

# A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy

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# A BRIEF HISTORY OF THE FIFTH AMENDMENT GUARANTEE AGAINST DOUBLE JEOPARDY\*

David S. Rudstein\*\*

## INTRODUCTION

The Double Jeopardy Clause of the Fifth Amendment provides: “[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb.”<sup>1</sup> This constitutional guarantee encompasses several related protections. First, it bars the government<sup>2</sup> from prosecuting a person a second time for the same

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<sup>1</sup> U.S. CONST. amend. V.

<sup>2</sup> Under the so-called “dual sovereignty” doctrine, two separate sovereigns, such as two states or the federal government and a state, can each prosecute an individual for the same act without running afoul of the Double Jeopardy Clause. *E.g.*, *United States v. Lara*, 541 U.S. 193, 197, 210 (2004) (holding that a conviction in an Indian tribal court of a non-tribal member Indian for “violence to a policeman” did not bar a subsequent federal prosecution for assaulting a federal officer); *Heath v. Alabama*, 474 U.S. 82, 87–88 (1985) (holding that an Alabama prosecution for “murder during a kidnaping” was not barred by a previous Georgia conviction for murder); *United States v. Wheeler*, 435 U.S. 313, 329–30 (1978) (holding that a federal prosecution of an Indian for statutory rape was not barred by a previous conviction in an Indian tribal court for the lesser-included offense of contributing to the delinquency of a minor); *Abbate v. United States*, 359 U.S. 187, 196 (1959) (holding that a federal prosecution for conspiracy to destroy telephone company property was not barred by a previous Illinois conviction for conspiring to injure or destroy property of another); *United States v. Lanza*, 260 U.S. 377, 382 (1922) (holding that a federal prosecution for manufacturing, transporting, and possessing intoxicating liquor was not barred by previous Washington convictions for manufacturing, transporting, and possessing liquor); *see also* *Bartkus v. Illinois*, 359 U.S. 121, 139 (1959) (holding that, under the Due Process Clause of the Fourteenth Amendment, an Illinois prosecution for armed robbery was not barred by a previous federal acquittal on a charge of robbing a federally insured savings and loan institution). The Supreme Court reasons that a crime constitutes an offense against the sovereignty of the government, so “[w]hen a defendant in a single act violates the ‘peace and dignity’ of two sovereigns by breaking the laws of each, he has committed two distinct ‘offences.’” *Heath*, 474 U.S. at 88 (citations omitted).

Over the years, many judges and scholars have criticized the dual sovereignty doctrine. *See, e.g., id.* at 98–101 (Marshall, J., dissenting) (as applied in the federal-state context);

offense after he has already been tried and acquitted.<sup>3</sup> Second, it prohibits the government from prosecuting a person a second time for the same offense after he has already been convicted.<sup>4</sup> Third, it forbids the government from imposing multiple punishments upon a person for the same offense in successive proceedings.<sup>5</sup> Finally, in some circumstances, it bars the government from prosecuting a person a second time for the same offense after a judge prematurely terminated his first

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*Abbate*, 359 U.S. at 202–03 (Black, J., dissenting); *Bartkus*, 359 U.S. at 155–64 (Black, J., dissenting); *United States v. All Assets of G.P.S. Auto. Corp.*, 66 F.3d 483, 497–99 (2d Cir. 1995) (Calabresi, J., concurring) (questioning *Heath*, 474 U.S. 82, *Abbate*, 359 U.S. 187, and *Bartkus*, 359 U.S. 121); Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1, 4–27 (1995); J.A.C. Grant, *The Lanza Rule of Successive Prosecutions*, 32 COLUM. L. REV. 1309, 1319–28 (1932); Sandra Guerra, *The Myth of Dual Sovereignty: Multijurisdictional Drug Law Enforcement and Double Jeopardy*, 73 N.C. L. REV. 1159, 1209–10 (1995); George C. Pontikes, *Dual Sovereignty and Double Jeopardy: A Critique of Bartkus v. Illinois and Abbate v. United States*, 14 CASE W. RES. L. REV. 700, 704–05 (1963); Robert Matz, Note, *Dual Sovereignty and the Double Jeopardy Clause: If at First You Don't Convict, Try, Try Again*, 24 FORDHAM URB. L.J. 353, 367–76 (1997).

<sup>3</sup> *E.g.*, *Smith v. Massachusetts*, 543 U.S. 462 (2005); *Smalis v. Pennsylvania*, 476 U.S. 140 (1986); *Sanabria v. United States*, 437 U.S. 54 (1978); *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977); *United States v. Sisson*, 399 U.S. 267 (1970); *Benton v. Maryland*, 395 U.S. 784 (1969); *Fong Foo v. United States*, 369 U.S. 141 (1962) (*per curiam*); *Green v. United States*, 355 U.S. 184 (1957); *Kepner v. United States*, 195 U.S. 100 (1904); *United States v. Ball*, 163 U.S. 662 (1896); *see also Bullington v. Missouri*, 451 U.S. 430, 446 (1981) (holding that the imposition of a sentence of life imprisonment at a trial-like capital sentencing proceeding bars a subsequent capital sentencing proceeding for the same offense); *Burks v. United States*, 437 U.S. 1, 11 (1978) (holding that an appellate court's reversal of a conviction because the evidence introduced at trial was insufficient to support the jury's verdict bars a subsequent trial for the same offense); *Ashe v. Swenson*, 397 U.S. 436, 444–45 (1970) (holding that the Double Jeopardy Clause incorporates the doctrine of collateral estoppel so that an acquittal of one offense can bar a subsequent prosecution for a related offense).

<sup>4</sup> *E.g.*, *United States v. Dixon*, 509 U.S. 688 (1993); *Harris v. Oklahoma*, 433 U.S. 682 (1977) (*per curiam*); *Brown v. Ohio*, 432 U.S. 161 (1977); *Ex parte Nielsen*, 131 U.S. 176 (1889).

<sup>5</sup> *Hudson v. United States*, 522 U.S. 93, 99 (1997); *Missouri v. Hunter*, 459 U.S. 359, 366 (1983); *see also Dep't of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 784 (1994) (holding that a "drug tax" assessed after a conviction violates double jeopardy); *North Carolina v. Pearce*, 395 U.S. 711, 718–19 (1969) (holding that "punishment already exacted must be fully 'credited'" upon re-conviction), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794 (1989). *But see Witte v. United States*, 515 U.S. 389, 407 (1995) (Scalia, J., concurring in the judgment) ("I adhere to my view that 'the Double Jeopardy Clause prohibits successive prosecution, not successive punishment.'" (citation omitted)).

With respect to multiple punishments for the same offense in a *single* trial, "the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Hunter*, 459 U.S. at 366.

trial, either by declaring a mistrial<sup>6</sup> or by dismissing the charge against him before the fact-finder reached a verdict in the case.<sup>7</sup>

The overall design of the Double Jeopardy Clause was perhaps best expressed by the Supreme Court in *Green v. United States*.<sup>8</sup> Writing for the majority, Justice Hugo L. Black stated:

The constitutional prohibition against "double jeopardy" was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. . . . The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.<sup>9</sup>

In recent years, courts and jurists have considered the protection against being placed in jeopardy twice for the same offense to be a fundamental right.<sup>10</sup> The Supreme Court of the United States in *Benton v. Maryland*<sup>11</sup> stated that "[t]he fundamental nature of the guarantee against double jeopardy can hardly be doubted."<sup>12</sup> A

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<sup>6</sup> See, e.g., *United States v. Jorn*, 400 U.S. 470 (1971) (declaring mistrial sua sponte so the Government's witnesses could consult with attorneys about their constitutional rights); *Downum v. United States*, 372 U.S. 734 (1963) (declaring mistrial at the Government's request, and over the defendant's objection, because the Government's key witness was not present).

<sup>7</sup> E.g., *United States v. Scott*, 437 U.S. 82, 99–100 (1978) (holding that the defendant could be tried twice for the same crime, but indicating that in some cases a retrial would be barred); *United States v. Govro*, 833 F.2d 135, 137 (9th Cir. 1987) (finding double jeopardy did exist and the defendant could not be tried twice for the same crime).

<sup>8</sup> 355 U.S. 184 (1957).

<sup>9</sup> *Id.* at 187–88.

<sup>10</sup> See *infra* notes 11–15 and accompanying text. But see MAX RADIN, HANDBOOK OF ANGLO-AMERICAN LEGAL HISTORY 228 (1936) (stating that the principle against placing a person in double jeopardy "is not now an accepted doctrine in Continental systems"); JAY A. SIGLER, DOUBLE JEOPARDY: THE DEVELOPMENT OF A LEGAL AND SOCIAL POLICY 4 (1969) (concluding that it is likely that "double jeopardy was not so fundamental a privilege" in early English law). See generally Jill Hunter, *The Development of the Rule Against Double Jeopardy*, 5 J. LEGAL HIST. 1, 3 (1984) (questioning the fundamentality of the principle).

<sup>11</sup> 395 U.S. 784 (1969).

<sup>12</sup> *Id.* at 795.

dozen years earlier, Justice Felix Frankfurter called the protection “an indispensable requirement of a civilized criminal procedure.”<sup>13</sup> Justice Ivan Rand of the Supreme Court of Canada made a similar claim, maintaining that this “cardinal principle” lies “[a]t the foundation of criminal law.”<sup>14</sup> One prominent scholar believes that “[n]o other procedural doctrine is more fundamental or all-pervasive.”<sup>15</sup>

This article will explore the sources of the Fifth Amendment guarantee against double jeopardy and trace its history through its incorporation into the Due Process Clause of the Fourteenth Amendment.

### I. ORIGINS OF THE GUARANTEE

The precise origins of the guarantee against double jeopardy are unclear. Early in the twentieth century, one American court declared that the doctrine “seems to have been always embedded in the common law of England, as well as in the Roman law, and doubtless in every other system of jurisprudence, and, instead of having a specific origin, it simply always existed.”<sup>16</sup> This claim certainly is overstated. The Code of Hammurabi,<sup>17</sup> for example, makes no reference to double jeopardy.<sup>18</sup> This, in part, led one scholar to conclude that “[t]he alleged universality of the double jeopardy principle is not apparent from a study of early law.”<sup>19</sup> Indeed, the United States Supreme Court itself recognized in *Palko v. Connecticut*<sup>20</sup> that “[d]ouble jeopardy . . . is not everywhere forbidden.”<sup>21</sup>

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<sup>13</sup> *Green v. United States*, 355 U.S. 184, 200 (1957) (Frankfurter, J., dissenting).

<sup>14</sup> *Cullen v. The King*, [1949] S.C.R. 658, 668 (Rand, J., dissenting).

<sup>15</sup> MARTIN L. FRIEDLAND, *DOUBLE JEOPARDY* 3 (1969) (“Double jeopardy plays a major role in such areas as recharging an accused with the same or another offence, new trials, [government] appeals, discharging the jury, framing an indictment, sentencing on multiple counts, withdrawing a plea, the relationship between courts, and the recognition of foreign criminal judgments.”).

<sup>16</sup> *Stout v. State ex rel. Caldwell*, 130 P. 553, 558 (Okla. 1913).

<sup>17</sup> See *THE OLDEST CODE OF LAWS IN THE WORLD: THE CODE OF LAWS PROMULGATED BY HAMMURABI, KING OF BABYLON, B.C. 2285–2242* (C.H.W. Johns trans., 2000).

<sup>18</sup> SIGLER, *supra* note 10, at 3 n.6; Note, *Double Jeopardy and Dual Sovereigns*, 35 *IND. L.J.* 444, 445 (1960). *But see* GEORGE C. THOMAS III, *DOUBLE JEOPARDY: THE HISTORY, THE LAW* 1 (1998) (asserting that “laws against changing a final judgment can be traced to the Code of Hammurabi.”); *id.* at 73 (stating that the first law of Hammurabi contains an “effective way of preventing a second trial by the same prosecutor after an acquittal” and that the fifth law contains a way of binding judges to a single verdict).

<sup>19</sup> SIGLER, *supra* note 10, at 3 n.6.

<sup>20</sup> 302 U.S. 319 (1937), *overruled by* *Benton v. Maryland*, 395 U.S. 784 (1969).

<sup>21</sup> *Id.* at 326 n.3. See also RADIN, *supra* note 10, at 228 (stating that the principle against placing a person in double jeopardy “is not now an accepted doctrine in Continental systems”).

Nevertheless, there can be no doubt that the protection against double jeopardy possesses a long history. Ancient Jewish law contains several references to principles encompassed by double jeopardy law.<sup>22</sup> The Talmud, a compilation of the teachings of the rabbinic sages, proclaims that in capital cases, an acquittal may not be reversed.<sup>23</sup> In the Old Testament, *Deuteronomy 25:2* states that when a dispute between men is brought before a court, a guilty man who deserves to be beaten shall be flogged in the presence of the judge according to the measure of his misdeeds.<sup>24</sup> The Talmud relates that Rabbi Akiba relied upon this verse to explain why Jewish law prohibited a person liable to a death penalty by a human tribunal from also being flogged.<sup>25</sup> Rabbi Akiba interpreted the verse to mean that “you make [the guilty man] liable to punishment for *one* misdeed, but you cannot hold him liable [in two ways as] for *two* misdeeds . . . [[i].e., death and lashes].”<sup>26</sup> A modern writer interprets Rabbi Akiba’s statement to mean “that for one offense, only one punishment might be inflicted.”<sup>27</sup>

The Talmud also contains a discussion by Rabbi Johanan of the situation in which a man forcibly engages in sexual intercourse with his maiden sister.<sup>28</sup> Sexual intercourse with a maiden was punishable by a fine, whereas forcible sexual intercourse by a man with his sister, after forewarning, was punishable by flogging.<sup>29</sup> Rabbi Johanan explained that a man who engaged in forcible sexual intercourse with his maiden sister would be liable *only* for the lashes, because *Deuteronomy 25:2* means that “you punish him because of one guilt but not because of two guilts.”<sup>30</sup>

One commentator suggests that the biblical story of Cain and Abel can be interpreted as showing that “two punishments for the same conduct would have offended the Hebrew sense of justice.”<sup>31</sup> After God banished Cain for killing Abel:

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<sup>22</sup> See *infra* notes 23–30.

<sup>23</sup> BABYLONIAN TALMUD, *Sanhedrin* 32a, 33b (Isidore Epstein ed., Jacob Shachter trans., Soncino Press 1935); see also HYMAN E. GOLDIN, *HEBREW CRIMINAL LAW AND PROCEDURE* 108–09 & n.6 (1952); SAMUEL MENDELSON, *THE CRIMINAL JURISPRUDENCE OF THE ANCIENT HEBREWS* 150 & n.358 (2d ed. 1968).

<sup>24</sup> The King James Bible translates this provision as “according to his fault,” *Deuteronomy 25:2* (King James), while the Revised Standard version translates it as “in proportion to his offense.” *Deuteronomy 25:2* (Revised Standard).

<sup>25</sup> BABYLONIAN TALMUD, *Makkoth* 13b (Isidore Epstein ed., H.M. Lazarus trans., Soncino Press 1935).

<sup>26</sup> *Id.* (first and third brackets added).

<sup>27</sup> GEORGE HOROWITZ, *THE SPIRIT OF JEWISH LAW* 170 (1973). See also MENDELSON, *supra* note 23, at 35 & n.62.

<sup>28</sup> BABYLONIAN TALMUD, *Kethuboth* 32b (Isidore Epstein ed., Samuel Daiches trans., Soncino Press 1936).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Note, *supra* note 18, at 444.

Cain said unto the LORD, My punishment *is* greater than I can bear. Behold, thou hast driven me out this day from the face of the earth; and from thy face shall I be hid; and I shall be a fugitive and a vagabond in the earth; and it shall come to pass, *that* every one that findeth me shall slay me. And the LORD said unto him, Therefore whosoever slayeth Cain, vengeance shall be taken on him sevenfold. And the LORD set a mark upon Cain, lest any finding him should kill him.<sup>32</sup>

Justice Hugo L. Black asserted in his dissenting opinion in *Bartkus v. Illinois*<sup>33</sup> that “[f]ear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in western civilization. Its roots run deep into Greek and Roman times.”<sup>34</sup> An examination of early Greek and Roman law bears out Justice Black’s assertion. Both legal systems contained some form of protection against double jeopardy. In 355 B.C., the Greek orator and pleader in law courts Demosthenes, in a speech against Leptines, stated that “the laws forbid the same man to be tried twice on the same issue, be it a civil action, a scrutiny, a contested claim, or anything else of the sort.”<sup>35</sup> Two years later, in a speech he wrote to be given by Diodorus against Timocrates, Demosthenes stated: “The legislator does not permit any question once decided by judgement of the court to be put a second time . . . .”<sup>36</sup> It is said that in ancient Athens, “[a] man could not be tried twice for the same offense.”<sup>37</sup> Referring to the practice in the last half of the fifth century, one scholar wrote: “The main concern of a man brought into court was to win a verdict by one means or another, for once tried he could not be prosecuted again on the same charge, the rule *ne bis in eadem re* being accepted in Athens if

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<sup>32</sup> *Genesis* 4:13–15 (King James).

<sup>33</sup> 359 U.S. 121 (1959).

<sup>34</sup> *Id.* at 151–52 (Black, J., dissenting). See also *Benton v. Maryland*, 395 U.S. 784, 795 (1969) (“[The guarantee against double jeopardy’s] origins can be traced to Greek and Roman times . . .”).

<sup>35</sup> Demosthenes, *Against Leptines*, in *OLYNTIACS, PHILIPPICS, MINOR PUBLIC SPEECHES, SPEECH AGAINST LEPTINES*, XX § 147, at 589 (J.H. Vince trans., Harvard Univ. Press 1998) (1930).

<sup>36</sup> Demosthenes, *Against Timocrates*, in *AGAINST MEIDIAS, ANDROTIAN, ARISTOCRATES, TIMOCRATES, ARISTOGEITON*, XXIV § 55, at 407 (J.H. Vince trans., Harvard Univ. Press 1986) (1935).

<sup>37</sup> ROBERT J. BONNER, *LAWYERS AND LITIGANTS IN ANCIENT ATHENS: THE GENESIS OF THE LEGAL PROFESSION* 195 (1927). See also JOHN POTTER, G. DUNBAR & CHARLES ANTHON, *ANTIQUITIES OF GREECE* 147 (New York, Collins 1825) (“There shall be no renewing of any thing dispatched by judges either in public or private matters, or by the people, according to the enactments of their decrees . . . .”); *id.* (“The judges are not to proceed so strictly, as that corporal and pecuniary punishments shall be inflicted at one and the same time.”).

not in Sparta . . . .”<sup>38</sup> This prohibition against double jeopardy in early Greek law may have been incomplete, however, for “the pleaders were not slow to find loopholes in the law and to employ various devices, including charges of false witness, for reopening questions which had apparently already been disposed of by the courts.”<sup>39</sup>

In the Roman Republic, an acquittal by a magistrate in a criminal prosecution barred further proceedings of any kind against the accused.<sup>40</sup> The Roman Empire also provided some protection against double jeopardy. During the early years of the Empire, “there was no appeal and no chance of reviewing the verdict of a jury.”<sup>41</sup> On one occasion during the reign of Tiberius in the first century, a jury acquitted a man Tiberius thought should have been convicted.<sup>42</sup> Tiberius scolded the jury and charged the man with another crime, “but he could not affect the verdict already given.”<sup>43</sup> Shortly thereafter, the rulers of Rome began providing substitutes for jury trials<sup>44</sup> and allowing an accuser to seek review of an acquittal in the imperial appeal courts.<sup>45</sup> Despite these new procedures, some protection against double jeopardy still existed. Iulius Paulus, a leading Roman jurist at the turn of the third century, stated that “[a]fter a public acquittal a defendant can again be prosecuted by his informer within thirty days, *but after that time this cannot be done.*”<sup>46</sup> The *Digest of Justinian*, a collection and abridgment of juristic writings on then-existing Roman law compiled under the Byzantine emperor Justinian I and published in 533, provided that “[t]he governor must not allow a man to be charged with the same offenses of which he has already been acquitted,”<sup>47</sup> and that “a person cannot be charged on account of the same crime under several statutes.”<sup>48</sup>

<sup>38</sup> J. WALTER JONES, *THE LAW AND LEGAL THEORY OF THE GREEKS: AN INTRODUCTION* 148 (1956).

