THE DOUBLE JEOPARDY CLAUSE AND THE FAILURE OF THE COMMON LAW

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"Failure" is too strong, of course, but one does want a title that grabs the reader's attention. "Inadequacy" is more accurate, as this Article shall endeavor to explain, but not nearly as dramatic.

The Supreme Court has, over the past 100 years, sucked the life out of the Double Jeopardy Clause. The Court's failure, in large part, is not recognizing that modern criminal law and procedure requires a more vigilant Double Jeopardy Clause. Specifically, the proliferation of overlapping state and federal criminal offenses and the power that modern prosecutors have to terminate proceedings prior to a verdict have made double jeopardy protection available only in cases where the prosecutor is not paying attention.[1] The Double Jeopardy Clause today is a pale reflection of a once-powerful limit on governmental power, a limit that:

- appears in an early form around 1800 B.C. in the Code of Hammurabi (law 5 punishes judges who change their judgment after it is reduced to writing);[2]
- was articulated by the orator Demosthenes in ancient Greece: "The laws do not allow one to bring the same charge twice";[3]
- is codified in the Digest of Justinian: "The governor must not allow a man to be charged with the same offenses of which he has already been acquitted";[4]
- appears in Bracton's treatise of English law written in the 1220s and 1230s and updated in the 1250s:[5] If an accused "defends himself" against a charge, he will "depart quit" against that accuser and all who accuse him "of the same deed"; and [6]

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1. *See* Gamble v. United States, 139 S. Ct. 1960, 1999–2000 (2019) (Gorsuch, J., dissenting).
2. HAMMURABI, THE CODE OF HAMMURABI 11 (Robert Francis Harper Ph.D. trans., 2nd ed. 1904).
3. DEMOSTHENES, SPEECHES 20–22, 67 (Edward M. Harris trans., 1st ed. 2008). Date of speech was 355/4 B.C. *Id*.
4. 4 THE DIGEST OF JUSTINIAN, Book 48, ch. 2, § 7, 311 (Alan Watson, rev. ed. 1998) (noting that Ulpian speculates that a third party who did not know of the original accusation would not be bound by the acquittal).
5. HENRY DE BRACTON, GEORGE E. WOODBINE & SAMUEL E. THORNE, ON THE LAWS AND CUSTOMS OF ENGLAND 400 (George E. Woodbine ed., Samuel E. Throne trans., 1968).
6. *Id.*

- was articulated by Blackstone in words that the framers included almost verbatim in the Fifth Amendment: Blackstone recognized a "univer[s]al maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for the [s]ame offence."[7]

This Article contends that Blackstone would not recognize the current state of double jeopardy law in the United States. In a few pages, I will explain how and why American double jeopardy law receded from its powerful historical position.

The panelists will address in more detail the state of double jeopardy law today and provide insights into whether Blackstone had it generally right. The subject of the first panel is the Court's most recent failure to create double jeopardy protection that Blackstone would recognize. A century ago, in an odd little Prohibition case, the Court held in *United States v. Lanza*, reversing the district court, that the federal government could prosecute a prohibition offense after a state had prosecuted the same offense to verdict.[8] The year was 1922 and Prohibition fever was at its height.[9] It took the *Lanza* Court nineteen days from argument to judgment, and that included the Thanksgiving holiday.[10] Just three years earlier, forty-five of forty-eight states had ratified the Eighteenth Amendment.[11] Indeed, in a rush to make the Amendment part of the Constitution, nineteen states ratified it in a five-day period—January 13, 1919 to January 17, 1919.[12] The Volstead Act, enacted to implement the Eighteenth Amendment, became effective in 1920.[13] While there was cheating from the beginning,[14] public support of Prohibition was still strong in 1922.[15] Excluding the two states that never ratified the

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7. 4 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 329 (London, 1st ed. 1765–1769). The limitation to "jeopardy of . . . life" might appear to be a narrow protection, but almost all felonies were punishable by death in English law of Blackstone's day; indeed, Blackstone states a presumption that all new statutory felonies are punishable by death. *Id*. at 98, 329.

8. United States v. Lanza, 260 U.S. 377 (1922).

9. *Id.* at 378–79.

10. *See id.*

11. THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION: ANALYSIS OF CASES DECIDED BY THE SUPREME COURT OF THE UNITED STATES TO JULY 2, 2014, S. DOC. NO. 112-9, 35 n.10. New Jersey was the last state to ratify the Eighteenth Amendment, three years after the other states. *Id*. Rhode Island and Connecticut never ratified. *Id.*

12. *See id.*

13. *See* National Prohibition Act, Pub. L. No. 66–66, 41 Stat. 305, 305–23, ch. 85 (1919).

14. Much liquor came from Canada. As Roy Haynes, head of the Prohibition Bureau, remarked, "You cannot keep liquor from dripping through a dotted line [the border with Canada]." DANIEL OKRENT, LAST CALL: THE RISE AND FALL OF PROHIBITION 153 (Schribner, 1st ed. 2010). Okrent remarked that, by 1923, "the Canada–U.S. border from one end to the other was so wet it's a wonder it didn't bleed off the maps." *Id.*

15. *See* Kenneth M. Murchison, *The Dual Sovereignty Exception to Double Jeopardy*, 14 N.Y.U. L. & SOC. CHANGE 383, 398 (1986) (noting that "[a]lthough exact measurements of public opinion from the [P]rohibition era are unavailable, most historians agree that [P]rohibition enjoyed substantial public support at the time the [E]ighteenth [A]mendment was adopted in 1919 and throughout the early years of the 1920s").

