

# Retrying the Acquitted in England, Part I: The Exception to the Rule Against Double Jeopardy for “New and Compelling Evidence”

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## I. INTRODUCTION

More than 240 years ago, Sir William Blackstone, perhaps the most important commentator on the English common law, wrote 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.”<sup>1</sup> This plea of *autrefois acquit* (a former acquittal), Blackstone explained, is based upon the principle that “no man is to be brought into jeopardy of his life, more than once for the same offence,”<sup>2</sup> which he called a “universal maxim of the common law of England.”<sup>3</sup> Yet, notwithstanding this long-established principle<sup>4</sup> barring “double

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1. WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAW OF ENGLAND \*335. Today, in practice, such second prosecutions are not brought and so do not reach court. SELECT COMMITTEE ON HOME AFFAIRS, THIRD REPORT, THE DOUBLE JEOPARDY RULE, 2000, H.C., ¶ 6 (Eng.) [hereinafter SELECT COMMITTEE ON HOME AFFAIRS, THIRD REPORT].

At the time Blackstone wrote his monumental treatise on the common law, a statute existed allowing 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 BLACKSTONE, *supra*, 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.).

2. 4 BLACKSTONE, *supra* note 1, at \*335. Blackstone used the alternative spelling *autrefois acquit*. In this article, I will use that spelling only when quoting from material using that spelling.

3. *Id.* Blackstone also wrote that “the plea of *autrefois convict*, or a former conviction for the same identical crime . . . depends upon the same principle as the [plea of *autrefois acquit*], that no man ought to be twice brought into danger of his life for one and the same crime.” *Id.* at \*336.

4. The first recorded mention in English law of a person raising a plea of a former acquittal to bar his prosecution for the same offense appears to have occurred in 1201. Sumerset (1201), in 2 PLEAS BEFORE THE KING OR HIS JUSTICES, 1198-1202, pl. 737 (Doris Mary Stenton ed., Selden Soc’y 1952) (holding null Goscelin’s appeal, i.e., a private suit seeking punishment, against Adam de Rupe for killing Goscelin’s brother

jeopardy,”<sup>5</sup> on September 11, 2006, William “Billy” Dunlop was convicted of the murder of Julie Hogg, a crime for which he had been acquitted nearly fifteen years earlier.<sup>6</sup> Retrial of Dunlop was permissible under an exception to the rule against double jeopardy created by Parliament in a statute enacted in 2003.<sup>7</sup> That statute, the Criminal Justice Act 2003, allows an acquitted person’s protection against double jeopardy to be withdrawn for certain serious offenses<sup>8</sup> when “there is new and compelling evidence against [him]”<sup>9</sup> and permits the government to retry the individual despite his previous trial and acquittal for the same offense.<sup>10</sup> In doing

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Ailnoth, alternatively, because “on another occasion” Ailnoth’s wife brought an appeal against de Rupe for the same killing and he “with[drew] quit therein”). For a brief history of the double jeopardy principle in English common law, see David S. Rudstein, *A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy*, 14 WM. & MARY BILL RTS. J. 193, 202-21 (2005).

5. Noted English legal scholar Glanville Williams stated that because the doctrine applies only when there has been an acquittal, or a conviction, see *supra* note 3, “the expression ‘double jeopardy’ . . . is misleading for English law,” for “[t]he defence is not given to a person merely because he was previously at risk of being convicted.” GLANVILLE WILLIAMS, *TEXTBOOK OF CRIMINAL LAW* 164 (2d ed. 1983).

6. Press Release, Crown Prosecution Service, *William Dunlop Pleads Guilty in First Double Jeopardy Case*, Sept. 11, 2006, [http://www.cps.gov.uk/news/pressreleases/archive/2006/152\\_06.html](http://www.cps.gov.uk/news/pressreleases/archive/2006/152_06.html) (announcing that William Dunlop pleaded guilty to the murder of Julie Hogg) [hereinafter Crown Prosecution Service, *Press Release 3*]. For a summary of the events leading up to Dunlop’s conviction, see *infra* note 14.

7. Criminal Justice Act, 2003, c. 44, §§ 75-86 (Eng.). The relevant portions of the statute took force on April 4, 2005. Criminal Justice Act, 2003, c.44, § 336 (Eng.). The statute applies, however, to all acquittals, regardless of whether they were rendered before or after passage of the Act. Criminal Justice Act, 2003, c. 44, § 75(6) (Eng.).

8. The statute, of course, uses the English spelling of the word “offense” (“offence”), as did Blackstone, see *supra* text accompanying note 2, and as does the Fifth Amendment to the Constitution of the United States, see *infra* text accompanying note 59. In this article, I will use the American spelling, except when quoting material that uses the English spelling. I will do the same for any other words that differ in their English and American spellings.

9. Criminal Justice Act, 2003, c. 44, § 78(1) (Eng.).

10. The statute sets forth detailed requirements that must be met before the second trial can take place. See *infra* text accompanying notes 17-51.

The Criminal Justice Act 2003 also grants the government the right to appeal to the Court of Appeal certain rulings of the trial court, including a ruling entered at the conclusion of the government’s case in “a trial on indictment,” Criminal Justice Act, 2003, c. 44, § 57(1) (Eng.), that “there is no case to answer.” *Id.* § 58(7)(a), i.e., a directed verdict of acquittal, see JOHN SPRACK, *A PRACTICAL APPROACH TO CRIMINAL PROCEDURE* § 20.48 (11th ed. 2006). If the Court of Appeal reverses the trial court’s ruling, it can “order that [the] proceedings for [the] offence may be resumed,” Criminal Justice Act, 2003, c. 44, § 61(4)(a) (Eng.), or “order that a fresh trial may take place . . . for [the same] offence.” *Id.* § 61(4)(b). Although this provision also raises significant issues concerning the rule against double jeopardy, my article focuses only upon the

so, the statute creates a “revolutionary” new power in the Court of Appeal<sup>11</sup> and “extinguishes the centuries old common-law rule against double jeopardy,”<sup>12</sup> hereby rescinding “[p]erhaps the most fundamental rule in the history of double jeopardy jurisprudence.”<sup>13</sup> In this article, I will discuss the wisdom of the statute in light of the policies underlying the protection against double jeopardy.<sup>14</sup> The issue is an important one

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“new and compelling evidence” exception created by the statute. I intend to discuss the right of the government to appeal a directed verdict of acquittal in a subsequent article.

The Criminal Justice Act 2003 is the second recent statute enacted by Parliament allowing the retrial of a person for the same offense for which he previously was acquitted. In 1996, Parliament passed a statute permitting a second trial when the acquittal in the first trial was “tainted,” that is, when it resulted from interference with, or intimidation of, a juror, witness, or potential witness. Criminal Procedure and Investigations Act, 1996, c. 25, §§ 54-57 (Eng.). I previously have written about the double jeopardy issue raised under the Fifth Amendment to the United States Constitution by allowing the retrial of an individual whose acquittal was obtained through fraud. See David S. Rudstein, *Double Jeopardy and the Fraudulently-Obtained Acquittal*, 60 MO. L. REV. 607 (1995). I intend to focus on the English statute in a subsequent article.

11. *In re D*, [2006] EWCA (Crim) 828 [4] (Eng.), [2006] 2 Crim. App. 286, 289 (Eng.).

12. *Id.*

13. *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977).

In the United States, such a statute would violate the Fifth Amendment’s protection against double jeopardy, *see infra* text accompanying note 59. *E.g.*, *Smith v. Massachusetts*, 543 U.S. 462, 467 (2005) (“[T]he Double Jeopardy Clause of the Fifth Amendment prohibits reexamination of a court-decreed acquittal to the same extent it prohibits reexamination of an acquittal by jury verdict.”); *Tibbs v. Florida*, 457 U.S. 31, 41 (1982) (“A verdict of not guilty, whether rendered by the jury or directed by the trial judge, *absolutely* shields the defendant from retrial.”) (emphasis added); *Bullington v. Missouri*, 451 U.S. 430, 445 (1981) (“A verdict of acquittal on the issue of guilt or innocence is, of course, *absolutely* final.”) (emphasis added); *United States v. DiFrancesco*, 449 U.S. 117, 129 (1980) (“The constitutional protection against double jeopardy *unequivocally* prohibits a second trial following an acquittal’ . . .”) (emphasis added) (quoting *Fong Foo v. United States*, 369 U.S. 141, 143 (1962)); *Sanabria v. United States*, 437 U.S. 54, 75 (1978) (“[T]here is *no exception* permitting retrial once the defendant has been acquitted, no matter how ‘egregiously erroneous’ the legal rulings leading to that judgment might be.”) (emphasis added) (quoting *Fong Foo* at 143 (*per curiam*)); *Burks v. United States*, 437 U.S. 1, 16 (1978) (“[W]e necessarily afford *absolute* finality to a jury’s verdict of acquittal—no matter how erroneous its decision . . .”) (emphasis added and emphasis deleted); *see generally* DAVID S. RUDSTEIN, *DOUBLE JEOPARDY: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION* 103-32 (2004).

14. The government relied upon the statute for the first time in late 2005 when it sought to retry William “Billy” Dunlop for the 1989 murder of Julie Hogg, a crime for which he was acquitted in 1991. Press Release, Crown Prosecution Service, *DPP Refers William Dunlop Case to Court of Appeal as First Under Double Jeopardy Law*, Nov. 10, 2005, [http://www.cps.gov.uk/news/pressreleases/archive/2005/158\\_05.html](http://www.cps.gov.uk/news/pressreleases/archive/2005/158_05.html) [hereinafter Crown Prosecution Service, *Press Release 1*] (announcing that the Director of Public Prosecutions gave his consent for the Crown Prosecution Service to refer the case of William Dunlop to the Court of Appeal to decide whether Dunlop should be retried for the 1989 murder of Julie Hogg). Julie Hogg, a pizza delivery girl, disappeared from her home in Billingham, Teeside, England, on November 16, 1989. Nearly three months later, Ms. Hogg’s dead body was discovered behind a bath panel in her home by her husband and mother. William “Billy” Dunlop, a local laborer and Ms. Hogg’s former

because there is movement in some other common law jurisdictions to follow the lead of England and create a similar exception to traditional double jeopardy principles.<sup>15</sup>

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boyfriend, was charged with Ms. Hogg's murder. Although fibers matching a rugby shirt worn by Dunlop on the night of November 16 were found on the blanket in which Ms. Hogg's dead body was wrapped, and keys and a fob that belonged to Ms. Hogg and that bore Dunlop's fingerprints were discovered concealed beneath the floorboards of Dunlop's home, two different juries failed to reach a verdict in the case. After the second jury was discharged in 1991, the government formally offered no evidence and a judge acquitted Dunlop of the murder. *See R v. Dunlop*, [2006] EWCA (Crim) 1354 [2], [9] (Eng.); *R v. Dunlop*, [2001] 2 Crim. App. (S) 133, 134-35 (2000) (Eng.); Crown Prosecution Service, *Press Release 1*, *supra*; Adam Fresco, *Murderer Makes Legal History in Double Jeopardy Case*, TIMES ONLINE, Sept. 11, 2006, <http://www.timesonline.co.uk/article/0,,2-2352963,00.html>. *See also* SPRACK, *supra* note 10, § 21.38, at 373 ("In practice, if two juries have disagreed, the prosecution offer no evidence at the start of what would otherwise be the third trial, and the judge enters a verdict of not guilty."). In 1999, while imprisoned for assaulting another former girlfriend and her new boyfriend, Dunlop confessed to a prison officer that he had killed Julie Hogg, admitting that to avoid conviction he had lied in his two trials. *Dunlop*, [2001] 2 Crim. App. (S) at 135; *see also Dunlop*, [2006] EWCA (Crim) 1354 at [10], [36]. He referred to the fact that he had confessed his guilt in letters he sent to a male friend, an ex-girlfriend, and to a nurse who had taken care of him in hospital, and in a statement that had been prepared for use in family proceedings. *Id.* at [10], [36]-[39]; *see also Dunlop*, [2001] 2 Crim. App. (S) at 135. Police arrested Dunlop in October of 1999 on suspicion of perjury, and in an interview, he admitted that he had killed Ms. Hogg. *Dunlop*, [2006] EWCA (Crim) 1354 at [11], [31], [35], [39]. On April 14, 2000, Dunlop pleaded guilty to two counts of perjury based upon his testimony at his two murder trials, and he was sentenced to two concurrent terms of six years' imprisonment to run consecutively to a seven-year sentence imposed in 1998 for assault. *Dunlop*, [2001] 2 Crim. App. (S) at 134-36; *see also Dunlop*, [2006] EWCA (Crim) 1354 at [12]. On November 10, 2005, the Director of Public Prosecutions, acting pursuant to the provisions of the Criminal Justice Act 2003, Criminal Justice Act, 2003, c. 44, § 76(4) (Eng.), gave his consent for the Crown Prosecution Service to refer Dunlop's case to the Court of Appeal to decide whether Dunlop should be retried for Ms. Hogg's murder. Crown Prosecution Service, *Press Release 1*, *supra*; *see also Dunlop*, [2006] EWCA (Crim) 1354 at [2]; *D*, [2006] EWCA (Crim) 733 at [1]. Following a hearing, the Court of Appeal, on May 17, 2006, Crown Prosecution Service, *Press Release 3*, *supra* note 6, quashed Dunlop's previous acquittal and held that he could be retried for Ms. Hogg's murder. *Dunlop*, [2006] EWCA (Crim) 1354 at [1]. On September 11, 2006, Dunlop pleaded guilty to Ms. Hogg's murder, Crown Prosecution Service, *Press Release 3*, *supra* note 6, and on October 6, 2006, a judge sentenced him to life imprisonment, Press Release, Crown Prosecution Service, *William Dunlop Sentenced in First Double Jeopardy Case*, Oct. 6, 2006, [http://www.cps.gov.uk/news/pressreleases/archive/2006/155\\_06.html](http://www.cps.gov.uk/news/pressreleases/archive/2006/155_06.html) [hereinafter Crown Prosecution Service, *Press Release 4*].

<sup>15</sup> For example, in Australia, the Model Criminal Code Officers' Committee of the Standing Committee of Attorneys-General canvassed a number of options for reform of the rule against double jeopardy, including a procedure to allow the government to retry a previously-acquitted individual for the same, or a similar offense, when fresh evidence arises. *See* Model Criminal Code Officers' Committee of the Standing Committee of the Attorneys-General, Discussion Paper, MODEL CRIMINAL CODE, CHAPTER 2,

## I. THE CRIMINAL JUSTICE ACT 2003<sup>16</sup>

The Criminal Justice Act 2003 allows the Court of Appeal to quash a person's acquittal of a "qualifying offence" and order that she be retried for the offense.<sup>17</sup> Qualifying offenses,<sup>18</sup> all of which are punishable by a maximum sentence of life imprisonment, include: murder;<sup>19</sup> attempted murder;<sup>20</sup> soliciting murder;<sup>21</sup> manslaughter;<sup>22</sup> kidnapping;<sup>23</sup> rape;<sup>24</sup>

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ISSUE ESTOPPEL, DOUBLE JEOPARDY AND PROSECUTION APPEALS AGAINST ACQUITTALS 74-77 (2003); see also Council of Australian Government's Meeting Communique, July 14, 2006, <http://www.coag.gov.au/meetings/140706/index.htm> ("COAG agreed that reform of the rule against double jeopardy is an important criminal law policy reform that merits nationally-consistent treatment"); Minister of Justice and Customs, Senator Chris Ellison, *Double Jeopardy Reform Still On the Agenda*, <http://www.ag.gov.au/www/justiceministerHome.nsf/Web%2BPages/C6FF6E5127873C12CA256E5E0081788C> (last visited Sept. 29, 2006) ("Whilst the Commonwealth, Queensland, New South Wales and Western Australia agreed that fresh and compelling evidence could provide an exception to the double jeopardy rule in strict circumstances, the remainder of the States and Territories could not agree on this issue."). A bill to create an exception to the rule against double jeopardy when there is fresh and compelling evidence of guilt currently is being considered by the Parliament in New South Wales, Australia. Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2006. The current status of the bill is available at <http://www.parliament.nsw.gov.au/prod/parlament/nswbills.nsf/V3BillsListCurrent> (last visited Sept. 22, 2006); the text of the bill is available at [http://www.parliament.nsw.gov.au/prod/parlament/nswbills.nsf/131a07fa4b8a041cca256e610012de17/3b218bf89297690ca2571e1001a5091/\\$FILE/b06-091-33-p07.pdf](http://www.parliament.nsw.gov.au/prod/parlament/nswbills.nsf/131a07fa4b8a041cca256e610012de17/3b218bf89297690ca2571e1001a5091/$FILE/b06-091-33-p07.pdf) (last visited Feb. 7, 2007).

16. Criminal Justice Act, 2003, c. 44, § 77(1)(a), 77(3)(a) (Eng.).

17. *Id.* § 77(1)(a), (3)(a) (Eng.).

The statute applies to an acquittal in proceedings "on indictment in England and Wales" and "on appeal against a conviction, verdict or finding in proceedings on indictment in England and Wales," as well as to proceedings "on appeal from a decision on such an appeal." *Id.* § 75(1). A person acquitted of an offense in any such proceeding is deemed also to have been acquitted of any other "qualifying offence" of which she could have been convicted in the proceedings, except one of which she was convicted, found not guilty by reason of insanity, or found to have committed the act or made the omission charged against her but to have been under a disability (other than insanity) that barred her being tried. *Id.* § 75(2). If a person is retried pursuant to the statute and again acquitted, that acquittal is no longer subject to the provisions of the statute and cannot be quashed. *Id.* § 75(3).

The statute also applies to an acquittal in proceedings on indictment in Northern Ireland, or as a result of an appeal from proceedings on such an indictment. *Id.* § 96. As well as to an acquittal "elsewhere than in the United Kingdom" if the offense of which the individual was acquitted would have constituted, or included the commission of, a "qualifying offence" under the statute. *Id.* § 75(4). For the sake of convenience, however, I generally will limit my discussion to acquittals in England and Wales. Moreover, although England and Wales are two countries, see Interpretation Act, 1978, c. 30, sched. 1, ¶ 1 (Eng.), I normally will use the word "England" to encompass both England and Wales.

18. Part 1 of Schedule 5 of the statute lists the offenses that are "qualifying offences." Criminal Justice Act, 2003, c. 44, sched. 5, pt. 1, ¶¶ 1-29 (Eng.).

19. *Id.* ¶ 1.

20. *Id.* ¶ 2 ("An offence under section 1 of the Criminal Attempts Act 1981 (c 47) of attempting to commit murder.").

attempted rape;<sup>25</sup> certain other sex offenses;<sup>26</sup> certain drug offenses;<sup>27</sup> and arson endangering life.<sup>28</sup> The Court of Appeal can quash an acquittal

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21. *Id.* ¶ 3 (“An offence under section 4 of the Offences against the Person Act 1861 (c 100).”).

22. *Id.* ¶ 4.

23. *Id.* ¶ 5.

24. *Id.* ¶ 6 (“An offence under section 1 of the Sexual Offences Act 1956 (c 69) or section 1 of the Sexual Offences Act 2003 (c 42).”).

25. *Id.* ¶ 7 (“An offence under section 1 of the Criminal Attempts Act 1981 of attempting to commit an offence under section 1 of the Sexual Offences Act 1956 or section 1 of the Sexual Offences Act 2003.”).

26. The offenses are: intercourse with a girl under thirteen, *id.* ¶ 8 (“An offence under section 5 of the Sexual Offences Act 1956.”); incest by a man with a girl under thirteen, *id.* ¶ 9 (“An offence under section 10 of the Sexual Offences Act 1956 alleged to have been committed with a girl under thirteen.”); assault by penetration, *id.* ¶ 10 (“An offence under section 2 of the Sexual Offences Act 2003 (c 42).”); causing a person to engage in sexual activity without consent, *id.* ¶ 11 (“An offence under section 4 of the Sexual Offences Act 2003 where it is alleged that the activity caused involved penetration within subsection (4)(a) to (d) of that section.”); rape of a child under thirteen, *id.* ¶ 12 (“An offence under section 5 of the Sexual Offences Act 2003.”); attempted rape of a child under thirteen, *id.* ¶ 13 (“An offence under section 1 of the Criminal Attempts Act 1981 (c 47) of attempting to commit an offence under section 5 of the Sexual Offences Act 2003.”); assault of a child under thirteen by penetration, *id.* ¶ 14 (“An offence under section 6 of the Sexual Offences Act 2003.”); causing a child under thirteen to engage in sexual activity, *id.* ¶ 15 (“An offence under section 8 of the Sexual Offences Act 2003 where it is alleged that an activity involving penetration within subsection (2)(a) to (d) of that section was caused.”); sexual activity with a person with a mental disorder impeding choice, *id.* ¶ 16 (“An offence under section 30 of the Sexual Offences Act 2003 where it is alleged that the touching involved penetration within subsection (3)(a) to (d) of that section.”); and causing a person with a mental disorder impeding choice to engage in sexual activity, *id.* ¶ 17 (“An offence under section 31 of the Sexual Offences Act 2003 where it is alleged that an activity involving penetration within subsection (3)(a) to (d) of that section was caused.”).

27. The offenses are: unlawful importation of a Class A drug, *id.* ¶ 18 (“An offence under section 50(2) of the Customs and Excise Management Act 1979 (c. 2) alleged to have been committed in respect of a Class A drug (as defined by section 2 of the Misuse of Drugs Act 1971 (c 38)).”); unlawful exportation of a Class A drug, *id.* ¶ 19 (“An offence under section 68(2) of the Customs and Excise Management Act 1979 alleged to have been committed in respect of a Class A drug (as defined by section 2 of the Misuse of Drugs Act 1971).”); fraudulent evasion in respect of a Class A drug, *id.* ¶ 20 (“An offence under section 170(1) or (2) of the Customs and Excise Management Act 1979 (c. 2) alleged to have been committed in respect of a Class A drug (as defined by section 2 of the Misuse of Drugs Act 1971 (c 38)).”); and producing or being concerned in production of a Class A drug, *id.* ¶ 21 (“An offence under section 4(2) of the Misuse of Drugs Act 1971 alleged to have been committed in relation to a Class A drug (as defined by section 2 of that Act).”).

28. *Id.* ¶ 22 (“An offence under section 1(2) of the Criminal Damage Act 1971 (c 48) alleged to have been committed by destroying or damaging property by fire.”).

Other qualifying offenses are: causing an explosion likely to endanger life or property, *id.* ¶ 23 (“An offence under section 2 of the Explosive Substances Act 1883 (c 3).”), and

and order a new trial only upon the application of a prosecutor,<sup>29</sup> who must first obtain written consent from the Director of Public Prosecutions.<sup>30</sup> The Director of Public Prosecutions may give such consent only if he or she is satisfied that there appears to be new and compelling evidence against the acquitted person with respect to the qualifying offense,<sup>31</sup> that it is in the public interest for the prosecutor to make the application,<sup>32</sup> and that a new trial “would not be inconsistent with obligations of the United Kingdom under Article 31 or 34 of the Treaty on European Union<sup>33</sup> relating to the principle of *ne bis in idem*,”<sup>34</sup> that is, the legal

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intent or conspiracy to cause such an explosion, *id.* ¶ 24 (“An offence under section 3(1)(a) of the Explosive Substances Act 1883.”); genocide, crimes against humanity, and war crimes, *id.* ¶ 25 (“An offence under section 51 or 52 of the International Criminal Court Act 2001 (c 17).”); grave breaches of the Geneva Conventions, *id.* ¶ 26 (“An offence under section 1 of the Geneva Conventions Act 1957 (c 52).”); directing a terrorist organization, *id.* ¶ 27 (“An offence under section 56 of the Terrorism Act 2000 (c 11).”); hostage-taking, *id.* ¶ 28 (“An offence under section 1 of the Taking of Hostages Act 1982 (c 28).”); and conspiracy to commit any of the substantive qualifying offenses, *id.* ¶ 29 (“An offence under section 1 of the Criminal Law Act 1977 (c 45) of conspiracy to commit an offence listed in this Part of this Schedule.”).

29. Criminal Justice Act, 2003, c. 44, § 77(1)(a) (Eng.). See also *id.* § 77(3)(a) (with respect to acquittal rendered elsewhere than in the United Kingdom). Only one application may be made in relation to an acquittal. *Id.* § 76(5).

A prosecutor desiring to make an application to quash an acquittal must give notice of the application to the Court of Appeal, *id.* § 80(1), and must serve notice on the person to whom the application relates, charging the person with the offense to which it relates or, if the person already has been charged in accordance with another section of the statute, stating that the person has been so charged, *id.* § 80(2).

A prosecutor may apply for a determination whether an acquittal rendered outside the United Kingdom bars the acquitted person from being tried in England and Wales for the “qualifying offence” and, if it does, for “an order that the acquittal is not to be a bar.” *Id.* § 76(2).

30. *Id.* § 76(3).

31. *Id.* § 76(4)(a).

32. *Id.* § 76(4)(b).

