DOUBLE TAKE:
EVALUATING DOUBLE JEOPARDY REFORM

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PROLOGUE

In February 1990, Ann Ming found her daughter Julie Hogg's body hidden behind a bath panel in her Teesside, England home.[1] She had been missing since the previous November.[2] The British government charged and indicted William Dunlop with her murder.[3] Following two mistrials in May and October 1991, the Crown Court declared Dunlop "not guilty."[4] In 1999, while incarcerated for an unrelated offense, Dunlop repeatedly admitted to having murdered Hogg.[5] He confessed to his prison nurse, wrote letters referencing his guilt to friends, and in a child custody proceeding stated, "I have admitted that I was responsible for the death of Julie Hogg. I stood trial at Newcastle Crown Court for her murder and was acquitted. I denied the offence and I accept that I lied."[6] Barred from re-indicting Dunlop for homicide by the historic common law prohibition on double jeopardy,[7] the Crown prosecution took the "unusual" step of

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1 *See* R v. Dunlop [2006] EWCA (Crim) 1354, [9], [2007] 1 All E.R. 593, 597; *see also Double Jeopardy Man Admits Guilt*, BBC NEWS, Sept. 11, 2006, http://news.bbc.co.uk/2/hi/uk_news/england/5144722.stm.

2 *Dunlop*, [2006] EWCA (Crim) 1354, [9], [2007] 1 All E.R. 593, 597.

3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.*

7 *See, e.g.*, Connelly v. DPP, [1964] A.C. 1254, 1306 (H.L. 1963) (appeal taken from Eng.) (U.K.) (opinion of Lord Morris) (stating that it is a "fundamental principle . . . that a man is not to be prosecuted twice for the same crime").

charging him with perjury.[8] Based on the foregoing evidence, Dunlop was convicted of perjury in 2000 and sentenced to six years in prison.[9]

Prior to the passage of the Criminal Justice Act of 2003[10] (CJA), this would have been the end of Dunlop's story. As in the United States,[11] the principle of double jeopardy previously provided "absolute" protection for Dunlop.[12] Regardless of the "truth," the state would always officially deem Dunlop "not guilty" of Julie Hogg's murder. By virtue of the CJA, however, that all changed.[13] The CJA codified a "new and compelling evidence" exception to the bar against double jeopardy in England and Wales.[14] This major inroad came into force in April 2005 with retrospective application, meaning "every living person ever acquitted of one of the twenty-nine designated serious offences will in principle become eligible for retrial and possible conviction and punishment."[15] The Crown, following the procedures proscribed by the CJA, applied to the Court of Appeal to quash Dunlop's acquittal and grant a retrial based on his repeated admissions of guilt.[16] Dunlop was a "soft target"[17] for the first application of the CJA's double jeopardy exception, and the Court of Appeal had little difficulty granting the retrial.[18] Dunlop subsequently pled guilty to murder and was given the mandatory life sentence.[19]

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8 [2007] All E.R. Rev. [10.8].

9 *Dunlop*, [2006] EWCA (Crim) 1354, [9], [2007] 1 All E.R. 593, 597.

10 Criminal Justice Act, 2003, c. 44, §§ 75–97 (U.K.).

11 U.S. CONST. amend. V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ."); *see also* Benton v. Maryland, 395 U.S. 784, 787 (1969) (incorporating the Fifth Amendment against the states through the Fourteenth Amendment). Despite the applicability of the Fifth Amendment to the states, the "dual sovereignty doctrine" allows different states or a state and the federal government to bring successive prosecutions. *See* Abbate v. United States, 359 U.S. 187, 195 (1959) (allowing a federal prosecution following a state conviction based on the same conduct).

12 Paul Roberts, *Justice for All? Two Bad Arguments (And Several Good Suggestions) for Resisting Double Jeopardy Reform*, 6 INT'L J. EVIDENCE & PROOF 197, 198 (2002).

13 Criminal Justice Act, 2003, c. 44, §§ 75–97 (U.K.) (allowing "retrial for serious offenses").

14 *Id.* § 78.

15 Roberts, *supra* note 12, at 199–200.

16 R v. Dunlop [2006] EWCA (Crim) 1354, [2], [2007] 1 All E.R. 593, 595.

17 [2007] All E.R. Rev. [10.8].

18 *Dunlop*, [2006] EWCA (Crim) 1354, [45], [2007] 1 All E.R. 593, 604 ("[T]he public would rightly be outraged were the exception to the double jeopardy rule not to be applied in the present case . . . .").

19 [2007] All E.R. Rev. [10.11].

INTRODUCTION

Double jeopardy reform moved to the front of U.K. politics with the publishing of *The Stephen Lawrence Inquiry*, an investigation into the racially motivated murder of Stephen Lawrence in 1997.[20] The report noted that "[i]f . . . fresh and viable evidence should emerge against any of the three suspects who were acquitted, they could not be tried again however strong the evidence might be."[21] It argued that "consideration should be given to the Court of Appeal being given power to permit prosecutions after acquittal,"[22] because "in modern conditions such absolute protection may sometimes lead to injustice."[23] Pursuant to these suggestions, the House of Commons charged the Law Commission to consider changes to the rule against double jeopardy. The Commission produced a report in 2001[24] agreeing with *The Stephen Lawrence Inquiry* and noting "there have in recent years been a number of well-publicised cases in which persons acquitted of serious offences are reported to have subsequently confessed their guilt."[25] Echoing *The Stephen Lawrence Inquiry*, the Commission concluded "that the Court of Appeal should have power to set aside an acquittal . . . *for murder only*."[26]

In light of these reports, Parliament began work on a revision to the double jeopardy rule in 2002. The white paper trumpeting these changes notes that the goal of the reform is the "rebalancing [of] the criminal justice system in favour of the victim."[27] The government sought to "remove the double jeopardy rule for *serious cases*,"[28] intentionally broadening the scope of the exception beyond the recommendations of the Law Commission. The paper states that the double jeopardy "safeguard to acquitted defendants . . . caus[es] grave injustice to victims and the community in certain cases where compelling

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20 HOME DEPARTMENT, THE STEPHEN LAWRENCE INQUIRY, 1999, Cm. 4262-I [hereinafter HOME DEP'T, LAWRENCE INQUIRY].

21 *Id.* ¶ 7.46.

22 *Id.* ¶ 47.38.

23 *Id.* ¶ 7.46.

24 LAW COMM'N, DOUBLE JEOPARDY AND PROSECUTION APPEALS, 2001, Cm. 5048, at 6, *available at* http://www.lawcom.gov.uk/docs/lc267(1).pdf (describing a proposal to permit retrial "where there is compelling new evidence of guilt" and it would be "in the interests of justice").

25 *Id.* ¶ 1.6.

26 *Id.* ¶ 1.18.

27 HOME DEPARTMENT, JUSTICE FOR ALL, 2002, Cm. 5563, at 1 [hereinafter HOME DEP'T, JUSTICE FOR ALL], *available at* http://www.cjsonline.gov.uk/downloads/application/pdf/CJS%20White%20Paper%20-%20Justice%20For%20All.pdf

28 *Id.* at 13 (emphasis added).

fresh evidence has come to light after an acquittal."[29] Arguing that "[j]ustice denied is justice derided,"[30] and noting the strain that a clearly false acquittal places upon the integrity of the justice system, the U.K. Parliament swept away centuries of common law consensus and enacted the CJA.

Despite the intentionally "radical" nature of the CJA, several jurisdictions have followed the United Kingdom's lead.[31] Indeed, since 2003 New South Wales, Queensland, and South Australia have passed some variant of the "new and compelling" evidence exception to the double jeopardy rule.[32] Citing the asymmetry between defense and prosecution, these reforms seek to place the victim at the center of the criminal justice system.[33] These reforms throughout the common law world challenge the conventional wisdom that double jeopardy principles provide a bulwark against state oppression, instead portraying them as archaic protections for wrongly acquitted criminals.

Global change demands an analysis of current U.S. double jeopardy law. While the Fifth Amendment would make change difficult, mere procedural hardship serves as a poor reason to dismiss reform out of hand. Indeed, according to supporters, double jeopardy reform cures an endemic problem in the Anglo-American system of justice. Such a claim deserves a reasoned response. Dunlop's case offers a valuable chance to evaluate the growing trend towards double jeopardy reform in other common law jurisdictions. As such, this Note will critically evaluate the CJA against the backdrop of double jeopardy jurisprudence in both the United Kingdom and the United States, concluding that these reforms unjustifiably impinge on an important bulwark against the power of the state. Part I briefly traces the history of the bar against double jeopardy through the ratification of the U.S. Constitution. Part II discusses the evolution of double jeopardy jurisprudence in the United States, highlighting the policies underpinning the expansion of the doctrine. Part III describes the development of U.K. double jeopardy law prior to the passage of the CJA. Part IV discusses and refutes the three main justifications for reform. Part V lays out the case against the CJA against the backdrop of *Regina v. Dunlop*.[34] This Note concludes by emphasizing the liberty

29 *Id.* at 83.

30 *Id.* at 3.

31 *Cf.* Roberts, *supra* note 12, at 197 n.2 ("The White Paper positively aspires to radicalism . . . .").

32 David Hamer, *The Expectation of Incorrect Acquittals and the "New and Compelling Evidence" Exception to Double Jeopardy*, 2 CRIM. L. REV. 63, 63 (2009).

33 *Id.* at 64.

34 [2006] EWCA (Crim) 1354, [2007] 1 All E.R. 593.

interests at stake in any reform of the double jeopardy doctrine and suggests that current reforms seriously and unjustifiably endanger those interests.

I. THE DOCTRINE OF DOUBLE JEOPARDY THROUGH 1789[35]

While the precise origins of the rule against double jeopardy remain lost to the "mists of time,"[36] the prohibition has existed in some form since "Greek and Roman Times."[37]

A. Origins of Double Jeopardy

While the laws of the various city-states of Ancient Greece differed greatly, by 355 B.C. the Greek orator Demosthenes concluded "the laws forbid the same man to be tried twice on the same issue."[38] Similarly, since the earliest years of the Roman Republic "an acquittal by a magistrate in a criminal prosecution barred further proceedings of any kind against the accused."[39] This proscription survived the imperial period, with the Digest of Justinian stating, "[T]he governor must not allow a man to be charged with the same offenses of which he has already been acquitted."[40] As Professor David Rudstein points out, however, the Roman law against double jeopardy operated quite differently from our modern conception of the doctrine due to the proliferation of private prosecutions.[41] This more limited version of the doctrine attempted to prevent citizens from employing different statutes or legal forms to effect successive prosecutions.

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35 This section draws heavily on Professor David Rudstein's work, particularly for the conclusion that the development of double jeopardy in the common law tracked the centralization of the prosecutorial power in the hands of the King. *See generally* David S. Rudstein, *A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy*, 14 WM. & MARY BILL RTS. J. 193 (2005).