Eighteenth Amendment—Rhode Island and Connecticut—more than eighty percent of state legislators voted in favor of it.[16]

The Supreme Court was onboard.[17] In a unanimous decision authored by Chief Justice Taft, the *Lanza* Court worried that rum-running criminals might race to the state courts "to plead guilty and secure immunity from federal prosecution" and thus rob the Volstead Act of "its deterrent effect."[18] One way to prevent that, of course, was to give the federal government the right to prosecute after state courts were finished. The *Lanza* Court collected scraps of dicta from nineteenth century cases to justify its holding that each sovereign could prosecute independently of the other.[19] This "dual sovereignty" principle had to be based on scraps of dicta because there was no holding that both sovereigns could prosecute the same offense.[20]

Although built on scraps of dicta, *Lanza*'s holding was clear, and its dual sovereignty principle was reaffirmed in 1959.[21] *Lanza* might have made sense in the Prohibition fever of 1922, but the fever passed; thus, it should have been overruled in 1959. Although it was not, this time there were four dissenters who rejected the notion that states could reprosecute after a federal verdict.[22] The dual sovereignty doctrine was later applied to permit each state to prosecute the same offense,[23] to permit Indian nations to prosecute independently of the federal government,[24] and, presumably, the state in which the nation is located. One can play a parlor game here. We know that some kidnappings are federal felonies. Imagine that Utah and Arizona both have a murder statute that requires killing during a kidnaping. Imagine also that the Navajo Nation has a crime of kidnaping. In our parlor game, kidnaper takes a victim from Utah through the Navajo Nation and into Arizona where he kills the victim. Under the Court's same offense doctrine, there are four offenses here—two of killing during a kidnaping and both federal and Navajo offenses of kidnaping. Kidnaper can thus be convicted of four offenses for

16. OKRENT, *supra* note 14, at 105.

17. *See* United States v. Lanza, 260 U.S. 377 (1922).

18. *Id.* at 385.

19. *See, e.g.*, Fox v. Ohio, 46 U.S. 410 (1847), where the defendant claimed that circulating counterfeit United States coin could not be an offense under state law because the Constitution gave Congress exclusive power to coin money. *Id.* The Court held that states could punish circulating counterfeit money because it was also an offense against the state. *Id.* The Court contemplated double prosecution but said that would not be double jeopardy because the Double Jeopardy Clause only applied to prosecutions by the federal government. *Id.* While this was still true when *Lanza* was decided, and even when it was reaffirmed in 1959, it has not been true since 1969. *See* Benton v. Maryland, 395 U.S. 784 (1969).

20. *See Lanza*, 260 U.S. 377.

21. *See* Abbate v. United States, 359 U.S. 187 (1959); Bartkus v. Illinois, 359 U.S. 121 (1959).

22. *See Bartkus*, 359 U.S. at 150.

23. Heath v. Alabama, 474 U.S. 82, 93 (1985).

24. United States v. Wheeler, 435 U.S. 313, 331–32 (1978).

one killing during a kidnaping,[25] which would be but one offense if prosecuted by either Utah or Arizona.[26]

The basic *Lanza* doctrine slept peacefully until the Court granted certiorari in 2018 to reexamine it.[27] That story, the story of *Gamble v. United States*,[28] will be the focus of the first panel. Note that Kiel Brennan-Marquez, Stephen Henderson, Michael Mannheimer, and I took up the fight against the dual sovereignty doctrine in *Gamble*. We lost 7–2.[29] I recommend you read our amicus brief and Justice Gorsuch's dissent. You can skip Justice Alito's slightly confused majority opinion. Here's a taste of the Gorsuch dissent:

> Imagine trying to explain the Court's separate sovereigns rule to [Gamble] . . . . Yes, you were sentenced to state prison for being a felon in possession of a firearm. And don't worry—the State can't prosecute you again. But a federal prosecutor *can* send you to prison again for exactly the same thing. What's more, that federal prosecutor may work hand-in-hand with the same state prosecutor who already went after you. They can share evidence and discuss what worked and what didn't the first time around. And the federal prosecutor can pursue you even if you were *acquitted* in the state case. None of that offends the Constitution's plain words protecting a person from being placed "twice . . . in jeopardy of life or limb" for "the same offence." Really?[30]

The second panel will examine a modern twist on double jeopardy, one that Blackstone almost surely did not consider: When will a trial that stops short of a verdict bar a second trial? Though this issue pertains to dismissals as well as mistrials, we can conveniently refer to it as the mistrial doctrine.[31] The only mistrial that might have existed in Blackstone's day was for a hung jury. Even this is uncertain; I found no reference in Blackstone to a deadlocked jury.[32] Also, fifty colonial New Jersey trials from 1749 to 1757

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25. I assume here, as in *Heath*, that a crime begun in Utah (killing during a kidnaping) can be prosecuted in another state if the crime is consummated in that state. *See Heath*, 474 U.S. 82.

26. One might object to my claim that only one offense occurs in the parlor game. What about the kidnaping? The Court held in *Harris v. Oklahoma*, that if murder requires proof of robbery, they are the same offense under the Double Jeopardy Clause. Harris v. Oklahoma, 433 U.S. 682, 682 (1977).

27. Gamble v. United States, 201 L.Ed.2d 1095 (2018), *cert. granted*, 138 S. Ct. 2707 (No. 17-646) (2018).

28. Gamble v. United States, 139 S. Ct. 1960 (2019).

29. *See id.*

30. *Id.* at 1999 (Gorsuch, J., dissenting).

31. *See* Lee v. United States, 432 U.S. 23, 31 (1977) (addressing a dismissal case in which the Court said "that the distinction between dismissals and mistrials has no significance in the circumstances here presented and that established double jeopardy principles governing the permissibility of retrial after a declaration of mistrial are fully applicable").

32. I did find an intriguing reference to the inability of jurors to reach verdicts of "tolerable propriety" that has "thrown more power into the hands of the judges, to direct, control, and even rever[s]e their verdicts." 1 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 8 (London, 1st ed. 1765–1769). This suggests, perhaps, that judges in Blackstone's day would enter verdicts if the jury did not agree. But the reference might only be to judges taking cases away from juries before deliberation.

contained zero hung juries.[33] But hung juries did exist in federal court by 1823 because Josef Perez was discharged from a piracy prosecution when the jury could not agree on a verdict.[34] The Supreme Court held, in a brief, unanimous opinion by Justice Story, that a mistrial based on a hung jury did not constitute a jeopardy bar to a retrial.[35]

Perez said that trial courts have "the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated."[36] Putting content to those terms, of course, is far from easy. Indeed, Professor Stephen Schulhofer has concluded that the "manifest necessity" standard is a "thoroughly deceptive misnomer, perhaps not rivaled even by the Holy Roman Empire."[37]

