

5-1-2007

The Meaning of Life (or Limb): An Originalist Proposal for Double Jeopardy Reform

Justin W. Curtin

University of Richmond School of Law

Follow this and additional works at: <https://scholarship.richmond.edu/lawreview>

Part of the [Constitutional Law Commons](#), [Criminal Law Commons](#), [Criminal Procedure Commons](#), and the [Legislation Commons](#)

Recommended Citation

Justin W. Curtin, *The Meaning of Life (or Limb): An Originalist Proposal for Double Jeopardy Reform*, 41 U. Rich. L. Rev. 991 (2007).
Available at: <https://scholarship.richmond.edu/lawreview/vol41/iss4/8>

This Comment is brought to you for free and open access by the Law School Journals at UR Scholarship Repository. It has been accepted for inclusion in University of Richmond Law Review by an authorized editor of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

COMMENTS

THE MEANING OF LIFE (OR LIMB): AN ORIGINALIST PROPOSAL FOR DOUBLE JEOPARDY REFORM

“In expounding the Constitution of the United States, every word must have its due force, and appropriate meaning Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood.”

—Chief Justice Roger Taney¹

“Life may have no meaning or, even worse, it may have a meaning of which I disapprove.”

—Ashleigh Brilliant²

I. INTRODUCTION

In August of 2005, Michael Lane walked into a Salt Lake City police station to unburden himself of a secret he had been harboring for fifteen years.³ Lane described to police how he had been high on methamphetamine one Sunday morning in 1991 and had repeatedly thrown his girlfriend’s baby to the floor in an attempt to make the two-year-old stop crying.⁴ The confession was recorded on video and Lane conceded to police that he “was prepared to go to jail . . . and face his consequences.”⁵ Fifteen years earlier, however, he had been acquitted of murdering the child.⁶

1. Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 570–71 (1840).

2. ASHLEIGH BRILLIANT, POTSHOT NO. 1347, (Brilliant Enterprises 1977) (postcard).

3. Pat Reavy, *Acquitted Man Says He’s Guilty*, DESERET MORNING NEWS, Salt Lake City, Ut., Jan. 19, 2006, <http://deseretnews.com/dn/print/1,1442,635177435,00.html>.

4. *Id.*

5. *Id.*

6. *Id.*

His attorney had successfully raised a reasonable doubt of Lane's guilt by arguing that the injuries to little P.J. Watts could have occurred anytime within a seventy-two-hour span.⁷

Although Lane may not have been aware of it when he confessed, he was in no danger of facing jail time for the murder; the Fifth Amendment's Double Jeopardy Clause, which states that no person "for the same offence [may] be twice put in jeopardy of life or limb,"⁸ precluded the possibility of new murder charges. The confession was subsequently forwarded to the Salt Lake City District Attorney's Office and the United States Attorney's Office, but the most severe consequence facing Lane for the murder was the possibility of civil litigation.⁹

The right to be free from multiple prosecutions for the same offense has been a feature of common law, to varying degrees, for almost 800 years.¹⁰ The prohibition of double jeopardy is largely meant to prevent overzealous governmental authorities from retrying a person multiple times for the same offense until a conviction is secured.¹¹ But in situations like that of Michael Lane—where evidence later surfaces that a guilty person was acquitted—the prohibition appears to be more of an anachronism. In an age where the media and state bar disciplinary procedures serve as checks on prosecutorial misconduct,¹² and where concerns about the accuracy of criminal trials are limiting the scope of cer-

7. *Paula Zahn Now: Outside the Law* (CNN television broadcast Jan. 17, 2006) (transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/060117/pzn.01.html>).

8. U.S. CONST. amend. V.

9. See Reavy, *supra* note 3. Lane's confession potentially could have subjected him to criminal liability for perjuring himself at the 1991 trial. However, there were insufficient records from the trial for such a charge. *Id.*

10. See DAVID S. RUDSTEIN, *DOUBLE JEOPARDY: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 4* (2004).

11. See *id.* at 39.

12. An excellent example of this proposition is found in the so-called "Duke Lacrosse Rape Case." See Duff Wilson & David Barstow, *Prosecutor Asks to Exit Duke Case*, N.Y. TIMES, Jan. 13, 2007, at A1. The racially charged case involved several Duke University lacrosse players who had been accused of raping a woman at a party. The prosecutor, Michael Nifong, allegedly "pursued a weak case for political gain." *Id.* Amid heavy media criticism of his handling of the case, Nifong requested to be dismissed from the case. At the time of this writing, he is facing disciplinary action from the state bar for alleged ethical violations, including misleading the public about the evidence and withholding exculpatory DNA evidence from the players' defense attorneys. *Id.* The overwhelming negative media attention has even prompted some North Carolina state lawmakers to consider reforming the oversight laws for prosecutors. See *id.*

tain criminal rights,¹³ perhaps it is time to reevaluate the double jeopardy prohibition.

Other common law nations around the world have already begun to address the problems created by double jeopardy laws.¹⁴ On September 11, 2006, William Dunlop became the first person in England convicted under a recent change to that country's double jeopardy law of a murder for which he had been previously acquitted.¹⁵ England's efforts to modernize its double jeopardy law are an example of how this ancient principle can be brought in line with evolving criminal justice norms that emphasize the justness of the outcome over the procedure. Unlike the English

13. See, e.g., *Hudson v. Michigan*, 126 S. Ct. 2159, 2165 (2006) (holding that the exclusionary rule does not apply to knock-and-announce violations).

The exclusionary rule generates "substantial social costs," which sometimes include setting the guilty free and the dangerous at large. We have therefore been "cautio[us] against expanding" it, and "have repeatedly emphasized that the rule's 'costly toll' upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application." We have rejected "[i]ndiscriminate application" of the rule, and have held it to be applicable only "where its remedial objectives are thought most efficaciously served,"—that is, "where its deterrence benefits outweigh its 'substantial social costs.'"

Id. at 2163 (citations omitted).

14. Part II.B of this comment details recent updates to English double jeopardy law. Australia is also taking a serious look at its double jeopardy laws in the aftermath of the High Court's 2002 decision in *The Queen v. Carroll*, (2002) 213 C.L.R. 635 (Austl.). Raymond Carroll had been convicted by a jury of murdering Deidre Kennedy in 1985 but the conviction was quashed on appeal. Evidence later surfaced indicating that he had committed the crime. Carroll was convicted of perjury in 2000 for denying under oath at his 1985 murder trial that he had killed Kennedy. On appeal to the High Court, the perjury conviction was overturned. The High Court determined that the perjury prosecution called into question Carroll's acquittal and therefore was barred by the common law principle of double jeopardy. *Id.* at 637–38. Since the case was decided, the Australian state of New South Wales has passed statutory exceptions to the double jeopardy rule and the Council of Australian Governments has begun discussing the possibility of national reforms to the double jeopardy laws. Press Release, Senator Chris Ellison, Australian Minister for Justice and Customs, Moves to Increase Uniformity of Criminal Laws (Nov. 10, 2006), available at http://www.ag.gov.au/agd/WWW/justiceministerhome.nsf/Page/Media_Releases_2006_4th_Quarter_10_November_2006_-_Moves_to_Increase_Uniformity_of_Criminal_Laws. New Zealand's Law Commission has likewise recommended revising that country's double jeopardy laws to allow unjust acquittals to be reopened. See LAW COMMISSION, ACQUITTAL FOLLOWING PERVERSION OF THE COURSE OF JUSTICE, 2001 at 14–15, available at http://www.lawcom.govt.nz/UploadFiles/Publications/Publication_77_166_R70.pdf. A bill that incorporates the Law Commission's findings has been introduced in New Zealand's Parliament. See LAW & ORDER COMMITTEE, CRIMINAL PROCEDURE BILL, COMMENTARY, 2004 [158-2], (N.Z.), available at http://www.parliament.nz/NR/rdonlyres/6A6607CC-B5CD-4D1A-BCB6-41805E572239/52582/DBHOH_BILL_6192_259999995.pdf.

15. Press Release, The Crown Prosecution Service, William Dunlop Pleads Guilty in First Double Jeopardy Case (Sept. 11, 2006), available at http://www.cps.gov.uk/news/pressreleases/archive/2006/152_06.html; see also Jon Silverman, *The Law of "Double Jeopardy,"* BBC NEWS, Sept. 11, 2006, http://news.bbc.co.uk/2/hi/uk_news/5333230.stm.

system, however, any changes to double jeopardy practices in the United States must be consistent with the Fifth Amendment.

The purpose of this comment is to argue that, in certain circumstances, allowing reprosecution of acquitted defendants is both desirable and feasible within the meaning of the Fifth Amendment's Double Jeopardy Clause.¹⁶ The concept of double jeopardy and the phrase "life or limb" evolved along disparate paths in the common law. The concept and the phrase were unrelated until the drafters of the Fifth Amendment purposefully united the two in the Double Jeopardy Clause. Section II of this comment traces the evolution of English double jeopardy law, culminating in recent reforms which may provide the framework for improving American double jeopardy standards. Section III discusses the adoption of the double jeopardy principle into the Fifth Amendment through the curious choice of wording: "jeopardy of life or limb." A historical reexamination of the meaning of "life or limb," as it was understood by the drafters of the Fifth Amendment, suggests that the Framers intended to limit the protection of the Double Jeopardy Clause to capital cases. Viewed in this light, the Double Jeopardy Clause should be no barrier to double jeopardy reforms patterned on the English example.

II. SETTING THE STAGE: EVOLUTION OF DOUBLE JEOPARDY LAW IN ENGLAND

Double jeopardy clauses, in various forms, have existed in codes of laws for millennia. Most early double jeopardy rules were primarily concerned with preventing multiple punishments for the same offense. The Talmud, for instance, prescribed no more than one punishment for one crime; a person convicted of a capital crime could be flogged or put to death, but not both.¹⁷ Early double jeopardy rules also addressed the finality of acquittals. The Code of Hammurabi prescribed that a judge who altered a final sentence was required to pay a penalty and was removed from

16. For the contrary view, that we should not attempt to emulate the English double jeopardy standards, see Daniel H. Erskine, *Double Jeopardy in the U.K.: We Should Not Follow Suit*, NAT'L L.J., Oct. 2, 2006, at 22.

