DOUBLING DOWN: INCONSISTENT PROSECUTIONS, CAPITAL PUNISHMENT, AND DOUBLE JEOPARDY

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There is a practice among prosecutors whereby they pursue incompatible theories of a case against two or more defendants for criminal behavior for which, factually, only one defendant can be culpable. While it's difficult to determine just how frequently these arguments are made, at least twenty-nine people have been condemned to death in cases where the defense has alleged inconsistencies, and seven of those twenty-nine people have been executed. Situations like these cut against our moral and ethical understanding of fairness and of justice; these arguments operate in a world detached from reality, where factually singular acts can have multiple agents, prosecutors are not accountable to a consistent narrative, and factfinders are asked to make ultimate determinations of death based on factual impossibilities. But finding ways to challenge the practice has, frustratingly, fallen short in providing legal relief to the condemned.

*This Note looks beyond the due process and Eighth Amendment arguments against this practice that have not provided fertile ground for protecting criminal defendants from this type of vindictive approach to sentencing. Instead, this Note makes a normative argument that the history of the Fifth Amendment's Double Jeopardy Clause, along with civil law principles of collateral estoppel that have been incorporated into the criminal law through the Clause, and protections against vindictive sentencing practices that undergird the Clause bars this practice. In other words, this Note argues that double jeopardy preclusion principles bar prosecutors from relitigating issues of ultimate culpability in successive cases. This solution draws on the Supreme Court's only consideration of this issue—*Bradshaw v. Stumpf*—which makes an analytical distinction between the consequences of this practice on conviction and consequences on sentencing.*

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Introduction

One evening in 1984, Norman and Mary Jane Stout were sitting at their kitchen table paying bills when they heard a knock at the door.[1] When Mr. Stout answered, two men—John David Stumpf and Clyde Daniel Wesley—said their car had broken down on a nearby highway and they needed a telephone.[2] After Mr. Stout let them in, things quickly started to go wrong.[3] Mr. Wesley announced that this was a "stickup," and when Mr. Stout lunged at Mr. Stumpf, he was shot twice in the head.[4] Miraculously, Mr. Stout didn't die, though he did

1 Ken Armstrong, *Two Murder Convictions for One Fatal Shot*, New Yorker (Nov. 6, 2017), https://www.newyorker.com/magazine/2017/11/13/two-murder-convictions-for-one-fatal-shot [https://perma.cc/NM9P-9H5U].

2 *Id.*; *see also* Bradshaw v. Stumpf, 545 U.S. 175, 178 (2005).

3 Armstrong, *supra* note 1.

4 *Id.*

briefly lose consciousness.[5] When he awoke, he heard gunshots coming from another room—the gunshots that killed his wife.[6]

The State of Ohio prosecuted both John David Stumpf and Clyde Daniel Wesley in separate, successive trials for the murder of Mary Jane Stout and sought the death penalty in both cases.[7] Mr. Stumpf pleaded guilty, and the penalty phase of his trial proceeded in front of a three-judge panel.[8] The prosecution argued that John David Stumpf had been the primary actor in the murder of Mrs. Stout, that he had pulled the trigger, and that he was thus deserving of the death penalty.[9] The judges agreed and sentenced Mr. Stumpf to death because he "was the principal offender."[10] In Clyde Daniel Wesley's trial, the same prosecutor who tried Mr. Stumpf's case, in front of the same judge who presided over Mr. Stumpf's penalty-phase bench trial, presented evidence suggesting that *Mr. Wesley*—not Mr. Stumpf—was the person who shot and killed Mary Jane Stout.[11] Upon learning of the inconsistencies between the two trials, John David Stumpf appealed. Remarkably, the State maintained that Mr. Stumpf was the shooter throughout the appellate process, despite the arguments made in Mr. Wesley's trial.[12]

This case study illustrates a practice among prosecutors of a single sovereign whereby they pursue incompatible theories of a case against two or more defendants for criminal behavior for which, factually, only one defendant can be culpable.[13] While it is difficult to determine exactly how frequently these types of arguments are made, at least twenty-nine people have been condemned to death in cases where the defense has alleged such inconsistencies, and seven of those

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[5] *Id.*

[6] *Id.*

[7] *Bradshaw*, 545 U.S. at 178–81.

[8] *Id.* at 179. There are many strategic reasons why a defendant might plead guilty to a crime they otherwise maintain innocence to, including the hope for leniency at sentencing. *See generally*, Nancy J. King, David A. Soulé, Sara Steen & Robert R. Weidner, *When Process Affects Punishment: Differences in Sentences After Guilty Plea, Bench Trial, and Jury Trial in Five Guidelines States*, 105 COLUM. L. REV. 959 (2005) (exploring how various process-related decisions, including whether to accept a plea or to opt for a bench trial rather than a jury trial, result in sentencing "discounts").

[9] *Bradshaw*, 545 U.S. at 179–80.

[10] *Id.* at 180 (internal quotations omitted).

[11] *Id.*

[12] *Id.* at 180–81.

[13] For a general discussion of how prosecutors make these inconsistent arguments, and the various degrees of inconsistency that can exist, see Brandon Buskey, *If the Convictions Don't Fit, You Must Acquit: Examining the Constitutional Limitations on the State's Pursuit of Inconsistent Criminal Prosecutions*, 36 N.Y.U. REV. L. & SOC. CHANGE 311, 316–19 (2012).

twenty-nine people have been executed.[14] Cases like these cut against our moral and ethical understandings of fairness and justice because they operate in a world detached from reality: one where factually singular acts can have multiple agents, prosecutors are not accountable to a consistent narrative, and factfinders are asked to make ultimate determinations of death based on factual impossibilities. But finding ways to challenge the practice has, frustratingly, fallen short in invalidating the practice or otherwise providing legal relief to the condemned.

Most arguments against this practice have hinged on procedural due process grounds—that is, the use of inconsistent theories violates the defendant's right to a fair trial as protected by the Fourteenth and Sixth Amendments—or the Eighth Amendment's prohibition on cruel and unusual punishment.[15] These arguments have failed to gain traction in federal courts.[16] In 2005, though, the Supreme Court heard John David Stumpf's appeal. While ruling that the prosecutor's use of inconsistent theories did not violate Mr. Stumpf's due process rights with regard to his guilt, the Court remanded to the Sixth Circuit to consider whether or not the use of inconsistent theories violated Mr. Stumpf's due process rights with regard to his sentence.[17] The Sixth Circuit ultimately determined there was no infringement on the process due to Mr. Stumpf and his death sentence,[18] but the Supreme Court's distinction between conviction and sentence[19] is an important one. Guilt, which asks whether someone did or did not do a crime, is a different question than sentence, which asks how someone should be held responsible for such actions.[20]

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14 Armstrong, *supra* note 1.

15 *See infra* Part I.

16 *Id.*

17 *Bradshaw*, 545 U.S. at 187 ("The prosecutor's use of allegedly inconsistent theories may have a more direct effect on Stumpf's sentence, however, for it is at least arguable that the sentencing panel's conclusion about Stumpf's principal role in the offense was material to its sentencing determination.").

18 Initially, the Sixth Circuit held that Mr. Stumpf's due process rights had been violated by the State's use of inconsistent theories between the two trials. Stumpf v. Houk, 653 F.3d 426, 436 (6th Cir. 2011) (holding that it would be "nothing short of complete abdication of our sworn responsibilities to ensure the reliability of capital sentencing were we to presume that the state's later-recanted argument that the petitioner was the triggerman in Mrs. Stout's murder did not affect the panel's sentencing decision"), *rev'd en banc sub nom.* Stumpf v. Robinson, 722 F.3d 739 (6th Cir. 2013) (en banc). Two years later though, the Sixth Circuit reversed this decision on en banc review, holding that there was no Due Process Clause violation. *Robinson*, 722 F.3d at 749, 751.

19 *See supra* note 17 and accompanying text.

20 *See* MODEL PENAL CODE § 1.02 (AM. L. INST., Official Draft and Revised Comments 1985) (outlining the purposes for the provisions governing the definition of offenses and the purposes for the provisions governing sentencing).

The concerns regarding fairness and justice that arise in scenarios where prosecutors pursue inconsistent theories are not unique to criminal law. In civil litigation, the doctrine of collateral estoppel, or issue preclusion, forbids the re-litigation of factual and legal determinations made in prior proceedings.[21] There are important policy reasons for issue preclusion. Litigants need to move on from their legal troubles, expensive litigation cuts into judicial resources, and differing outcomes for the same issue lead to confusion and the appearance of arbitrary decision-making.[22] Many of these policy justifications map onto the criminal legal system as well, so it is odd that in the criminal context, when a central issue has been decided (e.g., who the murderer was), prosecutors are allowed to relitigate that issue against a different defendant.

This Note seeks to resolve the tension between this problematic, but legally permissible, prosecutorial practice and the logical, legal, and policy principles for its prohibition by looking beyond the due process and Eighth Amendment arguments[23] to a different constitutional provision: the Fifth Amendment's Double Jeopardy Clause, the only area of criminal law that directly grapples with the idea of preclusion.[24] Specifically, this Note argues that the Double Jeopardy Clause bars a sovereign from pursuing inconsistent theories to mete out the same punishment to different individuals when only one individual can factually be guilty of the underlying conduct that gives rise to the punishment. While the application of this thesis can conceivably extend beyond the capital context,[25] this Note focuses exclusively on capital cases for two important reasons. First, the Supreme Court has consistently held that "death is different,"[26] which both justifies an

[21] Restatement (Second) of Judgments § 27 (Am. L. Inst. 1982). Collateral estoppel claims may be brought by a non-party to the original suit. *See infra* Section II.B (discussing issue preclusion in the civil litigation context).

[22] Christopher Murray, Note, *Collateral Estoppel in Criminal Prosecutions: Time to Abandon the Identity of Parties Rule*, 46 S. Cal. L. Rev. 922, 930–32 (1973).

[23] *See infra* Part I.

[24] The Fifth Amendment's double jeopardy protections have been incorporated to the states via the Fourteenth Amendment's Due Process Clause. Benton v. Maryland, 395 U.S. 784, 794 (1969).

[25] Take, for example, sentencing enhancements. *See, e.g.*, Shaw v. Terhune, 380 F.3d 473, 478 (9th Cir. 2004) ("[E]ven if Shaw's due process rights were infringed by the prosecutor's decision to seek the personal use enhancement against Watts after successfully arguing in the earlier trial that Shaw had personally used a firearm against Bishop, such error was harmless.").

[26] Woodson v. North Carolina, 428 U.S. 280, 305 (1976) ("Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year . . . . Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.").

expansion of the doctrine into this area and helpfully limits the scope of such an expansion.[27] Second, the two phases of a capital trial—the guilt phase and the penalty phase—make it easy to isolate the impact of inconsistent theories on sentencing.

In making this argument, this Note relies on the logic underpinning double jeopardy protections. It proposes that the same logic that suggests it is wrong to convict a single person more than once for the same offense justifies an application of double jeopardy protections when multiple people are threatened with death under inconsistent theories of primary culpability. Ultimately, when a person is found to be culpable beyond a reasonable doubt of conduct that only one person could have committed, it is vindictive and misleading for the prosecution to seek death for multiple people through the use of inconsistent theories in successive trials. Importantly, this thesis does not implicate culpability that arises from some mechanism other than the underlying offending conduct—for example, vicarious liability—because such cases do not require the prosecution to argue inconsistently and therefore, under this argument, do not trigger double jeopardy.[28] Secondly, this thesis does not implicate culpability that arises from separate sovereigns who seek to mete out punishment for the same criminal act.[29]

This Note seeks to address three major gaps in the scholarship on this topic and in arguments made by advocates challenging the State's use of inconsistent theories to secure multiple death sentences. First, as discussed above, challenges to the State's use of inconsistent theories typically focus on due process concerns or the Eighth Amendment's ban on cruel and unusual punishment.[30] This Note makes the normative argument that the Fifth Amendment's double jeopardy protections more soundly reject this prosecutorial practice. Second, while the idea of collateral estoppel from civil law has been incorporated to criminal cases through the Double Jeopardy Clause, the doctrine generally requires all parties to be identical. Some scholars have convincingly argued for the rejection of this narrow

[27] Looking at the expansion of double jeopardy protections through the prism of the death penalty establishes clear guideposts for any application beyond a capital scenario, namely that a prior determination of guilt is an important indication that an issue has already been resolved. See *infra* Part III for further discussion on how application of the Double Jeopardy Clause would function in cases where prosecutors argue inconsistently with regard to death sentences.

