Retrying the Acquitted in England Part III: Prosecution Appeals Against Judges' Rulings of "No Case to Answer"

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Retrying the Acquitted in England
Part III: Prosecution Appeals
Against Judges’ Rulings of
“No Case to Answer”

DAVID S. RUDSTEIN*

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In this Article, the Author uses the American spelling for any words that differ in their American and English spellings, except when quoting material using the English spelling.
The subject of appeals by the Crown raises problems that lie at the core of any study of double jeopardy.¹

I. INTRODUCTION

Around 6:00 p.m. on May 28, 2003, twenty-one-year-old Alan McCullough left his mother’s house in Belfast, Northern Ireland, in a car, accompanied by three men.² Eight days later his remains were discovered in a shallow grave near Mallusk, on the northern edge of Belfast.³ He had been shot in the head.⁴ McCullough, the former

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¹ MARTIN L. FRIEDLAND, DOUBLE JEOPARDY 279 (1969) (pointing out that “[t]he result of a successful appeal from an acquittal will usually involve a retrial of the accused”).
military commander of Johnny “Mad Dog” Adair’s “C Company,”

five a faction of the Ulster Defence Association (UDA), Northern Ireland’s largest Loyalist paramilitary organization, previously had fled Northern Ireland with other members of “C Company” following a feud with other sections of the UDA. He returned to Belfast in April or May of

2003 WLNR 4781701. Accord Lister & Jordan, supra note 2, at 334; Wood, supra note 2, at 302 (stating that McCullough’s body was discovered “[a] week later”); Gemma Murray, Body Found in Shallow Grave May Be Missing Man: Loyalist’s Murder “Just Unfinished Business”—UDA, Belfast News Letter, June 6, 2003, at 2, available at 2003 WLNR 10412738. See also Courtney, No. 03/09229, slip op. at [8] (stating that the prosecution’s evidence in the defendant’s trial for the murder of McCullough showed that after McCullough left his mother’s house on May 28, 2003, he “was not seen alive again by any of his family or friends,” and that “[h]is body was found in a shallow grave . . . at a place known as Aughnabrack Road, just over one week later” (quoted in Courtney, [2007] NICA (Crim) 6, [3], [2007] N.I. at 180)).

4. Lister & Jordan, supra note 2, at 334; Appeals Judges Hear Bid to Have Murder Charge Re-Trial, supra note 3; Joe Gorrod, Alan McCullough was Three Months Old When His Dad was Killed by the INLA. Yesterday His Coffin Paused at a Mural Paying Tribute to the Loyalist Godfather, Mirror (U.K.), May 31, 2003, at 8, available at 2003 WLNR 13093374. See also Wood, supra note 2, at 302 (“He had been shot several times.”); Courtney, No. 03/09229, slip op. at [8] (stating that the prosecution’s evidence showed that McCullough “had been shot several times” (quoted in Courtney, [2007] NICA (Crim) 6, [3], [2007] N.I. at 180)).


6. Lister, supra note 5. The UDA is an outlawed organization. Terrorism Act, 2000, c. 11, § 3, sch. 2 (Eng.). For a history of the UDA, see Wood, supra note 2.


Alan McCullough, the son of William “Bucky” McCullough, a UDA commander who was shot and killed by the Irish National Liberation Army (INLA) outside his Belfast home in October 1981, Lister & Jordan, supra note 2, at 335; Wood, supra note 2, at 301–02, was one of the members of “C Company” blamed for killing a UDA leader, John “Grug” Gregg, in February of 2003. Lister, supra note 5. See also Lister & Jordan, supra note 2, at 326–27 (describing the murders of Gregg and a UDA.
apparently after receiving assurances from UDA leaders he would not be harmed.9

colleague, Robert “Rah” Carson, on Feb. 1, 2003, as they were sitting in a taxi at a traffic light near the Belfast docks after returning from a football match in Scotland); Courtney, No. 03/03229, slip op. at [5] (stating that the prosecution’s evidence in the defendant’s trial for the murder of McCullough showed that in February of 2003 two men were murdered as they left a Belfast ferry terminal and that blame for these murders fell upon “C Company” (quoted in Courtney, [2007] NICA (Crim) 6, [3], [2007] N.I. at 179)); Courtney, [2007] NICC 11, [3] (at the defendant’s sentencing hearing following his plea of guilty to the manslaughter of McCullough, the prosecution stated that McCullough’s killing occurred after “C Company” killed two UDA members, John Gregg and Robert Carson, in February of 2003).

For a brief history of the 2003 feud, see LISTER & JORDAN, supra note 2, at 307–32; WOOD, supra note 2, at 226–59, 263–93, 297–303.

8. The precise date McCullough returned to Belfast is not clear. He may have returned in early April 2003, see Courtney, [2007] NICC 11, [3], although it appears more likely he did not return until May of that year. LISTER & JORDAN, supra note 2, at 334 (stating McCullough had been led away from his mother’s house three weeks after his return from England); Lister, supra note 5 (first stating McCullough “went missing . . . days after returning to Northern Ireland from England,” and then saying McCullough had returned to Belfast the Friday before his disappearance). McCullough appears to have still been living in England on April 30, 2003, for on that date, as an act of good faith to rival UDA leaders, he shot up the house in Bolton, England, in which Adair’s wife and their children were living. Gorrod, supra note 7. See also LISTER & JORDAN, supra note 2, at 334–35 (asserting McCullough helped organize a drive-by shooting of Adair’s wife’s house on April 30, 2003).

9. See Wood, supra note 2, at 302 (noting, however, that “some press reports suggested he might have been prepared for a punishment beating or even a shooting for his alleged involvement in John Gregg’s murder”); see Gorrod, supra note 4; Gorrod, supra note 7; Moriarty, supra note 3; Murray, supra note 3; Ted Oliver, Mad Dog’s Missing Pal Found Dead, SUN (U.K.), June 6, 2003, at 2.

McCullough became anxious to return to Belfast after his girlfriend, who had fled with him, Courtney, No. 03/039229, slip op. at [5] (quoted in Courtney, [2007] NICA (Crim) 6, [3], [2007] N.I. at 179); Courtney, [2007] NICC 11 [3] (discussing the written text submitted by the prosecution at the defendant’s sentencing hearing following his plea of guilty to the manslaughter of McCullough), moved back to Belfast. Lister, supra note 5. See also LISTER & JORDAN, supra note 2, at 334–35 (asserting that four months after fleeing England, McCullough had been “desperate to return home to his girlfriend and young daughter”). Although McCullough’s mother apparently had sought guarantees from the UDA that her son would not be harmed if he returned to Belfast, Lister, supra note 5, it does not appear she received any such assurances. See Courtney, No. 03/039229, slip op. at [5]-[7] (indicating McCullough’s mother had not received such assurances before her son’s return and negotiations concerning his safety were taking place shortly before his disappearance and death (quoted in Courtney, [2007] NICA (Crim) 6, [3], [2007] N.I. at 179–80)); Courtney, [2007] NICC 11, [3] (the prosecution’s written statement at the defendant’s sentencing hearing indicated McCullough’s mother had not received such assurances before her son’s return and that, after his return, she approached “a considerable number of persons” “with a view to trying to render acceptable to the leaders of the UDA [her son’s] return”). See also Lister, supra note 5 (“[I]t was not clear . . . whether the UDA leadership had guaranteed his safety before his return . . . .”). After McCullough’s murder, police speculated that members of other sections of the UDA lured him back to Northern Ireland to be executed. Gorrod, supra note 7. See also WOOD, supra note 2, at 302 (stating the mainstream UDA “led [McCullough] to believe he could return unharmed”).
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SAN DIEGO INT’L L.J.

In June of 2003, William “Mo” Courtney, a leading Loyalist and member of the Ulster Freedom Fighters (UFF), a branch of the UDA, was charged with the murder of McCullough, and in September of 2006 his trial commenced in Belfast Crown Court before Mr. Justice Richard McLaughlin, sitting without a jury. At the close of the prosecution’s case, in November 2006, defense counsel submitted that his client had “no case to answer,” that is, the prosecution’s evidence was insufficient to prove the defendant’s guilt. Mr. Justice McLaughlin acceded to the submission for a direction that a verdict of not guilty be entered, thereby acquitting Courtney. The judge stated that in light of

At the trial of William Courtney for the murder of McCullough, see infra text accompanying notes 10–23, the prosecution contended that McCullough had requested to meet with members of a paramilitary organization—presumably the UDA—in the hope of facilitating his remaining in Northern Ireland, and that on May 28, 2003, after receiving a telephone call from William Courtney, he left his mother’s home in a car belonging to Courtney. Courtney, [2007] NICC 11, [3].

10. In his book on the UDA, Ian S. Wood asserts that in May or June of 1973, the organization’s killers began operating under the name Ulster Freedom Fighters. Wood, supra note 2, at 21. See also LISTER & JORDAN, supra note 2, at 52 (asserting that military operations of the UDA were carried out “under the cover name of the Ulster Freedom Fighters”); Joe Gorrod, Tortured and Slain: UFF Admits Executing Adair Pal McCullough, MIRROR (U.K.), June 6, 2003, at 1, available at 2003 WLNR 13060421 (calling the UFF “a cover name for the UDA”). Like its parent organization, the UDA, see supra note 6, the UFF is an outlawed organization. Terrorism Act, 2000, § 3, sch. 2.

Courtney, who joined the UDA when he was fifteen years old, had been the military commander of C Company before being replaced by McCullough in early 2003. LISTER & JORDAN, supra note 2, at 56, 328.


The indictment also charged Courtney with being a member of two proscribed terrorist organizations, the UDA and the UFF. Courtney, No. 03/039299, slip op. at [1].


Because of the political situation in Northern Ireland, indictments charging certain offenses, including murder, are tried by a judge without a jury. Terrorism Act, 2000, §§ 65(1), 75(1), sch. 9, pt. 1, para. 1. Such a trial generally must “be held only at the Crown Court sitting in Belfast.” Id. § 74(1).


15. See R v. N. Ltd., [2008] EWCA (Crim) 1223, [15], [2009] 1 Crim. App. 3, at 61 (Eng.). See also ARCHBOLD: CRIMINAL PLEADING, EVIDENCE AND PRACTICE § 4-293 (J.P. Richardson ed., 2011) [hereinafter ARCHBOLD] (“A submission of no case should be allowed when there is no evidence upon which, if the evidence adduced were accepted, a reasonable jury, properly directed, could convict.”). For a more detailed discussion of a submission of no case to answer, see infra text accompanying notes 45–70.

the “inherent weaknesses”18 in the testimony of McCullough’s family relating to the alleged collection of the deceased at his mother’s house, and in the testimony of Witness A (a private citizen who discovered McCullough’s body19) concerning the alleged presence on 28 May 200320 of Courtney’s car at the place where Witness A discovered McCullough’s body eight days later,21 he “could not properly convict the accused of the murder of Alan McCullough.”22 The judge also concluded that “the prosecution case is highly deficient in establishing that the defendant was part of a common design to kill the deceased.”23

Prior to 2005, Courtney’s acquittal of murder would have been final:24 The judge also concluded that Courtney had no case to answer on the two charges, see supra note 11, of being a member of a proscribed terrorist organization. Courtney, [2007] NICA (Crim) 6, [1], [4], [2007] N.I. at 179.


20. The trial judge was satisfied, on a prima facie basis, that McCullough “died very shortly after he was taken away in the car on 28 May.” Courtney, No. 03/039299, slip op. at [9] (quoted in Courtney, [2007] NICA (Crim) 6, [3], [2007] N.I. at 180).
21. About a week after McCullough’s disappearance on May 28, 2003, the Irish News published a photograph of the automobile used in a police reconstruction of the events surrounding the disappearance, and it gave details about the vehicle involved in the disappearance. Witness A claimed he had been driving along Aughnabrack Road on 28 May 2003 when his progress was halted by a car that was parked at the entrance to a laneway. According to Witness A, the car matched the description of the vehicle allegedly involved in McCullough’s disappearance. Witness A read the Irish News article on the date of its publication and “immediately put two and two together but, curiously, instead of telephoning the police and reporting his suspicions he . . . went to the Aughnabrack Road, walked the laneway [in question,] and ultimately discovered the body of the deceased.” After hearing Witness A’s testimony at trial, however, the trial judge concluded “it was impossible to disentangle what [Witness A] could remember of events as they actually took place on 28 May and those details which he gathered upon reading the article in the Irish News.” Courtney, [2007] NICA (Crim) 6, [3], [2007] N.I. at 181.
23. Id. For Mr. Justice McLaughlin’s detailed reasoning for acceding to Courtney’s submission of no case to answer, see Courtney, No. 03/039299, slip op. at [14]–[17] (quoted in Courtney, [2007] NICA (Crim) 6, [4], [2007] N.I. at 181–83).
24. As an eighteenth century English defense attorney put it: “Whenever, and by whatever means, there is an acquittal in a criminal prosecution, the scene is closed and the curtain drops.” Duchess of Kingston, 20 How. St. Tr. 355, 526 (1776).
the prosecution could not have appealed the trial judge’s decision because such appeals by the prosecution were not permissible, and the


According to the English Law Commission, “[t]he position in Northern Ireland [governing prosecution appeals] is very similar to that in England and Wales.” Law Commission, Consultation Paper No. 158: Prosecution Appeals Against Judges’ Rulings para. 1.13 (2000) [hereinafter Eng. Law Comm’n, Consultation Paper No. 158]. In England, prior to 2005, the prosecution had no right to appeal an acquittal in a trial upon an indictment. Criminal Appeal Act, 1968, c. 19 (Eng.) (making no provision for an appeal by the prosecution of an acquittal in a trial on an indictment); Law Commission, Consultation Paper No. 156: Double Jeopardy paras. 2.11–.13 (1999) [hereinafter Eng. Law Comm’n, Consultation Paper No. 156] (“In general the prosecution has no right of appeal against an acquittal; but there are two exceptions to this rule. First, in the case of a summary acquittal, the prosecution may appeal to the Divisional Court on the ground that the decision ‘is wrong in law or is in excess of jurisdiction.’ . . . [Second,] [w]here the Criminal Division of the Court of Appeal quashes a conviction, the prosecution can [under certain circumstances] appeal to the House of Lords . . . .”); Law Commission, Report No. 267: Double Jeopardy and Prosecution Appeals para. 2.38 (2001) [hereinafter Eng. Law Comm’n, Report No. 267] (“[T]he main business of the Crown Court, trying cases on indictment, is subject to a defence right of appeal only . . . .” (emphasis added)); Criminal Justice Bill, 2002, [Bill 8] Explanatory Notes para. 36 (Eng.) (“Under current legislation, . . . the prosecution has no . . . right of appeal against a judicial decision to stop the trial.”), available at http://www.publications.parliament.uk/pa/cm200203/cmbills/008/en/03008x--.htm; Statement of the Attorney General, 654 Parl. Deb., H.L. (5th ser.) 1782 (2003) (“It is a matter of serious concern that defendants have had a right of appeal against their conviction for almost a century while the prosecution has had no right to challenge a judge-ordered acquittal, no matter how manifestly unjust such a ruling may be on rare occasions.”); Friedland, supra note 1, at 279 (“English law has generally refused to permit an appeal from an acquittal. . . . At the present time the Court of Criminal Appeal has jurisdiction to entertain an appeal only from a conviction. No provision was made in the Criminal Appeal Act of 1907 to permit an appeal from an acquittal . . . .”); IAN MCLEAN, CRIMINAL APPEALS: A PRACTICAL GUIDE TO APPEALS TO AND FROM THE CROWN COURT 59 (1980) (“No appeal lies against an acquittal on indictment.”); id. at 98 n.27 (“There is no right of appeal to the Criminal Division against an acquittal on indictment.”). See also Eng. Law Comm’n, Report No. 267, supra, paras. 2.29–53 (briefly setting forth “the main forms of prosecution appeal or review in the current law of England and Wales,” but not mentioning a prosecution appeal from an acquittal rendered in a trial on an indictment); Eng. Law Comm’n, Consultation Paper No. 158, supra, para. 1.13 (not mentioning a right of the prosecution to appeal an acquittal). Although both in England and Northern Ireland the Attorney General can refer a point of law to the Court of Appeal, such a reference does “not affect the trial in relation to which the reference is made or any acquittal in that trial.” Criminal Justice Act, 1972, c. 71, § 36(1), (7) (Eng.); Criminal Appeal (Northern Ireland) Act, 1980, c. 47, § 15 (Eng.).

The English Law Commission, whose work product is cited in the previous paragraph and later in this Article, is a body of five Commissioners appointed by the Lord Chancellor. Law Commissions Act, 1965, c. 22, § 1(1) (Eng.). Parliament established the Law Commission in 1965 “[f]or the purpose of promoting the reform of the law [of England and Wales].” Id. The Law Commission is charged with
plea of *autrefois acquit*\(^{26}\) (a former acquittal) would have effectively precluded the prosecution from bringing a new charge for either murder or manslaughter against Courtney in connection with the death of McCullough.\(^{27}\) However, pursuant to an Order in Council applicable to Northern Ireland that took effect in 2005,\(^{28}\) the prosecution sought leave tak[ing] and keep[ing] under review all the law . . . . with a view to its systematic development and reform, including in particular the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernisation of the law . . . .

Id. § 3(1).

26. The plea, expressed in Norman-French, is spelled in various ways, including *autrefois acquit*, e.g., *William Blackstone*, 4 COMMENTARIES *335, and autrefois acquit*, e.g., Connelly v. DPP, [1964] A.C. 1254 (H.L.) 1306–07 (Lord Morris of Borth-y-Gest) (appeal taken from Eng.) (U.K.). In this Article, the Author will use the spelling *autrefois acquit*, except when quoting from material using a different spelling.

27. The plea of *autrefois acquit* (a former acquittal) is a special plea in bar that “give[s] a rea[son] why the prisoner ought not to an[swer] [the indictment] at all, nor put himself upon his trial for the crime alleged,” 4 BLACKSTONE, *supra* note 26, at *335. The plea not only can be raised to an indictment for the same offense of which an individual previously has been acquitted, but also to an indictment for an offense in respect of which the individual, on a previous indictment, could have been convicted. Connelly, [1964] A.C. at 1305 (Lord Morris of Borth-y-Gest); ENG. LAW REPORT NO. 267, *supra* note 25, para. 2.2. Thus, Courtney could have pleaded *autrefois acquit* to a subsequent indictment charging him with manslaughter in connection with the death of McCullough. Connelly, [1964] A.C. at 1305 (Lord Morris of Borth-y-Gest). See also id. at 1298–99 (when an appellant’s conviction for murder is set aside on appeal, “[t]he result is that the appellant can validly assert that he has been acquitted of the charge of murder—with the consequential result that he has also been acquitted of manslaughter”);

`Id.` at 1307 (“Hale . . . point[ed] out . . . that if a man is acquitted generally on an indictment of murder, autrefois acquit would be a good plea to an indictment of manslaughter of the same person. It would be the same death: the fact would be the same. The charges of murder and manslaughter only differ in degree.”); *id.* at 1312 (“An acquittal upon an indictment for murder may be pleaded in bar of another indictment for manslaughter.” (quoting HERBERT BROOME, A SELECTION OF LEGAL MAXIMS 257–58 (2d ed. 1848))); SPRACK, *supra* note 16, § 17.46, at 288 (“An acquittal on a count of murdering X entitles the accused to raise autrefois if he is subsequently indicted for the manslaughter of X.”). In practice, however, second prosecutions are not brought and so do not reach court. See SELECT COMMITTEE ON HOME AFFAIRS, THIRD REPORT, THE DOUBLE JEOPARDY RULE para. 6 (2000), available at [http://www.publications.parliament.uk/pa/cm199900/cmselect/cmhaff/190/19002.htm](http://www.publications.parliament.uk/pa/cm199900/cmselect/cmhaff/190/19002.htm) [hereinafter SELECT COMMITTEE ON HOME AFFAIRS, THE DOUBLE JEOPARDY RULE]; SPRACK, *supra* note 16, § 17.43 (“It is rare in practice for the defence to be forced to have recourse to [the plea of *autrefois acquit*]. . . . If [a previous prosecution] ended in [an individual’s] being . . . acquitted . . . he would not be prosecuted again for the same offence.”). See also Pearce v The Queen, (1998) 194 CLR 610, 645 (Austl.) (Kirby, J.) (“Except for accidental oversight or lack of coordination between prosecuting authorities, it is virtually unthinkable that an accused would ever be charged with exactly the same offence twice.” (footnote omitted)). For a more detailed discussion of the plea of *autrefois acquit*, see infra text accompanying notes 130–31, 135–47.

to appeal Mr. Justice McLaughlin’s ruling to the Court of Appeal. In January of 2007, the Court of Appeal granted leave and allowed the appeal. The court concluded

that if the [trial] judge had taken all [the] evidence into account on an all-encompassing basis he would have found that there was sufficient evidence to raise a prima facie case against the defendant, notwithstanding the frailties of the testimony of the McCulloughs and [another witness allegedly present when McCullough left his mother’s house on May 28, 2003]

and that “the failure to approach the case in this way constituted . . . an error both in law and principle.”

It then found that “it is in the interests of justice that the defendant be tried again,” and directed Courtney to “stand trial again on the charge of the murder of Alan McCullough.” In March of 2007, following his re-arraignment on the murder charge, Courtney, with the agreement of

This Order was “made . . . for purposes corresponding to the purposes of the provisions of the Criminal Justice Act 2003 (c. 44),” Criminal Justice (Northern Ireland) Order, 2004, SI 2004/1500 (N. Ir. 9) Explanatory Note para. 1, and tracks the provisions of that statute dealing with, inter alia, prosecution appeals. For a more detailed discussion of the Criminal Justice Act 2003, see infra text accompanying notes 71–109.


Like the Criminal Justice Act 2003, Criminal Justice Act, 2003, c. 44, § 67 (Eng.), the Order in Council provides:

The Court of Appeal may not reverse a ruling on an appeal . . . unless it is satisfied–(a) that the ruling was wrong in law; (b) that the ruling involved an error of law or principle; or (c) that the ruling was a ruling that it was not reasonable for the judge to have made.

At the time, the Order in Council provided that the Court of Appeal could not order either the resumption of the defendant’s trial or a fresh trial “unless it consider[ed] it necessary in the interests of justice to do so.” Criminal Justice (Northern Ireland) Order, 2004, SI 2004/1500 (N. Ir. 9) art. 20(5). The provision has since been changed to provide that the Court of Appeal cannot order the acquittal of the defendant “unless it considers that the defendant could not receive a fair trial if an order were made [to resume his trial or that a fresh trial take place],” Criminal Justice and Immigration Act, 2008, c. 4, § 45 (Eng.). The same change was made to the Criminal Justice Act 2003. Id. § 44.

the prosecution, pleaded guilty to manslaughter in connection with the death of McCullough, on the theory that “he was a secondary figure not a principal in [the] crime.” The trial judge then sentenced him to a term of eight years’ imprisonment.

The Order in Council permitting the prosecution appeal of “Mo” Courtney’s acquittal and allowing him to be retried for the same offense of which he had previously been acquitted stems from the Criminal Justice Act 2003. That Act, which applies in England and Wales, grants the government the right to appeal certain rulings by the trial judge in criminal prosecutions on an indictment, including a ruling that there is no case to answer, i.e., a directed verdict of acquittal, and if the appeal is successful, allows the reviewing court to order that the acquitted defendant’s trial be resumed or that the acquitted defendant be tried a second time for the same offense. This Article analyzes Parliament’s decision to permit such appeals and to allow the government to haul a previously-acquitted individual back into court and force him to defend himself a second time for the same offense.

37. Id.
38. Id. at [9].

The prosecution accepted Courtney’s claim that when he drove McCullough to meet with members of a paramilitary organization (presumably the UDA), he “contemplated that Alan McCullough would be subjected to harm on [the] occasion which might include a punishment shooting in the form of a kneecapping,” but that “he did not intend nor wish such an outcome and in particular that he never contemplated that these other persons would go outside the scope of such harm by actually shooting Alan McCullough to death.” Id. at [3]. In sentencing Courtney for manslaughter, the trial judge stated that “the prosecution have made the decision to accept this plea of manslaughter on the basis that [Courtney] brought the deceased to the scene of the fatal shooting . . . but that he did not shoot him.” Id.

39. Id. at [10].
40. See Criminal Justice (Northern Ireland) Order, 2004, SI 2004/1500 (N. Ir. 9) Explanatory Note para. 1; Criminal Justice Act, 2003, c. 44, § 334 (Eng.).
41. Criminal Justice Act, 2003, c. 44, § 337 (Eng.).

Although England and Wales are two separate countries, see Interpretation Act, 1978, c. 30, sch. 1, para. 1 (Eng.), for the sake of convenience the Author henceforth will use the word “England” to encompass both England and Wales.

42. See infra notes 78–79 and accompanying text.
43. See infra text accompanying notes 104–05. For a detailed discussion of the provisions of the Act, see infra text accompanying notes 71–109.
44. The provision allowing government appeals of a trial judge’s ruling of no case to answer is one of several provisions enacted by Parliament in recent years allowing the government to retry a previously-acquitted individual. Another part of the Criminal Justice Act 2003, see Criminal Justice Act, 2003, §§ 75–86, allows the government, under certain circumstances, to retry a previously-acquitted individual for certain serious offenses when “there is new and compelling evidence against the acquitted person,” Id. § 78, e.g., R v. Dobson, [2011] EWCA (Crim) 1256, [2011] 2 Crim. App. 8 (Eng.) (quashing an individual’s acquittal of murder and allowing his retrial for that crime); R v. Dunlop, [2006] EWCA (Crim) 1354, [2007] 1 Crim. App. 8 (Eng.) (same), and the Criminal Procedure and Investigations Act 1996 permits retrial of a previously-acquitted
II. "NO CASE TO ANSWER"

At the close of the prosecution’s case in a criminal trial in England,
the defendant can make a submission to the court that he or she has no case to answer, 46 that is, the defendant can make “an application for a directed verdict [of not guilty]” 47 on the ground the prosecution’s evidence is insufficient to prove the defendant’s guilt beyond a reasonable doubt. 48 In a case tried by a jury, a submission of no case to answer normally is made outside the presence of the jury. 49 If the trial judge finds “there is no evidence that the crime alleged has been committed by

and once the jury is sworn, the judge should not direct a verdict of not guilty before the close of the prosecution’s case. N. Ltd., [2008] EWCA (Crim) 1223, [1], [26]–[29], [2009] 1 Crim. App. 3, at 58, 65–67. See also AG’s Reference (No. 2 of 2000), [2001] 1 Crim. App. 36, at [3], [26]–[27] (holding that “in a prosecution which otherwise has been properly brought and where there is evidence fit to go before a jury, a trial judge [does not have] power to prevent the prosecution from calling evidence and [cannot] direct the jury to acquit on the basis that he thinks a conviction is unlikely”).

46. See ARCHBOLD, supra note 15, § 4-292; SPRACK, supra note 16, § 20.48; WILLIAMS, supra note 16, at 44.

47. WILLIAMS, supra note 16, at 44. Accord SPRACK, supra note 16, § 20.48. If the defendant fails to make a submission of no case to answer, the trial judge can “decide of his own motion that there is no case to answer.” R v. C., [2007] EWCA (Crim) 854, [47] (Eng.) (quoting Speechley, [2004] EWCA (Crim) 3067, [53]), Accord Hoang Hai Viet v. R., [1997] H.K.L.R.D. 203, 205 (P.C.) (implying that the trial judge has the power to “stop[] the case of his own volition”); SPRACK, supra note 16, § 20.48 (“If the accused is unrepresented, or even if he is but counsel apparently is not going to make a submission when one is called for, the judge can raise the matter on his own initiative.”); WILLIAMS, supra note 16, at 47 (stating that if “there is no successful submission of no case and the trial runs on,” the trial judge has discretion to “afterwards stop the case on his own initiative” “at any time after the close of the prosecution case—even after all the evidence is in.”). See also ARCHBOLD, supra note 15, § 7–79 (reviewing cases).

48. See N. Ltd., [2008] EWCA (Crim) 1223, [15], [2009] 1 Crim. App. 3, at 58. See also ARCHBOLD, supra note 15, § 4-293 (“A submission of no case should be allowed when there is no evidence upon which, if the evidence adduced were accepted, a reasonable jury, properly directed, could convict.”).


49. R v. Falconer-Atlee, [1974] 58 Crim. App. 348, 354 (Eng.) (emphasizing that a submission of no case to answer “should, as a general rule, be made in the absence of the jury and not in their presence,” because the danger exists that “the judge may express a view on a matter of fact, which is within the province of the jury,” and because “[t]he presence of the jury may hamper freedom of discussion between counsel and judge”). See also ARCHBOLD, supra note 15, § 4-292 (“Submissions of no case should be made in the absence of the jury.”); SPRACK, supra note 16, § 20.42 (explaining that the absence of the jury allows “counsel and the judge [to] comment freely upon the quality and significance of the evidence without the risk of the jury being influenced by what is said”). Moreover, because the prosecution can now appeal a trial judge’s ruling of no case to answer, see infra text accompanying notes 73–79, a trial judge who rules the defendant has no case to answer should not immediately tell the jury about that ruling so it is possible for the trial to be resumed, e.g., R v. H., [2007] EWCA (Crim) 2056, [2], [32], [35] (Eng.), if the prosecution successfully appeals the trial judge’s ruling. See R v. Gilbert, [2006] EWCA (Crim) 3276, [16] (Eng.).
the defendant,650 for example, because the prosecution did not introduce any evidence relating to an essential element of the offense,651 or if the judge concludes “that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it,”652 the judge should allow the submission and direct the jury to acquit the accused.653 On the other hand, if the evidence introduced by the prosecution “is such that its strength or weakness depends on the view to be taken of a witness’s reliability, or other matters which are generally within the province of the jury,”654 and if “on one possible view of the facts there is

51. SPRACK, supra note 16, § 20.49 (explaining that this may come about because a prosecution witness failed to testify as the government anticipated, or because the prosecution relied upon circumstantial evidence to establish an element of the offense “but the inferences they ask the jury to draw from the evidence cannot reasonably be drawn”). See also ENG. LAW COMM’N, REP. NO. 267, supra note 25, para. 7.50 n.30 (stating “[t]his includes the case where there is evidence of some elements of the offence, but no evidence of one or more other essential elements.”).
Somewhat different rules apply in cases turning on eyewitness identification. As explained by the English Law Commission, “where the evidence of identification is poor, the judge should look for supporting evidence. If there is none, he or she should allow a submission of no case to answer.” ENG. LAW COMM’N, CONSULTATION PAPER No. 158, supra note 25, para. 6.13. In determining whether the identification evidence is “poor,” the judge should examine various factors, such as the length of time the witness observed the perpetrator and the lighting conditions. Id. Moreover, a judge is under a duty, “even in the absence of a defence submission, to act on his or her own initiative to withdraw a case from the jury if he or she forms the view that it is appropriate to do so.” Id. In addition, the judge must be satisfied “after the defence case that the quality of the identification evidence remains sufficient to go to the jury.” Id. See also ARCHBOLD, supra note 15, §§ 14–12, 14–13; SPRACK, supra note 16, § 20.54.
If the indictment on which the defendant is being tried contains multiple counts and the trial judge decides “there is no case to answer on one or more counts, but there is a case to answer on other counts,” the judge will tell the jury that at the conclusion of the trial he will direct them to return a verdict of not guilty on those counts for which there is no case to answer and that therefore, “for the remainder of the trial, they should ignore those counts.” SPRACK, supra note 16, § 20.52. Once the trial judge has ruled in favor of a submission of no case to answer on one count of a multi-count indictment, he cannot “change his mind [on that ruling] as a result of further evidence which is called [during the trial of the remaining counts].” R v. Livesey, [2006] EWCA (Crim) 3344, [18], [2007] 1 Crim. App. 35, 468 (Eng.) (interpreting the holding in R v. Plain, [1967] 51 Crim. App. 91 (Eng.)).
evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury.55

Although a submission of no case to answer is normally made in a case being tried by a jury, it can also be made in a summary trial in a Magistrates’ Court56 and in a trial on an indictment in those rare instances in which the judge is the trier of fact.57 When a trial judge decides a submission of no case to answer in a case being tried without a jury, she must undertake “precisely the same type of approach”58 as in a case involving a jury.59

55. Id.

For more detailed discussions of the submission of no case to answer, see ARCHBOLD, supra note 15, §§ 4-292–302, SPRACK, supra note 16, §§ 20.48–.55, and WILLIAMS, supra note 16, at 44.49.


57. Historically, a trial on an indictment in England has been by a jury. SPRACK, supra note 16, § 19.01. See also WHITE PAPER, JUSTICE FOR ALL para. 4.27 (2002) [hereinafter JUSTICE FOR ALL], available at http://www.cps.gov.uk/publications/docs/jlawwhitepaper.pdf (stating that the Labour Government would introduce legislation to grant defendants in trials on indictment “the right to apply to the court for trial by a judge sitting alone”). Under the Criminal Justice Act 2003, however, a judge may order that a trial take place without a jury in serious or complex fraud cases, Criminal Justice Act, 2003, c. 44, § 43 (Eng.), or when there is evidence that jury tampering will take, or has taken, place. Id. §§ 44, 46. In addition, because of the political situation in Northern Ireland, indictments charging certain offenses are tried there by a judge sitting without a jury. Terrorism Act, 2000, c. 11, §§ 65(1), 75(1), sch. 9, pt. 1 (Eng.). E.g., R v. Courtney, [2007] NICA (Crim) 6, [19], [2007] N.I. 178.

58. L.O., [2006] NICA (Crim) 3, [13], [2006] N.I. at 266. Accord Courtney, [2007] NICA (Crim) 6, [19], [2007] N.I. at 189. See also CPS v. S., [2007] EWHC (Admin) 3313, [11]–[12] (Eng.) (“Whether a submission of no case to answer is made in the Crown Court or in the Magistrates’ Court, it falls to be dealt with by reference to the well-known test in Galbraith. . . . [M]agistrates who are both judges of the law and the tribunal of fact. However, it remains important that they deal with a submission of no case to answer as the judges of the law, applying the Galbraith test, to the circumstances in which they find themselves.”); Moran v. DPP, [2002] EWHC (Admin) 89, [16] (Eng.) (“[I]f, on applying the Galbraith test, [the magistrates] conclude that there is no case to answer in respect of a particular allegation, the defendant should there and then be acquitted of that allegation . . . .”).

59. The only modification is “that the judge is not required to assess whether a properly directed jury could not properly convict on the evidence as it stood at the time” the submission was made, because, being in effect the jury, the judge can address the issue in terms of whether he could ever be convinced of the accused’s guilt. Where there is evidence against the accused, the only basis on which a judge [can] stop the trial at the direction stage is where he . . . conclude[s] that the evidence was so discredited or so intrinsically weak that it could not properly support a
A ruling by the trial judge that the defendant has no case to answer, whether in a jury trial or a non-jury trial, results in the defendant’s acquittal and, traditionally, terminated the prosecution because the government could neither appeal the ruling nor, because of the existence of the plea of autrefois acquit (a former acquittal), effectively bring a new prosecution against the acquitted individual for the same offense.

The ability of an accused to submit that he or she has no case to answer constitutes “an important safeguard” for the accused because it “protects him or her from a perverse verdict of guilty by the jury,” that is, a guilty verdict “contrary to the evidence”—one “where there was nothing in the trial process, save the result, that could raise a ground of appeal.” This safeguard is especially important in cases in which the defendant belongs to an unpopular group or to one that is subject to discrimination, and in cases in which the defendant raises an “unsavoury” defense, as well as in cases hinging on eyewitness conviction. It is confined to those exceptional cases where the judge can say that there was no possibility of his being convinced to the requisite standard by the evidence given for the prosecution.

Id. at [19], [2006] N.I. at 267 (quoted in Courtney, [2007] NICA (Crim) 6, [19], [2007] N.I. at 178). In such cases, “the judge should not ask himself the question, at the close of the prosecution case, ‘do I have a reasonable doubt?’.” Rather, the question that he should ask is whether he is convinced that there are no circumstances in which he could properly convict. Where evidence of the offence charged has been given, the judge [can] only reach that conclusion where the evidence was so weak or so discredited that it could not conceivably support a guilty verdict.

If the trial judge rules in favor of a submission of no case to answer on one count of a multi-count indictment, he cannot subsequently “change his mind [on that ruling] as a result of further evidence which is called [during the trial of the remaining counts].” R v. Livesey, [2006] EWCA (Crim) 3344, [18], [2007] 1 Crim. App. 35, at 468 (Eng.) (interpreting the holding in R v. Plain, [1967] 51 Crim. App. 91 (Eng.)).

See supra note 27 and infra text accompanying notes 130–31, 135–47.


Id.

BLACK’S LAW DICTIONARY 1697 (9th ed. 2009) [hereinafter BLACK’S].

ENG. LAW COMM’N, CONSULTATION PAPER NO. 156, supra note 25, para. 4.5 (stating that a “perverse verdict of guilty” is “a case which would fall only into the category formerly described as ‘lurking doubt’ cases . . . .”).


Id.

Id.
identification, for “experience has shown that juries may easily be persuaded by honest but mistaken witnesses.” At the core of the protection afforded an accused by the ability to make a submission of no case to answer “lies the burden of proof. It is for the prosecution to prove guilt, not for the defense to prove innocence. The case should not continue if there is no evidence, or not enough to demand a response.”

III. CRIMINAL JUSTICE ACT 2003

In 2003, Parliament enacted the Criminal Justice Act 2003 (the Act), a wide-ranging statute that introduced “radical innovations into English criminal procedure” as part of the Labour Government’s attempt “to rebalance the criminal justice system in favour of the victim and the community so as to reduce crime and bring more offenders to justice.” The Act, among other things, grants the prosecution in a trial upon an indictment the right to appeal to the Court of Appeal, after obtaining leave to do so, certain rulings of the trial judge. Although

69. Id.
70. Id.
The ability of the defendant to submit he has no case to answer also helps to protect him at earlier stages of the criminal process, because

Prosecution decision-makers know from the outset that they must have sufficient evidence of each and every element of the offence, or the case will not get to the jury at all, however persuasive their evidence on another part of the case is. They cannot rely on the defendant proving the case for them.

72. JUSTICE FOR ALL, supra note 57, at 14.
75. Id. § 57(3).
76. The prosecution may bring an appeal only with the leave of the trial judge or the Court of Appeal. Id. § 57(4). Although the prosecution is not required to seek leave to appeal from the trial judge, R v. F., [2009] EWCA (Crim) 1639, [79] (Eng.), “the usual good practice is to apply first to the judge.” Id. at [80].

Under the Criminal Procedure Rules adopted pursuant to the Act, see Criminal Justice Act, 2003, § 73(1), (2)(a), if the prosecution seeks leave to appeal from the trial judge, it must do so by either “apply[ing] orally, with reasons, immediately after the ruling against which [it] wants to appeal,” Criminal Procedure Rules, 2011, S.I. 2011/1709, 67.5(1)(a) (Eng.), or, if it receives an adjournment to consider whether to appeal, see
the Act does not list the types of rulings that may be appealed, it is clear the prosecution can appeal a judge’s ruling that there is no case to answer. The prosecution can appeal such a ruling under the Act only

infra text accompanying notes 82–85, by “apply[ing] in writing” following the adjournment. Criminal Procedure Rules, S.I. 2011/1709, 67.5(1)(b) (Eng.).

When the prosecution seeks leave to appeal from the trial judge, the trial judge must decide whether to give permission to appeal “on the day that the application for permission is made.” Criminal Procedure Rules, S.I. 2011/1709, 67.5(4) (Eng.). In deciding whether to allow leave to appeal, the Court of Appeal must “look rather more widely at the interests of justice than simply . . . ask [itself] whether an appeal has a realistic prospect of success, or some other test directed solely at the merits of the appeal.” R v. Bowers, [2009] EWCA (Crim) 2186, [8], [2009] 1 Crim. App. 21, at 283 (Eng.). Presumably, the same standard applies to the trial judge when deciding an application for leave to appeal.


The right of the prosecution to appeal against judicial decisions directing an acquittal before the jury considers the evidence was “introduced to balance the defendant’s right of appeal against both conviction and sentence.” Criminal Justice Act, 2003, Explanatory Notes para. 165.

In addition to the Order in Council granting the prosecution the same right to appeal judges’ rulings in criminal prosecutions in Northern Ireland, see supra note 28 and accompanying text, an order by the Secretary of State, see Armed Forces Act, 2001, c. 19, § 31 (Eng.), allows the prosecution the identical right to appeal to the Courts-Martial Appeal Court rulings made by the judge advocate in a trial by court-martial. Courts-Martial (Prosecution Appeals) Order, S.I. 2006/1786, art. 3 (Eng.).

78. The Act merely provides that “[t]he prosecution may appeal in respect of,” Criminal Justice Act, 2003, § 58(2), “a ruling [made by] a judge . . . in relation to a trial on indictment at an applicable time [where] the ruling relates to one or more offences included in the indictment,” id. § 58(1), and that a “ruling” includes a decision, determination, direction, finding, notice, order, refusal, rejection or requirement. Id. § 74(1). The “applicable time” is “any time . . . before the start of the judge’s summing-up to the jury,” id. § 58(13), or, if the judge has made an order that the trial is to be conducted without a jury because of evidence that jury tampering would take, or has taken, place, see id. §§ 44, 46, “the time when the judge would start his summing-up if there were a jury.” Id. § 54(4). In Northern Ireland, when a trial is conducted without a jury, see supra note 13, the “applicable time” “includes the time when the judge would start his summing-up if there were a jury.” Criminal Justice (Northern Ireland) Order, 2004, SI 2004/1500 (N. Ir. 9) art. 17(14).

The Act states that the prosecution has no right of appeal under its provisions in respect of “a ruling that a jury be discharged,” Criminal Justice Act, 2003, § 57(2)(a), or “a ruling from which an appeal lies to the Court of Appeal by virtue of any other enactment.” Id. § 57(2)(b).