17. See RUDSTEIN, *supra* note 10, at 2; see also GEORGE HOROWITZ, *THE SPIRIT OF JEWISH LAW* 172, 207-10 (1953) (noting that capital punishment precluded all other civil or criminal penalties, and that only one crime, defamation of a man's wife, was punishable by both lashes and fines).

the bench.¹⁸ History records an incident from the nascent Roman Empire in which Emperor Tiberius found that he lacked the authority to disturb a jury's not guilty verdict with which he disagreed.¹⁹ Following the demise of the Roman Empire, the double jeopardy principle survived in the canon law of the Catholic Church.²⁰ The canon law double jeopardy principle, relying on the biblical verse, "There shall not rise up a double affliction," was predicated on the belief that God punishes a person only once for each misdeed.²¹

The earliest identifiable advocate of a double jeopardy prohibition in England was Thomas Becket, an Archbishop of Canterbury in the twelfth century.²² Becket railed against a provision in King Henry II's Constitutions of Clarendon which provided for simultaneous punishment of church officials in the ecclesiastical and royal courts.²³ The provision stated:

Clergyman charged and accused of anything shall, on being summoned by a justice of the [K]ing, come into his court, to be responsible there for whatever it may seem to the [K]ing's court they should there be responsible for; and [to be responsible] in the ecclesiastical court [for what] it may seem they should there be responsible for—so that the [K]ing's justice shall send into the court of holy church to see on what ground matters are there to be treated. And if the clergyman is convicted, or [if he] confesses, the church should no longer protect him.²⁴

18. THE OLDEST CODE OF LAWS IN THE WORLD: THE CODE OF LAWS PROMULGATED BY HAMMURABI, KING OF BABYLON 2 (C. H. W. Johns trans., 1903).

§ 5. If a judge has judged a judgement, decided a decision, granted a sealed sentence, and afterwards has altered his judgement, that judge, for the alteration of the judgement that he judged, one shall put him to account, and he shall pay twelfefold the penalty which was in the said judgement, and in the assembly one shall expel him from his judgement seat, and he shall not return, and with the judges at a judgement he shall not take his seat.

Id.

19. See RUDSTEIN, *supra* note 10, at 2–3.

20. JAY A. SIGLER, DOUBLE JEOPARDY: THE DEVELOPMENT OF A LEGAL AND SOCIAL POLICY 3 (1969).

21. *Id.* (quoting *Nahum* 1:9 (Douay)).

22. Note, *Double Jeopardy and Dual Sovereigns*, 35 IND. L.J. 444, 445 (1959–60).

23. *Id.* at 445–46.

24. CONSTITUTIONS OF CLARENDON cl. 3, *reprinted in* RUDSTEIN, *supra* note 10, at 5.

In response to the uproar accompanying the murder of Becket, Henry II acquiesced and ended the practice of subjecting church officials to double jeopardy in the ecclesiastical and royal courts.²⁵

Some scholars speculate that the modern English conception of double jeopardy may have been derived from Becket's feud with Henry II.²⁶ Other theories contend that the concept was imported from the Roman or continental canon law, or developed independently from Anglo-Saxon criminal procedure.²⁷ Given Western Europe's "common fund of shared judicial concepts,"²⁸ it is likely that all three factors contributed to the English conception of double jeopardy.

Although its origins are difficult to pinpoint, by the thirteenth century the principle that a person should not be tried or punished twice for the same offense had gained a foothold in English common law.²⁹ The prohibition on double jeopardy evolved through case law into four technical pleas: *autrefois acquit* (already acquitted); *autrefois convict* (already convicted); *autrefois attain* (already sentenced to civil death); and pardon.³⁰ A successful plea of *autrefois acquit* or *autrefois convict*—the most common of the four pleas—prevented a common law court from retrying or imposing punishment upon the criminal defendant.³¹

The double jeopardy pleas were primarily understood as simple procedural devices—as opposed to substantive rights—throughout the Middle Ages in England.³² By the eighteenth century Enlightenment thinking prevailed and English legal scholars began to speak of double jeopardy prohibitions as rational and fundamental concepts.³³ An express prohibition on double jeopardy,

25. See Note, *supra* note 22, at 446.

26. See SIGLER, *supra* note 20, at 3.

27. RUDSTEIN, *supra* note 10, at 4, 6.

28. SIGLER, *supra* note 20, at 3.

29. See RUDSTEIN, *supra* note 10, at 4.

30. Charles L. Cantrell, *Double Jeopardy and Multiple Punishment: An Historical and Constitutional Analysis*, 24 S. TEX. L.J. 735, 754 (1983). Sources spell "*autrefois*" in various ways. I use only one spelling for consistency.

31. See *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 169 (1873).

32. See Cantrell, *supra* note 30, at 756.

33. Sir William Hawkins, writing in the early eighteenth century, described the plea of *autrefois acquit* thusly:

But if a man steal goods in one county, and then carry them into another, in which case it is certain that he may be indicted and found guilty in either, it seems very reasonable, that an acquittal in one county for such stealing may

however, was nowhere to be found in British statutory law.³⁴ To the contrary, homicide prosecutions were *excepted* from *autrefois* pleas by statute in 1487, although the statute was rarely applied and eventually repealed.³⁵ Double jeopardy continued to evolve in Britain primarily as a creature of common law jurisprudence until well into the twentieth century, when a remarkable criminal case caused the British to reassess the venerable concept.

A. *Impetus for Rethinking Double Jeopardy in England: Britain's Rodney King*

It took an incident of police and prosecutorial ineptitude—drawing comparisons to the Los Angeles Police Department's handling of the Rodney King affair³⁶—and the ensuing public outcry to prompt the British to reevaluate their double jeopardy laws. One evening in the spring of 1993, Stephen Lawrence was waiting for a bus at a southeast London bus stop with a friend, Duwayne Brooks.³⁷ Lawrence, a black eighteen-year-old aspiring architect, was attacked by a gang of white youths wielding weapons and shouting racial epithets.³⁸ Lawrence managed to run two hundred yards from the scene before succumbing to fatal stab wounds.³⁹ Brooks, who would later serve as the chief eyewitness for the prosecution of Lawrence's attackers, escaped unharmed.⁴⁰

be pleaded in bar of a subsequent prosecution for the same stealing in another county . . . and therefore if he could not bar the second prosecution by the acquittal on the first, his life would be twice in 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, which shall hardly take place against a maxim in favour of life.

SIR WILLIAM HAWKINS, 2 TREATISE OF THE PLEAS OF THE CROWN 517–18 (1824).

34. See SIGLER, *supra* note 20, at 4.

35. RUDSTEIN, *supra* note 10, at 8–9.

36. See, e.g., *A Fight for Justice: The Stephen Lawrence Story*, BBC NEWS, Feb. 22, 1999, http://news.bbc.co.uk/2/hi/special_report/1999/02/99/stephen_lawrence/281742.stm [hereinafter *Fight*].

37. *Id.*; Alan Travis, "Race Murder" Charges Dropped, GUARDIAN UNLIMITED, July 30, 1993, <http://www.guardian.co.uk/lawrence/Story0,,941254,00.html>.

38. *What Happened on Stephen Lawrence's Last Night Alive?*, BBC NEWS, Mar. 13, 1998, http://news.bbc.co.uk/2/hi/special_report/1998/03/98/lawrence/65060.stm [hereinafter *What Happened?*].

39. *Id.*

40. See, e.g., *id.*

A nearby police officer, who was on the scene within minutes, immediately began the investigation into the crime.⁴¹ Within hours of the murder, the Metropolitan Police had received numerous tips from the community regarding the identity of the perpetrators, and five suspects were identified.⁴² The subsequent police investigation, which a later inquiry found to be hampered by corruption and racism, failed to uncover significant evidence against the suspects.⁴³

Three of the suspects ultimately went to trial.⁴⁴ However, the prosecution's case against the suspects fell apart when the trial judge excluded Brooks's eyewitness testimony as "contaminated and flawed."⁴⁵ The exclusion of Brooks's testimony, coupled with the inadequate police investigation, left the prosecution with little evidence to present.⁴⁶ As a result, the judge ordered the jury to return not guilty verdicts for all three suspects.⁴⁷

The public perceived the acquittals as a miscarriage of justice, with blame falling on the perceived incompetence of the police and prosecutors.⁴⁸ Voicing the public outrage, London's Daily Mail newspaper famously printed the pictures of the five suspects on the front page under the headline, "MURDERERS," and challenged the suspects to sue the paper for libel if the accusation was wrong.⁴⁹ The BBC labeled the situation the "most serious threat

41. *Fight*, *supra* note 36. Brooks alleged that the officers mistreated him when they arrived, asking him if he had a criminal record and threatening to handcuff him. *See What Happened?*, *supra* note 38.

42. *Fight*, *supra* note 36.

43. *Id.*

44. *See In the Spotlight*, BBC NEWS, Feb. 19, 1999, http://news.bbc.co.uk/2/hi/special_report/1999/02/99/stephen_lawrence/281866.stm.

45. *What Happened?*, *supra* note 38. Although Brooks identified the suspects in a lineup, an officer testified that Brooks had admitted that he had not seen the faces of the suspects and that he had learned of their identities prior to the lineup. *Id.*

46. *See* SIR WILLIAM MACPHERSON, *THE STEPHEN LAWRENCE INQUIRY*, 1999, Cm. 4262-I, § 39.55, available at <http://www.archive.official-documents.co.uk/document/cm42/4262/4262.htm> ("Mr. Brooks was the only witness who could give direct evidence in the Stephen Lawrence murder."); *id.* § 39.38 ("[T]here was no satisfactory evidence to corroborate the doubtful evidence of Mr. Brooks . . .").