[28] *See infra* Section III.B.

[29] *See infra* note 124 and accompanying text.

[30] *See infra* Part I.

application of collateral estoppel in the criminal context,[31] but this argument looks specifically at how removing the identical parties requirement plays out in the capital sentencing context. Finally, the case law and scholarship on this topic nearly exclusively focus on the legitimacy of inconsistent prosecutions on *convictions*. Drawing on the Supreme Court's *Bradshaw v. Stumpf*[32] decision, this Note narrows in on the legitimacy of prosecutors using inconsistent theories for *sentencing*.

This Note is divided into three parts. Part I explores how appellate courts approach cases where prosecutors have used inconsistent theories against two or more defendants, looking closely at due process and Eighth Amendment challenges and why they have failed. Part II then turns to the Double Jeopardy Clause, closely examining the history and development of the Clause, as well as the incorporation of collateral estoppel doctrine and the application of the Clause's protections at sentencing. Finally, Part III grapples with the logical principles of the double jeopardy doctrine as applied to cases where prosecutors argue inconsistently with regard to sentencing by examining three hypothetical scenarios. Overall, this Note seeks to reconcile an area of criminal law that has profound consequences for human life, as well as for our fundamental trust in a judicial system that is grounded in fairness and justice.

I
Inconsistent Theories, Due Process, and Cruel and Unusual Punishment

The Supreme Court has only ever considered the constitutionality of inconsistent prosecutions in *Bradshaw v. Stumpf*.[33] The Court held that the prosecutor's inconsistent theories did not amount to an inherent due process violation concerning Mr. Stumpf's conviction, in part because the prosecution argued in the alternative under a theory of accomplice liability.[34] Rather than rule against Mr. Stumpf outright,

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31 *See, e.g.*, Murray, *supra* note 22; see also *infra* Section II.B for further discussion on the debates surrounding the incorporation of the identity of the parties requirement in criminal cases.

32 545 U.S. 175 (2005).

33 *Id.*

34 *See id.* at 183–84, 186–87 (holding that Stumpf's conviction was not the result of any procedural violations because the prosecutor's alternative argument—that Mr. Stumpf was an accomplice to the murder—was not inconsistent with the arguments presented at Wesley's trial). The distinction between primary culpability and accomplice liability is an important one because it requires the trier of fact to make a different calculus; primary culpability looks to whether a defendant is deserving of death because of their principal role in a particular criminal act whereas accomplice liability acknowledges a defendant's

however, the Supreme Court remanded to the Sixth Circuit to consider whether, given this prosecutorial practice, Mr. Stumpf's resulting sentence was constitutionally sound.[35] The Court's decision to remand signaled that a person's sentence is unique from a person's guilt when it comes to constitutional questions. Whereas the conviction analysis asks whether or not a person committed a specific act, the sentence someone receives gets to the heart of culpability. The prosecutorial pursuit of inconsistent theories at sentencing in cases where the facts presuppose a single culpable actor makes us question the fundamental principles of justice and how people are held responsible for harm; it requires a suspension of reality to conclude multiple people can be responsible beyond a reasonable doubt for a crime that only one person could have committed. Capital cases are thus ripe for examining this doctrinal distinction, both because death is the most extreme type of sentence our system doles out, and because capital trials are bifurcated—there are distinct guilt and sentencing phases.[36]

This Part proceeds by reviewing the frameworks under which due process and Eighth Amendment challenges have been made in cases where a death sentence is challenged on the grounds of prosecutorial inconsistencies and why they have failed. Section I.A dissects the due process jurisprudence, distinguishing between procedural and substantive due process attacks on this prosecutorial practice. Section I.B examines the Eighth Amendment's cruel and unusual punishment doctrine.

A. Procedural Versus Substantive Due Process Applied to Inconsistent Prosecutions

Several appellate courts have considered the question of the constitutionality of inconsistent prosecutions and agree that "under certain circumstances, a prosecutor's pursuit of inconsistent theories . . . can violate a defendant's due process right to a fair trial."[37] In the

secondary participation in the criminal act before assessing whether they are deserving of death despite such secondary participation. For further discussion on vicarious liability, see *infra* Section III.B.

35 *Bradshaw*, 545 U.S. at 187–88.

36 Gregg v. Georgia, 428 U.S. 153, 190–95, 206–07 (1976) (holding that the death penalty is permissible under the Constitution if imposed via bifurcated proceedings that sufficiently limit jury discretion).

37 Buskey, *supra* note 13, at 325; *see* Drake v. Kemp, 762 F.2d 1449, 1470, 1478–79 (11th Cir. 1985) (Clark, J., concurring) (arguing that the prosecutor's inconsistent theories amounted to the State's endorsement of a known falsity, which prejudiced both defendants and implicated the Fourteenth Amendment's right to a fundamentally fair trial); Thompson v. Calderon, 120 F.3d 1045, 1055–59 (9th Cir. 1997), *rev'd on other grounds*, 523 U.S. 538 (1998) (plurality opinion) (holding that a prosecutor's pursuit of fundamentally inconsistent theories in separate trials of defendants charged with murder for the same

main, the case law suggests that factual inconsistencies presented by a prosecutor amount to a due process violation if they "go 'to the core'" of the case[38]—for example, if a prosecutor knowingly introduces false evidence or fails to correct the record if evidence is later discovered to be false.[39] Ultimately, lower courts seem concerned with the idea that prosecutors would "knowingly pervert the truth-seeking function of the trial," thus rendering the trial unreliable.[40] But relief under this argument is rare; rather than find a due process violation, courts instead attempt to reconcile the inconsistencies.[41]

Case law regarding the pursuit of inconsistent prosecutions tracks exclusively along procedural due process grounds. That is, these legal arguments hinge on the fairness of the procedures used in a criminal trial.[42] Some commentators, though, have argued for a substantive due process approach. Substantive due process looks beyond the procedures used in a specific case to the fundamental nature of the rights that have been violated.[43] I explore each of these arguments—and their shortcomings—below.

1. Procedural Due Process

Most challenges to the practice of prosecutorial inconsistencies arise under the Fourteenth and Sixth Amendments, which offer constitutional protections to criminal defendants. The Due Process Clause of the Fourteenth Amendment prohibits the States from depriving "any person of life, liberty, or property, without due process of law."[44] The Sixth Amendment, on the other hand, offers protection of key trial procedures, including the right to a speedy and public trial, the right to confront witnesses, the right to counsel, and the jury process.[45] Combined, these Amendments make up the backbone of the jurisprudence around the fairness of the criminal trial—what is known as procedural due process.

The legacy of *Bradshaw*—and the ultimate fate of Mr. Stumpf—highlights the limitations of procedural due process protections for

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killing violated due process); Smith v. Groose, 205 F.3d 1045, 1052 (8th Cir. 2000) (holding that to prevail on a due process claim, "an inconsistency must exist at the core of the prosecutor's cases against defendants for the same crime").

[38] Buskey, *supra* note 13, at 327.

[39] *Id.*

[40] *Id.*

[41] *Id.*; *see also supra* notes 33–34 and accompanying text (discussing the attempt to reconcile inconsistencies in *Bradshaw v. Stumpf*, 545 U.S. 175 (2005)).

[42] *See infra* Section I.A.1.

[43] *See infra* Section I.A.2.

[44] U.S. Const. amend. XIV, § 1.

[45] U.S. Const. amend. VI.

defendants sentenced to death despite the use of inconsistent prosecutorial theories. After the Supreme Court remanded the case for further consideration, the Sixth Circuit initially found a constitutional violation, holding that John David Stumpf's procedural due process rights had been violated because the judges who sentenced him had the impression that he was the principal offender.[46] Finding that "[b]asic principles of justice and fairness . . . mandate that every effort be undertaken to ensure the reliability of the capital-sentencing process," the analysis hinged on principles of justice, fairness, reliability, and the State's search for the truth.[47] The opinion derided the prosecution for playing "fast and loose with the facts and with its theories," and noted that allowing such practices "without adequate explanation undermines confidence in the fairness and reliability of the trial and the punishment imposed . . . thus infring[ing] upon the petitioner's right to due process."[48] The Sixth Circuit took further issue with the State's failure to uphold their duties to the broader citizenry, saying that "[the s]tate's duty to its citizens does not allow it to pursue as many convictions as possible without regard to fairness and the search for truth."[49]

The Sixth Circuit was also concerned about issues of prosecutorial misconduct, observing that prosecutorial inconsistencies necessarily suggest either that there must be a reliability concern over which evidence is to be believed, or that there must be "an attempt . . . to perpetrate a fraud on the state court."[50] Highlighting the "special responsibility" prosecutors have in "ensuring the fairness" of criminal proceedings,[51] the Sixth Circuit took issue with the idea that the prosecution would not "refrain from improper methods calculated to produce a wrongful conviction."[52] Quoting Justice Stevens' similar distaste for prosecutorial misconduct, the Sixth Circuit explained, "[F]or a sovereign State represented by the same lawyer to take flatly inconsistent positions in two different cases—and to insist on the imposition of the death penalty after repudiating the factual basis for that sentence—surely raises a serious question of prosecutorial misconduct."[53]

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[46] Stumpf v. Houk, 653 F.3d 426, 436–37 (6th Cir. 2011).

[47] *Id.* at 435.

[48] *Id.* at 437.

[49] *Id.* at 436 (internal citation omitted).

[50] *Id.* at 439.

[51] *Id.* at 438.

[52] *Id.* (quoting Berger v. United States, 295 U.S. 78, 88 (1935)).

[53] Jacobs v. Scott, 513 U.S. 1067, 1069 (1995) (Stevens, J., dissenting) (arguing against Court's denial of a stay of execution in a case involving inconsistent prosecutorial theories in subsequent prosecutions).

The biggest challenge with this logic is that it argues something external to the defendant's trial resulted in the procedural due process violation. For example, evidentiary challenges to inconsistent prosecutions—such as perjury, failure to correct false evidence, and suppression of exculpatory evidence—rely on events that happen at subsequent trials for other defendants.[54] However, an argument that a defendant was denied a fundamentally fair trial requires showing "the State's omissions or commissions *in her case* crossed the line drawn by precedent barring the introduction of false evidence or the suppression of exculpatory evidence."[55] Indeed, the dissent in *Stumpf v. Houk* took issue with the majority's willingness to consider evidence disclosed in a separate, subsequent trial.[56]

Just two years later, the Sixth Circuit sent Mr. Stumpf back to death row.[57] Upon *en banc* review, the majority held there was no procedural due process issue in Mr. Stumpf's trial.[58] The reasoning pivoted on the fact that nothing deceitful or misleading happened at Mr. Stumpf's original trial because prosecutors have the latitude to argue different inferences from the same evidentiary record.[59] Looking at each trial in isolation,[60] the majority concluded that there was no procedural deficiency. "Stumpf . . . [received] an extraordinary amount of process—and certainly all of the process that he was due . . . . That he lost does not mean that he suffered unfairness, much less the kind of fundamental unfairness that would warrant our setting aside his sentence under the rubric of the Due Process Clause."[61]

So, while some courts may be amenable to procedural due process arguments, the protections it provides to those sentenced to death after the use of inconsistent prosecutorial theories are far from guar-

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54 Buskey, *supra* note 13, at 330 ("Consequently, as the Supreme Court suggested in *Bradshaw*, a defendant raising a fair trial claim cannot articulate how the prosecutor's inconsistent theories affected the fairness of that particular defendant's trial because the prosecutorial act in question did not occur within that defendant's trial.").

