100 YEARS OF DOUBLE JEOPARDY EROSION: CRIMINAL COLLATERAL ESTOPPEL MADE EXTINCT

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I. INTRODUCTION

John Doe faces first-degree murder charges. Before the trial begins, the defense moves to suppress the evidence obtained during a search of defendant's home, alleging there was no probable cause for the issuance of the search warrant. The court rules in favor of the defendant and suppresses the evidence. The prosecution then dismisses the case without prejudice.

One week later, another search warrant is issued based on additional information that was "unavailable" when the first search warrant was issued. The same evidence is obtained, and the defendant is again charged with first-degree murder. Can the State relitigate the admissibility of the evidence?[1]

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1. The proceeding fact pattern resembles *State v. Seager*, 571 N.W.2d 204 (Iowa 1997). For a complete description of *Seager* see *infra* notes 148-69 and accompanying text.

The answer to this question will ultimately rest with the court's interpretation of criminal collateral estoppel. Collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit."[2] Several questions can cloud this otherwise clear definition of collateral estoppel. What issue was determined? Was the judgment valid? Was it final? Are the parties the same?

This Note assesses the problems created when the Supreme Court constitutionalized collateral estoppel under the Double Jeopardy Clause of the Fifth Amendment.[3] Part II traces a brief history of the Double Jeopardy Clause and looks at how modern interpretation of the clause provides no protection for criminal defendants. Part III examines the history of criminal collateral estoppel, examines current rigid application of the doctrine, and suggests how the courts can alter their path and restore the protection originally provided by these constitutional safeguards.

II. DOUBLE JEOPARDY

The perverse risk of being tried twice for the same crime was of such importance that it was included in the Bill of Rights.[4] The Fifth Amendment reads: "No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb . . . ."[5] The Supreme Court considered this protection so important that they interpreted it to protect people from even facing the "risk" of being twice punished for the same offense.[6]

A. *The History of Double Jeopardy*[7]

Commentators and judges have differed on the origin of our Double Jeopardy Clause.[8] Some have argued double jeopardy "seems to have been always embedded in the common law of England, as well as in the Roman law, and doubtless in every other system of jurisprudence, and, instead of having a specific origin, it simply

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2. Ashe v. Swenson, 397 U.S. 436, 443 (1970).

3. *Id.* at 445-46. It is this author's contention that the Supreme Court was wrong in constitutionalizing the doctrine of collateral estoppel. If the Court believed an Amendment was needed as an anchor for this common-law doctrine, the Fourteenth Amendment's guarantee of "fundamental fairness" would have been more appropriate. *See* U.S. CONST. amend. XIV.

4. U.S. CONST. amend V.

5. *Id.*

6. *See* Abney v. United States, 431 U.S. 651, 660-62 (1977).

7. This Part is merely a cursory glance at the roots of our Double Jeopardy Clause. For a more thorough analysis of the history of this doctrine see JAY A. SIGLER, DOUBLE JEOPARDY 1-37 (1969).

8. *Compare* SIGLER, *supra* note 7, at 4 (stating the Double Jeopardy Clause does not appear in the Magna Carta), *with* State v. Felch, 105 A. 23, 28 (Vt. 1918) (stating the Double Jeopardy Clause was given a place in the Magna Carta).

always existed."[9] While this proposition seems overstated, the doctrine, although somewhat different, started to appear in English law before it was incorporated into the United States Constitution.[10]

Double jeopardy first appeared in the United States in the Massachusetts Code of 1648,[11] but it was not until 1784 that the first state bill of rights expressly adopted the Double Jeopardy Clause.[12] This early form of double jeopardy was similar to early English law because it required an acquittal before jeopardy attached.[13] The first state bill of rights to resemble the Federal Double Jeopardy Clause, where jeopardy could attach without an acquittal, was the Pennsylvania Declaration of Rights of 1790.[14]

The early double jeopardy proposals to the Federal Constitution included the English law requirement of previous acquittal.[15] This requirement was eventually removed, however, and the First Congress with little debate adopted its present form.[16] The states were reluctant to accept the federal form of double jeopardy.[17] The Supreme Court finally forced the Fifth Amendment upon the states in *Benton v. Maryland*,[18] declaring that the federal guarantee against double jeopardy as provided

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9. Stout v. State *ex rel.* Caldwell, 130 P. 553, 558 (Okla. 1913).

10. *See* Turner's Case, 89 Eng. Rep. 158, 158 (K.B. 1676) (suggesting jeopardy attaches after an acquittal by a jury in a criminal trial precluding post verdict amendment of the indictment, while recognizing the allowance of amendments to "informations" at common law which are not criminal in nature); *see also* The King v. Mawbey, 101 Eng. Rep. 736, 746-47 (K.B. 1796) (stating a misdemeanor does not place the defendant in risk of life or limb). For a thorough history of English law see WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW (3d ed. 1927).

11. *See* SIGLER, *supra* note 7, at 22 (citing George L. Heskins, *Codification of the Law in Colonial Massachusetts: A Study in Comparative Law*, 30 IND. L.J. 1, 3-11 (1954)).

12. *See id.* at 23. This early Double Jeopardy Clause was part of the New Hampshire Constitution. *Id.*

13. *Id.* The New Hampshire Constitution reads "' [n]o subject shall be liable to be tried, after an acquittal, for the same crime or offence.'" *See id.* (quoting N.H. CONST. of 1784, art. I, § XVI, *reprinted in* RICHARD L. PERRY & JOHN C. COOPER, SOURCES OF OUR LIBERTIES 384 (1959)).

14. *See id.* The Pennsylvania Declaration reads: "No person shall, for the same offence, be twice put in jeopardy of life or limb." *See id.*; *see also* PERRY & COOPER, *supra* note 13, at 324-37.

15. SIGLER, *supra* note 7, at 27-29.

16. *Id.* at 32. England also removed the requirement of an acquittal prior to jeopardy attaching. The Queen v. Miles, 24 Q.B.D. 423, 431 (1890). "[W]here a criminal charge has been adjudicated upon by a Court having jurisdiction to hear and determine it, that adjudication, whether it takes the form of an acquittal *or conviction*, is final . . . and may be pleaded in bar to any subsequent prosecution for the same offence." *Id.* (emphasis added).

17. SIGLER, *supra* note 7, at 7.

18. Benton v. Maryland, 395 U.S. 784 (1969).

in the Fifth Amendment was enforceable against the states through the Fourteenth Amendment.[19]

In *North Carolina v. Pearce*,[20] the Supreme Court outlined three distinct interests as being expressly protected under double jeopardy: "[1] It protects against a second prosecution for the same offense after acquittal. [2] It protects against a second prosecution for the same offense after conviction. And [3] it protects against multiple punishments for the same offense."[21] The Court later expressed an additional recognition that "[w]here successive prosecutions are at stake, the guarantee serves 'a constitutional policy of finality for the defendant's benefit.'"[22]

B. *The "Same Elements" Test*

Early case law interpreted when jeopardy attached,[23] expounded on "life or limb,"[24] and determined when charges were for the "same offense."[25] The Court rejected many tests for determining when charges were for the same offense.[26] The

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19. *Id.* at 787. For a discussion of the inherent conflict between double jeopardy and federalism see LEONARD G. MILLER, DOUBLE JEOPARDY AND THE FEDERAL SYSTEM (1968).

20. North Carolina v. Pearce, 395 U.S. 711 (1969), *overruled on other grounds by* Alabama v. Smith, 490 U.S. 794 (1989).

21. *Id.* at 717.

