Prosecution Appeals of Court-Ordered Midtrial Acquittals: Permissible Under the Double Jeopardy Clause?

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DAVID S. RUDSTEIN*

I. INTRODUCTION

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In this Article, the Author uses the American spelling for any words that differ in their American and English spellings, except when quoting material using the English spelling.
In 2003, the Parliament of the United Kingdom enacted the Criminal Justice Act 2003 (the Act), a wide-ranging statute that introduced “radical innovations into English criminal procedure.”\(^1\) Among other things, the Act grants the prosecution in a trial upon an indictment\(^2\) in England and Wales\(^3\) the right to appeal certain rulings of the trial judge,\(^4\) including a ruling that the defendant has no case to answer\(^5\) because the prosecution’s evidence was insufficient to prove the defendant’s guilt beyond a reasonable doubt,\(^6\) i.e., a directed verdict of not guilty.\(^7\) If


\(^2\) Criminal Justice Act, 2003, c. 44, §§ 57(1), 58(1) (Eng.).

\(^3\) *Id.* § 337.

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

\(^4\) Criminal Justice Act, 2003, §§ 57(1), 58(2).

The prosecution may bring an appeal only with the leave of the trial judge or the Court of Appeal. *Id.* § 57(4). See *infra* note 32.

\(^5\) See *infra* note 33.

A submission of no case to answer normally should be made at the close of the prosecution’s case in chief. ARCHBOLD: CRIMINAL PLEADING, EVIDENCE AND PRACTICE § 4-292 (J.P. Richardson ed., 2011) [hereinafter ARCHBOLD]; JOHN SPRACK, A PRACTICAL APPROACH TO CRIMINAL PROCEDURE § 20.48 (13th ed. 2011). Nevertheless, “in an exceptional case a judge can consider a submission of no case to answer . . . as late as the close of the defence case.” R v. C., [2007] EWCA (Crim) 854, [47] (Eng.) (quoting R v. Speechley, [2004] EWCA (Crim) 3067, [53] (Eng.)). If the defendant fails to make a submission of no case to answer, the trial judge can “decide of his own motion that there is no case to answer.” *Id.* (quoting Speechley, [2004] EWCA (Crim) 3067, [53]). See generally ARCHBOLD, *supra*, § 4-292 to -303; SPRACK, *supra*, §§ 20.48-.55.

\(^6\) See R v. N. Ltd., [2008] EWCA (Crim) 1223, [15], [2009] 1 Crim. App. 3, at 61 (Eng.). See also ARCHBOLD, *supra* note 5, § 4-293 (“A submission of no case should be allowed when there is no evidence upon which, if the evidence adduced were accepted, a reasonable jury, properly directed, could convict.”).

the prosecution’s appeal of the ruling succeeds, the Act allows the reviewing court to reverse the trial judge’s ruling\(^8\) and order either the defendant’s trial be resumed or he be tried a second time for the same offense.\(^9\) Prior to the effective date of the Act,\(^10\) a trial judge’s ruling of no case to answer in a trial on an indictment would have ended the case once and for all in favor of the accused. For the ruling would have constituted an acquittal, and prosecutors in England had no right to appeal an acquittal in a trial upon an indictment\(^11\) and would effectively have been

\(^3\) 364 (1970) (holding proof beyond a reasonable doubt is constitutionally required in criminal cases).

\(^7\)  N. Ltd., [2008] EWCA (Crim) 1223, [15], [2009] 1 Crim. App. 3, at 61; SPRACK, supra note 5, § 20.52; WILLIAMS, supra note 6, at 44.

\(^8\)  Criminal Justice Act, 2003, § 61(1).

\(^9\)  Id. § 61(4)(a), (b).


\(^11\)  Criminal Appeal Act, 1968, c. 19 (Eng.) (making no provision for an appeal by the prosecution of an acquittal in a trial on an indictment); LAW COMMISSION, CONSULTATION PAPER NO. 156: DOUBLE JEOPARDY paras. 2.11.-13 (1999) [hereinafter ENG. LAW COMM’N, CONSULTATION PAPER NO. 156] (“In general the prosecution has no right of appeal against an acquittal . . . .”); LAW COMMISSION, REPORT NO. 267: DOUBLE JEOPARDY AND PROSECUTION APPEALS para. 2.38 (2001) [hereinafter ENG. LAW COMM’N, REPORT NO. 267] (“[T]he main business of the Crown Court, trying cases on indictment, is subject to a defence right of appeal only . . . .” (emphasis added)); Criminal Justice Bill, 2002, [Bill 8] Explanatory Notes para. 36 (Eng.) (“Under current legislation, . . . the prosecution has no . . . right of appeal against a judicial decision to stop the trial.”), available at http://www.publications.parliament.uk/pa/cm200203/cmbills/008/en/03008x--.htm; Statement of the Attorney General, 654 Parl. Deb., H.L. (5th ser.) 1782 (2003) (“It is a matter of serious concern that defendants have had a right of appeal against their conviction for almost a century while the prosecution has had no right to challenge a judge-ordered acquittal, no matter how manifestly unjust such a ruling may be on rare occasions.”); MARTIN L. FRIEDLAND, DOUBLE JEOPARDY 279 (1969) (“English law has generally refused to permit an appeal from an acquittal. . . . At the present time the Court [of Criminal Appeal] has jurisdiction to entertain an appeal only from a conviction. No provision was made in the Criminal Appeal Act of 1907 to permit an appeal from an acquittal . . . .”); IAN MCLEAN, CRIMINAL APPEALS: A PRACTICAL GUIDE TO APPEALS TO AND FROM THE CROWN COURT 59 (1980) (“No appeal lies against an acquittal on indictment.”); id. at 98 n.27 (“There is no right of appeal to the Criminal Division against an acquittal on indictment.”).

Although the Attorney General can refer a point of law to the Court of Appeal, such a reference does “not affect the trial in relation to which the reference is made or any acquittal in that trial.” Criminal Justice Act, 1972, c. 71, § 36(1), (7) (Eng.).

The English Law Commission, whose work product is cited in the first paragraph of this note and later in this Article, is a body of five Commissioners appointed by the Lord Chancellor. Law Commissions Act, 1965, c.
precluded from bringing a new charge for the same offense by the plea of *autrefois acquit*\(^{12}\) (a former acquittal).\(^ {13}\) As one eighteenth century English defense attorney put it: “[W]henever, and by whatever means, there is an acquittal in a criminal prosecution, the scene is closed and the curtain drops.”\(^ {14}\)

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\(^{12}\) The plea, expressed in Norman-French, is spelled in various ways, including *autrefois acquit*, e.g., William Blackstone, *4 Commentaries* *335*, and *auterfoits acquit*, e.g., Connelly v. DPP, [1964] A.C. 1254 (H.L.) 1306-07 (Lord Morris of Borth-y-Gest) (appeal taken from Eng.) (U.K.). In this Article, the Author will use the spelling *autrefois acquit*, except when quoting material using a different spelling.

\(^{13}\) The plea of *autrefois acquit* (a former acquittal) is a special plea in bar that “give[s] a reason why the prisoner ought not to answer [the indictment] at all, nor put himself upon his trial for the crime alleged.” 4 Blackstone, *supra* note 12, at *335*. The plea not only can be raised to an indictment for the same offense of which an individual previously has been acquitted, but also to an indictment for an offense in respect of which the individual, on a previous indictment, *could have been convicted*. Connelly, [1964] A.C. at 1305 (Lord Morris of Borth-y-Gest); Eng. Law Report No. 267, *supra* note 11, para. 2.2. In practice, however, second prosecutions are not brought and so do not reach court. Select Committee on Home Affairs, Third Report, The Double Jeopardy Rule para. 6 (2000), available at http://www.publications.parliament.uk/pa/cm199900/cmemselect/cmhaff/190/19002.htm [hereinafter Select Committee on Home Affairs, The Double Jeopardy Rule]; Sprack, *supra* note 5, § 17.43 (“[I]t is rare in practice for the defence to be forced to have recourse to [the plea of *autrefois acquit*]. . . . If [a previous prosecution] ended in [an individual’s] being . . . acquitted . . . he would not be prosecuted again for the same offence.”).

\(^{14}\) Duchess of Kingston, 20 How. St. Tr. 355, 528 (1776).
By allowing the retrial of an individual for the same offense, or the resumption of his aborted trial, following a successful appeal by the prosecution of a trial judge’s ruling of no case to answer, the Act does indeed significantly change criminal procedure in England. According to the English Law Commission, however, the second trial of the accused for the same offense, or the resumption of his initial trial, “involves no breach of the double jeopardy rule[]”,15 i.e., the rule prohibiting a person from being tried twice for the same offense,16 because the autrefois rule17 and the “special application of the abuse of process rules”18—the two components of the

15 LAW COMMISSION, CONSULTATION PAPER NO. 158: PROSECUTION APPEALS AGAINST JUDGES’ RULINGS para. 1.9 (2000) [hereinafter ENG. LAW COMM’N, CONSULTATION PAPER NO. 158].

16 See, e.g., BLACK’S LAW DICTIONARY 564 (9th ed. 2009) [hereinafter BLACK’S] (defining double jeopardy as “[t]he fact of being prosecuted or sentenced twice for substantially the same offense.”).

17 The autrefois rule, comprising the pleas of autrefois acquit (a former acquittal) and autrefois convict (a former conviction), provides “that no-one may be put in peril twice for the same offence,” ENG. LAW COMM’N, REPORT NO. 267, supra note 11, para. 2.2, so if “a person has previously been acquitted or convicted (or could, by an alternate verdict, have been convicted) of an offence and is later charged on indictment with the same offence, a plea of autrefois will bar the prosecution.” Id. (italics added). Accord Connelly, [1964] A.C. at 1305 (Lord Morris of Borth-y-Gest); ARCHBOLD, supra note 5, § 4-117; SPRACK, supra note 5, §§ 17.43, 17.46. See also Criminal Justice Act, 2003, c. 44, Explanatory Notes para. 1(40) (Eng.) (“The[] principles [of autrefois acquit and autrefois convict] provide a bar to [a second] trial, in respect of the same offence, of a person who has previously been either acquitted or convicted of that offence.”). Both pleas, Blackstone explained, are based upon the “universal maxim of the common law of England,” 4 BLACKSTONE, supra note 12, at *335, that “no man is to be brought into jeopardy of his life, more than once for the same offence.” Id.

Recent legislation in England allows an acquittal to be quashed in two situations. If an acquittal is quashed, the previously-acquitted defendant cannot raise the plea of autrefois acquit. See Criminal Justice Act, 2003, §§ 75-86 (permitting the Court of Appeal to quash an acquittal for certain serious offenses when “there is new and compelling evidence against the acquitted person,” and authorizing the retrial of the individual for the same offense); Criminal Procedure and Investigations Act, 1996, c. 25, §§ 54-57 (Eng.) (permitting the High Court of Justice to quash an acquittal that was “tainted,” and authorizing the retrial of the individual for the same offense). The Author previously has written about these two provisions. See David S. Rudstein, Retrying the Acquitted in England, Part I: The Exception to the Rule Against Double Jeopardy for “New and Compelling Evidence,” 8 SAN DIEGO INT’L L.J. 387 (2007); David S. Rudstein, Retrying the Acquitted in England, Part II: The Exception to the Rule Against Double Jeopardy for “Tainted Acquittals,” 9 SAN DIEGO INT’L L.J. 217 (2008).

18 ENG. LAW COMM’N, REPORT NO. 267, supra note 11, para. 2, 14.

Under the abuse of process rules, the trial judge has “the discretion to stay proceedings which would be an abuse of the process of the court,” id. para. 2.1, when the “defendant has already been acquitted or convicted on the same or substantially the same facts.” Id. (emphasis added). Accord Connelly, [1964] A.C. at 1306-07 (Lord Devlin); id. at 1296 (Lord Reid); id. at 1362-68 (Lord Pearce); Criminal Justice Act, 2003, Explanatory Notes para. 1(40) (“[T]he courts may consider it an abuse of process for additional charges to be brought, following an acquittal or conviction, for different offences which arose from the same behaviour or facts.”). See also ARCHBOLD, supra
protection against double jeopardy law in England—merely “prevent a final acquittal or conviction from being re-opened,”¹⁹ and an acquittal entered by a trial judge before the jury has considered the evidence is not yet final.

¹⁹ ENG. LAW COMM’N, CONSULTATION PAPER NO. 158], supra note 15, para. 1.8. Accord ENG. LAW COMM’N, REPORT NO. 267, supra note 11, para. 2.1 (“[T]he ‘autrefois’ rule . . . states that a defendant who has been finally convicted or acquitted may not be tried again for the same offence . . . .” (emphasis added)). Because the doctrine applies in England only when there has been an acquittal or a conviction, Professor Glanville Williams stated that “the expression ‘double jeopardy’ . . . is misleading for English law,” as “[t]he defence is not given to a person merely because he was previously at risk of being convicted.” WILLIAMS, supra note 6, at 164.