36 Michelle Edgely, *Truth or Justice? Double Jeopardy Reform for Queensland: Rights in Jeopardy*, 7 QUEENSLAND U. TECH. L. & JUST. J. 108, 111 (2007). For a more thorough overview of the history of double jeopardy law, see Rudstein, *supra* note 35.

37 Benton v. Maryland, 395 U.S. 784, 795 (1969).

38 *Id.* at 198 (quoting Demosthenes, *Against Leptines*, *in* OLYNTHIACS, PHILIPPICS, MINOR PUBLIC SPEECHES, SPEECH AGAINST LEPTINES, XX § 147, at 589 (J.H. Vince trans., Harvard Univ. Press 1998) (1930)).

39 *Id.* at 199.

40 DIG. 48.2.7.2 (Ulpian, De Officio Proconsulis 7), *in* 4 THE DIGEST OF JUSTINIAN 797 (Theodor Mommsen et al. eds., Univ. of Pa. Press 1985) (1870). The Digest also states that "a person cannot be charged on account of the same crime under several statutes." DIG. 48.2.14 (Paulis, De Officio Proconsulis 2), *in id.* at 799; *see also* Rudstein, *supra* note 35, at 200.

41 Rudstein, *supra* note 35, at 200.

The first recorded use of the doctrine of double jeopardy in the English common law occurred in 1201. The court held a prosecution null partially on the basis of prior jeopardy, "thereby seeming to recognize [a] plea of previous acquittal."[42] Despite the early development of double jeopardy law in England, the doctrine failed to achieve consensus until well into the seventeenth century.[43] Notably, neither the Magna Carta[44] nor the English Bill of Rights of 1689, which cemented the constitutional structure of the monarchy and forms the basis for most modern English (and American) rights, mentions a bar against double jeopardy.[45]

Nonetheless, by the seventeenth century, the pleas of *autrefois acquit* (prior acquittal) and *autrefois convict* (prior conviction) had become firmly embedded principles of the English common law.[46] Indeed, both Lord Coke[47] and Sir Mathew Hale[48] described double jeopardy in a manner recognizable to modern readers. In the eighteenth century, William Blackstone wrote, "[T]he plea of *autrefois acquit* . . . is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for the same offence."[49]

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42 *Id.*

43 *Id.* at 209–17 (detailing the weakness of the doctrine of double jeopardy in the English Common Law prior to the seventeenth century).

44 *See* Barbara A. Mack, *Double Jeopardy—Civil Forfeitures and Criminal Punishment: Who Determines What Punishments Fit the Crime*, 19 SEATTLE U. L. REV. 217, 220 (1996) ("Although the Magna Carta contains the early form of other rights that subsequently appeared in the United States Constitution, it does not mention any former jeopardy rights.").

45 *See* An Act Declaring the Rights and Liberties of the Subject, and Settling the Succession of the Crown (Bill of Rights), 1689, 1 W. & M., c. 2 (Eng.); *see also* Mack, *supra* note 44, at 220 ("[T]he English Bill of Rights of 1689 contains many antecedents of our Constitution, but it makes no mention of any kind of double jeopardy protection." (footnote omitted)); Rudstein, *supra* note 35, at 218–19 ("Indeed, the English Bill of Rights enacted in 1689 made no mention of a protection against double jeopardy.").

46 Connelly v. DPP, [1964] A.C. 1254, 1306 (H.L. 1963) (appeal taken from Eng.) (U.K.) (opinion of Lord Morris) (collecting authorities from the sixteenth and seventeenth centuries); *see also* Grady v. Corbin, 495 U.S. 508, 530–33 (1990) (Scalia, J., dissenting) (discussing various seventeenth century English authorities).

47 3 EDWARD COKE, THE INSTITUTES OF THE LAWS OF ENGLAND 213–15 (M. Flesher ed., 1644).

48 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN *623. *But see* Rudstein, *supra* note 35, at 219 ("Whether Hale's work influenced the development of double jeopardy law during the seventeenth century is unclear because it was not published until 1736–39, more than sixty years after his death.").

49 4 WILLIAM BLACKSTONE, COMMENTARIES *329.

Notably, the expansion of the doctrine tracked the gradual decline of private prosecutions during the course of the seventeenth century. In the years prior to Lord Coke's famous treatise, "prosecutions by the King had begun replacing private prosecutions by appeal as the preferred method of prosecution."[50] No longer would double jeopardy merely be held up, as it was in Roman times, to prevent multiple prosecutions by a capricious victim. Rather, double jeopardy now stood as a protection against the King. As the government's prosecutorial power rapidly increased, the doctrine of double jeopardy underwent a correspondingly rapid solidification.

B. Double Jeopardy in America Prior to the Fifth Amendment

The prohibition against double jeopardy has been an important component of American law since colonial times.[51] In 1641, the General Court of the Massachusetts Bay Colony enacted the Body of Liberties, "[t]he first colonial enactment containing an express guarantee against double jeopardy," which stated that "'[n]o man shall be twise sentenced by Civill Justice for one and the same Crime, offence, or Trespasse.'"[52] Connecticut included a virtually identical proscription against double jeopardy in their Code of 1650.[53] Despite these early advances, no other state statutorily recognized the principle of double jeopardy until after the Revolutionary War.

While the Articles of Confederation, much like the Constitution in its original form, made no mention of double jeopardy, at least two state constitutions did. The first, the 1784 Constitution of New Hampshire, provided, "No subject shall be liable to be tried, after an acquittal, for the same crime or offence."[54] "Shortly after New Hampshire adopted a constitutional protection against double jeopardy, Pennsylvania followed suit."[55] Thus, while there was slightly greater legisla-

50 Rudstein, *supra* note 35, at 218 (describing the decline in private prosecutions in England).

51 *Id.* at 221 ("While double jeopardy law continued to develop in England during the seventeenth century, it began to take root in England's colonies in North America.").

52 *Id.* at 221–22 (quoting MASS. BODY OF LIBERTIES § 42 (1641)). Only seven years later the colony enacted another code, which included this earlier proscription against double jeopardy and also stated that "'[e]verie action between partie and partie . . . shall be briefly and distinctly entered on the Rolles of every Court by the Recorder thereof. That such actions be not afterwards brought againe to the vexation of any man.'" *Id.* at 222 (quoting MASS. BODY OF LIBERTIES § 64 (1648)).

53 Christopher Collier, *The Common Law and Individual Rights in Connecticut Before the Federal Bill of Rights*, 76 CONN. B.J. 1, 9 (2002).

54 N.H. CONST. OF 1784, art. I, § XVI.

55 Rudstein, *supra* note 35, at 223.

tive recognition of double jeopardy in the colonies, it was still predominantly the job of the courts to enforce and expand the doctrine.

Legislative silence aside, the rapidly advancing extension of the double jeopardy principle in England during the seventeenth century governed colonial courts. Colonial cases in Virginia, New York, Connecticut, Pennsylvania, and South Carolina explicitly recognized the prohibition against double jeopardy.[56] In one Virginia case from 1735, the court recognized the "[m]axim that a man should not be twice put in danger of his life," though the court concluded that "he had not been in [jeopardy because] the Jury that tried him [had] no Power to Convict him."[57] In *Respublica v. Shaffer*, Chief Justice Thomas McKean of the Supreme Court of Pennsylvania instructed a grand jury, "[B]y the law it is declared that no man shall be twice put in jeopardy for the same offence."[58]

As public demand for a bill of rights grew during the ratification debates over the newly minted U.S. Constitution, many called for a double jeopardy clause mirroring those in the New Hampshire and Pennsylvania Constitutions.[59] Indeed, several states attached suggested amendments to their ratification documents. Notably, the New York declaration of rights contained in their act of ratification stated that no person ought to be put in jeopardy or punished twice for the same offense, except in the case of impeachment.[60] A special committee appointed by the Maryland ratifying convention recommended a similar amendment.[61] Backed by these declarations, in his June 8 speech to the first Congress in 1789, James Madison proposed a series of amendments to the Constitution, including that "[n]o person shall be subject, except in cases of impeachment, to more than one punish-

56 *See, e.g.*, Hannaball v. Spalding, 1 Root 86 (Conn. 1783) (refusing to allow a prosecutor to bring a new trial following an acquittal not procured through fraud or malpractice); Steel v. Roach, 1 S.C.L. (1 Bay) 63 (1788) (refusing to allow a prosecutor to bring a new trial following an acquittal due to the "hard and rigorous" nature of qui tam actions); *see also infra* notes 57–58.

57 2 VIRGINIA COLONIAL DECISIONS, at B50–51 (R.T. Barton ed., 1909).

58 1 U.S. (1 Dall.) 236, 237 (Pa. 1788); *see also* Grady v. Corbin, 495 U.S. 508, 529 (1990) (Scalia, J., dissenting) (discussing the common law origins of the Double Jeopardy Clause); Rudstein, *supra* note 35, at 225 ("Chief Justice McKean told the grand jurors that the defendant could not summon witnesses to testify before the grand jury on his behalf, explaining that allowing the putative defendant to call witnesses would turn the grand jury proceeding into a trial, with the grand jury's decision being tantamount to a verdict of acquittal or guilt.").

59 Rudstein, *supra* note 35, at 227.

60 *Id.* at 227–28.

61 *Id.* at 228–29.

ment or one trial for the same offence."[62] Madison's original draft came under severe scrutiny due to its "or one trial" language. The Senate struck the debatable language, and in its place substituted "be twice put in jeopardy of life or limb by any public prosecution,"[63] though the reference to public prosecution was later eliminated.[64] The Double Jeopardy Clause was then incorporated with other clauses in the Fifth Amendment and ratified by the several states in 1791.[65]

II. Double Jeopardy in the United States

The Fifth Amendment, which states in part that "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb,"[66] represents only the start of understanding double jeopardy jurisprudence in America. As with most of the Constitution, especially the Bill of Rights, the meaning and applicability of the Amendment continues to generate controversy.[67] The development of double jeopardy law in the United States tells the story of jurists increasingly concerned with the developing power of the state. These judges recognized the importance of developing a robust protection against double jeopardy. Tracing and analyzing the policies underpinning this expansion of double jeopardy law in America helps illuminate the continued importance of this right.

A. Morey, Blockburger, *and the Expansion of Double Jeopardy*

Prior to the twentieth century, and the (selective) incorporation of the Bill of Rights against the states, state courts decided most of the important double jeopardy cases in the United States.[68]

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62 1 Annals of Cong. 434 (Joseph Gales ed., 1834). The Congressional Register and other "contemporary newspapers" printed Madison's proposals with different punctuation. *See* Rudstein, *supra* note 35, at 227 n.310.