22. Brown v. Ohio, 432 U.S. 161, 165 (1977) (quoting United States v. Jorn, 400 U.S. 470, 479 (1971)).

23. *See* United States v. Perez, 22 U.S. (9 Wheat.) 256, 256 (1824) (holding that dismissal of the jury prior to their reaching a verdict "constitutes no bar to further proceedings, and gives no right of exemption to the prisoner from being again put upon trial"); Kelly v. United States, 27 F. 616, 617 (D. Me. 1885) ("It is well settled, however, in the federal courts and in most of the state courts that the discharge of the jury by the court, where they are unable to agree, without the consent of the accused, is no bar to any future trial for the same offense."); United States v. Herbert, 26 F. Cas. 284, 286 (C.C.D.D.C. 1836) (No. 15,354) ("[A] former conviction cannot be pleaded in bar unless it has been followed by judgment . . . .").

24. United States v. Keen, 26 F. Cas. 686, 687 (C.C.D. Ind. 1839) (No. 15,510) (stating misdemeanors cannot be said to place someone in danger of "life or limb").

25. *See* Dixon v. Washington, 7 F. Cas. 766, 766 (C.C.D.D.C. 1830) (No. 3,935) ("[T]he keeping of a faro-table . . . is a single offence, although continued from day to day for many days . . . ."); United States v. Hood, 26 F. Cas. 369, 369 (C.C.D.D.C. 1817) (No. 15,385) (holding by-law of the municipality could not repeal the general law of the land because the two offenses differed); United States v. Burch, 24 F. Cas. 1300, 1300 (C.C.D.D.C. 1801) (No. 14,683) (finding "[t]he keeping of a disorderly house is a single offence, and one conviction is a bar . . . at any time prior to the finding of the indictment"). *But see* Blockburger v. United States, 284 U.S. 299, 302 (1932) ("Each of several successive sales constitutes a distinct offense, however closely they may follow each other."); United States v. Letterlough, 63 F.3d 332, 337 (4th Cir. 1995) (holding the defendant could be convicted of separate offenses for selling drugs to the same undercover agent on two occasions separated by 90 minutes).

26. *See, e.g.*, *Ex Parte* Nielsen, 131 U.S. 176, 188-90 (1889) (holding that a conviction of unlawful cohabitation is a bar to "subsequent prosecution for the crime of adultery").

"identical statutory offense" test in *Ex parte Nielsen*[27] was rejected by the Court,[28] as was the "same evidence" test by the legislature.[29] Not until *Blockburger v. United States*[30] was any test uniformly followed.[31] In establishing the same elements test, the *Blockburger* Court stated:

> Each of the offenses created requires proof of a different element. The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.[32]

As a result of *Blockburger*, double jeopardy bars successive prosecutions for greater and lesser included offenses,[33] regardless of the order of conviction.[34]

An exception to the rule barring successive prosecution for lesser or greater included offenses may occur when new evidence is discovered after the conviction for the lesser included offense,[35] or if the defendant pleads guilty to a lesser included offense in a multicount indictment.[36] Courts determining whether offenses are greater or lesser included offenses focus on the statutory elements of each offense.[37]

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27. *Ex parte* Nielsen, 131 U.S. 176 (1889).

28. *Id.* at 189-90.

29. MODEL PENAL CODE §§ 1.07(2), 1.09(1)(b) (Proposed Official Draft 1962) (replacing "same evidence" test with "same transaction" test). For a discussion of the history of the tests used by the Supreme Court in attempting to define "same offense" under double jeopardy see James M. Herrick, Note, *Double Jeopardy Analysis Comes Home: The "Same Conduct" Standard in* Grady v. Corbin, 79 KY. L.J. 847, 849-50 (1991).

30. Blockburger v. United States, 284 U.S. 299 (1983).

31. *See id.* at 304.

32. *Id.*

33. *See* Brown v. Ohio, 432 U.S. 161, 169-70 (1977) (holding previous plea and sentence for joyriding demanded reversal for conviction of the greater offense of auto theft); Costo v. United States, 904 F.2d 344, 348 (6th Cir. 1990) (holding previous conviction of actual distribution a bar to prosecution of lesser included offense of attempted distribution). *But see* Lowery v. Estelle, 696 F.2d 333, 341-42 (5th Cir. 1983) (holding the conviction of a lesser included offense that is subsequently set aside on appeal does not bar the prosecution of the greater included offense).

34. *See* Brown v. Ohio, 432 U.S. at 168.

35. Jeffers v. United States, 432 U.S. 137, 152 (1977); *see also* United States v. Stearns, 707 F.2d 391, 393-94 (9th Cir. 1983) (holding conviction for murder of boat's owners was not barred by previous conviction for theft of the boat when bodies were discovered after the theft conviction).

36. Ohio v. Johnson, 467 U.S. 493, 501-02 (1984); *see also* United States v. Quinones, 906 F.2d 924, 928 (2d Cir. 1990) (pleading guilty to conspiracy and possession counts did not bar a subsequent prosecution for the gun count).

37. *See* Yparrea v. Dorsey, 64 F.3d 577, 580 (10th Cir. 1995) (holding "larceny is not a lesser included offense of burglary"); United States v. Conley, 37 F.3d 970, 976-77 (3d Cir. 1994) (holding money laundering was not a lesser included offense of conducting illegal gaming business).

On a few occasions, the Supreme Court has taken a very strict reading of the *Blockburger* test and required the lesser included offense always be a part of the greater offense,[38] although this requirement seems almost unattainable.

With the increased passage of laws, both at the state and federal level, one should be able to see the shortcoming of *Blockburger*'s "same element" test.[39] Under *Blockburger*, seldom will two offenses have the same elements.[40] Nor, under the strict reading, will one offense "always" be a lesser or greater included offense of another.

C. *Emergence of the "Same Conduct" Test*

The concept of the same conduct test, sometimes referred to as the same transaction test, appeared in early drafts of the Model Penal Code.[41] Professor Wechsler, reporter for the Model Penal Code, stated "'this has been designed to cast the balance in favor of cleaning up the charges against a particular [person] at one time . . . .'"[42] This would eliminate judicial waste and the expense of multiple trials.

Although the concept of joinder was quickly adopted under civil law,[43] it was not until *Ashe v. Swenson*[44] that the concept appeared in a criminal setting.[45] While

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38. *Compare* Illinois v. Vitale, 447 U.S. 410, 419 (1980) (holding careless failure to slow down is not always a necessary element of manslaughter by an automobile), *with* Whalen v. United States, 445 U.S. 684, 694 (1980) (holding conviction of felony-murder bars the subsequent conviction of the felony), *and* Harris v. Oklahoma, 433 U.S. 682, 682 (1977) (per curiam) (holding felony-murder conviction bars a subsequent felony conviction). In *Whalen*, Justice Rehnquist believed that because felony-murder did not always require the proof of robbery, the successive prosecution of the robbery was not a lesser included offense. Whalen v. United States, 445 U.S. at 708-11 (Rehnquist, J., dissenting).

39. *See generally* Susan R. Klein & Katherine P. Chiarello, *Successive Prosecutions and Compound Criminal Statutes: A Functional Test*, 77 TEX. L. REV. 333, 355-83 (discussing the conflict between the same element test and statutory elemental construction).

40. Imagine if the legislature passed two statutes, identical except for one element. Statute A required that the crime be committed while the perpetrator was wearing a "right" shoe. Statute B required that the crime be committed while the perpetrator was wearing a "left" shoe. Under current double jeopardy analysis, these statutes would not contain the same elements and neither would be the lesser or greater included offense of the other. Therefore, acquittal of one charge would not bar a subsequent prosecution for the other.

