v. United States*, 471 U.S. 773 (1985).

114. *Id.* at 775.

115. *Id.* at 788-90.

116. As stated in *Albrecht v. United States*, 273 U. S. 11 (1927) (emphasis added): “There is nothing in the Constitution which prevents Congress from punishing separately each step leading

look to the language of the statutes, as well as their legislative history.¹¹⁷ Finally, courts may use common sense assumption about the intent of the statutes being used. As Justice Rehnquist noted,

[I]t would be illogical for Congress to intend that a choice be made between the predicate offenses and the CCE offense in pursuing major drug dealers. While, in the instant case, Garrett claims that the Government was aware of the possibility of bringing the CCE charge before he was indicted on the Washington offenses, in many cases, the Government would catch a drug dealer for one offense before it was aware of or had the evidence to make a case for other drug offenses he had committed or in the future would commit. The Government would then be forced to choose between prosecuting the dealer on the offense of which it could prove him guilty or releasing him with the idea that he would continue his drug dealing activities so that the Government might catch him twice more and then be able to prosecute him on the CCE.¹¹⁸

3. Double Jeopardy and the California *Kellett* Rule

In the United States, there is one safeguard that might not apply in common law countries. Each State can have its own law giving more double jeopardy protection than what is required by the federal Constitution. A key example of this is the California *Kellett* Rule.¹¹⁹ It requires prosecutors to charge a defendant with multiple offenses in a single proceeding if the same act or course of conduct is involved. This rule applies unless there is good cause to permit severance or joinder is prohibited. It is a procedural safeguard against harassment but does not necessarily relate to the punishment that is imposed.

In *Kellett*, the defendant was arrested when he was standing on a public sidewalk with a pistol in his hand.¹²⁰ He was initially charged with a misdemeanor of exhibiting a firearm in a threatening manner.¹²¹ *Kellett* pled guilty to that charge and was sentenced to ninety days in jail.¹²² *Kellett* was also charged with possessing a concealable weapon, but he moved to dismiss that charge, claiming it was barred by California Penal Code section 654.¹²³ Section 654(a) provides:

to the consummation of a transaction which it has power to prohibit and *punishing also the completed transaction.*"

117. See *Garrett*, 471 U.S. at 779-86.

118. *Garret*, 471 U.S. 773 at 786.

119. *Kellett v. Superior Ct.*, 409 P.2d 206 (1966).

120. *Id.* at 208.

121. *Id.*

122. *Id.*

123. *Id.*

An act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions, but in no case can it be punished under more than one. An acquittal or conviction and sentence under either one bars a prosecution for the same act or omission under any other.¹²⁴

The California Supreme Court held that when the prosecution is or should be aware of more than one offense in which the same act or course of conduct plays a significant part, such offenses must be prosecuted in a single proceeding.¹²⁵ As such, the California rule goes further to protect a defendant from needless harassment or the waste of public funds when charges are interrelated and should be tried together. This approach also makes it necessary for prosecutors to carefully assess the seriousness of a defendant's criminal conduct before determining what charges should be brought against him.

Thus, although the approach in the United States generally does not have an abuse of process protection to provide a backstop to double jeopardy pleas, individual states can decide what extra protections to give a defendant. The question then arises as to whether it would be better to use the two-prong approach adopted by England, or the American approach. Which approach is fairer, more efficient, more direct, and more honest in determining whether multiple prosecutions should be allowed?

III. OTHER APPROACHES TO THE DOUBLE JEOPARDY DOCTRINE

Americans tend not to look to other justice systems to assess their laws,¹²⁶ but in the field of double jeopardy law, perhaps some comparison should be encouraged. Even if American law has hitched its wagon to a double jeopardy concept of sameness in assessing whether the defendant is being tried for the "same offense," there is much to be learned from a more naturalistic approach used by other countries.

The naturalistic approach used in other jurisdictions does not focus on the legal definition of crimes, but on the behavior from which the offense stems. In its leading case on the matter, the European Court of Human Rights ("ECHR") has long held that the right not to be tried or punished twice under the European Convention on Human Rights (Art 4 of Protocol 7) implies that two offenses are the same when they "arise[] from identical facts or facts which are substantially the same," that is, "a set of concrete factual

124. Cal. Penal Code § 654(a) (West 2022).

125. *Kellett*, 409 P.2d at 210.

126. See generally John O. McGinnis & Ilya Somin, *Should International Law Be Part of Our Law*, 59 STAN. L. REV. 1175 (2007); John Yoo, *Peeking Abroad?: The Supreme Court's Use of Foreign Precedents in Constitutional Cases*, 26 U. HAW. L. REV. 385 (2004).

circumstances . . . inextricably linked together in time and space.”¹²⁷ Offenses that do not share the same core act are not the same even if they occur the same day and they are of a similar character.¹²⁸

Italy’s Constitutional Court adopted this naturalistic approach in 2016.¹²⁹ Pursuant to this approach, two offenses are the same not just when they share the same punishable act, but also any material consequence that is an element of the crime, such as death in murder or manslaughter.¹³⁰ However, if there are different material consequences of the same action, a new trial is not barred, regardless of when it occurred. This approach is less formalistic than the *Blockburger* approach in America and offers a more flexible way to assess whether multiple prosecutions and punishments should be allowed. In doing so, it provides a work-around the frustrations that can rise in using the “same elements” test under *Blockburger*.

A. Reassessing how the “Same Element” Test Should Be Used: Separate Approaches to Multiple Punishments and Multiple Trials

There are several ways in which the “same elements” test adopted in the United States, without a companion abuse of process doctrine, is inadequate to serve the underlying purposes of double jeopardy. If the same act or omission violates two different statutes, it would seem fair to punish for both. In fact, it would seem unfair not to do so. However, it is a separate question as to whether a defendant should have to face multiple trials on these related charges if there has not been a conviction in a joint trial.

However, the American *Blockburger* test does not bar new proceedings, and the strain, expense and ordeal they present, so long as a careful prosecutor is able to give the facts a different enough statutory definition.¹³¹

127. Zolotukhin v. Russia, App. No 14939/03, Eur. Ct. H.R., Grand Chamber, 10 February 2009, paras 81-84 (Russ.), <https://hudoc.echr.coe.int>.

128. *Id.* at para 92: “although in essence the applicant’s conduct was substantially similar during the entire day of 4 January 2002—in that he continued to be verbally abusive towards various officials—it was not a continuous act, but rather different manifestations of the same conduct shown on a number of distinct occasions.”

129. Corte Cost. [Constitutional Court], 21 July 2016, n. 200 (It.).

130. In the European Court of Human Rights case law, a different material event does not seem to be decisive: in *Maresti v. Croatia*, App. No 55759/07, Eur. Ct. H.R., First Section, 25 June 2009, <https://hudoc.echr.coe.int>, a conviction for particularly offensive behavior in a public place for punching and kicking a person would bar an indictment for inflicting grievous bodily injury on the same person, the injury not being an element of the first minor offense.

131. The problems with *Blockburger* are apparent by the Supreme Court’s departure from it in *Diaz v. United States*, 223 U.S. 442 (1912) and *Garrett v. United States*, 471 U.S. 773 (1985). In *Harris v. Oklahoma*, 433 U.S. 682 (1977), the Court stretched in its claim that murder and robbery did not meet the same elements test simply because the death in that case was caused by a specific robbery.