33. Consolidated Version of the Treaty on European Union, December 24, 2002, 2002 O.J. (C 325) 5 [hereinafter TEU], provides, *inter alia*, that “the Union’s objective shall be to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters . . .” TEU art. 29. Article 31 of the Treaty provides:

1. Common action on judicial cooperation in criminal matters shall include:
  - (a) facilitating and accelerating cooperation between competent ministries and judicial or equivalent authorities of the Member States, including, where appropriate, cooperation through Eurojust [the European Judicial Cooperation Unit], in relation to proceedings and the enforcement of decisions;
  - (b) facilitating extradition between Member States;
  - (c) ensuring compatibility in rules in the Member States, as may be necessary to improve such cooperation;
  - (d) preventing conflicts of jurisdiction between Member States [as may be necessary to improve such cooperation];



maxim declaring that “nobody should be punished more than once for the same offense,”<sup>35</sup> and that “[a] person may not be prosecuted twice for the same thing.”<sup>36</sup>

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- (e) progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking.
  - 2. The [European] Council shall encourage cooperation through Eurojust by:
    - (a) enabling Eurojust to facilitate proper coordination between Member States’ national prosecuting authorities;
    - (b) promoting support by Eurojust for criminal investigations in cases of serious cross-border crime, particularly in the case of organised crime, taking account, in particular, of analyses carried out by Europol [the European Police Office];
    - (c) facilitating close cooperation between Eurojust and the European Judicial Network, particularly, in order to facilitate the execution of letters rogatory and the implementation of extradition requests.
- TEU art. 31. Article 34 of the Treaty provides:
- 1. In the areas referred to in this title [police and judicial cooperation in criminal matters], Member States shall inform and consult one another within the Council with a view to coordinating their action. To that end, they shall establish collaboration between the relevant departments of their administrations.
  - 2. The [European] Council shall take measures and promote cooperation, using the appropriate form and procedures as set out in this title, contributing to the pursuit of the objectives of the Union. To that end, acting unanimously on the initiative of any Member State or of the Commission, the Council may:
    - (a) adopt common positions defining the approach of the Union to a particular matter;
    - (b) adopt framework decisions for the purpose of approximation of the laws and regulations of the Member States. Framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect;
    - (c) adopt decisions for any other purpose consistent with the objectives of this title, excluding any approximation of the laws and regulations of the Member States. These decisions shall be binding and shall not entail direct effect; the Council, acting by a qualified majority, shall adopt measures necessary to implement those decisions at the level of the Union; . . .

TEU art. 34 (footnote added).

34. Criminal Justice Act, 2003, c. 44, § 76(4)(c) (Eng.).

35. Dietrich Oehler, *Recognition of Foreign Penal Judgements: The European System*, in 2 INTERNATIONAL CRIMINAL LAW 607, 613 (M. Cherif Bassiouni ed., 2d ed. 1999).

36. ENGLISH LAW COMMISSION, REPORT NO. 267: DOUBLE JEOPARDY AND PROSECUTION APPEALS ¶ 1.13 n.15 (2001) [hereinafter LAW COMMISSION, REPORT NO. 267]; see also 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) (“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.”); BLACK’S LAW DICTIONARY 1077 (8th ed. 2004) (defining “*non bis in idem*,” another term for the same principle, see *United States v. Rezaq*, 134 F.3d 1121, 1130 (D.C. Cir. 1998),

Moreover, the Court of Appeal can quash an acquittal and order a new trial only when, following a hearing,<sup>37</sup> it is satisfied, first, that “there is new and compelling evidence against the acquitted person in relation to the qualifying offence,”<sup>38</sup> and second, that under the totality of the circumstances “it is in the interests of justice” to quash the acquittal and order a new trial.<sup>39</sup> For purposes of the statute, “[e]vidence is new if it was not adduced in the proceedings in which the person was acquitted”<sup>40</sup>; it is “compelling” if it is “reliable,”<sup>41</sup> “substantial,”<sup>42</sup> and “in the context of

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as the double jeopardy principle “forbidding more than one trial for the same thing”). See generally Oehler, *supra* note 35, at 613-18.

Article 4 of Protocol 7 of the European Convention on Human Rights provides:

1. 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 the State.
2. The provisions of the preceding paragraph shall not prevent the re-opening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case. . .

Protocol 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 4, Nov. 22, 1984. European law thus expressly permits an appellate court to reopen a case in accordance with the provisions of domestic law “if there is evidence of new or newly discovered facts.” Although the United Kingdom has signed the protocol, it has not yet ratified it. Nevertheless, the existence of the protocol shows that there is no conflict between the Criminal Justice Act 2003 and European law. See *R v. Dunlop*, [2006] EWCA (Crim) 1354, [15] (Eng.). For a discussion of the scope of Article 4, see LAW COMMISSION, REPORT NO. 267, *supra*, ¶¶ 3.10-3.21.

37. Criminal Justice Act, 2003, c. 44, § 80(4) (Eng.).

The person to whom the application relates has the right to be present at the hearing, even though she may be in custody, unless she is in custody somewhere other than in England, Wales, or Northern Ireland. *Id.* § 80(5)(a). In addition, the person has a right to be represented at the hearing, even if she is not present. *Id.* § 80(5)(b).

38. *Id.* § 78(1).

39. *Id.* § 79(1).

If the Court of Appeal concludes that the two requirements are met, it “*must* make the order.” *Id.* § 77(1)(a) (emphasis added); see also *id.* § 77(3)(a) (with respect to an acquittal somewhere other than in the United Kingdom that would otherwise bar the trial of the acquitted person for the “qualifying offence”); *id.* § 77(4) (with respect to an acquittal elsewhere than in the United Kingdom, if the Court of Appeal determines that the acquittal does not bar the person from being tried for the “qualifying offence, it must make a declaration to that effect”). On the other hand, if the Court of Appeal is not satisfied that the two requirements are met, it “*must* dismiss the application.” *Id.* § 77(1)(b) (emphasis added); see also *id.* § 77(3)(b) (with respect to an acquittal elsewhere than in the United Kingdom that would otherwise bar the trial of the acquitted person for the “qualifying offence,” the Court of Appeal must declare that the acquittal bars the person from being tried for the offense).

40. Criminal Justice Act, 2003, c. 44, § 78(2) (Eng.). If the proceedings in which the person was acquitted were appeal proceedings, the evidence also must not have been adduced “in earlier proceedings to which the appeal related.” *Id.*

41. *Id.* § 78(3)(a).

42. *Id.* § 78(3)(b).

the outstanding issues,<sup>43</sup> it appears highly probative of the case against the acquitted person.”<sup>44</sup> In determining whether “it is in the interests of justice”<sup>45</sup> to quash the acquittal and order a new trial, the Court of Appeal must pay particular regard to factors such as “whether existing circumstances make a fair trial unlikely”;<sup>46</sup> “the length of time since the qualifying offence was allegedly committed”;<sup>47</sup> “whether it is likely that the new evidence would have been adduced in the earlier proceedings against the acquitted person but for a failure by an officer or by a prosecutor<sup>48</sup> to act with due diligence or expedition”;<sup>49</sup> and “whether, since those proceedings . . . any officer or prosecutor has failed to act with due diligence or expedition.”<sup>50</sup> With the leave of the Court of Appeal or the House of Lords, either the acquitted person or the prosecutor may appeal a Court of Appeal decision to the House of Lords.<sup>51</sup>

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43. “Outstanding issues” are those issues that were “in dispute in the proceedings in which the person was acquitted.” *Id.* § 78(4). If those proceedings were appeal proceedings, they also include “any other issues remaining in dispute from earlier proceedings to which the appeal related.” *Id.* (footnote added).

44. *Id.* § 78(3)(c). It is irrelevant whether the evidence would have been admissible in earlier proceedings against the person who was acquitted. *Id.* § 78(5).

45. *Id.* § 79(1).

46. *Id.* § 79(2)(a).

47. *Id.* § 79(2)(b).

48. *Id.* § 79(2)(c). “Officer” “means an officer of a police force or a customs and excise officer,” while “prosecutor” means an individual or body charged with duties to conduct criminal prosecutions.” *Id.* § 95(1). The terms include “a person charged with corresponding duties under the law in force elsewhere than in England and Wales.” *Id.* § 79(3) (footnote added).

49. *Id.* § 79(2)(c). If a person other than a prosecutor conducted the earlier prosecution, *see* Prosecution of Offences Act, 1985, c. 23, §§ 1, 6 (establishing a prosecuting service for England and Wales, but expressly reserving, with certain exceptions, the right of a private individual to institute and conduct criminal proceedings); WILLIAMS, *supra* note 5, at 5; *e.g.*, Hayter v. L, [1998] W.L.R. 854, 859 (Q.B.D.), the Court of Appeal must also consider the question “in relation to that person as well as in relation to a prosecutor.” Criminal Justice Act, 2003, c. 44, § 79(4) (Eng.).

50. Criminal Justice Act, 2003, c. 44, § 79(2)(d) (Eng.). If the acquittal occurred prior to the commencement date of the statute, April 4, 2005, *see supra* note 7, the question is whether, since that date, “any officer or prosecutor has failed to act with due diligence or expedition.” Criminal Justice Act, 2003, c. 44, § 79(2)(d) (Eng.).

51. Criminal Appeal Act, 1968, c. 19, § 33 (Eng.).

### III. THE DOUBLE JEOPARDY PRINCIPLE

#### A. History

The principle that a person<sup>52</sup> should not be tried twice for the same offense, commonly called the protection against “double jeopardy” in Anglo-American legal systems,<sup>53</sup> is widely accepted throughout the world.<sup>54</sup> In England, for example, the common law *autrefois* doctrine generally allows an individual charged with an offense for which he was previously validly acquitted or convicted to plead either *autrefois acquit* (a former acquittal) or *autrefois convict* (a former conviction), as the case may be, to bar the second prosecution.<sup>55</sup> Most, if not all, other

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52. At least in the United States, the rule against double jeopardy protects not only an individual human being, but also a corporation. See *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 564 (1977); *Fong Foo v. United States*, 369 U.S. 141 (1962) (per curiam). In this article, I will use the words “person” and “individual” interchangeably, with the understanding that each term may encompass both natural persons and corporations.

53. But see WILLIAMS, *supra* note 5, at 164 (stating that because the doctrine applies only when there has been a conviction or acquittal, “the expression ‘double jeopardy’ . . . is misleading for English law,” for “[t]he defence is not given to a person merely because he was previously at risk of being convicted”).

54. 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* are found in over fifty national constitutions,” and listing those constitutional provisions); see also *Bartkus v. Illinois*, 359 U.S. 121, 154 (1959) (Black, J., dissenting) (“Today [the principle against double jeopardy] is found, in varying forms, not only in the Federal Constitution, but in the jurisprudence or constitutions of every State, as well as most foreign nations.”); Gerard 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*, or the rule against double jeopardy, “is prevalent among the legal systems of the world”); ENGLISH LAW COMMISSION, CONSULTATION PAPER NO. 156: DOUBLE JEOPARDY, Appendix B (1999) [hereinafter LAW COMMISSION, CONSULTATION PAPER NO. 156].

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 Rights, art. 14, *opened for signature* Dec. 16, 1966 (entered into force Mar. 12, 1976).

55. *Connelly v. DPP*, [1964] A.C. 1254, 1305-06 (H.L.) (appeal taken from Eng.) (U.K.) (Lord Morris of Borth-y-Gest); ARCHBOLD: CRIMINAL PLEADING, EVIDENCE AND PRACTICE §§ 4-114, 4-116 to 4-160 (P.J. Richardson ed., 2006) [hereinafter ARCHBOLD]; LAW COMMISSION, REPORT NO. 267, *supra* note 36, ¶¶ 1.14, 2.2, 2.6, 2.8; see also 4 BLACKSTONE, *supra* note 1, at \*335-36; 3 EDWARD COKE, THE INSTITUTES OF THE LAWS OF ENGLAND 213-14 (London, W. Lee & D. Parkman 1644); 2 MATTHEW HALE, [HISTORIA PLACITORUM CORONAE] THE HISTORY OF THE PLEAS OF THE CROWN \*240-55 (1847); 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 368-79 (Arno Press 1972) (2d ed. corrected 1726).

Today, of course, an individual whose previous acquittal was quashed pursuant to the provisions of either the Criminal Procedure and Investigations Act 1996, see *supra* note 10, or the Criminal Justice Act 2003, see *supra* text accompanying notes 17-51, cannot

European countries recognize the principle of *ne bis in idem*<sup>56</sup> (sometimes stated as *non bis in idem*<sup>57</sup>), which provides that a person should not be prosecuted more than once for the same offense.<sup>58</sup> In the United States,

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plead *autrefois acquit*. Nor can an individual whose court-directed acquittal was reversed on appeal under the provisions of the Criminal Justice Act 2003 granting the government the right to appeal certain rulings of a trial court, including a directed verdict of acquittal. See *supra* note 10.

In addition to the *autrefois* rule, a special application of the "abuse of process" rules provides protection against double jeopardy. Lord Devlin articulated the applicable principle in *Connelly*:

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.

*Connelly*, [1964] A.C. at 1359-60; e.g., *R v. Beedie*, [1998] Q.B. 356, 360-61, 366 (CA 1997) (holding that although a landlord who previously had pleaded guilty to summary offenses under the Health and Safety at Work Act 1974 arising from a defective gas fire on his premises that resulted in the death of a resident from carbon monoxide poisoning could not plead *autrefois convict* in a subsequent prosecution for manslaughter, because the two offenses were not the same, the manslaughter prosecution should have been stayed); see generally LAW COMMISSION, REPORT NO. 267, *supra* note 36, ¶¶ 2.14-2.19.

56. Fletcher, *supra* note 36, at 770 (asserting that the *ne bis in idem* "rule is recognised in some form within the domestic legal systems of all the European Economic Area Member States"); Oehler, *supra* note 35, at 613 (asserting that in Europe, "every state founded on constitutional principles acknowledges the principle of *ne bis in idem* as a national maxim"); see generally *id.* at 613-18.

57. *United States v. Rezaq*, 134 F.3d 1121, 1131 (D.C. Cir. 1998); e.g., Bassiouni, *supra* note 54, at 288.

58. Conway, *supra* note 54, 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 36, 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."); ENGLISH LAW COMMISSION, REPORT NO. 267, *supra* note 36, ¶ 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 36, at 1077 (defining *non bis in idem* as "[n]ot twice for the same thing," and stating that the maxim usually refers "to the law forbidding more than one trial for the same offense"). The maxim sometimes is translated as "nobody should be punished more than once for the same offense." E.g., Oehler, *supra* note 35, at 613.

Conway explains that "[t]he phrase is derived from the Roman law maxim *nemo bis vexari pro una et eadem causa* (a man shall not be twice vexed or tried for the same cause)." Conway, *supra* note 54, at 217 n.1, 221; see also BLACK'S, *supra* note 36, at

the Fifth Amendment to the Constitution provides that “[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb.”<sup>59</sup> 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 . . .,”<sup>60</sup> while New Zealand’s Bill of Rights Act provides: “No one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again.”<sup>61</sup> And the South African Constitution guarantees 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 . . .”<sup>62</sup>

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1736 (translating the maxim *nemo debet bis vexari pro una at eadem causa* as “No one ought to be twice troubled for one and the same cause.”).

59. U.S. CONST. amend. V. This constitutional guarantee encompasses several protections: it bars a second prosecution for the same offense following an acquittal, *e.g.*, *Smith v. Massachusetts*, 543 U.S. 462 (2005); *Smalis v. Pennsylvania*, 476 U.S. 140 (1986); it bars a second prosecution for the same offense following a conviction, *e.g.*, *United States v. Dixon*, 509 U.S. 688 (1993); *Harris v. Oklahoma*, 433 U.S. 682 (1977) (*per curiam*); it forbids multiple punishments for the same offense in successive proceedings, *Hudson v. United States*, 522 U.S. 93, 99 (1997); *Missouri v. Hunter*, 459 U.S. 359, 366 (1983); and in some circumstances, it prohibits a second prosecution for the same offense following the premature termination of a trial because of the declaration of a mistrial, *e.g.*, *United States v. Jorn*, 400 U.S. 470, 487 (1971) (plurality opinion); *Downum v. United States*, 372 U.S. 734 (1963), or the dismissal of the charge, *see United States v. Scott*, 437 U.S. 82, 99-100 (1978).

60. Constitution Act, R.S.C., annexe B, part I, § 11(h)(1982).

61. New Zealand Bill of Rights Act 1990, 1990 S.N.Z. No. 109.

62. S. AFR. CONST. 1996 § 35(3)(m). For a discussion of the current law of double jeopardy in a variety of other countries, including Germany, Spain, and Italy, *see* LAW COMMISSION, CONSULTATION PAPER NO. 156, *supra* note 54, App. B.

The precise scope of the protection afforded an individual by the rule against double jeopardy may differ from country to country. For example, in the United States, a person is placed in “jeopardy” (*i.e.*, jeopardy “attaches”) at that point in a proceeding when he is “put to trial before the trier of facts,” *Serfass v. United States*, 420 U.S. 377, 388 (1975) (quoting *Jorn*, 400 U.S. at 479) (plurality opinion)), so that under some circumstances the Double Jeopardy Clause prohibits a second trial of an individual for the same offense even if his 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*, 372 U.S. at 737-38 (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 13, at 43-73. In England, however, the protection afforded by the *autrefois* rule applies only following an acquittal or a conviction. *Connelly v. DPP*, [1964] A.C. 1254, 1305-06 (H.L.) (appeal taken from Eng.) (U.K.) (Lord Morris of Borth-y-Gest); ARCHBOLD, *supra* note 55, § 4-117; LAW COMMISSION, REPORT NO. 267, *supra* note 36, ¶¶ 2.2, 2.47; WILLIAMS, *supra* note 5, at 164. On the other hand, a person charged with

Although the precise origins of the protection against double jeopardy cannot be ascertained, its history is a long one.<sup>63</sup> The Old Testament and the Talmud show that ancient Jewish law to some extent recognized the principle,<sup>64</sup> as did both early Greek law<sup>65</sup> and early Roman law.<sup>66</sup> Canon law also contained a prohibition against double jeopardy.<sup>67</sup> By the middle of the thirteenth century, Spanish law recognized a protection

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an offense in England can plead *autrefois acquit* or *autrefois convict* based upon a former acquittal or a former conviction in another country, *Treacy v. DPP*, [1971] A.C. 537, 562 (H.L. 1970) (appeal taken from Eng.) (U.K.) (Lord Diplock) (“[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 . . .”); ARCHBOLD, *supra* note 55, § 4-130; LAW COMMISSION, REPORT NO. 267, *supra* note 36, ¶ 2.6 n.9, while in the United States, two separate sovereigns, such as 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, 86 (1985) (holding that Alabama could try an individual for the capital offense of murder during a kidnaping even though Georgia had previously tried and convicted him of murder based upon the same homicide); *Abbate v. United States*, 359 U.S. 187, 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 federal government 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 13, at 84-92.

63. *See generally* RUDSTEIN, *supra* note 13, at 1-15; JAY A. SIGLER, DOUBLE JEOPARDY: THE DEVELOPMENT OF A LEGAL AND SOCIAL POLICY 1-21 (1969); GEORGE C. THOMAS III, DOUBLE JEOPARDY: THE HISTORY, THE LAW 72-84 (1998); Rudstein, *supra* note 4, at 196-232.

64. *See* Rudstein, *supra* note 4, at 197-98.

65. *See id.* at 198-99.

66. *See id.* at 199-200.

67. *See id.* at 202.

The canon law’s prohibition emanated from an interpretation of *Nahum* 1:9, a verse in the Old Testament, given in A.D. 391 by Saint Jerome. MARTIN L. FRIEDLAND, DOUBLE JEOPARDY 5, 327 (1969); HELMHOLZ, THE SPIRIT OF CLASSICAL CANON LAW 287 (1986); RUDSTEIN, *supra* note 13, at 4; SIGLER, *supra* note 63, at 3; THOMAS, *supra* note 63, at 72; *see also* *Bartkus v. Illinois*, 359 U.S. 121, 152 n.4 (1959) (Black, J., dissenting). That verse provides: “Affliction shall not rise up the second time.” *Nahum* 1:9 (King James). Saint Jerome interpreted this verse, perhaps erroneously, *see* FRIEDLAND, *supra*, at 327 n. 1; THOMAS, *supra* note 63, at 72; Rudstein, *supra* note 4, at 201 to mean “that God does not punish twice for the same act.”; *Bartkus v. Illinois*, 359 U.S. 121, 152 n.4 (1959) (Black, J., dissenting) (relying upon 25 MIGNE, PATROLOGIA LATINA 1238 (1845)). His interpretation entered church canons as early as 847, being cited that year in the Council of Mainz and repeated in the Council of Worms in 868. Z.N. BROOKE, THE ENGLISH CHURCH AND THE PAPACY 205 n.1 (1989).

against double jeopardy.<sup>68</sup> The principle apparently entered the English common law no later than the beginning of the thirteenth century,<sup>69</sup> perhaps from the Continent through either canon law or Roman law,<sup>70</sup> or perhaps as a result of the posthumous victory of Thomas à Becket, the Archbishop of Canterbury, over King Henry II in the twelfth century power struggle between Henry and the Church.<sup>71</sup> Regardless of its source,<sup>72</sup> by the second half of the eighteenth century, the protection against double jeopardy, in the form of the pleas of *autrefois acquit* and *autrefois convict*, had become firmly entrenched in the common law.<sup>73</sup> In 1791, a guarantee against double jeopardy became part of the constitutions of both the United States<sup>74</sup> and France.<sup>75</sup>

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68. E.g., 5 LAS SIETE PARTIDAS 1309 (Samuel Parsons trans., Robert I. Burns ed., Univ. of Pa. Press 2001) (“Where a man has been acquitted, by a valid judgment, of some offense of which he was accused, no one can afterwards charge him with the same offense [except when he colluded in bringing the original charge and suppressed evidence in order to obtain the acquittal].”); FUERO REAL, lib. iv, tit. xxi, l. 13 (Azucena Palacios Alcaine ed., PPU 1991) (1255) (“Et si fidalgo lo fiziere a otro omne, o otro omne a fidalgo, o otros entre sí *que sean* fijos dalgo *non son* por ent aleusos; si *non* si lo fizieren en tregua o en pleyto *que ayan* puesto uno con otro; ca el pleyto de la amiztat antigua *non* fue fecho si *non* tan solamiente los fijos dalgo.” (translated in Kepner v. United States, 195 U.S. 100, 120 (1904), as: “After a man, accused of any crime, has been acquitted by the court, no one can afterwards accuse him of the same offense (except in certain specified cases).”; accord Lebbeus R. Wilfley, *Trial by Jury and “Double Jeopardy” in the Philippines*, 13 YALE L.J. 421, 424 (1904)).

69. See *supra* note 4; see also Rudstein, *supra* note 4, at 202-04.

70. See Rudstein, *supra* note 4 at 205.

71. See *id.* at 205-08. The available evidence suggests that prior to Henry II’s capitulation in 1176 the common law did not contain a protection against double jeopardy. *Id.* at 209-10. Even after Henry’s capitulation, it took hundreds of years for the protection to develop into its modern form. *Id.* at 210-21.

72. A third theory postulates that the protection against double jeopardy “evolved from Anglo-Saxon criminal procedure as a practical and obvious procedural assumption by the courts.” Jill Hunter, *The Development of the Rule Against Double Jeopardy*, 5 J. LEGAL HIST. 1, 3 (1984); see also Rudstein, *supra* note 4, at 208-09.

73. 4 BLACKSTONE, *supra* note 1, at \*335-36.

74. U.S. CONST. amend. V, § 1 (“No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb.”). For a discussion of the protection against double jeopardy in America before the adoption of the Fifth Amendment and the legislative events leading up to the ratification of the Double Jeopardy Clause of the Fifth Amendment, see Rudstein, *supra* note 4, at 221-32.

75. 1791 CONST. tit. III, c. V, ¶ 9 (“No man acquitted by a legal jury can be taken or accused on account of the same act.”), reprinted in CONSTITUTIONS AND OTHER SELECT DOCUMENTS ILLUSTRATIVE OF THE HISTORY OF FRANCE, 1789-1907, at 87 (Frank Maloy Anderson ed., 2d ed. 1908).