47. *Id.*

48. *Fight*, *supra* note 36. Even the Metropolitan Police Commissioner, Sir Paul Condon, called the investigation "our failure." *Id.*

49. *Murderers: The Mail Accuses These Men of Killing. If We Are Wrong, Let Them Sue Us*, DAILY MAIL (London), Feb. 14, 1997, at 1; *see also* Michael Seamark & Stephen Wright, *Stephen Lawrence Murder Inquiry Won't Be Reopened*, DAILY MAIL, July 26, 2006, available at http://www.dailymail.co.uk/pages/live/articles/news/news.html?in_articleid=397819&in_page_id=1770 (recounting the decision to print the "MURDERERS" headline

to a cohesive urban society since the mass inner-city rioting of 1981.”⁵⁰ Exacerbating the situation in the eyes of the public, two internal police investigations into the affair concluded that there had been no wrongdoing on the part of the police.⁵¹

The uproar prompted Home Secretary Jack Straw to appoint Sir William Macpherson to conduct an exhaustive inquiry into the Lawrence murder investigation.⁵² Macpherson’s findings, titled *The Stephen Lawrence Inquiry*, but more commonly known as the *Macpherson Report*,⁵³ were highly critical of London’s Metropolitan Police, which the report characterized as suffering from “institutional racism.”⁵⁴ The *Macpherson Report* made seventy recommendations to the government.⁵⁵ With a few minor stipulations, Secretary Straw accepted or took into further consideration all seventy recommendations.⁵⁶

Recommendation 38 of the *Macpherson Report* created a means by which the acquittals of the three suspects could be reopened by creating an exception to the *autrefois acquit* plea. Titled “Prosecution After Acquittal,” Recommendation 38 stated, “That consideration should be given to the Court of Appeal being given *power to permit prosecution after acquittal* where fresh and viable evidence is presented.”⁵⁷ Secretary Straw pledged to forward the recommendation to the Law Commission and set a deadline for a report on the feasibility of the recommendation.⁵⁸

and the controversy it caused).

50. *Fight*, *supra* note 36.

51. *Race: The Macpherson Report*, BBC NEWS, May 7, 2001, http://news.bbc.co.uk/vote2001/hi/english/main_issues/sections/facts/newsid_1190000/1190971.stm.

52. *See Fight*, *supra* note 36.

53. MACPHERSON, *supra* note 46.

54. *Id.* § 46.1. The *Macpherson Report* defined institutional racism as “[t]he collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture, or ethnic origin.” *Id.* § 6.34. For a summary of the findings of the *Macpherson Report*, see *Met’s “Incompetence” in Lawrence Investigation*, BBC NEWS, Mar. 24, 1999, http://news.bbc.co.uk/2/hi/uk_news/285569.stm.

55. MACPHERSON, *supra* note 46, ch. 47.

56. *See* JACK STRAW, SECRETARY OF STATE FOR THE HOME DEPARTMENT, STEPHEN LAWRENCE INQUIRY: THE HOME SECRETARY’S ACTION PLAN (1999), available at <http://police.homeoffice.gov.uk/news-and-publications/publication/community-policing/slpages.pdf?view=Binary>.

57. *Id.* at 19 (emphasis added).

58. *Id.*

The Law Commission, a statutory body charged with evaluating legal reforms,⁵⁹ came out in support of the proposal to relax the double jeopardy prohibition.⁶⁰ The Commission recommended that in cases involving murder, genocide, or reckless killing, the “rule against double jeopardy should be subject to an exception . . . where new evidence is discovered after an acquittal.”⁶¹ It also recommended that the changes apply retroactively to acquittals that had already occurred to avoid the “prospect of public outrage where new evidence came to light and the exception would otherwise have been available.”⁶² The Commission advocated a two-part threshold for determining whether new evidence warranted a second trial: the evidence must make the prosecution’s case “substantially *stronger*,” and the likelihood of conviction must be either “*highly probable*” or “*sure*.”⁶³ The evidence must also appear to be reliable.⁶⁴ In March of 2001, the Law Commission’s proposals were presented to the Parliament of the United Kingdom for consideration.⁶⁵

B. *Rewriting Double Jeopardy Law: The Criminal Justice Act of 2003*

The Criminal Justice Act of 2003 (“Act”)⁶⁶ received Royal Assent on November 20, 2003.⁶⁷ Acting upon the Law Commission’s report on Recommendation 38, the Parliament of the United Kingdom passed the most sweeping statutory change to double jeopardy law in 800 years, representing a more far-reaching departure from the common law than even the Law Commission had advocated.⁶⁸ The Act was Parliament’s attempt to correct the imbalance between two competing notions: “no one should be

59. Law Commission Home Page, <http://www.lawcom.gov.uk/> (last visited Apr. 10, 2007).

60. LAW COMMISSION, DOUBLE JEOPARDY AND PROSECUTION APPEALS, 2001, Cm. 5048, at 127, available at [http://www.lawcom.gov.uk/docs/lc267\(1\).pdf](http://www.lawcom.gov.uk/docs/lc267(1).pdf).

61. *Id.* at 45.

62. *Id.* at 46.

63. *Id.* at 49.

64. *Id.* at 52.

65. *Id.* at i.

66. Criminal Justice Act, 2003, c. 44 (Eng. & Wales).

67. HOME OFFICE, CRIMINAL JUSTICE ACT 2003: EXPLANATORY NOTES, 2003, at 159, available at http://www.opsi.gov.uk/acts/en2003/ukpgaen_20030044_en.pdf.

68. See generally *id.* at 10 (“This is in line with, but drawn more widely than, recommendations of the Law Commission.”).

tried a second time after being acquitted,” and the “basic objective of the criminal law that the guilty should be convicted.”⁶⁹ The law permits acquittals within England and Wales to be quashed and previously acquitted defendants to be retried.⁷⁰ It likewise provides a procedure whereby a defendant acquitted of an offense in a foreign jurisdiction may be retried for the same offense within the United Kingdom,⁷¹ a practice banned since 1677.⁷² It is, however, narrowly tailored to achieve the ends of justice while preventing harassing or frivolous retrials.⁷³ Additionally, several layers of procedural and substantive safeguards are incorporated in the Act to prevent abuses.

The heart of the new double jeopardy law is the “new and compelling evidence” standard.⁷⁴ Crown prosecutors may have a second bite at the apple only if new and compelling evidence comes to light that casts doubt on the validity of the acquittal verdict.⁷⁵ The standard embodies the belief that “where it is manifest to the public and to the victim, that there is strong evidence now, that was not available once before, that someone is, in fact, guilty who has been acquitted, . . . [it] is an affront to the notion of truth and justice.”⁷⁶ The new evidence standard is primarily targeted at blood and tissue samples from decades-old trials that resulted in acquittals before DNA testing was available.⁷⁷ Other examples of new and compelling evidence include the testimony of witnesses

69. HOME AFFAIRS SELECT COMMITTEE, THIRD REPORT, 1999–2000, H.C. 190, ¶ 1, available at <http://www.publications.parliament.uk/pa/cm199900/cmselect/cmhaff/190/19003.htm>.

70. See Criminal Justice Act, 2003, c. 44, § 75(1)(a) (Eng. & Wales). The Act applies to Northern Ireland to the extent that it is modified by § 96. See *id.* § 96. The changes to double jeopardy law do not apply to Scotland, which retains the common law rule. See Double Jeopardy Man Admits Guilt, BBC NEWS, Sept. 11, 2006, <http://news.bbc.co.uk/2/hi/uknews/england/5144722.stm>. This comment will focus on the changes in England and Wales.

71. Criminal Justice Act, 2003, c. 44, § 75(4) (Eng. & Wales).

72. See RUDSTEIN, *supra* note 10, at 10.

73. See HOME OFFICE, *supra* note 67, at 10.

74. See Criminal Justice Act, 2003, c. 44, § 78 (Eng. & Wales); see also HOME OFFICE, *supra* note 67, at 51.

75. Prosecutors may only attempt to quash an acquittal *one* time. Multiple attempts to retry an acquitted person are not allowed under the law. Criminal Justice Act, 2003, c. 44, § 76(5) (Eng. & Wales).

76. HOME AFFAIRS SELECT COMMITTEE, *supra* note 69, ¶ 18.

77. See HOME OFFICE, *supra* note 67, at 10; LAW COMMISSION, *supra* note 60, at 2; HOME AFFAIRS SELECT COMMITTEE, *supra* note 69, ¶ 3.

who were unknown at the time of trial and confessions of previously acquitted defendants.⁷⁸

The first prong of the standard is that the evidence must be “new.” New evidence is defined tersely as evidence “not adduced in the proceedings in which the person was acquitted.”⁷⁹ Strangely, neither the text of the Act nor the Explanatory notes makes it clear that the evidence must have been unavailable or unknown at the time of the first trial; it need only have not been adduced.⁸⁰ This appears at odds with the Law Commission’s discussion of new evidence which framed the issue in terms of evidence discovered post-acquittal.⁸¹ However, the reason the evidence was not adduced at the first trial factors into the Court of Appeal’s decision regarding whether a new trial is granted.⁸² So presumably, a prosecutor could not purposefully withhold evidence from trial in order to preserve her ability to retry the case should the defendant be acquitted.

“Compelling” evidence is the second prong of the evidentiary standard.⁸³ For new evidence to be compelling it must initially be both “reliable” and “substantial.”⁸⁴ The evidence must then be found “highly probative” of an “outstanding issue[]” from the trial.⁸⁵ The Act defines outstanding issues as “the issues in dispute in the proceedings in which the person was acquitted.”⁸⁶ Thus, the court must weigh the new evidence in the context of an issue of contention at trial. For instance, if the acquitted created a reasonable doubt as to the identity of the perpetrator of the crime, then reliable and substantial evidence going to the issue of identity would be compelling.⁸⁷ Evidence going to a collateral matter or evidence that merely tends to strengthen the case

78. HOME OFFICE, *supra* note 67, at 10; HOME AFFAIRS SELECT COMMITTEE, *supra* note 69 ¶ 3.

79. Criminal Justice Act, 2003, c. 44, § 78(2) (Eng. & Wales).

80. *See id.*; HOME OFFICE, *supra* note 67, at 51. *Blacks Law Dictionary* defines “aduce” as: “To offer or put forward for consideration (something) as evidence or authority.” BLACK’S LAW DICTIONARY 42 (8th ed. 2004).

81. *See* LAW COMMISSION, *supra* note 60, at 50–51.

82. Criminal Justice Act, 2003, c. 44, § 79(2)(c) (Eng. & Wales).

83. *Id.* § 78(3).

84. *Id.* § 78(3)(a)–(b).

85. *Id.* § 78(3)(c).

86. *Id.* § 78(4).