While the same elements test originates from *Vandercomb*, it is doubtful that a rule in force in England in the seventeenth century should be asked to apply effectively in today's America. At that time there were just a few common law crimes and the anti-joinder rules, themselves created by the courts to protect the accused, would make it impossible to try related offenses together. But when times and procedures changed those hurdles, and they were removed by legislative action and the rulings of the House of Lords on abuse of process, it was quickly recognized that trying the defendant twice on the same facts is "against the spirit (though not . . . against the letter) of the rule against double jeopardy."¹³² When the context around a rule changes, the rule should change with it, in order to fulfill its function.

Blockburger should, therefore, be used within the strict limit of a single trial and used as a test to answer whether statutory violations stemming from the same act are all punishable. When each offense requires proof of an element that the other one does not, it is likely that the two provisions are intended to protect different legal interests, both deserving to be vindicated.¹³³

As to multiple trials, *Blockburger* should not necessarily control. Rather than have the strict rule that looks to the elements of the offenses, double jeopardy could be redefined. The focus should be beyond just a look at whether the new prosecution covers another offense for which the defendant was already tried. Rather, broader principles should be used to examine whether the prosecution's approach involves an abuse of process, as recognized in England and other jurisdictions. Under that approach, even if the trial is for a *different* offense, the issue is *why* that offense is now being tried separately.

132. *Connelly v. D.P.P.* [1964] AC 1254 (HL) 1346 (Lord Devlin) (appeal taken from Eng.).

133. In *Kienapple v. R.*, [1975] 1 S.C.R. 729 (Can.), the majority of the Canada Supreme Court held that the accused could not be convicted of both rape and unlawful carnal knowledge of a female under fourteen, as it was the same delict against the same girl (substantially the same elements being involved). Despite the possible factual overlap of the two offenses (the rape of a female under fourteen) the latter was specifically created to protect young females from sexual intercourse with adult men and the defendant should not be relieved of that charge simply because the same act also constitutes rape. See *id.* at 729-30 (Ritchie, J., dissenting). Differently, in *Côté v. R.*, [1975] 1 S.C.R. 303 (Can.), the same court ruled that a person could be convicted of both robbery and possession of stolen property (the same taken during the robbery). Anyway, this would be a double punishment, as the possession of the stolen proceeds is inherent in the concept of robbery. They are both crimes against property and the judgment of blame that the legislature makes for robbery also takes into account that the robber will have the possession of the goods once the robbery is completed. The crime of possession should be used for people other than those who did the robbery.

B. *New Jersey's Focus on Inherent Power*

New Jersey provides an example of how an alternative approach might work. In *State v. Gregory*, an undercover police officer purchased a small amount of heroin in an apartment in Newark, New Jersey.¹³⁴ He had seen the defendant grabbing the substance from a stack of envelopes in the bathroom and, after leaving the house, he called other police officers to seize the remaining envelopes, which turned out containing other heroin.¹³⁵ Gregory was indicted for the single sale and, only after being convicted, was he indicted for possession and possession with intent to distribute.¹³⁶ In examining whether the prosecution's approach was valid, the New Jersey Supreme Court wrote: "Fairness dictated that if the State contemplated any additional prosecution . . . it would join it with the original prosecution rather than withhold mention of it until after completion of the trial. Such withholding and later prosecution smacks of harassment and oppression and should be barred."¹³⁷

The New Jersey Supreme Court then continued: "For present purposes we need not rest on constitutional grounds for *the just result we seek may readily be attained by our exercise of the broad administrative and procedural powers* vested in us by our State Constitution."¹³⁸ These words have a striking similarity to Lord Devlin's reasoning, even if in *Gregory* the power was not strictly inherent, but based on the State's constitution.¹³⁹ The Court used its power to set forth a generalized compulsory joinder rule of offenses stemming from the same episode, "with power in the Court to sever when justice so requires."¹⁴⁰ Once again, this approach parallels Lord Devlin's special circumstances approach. Even if sale and possession are different offenses for double jeopardy purposes, the second prosecution should have been barred.¹⁴¹ After *Gregory*, Rule 3:15-1(b) and N.J.S.A. 2C:1-8(b) were enacted by the Legislature.¹⁴² In *State v. James*, the New

134. *State v. Gregory*, 333 A.2d 257, 257 (N.J. 1975).

135. *Id.*

136. *Id.*

137. *Id.* at 261.

138. *Id.* (emphasis added).

139. N.J. CONST., art. VI, § II, para. 3 (1947): "The Supreme Court shall make rules governing the administration of all courts in the State and, subject to the law, the practice and procedure in all such courts."

140. *Gregory*, 66 N.J. 510 at 521.

141. For a decision following *Gregory*, with a similar facts pattern, see *State v. Williams*, 172 N.J. 361 (2002).

142. See N.J. Ct. R 3:15-1(b); N.J. STAT. ANN. § 2C:1-8(b), stating,

[A] defendant shall not be subject to separate trials for multiple criminal offenses based on the same conduct or arising from the same episode, if such offenses are known to the appropriate

Jersey Superior Court applied the joinder rule to different crimes committed in different times, but in furtherance of an overall scheme.¹⁴³

The United States Supreme Court has never opined as to the validity of such an approach. Yet, Federal Rule of Criminal Procedure 8, like the English Indictment Act when promulgated, provides:

The indictment or information may charge a defendant in separate counts with 2 or more offenses if the offenses charged—whether felonies or misdemeanors or both—are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan.¹⁴⁴

One of the roles of the federal rules is to implement the protections defendants have in criminal cases. While not identical to a defendant's constitutional rights, the rules reflect an effort to provide a fair, efficient proceeding for the prosecution and defense.¹⁴⁵ Tailoring our approach to double jeopardy would be consistent with Justice Felix Frankfurter's statement in *McNabb v. United States*, "The scope of our reviewing power over convictions brought here from the federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence."¹⁴⁶

C. Florida's Approach: A Solution by Statute

Certainly, within the states, statutes can be adopted that provide a different approach to double jeopardy by examining the rules of joinder. For example, in Florida, Rule 3.151(c) states: "When a defendant has been tried on a charge of one of two or more related offenses, the charge of every other related offense shall be dismissed on the defendant's motion."¹⁴⁷ As to the term "related," Florida Rule of Criminal Procedure 3.150(a) explains:

prosecuting officer at the time of the commencement of the first trial and are within the jurisdiction and venue of a single court.

Id.; see also *State v. Yoskowitz*, 116 N.J. 679, 701 (1989).

143. *State v. James*, 194 N.J. Super. 362 (1984).

144. FED. R. CRIM. P. 8.

145. FED. R. CRIM. P. 2: "These rules are to be interpreted to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay."

146. *McNabb v. United States*, 318 U.S. 332, 340 (1943). The passage is cited by Lissa Griffin, *Two Sides of a Sargasso Sea: Successive Prosecution for the Same Offence in the United States and the United Kingdom*, 37 U. RICH. L. REV. 471, 506 (2003), who also proposes a "supplement inherent power protection," on the English model.