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England is not alone in this position. Countries throughout the world that recognize the
rule against double jeopardy,20 nevertheless allow the prosecution to challenge at least some
acquittals by way of appeal.21 Included among these countries are many that trace their legal

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20 The rule that the government should not try a person twice for the same offense—called the principle of *ne bis in idem*, Gerald Conway, *Ne Bis in Idem in International Law*, 3 INT’L CRIM. L. REV. 217, 217 (2003); 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), or *non bis in idem*, see 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 LAW 235, 288 (1993), on the European continent—is accepted throughout the world. *Model Criminal Code Officers’ Comm. of the Standing Comm. of the Attorneys-General, Model Criminal Code, Discussion Paper, Chapter 2, Issue Estoppel, Double Jeopardy and Prosecution Appeals against Acquittals* 1 n.5 (2003) [hereinafter Australian Model Criminal Code, Discussion Paper] (noting the double jeopardy “[p]rinciple stands in constitutional status in over 50 countries”); Bassiouni, *supra*, at 289 & n.262 (asserting “[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 Conway, *supra*, at 217 (stating the maxim *ne bis in idem*, or the rule against double jeopardy, “is prevalent among the legal systems of the world”). *See, e.g.* Pearce v The Queen, (1998) 194 C.L.R. 610 (Austl.) (discussing the rule against double jeopardy in Australia); Constitution Act, 1982, pt. 1, § 11(h) (U.K.) (providing that in Canada, “[a]ny person charged with an offence has the right . . . if finally found 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”); INDIA CONST. art. 20, § 2 (“No person shall be prosecuted and punished for the same offence more than once.”); CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS [CONST.] art. 23, 5 de Febrero de 1917 (Mex.) (“No person, whether acquitted or convicted, can be tried twice for the same offense.”); Bill of Rights Act 1990, § 26(2) (N.Z.) (“No one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again.”); S. AFR. CONST. 1996 § 35(3)(m) (“Every 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 . . . .”); U.S. CONST. amend. V (“No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb.”).

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, 999 U.N.T.S. 171 (entered into force Mar. 12, 1976).


21 Among the countries recognizing the rule against double jeopardy but nevertheless apparently allowing the prosecution to appeal an acquittal are: Argentina, Alejandro D. Carrió & Alejandro M. Garro, *Argentina, in Criminal Procedure: A Worldwide Study* 3, 51-52 (Craig M. Bradley ed., 2d ed. 2007) [hereinafter A Worldwide Study] (“[A] judgment rendered by a trial court is subject to an appeal only on points of law. . . . [I]f the right to appeal is given not only to the defendant but to the prosecutor as well, in [a] case where there is an acquittal . . . . The Supreme Court has held that to permit the appeal of an acquittal by the prosecution does not violate due process nor constitute[,] a double jeopardy violation.” (footnote omitted)); Belgium, Brigitte Pesquié, revised by Yves Cartuyvels, *The Belgian System, in European Criminal Procedures* 81, 98, 99-100, 130-31, 131 (Mireille Delmas-Marty & J.R. Spencer eds. 2002) [hereinafter European Criminal Procedures] (an acquittal of
... a délit can be appealed to the local cour d'appel; a decision in the cour d'assises, which tries crimes, can be reviewed by the Cour de cassation, but only on a point of law, following a definitive judgment, i.e., “one that puts an end to the proceedings by conviction, acquittal or absolute discharge of the case”; see also The Royal Commission on Criminal Justice, Criminal Justice Systems in Other Jurisdictions paras. 3.29, 3.45 (1993) [hereinafter Royal Comm’n on Criminal Justice]; France, Richard S. Frase, France, in A Worldwide Study, supra, at 235-36 (the Attorney General may appeal an acquittal rendered by a cour d'assises (Assize Court), the court that tries crimes (the most serious offenses), to the Appellate Assize Court for a trial de novo on all issues of fact or law raised by the appeal; the prosecuting attorney or the attorney general for the appellate district may appeal an acquitted rendered by a tribunal correctionnel, the court with jurisdiction to try délits (less serious felonies and some misdemeanors) to the regional cour d'appel for what could potentially be a trial de novo on all issues of fact or law raised by the appeal); Valérie Dervieux, revised by Mikaël Benillouche & Olivier Bachelet, The French System, in European Criminal Procedures, supra, at 218, 274 (“[A]cquittals given by the cour d’assises may be the subject of an appeal on the merits.”); id. (“Any decision by the tribunal correctionnel . . . may be subject of an appeal by the prosecutor or the defendant. . . . Appeals against . . . acquittals recorded by the tribunal correctionnel are handled by the local cour d’appel . . . .”); Italy, Antoinette Perrodet, revised by Elena Ricci, The Italian System, in European Criminal Procedures, supra, at 348, 399 (“In principle, appeals may be brought against convictions or acquittals.”); id. at 400 (“[T]he court of cassation decides against convictions or acquittals by the corte di assise, the court that has jurisdiction over the most serious offenses); Rachel A. Van Cleave, Italy, in A Worldwide Study, supra, at 303, 330-31, 348 (“[T]he public prosecutor . . . may appeal [to the corte di assise di appello] a judgment of the Corte di assise, the court that “has jurisdiction over the most serious crimes . . . .” and to the Corte di appello a judgment of the tribunale, the court that has jurisdiction over less serious crimes); see also Royal Comm’n on Criminal Justice, supra, para. 10.44; Mexico, Miguel Sarré & Ian Perlin, Mexico, in A Worldwide Study, supra, at 351, 389-90 (“Both the prosecution and the defense may appeal [a trial verdict] . . . . The appeals court may review whether or not the appropriate law was applied, and whether it was applied correctly. The appeals court decides whether the lower court violated the ruling principles for evaluating evidence, the facts were altered, or indeed, if the decision was based on sufficient facts and the relevant law correctly applied. . . . Appeals of a verdict . . . also permit the presentation of new evidence, which means the appeals judge may review both the law and the facts, and indeed find and hear new evidence and determine additional facts.”); The Netherlands, Royal Comm’n on Criminal Justice, supra, para. 11.32 (“The . . . prosecutor can appeal as of right against judgments of the district courts, to one of the five courts of appeal.”); A.H.J. Swart, The Netherlands, in Criminal Procedure Systems in the European Community 279, 314 (Christine Van Den Wyngaert ed. 1993) (“Appeal involves a complete retrial by another, higher, judicial authority. If the accused was acquitted at the first trial he may not be convicted in appeal unless the court’s decision is unanimous.”); Russia, Catherine Newcombe, Russia, in A Worldwide Study, supra, at 397, 461 (“The court hearing [an] appeal [from a Justice of the Peace Court] may reverse an acquittal . . . pursuant to a representation [by the prosecutor] . . . arguing that the acquittal was not well-founded.”); id. at 462-63 (“[A] court of cassation may reverse an acquittal [by a District Court] . . . pursuant to petitions for review from the prosecutor . . .”; however, “a jury acquittal may only be reversed if there were violations of criminal procedure law that interfered with the right of the prosecutor . . . to present evidence or affected the content of the juror questionnaire and the answers thereto.”); Spain, Royal Comm’n on Criminal Justice, supra, para. 13.52 (“There is no appeal from the Provincial Criminal Court [the court that tries serious offenses] on the grounds that the Court decided the facts of the case wrongly. The only appeal from this Court is when (1) the court has misapplied the law; or (2) the court has made an error in procedure. All parties to the proceedings have the right to appeal, including the prosecution.”); and Sweden, Richard J. Terrill, World Criminal Justice Systems: A Survey 333 (5th ed. 2003) (“[O]nce a trial is concluded, the parties have an opportunity to appeal the court’s judgment to a court of appeal. . . . [B]oth the defendant and the prosecutor have the right to appeal. In the petition for appeal, the appellant must state the factual or legal grounds for the appeal.”).

The European Convention on Human Rights recognizes the rule against double jeopardy, but nevertheless permits the prosecution to have rights of appeal. Article 4(1) of that Convention provides: “No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.” Protocol 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 4, Nov. 22, 1984 (emphasis added). The Explanatory Report to Article 4 provides: “The principle established in this...
heritage to England. In addition, the Australian states of New South Wales, Tasmania, and Western Australia, which also trace their legal heritage to England and which also recognize the rule against double jeopardy, allow the prosecution to appeal some acquittals.

provision applies only after the person has been finally acquitted or convicted in accordance with the law and penal procedure of the State concerned. This means that there must have been a final decision . . . .” Id., Explanatory Report para. 29 (emphasis added). The Explanatory Report further provides that “a decision is final ‘if, according to the traditional expression, it has acquired the force of res judicata.' This is the case when it is irrevocable, that is to say when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time-limit to expire without availing themselves of them.” Id., Explanatory Report para. 22 (quoting European Convention on the International Validity of Criminal Judgments, Explanatory Note, Commentary on Article 1(a), May 28, 1970). See also ENG. LAW COMM’N, REPORT NO. 267, supra note 11, para. 1.13 (asserting the Convention permits the prosecution to have rights of appeal); id. para. 1.17 (“Allowing the prosecution to challenge an acquittal by way of appeal . . . (that is, before it becomes final), does not in principle present any difficulty in terms of compliance with the ECHR [European Convention on Human Rights].”).

E.g., Canada, Criminal Code, R.S.C., ch. C-46, § 676(1)(a) (1985) (Can.) (“The Attorney General or counsel instructed by him for the purpose may appeal to the court of appeal . . . . against a judgment or verdict of acquittal . . . of a trial court in proceedings by indictment on any ground of appeal that involves a question of law alone . . . .”); Israel, Rinat Kitai-Sangero, Israel, in A WORLDWIDE STUDY, supra note 21, at 273, 298-99 (“The prosecution . . . may submit an appeal against the judgment–both the verdict and the sentence. A defendant may not raise a claim of double jeopardy against an appeal submitted by the prosecution. . . . An appeal may be submitted against determinations of both law and fact.” (footnote omitted)); New Zealand, Crimes Act 1961, § 380 (N.Z.) (“(1) The court before which any accused person is tried may, either during or after the trial, reserve for the opinion of the Court of Appeal . . . any question of law arising either on the trial or on any of the proceedings preliminary, subsequent, or incidental thereto, or arising out of the direction of the Judge . . . . (3) Either the prosecutor or the accused may during the trial apply to the court to reserve any such question as aforesaid . . . . (4) If the result of the trial is acquittal the accused shall be discharged, subject to being again arrested if the Court of Appeal orders a new trial.”); id. § 381 (allowing the prosecutor to seek leave to appeal from the Court of Appeal if the trial judge refuses an application to reserve a question of law for the opinion of the Court of Appeal); id. § 381A (setting forth a procedure under which the prosecutor can seek review of a question of law arising out of a trial judge’s decision during the trial to discharge, i.e., acquit, a defendant); South Africa, P.J. Schwikkard & S.E. van der Merwe, South Africa in A WORLDWIDE STUDY, supra note 21, at 471, 515 (“The prosecution has no right to appeal against an acquittal on the facts. It does, however, have a right to appeal against a court’s decision on law . . . .”).

New South Wales and Tasmania recognize a plea of former acquittal or former conviction. Criminal Procedure Act 1986 (NSW) § 156(1) (Austl.) (“In any plea of autrefois convict, or of autrefois acquit, it is sufficient for the accused person to allege that he or she has been lawfully convicted or acquitted, as the case may be, of the offence charged in the indictment, without specifying the time or place of the previous conviction or acquittal.”); Criminal Code Act 1924 (Tas) sch. 1, § 355 (Austl.) (“(1) An accused person may plead to an indictment . . . . (b) that he has already been acquitted or convicted–(i) of the crime charged in the indictment; (ii) upon an indictment upon which he might have been convicted of that crime; (iii) of a crime arising out of the same facts and substantially the same crime as that charged in that indictment; (iv) of any crime, an acquittal or conviction of which is, under the provisions of the Code, a bar to a prosecution for the crime charged in the indictment; or (v) summarily, of an offence in respect of which he might have been indicted upon the charge to which he is called upon to plead . . . .”), while the Western Australia Criminal Code provides “[i]t is a defence to a charge of any offence to show that the accused person has already been tried, and convicted or acquitted upon an indictment or prosecution notice on which he might have been convicted of the offence with which he is charged, or has already been convicted or acquitted of an offence of which he might be convicted upon the indictment or prosecution notice on which he is charged.”
In New South Wales, the prosecution can appeal only an acquittal by a jury at the direction of the trial judge, Crimes (Appeal and Review) Act 2001 (NSW) § 107(1)(a), (2) (Austl.); e.g., R v R.K., [2008] NSWCCA 338, [1]-[2], [70], [73]-[75], [77]-[79], [2008] NSWLR 80, 82, 94 (NSW Crim. App.) (Austl.) (but upholding the trial judge’s decision to direct the jury to return a verdict of not guilty), or an acquittal by the judge sitting without a jury in a trial of an indictable offense. Crimes (Appeal and Review) Act 2001 § 107(1)(b), (2). Such an appeal, however, is restricted to a “ground that involves a question of law alone.” Id. § 107(2). If the Court of Appeal finds the trial judge committed error, it may quash the acquittal, id. § 107(5), and order a new trial. Id. § 107(6).