The principle continued to be recognized in the constitution of the year III (1795), 1795 CONST. tit. VIII, ¶ 253 (“No person acquitted by a legal jury can be re-arrested or accused of the same offence.”), reprinted in CONSTITUTIONS AND OTHER SELECT DOCUMENTS ILLUSTRATIVE OF THE HISTORY OF FRANCE, 1789-1907, *supra*, at 242; in the code of 3 Brumaire, year IV (1796), see Wilfley, *supra* note 68, at 424; and in the 1808 Napoleonic Code of Criminal Instruction (*code d’instruction criminelle*), see *id.* Article 360 of the Napoleonic Code provided: “No person legally acquitted can be a second time arrested or accused by reason of the same act.” *Id.*



*B. Policies Underlying the Rule Prohibiting a Retrial  
Following an Acquittal*<sup>76</sup>

Prohibiting the government<sup>77</sup> from reprosecuting an individual for the same offense following his trial and acquittal<sup>78</sup> serves a number of related

76. See generally RUDSTEIN, *supra* note 13, at 37-43.

77. For the sake of convenience, I will discuss the rule against double jeopardy in terms of a limitation upon the government. I recognize that in England, a private individual can bring a prosecution, *see supra* note 49, and that the *autrefois* doctrine applies to such private prosecutions, *e.g.*, SIR WILLIAM MACPHERSON OF CLUNY, THE STEPHEN LAWRENCE INQUIRY ¶ 2.3 (1999) ("Three of the prime suspects [in the unlawful killing of Stephen Lawrence] were taken to trial in 1996 in a private prosecution [for murder] which failed because of the absence of any firm and sustainable evidence. The trial resulted in the acquittal of all three accused. They can never be tried again in any circumstances in the present state of the law.") (emphasis deleted) [hereinafter MACPHERSON REPORT]; *id.* ¶ 43.47 ("The result of the unsuccessful [private] prosecution was that the three men who were acquitted can never be tried again . . ."); *see also* 4 BLACKSTONE, *supra* note 1, at \*335 (stating that "an acquittal on appeal [a form of private prosecution] is a good bar to an indictment on the same offence. And so also was an acquittal on an indictment a good bar to an appeal, by the common law"). Such prosecutions are relatively rare, however. In the United States, private prosecutions are permissible in some states, but only for minor offenses. *E.g.*, *State v. Martineau*, 808 A.2d 51, 53-54 (N.H. 2002) (concluding that private prosecutions are permissible only for offenses not punishable by imprisonment); *In re Grand Jury Appearance Request by Loigman*, 870 A.2d 249, 253 (N.J. 2005) (noting that private prosecutions are permissible in municipal court, but also stating that they are not favored); *Cronan ex rel. State v. Cronan*, 774 A.2d 866, 871-72 (R.I. 2001) (holding that private prosecutions are permissible in misdemeanor cases). Although the United States Supreme Court in *United States v. Halper*, 490 U.S. 435, 450 (1989), *method of analysis disavowed by Hudson v. United States*, 522 U.S. 93, 96 (1997), stated that "[t]he protections of the Double Jeopardy Clause are not triggered by litigation between private parties," it did so immediately following its statement that "nothing in [its] opinion precludes a private party from filing a civil suit seeking damages for conduct that previously was the subject of criminal prosecution and punishment," *id.* (emphasis added). The Court thereby indicated that its statement that the double jeopardy provision does not apply in "litigation between private parties" was limited to civil actions for damages, as opposed to criminal prosecutions brought by a private individual. Certainly that is the correct result. For, as one court stated, "the complainant in a private . . . prosecution stands in a qualitatively different relationship to the defendant than in a civil action." *Cronan*, 774 A.2d at 866 n.1 (in amending the caption of the case to reflect "the criminal nature of [the] case"). More importantly, though, because the defendant in such an action faces "the risk that is traditionally associated with a criminal prosecution," *Breed v. Jones*, 421 U.S. 519, 528 (1975), he must be deemed to be placed in "jeopardy" for purposes of the Double Jeopardy Clause once he is "'put to trial before the trier of facts, whether the trier be a jury or a judge,'" *Serfass v. United States*, 420 U.S. 377, 388 (1975) (quoting *United States v. Jorn*, 400 U.S. 470, 479 (1971) (plurality opinion)).

78. In the United States, a trial judge's ostensible "acquittal" of an individual does not necessarily constitute an acquittal for purposes of the Fifth Amendment's guarantee against double jeopardy. For what constitutes an acquittal for purposes of the double jeopardy provision is not controlled by the form of the judge's action. *United States v.*

and often overlapping interests, both of the individual and of society as a whole.<sup>79</sup> First, it “preserve[s] the finality of judgments.”<sup>80</sup> Second, it minimizes the “heavy personal strain”<sup>81</sup> caused by a trial.<sup>82</sup> Third, it reduces the risk of erroneously convicting an innocent person.<sup>83</sup> Fourth, it protects the power (or perhaps the right) of the jury, acting as representatives of the community, to acquit an individual despite sufficient evidence establishing his guilt.<sup>84</sup> Fifth, it “encourage[s] efficient investigation”<sup>85</sup> and prosecution.<sup>86</sup> Sixth, it helps to conserve scarce prosecutorial and judicial resources.<sup>87</sup> Seventh, it helps to prevent prosecutors from using the criminal process to harass an individual who

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Martin Linen Supply Co., 430 U.S. 564, 571 (1977); *see also* United States v. Scott, 437 U.S. 82, 96 (1978) (“[T]he trial judge’s characterization of his own action cannot control the classification of an action.” (quoting *Jorn*, 400 U.S. at 478 n.7 (plurality opinion))). Rather, a defendant is acquitted by a trial judge 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 inserted by the Court).

79. As indicated by the title of this subsection, I am limiting my discussion in the text to those policies relating to the prohibition against trying an individual following his previous *acquittal* for the same offense. The rule against double jeopardy, of course, also prohibits retrial following a *conviction*, *see supra* notes 3, 59, and 62, and text accompanying notes 55 and 60-62, and as noted previously, *see supra* note 62, in the United States, the Fifth Amendment to the Constitution in some circumstances prohibits a new trial following the premature termination of an individual’s initial trial. Some of the same policies underlying the prohibition of a new trial for the same offense following an acquittal also apply in those contexts. In addition, prohibiting a new trial following a conviction for the same offense recognizes the injustice inherent in punishing an individual twice for the same offense, *Bartkus v. Illinois*, 359 U.S. 121, 154 (1959) (Black, J., dissenting); *see also Halper*, 490 U.S. at 440; *Martin Linen Supply Co.*, 430 U.S. at 569 n.6; *North Carolina v. Pearce*, 395 U.S. 711, 728-29 (1969) (Douglas, J., concurring); *Abbate v. United States*, 359 U.S. 187, 203 (1959) (Black, J., dissenting); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 462 (1947) (plurality opinion); *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 168 (1874), and prevents the government from attempting to secure a greater penalty in a retrial than that originally imposed, *see Halper*, 490 U.S. at 451 n.10; *see also Brown v. Ohio*, 432 U.S. 161, 165 (1977); while prohibiting a new trial following the premature termination of a trial, helps to protect “a defendant’s ‘valued right to have his trial completed by a particular tribunal,’” *Crist v. Bretz*, 437 U.S. 28, 35-36 (1978) (quoting *Wade v. Hunter*, 336 U.S. 684, 689 (1949)), that is, 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,” *Arizona v. Washington*, 434 U.S. 497, 514 (1978) (quoting *Jorn*, 400 U.S. at 486 (plurality opinion)).

80. *Crist*, 437 U.S. at 33. *See infra* text accompanying notes 90-105.

81. *Martin Linen Supply Co.*, 430 U.S. at 569 (quoting *Jorn*, 400 U.S. at 479 (plurality opinion)).

82. *See infra* text accompanying notes 106-15.

83. *See infra* text accompanying notes 116-30.

84. *See infra* text accompanying notes 131-40.

85. LAW COMMISSION, REPORT NO. 267, *supra* note 36, ¶ 4.3.

86. *See infra* text accompanying notes 141-45.

87. *See infra* text accompanying notes 146-47.

has been tried and acquitted.<sup>88</sup> Finally, it helps to ensure that the legal system commands the respect and confidence of the public.<sup>89</sup>

### 1. Preserving the Finality of Judgments

As stated by the English Law Commission,<sup>90</sup> “the public interest requires finality in litigation, including criminal litigation, . . . so that life can move on.”<sup>91</sup> The rule against double jeopardy is intended to serve this purpose.<sup>92</sup> By precluding the government from prosecuting an individual a second time for the same offense following his previous acquittal, it maintains the finality of judgments<sup>93</sup> and protects the “integrity” of those judgments.<sup>94</sup> Once the fact finder in a trial acquits an individual of a particular offense, the government must respect that judgment in the future. Even though it might disagree with the result reached by the fact finder, it cannot bring a second prosecution against the same individual

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88. See *infra* text accompanying notes 148-50.

89. See *infra* text accompanying notes 151-55.

90. The Law Commission 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:

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).

91. LAW COMMISSION, CONSULTATION PAPER NO. 156, *supra* note 54, ¶ 4.8 (footnote omitted) (also stating that “there is virtue in putting a line under emotive and contentious events. . .”).

92. 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 §§ 14.1-14.8, 14.13 (4th ed. 2005).

93. United States v. DiFrancesco, 449 U.S. 117, 128 (1980); Crist v. Bretz, 437 U.S. 28, 33 (1978); Arizona v. Washington, 434 U.S. 497, 503 (1978); Brown v. Ohio, 432 U.S. 161, 165 (1977); United States v. Jorn, 400 U.S. 470, 479 (1971) (plurality opinion); see also Poland v. Arizona, 476 U.S. 147, 156 (1986); United States v. Wilson, 420 U.S. 332, 352 (1975); LAW COMMISSION, CONSULTATION PAPER NO. 156, *supra* note 54, ¶¶ 4.8-4.10.

94. United States v. Scott, 437 U.S. 82, 92 (1978).

for the same offense.<sup>95</sup> An acquitted defendant, and his family and dependents,<sup>96</sup> therefore need not suffer the anxiety and distress that would be constantly present if, despite the acquittal, the government could subsequently haul him into court a second time and compel him to defend against the same charge.<sup>97</sup> Without such a limitation, an acquitted defendant could never be sure that he was effectively acquitted, no matter how many times a trier of fact found him not guilty, for the

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95. In the United States, the Double Jeopardy Clause also bars the government from appealing or otherwise seeking review of an acquittal when reversal of the acquittal would require either “a second trial. . .[or] further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged.” *Smalis v. Pennsylvania*, 476 U.S. 140, 145-46 (1986) (quoting *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 570 (1977) (quoting *United States v. Jenkins*, 420 U.S. 358, 370 (1975), *overruled on other grounds by Scott*, 437 U.S. 82) (internal quotation marks omitted); *accord Sanabria v. United States*, 437 U.S. 54, 63-64 (1978); *Wilson*, 420 U.S. at 352-53; *United States v. Sisson*, 399 U.S. 267, 289 (1970); *Fong Foo v. United States*, 369 U.S. 141, 143 (1962) (per curiam); *United States v. Ball*, 163 U.S. 662, 671 (1896); *see also Smith v. Massachusetts*, 543 U.S. 462, 473 (2005) (holding that in a jury trial the judge cannot reconsider his midtrial final acquittal of the defendant); *Kepner v. United States*, 195 U.S. 100, 133-34 (1904) (precluding the government from trying the defendant a second time on the merits in an appellate court).

In England, the government can appeal an acquittal rendered in a magistrate’s court by way of case stated. Such an appeal, however, is limited to a claim that the verdict was either “wrong in law” or “in excess of jurisdiction.” Magistrates’ Courts Act, 1980, c. 43, § 111(1) (Eng.); *e.g.*, *DPP v. Milton*, [2006] EWHC (Admin) 242, [51], [55], [65] (Eng.) (allowing the government’s appeal of a police officer’s acquittal for driving dangerously and remitting the case to the Magistrate’s Court for a rehearing by a differently constituted tribunal) *available at* <http://www.bailii.org/ew/cases/EWHC/Admin/2006/242.html>. Under the Criminal Justice Act 2003, in a trial on an indictment, the government can appeal to the Court of Appeal a trial court’s ruling, entered at the end of the prosecution’s case, that “there is no case to answer,” *i.e.*, a directed verdict of acquittal, *see SPRACK, supra* note 10, § 20.48, and if the Court of Appeal reverses the ruling, it can order the proceedings for the offense to be resumed or that a new trial take place. Criminal Justice Act, 2003, c. 44, §§ 57-61, 67-74 (Eng.). In addition, in a case in which an individual was tried on an indictment and acquitted, the Attorney General can appeal by referring a point of law to the Court of Appeal, Criminal Justice Act, 1972, c. 71, § 36(1) (Eng.), but such a reference does “not affect the trial in relation to which the reference is made or any acquittal in that trial,” *id.* § 36(7). *See generally* ENGLISH LAW COMMISSION, CONSULTATION PAPER NO. 158: PROSECUTION APPEALS AGAINST JUDGES’ RULINGS ¶¶ 2.2, 2.13, 2.14 (2000).

96. LAW COMMISSION, REPORT NO. 267, *supra* note 36, ¶ 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.”).

97. *Green v. United States*, 355 U.S. 184, 187 (1957) (stating that allowing repeated prosecutions for the same offense would compel an individual “to live in a continuing state of anxiety and insecurity”); LAW COMMISSION, REPORT NO. 267, *supra* note 36, ¶ 4.11 (quoting a “very senior judge” as stating that it is “important to preserve the principle that a defendant acquitted by a jury need not worry that he may have to undergo the trial process all over again.”); LAW COMMISSION, CONSULTATION PAPER NO. 156, *supra* note 54, ¶ 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.”).

government could continue to try him until it found a fact finder that would convict.

In addition to serving as an “antidote to distress and anxiety,”<sup>98</sup> according to absolute finality to a judgment of acquittal allows the acquitted defendant to consider the matter closed and to plan his future accordingly. The English Law Commission recently recognized that in this “important sense[,] . . . finality as a value . . . impact[s] on individual liberty or autonomy.”<sup>99</sup> The Law Commission explained:

In a liberal democracy, it is a fundamental political and social objective to allow individuals as much personal autonomy as possible, to allow people the space to live their own lives and pursue their own visions of the good life. Lack of finality in criminal proceedings impinges on this to a significant degree, in that the individual, though acquitted of a crime, is not free thereafter to plan his or her life, enter into engagements with others and so on, if required constantly to have in mind that danger of being once more subject to a criminal prosecution for the same alleged crime.<sup>100</sup>

The Law Commission acknowledged that “[r]educing the personal autonomy of the individual may, of course, occasion distress and anxiety,”<sup>101</sup> but it concluded that “that is not the only reason for valuing it”<sup>102</sup>—“autonomy or liberty in this sense is to be valued for its own sake.”<sup>103</sup>

The finality of a judgment of acquittal also serves an additional purpose. As expressed by the English Law Commission,

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98. LAW COMMISSION, REPORT NO. 267, *supra* note 36, ¶ 4.12.

99. *Id.*

100. *Id.*

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.

Ian Dennis, *Rethinking Double Jeopardy: Justice and Finality in Criminal Process*, [2000] CRIM. L.R. 933, 941. See also Paul Roberts, *Double Jeopardy Law Reform: A Criminal Justice Commentary*, 65 MOD. L. REV. 393, 407 (2002) (“I surely have a keen[] interest . . . in knowing whether my autonomy is vulnerable to the potentially swinging restrictions of criminal sanctions.”).

101. LAW COMMISSION, REPORT NO. 267, *supra* note 36, ¶ 4.12.

102. *Id.*

103. *Id.*

The finality involved in the rule against double jeopardy . . . represents an enduring and resounding acknowledgement by the state that it respects the principle of limited government and the liberty of the subject. The rule against double jeopardy is, on this view, a symbol of the rule of law and can have a pervasive educative effect. The rule serves to emphasise commitment to democratic values.<sup>104</sup>

Quoting Professor Paul Roberts, the 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, 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 [*autrefois acquit* and *autrefois convict*] operate as near-absolute barriers to re-prosecution whenever their conditions precedent are satisfied.<sup>105</sup>

## 2. Minimizing Personal Strain

The Supreme Court of the United States explained in *Green v. United States*<sup>106</sup> that one of the underlying concerns of the rule 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.”<sup>107</sup> Glanville Williams, the eminent English legal scholar, made the same point when he stated that it would be “hard on the defendant if, after he has at great cost in money and anxiety secured a favorable

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104. *Id.* ¶ 4.17.

105. *Id.* (quoting Paul Roberts, *Acquitted Misconduct Evidence and Double Jeopardy Principles, from Sambasivam to Z*, [2000] Crim. L.R. 952, 954).

106. *Green v. United States*, 355 U.S. 184 (1957).

107. *Id.* at 187; *accord* *Will v. Hallock*, 126 S. Ct. 952, 959 (2006); *Monge v. California*, 524 U.S. 721, 732 (1998); *Justices of Boston Mun. Court v. Lydon*, 466 U.S. 294, 307 (1984); *Bullington v. Missouri*, 451 U.S. 430, 445 (1981); *United States v. DiFrancesco*, 449 U.S. 117, 127-28 (1980); *United States v. Scott*, 437 U.S. 82, 87 (1978); *Crist v. Bretz*, 437 U.S. 28, 35 (1978); *Arizona v. Washington*, 434 U.S. 497, 504 n.13 (1978); *Abney v. United States*, 431 U.S. 651, 661 (1977); *United States v. Dinitz*, 424 U.S. 600, 606 (1976); *Serfass v. United States*, 420 U.S. 377, 387-88 (1975); *United States v. Wilson*, 420 U.S. 332, 343 (1975); *United States v. Jorn*, 400 U.S. 470, 479 (1971) (plurality opinion); *Benton v. Maryland*, 395 U.S. 784, 796 (1969); *see also* LAW COMMISSION, CONSULTATION PAPER NO. 156, *supra* note 54, ¶¶ 4.6, 4.7; LAW COMMISSION, REPORT NO. 267, *supra* note 36, ¶ 4.3.

verdict from a jury on a particular issue, he must fight the battle over again.”<sup>108</sup>

As these statements indicate, defending against a criminal charge can place a heavy financial burden on an individual.<sup>109</sup> Those who can afford it nearly always retain an attorney to represent them.<sup>110</sup> 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 on their behalf at the trial.<sup>111</sup>

108. WILLIAMS, *supra* note 5, 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.” LAW COMMISSION, CONSULTATION PAPER NO. 156, *supra* note 54, ¶ 4.6 n.14.

109. See *Third Trial Set For John ‘Junior’ Gotti*, USA Today.Com, March 14, 2006, [http://www.usatoday.com/news/nation/2006-03-14-gotti\\_x.htm](http://www.usatoday.com/news/nation/2006-03-14-gotti_x.htm) (after a second jury deadlocked on charges alleging that 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 that Gotti needed time to borrow money to pay his attorneys); *but see* LAW COMMISSION, CONSULTATION PAPER NO. 156, *supra* note 47, ¶ 4.6 (“The cost [to a defendant] in money may not be of great significance in this country because of the availability of legal aid . . .”).

110. 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.”). In the United States, an indigent charged with a felony is constitutionally entitled to have counsel appointed to represent him at the government’s expense, *id.* at 343-45; an indigent charged with a misdemeanor or other lesser offense cannot be imprisoned unless counsel is appointed to represent him. See *Alabama v. Shelton*, 535 U.S. 654, 662 (2002); *Scott v. Illinois*, 440 U.S. 367, 373-74 (1979); *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972). In England, legal aid is available to those criminal defendants who cannot afford counsel. Access to Justice Act, 1999, c. 22, §§ 12-15, 17 (Eng.). For a brief description of the English system for providing legal aid to those accused of crime, see Norman Lefstein, *In Search of Gideon’s Promise: Lessons from England and the Need for Federal Help*, 55 HASTINGS L.J. 835, 861-904 (2004).

111. In the United States, due process of law may constitutionally entitle an indigent defendant to certain assistance, in addition to counsel, at the government’s expense. *E.g.*, *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985) (holding that when an accused demonstrates to the trial judge that his sanity at the time of the offense will be a significant factor at trial, the government must, at a minimum, assure him access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense). Statutes, rules of court, or administrative orders frequently provide for such assistance at the government’s expense. *E.g.*, 18 U.S.C. § 3006A(e) (2000) (providing for “investigative, expert, and other services necessary for adequate representation”); ARK. CODE ANN. § 16-87-212 (Supp. 2003) (authorizing the Arkansas Public Defender Commission “to pay for certain expenses regarding the defense of indigents,” including “expert witnesses, temporary investigators, testing, and travel,” and

The strain of defending oneself in a criminal prosecution also can affect an individual 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 of him, or be distrustful of him. Additionally, an accused who has a family and/or job will likely be concerned about the effect the pending charge (and possible conviction) will have on his family life and/or employment. Perhaps even more importantly, though, 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.<sup>112</sup> These concerns may exact not only a psychological toll on the accused, but also a physical one.<sup>113</sup>

This “distress and trauma of the trial process”<sup>114</sup> inevitably accompanies any criminal charge, as does the expense that must be borne by one who is not indigent or otherwise 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.<sup>115</sup> Once an individual is acquitted, he need never again have to undergo the expense and personal strain and ordeal of a trial for the same offense.

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authorizing trial public defenders and appointed private attorneys to utilize the services of the state crime lab); S.F. SUPER. CT. UNIF. LOC. R. 16.19(D) (providing for reimbursement of private appointed counsel for “[e]xpenses such as . . . expert witness or investigator costs, reasonably necessary . . . to represent a client . . .”); FLA. 9TH JUD. CIR. ADMIN. ORDER No. 2000-16(II)(A)(1) (providing for the appointment of an attorney in lieu of the public defender and for appointment of necessary “experts, investigators, and other specialists”); IND. CODE ANN. § 33-40-7-9(3) (West 2004) (providing that appointed counsel “may request authorization from the judge hearing the case for expenditures for investigative services, expert witnesses, or other services necessary to provide adequate legal representation”).

112. In the United States, a defendant convicted of certain offenses may, depending on the jurisdiction, even be sentenced to death. *E.g.*, 18 U.S.C. § 1111(b) (2000) (providing for the death penalty for murder in the first degree); *id.* § 2332b(c)(1)(A) (providing for the death penalty for certain acts of terrorism that result in death); CAL. PENAL CODE § 37(a) (West 1999) (providing for the death penalty for treason against the state); *id.* § 190(a) (West Supp. 2006) (providing for the death penalty for murder in the first degree); 720 ILL. COMP. STAT. ANN. § 5/9-1(b) (2004) (providing for the death penalty in certain cases of first degree murder); *id.* § 5/30-1(c) (providing for the death penalty for treason against the state).

113. *Breed v. Jones*, 421 U.S. 519, 530 (1975). Moreover, as the English Law Commission recognized, “[t]his distress is not confined to the defendant. His or her family also suffers, as do witnesses on both sides, including the alleged victim.” LAW COMMISSION, CONSULTATION PAPER No. 156, *supra* note 54, ¶ 4.7.

114. LAW COMMISSION, CONSULTATION PAPER No. 156, *supra* note 54, ¶ 4.7.

115. *Abney v. United States*, 431 U.S. 651, 661 (1977); *accord Smalis v. Pennsylvania*, 476 U.S. 140, 143 n.4 (1986); *Breed*, 421 U.S. at 529-30. Professor Dennis states that this purpose of the rule against double jeopardy is based upon “the state’s duty of humanity to its citizens, which is an aspect of the liberal imperative to treat all citizens with dignity and respect.” Dennis, *supra* note 100, at 940.



### 3. 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."<sup>116</sup> Indeed, Professor Martin L. Friedland asserts that the increased chance of convicting an innocent person "is at the core of the problem."<sup>117</sup> As the United States Supreme Court recognized in *Green v. United States*,<sup>118</sup> 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."<sup>119</sup> This increased risk of an erroneous conviction would come about 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.<sup>120</sup> Second, "[m]ultiple prosecutions [would] give the [government] an opportunity to rehearse its presentation of proof"<sup>121</sup> and to "hon[e] its trial strategies and perfect[] its evidence"<sup>122</sup>

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116. *United States v. Wilson*, 420 U.S. 332, 352 (1975).

117. FRIEDLAND, *supra* note 67, at 4.

118. *Green v. United States*, 355 U.S. 184 (1957).

119. *Id.* at 188; *accord* *Justices of Boston Mun. Court v. Lydon*, 466 U.S. 294, 307 (1984); *Bullington v. Missouri*, 451 U.S. 430, 445 (1981); *United States v. DiFrancesco*, 449 U.S. 117, 127-28 (1980); *United States v. Scott*, 437 U.S. 82, 91 (1978); *Crist v. Bretz*, 437 U.S. 28, 35 (1978); *Arizona v. Washington*, 434 U.S. 497, 504 n.13 (1978); *Abney*, 431 U.S. at 661-62; *United States v. Dinitz*, 424 U.S. 600, 606 (1976); *Serfass v. United States*, 420 U.S. 377, 387-88 (1975); *Wilson*, 420 U.S. at 343; *United States v. Jorn*, 400 U.S. 470, 479 (1971) (plurality opinion); *Benton v. Maryland*, 395 U.S. 784, 795-96 (1969); *see also* LAW COMMISSION, CONSULTATION PAPER NO. 156, *supra* note 54, ¶ 4.5.

120. FRIEDLAND, *supra* note 67, at 4.

121. *Grady v. Corbin*, 495 U.S. 508, 518 (1990), *overruled by* *United States v. Dixon*, 509 U.S. 688 (1993); *see also* *Dixon*, 509 U.S. at 749 (Souter, J., concurring in the judgment in part and dissenting in part) ("[T]he purpose of the Double Jeopardy Clause's protection against successive prosecutions is to prevent repeated trials in which a defendant will be forced to defend against the same charge again and again, and in which the government may perfect its presentation with dress rehearsal after dress rehearsal . . ."); *Ashe v. Swenson*, 397 U.S. 436, 447 (1970) (concluding that the government treated the defendant's related trial as a "dry run" for the subsequent prosecution).

122. *Tibbs v. Florida*, 457 U.S. 31, 41 (1982) (Multiple prosecutions would, for example, afford the government "another opportunity to supply evidence which it failed to muster in the first proceeding" (quoting *Burks v. United States*, 437 U.S. 1, 11 (1978)); *accord* *Smith v. Massachusetts*, 543 U.S. 462, 473 n.7 (2005); *DiFrancesco*, 449 U.S. at 128.

in light of what it learns at the first trial about the weaknesses of its case<sup>123</sup> and the strengths<sup>124</sup> and weaknesses<sup>125</sup> of the defendant's case.<sup>126</sup> Third, if multiple prosecutions were permitted, the government, with its vastly superior resources, could wear down the defendant—financially,<sup>127</sup> emotionally, and physically—and obtain a conviction “through sheer

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123. *DiFrancesco*, 449 U.S. at 128; *Scott*, 437 U.S. at 105 n.4 (Brennan, J., dissenting); *Wilson*, 420 U.S. at 352.

124. *DiFrancesco*, 449 U.S. at 128.

125. For example, Professor Martin L. 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.

FRIEDLAND, *supra* note 67, at 4.

126. See also LAW COMMISSION, CONSULTATION PAPER NO. 156, *supra* note 54, ¶ 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.”); 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) (Leventhal, J., concurring), 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); *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”); *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 100, at 939. As discussed in the text, however, the defendant’s resources pale in comparison to those of the government, and he might be financially, emotionally, and physically worn out after the first trial. See *infra* text accompanying note 127-28. He might therefore decide to plead guilty before the retrial, because of his inability to undergo the burden of a second trial. 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. Moreover, the fact that 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 note 129.