87. *See* HOME OFFICE, *supra* note 67, at 51.

against the acquitted would not satisfy the new and compelling standard.⁸⁸

The Act's scope is restricted to twenty-nine qualifying offenses.⁸⁹ Qualifying offenses fall into six categories: offenses against the person; sexual offenses; drugs offenses; criminal damage offenses; war crimes and terrorism; and conspiracy to commit one of the qualifying offenses.⁹⁰ The offenses, each carrying a maximum sentence of life in prison,⁹¹ are limited to those that "have a particularly serious impact either on the victim or on society more generally."⁹²

In order to quash an acquittal for a qualifying offense, a number of procedural hurdles must be overcome. A prosecutor wishing to reopen an acquittal must first obtain the written permission of the Director of Public Prosecutions ("DPP").⁹³ The DPP may then grant permission to proceed only if he is satisfied that the new and compelling evidence standard is met, that it is in the public interest to quash the acquittal, and that the rights of the defendant under British and European law would not be violated.⁹⁴ Once approved by the DPP, the prosecutor may then apply to the Court of Appeal for an order to quash the acquittal.⁹⁵

The Court of Appeal must make two determinations before issuing the order. It must first be independently satisfied that the new and compelling evidence standard is met.⁹⁶ The court must

88. *See id.*

89. Criminal Justice Act, 2003, c. 44, § 75, sched. 5 (Eng. & Wales). Part 1 lists the qualifying offenses for England and Wales.

90. *Id.* For example, listed offenses include murder, rape, arson endangering life, producing class A drugs, war crimes, and hostage-taking.

91. The United Kingdom eliminated the last vestiges of capital punishment in 1998 by abolishing the death penalty for treason and piracy. Crime and Disorder Act, 1998, c. 37, § 36 (Eng. & Wales).

92. HOME OFFICE, *supra* note 67, at 50. By contrast, the Law Commission recommended that only three offenses be subject to the new double jeopardy law. LAW COMMISSION, *supra* note 60, at 45.

93. Criminal Justice Act, 2003, c. 44, § 76(3) (Eng. & Wales). The Director of Public Prosecution is the head of the Crown Prosecution Service and reports directly to the Attorney General. Crown Prosecution Service, Director of Public Prosecutions, <http://www.cps.gov.uk/about/dpp.html> (last visited Apr. 10, 2007).

94. Criminal Justice Act, 2003, c. 44, § 76(4) (Eng. & Wales).

95. *See id.* § 76(1)(a). The Court of Appeal is the second highest court in England and Wales, inferior only to the House of Lords. *See* Her Majesty's Courts Service, The Court Structure of Her Majesty's Courts Service, <http://www.hmcourts-service.gov.uk/aboutus/structure/index.htm> (last visited Apr. 10, 2007).

96. Criminal Justice Act, 2003, c. 44, § 77 (Eng. & Wales).

then decide that retrying the defendant “in all . . . circumstances” would be in the “interests of justice.”⁹⁷ The Act presents four non-exclusive factors for the court to consider: the likelihood a retrial would be unfair; the length of time that has elapsed since acquittal; whether the new evidence was not adduced at the first trial due to police or prosecutorial error; and whether the second trial is being pursued by the government with due diligence and expedition.⁹⁸ Upon making its determination, the Court of Appeal must issue an order either granting or denying the application to quash the conviction.⁹⁹ Providing a final procedural safeguard, the acquitted defendant or prosecutor may immediately appeal the court’s decision to the House of Lords.¹⁰⁰

C. *Britain’s First Double Jeopardy Conviction: William Dunlop Case*

William Dunlop was one of the motivating factors in the passage of the Act.¹⁰¹ In 1989, Dunlop was charged with the murder of pizza delivery woman Julie Hogg.¹⁰² After two juries failed to return verdicts in subsequent trials, the trial court judge ordered Dunlop’s acquittal.¹⁰³ Several years later, while Dunlop was in prison on unrelated assault charges, he confided in a prison guard that he had murdered Julie Hogg.¹⁰⁴ Because double jeopardy laws at the time prevented reopening the murder charges, Dunlop was charged and convicted of perjury in 2000 for making

97. *Id.* § 79(1).

98. *Id.* § 79(2).

99. The Court of Appeal *must* issue an order; it does not have discretion to disregard the application. HOME OFFICE, *supra* note 67, at 51.

100. Criminal Appeal Act, 1968, c. 19, § 33(1B) (Eng. & Wales).

101. See HOME AFFAIRS SELECT COMMITTEE, *supra* note 69, ¶ 3 (“In a recent case a man twice tried and cleared in 1991 of killing a pizza delivery woman in 1989 was eventually jailed for perjury after he admitted that he had lied in court when he denied murder.”); see also *Mother’s Justice Plea to Lords*, BBC NEWS, July 9, 2003, http://news.bbc.co.uk/2/hi/uk_news/england/tees/3051909.stm (reporting that the mother of the woman murdered by Dunlop met with members of House of Lords during consideration of the Criminal Justice Act of 2003).

102. See *Mother’s Hope over Law Change*, BBC NEWS, Nov. 25, 2003, http://news.bbc.co.uk/2/hi/uk_news/england/tees/3235726.stm.

103. See *id.*

104. *Murder Conviction Is Legal First*, BBC NEWS, Sept. 11, 2006, http://news.bbc.co.uk/2/hi/uk_news/england/tees/5150346.stm.

false statements at his 1989 murder trial.¹⁰⁵ He was given a six-year sentence.¹⁰⁶

The new double jeopardy provisions of the Act took effect in April of 2005.¹⁰⁷ Soon thereafter, Crown Prosecutor Martin Goldman, citing Dunlop's jailhouse confession as new and compelling evidence, obtained permission from DPP Ken Macdonald to pursue the case.¹⁰⁸ The Court of Appeal determined that the evidence was new and compelling and that it was in the interest of justice to quash Dunlop's acquittal.¹⁰⁹ On September 11, 2006, Dunlop made history by becoming the first person to be convicted under the new double jeopardy law when he plead guilty to Hogg's murder.¹¹⁰ He was sentenced to life in prison.¹¹¹

III. ROAD TO REFORM: THE MEANING OF "LIFE OR LIMB"

The young American nation inherited the concept of double jeopardy from English common law.¹¹² The First Congress, preceded by several colonial legislatures,¹¹³ undertook a task that, until that point, had never been done in the English legal tradition when it chose to codify the principle of double jeopardy.¹¹⁴

105. *Id.*

106. *Id.*

107. Press Release, Crown Prosecution Service, William Dunlop Pleads Guilty in First Double Jeopardy Case (Sept. 11, 2006), available at http://www.cps.gov.uk/news/pressreleases/archive/2006/152_06.html.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Double Jeopardy Man Is Given Life*, BBC NEWS, Oct. 6, 2006, http://news.bbc.co.uk/2/hi/uk_news/england/tees/5412264.stm.

112. See ALFREDO GARCIA, *THE FIFTH AMENDMENT: A COMPREHENSIVE APPROACH* 27 (2002).

113. A total of four states had statutory or constitutional double jeopardy provisions prior to 1791. The Massachusetts Bay Colony enacted its Body of Liberties in 1641 which included the provision that "[n]o man shall be twice [sic] sentenced by [c]ivill [sic] [j]ustice for one and the same [c]rime, offence, or [t]respasse [sic]." RUDSTEIN, *supra* note 10, at 11 (alterations in original). Connecticut enacted a similar provision with similar language in 1652. *Id.* at 11–12. In the decade preceding the drafting of the Fifth Amendment, both New Hampshire and Pennsylvania enacted double jeopardy prohibitions. New Hampshire's provision stated, "No subject shall be liable to be tried, after an acquittal, for the same crime or offence." Pennsylvania's constitution contained the provision, "No person shall, for the same offence, be twice put in jeopardy of life or limb." *Id.* at 12. The Pennsylvania double jeopardy standard is almost identical to the Fifth Amendment's language. See *id.* at 12.

114. See SIGLER, *supra* note 20, at 4.

James Madison first presented what would become the Fifth Amendment.¹¹⁵ Madison's draft was less succinct than the final version but unmistakable in its intent: "No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence."¹¹⁶

Unfortunately, we know very little about why Madison's language was rejected by the First Congress.¹¹⁷ Representatives Egbert Benson of New York and Roger Sherman of Connecticut were recorded as having been opposed to Madison's wording.¹¹⁸ They feared that because the language restricted a person to one trial, it might be construed as overinclusive and prevent a convicted defendant from appealing his sentence.¹¹⁹ Benson's proposal to eliminate "or trial" from the amendment was soundly defeated.¹²⁰ Madison's proposed language was approved as is by the House of Representatives and sent to the Senate.¹²¹ For reasons lost to history, the Senate changed the clause to read, "be twice put in jeopardy of life or limb by any public prosecution."¹²² Although the House opposed the Senate's changes, the conference committee ultimately approved the present language of the Amendment, dropping only "by any public prosecution" from the Senate's draft.¹²³ The result, "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb,"¹²⁴ was then ratified. As a consequence, American courts have struggled with interpreting the cryptic language of the Double Jeopardy Clause for over two centuries.

The Supreme Court has acknowledged that its double jeopardy jurisprudence is "a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator."¹²⁵ One consequence of the Double Jeopardy Clause, however, is well settled: acquittals in the United States are final.¹²⁶ Aside from one rare

115. RUDSTEIN, *supra* note 10, at 14.

116. 1 ANNALS OF CONG. 434 (Joseph Gales ed., 1834) (statement of James Madison).

117. See GARCIA, *supra* note 112, at 28.

118. SIGLER, *supra* note 20, at 30.

119. *Id.*

120. GARCIA, *supra* note 112, at 28.

121. SIGLER, *supra* note 20, at 31.

122. *Id.*

123. *Id.* at 31-32.

124. U.S. CONST. amend. V.

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

126. See GARCIA, *supra* note 112, at 186-87 (noting that in the "paradigm" double jeop-

exception,¹²⁷ acquittals may not be overturned or quashed under any circumstances.¹²⁸ As the Court put it, “Perhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that ‘[a] verdict of acquittal . . . could not be reviewed, on error or otherwise, without putting [a defendant] twice in jeopardy, and thereby violating the Constitution.’”¹²⁹

Although it may be the most settled aspect of double jeopardy jurisprudence, the sanctity of acquittals is the primary obstacle to meaningful double jeopardy reforms similar to those undertaken in England’s Criminal Justice Act of 2003. The time has come to reevaluate the finality of acquittals. The ambiguities attending to the passage of the Double Jeopardy Clause should caution against over-reliance on even the most settled case law. A historical reevaluation of “life or limb,” as it was understood by the drafters of the Fifth Amendment, indicates that the double jeopardy protection was intended to apply solely to capital cases—cases in which the defendant’s literal life or limb was in jeopardy. Evidence from the common law usage of the “life or limb,” up to

ard case, the government may not re prosecute an acquitted defendant).