63 S.J., 1st Cong., 1st Sess. 71 (1789).

64 Rudstein, *supra* note 35, at 232.

65 *Id.*

66 U.S. Const. amend. V.

67 *Compare* Grady v. Corbin, 495 U.S. 508, 521–23 (1990) (holding that the Double Jeopardy Clause bars subsequent prosecutions based on the defendant's "same conduct"), *with* United States v. Dixon, 509 U.S. 688, 704–12 (1993) (overturning *Grady* and holding that only prosecutions for the same offense are barred).

68 *Grady*, 495 U.S. at 533–36 (Scalia, J., dissenting) (collecting early American cases on double jeopardy law).

1. The Development of the *Blockburger* "Same Offense" Test

Perhaps the most important of these early state cases was *Morey v. Commonwealth*,[69] which established the still-dominant test for what constitutes the "same offense" for the purposes of double jeopardy analysis.[70] In *Morey*, the Massachusetts Supreme Court decided whether prior conviction for "lewd and lascivious cohabitation" prohibited prosecution for adultery if based upon the same conduct.[71] The court held that "[a]lthough proof of one particular fact is necessary to a conviction under either of two statutes, . . . if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either is no bar to prosecution and punishment under the other."[72] Though the court found that the subsequent prosecution was not barred,[73] this standard represents an important expansion of the double jeopardy doctrine beyond the narrow common law pleas which prohibited simply "prosecution for the same identical act and crime."[74]

In *Blockburger v. United States*,[75] the Supreme Court adopted this restyled definition of same offense. In *Blockburger*, based upon a single sale of illegal drugs, the jury sentenced the defendant to punishment under two different sections of the Narcotics Act.[76] As explained by the Court, the first section prohibited "selling any of the forbidden drugs except in or from the original stamped package," while the second section prohibited selling any of the forbidden drugs "not in pursuance of a written order of the person to whom the drug is sold."[77] Echoing *Morey*, the Court concluded that the statute created two distinct offenses because "[e]ach of the offenses created requires proof of a different element."[78] The Court explained, "[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."[79]

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69 108 Mass. 433 (1871).
70 *Id.* at 436.
71 *Id.* at 433.
72 *Id.*
73 *Id.* at 436.
74 4 BLACKSTONE, *supra* note 49, at *330.
75 284 U.S. 299 (1932).
76 *Id.* at 303.
77 *Id.* at 303–04.
78 *Id.* at 304.
79 *Id.*; *see also* Grady v. Corbin, 495 U.S. 508, 521 n.12 ("Commentators and judges alike have referred to the *Blockburger* test as a 'same evidence' test.").

The development of the double jeopardy doctrine under the Fifth Amendment marked an advance beyond the strict formality of the common law pleas. Under the *Blockburger* test, a conviction or acquittal of one crime bars a later prosecution for a lesser-included offense.[80] For example, an acquittal for murder would bar prosecution for manslaughter. Similarly, albeit more controversially, an acquittal for manslaughter would bar later prosecution for murder.[81] Nonetheless, even after incorporation of the more permissive *Morey-Blockburger* "same offense" test into constitutional law, the Fifth Amendment's double jeopardy standard still only applied to the federal government.[82] Thus, while some states (such as Massachusetts) embraced a similarly expansive vision of double jeopardy law, others (such as Connecticut) continued to require identity of crimes.[83]

Justice Brennan later attacked this liberalization of the common law plea requirements as in fact too *strict* to effectuate the policy goals of the Double Jeopardy Clause.[84] In *Grady v. Corbin*,[85] Justice Brennan argued that "a technical comparison of the elements of the two offenses as required by *Blockburger* does not protect defendants sufficiently from the burdens of multiple *trials*."[86] According to Brennan, the *Blockburger* test, which "was developed 'in the context of multiple punishments imposed in a single prosecution,'"[87] did not satisfy all of the goals of the doctrine of double jeopardy.[88] Justice Brennan pro-

80 *Cf.* Harris v. Oklahoma, 433 U.S. 682, 682 (1977) (per curiam) ("When . . . conviction of a greater crime, murder, cannot be had without conviction of the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime after conviction of the greater one.").

81 Brown v. Ohio, 432 U.S. 161, 169 (1977) ("Whatever the sequence may be, the Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser included offense."); *see also* McIntyre v. Caspari, 35 F.3d 338, 344 (8th Cir. 1994) (holding that, as first degree tampering was a lesser-included offense to stealing under Missouri law, a conviction for the former barred prosecution for the latter).

82 Palko v. Connecticut, 302 U.S. 319, 328 (1937).

83 *See id.* at 321–22 (describing how Connecticut allowed a defendant to be recharged and, ultimately, convicted of first-degree murder subsequent to the procedural overturn of his conviction for second-degree murder).

84 Grady v. Corbin, 495 U.S. 508, 519–20 (1990) ("[A] strict application of the *Blockburger* test is not the exclusive means of determining whether a subsequent prosecution violates the Double Jeopardy Clause.").

85 495 U.S. at 508.

86 *Id.* at 520 (emphasis added).

87 *Id.* at 516 (quoting Garrett v. United States, 471 U.S. 773, 778 (1985)).

88 *Id.* at 520 ("If *Blockburger* constituted the entire double jeopardy inquiry in the context of successive prosecutions, the State could try Corbin in four consecutive trials . . . .").

posed a "same conduct" test, in which "a subsequent prosecution must do more than merely survive the *Blockburger* test."[89] Under *Grady*, the Double Jeopardy Clause "bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted."[90]

Within three years, a similarly divided court in *United States v. Dixon*[91] overturned *Grady* due to, inter alia, the difficulty of applying the *Grady* standard and the "unbroken line of decisions" applying *Blockburger* in all double jeopardy contexts.[92] Justice Scalia, who had written a pointed dissent in *Grady*,[93] argued that "[u]nlike [the] *Blockburger* analysis, whose definition of what prevents two crimes from being the 'same offence,' has deep historical roots, . . . *Grady* lacks constitutional roots."[94] Relying heavily upon *Harris v. Oklahoma*,[95] Justice Scalia labeled *Grady* a "mistake" that is "inconsistent with earlier Supreme Court precedent and with the clear common-law understanding of double jeopardy."[96] While the *Grady* "same conduct" test failed to achieve permanence due to both the practical implications of such a sweeping new rule and the impressive longevity of the *Blockburger* test, this failure still speaks volumes about the importance of the bar against double jeopardy. Despite his pretensions to common law continuity, Justice Scalia's opinion in *Dixon* underscored the continuing vitality of the *Morey-Blockburger* same offense test,[97] itself an expansion of the underlying common law pleas.

2. Collateral Estoppel

The doctrine of collateral estoppel operates in civil cases to prevent the relitigation of previously decided issues of fact. Many courts

89 *Id.* at 521–22.

90 *Id.* at 521.

91 509 U.S. 688 (1993). A year previously, and just two years after *Grady*, the Supreme Court had crafted a significant exception to Justice Brennan's "same conduct" test. In *United States v. Felix*, 503 U.S. 378 (1992), the Court held that, due to longstanding historical principles, the Fifth Amendment allowed successive prosecution for conspiracy and the underlying substantive offenses. *Id.* at 390–91.

92 *Dixon*, 509 U.S. at 711 (quoting Solario v. United States, 483 U.S. 435, 439 (1987)).

93 *Grady*, 495 U.S. at 524–44 (Scalia, J., dissenting).

94 *Dixon*, 509 U.S. at 704 (quoting U.S. CONST. amend. V).

95 433 U.S. 682 (1977).

96 *Dixon*, 509 U.S. at 704, 711.

97 *Id.* at 710 (holding that "[a]bsent *Grady*," the *Blockburger* test "provide[s] a clear answer" to double jeopardy analysis in that situation).

throughout the common law world, notably in the United Kingdom,[98] have declined to expand the doctrine to criminal law. But in *Ashe v. Swenson*,[99] the U.S. Supreme Court recognized criminal collateral estoppel as an expansion of the common law double jeopardy standard.[100] *Ashe* created a second standard, operating in conjunction with *Blockburger*, for assessing whether successive prosecutions violate the Double Jeopardy Clause. Foreshadowing Justice Brennan's concerns regarding *Blockburger*'s same-elements test, Justice Stewart incorporated the doctrine of criminal collateral estoppel into the Fifth Amendment.

In *Ashe*, four men were indicted for the armed robbery of a six-person poker game.[101] Although initially charged with one count of armed robbery for each poker player, the petitioner went to trial only on the charge of robbing Donald Knight.[102] Despite testimony from four of the poker players, "the State's evidence that the petitioner had been one of the robbers was weak."[103] The jury returned a verdict of "not guilty due to insufficient evidence" and was "not instructed to elaborate upon its verdict."[104] Six weeks later, petitioner was tried again for the robbery of a different poker player.[105] In the second trial, the government's "testimony was substantially stronger on the issue of the petitioner's identity."[106] Witnesses, previously unable to identify the petitioner, now testified against him.[107] Moreover, the "State further refined its case at the second trial by declining to call one of the participants in the poker game whose identification testimony at the first trial had been conspicuously negative."[108] The jury found the petitioner guilty of armed robbery and sentenced him to thirty-five years in prison.[109]

98 DPP v. Humphrys, [1977] A.C. 1 (H.L. 1976) (appeal taken from Eng.) (U.K.) (rejecting the doctrine of criminal collateral estoppel).

99 397 U.S. 436 (1970).

100 *Id.* at 442–45.

101 *Id.* at 437–38.

102 *Id.* at 438.

103 *Id.*

104 *Id.* at 439 (internal quotation marks omitted).

105 *Id.*

106 *Id.* at 440.

107 *Id.* ("For example, two witnesses who at the first trial had been wholly unable to identify the petitioner as one of the robbers, now testified that his features, size, and mannerisms matched those of one of their assailants. Another witness who before had identified the petitioner only by his size and actions now also remembered him by the unusual sound of his voice.").

108 *Id.*

109 *Id.* (adding that the Missouri Supreme Court affirmed the conviction).

Justice Stewart, writing for the court, argued that while "awkward," collateral estoppel "stands for an extremely important principle . . . 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."[110] While collateral estoppel was "first developed in civil litigation, . . . '[i]t cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt.'"[111] As such, criminal collateral estoppel "is embodied in the Fifth Amendment guarantee against double jeopardy."[112]

Further, Justice Stewart wrote that *Ashe* (much like *Blockburger*) "is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality."[113] Though most acquittals are "based upon a general verdict," courts must nonetheless "'examine the record of a prior proceeding . . . and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose.'"[114] After the foregoing analysis, Justice Stewart returned to the facts, stating "the record is utterly devoid of any indication that the first jury could rationally have found that an armed robbery had not occurred, or that Knight had not been a victim of that robbery."[115] Therefore they must have found the defendant not guilty on the issue of identity.[116] Since the prior jury decided that petitioner was not one of the men who held up the poker game, the same fact could not be relitigated in a subsequent trial.

Both the "same offense" *Blockburger* test and the *Ashe* doctrine of collateral estoppel liberalized the doctrine of double jeopardy in order to facilitate the policies underlying the Fifth Amendment, most importantly the protection of the individual against the power of the state. These dual expansions of the common law pleas require a deeper analysis of the policies justifying a liberally construed bar against double jeopardy.