147. FLA. R. CRIM. P. 3.151(c).

Two or more offenses that are triable in the same court may be charged in the same indictment or information in a separate count for each offense, when the offenses, whether felonies or misdemeanors, or both, are based on the same act or transaction or on two or more connected acts or transactions.¹⁴⁸

Florida Rule of Criminal Procedure 3.152(a)(2)(A) and (B) then adds that a severance should be granted when it “is appropriate to promote a fair determination of the defendant’s guilt or innocence of each offense,”¹⁴⁹ while Rule 3.151(c) also specifies that no dismissal can be granted when “the prosecution has been unable, by due diligence, to obtain sufficient evidence to warrant charging the other offense or offenses,”¹⁵⁰ thereby adopting Lord Devlin’s special circumstances approach.

In *Crossley v. State*, the Florida Supreme Court affirmed that the rule does not apply to crimes committed within a few hours of each other, when they are totally independent, with nothing connecting the one with the other.¹⁵¹ Nevertheless, there is enough connection when the crimes occur in a close temporal and spatial proximity, they have similar modes of execution and they are completed within an “uninterrupted spree” with no “significant period of respite.”¹⁵² Moreover, the joinder is appropriate when one crime is a means to commit another, despite a considerable lapse of time.¹⁵³ Similarly, joinder can be expanded to when a crime is committed to conceal another, or to escape punishment for that offense, including by resisting arrest.

D. *The Impact of Collateral Estoppel on the Double Jeopardy Doctrine*

The United States Supreme Court has interpreted the Double Jeopardy Clause to incorporate the doctrine of “collateral estoppel.”¹⁵⁴ Collateral estoppel prohibits re-litigating an issue of fact or law raised and necessarily resolved by a prior judgment.¹⁵⁵ The doctrine was incorporated into the Double Jeopardy Clause in *Ashe v. Swenson*.¹⁵⁶ In that case, the defendant

148. FLA. R. CRIM. P. 3.151(a).

149. FLA. R. CRIM. P. 3.152(a)(2)(A), (B).

150. FLA. R. CRIM. P. 3.151(c).

151. *Crossley v. State*, 596 So. 2d 447, 450 (Fla. 1992).

152. *Bundy v. State*, 455 So. 2d 330, 345 (Fla. 1984), *construed in* *Ellis v. State*, 622 So. 2d 991, 999 (Fla. 1993).

153. *Fotopoulos v. State*, 608 So. 2d 784, 786 (Fla. 1992).

154. *Ashe v. Swenson*, 397 U.S. 436, 443 (1970); *United States v. Bailin*, 997 F.2d 270, 273-74 (7th Cir. 1992).

155. *Ashe*, 397 U.S. at 443.

156. *Id.* at 445.

was charged with several other men with robbing six poker players.¹⁵⁷ Ashe was acquitted of robbing one of the players because of insufficient evidence.¹⁵⁸ He was then tried and convicted of robbing another player.¹⁵⁹ The Supreme Court held that the defendant's acquittal for robbing one player in the first trial precluded him from being charged with robbing another player because the first jury had necessarily determined that Ashe was not one of the robbers.¹⁶⁰

Writing for the Court, Justice Potter Stewart explained:

“Collateral estoppel” is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that, when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. Although first developed in civil litigation, collateral estoppel has been an established rule of federal criminal law at least since this Court's decision more than 50 years ago¹⁶¹

The challenge in applying the collateral estoppel rule is in determining what issues were necessarily decided by a prior jury. With general verdicts, it is difficult to know the basis of the jury's verdict. The jury might acquit because it was unclear whether the defendant participated, or it might acquit because they thought the prosecution was overreaching.¹⁶² To apply collateral estoppel, one must extrapolate from the issues in the case, and evidence presented to the jury, to determine the basis for acquittal.¹⁶³

In *Ashe*, it was clear that the prosecution had not proved that Ashe was one of the robbers and their second case was based on the same allegation. In fact, the prosecution frankly conceded that the first trial was no more than a dry run for the second prosecution.¹⁶⁴ That is exactly the type of abusive process that double jeopardy is designed to protect against.

157. *Id.* at 437-38.

158. *Id.* at 439.

159. *Id.* at 439-40.

160. *Id.* at 445.

161. *Id.* at 443.

162. *See, e.g., id.* at 439 (noting that jury found insufficient evidence to prove that the defendant was one of the robbers); *People v. Beck*, 939 N.W.2d 213, 235 (Mich. 2019) (Viviano, J., concurring) (discussing jury nullification and juries' roles in “protect[ing] defendants from prosecutorial overreach”).

163. For an excellent discussion of the challenges in ascertaining whether collateral estoppel applies, see Comment, *Collateral Estoppel in Criminal Cases*, 28 U. CHI. L. REV. 142 (1960).

164. *Ashe*, 397 U.S. at 447.

1. The rejection of Issue Collateral Estoppel in England and Wales;
Opening the Door to an Abuse of Process Approach

Even if *Connelly* touched upon it,¹⁶⁵ that case did not specifically address whether collateral estoppel (known as “issue estoppel” in England) must be adopted as part of English criminal law. Rather, the leading case addressing that point is *DPP v. Humphrys* of the House of Lords.¹⁶⁶ *Humphrys* was tried for driving when disqualified.¹⁶⁷ At trial, a police constable testified that *Humphrys* was the person he had stopped driving a motorcycle on that day; *Humphrys* took the stand and testified that he had not driven at all on a public road during that time.¹⁶⁸ The jury returned a verdict of acquittal, the sole issue under dispute being whether *Humphrys* was the person pulled over.¹⁶⁹ *Humphrys* was then tried for perjury, for lying under oath that he had not driven on the road.¹⁷⁰ The prosecution called some of *Humphrys*’ neighbors who had seen him driving during that period, as well as the constable to testify that *Connelly* had driven during the period at issue.¹⁷¹ When the admissibility of that evidence was challenged, the Privy Council ruled that collateral estoppel had no place in criminal proceedings.¹⁷²

Common law cases and authorities do not reveal a criminal collateral estoppel doctrine in England before that case.¹⁷³ Rather, the doctrine was developed in civil cases, where it is available to both parties to the controversy.¹⁷⁴ Consequently, if it were to be adopted in criminal cases, English precedent suggested that it might require mutual application of the rule and cherry-picking when to use the doctrine.¹⁷⁵ This result poses concerns. Whereas, in civil cases, the parties “are on an equal footing,” and estoppel protects the need for “finality in civil litigations,”¹⁷⁶ in criminal trials, there is a peculiar interest to be preserved: the protection from double jeopardy, “intrinsicly unavailable to the Crown.”¹⁷⁷

165. *Connelly v. DPP* [1964] AC 1254 (HL) 1273-74 (appeal taken from Eng.).

166. *DPP v. Humphrys* [1977] AC 1 (HL) 1 (appeal taken from Eng.).

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 1-2.

171. *Id.* at 14.

172. *Humphrys*, [1977] AC at 58.

173. For a lone exception, see *R v. Hogan* [1974] 1 QB 398 at 411-413 (Eng.) of the Leeds Crown Court, where it had been applied against the defendant.

174. *Humphrys*, [1977] AC 1 at 20.

175. See *id.* at 30-32 (Lord Hailsham of St. Marylebone).

176. *Id.* at 32-33 (quoting *Mills v. Cooper* [1967] 2 QB 459 at 469 (Eng.)).

177. *Id.* at 32.