Tasmania allows the Attorney-General, with the leave of the Court of Criminal Appeal or upon the certificate of the trial judge that it is a fit case for appeal, to appeal to the Court of Criminal Appeal “against an acquittal on a question of law” in a trial upon an indictment, Criminal Code Act 1924 sch. 1, § 401(2). E.g., DPP v Cook, [2006] TASSC 75, [47], [49] (Tas. Crim. App.) (Austl.) (granting the prosecutor’s application for leave to appeal an individual’s acquittal by a jury); id. at [91], [93]-[94] (Blow, J.) (same); id. at [150] (Tennent, J.) (same). If the Court of Appeal finds that the verdict of the jury was unreasonable or cannot be supported having regard to the evidence, the trial court reached the wrong decision on a question of law, or there was a miscarriage of justice, it can set aside the verdict or judgment, allow the appeal, Criminal Code Act 1924 § 402(1), and either enter a conviction, id. § 402(5)(b), or order a new trial. Id. § 402(5)(c). E.g., R v Pirimona, [1998] TASSC 136 (Tas) (Austl.) (ordering a retrial after setting aside a “verdict of acquittal entered by direction of the . . . trial judge”); R v Jenkins, [1970] Tas SR 13, 24 (Crim. App.) (Austl.) (Crisp, J.) (setting aside the defendant’s acquittal and ordering a new trial because of the erroneous exclusion of evidence); id. at 27 (Neasey, J.) (same); id. at 30 (Chambers, J.) (same).

In Western Australia, the prosecution, “in relation to a charge of an indictable offence,” Criminal Appeals Act 2004 (WA) § 24(2), and with the leave of the Court of Appeal, id. § 27(1), can appeal “a judgment of acquittal . . . entered after a jury’s verdict of not guilty of a charge the statutory penalty for which is or includes imprisonment for 14 years or more or life, but only on the grounds that before or during the trial the judge made an error of fact or law in relation to the charge,” id. § 24(2)(da), as well as “a judgment of acquittal . . . entered in a trial by the judge alone,” id. § 24(2)(e)ii, or “entered after a decision by the judge that the accused has no case to answer on the charge.” Id. § 24(2)(e)i. If the Court of Appeal finds in favor of the prosecution, it can set aside the acquittal and order a new trial. Id. § 33(1), (2)(a). E.g., State v Tilbrook, [2007] WASCA 4, [1], [40]-[42] (WA) (ordering a new trial after setting aside judgments of acquittal entered by the trial judge after finding that none of the defendants had a case to answer).
Those common law jurisdictions authorizing prosecution appeals of some acquittals typically permit an appeal of a trial judge’s directed verdict of not guilty, and if the appeal is successful, allow the government to retry the accused. In the United States, however, neither the federal government nor any state authorizes the prosecution to appeal a trial judge’s directed verdict of not guilty or its equivalent. At least one reason for this may be that legislatures assume a provision authorizing such an appeal would not pass muster under the Double Jeopardy

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25 E.g., Rowbotham v. The Queen, [1994] 2 S.C.R. 463, 474-75 (Can.) (interpreting Criminal Code, R.S.C., ch. C-46, § 676(1)(a); Crimes (Appeal and Review) Act 2001 (NSW) § 107(1)(a), (2); Crimes Act 1961, § 381A (N.Z.) (setting forth a procedure under which the prosecutor can seek review of a question of law arising out of a trial judge’s decision during the trial to discharge, i.e., acquit, the defendant). See Pirimona, [1998] TASSC 136 (upholding the Attorney-General’s appeal under Criminal Code Act 1924 sch.1, § 401(2) of a “verdict of acquittal entered by direction of the . . . trial judge”). See also Jenkins, [1970] Tas SR at 15 (indicating Criminal Code Act 1924 sch.1, § 401(2) clearly allows the prosecution to appeal a directed verdict of acquittal); Criminal Appeals Act 2004 (WA) § 24(2)(e)(i).


27 Many jurisdictions in the United States have substituted for a directed verdict of not guilty the functionally-equivalent court-ordered judgment of acquittal, e.g., FED. R. CRIM. P. 29(a) (“After the government closes its evidence or after the close of all the evidence, the court on the defendant’s motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction.”); CAL. PENAL CODE § 1118.1 (West 2004) (“In a case tried before a jury, the court on motion of the defendant or on its own motion, at the close of the evidence on either side and before the case is submitted to the jury for decision, shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal.”); FLA. R. CRIM. P. 3.380(a) (“If, at the close of the evidence for the state or at the close of all the evidence in the cause, the court is of the opinion that the evidence is insufficient to warrant a conviction, it may, and on the motion of the prosecuting attorney or the defendant shall, enter a judgment of acquittal.”), or required finding of not guilty. E.g., MASS. R. CRIM. P. 25(a) (“The judge on motion of a defendant or on his own motion shall enter a finding of not guilty of the offense charged in an indictment or complaint or any part thereof after the evidence on either side is closed if the evidence is insufficient as a matter of law to sustain a conviction on the charge. If a defendant’s motion for a required finding of not guilty is made at the close of the Commonwealth’s evidence, it shall be rule upon at that time. . . .”). For the sake of convenience, the Author henceforth will use the terms directed verdict of not guilty, court-ordered acquittal, and required finding of not guilty interchangeably.
Clause of the Fifth Amendment to the United States Constitution, because it would lead to a second trial of the defendant for the same offense. This Article will examine that assumption and attempt to answer the question whether a provision similar to that contained in England’s Criminal Justice Act 2003 would be constitutional in the United States.

II. THE ENGLISH MODEL

28 U.S. CONST. amend, V (“No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb.”).

It is of course possible that because so few directed verdicts of not guilty, or the equivalent, are rendered in a particular jurisdiction, see 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 1.8(i), at 97 n.110 (2d ed. 2003) [hereinafter LAFAVE] (“[S]tatistics show that directed verdicts are not granted in a large number of cases.” (citing HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 508 (1966) [hereinafter KALVEN & ZEISEL])), that the legislature (or supreme court) does not perceive the possibility of a significant number of erroneous directed verdicts to be a problem worth its time and effort.
The Criminal Justice Act 2003 grants the prosecution in a trial upon an indictment\(^{29}\) the right to appeal\(^{30}\) to the Court of Appeal,\(^{31}\) after obtaining leave to do so,\(^{32}\) certain rulings of the trial judge, including a ruling that the defendant has no case to answer.\(^{33}\) The prosecution can

\(^{29}\) Criminal Justice Act, 2003, c. 44, §§ 57(1), 58(1) (Eng.).

A trial on an indictment takes place in the Crown Court, Supreme Court Act, 1981, c. 003, § 46(1) (Eng.); references to a “judge” in the provisions of the Criminal Justice Act 2003 now being discussed are “to a judge of the Crown Court.” Criminal Justice Act, 2003, § 74(2).

\(^{30}\) Criminal Justice Act, 2003, §§ 57(1), 58(2).

\(^{31}\) Id. § 57(3).

\(^{32}\) The prosecution can appeal only with leave of either the trial judge or the Court of Appeal. Id. § 57(4). Under the Criminal Procedure Rules adopted pursuant to the Act, see id. § 73(1), 2(a), if the prosecution seeks leave to appeal from the trial judge, it must do so by either “apply[ing] orally, with reasons, immediately after the ruling against which [it] wants to appeal,” Criminal Procedure Rules, 2011, S.I. 2011/1709, 67.5(1)(a) (Eng.), or, if it receives an adjournment to consider whether to appeal, see infra text accompanying notes 36-38, by “apply[ing] in writing” following the adjournment. Criminal Procedure Rules, S.I. 2011/1709, 67.5(1)(b). When the prosecution seeks leave to appeal from the trial judge, the trial judge must decide whether to give permission to appeal “on the day that the application for permission is made.” Id. 67.5(4).

In deciding whether to allow leave to appeal, the Court of Appeal, and presumably the trial judge, must “look rather more widely at the interests of justice than simply . . . ask [itself] whether an appeal has a realistic prospect of success, or some other test directed solely at the merits of the appeal.” R v. Bowers, [2009] EWCA (Crim) 2186, [8], [2009] 1 Crim. App. 21, at 283 (Eng.).

\(^{33}\) The Act does not list the specific types of rulings the prosecution can appeal. Rather, it provides that “[t]he prosecution may appeal in respect of,” Criminal Justice Act, 2003, § 58(2), “a ruling [made by] a judge . . . in relation to a trial on indictment at an applicable time [where] the ruling relates to one or more offences included in the indictment.” Id. § 58(1). The Act goes on to define “applicable time” as “any time . . . before the time the judge starts his summing-up to the jury,” id. § 58(13), or, if the judge has made an order that the trial is to be conducted without a jury because of evidence that jury tampering would take, or has taken, place, see id. §§ 44, 46, “the time when the judge would start his summing-up if there were a jury.” id. § 58(14), and states that a “‘ruling’ includes a decision, determination, direction, finding, notice, order, refusal, rejection or requirement.” Id. § 74(1). It is clear, however, the prosecution can appeal a judge’s ruling of no case to answer. Id. § 58(7) (providing that if “the ruling [being appealed by the prosecution is] a ruling that there is no case to answer,” the prosecution also can appeal other rulings made by the trial judge that relate to the offense or offenses that are the subject of the appeal); id. § 61(6)-(8) (dealing with situations in which “the appeal relates to a ruling that there is no case to answer and one or more rulings”); R v. G.S., [2012] EWCA (Crim) 398, [1], [4], [28] (Eng.) (allowing the prosecution’s appeal of a ruling of no case to answer); R v. Q., [2011] EWCA (Crim) 1584, [1], [20], [2011] 2 Crim. App. 25, at 365, 369 (Eng.) (considering and dismissing the prosecution’s appeal of a ruling of no case to answer); R v. P., [2010] EWCA (Crim) 2895, [1], [32] (Wales) (same); R v. W., [2010] EWCA (Crim) 927, [1], [42] (no jur. given) (allowing the prosecution’s appeal of a ruling of no case to answer). See also Crown Prosecution Service, Prosecution Rights of Appeal, Part I, Law and Procedure, The General Right of Appeal, available at http://www.cps.gov.uk/legal/a_to_c/appealProsecution_rights/index.html (“[T]he intention of the 2003 Act is to restrict the right of appeal to terminating rulings, such as . . . a ruling of no case to answer . . . .”); KEOUGH, supra note 1, § 9.2.1 (“Appeals will . . . be confined to those rulings that have the effect of stopping the prosecution and resulting in an acquittal, effectively rulings of no case to answer, and rulings that have the effect of staying an indictment.”).
appeal such a ruling only if, “immediately after the ruling,” it “informs the court that it intends

to appeal,” or, alternatively, “immediately after the ruling” it requests an adjournment, and

if one is granted, it “informs the court following the adjournment that it intends to appeal.”

However, the prosecution may not inform the court it intends to appeal “unless, at or before that
time,” it also informs the court it agrees the defendant should be acquitted of the offense in


38 See id. § 58(5) (“If the prosecution requests an adjournment . . . , the judge may grant such an

adjournment.”).

The applicable criminal procedure rule indicates the judge normally should grant a request for an

adjournment. Criminal Procedure Rules, 2011, S.I. 2011/1709, 67.2(2)(b) (“The general rule is that the judge

must not require the appellant to decide there and then [whether he wants to appeal].”) It also indicates the

adjournment generally should be only “until the next business day.” Id. 67.2(2)(b). But see R v. H., [2008] EWCA

(Crim) 483, [10]-[12] (Eng.) (holding the court has the power to grant a greater extension of time than “until the next

business day”).


When the judge’s ruling relates to two or more offenses, any of those offenses may be the subject of the

appeal, id. § 58(6)(a), but “if the prosecution informs the court . . . that it intends to appeal, it must at the same time

inform the court of the offence or offences which are subject of the appeal.” Id. § 58(6)(b).

If the prosecution informs the court it intends to appeal a ruling of no case to answer, it may also appeal one

or more other rulings made by the trial judge relating to the offense or offenses that are the subject of the appeal.

Id. § 58(7) (provided the prosecution identifies the other ruling or rulings at the same time it informs the judge of its

intention to appeal the ruling of no case to answer). If the prosecution informs the court it intends to appeal a

ruling, the proceedings may continue with respect to any offense that is not the subject of the appeal. Id. § 60.

40 Id. § 58(8).
question if either leave to appeal is not obtained or the prosecution abandons its appeal before the Court of Appeal determines it.41

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41 Id. § 58(8)-(9).