What can be said with certainty is that only one defendant has ever mustered a Supreme Court majority (and a five-justice majority at that) to rule that a prosecution-requested mistrial is a jeopardy bar to a second trial.[38] In that case, *Downum v. United States*, the prosecutor did not bother to see if one of his key witnesses was available to testify.[39] When the prosecutor discovered the witness was not present, he moved for a mistrial over the defendant's objection.[40] *Downum* lost in the lower courts and won only 5–4 in the Supreme Court.[41] And when a prosecutor in *Illinois v. Somerville* went to trial on an indictment that was fatally flawed, the mistrial at the State's motion did not produce a jeopardy bar even though the error was completely within the control of the State.[42]

The only way to reconcile *Downum* and *Somerville* is that the *Downum* prosecutor ended a case that was weak on the merits and might have produced an acquittal, and the *Somerville* prosecutor ended a case of unknown merit, one that was subject to automatic reversal on appeal.[43] Determining whether

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33. *See* George C. Thomas III, *Colonial Criminal Law and Procedure: The Royal Colony of New Jersey 1749–57*, 1 N.Y.U. J.L. & LIBERTY 671, 703–04 (2005).

34. United States v. Perez, 2 Wheeler C.C.S.D.N.Y. 96, 96 (1823), *aff'd*, 22 U.S. 579, 580 (1824).

35. *Perez*, 22 U.S. at 580.

36. *Id.*

37. Stephen J. Schulhofer, *Jeopardy and Mistrials*, 125 U. PA. L. REV. 449, 491 (1977).

38. To be sure, six Justices found a jeopardy bar when the judge dismissed the jury without consultation from prosecution or defense. *See* United States v. Jorn, 400 U.S. 470, 487 (1971).

39. Downum v. United States, 372 U.S. 734, 735 (1963).

40. *Id.*

41. *Id.* at 737–38.

42. Illinois v. Somerville, 410 U.S. 458, 470–71 (1973).

43. *See Downum*, 372 U.S. 734; *Sommerville*, 410 U.S. 458. This oversimplifies the *Downum–Somerville* distinction. The missing key witness in *Downum* was essential in only two of the seven counts, and the Court could have permitted retrial on the other five. *Downum*, 372 U.S. at 735. Moreover, as the dissent in *Somerville* pointed out, the mistrial deprived Somerville of an opportunity for an acquittal that would have foreclosed appellate reversal on the flawed indictment. *Sommerville*, 410 U.S. at 474 (White, J., dissenting). But the crux of the distinction holds as follows: In *Downum*, the lack of a key witness on two counts created a substantial possibility of acquittal on those counts; while in *Somerville*, we know nothing from which we can infer the possibility of acquittal. *Downum*, 372 U.S. at 735; *Somerville*, 410 U.S. at 474 (White, J., dissenting). On the issue of the other five counts in *Downum*, it might be significant

a mistrial avoids an acquittal would be relatively easy in cases that end in hung juries because the reviewing court could examine the transcript. It would not be easy in cases that end before the trial is complete or, like *Downum*, that end before any evidence is produced. But it at least gives courts more guidance than terms like "manifest necessity" and the "ends of public justice."[44]

The second panel will bring us up to date on this issue. The third panel will also consider an issue that Blackstone certainly did not contemplate: Should we follow other countries and move away from a rigid double jeopardy rule that protects few defendants, but protects the few without regard to proportionality or justice? Imagine a case where a low-level prosecutor accepts a guilty plea to manslaughter, thinking that the killing was a reckless act, and agrees to the minimum two-year sentence. Later, investigation reveals that the killer premeditated the killing to obtain double-indemnity life insurance on his wife. Blackstone would say, and the Court's "same offense" test would say, that the manslaughter conviction forbids a trial for first-degree murder and a longer sentence.[45] But should rigid double jeopardy protect this murderer? The third panel will explore more flexible double jeopardy schemes in other common law countries.

Now I turn to the substance of this Article. As mentioned at the beginning, the Court has reduced the Double Jeopardy Clause to a pale reflection of the common law summarized by Blackstone. But I believe that this failure is not entirely the fault of the Court. The journey that the Court took in interpreting the Double Jeopardy Clause will be contrasted with its Fourth Amendment journey. The text in both cases is not very helpful. Tony Amsterdam famously remarked that the Fourth Amendment text is "brief, vague, general, [and] unilluminating."[46] This is certainly true. The text recognizes a "right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures."[47] But what is contained in the universe of "unreasonable searches and seizures"?[48] The Court has yet to define the boundaries of that universe with clarity.

But the text of the Double Jeopardy Clause is not much more helpful: "[N]or shall any person be subject for the same offence to be twice put in

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that the defendant offered to proceed on the other five counts. *Downum*, 372 U.S. at 737. Perhaps the Court is stating that the prosecutor had a chance to proceed on the five that did not involve the missing witness and lost that chance when he included those five counts in the mistrial motion. *Id.*

44. Oregon v. Kennedy, 456 U.S. 667, 676 n.7 (1982). The chance of a defendant proving a jeopardy bar when the defense moves for a mistrial is even more remote. The standard there is whether the prosecutor's conduct "giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial." *Id.* at 679. Imagine how difficult that will be to prove.

45. 4 BLACKSTONE, *supra* note 7, at 329.

46. Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 353–54 (1974).

47. *Id.* at 356 (quoting U.S. CONST. amend. V).

48. *Id.*

jeopardy of life or limb."[49] "Life" is easy enough; what about "limb"? The framers added this to Blackstone's "universal maxim."[50] While we do not know what the framers had in mind, the Court has given the Clause an expansive interpretation for over a century—any criminal penalty,[51] and recently even some civil penalties, trigger double jeopardy protection.[52]

What is "jeopardy"? When a verdict-less outcome has nonetheless become a first jeopardy that will bar a second trial is, as previously mentioned, the subject of the second panel.

The term that seems the most self-evident is "same offence," but that term has proved the most difficult. Having spent a large part of the first twenty years of my scholarly career wrestling with the "same offence" issue, I will take this issue myself.

Akhil Amar has argued that "same offence" should be taken literally so that murder is the same offense as murder, but not the same offense as manslaughter even if there is only one dead body.[53] This argument is not correct because Blackstone said that murder is the same offense as manslaughter of the same victim "for the fact pro[s]ecuted is the [s]ame in both, though the offen[s]es differ in colouring and in degree."[54] When I pointed this out to Akhil, he said that Blackstone was not always right.[55] That is true, though I suspect Blackstone was likely right about more than most of us.