Yet, there are reasons why collateral estoppel is a difficult doctrine to apply to either side of a criminal case.¹⁷⁸ First, while it might be able to identify the single issue upon which a decision is decoded when a judgment is written by a judge, this is a much more difficult task when there is a verdict of acquittal in which the trier of facts does not specify their grounds.¹⁷⁹ The judge in the new trial would have to guess what the first jury had agreed on, with the risk of allowing preclusion even when the grounds might be disputable.¹⁸⁰ Moreover, quoting Lord Devlin's *obiter* in *Connelly*:

The defence rightly enjoys the privilege of not having to prove anything; it has only to raise a reasonable doubt. Is it also to have the right to say that a fact which it has raised a reasonable doubt about is to be treated as conclusively established in its favour?¹⁸¹

If before being pulled over Humphrys had just come away from a robbery or a murder and he had been linked to that crime only after the verdict, his acquittal would have prevented the same constable and any other witness from giving evidence that he was the fleeing suspect riding that motorcycle.¹⁸² Collateral estoppel could encourage the joinder of charges in one trial for the risk of a later preclusion,¹⁸³ but this purpose would be better served by a doctrine of abuse of process, which would be both more flexible and more functional.

If read superficially, there appears to be some precedent of the Privy Council that might support a collateral estoppel rule. In *Sambasivam v. Public Prosecutor*, the defendant had been tried for possession of a firearm and possession of ammunition.¹⁸⁴ He was acquitted on the first charge, but he was retried on the second.¹⁸⁵ Upon retrial the prosecution sought to

178. In the United States, this would also abridge the Sixth Amendment right to a jury trial. *See State v. Ingenito*, 432 A.2d 912, 919 (1981) (“[T]he right to a jury in a criminal trial ordinarily includes the right to have the *same* trier of the fact decide *all* of the elements of the charged offense.”).

179. *Humphrys*, [1977] AC at 34 (Lord Hailsham of St. Marylebone).

180. One of these situations could be the habeas case *Aparo v. Superior Court*, 956 F. Supp. 118 (D. Conn. 1996); Aparo was tried for murder as an accessory and for conspiracy to commit murder. *Id.* at 119; She was acquitted on the first count, but the jury hung on the second. *Id.*; Upon retrial she claimed estoppel: as at trial it was undisputed that her actions had solicited or aided the principal, the jury must have negated the intent to kill necessary for the conspiracy. *Id.* at 122; It should be noted that had it been that crystal clear that she had not the intent to kill, the jury would have not hesitated to acquit her on the conspiracy charge.

181. *Connelly v. DPP* [1964] AC 1254 (HL) 1346 (appeal taken from Eng.).

182. *Humphrys*, [1977] AC at 34 (Lord Hailsham of St. Marylebone).

183. *See United States v. Dixon*, 509 U.S. 688, 710 n.15 (1993) (Scalia, J.) (majority opinion); *Garrett v. United States*, 471 U.S. 795, 798-99 (1985) (O'Connor, J., concurring).

184. *Sambasivam v. Pub. Prosecutor* [1950] AC 458 (PC) 460 (appeal taken from Malaya) (Eng.).

185. *Id.* at 462.

introduce a statement in which the defendant admitted to being guilty of *both* offenses, without telling the jury that the defendant must still be considered innocent of the possession of the firearm charge.¹⁸⁶ Lord MacDermott wrote:

[T]he verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication Here, the appellant having been acquitted at the first trial on the charge of having ammunition in his possession, the prosecution was bound to accept the correctness of that verdict and was precluded from taking any step to challenge it at the second trial. The maxim ‘Res Judicata pro veritate accipitur’ is no less applicable to criminal than to civil proceedings.¹⁸⁷

Yet, it would be incorrect to read this affirmation as referring to issue estoppel; it was a challenge to the validity of a verdict *as a whole*. This is nothing but a corollary of *autrefois*¹⁸⁸—if the prosecution cannot appeal an acquittal, they cannot challenge it in a trial for a different offense, as if it were an appeal in disguise.

This concept can also relate to subsequent charges of perjury. In *HM Advocate v. Cairns*, the Scotland High Court of Judiciary examined the rule of preclusion after a defendant who had been acquitted for murder later confessed to a newspaper.¹⁸⁹ He was then tried for perjury.¹⁹⁰ The Court found no bar as “the accused had not tholed [or suffered] his assize.”¹⁹¹ Anyway, even if murder and perjury are totally different offenses, a conviction for perjury would tend to negate the acquittal for the crime that the defendant denied on oath to have committed.

Given the inapplicability of estoppel doctrines, the correct way to address a charge of perjury after an acquittal is by using the line drawn in *R v. Carroll* of the High Court of Australia.¹⁹² At his trial for murder, Carroll denied he had killed a woman.¹⁹³ He was convicted, but the Court of Criminal Appeal overturned the verdict for insufficiency of evidence and directed the trial court to enter a verdict of acquittal.¹⁹⁴ After more than fourteen years, Carroll was then convicted for perjury.¹⁹⁵ The High Court ruled that the new prosecution was oppressive and that it should have been

186. *Id.* at 472-73, 475, 479-80.

187. *Id.* at 479.

188. *Connelly v. DPP* [1964] AC 1254 (HL) 1341 (Lord Devlin) (appeal taken from Eng.).

189. *HM Advoc. v. Cairns* (1967) JC 37, 37, 37 n.1 (Scot.).

190. *Id.* at 38.

191. *Id.* at 37.

192. *R v Carroll* (2002) 213 CLR 635 (Austl.), noted in K.R. HANDLEY, SPENCER BOWER AND HANDLEY: *Res Judicata*, 213-14 (4th ed. 2009).

193. *Carroll*, 213 CLR at 637-38.

194. *Id.* at 638.

195. *Id.*

stayed as abuse of process.¹⁹⁶ With the new charge, the prosecution was doing nothing but trying to controvert the acquittal for murder, based on the same ultimate issue.¹⁹⁷ When asked at his trial whether he had killed the woman, Carroll answered with a simple no.¹⁹⁸ Had his answer been different, such as asserting a false alibi, perhaps the new indictment could have proceeded; it would have cast serious doubt over his innocence for murder but would not have directly impeached his acquittal.¹⁹⁹

2. A Constitutional Abuse of Process Doctrine

Some commentators have analyzed old English cases as embracing a preclusion rule, that was part of a double jeopardy approach, that would not permit multiple prosecutions if they involve multiple-victim cases and rest on the same evidence.²⁰⁰ For example, Joseph J. DeMott cited in his work, three cases where the same people, after being acquitted for robbery or stealing from one person, faced back-to-back trials on a different indictment for robbing or stealing from a different person in the same incident.²⁰¹ In those cases, the courts would direct an acquittal.²⁰² Yet, these cases did not involve pleas of *autrefois*, and a previously convicted co-defendant would have still been convicted the second time.²⁰³ Those acquittals relied upon a

196. *Id.* at 649-51.

197. *Id.* at 644-45 (Gleeson, CJ & Hayne, J) (“[T]he factual inquiries made at the two trials, in the end, came to focus upon the same issue—did the respondent kill Deidre Kennedy?”); *see also id.* at 665 (Gaudron & Gummow, JJ); *Chitwood v. United States*, 178 F. 442, 443 (8th Cir. 1910) (“A person acquitted of a crime cannot be again tried for it under the guise of a charge of perjury.”).

198. *See Carroll*, 213 CLR at 666.