The prosecution’s agreement to this effect has been labeled an “acquittal agreement,” e.g., M., [2012] EWCA (Crim) 792, [9]; N.T., [2010] EWCA (Crim) 711, [9], [15], [2010] 2 Crim. App. 12, at 87, 89; CPS v. C., [2009] EWCA (Crim) 2614, [35] (Eng.), or an “acquittal undertaking,” R v. B., [2009] EWCA (Crim) 99, [14], [23] (Eng.). If the prosecution does not undertake an “acquittal agreement” “at or before” the time it informs the court it intends to appeal a ruling, the prosecution cannot appeal. N.T., [2010] EWCA (Crim) 711, [18], [2010] 2 Crim. App. 12, at 90; C., [2009] EWCA (Crim) 2614, [40]-[41]. See also M., [2012] EWCA (Crim) 792, [28] (“It is clear that . . . the decision to appeal and the acquittal agreement must be notified to the court immediately. In any event, the acquittal agreement must be provided by at latest the time when a decision to intend to appeal is notified. What in this context does “immediately following the ruling” mean? In our judgment it means there and then and in any event before anything important had happened. We think it would be going too far to say that it means simultaneously with the conclusion of the ruling, and section 58(3) suggests that the requirement has functional rather than merely temporal bite.”).
When “the prosecution informs the court . . . that it intends to appeal, the [trial] judge must decide whether . . . the appeal should be expedited.” If the judge concludes the appeal should be expedited, he can order an adjournment of the trial. If, on the other hand, the judge determines the appeal should not be expedited, he can either order an adjournment of the trial or discharge the jury, if one has been empaneled.

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

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42 Criminal Justice Act, 2003, § 59(1).
   If the prosecution wants the judge to expedite the appeal, it must request the judge to do so, giving reasons, when it informs the judge it intends to appeal. Criminal Procedure Rules, 2011, S.I. 2011/1709, 67.6(1).

43 Criminal Justice Act, 2003, § 59(2).
   If the trial judge decides the appeal should be expedited, he, or the Court of Appeal, can subsequently reverse that decision. If it is reversed, the trial judge can either order an adjournment of the trial or discharge the jury if one has been empaneled. Id. § 59(4)

44 Id. § 59(3)(a).

45 Id. § 59(3)(b).

46 Id. § 58(3)-(4).

47 Id. § 58(10).

48 Id. § 58(11)(a).

49 Id. § 58(11)(b).
   If the trial judge nevertheless takes any steps in consequence of the ruling, those steps are to have no effect. Id. § 58(11)(c).

According to one commentator, sections 58(11)(b) and (c) of the Act mean, among other things, that the trial judge, as a consequence of the ruling of no case to answer, cannot release the defendant on bail pending the appeal, “if that decision flowed from the judge’s view that there was no evidence against the defendant.” Keough, supra note 1, § 9.2.5.
On appeal, the Court of Appeal may confirm, reverse or vary [the trial judge’s] ruling.\(^5\) It may not, however, reverse a ruling “unless it is satisfied”\(^5\) the ruling either “was wrong in law,”\(^5\) “involved an error in law or principle,”\(^5\) or “was a ruling that was not reasonable for the judge to have made.”\(^5\) If the Court of Appeal confirms the ruling, it must order the defendant acquitted of the offense or offenses in question.\(^5\) On the other hand, if the court reverses or varies the ruling, it must, with respect to each offense in question, “order that proceedings for [the] offence may be resumed”\(^5\) or “that a fresh trial may take place . . . for [the same] offence;”\(^5\) but if the court determines the defendant could not receive a fair trial if the original trial were resumed or at a new trial,\(^5\) it must order the defendant be acquitted of the offense in question.\(^5\) The decision of the Court of Appeal can, with leave,\(^5\) be appealed to the Court of Appeal.

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\(^5\) If the prosecution does not obtain leave to appeal, or if it abandons the appeal before the Court of Appeal determines it, the defendant must be acquitted of the offense in question. Criminal Justice Act, 2003, § 58(12).

\(^5\) Id. § 61(1).

\(^5\) Id. § 67.

\(^5\) Id. § 67(a).

\(^5\) Id. § 67(b).

\(^5\) Id. § 67(c).

\(^5\) Id. § 61(3), (6)-(7).

\(^5\) Id. § 61(4)(a). See also id. § 61(6), (8) (dealing with the situation in which the prosecution is appealing additional rulings by the trial judge).

\(^5\) Id. § 61(4)(b). See also id. § 61(6), (8) (dealing with the situation in which the prosecution is appealing additional rulings by the trial judge).

\(^5\) Id. § 61(5).

\(^5\) Id. § 61(4)(c). See also id. § 61(8) (dealing with the situation in which additional rulings by the trial judge are being appealed).
Supreme Court of the United Kingdom by either the defendant or the prosecution.62

III. THE DOUBLE JEOPARDY CLAUSE OF THE UNITED STATES CONSTITUTION

A. In General

The Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States provides that “[n]o person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb.”63 More than a half-century ago, in Green v. United States,64 the Supreme Court articulated the overall design of this provision. It stated:

The constitutional prohibition against “double jeopardy” was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. . . .

The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all it resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.65

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

62 Id. § 33(1), as amended by Criminal Justice Act, 2003, § 68(1).

63 U.S. CONST., amend. V.

64 355 U.S. 184 (1957).

65 Id. at 187-88.
The prohibition against double jeopardy contained in the Fifth Amendment is “fundamental to the American scheme of justice.” As such, it is “incorporated” into the Due Process Clause of the Fourteenth Amendment and applies to the same extent against the individual states as it does against the federal government.

The constitutional protection against double jeopardy stems from the common-law pleas

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66 Benton v. Maryland, 395 U.S. 784, 796 (1969) (internal quotation marks omitted). Accord id. at 794 (“[T]he double jeopardy provision of the Fifth Amendment represents a fundamental ideal in our constitutional heritage . . . .”).

The Supreme Court in Benton stated:

The fundamental nature of the guarantee against double jeopardy can hardly be doubted. Its origins can be traced to Greek and Roman times, and it became established in the common law of England long before this nation’s independence. As with many other elements of the common law, it was carried into the jurisprudence of this country through the medium of Blackstone, who codified the doctrine in his Commentaries . . . . Today, every State incorporates some form of the prohibition in its constitution or common law . . . . [The] underlying notion [that the state should not be allowed to make repeated attempts to convict an individual for an alleged offense] has from the very beginning been part of our constitutional tradition.

Id. at 795-96 (footnotes and citation omitted).

67 Id. at 794 n.13 (internal quotation marks omitted). Accord id. at 801 (Harlan, J., dissenting) (internal quotation marks omitted); id. at 808. See also McDonald v. City of Chicago, 130 S. Ct. 3020, 3034 & n.12 (2010) (noting that the Court in Benton held the Due Process Clause of the Fourteenth Amendment incorporated the Double Jeopardy Clause of the Fifth Amendment).

68 The Due Process Clause of the Fourteenth Amendment provides that “[n]o . . . State shall deprive any person of life, liberty, or property, without due process of law.” U.S. CONST., amend. XIV, § 1.

69 Benton, 395 U.S. at 794, 796.

As the Supreme Court explained in Benton, the Court “has . . . looked to the specific guarantees of the [Bill of Rights] to determine whether a state criminal trial was conducted with due process of law,” id. at 794 (quoting Washington v. Texas, 388 U.S. 14, 18 (1967) (bracketed material added by the Court)), and if “it is decided that a particular Bill of Rights guarantee is ‘fundamental to the American scheme of justice,’ the same constitutional standards apply against both the State and Federal Governments.” Id. at 795 (citation omitted) (quoting Duncan v. Louisiana, 391 U.S. 145, 149 (1968)). See also McDonald, 130 S. Ct. at 3034-35 (“[T]he Court eventually . . . began to hold that the Due Process Clause fully incorporates particular rights contained in the first eight Amendments. [In doing so,] [t]he Court made it clear that the governing standard is not whether any ‘civilized system [can] be imagined that would not accord the particular protection.’ Instead, the Court inquired whether a particular Bill of Rights guarantee is fundamental to our scheme of ordered liberty and system of justice . . . . The Court [also] abandoned ‘the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective standard of the individual guarantees of the Bill of Rights.’ . . . Instead, the Court decisively held that incorporated Bill of Rights protections ‘are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.’” (citations omitted) (quoting Duncan, 391 U.S. at 149 & n.14, and Malloy v. Hogan, 378 U.S. 1, 10 (1964))).
of autrefois acquit (a former acquittal), autrefois convict (a former conviction), and pardon.\textsuperscript{70}

The provision encompasses several protections. Like the common-law plea of autrefois acquit,\textsuperscript{71}


\textsuperscript{71} See supra notes 13 & 17.
it bars the government from prosecuting a person after he already has been acquitted. And like the common-law plea of autrefois convict, it prohibits...
the government from prosecuting an individual a second time for the same offense if he already has been convicted. In addition, it bars the government from imposing multiple punishments upon a person for the same offense in separate proceedings, and in some circumstances, it prohibits the government from prosecuting a person a second time for the same offense after a judge prematurely terminated the individual’s first trial, either by declaring a

The protection against a subsequent prosecution following an acquittal does not extend to an acquittal obtained 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, . . . like all proceedings in the case, absolutely void, and therefore no bar to subsequent indictment and trial in a court which has jurisdiction.”). *E.g.*, B.D.T. v. State, 738 N.E.2d 1066, 1068-69 (Ind. Ct. App. 2000); Commonwealth v. Simeone, 294 A.2d 921, 922 (Pa. Super. Ct. 1972). It also may not apply to a fraudulently-obtained acquittal, see Aleman v. Honorable Judges of the Circuit Court of Cook County, 138 F.3d 302, 303 (7th Cir. 1998) (affirming the denial of habeas corpus relief to an individual being retried for murder following his acquittal in a bench trial conducted before a judge whom he bribed), *aff’g* sub nom. United States *ex rel.* Aleman v. Circuit Court of Cook County, 967 F. Supp. 1022 (N.D. Ill. 1997); People v. Aleman, 667 N.E.2d 615 (Ill. App. Ct. 1996) (holding an individual previously acquitted of murder in a bench trial could be retried for the same offense because he obtained the acquittal by bribing the trial judge), *aff’g* Nos. 93 CR 28786, 93 CR 28787, 1994 WL 684499 (Cir. Ct., Oct. 12, 1994) (interim ruling on defendant’s motion to dismiss indictments), or one obtained following a “sham” trial. See People v. Deems, 410 N.E.2d 8, 11 (Ill. 1980).

Civil cases do not fall within the protection of the Double Jeopardy Clause. *American Life Assurance Co. v. United States*, 266 U.S. 367, 369 (1925) (holding a suit for money damages arising out of a fraud by the defendant to secure an earlier suit for the fraud itself was not barred by the Double Jeopardy Clause). See generally *Rudstein*, supra note 20, at 95-110.

A number of situations exist in which the government can try an individual a second time for the same offense despite his previous conviction for that offense. For example, the government can retry an individual who succeeded in having his conviction set aside on appeal or collateral attack on the basis of trial error. *E.g.*, Lockhart v. Nelson, 488 U.S. 33, 38 (1988); Montana v. Hall, 481 U.S. 400, 402 (1987) (per curiam); United States v. Tateo, 377 U.S. 463, 465-66 (1971); *Ball*, 163 U.S. at 672. Similarly, in a jurisdiction with a two-tier system of trial courts, the government can retry an individual who was convicted in the first tier and who then elected to be tried *de novo* in the second tier. Justices of Boston Municipal Court v. Lydon, 466 U.S. 294, 310-12 (1984); Ludwig v. Massachusetts, 427 U.S. 618, 631 (1976). The government also can retry an individual who was convicted in a court lacking jurisdiction of the person or the offense, State v. Perkins, 580 S.E.2d 523, 525-26 (Ga. 2003); Gallemore v. State, 312 S.W.3d 156, 161 (Tex. Ct. App. 2010), for in such a situation the initial judgment of conviction is void. See *Ball*, 163 U.S. at 669 (dictum). In addition, the Double Jeopardy Clause does not bar a subsequent prosecution for the same offense when the defendant procured the conviction in the first trial through fraud or collusion. People v. Malveaux, 59 Cal. Rptr. 2d 371, 380-82 (Ct. App. 1996); State v. Hazzard, 743 S.W.2d 938, 941 (Tenn. Crim. App. 1987). *See generally Rudstein*, supra note 20, at 95-110.

75 *See supra* note 17.

76 United States v. Dixon, 509 U.S. 688, 697-98 (1993) (Scalia, J.) (finding of guilty rendered by the judge in a bench trial); *id.* at 720 (White, J., concurring in judgment in part and dissenting in part) (same); *id.* at 744 (Souter, J., concurring in judgment in part and dissenting in part) (same); Harris v. Oklahoma, 433 U.S. 682, 682 (1977) (per curiam) (jury verdict of guilty); Brown, 432 U.S. at 165, 168 (guilty plea); In re Nielsen, 131 U.S. 176, 189-90 (1889) (guilty plea). See also Breed v. Jones, 421 U.S. 519, 541 (1975) (holding the Double Jeopardy Clause barred the criminal prosecution of a juvenile for armed robbery after his previous adjudication of delinquency based upon the same armed robbery).

mistrial\textsuperscript{78} or by dismissing the charges against him before the fact finder reached a verdict in the case.\textsuperscript{79}

B. Reprosecution Following an Acquittal

\textsuperscript{78} United States v. Jorn, 400 U.S. 470, 486-87 (1971) (plurality opinion) (concluding the double jeopardy provision prohibited retrial following the trial judge’s \textit{sua sponte} declaration of a mistrial to allow several government witnesses the opportunity to consult with attorneys about their privilege against self-incrimination); Downum v. United States, 372 U.S. 734, 737-38 (1963) (holding 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 20, at 43-73.