And Blackstone is right on the murder/manslaughter issue. In part, he is right because his view reflects common sense—one dead body should be one homicide.[56] Also, he is right because that had been the common law since at least 1591 when the King's Bench noted that:

> [I]f a man commits murder, and is indicted and convicted or acquitted . . . of manslaughter, he shall never answer to any indictment of the same death, for all is one and the same felony for one and the same death, although murder is in respect of the circumstance of the forethought malice more odious."[57]

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49. U.S. CONST. amend. V.

50. 4 BLACKSTONE, *supra* note 7, at 329.

51. *See Ex parte* Lange, 85 U.S. 163, 178 (1873).

52. *See, e.g.*, United States v. Halper, 490 U.S. 435, 447–49 (1989).

53. *See* Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1, 28–38 (1995).

54. 4 BLACKSTONE, *supra* note 7, at 330.

55. Telephone interview with Akhil Amar (1995).

56. To be fair, Amar and his coauthor would also prohibit a trial for manslaughter after a murder acquittal, but they would lodge the protection in a collateral estoppel doctrine found in the Due Process Clause. *See* Amar & Marcus, *supra* note 53, at 33. It is not clear why one would reject hundreds of years of common law and instead stretch collateral estoppel to accomplish the same outcome in acquittal cases. Moreover, the Amar-Marcus approach to a trial for the same offense after conviction is complex and difficult to predict. *Id*.

57. *See* Wrote v. Wigges, (1591) 76 Eng. Rep. 994, 996–97 (KB) (footnote omitted).

Except for dicta in a few cases and one brief detour, the Supreme Court eschewed the notion that one act or one result (one death) equals one offense, instead insisting that courts look to the statutory definitions to determine sameness.[58] The "same element" test was first clearly established in the 1932 case *Blockburger v. United States*, where the Court sought to understand whether Congress intended more than one conviction for a single sale of narcotics that violated two criminal statutes.[59] The Court held that if each statute requires at least one element that the other does not, Congress meant the offenses to be punished cumulatively in a single trial.[60]

Notice, however, what the Court has ignored. *Blockburger* is a case about statutory construction.[61] The opinion never mentions the Double Jeopardy Clause.[62] To be sure, the Court cites a Court opinion interpreting a statute that prohibited double jeopardy in the Philippines, but that was only a statute.[63] Of course, it can be argued that the Court was aware of the Double Jeopardy Clause and that the test it established implicitly settles the double jeopardy issue. But what is known for certain is that no reference to double jeopardy or the Constitution appears in the *Blockburger* opinion, in the court of appeals opinion, or in the briefs filed in the Supreme Court.[64] If the *Blockburger* Court meant to establish a test for same offense under the Double Jeopardy Clause, wouldn't it have said so? It seems more likely that the *Blockburger* Court did not consider two convictions in a single trial to raise a double jeopardy issue. The common law pleas in bar prevented a second trial, not a second conviction in a single trial.[65] If the 1932 Court did not consider the Double Jeopardy Clause to be relevant in a single trial, the modern Court's embrace of the *Blockburger* same offense test in successive prosecution cases is a classic example of a Court ignoring history.

Perhaps sensing *Blockburger*'s uncertain constitutional stature, the Court has occasionally suggested that *Blockburger* is not a completely satisfying test of same offense when successive prosecutions are the issue.[66] In *Brown v. Ohio*, for example, the Court dropped a footnote that said:

> The *Blockburger* test is not the only standard for determining whether successive prosecutions impermissibly involve the same offense. Even if

58. *See* Blockburger v. United States, 284 U.S. 299, 304 (1932).
59. *Id.* at 302–04.
60. *Id.* at 304.
61. *See id.*
62. *See id.*
63. *Id.* at 304 (citing Gaveries v. United States, 220 U.S. 338, 342 (1911)).
64. To be sure, the court of appeals cited a case for the proposition that "[t]here is nothing in the Constitution which prevents Congress from punishing separately each step leading to the consummation of a transaction which it has power to prohibit and punishing also the completed transaction." Blockburger v. United States, 50 F.2d 795, 797 (7th Cir. 1931) (quoting Albrecht v. United States, 273 U.S. 1 (1927)). But this is hardly an interpretation of "same offense" in the Double Jeopardy Clause.
65. The very terms *autrefois acquit* and *autrefois convict* presuppose an existing verdict.
66. *See* Brown v. Ohio, 432 U.S. 161 (1977).

> two offenses are sufficiently different to permit the imposition of consecutive sentences, successive prosecutions will be barred in some circumstances where the second prosecution requires the relitigation of factual issues already resolved by the first.[67]

This footnote principally relied on *In re Nielsen*[68] and *Ashe v. Swenson*.[69] But this was a weak doctrinal foundation. *Ashe* was a collateral estoppel case that did not even raise a "same offense" issue, and *Nielsen* was an 1889 prosecution of a Mormon for adultery and unlawful cohabitation;[70] one wonders if the *Nielsen* Court thought the local Utah prosecutor was too aggressive in charging both offenses. Another case signaling the possibility of a same conduct gloss on *Blockburger* was *Illinois v. Vitale*.[71] Weak foundation or no, it might be a better approach than *Blockburger*, and in the 1980s I used these sources to develop a same conduct test of same offense.[72]

In *Grady v. Corbin*, the Court developed an analytical framework that also built on these sources.[73] *Grady* held that the Double Jeopardy Clause bars a second prosecution if, to establish an essential element of that offense, the prosecution will prove conduct that constitutes an offense for which the defendant has already been prosecuted.[74] So, for example, if to prove reckless manslaughter, the State must prove conduct for which a defendant had already been prosecuted—driving while intoxicated and crossing the median—then the homicide charge was the same offense as the misdemeanor charge even though they are not the same offense under the *Blockburger* test; each offense required proof of an element the others did not. Thus, in effect, *Grady* held that the *Blockburger* same element test had to be supplemented with a same conduct gloss that would provide broader protection against successive prosecutions.[75]

Grady was a 5–4 decision that was unstable from the beginning, as I noted in 1991.[76] The precedents on which it relied were far from clear, as

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67. *Id.* at 166 n.6.