55 *Id.* at 333.

56 *See* Stumpf v. Houk, 653 F.3d 440 (6th Cir. 2011) (Boggs, J., dissenting) ("[The majority's articulation of a] new right protects a convicted murderer from being sentenced to death where mitigating evidence . . . discovered *after* sentencing is *later* used . . . against a *different* defendant. . . . Somehow, that purely later conduct retroactively renders the earlier sentence unconstitutional.").

57 *See supra* note 18 and accompanying text.

58 Stumpf v. Robinson, 722 F.3d 739, 749, 751 (6th Cir. 2013).

59 *See id.* at 749 ("All that the prosecution did was to argue for two different inferences from the same, unquestionably complete, evidentiary record. It left the factfinder in Wesley's trial and the factfinders in Stumpf's post-sentencing proceedings to find the facts.").

60 *Id.* at 750 (explaining how "[e]ach of the prosecutor's two arguments, taken alone, was proper").

61 *Id.* at 754.

anteed.[62] When these arguments succeed, there must be a reasonable probability that the inconsistencies impacted the outcome.[63] When they fail, they are usually rejected because, despite the substantively related nature of the multiple trials, they are procedurally independent.[64]

2. Substantive Due Process

Where procedural due process grounds fail, perhaps a better argument is that the use of inconsistent prosecutorial theories to secure multiple death sentences against multiple defendants violates some fundamental right that is protected from government interference. The Fourteenth Amendment's due process protections have been interpreted by the Court to provide *substantive* protections; that is, there are certain rights that are so fundamental that they are protected from government interference no matter what process is used.[65]

What makes a substantive due process analysis distinct from a procedural due process one is that substantive due process can be violated even when the procedures are otherwise fair.[66] In a paper on the topic, Brandon Buskey argues that substantive due process is a better approach to protecting the rights of criminal defendants facing a scenario like this because the problem with the use of inconsistent prosecutions is not actually located within the process that was afforded to a particular defendant.[67] Instead, Buskey's analysis looks at the arbitrary nature of these types of prosecutions, which is a key feature of the substantive due process analysis because it represents oppressive government action.[68] For a government action to be considered arbitrary, it must "shock[] the conscience" to the point that it "offend[s] 'a sense of justice.'"[69]

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[62] *See* Buskey, *supra* note 13, at 330–33 (describing why procedural due process arguments inadequately protect defendants facing inconsistent prosecutorial theories).

[63] *See supra* notes 39–41 and accompanying text.

[64] *See supra* notes 54–56 and accompanying text.

[65] Buskey, *supra* note 13, at 336 ("The substantive component of due process bars 'certain government actions regardless of the fairness of the procedures used to implement them.'" (quoting Daniels v. Williams, 474 U.S. 327, 331 (1986))).

[66] *Id.* ("While the fair trial component of due process focuses on the reliability of the guilt determination as a function of the trial procedures afforded the defendant, substantive due process asks whether the prosecutor has abused her executive discretion in a manner divorced from acceptable law *enforcement* objectives.") (emphasis added).

[67] *See generally id.* (arguing for a substantive due process approach rather than a procedural due process approach).

[68] *Id.* at 337 (describing how, in the criminal context, substantive due process claims require a showing that "the government has acted arbitrarily").

[69] Rochin v. California, 342 U.S. 165, 172–73 (1952) (holding that a conviction based on evidence gathered by forcibly pumping the defendant's stomach violated due process) (citation omitted).

For Buskey, the fundamental right that is implicated by prosecutorial inconsistencies is the bedrock principle that criminal defendants are presumed innocent until proven guilty.[70] Because "[t]he presumption of innocence enforces the norm that the criminal justice system must treat the accused as an end, rather than simply as a means to an end," prosecutors who pursue inconsistent theories expose defendants to arbitrary state action by treating them as a means to an end.[71] In other words, prosecutors use inconsistent theories against defendants—the means—in an attempt to secure multiple death sentences—the ends. By flipping the means-ends calculus, prosecutors violate substantive due process because they fail "to recognize that individual liberty has value equal, if not superior, to the State's interest in conviction."[72]

Substantive due process may afford defendants in these situations some protection in certain scenarios, but it does not ultimately resolve the underlying tension in applying a due process analysis to death sentences resulting from inconsistent theories pursued by the State. For one, a substantive due process approach does not protect against the State's pursuit of inconsistent theories, only the maintenance of them.[73] In other words, a substantive due process argument could *only* be raised on appeal and would not preclude the State from this practice altogether.[74] While this is a more promising form of protection than that provided by procedural due process, this does not solve some of the major policy concerns associated with this practice, including finality and judicial resources.[75] Second, substantive due process only applies if another constitutional amendment does not more specifically protect against the invasion of a fundamental right caused by a government action.[76] As this Note demonstrates, the Fifth Amendment could, in fact, be the better amendment to confront this prosecutorial practice. But even in the absence of Fifth Amendment

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[70] *See* Buskey, *supra* note 13, at 340 n.184 ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.") (quoting Coffin v. United States, 156 U.S. 432, 453 (1895)).

[71] *Id.* at 341.

[72] *Id.*

[73] *Id.* at 339–43.

[74] A discussion of which defendant can raise a double jeopardy challenge and when is beyond the scope of this Note, but it is likely that initially it would be raised by people already sentenced via direct appeal and post-conviction relief. Once the doctrine is expanded in the way I argue, the challenge would be better suited for defendants to raise at their trial proceedings if a prior death sentence had previously been secured.

[75] *See infra* Section III.B.1.

[76] Buskey, *supra* note 13, at 337.

protections, the Eighth Amendment is the primary source of law that governs in the death penalty context.[77]

B. Cruel and Unusual Punishment: Inconsistent Prosecutions and the Eighth Amendment

Where due process challenges run into issues because it is hard to argue that a process occurring in an entirely independent trial implicates the fairness of one's sentence, the Eighth Amendment's prohibition on cruel and unusual punishment may appear to be a promising alternative. Indeed, the Supreme Court has held that post-case events *can* call into question the reliability of a death sentence.[78] Surprisingly, these arguments have rarely gained traction, perhaps because courts encountering them have flatly rejected them.

Raleigh v. Secretary, Florida Department of Corrections[79] illustrates why. The case involved a double homicide with two co-defendants, Bobby Allen Raleigh and Domingo Figueroa, who were tried separately.[80] At both trials, there was little debate over whether Mr. Raleigh killed the first victim, Douglas Cox.[81] The inconsistencies arose over who murdered the second victim, Timothy Eberlin.

Mr. Raleigh pleaded guilty to two counts of first-degree murder and the State sought the death penalty.[82] In a penalty phase jury trial, the State introduced a taped statement where Domingo Figueroa, the co-defendant, admitted to shooting Mr. Eberlin at Mr. Raleigh's direction, but only after Mr. Raleigh had already shot Mr. Eberlin.[83] The jury returned a death sentence.[84] In Domingo Figueroa's trial, the State argued that the statements made by Mr. Figueroa that were presented in Mr. Raleigh's trial downplayed Mr. Figueroa's role in the murders.[85] To demonstrate this, the prosecution introduced an additional statement where Domingo Figueroa admitted to his uncle that he, not Mr. Raleigh, had killed Timothy Eberlin; with this statement,

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[77] *Id.* at 344 (citing Albright v. Oliver, 510 U.S. 266, 273 (1994)).

[78] *See, e.g.*, Johnson v. Mississippi, 486 U.S. 578, 584 (1988) (holding that allowing a death sentence to stand based in part on an aggravating circumstance that was subsequently deemed invalid violates the Eighth Amendment).

[79] 827 F.3d 938 (11th Cir. 2016).

[80] *Id.* at 945.

[81] *Id.* at 943–46.

[82] *Id.* at 943–44.

[83] *Id.* at 944.

[84] *Id.* at 945.

[85] *Id.*

the prosecution argued that Mr. Figueroa had the requisite intent to commit capital murder.[86]

These cases involve inconsistent theories by the prosecution because in one trial, the State argued that Bobby Allen Raleigh was the principal actor; he shot the victim and *also* directed the co-defendant to shoot Mr. Eberlin. And in the second trial, the State argued that Domingo Figueroa, not Mr. Raleigh, was the principal actor who had formed the intent to kill. Remarkably, every appellate court that heard Mr. Raleigh's case declined to see the inconsistencies.[87] At first blush, this is not outlandish since there was no inconsistency in the two trials as to Mr. Raleigh's principal role in the murder of Douglas Cox, the first victim. But to suggest that the State's arguments as to Mr. Raleigh's role in the murder of Timothy Eberlin were irrelevant to the sentencer's determination of death is nonsensical. The difference between being the principal actor in a single homicide versus being the principal actor in a double homicide is vast, and the jurors likely would have weighed this reality in reaching its determination of death.

On appeal, Mr. Raleigh argued that the inconsistent position taken by the prosecution in the subsequent trial resulted in cruel and unusual punishment in violation of the Eighth Amendment.[88] Mr. Raleigh's reasoning principally relied on Justice Souter's concurrence in *Bradshaw* where he said: "Ultimately, Stumpf's argument appears to be that sustaining a death sentence in circumstances like [these] results in a sentencing system that invites the death penalty 'to be . . . wantonly and . . . freakishly imposed.' "[89] The idea of a sentence being "wanton" or "freakish" stems from the Supreme Court's Eighth Amendment jurisprudence,[90] which "demands reliability in death

[86] *Id.*; *see also* Purvette A. Bryant, *Witness Says Figueroa Bragged About Killing*, Orlando Sentinel (Jan. 19, 1996), https://www.orlandosentinel.com/news/os-xpm-1996-01-19-9601181696-story.html [https://perma.cc/XG2N-VGG6] ("Figueroa, 25, is on trial for the deaths of Timothy Eberlin, 21, and Douglas Cox, 24. He could face the death penalty or life in prison.").

[87] *See Raleigh*, 827 F.3d at 951 (noting that both the Florida Supreme Court and the District Court determined that the State had not contradicted the position it took in Mr. Raleigh's trial as to Raleigh's culpability, and holding that these determinations were reasonable).

[88] Motion to Alter or Amend Judgment and Motion for Reconsideration of the Denial of a Certificate of Appealability at 8–16, Raleigh v. Sec'y, Fla. Dep't Corrs., No. 07-cv-37 (M.D. Fla. Oct. 18, 2013).

[89] Bradshaw v. Stumpf, 545 U.S. 175, 190 (2005) (Souter, J., concurring) (internal citation omitted).

[90] *See* Furman v. Georgia, 408 U.S. 238, 310 (1972) (Stewart, J., concurring) ("I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly

sentences."[91] For Mr. Raleigh, the principle issue is that the prosecutor's use of inconsistent theories in both trials "demonstrates an arbitrary resolution of the facts in violation of the Eighth Amendment."[92]

But the Eleventh Circuit rejected this argument outright, noting that the Supreme Court has never held that the State violates either due process or the Eighth Amendment when it presents contradictory theories of culpability at separate trials.[93] Furthermore, the Eleventh Circuit rejected Mr. Raleigh's reliance on *Bradshaw*, since, although the *Bradshaw* majority ultimately determined that there might be due process concerns with regard to sentencing, they were silent on the Eighth Amendment's application to such issues.[94]

What is clear from an analysis of the case law is that courts struggle to fit the arguments against a prosecutor's use of inconsistent theories within the framework of due process protections and the Eighth Amendment. The Fifth Amendment's Double Jeopardy Clause, on the other hand, more squarely protects the conceptions of justice and fairness that are contravened by the use of prosecutorial inconsistent theories.

