# A MODEST PROPOSAL TO SAVE THE DOUBLE JEOPARDY CLAUSE*

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Though it did not attract much attention, one of Justice Brennan's last majority opinions for the Supreme Court effected a major change in the long-standing interpretation of the double jeopardy clause. Brennan's opinion in *Grady v. Corbin*[1] affirmed a position I had taken in previous articles,[2] namely that the double jeopardy clause provides some form of protection against reprosecution of the same conduct. I still believe the principle correct. But I also believe the lack of articulated limitations on the principle renders the 5-4 decision in *Corbin* unstable because, if unchecked, it will lead to results that are contrary to our shared intuitions about what double jeopardy should forbid. Thus, while I would not phrase it quite the same way, I agree in essence with Justice Scalia's pre-

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* I confess. The title is a bit overdramatic. This paper addresses my concerns over the Supreme Court's new definition of when two different statutory offenses are the "same offense" for purposes of the double jeopardy clause. *See* Grady v. Corbin, 110 S. Ct. 2084 (1990). But even if my worst fears about the "same offense" definition come true and a future Court interprets the concept in line with Justice Scalia's dissent, see *id.* at 2096-2105, that would not mean the end of double jeopardy protection. It would mean, instead, narrow rather than generous protection. So perhaps the title should be "A Modest Proposal to Save a Generous Interpretation of the Double Jeopardy Clause" or "A Modest Proposal to Save the Interpretation of the Double Jeopardy Clause That I Happen to Favor." But neither of those titles sounded very catchy to me, and I went with the one that sounded like a combination of Johnathan Swift and Chicken Little.

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1. 110 S. Ct. 2084 (1990).

2. *See* Thomas, *An Elegant Theory of Double Jeopardy*, 1988 U. ILL. L. REV. 827 [hereinafter Thomas, *Elegant Theory*]; Thomas, *The Prohibition of Successive Prosecutions for the Same Offense: In Search of a Definition*, 71 IOWA L. REV. 323 (1986) [hereinafter Thomas, *Successive Prosecutions*]; Thomas, *RICO Prosecutions and the Double Jeopardy/Multiple Punishment Problem*, 78 NW. U.L. REV. 1359 (1984).

diction of the societal response to *Corbin*: "rejection of today's [majority] opinion is adequately supported by the modest desire to protect our criminal legal system from ridicule."[3] Moreover, I agree with Scalia's prediction of *Corbin*'s future if it remains in its current form: "A limitation that is so unsupported in reason and so absurd in application is unlikely to survive."[4]

But if a future Court reverses *Corbin* on the grounds that Scalia suggests, the result will be to narrow severely the protection of the clause. Thus, I wish to discuss how *Corbin* is simultaneously right and wrong. Then I will propose a solution to this dilemma, one that avoids Scalia's narrow dissenting position and derives from the literal language of the double jeopardy clause.

## I. THE RIGHT PRINCIPLE

The double jeopardy clause provides, "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb."[5] One of the puzzling aspects of the protection is deciding when violations of different statutes are nevertheless the "same offense."[6] This issue has two procedural dimensions—multiple verdicts sought in successive prosecutions and multiple convictions sought in a single trial.[7] The only dimension that concerns me in this Article, however, is the successive prosecution issue: how many trials can the state require a defendant to face for particular conduct in which he has engaged?

I have previously written about this question and will only sketch the

3. *See* 110 S. Ct. at 2104 (Scalia, J., dissenting) (joined by Rehnquist, C.J., & Kennedy, J.). Justice O'Connor dissented separately, making essentially the same point and noting that she "agree[d] with much of what Justice Scalia says." *Id.* at 2095.

4. *Id.* at 2104 (Scalia, J., dissenting).

5. U.S. CONST. amend. V.

6. This question is puzzling, of course, only if the term "same offense" does not literally mean "same statutory offense." There are several reasons to reject a literal "same statute" reading of "same offense." *See* Thomas, *Elegant Theory*, *supra* note 2, at 847; Thomas, *Successive Prosecutions*, *supra* note 2, at 330-31. Not a single Justice of the Supreme Court has ever argued for this reading. Even the dissent in *Grady v. Corbin*, written by Justice Scalia and adopting a strict construction approach to the double jeopardy clause, fails to mention this argument. The Court has implicitly rejected the literal interpretation in several cases. *See, e.g.*, In re Nielsen, 131 U.S. 176 (1889) (holding adultery and cohabitation the same offense for purposes of successive prosecutions). The Court finally rejected it explicitly in Brown v. Ohio, 432 U.S. 161, 164 (1977).

7. *See, e.g.*, Thomas, *Successive Prosecutions*, *supra* note 2; Thomas, *A Unified Theory of Multiple Punishment*, 47 U. PITT. L. REV. 1 (1985) [hereinafter Thomas, *Unified Theory*]; Thomas, *Multiple Punishments for the Same Offense: The Analysis After* Missouri v. Hunter, 62 WASH. U.L.Q. 79 (1984) [hereinafter Thomas, *Hunter Analysis*].

arguments here.[8] I reached the conclusion that meaningful protection against successive prosecutions requires a test that draws some equivalence between "same conduct" and "same offense." Two principal arguments support this conclusion. First, our modern world has witnessed an "extraordinary proliferation of overlapping and related statutory offenses."[9] Any test that focuses on offense definitions to the exclusion of the defendant's conduct renders the protection close to a nullity when a prosecutor seeks to bring an additional prosecution, to increase the penalty imposed, or to avoid the effect of an acquittal.[10] Second, the "same conduct" reading is not foreclosed by the framers' choice of the term "same offense." The framers gave no indication that they were "distinguishing between the legal theory of an offense and the underlying factual transaction."[11] That is, the *conduct* of robbery was coextensive with the *offense* of robbery, and multiple degrees of robbery or overlapping offenses such as the use of a firearm to commit[12] a felony did not exist in 1792.

I think the point is best made by a hypothetical. X is driving late at night when her car swerves across the center line and kills a child on the other side of the road. The state charges X with three minor traffic offenses, none of which permits incarceration: failure to slow to avoid an accident, speeding, and failure to keep to the right of the median. The state also charges the misdemeanor traffic offense of drunk driving and the felony offense of vehicular homicide. Ignoring, for the moment, the felony offense, it is possible that the minor traffic offenses could be used to prove X's conduct of drunk driving. But the traditional, pre-*Corbin* test for measuring "same offense" would likely dictate that all of these offenses are different.

The traditional test, often called the *Blockburger* test,[13] deems offenses to be the same only when proof of one always proves another—for example, proof of armed robbery would always prove robbery. While state

8. *See supra* notes 2, 7.

9. *See* Ashe v. Swenson, 397 U.S. 436, 445 n.10 (1970).

10. *See* Thomas, *Elegant Theory*, *supra* note 2, at 834-36 (discussing an example of this kind of prosecutorial action).

11. Comment, *Statutory Implementation of Double Jeopardy Clauses: New Life for a Moribund Constitutional Guarantee*, 65 YALE L.J. 339, 342 (1956).

12. *See, e.g.*, Thomas, *Hunter Analysis*, *supra* note 7.

13. *See* Blockburger v. United States, 284 U.S. 299, 304 (1932). For a discussion of the *Blockburger* test and some of its variants, see Thomas, *Unified Theory*, *supra* note 7, at 25-52.

law determines the result,[14] it seems very unlikely that proving any of the three minor traffic offenses would always prove any of the others. For example, proving failure to slow to avoid an accident might prove speeding, but one can easily imagine a situation in which the driver was never guilty of speeding and still failed to slow to avoid an accident. Similarly, the offense of speeding would not always prove failure to slow to avoid an accident because no type of reckless driving invariably results in an accident. Presumably, this reasoning led the Supreme Court to express skepticism that manslaughter by automobile always proves failure to slow to avoid an accident.[15]

Moreover, none of the minor traffic offenses is a necessarily-included offense of drunk driving—that is, proof of drunk driving does not always entail proof of speeding, failure to slow, or failure to keep to the right of the median. If none of these offenses is a *Blockburger*-included offense of any of the others, *Blockburger* would permit the state to separately prosecute X for each manifestation of her drunk driving. This would be true even if the conduct that constituted one of the offenses—say, failure to slow to avoid an accident—happened to be essential to proving the other two. Following those separate trials, the state could reprove all of that conduct in a drunk driving prosecution. Of course, the minor traffic offenses will not take long to prosecute and do not involve the anxiety and expense of more serious offenses. But it is controversial, I believe, to allow the state to reprosecute the minor offense conduct to prove a more serious offense (drunk driving, in this case).