79. Criminal Justice Act, 2003, § 58(7) (providing that if “the ruling [being appealed by the prosecution] is a ruling that there is no case to answer,” the prosecution also can appeal other rulings made by the trial judge relating to the offense or offenses that are the subject of the appeal); id. § 61(6)–(8) (dealing with situations in which “the
if, “immediately after the ruling,” it “informs the court that it intends to appeal relates to a ruling that there is no case to answer and one or more other rulings”); id. Explanatory Notes para. 1(276) (explaining that § 58 of the Act “sets out the procedure that must be followed when the prosecution wishes to appeal against a terminating ruling” (emphasis added)); R v. Q., [2011] EWCA (Crim) 1584, [1], [20], [2011] 2 Crim. App. 25, at 365, 369 (Eng.) (considering and dismissing the prosecution’s appeal of a ruling of no case to answer on charges of violating the Protection from Eviction Act 1977); R v. P., [2010] EWCA (Crim) 2895, [1], [32] (Wales) (considering and dismissing the prosecution’s appeal of a ruling of no case to answer on charges of causing grievous bodily harm); R v. W., [2010] EWCA (Crim) 927, [1], [42] (no jur. given) (allowing the prosecution’s appeal of a ruling of no case to answer on charges of knowingly permitting the deposit of controlled waste and disposing or keeping of controlled waste); R v. M., [2009] EWCA (Crim) 2848, [1], [26] (Eng.) (considering and dismissing the prosecution’s appeal of rulings of no case to answer on charges of murder); R v. Thomas, [2009] EWCA (Crim) 1682, [1], [46] (Eng.) (allowing the prosecution leave to appeal the trial judge’s ruling of no case to answer on charges of murder, but upholding the trial judge’s decision and dismissing the appeal); R v. M.K., [2009] EWCA (Crim) 952, [1], [8], [21], [27], [30], [33] (Eng.) (allowing the prosecution’s appeal of a ruling of no case to answer on charges of entering into or becoming concerned in a money laundering arrangement, and ordering a fresh trial); R v. R., [2008] EWCA (Crim) 683, [1], [18] (Eng.) (allowing the prosecution’s appeal of a ruling of no case to answer on a charge of conspiracy to rob, and ordering a fresh trial); R v. Robson, [2008] EWCA (Crim) 619, [2], [13]–[14], [2008] 2 Crim. App. 38, 559, 562–63 (Eng.) (allowing the prosecution’s appeal of a ruling of no case to answer and ordering the respondent’s trial for arranging or facilitating the commission of a child sex offense to resume on the theory that he could be liable for attempting to commit the charged offense); R v. P., [2007] EWCA (Crim) 3484, [1], [13] (Eng.) (allowing the prosecution’s appeal of a ruling of no case to answer and ordering the respondent’s trial for conspiracy to produce cannabis to resume); R v. A., [2007] EWCA (Crim) 2868, [1], [21] (Eng.) (considering and dismissing the prosecution’s appeal of a ruling of no case to answer on charges of concealing or disguising proceeds of criminal conduct and converting or illegally transferring proceeds of criminal conduct); R v. C., [2007] EWCA (Crim) 1862, [1], [42], [60] (Wales) (allowing the prosecution’s appeal of a ruling of no case to answer on a charge of causing death by dangerous driving, and ordering a fresh trial). See also Crown Prosecution Service, Prosecution Rights of Appeal, Part I, Law and Procedure, The General Right of Appeal, available at http://www.cps.gov.uk/legal/ a_to_c/appealProsecution Rights/index.html (“[T]he intention of the 2003 Act is to restrict the right of appeal to terminating rulings, such as . . . a ruling of no case to answer. . . .”); KEOGH, supra note 71, § 9.2.1 (“Appeals will . . . be confined to those rulings that have the effect of stopping the prosecution and resulting in an acquittal, effectively rulings of no case to answer, and rulings that have the effect of staying an indictment.”).

The original bill introduced into the House of Commons provided that “[t]he prosecution is to have the right of appeal . . . in respect of a terminating ruling— . . . (c) which is a ruling that there is no case to answer.” Criminal Justice Bill, 2002, H.C. Bill [8] § 50(1)(c) (Eng.), available at http://www.publications.parliament.uk/pa/cm200203/ cmbills/008/2003008.htm. As enacted, however, the Act does not use the word “terminating.” Courts nonetheless frequently state that the Act gives the prosecution the right to appeal a “terminating ruling” E.g., R v. B., [2009] EWCA (Crim) 99, [3], [20] (Eng.); R v. A., [2009] EWCA (Crim) 2186, [1]–[2], [9], [2009] 1 Crim. App. 21, 281, 283 (Eng.).

appeal,"81 or, alternatively, “immediately after the ruling”82 it requests an adjournment,83 and if one is granted,84 it “informs the court following the adjournment that it intends to appeal.”85 However, the prosecution may


In R v. Grindy, [2006] NICA (Crim) 10, [2006] N.I. 290, the Northern Ireland Court of Appeal held that in determining whether the prosecution’s application for an adjournment was made “immediately following the making of [the] ruling,” the “crucial factor . . . is not the period of time that . . . elapsed between the ruling and the application but the occurrence of a decisive intermediate event,” id. at [24], [2006] N.I. at 297, that “frustrate[d] the implementation of the . . . statutory scheme,” id. at [22], [2006] N.I. at 297, such as the discharge of the jury which precludes the defendant from seeking an expedited hearing of the appeal so that, if the trial judge’s ruling is reversed, the trial can be resumed. Id. at [24], [2006] N.I. at 297. Nevertheless, the court in Grindy also concluded “that the prosecution is not precluded from applying for leave to appeal solely because it has failed to comply with the requirement that it either apply immediately for an adjournment to consider whether to appeal or inform the judge immediately of its intention to appeal.” Id. at [27], [2006] N.I. at 298 (emphasis added).


84. See id. § 58(5) (“If the prosecution requests an adjournment . . . , the judge may grant such an adjournment.”). The applicable criminal procedure rule indicates that the judge normally should grant a request for an adjournment. Criminal Procedure Rules, 2011, S.I. 2011/1709, 67.2(2)(b) (Eng.) (“[T]he general rule is that the judge must not require the appellant to decide there and then [whether he wants to appeal].”) It also indicates that the adjournment generally should be only “until the next business day,” Criminal Procedure Rules, 2011, S.I. 2011/1709, 67.2(2)(b) (Eng.). But see R v. H., [2008] EWCA (Crim) 483, [10]–[12] (Eng.) (holding that the court has the power to grant a greater extension of time than “until the next business day”). The original version of the rule was more specific on these points. It provided that “[t]he judge of the court shall grant the request [for an adjournment] unless it is in the interests of justice for the prosecutor to indicate immediately whether or not he intends to seek leave to appeal,” and that “[t]he adjournment shall be until the next business day after the day on which the ruling was given, unless the interests of justice require a longer adjournment.” Criminal Procedure Rules, 2005, S.I. 2005/384, 66.2 (Eng.) (superseded) (emphasis added).


When the judge’s ruling relates to two or more offenses, any “of those offenses may be the subject of the appeal,” id. § 58(6)(a), but “if the prosecution informs the court . . . that it intends to appeal, it must at the same time inform the court of the offence or offences which are the subject of the appeal.” Id. § 58(6)(b).
not inform the court it intends to appeal “unless, at or before that time,” it further informs the court that it concurs that the defendant should be acquitted of the offense in question if either leave to appeal is not obtained or the prosecution abandons its appeal before the Court of Appeal determines it.

When “the prosecution informs the court . . . that it intends to appeal, the [trial] judge must decide whether . . . the appeal should be expedited.”

If the prosecution informs the court that it intends to appeal a ruling of no case to answer, it may also appeal one or more other rulings made by the trial judge relating to the offense or offenses that are the subject of the appeal. Id. § 58(7) (provided the prosecution identifies the other ruling or rulings at the same time it informs the judge of its intention to appeal the ruling of no case to answer).

Lord Goldsmith, the Attorney General, justified this provision in the House of Lords, stating:

[A] ruling of no case to answer . . . may well be preceded by a number of earlier rulings, each of them incrementally weakening the prosecution case. The effect of some or all of those earlier rulings might contribute significantly to the judge’s eventual decision to make the ruling of no case to answer.

For that reason, where the prosecution appeals against a ruling of no case to answer, we consider that it should be able to nominate such earlier rulings as it specifies for the Court of Appeal to review at the same time all as part of the same appeal. It seems to us that it is only sensible and logical that where the prosecution appeals against a ruling of no case to answer there should be arrangements for the Court of Appeal to examine formally those earlier rulings which led up to the eventual ruling of no case. In that way the Court of Appeal will have a better grasp of the case and as a whole will be able to review more effectively the judge’s terminating ruling.


If “the prosecution informs the court . . . that it intends to appeal [a ruling, the] [p]roceedings may . . . continue[]. in respect of any offense [that] is not the subject of the appeal.” Criminal Justice Act, 2003, § 60.


87. Id. § 58(8)–(9).


If the judge concludes that the appeal should be expedited, he or she can order an adjournment of the trial. If, on the other hand, the judge determines the appeal should not be expedited, he can either order an adjournment of the trial or discharge the jury, if one has been empaneled.

A ruling by the trial judge has no effect during the period in which the prosecution can inform the court it intends to appeal that ruling, nor during the pendency of any appeal it decides to pursue. In addition, “any consequences of the ruling . . . also . . . have no effect,” and “the [trial] judge may not take any steps in consequence of the ruling.” However, if the judge does take any steps, those steps are also to have no effect.

On appeal, the Court of Appeal may confirm, reverse or vary [the trial judge’s] ruling. It may not, however, reverse a ruling “unless it
is satisfied" that the ruling either “was wrong in law,” “involved an error of law or principle,” or “was a ruling that was not reasonable for the judge to have made.” If the Court of Appeal confirms the ruling, it must order the defendant acquitted of the offense or offenses in question. Conversely, if the court “reverses or varies the ruling, it must,” with respect to each offense in question, “order that proceedings for [the] offence may be resumed” or “that a fresh trial may take place . . . for [the same] offence,” or, if the court determines the defendant could not receive a fair trial if the trial were resumed or at a new trial, it must order that the defendant be acquitted of the offense in question. The decision of the Court of Appeal can, with leave, be appealed to the Supreme Court of the United Kingdom by either the defendant or the prosecutor.

98. Id. § 61(1).
99. Id. § 67.
100. Id. § 67(a).
101. Id. § 67(b).
102. Id. § 67(c).
103. Id. § 61(3), (6)–(7).
104. Id. § 61(4)(a). See also id. § 61(6), (8) (dealing with the situation in which the prosecution is appealing additional rulings by the trial judge).
105. Id. § 61(4)(b). See also id. § 61(6), (8) (dealing with the situation in which the prosecution is appealing additional rulings by the trial judge).
106. Id. § 61(5).
107. Id. § 61(4)(c). See also id. § 61(8) (dealing with the situation in which additional rulings by the trial judge are being appealed).

The Act also prohibits a publication from including a report of various actions taken pursuant to the Act, Criminal Justice Act, 2003, § 71, including an appeal by the prosecution. Id. § 71(1)(b). The Act does, however, permit the trial judge, the Court of Appeal, and the Supreme Court of the United Kingdom to order that some or all of these prohibitions not apply, or not apply to a specified extent. Id. § 71(2)–(4). For purposes of the restrictions on reporting, “‘publication’ includes any speech, writing, relevant programme [i.e., a programme included in a programme service as defined in the Broadcasting Act 1990, Broadcasting Act, 1990, c. 42, § 201 (Eng.)] or other communication in whatever form, which is addressed to the public at large or any section of the public.” Id. § 71(11). A violation of any restrictions imposed on reporting constitutes a criminal offense, punishable by a fine. Id. § 72.

108. Leave to appeal must be obtained from either the Court of Appeal or the Supreme Court of the United Kingdom. Criminal Appeal Act, 1968, c. 19, § 33(2) (Eng.). Such leave shall not be granted unless it is certified by the Court of Appeal that a point of law of general public importance is involved in the decision,” id., and in addition, “it appears to the Court of Appeal or the Supreme Court (as the case may be) that the point is one which ought to be considered by the Supreme Court.” Id.
109. Id. § 33(1), as amended by Criminal Justice Act, 2003, § 68(1).
IV. PROSECUTION APPEALS AND DOUBLE JEOPARDY

A. The Double Jeopardy Principle

The principle that a person should not be tried twice for the same offense—what in Anglo-American legal systems is called the rule against “double jeopardy”\(^\text{110}\)—is accepted throughout the world.\(^\text{111}\) In English legal scholar Glanville Williams stated that because the doctrine applies in England only when there has been an acquittal or a conviction, see infra note 130, “the expression 'double jeopardy' . . . is misleading for English law,” because “[t]he defence is not given to a person merely because he was previously at risk of being convicted.” WILLIAMS, supra note 16, at 164.

The Scottish Law Commission, whose work product is cited in this and a subsequent note, is a body of not more than five Commissioners appointed by the Scottish Ministers. Law Commissions Act, 1965, c. 22, § 2(1) (Eng.). Parliament established the Law Commission in 1965, at the same time it established the English Law Commission, see supra note 25, “[f]or the purpose of promoting the reform of the law of Scotland.” Law Commissions Act, 1965, c. 22, § 2(1) (Eng.). Its charge is identical to that of the English Law Commission. Id. § 3(1). For the charge of the Commissions, see supra note 25.

\(^{110}\) E.g., Connelly v. DPP, [1964] A.C. 1254 (H.L.) 1346, 1348 (Lord Devlin) (appeal taken from Eng.) (U.K.); In re D., [2006] EWCA (Crim) 828, [4], [2006] 2 Crim. App. 18, at 289 (Eng.); Smith v. Massachusetts, 543 U.S. 462, 466 (2005); Crist v. Bretz, 437 U.S. 28, 32–33 (1978); Green v. United States, 355 U.S. 184, 187 (1957); Criminal Justice Act, 2003, Explanatory Notes para. 1(40); ARCHBOLD, supra note 15, § 4-157. See also SPRACK, supra note 16, § 17.42. But see SCOTTISH LAW COMMISSION, DISCUSSION PAPER ON DOUBLE JEOPARDY (Discussion Paper No. 141) paras. 1.3, 1.10 (2009) [hereinafter SCOTTISH LAW COMM’N, DOUBLE JEOPARDY] (stating that “'[d]ouble jeopardy' is not a technical term of Scots law,” but that “Scots law speaks of a principle that a person shall not be made to thole an assize more than once,” which “translates directly to a rule against successive trials or, in other words, double jeopardy”).

\(^{111}\) MODEL CRIMINAL CODE OFFICERS’ COMM. OF THE STANDING COMM. OF THE ATTORNEYS-GENERAL, MODEL CRIMINAL CODE, DISCUSSION PAPER, CHAPTER 2, ISSUE ESTOPPEL, DOUBLE JEOPARDY AND PROSECUTION APPEALS AGAINST ACQUITTALS 1 n.5 (2003) [hereinafter AUSTRALIAN MODEL CRIMINAL CODE, DISCUSSION PAPER] (noting that the double jeopardy “principle stands in constitutional status in over 50 countries”); M. Cherif Bassiouni, Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions, 3 DUKE J. COMP. & INT’L L. 235, 289, & n.262 (1993) (asserting that “[t]he right to protection from double jeopardy and non bis in idem [see infra note 115 and text accompanying notes 115–16] are found in over fifty national constitutions,” and listing those constitutional provisions). See also Gerald Conway, Ne Bis in Idem in International Law, 3 INT’L CRIM. L. REV. 217, 217 (2003) (stating that “the maxim ne bis in idem” [see infra notes 115–16 and accompanying text], or “the rule against double jeopardy, is prevalent among the legal systems of the world”).

Article 14 of the International Covenant on Civil and Political Rights provides: “7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.” United Nations Convention for the Protection of Civil and Political
the United States, for example, the Fifth Amendment to the Constitution guarantees that “[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb,” 112 while in Canada, the Charter of Rights and Freedoms states that “[a]ny person charged with an offence has the right . . . if finally acquitted of the offence, not to be tried for it again, and if finally found guilty and punished for the offence, not to be tried or punished for it again.” 113 Similarly, the Constitution of India provides: “No person shall be prosecuted and punished for the same offence more than once.” 114 Most, if not all, countries on the European continent recognize the principle of ne bis in idem, 115 which provides that a person should not be prosecuted more than once for the same offense. 116


112. U.S. Const. amend. V.
114. India Const. art. 20, § 2. See also New Zealand Bill of Rights Act 1990, § 26(2) (“No one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again.”); Crimes Act 1961, § 357(1) (N.Z.) (“The following special pleas . . . may be pleaded according to the provisions hereinafter contained—that is to say, a plea of previous acquittal, a plea of previous conviction, and a plea of pardon.”); S. Afr. Const. 1996 § 35(3)(m) (“Every accused person has a right to a fair trial, which includes the right not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted . . . .”); Eng. Law Comm’n, Consultation Paper No. 156, supra note 25, app. B (setting forth the law of double jeopardy in a variety of countries).
115. Maria Fletcher, Some Developments to the ne bis in idem Principle in the European Union: Criminal Proceedings Against Hüseyin Gözütok and Klaus Brügge, 66 M.L.R. 769, 770 (2003) (asserting that the ne bis idem “rule is recognized in some form within the domestic legal systems of all the European Economic Area Member States”); Dietrich Oehler, Recognition of Foreign Penal Judgements: The European System, in 2 International Criminal Law 607, 613 (M. Cherif Bassiouni ed., 2d ed. 1999) (asserting that in Europe “every state founded on constitutional principles acknowledges the principle of ne bis idem [sic] as a national maxim”). See generally id. at 613–18.

The principle is sometimes stated as non bis in idem. Scottish Law Comm’n, Double Jeopardy, supra note 110, para. 1.10; e.g., Bassiouni, supra note 111, at 288.

116. Conway, supra note 111, at 217 (stating that the maxim ne bis in idem expresses “[t]he principle that a person should not be prosecuted more than once for the same criminal conduct”); Fletcher, supra note 115, at 770 (“The ne bis in idem rule . . . states that no-one shall be prosecuted or tried twice for the same acts and for the same criminal behaviour.”); Eng. Law Comm’n, Report No. 267, supra note 25, para. 1.13 n.15 (translating ne bis in idem as: “A person may not be prosecuted twice for the same thing.”). See also Black’s, supra note 64, at 1853 (defining non (ne) bis in idem as “[n]ot twice for the same thing, [t]hat is, a person shall not be twice tried for the same
Barring the government from prosecuting an individual a second time for the same offense following his trial and acquittal serves a number of related and often overlapping interests, of both the individual and society as a whole. First, it implements the “public policy that there should be finality in litigation.” Second, it minimizes the “distress and trauma of the trial process.” Third, it reduces the risk of erroneously
convicting an innocent person. 121 Fourth, it protects the power of the jury, acting as representatives of the community, 122 to acquit an individual against the evidence, that is, to find the individual not guilty even though sufficient evidence of his guilt exists. 123 Fifth, it “encourage[s] efficient investigation” 124 of crimes by the police and efficient prosecution of individuals charged with crimes. 125 Sixth, it helps to conserve scarce prosecutorial and judicial resources. 126 Seventh, it helps to prevent police and prosecutors from using the criminal process to harass an individual who has been tried and acquitted. 127 Finally, it helps to maintain the public’s respect for, and confidence in, the legal system. 128

 Accord Green v. United States, 355 U.S. 184, 187 (1957) (stating that one of the underlying concerns of the protection against double jeopardy “is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal”). 121 ENG. LAW COMM’N, REPORT NO. 156, supra note 25, para. 4.5; Green, 355 U.S. at 187–88.


 124 ENG. LAW COMM’N, REPORT NO. 267, supra note 25, para. 4.3.

 125 Ian Dennis, Rethinking Double Jeopardy: Justice and Finality in Criminal Process, 2000 CRIM. L. REV. 933, 941 (Eng.). See also FRIEDLAND, supra note 1, at 4 (“It is to the first trial . . . that [the] efforts [of the prosecutor] should be directed.”).

 126 FRIEDLAND, supra note 1, at 4.

 127 Id. at 3–4; AUSTRALIAN MODEL CRIMINAL CODE, DISCUSSION PAPER supra note 111, at 2; ENG. LAW COMM’N, REPORT NO. 267, supra note 25, para. 4.14; NEW ZEALAND LAW COMMISSION, REPORT 70: ACQUITTAL FOLLOWING PERVERSION OF THE COURSE OF JUSTICE para. 12 (2001) [hereinafter N.Z. LAW COMM’N, REPORT 70].

 The New Zealand Law Commission, whose work product is cited in this and subsequent notes in this Article, is a body comprising no fewer than three, and no more than six, members, established by the New Zealand Parliament in 1985. Law Commission Act 1985, § 9(1) (N.Z.). Its members are appointed by the Governor-General on the recommendation of the Cabinet. E-mail from Margaret Thompson, Special Projects Advisor, N.Z. Law Comm’n, to David S. Rudstein, Professor of Law, Chicago-Kent Coll. of Law (Feb. 14, 2007, 20:18 CST) (on file with author). The principal functions of the Commission are—

 (a) to take and keep under review in a systematic way the law of New Zealand;

 (b) to make recommendations for the reform and development of the law of New Zealand:

 (c) to advise on the review of any aspect of the law of New Zealand conducted by any Government department or organisation . . . and on proposals made as a result of the review:

 (d) to advise the Minister of Justice and the responsible Minister on ways in which the law of New Zealand can be made as understandable and accessible as practicable.


B. English Double Jeopardy Law

The precise scope of the protection against double jeopardy may differ from country to country. In England, the protection against double jeopardy afforded by the *autrefois* rule, see infra text accompanying notes 130–31, 135–47, applies only following an acquittal or a conviction. ENG. LAW COMM’N, REPORT NO. 267, supra note 25, para. 2.6 (“For a plea of *autrefois* to succeed there must previously have been a valid acquittal or conviction.”) (emphasis deleted); *id.* at para. 6.8 (“The double jeopardy rule . . . does not apply if the proceedings come to an end without the defendant being finally pronounced either guilty or not guilty.”); ENG. LAW COMM’N, CONSULTATION PAPER NO. 156, supra note 25, para. 3.34 (“There are a number of ways in which an English court’s consideration of an alleged offence can end without the defendant being acquitted or convicted, with the result that he or she can be prosecuted again for the same offence.”); WILLIAMS, supra note 16, at 164 (“The defence[s] of *autrefois acquit* and *autrefois convict* are not given to a person merely because he was previously at risk of being convicted. The earlier proceedings must have gone to their conclusion.”). In the United States, however, a person is placed in “jeopardy” (i.e., jeopardy “attaches”) at that point in a proceeding when she is “put to trial before the trier of the facts,” Serfass v. United States, 420 U.S. 377, 388 (1975) (quoting United States v. Jorn, 400 U.S. 470, 479 (1971) (plurality opinion)), so that under some circumstances the Double Jeopardy Clause prohibits a second trial of an individual for the same offense even though her first trial ended prematurely without a judgment of either conviction or acquittal, e.g., *Jorn*, 400 U.S. at 487 (plurality opinion) (concluding that the double jeopardy provision prohibited retrial following the trial judge’s *sua sponte* declaration of a mistrial to allow several government witnesses the opportunity to consult with attorneys about their privilege against self-incrimination); *Downum v. United States*, 372 U.S. 734, 737–38 (1963) (holding that the double jeopardy provision prohibited retrial following the trial judge’s declaration of a mistrial, at the prosecutor’s request and over the defendant’s objection, because of the absence of a key government witness). See generally RUDSTEIN, supra note 111, at 43–73. Similarly, in the United States the principle of collateral estoppel, see *Ash v. Swenson*, 397 U.S. 436, 443 (1970), more recently called issue preclusion, see, e.g., *Yeager v. United States*, 129 S. Ct. 2360, 2367 n.4 (2009); *Bobby v. Bies*, 129 S. Ct. 2145, 2149 n.1 (2009), applies in criminal cases, e.g., *Ashe*, 397 U.S. at 444–46 (holding that the rule of collateral estoppel “is embodied in the Fifth Amendment guarantee against double jeopardy” and that therefore an individual’s acquittal for robbing one participant in a poker game, in a trial in which the only issue was the identity of the robber, barred a subsequent prosecution of the same individual for robbing a second participant in the poker game); see generally RUDSTEIN, supra note 111, at 126–32; whereas in England it does not. *DPP v. Humphrys*, [1977] A.C. 1 (H.L.) 21 (Viscount Dilhorne) (appeal taken from Eng.) (U.K.); *id.* at 43–44 (Lord Salmon); *id.* at 48 (Lord Edmund-Davies); *id.* at 58 (Lord Fraser of Tullybelton); but see infra text accompanying notes 132–34. On the other hand, a person charged with an offense in England can plead *autrefois acquit* or *autrefois convict* based upon a former acquittal or a former conviction, as the case may be, in another country, Treacy v. DPP, [1971] A.C. 537 (H.L. 1970) 562 (Lord Diplock) (appeal taken from Eng.) (U.K.) (“[T]he common law doctrine of *autrefois convict* and *autrefois acquit* . . . has always applied whether the previous conviction or acquittal based on the same facts was by an English court or by a foreign court . . . .” (italics added)); ARCHBOLD, supra note 15, § 4-145a; ENG. LAW COMM’N, REPORT NO. 267, supra note 25, para. 2.6 n.9, while in the United States, two
jeopardy comprises the pleas of *autrefois acquit* (a former acquittal) and *
autrefois convict* (a former conviction)—together which form “the *autrefois* rule” and “a special application of the abuse of process rules,” under which the trial judge has “the discretion to stay proceedings which would be an abuse of the process of the court” when the “defendant has already been acquitted or convicted on the same or substantially the same facts.”

Separate sovereigns (i.e., two states; the federal government and a state; or the federal government and a foreign country) can each prosecute an individual for the same conduct. *E.g.*, Heath v. Alabama, 474 U.S. 82, 83–84, 86–87 (1985) (holding that the State of Alabama could try an individual for the capital offense of murder during a kidnapping even though the State of Georgia had previously tried and convicted him of murder based upon the same homicide); Abbate v. United States, 359 U.S. 187, 187–89, 196 (1959) (holding that an individual’s trial and conviction in an Illinois state court for conspiring to injure or destroy property of another did not bar his subsequent prosecution by the United States for conspiring to destroy property of a telephone company, even though both prosecutions were based upon the same conduct); United States v. Rezaq, 134 F.3d 1121, 1127–28 (D.C. Cir. 1998) (holding that an individual’s prosecution and conviction in Malta for murder, attempted murder, and hostage-taking did not bar his subsequent prosecution by the United States for air piracy, even though both prosecutions arose from the same incident). See generally *Rudstein*, supra note 111, at 84–92.


131. Eng. Law Comm’n, Report No. 267, supra note 25, para. 2.1 (italics added and internal quotation marks deleted). See infra text accompanying notes 135–47.


The Law Commission explained:

The general principles of abuse of process as they are now understood cover cases in which it is not possible for the defendant to receive a fair trial, and cases in which, although the defendant could be fairly tried, it is unfair to put him or her on trial. In the first category are cases in which there has been a delay between the commission of the offence and the trial, where potential evidence has been lost or destroyed, or there has been prejudicial pre-trial publicity. The second category includes cases in which the prosecution has gone back on promises not to prosecute or to discontinue proceedings, or where the defendant has been brought within the jurisdiction in unlawful or unconscionable ways.

Eng. Law Comm’n, Report No. 267, supra note 25, para. 2.14 (footnotes omitted).


134. *Id.* Accord Connelly v. DPP, [1964] A.C. 1254 (H.L.) 1347, 1350–54, 1356–60 (Lord Devlin) (appeal taken from Eng.) (U.K.); *id.* at 1296 (Lord Reid); *id.* at 1362–68 (Lord Pearce); Criminal Justice Act, 2003, Explanatory Notes para. 1(40) (“[T]he courts may consider it an abuse of process for additional charges to be brought, following an acquittal or conviction, for different offences which arose from the same
The *autrefois* rule provides “that no-one may be put in peril twice for the same offence,” so if “a person has previously been acquitted or convicted (or could, by an alternate verdict, have been convicted of an offence) and is later charged on indictment with the same offence, a plea of *autrefois acquit* or *autrefois convict*, as the case may be[,] will bar the prosecution.” As Blackstone explained over two hundred years ago, these special pleas in bar “give a reason why the prisoner ought not to answer [the indictment] at all, nor put himself upon his trial for the crime alleged.” Both pleas, he explained, are based upon the “universal behaviour or facts.” (emphasis deleted)). See also *Archbold*, supra note 15, § 4-48 (discussing Connelly).

135. *Eng. Law Comm’n, Report No. 267*, supra note 25, para. 2.2. See also *Sprack*, supra note 16, § 17.42 (“It is a vital constitutional principle that no one should be prosecuted twice to acquittal or conviction for the same offence.”).

136. Neither the discharge of an individual by the examining justices at a committal proceeding to determine whether the individual should be sent to the Crown Court for trial, *R v. Manchester City Stipendiary Magistrate ex parte Snelson*, [1978] 66 Crim. App. 44, 45 (Div. Ct.) (Eng.), nor the quashing of indictment, *In re Smalley*, [1985] A.C. 622 (H.L.) 641 (Lord Bridge of Harwich) (appeal taken from Eng.) (U.K.) (“The quashing of an indictment is not a judgment of acquittal . . . .”) (quoting *R v. Chairman of London Country Quarter Sessions ex parte Downes*, [1953] 37 Crim. App. 148, 153, [1954] 1 Q.B. 1, 7 (Eng.)), constitutes an “acquittal” for purposes of the plea of *autrefois acquit*. On the other hand, when a convicted defendant successfully appeals her conviction to the Court of Appeal, unless the court exercises its power to order the defendant be retried, *see Criminal Appeal Act, 1968*, c. 19, § 7 (Eng.), an order of that court quashing the conviction “operate[s] as a direction to the court of trial to enter . . . a judgment and verdict of acquittal.” *Id.* § 2(3). See also *Connelly*, [1964] A.C. at 1298-99 (Lord Morris of Borth-y-Gest) (“The result [of the Court of Appeal’s setting aside the appellant’s conviction of murder and not ordering a retrial] is that the appellant can validly assert that he has been acquitted of the charge of murder . . . .”).

137. *Eng. Law Comm’n, Report No. 267*, supra note 25, para. 2.2 (italics added). *Accord Connelly*, [1964] A.C. at 1305 (Lord Morris of Borth-y-Gest); *Archbold, supra* note 15, § 4-117; *Sprack, supra* note 16, §§ 17.43, 17.46. See also *Eng. Law Comm’n, Report No. 267, supra* note 25, para. 2.1 (“The *autrefois* rule . . . states that a defendant who has been finally convicted or acquitted may not be tried again for the same offence . . . .”); Criminal Justice Act, 2003, Explanatory Notes para. 1(40) (“The[ ] principles [of *autrefois acquit* and *autrefois convict*] provide a bar to [a second] trial, in respect of the same offence, of a person who has previously been either acquitted or convicted of that offence.”).

The principle underlying the *autrefois* rule—i.e., that a person should not be prosecuted twice for the same offense—also applies in summary trials in magistrates’ courts, although the pleas in bar themselves do not. *Connelly*, [1964] A.C. at 1306 (Lord Morris of Borth-y-Gest); *Archbold, supra* note 15, § 4-118; *Eng. Law Comm’n, Report No. 267, supra* note 25, paras. 1.14 n.16, 2.2; *Sprack, supra* note 16, § 17.46(g). In such trials the defendant raises the issue on a plea of not guilty. *Id.*
maxim of the common law of England" that “no man is to be brought into jeopardy of his life, more than once for the same offence.”

For the autrefois rule to apply, “[t]he offence with which the defendant is now charged must be identical to the offence of which she was previously acquitted or convicted,” “both in fact and in law.” Moreover, the previous acquittal or conviction must have been “in a

With respect to the plea of autrefois convict, Blackstone wrote that that plea is grounded upon the principle that “no man ought to be twice brought in danger of his life for one and the same crime.” Id. at *336. Blackstone concluded that “when a man is once fairly found not guilty upon any indictment, or other prosecution, before any court having competent jurisdiction of the offence, he may plead such acquittal in bar of any subsequent accusation for the same crime,” id. at *335, and similarly, when a person is convicted of a crime, he can plead that conviction in bar of any subsequent accusation “for the same identical crime.” Id. at *336. When Blackstone wrote these words, a statute allowed the wife or male heir of a homicide victim to bring a private prosecution, known as an “appeal,” against the alleged killer despite that individual’s previous acquittal in a prosecution brought by the King for the same killing. 1487, 3 Hen. 7, c. 1 (Eng.). The statute was of little practical significance, however, because by the early part of the eighteenth century prosecution by appeal was “all but practically obsolete.” 1 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 247 (London, MacMillan 1883). See also 4 BLACKSTONE, supra note 26, at *312 (stating that prosecution by appeal is “very little in use”). Parliament formally abolished prosecution by appeal in 1819. 1819, 59 Geo. 3, c. 46 (Eng.).

Today, an individual whose previous acquittal was quashed pursuant to the provisions of either the Criminal Procedure and Investigations Act 1996 relating to “tainted” acquittals, Criminal Procedure and Investigations Act, 1996, c. 25, §§ 54–57 (Eng.), discussed supra note 44, or the Criminal Justice Act 2003 relating to “new and compelling evidence,” Criminal Justice Act, 2003, §§ 75–86, discussed supra note 44, cannot plead autrefois acquit; nor can one who is being retried after the reversal, upon an appeal by the prosecution, of the trial judge’s ruling that she had no case to answer in a trial on an indictment, Criminal Justice Act, 2003, §§ 57–61, 67–68, see supra text accompanying notes 71–109, or under the provisions of the Magistrates’ Courts Act 1980, c. 43, § 111 (Eng.), see supra note 44.

141. ENG. LAW COMM’N, REPORT NO. 267, supra note 25, para. 2.3. See also ARCHBOLD, supra note 15, § 4-119; 4 BLACKSTONE, supra note 26, at *336.

142. Connelly, [1964] A.C. at 1339–40 (Lord Devlin) (also stating that “[t]he word ‘offence’ embraces both the facts which constitute the crime and the legal characteristics which make it an offence”). Accord id. at 1295 (Lord Reid); id. at 1368 (Lord Pearce) (agreeing with Lord Devlin’s speech on this point); R v. Beedie, [1998] Q.B. 356, 360, 361, [1997] 2 Crim. App. 167, 170 (Eng.) (quoting Lord Devlin’s speech in Connelly); 4 BLACKSTONE, supra note 26, at *336 (“It is to be observed, that the pleas of autrefois acquit and autrefois convict, or a former acquittal, and former conviction, must be upon a prosecution for the same identical act and crime.”); ENG. LAW COMM’N, REPORT NO. 267, supra note 25, para. 2.3 (quoting Lord Devlin’s speech in Connelly); SPRACK, supra note 16, § 17.46(d).

Despite the statement by Lord Devlin that is quoted in the text, it appears “[t]he facts need only be substantially the same.” ENG. LAW COMM’N, REPORT NO. 267, supra note 25, para. 2.5 (emphasis added) (relying upon and quoting Lord Devlin’s later statement in Connelly, [1964] A.C. at 1340, that “I have no difficulty about the idea that one set of facts may be substantially but not exactly the same as another.”).
court of competent jurisdiction;” otherwise the proceedings that resulted in the “acquittal” or “conviction” were “in fact a nullity.” Thus, for example, an individual “acquitted” of an offense in a court lacking jurisdiction of either the offense or the person cannot plead autrefois acquit to a subsequent indictment for the same offense. In addition, the proceedings in a court of competent jurisdiction “must not have been ultra vires.” When a defendant pleads autrefois acquit or autrefois convict, the judge, not the jury, decides the issue.

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143. ENG. LAW COMM’N, REPORT NO. 267, supra note 25, para. 2.6. Accord ARCHBOLD, supra note 15, § 4-118; BLACKSTONE, supra note 26, at *335 (“[W]hen a man is once fairly found not guilty upon any indictment, or other prosecution, before any court having competent jurisdiction of the offence, he may plead such acquittal in bar of any subsequent accusation for the same crime.”). 2 HAWKINS, supra note 130, at 372 (“I take it to be settled . . .  That an Acquittal in any Court whatsoever, which has Jurisdiction of the Cause, is as good a Bar of any subsequent Prosecution for the same Crime, as an Acquittal in the Highest Court.”); SPRACK, supra note 16, § 17.48 (“[F]or the pleas to apply, the court trying the case must have been acting within its jurisdiction.”). 144. R v. West, [1962] 46 Crim. App. 296, 308, [1964] 1 Q.B. 15, 25 (1962) (Eng.). 145. Id., [1964] 1 Q.B. at 25 (holding that the defendant’s acquittal in a summary trial in a Magistrates’ Court of a charge of being an accessory after the fact to a larceny, over which court lacked summary jurisdiction, did not preclude his subsequent trial on an indictment charging him with the same offense). 146. ENG. LAW COMM’N, REPORT NO. 267, supra note 25, para. 2.6 (italics added). E.g., R v. Kent Justices, [1952] 36 Crim. App. 23, 28–29, [1952], 2 Q.B. 355, 360–61 (Eng.) (quashing the defendant’s convictions, following a summary trial, for larceny and obtaining credit by fraud, and his committal to quarter sessions for sentencing, because he was not warned when consenting to a summary trial that, if convicted, he could be committed to quarter sessions for sentencing, but nevertheless holding the defendant could be “tried over again” for the offenses because he “ha[d] never been technically in peril”). Likewise, a purported acquittal or conviction by a court of competent jurisdiction does not preclude a subsequent prosecution for the same offense “if the proceedings were so irregular as to be a nullity.” ENG. LAW COMM’N, REPORT NO. 267, supra note 25, para. 2.6 (citing as examples In re Harrington, [1984] A.C. 743 (H.L.) 753-53 (Lord Roskill) (appeal taken from Eng.) (U.K.), in which the House of Lords held that an individual’s “acquittal” in a Magistrates’ Court was a “nullity” because the magistrates did not give the prosecution an opportunity to adduce evidence, and Crane v. DPP, [1921] 2 A.C. 299 (H.L.) (appeal taken from Eng.) (U.K.), in which the House of Lords held the defendant’s conviction for receiving stolen goods, obtained in a trial in which he was improperly tried with another individual, was “without authority,” id. at 330 (Lord Sumner), and obtained in proceedings that were a “nullity,” id. at 321 (Lord Atkinson); id. at 336 (Lord Parmoor), and therefore the defendant, after his successful appeal, could be tried again for the same offense under the original indictment, id. at 330 (Lord Atkinson); id. at 334–35 (Lord Sumner); id. at 337–38 (Lord Parmoor). 147. Criminal Justice Act, 1988, c. 33, § 122 (Eng.).
In addition to the *autrefois* rule, a special application of the “abuse of process” rules provides protection against double jeopardy in England.148 Lord Devlin articulated the applicable principle in *Connelly v. DPP.*149

As a general rule a judge should stay an indictment (that is, order that it remain on file not to be proceeded with) when he is satisfied that the charges therein are founded on the same facts as the charges in a previous indictment on which the accused has been tried, or form or are a part of a series of offences of the same or a similar character as the offences charged in the previous indictment. He will do this because as a general rule it is oppressive to an accused for the prosecution not to [join the charges for trial in a single proceeding] where it can properly [do so]. But a second trial on the same or similar facts is not always and necessarily oppressive, and there may in a particular case be special circumstances which make it just and convenient in that case. The judge must then, in all the circumstances of the particular case, exercise his discretion as to whether or not he applies the general rule.150

For example, in *Regina v. Beedie,*151 the Court of Appeal held that a landlord who previously had pleaded guilty in a Magistrates’ Court to summary offenses under the Health and Safety at Work etc. Act 1974152 arising from a defective gas fire on his premises could not plead *autrefois convict* in a subsequent prosecution for manslaughter based upon the death of a resident of those premises from carbon monoxide poisoning caused by the use of the defective gas fire.153 Nevertheless, the Court of Appeal concluded the manslaughter prosecution should

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150. Id. at 1359–60 (Lord Devlin).

Lord Devlin reasoned:

First, a general power, taking various specific forms, to prevent unfairness to the accused has always been a part of the English criminal law . . . . Secondly, if the power of the prosecutor to spread his case over any number of indictments were unrestrained there could be grave injustice to defendants. Thirdly, a controlling power of this character is well established in the civil law.

Id. at 1347. See also id. at 1296 (Lord Reid) (“[T]he general rule must be that the prosecutor should combine in one indictment all the charges which he intends to prefer . . . . That will avoid any general question as to the extent of the discretion of the court to prevent a trial from taking place. But I think that there must always be a residual discretion to prevent anything which savours of abuse of process.”).

The English Law Commission has explained that the approach articulated by Justice Devlin in *Connelly* reverses the burden of proof normally applied in abuse of process cases, shifting it from the defendant to the prosecution. ENG. LAW COMM’N, REPORT NO. 267, supra note 25, paras. 2.15–16.

152. Health and Safety at Work etc. Act, 1974, c. 37, § 33 (Eng.).
have been stayed because it “was based on substantially the same facts as the earlier summary prosecutions” and “no special circumstances” existed.\footnote{155}

\footnote{154} Id. at 176, [1998] Q.B. at 366.