199. *Id.* at 666 (Gaudron & Gummow, JJ); *see also R v. Z* [2000] 2 AC 483 (HL) 483 (appeal taken from Eng.) (emphasis added) (English House of Lords underscoring that evidence is not inadmissible as it simply “*tend[s]* to show” that the defendant is guilty of an offense for which he has been acquitted).

200. *See, e.g.,* Joseph J. DeMott, *Rethinking Ashe v. Swenson from an Originalist Perspective*, 71 STAN. L. REV. 411, 440-44 (2019).

201. *Id.* at 441-42.

202. DeMott also cites the *Turner’s Case* (1664) 84 Eng. Rep. 1068, where a person acquitted for burglary (breaking into a house and taking away money) could not “be indicted again for the same burglary” when the new indictment contained money belonging to a different person. DeMott, *supra* note 200, at 442-43 (quoting *Turner’s Case*, 84 Eng. Rep. at 1068). But if at common law burglary was defined as entering into a dwelling with the intent to commit a felony, that was in effect the very same offense: the same entering supported by the same intent to steal. It should not be compared to a multiple-victim case, as the new money was just a descriptive element of the same crime.

203. *See Trial Account of The Trial of Thomas & Edward Lake*, THE PROCEEDING OF THE OLD BAILEY, (Feb. 18, 1778), *microformed on* Harvester No. t17780218-4 (Harvester Microform), <https://www.oldbaileyonline.org/record/t17780218-?text=Thomas%20Flink%20Edward%20Lake>.

legal tool that a court at that time would use to activate so it could use its inherent power to stop an indictment, even when *autrefois* was not enough.²⁰⁴

Rather, as in *Ashe*, the Court felt the new trial was unfair and oppressive.²⁰⁵ Yet, this concept of unfairness is, as Professor Akhil Amar has argued, much more based on a Due Process Clause than the strict wording of double jeopardy.²⁰⁶ It was not part of the common law. What common law knew, instead, was the power of the courts to protect their proceedings from abuse and to preserve fairness. *Ashe* would have been the perfect occasion for the U.S. Supreme Court to recognize that at common law, England protected the fairness of trials by recognizing procedures that judges could use, such as severance and joinder, to ensure there was not an abuse of process. The Court could have affirmed that the *Connelly*-style abuse of process is implicit in the Due Process Clause and avoided the ambiguities and difficulties that have arisen by trying to apply collateral estoppel as a double jeopardy concept.²⁰⁷

3. Using a Different Approach to Address Asymmetric Appeal Rights in the United States

One area where it is particularly challenging to think of how double jeopardy should be applied is the question of whether prosecutors should ever be allowed to appeal acquittals. In *Kepner v. United States*, the Court acknowledged the rule that prosecutors were precluded from such appeals no matter the basis for the acquittal.²⁰⁸ The reason for this rule was explained by Justice Gray in *United States v. Ball*.²⁰⁹ The Court held that if there was a review of an acquittal, the defendant might be put twice in jeopardy on retrial.²¹⁰ The same would be true for a judgment of acquittal,²¹¹ as erroneous

204. See Demott, *supra* note 200, at 442-43.

205. *Ashe v. Swenson*, 397 U.S. 436, 445-46, 445 n.10 (1970).

206. Amar, *supra* note 2, at 1828-1829.

207. This general approach, focused on what is fair to the defendant, is wider than a case-by-case due process argument based on the prosecution's intent to harass or seek additional punishment. For the proposal of a supplement due process protection in this sense, see Lissa Griffin, *supra* note 146, at 504-05, who cites *Blackledge v. Perry*, 417 U.S. 21 (1974) as an example of how due process has already been applied to presumed vindictiveness upon a retrial on more serious charges.

208. See *Kepner v. United States*, 195 U.S. 100, 133 (1904).

209. *United States v. Ball*, 163 U.S. 662, 671 (1896).

210. *Id.*; see also *United States v. DiFrancesco*, 449 U.S. 117, 130 (1980) (“[H]owever mistaken the acquittal may have been, there would be an unacceptably high risk that the Government, with its superior resources, would wear down a defendant.”).

211. *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 570-71 (1977). A post acquittal appeal is also barred when it would result in a retrial, but more in general, in further proceedings related to the resolution of factual issues. See *Smalis v. Pennsylvania*, 476 U.S. 140, 142 (1986).

as it might be.²¹² The focus was on the finality of the acquittal itself, rather than on remedying a trial error. By contrast, the defense could always appeal a conviction. When the defense succeeds, the result is often a new trial, unless the conviction is overturned for a speedy trial violation²¹³ or for the lack of legally sufficient evidence.²¹⁴ While this retrial would surely expose the defendant to jeopardy again, it does not violate the Fifth Amendment because it is the defendant who seeks a new judgment.²¹⁵

In England and Wales, there are two kinds of trial. Most crimes, named “summary offences,” are tried in the Magistrates’ Court before three laypersons, legally assisted by a clerk.²¹⁶ The most serious crimes, “indictable offences,” are tried before a jury and a presiding judge in the Crown Court.²¹⁷ In summary trials, a convicted defendant can appeal without leave from the Magistrates’ Court to the Crown Court,²¹⁸ which must be composed of at least one judge and two justices of the peace in its appellate capacity.²¹⁹ This appeal, not available to the prosecution, brings a completely new trial. Otherwise, both the prosecution and the defense can appeal to the High Court by way of case stated on matters of law or excess of jurisdiction.²²⁰ It is a request for the magistrates to state the case for the opinion of the High Court.²²¹ If the defendant was wrongly acquitted, the High Court overturns the acquittal, and it can send the case back for a new

212. In *Fong Foo v. United States*, 369 U.S. 141, 141-43 (1962), before FED. R. CRIM. P. 29 was enacted, the jury was directed to acquit even before the close of the prosecution’s case. In *Evans v. Michigan*, 568 U.S. 313, 315-16 (2013), the judge acquitted the defendant thinking that the prosecution had failed to prove a fact that the court mistakenly believed was an element of the crime.

213. *Smith v. United States*, 599 U.S. 236, 241-242 (2023).

214. See *Burks v. United States*, 437 U.S. 1, 3, 5, 18 (1978). This is because when the appellate court finds that a reasonable jury could not convict upon the evidence taken in the light most favorable to the prosecution, e.g., *Glasser v. United States*, 315 U.S. 60, 80 (1942), the trial judge should have entered a conclusive judgment of acquittal, which could have not been challenged. Under *Lockhart v. Nelson*, 488 U.S. 33, 40 (1988), even wrongly admitted evidence is part of the sufficiency calculus.

215. The so-called “clean slate rule” was enunciated in *United States v. Ball*, 163 U.S. 662, 671 (1896). The rule is the same in case of an overturned conviction in collateral proceedings. *United States v. Tateo*, 377 U.S. 463, 463-64, 466 (1964) (stating that “[i]t would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction”).

216. THE RIGHT HONOURABLE LORD JUSTICE AULD, REVIEW OF THE CRIMINAL COURTS OF ENGLAND AND WALES 72, 74 (2007), <https://www.criminal-courts-review.org.uk/chpt3.pdf>.

217. *Id.* at 71-72.