41. *See* MODEL PENAL CODE § 1.08 (Tentative Draft No. 5, 1956), *reprinted in* Harlan R. Harrison, *Federalism and Double Jeopardy: A Study in the Frustration of Human Rights*, 17 U. MIAMI L. REV. 306, 339 n.176 (1963).

42. Harrison, *supra* note 41, at 339 n.177 (quoting 1956 A.L.I. PROC. 139).

43. *See* FED. R. CIV. P. 13(a) (requiring joinder of all counterclaims arising from the same transaction or occurrence); FED. R. CIV. P. 14(a) (requiring joinder of third-party defendants); FED. R. CIV. P. 18(a) (permitting broad joinder of claims, counterclaims, cross-claims, and third-party claims); *see also* United Mine Workers v. Gibbs, 383 U.S. 715, 725-27 (1966) (establishing the concept of pendant jurisdiction in furtherance of broad joinder rules).

the majority decided the case under the theory of criminal collateral estoppel,[46] Justice Brennan, in a concurring opinion, thought the case could be decided without collateral estoppel under a traditional double jeopardy analysis.[47] To achieve this end, Justice Brennan introduced the same conduct test.[48]

Justice Brennan believed the Double Jeopardy Clause required the prosecution, except under a few exceptions, to join all the charges that grow out of a single criminal act, occurrence, episode, or transaction against the defendant in one proceeding.[49] Believing the same evidence test was intolerable,[50] he stated judicial economy required a policy against vexatious multiple prosecutions.[51] This idea was reiterated by the Court:

> Permitting repeated litigation of the same issue as long as the supply of unrelated defendants holds out reflects either the aura of the gaming table or "a lack of discipline and of disinterestedness on the part of the lower courts, hardly a worthy or wise basis for fashioning rules of procedure."[52]

Justice Brennan, usually joined by Justice Marshall, voiced his opinion for the "same transaction" test to be applied to double jeopardy claims in several cases following *Ashe*.[53] Finally, in *Grady v. Corbin*,[54] Justice Brennan was able to convince the majority to adopt the single transaction test.[55]

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44. Ashe v. Swenson, 397 U.S. 436 (1970).
45. *See id.* at 443.
46. *Id.* at 445.
47. *Id.* at 449 (Brennan, J., concurring).
48. *Id.* at 453-54 (Brennan, J., concurring).
49. *Id.* (Brennan, J., concurring).
50. *Id.* at 452 (Brennan, J., concurring).
51. *Id.* at 456 (Brennan, J., concurring); *see also* Sucher v. Kutscher's Country Club, 493 N.Y.S.2d 829, 832 (App. Div. 1985) ("Collateral estoppel or issue preclusion is founded upon policy considerations and judicial recognition of aims which seek, inter alia, to conserve the resources of the courts and litigants.").
52. Blonder-Tongue Lab., Inc. v. University of Ill. Found., 402 U.S. 313, 329 (1971) (quoting Kerotest Mfg. Co. v. C-O-Two Co., 342 U.S. 180, 185 (1952)); *see also* Green v. United States, 355 U.S. 184, 187 (1957) ("The underlying idea . . . is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual . . . , thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity . . . .").
53. *See* Dowling v. United States, 493 U.S. 342, 354-55 (1990) (Brennan, J., dissenting); Harris v. Oklahoma, 433 U.S. 682, 683 (1977) (per curiam) (Brennan, J., concurring); Brown v. Ohio, 432 U.S. 161, 170 (1977) (Brennan, J., concurring); Simpson v. Florida, 403 U.S. 384, 387 (1971) (per curiam) (Brennan, J., concurring).
54. Grady v. Corbin, 495 U.S. 508 (1990), *overruled by* United States v. Dixon, 509 U.S. 688 (1993). For a more thorough analysis of *Grady v. Corbin*, see James K. Gatz, Note, Grady v. Corbin: *A New Approach for Insuring Defendants' Fifth Amendment Rights in Successive*

The *Grady* majority held 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."[56] In reaching this conclusion, the Court relied on *Illinois v. Vitale*,[57] where Justice White, writing for the majority, stated:

> "[I]t may be that to sustain its manslaughter case the State may find it necessary to prove a failure to slow or to rely on conduct necessarily involving such failure; it may concede as much prior to trial. In that case, because Vitale has already been convicted for conduct that is a necessary element of the more serious crime for which he has been charged, his claim of double jeopardy would be substantial under *Brown* and our later decision in *Harris v. Oklahoma*."[58]

In short, the majority believed the prosecution of an offense that contained an element that a later prosecution intended to rely on, would necessarily bar that later prosecution—all charges relating to the same transaction, episode, or occurrence must be brought at the same proceeding.[59]

The majority did not do away with the *Blockburger* test but instead limited it to be only a test of statutory construction—an aid in determining if the legislature intended to allow multiple punishments—not for determining if the legislature provided for multiple offenses.[60] While the majority believed the *Blockburger* test was only the first step in determining what constituted the same offense,[61] the dissenting Justices believed the *Blockburger* test was the only step when interpreting the Double Jeopardy Clause.[62]

D. *Return to "Same Elements" Test*

Justice Brennan's victory, however, was very short lived.[63] Only three years passed before *United States v. Dixon*[64] did away with the extra analysis of the same

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Prosecutions for Separate Offenses Arising from One Incident or the Supreme Court Builds Another Twist in the Double Jeopardy Clause Maze, 36 ST. LOUIS U. L.J. 769 (1992), and Tat Man J. So, Comment, *Double Jeopardy, Complex Crimes and* Grady v. Corbin, 60 FORDHAM L. REV. 351 (1991).

55. *See* Grady v. Corbin, 495 U.S. at 510.

56. *Id.*

57. Illinois v. Vitale, 447 U.S. 410 (1980).

58. Grady v. Corbin, 495 U.S. at 515-16 (quoting Illinois v. Vitale, 447 U.S. at 420) (citations omitted).

59. *Id.*

60. *Id.* at 517.

61. *Id.* at 516.

62. *Id.* at 527-28 (Scalia, J., dissenting).

63. *See* United States v. Dixon, 509 U.S. 688, 704 (1993).

transaction test and reinstated *Blockburger*'s same element test as the sole analysis used to interpret double jeopardy claims.[65]

> By overruling *Grady*, the Court may have tried to clarify a somewhat confused area of law which the Court believed became even further confused by *Grady's* "same conduct" test. Now that *Grady* has been overruled, a subsequent prosecution no longer needs to satisfy both the *Grady* "same conduct" test and the "same elements" test of *Blockburger v. United States*. After *Dixon*, the prosecution of the second offense must only survive the *Blockburger* test. Offenses that fail the *Blockburger* test are the same and the double jeopardy bar prevents the second prosecution.[66]

Justice Scalia, who wrote the dissent three years earlier in *Grady*, wrote a nearly identical opinion for the majority in *Dixon*.[67] The majority believed that, unlike *Blockburger*, *Grady* lacked "constitutional roots."[68] Justice Souter blasted the majority's quick departure from precedent stating: "The Court has read our precedents so narrowly as to leave them bereft of the principles animating that protection, and has chosen to overrule the most recent" case, *Grady v. Corbin*, decided three years ago.[69]

For whatever reason, the Supreme Court refused to accept the same transaction test. Had this test been given an opportunity in criminal law, it may have become the legal force it is today in civil law.[70] Such a result may very well have obviated the need for criminal collateral estoppel.