<sup>39</sup> *Id.* at 149.

<sup>40</sup> H.F. JOLOWICZ, *HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW* 325 (2d corrected ed. 1954); 1 JAMES LEIGH STRACHAN-DAVIDSON, *PROBLEMS OF THE ROMAN CRIMINAL LAW* 155 (1912).

<sup>41</sup> 2 STRACHAN-DAVIDSON, *supra* note 40, at 157.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* See also PANDIAS M. SCHISAS, *OFFENCES AGAINST THE STATE IN ROMAN LAW* 190 (1926) (stating that Tiberius had “no right to revise” the jury’s decision).

<sup>44</sup> 2 STRACHAN-DAVIDSON, *supra* note 40, at 157.

<sup>45</sup> *Id.* at 177; SCHISAS, *supra* note 43, at 221–22, 232.

<sup>46</sup> *THE OPINIONS OF PAULUS* 4.17, in 1 *THE CIVIL LAW* 323 (S.P. Scott trans., 1973) (emphasis added).

<sup>47</sup> DIG. 48.2.7.2 (Ulpian, *De Officio Proconsulis* 7), in 4 *THE DIGEST OF JUSTINIAN* 797 (Theodor Mommsen et al. eds., Univ. of Pa. Press 1985) (1870).

<sup>48</sup> DIG. 48.2.14 (Paulus, *De Officio Proconsulis* 2), in 4 *THE DIGEST OF JUSTINIAN* 799 (Theodor Mommsen et al. eds., Univ. of Pa. Press 1985) (1870).

The Roman law contained the maxim *nemo debet bis puniri pro uno delicto*,<sup>49</sup> that is, “[n]o one ought to be punished twice for the same offense.”<sup>50</sup> Nonetheless, the protection against double jeopardy afforded by Roman law differed significantly from that accorded an individual under modern double jeopardy principles, primarily because criminal prosecutions generally were not brought by the state. Rather, under Roman law, a criminal prosecution could be brought by the victim of the crime or by any Roman citizen.<sup>51</sup> In most cases, a person injured by the conduct of another could elect<sup>52</sup> to bring either a criminal action against the wrongdoer or, alternatively, a private action, known a delictual action, seeking a penalty — not compensation — from the wrongdoer.<sup>53</sup> Thus, after stating that “[t]he governor must not allow a man to be charged with the same offenses of which he has already been acquitted,” the *Digest of Justinian* explains that this principle means only that the individual cannot be charged *by the same accuser*, at least “if the person who has now come forward as accuser be pursuing his own injury and shows that he had not known that an accusation had [previously] been brought by another, if there is good reason he is to be allowed to be an accuser.”<sup>54</sup>

The canon law, which began its development near the end of the Roman Empire, also contained a prohibition against double jeopardy.<sup>55</sup> The *Gregorian*

<sup>49</sup> SIGLER, *supra* note 10, at 2.

The Code of Justinian contains the following rescript delivered by the Emperors Diocletian and Maximian in 289:

Anyone who has been charged with a public crime, cannot again be accused of the same crime by another person. If, however, several offences arise from the same act, and complaint is only made of one of them, it is not forbidden for an accusation of another to be filed by some other individual.

CODE JUST. 9.2.9 (Diocletian & Maximian 289), in 6 THE CIVIL LAW 360 (S.P. Scott trans., 1973).

<sup>50</sup> BLACK’S LAW DICTIONARY 1736 (8th ed. 2004). This maxim is based upon the more general maxim *nemo debet bis vexari pro una et eadem causa*, which BLACK’S translates as “[n]o one ought to be twice troubled for one and the same cause.” *Id.* Broom translates this latter maxim as “a man shall not be twice vexed for one and the same cause.” HERBERT BROOM, A SELECTION OF LEGAL MAXIMS 247, \*321 (6th American ed. 1868).

<sup>51</sup> JOLOWICZ, *supra* note 40, at 331; MAX RADIN, HANDBOOK OF ROMAN LAW § 176, at 469 (1927); *see also* 2 CHARLES PHINEAS SHERMAN, ROMAN LAW IN THE MODERN WORLD 486 (2d ed. 1922) (stating that in the Republic, “[a]ny Roman citizen or subject, desiring to cause anybody to be prosecuted criminally, could apply to the presiding judge of the appropriate court for permission to make an accusation against the alleged offender.”); WOLFGANG KUNKEL, AN INTRODUCTION TO ROMAN LEGAL AND CONSTITUTIONAL HISTORY 29 (J.M. Kelly trans., 2d ed. 1973).

<sup>52</sup> RADIN, *supra* note 51, § 176, at 468.

<sup>53</sup> *Id.* § 44, at 127–28.

<sup>54</sup> DIG. 48.2.7.2 (Ulpian, De Officio Proconsulis 7), in 4 THE DIGEST OF JUSTINIAN 797 (Theodor Mommsen et al. eds., Univ. of Pa. Press 1985) (1870) (brackets in original).

<sup>55</sup> FRIEDLAND, *supra* note 15, at 5, 326–27; R.H. HELMHOLZ, THE SPIRIT OF CLASSICAL

*Decretals*, a compilation of papal decretals (mainly written answers to specific questions put to the pope) promulgated by Pope Gregory IX in 1234,<sup>56</sup> contains a chapter, taken from a canon of an earlier church council, proclaiming: “An accusation cannot be repeated with respect to those crimes of which the accused has been absolved.”<sup>57</sup> The commentary on this chapter states the principle as: “[I]f anyone is absolved of a crime of which he was accused, he should not again be accused of the same thing.”<sup>58</sup> Even earlier, around 1140, Gratian, a Camaldolese monk who taught in Bologna, published his *Concordantia discordantium canonum* (*Concordance of discordant canons*), known as the *Decretum*, containing a mass of authorities from the past, including canons of church councils, scriptural passages, and decisions of popes.<sup>59</sup> The *Decretum* contains at least two references to double jeopardy. At one point it states, “The Scripture holds, ‘God does not punish twice in the same matter,’”<sup>60</sup> while at another it proclaims, “Whether one is condemned or absolved, there can be no further action involving the same crime.”<sup>61</sup>

The canon law’s prohibition against double jeopardy emanated from an interpretation given by Saint Jerome in A.D. 391 of *Nahum* 1:9, a verse in the Old Testament.<sup>62</sup> The Douay version of the Bible translates this verse as: “there shall not rise a double affliction;”<sup>63</sup> the King James Bible declares: “[a]ffliction shall not rise up the second time.”<sup>64</sup> Saint Jerome read the verse to mean “that God does not punish twice for the same act.”<sup>65</sup> It was reasoned that if this were so before God, it should be the same on earth.<sup>66</sup>

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CANON LAW 284, 286–87 (1996); SIGLER, *supra* note 10, at 3.

<sup>56</sup> HELMHOLZ, *supra* note 55, at 11–13.

<sup>57</sup> *Id.* at 286 (citing DECRETALS GREGORII IX 5.1.6).

<sup>58</sup> *Id.* (discussing the *glossa ordinaria*, or gloss, to DECRETALS GREGORII IX 5.1.6).

<sup>59</sup> *Id.* at 7.

<sup>60</sup> *Id.* at 286 (citing DECRETUM GRATIANI, Distinctio 81, canon 12).

<sup>61</sup> *Id.* (citing DECRETUM GRATIANI, Causa 2, quaestio 1, canon 14).

<sup>62</sup> FRIEDLAND, *supra* note 15, at 5, 327; HELMHOLZ, *supra* note 55, at 287; SIGLER, *supra* note 10, at 3; THOMAS, *supra* note 18, at 72; *see also* *Bartkus v. Illinois*, 359 U.S. 121, 152 n.4 (1959) (Black, J., dissenting).

<sup>63</sup> *Nahum* 1:9 (Douay).

<sup>64</sup> *Nahum* 1:9 (King James). The Revised Standard version of the Bible translates the verse as “[The LORD] will not take vengeance twice on his foes.” *Nahum* 1:9 (Revised Standard). The New Revised Standard version translates it as “no adversary will rise up twice,” *Nahum* 1:9 (New Revised Standard), while the New International version translates it as “trouble will not come a second time.” *Nahum* 1:9 (New International).

<sup>65</sup> *Bartkus*, 359 U.S. at 152 n.4 (Black, J., dissenting) (relying upon 25 MIGNE, PATROLOGIA LATINA 1238 (1845)). *See also* Z.N. BROOKE, THE ENGLISH CHURCH AND THE PAPACY 205 & n.1 (1989); SIGLER, *supra* note 10, at 3 (translating the phrase as “God does not punish twice for the same transgression.”).

<sup>66</sup> HELMHOLZ, *supra* note 55, at 287.

Some legal scholars have persuasively argued that Saint Jerome erred in his interpretation of this verse.<sup>67</sup> The entire verse in *Nahum* in the Douay version of the Bible provides: “What do ye devise against the Lord? he will make an utter end: there shall not rise a double affliction”;<sup>68</sup> the King James Bible states: “What do ye imagine against the LORD? he will make an utter end: affliction shall not rise up the second time.”<sup>69</sup> When read in context, this verse appears to mean that God does not punish the same act twice because there is no need to do so — the first punishment will make “an utter end” of God’s enemies. “The better interpretation of this passage, then, is that God does not judge twice because it is unnecessary.”<sup>70</sup> Nevertheless, Saint Jerome’s interpretation of the verse entered church canons as early as 847,<sup>71</sup> subsequently to be stated as, “Not even God judges twice for the same act.”<sup>72</sup>

Despite the seemingly absolute nature of the canon law’s prohibition against double jeopardy, “[c]riminal defendants were not in the end given the blanket sort of protection the words suggest.”<sup>73</sup> On the other hand, “the reality of the basic principle within the canon law always remained real enough.”<sup>74</sup>

## II. ENGLISH COMMON LAW

The first recorded mention in English law of an individual raising a plea of a former acquittal to bar a prosecution for the same offense appears to have occurred at the beginning of the thirteenth century.<sup>75</sup> In a case decided in 1201,<sup>76</sup> Goscelin, the son of Walter, brought a private suit seeking punishment (an action known as

<sup>67</sup> FRIEDLAND, *supra* note 15, at 327 n.1; THOMAS, *supra* note 18, at 72.

<sup>68</sup> *Nahum* 1:9 (Douay).

<sup>69</sup> *Nahum* 1:9 (King James).

<sup>70</sup> THOMAS, *supra* note 18, at 72. *Accord* FRIEDLAND, *supra* note 15, at 327 n.1.

<sup>71</sup> BROOKE, *supra* note 65, at 205 n.1 (1989). The maxim was cited in the Council of Mainz in 847 and repeated in the Council of Worms in 868. *Id.*; FRIEDLAND, *supra* note 15, at 5 n.4.

<sup>72</sup> *Bartkus v. Illinois*, 359 U.S. 121, 152 n.4 (1959) (Black, J., dissenting). *See also* THOMAS, *supra* note 18, at 72; BROOKE, *supra* note 65, at 205 n.1; HELMHOLZ, *supra* note 55, at 286.

<sup>73</sup> HELMHOLZ, *supra* note 55, at 287.

<sup>74</sup> *Id.* One commentator points out that “in one sense, double punishment for the same conduct is implicit in Christianity. The ecclesiastical courts punish now and God will also punish later.” Note, *supra* note 18, at 446.

<sup>75</sup> Hunter, *supra* note 10, at 16 n.3, points to a case decided in 1203, *see infra* text accompanying notes 83–86, as the first recorded mention of the plea, but the plea seems to have been raised in a case decided two years earlier. *See infra* text accompanying notes 76–82.

<sup>76</sup> 2 PLEAS BEFORE THE KING OR HIS JUSTICES, 1198–1202, pl. 737 (Doris Mary Stenton ed., 68 SELDEN SOC’Y 1952 (Sumerset 1201)) [hereinafter 2 PLEAS BEFORE THE KING OR HIS JUSTICES].

an “appeal”<sup>77</sup>) against Adam de Rupe for killing his brother, Ailnoth.<sup>78</sup> As a defense to the action, Adam claimed that “on another occasion”<sup>79</sup> Ailnoth’s wife brought an appeal against him for the same killing and that “he withdrew quit therein by judgment of the lord king’s court.”<sup>80</sup> The court held Goscelin’s appeal null because Goscelin was in Ireland at the time of the killing and did not see or hear it<sup>81</sup> and because “the appealed has withdrawn quit therein,” thereby seeming to recognize Adam’s plea of a previous acquittal.<sup>82</sup>

In a case decided two years later, Ralph Russiadic brought an appeal against Richard Old for killing Richard, the servant of Ralph’s lord.<sup>83</sup> Richard Old claimed that “on a former occasion,” Adam of St. Brides brought an appeal for the same killing against Robert, son of Aier, as principal, and several others, including Richard Old, as accessories, and that Adam “withdrew from his suit and quit-claimed Robert, so that [Robert] and those appealed as his accessories were adjudged quit thereof.”<sup>84</sup> The court, however, did not decide the case on the basis of this plea.<sup>85</sup> Rather, because Ralph “made no mention of sight or hearing” in his appeal, “the appeal [was] null.”<sup>86</sup>

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<sup>77</sup> See *infra* text accompanying notes 166–68 for a discussion of “appeals.”

<sup>78</sup> 2 PLEAS BEFORE THE KING OR HIS JUSTICES, *supra* note 76, at pl. 737 (Sumerset 1201).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* An appellor had to speak of his own sight and hearing. 2 BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND 397–98 (George E. Woodbine ed., Samuel E. Thorne trans., 1968) [hereinafter BRACTON].

<sup>82</sup> 2 PLEAS BEFORE THE KING OR HIS JUSTICES, *supra* note 76, at pl. 737 (Sumerset 1201).

<sup>83</sup> 1 SELECT PLEAS OF THE CROWN A.D. 1200–1225, pl. 76 (F.W. Maitland ed., SELDEN SOC’Y 1888) (Hundred of Stottesden 1203) [hereinafter 1 SELECT PLEAS OF THE CROWN].

<sup>84</sup> *Id.* At the time, “no man could be tried as accessory till after the principal was convicted, or at least he must have been tried at the same time with him.” 4 WILLIAM BLACKSTONE, COMMENTARIES \*40. See also *Standefer v. United States*, 447 U.S. 10, 15 (1980); 1 MATTHEW HALE, [HISTORIA PLACITORUM CORONAE] THE HISTORY OF THE PLEAS OF THE CROWN \*623–24.

<sup>85</sup> 1 SELECT PLEAS OF THE CROWN, *supra* note 83, at pl. 76 (Hundred of Stottesden 1203).

<sup>86</sup> *Id.* The appellee (i.e., the accused) in another appeal decided in 1203 raised a defense resembling a claim of double jeopardy. In that case, Jordan appealed Reiner Reid for assaulting him and cutting off his fingers. Reiner defended on the ground that “on a former occasion this appeal came before Sir Geoffrey FitzPeter . . . and by his leave a concord was made between them, so that [Jordan] remitted him from that appeal for ten marks which [Reiner] paid him.” 1 SELECT PLEAS OF THE CROWN, *supra* note 83, at pl. 79 (Borough of Shrewsbury 1203). A jury found that a concord indeed was made between the parties to the appeal, which apparently precluded Jordan from bringing the appeal a second time. *Id.* Sigler asserts that:

Although it may be tempting to declare [the plea in] this [case] a double jeopardy plea, the context is not even a criminal case. The state merely provided a forum for what is essentially a civil suit with criminal overtones, resolved as a claim in contract by the doctrine of

In a case decided in 1221,<sup>87</sup> Sibil, the widow of Simon of Barton, brought an appeal against Engelram of Barton as an accessory in the killing of her husband.<sup>88</sup> Engelram defended on the ground that Sibil previously had brought an appeal against him in another county for the same killing and that he had been tried and acquitted in the king's court there.<sup>89</sup> Once again, the court did not determine the validity of this plea.<sup>90</sup> Instead, it dismissed the appeal because Sibil had remarried and therefore was not a proper party to bring the action.<sup>91</sup>

Over the next five hundred years, the guarantee against double jeopardy became firmly entrenched in the common law in the form of the pleas of *autrefois acquit* (a former acquittal), *autrefois convict* (a former conviction), and pardon.<sup>92</sup> By the second half of the eighteenth century, Sir William Blackstone, perhaps the most important writer on the common law, could say that the principle that "no man is to be brought into jeopardy of his life, more than once for the same offence" constitutes a "universal maxim of the common law."<sup>93</sup>

accord and satisfaction.

SIGLER, *supra* note 10, at 11. But at the time this case arose, the distinction between criminal and civil actions was not as pronounced as it is today. All appeals were "civil" in nature, in the sense that they were brought by private individuals, yet they sought punishment for an alleged criminal offense, not compensation for an injury suffered.

<sup>87</sup> 1 SELECT PLEAS OF THE CROWN, *supra* note 83, at pl. 158 (Hundred of Kington 1221).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* A wife could bring an appeal for the death of her husband, but "if she marrie[d] again, before or pending her appeal," she lost that right. 4 BLACKSTONE, *supra* note 84, at \*314. See also 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 164 (Arno Press 1972) (2d ed. corrected 1724).

<sup>92</sup> 4 BLACKSTONE, *supra* note 84, at \*335–38.

The common law also recognized the plea of *autrefois attain*, or a former attainder. *Id.* at \*336. At common law, when a court entered a judgment of conviction of a felony against an individual and sentenced him to death (or upon such circumstances equivalent to a judgment of death, such as a judgment of outlawry on a capital offense, pronounced for fleeing from justice and thereby tacitly confessing guilt), the individual became attainted, that is, stained or blackened. *Id.* at \*380. In the eyes of the law, he was dead. The consequences of attainder were forfeiture of the individual's property and corruption of blood, so he could neither inherit lands nor transfer them by descent. See generally *id.* at \*380–89. With some exceptions, an attainted person could plead *autrefois attain* to bar a new prosecution for the same or any other felony. *Id.* at \*336. The plea extended to other felonies because a second prosecution could serve no purpose. As Blackstone explained, "the prisoner is dead in law by the first attainder, his blood is already corrupted, and he hath forfeited all that he had: so it is absurd and superfluous to endeavor to attain him a second time." *Id.* In this respect, the plea of *autrefois attain* was broader than the plea of *autrefois convict*, which could be raised only to bar a prosecution for the *same* offense.