The court in \textit{Beedie} also relied, in part, upon the so-called “\textit{Elrington principle},” under which an individual who is charged with a minor offense and who is either acquitted or convicted of that offense “shall not be charged again on the same facts in a more aggravated form.” \textit{R v. Elrington}, 121 Eng. Rep. 870, 873 (K.B. 1861) (holding, on statutory grounds, that an individual who had been acquitted of assault could not subsequently be tried for causing grievous bodily harm on the basis of the same assault). According to the English Law Commission, the \textit{Beedie} court’s reliance on this principle means that “the \textit{Elrington} principle has the effect that the presumption in favour of a stay is even stronger where the second charge does not merely arise out of the same facts but is an aggravated form of the first.” \textit{Eng. Law Comm’n, Report No. 267}, supra note 25, para. 2.20. A majority in \textit{Connelly} approved the \textit{Elrington} principle. \textit{Connelly}, [1964] A.C. at 1332 (Lord Hodson) (labeling the principle the “ascending scale principle” and viewing it as an “extension of the narrow principle of autrefois”); \textit{id.} at 1357–58 (Lord Devlin) (stating that the principle “goes beyond the principle of autrefois” and that it gives the defendant “only a qualified right [to relief]”); \textit{id.} at 1367 (Lord Pearce) (“agree[ing] with the general principle”). \textit{See also id.} at 1316–16 (Lord Morris of Borth-y-Gest) (treating the principle as part of the \textit{autrefois} rule); \textit{Sprack, supra} note 16, § 17.46(e) (same). An exception to the \textit{Elrington} principle allows an individual who has been convicted of an offense to be prosecuted for an aggravated form of the same offense if the facts constituting the aggravating factor did not exist at the time of the initial conviction. \textit{Eng. Law Comm’n, Report No. 267}, supra note 25, para. 2.21. \textit{See also Connelly}, [1964] A.C. at 1305 (Lord Morris of Borth-y-Gest) (articulating a broader \textit{autrefois} rule than the majority, but recognizing that that rule would not include the situation in which “the offence charged in the second indictment had [not] in fact been committed at the same time of the first charge”); \textit{Archbold, supra} note 15, § 4-118 (“For the \textit{autrefois} rule to apply, the offence charged in the second indictment must have been committed at the time of the first charge.”). Thus, an individual convicted of assault or wounding with intent to murder can later be tried for murder or manslaughter if the victim of the assault or wounding subsequently dies from the injuries he sustained in that assault. \textit{Eng. Law Comm’n, Report No. 267}, supra note 25, para. 2.21 \textit{Sprack, supra} note 16, § 17.46(e). \textit{See also Connelly}, [1964] A.C. at 1332 (Lord Hodson) (recognizing the exception); \textit{id.} at 1306 (Lord Morris of Borth-y-Gest) (stating that even under his broader view of the \textit{autrefois} rule, “if there is an assault and a prosecution and conviction in respect of it there is no bar to a charge of murder if the assaulted person later dies”); \textit{id.} at 1318–19 (Lord Morris of Borth-y-Gest) (discussing cases); \textit{Archbold, supra} note 15, § 4-118 (“[A] conviction or acquittal for assault will not bar a charge of murder if the assaulted person later dies.”).


The Court of Appeal added that it could see no reason why, prior to institution of the summary proceedings, the C.P.S. [Crown Prosecution Service] should not have been alerted by the police, the Health and Safety Executive, or the Local Authority to the inquiry which was being undertaken into the circumstances leading to the death of [the resident]. Had this been done, it should have been possible for a sensible joint decision to be reached as to what charges could, and should, have been properly brought
C. Prosecution Appeals and Double Jeopardy in England

The rules relating to double jeopardy in England—that is, the autrefois rule and the special application of the abuse of process rules articulated in Connelly156—merely “prevent a final acquittal or conviction from being re-opened.”157 The English Law Commission, in its 2000 consultation paper on prosecution appeals, concluded that because an acquittal entered by a trial judge before the jury has considered the evidence is not yet final, an appeal of such an acquittal “involves no breach of the double jeopardy rules.”158 The Law Commission explained:

A prosecution right of appeal [of such an acquittal is] exercised when the prosecution consider[s] that the judge . . . made an error in a ruling . . . during the trial. In contrast to the double jeopardy exceptions [for “tainted acquittals” and compelling new evidence159] the prosecution [is] asserting at the time that the course of the trial was flawed and should be corrected by the appellate court.160

against the [landlord], and no doubt manslaughter would have been among them.
Id. at 177, [1998] Q.B. at 366.
In Connelly, Lord Devlin did not attempt a comprehensive definition of what constitutes “special circumstances” not to stay an indictment in a particular case. He did, however, provide the following example:
If the prosecution considers that there ought to be two or more trials [for offenses it could have included in one indictment], it can make its choice plain by preferring two or more indictments. In many cases this may be to the advantage of the defence. If the defence accepts the choice without complaint and avails itself of any advantage that may flow from it, I should regard that as a special circumstance; for where the defence considers that a single trial of two indictments is desirable, it can apply to the judge for an order [to that effect].

Connelly, [1964] A.C. at 1360 (Lord Devlin). The “discovery of new evidence” after the defendant’s first trial may also constitute a “special circumstance.” ENG. LAW COMM’N, REPORT No. 267, supra note 25, paras. 2.18–19 (discussing AG for Gibraltar v. Leoni, Criminal Appeal No. 4 of 1998 (Mar. 19, 1999), an unreported case decided by three former judges of the Court of Appeal sitting as the Court of Appeal for Gibraltar).

156. See supra text accompanying notes 130–55 and supra note 129.
157. ENG. LAW COMM’N, CONSULTATION PAPER NO. 158, supra note 25, para. 1.8. Today, of course, exceptions to this rule exist when an acquittal was “tainted,” see Criminal Procedure and Investigations Act, 1996, c. 25, §§ 54–57 (Eng.), discussed supra note 44, and, in some situations, when the prosecution discovers “new and compelling evidence” following an acquittal. See Criminal Justice Act, 2003, c. 44, §§ 75–86 (Eng.), discussed supra note 44.

158. ENG. LAW COMM’N, CONSULTATION PAPER NO. 158, supra note 25, para. 1.9. The English Law Commission certainly intended its statement to encompass an acquittal based upon a trial judge’s ruling of no case to answer.

159. See supra note 44.

160. ENG. LAW COMM’N, CONSULTATION PAPER No. 158, supra note 25, para. 1.9. Accord ENG. LAW COMM’N, REPORT No. 267, supra note 25, para. 2.9 (“A retrial following the prosecution successfully appealing a summary acquittal [in a Magistrates’ Court] by way of a case stated . . . [is] not [a] genuine exception[] to the autrefois rule. This is because an acquittal . . . which is subject to appeal is not a final acquittal until the
This position is not unique. “Prosecution appeals . . . are a general feature of continental European jurisdictions,”\textsuperscript{161} despite their recognition of the principle of double jeopardy.\textsuperscript{162} For example, in Germany, a prosecutor can appeal an acquittal on a question of law,\textsuperscript{163} and in France, the prosecution can appeal an acquittal rendered by a cour d’assises (Assize Court),\textsuperscript{164} the court that tries crimes,\textsuperscript{165} or by a tribunal correctionnel (correctional court),\textsuperscript{166} the court with jurisdiction to try délits (delicts).\textsuperscript{167}

\textsuperscript{161} ENG. LAW COMM’N, CONSULTATION PAPER NO. 158, supra note 25, para. 1.11. Accord ENG. LAW COMM’N, REPORT NO. 267, supra note 25, para. 1.17 (“Allowing the prosecution to challenge an acquittal by way of appeal . . . [is] common on the Continent.”).

\textsuperscript{162} See supra text accompanying notes 115–16.

\textsuperscript{163} Strafprozeßordnung [StPO] [Code of Criminal Procedure] Apr. 7, 1987, Bundesgesetzblatt, Teil I [BGBl. I] 1074, as amended, §§ 296, 333–58. See also id. §§ 296, 312–332 (allowing the prosecution to appeal an acquittal in the Amtsgericht, the court having jurisdiction over less serious offenses, on the basis of both fact and law).

\textsuperscript{164} Richard S. Frase, France, in CRIMINAL PROCEDURE: A WORLDWIDE STUDY 201, 236 (Craig M. Bradley ed., 2d ed. 2007) [hereinafter A WORLDWIDE STUDY] (the Attorney General may appeal an acquittal to the Appellate Assize Court for a trial \textit{de novo} on all issues of fact or law raised by the appeal). Accord Valérie Dervieux, revised by Mikaël Benilouche & Olivier Bachelet, The French System, in EUROPEAN CRIMINAL PROCEDURES 218, 274 (Mireille Delmas-Marty & J.R. Spencer eds. 2002) [hereinafter EUROPEAN CRIMINAL PROCEDURES] (“[A]cquittals given by the cour d’assises may be the subject of an appeal on the merits.”).

\textsuperscript{165} Frase, supra note 164, at 219. Accord Dervieux, supra note 164, at 231.

\textsuperscript{166} Frase, supra note 164, at 235–36 (the prosecuting attorney or the attorney general for the appellate district may appeal an acquittal to the regional cour d’appel (Court of Appeals) for what could potentially be a trial \textit{de novo} on all issues of fact or law raised by the appeal). Accord Dervieux, supra note 164, at 274 (“Any decision by the tribunal correctionnel . . . may be the subject of an appeal on the merits. . . . Appeals against . . . acquittals recorded by the tribunal correctionnel are handled by the local cour d’appel . . . .”).

\textsuperscript{167} Frase, supra note 164, at 219, 231. Accord Dervieux, supra note 164, at 230.

Délits are offenses that in the United States would be less serious felonies, such as aggravated assault, burglary, grand larceny, and drug offenses, as well as many offenses that would be misdemeanors. Frase, supra note 164, at 202.

Among the other European countries that apparently allow the prosecution to appeal an acquittal in a case involving a serious offense are: Belgium, Brigitte Pesquié, revised by Yves Cartuyvels, The Belgian System, in EUROPEAN CRIMINAL PROCEDURES, supra note 164, at 81, 98, 99–100, 130–31, 131 (an acquittal of a délité can be appealed to the local cour d’appel; a decision in the cour d’assises, which tries crimes, can be reviewed in the \textit{Cour de cassation}, but only on a point of law, following a definitive judgment, i.e., “one that puts an end to the proceedings by conviction, acquittal or absolute discharge of the case”); see also THE ROYAL COMMISSION ON CRIMINAL JUSTICE, CRIMINAL JUSTICE
Indeed, the European Convention on Human Rights recognizes the rule against double jeopardy yet permits the prosecution to have rights of appeal. Article 4(1) of that Convention provides: “No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.”168 Countries in other parts of the world, such as Argentina,169

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The Explanatory Report to Article 4 provides: “The principle established in this provision applies only after the person has been finally acquitted or convicted in accordance with the law and penal procedure of the State concerned. This means that there must have been a final decision . . . .” Id. Explanatory Report para. 29. The Explanatory Report further provides that “a decision is final ‘if, according to the traditional expression, it has acquired the force of res judicata. This is the case when it is irrevocable, that is to say when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time-limit to expire without availing themselves of them.’” Id. Explanatory Report para. 22 (quoting European
Israel,\textsuperscript{170} Mexico,\textsuperscript{171} and South Africa,\textsuperscript{172} also allow the prosecution to appeal acquittals, despite recognizing the principle of double jeopardy.

The view that the guarantee against double jeopardy does not prohibit the prosecution from appealing an acquittal is not limited to countries whose legal systems are based in whole or in part on the civil law. The eminent jurist Oliver Wendell Holmes, while an Associate Justice of the Supreme Court of the United States, espoused this position in his Convention on the International Validity of Criminal Judgments, Explanatory Note, Commentary on Article 1(a), May 28, 1970. \textit{See also} ENG. LAW COMM’N, REPORT NO. 267, \textit{supra} note 25, para. 1.13 (asserting the Convention permits the prosecution to have rights of appeal); \textit{id.} § 1.17 (“Allowing the prosecution to challenge an acquittal by way of appeal . . . (that is, before it becomes final), does not in principle present any difficulty in terms of compliance with the ECHR [European Convention on Human Rights].”).

\textsuperscript{169} Alejandro D. Carrió & Alejandro M. Garro, \textit{Argentina}, in \textit{A WORLDWIDE STUDY}, \textit{supra} note 164, at 3, 51–52 (“[A] judgment rendered by a trial court is subject to an appeal only on points of law. . . . [T]he right to appeal is given not only to the defendant but to the prosecutor as well, in [a] case where there is an acquittal. . . . The Supreme Court has held that to permit the appeal of an acquittal by the prosecution does not violate due process nor constitute[] a double jeopardy violation.” (footnote omitted)).

\textsuperscript{170} Rinat Kitai-Sangero, \textit{Israel}, in \textit{A WORLDWIDE STUDY}, \textit{supra} note 164, at 273, 298–99 (“The prosecution . . . may submit an appeal against the judgment–both the verdict and the sentence. A defendant may not raise a claim of double jeopardy against an appeal submitted by the prosecution. . . . An appeal may be submitted against determinations of both law and fact.” (footnote omitted)). \textit{See also} Anne Bowen Poulin, \textit{Double Jeopardy and Judicial Accountability: When is an Acquittal Not an Acquittal?}, 27 ARIZ. ST. L. J. 953, 953 (1995) (discussing a case in which the Supreme Court of Israel, in response to a government appeal, reversed a trial court’s acquittal of four defendants charged with rape).

\textsuperscript{171} Miguel Sarré & Ian Perlin, \textit{Mexico}, in \textit{A WORLDWIDE STUDY}, \textit{supra} note 164, at 351, 389–90 (“Both the prosecution and the defense may appeal [a trial verdict]. . . . The appeals court may review whether or not the appropriate law was applied, and whether it was applied correctly. The appeals court decides whether the lower court violated the ruling principles for evaluating evidence, the facts were altered, or indeed, if the decision was based on sufficient facts and the relevant law correctly applied. . . . Appeals of a verdict . . . also permit the presentation of new evidence, which means the appeals judge may review both the law and the facts, and indeed find and hear new evidence and determine additional facts.”). Article 23 of the Mexican Constitution provides: “No person, whether acquitted or convicted, can be tried twice for the same offense.” \textit{CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS [CONST.]} art. 23, 5 de Febrero de 1917 (Mex.).

\textsuperscript{172} P.J. Schwikkard & S.E. van der Merwe, \textit{South Africa in A WORLDWIDE STUDY}, \textit{supra} note 164, at 471, 515 (“The prosecution has no right to appeal against an acquittal on the facts. It does, however, have a right to appeal against a court’s decision on law . . . .”). Section 35(3)(m) of the South African Constitution provides that “[e]very accused person has the right to a fair trial, which includes the right not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted.” S. AFR. CONST. 1996 § 35(3)(m).
dissenting opinion in *Kepner v. United States*. He cogently argued:

[I]t seems to me that logically and rationally a man cannot be said to be more than once in jeopardy in the same cause, however often he may be tried. The jeopardy is one continuing jeopardy, from its beginning to the end of the cause. Everybody agrees that the [double jeopardy] principle in its origin was a rule forbidding a trial in a new and independent case where a man already had been tried once. But there is no rule that a man may not be tried twice in the same case. It has been decided by this court that he may be tried a second time, even for his life, if the jury disagree, or, notwithstanding their agreement and verdict, if the verdict is set aside on the prisoner’s exceptions for error in the trial. . . .

If a statute should give the right to take exceptions to the government, I believe it would be impossible to maintain that the prisoner would be protected by the Constitution from being tried again. He no more would be put in jeopardy a second time when retried because of a mistake of law in his favor, than he would be when retried for a mistake that did him harm. . . .

Indeed, many common law jurisdictions other than England—all of which recognize the basic rule against double jeopardy to some extent—allow prosecution appeals of acquittals in cases involving serious offenses. In Canada, for instance, a statute permits the prosecution to “appeal to the court of appeal . . . against a judgment or verdict of acquittal . . . in proceedings by indictment on any ground of appeal that involves a question of law alone,” a provision encompassing a trial

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173. 195 U.S. 100 (1904).
174. Id. at 134–35 (citations omitted).
175. The Canadian Charter of Rights and Freedoms provides: “Any person charged with an offence has the right . . . if finally acquitted of the offence, not to be tried for it again, and if finally found guilty and punished for the offence, not to be tried or punished for it again . . . .” Constitution Act, 1982, pt. I, § 11(h) (U.K.). In addition, the Canadian Criminal Code permits an accused to “plead the special pleas of (a) *autrefois acquit* [and] (b) *autrefois convict* . . . .” Criminal Code, R.S.C., ch. C-46, § 607(1) (1985) (Can.). See also id. §§ 609–10 (setting forth the scope of a plea of *autrefois acquit* or *autrefois convict*).
176. Criminal Code, R.S.C., ch. C-46, § 676(1)(a) (1985) (Can.). E.g., Graveline v. The Queen, 2006 SCC 16, [14], [18]–[19], [2006] 1 S.C.R. 609, 614, 615–16 (Can.) (but concluding that the Crown failed to meets its “very heavy” burden of showing “that the error (or errors) of the trial judge might reasonably be thought . . . to have had a material bearing on the [jury’s] acquittal” of the defendant on a charge of second-degree murder); see also cases cited infra note 179.

The use of the expression “question of law alone” in section 676(1)(a) means that the prosecution “has a right of appeal from an acquittal only on a question of law,” as opposed to questions of fact and questions of mixed fact and law. R. v. Biniaris, 2000 SCC 15, [30], [2000] 1 S.C.R. 381, 401 (Can.) (rejecting the possible interpretation that there exists such a thing as a “question of law alone” that is distinct from a “question of law”). Under this provision, the prosecution cannot appeal an acquittal by a trial judge sitting without a jury on the ground that it was not supported by the evidence. R. v. Poirier, 147 Nfld. & P.E.I.R. 195, 200 (P.E.I. App. Div. 1997) (Can.) (Mitchell, J., with Carruthers, C.J., agreeing) (“[A] claim [that the trial judge’s verdict was unreasonable

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judge’s directed verdict of acquittal.\textsuperscript{177} If the Court of Appeal allows the prosecution’s appeal, it can set aside the acquittal and order a new trial,\textsuperscript{178} or if the acquittal were rendered by the judge in a bench trial, “enter a verdict of guilty with respect to the offence of which, in its opinion, the accused should have been found guilty but for the error in law.”\textsuperscript{179}

and not supported by the evidence . . . is not an appealable issue. The Crown’s right of appeal in respect of an acquittal is restricted to grounds that involve questions of law alone. . . . If a trial judge errs in finding that the onus of proving guilt has not been satisfied, that is an error of fact, not law. The sufficiency of the evidence, and whether the guilt of an accused should be inferred from it, is a question of fact within the province of the trial judge.” (citation omitted). See also Walker v. The Queen, 2008 SCC 34, [27], [2008] 2 S.C.R. 245, 260 (Can.) (concluding that the trial judge’s orally-stated reasons for acquitting the defendant of second-degree murder in a bench trial—while convicting him of manslaughter—“were not so inadequate that the Crown’s limited right of appeal was impaired” and that “[t]here was thus no error of law and no basis on which the Crown could properly succeed in bringing itself within the limited Crown appeal provisions of § 676(1)(a) of the \textit{Criminal Code}.’’); Lampard v. The Queen, [1969] 1 S.C.R. 373, 380–81 (Can.) (“In the case at bar the onus was, of course, upon the Crown to prove that the appellant did the acts complained of with the necessary guilty intention . . . If the learned trial Judge erred in finding that that onus had not been satisfied, his error was one of fact, certainly not one of law in the strict sense.”).

177. Rowbotham v. The Queen, [1994] 2 S.C.R. 463, 474–75 (Can.). See also Greyeyes v. The Queen, [1997] 2 S.C.R. 825, 843 (Can.) (Cory, J.) (“[T]he legal effect of undisputed facts is a question of law.”); Morin v. The Queen, [1992] 3 S.C.R. 286, 294 (Can.) (“If a trial judge finds all the facts necessary to reach a conclusion in law, and in order to reach that conclusion the facts can simply be accepted as found, a Court of Appeal can disagree with the conclusion reached without trespassing on the fact-finding function of the trial judge. The disagreement is with respect to the law and not the facts nor inferences to be drawn from the facts.”).


179. Id. § 686(4)(b)(ii); e.g., R. v. Larue, 2003 SCC 22, [1], [5], [2003] 1 S.C.R. 277–79 (Can.) (entering a verdict of guilty of aggravated sexual assault after setting aside the trial judge’s acquittal of the defendant on that charge in a bench trial); Greyeyes, [1997] 2 S.C.R. at 843, 844 (Cory, J.) (upholding the conviction of the defendant for trafficking in cocaine that had been imposed by the Saskatchewan Court of Appeal upon an appeal by the prosecution following the trial judge’s acquittal of the defendant in a bench trial for that offense); id. at 833 (L’Heureux-Dubé, J.) (“dispos[ing] of the appeal as proposed by Cory, J.”).

If the Court of Appeal enters a verdict of guilty, it may either pass a sentence that is warranted in law, or remit the matter to the trial court and direct the trial court to impose a sentence that is warranted in law. Criminal Code, R.S.C. 1985, c. C-46, § 686(4)(b)(ii) (Can.).

If the Court of Appeal sets aside an individual’s acquittal, the individual “may appeal to the Supreme Court of Canada (a) on any question of law on which a judge of the court of appeal dissents; (b) on any question of law, if the Court of Appeal enters a verdict of
New Zealand\textsuperscript{180} allows the prosecution generally to seek review in the Court of Appeal of questions of law arising at the trial,\textsuperscript{181} even if the trial resulted in the defendant’s acquittal.\textsuperscript{182} In addition, it specifically provides a procedure under which the prosecution can seek review of a question of law arising out of a trial judge’s decision during the trial to discharge,\textsuperscript{183} i.e., acquit,\textsuperscript{184} a defendant.\textsuperscript{185} Such a discharge can be based upon the judge’s conclusion that the defendant had no case to answer.\textsuperscript{186} If the Court of Appeal finds that the trial judge’s “ruling was erroneous, and . . . that the accused [was] wrongfully discharged,”\textsuperscript{187} it may “direct a new trial.”\textsuperscript{188}

\textsuperscript{180} The New Zealand Bill of Rights Act 1990 provides: “No one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again.” Bill of Rights Act 1990, § 26(2) (N.Z.). In addition, the Crimes Act 1961 recognizes “a plea of previous acquittal, a plea of previous conviction, and a plea of pardon.” Crimes Act 1961, § 357(1) (N.Z.). See also id. §§ 358–59 (setting forth the scope of a plea of a previous acquittal or conviction).

\textsuperscript{181} Crimes Act 1961, § 380 (N.Z.) (permitting the parties to apply to the trial judge to reserve for the opinion of the Court of Appeal a question of law). See also id. § 381 (allowing the prosecutor to seek leave to appeal from the Court of Appeal if the trial judge refuses an application to reserve a question of law for the opinion of the Court of Appeal).

\textsuperscript{182} Id. § 380(4) (“If the result of the trial is acquittal the accused shall be discharged, subject to being again arrested if the Court of Appeal orders a new trial.”).

\textsuperscript{183} Id. § 347(3) (“The Judge may in his discretion, at any stage of any trial, whether before or after verdict, direct that the accused be discharged.”).

\textsuperscript{184} Id. § 347(4) (“A discharge under this section shall be deemed an acquittal.”).

\textsuperscript{185} Id. § 381A(1) (“A Judge who directs that an accused be discharged under section 347 [see supra note 183] . . . may, on the application of the prosecutor, refer for the opinion of the Court of Appeal any question of law arising out of that direction.”). See also Crimes Act 1961, § 381A(5) (N.Z.) (allowing the prosecutor to seek leave to appeal from the Court of Appeal if the trial judge refuses the prosecutor’s application to refer a question of law to the Court of Appeal).

\textsuperscript{186} See Gordon-Smith v. The Queen, [2008] NZSC 56, [3] (noting that during the appellant’s trial the judge had discharged three of the appellant’s co-defendants pursuant to section 347 of the Crimes Act 1961, Crimes Act 1961, § 347 (N.Z.), “on the basis that they had no case to answer”).

\textsuperscript{187} Crimes Act 1961, § 382(2)(b) (N.Z.).

\textsuperscript{188} Id.

This section includes the proviso that “no conviction or acquittal shall be set aside, nor any new trial directed, although it appears that some evidence was improperly admitted or rejected, or that something not according to law was done at the trial, or some misdirection given, unless in the opinion of the Court of Appeal some substantial wrong or miscarriage of justice was thereby occasioned on the trial.” Id.

Section 381A(3) of the Crimes Act 1961 provides that “[w]hen a question is referred to the Court of Appeal, the accused who has been discharged . . . is subject to again being arrested or summoned to appear if the Court of Appeal orders a new trial. Id. § 381A(3).
The Australian states of Tasmania, Western Australia, and New South Wales also grant the prosecution a limited right to appeal some acquittals. In Tasmania, a statute provides that the Attorney General, with the leave of the Court of Criminal Appeal or upon the certificate of the trial judge that it is a fit case for appeal, can appeal to the Court of Criminal Appeal “against an acquittal on a question of law” in a trial upon an indictment, a provision encompassing a directed verdict of acquittal.

189. For a discussion of the rule against double jeopardy by the High Court of Australia, see Pearce v The Queen, (1998) 194 CLR 610 (Austl.) (concluding (1) the pleas of autrefois acquit and autrefois convict apply only when the elements of the two offenses in question are identical or when all the elements of one offense are wholly included in the other offense; (2) a court possesses the inherent power to stay proceedings against an individual to prevent abuse of its process and such an abuse of process can arise from the repeated prosecution of an individual in circumstances in which he or she cannot plead autrefois acquit or autrefois convict; and (3) when an individual is convicted of two offenses containing common elements, absent a contrary legislative intent, it is wrong to punish the individual twice for the commission of the common elements).

190. Tasmania recognizes the pleas of autrefois acquit and autrefois convict. Criminal Code Act 1924 (Tas) § 358 (Austl.) (“In a plea that the accused person has already been acquitted or convicted, it is sufficient to state that he has been lawfully acquitted or convicted, as the case may be, of the crime charged in the indictment, or of the other offence of which he alleges that he has been acquitted or convicted, and, in the latter case, to describe the offence by any term by which it is commonly known.”).


191. Criminal Code Act 1924 (Tas) § 401(2) (Austl.). E.g., DPP v Cook, [2006] TASSC 75, [47], [49] (Tas. Crim. App.) (Austl.) (Crawford, J.) (granting the prosecutor’s application for leave to appeal an individual’s acquittal by a jury on a charge of attempted rape); id. at [91], [93]–[94] (Blow, J.) (same); id. at [150] (Tennent, J.) (same).

A question of law excludes questions of mixed fact and law. Williams v The Queen, (1986) 161 CLR 278, 286-87 (Austl.) (Gibbs, C.J.) (concluding that the claim that the trial court erroneously excluded from evidence confessions allegedly made by the defendant raised questions of mixed fact and law and therefore the Tasmanian Court of Criminal Appeal improperly granted the prosecution leave to appeal the defendant’s directed acquittal); id. at 301–02 (Mason & Brennan, JJ.) (same); id. at 314 (Wilson & Dawson, JJ.) (same); R v Jenkins, [1970] Tas SR 13, 14-5 (Crim. App.) (Austl.). Although both Williams and Jenkins involved the now-amended statutory phrase “a question of law alone,” the removal of the word “alone” does not seem significant. For the same word was also removed from the previous subsection of the statute dealing with the right of a convicted defendant to appeal a conviction, and that provision expressly distinguishes between “a question of law,” Criminal Code Act 1924 (Tas) § 401(2) (Austl.), “a mixed question of fact and law,” id. § 401(1)(b)(ii), and “a question of fact alone” id. § 401(1)(b)(i). See NEW SOUTH WALES LAW REFORM COMMISSION, DISCUSSION PAPER 37, DIRECTED VERDICTS OF ACQUITTAL § 3.10 (1995) [hereinafter N.S.W. LAW
If the Court of Appeal finds the verdict of the jury was unreasonable or cannot be supported having regard to the evidence, or the trial court reached the wrong decision on a question of law, or there was a miscarriage of justice, it can set aside the verdict or judgment, allow the appeal, and either enter a conviction or order a new trial.

In Western Australia, the prosecution, "in relation to a charge of an indictable offence," and with the leave of the Court of Appeal, can appeal "a judgment of acquittal . . . entered after a jury's verdict of not guilty of a [serious offense], but only on the grounds that before or during the trial the judge made an error of fact or law in relation to the charge," as well as "a judgment of acquittal . . . entered in a trial by the judge alone" or "entered after a decision by the judge that the accused has no case to answer on the charge." If the Court of Appeal finds in favor of the prosecution, it can set aside the acquittal and order a new trial.

REFORM COMM'N, DISCUSSION PAPER 37]. For information concerning the New South Wales Law Reform Commission, see infra note 207.

193. Criminal Code Act 1924 (Tas) § 401(2) (Austl.).
194. Id. § 402(5)(b).
196. The Criminal Code Act Compilation Act 1913 recognizes the pleas of former conviction and former acquittal. Criminal Code Act Compilation Act 1913 (WA) § 17 ("It is a defence to a charge of any offence to show that the accused person has already been tried, and convicted or acquitted upon an indictment or prosecution notice on which he might have been convicted of the offence with which he is charged, or has already been convicted or acquitted of an offence of which he might be convicted upon the indictment or prosecution notice on which he is charged.").
197. Criminal Appeals Act 2004 (WA) § 24(2).
198. Id. § 27(1).
199. The verdict of not guilty must be "of a charge the statutory penalty for which is or includes imprisonment for 14 years or more or life." Id. § 24(2)(da).
200. Id.
201. Id. § 24(2)(e).
202. Id. § 24(2)(e)(i).
Judgments of acquittal "on account of unsoundness of mind" are specifically excluded from section 24. Id. § 24(2)(da), (e). Such judgments of acquittal are governed by a separate provision in the statute. See id. § 25.
203. Id. § 33(1), (2)(a). E.g., State v Tilbrook, [2007] WASCA 4, [1], [40]–[42] (WA) (ordering a new trial after setting aside the judgments of acquittal on charges of knowingly making false statements to a police officer that had been entered by the trial
The prosecution’s right to appeal an acquittal is more limited in New South Wales than in either Tasmania or Western Australia. In New South Wales, the prosecution can appeal only an acquittal by a jury at the direction of the trial judge or an acquittal by the judge sitting without a jury in a trial of an indictable offense. Moreover, such an appeal is restricted to a “ground that involves a question of law alone.” If the Court of Appeal finds the trial judge committed error, it judge at the conclusion of the defendants’ trial based upon her findings that none of the defendants had a case to answer.

204. New South Wales recognizes the pleas of *autrefois convict* and *autrefois acquit*. *Criminal Procedure Act 1986* (NSW) § 156(1) (Austl.) (“In any plea of *autrefois convict*, or of *autrefois acquit*, it is sufficient for the accused person to allege that he or she has been lawfully convicted or acquitted, as the case may be, of the offence charged in the indictment, without specifying the time or place of the previous conviction or acquittal.”).

205. *Crimes (Appeal and Review) Act 2001* (NSW) § 107(1)(a), (2) (Austl.). *E.g.*, *R v R.K.*, [2008] NSWCCA 338, [1]–[2], [70], [73]–[75], [77]–[79], [2008] 73 NSWLR 80, 82, 94 (NSW Crim. App.) (Austl.) (but upholding the trial judge’s decision at the end of the prosecution’s case to direct the jury to return a verdict of not guilty on the ground that the offense charged in the indictment was not an offense known to law).


207. *Id.* § 107(2).

Prior to the enactment of these provisions, the New South Wales Law Reform Commission, in its report examining whether the prosecution should be allowed to appeal a directed verdict of acquittal, recommended that “[a] Crown right of appeal from a directed verdict of acquittal should not be introduced in New South Wales.” *NEW SOUTH WALES LAW REFORM COMM’N, REPORT 77: DIRECTED VERDICTS OF ACQUITTAL* § 3 (1996) [hereinafter N.S.W. LAW REFORM COMM’N, REPORT 77]. In exploring the scope of the rule against double jeopardy, the Commission stated: “The development of the principle [of double jeopardy] has gone beyond prohibiting multiple punishment for the same offence, to adopting practices to prevent undue prolongation of the criminal process. To allow otherwise is to risk harassment of an accused, who is, after all presumed innocent.” *Id.* § 2.8.

The Law Reform Commission of New South Wales was established by the Law Reform Commission Act 1967, *Law Reform Commission Act 1967* (NSW) (Austl.). It comprises a Chairman and at least two other members, all appointed by the Governor. *Id.* § 3(2). Its purpose is, with references made to it, to consider the law, enacted or promulgated by the Legislature of New South Wales . . . with a view to, or for the purpose of: (i) eliminating defects and anachronisms in the law, (ii) repealing obsolete or unnecessary enactments, (iii) consolidating, codifying or revising the law, (iv) simplifying or modernising the law by bringing it into accord with current conditions, (v) adopting new or more effective methods for the administration of the law and the dispensation of justice, (vi) systematically developing and reforming the law.

*Id.* § 10(a), and to “consider proposals relating to matters in respect of which it is competent for the Legislature of New South Wales . . . to enact or promulgate laws.” *Id.* § 10(b).
may quash the acquittal and order a new trial. In the United States, however, the Double Jeopardy Clause of the Fifth Amendment accords “absolute finality” to an acquittal and

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209. Id. § 107(6).
210. See supra text accompanying note 112.
212. See also Smith v. Massachusetts, 543 U.S. 462, 467 (2005) (“[T]he Double Jeopardy Clause . . . prohibits reexamination of a court-decided acquittal to the same extent it prohibits reexamination of an acquittal by a jury. . . . [F]urther proceedings to secure [a conviction] are impermissible.”; Sanabria v. United States, 437 U.S. 54, 64 (1978) (“[T]hat [a] verdict of acquittal . . . [may] not be reviewed . . . without putting [the defendant] twice in jeopardy, and thereby violating the Constitution”); Fong Foo v. United States, 369 U.S. 141, 143 (1962) (“The verdict of acquittal was final, and could not be reviewed . . . without putting [the petitioners] twice in jeopardy and thereby violating the Constitution.”)

In a bench trial, or when the judge intervenes in a jury trial, what constitutes an “acquittal” for purposes of the double jeopardy provision “is not controlled by the form of the judge’s action.” Martin Linen Supply Co., 430 U.S. at 571; accord United States v. Scott, 437 U.S. 82, 96 (1978); rather, a trial judge’s ruling constitutes an “acquittal” only when “the ruling of the judge, whatever its label, actually represents a resolution, in the defendant’s favor, correct or not, of some or all of the factual elements of the offense charged.” Id. at 97 (quoting Martin Linen Supply Co., 430 U.S. at 571 (brackets deleted)). “[A] ruling that as a matter of law the [prosecution’s] evidence is insufficient to establish the defendant’s factual guilt” constitutes “an acquittal under the Double Jeopardy Clause.” Smalis v. Pennsylvania, 476 U.S. at 144 (“The category of acquittals includes ‘judgment[s] . . . by the court that the evidence is insufficient to convict.’”)

Before the Supreme Court held the Double Jeopardy Clause of the Fifth Amendment applicable to the states through the Due Process Clause of the Fourteenth Amendment, see Benton v. Maryland, 395 U.S. 784, 794 (1969), a few states had enacted statutes allowing the prosecution to appeal an acquittal. See, e.g., State v. Lee, 30 A. 1110, 1113–14 (Conn. 1894) (rejecting the claim of an individual acquitted by a jury of murder in the second degree that a statute allowing the prosecution to appeal questions of law, with the permission of the presiding judge, violated the common law principle against double jeopardy, and granting the prosecution a new trial because of the trial court’s erroneous exclusion of evidence); State v. Felch, 105 A. 23, 26–28 (Vt. 1918) (rejecting the claim of an individual acquitted by a jury of murder that a statute allowing the prosecution to seek review of alleged errors at trial violated the Fourteenth
consequently bars the government from trying an individual a second time for the same offense following his acquittal,213 whether the acquittal was rendered by a jury,214 a judge in a bench trial,215 or a judge in a jury Amendment, and remanding the case for retrial because of the erroneous exclusion of evidence); State v. Kennedy, 113 N.W.2d 372, 375-77, 379 (Wis. 1962) (holding that the trial court’s ruling that there was insufficient evidence to submit the case to the jury was a question of law, and therefore appealable by the prosecution under a statute allowing the prosecution, with the permission of the trial judge, to appeal acquittals upon questions of law, and additionally holding that subjecting the defendant to a second trial because of errors in his first trial would not subject him to double jeopardy in violation of the state constitution, but nevertheless affirming the defendant’s acquittal on the ground that the trial court did not err in its ruling), overruled in part on other grounds by State v. Holmstrom, 168 N.W.2d 574 (Wis. 1969). See generally Office of Legal Policy, U.S. Dep’t of Justice, Truth in Criminal Justice Rep. No. 6, Report to the Attorney General on Double Jeopardy and Government Appeals of Acquittals (1987) [hereinafter Report to the Attorney General], reprinted in 22 J. Law Reform 834, 878-85 (1989). Indeed, in Palko v. Connecticut, 302 U.S. 319, 328 (1937), overruled by Benton, supra, the Supreme Court affirmed the conviction for first-degree murder (and sentence of death) of a defendant whose previous conviction for second-degree murder (and sentence of life imprisonment), after a trial for first-degree murder, was reversed following the prosecution’s successful appeal. In doing so, the Supreme Court upheld the validity of the Connecticut statute involved in Lee, supra, against a claim that it violated the Due Process Clause of the Fourteenth Amendment. The Court reasoned that allowing the prosecution to appeal an acquittal did not violate the requirements of due process because it was not contrary to “a scheme of ordered liberty,” Palko, 302 U.S. at 325, and did not “violate those ‘fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.’” Id. at 328 (quoting Hebert v. Louisiana, 272 U.S. 312, 316 (1926)). See also id. (concluding that such an appeal did not subject the defendant to “a hardship so acute and shocking that our polity will not endure it”).

213. Smith, 543 U.S. at 467; Smalis, 476 U.S. at 145-46; Bullington, 451 U.S. at 437; DiFrancesco, 449 U.S. at 129; Scott, 437 U.S. at 88; Sanabria, 437 U.S. at 64; Burks, 437 U.S. at 10–11; Arizona v. Washington, 434 U.S. 497, 503 (1978); Martin Linen Supply Co., 430 U.S. at 576; United States v. Sisson, 399 U.S. 267, 289-91 & n.18 (1970); Price v. Georgia, 398 U.S. 323, 329 (1970); Benton, 395 U.S. at 797; Fong Foo, 369 U.S. at 143; Green v. United States, 355 U.S. 184, 188, 192 (1957); Kepner v. United States, 195 U.S. 100, 130, 133 (1904) (although the decision was based on a statute extending double jeopardy protection to the Philippines, not on the Double Jeopardy Clause, the Supreme Court in DiFrancesco stated that it “has accepted [the] decision in Kepner as having correctly stated the relevant double jeopardy principles,” 449 U.S. at 133 n.13 (internal quotation marks omitted)); Ball, 163 U.S. at 671.

The Double Jeopardy Clause also bars a second trial when a defendant’s conviction is reversed by a reviewing court solely for lack of sufficient evidence to sustain the conviction. Burks, 437 U.S. at 18 (concluding that “the only ‘just remedy’ in such a situation is for the reviewing court to ‘direct[] a judgment of acquittal’”).

214. See Price, 398 U.S. at 329 (implied acquittal of charged greater offense by conviction for lesser offense); Benton, 395 U.S. at 785, 797; Green, 355 U.S. at 184, 198 (implied acquittal of charged greater offense by conviction for lesser offense); Ball, 163 U.S. at 671.
The finality of an acquittal applies even if it were “based upon an egregiously erroneous foundation.”

215. Smalis, 476 U.S. at 145–46 (the trial judge sustained the defendants’ demurrer at the end of the prosecution’s case); Kepner, 195 U.S. at 133-34. See also Martin Linen Supply Co., 430 U.S. at 573 n.12 (“In the situation where a criminal prosecution is tried by a judge alone, there is no question that the Double Jeopardy Clause accords his determination in favor of a defendant full constitutional effect.”).

216. Smith, 543 U.S. at 467 (at the conclusion of the prosecution’s case, the trial judge granted the defendant’s motion for a required finding of not guilty on one count of a three-count indictment); Sanabria, 437 U.S. at 54, 64 (in a multi-defendant trial, the trial judge granted one defendant’s motion for a judgment of acquittal); Martin Linen Supply Co., 430 U.S. at 564 (the trial judge granted the defendants’ motions for judgments of acquittal following the discharge of a hung jury); Fong Foo, 369 U.S. at 142-43 (the trial judge, apparently on his own motion, “directed the jury to return verdicts of acquittal”).

Moreover, when the trial judge has ruled at the close of the prosecution’s case that its proof failed as a matter of law to establish the defendant’s guilt as to fewer than all the charges, and the trial has proceeded to the defendant’s introduction of evidence concerning the remaining charges, the Double Jeopardy Clause generally prohibits the judge from reconsidering her midtrial ruling. Smith, 543 U.S. at 473 (“unless the availability of reconsideration has been plainly established by pre-existing rule or case authority”). Compare Price v. Vincent, 538 U.S. 634, 643 (2003) (holding the state supreme court did not unreasonably apply clearly established federal law when it concluded the Double Jeopardy Clause was not violated when the trial judge, before any further proceedings occurred and before he informed the jury of his decision, reversed his initial ruling that the prosecution failed to introduce sufficient evidence of premeditation to support a conviction for first-degree murder).

In Smith, the Supreme Court stated that “the Double Jeopardy Clause of the Fifth Amendment prohibits reexamination of a court-decree acquittal to the same extent it prohibits reexamination of an acquittal by jury verdict. This is so whether the judge’s ruling of acquittal comes in a bench trial or . . . in a trial by jury.” 543 U.S. at 467 (citations omitted). See also Smalis, 476 U.S. at 145 (“[W]hether the trial is to a jury or to the bench, subjecting the defendant to postacquittal factfinding proceedings going to guilt or innocence violates the Double Jeopardy Clause.”); United States v. Jenkins, 420 U.S. 358, 365 (1975) (“Since the Double Jeopardy Clause of the Fifth Amendment nowhere distinguishes between bench and jury trials, the principles given expression through that Clause apply to cases tried by a judge.”), overruled on other grounds by Scott, 437 U.S. 82.

217. Fong Foo, 369 U.S. at 143 (indicating the trial judge had no power to direct a verdict of acquittal under the circumstances, but nevertheless concluding the acquittal could not be reviewed without putting the acquitted defendants twice in jeopardy in violation of the Constitution). Accord DiFrancesco, 449 U.S. at 129 (quoting Fong Foo, 369 U.S. at 143); Washington, 434 U.S. at 503 (quoting Fong Foo, 369 U.S. at 143). See also Smith, 543 U.S. at 473 (“[T]he well established rule [is] that the bar [of the Double Jeopardy Clause] will attach to a pre-verdict acquittal that is patently wrong in law.”); Smalis, 476 U.S. at 144 n.7 (“[T]he fact that the acquittal may result from erroneous evidentiary rulings or erroneous interpretations of governing legal principles . . . affects the accuracy of that determination but it does not alter its essential character.” (quoting Scott, 437 U.S. at 98) (internal quotations marks omitted; alterations by the Court)); DiFrancesco, 449 U.S. at 132 (“It is acquittal that prevents retrial even if legal error was committed at the trial.”); Burks, 437 U.S. at 16 (“[W]e . . . afford absolute finality to a jury’s verdict of acquittal—no matter how erroneous it decision . . . .” (emphasis deleted)); Green, 355 U.S. at 188 (“[I]t is one of the elemental principles of our criminal
Accordingly, although the primary purpose of the double jeopardy provision in the Fifth Amendment is not “to prevent . . . [g]overnment appeals per se,” it nevertheless prohibits an appeal by the prosecution of an acquittal whenever reversal by the appellate court would lead either to a second trial or “further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged,” such as a resumption of the appellee’s trial. The Supreme Court and Congress have dealt with prosecution appeals in the Federal courts, see id. at 336–42.