Even more unsettling is the prospect that the state could prosecute the drunk driving charge, an offense that might permit incarceration of up to one year, and then prosecute vehicular homicide months or years later. Again, though, this is the likely result under *Blockburger*. Vehicular homicide can typically be proved without proving drunk driving,[16] and proof of drunk driving obviously does not always prove vehicular homicide.

Finally, it is not true that proving vehicular homicide would always

14. *See* Brown v. Ohio, 432 U.S. 161, 163-64 (1977).

15. *See* Illinois v. Vitale, 447 U.S. 410, 421 (1980) (expressing "doubts about the [*Blockburger*] relationship under Illinois law between the crimes of manslaughter and a careless failure to reduce speed to avoid an accident"). *Corbin* states that *Vitale* "held that the second prosecution was not barred under the traditional *Blockburger* test," 110 S. Ct. at 2090, but this is an inaccurate characterization of *Vitale*. *See* 447 U.S. at 419-21.

16. *See, e.g.*, N.J. REV. STAT. § 2C:11-5 (Supp. 1990) (requiring proof of reckless operation of vehicle).

prove any of the traffic offenses.[17] Thus, the *Blockburger* test would permit five separate trials for the one driving event that caused the victim's death. If the prosecutor were more creative, and malevolent, she could surely come up with other offenses that would be separate under *Blockburger* and thus permit her to stretch out further the series of prosecutions. This typical fact pattern suggests, I believe, that use of the *Blockburger* test as the only definition of "same offense" is an excessively narrow interpretation of a constitutional provision designed, in part at least, to promote finality.[18] Moreover, the linguistic argument that "offense" does not mean "conduct" seems trivial when one realizes that the clause came into existence at a time when none of the narrow offenses in the hypothetical even existed. Instead, I believe the meaning of "same offense" must somehow entail "same conduct" when successive prosecutions are the issue.[19]

"Same offense" can be read in at least three slightly different ways to prohibit successive prosecutions for the "same conduct," but the constitutional focus will now be on the method the Court used in *Corbin*.[20] Corbin, like X, was involved in a traffic accident that resulted in a death and was initially charged with two of the same traffic offenses as X—drunk driving and failing to keep to the right of the median. One assistant district attorney was informed of the death,[21] but, through a series of misadventures that would have made the Marx Brothers proud, the state managed to proceed to verdict and sentencing on the traffic offenses with-

17. *See Corbin*, 110 S. Ct. at 2090.

18. *See, e.g.*, Thomas, *Elegant Theory*, *supra* note 2, at 829-50.

19. That is not the proper interpretation, however, when multiple convictions are sought in a single trial because the only issue in that context is whether the legislature intended multiple punishment, and *Blockburger* will suffice, in most cases, to answer this question. *See, e.g.*, Thomas, *Hunter Analysis*, *supra* note 7, at 112-14; Thomas, *Unified Theory*, *supra* note 7, at 56-61.

20. Two other readings are Justice Brennan's "same transaction" test and an evidence-bar test suggested by a commentator. Brennan's test requires "the prosecution, except in [the] most limited circumstances, to join at one trial all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction." Ashe v. Swenson, 397 U.S. 436, 453-54 (1970) (Brennan, J., concurring). For a comparison of the "same transaction" test to the "same conduct" test, see Thomas, *Successive Prosecutions*, *supra* note 2, at 377-80. The evidence-bar test forbids use of evidence in one trial that has been introduced in a prior criminal trial that resulted in a verdict. *See* Note, *The Double Jeopardy Clause as a Bar to Reintroducing Evidence*, 89 YALE L.J. 962, 976-81 (1980). While the evidence-bar test is related to *Corbin*'s "same conduct" test, it is importantly different. *See* Thomas, *Successive Prosecutions*, *supra* note 2, at 380-82. The Supreme Court has recently rejected the evidence-bar test. *See* Dowling v. United States, 110 S. Ct. 668 (1990) (holding that evidence of an eyewitness concerning the robber's identity could be introduced in a trial following acquittal for an unrelated robbery in which the same evidence was introduced).

21. *See* 110 S. Ct. at 2088.

out the relevant members of the DA's office being aware of the fatality.[22] Indeed, the assistant district attorney who represented the state at sentencing on the traffic convictions recommended a "minimum sentence" even though she could not find the case file, she had not been involved in the case prior to sentencing, and she had not spoken to the prosecutor responsible for the traffic prosecution.[23]

The Supreme Court held that the traffic convictions barred a subsequent trial for three other offenses: reckless manslaughter, criminally negligent homicide, and third-degree reckless assault.[24] As the Court explicitly recognized, *Blockburger* would not bar a second trial on any of these counts because none of them would inevitably prove either drunk driving or failure to keep to the right of the median.[25] But the Court held *Blockburger* was only the first step in the double jeopardy analysis of a second prosecution.[26] The second step is whether the pending prosecution would prove the same conduct that constituted the traffic offenses.[27] Because the state conceded this issue, the Court held that the double jeopardy clause barred a prosecution for the assault and homicide offenses.[28]

The legal effect of *Corbin* is that the state cannot use the facts that proved a previously-prosecuted offense to prove another offense. As the Court had stated in dictum ten years earlier, if a defendant "has already

22. The assistant district attorney responsible for gathering evidence for a homicide prosecution failed to ascertain when Corbin would appear on the traffic charges and failed to inform either the traffic court or the assistant district attorney responsible for traffic prosecutions about the fatality. Thus, the traffic judge had no knowledge of the fatality when the state filed its statement of readiness for trial. Moreover, no member of the DA's office appeared for the state on the date Corbin pleaded guilty. The judge accepted the guilty plea but postponed the sentencing because the DA's office had not submitted a sentencing recommendation. By the date of the sentencing hearing, a full six weeks after the victim's death, the assistant district attorney who appeared for the state still had no knowledge of the fatality. Moreover, she was even unfamiliar with the traffic offenses. *Id.* at 2088-89.

23. *Id.* at 2089.

24. The state filed two other counts—second-degree vehicular manslaughter and felony drunk driving—but the state court barred prosecution of these counts on the grounds of *Blockburger* and the state statutory double jeopardy provision, respectively. *Id.* at 2089. The state did not appeal these questions, *id.* at 2094 n.13, and, in any event, the United States Supreme Court would have no jurisdiction to review the state statutory issue.

25. *Id.* at 2093.

26. *Id.* Illinois v. Vitale, 447 U.S. 410, 419-20 (1980), had hinted that successive prosecution analysis requires two steps when *Blockburger* permits a second trial. *See* Thomas, *Successive Prosecutions*, *supra* note 2, at 350-54, 382-88.

27. 110 S. Ct. at 2093. *See also* Illinois v. Vitale, 447 U.S. 410 (1980); Thomas, *Successive Prosecutions*, *supra* note 2.

28. 110 S. Ct. at 2094.

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."[29] The effect of *Corbin*, I believe, is to transform that language from dictum to a holding, to broaden it to include acquittals,[30] and to acknowledge that a "substantial" double jeopardy claim under this analysis is a dispositive claim.[31]

Returning to the hypothetical, proof of drunk driving could establish a necessary element of vehicular homicide. If the state first prosecutes the drunk driving, *Corbin* bars a later prosecution for vehicular homicide that is based on the drunk driving conduct. But the state can avoid *Corbin* by prosecuting X for vehicular homicide based on different conduct—for example, speeding.[32] And it should be fairly easy for the state to separately prosecute speeding and failure to remain to the right of the median because neither offense would likely prove conduct that constitutes the other offense.[33]

While this aspect of *Corbin* is relatively straightforward, the Court's phrasing of the test creates the possibility that it is less than a "same conduct" test.[34] The Court expressed its holding as follows: "the Double Jeopardy Clause bars any 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."[35] Strictly construed, a prohibition of proving "conduct that constitutes an offense for which the defendant has already been prosecuted" would seem to permit the state

29. *Vitale*, 447 U.S. at 420. The New York Court of Appeals characterized this as "pointed dictum" when it reversed Corbin's convictions for the offenses that would not be barred under *Blockburger*. *In re* Corbin v. Hillery, 74 N.Y.2d 279, 290, 543 N.E.2d 714, 719-20 (1989).