127. Cf. *Third Trial Set For John ‘Junior’ Gotti*, *supra* note 109 (after a second jury deadlocked on charges alleging that John “Junior” Gotti, the son of a late New York 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 that Gotti needed time to borrow money to pay his attorneys).

governmental perseverance.”<sup>128</sup> Finally, “[i]f it is accepted that juries do on occasion return perverse verdicts of guilty, the chance that a particular defendant will be perversely convicted must increase if he or she is tried more than once.”<sup>129</sup> In sum, as Professors Akhil Reed Amar 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.”<sup>130</sup>

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128. *Tibbs v. Florida*, 457 U.S. 31, 41 (1982); see also FRIEDLAND, *supra* note 67, at 4 (stating that “[i]n many cases an innocent person will not have the stamina or resources effectively to fight a second charge”); but see LAW COMMISSION, CONSULTATION PAPER NO. 156, *supra* note 54, ¶ 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”); see also *supra* notes 109-10.

129. LAW COMMISSION, CONSULTATION PAPER NO. 156, *supra* note 54, ¶ 4.5 (footnote omitted) (defining a “perverse verdict of guilty” as “a guilty verdict where there was nothing in the trial process, save the result, that could raise a ground of appeal”).

130. Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy After Rodney King*, 95 COLUM. L. REV. 1, 31 n.158 (1995). See also Comment, *Twice in Jeopardy*, 75 YALE L.J. 262, 278 n.74 (1965) (attempting to illustrate the point though a mathematical equation); but see Roberts, *supra* note 100, at 398 (“[A]n argument about the risk of wrongful conviction appears to rest on empirical propositions. But it does not. The empirical foundations of the argument are unknown, and probably unknowable.”).

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 argues that “[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. I respectfully disagree. Professor Roberts 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*, 397 U.S. at 447. *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 one of the robbery victims whose identification testimony at the first trial had been negative. *Id.* at 439-40. See also *Washington*, 434 U.S. at 504 n.14 (quoting Judge Leventhal’s description in *Carsey*, 392 F.2d at 813-14 (Leventhal, J., concurring), 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*, 356 U.S. at 465-66 (in a prosecution for robbing a

#### 4. Protecting the Power of the Jury to Acquit Against the Evidence

Barring a second trial for the same offense following an acquittal by a jury also protects “the ‘jury’s prerogative to acquit against the evidence,’”<sup>131</sup> that is, the jury’s “legitimate authority”<sup>132</sup> (or perhaps its right<sup>133</sup>) to acquit an individual “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.”<sup>134</sup> In such situations the jury, acting as “the conscience of the community in applying the law,”<sup>135</sup> exercises its power to “nullify” the law in the particular case,<sup>136</sup> or to engage in what in England is called “jury equity.”<sup>137</sup> It may do so for a variety of reasons, perhaps because it feels that the conduct engaged in by the defendant ought not to be criminal,<sup>138</sup> or perhaps because it believes the sentence for the offense in question is too harsh.<sup>139</sup> In the view of some, protecting the power of

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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—and the realistic possibility that the government will obtain a conviction “through sheer . . . perseverance,” *Tibbs*, 457 U.S. at 41. See *supra* text accompanying notes 127-28.

131. *United States v. DiFrancesco*, 449 U.S. 117, 130 n.11 (1980) (quoting Peter Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 MICH. L. REV. 1001, 1063 (1980)); see also Vikramaditya S. Khanna, *Double Jeopardy’s Asymmetric Appeal Rights: What Purposes Do They Serve?*, 82 B.U. L. REV. 341, 358 (2002); Peter Westen & Richard Drubel, *Toward a General Theory of Double Jeopardy*, [1978] SUP. CT. REV. 81, 129-30.

132. Westen & Drubel, *supra* note 131, at 129.

133. In the United States, this “right” may arise for the Sixth Amendment right to a trial by jury. 5 WAYNE R. LAFAVE, JEROLD H. ISRAEL & NANCY J. KING, *CRIMINAL PROCEDURE* § 24.10(a) (2d ed. 1999) (“The sixth amendment right to jury trial includes the right to a jury decision independent of the judge, and may protect the power of the jury to disregard the law and acquit . . .”) [hereinafter LAFAVE ET AL.]; Westen & Drubel, *supra* note 131, at 133 (asserting that the Sixth Amendment right to a jury trial is the source of the jury’s authority to acquit against the evidence); see also 5 LAFAVE ET AL., *supra*, § 22.1(g), at 257-58.

134. 5 LAFAVE ET AL., *supra* note 133, § 22.1(g).

135. Westen & Drubel, *supra* note 131, at 130.

136. See generally CLAY S. CONRAD, *JURY NULLIFICATION: THE EVOLUTION OF A DOCTRINE* (1998); 5 LAFAVE ET AL., *supra* note 133, § 22.1(g).

137. Roberts, *supra* note 100, at 422 n.118.

138. For example, a jury might be unwilling to convict a defendant of murder when, out of love, he acceded to the request of his terminally-ill wife of fifty years and intentionally killed her. Or, it 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.

139. For example, a jury might believe that possession of a small amount of marijuana should be a criminal offense, but that the statutory minimum sentence for that offense is too severe.

The judge in a bench trial also can acquit against the evidence. One would think that a judge would be more likely than a jury to follow the law and that therefore judicial

jury nullification is the primary purpose of the rule against double jeopardy.<sup>140</sup>

### 5. *Encouraging Efficient Investigation and Prosecution*

If the government could retry an acquitted defendant for the same offense, the danger would exist that the police would not initially investigate the matter, and prosecutors would not initially prosecute the case, as diligently as they otherwise might,<sup>141</sup> because they would know that should the first prosecution prove unsuccessful, they would get a “second bite at the apple”<sup>142</sup> and could carry out a more thorough investigation before, and conduct a more vigorous prosecution at the defendant’s second trial.<sup>143</sup> The fact that the rule against double jeopardy

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acquittals against the evidence would occur much less frequently than jury acquittals against the evidence. Professors Westen and Drubel, however, state that “judicial acquittals against the evidence are apparently quite a common . . . phenomenon.” Westen & Drubel, *supra* note 131, at 134 n.250 (citing DONALD J. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 149 (1966)).

140. *Id.* at 84.

141. LAW COMMISSION, CONSULTATION PAPER NO. 156, *supra* note 54, ¶ 4.11; *see also* FRIEDLAND, *supra* note 67, at 4 (“It is to the first trial . . . that [the] efforts [of the police and the prosecutor] should be directed.”); SELECT COMMITTEE ON HOME AFFAIRS, THIRD REPORT, *supra* note 1, ¶ 19 (noting that one of the arguments against changing the traditional rule against double jeopardy is that “a second opportunity to prosecute would encourage the police to be less thorough in their initial investigation”).

142. *Burks v. United States*, 437 U.S. 1, 17 (1978) (internal quotation marks omitted).

143. Initially, I 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 me that my skepticism was unwarranted. They told me 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 or she 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, I would not be surprised to find that they possessed the same mind-set. With respect to England, I am willing to defer to the conclusions of the Law Commission. *See* LAW COMMISSION, CONSULTATION PAPER NO. 156, *supra* note 54, ¶ 4.11. *But see* Dennis, *supra* note 100, at 942 (pointing out that police and prosecutors “will not know before the first trial whether [new] evidence might become available later [so] the incentive to investigate and prosecute efficiently in the first place [is] not . . . lost”); SELECT COMMITTEE ON HOME AFFAIRS, THIRD REPORT, *supra* note 1, ¶ 47 (“Neither the Director of Public Prosecutions nor the Chief Constable of Kent would accept this. They pointed out that one of the Law Commission’s conditions for accepting new evidence was that it could not have been adduced with due diligence at

provides the government with “but one chance to convict a defendant [therefore] operates as a powerful incentive to efficient and exhaustive investigation”<sup>144</sup> and prosecution from the outset.<sup>145</sup>

#### 6. *Conserving Scarce Prosecutorial and Judicial Resources*

Prohibiting retrial for the same offense after an acquittal also conserves limited police, 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.<sup>146</sup> Similarly, it keeps prosecutors from tying up judges, courtrooms, and court personnel in successive attempts to convict an individual for the same offense.<sup>147</sup>

#### 7. *Preventing Harassment*

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.”<sup>148</sup> Absent the 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.”<sup>149</sup> Similarly, a prosecutor who believed a fact finder erroneously acquitted a guilty individual could harass and oppress that individual by continuing to investigate him for the same offense in the hope of finding new and compelling evidence against that person.<sup>150</sup>

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the first trial. Thus, if the initial investigation had been inadequate, it would be unlikely the . . . Court would accept new evidence and quash an acquittal. . . . The prospect of an exception to the double jeopardy rule [is] too remote to affect the initial investigation. The DPP told us ‘no judge would ever allow the prosecution a second bite at the cherry to make up for police incompetence at the first trial.’”) (footnotes omitted and emphasis deleted).

144. LAW COMMISSION, CONSULTATION PAPER NO. 156, *supra* note 54, ¶ 4.11.

145. Dennis, *supra* note 100, at 941.

146. 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 acquitted of robbing one participant the State tried him for robbing a second participant); 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 convictions in each trial—until it obtained the sentence it wanted, the death penalty); Hoag v. New Jersey, 356 U.S. 464, 464 (1958) (after the defendant was 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).

147. FRIEDLAND, *supra* note 67, at 4.

148. LAW COMMISSION, REPORT NO. 267, *supra* note 36, ¶ 4.14 (emphasis deleted).

149. SELECT COMMITTEE ON HOME AFFAIRS, THIRD REPORT, *supra* note 1, ¶ 19.

150. See *id.*

Even if the police and prosecutor did not find any new evidence implicating the individual in the crime, they may be satisfied with forcing the acquitted individual to undergo additional embarrassment, anxiety, and concern.

#### 8. *Maintaining the Public's Respect and Confidence in the Legal System*

The rule against double jeopardy also “protect[s] . . . the legal system itself.”<sup>151</sup> As Professor Martin L. Friedland explains, “[b]y preventing harassment and inconsistent results, the rule assists in ensuring that court proceedings . . . ‘command the respect and confidence of the public.’”<sup>152</sup> The community would almost certainly lose respect for the legal system if the government were allowed to try an individual again and again for the same offense, despite acquittal after acquittal, for, in most cases, the community would perceive the multiple prosecutions as harassment of the individual by the government. In addition, if the government ultimately obtained a conviction of an individual after a fact finder in a previous trial acquitted him of the same offense, the inconsistent verdicts would likely affect the community’s confidence in the accuracy of the legal system and dilute the moral force of the criminal law, because it would “leave[] people in doubt whether innocent men are being condemned.”<sup>153</sup> Professor Paul Roberts explained 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<sup>154</sup>]. If governments

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151. FRIEDLAND, *supra* note 67, at 4.

152. *Id.* (quoting *Connelly v. DPP*, [1964] A.C. 1254, 1353 (H.L.) (appeal taken from Eng.) (U.K.) (Lord Devlin)).

153. *In re Winship*, 397 U.S. 358, 364 (1970).

154. The same “criminal justice deal” has been struck, or has evolved, in the United States. Compare, e.g., *United States v. Ball*, 163 U.S. 662, 671 (1896) (holding that the acquittal of a defendant in a jury trial precluded his subsequent trial for the same offense, because “[t]he verdict of acquittal was final, and could not be reviewed, on error or otherwise, without putting him twice in jeopardy, and thereby violating the constitution”), with, e.g., *Abney v. United States*, 431 U.S. 651, 657 (1977) (explaining that 28 U.S.C. § 1291 “grants the federal courts of appeals jurisdiction to review ‘all final decisions of the district courts,’ both civil and criminal,” which allows a convicted defendant to appeal his conviction), and *United States v. Tateo*, 377 U.S. 463, 463-64 (1964) (holding that a defendant whose conviction is reversed by an appellate court can be retried for the same offense without violating the double jeopardy provision of the Fifth Amendment) (footnote added.)

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.<sup>155</sup>

#### IV. THE EXCEPTION FOR “NEW AND COMPELLING EVIDENCE”

##### A. *The Problem*

In any litigation, including criminal prosecutions, “[t]here is always . . . a margin of error, representing error in factfinding.”<sup>156</sup> For, as the second Justice John Marshall Harlan of the United States Supreme Court explained, “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.”<sup>157</sup> This belief of “what probably happened” must be based upon the evidence introduced by the parties at trial. In a criminal case, that evidence may consist of the testimony of eyewitnesses to the crime, including the victim; physical evidence; the opinion testimony of experts; and the testimony of alibi and character witnesses. We know, however, “that the trier of fact will sometimes, despite [its] best efforts, be wrong in [its] factual conclusions.”<sup>158</sup> 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 [government] when the true facts warrant a judgment for the defendant,”<sup>159</sup> that is, the fact finder “convict[s] . . . an innocent man.”<sup>160</sup> Or, “an erroneous factual determination can result in a judgment

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155. Roberts, *supra* note 100, at 411.

156. *Winship*, 397 U.S. at 364 (quoting *Speiser v. Randall*, 357 U.S. 513, 525 (1958)).

157. *Id.* at 370 (Harlan, J., concurring).

158. *Id.*

159. *Id.*

160. *Id.* at 370-71.

In the United States, a convicted defendant can move to have the trial judge enter a judgment of acquittal, *e.g.*, FED. R. CRIM. P. 29(c), and if unsuccessful, can file a motion for a new trial, *e.g.*, FED. R. CRIM. P. 33; 725 ILL. COMP. STAT. ANN. 5/116-1 (2004); *see generally* 5 LAFAVE ET AL., *supra* note 133, § 24.11(a), (b). If the trial judge refuses to enter a judgment of acquittal or grant a new trial, the convicted defendant can appeal the conviction, *e.g.*, 28 U.S.C. § 1291 (2000); FED. R. APP. P. 3, 4(b); ILL. SUP. CT. R. 601-15. *See generally* 5 LAFAVE ET AL., *supra* note 133, §§ 27.1-27.2, 27.5-27.6, and either (1) seek a new trial, on the ground that legal error infected the initial trial, *see* *Burks v. United States*, 437 U.S. 1, 14-15 (1978) (stating that the Double Jeopardy Clause does not prohibit a second trial when a reviewing court reverses a conviction because of “trial error”), or, when convicted by a jury, on the ground that the jury’s decision was against the weight of the evidence, *see* *Tibbs v. Florida*, 457 U.S. 31, 44-45 (1982) (holding that the Double Jeopardy Clause does not prohibit a reviewing court from granting a new trial when it reverses a conviction on the ground that the jury’s verdict was against the weight of the evidence); or (2) seek reversal of the conviction and a court-ordered acquittal on



for the defendant when the true facts justify a judgment in [the government's] favor,"<sup>161</sup> that is, the fact finder "acquit[s] . . . a guilty man."<sup>162</sup>

In a criminal prosecution, the accused "has at stake interests of immense importance. . . ."<sup>163</sup> If convicted, he may be sentenced to a term of imprisonment and thereby lose his liberty,<sup>164</sup> and he will certainly "be

the ground that the evidence, as a matter of law, was insufficient to prove her guilt beyond a reasonable doubt, *see Burks*, 437 U.S. at 16-18 (holding that when a reviewing court reverses a conviction because of insufficient evidence, the Double Jeopardy Clause prohibits a new trial and requires "the direction of a judgment of acquittal"). The appellate court decides an appeal on the basis of the trial record and cannot consider any newly-discovered evidence.

In England, a convicted defendant can avail herself of the applicable provisions governing the appeal of a conviction. Criminal Appeal Act, 1968, c. 19, §§ 1-3, 7, 8 (Eng.). However, "wrongful convictions are unlikely to be detected or corrected on appeal." Lissa Griffin, *The Correction of Wrongful Convictions: A Comparative Perspective*, 16 AM. U. INT'L L. REV. 1241, 1267 (2001) (explaining that "in most cases there is no appeal" and that, when there is an appeal, the Court of Appeal is reluctant to exercise its power to receive new evidence).

161. *Winship*, 397 U.S. at 371 (Harlan, J., concurring).

162. *Id.* *See also* Roberts, *supra* note 100, at 402 ("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 the United States, the Double Jeopardy Clause of the Fifth Amendment bars the government from appealing or otherwise seeking review of a fact finder's verdict of not guilty, *see supra* note 95, or re-prosecuting the acquitted person for the same offense, *see supra* note 13 and *infra* text accompanying notes 182-84, even if the acquittal were based upon an erroneous foundation, *but see* United States *ex rel.* Aleman v. Circuit Court of Cook County, 967 F. Supp. 1022, 1028 (N.D. Ill. 1997) (allowing re-prosecution of a defendant who, in a bench trial, allegedly bribed the trial judge to acquit him), *aff'd on other grounds sub nom.* Aleman v. Honorable Judges of the Circuit Court of Cook County, 138 F.3d 302 (7th Cir. 1998); *People v. Aleman*, 667 N.E.2d 615, 625-26 (Ill. App. Ct. 1996).

In England, until recently, the government could not seek the reversal on appeal of an acquittal returned in a trial on an indictment, *see supra* note 95, and because of the plea of *autrefois acquit*, could not attempt to retry an erroneously-acquitted individual for the same offense, *see supra* text accompanying note 55. Today, however, the government can appeal a trial judge's finding of no case to answer (a directed verdict of not guilty), Criminal Justice Act, 2003, c. 44, §§ 57-58, 61 (Eng.), and in cases involving serious offenses, can seek to retry the previously-acquitted individual if new and compelling evidence is discovered, Criminal Justice Act, 2003, c. 44, §§ 75-97 (Eng.), discussed *supra* notes 17-51. In addition, if the acquittal were "tainted," the government can seek to have it set aside so it can retry the individual for the same offense. Criminal Procedure and Investigations Act, 1996, c. 25, §§ 54-57 (Eng.).

163. *Winship*, 397 U.S. at 363.

164. Of course, in the United States, a person convicted of murder in some states can be sentenced to death. *See supra* note 112.

stigmatized by the conviction.”<sup>165</sup> Moreover, a criminal justice system that erroneously convicts innocent people in any great number cannot “command the respect and confidence of the community.”<sup>166</sup> For these reasons, in both the United States and England the erroneous conviction of an innocent person is viewed as more harmful than the erroneous acquittal of a guilty person. As the Supreme Court of the United States has stated, in words that are equally applicable in England,<sup>167</sup> it 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.”<sup>168</sup>

This “concern about the injustice that results from the conviction of an innocent person”<sup>169</sup> has led Anglo-American legal systems to attempt to minimize the number of erroneous convictions of innocent people<sup>170</sup> by requiring that the government prove a criminal defendant’s guilt beyond a reasonable doubt.<sup>171</sup> Such a high standard of proof, however, also increases the risk that the fact finder will erroneously acquit a factually guilty defendant.<sup>172</sup>

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165. *Winship*, 397 U.S. at 363. See also Roberts, *supra* note 100, at 403 (“A criminal conviction entails all manner of negative personal and social consequences, to say nothing of the material deprivations directly imposed by state punishment.”).

166. *Winship*, 397 U.S. at 364 (further stating that “[i]t also is important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty”). See also Roberts, *supra* note 100, at 408 (“Most people share the intuition that the state perpetrates a grave moral wrong by convicting an innocent person of a crime. The sting of unmerited censure is keenly felt, and bitterly resented.”).

167. Blackstone stated that “the law holds, that it is better that ten guilty persons escape, than one innocent suffer.” 4 BLACKSTONE, *supra* note 1, at \*358.

168. *Schlup v. Delo*, 513 U.S. 298, 325 (1995) (quoting *Winship*, 397 U.S. at 372 (Harlan, J., concurring)); *accord* *Yates v. Aiken*, 484 U.S. 211, 214 (1988); *Rose v. Clark*, 478 U.S. 570, 580 (1986); *Francis v. Franklin*, 471 U.S. 307, 313 (1985); *Patterson v. New York*, 432 U.S. 197, 208 (1977).

To put it another way, “[i]n a criminal case, . . . [society] do[es] not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty.” *Winship*, 397 U.S. at 372 (Harlan, J., concurring).

169. *Schlup*, 513 U.S. at 325.

170. *Winship*, 397 U.S. at 363 (“The reasonable-doubt standard . . . is a prime instrument for reducing the risk of convictions resting on factual error.”); *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958) (“[The] margin of error [representing error in factfinding] . . . is reduced as to [a criminal defendant] by the process of placing on the [government] the burden . . . of persuading the factfinder at the conclusion of the trial of [the defendant’s] guilt beyond a reasonable doubt.”).

171. *Winship*, 397 U.S. at 364 (holding that proof beyond a reasonable doubt is constitutionally required in all criminal cases); *Woolmington v. DPP*, [1935] A.C. 462, 481-82 (H.L.) (appeal taken from Eng.) (U.K.); WILLIAMS, *supra* note 5, at 42-43; Roberts, *supra* note 100, at 402.

172. *Patterson v. New York*, 432 U.S. 197, 208 (1977) (“The social cost of placing the burden on the prosecution to prove guilt beyond a reasonable doubt is . . . an increased risk that the guilty will go free.”); *Winship*, 397 U.S. at 371 (Harlan, J., concurring) (“If . . . the standard of proof for a criminal trial were a preponderance of the

At the conclusion of any particular criminal trial, one cannot be absolutely certain that the fact finder reached the correct result. Indeed, convicted defendants frequently maintain their innocence, even though they are factually guilty.<sup>173</sup> On the other hand, in cases in which the fact finder acquitted the accused, the prosecutor is still likely to be convinced of the individual's guilt.<sup>174</sup> In some cases, strong evidence that an acquitted defendant is in fact guilty may already exist at the conclusion of the trial. For example, the prosecutor may have been prohibited from introducing at trial reliable physical evidence of the defendant's guilt because of the manner in which the police obtained that evidence.<sup>175</sup>

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evidence rather than proof beyond a reasonable doubt, there would be a smaller risk of factual errors that result in freeing guilty persons . . .").

173. The case of Roger K. Coleman provides a striking illustration. In 1982, a jury convicted Coleman of the murder and rape of his nineteen-year-old sister-in-law on the basis of circumstantial evidence. Nevertheless, Coleman, who had presented an alibi at trial, consistently maintained his innocence. As he was being strapped into the electric chair in 1992, he declared, "An innocent man is going to be murdered tonight." DNA testing conducted in 2006, however, confirmed Coleman's guilt. Frank Green, *Tests Reaffirm Coleman's Guilt*, RICHMOND TIMES-DISPATCH, Jan. 13, 2006, at A1, available at 2006 WLNR 2197919; see also *Wife Killer Finally Admits Crime*, BBC NEWS, Mar. 16, 2006, <http://news.bbc.co.uk/1/hi/england/wiltshire/4811934.stm> (last visited Feb. 8, 2007) (reporting that Randle Williams, who was convicted in 2003 of murdering his wife, but who continued to deny committing the crime, finally admitted to detectives that he had killed her).

174. The recent case involving film actor Robert Blake aptly illustrates how prosecutors often feel following an acquittal—though prosecutors rarely express these feelings publicly. After a jury acquitted Blake of murdering his wife, the prosecutor called the jurors "incredibly stupid" and said that "based on [his] review of the evidence, [Blake] is as guilty as sin." Richard Winton, *District Attorney Calls Blake Jury "Stupid"*, L.A. TIMES, Mar. 24, 2005 at B1, B8, available at 2005 WLNR 4586238; see also *Ashe v. Swenson*, 397 U.S. 436 (1970) (after the jury acquitted an individual of robbing one participant in a poker game, the government tried him for robbing a second participant in the same poker game); *Hoag v. New Jersey*, 356 U.S. 464, 464 (1958) (after the jury acquitted an individual of robbing three individuals at a tavern, the government tried him for robbing a fourth person in the same incident).

175. The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV, § 1. Under *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (holding the exclusionary rule applicable in state criminal prosecutions), and *Weeks v. United States*, 232 U.S. 383, 393-94, 398 (1914) (holding the exclusionary rule applicable in federal criminal prosecutions), the government generally cannot use in its case-in-chief evidence obtained in a search that violated the defendant's Fourth Amendment rights. Thus, if police officers investigating a murder conducted an illegal warrantless search of a suspect's home and discovered the murder weapon with the suspect's fingerprints on it, the

Evidence that the fact finder reached an erroneous decision—either acquitting a factually guilty individual or convicting an innocent one—is far more likely to arise sometime after the completion of the trial, however.

It is not uncommon in criminal cases that weeks, months, or even years after a trial, the police, prosecutor, or defense counsel discover new evidence relevant to the defendant's guilt or innocence. In some of these cases, the newly-discovered evidence indicates that the fact finder convicted an innocent person. For instance, another person may have stepped forward and admitted committing the crime in question,<sup>176</sup> the complaining witness might have recanted her testimony and admitted that no crime in fact took place,<sup>177</sup> or DNA testing may have shown that the person convicted of the crime did not actually commit it.<sup>178</sup> In such cases, the wrongly-convicted individual may be able to obtain relief.<sup>179</sup>

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prosecution could not introduce that weapon in its case-in-chief should the suspect later be tried for the murder. *See* *Flippo v. West Virginia*, 528 U.S. 11, 13-15 (1999) (per curiam); *Thompson v. Louisiana*, 469 U.S. 17, 19-23 (1984) (per curiam); *Mincey v. Arizona*, 437 U.S. 385, 388-95 (1978).

In England, a trial judge has discretion to exclude illegally-obtained evidence. Police and Criminal Evidence Act, 1984, c. 60, § 78(1) (Eng.) (“In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, *including the circumstances in which the evidence was obtained*, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.”) (emphasis added); *see generally* SPRACK, *supra* note 10, § 3.02-3.08.