II
The History and Application of the Double Jeopardy Clause

The Fifth Amendment to the Constitution protects the accused against prosecution for the same crime twice.[95] In effect, the Double Jeopardy Clause creates a constitutional right to preclusion in criminal cases in certain circumstances, but there are nuances to this protection and many exceptions to the rule.

For example, double jeopardy protections are the strongest in cases where a defendant is acquitted, but the prosecution may be allowed to appeal that judgment in extremely limited circumstances.[96]

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and so freakishly imposed."); Gregg v. Georgia, 428 U.S. 153 (1976) (holding that the death penalty does not always amount to a violation of the Eighth Amendment).

[91] Motion to Alter or Amend Judgment and Motion for Reconsideration of the Denial of a Certificate of Appealability, *supra* note 88, at 14.

[92] *Id.*

[93] Raleigh v. Sec'y, Fla. Dep't Corr., 827 F.3d 938, 952 (11th Cir. 2016).

[94] *Id.* at 953–54 ("Justice Souter's concurrence in *Stumpf* cannot and does not show that it is clearly established as a matter of Eighth Amendment law (or, for that matter, due process) that the state may not take inconsistent positions.").

[95] U.S. Const. amend. V ("[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb.").

[96] *See, e.g.*, United States v. Wilson, 420 U.S. 332, 352–53 (1975) ("[W]hen a judge rules in favor of the defendant after a verdict of guilty has been entered by the trier of fact, the Government may appeal from that ruling without running afoul of the Double Jeopardy

On the other hand, the ripest ground for re-prosecution is when the defendant appeals and the appellate courts reverse in their favor, because the defendant has "waived" their objection to further prosecution.[97] Importantly, the Double Jeopardy Clause does not prevent two different sovereign governments from prosecuting the same person for the same offense.[98] This idea, called the dual sovereignty principle, applies to both foreign and domestic governments as well as state, federal, and tribal governments.[99]

Carveouts to the Double Jeopardy Clause reflect the Court's willingness to apply the doctrine practically and functionally while simultaneously maintaining and respecting that preclusion in the criminal context "represents a fundamental ideal in our constitutional heritage."[100] Despite the fundamental nature of double jeopardy's preclusive effect, as well as the functional ways it operates, federal courts have not contemplated double jeopardy preclusion in cases where prosecutors argue inconsistently with regard to sentencing in subsequent trials against different defendants, perhaps because it runs counter to a strictly textualist reading of the Clause. This Part demon-

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Clause."); Serfass v. United States, 420 U.S. 377, 389 (1975) (holding that double jeopardy does not attach in cases where a district court grants a motion to dismiss an indictment because the defendant had not been "put to trial before a trier of facts").

[97] Ball v. United States, 163 U.S. 662, 671–72 (1896) (holding that when a "plea of former conviction cannot be sustained, because upon a writ of error sued out by [the defendant], . . . it is quite clear that a defendant . . . may be tried anew upon the same indictment, or upon another indictment, for the same offense of which he had been convicted"). There are other scenarios where a person may be re-prosecuted, including after a mistrial if the mistrial is the result of "manifest necessity." Manifest necessity may include a hung jury or other similar circumstances that prevent the continuation of a trial. *See, e.g.*, United States v. Perez, 22 U.S. 579, 580 (1824) (holding that in the case of a hung jury, there is "no bar to further proceedings" because "[t]he prisoner has not been convicted or acquitted, and may again be put upon his defence [sic]"); Simmons v. United States, 142 U.S. 148, 154–55 (1891) (holding that in a case of jury misconduct, a new trial is not barred on the grounds of double jeopardy). Re-prosecution may also occur in certain circumstances where a judge stops a trial before the jury can issue a verdict, for example, when it is determined that there was prejudicial preindictment delay. *See, e.g.*, United States v. Scott, 437 U.S. 82, 98–99 (1978) (holding that in a case involving prejudicial preindictment delay, "the defendant, by deliberately choosing to seek termination of the proceedings against him on a basis unrelated to factual guilt or innocence of the offense of which he is accused, suffers no injury cognizable under the Double Jeopardy Clause").

[98] *E.g.*, Gamble v. United States, 139 S. Ct. 1960, 1965 (2019) ("[W]here there are two sovereigns, there are two laws, and two 'offences [sic].'"); United States v. Lanza, 260 U.S. 377, 382 (1922) ("We have here two sovereignties, deriving power from different sources . . . . It follows that an act denounced as a crime by both . . . is an offense against the peace and dignity of both and may be punished by each.").

[99] *Gamble*, 139 S. Ct. at 1964–67; *see also* United States v. Wheeler, 435 U.S. 313, 329–30 (1978) ("Since tribal and federal prosecutions are brought by separate sovereigns, they are not 'for the same offence [sic],' and the Double Jeopardy Clause thus does not bar one when the other has occurred.").

[100] Benton v. Maryland, 395 U.S. 784, 794 (1969).

strates that the Court's willingness to apply the Clause in a functional manner as well as the Framers' commitment to fairness for criminal defendants cuts in favor of extending the Clause's preclusion principles to multiple defendants. Section II.A examines the history of the Double Jeopardy Clause, including its origins and ultimate incorporation into the Bill of Rights. Section II.B then explicates how the doctrine of collateral estoppel has been incorporated into the Fifth Amendment's Double Jeopardy Clause and what protections it does and does not offer to criminal defendants. Finally, Section II.C considers the Court's double jeopardy jurisprudence with respect to issues of sentencing, giving close attention to capital punishment.

A. *History of the Fifth Amendment's Double Jeopardy Protections*

By some accounts, the protection against double jeopardy extends back as early as Greek and Roman times, and it was clearly established in European common law traditions before the American Revolution.[101] Blackstone wrote, "[T]he plea of *autrefoits acquit*, or a formal acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offense."[102] These principles were so foundational that they were incorporated into the earliest colonial governments in the United States[103] and ultimately—in the post-Revolution era—into the constitutions of several states.[104]

As the Founders drafted the Constitution and contemplated the Bill of Rights, concern over multiple prosecutions against a single person for the same crime was central to their consideration. The New York Convention proposed language specifically barring multiple prosecutions *and multiple punishments* for the same offense.[105]

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[101] *Id.* at 795 ("Its origins can be traced to Greek and Roman times, and it became established in the common law of England long before this Nation's independence.").

[102] 4 William Blackstone, Commentaries 1019.

[103] Green v. United States, 355 U.S. 184, 200 (1957) (Frankfurter, J., dissenting) ("The Massachusetts Body of Liberties of 1641, an early compilation of principles drawn from the statutes and common law of England, declared that, 'No man shall be twise [sic] sentenced by Civill [sic] Justice for one and the same Crime, offence [sic], or Trespasse [sic].'" (citing Colonial Laws of Massachusetts 43, 47)); *see also* Jay A. Sigler, Double Jeopardy: The Development of a Legal and Social Policy 22 (1969) ("Massachusetts law also spread southward into New York, Pennsylvania, and New Jersey . . . help[ing] serve as a conveyer of the double jeopardy concept to those other colonies.").

[104] *See* Sigler, *supra* note 103, at 23–27.

[105] *Green*, 355 U.S. at 201 (Frankfurter, J., dissenting) (describing how the bill of rights that was adopted by the New York convention and was ultimately shared with Congress when the Constitution was ratified "included a declaration that, 'no Person ought to be put twice in Jeopardy of Life or Limb for one and the same Offence [sic], nor, unless in case of impeachment, *be punished more than once for the same Offence* [sic].'" (emphasis added)

Madison's proposal for the guarantee that was introduced to the House read, "No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence [sic]."[106] But Congressional debate raised concerns that the inclusion of the word "trial" would prohibit retrial after a vacated conviction and, further, would be unfair to appellants who would be less likely to have their conviction overturned because of judicial concerns that they could never be retried.[107] The language was eventually revised to the familiar Double Jeopardy Clause and ratified as the Fifth Amendment.[108]

The Framers' attention to the rights afforded to criminal defendants can be elucidated in another critical way. The structure of the Constitution itself indicates a particular concern about criminal procedure. Multiple amendments directly relate to the rights of criminal defendants;[109] in contrast, most procedural rights in the civil context stem from the Federal Rules of Civil Procedure and are not *directly* articulated within the Constitution.[110] In other words, the Constitution gives special attention to those accused of criminal transgressions in a way it does not for civil matters.

What this history tells us is significant. Concerns about fairness to criminal defendants were of primary importance to the Founders, as the Supreme Court has summarized nicely:

> [T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[111]

But these worries were also balanced against the needs of the State to enforce its laws and ensure accountability against the guilty. Additionally, the Framers' inclusion of the Double Jeopardy Clause indicates

(citing Documents Illustrative of the Formation of the Union, H.R. Doc. No. 69-398, at 1035 (1st Sess. 1927))).

[106] *Id.* at 201–02.

[107] *Id.*; 1 Annals of Cong. 781–82 (1789) (Joseph Gales ed., 1834).

[108] *Green*, 355 U.S. at 202 (Frankfurter, J., dissenting).

[109] U.S. Const. amend. IV (protecting against unreasonable searches and seizures); U.S. Const. amend. V (addressing the rights of a criminal defendant to a grand jury, double jeopardy protections, self-incrimination, and due process); U.S. Const. amend. VI (outlining criminal trial rights); U.S. Const. amend. VIII (prohibiting the use of excessive bail and cruel and unusual punishment).

[110] The Constitution's protections for civil litigants include due process protections, U.S. Const. amends. V, XIV, and the right to a jury trial, U.S. Const. amend. VII. These amendments form the basis of authority for the Federal Rules of Civil Procedure.

[111] *Green*, 355 U.S. at 187–88.

an interest in the finality of a verdict of acquittal.[112] In many ways, these concerns are *fundamental*—a position endorsed by the Supreme Court and demonstrated by the ways in which the underlying logic of the Clause stretches back centuries.[113]

B. Collateral Estoppel and Double Jeopardy

The history of the Double Jeopardy Clause shows that the Founders were concerned with criminal defendants having multiple trials "for the same offense,"[114] but it leaves open the question of whether the language similarly precludes prosecution for the same *issue*. Recall that in the civil context, collateral estoppel is a doctrine of issue preclusion.[115]

In 1970, the Supreme Court answered this question, holding that aspects of the doctrine of collateral estoppel are embodied by the Fifth Amendment's Double Jeopardy Clause.[116] In the civil context, collateral estoppel does not require all parties to a litigation to be the same in order to assert that an issue is precluded.[117] Yet, the incorporation of issue preclusion in criminal law has maintained the identity of the parties requirement, meaning that collateral estoppel only applies to a single defendant, not multiple defendants.[118] For example, a defendant charged with exhibiting an obscene movie[119] cannot assert double jeopardy defenses on the grounds that the issue of whether or not the movie was obscene was already decided in a previous prosecution of a different defendant.[120]

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[112] The conception of finality within the Double Jeopardy Clause easily extends beyond a strictly textualist reading of the Clause as only protecting a single defendant from double jeopardy, suggesting that once an issue has been adjudicated and a sentence of death has been doled out, other defendants should not have to live with the fear that the State will use its power to secure a successive death sentence under an identical framework of liability. For further discussion on the principle of finality, see *infra* Section III.B.1.

[113] Benton v. Maryland, 395 U.S. 784, 794–95 (1969).