218. See Sanabria, 437 U.S. at 63. Accord Martin Linen Supply Co., 430 U.S. at 568–69 (“The development of the Double Jeopardy Clause from its common-law origins . . . suggests that it was directed at the threat of multiple prosecutions, not at [g]overnment appeals, at least where those appeals would not require a new trial.” (quoting United States v. Wilson, 420 U.S. 332, 342 (1975)). See also DiFrancesco, 449 U.S. at 131 (“The Double Jeopardy Clause is not a complete barrier to an appeal by the prosecution in a criminal case.”); Wilson, 420 U.S. at 342 (“In the course of the debates over the Bill of Rights, there was no suggestion that the Double Jeopardy Clause imposed any general ban on appeals by the prosecution.”).

219. See Smalis, 476 U.S. at 145–46; Scott, 437 U.S. at 91; Martin Linen Supply Co., 430 U.S. at 570–71; Wilson, 420 U.S. at 336. See also DiFrancesco, 449 U.S. at 132 (“[W]here a [g]overnment appeal presents no threat of successive prosecutions, the Double Jeopardy Clause is not offended.” (quoting Martin Linen Supply Co., 430 U.S. at 569–70)); Green, 355 U.S. at 188 (“[T]he [g]overnment cannot secure a new trial by means of an appeal even though an acquittal may appear to be erroneous.”).


221. See also Smith, 543 U.S. at 469 n.4 (“[A]n acquittal, once final, may not be reconsidered on appeal or otherwise.”); Sanabria, 437 U.S. at 69 (“[T]he judgment of acquittal [for insufficient evidence], however erroneous, bars further prosecution . . . and hence bars appellate review of the trial court’s error.”); Martin Linen Supply Co., 430 U.S. at 575 (“[T]he Double Jeopardy Clause bars appeal from a judgment of acquittal entered by a trial court upon a motion by the defendant or upon the court’s own motion.”); Wilson, 420 U.S. at 345 (“[A] verdict of acquittal at the hands of the jury [is] not subject to review by . . . appeal . . . .”) (quoting Forman v. United States 361 U.S. 416, 426 (1960)); Fong Foo, 369 U.S. at 143 (“The verdict of acquittal was final, and could not be reviewed . . . without putting [the petitioners] twice in jeopardy, and thereby violating the constitution.” (quoting Ball, 163 U.S. at 671) (alteration by the Court)); Kepner, 195 U.S. at 133–34 (holding, as characterized in Green, 355 U.S. at 192, “that the [g]overnment could not appeal an acquittal”).

222. Smalis, 476 U.S. at 145 (rejecting the prosecution’s contention that its appeal was permissible “because resumption of [the] petitioners’ bench trial following a reversal on appeal would simply constitute ‘continuing jeopardy.’”). Cf. Smith, 543 U.S.
Court of the United States has recognized that “[a] system permitting review of all claimed legal errors would have symmetry to recommend it” and would avoid the release of some defendants who have benefitted from instructions or evidentiary rulings that are unduly favorable to them.” Nevertheless, the Court has rejected that position, being “of the view that the policies underlying the Double Jeopardy Clause militate against permitting the [g]overnment to appeal after a verdict of acquittal.” “Granting the [g]overnment such broad appeal rights,” the Court explained in United States v. Wilson, “would . . . disserve the

222 At least in felony cases, a convicted defendant generally can appeal his conviction, JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE: VOLUME 2: ADJUDICATION § 16.01 (4th ed. 2006); 7 WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, CRIMINAL PROCEDURE § 27.1 (3d ed. 2007) [hereinafter LAFAVE ET AL.] (“In the federal system and in most states, statutes (or state constitutional provisions) guarantee defendants in all felony cases a right to appellate review. In a small number of states, review of felony convictions remains at the discretion of the state’s highest court, but the defendant has at least the opportunity to gain appellate review.”); e.g., FED. R. CRIM. P. 32(j)(1)(A); 28 U.S.C. § 1291 (2006); ILL. CONST. art. 6, § 6; ILL. SUP. CT. R.615; N.Y. CRIM. PROC. LAW § 450.10 (McKinney 2005); see generally 7 LAFAVE ET AL., supra, §§ 27.1–2, 27.5–6, and, if successful, obtain a new trial. E.g., ILL. SUP. CT. R. 615(b)(5); N.Y. CRIM. PROC. LAW § 470.20 (McKinney 2009). Ordinarily, a second trial for the same offense under such circumstances does not violate the Double Jeopardy Clause. Ball, 163 U.S. at 671–72. Accord Lockhart v. Nelson, 488 U.S. 33, 38–39 (1988); Price v. Georgia, 398 U.S. 323, 326–27 (1970); United States v. Tateo, 377 U.S. 463, 465–66 (1971) (articulating the rationale for allowing a second trial). But see Burks, 437 U.S. at 16 (holding that the Double Jeopardy Clause bars a second trial when a defendant’s conviction is reversed by a reviewing court solely for lack of sufficient evidence to sustain the conviction).
defendant’s legitimate interest in the finality of a verdict of acquittal.” 226
More importantly, though, it “would allow the prosecutor to seek to
persuade a second trier of fact of the defendant’s guilt after having failed
with the first; it would permit him to re-examine the weaknesses in his
first presentation in order to strengthen the second” 227 and “would present
an unacceptably high risk that the [g]overnment, with its vastly superior
resources, might wear down the defendant,” 228 “thereby ‘enhancing the
possibility that even though innocent he may be found guilty.’” 229 It
therefore seems that in the United States a statute containing provisions
akin to those in the Criminal Justice Act 2003 allowing a prosecution
appeal of a judge’s pre-verdict finding that the prosecution failed to
prove the defendant’s guilt would be unconstitutional. 230

226. Id. at 352. See also Smalis, 476 U.S. at 145 (“When a successful postacquittal
appeal by the prosecution would lead to proceedings that violate the Double Jeopardy
Clause, the appeal has no proper purpose. Allowing such an appeal would frustrate the
interest of the accused in having an end to the proceedings against him.”).
227. Wilson, 420 U.S. at 352.
United States, 355 U.S. 184, 188 (1957)). Accord Scott, 437 U.S. at 91.

In Sanabria v. United States, 437 U.S. 54 (1978), the Supreme Court stated:
[T]he Double Jeopardy Clause [does not] permit[] the [g]overnment to obtain
relief from all of the adverse rulings—most of which result from defense
motions—that lead to the termination of a criminal trial in the defendant’s
favor. To hold that a defendant waives his double jeopardy protection
whenever a trial court error in his favor on a midtrial motion leads to an
acquittal would undercut the adversary assumption on which our system of
criminal justice rests and would vitiate one of the fundamental rights
established by the Fifth Amendment.
Id. at 78 (citations omitted).
230. Some uncertainty exists because of the language contained in the Supreme
Court’s decision in Smith v. Massachusetts, 543 U.S. 462, 467 (2005). The Court in
Smith held that the defendant had been subjected to double jeopardy when, at the
conclusion of his trial, the trial judge reversed her initial midtrial ruling entering a
required finding of not guilty on one count of a multi-count indictment and submitted
that count to the jury. In doing so, however, the Court emphasized that an “acquittal,
onece final, may not be reconsidered on appeal or otherwise.” Id. at 469 n.4. See also id.
([T]he initial jeopardy does not end until there is a final decision.”). Moreover, the
Court stated that it thought “that as a general matter state law may prescribe that a
judge’s midtrial determination of the sufficiency of the State’s proof can be
reconsidered.” Id. at 470. See also id. at 473 (“If, after a facially unqualified midtrial
dischmissal of one count, the trial has proceeded to the defendant’s introduction of
evidence, the acquittal must be treated as final, unless the availability of reconsideration
has been plainly established by pre-existing rule or case authority expressly applicable to
midtrial rulings on the sufficiency of the evidence.”). If a state can allow a trial judge to
reconsider his midtrial ruling on the sufficiency of the evidence without violating the
Thus, some disagreement exists among common law jurisdictions on whether the rule against double jeopardy prohibits the prosecution from appealing an acquittal. Nevertheless, even if the rule itself does not bar such appeals, one must recognize, as did the English Law Commission, that “[t]he issues of double jeopardy and prosecution appeals . . . are clearly related,” because “[t]hey both concern the circumstances in which an acquittal may be revisited at the instigation of the prosecution, with the possibility of retrial.”

It is therefore appropriate, in evaluating the wisdom of allowing the prosecution to appeal a ruling of no case to answer, to weigh the need for such prosecution appeals against the policies underlying the rule against double jeopardy.

V. PROSECUTION APPEALS OF A RULING OF NO CASE TO ANSWER IN LIGHT OF THE POLICIES UNDERLYING THE PROHIBITION AGAINST DOUBLE JEOPARDY

A. The Need for a Prosecution Right to Appeal a Ruling of No Case to Answer

A number of different arguments can be made in support of the need for a scheme under which the prosecution can appeal a trial judge’s ruling that the defendant has no case to answer. It can be argued that such appeal rights will: (1) help to achieve symmetry between the appeal rights of the prosecution and those of the defendant, thereby aiding in rectifying an imbalance in the criminal justice system; (2) clarify the law involved in the particular case and, more importantly, prevent the law from taking the wrong course; (3) increase the accountability of

Double Jeopardy Clause, perhaps it may also be constitutionally permissible for a state to provide by statute that the prosecution can take an immediate appeal from such a midtrial ruling. But see id. at 469 n.4 (“[T]he taking of an appeal necessarily signals the finality of the order appealed.” (internal quotation marks omitted)); id. at 477 (Ginsburg, J., dissenting) (“An appeal, including an interlocutory appeal, moves a case from a court of first instance to an appellate forum, and necessarily signals that the trial court has ruled with finality on the appealed issue or issues.”) (emphasis added).

231. See infra text accompanying notes 237–67.
232. This ostensibly was the approach taken by the English Law Commission in its report on prosecution appeals. See ENG. LAW COMM’N, REPORT NO. 267, supra note 25, para. 7.18 (“[A] trial is a forum in which it is sought to do justice between the different, often incompatible interests of the various participants. . . . [T]he participants whose interests have to be accommodated are not limited to the prosecution, representing the public interest, and the defendant, but may also include the complainant insofar as that person may have a different perspective from that of the prosecution. The concept of ‘balancing’ these competing interests is . . . in our judgment entirely appropriate.”).
234. See infra text accompanying notes 269–79.

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trial judges and improve the quality of their performance; and (4) enhance the accuracy of the outcome of criminal proceedings, thereby preventing miscarriages of justice in some cases and maintaining respect for, and confidence in, the criminal justice system.

1. Achieving Symmetry and Rectifying an Imbalance in the Criminal Justice System

In a 1999 lecture, Lord Williams of Mostyn, then the Attorney General of England, expressed his concern that there was an “imbalance” in the criminal justice system because, unlike a convicted defendant, the prosecution could not appeal various types of adverse rulings made by the judge during a trial. In particular, Lord Mostyn pointed out that the prosecution could not appeal a trial judge’s ruling to stay the prosecution on the ground of abuse of process, to direct the jury to acquit the defendant (i.e., that the defendant had no case to answer), or to exclude crucial evidence from the prosecution’s case. According to the Lord Mostyn, the way to “remedy” this “imbalance” was to allow the prosecution to appeal such rulings, which would thereby have the effect of making the appeal rights of the defendant and the prosecution more symmetrical.

As Lord Mostyn’s statements illustrate, appeal rights in Anglo-American criminal justice systems, at least in the recent past, have been asymmetrical in nature, that is, the defendant possesses greater rights of

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235. See infra text accompanying notes 280–306.
238. See Criminal Appeal Act, 1968, c. 19, § 1(1) (Eng.).
239. Lord Williams of Mostyn, supra note 237, paras. 53–54.
240. Lord Williams of Mostyn, supra note 237, para. 54.
241. Id. at paras. 54–55.
appeal than does the prosecution. But the fact that allowing the prosecution greater appeal rights will help to achieve symmetry in appeal rights is not, in itself, a valid argument to grant such rights. For “there is no necessity for symmetry, just for the sake of symmetry.” Rather, in determining whether the prosecution should be allowed to appeal certain types of rulings by a trial judge, the merits of permitting such appeals must be considered with respect to each type of ruling. For example, on the merits, a decision to allow the prosecution to appeal a pretrial ruling by a trial judge dismissing the indictment, or excluding certain evidence from the prosecution’s case, may be a wise one, and the effect of extending such appeal rights to the prosecution will, of course, be greater symmetry. Nevertheless, the resulting symmetry should merely be a consequence of any such change, not a reason for it.

242. In the United States, for example, although a defendant convicted of a serious offense after a trial generally can appeal that conviction, see supra note 222, the prosecution is, in most cases, constitutionally barred from appealing an acquittal, “even if legal error was committed at the trial,” United States v. DiFrancesco, 449 U.S. 117, 132 (1980). See supra text accompanying notes 210–30.

Prior to England’s expanding the prosecution’s appeal rights in the Criminal Justice Act 2003, some common law jurisdictions had already taken steps towards achieving greater symmetry. For example, in 1924 the Australian state of Tasmania granted the prosecution the right to appeal an acquittal on matters of law, see supra text accompanying notes 190–95, and in 1930 Canada, see Cullen v. The King, [1949] S.C.R. 658, 661 (Can.) (“The right to appeal to the Court of Appeal against any judgment or verdict of acquittal in a trial court in respect of an indictable offence on any ground of appeal which involves a question of law alone was first given by s. 28, c. 11, Statutes of Canada 1930.”), did the same. See supra text accompanying notes 175–79.

243. In writing for the Supreme Court of the United States in an opinion upholding the constitutionality of a state statute allowing the prosecution to appeal questions of law following a jury’s acquittal of the defendant, Justice Benjamin Cardozo focused upon the symmetry of a system allowing both the defendant and the prosecution to appeal a jury verdict. He stated, under the statute in question, “[t]he edifice of justice stands, its symmetry, to many, greater than before.” Palko v. Connecticut, 302 U.S. 319, 328 (1937), overruled by Benton v. Maryland, 395 U.S. 784 (1969).

244. FRIEDLAND, supra note 1, at 280 (commenting on the view that a new trial should not be allowed following an improper conviction because a new trial is not permitted following an improper acquittal).

245. Cf. id. (“The answers to the question whether there should be new trial in each case [following a successful appeal of an acquittal and following the successful appeal of a conviction] depend on considerations of policy and the factors influencing each are bound to be different.”).

246. See 18 U.S.C. § 3731 (2006); R v. T., [2005] EWCA (Crim) 3511, [1]–[2], [7], [16], [18] (Eng.) (allowing the prosecution’s appeal, taken pursuant to the Criminal Justice Act 2003, of the trial judge’s ruling quashing seven counts of an indictment on the ground they were defective in law).


248. To illustrate the fallacy in the “symmetry for symmetry’s sake” argument, one need only point out that, prior to 2003, Parliament could truly have made the appeal rights of the parties in a criminal case symmetrical by repealing the statutes granting a defendant the right to appeal a conviction, thereby creating a “symmetrical” system in
By its very nature, an Anglo-American legal system is asymmetrical. Only the government (i.e., the prosecution) has the power to haul a person into court and force her to defend herself against charges of criminal conduct. An individual whose name has been bandied about in the press as a “suspect” in a particular crime, or who is “rumored” to have committed a certain crime, cannot force the government to prosecute her so she can seek to be acquitted and thereby clear her name. Similarly, the standard of proof required in a criminal case results in an “asymmetrical” system, in that the prosecution, to obtain a conviction, must prove the defendant’s guilt beyond a reasonable doubt, but the defendant need only create a reasonable doubt of her guilt to be entitled to an acquittal. A “symmetrical” system would merely require the prosecution to meet a preponderance of the evidence standard to gain a conviction. So too, the defendant in a criminal case may, if she so desires, enter the witness box (i.e., take the stand) and testify in her own behalf; yet, because she is clothed with a privilege against self-

which neither the prosecution nor the defendant could appeal an adverse verdict. But certainly there are valid policy reasons for allowing a convicted defendant to appeal her conviction, reasons that apply without regard to whether the prosecution has a similar right to appeal. One would hope that in the 21st century no right-minded person would opt to disregard those reasons and, merely for the sake of symmetry, opt for a system that precludes a convicted (and perhaps factually innocent) defendant from showing that her conviction resulted from a legal error at her trial.

249. Although a private individual can, under certain circumstances, bring a criminal prosecution in England, see supra note 117, such prosecutions are rare. See SPRACK, supra note 16, § 4.20.


251. See, e.g., Martin v. Ohio, 480 U.S. 228, 234 (1987) (“When the prosecution has made out a prima facie case and survives a motion to acquit, the jury may nevertheless not convict if the evidence offered by the defendant raises any reasonable doubt about the existence of any fact necessary for the finding of guilt.”).

252. Rock v. Arkansas, 483 U.S. 44, 49 (1987) (“At this point in the development of our adversary system, it cannot be doubted that a defendant in a criminal case has the right to take the witness stand and to testify in his or her own defense.”); Criminal Evidence Act, 1898, c. 36, § 1 (Eng.) (“A person charged in criminal proceedings shall not be called as a witness in the proceedings except upon his own application.”) (emphasis added); SPRACK, supra note 16, § 20.58 (“The [defendant] is a competent . . . witness for the defence.”) (emphasis added). See also Criminal Justice and Public Order Act, 1994, c. 33, § 2 (Eng.) (“[T]he court shall, at the conclusion of the evidence for the prosecution, satisfy itself (in the case of proceedings on indictment with a jury, in the presence of the jury) that the accused is aware that the stage has been reached at which
incrimination, the prosecution cannot call her to testify, no matter how favorable her testimony would be to the prosecution’s case. In each of these situations a policy decision has been made that there is a need for asymmetrical rights. Thus, for policy reasons, Anglo-American systems of criminal justice have been (and are) asymmetrical, and will continue to be so, even though the prosecution might possess greater appeal rights than in the past.

Moreover, despite the recent legislation in England granting the prosecution the right to appeal certain rulings, appeal rights in that country are still asymmetrical. For instance, only the defendant can appeal a non-directed verdict rendered by a jury. Certainly if one were going to focus on symmetry as a justification for expanding the appeal rights of the prosecution, one would, to be consistent, have to argue that the prosecution should be permitted to appeal a jury’s non-directed verdict of not guilty. Yet the English Law Commission opposed such an expansion of appeal rights in its 2000 consultation paper on prosecution appeals, and in its 2001 report on that topic revealed that it had received “virtually no opposition” to that position. When contrasted with the fact that the Law Commission’s provisional conclusion “that there should be no right of appeal by the prosecution against a ruling of no case to answer” “gave rise to [a] significant level of . . . dissent,” it is clear even those favoring the expansion of the prosecution’s rights of appeal were satisfied with an asymmetrical system. Moreover, one could argue the current system of appeal rights in England is asymmetrical in another respect, because, while the prosecution can immediately appeal a trial judge’s ruling of no case to answer, the defendant cannot immediately appeal a trial judge’s refusal to allow a submission of no case to answer.

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253. Michigan v. Tucker, 417 U.S. 433, 440 (1974) (noting that the language of the Fifth Amendment privilege against self-incrimination clearly encompasses the “situation[] in which the prosecution seeks to call a defendant to testify against himself at his criminal trial”); Criminal Evidence Act, 1898, c. 36, § 1 (Eng.) (“A person charged in criminal proceedings shall not be called as a witness in the proceedings except upon his own application.”) (emphasis added). See generally 6 LAFAVE ET AL., supra note 222, § 24.5(d).

254. ENG. LAW COMM’N, CONSULTATION PAPER NO. 158, supra note 25, para. 6.26 (“We provisionally conclude that there should be no right of appeal by the prosecution against a jury’s verdict of not guilty, even where there has been a misdirection by the trial judge which may have favoured the defence.”).

255. ENG. LAW COMM’N, REPORT NO. 267, supra note 25, para. 7.78.

256. Id. (stating “[t]here was . . . no opposition . . . from any practitioner or judge”).

257. ENG. LAW COMM’N, CONSULTATION PAPER NO. 158, supra note 25, para. 6.20.

258. ENG. LAW COMM’N, REPORT NO. 267, supra note 25, para. 7.3.

259. See id. at para. 7.41 (“[T]he defence right of appeal is most properly and conveniently exercised at the end of the trial after conviction. It may, of course, include,
To put it succinctly, an Anglo-American criminal justice system is not, nor is it intended to be, a system containing symmetrical rights for the prosecution and the defendant. Why? Because “the parties are not of equal strength,”\textsuperscript{260} Indeed, the accused is “powerless[,] . . . relative to the [prosecution].”\textsuperscript{261} Putting aside other advantages it may possess,\textsuperscript{262} the prosecution—that is to say, the government\textsuperscript{263}—possesses an enormous advantage in resources over those possessed by an individual accused of crime, typically allowing it to do much more in its efforts to convict the individual than the individual can do in his defense. For example, if the prosecution knows a particular person’s testimony would be favorable to it, but does not know the person’s whereabouts, it can spend huge sums of money to track down the missing witness, perhaps even using the police department to help it. Moreover, not only can the prosecution assign numerous staff attorneys to prepare and present its case, it also can use doctors, scientists, and other forensic experts on the government payroll (or it can hire such individuals on a case-by-case

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\textsuperscript{260} FRIEDLAND, supra note 1, at 280 (commenting on the view that a new trial should not be allowed following an improper conviction because a new trial is not permitted following an improper acquittal).

\textsuperscript{261} N.S.W. LAW REFORM COMM’N, DISCUSSION PAPER 37, supra note 191, para. 4.14.

\textsuperscript{262} During the period between indictment and trial, the accused, unlike the prosecution, may suffer adverse physical and psychological effects, as well as significant financial consequences, see infra text accompanying notes 458–62, that can have a negative impact upon his case. For instance, the psychological effects of the charge upon the accused might hamper his ability to help his attorney prepare his defense, or an innocent individual, overwrought at the prospect of his looming trial, might plead guilty merely to “get the matter over with.”

\textsuperscript{263} But see supra note 117.
basis) to help in the investigation, preparation, and presentation of its case. In sum, the prosecution can spend “whatever it takes” in a particular case to obtain a conviction. On the other hand, it is unlikely that all but the wealthiest criminal defendants could afford to retain an attorney and then match, or even come close to matching, the government’s spending to allow the attorney to investigate the facts in the case and to prepare for trial.\footnote{This would seem to be true in England even though a criminal defendant who is “tried on indictment and acquitted” is entitled to be reimbursed, Prosecution of Offences Act, 1985, c. 23, § 16(2)(b) (Eng.), an “amount as the [trial] court considers reasonably sufficient to compensate him for any expenses properly incurred by him in the proceedings.” Id. § 16(6). For it is difficult for one to expend large sums of money he does not have, even if he knows that he will be, at least to some extent, reimbursed if he is acquitted at trial.} Nor is it likely that a legal aid attorney representing a defendant who lacks sufficient means to hire a lawyer\footnote{The Access to Justice Act 1999 eliminated a means test to qualify for legal aid in criminal cases (although leaving it open for a means test to be re-introduced through regulations). Access to Justice Act, 1999, c. 22, §§ 12–15, 17–17A, Sch. 3, §§ 1(1), 2(1), 3B(1), 5(1), (2) (Eng.). As a result, for about a decade, very few individuals in England retained private counsel to represent them in a criminal case. Norman Lefstein, \textit{In Search of Gideon’s Promises: Lessons from England and the Need for Federal Help}, 55 HASTINGS L.J. 835, 868 (2004) (stating that several solicitors told the author that the only people who retain private counsel in criminal cases are celebrities and those charged with corporate misconduct, and that “the Head of Public Legal Services for the Lord Chancellor’s Department commented that more persons retain private physicians in lieu of the National Health Service than defendants in criminal cases retain private lawyers”). Regulations that recently took effect, however, re-introduced a means test for cases tried in the Crown Court, which means that far fewer individuals will be entitled to a legal aid attorney at no cost to themselves. \textit{See Criminal Legal Aid Eligibility, LEGAL SERV. COMM’N}, http://www.legalservices.gov.uk/criminal/getting_legal_aid/means_testing_in_the_courts.asp (explaining the means test and stating that “[a]bout half of all defendants receive legal aid at the magistrates’ court, and about 3 out of 4 at the Crown Court”). \textit{See also PROPOSALS FOR THE REFORM OF LEGAL AID IN ENGLAND AND WALES ANNEX B 156-57 (Nov. 2010). See generally LEGAL AID IN THE CRIMINAL COURTS, available at http://www.legalservices.gov.uk/docs/nds_main/A_guide_to_CCMT.pdf.}} would be permitted to expend substantial sums from the public coffers for such purposes.\footnote{See \textit{supra} note 264.}

Arguing a particular procedure should be adopted merely to make part of the criminal justice system symmetrical fails to take into account this inequality between the parties. Certain safeguards must be afforded “the weaker of the two parties”\footnote{FRIEDLAND, \textit{supra} note 1, at 280 (internal quotation marks omitted).} to reduce, to some extent, the enormous advantage in resources that the government possesses. One logically could maintain, for example, that if the prosecution, with all its resources, managed to obtain a conviction, the defendant should be able to attack that conviction on appeal, but that if the prosecution, despite its enormous advantage in resources, could not present a sufficient case to convince a jury beyond a reasonable doubt that the defendant committed
the crime in question, or to convince a trial judge that the evidence introduced by the prosecution—even when taken most favorably to the prosecution—could not convince a jury beyond a reasonable doubt of the defendant’s guilt, that should be the end of the matter and no appeal from that decision should be allowed.

2. Clarifying the Law and Preventing It from Taking the Wrong Course

A second argument in favor of a prosecution right to appeal a trial judge’s ruling of no case to answer is that a successful appeal of an erroneous decision will help to clarify the law at issue in the particular case and prevent the law from following the wrong course. To illustrate: Assume D1 is charged with committing crime X and that at the close of the prosecution’s case D1’s attorney argues Y is an essential element of crime X and submits that because the prosecution failed to introduce any evidence of element Y, her client has no case to answer. Further assume the trial judge allows the submission, erroneously concluding that crime X does indeed require element Y. It could be argued that unless the prosecution can appeal that erroneous decision, not only will D1 be acquitted, but the law concerning crime X will be wrongly-stated and develop along the wrong path.

Such an argument, however, suffers from at least three serious flaws. First, the hypothetical stated above and other fact situations raising questions about the scope of the substantive law will rarely occur. For in the run-of-the-mill case involving a submission of no case to answer, the elements of the offense with which the defendant is charged are clear, and the judge merely must decide whether the prosecution introduced evidence that, if believed, would be sufficient to convince a jury beyond a reasonable doubt of the presence of each of those elements and of the identity of the defendant as the perpetrator of the offense. Such a decision is case-specific, and its resolution will not affect the development

268. See N.S.W. LAW REFORM COMM’N, DISCUSSION PAPER 37, supra note 191, para. 4.19; N.S.W. LAW REFORM COMM’N, REPORT 77, supra note 207, para. 2.29.

269. See R v. Galbraith, [1981] 73 Crim. App. 124, 127 (Eng.) (“If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case.”); SPRACK, supra note 16, § 20.49 (“If there is literally no evidence relating to an essential element of the offence . . . , a submission of no case must clearly succeed.”). See also ENG. LAW COMM’N, REPORT NO. 267, supra note 25, para. 7.50 & n.30 (setting forth criteria from Galbraith).
of the law with respect to the offense with which the defendant is charged. For example, in the Northern Ireland case involving “Mo” Courtney, there was no dispute about the elements of the crime of murder or about the fact that someone had murdered Alan McCullough. The only issue raised by Courtney’s submission of no case to answer was whether the evidence introduced by the prosecution was sufficient to show “Mo” Courtney was the person who killed, or at least participated in the killing of, Alan McCullough. Even if the prosecution could not have appealed the trial judge’s ruling of no case to answer and that ruling had stood, it would not have steered the law of murder in the wrong direction.

But even in those few cases that involve a legal question concerning the scope of the crime charged, such as, in the above hypothetical, whether that crime (crime \(X\)) requires a particular element (element \(Y\)), it is unlikely, even absent a prosecution right of appeal, that a decision by one trial judge will alter the course of the law. Assuming prosecutions for crime \(X\) occur with some frequency, it is highly probable that the same legal issue that arose in the prosecution of \(D_1\) will arise again in the prosecutions of other individuals. It is also fair to assume that in at least one of these other prosecutions, say the trial of \(D_2\), the trial judge, unlike the judge in the trial of \(D_1\), will conclude that element \(Y\) is not a required element of crime \(X\) and that \(D_2\) will be convicted of crime \(X\) and will appeal that conviction. On appeal, \(D_2\) will contend, as \(D_1\) did in his case, that he could not properly be convicted of crime \(X\) because the prosecution failed to prove the existence of element \(Y\). The issue whether element \(Y\) is an essential element of crime \(X\)—the issue the prosecution would have liked to appeal in \(D_1\)’s case—will then be joined before the Court of Appeal, and that court can reject the first trial judge’s erroneous interpretation and redirect the law of crime \(X\) to its proper path.

Finally, in cases such as the one in the above hypothetical, English law provides a procedure by which the government can seek to prevent the law from being diverted down the wrong path. Under the Criminal Justice Act 1972, when a person has been acquitted in a trial on an indictment, the Attorney General can obtain the opinion of the Court of Appeal on a point of law that arose in the case by referring the point to that court. The Court of Appeal gives its opinion on the point of law after a full adversary hearing at which both the Attorney General

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270. See supra text accompanying notes 11–39.
271. See supra text accompanying note 269.
272. Criminal Justice Act, 1972, c. 71, § 36(1) (Eng.).
273. Id. § 36(2)(a).
counsel for the acquitted individual,274 or an advocate appointed by the court as amicus curiae,275 present their arguments. Once the Court of Appeal has given its opinion on the point of law, it can refer that point to the Supreme Court of the United Kingdom, either on its own motion or pursuant to an application of one of the parties,276 to obtain that court’s opinion on the point.277 The opinion of the Court of Appeal (or the Supreme Court) on the point of law does not, however, “affect the trial in relation to which the reference [was] made or [the] acquittal in that trial.”278 Thus, even without a prosecution right of appeal, this Act provides a mechanism by which the Attorney General can have the Court of Appeal, and perhaps the Supreme Court, clarify an issue of law and set it on the proper path, without setting aside the acquittal of the accused in the particular case.279

3. Increasing the Accountability of Trial Judges

A third argument in favor of allowing prosecution appeals of a trial judge’s ruling of no case to answer is that such appeal rights will increase the accountability of trial judges by permitting their rulings to

274. The acquitted person can, if he so desires, have counsel present his argument on the point to the Court of Appeal (and Supreme Court of the United Kingdom) on his behalf. Id. § 36(2)(b) (also allowing the acquitted individual, with leave, to present his argument personally). An acquitted individual who appears by counsel is entitled to be reimbursed from public funds for his costs. Id. § 36(5).

275. ENG. LAW COMM’N, CONSULTATION PAPER NO. 158, supra note 25, para. 2.2 (stating that if the acquitted individual declines to argue the point of law, “the court may appoint an advocate as an amicus curiae”).

276. Criminal Justice Act, 1972, § 36(3) (providing that the Court of Appeal “may, of their own motion or in pursuance of an application in that behalf, refer the point to the Supreme Court if it appears to the Court of Appeal that the point ought to be considered by the Supreme Court”).

277. Id. § 36(4) (“If a point is referred to the Supreme Court . . . , the Supreme Court shall consider the point and give its opinion on it accordingly . . . .”).

278. Id. § 36(7).

279. ENG. LAW COMM’N, CONSULTATION PAPER NO. 158, supra note 25, para. 1.27. See also N.S.W. LAW REFORM COMM’N, DISCUSSION PAPER 37, supra note 191, para. 4.19 (concluding that, in light of the then-existing statutory authority of the Attorney General or Director of Public Prosecution to appeal important questions of law arising in a trial, without affecting the verdict or outcome of the particular trial, a new provision allowing the prosecution to appeal directed verdicts of acquittal “is not required in order to provide a means of preventing the criminal law from being corrupted by error”); N.S.W. LAW REFORM COMM’N, REPORT 77, supra note 207, para. 2.29 (“An appeal mechanism that aids the administration of the criminal law generally and avoids ‘rogue’ judgments corrupting the body of precedent already exists.”).
undergo the scrutiny of a higher court. Whenever a ruling by a trial judge is appealed, the appellate court considers, and usually comments upon, the propriety of that ruling, and if the appellate tribunal finds the trial judge made a sufficiently serious error, it will grant relief to the appealing party. Through this process “trial judges are, to some degree, held accountable for their interpretation and application of the law,” thereby helping to satisfy the public’s interest in ensuring that the trial court’s rulings against the prosecution represent fair applications of the existing law. On the other hand, when the prosecution cannot seek review of a particular ruling, “the trial judge will not be held accountable for the ruling through normal judicial processes.” This, in turn, leaves trial judges “free to behave in a lawless manner,” not necessarily in the sense of engaging in unlawful (i.e., criminal) activity, but in the sense of either being unable to reach the correct decision (i.e., the one required by existing law) because of their lack of legal knowledge or skill, or their not acting conscientiously when making their rulings. For example, some trial judges, especially those who are “weak” and who are presiding over a “difficult case,” might be tempted “too readily to accept defence submissions [of no case to answer] where they know that their reasoning will not be susceptible to scrutiny by the Court of Appeal.” Other judges might be lazy and might not put in sufficient time and effort before making a particular ruling. Regardless of how it might be manifested, such “[l]awless behavior destroys the actual and apparent fairness of the justice system,

280. Lord Williams of Mostyn, supra note 237, para. 54 (the then-Attorney General of England asked: “If a judge decides . . . to direct the jury to acquit a defendant, . . . [and] the prosecution [cannot] . . . test that decision on appeal . . . , are we not allowing in fact a system in which judges are unaccountable to the appeal courts as to a crucial aspect of their responsibilities . . . ?”).
281. Poulin, supra note 170, at 958 n.20.
282. Id.
283. Id. at 959.
284. Id.
285. Id.
286. Of course, criminal conduct on the part of a judge in connection with his judicial duties is not unheard of, at least in the United States. E.g., United States v. Maloney, 71 F.3d 645, 650 (7th Cir. 1995) (affirming the conviction of a judge for various offenses in connection with his taking bribes, inter alia, to acquit individuals in bench trials); People v. Aleman, 667 N.E.2d 615 (Ill. App. Ct. 1996) (holding that an individual previously acquitted of murder in a bench trial could be retried for the same offense because he had obtained the acquittal by bribing the trial judge), aff’g, Nos. 93 CR 28786, 93 CR 28787, 1994 WL 684499 (Cir. Ct., Oct. 12, 1994) (interim ruling on defendant’s motion to dismiss indictments).
287. ENG. LAW COMM’N, REPORT NO. 267, supra note 25, para. 7.57 (quoting a “senior trial judge with Court of Appeal experience”).
288. Id. (quoting a “senior trial judge with Court of Appeal experience”).
289. Id. at para. 7.62.
and may also harm the public directly by freeing criminal offenders despite the existence of adequate proof of guilt.\textsuperscript{290} Allowing the prosecution to appeal rulings of no case to answer, so the argument goes, will thus serve “the public interest in judicial accountability,”\textsuperscript{291} first, by permitting an appellate court to rectify an “error”\textsuperscript{292} made by the trial judge in ruling the defendant had no case to answer, and second, by forcing a trial judge, when faced with a submission of no case to answer, to “concentrate [his] mind[,] and improve both the quality of [his] decision . . . and its expression”\textsuperscript{293} because of the desire not to have his ruling overturned on appeal.\textsuperscript{294}

\textsuperscript{290} Poulin, \textit{supra} note 170, at 959.

\textsuperscript{291} \textit{Id.}

\textsuperscript{292} The word “error” is enclosed in quotation marks because a ruling by a trial judge is deemed to be erroneous whenever the majority of an appellate court disagrees with the trial judge’s decision. In fact, it may not be an “error” at all. For it is quite conceivable (as illustrated by the numerous cases in which a supreme court reverses the decision of an appellate court disagreeing with the ruling of the trial judge) that the trial judge—not the appellate court—reached the “correct” result. See \textit{Eng. Law Comm’n, Consultation Paper No. 158, supra} note 25, para. 3.19 n.21 (acknowledging that “appellate courts . . . can make mistakes”). However, because the appellate court is a “higher” court than the trial court, its decision will stand (unless, of course, an even higher court overturns its decision).

\textsuperscript{293} \textit{Eng. Law Comm’n, Report No. 267, supra} note 25, para. 7.62.

\textsuperscript{294} In a 1999 lecture, the then-Attorney General of England said that he “strongly suspect[ed] that the mere existence of a prosecution right of appeal, even if only sparingly used, could lead to a significant and beneficial change in the culture of practice in the criminal courts.” Lord Williams of Mostyn, \textit{supra} note 237, para. 53–55 (discussing whether to allow the prosecution to appeal (1) directed verdicts of acquittal; (2) a trial judge’s decision “to stay a prosecution on the ground of abuse of process,” see \textit{supra} note 132, \textit{supra} text accompanying notes 148–55; see \textit{generally Choo, supra} note 148; and (3) “[a trial judge’s] ruling concerning the admissibility of evidence which has the effect of depriving the prosecution of a crucial plank in its case.”). Similarly, the Crown Prosecution Service, in its response to the English Law Commission’s 2000 consultation paper on prosecution appeals of judges’ rulings, claimed that “[t]he mere existence of the right [to appeal] would serve to improve the quality of such rulings . . .” \textit{Eng. Law Comm’n, Report No. 267, supra} note 25, para. 7.60 (quoting the response of the Crown Prosecution Service). See also \textit{id.} at para. 7.57 (setting forth one line of argument against its provisional conclusion that the prosecution should not be allowed to appeal a trial judge’s ruling of no case to answer as: “The possibility of an appeal against an acquittal arising from an erroneous ruling of no case would help to ’keep the judges honest.’”). Cf. House of Commons Select Committee on Home Affairs, 1999–2000 session, Minutes of Evidence, Jan. 25, 2000, \textit{available at} http://www.publications.parliament.uk/pa/cm199900/cmselect/cmsaff/190/0012505.htm (the then-Director of Public Prosecutions, David Calvert-Smith, testified that the prosecution should be permitted to appeal a trial judge’s ruling that a trial would be an abuse of process, in part, because “if a judge knows that he can be appealed either way in due course, he, or she, is going to focus carefully on the decision”).
The response to this argument, however, is quite simple: A defendant should not have to pay the price of a second trial because of a weak, lazy, incompetent, or dishonest judge. Although the judge in a common law system plays a neutral role in the trial, she “is more closely allied with the government than with the accused.” For she is appointed by the state, and is compensated by the state for performing judicial functions, and under certain circumstances, can be removed from

295. Or even the resumption of his initial trial. See Criminal Justice Act, 2003, c. 44, § 61(4)(a), (5), (6), (8) (Eng.). Even if the appellate court found that the trial judge did not err in allowing the defendant’s submission of no case to answer and upheld the acquittal, the defendant still may have “paid” the cost of an appeal in having “faced an unnecessary emotional and financial burden.” N.S.W. LAW REFORM COMM’N, REPORT 77, supra note 207, para. 2.13.

296. R v Jessop, [1974] Tas SR 64, 87 (Crim. App.) (Chambers, J., dissenting) (“If the [trial] judge makes a mistake and the accused is acquitted, then the setting aside of the verdict may involve the accused in the emotional ordeal of going through it all again, although the mistake was something over which he had no control.” (emphasis added)). See also N.S.W. LAW REFORM COMM’N, REPORT 77, supra note 207, para. 2.23. But see FRIEDLAND, supra note 1, at 297–99 (stating that the “initial presumption must be . . . [that] an accused should not have to pay the price of a second trial because of a lack of judicial competence in the particular case,” but concluding that the prosecution should not “bear the risk of [judicial] error” in those cases in which “the error must have,” rather than may have, contributed to the acquittal, such as in cases in which the trial judge directed a verdict of acquittal).

Of course, this argument does not apply if the defendant participated in a “corrupt” ruling by the judge, for example, by bribing the judge. See Rudstein, Retrying the Acquitted in England: Part II, supra note 44, at 265–69. It is interesting to note that, although the Court of Appeal can, under certain circumstances, quash a “tainted” acquittal and order that the previously-acquitted individual be re-tried, see Criminal Procedure and Investigations Act, 1996, c. 25, §§ 54–57 (Eng.), it cannot so when the acquittal was obtained through the defendant’s bribery or intimidation of the trial judge. See id. § 54(1)(b) (limiting the provision to situations in which the previously-acquitted defendant was subsequently “convicted of an administration of justice offence involving interference with or intimidation of a juror or a witness (or potential witness) in any proceedings which led to [his] acquittal”). One explanation may be that an individual charged with a felony in England cannot opt for a bench trial, see supra note 57, so a defendant in England cannot choose to be tried by a judge alone and then “buy” a finding of not guilty, as apparently occurred in the cases cited supra in note 286. Nevertheless, despite the inability to obtain a bench trial, an English defendant could, theoretically, bribe or intimidate the trial judge either to allow a submission of no case to answer or to exclude evidence so important to the prosecution’s case that a finding of no case to answer is inescapable. An alternative explanation for excluding the bribing or intimidating of a trial judge from the “tainted” acquittal provisions of the Criminal Procedure and Investigations Act 1996 is that Parliament did not believe that English judges are corruptible or subject to intimidation.

297. FRIEDLAND, supra note 1, at 298.

298. In England, the Queen, upon the recommendation of the Lord Chancellor appoints Circuit judges to serve on the Crown Court. Courts Act, 1971, c. 23, § 16 (Eng.). In addition, the Queen, upon the recommendation of the Lord Chancellor, may appoint Recorders “to act as part-time judges of the Crown Court,” id. § 21(1), for a fixed, extendable term. Id. §§ 21(3)(a), (4A).