176. *E.g.*, KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 133, 135 (1997) (discussing two cases in which individuals convicted of an offense were subsequently determined to be innocent when another person confessed to committing the crime in question); Andrew Bluth, *Illinois Man is Finally Cleared in 2 Murders*, N.Y. TIMES, Mar. 12, 1999, at A20, *available at* 1999 WLNR 3031515 (recounting the story of Anthony Porter, who was convicted of a double murder and sentenced to death but subsequently exonerated and released after spending sixteen years on death row when another man admitted committing the crimes).

177. *E.g.*, MOORE, *supra* note 176, at 135 (discussing a case in which the alleged victim of a kidnapping and rape recanted her testimony six years after the man she implicated in the alleged crimes was convicted and sentenced to 25-50 years' imprisonment); *Prosecutors Drop Charges of Rape 4 Years After Accuser Recanted*, N.Y. TIMES, Aug. 15, 1989, at A14, *available at* 1989 WLNR 2013284.

178. *E.g.*, EDWARD CONNORS ET AL., CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL 34-76 (1996) (documenting twenty-eight cases in which a convicted defendant was later exonerated on the basis of DNA evidence).

179. In the United States, a wrongly-convicted individual might be able to seek a new trial on the basis of the newly-discovered evidence showing her innocence. *E.g.*, FED. R. CRIM. P. 33; *see generally* 5 LAFAVE ET AL., *supra* note 133, § 24.11(b), (d). There may, however, be strict time limits within which she must file a motion for a new trial. *E.g.*, FED. R. CRIM. P. 33(b)(1) (requiring that a motion for a new trial on the basis of newly-discovered evidence be filed within three years of the verdict or finding of guilty); *see also* Griffin, *supra* note 160, at 1294 n.202 (compiling state statutes and rules of court); *Herrera v. Collins*, 506 U.S. 390, 411 (1993) (holding that the refusal of the State of Texas to consider newly-discovered evidence eight years after the petitioner was

Sometimes, however, the newly-discovered evidence indicates that the fact finder erroneously acquitted a factually guilty individual, such as in

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convicted of murder and sentenced to death did not deny him due process of law). After the expiration of the time for filing a motion for a new trial, a convicted defendant may be able to seek relief under a post-conviction review act, e.g., *People v. Washington*, 665 N.E.2d 1330, 1337 (Ill. 1996) (holding that a claim of newly-discovered evidence showing that a convicted defendant was actually innocent of the crime for which he was convicted is cognizable under the Illinois Post-Conviction Hearing Act, currently 725 ILL. COMP. STAT. §§ 5/122-1 to 122-8 (2004), and upholding the trial court's judgment granting the convicted defendant a new trial based upon his claim of newly-discovered evidence consisting of the testimony of a witness who had been in hiding at the time of his trial), or by moving to vacate the judgment of conviction, e.g., *People v. Wise*, 752 N.Y.S.2d 837 (Sup. Ct. 2002) (granting the defendants' motions under N.Y. CRIM. PROC. LAW § 440.10(1)(g) to vacate their convictions for the beating and rape of a woman in Central Park on the basis of newly-discovered evidence comprising a confession from a convicted murderer and serial rapist and forensic DNA evidence conclusively establishing the convicted murderer and rapist was the source of semen and a pubic hair found at the crime scene). It should be noted, however, that a claim of actual innocence based on newly-discovered evidence does not state a ground for federal habeas corpus relief absent an independent constitutional violation occurring in the underlying criminal proceeding. *Herrera*, 506 U.S. at 400. If judicial relief is unavailable, the wrongly-convicted individual may be able to obtain executive clemency. E.g., Tim McGlone, *Governor Grants Pardon to Man Wrongly Convicted of 1981 Rape*, VIRGINIAN PILOT & LEDGER-STAR (Norfolk, Va.), Mar. 20, 2003, at A1, available at 2003 WLNR 3264988 (reporting that Virginia's governor granted a pardon to a man convicted of rape but exonerated of the crime by DNA evidence after serving twenty-one years in prison).

In England, a wrongly-convicted defendant, following an unsuccessful appeal or the failure to obtain leave to appeal, Criminal Appeal Act, 1995, c. 35, § 13(1)(c) (Eng.), can apply, *id.* § 14(1), to the Criminal Case Review Commission ("CCRC") for relief. The CCRC, a public body appointed by the Queen upon the recommendation of the Prime Minister, *id.* § 8, can refer the case to the Court of Appeal, *id.* § 9(1)(a), if it considers that, "because of . . . evidence, not raised in the proceedings which led to [the conviction, verdict, or finding]," *id.* § 13(1)(b)(1), there is a real possibility that the conviction, verdict, or finding would not be upheld were the reference to be made, *id.* § 13(1)(a). Upon referral, the Court of Appeal can receive new evidence, *id.* § 9(2); Criminal Appeal Act, 1968, c. 19, § 23(1) (Eng.), and if it allows the appeal, can quash the conviction and order the entry of a judgment of acquittal, *id.* § 2, e.g., *R v. Downing*, [2002] EWCA (Crim) 263 (Eng.), or, "when the interests of justice so require," order a retrial of the appellant, *id.* § 7(1); e.g., Press Release, Crown Prosecution Service, *Sion Jenkins Not Guilty of Billie-Jo's Murder*, Feb. 9, 2006, [http://www.cps.gov.uk/news/pressreleases/archive/2006/107\\_06.html](http://www.cps.gov.uk/news/pressreleases/archive/2006/107_06.html) (noting that in July 2004, after the case had been referred to it by the CCRC, the Court of Appeal ordered that Sion Jenkins, *see infra* note 226, be retried for the murder of his foster daughter) [hereinafter Crown Prosecution Service, *Press Release 2*]; *Twists and Turns in Jenkins Case*, BBC News, Feb. 9, 2006, [http://news.bbc.co.uk/1/hi/england/southern\\_counties/4446650.stm](http://news.bbc.co.uk/1/hi/england/southern_counties/4446650.stm) (stating that on May 12, 2003, the CCRC gave leave to Sion Jenkins, *see infra* note 226, to launch a second appeal of his murder conviction to the Court of Appeal and that on July 16, 2004, the Court of Appeal quashed Jenkins's conviction and ordered a new trial on the basis of new scientific evidence). For a description of the CCRC and how it operates, see Griffin, *supra* note 160, at 1275-81.

the following hypothetical cases propounded by the English Law Commission in its 1999 consultation paper on double jeopardy:

- (a) In a rape case, the complainant identifies the defendant, whom she did not know, and there is circumstantial evidence implicating him. The defendant claims that he has never met the complainant, and puts up an alibi. Some body fluid is found which unquestionably came from the rapist, but the quantity is too small to permit DNA analysis. The defendant is acquitted. Three months later, a new DNA test becomes available which makes it possible to analyze much smaller quantities of biological material than had formerly been the case. The technique is used to identify the rapist's body fluid as coming from the defendant.<sup>180</sup>
- (b) Two defendants are acquitted of conspiracy to murder. They are alleged to have hired X to kill another. The prosecution case, while to a degree compelling, is purely circumstantial. Shortly after the trial, as a consequence of a genuine religious conversion, X comes forward and volunteers to give evidence for the prosecution. The veracity of her evidence is supported by the revelation of certain details that would only be known to the murderer.<sup>181</sup>

In the United States, there is no doubt that the Double Jeopardy Clause would prohibit the government from reprosecuting the defendant(s) in either of these situations. Indeed, it would bar the retrial of *any* acquitted defendant in *any* situation when the government relies solely upon the discovery of new evidence.<sup>182</sup> Over the years, the Supreme Court has made it clear that the constitutional guarantee against double jeopardy

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180. LAW COMMISSION, CONSULTATION PAPER NO. 156, *supra* note 54, ¶ 5.8(a) (footnote omitted).

181. *Id.* ¶ 5.8(b).

182. If, however, the defendant or someone acting on her behalf fraudulently suppressed the newly-discovered evidence at the time of the defendant's trial, such as by paying an eyewitness to the crime not to come forward and to absent himself from the jurisdiction until the completion of the defendant's trial, the government *might* be able to reprosecute the defendant for the same offense. *Cf.* United States *ex rel.* Aleman v. Circuit Court of Cook County, 967 F. Supp. 1022, 1028 (N.D. Ill. 1997) (allowing reprosecution of a defendant who, in a bench trial, allegedly bribed the trial judge to acquit him), *aff'd on other grounds sub nom.* Aleman v. Honorable Judges of the Circuit Court of Cook County, 138 F.3d 302 (7th Cir. 1998); *People v. Aleman*, 667 N.E.2d 615, 625-26 (Ill. App. Ct. 1996) (same); *but see* Rudstein, *supra* note 10, at 620-51 (arguing that the Double Jeopardy Clause does not, and should not, contain an exception for a fraudulently-obtained acquittal). For a detailed account of the saga of Harry Aleman and his alleged bribery of the trial judge, see MAURICE POSSLEY & RICK KOGAN, *EVERYBODY PAYS: TWO MEN, ONE MURDER AND THE PRICE OF TRUTH* (2001).

accords absolute finality to an acquittal<sup>183</sup> and forbids “retrial once the defendant has been acquitted, no matter how egregiously erroneous the legal rulings leading to that judgment might be.”<sup>184</sup>

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183. *Smith v. Massachusetts*, 543 U.S. 462, 467 (2005); *Bullington v. Missouri*, 451 U.S. 430, 442 (1981); *United States v. DiFrancesco*, 449 U.S. 117, 129-30 (1980); *Burks v. United States*, 437 U.S. 1, 16 (1978); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977); *United States v. Sisson*, 399 U.S. 267, 289 (1970); *Fong Foo v. United States*, 369 U.S. 141, 143 (1962) (per curiam); *Green v. United States*, 355 U.S. 184, 188 (1957); *United States v. Kepner*, 195 U.S. 100, 130 (1904); *United States v. Ball*, 163 U.S. 662, 671 (1896).

In some circumstances, the trial judge may “acquit” the defendant, yet that “acquittal” will not be deemed an acquittal for purposes of double jeopardy analysis. For what constitutes an acquittal by a trial judge is not controlled by the form of her action. *Smalis v. Pennsylvania*, 476 U.S. 140, 144 n.5 (1986); *Martin Linen Supply Co.*, 430 U.S. at 571; *Sisson*, 399 U.S. at 270. Rather, an acquittal occurs “only when ‘the ruling of the trial 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.’” *United States v. Scott*, 437 U.S. 82, 97 (1978) (quoting *Martin Linen Supply Co.*, 430 U.S. at 571) (brackets added by the Court); *accord Smith*, 543 U.S. at 468.

184. *Sanabria v. United States*, 437 U.S. 54, 75 (1978) (citation and internal quotation marks omitted); *accord DiFrancesco*, 449 U.S. at 129; *Scott*, 437 U.S. at 91; *Arizona v. Washington*, 434 U.S. 497, 503 (1978); *Fong Foo*, 369 U.S. at 143; *Green*, 355 U.S. at 188, 191; *see also Tibbs v. Florida*, 457 U.S. 31, 41 (1982) (“A verdict of not guilty, whether rendered by the jury or directed by the trial judge, absolutely shields the defendant from retrial.”); *Bullington*, 451 U.S. at 437 (“[T]he Double Jeopardy Clause forbids the retrial of a defendant who has been acquitted of the crime charged.” (emphasis deleted)); *Burks*, 437 U.S. at 18 (“[T]he Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence [introduced at the trial resulting in the defendant’s conviction] legally insufficient . . . .”); *Sisson*, 399 U.S. at 289-90 (“[I]n this country a verdict of acquittal . . . is a bar to a subsequent prosecution for the same offense.” (quoting *Ball*, 163 U.S. at 671)); *Benton v. Maryland*, 395 U.S. 784, 797 (1969) (holding that when the jury acquitted the accused of larceny but convicted him of burglary, the government could not retry the accused for larceny after he successfully obtained a reversal of the burglary conviction); *Kepner*, 195 U.S. at 130 (“[F]ormer jeopardy includes one who has been acquitted by a verdict duly rendered . . . . The protection is . . . against being tried again for the same offense.”); *id.* at 133 (“The court of first instance . . . found [the defendant] not guilty; to try him again on the merits, even in an appellate court, is to put him a second time in jeopardy for the same offense.”).

There are several situations in which an acquittal is not final. *See generally* RUDSTEIN, *supra* note 13, at 116-20. If the jury returned a verdict of guilty, but the trial judge overruled that decision on the ground of insufficient evidence and found the accused not guilty, the Double Jeopardy Clause does not bar the government from appealing that acquittal, and, if the appellate court finds the acquittal improper, having a judgment entered on the jury’s initial verdict of guilty. *United States v. Jenkins*, 420 U.S. 358, 365 (1975), *overruled on other grounds by Scott*, 437 U.S. at 82 (1978). Similarly, if the trial judge in a bench trial initially found the accused guilty, but subsequently set aside that finding and entered a judgment of acquittal after concluding that she erroneously considered certain inadmissible evidence and that without that evidence the government failed to prove the accused’s guilt beyond a reasonable doubt, the double jeopardy

In England, until recently, the plea of *autrefois acquit* would have been available to the defendant(s) in both of the hypothetical situations posed by the Law Commission, as well as to defendants in other cases involving newly-discovered inculpatory evidence.<sup>185</sup> With the enactment of the Criminal Procedure Act 2003, however, Parliament created an exception to the principle against double jeopardy under which the government can, in limited circumstances, prosecute an acquitted individual a second time for the same offense on the basis of “new and compelling evidence.”<sup>186</sup>

The catalyst for this exception was the brutal, racially-motivated murder of Stephen Lawrence in April of 1993, the subsequent bungled police investigation of the killing, and the acquittal of three of the prime suspects for lack of evidence in a private prosecution by the victim’s parents.<sup>187</sup> Certainly justice would be served in the Stephen Lawrence

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provision does not bar the government from appealing the acquittal on the ground that the judge erred in her post-trial ruling that the disputed evidence was inadmissible, and, if it succeeds, from having the trial judge enter a judgment of conviction based upon her initial finding of guilty. *United States v. Ceccolini*, 435 U.S. 268, 270-71 (1978). Retrial also is permissible if the acquittal occurred in a court lacking jurisdiction over either the accused or the offense. *Ball*, 163 U.S. at 669 (dictum) (“An acquittal before a court having no jurisdiction is, of course, like all the proceedings in the case, absolutely void, and therefore no bar to subsequent indictment and trial in a court which has jurisdiction of the offense.”). In addition, an acquittal rendered following a “sham” trial *may* not bar a subsequent prosecution for the same offense. *People v. Deems*, 410 N.E.2d 8, 11 (Ill. 1980); *but see Goolsby v. Hutto*, 691 F.2d 199 (4th Cir. 1982) (prohibiting a retrial on essentially the same facts as in *Deems*).

185. See *supra* text accompanying note 55; see also LAW COMMISSION, CONSULTATION PAPER NO. 156, *supra* note 54, ¶ 3.45; MACPHERSON REPORT, *supra* note 77, ¶ 7.46 (1999) (“If, even at this late stage, fresh and viable evidence should emerge against any of the three suspects who were acquitted [of the murder of Stephen Lawrence], they could not be tried again however strong the evidence might be.”); *id.* ¶ 43.47 (“The result of the unsuccessful prosecution was that the three men who were acquitted [of the murder of Stephen Lawrence] can never be tried again, even if final appeals for fresh witnesses were to bear fruit, or if the three men were to admit their guilt.”).

Some countries, including Germany, Denmark, and Finland, allow the government to re-open a prosecution in certain circumstances when new evidence has been discovered. LAW COMMISSION, CONSULTATION PAPER NO. 156, *supra* note 54, ¶¶ 1.8, 3.9, 3.10. Such provisions are consistent with Article 4(2) of the Seventh Protocol to the European Convention of Human Rights, see *supra* note 36; see also LAW COMMISSION, CONSULTATION PAPER NO. 156, *supra* note 54, ¶¶ 1.9, 3.15, 3.28-3.31.

186. See *supra* text accompanying notes 17-51.

187. See MACPHERSON REPORT, *supra* note 77, c. 47, rec. 38 (“We recommend . . . [t]hat consideration should be given to the Court of Appeal being given power to permit prosecution after acquittal where fresh and viable evidence is presented.”); LAW COMMISSION, CONSULTATION PAPER NO. 156, *supra* note 54, ¶ 1.1 (“[T]he Secretary of State for the Home Department made a reference to this Commission in the following terms: ‘To consider the law of England and Wales relating to double jeopardy (after acquittal), taking into account: recommendation 38 of the Macpherson Report on the Stephen Lawrence Inquiry that consideration should be given to permit the prosecution after acquittal where fresh and viable evidence is presented; the powers of the prosecution to re-instate criminal proceedings; and also the United Kingdom’s international obligations;



case if those responsible for his murder were tried, convicted, and punished, even if they have previously been acquitted of the crime. The newly-created exception to the rule against double jeopardy for “new and compelling evidence” opens the door to this possibility, not only in the Stephen Lawrence case, but in other cases as well, both past and future.<sup>188</sup> Nevertheless, achieving justice (in the sense of reaching the accurate outcome) *in every case* is not the be-all and end-all of a criminal justice system. Other societal values must be considered. As Professor Martin L. Friedland points out, “[a]n obvious result of the rule against double jeopardy is that occasionally guilty persons will escape punishment.”<sup>189</sup> Yet, for hundreds of years, in both the United States and England, the values underlying the double jeopardy principle have been thought to be of sufficient importance to a free society to allow, on occasion, a guilty person to avoid conviction. The question raised by Parliament’s creation of an exception to the rule against double jeopardy for “new and compelling evidence” is whether “the need to pursue and convict the guilty”<sup>190</sup> in these situations outweighs the time-honored “principles underpinning the rule against double jeopardy.”<sup>191</sup>

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and to make recommendations.”).

188. The statutory exception to the traditional rule against double jeopardy applies to all acquittals, regardless of whether they were rendered before or after the enactment of the statute. Criminal Justice Act, 2003, c. 44, § 75(6) (Eng.).

189. FRIEDLAND, *supra* note 67, at 4. The same is true with other rights. For example, the privilege against self-incrimination may in some cases prevent the government from convicting and punishing a guilty person. See *Marchetti v. United States*, 390 U.S. 39, 51 (1968) (“The constitutional privilege [against self-incrimination] was intended to shield the guilty. . . as well as the innocent. . .”). Similarly, limitations on the authority of the police to conduct a search may mean that in some cases they will not discover certain incriminating physical evidence against an individual and that that individual, though guilty, will escape conviction and punishment. See *United States v. Leon*, 468 U.S. 897, 941 n.8 (1984) (Brennan, J., dissenting) (“The inevitable result of the Constitution’s prohibition against unreasonable searches and seizures and its requirement that no warrant shall issue but upon probable cause is that police officers who obey its strictures will catch fewer criminals . . . [t]hat is the price the framers anticipated and were willing to pay to ensure the sanctity of the person, the home, and property against unrestrained governmental power. . . .”) (quoting Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV., 1365, 1393 (1983)). See also *Arizona v. Hicks*, 480 U.S. 321, 329 (1987) (“[T]here is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect . . . us all.”).

190. LAW COMMISSION, REPORT NO. 267, *supra* note 36, ¶ 4.2.

191. *Id.*

A primary goal—if not *the* primary goal—of any criminal justice system is to identify, convict, and punish those who have committed offenses.<sup>192</sup> Society is justifiably concerned about the erroneous acquittal of a guilty person. When an erroneous acquittal involves a serious crime, such as murder, kidnapping, or rape, it usually will allow a dangerous person to remain at-large in the community,<sup>193</sup> where he or she may commit other serious crimes in the future. Moreover, erroneous acquittals, at least in serious cases,<sup>194</sup> can spawn a lack of respect for, and confidence in, the criminal justice system.<sup>195</sup>

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192. 1 LAFAVE ET AL, *supra* note 133, § 1.4(a), at 150; LAW COMMISSION, CONSULTATION PAPER NO. 156, *supra* note 54, ¶ 1.4.

193. In some cases, an erroneously acquitted individual will remain in custody for some other offense. For example, in *Benton v. Maryland*, 395 U.S. 784, 785 (1969), the government tried an individual for the crimes of burglary and larceny. The jury found him not guilty of larceny but convicted him of burglary, and he was sentenced to ten years' imprisonment for that offense. Thus, even if the jury erroneously acquitted the defendant of larceny, he remained in custody on the basis of his conviction for burglary. In other cases, an erroneously acquitted person will initially be released, but some time shortly thereafter will be incarcerated for some other offense. For example, in 1977, Harry Aleman, an alleged hit-man for the Chicago mob, was acquitted of murder in a bench trial, allegedly on the basis of a bribe he arranged to be paid to the trial judge. *People v. Aleman*, 667 N.E.2d 615, 617 (1996). Although he was released from custody, his freedom was short-lived. Aleman was taken into custody the following year on another charge and has been incarcerated on one charge or another for the past twenty-eight years. See Dave McKinney, CHICAGO SUN-TIMES, Dec. 16, 2005, at 16, *available at* 2005 WLNR 20296189; see also Chicago Tribune, *Mob Hit Man Sentenced to 100-300 Years in 1972 Murder*, LAS VEGAS REV. J., Nov. 27, 1997, at 14A, *available at* 1997 WLNR 519186 (reporting that at the sentencing hearing in 1997 following Aleman's conviction for murder, Aleman's attorney claimed that Aleman had been imprisoned for nineteen of the previous twenty years on federal charges); see generally POSSLEY & KOGAN, *supra* note 182 (recounting the tale of Harry Aleman). Similarly, William "Billy" Dunlop, see *supra* note 14, was acquitted of the murder of Julie Hogg in 1991. In 1998, he was convicted of assault and sentenced to a term of seven years' imprisonment. Two years later he pleaded guilty to perjury and was sentenced to a term of six years' imprisonment, which was to run consecutively to his sentence for assault. See *R v. Dunlop*, [2006] EWCA (Crim) 1354 [10], [12] (Eng.); Crown Prosecution Service, *Press Release 4*, *supra* note 14. Thus, in 2005, when the Director of Public Prosecutions authorized the Crown Prosecution Service to apply to the Court of Appeal for an order quashing Dunlop's acquittal of murder, Dunlop had spent the previous seven years incarcerated and had approximately six years of imprisonment remaining on his sentences for perjury.

194. 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.

LAW COMMISSION, CONSULTATION PAPER NO. 156, *supra* note 54, ¶ 5.23.

195. LAW COMMISSION, REPORT NO. 267, *supra* note 36, ¶ 4.5; LAW COMMISSION, CONSULTATION PAPER NO. 156, *supra* note 54, ¶ 1.4. This is especially true in cases in which an acquitted individual publicly admits his guilt in a book. Dennis, *supra* note 100, at 943 & n.44.

On the other hand, in Anglo-American systems of law,<sup>196</sup> society is unwilling to pay any price to achieve the goal of convicting and punishing those who have committed criminal offenses. For example, one way to increase the number of factually guilty people who are convicted would be to lower the standard of proof required in a criminal case from “beyond a reasonable doubt,”<sup>197</sup> to a “preponderance of the evidence,” the standard of proof generally required in a civil case.<sup>198</sup> A lower standard of proof undoubtedly would result in more guilty verdicts,<sup>199</sup>

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Professor Dennis put forth the following argument:

[T]he emergence of significant new evidence of guilt calls into question the legitimacy of an acquittal. It suggests . . . that a mistake has been made. Why should we not investigate and if necessary rectify the mistake, so as to lead to a retrial? . . . The criminal justice system exists to enforce the criminal law, and the correct enforcement of the criminal law against those whom we have reason to believe may be guilty is a matter of state policy. The interests of justice seem therefore to call for a retrial in these circumstances. A retrial will resolve the legitimacy problem of the first acquittal and forward the aims of criminal justice if the defendant is in fact guilty.

*Id.* at 945.

196. In this article, I am focusing upon the rule against double jeopardy as it applies in Anglo-American systems of law. I by no means intend to imply that no other societies and legal systems share the values I discuss herein and that they are willing to pay any price to convict and punish those who commit criminal offenses.

197. See *supra* text accompanying note 171.

198. In the United States, of course, this would initially require either a constitutional amendment or the Supreme Court's overruling its decision in *In re Winship*, 397 U.S. 358 (1970) (holding that proof beyond a reasonable doubt is constitutionally required in all criminal prosecutions).