<sup>93</sup> *Id.* at \*335.

Scholars have advanced three different theories explaining the introduction of the double jeopardy principle into English common law. One theory postulates that the principle came from the Continent, either through canon law, which was introduced into England after the Norman conquest in 1066,<sup>94</sup> or through Roman law, which influenced treatise writers and judges.<sup>95</sup> These writers, as the theory goes, supplemented the relatively undeveloped common law with the more refined and sophisticated jurisprudence of the Roman law.<sup>96</sup> In addition, the earliest judges of the common law courts, as well as the chancellors in England, were members of the clergy who had studied Roman law.<sup>97</sup> When called upon to formulate principles, it is contended, they naturally turned to the ideas with which they were familiar from their studies.<sup>98</sup>

The second theory advocates that the posthumous victory of Thomas à Becket, the Archbishop of Canterbury, in the twelfth century power struggle between the Church and King Henry II, led to the introduction of the double jeopardy principle.<sup>99</sup> Following his conquest of England, William the Conqueror (William I) appointed his right-hand man, Lanfranc, an Italian lawyer and theologian, to the post of Archbishop of Canterbury.<sup>100</sup> Perhaps to repay the Pope for supporting his conquest,<sup>101</sup> or perhaps to help him gain control over the English Church,<sup>102</sup> William encouraged Lanfranc to establish a system of ecclesiastical courts to exist side by side with the royal courts.<sup>103</sup> These ecclesiastical courts claimed jurisdiction not only over spiritual matters<sup>104</sup> but also over all criminal and civil cases in which a clerk (cleric) stood accused of committing a crime or a wrong.<sup>105</sup>

The relationship between the Church and the King deteriorated after William's death in 1087.<sup>106</sup> In the middle of the twelfth century, Henry II sought to regain

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<sup>94</sup> HELMHOLZ, *supra* note 55, at 286; RADIN, *supra* note 10, at 228; SIGLER, *supra* note 10, at 3; Note, *supra* note 18, at 446–47; *see also* FRIEDLAND, *supra* note 15, at 6.

<sup>95</sup> Note, *supra* note 18, at 446–47; *see also* FRIEDLAND, *supra* note 15, at 6.

<sup>96</sup> Note, *supra* note 18, at 446.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> FRIEDLAND, *supra* note 15, at 5–6, 328; HELMHOLZ, *supra* note 55, at 284–85; SIGLER, *supra* note 10, at 3.

<sup>100</sup> THEODORE F. T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 11, 297 (5th ed. 1956); 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW* 77 (2d ed. Cambridge, Cambridge Univ. Press 1898); GOLDWIN SMITH, *A CONSTITUTIONAL AND LEGAL HISTORY OF ENGLAND* 77 (1955).

<sup>101</sup> Hunter, *supra* note 10, at 5.

<sup>102</sup> BROOKE, *supra* note 65, at 135–37.

<sup>103</sup> Hunter, *supra* note 10, at 5.

<sup>104</sup> 1 POLLOCK & MAITLAND, *supra* note 100, at 125–30.

<sup>105</sup> *Id.* at 130; *see also* SMITH, *supra* note 100, at 88.

<sup>106</sup> Hunter, *supra* note 10, at 5.

jurisdiction over clerics who committed secular offenses.<sup>107</sup> What motivated Henry remains a matter of conjecture. Some contend he sought to curb the power of the Church generally.<sup>108</sup> Others maintain that he wanted to strengthen law enforcement in the realm and believed that ecclesiastical courts did not punish criminal clerics severely enough because they could impose neither the death penalty nor a penalty involving the shedding of blood.<sup>109</sup> Henry allegedly quipped that “it took two crimes to hang a priest.”<sup>110</sup> By this he meant that a cleric could be defrocked for committing one crime and only if he thereafter committed a second crime could he, as a former cleric no longer protected by the Church, be hanged.<sup>111</sup> Still others claim that Henry sought to regain jurisdiction over clerics because he needed money to finance overseas campaigns and coveted the revenue generated for the Church through fines and forfeitures imposed by ecclesiastical courts.<sup>112</sup>

Whatever his motivation, Henry held a council of the magnates of the realm in 1164 and caused to be issued the Constitutions of Clarendon, a formal statement embodying the previous customs concerning the jurisdiction of the Church in certain matters.<sup>113</sup> The third clause of that document provided:

Clergyman charged and accused of anything shall, on being summoned by a justice of the king, come into his court, to be responsible there for whatever it may seem to the king’s court they should there be responsible for; and [to be responsible] in the ecclesiastical court [for what] it may seem they should there be responsible for — so that the king’s justice shall send into the court of holy church to see on what ground matters are there to be treated. And if the clergyman is convicted, or [if he] confesses, the church should no longer protect him.<sup>114</sup>

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<sup>107</sup> *Id.*

<sup>108</sup> AUSTIN LANE POOLE, *FROM DOMESDAY BOOK TO MAGNA CARTA 1087–1216*, at 200–02 (2d ed. 1955).

<sup>109</sup> *Id.* at 202; BROOKE, *supra* note 65, at 200; W.L. WARREN, *HENRY II* 461, 464–65 (1973); *see also* HELMHOLZ, *supra* note 55, at 284.

<sup>110</sup> SMITH, *supra* note 100, at 88.

<sup>111</sup> *Id.*

<sup>112</sup> Hunter, *supra* note 10, at 5, 17 n.16.

<sup>113</sup> One scholar puts it in these terms: “Henry . . . sought to restore the jurisdiction of the King’s courts to the position prior to Stephen’s disastrous reign.” *Id.* at 5. Stephen of Blois, the grandson of William the Conqueror, succeeded Henry I in 1135 and reigned until 1154. *See* 1 WILLIAM STUBBS, *THE CONSTITUTIONAL HISTORY OF ENGLAND 360–81* (4th ed. 1883) (discussing Stephen’s reign); *see also* 1 POLLOCK & MAITLAND, *supra* note 100, at 449 (“[Henry II’s scheme] does not profess to represent the practice of Stephen’s day. For legal purposes, Stephen’s reign is to be ignored, not because he was an usurper, but because it was a time of war and of ‘unlaw.’”).

<sup>114</sup> *THE CONSTITUTIONS OF CLARENDON* c.3 (1164), *reprinted in* MICHAEL EVANS & R. IAN

Historians have read this clause in various ways. One scholar maintained that Henry intended that “clerical criminals should be tried in the ordinary courts of the country.”<sup>115</sup> Others disputed this interpretation. While admitting that “Henry may at one time have gone as far as this,”<sup>116</sup> Pollock and Maitland could not doubt that the clause in the Constitutions meant that a clergyman suspected of committing a crime had to be brought to the royal court and accused there. Unless he admitted his guilt, he would be sent to the ecclesiastical court for trial in the presence of royal officers; if convicted in the ecclesiastical court, he would be stripped of his clerical status and returned to the royal court and then be sentenced — it is unclear whether there would be a further trial — to the layman’s punishment, either death or mutilation.<sup>117</sup> In addition, he would forfeit his property to the King.<sup>118</sup> This latter interpretation of the clause has “become almost universally regarded as the proper interpretation by legal historians.”<sup>119</sup>

Archbishop Becket, whom ironically Henry had appointed to his position in 1162,<sup>120</sup> objected to this scheme. He claimed, among other things, that clerics could be tried and punished only in an ecclesiastical court and that a cleric convicted in such a court and deposed from his orders could not subsequently be brought to the royal court for punishment.<sup>121</sup> To do so, argued Becket, would be to punish him twice for the same offense in violation of the maxim *nec enim Deus iudicat bis in idipsum* (or a variation thereof) and of canon law.<sup>122</sup> The conflict between Henry

JACK, SOURCES OF ENGLISH LEGAL AND CONSTITUTIONAL HISTORY 12 (1984) (brackets included in reprint).

<sup>115</sup> 1 STUBBS, *supra* note 113, at 523–24.

<sup>116</sup> 1 POLLOCK & MAITLAND, *supra* note 100, at 448 n.1.

<sup>117</sup> *Id.* at 447–48 & n.1; *see also* FRIEDLAND, *supra* note 15, at 326; 1 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 615 (4th ed. 1936); PLUCKNETT, *supra* note 100, at 18; POOLE, *supra* note 108, at 206; SMITH, *supra* note 100, at 89; WARREN, *supra* note 109, at 481; Hunter, *supra* note 10, at 5–6.

<sup>118</sup> Hunter, *supra* note 10, at 6.

<sup>119</sup> FRIEDLAND, *supra* note 15, at 326 n.1.

<sup>120</sup> Henry II appointed Becket his Chancellor in 1154 and upon the death of Theobald, the Archbishop of Canterbury, in 1161, Henry persuaded a reluctant Becket to assume the Archbishopric. WARREN, *supra* note 109, at 79, 91–92.

<sup>121</sup> FRIEDLAND, *supra* note 15, at 5.

<sup>122</sup> *Id.* at 5 & n.3, 326 & n.5; HELMHOLZ, *supra* note 55, at 284; 1 POLLOCK & MAITLAND, *supra* note 100, at 448; POOLE, *supra* note 108, at 206; Hunter, *supra* note 10, at 6.

Pollock and Maitland had grave doubts that Becket’s claims in fact were sanctioned by canon law. 1 POLLOCK & MAITLAND, *supra* note 100, at 454. They wrote that in asserting that the state could not punish a criminal cleric for a crime for which he already had been deposed from his orders, “Becket propounded a doctrine which, so far as we are aware, had neither been tolerated by the state nor consecrated by the church.” *Id.* Moreover, because Becket was willing to add life imprisonment as an additional sanction in the ecclesiastical courts, “the principle for which he contended was a highly technical principle condemning not two punishments but two judgments.” *Id.* at 455–56 n.1. *See also* BROOKE, *supra* note 65, at 204

and Becket continued for several years, with Becket at one point fleeing to France and excommunicating several of the King's ministers after Henry seized the revenues of the see of Canterbury.<sup>123</sup> Becket and the King eventually reached a compromise, and Becket returned to England.<sup>124</sup> Shortly thereafter, in 1170, four of Henry's knights murdered Becket inside Canterbury Cathedral.<sup>125</sup> Six years later, and after the canonization of Becket by Pope Alexander III, Henry renounced the provision in the Constitutions that allowed a degraded cleric to be further punished in the royal court.<sup>126</sup> Archbishop Becket's martyrdom and Henry's capitulation, this theory argues, must have made an impression on the King's judges, many of whom were bishops and archdeacons, and convinced them that "the maxim which Becket was espousing was worthy of consideration."<sup>127</sup>

The third theory explaining the introduction of the protection against double jeopardy into English common law suggests that "the protection evolved from Anglo-Saxon criminal procedure as a practical and obvious procedural assumption by the courts."<sup>128</sup> The proponent of this theory argues that the unimportance of the protection during the first five hundred years of its existence, as illustrated by its numerous exceptions and its vulnerability to legislative interference on two occasions<sup>129</sup> without public or judicial uproar over the loss of liberties, in conjunction with its slow development, points towards procedural evolution rather than introduction from Roman

("Henry was possibly claiming even less than the practice of his grandfather [Henry I]. . . . [U]ntil Becket intervened, clerks were being tried for criminal offences in the king's courts; I see no reason to believe that this was an innovation suddenly introduced by Henry II."); POOLE, *supra* note 108, at 206 ("[Becket] was not on sure ground . . . . He was taking his stand, not on what was the law, but what should, in his view, be the law."). *But see* FRIEDLAND, *supra* note 15 at 329–32 (arguing that "Becket's position was much stronger than the historians would have us believe" and concluding that "Becket's position was the better one"); Charles Duggan, *The Becket Dispute and the Criminous Clerks*, 35 BULL. OF THE INST. OF HIST. RES. 1, 27–28 (1962) (concluding that "[a]s far as canonical considerations are concerned, . . . the better opinion was . . . that of Becket.").

<sup>123</sup> POOLE, *supra* note 108, at 208–09.

<sup>124</sup> *Id.* at 213–14.

<sup>125</sup> *Id.* at 214; SMITH, *supra* note 100, at 90. *See generally* WARREN, *supra* note 109, at 447–518.

<sup>126</sup> BROOKE, *supra* note 65, at 212; 1 POLLOCK & MAITLAND, *supra* note 100, at 124; POOLE, *supra* note 108, at 218; SMITH, *supra* note 100, at 90.

The resolution of the conflict between Henry II and Becket could be seen to constitute a complete rejection of the so-called "dual sovereignty" doctrine that subsequently developed in the United States. *See supra* note 2 (discussing the so-called "dual sovereignty" doctrine); *infra* text accompanying notes 240–42 (discussing the rejection of the "dual sovereignty" doctrine in England by the Court of King's Bench).

<sup>127</sup> FRIEDLAND, *supra* note 15, at 5–6, 328.

<sup>128</sup> Hunter, *supra* note 10, at 4.

<sup>129</sup> 1487, 3 Hen. 7, c.1 (Eng.); 1534, 26 Hen. 8, c. 6 (Eng.). *See infra* text accompanying notes 192–96 & notes 211–12.

law.<sup>130</sup> Had the protection been a product of Roman law, the proponent contends, it probably would “have established a rule of fundamental doctrine from its inception.”<sup>131</sup> Similarly, she claims that the appearance of the plea of a former acquittal in 1203,<sup>132</sup> so soon after the clash between Becket and Henry II, shows that that conflict could not have played a major role in the introduction of the protection into English common law.<sup>133</sup> She reasons that “to establish itself as a commonplace rule . . . ,”<sup>134</sup> such “a novel principle would take much longer to percolate through to [the] courts.”<sup>135</sup>

Regardless of the theory to which they subscribe, scholars generally agree that the origin of the protection against double jeopardy in English law “is, and undoubtedly will remain, a matter of speculation,”<sup>136</sup> because “much of Western law derives from a common fund of shared judicial concepts.”<sup>137</sup>

The extent to which the common law protected a person against double jeopardy before Henry II’s capitulation in 1176 is difficult to ascertain. Some evidence suggests that “the earliest English rulers after the Norman Conquest had little regard for questions of double jeopardy.”<sup>138</sup> William II (“Rufus”), who reigned from 1087–1100, once tried fifty Englishmen by the ordeal of the hot iron.<sup>139</sup> When they escaped unhurt and hence were acquitted, William purportedly “declared he would try them again by the judgment of his court, and would not abide by this pretended judgment of God . . . .”<sup>140</sup> The Charter of Liberties, issued by Henry I in 1101, contained no mention of a protection against double jeopardy.<sup>141</sup> In 1163, Henry II’s claim that he could retry a cleric, Philip de Brois, following his acquittal in an ecclesiastical court of murdering a knight<sup>142</sup> brought his dispute with Becket to a head and constituted a complete rejection of a protection against double jeopardy.<sup>143</sup> In 1166, Henry II included in the Assize of Clarendon a provision that

<sup>130</sup> Hunter, *supra* note 10, at 4–5.

<sup>131</sup> *Id.* at 5.

<sup>132</sup> See *supra* notes 83–86 and accompanying text. As indicated in the text, the plea of former acquittal most likely originated even before 1203. See *supra* text accompanying notes 76–82.

<sup>133</sup> Hunter, *supra* note 10, at 6–7.

<sup>134</sup> *Id.* at 7.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 4.

<sup>137</sup> SIGLER, *supra* note 10, at 3.

<sup>138</sup> *Id.* at 6.

<sup>139</sup> 1 REEVES’ HISTORY OF THE ENGLISH LAW, FROM THE TIME OF THE ROMANS TO THE END OF THE REIGN OF ELIZABETH 456 (William S. Hein 1981) (W.F. Finlason ed., 1880).

<sup>140</sup> *Id.*

<sup>141</sup> THE CHARTER OF LIBERTIES OF HENRY I (1101), *reprinted in* EVANS & JACK, *supra* note 114, at 49–50.

<sup>142</sup> POOLE, *supra* note 108, at 202; WARREN, *supra* note 109, at 465–66.

<sup>143</sup> FRIEDLAND, *supra* note 15, at 6, 330; POOLE, *supra* note 108, at 203.

a person acquitted by the ordeal must abjure the realm (*i.e.*, depart the country under an oath never to return) if he were of bad character,<sup>144</sup> once again violating the principle against double jeopardy.

Even after Becket's murder and Henry's capitulation, a general prohibition against double jeopardy did not exist in England. The earliest treatise on the common law, purportedly written by Ranulf de Glanville in the last part of the twelfth century,<sup>145</sup> does not mention any protection against double jeopardy,<sup>146</sup> nor is it included in the *Magna Carta*,<sup>147</sup> which was originally issued by King John in 1215<sup>148</sup> and reaffirmed by King Edward I in 1297.<sup>149</sup>

Thomas à Becket's successor, Archbishop Richard, did not oppose the form of dual punishment contained in the Constitutions of Clarendon.<sup>150</sup> Upset that Becket's murderers had not been punished for their misdeed, he wanted laymen who murdered clerics to be excommunicated in the ecclesiastical court and then turned over to the royal courts to be hanged.<sup>151</sup> He assured several of the King's justices that such a procedure would not punish a person twice for the same offense.<sup>152</sup> He argued that "there is no duplication where what is begun by one is completed by another"<sup>153</sup> — the exact position Henry had taken concerning offenses committed by clerics. Indeed, after Henry II's death, Pope Innocent III (1198–1216) issued a decree providing that clerics who forged papal letters should be handed over to the secular courts after first being degraded, and he declared that such a procedure was

<sup>144</sup> FRIEDLAND, *supra* note 15, at 6, 328; 1 POLLOCK & MAITLAND, *supra* note 100, at 152; see also THOMAS, *supra* note 18, at 79–80.

<sup>145</sup> See JOHN BEAMES, A TRANSLATION OF GLANVILLE (Littleton, Fred B. Rothman 1980) (1812); THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND COMMONLY CALLED GLANVILL (G.D.G. Hall ed., 1993) [hereinafter TREATISE ON GLANVILL]. Scholars question whether Glanville (sometimes spelled Glanvil or Glanvill) (d. 1190), who served as chief justiciar, or prime minister, of England under Henry II, actually wrote this treatise. They suggest it may have been the work of Glanville's secretary, Hubert Walter, who later became chief justiciar himself. 1 POLLOCK & MAITLAND, *supra* note 100, at 163–64 & n.5; see also G.D.G. Hall, *Introduction* to TREATISE ON GLANVILL, *supra*, at xxx–xxxiii; 2 WILLIAM S. HOLDSWORTH, *supra* note 117, at 189–90.

<sup>146</sup> FRIEDLAND, *supra* note 15, at 7 n.1; SIGLER, *supra* note 10, at 12; Hunter, *supra* note 10, at 18 n.36.

<sup>147</sup> SIGLER, *supra* note 10, at 4.

<sup>148</sup> MAGNA CARTA (1215), reprinted in RAY STINGHAM, MAGNA CARTA: FOUNTAINHEAD OF FREEDOM 227 (1966).