127. The exception applies when the criminal defendant was never actually placed in jeopardy during the trial due to some extraordinary circumstance. *See Aleman v. Judges of the Circuit Court*, 138 F.3d 302, 308 (7th Cir. 1998) (holding that the acquittal of a defendant who bribed the trial judge did not bar re prosecution of the defendant because he was “never in jeopardy at his first trial”); *see also Gonzalez v. Justices of the Mun. Court*, 382 F.3d 1, 2 (1st Cir. 2004) (allowing re prosecution of a defendant acquitted in a “sham trial” in which no factual issues were argued), *vacated* 544 U.S. 918 (2005), *affd on other grounds*, 420 F.3d 5, 7 (1st Cir. 2005). *But see Goolsby v. Hutto*, 691 F.2d 199, 202 (4th Cir. 1982) (holding that double jeopardy concerns prevent re prosecution even though no evidence had been presented at trial).

128. There are, however, a few circumstances in which a *convicted* defendant may be re prosecuted. In *Diaz v. United States*, 223 U.S. 442 (1912), the Supreme Court determined that Gabriel Diaz’s assault and battery conviction did not bar a subsequent homicide trial when the victim later died from the injuries inflicted during the battery. *Id.* at 448–49 (interpreting a double jeopardy provision in Philippine law during the period in which the Philippines were a United States Territory); *see also People v. Latham*, 631 N.E.2d 83, 85–86 (N.Y. 1994) (holding that attempted murder conviction did not bar subsequent prosecution for second-degree murder after victim died). Under the “dual sovereignty doctrine” a defendant may be prosecuted by multiple states for committing a single criminal act if the act “break[s] the laws of each.” *Heath v. Alabama*, 474 U.S. 82, 88 (1985); *cf. Fox v. Ohio*, 46 U.S. 410, 434–35 (1847) (holding that the Fifth Amendment does not bar a state from criminalizing an activity which is concurrently criminalized by Congress). In *Heath*, hitmen hired by the defendant abducted Heath’s pregnant wife from her Alabama home and transported her to Georgia where they killed her. *Heath*, 474 U.S. at 83–84. The Court held that Heath’s murder conviction in Georgia did not bar a subsequent prosecution in Alabama for murder during a kidnapping for the killing. *Id.* at 93.

129. *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977) (quoting *United States v. Ball*, 163 U.S. 662, 671 (1896)).

and including Blackstone, suggests an interpretation of the phrase that is applicable only to capital cases. American usage of the phrase by the contemporaries of the drafters of the Fifth Amendment further supports this contention. Viewing the Double Jeopardy Clause in this context permits the pursuit of meaningful double jeopardy reforms without offending its original intent.

Commentators have referred to the wording of the Double Jeopardy Clause as “unclear” and “unfathomable.”¹³⁰ The term “life or limb” is particularly confounding.¹³¹ Another of the Fifth Amendment’s clauses, the Due Process Clause, states that a person shall not be deprived of “*life, liberty, or property*, without due process of law.”¹³² The negative inference from such a word choice *in the same amendment* as the Double Jeopardy Clause is that the Double Jeopardy Clause was not intended to protect a person’s liberty or property rights. The Framers purposefully reference “life or limb” in the Double Jeopardy Clause in order to extend constitutional protection to situations where the consequences of an erroneous conviction heavily outweighed the utility of revisiting apparently faulty acquittals: capital cases in which the defendant’s life—not just liberty—is in jeopardy.¹³³

A. *The Present (Lack of) Meaning of “Life or Limb”*

The Court in *Ex parte Lange*¹³⁴ pronounced the rule that a defendant may not be tried twice for any offense—felony or misdemeanor, capital or otherwise—but it did so by employing language paralleling Madison’s original wording, which the First Congress rejected. Glossing over the significance of the phrase, “life or limb,” the Court declared, “[W]e do not doubt that the Constitution was designed as much *to prevent the criminal from being twice punished for the same offence as from being twice tried for it.*”¹³⁵ In support of this position, the Court cited a decision of the New Jersey Supreme Court:

130. See GARCIA, *supra* note 112, at 28 (citing SIGLER, *supra* note 20, at 35).

131. See Stephen N. Limbaugh, Jr., *The Case of Ex Parte Lange (or How the Double Jeopardy Clause Lost Its “Life or Limb,”*) 36 AM. CRIM. L. REV. 53, 69 (1999).

132. U.S. CONST. amend. V (emphasis added).

133. See Limbaugh, *supra* note 131, at 81; see also LARRY LAUDAN, TRUTH, ERROR, AND CRIMINAL LAW: AN ESSAY IN LEGAL EPISTEMOLOGY 197 (2006) (“[L]ife or limb’ was a standard phrase in the eighteenth century for the death penalty.”).

134. 85 U.S. (18 Wall.) 163 (1873).

135. *Id.* at 173 (emphasis added).

In the case of *Cooper v. The State*, in the Supreme Court of New Jersey, the prisoner had been indicted, tried, and convicted for arson. While still in custody under this proceeding he was arraigned on an indictment for the murder of two persons who were in the house when it was burned. To this he pleaded the former conviction in bar, and the Supreme Court held it a good plea. It is to be observed that the punishment for arson could not technically extend either to life or limb; but the Supreme Court founded its argument on the provision of the constitution of New Jersey, which embodies the precise language of the Federal Constitution. After referring to the common law maxim the court says: "The constitution of New Jersey declares this important principle in this form: 'Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb.' Our courts of justice would have recognized and acted upon it as one of the most valuable principles of the common law without any constitutional provision. But the framers of our Constitution have thought it worthy of especial notice. And all who are conversant with courts of justice must be satisfied that this great principle forms one of the strong bulwarks of liberty. . . . Upon this principle are founded the pleas of *autrefois acquit* and *autrefois convict*."¹³⁶

By conflating "jeopardy of life or limb" with the procedural effect of the *autrefois* pleas, the Court stifled any further debate on the meaning of the First Congress's curious word choice.

B. *The Meaning of "Life or Limb" in Common Law*

"Life or limb" was not a neologism created by the First Congress. The phrase had a "literal meaning in English history"¹³⁷ for hundreds of years before it was incorporated into the Fifth Amendment. The term "life or limb" refers to criminal punishments involving the loss of natural life or limb throughout English legal history.¹³⁸ Many ancient sources from the common law include the phrase—always in reference to severe corporal punishment.¹³⁹ The learned men drafting the Double Jeopardy Clause were undoubtedly familiar with many of these sources.¹⁴⁰

136. *Id.* at 171–72 (quoting *State v. Cooper*, 13 N.J.L. 361, 370–71 (1833)); see also *United States v. Scott*, 437 U.S. 82, 96 (1978) ("[T]he three common-law pleas of *autrefois acquit*, *autrefois convict*, and pardon, . . . lie at the core of the area protected by the Double Jeopardy Clause.").

137. SIGLER, *supra* note 20, at 5.

138. *Id.*

139. This primarily means corporal punishment because the severing of limbs as a punishment had fallen out of favor by the eighteenth century. See Limbaugh, *supra* note 131, at 65.

140. See *id.* at 79–82.

Although the evidence may be largely circumstantial, we have no better way to peer into the minds of the Framers who chose "life or limb" than by reading and examining the sources that they likely read and examined.¹⁴¹

The Magna Carta contains the first known reference to the term "life or limb" in the common law tradition.¹⁴² At the time the Magna Carta was issued in 1215, the criminal justice system in England was not overly concerned with prosecuting crimes occurring between subjects of the Crown.¹⁴³ When a party accused another of committing a felony, judicial trial by combat often occurred, which quite literally placed the accused's life and limbs in jeopardy.¹⁴⁴ The Magna Carta signaled the demise of trial by battle by declaring, "Nothing in future shall be given or taken for a writ of inquisition of life or limbs, but freely it shall be granted, and never denied."¹⁴⁵ Thus, a party could plead the writ of life or limb and be judged by twelve of his neighbors in substitution of trial by battle.¹⁴⁶

The term "life or limb" appeared again four years later, in 1219, in a "temporary ordinance" of the King's Council.¹⁴⁷ In the absence of trial by ordeal or combat, Henry III ordered England's judges to imprison persons suspected of felonies.¹⁴⁸ Judges were correspondingly instructed that the prisoners' "*vitae et membrorum*"—life or limb—was not to be jeopardized.¹⁴⁹ The reference provides a clear early example of the differentiation between punishments affecting life or limb and those involving lesser punitive measures, such as incarceration.

Dating from one generation after the creation of the Magna Carta, a court document directs the judges in the Tower of Lon-

141. Cf. *supra* notes 117–24 and accompanying text (discussing the lack of records from the First Congress explaining the wording of the Double Jeopardy Clause).

142. GEORGE C. THOMAS, III, *DOUBLE JEOPARDY: THE HISTORY, THE LAW* 120 (1998).

143. WILLIAM SHARP MCKECHNIE, *MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN* 359–60 (2d ed. 1914).

144. *Id.* at 359. If the accuser lost the battle, then the result was considered just as he was thereby proven to be a perjurer. *Id.* at 360.

145. *Id.* at 359 ("*Nichil detur vel capiatur de cetero pro brevi inquisitionis de vita vel membris, sed gratis concedatur et non negetur.*").

146. *Id.* at 361–62.