30. The Court stated in *Corbin* that the double jeopardy clause bars a second trial if "the government will prove conduct that constitutes an offense for which the defendant has already been *prosecuted*." 110 S. Ct. at 2093 (emphasis added).

31. *Id.* at 2087 ("Today we adopt the suggestion set forth in *Vitale*."). *See also Vitale*, 447 U.S. at 426 (Stevens, J., dissenting).

32. *See Corbin*, 110 S. Ct. at 2094.

33. If the state prosecutes speeding first, it can prosecute failure to remain to the right of the median unless it must rely on the conduct of speeding—which seems unlikely. Similarly, if the state prosecutes failure to remain to the right of the median first, it can prosecute speeding unless it must prove X's conduct in crossing the centerline—somewhat more likely but not inevitable. The state could also separately prosecute failure to slow to avoid an accident and speeding if X's conduct of speeding was independent of that offered to prove failure to slow.

34. I am indebted to Barry Pollack, one of my students, for helping me clarify this aspect of *Corbin*.

35. *Corbin*, 110 S. Ct. at 2093.

to reuse the same conduct as long as it did not establish the offense the prosecutor charged in the first trial. This would often make the order of prosecution a critical factor; when the state seeks to reprove the same conduct, lesser offenses could be reprosecuted after greater ones—because the defendant has never been charged with the lesser—but not greater after lesser.

For example, we know from *Corbin* that the state cannot prosecute drunk driving and then vehicular homicide that is based on the offense of drunk driving. But what if the order of prosecution is reversed? Under a strict reading of *Corbin*, it might be that the state can prosecute vehicular homicide based on drunk driving and then drunk driving because X has never been prosecuted for the *offense* of drunk driving (as opposed to the conduct of drunk driving).

Even if correct, this narrow reading of *Corbin* will probably not have a significant practical effect. Few prosecutors will wish to prosecute a lesser offense after securing a conviction on a more serious offense based on the same conduct, and the *Blockburger* test provides some protection in the rare cases where it might occur. If X is convicted of drunk driving, she could not later be prosecuted for being drunk in a vehicle because proving the former would always prove the latter. And, although it is perhaps less clear, a prosecution for drunk driving would also seem to be a *Blockburger* bar to reckless driving defined as "the reckless operation of a vehicle." Every episode of drunk driving would, I think, prove reckless operation of a vehicle.

To be sure, prosecutors may seek with some frequency a minor offense prosecution after an acquittal on a serious offense, but the principle of collateral estoppel already provides at least a modicum of protection in this situation.[36] Assume vehicular homicide requires proof that X operated a vehicle recklessly.[37] If X's defense in a vehicular homicide prosecution is that her driving was not reckless, an acquittal would likely raise a collateral estoppel bar to a prosecution for any of the other offenses because each one presupposes a type of reckless driving, and the acquittal forecloses redetermination of this fact. If, however, X is acquitted of drunk driving under a defense that she was not drunk, collateral estoppel would not provide a bar to any speeding prosecution that proves another cause of reckless driving.

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

37. *See, e.g.*, N.J. REV. STAT. § 2C:11-5 (Supp. 1990).

This brings us to the theoretical question of whether the narrow reading of *Corbin* is the best reading. Again, the question is what it means to forbid proving "conduct that constitutes an offense for which the defendant has already been prosecuted."[38] Does this language mean that conduct can be re-used unless it constituted a statutory offense previously prosecuted? If so, a prosecution for drunk driving could follow a prosecution for vehicular homicide based on that same conduct.[39] The alternative, non-literal reading of this language is that a defendant has been prosecuted for an offense when she has been prosecuted for the conduct that constitutes that offense. Thus, a prosecution for vehicular homicide that proves drunk driving has already subjected the defendant to a (functional) prosecution for the offense of drunk driving. One argument in favor of this broader, non-literal reading is that the double jeopardy clause forbids reprosecuting the "same" offense, and what is the "same" offense in one order of prosecution should be the "same" if the order is reversed. Indeed, the Court has explicitly reached that conclusion in applying the *Blockburger* test.[40]

Another argument in favor of a broader reading is based on what I will call the "same culpability" principle. When one considers why it seems like good policy to prevent the reprosecution of conduct, the best answer is because conduct is the essence of criminal culpability, and criminal culpability, once determined, should not be redetermined. This statement of policy is the criminal analog to civil res judicata.[41] While the parallel is not perfect,[42] it suffices to explain that a bar against re-

38. *Corbin*, 110 S. Ct. at 2093.

39. It is clear that a prosecution for a lesser offense cannot follow a prosecution for a greater offense when the lesser is what the Court calls a "component" offense—one that the state "necessarily" proves to prove the greater. *See* 110 S. Ct. at 2093 n.11. Thus, if the greater offense requires proof of all the elements of the lesser—as would be the relationship between felony murder based on rape and the offense of rape—the double jeopardy clause forbids a subsequent prosecution for the lesser. *See* Harris v. Oklahoma, 433 U.S. 682 (1977) (per curiam). But drunk driving would not be a "component" offense of vehicular homicide because the latter could be proved by reckless acts that do not constitute drunk driving (or, indeed, any offense). Whether there is any justification to treat "component" lesser offenses differently from other types of "factually included" lesser offenses is, of course, another question. *See infra* notes 40-45 and accompanying text.

40. *See* Brown v. Ohio, 432 U.S. 161, 168 (1977) ("sequence" of prosecution "immaterial").

41. *See Ex parte* Lange, 85 U.S. (18 Wall.) 163, 168-69 (1873) (explicitly drawing a parallel between res judicata and double jeopardy).

42. "Criminal" res judicata protects a defendant's interest in finality by forbidding a redetermination of guilt as well as innocence. In civil res judicata, a determination of "guilt" does not bar adverse consequences in another proceeding; quite the contrary, the finding can be used "offensively" to establish the facts without the necessity of proving them again. *See Ex parte* Lange, 85

prosecuting the same conduct makes sense because it bars redetermining culpability. But culpability does not exist in the abstract. Indeed, one can say that X did act Y, but one cannot say that X is guilty of offense Y in the absence of a verdict. A verdict entails both facts and a theory of culpability. Because facts can give rise to multiple, alternative theories of culpability, our system of justice requires the prosecutor to identify a charge that describes the defendant's liability. Thus, one of the prosecutor's tasks is to provide coherence to the disorderly facts and inferences of an unstructured, random universe by alleging that X did Y which caused Z, and that Y and Z constitute criminal offense Q. The criminal charge is nothing more than a theory of culpability.

The factfinder will thus have access to the evidence and the prosecutor's theory of how that evidence creates culpability. If the factfinder determines that X is guilty of vehicular homicide because her drunk driving caused the fatal accident, what difference does it make to the culpability question that the prosecutor did not charge drunk driving? It seems to me that it should make no difference, that proving the facts and theory of drunk driving establishes the culpability of drunk driving just as surely as if the offense had been charged.

If I am right about this, the double jeopardy clause is, in effect, an embodiment of a policy that holds the prosecutor to the theories of culpability presented in the first trial, whether or not they were charged. Once prosecuted to verdict, the theories of culpability stand as a barrier to reproving any of that culpability. Thus, the state has proven the culpability of drunk driving when it proves the conduct of drunk driving to prove the reckless mens rea required by a vehicular homicide prosecution. It has proven the facts constituting drunk driving, and its theory of culpability is that the defendant engaged in drunk driving that caused the death. I think it difficult to distinguish this means of proving culpability from that used when the state proves drunk driving in a drunk driving prosecution.