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110 *Id.* at 443.

111 *Id.* (quoting United States v. Oppenheimer, 242 U.S. 85, 87 (1916)).

112 *Id.* at 445; *see also id.* at 443 (noting that it is "'much too late to suggest that the principle is not fully applicable to a former judgment in a criminal case'" (quoting United States v. Kramer, 289 F.2d 909, 913 (2d Cir. 1961))).

113 *Id.* at 444.

114 *Id.* (quoting Daniel K. Mayers & Fletcher L. Yarbrough, Bis Vexari*: New Trials and Successive Prosecutions*, 74 HARV. L. REV. 1, 38–39 (1960)).

115 *Id.* at 445.

116 *Id.*

B. From "Universal" to "Fundamental"

Perhaps the most important development in U.S. double jeopardy law occurred when the Supreme Court recognized Blackstone's universal maxim prohibiting double jeopardy as a fundamental component of American democracy.[117] This allowed the Court to incorporate the prohibition against double jeopardy against the states through the Fourteenth Amendment.

1. The Policies and Purposes of the Double Jeopardy Clause

While the principle against double jeopardy most obviously represents a policy against multiple punishments, the Supreme Court has recognized additional policy objectives. In *Ex Parte Lange*[118] the Court stated, "The common law not only prohibited a second punishment for the same offence, but it went further and forbid a second trial for the same offence, whether the accused had suffered punishment or not . . . ."[119] The basis for this "deeply ingrained" double jeopardy doctrine "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."[120] Successive prosecutions subject a defendant "to embarrassment, expense and ordeal and compel him to live in a continuing state of anxiety and insecurity."[121] More importantly, however, successive prosecutions "enhanc[e] the possibility that even though innocent [a defendant] may be found guilty."[122] The Double Jeopardy Clause implicates more than merely successive punishments.

In *North Carolina v. Pearce*,[123] the Court explicitly laid out the protections afforded by the Double Jeopardy Clause: "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense."[124] *Pearce* reinforced that "it is not even essential that a verdict of guilt or innocence be returned" because simply "to have once been placed in jeopardy" bars a second prosecution.[125] Indeed, even "though an acquittal may appear to be erroneous," the government "cannot

117 *See* 4 BLACKSTONE, *supra* note 49, at *329.
118 85 U.S. (18 Wall.) 163 (1874).
119 *Id.* at 169.
120 Green v. United States, 355 U.S. 184, 187 (1957).
121 *Id.*
122 *Id.* at 188.
123 395 U.S. 711 (1969).
124 *Id.* at 717 (footnotes omitted).
125 *Green*, 355 U.S. at 188.

secure a new trial."[126] As illustrated by *Ashe*, given a "second chance" the State will refine its prosecutorial approach.[127] In *Ashe*, two witnesses changed their identification testimony, one witness was removed from the docket, and others who "remembered" the "mannerisms" of the defendant more clearly came forward to testify.[128] While perhaps all true, witness identification testimony is both highly probative and highly suspect. Second trials allow the government to utilize their superior resources to adjust after their initial defeat and therefore do not necessarily ensure "truth." At its core, the Fifth Amendment "protects a man who has been acquitted from having to 'run the gantlet' a second time."[129]

2. Incorporation of the Double Jeopardy Clause

Only five years after *Blockburger*, Justice Cardozo, writing for a nearly unanimous court, wrote that violation of the principle against double jeopardy by the states did not necessarily "violate those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'"[130] Thus, the Court did not incorporate the Double Jeopardy Clause against the states as a necessary procedure under the Fourteenth Amendment's Due Process Clause. Despite the policy goals animating double jeopardy jurisprudence, it was still not considered a "fundamental" requirement of due process.

In *Palko v. Connecticut*, the defendant was indicted for first-degree murder, but the jury returned a conviction for only second-degree murder.[131] The prosecution appealed on the basis of wrongly excluded testimony and prejudicial jury instructions.[132] The Connecticut Supreme Court, on the basis of a state statute permitting prosecution appeals, allowed the retrial of the defendant.[133] At the second trial, the jury convicted the defendant of first-degree murder and sentenced him to death.[134] On appeal to the U.S. Supreme Court, the defendant argued that such prosecution violated the Fifth Amendment's Double Jeopardy Clause and the Fourteenth Amendment's Due Process Clause. Writing for the Court, Justice Cardozo, however,

126 *Id.*
127 *See supra* notes 101–09 and accompanying text.
128 *See* Ashe v. Swenson, 397 U.S. 436, 440 (1970).
129 *Id.* at 446 (quoting *Green*, 355 U.S. at 190).
130 Palko v. Connecticut, 302 U.S. 319, 328 (1937) (quoting Hebert v. Louisiana, 272 U.S. 312, 316 (1926)).
131 *Id.* at 321.
132 *Id.*
133 *Id.*
134 *Id.* at 321–22.

reasoned that while certain provisions of the Bill of Rights "have been found to be implicit in the concept of ordered liberty," the Fifth Amendment's double jeopardy guarantee is not.[135] He continued, stating, "Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without [double jeopardy protections]."[136] Further, under *Palko*, only if double jeopardy subjected a defendant to "hardship so acute and shocking that our polity will not endure it" could that defendant rely upon the Due Process Clause of the Fourteenth Amendment for protection.[137]

The Supreme Court changed tack in *Benton v. Maryland*,[138] deciding that the Double Jeopardy Clause represented a "fundamental" component of American justice.[139] In *Benton*, the petitioner was tried in Maryland for burglary and larceny. While the jury found him not guilty of larceny, they sentenced him to ten years in prison on the burglary count.[140] Due to a recent Maryland Court of Appeals case regarding oath procedure,[141] the petitioner was "given the option of demanding re-indictment and retrial."[142] He chose to have his conviction set aside and was reindicted for *both* larceny and burglary.[143] The petitioner objected to the larceny count on double jeopardy grounds, but the court denied his motion to dismiss.[144] At the second trial, the jury found the petitioner guilty of both crimes and sentenced him to fifteen years' imprisonment on the burglary charge and five years' imprisonment on the larceny charge.[145]

Rejecting Justice Cardozo's "acute and shocking" standard, Justice Marshall asked if the protections of the Double Jeopardy Clause were "'fundamental to the American scheme of justice.'"[146] Finding that "the double jeopardy prohibition . . . represents a fundamental ideal in our constitutional heritage," the Court held that it "should

135 *Id.* at 324–25 & n.2.

136 *Id.* at 325.

137 *Id.* at 328.

138 395 U.S. 784 (1969).

139 *Id.* at 794.

140 *Id.* at 785.

141 *Id.* ("In *Schowgurow* the Maryland Court of Appeals struck down a section of the state constitution which required jurors to swear their belief in the existence of God." (citing Schowgurow v. State, 213 A.2d 475 (Md. 1965))).

142 *Id.* at 786.

143 *Id.*

144 *Id.*

145 *Id.*

146 *Id.* at 794 (quoting Duncan v. Louisiana, 391 U.S. 145, 149 (1968)).

apply to the States through the Fourteenth Amendment."[147] Justice Marshall relied upon the ancient heritage of the right, noting that it was carried to "this Country through the medium of Blackstone."[148] He next underscored the policies against embarrassment and the threat of successive prosecution embodied in the right, concluding that "[t]his underlying notion has from the very beginning been part of our constitutional tradition."[149] As such, the Court held that "conditioning an appeal of one offense on a coerced surrender of a valid plea of former jeopardy on another offense exacts a forfeiture in plain conflict with the constitutional bar against double jeopardy."[150]

The expansion of double jeopardy in *Morey* and *Blockburger*,[151] the development of criminal collateral estoppel in *Ashe*,[152] and the incorporation of the Fifth Amendment bar against double jeopardy in *Benton*[153] all rested upon court recognition that to allow successive prosecution is to allow injustice. The principle of double jeopardy represents not only a deeply rooted component of America's constitutional fabric, but also an important protection against the resources of the government. By preventing successive punishment and prosecution, the prohibition ensures that the state cannot use its superior resources to continue to pursue an allegedly guilty citizen, thereby enhancing the prospect of conviction. For these reasons, in the United States an acquittal is absolute and final. According to the Supreme Court, the dangers of successive prosecution are too great to allow even a clearly erroneous acquittal to be overturned.[154]

These cases speak to more than America's shared constitutional heritage. They go directly to the core of the prohibition against double jeopardy as an important individual right. As discussed above, and emphasized by Professor Rudstein, double jeopardy grew in England in response to the centralization of the prosecutorial power with the Crown. Similarly, with the growth of government power in the United States, the prohibition against double jeopardy has become an increasingly important force in American justice. To relin-

147 *Id.*; *see also id.* ("Insofar as it is inconsistent with this holding, *Palko v. Connecticut* is overruled.").

148 *Id.* at 795.

149 *Id.* at 796.

150 *Id.* (quoting Green v. United States, 355 U.S. 184, 193–94 (1957)).

151 *See supra* Part II.A.1.

152 *See supra* Part II.A.2.

153 *See supra* Part II.B.

154 *Green*, 355 U.S. at 188 ("[I]t is one of the elemental principles of our criminal law that the Government cannot secure a new trial by means of an appeal even though an acquittal may appear to be erroneous.")).

quish or limit such a right seriously impinges upon personal liberty, irrespective of the gains achieved. In expanding the doctrine, the American judiciary has succinctly elucidated the necessity for a broad prohibition against double jeopardy.

III. Double Jeopardy in the U.K. Before the CJA

Despite developing from the same point, double jeopardy jurisprudence in the United States and United Kingdom looked quite different, even before the passage of the CJA.

A. Searching for an English Blockburger

While not required to interpret the vagaries of a constitutional amendment, U.K. courts nonetheless had to grapple with defining the extent of the "maxim" prohibiting double jeopardy. For example, in *King v. Vandercomb*[155] (later cited in *Dixon*), the Court confronted the same difficulty in defining "same offense" that was later faced by the *Morey* and *Blockburger* courts.

