

Essay

Double Jeopardy Law Made Simple

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“[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb”¹

Modern Supreme Court case law is full of double jeopardy double talk. Consider first the poetic phrase “life or limb.” It seems sensible enough to read these words as a grim and graphic metaphor for criminal sanctions—and such an approach runs deep in American case law, to say nothing of English literature. This reading also makes the most sense of the precise location of the Fifth Amendment Double Jeopardy Clause, wedged as it is between two other provisions—the Grand Jury and Self-Incrimination Clauses—that apply only to criminal offenses. But can “life or limb” be stretched to encompass some civil suits involving only money? Today’s Supreme Court seems to think so,² but how can this be squared with the text and structure of the Fifth Amendment? The Fifth Amendment Due Process Clause clearly applies to civil cases, but isn’t its “life, liberty, *or property*” language obviously contradistinguished from the more narrow “life or limb” language of the Fifth Amendment Double Jeopardy Clause?

Consider next a far more egregious example of modern double jeopardy double talk. The Double Jeopardy Clause speaks of the “same” offense, and yet the Court casually applies the Clause to offenses that are not the same but obviously different. Premeditated murder is not the *same* as attempted murder or manslaughter; armed robbery is not the *same* as robbery; and yet under the so-called *Blockburger* test, the Court generally treats a greater offense as the same as each of its logically lesser-included offenses.³ But on rare occasions,

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1. U.S. CONST. amend. V.

2. See, e.g., *United States v. Ursery*, 116 S. Ct. 2135, 2142–47 (1996); see also *Department of Revenue v. Kurth Ranch*, 114 S. Ct. 1937 (1994); *United States v. Halper*, 490 U.S. 435 (1989).

3. See *Blockburger v. United States*, 284 U.S. 299 (1932). In fact, the *Blockburger* case itself does not quite stand for the global test of sameness that later courts have attributed to it. See *infra* note 38. For an example of a modern-day application of the so-called *Blockburger* test, see, e.g., *Brown v. Ohio*, 432 U.S.

the Court rejects this test and reminds us that "[q]uite obviously the [greater] offense is not, in any common-sense or literal meaning of the term, the 'same' offense as one of [its lesser-included] offenses."⁴ How can we make sense of all this?

Finally, consider the question of precisely when "jeopardy" attaches. The modern Court claims that once the jury is sworn, a defendant is in "jeopardy."⁵ Thus, defendant *A* cannot be tried a second time if, say, her first jury is dismissed because of gross prosecutorial misconduct. But if defendant *B*'s first jury is dismissed for some other reason—because it cannot reach a unanimous verdict or because some jurors fall ill during trial—then *B* can indeed be tried again.⁶ Why, on the Court's premises, doesn't such a retrial likewise place a person twice in jeopardy—and for the identical offense—in obvious violation of the bright-line rule of the Clause? And if a person is simply not "in jeopardy" until his jury is sworn, does this mean that if defendant *C* has won an acquittal in a fair and suitably error-free trial, *C* may nonetheless be reindicted for the same offense and held in pretrial detention until a second jury is sworn? If not—if jeopardy really attaches upon *C*'s second indictment itself—does this mean that when a good faith prosecutor dismisses defendant *D*'s first indictment pretrial, then the government is forever barred from bringing a new indictment on the same offense against *D* (based, say, on new evidence)?

Modern Supreme Court case law is also full of double jeopardy double takes. For example, in the 1975 *Jenkins* case,⁷ the Court, per Justice Rehnquist, promulgated a double jeopardy test for identifying which erroneous trial court dismissals could be appealed by the government, reversed on appeal, and remanded for proper retrial.⁸ But in the 1978 *Scott* case,⁹ the Court, per Justice Rehnquist, explicitly overruled the 1975 *Jenkins* case and promulgated a new test.¹⁰ (As we shall see, this new test is also flawed¹¹—but never mind that for now.) Another example: In the 1990 *Corbin* case,¹² the Court,

161, 166–69 (1977), which barred prosecution for auto theft on double jeopardy grounds because the defendant had been previously convicted of the lesser-included offense of joyriding.

4. *Garrett v. United States*, 471 U.S. 773, 786 (1985) (holding that continuing criminal enterprise (CCE) offense is not same as any of its lesser-included predicate crimes).

5. *See Crist v. Bretz*, 437 U.S. 28, 32–38 (1978).

6. *See, e.g., id.* at 34 n.10; *Arizona v. Washington*, 434 U.S. 497, 505–16 (1978); *Wade v. Hunter*, 336 U.S. 684, 688–92 (1949).

7. *United States v. Jenkins*, 420 U.S. 358 (1975).

8. *See id.* at 365–70 (generally barring any government appeal that would require retrial).

9. *United States v. Scott*, 437 U.S. 82 (1978).

10. *See id.* at 95–101 (allowing erroneous ruling to be appealed and case retried if ruling was not related to factual guilt or innocence).

11. *See infra* Part III (defending "continuing jeopardy" approach that would permit appeal of virtually all erroneous rulings by trial judge).

12. *Grady v. Corbin*, 495 U.S. 508 (1990), *overruled by* *United States v. Dixon*, 113 S. Ct. 2849 (1993).

by a five-to-four vote, laid down a general test for identifying which formally different offenses should be treated as the “same” for double jeopardy purposes.¹³ But in the 1993 *Dixon* case,¹⁴ the Court, by a five-to-four vote, explicitly overruled the 1990 *Corbin* case.¹⁵ And yet in the 1994 *Kurth Ranch* case,¹⁶ the Court, by a five-to-four vote, ignored the 1993 *Dixon* test without explanation, and seemed sub silentio to apply some version of the overruled 1990 *Corbin* test.¹⁷ As the modern Court itself has noted, “the decisional law in [the double jeopardy] area is a veritable Saragasso Sea which could not fail to challenge the most intrepid judicial navigator.”¹⁸

What, in the end, are we to make of all this double jeopardy double talk, of all these double jeopardy double takes? In this Essay, I will suggest that the Double Jeopardy Clause is in fact rather simple and easy to apply. “Life or limb” connotes all criminal sanctions but never covers a mere civil suit about money. “Same offense” means just that—murder means murder, not attempted murder. And “jeopardy” begins with an indictment and ends with a suitably error-free verdict. However, the Double Jeopardy Clause itself does not exhaust the scope of constitutional principle involved in multiple prosecution and multiple punishment cases. Rather, the clean and simple rules of the Double Jeopardy Clause must be supplemented by several broader but more flexible commonsense principles protected by the Due Process Clause—and by certain other rules and principles rooted in the Sixth Amendment Jury Trial Clause. Rhetorically, the Court has tied itself into knots because it has failed to carefully disentangle the Double Jeopardy, Due Process, and Jury Trial Clauses. As a result, some defendants today are getting windfalls—needless and dangerous “get out of jail free” cards—while other defendants are getting less than they constitutionally deserve. Lawmakers, lawyers, citizens, and the Justices themselves are deprived of a clear account of exactly what the Constitution says, where, and why.

In this Essay, I seek to provide such an account.¹⁹

13. See *id.* at 521 (holding that in second trial, government may not “prove conduct that constitutes an offense for which the defendant has already been prosecuted”).

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

15. See *id.* at 703–12 (overruling *Corbin* and restoring *Blockburger* as sole test of sameness).

16. *Department of Revenue v. Kurth Ranch*, 114 S. Ct. 1937 (1994).

17. For more analysis, see *infra* text accompanying notes 105–35.

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

19. A roadmap may be helpful here. In Part I, I explore the scope of the Double Jeopardy Clause. Does it, for example, ever apply to civil cases? In Part II, I ask when two offenses should be deemed the same, and I identify the functional concerns that should animate analysis here. In Part III, I examine when jeopardy begins and ends—attaches—with particular emphasis on the issues of continuing jeopardy, erroneous jury verdicts, and mistrials. To put the point textually rather than functionally, Part I explores the phrase “life or limb”; Part II explains the words “same offense”; and Part III expounds the trope “twice in jeopardy.”

I. "LIFE OR LIMB"

Before we analyze in detail the precise meaning of the double jeopardy rule, let us consider its scope, its domain: What proceedings are covered by the rule? A hyperliteralist might insist that the Clause applies only to cases where the threatened punishment involves death or dismemberment—"life" or "limb." Although Justice Joseph Story once came close to saying as much on circuit to wriggle out of a tight spot,²⁰ the Supreme Court rejected this gambit long ago in *Ex Parte Lange*,²¹ holding that the Clause applies to all criminal cases.²² "[A]t the time this [double jeopardy] maxim came into existence," explained the *Lange* Court, "almost every offence was punished with death or other punishment touching the person."²³ And so the phrase "life or limb" should be understood as a vivid and poetic metaphor for all criminal punishment.

"A vivid and poetic metaphor?" our hyperliteralist might sneer. "In the Constitution? What about plain meaning?" Yes, I would respond, what about it? Surely the nuances of words and phrases are part of their plain meaning. The obviously alliterative, monosyllabic coupling of two good Old English words in the "life or limb" clause; their tethering to another fine poetic word, "jeopardy" (deriving from the French *jeu-perdre*, a "game" that one might "lose," and the Middle English *iuparti*, an uncertain game);²⁴ and the prominence of the unitary phrase "life or limb" in poetic and literary texts stretching back at least 500 years before the Bill of Rights²⁵—all this is part of the plain meaning of the phrase. The hyperliteralist tries to play divide and conquer, splitting one phrase into two parts—"life" or "limb"—but in fact, the plain meaning yokes these words together in a single unitary phrase, "life or limb," whose whole is greater than its parts. Fidelity to constitutional text requires that we pay close heed to what the Constitution is trying to tell us; and to miss all the poetic notes here is to be not faithful, but tone-deaf. (Not literally tone-deaf, of course, but metaphorically—that's the point.)

Since words are sometimes used rather literally, and other times more metaphorically, faithful textualism must also attend to the apparent purpose and

20. See *United States v. Gibert*, 25 F. Cas. 1287, 1294-97 (C.C.D. Mass. 1834) (No. 15,204) (finding "life or limb" clause inapplicable to misdemeanors); see also OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL ON DOUBLE JEOPARDY APPEALS OF ACQUITTALS, No. 6 (1987) [hereinafter OLP REPORT], reprinted in 22 U. MICH. J.L. REFORM 831, 842 (1989) (presenting originalist evidence that "life or limb" was term of art for felonies); cf. *id.* at 862 n.108 (declining to press this point in light of well-established case law reading phrase more broadly to encompass misdemeanors too).

21. 85 U.S. (18 Wall.) 163 (1873).

22. See *id.* at 170-73.

23. *Id.* at 173.

24. See 8 THE OXFORD ENGLISH DICTIONARY 214 (2d ed. 1989).

25. See *id.* at 956 (quoting source from 1205 using phrases "lif & leomen" and "leome & vppe lif"; source from 1300 using phrase "leme or lif"; source from 1362 using phrase "his lyf and his leome"; source from 1480 using phrase "lyf and lymme"; and source from 1548 using phrase "lifes and lymmes").

logic of a given clause. To me at least, it is hard to see why the double jeopardy principle should apply when the state wants to chop off my toes, but not when it seeks to slit my nose, or brand my skin, or gouge my ears, or flay my back. (All these, of course, were actual punishments meted out in seventeenth-century England.)²⁶ These are punishments that, to borrow from *Lange*, quite literally “touch[] the person”;²⁷ and these are “games” that the government should not be able to keep playing until it wins. Imprisonment may not literally deprive me of my limbs, but chains and bars do deprive me of free use of my limbs—and so here too it seems that the spirit and purpose of the Clause obviously apply.

Nor is any of this mere special pleading on behalf of a pet clause. Consider, for example, the outlandish results that hyperliteralism would seem to demand elsewhere in the Constitution. Shall we say that because Article I addresses only “land and naval Forces”—“Armies” and “a Navy”²⁸—that the Air Force is unconstitutional? Or that photographs can never receive copyright protection because the Copyright Clause speaks only of “Authors” and “Writings”?²⁹ Or that a handwritten private letter lacks all First Amendment protection because it is neither an oral “speech” nor the product of a printing “press”?³⁰ Or that a defendant may not subpoena and introduce reliable physical evidence that proves his innocence because the Sixth Amendment gives him only a right to compel the production of “witnesses” in his favor?³¹

But once we go beyond literal lives and limbs, where shall we stop? Were the Double Jeopardy Clause freestanding, I would think its life or limb imagery should obviously apply to imprisonment and all serious criminal punishments and should probably apply to petty criminal punishments (including criminal fines which, by their inherently stigmatic nature as “criminal” sanctions, rob a man of his good name as well as his purse by branding him a “criminal”),³² but should never apply to mere civil suits involving only money. (It is, after all, precisely the obvious contrast between “life or limb,” on the one hand, and mere “money,” on the other, that drives the drama of Shakespeare’s great meditation on law, lawyers, and hyperliteralism, *The Merchant of Venice*.)³³

26. See, e.g., 4 WILLIAM BLACKSTONE, COMMENTARIES *376–77.

27. See *supra* text accompanying note 23.

28. U.S. CONST. art. I, § 8, cls. 12–14.

29. *Id.* cl. 8.

30. *Id.* amend. I. For an earlier exploration of this analogy, see Akhil Reed Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124, 134 & n.66 (1992).

31. See U.S. CONST. amend. VI. For more discussion and analysis of this point, see Akhil Reed Amar, *Foreword: Sixth Amendment First Principles*, 84 GEO. L.J. 641, 647–49 (1996).

32. Cf. WILLIAM SHAKESPEARE, *OTHELLO*, act 3, sc. 3 (“Who steals my purse steals trash . . . But he that filches from me my good name/Robs me of that which not enriches him/And makes me poor indeed.”). Note the metaphoric link here to physical branding. See *supra* text accompanying note 26.

33. For a brilliant meditation on these (and other) themes of the play, see Kenji Yoshino, *The Lawyer of Belmont*, 9 YALE J.L. & HUMAN. (forthcoming Summer 1997).

Happily, the Double Jeopardy Clause does not stand alone, but rather shoulder to shoulder with other clauses of the Fifth Amendment. Faithful textualism attends to the context as well as the text of a clause, and here context confirms our freestanding textual analysis. A faithful reader hearkening to nuance should not fail to note the obvious contrast between “life or limb” in the Double Jeopardy Clause and the more sweeping “life, liberty, or property” phrasing of the Due Process Clause, which clearly applies to a mere civil suit about only money. More generally, we should note the grand arc of ever-greater inclusion, the subtle spiraling outward of clausal scope, in the sequence of Fifth Amendment clauses. First comes the Grand Jury Clause, limited to “capital and otherwise infamous crime”; next comes the broader poetry of “life or limb”; then comes the perhaps broader—or at least clearer—scope of the Self-Incrimination Clause, applicable in “any criminal case”; and finally comes the still broader Due Process Clause encompassing all civil and criminal proceedings implicating “life, liberty, or property.”