No inevitable meaning of "offense" exists, despite Justice Scalia's best efforts to establish one.[43] It is possible that the framers meant "culpability" when they used the term "offense." To be more accurate, *Corbin* does not create a "same conduct" test as much as it does a "same culpability" test. This suggests that being prosecuted for an "offense" is noth-

U.S. (18 Wall.) at 169. The reasons behind this distinction are complex and outside the scope of this paper.

43. *See Corbin*, 110 S. Ct. at 2097 (Scalia, J., dissenting).

ing more than being prosecuted for the culpability proscribed by the offense and that the broad, non-literal interpretation of *Corbin*'s holding is the best one.

Moreover, one must question the motives of a prosecutor who seeks to reprosecute the same conduct in a greater-lesser order. In this situation, unlike the lesser-greater order, the prosecutor must know of the existence of the lesser offense. Thus, it would seem that this prosecutor must either be dissatisfied with the verdict in the first prosecution (acquittal) or with the quantity of punishment. But I believe basic principles of our adversary system render both of these motives improper. We do not want the prosecution to be able to "improve its presentation of proof with each trial" until a conviction finally results.[44] And the responsibility for deciding the appropriate sentence is that of the judge, not the prosecutor.

There is one final argument in favor of the broader reading of *Corbin*: none of the four dissenting Justices adopted the narrow reading. Indeed, Justice Scalia quoted the "constitutes an offense" language and then wrote, "This means, presumably, that prosecutors who wish to use facts sufficient to prove one crime in order to establish guilt of another crime must bring both prosecutions simultaneously. . . ."[45] If Scalia's reading of the majority opinion proves correct, then *Corbin* does, indeed, establish a "same culpability" test for the same offense that applies regardless of the order of prosecution.

It is, I believe, relatively uncontroversial to conclude that a prosecution for failure to keep to the right of the median bars a prosecution for drunk driving that will relitigate the same conduct. It is somewhat more controversial to conclude that a prosecution for drunk driving will bar a prosecution for vehicular homicide. But it is, I believe, quite controversial to conclude that a prosecution for failure to keep to the right of the median will bar a homicide prosecution. The question, then, is whether *Corbin* operates to bar a second trial in each of these cases, and whether *Corbin*'s double jeopardy rule is in need of a limiting principle.

## II. THE NEED TO RESTRAIN THE *CORBIN* PRINCIPLE

I will focus on the most controversial application of *Corbin*—that a prosecution for a minor traffic offense will bar prosecution for homicide if

44. *Id.* at 2093.

45. *Id.* at 2103 (Scalia, J., dissenting).

based on the same conduct that constitutes the traffic offense. Although the traffic offense conduct may be an integral part of proving the recklessness required for the homicide prosecution, the much greater seriousness of the latter charge makes linking them as the "same offense" seem unsatisfying. I will refer to this as the "disparity problem."

I think the disparity problem can be solved if I am right that a conduct definition of "same offense" is in reality a "same culpability" definition. "Same culpability" entails, I think, some rough equivalence in the seriousness of the culpabilities. The culpability for failure to keep to the right of the median, while part of reckless homicide based on that conduct, is so different from the culpability for homicide that it seems jarring to say that a homicide prosecution will redetermine the culpability of failure to keep to the right of the median. To be sure, one cannot insist on much in the way of culpability equivalence without reintroducing the problem of a narrow "same offense" definition that would permit many trials for overlapping offenses based on the same conduct. Thus, premeditated murder cannot define a different culpability than reckless homicide. And, as the Court has held, joyriding cannot define a different culpability than auto theft.[46]

Nonetheless, it still seems implausible that culpability for failure to keep to the right of the median is the same in a constitutional sense as that of homicide. It remains, then, to attempt to give a doctrinal voice to this intuition. There are three quite different ways to address the disparity problem. One way, arguably attempted by the *Corbin* majority, is an artificial approach to what is, I believe, a serious problem.

As noted in the last Part, the Court's formulation of the test in *Corbin* does not identify offenses as the same unless the second trial requires the use of conduct that constitutes an offense previously prosecuted, a phrasing that gives rise to narrow and broad readings. Another implication of the Court's formulation of the *Corbin* test, as Justice Scalia correctly notes in his dissent, is that prosecutors may avoid *Corbin*'s rule by proving in the second trial only *some* of the facts constituting the offense that was first prosecuted.[47] In that situation, because the prosecutor is not proving "conduct that constitutes an offense for which the defendant has already been prosecuted,"[48] the literal holding of *Corbin* is satisfied. In the hypothetical, for example, it may be possible for the state to prove the

46. *See* Brown v. Ohio, 432 U.S. 161 (1977).

47. *Corbin*, 110 S. Ct. at 2103-04 (Scalia, J., dissenting).

48. *Id.* at 2093.

reckless mens rea of vehicular homicide by proving that X was not watching the road as she came around a curve. While this is relevant to the offense of failure to keep to the right of the median, it is not sufficient to prove that offense. Thus, a prosecutor might be able to use the conduct that proved a minor offense in a prosecution for a more serious offense by omitting one element of the minor offense.

But this "whole conduct" solution suffers the worst of both worlds as it is either too narrow or too broad. If the disparity problem is a serious one, the "whole conduct" solution is artificially narrow in that it operates by chance to select the cases when second trials will be permitted. The "whole conduct" solution is merely another mechanism by which the prosecutor can craft her proof and will only work in cases in which the proof can be crafted—for example, it would appear impossible to prove excessive speed as the reckless act for homicide without also proving speeding. A solution that generates appropriate results in only a subset of cases is unsatisfying. On the other hand, the "whole conduct" solution is artificially broad and undermines the "same culpability" principle. As Justice Scalia aptly argues, if the *Corbin* principle has appeal, a defendant is not injured any the less when the prosecutor is fortuitously able to prove the second offense by use of some (but not all) of the conduct that proved the first offense.[49] A solution that is, at once, too narrow and too broad cannot be a very good one.

Justice Scalia offers a second solution. It does not suffer the artificiality of the "whole conduct" solution but has other problems. Scalia explicitly rejects the equivalence of "same offense" to "same conduct" in favor of *Blockburger* as the only test of same offense. Scalia's solution would thus permit prosecutors to maintain a series of trials based on precisely the same conduct.[50] Since I think "same offense" meant "same culpability" in 1792, and should mean the same thing today, I would

49. *See id.* at 2103 (Scalia, J., dissenting).

50. My favorite example derives from a commentator's observation that *Blockburger* would define nine federal narcotics offenses as separate from each other. *See* Note, *Consecutive Sentences in Single Prosecutions: Judicial Manipulation of Statutory Penalties*, 67 YALE L.J. 916, 928 n.43 (1958). Because a single sale of narcotics could violate all nine of these offenses, *Blockburger* would permit the government to spin out nine separate trials that would (almost) endlessly relitigate the same sale of narcotics. *See* Thomas, *Elegant Theory*, *supra* note 2, at 847-48. The need to limit this kind of prosecutorial discretion is what infuses the search for a different definition of "same offense" in the context of successive prosecutions. Professor Brian Serr once commented to me, "But, of course, prosecutors would not bring nine prosecutions based on a single sale." While this may be true, I think it quite likely that prosecutors would routinely bring a second (and perhaps a third) trial based on the same sale if they were dissatisfied with the earlier verdict or punishment. *See id.* at 834-36

prefer *Corbin*'s artificial, unsatisfying solution, because it would at least retain the benefits of the "same culpability" test in some cases even though it would permit exceptions in a randomly-selected group of cases.

But there is another solution to the disparity problem, one that retains the "same culpability" principle and avoids artificiality. Remarkably enough, although the very language of the double jeopardy clause suggests this solution, neither the Court nor any commentator (myself included) has yet to mention it. Indeed, the Court has not discussed since 1873 the part of the clause that requires "jeopardy of life or limb" before its protection applies.

Thus, an undiscussed dimension of double jeopardy protection is whether a person who faces a traffic conviction has been placed in jeopardy of life or limb. One would hardly think so, but the issue needs consideration. Moreover, close cases are bound to occur. What about drunk driving that permits a one-year jail sentence?