\textsuperscript{79} United States v. Gaytan, 115 F.3d 737, 740, 744 (9th Cir. 1997) (holding the defendant could not be retried after the trial judge \textit{sua sponte} dismissed the charge against him because of discovery violations by the prosecution); United States v. Govro, 833 F.2d 135, 137 (9th Cir. 1987) (holding the defendant could not be retried after the trial judge \textit{sua sponte} dismissed the charge against him because of his belief that a state supreme court decision barred the defendant’s prosecution because of the refusal of military police to administer a second intoxilyzer test to the defendant upon request); State v. Bell, 753 So. 2d 619, 620 (Fla. Dist. Ct. App. 2000) (holding the defendant could not be retried after the trial judge \textit{sua sponte} dismissed the charge against him because of the lack of credibility of the prosecution’s witnesses). See also Scott, 437 U.S. at 98-99 (concluding that a “defendant [who] deliberately choos[es] to seek determination of the proceedings against him on a basis unrelated to factual guilt or innocence of the offense of which he is accused . . . suffers no injury cognizable under the Double Jeopardy Clause if the Government is permitted to appeal from such a ruling of the trial court in favor of the defendant” and retry him if the appellate court finds the trial judge erred (emphasis added)).
On numerous occasions the Supreme Court has stated that the Double Jeopardy Clause accords “absolute finality”\textsuperscript{80} to an acquittal\textsuperscript{81} and consequently bars the government from trying an individual a second time for the same offense following his acquittal,\textsuperscript{82} whether the acquittal was rendered by a jury,\textsuperscript{83} a judge in a bench trial,\textsuperscript{84} or a judge in a jury trial.\textsuperscript{85} Moreover, the


\textsuperscript{81} See also Smith v. Massachusetts, 543 U.S. 462, 467 (2005) (“[T]he Double Jeopardy Clause . . . prohibits reexamination of a court-decreed acquittal to the same extent it prohibits reexamination of an acquittal by a jury. . . . [F]urther proceedings to secure [a conviction] are impermissible.”); Sanabria v. United States, 437 U.S. 54, 64 (1978) (“That [a] verdict of acquittal . . . [may] not be reviewed . . . without putting [the defendant] twice in jeopardy, and thereby violating the Constitution” has recently been described as “the most fundamental rule in the history of double jeopardy jurisprudence.”” (quoting United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977)) (some internal quotation marks omitted)); United States v. Wilson, 420 U.S. 332, 345 (1975) (“[A] verdict of acquittal at the hands of the jury [is] not subject to review by motion for rehearing [or] appeal . . . .”); Fong Foo v. United States, 369 U.S. 141, 143 (1962) (per curiam) (“The verdict of acquittal was final, and could not be reviewed . . . without putting [the petitioners] twice in jeopardy and thereby violating the constitution.” (quoting \textit{Ball}, 163 U.S. at 671 (bracketed material added by the Court))).


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

\textsuperscript{83} Price, 398 U.S. at 329 (implied acquittal of charged greater offense by conviction for lesser offense); Benton, 395 U.S. at 797; Green, 355 U.S. at 198 (implied acquittal of charged greater offense by conviction for lesser offense); \textit{Ball}, 163 U.S. at 671.

\textsuperscript{84} Kepner v. United States, 195 U.S. 100, 133 (1904) (although the decision was based on a statute extending double jeopardy protection to the Philippines, not on the Double Jeopardy Clause, the Supreme Court in \textit{DiFrancesco}, 449 U.S. at 133 n.13, stated that it “has accepted [the] decision [in \textit{Kepner}] as having correctly stated the relevant double jeopardy principles” (internal quotation marks omitted)). \textit{See also \textit{Martin Linen Supply Co.}, 430 U.S. at 573 n.12 (dictum) (“In the situation where a criminal prosecution is tried to a judge alone, there is no question that the Double Jeopardy Clause accords his determination in favor of a defendant full constitutional effect.”)).

\textsuperscript{85} Smith, 543 U.S. at 467 (at the conclusion of the prosecution’s case in chief, the trial judge granted the defendant’s motion for a required finding of not guilty on one count of a three-count indictment); \textit{Sanabria}, 437 U.S. at 64 (in a multi-defendant trial, the trial judge granted one defendant’s motion for a judgment of acquittal); \textit{Martin Linen Supply Co.}, 430 U.S. at 571 (following the discharge of a hung jury, the trial judge granted the defendants’ motions for judgments of acquittal); Fong Foo, 369 U.S. at 142, 143 (the trial judge, apparently on his own motion,
finality of an acquittal applies even if “based upon an egregiously erroneous foundation.”

Fong Foo, 369 U.S. at 143 (indicating the trial judge had no power to direct a verdict of acquittal under the circumstances, but nevertheless concluding the acquittal could not be reviewed without putting the acquitted defendants twice in jeopardy in violation of the Constitution). Accord DiFrancesco, 449 U.S. at 129; Sanabria, 437 U.S. at 64, 75, 78; Washington, 434 U.S. at 503. See also Smith, 543 U.S. at 473 (“[T]he well established rule [is] that the bar [of the Double Jeopardy Clause] will attach to a pre-verdict acquittal that is patently wrong in law.”); Smalis, 476 U.S. at 144 n.7 (“[T]he fact that the acquittal may result from erroneous evidentiary rulings or erroneous interpretations of governing legal principles . . . affects the accuracy of that determination but it does not alter its essential character.” (internal quotations marks omitted; alterations by the Court)); DiFrancesco, 449 U.S. at 132 (“It is acquittal that prevents retrial even if legal error was committed at the trial.”); Burks, 437 U.S. at 16 (“[W]e . . . afford absolute finality to a jury’s verdict of acquittal–no matter how erroneous it decision . . . .” (emphasis deleted)); Green, 355 U.S. at 224 (“[I]t is one of the elemental principles of our criminal law that the government cannot secure a new trial by means of an appeal even though an acquittal may appear to be erroneous.”).

To be accorded this finality, however, the acquittal must be rendered in a court having jurisdiction over both the defendant and the offense. For an acquittal rendered in a court lacking jurisdiction is “absolutely void,” and therefore does not bar a second trial for the same offense in a court having jurisdiction. Ball, 163 U.S. at 669 (dictum).
In a bench trial, or when the judge intervenes in a jury trial, what constitutes an “acquittal” for purposes of the double jeopardy provision “is not controlled by the form of the judge’s action;” rather, a trial judge’s ruling constitutes an “acquittal” only when “the ruling of the judge, whatever its label, actually represents a resolution, in the defendant’s favor, correct or not, of all of the factual elements of the offense charged.” Under this definition, “a ruling [by the trial judge] that as a matter of law the [prosecution’s] evidence is insufficient to establish [the defendant’s] factual guilt [constitutes] an acquittal under the Double Jeopardy Clause.”

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88 Scott, 437 U.S. at 96 (quoting Martin Linen Supply Co., 430 U.S. at 571 (brackets deleted)).

89 Smalis, 476 U.S. at 144. See also Smith, 543 U.S. at 467-68 (holding an order by the trial judge entering a required finding of not guilty in a jury trial, pursuant to a state rule of criminal procedure, meets the definition of an acquittal for double jeopardy purposes); Smalis, 476 U.S. at 144 (“The category of acquittals includes ‘judgment[s] . . . by the court that the evidence is insufficient to convict.’” (quoting Scott, 437 U.S. at 91 (alterations by the Court))); Martin Linen Supply Co., 430 U.S. at 571-72 (“There can be no question that the judgments of acquittal entered here by the District Court were ‘acquittals’ in substance as well as form.”).
The Supreme Court has identified a number of related and often overlapping interests, both of the individual and of society as a whole, served by the rule according “absolute finality” to an acquittal and barring the government from prosecuting an individual a second time for the same offense following his trial and acquittal. “A primary purpose served by [the guarantee against double jeopardy] is . . . to preserve the finality of judgments” and to protect the “integrity” of those judgments. Additionally, the guarantee serves to minimize the financial, psychological, and physical ordeal of the trial process, and it reduces the risk of erroneously convicting an innocent person by preventing the government from attempting to persuade a second fact finder of the individual’s guilt “after having failed with the first.” The rule against double jeopardy also protects the power of the jury, acting “as the conscience of the community in applying the law,” “to acquit against the evidence,” that is, to find the

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92 Scott, 437 U.S. at 92.

93 See infra text accompanying notes 224-36.


96 Wilson, 420 U.S. at 352. See infra text accompanying notes 291-309.

97 Peter Westen & Richard Drubel, Toward a General Theory of Double Jeopardy, 1978 SUP. CT. REV. 81,
individual not guilty “even when its findings as to the facts, if literally applied to the law as stated by the judge, would have resulted in a conviction.”

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In addition to those purposes expressly identified by the Supreme Court, the protection against double jeopardy serves a number of other purposes. Not only does it help to prevent police and prosecutors from using the criminal process to harass an individual who already has been tried and acquitted for an offense,\(^{100}\) it also helps to conserve scarce prosecutorial and judicial resources,\(^{101}\) and assists in maintaining the public’s respect for, and confidence in, the criminal justice system.\(^{102}\) And by generally providing the government with “but one chance to convict a defendant[,] it operates as a powerful incentive to efficient and exhaustive investigation”\(^{103}\) and prosecution\(^{104}\) from the outset.\(^{105}\)

C. Prosecution Appeals

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\(^{100}\) FRIEDLAND, supra note 11, at 3-4; AUSTRALIAN MODEL CRIMINAL CODE, DISCUSSION PAPER supra note 20, at 2; ENG. LAW COMM’N, REPORT NO. 267, supra note 11, para. 4.14. See infra text accompanying notes 344-48.

\(^{101}\) FRIEDLAND, supra note 11, at 4. See infra text accompanying notes 362-63.

\(^{102}\) FRIEDLAND, supra note 11, at 4; Connelly v. DPP, [1964] A.C. 1254, 1346 (H.L.), 1353 (Lord Devlin) (appeal taken from Eng.) (U.K.). See infra text accompanying notes 371-76.

\(^{103}\) ENG. LAW COMM’N, CONSULTATION PAPER NO. 156, supra note 11, para. 4.11. See also FRIEDLAND, supra note 11, at 4 (“It is to the first trial . . . that [the] efforts [of the police] should be directed.”); ENG. LAW COMM’N, REPORT NO. 267, supra note 11, para. 4.3.

\(^{104}\) FRIEDLAND, supra note 11, at 4 (“It is to the first trial . . . that [the] efforts [of the prosecutor] should be directed.”); Ian Dennis, Rethinking Double Jeopardy: Justice and Finality in Criminal Process, [2000] CRIM. L.R. 933, 941.

\(^{105}\) See infra text accompanying notes 385-89.
The Supreme Court has remarked that “the primary purpose of the Double Jeopardy Clause was to prevent successive trials, and not [g]overnment appeals per se.” Accordingly, if an appeal by the prosecution does not present a threat of successive prosecutions, the Double Jeopardy Clause is not offended. For example, that provision does not preclude the prosecution from appealing an acquittal ordered by a trial judge (or appellate court) overruling a jury’s verdict of guilty, because in such a situation a new trial would not be necessary; rather the appellate court could merely reverse the trial judge’s decision, thereby reinstituting the jury’s original verdict of guilty. For the same reason, the prosecution can appeal an acquittal when the judge in a bench trial finds the defendant guilty, but then sets aside that finding and enters a judgment of acquittal after concluding that some of the evidence on which he based his initial finding of guilt should not have been admitted into evidence and that, without that evidence, the

106 Sanabria v. United States, 437 U.S. 54, 63 (1978). Accord United States v. Martin Linen Supply Co., 430 U.S. 564, 568-69 (1977) (“[T]he Double Jeopardy Clause . . . was directed at the threat of multiple prosecutions, not at Government appeals, at least where those appeals would not require a new trial.” (quoting United States v. Wilson, 420 U.S. 332, 342 (1975) (internal quotation marks omitted))). See also United States v. DiFrancesco, 449 U.S. 117, 131 (1980) (“The Double Jeopardy Clause is not a complete barrier to an appeal by the prosecution in a criminal case.”); Wilson, 420 U.S. at 342 (“In the course of the debates over the Bill of Rights, there was no suggestion that the Double Jeopardy Clause imposed any general ban on appeals by the prosecution.”).

107 Martin Linen Supply Co., 430 U.S. at 569-70. Accord DiFrancesco, 449 U.S. at 132. Of course, for the prosecution to appeal, local law must authorize that appeal. For a brief overview of how Congress and the Supreme Court have dealt with prosecution appeals in the federal courts, see Wilson, 420 U.S. at 336-42.