299. Id. § 18 (Circuit judges); id. § 21(7) (Recorders).
office by the state. If the state is concerned about the work habits, competence, and honesty of its judges, it should focus its attention on direct means of improving the quality of the judiciary, rather than relying upon the indirect means of allowing the prosecution to appeal trial judges’ rulings. It could begin by selecting more qualified individuals to serve on the bench, perhaps by engaging in a more thorough vetting process, and certainly by eliminating political considerations in appointments to the bench. In conjunction with choosing more qualified individuals, it could be more vigilant in its oversight of sitting judges, conducting educational programs for those whose rulings frequently appear to be inconsistent with established law, and if necessary, attempting to remove any judges who engage in misconduct. Certainly any judge who engages in criminal activity in conjunction with his office should be prosecuted criminally. The steps outlined above should have a far

300. The Lord Chancellor, with the agreement of the Lord Chief Justice, can remove a Circuit judge “on the ground of incapacity or misbehaviour,” id. § 17, and may decline to extend the term, or terminate the appointment, of a Recorder, on the ground, inter alia, of “incapacity or misbehaviour,” or that a circumstance for termination specified in the initial appointment applies. Id. §§ 21(4C)(a), (c), (6)(a), (c). E.g., Office for Judicial Complaints, OJC 53/11, Statement from the Office for Judicial Complaints: Mr. James Allen QC (Nov. 2, 2011) (stating that the Lord High Chancellor and the Lord Chief Justice removed Judge Allen, a Deputy High Court Judge and a Recorder, from his judicial positions following his conviction for assault, because his actions “brought the judiciary into disrepute”), available at http://judicialcomplaints.judiciary.gov.uk/docs/ Mr_James_Allen_QC_-_OJC_Investigation_Statement_-_3311.pdf.

301. See FRIEDLAND, supra note 1, at 298–99.

302. See supra note 298.

303. Poulin, supra note 170, at 987.

304. See supra note 300.

305. Poulin, supra note 170, at 987–88 (“When a prosecutor has adequate proof of conduct that is criminal, the prosecutor can pursue charges against both the defendant who procured the acquitted and the judge . . . who was corrupted.”).

A judge who, in relation to his judicial duties, engages in misconduct amounting to criminal activity can be subjected to a criminal prosecution. See, e.g., ARCHBOLD, supra note 15, § 31-138 (“Where a person in the position of trustee to perform a public duty takes a bribe to act corruptly in discharging that duty, it is an offence in both parties. . . . This formulation of the offence is clearly wide enough to embrace those involved in the administration of justice, such as . . . a justice (R. v. Gurney (1867) 10 Cox 550) . . . .”);
greater impact on holding trial judges accountable for their rulings than merely making their rulings against the prosecution subject to review on appeal, and it would do so without placing the burden for increasing their accountability on the backs of acquitted defendants. 306

4. Ensuring the Accuracy of the Outcome

A primary goal—if not the primary goal—of any criminal justice system is to identify, convict, and punish those who violate the law.307 Society is justifiably concerned about the erroneous acquittal of a guilty person.308 For an erroneous acquittal of an individual charged with a

4 BLACKSTONE, supra note 26, at *139 (“Bribery is where a judge . . . takes any undue reward to influence his behaviour in office.”).

306. Of course, too great an oversight on trial judges might make them reluctant to rule against the prosecution. Cf. Poulin, supra note 170, at 991 (discussing the possible ramifications of investigations for corruption when a trial judge acquits an individual in a bench trial). Nevertheless, one could argue that the same result might occur under a regime in which the prosecution can appeal a trial judge’s rulings, especially a ruling of no case to answer. The judge might think, “If I rule that the defendant has no case to answer, the prosecution might appeal that decision, and it is possible that I will be shown to have been mistaken in my ruling. On the other hand, if I rule in favor of the prosecution and find there is a case to answer, the defendant might be acquitted by the jury—a likely result, because, in my learned opinion, the prosecution did not introduce sufficient evidence to prove the defendant’s guilt—and the prosecution cannot appeal that verdict. Under such circumstances, the defendant gets what he wants—an acquittal—and my decision will not have been held to be error by the Court of Appeal.”

307. 1 LAFAYE ET AL., supra note 222, § 1.5. See also ENG. LAW COMM’N, CONSULTATION PAPER NO. 158, supra note 25, para. 3.3.

308. An erroneous acquittal can occur in several ways. It is most likely to be the result of an erroneous factual conclusion reached by the fact finder in the case. In any litigation, including criminal prosecutions, “[t]here is always . . . a margin of error in factfinding.” In re Winship, 397 U.S. 358, 364 (1970) (quoting Speiser v. Randall, 357 U.S. 513, 525 (1958)), because “in a judicial proceeding in which there is a dispute about the facts of some earlier event, the factfinder cannot acquire unassailably accurate knowledge of what happened. Instead, all the factfinder can acquire is a belief of what probably happened.” Id. at 370 (Harlan, J., concurring). This belief of “what probably happened” must be based upon the evidence introduced by the parties at trial. We know, however, “that the trier of fact will sometimes, despite [its] best efforts, be wrong in [its] factual conclusions.” Id. In a criminal prosecution, “a factual error can make a difference in one of two ways. First, it can result in a judgment in favor of the [prosecution] when the true facts warrant a judgment for the defendant,” id., that is, the fact finder “convict[s] an innocent man.” Id. at 370–71. Or, “an erroneous factual determination can result in a judgment for the defendant when the true facts justify a judgment in [the prosecution’s] favor,” id. at 371, that is, the fact finder “acquit[s] . . . a guilty man.” Id. See also Paul Roberts, Double Jeopardy Law Reform: A Criminal Justice Commentary, 65 M.L.R. 393, 402 (2002) (“A fallible human process like criminal adjudication is going to make mistakes in both directions, convicting some people who are factually innocent and acquitting others who are factually guilty.”). In addition, an erroneous acquittal can result from a trial judge’s finding of no case to answer based upon his erroneous legal conclusion that either (1) the crime at issue requires a particular element (and his finding that the prosecution did not introduce any evidence to show the presence of that element), see supra text accompanying notes 50–
serious crime, such as murder, robbery, or rape, usually will allow a
dangerous person to remain at-large in the community, where he or
she may commit other serious crimes in the future. Moreover, erroneous
acquittals, at least in serious cases, can spawn a lack of respect for,
and confidence in, the criminal justice system. Nevertheless, the goal
of the criminal justice system in a civilized democracy is not merely
to convict and punish the guilty, but to convict and punish only the guilty,
that is, it must ensure, insofar as possible, that those who did not
transgress the law are not convicted and are not subjected to criminal
sanctions. Thus, the goal of a criminal trial in an Anglo-American

51, 53, or (2) the evidence introduced by the prosecution, taken at its highest, was insufficient to prove the defendant’s guilt beyond a reasonable doubt. See supra text accompanying note 52–53. It is also possible that the jury will reach the correct factual conclusions but erroneously acquit the defendant because it has misinterpreted the law, either on its own or due to a misdirection by the trial judge. Finally, the jury might reach both the correct factual and legal conclusions and yet still “erroneously” acquit the accused as an act of jury nullification. See infra text accompanying notes 348–55.

309. In some cases, an erroneously acquitted individual will remain in custody for some other offense. See, e.g., Benton v. Maryland, 395 U.S. 784, 785 (1969) (even if the jury had erroneously acquitted the accused of larceny, he would still have remained in custody because the same jury convicted him of burglary, for which he was sentenced to serve ten years’ imprisonment). In other cases the erroneously acquitted individual will be initially released from custody, but shortly thereafter will be arrested, convicted, and imprisoned for another offense. See, e.g., R v. Dunlop, [2006] EWCA (Crim) 1354, [10], [12], [2007] Crim. App. 8, at 120–21 (Eng.) (an individual erroneously acquitted of murder subsequently was convicted of an unrelated assault and sentenced to seven years’ imprisonment, and then, two years later, pleaded guilty to committing perjury in his murder trial and was sentenced to six years’ imprisonment).

310. The English Law Commission believes that

The general public . . . is well aware that the evidence against a defendant will sometimes fail to satisfy [the very high] standard [of proof required in a criminal case] although the defendant is in fact guilty; and, in the ordinary run of offences against property and minor assaults, the public is generally content to accept this as the price to be paid for the presumption of innocence.

ENG. LAW COMM’N, CONSULTATION PAPER NO. 156, supra note 25, para. 5.23.

311. Id. at para. 1.4; ENG. LAW COMM’N, REPORT NO. 267, supra note 25, para. 4.5.

312. Requiring that the prosecution prove a defendant’s guilt beyond a reasonable doubt, see supra text accompanying note 250, is one procedural device adopted in common law jurisdictions to help ensure that factually innocent individuals are not erroneously convicted. Winship, 397 U.S. at 363. See also Rudstein, Retrying the Acquitted in England, Part I, supra note 44, at 429–30.

313. ENG. LAW COMM’N, CONSULTATION PAPER NO. 158, supra note 25, para. 3.3. See also Roberts, supra note 308, at 404 (“Liberal states have an obligation to detect, catch, try and punish offenders, but that obligation can be legitimately discharged only under certain conditions. Prominent amongst them is the condition that appropriately strenuous efforts be made to avoid wrongful convictions.”).
This leads to the strongest, and perhaps only viable, argument in favor of allowing prosecution appeals of trial judges’ rulings of no case to answer. It is urged that such appeals will enhance the accuracy of the outcome of criminal proceedings, “because an accurate outcome is more likely to be achieved if the law is correctly applied than if it is not.” As explained by the English Law Commission, “[a] prosecution right of appeal is designed to remove an inaccuracy which benefits the defendant, (for instance, a wrong ruling by a judge on the law). By correcting the inaccuracy, a successful appeal makes it more likely that a guilty defendant will be convicted.” Allowing prosecution appeals of a trial judge’s ruling of no case to answer therefore will, according to this argument, prevent “miscarriage[s] of justice” in some cases by overturning rulings that would otherwise result in the final acquittal of an individual who in fact is guilty of committing a crime.

In addition to preventing miscarriages of justice, when a trial judge erroneously allows a submission of no case to answer, she not only “deprives the jury of a proper opportunity to judge the case,” but also denies the prosecution a full and fair opportunity to convict the defendant. This in turn arguably can “diminish[] the legitimacy of the resulting acquittal” and “may appear to interested persons and the public to be the product of bizarre technicality,” thereby “damag[ing] public confidence in the system.”

The Law Commission recognized that “appellate courts too can make mistakes,” but concluded that, for purposes of its analysis, it was “reasonable to suppose that generally the appeals process works, in the sense of correcting errors at first instance and not overturning correct first instance decisions.”

As discussed infra text accompanying notes 501–546, allowing prosecution appeals of rulings of trial judge may, in some circumstances, lead to a wrongful conviction.
Commission, “[i]f a case is to fail on a legal argument it is better for public confidence in the system of criminal justice that it be susceptible to the second opinion of a higher court than that it be unappealable.”

**B. The Policies Underlying the Rule Against Double Jeopardy**

As stated earlier, even if the rule against double jeopardy itself does not preclude prosecution appeals of trial judges’ rulings of no case to answer, the underlying policies of that rule are relevant in analyzing the wisdom of allowing such appeals. The double jeopardy prohibition against prosecuting an acquitted individual a second time for the same offense serves a number of related interests, both of the individual and of society as a whole. This section of the Article will discuss how each of these policies applies to prosecution appeals of a ruling of no case to answer.

**1. Encouraging Efficient Investigation and Prosecution**

Allowing the government to retry a previously-acquitted individual for the same offense would, as a general matter, give rise to the danger that the police would not initially investigate the matter, and prosecutors

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326. ENG. LAW COMM’N, REPORT NO. 267, supra note 25, para. 7.63.
327. See supra text accompanying notes 231–32.
329. The policies will be discussed in a different order than those in which they were initially presented.
330. ENG. LAW COMM’N, CONSULTATION PAPER NO. 156, supra note 25, para. 4.11; AUSTRALIAN MODEL CRIMINAL CODE, DISCUSSION PAPER, supra note 111, at 2; N.Z. LAW COMM’N, REPORT 70, supra note 127, para. 16; Dennis, supra note 125, at 941. See also FRIEDLAND, supra note 1, at 4 (“It is to the first trial . . . that [the] efforts [of the police] should be directed.”); SELECT COMMITTEE ON HOME AFFAIRS, THE DOUBLE JEOPARDY RULE, supra note 27, para. 19 (noting that one of the arguments against
would not initially prosecute the case, as diligently as they otherwise might because they would know that, should the first prosecution fail, they would get a "second bite at the cherry" and could carry out a more thorough investigation before, and conduct a more vigorous prosecution at, the individual's second trial. The fact that the rule against double jeopardy generally provides the government with "but creating exceptions to the traditional rule barring a retrial following an acquittal is that "a second opportunity to prosecute would encourage the police to be less thorough in their initial investigation".

331. Dennis, supra note 125, at 941; see also Friedland, supra note 1, at 4 ("It is to the first trial . . . that [the] efforts [of the prosecutor] should be directed.").

332. Ian Dennis, Double Jeopardy: A Second Bite at the Cherry, [1999] CRIM. L.R. 927, 927. See also Burks v. United States, 437 U.S. 1, 17 (1978) ("second bite at the apple").

333. Initially, the Author was somewhat skeptical of the argument that police officers would conduct a less diligent investigation of a case if they knew that the government would be able to try an individual a second time following an unsuccessful prosecution. A number of veteran police officers, from both urban and suburban police departments in the United States, assured the Author that the skepticism was unwarranted. They informed the Author that, given the heavy case loads of their police departments, they, and their fellow officers, would be much more willing to "wrap up" an investigation and "move on to the next case" at an earlier point under a regime that allowed the government to retry an individual should he be acquitted at trial than under the current regime that bars a subsequent prosecution following an acquittal. Given the heavy case loads facing prosecutors in urban areas in the United States, it would not be surprising to find that they possessed the same mind-set as police officers. With respect to England, the Author is willing to defer to the conclusions of the Law Commission. See Eng. Law Comm'n, Consultation Paper No. 156, supra note 25, para. 4.11.

334. In England, as in the United States, retrials normally are permitted following the discharge of the jury and the declaration of a mistrial. R v. Davison, [1860] 175 E.R. 1046 (Eng. Cent. Crim. Ct.) 1048; 2 F. & F. 250, 254 (Pollock, C.B.) (concluding that a defendant can be retried when the trial judge, in the exercise of his discretion, discharged the jury); id.; 2 F. & F. at 255 (Martin, B.) (same); id.; 2 F. & F. at 255 (Hill, J.) (same); Archbold, supra note 15, § 4-262; Eng. Law Comm'n, Report No. 267, supra note 25, paras. 2.47, 2.50–.51; Oregon v. Kennedy, 456 U.S. 667, 673 (1982) (holding that retrial is constitutionally permissible following a mistrial declared at the request of the defendant, except when the prosecution engaged in conduct "intended to 'goad' the defendant into moving for [the] mistrial"); Arizona v. Washington, 434 U.S. 497, 505, 516 (1978) (holding that retrial is constitutionally permissible following a mistrial brought about by a manifest necessity, such as a deadlocked jury); Rudsteen, supra note 111, at 132–48.

bars a second trial when a defendant’s conviction is reversed by a reviewing court solely for lack of sufficient evidence to sustain the conviction).

In addition, in England, the Magistrates’ Courts Act 1980 allows the government to appeal an acquittal rendered in a magistrates’ court by way of case stated, and if successful, to retry the individual for the same offense. Magistrates’ Court Act, 1980, c. 43, § 111(1) (Eng.) (but limiting the grounds of such an appeal to a claim that the verdict was either “wrong in law or in excess of jurisdiction”). So too, the Criminal Justice Act 2003, Criminal Justice Act, 2003, c. 44, §§ 75–86 (Eng.), sets forth a procedure under which the government can prosecute an individual a second time for certain serious offenses, despite the individual’s previous acquittal, when “there is new and compelling evidence against the acquitted person in relation to the . . . offence,” id. § 78(1), and “it is in the interests of justice” to try the individual again. Id. § 79(1). See also Crimes (Appeal and Review) Act, 2001, §§ 98–100, 102, 104–06 (N.S.W.) (Austl.) (setting forth a procedure under which the government can retry an acquitted individual for a “life sentence offence” when “there is fresh and compelling evidence against the acquitted person in relation to the offence, and . . . it is in the interests of justice” to try the individual again); Criminal Code, 1899, §§ 678–678B, 678D, 678F–678H (Qld) (Austl.) (setting forth a procedure under which the government can retry an acquitted individual for certain serious offenses when there is “fresh and compelling evidence against the acquitted person in relation to the offence and it is likely that the new trial would be fair”); Criminal Code Act, 1924, §§ 390–91, 393, 395, 397, 397AC–397AD (Tas) (Austl.) (setting forth a procedure under which the government can retry an acquitted individual for a “very serious crime” when “there appears to be fresh and compelling evidence against the acquitted person in relation to the crime and it is in the interests of justice” to try the individual again). Similarly, the Criminal Procedure and Investigation Act 1996, Criminal Procedure and Investigation Act, 1996, c. 25, §§ 54–57 (Eng.), sets forth a procedure under which the government can retry an acquitted individual for offenses punishable by a period of 25 years or more when the acquittal was “tainted” by interference with or intimidation of a juror, witness, or potential witness. See also Crimes (Appeal and Review) Act, 2001, §§ 98–99, 101, 103–06 (NSW) (Austl.) (setting forth a procedure under which the government can retry an acquitted individual when the acquittal was “tainted”); Criminal Code, 1899, §§ 678–678A, 678C, 678E–678H (Qld) (Austl.) (setting forth a procedure under which the government can retry an acquitted individual for offenses punishable by a period of 25 years or more when the acquittal was “tainted”); Criminal Law Consolidation Act, 1935, §§ 331–32, 334, 337 (SA) (Austl.) (setting forth a procedure under which the government can retry an acquitted individual for offenses punishable by a period of 25 years or more when the acquittal was “tainted”); Criminal Code Act, 1924, §§ 390–91, 394, 396–97, 397AC–397AD (Tas) (Austl.) (setting forth a procedure under which the government can retry an acquitted individual for certain serious offenses when the acquittal was “tainted”); Criminal Code Act, 1924, §§ 390–91, 394, 396–97, 397AC–397AD (Tas) (Austl.) (setting forth a procedure under which the government can retry an acquitted individual for offenses punishable by a period of 25 years or more when the acquittal was “tainted”); Criminal Code Act, 1924, §§ 390–91, 394, 396–97, 397AC–397AD (Tas) (Austl.) (setting forth a procedure under which the government can retry an acquitted individual when the acquittal was “tainted”); Aleman v. Honorable Judges of the Circuit Court of Cook County, 138 F.3d 302, 303 (7th Cir. 1998) (affirming the denial of habeas corpus relief to an individual being retried for murder following his acquittal in a bench trial conducted before a judge whom he bribed), aff’g sub nom. United States ex rel. Aleman v. Circuit Court of Cook County, 967 F. Supp. 1022 (N.D. Ill. 1997); People v. Aleman, 667 N.E.2d 615 (Ill. App. Ct. 1996) (holding that an individual previously acquitted of murder in a bench trial could be retried for the same offense because he had obtained the
one chance to convict a defendant [therefore] operates as a powerful incentive to efficient and exhaustive investigation and prosecution from the outset.  

It is unlikely, however, that allowing the prosecution to appeal a trial judge’s ruling of no case to answer—and permitting the prosecution to retry the accused if it succeeds in the appeal—would cause police and prosecutors to be less efficient in their initial investigation and prosecution of crimes. As a general matter, when police are investigating a crime, and when prosecutors are preparing for a criminal trial, they have every incentive to obtain and present as much evidence as possible to establish the guilt of the individual suspected of, or charged with, committing the crime. For they cannot accurately predict whether the trial judge will find some of their evidence inadmissible under the applicable rules of evidence or, perhaps more importantly, whether the jury will reject as unreliable some of the evidence presented at trial or will refuse to draw some of the desired inferences from the evidence. Curtailing an investigation, or limiting the amount of evidence presented at trial, would increase the risk that the jury will find the evidence that is introduced at trial insufficient to prove the accused’s guilt beyond a reasonable doubt and therefore acquit the accused, which, in light of the prosecution’s inability to appeal a jury’s verdict of not guilty, would put an end to the case without a conviction.

335. ENG. LAW COMM’N, CONSULTATION PAPER NO. 156, supra note 25, para. 4.11. See also N.Z. LAW COMM’N, REPORT 70, supra note 127, para. 16 (stating that the argument that the rule against double jeopardy “promot[es] . . . efficient investigation preceding prosecution of the original trial” “has obvious force”). But see SELECT COMMITTEE ON HOME AFFAIRS, THE DOUBLE JEOPARDY RULE, supra note 27, paras. 46–48 (reporting that neither the Director of Public Prosecutions nor the Chief Constable of Kent agreed that an exception to the traditional rule against double jeopardy allowing a second trial when new evidence of an acquitted defendant’s guilt is discovered would “allow the police to proceed without due diligence” in their initial investigation, and concluding that “[w]e do not expect that the proposed relaxation of the double jeopardy rule would have an adverse impact on the quality of future police investigations” (emphasis deleted)).

336. Dennis, supra note 125, at 941.

337. The Criminal Justice Act 2003 does not permit the prosecution to appeal a jury’s verdict of not guilty. See Criminal Justice Act, 2003, c. 44, § 58(1) (Eng.) (“58. General right of appeal in respect of rulings. (1) This section applies where a judge makes a ruling in relation to a trial on indictment at an applicable time and the ruling relates to one or more offences included in the indictment.” (emphasis added)). Under previously-enacted statutes, the prosecution can appeal various rulings and decisions, such as those of a judge at a preparatory hearing, Criminal Procedure and Investigations Act, 1996, c. 25, § 35(1) (Eng.); Criminal Justice Act, 1987, c. 38, § 9 (11) (Eng.), and the sentence imposed upon a convicted defendant, Criminal Justice Act, 1988, c. 33, § 36(1) (Eng.), but not a jury’s verdict of not guilty. Although the Attorney General can
Allowing the prosecution to appeal a trial judge’s ruling of no case to answer does not change the incentives, so it is highly unlikely the police would end their investigation immediately after concluding the evidence they had thus far obtained was sufficient to survive a submission of no case to answer, or that prosecutors would seek and present only enough evidence to meet this standard. For even if they are correct and the limited amount of evidence survives a submission of no case to answer, the particular jury trying the case might view the evidence and the credibility of the witnesses differently than the police and prosecutors and find the defendant not guilty, thereby putting an end to the case. Moreover, evidence the police and prosecutors believe is sufficient to prove the defendant’s guilt beyond a reasonable doubt may be perceived differently by the trial judge, and she might put an end to the case without even permitting the jury to consider the evidence by acceding to a submission of no case to answer. If the prosecution could appeal such a ruling only with leave to appeal, as the Criminal Justice Act 2003 refer a point of law to the Court of Appeal following a jury acquittal, Criminal Justice Act, 1972, c. 71, § 36(1) (Eng.) (discussed supra text accompanying notes 272–78), such a reference does “not affect the trial in relation to which the reference is made or any acquittal in that trial.” Criminal Justice Act, 1972, c. 71, § 36(7) (Eng.). See generally ENG. LAW COMM’N, CONSULTATION PAPER NO. 156, supra note 25, paras. 2.2–17.

Assuming the trial judge properly directed the jury and made no erroneous evidentiary rulings adverse to the prosecution, the case would terminate even in those common law jurisdictions allowing the prosecution to appeal an error of law in a trial that resulted in the defendant’s acquittal. See supra text accompanying notes 175–76, 180–82, 190–91.

338. Police officers, for the most part, lack a legal education, and they almost certainly do not have experience in trying cases. In addition, the police are unlikely to have knowledge of all the evidence against the suspect possessed by prosecutors. As a result, the police probably would not even know when their investigation had reached the point that the evidence against the suspect would suffice to survive a submission of no case to answer, if indeed such point is identifiable. Moreover, even if the police concluded their investigation at the point at which the evidence would be just enough to survive a submission of no case to answer, prosecutors, after reviewing the evidence, would realize the case against the suspect was marginal at best and, consequently, would more than likely insist that the police resume their investigation in an attempt to discover additional evidence implicating the suspect in the crime in question.

339. As explained earlier, see supra text accompanying notes 54–55, if the evidence introduced by the prosecution at trial “is such that its strength or weakness depends on the view to be taken of a witness’s reliability, or other matters which are generally within the province of the jury,” and if “on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should the allow the matter to be tried by the jury.” R v. Galbraith, [1981] 73 Crim. App. 124, 127 (Eng.) (second emphasis added).

340. See supra note 337.
provides, and it did not obtain such leave, the trial judge’s ruling would stand, the defendant would be acquitted, and the prosecution would lose its case. Even if the prosecution obtained leave to appeal (or the statute authorizing the appeal did not require such leave), there would be no guarantee the Court of Appeal, in what almost by definition would be a “close case,” would conclude the trial judge erred in ruling the defendant had no case to answer, reverse that ruling, and order either a new trial or resumption of the initial trial. Therefore, even with a right to appeal a trial judge’s ruling of no case to answer, police and prosecutors can never be certain—or for that matter, even reasonably sure—that they will get a “second bite at the cherry” if the trial judge should rule that the defendant has no case to answer, and, consequently, will have every incentive to put forth their best efforts to investigate the crime, and convict the defendant, from the outset.

341. Criminal Justice Act, 2003, § 57(4) (requiring the prosecution to obtain leave to appeal from either the trial judge or the Court of Appeal).
342. As stated earlier, see supra note 76, in deciding whether to allow leave to appeal, the Court of Appeal, and presumably also the trial judge, must “look rather more widely at the interests of justice than simply . . . ask [itself] whether an appeal has a realistic prospect of success, or some other test directed solely at the merits of the appeal.” R v. A., [2009] EWCA 2186, [8], [2009] 1 Crim. App. 21, at 283 (Eng.).
343. In England, the Criminal Justice Act 2003 provides that the prosecution may not inform the trial court that it intends to appeal unless it also informs the trial court that it agrees that the defendant should be acquitted of the offense in question if it does not obtain leave to appeal. See Criminal Justice Act, 2003, § 58(8)–(9)(a). It further provides that if leave to appeal is not obtained, the trial “judge or the Court of Appeal must order that the defendant . . . be acquitted.” Id. § 58(12). See supra text accompanying notes 86–87.
344. It would have been highly unlikely that the trial judge would have acceded to the defendant’s submission of no case to answer if the prosecution introduced evidence clearly sufficient to convict. Moreover, if an appeal could be taken only with leave, it would be highly unlikely that such leave would have been given if the defendant clearly was entitled to a ruling of no case to answer, that is, if the prosecution’s evidence was undeniably insufficient to prove the accused’s guilt beyond a reasonable doubt, and the fact that it was given strongly indicates that the question whether the defendant had a case to answer is a close one.
346. See id. § 61(4)(a), (b).
Indeed, the Court of Appeal could reverse the trial judge’s ruling of no case to answer but still order that the defendant be acquitted if it concluded the defendant could not receive a fair trial if his initial trial were resumed or if a fresh trial were ordered. Id. § 61(4)(c), (5). Cf. R v. L., [2008] EWCA (Crim) 1970, [36]–[37], [2009] 1 Crim. App. 16, at 242 (Eng.) (the Court of Appeal reversed the trial judge’s ruling quashing the indictment against the individual defendants, but nevertheless directed the acquittal of those defendants because, relying on the language contained in the original version of section 61(5), it found it would not be “in the interests of justice” to order a new trial).
347. See generally Dennis, supra note 332.
2. Protecting the Power of the Jury to Acquit Against the Evidence

One of the purposes of the rule against double jeopardy—indeed, according to some legal scholars, the primary purpose—\textsuperscript{348} is to protect the prerogative of the jury, acting "as the conscience of the community in applying the law," \textsuperscript{350} to acquit against the evidence, \textsuperscript{350} that is, to find the defendant not guilty "even when its findings as to the facts, if literally applied to the law as stated by the judge, would have resulted in a conviction." \textsuperscript{351} A jury may exercise this power to "nullify" the law in a particular case, or to engage in what in England is called "jury equity," \textsuperscript{352} for a variety of reasons, \textsuperscript{353} such as its belief that the conduct engaged in by the defendant should not be a crime, \textsuperscript{354} or its feeling that the punishment for the crime in question is too severe. \textsuperscript{355}

\begin{itemize}
  \item \textsuperscript{348} Westen & Drubel, supra note 122, at 84.
  \item \textsuperscript{349} \textit{Id.} at 130.
  \item \textsuperscript{351} 6 LAFAVE ET AL., supra note 222, § 22.1(g).
  \item \textsuperscript{352} Roberts, supra note 308, at 422 & n.118.
  \item \textsuperscript{353} \textit{See generally} CLAY S. CONRAD, \textit{JURY NULLIFICATION: THE EVOLUTION OF A DOCTRINE} (1998); 6 LAFAVE ET AL., supra note 222, § 22.1(g).
  \item \textsuperscript{354} For example, a jury might be unwilling to convict a defendant of murder when, at the request of a terminally-ill individual, he intentionally killed that individual, \textit{e.g.}, \textit{Three Acquitted of Mercy Killing}, TOWNSVILLE BULLETIN (AustL), Oct. 24, 2001, at 16, \textit{available at} 2001 WLNR 5392278 (reporting that a doctor who used a lethal injection to kill a terminally-ill patient, hours after the patient begged another doctor to end her suffering, was acquitted of murder by a jury), or assisted him in committing suicide. CONRAD, supra note 353, at 149–50 (discussing two cases in which a jury acquitted individuals charged with assisting a suicide). \textit{See generally} SHAI J. LAVI, \textit{THE MODERN ART OF DYING: A HISTORY OF EUTHANASIA IN THE UNITED STATES 144–62} (2005). Or, a jury might acquit a battered wife charged with murder for intentionally killing her abusive husband, even though several days had intervened since he last beat her and she therefore did not have a valid claim of self-defense. \textit{See} Melissa Jenkins, \textit{Sniper Mother Walks Free – Murder Accquittal Sets New Defence for Battered Wives}, DAILY TELEGRAPH (Sydney), Mar. 4, 2006, at 1, \textit{available at} 2006 WLNR 3677321 (reporting that a jury found a battered woman who laid in wait before shooting her husband to death not guilty of either murder or manslaughter). \textit{See also} Lorna Knowles, Features, \textit{Battered Tasha Dances Towards New Life}, DAILY TELEGRAPH (Sydney), June 29, 2002, at 29, \textit{available at} 2002 WLNR 6118462 (reporting that the jury in a murder trial acquitted a battered woman who stabbed her de facto husband to death during an argument); CONRAD, supra note 353, at 151–52.
\end{itemize}
At first glance, it would appear that allowing the prosecution to appeal a trial judge’s ruling of no case to answer does not frustrate this policy because a ruling of no case to answer ends the case, at least temporarily, favorably to the accused before the jury even has an opportunity to consider the evidence. Nevertheless, a closer examination must be undertaken because of two factors. First, a defendant possesses what the United States Supreme Court calls a “valued right to have his trial completed by a particular tribunal,” and second, judges may be entitled to engage in nullification of the law, that is, to dispense what might be termed “judicial equity.”

After the commencement of trial, the prosecution sometimes may believe the case is “going badly” for it, either because of its own mistakes, the trial judge’s adverse rulings, the unexpected strength of the defendant’s case, or a jury that appears sympathetic to the accused or hostile to the prosecution. Rather than continue the trial to what it believes will be an unfavorable conclusion, i.e., the acquittal of the accused, the prosecution might prefer to have “another, more favorable opportunity to convict the accused” by starting the trial anew. Doing so, however, would “deprive[] the defendant of his option to go to the first jury” and infringe upon his interest in “being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate.” Accordingly, in the United States, the constitutional guarantee against double jeopardy bars retrial if the trial judge, without the defendant’s consent and in the absence

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359. Id.
361. See supra text accompanying note 112.
362. Oregon v. Kennedy, 456 U.S. 667, 676, 679 (1982) (holding a retrial is constitutionally permissible following a mistrial declared at the request of the defendant, except when the prosecution engaged in conduct “intended to ‘goad’ the defendant into moving for [the] mistrial”); United States v. Dinitz, 424 U.S. 600, 607–08, 611 (1976) (holding that a retrial is permissible following a mistrial declared at the request of, or with the consent of, the defendant, even if his request is necessitated by judicial or prosecutorial error).
of a “manifest necessity,” \(^{363}\) declares a mistrial, \(^{364}\) either \textit{sua sponte} \(^{365}\) or at the request of the prosecution. \(^{366}\) In England, the Court of Appeal, more than one hundred years ago, warned trial judges not to discharge a jury “in order to allow the prosecution to present a stronger case on another trial,” \(^{367}\) and it may well be that if a trial judge fails to heed this admonition and discharges a jury so the prosecution can present a stronger case at a retrial, the judge at the retrial could stay the proceedings as an abuse of the court’s process. \(^{368}\)

\(^{363}\) United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824) (holding the Double Jeopardy Clause of the Fifth Amendment does not preclude retrial when a trial judge, without the defendant’s consent, declares a mistrial because “there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated”). See also Renico v. Lett, 130 S. Ct. 1855, 1862–64 (2010) (discussing “[t]he clearly established Federal law in this area” (quoting 28 U.S.C. § 2254(d)(1) (2006)); Washington, 434 U.S. at 505–17 (discussing the meaning of “manifest necessity”).

\(^{364}\) Washington, 434 U.S. at 507–08 (”At one extreme are cases in which a prosecutor requests a mistrial in order to buttress weakness in his evidence. Although there was a time when English judges served the Stuart monarchs by exercising a power to discharge a jury whenever it appeared that the Crown’s evidence would be insufficient to convict, the prohibition against double jeopardy as it evolved in this country was plainly intended to condemn this ‘abhorrent’ practice.” (footnote omitted)); United States v. Jorn, 400 U.S. 470, 489 (1971) (plurality opinion) (“[T]here are situations where the circumstances under which the mistrial was declared may be such as to bar a future prosecution. One example is where a judge exercises his authority to help the prosecution, at a trial in which its case is going badly, by affording it another, more favorable opportunity to convict the accused.” (quoting Gori v. United States, 367 U.S. 364, 369 (1961))).

\(^{365}\) Jorn, 400 U.S. at 487 (plurality opinion) (concluding the Double Jeopardy Clause of the Fifth Amendment prohibited retrial following the trial judge’s \textit{sua sponte} declaration of a mistrial to allow several government witnesses the opportunity to consult with attorneys about their privilege against self-incrimination).

\(^{366}\) Downum v. United States, 372 U.S. 734, 735–37 (1963) (holding the Double Jeopardy Clause of the Fifth Amendment prohibited retrial following the trial judge’s declaration of a mistrial, at the prosecutor’s request and over the defendant’s objection, because of the absence of a key government witness).

\(^{367}\) R v. Lewis, [1909] 2 Crim. App. 180, 182 (Eng.) (commenting on a situation in which the trial judge discharges the jury because the prosecution’s witnesses were not ready).

\(^{368}\) A trial judge in England can discharge the jury before it reaches a verdict if there exists an “evident necessity,” see Winsor v. R, [1866] 1 Q.B. 289, 305 (Eng.); 4 BLACKSTONE, supra note 26, at 360, “that is, a high degree of need for such discharge.” ARCHBOLD, supra note 15, § 4-253. The decision to discharge a jury is not subject to review, Lewis, [1909] 2 Crim. App. at 181; accord Criminal Justice Act, 2003, c. 44 § 57(2)(a) (Eng.) (providing that the prosecution has no right of appeal under the provisions of the Act in respect of “a ruling that a jury be discharged”), so that, ordinarily, the defendant can be retried. See R v. Davison, [1860] 175 Eng. Rep. 1046, (Cent. Crim. Ct.) 1048; 2 F. & F. 250, 254 (Pollock, C.B.) (concluding a defendant can be retried when the trial judge in the first trial exercised his discretion and discharged the jury); id.; 2 F. & F. at 255 (Martin, B.) (same); id.; 2 F. & F. at 255 (Hill, J.) (same). Accord ARCHBOLD, supra note 15, § 4-262. See generally id. §§ 4-253 to –263.
A trial judge’s ruling that the defendant has no case to answer, like the discharge of the jury before it reaches a verdict, ends the trial prematurely because it terminates the proceedings before the jury has had an opportunity to reach its own verdict based upon its own consideration of the evidence introduced by the parties at trial. It therefore could be argued that allowing the prosecution to appeal such a ruling could, if the appeal succeeds, result in a new trial, before a new jury,369 and thus deprive the accused of an opportunity to be acquitted by the original jury, one the accused may believe was favorably disposed towards him and that might have found him not guilty even if it concluded the evidence proved his guilt beyond a reasonable doubt. In other words, had the trial judge ruled correctly and held the defendant did have a case to answer, the jury might nevertheless have acquitted him against the evidence.370

(discussing the discharge of either individual jurors or the entire jury). Although there do not appear to be any cases on point, it would seem that if a trial judge disregarded the warning of the Court of Appeal in Lewis and discharged the jury “in order to allow the prosecution to present a stronger case on another trial,” Lewis, [1909] 2 Crim. App. at 182, the defendant could, at his retrial, seek to have the trial judge exercise her discretionary power to stay the proceedings as an abuse of the court’s process. R v. Martin, [1998] A.C. 917 (H.L.) 926 (Lord Lloyd of Berwick) (appeal taken from Eng.) (U.K.) (“[T]he categories of abuse of process, like the categories of negligence, are never closed.”). See generally CHOO, supra note 148; ARCHBOLD, supra note 15, §§ 4-47 to – 75. For such a power includes “a power to safeguard an accused person from oppression or prejudice,” id. § 4-54, “a formidable safeguard[, developed by the common law,] to protect persons from being prosecuted in circumstances where it would be seriously unjust to do so.” AG of Trinidad and Tobago v. Phillip, [1995] 1 A.C. 396, 417 (P.C. 1994) (appeal taken from Trinidad & Tobago) (U.K.). Accord Hui Chi-Ming v. R, [1992] 1 A.C. 34, 54–57 (P.C. 1991) (appeal taken from Hong Kong) (U.K.) (“The doctrine of abuse of process and the remedy of refusal to allow a trial to proceed are well established. . . . [A]n abuse of process . . . is . . . something so unfair and wrong that the court should not allow a prosecutor to proceed with what is in all respects a regular proceeding.”); Connelly v. DPP, [1964] A.C. 1254 (H.L.) 1354 (Lord Devlin) (appeal taken from Eng.) (U.K.) (“[T]he courts . . . [h]ave . . . an inescapable duty to secure fair treatment for those who come or are brought before them[.]”); R v. Beckford, [1996] 1 Crim. App. 94, at 100–01 (Eng.) (stating that one of the “two main strands” for exercising the jurisdiction to stay a proceeding for abuse of process is “where the court concludes that it would be unfair for the defendant to be tried”); R v. Derby Crown Court ex parte Brooks, [1985] 80 Crim. App. 164–65, 168–69 (Q.B.) (Eng.) (“It may be an abuse of process if . . . the prosecution have manipulated or misused the process of the court so as to deprive the defendant of a protection provided by the law . . . .”).

369. Under the Criminal Justice Act of 2003, if the Court of Appeal allows the prosecution’s appeal of a ruling of no case to answer, it can order a new trial, Criminal Justice Act, 2003, § 61(4)(b), which would have to be before a new jury if the original jury was discharged.

370. The defendant also could argue, more broadly, that by ruling he had no case to answer the trial judge prevented him from being acquitted by the jury on the basis of the evidence that would have been presented at trial, i.e., at the end of a complete trial, the jury might have found the evidence insufficient to prove the defendant’s guilt beyond a reasonable doubt. While the possibility that the jury would have acquitted the defendant based upon the insufficiency of the evidence certainly is more likely than the possibility that it would have acquitted against the evidence (because the trial judge believed the
Such an argument is unpersuasive, however. Aside from being highly speculative,\(^{371}\) nearly all circumstances the defendant, by submitting at the close of the prosecution’s case that he had no case to answer, will have asked the trial judge to end the case before the jury reached a verdict.\(^{372}\) By doing so, he has shown his preference that the case end then and there, and he has deliberately elected “to forgo his valued right to have his guilt or innocence determined by the particular jury.”\(^{373}\) If the defendant believed that the jury would have acquitted him, regardless of the evidence, he could have refrained from submitting that he had no case to answer and allowed the trial to run its course. Having chosen not to pursue that course, he cannot convincingly claim that allowing the prosecution to appeal the ruling of no case to answer interfered with the policy of allowing the jury to acquit against the evidence.

It is possible, however, that a trial judge who rules that the defendant has no case to answer may actually be engaging in an act of “judicial” nullification, or “judicial” equity, and acquitting the defendant against the evidence, that is, the trial judge is “acquit[ting] for reasons of evidence was insufficient and allowed the defendant’s submission of no case to answer), the response to this broader argument is the same as the response to the narrower argument discussed in the text, see infra text accompanying notes 371–72, and for that reason will not be discussed separately. Nevertheless, allowing the prosecution to appeal a ruling of no case to answer may create a dilemma for the accused at the close of the prosecution’s case: should he submit he has no case to answer and risk losing any advantages he may have gained at the trial if the trial judge accedes to his submission but the Court of Appeal reverses that ruling on appeal and orders a fresh trial, or should he refrain from submitting he has no case to answer (even though he believes such a submission would succeed) and take his chances with the jury. Eng. Law Comm’n, Consultation Paper No. 156, supra note 25, para. 6.15. This dilemma gives rise to the risk that an accused will not make a submission of no case to answer when it would be in his best interest to do so. Id. at para. 6.16. This dilemma is considered infra text accompanying notes 384–437.

371. Because a jury that acquits a defendant does not explain its reasons for doing so, it is impossible to determine the frequency of jury acquittals against the evidence. Nevertheless, one would expect such acquittals are relatively rare, and are limited for the most part to certain types of cases. See supra note 354–55 and accompanying text.
372. See supra text accompanying note 46, and supra note 47.
374. Cf. id. at 93–94 (“[A] motion by the defendant [for mistrial] is deemed to be a deliberate election on his part to forgo his valued right to have his guilt or innocence determined before the first trier of fact. ‘The important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of such error.’” (quoting United States v. Dinitz, 424 U.S. 600, 609 (1976))).
personal conscience, irrespective of the defendant’s actual guilt. One therefore could maintain that allowing the prosecution to appeal rulings of no case to answer thwarts the policy of permitting “the judicial system to temper the legislature’s generalized standards of criminal responsibility with lenity in particular cases.”