218. Magistrates’ Court Act 1980, c. 43 § 108(1) (U.K.).

219. Senior Courts Act 1981, c. 54 § 74(1)(b) (U.K.).

220. Magistrates’ Court Act 1980, c. 43 § 111(1) (U.K.).

221. *Id.*

trial.²²² If the defendant was wrongly convicted, the High Court overturns the conviction and orders a new trial or convicts on a lesser offense.²²³

By contrast, after jury trials, the prosecution cannot appeal an acquittal, but the defense can appeal an “unsafe” conviction before the Court of Appeal (Criminal Division) with the leave of the court itself or a certificate of the trial judge.²²⁴ When the conviction is overturned, the defendant is placed in the position they would have been in had they been acquitted unless the court orders a retrial when “the interests of justice so require.”²²⁵ Additionally, *before* the verdict is rendered, the Crown is entitled to challenge the trial judge’s rulings under section 58 of the Criminal Justice Act 2003, at which point the trial is suspended.²²⁶ These are the so-called “interlocutory appeals,” decided by the Court of Appeal.²²⁷ The rulings in question can be the stay of the proceedings due to abuse of process, the inadmissibility of evidence, or even a “no case to answer.”²²⁸ A submission of a “no case to answer” corresponds to the American motion for a judgment of acquittal, with the difference that when the trial judge grants the request, they do not directly acquit, but they rule that they will direct the jury to do so.²²⁹ If the prosecution is quick enough to declare their intention to appeal, no formal acquittal is entered, and the judge’s evaluation of the sufficiency of evidence can be challenged.²³⁰

Section 58(8) sets down a condition to raise an interlocutory appeal. It must be done in open court and if the leave to appeal is not granted or if the appeal is later abandoned, the defendant should be acquitted for the offense object of the appeal.²³¹ Moreover, section 61(3) adds that if the appeal fails

222. Criminal Appeal Act 1968, c. 19, § 7 (U.K.).

223. *Id.* §§ 2, 3.

224. Criminal Appeal Act 1968, c. 19 §§ 1,2 (U.K.); *see also* R. v. Cooper [1969] 1QB 267 (Eng.); R v. Pope [2012] EWCA (Crim) 2241.

225. Criminal Appeal Act 1968, c. 19, § 7 (U.K.); James Chalmers & Fiona Leverik, *When Should a Retrial be Permitted After a Conviction is Quashed on Appeal?*, 74 MOD. L. REV. 721, 722, 747 (2011) (reasoning like *Burks*, that retrial should be excluded only for insufficiency of evidence and abuse of process, leaving the other situations to prosecutorial discretion. Even if the section uses the word “order”, the Court could not force the Crown to proceed against their will).

226. *See* Criminal Justice Act 2003, c. 44 § 9 § 58 (U.K.).

227. *Id.* § 57.

228. *Id.* §§ 58, 62.

229. *Appeals - Prosecution Rights*, THE CROWN PROSECUTION SERVICES (Dec. 19, 2019), <https://www.cps.gov.uk/prosecution-guidance/appeals-prosecution-rights> [<https://perma.cc/X84D-2X7N>] (last visited Nov. 9, 2025).

230. For a critical opinion on this point, see David S. Rudstein, *Retrying the Acquitted in England Part III: Prosecution Appeals against Judges’ Rulings of No Case to Answer*, 13 SAN DIEGO INT’L L.J. 5, 38 (2011); Criminal Justice Act 2003, c. 44, § 58(8) (U.K.).

231. R v. R [2008] (Crim) 370 [19] (stating that “an acquittal agreement is fundamental to an appeal under section 58. Without an acquittal agreement, there can be no appeal under section 58”);

on the merit, the Court of Appeal orders that the defendant be acquitted for the relevant offense.²³²

There is no mechanism under American law to correct a blatantly wrong acquittal because of America's blanket approach to the double jeopardy rule.²³³ There seems to be widespread agreement with this rule, but it should not be because it is mandated by English common law of double jeopardy. England's Criminal Justice Act 2003 introduced the possibility of retrial for serious offenses (listed in schedule 5), even for acquittals entered before the passing of the Act itself.²³⁴ A case can be reopened when there is "new and compelling evidence" against the acquittal,²³⁵ and it is in the interest of justice to proceed.²³⁶ The process is, as it should be, exacting to reopen a case. First, the prosecutor must be given permission by the Director of Public Prosecutions,²³⁷ and then must apply to the Court of Appeal for it to set aside the acquittal.²³⁸ The decision granting the application can be challenged before the Supreme Court.²³⁹

While the English reform addresses cries for symmetry in prosecution and defense rights to appeal, it risks subjecting innocent defendants to multiple trials. Yet, the fact that England is open to limited prosecution appeals that would not violate double jeopardy suggests that there can be procedural refinements in the American process that would allow such appeals. For example, a judgment of acquittal could be limited to only after the jury has returned a conviction. Another possibility might be that the prosecution could appeal an order suppressing evidence even after jeopardy has been attached if it does not delay or otherwise prejudice the ongoing proceedings.²⁴⁰ Such an approach would free American practices from rules

see also R v. Arnold, [2008] 1 WLR 2881 at 2888 (Eng.); Criminal Justice Act 2003, c. 44, § 61(3) (U.K.).

232. Criminal Justice Act 2003, c. 44, part 9 § 61(3) (U.K.).

233. For the proposed idea of a continuing jeopardy where both parties are entitled to see the correct application of the law, see Amar, *supra* note 2, at 1842, 1845 ("We do not demand that the defendant go free because the initial jurors catch fever and a new trial is ordered; why should things be any different if a fevered judge makes egregiously wrong legal rulings at trial?"); see also Kyden Creekpau, *What's Wrong with a Little More Double Jeopardy - A 21st Century Recalibration of an Ancient Individual Right*, 44 AM. CRIM. L. REV. 1179, 1200 (2007).

234. *Id.* § 75(6).

235. *Id.* § 78(1).

236. *Id.* §§ 77, 79.

237. *Id.* § 76(4).

238. *Id.* §§ 76(3), 76(1).

239. *Id.* § 81.

240. Under current law, these rulings cannot be challenged even if at trial it becomes impossible for the prosecution to prove their case. See *Sanabria v. United States*, 437 U.S. 54, 77-78 (1978) (granting a judgement of acquittal after excluding key evidence at the close of defendants' case); see also *United States v. Pharis*, 298 F.3d 228, 237, 245 (2002).

that have been historically justified under the double jeopardy doctrine but are really based upon when the government is involved in abuse of process. Moreover, as has been noted, it would address wrongful verdicts that can occur, for example, by the defense bribing jurors or the trial judge such that the defendant was never really placed in jeopardy as the concept of double jeopardy requires.²⁴¹

Allowing limited interlocutory appeals can be both a fair and efficient way of addressing issues that arise in criminal cases. Consider the saga of Wendell Baker.²⁴² In 1997, a man broke into the house of a sixty-six-year-old woman, tied her up, beat and sexually assaulted her.²⁴³ The police obtained a DNA profile of the likely assailant.²⁴⁴ In 1998, the authorities arrested Wendell Baker for burglary and obtained a DNA sample from him.²⁴⁵ He was acquitted of the burglary and, although the DNA profile should have been deleted, it remained on the national database.²⁴⁶ Afterward, the police matched his DNA with materials found in the woman's house.²⁴⁷ Baker faced trial for burglary, assault and rape.²⁴⁸ The trial judge wrongly thought that the fresh DNA evidence was inadmissible and he excluded it.²⁴⁹ The prosecution was then left with no evidence, and Baker was acquitted.²⁵⁰

No interlocutory appeal was available at that time. The Attorney General brought a reference and the House of Lords ruled that this type of DNA evidence was admissible under English law.²⁵¹ When the Criminal Justice Act 2003 was enacted, the acquittal was set aside because the DNA evidence was considered "new" evidence that had been excluded at trial.²⁵²

241. U.S. *ex rel.* Aleman v. Cir. Ct. Cook Cnty., 967 F. Supp. 1022, 1024-26, 1028 (1997). In England this would be treated as a tainted acquittal under Criminal Procedure and Investigations Act 1996, c. 25 § 54 (Eng.).