109 United States v. Jenkins, 420 U.S. 358, 365 (1975), overruled on other grounds by United States v. Scott, 437 U.S. 82 (1978). See also Smith, 543 U.S. at 467 (“When a jury returns a verdict of guilty and a trial judge (or an appellate court) sets aside that verdict and enters a judgment of acquittal, the Double Jeopardy Clause does not preclude a prosecution appeal to reinstate the jury verdict of guilty.”); DiFrancesco, 449 U.S. at 130 (“[T]he Double Jeopardy Clause does not bar a Government appeal from a ruling in favor of the defendant after a guilty verdict has been entered by the trial of fact.”); Wilson, 420 U.S. at 352-53 (“[W]hen a judge rules in favor of the defendant after a verdict of guilty has been entered by the trial of fact, the Government may appeal from that ruling without running afoul of the Double Jeopardy Clause.”). E.g., United States v. Baggett, 251 F.3d 1087, 1093 (6th Cir. 2001); People v. Madison, 176 P.3d 793, 799 (Colo. Ct. App. 2007); State v. Finley, 252 P.3d 199, 203 (Mont. 2011).
prosecution failed to prove the defendant’s guilt beyond a reasonable doubt.\textsuperscript{110} The Double Jeopardy Clause also does not bar the prosecution from appealing the sentence imposed on a convicted defendant, in part, because a revision of the defendant’s sentence would not require him to undergo a second trial.\textsuperscript{111}


\textsuperscript{111} \textit{DiFrancesco}, 449 U.S. at 136-38, 143.
When, however, reversal by the appellate court of an acquittal would lead either to a second trial or to “further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged,” such as a resumption of the appellee’s trial, the Double Jeopardy Clause prohibits an appeal by the prosecution. Smalis v. Pennsylvania is illustrative. There, a husband and wife being tried in a bench trial for various offenses stemming from a suspicious fire in a building they owned challenged the sufficiency of the evidence by filing a demurrer at the close of the prosecution’s case. The trial court

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112 Smalis v. Pennsylvania, 476 U.S. 140, 145-46 (1986); Scott, 437 U.S. at 91; Martin Linen Supply Co., 430 U.S. at 570-71; Wilson, 420 U.S. at 336. See also DiFrancesco, 449 U.S. at 132 (“[W]here a Government appeal presents no threat of successive prosecutions, the Double Jeopardy Clause is not offended.” (quoting Martin Linen Supply, 430 U.S. at 569-70)).

113 Smalis, 476 U.S. at 146 (quoting Martin Linen Supply Co., 430 U.S. at 570-71 (internal quotation marks omitted)).

114 Smalis, 476 U.S. at 145 (rejecting the prosecution’s contention that its appeal was permissible “because resumption of [the] petitioners’ bench trial following a reversal on appeal would simply constitute ‘continuing jeopardy.’”). Cf. Smith, 543 U.S. at 467 (holding that submission to the jury of a count on which the trial judge had reconsidered her initial midtrial ruling entering a required finding of not guilty subjected the defendant “to further factfinding proceedings going to guilt or innocence, prohibited by Smalis following an acquittal”).

115 See also Smith, 543 U.S. at 469 n.4 (“[A]n acquittal, once final, may not be reconsidered on appeal or otherwise.”); Sanabria v. United States, 437 U.S. 54, 69 (1978) (“[The] judgment of acquittal [for insufficient evidence], however erroneous, bars further prosecution . . . and hence bars appellate review of the trial court’s error.”); Martin Linen Supply Co., 430 U.S. at 575 (“[T]he Double Jeopardy Clause bars appeal from [a judgment of] acquittal entered [by a trial court upon a motion by the defendant or upon the court’s own motion].”); Wilson, 420 U.S. at 345 (“[A] verdict of acquittal at the hands of the jury [is] not subject to review by . . . appeal . . . .”); United States v. Ball, 163 U.S. 662, 671 (1896) (“The verdict of acquittal was final, and could not be reviewed, on error or otherwise, without putting [the defendant] twice in jeopardy, and thereby violating the constitution.”); Fong Foo v. United States, 369 U.S. 141, 143 (1962) (per curiam) (quoting Ball and reversing the issuance of a writ of mandamus that vacated the acquittal and ordered a new trial).


117 Id. at 141.

At the time, the Pennsylvania Rules of Criminal Procedure provided:

1124. Challenges to Sufficiency of Evidence

(a) A defendant may challenge the sufficiency of the evidence to sustain a conviction of one or more of the offenses charged by a:

(1) demurrer to the evidence presented by the Commonwealth at the close of the Commonwealth’s case-in-chief; . . . .
sustained the demurrer on three of the charges, stating that after considering all the facts and reasonable inferences therefrom, it “was not satisfied . . . that there was sufficient evidence from which it could be concluded that either of the defendants was guilty beyond a reasonable doubt.”118 The prosecution then sought to appeal that ruling. The Pennsylvania Supreme Court held the appeal could proceed,119 but on certiorari, the Supreme Court of the United States disagreed. The Court unanimously held the Double Jeopardy Clause barred the prosecution’s appeal120 because the trial judge’s ruling that the prosecution’s evidence was insufficient as a matter of law to prove the factual guilt of the accused constituted an acquittal for double jeopardy purposes121 and reversal of that ruling would require “further factfinding proceedings going to guilt or innocence”122 that would place the defendants in jeopardy a second time for the same offense.123

See id. at 141 n.2.

118 Id. at 141-42 (quoting App. to Pet. for Cert. 101a-102a).

119 Both a panel of the Superior Court of Pennsylvania, see id. at 142, and the court en banc held the Double Jeopardy Clause barred the appeal. Commonwealth v. Smalis, 480 A.2d 1046, 1051-52 (Pa. Super. Ct. 1984). The Supreme Court of Pennsylvania, however, held otherwise. Commonwealth v. Zoller, 490 A.2d 394 (Pa. 1985) (consolidated with Smalis). It concluded that “a demurrer is not the functional equivalent of an acquittal,” id. at 401, and therefore the prosecution could appeal from an order sustaining a defendant’s demurrer without violating the guarantee against double jeopardy. Id.

120 476 U.S. at 146.

121 Id. at 144.

122 Id. at 145.

123 Id. at 145-46.
In reaching its result in Smalis, the Supreme Court rejected the State’s argument that resumption of the Smalises’ bench trial following a successful appeal on the merits would “simply constitute ‘continuing jeopardy,’”\(^ {124}\) reasoning that the trial judge’s acquittal of the Smalises terminated the initial jeopardy.\(^ {125}\) The concept of continuing jeopardy relied upon by the State in Smalis was espoused by Justice Oliver Wendell Holmes in his dissenting opinion in Kepner v. United States.\(^ {126}\) He stated:

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

> If a statute should give the right to take exceptions to the government, I believe it would be impossible to maintain that the prisoner would be protected by the Constitution from being tried again. He no more would be put in jeopardy a second time when retried because of a mistake of law in his favor, than he would be when retried for a mistake that did him harm. . . .\(^ {127}\)

Justice Holmes’s position, however, “has never been accepted by a majority of th[e] Court.”\(^ {128}\)

\(^{124}\) Id. at 145.

\(^{125}\) Id.

\(^{126}\) 195 U.S. 100 (1904).

\(^{127}\) Id. at 134-35 (citations omitted).

Moreover, while the Supreme Court has recognized that “[a] system permitting review of all claimed legal errors would have symmetry to recommend it”\(^{129}\) and would avoid the release of some defendants who have benefitted from instructions or evidentiary rulings that are unduly favorable to them,\(^{130}\) it has rejected that position, concluding “that the policies underlying the Double Jeopardy Clause militate against permitting the [g]overnment to appeal after a verdict of acquittal.”\(^{131}\) “Granting the [g]overnment such broad appeal rights,” the Court explained in *United States v. Wilson*,\(^ {132}\) “would . . . disserve the defendant’s legitimate interest in the finality of a verdict of acquittal.”\(^ {133}\) More importantly, though, a successful appeal “would allow the prosecutor to seek to persuade a second trier of fact of the defendant’s guilt after having failed with the first; it would permit him to re-examine the weaknesses in his first

\(^{129}\) At least in felony cases, a convicted defendant generally can appeal his conviction, 7 LAFAVE ET AL., *supra* note 99, § 27.1 (“In the federal system and in most states, statutes (or state constitutional provisions) guarantee defendants in all felony cases a right to appellate review. In a small number of states, review of felony convictions remains at the discretion of the state’s highest court, but the defendant has at least the opportunity to gain appellate review.” (footnotes omitted)); e.g., FED. R. CRIM. P. 32(j)(1)(A); 28 U.S.C. § 1291 (2006); ILL. CONST. art. 6, § 6; ILL. SUP. CT. R. 601 to 615; N.Y. CRIM. PROC. LAW § 450.10 (McKinney 2005). See generally 7 LAFAVE ET AL., *supra* note 99, §§ 27.1-27.2, 27.5-27.6 (3d ed. 2008), and, if successful, obtain a new trial. ILL. SUP. CT. R. 615(b)(5); N.Y. CRIM. PROC. LAW § 470.20 (McKinney 2009). Ordinarily, if the defendant’s appeal succeeds, a second trial for the same offense does not violate the Double Jeopardy Clause. United States v. Ball, 163 U.S. 662, 671-72 (1896). Accord Lockhart v. Nelson, 488 U.S. 33, 38-39 (1988); Price v. Georgia, 398 U.S. 323, 326-27 (1970); United States v. Tateo, 377 U.S. 463, 465-66 (1971) (articulating the rationale for allowing a second trial). But see Burks v. United States, 437 U.S. 1, 16 (1978) (holding the Double Jeopardy Clause bars a second trial when a defendant’s conviction is reversed by a reviewing court solely for lack of sufficient evidence to sustain the conviction).


\(^{131}\) *Id.*

\(^{132}\) 420 U.S. 332 (1975).

\(^{133}\) *Id.* at 352. See also Smalis v. Pennsylvania, 476 U.S. 140, 145 (1986) (“When a successful postacquittal appeal by the prosecution would lead to proceedings that violate the Double Jeopardy Clause, the appeal has no proper purpose. Allowing such an appeal would frustrate the interest of the accused in having an end to the proceedings against him.”).
presentation in order to strengthen the second,“134 and “would present an unacceptably high risk that the [g]overnment, with its vastly superior resources, might wear down the defendant . . . ,”135 “thereby ‘enhancing the possibility that even though innocent he may be found guilty.’”136

IV. THE ISSUE

134 Wilson, 420 U.S. at 352.


In Sanabria v. United States, 437 U.S. 54 (1978), the Supreme Court stated:

[T]he Double Jeopardy Clause [does not] permit[] the Government to obtain relief from all of the adverse rulings–most of which result from defense motions–that lead to the termination of a criminal trial in the defendant’s favor. To hold that a defendant waives his double jeopardy protection whenever a trial court error in his favor on a midtrial motion leads to an acquittal would undercut the adversary assumption on which our system of criminal justice rests and would vitiate one of the fundamental rights established by the Fifth Amendment. Id. at 78 (citations omitted).
The previous discussion indicates the Double Jeopardy Clause bars the prosecution from appealing an acquittal based upon a trial judge’s directed verdict of not guilty or its equivalent. For the purpose of such an appeal would be to obtain a reversal of the acquittal so the prosecution could try the defendant a second time for the same offense. Indeed, several cases decided by the Supreme Court involved an attempt by the prosecution to obtain review of a court-ordered acquittal and therefore support this conclusion.\textsuperscript{137} But in all these cases, it was quite clear the “acquittal” by the trial judge was a final judgment. No statute, rule of court, or prior court decision provided otherwise. What if a state (or the federal government for that matter) enacted a statute or adopted a rule of court, based upon England’s Criminal Justice Act 2003, providing that a trial judge’s pre-verdict decision to order an acquittal would not become “final” until the expiration of a specified period of time during which the prosecution could appeal that decision, and that if the prosecution availed itself of the opportunity to appeal, the trial judge’s decision would have no effect until either the appellate court denied leave to appeal, the prosecution abandoned the appeal before it was decided, or the appellate court decided the appeal adversely to the prosecution? Under such a provision, the trial judge’s determination that the prosecution failed to establish a prima facie case would not immediately become a final judgment and therefore arguably would not constitute an “acquittal” for purposes of the Double Jeopardy Clause. Would the Double Jeopardy Clause still bar further proceedings in the matter going to guilt or innocence if the prosecution appealed the trial judge’s decision and the appellate court overturned that decision? That is the question this Article will consider.

V. ANALYSIS

A. A Trial Judge’s Reconsideration of a Midtrial Acquittal Ruling: Smith v. Massachusetts

The argument that a jurisdiction in the United States could, consistent with the Double Jeopardy Clause, provide the prosecution with the right to appeal a directed verdict of not guilty can be based upon the Supreme Court’s decision in Smith v. Massachusetts,138 a case involving a trial judge’s reconsideration of her initial midtrial acquittal ruling on one, but not all, of the charges against the accused. The facts in Smith were as follows: A grand jury returned an indictment charging Smith with three offenses: armed assault with intent to murder; assault and battery by means of a dangerous weapon; and unlawful possession of a firearm,139 i.e., a weapon with a barrel less than sixteen inches in length.140 Smith elected to be tried by a jury, and at the close of the prosecution’s case in chief moved pursuant to Massachusetts Rule of Criminal Procedure 25(a)141 for a required finding of not guilty on the firearm charge.142 He


139 Id. at 464.

The charges against Smith related to the shooting of his girlfriend’s cousin. The state tried the girlfriend with Smith as an accessory after the fact. Id. at 464-65.