[114] U.S. Const. amend. V.

[115] *See supra* note 21 and accompanying text.

[116] Ashe v. Swenson, 397 U.S. 436, 445–46 (1970) (plurality opinion) (holding that a person charged with six individual counts of robbery stemming from a single incident could not be brought to trial for robbing person two if previously acquitted for robbing person one because "the Fifth Amendment guarantee against double jeopardy . . . surely protects a man who has been acquitted from having to 'run the gantlet' a second time." (quoting *Green*, 355 U.S. at 190)).

[117] *See* Murray, *supra* note 22, at 928–30.

[118] *See, e.g.*, Nichols v. Scott, 69 F.3d 1255, 1270 (5th Cir. 1995) (declining "to apply collateral estoppel . . . in a criminal prosecution on the basis of an earlier determination in the . . . criminal prosecution of a different defendant").

[119] The defendant in *People v. Seltzer*, 101 Cal. Rptr. 260 (App. Dep't Super. Ct. 1972) was charged with violating Cal. Penal Code § 311.2 (West 1970). *See* Murray, *supra* note 22, at 922 n.3 (noting the statute the defendant was charged with violating).

[120] *Seltzer*, 101 Cal. Rptr. at 263.

The first reason for the identity of the parties requirement in criminal trials is that without this rule, defendants could move to bar successive prosecutions by different sovereigns,[121] drawing the collateral estoppel rule into direct collision with the dual sovereignty doctrine.[122] For example, if the identity of the parties rule was not a requirement, a defendant could estop successive prosecutions of the same offense by a different sovereign because the issue of guilt or acquittal had already been decided.[123] But this Note only argues for the extension of the Double Jeopardy Clause to a *single* sovereign pursuing inconsistent prosecutorial theories in successive criminal trials, so dual sovereignty concerns are not implicated.[124]

A separate reason for the identity of the parties requirement in criminal cases arises from the differing burdens of proof between the civil law, which only requires a jury to consider the preponderance of the evidence, and the criminal law, which requires a jury to find guilt beyond reasonable doubt.[125] These differences raise concerns that an acquittal in a criminal case does not necessarily reflect innocence, only that the factfinders were not persuaded beyond a reasonable doubt.[126] Indeed, most criminal cases where courts have declined to extend collateral estoppel principles involve a defendant's assertion of double

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121 Murray, *supra* note 22, at 937.

122 *Id.*; *see also supra* notes 98–99.

123 Even in this scenario though, a defendant may be able to extend the proposed double jeopardy protections to a separate sovereign if it can be demonstrated that the sovereigns acted in "privity" with one another in pursuing multiple death sentences through the use of inconsistent prosecutions. *See* Bartkus v. Illinois, 359 U.S. 121, 124 (1959) (leaving open the possibility of limiting the dual sovereignty doctrine in cases where a sovereign's prosecution served as a "sham and a cover" for a separate sovereign's prior prosecution). Privity refers to the idea that a sovereign is not truly independent. *See, e.g.*, United States v. Rashed, 234 F.3d 1280, 1282–83 (D.C. Cir. 2000) ("In general, a party is in privity with another if it assumed control over litigation by the other." (internal quotations omitted)).

124 This would create an "asymmetry" of sorts, where a defendant could assert double jeopardy as a defense against one sovereign but not another. This type of asymmetry is neither unworkable nor unusual. Indeed, asymmetry already exists in the collateral estoppel doctrine as applied to criminal law in that only a criminal defendant, not the prosecution, can assert collateral estoppel. *See* Murray, *supra* note 22, at 936.

125 The standard of proof in most civil cases is a preponderance of the evidence, *e.g.*, Addington v. Texas, 441 U.S. 418, 423 (1979), whereas the standard of proof in criminal cases is beyond a reasonable doubt, *e.g.*, *In re* Winship, 397 U.S. 358, 361 (1970) ("The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation."). Burdens of proof reflect the levels of risk courts are willing to take in erroneous outcomes. *In re* Winship, 397 U.S. at 370–71 (Harlan, J., concurring).

126 Murray, *supra* note 22, at 937–38.

jeopardy defenses on the grounds that the issue was already resolved through a previous *acquittal*.[127]

But the issue this Note addresses doesn't implicate prior acquittals. Instead, by focusing on sentencing, this Note focuses only on situations where there has been a finding of guilt, which is a required element for punishment to arise. In fact, burdens of proof cut in *favor* of extending the Double Jeopardy Clause to cases where a prosecutor seeks a death sentence against multiple defendants through the use of incompatible theories of the crime. If a factfinder has found a defendant guilty *beyond a reasonable doubt*, it is logically and ethically untenable to contemplate that a different defendant also committed the criminal act that only one person could factually commit.

Even though federal courts have declined to extend collateral estoppel to multiple defendants, the Supreme Court has said 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] This language indicates a willingness on behalf of the Court to think about issues arising under the criminal law's collateral estoppel doctrine in a functional manner that is grounded in fairness as opposed to rigidity. The civil law's rejection of the identity of the parties requirement within the doctrine of collateral estoppel can thus be extended to the Double Jeopardy Clause in a limited manner without running the risk of disrupting the dual sovereignty doctrine or limiting the value of the factfinder's determinations of guilt. This interpretation is bolstered by its alignment with the Framers' concerns over developing a just and equitable criminal legal system.[129]

C. Double Jeopardy and Sentencing

Double jeopardy protections are strongest when a defendant is acquitted, but the Clause offers defendants some protection from the imposition of multiple forms of punishment for the same offense, especially when statutorily proscribed.[130] There are limitations to this

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[127] Anne Bowen Poulin, *Prosecutorial Inconsistency, Estoppel, and Due Process: Making the Prosecution Get Its Story Straight*, 89 CALIF. L. REV. 1423, 1445–47 (2001) (describing how courts have enforced the mutuality requirements of collateral estoppel in criminal cases).

[128] Ashe v. Swenson, 397 U.S. 436, 444 (1970).

[129] *See supra* Section II.A.

[130] *E.g.*, *Ex parte* Lange, 85 U.S. 163, 168 (1873) (noting that in a case where the defendant had paid a statutorily imposed fine, the court could not later impose a sentence of incarceration for the same crime when the law only allowed a fine *or* incarceration, because it is "[n]ot only [a] gross injustice . . . , but the inexpediency of placing such a power in the hands of any tribunal is manifest").

protection, though. For example, a sentence of incarceration may be increased,[131] or a defendant may be sentenced to both a term of incarceration *and* a fine.[132]

The Court pays special attention to the vindictive nature of the sentence when multiple sentences might be applied to the same crime. Vindictiveness, as the Court has construed it, is an inquiry into whether the sentence reflects the culpability of the defendant or whether it represents punishment for pursuit of post-conviction relief, as might arise when a verdict is vacated on appeal and retried or when a case is remanded for resentencing.[133] The Court has ruled that "vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial."[134] This holding was later narrowed, but in so doing, the Court did not dispose of its vindictiveness analysis.[135] Rather, the Court used vindictiveness to distinguish between a case involving resentencing after appeal of a trial court judgment and a case involving resentencing after appeal from a guilty plea; the Court reasoned that in the latter case, the initial sentencing judge had less information than would be elucidated from a trial, and therefore, information that emerges through the resentencing process may justify a harsher penalty.[136]

The Double Jeopardy Clause does not categorically prohibit sentence enhancements at retrial or resentencing following a successful appeal,[137] but there is an exception to this rule with respect to capital trials. Because of the bifurcated nature of a capital trial, the sen-

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[131] Alabama v. Smith, 490 U.S. 794, 801 (1989) (holding that "when a greater penalty is imposed after trial than was imposed after a prior guilty plea, the increase in sentence is more likely than not attributable to the vindictiveness on the part of the sentencing judge").

[132] *Contra Lange*, 85 U.S. at 168.

[133] *E.g.*, North Carolina v. Pearce, 395 U.S. 711, 723–24 (1969) (distinguishing between sentence increase due to "events subsequent to the first trial that may have thrown new light upon the defendant's life, health, habits, conduct, and mental and moral propensities" and a sentence increase "for the explicit purpose of punishing the defendant for his having succeeded in getting his original conviction set aside") (internal quotations omitted); *Smith*, 490 U.S. at 798 ("While sentencing discretion permits consideration of a wide range of information relevant to the assessment of punishment . . . , we have recognized it must not be exercised with the purpose of punishing a successful appeal." (internal citation omitted)).

[134] *Pearce*, 395 U.S. at 725.

[135] *Smith*, 490 U.S. at 799–803.

[136] *Id.* at 802 ("[In a trial court judgment] any unexplained change in the sentence is . . . subject to a presumption of vindictiveness. In cases like the present one, however, . . . it cannot be said to be more likely than not that a judge . . . is motivated by vindictiveness.").

[137] Chaffin v. Stynchcombe, 412 U.S. 17, 23 (1973) ("[T]he Court [has] recognized the long-accepted power of a State 'to retry a defendant who has succeeded in getting his first conviction set aside,' . . . and . . . 'to impose whatever sentence may be legally authorized,

tencer—whether a jury or a trial judge—is able to make a specific determination as to whether the State has done enough to justify a sentence of death.[138] In other words, this determination is analogous to the determination made when deciding guilt or innocence. Thus, if a sentencer determines that aggravating factors were not sufficient to justify death in one trial, that determination carries similar weight as a determination of acquittal does in any subsequent trial for the same offense. So, if a defendant had a bifurcated capital trial and is sentenced to life, they can appeal without concern that they may be later sentenced to death.

By examining the history of the Double Jeopardy Clause, including the way the doctrine has shifted over the years to incorporate principles of collateral estoppel and protection from multiple forms of punishment, especially in the capital context, some key logical principles emerge. Protection against double jeopardy, including collateral estoppel, is a fundamental right grounded in conceptions of fairness, and as such, should be applied with an eye towards functionality and realism, particularly in cases involving the death penalty.

III
Applying the Double Jeopardy Clause to Inconsistent Prosecutorial Theories at Sentencing

In practice, prosecutors pursue inconsistent theories between multiple trials in a variety of ways and for various reasons. For example, some may make "inconsistent inferences from the same basic evidence," or they may present "different quanta of evidence at the separate trials."[139] Prosecutors do this because they have discov-

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whether or not it is greater than the sentence imposed after the first conviction.'" (quoting *Pearce*, 395 U.S. at 720)) (citation omitted).

[138] *See* Bullington v. Missouri, 451 U.S. 430, 445 (1981) ("A verdict of acquittal on the issue of guilt or innocence is, of course, absolutely final. The values that underlie this principle . . . are equally applicable when a jury has rejected the State's claim that the defendant deserves to die . . . ."); Arizona v. Rumsey, 467 U.S. 203, 212 (1984) (extending *Bullington* to a scenario where the sentencer is a trial judge rather than a jury). *But see* Stroud v. United States, 251 U.S. 15, 18 (1919) (holding that the defendant's sentence of death following an appeal on a sentence to life was constitutionally sound). While *Stroud* has not been formally overruled by the Supreme Court, the bifurcated trial was not required at the time the case was decided. Because bifurcated trials are now required in capital trials, the holding of *Stroud* has effectively been abrogated. *See* Gregg v. Georgia, 428 U.S. 153, 190–91 (1976) (holding that the Constitution requires a separate penalty phase in capital cases).

