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NOTE

Rethinking *Ashe v. Swenson* from an Originalist Perspective

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Abstract. Since its 1970 decision in *Ashe v. Swenson*, the U.S. Supreme Court has recognized issue preclusion as part of the constitutional guarantee against double jeopardy. *Ashe* held that where an acquittal necessarily involved deciding a factual issue in the defendant's favor, the Double Jeopardy Clause of the Fifth Amendment prevents the prosecution from relitigating that issue in any subsequent trial. In recent years, several Justices have expressed doubts about whether *Ashe* is consistent with the original meaning of the Double Jeopardy Clause. This Note fills a gap in the academic literature by taking up that question.

This Note argues that the judgment in *Ashe*, but not the issue preclusion rationale on which it rests, is consistent with the original meaning of the Double Jeopardy Clause. The text, drafting history, and early judicial interpretations of the Clause indicate that it codified an English common law right. Seventeenth- and eighteenth-century sources reveal the content of that right: At common law, two crimes were considered "the same" for double jeopardy purposes only if (1) the charged offenses were identical or one was a lesser included offense of the other; and (2) they rested on the same factual allegations. This historical evidence shows that the issue preclusion rule announced in *Ashe* was not part of the original guarantee against double jeopardy. But it also shows that the common law did not allow what the State attempted in *Ashe*—subjecting a criminal defendant to multiple trials for a single crime simply because the crime involved multiple victims.

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Rethinking Ashe v. Swenson
71 STAN. L. REV. 411 (2019)

Table of Contents

Introduction

Early one morning in January 1960, six men were playing "a friendly game of poker" in the basement of a private home in Lee's Summit, Missouri.[1] Suddenly, a group of armed criminals broke into the house.[2] They made their way to the basement, "robbed each of the poker players of money and various articles of personal property," and then "fled in a car belonging to one of the victims."[3] Bob Ashe, along with three other suspects, was later arrested and charged with six counts of first-degree robbery—one for each poker player—as well as one count of auto theft.[4]

The State decided to prosecute each charge separately. First, it put Ashe on trial for robbing just one of the poker players, a man named Knight.[5] The court instructed the jury to convict Ashe if it determined that he had been "one of the robbers, . . . even if he had not personally robbed Knight."[6] The jury returned an acquittal.[7] Six weeks later, the State put Ashe on trial for robbing another one of the poker players, Roberts.[8] This time, the jury concluded that Ashe *had* been one of the robbers. He was convicted and sentenced to thirty-five years in prison.[9]

After exhausting his state court appeals, Ashe filed a petition for habeas corpus claiming that the State had violated the Double Jeopardy Clause by subjecting him to successive trials for what was in essence "the same offence."[10] In an opinion by then-Judge Blackmun, the Eighth Circuit affirmed Ashe's conviction.[11] The U.S. Supreme Court reversed, however, holding in *Ashe v. Swenson* that the Double Jeopardy Clause barred the State from relitigating the

1. Ashe v. Swenson, 397 U.S. 436, 437 (1970); *id.* at 461 (Burger, C.J., dissenting).
2. *Id.* at 437 (majority opinion).
3. *Id.*
4. *See id.* at 437-38.
5. *See id.* at 438.
6. *Id.* at 439. Specifically, the jury was instructed "that all persons are equally guilty who act together with a common intent in the commission of a crime, and a crime so committed by two or more persons jointly is the act of all and of each one so acting." *Id.* at 439 n.3 (quoting jury instructions).
7. *Id.* at 439.
8. *Id.*
9. *Id.* at 440.
10. *See* Ashe v. Swenson, 399 F.2d 40, 42-43 (8th Cir. 1968), *rev'd*, 397 U.S. 436; *see also* U.S. CONST. amend. V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . .").
11. *See Ashe*, 399 F.2d at 45.

issue of Ashe's involvement in the robbery at the second trial.[12] Thus, *Ashe* stands for the proposition that issue preclusion is part of the constitutional guarantee against double jeopardy.[13]

In recent years, several Justices have criticized *Ashe* on originalist grounds. In 2009, Justice Scalia's dissenting opinion in *Yeager v. United States*—joined by Justices Thomas and Alito—declared that "[i]n *Ashe*, the Court departed from the original meaning of the Double Jeopardy Clause."[14] Although Justice Scalia noted the possibility of "adher[ing] to *Ashe* on *stare decisis* grounds,"[15] he vehemently opposed extending its holding.[16] In 2016, Justice Thomas went further, urging his colleagues to "reconsider the holding[] of *Ashe*" in "an appropriate case."[17] And just last Term, Justice Gorsuch's opinion for the Court in *Currier v. Virginia* called *Ashe* "a significant innovation" in the Court's double jeopardy jurisprudence and suggested that "it sits uneasily with . . . the Constitution's original meaning."[18]

Beyond these Justices' expressions of skepticism, there has been little scholarly exploration of whether the issue preclusion doctrine announced in *Ashe* can be squared with the original understanding of the Double Jeopardy Clause. The major historical accounts of double jeopardy law include some relevant discussion but do not assess the doctrine's originalist bona fides.[19] And the few scholars who have considered the question disagree about the answer. George Thomas has asserted that issue preclusion is "implicit in the same-

12. *See Ashe*, 397 U.S. at 445-47.

13. *See, e.g.*, Bravo-Fernandez v. United States, 137 S. Ct. 352, 356 (2016) (citing *Ashe*, 397 U.S. at 443).

14. Yeager v. United States, 557 U.S. 110, 128 (2009) (Scalia, J., dissenting).

15. *Id.* at 128-29; *cf.* Grady v. Corbin, 495 U.S. 508, 528 (1990) (Scalia, J., dissenting) (acknowledging *Ashe* as precedent), *overruled by* United States v. Dixon, 509 U.S. 688 (1993).

16. *See Yeager*, 557 U.S. at 131-33 (Scalia, J., dissenting).

17. *Bravo-Fernandez*, 137 S. Ct. at 367 (Thomas, J., concurring).

18. Currier v. Virginia, 138 S. Ct. 2144, 2149-50 (2018). In a part of the opinion that garnered only four votes, Justice Gorsuch asserted that "the [Double Jeopardy] Clause was not originally understood to include an issue preclusion rule." *Id.* at 2155 (plurality opinion). He claimed that the four dissenters "appear[ed] to agree," *see id.*, although they declined to "engage in [his] endeavor to restore things past," *id.* at 2164 (Ginsburg, J., dissenting).

19. *See, e.g.*, MARTIN L. FRIEDLAND, DOUBLE JEOPARDY 117-28, 170-84 (1969) (discussing issue preclusion in the criminal context and its limited availability at common law); JAY A. SIGLER, DOUBLE JEOPARDY: THE DEVELOPMENT OF A LEGAL AND SOCIAL POLICY 1-37 (1969) (discussing the historical origins of the guarantee against double jeopardy and the circumstances surrounding its inclusion in the Bill of Rights); GEORGE C. THOMAS III, DOUBLE JEOPARDY: THE HISTORY, THE LAW 201-13 (1998) (discussing the criminal issue preclusion doctrine that the Court embraced in *Ashe*).

offense language of the Double Jeopardy Clause,"[20] but cites no Founding-era sources in support of that view.[21] Akhil Amar has disagreed, arguing that the doctrine "cannot easily be crammed into the Double Jeopardy Clause in light of the syntax, grammar, purpose, and history of the Clause," and should instead be rooted in due process.[22] David Zlotnick has taken a third position, claiming that *Ashe* is totally indefensible on originalist grounds because "[s]uccessive prosecutions based on different victims of one criminal event were permissible at common law."[23] But none of these scholars devotes more than a few sentences to the question or seriously engages with the historical evidence. Thus, the scholarly literature lacks an in-depth analysis of whether *Ashe* can be justified on originalist grounds.

This Note provides that analysis. Part I gives a brief overview of modern double jeopardy doctrine. Part II explains that in 1791, when the Bill of Rights was ratified, the Double Jeopardy Clause was understood to guarantee a preexisting common law right. Part III describes the content of that right. In eighteenth-century England, a defendant who had already stood trial on a particular charge could bar a subsequent prosecution by demonstrating two things. First, he had to show that the formal elements of the two charges overlapped such that he could have been convicted of the new charge at the initial trial. And second, he had to show that the two indictments described the same factual incident.

Part IV compares this common law approach with the three positions set forth in *Ashe*—Justice Stewart's majority opinion, Justice Brennan's concurrence, and Chief Justice Burger's dissent. It concludes that none of them accurately reflects the content of the common law right. It then makes the case that all seven of the charges against Ashe would have been treated as the "same offence" at common law. Part V considers how different brands of originalism might translate the common law understanding of double jeopardy into modern doctrine. After considering and rejecting two potential alternatives, it settles on the rule that where two charges are (1) legally identical and (2) arise from a single incident, the Double Jeopardy Clause requires them to be resolved in a single proceeding. Part VI considers the pros and cons of this

20. THOMAS, *supra* note 19, at 201.

21. *See id.* at 201-13.

22. Akhil Reed Amar, Essay, *Double Jeopardy Law Made Simple*, 106 YALE L.J. 1807, 1816 (1997); *see id.* at 1828-29.

23. *See* David M. Zlotnick, *Battered Women & Justice Scalia*, 41 ARIZ. L. REV. 847, 880-81 (1999); *see also* SIGLER, *supra* note 19, at 214 ("To mistake double jeopardy for res judicata or collateral estoppel is to forget that double jeopardy is a doctrine with a long and definite history, a history which bears little relationship to the civil law."); Zlotnick, *supra*, at 866 & nn.123-24.

originalist rule and compares it with current Supreme Court doctrine. This Note concludes that the judgment in *Ashe*, though not the issue preclusion rationale on which it rests, can be justified on originalist grounds.

I. Modern Double Jeopardy Doctrine

The Double Jeopardy Clause states that "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb."[24] Current U.S. Supreme Court doctrine contains two distinct tests for determining whether the Clause permits a defendant who has received a final judgment on one charge to be subsequently tried for a similar charge.

A. The *Blockburger* Test

The primary test for whether two crimes constitute "the same offence" for double jeopardy purposes is named after *Blockburger v. United States*.[25] It requires a court considering the claim that a prosecution is barred by double jeopardy to compare the formal elements of the previously adjudicated offense with those of the newly charged offense.[26] Under *Blockburger*, greater and lesser included offenses are always "the same offence."[27] In other words, "[t]wo offenses are different, for double jeopardy purposes, whenever each contains an element that the other does not."[28]

As an illustration, consider the crimes of joyriding and auto theft (as defined by Ohio law in 1973). Joyriding was defined as "taking or operating a vehicle without the owner's consent."[29] Auto theft was defined as joyriding plus one additional element—"the intent permanently to deprive the owner of

24. U.S. CONST. amend. V.

25. 284 U.S. 299 (1932); *see* 21 AM. JUR. 2D *Criminal Law* § 296 (West 2018) (discussing the "*Blockburger* test"); *see also, e.g.*, Texas v. Cobb, 532 U.S. 162, 173 (2001) (explaining that the Court "applie[s] the *Blockburger* test to delineate the scope of the Fifth Amendment's Double Jeopardy Clause, which prevents multiple or successive prosecutions for the 'same offence'" (quoting U.S. CONST. amend. V)).

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

27. *See, e.g.*, Ohio v. Johnson, 467 U.S. 493, 501 (1984) ("[T]he Double Jeopardy Clause prohibits prosecution of a defendant for a greater offense when he has already been tried and acquitted or convicted on the lesser included offense.").

28. Lewis v. United States, 523 U.S. 155, 176 (1998) (Scalia, J., concurring in the judgment).

29. Brown v. Ohio, 432 U.S. 161, 167 (1977); *see also* OHIO REV. CODE § 4549.04(D) (1973) (repealed 1974).

possession."[30] Because joyriding contains no elements that auto theft does not, it is a lesser included offense of auto theft.[31] Therefore, the two crimes are "the same offence" under *Blockburger*.

In contrast, consider the following pair of gun possession laws. Under 18 U.S.C. § 922(g), it is unlawful to (1) possess a firearm affecting interstate commerce (2) after having been convicted of a felony.[32] It is also unlawful under § 922(q)(2)(A) to (1) possess a firearm affecting interstate commerce (2) in a school zone.[33] Although the two crimes share the element of firearm possession, they are not the "same offence" under *Blockburger* because each contains an element that the other lacks. Thus, if a convicted felon is found carrying a gun in a school zone and tried under the felon in possession provision, the Double Jeopardy Clause would not bar a subsequent trial under the school zone provision.

B. Issue Preclusion

In addition to the *Blockburger* test, modern double jeopardy law includes the doctrine of issue preclusion,[34] also known as collateral estoppel.[35] Issue preclusion has a long history as a civil litigation doctrine.[36] In the civil context, it prevents a party from relitigating an issue that a court has "determined by a valid and final judgment," provided that the party "actually litigated" the issue in the prior proceeding and that it was "essential to the judgment."[37] By the 1940s, if not earlier, issue preclusion had also become part of federal criminal law,[38] and the 1970 decision in *Ashe* held that it was a constitutional

30. *See Brown*, 432 U.S. at 167; *see also* OHIO REV. CODE § 4549.04(A) (repealed 1974).

31. *See Brown*, 432 U.S. at 168 ("[T]he prosecutor who has established auto theft necessarily has established joyriding as well.").

32. *See* 18 U.S.C. § 922(g) (2017).

33. *See id.* § 922(q)(2)(A).

34. *See, e.g.*, Bravo-Fernandez v. United States, 137 S. Ct. 352, 356 (2016) (referring to the "issue-preclusion component of the Double Jeopardy Clause").

35. The Supreme Court has indicated that it prefers the term "issue preclusion," which it views as "more descriptive" than the term "collateral estoppel." *See id.* at 356 n.1; Yeager v. United States, 557 U.S. 110, 120 n.4 (2009).

36. *See Bravo-Fernandez*, 137 S. Ct. at 358 (noting that the doctrine of issue preclusion was "first developed" in civil litigation); Ashe v. Swenson, 397 U.S. 436, 443 (1970) (same). *See generally* Robert Wyness Millar, *The Historical Relation of Estoppel by Record to Res Judicata*, 35 ILL. L. REV. 41 (1940-1941) (tracing the history of issue preclusion in civil litigation back to fourteenth-century England).

37. 1 RESTATEMENT (SECOND) OF JUDGMENTS § 27 (AM. LAW INST. 1982).

38. *See* Sealfon v. United States, 332 U.S. 575, 578-79 (1948); United States v. De Angelo, 138 F.2d 466, 468-69 (3d Cir. 1943); *cf.* United States v. Oppenheimer, 242 U.S. 85, 87 (1916) (reasoning that federal criminal law permits defendants to invoke civil law preclusion principles because "[i]t cannot be that the safeguards of the person, so often and so

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requirement.[39] In its criminal law form, issue preclusion works only against the prosecution, which it prevents from "relitigating any issue that was necessarily decided [in the defendant's favor] by a jury's acquittal in a prior trial."[40]

As an illustration, consider *Turner v. Arkansas*, which involved a murder that occurred during a robbery.[41] Turner was initially tried for murder.[42] The prosecution argued that Turner had shot and killed the victim "while perpetrating [the] crime of robbery,"[43] and the jury was instructed to convict if it determined that he had participated in the robbery, even if he was not the one who pulled the trigger.[44] The jury's verdict of not guilty therefore implied a factual determination that Turner was "not present at the scene."[45] After this acquittal, issue preclusion barred the State from trying Turner for robbery because the prosecution would have had to relitigate the issue of his presence at the crime scene in order to obtain a conviction.[46] Thus, the Court treated the murder and robbery in *Turner* as "the same offence" because of their close factual relationship, even though the two crimes are distinct under *Blockburger*.