147. JAMES BRADLEY THAYER, *A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW* 79 (1896).

148. SIGLER, *supra* note 20, at 9.

149. THAYER, *supra* note 147, at 79.

don to observe the provisions of the Dictum of Kenilworth.¹⁵⁰ By separating “life or limb” from imprisonment with the disjunctive, “or,” it further reinforces that in early common law a punishment affecting “life or limb” was distinguishable from a punishment involving incarceration:

[I]f appeal or complaint of robbery and breach of the peace or homicide should be made before justices in eyre or of other offences in the time of the war against any who were against the late king or against others, or if presentments of such offences should be made as are wont [sic] to be made at the *capitula* of the crown, no one should lose life or limb or incur the penalty of perpetual imprisonment on these grounds, but that justice should be done in another manner concerning damages or things lost or carried off and trespasses according to the discretion of the late king’s justices. . . .¹⁵¹

Later English legal historians have discussed the meaning of life or limb at common law. Two such historians, Lord Edward Coke and Sir William Blackstone, are of particular importance because, as one commentator put it, “To colonial lawyers, Coke and Blackstone were names which had become synonymous with the common law itself.”¹⁵² Lord Coke, writing in 1681 on the history of English common law, affirms the common law distinction between life or limb punishments—referring to capital punishment—and lesser penalties.¹⁵³ Lord Coke explained that English criminal statutes employed the phrase life or member¹⁵⁴ to denote capital punishment, which Coke distinguishes from penalties involving loss of liberty or property:

[S]ome statutes . . . are not extended to the loss of life or member, but to imprisonment, lands and goods. But if an act of parliament saith, *Eeit judgement de vie et member* [judgment of life or limb], . . . in that case judgment of death shall be given, as in case of felony, viz. [sic] that he be hanged by the neck till he be dead. . . .¹⁵⁵

150. THE DICTUM OF KENILWORTH IN THE COURTS (1276), *reprinted in* 3 ENGLISH HISTORICAL DOCUMENTS, 1189–1327, at 580–81 (Henry Rothwell ed., 1996) (1975). The Dictum of Kenilworth, which stated the terms for peace between King Henry III and rebellious supporters of Simon de Montfort, can be found at THE DICTUM OF KENILWORTH (1266), *reprinted in* 3 ENGLISH HISTORICAL DOCUMENTS, 1189–1327, at 380–84, *supra*.

151. *Id.* at 580 (second emphasis added).

152. SIGLER, *supra* note 20, at 16.

153. See DEPARTMENT OF JUSTICE, OFFICE OF LEGAL POLICY, DOUBLE JEOPARDY AND GOVERNMENT APPEALS OF ACQUITTALS (1987), *reprinted in* 22 U. MICH. J.L. REFORM 831, 842 (1989) (noting that Coke equated “judgment of life or member [limb]” with felonies).

154. Coke’s use of the term member is synonymous with limb. It is based on his translation of the Latin *member* to English. Blackstone also used the word member as a synonym for limb. See *infra* text accompanying note 164.

155. J.H. THOMAS, 3 A SYSTEMATIC ARRANGEMENT OF LORD COKE’S FIRST INSTITUTE OF

Particular scrutiny should attend to Blackstone's treatment of the term "life or limb" because scholars and courts have attributed the language of the Double Jeopardy Clause directly to Blackstone.¹⁵⁶ In his *Commentaries on the Laws of England*, written a decade before the American Revolution, Blackstone engages in a lengthy discussion of life and limbs.¹⁵⁷

Blackstone gives the word "life" literal and civil meanings. It is expressed in its literal meaning as "natural life being . . . the immediate donation of the great [c]reator."¹⁵⁸ In addition to natural life, the common law contemplated a "civil life" consisting of all the rights and responsibilities of lawfully living in society.¹⁵⁹ Life could be lost through natural death, be forfeited by choice, or be taken by the state.¹⁶⁰ A man could choose to become civilly dead by becoming a monk, at which time his worldly possessions and rights passed to his heirs as if he were naturally dead.¹⁶¹ Civil death could also occur by operation of law if the person was "banished or abjured the realm."¹⁶² Natural life could be taken by government authority when it is "forfeited for the breach of those laws of society, which are enforced by the sanction of capital punishments."¹⁶³

Limbs are given only a literal description by Blackstone: "[T]hose members which may be useful to [a person] in fight, and the loss of which alone amounts to mayhem by the common law."¹⁶⁴ According to Blackstone, no individual has the authority to deprive a person of life or limb, and "the common law [of England] does never inflict any punishment extending to *life or limb*, unless upon the highest necessity."¹⁶⁵

THE LAWS OF ENGLAND 448-49 (1836).

156. See, e.g., *Benton v. Maryland*, 395 U.S. 784, 795 (1969); THOMAS, *supra* note 142, at 7.

157. WILLIAM BLACKSTONE, 1 COMMENTARIES *129-34.

158. *Id.* at *133.

159. *Id.* at *132.

160. See *id.* at *132-33.

161. *Id.* at *132.

162. *Id.*

163. *Id.* at *133.

164. *Id.* at *130. The offense of mayhem was committed by causing a severe injury to the victim that deprived the victim of the use of any of her arms or legs. 3 BLACKSTONE, *supra* note 157, at *121.

165. 1 BLACKSTONE, *supra* note 157, at *133 (emphasis added).

A passage from Blackstone's Commentaries is often erroneously cited in support of the proposition that the wording of the Double Jeopardy Clause is intended to extend its scope to all acquittals—capital or otherwise:¹⁶⁶

[T]he plea of *autrefois acquit*, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for the same offence [sic]. And hence it is allowed as a consequence, that when a man is once fairly found not guilty upon any indictment, or other prosecution, before any court having competent jurisdiction of the offence, he may plead such acquittal in bar of any subsequent accusation for the same crime.¹⁶⁷

According to the generally-accepted argument, Blackstone's phrase "jeopardy of life" is a term of art referring to any punishment.¹⁶⁸ The incorporation of the term "life or limb" into the Fifth Amendment is therefore nothing more than Blackstone's term for the possibility of punishment—jeopardy of life—with the addition of "or limb" for alliterative flourish.¹⁶⁹ The reliance on the above quoted passage for this purpose, however, is misplaced. It disregards the fact that Blackstone frames the "universal maxim" in terms of "jeopardy of his *life*." Far from being a simple term of art, Blackstone ascribed a very particular meaning to the word *life*;¹⁷⁰ *life* means natural or civil life. In particular, it is natural life that Blackstone states is imperiled by the "breach of [the] laws of society."¹⁷¹ Life is not lost by incarceration. Jeopardizing life, as it is defined by Blackstone, therefore must involve the threat of natural death or banishment.

Further, commentators who cite Blackstone's "jeopardy of life" passage¹⁷² as the model for the Double Jeopardy Clause fail to give any significance to the Framers' decision to write "jeopardy of life *or limb*" into the Fifth Amendment. Supposing that the Framers had the writings of Blackstone in mind when they were constructing the Double Jeopardy Clause, then presumably they

166. See, e.g., *Benton v. Maryland*, 395 U.S. 784, 795 (1969).

167. 4 BLACKSTONE, *supra* note 157, at *335.

168. See THOMAS, *supra* note 142, at 121–22.

169. See *id.*

170. See *supra* text accompanying notes 158–63.

171. 1 BLACKSTONE, *supra* note 157, at *133.

172. See *supra* text accompanying note 167.

were also cognizant of Blackstone's discussion of "life or limb."¹⁷³ A plausible rationale for the phrase "jeopardy of life or limb" in the Fifth Amendment becomes apparent if the phrase is deconstructed into two constitutive parts: "jeopardy of life" and "life or limb"—each derived from separate passages in Blackstone's *Commentaries*. By employing Blackstone's "jeopardy of life" phrase, the Framers adopted Blackstone's reasoning that "the plea of *autrefois acquit* . . . is grounded on this universal maxim . . . that no man is to be brought into jeopardy of his life, more than once, for the same offense."¹⁷⁴ However, the Framers qualified this constitutionalization of the *autrefois acquit* plea by appending "life or limb," which restricted its application to cases involving the death penalty.

C. "Life or Limb" in American Usage Prior to *Ex parte Lange*¹⁷⁵

An examination of the use of "life or limb" by contemporaries and near-contemporaries of the First Congress should prove beneficial to the task of ascertaining its intended meaning. In the latter part of the eighteenth and the early part of the nineteenth centuries debate regarding the meaning of the phrase was generally confined to the courts, which struggled to reconcile the common law tradition of the *autrefois* pleas with the wording of the Double Jeopardy Clause. When used in other contexts, such as in writings and statutes, "life or limb" commonly appeared as a synonym for capital punishment, which is consistent with its English usage dating back to the Magna Carta.

1. "Life or Limb" in the Judiciary

In the decades following the passage of the Fifth Amendment, there was no consensus in the courts on the meaning of "life or limb." Jurisdictions did not agree whether the Double Jeopardy Clause's drafters had intended life or limb to have its generally understood meaning or whether they had made an inartful attempt to constitutionalize the *autrefois* pleas. Based on their

173. See *supra* notes 158–65 and accompanying text.

174. 4 BLACKSTONE, *supra* note 157, at *335.

175. The *Ex parte Lange* decision in 1874 is a natural cutoff point for researching usage of "life or limb" since the Court laid down the phrase's authoritative meaning in that case. See *supra* text accompanying notes 134–36.

reading of the phrase, courts in the early nineteenth century tended to espouse one of three interpretations of the Double Jeopardy Clause.¹⁷⁶

One group of courts adopted the construction of the Double Jeopardy Clause that would later be embraced in *Ex parte Lange*, and which continues to be the prevailing view today.¹⁷⁷ Largely disregarding the importance of the phrase “life or limb,” these courts maintained that the Double Jeopardy Clause prevented reprosecution of an acquitted defendant for any offense, including misdemeanors.¹⁷⁸ In practical effect, this interpretation of the Double Jeopardy Clause imported many common law double jeopardy principles into the Fifth Amendment.¹⁷⁹

A second group of courts argued persuasively that the phrase, “life or limb,” limited the scope of the Double Jeopardy Clause to felonies.

The expression, *jeopardy of limb*, was used in reference to the nature of the offence, and not to designate the punishment for an offence; for no such punishment as loss of limb was inflicted by the laws of any of the states, at the adoption of the constitution. Punishment by deprivation of the limbs of the offender would be abhorrent to the feelings and opinions of the enlightened age in which the constitution was adopted, and it had grown into disuse in *England*, for a long period antecedently. We must understand the term, “jeopardy of limb,” as referring to offences which, in former ages, were punishable by dismemberment, and as intending to comprise the crimes denominated in the law, felonies.¹⁸⁰

176. Groupings represent the author’s generalizations. To address all the nuances of judicial interpretations of the Double Jeopardy Clause in the early nineteenth century would be beyond the scope of this comment.

177. See *Texas v. Cobb*, 532 U.S. 162, 173 (2001) (“[T]he Fifth Amendment’s Double Jeopardy Clause . . . prevents multiple or successive prosecutions for the ‘same offence.’”).