Of course, to say that the Double Jeopardy Clause does not reach civil cases about money³⁴ is not to leave defendants in these cases defenseless against state assault. Rather, it is to give them the shield of the Due Process Clause. Even if the Double Jeopardy Clause, strictly speaking, does not apply, if its rules make sense where they do apply, analogous rules could be assimilated into more general due process protection.³⁵ And the root commonsense idea underlying double jeopardy is generalizable beyond criminal cases: Government should not structure the adjudication game so that it is “heads we win; tails let’s play again until you lose; then let’s quit (unless we want to play again).”

The problem, alas, is that in its domain, the Double Jeopardy Clause has been read far beyond this commonsense norm; and so long as this is so, the damage should and can, in a principled way, be cabined to criminal cases. But a better approach would be to solve the problems at their root in double jeopardy doctrine proper. First, conviction of a lesser-included offense should not always bar a second prosecution for a greater offense. Second, an erroneous acquittal should not be immune from correction on appeal followed by a fair retrial. To see this more clearly, we must turn to the two other intriguing phrases in the Double Jeopardy Clause, “same offence” and “twice in jeopardy.” Let us start with the words “same offense.”

34. To be sure, a genuine criminal punishment masquerading as a “civil” sanction can and should be unmasked by courts; but this unmasking would summon up all the Constitution’s criminal procedure protections, not merely the Double Jeopardy Clause. See *infra* text accompanying note 128.

It is also worth noting that not until the late 1980s did the Supreme Court ever embrace the novel notion that the Double Jeopardy Clause could be stretched to cover some civil suits about money. See *United States v. Halper*, 490 U.S. 435 (1989). For an analysis of how a Due Process Clause analysis would have better fit the facts of *Halper*, see *infra* text accompanying notes 130–35.

35. See *infra* text accompanying notes 130–43.

II. "SAME OFFENSE"

In contrast to the metaphoric and somewhat fuzzy phrase "life or limb," the phrase "same offense" feels exact, precise, mathematical. If X is the same as Y, and Y is the same as Z, then X is the same as Z by the clear and hard logic of transitivity. Rose is a rose is a rose.³⁶ Same means same; and done is done—this is the obvious meaning of the Double Jeopardy Clause. Thus, after a defendant has been tried and "finally" "acquitted" or "convicted" of attempted murder in a "fair" and "suitably error-free" trial—and we shall later refine the concepts in quotes³⁷—he cannot be retried for the *same* attempted murder.

But can he later be tried for premeditated murder? The Supreme Court has put forth a test that, applied with a straight face, would always bar this second trial. Under the so-called *Blockburger* test, attempted murder is the *same* as premeditated murder.³⁸ More generally, a greater offense, under *Blockburger*, is treated as the same as any logically lesser-included offense with some but not all of the formal "elements" of the greater offense—in other words, *Blockburger* treats two offenses as different if and only if each requires an element the other does not.³⁹ Sometimes, *Blockburger*'s rule makes sense: As we shall see, if a defendant were *acquitted* in a fair attempted murder trial, there would be something wrong and unconstitutional about retrying him for the "different" offense of murder.⁴⁰ But other times, *Blockburger*'s rule makes far less sense: Suppose a defendant is *convicted* in a fair attempted murder trial, and the victim thereafter dies from injuries proximately caused by the initial attack. Taken seriously, *Blockburger*'s rule would bar a murder trial here too—even if the state stood ready to offset against the murder sentence any penalty already imposed for the attempt (so as to avoid any kind of double-counting). But as early as 1912, the Supreme Court held in the *Diaz* case⁴¹ that a *Blockburger*-like test should not be taken seriously in this scenario, and that a second trial should not be barred.⁴² Moreover, in the 1985 *Garrett* case,⁴³ the Court applied *Diaz*-like logic to uphold a trial for a greater continuing criminal enterprise offense after the defendant had already been

36. Cf. GERTRUDE STEIN, *SACRED EMILY* (1913).

37. See *infra* Part III.

38. See *Blockburger v. United States*, 284 U.S. 299, 304 (1932). On its facts, *Blockburger* propounded a test for identifying when two offenses could be charged in a single proceeding, resulting in two convictions and possibly cumulative sentences. This test thus addressed what I shall later call the "double-counting" problem. See *infra* Subsection II.B.1. Later courts, however, applied *Blockburger*'s test as a general measure of double jeopardy sameness for situations involving successive prosecutions. See, e.g., *Brown v. Ohio*, 432 U.S. 161, 168 (1977) (noting that greater and lesser-included offenses are "by definition the 'same'" for double jeopardy purposes).

39. See *Blockburger*, 284 U.S. at 304.

40. See *infra* Subsections II.B.3–4 (discussing implicit acquittals and collateral estoppel).

41. *Diaz v. United States*, 223 U.S. 442 (1912).

42. See *id.* at 448–49. This case is discussed *infra* text accompanying note 76.

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

convicted of a lesser-included predicate offense.⁴⁴ But other Supreme Court cases—the 1977 *Brown v. Ohio* case,⁴⁵ for example—have blandly ignored the deep logic of *Diaz* and have instead idolized *Blockburger*.

All this is, to put it mildly, confusing. If greater and lesser-included offenses really are the “same” offense within the meaning of the Double Jeopardy Clause, by what right do judges carve out *Diaz*/*Garrett* exceptions to clear textual commands? And if the answer is that of the *Diaz* and *Garrett* Courts—that quite obviously a greater offense is not in any commonsense or literal way the *same* offense as one of its lesser-included offenses⁴⁶—then by what right do judges continue to apply *Blockburger*? If *Diaz* and *Garrett* are right, then isn’t *Brown* wrong—at least in reasoning and perhaps also in result?

Now move beyond these legal puzzles to logical puzzles. As we have seen, transitivity is a basic property of sameness: If one thing is the same as each of two other things, each of those things must be the same as the other. But the *Blockburger* rule of sameness flunks this elementary test. Under *Blockburger*, murder is the “same” as the lesser-included offense of involuntary manslaughter, and is also the “same” as the lesser-included crime of attempted murder, but these two lesser offenses are not the same as each other. (Only one requires a dead body; only the other requires an intent to kill.) Under *Blockburger*, the lesser-included offense of robbery is the “same” as the greater offenses of armed robbery and bank robbery, but these greater offenses are not the same. (One requires a gun, the other a bank.)

Blockburger, it seems, is a mess, legally and logically. Can we do better than this? I think so.

A. *Same Means Same (and Offense Means Offense)*

When we consider the entire text of the Double Jeopardy Clause, and its history, a same-means-same approach makes perfect sense. At common law, the double jeopardy idea encompassed two basic pleas in bar, prior acquittal and prior conviction—in law French, *autrefois acquit de même felonie* and *autrefois convict de même felonie*.⁴⁷ The obvious idea here is that if a person has, on a prior occasion (*autrefois*) been acquitted or convicted of the *exact same crime (la même felonie)* with which he is now charged, he can plead the previous judgment as a bar to the second indictment.

44. See *id.* This case is discussed *infra* text accompanying notes 82–87.

45. 432 U.S. 161 (1977). This case is discussed *infra* text accompanying notes 78–81.

46. See *Garrett*, 471 U.S. at 786; *Diaz*, 223 U.S. at 448–49.

47. See 4 BLACKSTONE, *supra* note 26, at *335–36; 2 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN *240–55; 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 368–79 (Garland Publ’g, Inc. 1978) (1721). At common law, a third plea, *autrefois attainé* complemented *autrefois acquit* and *autrefois convict*. Courts have also linked double jeopardy to the plea of prior pardon. See *United States v. Scott*, 437 U.S. 82, 87 (1978); *United States v. Wilson*, 420 U.S. 332, 340 (1975).

The logic behind this rule is simple. If Atticus has already been convicted of, say, attempted murder, in a fair trial that has rendered a final judgment, it is not right to try to heap a second punishment upon him in a second trial for what was after all only a single legal offense. A second punishment is a kind of double-counting, in which courts might end up imposing more punishment than the legislature authorized, in obvious violation of basic principles of the rule of law. If Atticus received the maximum sentence allowable at his first trial—say, ten years—then to subject him to a risk of *another* ten years is obviously wrong and unlawful. And, if this second trial were allowed, when would things stop? If two trials and two ten-year sentences are okay, why not three, or four, or . . . ? Anyone guilty of anything could end up being infinitely punished in defiance of statutes prescribing maximum penalties.

Here we see how the Double Jeopardy Clause, via the constitutionally guaranteed plea of *autrefois convict*, protects even the guilty. But the Clause is more precious for its protection of the innocent, via the constitutionally grounded plea of *autrefois acquit*. If Amanda is acquitted in a fair and error-free trial for attempted murder, the state may not ignore this final judgment and force her into a second trial for the same attempted murder. One obvious reason here is to protect the innocent from erroneous conviction.⁴⁸ If two trials are okay, why not three, or four, or . . . ? Eventually, the state may be able to wear an innocent Amanda down, and find one statistically aberrant or quirky jury that would erroneously convict.⁴⁹ Even if the state fails to convict Amanda in later trials, these judicial ordeals themselves can impose crushing psychic and financial costs on an innocent defendant.⁵⁰ Basic notions of symmetry are also offended by this “heads-we-win, tails-let’s-play-again” scheme. If the *state* wins in an initial fair trial for attempted murder, it does not give the defendant the right to ignore the verdict and demand a new trial on a clean slate. Why should the defendant be placed in a lesser position when *she* wins? When the game is over, it’s over. The winner is the winner; that’s that; done is done.

And “same offense” is “same offense.”⁵¹ Even if a murder and robbery spring from the same crime spree, or the same underlying factual “transaction,” they remain different legal offenses in statute books and decisional law—with

48. Elsewhere, I have suggested that the protection of the *innocent* from *erroneous* conviction is one of the root principles of our system of constitutional criminal procedure. See, e.g., Amar, *supra* note 31, at 642–46; Akhil Reed Amar, *The Future of Constitutional Criminal Procedure*, 33 AM CRIM. L. REV. 1123 (1996). See generally AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE. FIRST PRINCIPLES* (1997).

49. Thus, there is a resonance between the *autrefois acquit* idea and the *Winship* principle that seeks to avoid erroneous convictions by placing a heavy burden of proof on the government. See *In re Winship*, 397 U.S. 358 (1970).

50. See Amar, *supra* note 31, at 658–62.

51. Cf. George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297, 1323 n.128, 1324, 1337 (1990) (tracing similar tropes in writings of Justice Scalia)

different formal legal elements. They are not *la même felonie*.⁵² And so the Double Jeopardy Clause does not, for example, give Robert the right to plead *autrefois convict* to a first-degree murder charge merely because he has already been convicted of a robbery that grew out of the same set of events. Indeed, at the time of the Founding, the murder and the robbery would ordinarily not have been tried together.⁵³ Today, joinder rules might allow the two offenses to be litigated in a single trial, but the Double Jeopardy Clause does not demand that they be so tried.

As we shall see, general due process principles can be construed to require that factually related crimes be tried together, but this command cannot easily be crammed into the Double Jeopardy Clause in light of the syntax, grammar, purpose, and history of the Clause.⁵⁴ The Clause lays down a clear bright-line rule enforced by a special plea in bar before the second trial has even begun. And this enforcement scheme works perfectly where "same offense" means same legally defined offense; but not where "same offense" means factually related action or same overall transaction. Sometimes, the witnesses and evidence needed to prove one crime will materialize before the witnesses and evidence materialize for a factually related but legally distinct offense. But the precise amount of evidentiary overlap and divergence between "related" crimes will be highly case- and fact-specific and will often not be apparent before trial.⁵⁵ The Due Process Clause can flexibly accommodate all these concerns, and can be invoked during or after the second trial, when it becomes clear in retrospect that the second trial could easily have been folded into the first.⁵⁶ But the Double Jeopardy Clause is designed to spare Atticus and Amanda from the burden of the second trial itself: The second trial itself impermissibly "put[s]" the defendant "twice in jeopardy" in violation of the plain meaning of the Clause.⁵⁷ And so the language of the Clause is limited to the "same

52. See, e.g., 4 BLACKSTONE, *supra* note 26, at *336 ("It is to be observed that the pleas of *autrefois acquit* and *autrefois convict* . . . must be upon a prosecution for the *same identical act and crime*." (emphasis altered)); 2 HALE, *supra* note 47, at *245-46 (stating that burglary and larceny committed "at the same time" are different offenses; prior acquittal of one will not bar prosecution of other); 2 HAWKINS, *supra* note 47, at 371 ("It seems that it is no Plea to an Appeal of Larceny, That the Defendant hath been found Not guilty in an Action of Trespass brought against him by the same Plaintiff for the same Goods; for Larceny and Trespass are entirely different."); *id.* at 376 (offering similar example). The foregoing sources, and many others, are discussed in *Grady v. Corbin*, 495 U.S. 508, 530-35 (1990) (Scalia, J., dissenting). That discussion, in turn, was heavily relied on in *United States v. Dixon*, 509 U.S. 688, 709-10 (1993).

53. See *Ashe v. Swenson*, 397 U.S. 436, 453 (1970) (Brennan, J., concurring) ("English common law . . . severely restricted the power of prosecutors to combine several charges in a single trial."); 1 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 508 (William S. Hein & Co., Inc. 1980) (1883) ("In an indictment for felony one offence only can practically be charged.").

54. But see *Ashe*, 397 U.S. at 453-54 (Brennan, J., concurring) (arguing that Double Jeopardy Clause generally requires that all offenses arising out of "same transaction" be prosecuted in single proceeding).

55. See *Corbin*, 495 U.S. at 529-30 (Scalia, J., dissenting).

56. Cf. *United States v. MacDonald*, 435 U.S. 850, 858-59 (1978) (making similar point about Speedy Trial Clause).

57. See *Corbin*, 495 U.S. at 529-30 (Scalia, J., dissenting); *Abney v. United States*, 431 U.S. 651, 660-62 (1977).

offense”; its grammar is absolute, not flexible and case-specific; its purpose is to prevent the second trial entirely; and its history shows it to be a paradigmatically *pretrial* plea.

As Robert’s murder/robbery hypothetical illustrates, two offenses cannot be the same if they have different legal elements. But under the Double Jeopardy Clause, an offense must not only be the same in law—it must also be the same in fact. Even if Robert is convicted of robbery in an earlier trial, he may later be charged with and tried for robbery so long as the second indictment concerns a factually different robbery—committed, say, on a different day against a different victim. (Of course, to the extent that the two robberies grew out of the same factual “transaction” with a high degree of evidentiary overlap and a small amount of evidentiary divergence, the Due Process Clause could, as noted, be construed as a constitutionally based mandatory joinder principle.)⁵⁸ Even if the identity of the robbery victim and the day of the robbery are not formal elements of the offense of robbery—in other words, even if the legal elements in Robert’s two trials are identical—Robert would have no good double jeopardy defense. He simply broke the same law twice, and thus he may be tried twice and punished twice. He may be “twice put in jeopardy of life or limb” because he committed two offenses, not one.