[139] Buskey, *supra* note 13, at 318–19 (describing how prosecutors pursue inconsistent prosecutions); *see also* Drake v. Kemp, 762 F.2d 1449, 1451 (11th Cir. 1985) (inconsistent inferences from the same basic evidence); Thompson v. Calderon, 120 F.3d 1045, 1056 (9th Cir. 1997), *rev'd on other grounds*, 523 U.S. 538 (1998) (different quanta of evidence at different trials).

ered new evidence, have reevaluated existing evidence, are agnostic or uncertain about which defendant is guilty, or because they have a "win at all costs" mentality.[140] As such, a closer look at how the Double Jeopardy Clause functions as a bar to these prosecutorial approaches is warranted. This Part analyzes three hypothetical scenarios to understand whether and how a double jeopardy bar to inconsistent prosecutorial theories in capital cases would function in practice. Section III.A examines the application of the double jeopardy prohibition in cases involving irreconcilable inconsistencies. Next, Section III.B looks at how the Double Jeopardy Clause works in scenarios involving vicarious liability, such as felony-murder cases. Section III.C then explores how prosecutors should approach cases where there is genuine uncertainty as to which defendant is guilty of the capital crime. Finally, Section III.D situates each of these hypothetical scenarios within the context of the purpose of punishment, explaining how double jeopardy protections bring clarity to the justifications for the death penalty.

A. Irreconcilable Inconsistencies

Irreconcilable inconsistencies present themselves in situations where "the fact-finder [sic] is forced into an either/or proposition with respect to culpability. In other words, where one defendant's guilt logically precludes the possibility of the other defendant's guilt, the primary question becomes 'who did it?' "[141] Imagine, for example, a scenario where a single person robs a store and kills the cashier with a single gunshot. Upon investigating the crime, the murder weapon is found, but the police are unable to make any fingerprint matches. Through the use of eyewitness and circumstantial evidence, the police arrest Defendant *A* and prosecutors bring them to trial, arguing that they shot and killed the cashier. The factfinder finds Defendant *A* guilty and sentences them to death. A few years later, through the development of new fingerprint technology or through a subsequent arrest, a fingerprint match is found that implicates Defendant *B* in the robbery and murder of the cashier. Based on this discovery of new evidence, Defendant *B* is brought to trial for the murder of the cashier. Prosecutors argue that Defendant *B* pulled the trigger that resulted in the cashier's death, and Defendant *B* is found guilty and sentenced to death.

In this hypothetical situation, Defendant *A*'s guilt precludes the guilt and culpability of Defendant *B* because only one person was

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[140] Buskey, *supra* note 13, at 319–21.
[141] *Id.* at 317.

involved in the stickup and murder of the cashier. If Defendant *A* was the one to pull the trigger, as prosecutors initially argued, it becomes factually impossible for Defendant *B* to have done so. But prosecutors have become convinced that Defendant *B*, not Defendant *A*, is the real culprit. Any subsequent prosecution of Defendant *B* would not require any misrepresentation of the evidence, malpractice, ethical violation, or intentional gamesmanship in Defendant *B*'s trial. Rather, a subsequent prosecution of Defendant *B* is simply the result of changing circumstances. In this situation, would the preclusive effect of the Double Jeopardy Clause prohibit the prosecution from bringing criminal charges and seeking the death penalty against Defendant *B*?

Yes, but only if the prosecution maintains the earlier stain of the problematic conviction and sentence of Defendant *A*. This challenge can therefore be avoided altogether if the prosecution remedies the injustice of the first trial before pursuing the subsequent prosecution. This application of double jeopardy preclusion is supported by several policy principles that undergird the Clause. The remainder of this Section explores those policy principles.

1. Ethical Duty to Rectify Criminal Convictions Secured in Error

The American Bar Association's Model Rules of Professional Responsibility have two rules that apply to prosecutors who discover new evidence that creates a reasonable likelihood that a defendant who has been convicted of a crime did not commit that crime. First, prosecutors must disclose the new evidence to the court and to the defendant, and they must investigate the crime further to make a final determination of the legitimacy of the conviction.[142] Second, prosecutors are obligated to remedy convictions when there is clear and convincing evidence that establishes a defendant was erroneously convicted.[143] So, in the hypothetical scenario presented, upon discovering a fingerprint match to Defendant *B*, prosecutors have an ethical duty to investigate the robbery and murder of the cashier further. Should they become convinced of Defendant *B*'s guilt, they must ensure that Defendant *A* does not serve a sentence for a crime they do not think Defendant *A* committed. Unfortunately, these rules are often difficult to enforce.

Take, for example, the experience of Mr. Stumpf. After the panel of judges sentenced him to death, newly discovered evidence impli-

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142 MODEL RULES OF PRO. CONDUCT r. 3.8(g) (AM. BAR ASS'N 1983).

143 *Id.* r. 3.8(h).

cated Mr. Wesley in the murder of Mrs. Stout.[144] Upon this discovery, prosecutors had an ethical obligation to investigate the crime further to determine whether Mr. Stumpf was erroneously convicted and sentenced to death for that murder. While there is no indication of further investigation in the appellate record, the arguments made by the prosecutors in the subsequent trial of Mr. Wesley[145]—that Mr. Wesley was the person to pull the trigger on the fatal shot—suggests that they had indeed become convinced that Mr. Wesley, not Mr. Stumpf, murdered Mrs. Stout.

But Mr. Stumpf's fate indicates that the ethics rules are not strong enough on their own to prevent the execution of a defendant who may have erroneously received that sentence. Due process arguments are not able to account for these ethical obligations because the process due to a defendant is singularly focused on the procedures used to convict and sentence them in their own trial, not the trial of a different defendant, whereas the ethics rules account for changing circumstances. As one judge noted, "[H]ow did the prosecution violate the Constitution at Stumpf's trial with respect to evidence that did not yet exist? . . . [T]he prosecutor made an argument, referencing all available evidence, to a panel of judges. The state did not hide the ball, and the judges were not bamboozled."[146] In other words, everything about Mr. Stumpf's trial proceedings was fair, and the discovery of new evidence did not implicate that fairness. Due process arguments against inconsistent prosecutorial theories, even when those inconsistencies are irreconcilable, do not protect defendants from prosecutorial ethical violations.

Alternatively, a double jeopardy bar against inconsistent prosecutorial theories requires prosecutors to adhere to their ethical obligations. In scenarios where new evidence is discovered that calls into question the veracity of the original conviction and sentence, the Double Jeopardy Clause can prevent prosecutors from making irreconcilably inconsistent arguments in subsequent trials. This prohibition does not mean that prosecutors are locked into the outcome of the first trial, though. If, in fulfilling their ethical obligations, prosecutors become convinced of another defendant's guilt, the double jeopardy

144 *See supra* notes 10–11 and accompanying text (discussing the prosecutor's use of a jailhouse informant in Mr. Wesley's trial, who claimed that Mr. Wesley confessed to the murder while in pretrial detention, to establish that Mr. Wesley was the principal offender).

145 *See* Bradshaw v. Stumpf, 545 U.S. 175, 188 (2005) (Souter, J., concurring) ("After the sentencing proceeding was over, the State tried the codefendant, Wesley, and on the basis of testimony from a new witness argued that Wesley was in fact the triggerman . . . .").

146 Stumpf v. Houk, 653 F.3d 426, 441 (2011) (Boggs, J., dissenting).

bar on inconsistent prosecutorial theories in subsequent trials can be avoided altogether by first remedying the injustice caused in the first trial.[147] The purpose of barring the prosecution from pursuing inconsistent theories to mete out the same punishment to different individuals is not to unfairly pin the prosecution to a particular story but to ensure consistency in whatever story the prosecution has regarding a specific crime. When the prosecution's theory changes, there is an ethical duty to correct the record; extending the Double Jeopardy Clause's protections in the manner argued in this Note simply makes this a legal obligation as well.

2. Truth-Seeking Function of the Criminal Law

In incorporating aspects of the doctrine of collateral estoppel through the Fifth Amendment's Double Jeopardy Clause, the Supreme Court implicitly embraced the policy justifications for collateral estoppel as applicable to criminal cases.[148] One such justification is that issue preclusion ensures consistent results. Without preclusion of resolved issues, there runs a risk that different adjudicators will reach different conclusions on matters of law and fact, resulting in fundamentally unfair judgments over time. This practice can undermine the legitimacy and prestige of the courts. As one commentator notes, "Successive trials with inconsistent results tend to erode public confidence in the courts because such inconsistency suggests that one litigant is not receiving the fundamental fairness that is essential to any just procedure for settling disputes."[149]

It is clear there is a public interest in the integrity of the criminal legal system and for this system to seek the truth. Consider the hypothetical scenario where prosecutors pursue irreconcilably inconsistent theories in Defendant *A*'s and Defendant *B*'s trials. If prosecutors are able to convict and sentence to death both Defendant *A* and Defendant *B* for the robbery and murder of the cashier when only one of the two could have possibly pulled the trigger, factfinders, victims, the courts, and the general public are left wondering who the culprit actually was. This has severe consequences.

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[147] The mechanisms through which a prosecutor could remedy such an injustice are beyond the scope of this Note but may include negotiating an alternative plea agreement, supporting appeals for clemency, or modifying the State's position when the defendant appeals.

[148] *See* Ashe v. Swenson, 397 U.S. 436, 456 (1970) (Brennan, J., concurring) ("The considerations of justice, economy, and convenience that have propelled the movement for consolidation of civil cases apply with even greater force in the criminal context because of the constitutional principle that no man shall be vexed more than once by trial for the same offense.").

[149] Murray, *supra* note 22, at 932.

Take, for example, the story of Susan Conway-Weisen, who served as a juror in the trial of Antoine Bankhead[150]—a man who was convicted of second-degree murder on the prosecution's theory that he served as the sole accomplice to Martez Shadwick, who had previously been found guilty of murder during the commission of a robbery.[151] Unbeknownst to the jurors or the judge in Mr. Bankhead's trial, the prosecution had—just two weeks before the start of Mr. Bankhead's trial—argued that Alvin Washington, not Mr. Bankhead, was the sole accomplice to Mr. Shadwick.[152] In other words, in a murder and robbery involving two possible defendants, three people were convicted and sentenced in connection with the crime: In Mr. Shadwick's trial, the prosecution argued that Mr. Washington and Mr. Shadwick were the two people responsible, and in Mr. Bankhead's trial, the prosecution argued that Mr. Shadwick and Mr. Bankhead were the two people responsible.

Mr. Bankhead ultimately prevailed on appeal, but the impact of the inconsistencies had a lasting effect on the people involved in Mr. Bankhead's trial.[153] Years after the trial, juror Conway-Weisen was interviewed and, upon learning of the prosecutor's duplicity, she gasped and started to cry.[154] "That is terrible. That is just terrible. I think our justice system should actually be . . . justice. I think that is awful."[155] When asked whether knowing that the prosecution had previously accused someone else of the crime would have made a difference, Ms. Conway-Weisen said, "Absolutely. Oh my gosh, that's outrageous."[156]

While truth may be difficult to know with certainty, the failure of those whose duty it is to seek justice to uphold this guiding principle undermines the system altogether. Professor Poulin says that without the full range of protection offered by the collateral estoppel doctrine, "[t]he courts . . . have undervalued the importance of consistent results in the criminal justice system as an aspect of the public's interest in accuracy and justice in criminal cases."[157] These values are

[150] Armstrong, *supra* note 1.
[151] *See generally* Bankhead v. State, 182 S.W.3d 253, 253–58 (Mo. Ct. App. 2006) (describing the factual history of the cases).
[152] Armstrong, *supra* note 1.
[153] *See Bankhead*, 182 S.W.3d at 260 ("[W]hile the Prosecutor was not required to present the same evidence and theories in pursuing the convictions of Shadwick, Washington and Bankhead, the use of theories that were factually contradictory to secure the convictions in this case for the same robbery and murder violated the principles of due process.").
[154] Armstrong, *supra* note 1.
[155] *Id.*
[156] *Id.*
[157] Poulin, *supra* note 127, at 1447.

only further amplified when the State seeks to sentence someone to death. The Court has said that the legitimacy of capital punishment relies, at least in part, on public perceptions of standards of decency and the "dignity of man."[158] When the integrity of the system is cast into doubt due to the re-litigation of issues already determined, thus raising the potential for inconsistent results as to facts and law, the legitimacy of any resulting death sentence is undermined.