Nevertheless, this argument, too, is unpersuasive. At least three reasons make it highly unlikely that a trial judge’s ruling of no case to answer is actually an acquittal against the evidence, rather than what it purports to be, namely, a finding that the evidence introduced by the prosecution failed to prove the defendant’s guilt beyond a reasonable doubt. First, judges, unlike most individuals who serve on a jury, are professionals in the criminal justice system, and on a daily basis they are asked to supervise trials and apply the law in a neutral manner. As a result, they are likely to view it as their professional obligation to follow the law, certainly much more so than would individual members of the community who are thrust, perhaps unwillingly, into the role of a juror on a one-time, or at most occasional, basis. Second, judges in England are appointed to their positions, and for that reason a judge would most likely conclude that she, unlike a jury, would not be acting as a representative of the community if, despite sufficient evidence of the defendant’s guilt, she were to acquit him against the evidence by ruling that he had no case to answer. Finally, in most cases of jury

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375. Westen & Drubel, supra note 122, at 134.
376. Id.
377. But see id. at 134 n.250 (asserting that in the United States “judicial acquittals against the evidence are apparently quite a common . . . phenomenon” in bench trials (citing DONALD J. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 149 (1966))).
378. See Juries Act, 1974, c. 23, §§ 1–10 (Eng.) (detailing, inter alia, the eligibility requirements for, and the manner of summoning, jurors in England).
379. See supra note 298.
380. See United States v. Maybury, 274 F.2d 899, 903 (2d Cir. 1960) (Friendly, J.) (stating in a case involving an appointed judge that “the judge is hardly the ‘voice of the community,’ even when he sits in the jury’s place”).
381. Although judicial acquittals against the evidence may be quite common in the United States, see supra note 377, it is almost certain that virtually all of these acquittals occur in bench trials, in which the judge is acting not as a neutral “referee,” but rather as the trier of fact. Especially in those states in which trial judges are elected to their position by the voters in the community, see, e.g., 705 ILL. COMP. STAT. § 35/2 (2010); 42 PA. CONSOL. STAT. ANN. § 3131(a) (Supp. 2011), a judge who acquits an individual in a bench trial could be seen as doing so in her role as the “conscience of the community.” See supra text accompanying note 349. But see Maybury, 274 F.2d at 903 (Friendly, J.) (stating in a case involving an appointed judge that “the judge is hardly the ‘voice of the country,’ even when he sits in the jury’s place”). Moreover, one would expect that a trial judge would feel less constrained in acquitting against the evidence in a bench trial than in a jury trial (in which at the close of the prosecution’s case she would have to direct a verdict of not guilty, or in some jurisdictions enter a judgment of acquittal), because, in a bench trial, she is the only one who can “temper the legislature’s generalized standards
nullification, or jury equity, the prosecution’s evidence unequivocally proves the defendant committed the crime in question. In such situations, it would seem that a judge who disagreed with the law in question, and who desired to acquit the accused against the evidence by finding the accused had no case to answer, would be reluctant to do so, not only because of her professional obligations, but also because of the possible ramifications stemming from what clearly would be an erroneous decision based purely on her personal views. These ramifications could include disciplinary action against her, or even her removal from office. Thus, because of the slimmest of possibilities that a trial judge’s ruling of no case to answer is actually an instance of the trial judge’s acquitting against the evidence, allowing the prosecution to appeal such a ruling does not frustrate the policy of allowing “the judicial system to temper the legislature’s generalized standards of criminal responsibility with lenity in particular cases.”

3. Preserving the Finality of Judgments

“The public interest requires finality in litigation, including criminal litigation, . . . so that life can move on.” This statement by the English
Law Commission articulates what the Supreme Court of the United States has called “the primary purpose” served by the rule against double jeopardy. By precluding the government from reprosecuting an acquitted individual for the same offense, the rule maintains the finality of judgments and protects the “integrity” of those judgments. Once a person has been acquitted of a particular offense, the government must respect that judgment in the future. Even if it disagrees with the result, it cannot bring a second prosecution against the same person for the same offense. A person acquitted of a crime, along with his family and friends, therefore need not “live in a continuing state of anxiety and insecurity,” fearful that, despite the acquittal, the government will subsequently haul him into court a second time and compel him to defend against the same charge. Without such a


386. See also AUSTRALIAN MODEL CRIMINAL CODE, DISCUSSION PAPER, supra note 111, at 2–4 (discussing “the various interests in securing finality of decisions”); N.Z. LAW COMM’N, REPORT 70, supra note 127, para. 14 (“The need to secure a conclusion of disputes concerning status has long been recognised. The status conferred by acquittal is one of particular importance.”).

The doctrine of res judicata serves this purpose in civil cases. That doctrine provides that a final judgment based upon the merits of a claim precludes the plaintiff from instituting a second action against the same defendant for the same claim and, conversely, bars the defendant from subsequently raising a new defense to seek to defeat the enforcement of a judgment rendered against him in the action. See generally JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, CIVIL PROCEDURE §§ 14.1–8, 14.13 (4th ed. 2005).


388. Scott, 437 U.S. at 92.

389. See supra note 117.

390. But see supra note 334, discussing the recent exceptions to the rule against double jeopardy in England and Australia for fresh and compelling evidence and for so-called “tainted” acquittals.

391. ENG. LAW COMM’N, REPORT No. 267, supra note 25, para. 4.16 (“[T]here is some value in protecting certain third party interests by finality of criminal proceedings[such as] the emotional and financial interests of an acquitted person’s family and dependants.”); AUSTRALIAN MODEL CRIMINAL CODE, DISCUSSION PAPER, supra note 111, at 3 (paraphrasing the English Law Commission and stating that “the interests of finality also affect friends, family and others dealing with the person concerned,” and that “[s]ome weight must be given to the emotional and financial interests of these people”).


393. Id.; ENG. LAW COMM’N, REPORT No. 267, supra note 25, para. 4.11 (quoting a “very senior judge” as stating it is “important to preserve the principle that a defendant
limitation, a person found not guilty of a crime could never be sure he was effectively acquitted, no matter how many times a trier of fact found him not guilty, for the government could continue to try him again and again and again until it found a fact finder that would convict.

According absolute finality to a judgment of acquittal not only serves as an “antidote to distress and anxiety,” 394 it also allows the acquitted defendant to consider the matter closed and to plan his future accordingly. In this “important sense[,] . . . finality as a value . . . impact[s] . . . individual liberty or autonomy.” 395 In addition, according finality to a judgment of acquitted by a jury need not worry that he may have to undergo the trial process all over again”); ENG. LAW COMM’N, CONSULTATION PAPER NO. 156, supra note 25, para. 4.9 (“In a serious case the prospect of going through the trial process at some future date is likely to cause great anxiety . . . . At least some acquitted defendants will be prey to a constant and persisting sense of doubt.”); AUSTRALIAN MODEL CRIMINAL CODE, DISCUSSION PAPER, supra note 111, at 3 (“[T]hose subject, or potentially subject, to any double jeopardy should not be subjected to the anxiety and distress occasioned by the fear that he or she may have to undergo the admittedly stressful trial process all over again.”).


Professor Ian Dennis put it this way:

Fairness to the defendant— . . . an aspect of the state’s concern to treat all citizens with respect for their liberty and autonomy—results in a claim that final judgment of acquittal should represent a line drawn under the past. The defendant should be able to get on with the rest of his life in a state of security from further prosecution. We might say that an acquitted person deserves a fresh start: that it would be unfair to deprive him of the right of self-determination free of the restraints imposed by knowledge of the possibility of further interference in his life through reopening of the acquittal.

Dennis, supra note 125, at 941. See also Roberts, supra note 308, at 407 (“I surely have a keen[] interest . . . in knowing whether my autonomy is vulnerable to the potentially swinging restrictions of criminal sanctions.”).

The English Law Commission acknowledged that “[r]educing the personal autonomy of the individual may, of course, occasion distress and anxiety,” ENG. LAW COMM’N, REPORT NO. 267, supra note 25, ¶ 4.12, but it concluded that “that is not the only reason
acquittal “represents an enduring and resounding acknowledgement by the state that it respects the principle of limited government and the liberty of the subject,” making “[t]he rule against double jeopardy . . . a symbol of the rule of law” that “serves to emphasise commitment to democratic values.”

The Criminal Justice Act 2003 seeks to avoid contravening this policy underlying the protection against double jeopardy by providing that any ruling by a trial judge that is subject to appeal is not effective immediately, and that even if the trial judge should immediately enter a judgment of acquittal based upon that ruling, that judgment is to have no effect during the pendency of any appeal. A trial judge’s ruling of no case to answer therefore does not become “final,” and the trial judge cannot enter a final judgment in the case, until the period during which

for valuing it,” id.,—“autonomy or liberty in this sense is to be valued for its own sake.”

396. ENG. LAW COMM’N, REPORT NO. 267, supra note 25, para. 4.17.
397. Id.
398. Id. Accord AUSTRALIAN MODEL CRIMINAL CODE, DISCUSSION PAPER, supra note 111, at 3.

The English Law Commission went on to explain:

“Double jeopardy protection is very imperfectly expressed in terms of fairness to the accused . . . . It is more illuminating to think of double jeopardy as forming one, significant strand of the limits on a state’s moral authority to censure and punish through criminal law. A defendant is not pleading unfair treatment qua criminal accused when invoking the pleas in bar [autrefois acquit (a former acquittal) and autrefois convict (a former conviction)], but rather reminding the state—as the community’s representative, the community in whose name the business of criminal justice is done—of the limits of its power. . . . Defendants asserting double jeopardy protection act almost as private attorneys general, policing the boundaries of legitimacy in criminal law enforcement, keeping state power in check for the benefit of all who value democracy and personal freedom. This is the special value of finality in criminal proceedings, and the principal rationale underpinning double jeopardy protection. The fundamental nature of the values at stake explains why English law’s pleas in bar operate as near-absolute barriers to re-prosecution whenever their conditions precedent are satisfied.”


399. The Act provides that “[t]he [judge’s] ruling is to have no effect whilst the prosecution is able to . . . inform[] the court that it intends to appeal,” Criminal Justice Act, 2003, c. 44, § 58(3)–(4)(a)(i) (Eng.), which it can do either immediately “following the making of the ruling,” id. § 58(4)(a), or following an adjournment granted by the court to allow the prosecution “to consider whether to appeal.” Id. § 58(4)(a)(ii). If the prosecution properly informs the court it intends to appeal, the ruling continues to have no effect while the prosecution pursues the appeal, id. § 58(10), and in addition, “any consequences of the ruling are also to have no effect.” Id. § 11(a).

400. The Act provides that “the judge may not take any steps in consequence of the ruling, and if he does so, any such steps are also to have no effect.” Id. § 58(11)(b)–(c).
the prosecution can inform the trial judge it intends to appeal the ruling expires without the prosecution’s having notified the trial judge of its intention to appeal,\textsuperscript{401} or if the prosecution informs the judge in a timely manner that it intends to appeal the ruling, either leave to appeal is denied by the Court of Appeal,\textsuperscript{402} or if leave is granted, the Court of Appeal upholds the trial judge’s ruling that the defendant had no case to answer.\textsuperscript{403} Accordingly, until one of these events occurs, there is no “final” judgment whose “integrity” must be maintained.\textsuperscript{404} Moreover, every criminal defendant charged by way of indictment knows at the outset of his trial that, should the trial judge find at the conclusion of the prosecution’s case—or at any time thereafter—that the evidence is insufficient to prove his guilt, that ruling will not at that time be final and will not immediately acquit him of the offense charged,\textsuperscript{405} and in

\textsuperscript{401} See id. § 58(3)–(4).

\textsuperscript{402} Because the prosecution must obtain leave to appeal, either from the trial judge or the Court of Appeal, id. § 57(4), a ruling of no case to answer would become “final” (i.e., the defendant would be acquitted of the offense in question) if, and when, both the trial judge and the Court of Appeal refuse to grant the prosecution leave to appeal. Id. § 58(8)–(9). For, pursuant to the terms of the required “acquittal agreement,” see supra note 87 and text accompanying notes 86–87, undertaken by the prosecution as a condition of taking the appeal, “the defendant . . . [must] be acquitted of [the] offence [in question] if [leave to appeal to the Court of Appeal is not obtained].” Criminal Justice Act, 2003, § 58(8)–(9)(a).

\textsuperscript{403} See Criminal Justice Act, 2003, §§ 58(10)–(11), 61(1), (3), (7).

In fact, the ruling of no case to answer might not be final even after the Court of Appeal confirms the trial judge’s ruling. For the Act provides that the prosecution can appeal further following an adverse decision by the Court of Appeal. Criminal Appeal Act, 1968, c. 19, § 33(1)–(2) (Eng.), as amended by Criminal Justice Act, 2003, § 61(1), (3)(i) (allowing either party, with leave from the Court of Appeal or the Supreme Court of the United Kingdom, to appeal to the Supreme Court following an adverse ruling in the Court of Appeal, provided, however, the Court of Appeal certifies “that a point of law of general public importance is involved in the decision and it appears to the Court of Appeal that the point is one which ought to be considered by the Supreme Court”).

In addition to the situations mentioned in the text, a ruling of no case to answer can also become “final” if, and when, the prosecution, after informing the trial judge that it intends to appeal, abandons that appeal “before it is determined by the Court of Appeal.” Criminal Justice Act, 2003, § 58(8)–(9)(b).

\textsuperscript{404} See supra text accompanying notes 387–88.

\textsuperscript{405} Cf. Smith v. Massachusetts, 543 U.S. 462, 473 (2005) (“If, after a facially unqualified midtrial dismissal of one count [because of the insufficiency of the prosecution’s evidence], the trial has proceeded to the defendant’s introduction of evidence [on another count of the indictment], the acquittal must be treated as final [under the Double Jeopardy Clause of the Fifth Amendment], unless the availability of reconsideration has been plainly established by pre-existing rule or case authority

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addition, that if the prosecution successfully appeals the ruling, his trial may be resumed or he may subjected to a fresh trial for the same offense. And because the state still prohibits the prosecution from challenging a “final” judgment of acquittal based upon a ruling of no case to answer, it continues to acknowledge “that it respects the principle of limited government and the liberty of the subject.”

Nevertheless, some of the same interests of the defendant the rule against double jeopardy seeks to protect by precluding the government from prosecuting an individual a second time for the same offense following a “final” judgment of acquittal also exist when the trial judge “acquits” a defendant by ruling he has no case to answer but the prosecutor has a right to appeal that ruling. From the time the trial judge issues his ruling until his ruling either becomes “final” or is overturned on appeal, the “acquitted” defendant, and his family and friends, must live in a “state of anxiety and insecurity,” not knowing whether he will have to undergo the ordeal of another, or further, trial for the same offense. The “acquitted” defendant also will have to put his life on “hold” during this period; he will be unable to plan his future, and his individual liberty and autonomy will thus be curtailed.

How greatly these interests of the “acquitted” defendant will be affected will
depend largely upon the length of time involved. A relatively short period will have only a minimal impact, while a lengthier period will have a far greater impact.

The first determinant of the length of this period is the time during which the prosecution can consider whether to appeal the trial judge’s ruling of no case to answer. If the prosecution were allowed an extended period of time in which to decide whether to take an appeal, the encroachment on the defendant’s interests could be quite severe. Take, for example, a hypothetical statute allowing the prosecution two years within which to appeal a trial judge’s ruling of no case to answer. For up to two years the “acquitted” defendant and his family and friends would “live in a continuing state of anxiety and insecurity,” and the defendant’s liberty and autonomy would be limited, because of the threat of a new trial for the same offense hovering over them. The effect upon the “acquitted” defendant and his intimates of such an extended period within which to appeal would be little different than it would be under a legal regime that did not recognize the rule against double jeopardy and did not bar the government from prosecuting an acquitted defendant a second time for the same offense.

In England, however, the rules adopted to implement the prosecution’s right to appeal a trial judge’s ruling require the prosecution, as a general matter, to announce its decision to appeal no later than “the next business day” after the ruling against which it wants to appeal; and, if it wants the trial judge to grant leave to appeal, it must apply for such leave within the same time period. If the prosecution decides not to


416. The anxiety and concern, and the curtailment of the defendant’s liberty and autonomy, produced by his not knowing whether the prosecution would appeal, could end earlier only if the prosecution decided to take an appeal, being replaced at that point by the anxiety and concern, and curtailment of liberty, brought about by his uncertainty over whether the Court of Appeal would give leave to appeal, and if it did, by his uncertainty over whether the Court of Appeal would reverse the trial judge’s ruling and order a new trial. Id.

417. The prosecution must inform the court that it intends to appeal such a ruling either “immediately after the ruling,” Criminal Procedure Rules 2011, S.I. 2011/1709, 67.2(1)(a) (Eng.), or following an adjournment “until the next business day,” Criminal Procedure Rules, 2011, S.I. 2011/1709, 67.2(2)(b) (Eng.), granted by the trial judge, upon the prosecution’s request made “immediately after the ruling.” Criminal Procedure Rules 2011, S.I. 2011/1709, 67.2(2)(a) (Eng.). See supra text accompanying notes 80–85.

418. The prosecution must “apply orally, with reasons, immediately after the ruling against which [it] wants to appeal,” Criminal Procedure Rules, 2011, S.I. 2011/1709,
appeal, the additional anxiety and concern imposed upon the defendant, and the limits on his liberty and autonomy, will have ranged from a matter of minutes to, at most, a few days.\textsuperscript{419} Such a short period of time is \textit{de minimis} in this context.\textsuperscript{420} If, on the other hand, the prosecution decides to take an appeal, the defendant’s anxiety and concern will continue while the appellate process runs its course; nevertheless, the few minutes or days taken by the prosecution to make its decision to appeal will not add significantly to the overall period during which the defendant must live under the threat of a new trial.

A legal system that allows the prosecution a longer period of time in which to decide whether to appeal, such as the twenty-eight days permitted in New South Wales,\textsuperscript{421} gives rise to more concern because of its greater impact upon the interests of the “acquitted” defendant and his family and friends. But, in this context, even twenty-eight days is a relatively short period. Unlike a legal system that did not recognize the rule against double jeopardy, and in which the government could therefore reprosecute an acquitted individual for the same offense at \textit{any} time in the future, an “acquitted” defendant in England, and even one in New South Wales, would not have to “live in a \textit{continuing} state of anxiety and insecurity,”\textsuperscript{422} nor would the limitations on his individual liberty and autonomy be ongoing and of indeterminate length.

The true impact upon an “acquitted” defendant’s interests of a prosecution right to appeal a ruling of no case to answer will be in those cases in which the prosecution actually takes an appeal.\textsuperscript{423} The extent of that impact will depend upon how much time intervenes between the

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\item 67.5(1)(a) (Eng.); \textit{but see} R v. O., [2008] EWCA (Crim) 463, [34] (Eng.) (holding that, “[g]iven the extraordinary sequence of events on the previous day,” when the trial judge made the ruling in question, the prosecution’s application for leave to appeal on the day after the ruling was “sufficiently ‘immediate’ for the purposes of the criminal procedure rules), whether to appeal, it must “apply in writing . . . on the expiry of [that] time.” Criminal Procedure Rules, 2011, S.I. 2011/1709, 67.5(1)(b) (Eng.).
\item 419. When the trial judge issues the ruling on a Friday, the prosecution normally will have until the following Monday—the next business day—to decide whether to appeal. In addition, it is possible for the prosecution to obtain additional time within which to make its decision. R v. H., [2008] EWCA (Crim) 483, [10]–[12] (Eng.) (holding the court has power to grant a greater extension of time than “until the next business day”).
\item 420. Indeed, in most cases this will be a shorter amount of time than would have been necessary to complete the defendant’s trial if the judge had not allowed his submission of no case to answer.
\item 421. \textit{Crimes (Appeal and Review) Act 2001}, § 107(3) (NSW) (Austl.) (also providing that an appeal may be made after 28 days “with the leave of the Court of Criminal Appeal”).
\item 423. The analysis in the text proceeds under the assumption that the prosecution has only a short period of time within which to decide whether to appeal.
\end{enumerate}
\end{footnotesize}
prosecution’s decision to appeal and the appellate court’s final resolution of the case.

If, as in England, the prosecution must obtain leave to appeal the trial judge’s ruling of no case to answer and such leave is denied, the defendant’s interests in finality are unlikely to be affected to a significant extent. For it is probable that the decision to deny leave to appeal will come relatively quickly. In the reported cases decided thus far in England, in which the Court of Appeal has refused the prosecution’s application for leave to appeal a trial judge’s ruling under the Criminal Justice Act 2003, the Court of Appeal has made its decision no later than 144 days after the trial judge’s ruling, with the average length of time between the ruling and the denial being 67 days. While not de minimis, this relatively short period of time during

424. Criminal Justice Act, 2003, c. 44, § 57(4) (Eng.).
425. As of Nov. 1, 2011.
426. The Author has attempted to include all published opinions of the Court of Appeal involving applications for leave to appeal from a ruling by the trial judge, not only those involving a ruling of no case to answer. The Court of Appeal, however, has denied applications for leave to appeal without issuing an opinion explaining its reasons for doing so. E.g., Serious Organized Crime Agency v. French, [2011] EWHC (Admin) 10, [7] (Eng.) (noting that these proceedings originated after the Court of Appeal, in an unreported decision, refused the prosecution leave to appeal the trial judge’s ruling that the defendants in a related case had no case to answer). Moreover, it also is possible the Author’s research failed to discover some reported cases.
427. See CPS v. C., [2010] EWCA (Crim) 97, [1], [8], [18] (Eng.) (on Sept. 14, 2009, the trial judge ruled the indictment should be stayed because to proceed would be an abuse of process, and on Feb. 5, 2010, the Court of Appeal denied leave to appeal).
428. See R v. A.T., [2009] EWCA (Crim) 668, [3], [5], [7], [9] (Eng.) (on Jan. 29, 2009, the trial judge ruled certain defense evidence admissible, and the Court of Appeal denied the prosecution’s application for leave to appeal 42 days later, on Mar. 12, 2009); R v. B., [2009] EWCA (Crim) 99, [1], [21] (Eng.) (on Nov. 26, 2008, the trial judge refused the prosecution’s request to change the date set for trial, and the Court of Appeal denied the prosecution’s application for leave to appeal 55 days later, on Jan. 20, 2009); R v. A., [2008] EWCA (Crim) 2186, [1], [10]–[11], [2009] 1 Crim. App. 21, at 281, 283 (Eng.) (on July 2, 2008, the trial judge ruled the defendant had no case to answer, and the Court of Appeal denied the prosecution’s application for leave to appeal 62 days later, on Sept. 2, 2008); R v. O., [2008] EWCA (Crim) 463, [1], [35] (Eng.) (on Dec. 12, 2007, the trial judge ruled he would direct the jury to disregard the bulk of the key prosecution witness’s testimony, and the Court of Appeal refused the prosecution’s application for leave to appeal 85 days later, on Mar. 6, 2008); R v. R., [2008] EWCA (Crim) 370, [1], [32] (Eng.) (on Dec. 3, 2007, the trial judge ruled the prosecution could not call an expert medical witness, and the Court of Appeal refused the prosecution’s application for leave to appeal 81 days later, on Feb. 22, 2008); R v. B., [2007] EWCA (Crim) 2970, [2], [20], [21] (Eng.) (on July 19, 2007, the trial judge refused the prosecution’s requests to issue a witness summons to a key prosecution witness and then to adjourn the trial because that witness was not present, and 106 days later, on Nov. 2, 2007, the Court of Appeal
which the “acquitted” defendant and his family and friends might suffer anxiety and concern, and the defendant endure limitations upon his liberty and autonomy, cannot be equated to the continuing state of uncertainty that would arise under a legal system that did not recognize the rule against double jeopardy.

On the other hand, if the prosecution obtains leave to appeal, either from the trial judge or the Court of Appeal, the impact upon the defendant’s interests could, at least theoretically, be quite severe. For there is no specified period within which the Court of Appeal must decide an appeal once leave to appeal has been granted. The greater

dismissed the application for leave to appeal on the ground that it lacked jurisdiction to entertain an application for leave to appeal under § 58 of the Criminal Appeal Act 2003 because its provisions did not apply retroactively to this case; R v. Clarke, [2007] EWCA (Crim) 2532, [1], [20], [34], [2008] 1 Crim. App. 33, at 404, 407, 410 (Eng.) (on Sept. 18, 2007, the trial judge refused the prosecution’s request to adjourn the trial for a period of up to four weeks because of the absence of a key prosecution witness, and the Court of Appeal denied the prosecution’s application for leave to appeal 21 days later, on Oct. 9, 2007); R v. Thompson, [2006] EWCA (Crim) 2849, [1], [7], [39], [2007] 1 Crim. App. 15, at 213, 214 (Eng.) (on Sept. 29, 2006, the trial judge quashed a count of the indictment and a week later, on Oct. 6, 2006, the Court of Appeal denied the prosecution’s application for leave to appeal for lack of jurisdiction).

In two cases the Court of Appeal did not specify the date of the trial judge’s ruling, so the time it took for the court to deny the prosecution’s application for leave to appeal cannot be determined. R v. T., [2011] EWCA (Crim) 1646 (Eng.); R v. O., [2006] EWCA (Crim) 2047 (Eng.). Only two of these cases involved rulings of no case to answer. In one, the Court of Appeal took 62 days to deny leave to appeal, A., [2008] EWCA (Crim) 2186, [1], [10]–[11], [2009] 1 Crim. App. 21, at 281, 283, and in the other, the Court of Appeal did not mention the date on which the trial judge made the ruling. O., [2006] EWCA (Crim) 2047.


If the prosecution seeks leave to appeal from the trial judge, it must do so either by “apply[ing] orally, with reasons, immediately after the ruling against which [it] wants to appeal,” Criminal Procedure Rules, 2011, S.I. 2011/1709, 67.5(1)(a) (Eng.), or, if it receives an adjournment to consider whether to appeal, see supra text accompanying notes 82–85, by “apply[ing] in writing” following the adjournment. Criminal Procedure Rules, 2011, S.I. 2011/1709, 67.5(1)(b) (Eng.). The trial judge must decide whether to allow leave to appeal “on the day that the application for permission is made.” Criminal Procedure Rules, 2011, Š.I. 2011/1709, 67.5(1)(b) (Eng.). Thus, when the trial judge allows leave to appeal, no significant time will have intervened between the trial judge’s ruling, the application for leave, and the giving of leave.

430. The discussion in the text would also apply under a statute allowing the prosecution to appeal as a matter of right, that is, without first obtaining leave to appeal.

431. The trial judge can order an expedited appeal after being informed by the prosecution that it intends to appeal. Criminal Justice Act, 2003, § 59(1). The Court of Appeal (or the trial judge) may, however, subsequently reverse that decision. Id. § 59(4).
the time period between the trial judge’s ruling of no case to answer and the Court of Appeal’s decision on the merits of the appeal, the longer the “acquitted” defendant and his family and friends must suffer the anxiety and concern about whether the defendant will have to undergo a new trial for the same offense, and the longer the “acquitted” defendant’s autonomy will be limited. Nevertheless, based on the reported cases decided thus far under the Criminal Justice Act 2003 by the Court of Appeal in England, there does not appear to be significant cause for concern. For from the reported cases it appears that the longest the Court of Appeal has taken to decide an appeal has been 386 days, or just over one year, with the average being approximately 102 days, or nearly three and one-half months. Although one year cannot be deemed


432. As of Nov. 1, 2011.

433. Once again, the Author is including all appeals by the prosecution under section 58 of the Criminal Justice Act 2003 of a trial judge’s ruling, not only those involving a ruling of no case to answer. See supra note 426.

434. “R v. S.H., [2010] EWCA (Crim) 1931, [1], [44], [64], [2011] 1 Crim. App. 14, at 184, 195, 201 (Eng.) (on July 13, 2009, the trial judge ruled the defendant had no case to answer, and the Court of Appeal allowed the prosecution’s appeal and ordered a new trial on Aug. 3, 2010).”

435. See R v. Q., [2011] EWCA (Crim) 1584, [1], [20], [2011] 2 Crim. App. 25, at 365, 369 (Eng.) (the trial judge ruled on Jan. 14, 2011, the defendant had no case to answer, and the Court of Appeal dismissed the prosecution’s appeal 123 days later, on May 17, 2011); R v. P., [2010] EWCA (Crim) 2895, [1], [32] (Wales) (the trial judge ruled on July 21, 2010, the defendant had no case to answer, and the Court of Appeal dismissed the prosecution’s appeal 113 days later, on Nov. 11, 2010); R v. F., [2010] EWCA (Crim) 2243, [2], [5], [16] (Eng.) (prior to trial, on June 16, 2010, the trial judge ruled the trial should not proceed because, on the basis of the evidence—a witness statement—the prosecution could not succeed, and the Court of Appeal dismissed the prosecution’s appeal 93 days later, on Sept. 17, 2010); R v. B., [2010] EWCA (Crim) 1857, [1], [2010] 2 Crim. App. 35, at 424 (Eng.) (in one case, the trial judge on Apr. 23, 2010, quashed the indictment because he did not believe the case should have been brought by the CPS, and 81 days later, on July 13, 2010, the Court of Appeal allowed the prosecution’s appeal and ordered a fresh trial before a different judge; in two other cases,
the trial judge on June 1, 2010, quashed the indictments, and 42 days later, on July 13, 2010, the Court of Appeal allowed the prosecution’s appeal and ordered fresh trials before a different judge); R v. W., [2010] EWCA (Crim) 927, [1], [42] (no jur. given) (the trial judge ruled on Oct. 9, 2009, the defendant had no case to answer, and 214 days later, on May 11, 2010, the Court of Appeal allowed the prosecution’s appeal and ordered a fresh trial); CPS v. L.R., [2010] EWCA (Crim) 924, [1], [2010] 2 Crim. App. 9, at 64 (Eng.) (on Jan. 15, 2010, the trial judge stayed the proceedings as an abuse of process, and the Court of Appeal dismissed the prosecution’s appeal 69 days later, on Mar. 25, 2010); R v. N.T., [2010] EWCA (Crim) 711, [9], [15], [2010] 2 Crim. App. 12, at 87, 89 (Eng.) (on Aug. 13, 2009, the trial judge stayed the proceedings as an abuse of process, and the Court of Appeal dismissed the prosecution’s appeal 230 days later, on Mar. 31, 2010, for lack of jurisdiction); R v. M., [2009] EWCA (Crim) 2848, [1], [26] (Eng.) (the trial judge ruled on Nov. 19, 2009, the defendants had no case to answer, and the Court of Appeal dismissed the prosecution’s appeal 12 days later, on Dec. 1, 2009); CPS v. C., [2009] EWCA (Crim) 2614, [1] (Eng.) (on May 27, 2009, the trial judge refused to postpone the case to allow the prosecutor to seek instructions, and then entered an acquittal, and the Court of Appeal dismissed the appeal for lack of jurisdiction at a hearing on Sept. 8, 2009, 164 days later); R v. Thomas, [2009] EWCA (Crim) 1682, [1], [41], [46] (Eng.) (the trial judge ruled on May 19, 2009, the defendant had no case to answer, and the Court of Appeal dismissed the prosecution’s appeal 17 days later, on June 5, 2009); R v. F., [2009] EWCA (Crim) 1639, [1], [72] (Eng.) (on June 1, 2009, the trial judge stayed the proceedings on eight counts of the indictment as an abuse of process, and the Court of Appeal allowed the prosecution’s appeal 58 days later, on July 29, 2009); CPS v. Mattu, [2009] EWCA (Crim) 1483, [1], [22] (Eng.) (on Nov. 3, 2008, the trial judge stayed the proceedings on two counts of the indictment as an abuse of process, and the Court of Appeal dismissed the prosecution’s appeal 232 days later, on June 23, 2009); R v. Tilley, [2009] EWCA (Crim) 1426, [4]–[6], [46], [49] 2 Crim. App. 31, at 512, 513–14, 522 (Eng.) (the trial judge ruled on Apr. 16, 2009, that the statute under which the defendant was charged did not encompass his conduct, and the Court of Appeal dismissed the prosecution’s appeal 95 days later, on July 20, 2009); R v. M.K., [2009] EWCA (Crim) 952, [1], [8], [21], [27], [30] (Eng.) (the trial judge ruled on June 11, 2008, the defendant had no case to answer, and 324 days later, on May 1, 2009, the Court of Appeal allowed the prosecution’s appeal and ordered a fresh trial); R v. B., [2009] EWCA (Crim) 644, [2]–[3], [42] (Eng.) (the trial judge ruled on Dec. 22, 2008, the ABE (achieving best evidence) interview of the young complainant in a case involving various sex offenses with a child under the age of 13 was inadmissible as hearsay evidence, and the Court of Appeal dismissed the prosecution’s appeal 80 days later, on Mar. 12, 2009); R v. I., [2009] EWCA (Crim) 186, [2], [9], [16] (Eng.) (on Oct. 7, 2008, the trial judge stayed the proceedings as an abuse of process, and 115 days later, on Jan. 30, 2009, the Court of Appeal allowed the prosecution’s appeal and ordered the proceedings resumed); R v. L., [2008] EWCA (Crim) 1970, [6]–[7], [36]–[37] (Eng.) (the trial judge quashed the indictment on Jan. 29, 2008, and 212 days later, on Aug. 28, 2008, the Court of Appeal allowed the prosecution’s appeal in part, but nevertheless directed the acquittal of the defendants because it found it would not be in the interests of justice to order a new trial); R v. B., [2008] EWCA (Crim) 1524, [1], [23] (Eng.) (the trial judge ruled on Feb. 21, 2008, that evidence of a video identification of the defendant by the victim of a kidnapping and robbery should be excluded, and 147 days later, on July 17, 2008, the Court of Appeal allowed the prosecution’s appeal and ordered that the trial be resumed); R v. F., [2008] EWCA (Crim) 1868, [1], [10], [12], [16] (Eng.) (the trial judge ruled on June 19, 2008, the defendant had no case to answer, and 28 days later, on July 17, 2008, the Court of Appeal allowed the prosecution’s appeal and ordered a fresh trial); R v. N. Ltd., [2008] EWCA (Crim) 1223, [1], [10], [29]–[30] (Eng.) (the trial judge ruled on Dec. 5, 2007, the defendant had no case to answer, and 186 days later, on June 10, 2008, the Court of Appeal allowed the prosecution’s appeal and
ordered a fresh trial); R v. B., [2008] EWCA (Crim) 1144, [1], [11], [19] (Eng.) (apparently on Apr. 23, 2008, the trial judge stayed the proceedings on one count of the indictment as an abuse of discretion, and the Court of Appeal dismissed the prosecution’s appeal eight days later, on May 1, 2008); R v. Chi Kuen Chung, [2008] EWCA (Crim) 836, [1], [28] (Eng.) (the trial judge ruled on Nov. 28, 2007, the defendant had no case to answer, and the Court of Appeal dismissed the prosecution’s appeal 92 days later, on Feb. 28, 2008); R v. R., [2008] EWCA (Crim) 683, [4]–[5], [18] (Eng.) (the trial judge ruled on Mar. 5, 2008, the defendant had no case to answer, and 14 days later, on Mar. 19, 2008, the Court of Appeal allowed the prosecution’s appeal and ordered a new trial); R v. R., [2008] EWCA (Crim) 619, [1], [13]–[14], [2008] 2 Crim. App. 38, at 559, 562–63 (Eng.) (sometime after the defendant’s trial began on Jan. 7, 2008, the trial judge ruled the defendant had no case to answer, and no more than nine days later, on Jan. 16, 2008, the Court of Appeal allowed the prosecution’s appeal and ordered the trial be resumed); R v. H., [2008] EWCA (Crim) 483, [3], [34], [57]–[58] (Eng.) (the trial judge ruled on Oct. 4, 2007, before the jury was sworn, that under the prosecution’s evidence in its then form, the defendant did not have a case to answer, and after the prosecution, at the judge’s invitation, offered no evidence, the judge entered verdicts of not guilty; 132 days later, on Feb. 13, 2008, the Court of Appeal allowed the prosecution’s appeal and reversed the judgment of the trial court but nevertheless concluded that the interests of justice would not be served by resuming the proceedings or ordering a new trial); R v. O.B., [2008] EWCA (Crim) 238, [1]–[2], [23] (Eng.) (on Jan. 18, 2008, the trial judge stayed the proceedings as an abuse of process, and 13 days later, on Jan. 31, 2008, the Court of Appeal dismissed the prosecution’s appeal); R v. N.W., [2008] EWCA (Crim) 2, [1], [39] (Eng.) (the trial judge ruled on Apr. 27, 2007, the defendants had no case to answer, and the Court of Appeal dismissed the prosecution’s appeal 271 days later, on Jan. 23, 2008); R v. P., [2007] EWCA (Crim) 3484, [1]–[2], [13] (Eng.) (sometime after the defendant’s trial began on Nov. 27, 2006, the trial judge ruled the defendant had no case to answer, and the Court of Appeal allowed the prosecution’s appeal on Oct. 12, 2007, 319 days after the commencement of the trial); R v. C., [2007] EWCA (Crim) 3463, [1], [7], [9], [16] (Eng.) (the trial judge ruled on Oct. 4, 2007, that statements made by a domestic violence victim in an emergency 999 call and to police officers investigating the call were inadmissible at trial, and the Court of Appeal dismissed the prosecution’s appeal 75 days later, on Dec. 18, 2007); R v. O., [2007] EWCA (Crim) 3483, [1], [4], [14], [46] (Eng.) (the trial judge stayed the proceedings against the defendant on Sept. 21, 2007, as an abuse of process, and the Court of Appeal dismissed the prosecution’s appeal six days later, on Sept. 27, 2007); R v. R., [2007] EWCA (Crim) 3312, [1], [8]–[9], [2008] 1 Crim. App. 26, at 358, 359 (Eng.) (the trial judge ruled on Aug. 30, 2007, the defendant had no case to answer, and the Court of Appeal allowed the prosecution’s appeal 77 days later, on Nov. 15, 2007); R v. P., [2007] EWCA (Crim) 3216, [2], [24], [2008] 2 Crim. App. 6, at 69, 75 (Eng.) (the trial judge ruled on Oct. 10, 2007, the defendant had no case to answer, and 65 days later, on Dec. 14, 2007, the Court of Appeal allowed the prosecution’s appeal and ordered a fresh trial); R v. M.K., [2007] EWCA (Crim) 3150, [1], [10], [17], [23] (Eng.) (the trial judge ruled on Aug. 21, 2007, certain evidence inadmissible as hearsay, and 105 days later, on Dec. 4, 2007, the Court of Appeal allowed the prosecution’s appeal and ordered a fresh trial); R v. A., [2007] EWCA (Crim) 2868, [1]–[2], [21] (Eng.) (the trial judge ruled on July 11, 2007, the defendant had no case to answer, and the Court of Appeal dismissed the appeal 146 days later, on Dec. 4, 2007); R v. P.S., [2007] EWCA (Crim) 2058, [2], [24], [61] (Eng.) (the trial judge ruled on Apr. 23, 2007, the defendants had no case to answer, and 80 days later, on July 12, 2007, the Court of
Appeal allowed the prosecution’s appeal and ordered a fresh trial); R v. H., [2007] EWCA (Crim) 2056, [2], [32], [35] (Eng.) (on June 28, 2007, the trial judge gave his reasons for ruling the defendant had no case to answer, and 12 days later, on July 12, 2007, the Court of Appeal allowed the prosecution’s appeal and ordered the trial be resumed); R v. K., [2007] EWCA (Crim) 971, [1], [61], [65], [68], [2007] 2 Crim. App. 15, at 191, 206, 207, 208 (Eng.) (on Feb. 21, 2007, the trial judge stayed the proceedings as an abuse of process, and 57 days later, on Mar. 30, 2007, the Court of Appeal allowed the appeal and ordered the trial be resumed); R v. K., [2007] EWCA (Crim) 491, [1], [14], [33]–[35], [2007] 2 Crim. App. 10, at 130, 133, 138 (the trial judge ruled on Feb. 26, 2007, the defendant had no case to answer on two counts of an indictment, and the Court of Appeal allowed the prosecution’s appeal ten days later, on March 8, 2007); R v. Francis, [2006] EWCA (Crim) 3323, [1], [11]–[13], [2007] 1 Crim. App. 36, at 470, 472 (Eng.) (the trial judge ruled on Nov. 2, 2006, that as a matter of law the offense charged could not have been committed, and the Court of Appeal allowed the prosecution’s appeal 49 days later, on Dec. 21, 2006); R v. J.G., [2006] EWCA (Crim) 3276, [1], [15] (the trial judge ruled on Dec. 4, 2006, the defendant had no case to answer, and the Court of Appeal dismissed the prosecution’s appeal four days later, on Dec. 8, 2006); R v. Patel, [2006] EWCA (Crim) 2689, [18], [2007] Crim. App. 12, at 192, 196 (Eng.) (the trial judge ruled on Sept. 21, 2006, the defendant had no case to answer, and the Court of Appeal dismissed the prosecution’s appeal 34 days later, on Oct. 25, 2006); R v. C., [2006] EWCA (Crim) 2132, [1], [3], [7], [43], [45], [47] (Eng.) (the trial judge ruled on Mar. 28, 2006, the Crown Court had no jurisdiction to try the offense with which the defendant was charged, and 122 days later, on July 28, 2006, the Court of Appeal allowed the prosecution’s appeal and ordered the trial be resumed); R v. J.S.M., [2006] EWCA (Crim) 2046, [1]–[2], [6]–[8] (jur. not given) (the trial judge ruled on Feb. 14, 2006, the defendant had no case to answer, and the Court of Appeal allowed the prosecution’s appeal 149 days later, on July 13, 2006); CPS v. Morgan, [2006] EWCA (Crim) 1742, [1]–[2], [8]–[12], [26] (Eng.) (the trial judge ruled on Mar. 7, 2006, that upon the agreed-upon facts, the defendant’s conduct did not constitute an offense, and the Court of Appeal allowed the prosecution’s appeal 129 days later, on July 14, 2006); CPS v. C.E., [2006] EWCA (Crim) 1410, [4]–[5], [14]–[16] (Eng.) (the trial judge ruled on Apr. 26, 2006, that a video-taped interview of the complainant in a rape case was inadmissible hearsay, and the Court of Appeal dismissed the appeal 70 days later, on May 24, 2006); R v. D., [2006] EWCA (Crim) 1139, [1], [7]–[8], [18], [31]–[33], [2006] 2 Crim. App. 24, at 350, 351, 353, 357–58 (Eng.) (the trial judge ruled on Mar. 7, 2006, the cases should not proceed to trial because there was no basis on which a reasonable jury could convict the defendant of the offenses with which he was charged, and the Court of Appeal dismissed the appeal 70 days later, on May 16, 2006); R v. C., [2005] EWCA (Crim) 3533, [4], [6]–[7], [19], [24], [2006] 1 Crim. App. 28, at 434, 435, 438, 439 (Eng.) (the trial judge ruled on Dec. 2, 2005, that because the prosecution would be unable to prove that the conduct alleged in four counts of an indictment occurred before the date of the repeal of the statute under which the defendant was charged, those four counts could not be left to the jury, and the Court of Appeal dismissed the appeal ten days later, on Dec. 15, 2005); R v. T., [2005] EWCA (Crim) 3511, [1], [7], [16], [18] (Eng.) (on Oct. 24, 2005, the trial judge quashed seven counts of an indictment on the ground they were defective in law, and 57 days later, on Dec. 20, 2005, the Court of Appeal allowed the prosecution’s appeal and ordered the proceedings against the defendant be resumed). See also R v. M.H., [2011] EWCA (Crim) 1508 (Eng.) (although the opinion does not give the date on which the trial judge ruled the defendant had no case to answer, 224 days intervened between the date the Court of Appeal heard the prosecution’s appeal, Nov. 5, 2010, and the date it allowed the appeal and ordered a fresh trial, June 17, 2011).
In three cases the opinion does not give the date on which the trial judge issued the ruling in question, so the length of time between the judge’s ruling and the Court of Appeal’s decision in those cases cannot be determined. R v. T., [2010] EWCA (Crim) 630, [1] (Eng.); R v. M., [2008] EWCA (Crim) 2751, [1], [27] (Eng.) (although the opinion does not state when the trial judge issued his ruling that the child complainant was not a competent witness, it does state the alleged crime occurred in Nov. 2007, so the time between the judge’s ruling and the decision of the Court of Appeal must have been much less than one year, as the Court of Appeal issued its opinion dismissing the appeal on Nov. 4, 2008); R v. Y., [2008] EWCA (Crim) 10, [1], [2008] 1 Crim. App. 34, at 413–14 (no jur. given).