At times, nice “unit of prosecution” questions will arise.⁵⁹ Are two pulls of the trigger one attempted murder or two? (Does it matter if the two pulls are aimed at two different persons; or aimed at the same person, but on different days, as parts of different schemes?) Is an ongoing course of continuous conduct one offense or several? Is marrying four women one bigamy or three? (Does it matter whether the marriages occur simultaneously or sequentially?) Is a liquor store stickup in which the robber takes money from two persons one armed robbery or two? (Does it matter whether the two are both clerks, or are instead one clerk and one store patron?) These questions are both fascinating and difficult, but they are ultimately questions of substantive law, questions on which the Double Jeopardy Clause is wholly agnostic. The Clause takes substantive criminal law as it finds it; it is outlandish (and judicially unworkable) to suppose that hidden deep in the word “offense” lies some magic metatheory of substantive criminal law, telling legislators in all times and places what can and cannot be made criminal. And

58. I place the word “transaction” in quotes because this word is hardly self-defining, as even the chief proponent of a “same transaction” rule has acknowledged. See *Ashe*, 397 U.S. at 454 n.8 (Brennan, J., concurring).

In light of the incentive effects created by other (relatively easily enforced) constitutional rules—namely, the asymmetric rule of collateral estoppel—a global mandatory joinder rule for offenses growing out of the same “transaction” is probably unnecessary and unwise as a matter of due process (though textually permissible). For more explanation, see *infra* text accompanying notes 102, 130–32.

59. For an excellent discussion, see Peter Westen & Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81, 111–22.

so it is up to the legislature to decide whether planting and exploding a bomb should be one crime or two (because the bomb was first planted, then exploded) or fifty (because fifty people died) or 500 (because 450 more were at risk) or 1,000,500 (because the bomb also destroyed one million dollars of property and each dollar of bomb damage is defined as a separate offense).⁶⁰ The Eighth Amendment's Cruel and Unusual Punishment Clause might impose limits on the total amount of punishment that can be heaped upon a person for a single "act" or series of acts,⁶¹ but the Double Jeopardy Clause imposes no limits on how the legislature may carve up conduct into discrete legal offense units.⁶²

B. *Rethinking Blockburger's Boxes*

In light of all this, it seems obvious that a same-offense-means-same-offense approach to the Double Jeopardy Clause enjoys clear textual, historical, and logical advantages over the *Blockburger* test. It remains to see how a plain-meaning approach to the Double Jeopardy Clause, when properly supplemented by various due process rules and principles, is functionally superior to *Blockburger*. As we shall see, *Blockburger's* test makes sense insofar as it (1) prevents double-counting; (2) requires joinder of certain related charges to prohibit vexatious reprosecution; (3) affirms the concept of implicit acquittal; and (4) safeguards the defendant's right to collateral estoppel. But *Blockburger* achieves these functional results in a crude and imprecise manner that is both over- and underinclusive. A more functional approach would admit that same means same (and offense means offense) in the Double Jeopardy Clause, and would use the Due Process Clause directly to vindicate these four principles in cases where the Double Jeopardy Clause alone cannot bear the textual load. Such a direct approach would avoid *Blockburger's* overprotective rigidity in cases where its test makes no sense—*Diaz*,⁶³ *Brown*,⁶⁴ and *Garrett*⁶⁵—and would also avoid *Blockburger's* underprotective narrowness

60. See *id.* at 114 ("There is simply no way to make sense out of the notion that a course of conduct is 'really' only one act, rather than two or three, or, indeed, as many as one likes."); Comment, *Twice in Jeopardy*, 75 YALE L.J. 262, 275–77 (1965) (making similar point).

61. See Nancy J. King, *Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties*, 144 U. PA. L. REV. 101 (1995); Westen & Drubel, *supra* note 59, at 114. I place the word "act" in quotes here because, like "transaction," "act" is hardly self-defining. Cf. *supra* note 60; see also *supra* note 58. By contrast, an "offense" on my view connotes a precise and discrete set of elements and penalties defined by statute or decisional law; and so the word is much easier to define and apply. Cf. King, *supra*, at 182 (arguing that Eighth Amendment prohibits excessive overall punishment for single act, and noting that "[t]he concept of punishment under the Eighth Amendment, unlike the textual reference to 'offence' in the Fifth Amendment, is not limited by statutory elements or legislative intent").

62. See generally Westen & Drubel, *supra* note 59, at 111–22; see also cases cited *infra* note 67.

63. *Diaz v. United States*, 223 U.S. 442 (1912).

64. *Brown v. Ohio*, 432 U.S. 161 (1977).

65. *Garrett v. United States*, 471 U.S. 773 (1985). *Diaz*, *Brown*, and *Garrett* are discussed *infra* Subsection II.B.2.

in cases that fail to pass the *Blockburger* test for sameness but that nevertheless implicate one or more of the four principles. To see this more clearly, let us analyze the four logical categories—boxes—where *Blockburger* goes beyond true sameness: (1) prior conviction of a greater offense; (2) prior conviction of a lesser-included offense; (3) prior acquittal of a greater offense; (4) and prior acquittal of a lesser-included offense.⁶⁶

1. *Blockburger Box One: The Anti-Double-Counting Principle*

Consider first a case where Robin has been convicted of armed robbery and is now charged, in a second prosecution, with robbery for the same transaction. Suppose that armed robbery carries an eight-year sentence and robbery a five-year sentence. To try Robin in two trials, and impose the maximum sentence each time, is to risk a kind of double-counting. Ordinarily, it is sensible to presume that the initial armed robbery statutory sentence already included five years for the logically lesser-included robbery, and then tacked on an additional three years for the use of a gun. And so to convict Robin of armed robbery and robbery and to cumulate the maximum sentences is in effect to double-count the robbery: (robbery plus gun) plus robbery—(five plus three) plus five. By preventing the robbery trial after the armed robbery conviction, *Blockburger's* rule prevents this double-counting.

But *Blockburger's* rule does not achieve this result very directly or precisely. For starters, the Supreme Court has now made clear that *Blockburger's* rule is overbroad to the extent that it irrebuttably bars cumulative punishment for logically related but distinct offenses such as robbery and armed robbery. In this doctrinal context, at least, *Blockburger* is now seen as simply a rule of construction creating a rebuttable presumption of sameness.⁶⁷ A legislature could, if it wanted (and spoke clearly), define armed robbery as a three-year crime to be *added to* a five-year robbery conviction rather than as an eight-year crime to be punished *instead of* a five-year robbery. But once we admit that *Blockburger* is only a presumption here, it is hard to insist that it furnishes a true *constitutional* definition of sameness.

Blockburger also underprotects the anti-double-counting principle in a number of ways. If *Blockburger* is indeed simply a Double Jeopardy Clause test, it applies only where a *prior* conviction or acquittal exists. But suppose a state prosecutes Robin in a *single trial* for five-year robbery and eight-year armed robbery, and announces its intention to cumulate maximum sentences.

66. In 1995, Jon Marcus and I sketched out a preliminary critique of *Blockburger* that set the stage for the more thoroughgoing critique I shall now offer. See Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1, 28–38 (1995). Consider the present Essay, if you will, my own double take on double jeopardy.

67. See *Garrett*, 471 U.S. at 778–79; *Ohio v. Johnson*, 467 U.S. 493, 499 n.8 (1984); *Missouri v. Hunter*, 459 U.S. 359, 366–67 (1983).

This too should be (presumptively) unconstitutional as a (presumptive) double-counting of Robin's robbery. It is as if the state simply tried Robin for robbery in one trial, and announced in advance it would double the statutory robbery punishment. This is indeed a kind of "double jeopardy"—like the "double jeopardy" round of the TV game show, when all dollar values are doubled—but one that requires some mild but real straining of words to fit into the *Twice in Jeopardy* Clause. Robin is being placed in a kind of "doubled" jeopardy, a kind of "two-fold" jeopardy; but is she really being placed *twice* in jeopardy—on two occasions, *deux fois*? At common law could she plead a *prior* (*autrefois*) conviction? Of course the claim here is not that doubled punishment in a single trial is constitutional, or even legal—of course not—but that the Double Jeopardy Clause fails to fit snugly here.

Even if we crammed this hypothetical into the text of the Double Jeopardy Clause, other double-counting scenarios cannot be so crammed, under *Blockburger*. Suppose Roberta is charged in a single trial with eight-year armed robbery and nine-year bank robbery for a single act in which she robbed a bank with a gun. Under the *Blockburger* test, armed robbery is not the same as bank robbery—and so the maximum penalties can be cumulated under *Blockburger*. But this cumulation ends up double-counting the common-predicate robbery: (robbery plus gun) plus (robbery plus bank)—(five plus three) plus (five plus four). Notwithstanding *Blockburger*, this double-counting should be treated as presumptively violative of due process. If *Blockburger* would (presumptively) prohibit double-counting the robbery in a robbery-plus-armed-robbery trial, or in a robbery-plus-bank-robbery trial, surely the true logic at work here should (presumptively) bar the similar double-counting of the robbery in an armed-robbery-plus-bank-robbery trial.

Of course, here too, courts should apply this test only as a presumptive guide to legislative intent. Perhaps a legislature thinks that an armed bank robbery as a whole is worse than the sum of its parts. But if so, it should say so clearly in statute books—for example, by creating an offense of *armed bank robbery* explicitly punishable by more than twelve years (five for the robbery, three for the gun, four for the bank). If the legislature does not do so, courts should, as a simple matter of due process, presumptively deduct five years from the cumulative sentences for armed robbery and bank robbery, whether those sentences are imposed in a single trial or in two successive prosecutions.⁶⁸

Alas, in many cases the presumptive math will not be so easy. When two offenses overlap, and the overlapping area is not itself a distinct crime with an identifiable sentence, a court might have to improvise to avoid double-counting the overlapping predicate area. (Sentencing guidelines may be a great boon here, since they may assign a specific number to the overlapping element, even

68. See King, *supra* note 61, at 194 n.269.

if it is not itself a stand-alone crime.) And when more than two offenses are involved, the (presumptive) math can get quite tricky indeed.⁶⁹ Perhaps, in some cases, concerns about justiciability and the need for clear lines will result in some underenforcement of the anti-double-counting principle—as was evident in the famous case of *Gore v. United States*,⁷⁰ where various overlapping statutes (none logically greater or lesser-included than another) were brought to bear on a single transaction. But however courts ultimately address the double-counting problem, at least they should be asking the right due process question—would cumulative punishment risk double-counting, and if so, how much?⁷¹—rather than the mismatched, over- and underinclusive *Blockburger* double jeopardy question: Does each crime contain at least one element the other lacks?

2. *Blockburger Box Two: The Anti-Vexation Principle*

Consider next the case where a defendant seeks to plead a prior conviction of a logically lesser-included crime as a bar to prosecution on a greater offense. Here, too, *Blockburger* tells courts to bar the second prosecution, and in so doing both over- and underprotects the true constitutional principles at stake.

Suppose Robin is first prosecuted and convicted for a five-year robbery, and then the state seeks to prosecute her for eight-year armed robbery. Of course, if the state sought to cumulate punishment, the issue would be the same as *Blockburger Box One*: five plus eight is no different, or constitutionally less offensive, than eight plus five. But suppose the state stands ready to offset the five-year robbery sentence against the eight-year armed robbery sentence; suppose, in other words, that the state in the second trial is merely seeking an incremental three-year punishment for the use of the gun.

Blockburger purports to ban this second trial. Sometimes this ban makes sense; sometimes it does not. In many cases, the state may have no particularly

69. Imagine, for example, three crimes, A+B, A+C, and B+C. The first crime (A+B) is punishable by five years, the second (A+C) is also punishable by five years, and the third (B+C) is punishable by four years. Presumably, the legislature here deems A alone worthy of three years; B worthy of two; and C worthy of two. But exactly what is a judge to do if she finds two more crimes on the statute books, A+D, and B+D, punishable by four years apiece? The simple presumptive (additive) math breaks down.

70. 357 U.S. 386 (1958) (upholding six convictions and three consecutive sentences arising out of two narcotics sales, in violation of three statutes; first statute banned drug sale without "a written order," second banned drug sale without "stamped package," and third banned sale of illegally imported drug). The case is discussed in Comment, *supra* note 60, at 303–04.

71. Suppose two statutes share a common substantive legal element, but the element is described in slightly different language in the two statutes. (Say, one uses the word "intentionally" and the other, "purposefully.") The anti-double-counting principle turns on things, not words, and so two verbal formulas describing the same thing should (presumptively) be treated as defining the same legal element. Cf. Amar & Marcus, *supra* note 66, at 38–44 (putting forth similar argument for double jeopardy analysis in dual sovereignty context).

good reason for splitting a single criminal transaction or episode into two separate trials. And in some cases, perhaps the state may have particularly bad—illegitimate—reasons. Perhaps bifurcation reflects a systematic attempt to vex or harass a defendant, by wearing her down in successive proceedings, draining her financial resources, and forcing her witnesses to appear twice on her behalf. Such vexation can create a real risk that a defendant, though innocent of the greater offense, will be erroneously convicted in the second trial.⁷² Or perhaps the prosecutor is trying to evade statutory limits on prosecutorial discovery by forcing a defendant to tip her hand in the first trial—a preliminary round—so that the state, with the benefit of this “cheat peek,” has an edge in the second trial, the main event.⁷³ Or perhaps the prosecutor is angry and vindictive after the first trial because, although the state won a conviction, the defendant largely prevailed in the sentencing, and the prosecutor seeks to punish this success—and send a message to future defendants—via a new round of charges.⁷⁴

But once we see that these are the relevant constitutional principles at stake in *Blockburger* Box Two, it is clear that the rigid *Blockburger* test itself ill fits these principles. To the extent that *Blockburger* seeks to prevent Robin’s harassment by, in effect, mandating joinder of robbery and armed robbery, it seems odd that Roberta’s case (involving armed robbery and bank robbery growing out of the same factual transaction) and Robert’s case (involving robbery and intentional murder arising out of the same factual transaction) are treated categorically differently. Why is *Blockburger*’s mandatory joinder rule limited to greater and lesser-included offenses?⁷⁵ If the issue is the possible

72. As we shall see, other constitutional principles that are—or at least should be—in place can severely constrain the prosecutor’s incentive to strategically bifurcate her prosecution. See *infra* text accompanying notes 102, 130–32.

73. A similar “peek,” of course, can lawfully occur when a defendant is tried, convicted, and then—because of impermissible progovernment error—the conviction is set aside and the defendant is retried. See *infra* Part III.

One obvious way to reduce the prosecutor’s incentive to bifurcate litigation and thus evade statutory limits on discovery is to allow liberal discovery against the defendant in the first place. Renée Lettow and I have elsewhere explained why the Fifth Amendment Self-Incrimination Clause, rightly understood, poses a much smaller obstacle to pretrial discovery against defendants than is conventionally assumed. See Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857 (1995) (arguing that defendant can be forced to tell all pretrial, with only narrow “testimonial immunity” granted, enabling prosecutor to use all testimonial fruit, but not defendant’s words themselves, at trial). Here we see a way in which overprotecting some defendants’ rights—in this case rights to resist discovery—may end up hurting defendants in other ways.