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64. United States v. Dixon, 509 U.S. 688 (1993). For a more thorough analysis of *United States v. Dixon* see David Mccune, Case Note, United States v. Dixon*: What Does "Same Offense" Really Mean?*, 48 ARK. L. REV. 709 (1995), and Scott Storper, Case Note, *Double Jeopardy's Door Revolves Again in* United States v. Dixon*: The Untimely Death of the "Same Conduct" Standard*, 49 U. MIAMI L. REV. 881 (1995).

65. United States v. Dixon, 509 U.S. at 704.

66. Aquannette Y. Chinnery, Comment, United States v. Dixon*: The Death of the* Grady v. Corbin *"Same Conduct" Test for Double Jeopardy*, 47 RUTGERS L. REV. 247, 248-49 (1994) (footnotes omitted).

67. *See* United States v. Dixon 509 U.S. at 691-712; Grady v. Corbin, 495 U.S. at 526-44.

68. United States v. Dixon, 509 U.S. at 704. Although later in his opinion, Justice Scalia distinguished cases relied upon by the dissenting justices by stating: "Once, it seems to us, is enough to make a precedent." *Id.* at 708 n.12. Obviously, it was not.

69. *Id.* at 774 (Souter, J., concurring in part and dissenting in part) (citation omitted). As Justice Oliver Wendell Holmes, Jr. once put it:

> It is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and that rule simply persists from blind imitation of the past.

Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

70. *See supra* note 43 and accompanying text.

E. *Problems with Modern Double Jeopardy Analysis*

The same transaction rule was fundamentally sound and would probably have done away with the doctrine of criminal collateral estoppel.[71] Regardless, there exists a serious problem with its application as well as serious problems with the current *Blockburger* analysis. The Double Jeopardy Clause only protects persons from being "twice put in jeopardy of life or limb."[72] As this statement suggests, a person facing multiple charges under one proceeding cannot literally be said to be twice put in jeopardy.[73] Presumably, this was exactly what the *Blockburger* test sought to deny. The *Blockburger* test was originally established to protect against multiple "punishments" for the same offense.[74] Unfortunately, modern courts have acquiesced to the legislature the power to unconstitutionally punish the same offense twice.[75] "Thus, the question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed. Where Congress intended . . . to impose multiple punishments, imposition of such sentences does not violate the Constitution."[76]

As a counter measure, the Supreme Court instituted the presumption that Congress would and does not punish the same offense twice, and the requirement that "a clear indication of contrary legislative intent" exist if there are multiple punishments for the same offense.[77] But even this requirement has been eroded by judicial gloss.[78] "Where Congress has authorized cumulative punishments for even the same offense, the Double Jeopardy Clause of the Fifth Amendment is not

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71. If the prosecution was required to bring all charges related to the same transaction, episode, or occurrence at the same time, criminal collateral estoppel could only be applied in the most limited of circumstances. There would only exist one proceeding for issues to be decided in, and, therefore, no other proceedings would exist in which to raise criminal collateral estoppel claims.

72. U.S. CONST. amend V.

73. *See* Missouri v. Hunter, 459 U.S. 359, 365 (1983) ("Because respondent has been subjected to only one trial, it is not contended that [respondent's] right to be free from multiple trials for the same offense has been violated.").

74. *See* Blockburger v. United States, 284 U.S. 299, 304 (1932). Harry Blockburger faced an indictment containing five counts. *Id.* at 300-01. The jury found him guilty of the second, third, and fifth counts, all of which were charges for the sale of morphine hydrochloride to the same person. *Id.* at 301.

75. *See* Albernaz v. United States, 450 U.S. 333, 344 (1981).

76. *Id.* In the concurring opinion, Justice Stewart criticized the majority's statement by saying: "[T]hese statements are supported by neither precedent nor reasoning and are unnecessary to reach the Court's conclusion." *Id.* at 345 (Stewart, J., concurring).

77. Whalen v. United States, 445 U.S. 684, 691-92 (1980).

78. United States v. Centeno-Torres, 50 F.3d 84, 85 (1st Cir. 1995) (per curiam).

offended."[79] This passage suggests the mere fact that the legislature passed two laws addressing the same offense demonstrates their clear intent for multiple punishments of the same offense.[80]

In *Missouri v. Hunter*,[81] Justice Marshall, joined by Justice Stevens, blistered the modern interpretation of the Fifth Amendment's double jeopardy protection.[82] He believed the Court should not use one interpretation for what constitutes the same offense for multiple prosecutions. Another interpretation for multiple punishments is that "[h]ad respondent been tried for these two crimes in separate trials, he would plainly have been subjected to multiple prosecutions for 'the same offence' in violation of the Double Jeopardy Clause."[83]

Justice Marshall also recognized the erosion of the protection provided by the Double Jeopardy Clause:

> If the prohibition against being "twice put in jeopardy" for "the same offence" is to have any real meaning, a State cannot be allowed to convict a defendant two, three, or more times simply by enacting separate statutory provisions defining nominally distinct crimes. If the Double Jeopardy Clause imposed no restrictions on a legislature's power to authorize multiple punishment, there would be no limit to the number of convictions that a State could obtain on the basis of the same act, state of mind, and result. A State would be free to create substantively identical crimes differing only in name . . . .[84]

The tension between the legislature's power to enact laws and the Constitution's prohibition of multiple convictions for the same offense, caused the Missouri Supreme Court to comment:

> Until such time as the Supreme Court of the United States declares clearly and unequivocally that the Double Jeopardy Clause . . . does not apply to the

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79. *Id.* This is in direct contradiction to the protection against multiple punishments for the same offense, as originally provided for under the Fifth Amendment. *See* North Carolina v. Pearce, 395 U.S. 711, 717 (1969), *overruled on other grounds by* Alabama v. Smith, 490 U.S. 794 (1989).

80. *But see* Ball v. United States, 470 U.S. 856, 865 (1985) (holding that although receiving a firearm shipped in interstate commerce and possessing that firearm were two distinct statutory crimes, Congress did not intend for multiple punishments where the same conduct violated both code sections).

81. Missouri v. Hunter, 459 U.S. 359 (1983).

82. *Id.* at 369-74 (Marshall, J., dissenting).

83. *Id.* at 369 (Marshall, J., dissenting). Many commentators disagree with such a strict reading of constitutional text that is over a century old. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 134 (1977). Ronald Dworkin has criticized such an interpretation stating: "[A] strict interpretation of the [Constitution's] text yield[s] a narrow view of constitutional rights . . . ." *Id.* Justice Black stated: "If such great constitutional protections are given a narrow grudging application, they are deprived of much of their significance." Green v. United States, 355 U.S. 184, 198 (1957).

84. Missouri v. Hunter, 459 U.S. at 370-71 (citation omitted).

> legislative branch of government, we cannot do other than what we perceive to be our duty to refuse to enforce multiple punishments for the same offense arising out of a single transaction.[85]

Modern courts have forgotten, or at least ignore, the original intent of the Bill of Rights. The Bill of Rights was not created or incorporated into the Constitution so that the legislature might impose their unfettered will upon the populous. The Bill of Rights was established for the exact opposite purpose—to protect individual liberties from oppressive government regulation and control.

Somehow over the last 100 years of interpretation, the protection provided by the Fifth Amendment's Double Jeopardy Clause has become extinct. The Supreme Court has authorized Congress to punish the same offense twice, clearly in violation of the Constitution.[86] The sole protection remaining is that courts cannot prescribe "greater punishment than the legislature intended."[87] Whatever the test—be it through implication or by application—the problems with modern interpretation of the Double Jeopardy Clause necessarily infect the corollary doctrine of criminal collateral estoppel.[88] Although the Supreme Court may have believed it was strengthening the criminal collateral estoppel doctrine by constitutionalizing the doctrine under the Double Jeopardy Clause, the Court unwittingly weakened it.