199. Two highly-publicized cases in the United States illustrate this point. In 1995, a criminal court jury acquitted former professional football player O.J. Simpson of the murder of his former wife Nicole Brown Simpson and her friend Ronald Goldman. Adam Pertman, 'Not Guilty,' *Simpson Free After Acquittal*, B. GLOBE, Oct. 4, 1995, at 1, available at 1995 WLNR 2139224. Sixteen months later, a jury in a civil action brought by the victims' parents found that Simpson had wrongfully caused the deaths of the two victims and ordered him to pay \$8.5 million in compensatory damages and \$25 million in punitive damages. B. Drummond Ayres, Jr., *Jury Decides Simpson Must Pay \$25 Million in Punitive Award*, N.Y. TIMES, Feb. 11, 1997, at A1, available at 1997 WLNR 4894073; see also *Rufo v. Simpson*, 103 Cal. Rptr. 2d 492, 529 (2001) (upholding the damage award against Simpson). Similarly, in March of 2005, a criminal court jury found film actor Robert Blake not guilty of murdering his wife. Winton, *supra* note 174. Later that year, a jury in a civil action brought by the victim's heirs found Blake liable for his wife's death and awarded her four children \$30 million in damages. *Civil Jury: Blake Caused Wife's Death*, CINCINNATI POST, Nov. 19, 2005, at B10, available at 2005 WLNR 18851208. See also *Winship*, 397 U.S. at 367 (noting that the judge in a juvenile delinquency proceeding made “a finding of guilt [under the preponderance standard] that he conceded he might not have made under the standard of proof beyond a reasonable doubt”). This is not to say that either Simpson or Blake actually committed the murder(s) with which he was charged, but rather to point out that a verdict against the

and many of the additional convicted individuals would be factually guilty. Nevertheless, some of them would be innocent. Because of society's view, both in the United States and in England, that "it is far worse to convict an innocent man than to let a guilty man go free,"<sup>200</sup> the beyond a reasonable doubt standard "is now accepted in common law jurisdictions as the measure of persuasion by which the prosecution must convince the trier of all the essential elements of guilt."<sup>201</sup>

Accordingly, it is clear that in both the United States and England the goal of the criminal justice system is not merely to convict and punish the guilty, but to convict and punish *only* the guilty;<sup>202</sup> in other words, the citizenry of both countries place a "high value" on "the accuracy of the outcome of [criminal] proceedings."<sup>203</sup> Therefore, to justify an exception to the rule against double jeopardy, "the advantages in terms of accuracy of outcome must override the collective and individual process values served by the rule."<sup>204</sup>

*B. Will the Exception for "New and Compelling" Evidence Lead to More Accurate Outcomes or to Convicting the Innocent?*

At first glance, it would seem that allowing the government to prosecute an acquitted individual a second time for the same offense when new and compelling evidence of her guilt has been discovered would help to achieve an accurate outcome in the particular case. For example, in the first hypothetical situation posed by the English Law Commission,<sup>205</sup> it appears that, based on the results of the DNA testing of the body fluid found at the scene of the rape that "unquestionably came from the

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defendant is more likely when the required standard of proof in an action is by a "preponderance of the evidence" than when it is "beyond a reasonable doubt."

200. *Winship*, 397 U.S. at 372 (Harlan, J., concurring); *accord* *Schlup v. Delo*, 513 U.S. 298, 325 (1995); *Yates v. Aiken*, 484 U.S. 211, 214 (1988); *Rose v. Clark*, 478 U.S. 570, 580 (1986); *Francis v. Franklin*, 471 U.S. 307, 313 (1985); *Patterson v. New York*, 432 U.S. 197, 208 (1977); 4 BLACKSTONE, *supra* note 1, at \*358 ("[T]he law holds, that it is better that ten guilty persons escape, than one innocent suffer.").

201. *Winship*, 397 U.S. at 361 (quoting CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 321, at 682 (1954)).

202. *See* *Roberts*, *supra* note 100, 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.").

203. LAW COMMISSION, REPORT NO. 267, *supra* note 36, ¶ 4.2. *See also* *Dennis*, *supra* note 100, at 944 ("A legitimate verdict in criminal adjudication is one that is factually correct and morally authoritative. Moral authority derives in large measure from factual accuracy . . .").

204. LAW COMMISSION, REPORT NO. 267, *supra* note 36, ¶ 4.2.

205. *See supra* text accompanying note 180.

rapist,”<sup>206</sup> the acquitted defendant is in fact guilty and that a second trial would result in a verdict of guilty, or more likely, a plea of guilty. The criminal justice system therefore would (presumably) reach an accurate outcome in the case if the initial acquittal were quashed and a new trial allowed.

The same appears to be true in the English Law Commission’s hypothetical situation involving an apparent murderer’s testimony that two individuals, previously acquitted of conspiracy to commit murder, hired her to kill another.<sup>207</sup> Assuming that the veracity of the apparent murderer’s evidence is supported by her revelation of certain details that only the murderer would know (as stated in the hypothetical), it appears that the two acquitted individuals may in fact be guilty of conspiracy to commit murder. Allowing a second trial of those individuals for that offense most likely would result in their convictions and therefore the (presumably) accurate outcome in the case.

Nevertheless, the two hypothetical cases promulgated by the English Law Commission make assumptions that may not be true in actual cases, and if they are not true, the previously-acquitted defendants may in fact be innocent and their convictions in a retrial will lead to an *inaccurate* result. In the first hypothetical, it is assumed that the body fluid found at the scene of the rape “unquestionably came from the rapist.”<sup>208</sup> In the real world, however, there is no assurance that the DNA found to match that of the previously-acquitted defendant “unquestionably” belonged to the rapist. For example, “[a] suspect’s DNA profile might match the profile found at the scene as a result of tampering with the crime scene . . . , which might occur where the actual offender, a police investigator, or another person deliberately leaves a suspect’s genetic sample at the crime scene.”<sup>209</sup> Or, “a suspect’s sample might later be substituted for the actual crime scene sample to falsely implicate the suspect in the offence.”<sup>210</sup> Alternatively, the sample found at the scene of the crime

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206. LAW COMMISSION, CONSULTATION PAPER NO. 156, *supra* note 54, ¶ 5.8(a) (footnote omitted).

207. *See supra* text accompanying note 181.

208. LAW COMMISSION, CONSULTATION PAPER NO. 156, *supra* note 54, ¶ 5.8(a) (footnote omitted).

209. 2 AUSTRALIAN LAW REFORM COMMISSION & NATIONAL HEALTH AND MEDICAL RESEARCH COUNCIL, REPORT 96, ESSENTIALLY YOURS: THE PROTECTION OF HUMAN GENETIC INFORMATION IN AUSTRALIA ¶ 44.16 (2003) (footnotes omitted).

210. *Id.* The Law Reform Commission discussed a case from New South Wales in which a defendant convicted of assault alleged that the police had planted DNA evidence on his clothes after they took them into custody. An expert witness called by the defense

may have been contaminated with other human DNA,<sup>211</sup> “[l]aboratory staff [may have made] errors in conducting [the] DNA analysis, in interpreting or reporting the results of the analysis, or in entering the resulting DNA profile into a DNA database system,”<sup>212</sup> or a forensic scientist might have intentionally engaged in misconduct.<sup>213</sup>

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suggested that the blood found on the defendant’s clothing appeared to be post-transfusion blood from the assault victim that “might have been deposited on the clothing *after* it was taken into police custody.” The Commission noted that “[t]he victim’s blood sample had been stored in the same police exhibit room as the accused’s clothing.” *Id.* ¶ 44.17.

211. The Australian Law Reform Commission, in a recent report, stated: Contamination may occur at any stage of the collection, transport or analysis of a DNA sample. A DNA sample may be contaminated with other human DNA in a number of ways, including:

- the crime scene sample may contain a mixture of fluids or tissues from different persons due to the nature of the crime;
- the crime scene sample may be contaminated during sample handling at the crime scene or in the laboratory;
- or carry-over contamination may occur in PCR [Polymerase Chain Reaction]-based testing if the amplification products of one test are carried over into the mix for a subsequent PCR test.

*Id.* ¶ 44.9 (footnotes omitted). The Law Reform Commission discussed one reported example of the contamination of a DNA sample that occurred in New Zealand:

[T]he DNA profile of an assault victim on the South Island was entered into the DNA data bank and matched the profiles obtained from two separate homicide scenes on the North Island. The DNA samples collected from each crime scene, including the assault, had been analysed in the same forensic laboratory. Police were satisfied the assault victim had not been at either of the homicide scenes at any time, and was not the offender. An independent inquiry could not find any conclusive explanation for the false positive results. The inquiry identified a number of potential sources of contamination, including bench contamination, instrument contamination, failure to observe certain protocols, and deliberate contamination. It concluded that, on the balance of probabilities, the results were caused by accidental contamination of the crime scenes samples during an early stage of processing at the laboratory.

*Id.* ¶ 44.10 (footnote omitted).

212. *Id.* ¶ 44.12 (explaining that such errors might have resulted “from a failure to comply with established procedure, misjudgement by the [forensic] scientist, or some other mistake”).

The Commission discussed an American case in which a clerical error at a forensic laboratory led to an innocent man being charged with two sexual assaults. In that case, “[a] DNA expert who examined the laboratory’s records found that the man’s name had been accidentally switched with his cellmate’s name when the profiles were entered into the database.” *Id.* ¶ 44.13.

213. *Id.* ¶ 44.14. *See also In re Investigation of West Virginia State Police Crime Laboratory, Serology Div.*, 438 S.E.2d 501, 503 (W. Va. 1993) (after conducting an investigation of the Serology Division of the state police crime lab, a retired circuit court judge appointed by the state supreme court concluded that a serologist at the lab engaged in “acts of misconduct . . . includ[ing] (1) overstating the strength of results; (2) overstating the frequency of genetic matches on individual pieces of evidence; (3) misreporting the frequency of genetic matches on multiple pieces of evidence; (4) reporting that multiple items had been tested, when only a single item had been tested; (5) reporting inconclusive results as conclusive; (6) repeatedly altering laboratory records; (7) grouping results to create the erroneous impression that genetic markers had

Similarly, the second hypothetical states that the veracity of the new witness's evidence is "supported by the revelation of certain details that would only be known to the murderer."<sup>214</sup> While this may show that the new witness is in fact the murderer, it says nothing about the truthfulness of her statement implicating the two previously-acquitted individuals. The hypothetical attempts to circumvent this problem by stating that the witness-murderer came forward due to "a genuine religious conversion."<sup>215</sup> In the real world, however, we would not know whether this asserted reason for her volunteering information to the police is the true reason for her doing so. What we would know, however, is that, with an exception to the rule against double jeopardy for newly-discovered evidence, there will be situations in which it might be advantageous for someone in the position of the witness-murderer to step forward, admit her guilt, and *falsely* implicate the two previously-acquitted individuals. For example, the witness-murderer might know that the police are continuing to investigate the homicide and may believe that she will soon be arrested for the crime. Believing that she would be treated more leniently if she could shift much of the blame to others, she might contact the police, admit her guilt, and claim she was merely a pawn of the previously-acquitted individuals in their murder-for-hire plot. Or, in a jurisdiction in which plea-bargaining is tolerated, the witness-murderer's testimony against the two previously-acquitted individuals would be a strong bargaining chip in any plea negotiations with the authorities, because

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been obtained from all samples tested; (8) failing to report conflicting results; (9) failing to conduct or to report conducting additional testing to resolve conflicting results; (10) implying a match with a suspect when testing supported only a match with the victim; and (11) reporting scientifically impossible or improbable results"); CONNORS ET AL., *supra* note 178, at 18, 34-35, 48-49, 55-57, 74-76 (discussing four separate cases in which the perjured testimony of a serologist who worked first for the West Virginia State Police Crime Laboratory and then for the Bexar County, Texas, crime lab led to the erroneous convictions of five innocent men); *id.*, at 18, 61-64 (discussing the case of an innocent man who was erroneously convicted, in part, on the basis of the testimony of a government serologist who subsequently pleaded guilty to perjury charges alleging that he lied about his qualifications and training); James Herbie DiFonzo, *In Praise of Statutes of Limitations in Sex Offense Cases*, 41 HOUS. L. REV. 1205, 1242-54 (2004) (describing the manner through which the serious deficiencies in the Houston, Texas, Crime Lab led to the erroneous rape conviction of an individual); *see also* J. Herbie DiFonzo, *The Crimes of Crime Labs*, 34 HOFSTRA L. REV. 1, 2 (2005) ("DNA's reputation for scientific precision is in fact unwarranted. The record is littered with slapdash forensic analyses often performed by untrained, underpaid, overworked forensic technicians operating in crime labs whose workings reflect gross incompetence or rampant corruption.").

214. LAW COMMISSION, CONSULTATION PAPER NO. 156, *supra* note 54, ¶ 5.8(b).

215. *Id.*

those authorities would be free to pursue those individuals a second time despite their previous acquittals. The witness-murderer therefore might be able to persuade the prosecutor to accept a guilty plea to a lesser offense, such as manslaughter, in exchange for her testimony against the two previously-acquitted individuals.<sup>216</sup>

What about two other situations posed by the English Law Commission? In its 2001 report on double jeopardy, the Law Commission pointed out that “there have [been] in recent years a number of well-publicized cases in which persons acquitted of serious offences are reported to have subsequently confessed their guilt.”<sup>217</sup> The Law Commission seems to be implying that the original acquittal in such a case is *always* erroneous (i.e., the acquitted defendant is in fact guilty) and that the accurate outcome could be achieved only by quashing the original acquittal and allowing the government to retry the previously-acquitted defendant using her alleged confession. Although this may well be true in some cases, such as the one involving William “Billy” Dunlop,<sup>218</sup> I disagree with the Law Commission’s generalization. Even assuming that the previously-acquitted defendant actually did confess—an assumption that may be unwarranted,<sup>219</sup> that “confession” may not be true. The previously-acquitted individual may, for instance, have been trying to boost herself in the eyes of her peers by saying, in effect, “look, I got away with something and beat the system.” Or, she may be suffering from a mental illness that caused her

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216. Moreover, even if she would not gain any tangible benefits from falsely implicating the two previously-acquitted individuals, the witness-murderer may have a grudge against them and, realizing that she may be “going down,” wants to take them with her.

217. LAW COMMISSION, REPORT NO. 267, *supra* note 36, ¶ 1.6.

218. *See supra* note 14.

219. Individuals frequently fabricate stories asserting that another person confessed to having committed a crime. The motives of these individuals vary, but may include, for example, gaining revenge against that other person for something he may have done, or currying favor with the authorities, perhaps to help themselves in their own troubles with the law. Included in this latter category are “jailhouse informants” who might claim to have heard the previously acquitted defendant’s confession while she was serving time for some other offense. *See, e.g.,* State v. Patterson, 886 A.2d 777, 789 (Conn. 2005) (“[A jailhouse] informant who has been promised a benefit by the state in return for his or her testimony has a powerful incentive, fueled by self-interest, to implicate falsely the accused.”); Dodd v. State, 993 P.2d 778, 783 (Okla. Crim. App. 2000) (“Courts should be exceedingly leery of jailhouse informants, especially if there is a hint that the informant received some sort of a benefit for his or her testimony.”); *see also* Roberts, *supra* note 100, at 399 (“[I]t seems likely—on the basis of experience and accumulated wisdom—that wrongful conviction is skewed towards cases involving particular forms of notoriously unreliable evidence, such as . . . prisoners’ alleged confessions to cellmates.”). *Cf.* O’Brien v. Chief Constable of South Wales, [2005] 2 A.C. 534, 544 (appeal taken from Wales) (U.K.) (Lord Phillips of Worth Matravers) (involving a civil action arising from a criminal case in which three individuals were convicted of murder, in part, on the basis of testimony by one of them that was untrue).



to confess falsely.<sup>220</sup> Or, as in several of the cases that caused English lawmakers particular concern,<sup>221</sup> the previously-acquitted individual may have had a strong financial incentive to confess falsely.<sup>222</sup> Yet, a retrial at which the fact finder hears the previously-acquitted defendant's "confession" is highly likely to result in a conviction, even if the "confession" is false. For confessions have a "decisive impact on the adversarial process"<sup>223</sup>—"[t]riers of fact accord confessions such heavy weight in their determinations that 'the introduction of a confession makes the other aspects of a trial in court superfluous . . .'"<sup>224</sup> In such a

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220. See *Colorado v. Connelly*, 479 U.S. 157, 157 (1986) (according to a psychiatrist employed by the state hospital, the defendant, who approached a police officer and without any prompting stated that he had murdered a woman, was suffering from chronic schizophrenia and was following the "voice of God," which instructed him either to confess to the killing or to commit suicide). By citing *Connelly*, I am not asserting that Connelly's confession was false and that he did not in fact commit the murder; nevertheless, that may well have been the case. For, as United States Supreme Court Justice William J. Brennan, Jr., pointed out:

[T]he record is barren of any corroboration of the mentally ill defendant's confession. No physical evidence links the defendant to the alleged crime. Police did not identify the alleged victim's body as the woman named by the defendant. Mr. Connelly identified the alleged scene of the crime, but it has not been verified that the unidentified body was found there or that a crime actually occurred there.

*Id.* at 183 (Brennan, J., dissenting).

221. Roberts, *supra* note 100, at 417 n.97 (noting that a member of Parliament in a House of Commons debate "cited several examples of 'kill-and-tell memoirs,' including those of former Kray twins henchmen and the Richardson gang torturer 'Mad' Frank Fraser").

222. In three English murder cases that could be re-examined under the new statute, the acquitted individual allegedly made his "confession" in a book. *Double Jeopardy Law Ushered Out*, BBC News, Apr. 3, 2005, [http://news.bbc.co.uk/2/hi/uk\\_news/4406129.stm](http://news.bbc.co.uk/2/hi/uk_news/4406129.stm) (speculating that the cases involving Ronnie Knight, the ex-husband of a slain television actress, and Freddie Foreman, an ex-associate of the Kray Twins, are two cases in which detectives hope new evidence comes to light); Dennis, *supra* note 100, at 943 (stating that in his autobiography, RESPECT, Freddie Foreman, the "Managing Director of British Crime," told in detail how he participated in the killing of Frank "The Mad Axeman" Mitchell as a favor to the Kray brothers); *id.* at 943 n.43 (noting that Foreman also described how he shot and killed Thomas "Ginger" Marks). The truth of such a "confession," though, is somewhat dubious. For a book in which an acquitted individual admits his involvement in a notorious crime is likely sell far more copies, and hence result in a greater royalties, than one in which the author continues to deny his involvement in the crime. Moreover, some individuals might make false statements in a book in attempt to gain greater notoriety.

223. *Connelly*, 479 U.S. at 182 (Brennan, J., dissenting) (quoting EDWARD W. CLEARY, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 148, at 316 (2d ed. 1972)).

224. *Id.*

case, the original acquittal, not the conviction based on the newly-discovered evidence (i.e., the defendant's confession), would be the "accurate outcome."

In any event, I think it is highly probable that the number of "confessions" by individuals acquitted of a serious offense in England will, in the future, be reduced to nearly zero, because a guilty person who has been acquitted of such an offense will know that a confession could lead to the quashing of her acquittal and a new trial at which her confession will be introduced into evidence. Certainly acquitted murderers will not confess their involvement in the crime in a book.<sup>225</sup> And is there any realistic possibility that, for example, Siôn Jenkins—even if actually guilty of the murder of which he was acquitted—would now admit his guilt?<sup>226</sup>

As a practical matter, then, the newly-enacted statute will not result in many factually guilty defendants who were acquitted after the effective date of the new statute being subsequently convicted on the basis of their own post-acquittal confession.<sup>227</sup> Indeed, it seems more likely that, in

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225. Roberts, *supra* note 100, at 417 ("[I]f double jeopardy protection were withdrawn, so that the lure of media fame (and open cheque-books) also carried the risk of re prosecution and conviction, post-acquittal revelations would presumably be even rarer than they are already."); *id.* at 417 n.97 (quoting a member of Parliament as saying, in response to another member's citing the "kill-and-tell memoir" of the Richardson gang torturer "Mad" Frank Fraser, that if he had "'learned one thing in this life, it is that anyone whose nickname contains the word 'mad' is not stupid enough to confess while there is still the possibility of his being tried.'").

226. On February 15, 1997, someone bludgeoned to death Billie-Jo Jenkins, a thirteen-year-old schoolgirl, with a metal tent peg while she was painting the patio doors at the home of her foster family in Hastings, East Sussex, England. In July of 1998, a jury convicted Siôn Jenkins, Billie-Jo's foster father, of her murder. Jenkins appealed his conviction to the Court of Appeal, focusing heavily on fresh evidence indicating that the 150 or so microscopic spots of Billie-Jo's blood discovered on his clothing could have been exhaled by her when he lifted her shoulder after finding her body. Following a nine-day hearing at which the fresh evidence was presented, the Court of Appeal, on December 21, 1999, upheld the conviction. *R v. Jenkins*, (1999) No. 98/4720/W3 Crim. App. (Eng.), available at <http://www.homepage-link.to/justice/Jenkins/index.htm> (last visited Feb. 15, 2007). In May of 2003, the Criminal Cases Review Commission, *see supra* note 179, referred the case to the Court of Appeal. On July 16, 2004, the Court of Appeal quashed Jenkins's conviction on the strength of the fresh scientific evidence and ordered a new trial. Thereafter, two different juries failed to reach a verdict in the case. After the second jury was discharged on February 9, 2006, the prosecution offered no evidence and a judge formally acquitted Jenkins of the murder. *See* Crown Prosecution Service, *Press Release 2*, *supra* note 179; *Twists and Turns in Jenkins Case*, *supra* note 179; *Jenkins Cleared in Billie Jo Case*, BBC NEWS, Feb. 9, 2006, <http://news.bbc.co.uk/1/hi/england/4661252.stm>; Claire Gibson, *Case Turned on 158 Spots of Blood*, BBC NEWS, Feb. 9, 2006, [http://news.bbc.co.uk/1/hi/england/southern\\_counties/4661302.stm](http://news.bbc.co.uk/1/hi/england/southern_counties/4661302.stm); Duncan Thorpe, *Constable Helps Clear British Man Accused of Foster Daughter's Murder*, EDMONTON J., Feb. 12, 2006, <http://www.bloodspatter.com/News.htm>.

227. The statute, of course, applies to acquittals rendered before passage of the Act, Criminal Justice Act, 2003, c. 44, § 75(6) (Eng.), and therefore could be used to prosecute individuals who were acquitted of a qualifying offense prior to the enactment of the statute, as it was in the case of William "Billy" Dunlop, *see supra* note 14.

the future, most “confessions” by previously-acquitted individuals will be fabrications on the part of the person to whom the confession was allegedly made and that use of such a “confession” will lead to an inaccurate outcome in the case by allowing the quashing of the acquittal of an innocent person and a new trial that results in an erroneous conviction based upon the fabricated confession.

In its 2001 report on double jeopardy, the English Law Commission also set forth the following additional hypothetical situation:

[B]lood samples taken at a murder scene in the early 1980s might not have produced sufficient identification at that time. The prime suspect may have been prosecuted on the basis of other evidence. If the prosecution failed to satisfy the jury that the defendant was guilty beyond a reasonable doubt, the defendant would have been acquitted and left the court a free man. A decade later, advances in DNA testing could enable the original blood samples to be analyzed and show with near certainty that the acquitted person had been at the crime scene.<sup>228</sup>

Once again, it is by no means certain that a new trial resulting in a conviction would be the “accurate outcome” in this case. Under the facts, as stated, the results of the DNA test would, at most, show that the acquitted person had been at the scene of the crime. But one’s mere presence at the scene of a murder does not make that person guilty of the murder.<sup>229</sup> For example, the person whose blood was found at the scene of a murder may have been an innocent bystander who was injured by the real killer (thus explaining the presence of his blood), but who fled the scene and did not contact the police because he was afraid that the police might think, perhaps based on his race (Black), age (young), and the location of the homicide (a high-crime area), that he killed the victim. The reasons that may have led this innocent bystander to flee the scene without calling the police may be the very ones relied upon by a jury, in conjunction with the results of the DNA test showing that the individual had been present at the scene of the crime, to convict him erroneously.

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228. LAW COMMISSION, REPORT NO. 267, *supra* note 36, ¶ 1.5 (quoting Select Committee on Home Affairs, Third Report, *supra* note 1, ¶ 3).

229. See, e.g., CONNORS ET AL., *supra* note 178, at 59-61 (reporting on an innocent man who was convicted of kidnapping a woman from the parking lot of a nightclub and raping her, in part, because of the fact that he had been present at the nightclub on the evening of the crime); see also *Jenkins Cleared in Billie Jo Case*, *supra* note 226 (discussing the case of Siôn Jenkins who undoubtedly was at the scene of the murder of his foster daughter but who was acquitted of the crime); Gibson, *supra* note 226.

Allowing the government to retry an individual on the basis of newly-discovered evidence of her guilt will certainly increase the government's chances of obtaining a conviction. But, in most cases, the newly-discovered evidence will not be the *only* reason for the increased probability of a conviction. In addition to the new evidence, the government may have significant advantages in the second trial that it did not have at the first trial. The initial trial will have allowed it to discover the weaknesses in its own case that it can attempt to deal with at the second trial, and it will have learned the strengths and weaknesses of the defendant's case, which it can attempt to attack and exploit at the second trial.<sup>230</sup> It may also have worn out the defendant, both emotionally and physically, and perhaps financially.<sup>231</sup> Moreover, retrials typically will involve high-profile cases that have generated massive amounts of publicity and that may have been in the news for years following the defendant's initial acquittal.<sup>232</sup> Even with restrictions on the publication of information concerning the application to quash an acquittal,<sup>233</sup> it may be difficult for

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230. See *supra* text accompanying notes 121-26.

231. See *supra* text accompanying notes 127-28.

232. Take, for example, the case of William "Billy" Dunlop, the first case in which an application for retrial was made to the Court of Appeal. See *infra* note 14. In that case, the victim's mother kept the case in the news by her "long campaign[]" for a change in the law of double jeopardy. See *Man Faces Double Jeopardy Retrial*, BBC NEWS, Nov. 10, 2005, <http://news.bbc.co.uk/1/hi/england/tees/4426038.stm>. In deciding whether to place restrictions upon publication on the publication of information concerning the Crown Prosecution Service's application to quash Dunlop's acquittal and retry him, the Court of Appeal stated: "Some cases, like the present case of D[unlop], will be of considerable national interest, likely to attract huge publicity. Many of these cases, as and when they arise, will generate considerable interest, if not nationally, certainly in the locality where the crime was committed." *In re D*, [2006] EWCA (Crim) 733 [13] (Eng.)