<sup>149</sup> MAGNA CARTA (1297), reprinted in EVANS & JACK, *supra* note 114, at 51–55.

<sup>150</sup> FRIEDLAND, *supra* note 15, at 7; Hunter, *supra* note 10, at 17 n.21.

<sup>151</sup> 1 POLLOCK & MAITLAND, *supra* note 100, at 457.

<sup>152</sup> *Id.* at 456.

<sup>153</sup> BROOKE, *supra* note 65, at 220. Brooke disagrees with Pollock and Maitland's conclusion that Archbishop Richard advocated *both* excommunication and execution. *Id.* at 220 n.1. He asserts that Richard wanted the offenders tried in an ecclesiastical court and, if found guilty, handed over to a secular court for punishment without first being excommunicated. *Id.*

sanctioned by the *Decretum*.<sup>154</sup> That position, too, was consistent with Henry's claim in his controversy with Becket.

The clash between Henry II and Archbishop Becket spawned the institution of "benefit of clergy,"<sup>155</sup> which in its original form exempted clerics who committed felonies from the jurisdiction of the royal courts.<sup>156</sup> After being brought before one of the King's justices and saying that he could not answer in a royal court, a cleric would be turned over to the ecclesiastical courts for trial without any inquiry on the part of the justice concerning his guilt or innocence.<sup>157</sup> Sometime before the end of the reign of Henry III in 1272, however, the procedure was changed so that the royal court first determined the guilt or innocence of the cleric.<sup>158</sup> The justices conducted an "inquest *ex officio*" (an inquiry into the right of the King to the cleric's goods), which technically did not constitute a "trial."<sup>159</sup> Nevertheless, if the jurors found against the cleric, he was delivered to Church authorities and tried in an ecclesiastical court.<sup>160</sup> If convicted in that court, the royal court ordered his chattels forfeited to the King.<sup>161</sup> The Church protested this procedure on grounds that it inflicted double punishment, but to no avail,<sup>162</sup> once again showing that the protection against double jeopardy was not generally accepted.

The principle against double jeopardy was violated also by a statute enacted early in the fourteenth century in an attempt to ensure that the royal courts remained paramount to the ecclesiastical courts in situations in which both had jurisdiction over the act of an individual.<sup>163</sup> That statute allowed the royal courts to ignore the determination of an ecclesiastical court and any punishment imposed by such a court. It provided that "[w]hen any one Case is debated before Judges Spiritual [or] Temporal, as . . . upon the Case of laying violent Hands on a Clerk, [it is thought,] that notwithstanding the Spiritual Judgement, the King's Court shall discuss the same Matter."<sup>164</sup>

Situations not involving clergy, however, show some recognition of the principle against double jeopardy following the Henry II-Becket dispute, but its development and emergence into modern double jeopardy law was slow. One

<sup>154</sup> 1 POLLOCK & MAITLAND, *supra* note 100, at 455 & n.1; *see also* FRIEDLAND, *supra* note 15, at 7, 329.

<sup>155</sup> FRIEDLAND, *supra* note 15, at 328; HELMHOLZ, *supra* note 55, at 285; Hunter, *supra* note 10, at 6.

<sup>156</sup> 1 POLLOCK & MAITLAND, *supra* note 100, at 441; *see also* Hunter, *supra* note 10, at 6.

<sup>157</sup> 1 POLLOCK & MAITLAND, *supra* note 100, at 441-42.

<sup>158</sup> *Id.* at 442.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 442 & n.1; *see also* FRIEDLAND, *supra* note 15, at 7, 333.

<sup>163</sup> *See* FRIEDLAND, *supra* note 15, at 333-34.

<sup>164</sup> 1315-16, 9 Edw. 2, stat.1, c. 6 (Eng.).

explanation for its slow growth is that the power to prosecute for offenses had not yet coalesced in the state.<sup>165</sup> At least since the Norman Conquest, criminal prosecutions could be brought not only by the King by means of an indictment, but also by a private subject in a suit against another demanding punishment for the particular wrong he suffered, *i.e.*, a “suit of vengeance,”<sup>166</sup> rather than for the offense against the public.<sup>167</sup> This latter method of prosecution, known as an “appeal,” initially could be used for a variety of offenses, although by the end of the thirteenth century its use was limited to serious ones.<sup>168</sup> By its very nature, the protection against double jeopardy constitutes a limitation on the power of the state to prosecute and punish an individual. As one scholar put it, “[t]he state’s gathering of the power to institute suit is a prerequisite to a true double jeopardy situation . . . .”<sup>169</sup>

By the beginning of the thirteenth century, a judgment of acquittal in an appeal brought by a private individual barred a further suit by that individual<sup>170</sup> and by any other individual otherwise entitled to bring an appeal.<sup>171</sup> Bracton, in a treatise

<sup>165</sup> FRIEDLAND, *supra* note 15, at 6–7. In addition, Friedland suggests that the rule against double jeopardy “understandably” developed slowly “until the elimination of trial by ordeal in 1219 . . .” because of the ease of obtaining an unwarranted acquittal in such trials. *Id.*

<sup>166</sup> Marion S. Kirk, “Jeopardy” *During the Period of the Year Books*, 82 U. PA. L. REV. 602, 605 (1934) (internal quotation marks omitted).

<sup>167</sup> See 4 BLACKSTONE, *supra* note 84, at \*312–17; 2 HAWKINS, *supra* note 91, at 155–204; 1 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 244–50 (London, MacMillan 1883); Hunter, *supra* note 10, at 8–9; Kirk, *supra* note 166, at 605–06.

<sup>168</sup> 4 BLACKSTONE, *supra* note 84, at \*314; 2 HAWKINS, *supra* note 91, at 157, 161–62; 2 HOLDSWORTH, *supra* note 117, at 257; Kirk, *supra* note 166, at 605.

<sup>169</sup> SIGLER, *supra* note 10, at 9. See also *id.* at 8 (“Since double jeopardy involves a limitation upon the power of the state to bring suit, by the time of its formulation criminal procedure must have developed to a point where the state had the power to conduct criminal actions at its discretion.”).

<sup>170</sup> 1 SELECT PLEAS OF THE CROWN, *supra* note 83, at pl. 158 (Hundred of Kington 1221). See also FRIEDLAND, *supra* note 15, at 8; Kirk, *supra* note 166, at 607. But see INTRODUCTION TO THE CURIA REGIS ROLLS, 1199–1230 A.D., at 258, 375–76, 62 SELDEN SOC’Y (C.T. Flower ed., 1944) (discussing a case arising in approximately 1208 in which several appeals of the same individual for the same act were allowed despite previous acquittals).

<sup>171</sup> 1 SELECT PLEAS OF THE CROWN, *supra* note 83, at pl. 76 (Hundred of Stottesden 1203); 2 PLEAS BEFORE THE KING OR HIS JUSTICES, *supra* note 76, at pl. 737 (Sumerset 1201); Hunter, *supra* note 10, at 9 (noting that at that time an appeal could be brought by anyone “who had raised a hue and cry and could substantiate the appeal with detailed first-hand knowledge of the crime”) (internal citations omitted); see also FLETA, bk. I, ch. 32, at 26, reprinted in 72 SELDEN SOC’Y 82 (H.G. Richardson & G.O. Sayles eds. & trans., 1953) (c.1290) (“[T]he appellee may . . . except against the appeal and say that he was appealed on another occasion of the same deed and was acquitted thereof by judgement of the court . . . .”) (written approximately 1290, supposedly by a judge imprisoned in Fleet prison for malpractices).

written sometime between 1220 and 1256, stated that a person against whom an appeal was brought “may except against the appeal by saying that he had earlier been appealed of the same deed by another and had departed quit by judgment, in proof whereof he may vouch the rolls and the record of the justices.”<sup>172</sup> This rule applied not only to acquittals by a jury, but also to those obtained through trial by battle.<sup>173</sup> Bracton stated:

When [an appellee] has elected to make his defence by his body and all the elements necessary for an appeal are in order, let the duel be waged at once. If he has been appealed by several of one deed and one wound and successfully makes his defence against one, he will depart quit against all . . . because he thereby proves his innocence against all, as though he had put himself on the country [i.e., had been tried by a jury] and it had exonerated him completely.<sup>174</sup>

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Around the middle of the thirteenth century, it became clear that Spanish law recognized a protection against double jeopardy. The *Fuero Real*, promulgated by King Alfonso X of Castile and Leon in 1255, provided: “After a man, accused of any crime, has been acquitted by the court, no one can afterwards accuse him of the same offence (except in certain specified cases)” (quoted in *Kepner v. United States*, 195 U.S. 100, 120 (1904), also quoted in *Lebbeus R. Wilfley, Trial by Jury and “Double Jeopardy” in the Philippines*, 13 *YALE L.J.* 421, 424 (1904)). Several years later, *Las Siete Partidas*, also promulgated by Alfonso X, was completed. It proclaimed: “Where a man has been acquitted, by a valid judgment, of some offense of which he was accused, no one can afterwards charge him with the same offense [except when he colluded in bringing the original charge and suppressed evidence in order to obtain the acquittal].” 5 *LAS SIETE PARTIDAS* 1309 (Robert I. Burns ed., Samuel Parsons trans., Univ. of Pa. Press 2001). It went on to provide that:

where one man accuses another of the death of a third party who is not his relative, and the accused person answers the accusation, and is acquitted of it in court; from that time forth none of the relatives of the deceased can bring an accusation against him for the offense of which he was acquitted . . . .

*Id.* This latter protection against double jeopardy following an acquittal in a homicide case was incomplete however, for an exception existed “where the relative [of the deceased] who wishes to accuse [the original defendant] a second time swears that he was not aware of the fact when the other party, who was a stranger, accused him.” *Id.* In such circumstances, “the defendant will be bound to answer the accusation brought against him.” *Id.*

<sup>172</sup> 2 BRACTON, *supra* note 81, at 397.

<sup>173</sup> The appellee in an appeal by a private individual generally could elect either trial by jury or trial by battle. *Id.* at 385–86, 390; BRITTON: AN ENGLISH TRANSLATION AND NOTES 87 (Francis Morgan Nichols ed., 1901) [hereinafter BRITTON].

<sup>174</sup> 2 BRACTON, *supra* note 81, at 391 (citations omitted). *See also id.* at 388 (“[S]everal persons may appeal one man of one and the same deed and the same wound. If the appellee successfully makes his defence against one of the several or withdraws quit by judgment he will be discharged as against all the others and depart quit.”).

Britton, writing around 1290,<sup>175</sup> said that in appeals of homicides, “the defendant may say that at another time there was an appeal in our Court between the same persons for the same felony, and that he was acquitted thereof before such Justices; and if he avouches this by warrant of record, and the record passes in his favour, he shall be awarded quit.”<sup>176</sup>

In the fourteenth century,<sup>177</sup> and perhaps even earlier,<sup>178</sup> a judgment of acquittal in a suit brought on an indictment by the King barred a further suit on an indictment by the King. It is unclear whether at this time an acquittal on an appeal by a private individual barred an indictment by the King. Bracton, writing in the thirteenth century, indicated that it did, stating that an acquittal of an appeal of homicide barred a suit by the King for the same deed.<sup>179</sup> Professor Friedland, however, states that “during the thirteenth and part of the fourteenth centuries a suit by an appellor would

<sup>175</sup> The identity of “Britton” is uncertain. Although Sir Edward Coke attributed the book to John Britton (or de Breton), bishop of Hereford, the bishop died in 1275, fifteen years before the treatise was written. It has been suggested that the author was Sir John le Breton, of Blatherwyk, who may also have been known as Sir John de Bretaign. Simeon E. Baldwin, *Introduction to BRITTON*, *supra* note 173, at viii–xi.

<sup>176</sup> BRITTON, *supra* note 173, at 94. By Britton’s time, an appeal of homicide could be brought only by “the male nearest in blood of the kindred of him who has been feloniously killed, or one who has done homage to him or been of his household.” *Id.* at 91. *See also* 4 BLACKSTONE, *supra* note 84, at \*314.

The only crime against one’s relation, for which an appeal can be brought, is that of *killing* him, by either murder or manslaughter. But this cannot be brought by every relation: but only by the wife for the death of her husband, or by the male heir for the death of his ancestor

....

*Id.*

<sup>177</sup> *See* Kirk, *supra* note 166, at 607 & n.29 (stating that “[o]ne indictment was a bar to a second” and citing examples of cases from the fourteenth century England); *see also* 3 YEAR BOOKS OF THE REIGN OF KING EDWARD THE FIRST 522 (Alfred J. Horwood ed., trans., Kraus Reprint Ltd. 1964) (1863) [hereinafter KING EDWARD THE FIRST].

<sup>178</sup> Friedland asserts that “[i]n the *thirteenth* century, . . . a judgment in a suit brought on indictment by the King barred a further suit by the King.” FRIEDLAND, *supra* note 15, at 8 (emphasis added). In support of this statement, Friedland cites Kirk, *supra* note 166, at 607; however, it appears that the earliest case cited by Kirk was decided in the beginning of the *fourteenth* century. *Id.*

<sup>179</sup> 2 BRACTON, *supra* note 81, at 391.

If he has been appealed by several of one deed and one wound and successfully makes his defence against one [in a trial by battle], he will depart quit against all, *also as regards the king’s suit*, because he thereby proves his innocence against all, as though he had put himself on the country [i.e., elected a trial by jury] *and it had exonerated him completely*.

*Id.* (citations omitted) (emphasis added).

not bar a suit by the King . . . .<sup>180</sup> On the other hand, it seems that, at least well into the fourteenth century, an acquittal on an indictment did not bar an appeal by a private individual for the same offense.<sup>181</sup> Britton stated that “although [an appellee of homicide] acquit himself as to our [*i.e.*, the King’s] suit, yet the suit of any other, who will prosecute within the year and day, is not thereby taken away.”<sup>182</sup> One modern scholar asserts that “at least up to the mid-fourteenth century, if a verdict of acquittal at the suit of the King preceded an appeal the courts would hold the earlier acquittal null and void.”<sup>183</sup>

Conviction of a felony at this time carried a mandatory death penalty; therefore, a prohibition against a second conviction was irrelevant.<sup>184</sup> If the King pardoned an individual convicted on an appeal, the pardon operated to prevent a subsequent prosecution by the King for the same offense.<sup>185</sup> However, a conviction on an indictment, followed by a pardon, would not bar an appeal by a private party,<sup>186</sup> “for the pardon invariably was on the condition that the defendant ‘stand to right’ (*stet recto*) to answer the suit of the party.”<sup>187</sup>

Certainly by the fifteenth century, an acquittal on an appeal following a trial by jury<sup>188</sup> barred a prosecution for the same offense by indictment,<sup>189</sup> and an acquittal

<sup>180</sup> FRIEDLAND, *supra* note 15, at 8–9 (citing BRITTON, *supra* note 173, at 86–87).

<sup>181</sup> See Kirk, *supra* note 166, at 607 n.26 (citing examples of this proposition); see also 4 BLACKSTONE, *supra* note 84, at \*315 (“[I]f [an offender] made his peace with the king, still he might be prosecuted at the suit of the party.”); FRIEDLAND, *supra* note 15, at 8–9.

<sup>182</sup> BRITTON, *supra* note 173, at 94.

<sup>183</sup> Hunter, *supra* note 10, at 11–12.

<sup>184</sup> *Id.* at 18 n.37 (citing 2 BRACTON, *supra* note 81, at 400); see also Kirk, *supra* note 166, at 607 n.25.

<sup>185</sup> Kirk, *supra* note 166, at 607 n.25.

<sup>186</sup> 3 KING EDWARD THE FIRST, *supra* note 177, at 504; *id.* at 514; Kirk, *supra* note 166, at 608; see also Smith v. Bowen, (1709) 88 Eng. Rep. 998 (Q.B.); (1709) 88 Eng. Rep. 1008 (Q.B.); (1709) 88 Eng. Rep. 1022 (Q.B.) (involving an appeal of murder lodged against an individual who had been previously indicted, convicted, and then pardoned by the Queen for the same murder); 2 POLLOCK & MAITLAND, *supra* note 100, at 482 (“The king could not protect the man-slayer from the suit of the dead man’s kin. Even when the pardon was granted on the score of misadventure, this suit was saved by express words.”).

<sup>187</sup> Kirk, *supra* note 166, at 608.

<sup>188</sup> It is unclear whether an acquittal after a trial by battle barred a prosecution by indictment. *Id.* at 607 n.25. The issue may not have been of much importance, though, because nearly all appeals were tried by jury. *Id.* at 606 & n.23.

<sup>189</sup> *Id.* at 607 n.25 (discussing scholars’ views on “whether an acquittal after a trial by battle was a bar to a prosecution by indictment”); see also 4 BLACKSTONE, *supra* note 84, at \*315 (“[I]f any offender gained a verdict in his favour, when prosecuted by the party injured, he was also understood to be acquitted of any crown prosecution for the same offence . . . .”); *id.* at \*335 (“[A]n acquittal on an appeal is a good bar to an indictment on the same offence.”); FRIEDLAND, *supra* note 15, at 9; SIGLER, *supra* note 10, at 10.

on an indictment barred an appeal for the same offense.<sup>190</sup> In such situations, the accused could plead the former acquittal as a bar to the subsequent prosecution.<sup>191</sup> In 1487, however, a statute created a limited exception to the plea of a former acquittal.<sup>192</sup> By that time, a general practice had developed in homicide cases in favor of appeals. An individual could not be tried on an indictment for homicide until more than a year and a day after the death of the victim<sup>193</sup> — a year and a day being the period within which an appeal could be brought by those (the wife or the male heir of the deceased)<sup>194</sup> entitled to prosecute an appeal of death.<sup>195</sup> Frequently, though, witnesses died during that time period, or the matter was forgotten. To remedy this situation, the statute provided for the immediate prosecution of an indictment for homicide without waiting for an appeal, and it removed the plea of a former acquittal as a bar to the prosecuting of an appeal for the same death so long as the appeal was brought within a year and a day.<sup>196</sup>

This “loophole” created by the statute proved to be of little practical significance, however.<sup>197</sup> Courts construed it extremely narrowly, and it was never broadened beyond homicide cases.<sup>198</sup> Moreover, the statute “soon fell into disuse.”<sup>199</sup>

<sup>190</sup> 4 YEAR BOOKS OF THE REIGN OF KING EDWARD THE THIRD 154 (Luke Owen Pike ed., trans., Kraus Reprint Ltd. 1964) (1888) [hereinafter KING EDWARD THE THIRD]; Kirk, *supra* note 166, at 607 n.28, 608 (citing English cases from the fourteenth and fifteenth centuries); see also 4 BLACKSTONE, *supra* note 84, at \*315; *id.* at \*335 (“And so also was an acquittal on an indictment a good bar to an appeal, by the common law . . .”); FRIEDLAND, *supra* note 15, at 9; SIGLER, *supra* note 10, at 8, 10; Hunter, *supra* note 10, at 12.

If a person abandoned an appeal, the prosecution could continue on the appeal “at the suit of the king.” Kirk, *supra* note 166, at 606 (internal quotations omitted). An acquittal or conviction at the suit of the king apparently barred a subsequent prosecution by means of indictment and vice versa. See *id.* at 607 & nn.27–28 (for examples of cases from the reigns of Edward I and Edward IV).