68. *In re* Nielsen, 131 U.S. 176 (1889).

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

70. *See generally Nielsen*, 131 U.S. 176; *Ashe*, 397 U.S. 436.

71. Illinois v. Vitale, 447 U.S. 410 (1980) (stating that if the offenses in question were different under *Blockburger*, they might otherwise be the same offense if the State had to relitigate the same conduct).

72. George C. Thomas III, *The Prohibition of Successive Prosecutions for the Same Offense: In Search of a Definition*, 71 IOWA L. REV. 323 (1986). I later attempted to improve on, and broaden, the same-conduct theory. *See* George C. Thomas III, *A Blameworthy Act Approach to the Double Jeopardy "Same Offense" Problem*, 83 CALIF. L. REV. 1027 (1995).

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

74. *Id.* at 510.

75. *Id.* at 508.

76. *See* George C. Thomas III, *A Modest Proposal to Save the Double Jeopardy Clause*, 69 WASH. U. L. Q. 195 (1991); *see generally Grady*, 495 U.S. 508, *overruled by* United States v. Dixon, 509 U.S. 688 (1993).

Justice Scalia would point out three years later.[77] But the main problem was the inherent distaste for allowing a minor traffic offense, like crossing the median, to bar liability for manslaughter or murder.[78] The Court could have limited the same conduct bar to felonies, though this might appear to be judging by fiat. Perhaps the Court could have reached back to the common law of Blackstone's day to claim that the pleas of *autrefois acquit* and *autrefois convict* were never used to allow a misdemeanor prosecution to bar a felony prosecution.[79] Moreover, most of the dicta the Court relied on to support its same conduct reading of same offense involved prosecutions for felonies.[80] *Grady* could have been limited to felonies.

But it was not to be. Achieving total "victory" for a same conduct gloss on the same offense dicta was costly. Justice Thomas replaced Justice Marshall and became the swing vote to overrule *Grady* a mere three years later in *United States v. Dixon*.[81] Scalia's majority opinion in *Dixon* insisted that the scraps of dicta Justice Brennan relied on in *Grady* were fully consistent with *Blockburger*.[82]

Whatever the merits of overruling *Grady*, *Dixon* holds that *Blockburger* is the only definition of same offense for the purposes of the Double Jeopardy Clause.[83] Perhaps the *Blockburger* same element test makes sense as a method for determining whether a legislature intends to punish both statutory violations in single trial; this was indeed the narrow holding in *Blockburger*.[84] But *Dixon* makes clear that it is also the test for determining when a second prosecution is for the same offense as the first under the Double Jeopardy Clause.[85] Indeed, in his characteristically sarcastic manner, Justice Scalia asserted that "it is embarrassing to assert that the single term 'same offence' (the words of the Fifth Amendment at issue here) has two different meanings—that what *is* the same offense is yet *not* the same offense."[86]

I have argued tirelessly,[87] and with no noticeable effect, that the *Blockburger* test does not provide the protection that the common law provided or that the framers envisioned when multiple trials are involved.

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77. *See Dixon*, 509 U.S. at 704–08.

78. *Id.* (discussing the problem that the *Grady v. Corbin* decision presented).

79. This follows from the articulation of the universal maxim as being twice placed in jeopardy of life. Misdemeanors were not capital offenses. *See* 4 BLACKSTONE, *supra* note 7, at 335–36.

80. *Grady*, 495 U.S. at 511–24.

81. *Dixon*, 509 U.S. 688.

82. *Id.* at 704–08.

83. *Id.*

84. Blockburger v. United States, 284 U.S. 299, 301–05 (1932).

85. *Dixon*, 509 U.S. at 704–08.

86. *Id.* at 704. But Scalia's attack misses the mark. One could hold that the double punishment issue is wholly a matter of legislative intent, as the Court had already done in *Missouri v. Hunter*, 459 U.S. 359 (1983), and then invest "same offense" with the *Grady* meaning when successive prosecutions occur. That was, after all, the origin of the double jeopardy principle. *See supra* notes 65–67 and accompanying text (discussing the problems associated with the *Blockburger* test).

87. *See, e.g.*, Thomas, *Prohibition*, *supra* note 72; Thomas, *Blameworthy Act*, *supra* note 72; Thomas, *supra* note 76.

But it is the Double Jeopardy Clause "same offense" world we inhabit; a world that contains some bizarre results. I could go on for hours but let us take just one example. As the King's Bench realized in 1591, and as Blackstone reiterated two centuries later, "the same death" is "one and the same felony."[88] The "fact prosecuted is the same in both."[89] But under *Blockburger/Dixon*, a prosecutor could charge and convict of more than one homicide count for a single killing if each offense required proof of an element that the other did not.[90] For example, consider a charge of felony murder and premeditated murder; each statute requires proof of an element that the other does not (killing in commission of a felony and premeditation).[91]

A few courts have approved of more than one conviction or prosecution for multiple homicide offenses based on a single killing.[92] As the Virginia Supreme Court recognized, this is where *Blockburger* leads.[93] In approving convictions for felony murder and aggravated involuntary manslaughter based on a single killing, the court wrote:

> To convict under the felony homicide statute, the Commonwealth must prove that the defendant committed the killing in the commission of a felonious act; however, the Commonwealth is not required to prove any level of intoxication or recklessness. To convict under the aggravated involuntary manslaughter statute, the Commonwealth must prove intoxication and recklessness; however, the Commonwealth is not required to prove that the defendant committed the killing in the commission of a felonious act.[94]

The Delaware Supreme Court agreed in *Chao v. State*, upholding six homicide convictions for the death of three victims.[95] The defendant was convicted of three counts of first-degree intentional murder and three counts of first-degree felony murder for causing the deaths of the same three victims during the commission of an arson.[96] The defendant was sentenced to seven life terms of imprisonment, based on the killing of three victims, the life

88. Wrote v. Wigges, (1591) 76 Eng. Rep. 994, 996–97 (KB).

89. 4 BLACKSTONE, *supra* note 7, at 330.

90. *See* Blockburger v. United States, 284 U.S. 299, 304 (1932); *Dixon*, 509 U.S. at 688.