II. The Original Guarantee Against Double Jeopardy

In 1791, when the Fifth Amendment was ratified, "the double jeopardy principle was well entrenched in English law."[47] For example, William

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rightly mentioned with solemn reverence, are less than those that protect from a liability in debt"). Although *Oppenheimer* involved an application of claim preclusion principles, *see* 242 U.S. at 87-88, the *Ashe* Court cited Justice Holmes's majority opinion in *Oppenheimer* as establishing issue preclusion as a "rule of federal criminal law," *see Ashe*, 397 U.S. at 443 (citing *Oppenheimer*, 242 U.S. at 87).

39. *See Ashe*, 397 U.S. at 445-46.

40. *Yeager*, 557 U.S. at 119. In *Currier v. Virginia*, decided last Term, a four-Justice plurality declared that the issue preclusion component of the Double Jeopardy Clause is only available when, as in *Ashe*, barring relitigation of an issue would completely prevent a second trial; it cannot be used as "a bar against the relitigation of issues or evidence" within a second trial. *See* Currier v. Virginia, 138 S. Ct. 2144, 2153 (2018) (plurality opinion). The four dissenters disagreed, *see id.* at 2164-65 (Ginsburg, J., dissenting), and Justice Kennedy in concurrence found it unnecessary to reach the issue, *see id.* at 2156-57 (Kennedy, J., concurring in part).

41. *See* 407 U.S. 366, 366 (1972) (per curiam).

42. *See id.* at 366-67.

43. *Id.* at 366 (quoting the charging document).

44. *See id.* at 369.

45. *Id.*

46. *See id.* at 369-70.

47. OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, TRUTH IN CRIMINAL JUSTICE REP. NO. 6, REPORT TO THE ATTORNEY GENERAL ON DOUBLE JEOPARDY AND GOVERNMENT APPEALS

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Hawkins's *A Treatise of the Pleas of the Crown*, published between 1716 and 1721, affirmed the "Maxim, That a Man shall not be brought into Danger of his Life for one and the same Offence, more than once."[48] Similarly, William Blackstone's *Commentaries*, published between 1765 and 1769, recognized the "universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for the same offence."[49]

In 1788, the New York convention that ratified the Constitution proposed an amendment that included much of Blackstone's language: "That no 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."[50] The following year, James Madison used similar language when he introduced before Congress the precursor to the Double Jeopardy Clause: "No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence . . . ."[51]

The brief congressional debate about the Double Jeopardy Clause indicates that its Framers meant to codify the existing common law right and only disagreed about whether Madison's proposal was the best way of doing so. Some feared that Madison's formulation might be read to prevent a criminal defendant from appealing his conviction because a successful appeal often leads to a second trial on the exact same charge.[52] Egbert Benson of New York argued that insofar as the language was susceptible to this construction, it was

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OF ACQUITTALS (1987), *reprinted in* 22 U. MICH. J.L. REFORM 831, 851 (1989) [hereinafter REPORT TO THE ATTORNEY GENERAL ON DOUBLE JEOPARDY].

48. 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN, OR, A SYSTEM OF THE PRINCIPAL MATTERS RELATING TO THAT SUBJECT, DIGESTED UNDER THEIR PROPER HEADS 368 (London, Eliz. Nutt & R. Gosling 1721) (emphasis omitted) (footnote omitted); *see also* 1 *id.* (London, Eliz. Nutt 1716). Although Hawkins is not as well known as Blackstone, his treatise on eighteenth-century English common law contains a much more robust discussion of double jeopardy principles. Accordingly, this Note cites Hawkins extensively.

49. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 329 (Oxford, Clarendon Press 1769); *see also* 1 *id.* (Oxford, Clarendon Press 1765).

50. THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS § 8.1.2.2 (Neil H. Cogan ed., 2d ed. 2015). For further information on the states' role in ratifying the Constitution, see Gregory E. Maggs, *A Concise Guide to the Records of the State Ratifying Conventions as a Source of the Original Meaning of the U.S. Constitution*, 2009 U. ILL. L. REV. 457.

51. 1 ANNALS OF CONG. 434 (1789) (Joseph Gales, Sr. ed., 1834) (statement of Rep. Madison). The citations to the *Annals of Congress* in this Note are to the "History of Congress" printing. *See* William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 10 n.44 (2019); William Baude & Jud Campbell, Early American Constitutional History: A Source Guide 11-12 (Oct. 31, 2018) (unpublished manuscript), https://perma.cc/3T8C-6A37.

52. *See, e.g.*, *id.* at 753 (statement of Rep. Sherman).

"contrary to the right [then] established."[53] Samuel Livermore of New Hampshire disagreed, describing Madison's formulation as "declaratory of the law as it [then] stood"—that is, an accurate statement of "the universal practice in Great Britain, and in this country."[54] Madison's supporters prevailed: Benson's motion to omit the reference to "one trial" from the draft "lost by a considerable majority,"[55] and the House approved Madison's articulation.[56]

The Senate's modifications to Madison's proposal provide additional evidence that the Double Jeopardy Clause codified an existing common law right. The Senate replaced the references to "more than one trial, or one punishment" with a single guarantee that no person "[b]e twice put in jeopardy of life or limb,"[57] the phrase that Congress ultimately settled on.[58] There is no record explaining reasons for the change, but "the rapid approval" of the Senate's version by the conference committee—of which Madison was a member—"in no way suggests an essential departure from the general understanding of the House's double jeopardy concept."[59] Perhaps some senators shared Benson's concern that language forbidding "more than one trial" might be misconstrued to prevent appeals.[60] But regardless of whether that particular concern motivated the change, Congress's acceptance of "jeopardy of life or limb"—a phrase "borrowed from reputable common law sources"[61]—provides further evidence that the Clause was meant to guarantee the common law right.

Early judicial interpretations of the Double Jeopardy Clause are in accord. Justice Story described the Clause as "a constitutional recognition of an old and

53. *See id.* (statement of Rep. Benson); *see also* BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, 1774-2005, H.R. DOC. NO. 108-222, at 644 (2005).

54. 1 ANNALS OF CONG. 753 (1789) (statement of Rep. Livermore); *see also* H.R. DOC. NO. 108-222, at 1456.

55. 1 ANNALS OF CONG. 753 (1789).

56. *See* THE COMPLETE BILL OF RIGHTS, *supra* note 50, § 8.1.1.8 (reproducing the House's proposed language).

57. *See id.* § 8.1.1.10.d.

58. *See* Act of Sept. 25, 1789, art. VII, 1 Stat. 97, 98; *see also* THE COMPLETE BILL OF RIGHTS, *supra* note 50, § 8.1.1.23a. The Double Jeopardy Clause was part of the seventh article of amendment as proposed by Congress but ended up as part of the Fifth Amendment because the first two proposed amendments were not ratified by the states. *See* DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 371-73 (3d ed. 2013).

59. REPORT TO THE ATTORNEY GENERAL ON DOUBLE JEOPARDY, *supra* note 47, at 857; *see also* SIGLER, *supra* note 19, at 31-32 (noting that Madison was a member of the conference committee).

60. *See* REPORT TO THE ATTORNEY GENERAL ON DOUBLE JEOPARDY, *supra* note 47, at 857 n.96.

61. *See* SIGLER, *supra* note 19, at 32-33.

well established maxim of the common law."[62] Accordingly, he "resort[ed] to the common law to ascertain its true use, interpretation, and limitation."[63] Chief Justice Lemuel Shaw of the Supreme Judicial Court of Massachusetts took the same approach in an 1832 opinion,[64] as did Chief Justice Ambrose Spencer of the New York Supreme Court of Judicature in an 1820 opinion.[65] Similarly, an 1824 opinion by the Kentucky Court of Appeals interpreted the double jeopardy clause in the Kentucky state constitution as coextensive with the common law right.[66] Thus, the language, drafting history, and early interpretations of the Double Jeopardy Clause all indicate that it was originally understood to codify an English common law right that existed in 1791.

III. The Common Law Understanding of "Same Offence"

Under eighteenth-century English law, defendants could invoke the guarantee against double jeopardy in the form of two pleas: *autrefois acquit* (formerly acquitted) and *autrefois convict* (formerly convicted).[67] *Autrefois acquit* protected the finality of acquittals, diminishing the risk of a wrongful conviction by preventing unsuccessful prosecutors from taking a second bite at the apple.[68] *Autrefois convict* could be invoked by a felon whose capital sentence

62. United States v. Gibert, 25 F. Cas. 1287, 1294 (C.C.D. Mass. Oct. Term 1834) (No. 15,204); *see also* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1781 (Boston, Hilliard, Gray & Co. 1833) (describing the constitutional protection against double jeopardy as a "great privilege secured by the common law").

63. *See Gibert*, 25 F. Cas. at 1294-97.

64. *See* Commonwealth v. Roby, 29 Mass. (12 Pick.) 496, 502 (1832) (acknowledging double jeopardy as an "ancient and well established principle[] of the common law," and explaining that the Double Jeopardy Clause "may be considered equivalent to a declaration of the common law principle"); *id.* at 503-06 (consulting common law sources to ascertain the principle's content).

65. *See* People v. Goodwin, 18 Johns. 187, 200-03 (N.Y. Sup. Ct. 1820) (referring to the Double Jeopardy Clause as "an acknowledged axiom of the common law").

66. *See* Commonwealth v. Olds, 15 Ky. (5 Litt.) 137, 138-39 (1824) ("If, then, we ascertain what is necessary to constitute, at common law, a good plea of *autrefois acquit* [formerly acquitted], or *autrefois convict* [formerly convicted], we shall have what constitutes a complete defence under this clause of the constitution.").

67. *See* 4 BLACKSTONE, *supra* note 49, at 329-30; 1 JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 451-63 (London, A.J. Valpy 1816); 2 MATTHEW HALE, HISTORIA PLACITORUM CORONAE: THE HISTORY OF THE PLEAS OF THE CROWN 240-55 (London, E. & R. Nutt & R. Gosling 1736); 2 HAWKINS, *supra* note 48, at 368-79; 1 THOMAS STARKIE, A TREATISE ON CRIMINAL PLEADING, WITH PRECEDENTS OF INDICTMENTS, SPECIAL PLEAS, &C. 316-31 (London, J. & W.T. Clarke 2d ed. 1822). Note that the English sources use several alternative spellings of *autrefois*, including "*auter-foits*," *see, e.g.*, 1 STARKIE, *supra*, at 316; "*auterfoits*," *see, e.g.*, 4 BLACKSTONE, *supra* note 49, at 329; 2 HALE, *supra*, at 240; and "*autrefoits*," *see, e.g.*, 2 HAWKINS, *supra* note 48, at 368.

68. *See* 2 HAWKINS, *supra* note 48, at 370 (describing the double jeopardy principle as "a Maxim made in favour of Life").

had been "suspended by the benefit of clergy"—a legal fiction that enabled certain first-time offenders, especially those convicted of larceny, to escape the death penalty.[69] Together, the two pleas enabled a criminal defendant who had once been in jeopardy to bar prosecution of "any subsequent accusation for the same crime."[70]

As a threshold matter, the pleas of *autrefois acquit* and *autrefois convict* were available only to a defendant who had been in actual jeopardy—meaning he had previously received a verdict of conviction or "acquittal upon trial."[71] If a person previously had been accused of a given crime, but the grand jury had failed to indict him, the pleas would not bar a subsequent indictment for the same crime.[72] And even an acquittal would not give rise to *autrefois acquit* if the underlying indictment (or private appeal[73]) was "so far erroneous . . . that no good Judgment could have been given upon it against the Defendant," because in that scenario "the Defendant was never in danger" at the initial trial.[74] For

69. *See* 4 BLACKSTONE, *supra* note 49, at 330; *see also* 2 HALE, *supra* note 67, at 251. Benefit of clergy was originally a medieval procedure whereby a cleric facing criminal charges in an English common law court could obtain transfer to an ecclesiastical court. *See* John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 37 (1983). By the eighteenth century, however, it had morphed into a legal fiction whereby first-time offenders convicted of certain felonies—most notably larceny—would be released or transported overseas instead of being sentenced to death. *See id.* at 38-39. Thus, "[b]enefit of clergy drained much of the blood from a system of criminal sanctions that remained nominally based upon capital punishment." *Id.* at 39; *see also* 4 BLACKSTONE, *supra* note 49, at 239 ("[B]y the merciful extensions of the benefit of clergy by our modern statute law, a person who commits a simple larceny to the value of thirteen pence or thirteen hundred pounds, though guilty of a capital offense, shall be excused the pains of death: but this is only for the first offence.").

70. *See* 4 BLACKSTONE, *supra* note 49, at 329-30.

71. *See* 2 HALE, *supra* note 67, at 246; *see also* 1 STARKIE, *supra* note 67, at 319 ("[T]he plea will fail, unless it appear that defendant was [acquitted], by judgment either upon verdict or by battle." (emphasis omitted)). Although Hale and Starkie mention only acquittals, the same rule applied to prior convictions through the plea of *autrefois convict*. *See* 4 BLACKSTONE, *supra* note 49, at 330.

72. *See* 2 HALE, *supra* note 67, at 246.

73. Until the early nineteenth century, a prosecution "could be instituted either by common law 'appeal' (at the behest of a private party) or by 'indictment' (at the behest of the crown)." *See* REPORT TO THE ATTORNEY GENERAL ON DOUBLE JEOPARDY, *supra* note 47, at 844 & n.24; *see also* JOHN H. LANGBEIN ET AL., HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 29-35 (2009) (describing the "appeal of felony" process).

74. 2 HAWKINS, *supra* note 48, at 372.

example, "an Acquittal on an Appeal brought by one who had no Right to bring it" would not bar a later prosecution brought by the appropriate party.[75]

Where this requirement of actual prior jeopardy was satisfied, the common law employed a two-part test to determine whether the old charge and new charge alleged the same offense. For a plea of *autrefois acquit* or *autrefois convict* to be valid, the defendant had to show that the previously tried offense was both (1) legally and (2) factually the same as the subsequently charged offense that he sought to bar.[76] As of 1791, the common law had developed a clear test for legal identity. Its test for factual identity was somewhat vague, however, and in practice, judges seem to have focused not on how factually similar the two indictments were but on whether the defendant's guilt or innocence had actually been adjudicated at the initial trial.

A. Legal Identity of the Offenses

The legal identity portion of the common law test was quite similar to the modern *Blockburger* test.[77] It involved an abstract consideration of the formal legal elements of a crime and treated greater and lesser included offenses as "the same." Eighteenth-century rules of criminal procedure, which did not allow joinder of legally distinct felonies or joinder of a felony and a misdemeanor, help explain the emergence of this test.

1. An elements-based test

To satisfy the common law test for legal identity, a defendant had to show that the legal elements of the newly charged offense made it possible for him to have been convicted of that offense at a previous trial. It was well established that greater and lesser included offenses fell into this category; the eighteenth-century common law treatises unanimously agree that *autrefois acquit* and *autrefois convict* could be pleaded where two offenses were "in Substance the same,"[78] even if they "differ[ed] in colouring and in degree."[79]

75. *See id.* In the case of murder, for instance, a private appeal could not be brought by "any other Woman except the Wife of the Deceased, or by any other Man except the next Heir." *Id.* (footnotes omitted).

76. *See, e.g.*, 4 BLACKSTONE, *supra* note 49, at 330 (explaining that double jeopardy prevents a second "prosecution for the same identical *act* and *crime*" (emphasis added)); 1 STARKIE, *supra* note 67, at 322 (explaining that a defendant had to prove that his prior acquittal or conviction was for "the offense [presently] charged *in law* and *in fact*"); *see also* Commonwealth v. Roby, 29 Mass. (12 Pick.) 496, 504 (1832) (citing 1 STARKIE, *supra* note 67, at 322).