III. CRIMINAL COLLATERAL ESTOPPEL[89]

The doctrine of collateral estoppel is often used interchangeably with the common law doctrine of res judicata, but this is in error:

> The doctrine of res judicata precludes parties or their privies from relitigating a cause of action that has been finally determined by a court of competent jurisdiction. Any issue necessarily decided in such litigation is conclusively

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85. State v. Haggard, 619 S.W.2d 44, 51 (Mo. 1981), *vacated*, 459 U.S. 1192 (1983).

86. *See supra* notes 84-85 and accompanying text.

87. Missouri v. Hunter, 459 U.S. at 366.

88. *See, e.g.*, Showery v. Samaniego, 814 F.2d 200, 204 (5th Cir. 1987) (holding criminal collateral estoppel was not applicable because double jeopardy failed to attach in prior proceeding).

89. Constitutional rights can be thought of as either substantive, in that they offer the individual a certain quantifiable protection; or procedural, in that they outline the proper procedure the government must follow when encroaching on an otherwise protected substantive right. Most constitutional rights are easily classified as either substantive or procedural. However, double jeopardy appears to be a unique right that offers substantive rights as well as procedural safeguards. This author believes many of the problems attributable to modern criminal collateral estoppel analysis stems from the Supreme Court's inability to define the scope of the procedural safeguards provided by the double jeopardy clause.

> determined as to the parties or their privies if it is involved in a subsequent lawsuit on a different cause of action.[90]

Collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit."[91] Therefore, res judicata is more appropriately "claim or cause of action preclusion," while collateral estoppel is "issue or fact preclusion."[92]

A. *The History of Criminal Collateral Estoppel*

Collateral estoppel is believed to have Germanic origins which "were based on the premise that the parties having dominated the judicial proceedings, their acts created a true estoppel against future relitigation."[93] Gradually, the concept of collateral estoppel infused English common law as "estoppel by record."[94] The United States Supreme Court, quoting Lord Ellenborough's passage from *Outram v. Morewood*,[95] incorporated collateral estoppel into American common law.[96]

> It is not the recovery, but the matter alleged by the party, and upon which the recovery proceeds, which creates the estoppel . . . . "[T]he estoppel precludes

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90. Bernhard v. Bank of Am. Nat'l Trust & Sav. Ass'n, 122 P.2d 892, 894 (Cal. 1942). The distinction between collateral estoppel and res judicata is an important one:

> [T]here is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to *any other admissible matter which might have been offered for that purpose* . . . . But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.

Cromwell v. County of Sac, 94 U.S. 351, 352-53 (1876) (emphasis added).

91. Ashe v. Swenson, 397 U.S. 436, 443 (1970).

92. WARREN FREEDMAN, RES JUDICATA AND COLLATERAL ESTOPPEL 1 (1988). This Note concentrates on criminal collateral estoppel and not the related common law doctrine of res judicata.

93. *Id.* at 7.

94. *Id.*; *see also* The King v. Carlisle, 109 Eng. Rep. 1177, 1177-78 (K.B. 1831) (referencing estoppel by record); Outram v. Morewood, 102 Eng. Rep. 630, 633 (K.B. 1803) (referencing estoppel).

95. Outram v. Morewood, 102 Eng. Rep. 630, 633 (K.B. 1803).

96. Cromwell v. County of Sac, 94 U.S. 351, 353 (1876).

> parties . . . from contending to the contrary of that point or matter of fact, which, having been once distinctly put in issue by them [was] . . . solemnly found against them."[97]

The Supreme Court further stated, "[w]here the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered."[98] This early form of collateral estoppel only existed in civil law; nearly forty years passed before the Supreme Court recognized criminal collateral estoppel.[99]

B. *Due Process Overtones in Early Supreme Court Cases*

Criminal collateral estoppel was born in *United States v. Oppenheimer*.[100] The Supreme Court held:

> Where a criminal charge has been adjudicated upon by a court having jurisdiction to hear and determine it, that adjudication, whether it takes the form of an acquittal or conviction, is final as to the matter so adjudicated upon, and may be pleaded in bar to any subsequent prosecution for the same offense.[101]

The Court further stated:

> The safeguard provided by the Constitution against the gravest abuses has tended to give the impression that when it did not apply in terms, there was no other principle that could. But the Fifth Amendment was not intended to do away with what in the civil law is a fundamental principle of justice.[102]

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97. *Id.* at 353 (quoting Outram v. Morewood, 102 Eng. Rep. at 633).

98. *Id.*

99. *See* United States v. Oppenheimer, 242 U.S. 85, 87 (1916).

100. United States v. Oppenheimer, 242 U.S. 85 (1916). In his argument for applying the civil law doctrine of collateral estoppel to criminal law, Justice Holmes stated: "It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from liability in debt." *Id.* at 87. England had previously taken the same course in *The Queen v. Miles*, holding "the criminal law is in unison with that which prevails in civil proceedings." The Queen v. Miles, 24 Q.B.D. 423, 431 (1890).

101. United States v. Oppenheimer, 242 U.S. at 88 (quoting The Queen v. Miles, 24 Q.B.D. at 431).

102. *Id.*

One commentator, Judge Friendly, believed "overly sensitive ears are not needed to detect due process overtones in Mr. Justice Holmes' statement."[103]

Unfortunately, Justice Holmes failed to constitutionalize criminal collateral estoppel under the Due Process Clause. Even worse, he failed to directly mention the Due Process Clause in his analysis, thus failing to pave a path for a future decision which might constitutionalize criminal collateral estoppel.[104] Perhaps these shortcomings of *Oppenheimer* directly led to the Court's future denial to interpret the Due Process Clause's "fundamental fairness" as providing the constitutional anchor for criminal collateral estoppel.[105]

Chief Justice Warren attempted to do just that—anchor criminal collateral estoppel to the Due Process Clause.[106] In *Hoag v. New Jersey*,[107] Chief Justice Warren stated: "The issue is whether or not this determination of guilt, based . . . on the successive litigation of a single issue that had previously been resolved by a jury in petitioner's favor, is contrary to the requirements of fair procedure guaranteed by the Due Process Clause of the Fourteenth Amendment."[108] Unfortunately, Chief Justice Warren was in the minority—the majority did not find criminal collateral estoppel to be a constitutional guarantee.[109] "Despite [criminal collateral estoppel's] wide employment, we entertain grave doubts whether [criminal] collateral estoppel can be regarded as a constitutional requirement. Certainly this Court has never so held."[110]

If criminal collateral estoppel had been successfully constitutionalized under the Fourteenth Amendment, it may have provided real protection for criminal defendants, because due process is a protection of "fundamental fairness essential to the very concept of justice," and in a way that "necessarily prevents a fair trial."[111] If judges were armed with the latitude of "fundamental fairness" and not the rigidity

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103. United States *ex rel.* DiGiangiemo v. Regan, 528 F.2d 1262, 1266 (2d Cir. 1975). *But see* Daniel K. Mayers & Fletcher L. Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 HARV. L. REV. 1, 39 (1960) ("Mr. Justice Holmes' language in [*Oppenheimer*] is broad . . . , but it conspicuously fails to allude to the due process clause."). For a complete discussion of the due process foundation of criminal collateral estoppel see Note, *The Due Process Roots of Criminal Collateral Estoppel*, 109 HARV. L. REV. 1729 (1996).