74. Cf. *United States v. Goodwin*, 457 U.S. 368, 372, 384 (1982) (affirming that due process prohibits prosecutors from bringing new vindictive charges to penalize defendant for exercising right to jury trial on initial charge, but declining to presume vindictiveness without specific proof); *Blackledge v. Perry*, 417 U.S. 21 (1974) (applying due process principles to constrain prosecutorial vindictiveness after successful defendant appeal); *North Carolina v. Pearce*, 395 U.S. 711 (1969) (developing due process test to protect against judicial vindictiveness when judge “loses” to defendant who successfully appeals judge’s verdict).

75. See Westen & Drubel, *supra* note 59, at 162–63 (noting how *Blockburger* test establishes narrow mandatory joinder rule).

vexation and harassment and vindictiveness of bifurcated proceedings, why is Robin's case so different from Roberta's and Robert's?

One possible answer is that in Roberta's (bank robbery/armed robbery) case and Robert's (robbery/murder) case, the state may have good nonvexatious reasons for bifurcation. Perhaps the first-degree murder Robert committed did not occur at the precise moment of the robbery; and the two crimes involve different groups of witnesses. Perhaps it is clear that Roberta robbed a bank, but less clear that she actually used a gun, and the key witnesses and evidence about the gun are not available at the same time as the bank evidence. Because of this, whatever constitutional mandatory joinder rules are applicable in Roberta's and Robert's case must be flexible, fact- and case-specific rules of due process, rather than global, rigid, bright-line rules of double jeopardy.

But the same thing is true of Robin's (robbery/armed robbery) case! (And here we see how *Blockburger*, taken seriously, not only underprotects Roberta and Robert, but also overprotects Robin.) Despite due diligence, the government may not be able to prove—or even know—at the time of Robin's robbery trial that she used a gun. Suppose, for example, the *armed* robbery statute requires that the “gun” not be a toy gun, and at the first trial, the state lacks good evidence of a real gun.

Indeed, at the time of the first trial on a lesser-included offense, the greater offense may not even have occurred. Recall, for example, the attempted murder trial where the victim dies *after* the trial: Is the state forever barred from prosecuting the premeditated murder (with a sentencing offset to avoid double-counting)? The *Blockburger* test says yes; but the Supreme Court now says no. As early as 1912, in a case arising in the Philippines and decided under a statutory double jeopardy clause, the *Diaz* Court held as follows:

The provision against double jeopardy, in the Philippine Civil Government Act, is in terms restricted to instances where the second jeopardy is “for the same offense” as was the first. That was not the case here. The homicide charged against the accused in the Court of First Instance and the assault and battery for which he was tried before the justice of the peace, although identical in some of their elements, were distinct offenses both in law and fact. The death of the injured person was the principal element of the homicide, but was no part of the assault and battery. At the time of the trial for the latter the death had not ensued, and not until it did ensue was the homicide committed. Then, and not before, was it possible to put the accused in jeopardy for that offense. Besides, under the Philippine law, the justice of the peace, although possessed of jurisdiction to try the accused for assault and battery, was without jurisdiction to try him for homicide; and, of course, the jeopardy incident to the trial before the justice did not extend to an offense beyond his jurisdiction It

follows that the plea of former jeopardy disclosed no obstacle to the prosecution for homicide.⁷⁶

Diaz was decided long before the Court proclaimed *Blockburger* as a general test of double jeopardy sameness; but recent cases have made clear that *Diaz* still lives.⁷⁷ But what exactly does *Diaz* mean, and how can it be squared with *Blockburger*? Read narrowly, *Diaz* applies only when the greater offense has not even occurred at the time of the first trial. In the 1977 case of *Brown v. Ohio*,⁷⁸ the Court, in a footnote, admitted that *Diaz* might sweep somewhat more broadly: "An exception [to *Blockburger*] may exist where the State is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred *or have not been discovered* despite the exercise of due diligence. See *Diaz*"⁷⁹ But even this is far too narrow a reading of *Diaz*—and not merely because the Court acknowledged only that an exception *may* exist. Read most sweepingly, *Diaz* contradicts the very claim in *Brown*'s text accompanying its *Diaz* footnote: "The greater offense is therefore *by definition* the 'same' for purposes of double jeopardy as any lesser offense included in it Whatever the sequence may be, the Fifth Amendment forbids successive prosecution . . . for a greater and lesser included offense."⁸⁰

Without this sweeping—and obviously wrong—textual claim, *Brown*'s holding is hard to defend: The *Brown* Court precluded a trial on auto theft because of an earlier conviction on the lesser-included offense of joyriding, in a case where there was no real hint that bifurcation was a result of prosecutorial manipulation, harassment, vindictiveness, or bad faith.⁸¹

Eight years after *Brown*, the Court took a great, if somewhat unselfconscious, step away from *Blockburger* and *Brown*, and back towards a sweeping reading of *Diaz*. In *Garrett v. United States*,⁸² the Court upheld a

76. *Diaz v. United States*, 223 U.S. 442, 448–49 (1912) (citations omitted).

77. For recent favorable citations of *Diaz*, see, e.g., *Rutledge v. United States*, 116 S. Ct. 1241, 1250 n.17 (1996); *Grady v. Corbin*, 495 U.S. 508, 516 n.7 (1990); *Garrett v. United States*, 471 U.S. 773, 791–93 (1985); *id.* at 796–98 (O'Connor, J., concurring); *id.* at 803–04 (Stevens, J., dissenting); *Brown v. Ohio*, 432 U.S. 161, 169 n.7 (1977); and *Jeffers v. United States*, 432 U.S. 137, 151–52 (1977) (plurality opinion). See also *Illinois v. Vitale*, 447 U.S. 410, 420 n.8 (1980) (referring to *Diaz* principle, but not by name).

78. 432 U.S. 161 (1977).

79. *Id.* at 169 n.7 (emphasis added).

80. *Id.* at 168–69 (emphasis added).

81. Nothing in the *Brown* Court's opinion suggests any governmental bad faith. Thus we may assume that the police in the county where *Brown* was caught and immediately charged with joyriding simply did not know of the prosecutorial plans of charging authorities from another county, where the defendant had stolen the car nine days earlier.

Brown also raised a double-counting issue: Should *Brown* have received a setoff for the one month he served for joyriding against his six-month car theft sentence? But this concern should not have precluded a second trial itself; it merely went to the proper amount of additional punishment to be meted out after a second conviction.

82. 471 U.S. 773 (1985).

continuing criminal enterprise (CCE) prosecution against a man who had already been convicted of a lesser-included predicate drug felony. (The CCE statute required proof of three predicate offenses as evidence that a person was engaged in a continuing criminal enterprise.)⁸³ The *Garrett* Court noted that in some cases, a trial for a predicate offense could take place before the other predicate offenses—and thus the CCE offense—had even occurred.⁸⁴ This tracks the narrowest reading of *Diaz*. The Court went on to suggest that even if the other crimes had occurred, the government, despite due diligence, would not always have evidence of this at the time of the first trial.⁸⁵ This tracks the *Brown* footnote's somewhat broader reading of *Diaz*. The Court also hinted that even if the government had such evidence, it should not necessarily have to tip off the defendant about ongoing undercover operations in order to prosecute for an initial predicate offense.⁸⁶ (A still broader reading of *Diaz*.) And most strikingly, the Court began its entire analysis by saying: "Quite obviously the CCE offense is not, in any commonsense or literal meaning of the term, the 'same' offense as one of the predicate offenses."⁸⁷ This is the broadest reading of *Diaz*—and a reading which, if taken seriously, demolishes *Blockburger*, and leaves us instead with a more supple fact- and case-specific due process analysis asking when mandatory joinder makes functional good sense to protect defendants against prosecutorial manipulation and harassment.

3. *Blockburger Box Three: The Implicit Acquittal Principle*

Consider next the third *Blockburger* quadrant, where a defendant seeks to plead a prior *acquittal* on a greater offense. Suppose that Robin is tried for armed robbery and is acquitted by the jury. May the state turn around and try her for robbery?

Blockburger says no, and usually this makes good sense. The proper reasoning here is not that of avoiding double-counting or double punishment—for the first trial resulted in no punishment. Rather, the reasoning in this *Blockburger* quadrant rests on the idea of *implicit acquittal*.

At an armed robbery trial, a jury can ordinarily decide to convict the defendant of any lesser-included offense supported by the evidence. In the federal system, for example, Federal Rule of Criminal Procedure 31(c) provides that "[t]he defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein."⁸⁸ Thus, at Robin's first

83. See *id.* at 775.

84. See *id.* at 788–89, 791–93.

85. See *id.* at 789.

86. See *id.* at 789–90.

87. *Id.* at 786.

88. FED. R. CRIM. P. 31(c).

(armed robbery) trial, she was in actual peril—in jeopardy—of a conviction for robbery. Under the well-established rule of *Green v. United States*,⁸⁹ **when a jury renders an explicit verdict on one count in an indictment, but says nothing about another count, its silence is often best construed as an implicit acquittal.** And so, ordinarily, Robin can plead *autrefois acquit* in her second trial because she really was tried for robbery—the *same* offense, *la même felonie*—in the first trial, and was *acquitted*.⁹⁰

Lest it seem that *Blockburger* always gets it right—in this quadrant at least—we must note that here, too, *Blockburger*'s mindless equation of greater and lesser offenses is both over- and underinclusive. In a few rare situations, a trier of fact is *not* permitted to convict on a lesser-included charge, and in these contexts a prior acquittal should not always stand as a bar, where the acquittal was based on the government's failure to prove elements unique to the greater charge.⁹¹ As the Court noted in the prominent 1889 case, *In re Nielsen*:⁹²

[I]n order that an acquittal may be a bar to a subsequent indictment for the lesser crime, it would seem to be essential that a conviction of such crime might have been had under the indictment for the greater. *If a conviction might have been had, and was not, there was an implied acquittal.* But, where a conviction for a less crime cannot be had under an indictment for a greater which includes it, there it is plain that . . . an acquittal would not or might not be a bar⁹³

Conversely, suppose Roberta is explicitly acquitted in her first trial of bank robbery, and the state then seeks to prosecute her for armed robbery arising from the same events. Bank robbery and armed robbery are not the same under *Blockburger*—and so *Blockburger* would allow a second trial—but surely this second trial should be barred. If Roberta's first jury implicitly acquitted her of robbery, she cannot later be charged with the same robbery; and *a fortiori* she

89. 355 U.S. 184, 190–91 (1957) (stating that when jury convicts on lesser-included offense without rendering explicit verdict on greater offense, “the great majority of cases in this country have regarded the jury’s verdict as an implicit acquittal on the [greater] charge [W]e believe [this implicit acquittal assumption] legitimate.”) (alternative holding); see also *Grady v. Corbin*, 495 U.S. 508, 533–34 (1990) (Scalia, J., dissenting) (“Thus an acquittal on an indictment for murder will be a good bar to an indictment for manslaughter [because] had the defendant been guilty, not of murder but of manslaughter, he would have been found guilty of the latter offence upon that indictment”) (quoting *Commonwealth v. Roby*, 30 Mass. (12 Pick.) 496, 504 (1832)), *overruled by United States v. Dixon*, 113 S. Ct. 2849 (1993).

90. The attentive reader will note that here, at least, the Double Jeopardy Clause itself can bear the load—perhaps, however, with a little help from lenity principles construing the jury’s arguably ambiguous verdict as an *implicit* acquittal on robbery.

91. For further elaboration, see Amar & Marcus, *supra* note 66, at 33.

92. 131 U.S. 176 (1889).

93. *Id.* at 189–90 (emphasis added); see also *Grady v. Corbin*, 495 U.S. 508, 531–32 (1990) (Scalia, J., dissenting) (unselfconsciously quoting similar observation of Charles Petersdorff in 1825), *overruled by United States v. Dixon*, 113 S. Ct. 2849 (1993).

cannot later be charged with the same robbery with a gun.⁹⁴ (To think otherwise would be like saying that a person cannot be *nice* put in jeopardy; but *thrice* is just fine.)

The key point in this quadrant is not that greater and lesser-included offenses are somehow the same. Rather, it is that when a defendant is implicitly acquitted of, say, robbery, that acquittal bars all further charges that necessarily travel through that robbery. To see this more clearly still, let us consider the final *Blockburger* box, and the all-important constitutional right of collateral estoppel.

4. *Blockburger Box Four: The Collateral Estoppel Principle*

If Robin is first tried for robbery and explicitly acquitted, can she later be tried for armed robbery? Surely not, says *Blockburger*—and here, at last, *Blockburger* is surely right.

But even though *Blockburger* is surely right in this quadrant—it never overprotects Robin—it does underprotect other defendants. Consider, for example, defendant Robert whom the government claims was involved in a robbery and then a closely related intentional murder. The government tries Robert for robbery, and Robert claims mistaken identity: He was off on a six-month trek in Nepal at the time of the crime. If the jury acquits, may the government then bring a murder prosecution?

Blockburger would say yes—first-degree murder and robbery are not the same offense under its test—but we should say no. Under the constitutional principle of collateral estoppel, once a criminal defendant has prevailed against the government on an issue of ultimate fact, he should not be forced to continue to relitigate it criminally. As the Court made clear in the famous *Ashe v. Swenson* case in 1970,⁹⁵ the Constitution “surely protects a man who has been acquitted from having to ‘run the gantlet’ a second time.”⁹⁶ Without this principle, the government could keep prosecuting an acquitted defendant over and over on slightly different charges, wearing him down and increasing the chance that one odd jury might convict him of something. This conviction could occur even though the defendant is innocent, and prevailed on a key factual issue—such as his whereabouts during a crime spree—in a previous trial.

94. Cf. *Corbin*, 495 U.S. at 531 (Scalia, J., dissenting) (“But if one charge consists of the circumstances A. B. C. and another of the circumstances A. D. E., then, if [A] does not itself constitute a distinct substantive offense, an acquittal from the one charge cannot include an acquittal of the other”) (quoting 1 THOMAS STARKIE, CRIMINAL PLEADING 323 (2d ed. 1822)) (emphasis added).

95. 397 U.S. 436 (1970).

96. *Id.* at 446 (quoting *Green v. United States*, 355 U.S. 184, 190 (1957)).

Ashe claimed that its collateral estoppel rule came from the Double Jeopardy Clause, not the Due Process Clause,⁹⁷ but this cannot quite be taken seriously; for *Ashe* applied its collateral estoppel rule to bar a second trial for an offense that was, strictly speaking, not the same offense in fact and law, nor even a greater or lesser-included offense. Rather, the Court's theory was that Bob Ashe's first jury acquitted him because it accepted his claim of mistaken identity, and that therefore he could not be charged with other offenses arising from the same set of events.⁹⁸

Several points need to be made about the deep due process principle of collateral estoppel. First, as with *Winship*'s asymmetric allocation of the burden of proof in criminal cases,⁹⁹ the principle is openly asymmetric in a prodefendant direction. The *Ashe* collateral estoppel principle bars the government from relitigating an issue of fact resolved in the *defendant's* favor; but it does not bar a defendant from later contesting an issue once decided in the *government's* favor.¹⁰⁰ Second, the principle is a special boon to the *innocent*. Whereas the formal rules of the Double Jeopardy Clause apply equally to *autrefois acquit* and *autrefois convict*, the collateral estoppel principle aids a defendant who is in effect *acquitted* on some contested issue.¹⁰¹ Third, as a result of these two features of collateral estoppel, most prosecutors will be powerfully discouraged from attempting to bifurcate litigation in search of strategic advantage or to vex defendants.¹⁰² If a prosecutor wins the first trial, she will have to prove everything all over again in a second criminal case; but if she loses on any issue, she loses that issue forever (in criminal cases, at least) against the defendant. Thus, the *Ashe* due process principle, properly understood, puts real teeth into our earlier due process principle frowning on manipulative bifurcation.