See also R v. A., [2008] EWCA (Crim) 1034, [2], [17], [40], [2008] 2 Crim. App. 37, at 547, 550, 557 (Eng.) (in a court-martial proceeding, the assistant judge advocate, on Dec. 13, 2007, directed an acquittal on one of two charges and stayed the second charge as an abuse of process, and 155 days later, on May 16, 2008, the Court of Appeal dismissed the prosecution’s appeal, taken pursuant to provisions of military law that mirror sections 58–61 of the Criminal Justice Act 2003, for want of jurisdiction).

The Court of Appeal in Northern Ireland has taken an average of approximately 118 days to decide a prosecution appeal taken under the Criminal Justice (Northern Ireland) Order, 2004, SI 2004/1500 (N. Ir. 9) arts. 16–20, 26–31, which adopts provisions in Northern Ireland tracking those of the Criminal Justice Act 2003. R v. S.R., [2011] NICA (Crim) 49, [1], [4]–[5] (shortly after Nov. 18, 2010, the trial judge stayed the proceedings as an abuse of process, and approximately 120 days later, on Mar. 23, 2011, the Court of Appeal in Northern Ireland allowed the prosecution’s appeal); R v. McNally, [2009] NICA (Crim) 3, [1]–[2], [24]–[25] (on May 2, 2008, the trial judge stayed the proceedings on several counts of an indictment as an abuse of process, and 249 days later, on Jan. 6, 2009, the Court of Appeal in Northern Ireland allowed the prosecution’s appeal); R v. Jamison, [2008] NICA (Crim) 32, [1], [3] (on Oct. 18, 2007, the trial judge stayed the proceedings as an abuse of process, and 210 days later, on May 15, 2008, the Court of Appeal in Northern Ireland dismissed the prosecution’s appeal on the ground it did not have jurisdiction); R v. McCann, [2008] NICA (Crim) 25, [4], [21], [24], [26]–[27] (the trial judge ruled on June 4, 2008, the defendants had no case to answer on three counts of the indictment, and five days later, on June 9, 2008, the Court of Appeal in Northern Ireland allowed the prosecution’s appeal and ordered that the charges contained in the three counts be considered by the jury); R v. Courtney, [2007] NICA (Crim) 6, [1]–[2], [33], [2007] N.I. 178, 179, 193 (the trial judge ruled on Nov. 28, 2006, the defendant had no case to answer, and 58 days later, on Jan. 26, 2007, the Court of Appeal in Northern Ireland allowed the prosecution’s appeal and ordered a new trial); R v. A.B., [2007] NICA (Crim) 18, [1], [3], [41] (on Dec. 12, 2006, the trial judge stayed the proceedings as an abuse of process, and the Court of Appeal in Northern Ireland allowed the prosecution’s appeal 101 days later, on Mar. 23, 2007); R v. Murray, [2006] NICA (Crim) 33, [1], [5], [26], [28]–[29] (on May 26, 2006, the trial judge stayed the proceedings as an abuse of process, and the Court of Appeal in Northern Ireland allowed the appeal 46 days later, on July 11, 2006); R v. Grindy, [2006] NICA (Crim) 10, [1], [2006] N. Ir. L.R. 290, 292 (on Dec. 15, 2005, the trial judge stayed the proceedings as an abuse of process, and the Court of Appeal in Northern Ireland dismissed the appeal 96 days later, on Mar. 21, 2006). In one case, the opinion does not give the date on which the trial judge issued the ruling in question, so the length of time between that ruling and the Court of Appeal’s decision cannot be calculated. R v. Quinn, [2011] NICA (Crim) 19.

de minimis insofar as it affects the defendant’s interests, it is at most a
slight impingement upon those interests and certainly is not akin to the “continuing state of anxiety and concern”436 that is the concern of the rule against double jeopardy.437

It therefore seems that although some of the same interests of the defendant the rule against double jeopardy seeks to protect are adversely affected by the delays introduced by allowing the prosecution to appeal a trial judge’s ruling of no case to answer, the delays that have thus far

437. A decision by the Court of Appeal confirming the trial judge’s ruling of no case to answer may not in fact be “final,” because the prosecution can, with leave from either the Court of Appeal or the Supreme Court of the United Kingdom, take a further appeal to the Supreme Court. Criminal Appeal Act, 1968, c. 19, § 33(1), (2) (Eng.). The prosecution must seek leave to appeal from the Court of Appeal within 28 days of the decision of the Court of Appeal (or, if later, the date on which the court gives reasons for its decision), id. § 34(1)–(1A), and if the Court of Appeal refuses to give leave to appeal, the prosecution has 28 days from the date of the refusal to seek leave to appeal from the Supreme Court. Id. § 34(1). A defendant who was successful in the Court of Appeal therefore will be in limbo over whether he must undergo a new trial for up to five additional periods: first, a period of up to 28 days (or longer if the Court of Appeal gave the reasons for its decision after it announced that decision) during which the prosecution can seek leave to appeal from the Court of Appeal; second, if the prosecution seeks leave to appeal from the Court of Appeal, the period during which the Court of Appeal is deciding whether to give such leave; third, if the prosecution seeks leave to appeal from the Court of Appeal but that court refuses such leave, up to an additional 28 days during which the prosecution can seek leave to appeal from the Supreme Court; fourth, if the prosecution seeks leave to appeal from the Supreme Court, the period of time during which the Supreme Court is deciding whether to give such leave; and finally, if either the Court of Appeal or the Supreme Court gives leave to appeal, the period of time it takes for the Supreme Court to decide the case on the merits. Although the additional period during which trial judge’s ruling of no case to answer is still not final could be an extremely lengthy period that could seriously affect the defendant’s interests, such appeals are likely to be rare. For leave to appeal cannot be granted unless the Court of Appeal certifies “that a point of law of general public importance is involved in the decision and it appears to the Court of Appeal or the Supreme Court (as the case may be) that the point is one which ought to be considered by the Supreme Court,” Id. (emphasis added). The typical case involving a ruling of no case to answer is unlikely to involve a “point of general public importance,” and therefore would not be the proper subject for further appeal by the prosecution. Indeed, the only situation in which the relevant standard is likely to be met is one in which the trial judge based his ruling on the so-called first prong of Galbraith—that is, when the trial judge ruled “there [was] no evidence that the crime alleged has been committed by the defendant,” R v. Galbraith, [1981] 73 Crim. App. 124, 127 (Eng.), more specifically, when the trial judge concluded, over the protest of the prosecution, the crime with which the defendant was charged required a particular element, and then ruled there was no evidence introduced by the prosecution of such element. The question whether the crime in question actually requires the element at issue could be one of “general public importance.” In the run-of-the-mill case, then, even if the prosecution seeks certification from the Court of Appeal, it will not receive it and no further appeal of the trial judge’s ruling of no case to answer will be allowed. Indeed, between April 4, 2005, the effective date of the provisions allowing prosecution appeals of a ruling of no case to answer, see supra note 77, and November 1, 2011, neither the Supreme Court of the United Kingdom, nor, before its creation, the House of Lords, has decided an appeal from a decision of the Court of Appeal involving a prosecution appeal of a ruling of no case to answer.
occurred in England under the Criminal Justice Act 2003 have not been of such an extent as to cause grave concern.

4. Preventing Harassment

Another purpose of the rule against double jeopardy “is to prevent the harassment of the accused by repeated prosecution for the same matter.” If the government could retry an individual for the same offense following his acquittal, that power “could be used illegitimately by ill-intentioned state servants.” In the absence of a rule against double jeopardy, it is possible that “the police, unhappy at [an individual’s] being found not guilty, would unfairly pursue the person in order to try to bring about a second trial,” or a “disgruntled prosecutor” who believed a fact finder erroneously acquitted a guilty individual could harass and oppress that individual by bringing a second prosecution for the same offense, or by continuing to investigate him for the same offense in the hope of finding new evidence implicating him in the crime. Four even if the defendant were acquitted again at the second trial, or if the police or prosecutor did not find any new evidence of the acquitted individual’s guilt and did not charge him a second time for the same offense, they may be satisfied with having forced the individual to undergo additional embarrassment, anxiety, concern, and perhaps expense arising from the second trial or the continued investigation.

Without any safeguards in place, allowing the prosecution to appeal a trial judge’s ruling of no case to answer could open the door to

438. N.Z. LAW COMM’N, REPORT 70, supra note 127, para. 12. See also N.S.W. LAW REFORM COMM’N, REPORT 77, supra note 207, para. 2.8 (“The development of the principle [of double jeopardy] has gone beyond prohibiting multiple punishment for the same offence, to adopting practices to prevent undue prolongation of the criminal process. To allow otherwise is to risk harassment of an accused, who is, after all presumed innocent.”).

439. ENG. LAW COMM’N, REPORT NO. 267, supra note 25, para. 4.14 (emphasis deleted).

440. SELECT COMMITTEE ON HOME AFFAIRS, THE DOUBLE JEOPARDY RULE, supra note 27, para. 19.

441. Thompson v Mastertouch T.V. Service Pty. Ltd. (No. 3), (1978) 38 FLR 397, 408 (Fed. Ct. Austl.) (Deane, J., with Smithers & Riley, JJ., agreeing).

442. See SELECT COMMITTEE ON HOME AFFAIRS, THE DOUBLE JEOPARDY RULE, supra note 27, para. 19. See also FRIEDLAND, supra note 1, at 3–4 (“The main rationale of the rule against double jeopardy is that it prevents the unwarranted harassment of the accused by multiple prosecutions.”); AUSTRALIAN MODEL CRIMINAL CODE, DISCUSSION PAPER, supra note 111, at 2 (one of the policies underlying the rule against double jeopardy is “the protection of citizens from harassment by the State”).
harassment of the individual who benefitted from the trial judge’s ruling. An unscrupulous prosecutor, upset at the trial judge’s ruling and bent on harassing the individual who would otherwise be acquitted of the offense with which he was charged, could appeal the judge’s ruling even though she believed the appeal had little chance of success. By doing so, the prosecutor would force the individual to continue to defend himself against a charge that a judge had already found to be unsubstantiated. Even if the prosecutor failed in convincing the appellate court to overturn the trial judge’s ruling and the case ended at that point with the acquittal of the accused, the prosecutor would have forced the accused to undergo the anxiety, distress, and perhaps expense of the appellate process. On the other hand, if the unscrupulous prosecutor succeeded in convincing the appellate tribunal that the trial judge erred in ruling the defendant had no case to answer, the defendant might be compelled to undergo either a second trial for the same offense, or the resumption of his original trial for that offense. Even if the prosecutor failed to convict the individual at this second, or resumed, trial, she will have forced him to undergo the “heavy personal strain,” of a second trial, or further proceedings in the first trial, thereby frustrating the rule against double jeopardy’s purpose of preventing the government from harassing an individual through repeated trials for the same offense.

The appeal process authorized by the Criminal Justice Act 2003, however, contains a significant safeguard for individuals who benefit from a trial judge’s ruling of no case to answer, and for that reason is unlikely to open the door to government harassment. The Act provides that the prosecution can appeal a ruling of no case to answer only after obtaining leave to appeal from either the trial judge or the Court of Appeal. It can be expected that both the trial judge and the Court of

443. Allowing the prosecution to appeal a ruling of no case to answer does not give rise to an opportunity for the police to harass the “acquitted” defendant by trying to find new evidence against him. For any inculpatory evidence unearthed by the police following the trial judge’s ruling of no case to answer would be meaningless to the prosecution unless it succeeded in obtaining a fresh trial of the accused. Moreover, because the only issue in the prosecution’s appeal would be whether the evidence already presented in the prosecution’s case in chief was, as a matter of law, sufficient to prove the defendant’s guilt beyond a reasonable doubt, any newly-discovered evidence could in no way enhance the prosecution’s chances of winning its appeal. Thus, the fact the prosecution was appealing a trial judge’s ruling of no case to answer would not provide any incentive to the police to continue their investigation of the accused. Indeed, it would seem the police would not want to waste their time further investigating an individual whom a judge had already “acquitted.”

444. Criminal Justice Act, 2003, c. 44, § 61(4)(b) (Eng.).

445. Id. § 61(4)(a).


Appeal would be unwilling to grant leave to appeal if there existed the slightest hint the prosecution sought to appeal merely to harass the “acquitted” defendant. This provision therefore provides significant protection for the accused against government harassment, as the prosecution cannot merely on its own initiative, and without any judicial oversight, appeal a particular ruling of no case to answer. Moreover, because the prosecution must seek leave to appeal from the trial judge either “immediately after the ruling against which [it] wants to appeal,” or, if it receives an adjournment to consider whether to appeal, following the adjournment (which generally should be only “until the next business day”), and because generally the trial judge must decide whether to allow leave to appeal “on the day that the application for permission is made,” no significant time will intervene between the trial judge’s ruling of no case to answer and the denial of leave by the trial judge. And although it may take a bit longer for the Court of Appeal to deny an application for leave to appeal, any harassment of the defendant by the prosecution from merely seeking to appeal will be relatively minor.

Moreover, even if an unscrupulous prosecutor successfully masked her intention of gaining a second trial for the purpose of harassing the “acquitted” individual and managed to obtain leave to appeal, a second trial would be dependent upon the Court of Appeal’s finding that the trial judge erred in ruling the defendant had no case to answer. Unlike the situation in a legal system that did not recognize the rule against

448. If the prosecution’s evidence were clearly insufficient to prove the accused’s guilt beyond a reasonable doubt, and the appeal were attempted to be taken merely to harass the accused, it is almost certain that neither the trial judge nor the Court of Appeal would grant leave to appeal. Moreover, as stated earlier, see supra notes 76 and 342, in deciding whether to grant leave to appeal, the Court of Appeal, and presumably also the trial judge, must “look rather more widely at the interests of justice than simply . . . ask [itself] whether an appeal has a realistic prospect of success, or some other test directed solely at the merits of the appeal.” R v. A., [2009] EWCA 2186, [8], [2009] 1 Crim. App. 21, at 283 (Eng.).

451. Criminal Procedure Rules, 2011, S.I. 2011/1709, 67.2(2)(b) (Eng.). But see R v. H., [2008] EWCA (Crim) 483, [10]–[12] (Eng.) (holding that the court has the power to grant a greater extension of time than “until the next business day”).
453. See supra notes 425–28 and accompanying text.
454. And also finding the defendant could receive a “fair trial” if the Court of Appeal ordered his initial trial be resumed or that a fresh trial take place. Criminal Justice Act, 2003, c. 44, § 61(5) (Eng.).
double jeopardy, a second trial could not be brought merely at the whim of the prosecution. The existence of such oversight makes it probable that appeals taken by the prosecution merely for the purpose of obtaining a second trial to harass the “acquitted” individual would be weeded out and the “acquitted” individual would not have to undergo a second trial for the same offense.

It is true, of course, the prosecution might not care if it obtains a second trial. Its motive may be to harass the “acquitted” individual by forcing him to undergo the anxiety and expense of the appellate process. Even if the prosecution managed to obtain leave to appeal, the anxiety and expense an individual would be forced to undergo during the appellate process pales in comparison to the anxiety and expense he would be forced to undergo at a second trial for the same offense.455

5. Minimizing the Distress and Trauma of the Trial Process

Another raison d’être for the rule against double jeopardy is to prevent “the state with all its resources and power [from] . . . mak[ing] repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal.”456 As explained by noted English scholar Glanville Williams, it would be “hard on the defendant if, after he has at great cost in money and anxiety secured a favorable verdict from a jury on a particular issue, he must fight the battle over again.”457

As these statements indicate, defending against a criminal charge can be a “grueling”458 process for a person. In the absence of legal aid, it can place a heavy financial burden on an individual.459 Those who can

455. See supra text accompanying notes 470–75.
456. Green v. United States, 355 U.S. 184, 187 (1957). Accord Pearce v The Queen (1998) 194 CLR 610, 614 (Austl.) (McHugh, Hayne & Callahan, JJ.); id. at 636 (Kirby, J.). See also ENG. LAW COMM’N, CONSULTATION PAPER NO. 156, supra note 25, para. 4.6–7 (noting the effects also extend to the individual’s family, the witnesses, and the victim); ENG. LAW COMM’N, REPORT NO. 267, supra note 25, para. 4.3; N.Z. LAW COMM’N, REPORT 70, supra note 127, paras. 12–13.
457. WILLIAMS, supra note 16, at 164. Williams was writing about a subsequent prosecution for a different offense, but one arising out of the same facts as the first. As the English Law Commission pointed out, though, “clearly the principle also applies to true autrefois cases.” ENG. LAW COMM’N, CONSULTATION PAPER NO. 156, supra note 25, para. 4.6 n.14.
459. See, e.g., Susan Chandler, Free Ryan Defense Could Get Expensive If Mistrial Declared, Rerun Would Be Costly, CHI. TRIB., Mar. 30, 2006, at Business 1, available at 2006 WLNR 7238109 (stating the defense costs in the fraud trial of former Illinois Governor George H. Ryan stood at $10 million as of November of 2005, and noting the defendant’s lead lawyer bills at the rate of $750 per hour); Junior Gotti: They're
 afford it nearly always retain an attorney to represent them. In addition, they frequently hire an investigator to help locate witnesses and find evidence favorable to their defense, and they may employ experts and other specialists to assist in the preparation of their case and perhaps to testify in their behalf at the trial. Even in cases in which the accused is entitled to legal aid, “the financial burden can still be felt by the accused in other substantial ways, for example, the disruption to normal employment or business.”

The stress of defending oneself in a criminal prosecution also can affect an individual both emotionally and physically. A criminal charge generally causes embarrassment to the accused, and it may cause his friends, neighbors, colleagues, and even relatives to disapprove of him, be suspicious and distrustful of him, and perhaps even shun him. Additionally, an accused who has a family and will likely be concerned about the effect the pending charge—and possible conviction—will have on his family life or employment, or both. Perhaps even more importantly, the individual will be concerned about his impending trial and the possibility that he will be convicted and punished, sentenced perhaps to a lengthy term of incarceration. These concerns may exact not only a psychological toll on the accused, but a physical one as well.

Moreover, “[t]his distress is not confined to the defendant. His or her family also suffers . . . .”

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Breaking Me, CNN.COM, Mar. 14, 2006, http://www.cnn.com/2006/LAW/03/14/gotti.retrial.ap/index.html (last visited Mar. 14, 2006) (after a second jury deadlocked on charges alleging John “Junior” Gotti, the son of a late mob boss, arranged a brutal beating of an individual, and after the trial judge set the date for a third trial, Gotti’s lawyer said Gotti is struggling financially to fight the charges and told the judge Gotti needed time to borrow money to pay his attorneys).

As discussed earlier, see supra note 265, regulations that recently took effect in England re-introduced a means test for cases tried in the Crown Court, which means that far fewer individuals will be entitled to a legal aid attorney at no cost to themselves than were eligible for such aid as in the recent past.

460. See Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (“[T]here are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can to prepare and present their defenses.”).

461. N.S.W. LAW REFORM COMM’N, REPORT 77, supra note 207, para. 2.12.


463. ENG. LAW COMM’N, CONSULTATION PAPER NO. 156, supra note 25, para. 4.7 (noting that “witnesses on both sides, including the alleged victim” also suffer). See also N.Z. LAW COMM’N, REPORT 70, supra note 127, para. 13 (“[T]he process of a criminal trial is . . . a process which may have been grueling for all involved and even hideous . . . for the victim, the accused, witnesses and their families.”).
This “heavy personal strain” inevitably accompanies any criminal charge, as does the expense that must be borne by one who is not entitled to legal aid. The rule against double jeopardy, however, is intended, in part, to minimize the expense, distress, and trauma to an individual accused of a crime by confining it, in most cases, to that arising from a single trial. Once an individual is acquitted, or convicted, he need never again have to undergo the “distress and trauma of the trial process” for the same offense. However, allowing the prosecution to appeal a trial judge’s ruling of no case to answer could frustrate this purpose, because, at a minimum, the defendant must endure the rigors of the appellate process before the trial judge’s ruling of no case to answer can take effect and he can be formally acquitted, and at the extreme, by being compelled to undergo a second trial for the same offense if the prosecution succeeds in its appeal.

In those cases in which the prosecution decides to appeal the trial judge’s ruling of no case to answer, the “acquitted” defendant will have to “defend” himself in the appellate court. In the absence of legal aid, he “is likely to carry an enormous burden if, in addition to defending himself or herself at trial, the additional expense of an appeal . . . is to be borne.” Even if the “acquitted” defendant receives legal aid for the appeal, he may bear a severe financial burden during the pendency of the appeal because of the continued disruption to his employment or business.
Nevertheless, one must remember the trial judge’s ruling of no case to answer ended the defendant’s trial (at least for the moment) before the defendant presented his case and the appellate proceedings can be viewed, in effect, as a substitute for the remainder of his trial. During the pendency of the appeal, the accused will not have to face the stress, embarrassment, and expense of the remainder of his trial. And while he still must “defend” himself in the appellate court, doing so under these circumstances may be less stressful and embarrassing than defending himself at trial, because the trial judge has already ruled in his favor and

(Eng.) (the Court of Appeal heard the prosecution’s appeal on Nov. 5, 2010, but did not decide the case until June 17, 2011, 224 days later, when it upheld the appeal and ordered a fresh trial); R v. S.H., [2010] EWCA (Crim) 1931, [1], [44], [64], [2011] 1 Crim. App. 14, at 184, 195, 201 (Eng.) (the trial judge ruled on July 13, 2009, the defendant had no case to answer, and 386 days later, on Aug. 3, 2010, the Court of Appeal allowed the prosecution’s appeal and ordered a fresh trial); R v. W., [2010] EWCA (Crim) 927, [1], [42] (no jur. given) (the trial judge ruled on Oct. 9, 2009, the defendant had no case to answer, and 214 days later, on May 11, 2010, the Court of Appeal allowed the prosecution’s appeal and ordered a fresh trial); R v. N.T., [2010] EWCA (Crim) 711, [9], [15], [2010] 2 Crim. App. 12, at 87, 89 (Eng.) (on Aug. 13, 2009, the trial judge stayed the proceedings as an abuse of process, and the Court of Appeal dismissed the prosecution’s appeal 230 days later, on Mar. 31, 2010, for lack of jurisdiction); CPS v. Mattu, [2009] EWCA (Crim) 1483, [1], [22] (Eng.) (on Nov. 3, 2008, the trial judge stayed as an abuse of process two counts of the indictment, and the Court of Appeal dismissed the prosecution’s appeal 232 days later, on June 23, 2009); R v. M.K., [2009] EWCA (Crim) 952, [1], [8], [21], [27], [30] (Eng.) (the trial judge ruled on June 11, 2008, the defendants had no case to answer, and the Court of Appeal reversed that ruling and ordered a new trial 324 days later, on May 1, 2009); R v. L., [2008] EWCA (Crim) 1970, [6]–[7], [36]–[37], [2009] 1 Crim. App. 16, at 232, 233, 242 (Eng.) (the trial judge quashed the indictment on Jan. 29, 2008, and 212 days later, on Aug. 28, 2008, the Court of Appeal allowed the prosecution’s appeal in part, but nevertheless directed the acquittal of the defendants because it found it would not be in the interests of justice to order a new trial); R v. N.W., [2008] EWCA (Crim) 2, [1], [39] (Eng.) (the trial judge ruled on Apr. 27, 2007, the defendants had no case to answer, and the Court of Appeal dismissed the prosecution’s appeal 271 days later, on Jan. 23, 2008); R v. P., [2007] EWCA (Crim) 3484, [1]–[2], [13] (Eng.) (sometime after the defendant’s trial began on Nov. 27, 2006, the trial judge ruled the defendant had no case to answer, and the Court of Appeal allowed the prosecution’s appeal on Oct. 12, 2007, 319 days after the commencement of the trial). See also R v. McNally, [2009] NICA (Crim) 3, [1]–[2], [24]–[25] (on May 2, 2008, the trial judge stayed the proceedings on several counts of an indictment as an abuse of process, and 249 days later, on Jan. 6, 2009, the Court of Appeal in Northern Ireland allowed the prosecution’s appeal); R v. Jamison, [2008] NICA (Crim) 32, [1], [3] (on Oct. 18, 2007, the trial judge stayed the proceedings as an abuse of process, and 210 days later, on May 15, 2008, the Court of Appeal in Northern Ireland dismissed the prosecution’s appeal on the ground it did not have jurisdiction).
concluded that the prosecution did not prove its case.\textsuperscript{473} On the other hand, the appellate process is likely to last longer than it would have taken to complete the defendant’s trial,\textsuperscript{474} so whatever stress and embarrassment the appellate process produces will last longer than that which would have resulted from the completion of the defendant’s trial. In addition, the appeal may be more expensive for the defendant than would the completion of the trial. On balance, then, one might reasonably conclude that the trauma and distress, and perhaps also the financial cost, of the appellate process that has replaced that which would have resulted had the trial judge concluded the defendant did have a case to answer and allowed the trial to continue until the jury reached a verdict will to some extent have increased the overall trauma and distress of the criminal process.\textsuperscript{475}

Moreover, if the appellate court orders a new trial because it finds the trial judge erred in ruling the defendant had no case to answer, the defendant will be compelled to undergo the anxiety, embarrassment, and perhaps expense of a second trial for the same offense,\textsuperscript{476} thus frustrating one of the fundamental purposes of the rule against double jeopardy. It is true, of course, the rule against double jeopardy does not in all circumstances preclude a second trial for the same offense. A second trial for the same offense is permissible, for example, when the trial judge in the defendant’s first trial discharges the jury, i.e., declares a mistrial,\textsuperscript{477} either at the request of the defendant or with his consent,\textsuperscript{478} or

\textsuperscript{473} The defendant will of course be worried about having to undergo a new trial, or the resumption of his original trial, and his life may be put on “hold” during the pendency of the appellate process. Those concerns were discussed earlier. See supra text accompanying notes 384–437.\textsuperscript{474} See cases cited supra note 435. As of November 1, 2011, the appellate process (in all appeals by the prosecution under section 58 of the Criminal Justice Act 2003) has taken between four days, R v. J.G., [2006] EW CA (Crim) 3276, [1], [15] (the trial judge ruled on Dec. 4, 2006, the defendant had no case to answer, and the Court of Appeal dismissed the prosecution’s appeal on Dec. 8, 2006), and 386 days, R v. S.H., [2010] EWCA (Crim) 1931, [1], [44], [64], [2011] 1 Crim. App. 14, at 184, 195, 201 (Eng.) (the trial judge ruled on July 13, 2009, the defendant had no case to answer, and the Court of Appeal allowed the prosecution’s appeal and ordered a fresh trial on Aug. 3, 2010), to complete.\textsuperscript{475} See N.S.W. LAW REFORM COMM’N, REPORT 77, supra note 207, para. 2.13 (“If, in fact, there were no mistake, and, ultimately, an appeal court were to find the original verdict of acquittal sound, then the accused has faced an unnecessary emotional and financial burden.”).\textsuperscript{476} Or, alternatively, the resumption of his initial trial. See Criminal Justice Act, 2003, c. 44, § 61[4](a) (Eng.).\textsuperscript{477} A new trial also is permissible, in most circumstances, when a convicted defendant successfully appeals her conviction. See supra note 334. The justification for allowing retrial in this situation and the reasons for distinguishing the situation involving a prosecution appeal of a trial judge’s ruling of no case to answer are discussed infra text accompanying notes 535–36.
regardless of the defendant’s consent, because of the jury’s inability to reach a verdict or some other valid reason. In each of these situations, though, the defendant’s trial ended without a decision, and it can be persuasively argued that the needs of justice require the defendant undergo a second trial for the same offense so the question of his guilt or innocence can be resolved one way or the other. In addition, when the

478. See supra notes 334 & 362.
479. Archbold, supra note 15, § 4-440; United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824) (holding a retrial is constitutionally permissible following a mistrial brought about by a deadlocked jury).
480. A trial judge in England can discharge the jury before it reaches a verdict if there exists an “evident necessity,” Winsor v. R, [1866] 1 Q.B. 289, 305 (Eng.); 4 Blackstone, supra note 26, at 360, “that is, a high degree of need for such discharge,” Archbold, supra note 15, § 4-253. The decision to discharge a jury is not subject to review, R v. Lewis, [1909] 2 Crim. App. 180, 181 (Eng.); accord Criminal Justice Act, 2003, § 58(2)(a) (providing that the prosecution has no right of appeal under the provisions of the Act in respect of “a ruling that a jury be discharged”), so, ordinarily, the defendant can be retried. R v. Davison, [1860] 175 E.R. 1046 (Eng. Cent. Crim. Ct.) 1048; 2 F. & F. 250, 254 (Pollock, C.B.) (concluding a defendant can be retried when the trial judge in the first trial exercised his discretion and discharged the jury); id.; 2 F. & F. at 255 (Martin, B.) (same); id.; 2 F. & F. at 255 (Hill, J.) (same). Accord Archbold, supra note 15, § 4-262. The same rule holds forth in the United States. Perez, 22 U.S. (9 Wheat.) at 580 (holding the Double Jeopardy Clause of the Fifth Amendment does not preclude retrial when a trial judge, without the defendant’s consent, declares a mistrial because “there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated”); Arizona v. Washington, 434 U.S. 497, 505, 516 (1978) (holding retrial is constitutionally permissible following a mistrial brought about by a “manifest necessity”).
481. See Illinois v. Somerville, 410 U.S. 458, 463 (1973) (recognizing the public has an “interest . . . in seeing that a criminal prosecution proceed to verdict, either of acquittal or conviction”).

With respect to the situation involving a hung jury, there is an additional consideration. If a jury verdict, whether a conviction or acquittal, requires unanimity, or in some circumstances the agreement of a specified number, such as 10 members of a 12-person jury, see Juries Act, 1974, c. 23, § 17(1) (Eng.) (“[T]he verdict of a jury in proceedings in the Crown Court or the High Court need not be unanimous if—(a) in a case where there are not less than eleven jurors, ten of them agree on the verdict; and (b) in a case where there are ten jurors, nine of them agree on the verdict.”), precluding a retrial when the jury cannot meet the requirements for a verdict, for example, when it is split 9-3 in favor of conviction, or 8-4 in favor of acquittal, would actually change the requirements for a verdict to say, in effect, a jury reaches a verdict of not guilty whenever a sufficient number do not agree to convict. While some may prefer that rule, it has never been the law in Anglo-American legal systems. Moreover, although “fault” can sometimes be attributed to one party or the other when a mistrial is declared before the case is sent to the jury—in the sense that the prosecution (or defense) engaged in some (mis)conduct that gave rise to the request for a mistrial (or to the judge’s sua sponte declaration of a mistrial)—neither party can be “faulted” for the jury’s inability to reach a verdict.
defendant sought to have the jury discharged, or consented to its discharge, it is by no means unfair to allow him to be tried anew for the same offense, for he himself sought to end his trial, or at least consented to have his trial end, before its completion. Indeed, in seeking or agreeing to have the jury discharged because error infected the trial, the defendant most likely contemplated he would be subject to a new trial.

The above reasoning does not apply, however, when a trial judge erroneously ends a defendant’s trial by ruling the defendant has no case to answer. First, unlike the case involving the discharge of the jury (i.e., the declaration of a mistrial), when a trial judge rules the defendant has no case to answer, there is a decision in the case: the trial judge has concluded the prosecution failed to prove its case and the defendant should be acquitted. The charges against the defendant will not stand unresolved if retrial is not permitted. Second, although the defendant is “responsible” for the trial judge’s ruling—in the sense he made the submission on which the judge’s ruling was based—by making that submission the defendant, unlike in the situation in which he asks for or consents to a mistrial because of some error in the proceedings, seeks to end the trial with a decision on his guilt or innocence. He did not want a new trial, nor did he contemplate a new trial would take place if the judge acceded to his submission; rather, he desired the case to end then and there with his acquittal, and believed that if the judge acceded to his submission, it would do so.

If the trial judge erred in ruling the defendant had no case to answer, that is not the defendant’s fault. So why should he have to “pay” for it by undergoing a new trial? As pointed out earlier, although the judge in a common law system plays a neutral role in the trial, he “is more

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483. See id. at 608.
484. Compare Scott, 437 U.S. 82, 96 (“[T]he defendant elected to seek termination of the trial on grounds unrelated to guilt or innocence. This is scarcely a picture of an all-powerful state relentlessly pursuing a defendant who had either been found not guilty or who had at least insisted on having the issue of guilt submitted to the first trier of fact.” (emphasis added)); id. at 98–99 (“[I]f 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 if the government is permitted to appeal from such a ruling of the trial court in favor of the defendant.”) (emphasis added)).
485. See supra note 292.
486. N.S.W. LAW REFORM COMM’N, REPORT 77, supra note 207, para. 2.13.
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...closely allied with the government than with the accused," and in England, is appointed and paid by the state. Why should that same state, as represented by the prosecution, be entitled to haul an individual into court a second time and compel him to undergo the “grueling” ordeal of a second trial, because one of its own actors erred? As one judge put it, “[i]f the [trial] judge makes a mistake and the accused is acquitted, then the setting aside of the verdict may involve the accused in the emotional ordeal of going through it all again, although the mistake was something over which he had no control.”

One therefore must conclude that allowing the prosecution to appeal a judge’s ruling of no case to answer, and if successful, to try the defendant again for the same offense, frustrates the double jeopardy rule’s purpose of limiting the expense, distress, and trauma to an individual accused of a crime to that arising from a single trial.

6. Conserving Scarce Prosecutorial and Judicial Resources

Prohibiting the government from retrying an individual for the same offense following an acquittal also conserves limited prosecutorial and judicial resources. It prevents a prosecutor from expending additional time, money, and effort investigating and prosecuting a person for the same offense again and again until he achieves the desired result—a conviction. Similarly, it keeps prosecutors from tying up courtrooms,

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487. FRIEDLAND, supra note 1, at 298.
488. See supra note 298.
489. See supra note 299.
In England, there are certain circumstances under which the state can remove a judge from office. See supra note 300.
492. Cf. Ashe v. Swenson, 397 U.S. 436 (1970) (the State of Missouri charged an individual with robbing each of six participants in a poker game and after he was tried and acquitted of robbing one participant the State tried him for robbing a second participant); Hoag v. New Jersey, 356 U.S. 464 (1958) (after the defendant was tried and acquitted of robbing three individuals at a tavern, the State of New Jersey tried him for robbing a fourth person who had been robbed in the same incident). See also Ciucci v. Illinois, 356 U.S. 571 (1958) (per curiam) (in separate indictments, the State of Illinois charged an individual with murdering his wife and three children and tried him three separate times, first for the murder of his wife, then for the murder of one of his daughters, and finally for the murder of his son—gaining a conviction in each trial— until it obtained the sentence it wanted, the death penalty).
judges, and court personnel in successive attempts to convict an individual for the same offense.\footnote{493}

This policy is frustrated by allowing the prosecution to appeal rulings of no case to answer. In the absence of a right to appeal, a trial judge’s ruling of no case to answer would end the case, forcing the prosecution to move on to its next case without “imposing further on scarce financial and court resources.”\footnote{494} In England, however, whenever the prosecution exercises its right to appeal a ruling of no case to answer, it will expend additional time, money, and effort on a case that has already been “decided.” Given the limited resources available to prosecutors, this means that a prosecutor seeking to appeal a ruling of no case to answer will have to divert time and other resources from cases that have not yet been tried.\footnote{495} If the prosecution succeeds in its appeal of the ruling of no case to answer and obtains a new trial,\footnote{496} or is allowed to resume the initial trial,\footnote{497} it will have to divert further resources from untried cases to undertake the prosecution at that new, or resumed, trial. The reduced amount of time, effort, and money expended on some of these untried cases might result in acquittals that would otherwise have been—or at least should have been—convictions, perhaps resulting in dangerous criminals going free. Moreover, if the prosecution fails in its appeal,
either by not obtaining leave to appeal\(^{498}\) or on the merits,\(^{499}\) or if it succeeds in its appeal but the resultant new (or resumed) trial ends in the acquittal of the accused, the prosecution’s diversion of its limited resources will have been for nought.\(^{500}\)

Allowing the prosecution to appeal a ruling of no case to answer also diverts limited judicial resources. Instead of dealing with pending appeals—some of which might involve incarcerated individuals convicted at trials infected with legal error and whose appeals ultimately will be granted—judges on the Court of Appeal will be hearing appeals on rulings of no case to answer. Similarly, when the Court of Appeal reverses a trial judge’s ruling of no case to answer and orders a new trial, or the resumption of the defendant’s trial, the trial court might have to delay other trials so it can conduct the retrial, or resume the initial trial—other trials that could involve a guilty defendant who is free in the community on bail, or an innocent person being held in custody awaiting trial.

7. Reducing the Risk of an Erroneous Conviction

Prohibiting a new trial of an individual following his acquittal for the same offense prevents the government from attempting to persuade a second fact finder of the individual’s guilt “after having failed with the first.”\(^{501}\) In doing so, it reduces the risk of an erroneous conviction.

\(^{498}\) See id. § 57(4), (8)–(9).

\(^{499}\) The same would be true if the Court of Appeal reverses the trial judge’s ruling but nevertheless orders the defendant’s acquittal because it concludes the defendant could not receive a fair trial if it ordered either the resumption of his trial or a fresh trial. See id. § 61(4)(c), (5).

\(^{500}\) Of course, it is impossible to determine the ramifications of the prosecution’s decision to spend its limited resources on appealing a ruling of no case to answer, rather than on untried cases. But even if it were possible, it would still be difficult, if not impossible, to say whether the appeal, if successful, achieved an overall benefit for society. To illustrate, assume the prosecution obtained one additional burglary conviction in a given time period because of its successful appeal of a trial judge’s ruling of no case to answer. At first glance, one would conclude that society gained by the prosecution’s expenditure of resources to appeal the trial judge’s ruling. But would one maintain that position if, during the same time period, the prosecution expended resources to appeal, unsuccessfully, three other rulings of no case to answer in prosecutions for various property offenses, and because of its expenditure of resources on the four appeals, diverted time, effort, and money from a rape trial that resulted in the defendant’s acquittal (and release into the community) that, with the infusion of more time, effort, and money, would otherwise have resulted in a conviction and the incarceration of a dangerous individual?

Indeed, Professor Martin L. Friedland asserts that the increased chances of convicting an innocent person at a second trial for the same offense “is at the core of the problem.”

As the Supreme Court of the United States recognized in *Green v. United States*, if the government were allowed to make repeated attempts to convict an individual for an offense, it would “enhanc[e] the possibility that even though innocent he may be found guilty.”