104. *See supra* note 103 and accompanying text.

105. *See* Ashe v. Swenson, 397 U.S. 436, 447 (1970) (Black, J., concurring). "I must reject any implication in [the majority's] opinion that the so-called due process test of 'fundamental fairness' might have been appropriate as a constitutional standard at some point in the past or might have a continuing relevancy today in some areas of constitutional law." *Id.*

106. *See* Hoag v. New Jersey, 356 U.S. 464, 474 (1958) (Warren, C.J., dissenting).

107. Hoag v. New Jersey, 356 U.S. 464 (1958).

108. *Id.* at 474 (Warren, C.J., dissenting).

109. *Id.* at 471.

110. *Id.*

111. Lisenba v. California, 314 U.S. 219, 236 (1941).

of double jeopardy, criminal collateral estoppel would be a viable, living constitutional protection.[112]

C. *Collateral Estoppel Constitutionalized Under the Double Jeopardy Clause*

Twelve years after *Hoag*, the Supreme Court did constitutionalize the doctrine of criminal collateral estoppel in *Ashe v. Swenson*.[113] Ironically, criminal collateral estoppel was consitutionalized under an amendment that it cannot coexist with.[114] Although the facts of *Ashe*[115] were nearly identical to *Hoag*,[116] the issue presented was not.[117] While the *Hoag* Court was unwilling to find criminal collateral estoppel as a guarantee under the Due Process Clause of the Fourteenth Amendment,[118] the *Ashe* Court did not hesitate to find collateral estoppel a guarantee under the Double Jeopardy Clause of the Fifth Amendment.[119] Justice Stewart, in writing for the majority stated: "The ultimate question to be determined, then, in the light of *Benton*

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112. For the current rigid application of criminal collateral estoppel and its double jeopardy requirements see *Showery v. Samaniego*, 814 F.2d 200, 201-04 (5th Cir. 1987). Although the State had been unable to prove by a preponderance of the evidence in a bond revocation hearing that the petitioner had committed involuntary manslaughter, it was able to seek prosecution for the crime at the higher standard of a criminal proceeding. *Id.* at 201-02. The Fifth Circuit concluded that criminal collateral estoppel was not applicable because petitioner had not been placed in jeopardy at the bond revocation hearing. *Id.* at 202-04. The court further ruled petitioner's independent due process basis for criminal collateral estoppel meritless. *Id.* at 203. The dissent, however, did not believe *Ashe* necessarily "foreclose[d] the possibility that [criminal] collateral estoppel might also be constitutionally required . . . as a 'fundamental principle of ordered liberty' or as a principle of 'fundamental fairness.'" *Id.* at 204 (Goldberg, J., dissenting) (quoting Ashe v. Swenson, 397 U.S. 436, 442 (1970)).

113. *See* Ashe v. Swenson, 397 U.S. 436, 448 (1970).

114. United States v. Bailin, 977 F.2d 270, 275 (7th Cir. 1992) (stating criminal collateral estoppel "is applicable in criminal cases only when double jeopardy is not").

115. Ashe v. Swenson, 397 U.S. at 437-40. In *Ashe*, six men were robbed during a poker game. *Id.* at 437. Ashe was charged with robbing five of the men. *Id.* at 438. The sole issue of contention was whether Ashe was one of the robbers. *Id.* at 438-39. After he was acquitted of these five robberies, the State prosecuted and convicted him of the sixth robbery in a second trial. *Id.* at 439-40.

116. Hoag v. New Jersey, 356 U.S. 464, 465-66 (1958). In *Hoag*, five bar patrons were robbed. *Id.* at 465. Hoag was tried and acquitted of robbing three of the men. *Id.* The sole defense Hoag put forward was an alibi, claiming he could not have been one of the robbers. *Id.* at 466. After he was acquitted of these three robberies, the State prosecuted and convicted him of the remaining two robberies in a second trial. *Id.*

117. *Compare* Ashe v. Swenson, 397 U.S. at 442 (considering collateral estoppel under the Double Jeopardy Clause of the Fifth Amendment), *with* Hoag v. New Jersey, 356 U.S. at 465, 470-72 (considering collateral estoppel under the Due Process Clause of the Fourteenth Amendment).

118. Hoag v. New Jersey, 356 U.S. at 471-72.

119. Ashe v. Swenson, 397 U.S. at 445.

v. Maryland . . . is whether this established rule of federal law is embodied in the Fifth Amendment . . . . We do not hesitate to hold that it is."[120]

Although the majority quickly constitutionalized criminal collateral estoppel, Chief Justice Burger wrote a scathing dissent, in which he blasted the majority for creating new constitutional rights.[121] "Nothing in the language or gloss previously placed on this provision of the Fifth Amendment remotely justifies the treatment that the Court today accords to the collateral-estoppel doctrine. Nothing in the purpose of the authors of the Constitution commands or even justifies what the Court decides today."[122]

Justice Burger, however, was far from finished. "The Court now finds the federal collateral estoppel rule to be an 'ingredient' of the Fifth Amendment guarantee against double jeopardy and applies it to the states through the Fourteenth Amendment. This is an ingredient that eluded judges and justices for nearly two centuries . . . ."[123]

Clearly, *Ashe* was the pinnacle of criminal collateral estoppel law.[124] The majority wrote broadly, with inclinations of due process and fairness.[125] While they did constitutionalize the doctrine under the Double Jeopardy Clause,[126] they never suggested that criminal collateral estoppel should be constricted to the requirements of double jeopardy, nor that it only existed under that Clause.[127]

In fact, the Court suggested just the opposite stating: "[T]he federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality."[128] Courts should not be rigid in their

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120. *Id.*

121. *Id.* at 460-64 (Burger, C.J., dissenting).

122. *Id.* at 460 (Burger, C.J., dissenting).

123. *Id.* at 464. (Burger, C.J., dissenting).

124. For a discussion of the continued demise of the protection provided by criminal collateral estoppel see *infra* notes 134-39 and accompanying text.

125. *See* Ashe v. Swenson, 397 U.S. at 444 (speaking of rationality, practicality, and realism).

126. *Id.* at 445.

127. In fact, it was carefully worded that the Double Jeopardy Clause only incorporated the doctrine of collateral estoppel, not that the doctrine only existed under that Clause. *See id.* at 445-46. The wording suggests the protection offered by the Fifth Amendment encompasses the protection offered by criminal collateral estoppel, but not that criminal collateral estoppel only exists under the Fifth Amendment. Unfortunately, the latter is the current belief among justices and judges.

128. *Id.* at 444.

application of criminal collateral estoppel.[129] The "overall fairness of applying the doctrine must be the crowning consideration."[130]

Unfortunately, current criminal collateral estoppel can only be applied with "the hypertechnical and archaic approach of a 19th century pleading book,"[131] with rigidity surpassing fairness.[132] Many of the weaknesses of current double jeopardy analysis needlessly infest the once independent doctrine of criminal collateral estoppel. The protection afforded individuals under common law criminal collateral estoppel has been severely eroded by Supreme Court decisions since its constitutionalization in *Ashe*.[133]

D. *Criminal Collateral Estoppel Severely Limited*[134]

The first severe limitation placed on criminal collateral estoppel occurred in *Dowling v. United States*.[135] Dowling had been acquitted of the robbery of a woman during which the assailant wore a knitted mask with cutout eyes and carried a small handgun.[136] Dowling was tried for a bank robbery during which the assailant wore a mask and carried a pistol.[137] During Dowling's trial for the bank robbery, the woman who was previously robbed was allowed to testify that Dowling had worn a mask and carried a handgun when he robbed her, even though Dowling had already been acquitted of those charges.[138] This result best demonstrates the difference between criminal collateral estoppel as constitutionalized under the Double Jeopardy Clause and criminal collateral estoppel as constitutionalized under the Due Process Clause. If the doctrine had been constitutionalized under the Fourteenth

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129. *See* Sucher v. Kutscher's Country Club, 493 N.Y.S.2d 829, 832-33 (App. Div. 1985) ("Applicability of the [collateral estoppel] doctrine must be determined on a case-by-case basis, without rigidity.").