77. *See supra* Part I.A.

78. *See* 2 HAWKINS, *supra* note 48, at 371 (using this language to describe the crime of petit treason and the lesser included offense of murder).

79. *See* 4 BLACKSTONE, *supra* note 49, at 330.

Murder and manslaughter provide the classic example.[80] Murder was defined as manslaughter "with the addition of malice and design."[81] Because common law juries typically received instructions about available lesser included offenses,[82] a defendant standing trial for murder could be convicted of murder or manslaughter.[83] Therefore, the two offenses were considered legally identical for double jeopardy purposes. As Matthew Hale put it:

> [I]f a man be acquit generally upon an indictment of murder, *auterfoits acquit* is a good plea to an indictment of manslaughter of the same person, or *è converso*, if he be indicted of manslaughter, and be acquit, he shall not be indicted for the same death, as murder, for they differ only in degree, and the fact is the same.[84]

80. *See id.* (using these two crimes as an example); 2 HALE, *supra* note 67, at 246 (same).

81. *See* 1 CHITTY, *supra* note 67, at 455.

82. *See Trial Procedures*, PROC. OLD BAILEY, https://perma.cc/7CTY-2XPF (archived Dec. 16, 2018) (explaining that an eighteenth-century English jury "could choose between innocent, guilty, or a partial verdict," with the latter category including finding the defendant "guilty of part of the charges . . . or of a lesser offence"); *see also* Langbein, *supra* note 69, at 41-42, 52-55 (finding that "partial verdicts were quantitatively important, comprising . . . one-third of the guilty verdicts returned" in a sample of 171 eighteenth-century English cases).

83. *See* 1 CHITTY, *supra* note 67, at 455-56; 1 STARKIE, *supra* note 67, at 323-24. In a 1758 case, for example, the defendant "was indicted for . . . wilful murder," but the jury returned a conviction for manslaughter. *See Trial of Robert Baker*, PROC. OLD BAILEY, June 28-29, 1758, at 248, 248, https://perma.cc/5MCW-9ZQ8. Similarly, in a 1780 case, the defendant was indicted for highway robbery but convicted of only theft. *See Trial of Jane Morris*, PROC. OLD BAILEY, Apr. 5, 1780, at 260, 260-61, https://perma.cc/X2YJ-D39Z.

This Note cites extensively to the *Old Bailey Sessions Papers*, which contain summaries of trials held at London's central criminal court and which were regularly published from the late seventeenth century through the early twentieth century. *See Publishing History of the Proceedings*, PROC. OLD BAILEY, https://perma.cc/9M2L-23RL (archived Jan. 21, 2019). While the *Old Bailey Sessions Papers* are far from a complete record, they are "probably the best accounts we shall ever have of what transpired in ordinary English criminal courts before the later eighteenth century." JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 190 (reprt. 2005) (quoting John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 271 (1978)).

Citations to summaries of Old Bailey trials in this Note are given by reference to the date(s) contained on the cover of the respective publications. A searchable database of the *Old Bailey Sessions Papers* is available online, *see The Proceedings of the Old Bailey, 1674-1913*, PROC. OLD BAILEY, https://perma.cc/EVR6-ACGE (archived Jan. 21, 2019), and while the citations in this Note are to the originals, URLs have been provided to the publicly available transcriptions.

84. 2 HALE, *supra* note 67, at 246. Although this quotation from Hale mentions only acquittals, the same rule applied to a prior conviction of either offense through the plea of *autrefois convict*. *See* 4 BLACKSTONE, *supra* note 49, at 330.

By contrast, *autrefois acquit* and *autrefois convict* would not bar a subsequent trial for an offense with legally distinct elements.[85] Here, burglary and larceny provide an illustration.[86] Larceny was defined at common law as the (1) "fraudulent taking and carrying away" (2) of the "personal goods of another."[87] Burglary, by contrast, required (1) breaking into a dwelling house (2) at night (3) with intent to commit a felony.[88] Even though burglars often commit larceny,[89] at common law the two crimes were considered to be "several offenses" for double jeopardy purposes because of their distinct elements.[90] As Hale put it, "burglary may be where there is no larciny, and larciny may be where there is no burglary."[91]

The seminal case of *The King v. Vandercomb*[92] shows the common law test for legal identity in action. *Vandercomb* involved two defendants who were originally indicted for "having burglariously broken and entered [a] dwelling-house . . . about the hour of six in the night of the 19th of November, 1795," and for "having stolen a great variety of articles."[93] At trial, the prosecution produced evidence that the two men had been apprehended in the house around 6:00 PM on November 19, but failed to prove that they had stolen any property at that time; instead, the evidence showed that the property had been taken earlier in the day.[94] Accordingly, the court found it "impossible legally to convict the[] prisoners" of the charged burglary,[95] and directed an acquittal.[96]

85. *See, e.g.*, 2 HAWKINS, *supra* note 48, at 373 (explaining that "if a Man cannot be found guilty of [a later] Indictment" upon proof of the elements of a previously tried offense, an acquittal in the first trial in "no way acquits him" of the later-charged offense).

86. *See* 2 HALE, *supra* note 67, at 245-46 (using these two crimes as an example); *see also* 2 HAWKINS, *supra* note 48, at 371 (using the example of larceny and trespass as crimes that are "entirely different").

87. 1 HALE, *supra* note 67, at 504.

88. *See id.* at 548-49.

89. *Cf., e.g.*, Descamps v. United States, 133 S. Ct. 2276, 2295 (2013) (Alito, J., dissenting) (observing that "breaking into a home to steal valuables" is "what everyone imagines when the term 'burglary' is mentioned").

90. *See* 2 HALE, *supra* note 67, at 245-46.

91. *Id.* at 246.

92. (1796) 168 Eng. Rep. 455; 2 Leach 708. Although *Vandercomb* was decided shortly after the ratification of the U.S. Constitution's Bill of Rights, it very likely reflects the common law understanding that the Framers sought to codify in the Double Jeopardy Clause. *See infra* text accompanying notes 181-90.

93. *Vandercomb*, 168 Eng. Rep. at 455, 2 Leach at 708; *see also Trial of James Vandercom & James Abbot*, PROC. OLD BAILEY, Jan. 13, 1796, at 128, 128, https://perma.cc/2D3Q-6UPH.

94. *See Vandercomb*, 168 Eng. Rep. at 455-56, 2 Leach at 708-10.

95. *Trial of James Vandercom & James Abbot*, *supra* note 93, at 136.

96. *Vandercomb*, 168 Eng. Rep. at 457, 2 Leach at 711.

After this acquittal, the prosecution submitted a new indictment for burglary.[97] It repeated the original allegation that the defendants had "burglariously broken and entered the house," but diverged from the original indictment by alleging "intent to steal" property instead of actual theft.[98] The defendants pleaded *autrefois acquit*.[99]

The critical issue was whether the new burglary charge was legally identical to the original burglary charge of which the defendants had been acquitted. The defense lawyer[100] argued that double jeopardy should apply because both indictments charged "burglary," which he "defined . . . to be a felonious breaking of the dwelling-house and stealing the goods, or with intent to commit a felony."[101] In essence, he urged the court to conceptualize burglary as a single crime that could be proved in more than one way.

The court, however, held that "burglary is of two sorts."[102] The first type of burglary involved "[1] breaking and entering a dwelling-house in the night time, and [2] stealing goods therein"; the second involved "[1] breaking and entering a dwelling-house in the night time, [2] with intent to commit a felony."[103] Considered in the abstract, these two types of burglary were legally

97. *See id.* The prosecution also submitted a new indictment alleging larceny, which stated that the defendants had stolen "other goods than those stated in the former indictment," including "the property of different persons than what were included in the [original] indictment . . . on which the prisoners had been acquitted." *Id.*, 2 Leach at 711-12. The court apparently saw this new larceny charge as a lesser included offense of the burglary charge of which the defendants had already been acquitted, which had alleged (1) breaking and entering and (2) larceny. *See id.* at 455, 2 Leach at 708. The fact that the new indictment listed different stolen goods and different victims went to the second part of the double jeopardy test—factual identity. Therefore, the court "gave [the defendants] time to consider whether they could by any averment" show that the two indictments were factually identical. *See id.* at 457, 2 Leach at 712. That question was never resolved, however, because the case went forward on the new indictment for burglary. *See id.*

98. *See id.* at 457, 2 Leach at 711.

99. *See id.*

100. While eighteenth-century defendants facing felony charges usually were not allowed to be represented by a lawyer, *see infra* text accompanying note 122, defense counsel was occasionally admitted to argue "narrow points of law," *see Trial Procedures*, *supra* note 82.

101. *Vandercom and Abbot's Case*, PROC. OLD BAILEY, June 22, 1796, at 723, 723, https://perma.cc/JM74-R2DC.

102. *Vandercomb*, 168 Eng. Rep. at 459, 2 Leach at 717.

103. *Id.* at 459-60, 2 Leach at 717.

distinct offenses because each contained an element that the other did not.[104] Accordingly, the judges unanimously rejected the plea of *autrefois acquit*.[105]

2. Relevant common law procedures

The strict rules of common law pleading help explain the adoption of the *Vandercomb* test. Until the late nineteenth century, common law judges generally did not permit two legally distinct felonies to be tried at the same time.[106] Where the prosecutor's factual allegations could support two different felony charges, the judge "would in general automatically force the prosecutor to elect upon which count he wished to proceed."[107] For example, where a defendant was

104. In the court's words, the two offenses were "distinct in their nature" because "evidence of one of them [would] not support an indictment for the other." *Id.* at 460, 2 Leach at 717. This statement is "the precise equivalent" of the Supreme Court's *Blockburger* test. *See* Grady v. Corbin, 495 U.S. 508, 532-33 (1990) (Scalia, J., dissenting), *overruled by* United States v. Dixon, 509 U.S. 688 (1993). It sounds odd to modern ears, however, because in the eighteenth century, the term "evidence" was sometimes used to refer to the formal elements of an offense. *See, e.g.*, 2 HAWKINS, *supra* note 48, at 370 (expressing the idea that time and place are not formal elements of an offense by stating that "neither the Time nor Place laid in an Indictment . . . are material upon Evidence"). For this reason, the *Vandercomb-Blockburger* test is sometimes called the "same evidence" test. *See, e.g.*, *Grady*, 495 U.S. at 521 & n.12. This is a "misnomer" because the test "has nothing to do with the *evidence* presented at trial" and "is concerned solely with the statutory elements of the offenses charged." *Id.* at 521 n.12. Accordingly, I refer to this elements-based inquiry as the *Vandercomb* test.

105. *See Vandercomb*, 168 Eng. Rep. at 461, 2 Leach at 719-21; *see also* 1 STARKIE, *supra* note 67, at 324 & nn.o-p (explaining that even though "burglarious entry [was] common to both indictments" in *Vandercomb*, the fact that "actual larciny essentially differs from a mere intent" meant that "the defendant[s] could not, upon the first indictment, have been found guilty of . . . the offence charged in the second, and therefore no inference in [their] favour can be drawn from an acquittal").

106. *See* 1 CHITTY, *supra* note 67, at 252-53 (explaining that this was the typical practice, although failure to abide by it did not provide grounds for reversing an otherwise valid conviction); *see also, e.g.*, Young v. The King (1789) 100 Eng. Rep. 475, 479-80; 3 T.R. 98, 105-06 (opinion of Buller, J.). *See generally* FRIEDLAND, *supra* note 19, at 179-84 (discussing the "doctrine of election").

107. *See* FRIEDLAND, *supra* note 19, at 179-80. This anti-joinder rule was seen as defendant-friendly. For one thing, common law judges believed that being forced to defend against multiple felonies at the same time might "confound the prisoner in his defence." *See, e.g., Young*, 100 Eng. Rep. at 479-80, 3. T.R. at 106 (opinion of Buller, J.). Confining each trial to a single, "relatively simple issue" made it easier for the (usually uncounseled) defendant to prepare his defense and lessened the risk of a wrongful conviction based on jury confusion. *See* FRIEDLAND, *supra* note 19, at 180. In addition, the anti-joinder rule guaranteed the defendant a full allotment of peremptory challenges with respect to each charge, "for he might object to a juryman's trying one of the offences, though he might have no reason to do so" with respect to the other charge. *See Young*, 100 Eng. Rep. at 480, 3 T.R. at 106.

accused of raping and robbing a victim in a single incident, the common law required a separate indictment and a separate trial for each charge.[108]

The common law did permit multiple-count felony indictments, however, as long as the counts all alleged a single offense and merely "describ[ed] the facts in different ways."[109] This was common when there was uncertainty about the factual details of how a particular offense had been committed, as it allowed the prosecutor to allege alternative factual theories. For example, different counts could list different dates on which a given crime might have been committed,[110] different items of property that had been damaged,[111] different persons who might have owned an item of stolen property,[112] or different ways in which a murder might have been committed.[113]

Disputes sometimes arose over whether two allegations were legally distinct, which would mean they had to be tried separately, or merely factually distinct, which would mean they could be joined in a single trial. For example, Sir Edward East discussed a 1781 case in which an indictment for burglary included one count of breaking and entering with "intent to steal," and another count of breaking and entering with "intent to kill and murder."[114] The defendant objected "that there were two [distinct] capital charges in the same

108. *See, e.g.*, *Trial of John Stevens*, PROC. OLD BAILEY, Apr. 8-14, 1752, at 129, 129-30, 132, https://perma.cc/YPR5-QKXM (first trying the defendant only for robbery, even though the victim alleged both rape and robbery, then dismissing the rape indictment after the defendant had been convicted of the robbery and sentenced to death). For another example, see *Trial of Joseph Harrison & John Mitchell*, PROC. OLD BAILEY, Dec. 9-16, 1772, at 20, https://perma.cc/W474-GAHA, in which the defendants were tried on robbery charges, and *Trial of Joseph Harrison & John Mitchell*, PROC. OLD BAILEY, Dec. 9-16, 1772, at 42, https://perma.cc/4VQ6-EB7Q, in which the same two defendants were tried for factually related rape charges.

109. FRIEDLAND, *supra* note 19, at 180.

110. *See, e.g.*, *Trial of Sadi & William Morris*, PROC. OLD BAILEY, July 11, 1787, at 826, 826, https://perma.cc/M2ZT-TASB (containing one count alleging that the offense was committed on May 28 and a second count alleging that it was committed on May 29).

111. *See, e.g.*, *Trial of John Mead*, PROC. OLD BAILEY, July 20, 1791, at 444, 444, https://perma.cc/6587-ZY4K (containing one count alleging arson of a house belonging to Walter Carwardine, and a second count alleging arson "on the same day" of "another dwelling house of the said Walter").

112. *See, e.g.*, *Trial of Thomas Boyce*, PROC. OLD BAILEY, Apr. 10-15, 1771, at 169, 169, https://perma.cc/4S8V-4KL3 (containing one count alleging that the stolen property in question belonged to Roger Jones, a second count alleging that it belonged to Sir Thomas Robinson, a third count alleging that it belonged to Sir Richard Glynn and Tomkins Dew, and a fourth count alleging that it was "the property of persons unknown").

113. *See, e.g.*, R v. Clark (1820) 129 Eng. Rep. 804, 804-05; 1 Brod. & B. 473, 473-75 (containing two counts alleging slightly different methods of poisoning).

114. *See* 2 EDWARD HYDE EAST, A TREATISE OF THE PLEAS OF THE CROWN 515 (Philadelphia, P. Byrne 1806).

indictment."[115] But the seven-judge court unanimously "held the indictment good."[116] It reasoned that the two counts stated a legally identical offense: burglary, defined as (1) breaking and entering (2) with intent to commit a felony.[117] The different counts permissibly alleged alternative factual theories of *how* that offense was committed.