178. See, e.g., *Wyatt v. State*, 1 Blackf. 257, 258 n.1 (Ind. 1823); *Commonwealth v. Olds*, 15 Ky. (5 Litt.) 137, 137 (1824) (suggesting that double jeopardy protection would have been available to a defendant charged with failing to register a billiard table if a final judgment had been pronounced against him in his initial trial).

179. The common law doctrine was formerly said to be that a jury once sworn and charged in any criminal case could not be discharged without giving a verdict. And it was contended that this doctrine is recognized by the 5th Amendment of the U.S. Constitution. It is now considered, however, that the common law is that *no one shall be twice tried for the same offense*.

Wyatt, 1 Blackf. at 258 n.1 (citation omitted) (emphasis added).

180. *People v. Goodwin*, 18 Johns. 187, 201 (N.Y. Sup. Ct. 1820); see also *Commonwealth v. Purchase*, 19 Mass. (1 Pick.) 521, 523 (1824) (“So in the amendment to the constitution of the United States, which provides that no person shall ‘be subject, for the same offence, to be twice put in jeopardy of life or limb;’ all felonies, whether capital or other-

By limiting the double jeopardy protection to felonies, these courts ascribed meaning to "life or limb," rather than relegating the phrase to surplusage. Their conclusion, however, was off the mark. Properly understood in its historical context "life or limb" referred to a mode of punishment rather than a degree of crimes.¹⁸¹

A third group of courts more faithfully applied the carefully chosen wording of the Double Jeopardy Clause. These courts held that the drafters of the Fifth Amendment intended "life or limb" to have its commonly accepted meaning, so that the Double Jeopardy Clause was restricted to capital cases where life and limb were literally in jeopardy.¹⁸² Justice Joseph Story fell into this latter category, although he appears to have held a contrary view at one point.

Justice Story published *Commentaries on the Constitution of the United States* in 1833.¹⁸³ In the *Commentaries*, Story explains the meaning of the phrase "to be twice put 'in jeopardy of life and limb.'"¹⁸⁴ He attributes the principle to the common law and defines it: "[A] party shall not be tried a second time for the same offence, after he has once been convicted, or acquitted of the offence charged. . . ." ¹⁸⁵ Story makes no reference to the degree of the offense charged, with the inference being that he understood the Double Jeopardy Clause as applying to both capital and non-capital offenses. This language, however, is at odds with his ruling just one year later in the case of *United States v. Gibert*.¹⁸⁶ In *Gibert*, Story grapples with the meaning of life or limb:

wise, being included in that provision.").

181. See *supra* Part III.A.

182. See *United States v. Gibert*, 25 F. Cas. 1287, 1294 (C.C.D. Mass. 1834) (No. 15,204); *State v. Graham*, 1 Ark. 428, 434-35 (1839); see also *Commonwealth v. Simpson*, 165 A. 498, 500 (Pa. 1933) (refusing to abandon the view that the Double Jeopardy Clause applied only to capital offenses in spite of the Supreme Court's ruling in *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873)).

183. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1833).

184. *Id.* at 659 (quoting U.S. CONST. amend. V).

185. *Id.*

186. See 25 F. Cas. 1287 (C.C.D. Mass. 1834) (No. 15,204).

When, in a constitutional sense, can a person be said to be twice put in jeopardy of life or limb? If resort should be had to the grammatical structure and meaning of the words, the natural interpretation would certainly seem to be, that no person should be twice put upon trial for any offence, for which he would be liable, upon conviction, to be punished with the loss of life or limb;—for jeopardy means hazard, danger, or peril; and when a party is put upon trial for an offence punishable with the loss of life or limb, and he stands for his deliverance upon the verdict of the jury, he is thereby put in jeopardy, hazard, danger or peril of his life or limb.¹⁸⁷

Story concludes that the Double Jeopardy Clause prohibits new trials only in capital cases.

My judgment is, that the words in the constitution, “Nor shall any person be subject, for the same offence, to be twice put in jeopardy of life or limb,” mean that no person shall be tried a second time for the same offence, where a verdict has been already given by a jury. The party tried is in a legal sense, as well as in common sense, in jeopardy of his life, when a lawful jury have once had charge of his offence *as a capital offence* upon a good indictment, and have delivered themselves of the charge by a verdict.¹⁸⁸

In *In re Spier*,¹⁸⁹ the Supreme Court of North Carolina offered a very plausible rationale to differentiate the common law double jeopardy standard and the purpose of the Fifth Amendment. The *Spier* court affirmed the principle that “a citizen shall not be twice put in danger of his life upon the same charge for a capital offense.”¹⁹⁰ It then questioned why courts in other jurisdictions had given the Double Jeopardy Clause no meaning independent of the common law *autrefois* pleas.

[I]t would seem strange that a familiar maxim of the common law, admitted for ages without denial or controversy, should require a solemn constitutional sanction for the more effectual protection of the citizens. The pleas of “heretofore convicted” [*autrefois convict*] and “heretofore acquitted” [*autrefois acquit*] are interwoven with our criminal law. . . . Could the amendment to the Constitution of the United States mean no more than this, when it provided that “no

187. *Id.* at 1294. Perhaps Justice Story decided to follow his own advice from nearly thirty years earlier: “The words [of the Constitution] are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged.” *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 326 (1816).

188. *Gibert*, 25 F. Cas. at 1301–02 (emphasis added). Justice Story argued further that the Double Jeopardy Clause applied to the appeal of a conviction, as well as an acquittal.

189. 12 N.C. (1 Dev.) 331 (1828).

190. *Id.* at 332.

person shall be subject for the same offense to be twice put in jeopardy of life or limb"? Did the constitutions of several of the States mean no more when they adopted the same article? As the common law of every State already protects the accused against a second trial
¹⁹¹

The *Spier* court concluded that the capital defendant's life was in jeopardy as soon as the jury was impaneled, and the protection of the Double Jeopardy Clause attached concurrently.¹⁹² By contrast, the right to plead *autrefois acquit* only arose once a final judgment had been entered.¹⁹³ Consequently, the Double Jeopardy Clause prevented a jury, once impaneled, from being dismissed without cause.¹⁹⁴ Such a practice, if allowed, could be manipulated to "operate oppressively to the prisoner."¹⁹⁵

United States v. Shoemaker,¹⁹⁶ a federal circuit court case decided in 1840, echoed the reasoning of *Spier* by giving the Double Jeopardy Clause a meaning separate from common law notions of double jeopardy. In a per curiam opinion likely written by Supreme Court Justice John McLean,¹⁹⁷ the court explained that it was not the purpose of the Double Jeopardy Clause to prevent subsequent prosecutions in non-capital cases; the common law already served such a purpose: "The offence charged against the defendant does not subject him, if convicted, to the loss of either life or limb, and it is not, therefore, within this provision of the constitution; but the rights of the defendant are equally guarded by

191. *Id.* at 337 (quoting U.S. CONST. amend. V).

192. *Id.* ("When the jury are impaneled [sic] upon the trial of a person charged with a capital offense, and the indictment is not defective, his life is in peril or jeopardy, and continues so throughout the trial.")

193. *Id.* at 338.

194. *Id.* at 337.

195. *Id.* at 338.

196. 27 F. Cas. 1067 (C.C.D. Ill. 1840) (No. 16,279).

197. The federal circuit court system of the time was quite different from the one in place today. See 5 CARL B. SWISHER, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 249-54 (1974). Supreme Court justices spent roughly half the year "riding circuit," which involved traveling to various areas of the United States to preside over appeals from the federal district courts. *Id.* at 248. Only one justice was assigned to each of the nine circuits. *Id.* at 249. Justice McLean was riding the Seventh Circuit, which included Illinois, in 1840. *Id.* at 249. So it is reasonable to assume that Justice McLean presided over the *Shoemaker* case. Moreover, the author of the opinion states, "From the limited access to books, which I have had at this place, I can find no case in point," *Shoemaker*, 27 F. Cas. at 1069, which suggests that the author was Justice McLean visiting the area rather than a local district judge. It is, however, possible that the opinion was penned by a district judge, who would have handled cases himself if the Supreme Court Justice riding circuit were unable to attend court. SWISHER, *supra*, at 248.

established principles.”¹⁹⁸ The “established principle[]” the opinion referred to was the common law plea of *autrefois acquit*, which was available to the defendant in *Shoemaker* to avoid a vexatious second prosecution for theft of mail.¹⁹⁹

2. In the Words of the Framers

The Framers of the Constitution were aware of the significance of the phrase “life or limb.” This proposition is evidenced by writings which make clear that the Framers understood “life or limb” as a synonym for capital punishment. Thomas Jefferson references life or limb in a 1778 letter to George Wythe.²⁰⁰ In the letter, Jefferson includes a draft of a bill he penned for the Virginia General Assembly on the subject of setting punishments for crimes that had been, up until that point, punishable by death.²⁰¹ In the bill’s preface, Jefferson states the principle that “no crime shall be henceforth punished by deprivation of life or limb, except those hereinafter ordained to be so punished.”²⁰² Jefferson defines life or limb as “the punishment of cutting off the hand of a person . . . [or] death.”²⁰³

John Adams employs the phrase in similar fashion when writing about his misapprehensions of the power of Parliament. Adams makes a distinction between punishments involving life or limb and those involving deprivation of liberty: “[I]f Parliament can erect dioceses and appoint bishops, they may introduce the whole hierarchy, establish tithes, forbid marriages and funerals, establish religions, forbid dissenters, make schism heresy, impose

198. *Shoemaker*, 27 F. Cas. at 1068.

199. *Id.* at 1069 (“The plea of *autrefois acquit* consists of matter of record, and matter of fact If a defendant be acquitted on the misdirection of the judge, still his acquittal may be pleaded.”). In the case, the prosecutor had entered a *nolle prosequi*, without cause, before the jury returned a verdict. *Id.* The court held that the defendant’s *autrefois acquit* plea could not be “technically sustained” because the defendant had not actually been acquitted. *Id.* However, because the prosecutor’s actions “must be considered equivalent to a verdict of acquittal,” the court allowed the plea of former acquittal. *Id.* at 1069–70.

200. See Letter from Thomas Jefferson to George Wythe (Nov. 1, 1778), in 1 MEMOIR, CORRESPONDENCE, AND MISCELLANIES: FROM THE PAPERS OF THOMAS JEFFERSON 119, at 121 (Thomas Jefferson Randolph ed., 1829).

201. *Id.* at 120.

202. *Id.* at 121.