97. This claim enabled the *Ashe* Court to sidestep an earlier case with virtually identical facts, decided against the defendant under the Due Process Clause. See *Hoag v. New Jersey*, 356 U.S. 464 (1958). But the *Ashe* Court could have distinguished away *Hoag* simply by *reinterpreting due process* in light of the intervening incorporation of the Double Jeopardy Clause against states in *Benton v. Maryland*, 395 U.S. 784, 793–96 (1969). This intervening event, the Court should have argued, properly exerted a new gravitational pull on due process principles. See *infra* text accompanying note 143.

98. *Ashe* was suspected of having robbed six poker players around a poker table. In his first trial, the government prosecuted him for robbing one of the players, Donald Knight, and *Ashe* won an acquittal on grounds of mistaken identity. In the second trial, *Ashe* was charged with a *formally different* robbery—of one of the other five players. Each robbery was a distinct offense for “unit of prosecution” purposes, see *supra* text accompanying note 59; in other words, *Ashe* could initially have been charged with *six* offenses, received *six* convictions, and served *six* cumulative sentences, see *Ashe*, 397 U.S. at 446.

99. See *In re Winship*, 397 U.S. 358, 362–64 (1970) (finding due process requires governmental proof beyond reasonable doubt in criminal cases).

100. See *Ashe*, 397 U.S. at 443 (noting “lack of ‘mutuality’”) (citation omitted); see also *Simpson v. Florida*, 403 U.S. 384, 386 (1971) (per curiam) (reaffirming lack of “mutuality”; convicted defendant is not estopped in second trial from denying facts resolved against him in first trial).

101. This factor should be especially important for those who believe, as I do, that constitutional criminal procedure should protect the innocent from erroneous conviction without needlessly advantaging the guilty. See generally AMAR, *supra* note 48.

102. See *United States v. Dixon*, 509 U.S. 688, 710 n.15 (1993) (noting that because of *Ashe* asymmetry, prosecutors “have little to gain and much to lose from [a bifurcation] strategy”).

Finally, to get maximum protection from the *Ashe* principle, a defendant should be given the right to request a specific verdict from the first trier of fact so as to make clear precisely which issues—which elements, which ultimate facts—were decided in his favor. In light of a strong constitutional tradition upholding both the defendant's and the jury's right to a general jury verdict¹⁰³—a simple “guilty” or “not guilty”—the most sensible approach would be to allow (but not oblige) the defendant to request specific findings from the jury *after* the jury has rendered its general verdict. The jury would then be allowed (but not obliged) to provide these findings, which would then furnish a solid basis for any *Ashe* claim a defendant might later assert.¹⁰⁴

With this regime in place, an acquitted (alleged robber/murderer) Robert could benefit just as much as an acquitted (alleged robber/bank robber) Robin from the true constitutional principle at issue here. The key constitutional idea in this quadrant is not that two formally different offenses are somehow the same under the Double Jeopardy Clause—two different offenses are never the same, and no amount of judicial gibberish can make them so. Rather, the key idea is that, as a matter of due process, once a defendant has prevailed in a criminal case on a certain factual issue, he need not prove it all over again in a subsequent criminal case.

5. *Beyond the Boxes: Applying the Framework*

We have seen that *Blockburger*'s test often gets it wrong in the four boxes. Moreover, no single test can work across all four boxes, given that each box contains a different cluster of functional issues. A better framework of analysis, I suggest, would insist that “same offense” means just that under the Double Jeopardy Clause, and would directly vindicate residual functional concerns using the Due Process Clause. With this revised framework of analysis in place, we are now in a position to sort out the real issues at stake in the Supreme Court's major double jeopardy decisions in the 1990s.

The decade began on an off note with the 1990 case of *Grady v. Corbin*.¹⁰⁵ Thomas Corbin was a drunk driver whose criminal behavior killed one person and seriously injured another. After pleading guilty to a couple of traffic tickets before the Town Justice Court, Corbin claimed that the Double

103. The jury's right to a general verdict is intimately connected to the jury's right to acquit against the evidence. I do not challenge this right here—on the contrary. See *infra* text accompanying notes 152, 157–58, 167.

104. For earlier discussions of this point, see Amar & Marcus, *supra* note 66, at 33 n 166, and Cynthia L. Randall, Comment, *Acquittals in Jeopardy: Criminal Collateral Estoppel and the Use of Acquitted Act Evidence*, 141 U. PA. L. REV. 283, 317–25 (1992). Presumably, the voting rule in the jury for any special verdict would be the same one prescribed by domestic law for general verdicts. Note that, under a broad view of *Ashe*'s asymmetry, a defendant who prevails on a given issue could have the right not only to prevent any future criminal prosecution based on that issue, but also to vacate any past criminal conviction so based.

105. 495 U.S. 508 (1990).

Jeopardy Clause barred a later prosecution for reckless manslaughter and criminally negligent homicide. The Supreme Court, by a five-to-four vote, agreed.

To most people—myself included—the idea that the traffic offenses of driving on the wrong side of the road and driving while drunk are the same offense as criminally negligent homicide seems outrageous. So too does the idea that, by paying his \$360 traffic tickets, Corbin deserved a “get out of jail free” card immunizing him from all serious prosecution. How on earth did five Justices (four of whom now no longer sit) reach this outlandish result?

Not by strictly applying *Blockburger*, since even under its decidedly expansive definition of sameness, Thomas Corbin would have lost. (Being drunk and on the wrong side of the road were not formal elements of the key offenses charged in the second trial; and dead bodies were surely no part of the traffic tickets.) But perhaps *Blockburger*’s strained approach to the words “same offense,” equating small crimes with bigger ones, emboldened the *Corbin* Court: One good stretch deserves another. The key fact, in the Court’s mind, was that in the second trial, the state would “prove conduct that constitutes an offense for which the defendant has already been prosecuted”¹⁰⁶—would prove, in other words, that Corbin was drunk and on the wrong side of the road as evidence (not elements) of his criminal negligence and recklessness. But this cannot be a Double Jeopardy Clause test because, as we have seen, double jeopardy is a *pretrial* plea; and before the trial, we often do not know exactly what factual conduct the prosecution will ultimately point to, and what evidence the state will ultimately invoke, to prove the formal elements of the offense.¹⁰⁷ (Suppose, for example, the state planned to prove Corbin’s negligence and recklessness by pointing to his speeding, and not his drinking.) Thus, the Double Jeopardy Clause does not sensibly apply to *factual conduct* and *evidence* that *will* be proved in a second trial, but rather to the *legal offense* and *elements* that *have been* formally alleged in a second indictment, a second jeopardy. (*Blockburger*, whatever its other flaws, at least focuses squarely on legal offenses themselves, as defined in statute books and alleged in indictments.)

Of course, the Constitution does protect a defendant in a *conduct*-based as well as an *offense*-based inquiry, but only where a second trial tries to “prove conduct that constitutes an offense for which the defendant has already been [acquitted.]”¹⁰⁸ This is the key principle of *Ashe v. Swenson*;¹⁰⁹ but as we have seen, this is a due process principle designed to protect the *innocent*. The

106. *Id.* at 521.

107. Justice Scalia has made this point well. See *id.* at 529–30 (Scalia, J., dissenting); see also *supra* text accompanying notes 54–57.

108. Cf. *supra* text accompanying note 106.

109. 397 U.S. 436 (1970).

Corbin Court repeatedly invoked *Ashe* and various other prior acquittal cases,¹¹⁰ and tried to apply symmetrically their lessons to the prior conviction context, substituting “*prosecuted*” for “*acquitted*” as the key test. The Double Jeopardy Clause is indeed symmetric—in *Corbin*’s words, it bars “[s]uccessive prosecutions . . . whether following acquittals or convictions”¹¹¹—but the collateral estoppel principle at the heart of *Ashe* is not. The obvious difference between Bob Ashe and Thomas Corbin is that Bob Ashe’s first trial proclaimed him *innocent* of the conduct the state later tried to prove against him.¹¹²

Finally, the *Corbin* Court raised the specter of manipulative government bifurcation and vexation:

If *Blockburger* constituted the entire double jeopardy inquiry in the context of successive prosecutions, the State could try Corbin in four consecutive trials: for failure to keep right of the median, for driving while intoxicated, for assault, and for homicide. The State could improve its presentation of proof with each trial, assessing which witnesses gave the most persuasive testimony, which documents had the greatest impact, and which opening and closing arguments most persuaded the jurors. Corbin would be forced either to contest each of these trials or to plead guilty to avoid the harassment and expense.¹¹³

This argument fails on several counts. To begin with, it is quite far afield from the facts of *Corbin*, which involved not a manipulative, strategic, or vexatious prosecutorial juggernaut, but a bumbling bureaucracy. The state prosecutor had no clue in the Town Justice Court proceedings, and so this case was miles from any constitutional cap on prosecutorial bad faith. Second, even if *Blockburger*—or something less, like same-means-same—“constituted the entire double jeopardy inquiry,” the state would not be free to try Corbin four times without constraint so long as *other constitutional principles applied*. The most important one here is *Ashe*, for it gives the state a strong disincentive to split one case into four for strategic reasons. Whenever the state prevails on a contested issue in the first trial, it will have to prove it all over again in later trials, but if it loses once on an issue, it loses forever. As we have seen, however, the *Ashe* principle is asymmetric, designed to protect defendants (like

110. See *Corbin*, 495 U.S. at 518 n.8, 518–19.

111. *Id.* at 518.

112. See *id.* at 528 (Scalia, J., dissenting) (affirming *Ashe*’s conduct-based analysis where earlier adjudication resolved factual issue “*in the defendant’s favor*”) (emphasis added), *United States v. Dixon*, 509 U.S. 688, 705 (1993) (“[*Ashe*] may bar a later prosecution for a separate offense where the Government has *lost* an earlier prosecution involving the same facts. But this does not establish that the Government ‘must . . . bring its prosecutions . . . together.’ It is entirely free to bring them separately, and can win convictions in both.”).

113. *Corbin*, 495 U.S. at 520–21 (citation omitted).

Bob Ashe) who *prevail* on contested issues and not defendants (like Thomas Corbin) who lose on those issues.

The striking injustice of *Corbin* is highly reminiscent of the claim *rejected* in *Diaz*, where a defendant pled guilty to a petty offense in a petty court, paid a petty fine, and then tried to use this to shield himself from a fair trial on his overall guilt. *Corbin* tucked *Diaz* away in a casual footnote,¹¹⁴ à la *Brown*, paying no heed to *Diaz*'s same-means-same language and ignoring its interesting argument that because a petty court simply had no jurisdiction over a major offense like homicide, the defendant could not possibly have been previously in jeopardy on the greater offense. One wonders whether Town Justice Traffic Courts in New York are equipped to try serious criminal charges; surely there are good reasons for trying traffic offenses in special traffic courts, under special procedures—perhaps without juries. Thus, the mandatory joinder demand implicit in *Corbin*—try everything together in one proceeding—seems hard to defend as an unyielding constitutional command on the facts of this case.

Three years later, the Supreme Court overruled *Corbin*, by a five-to-four vote in *United States v. Dixon*.¹¹⁵ Four Justices (only two of whom remain on the Court) proclaimed that *Corbin* was right;¹¹⁶ but the other five Justices insisted that *Blockburger* constituted the sole test of sameness. However, these five could not agree on what *Blockburger* meant. Three thought that by no stretch of imagination could a fifteen-year drug offense be seen as a logical lesser-included offense of a six-month contempt of court offense;¹¹⁷ two Justices disagreed, and thus voted in the end with the *Corbin* four to immunize Alvin Dixon from drug prosecution because he had earlier been convicted of contempt for violating a court order not to commit crimes while on bail.¹¹⁸ The mind boggles here: Contempt of court and drug pushing are somehow “the same”; a fifteen-year offense is somehow “lesser” than a six-month offense; because someone is found guilty of a small crime he must be set free on his big crime—and all this from Justice Scalia, who usually claims he believes in plain meaning and common sense.¹¹⁹

114. See *id.* at 516 n.7.

115. 509 U.S. 688, 704 (1993).

116. See *id.* at 740 (White, J., concurring in judgment in part and dissenting in part); *id.* at 741 (Blackmun, J., concurring in judgment in part and dissenting in part); *id.* at 744 (Souter, J., joined by Stevens, J., concurring in judgment in part and dissenting in part).

117. See *id.* at 718 (Rehnquist, C.J., joined by O'Connor & Thomas, JJ., concurring in part and dissenting in part).

118. See *id.* at 697–700 (Scalia, J., joined by Kennedy, J.).

119. See, e.g., *California v. Acevedo*, 500 U.S. 565, 581–85 (1991) (Scalia, J., concurring in judgment) (championing plain meaning and commonsensical approach to Fourth Amendment reasonableness); *Minnick v. Mississippi*, 498 U.S. 146, 166–67 (1990) (Scalia, J., dissenting) (arguing for plain meaning and commonsensical understanding of Fifth Amendment compulsion under Self-Incrimination Clause); see also *Grady v. Corbin*, 495 U.S. 508, 529–30, 540–43 (1990) (Scalia, J., dissenting) (rejecting majority analysis on textual grounds that “offense” in Double Jeopardy Clause means legally-defined crime, not factual transaction, and that “put in jeopardy” precludes second trial itself, thus calling for *pretrial* plea; and on

Even good Justices have bad days. Here is how Justice Scalia should have analyzed *Dixon* in keeping with his commitment to text and common sense: Alvin Dixon has no good core Double Jeopardy Clause argument since he had never been previously convicted or acquitted of the same fifteen-year drug offense with which he is now charged. Nor does he have any good claim against double-counting since Congress clearly intended contempt of court and drug offenses to be punished cumulatively (and even if not, this would argue only for a six-month setoff in the second case, not a fifteen-year windfall). Nor does he have any good implicit acquittal or *Ashe*-type argument, since he has never been acquitted of *anything*. Finally, to try his drug conduct in two separate proceedings is not constitutionally vexatious because a single hybrid proceeding should not be constitutionally required here under mandatory joinder principles. It is legitimate for the government to litigate contempt in a separate proceeding from other crimes, since a minor contempt is subject to special procedural rules (no jury, for example).¹²⁰ In this sense, the juryless tribunal that adjudged Dixon's contempt did not even have "jurisdiction" over his big drug crime—a scenario strikingly reminiscent of *Diaz*.

The following year, the Court again split five-to-four in a major double jeopardy case, *Department of Revenue v. Kurth Ranch*.¹²¹ Montana criminally prosecuted and convicted members of the Kurth family on various drug charges. After these convictions became final and sentences were imposed, Montana continued to press civil charges against the Kurths based on a special, highly punitive civil law imposing special taxes on illegal drugs. The Court, holding that the second, civil trial, was aimed at "the same conduct"¹²² as the first, sided with the Kurths and blocked the civil suit on double jeopardy grounds.