The common law test for whether two counts alleged a single offense for purposes of joinder appears quite similar to the "same offence" inquiry in the double jeopardy context. This makes sense. The anti-joinder rule made it impossible for a defendant standing trial for one offense to be convicted of any legally distinct crime, no matter how overwhelmingly the evidence demonstrated his guilt. It would therefore have been illogical[118] to permit a defendant acquitted of highway robbery to bar a subsequent prosecution for rape, even if the two crimes rested upon the exact same factual allegations, because the rules of procedure made it impossible to have prosecuted the rape in the original proceeding. This squares with *Vandercomb*. There, the court permitted the second trial because the defendants could not have been convicted of the break-in with felonious intent at the initial trial, where they had been charged with the legally distinct offense of breaking in and actually stealing goods.[119]

One other common law procedure had important implications for double jeopardy. Felony charges could not be joined with misdemeanor charges,[120] and "there could not be a conviction for a misdemeanour on a charge of felony" (or vice versa).[121] One reason for this felony-misdemeanor barrier was that certain procedural protections—notably the right to counsel—were available to eighteenth-century defendants charged with misdemeanors but not to defendants charged with felonies.[122] Accordingly, "it often happen[ed], that after an acquittal of the felony, the defendant [was] indicted and tried for the

115. *Id.*

116. *Id.*

117. *See id.* at 515-16.

118. *See* 1 CHITTY, *supra* note 67, at 452-53 (asserting that it would be "inconsistent with reason" and "repugnant to the rules of law" to treat an acquittal or conviction as barring a prosecution for a legally distinct offense).

119. *See* R v. Vandercomb (1796) 168 Eng. Rep. 455, 461; 2 Leach 708, 720-21.

120. *See* FRIEDLAND, *supra* note 19, at 171-72.

121. *See id.* at 172-74.

122. *See id.* at 173-74 (listing procedural protections in misdemeanor trials, including the right to counsel; the right to a copy of the indictment; and a "much better chance of having the case removed into the Court of Queen's Bench by certiorari," which would allow the defendant to "more easily obtain a new trial, a special jury or a view"); *see also* LANGBEIN ET AL., *supra* note 73, at 602-05 (discussing the rule against allowing defense counsel in felony trials).

misdemeanour upon the same evidence."[123] For example, an acquittal for the felony of highway robbery did not bar a subsequent trial for a misdemeanor assault on the exact same factual allegations,[124] even though assault would otherwise be a lesser included offense of highway robbery.

B. Factual Identity of the Offenses

As of 1791, a defendant pleading double jeopardy had to show not only that the crimes described in two successive indictments were legally identical, but also that they were "the same offence in fact."[125] Factual identity was self-evident where the two indictments contained the exact same text. But difficult questions arose when there was some "Variance between the Record of the former Acquittal, and the [later] Indictment."[126]

The common law sources do not give a precise formula for determining the amount of factual variance that would defeat a plea of double jeopardy. Instead, they offer two guiding principles. Where a prior acquittal resulted from "a mere Slip in the Indictment"—that is, a minor technical defect—a defendant should not be able to use double jeopardy to avoid a trial on the merits.[127] But where a prior acquittal reflected a jury's determination that the defendant was not guilty, a prosecutor should not be able to circumvent double jeopardy by repackaging the same factual allegations in slightly different terms[128] or exploiting some other "Fiction or Construction of Law."[129] Thus, the common law test for factual identity depended more on the *reason* for a prior acquittal than on the amount of factual variation between two indictments.

Under the strict rules of common law pleading, a small, technical defect in an indictment—even a scrivener's error—could not be amended and would result in a directed verdict of acquittal.[130] In a 1754 case, for example, a private

123. 1 CHITTY, *supra* note 67, at 456; *see also* 2 HAWKINS, *supra* note 48, at 371 (explaining that an acquittal on charges of trespass (a misdemeanor) would not bar a subsequent charge of larceny (a felony) brought by the same private prosecutor for the same goods).

124. *See, e.g.*, *Trial of Thomas Wells et al.*, PROC. OLD BAILEY, Oct. 17-19, 1744, at 231, 231-32 https://perma.cc/LT6J-EVJS (convicting the defendants of misdemeanor assault after a prior acquittal for robbery on the exact same factual allegations); *see also Trial of Thomas Wells et al.*, PROC. OLD BAILEY, Oct. 17-19, 1744, at 229, https://perma.cc/QD8K-E7DQ (the earlier trial).

125. *See* 1 STARKIE, *supra* note 67, at 325-26.

126. *See* 2 HAWKINS, *supra* note 48, at 369-70.

127. *See id.* at 373.

128. *See* 1 CHITTY, *supra* note 67, at 453.

129. *See* 2 HAWKINS, *supra* note 48, at 370.

130. In contrast, modern procedures make it easy for a prosecutor to correct a factual error in a criminal charge. The Federal Rules of Criminal Procedure permit an information

footnote continued on next page

prosecutor (that is, a layperson unaided by counsel[131]) drew up two separate indictments accusing a man named Womersly of forgery.[132] Each contained a minor defect: The first misidentified the victims, and the second alleged that the forged document was "a true bill of Exchange" instead of alleging that it was a writing "*purporting* to be a bill of Exchange."[133] Accordingly, Womersly was acquitted on both counts.[134] The 1787 case of *The King v. Coogan*[135] provides an even more extreme example. Coogan was charged with forging a will "purporting to be the last Will and Testament of James Gibson," a deceased sailor.[136] According to the indictment, the forged will began with the words "I James Gibson, do hereby."[137] But the will produced in evidence began "'James Gibson do hereby,' . . . leaving out the pronoun of the first person."[138] The omission of this single "I" was enough to render the indictment invalid, so Coogan was acquitted.[139]

An acquittal based on this kind of technicality did not trigger double jeopardy protection. Womersly and Coogan each faced retrial and pleaded *autrefois acquit*, but their pleas were rejected on grounds of factual variance. In Womersly's case, the court accepted the argument that the facts contained in

"to be amended at any time before the verdict." FED. R. CRIM. P. 7(e). And while the Fifth Amendment prevents substantive amendments to indictments issued by a grand jury, *see, e.g.*, Stirone v. United States, 361 U.S. 212, 215-16 (1960), "amendments are typically allowed to correct a misnomer or cure a clerical or typographical error," 1 CHARLES ALAN WRIGHT & ANDREW D. LEIPOLD, FEDERAL PRACTICE AND PROCEDURE § 128, at 623-24 (4th ed. 2008) (footnote omitted). In addition, errors can be corrected via the filing of a superseding indictment, which generally may be done "at any time prior to trial." *Id.* § 128, at 652.

131. *See* LANGBEIN, *supra* note 83, at 11-12 (describing the eighteenth-century English system of private prosecution).

132. *See Trial of Thomas Womersly*, PROC. OLD BAILEY, May 30-June 1, 1754, at 188, 188, https://perma.cc/5JHJ-F8PV. Clerks often assisted private prosecutors in drafting indictments to comply with common law pleading standards, *see Trial Procedures*, *supra* note 82, but in this case the clerk informed the court that he "never saw" the two indictments "till they had been preferred to the Grand Jury," *Trial of Thomas Womersly*, *supra*, at 188.

133. *See Trial of Thomas Womersly*, *supra* note 132, at 188 (emphasis added).

134. *See id.*

135. (1787) 168 Eng. Rep. 326; 1 Leach 448 (Case No. 207).

136. *Id.* at 326, 1 Leach at 448.

137. *Id.*

138. *Id.*

139. *Id.*

the new indictment were "totally different from" the facts in the previous two.[140] Similarly, in Coogan's case, the court explained that the earlier and later charges differed "in point of fact" because the two indictments described "different" wills.[141]

Yet common law treatises make clear that minor factual differences between two indictments did not invariably defeat a plea of double jeopardy. As Joseph Chitty explained, "it would be absurd to suppose that by varying the day, parish, or any other allegation, the precise accuracy of which is not material, the prosecutor could change the rights of the defendant, and subject him to a second trial."[142] For example, if both indictments charged the defendant with murder, but each used a different title or surname to identify the victim, the defendant could successfully overcome the variance by showing "that the Person so differently named was one and the same Person."[143] Similarly, if one indictment said that a particular crime had been committed on March 1 in the seventeenth year of the queen's reign, and the other said it had been committed on March 1 in the twenty-first year, the defendant could "plead *auterfoits acquit*, and aver it to be the same felony."[144] And if a person who had been acquitted of a robbery committed in one town was subsequently indicted for a robbery committed on the same person but in a different town within the same county, he could bar the second indictment by showing it was really the same incident.[145]

These examples reveal that the common law test for factual identity often turned on whether the defendant had been acquitted on the merits. Imagine that instead of raising a technical objection to the form of the first two indictments against him, Womersly had denied producing the forgery and been found not guilty. The treatises make clear that under those conditions, the prosecutor could not have gotten a second bite at the apple by tweaking the language of the new indictment. So too in Coogan's case. What really mattered was not the *amount* of factual variance between the earlier and later charges,

140. *See Trial of Thomas Womersly*, *supra* note 132, at 188 (Court: "Your life was never in jeopardy for the offence you are now charged with . . . .").

141. *See Trial of John Coogan*, PROC. OLD BAILEY, July 11, 1787, at 879, 880, https://perma.cc/QJ97-2M38; *see also* R v. Coogan (1787) 168 Eng. Rep. 326, 326; 1 Leach 448, 448-49 (Case No. 208).

142. 1 CHITTY, *supra* note 67, at 453.

143. *See* 2 HAWKINS, *supra* note 48, at 369.

144. 2 HALE, *supra* note 67, at 244.

145. *See id.* at 245. Double jeopardy might not bar a second indictment alleging that the robbery had been committed in a different county, however. *See infra* text accompanying notes 147-51.

but the judge's determination that the earlier acquittal did not reflect a judgment about the defendant's guilt or innocence.[146]

Hawkins's discussion of acquittals based on lack of jurisdiction provides further evidence that common law factual identity often turned on whether the merits of the defendant's case had previously been adjudicated. At the time, it was settled that where an earlier and a later indictment differed "only as to the Times when the Crime is alledged to have been committed, or as to the Places being both in the same County," double jeopardy could be invoked.[147] But Hawkins questioned whether an acquittal "in one County may be pleaded in Bar of a subsequent Indictment in *another* County."[148] The reason was that courts in County *A* lacked jurisdiction over crimes committed in County *B*.[149] Hawkins imagined a defendant brought to trial in County *A* and acquitted based on a determination that he had committed the crime in County *B*.[150] If this type of acquittal would bar a subsequent trial in County *B*, a guilty defendant would be able to escape justice because of a procedural error. Therefore, Hawkins argued that double jeopardy generally should not apply across counties, justifying this conclusion on the grounds that the defendant "was in no danger of his Life" during the initial proceeding in County *A* because the court had lacked jurisdiction.[151]

On the other hand, Hawkins found it "very reasonable" to permit a defendant charged with "steal[ing] Goods in one County, and then carry[ing] them into another" to plead "an Acquittal in the one County for such stealing . . . in Bar of a subsequent Prosecution for the same stealing in another County."[152] He reasoned that if the offense had occurred across the two counties, then there was no jurisdictional barrier to the defendant "be[ing] indicted and found guilty in either."[153] This being so, "if he could not bar the second Prosecution by the Acquittal on the first, his Life would be twice in

146. This foreshadowed the modern distinction between cases dismissed for reasons related to guilt or innocence, which are treated as acquittals and therefore trigger double jeopardy protections, and cases dismissed for procedural reasons, which do not. *See, e.g.*, Evans v. Michigan, 568 U.S. 313, 318-20 (2013).

147. 2 HAWKINS, *supra* note 48, at 369-70 (footnotes omitted).

148. *Id.* at 370 (emphasis added).

149. *See id.* ("[A]ll Indictments are local . . . .").

150. *See id.*

151. *See id.*; *cf. Trial of Thomas Womersly*, *supra* note 132, at 188 (stating that because of the variance between the former and latter indictments, Womersly's "life was never in jeopardy" for the later-charged offence at the earlier trial).

152. 2 HAWKINS, *supra* note 48, at 370.

153. *See id.*

Danger from that which is in Truth but one and the same Offence, and only considered as a new one by a mere Fiction or Construction of Law."[154]

Chief Justice John Marshall appears to have followed this English common law approach. In 1807, the Chief Justice presided over one of the highest-profile cases of the early nineteenth century—the treason trial of former Vice President Aaron Burr.[155] Burr was charged in Virginia with committing treason by "levying war against the United States."[156] He stood trial in the U.S. Circuit Court for the District of Virginia and was acquitted.[157] In a letter to a colleague, Chief Justice Marshall contemplated whether "an acquittal in Virginia could . . . be pleaded in bar to an indictment in Kentucky for levying war in Kentucky."[158] As a formal matter, it seemed that Burr could "be again indicted in Kentucky" for levying war there, as opposed to in Virginia.[159] But the Chief Justice was troubled by the fact that at the original trial in Virginia, relevant evidence of Burr's allegedly treasonous acts in Kentucky could have been introduced, and that at the trial in Kentucky, relevant evidence of allegedly treasonous acts in Virginia could be introduced.[160] If this happened, it seemed to him that "a man's life would in fact be twice put in jeopardy for the same offence."[161] In the end, Chief Justice Marshall never had occasion to resolve the question because the government dropped its prosecution of Burr after his acquittal in Virginia.[162] Nevertheless, Chief Justice Marshall's analysis shows his acceptance of the principle that a prosecutor should not be able to use "a mere Fiction or Construction of Law" to undermine the guarantee against double jeopardy.

To summarize, it is clear that eighteenth-century English common law used the elements-based *Vandercomb* test to determine whether two offenses were legally identical for double jeopardy purposes. Where that test was satisfied, the common law was less clear about when factual differences between two indictments would defeat a plea of *autrefois acquit* or *autrefois*

154. *Id.*

155. *See* CHARLES F. HOBSON, THE AARON BURR TREASON TRIAL 1 (2006), https://perma.cc/8AMK-TNUP.

156. *Id.* at 4 (quoting United States v. Burr, 25 F. Cas. 2, 14 (C.C.D. Va. 1807) (No. 14,692a)); *see id.* at 4-6; *see also* U.S. CONST. art. III, § 3, cl. 1 ("Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort.").

157. *See* HOBSON, *supra* note 155, at 6-7.

158. Letter from John Marshall to William Cushing (June 29, 1807), https://perma.cc/S33A-Y8CH, *reprinted in* 7 THE PAPERS OF JOHN MARSHALL 60, 61 (Charles Hobson ed., 1993).

159. *Id.*

160. *See id.*

161. *Id.*

162. *See* HOBSON, *supra* note 155, at 7-8.

convict. The cases suggest that if the factual variance was the reason for the prior acquittal, a new trial would be permitted. But if the merits of the charge had genuinely been tried, common law judges would not allow the prosecutor to obtain a retrial on a legally identical offense by merely reframing the factual particulars.

IV. Assessing *Ashe* from an Originalist Perspective

The Supreme Court in *Ashe* produced a majority opinion, a concurrence, and a dissent. Yet none of these three opinions captures the common law understanding of "same offence" described in the previous Part. The common law would have recognized the charge Ashe faced in his second trial as legally identical to the charge he faced in his first trial; both were first-degree robbery. Whether the common law would have treated the two charges against Ashe as factually identical is a more difficult question, but eighteenth-century cases involving multiple victims suggest that it would have.