The same would be true if new evidence arose in the case of Siôn Jenkins, discussed *supra* note 226, and the government sought to have the Court of Appeal quash his acquittal. For other examples of controversial acquittals that gave rise to significant publicity, see the cases involving Robert Blake, discussed *supra* notes 174 and 199, and O.J. Simpson, discussed *supra* note 199. Indeed, the Simpson murder case still is in the news, more than eleven years after Simpson's acquittal. See *O.J. Simpson Asks Judge to Dismiss Publicity Rights Claim*, CNN.COM, Oct. 13, 2006, <http://www.cnn.com/2006/LAW/10/13/simpson.suit.ap/index.html> (noting that "O.J. Simpson was acquitted of the killings [of his ex-wife and her friend], but another jury found him liable in 1997 in a wrongful death lawsuit filed by the victim's families").

233. See Criminal Justice Act, 2003, c. 44, § 82 (Eng.). For example, in *In re D*, [2006] EWCA (Crim) 733 (Eng.), the case involving William "Billy" Dunlop, see *supra* note 14, the Court of Appeal ordered that

There should be no publication of any matter relating to: (1) the fact and hearing of the Crown's application to quash the acquittal of D for the murder of H and, if the application is successful, the same restriction will apply to the judgment and order of the court; (2) save to the extent that they are referred to any retrial (a) the earlier trials of D for the murder of H and the earlier convictions of D for perjury during those trials; (b) anything said or done by M or any other person seeking to bring about the retrial of D for the murder of H;

a previously-acquitted individual to get a fair trial if the Court of Appeal allows her to be retried. The jury hearing the case on retrial is quite likely to be aware that the defendant previously had been acquitted and could be retried only if the Court of Appeal concluded that there was new evidence against her. They therefore “might assume that, since our cleverest judges found the new evidence persuasive, their role is simply to endorse a conviction.”<sup>234</sup>

All these factors will help the government obtain a conviction at the retrial; but, as my analysis has shown, any such conviction will not

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(c) any other prosecutions or convictions of D; (d) any other matter relating to the character, antecedent history, reputation or reprehensible behaviour of D. For the avoidance of doubt, there should be no further publication of any such matter which has been previously published.

*Id.* at [4]. The Court also stated that, although it understood why a press release by the Director of Public Prosecutions was thought to be appropriate in the case, it doubted whether, in the future, “any form of press release would be appropriate.” *Id.* at [23].

234. Helena Kennedy, *Second Time Unlucky?: The Case Against Change*, GUARDIAN UNLIMITED, July 17, 2001, <http://www.innocent.org.uk/misc/doublejeopardy.html> (also asking the question, if new evidence were found implicating the three previously-acquitted defendants in the Stephen Lawrence case, see MACPHERSON REPORT, *supra* note 77, “how could any jury be found that would be impartial after the saturation coverage that the case has received?”). See also *D*, [2006] EWCA (Crim) 733 at [16] (Eng.), (“Without some restrictions on publication, publicity could be given not only to all the evidence examined by the Court of Appeal, considering whether it was indeed new and compelling, but also to the stark fact that the court had reached that conclusion. In some cases, at any rate, that would give rise to a substantial risk to the administration of justice at the retrial.”); Dennis, *supra* note 100, at 949 (recognizing that “[t]here is a real danger of prejudicial publicity arising from the reporting of a decision to quash an acquittal on the ground of significant new evidence” and that, in some cases, a fair retrial could not take place).

In the case involving William “Billy” Dunlop, see *supra* note 14, the Court of Appeal acknowledged that “there has been considerable publicity about Dunlop’s case, intense publicity in Teeside where the murder occurred, but also national publicity. There was national publicity when he pleaded guilty to perjury, television programmes in 2005 and national press coverage in 2005, continuing into 2006.” *R v. Dunlop*, [2006] EWCA (Crim) 1354 [20]. Nevertheless, the Court concluded that “using accepted techniques of jury management, it should be possible to select a jury that is not prejudiced by recollection of such publicity.” *Id.* at [22]. Then, in a statement disparaging the English public, it said, “we consider that there would be no difficulty in ensuring that members of the jury were unaware of the legal requirements for a retrial, for *we doubt whether many members of the public are aware of these . . .*” *Id.* (emphasis added). Finally, the Court of Appeal reasoned that

any recollection that members of the jury might have in relation to publicity about Dunlop would pale into insignificance in comparison to the legitimate prejudicial effect of being told that he had, on a number of occasions, confessed to her murder and that he pleaded guilty to perjury in relation to his denial of being guilty of these of that offence.

*Id.* at [26].

necessarily be the “accurate outcome” in the case, even when the newly-discovered evidence is reliable, scientific evidence, such as the results of a DNA test is reliable. Rather, in some cases, a retrial could change an “accurate outcome”—the acquittal of an innocent person—into an “inaccurate outcome”—the conviction of an innocent person. And, of course, because the English statute applies only in cases involving “serious offences,”<sup>235</sup> this means that some innocent people, after being rightly acquitted, will subsequently be erroneously convicted of murder, rape, or some other serious offense, and will be wrongfully imprisoned, perhaps, for the remainder of their life. In addition, once the innocent person is convicted, the police, in all probability, will mark the case “closed” and end their investigation, meaning that the real criminal escaped justice and likely is walking the streets, free to repeat her serious crime.

The English statute does, of course, provide safeguards for a previously-acquitted individual. It allows the Court of Appeal to quash an acquittal only when the new evidence is “compelling”<sup>236</sup>—that is, when it is “reliable,”<sup>237</sup> “substantial,”<sup>238</sup> and “highly probative of the case against the acquitted person.”<sup>239</sup> While this requirement may provide some protection to acquitted individuals, an analysis of the two previous hypothetical situations indicates that it will not always prevent erroneous convictions.

In the first situation,<sup>240</sup> the “confession” of the previously-acquitted individual certainly would be deemed “substantial” and “highly probative of the case against [her]” in every, or virtually every, case. The only issue in determining whether it is “compelling” will be whether it is “reliable.”<sup>241</sup> Certainly, the prosecutor, the Director of Public Prosecutions, and the Court of Appeal will weed out many fabricated confessions, yet it is not unlikely that some will survive the vetting process and, as my above analysis shows,<sup>242</sup> lead to the quashing of an acquittal and the subsequent conviction of an innocent person for a serious offense.

In the second situation,<sup>243</sup> the results of a DNA test that place the individual at the scene of the murder certainly would most likely be deemed “reliable”<sup>244</sup> and “substantial,” and in cases in which the individual,

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235. Criminal Justice Act, 2003, c. 44, pt. 10 (Eng.).

236. *Id.* § 78(1).

237. *Id.* § 78(3)(a).

238. *Id.* § 78(3)(b).

239. *Id.* § 78(3)(c).

240. *See supra* text accompanying note 217.

241. On the issue of the reliability of such “confessions,” *see supra* note 219 and text accompanying notes 219-22.

242. *See supra* text accompanying notes 223-24 and text accompanying notes 230-34.

243. *See supra* text accompanying note 228.

244. *But see supra* notes 210-13 and text accompanying notes 209-13.

at her initial trial, denied being present at the scene of the crime (as opposed, for example, to claiming she killed the victim in self-defense), would be “highly probative of the case against her.” The evidence therefore would be deemed “new and compelling,” within the meaning of the statute, and could be relied upon to quash the acquittal and allow the retrial of the individual. Yet, as my above analysis shows,<sup>245</sup> this might still lead to the conviction of an innocent person for a serious offense.

In sum, a retrial of a previously-acquitted individual on the basis of “new and compelling evidence” of her guilt will not always lead to an “accurate outcome.” In some cases it will lead to an “inaccurate outcome”—and an “inaccurate outcome” of the worst type, the conviction of an innocent person. One of the main purposes of the rule against double jeopardy, of course, is to reduce the risk that an innocent person will be erroneously convicted at a second trial for the same offense.<sup>246</sup> This purpose is frustrated when the government is permitted to have an acquittal quashed and is then able to retry the previously-acquitted individual a second time for the same offense.<sup>247</sup>

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245. See *supra* text accompanying notes 229-34.

246. See *supra* text accompanying notes 116-30.

247. It is true, of course, that an increased risk of an erroneous conviction also exists in a retrial following a jury's failure to agree upon a verdict, an appellate court's reversal of a defendant's conviction, or the quashing of a “tainted” acquittal—retrials that the rule against double jeopardy, as applied in England, allows. Nevertheless, contrary to Professor Dennis's analysis, see Dennis, *supra* note 100, at 939, the fact that retrials sometimes are permitted does not mean that the increased risk of an erroneous conviction is not a persuasive argument against the exception for new and compelling evidence. The crucial point is that retrials, with their increased risk of an erroneous conviction, should be kept to a minimum. Moreover, to be consistent, Professor Dennis would have to argue that the increased risk of an erroneous conviction should not prohibit an exception to normal double jeopardy principle in other situations, such as when the government claims that legal error beneficial to a defendant contributed to a fact finder's acquittal of that defendant, or even when it asserts that its faulty strategy at trial contributed to the defendant's acquittal. Cf. *Ashe v. Swenson*, 397 U.S. 436, 447 (1970) (at an individual's trial for robbing one of several participants in a poker game, the government called that victim as well as three other victims, but its identification evidence was weak and the jury acquitted the individual; the government subsequently brought the individual to trial for the robbery of one of the other participants in the poker game, this time eliciting stronger identification testimony from three of the witnesses who had testified at the first trial and further refining its case by declining to call one of the participants whose identification testimony at the first trial had been negative); *Hoag v. New Jersey*, 356 U.S. 464, 465-66 (1958) (at the defendant's trial for robbing several individuals at a tavern, the government called the three victims named in the indictment as well as two other victims, but the only witness who identified the defendant as one of the robbers was a victim not named in the indictment; after the jury acquitted the defendant, the government brought the defendant to trial for the robbery of the victim

But even if virtually all retrials lead to the “accurate outcome” in the case (either the conviction of a guilty person or the second acquittal of an innocent person), so that only a few innocent people are convicted on retrial, the question remains whether reaching an accurate outcome in *every* case trumps the other values underlying the rule against double jeopardy. I do not believe it does.

*C. The Exception for “New and Compelling Evidence” and the Remaining Policies Underlying the Rule Prohibiting a Retrial Following an Acquittal*

Under the English statute creating an exception to the rule against double jeopardy for “new and compelling evidence,” a prosecutor who receives the written consent of the Director of Public Prosecutions<sup>248</sup> can apply to the Court of Appeal for an order quashing the acquittal of an individual for a “qualifying offence”<sup>249</sup> and allowing the individual to be retried for that offense.<sup>250</sup> Once an application is made, the Court of Appeal must hold a hearing<sup>251</sup> at which the previously-acquitted individual can be present and represented by counsel.<sup>252</sup> At that hearing, the Court of Appeal must decide, first, whether there exists “new and compelling evidence” against the individual for the offense<sup>253</sup>—that is, whether the prosecution’s proffered evidence “was not adduced in the proceedings in which the person was acquitted”<sup>254</sup> and whether that evidence is “reliable,”<sup>255</sup> “substantial,”<sup>256</sup> and “highly probative of the case against the acquitted

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who had identified him at the first trial and called that person as its only witness, this time obtaining a conviction). I doubt that Professor Dennis would be willing to make such an argument.

It could also be argued that, because the exception requires new and compelling evidence of the defendant’s guilt, “any increased risk of wrongful conviction would be reduced.” See Dennis, *supra* note 100, at 939. But a “reduced” increased risk of an erroneous conviction is still an increased risk of an erroneous conviction, and it is the increased risk of an erroneous conviction that the rule against double jeopardy is intended to prevent. In addition, other factors, such as prejudicial pretrial publicity resulting from the Court of Appeal’s decision to quash the initial acquittal, see *supra* text accompanying notes 232-34; see also Dennis, *supra* note 100, at 934 (recognizing that there could be “extensive prejudicial publicity about the overturning of a previous acquittal”), may offset any reduction in the increased risk of an erroneous conviction, see *supra* text accompanying notes 230-34.

248. Criminal Justice Act, 2003, c. 44, § 76(3) (Eng.).

249. *Id.* § 75(1). For a list of “qualifying offences” see *id.* sched. 5, pt. 1, ¶¶ 1-29.

250. *Id.* § 76(1).

251. *Id.* § 80(4).

252. *Id.* § 80(4), (5).

253. *Id.* § 78(1).

254. *Id.* § 78(2).

255. *Id.* § 78(3)(a).

256. *Id.* § 78(3)(b).



person”<sup>257</sup>—and second, whether issuing the requested order would be “in the interests of justice.”<sup>258</sup>

The stakes for the previously-acquitted individual at such a hearing will be quite high, for it may result in the Court of Appeal’s quashing of her previous acquittal and ordering a new trial that could lead to her conviction and punishment. Because of these serious consequences, and in light of the availability of legal aid in England,<sup>259</sup> I would imagine that in virtually all cases the previously-acquitted individual will choose to be represented by an attorney.<sup>260</sup>

Neither the Criminal Justice Act 2003 nor the rules of procedure adopted to implement that statute<sup>261</sup> outline the procedures to be followed at a hearing on an application to quash an acquittal. It is clear, however, that both the prosecutor and the previously-acquitted individual can call and examine witnesses and introduce physical evidence.<sup>262</sup> Moreover, in the interest of fairness, I believe that both the previously-acquitted individual’s attorney and the prosecutor must be allowed to cross-examine the

257. *Id.* § 78(3)(c).

258. *Id.* § 79(1).

259. *See supra* note 110.

260. In the first case brought under the newly-created exception to the traditional rule against double jeopardy, William “Billy” Dunlop, *see supra* note 14, was represented by counsel at the hearing in the Court of Appeal on the government’s application to quash his acquittal. *R v. Dunlop*, [2006] EWCA (Crim) 1354 [15] (Eng.) (“Mr. Tim Owen QC appeared for Dunlop.”). The opinion of the Court of Appeal is silent about Dunlop’s presence at the hearing. *Id.*

Hereinafter, my discussion in the text will assume that the previously-acquitted individual is represented by counsel at the hearing in the Court of Appeal to quash her acquittal.

261. *See* Criminal Justice Act, 2003, c. 44, § 93 (Eng.) (authorizing the promulgation of rules of court making “provision as to procedures to be applied in connection with sections 76 to 82, 84 and 88 to 90” of the statute).

262. CRIM. PROC. R. 41.4(1) (Eng.) (“Prior to the hearing of a section 76 application, a party may apply to the Court of Appeal for an order under section 80(6) of the Criminal Justice Act 2003 for (a) the production of any document, exhibit or other thing; or (b) a witness to attend for examination and to be examined before the Court of Appeal.”); *see also* CRIM. PROC. R. 41.3(1)(a) (Eng.) (“An acquitted person who wants to oppose a section 76 application must serve a response . . . which indicates if he is also seeking an order under section 80(6) of the Criminal Justice Act 2003 for—(i) the production of any document, exhibit or other thing, or (ii) a witness to attend for examination and to be examined before the Court of Appeal.”).

The Criminal Justice Act 2003 authorizes the Court of Appeal to order the production of documents, exhibits, and other things and to order witnesses to attend the hearing for examination and to be examined before the court. Criminal Justice Act, 2003, c. 44, § 80(6) (Eng.).

opposing party's witnesses. The hearing in the Court of Appeal therefore is likely to be quite involved.<sup>263</sup>

Take, for example, the case involving Siôn Jenkins, who in 1998 was convicted of murdering his foster daughter, Billie-Jo.<sup>264</sup> Jenkins's appeal to the Court of Appeal focused heavily on fresh evidence that he claimed explained how 150 or so microscopic spots of Billie-Jo's blood could have innocently wound up on his clothing.<sup>265</sup> The hearing in the Court of Appeal lasted nine days, five of which were devoted to the testimony and cross-examination of six different expert witnesses concerning the source of the blood stains on Jenkins's clothing.<sup>266</sup> Although the case involved an attempt by a convicted defendant to overturn his conviction, there is no reason to believe that the presentation of the case in the Court of Appeal would have been much different if Jenkins had initially been *acquitted* and it were a prosecutor seeking to have the Court of Appeal *quash that acquittal* on the basis of newly-discovered blood-splatter evidence.

A case in which the newly-discovered evidence is an alleged confession by the previously-acquitted individual also is likely to be quite involved.<sup>267</sup> In such a case, the prosecutor most likely will call and

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263. In this respect, the case involving William "Billy" Dunlop, the first case brought under the "new and compelling evidence" exception to the double jeopardy rule, may be atypical. There, neither party called any witnesses or introduced any physical evidence in the hearing in the Court of Appeal. *See R v. Dunlop*, [2006] EWCA (Crim) 1354 (Eng.). In that case, however, there was never any question about Dunlop's having confessed to the murder of Julie Hogg and, when the government applied to the Court of Appeal to have Dunlop's prior acquittal quashed, Dunlop had already been convicted of perjury for testifying in his murder trials that he did not kill Ms. Hogg. *R v. Dunlop*, [2001] 2 Crim. App. (S) 133, 134 (2000) (Eng.). In the typical case involving an alleged confession by the previously-acquitted individual, the government most likely will have to prove that the individual actually confessed to the crime and, if he did, that the confession was "reliable." As pointed out earlier, there may be serious questions about whether the individual actually confessed, *see supra* text accompanying note 219, and whether, if he did, the confession is true, *see supra* text accompanying notes 219-22; *see also infra* text accompanying notes 267-72.

264. For a chronology of the events in the case, *see supra* note 226.

265. *R v. Jenkins*, (1999) No. 98/4720/W3 ¶¶ 128-62 Crim. App. (Eng.), *available at* <http://www.homepage-link.to/justice/Jenkins/index.htm> (last visited Oct. 4, 2006).

266. *JUSTICE for Siôn Jenkins, The First Appeal*, <http://www.justiceforsionjenkins.org.uk/appeal.html> (last visited Oct. 4, 2006). In Jenkins's second appeal, *see supra* note 226, which focused on fresh evidence concerning the blood splattering, at least four expert witnesses testified. *JUSTICE for Siôn Jenkins, The second appeal*, <http://www.justiceforsionjenkins.org.uk/appeal2.html> (last visited Oct. 4, 2006).

267. As I previously pointed out, *see supra* text accompanying notes 225-26, given the exception to the rule against double jeopardy for "new and compelling evidence," it is no longer likely that an individual acquitted of a "qualifying offence" will *publicly* acknowledge her guilt, in a book or otherwise. This is especially true in light of the quashing of the acquittal of William "Billy" Dunlop and his subsequent conviction for the murder of which he had previously been acquitted. *See supra* note 14. My discussion in the text therefore will not focus on any type of "public" a confession.

examine before the Court of Appeal those people who claim to have heard the confession. The previously-acquitted individual's attorney could then cross-examine the prosecutor's witnesses. If the previously-acquitted individual denies making the alleged confession, her attorney could attempt to attack the credibility of the prosecutor's witnesses,<sup>268</sup> perhaps by showing possible bias,<sup>269</sup> including any benefits they may have received from the government for their testimony; any prior inconsistent statements they may have made;<sup>270</sup> and the fact that they previously had been convicted of a criminal offense.<sup>271</sup> The previously-acquitted individual may also present her own case to try to show that she did not in fact make the alleged confession and that the testimony of the prosecutor's witnesses therefore is not "reliable," and hence not "compelling" within the meaning of the statute. This may involve presenting her own testimony, as well as the testimony of people who claim they were present at the time of the alleged confession but did not hear any such confession, or the testimony of alibi witnesses who claim that the previously-acquitted individual was not at the place of the alleged confession at the time the prosecutor's witnesses say it was made.<sup>272</sup>

Even in cases in which the new evidence presented by the prosecutor concerns the results of DNA testing, the hearing in the Court of Appeal may be quite involved. The previously-acquitted individual's attorney may, for example, vigorously cross-examine the prosecutor's witnesses, and perhaps call his own witnesses, in an attempt to show that someone tampered with the crime scene or the genetic sample taken from the crime scene,<sup>273</sup> or that laboratory staff made errors in conducting, interpreting,

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268. See ARCHBOLD, *supra* note 55, § 8-112.

269. See *id.* § 8-148.

270. See *id.* §§ 8-124 to 8-129a.

271. See *id.* §§ 8-151 to 8-152.

272. If, on the other hand, the previously-acquitted individual admits having made the confession, she may make the strategic decision not to contest its truthfulness at the hearing in the Court of Appeal, preferring not to "show her hand" at this point, but rather to save any attack on the truthfulness of the confession until the retrial, if any.

The scenario described in the text did not occur in the case involving William "Billy" Dunlop, see *supra* note 14, as Dunlop pleaded guilty to committing perjury in his previous two trials for the murder of Julie Hogg when he testified that he had not been to Ms. Hogg's house on the night of her disappearance and that he had nothing to do with her murder. *R v. Dunlop*, [2001] 2 Crim. App. (S) 133, 134 (2000) (Eng.). But the situation involving Billy Dunlop may not be representative of the cases in which the newly-discovered evidence is a confession by the previously-acquitted individual. See *supra* note 263.

273. See *supra* text accompanying notes 209-10.

or reporting the DNA analysis.<sup>274</sup> Even if the previously-acquitted individual concedes that the genetic sample found at the scene of the crime came from her, her attorney might call witnesses and introduce evidence tending to show an innocent explanation for its presence.<sup>275</sup>

In addition to, or in lieu of, contesting the prosecutor's claim that the newly-discovered evidence is "compelling," the previously-acquitted individual might attempt to show that quashing the acquittal and ordering a new trial would not be "in the interests of justice."<sup>276</sup> She may, for example, call witnesses, including experts, if permissible, in an attempt to show that "existing circumstances make a fair trial unlikely"<sup>277</sup>—evidence to

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274. See *supra* text accompanying note 212. See also *supra* text accompanying notes 211, 213.

275. See *supra* text accompanying note 229. Of course, if the previously-acquitted individual admits that the DNA found at the scene of the crime came from her, she may make the strategic decision not to attempt to show at the hearing that her presence at the scene of the crime was "innocent."

If the new evidence presented by the prosecutor is an eyewitness who purports to have observed the previously-acquitted defendant commit the crime in question, the prosecutor will most likely examine that person before the Court of Appeal. The previously-acquitted individual's attorney would then cross-examine the prosecutor's witness and attempt to impeach his credibility. The previously-acquitted individual may also present her own case to try to show that the testimony of the prosecutor's new witness is not "reliable" and "substantial." This may involve presenting her own testimony, as well as the testimony of other people contradicting the testimony of the prosecutor's witness, such as someone who claims he was present at the scene of the crime but did not observe the prosecutor's witness there. The previously-acquitted individual might also present the testimony of alibi witnesses, some of whom may have testified in her behalf at her first trial.

276. In the first case brought under the English statute, see *supra* note 14, William "Billy" Dunlop's attorney conceded that the evidence of Dunlop's confessions and of Dunlop's plea of guilty to perjury constituted "new" evidence, within the meaning of the Act, and he made no positive challenge to the government's claim that the new evidence was "compelling." Instead, he submitted that an order quashing Dunlop's acquittal and allowing a retrial would not be "in the interests of justice." *R v. Dunlop*, [2006] EWCA (Crim) 1354 [15]-[17] (Eng.).

277. Criminal Justice Act, 2003, c. 44, § 79(2)(a) (Eng.).

In the case involving William "Billy" Dunlop, see *supra* note 14, Dunlop's attorney did not introduce any evidence to support his claim that, because of the prejudicial publicity surrounding the case, Dunlop could not receive a fair trial. The Court of Appeal, however, acknowledged that "there has been considerable publicity about Dunlop's case, intense publicity in Teeside where the murder occurred, but also national publicity. There was national publicity when he pleaded guilty to perjury, television programmes in 2005 and national press coverage in 2005, continuing into 2006." *Dunlop*, [2006] EWCA (Crim) 1354 at [20]. Nevertheless, the Court concluded that "using accepted techniques of jury management, it should be possible to select a jury that is not prejudiced by recollection of such publicity." *Id.* at [22]. In a statement disparaging the English public, it said, "we consider that there would be no difficulty in ensuring that members of the jury were unaware of the legal requirements for a retrial, for *we doubt whether many members of the public are aware of these . . .*" *Id.* (emphasis added). Finally, the Court of Appeal reasoned that

any recollection that members of the jury might have in relation to publicity about Dunlop would pale into insignificance in comparison to the legitimate prejudicial effect of being told that he had, on a number of occasions,

which the prosecutor would likely respond by introducing his own witnesses. Alternatively, or additionally, she might attempt to show that the new evidence was not adduced at her first trial because of “a failure by an officer or by a prosecutor to act with due diligence or expedition.”<sup>278</sup> For instance, if a witness, such as a “jailhouse informant,” testified at the hearing that the previously-acquitted individual confessed to the crime while being held in custody before her initial trial, the previously-acquitted individual might call witnesses in an attempt to show that with due diligence the police or the prosecutor could have discovered the witness’s evidence before her first trial. The same is true if an alleged eyewitness testified at the hearing that he saw the previously-acquitted individual commit the crime.<sup>279</sup> Or, if the police discover physical evidence purportedly linking the previously-acquitted individual to the crime, that individual may attack the thoroughness of the entire police investigation, claiming that, but for shoddy procedures, they would have discovered the evidence before the individual’s first trial. Or, to use the first hypothetical situation presented by the English Law Commission in its 1999 consultation paper,<sup>280</sup> the previously-acquitted individual might call witnesses in an attempt to show that the new DNA test actually became available *before* her first trial, not, as the prosecution claims, three months *after* the trial, and that with due diligence the prosecutor could have learned about the new test prior to the first trial. In any of these situations, I would imagine that the prosecutor would respond with his own witnesses to try to show why the police or the prosecutor did not discover the alleged confession, the purported eyewitness, the physical evidence, or the new DNA test, despite due diligence, before the previously-acquitted individual’s first trial. Indeed, in some cases, the hearing on the application to quash the acquittal could turn into a full-blown trial of the competence of the police investigation.