130. *Id.* at 833.

131. Ashe v. Swenson, 397 U.S. at 444.

132. *See supra* Part III.A.

133. *See* Dowling v. United States, 493 U.S. 342, 344-45 (1990); *see also* cases cited *infra* note 141.

134. This Note only addresses limitations in collateral estoppel created by differing burdens of proof and the determination of what issue had been previously decided. This Note does not attempt to analyze mutuality of parties, administrative rulings, or the problems created when different sovereigns render judgment.

135. Dowling v. United States, 493 U.S. 342 (1990).

136. *Id.* at 344.

137. *Id.*

138. *Id.* at 344-45.

Amendment's requirement of fundamental fairness, the *Dowling* decision may very well have been different.[139]

The majority, however, relied on the exception to the doctrine of collateral estoppel—non-application of the doctrine when there exists differing burdens of proof.[140] Prior to *Dowling*, this exception was limited to the distinction between civil and criminal burdens of proof.[141] Unfortunately, the majority extended this exception to the realm of the Federal Rules of Evidence, stating:

> "In the Rule 404(b) context, similar act evidence is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor." Because a jury might reasonably conclude that Dowling was the masked man who entered Henry's home, even if it did not believe beyond a reasonable doubt that Dowling committed the crimes charged at the first trial, the *collateral-estoppel component of the Double Jeopardy Clause is inapposite*.[142]

Dowling also argued that the Due Process Clause's fundamental fairness guarantee was violated, in that he was forced to defend charges he was acquitted of in a second trial.[143] The majority acknowledged this tradition, but believed it was amply protected by the Double Jeopardy Clause and declined "to use the Due Process Clause as a device for extending the double jeopardy protection to cases where it otherwise would not extend."[144]

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139. Justice Brennan's dissent in *Dowling* amply demonstrates how a fundamental fairness analysis differs from the rigid analysis of criminal collateral estoppel under double jeopardy. *See id.* at 354-64 (Brennan, J., dissenting); *see also infra* note 144.

140. Dowling v. United States, 493 U.S. at 349-50.

141. *See* United States v. One Assortment of 89 Firearms, 465 U.S. 354, 361-62 (1984) ("It is clear that the difference in the relative burdens of proof in the criminal and civil actions precludes the application of the doctrine of collateral estoppel."); One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 235 (1972) ("[T]he difference in the burden of proof in criminal and civil cases precludes application of the doctrine of collateral estoppel."); Helvering v. Mitchell, 303 U.S. 391, 397 (1938) ("The difference in degree in the burden of proof in criminal and civil cases precludes application of the doctrine of res judicata."). *But see* Coffey v. United States, 116 U.S. 436, 443 (1886) (holding under common law a civil proceeding could not follow a criminal acquittal).

142. Dowling v. United States, 493 U.S. at 348-49 (quoting Huddleston v. United States, 485 U.S. 681, 699 (1988)) (emphasis added).

143. *Id.* at 354.

144. *Id.* Justice Brennan's dissent suggested that this tradition is not adequately protected by the Fifth Amendment because the majority's holding required a second defense to a previously acquitted charge. *Id.* at 360-61 (Brennan, J., dissenting). Justice Brennan argued:

> "[T]he acquitted defendant is to be treated as innocent and in the interests of fairness and finality made no more to answer for his alleged crime." It is ironic that petitioner would have been better off, in his second trial, if he had not been represented by

E. *Modern Problems Applying Criminal Collateral Estoppel to Motions to Suppress Evidence—Determining What Issue Was Previously Decided*

Another area where criminal collateral estoppel has been recently limited is through narrow determinations of what issue was previously decided.[145] Determining what issue was previously decided has been a basic requirement of the collateral estoppel doctrine since its incorporation into American law.[146] "[T]he inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."[147] While this problem arises most often when there are different proceedings for different causes of action, defining what issue was decided also occurs during the same proceeding when the suppression of evidence is disputed on different grounds.[148]

The Iowa Supreme Court recently had the opportunity to address criminal collateral estoppel as applying to a subsequent motion to suppress evidence previously ruled inadmissible in *State v. Seager*.[149] Seager faced an investigation for second degree murder (Count A, victim was beaten to death) and two related investigations for first-degree murder (Counts B and C, both victims shot in the head

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> counsel at the first trial and had been convicted because uncounseled convictions may not be used in any capacity in subsequent trials.

Id. at 361 n.4 (Brennan, J., dissenting) (quoting State v. Wakefield, 278 N.W.2d 307, 308 (Minn. 1979)) (citations omitted). Justice Brennan also attacked the majority's statement that the accused could just produce evidence of his prior acquittal to rebut the evidence by stating: "This response . . . underscores the flaw in the Court's reasoning: introduction of this type of evidence requires the defendant to mount a second defense to an offense for which he has been acquitted." *Id.* at 362.

145. *See, e.g.*, State v. Seager, 571 N.W.2d 204, 208-09 (Iowa 1997) (holding a previous ruling on a motion to suppress did not determine the issue of the admissibility of the evidence, but only the issue argued for admission of the evidence).

146. *See* Cromwell v. County of Sac, 94 U.S. 351, 353 (1876).

147. *Id.* at 353. "[I]t must be recognized at the outset that this collateral estoppel defense will not often be available to a criminal defendant, for it is seldom possible to determine how the judge or jury has decided any particular issue." WAYNE R. LAFAVE & HEROLD H. ISRAEL, CRIMINAL PROCEDURE § 17.4, at 674 (student ed. 1985).

148. *See* State v. Seager, 571 N.W.2d at 206-07. In *Seager*, although the suppression of the evidence was argued in two different proceedings, they were technically the same because the parties and the charges were identical, and the only reason there were two proceedings was because the State had previously dismissed the charges after the evidence in contention was ruled inadmissible. *Id.* at 207. Although never raised, the theory of res judicata may have been the better argument in that the State's claim was identical to its previous claim, and the proceedings were not different in the classical sense. *See id.* at 206-07. This argument would have rendered the evidence inadmissible because all issues that could have been previously raised would have been lost. *See supra* note 84 and accompanying text.