<sup>191</sup> See 4 BLACKSTONE, *supra* note 84, at \*335–36; 1 JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW \*452, \*461.

<sup>192</sup> 1487, 3 Hen. 7, c. 1 (1487) (Eng.).

<sup>193</sup> 4 BLACKSTONE, *supra* note 84, at \*335; FRIEDLAND, *supra* note 15, at 9; 2 HAWKINS, *supra* note 91, at 162.

<sup>194</sup> See 4 BLACKSTONE, *supra* note 84, at \*314.

<sup>195</sup> See *id.* at \*314–15; 2 HAWKINS, *supra* note 91, at 162–66; Kirk, *supra* note 166, at 605–06 & n.20.

<sup>196</sup> See 4 BLACKSTONE, *supra* note 84, at \*335–36; FRIEDLAND, *supra* note 15, at 9–10; SIGLER, *supra* note 10, at 8; 1 STEPHEN, *supra* note 167, at 248–49; Hunter, *supra* note 10, at 12; Kirk, *supra* note 166, at 607 n.26, 608.

<sup>197</sup> See *Bartkus v. Illinois*, 359 U.S. 121, 153 n.6 (1959) (Black, J., dissenting).

<sup>198</sup> FRIEDLAND, *supra* note 15, at 10; 2 HAWKINS, *supra* note 91, at 373–74; see also 1 CHITTY, *supra* note 191, at \*462–63.

<sup>199</sup> *Bartkus*, 359 U.S. at 153 n.6 (Black, J., dissenting); see also FRIEDLAND, *supra* note 15, at 10 (“Because the use of the procedure of appeal was on the decline by this time, the dual procedure was probably not widely employed.”); 1 STEPHEN, *supra* note 167, at 249 (stating that the result of the trial on an indictment was “practically conclusive” unless it

Although Parliament did not formally abolish prosecution by appeal until 1819,<sup>200</sup> by the early part of the eighteenth century, that method of prosecution was “all but practically obsolete.”<sup>201</sup> Nevertheless, as late as 1709, an appeal was brought after an acquittal.<sup>202</sup> In *Young v. Slaughterford*, Chief Justice Holt ordered an appeal for murder to be brought against a man who previously had been acquitted against the evidence on an indictment for the same offense.<sup>203</sup> A jury convicted the man on the appeal,<sup>204</sup> and he apparently was sentenced to death.<sup>205</sup> Indeed, it was an appeal after an acquittal for murder<sup>206</sup> that prompted Parliament to abolish prosecutions by appeal.<sup>207</sup>

Perhaps because of the statute of Henry VII in 1487,<sup>208</sup> the sixteenth century, for the most part, proved to be a “dark period” in the development of rules prohibiting double jeopardy.<sup>209</sup> In an apparent attempt to prevent Welsh criminals from receiving favorable treatment from Welsh juries,<sup>210</sup> a statute was enacted in 1534<sup>211</sup> allowing individuals acquitted of felonies committed in Wales to be tried in the adjoining English county within two years of the alleged offense.<sup>212</sup> In 1591, the Court of King’s Bench, the highest court in England, held in *Vaux’s Case* that an individual acquitted of an offense under an insufficient indictment could be tried again for the same offense under a new indictment because he was never in jeopardy under the defective indictment.<sup>213</sup> This was one of several judicial decisions “stultify[ing] the widening of the protection [against double jeopardy].”<sup>214</sup>

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resulted in an acquittal “under circumstances which greatly dissatisfied the parties concerned”).

<sup>200</sup> 1819, 59 Geo.3, c.46 (Eng.).

<sup>201</sup> 1 STEPHEN, *supra* note 167, at 247. See also 4 BLACKSTONE, *supra* note 84, at \*312 (stating that prosecution by appeal is “very little in use”); Kirk, *supra* note 166, at 605 (“[T]he appeal became obsolete long before [its abolition by statute in 1819].”); *id.* at 608–09 (by 1818, “prosecution by appeal had become well-nigh forgotten.”). See generally 2 HOLDSWORTH, *supra* note 117, at 360–61 (tracing decay of use of appeals).

<sup>202</sup> *Young v. Slaughterford*, (1709) 88 Eng. Rep. 999 (Q.B.).

<sup>203</sup> *Id.*

<sup>204</sup> See *Young v. Slaughterford*, (1709) 88 Eng. Rep. 1007 (Q.B.).

<sup>205</sup> Kirk, *supra* note 166, at 608.

<sup>206</sup> *Ashford v. Thornton*, (1818) 106 Eng. Rep. 149 (K.B.) (involving an appeal of murder brought by the victim’s brother against an individual following that individual’s indictment and acquittal by a jury for the same killing).

<sup>207</sup> See FRIEDLAND, *supra* note 15, at 8; 1 STEPHEN, *supra* note 167, at 249; Hunter, *supra* note 10, at 19 n.57; Kirk, *supra* note 166, at 608–09.

<sup>208</sup> FRIEDLAND, *supra* note 15, at 10.

<sup>209</sup> Hunter, *supra* note 10, at 13.

<sup>210</sup> *Id.* at 12.

<sup>211</sup> 1534, 26 Hen. 8, c. 6 (Eng.).

<sup>212</sup> Hunter, *supra* note 10, at 12.

<sup>213</sup> *Vaux’s Case*, (1591) 76 Eng. Rep. 992, 993 (K.B.).

<sup>214</sup> Hunter, *supra* note 10, at 13.

Despite these “significant lapses”<sup>215</sup> in the development of sound rules against double jeopardy, the sixteenth century saw a legal text describe in detail for the first time the pleas of *autrefois acquit* (a former acquittal) and *autrefois convict* (a former conviction) and present them as principles of law.<sup>216</sup> This text, written by Sir William Staunford in 1557,<sup>217</sup> “was the first to use the Norman-French labels to describe the pleas . . . and the first to mention the plea of previous conviction, albeit in a form which bears little resemblance to its modern manifestation.”<sup>218</sup> At that time, though, the pleas “still represented little more than a set of rules of procedure of no great pre-eminence.”<sup>219</sup>

Modern double jeopardy law began to emerge in England in the last half of the seventeenth century.<sup>220</sup> By that time, prosecutions by the King had begun replacing private prosecutions by appeal as the preferred method of prosecution,<sup>221</sup> thereby fulfilling the “prerequisite to a true double jeopardy situation.”<sup>222</sup> In addition, Sir Edward Coke’s *Institutes* had been published posthumously in 1641 and 1644. In his *Third Institutes*,<sup>223</sup> Lord Coke, whom one scholar called “a fountainhead of double jeopardy law,”<sup>224</sup> described the basis for double jeopardy, clarifying the concept and emphasizing its importance.<sup>225</sup> Largely restating Bracton, Britton, and Staunford, Coke incorporated “the slowly growing body of case law” concerning double jeopardy.<sup>226</sup> Coke’s work did not indicate any important advances in the application of the pleas of *autrefois acquit*, *autrefois convict*, and pardon, which “remained the only manifestations of the rule against double jeopardy.”<sup>227</sup> Indeed,

<sup>215</sup> FRIEDLAND, *supra* note 15, at 10.

<sup>216</sup> 2 WILLIAM STAUNFORD, *LES PLEES DEL CORON* 105–08 (P.R. Glazebrook ed., London, Prof. Books 1971) (1557).

<sup>217</sup> *Id.*

<sup>218</sup> Hunter, *supra* note 10, at 13. Hunter’s article contains an excellent summary of Staunford’s treatment of the protection against double jeopardy. *See id.* at 13–14.

<sup>219</sup> *Id.* at 14.

<sup>220</sup> *See generally* FRIEDLAND, *supra* note 15, at 11–13 (citing intermittent barring of trials due to double jeopardy in the late seventeenth century); SIGLER, *supra* note 10, at 16–21 (tracing the emergence of the double jeopardy exception in English common law).

<sup>221</sup> *Cf.* 4 BLACKSTONE, *supra* note 84, at \*312 (stating that prosecution by appeal is “very little in use”); Kirk, *supra* note 166, at 605 (“[T]he appeal became obsolete long before [its abolition by statute in 1819].”). *See generally* 2 HOLDSWORTH, *supra* note 117, at 360–61.

<sup>222</sup> SIGLER, *supra* note 10, at 9.

<sup>223</sup> 3 EDWARD COKE, *THE INSTITUTES OF THE LAWS OF ENGLAND* (M. Flesher ed., London, W. Lee & D. Parkman 1644).

<sup>224</sup> SIGLER, *supra* note 10, at 17.

<sup>225</sup> *See id.* at 16–17; 3 COKE, *supra* note 223, at 213–14, 233–40.

<sup>226</sup> Hunter, *supra* note 10, at 14 (concluding that the case law “by and large led the law deeper and deeper into a mire of tangled technical and artificial rules”).

<sup>227</sup> *Id.* Coke also described the plea of *autrefois attain*. *See* COKE, *supra* note 223, at 213. For a discussion of the plea of *autrefois attain*, see *supra* note 92.

the English Bill of Rights enacted in 1689 made no mention of a protection against double jeopardy.<sup>228</sup>

Shortly after the publication of Coke's *Institutes*, Sir Matthew Hale wrote *The History of the Pleas of the Crown (Historia Placitorum Coronae)*.<sup>229</sup> Like Coke, Hale detailed the pleas of *autrefois acquit*, *autrefois convict*, and pardon,<sup>230</sup> but also like Coke, "many of his observations are studded with legal anachronisms."<sup>231</sup> Whether Hale's work influenced the development of double jeopardy law during the seventeenth century is unclear because it was not published until 1736–39, more than sixty years after his death.

During the last half of the seventeenth century, English courts began dealing with a variety of double jeopardy issues, such as whether an individual acquitted of an offense could be re-indicted for a different offense based upon the same conduct for which he had been acquitted.<sup>232</sup> For example, in *Turner*, the court held that William Turner's acquittal of burglary for breaking into the house of a Mr. Tryon and taking away great sums of money barred his subsequent prosecution under an indictment charging him with the same burglary for breaking into Mr. Tryon's house and taking away the money of Tryon's servant, Hills.<sup>233</sup> Nevertheless, the court also concluded that Turner could be prosecuted for stealing the money belonging to Hills because that constituted a different crime than burglary.<sup>234</sup>

Overall, in the 1660s, the Court of King's Bench expanded the protection against double jeopardy considerably. Among other things, that Court held that a prosecutor could not seek a new trial following an acquittal.<sup>235</sup> It also held that a bill of exceptions could not be employed in criminal cases.<sup>236</sup> In so holding, the Court refused to expand the scope of review by writ of error, which was limited to errors on the face of the trial record. Because a second proceeding was permitted when a conviction was reversed on a writ of error,<sup>237</sup> had the Court not limited the use of a bill of exceptions, further trials would have been permitted in criminal cases.<sup>238</sup>

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<sup>228</sup> 1688, 1 W. & M., sess. 2, c. 2 (Eng.).

<sup>229</sup> 2 HALE, *supra* note 84.

<sup>230</sup> *Id.* at \*240–55. Hale also discussed the plea of *autrefois attain*. See *id.* at \*251–55.

<sup>231</sup> SIGLER, *supra* note 10, at 16; see also Hunter, *supra* note 10, at 15.

<sup>232</sup> See FRIEDLAND, *supra* note 15, at 11–13.

<sup>233</sup> (1664) 84 Eng. Rep. 1068 (K.B.).

<sup>234</sup> *Id.*; see also Jones & Bever, (1665) 84 Eng. Rep. 1078 (K.B.) (holding that Jones's and Bever's acquittals of burglary for breaking into the King's house at Whitehal and stealing the goods of Lord Cornbury barred their subsequent prosecution under an indictment charging them with the same burglary for breaking into the house and stealing the goods of a Mr. Nunnesy, but also concluding that they might be prosecuted for the theft of Nunnesy's goods).

<sup>235</sup> *The King v. Read*, (1660) 83 Eng. Rep. 271 (K.B.) (1 Lev. 9).

<sup>236</sup> *Sir Henry Vane's Case*, (1662) 83 Eng. Rep. 300 (K.B.).

<sup>237</sup> FRIEDLAND, *supra* note 15, at 238.

<sup>238</sup> *Id.* at 11–12.

During the last half of the seventeenth century, the Court of King's Bench recognized judgments of other criminal courts in England, so an acquittal in any such court that had jurisdiction of the matter barred a subsequent prosecution for the same crime in the Court of King's Bench.<sup>239</sup> In addition, the Court of King's Bench held that an acquittal in another country barred a subsequent prosecution for the same offense in England,<sup>240</sup> concluding in *Rex v. Hutchinson*<sup>241</sup> that Hutchinson's previous acquittal of murder in Portugal barred his prosecution in England for the same killing.<sup>242</sup>

During that same period, the Court of King's Bench also dealt with the practice frequently engaged in by trial judges of discharging the jury when it appeared an acquittal was imminent, thereby affording the prosecutor the opportunity to bring a stronger case in a new trial. In *The King v. Perkins*,<sup>243</sup> the Court prohibited the practice, with Chief Justice Lord Holt stating that "it was the opinion of all the Judges of England, upon debate between them, that in all capital cases, a juror cannot be withdrawn, though the parties consent to it: that in criminal cases, not capital, a juror may be withdrawn, if both parties consent, but not otherwise . . ." <sup>244</sup>

By the second half of the eighteenth century, the pleas of *autrefois acquit*, *autrefois convict*, and pardon were fixtures in English common law.<sup>245</sup> In his

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<sup>239</sup> *Id.* at 12 (quoting 2 HAWKINS, *supra* note 91, at 372).

<sup>240</sup> Despite the statute of 1534 allowing individuals acquitted of felonies committed in Wales to be tried anew in England within two years of the alleged offense, 1534, 26 Hen. 8, c. 6 (Eng.), the Court of King's Bench in *The King v. Thomas*, (1664) 83 Eng. Rep. 1180, 1181 (K.B.), (1664) 83 Eng. Rep. 326, 327 (K.B.), held that Thomas's acquittal in Wales on a charge of murder barred a subsequent trial in England for the same killing. At the time that *Thomas* arose, however, statutes had legally incorporated Wales into England, so the court in *Thomas* may only have been holding that English law prohibited successive prosecutions in English courts. Note, *supra* note 18, at 447–48 & n.27. Friedland, after initially asserting that *Thomas* was a case in which the court "barred further proceedings in England because of a trial in another jurisdiction," subsequently acknowledges that "it is not a 'clearcut' decision that an English court will recognize a foreign criminal judgment[, because] Wales was part of England and Thomas had formerly been tried before one of the King's Judges in a proceeding brought in the name of the King." FRIEDLAND, *supra* note 15, at 12, 362 (citations omitted).

<sup>241</sup> (1677) 84 Eng. Rep. 1011 (K.B.) (the decision does not report the facts of the case, only that the defendant was denied bail). See *Beak v. Thyrrwhit*, (1688) 87 Eng. Rep. 124, 125 (K.B.) (discussing *Rex v. Hutchinson*); see also *The King v. Roche*, (1775) 168 Eng. Rep. 169, 169 n.(a) (C.C.) (referencing *Rex v. Hutchinson*).

<sup>242</sup> But see FRIEDLAND, *supra* note 15, at 363 (stating that it is uncertain whether the court in *Hutchinson* held that the defendant *could* not be tried in England or *should* not be tried there).

<sup>243</sup> (1698) 90 Eng. Rep. 1122 (K.B.).

<sup>244</sup> *Id.*

<sup>245</sup> The common law also recognized the plea of *autrefois attaint*. See *supra* note 92.

monumental treatise, Sir William Blackstone set forth the following rules that applied to all but homicide cases, which were governed by the statute of 1487.<sup>246</sup> He stated:

First, [under] the plea of *autrefois acquit*, or a former acquittal, . . . when a man is once fairly found not guilty upon any indictment, or other prosecution, before any court having competent jurisdiction of the offence, he may plead such acquittal in bar of any subsequent accusation for the same crime. Therefore an acquittal on an appeal is a good bar to an indictment on the same offence. And so also was an acquittal on an indictment a good bar to an appeal, by the common law . . . .

Secondly, the plea of *autrefois convict*, or a former conviction for the same identical crime, though no judgment was ever given, or perhaps will be, (being suspended by the benefit of clergy or other causes,) is a good plea in bar to an indictment. . . .

Lastly, a *pardon* may be pleaded in bar; as at once destroying the end and purpose of the indictment, by remitting that punishment which the prosecution is calculated to inflict.<sup>247</sup>

### III. DOUBLE JEOPARDY PROTECTION IN AMERICA BEFORE THE ADOPTION OF THE FIFTH AMENDMENT

While double jeopardy law continued to develop in England during the seventeenth century, it began to take root in England's colonies in North America. In 1639, the Maryland General Assembly enacted the Act for the Liberties of the People, which has been called "the first American Bill of Rights."<sup>248</sup> Although the Act did not contain an express protection against double jeopardy, it reaffirmed the principle that the inhabitants of the Colony (with the exception of slaves) "[s]hall have and enjoy all such rights liberties immunities priviledges and free customs . . . as any naturall born subject of England hath or ought to have or enjoy in the Realm of England by force or vertue of the common law or Statute Law of England."<sup>249</sup>

The first colonial enactment containing an express guarantee against double jeopardy appeared in 1641 when the General Court of the Massachusetts Bay

<sup>246</sup> See *supra* text accompanying notes 192–96.

<sup>247</sup> 4 BLACKSTONE, *supra* note 84, at \*335–36, \*337.

<sup>248</sup> 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 67 (1971).

<sup>249</sup> Maryland Act for the Liberties of the People (1639), *reprinted in* 1 SCHWARTZ, *supra* note 248, at 68.

Colony enacted the Body of Liberties.<sup>250</sup> This detailed charter of liberties served as the model for other colonies and was “the most important . . . forerunner of the federal Bill of Rights.”<sup>251</sup> Paragraph 42 of the Body of Liberties stated that “[n]o man shall be twice sentenced by Civill Justice for one and the same Crime, offence, or Trespasse.”<sup>252</sup> Seven years later came the Laws and Liberties of 1648. This code included the double jeopardy provision contained in the Body of Liberties.<sup>253</sup> It also contained a provision stating that “everie Action between partie and partie and proceedings against delinquents in *criminal* Causes shall be . . . entred in the *rolls* of everie Court by the *Recorder* therof, that such Actions be not afterwards brought again to the vexation of any man.”<sup>254</sup>

Connecticut also adopted a provision against double jeopardy.<sup>255</sup> The Connecticut Code of 1652 included a clause, which its authors took from the Massachusetts Bay Colony’s Body of Liberties, providing that “no Person shall be twice sentenced by Civil Justice for one and the same Crime . . . .”<sup>256</sup> In addition, the Fundamental Constitutions of Carolina, a document drafted by the political philosopher John Locke but never adopted, contained a provision stating that “[n]o cause shall be twice tried in any one court, upon any reason or pretence whatsoever.”<sup>257</sup>

After the Revolutionary War, the former colonies formed the United States of America under the Articles of Confederation. While guaranteeing the free inhabitants of each State “all privileges and immunities of free citizens in the several States,”<sup>258</sup> the Articles of Confederation did not contain a Bill of Rights or an express protection against double jeopardy.<sup>259</sup> Similarly, most state constitutions at that time did not contain an express guarantee against double jeopardy, although some provided for the

<sup>250</sup> See 1 SCHWARTZ, *supra* note 248, at 71.