## III. THE "LIFE OR LIMB" REQUIREMENT AS A RESTRAINING PRINCIPLE

A culpability test for "same offense" that does not address the disparity problem is vulnerable. Indeed, the disparity problem has arisen quite often in the past decade,[51] and it will likely arise much more frequently in the wake of *Corbin*'s explicit adoption of a "same culpability" definition of "same offense." The frequency results from the prevalence of minor offenses, the inevitable disorder in urban prosecutors' offices,[52] and the natural incentive to seek a culpability determination that is at least roughly proportionate to what the prosecutor believes is justified on the facts.

In 1873, the Supreme Court decided in *Ex parte Lange* that "jeopardy

(discussing case in which this happened). In any event, the double jeopardy clause must be informed by a value other than faith in the discretion of prosecutors.

51. Prior to *Corbin*, it had arisen at least four times before the Supreme Court. *See, e.g.*, Fugate v. New Mexico, 470 U.S. 904 (1985) (equally divided Court affirming lower court's refusal to bar homicide prosecution following traffic convictions) (Powell, J., not participating); Thigpen v. Roberts, 468 U.S. 27 (1984) (holding traffic convictions a due process bar to manslaughter trial; not reaching double jeopardy question); Illinois v. Zegart, 452 U.S. 948 (1981) (denying certiorari, over dissent joined by three Justices, in case holding that conviction of crossing the median barred trial for reckless homicide); Illinois v. Vitale, 447 U.S. 410, 419-21 (1980) (noting "substantial" claim of double jeopardy if state follows traffic conviction with homicide prosecution based on same conduct).

52. *See Corbin*, 110 S. Ct. at 2095.

of life or limb" meant that the defendant faced a threat of any criminal punishment,[53] and the Court has not since explicitly revisited "life or limb." The double jeopardy landscape looks quite different now than it did in 1873. The Court has explicitly stated that the clause protects culpability determinations,[54] and legislatures in the last century have created much new criminal culpability upon which this protection can operate. A substantial part of the new culpability is in the nature of regulatory offenses that were unknown in 1873. Thus, I believe the time has come to re-examine what "life or limb" means, and I will do that in the context of the disparity problem that *Corbin* implicitly raises.

It is tempting to seek an historical, literal interpretation of "life or limb," but there is less there than meets the eye. "Life" is easy enough, suggesting that capital cases trigger double jeopardy protection, but what are we to do with "limb"? It cannot be limited to its literal meaning of amputation or mutilation[55] for two reasons. First, a literal reading would have no meaning today because we would consider loss of limb a cruel and unusual punishment in violation of the eighth amendment.[56] No modern penalties put "limb" in literal jeopardy. To read "limb" literally, then, would be to read it entirely out of the clause. Second, the framers in all likelihood did not intend a literal interpretation in 1792. Death replaced amputation and mutilation as the usual punishment for felons as early as the thirteenth century.[57] Since the framers sought to restrict the range of permissible punishments in the eighth amendment, it seems very unlikely that they would simultaneously signal acceptance, in

53. 85 U.S. (18 Wall.) 163, 168-73 (1873).

54. I believe this merely re-institutes the framers' likely understanding of "same offense," Justice Scalia's dissent in *Corbin* notwithstanding. Blackstone and Hale are as consistent with a "same conduct" definition of "same offense" as with any alternative reading. Blackstone, for example, noted that a conviction of manslaughter barred a prosecution for murder because "the fact prosecuted is the same in both, though the offenses differ in coloring and degree." 4 W. BLACKSTONE, COMMENTARIES *336; *see also* M. HALE, PLEAS OF THE CROWN, 244-46 (1847) (series of examples). Indeed, a few years after *Ex parte Lange*, the Court read "same offense" to mean same conduct. *See In re* Nielsen, 131 U.S. 176 (1889) (holding that a prosecution for cohabitation barred a subsequent prosecution for adultery); Thomas, *Successive Prosecutions*, *supra* note 2, at 342-45 (discussing this point in more detail). Moreover, while this is a complex point that cannot be fully developed here, I believe that the plea of former attaint existing in 1792, *see* W. BLACKSTONE, COMMENTARIES *336-37, has reappeared in a new form in *Corbin* after a long period of quiescence. In sum, I believe *Corbin*, and not *Blockburger*, is the true descendant of Blackstone.

55. *See* 2 F. POLLOCK & F. MAITLAND, A HISTORY OF ENGLISH LAW 452-53 (1899) (detailing eleventh century English punishments, including loss of ears, nose, upper-lip, hands, and feet).

56. U.S. CONST. amend. VIII.

57. *See* 2 F. POLLOCK & F. MAITLAND, *supra* note 55, at 461.

the double jeopardy clause, of a type of punishment that had long since disappeared in England.

Moreover, the earliest use of the term "life or limb" had nothing to do with double jeopardy. It was used in the Magna Carta to describe trial by battle,[58] a species of criminal trial in the thirteenth century that literally placed the defendant's life and limb in jeopardy.[59] Since trial by battle had become, by the eighteenth century, a "long forgotten procedure of the dark ages,"[60] the framers were almost certainly using the term other than in its literal sense when they wrote the double jeopardy clause. This leaves the likely meaning of "limb" quite unclear.

Whatever "limb" means, being in jeopardy of "life or limb" connotes being prosecuted for an offense that threatens a penalty of some unspecified gravity. The Court has previously used, in a different context, the potential penalty as a measure of the constitutional gravity of an offense. In extending the sixth amendment right to a jury trial to the states, the Court drew a distinction between "serious" crimes, which required a jury trial, and "petty" offenses, which did not.[61] To make this determination, the Court noted that the "penalty authorized by the law of the locality may be taken 'as a gauge of its social and ethical judgments' of the crime in question."[62] Based on this criterion, the Court drew the line for "serious" offenses at potential imprisonment of more than six months.[63]

Justice Black questioned the wisdom of drawing the jury-trial line at "serious" crimes, noting that the Constitution guaranteed a right to trial by jury "[i]n all criminal prosecutions" and for "all crimes" without qualification.[64] But the Court rejected this argument on two grounds. First, the Court noted that the common law history suggested that "petty" offenses punishable by six months or less had been generally "tri-

58. *See* W. McKECHNIE, MAGNA CARTA 359-367 (2d ed. 1914) (discussing chapter thirty-six of Magna Carta, which provided for "a writ of inquisition of life or limbs," a writ that permitted the accused to test the adequacy of a homicide charge before twelve recognitors and thus allow those who were unjustly accused to avoid trial by battle).

59. *See* Russell, *Trial By Battle and the Appeals of Felony*, 1 J. LEGAL HIST. 135 (1980).

60. *See* W. McKECHNIE, *supra* note 58, at 366-67 (noting that trial by battle was nonetheless not officially repealed until 1819).

61. *See* Duncan v. Louisiana, 391 U.S. 145 (1968).

62. *Id.* at 160 (quoting District of Columbia v. Clawans, 300 U.S. 617, 628 (1937) (internal citation omitted)).

63. *See* Baldwin v. New York, 399 U.S. 66 (1970) (plurality).

64. *See id.* at 74 (Black, J., concurring in the judgment) (noting text of the Constitution at amendment VI and article III, § 2, cl. 3, respectively) (joined by Douglas, J.).

able without a jury in the American States since the late 18th century."[65] Second, the Court balanced the disadvantage of not having a jury against the "benefits that result from speedy and inexpensive non-jury adjudications."[66]

History might suggest a somewhat analogous line for defining "life or limb." In Blackstone's day, most felonies were punishable by death.[67] Thus, when Blackstone wrote that the "universal maxim of the common law of England [was] that no man is to be brought into jeopardy *of his life* more than once for the same offence,"[68] he was stating a rule that applied to most felonies but presumably not to misdemeanors.[69] Indeed, both Hale and Coke explicitly limited the double jeopardy pleas to felonies.[70]

Drawing on this evidence, some have suggested that "life or limb" implied a limitation of double jeopardy protection to felonies,[71] a line roughly analogous to the six-month line the Court drew in the jury trial cases. Even if this distinction is historically true, however,[72] it would be of doubtful utility today. Since most felonies in the eighteenth century were punishable by death, any penalty less than death would seem leni-

65. *Id.* at 71. *See also Duncan*, 391 U.S. at 160 ("So-called petty offenses were tried without juries both in England and in the Colonies and have always been held to be exempt from the otherwise comprehensive language of the Sixth Amendment's jury trial provisions").