91. *See* Thomas, *Blameworthy Act*, *supra* note 72, at 1036. Stephen Henderson argues that *mens rea* elements are not what the Court considers separate elements for purposes of *Blockburger*, and thus that my felony murder example is inapposite. Communication from Henderson to author, May 21, 2020. I hope he is right, but I have found no cases making that distinction.

92. *See* Payne v. Commonwealth, 674 S.E.2d 835, 835 (Va. 2009).

93. *Id.* at 840.

94. *Id.* at 840.

95. *See* Chao v. State, 604 A.2d 1351 (Del. 1992).

96. *Id.* at 1352.

sentences to be served consecutively "without benefit of probation or parole or any other reduction."[97]

But most courts that have faced this issue realize the absurdity of double counting one death under the *Blockburger* test.[98] As the Texas Court of Criminal Appeals put it: "Despite the apparent divergence of elements under *Blockburger*, a decisive majority of jurisdictions that have addressed the issue have held that a trial court cannot impose multiple convictions and sentences for variations of murder when only one person was killed."[99]

This is not a victory for *Blockburger*, but an example of courts using common sense to patch a hole in the Court's *Blockburger* lifeboat. Unfortunately, courts lack a sound basis for rejecting *Blockburger* in this context. Some courts simply conclude that the legislature did not intend more than one conviction for one death, [100] sometimes using the hoary "rule of lenity" that courts use when they wish to rule for a criminal defendant but have no compelling justification.[101] But these cases offer no reason to think that the legislature intended a result at odds with *Blockburger*.

Other courts simply assert that one death can only be one crime,[102] or that double jeopardy precludes more than one punishment when but one evil has been committed.[103] "[M]any jurisdictions have held that murder is [but] one crime with multiple theories of liability."[104] "The Colorado and Nebraska high courts explained that *Blockburger* applies only when one offense merges into another due to identity of elements and that the *Blockburger* test never applie[s] when a person [is] charged with the same crime committed in

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97. *Id.* at 1353. Defendant was sentenced to seven life terms, to be served consecutively. *Id.* She was convicted of other counts, including conspiracy and arson. *Id.* at 1352. The opinion does not state precisely which of the counts justified the consecutive life sentences, but I assume the murder counts were six of the seven.

98. *See* Ervin v. State, 991 S.W.2d 804 (Tex. Crim. App. 1999).

99. *Id.* at 807 (citing cases from over twenty jurisdictions).

100. *See* State v. Chicano, 584 A.2d 425, 434 (Conn. 1990); Houser v. State, 474 So.2d 1193, 1197 (Fla. 1985) (first citing Vela v. State, 450 So.2d 305, 308 (Fla. Dist. Ct. App. 1984); then citing Goss v. State, 398 So.2d 998 (Fla. Dist. Ct. App. 1981); and then citing Muszynski v. State, 392 So.2d 63, 65 (Fla. Dist. Ct. App. 1981)).

101. *See* People v. Lowe, 660 P.2d 1261, 1269 (Colo. 1983) (applying rule of lenity because "legislature has not manifested any clear intent that a defendant could be convicted of more than one kind of first-degree murder where there is but one victim"); State v. Landgraf, 913 P.2d 252, 262 (N.M. Ct. App. 1996) (explaining that lenity applies based on lack of "clear [legislative] intent that Defendant could be convicted of more than one type of homicide by vehicle for each victim").

102. Martinez Chavez v. State, 534 N.E.2d 731, 739 (Ind. 1989) (citing Sandlin v. State, 461 N.E.2d 1116, 1119 (Ind. 1984)).

103. Byrd v. United States, 510 A.2d 1035, 1036–37 (D.C. Cir. 1986).

104. Ervin v. State, 991 S.W.2d 804, 809 (Tex. Crim. App. 1999) (first citing Gray v. State, 463 P.2d 897, 911 (Alaska 1970); then citing State v. Arnett, 760 P.2d 1064, 1068–69 (Ariz. 1988); then citing *Lowe*, 660 P.2d at 1271; then citing State v. Oeur, 711 A.2d 118, 119 (Me. 1998); then citing Wooten-Bey v. State, 520 A.2d 1090, 1091–92 (Md. 1987); then citing State v. White, 577 N.W.2d 741, 747 (Neb. 1998); then citing State v. White, 549 N.W.2d 676, 682 (S.D. 1996); and then citing Byrd v. United States, 500 A.2d 1376, 1384–85 (D.C. Cir. 1985)).

alternate ways."[105] Notice the judicial sleight of hand in these cases. To claim that *Blockburger* does not make one crime into separate offenses requires an account, other than *Blockburger*, of when two offenses *are* the same crime. The Court, and the lower courts, have failed to provide that account.

There is no avoiding that despite the Supreme Court's embrace of *Blockburger* in *Dixon*, it is, at best, an incomplete account of "same offense." The New Mexico Supreme Court agreed.[106] Embracing the principle that a single death can justify but one conviction, *State v. Montoya* rejected the contrary result that *Blockburger* produces.[107] As the court noted, while *Blockburger* offers "the virtue of simplicity, it has been justly criticized as a 'mechanical test that compares statutory elements and is only sometimes related to substantive sameness.'"[108]

In *Montoya*, the prosecutor sought convictions for felony murder and manslaughter based on a single killing.[109] The district court and the supreme court vacated the manslaughter conviction.[110] But in states that follow *Blockburger*, the New Mexico prosecutor could have had two convictions and consecutive sentences for one killing.[111] And thanks to the *Gamble* Court's unwillingness to rethink the century-old dual sovereignty doctrine, additional federal charges can be prosecuted as well.[112] Perhaps the victim was a federal law enforcement officer, or the killing took place during a robbery of a federally-insured bank. So we are up to three or four convictions and separate prosecutions from a single killing. One fact, one death, one killing turns out to multiply many fold.

It's no good saying, "well, prosecutors would not be so aggressive." The point to a constitutional guarantee against double jeopardy is to provide limits that exist without regard to the good faith of prosecutors. And the New Mexico prosecutor in *Montoya* did seek two convictions and sentences for a single killing.[113]

Prosecutors, start your engines.