Kurth Ranch is exceedingly hard to square with *Dixon*, decided only a year earlier.¹²³ *Dixon* overruled *Corbin* and insisted on *Blockburger* as the sole test of sameness. But *Kurth* nowhere applied the *Blockburger* test, under which the civil and criminal charges seem obviously different.¹²⁴ In its key passages—indeed in its opening sentence—*Kurth* stressed that the two trials

commonsensical grounds that majority approach would be unworkable and would lead to absurd results), overruled by *United States v. Dixon*, 113 S. Ct. 2849 (1993).

120. See *Dixon*, 509 U.S. at 692–93 (describing bench trial in contempt proceeding). According to the Court, the Constitution does not require a jury in a "petty" criminal case where the authorized term of imprisonment is six months or less. See *Baldwin v. New York*, 399 U.S. 66 (1969); *Bloom v. Illinois*, 391 U.S. 194 (1968).

121. 114 S. Ct. 1937 (1994).

122. *Id.* at 1941.

123. This point is made well in King, *supra* note 61, at 120–22.

124. See *id.* at 121 (noting that civil and criminal statutes contained different elements, and that Montana legislature intended them as separate and cumulative sanctions). How, exactly, could Montana enforce both laws against a single person on the *Kurth* Court's view? By bringing a single hybrid civil-criminal case? It seems hard to say that such a virtually unprecedented proceeding could really be required by the Constitution.

focused on “the same conduct,”¹²⁵ but this is precisely the *Corbin*-five test rejected by the *Dixon* five in favor of *Blockburger*’s focus on legal offenses and elements rather than factual conduct. *Kurth* was authored by Justice Stevens—the only member of the *Corbin* five who still sits on the High Court—and his opinion was joined by only one of the (anti-*Corbin*) *Dixon* five, Justice Kennedy.

What *Kurth* said makes little sense. Following a case from 1989,¹²⁶ *Kurth* held that the Double Jeopardy Clause could apply to a civil trial involving only money. In light of the “life or limb” clause, this seems a real stretch.¹²⁷ If *Kurth* was in effect saying that the civil suit was really a criminal wolf disguised in civil sheep’s clothing, well and good—but then the Double Jeopardy Clause was the least of the state’s problems. If the second suit was really criminal, it called for the entire panoply of applicable constitutional safeguards—appointed counsel, proof beyond reasonable doubt, and so forth¹²⁸—and yet the Court seemed to think that none of these other protections applied. Since double jeopardy is formally symmetric between acquittal and conviction, does *Kurth* mean that if the Kurths had won in the criminal trial—because the state could not prove their drug conduct beyond reasonable doubt—then the state would be barred from trying to prove that same conduct, in a civil case, under a preponderance-of-the-evidence test?¹²⁹ Since the precise sequence of trials should make no difference under the Double Jeopardy Clause, does this mean that if the Kurths had rushed forward and paid their civil drug tax first, they would have been forever immune from all criminal prosecution?

But perhaps the *Kurth* Court—with Justice Kennedy as the key vote—was onto something after all, and just failed to package its intuition well. Even if the Double Jeopardy Clause is inapplicable to civil cases involving only money, the Due Process Clause surely applies to all proceedings involving life, liberty, or property. Due process protects a defendant’s right to collateral estoppel in suits against the government, and frowns on vexatious and vindictive successive prosecutions, civil or criminal. But a particular problem exists where a state first criminally prosecutes, and then litigates in a civil suit after the criminal suit has ended. A vindictive prosecutor who wins a criminal conviction, but gets a lower punishment than she sought, or who loses a criminal suit, may be tempted to go after the defendant again in a civil

125. 114 S. Ct. at 1941; see *id.* at 1943 (“the same criminal conduct”); *id.* at 1947 (“the precise conduct”).

126. See *United States v. Halper*, 490 U.S. 435 (1989) (holding that double jeopardy bars civil penalty proceeding filed after criminal conviction).

127. See *supra* Part I.

128. See *Kurth*, 114 S. Ct. at 1960 (Scalia, J., dissenting).

129. But see *infra* note 132.

suit.¹³⁰ Ordinarily, this temptation to bifurcate strategically and to double-dip is constrained *ex ante* by *Ashe v. Swenson*.¹³¹ A prosecutor knows that if she wins on a given issue, she must always prove it all over again in another trial, but if she loses once, she loses forever; therefore she has strong *ex ante* incentives to try to consolidate everything into one round. But where the state sues first criminally and then civilly, *Ashe* may have less bite. If the state loses the first, criminal trial, it can claim that this is only because it failed to prove something beyond reasonable doubt; this failure, it can claim, should not estop it from trying to prove that same thing in a later civil case by a preponderance of the evidence.¹³²

As a result of the relative weakness of *Ashe* in deterring vindictive multiple proceedings *ex ante* where criminal suits are followed by civil suits, courts must be especially vigilant to protect against vindictiveness *ex post*. The best analogy here is to the *North Carolina v. Pearce*¹³³ line of cases constraining vindictiveness in the resentencing context, a line in which the Court has explicitly rejected a rigid double jeopardy analysis in favor of a more flexible due process approach focused squarely on vindictiveness.¹³⁴

If this is indeed the best thing that can be said on *Kurth*'s behalf—and I think it is—it has profound implications for so-called reverse-*Kurth* cases now percolating in lower courts.¹³⁵ In these cases, citizens in various civil suits rush forward to pay their civil drug taxes and then claim that they may never

130. The facts of *Kurth* itself were rather more complicated than in *Halper*. In *Halper*, the civil penalty proceeding was initially filed after the conclusion of the criminal case; in *Kurth*, civil proceedings were initiated while the criminal suit was pending, and continued after the criminal suit ended. The sequence of events in *Halper* raised a stronger inference of prosecutorial vindictiveness than in *Kurth*. Cf. *Halper*, 490 U.S. at 451 n.10 ("[W]hen the Government already has imposed a criminal penalty and seeks to impose additional punishment in a second proceeding, the Double Jeopardy Clause protects against the possibility that the Government is seeking the second punishment because it is dissatisfied with the sanction obtained in the first proceeding.").

131. 397 U.S. 436 (1970).

132. Cf. *Dowling v. United States*, 493 U.S. 342, 347–50 (1990). In this case, the Court declined to use *Ashe* to bar the government from introducing evidence that the defendant had in fact committed an earlier crime, for which he had been previously acquitted. The Court reasoned that the second jury could believe that even though defendant was not guilty of the first crime beyond reasonable doubt he was nonetheless probably guilty, and that this probable guilt was relevant to his guilt beyond reasonable doubt of the second crime. Put a different way, since the government did not need to prove in the second case that the defendant committed the first crime beyond a reasonable doubt, its theory was not logically inconsistent with the earlier acquittal. For similar discussions of the hole in collateral estoppel created by the gap between the reasonable doubt and preponderance standards, see *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 361–62 (1984); and *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 235 (1972) (per curiam).

133. 395 U.S. 711 (1969).

134. See, e.g., *id.* (using Due Process Clause to constrain judicial vindictiveness toward defendant who successfully overturns judge's ruling on appeal and then faces stiffer sentence on retrial; judge must specifically justify sentence increase); *Wasman v. United States*, 468 U.S. 559 (1984) (further elaborating *Pearce*); cf. *United States v. Goodwin*, 457 U.S. 368, 372, 384 (1982) (using Due Process Clause to prohibit prosecutorial vindictiveness toward defendant who exercises right to jury trial, but requiring specific proof of vindictiveness); *Blackledge v. Perry*, 417 U.S. 21 (1974) (using Due Process Clause to constrain prosecutorial vindictiveness toward defendant who exercises right to appeal).

135. Several of these cases are discussed in King, *supra* note 61, at 123 n.70.

be criminally prosecuted for the basic underlying drug conduct. Such cases are the "reverse" of *Kurth* because the civil suits come first here. If *Kurth* is indeed a true and pure Double Jeopardy Clause case, it is hard to deny the logic of clever drug dealers who insist that under this Clause, the sequence of trial matters not. But the basic equities in these cases—where plainly guilty people are never even tried for their crimes—feel rather different from the equities in *Kurth* itself, and a supple due process recharacterization of *Kurth* can help explain *why* these cases feel so different. When a civil case is litigated first, a defendant who prevails will be able to use *Ashe* to shield himself from an abusive criminal suit: If the state could not prove the drug conduct by a preponderance-of-the-evidence standard, it surely should be estopped from claiming the conduct occurred beyond reasonable doubt. Since *Ashe* works *ex ante* here to deter strategic bifurcation, much less *ex post* *Kurth*-like judicial protection is called for. And so even if *Kurth* is right (in result), it should not extend to reverse-*Kurth* cases.

Last term, a reverse-*Kurth* case did reach the Court, via the Sixth Circuit, in *United States v. Ursery*.¹³⁶ The Justices, however, managed to sidestep any real analysis of the key "same offense" issues.¹³⁷ At a couple of points, the Court came close to claiming that the civil suit at hand was merely an *in rem* action directed against a particular piece of drug-related property itself (here, a house)—and not against Guy Jerome Ursery himself, the owner and occupant of the house. On this *in rem* logic, Ursery could not claim that *he* had ever been previously convicted or acquitted in any way that would bar his criminal prosecution.¹³⁸ The *in rem* gimmick here is a plausible and ancient one;¹³⁹ but it can lead to striking injustices if we truly buy into the fiction that the rights of individual persons are not really at stake in *in rem* actions.¹⁴⁰ (Just ask Tina Bennis.¹⁴¹) And so the deepest lesson here is that when the Supreme Court overreads a clause in a prodefendant way, it often sets in motion a chain of events that can result in a rather drastic curtailment of citizens' rights somewhere else.¹⁴²

136. 116 S. Ct. 2135 (1996). At the Supreme Court, the Sixth Circuit case was consolidated with a case originating in the Ninth Circuit. *See id.* at 2138. Because the Sixth Circuit fact pattern presents a clearer example of reverse-*Kurth* issues, I shall focus on it here.

137. *See id.* at 2140 n.1.

138. *See id.* at 2140, 2145 (relying on *in rem* fiction of *Various Items of Personal Property v. United States*, 282 U.S. 577, 581 (1931)). *But see id.* at 2148 n.3 (claiming that Court's ultimate conclusion does not rest on "the long-recognized fiction that a forfeiture *in rem* punishes only malefasant property rather than a particular person").

139. *See id.* at 2140–42 (invoking congressional statute from 1789, and several nineteenth- and twentieth-century Supreme Court cases).

140. *See id.* at 2151 (Kennedy, J., concurring) ("It is the owner who feels the pain and receives the stigma of the forfeiture, not the property.").

141. *See Bennis v. Michigan*, 116 S. Ct. 994 (1996) (using *in rem* gimmick to uphold hardhearted forfeiture of family car against wholly innocent wife of wrongdoing husband).

142. For many more examples of this phenomenon, see Amar, *supra* note 48, at 1138.

Even if no curtailment ever occurred, the overreading of the Double Jeopardy Clause is of course wrong in itself—and has resulted in indefensible windfalls to various car thieves, drunk drivers, drug pushers, and other criminals. The solution, I have suggested, is to heed the words of the Clause; and, where necessary and appropriate, to supplement those words with due process principles to directly protect implicit acquittals, enforce collateral estoppel, thwart vexatious reprosecutions, and avoid double-counting. An alternative approach could label these issues as “double jeopardy principles” but apply these principles functionally and flexibly. This alternative approach has the virtue of highlighting connections between the Double Jeopardy Clause itself and the four functional concerns we have identified. But it also poses some distinctive risks. Some of those functional concerns radiate far beyond the Double Jeopardy Clause, however broadly construed. (Double-counting, for example, should be avoided in *every* case, civil or criminal.) Given the need to wheel in due process at some point, conceptual clarity is served if we directly apply due process whenever it fits best. And if we mean to have a genuinely flexible approach in at least some of the *Blockburger* boxes—to avoid the mindlessness and definitional foolishness of *Brown* and *Corbin* and *Dixon*—then the flexible phrasing of the Due Process Clause seems to fit better than the stiffer syntax of the Double Jeopardy Clause. Unless judges sharply distinguish between the core double jeopardy “rules”—*autrefois acquit de même felonie* and *autrefois convict de même felonie*—and various penumbral double jeopardy “principles,” there is a real risk that the penumbra will be applied too rigidly (*Brown*, *Corbin*, and *Dixon*, for example) and/or that the core will be applied too mushily (the curtailment effect). Thus, the conceptually clearest approach is to insist that the Double Jeopardy Clause means just what it says, but to recognize that the principles underlying and radiating beyond the words of the Clause should inform due process analysis.¹⁴³

143. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST* 87–101 (1980) (recommending that open-textured constitutional clauses such as Due Process be informed by values underlying more specific constitutional clauses); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 804–11 (1994) (following similar approach to help define “constitutional reasonableness” under Fourth Amendment).

It might be asked whether my approach leaves any independent bite to the Double Jeopardy Clause itself. If the Clause did not exist, couldn't the Due Process Clause itself do all the work? Perhaps, but this is hardly a forceful argument against a plain-meaning reading of the Double Jeopardy Clause. Many of the clauses of our Constitution, when best read, may simply textually clarify what would probably be the best reading of the Constitution, even without that clause. Many of the clauses of the Sixth Amendment, for example, clarify rules that might otherwise have been implicit in due process. See generally Amar, *supra* note 31. For a general discussion of the ubiquity of such clarifying clauses in our Constitution, see Akhil Reed Amar, *Some Opinions on the Opinion Clause*, 82 VA. L. REV. 647, 648–51 (1996).

III. "TWICE IN JEOPARDY"

Let us, finally, turn to the remaining key phrase in the Double Jeopardy Clause: "twice in jeopardy." Even if a person clearly risks losing "life or limb" (in a poetic sense) for a single legal offense—"the same offense"—exactly how are we to decide whether he has been placed *twice in jeopardy*? The Court has approached this question by asking when jeopardy attaches, but a more precise analysis would bifurcate this inquiry. We must ask both when does a jeopardy *begin* and when does that same jeopardy *end*. Only then can we decide whether a particular event threatens a *second* jeopardy. Since the word jeopardy draws upon an obvious game metaphor—jeopardy is, etymologically, an uncertain game, a game that one might lose¹⁴⁴—we might recast the question by asking when does the "game" begin and end. What exactly are the rules of the "game" when officials make bad calls, when the players cheat or commit fouls, or when external events like the weather intrude upon the game? As we think about these questions, and try to make them simpler to understand, perhaps various lessons and examples from other well-known games can help sort things out.