A. The Court's Three Competing Approaches

Confronted with the six-victim robbery in *Ashe*,[163] the Supreme Court articulated three competing rules. Justice Stewart's majority opinion constitutionalized criminal law issue preclusion,[164] announcing for the first time that the doctrine "is embodied in the Fifth Amendment guarantee against double jeopardy."[165] Based on the arguments presented at Ashe's first trial—where he was charged only with robbing Knight—the Court reasoned that the "single rationally conceivable issue in dispute before the jury was whether [Ashe] had been one of the robbers."[166] By returning an acquittal, the jury necessarily decided that issue in Ashe's favor.[167] Accordingly, issue preclusion prevented the State from asserting, in any subsequent trial, that Ashe had participated in the robbery.[168] As a result, the State was effectively barred from trying him for robbing the other poker players.

In a concurrence joined by Justice Douglas and Justice Marshall, Justice Brennan proposed an alternative: the "same transaction" test.[169] He contended

163. For a summary of the facts and procedural posture of the case, see notes 1-9 and accompanying text above.

164. For an explanation of this doctrine, see Part I.B above.

165. Ashe v. Swenson, 397 U.S. 436, 445 (1970).

166. *Id.*

167. *See id.* ("[T]he jury by its verdict found that he had not.").

168. *See id.*

169. *See id.* at 453-54 (Brennan, J., concurring).

that "the Double Jeopardy Clause requires the prosecution, except in most limited circumstances, to join at one trial all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction."[170] Since all the charges against Ashe stemmed from "one criminal episode," the "same transaction" test would have forbidden the state from trying them separately.[171] After trying Ashe for robbing Knight, the State would have been precluded from trying him for robbing any of the other players or stealing the car—regardless of whether the initial trial ended in a conviction or an acquittal. Justice Brennan claimed that this test would fulfill the Double Jeopardy Clause's purpose of preventing "possible tyranny by the overzealous prosecutor" and would "promote[] justice, economy, and convenience."[172]

Chief Justice Burger dissented. He argued that the double jeopardy right against successive trials is limited to the protection afforded by the *Blockburger* test and that Ashe was not entitled to relief under that test.[173] In his view, it was "beyond dispute [that] the charge against Ashe in the second trial required proof of a fact—robbery of Roberts—which the charge involving Knight did not."[174] Since he viewed each of the seven counts against Ashe as a distinct offense under *Blockburger*, he believed it constitutional for the State to try each count separately. Emphasizing that the Double Jeopardy Clause forbids only "repeated trials 'for the *same offence*,'" the Chief Justice criticized his colleagues for "reach[ing] out far beyond the accepted offense-defining rule" and "superimpos[ing] on the [*Blockburger*] test a new and novel collateral-estoppel gloss."[175]

None of these three opinions accurately reflects the original meaning of the Double Jeopardy Clause. As Justices Scalia, Thomas, and Gorsuch have each suggested,[176] the issue preclusion doctrine embraced by the *Ashe* majority was not part of the double jeopardy protection enshrined in the Fifth Amendment in 1791. The common law sources make clear that *autrefois acquit* and *autrefois convict* were completely unavailable when two offences were "distinct in point

170. *Id.* (footnote omitted). This rule is analogous to the civil law doctrine of claim preclusion. *See id.* at 454-56, 454 n.8; *see also* 1 RESTATEMENT (SECOND) OF JUDGMENTS §§ 18-19, 24 (AM. LAW INST. 1982).

171. *Ashe*, 397 U.S. at 449 (Brennan, J., concurring).

172. *See id.* at 454, 456-57.

173. *See Ashe*, 397 U.S. at 463-64 (Burger, C.J., dissenting) (citing Blockburger v. United States, 284 U.S. 299, 304 (1932)). For an explanation of the *Blockburger* test, see Part I.A above.

174. *Ashe*, 397 U.S. at 464.

175. *Id.* at 463-64 (quoting U.S. CONST. amend. V). Recall that collateral estoppel is simply another term for issue preclusion. *See supra* note 35 and accompanying text.

176. *See supra* notes 14-18 and accompanying text.

of law, however nearly . . . connected in fact."[177] It was not unusual for a defendant to face successive trials where substantially the same evidence was presented.[178] And the common law sources give no indication whatsoever that when this occurred, the judge at the second trial would assess whether the first jury's verdict had necessarily determined any "issue[s] of ultimate fact" in the defendant's favor.[179] Indeed, Justice Stewart's opinion for the Court did not even attempt to square its rule with the original meaning of the Double Jeopardy Clause; it claimed only that issue preclusion "ha[d] been an established rule of federal criminal law at least since" the early twentieth century.[180]

Justice Brennan's "same transaction" test fares even worse by originalist lights. Far from "*requir*[*ing*] the prosecution . . . to join at one trial all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction,"[181] the common law usually *prohibited* joinder of multiple offenses arising from a single transaction.[182] Nevertheless, Justice Brennan attempted to defend his rule as consistent with the original meaning of the Double Jeopardy Clause.[183] First, he asserted that the common law test for legal identity embodied in *Vandercomb* "is not constitutionally required" because

177. *See* 1 STARKIE, *supra* note 67, at 316, 322.

178. *See, e.g.*, 1 CHITTY, *supra* note 67, at 456 ("[I]t often happens, that after an acquittal of the felony, the defendant is indicted and tried for the misdemeanour upon the same evidence . . . ."); 2 HALE, *supra* note 67, at 246 (explaining that because burglary and larceny were considered legally distinct offenses, "a man acquitted for stealing the horse hath yet been arraigned and convict [sic] for stealing the saddle, tho both were done at the same time"); 2 HAWKINS, *supra* note 48, at 371 ("[A]n Acquittal of one Felony is no manner of Bar to a Prosecution for another in Substance different, whether committed before or at the same Time with that of which he is acquitted . . . ." (footnote omitted)).

179. *Cf. Ashe*, 397 U.S. at 443-44 (explaining that this is what issue preclusion requires). Hale did describe "one special kind of *auterfoits acquit*" whereby a defendant accused of being an accessory to a felony could bar the charge by "plead[ing] the acquittal of the principal." 2 HALE, *supra* note 67, at 254. This is similar to the modern civil law doctrine of defensive nonmutual issue preclusion, which allows a civil defendant to bar its adversary from relitigating an issue that the adversary previously and unsuccessfully litigated against a *different* defendant. *See* Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found., 402 U.S. 313, 328-30, 349-50 (1971) (approving of this doctrine). But Hale makes clear that this doctrine was a very limited exception to the normal common law rule. *See* 2 HALE, *supra* note 67, at 254. And at any rate it is unlike the doctrine that the Court articulated in *Ashe*, which can only bar relitigation of issues in subsequent lawsuits "between the same parties." *See* 397 U.S. at 443.

180. *Ashe*, 397 U.S. at 443 (citing United States v. Oppenheimer, 242 U.S. 85 (1916)).

181. *Id.* at 453-54 (Brennan, J., concurring) (emphasis added).

182. *See supra* Part III.A.2 (discussing the common law rules against joinder of multiple felonies and joinder of a felony and a misdemeanor).

183. *See Ashe*, 397 U.S. at 450-52 (Brennan, J., concurring) (considering how the guarantee against double jeopardy was understood at "the time the Bill of Rights was adopted").

Vandercomb was decided "*after* the adoption of the Fifth Amendment."[184] In addition, he claimed that questions about the "precise meaning" of the term "same offence" "rarely arose prior to the 18th century, and by the time the Bill of Rights was adopted [the term] had not been authoritatively defined."[185]

Neither argument withstands scrutiny. The claim that *Vandercomb* is not constitutionally required makes far too much of the less-than-five-year gap between the ratification of the Bill of Rights and the *Vandercomb* decision. The early nineteenth-century treatises do not treat *Vandercomb*—a unanimous decision[186]—as effecting a sea change in double jeopardy law. Rather, they portray it as applying a preexisting legal principle.[187] Moreover, common law treatises written well before 1791 articulate the elements-based test that *Vandercomb* has come to represent.[188] In addition, early American courts widely applied *Vandercomb*[189]—a fact Justice Brennan himself conceded.[190] Therefore, in all probability *Vandercomb* articulated the common law as it stood not only in 1796 but also in 1791.

Justice Brennan's claim that the common law had not authoritatively defined "same offence" by 1791 fails, too. To be sure, the common law did not provide a precise formula for determining when two *factually* similar indictments described the "same offence."[191] But it was abundantly clear in 1791 that the notion of "same offence" did not extend to *legally* distinct offenses.[192] Justice Brennan's claim that questions about the definition of "same offence"

184. *See id.* at 451-53. The *Vandercomb* test is described in Part III.A.1 above.

185. *Ashe*, 397 U.S. at 450-51 (Brennan, J., concurring); *cf. id.* at 445 n.10 (majority opinion) (suggesting that few eighteenth-century cases presented questions about what constituted the "same offence" because "at common law, and under early federal criminal statutes, offense categories were relatively few and distinct").

186. *See* 168 Eng. Rep. at 461, 2 Leach at 721.

187. *See, e.g.*, 1 CHITTY, *supra* note 67, at 452-53, 453 nn.x-y (citing R v. Vandercomb (1796) 168 Eng. Rep. 455, 459; 2 Leach 708, 717); 1 STARKIE, *supra* note 67, at 322-25, 324 nn.o-p (also citing *Vandercomb*).

188. *See supra* notes 85-91 and accompanying text (citing extensively from Blackstone, Hale, and Hawkins).

189. *See, e.g.*, Commonwealth v. Roby, 29 Mass. (12 Pick.) 496, 503-04 (1832) (citing *Vandercomb* for the elements-based test); Hite v. State, 17 Tenn. (9 Yer.) 357, 376 (Dec. Term 1836) (same); *see also* Grady v. Corbin, 495 U.S. 508, 533-35 (1990) (Scalia, J., dissenting) (discussing these and other early American cases that followed *Vandercomb*), *overruled by* United States v. Dixon, 509 U.S. 688 (1993).

190. *See Ashe*, 397 U.S. at 451 (Brennan, J., concurring) (acknowledging that after *Vandercomb* was decided, it was "soon followed by a majority of American jurisdictions").

191. *See supra* Part III.B.

192. *See, e.g.*, 2 HAWKINS, *supra* note 48, at 371 (describing it as "clear" that "an Acquittal of one Felony is no manner of Bar to a Prosecution for another in Substance different," even if the two crimes were "committed . . . at the same Time"); *see also* 2 HALE, *supra* note 67, at 245-46; 1 STARKIE, *supra* note 67, at 322.

"rarely arose" at common law[193]—supposedly, according to the majority, because there were relatively few common law crimes and their definitions rarely overlapped[194]—is simply incorrect. To the contrary, it was not unusual for a single course of conduct to generate charges for multiple common law offenses.[195] And when this happened, courts never required (or even permitted) such charges to be tried jointly.[196] Justice Brennan's position ignores this reality.

Chief Justice Burger's approach does not accurately reflect the common law test either. Although the Chief Justice began his dissent by citing *Vandercomb* and articulating its elements-based test,[197] he failed to appreciate that legal identity and factual identity were analyzed separately at common law. Instead, he merged those two inquiries, treating the victim's identity—a factual detail—as if it were an element of the offense. He described "the charge against Ashe in the second trial" as "robbery *of Roberts*," and claimed that this distinguished it from robbery *of Knight*.[198] In contrast, the common law inquiry into legal identity would have considered the elements of the two crimes in the abstract.[199] Stripped of all factual details, the charges that Ashe faced in his first and second trials were both first-degree robbery, so they were legally identical under *Vandercomb*. Because Chief Justice Burger incorrectly described the charges against Ashe as *legally* distinct, he never considered the more difficult question whether the *factual* variance between the charge of robbing Knight and the charge of robbing Roberts would have defeated Ashe's double jeopardy plea at common law. The following Subpart addresses that question.

193. *Ashe*, 397 U.S. at 450-51 (Brennan, J., concurring).

194. *Cf. id.* at 445 n.10 (majority opinion) (asserting that at common law, "[a] single course of criminal conduct was likely to yield but a single offense" because "offense categories were relatively few and distinct").

195. *See, e.g.*, 2 HALE, *supra* note 67, at 246 (noting that burglary and larceny could be "committed at the same time" yet an acquittal or conviction for one of the two offenses would not bar a trial for the other); *see also supra* note 108 (citing eighteenth-century cases in which rape and robbery were committed in a single criminal episode but the defendants were tried separately for the two charges).

196. *See supra* notes 106-08 and accompanying text.

197. *See Ashe*, 397 U.S. at 463 & n.1 (Burger, C.J., dissenting).

198. *See id.* at 464 (emphasis added).

199. *See supra* Part III.A.1; *see also* Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1, 38-39, 39 n.193 (1995) (agreeing, based on citations to Hale and Sir Edward Coke, that "this focus on legal elements finds strong support in early case law and commentary").

B. The Common Law Approach

In late eighteenth-century England, multiple-victim cases like *Ashe* generated a separate indictment for each victim.[200] And where different evidence was needed to prove each indictment, the indictments would be adjudicated separately—though often by the same jury in back-to-back trials.[201] In a 1775 case, for example, defendants M'Allester and Girdwood were accused of robbing three separate travelers at roughly the same location within a span of about an hour.[202] The first indictment charged them with robbing Eldridge of three guineas "between nine and ten o'clock" on the night of June 7.[203] M'Allester was convicted and Girdwood was acquitted.[204] The second indictment charged them with robbing Gainsborough of a watch and two guineas.[205] Both defendants were acquitted.[206] The third indictment charged them with robbing Bach at "about half after 9, or near 10 o'clock."[207] This time, Girdwood was convicted.[208] Similarly, a 1776 case involved the robbery of two travelers—a gentleman in a carriage and a servant following on horseback—on the night of September 6.[209] The robberies generated two separate indictments of defendant Davis. First, he was tried and convicted of robbing the servant of

200. *See, e.g.*, *Trial of Charles M'Loughlin et al.*, PROC. OLD BAILEY, Oct. 16, 1776, at 493, 493, 496, https://perma.cc/2C2J-LLUH (trial of four defendants for robbery of one victim followed by trial of three of those same defendants for the same crime against a different victim); *Trial of George Rooke*, PROC. OLD BAILEY, July 10, 1776, at 302, 302, https://perma.cc/SD3L-K96V (similar).

201. Because eighteenth-century trials "were very short, averaging perhaps half an hour per case," juries at the Old Bailey—London's central criminal court—typically "hear[d] perhaps half a dozen trials before retiring to consider their verdicts." *See Trial Procedures*, *supra* note 82. For an example of legally identical, factually related charges being resolved by a single jury in back-to-back trials, compare *Trial of Isaac Hicks & Mary Adams*, PROC. OLD BAILEY, Dec. 13, 1786, at 74, 74, https://perma.cc/JJB3-QYP5 [hereinafter *First Trial of Isaac Hicks & Mary Adams*], with *Trial of Isaac Hicks & Mary Adams*, PROC. OLD BAILEY, Dec. 13, 1786, at 75, 75, https://perma.cc/VNQ7-SQKN [hereinafter *Second Trial of Isaac Hicks & Mary Adams*]. For additional examples, see *Trial of Thomas Finck & Edward Lake*, PROC. OLD BAILEY, Feb. 18, 1778, at 96, 96, https://perma.cc/4RHA-W9VY; and *Trial of Joseph Smith*, PROC. OLD BAILEY, Sept. 12-19, 1770, at 331, 331, https://perma.cc/2KLP-LHRK.

202. *See Trial of Henry M'Allester & Archibald Girdwood*, PROC. OLD BAILEY, July 12-17, 1775, at 451, 451-53, https://perma.cc/R88F-NFPZ.

203. *Id.* at 451.