To be sure, some states have enacted statutory bars to successive prosecutions that are based on the same conduct or same transaction (and I am indebted here to Adam Kurland for his excellent ABA monograph, *Successive Criminal Prosecutions*).[114] Moreover, the Department of Justice has a self-imposed limitation on re-prosecuting the same conduct that has

105. *Id.* at 810 (first citing *Lowe*, 660 P.2d at 1266–67; and then citing *White*, 577 N.W.2d at 745).
106. *See* State v. Montoya, 306 P.3d 426, 439 (N.M. 2013).
107. *Id.* (overruling precedent).
108. *Id.* at 433 (quoting Thomas, *Blameworthy Act*, *supra* note 72, at 1028).
109. *Id.* at 429.
110. *Id.* at 440.
111. Blockburger v. United States, 284 U.S. 299, 302 (1932).
112. Gamble v. United States, 139 S. Ct. 1960, 1964 (2019).
113. *Montoya*, 306 P.3d at 426.
114. Adam Harris Kurland, *Successive Criminal Prosecutions: The Dual Sovereignty Exception to Double Jeopardy in State and Federal Courts* (Am. Bar Assoc. 2001).

resulted in a state verdict.[115] But it is merely a guideline that confers no enforceable rights on defendants.[116]

This symposium, however, is about the Double Jeopardy Clause and I will keep my focus there.

What would Blackstone say about the *Blockburger* test? Hard to know. In his day, the same element test and same conduct test might have produced the same outcomes. Indeed, Blackstone stated his pleas in bar in ways consistent with a same act test and a *Blockburger* test.[117] As noted earlier, he concluded that a conviction of manslaughter barred a prosecution for murder "for the fact pro[s]ecuted is the [s]ame in both, though [they] differ in colouring and in degree."[118] The next sentence: "It is to be ob[s]erved, that the pleas of . . . former acquittal, and former conviction, mu[s]t be upon a pro[s]ecution for the [s]ame identical act and crime."[119] He apparently did not see the difference between a same act and same element test because he saw act and crime as two sides of the same coin. Murder was an act and a crime.

So, what would Blackstone say when faced more generally with the American double jeopardy doctrine in 2020? It is a strange, alien creature that he would not recognize: pleas in bar that permit multiple prosecutions for what would look to him like the same offense (felony murder would strike Blackstone as the same offense as intentional murder if there was one dead body);[120] pre-verdict mistrials that permit the State to try the defendant again (and again and again if necessary); and a dual sovereignty doctrine that permits both "monarchs" to try a defendant for the exact same offense. A strange, alien creature indeed.

But the double jeopardy common law of Blackstone's day is alien to modern criminal law and procedure. It is fair to say that the common law prohibition of more than one jeopardy for the same offense is buried under a blizzard of state and federal statutory crimes and new rules of procedure, assisted by a notion of dual sovereignty that would have been alien to Blackstone, and blessed by a Supreme Court that reposes enormous trust in prosecutors.

The common law that led to the Fourth Amendment[121] is not so alien to 2020. A common law magistrate from 1787 would recognize much of 2020 Fourth Amendment law that is not spelled out in the text of the amendment. That well-developed body of law gives the modern Court a template from

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115. *See* U.S. DEP'T OF JUST., JUST. MANUAL 9-2.031 (2020).

116. *See* Rinaldi v. United States, 434 U.S. 22 (1977); Petite v. United States, 361 U.S. 529 (1960).

117. 4 BLACKSTONE, *supra* note 7, at 329; Blockburger v. United States, 284 U.S. 299, 304 (1932) (citing Gavieres v. United States, 220 U.S. 338, 342 (1911)).

118. 4 BLACKSTONE, *supra* note 7, at 330.

119. *Id.*

120. *See supra* notes 91–113 and accompanying text (discussing different approaches to different kinds of murder).

121. U.S. CONST. amend. IV.

which to draw ideas about the meaning of an "unreasonable" search and an "unreasonable" seizure.[122] Here's a brief primer in some aspects of the common law of trespass, from which our Fourth Amendment developed:

(1) Arrests for felonies can be made in public without a warrant.[123]

(2) Warrants must be issued by judicial officers.[124]

(3) The judicial officer must be capable of rendering an unbiased, independent judgment.[125]

(4) The judicial officer must examine the person providing cause for issuing a warrant under oath and determine whether cause has been shown.[126]

(5) Before a warrant can be executed in a dwelling, the officer must knock and announce.[127]

(6) The privacy of a dwelling includes the curtilage.[128]

(7) One cannot contest a search unless one has "standing" in the area searched; one cannot, for example, object to the search of a home belonging to another.[129]

(8) The "night watch" can stop suspicious persons in a village and inquire into their purpose.[130]

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122. *Id.*

123. 4 BLACKSTONE, *supra* note 7, at 289–90; 5 MATTHEW BACON, A NEW ABRIDGEMENT OF THE LAW 165 (Edward Christian ed., 1766); 2 WILLIAM HAWKINS, TREATISE OF THE PLEAS OF THE CROWN 86–87 (1st ed. 1724). *Accord* United States v. Watson, 423 U.S. 411 (1976).

124. 4 BLACKSTONE, *supra* note 7, at 287 (noting the existence of "extraordinary" cases in which the privy council or secretaries of state can issue warrants); 2 HAWKINS, *supra* note 123, at 84–85; Coolidge v. New Hampshire, 403 U.S. 443 (1971) (discussing that a warrant violated Fourth Amendment when issued by chief prosecuting officer serving as justice of the peace).

125. MICHAEL DALTON, THE COUNTRY JUSTICE 4–5 (1622). *Accord Coolidge*, 403 U.S. 443; Connally v. Georgia, 429 U.S. 245 (1977) (per curiam). Dalton explicitly condemned justices of the peace accepting a "fee, gift, or reward." DALTON, *supra*, at 5, ¶4, but that is precisely the Georgia system *Connally* struck down in a unanimous per curiam opinion; the magistrate received a fee for issuing warrants but no fee for refusing to issue a warrant.

126. 4 BLACKSTONE, *supra* note 7, at 297; *cf.* 2 HAWKINS, *supra* note 123, at 85 (discussing that a warrant based on suspicion should be based on person who has the suspicion, implying, I think, that the justice examine the person who has suspicion). *Accord* Nathanson v. United States, 290 U.S. 41 (1933) (discussing that a magistrate must determine probable cause, not rely on the officer's assertion that he has probable cause).