140 MASS. GEN. LAWS ANN. ch. 140, § 121 (West 2002) (defining a “firearm,” inter alia, for purposes of the offense of unlawfully possessing a firearm, see MASS. GEN. LAWS ANN. ch. 269, § 10(a) (West 2000), as “a pistol, revolver or other weapon of any description, loaded or unloaded, from which a shot or bullet can be discharged and of which the length of the barrel or barrels is less than 16 inches or 18 inches in the case of a shotgun as originally manufactured . . . .”).

141 Rule 25(a) of the Massachusetts Rules of Criminal Procedure provided:

The judge on motion of a defendant or on his own motion shall enter a finding of not guilty of the offense charged in an indictment or complaint or any part thereof after the evidence on either side is closed if the evidence is insufficient as a matter of law to sustain a conviction on the charge. If a defendant's motion for a required finding of not guilty is made at the close of the
claimed, in part, that the prosecution had not proved the barrel of the gun in question was less than sixteen inches. Although the victim had testified Smith “had shot him with ‘a pistol,’ specifically ‘a revolver’ that ‘appeared to be a .32 or a .38,’” the trial judge granted Smith’s motion during a sidebar conference, “reasoning that there was ‘not a scintilla of evidence’ that [Smith] had possessed a weapon with a barrel of less than 16 inches.” At the conclusion of the sidebar conference, the prosecution rested without moving to reopen its case to allow the victim to testify concerning the length of the gun’s barrel. The trial then continued, with Smith’s codefendant presenting one witness. After the defendants rested, and prior to closing arguments, the trial judge, who had not notified the jury of Smith’s acquittal on the firearm charge, reversed her ruling and allowed the jury to consider the firearm charge against Smith. The jury convicted Smith of all three offenses.

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Commonwealth’s evidence, it shall be ruled upon at that time. . . .

MASS. R. CRIM. P. 25(a).

142 543 U.S. at 465.

143 Id.

144 Id. (quoting App. 12, 14, available at 2004 WL2295575).

145 Id. (quoting App. 21, available at 2004 WL2295575). The trial judge wrote on Smith’s motion “‘Filed and after hearing, Allowed.’” Id. (quoting Consolidated Brief and Record Appendix for Defendant in No. 00-p-1215 (Mass. App. Ct.) p. A. 21, App. 3, available at 2004 WL2295575). The granting of the motion was then entered on the docket. Id.

146 Id. at 465 & n.1.

147 See supra note 139.

148 543 U.S. at 465.

149 Id.

150 Id.

151 Id. at 466.
The jury acquitted Smith’s girlfriend, see supra note 139, of being an accessory after the fact, the lone charge she faced in the trial. Commonwealth v. Smith, 788 N.E.2d 977, 980 n.1 (Mass. App. Ct. 2003).
On certiorari, the Supreme Court of the United States reversed. The Court held the Double Jeopardy Clause precluded the trial judge from reconsidering her midtrial acquittal ruling on the firearm-possession charge and submitting that charge to the jury. For the judge’s ruling constituted an “acquittal,” and “an acquittal, once final, may not be reconsidered on appeal or otherwise.” Submitting the charge to the jury, reasoned the Court, “plainly subjected [Smith] to further ‘factfinding proceedings going to guilt or innocence,’ prohibited by Smalis v. Pennsylvania following an acquittal.”

In reaching its result, the Supreme Court first concluded that the trial judge’s order entering a finding of not guilty pursuant to Massachusetts Rule of Criminal Procedure 25(a) (that is, because “the evidence [introduced by the prosecution] is insufficient as a matter of law

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152 The Appeals Court of Massachusetts affirmed Smith’s conviction on the firearm charge, holding, inter alia, that the trial judge’s correction of her midtrial ruling did not implicate the Double Jeopardy Clause because it did not subject Smith to a second trial or proceeding, and that Massachusetts Rule of Criminal Procedure 25(a), see supra note 141, which mandates that a motion for a required finding of not guilty made at the close of the prosecution’s case “be ruled upon at that time,” MASS. R. CRIM. P. 25(a), did not preclude a trial judge from correcting her initial ruling. Smith, 788 N.E.2d at 982-83. The Supreme Judicial Court of Massachusetts denied further review. Commonwealth v. Smith, 797 N.E.2d 380 (Mass. 2003) (table).

153 543 U.S. at 475.

154 Id. at 473.

155 Id. at 467-69, 470-72.

156 Id. at 469 n.4. See also id. at 467 (“[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. This is so whether the judge’s ruling of acquittal comes in a bench trial or, as here, in a trial by jury.” (citations omitted)).


158 543 U.S. at 467 (quoting Smalis v. Pennsylvania, 476 U.S. 140, 145 (1986)).

159 See supra note 141.
to sustain a conviction”\textsuperscript{160} met the Court’s definition of an “acquittal,”\textsuperscript{161} as “it ‘actually represent[ed] a resolution, correct or not, of some or all of the factual elements of the offense charged.”\textsuperscript{162}

\textsuperscript{160} Mass. R. Crim. P. 25(a).

\textsuperscript{161} 543 U.S. at 467-68.

\textsuperscript{162} Id. at 468 (quoting United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977)).
The Supreme Court next considered whether the Double Jeopardy Clause barred the trial judge from reconsidering her ruling,\(^{163}\) in other words, whether the “acquittal” on the firearm charge was final for purposes of the double jeopardy provision. The Court noted at the outset of its analysis that the facts of the case did not give Smith any reason to doubt the finality of the trial judge’s ruling acquitting him of the firearm charge: the prosecutor did not move for reconsideration of the ruling or reserve such a motion;\(^{164}\) he did not request a continuance so he could provide favorable authority to the court;\(^{165}\) and the trial judge’s ruling did not “appear on its face to be tentative.”\(^{166}\) The Court then observed that at the time of Smith’s trial Massachusetts had not provided, either by statute or rule of court,\(^{167}\) or through a judicial decision,\(^{168}\) that a trial judge’s midtrial determination of the sufficiency of the prosecution’s

\(^{163}\) Id. at 467, 473.

\(^{164}\) Id. at 470.

\(^{165}\) Id.

Near the end of its opinion, the Supreme Court observed that the prosecutor ultimately “convinced the [trial] judge to reconsider her acquittal ruling on the basis of legal authority he had obtained during a 15-minute recess before closing argument,” id. at 474, and stated that “[h]ad [the prosecutor] sought a short continuance at the time of the acquittal motion, the matter could have been resolved satisfactorily before [Smith] went forward with his case.” Id. at 475.

\(^{166}\) Id. at 470.

The Supreme Court pointed out that Massachusetts procedure did not allow the trial judge to defer ruling on Smith’s motion, id. (citing MASS. R. CRIM. P. 25(a), quoted supra note 141), or to require the defendants to present their cases while the prosecution reserved the right to present more evidence. Id. (citing Commonwealth v. Cote, 444 N.E.2d 1282, 1290-91 (Mass. App. Ct. (1983)). It also observed that “when the prosecutor suggested that he be given a chance to reopen his case before the defendants proceeded, the [trial] court rejected the suggestion because it was time to rule on [Smith’s] motion.” Id.

\(^{167}\) Id. at 471.

The Supreme Court pointed out that the Massachusetts Rules of Criminal Procedure “provided that only clerical errors in a judgment or order, or errors ‘arising from oversight or omission’” could be corrected at any time. Id. (citing MASS. R. CRIM. P. 42).

\(^{168}\) Id.

The prosecution had cited several Massachusetts decisions “supporting the general proposition,” id., that a trial judge could reconsider interlocutory rulings, such as rulings on pretrial motions and evidentiary rulings, but the Supreme Court found it “far from obvious that [the] principle [set forth in those cases] extends to entry of a required
And while the Supreme Court acknowledged that “[i]t might suffice for an appellate court to announce the state-law rule that midtrial acquittals are tentative in a case where reconsideration of the acquittal occurred at a stage in the trial where the defendant’s justifiable ignorance of the rule could not possibly have caused him prejudice,”\textsuperscript{170} it held that an appellate court could not do so in a case such as \textit{Smith}, in which “the possibility of prejudice ar[o]se[]”\textsuperscript{171} because “the trial ha[d] proceeded to the defendant’s presentation of his case.”\textsuperscript{172} To allow a court to reconsider its finding of not guilty . . . (or its common-law predecessor, the directed verdict)—which on its face, at least, purports not to be interlocutory but to end the case.” \textit{Id.}

\textsuperscript{169} Indeed, the Supreme Court remarked that it could find no instance of \textit{any} state having done so by statute or rule of court. \textit{Id.} at 470-71. It did, however, say that some states had “held, as a matter of common law or in the exercise of their supervisory authority, that a court-directed judgment of acquittal,” \textit{id.} at 471, does not become effective immediately upon its announcement by the trial judge. \textit{Id.} (citing Watson v. State, 410 So. 2d 207, 209 (Fla. Dist. Ct. App. 1982) (per curiam), as holding a court-directed judgment of acquittal becomes effective only at the conclusion of the hearing upon the defendant’s motion for such a judgment; Harden v. State, 287 S.E.2d 329, 331 (Ga. Ct. App. 1981), as holding a court-directed judgment of acquittal becomes effective only when the trial judge signs it and it is “entered in the docket”; and State v. Collins, 771 P.2d 350, 353 (Wash. 1989), as holding a court-directed judgment of acquittal becomes effective only when the trial court issues a formal order).

\textsuperscript{170} \textit{Id.}

\textsuperscript{171} \textit{Id.} at 472.

\textsuperscript{172} \textit{Id.} at 471.

The Supreme Court identified two sources of potential prejudice. First, the seeming acquittal on one charge might prejudice the accused by inducing him “to present a defense to the undismissed charges when he would be better advised to remain silent.” \textit{Id.} at 472. Because many states “still follow the traditional rule that after trial or on appeal, sufficiency-of-the-evidence challenges are reviewed on the basis of the entire record, even if the defendant moved for acquittal when the prosecution rested and the court erroneously denied that motion,” \textit{id.} a defendant in one of those states who introduced evidence on other counts following the trial judge’s required finding of not guilty might “bolster the [prosecution’s] case enough for it to support a verdict of guilty” on the count on which he seemingly was acquitted. \textit{Id.} (quoting McGautha v. California, 402 U.S. 183, 215 (1971)). For example, “[t]he defendant’s evidence ‘may lay the foundation for otherwise inadmissible evidence in the [prosecution’s] initial presentation or provide corroboration for essential elements of the [prosecution’s] case.” \textit{Id.} (quoting United States v. Calderon, 348 U.S. 160, 164 n.1 (1954)). At that point the trial judge might reverse her initial ruling because the entirety of the evidence introduced at the trial would support the defendant’s guilt on the initially dismissed count, and such decision would be upheld on appeal even though the judge’s original ruling was correct on the basis of the evidence in the prosecution’s case in chief. Second, “[i]n all jurisdictions, . . . false assurance of acquittal on one count may induce the defendant to present defenses to the remaining counts that are inadvisable—for example, a defense that entails admission of guilt on the acquitted count.” \textit{Id.} The Court also noted that in multiple-defendant trials an apparent final dismissal of one defendant might cause the other defendants...
initial ruling at that point, stated the Court, would allow the Double Jeopardy Clause’s guarantee “to become a potential snare for those who reasonably rely upon it.”

The Court acknowledged, however, that “the potential effect upon codefendants had no bearing upon [the seemingly acquitted defendant’s] double-jeopardy claim,” id. at 472 n.6, although it stated that such a possibility “confirm[ed] the wisdom of the rule [it] adopted.” Id.

173 Id. at 473.
Two statements by the Supreme Court in *Smith* are highly relevant in determining whether a jurisdiction could constitutionally allow the prosecution to appeal a pre-verdict court-ordered acquittal. First, the Court stated that “as a general matter state law may prescribe that a judge’s midtrial determination of the sufficiency of the [prosecution’s] proof can be reconsidered.”\(^{174}\) Second, it said that a midtrial acquittal need not be treated as final for double jeopardy purposes when “the availability of reconsideration has been plainly established by preexisting rule or case authority expressly applicable to midtrial rulings on the sufficiency of the evidence.”\(^{175}\) The four dissenters in *Smith*\(^{176}\) agreed with these statements by the majority, so, as Justice Ginsburg pointed out in her dissenting opinion, “[t]he Court unanimously concluded that “the Double Jeopardy Clause [does not] bar the States from allowing trial judges to reconsider a midtrial grant of a motion to acquit on one or more but fewer than all counts of an indictment[.]”\(^{177}\) Accordingly, the general rule that can be taken from these statements in *Smith* is that a jurisdiction “may provide for such reconsideration . . . by legislation or by judicial rule, common-law decision, or exercise of supervisory power.”\(^{178}\)

\(^{174}\) Id. at 470 (emphasis added).