Irreconcilable inconsistencies, such as in the hypothetical described or in the case of Mr. Bankhead, draw into stark relief the consequences of a justice system that allows prosecutors to pursue inconsistent theories in subsequent trials; the Double Jeopardy Clause's incorporation of the collateral estoppel doctrine can account for these consequences.

B. Vicarious Liability

Not every prosecutorial inconsistency falls neatly into the either/or situation that the use of irreconcilable theories of a case creates. Often, inconsistencies arising out of cases involving multiple defendants can be reconciled through theories of vicarious liability. Vicarious liability holds people involved in the commission of a crime in *some* capacity culpable as if they themselves had committed the crime. This can occur when a defendant aids and abets a crime—also known as accomplice liability—or when a defendant is a member of a conspiracy.[159] In the capital context, vicarious liability functions through the felony murder rule, which allows the State to pursue the death penalty against accomplices charged with first-degree murder if they have the required mental state.[160]

These cases are easier to resolve than irreconcilable inconsistencies because "culpability turns on the question of 'who did what?'"[161] Imagine, for example, a case where two people rob a house, and one of the two people has a gun. In the midst of the robbery, the homeowner returns. Startled, one of the robbers shoots and kills the homeowner. Police identify the two people through the use of surveillance footage, but the murder weapon is never found, and the killing took

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[158] *See* Furman v. Georgia, 408 U.S. 238, 270 (1972) (Brennan, J., concurring) (describing how human dignity is a touchstone of Cruel and Unusual Punishments Clause); Gregg v. Georgia, 428 U.S. 153, 173 (1976) ("A penalty also must accord with 'the dignity of man,' which is the 'basic concept underlying the Eighth Amendment.'") (internal citation omitted).

[159] *See* Pinkerton v. United States, 328 U.S. 640, 646 (1946) ("[S]o long as the partnership in crime continues, the partners act for each other in carrying it forward.").

[160] *See* Tison v. Arizona, 481 U.S. 137, 152–53 (1987) (discussing what the required mental states are and upholding the felony murder rule as constitutional).

[161] Buskey, *supra* note 13, at 317.

place in an area of the home where there were no security cameras. Both Defendant *A* and Defendant *B* are prosecuted in separate trials. Initially, it may seem like there is no inconsistency in this scenario because rather than an either/or calculus, jurors weigh the level of involvement each person had in the commission of the crime.

But instead of the felony murder rule, prosecutors decide to approach each defendant's trial through a theory of primary culpability. In Defendant *A*'s trial, prosecutors present evidence suggesting that Defendant *A* was the defendant to pull the trigger, and the jury convicts and sentences Defendant *A* to death. A few weeks later, in Defendant *B*'s trial, prosecutors present different evidence suggesting that Defendant *B*, not Defendant *A*, pulled the trigger.[162] Under a construction of the Double Jeopardy Clause as argued for in this Note, can prosecutors secure two death sentences in this manner without violating double jeopardy principles?

No, but that is not to say that the prosecution cannot seek the death penalty for both defendants at all. Rather, the preclusive effect of the Double Jeopardy Clause only prevents prosecutors from arguing that two different defendants were primarily culpable for a murder that, factually, only one of them could have committed. The preclusive effect of the Double Jeopardy Clause does not prevent prosecutors from seeking the death penalty against one defendant under a theory of primary culpability and against another defendant under a theory of accomplice liability. The remainder of this Section explores why the Fifth Amendment's double jeopardy protections function in this manner.

1. Finality

One key motivation of double jeopardy is finality, or the idea that at a certain point, a decision has been made on a particular subject.[163] The Court has repeatedly relied on the conception of finality, stating that "[n]either innocence nor just punishment can be vindicated until the final judgment is known."[164] The Fifth Amendment's prohibition on multiple prosecutions for a single offense likewise reflects the

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162 This hypothetical closely mirrors John David Stumpf's case, where Mr. Stumpf was Defendant *A*. Under the prosecution's construction, Mr. Stumpf's conviction and sentence were sound because even if Mr. Stumpf did not pull the trigger, the very fact that he was present at the Stouts' house made him culpable for the death of Mrs. Stout under a theory of accomplice liability. Bradshaw v. Stumpf, 545 U.S. 175, 187 (2005) (holding that Stumpf's conviction was sound because "the precise identity of the triggerman was immaterial").

163 *See supra* Section II.B (exploring the relationship between the doctrines of collateral estoppel and double jeopardy).

164 McCleskey v. Zant, 499 U.S. 467, 491 (1991).

Founders' concern that the State respect the finality of a jury or trial judge's decision in a particular case.[165]

The principle of finality serves many important functions within the criminal legal system, including deterrence[166] and resolution, which is particularly important for victims of crime.[167] The use of inconsistent prosecutorial theories to pursue multiple death sentences under a theory of primary culpability runs counter to these values. In suggesting that the issue of such culpability was never decided, the legitimacy of any prior or subsequent death sentence is thrown into question. Recall the hypothetical previously described; by accusing both Defendant *A* and Defendant *B* of primary culpability, it becomes impossible to uphold the standard of beyond reasonable doubt when only one of them could have, factually, committed the act. Alternatively, prosecutors can seek the death penalty against both Defendants *A* and *B* without disrupting the principle of finality by arguing that one of the defendants is culpable under a theory of primary liability and the other is culpable under a theory of accomplice liability. The functions of deterrence and resolution are not confused by such arguments; rather, they are enhanced when prosecutors are clear and consistent about the role each defendant played in a particular crime.

In addition to these foundational concerns, the issue of finality has practical elements, principally the concern over the judicial economy of the criminal legal system. Judicial resources are finite and thus subject to scarcity; there are only so many judges and lawyers, and jails and prisons have capacity constraints. Indeed, there is reason to believe that the judicial economy is under considerable strain in the criminal legal system. Case processing times are increasing around the country, leading to docket backlogs, growing jail populations, and

[165] *See supra* Section II.A (recounting the history of the Fifth Amendment's double jeopardy protections).

[166] *See, e.g.*, Calderon v. Thompson, 523 U.S. 538, 555 (1998) ("Finality is essential to both the retributive and the deterrent functions of criminal law."); Teague v. Lane, 489 U.S. 288, 309 (1989) ("Without finality, the criminal law is deprived of much of its deterrent effect.").

[167] *Calderon*, 523 U.S. at 556 ("Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out." (citing Payne v. Tennessee, 501 U.S. 808 (1991))); *id.* at 556 ("To unsettle these expectations is to inflict a profound injury to the 'powerful and legitimate interest in punishing the guilty,' . . . an interest shared by the State and the victims of crime alike." (quoting Herrera v. Collins, 506 U.S. 390, 421 (1993) (O'Connor, J., concurring))).

increasing taxpayer expenses.[168] Allowing superfluous prosecutions contributes to this problem; finality helps to resolve it.[169]

2. *Clarity to the Sentencer*

The thesis advanced by this Note hinges on the idea that the State cannot mete out the same punishment to different individuals when only one individual can, factually, be guilty of the underlying conduct that gives rise to the punishment, a conception that is in tension with vicarious liability, such as the felony murder rule. The tension identified, though, is distinct from the argument this Note proposes, because theories of culpability based on vicarious liability do not require the State to argue inconsistently across multiple trials and therefore do not obfuscate the issue of culpability for the sentencer.

This divergence gets to the heart of the distinction between conviction and sentence. For example, imagine that during the trial for Defendant *A*, the prosecution argues that they were the principal actor in the murder of the homeowner. Based on the evidence presented, the jury convicts. During sentencing, the jury unanimously agrees that Defendant *A* is deserving of a death sentence based on the aggravating factor that the murder was atrocious or cruel. The sentence of Defendant *B* in a subsequent trial hinges on whether the prosecution argues that Defendant *B* was an accomplice or the primary actor. While the jury in Defendant *B*'s sentencing may still determine that Defendant *B* is deserving of death based on the aggravating factor of felony murder, it might also find that mitigating circumstances counsel against death given the secondary role Defendant *B* played. Because factfinders are asked to weigh aggravating and mitigating circumstances in reaching a determination of death or life, the arguments prosecutors advance are of vital importance.[170]

In other words, in cases involving vicarious liability, the trier of fact is asked to make a different determination at sentencing. Rather than inquiring whether or not a primary actor is deserving of death,

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[168] Ram Subramanian, Ruth Delaney, Stephen Roberts, Nancy Fishman & Peggy McGarry, Vera Inst. of Just., Incarceration's Front Door: The Misuse of Jails in America 36–38 (2015), https://www.vera.org/downloads/publications/incarcerations-front-door-report_02.pdf [https://perma.cc/P9UT-XUQD].

[169] A corollary concern related to the finality of the factfinder's determination of culpability is the finality of the death sentence itself, and any discussion of finality within the context of capital punishment is remiss to ignore the reality that there is no sentence more final than a death sentence. While an in-depth discussion of this is beyond the scope of this Note, it is important to acknowledge nonetheless.

[170] *See* Gregg v. Georgia, 428 U.S. 153, 193 (1976) (explaining that a jury should weigh aggravating and mitigating factors against each other during the sentencing phase of a bifurcated capital trial).

the question becomes: Despite this person's more secondary participation in this crime, are they still deserving of death? While both defendants may be guilty, the calculus a factfinder must make with regard to sentencing is much different when the prosecution argues a theory of primary culpability rather than a theory of accomplice liability. The Double Jeopardy Clause therefore precludes the State from arguing the factually impossible in an attempt to secure multiple death sentences, in part because there are other viable legal ways for the State to enforce laws and deter crime while simultaneously upholding conceptions of fairness and justice.

C. Genuine Uncertainty

Sometimes cases arise where the evidence points in the direction of multiple defendants, and the prosecution is genuinely unsure as to which defendant committed the act. In other words, there are situations in which the prosecution legitimately lacks a clearly defined theory of the case. Imagine the same vicarious liability scenario where two defendants rob a house and murder the homeowner.[171] While it is clear both Defendant *A* and Defendant *B* participated in the robbery and murder, evidence does not plainly point in the direction of either one of them as the person who pulled the trigger. In this hypothetical case, prosecutors do not know whether Defendant *A* or Defendant *B* was the principal actor, so they decide to leave the question for the jury. In Defendant *A*'s trial, prosecutors argue that Defendant *A* was the principal actor and present all the evidence they have. The jury hears the evidence and convicts and sentences Defendant *A* to death. A few weeks later, prosecutors argue in Defendant *B*'s trial that Defendant *B* was the principal actor and present all the same evidence that was used in Defendant *A*'s trial. Does the preclusive effect of the Double Jeopardy Clause prohibit the prosecution from this approach?

Yes, because once Defendant *A* has been found guilty and sentenced to death, the question of who killed the homeowner has been answered. Of course, it is possible that the jury, upon seeing the evidence, would determine that Defendant *A* was not guilty. In these cases, double jeopardy principles would not preclude the prosecution from presenting the issue to Defendant *B*'s jury, since no determination of primary culpability had been made. Alternatively, the jury might determine that Defendant *A* was guilty but not deserving of the death penalty. In this scenario, double jeopardy preclusion would take effect because the issue of primary liability had been determined

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[171] *See supra* Section III.B.

despite the sentence. Prosecutors could still argue for capital punishment for Defendant *B*, but only under a theory of vicarious liability.[172] The Double Jeopardy Clause functions in this manner when there is genuine uncertainty as to primary liability for a number of reasons, including finality,[173] advancing the truth-seeking function of the criminal legal system,[174] and offering clarity to the sentencer.[175] Perhaps more fundamentally though, the Double Jeopardy Clause functions as a means of limiting the zealousness of the State in hindering liberty when prosecutors might otherwise be inclined to pursue inconsistent theories of a case.