203. *Id.* at 121 n.*.

penalties extending to life and limb as well as to liberty and property.”²⁰⁴

3. Statutory Treatments of “Life or Limb”

Various state statutes in effect prior to *Ex parte Lange* incorporated life or limb as a synonym for capital punishment.²⁰⁵ In South Carolina, for instance, the penalty for a slave harboring a runaway slave was “corporal punishment, not extending to life or limb. . . .”²⁰⁶ The distinction makes it clear that punishments involving “life or limb” are distinguishable from corporal punishment in general. A similar provision under Texas law for the punishment of slaves stated, “That [all crimes, below those denominated capital] known to the common law of England, committed by slaves, shall be triable . . . and on conviction shall be punished at the discretion of said courts, so as not to extend to life or limb.”²⁰⁷ In Florida, the penalty for a slave committing a misdemeanor, which by definition could not result in capital punishment, was “punishment of which shall not affect life or limb.”²⁰⁸ Under Massachusetts law, homicide was justifiable only if the actor’s “life or limb”²⁰⁹ was threatened, which the act designates as a “criminal aggression or attempt . . . involving danger of mutila-

204. Letter from John Adams to Dr. J. Morse (Dec. 2, 1815), in 10 THE WORKS OF JOHN ADAMS 185 (1856).

205. “Life or limb” is not typically used to signify a manner of judicial punishment today. However, many contemporary state constitutions and statutes continue to use the phrase “life or limb” to denote grievous bodily harm or death in other contexts. See, e.g., ARIZ. CONST. art. XVIII, § 2 (“nor shall any child under sixteen years of age be employed underground in mines, or in any occupation injurious to health or morals or hazardous to life or limb”); COLO. CONST. art. V, § 25(a)(1) (limiting workdays to eight hours in professions “that the general assembly may consider injurious or dangerous to health, life or limb”); MO. REV. STAT. § 217.360.1(4) (2004) (prohibiting from prisons “[a]ny gun, knife, weapon, or other article . . . [that may] endanger . . . the life or limb of any offender or employee of such a center”); TENN. CODE ANN. § 55-10-616(c) (2004 & Supp. 2006) (allowing a non-permitted driver to operate a motor vehicle “in situations of apparent extreme emergency which require such operation to save life or limb”).

206. B.C. PRESSLEY, THE LAW OF MAGISTRATES AND CONSTABLES, IN THE STATE OF SOUTH CAROLINA 279 (1848).

207. HOWELL COBB, A SCRIPTURAL EXAMINATION OF THE INSTITUTION OF SLAVERY IN THE UNITED STATES WITH ITS OBJECTS AND PURPOSES 139 (1856) (brackets in original).

208. GEORGE M. STROUD, A SKETCH OF THE LAWS RELATING TO SLAVERY 27 (2d ed. 1856).

209. REPORT OF THE PENAL CODE OF MASSACHUSETTS ch. 7, at 24 n.bb (1844).

tion, loss of life, . . . destruction, maiming or disabling, or privation of the use or function of limb. . . .”²¹⁰

D. *Opening the Door to Reform by Restricting Double Jeopardy Protection to Capital Offenses*

The underlying principles served by the criminal justice system as a whole, and by the Double Jeopardy Clause in particular, are not entirely consistent. “[T]he central purpose of any system of criminal justice is to convict the guilty and free the innocent.”²¹¹ The Double Jeopardy Clause’s function is consistent with this purpose inasmuch as it prevents multiple trials of defendants, which ostensibly decreases the likelihood that innocent persons may be convicted.²¹² However, the other purpose of the criminal justice system—that the guilty be convicted—may be frustrated by a mechanical application of *Ex parte Lange*’s version of the Double Jeopardy Clause. A high price is paid when erroneous acquittals are allowed to remain uncorrected.

Protecting the innocent from erroneous conviction is not the sole purpose of the Double Jeopardy Clause; it serves as a restraint on potentially abusive governmental power.²¹³ As the Court stated in *Green v. United States*,²¹⁴ the Double Jeopardy Clause embodies the belief that,

the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.²¹⁵

Put more succinctly, the “core purpose of the [Double Jeopardy] Clause is to guard against a tyrannical state run amok.”²¹⁶

210. *Id.* at 24.

211. *Herrera v. Collins*, 506 U.S. 390, 398 (1993); see also John F. Wirenius, *A Model of Discretion: New York’s “Interests of Justice” Dismissal Statute*, 58 ALB. L. REV. 175, 175 (1994) (“The purpose of the criminal justice system is . . . to do justice in criminal cases.”).

212. *Arizona v. Washington*, 434 U.S. 497, 503–04 (1978).

213. See RUDSTEIN, *supra* note 10, at 39.

214. 355 U.S. 184 (1957).

215. *Id.* at 187–88.

216. *Gonzalez v. Justices of the Mun. Court*, 382 F.3d 1, 11 (1st Cir. 2004). The fear of abusive use of the courts was very real to the Framers of the Fifth Amendment, who

The competing objectives of the criminal justice system and the Double Jeopardy Clause—respectively to furnish the state with the tools to punish the guilty and to constrain prosecutorial power—are not incapable of reconciliation. Properly restricting the scope of the Double Jeopardy Clause’s protection to cases involving the threat of capital punishment—those cases in which the defendant should enjoy the highest degree of procedural protections from the possibility of wrongful conviction—would allow meaningful legislative reforms to double jeopardy along the English model.²¹⁷

England’s Criminal Justice Act of 2003 provides for multiple layers of procedural and substantive safeguards to ensure that the relaxed double jeopardy standards are not susceptible to abuse. The procedures specified in the Act to quash acquittals could be imported into the comparably structured American judicial system without difficulty. Undoubtedly, American courts would jealously administer the power to grant new trials, restricting it to instances when it was truly “in the interests of justice”²¹⁸ to afford a prosecutor a second bite at the apple.

Measured and thoughtful reforms would not radically alter the landscape of criminal procedure. The Double Jeopardy Clause would not be eviscerated if its scope was limited to cases involving capital punishment.²¹⁹ For lesser offenses, the practical effect of such a limitation would be negligible; presumably the common law pleas of *autrefois acquit* would be resurrected by criminal defense attorneys when the situation merited it.²²⁰ This practice has worked quite well in English criminal procedure for hundreds of

drafted the Double Jeopardy Clause largely in response to “horror at the wanton infliction of capital punishment in England” at the time. Limbaugh, *supra* note 131, at 67.

217. See *supra* Part II.B–C.

218. Criminal Justice Act, 2003, c. 44, § 79(1) (Eng. & Wales).

219. But see Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 YALE L.J. 1807, 1810–12 (1997) (arguing against a “hyperliteralist” interpretation of “life or limb”).

220. See William S. McAninch, *Unfolding the Law of Double Jeopardy*, 44 S.C. L. REV. 411, 414–15 n.17 (1993) (noting that the plea of *autrefois acquit* is still viable in most jurisdictions.). In the federal context, FED. R. CRIM. P. 11(a) could be swiftly amended to allow a former *acquit* plea. In the absence of an amendment to Rule 11, former *acquit* pleas could be entered in federal trials in a similar fashion to *Alford* pleas. Federal prosecutors are permitted to accept *Alford* pleas, which first arose in a state law context, see *North Carolina v. Alford*, 400 U.S. 25 (1970), in certain circumstances even though they are not listed under FED. R. CRIM. P. 11(a)(1). U.S. Department of Justice, United States Attorney Manual at 9-16.015, <http://www.usdoj.gov/usao/eousa/foiareadingroom/usam/title9/16mcrm.htm> (last visited Apr. 10, 2007).

years. Distinct benefits would be obtained by state and federal statutes patterned on the Criminal Justice Act of 2003, which would limit the availability of such pleas in appropriate situations where new and compelling evidence called the prior acquittal into doubt.

In the thirty-eight states that retain the death penalty,²²¹ the Double Jeopardy Clause would reassume the function the Fifth Amendment's Framers intended by affording capital defendants greater protections at trial. Capital defendants rightfully enjoy procedural safeguards not available to defendants on trial for lesser crimes because "[f]rom the point of view of the defendant, [capital punishment] is different in both its severity and its finality."²²² The potential consequences of an erroneous capital conviction are so high that they outweigh society's interest in the "truth-seeking" function of criminal trials.²²³ As the Framers of the Double Jeopardy Clause understood, when a defendant's life and limb are in jeopardy, it's best to err on the side of caution.

IV. CONCLUSION

The Supreme Court's interpretation of the Fifth Amendment is the greatest barrier to meaningful reform of American double jeopardy law. By making acquittals sacrosanct the Court has worked mischief upon the carefully chosen wording of the Fifth Amendment and allowed unjust verdicts to go uncorrected—such as the verdict which still permits admitted murderer Michael Lane to evade justice.²²⁴ Based on the historical evidence relating to the use of the term "life or limb," it is apparent that the phrase had a singular meaning in English common law. The ancient usage of the phrase was adopted into the American lexicon as a reference for capital punishment.²²⁵ A proper understanding of the First Congress's interpretation of the phrase "life or limb," which was purposefully written into the Double Jeopardy Clause to re-

221. U.S. Department of Justice, Capital Punishment Statistics, <http://www.ojp.usdoj.gov/bjs/cp.htm> (last visited Apr. 10, 2007).

222. *Gardner v. Florida*, 430 U.S. 349, 357 (1977). See generally Margaret Jane Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143 (1980) (discussing heightened procedural protections for capital defendants).

223. See Limbaugh, *supra* note 131, at 81.

224. See *supra* text accompanying notes 3–9.

225. See *supra* Part III.A–B.

strict the protection to capital cases, would allow meaningful reforms to take place. Acquittals that later turn out to be incorrect could therefore be revisited without contravening the Fifth Amendment.

A reasonable and just double jeopardy rule would have some safeguards built in to allow patently unjust results to be rectified. The English double jeopardy standard, described above,²²⁶ appears to strike the correct balance between protecting defendants' rights and ensuring the accuracy of criminal verdicts. Thoughtfully crafted legislation, using England's Criminal Justice Act of 2003 as a guide, should therefore be pursued. Double Jeopardy protection should be restricted to its proper scope by eliminating the protection in non-capital cases under very narrow circumstances: when new and compelling evidence arises post-acquittal that identifies the acquitted as the guilty party.

Justin W. Curtis

226. See *supra* Part II.B–C.