A. *The Jeopardy Game*1. *The Puzzle*

Although courts often speak of when jeopardy attaches, this attachment metaphor misleads to the extent that it implies that there is one key moment rather than two. Jeopardy is a process—like any other game—and we thus must ask when it begins and when it ends. Consider the puzzles any other approach creates. In early American courts, judges often proclaimed that jeopardy did not attach until the jury rendered its verdict. Thus, in 1823, Justice Washington proclaimed on circuit that "jeopardy" means "nothing short of the acquittal or conviction of the prisoner, and the judgment of the court thereupon."¹⁴⁵ But textually, it seems a bit odd to say that one's jeopardy—one's risk, one's uncertainty—begins just at the point the uncertainty is resolved by a verdict. It is like saying that the game one might lose begins just as the final buzzer sounds. And if jeopardy connotes nothing less than a verdict (or a verdict and a sentence), does this mean that one is not put *twice* in jeopardy until a second verdict (or a second sentence)? Surely this cannot be right; for as we have seen, the Double Jeopardy Clause was clearly designed to be enforced by a pretrial special plea in bar to spare a person from

144. See *supra* text accompanying note 24.145. *United States v. Haskell*, 26 F. Cas. 207, 212 (C.C.E.D. Pa. 1823) (No. 15,321).

the burden of the second trial itself (and indeed, from any pretrial impositions incident to a voidable indictment on the "same offense").

The motivation of the early American rule is clear: to allow a defendant whose first trial had not reached a final judgment of acquittal or conviction—say, because of a mistrial created by a hung jury or juror illness—to be retried. As Justice Story wrote in his classic treatise on the Constitution:

[The Double Jeopardy Clause means] that a party shall not be tried a second time for the same offence, after he has once been convicted, or acquitted of the offence charged, by the verdict of a jury, and judgment has passed thereon for or against him. But it does not mean, that he shall not be tried for the offence a second time, if the jury has been discharged without giving any verdict; or, if, having given a verdict, judgment has been arrested upon it, or a new trial has been granted in his favor; for, in such a case, his life or limb cannot judicially be said to have been put in jeopardy.¹⁴⁶

This seems sensible enough except for the last line ("for, in such a case . . ."). Taken literally, this line would contradict Story's earlier statements by allowing a person to be *tried* after acquittal so long as the trial did not proceed to verdict and judgment: The defendant could "not be said to have been put in [a second] jeopardy." A friendly reworking of Story's last line would say that "although placed in jeopardy once, his first jeopardy has only *begun*, but has not *ended* in a *final* verdict of conviction or acquittal. His jeopardy may thus *continue* until a proper final verdict is reached, after which, of course, he may no longer be tried for the same offence."

More modern American courts have held that jeopardy attaches much earlier than Story and Washington thought: at the impaneling of the jury.¹⁴⁷ This solves some problems, leaves others unsolved, and creates new ones of its own. It seems more plausible to say that the game and the risk begin before the end, and that a person is in genuine jeopardy throughout his trial. But he is in peril even earlier, given that an indictment itself can trigger pretrial loss of liberty—loss of the free use of one's "limbs," loss of days, weeks, or even months of one's "life."¹⁴⁸ Surely we should not say to someone acquitted of robbery that he may be reindicted for the same robbery and held pretrial because, unless and until his second jury is seated, he will not be twice "in jeopardy."

Now consider the trial itself. The modern rule seems superior to the earlier rule in some mistrials and inferior in others. Suppose the prosecutor, near the

146. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1781, at 659–60 (Fred B. Rothman & Co. 1991) (1833).

147. See, e.g., *Crist v. Bretz*, 437 U.S. 28, 32–38 (1978).

148. See Amar, *supra* note 31, at 658–61.

end of a trial, senses that things are not going well for the state, and that the jury will likely acquit. Out of desperation, she engages in gross and intentional misconduct that forces the judge to declare a mistrial. She then argues that because the first trial never reached a verdict and final judgment, the defendant can be retried on a clean slate. Under the Washington/Story definition of "jeopardy" perhaps this gambit might work, but not under the modern definition: Jeopardy has already "attached." Under the modern definition however, why is a retrial permissible if a mistrial results from some other, wholly benign, cause—like a hung jury, or juror illness? The Double Jeopardy Clause seems to lay down a clear rule. By what right do judges balance away this right, saying that some second jury impanelings and thus second "jeopardies" are permissible and others are not?¹⁴⁹

2. *The Solution*

The most sensible approach, I suggest, is as follows. The Double Jeopardy Clause in effect says that for any given offense, the government may play the adjudication game only once: No person shall be "*twice* put in jeopardy." The adjudication game—highlighted by the richly poetic word "jeopardy"—begins when a person is indicted. Before this event, of course, there is simply no criminal charge on the table, and thus no way to decide whether an offense is *la même felonie* as the offense for which a person was *autrefois convict* or *acquitt*. What's more, once an indictment does issue, a person's "life or limb," in the poetic sense, is very much at risk and in jeopardy. But indictment is only the moment when adjudication game *begins*; and the adjudication game does not *end* until there is a final winner. Until there is a final winner, the *first* jeopardy has not ended, and further proceedings do not place a person in jeopardy a *second* time—"twice."

Sometimes, a game can begin and not end; and so it must be replayed from the start later. Consider, for example, a baseball game that is called off after several innings because of rain and is then replayed on a blank scorecard at the end of the season. In a roughly analogous way, domestic law often allows a prosecutor to drop an indictment, with leave to refile—to reschedule the game—later.¹⁵⁰ Sometimes, a game that seemed to end must be replayed because a referee erred and that error compromised the fairness of the game. When a linesman in tennis makes an incorrect call on which the players

149. The Court has said that mistrials followed by retrials may be granted in cases of "manifest necessity." See *Arizona v. Washington*, 434 U.S. 497, 505 (1978). But the Court has hastened to add that "it is manifest that the key word 'necessity' cannot be interpreted literally." *Id.* at 506. More double jeopardy double talk? For a superb account of the actual judicial standards at work in mistrial cases, see Westen & Drubel, *supra* note 59, at 85–106.

150. See Westen & Drubel, *supra* note 59, at 88, 97–99 (distinguishing between harassing and nonharassing indictment dismissals followed by reindictment).

nevertheless rely, the presiding official can overrule the call, and the point is simply played over. So too, domestic law should generally be allowed to provide that a trial judge error—even one in the defendant's favor—can be reversed, and a new trial ordered. The game need not end—jeopardy may *continue*—until an error-free result is obtained, and a fair winner emerges. Finally, a winner sometimes emerges because of the misconduct of the other player. A boxer who repeatedly hits his opponent with low blows is disqualified, and the other boxer is declared the winner. Some mistrials should be similarly understood: Because of the flagrant misconduct of the prosecutor, the defendant is simply declared the winner. Such a trial court ruling, if correct (and upheld on appeal), is in effect an *acquittal*, and thus jeopardy has indeed ended.

My approach has several major implications. First, it supports Justice Holmes's general theory of *continuing jeopardy*:¹⁵¹ When a trial judge errs in favor of the defendant and the defendant thereby wins an alleged "acquittal" at trial, this "acquittal" need not be seen as the end of the game. Rather, an appeals court should be able to review and reverse the legal error, and remand for a new trial—a continuation of the game—until a suitably error-free result is reached. Second, my approach highlights the special role played by the Sixth Amendment in immunizing certain jury decisions from judicial review and reversals. In our system, a properly informed criminal jury given the proper evidence is always entitled to acquit a defendant; no other official can reverse that decision, no matter how "erroneous" it seems to nonjurors. On some issues, juries are the ultimate referees, who are infallible because they are final.¹⁵² Because it is the *Sixth* Amendment that requires certain jury decisions to be treated as nonerroneous acquittals, the Fifth Amendment Double Jeopardy Clause here merely piggybacks, specifying the legal effect of these acquittals in future proceedings.¹⁵³ Finally, my approach helps to identify a range of penalties that can be imposed on players who cheat or commit fouls. The Due Process Clause, with its historic emphasis on fair play, is the obvious constitutional vehicle for implementing those penalties; and so the Double Jeopardy Clause itself is not really the formal source of these penalties—here too it merely piggybacks by specifying the consequences for

151. See *Kepner v. United States*, 195 U.S. 100, 134 (1904) (Holmes, J., dissenting) ("[L]ogically and rationally a man cannot be said to be more than once in jeopardy in the same cause, however often he may be tried. The jeopardy is one continuing jeopardy from its beginning to the end of the cause.")

152. Cf. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in judgment) ("We are not final because we are infallible, but we are infallible only because we are final.")

153. Ordinarily, domestic law should define what counts as an "acquittal" just as it defines what counts as an "offense." And ordinarily, the Double Jeopardy Clause itself should take these domestic law concepts as it finds them. But just as other constitutional clauses can constrain what domestic law can treat as a criminal "offense"—an "offense" for example cannot be *ex post facto*—so here the Sixth Amendment demands that domestic law must treat certain events as "acquittals." See also *infra* text accompanying notes 165, 168–69 (describing similar role for Due Process Clause)

future judicial proceedings when the form of a given penalty is, in effect, an acquittal.

B. *Continuing Jeopardy*

Consider first the idea of continuing jeopardy: Must a person go free because he wins something called an "acquittal" from a trial judge, even though appellate courts with general review power over the trial court deem the "acquittal" legally erroneous? Holmes thought not, and here Holmes was right.¹⁵⁴ To begin with, surely there is nothing magic in a name or a word. Surely it matters not at all whether a state calls a trial judge's decision an "acquittal" subject to appellate review or a "bacquittal" that only ripens into a final and true "acquittal" if upheld on appeal. In both cases, domestic law is in effect saying that a trial ruling is merely provisional, not final, and should be subject to correction if erroneous.

Holmes's basic idea is that a state could indeed structure its judicial system such that erroneous trial judge rulings are simply not final. When a defendant is convicted at trial because of a pro-state trial court error, an appellate court can review this error, reverse the conviction, and remand for a new trial. This new trial is not, constitutionally, a *second* jeopardy, but a continuation of the first, because the trial court "conviction" was not a true conviction. In effect, it was a "bonviction" that failed on appeal to ripen into a true "conviction." But if retrial is allowed after an erroneous trial court conviction, why not after an erroneous trial court acquittal?¹⁵⁵

The usual answer will not do:¹⁵⁶ "When a defendant appeals a conviction, he waives any double jeopardy claim he might have against retrial; but this waiver argument does not apply when the government appeals an acquittal." The problem is that a defendant who appeals does not really "waive" anything: He does not voluntarily, knowingly, and freely relinquish his double jeopardy claim. He would love to win a reversal on appeal and be done with it—to face no further trial proceedings. But domestic law denies him this option: It *forces* him to "waive" his double jeopardy right in order to

154. See *Kepner*, 195 U.S. at 134 (Holmes, J., dissenting) (quoted *supra* note 151); see also *Palko v. Connecticut*, 302 U.S. 319 (1937) (upholding Connecticut continuing jeopardy regime under Due Process Clause). *Palko*, of course, was decided before the Court held that the Double Jeopardy Clause directly applied against states via Fourteenth Amendment incorporation. See *Benton v. Maryland*, 395 U.S. 784, 793–96 (1969).

155. See *Kepner*, 195 U.S. at 135 (Holmes, J., dissenting) (explaining that defendant "no more would be put in jeopardy a second time when retried because of a mistake of law in his favor, than he would be when retried for a mistake that did him harm").

156. My analysis in this paragraph is obviously heavily indebted to Professor Peter Westen's work, which addresses the relevant issues with great penetration and power. I shall thus only summarize his arguments here; readers with any lingering doubts should directly confront Peter Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 MICH. L. REV. 1001, 1008–09, 1055–59 (1980); and Westen & Drubel, *supra* note 59, at 125–28.

exercise his right to appeal. Nothing in logic requires this construction (and constriction) of options—unlike, say, the situations where logic “forces” one to forgo his right to complete silence at trial if he exercises his right to speak at trial, or where logic “forces” one to forgo her right not to have a lawyer if she exercises her right to have a lawyer. It is hard to see how a defendant could simultaneously do X and not-X; but it is easy to imagine how, in theory, a defendant could first appeal, and then (if successful) go free. England, for example, allows defendants to appeal without generally subjecting the successful appellant to retrial. To put the point another way, if we insist on saying that a defendant implicitly waives any claim against retrial when he appeals, we could likewise say that he implicitly waives any claim against a government-appeal-driven retrial when he demands the benefit of being tried under nonerroneous law in the initial proceeding: Unless a defendant renounces the right to appeal all erroneous decisions against him, he implicitly waives the right to object to any governmental appeal of any erroneous decisions in his favor.

One possible objection to continuing jeopardy is that although trial judges sometimes do err in prodefendant directions, some defendants would clearly have won anyway, and so it is unfair to subject these defendants to retrial. But this objection argues not against continuing jeopardy but for a kind of prodefendant “harmless error” doctrine, in which appellate courts should refuse to order retrials where the errors below likely did not affect the verdict. (Similarly, in football, if a pass was simply not catchable anyway, any pass interference made no difference, and so officials will not intervene.)

A second possible objection to continuing jeopardy is a variant of the first: The initial jury may have acquitted to “nullify” the prosecution altogether, and appellate judges have no right—under Sixth Amendment doctrine—to disturb this jury prerogative. But even if a jury has a shadow right to nullify¹⁵⁷ (a right that jurors are not told about), a jury also has a right *not* to nullify. The jury as an institution is not well respected if its decisions are taken as final even when those decisions are based on a trial judge’s legally erroneous instructions or evidentiary rulings. No nullification prerogative would be threatened by correcting the trial judge’s legal errors on appeal and remanding the case back to the *same jury* for retrial, this time with legally correct evidence and instructions.¹⁵⁸ If the jury still wants to acquit and nullify, it can then do so.

157. Here, too, I stand on the shoulders of Professor Westen, who has thoughtfully addressed the interplay between double jeopardy doctrine and jury nullification theory. See Westen, *supra* note 156, at 1012–23; Westen & Drubel, *supra* note 59, at 129–32.

158. Here, I go one step beyond Professor Westen, who seems to overlook this possibility and its larger logical implications. See Westen, *supra* note 156, at 1017 n.58; Westen & Drubel, *supra* note 59, at 130 & n.230.

But the Constitution probably does not require even this. Even if different jurors sit in the retrial, these jurors would enjoy the same shadow right to nullify and acquit as would the original jurors in a retrial. Constitutionally speaking, a second jury simply stands in the shoes of the first—just as, in a single trial, jury alternates may be called to stand in the shoes of jurors who fall sick. Perhaps a defendant prefers his first jury, but the Constitution does not absolutely protect that preference in all contexts. When a defendant is erroneously convicted—solely because of progovernment error in the first trial that he vigorously opposed—he may be retried by a second jury even if he would prefer the first. It is hard to see why his preference should be constitutionally stronger in a retrial triggered by a successful government appeal; here, the very error that causes the retrial is one that he may have introduced rather than one that he opposed.¹⁵⁹

A third objection to continuing jeopardy points to other prodefendant asymmetries in our criminal justice system, such as *Winship's* rule that the government bears a heavy burden of proof,¹⁶⁰ and *Ashe's* openly asymmetric rule of collateral estoppel.¹⁶¹ One good asymmetry deserves another, the argument might go, and so it is constitutionally apt that defendants may appeal erroneous trial rulings but prosecutors may not. This is a bad argument chasing a bad analogy in fruitless search of a good reason. Other asymmetries in our criminal justice system are not random or purposeless; they exist to protect an *innocent* defendant from an *erroneous* conviction. Indeed, I have elsewhere suggested that this is one of the governing principles of the field of constitutional criminal procedure.¹⁶² But no similar constitutional value is served by insulating what are—by hypothesis—incorrect judicial rulings of law from review and reversal. Insulation here is an arbitrary windfall to the guilty, not a carefully structured scheme to protect the innocent. It is as if we simply said that every third (randomly selected) defendant should go free *without good reason*.