242. *Double Jeopardy Case: Wendell Baker Jailed for Pensioner Rape*, BBC NEWS (Jun. 28, 2013), <https://www.bbc.com/news/uk-england-23101232>.

243. Jonathan Paige, *Rapist Wendell Baker Sentenced to Life as He Finally Faces Justice After 1997 Attack*, THE INDEPENDENT (Jun. 28, 2013), <https://www.independent.co.uk/news/uk/crime/rapist-wendell-baker-sentenced-to-life-as-he-finally-faces-justice-after-1997-attack-8678665.html>.

244. *Id.*

245. *Id.*

246. Emma Bartholomew, *Landmark Double Jeopardy Case Sees Man Jailed 14 Years After Rape Using DNA From Hackney Burglary Arrest*, HACKNEY GAZETTE (July 1, 2013), <https://www.hackneygazette.co.uk/news/crime/22945977.landmark-double-jeopardy-case-sees-man-jailed-14-years-rape-using-dna-hackney-burglary-arrest/>.

247. *See* Bartholomew, *supra* note 246.

248. *See id.*

249. R v. B [2012] EWCA (Crim) 414 [1], [10].

250. *Id.* at [1].

251. AG's Ref. No. 3 of 1999 [2000] UKHL 63 (HL).

252. R v. B, [2012] EWCA at 414.

Baker was then retried and convicted.²⁵³ Had an interlocutory appeal been available at that time, there would have been no need to reopen the case after a wrongful acquittal. Indeed, slight changes in appellate rights can both safeguard a defendant's double jeopardy rights but ensure that those rights do not undermine the prosecution's opportunity to obtain key rulings from the appellate courts and, when appropriate, a retrial.

Using the lessons from other countries, America's double jeopardy doctrine can remain a strong protection for the defendant but not impede the use of procedures that protect the prosecution's interests as well. America tends to adopt "exceptions" to double jeopardy law rather than set forth the narrow scope of the rule and then evaluate other issues from an abuse of process perspective. For example, the doctrine of double jeopardy only applies to criminal cases.²⁵⁴ Thus, the United States has adopted a "separate sovereign" exception that allows federal and state governments to each prosecute a defendant for the same crime.²⁵⁵ However, at the same time, the Department of Justice has adopted a "Petite Policy" that guides federal prosecutors as to when they should use the dual sovereignty doctrine.²⁵⁶

253. *R v. Baker* [2013] Ctr. Crim. Ct. (Eng. & Wales) [1], [29], [30], (Sentencing Remarks of His Honour Judge Rook QC), <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Judgments/r-v-wendell-baker-sentencing.pdf>.

254. *See Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 899-900 (2009) (Robert, J., dissenting) (second alteration in original) (internal quotation marks and citations omitted) ("Historically, we have held that the Double Jeopardy Clause only applies to criminal penalties, not civil ones [But] a civil penalty could violate the Clause if it were overwhelmingly disproportionate to the damages [the defendant] has caused and resulted in a clear injustice.").

255. *Gamble v. United States*, 587 U.S. 678, 686-87 (2019).

256. Statement of Policy:

This policy establishes guidelines for the exercise of discretion by appropriate officers of the Department of Justice in determining whether to bring a federal prosecution based on substantially the same act(s) or transactions involved in a prior state or federal proceeding. Although there is no general statutory bar to a federal prosecution where the defendant's conduct has already formed the basis for a state prosecution, Congress has expressly provided that, as to certain offenses, a state judgment of conviction or acquittal on the merits shall be a bar to any subsequent federal prosecution for the same act or acts. *See* 18 U.S.C. §§ 659, 660, 2101, 2117; *see also* 15 U.S.C. §§ 80a-36; The purpose of this policy is to vindicate substantial federal interests through appropriate federal prosecutions, to protect persons charged with criminal conduct from the burdens associated with multiple prosecutions and punishments for substantially the same act(s) or transaction(s), to promote efficient utilization of Department resources, and to promote coordination and cooperation between federal and state prosecutors.

This policy precludes the initiation or continuation of a federal prosecution, following a prior state or federal prosecution based on substantially the same act(s) or transaction(s) unless three substantive prerequisites are satisfied. First, the matter must involve a substantial federal interest. This determination is made on a case-by-case method, such as when a civil rights violation occurs and is not being successfully pursued by local authorities. Second, the prior prosecution must have left that interest demonstrably unvindicated. This may be shown by the following occurring in the first trial: incompetence, corruption, intimidation, jury nullification in clear disregard for the law, unavailability of significant evidence, inaccurate interpretations of the law, or other failures of the state authorities to prove their case. If there is a conviction in the prior case, federal trial is allowed only when the sentence imposed was manifestly inadequate. Third, applying the same test that is applicable to all federal prosecutions, the

In other words, America can be true to the true meaning of double jeopardy as created by the common law and still receptive to procedural rules that provide broader protection to defendants. The question is how willing courts are to consider the overall criminal prosecution process and the impact of its rulings on the defendant's rights, as well as the prosecution's interests.

4. Implications of a New Double Jeopardy Approach for Transnational Prosecutions

A different approach to double jeopardy may also require examination of how the separate sovereign doctrine is used in American law. While sovereign countries apply double jeopardy vertically within their own borders, they are generally reluctant to recognize a horizontal dimension of the principle, giving preclusive force even to a final criminal decision handed down by a foreign court.²⁵⁷ This is because handling criminal law and punishing crimes are among the most characteristic functions of a sovereign.²⁵⁸ A possible solution might be working outside the double jeopardy structure and considering these prosecutions as the application of a Petite Policy on the international level.²⁵⁹

Rather than starting successive prosecutions, the enforcement agencies of different countries could cooperate in a shared investigatory effort after waiving their power to prosecute in favor of the sovereign best placed to try the relevant offenses. Nevertheless, this case-by-case option seems too vague and, in practice, it does not depart from a predominantly covenantal logic of international double jeopardy. The problem of double prosecutions arises exactly when all the interested countries have not cooperated and one of them has already tried the suspect.

government must believe that the defendant's conduct constitutes a federal offense, and that the admissible evidence probably will be sufficient to obtain and sustain a conviction by an unbiased trier of fact. In order to ensure the most efficient use of law enforcement resources, whenever a matter involves overlapping federal and state jurisdiction, federal prosecutors should, as soon as possible, consult with their state counterparts to determine the most appropriate single forum in which to proceed to satisfy the substantial federal and state interests involved, and, if possible, to resolve all criminal liability for the acts in question. In addition, there is a procedural prerequisite to be satisfied, that is, the prosecution must be approved by the appropriate Assistant Attorney General.