<sup>251</sup> *Id.* at 69.

<sup>252</sup> Mass. Body of Liberties ¶ 42 (1641), *reprinted in* SOURCES OF OUR LIBERTIES: DOCUMENTARY ORIGINS OF INDIVIDUAL LIBERTIES IN THE UNITED STATES CONSTITUTION AND BILL OF RIGHTS 153 (Richard L. Perry & John C. Cooper eds., 1959).

<sup>253</sup> THE LAWS AND LIBERTIES OF MASSACHUSETTS: REPRINTED FROM THE COPY OF THE 1648 EDITION IN THE HENRY E. HUNTINGTON LIBRARY 46 (1929).

<sup>254</sup> *Id.* at 47 (emphasis in original). This provision appears in the section mandating the keeping of court records, however, which raises the question whether the legislature intended it to create an additional protection against double jeopardy.

<sup>255</sup> See Christopher Collier, *The Common Law and Individual Rights in Connecticut Before the Federal Bill of Rights*, 76 CONN. B.J. 1 (2002).

<sup>256</sup> *Id.* at 12.

<sup>257</sup> THE FUNDAMENTAL CONSTITUTIONS OF CAROLINA ¶ 64 (1669), *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 2780 (Francis Newton Thorpe ed., 1909).

<sup>258</sup> ARTICLES OF CONFEDERATION art. IV (1778).

<sup>259</sup> *Id.*

common law of England to remain in force unless altered by statute.<sup>260</sup> The common law of England, of course, recognized the pleas of *autrefois acquit*, *autrefois convict*, and pardon.<sup>261</sup>

The first state constitution to incorporate an express protection against double jeopardy was the New Hampshire Constitution of 1784. Article XVI of that constitution's Bill of Rights provided: "No subject shall be liable to be tried, after an acquittal, for the same crime or offence."<sup>262</sup> Shortly after New Hampshire adopted a constitutional protection against double jeopardy, Pennsylvania followed suit.<sup>263</sup> In 1790, Pennsylvania ratified a new constitution containing the following double jeopardy clause: "No person shall, for the same offence, be twice put in jeopardy of life or limb."<sup>264</sup>

In addition to statutes and constitutional provisions recognizing a protection against double jeopardy, several colonies and, after independence, states also recognized a prohibition against double jeopardy through case law.<sup>265</sup> For example, Virginia courts acknowledged the English common law pleas of a former conviction, a former acquittal, and a pardon for the identical crime charged, as well as a plea of a former attainder for any felony.<sup>266</sup> Thus, "[o]n a verdict of not guilty, the prisoner was forever discharged so far as that particular accusation was concerned."<sup>267</sup> Not surprisingly, the decisions in the Virginia courts concerning these pleas tended to follow English precedent. In one case decided in 1735, a jury convicted an individual for stealing a horse.<sup>268</sup> On a motion in arrest of judgment, the trial court declared a mistrial after finding that the order directing the sheriff to assemble a jury to try the case had been issued to the wrong county.<sup>269</sup> The trial court remanded the case for

<sup>260</sup> *E.g.*, DEL. CONST. of 1776 art. 25 ("The common law of England . . . shall remain in force, unless [it] shall be altered by a future law of the legislature . . ."); N.J. CONST. of 1776 ¶ XXII ("[T]he common law of England . . . as [has] been heretofore practised in this Colony, shall still remain in force, until [it] shall be altered by a future law of the Legislature . . ."); N.Y. CONST. of 1777 ¶ XXXV ("[T]he common law of England . . . shall be and continue the law of this State, subject to such alterations and provisions as the legislature of this State shall, from time to time, make concerning the same."); *see also* MD. CONST. of 1776, A Declaration of Rights, &C. ¶ III ("[T]he inhabitants of Maryland are entitled to the common law of England . . .").

<sup>261</sup> 4 BLACKSTONE, *supra* note 84, at \*335–37.

<sup>262</sup> N.H. CONST. OF 1784, Part. I, art. XVI.

<sup>263</sup> PA. CONST. OF 1790, art. IX, § 10.

<sup>264</sup> *Id.*

<sup>265</sup> *See infra* notes 266–97.

<sup>266</sup> ARTHUR P. SCOTT, CRIMINAL LAW IN COLONIAL VIRGINIA 81–82 (1930).

<sup>267</sup> *Id.* at 102.

<sup>268</sup> 2 VIRGINIA COLONIAL DECISIONS: THE REPORTS BY SIR JOHN RANDOLPH AND BY EDWARD BARRADALL OF DECISIONS OF THE GENERAL COURT OF VIRGINIA 1728–1741, at B50 (R.T. Barton ed., 1909).

<sup>269</sup> *Id.* at B51.

a new trial before a jury in the proper county.<sup>270</sup> It concluded that the maxim that “a Man should not be twice put in Danger of his Life” did not bar a second trial of the individual for the horse theft because the jury that initially tried the case had no power to convict the accused.<sup>271</sup> This result was consistent with that reached in *Vaux’s Case*,<sup>272</sup> in which the Court of King’s Bench held that an individual acquitted of an offense charged in an insufficient indictment could be tried for the same offense under a new indictment because he was never in jeopardy under the original one.<sup>273</sup>

New York courts also recognized the defenses of a previous conviction and a previous acquittal.<sup>274</sup> In 1699, a grand jury in New York City charged three men, Jacob Bratt, Francis Wessells, and William Shakerly, with vending bread of unlawful assize.<sup>275</sup> Two years earlier, the men had been convicted and fined for making bread contrary to the laws of New York City.<sup>276</sup> The same act apparently constituted the basis for both charges, for the court dismissed the second charge because the men “ha[d] been fined before for the same fact.”<sup>277</sup> Nearly seventy years later, George Klock, Jr., was charged in the Supreme Court of New York with contempt for rescuing his father from the sheriff.<sup>278</sup> Klock pleaded *autrefois convict*, and the court discharged him, “[i]t appearing to the Court by the Examination of the Defendant taken in Court on Oath that the Defendant had been indicted in the Court of . . . [General Sessions] . . . for Albany for the Rescue aforesaid and had been fined the sum of ten pounds for the same and had paid the said Fine.”<sup>279</sup> Although judicial records in colonial New York do not show any sign of a plea of *autrefois acquit*, it has been suggested that this “can be attributed to the solicitude of royal officials that there be no double prosecutions.”<sup>280</sup> Such solicitude also may explain the infrequency of a plea of *autrefois convict*.<sup>281</sup>

In Connecticut, the courts also recognized a protection against double jeopardy. In *Hannaball v. Spalding*,<sup>282</sup> a private individual, Spalding, brought a combined

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> (1591) 76 Eng. Rep. 992, 993 (K.B.).

<sup>273</sup> *Id.*

<sup>274</sup> See generally JULIUS GOEBEL, JR., & T. RAYMOND NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK: A STUDY IN CRIMINAL PROCEDURE (1664–1776) 558–59 (1944).

<sup>275</sup> *Id.* at 588.

<sup>276</sup> *Id.*

<sup>277</sup> *Id.* (discussing Minutes of the General Quarter Sessions of the Peace for the City and County of New York 1694–1731/32 30, 51, 53).

<sup>278</sup> *Id.* (discussing Minutes of the Supreme Court of Judicature of the Province of New York 1766–69 (Engrossed Minutes) 504, 505).

<sup>279</sup> *Id.* at 588–89.

<sup>280</sup> *Id.* at 589.

<sup>281</sup> *Id.*

<sup>282</sup> 1 Root 86 (Conn. 1783).

criminal prosecution and civil action for damages against Hannaball for the theft of a handkerchief.<sup>283</sup> The county court acquitted Hannaball but subsequently granted Spalding a new trial on the civil portion of the case on the ground of newly discovered evidence. At his second trial, Hannaball was found guilty, and the court entered a judgment against him. The appellate court reversed that judgment, holding that a prosecutor could not obtain a new trial in a criminal case following the acquittal of the accused and that a new trial could not be granted on the civil portion only of a combined criminal prosecution and civil action for damages.<sup>284</sup> Four years later, another appellate court in Connecticut reached a similar result. In *Coit v. Geer*,<sup>285</sup> the court held that an individual who brought a combined criminal prosecution and civil action for damages for theft could not appeal a verdict of not guilty.<sup>286</sup> The court reasoned that “[n]o one is to be twice drawn in jeopardy for the same crime, which might be the case if this appeal is sustained.”<sup>287</sup>

Pennsylvania courts also recognized a protection against double jeopardy. In *Respublica v. Shaffer*,<sup>288</sup> Chief Justice Thomas McKean of the Supreme Court of Pennsylvania addressed a grand jury that was considering whether to charge a particular individual with a criminal offense.<sup>289</sup> Chief Justice McKean told the grand jurors that the defendant could not summon witnesses to testify before the grand jury on his behalf, explaining that allowing the putative defendant to call witnesses would turn the grand jury proceeding into a trial, with the grand jury’s decision being tantamount to a verdict of acquittal or guilt.<sup>290</sup> The Chief Justice continued: “[T]his would involve us in another difficulty; for, by the law it is declared that no man shall be twice put in jeopardy for the same offence: and, yet, it is certain that the enquiry, now proposed by the Grand Jury, would necessarily introduce the oppression of a double trial.”<sup>291</sup>

The courts in South Carolina also seemed to grant individuals some protection against double jeopardy. In *Steel v. Roach*,<sup>292</sup> a *qui tam* action, the Attorney General, at the request of a private party, filed an information alleging that the claimant of the cargo of a ship violated the revenue laws by unloading the cargo before obtaining a permit or paying the duty and by unloading before sunrise.<sup>293</sup> The defendant obtained a verdict in his favor after which a motion for a new trial was made.<sup>294</sup> The court

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<sup>283</sup> *Id.*

<sup>284</sup> *Id.* at 87.

<sup>285</sup> 1 Kirby 269 (Conn. 1787).

<sup>286</sup> *Id.*

<sup>287</sup> *Id.*

<sup>288</sup> 1 U.S. (1 Dall.) 236 (1788).

<sup>289</sup> *Id.*

<sup>290</sup> *Id.* at 237.

<sup>291</sup> *Id.*

<sup>292</sup> 1 S.C.L. (1 Bay) 63 (1788).

<sup>293</sup> *Id.* at 63-64.

<sup>294</sup> *Id.* at 64.

denied the motion “upon the ground of [the action] being a *qui tam* or *penal* action.”<sup>295</sup> This language seems to recognize the principle against double jeopardy, but the report of the case then adds that, in these kinds of penal actions, “the Court will seldom grant a new trial.”<sup>296</sup> This latter statement raises the question whether a court could order a new trial after a verdict for the defendant in a *qui tam* action.<sup>297</sup>

#### IV. THE ADOPTION OF THE FIFTH AMENDMENT GUARANTEE AGAINST DOUBLE JEOPARDY

As originally submitted by the Constitutional Convention to the states for ratification, the Constitution of the United States did not contain a bill of rights. Its failure to do so created an outcry from the populace.<sup>298</sup> President George Washington, in his Inaugural Address to Congress, mentioned the widespread call for amendments to the Constitution.<sup>299</sup> Thomas Jefferson, in a series of letters he wrote to his political mentor and intimate friend James Madison — the “father of the Constitution”<sup>300</sup> — demanded that a bill of rights be added.<sup>301</sup> In a number of states, ratification of the Constitution occurred only after its supporters at the

<sup>295</sup> *Id.*

<sup>296</sup> *Id.*

<sup>297</sup> The Supreme Court has never decided whether the Double Jeopardy Clause applies to *qui tam* actions. In *United States v. Halper*, 490 U.S. 435 (1989), *method of analysis disavowed* by *Hudson v. United States*, 522 U.S. 93 (1997), the Court stated:

We express no opinion as to whether a *qui tam* action . . . is properly characterized as a suit between private parties for purposes of [the] rule [that the protections of the Double Jeopardy Clause are not triggered by litigation between private parties]. In contrast to the plaintiff in a private-attorney-general action, the private party in a *qui tam* action brings suit in the name of the [government] and shares with the [g]overnment any proceeds of the action. . . . In [*United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943),] the Court assumed but did not decide that a *qui tam* action could give rise to double jeopardy. Since this assumption was not essential to the judgment in *Hess*, we consider the issue unresolved.

*Id.* at 451 n.11.

<sup>298</sup> IRVING BRANT, *THE BILL OF RIGHTS: ITS ORIGIN AND MEANING* 39 (1965); EDWARD DUMBAULD, *THE BILL OF RIGHTS AND WHAT IT MEANS TODAY* 9 (Greenwood Press 1979) (1957); LEONARD W. LEVY, *ORIGINS OF THE BILL OF RIGHTS* 32 (1999).

<sup>299</sup> George Washington, First Inaugural Address (Apr. 30, 1789), in 1 *ANNALS OF CONG.* 27–29 (Joseph Gales ed., 1834).

<sup>300</sup> See IRVING BRANT, *JAMES MADISON: FATHER OF THE CONSTITUTION 1787–1800* (1950); see also DUMBAULD, *supra* note 298, at 21; LEVY, *supra* note 298, at 34.

<sup>301</sup> DUMBAULD, *supra* note 298, at 8–9; see also LEVY, *supra* note 298, at 32–34; 2 FRANCIS NEWTON THORPE, *THE CONSTITUTIONAL HISTORY OF THE UNITED STATES* 212–13 (1901).

ratifying convention assured hesitant delegates that a bill of rights would be added to the Constitution in the form of subsequent amendments.<sup>302</sup> George Mason and Elbridge Gerry, two of the framers of the Constitution, relied partly upon the lack of a bill of rights as a ground to oppose ratification of the Constitution.<sup>303</sup> To be sure, many of those clamoring for a bill of rights viewed the proposed Constitution as too great an infringement on the sovereignty of the individual states and actually opposed ratification of the Constitution on that ground.<sup>304</sup> Yet, their expressions of alarm would not have received a favorable response from the masses of people unless the citizenry felt genuine concern about the absence of a bill of rights.<sup>305</sup>

The First Congress convened on March 4, 1789. On May 4, Representative James Madison of Virginia gave notice to the House of Representatives that on May 25, he intended to raise the subject of amendments to the Constitution.<sup>306</sup> He did not do so on that date,<sup>307</sup> but on June 8, he introduced a series of proposed amendments, including all those that ultimately became the Bill of Rights.<sup>308</sup> One of those proposals was the forerunner of the Double Jeopardy Clause.<sup>309</sup> Madison proposed that “[n]o person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence . . . .”<sup>310</sup> Madison may have taken this prohibition against double jeopardy from a statement in the prefatory declaration of rights contained in the New York act ratifying the Constitution:<sup>311</sup> “[N]o Person ought to be put twice in Jeopardy of Life or Limb for one and the same Offence, nor, unless in case of impeachment, be punished more than once for the same Offence.”<sup>312</sup> Alternatively, Madison may have been influenced by an amendment recommended by a special committee appointed by the Maryland convention

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<sup>302</sup> LEVY, *supra* note 298, at 31–32.

<sup>303</sup> BRANT, *supra* note 298, at 39.

<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

<sup>306</sup> 1 ANNALS OF CONG. 257 (Joseph Gales ed., 1834).

<sup>307</sup> *Id.* at 425–26.

<sup>308</sup> *Id.* at 450–53.

<sup>309</sup> *Id.* at 451–52.

<sup>310</sup> *Id.* The Congressional Register and two contemporary newspapers printed this proposal with slightly different punctuation than the version printed in the Annals of Congress. In the former versions, a comma separates the words “one punishment” from the words “or one trial.” See THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 297 (Neil H. Cogan ed., 1997) [hereinafter COMPLETE BILL OF RIGHTS]. It is unclear which of these versions is accurate. It should be noted, however, that the Annals of Congress, formally titled The Debates and Proceedings in the Congress of the United States, were not published contemporaneously. Rather, they were compiled between 1834 and 1856, primarily from newspaper accounts. Speeches in the Annals are not presented verbatim, but are paraphrased.

<sup>311</sup> DUMBAULD, *supra* note 298, at 53.

<sup>312</sup> Reprinted in *id.* at 190. See also COMPLETE BILL OF RIGHTS, *supra* note 310, at 308.

following its ratification of the Constitution.<sup>313</sup> The majority of that committee recommended the addition to the Constitution of a provision stating that “there be no . . . second trial after acquittal. . . .”<sup>314</sup> Madison also may have considered Blackstone’s statement that it was a “universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once for the same offence.”<sup>315</sup>

Whatever the source of Madison’s proposal concerning double jeopardy, the House of Representatives referred Madison’s proposed amendments to a Committee of the Whole on the state of the Union.<sup>316</sup> Six weeks later, on July 21, Madison sought to have the House go into a Committee of the Whole to consider the proposed amendments.<sup>317</sup> The House instead referred them to a Select Committee “to consist of a member from each State”<sup>318</sup> and instructed the Select Committee “to take the subject of amendments to the constitution . . . generally into their consideration, and to report thereupon . . . .”<sup>319</sup> On July 28, Representative John Vining of Delaware, a member of the Select Committee, “made a report, which was ordered to lie on the table.”<sup>320</sup>

The House of Representatives, sitting as a Committee of the Whole, eventually considered the proposed amendments to the Constitution on August 13.<sup>321</sup> Four days later, it debated the clause prohibiting double jeopardy, which, as reported by the Select Committee, then read: “No person shall be subject, [except] in case of impeachment, to more than one trial or one punishment for the same offence . . . .”<sup>322</sup> Representative Egbert Benson of New York opposed this proposed amendment “in the manner it stood.”<sup>323</sup> He claimed that the meaning of this clause “appeared rather doubtful”<sup>324</sup> and asserted that its language prohibiting more than one trial for the same offense contradicted established law.<sup>325</sup> Representative Benson presumed that the clause intended to express the guarantee that no man’s life should be put in jeopardy more than once for the same offense, but pointed out that an individual was entitled to more than one trial for the same offense.<sup>326</sup> He

<sup>313</sup> DUMBAULD, *supra* note 298, at 53.

<sup>314</sup> *Reprinted in id.* at 177. *See also* COMPLETE BILL OF RIGHTS, *supra* note 310, at 308.

<sup>315</sup> DUMBAULD, *supra* note 298, at 53 n.8.

<sup>316</sup> 1 ANNALS OF CONG. 468 (Joseph Gales ed., 1834).

<sup>317</sup> *Id.* at 685–86.

<sup>318</sup> *Id.* at 690.

<sup>319</sup> *Id.*

<sup>320</sup> *Id.* at 699.

<sup>321</sup> *Id.* at 734.

<sup>322</sup> *Id.* at 781.