66. *See Baldwin*, 399 U.S. at 73.

67. Writing in the eighteenth century, Blackstone noted the "melancholy truth" that "a multitude of successive independent statutes . . . no less than a hundred and sixty" were punishable by death. 4 W. BLACKSTONE, COMMENTARIES 18. *See also Ex parte* Lange, 85 U.S. (18 Wall.) 163, 173 (1873).

68. 4 W. BLACKSTONE, COMMENTARIES 335. The omission of "limb" here could imply that the framers intended to adopt a broader protection than the common law pleas provided.

69. Blackstone did not explicitly limit the common law double jeopardy pleas of former acquittal and former conviction to felonies. *Compare id.* at 335 (plea of former acquittal good against "subsequent accusation for the same crime" after "a man is once fairly found not guilty upon any indictment or other prosecution") (implying rule of general application) *with id.* at 336 (limiting plea of former attaint to "the same or any other felony").

70. *See* E. COKE, THIRD INSTITUTES OF THE LAWS OF ENGLAND 212-214 (1817); 2 M. HALE, THE HISTORY OF THE PLEAS OF THE CROWN 240 (1847).

71. *See* BISHOP ON CRIMINAL LAW § 990 (5th ed. 1872) (noting that "life or limb" rule "properly . . . extends to treason and all felonies, not to misdemeanors" but "practically and wisely, the courts have applied it to misdemeanors also"); J. SIGLER, DOUBLE JEOPARDY, THE DEVELOPMENT OF A LEGAL AND SOCIAL POLICY 5 (1968).

72. It may have had less validity in the late eighteenth century than in the days of Coke and Hale. As noted, *supra* note 69, Blackstone was somewhat ambiguous about whether the common law pleas were limited to felonies. Moreover, Chitty stated the rule of former acquittal and former conviction as "no man shall be placed in peril of legal penalties more than once upon the same accusation." *See* 1 J. CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 452, 462 (1836).

ent by comparison. The line between misdemeanor and felony was, at that time, relatively easy to draw and justify.[73]

By the late nineteenth century, however, the distinction between felonies and misdemeanors had lost most of its significance.[74] Indeed, the present distinction in many states is that misdemeanor sentences are limited to less than one year and felonies are offenses punishable by imprisonment of one year or more.[75] It makes little sense to draw a double jeopardy distinction between classes of crimes separated by a theoretical gap of only one day's punishment.[76] This recognition led the Court in *Ex parte Lange* to refuse to limit the application of the clause to felonies; instead, the Court held that "life or limb" meant risk of a "second punishment."[77]

Even if an historical argument were as persuasive in the "life or limb" context as it was on the jury trial issue, the second half of the jury trial rationale collapses when applied to double jeopardy. It is relatively uncontroversial to exempt petty offenses from the right to a jury trial because the value of a jury trial in an individual case is difficult to demonstrate. There is no particular reason to believe that a jury is more likely to reach an accurate result than a judge. To be sure, defendants might prefer "the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge."[78] But the principal benefit of the right to a jury trial is systemic. It "prevent[s] oppression by the Government" by refusing "to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of

73. Indeed, Blackstone noted that "inferior" offenses were often treated as civil wrongs "for which a satisfaction or remedy is given to the party aggrieved." *See* 4 W. BLACKSTONE, COMMENTARIES 216. *See also id.* at 217, 218.

74. *See Ex parte Lange*, 85 U.S. (18 Wall.) at 173 (noting "difficulty of deciding when a statute under modern systems does or does not describe a felony when it defines and punishes an offence").

75. *See* R. PERKINS & R. BOYCE, CRIMINAL LAW 18-19 (3d ed. 1982). Another way of distinguishing felonies from misdemeanors is the place where the sentence must be served; felonies are punishable by imprisonment in the penitentiary while misdemeanors authorize incarceration in jail. *See id.* Even under this latter system, however, the length of incarceration typically reflects the one-year dividing line. *See id.*; W. LAFAVE & A. SCOTT, CRIMINAL LAW 30 (2d ed. 1986).

76. *Cf.* Duncan v. Louisiana, 391 U.S. 145, 161 (1968) (noting that the task of drawing a line between "serious" and "petty" offenses for purposes of the right to a jury trial "requires attaching different consequences to events which, when they lie near the line, actually differ very little"); Baldwin v. New York, 399 U.S. 66, 68 (1970) (noting that drawing the *Duncan* distinction is "essential if not wholly satisfactory") (plurality). These cases are discussed *supra* notes 61-66 and accompanying text.

77. *See Ex parte* Lange, 85 U.S. (18 Wall.) at 173.

78. *Duncan*, 391 U.S. at 156.

judges."[79] It prevents judges from favoring the state because they know that future defendants can choose to avoid their judgment.

The double jeopardy right, on the other hand, belongs entirely to the individual defendant, rather than partly to the defendant and partly to the system as a whole. A prohibition of successive prosecutions promotes the finality of a judgment with respect to a particular group of facts and a particular defendant. While its effect may act as a check on government oppression, that is not, in my opinion, its rationale.[80] If the double jeopardy clause protects determinations of culpability, as I have argued, it is no less violated just because an offense is fortuitously punishable by less than one year. The wrongdoer's culpability for joyriding (a misdemeanor in most states)[81] seems to be wholly included in her culpability for auto theft (a felony in most states),[82] and any definition that distinguishes those culpabilities is unhelpful.

To conclude that the felony-misdemeanor or serious-petty distinction is unhelpful, however, still leaves a role for history to play. Most likely the framers meant the term metaphorically rather than literally. Early English law permitted defendants to purchase emendment (atonement) for some crimes by pecuniary compensation to the injured party (the *bot*) and to the king (the *wite*).[83] But emendment was not available for a category of serious crimes.[84] The rationale underlying this principle was that "by the gravest, the unemendable, crimes a man 'forfeited life and member and all that he had.' "[85] Although the definition of which crimes could be emended varied over time,[86] it included only serious offenses. Thus, the "life or limb" concept probably referred to crimes for which a defendant forfeited "life and member," not in a literal sense, but in the metaphorical sense that required punishment rather than compensation to the victim. This reading would limit double jeopardy clause protection to non-emendable or "grave" crimes.

In defining "grave" crimes, one could follow history and draw a dis-

79. *Id.*

80. *See* Thomas, *Elegant Theory*, *supra* note 2, at 832-34, 869-73.

81. *See, e.g.*, Brown v. Ohio, 432 U.S. 161, 162 n.1 (1977).

82. *See, e.g.*, *id.* at 163 n.2.

83. *See* 2 F. POLLOCK & F. MAITLAND, *supra* note 55, at 451.

84. *Id.* at 451-52.

85. *See id.* at 462 (source of internal quotation said to be "the old law," presumably of the Anglo-Saxon kings, *see id.* at 449-59).

86. *See id.* at 452 (noting that even homicide was emendable at times by payment of money, horses, or oxen).

tinction between punishment and other purposes served by proscribing conduct. This is essentially what *Ex parte Lange* did when it held that risk of any second punishment is jeopardy of "life or limb," but the Court left unanswered what "punishment" meant. In *United States v. Halper*,[87] the Court recently attempted to answer that question, concluding that a sanction constitutes punishment when it "serves the goals of punishment," that is, when the sanction "cannot fairly be said solely to serve a remedial purpose, but rather can be explained only as also serving either retributive or deterrent purposes."[88] If this is the right way to read "life or limb," however, it cannot provide a solution to the disparity problem because most minor offenses serve deterrent (if not retributive) purposes. The fine authorized for double parking, for example, hardly serves a remedial function; its dominant purpose is to deter double parking.