In *Vandercomb*, the government abandoned, midtrial, the prosecution of the defendant for burglary by breaking and entering and stealing goods.[156] The government then brought a second prosecution, this time charging burglary by breaking and entering with intent to steal.[157] The King's Bench allowed the second prosecution because "these two offences are so distinct in their nature, that evidence of one of them will not support an indictment for the other."[158] While this sounds like *Blockburger*, the court's final holding "is demonstrably not the *Blockburger* test."[159] The court, referring to confusing earlier precedent,[160] stated, "These cases establish the principle, that 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 of the first indictment can be no bar to the second."[161] First, this test refers only to acquittals. Second, the order of the prosecutions is extremely important. Under *Blockburger*, prosecution for a lesser-included offense precludes later prosecution for the more serious crime. Under *Vandercomb*, "if a greater offense is prosecuted first, no bar would arise to a necessarily included offense because the

155 (1796) 168 Eng. Rep. 455 (K.B).
156 *Id.* at 457.
157 *Id.*
158 *Id.* at 460 (citations omitted).
159 George C. Thomas III, Double Jeopardy 99 (1998).
160 *Id.* at 99–100.
161 *Vandercomb*, 168 Eng. Rep. at 461 (emphasis added).

defendant could not have been convicted under the first indictment on proof of the lesser offense."[162]

In modern English jurisprudence, the extent of the offenses covered by the double jeopardy prohibition remains unclear, even though nearly all sources cite one case.[163] The U.K. practice of issuing seriatim opinions has led to the current confusion. Two respected jurists, Lords Morris and Devlin issued highly influential concurring opinions in *Connelly v. Director of Public Prosecutions*.[164] In *Connelly*, the appellant participated in an armed robbery during which one robber shot and killed a man.[165] Those events gave "rise to two charges against the appellant—murder and robbery."[166] The appellant was tried and convicted of murder, but due to a procedural error the Court of Criminal Appeal quashed the conviction.[167] The question before the *Connelly* court was whether he could then be tried for the robbery in a subsequent retrial.[168]

1. Lord Morris and the Hornbooks

Echoing *Vandercomb*, Lord Morris first noted that "[t]he appellant could not on the first indictment have been found guilty of the offence of robbery with aggravation."[169] Accordingly, while the appellant could "validly assert that he ha[d] been acquitted of the charge of murder—with the consequential result that he ha[d] also been acquitted of manslaughter," the issues posed by the robbery had not been resolved.[170] As a result, the plea of *autrefois acquit* was properly denied. Lord Morris then dealt with the issue of judicial discretion, a

162 THOMAS, *supra* note 159, at 99.

163 Connelly v. DPP, [1964] A.C. 1254 (H.L. 1963) (appeal taken from Eng.) (U.K.); *see also, e.g.* JOHN SPRACK, A PRACTICAL APPROACH TO CRIMINAL PROCEDURE § 17.46 (2006) [hereinafter SPRACK, A PRACTICAL APPROACH] (citing *Connelly*); JOHN SPRACK, EMMINS ON CRIMINAL PROCEDURE § 16.8.2 (2002) [hereinafter SPRACK, EMMINS] (same).

164 *See Connelly*, [1964] A.C. at 1254 (opinion of Lord Reid). For the facts, I will rely on the more straightforward, less controversial, opinion of Lord Reid.

165 *Id.* at 1295.

166 *Id.* The then-prevailing practice was for prosecutors to prosecute only one count of murder in any given case. *Id.* at 1296 ("The difficulty in this case arises from the practice . . . that a second charge is never combined in one indictment with a charge of murder."). The *Connelly* judges all agreed to end that practice. *See id.* at 1286, 1297, 1367.

167 *Id.* at 1295.

168 *Id.*

169 *Id.* at 1298 (opinion of Lord Morris).

170 *Id.* at 1298–99.

"second strand of (loosely speaking) double jeopardy protection."[171] While "once an indictment is before the court the accused must be arraigned and tried thereon," Lord Morris argued that "[a] court must enjoy" sufficient powers "to suppress any abuses of its process."[172] Thus, while the proceedings in *Connelly* "could not . . . be characterised as an abuse of the process of the court,"[173] other situations would allow a court to stay "obnoxious proceedings."[174] Despite seeming adherence to the strict test enunciated in *Vandercomb*, Lord Morris appeared aware of the possible injustice of allowing multiple prosecutions—even when such prosecutions would seem strictly allowed by U.K. law.

Lord Morris then glossed over the possibility of criminal collateral estoppel. He argued that the appellant could not "say that anyone has ever decided that he was not present" at the scene of the robbery.[175] At the time of *Connelly*, issue estoppel in the criminal context was muddled in the United Kingdom. A Privy Council decision in *Sambasivam v. Public Prosecutor*[176] seemed to "stand in the way of prosecutors making collateral attacks on a defendant's previous acquittals in subsequent proceedings."[177] Subsequent to *Connelly*, in *Director of Public Prosecutions v. Humphrys*,[178] the House of Lords distinguished *Sambasivam* to "oblivion."[179] In the recent case of *Regina v. Z*,[180] the House of Lords, while agreeing that *Sambasivam* was rightly decided on the facts, rejected that case's holding.[181]

Lord Morris then "pass[ed] . . . to a consideration of the questions which arise concerning the plea of autrefois acquit."[182] In doing so, he enunciated nine principles of double jeopardy jurisprudence, only three of which truly concern the "scope" of the doctrine.[183] The

171 Paul Roberts, *Acquitted Misconduct Evidence and Double Jeopardy Principles*, 2000 CRIM. L. REV. 952, 955.

172 *Connelly*, [1964] A.C. at 1300–01 (opinion of Lord Morris).

173 *Id.* at 1301 ("The preferment in this case of the second indictment could not, however, in my view, be characterised as an abuse of the process of the court.").

174 *See* Roberts, *supra* note 171, at 955.

175 *Connelly*, [1964] A.C. at 1299 (opinion of Lord Morris).

176 [1950] A.C. 458 (P.C.) (appeal taken from Malaya) (U.K.).

177 Roberts, *supra* note 171, at 952. This became known as the "rule in Sambasivam." *Id.*

178 [1977] A.C. 1 (H.L. 1976) (appeal taken from Eng.) (U.K.).

179 Roberts, *supra* note 171, at 952.

180 [2000] 2 A.C. 483 (H.L.) (appeal taken from Eng.) (U.K.).

181 *Id.* at 504 (noting that it was right in *Sambasivam* to set aside the conviction).

182 Connelly v. DPP, [1964] A.C. 1254, 1305 (H.L. 1963) (appeal taken from Eng.) (U.K.) (opinion of Lord Morris).

183 *Id.* at 1305–06.

first two establish that "a man cannot be tried for a crime in respect of which he has previously been acquitted or convicted" or "for a crime in respect of which he could on some previous indictment have been convicted."[184] The third of Lord Morris's established principles is that the doctrine of double jeopardy "applies if the crime in respect of which he is being charged is in effect the same, or is substantially the same," as a crime of which the defendant had been previously convicted or acquitted.[185] Extending the principle of double jeopardy to "substantially" or "practically" similar crimes may seem an obvious extension of the principle, thought perhaps even more expansive than *Blockburger*. In the United Kingdom, however, the question of whether the doctrine extends this far has yet to be definitively decided. Indeed, only one earlier case, *Regina v. King*,[186] supports Lord Morris's proposition. In *King*, the defendant was convicted of obtaining credit for goods on false pretenses.[187] Following that conviction, he was indicted for larceny of the same goods.[188] The Queen's Bench ruled that the defendant was entitled to rely upon *autrefois convict* and dismissed the larceny charges.[189]

If Lord Morris meant to adopt the broad reading of the double jeopardy clause suggested by the Queen's Bench in *King*, his test ultimately looks markedly similar to the "same conduct" test articulated by Justice Brennan. This would represent a significant shift from the common law pleas and *Vandercomb*. Even a more minimalist interpretation, however, would represent an expansion of the doctrine of double jeopardy in U.K. law. Such expansion would mark a definitive break with the strictness of the common law pleas. In both leaving open the possibility that some prosecutions would warrant judicial limitation due to their "abuse of process" and that *autrefois acquit* bars prosecution for "substantially similar" offenses, Lord Morris implicitly recognized the negative of consequences of strictly construing double jeopardy law. A narrow principle against double jeopardy allows prosecutors to abuse the criminal justice process, requiring a more robust right. Nonetheless, Lord Morris never fully explicated these policy concerns, instead leaving them both unstated and unheeded.

184 *Id.* at 1305; *see also* SPRACK, A PRACTICAL APPROACH, *supra* note 163, § 17.46(a)–(b) (explaining Lord Morris's first two *Connelly* principles).

185 *Connelly*, [1964] A.C. at 1305 (opinion of Lord Morris); *see also* SPRACK, EMMINS, *supra* note 163, § 16.8.2(d) (discussing Lord Morris's third *Connelly* principle).

186 [1897] 1 Q.B. 214 (1896) (appeal taken from Eng.) (U.K).

187 *Id.* at 216.

188 *Id.* at 218.

189 *See id.*

2. Lord Devlin and *Beedie*

In contrast to Lord Morris, Lord Devlin articulated a far more limited vision of double jeopardy in his *Connelly* opinion. After recounting the facts, Lord Devlin stated that "[f]or the doctrine of autrefois to apply it is necessary that the accused should have been put in peril of conviction for the same offence as that with which he is then charged."[190] Although under veil of agreement with Lord Morris, Lord Devlin thus argued that *autrefois* requires one to be charged with the "same offence," not "substantially" the same offense.[191]

Lord Devlin then defined offense as "both the facts which constitute the crime and the legal characteristics which make it an offence."[192] Echoing Blackstone, he argued that, "[f]or the doctrine to apply it must be the same offence both in fact and in law."[193] Arguing that Lord Morris "extend[ed] the doctrine," Lord Devlin took issue with "the idea that an offence may be substantially the same as another."[194] For Lord Devlin, "legal characteristics are precise things and are either the same or not."[195] While most hornbooks cite Lord Morris's opinion,[196] subsequent case law seems to favor Lord Devlin.[197]

Indeed, the Court of Appeal dealt with this very dichotomy in *Regina v. Beedie*.[198] In *Beedie*, a woman died in her apartment from carbon monoxide poisoning due to a defective gas fireplace.[199] Under the Health and Safety Work Act of 1974, her landlord had a duty to ensure that the appliance was maintained properly.[200] The landlord was charged under the statute, pled guilty, and was fined.[201] Several months later the landlord was charged with manslaughter

190 *Connelly*, [1964] A.C. at 1339 (opinion of Lord Devlin).
191 *Id.* at 1339–40.
192 *Id.* at 1339.
193 *Id.* at 1339–40.
194 *Id.* at 1340.
195 *Id.*
196 *See, e.g.*, SPRACK, A PRACTICAL APPROACH, *supra* note 163, § 17.46 (reviewing Lord Morris's *Connelly* principles when describing current U.K. double jeopardy law); SPRACK, EMMINS, *supra* note 163, § 16.8.2 (same). *But see* SPRACK, A PRACTICAL APPROACH, *supra* note 163, § 17.47 (recognizing that the Court of Appeal "was unable to accept that Lord Morris's speech correctly represented the reasoning of the majority" in *Connelly*).
197 *See, e.g.*, R v. Beedie, [1998] Q.B. 356, 360 (U.K.) (accepting Lord Devlin's opinion in *Connelly* as the majority opinion of the case).
198 [1998] Q.B. at 356.
199 *Id.* at 358–59.
200 *Id.* at 358.
201 *Id.* at 359.

based on the same conduct.[202] Citing Lord Devlin's opinion in *Connelly*, the lower court denied the landlord's motion to dismiss the manslaughter charge on the basis of *autrefois convict*.[203]

The Court of Appeal agreed with the lower court, stating, "the House of Lords identified a narrow principle of autrefois, applicable only where the same offence is alleged in the second indictment."[204] Referencing Lord Devlin's opinion, the court further stated it was "unable to accept the view" that Lord Morris's third principle "represents the ratio of the House's decision."[205] For, as *Connelly* itself shows, the "majority of their Lordships . . . defined autrefois in the narrow way."[206]

B. Finding Policy in U.K. Decisions

One important component of the continued vitality of double jeopardy in the United States, aside from the difficulty of amending the Constitution, is the primacy of place given to policy concerns in considering the Double Jeopardy Clause. Due to the nature of the Constitution, the historic development of judicial opinions, and a host of other cultural factors on both sides of the Atlantic, policy plays a far less prominent role in U.K. cases. Indeed, Lord Morris's opinion is an excellent example of a policy-influenced judgment that makes no mention of policy considerations. Though Lord Morris articulated a controversial position, he strove to frame it as an "established principle" of the common law.[207]

Despite this historic and cultural reticence on the part of U.K. judges to shield the policies underlying their opinions,[208] judges in the United Kingdom consistently cite the threat of "multiple punishments" as the prime goal animating double jeopardy jurisprudence.[209] The principle of double jeopardy bars further proceedings to ensure that defendants "shall not be punished again for the same matter; otherwise there might be two different punishments for the same

202 *Id.* at 360.