<sup>323</sup> *Id.*

<sup>324</sup> *Id.*

<sup>325</sup> *Id.*

<sup>326</sup> *Id.* at 781–82.

noted that the “humane”<sup>327</sup> objective of a guarantee against double jeopardy was to prevent more than one punishment for a single offense.<sup>328</sup> For that reason, he moved to amend the clause by striking the words “one trial or.”<sup>329</sup>

Representative Roger Sherman of Connecticut agreed with Benson.<sup>330</sup> Sherman thought that the courts would never think of trying and punishing an individual twice for the same offense and that a person acquitted in his first trial should not be tried a second time.<sup>331</sup> He argued, however, that an individual convicted in his first trial should be entitled to a second trial if prejudicial error infected his initial trial.<sup>332</sup> As the clause stood, Sherman contended, it deprived such a person of that opportunity.<sup>333</sup>

Representative Samuel Livermore of New Hampshire spoke in favor of the proposed amendment.<sup>334</sup> He thought the clause was “essential” and that it declared the current state of the law.<sup>335</sup> He asserted that striking the words “one trial or,” as proposed by Representative Benson, would imply that the House intended to change the current law and expose an individual to the danger of more than one trial for the same offense.<sup>336</sup> He noted that in many cases, a guilty person obtains an acquittal because the prosecution failed to introduce sufficient evidence to prove his guilt and that in such cases, both in Great Britain and the United States, the individual cannot be tried again for the same offense.<sup>337</sup> Accordingly, Livermore argued, the clause was proper as originally proposed.<sup>338</sup>

Representative Theodore Sedgwick of Massachusetts sided with Benson.<sup>339</sup> He proclaimed that instead of securing the liberty of an individual, the clause would abridge the privileges of those accused of a crime.<sup>340</sup> Nevertheless, Benson’s motion “lost by a considerable majority.”<sup>341</sup>

Representative George Partridge of Massachusetts then moved to amend the proposal by inserting the words “by any law of the United States” after the words “same offence.”<sup>342</sup> That amendment “lost also.”<sup>343</sup>

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<sup>327</sup> *Id.* at 782.

<sup>328</sup> *Id.*

<sup>329</sup> *Id.*

<sup>330</sup> *Id.*

<sup>331</sup> *Id.*

<sup>332</sup> *Id.*

<sup>333</sup> *Id.*

<sup>334</sup> *Id.*

<sup>335</sup> *Id.*

<sup>336</sup> *Id.*

<sup>337</sup> *Id.*

<sup>338</sup> *Id.*

<sup>339</sup> *Id.*

<sup>340</sup> *Id.*

<sup>341</sup> *Id.*

<sup>342</sup> *Id.*

<sup>343</sup> *Id.*

On August 19, the House of Representatives began considering the proposed amendments as reported by the Committee of the Whole.<sup>344</sup> On August 21, the House adopted the proposed amendment concerning double jeopardy<sup>345</sup> and the next day referred it and the other proposed amendments it had adopted to a committee consisting of Representatives Benson, Sherman, and Sedgwick, “who were directed to arrange the said amendments and make report thereof.”<sup>346</sup> The committee arranged the proposed articles of amendment, and on August 24, the House enacted a resolution to send the proposed amendments to the States for ratification.<sup>347</sup> The House then sent the proposed articles of amendment to the Senate for its concurrence.<sup>348</sup>

The Senate took up the proposed amendments to the Constitution on September 2.<sup>349</sup> Two days later, it considered the clause dealing with double jeopardy.<sup>350</sup> It struck the words “except in case of impeachment, to more than one trial, or one punishment,”<sup>351</sup> and in its place substituted the phrase “be twice put in jeopardy of life or limb by any public prosecution.”<sup>352</sup>

The source of the Senate’s language is uncertain.<sup>353</sup> The word “jeopardy” appears only eleven times in reports of criminal cases in the Year Books, which covered the period from about 1290 to 1535, and in only three of these instances was the word used in the statement that a man’s life should not be “put in jeopardy” twice for the same offense.<sup>354</sup> Several American courts used the word prior to the First Congress.<sup>355</sup> In addition, as indicated above,<sup>356</sup> a prefatory declaration of rights contained in the New York act ratifying the Constitution provided that “no Person ought to be put twice in Jeopardy of Life or Limb for one and the same Offence . . . .”<sup>357</sup>

<sup>344</sup> *Id.* at 795.

<sup>345</sup> H.J. 1st Cong., 1st Sess. 85 (1789). Unlike the official version, the version included in a House Pamphlet contains a comma between the words “one trial” and the words “or one punishment.” See COMPLETE BILL OF RIGHTS, *supra* note 310, at 300.

<sup>346</sup> 1 ANNALS OF CONG. 808 (Joseph Gales ed., 1834).

<sup>347</sup> *Id.* at 809.

<sup>348</sup> *Id.*

<sup>349</sup> S.J., 1st Cong., 1st Sess., 69 (1789). The proposed amendments, as passed by the House, were initially read in the Senate on August 25. *Id.* at 63–64.

<sup>350</sup> *Id.* at 71.

<sup>351</sup> *Id.* As it appears in the Senate Journal, the punctuation in the proposed amendment on double jeopardy differs slightly from the version that appears in the House Journal: in the former, a comma separates the words “one trial” from the words “or one punishment.” *Id.* at 64. The latter is missing the comma. H.J., 1st Cong., 1st Sess., 85 (1789).

<sup>352</sup> S.J., 1st Cong., 1st Sess., 71 (1789).

<sup>353</sup> The Senate’s sessions were not open to the public at this time. Consequently, there are no reports of the Senate debates on the proposed amendments that became the Bill of Rights.

<sup>354</sup> Kirk, *supra* note 166, at 604–05. Kirk concluded that “although the word ‘jeopardy’ began early to have some legal significance, it was not originally connected with the maxim that a man’s life cannot twice be jeopardized for the same offense.” *Id.* at 605.

<sup>355</sup> See *supra* text accompanying notes 285–91.

<sup>356</sup> See *supra* text accompanying note 311.

<sup>357</sup> Reprinted in DUMBAULD, *supra* note 298, at 190. See also COMPLETE BILL OF RIGHTS,

Nevertheless, there appears to be no clear indication that the word “jeopardy” (or, for that matter, the phrase “double jeopardy”) was a legal term of art in the eighteenth century.<sup>358</sup> Neither Samuel Johnson’s 1755 dictionary<sup>359</sup> nor Giles Jacob’s 1772 law dictionary<sup>360</sup> define the word.<sup>361</sup> Noah Webster’s dictionary, which was published in 1828, nearly forty years after the First Congress, defines “jeopardy” as “[e]xposure to death, loss or injury; hazard; danger; peril.”<sup>362</sup> It is therefore possible that the Senate intended the word “jeopardy” to mean “risk,” “danger,” or “peril.”<sup>363</sup>

The term “life or limb” also does not appear in eighteenth and early nineteenth century dictionaries.<sup>364</sup> Some believe that the phrase was a term of art at the time of the adoption of the Double Jeopardy Clause and that it is highly probable that the drafters of the Clause intended it to refer only to crimes punishable as felonies.<sup>365</sup> Others believe that, to the drafters of the Clause, “to be in ‘jeopardy of life or limb’ meant to be in jeopardy of capital punishment.”<sup>366</sup>

*supra* note 310, at 308.

<sup>358</sup> OFFICE OF LEGAL POLICY, U.S. DEP’T OF JUSTICE, TRUTH IN CRIMINAL JUSTICE REPORT NO. 6, REPORT TO THE ATTORNEY GENERAL ON DOUBLE JEOPARDY AND GOVERNMENT APPEALS OF ACQUITTALS (1987), *reprinted in* 22 U. MICH. J.L. REFORM 831, 841 n.7 (1989) [hereinafter REPORT TO THE ATTORNEY GENERAL].

<sup>359</sup> SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, W. Strahan 1755) [hereinafter JOHNSON’S DICTIONARY].

<sup>360</sup> GILES JACOB, A NEW LAW DICTIONARY (9th ed., London, W. Strahan 1772).

<sup>361</sup> REPORT TO THE ATTORNEY GENERAL, *supra* note 358, at 841.

<sup>362</sup> NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (New York, S. Converse 1828) [hereinafter WEBSTER’S DICTIONARY]; REPORT TO THE ATTORNEY GENERAL, *supra* note 358, at 841. The word “jeopardy” derives from the “French *jue-perdre*, a game that one might lose, and the Middle English *iupart*, an uncertain game.” Amar & Marcus, *supra* note 2, at 55.

<sup>363</sup> REPORT TO THE ATTORNEY GENERAL, *supra* note 358, at 841. The Supreme Court subsequently adopted this interpretation. In *Breed v. Jones*, 421 U.S. 519, 528 (1975), the Court stated: “Jeopardy denotes risk. In the constitutional sense, jeopardy describes the risk that is traditionally associated with a criminal prosecution.” *See also* Price v. Georgia, 398 U.S. 323, 326 (1970) (“The ‘twice in jeopardy’ language of the Constitution . . . relates to a potential, *i. e.*, [sic] the risk that an accused for a second time will be convicted of the ‘same offense’ . . . .”); *id.* at 331 (“The Double Jeopardy Clause . . . is cast in terms of the risk or hazard of trial and conviction . . . .”).

<sup>364</sup> REPORT TO THE ATTORNEY GENERAL, *supra* note 358, at 841. Webster defined the noun “limb” as “an extremity of the human body; a member; . . . as the arm or leg,” and the verb “to limb” as “[t]o dismember; to tear off the limbs.” WEBSTER’S DICTIONARY, *supra* note 362. Johnson defined “limb” as “a member,” and “to limb” as “[t]o tear asunder.” JOHNSON’S DICTIONARY, *supra* note 359.

<sup>365</sup> REPORT TO THE ATTORNEY GENERAL, *supra* note 358, at 842.

<sup>366</sup> Stephen N. Limbaugh, Jr., *The Case of Ex Parte Lange (or How the Double Jeopardy Clause Lost Its “Life or Limb”)*, 36 AM. CRIM. L. REV. 53, 54 (1999). The Supreme Court held in *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873), that the Double Jeopardy Clause

Whatever the source of the language of its amendment, on September 9, 1789, the Senate eliminated the words “by any public prosecution” and, after joining the amended clause with several other clauses, approved the following proposed amendment dealing with double jeopardy: “[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . .”<sup>367</sup> The House of Representatives agreed to the Senate’s version of the proposed amendment,<sup>368</sup> and after the Senate on September 25 agreed to several changes in other proposed amendments,<sup>369</sup> Congress submitted the proposal to the States for ratification.<sup>370</sup> The Double Jeopardy Clause became part of the Fifth Amendment to the Constitution following its ratification by the States in 1791.<sup>371</sup>

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extends its protection to all criminal offenses. Referring to the maxim that “no man shall more than once be placed in peril of legal penalties upon the same accusation,” upon which the common law pleas of *autrefois acquit* and *autrefois convict* — as well as the Double Jeopardy Clause itself — are based, the Court explained:

If we reflect that at the time this maxim came into existence almost every offence was punished with death or other punishment touching the person, and that [the] pleas [of *autrefois acquit* and *autrefois convict*] are now held valid in felonies, minor crimes, and misdemeanors alike, and on the difficulty of deciding when a statute under modern systems does or does not describe a felony when it defines and punishes an offence, we shall see ample reason for holding that the principle intended to be asserted by the constitutional provision [against double jeopardy] must be applied to all cases where a second punishment is attempted to be inflicted for the same offence by judicial sentence.

*Id.* at 173. Judge Limbaugh, like the Report to the Attorney General, *see supra* note 358, at 862 n.108 and accompanying text, concludes that the Supreme Court incorrectly interpreted the clause in *Lange*. Limbaugh, *supra*, at 61. He concedes, however, that it is too late in the day to adopt the literal meaning intended by the Framers. *Id.* He suggests instead that the Supreme Court acknowledge the error of *Lange* and redraw the double jeopardy line between felonies and misdemeanors. Such a line, he contends, is the one “most faithful to the Constitution (or more properly, least unfaithful).” *Id.* at 86. Akhil Reed Amar, on the other hand, agrees with the Supreme Court’s decision in *Lange*. Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 YALE L.J. 1807, 1810 (1997). He claims that the phrase “life or limb” should be taken “as a vivid and poetic metaphor for all criminal punishment.” *Id.*

<sup>367</sup> Senate Pamphlet *reprinted in* COMPLETE BILL OF RIGHTS, *supra* note 310, at 303. The Senate Journal shows that the proposed clause provided: “[N]or shall any person be subject to be put in jeopardy of life or limb, for the same offence . . . .” S.J., 1st Cong., 1st Sess., 77 (1789).

<sup>368</sup> H.J., 1st Cong., 1st Sess., 121 (1789).

<sup>369</sup> S.J., 1st Cong., 1st Sess., 88 (1789).

<sup>370</sup> 1 Stat. 98 (1789).

<sup>371</sup> U.S. CONST. amend. V. A protection against double jeopardy was made part of the French constitution of 1791. *See* Wilfley, *supra* note 171, at 424. The Napoleonic Code of Criminal Procedure published in 1808 also recognized the principle. Article 360 of that Code

#### IV. THE FIFTH AMENDMENT GUARANTEE AGAINST DOUBLE JEOPARDY IN STATE CRIMINAL PROSECUTIONS

The provisions of the Bill of Rights originally placed restrictions only upon the federal government;<sup>372</sup> they were “not directed to the States.”<sup>373</sup> As a result, the Double Jeopardy Clause of the Fifth Amendment did not prohibit a state from placing an individual in jeopardy twice for the same offense.<sup>374</sup>

In 1868, following the Civil War, the States ratified the Fourteenth Amendment to the Constitution.<sup>375</sup> The Privileges and Immunities Clause of that Amendment prohibits a state from “mak[ing] or enforc[ing] any law which shall abridge the privileges or immunities of citizens of the United States,” while the Due Process Clause of that Amendment forbids a state from “depriv[ing] any person of life, liberty, or property, without due process of law . . . .”<sup>376</sup> Soon after the ratification of the

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provided: “No person legally acquitted can be a second time arrested or accused by reason of the same act.” *Id.*

<sup>372</sup> *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 247 (1833); *accord Adamson v. California*, 332 U.S. 46, 51 (1947).

<sup>373</sup> *Palko v. Connecticut*, 302 U.S. 319, 322 (1937), *overruled by Benton v. Maryland*, 395 U.S. 784 (1969).

<sup>374</sup> *Id.*; *Brock v. North Carolina*, 344 U.S. 424, 426 (1953), *overruled in part by Benton*, 395 U.S. 784. Many states, of course, extended protection against double jeopardy to individuals under their state constitution, e.g., DEL. CONST. OF 1792 art. I, § 8 (“[N]o person shall be for the same offence twice put in jeopardy of life or limb . . . .”); N.H. CONST. OF 1784 part I, art. XVI (“No person shall be liable to be tried, after an acquittal, for the same crime or offence.”); N.Y. CONST. art. 1, § 6 (“No person shall be subject to be twice put in jeopardy for the same offence . . . .”); PA. CONST. OF 1790 art. IX, § 10 (“No person shall, for the same offence, be twice put in jeopardy of life or limb.”); R.I. CONST. OF 1842, art. 1, § 7 (“[N]o person shall be subject for the same offense to be twice put in jeopardy.”); WASH. CONST. art. I, § 9 (“No person shall . . . be twice put in jeopardy for the same offense.”), or through their common law, e.g., *State v. Benham*, 7 Conn. 414, 418–19 (1829); *Gilpin v. State*, 121 A. 354, 355 (Md. 1923); *Commonwealth v. McCan*, 178 N.E. 633, 634 (Mass. 1931); *State v. Clemmons*, 176 S.E. 760, 761 (N.C. 1934); *State v. O’Brien*, 170 A. 98, 100 (Vt. 1934). In his dissenting opinion in *Brock*, Chief Justice Vinson stated: “The Constitutions of all but five states, Connecticut, Maryland, Massachusetts, North Carolina, and Vermont, contain clauses forbidding double jeopardy. And each of those five states has the prohibition against double jeopardy as part of its common law.” *Brock*, 344 U.S. at 435 (Vinson, C.J., dissenting) (citation omitted). *See also Benton*, 395 U.S. at 795 (“Today, every State incorporates some form of the prohibition in its constitution or common law.”) (citation omitted). *See generally* SIGLER, *supra* note 10, at 78–83.

<sup>375</sup> 15 Stat. 706, 707 (1868).

<sup>376</sup> U.S. CONST. amend. XIV, § 1 provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

Fourteenth Amendment, the question arose whether either of these clauses incorporated the Bill of Rights and made its provisions applicable to the States. Early on, the Supreme Court rejected the view that the Privileges and Immunities Clause was “intended as a protection to the citizen of a State against the legislative power of his own State,”<sup>377</sup> and it therefore held that this clause did not incorporate the provisions of the Bill of Rights.<sup>378</sup> The Court subsequently reached the same result concerning the Due Process Clause,<sup>379</sup> despite the insistence over the years of a number of individual Justices, most notably Justice Hugo L. Black. In his dissenting opinion in *Adamson v. California*,<sup>380</sup> Justice Black maintained that the Clause fully incorporated the provisions of the Bill of Rights.<sup>381</sup>

The Supreme Court did, however, hold that due process of law encompassed those rights — whether or not included in the specific provisions of the Bill of Rights — that are “fundamental,”<sup>382</sup> or, as the Court put it in *Palko v. Connecticut*,<sup>383</sup> that are “implicit in the concept of ordered liberty.”<sup>384</sup> Under this test, the Court held that several guarantees contained in the Bill of Rights applied to the States through the Due Process Clause of the Fourteenth Amendment, including the right to counsel in capital cases,<sup>385</sup> the right to a public trial,<sup>386</sup> and the protection against unreasonable searches and seizures (albeit not the exclusionary rule).<sup>387</sup> For the most part, though, the Court refused to hold that various other rights guaranteed to those accused of criminal conduct applied to the States through the Due Process Clause of the Fourteenth Amendment. In *Hurtado v. California*, for example, the Court held that due process of law does not require a grand jury indictment to institute serious criminal charges against an individual,<sup>388</sup> and in *Twining v. New*

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States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

<sup>377</sup> *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 74 (1872).

<sup>378</sup> *Id.* at 78; *see also Twining v. New Jersey*, 211 U.S. 78, 98–99 (1908).

<sup>379</sup> *E.g.*, *Bartkus v. Illinois*, 359 U.S. 121, 124–27 (1959); *Wolf v. Colorado*, 338 U.S. 25, 26 (1949), *overruled by Mapp v. Ohio*, 367 U.S. 643 (1961); *Adamson v. California*, 332 U.S. 46, 53–54 (1947); *Palko v. Connecticut*, 302 U.S. 319, 323 (1937); *Twining*, 211 U.S. at 99.

<sup>380</sup> 332 U.S. 46 (1947).

<sup>381</sup> *Id.* at 71–72 (Black, J., dissenting); *see also Duncan v. Louisiana*, 391 U.S. 145, 163 (1968) (Black, J., concurring); *Wolf*, 338 U.S. at 39 (Black, J., concurring); *Betts v. Brady*, 316 U.S. 455, 474 (1942) (Black, J., dissenting).

<sup>382</sup> *Twining*, 211 U.S. at 98.

<sup>383</sup> 302 U.S. 319 (1937), *overruled by Benton v. Maryland*, 395 U.S. 784 (1969).

<sup>384</sup> *Id.* at 325. *See also Wolf*, 338 U.S. at 27; *Adamson*, 332 U.S. at 54.

<sup>385</sup> *Powell v. Alabama*, 287 U.S. 45, 71 (1932).