But I believe this aspect of *Halper* misconceives what is unique about crimes when compared to other statutory prohibitions. The question is not whether a particular law seeks to deter conduct—indeed, tort law also seeks to deter conduct—but whether the conduct deserves to be punished. This suggests that emendment followed a line roughly between blameworthy and non-blameworthy conduct. Indeed, Pollock and Maitland observed that the line between emendable and unemendable "fluctuated from time to time" and "from district to district"[89] as one would expect if it roughly tracked societal notions of blameworthiness. If this is right, "unemendable" means those offenses that society views as blameworthy or deserving of punishment. But blameworthiness reflects a concern with retribution (punishment for the sake of punishment) rather than deterrence. Deterrence assumes a rational, utilitarian balance of benefits and harms that has to do with perceived risk and strength of temptation rather than with blameworthiness.

Thus, I would reject the *Halper* alternative definition of punishment (serving retribution or deterrence) in favor of one that makes retribution the sole criterion. Under this approach, "non-grave" crimes would be those for which the legislature's principal purpose is compensation or deterrence rather than retribution. Double parking would not qualify as a "grave" crime under this definition nor would speeding or failure to stay to the right of the median. Retribution plays a much smaller role (if

87. 109 S. Ct. 1892 (1989).

88. *Id.* at 1902.

89. *See* 2 F. POLLOCK & F. MAITLAND, *supra* note 55, at 456.

any) in these offenses than does deterrence. On the other hand, if retribution is one of the principal legislative purposes—not necessarily the major one—then I believe the proscribed conduct is blameworthy and the crime "grave." And, as we shall see,[90] the offense in *Halper* was one in which retribution played a major role; thus, my revision of the *Halper* definition is inconsistent with the Court's dicta but not its holding.

Making a determination on a case-by-case basis of whether retribution was one of the legislature's principal purposes is fraught with uncertainty.[91] What is needed is a mechanical line that would guide trial judges in deciding when double jeopardy protection exists, much like the Court provided for the jury trial right when it drew a line at six months authorized incarceration. Fortunately, a similar line is available for the blameworthiness inquiry; since the focus here is on punishment, rather than on "serious" versus "petty," I think the legislative judgment to permit incarceration for particular conduct is a rough and ready guide to what society considers blameworthy conduct.

If no incarceration is authorized it would seem that the principal legislative purpose is compensation or deterrence rather than punishment. This makes "non-grave" offenses roughly analogous to "regulatory offenses,"[92] known in the colorless language of the Model Penal Code as "violations."[93] They include municipal ordinances and traffic offenses. The Model Penal Code tracks my blameworthiness analysis in commenting that regulatory offenses do not imply "the type of moral condemnation that is and ought to be implicit when a sentence of imprisonment may be imposed."[94] While "regulatory offense" is not self-defining, the Model Penal Code limits the category to those explicitly denominated as such by the criminal code or those that authorize sanctions short of incarceration.[95]

I propose, then, that the existence of authorized incarceration serves,

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90. *See infra* notes 100-01 and accompanying text.

91. *See Halper*, 109 S. Ct. at 1904 (Kennedy, J. concurring) (noting that an inquiry into the "subjective purposes that may be thought to lie behind a given judicial proceeding . . . would be amorphous and speculative, and would mire the courts in the quagmire of differentiating among the multiple purposes that underlie every proceeding, whether it be civil or criminal in name").

92. *See* Morisette v. United States, 342 U.S. 247, 258 (1952); Sayre, *Criminal Responsibility for the Acts of Another*, 43 HARV. L. REV. 689, 720 (1930). For a good discussion of this category of offenses, see R. PERKINS & R. BOYCE, *supra* note 75, at 880-907.

93. *See* MODEL PENAL CODE § 1.04(5).

94. *See* MODEL PENAL CODE § 2.05, Comments (Tent. Draft No. 4, 1955).

95. *See* MODEL PENAL CODE § 1.04(5).

in every case, to manifest legislative concern with retribution and thus to demarcate an offense as "grave." If no incarceration is authorized, the inquiry becomes whether retribution was one of the principal legislative purposes. If it was, then the offense is "grave" despite the absence of authorized incarceration. But I think it quite unlikely that a traditional offense would manifest a serious concern with retribution unless it authorized incarceration. To be sure, this could be true in the non-traditional case of corporate offenses. Because corporations cannot be incarcerated, criminal offenses that target them can only provide fines or probation as sanctions,[96] and a sufficiently large authorized fine or lengthy probation might mark the offense as being blameworthy. Moreover, corporations can also be charged with violations of traditional offenses.[97] Here, the inquiry might properly focus on the potential for incarceration that an individual would face, because the gravity of the offense is presumably the same whether it is committed by an individual or a corporation. Outside the area of corporate defendants, it is difficult to imagine an offense that manifests retribution in the absence of authorized incarceration.[98]

Thus, once the *Halper* definition is refocused on retribution as the appropriate measure of blameworthiness, the legislature's authorization of incarceration serves as a reliable guide to the category of "grave" offenses that would place a defendant in jeopardy of "life or limb." But the legislature is not the only entity that can place a defendant in jeopardy of "life or limb." The prosecutor can charge multiple counts of a "non-grave" offense sufficient to transform it into a "grave" offense. This is what happened in *Halper*. The *Halper* Court held that cumulative fines under a single civil statute constitute a criminal punishment for purposes of the double jeopardy clause if the total fine was "so disproportionate to the damages caused" that it was "not rationally related to the goal of making the Government whole."[99] But the key here, I believe, is not the lack of

96. *See* 1 K. BRICKEY, CORPORATE CRIMINAL LIABILITY §§ 1.07, 1.08 (Supp. 1989).

97. *See, e.g.*, 18 U.S.C. § 3571(e) (Supp. II 1984) (setting new maximum fine levels for corporations at $500,000 for felonies and for misdemeanors resulting in death); 1 K. BRICKEY, *supra* note 96, at § 1.07 (discussing sanctions on corporations contemplated by Sentencing Commission's preliminary report).

98. For example, a few jurisdictions have decriminalized the possession of small amounts of marijuana. Perhaps this would be considered blameworthy conduct due to its history as an offense that permitted incarceration. But, on balance, it would seem that the legislative decision to decriminalize an offense would inevitably reflect a social judgment that it is no longer considered blameworthy.

99. *Halper*, 109 S. Ct. at 1903.

a remedial purpose; it is, instead, that the government's dominant purpose was to achieve retribution. The amount of fraud was $585,[100] yet the government charged 65 counts that required a total sanction of $130,000.[101] Because this seems designed to punish the particular wrongdoing, *Halper*'s holding that the proceeding was barred by a prior criminal verdict for the same conduct is consistent with my argument that retribution is the best marker for "grave" offenses that place a defendant in jeopardy of "life or limb."[102]

Since I believe that blameworthiness is determined either by the legislature's purpose in enacting the law or by the prosecutor's use of that law, lack of incarceration in an individual case would not change the character of a blameworthy offense. Thus, the Court's right to counsel cases do not provide a solution to the "life or limb" problem. The Court held, in those cases, that lack of incarceration of a particular indigent defendant meant that no right to counsel violation had occurred.[103] But whether incarceration was imposed in a particular instance has to do with factors in addition to the blameworthiness of the proscribed conduct—for example, the likelihood that the defendant will violate the criminal law in the future. More importantly, a test that looks to the sanction actually imposed is inconsistent with the double jeopardy clause policy that defendants not be forced to endure the second prosecution, regardless of the penalty imposed.[104]

In sum, I believe that double jeopardy protection should be limited to "grave" offenses—those offenses that, in purpose or effect, manifest

100. *Id.* The Court was willing to consider all the government's costs resulting from the fraud as the measure of damages, not merely the amount of fraud itself. The district court had approximated the government's total expenses at $16,000. *Id.* The government did not seek to prove its expenses, and the Court remanded the case to give it that opportunity. *Id.* at 1904.

101. *Id.* at 1896.

102. Blameworthiness would not usually attend a civil penalty, however, because most civil sanctions are remedial in effect as well as in purpose. *Id.* at 1902.