149. State v. Seager, 571 N.W.2d 204 (Iowa 1997).

with a .22 caliber weapon).[150] The authorities executed a search warrant at Seager's residence to obtain information for Count A.[151] During the search, authorities found a .22 caliber Mossberg rifle, the potential murder weapon in Counts B and C.[152] At this time, the authorities did not seize the weapon.[153]

Three months later another search warrant was executed for Seager's residence, for the pending investigation of Counts B and C.[154] Once again the weapon was not seized.[155] Two weeks later a third search warrant was executed for Seager's residence, again for Counts B and C, and this time the weapon was seized.[156] Ballistics tests found this to be the murder weapon in Counts B and C.[157]

The defense moved to suppress the weapon, ammunition, and subsequent ballistics tests, alleging the warrant with which the evidence was obtained was invalid.[158] The trial court found in favor of the defense and suppressed the evidence.[159] The Iowa Supreme Court affirmed the trial court's suppression and on remand, the prosecution dismissed the charges without prejudice.[160]

Fourteen years later, after Seager had been found guilty of Count A, the State obtained and executed a search warrant to seize the Mossberg rifle from the Highway Patrol office, where it had been stored since its forfeiture to the State.[161] New ballistics tests once again found this to be the murder weapon used in Counts B and C.[162] The State again charged Seager with two counts of first-degree murder.[163]

In Iowa, four conditions must exist for collateral estoppel to apply:

> (1) [T]he issue concluded must be identical; (2) the issue must have been raised and litigated in the prior action; (3) the issue must have been material and relevant to the disposition of the prior action; and (4) the determination

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150. *Id.* at 207.
151. *Id.* at 206.
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.* at 207.
159. *Id.*
160. *Id.*
161. *Id.* At the forfeiture hearing, Seager was unable to claim his Mossberg rifle because he was serving time for his conviction of Count A. *Id.* at 206. Thus, the forfeited weapon was stored at the Highway Patrol office in the State's custody for fourteen years. *Id.* at 207.
162. *Id.*
163. *Id.*

> made of the issue in the prior action must have been necessary and essential to the resulting judgment.[164]

The State argued the issue concluded[165] in the previous ruling—suppressing the evidence—was only the validity of the 1979 warrant, not the general admissibility of the evidence obtained from the 1993 search warrant.[166] Seager argued the admissibility of the evidence was the issue previously determined, and any relitigation of the admissibility of that evidence was barred by criminal collateral estoppel.[167]

The lower court found the issue determined in the prior proceeding was the general admissibility of the evidence stating: "The District Court and the [Iowa] Supreme Court specifically declared the weapon to be inadmissible . . . . Therefore the district court conclude[d] . . . the doctrine of collateral estoppel bars relitigation of the admissibility of the weapon . . . ."[168] However, the Iowa Supreme Court was not persuaded, holding that the issue previously concluded was the legality of the 1979 search warrant; therefore, the issue of the legality of the 1993 warrant had never been litigated and was not barred by criminal collateral estoppel.[169]

Other states have taken a different approach when applying criminal collateral estoppel to evidentiary motions to suppress.[170] These courts have based their rulings on whether a final judgment on the merits was actually reached.[171] Interestingly, the Louisiana Supreme Court addressed the issue in terms of due process stating, "assuming . . . the State has had an opportunity for a full hearing on [the] suppression

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164. *Id.* at 208 (citing Hunter v. City of Des Moines, 300 N.W.2d 121, 123 (Iowa 1981)).

165. *Id.* The Iowa Supreme Court has defined a previously concluded issue under collateral estoppel as an "ultimate fact," or a "question[ ] of a fact essential to the prior judgment." State v. Stergion, 248 N.W.2d 911, 913 (Iowa 1976).

166. State v. Seager, 571 N.W.2d at 208.

167. *Id.*

168. State v. Seager, No. FECR3863-1295, slip op. at 8 (Iowa Dist. Ct. June 26, 1996).

169. State v. Seager, 571 N.W.2d at 208.

170. *See* State v. Greenwood, 565 P.2d 701, 703 (Okla. Crim. App. 1977) (holding that collateral estoppel does not require the prosecutor to abide by a former court decree suppressing evidence without an independent review of its validity); Cook v. State, 371 A.2d 433, 438 (Md. Ct. Spec. App. 1977) (holding that collateral estoppel does not require the prosecutor to abide by a former court decree suppressing evidence when the prior action ended in a mistrial because it was not a final judgment on the merits), *aff'd*, 381 A.2d 671 (Md. 1978). *But see* State v. Doucet, 359 So. 2d 1239, 1249 (La. 1977) (holding a defendant's belief that a court's pre-trial ruling on motions to suppress was binding under collateral estoppel as a final judgment justified his failure to reassert the motions, and the lack of allowance of such reassertion constituted error).

171. Factors to use when determining if a final judgment has been reached are: "[T]hat the parties were fully heard, that the court supported its decision with a reasoned opinion, [and] that the decision was subject to appeal or was in fact reviewed on appeal." RESTATEMENT (SECOND) OF JUDGMENTS § 13 cmt. g (1982).

[of the evidence] and an adequate opportunity for review, *due process would forbid relitigation of the issue determined adversely to it.*"[172] At least these states have applied criminal collateral estoppel to multiple motions to suppress the same evidence. Arguably, under a rigid analysis like that used in *Showery v. Samaniego*,[173] criminal collateral estoppel would be inapplicable in cases like *Seager*, because jeopardy never attached.[174]

Although the Iowa Supreme Court reached the correct result in *Seager* by applying criminal collateral estoppel, it incorrectly applied it to the facts of the case. Rulings on motions to suppress only decide one issue—the admissibility of the illegally obtained evidence.[175] The Iowa Supreme Court needlessly opened the door for endless litigation when attempting to admit evidence.[176] If the issue decided is only the grounds upon which the given suppression is argued and not the admission of the evidence, the prosecution can argue every conceivable legal doctrine, one after another, to gain the admittance of evidence. Unlike *Seager*, the prosecution will not have to argue for admission in different proceedings—the prosecution can fully litigate the admission of evidence in one proceeding. The first time the prosecution might argue the search warrant was legal. The second time the prosecution could argue the evidence was in plain view. The third time the argument may be inevitable discovery. The opportunities are endless for the relitigation of the admissibility of evidence. Criminal defendants beware.

IV. CONCLUSION

While double jeopardy is a protection of an individual right embodied in the Bill of Rights, criminal collateral estoppel is a procedural safeguard created by the courts. As a procedural safeguard, criminal collateral estoppel cannot be constrained to the rigid requirements of the Fifth Amendment. It needs to be a living, breathing doctrine capable of varying interpretations for varying situations.

The Supreme Court needs to rediscover the common law history of criminal collateral estoppel and its due process roots. This can be achieved by one of three ways. First, the Supreme Court could hold that criminal collateral estoppel is not a constitutional guarantee under the Fifth Amendment's Double Jeopardy Clause,

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172. State v. Doucet, 359 So. 2d at 1244 (emphasis added).

173. Showery v. Samaniego, 814 F.2d 200 (5th Cir. 1987).

174. *See supra* note 112 for a discussion of *Showery v. Samaniego*.

175. A motion to suppress is defined as a "[d]evice used to eliminate from the trial of a criminal case evidence which has been secured illegally . . . ." BLACK'S LAW DICTIONARY 914 (5th ed. 1979). Clearly, the issue decided in a ruling on a motion to suppress is the elimination or admission of the evidence.

176. *See* State v. Seager, 248 N.W.2d 204, 208 (Iowa 1997).

reverting it to a common law doctrine and restoring its common law force. Second, the Court could specifically hold that criminal collateral estoppel is not only embodied in the Fifth Amendment, but also a constitutional guarantee provided by the fundamental fairness doctrine under the Fourteenth Amendment's Due Process Clause. Third, the Court could readopt the same transaction test for criminal law, and render the doctrine of criminal collateral estoppel nearly moot.

The Iowa courts must not yield to the unconstitutional precedents established by the United States Supreme Court. It must construe the doctrines of criminal collateral estoppel and double jeopardy with the utmost latitude and grant criminal defendants their constitutional safeguards. Allowing prosecutors to relitigate issues until they win does not serve judicial economy and violates fundamental fairness required by due process.

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