The central thrust of much of the critique regarding the use of inconsistent prosecutorial theories to secure multiple death sentences for a single criminal act is that it is simply an overreach of State power. When a sovereign flip-flops its theories based on convenience, it "reeks of unfairness," in part because it is done by an "official sworn to uphold justice" and reflects an "unwavering commitment to a win-at-all-costs callousness that is directly at odds with [the] solemn oath to preserve and defend the Constitution."[176] The history of the Double Jeopardy Clause demonstrates a similar concern around fairness in criminal trials, especially with respect to criminal defendants.[177]

Extending double jeopardy protections to scenarios like the one described in this Note solves two critical issues raised by these prosecutorial practices. First, it harkens back to the unseemly nature of prosecutorial misconduct by giving legal ethics rules teeth.[178] The due process cases,[179] for example, all take a close look at the ways in which this practice allows prosecutors to "knowingly pervert the truth-seeking function of the trial."[180] The criminal legal system in the United States is structured in a way that gives factfinders—not prosecutors—the authority to resolve ambiguities that may exist in a particular case.[181] In successive trials, the sovereign has the benefit of seeing the outcome from a prior case, but the factfinder does not have that

172 *Id.*

173 *See supra* Section III.B.1.

174 *See supra* Section III.A.2.

175 *See supra* Section III.B.2.

176 Stumpf v. Robinson, 722 F.3d 739, 758 (6th Cir. 2013) (Daughtrey, J., dissenting).

177 *See supra* Section II.A (noting that fairness to criminal defendants was of paramount concern for the Founders).

178 *See supra* Section III.A.1.

179 *See supra* Section I.A.

180 Buskey, *supra* note 13, at 327.

181 U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .").

same benefit, giving the prosecution an unfair opportunity to benefit from that information gap.[182] If the government believes a particular crime is deserving of a capital sentence, it makes logical sense that it must unwaveringly commit to a non-contradictory factual narrative.

The second critical issue this application of the Double Jeopardy Clause solves is that it does not allow the prosecution to receive an unfair "windfall" by allowing the State to have multiple bites at the same apple. The doctrine of joint and several liability in the tort law context is instructive.[183] *Summers v. Tice*[184] is the paradigm example. In this case, three people were hunting, and, at one point, two of the hunters fired their guns at the exact same time, injuring the third hunter.[185] It was impossible to tell from which of the two guns the bullets that struck the third hunter originated.[186] The court held that both defendants were jointly liable, since both defendants acted negligently.[187] In scenarios like this, the burden then shifts to the defendants to demonstrate that they did not fire the injurious shot.[188] *Summers* is often used to demonstrate this burden shifting framework, but the court's approach to apportioning damages is enlightening. In a situation where neither defendant can prove they did not fire the injurious shot, damages are allocated between them.[189] This makes intuitive sense because the alternative, requiring each defendant to be responsible for 100% of the damages, would result in an unfair windfall to the plaintiff; absent punitive damages, the plaintiff is not able to recover more than the damage incurred by the injury.[190]

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[182] See, for example, *supra* Section III.A.2 for a discussion on the impact of these practices on jurors who participate in criminal trials.

[183] Tort law and criminal law serve different functions—tort law is primarily focused on compensating victims for any harm incurred. *See generally* Mark A. Geistfeld, *Conceptualizing the Intentional Torts*, 10 J. Tort L. 1, 1, 5–10 (2017) (describing the legal history of the development of intentional torts as distinguished from criminal law). Criminal law is focused on punishing people for the wrongful acts that led to harm. *Id.* But both areas of law are centered on the harm caused and the pursuit of justice on behalf of the victim.

[184] 199 P.2d 1, 2 (Cal. 1948).

[185] *Id.*

[186] *Id.* at 2–3.

[187] *Id.* at 2.

[188] Restatement (Second) of Torts § 433B(3) (Am. L. Inst. 1965).

[189] *Summers*, 199 P.2d at 5 ("If defendants are independent tort feasors [sic] and thus each liable for the damage caused by him alone, and . . . where the matter of apportionment is incapable of proof, . . . [t]he wrongdoers should be left to work out between themselves any apportionment.").

[190] For a discussion on apportionment of damages in tort cases involving multiple defendants who are held jointly and severally liable, see generally Mark A. Geistfeld, *The Doctrinal Unity of Alternative Liability and Market-Share Liability*, 155 U. Pa. L. Rev. 447 (2006).

This tort law example demonstrates how a prosecutor's pursuit of the same severe sentence, under conflicting theories of primary culpability, against multiple individuals, results in a sort of windfall for the State. Looking beyond gut feelings about fairness and justice, imagining the same scenario through a lens of "compensation" makes it clear that these kinds of activities serve no purpose other than to ensure convictions through vindictive measures. Likewise, allowing prosecutors multiple bites at the same sentencing apple results in an unfair windfall for the State. Such a windfall—at least when it is the result of inconsistent prosecutorial theories—has no legal or moral justification and thus points to the inherently vindictive nature of this practice, a factor the Court takes seriously in the context of sentencing.[191]

The extension of the Fifth Amendment's double jeopardy protections to defendants facing the death penalty in cases where prosecutors have pursued inconsistent theories in successive trials therefore offers critical solutions to limiting uncontrolled State power while simultaneously giving the State wide latitude to enforce its laws and ensure accountability against the guilty, aligning closely with the Founders' original goals.[192]

D. The Purposes of Punishment

Each of these hypothetical scenarios highlights that, in addition to enforcing ethical obligations, advancing the truth-seeking function of the justice system, promoting finality principles, giving clarity to the sentencer, and limiting the zealousness of the State, double jeopardy preclusion of prosecutorial inconsistent theories in successive trials also clarifies the purpose of a capital punishment scheme.

Capital punishment arguably serves a number of functions, including deterrence[193] and retribution.[194] But in order for these func-

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[191] *Supra* Section II.C.

[192] *See supra* Section II.A (discussing the Founders' attention toward multiple prosecutions against a single person for the same crime).

[193] The deterrent effect of capital punishment schemes is subject to much debate. While some studies have claimed to find capital punishment to decrease murder rates, these studies have fundamental flaws. NAT'L RSCH. COUNCIL, DETERRENCE AND THE DEATH PENALTY 2–7 (Daniel S. Nagin & John V. Pepper eds., 2012). Despite the questionable efficacy of capital punishment as a deterrent, courts implicitly accept deterrence as a justification for the death penalty. *E.g.*, Gregg v. Georgia, 428 U.S. 153, 183 (1976) ("The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders.").

[194] *E.g.*, Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313, 1313 (2000). Rehabilitation and incapacitation are also often cited as justifications for punishment, but they are less applicable to the capital context. *Id.*

tions to be effective, clarity as to why a particular punishment is justified is required. A person cannot be deterred from committing a criminal act if they do not know what to expect if they are caught. Deterrence works in two primary ways: first, it makes people scared of a particular punishment, and second, people "internalize[] the norm," the norm being the law.[195] When prosecutors pursue inconsistent theories against multiple defendants, the deterrent effect of punishment becomes muddled. Take a case involving irreconcilable inconsistencies; if both Defendant *A* and Defendant *B* can be sentenced to death for a crime that only one of them could have factually done, it sends the signal that a person's actual behavior has very limited weight in determining the sentence they receive. Likewise, a prosecutor who argues primary liability against multiple defendants rather than vicarious liability compromises the deterrent function of a capital punishment scheme because defendants, jurors, judges, victims, and society do not know whether a person received the death sentence because of their primary or secondary role in a crime. When there is no correlation between behavior and punishment, deterrence becomes moot because neither fear nor internalized norms can protect someone from receiving the death penalty.

The retributive purpose of a capital punishment scheme is also compromised through the use of inconsistent theories in successive trials. While deterrence is largely focused on the criminal actor, retributivism is centered on the idea of restoring a moral balance to society.[196] Thus, retributivism requires a confidence that the convicted party is actually guilty of the crime for which they have been convicted. It is easy to see how any of the three hypotheticals discussed in this Note calls into question this justification for the death penalty, but it is particularly stark when prosecutors pursue inconsistent theories because of their genuine uncertainty as to which party is actually guilty. In these cases, the retributive justification is compromised for the victim of the crime. Imagine losing a loved one in a factually singular crime. With multiple people convicted and sentenced to death under a theory of primary culpability, the question of who killed the loved one remains unresolved. Thus, it becomes challenging to know that the moral balance has actually been restored.

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[195] Jack P. Gibbs, *Crime, Punishment, and Deterrence*, 48 Sw. Soc. Sci. Q. 515, 517 (1968) ("Individuals may refrain from a criminal act from fear of punishment or because the act is contrary to their conscience or sense of values. In the latter case, they have 'internalized the norm' (in this case the law).").

[196] *See generally* Hugo Adam Bedau, *Retribution and the Theory of Punishment*, 75 J. Phil. 601 (1978) (discussing retributivism as a justification for punishment).

The Double Jeopardy Clause resolves these tensions. In extending double jeopardy protections to people subject to inconsistent prosecutorial theories, the law becomes clearer and the associated punishment more justified.

Conclusion

The issue this Note addresses is not whether the State can charge multiple people for the same act. Surely there is no constitutional bar on the State from charging a defendant with first-degree murder after a prior prosecution for the same crime against a different defendant resulted in an acquittal.[197] The issue is also not whether the State can seek the death penalty against multiple people for the same crime. There is no constitutional prohibition against capital punishment generally,[198] and there are legal mechanisms through which a prosecutor can argue—without contradiction—that multiple people should be sentenced to death for a singular criminal act.[199] The issue this Note tackles boils down to whether or not our society is comfortable allowing the re-litigation of ultimate culpability after a factfinder has already made a determination that one of multiple defendants was so blameworthy that they deserved a sentence of death for a factually singular act.

A review of the case law involving inconsistent prosecutions and a look at the historical development of the double jeopardy doctrine, as well as the Supreme Court's suggestion in *Bradshaw* that the sentencing inquiry might be uniquely impacted by inconsistent arguments,[200] leads to the conclusion that the Fifth Amendment's Double Jeopardy Clause protects defendants from this type of prosecutorial action. There is no doubt that this proposed application of the double jeopardy principle cuts against a strictly textualist reading of the Double Jeopardy Clause.[201] But Supreme Court precedent instructs courts to approach double jeopardy analyses in a functional manner that is grounded in realism,[202] and the Framers' drafting principles reflect a reading of the Clause that arcs toward fundamental fairness for criminal defendants.[203]

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197 *Supra* Section III.C.

198 *Gregg*, 428 U.S. at 208 (holding that capital punishment can be administered in a way that comports with the Constitution).

199 *Supra* Section III.B.

200 *See supra* note 17.

201 *See supra* note 112.

202 *See supra* Section II.B.

203 *See supra* Section II.A.

Mr. Stumpf might be executed by the State of Ohio, despite the prosecutor's apparent subsequent belief that Mr. Wesley was the person to murder Mrs. Stout. This result offends our collective understanding of justice, morality, and the function and purpose of the criminal legal system. Mr. Stumpf's story also calls into question the founding principles of our country, namely that criminal defendants should be treated fairly and that the power of the State should be wielded with caution. A closer look at the logical principles that undergird the Fifth Amendment's Double Jeopardy Clause, including a commitment to fairness, respect for human life, and a desire for integrity within the criminal law, demonstrates that prosecutors must be precluded from this form of vindictive justice.