<sup>386</sup> *In re Oliver*, 333 U.S. 257, 273 (1948).

<sup>387</sup> *Wolf*, 338 U.S. at 27–28, 33.

<sup>388</sup> 110 U.S. 516, 538 (1884).

*Jersey* it held that the privilege against self-incrimination is not so fundamental as to be required by due process of law.<sup>389</sup> The Court reached the same result in *Betts v. Brady* concerning the right to counsel, holding that due process does not require a state to appoint counsel to represent indigents accused of committing felonies.<sup>390</sup>

The issue whether due process of law protects an individual against double jeopardy was first presented to the Supreme Court in 1902 in *Dreyer v. Illinois*.<sup>391</sup> In that case, Edward Dreyer, the former treasurer of the West Chicago park commissioners, contended that the State of Illinois placed him in jeopardy twice for the same offense when it retried him for failing to turn over funds and other personal property to his successor in office after his first trial for that offense ended in a mistrial because the jury could not agree upon a verdict.<sup>392</sup> The Supreme Court did not, however, consider the merits of Dreyer's claim.<sup>393</sup> Instead, the Court held that even if the due process of law required by the Fourteenth Amendment embraced the guarantee against double jeopardy, Dreyer's retrial following a hung jury did not place him in jeopardy twice for the same offense.<sup>394</sup>

The Supreme Court next faced the issue in *Palko v. Connecticut*.<sup>395</sup> The State of Connecticut charged Frank Palko with murder in the first degree.<sup>396</sup> A jury convicted him of murder in the second degree, and the trial judge sentenced him to life imprisonment.<sup>397</sup> The State, acting pursuant to a state statute and with the permission of the trial judge, appealed.<sup>398</sup> It claimed that the judge committed a number of errors of law prejudicial to the prosecution, including erroneously instructing the jury concerning the difference between first-degree murder and second-degree murder.<sup>399</sup> The Connecticut Supreme Court of Errors reversed Palko's conviction and ordered that he be tried again for murder in the first degree.<sup>400</sup> Prior to his retrial, Palko claimed that the new trial would place him in jeopardy twice for the same offense in violation of the Fourteenth Amendment.<sup>401</sup> The trial judge rejected Palko's claim, and the trial proceeded.<sup>402</sup> This time the jury

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<sup>389</sup> 211 U.S. 78, 113 (1908), *overruled by* *Malloy v. Hogan*, 378 U.S. 1 (1964).

<sup>390</sup> 316 U.S. 455, 471 (1942), *overruled by* *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>391</sup> 187 U.S. 71 (1902).

<sup>392</sup> *Id.* at 73.

<sup>393</sup> *Id.* at 85–86.

<sup>394</sup> *Id.* (relying on *United States v. Perez*, 22 U.S. (9 Wheat.) 579 (1824)).

<sup>395</sup> 302 U.S. 319 (1937), *overruled by* *Benton v. Maryland*, 395 U.S. 784 (1969).

<sup>396</sup> *Id.* at 320–21.

<sup>397</sup> *Id.*

<sup>398</sup> *Id.* at 321.

<sup>399</sup> *State v. Palko*, 186 A. 657, 660 (Conn. 1936).

<sup>400</sup> *Id.* at 662.

<sup>401</sup> *Palko*, 302 U.S. at 321–22.

<sup>402</sup> *Id.* at 321.

convicted Palko of first-degree murder and the trial judge sentenced him to the punishment of death.<sup>403</sup>

In an opinion written by Justice Benjamin Cardozo, the Supreme Court, with only a single justice dissenting, concluded that Palko's second trial did not deprive him of due process of law under the Fourteenth Amendment.<sup>404</sup> Cardozo acknowledged that a "closely divided"<sup>405</sup> Court in *Kepner v. United States*<sup>406</sup> held that the prohibition against double jeopardy contained in the Fifth Amendment forbids putting an individual in jeopardy a second time, not only in a different case, but also in the same case if the new jeopardy was at the insistence of the government and not the accused.<sup>407</sup> Nevertheless, after reviewing its previous decisions concerning the relationship between the Bill of Rights and the Due Process Clause of the Fourteenth Amendment, the Supreme Court concluded that the rights encompassed by due process of law, and hence applicable against the States, were those "implicit in the concept of ordered liberty."<sup>408</sup> The Court stated that the right must be such that abolishing it would "violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' . . . [N]either liberty nor justice would exist if [it] were sacrificed."<sup>409</sup> Allowing the government to appeal errors of law, the Court decided, would neither subject an accused to "a hardship so acute and shocking that our polity will not endure it,"<sup>410</sup> nor "violate those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'"<sup>411</sup> The Court reasoned:

The state is not attempting to wear the accused out by a multitude of cases with accumulated trials. It asks no more than this, that the case against him shall go on until there shall be a trial free from the corrosion of substantial legal error. This is not cruelty at all, nor even vexation in any immoderate degree. If the trial had been infected with error adverse to the accused, there might have been review at his instance, and as often as necessary to purge the vicious taint. A reciprocal privilege, subject at all times to the discretion of the presiding judge, has now been granted to

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<sup>403</sup> *Id.* at 321–22.

<sup>404</sup> *Id.* at 328.

<sup>405</sup> *Id.* at 322.

<sup>406</sup> 195 U.S. 100 (1904).

<sup>407</sup> *Palko*, 302 U.S. at 322–23.

<sup>408</sup> *Id.* at 325.

<sup>409</sup> *Id.* at 325–26 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

<sup>410</sup> *Id.* at 328.

<sup>411</sup> *Id.* (quoting *Hebert v. Louisiana*, 272 U.S. 312, 316 (1926)).

the state. There is here no seismic innovation. The edifice of justice stands, its symmetry, to many, greater than before.<sup>412</sup>

Indeed, earlier in its opinion, the Court stated that the dissenting opinions in *Kepner* show how much could be said in favor of a ruling in that case that the Fifth Amendment does *not* forbid putting an individual in jeopardy in the same case if the new jeopardy is following a successful appeal by the government.<sup>413</sup> The Court continued:

Right-minded men, as we learn from those opinions, could reasonably, even if mistakenly, believe that a second trial was lawful in prosecutions subject to the Fifth Amendment, if it was all in the same case. Even more plainly, right-minded men could reasonably believe that in espousing that conclusion they were not favoring a practice repugnant to the conscience of mankind.<sup>414</sup>

Sixteen years later, in *Brock v. North Carolina*,<sup>415</sup> the Supreme Court again faced the question whether due process protects an individual against double jeopardy. In that case, the State of North Carolina charged Brock and two others involved in a labor dispute with firing shots into a house from a passing automobile.<sup>416</sup> The government tried the others first and obtained convictions for assault with a deadly weapon.<sup>417</sup> At Brock's separate trial, the government called his two alleged accomplices to corroborate the testimony of its other witnesses.<sup>418</sup> Each of the alleged accomplices represented to the trial judge that he intended to appeal his conviction and invoked his privilege against self-incrimination.<sup>419</sup> Upon their refusal to testify, the trial judge declared a mistrial.<sup>420</sup> After the Supreme Court of North Carolina affirmed the convictions of Brock's alleged accomplices, the government brought Brock to trial a second time.<sup>421</sup> Brock objected, claiming that a new trial would place him in jeopardy a second time for the same offense and thereby deny him due process of law under the Fourteenth Amendment.<sup>422</sup> The trial court overruled the objection, and Brock was tried, convicted, and sentenced to two

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<sup>412</sup> *Id.*

<sup>413</sup> *Id.* at 322–23.

<sup>414</sup> *Id.* at 323.

<sup>415</sup> 344 U.S. 424 (1953).

<sup>416</sup> *Id.* at 424.

<sup>417</sup> *Id.* at 425.

<sup>418</sup> *Id.*

<sup>419</sup> *Id.*

<sup>420</sup> *Id.*

<sup>421</sup> *Id.* at 425–26.

<sup>422</sup> *Id.* at 426.

years imprisonment.<sup>423</sup> The Supreme Court of North Carolina affirmed Brock's conviction.<sup>424</sup>

On *certiorari*, the State argued that the second trial did not place Brock twice in jeopardy for the same offense "because the trial court has the discretion to declare a mistrial and require the defendant to be presented before another jury if it be in the interest of justice to do so."<sup>425</sup> The Supreme Court of the United States agreed, holding that the second trial did not deny Brock due process of law.<sup>426</sup> As in *Palko*, the Court concluded that the second trial did not subject the accused to "a hardship so acute and shocking that our polity will not endure it"<sup>427</sup> and that it did not "violate those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."<sup>428</sup> The Court stated that under the Double Jeopardy Clause of the Fifth Amendment, it had "long favored the rule of discretion in the trial judge to declare a mistrial and to require another panel to try the defendant if the ends of justice will be best served."<sup>429</sup> The Court continued:

"[A] trial can be discontinued when particular circumstances manifest a necessity for so doing, and when failure to discontinue would defeat the ends of justice." Justice to either or both parties may indicate to the wise discretion of the trial judge that he declare a mistrial and require the defendant to stand trial before another jury. As in all cases involving what is or is not due process, so in this case, no hard and fast rule can be laid down. The pattern of due process is picked out in the facts and circumstances of each case. The pattern here, long in use in North Carolina, does not deny the fundamental essentials of a trial, "the very essence of a scheme of ordered justice," which is due process.<sup>430</sup>

During the 1960s, the Supreme Court altered its approach concerning the relationship between the Bill of Rights and the requirement of due process of law. Beginning with *Mapp v. Ohio*,<sup>431</sup> the Court held that the Due Process Clause of the Fourteenth Amendment selectively incorporates various provisions of the first eight

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<sup>423</sup> *Id.*

<sup>424</sup> *State v. Brock*, 67 S.E.2d 282 (N.C. 1951).

<sup>425</sup> *Brock*, 344 U.S. at 426.

<sup>426</sup> *Id.* at 427-28.

<sup>427</sup> *Id.* at 427 (quoting *Palko v. Connecticut*, 302 U.S. 319, 328 (1937)).

<sup>428</sup> *Id.* (quoting *Palko*, 302 U.S. at 328).

<sup>429</sup> *Id.*

<sup>430</sup> *Id.* at 427-28 (quoting *Wade v. Hunter*, 336 U.S. 684, 690 (1949)).

<sup>431</sup> 367 U.S. 643 (1961).

amendments and makes them fully applicable to the States.<sup>432</sup> Under this approach, the Court held that the Fourth Amendment exclusionary rule,<sup>433</sup> the Eighth Amendment protection against cruel and unusual punishment,<sup>434</sup> the Sixth Amendment right to counsel,<sup>435</sup> the Fifth Amendment privilege against self-incrimination,<sup>436</sup> the Sixth Amendment right to confrontation of witnesses,<sup>437</sup> the Sixth Amendment right to a speedy trial,<sup>438</sup> the Sixth Amendment right to compulsory process for obtaining witnesses,<sup>439</sup> and the Sixth Amendment right to a trial by jury,<sup>440</sup> apply in state criminal prosecutions. The Court in *Duncan v. Louisiana*<sup>441</sup> explained the Court's new test for determining whether a particular provision of the Bill of Rights is "incorporated" into the Due Process Clause of the Fourteenth Amendment:

The recent cases . . . have proceeded upon the valid assumption that state criminal processes are not imaginary and theoretical schemes but actual systems bearing virtually every characteristic of the common-law system that has been developing contemporaneously in England and in this country. The question thus is whether given this kind of system a particular procedure is fundamental — whether, that is, a procedure is necessary to an Anglo-American regime of ordered liberty.<sup>442</sup>

In 1969, the Supreme Court faced the question whether the Due Process Clause of the Fourteenth Amendment incorporated the double jeopardy provision of the Fifth Amendment.<sup>443</sup> In *Benton v. Maryland*, the State of Maryland charged John Benton with the crimes of burglary and larceny.<sup>444</sup> A jury found him not guilty of the larceny charge but convicted him on the burglary charge, for which the trial judge sentenced him to ten years' imprisonment.<sup>445</sup> After the trial, however, it was

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<sup>432</sup> *Id.* at 655–60 (holding that the Fourth Amendment is fully applicable to the states through the Due Process Clause); see also *Duncan v. Louisiana*, 391 U.S. 145, 164 (1968) (Black, J., concurring); *Pointer v. Texas*, 380 U.S. 400, 409 (1965) (Harlan, J., concurring).

<sup>433</sup> *Mapp*, 367 U.S. at 655–57.

<sup>434</sup> *Robinson v. California*, 370 U.S. 660, 667 (1962).

<sup>435</sup> *Gideon v. Wainwright*, 372 U.S. 335, 342–43 (1963).

<sup>436</sup> *Malloy v. Hogan*, 378 U.S. 1, 6 (1964).

<sup>437</sup> *Pointer v. Texas*, 380 U.S. 400, 403 (1965).

<sup>438</sup> *Klopfert v. North Carolina*, 386 U.S. 213, 223 (1967).

<sup>439</sup> *Washington v. Texas*, 388 U.S. 14, 19 (1968).

<sup>440</sup> *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

<sup>441</sup> 391 U.S. 145 (1968).

<sup>442</sup> *Id.* at 149 n.14.

<sup>443</sup> *Benton v. Maryland*, 395 U.S. 784 (1969).

<sup>444</sup> *Id.* at 785.

<sup>445</sup> *Id.*

determined that both the grand jury that indicted Benton and the jury that tried him had been unlawfully selected.<sup>446</sup> The trial court gave Benton the option of accepting the conviction or demanding re-indictment and retrial.<sup>447</sup> Benton chose to have his conviction set aside, and the State again charged him with both larceny and burglary.<sup>448</sup> Benton moved to dismiss the larceny charge, arguing that because the first jury acquitted him of that crime, retrial would unconstitutionally place him in jeopardy twice for the same offense.<sup>449</sup> The trial judge denied the motion, and trial proceeded on both charges.<sup>450</sup> This time, the jury convicted Benton of both larceny and burglary, and the trial judge sentenced him to a total of fifteen years in prison.<sup>451</sup>

Overruling its decision in *Palko v. Connecticut*,<sup>452</sup> the Supreme Court held that the Double Jeopardy Clause applies to the States through the Due Process Clause of the Fourteenth Amendment.<sup>453</sup> The Court began its analysis by noting that in recent years it had “increasingly looked to the specific guarantees of the [Bill of Rights] to determine whether a state criminal trial was conducted with due process of law,”<sup>454</sup> and that “[i]n an increasing number of cases, [it] ha[d] rejected the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights . . . .”<sup>455</sup> The Court continued:

Our recent cases have thoroughly rejected the *Palko* notion that basic constitutional rights can be denied by the States as long as the totality of the circumstances does not disclose a denial of “fundamental fairness.” Once it is decided that a particular Bill of Rights guarantee is “fundamental to the American scheme of

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<sup>446</sup> *Id.* at 786.

<sup>447</sup> *Id.*

<sup>448</sup> *Id.* The government can retry a convicted defendant who has his conviction set aside on the basis of “trial error” without running afoul of the double jeopardy provision. *Lockhart v. Nelson*, 488 U.S. 33, 38 (1988); *Montana v. Hall*, 481 U.S. 400, 402–04 (1987); *United States v. Tateo*, 377 U.S. 463, 468 (1971); *Forman v. United States*, 361 U.S. 416, 425–26 (1960); *United States v. Ball*, 163 U.S. 662, 672 (1896).

<sup>449</sup> *Benton*, 395 U.S. at 786.

<sup>450</sup> *Id.*

<sup>451</sup> *Id.* The Maryland Court of Special Appeals affirmed Benton’s conviction, and the Maryland Court of Appeals denied certiorari. *Benton v. State*, 232 A.2d 541 (Md. Ct. Spec. App. 1967), *cert. denied*, 248 Md. 733 (1967).

<sup>452</sup> 302 U.S. 319 (1937), *overruled by Benton*, 395 U.S. 784.

<sup>453</sup> *Benton*, 395 U.S. at 794.

<sup>454</sup> *Id.* (quoting *Washington v. Texas*, 388 U.S. 14, 18 (1967)) (brackets in original).

<sup>455</sup> *Id.* (quoting *Malloy v. Hogan*, 378 U.S. 1, 10–11 (1964) (quoting *Ohio ex rel. Eaton v. Price*, 364 U.S. 263, 275 (1960))).

justice,” the same constitutional standards apply against both the State and Federal Governments.<sup>456</sup>

The Court then concluded that the protection against double jeopardy contained in the Fifth Amendment “represents a fundamental ideal in our constitutional heritage.”<sup>457</sup> It stated:

The fundamental nature of the guarantee against double jeopardy can hardly be doubted. Its origins can be traced to Greek and Roman times, and it became established in the common law of England long before this Nation’s independence. As with many other elements of the common law, it was carried into the jurisprudence of this Country through the medium of Blackstone, who codified the doctrine in his Commentaries. “[T]he plea of *autrefois acquit*, or a former acquittal,” he wrote “is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence.” Today, every State incorporates some form of the prohibition in its constitution or common law. . . . Th[e] underlying notion [that the state should not be allowed to make repeated attempts to convict an individual for an alleged offense] has from the very beginning been part of our constitutional tradition. . . . [I]t is clearly “fundamental to the American scheme of justice.”<sup>458</sup>

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<sup>456</sup> *Id.* at 795 (quoting *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968)).

<sup>457</sup> *Id.* at 794.

<sup>458</sup> *Id.* at 795–96 (citation and footnotes omitted) (quoting 4 BLACKSTONE, *supra* note 84, at \*335, and *Duncan*, 391 U.S. at 149). Judging the validity of Benton’s larceny conviction by federal double jeopardy standards, the Supreme Court held that that conviction could not stand. *Id.* at 796. Benton’s initial acquittal of larceny barred his second trial because under the Court’s holding in *Green v. United States*, 355 U.S. 184, 193–94 (1957), the State of Maryland could not condition Benton’s appeal of his burglary conviction upon his coerced surrender of a valid plea of former jeopardy on the larceny charge. *Benton*, 395 U.S. at 796–97. Moreover, Benton was placed in “jeopardy” for larceny at his first trial, despite the defect in the original indictment. *Id.* At most, reasoned the Court, the defect rendered that indictment “voidable,” not “void.” *Id.* at 797.

## CONCLUSION

Although the precise origins of the guarantee against double jeopardy cannot be pinpointed, it is clear that it began developing thousands of years ago. Evidence shows that ancient Jewish law recognized the principle in some form, as did early Greek law, classical Roman law, and canon law. After being introduced into the common law of England at the beginning of the thirteenth century, the principle slowly took root there and developed into the pleas of *autrefois acquit*, *autrefois convict*, and pardon. By the time the Bill of Rights was added to the United States Constitution in 1791, the principle that a person's life ought not to be placed in jeopardy more than once for the same offense constituted a "universal maxim of the common law."<sup>459</sup> Today, in the United States, the guarantee against double jeopardy is deemed a "fundamental"<sup>460</sup> right, and the Double Jeopardy Clause of the Fifth Amendment protects a person from being twice placed in jeopardy by either the federal government or a state.

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<sup>459</sup> 4 BLACKSTONE, *supra* note 84, at \*335.

<sup>460</sup> *Benton*, 395 U.S. at 795.