If the previously-acquitted individual is not entitled to legal aid, it is likely that she will expend significant resources contesting the prosecution’s application to quash the acquittal. Moreover, whether or not entitled to legal aid, the previously-acquitted individual certainly will suffer from

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confessed to her murder and that he pleaded guilty to perjury in relation to his denial of being guilty of these of that offence.

*Id.* at [26].

278. Criminal Justice Act, 2003, c. 44, § 79(2)(c) (Eng.).

279. See *supra* note 275.

280. See *supra* text accompanying note 180.

the anxiety caused by her realization that she could face the possibility of a new trial, conviction, and punishment for a serious offense. She may again be embarrassed by the criminal charges brought against her for the second time; her friends, neighbors, and colleagues, and perhaps even her relatives may once again disapprove of her or be suspicious or distrustful of her. And, once again, it may affect her family life and her job. The expenses, if any, and the anxiety, embarrassment, disapproval, and suspicion will come about even if the previously-acquitted individual ultimately prevails at the hearing.

Furthermore, the expense, if any, and the anxiety and ordeal may not end at the conclusion of the hearing in the Court of Appeal. The losing party at the hearing has the right to seek leave to appeal the decision to the House of Lords.<sup>281</sup> If the Court of Appeal quashed the acquittal and ordered a new trial, it is virtually certain that the previously-acquitted individual will seek to have that decision overturned through an appeal to the House of Lords. If, on the other hand, the Court of Appeal refused to quash the acquittal, the prosecutor might seek leave to appeal that decision to the House of Lords. In the event one of the parties does appeal, and the House of Lords decides to hear the appeal, the cost, if any, to the previously-acquitted individual will continue to mount and her anxiety about a possible new trial, conviction, and punishment will continue. Even if the previously-acquitted individual ultimately prevails in the House of Lords, she will have been forced to endure significant additional personal strain, and perhaps expense, in an effort to avoid a second trial for the same offense.

One of the major purposes of the rule against double jeopardy is to prevent the government from subjecting a person to the embarrassment, expense, and ordeal of multiple trials for the same offense and compelling her to live in a continuing state of anxiety and insecurity concerning a criminal charge.<sup>282</sup> Although a hearing to quash an acquittal, and any appeal therefrom, is not a second “trial” for the same offense, it comes only after the prosecutor has charged the previously-acquitted individual with the same offense of which she previously was acquitted<sup>283</sup> and constitutes part of the first step of the government’s *attempt to prosecute the individual a second time for the same offense*. Allowing the government

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281. Criminal Appeal Act, 1968, c. 19, § 33(1B) (Eng.).

282. See *supra* text accompanying notes 106-15.

283. See Criminal Justice Act, 2003, c. 44, § 80(2) (Eng.) (“Within two days beginning with the day on which such notice is given, notice of the application [to quash the acquittal] must be served by the prosecutor on the person to whom the application relates, *charging him with the offence to which it relates or, if he has been charged with it in accordance with section 87(4), stating that he has been so charged.*” (emphasis added)).

to seek to quash an acquittal therefore frustrates this purpose of the rule against double jeopardy, even if the acquittal of the previously-acquitted individual ultimately is not quashed.<sup>284</sup> Moreover, if the government succeeds in having the acquittal quashed, it will try the previously-acquitted individual a second time for the same offense, thereby forcing the individual again to suffer the “distress and trauma of the trial process.”<sup>285</sup>

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284. Cf. *Abney v. United States*, 431 U.S. 651, 661-62 (1977) (holding that, in a federal criminal prosecution, an order denying a defendant’s pretrial motion to dismiss an indictment on double jeopardy grounds is immediately appealable under 28 U.S.C. § 2891, for otherwise the defendant would have to undergo the ordeal of a second trial that the double jeopardy provision was designed to prohibit).

285. LAW COMMISSION, CONSULTATION PAPER NO. 156, *supra* note 54, ¶ 4.7.

Professor Dennis contends that “the argument about the distress of the trial process presents some difficulties.” Dennis, *supra* note 100, at 940. He first points out that the rule against double jeopardy does not prevent retrials after a hung jury or after an appellate court reverses a conviction or quashes a “tainted” acquittal. *Id.* However, the fact that the rule against double jeopardy does not protect *every* criminal defendant against having to undergo the distress of the trial process a second time for the same offense does not negate the argument that the number of individuals forced to do so should be kept to a minimum. See *supra* text accompanying notes 114-15. Professor Dennis then focuses upon the English Law Commission’s statement that the distress of “facing trial” for a serious offense extends beyond the defendant and that “[h]is or her family also suffers, *as do witnesses on both sides, including the alleged victim*,” LAW COMMISSION, CONSULTATION PAPER NO. 156, *supra* note 54, ¶ 4.7 (emphasis added). Dennis, *supra* note 100, at 940. From this, he argues that

if strong new evidence of guilty emerges after an acquittal, it is not obvious that witnesses and victims would always wish to avoid the distress associated with a second trial. In many cases surely, they would say that this is a price they were prepared to pay in order to see justice done . . . In such cases the distress to victims and their families from not permitting retrial might fairly be offset against the distress likely to be suffered by the defendants concerned.

*Id.* This argument totally misses the mark. First, I would imagine that in virtually every case resulting in acquittal the alleged victim (as well as the alleged victim’s family and perhaps also the witnesses who testified for the government) believes that the fact finder reached the wrong result and would, in most cases, be willing to suffer the stress of a second trial if it would rectify the (perceived) mistake by the first fact finder. Professor Dennis’s argument therefore would not be limited to the exception for new and compelling evidence; rather it would also apply to an exception to normal double jeopardy principle in other situations, such as when the government claims that legal error beneficial to a defendant contributed to a fact finder’s acquittal of that defendant, or even when it asserts that its faulty strategy at trial contributed to the defendant’s acquittal. More importantly, though, the rule against double jeopardy is *not* designed to protect alleged victims and witnesses (or even the defendant’s family). In the context now under discussion, it is a protection for those who have once been tried for a particular criminal offense and acquitted. It is intended to avoid “subjecting [her] to embarrassment, expense and ordeal and compelling [her] to live in a continuing state of anxiety and insecurity . . .” *Green v. United States*, 355 U.S. 184, 187 (1957). Professor

Perhaps most importantly, though, allowing the government to prosecute a previously-acquitted individual for the same offense would undermine the finality of *every* acquittal in *every* case involving a “qualifying offence” and would thereby frustrate what the Supreme Court of the United States has called “*the primary purpose*”<sup>286</sup> of the rule against double jeopardy. The English exception to the rule against double jeopardy opens up *every* judgment of acquittal of a “qualifying offence” to subsequent challenge by the government.<sup>287</sup> An individual acquitted of a qualifying offence could never be certain that the government would not at some point—probably years later<sup>288</sup>—haul her into court for a second (or perhaps even a third<sup>289</sup> or fourth<sup>290</sup>) trial, alleging that newly-discovered evidence allows the Court of Appeal to quash the original acquittal and order a new trial for the same offense, and thereby forcing her to defend herself, first, against the claim that newly-discovered evidence justifies the quashing of the original acquittal and, if she fails on that score, against the same criminal charge of which she already has been acquitted. *No person acquitted of a qualifying offence*—whether in fact guilty or actually innocent—could ever take her acquittal as final.<sup>291</sup> Nearly every one of

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Roberts points out that there will be cases in which the criminal justice system “badly misfired,” but, despite the urgent demand for justice, justice can no longer be achieved. Roberts, *supra* note 100, at 396. He admits that “[t]hat is an unpalatable conclusion, which few crime victims directly touched by tragedy are ever likely to be able to accept, for perfectly understandable reasons of human psychology, anger and despair.” *Id.* Nevertheless, he rightly concludes that “policy-makers need to adopt a broader perspective, in which the interests and demands of victims do not exhaust the public interest in criminal justice reform.” *Id.*

286. United States v. Scott, 437 U.S. 82, 92 (1978) (emphasis added); *see also* United States v. DiFrancesco, 449 U.S. 117, 128 (1980) (“It has been said that . . . ‘the’ ‘primary purpose’ of the [Double Jeopardy] Clause was ‘to preserve the finality of judgments[.]’” (quoting *Crist v. Bretz*, 437 U.S. 28, 33 (1978))).

287. *Cf.* FRIEDLAND, *supra* note 67, at 296 (“A further danger is that to concede a right of appeal to the Crown in even a limited number of cases makes *all acquittals uncertain* until the time for appeals goes by.”) (emphasis added).

288. In the case involving William “Billy” Dunlop, *see supra* note 14 and text accompanying note 6, the government sought to quash Dunlop’s acquittal of murder more than fourteen years later. *Cf.* *People v. Aleman*, 667 N.E.2d 615, 617 (1996) (the government re-indicted the defendant for murder sixteen years after his previous acquittal for the same offense, alleging his acquittal in a bench trial was obtained by bribing the judge).

289. For example, the government tried William “Billy” Dunlop twice before he was acquitted of the murder of Julie Hogg. *See supra* note 14.

290. For example, Siôn Jenkins has already been tried three times for the murder of his foster daughter, Billie-Jo Jenkins. *See Jenkins Cleared in Billie Jo Case*, *supra* note 226. If “new and compelling” evidence led to the quashing of his acquittal, his retrial would be his fourth trial for the same crime.

291. Can one believe that Siôn Jenkins, *see supra* note 226, will *ever* be able to consider the matter closed? He certainly will live with the fear and anxiety that the government will claim to have found “new and compelling” evidence implicating him in the murder of his foster daughter and that he may someday have to undergo a fourth trial



these acquitted individuals would “live in a continuing state of anxiety”<sup>292</sup> and concern that the government would seek to try her again for the same offense. Moreover, none of these individuals could ever consider the matter closed and be able to plan her future accordingly. The threat of re prosecution for the same offense would impinge upon the “individual liberty”<sup>293</sup> and “autonomy”<sup>294</sup> of each of these acquitted defendants. Moreover, it allows the government to wield its enormous power unchecked, flaunting “the principle of limited government and the liberty of the subject”<sup>295</sup> and raising questions about its “commitment to democratic values”<sup>296</sup> and “personal freedom.”<sup>297</sup> Thus, this lack of finality in a judgment of acquittal frustrates a major, if not the “primary,”<sup>298</sup> purpose of the rule against double jeopardy.<sup>299</sup>

The double jeopardy principle also is intended to help ensure that the criminal justice system commands the respect and confidence of the community.<sup>300</sup> Allowing retrials of acquitted individuals may well frustrate this purpose.<sup>301</sup> In many cases, the government’s retrial of a previously-

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for that crime, with the possibility that he may be convicted and sentenced to life imprisonment. One might respond by saying, “But if he is guilty, so what?” The difficulty with that line of reasoning is that it assumes that every person ever acquitted of a “qualifying offense” was actually guilty and was wrongly acquitted. For, as explained in the text, under the “new and compelling” exception to the rule against double jeopardy, every person acquitted of a such an offense—whether factually innocent or guilty—will worry about being tried again for the same crime, and perhaps convicted (in some cases wrongly, see *supra* text accompanying notes 205-47), despite her previous acquittal.

292. *Green v. United States*, 355 U.S. 184, 187 (1957).

293. LAW COMMISSION, REPORT NO. 267, *supra* note 36, ¶ 4.12.

294. *Id.*

295. *Id.* ¶ 4.17.

296. *Id.*

297. *Id.* (quoting Paul Roberts, *Acquitted Misconduct Evidence and Double Jeopardy Principles, from Sambasivam to Z*, [2000] Crim. L.R. 952, 954).

298. *United States v. DiFrancesco*, 449 U.S. 117, 128 (1980) (quoting *Crist v. Bretz*, 437 U.S. 28, 33 (1978) (internal quotation marks omitted)); *United States v. Scott*, 437 U.S. 82, 92 (1978).

299. See *supra* text accompanying notes 90-105. But see Dennis, *supra* note 100, at 945 (“The interests of finality of legal process ought to be subordinate to the interests of the legitimacy of the process. There seems to be little merit in drawing a line under an outcome which we now have good reason to believe to be wrong . . .”).

300. See *supra* text accompanying notes 151-55.

301. But cf. *R v. Dunlop*, [2006] EWCA (Crim) 1354 [45] (Eng.) (“We have concluded that the public would rightly be outraged were the exception to the double jeopardy rule not to be applied in the present case simply on the basis that Dunlop would not have made the confessions that he did had he appreciated that they might lead to his retrial [in this case].”).

acquitted individual may be perceived by the public as an instance of the government's using its awesome power as a means of harassing that individual. For example, a large segment of the English population apparently believes that Siôn Jenkins<sup>302</sup> did not kill his foster daughter, Billie-Jo Jenkins. While many members of the community would no doubt welcome a retrial of Jenkins, many others would believe the government was continuing its harassment of him.

Moreover, if most retrials after an acquittal end up in convictions of the accused—and this certainly is the result intended by the English statute and the result to be anticipated—the community may question the accuracy of a criminal justice system that can, on one occasion, acquit a person of an offense and then, on a later occasion, convict the same person of the same offense. While it may be true that the “inconsistency” in the verdicts could be explained by the fact that new evidence was introduced in the second trial,<sup>303</sup> the new evidence usually will not be the only reason for the conviction in the second trial. The government has significant advantages at a second trial for the same offense,<sup>304</sup> and in a jury trial, the jury may be prejudiced against the accused.<sup>305</sup> These advantages and that prejudice may play an even greater part in the guilty verdict than the new evidence. As a result, many members of the community are likely to wonder whether innocent people are being convicted of serious offenses, and they may lose respect for, and confidence in, the criminal justice system. As Professor Paul Roberts stated, if the government could accept or reject verdicts of acquittal much as it suited itself, “criminal proceedings would soon be exposed as a sham trial of guilt, and . . . [p]ublic confidence in jury verdicts generally would be undermined . . . .”<sup>306</sup>

In some cases, quashing a judgment of acquittal entered upon a jury's verdict of “not guilty” and allowing a retrial of the acquitted individual for the same offense could also frustrate the jury's power to nullify the law, that is, “to dispense its ‘equity’ to acquit against the evidence.”<sup>307</sup> To take but one example, assume that the government charges a man with murder for intentionally killing his terminally-ill wife of fifty years—whom he loved deeply—by giving her an overdose of sleeping pills.<sup>308</sup> The evidence against the defendant is purely circumstantial. He defends on the ground that he did not administer the drugs that caused

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302. See *supra* note 226.

303. Dennis, *supra* note 100, at 945.

304. See *supra* text accompanying notes 121-30, 230-31.

305. See *supra* text accompanying notes 232-34.

306. Roberts, *supra* note 100, at 411.

307. *Id.* at 422.

308. See *supra* note 138.

her death, claiming instead that she ingested them on her own. If the jury returns a verdict of not guilty, thereby acquitting the husband, we have no way of knowing whether, on the one hand, the jury found that the accused did not administer the drugs that caused his wife's death, or, on the other hand, it found that he did administer the fatal drugs but nevertheless decided not to convict him"—acquit[ting] [him] against the evidence"<sup>309</sup> and engaging in "jury nullification"<sup>310</sup> or "jury equity."<sup>311</sup> If a witness previously unknown to the prosecutor, say an in-home nurse, stepped forward some time after the husband's acquittal and informed the prosecutor that she saw the husband administer the fatal drugs to his wife,<sup>312</sup> the prosecutor presumably could have the defendant's previous acquittal quashed and could retry him for murder. At the second trial, the jury may convict the defendant, a result that may well overturn the first jury's decision to nullify the law in this defendant's case. Protecting the power, or the right, of the jury nullification, of course, is one of the major purposes of the rule against double jeopardy.<sup>313</sup> This purpose will be frustrated in some cases because the government, if it discovers "new and compelling evidence," can overrule a jury's decision to acquit against the evidence by having the acquittal quashed and then retrying the previously-acquitted individual before a different jury.<sup>314</sup>

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309. *United States v. DiFrancesco*, 449 U.S. 117, 130 n.11 (1980) (quoting *Westen*, *supra* note 131, at 1063).

310. 5 LAFAYETTE ET AL., *supra* note 133, § 24.10(a), at 612.

311. *Roberts*, *supra* note 100, at 422 n.118.

312. The nurse may have felt sympathy for the couple and may have gone along with the husband's story by not informing the prosecutor that she was present at the time of the wife's death. After the husband's trial, however, she may have undergone "a genuine religious conversion," LAW COMMISSION, CONSULTATION PAPER NO. 156, *supra* note 54, ¶ 5.8(b), and decided to step forward and tell her story.

313. See *supra* text accompanying notes 131-40.

314. To take another example, assume that a woman shot and killed her husband in the bedroom of their home. The government charges the woman with the murder. She claims she was a battered spouse and that she was acting in self-defense when she shot her husband. At trial, the prosecutor does not contest her claim that she was a battered spouse, but introduces circumstantial evidence tending to show that at the time of the shooting she was not being threatened by the deceased. She, on the other hand, testifies that her husband had been abusive toward her for years and was about to inflict grievous bodily harm upon her when she shot him. If the jury acquits the wife, we have no way of knowing whether it found that she acted in self-defense or whether it instead rejected her self-defense claim but nevertheless concluded that because she was a battered spouse, she should not be held criminally liable for killing her abusive husband. If, sometime after the wife's acquittal, the prosecutor discovers compelling new evidence showing that the deceased was not attacking his wife at the time of the killing, he presumably could have the previous acquittal quashed and could retry the previously-acquitted wife

The exception to the double jeopardy rule for newly-discovered evidence will also result in the expenditure of additional time, money, and effort by prosecutors on cases that have already been decided. Given the limited resources available to prosecutors, this means that a prosecutor seeking to quash an acquittal will have to divert time and other resources from some cases that have not yet been tried. Should the Court of Appeal quash an appeal and order a new trial,<sup>315</sup> further prosecutorial resources will be diverted from untried cases. 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.

In addition, the newly-discovered evidence exception will lead to the diversion of limited judicial resources. Instead of dealing with pending appeals—some of which will involve incarcerated individuals convicted at trials infected by legal error and whose appeals ultimately will be granted—judges on the Court of Appeal will be conducting hearings on applications to quash acquittals. Some of these hearings may last several days.<sup>316</sup> And, of course, the courtroom in which the Court of Appeal holds the hearing to quash an acquittal, and the courtroom personnel, will be unavailable for other cases. Similarly, when the Court of Appeal quashes an acquittal and orders a new trial, the trial court might have to delay other trials—some of which could involve a guilty defendant who is free on bail; others of which could involve an innocent person being held in custody awaiting trial—so it can conduct a second trial of someone who has already been tried and acquitted for the same offense.

One of the purposes of the rule against double jeopardy is to conserve scarce prosecutorial and judicial resources.<sup>317</sup> Allowing a prosecutor to

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for murder. But, as with the situation discussed in the text, a conviction returned by the second jury could overrule the first jury's decision to acquit against the evidence.

Many retrials based upon newly-discovered evidence, of course, will not involve the possibility of jury nullification. For, even if the jury acquitted against the evidence, it presumably did so on the basis of the evidence it heard at trial. Had the jury heard all the relevant facts, including the newly-discovered evidence, it is not at all clear that it would have reached the same result.

315. If the losing party in the Court of Appeal is permitted to appeal to the House of Lords, *see* Criminal Appeal Act, 1968, c. 19, § 33(1B) (Eng.); *see also supra* text accompanying note 281, additional prosecutorial resources will be expended either pursuing an appeal from the Court of Appeal's decision not to quash the acquittal, or opposing the previously-acquitted individual's appeal from the Court of Appeal's decision quashing her acquittal and ordering a new trial.

316. *Cf.* the case involving Siôn Jenkins, *see supra* note 226, in which the hearing in the Court of Appeal on Jenkins's appeal lasted nine days, five of which were devoted to the testimony and cross-examination of six different expert witnesses concerning the source of the blood stains on Jenkins's clothing.

317. *See supra* text accompanying notes 146-47.

seek to quash an acquittal and to obtain an order allowing him to retry a previously-acquitted individual frustrates this purpose.<sup>318</sup>

Insofar as the exception to traditional double jeopardy principles for “new and compelling evidence” leads police officers initially to conduct a less thorough investigation, and prosecutors initially to conduct a less vigorous prosecution, than they otherwise might,<sup>319</sup> it would frustrate an additional purpose of the rule against double jeopardy.

Finally, the exception for “new and compelling evidence” could also lead police officers and prosecutors who were dissatisfied with a defendant’s acquittal to harass that individual by continuing to investigate him in an attempt to find new evidence on which to seek a second trial, thereby frustrating another purpose underlying the rule against double jeopardy.<sup>320</sup>

As I have shown, the exception to the rule against double jeopardy created by Parliament in the Criminal Justice Act 2003—even with the limitations contained therein—frustrates all the purposes underlying that rule. This result might be justifiable if the exception allowed the government to prosecute and convict large numbers of dangerous individuals who might otherwise avoid conviction and punishment for their criminal conduct. However, it does not appear that the exception will do so. It would seem to be the rare case in which the government, following an individual’s acquittal, will find “new and compelling” evidence of the

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318. It has been estimated that the cost of the investigation and prosecution of Sion Jenkins, including his three trials and two hearings in the Court of Appeal, *see supra* note 226, was £10 million, *Sion Jenkins Acquitted*, BRIT. PRESS REV., [http://www.britainusa.com/sections/articles\\_show\\_ntl.asp?d=0&i=41089&L1=&L2=&a=40962&pv=1](http://www.britainusa.com/sections/articles_show_ntl.asp?d=0&i=41089&L1=&L2=&a=40962&pv=1) (last visited Oct. 8, 2006) (reporting on an article in THE TIMES). As Mr. Jenkins was receiving legal aid, this amount includes his legal fees. Although the hearings in the Court of Appeal were on appeals by Jenkins following his conviction, there is no reason to believe the cost of the case would have been proportionately less if: 1) Jenkins’s first trial had ended in his acquittal; 2) the Court of Appeal held a hearing on an application of the government to quash that acquittal; 3) Jenkins was retried and convicted of murder following the denial of his appeal in the House of Lords; and 4) Jenkins appealed that conviction of the Court of Appeal. On a proportionate basis, the cost for two trials, a hearing in the Court of Appeal, and an appeal to the Court of Appeal would be approximately £8 million.

319. *See supra* text accompanying notes 141–45.

As I noted earlier, *see supra* note 143, I was initially skeptical of this possibility, but was told by police officers that it indeed would happen. As Professor Dennis points out, however, police and prosecutors “will not know before the first trial whether [new] evidence might become available later [so] the incentive to investigate and prosecute efficiently in the first place [is] not . . . lost.” Dennis, *supra* note 100, at 942.

320. *See supra* notes 148–50.

acquitted defendant's guilt.<sup>321</sup> Moreover, even in some of the cases in which it does, the acquitted individual may in fact be innocent; yet, quashing the original acquittal (the accurate outcome) in these cases and allowing a new trial may well result in an inaccurate outcome, namely, the conviction of an innocent person.<sup>322</sup>

## V. CONCLUSION

The rule against double jeopardy, in the form of the pleas of *autrefois acquit* and *autrefois convict*, has protected English citizens against the power of the government for hundreds of years. During that time, there can be no doubt that, on occasion, a guilty person has escaped conviction and punishment. But occasionally freeing a guilty person "is merely a part of the price that . . . society must pay in order to preserve its freedom."<sup>323</sup> Tinkering with the protections of the rule against double jeopardy by creating an exception for those rare situations in which the government discovers "new and compelling" evidence of an acquitted person's guilt of a qualifying offense hardly seems worth the cost. Not only will it require some individuals to undergo additional personal strain and expense, but it will also divert scarce prosecutorial and judicial resources, and, in some cases, will undermine a jury's power to nullify the law. It also could lead the police initially to investigate cases less diligently, and prosecutors initially to prosecute cases less vigorously, than they otherwise might, and to harass individuals whom they believe were wrongly acquitted in their first trial. The exception might also produce a loss of respect for, and confidence in, the criminal justice system. More importantly, though, it opens *every* judgment of acquittal for a "qualifying offence" to re-examination, and in addition to requiring significant numbers of acquitted individuals to "live in a continuing state of anxiety,"<sup>324</sup> it is likely to result in some innocent individuals being erroneously convicted and punished of a serious offense. Preserving the

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321. Roberts, *supra* note 100, at 414-15.

322. In an article written before Parliament enacted the English statute creating the exception for new and compelling evidence, Professor Dennis argued that the United Kingdom's failure to enact a procedure for re-opening acquittals on the basis of newly discovered evidence might, in some cases, give rise to a claim by an individual against the government of the United Kingdom for breach of the individual's rights under article 2(1) of the European Convention on Human Rights, which provides that "[e]veryone's right to life shall be protected by law," Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2(1), Nov. 4, 1950. Dennis, *supra* note 100, at 945-46.

323. California v. Acevedo, 500 U.S. 565, 601 (1991) (Stevens, J., dissenting). Cf. Arizona v. Hicks, 480 U.S. 321, 329 (1987) ("[T]here is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect . . . us all.").

324. Green v. United States, 355 U.S. 184, 187 (1957).

finality of *all* untainted<sup>325</sup> judgments of acquittal, and allowing a few guilty individuals to avoid conviction, seems preferable.

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325. As I noted earlier, *see supra* note 10, a separate exception exists in England permitting a second trial when an acquittal is “tainted,” that is, when it resulted from interference with, or intimidation of, a juror, witness, or potential witness. Criminal Procedure and Investigations Act, 1996, c. 25, §§ 54-57 (Eng.). I take no position in this paper concerning the wisdom of such an exception to the traditional rule against double jeopardy.