A defendant has no vested right to a legal error in his favor.¹⁶³ For

159. See Westen, *supra* note 156, at 1009; Westen & Drubel, *supra* note 59, at 127–28.

160. See *In re Winship*, 397 U.S. 358, 362–64 (1970).

161. See *Ashe v. Swenson*, 397 U.S. 436 (1970).

162. See *supra* note 48.

163. See *Lockhart v. Fretwell*, 506 U.S. 364, 366, 370–71 (1993) (stating that criminal defendant is “not entitled” to “windfall” of incorrect application of law or to “the luck of a lawless decisionmaker” when “the state court make[s] an error in his favor”) (citations omitted); see also *United States v. Scott*, 437 U.S. 82, 91 n.7 (1978) (allowing appellate reversal of erroneous trial court acquittal, where result is to reinstate jury’s guilty verdict).

It might be argued that, under *Ashe*, we immunize an “erroneous” jury finding of fact from reversal by a second jury; why shouldn’t we likewise immunize an “erroneous” trial judge ruling of law? The answer is that, in legal contemplation, we have no good reason to systematically prefer the second jury’s finding as generally more likely to be “true” or “accurate” than the first jury’s finding. Perhaps it is really the second jury that is erroneous in thinking that the first erred. But the entire structure of judicial appellate review gives us good reason to think that an appeals court—typically with more judges and more time for careful legal study of difficult issues—is generally more likely to be legally correct than a trial judge. Thus, we have structured our system so that appellate judges can generally reverse trial judges; but one jury

example, if a trial judge erroneously excludes evidence in a pretrial suppression hearing, a defendant has no constitutional right to prevent the government from seeking an interlocutory appeal to review and reverse this legal error. Subsequent proceedings are simply a continuation of the original jeopardy. But—constitutionally speaking—the matter is no different if appeal occurs *after* trial; here too, the subsequent proceedings are simply a continuation of a single jeopardy in search of a fair verdict based on the *correct* application of law. We do not demand that the defendant go free because the initial jurors catch fever and a new trial is ordered; why should things be any different if a fevered judge makes egregiously wrong legal rulings at trial?¹⁶⁴

The final objection to continuing jeopardy is that it might allow a government to treat a trial court's prodefendant rulings more harshly than its pro-state rulings. In this nightmare scenario, a trial court's pro-state rulings are called "convictions," and are final and unreviewable, but a trial court's prodefendant rulings are called "acquittals" that do not ripen into true acquittals until an endless series of onerous appeals. But a simple symmetry rule rooted in due process would prevent the state from structuring decisionmaking authority in any way that endowed pro-state rulings with more finality than prodefendant rulings.¹⁶⁵

cannot generally reverse another.

In addition, as we saw in Part II, *Ashe* can be defended as creating a worthy and workable incentive structure discouraging prosecutorial vexation and strategic bifurcation. No such vexation exists in the typical case where a prosecutor seeks reversal and retrial to correct an erroneous prodefendant ruling by the trial judge; appeal and retrial here would typically occur because the *defendant*—over the prosecutor's objection—persuaded the trial judge to commit legal error. If we generally allow retrial after an erroneous conviction (where the state is to blame for the initial error, and retrial can be vexing), we should allow retrial after an erroneous acquittal *a fortiori*.

164. Note that I do not argue here that every American jurisdiction must or should provide for continuing jeopardy, but only that government should be free to do so if it chooses. Perhaps many legislatures will decide that in certain subcategories or across the board, the appeal and retrial game is not worth the candle. As with my work elsewhere, *see supra* note 48, here I address only questions of constitutional criminal procedure.

165. While finding the logic of continuing jeopardy compelling, the Office of Legal Policy (OLP) rejected the idea on originalist grounds in 1987. *See generally* OLP REPORT, *supra* note 20. The main argument of the OLP was not textual but historical: England at the time of the Founding rejected continuing jeopardy (and so did many later American courts).

This argument blurs the key difference between those legal rules that were effectively inscribed in constitutional text, and those that were not. The English cases, I submit, rested on the interaction of two distinct rules: (1) The double jeopardy principle barred a retrial after a true (that is, a suitably error-free and final) acquittal; and (2) domestic English law at the time did not provide for appeals of certain trial court error. Thus, trial court acquittals were suitably error-free and final in the sense that domestic English jurisdictional law chose to endow them with finality. But this second rule of English judicial structure was nowhere locked into the American Constitution; and if the American judicial structure were to depart from the English model, then the first principle—which was inserted into the text of the Double Jeopardy Clause—would interact differently. The Double Jeopardy Clause demands that *if* a true acquittal occurs, retrial is barred, but it looks to *current domestic law*, not the law of England in 1789, to determine *what* should count as a true acquittal.

Analogously, we might ask whether double jeopardy today applies to RICO offenses. An OLP-like approach might lead us into the following absurdity: Since old England (and early America) did not view RICO as an offense, double jeopardy does not apply. The correct approach, of course, is to see two distinct

C. *Jury Acquittals*

So far, we see that nothing in the Constitution, properly read, bars the state from structuring its domestic law to give appellate judges plenary power to correct the errors—to “reverse the calls”—of trial judges. We must now ask, what bars the state from likewise giving appellate judges plenary power to reverse the calls of juries? The short answer is the Sixth Amendment. In civil suits, the Seventh Amendment privileges jury factfinding, but a judge can reverse the call of a jury when it is clear beyond doubt that the jury has erred in its task.¹⁶⁶ Under the Sixth Amendment, however, a criminal jury has the right to acquit a defendant even in the face of indisputable factual evidence of guilt.¹⁶⁷ And so when the jury is given the proper evidence and the proper instructions, it may acquit and no other official can overrule its call: In legal contemplation, this properly informed jury’s acquittal is by definition nonerroneous. Of course, its general power to acquit with finality does not mean it must be final on all its decisions (convictions and sentencing, for example); by analogy, the home-plate umpire is the ultimate arbiter of balls and strikes generally, but not on check swings.

D. *Mistrials and Misconduct*

Under the continuing jeopardy principle, an innocently induced mistrial—due, say, to juror illness—can indeed be followed by retrial: Jeopardy has begun, but has not yet ended, and may resume on a blank scorecard at retrial. (The issue is rather precisely analogous to a baseball game

rules interacting 200 years ago: (1) The double jeopardy principle applied to all criminal offenses; and (2) domestic law at the time did not make RICO an offense. Only the first principle was inscribed into the Double Jeopardy Clause. The Clause demands that *if* RICO is a criminal offense, retrial is barred; but it looks to current domestic law, not the law of England in 1789, to determine *what should count* as an offense. See *supra* text accompanying notes 51–62.

To put the point one final way, recall that England does not generally allow a defendant to be retried after he successfully appeals his conviction. The current American rule, of course, ordinarily permits retrial after an appellate court reverses a conviction tainted by legal error. But, as we have seen, this retrial is permissible only because it simply continues the initial jeopardy, not because defendant somehow “waives” his double jeopardy rights. If retrial after erroneous conviction is allowed, so must be retrial after erroneous acquittal: The formal rules of the Double Jeopardy Clause are symmetric between acquittals and convictions. (Due process is, of course, asymmetric, and protects acquittals more; but there is no strong reason to specifically protect *legally erroneous* acquittals.) England, in short, cannot be our guide here because its domestic judicial structure sharply departs from America’s, and nothing in the Double Jeopardy Clause freezes in place England’s domestic jurisdictional rules for appeals. Cf. *United States v. DiFrancesco*, 449 U.S. 117 (1980) (allowing appellate court to increase sentence imposed by trial court where domestic law authorizes such appeals, and paying no heed to whether English appellate courts in 1789 had such power as matter of domestic law).

166. See Amar, *supra* note 31, at 685–86.

167. Yet again, I echo Professor Westen. See Westen & Drubel, *supra* note 59, at 129–32 (deriving this right of criminal juries from series of doctrinal rules concerning directed verdicts, special verdicts, verdict inconsistency, and collateral estoppel); Westen, *supra* note 156, at 1012–23 (providing similar derivation).

called on account of rain after three innings.) In other contexts, where judges suspect that the prosecutor may have triggered a mistrial to avoid an impending defeat, the judges (whether at trial or on appeal) may simply declare the defendant the victor by penalty.¹⁶⁸ But the key principles at work in determining when judges should award an acquittal by penalty are not the hard and fast rules of the Double Jeopardy Clause—which formally come into play only after an acquittal occurs—but the flexible, case-specific fair-play ideals of due process. These due process principles determine *whether* a judge should, in effect, direct an acquittal; and prosecutorial motive may matter here, in a way that it does not generally matter under the Double Jeopardy Clause. Formally, all that the Double Jeopardy Clause does is specify the consequences for future proceedings *if* the Due Process Clause or domestic law compels the judicial award of an acquittal by penalty.¹⁶⁹

If we view the misconduct/mistrial issue primarily through the prism of the Double Jeopardy Clause, we might think that the sole or most apt judicial response to prosecutorial misconduct is an award of acquittal; the Clause, as we have seen, is tightly linked to the idea of *autrefois acquit*. But once we see that a judicial award of acquittal is a kind of due process penalty for low blows, it becomes clear that this extreme sanction is only one of a whole set that could be devised.¹⁷⁰ Ordinary games from everyday life offer a series of analogies. Some minor misconduct could be ignored.¹⁷¹ (Incidental contact under the boards, all part of the game.) Some more serious misconduct could be dealt with by sanctions *outside* the proceedings at hand, such as fines and contempt citations.¹⁷² (A three-game suspension.) Still other misconduct may call for disgorgement of ill-gotten gain in the proceeding at hand.¹⁷³ (A touchdown called back because of offensive pass interference.) Some misconduct may trigger a defendant option—to continue a trial with a curative instruction, or to demand an immediate mistrial and new trial.¹⁷⁴ (An option to decline the penalty, or to accept it and replay the down.) Other types of

168. See *Green v. United States*, 355 U.S. 184, 188 (1957); Westen & Drubel, *supra* note 59, at 85–106.

169. Alternatively, we could see acquittals by penalty as penumbral double jeopardy “principles” designed to prevent purposeful evasion of the core double jeopardy rule: A prosecutor who intentionally derails a case she is about to lose should stand in no better position than a prosecutor who in fact does lose (and is thus barred from retrial by the Double Jeopardy Clause’s formal rule of *autrefois acquit*).

The labeling issue here—are acquittals by penalty double jeopardy or due process issues?—parallels the issues discussed *supra* Part II.

170. Thus, my analysis of the Double Jeopardy Clause complements my analysis of other constitutional criminal procedure clauses. Elsewhere I have argued for alternative remedies to various kinds of exclusionary rules—under the Fourth Amendment, the Fifth Amendment Self-Incrimination Clause, and the Sixth Amendment Speedy Trial Clause—that needlessly free the guilty. See AMAR, *supra* note 48.

171. Cf. *Chapman v. California*, 386 U.S. 18, 22 (1967) (propounding harmless error rule).

172. This type of sanction is of course quite common today.

173. In theory, this is what happens when a trial judge strikes from the record, and instructs the jury to ignore, counsel’s improper question and any answer it elicited.

174. See Westen & Drubel, *supra* note 59, at 102 nn.114 & 116, 104–05 (discussing this remedial possibility).

misbehavior may justify special opportunities for one's opponent.¹⁷⁵ (A free penalty kick.) Still other forms of grave misconduct might be best addressed by allowing a defendant two shots at winning—either with the initial jury, or with a second jury summoned if the first jury convicts and the conviction is then set aside.¹⁷⁶ (A “free play” in football that gives the quarterback two chances to score.)

The broad range of possible alternative penalties suggests that judges should hesitate before awarding the extreme sanction of acquittal as a penalty. For such a sanction, of course, when cloaked with the special measure of finality of the Double Jeopardy Clause, can allow the guilty to escape without a full and fair trial of their guilt. If judges award an acquittal by penalty because the defendant was about to win his trial when the prosecution committed a low blow out of desperation, the award seems fully justified.¹⁷⁷ But to use such a sanction to punish or deter less egregious misconduct—especially where the defendant would likely have lost a fair first trial on the merits—is a very different thing. In many games, victory by penalty is not particularly troubling, since in the grand scheme of things it does not matter much who wins. But if the justice system is like a game in some ways,¹⁷⁸ it is also much more than a game in other, more important ways.¹⁷⁹ Lives and limbs—of victims as well as defendants—are serious business, and so it is hugely important in the criminal adjudication game to get it right: to acquit the innocent and convict the guilty.

And, as I have tried to suggest throughout this Essay, constitutional interpretation is also serious business; here too it is important to try to play by the rules, and to get it right. In this Essay, I have tried to do both.¹⁸⁰

175. Cf. Rosemary Nidiry, Note, *Restraining Adversarial Excess in Closing Argument*, 96 COLUM. L. REV. 1299, 1319–23 (1996) (discussing tit-for-tat “invited response” doctrine).

176. In fact, this is apparently current doctrine's approach to certain types of mistrials. See Westen & Drubel, *supra* note 59, at 101–02, 106. Once we see this theoretical possibility, it is conceptually possible to argue that the most apt remedy in a particular case would be a requirement that the penalized party win three times in a row, or four, or more.

Query whether this penalty could ever be imposed *against* a defendant for his low blows, or the low blows of his counsel. A judge could never award a victory by penalty to the government—such a ruling would be tantamount to a directed verdict and would violate the Sixth Amendment right of a jury to acquit against the evidence. But even accepting *this* asymmetry between the government and the defendant, must we also say that penalties less severe than victory by default can never be assessed against defendants who cheat in the adjudication game?

177. See *supra* note 169.

178. See Arthur Allen Leff, *Law and*, 87 YALE L.J. 989, 998–1005 (1978) (describing “Ludic Metaphor” and “The Game of the Trial” and concluding that if Leff's fictional “Trial is not a game, it is not not a game either”).

179. See Akhil Reed Amar, *Hits, Runs, Trial Error: How Courts Let Legal Games Hide the Truth*, WASH. POST, Apr. 16, 1995, at C1 (“A criminal trial is not a football game, even if it stars O.J. Simpson.”).

180. Playing by the rules of constitutional interpretation requires fidelity to constitutional text (among other things), but there are different ways that one can be faithful to a text. This Essay has featured three slightly different approaches. In Part I, fidelity to the poetic phrase “life or limb” called for literary sensitivity; in Part II, fidelity to the mathematical word “same” and the distinctly legal word “offense” called for a more legalistic and logic-chopping analytic framework; and in Part III, fidelity to the game metaphor at the root of the word “jeopardy” invited comparisons and contrasts with other familiar games.