204. *Id.* at 453.

205. *Id.*

206. *Id.*

207. *See id.*

208. *Id.* at 454.

209. *See Trial of William Davis*, PROC. OLD BAILEY, Dec. 4, 1776, at 22, 22, https://perma.cc/33GJ-7ATJ (first trial).

three guineas.[210] Later that day, he was tried and convicted of robbing the gentleman of a gold watch and various other articles of personal property.[211] In each of these cases, the differences in victims, time, and property taken meant that different evidence was needed to prove each charge, such that the jury could reasonably have found that the defendant committed one crime but not the other.

When each indictment rested on essentially the same evidence, however, the mere presence of a separate indictment for each victim did not enable the prosecutor to litigate his allegations twice before two different juries. In a 1778 case, for example, defendants Finck and Lake were indicted for robbing two men traveling in a single carriage.[212] The first indictment charged them with stealing a shilling from one of the travelers.[213] After a trial on the merits, Finck was acquitted and Lake was convicted.[214] Immediately afterward, the same jury was presented with the second indictment, which charged Finck and Lake with stealing a silver watch from the other traveler.[215] There was no point in relitigating the allegations, however, because "[t]he evidence was the same as upon the last trial."[216] Accordingly, the jury again acquitted Finck and convicted Lake.[217]

Similarly, in a 1784 case, defendants Cash, Mears, and Stanley were accused of robbing two men traveling in a carriage.[218] A separate indictment was issued for each victim.[219] Cash was unable to stand trial due to illness, but Mears and Stanley were tried and acquitted of robbing the first traveler.[220] Immediately afterward, the court directed acquittals on the charge that they had robbed the second traveler, "[t]here being no other evidence than that on the last trial."[221] What is more, the case was not relitigated with respect to Cash after he recovered from his illness. Instead, the court entered two acquittals for him

210. *See id.* at 22, 24.

211. *See Trial of William Davis*, PROC. OLD BAILEY, Dec. 4, 1776, at 28, 28, https://perma.cc/2Z5V-EELS (second trial).

212. *See Trial of Thomas Finck & Edward Lake*, *supra* note 201, at 96.

213. *Id.*

214. *Id.*

215. *See id.* at 96-97.

216. *See id.* at 97.

217. *Id.*

218. *See Trial of John Stanley & John Mears*, PROC. OLD BAILEY, May 26, 1784, at 784, 784, https://perma.cc/84YR-8T5T (first indictment).

219. *See id.* (indictment for robbery of Heartley); *id.* at 785 (for robbery of Tryon).

220. *See id.* at 784-85.

221. *See Trial of John Stanley & John Mears*, PROC. OLD BAILEY, May 26, 1784, at 785, 785, https://perma.cc/84YR-8T5T (second indictment).

based on the result of his codefendants' trial.[222] Thus, although separate indictments were used in these cases, the charges were effectively resolved together, preventing the prosecutor from getting multiple chances at a conviction.

Nor could a prosecutor get around double jeopardy by listing some goods allegedly stolen in a single incident in one indictment and the rest of the goods in a second indictment. In a 1770 case, for example, defendant Smith was accused of "stealing a mahogany tea-chest . . . and fifty guineas" from a private home on August 21.[223] After a trial on the merits, he was acquitted.[224] A second indictment charged him with stealing "two bank notes" from the same private home on the same day.[225] Because "the circumstances of the robbery were the same as upon the last trial, no evidence was given" at the second trial.[226] Accordingly, Smith was again acquitted without having to relitigate his defense before a new jury.[227]

Similarly, in a 1785 case, defendant Young was accused of stealing "a quantity of red wood" as well as "a quantity of hemp, and seven bags of hops."[228] First, he and a codefendant were tried and acquitted of stealing the wood.[229] Immediately afterward, the court directed acquittals on separate indictments charging Young with stealing the hemp and the hops because there was "no evidence to carry the matter further than on the last trial."[230]

These cases do not mention double jeopardy by name. No plea of *autrefois acquit* or *autrefois convict* was necessary because the judge proactively prevented relitigation. But double jeopardy was directly invoked in another multiple-victim case, cited approvingly by Hawkins.[231] James and William Turner "were indicted of burglary for breaking the house of Mr. Tryon in the night, and taking away great sums of money."[232] James was convicted but William

222. *See Trial of Isaac Cash*, PROC. OLD BAILEY, May 26, 1784, at 326, 326, https://perma.cc/RHS8-7MA2.

223. *Trial of Joseph Smith*, *supra* note 201, at 331.

224. *See id.*

225. *See id.*

226. *Id.*

227. *See id.*

228. *See Trial of Charles Young & John Power*, PROC. OLD BAILEY, Dec. 14, 1785, at 124, 126, https://perma.cc/4MVU-VU83.

229. *See id.* at 124, 127.

230. *See Trial of Charles Young*, PROC. OLD BAILEY, Dec. 14, 1785, at 127, 127, https://perma.cc/LK2H-UQ97.

231. *See* 2 HAWKINS, *supra* note 48, at 371 & n.e (citing Turner's Case (1708) 84 Eng. Rep. 1068, 1068; Kelyng 30, 30).

232. *Turner's Case*, 84 Eng. Rep. at 1068, Kelyng at 30.

was acquitted.[233] Subsequently, William was indicted for stealing forty-seven pounds belonging to "a servant to Mr. Tryon"—money that was allegedly stolen during the same incident but "not [mentioned] in the former indictment."[234] The judges "all agreed" that double jeopardy principles would not permit William to "be indicted again for the same burglary" simply because a different victim was alleged.[235]

Thus, English case law—bolstered by the more general double jeopardy principles articulated in the common law treatises[236]—reveals that the multiple prosecutions that took place in *Ashe* would not have occurred at common law. To be sure, the common law would have allowed the prosecution to file six separate indictments, one for each victim who was robbed. And if the charge that Ashe robbed Roberts and the charge that Ashe robbed Knight had rested on different evidence, then the charges would have been adjudicated separately. But in reality, the evidence supporting the two charges was the same: There was no realistic possibility that Ashe could have robbed Roberts but not Knight. Indeed, the jury at Ashe's first trial was instructed to convict him if it found he had been "one of the robbers, . . . even if he had not personally robbed Knight."[237] Accordingly, after Ashe's initial acquittal, an eighteenth-century judge presented with a new indictment accusing Ashe of robbing Roberts (or any of the other four victims) would have directed a verdict of acquittal on the grounds that there was "no other evidence than that on the last trial."[238]

Whether a common law court would have treated Ashe's initial acquittal as barring the seventh charge, which alleged theft of Roberts's car,[239] is a closer question. To begin with, the two charges satisfy the common law test for legal identity because theft is a lesser included offense of first-degree robbery.[240] To resolve the question of factual identity, a common law judge would have

233. *Id.*

234. *Id.*

235. *See id.* The judges did permit him to be tried for larceny, however, which they viewed as a legally distinct offense. *See id.*; *see also supra* text accompanying notes 86-91 (explaining why at common law burglary and larceny were treated as legally distinct offenses).

236. *See supra* Part III.B.

237. Ashe v. Swenson, 397 U.S. 436, 439 (1970).

238. *Cf. Trial of John Stanley & John Mears*, *supra* note 218, at 785 (directing a verdict of acquittal for this reason after the defendants had been acquitted at an earlier trial for committing the charged crime against a different victim).

239. *See Ashe*, 397 U.S. at 437-38.

240. *Compare* MO. REV. STAT. § 560.120 (1959) (repealed 1977) (defining first-degree robbery as "[1] feloniously taking the property of another [2] from his person . . . [3] by violence to his person, or by putting him in fear of some immediate injury to his person"), *with id.* § 560.156(2) (repealed 1977) (defining theft to include "taking" property "in a manner inconsistent with the rights of the owner").

compared the auto theft indictment with the "Record of [the] former Acquittal."[241] If, at the initial trial, the prosecutor had introduced evidence of only the break-in and robbery, the court would have permitted him to present additional evidence to support the new charge of auto theft.[242] But that is not what happened at Ashe's actual trial. Instead, the prosecutor introduced evidence that the perpetrators not only robbed Roberts of his personal effects but also stole Roberts's car.[243] Therefore, the situation is analogous to the cases of Smith and Young, described above, in which different goods taken from the same victim were listed in separate indictments.[244] In those cases, the allegations were not relitigated after an initial acquittal because there was "no evidence to carry the matter further than on the last trial."[245] Accordingly, there is strong evidence that all seven of the charges against Ashe would have been considered the "same offence" under the common law as it existed in 1791.

V. Translating the Common Law Understanding into Modern Doctrine

Much has changed since 1791. Common law crimes have been replaced by statutory crimes. Criminal allegations are no longer prosecuted by private individuals, but by professionals employed by the state. Criminal trials have become much more complex, expensive, and time-consuming. Defendants charged with felonies are no longer denied counsel, as they were at common law;[246] on the contrary, they have a constitutional right to counsel.[247] Joinder of felonies and misdemeanors in a single trial is no longer forbidden; it is the

241. *See* 2 HAWKINS, *supra* note 48, at 369.

242. Note, however, that in 1791 the multiple indictments likely would have been resolved by the same jury. *See supra* note 201 and accompanying text. Therefore, the additional evidence would have been unlikely to result in a conviction on the charge of car theft. After the first trial, the jury was apparently not convinced that Ashe had been one of the robbers. There is no reason to think that the prosecutor would have changed the jury's position on that critical question by presenting evidence that the robbers had stolen not only personal property from the poker players but also Roberts's car.

243. *See Ashe*, 397 U.S. at 437-38; *see also id.* at 462-63 (Burger, C.J., dissenting).

244. *See supra* text accompanying notes 223-30.

245. *See Trial of Charles Young*, *supra* note 230, at 127; *see also Trial of Joseph Smith*, *supra* note 201, at 331 (explaining that "as the circumstances of the robbery were the same as upon the last trial, no evidence was given" and the defendant was acquitted on the second indictment).

246. *See supra* note 122 and accompanying text.

247. *See* Gideon v. Wainwright, 372 U.S. 335, 343-45 (1963).

norm. And joinder of multiple felonies is not only permitted but encouraged.[248] Different brands of originalism reach contrary conclusions as to whether, and in what way, these changes have affected what it means to be tried twice for "the same offence."

A. Originalist Theories of Translation

The academic literature on originalism draws a basic distinction between "old originalism" and "new originalism."[249] Old originalism emerged in the 1960s and was embraced during the 1980s by prominent figures such as Attorney General Edwin Meese and Judge Robert Bork.[250] It was "a reactive theory motivated by substantive disagreement with the recent and then-current actions of the Warren and Burger Courts,"[251] particularly decisions such as *Roe v. Wade*, *Stanley v. Georgia*, and *Griswold v. Connecticut* that announced "new-found rights."[252] Old originalism focused on constraining judges—preventing them from "imposing their personal policy preferences under the guise of interpretation," and "requiring judges, in most cases, to defer to legislative majorities."[253] It sought to combat judicial activism by seeking "constitutional meaning at a low level of generality,"[254] and "paid special attention to how the framers would have expected the text to apply to the particular question at issue."[255]

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248. *See* FED. R. CRIM. P. 8(a) (permitting joinder of criminal charges that "are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan"); 1A WRIGHT & LEIPOLD, *supra* note 130, § 143, at 29-30 ("It is . . . the policy of the Department of Justice 'that several offenses arising out of a single transaction should be alleged and tried together and should not be made the basis of multiple prosecutions . . . .'" (quoting Petite v. United States, 361 U.S. 529, 530 (1960) (per curiam))).

249. *See, e.g.*, Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599 (2004); Steven Douglas Smith et al., *The New and Old Originalism: A Discussion* (Coase-Sandor Inst. for Law & Econ., The Univ. of Chi. Law Sch., Working Paper No. 718 (2d series), 2015), https://perma.cc/4U5P-LFL2.

250. *See* Whittington, *supra* note 249, at 599.

251. *Id.* at 601.

252. *See id.* at 602-03; *see also* Roe v. Wade, 410 U.S. 113, 153 (1973) (holding that an unenumerated constitutional "right of privacy" protects "a woman's decision whether or not to terminate her pregnancy"); Stanley v. Georgia, 394 U.S. 557, 568 (1969) (holding that "the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime"); Griswold v. Connecticut, 381 U.S. 479, 480, 485-86 (1965) (holding that a ban on the use of contraceptives violated a "penumbral right[] of 'privacy and repose'" (quoting Breard v. Alexandria, 341 U.S. 622, 626 (1951))).

253. Peter J. Smith, *Originalism and Level of Generality*, 51 GA. L. REV. 485, 489 (2017).

254. *See id.* at 488-89.

255. *Id.* at 501.

By contrast, new originalism, which "has flourished since the early 1990s,"[256] places less emphasis on how the Framers would have decided a specific legal question.[257] Its primary value is not judicial restraint but "fidelity to the original meaning of the text."[258] Accordingly, new originalists "attempt[] to identify the level of generality in which the Constitution is objectively expressed,"[259] recognizing that some constitutional provisions articulate fairly flexible principles capable of adapting to changed circumstances.[260] And new originalists acknowledge that their methodology sometimes "excludes certain possibilities" and "generally establishes at least a range of plausible interpretations," but in many cases provides "no single definitive historical answer" to a constitutional question.[261]

B. Translating the Test for Legal Identity

Under either brand of originalism, double jeopardy protections do not apply where two charged offenses are legally distinct under the *Vandercomb* test.[262] All originalists, old and new, "agree that meaning is fixed when the text is written and adopted."[263] As demonstrated above, the Framers of the Double Jeopardy Clause understood it to guarantee a preexisting common law right.[264] Accordingly, to the extent that the common law had defined "same offence" as

256. Whittington, *supra* note 249, at 599.

257. *See* William Baude, Essay, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2356 (2015) ("Though the text may have originally been *expected* to apply in a particular way to a particular circumstance, that does not mean that its original meaning always must apply in the same way."); Smith, *supra* note 253, at 491-92.

258. Smith, *supra* note 253, at 491.

259. *See* Randy E. Barnett, William Howard Taft Lecture, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7, 23 (2006); *see also* Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 FORDHAM L. REV. 1269, 1280 (1997) ("A genuine commitment to the semantic intentions of the Framers requires the interpreter to seek the level of generality at which the particular language was understood by its Framers.").

260. *See* Baude, *supra* note 257, at 2357 ("[O]riginalists ought not impose greater specificity than the Framers did. . . . [T]he Constitution's terms may have significantly more flexibility than the simplest conception of originalism would imply." (citing David A. Strauss, Essay, *Common Law, Common Ground, and Jefferson's Principle*, 112 YALE L.J. 1717, 1736-37 (2003))).

261. *See* Michael W. McConnell, Lecture, *Time, Institutions, and Interpretation*, 95 B.U. L. REV. 1745, 1761 (2015).

262. The elements-based *Vandercomb* test is described in Part III.A.1 above.

263. *See* Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 459 (2013); *see also id.* at 456 & n.7 (collecting sources to demonstrate that this understanding of originalism is "widely accepted").

264. *See supra* Part II.

of 1791, that definition is part of the original understanding of the Clause. The elements-based test set forth in *Vandercomb* was a well-established part of that definition.[265] Therefore, originalists should broadly agree that the *Vandercomb* test defines whether two offenses are legally identical.

Nevertheless, some new originalists might be willing to modify the *Vandercomb* test if it were no longer feasible to apply in light of modern criminal procedure.[266] But the myriad changes in criminal procedure since 1791 have not affected courts' ability to apply this common law rule. If anything, the specificity with which modern criminal statutes tend to state the elements of a given offense makes it easier for a judge presented with two offenses to determine whether, factual details aside, "each contains an element that the other does not."[267] Therefore, an originalist double jeopardy doctrine must begin with the *Vandercomb* test.