The risk of erroneously convicting an innocent person would increase for several reasons. First, the fact that an individual accused of a particular offense could face additional trials for the same offense, even after being acquitted, might induce an innocent person to forgo a trial entirely and plead guilty before his first trial even begins. Second, multiple prosecutions would permit the government to use the first trial as a “dry run,” allowing it the opportunity to “hon[e] its trial strategies and perfect[] its evidence” in light of what it learned at the first trial about the weaknesses of its case and the strengths and weaknesses of the defendant’s case. For instance, the government

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502. FRIEDLAND, supra note 1, at 4.
504. Id. at 188. Accord Pearce v The Queen, (1998) 194 CLR 610, 614 (Austl.) (McHugh, Hayne & Callinan, JJ.); id. at 636 (Kirby, J.). See also ENG. LAW COMM’N, CONSULTATION PAPER NO. 156, supra note 25, para. 4.5; N.Z. LAW COMM’N, REPORT 70, supra note 127, para. 15 (quoting id.); AUSTRALIAN MODEL CRIMINAL CODE, DISCUSSION PAPER, supra note 111, at 2.
505. FRIEDLAND, supra note 1, at 4.
509. DiFrancesco, 449 U.S. at 128.
510. Professor Friedland writes that at a second trial the defendant may be at a greater disadvantage than he was at the first trial because he will normally have disclosed his complete defence at the former trial. Moreover, he may have entered the witness-box himself. The prosecutor can study the transcript and may thereby find apparent defects and inconsistencies in the defence evidence to use at the second trial. See also ENG. LAW COMM’N, CONSULTATION PAPER NO. 156, supra note 25, para. 4.5 (“[B]ecause there has already been one trial at which the defence has shown its hand, the prosecution may enjoy a tactical advantage at a second trial; and this will increase the likelihood of a conviction, whether the defendant is guilty or innocent.”); ENG. LAW COMM’N, REPORT NO. 267, supra note 25, para. 7.65 (“[A]t a retrial witnesses will have had a dry run, tactics will have been revealed and weaknesses in the prosecution case will have been spotted and possibly plugged.”); N.Z. LAW COMM’N, REPORT 70, supra note 127, para. 15 (quoting id.); Poulin, supra note 170, at 977 (“[R]eprosecution after the government presents its evidence and the fact finder acquits the defendant, creates the risk that the prosecution will marshal its resources in the second proceeding to correct the deficiency in its case and, possibly, convict an innocent defendant.”). Cf. Arizona v. Washington, 434 U.S. 497, 504 n.14 (1978) (quoting Judge Leventhal’s description in *Carsey v. United States*, 392 F.2d 810, 813–14 (D.C. Cir. 1967) (concurring opinion), of how some of the Government’s witnesses
could “supply evidence which it failed to muster in the first proceeding.”\textsuperscript{511} Third, if multiple prosecutions were permitted, the government, with its vastly superior resources, could wear down the defendant—financially,\textsuperscript{512} emotionally, and physically—\textsuperscript{513} and obtain a conviction “through sheer governmental perseverance.”\textsuperscript{514} Finally, “[i]f it is accepted that juries do on occasion return perverse verdicts of guilty [that is, verdicts ‘contrary to the evidence,’\textsuperscript{515}] the chance that a particular defendant will be perversely convicted must increase if he or she is tried more than once.”\textsuperscript{516} In sum, as Professor Akhil Reed Amar subtly changed their testimony over the course of four trials so it became more favorable to the Government; \textit{Ashe}, 397 U.S. at 447 (in a prosecution for robbing a participant in a poker game, following the defendant’s acquittal of robbing another participant, the government conceded that when the prosecutor lost the first trial, “‘he did what every good attorney would do—he refined his presentation in light of the turn of events at the first trial’”); \textit{Hoag v. New Jersey}, 356 U.S. 464, 465–66 (1958) (in a prosecution for robbing a person at a tavern, following the defendant’s acquittal of robbing three other individuals at the tavern, the government altered its presentation of proof by calling only the witness who had testified most favorably to it in the first trial).

It is true that in a second trial for the same offense “the defence may equally be in a position to adapt their case to the prosecution strategy appropriately.” Dennis, supra note 125, at 939. As discussed in the text, however, the defendant’s resources pale in comparison to those of the government, see supra text accompanying notes 263–66, and the defendant might be financially, emotionally, and physically worn out after the first trial. See infra text accompanying notes 512–13. The defendant might therefore decide to plead guilty before the retrial because of his inability to undergo the burden of a second trial. Cf. text accompanying note 495. Even if he opts to go to trial a second time, any knowledge of the government’s evidence and its strategy he may have gained at the first trial is likely to be of less value to him than the information gained by the government at the first trial. For example, if the government discovered a particular weakness in its own case, it is likely that it could do much more to eliminate that weakness (e.g., locate and interview witnesses or conduct forensic tests) than the defendant could do if he identified a particular weakness in his own case. See supra text accompanying notes 263–66. Moreover, the fact the defendant gained information about the government’s evidence or strategy does nothing to prevent a perverse verdict of guilty in his second trial. See infra text accompanying notes 515–16.

\textsuperscript{511} \textit{Tibbs}, 457 U.S. at 11 (quoting \textit{Burks v. United States}, 437 U.S. 1, 11 (1978)).

\textsuperscript{512} See supra text accompanying notes 459–61. \textit{But see} ENG. LAW COMM’N, CONSULTATION PAPER NO. 156, supra note 25, para. 4.5 (asserting that “[i]n England and Wales, lack of financial resources is not usually a serious problem for defendants in criminal cases because of the availability of legal aid”).

\textsuperscript{513} See supra text accompanying notes 462.

\textsuperscript{514} \textit{Tibbs}, 457 U.S. at 41. \textit{See also} FRIEDLAND, supra note 1, at 4 (“In many cases an innocent person will not have the stamina or resources effectively to fight a second charge”).

\textsuperscript{515} \textit{BLACK’S}, supra note 64, at 1697.

\textsuperscript{516} \textit{ENGLISH LAW COMMISSION}, CONSULTATION PAPER NO. 156, supra note 25, para. 4.5 (footnote omitted) (defining a “perverse verdict of guilty” as “a guilty verdict
and Jonathan L. Marcus so eloquently put it, “[i]f you play with something long enough, you are likely to break it; and if the government is allowed to prosecute an innocent defendant enough times and disregard all acquittals, eventually it is likely to convict an innocent (by hypothesis) person.”

Permitting the prosecution to appeal a trial judge’s ruling of no case to answer will frustrate this purpose of the rule against double jeopardy.

Professor Roberts asserts that “in our current state of ignorance about the factors predicting wrongful conviction, we have no reason to be confident that successive retrials would materially increase the global risk of convicting the innocent...,” and he rhetorically asks “[i]f the jury at the first trial correctly acquitted an innocent defendant on the evidence, could a second (or third) jury, as presumptively rational fact-finders, not be counted on to acquit again (and again)?” Id. at 399–400. The answer to that question may well be “No.” Professor Roberts’s implied affirmative answer would be correct if the government in the second trial presented precisely the same evidence, in virtually the same manner, as it did in the first trial. But that is unlikely to happen. For, after losing the first case, the prosecutor most likely would do “‘what every good attorney would do—... refine[,] his presentation in light of the turn of events at the first trial.’” Ashe v. Swenson, 397 U.S. 436, 447 (1970). Ashe provides an excellent example of why the government has an increased chance of conviction in a second trial. There, the government prosecuted an individual for robbing a participant in a poker game. The government’s identification testimony at trial was weak—only one of its four witnesses identified the accused in court as one of the robbers—and the jury acquitted the accused. After the acquittal, the government tried the individual for the robbery of one of the other participants in the poker game. At the second trial it elicited stronger identification testimony from three of the witnesses who had testified at the first trial and further refined its case by declining to call the robbery victim whose identification testimony at the first trial had been negative. Id. at 439–40. See also Arizona v. Washington, 434 U.S. 497, 504 n.14 (1978) (quoting Judge Leventhal’s description in Carsey v. United States, 392 F.2d 810, 813–14 (D.C. Cir. 1967) (concurring opinion), of how some of the Government’s witnesses subtly changed their testimony over the course of four trials so that it became more favorable to the Government); Hoag v. New Jersey, 356 U.S. 464, 465–66 (1958) (in a prosecution for robbing a person at a tavern, following the defendant’s acquittal of robbing three other individuals at the tavern, the government altered its presentation of proof by calling only the witness who had testified most favorably to it in the first trial). Professor Roberts also does not sufficiently take into account the effect multiple trials can have on the defendant—financially, emotionally, and physically, see supra text accompanying notes 459–62—and the realistic possibility that the government will obtain a conviction “through sheer... perseverance.” Tibbs, 457 U.S. at 41.

See N.S.W. LAW REFORM COMM’N, REPORT 77, supra note 207, para. 2.6 (“[T]he ultimate consequence of allowing an appeal from a directed verdict of acquittal may be a retrial. The accused’s position in that event is unlikely to be exactly the same as it was at the original trial, and, in fact, more likely to be prejudiced in comparison
Whenever the prosecution, acting in good faith, brings an individual to trial on a criminal charge, it believes it has sufficient evidence to prove the individual’s guilt beyond a reasonable doubt. In trials that run their course, the prosecution may learn its belief was wrong when the jury returns its verdict—that is, the jury may find the evidence lacking and therefore acquit the defendant—but, absent a right of appeal, the rule against double jeopardy prevents the prosecution from strengthening its case and bringing a second prosecution against the acquitted individual for the same offense. When, however, a trial judge rules at the close of the prosecution’s case that the defendant has no case to answer, the prosecution learns at an earlier stage of the proceeding that its evidence may not be as strong as it initially believed. Yet, allowing the prosecution to appeal the judge’s ruling may result in the prosecution’s being able to retry the “acquitted” defendant for the same offense. And certainly if it succeeds in its appeal and obtains a new trial, it will not merely present the same evidence that initially resulted in a trial judge’s finding of no case to answer. For even if the appellate court were correct and the prosecution did present a case for the defendant to answer, the prosecution will have been put on notice that, at least in the eyes of a trained, professional judge, its case against the defendant was not a

with the earlier position.”); Poulin, supra note 170, at 977 (“Th[e] risk [that the prosecution will convict an innocent defendant] is most acute when either the court or the jury has assessed the prosecution’s case and found it wanting.”).

519. See Standards for Criminal Justice § 3-3.9 (a) (1993) (“A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction.”).

520. But see Criminal Justice Act, 2003, c. 44, §§ 75–86 (Eng.) (allowing the government, under certain circumstances, to retry a previously-acquitted individual for certain serious offenses when “there is new and compelling evidence against the acquitted person”).

521. See supra text accompanying notes 50–53, 60–61.


523. As opposed to the Court of Appeal’s ordering a resumption of the initial trial. See id. § 61(4)(a).

524. The only exception might be when the trial judge ruled the defendant had no case to answer on the basis of the so-called first limb of Galbraith, (that is, on the basis that the Crown has not adduced any evidence of one or more elements of the offence—a ruling on a point of law) as distinct from the second (namely that the evidence adduced is such that a jury could not properly convict on it—a ruling based on the court’s view of the evidence).

particularly strong one, and it “presumably will be spurred to greater efforts in gathering and presenting proof of guilt”\textsuperscript{525} at the defendant’s second trial. Moreover, if the trial judge explained in detail his reasons for finding the prosecution’s case insufficient,\textsuperscript{526} the prosecution will have a road map pinpointing the areas in which it needs to strengthen its case at the retrial.\textsuperscript{527} It may, for example, attempt to strengthen its case against the defendant by presenting additional evidence on a particular factual issue;\textsuperscript{528} or it may work with a witness so the witness comes across more credibly while testifying at the second trial than she did at the first trial; or perhaps it will refrain from calling a particular witness whose testimony at the first trial was confused or somewhat contradictory.\textsuperscript{529} In effect, it will treat the first, aborted, trial as a “dress rehearsal”\textsuperscript{530} for the second trial. And this is true even though the defense did not put on its case at the first trial. As the English Law Commission explained,

the defence may have tested [the prosecution’s evidence] in cross-examination. In doing so the defence may have revealed some or all of its strategy, although it will not have begun to present its case. It may also have provided the prosecution witnesses who have given evidence with a “dry run.” Accordingly, in these ways the defence would be disadvantaged at a retrial by facing a prosecution potentially better prepared.\textsuperscript{531}

It is true that “[r]etrials are a routine feature of the trial process”\textsuperscript{532} in England, occurring most frequently after a convicted defendant successfully appeals his conviction, or after the trial judge discharges the jury (declares a mistrial) in the defendant’s initial trial, either because the

\begin{itemize}
\item \textsuperscript{525} Poulin, \textit{supra} note 170, at 977.
\item \textsuperscript{527} Professor Poulin concludes that, “if it is accompanied by a statement of reasons, a judicial determination of inadequacy will be a more effective spur to the prosecution [to correct the deficiency in its case] than [would] a general verdict of not guilty.” Poulin, \textit{supra} note 170, at 977.
\item \textsuperscript{528} \textit{Cf. Ashe v. Swenson}, 397 U.S. 436, 439–40 (1970) (at the defendant’s second trial for armed robbery, the prosecution elicited stronger identification testimony from three of the witnesses who had testified at the defendant’s first trial and declined to call the robbery victim whose identification testimony at the first trial had been negative).
\item \textsuperscript{531} \textit{Eng. Law Comm’n, Consultation Paper No. 158, \textit{supra} note 25, para. 6.3} (stating, however, that, “[c]onversely, the defence will have available for cross-examination on the retrial an additional version of events from prosecution witnesses on the basis of which it may be able to mount a challenge to witnesses’ reliability, based on inconsistencies in their various accounts”).
\item \textsuperscript{532} \textit{Id.} at para. 6.6.
\end{itemize}
jury could not reach a verdict or because of an error that infected the trial. Moreover, retrials are permitted in these situations\textsuperscript{533} even though the prosecution is likely to have an additional advantage over the defendant at the second trial.\textsuperscript{534} One could argue, then, that the fact that the prosecution will be able to strengthen its case at a retrial following the prosecutions’s successful appeal of a trial judge’s ruling of no case to answer should not be a reason for prohibiting the prosecution from taking such appeals. Such reasoning is flawed, however. Merely because the legal system sometimes allows the prosecution to enjoy an additional advantage over the defendant at a retrial does not mean it should always permit it to do so. One must remember that the prosecution’s ability to strengthen its case at a retrial raises a concern because it increases the possibility of an innocent person being convicted. Furthermore, each of the situations mentioned above in which retrials are common is distinguishable from the situation in which a retrial follows the reversal of a trial judge’s ruling of no case to answer.

When a convicted defendant appeals his conviction on the ground that error infected his trial, he is the one \textit{asking} that the case against him not end with the judgment entered upon the jury’s verdict of guilty,\textsuperscript{535} and at the time of taking his appeal, he would be quite content if the Court of Appeal overturned his conviction and granted him a new trial, despite

\textsuperscript{533} See supra note 334.
\textsuperscript{534} See supra text accompanying notes 506–14.

The extent of the additional advantage may depend upon the stage at which the defendant’s first trial ended. The prosecution is likely to have learned very little about the defense case, or any weaknesses in its case, when the first trial ended before the prosecution began presenting its evidence. As a general matter, though, it is likely the prosecution will have learned significantly more about the defense strategy and evidence, and perhaps about any weaknesses in its own case, when the initial trial was aborted before the presentation of the defense case, that is, when the trial judge halted the trial during, or immediately following the completion of, the prosecution case. For even when the trial was halted before the defense presented its case, the prosecution may have learned something about the defendant’s strategy. See supra text accompanying note 531. Of course, it is likely the prosecution is going to gain the most if the first trial ran its course, that is, after both the prosecution and the defense fully presented their cases, as in the situations of a hung jury or a successful defense appeal of a conviction.

\textsuperscript{535} See Price v. Georgia, 398 U.S. 323, 326–27 (1970); United States v. Ball, 163 U.S. 662, 671–72 (1896). See also United States v. Tateo, 377 U.S. 463, 465–66 (1971) (“Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction.”).
the additional advantages the prosecution might have at a second trial. That certainly is not the case when the prosecution appeals a trial judge’s ruling of no case to answer. Should the Court of Appeal allow the appeal and order a new trial, the defendant will be forced to surrender a ruling favorable to him (i.e., no case to answer), and one that, absent the appeal, would have forever ended the case against him for that offense; and in addition, he may be forced to undergo a second trial at which he is likely to be at a significant disadvantage. In short, while it may be fair to retry a convicted defendant who seeks to overturn his conviction and obtain a new trial, it may well be unfair to compel a defendant who has benefited from the trial judge’s ruling of no case to answer to give up that favorable judgment and undergo a new trial.

When a jury, after hearing all the evidence in the case, is unable to reach a verdict, there is no decision in the case—the defendant has been neither acquitted nor convicted. Moreover, neither party can be blamed for the jury’s inability to reach a decision. Under such circumstances, it can be persuasively argued that the needs of justice require the defendant to undergo a second trial for the same offense so the case against him can be resolved one way or the other. Prohibiting a retrial in such situations would, in effect, eliminate the requirement that a prescribed number of jurors agree upon a “not guilty” verdict before a defendant can be acquitted. Unlike the case of a hung jury, however, when a trial judge rules the defendant has no case to answer, there is a decision in the case—the trial judge has concluded the prosecution failed to prove its case and the defendant therefore should be acquitted. Furthermore, as explained earlier, even if the trial judge erred in ruling the defendant had no case to answer, that error can be attributed to an agent of the state—the trial judge. Clearly, the error was not the defendant’s fault, and he should not have to “pay” for it by being forced to undergo a new trial.

Finally, the discharge of the jury (declaration of a mistrial) during the defendant’s initial trial because of some error that infected the trial—like the situation involving a deadlocked jury, but unlike the situation involving a ruling of no case to answer—ends that trial without a

536. See supra text accompanying notes 53, 60–61.
538. See supra note 481.
539. See supra text accompanying notes 53, 60–61.
540. See supra text accompanying notes 485–91.
541. See supra text accompanying notes 297–99.
542. N.S.W. LAW REFORM COMM’N, REPORT 77, supra note 207, para. 2.13.
decision having been reached on the defendant’s guilt or innocence. For that reason it can be argued that the interests of justice compel that the case against the defendant be resolved one way or the other.543 Moreover, when the trial judge discharges the jury at the request of the defendant, or with his consent, the defendant in nearly all circumstances contemplates being tried again. 544 Indeed, in most situations in which the defendant moves for the discharge of the jury, he wants a retrial because he believes the error that gave rise to his motion would increase the chances he will be convicted at the first trial and would in any event necessitate a retrial following a successful appeal.545 As explained earlier, this is not true when a defendant submits he has no case to answer.546

Thus, although retrials in criminal cases occur with some frequency in the English legal system, such retrials should be limited to those situations in which a convicted defendant successfully appeals his conviction or those in which there was no decision in the case, either because of a “hung” jury or the midtrial discharge of the jury because of error that infected the trial. Such a limitation will keep to a minimum the number of cases in which the additional advantages enjoyed by the prosecution at a retrial could lead to the conviction of an innocent person.

8. Maintaining the Public’s Respect for, and Confidence in, the Legal System

The rule against double jeopardy also “protect[s] . . . the legal system itself.”547 As Professor Friedland explains, “[b]y preventing harassment and inconsistent results, the rule assists in ensuring that court

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543. See Illinois v. Somerville, 410 U.S. 458, 463 (1973) (recognizing that the public has an “interest . . . in seeing that a criminal prosecution proceed to verdict, either of acquittal or conviction”).
544. See United States v. Dinitz, 424 U.S. 600, 608 (1976). The trial court in granting the mistrial most certainly also contemplated the defendant would be retried. United States v. Scott, 437 U.S. 82, 92 (1978) (“When a trial court declares a mistrial, it all but invariably contemplates that the prosecutor will be permitted to proceed anew notwithstanding the defendant’s plea of double jeopardy.”).
545. See Dinitz, 424 U.S. at 608, 610.
546. See supra text accompanying note 484.
547. Friedland, supra note 1, at 4. See also N.Z. LAW COMM’N., REPORT 70, supra note 127, para. 14 (“A consequence of the rule against double jeopardy is protection of the administration of justice itself.”).
proceedings . . . ‘command the respect and confidence of the public.’\textsuperscript{548} The public would almost certainly lose respect for the legal system if the government were allowed to try an individual repeatedly for the same offense, despite repeated acquittals. In most cases, the public would perceive the multiple prosecutions as government harassment.\textsuperscript{549} In addition, if the government ultimately obtained a conviction after a previous acquittal, the inconsistent verdicts could affect the public’s confidence in the accuracy of the legal system and dilute the moral force of the criminal law\textsuperscript{550} because it would “leave[] people in doubt whether innocent men are being condemned.”\textsuperscript{551} Professor Paul Roberts explains it in these terms:

[C]riminal conviction and punishment can only hope to be legitimate for as long as political authorities abide by the terms of the criminal justice deal [that has been struck (or that has evolved) in England and Wales, allowing jury verdicts to be set aside to accommodate successful defence appeals against convictions, but not authorizing governments to invalidate jury acquittals.] If governments could accept or reject acquittal verdicts much as it suited them, criminal proceedings would soon be exposed as a sham trial of guilt, and jury acquittal would lose its current practical and symbolic meaning. Public confidence in jury verdicts generally would be undermined, and government would have assumed an ominously authoritarian jurisdiction.\textsuperscript{552}

Although Professor Roberts focuses upon acquittals rendered by a jury, allowing the prosecution to appeal trial judges’ rulings of no case to answer can have a similar effect on the community’s respect for, and confidence in, the legal system. Members of the community may view the prosecution’s right to appeal a ruling of no case to answer as a tool the government can use to disassemble what would otherwise be an acquittal,\textsuperscript{553} and they may ultimately conclude the government is not always bound by an acquittal with which it disagrees and that citizens are not adequately protected. This would be especially true if significant numbers of rulings of no case to answer are overturned by the appellate court.\textsuperscript{554} Moreover, the more rulings of no case to answer the appellate

\textsuperscript{548} FRIEDLAND, supra note 1, at 4 (quoting Connelly v. DPP, [1964] A.C. 1254 (H.L.) 1353 (Lord Devlin) (appeal taken from Eng.) (U.K.)).

\textsuperscript{549} See N.Z. LAW COMM’N, REPORT 70, supra note 127, para. 14.

\textsuperscript{550} Id.

\textsuperscript{551} In re Winship, 397 U.S. 358, 364 (1970).

\textsuperscript{552} Roberts, supra note 308, at 411.

\textsuperscript{553} Absent a prosecution right of appeal, a trial judge who rules the defendant has no case to answer would order the jury to acquit the defendant. See supra text accompanying notes 50–53, 60–61.

\textsuperscript{554} The Author’s research disclosed that as of November 1, 2011, the prosecution appealed twenty-four rulings of no case to answer pursuant to the Criminal Justice Act 2003, and the Court of Appeal reversed fifteen of those rulings. Compare R v. S.H., [2010] EWCA (Crim) 1931, [2], [44], [2011] 1 Crim. App. 14, at 184, 195 (Eng.) (reversing the trial judge’s ruling of no case to answer); R v. W., [2010] EWCA (Crim)
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[145x748]RUDSTEIN (DO NOT DELETE) [1]

Retrying the Acquitted in England

[2011] 2 Crim. App. 25, at 365, 369 (Eng.) (dismissing the prosecution’s appeal of the trial judge’s ruling of no case to answer); R v. Q., [2011] EWCA (Crim) 1584, [1], [20], [2011] 2 Crim. App. 25, at 365, 369 (Eng.) (dismissing the prosecution’s appeal of the trial judge’s ruling of no case to answer); R v. H., [2007] EWCA (Crim) 2056, [2], [32], [35] (Eng.) (same); R v. C., [2007] EWCA (Crim) 1862, [1], [42], [60] (Wales) (same); R v. K., [2007] EWCA (Crim) 491, [1], [14], [33]–[35], [2007] 2 Crim. App. 10, at 130, 133, 138 (same), and R v. J.S.M., [2006] EWCA (Crim) 2046, [1]–[2], [6]–[8] (jur. not given) (same), with R v. Q., [2011] EWCA (Crim) 1584, [1], [20], [2011] 2 Crim. App. 25, at 365, 369 (Eng.) (dismissing the prosecution’s appeal of the trial judge’s ruling of no case to answer); R v. P., [2010] EWCA (Crim) 2895, [1], [32] (Wales) (same); R v. M., [2009] EWCA (Crim) 2848, [1], [26] (Eng.) (same); R v. Thomas, [2009] EWCA (Crim) 1682, [1], [41], [46] (Eng.) (same); R v. Chi Kuen Chung, [2008] EWCA (Crim) 836, [1], [28] (Eng.) (same); R v. N.W., [2008] EWCA (Crim) 2, [1], [39] (Eng.) (same); R v. A., [2007] EWCA (Crim) 2868, [1]–[2], [21] (Eng.) (same); R v. J.G., [2006] EWCA (Crim) 3276, [1], [15] (same), and R v. Patel, [2006] EWCA (Crim) 2689, [18], [2007] Crim. App. 12, at 192, 196 (Eng.) (same). See also R v. M.H., [2011] EWCA (Crim) 1508, [2], [50] (Eng.) (in a case involving charges of causing the death of a motorist by driving while uninsured and driving while unlicensed, the Court of Appeal allowed the prosecution’s appeal of a ruling by the trial judge, on an agreed factual basis, that “as a matter of law a jury could not be directed that . . . the defendant was a cause of the motorist’s death”); R v. F., [2010] EWCA (Crim) 2243, [1]–[4], [16] (Eng.) (the Court of Appeal dismissed the prosecution’s appeal of the trial judge’s pretrial ruling that as a matter of law the agreed facts in the case were insufficient to prove the defendant’s guilt); R v. Tilley, [2009] EWCA (Crim) 1426, [4]–[6], [46], [2009] Crim. App. 31, at 512, 513–14, 522 (Eng.) (the Court of Appeal dismissed the prosecution’s appeal of the trial judge’s ruling that the statute under which the defendant was charged did not encompass his conduct); R v. H., [2008] EWCA (Crim) 483, [3], [34], [57]–[58] (Eng.) (the Court of Appeal allowed the prosecution’s appeal and reversed the trial judge’s ruling, made before the jury was sworn, that under the prosecution’s evidence in its then form, the defendant did not have a case to answer; but the Court of Appeal nevertheless concluded that the interests of justice would not be served by resuming the proceedings or ordering a new trial); R v. Francis, [2006] EWCA (Crim) 3323, [1], [11]–[13], [2007] 1 Crim. App. 36, at 470, 472 (Eng.) (the Court of Appeal allowed the prosecution’s appeal of the trial judge’s ruling that as a matter of law the offense charged could not have been committed); CPS v. Morgan, [2006] EWCA (Crim) 1742, [1]–[2], [8]–[12], [26] (Eng.) (the Court of Appeal allowed the prosecution’s appeal of the trial judge’s ruling that upon the agreed-upon facts, the defendant’s conduct did not constitute an offense); R v. D., [2006] EWCA (Crim) 1139, [1], [7]–[8], [18], [31]–[33], [2006] 2 Crim. App. 24, at 350, 351, 353, 357–58 (Eng.) (the Court of Appeal dismissed the prosecution’s appeal of the trial judge’s ruling that the cases should not proceed to trial because there was no basis on which a reasonable jury could convict the defendant of the offenses with which he was charged); R v. C., [2005] EWCA (Crim) 3533, [4], [6]–[7], [19], [24], [2006] 1 Crim. App. 28, at 434, 435, 438, 439 (Eng.) (the Court of Appeal dismissed the prosecution’s appeal of the trial judge’s ruling that, because the prosecution would be unable to prove
court reverses, the more likely the public will question the legal ability of its trial judges. Perhaps more importantly, many may ask: If trial judges keep getting it “wrong” in the important matter of whether the prosecution’s evidence is sufficient to prove the defendant’s guilt beyond a reasonable doubt, are they likely to be getting it “right” on other “less important” issues that arise in a trial, such as evidentiary rulings, that could ultimately lead to the conviction of innocent individuals or the acquittal of guilty people? Questions could also arise about the legal ability of the appellate court judges if cases in which they reverse the trial judge’s ruling of no case to answer and order a new,\textsuperscript{555} or resumed,\textsuperscript{556} trial ultimately result in the jury’s acquitting the accused.\textsuperscript{557}

It is true, of course, that in those cases in which the appellate court reverses the trial judge’s ruling of no case to answer and the jury ultimately convicts the accused, members of the community might conclude that the existence of a prosecution right to appeal prevented a miscarriage of justice that would have resulted in the acquittal of a factually guilty individual,\textsuperscript{558} and may thereby gain confidence in the legal system. Indeed, absent a prosecution right of appeal, acquittals in cases involving serious offenses can give rise to anger and frustration in the community

\textsuperscript{555} See Criminal Justice Act, 2003, c. 44, § 61(4)(b) (Eng.).
\textsuperscript{556} Id. § 61(4)(a).
\textsuperscript{557} Of course, no inconsistency necessarily exists between a finding the prosecution presented a case for the defendant to answer and a jury’s subsequent verdict acquitting the defendant. For in determining whether the prosecution’s case is sufficient to convict, the trial judge must take the prosecution’s evidence “at its highest,” R v. Galbraith, [1981] 73 Crim. App. 124, 127 (Eng.), and, in addition, she normally makes her ruling before hearing the defense case. See supra text accompanying notes 45–46. The jury, on the other hand, must consider both the defense case and the credibility of the witnesses. Thus, the jury might disbelieve some testimony that, if believed, would have proven the prosecution’s case; or, despite the sufficiency of the prosecution’s evidence, the jury might nevertheless find the defendant not guilty after hearing the defendant’s evidence, including perhaps the defendant’s own testimony. Members of the public, however, may not make these distinctions. Rather, they may well reason that because the jury acquitted the defendant, which is what the trial judge initially did by ruling the defendant had no case to answer, the appellate court must have been wrong when it overturned the trial judge’s initial ruling.
\textsuperscript{558} See supra text accompanying notes 316–20.
at large,\textsuperscript{559} and can cause the public, or a large segment of it, to lose faith in the criminal justice system.\textsuperscript{560} But such cases are likely to be rare. For it is a “reasonable assumption . . . that the more serious the charge, the less likely the [trial] judge would be to intervene and direct a verdict where there is credible evidence to be put to the jury.”\textsuperscript{561} Perhaps more

\textsuperscript{559} The New South Wales Law Reform Commission recognized this fact when it stated in its report on directed verdicts of acquittal that “understandable community outrage . . . would result in the event of a worst case occurring, the acquittal by manifest error of an accused charged with an extremely serious offence, without an opportunity for the jury to deliberate properly upon the evidence or for the Crown to appeal the acquittal.” N.S.W. LAW REFORM COMM’N, REPORT 77, supra note 207, para. 3.5. However, for the reason stated in the text, see infra text accompanying note 561, the Commission concluded that “[s]uch a scenario . . . is very unlikely.” N.S.W. LAW REFORM COMM’N, REPORT 77, supra note 207, para. 3.5 (also noting that a senior public defender stated that “in his experience it is very rare for a judge to direct a verdict in a murder case”).


\textsuperscript{560} See supra text accompanying notes 321–25.

\textsuperscript{561} N.S.W. LAW REFORM COMM’N, REPORT 77, supra note 207, para. 3.5.
importantly, though, “[a]n obvious result of the rule against double
jeopardy is that occasionally guilty persons will escape punishment,”562
and members of the community might well recognize this fact and
accept it as an “inevitable [part of the] system of justice.”563 On balance,
then, it seems the negative effect on the community’s respect for, and
confidence in, the legal system of allowing the prosecution a right to
appeal a trial judge’s ruling of no case to answer outweighs any positive
effect it may have, and therefore will frustrate this purpose of the rule
against double jeopardy.

C. Balancing the Need for a Prosecution Right to Appeal
Rulings of No Case to Answer Against the Policies
Underlying the Rule Against Double Jeopardy

In evaluating the wisdom of allowing the prosecution to appeal a trial
judge’s ruling of no case to answer, one must weigh the need for such
appeals against the policies underlying the rule against double jeopardy.564
The only viable argument in favor of allowing the prosecution to appeal
a ruling of no case to answer is that such appeals will enhance the
accuracy of the outcome of criminal proceedings by allowing an
appellate tribunal to correct erroneous rulings of no case to answer,565
and in doing so, will prevent some “miscarriage[s] of justice”566 by making
it “more likely that a guilty defendant will be convicted.”567

Nevertheless, the weight to be accorded this factor in the balancing
process must be reduced significantly because prosecution appeals of
rulings of no case to answer sometimes may lead to miscarriages of
justice of the opposite kind—the conviction of an individual who in fact
is innocent. Such wrongful convictions can result from the dilemma a
defendant might face at the close of the prosecution’s case if the
prosecution can appeal a ruling of no case to answer when that ruling
involved the trial judge’s assessment of the strength of the prosecution’s
case568 (as opposed to one involving a finding that “there [was] no
evidence that the crime alleged [was] committed by the defendant”569).

562. FRIEDLAND, supra note 1, at 4.
563. Id.
564. See supra text accompanying notes 231–32.
566. N.S.W. LAW REFORM COMM’N, REPORT 77, supra note 207, para. 2.15.
567. ENG. LAW COMM’N, CONSULTATION PAPER NO. 158, supra note 25, para. 3.19
(also stating that, “[c]onversely, the outcome is no less likely to be accurate if an appeal
is unsuccessful.”).
568. See ENG. LAW COMM’N, REPORT NO. 267, supra note 25, paras. 7.68, 7.70,
7.77.
The English Law Commission explained:

The dilemma for the defence would be that if it makes a submission of no case [to answer], and is successful, there is a danger that the prosecution will appeal and there will be a retrial. In the interim, the prosecution case might improve. The prosecution might seek and obtain more evidence to shore up the weaknesses exposed first time round. The defence’s case might deteriorate. Its witnesses might become unavailable. The prosecution evidence might have appeared tenuous at the initial trial because of a particularly effective cross-examination of one or more of the Crown’s witnesses. There is no guarantee that this will be repeated at the retrial. The defence, in making the decision whether or not to make a submission [of no case to answer], would bear in mind that the prosecution has a weak case, and, therefore, that there is a realistic prospect that the jury will acquit, particularly in light of the way the trial has gone thus far.\(^{570}\)

This dilemma creates “the danger of wrongful conviction,”\(^{571}\) because of the “real risk that defendants might not make a submission of no case [to answer], when they should.”\(^{572}\) The English Law Commission reasoned:

For a discussion of the two bases for a ruling of no case to answer, see supra text accompanying notes 50–53.

570. Eng. Law Comm’n, Consultation Paper No. 158, supra note 25, paras. 6.15. After receiving comments on its consultation paper, the English Law Commission, in its Report on Double Jeopardy and Prosecution Appeals, did not accept the arguments that sought to “diminish the dilemma for the defence,” stating, first, that “[t]he fact that the defence has other difficult choices to make is not a sufficient argument for adding to that burden.” It also rejected the arguments suggest[ing] that there is no particular disadvantage to a defendant in being required either (i) to make a submission and to face a retrial after an appeal; or (ii) to forgo a submission and give evidence for fear that an appealed ruling of no case would deprive the defendant of the chance of an acquittal by a jury in a trial which is going well.

Eng. Law Comm’n, Report No. 267, supra note 25, para. 7.65. The Law Commission explained that these arguments fail to take any, or any sufficient, account of the fact that trials are organic unpredictable events, each one of which has its own momentum, or feel, deriving from the particular interplay of is cast of characters on a particular occasion. The progress made by the defence in one trial may well not be repeated at a retrial. It is a truism, recognised by most experienced practitioners, that the high point of the defence case is invariably at the close of the prosecution case. This is quite apart from the obvious fact that at a retrial witnesses will have had a dry run, tactics will have been revealed and weaknesses in the prosecution case will have been spotted and possibly plugged.

Id.

571. Eng. Law Comm’n, Consultation Paper No. 158, supra note 25, para. 6.17. 572. Id. at para. 6.16. See also Eng. Law Comm’n, Report No. 267, supra note 25, para. 7.52 (stating that a prosecution right of appeal with respect to a ruling of no case to
If the law relating to submissions of no case [to answer] is right, it secures accuracy of outcome, in that the defendant who makes a successful submission of no case [to answer] will be rightly acquitted, when there is a risk that, absent a submission of no case, he or she would be wrongly convicted by the jury.\textsuperscript{573}

Such wrongful convictions would be most likely to occur in cases involving a defendant who belongs to an unpopular group or one that is subject to discrimination, cases in which the defendant raises an unsavoury defense, and in cases turning on identification testimony.\textsuperscript{574}

To be weighed on the other side of the balance are the policies underlying the rule against double jeopardy. One of those policies is concerned with the increased risk of an erroneous conviction if the government can prosecute an individual a second time for the same offense. In addition to wrongful convictions resulting from the dilemma discussed above, wrongful convictions are likely to result because of the appellate court’s reversal of a “correct” ruling of no case to answer—that is, one in which the defendant in fact did not commit the crime in question\textsuperscript{575}—and a new trial at which the jury will erroneously convict the accused. An erroneous conviction may occur because the prosecution almost certainly will present a stronger case at the fresh trial ordered by the appellate court than it did in the initial trial. As a result, the chances the jury may erroneously convict the factually-innocent defendant increase significantly,\textsuperscript{576} thereby frustrating one of the principle purposes\textsuperscript{577} of the rule against double jeopardy.

\textsuperscript{573} ENG. LAW COMM’N, CONSULTATION PAPER NO. 158, supra note 25, para. 6.16

\textsuperscript{574} See id. at para. 6.14 (explaining that the ability of the defendant to submit there is no case to answer is an important safeguard, protecting the accused from a jury’s perverse verdict of guilty, and that “[t]his might be particularly important where the defendant belongs to a group which is unpopular or subject to discrimination, or where the nature of the defence is unsavoury; also pointing out that “[i]n identification cases, experience has shown that juries may easily be persuaded by honest but mistaken witnesses”).

The English Law Commission also believed that “[q]uite apart from the danger of wrongful conviction, a defendant who did not make a submission of no case out of fear of a prosecution appeal would be disadvantaged even if the jury acquitted,” because “[i]f a defendant is to be acquitted, it is procedurally fairer that he or she be acquitted earlier rather than later, as he or she is then bearing the burden of prosecution for a shorter period.” Id. at para. 6.17 (also noting that an earlier acquittal “saves resources, both in terms of money and court time,” and that “[t]he longer and more complicated the case, the greater the saving of public funds in not having issues for the distance which should have been excluded at an early stage.”).

\textsuperscript{575} In its Consultation Paper on Prosecution Appeals Against Judges’ Rulings, the English Law Commission acknowledged that “appellate courts . . . can make mistakes.” Id. at para. 3.19 n.21 (nevertheless concluding that, for purposes of its analysis, it was “reasonable to suppose that generally the appeals process works, in the sense of correcting errors at first instance and not overturning correct first instance decisions.”).

\textsuperscript{576} See supra text accompanying notes 501–46.
Significant weight should be accorded this factor in the balancing process. For in England, as in the United States, society has always deemed the erroneous conviction of an innocent person more harmful than the erroneous acquittal of a guilty person.\textsuperscript{578} As Sir William Blackstone, perhaps the most important commentator on the English common law, wrote nearly 250 years ago, “the law holds, that it is better that ten guilty persons escape, than one innocent suffer.”\textsuperscript{579}

Aside from increasing the risk of an erroneous conviction, allowing the prosecution to appeal a ruling of no case to answer and obtain a fresh trial also frustrates the double jeopardy protection’s policy of minimizing the distress and trauma of the trial process resulting from the defendant’s being compelled to undergo a second trial for the same offense through no fault of her own and after she has already, in effect, been found not guilty of that offense.\textsuperscript{580} Additionally, allowing the prosecution to appeal a ruling of no case to answer and, if successful, to retry the accused will frustrate the rule against double jeopardy’s policy of conserving scarce prosecutorial and judicial resources.\textsuperscript{581} And, at least to some extent, it also might cause the public to lose respect for, and confidence in, the criminal justice system.\textsuperscript{582}

\footnotesize{577. As stated earlier, see supra text accompanying note 502, Professor Friedland maintains that the increased chances of convicting an innocent individual at a second trial for the same offense “is at the core of the problem.” FRIEDLAND, supra note 1, at 4.\textsuperscript{578} To put it another way, “[i]n a criminal case, . . . [society] do[es] not view the social disutility of convicting an innocent men as equivalent to the disutility of acquitting someone who is guilty.”\textsuperscript{579} In re Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring). For this reason, see id. at 363 (opinion of the Court) (“The reasonable-doubt standard . . . is a prime instrument for reducing the risk of convictions resting on factual error.”), a person can be convicted of a criminal offense only if the prosecution proves her guilty beyond a reasonable doubt. Woolmington v. DPP, [1935] A.C. 462 (H.L.) 481–82 (Viscount Sankey) (appeal taken from Eng.) (U.K.); Williams, supra note 16, at 42–43; Winship, 397 U.S. at 364. A lower standard of proof, such as a preponderance of the evidence, would undoubtedly result in more factually-guilty defendants being convicted, but at the expense of a significant increase in the number of convictions of factually-innocent defendants.\textsuperscript{579} 4 BLACKSTONE, supra note 26, at *358. Accord Schlup v. Delo, 513 U.S. 298, 325 (1995) (quoting Winship, 397 U.S. at 372 (Harlan, J., concurring) (“[I]t is a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.”)).\textsuperscript{580} See supra text accompanying notes 456–91.\textsuperscript{581} See supra text accompanying notes 492–500.\textsuperscript{582} See supra text accompanying notes 548–63.}
On balance, then, one can reasonably conclude that the extent to which allowing the prosecution to appeal a trial judge’s ruling of no case to answer frustrates several policy interests underlying the rule against double jeopardy outweighs the benefits of allowing such appeals, and that Parliament made an unwise choice in voting to allow such prosecution appeals.

VI. CONCLUSION

In England, a trial judge’s ruling that a defendant has no case to answer on a charge against him traditionally resulted in the defendant’s acquittal of that charge and, because of the plea of *autrefois acquit* and the inability of the prosecution to appeal the judge’s ruling, a final disposition of the charge in his or her favor. The Criminal Justice Act 2003 now permits the prosecution to appeal a ruling of no case to answer, and if successful in its appeal, to obtain a fresh trial of the defendant for the same offense—or, if possible, the resumption of the initial trial. This significant change in the law was intended to enhance the accuracy of the outcome of criminal proceedings by allowing an appellate tribunal to correct an erroneous ruling of no case to answer by the trial judge, thereby preventing a guilty defendant from being acquitted and freed because of the trial judge’s error. While this is a laudable goal, it will not be achieved without significant costs. Allowing the prosecution to take such appeals will not only increase the number of erroneous convictions, that is, the number of factually-innocent individuals who are wrongly convicted, but will also compel some individuals to undergo the burdens of a second trial for the same offense despite the trial judge’s finding that the prosecution failed to introduce sufficient evidence to prove their guilt beyond a reasonable doubt. Moreover, the appeals process and second trials will require the expenditure of scarce prosecutorial and judicial resources on cases that have, in effect, already been decided. Finally, permitting the prosecution to appeal rulings of no case to answer may, to some extent, cause the public to lose respect for, and confidence in, the criminal justice system.

Thus, even if the rule against double jeopardy does not directly prohibit the prosecution from appealing a trial judge’s ruling of no case to answer when a successful appeal would require a new (or resumed) trial for the same offense, many of the policies underlying the protection against double jeopardy are frustrated. When weighed against the benefits of allowing the prosecution to appeal a ruling of no case to answer, it seems Parliament made an unwise decision in deciding to extend appeal rights to the prosecution.