203 *Id.* ("Clarke J.'s analysis of the speeches in *Connelly v. Director of Public Prosecutions* was correct, namely that the majority of the House of Lords identified a narrow principle of autrefois . . . .").

204 *Id.*

205 *Id.* at 361.

206 *Id.*

207 I do not in any way mean to suggest that this occurs on only one side of the Atlantic. *See, e.g.*, THOMAS, *supra* note 159, at 99–100 (criticizing Justice Scalia's conclusion that the *Blockburger* test has roots stretching back to *Vandercomb*).

208 *See, e.g.*, *supra* Part III.A.1 (discussing Lord Morris's *Connelly* opinion).

209 *See infra* notes 213–25 and accompanying text.

offence."[210] For example, in *Connelly*, Lord Pearce references only the need to prevent multiple punishments in discussing the doctrine.[211]

Two other cases underscore this focus on preventing multiple punishments. In *Regina v. Manchester City Stipendiary Magistrate*,[212] the defendant was brought before the magistrate on a charge of theft.[213] After failing to complete all of their witness statements ahead of time, the prosecution asked for adjournment.[214] After the adjournment, the prosecution had still failed to complete their case, and the judge discharged the case.[215] Despite the fact that proceedings had already begun in their initial trial, the court in *Manchester City* allowed the defendants to be re-charged with the same counts.[216] In closing, however, the judge stated, "[T]he only aspect of the whole case which has troubled me is . . . there seems to be a risk that a defendant might be prejudiced by repeated committal proceedings . . . ."[217]

In *Richards v. Regina*,[218] the defendant was charged with murder and accepted a plea bargain.[219] Pursuant to the agreement, the defendant pled guilty to manslaughter.[220] The Jamaican Director of Public Prosecutions (DPP) changed his mind, viewing manslaughter as insufficient.[221] As a result, he discontinued the prosecution.[222] Subsequently, the defendant was re-charged with murder and convicted.[223] The Privy Council, relying upon the "well-established rule at common law, that where a person has been convicted *and punished* for an offence . . . the conviction shall be a bar to all further proceedings for the same offense, and he shall not be *punished again*," denied his motion to dismiss on double jeopardy grounds.[224] Despite the initial guilty plea, a dissatisfied prosecutor could discontinue the proceed-

210 Connelly v. DPP, [1964] A.C. 1254, 1361–62 (H.L. 1963) (appeal taken from Eng.) (U.K.) (quoting Wemyss v. Hopkins, (1875) 10 L.R.Q.B. 378, 381.

211 *Id.* at 1362 (opinion of Lord Pearce) (discussing the importance of judicial discretion to prevent abuse of process and multiple punishments).

212 [1977] 1 WLR 911 (Q.B.).

213 *Id.* at 912.

214 *Id.*

215 *Id.*

216 *Id.* at 913.

217 *Id.*

218 [1993] A.C. 217 (P.C. 1992) (appeal taken from Jam.) (U.K.).

219 *Id.* at 221.

220 *Id.*

221 *Id.* at 221–22.

222 *Id.* at 222.

223 *Id.*

224 *Id.* at 224 (citing Wemyss v. Hopkins, (1875) 10 L.R.Q.B. 378) (emphasis added).

ings and seek conviction on the more serious charge, so long as the defendant had not yet been punished for that plea.

Both *Manchester City* and *Richards* ignore even the possibility that successive prosecution, in and of itself, is an evil. In *Richards*, the DPP changed his mind and, like the prosecutor in *Vandercomb*, discontinued the case.[225] Desirous of a more serious punishment, the DPP avoided finality despite the fact that the defendant had already pled guilty to the charge of manslaughter. Successive indictments such as these not only needlessly harass the citizenry, but they run the risk of allowing the government to convict innocent defendants. Moreover, this allows the prosecution to "refine[ ]" its strategy.[226] While this may lead to more convictions, it will quite likely lead to a corresponding increase in *wrongful convictions*.[227]

The foregoing in no way represents a comprehensive analysis of double jeopardy policy in U.K. cases; however, these cases illustrate at least a moderately concerning disregard for the problem inherent in allowing successive prosecutions. Government capriciousness and manipulation, especially of the sort seen in *Richards*, is itself an evil to be avoided. Indeed, while both Lord Morris and the judge in *Manchester City* hinted at the problems stemming from an overly technical application of double jeopardy law, neither explicated their concerns. Leaving aside the issue of judicial style, without a developed body of case law explicating the goals underlying the prohibition against double jeopardy, the U.K. failed to expand the right even before the CJA.

Having discussed the state of U.K. double jeopardy law prior to the passage of the CJA, we can now analyze the justifications for reform. Importantly, while reformers faced strong opposition, the above cases illustrate that they did not face a coherent and powerful statement of double jeopardy's policy benefits by the English judiciary.

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225 *Compare* R v. Vandercomb, (1796) 168 Eng. Rep. 455 (K.B.) (allowing prosecution for larceny following prosecutor's discontinuation of a case for burglary accompanied with larceny), *with Richards*, [1993] A.C. at 221 (allowing re-prosecution for murder following submittal of a guilty plea to manslaughter after prosecutor discontinued initial case and filed new indictment).

226 Ashe v. Swenson, 397 U.S. 436, 440 (1970).

227 *Compare* Green v. United States, 355 U.S. 184, 188 (1957) (arguing that successive prosecutions increase the likelihood of wrongful convictions), *with* Hamer, *supra* note 32, at 63 (arguing that, considering the high burden of proof in criminal cases, the number of wrongful acquittals is likely substantially higher than the number of wrongful convictions).

IV. The Case for Reform

Myriad arguments have been made in support of double jeopardy reform. Despite the breadth of academic argument, three policies consistently recur: victims' rights, the nature of the "beyond reasonable doubt" standard, and the need for accuracy in the criminal justice system. As the Law Commission itself noted, "[t]he crucial question is whether the principles underpinning the rule against double jeopardy can ever be outweighed by the need to pursue and convict the guilty."[228] In so stating, the Law Commission acknowledged that arguments for reform implicitly rely upon two interrelated claims: first, the CJA exception to double jeopardy will materially advance the implicated policy goal; and second, said policy deserves to be elevated above the principle of double jeopardy. Further, many writers rely, either implicitly or explicitly, on the advances in forensic technology to buttress their policy-based conclusions.

A. Victim-Centric Criminal Justice

The starting point of this argument, clearly articulated by the U.K. Law Commission in *Justice for All*, is "rebalancing the criminal justice system in favour of the victim."[229] The Law Commission argues that the current preoccupation with the defendant stems from an asymmetrical analysis of the criminal justice system. In addition, victims, who are drawn into the system by the wantonness of others, deserve "effective justice."[230] The system must "convict the guilty, acquit the innocent, and in the penalties it imposes, punish offenders and reduce reoffending" in order to satisfy its obligations to both the victims and society.[231] This reorientation necessarily entails an abandonment of a more rights-based, defendant-centric view of the justice system.

One important component of this reorientation seems to be a minimization, or erosion, of the presumption of innocence. In *Justice for All*, the Law Commission approvingly cites Lord Auld's admonition that "'a criminal trial is not a game under which a guilty defendant should be provided with a sporting chance.'"[232] Lord Auld implicitly

228 Law Comm'n, *supra* note 24, ¶ 4.2.

229 Home Dep't, Justice for All, *supra* note 27, at 26. *Justice for All* also focuses upon punishing criminals; however this focus seems to stem from a desire to ensure proper retribution on behalf of wronged victims. *See id.*

230 *Id.*

231 *Id.*

232 *Id.* at 28 (quoting Lord Justice Auld, Review of the Criminal Courts of England and Wales, 2001, ch. 10, ¶ 154).

envisions a trial where the defendant is guilty, and condemns lawyers who view trial as a means to beat the truth and secure an acquittal. This underlying presumption becomes more explicit as Lord Auld continues, stating, "'[Trial] is a search for truth in accordance with the twin principles that the prosecution must prove its case and that a defendant is not obliged to inculpate themselves.'"[233] No longer, in this victim-oriented system of criminal justice, must we envision an innocent man standing trial, facing imminent and unjust punishment. Instead, along with Lord Auld, we are called to envision a guilty man attempting to manipulate the "game" to secure his freedom unjustly.

Recognizing the victim as an integral part of the criminal justice system makes intuitive sense. Victims are not mere third parties. They were the targets of illegal, often violent, activity and their desires deserve respect. Respecting the importance of the victim in the criminal justice system does not, however, justify a reorientation of that system. The victim represents only one important component of the system. Their needs must be balanced against those of the state and those of the defendant. Centering the criminal justice system upon the expectations of the victim unjustifiably tilts the scales against the defendant and runs counter to the traditions of Anglo-American criminal justice.

Placed in the wider context of a governmental overhaul of the criminal justice system, including increased sentences and prosecutorial appeals,[234] the CJA exception to double jeopardy becomes more problematic. Fostering prosecutorial aggressiveness while also removing several of the "archaic" evidentiary and procedural rules used by defendants at trial represents a remarkable realignment of the system.[235] Despite their procedural nature, these changes reflect a reevaluation of centuries of common law consensus. The U.K. Parliament elevated retributory justice as a systemic value at the expense of the erosion of the presumption of innocence and the rule against double jeopardy.