C. Translating the Test for Factual Identity

The common law test for factual identity, however, admits of several originalist interpretations. For one thing, the common law sources do not supply a precise formula for determining when two charges are not only legally identical but also factually identical.[268] In addition, changed circumstances have made it more difficult to directly apply the common law method in the way that courts did in 1791.[269] This Subpart presents and analyzes three possible ways to translate the common law test into modern doctrine: an "old originalist" approach that attempts to track the Framers' expected applications as closely as possible; a "new originalist" approach based on deference to legislative judgments; and another "new originalist" approach derived from double jeopardy principles found in the common law sources. It concludes that the third option is the best approach.

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265. *See supra* Part III.A.1.

266. *Cf.* Stephanos Bibas, Essay, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183, 196-97 (2005) (arguing that an originalist reading of the provision in Article III that "[t]he [T]rial of *all Crimes* . . . *shall* be by Jury" is no longer feasible today, "lest criminal trials overwhelm the justice system" (first and third alterations in original) (quoting U.S. CONST. art. III, § 2, cl. 3)).

267. *See* Lewis v. United States, 523 U.S. 155, 176-77 (1998) (Scalia, J., concurring in the judgment) (observing that the *Blockburger* test "can be easily and mechanically applied").

268. The common law test for factual identity is described in Part III.B above. For an application of the test to the facts of *Ashe*, see notes 236-45 and accompanying text above.

269. *See infra* text accompanying notes 277-78.

1. An expected-applications approach

An old originalist approach would attempt to replicate, to the extent feasible, the results that the Framers of the Double Jeopardy Clause would have expected. One might try to accomplish this by drawing direct analogies to eighteenth-century cases that turned on the issue of factual identity. This works reasonably well for crimes that existed in 1791, like the robbery committed in *Ashe*. But since many modern statutory offenses bear little resemblance to common law crimes, direct analogies are often unavailable.

Recognizing this, an old originalist might seek fidelity to the Framers' expectations by having modern judges use the common law method for determining whether a prior judgment bars a new trial for a legally identical and factually related offense. That method requires a judge to compare the new charge against "the Record of the former Acquittal" or conviction.[270] If the judge determines that the new charge rests on new evidence that would have been inadmissible in the former proceeding, double jeopardy protections do not apply.[271] But if the judge determines that the evidence needed to support both charges is substantially the same, giving rise to an inference that the prosecutor is trying to circumvent double jeopardy by merely repackaging the same factual allegations in a new indictment, double jeopardy bars the latter charge.[272]

This method worked reasonably well in the eighteenth century. In 1791, criminal trials were short and involved fairly simple issues.[273] It was therefore easy for a judge to scrutinize the record of a prior trial and determine whether

270. *See* 2 HAWKINS, *supra* note 48, at 369. Note the similarity to the modern issue preclusion inquiry, which also requires a judge to "examine the record of a prior proceeding." *See* Bravo-Fernandez v. United States, 137 S. Ct. 352, 359 (2016) (quoting Ashe v. Swenson, 397 U.S. 436, 444 (1970)).

271. *See supra* notes 200-11 and accompanying text.

272. *See supra* notes 212-35 and accompanying text. This test is something like the "same conduct" test that the Supreme Court briefly adopted in *Grady v. Corbin*. *See* 495 U.S. 508, 510 (1990) ("We hold that the Double Jeopardy Clause bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted."), *overruled by* United States v. Dixon, 509 U.S. 688 (1993). But whereas *Grady* applied broadly, *see id.*, this test would only apply to offenses that are also legally identical under the *Vandercomb* test.

273. *See Trial Procedures*, *supra* note 82 (noting that in the late seventeenth century, trials took only half an hour); *see also* FRIEDLAND, *supra* note 19, at 180 (explaining that the common law doctrine of election "had the effect of confining the jury's attention to a relatively simple issue"). For more on the doctrine of election, see notes 106-08 and accompanying text above.

double jeopardy should apply.[274] In addition, separate indictments containing factually related allegations were often presented to the same judge and jury in back-to-back trials.[275] This made assessing the prior record even easier. And where the second charge relied partly on evidence presented in the first trial, there was no need to reintroduce that evidence because the jury had heard it just minutes earlier.[276]

The common law method is unworkable today, however, due to changed circumstances. The complexity of modern criminal codes and the length of modern trials make it difficult for a judge to assess the record of a prior trial to see whether two charges rest on the same factual allegations.[277] Moreover, separately filed criminal charges are now heard by different juries weeks or months apart—creating a possibility of duplicative litigation and inconsistent results that common law procedures avoided.[278] Therefore, because it is no longer feasible to use the common law method for resolving questions of factual identity, the expected-applications approach fails to yield a viable modern doctrine.

2. A judicial deference approach

An alternative position is that "the Framers intended that prosecutors and judges adhere to legislative choices" about when two offenses are factually identical.[279] On this view, the phrase "same offence" in the Double Jeopardy Clause "refer[s] to a preexisting legislative definition" of what constitutes a crime.[280] The Supreme Court has long accepted this understanding of "same

274. *See, e.g.*, *Trial of Thomas Womersly*, *supra* note 132, at 88 (issuing a double jeopardy ruling based on the clerk's one-paragraph description of the defendant's two prior trials).

275. *See supra* note 201 and accompanying text.

276. *Compare, e.g.*, *First Trial of Isaac Hicks & Mary Adams*, *supra* note 201, at 74 (trying two defendants for stealing three pewter pots from one victim), *with Second Trial of Isaac Hicks & Mary Adams*, *supra* note 201, at 75 (trying the same defendants—in the very next trial—for stealing two pewter pots from a different victim based on slightly different evidence).

277. *Cf.* Yeager v. United States, 557 U.S. 110, 113, 125 (2009) (noting an "understandable" dispute, caused by "the length and complexity of the proceedings," regarding exactly what factual issues must be proven to convict the defendant of particular charges where the defendant was charged with "126 counts of five federal offenses").

278. *Compare supra* notes 1-9 and accompanying text (discussing the relitigation and inconsistent results in *Ashe*), *with supra* text accompanying notes 212-22 (discussing second, postacquittal trials in common law cases).

279. *See* Nancy J. King, *Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties*, 144 U. PA. L. REV. 101, 115 (1995) (citing Amar & Marcus, *supra* note 199, at 38-39). King offers a normative defense of this position but expressly declines to grapple with whether it is historically accurate. *See id.* at 127.

280. *See id.* at 115.

offence" in the context of the double jeopardy right against multiple punishments.[281] Consider, for example, the Missouri first-degree robbery statute under which Ashe was charged.[282] That law imposed a minimum penalty of five years in prison[283] for "feloniously taking the property *of another* . . . by putting him in fear of some immediate injury to *his person*."[284] Because the statute defined first-degree robbery as a crime against a single person, the Constitution would permit a person who robbed six people—even simultaneously—to be punished for six separate statutory offenses.

For the last quarter-century, the Supreme Court has held that "the same inquiry generally applies '[i]n both the multiple punishment and multiple prosecution contexts.'"[285] That is, where the Constitution would permit the state to *punish* a defendant for multiple statutory offenses in a single trial, it also would permit the state to *try* a defendant for those offenses in multiple, successive proceedings. The Court has explained that it would be "embarrassing" to assert, for example, that robbing six people simultaneously constitutes "the same offence" for purposes of the right against multiple trials but not the right against multiple punishments.[286] The Court has also suggested that the judicial deference approach reflects the Framers' intent,[287] though there is little historical evidence to support this claim.[288]

Even if the Framers didn't specifically intend for courts to defer to legislative definitions of crimes when interpreting the phrase "same offence," a new originalist argument for that position can be made. In eighteenth-century

281. *See, e.g.*, Missouri v. Hunter, 459 U.S. 359, 366 (1983) ("With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended."); *see also* Whalen v. United States, 445 U.S. 684, 691 (1980) (explaining that since the 1930s, the Court has "consistently relied" on the *Blockburger* test "to determine whether Congress has in a given situation provided that two statutory offenses may be punished cumulatively").

282. *See* MO. REV. STAT. § 560.120 (1959) (repealed 1977); *see* State v. Ashe, 350 S.W.2d 768, 769 (Mo. 1961) (noting that Ashe was convicted of robbery in the first degree).

283. *See* MO. REV. STAT. § 560.135 (repealed 1975).

284. *Id.* § 560.120 (emphasis added) (defining the crime of "[r]obbery in first degree").

285. *See* Witte v. United States, 515 U.S. 389, 396 (1995) (alteration in original) (quoting United States v. Dixon, 509 U.S. 688, 696 (1993)).

286. *See Dixon*, 509 U.S. at 704.

287. *See* Brown v. Ohio, 432 U.S. 161, 165 (1977) (suggesting—without citing any historical evidence—that the Double Jeopardy Clause was originally intended "as a restraint on courts and prosecutors" but not the legislature).

288. *See* Charles L. Cantrell, *Double Jeopardy and Multiple Punishment: An Historical and Constitutional Analysis*, 24 S. TEX. L.J. 735, 766-67 (1983) (explaining that the colonies' adoption of strong double jeopardy rules "reflect[ed] a distrust of governmental and lawmaking bodies in general").

England, common law judges defined much of the content of criminal law.[289] Today, however, the power to make criminal laws is "assign[ed] to the legislature."[290] Confronted with this changed circumstance, a new originalist might argue that it now falls to the legislature to define what constitutes the "same offence." To be sure, this generates results that deviate from the Framers' expected applications of the Double Jeopardy Clause—for example, the simultaneous robbery of two individuals could now be treated as two offenses even though it was considered a single offense at common law. But for at least some new originalists, this would be acceptable as long as the meaning of the Double Jeopardy Clause—no successive trials for the "same offence"—remains fixed.[291]

But there are serious problems with the judicial deference approach. First of all, it interprets the Double Jeopardy Clause quite differently than the rest of the Fifth Amendment. The Amendment's other clauses forbid the government from doing away with grand juries; forcing a criminal defendant "to be a witness against himself"; depriving individuals of "life, liberty, or property, without due process of law"; and taking "private property . . . for public use, without just compensation."[292] Each of these guarantees establishes a check on governmental power that applies to all three branches of government. And it falls to the judiciary to specify the contours of those checks by defining terms such as "due process" and "just compensation." The judicial deference approach flips this model on its head: It gives the legislature absolute power to define "same offence," and as a result the legislature is completely unconstrained by the guarantee against double jeopardy.[293]

Moreover, the judicial deference approach fits uneasily with one of the foundational principles of originalism. Originalism is best known for preventing unelected judges from *expanding* the scope of constitutional rights

289. *See* THOMAS, *supra* note 19, at 18; *see also* Susan R. Klein & Katherine P. Chiarello, *Successive Prosecutions and Compound Criminal Statutes: A Functional Test*, 77 TEX. L. REV. 333, 357 (1998) (explaining that under eighteenth-century English common law, it was "impossible for a legislature to authorize successive prosecutions by creating additional offenses covering conduct already criminalized, because the judiciary defined criminal offenses").

290. *See* THOMAS, *supra* note 19, at 18.

291. *See, e.g.*, Baude, *supra* note 257, at 2356; Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. L.J. 555, 558-60 (2006) (describing a new originalist position in which "changing constitutional outcomes can coexist with stability in constitutional meaning").

292. U.S. CONST. amend. V.

293. *See* THOMAS, *supra* note 19, at 16 ("The legislature cannot authorize unreasonable searches and seizures, or put limits on the constitutional right to counsel or confrontation, or permit defendants to be compelled to testify against themselves. Why, then, is the legislature . . . free to act without the constraint of the Double Jeopardy Clause?").

as they existed in 1791, on the theory that this usurps the legislative function.[294] But it is also supposed to prevent the government from *contracting* the scope of constitutional rights as they existed in 1791.[295] As Justice Scalia put it in his opinion for the Court in *District of Columbia v. Heller*, "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures . . . think that scope too broad."[296] The judicial deference approach violates this principle by empowering the legislative branch to diminish or even eliminate the double jeopardy right that existed in 1791.

To be sure, at English common law "an occasional statute usurped the judicial role by permitting second trials or punishments in particular categories of cases."[297] The most famous example is a law enacted during the late fifteenth-century reign of Henry VII.[298] At that time, a prosecution "could be instituted either by common law 'appeal' (at the behest of a private party) or by 'indictment' (at the behest of the crown)."[299] And under the common law of double jeopardy, "an acquittal on an appeal [was] a good bar to an indictment of the same offence," and vice versa.[300] The statute of Henry VII changed this, authorizing successive prosecutions in homicide cases.[301] Accordingly, in April 1729, James Cluff was indicted for the murder of Mary Green, and "[o]n a full Hearing of the Matter, the Jury acquitted him."[302] Less than three months later, Green's brother brought a private appeal charging Cluff with the same murder.[303] The case was retried before a new jury, which, "upon a mature Deliberation of the Matter, found the Prisoner guilty," and he was sentenced to death.[304]

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294. *See, e.g.*, Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 8 (1971) ("The judge must stick close to the text and the history, and their fair implications, and not construct new rights.").

295. *See, e.g.*, Antonin Scalia, Essay, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 855-56 (1989) (arguing that nonoriginalism is dangerous because it allows judges to both expand and contract constitutional rights).

296. 554 U.S. 570, 634-35 (2008).

297. THOMAS, *supra* note 19, at 18.

298. *See* 3 Hen. 7 c. 1, ¶ 2 (1487).

299. REPORT TO THE ATTORNEY GENERAL ON DOUBLE JEOPARDY, *supra* note 47, at 844; *see also* SIGLER, *supra* note 19, at 8; THOMAS, *supra* note 19, at 27.

300. *See* 4 BLACKSTONE, *supra* note 49, at 329.

301. *See id.* at 329-30 (citing 3 Hen. 7 c. 1, ¶ 2).

302. *See Trial of James Cluff*, PROC. OLD BAILEY, Apr. 16-24, 1729, at 5, 5-6, https://perma.cc/ZEH7-ZCXJ (first trial).

303. *See Trial of James Cluff*, PROC. OLD BAILEY July 9-21, 1729, at 6, 6, https://perma.cc/J3MU-3UPJ (second trial).

304. *See id.* at 7.

George Thomas has treated the statute of Henry VII as evidence that the eighteenth-century English common law gave the legislature absolute power to define the scope of the guarantee against double jeopardy.[305] But common law sources treat the statute as *violating* the double jeopardy principle, not defining its scope. In a 1697 case, Lord Holt held that the statute should be narrowly construed, calling it "severe in overthrowing a fundamental point in law, in subjecting a man that is acquitted, to another tryal, which is putting his life twice in danger for the same crime."[306] Similarly, Hawkins's early eighteenth-century discussion of the statute suggested that it "was a product of the Crown's power and constituted a derogation from the common law rule."[307]

In any case, the statute of Henry VII does not support the position that the Framers of the U.S. Constitution meant for the legislature to define "same offence." Quite the opposite. The Framers of the Bill of Rights certainly knew that the English government had infringed upon the common law right against double jeopardy, not only by enacting the statute of Henry VII but also through the seventeenth-century practice of "discharging a jury when it appeared that an acquittal would be forthcoming in order to permit the prosecutor to bring a further charge on better evidence."[308] By codifying the common law right in the Fifth Amendment, they intended to prevent the U.S. government—including the legislative branch—from engaging in similar abuses.[309] For all these reasons, the judicial deference approach fails to accurately translate the Framers' intent.