Satisfaction of the three substantive prerequisites does not mean that a proposed prosecution must be approved or brought. The traditional elements of federal prosecutorial discretion continue to apply.

See U.S. Dep't of Just. Just. Manual § 9-27.000 (2024).

257. See Gerard Conway, *Ne Bis in Idem in International Law*, 3 INT'L CRIM. L. REV. 217, 218 (2003).

258. See *id.* at 217-218 (2003).

259. See Anthony J. Colangelo, *Double Jeopardy and Multiple Sovereigns: A Jurisdictional Theory*, 86 WASH. U. L. REV. 769, 847-48, 851-53 (2009).

In Italy, the Supreme Court of Cassation has never recognized *ne bis in idem* as a general principle or a customary rule of international law under Article 38 of the ICJ Statute, thus binding upon the State in light of the automatic adaptation clause of Article 10 of the Italian Constitution: “The Italian legal system conforms to the generally recognized norms of international law.” For instance, an Albanian national could be retried in Italy for a crime that occurred on Italian soil, even if the same person has already been tried in Albania according to the active nationality principle.²⁶⁰ As Italian criminal law is mainly inspired by territoriality (Articles 6 and 11 of the Italian Criminal Code), a derogation to territorial jurisdiction would be allowed only in presence of a specific international treaty pursuant to which a foreign decision would have the force of *res judicata* in the Italian legal system.²⁶¹ This is the case of Article 50 of the Charter of Fundamental Rights of the European Union, which applies *ne bis in idem* horizontally to all the member States of the EU.²⁶² Italy is thus a good example of how international *ne bis in idem* would generally require a common trust among different legal systems, besides shared sensibilities, values, and harmonized criminal categories.²⁶³

An approach in exactly the opposite direction is offered by the Netherlands. Article 68 (3) of the Dutch Criminal Code provides that no person can be prosecuted twice after a final judgment has been rendered by a foreign court.²⁶⁴ The preclusion operates unconditionally in case of a previous decision on the merits, but a previous conviction when punishment is imposed is a bar only when the sentence has been *completely* enforced²⁶⁵ or pardoned.²⁶⁶ Moreover, the immunity from punishment due to the lapse of the period of limitation under Article 74 (1) would be a bar.²⁶⁷ Under Article 68 (3), new charges cannot be brought when the matter has been finally settled abroad with the “fulfillment of a condition set by the competent authorities in order to avoid criminal proceedings.”²⁶⁸ The most surprising

260. Cass. Pen., Sez. I [Court of Cassation], 7 September 2022, n. 32932 (It.); Cass. Pen., Sez. I [Court of Cassation], 24 July 2019, n. 33564 (It.). Anyway, the time already served for a conviction abroad is deducted from the sentence in Italy. Art. 138 Cod. Pen. [Italian Criminal Code] (It.).

261. Without a specific treaty providing differently, a person already tried abroad for an offense occurred in a different country and on which Italy would have jurisdiction can be tried again if the Minister of Justice requests so.

262. Charter of Fundamental Rights of the European Union, art. 50, 2016 O.J. (C 202/02).

263. See Corte Cost. [Constitutional Court], 18 April 1967, n. 48 (It.).

264. Artikel 68 lid 3 WETBOEK VAN STRAFRECHT [Sr] [CRIMINAL CODE] (Neth.).

265. In case of a just partially enforced penalty, it is not taken into account at sentencing.

266. See André Klip & Harmen Van Der Wilt, *The Netherlands Non Bis in Idem*, 73 INT’L REV. PENAL L. 1100, 1112 (2002).

267. *Id.* at 1092, 1100, 1112.

268. Artikel 68 lid 3 SR (unofficial English translation).

aspect of the Dutch approach is the great deference it grants to foreign courts: an acquittal for lack of evidence would be a bar even if, in the Netherlands, enough evidence was available to convict. An acquittal, because the conduct does not integrate a crime, would be a bar even if that same conduct were a crime under Dutch law. The same would be for an acquittal obtained by fraud or, in the absence of a specific exception, rendered in a so-called “sham trial” directed to shield the defendant.²⁶⁹

In England and Wales, a plea of *autrefois* seems generally available no matter where the acquittal or conviction was rendered. In fact, recent decisions have recognized the international extension of *autrefois*. The Court of Appeal in *R v. Lavercombe*,²⁷⁰—scrutinizing the sameness of a charge of conspiracy to keep possession of cannabis for sale in Thailand (to which the defendants had pleaded guilty) and conspiracy to import cannabis in England—implicitly assumed that *autrefois convict* could potentially apply.

In *Cheong v. R*, *autrefois* was not involved, but abuse of process was.²⁷¹ A British national was tried in England for murder for a killing in Guyana, under section 9 of the Offences against the Person Act of 1861.²⁷² For the same set of facts, the Guyana’s Director of Public Prosecutors had decided that the defendant had to stand trial for unlawful possession of a firearm but for no other offense.²⁷³ Even if *Beedie* was not applicable to a situation in which a foreign prosecuting authority was involved, the Court of Appeal conceded: “There may be circumstances in which the decision of a foreign prosecuting authority not to charge an offence of homicide may make it unfair to try a British subject under [section] 9.”²⁷⁴

Thus, while it seems that a defendant could not generally be tried in England after a final decision rendered in another country, under the “dual sovereignty doctrine” the same defendant could face multiple trials under separate “sovereigns” in the United States.

IV. CONCLUSION

There are many benefits in taking another look at the double jeopardy doctrine. First, one can get a clearer idea as to the genesis of the doctrine

269. The test is not whether Dutch courts would have reached the same conclusion, but whether the decision technically constitutes an acquittal or dismissal under Dutch law. See André Klip & Harmen Van Der Wilt, *The Netherlands Non Bis in Idem*, 73 INT’L REV. PENAL L. 1019, 1100-01, 1110-1113 (2002).

270. *R v. Lavercombe* [1988] CRIM. L.R. 435.

271. *Cheong v R* [2006] EWCA (Crim) 524 [2], [5], [9].

272. See *id.* at [9].

273. *Id.* at [5].

274. *Id.* at [16].

and, therefore, its proper scope under American law. Rather than focusing on all the difficult rules that have been developed, such as how to identify the “same offense,” examining the “abuse of process” doctrine can open the door to a more flexible approach that looks at the defendant’s overall criminal behavior.

Second, American defendants could have protections beyond the narrow constitutional rule that the Supreme Court has developed. Rather, as in other countries, the Court could also consider the issue of abuse of process in deciding whether defendants could be tried or doctrines like collateral estoppel should be used.

Third, a new approach might open an avenue for government appeals in cases where previously there has been a per se prohibition under current double jeopardy law.

Finally, changing double jeopardy law in a manner that fully adopts the English approach of pleas of *autrefois* may be unrealistic, especially in light of the roots of the dual sovereignty doctrine. However, drawing from approaches by other countries may lead to a reasonable balance between the interests of the sovereign and the right of the individual not to be prosecuted repeatedly for the same offense.

As America becomes more engaged in cases that involve foreign courts, there will be a need to both simplify the double jeopardy doctrine and ensure that it will recognize the concerns raised by other countries. While the Supreme Court may have believed that returning to the *Blockburger* test has settled the application of double jeopardy for the future, there are many questions that remain, and a comparative examination might help with how those questions are addressed in the future.