B. Reasonable Doubt and Wrongful Acquittals

Relying upon the aforementioned reorientation of the criminal justice system, the CJA exception specifically "targets factually inaccurate acquittals."[236] Due to the burden of proof required for criminal conviction, there is a concomitantly higher likelihood of mistaken

233 *Id.* (quoting AULD, *supra* note 232, at ch. 10, ¶ 154).
234 *Id.*
235 *Cf. id.* at 11 (discussing the "radical" nature of the proposed reforms).
236 Hamer, *supra* note 32, at 66.

acquittals.[237] For example, David Hamer argues that "even where the fact finder considers the defendant's guilt highly probable," an acquittal is likely.[238] Even more damningly, according to Hamer, "acquittals where the fact-finder considers guilt probable will be more common than those where innocence is considered probable"[239] because prosecutors usually decline to bring weak cases. The acknowledged percentage of wrongful convictions implies an even higher percentage of wrongful acquittals, given the ingrained institutional biases in favor of the defendant.[240] On this basis, commentators argue that the CJA exception is a necessary correction to the system.

The statistical likelihood of wrongful acquittals implicit in the historic Anglo-American conception of criminal justice exemplifies, rather than eviscerates, the goals of the criminal justice system. Hamer argues that the CJA exception represents a necessary corrective to our system's high burden of proof.[241] This fails to recognize that, far from needing to be counterbalanced, the higher burden of proof forms a key component of the common law scheme of justice. If viewed through the eyes of an innocent man, correcting the presumption of innocence and high criminal burden of proof seems a misnomer. Implicit in our system of justice is the ancient common-law maxim, preserved by Blackstone, that it is "[b]etter that ten guilty persons escape than that one innocent suffer."[242] Premising the expansive CJA exception on the problems of the "reasonable doubt" standard illustrates a new and radical approach to criminal justice.

While both Hamer and the Law Commission seem to make a straightforward statistical argument by focusing upon the probability of factually inaccurate acquittals, they are actually advancing a profound change in policy. By undercutting the presumption of innocence and high criminal law burden of proof, they are attacking not only double jeopardy but those components of the criminal justice system as well. Thus, while the high burden of proof does ensure a higher likelihood of wrongful acquittals, to "fix" this problem represents a revolution in the goals of the system.

237 *Id.* at 66–67.
238 *Id.* at 67.
239 *Id.*
240 *Id.*
241 *Id.* at 66–69.
242 4 BLACKSTONE, *supra* note 49, at *352.

C. Accuracy and Respect for the System

In light of both the reorientation of the criminal justice system in favor of the victim and the theoretic proliferation of inaccurate acquittals, the most powerful argument in favor of the double jeopardy exception centers upon accuracy in the criminal justice system. The double jeopardy exception will foster increased accuracy by "correcting" those mistaken acquittals discussed above.[243] The Law Commission emphasized that "accuracy of outcome is more important than finality."[244] Leaving aside the Law Commission's emphasis upon "finality" as the prime systemic goal achieved by the principle against double jeopardy, the supposition that the new evidence exception would ensure increased accuracy rests upon the notion that a second trial with different evidence necessarily entails reaching the "truth."[245] Moreover, in recommending the exception, the Law Commission elevated the goal of accuracy over the "*process aim* in ensuring that the system shows respect for the fundamental rights and freedoms of the individual."[246]

Elevation of "accuracy of outcome" rests upon the argument that "'accuracy is the major component in the legitimacy of verdicts.'"[247] When new and compelling evidence surfaces, the very legitimacy of an acquittal is called into question. A new trial can solve that problem.[248] Focusing on the goal of the system to convict the guilty justifies an exception to the principle against double jeopardy.[249] Further, implicit in the notion of verdict legitimacy is the legitimacy of the criminal justice system itself.

The discovery of new evidence indicating guilt not only decreases the legitimacy of the verdict or the criminal justice system in the abstract, but also fosters public disrespect and mistrust. As the Law Commission argued, the "erosion of the legitimacy" fosters "public disquiet, even revulsion, when someone is acquitted of the most serious of crimes and new material (such as that person's own admission) points strongly or conclusively to guilt."[250] Combined with increased

243 Hamer, *supra* note 32, at 68–69 (discussing the probable likelihood of wrongful acquittals and arguing for a liberal and expansive use of the CJA exception).

244 LAW COMM'N, *supra* note 24, ¶ 4.7.

245 Hamer, *supra* note 32, at 68.

246 LAW COMM'N, *supra* note 24, ¶ 7.12.

247 Hamer, *supra* note 32, at 64 (quoting Ian Dennis, *Prosecution Appeals and Retrials for Serious Offences*, 2004 CRIM. L. REV. 619, 637).

248 *Id.* at 66–69.

249 *Id.*

250 LAW COMM'N, *supra* note 24, ¶¶ 4.4–4.5.

media coverage, such cases "undermine public confidence,"[251] the erosion of which "caused by the demonstrable failure of the system to deliver accurate outcomes in very serious cases, is at least as important as the failure itself."[252] Therefore, factually inaccurate acquittals, called into question by fresh evidence of guilt, undermine the goals of the criminal justice system and its place in society.

While public outrage should be taken into account, especially in those flagrant cases of an acquitted defendant's latter-day confession, the emphasis on accuracy relies upon an overstatement of a second trial's value. Focusing upon clear examples of admissions or forensic DNA evidence ignores the possible proliferation of, for example, new or changing eyewitness testimony. As discussed below,[253] recognizing the broad scope of the "new evidence exception" requires reformers to look past the obvious case. The CJA, as currently framed, does not reach solely those acquitted defendants who have admitted guilt, but encompasses a far wider range of evidentiary possibilities.

Moreover, this emphasis on accuracy fails to account for public disquiet at seeming abuses of the criminal justice system by the state, or for the need to protect fundamental rights, such as the rights against double jeopardy, from majoritarian excess. A second trial raises the specter of a wrongful conviction.[254] With a refined case and new evidence, the prosecution may very well convict an innocent man. This both questions whether the exception necessarily facilitates accuracy and raises the possibility of public outrage *as a result* of the exception. Further, despite the possibility of public disquiet, the criminal justice system should not be recalibrated to meet the retributive demands of society. The specific balance between accuracy and justice, forged over centuries of common law debate, represents a weighing of the immense prosecutorial power of the state and the rights of the defendant. The exception to the rule against double jeopardy allows the state to further leverage their resources against possible defendants, and this shift in the nature of the criminal justice system requires more than "public disquiet."[255] It requires an honest analysis of the costs and benefits associated with abandoning the principle

251 *Id.* ¶ 4.5.

252 *Id.*

253 *See infra* notes 258–67 and accompanying text (discussing the expansive nature of the new evidence exception and the plausible use of specious evidence to quash acquittals under the CJA).

254 Green v. United States, 355 U.S. 184, 188 (1957); *see also* Ashe v. Swenson, 397 U.S. 436, 440 (1970).

255 LAW COMM'N, *supra* note 24, ¶ 4.5.

against double jeopardy as an absolute bar to retrial, and the dangers that may result to a free society.

The goals of reorienting the criminal justice system, balancing out the "beyond reasonable doubt" burden of proof standard and fostering accuracy in the system form the core policy arguments in favor of the CJA exception. Combined, they seek to fix the principled asymmetry of Anglo-American criminal justice. Correcting factually inaccurate acquittals at this price, however, raises several issues, the most problematic of which is the possibility that decreasing the likelihood of wrongful acquittals *increases* the likelihood of wrongful convictions.

V. THE CASE AGAINST THE CJA

The exception to the principle of double jeopardy contained in the CJA ranges far beyond the Law Commission's original recommendations. Analyzing this broad new exception, this Note raises three interconnected issues militating against its continued enforcement. First, the widely framed nature of the evidence exception,[256] despite the procedural safeguards put in place by the Act, raises serious questions of fairness and systemic abuse.[257] Second, though one of the only double jeopardy policies sufficiently considered by the Law Commission, the CJA unjustifiably undercuts the finality of acquittals. Aside from these practical problems confronting the CJA, supporters of the exception fail to recognize the perils associated with multiple prosecutions. As such, this section will conclude by discussing the policies underlying the prohibition against double jeopardy. While this Note assuredly fails to catalog the entire universe of arguments against the CJA exception, these issues form a firm basis for future discussion and critique of double jeopardy reform.

A. The Wide Scope of the Exception

The CJA allows the Court of Appeal to quash an acquittal on the basis of evidence that is both "new" and "highly probative."[258] For a piece of evidence to be probative it must make a fact in issue more or less likely. As such, a highly probative piece of evidence makes a fact in issue substantially more or less likely.

While the term "highly probative" may seem definitive, conjuring up images of DNA evidence and latter-day confessions, several more

256 Criminal Justice Act, 2003, c. 44 (U.K.).

257 *See* Hamer, *supra* note 32, at 66.

258 Criminal Justice Act, 2003, c. 44, § 78 (U.K.); *see also* R v. Dunlop [2006] EWCA (Crim) 1354, [7], [2007] 1 All E.R. 593, 597 (discussing the evidentiary requirements under the CJA).

specious forms of evidence comfortably fall within this definition. Specifically, eyewitness testimony in general, and identification testimony specifically, can speak with powerful force regarding facts in issue. Problematically, both are notoriously unreliable.[259] Despite this, eyewitness testimony also falls squarely within the double jeopardy exception. A verdict of not guilty, decided without the help of one additional eyewitness, could very well end in conviction on retrial.[260] The CJA, therefore, allows conviction (after prior acquittal) of a defendant on the basis of prototypically unreliable evidence. Moreover, these problems are exacerbated when the eyewitness testimony centers upon identification. Such testimony problematically involves issues of race, subjectivity, and memory, the last of which is seriously implicated in the case of later retrial. Despite these shortcomings, such identification evidence may very well sway a later jury.

The aforementioned case of *Ashe v. Swenson* illustrates the power of identification evidence.[261] During the second trial, two witnesses previously "wholly unable to identify" the defendant "now testified that his features, size, and mannerisms matched those of one of their assailants," while another witness recalled the "unusual sound" of the defendant's voice.[262] In addition to this "stronger" identification testimony, the prosecution further "refined" its case by declining to call a witness from the earlier trial whose testimony had been "conspicuously negative."[263] On the basis of this new evidence the defendant was convicted of robbery, despite earlier acquittal.[264] Even presuming that latter-day identifications occur in good faith, the danger of allowing such unreliable evidence to quash an acquittal is manifold. Indeed, several commentators have urged barring eyewitness testimony in *all* trials without corroborating evidence.[265] Until this is done, eyewitness testimony remains a highly probative and persuasive form of evidence.

The breadth of the new and compelling evidence exception admits double jeopardy for a far wider range of evidence than initially

259 *See generally* Fredric D. Woocher, Note, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 STAN. L. REV. 969, 976–89 (1977) (describing the reasons why eyewitness testimony is unreliable).