103. *See* Argersinger v. Hamlin, 407 U.S. 25 (1972); Scott v. Illinois, 440 U.S. 367 (1979).

104. *See* Price v. Georgia, 398 U.S. 323, 326 (1970) (stating that "[t]he 'twice put in jeopardy' language of the Constitution thus relates to a potential, i.e., the risk that an accused for a second time will be convicted of the 'same offense' for which he was initially tried"); United States v. Ball, 163 U.S. 662, 669 (1896) (noting that the "prohibition is not against being twice punished, but against being twice *put* in jeopardy") (emphasis added). In Ball v. United States, 470 U.S. 856 (1985), the Court held that a second conviction for the same offense violates the multiple punishment aspect of double jeopardy even if no penalty whatsoever is imposed. *Ball* is a federal case, and the Court premised its reasoning on congressional intent, but I believe its holding derives from the double jeopardy clause itself. If so, it would be binding on the states as well. *See* Thomas, *Sentencing Problems Under the Multiple Punishment Doctrine*, 31 VILL. L. REV. 1351, 1418-23 (1986).

blameworthiness. In almost all cases, whether the offense permits incarceration will determine blameworthiness, meaning that most regulatory offenses will not trigger double jeopardy clause protection. I also believe that the constitutional text supports this exclusion from double jeopardy protection. If "life or limb" is 1792 shorthand for "grave" or "unemendable" criminal penalties of that era, then minor traffic and other municipal offenses would seem beyond this definition of "life or limb" because they did not exist at that time. This argument is consistent with *Ex parte Lange*'s holding that "life or limb" means "criminal punishment" if we read "crime" in its 1873 context and thus exclude modern regulatory offenses.

My proposed limitation of double jeopardy protection would not, however, have led to a different result in *Corbin* itself. Although the Court does not indicate the potential penalty of the traffic charges to which Corbin pleaded guilty (misdemeanor drunk driving and failing to keep to the right of the median), the New York traffic code authorized incarceration of up to one year for the drunk driving offense.[105] This offense would qualify as "serious" for purposes of the right to a jury trial. It would also qualify as "grave" under my proposed test that looks to the potential for incarceration for any period of time. This means that *Corbin* is right both in its principle and its result.

But, as the Court took great pains to point out, prosecutorial ineptness, in large part, caused the result in *Corbin*.[106] There is no reason, even under a "same culpability" version of double jeopardy protection, that Corbin could not have been tried in a single trial for reckless manslaughter, assault with injury, drunk driving, and failing to keep to the right of the median.[107] It requires only that the person responsible for prosecuting the traffic offenses note that an accident and death resulted from the defendant's conduct. At that point, the prosecutor's office could determine whether it wanted to join all four of the offenses, join only some of them, or prosecute only the most serious offense.[108] Since

105. *See* N.Y. VEH. & TRAF. LAW §§ 1192(3), (5) (McKinney 1986).

106. *See Corbin*, 110 S. Ct. at 2087-88.

107. *See Corbin*, 110 S. Ct. at 2095 ("With adequate preparation and foresight, the State could have prosecuted Corbin for the offenses charged in the traffic tickets and the subsequent indictment in a single proceeding, thereby avoiding the double jeopardy question.").

108. *Id.* at 2095. More than one conviction for the same conduct can be imposed in a single trial if authorized by the legislature. *See, e.g.*, Missouri v. Hunter, 459 U.S. 359 (1983); Thomas, *Hunter Analysis*, *supra* note 7. The *Blockburger* test is used to determine whether the legislature has authorized multiple convictions when there is no explicit guidance on this question. *See* Thomas, *Unified*

the drunk driving offense in New York authorized a punishment of up to one year in jail, it surely justified that level of attention.

Limiting double jeopardy protection to crimes that proscribe blameworthy conduct (usually identified by whether the offense authorizes incarceration) has three advantages. First, from a practical standpoint, offenses that authorize incarceration are sufficiently serious that the prosecutor's office is effectively put on notice of the existence of the charge and pending prosecution. If the prosecutor proceeds with a prosecution for a less serious offense, the state can be charged with having made an election of that culpability rather than a more serious one.[109]

Second, the limitation to offenses that authorize incarceration is conceptually consistent with the culpability principle that I believe underlies *Corbin*. Equating the culpability of a minor traffic offense to that of homicide strikes me as a peculiar use of "same culpability." The third advantage is related to the second but deserves separate mention. Judges naturally recoil from applying the double jeopardy clause to permit minor traffic offenses to substitute for serious felonies, and their recourse is to define "same offense" narrowly to permit a second prosecution.[110] The narrow definition used in these cases damages the fabric of double jeopardy protection, permitting prosecutors to bring multiple prosecutions for a series of serious offenses that prove the same culpability.[111] In the 1981 case of *Illinois v. Zegart*,[112] for example, the state court held that a traffic conviction barred a homicide prosecution. Three members of the Supreme Court dissented from the majority's refusal to overturn the state court decision and argued that only the narrow *Blockburger* test should measure the protection against successive prosecutions.[113] Justice

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*Theory*, *supra* note 7, at 56-58. Because reckless manslaughter would not always prove assault with injury, drunk driving, or failing to keep to the right of the median, these offenses would not be the same under *Blockburger*.

109. *See* Thomas, *Elegant Theory*, *supra* note 2, at 869-73 (describing a theory of culpability election that works against the prosecutor as well as defendants).

110. *See, e.g.*, Fugate v. New Mexico, 470 U.S. 904 (1985) (equally divided Court affirming lower court's holding that double jeopardy did not bar homicide prosecution following traffic convictions) (Powell, J., not participating); Illinois v. Zegart, 452 U.S. 948, 948 (1981) (Burger, C.J., dissenting from denial of certiorari) (joined by Blackmun & Rehnquist, JJ.).

111. *Cf.* Garrett v. United States, 471 U.S. 773, 787-89 (1985) (arguing, in dicta, that conviction for offense of importing marijuana was not "same offense" as greater crime that required proof of that offense).

112. 452 U.S. 948, 948 (1981) (Burger, C.J., dissenting from denial of certiorari) (joined by Blackmun & Rehnquist, JJ.).

113. *See id.* at 951 (Burger's dissent argues that the double jeopardy clause "require[s] the courts

Scalia's dissent urged the same standard in *Corbin*, and three other Justices joined his opinion. With Justice Brennan retired, the *Blockburger* faction could already have the votes to overrule *Corbin* and institute a test so narrow that it would permit nine prosecutions for a single sale of narcotics.[114] But I believe that result is equally as erroneous as permitting a traffic conviction to bar a homicide prosecution. I want a solution to both excesses, and I think the "life or limb" analysis is precisely that solution. It is an explicit part of the double jeopardy clause, it derives from the same notion of culpability that underlies *Corbin*'s "same conduct" test, and it is consistent with societal notions of blameworthiness. Finally, my "life or limb" solution would permit the Court to solve the disparity problem without overruling *Corbin*.

## IV. CONCLUSION

Society is better served by a meaningful bulwark against reprosecution when the same "grave" culpability underlies both trials than by an all-inclusive barrier that causes courts to twist the definition of "same offense" to fit the equities of a particular case. Courts *are* right when they seek to fashion an interpretation of the double jeopardy clause that permits the state an opportunity to prosecute "grave" culpability following a prosecution for a regulatory offense based on the same conduct. But courts use the wrong tool to achieve this result, in my opinion, when they rely on the definition of "same offense," because it causes them to reverse, distinguish, or ignore earlier decisions that prohibited more than one prosecution for the same "grave" culpability. The solution is to explicitly remove "non-grave" offenses from the ambit of the double jeopardy clause, while retaining *Corbin*'s "same culpability" test as a mechanism to prevent successive prosecutions that seek to relitigate the same "grave" culpability.

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to look to the *statutory* elements of the first and second charges, not to similarities of facts in the government's proof") (emphasis in original).

114. *See supra* note 50. *Compare* Gore v. United States, 357 U.S. 386 (1958) (permitting three convictions, in single proceeding, for single possession of narcotics that violated three offenses each of which required proof of a distinct element).