3. A principle-based approach

A third possible approach focuses on the more general principles underlying the common law test for factual identity. This reflects the new originalist view that interpreters of the Constitution "ought not impose greater specificity

305. *See* THOMAS, *supra* note 19, at 80; *see also id.* at 18 (claiming that no commentators, "including the oft-critical Blackstone," criticized the statute of Henry VII or similar statutes).

306. Armstrong v. Lisle (1697) 84 Eng. Rep. 1096, 1101; Kelyng 93, 104; *see also* FRIEDLAND, *supra* note 19, at 13 (discussing the case); THOMAS, *supra* note 18, at 81 & 291 n.148 (same).

307. *See* Cantrell, *supra* note 288, at 759 (citing 2 HAWKINS, *supra* note 48, at 373-74).

308. *See* FRIEDLAND, *supra* note 19, at 13; *see also id.* at 21-25 (discussing the "strong reaction against the[se] abusive practices" by common law judges in the eighteenth century).

309. *Cf.* District of Columbia v. Heller, 554 U.S. 570, 592-95 (2008) (arguing that the Second Amendment, which "codified a *pre-existing* right," must be understood as a reaction against English monarchs' efforts to "suppress political dissidents, in part by disarming their opponents"); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1466-73 (1990) (arguing that free exercise protections must be understood as a reaction to "notorious . . . cases of religious intolerance in England").

than the Framers did."[310] As described above, as of 1791 the common law had not developed a precise test for determining when two offenses were factually identical.[311] Instead, it offered two guiding principles. Where a prior acquittal resulted from "a mere Slip in the Indictment," a defendant should not be able to use double jeopardy to avoid a trial on the merits.[312] But where a prior acquittal reflected a jury's determination that the defendant was not guilty, a prosecutor should not be able to circumvent double jeopardy by repackaging the same factual allegations in slightly different terms[313] or exploiting some other "Fiction or Construction of Law."[314] In the absence of a clear historical rule, a new originalist is free to craft a workable modern doctrine that reflects these principles.

Today, the concern that a guilty defendant will go free due to a technical defect in the indictment has largely disappeared. For one thing, at common law it was clerks of the court who drafted criminal charges based on the accounts offered by victims and other witnesses to the alleged crime.[315] Nowadays, however, professional prosecutors determine what charges to file with the assistance of professional law enforcement officials and with the benefit of substantial information-gathering powers. This makes factual slip-ups far less likely. Moreover, the hypertechnical rules of common law pleading have been replaced by procedures that greatly diminish the possibility that a minor error in an indictment will cause an acquittal.[316]

At the same time, the danger that a prosecutor will use artful pleading to circumvent double jeopardy remains all too real. *Ashe* provides a vivid illustration. In its Supreme Court brief, the State "frankly conceded" that it had "treated the first trial as no more than a dry run for the second prosecution."[317] The second time around, it "refined its case . . . by declining to call one of the participants in the poker game whose identification testimony at the first trial

310. Baude, *supra* note 257, at 2357 (citing Strauss, *supra* note 260, at 1736-37).

311. *See supra* Part III.B; *see also* Cantrell, *supra* note 288, at 754-55 (arguing that "[i]f one looks past the technical aspects" of the common law pleas of *autrefois acquit* and *autrefois convict*, "it is apparent that there existed a flexible theory of jurisprudence underlying the procedures").

312. *See* 2 HAWKINS, *supra* note 48, at 373.

313. *See* 1 CHITTY, *supra* note 67, at 453.

314. *See* 2 HAWKINS, *supra* note 48, at 370.

315. *See Trial Procedures*, *supra* note 82.

316. *See supra* note 130.

317. Ashe v. Swenson, 397 U.S. 436, 447 (1970); *see also id.* ("No doubt the prosecutor felt the state had a provable case on the first charge and, when he lost, he did what every good attorney would do—he refined his presentation in light of the turn of events at the first trial." (quoting Brief for the Respondent at 11, *Ashe*, 397 U.S. 436 (No. 57), 1969 WL 120151)).

had been conspicuously negative," and the witnesses whom it did call gave "substantially stronger [testimony] on the issue of the petitioner's identity."[318] This is reminiscent of the seventeenth-century English practice that common law judges so vigorously condemned.[319]

Furthermore, the jury in each of Ashe's trials was instructed to convict if it determined that Ashe had been "one of the robbers," regardless of whether he had personally robbed the named victim.[320] This gave the State up to six separate chances to win "a prosecution for the same identical act and crime."[321] There can be little doubt that this violates the common law principle against putting a person twice in jeopardy for "that which is in Truth but one and the same Offence, and only considered as a new one by a mere Fiction or Construction of Law."[322]

To prevent such abuses, modern courts could adopt the rule that the Double Jeopardy Clause requires charges that (1) are legally identical and (2) arise from a single incident to be resolved in a single trial. This test remains faithful to the original meaning of "same offence" but also takes the realities of modern criminal procedure into account. To be sure, the precise contours of "same incident" are not self-evident, but they could be clarified through case-by-case adjudication.[323] And this rule would be much easier to administer than the issue preclusion test because it does not require determining what issues were "necessarily decided" by a general verdict in a previous trial.[324]

318. *Id.* at 439-40.

319. *See supra* note 308 and accompanying text.

320. *See Ashe*, 397 U.S. at 439; *see also id.* at 440 (noting that the jury instructions given at the second trial were "virtually identical to those given at the first trial").

321. *See* 4 BLACKSTONE, *supra* note 49, at 330 (describing this as the exact situation in which double jeopardy protection applies).

322. 2 HAWKINS, *supra* note 48, at 370.

323. The "arise from a single incident" requirement is similar to Justice Brennan's "same transaction" test. *See Ashe*, 397 U.S. at 453 (Brennan, J., concurring). Like that test, it might include certain exceptions, such as "where a crime is not completed or not discovered, despite diligence on the part of the police, until after the commencement of a prosecution for other crimes arising from the same transaction." *See id.* at 453 n.7.

324. *Cf.* Yeager v. United States, 557 U.S. 110, 119-20 (2009) ("To decipher what a jury has necessarily decided, . . . courts should 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.'" (quoting *Ashe*, 397 U.S. at 444)).

VI. Comparing the New Originalist Approach with Existing Doctrine

The "new originalist" test proposed above is both more and less protective of criminal defendants than the U.S. Supreme Court's current doctrine. It is less protective because it never applies unless the elements of two crimes are legally identical under *Vandercomb*.[325] By contrast, the issue preclusion doctrine[326] adopted in *Ashe* can bar a second trial for a factually related but legally distinct charge. The new originalist test would have provided no relief in *Turner v. Arkansas*,[327] for example, because the two offenses there—murder and armed robbery—were "distinct in point of law, however nearly . . . connected in fact."[328] But issue preclusion did apply, barring any further allegation that Turner was present at the scene of the murder and robbery.[329]

In two other respects, the new originalist approach sketched out above is more protective than the Court's current doctrine. First, the new originalist test applies regardless of the outcome in the first trial because it mirrors the common law pleas of *autrefois acquit* and *autrefois convict*. Thus, even if the first trial in *Ashe* had resulted in a conviction, the originalist approach would have barred a subsequent trial on any of the other counts.[330] By contrast, issue preclusion is only available after an acquittal.[331]

Second, the new originalist rule does not require defendants to make the difficult showing that a jury's general verdict "necessarily decided" an issue of ultimate fact at the initial trial. Issue preclusion is only available in "rare situation[s]" because "it is usually impossible to determine with any precision upon what basis the jury reached a verdict in a criminal case."[332] In *Ex parte*

325. The *Vandercomb* test is described in Part III.A.1 above.

326. The criminal law issue preclusion doctrine is discussed in Part I.B above.

327. 407 U.S. 366 (1972) (per curiam); *see supra* text accompanying notes 41-46.

328. 1 STARKIE, *supra* note 67, at 322.

329. *See Turner*, 407 U.S. at 369-70 (per curiam).

330. While this may sound like a significant degree of additional protection, it likely provides cold comfort in most cases. Prosecutors are unlikely to split legally identical, factually related charges into separate trials unless each charge carries such a large sentence that the prosecutor is only interested in obtaining one conviction. In *Ashe*, for example, the State probably would have dropped the charge of robbing Roberts if it had obtained a conviction on the charge of robbing Knight.

331. *See* Currier v. Virginia, 138 S. Ct. 2144, 2150 (2018) ("[W]e acknowledge that *Ashe*'s protections apply only to trials following acquittals . . . ."); *see also* Yeager v. United States, 557 U.S. 110, 119 (2009) (explaining that issue preclusion prevents the prosecution from "relitigating any issue that was necessarily decided by a jury's acquittal in a prior trial").

332. United States v. McGowan, 58 F.3d 8, 12 (2d Cir. 1995) (quoting United States v. Tramunti, 500 F.2d 1334, 1346 (2d Cir. 1974)); *see also Currier*, 138 S. Ct. at 2150 (describing the issue preclusion test as "a demanding one" in that a defendant is not

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Taylor, for instance, the defendant "lost control of his car on a rural road and collided with an oncoming car," killing two passengers.[333] He was originally tried and acquitted on a charge of "intoxication manslaughter in causing the death of one passenger."[334] Next, the State attempted to prosecute him for "intoxication manslaughter in causing the death of [the] second passenger."[335] The en banc Texas Court of Criminal Appeals held that issue preclusion barred the second prosecution,[336] but two judges dissented on the theory that it was "impossible to decide what the jury necessarily found in [the] first trial."[337] The new originalist test eliminates such inquiries into what the first jury necessarily decided. In *Ex parte Taylor*, it would have unequivocally barred a second trial because the two charges were legally identical and arose from the exact same incident.

The new originalist approach also fixes the "embarrassing" fact that in the Court's current jurisprudence, "same offence" means something different in the context of multiple punishments than it does in the context of multiple trials.[338] Murder and robbery are always distinct offenses for purposes of the right against multiple punishments. But in certain circumstances, the issue preclusion doctrine merges them into the "same offence" for purposes of the right against multiple trials.[339] The new originalist approach solves this incongruity. It affirms that in a case like *Ex parte Taylor*, the Double Jeopardy Clause would not bar the imposition of two separate statutory *sentences*, one for each count of intoxication manslaughter.[340] But it denies that this would amount to imposing multiple punishments for the "same offence." Although the legislature has authorized more *severe* punishment for a drunk driver who kills two people than for a drunk driver who kills only one, the two sentences

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entitled to relief "simply because it is unlikely—or even very unlikely—that the original jury acquitted without finding the fact in question" (quoting *Yeager*, 557 U.S. at 133-34 (Alito, J., dissenting))).

333. 101 S.W.3d 434, 436 (Tex. Crim. App. 2002) (en banc).

334. *Id.*

335. *Id.*

336. *See id.*

337. *See id.* at 453 (Hervey, J., dissenting).

338. *Cf.* United States v. Dixon, 509 U.S. 688, 704 (1993) ("[I]t is embarrassing to assert that the single term 'same offence' . . . has two different meanings—that what *is* the same offense is yet *not* the same offense."); *see also* THOMAS, *supra* note 19, at 54 ("How is it that 'same offense' is a chameleon that changes meaning in different procedural contexts?").

339. *See, e.g.*, Turner v. Arkansas, 407 U.S. 366, 369-70 (1972) (per curiam); *supra* text accompanying notes 41-46.

340. *See* Missouri v. Hunter, 459 U.S. 359, 366 (1983) ("With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.").

are still a single punishment if imposed in a single trial. Thus, the new originalist test comports with the text of the Clause by requiring that when two counts are for "the same offence," they must be tried jointly and all punishment must be imposed in a single proceeding.

At the same time, the new originalist test avoids the embarrassing (not to mention unjust) results that would follow from simply overruling *Ashe*. Stripped of issue preclusion, the Court's current doctrine—that is, the *Blockburger* test alone—would generate absurd results in cases where a single act harms multiple victims.[341] Take *Harris v. Washington*,[342] for instance. In that case, a mail bomb killed two victims and injured a third.[343] The defendant was initially tried for the murder of one victim, acquitted, and then "immediately rearrested on informations charging the [other] murder" as well as assault against the third victim.[344] This second trial for the "same identical act and crime" is precisely what the guarantee against double jeopardy has always prevented.[345] But the *Blockburger* test would allow it.[346] By contrast, the new originalist approach would bar the second trial: All three charges were (1) legally identical, since assault is a lesser included offense of murder under Washington law;[347] and (2) factually identical, since they arose from a single criminal act.

As a policy matter, the new originalist approach is far from perfect. The "extraordinary proliferation of overlapping and related statutory offenses" in recent decades makes it easy for prosecutors to circumvent the double jeopardy right by charging legally distinct offenses.[348] Although the new originalist rule would have protected Ashe from further prosecution for robbery or theft, it would not have barred a subsequent prosecution for the legally distinct charge of burglary.[349] Nor would it have saved Harris from being prosecuted for the

341. *Cf.* Ashe v. Swenson, 397 U.S. 436, 463-64 (1970) (Burger, C.J., dissenting) (explaining that the *Blockburger* test would have allowed the State to subject Ashe to a separate trial for each victim).

342. 404 U.S. 55 (1971) (per curiam).

343. *See id.* at 55.

344. *Id.*

345. *See* 4 BLACKSTONE, *supra* note 49, at 330.

346. *See Harris*, 404 U.S. at 57 (Burger, C.J., dissenting) (citing his dissent in *Ashe*, which claimed that *Blockburger* would allow a separate trial for each victim); *id.* at 57-58 (Blackmun, J., dissenting) (citing his Eighth Circuit opinion in *Ashe* for the same proposition); *see also* Ashe v. Swenson, 399 F.2d 40, 45 (8th Cir. 1968) (Blackmun, J.), *rev'd*, 397 U.S. 436.

347. *See* State v. Harris, 849 P.2d 1216, 1218 (Wash. 1993) ("[F]irst degree assault is included within the crime of premeditated murder in the first degree.").

348. *See Ashe*, 397 U.S. at 445 n.10.

349. *See* MO. REV. STAT. § 560.040 (1959) (repealed 1977) (defining first-degree burglary as "breaking into and entering the dwelling house of another, in which there is at the time

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federal crime of mailing injurious articles, which today carries a maximum sentence of twenty years in prison.[350] Strong normative arguments can be made in favor of double jeopardy rules that would more effectively safeguard acquittals.[351] But from an originalist perspective, it is up to the legislature to enact such policies.

Conclusion

The Supreme Court's originalist Justices have repeatedly suggested that the Court's decision in *Ashe v. Swenson* is inconsistent with the original meaning of the Double Jeopardy Clause. While their originalist criticisms of the Court's issue preclusion doctrine and Justice Brennan's "same transaction" test are sound, it does not follow that *Ashe* was wrongly decided. There is strong historical evidence that the Double Jeopardy Clause forbids "forcing the accused to 'run the gantlet' as many times as there are victims" of what is essentially a single criminal act.[352] Although the robbery in *Ashe* involved six victims—and therefore constitutionally could be punished more severely than a one-victim robbery—it was a single crime both "in law and in fact."[353] Accordingly, the judgment in *Ashe* is correct from an originalist perspective.

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some human being, with intent to commit some felony or to steal therein, . . . being armed with some dangerous weapon, or with the assistance and aid of one or more confederates").

350. *See* 18 U.S.C. § 1716(a), (j)(2) (2017).

351. *See, e.g.*, Klein & Chiarello, *supra* note 289, at 358-61 (arguing that the elements-based test for what constitutes the "same offence" inadequately protects criminal defendants against successive prosecutions because modern criminal codes contain "thousands" of laws that "prohibit identical conduct with nearly (though not quite) identical elements").

352. *See Ashe*, 397 U.S. at 459 (Brennan, J., concurring).

353. *See* 1 STARKIE, *supra* note 67, at 322 (emphasis omitted).