260 See id. at 976–82.

261 Ashe v. Swenson, 397 U.S. 436, 436–40 (1970).

262 *Id.* at 440.

263 *Id.*

264 *Id.*

265 *See, e.g.*, Sandra Guerra Thompson, *Beyond a Reasonable Doubt? Reconsidering Uncorroborated Eyewitness Identification Testimony*, 41 U.C. DAVIS L. REV. 1487, 1487 (2008) (labeling eyewitness testimony "notoriously inaccurate" and calling for a corroboration requirement).

suggested. As Hamer himself notes, speculation as to the limited use of the exception is nothing more than guesswork.[266] Indeed, Hamer urges prosecutors to use their newfound power to rectify the proliferation of factually inaccurate acquittals, necessarily urging them to consider more than the handful of cases involving post-acquittal confessions.[267] Reviewing the evidentiary standard codified by the CJA therefore illustrates the wide reach of the exception and the problems of using specious evidence to overturn a properly entered acquittal.

B. The Value of Finality

The Law Commission report placed substantial weight upon the "fundamental process value" of finality in ultimately recommending that double jeopardy reform extend only to past homicide acquittals.[268] The Law Commission noted that liberal democracies must strive to "allow individuals as much personal autonomy as possible" and "the space to live their own lives."[269] Depriving the criminal justice system of finality "impinges on this to a significant degree."[270] After the passage of the CJA, "the individual, though acquitted of a crime, is not free thereafter to plan his or her life . . . if required constantly to have in mind the danger of being once more subject to a criminal prosecution for the same alleged crime."[271] Finality, as codified in the rule against double jeopardy, "represents an enduring and resounding acknowledgment by the state that it respects the principle of limited government and the liberty of the subject."[272] Despite these resounding endorsements of the substantive value of finality in the criminal law, the Government still moved forward with the CJA.

In contrast to the respect accorded to finality by the Law Commission, the Court of Appeal in *Dunlop* illustrated a marked lack of respect.[273] Dunlop's counsel argued that Dunlop made all of his admissions in the firm belief that that the principle against double jeopardy shielded him from further punishment or prosecution.[274] Quite apart from the general problems associated with the CJA, the

266 Hamer, *supra* note 32, at 66.
267 *Id.* at 66–68.
268 LAW COMM'N, *supra* note 24, ¶ 4.19.
269 *Id.* ¶ 4.12.
270 *Id.*
271 *Id.*
272 *Id.* ¶ 4.17.
273 *See* R v. Dunlop, [2006] EWCA (Crim) 1354, [31], [2007] 1 All E.R. 593, 600–01.
274 *Id.* at 601.

retrospective application of the rule to Dunlop represents a separate source of injustice. Indeed, "[i]t was particularly unjust that after serving the sentence for perjury he should once again be placed at risk in relation to the murder," as it constituted a stream of prosecutions ensured to harass and convict.[275] Even more problematic, the Court of Appeal likened Dunlop's reliance upon the principle of double jeopardy to a sex offender's mistaken belief that he escaped police detection.[276] In discussing the seventeen-year delay between the homicide and the indictment, the Court of Appeal dismissed the issue of delay by holding:

> [W]e can see little difference between the delay in charging a sex offender, who may have been lulled into a sense of false security by the absence of any charge over many years, and the delay in retrying a defendant who has been lulled into a false sense of security by the existence of a rule against double jeopardy.[277]

Under the CJA, relying upon the ancient common law bar against double jeopardy has become akin to a sex-offender relying upon the mere passage of time—despite the presence of an acquittal. The Court of Appeal in *Dunlop* illustrated just how much finality and security the citizenry forfeited when they created the exception to the rule against double jeopardy.

C. The Problem of Multiple Prosecutions

As the discussion of the rule against double jeopardy in the United States illustrates, one of the most important goals of the rule is to prevent multiple prosecutions. The Law Commission alluded to this issue, citing "the distress of the trial process" and "the risk of wrongful conviction."[278] The Commission correctly noted that a second chance at prosecution would enhance the likelihood of wrongful convictions.[279] Moreover, as *Ashe* notes, the prosecution will have the ability to refine its case, removing problematic witnesses and varying its lines of argument and questioning.[280] The Law Commission ultimately concluded, however, that due to the strict procedural rules in place, such a danger would be minimal.[281] Similarly, in discussing the

275 *Id.* at 600–01.
276 *Id.* at 600.
277 *Id.*
278 LAW COMM'N, *supra* note 24, ¶ 4.3.
279 *Id.*
280 *See, e.g.*, Ashe v. Swenson, 397 U.S. 436, 436–40 (1970) (discussing the prosecution's refinement of its case on retrial).
281 LAW COMM'N, *supra* note 24, ¶ 4.3.

"distress of the trial process," the Law Commission stated that while the trial process does cause great stress and difficulty for defendants, it is not sufficiently weighty to prevent reform.[282] The Commission recognized that "facing trial, at least for a serious offence, must be extremely distressing."[283] Moreover, the "distress is not confined to the defendant," as his or her family, witnesses on both sides, and the alleged victims also suffer.[284] Despite these "weighty" considerations, the Commission decided that "[t]he anxiety and distress occasioned by trial justifies a *general* rule against retrials, but not, in our view, an *absolute* one."[285]

The Law Commission failed to recognize, however, that these two issues are merely surface manifestations of a far more fundamental goal of the prohibition against double jeopardy—to protect citizens from the overwhelming resources and power of the state. While a wrongful conviction represents the greatest single outcome-related problem with allowing multiple prosecutions, the power of a government *able* to institute multiple prosecutions poses a powerful threat. As illustrated above, the principle of double jeopardy rose from a procedural formality to an acknowledged maxim due to the shift from private to public prosecutions.[286] As the Crown gradually centralized the power to prosecute, that power needed to be checked.[287]

Similarly, American courts gradually broadened the protections afforded by the Fifth Amendment's double jeopardy clause beyond the strict identity of crimes required by the common law pleas. They also adopted criminal collateral estoppel and recognized the principle of double jeopardy as fundamental to the American scheme of justice. This vast expansion of the principle against double jeopardy in American law stands in marked contrast not only to the CJA, but also to U.K. double jeopardy law prior to the CJA. Fundamentally, these American cases illustrate the importance of the bar against double jeopardy in ensuring 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."[288]

Discussing prosecution appeals of acquittals, Stephen Seabrooke challenged the complacency inherent in allowing the government to

282 *Id.*

283 LAW COMM'N, DOUBLE JEOPARDY, 1999, Consult. Paper 156, ¶ 4.7.

284 *Id.*

285 *Id.* ¶ 5.11.

286 *See supra* Part I.A (discussing codification of the rule in response to increased governmental prosecutions).

287 4 BLACKSTONE, *supra* note 49, at *329.

288 Green v. United States, 355 U.S. 184, 187 (1957).

remove such checks upon its power. He argued that "[n]obody . . . would deny that it is virtually unthinkable that Her Majesty's Government (of whatever persuasion) would seek to abuse its powers."[289] Nonetheless, as he noted, "the stakes are very high."[290] Referencing the perversion of previous governments, he warned that "we should all realise what terrible consequences may follow if a state does begin to prey on its own people."[291] These sentiments may seem unjustified and alarmist, however they speak to the potential problems of freely relinquishing powerful procedural rights on the presumption of governmental morality.

Dunlop, in which a man was unusually tried and convicted for perjury before being retried for murder, illustrates the lengths the state may go to vindicate its beliefs.[292] Without questioning the motives of the various prosecutors involved, the three separate prosecutions Dunlop underwent over a seventeen-year period based upon the same conduct displays the immense power the CJA granted to the state.[293] When the Law Commission discusses the mental distresses of the trial process, they miss the forest for the trees. The possibility for mental distress is merely one component of a renewed ability for a determined government to harass, embarrass and, ultimately, convict a *suspected* criminal. Indeed, a criminal previously found innocent of the same crime. Allowing multiple prosecutions cedes to the government the power to harass and victimize the entire citizenry in ways previously prohibited. While many argue that the risk is worth it to prevent the injustice of a murderer walking free, "it may be doubted whether [the government] should be encouraged to 'pick and choose' which of our constitutional rights might have outlived their usefulness."[294]

Conclusion

While the sight of a guilty man walking free assuredly harms society, the cure proposed by the CJA goes too far and forfeits too much. In forfeiting this right, the United Kingdom has trusted their government to wield this new power in a conscientious manner. In the current environment, such a hope seems well founded. Nonetheless, times change, and the absence of the bar against double jeopardy in

289 Stephen Seabrooke, *Two-Timing the Double Jeopardy Principle*, 1988 Crim. L. Rev. 103, 105.
290 *Id.*
291 *Id.*
292 R v. Dunlop [2006] EWCA (Crim) 1354, [12], [2007] 1 All E.R. 593, 597.
293 *Id.* at 595–97.
294 Seabrooke, *supra* note 289, at 106.

later years may underscore its fundamental importance more powerfully than its history can at instant. Several commentators have suggested that double jeopardy is "anachronistic" and a mere procedural holdover from the common law, not suited for modern times. As the development of American double jeopardy jurisprudence illustrates, however, the power of modern governments demands a broader prohibition against double jeopardy. The power of the state to impose a suspect to multiple prosecutions poses an even more worrisome picture than the prospect of the guilty walking free. The benefits of a CJA-like exception pale in comparison to the danger foisted upon society when they relinquish important individual rights.

Regina v. Dunlop poignantly displays both the benefits and potential drawbacks of a double jeopardy exception. The victim's mother had to learn that the system had allowed the man guilty of her daughter's murder to walk free. With a latter day confession undermining the conviction, society had to deal with the pain and injustice of a wrongful acquittal. In response, the government prosecuted and convicted Dunlop of perjury. Following the passage of the CJA, the prosecutors then charged Dunlop with murder. While Dunlop's case offers, as the Court of Appeal noted, an archetypal case in which to use the CJA's exception it also raises several serious issues. Including his first mistrial, Dunlop was tried four times on the basis of the same conduct. The government continued to bring their resources to bear against him, even after he was sent away for perjury. This dogged determination illustrates the freedoms U.K. citizens have lost under the CJA.

While these facts may seem palatable due to Dunlop's confession, the government could use the same tactics on the basis of a new witness or new identification testimony. Even in *Dunlop*, the ideal case for justifying a double jeopardy exception, the problems posed by the CJA are evident. Protected by the guarantees of the Fifth Amendment, the difficulty of enacting a CJA-like exception would be manifold. Placing aside the difficulty of passing an amendment, however, Americans looking warily across the Atlantic should remember that much modern American double jeopardy law rests upon judicial constructs. From *Blockburger* to *Ashe* to *Benton*, our present constitutional structure may be strong, but it is not unchangeable. As such, the growing calls for reform throughout the common law world require recognizing the powerful lessons taught by our own case law. The prohibition against double jeopardy serves as an important and indispensable component of the American scheme of justice and must be respected and protected as such.