127. 4 BLACKSTONE, *supra* note 7, at 289; 5 BACON, *supra* note 123, at 177; 2 HAWKINS, *supra* note 123, at 86; 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 583 (London, E. and R. Nutt and R. Gosling, printers, 1776); *accord* Wilson v. Arkansas, 514 U.S. 927 (1995) (admitting of exceptions).

128. 5 BACON, *supra* note 123, at 177; 3 WILLIAM NELSON, AN ABRIDGEMENT OF THE COMMON LAW 395 (London, E. and R. Nutt and R. Gosling, printers, 1724). *Accord* Collins v. Virginia, 138 S. Ct. 1663 (2018).

129. 5 BACON, *supra* note 123, at 177; *accord* Rakasa v. Illinois, 439 U.S. 128 (1978); Jones v. United States, 362 U.S. 257 (1960).

130. 5 BACON, *supra* note 123, at 166; 2 HAWKINS, *supra* note 123, at 77; 2 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 52, cap. 29 (London, E. and R. Brooke, printers, 1644). *Accord* Terry v. Ohio, 392 U.S 1 (1968). The overlap is incomplete. The common law allowed suspicious night-walkers to be detained overnight while *Terry* permits only a brief stop. Larry Rosenthal argues that the standard for detention of night walkers was the same as for arrest, another difference from *Terry*. *See*

(9) Constables can enter a dwelling without a warrant to stop violence occurring inside the dwelling.[131]

(10) An arrest, begun in public, permits an officer to pursue the suspect into a house without a warrant.[132]

(11) A search that is otherwise justified cannot exceed the scope of the justification; for example, a search of a house for stolen goods permitted by warrant does not permit the search under a woman's dress.[133]

(12) Though the common law on this point was sparse, it appears that an entry into a house without a warrant but with consent was legal.[134]

I do not claim that the Fourth Amendment is a model of clarity. But most of the questions that occur today have a common law analog that the Court can at least consult. Of course, the common law magistrate would wonder about modern Fourth Amendment inventions, like the exclusionary rule that requires the antidote of a good faith exception.[135] The common law magistrate might also wonder about the ubiquity of the consent search. The scant reference to consent as a way to make legal searches of persons suggests that the common law constable would not have dared ask for consent to search a person stopped on the street. But, all in all, the common law magistrate would not be lost in the basic Fourth Amendment doctrine.

That sturdy common law doctrine provides a framework for the modern Court. In *Wilson v. Arkansas*, the Court unanimously turned to the common law to interpret the Fourth Amendment to include a knock and announce requirement before executing a search warrant in a home.[136] To be sure, *Wilson* created exceptions where the common law admitted of no exceptions, but the Court at least had a place to begin.[137] In *United States v. Watson*, the Court drew on the common law to conclude that arrest warrants are not required for a felony arrest in public.[138] In 2008, eight members of the Court signed an opinion stating that history can sometimes provide "a conclusive answer" to a Fourth Amendment question.[139]

Lawrence Rosenthal, *Pragmatism, Originalism, Race, and the Case Against Terry v. Ohio*, 43 TEX. TECH L. REV. 299 (2010).

131. 5 BACON, *supra* note 123, at 165; 1 HALE, *supra* note 127, at 95. *Accord* Brigham City, Utah v. Stuart, 547 U.S. 398 (2006).

132. 5 BACON, *supra* note 123, at 179. *Accord* United States v. Santana, 427 U.S. 38 (1976).

133. 5 BACON, *supra* note 123, at 155. *Accord* Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364 (2009).

134. 5 JOHN COMYNS, A DIGEST OF THE LAWS OF ENGLAND 535 (London, Woodfall and W. Strahan, printers, 1767). *Accord* United States v. Matlock, 415 U.S. 164 (1974).

135. *See* United States v. Leon, 468 U.S. 897 (1984) (announcing good faith exception to exclusionary rule when officer has a facially valid search warrant).

136. Wilson v. Arkansas, 514 U.S. 927, 929 (1995).

137. *Id.* at 934.

138. United States v. Watson, 423 U.S. 411, 425 (1976).

139. Virginia v. Moore, 553 U.S. 164, 171 (2008).

That raises the question of why modern double jeopardy law, but not the Fourth Amendment, is a grotesquely disfigured descendant of the common law.

And the answer lies in my title. The right to liberty, privacy, and property had been threatened by various monarchs in England for hundreds of years prior to the American Bill of Rights.[140] To be sure, the framers wrote with the recent and famous tort cases against King George III in mind.[141] But an elaborate, sophisticated common law of trespass had been in place for centuries when King George III attacked the printers who criticized him.[142] Courts today can draw on that elaborate body of common law.

No similar elaborate doctrine protected a defendant's right to repose. Pleas of former jeopardy can be found in thirteenth century English cases,[143] but the sparse criminal law, even as late as Blackstone, did not require an elaborate doctrine. The double jeopardy concept was, under the substantive law of Blackstone's day, self-executing. Larceny of X was the same offense as larceny of X. Burglarizing Y's home was the same offense as burglarizing Y's home. Murder of Z was the same offense as manslaughter of Z.

Thus, when the Court began to face complicated questions of mistrial, same offense, and dual sovereignty, it had no common law template on which to rely. It had to make double jeopardy law from scratch.

The Court has done a pretty poor job. It has failed to recognize that a complex modern criminal law and procedure requires a more protective doctrine than now exists. But it is probably too late in the game to change course. Double jeopardy will perhaps never provide anything approaching what defendants enjoyed in Blackstone's day.

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140. JAMES OLDHAM, THE MANSFIELD MANUSCRIPTS AND THE GROWTH OF ENGLISH LAW IN THE EIGHTEENTH CENTURY 204 (UNC, 1st ed. 2012).

141. *See* Entick v. Carrington (1765) 95 Eng. Rep. 807 (CP); Wilkes v. Wood (1763) 98 Eng. Rep. 489, 499 (CP); Money v. Leach (1765) 97 Eng. Rep. 1075, 1077 (KB); Huckle v. Money (1763) 95 Eng. Rep. 768, 768 (CP).

142. *Entick*, 95 Eng. Rep. 807.

143. *See* 1 SELECT PLEAS OF THE CROWN 1200-1225, at 27–28, 55 (Selden Society 2012) (referencing out cases 76 and 124).