\(^{175}\) Id. at 473 (emphasis added).

\(^{176}\) Justice Scalia wrote the opinion for the Court, in which Justices Stevens, O’Connor, Souter, and Thomas joined. Justice Ginsburg wrote a dissenting opinion that was joined by Chief Justice Rehnquist and Justices Kennedy and Breyer.

\(^{177}\) 543 U.S. at 475 (Ginsburg, J., dissenting) (emphasis added).

\(^{178}\) Id.

\(^{179}\) *Id.* E.g., People v. Madison, 176 P.3d 793, 800 (Colo. Ct. App. 2007) (holding the trial court did not violate the Double Jeopardy Clause when, after the defendant presented his case, it reconsidered its ruling that the prosecution had not presented sufficient evidence to prove the defendant’s guilt on one of several charges, because a previous state supreme court decision held that “a trial court may correct an erroneous ruling granting a motion for judgment of acquittal without offending the . . . Double Jeopardy Clause as long as it does so before the jury is dismissed and there had been no demonstrable prejudice to the defense”).
The lone exception to the general rule stated in the text would seem to be that an appellate court cannot announce a new rule and apply it to the case before it when the trial judge reconsidered her initial acquittal ruling after the defendant began presentation of his case. See supra text accompanying notes 170-73. Compare Price v. Vincent, 538 U.S. 634 (2003) (holding a habeas corpus petitioner was not entitled to relief because the state supreme court’s decision that the trial judge, in reconsidering his initial midtrial acquittal ruling before the defendant began presenting his case, and his submitting the charge to the jury, did not violate the Double Jeopardy Clause was neither contrary to, nor an unreasonable application of, clearly established federal law).
B. Double Jeopardy and Appeal of a Midtrial Acquittal Ruling: Extending Smith

The Supreme Court in *Smith* was concerned, of course, only with whether the Double Jeopardy Clause prohibits a trial judge from reconsidering her initial ruling, made at the close of the prosecution’s case in chief, allowing the defendant’s motion for a court-ordered acquittal. Nevertheless, the Court’s statements and reasoning in *Smith* arguably can be extended to support the constitutional validity of a statute or rule of court, modeled upon the Criminal Justice Act 2003, allowing the prosecution to appeal a trial judge’s decision to allow a defendant’s motion for a directed verdict of not guilty and permitting a new trial, or the resumption of the defendant’s initial trial, if the appeal results in the trial judge’s decision being overturned.

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180 See *supra* text accompanying notes 29-62.
The Supreme Court in *Smith* concluded that the trial judge’s reconsideration of her midtrial ruling acquitting the accused of the firearm charge violated the Double Jeopardy Clause because the initial ruling was “final” and, as a result of her reconsideration, the accused was “subjected . . . to further factfinding proceedings going to guilt or innocence”\(^\text{181}\) on the firearm charge.\(^\text{182}\) The Court unanimously agreed, however, that if the state had previously provided by statute or otherwise that the such a midtrial acquittal ruling could be reconsidered by the trial judge, it would not have been final for double jeopardy purposes.\(^\text{183}\) The Criminal Justice Act 2003 does just that with respect to an appeal by the prosecution of a ruling of no case to answer. It effectively provides that a trial judge’s ruling of no case to answer, the functional equivalent of a directed verdict of not guilty or required finding of not guilty, is not immediately final. Rather, the prosecution is given the opportunity to inform the trial court “immediately after the ruling”\(^\text{184}\) that it “intends to appeal” the ruling,\(^\text{185}\) or, alternatively, that it desires an adjournment to decide whether to appeal.\(^\text{186}\) During the period in which the prosecution can inform the trial court it intends to appeal, the trial judge’s ruling of no case to answer has no effect,\(^\text{187}\) that is, is not yet final. Moreover, should the prosecutor inform the trial court at the appropriate time that

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\(^{181}\) Smith v. Massachusetts, 543 U.S. 462, 467 (2005).

\(^{182}\) Id. at 469-73.

\(^{183}\) Id. at 470, 473. See supra text accompanying notes 174-79.


\(^{186}\) Id. § 58(4)(b). See supra note 38.

\(^{187}\) Criminal Justice Act, 2003, § 58(3).
it intends to appeal, the ruling continues to have no effect, i.e., is not final, during the time the appeal is pending.\textsuperscript{188} Thus, a trial judge’s ruling that the evidence in the prosecution’s case in chief fails to prove the defendant’s guilt beyond a reasonable doubt effectively becomes final only when one of the following events occurs: 1) the period during which the prosecution can inform the trial court it intends to appeal the ruling expires without the prosecution having informed the trial court of such an intention;\textsuperscript{189} 2) the Court of Appeal denies leave to appeal after the prosecution informed the trial court in a timely manner that it intended to appeal;\textsuperscript{190} 3) the prosecution abandons its appeal before the Court of Appeal determines the appeal;\textsuperscript{191} or 4) the Court of Appeal affirms the trial judge’s ruling.\textsuperscript{192}

\textsuperscript{188} Id. § 58(10).

\textsuperscript{189} This would occur almost at once if the prosecutor does not immediately inform the trial court either that it intends to appeal the ruling or that it desires an adjournment to consider whether to appeal. See supra text accompany notes 184-86. If the prosecution obtained an adjournment to decide whether to appeal, it generally would occur on the next business day following the adjournment. See supra note 38.

\textsuperscript{190} Criminal Justice Act, 2003, § 57(4), (8), (9)(a).

The ruling would also become final if the trial court denied leave to appeal and the prosecution decided not to seek leave to appeal from the Court of Appeal. See id.

\textsuperscript{191} Id. § (8), (9)(b).

\textsuperscript{192} Id. § 61(1), (3), (7).

In theory, a ruling of no case to answer might not be final even after the Court of Appeal confirms the trial judge’s ruling. For the Act provides that the prosecution can appeal further following an adverse decision by the Court of Appeal. Criminal Appeal Act, 1968, c. 19, § 33(1)-(2) (Eng.), as amended by Criminal Justice Act, 2003, § 61(1), (3) (i) (allowing either party, with leave from the Court of Appeal or the Supreme Court of the United Kingdom, to appeal to the Supreme Court following an adverse ruling in the Court of Appeal, provided, however, that the Court of Appeal certifies "that a point of law of general public importance is involved in the decision and it appears to the Court of Appeal or the Supreme Court (as the case may be) that the point is one which ought to be considered by the Supreme Court"). In fact, however, as of May 20, 2012, neither the Supreme Court of the United Kingdom, nor its predecessor, the House of Lords, see Constitutional Reform Act, 2005, c. 4, Preamble, § 23, sch. 9, para. 16 (U.K.), has decided such an appeal.
Under a statute or rule of court based upon the Criminal Justice Act 2003, a trial judge’s midtrial acquittal ruling would not be a “final judgment” of acquittal and, at least on its face, would not run afoul of the double jeopardy rule that “an acquittal, once final, may not be reconsidered on appeal.” Moreover, a statute or rule of court based upon the Criminal Justice Act 2003 would be consistent with the Court’s unanimous view in *Smith* that a state can make what would otherwise be a “final” acquittal merely provisional for double jeopardy purposes. In other words, a trial judge’s midtrial ruling that the prosecution’s evidence failed to establish a prima facie case arguably would not meet the Supreme Court’s definition of an “acquittal” for double jeopardy purposes because it would not be a ruling that “actually represents a resolution in the defendant’s favor, correct or not, of some or all of the factual elements of the offense charged.” For the ruling would not at that point be final and, in effect, would not have “resolv[ed] or conclu[ded]” one way or the other—the dispute about any of the factual elements of the charge.

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193 *Smith v. Massachusetts*, 543 U.S. 462, 469 n.4 (2005) (emphasis added). *See also* Blueford v. Arkansas, 132 S. Ct. ___, ___ (2012), 2012 WL 1868066, at *5 (May 24, 2012) (“The foreperson’s report [to the trial judge that the jury had unanimously voted against convicting the defendant of capital murder and first-degree murder] was not a final resolution of anything. . . . The fact that deliberations continued after the report deprives the report of the finality necessary to constitute an acquittal on the murder offenses [for purposes of the Double Jeopardy Clause].” (emphasis added)); *id. at ___*, 2012 WL 1868066, at *6 (“[T]he foreperson’s report [to the trial judge that the jury had unanimously voted against convicting the defendant of capital murder and first-degree murder] prior to the end of deliberations lacked the finality necessary to amount to an acquittal on those offenses . . . .” (emphasis added)); *id. at ___*, 2012 WL 1868066, at *6 (“Blueford . . . overlooks the real distinction between [his case and] *Green v. United States*, 355 U.S. 184 (1957), and *Price v. Georgia*, 398 U.S. 323 (1970): In *Green and Price*, the verdict of the jury was a final decision; here, the report of the foreperson [to the trial judge] was not.” (emphasis added)); United States v. DiFrancesco, 449 U.S. 117, 129 (1980) (“If the innocence of the accused has been confirmed by a final judgment [of acquittal], the Constitution conclusively presumes that a second trial would be unfair.” (quoting *Arizona v. Washington*, 434 U.S. 497, 503 (1978) (emphasis added)); Swisher v. Brady, 438 U.S. 204, 214 (1978) (same)).

194 *See supra* text accompanying notes174-79.


196 *See* THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1494 (5th ed. 2011) (defining “resolution” as, *inter alia*, “[t]he resolving or concluding of a dispute or disagreement”). *See also id.*
elements of the offense in question.  

In addition, a preexisting statute or rule of court would satisfy the Supreme Court’s concern in Smith about the accused’s lack of notice that the trial judge’s initial ruling was not final. For the statute or rule of court would have provided such notice.

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197 Cf. Blueford, 132 S. Ct. at ___, 2012 WL 1868066, at *5 (“The foreperson’s report [to the trial judge that the jury had unanimously voted against convicting the defendant of capital murder and first-degree murder] was not a final resolution of anything.”).

198 See Smith, 543 U.S. at 470 (“It is important to note, at the outset, that the facts of this case gave the petitioner no reason to doubt the finality of the state court’s ruling.”); id. at 473 (“If, after a facially unqualified midtrial dismissal of one count, the trial has proceeded to the defendant’s introduction of evidence, the acquittal must be treated as final, unless the availability of reconsideration has been plainly established by preexisting rule or case authority expressly applicable to midtrial rulings on the sufficiency of the evidence.” (emphasis added)). See also id. at 471-72 (in a case in which the trial judge reconsidered her initial midtrial acquittal ruling after the trial had proceeded to the presentation of the defendant’s case on the undismissed charges, concluding an appellate court cannot announce a new rule that midtrial acquittals are tentative, because of the possibility of prejudice to the accused, who was “justifiably ignorant,” i.e., lacked notice, of the rule).

199 Cf. United States v. DiFrancesco, 449 U.S. 117, 136 (1980) (“The defendant, of course, is charged with knowledge of the statute and its . . . provisions [authorizing the Government to appeal a convicted defendant’s sentence], and has no expectation of finality in his sentence until the appeal is concluded or the time to appeal has expired.”); id. at 139 (“Where . . . Congress has specifically provided that the sentence [of a convicted defendant] is subject to appeal[,] . . . there can be no expectation of finality in the original sentence.”); id. at 137 (“Respondent was . . . aware [from the statute] that a dangerous special offender sentence is subject to increase on appeal. [Therefore] [h]is legitimate expectations are not defeated if his sentence is increased on appeal . . . .”)

Under the provisions of the Criminal Justice Act 2003 a person being tried for a criminal offense knows at the outset of his trial that if the trial judge rules he has no case to answer and the prosecution informs the judge it will appeal that ruling, the ruling will not immediately take effect. Criminal Justice Act, 2003, c. 44, § 58(3)-(4) (Eng.).
But are there any differences between, on one hand, allowing a trial judge to reconsider her midtrial acquittal ruling and, on the other hand, allowing an appellate court to review such a ruling, differences that would preclude extending the Supreme Court’s decision in Smith? Justice Ginsburg, in her dissenting opinion in Smith, thought so. She expressly distinguished the two situations. She believed a trial judge’s reconsideration of a midtrial acquittal ruling would not constitute a double jeopardy violation (at least in the absence of any prejudice to the accused’s defense\footnote{See Smith, 543 U.S. at 476 (Ginsburg, J., dissenting).}) because further proceedings in the case would merely be “continuing proceedings before the initial tribunal prior to rendition of a final adjudication.”\footnote{Id. at 478 (emphasis added).}

Nevertheless, Justice Ginsburg also thought the “Double Jeopardy Clause bars appellate review of a trial court’s grant of a motion to acquit, because reversal would lead to a remand for further trial proceedings.”\footnote{Id. at 477(emphasis added).} She stated that “[a]n appeal, including an interlocutory appeal, moves a case from a court of first instance to an appellate forum, and necessarily signals that the trial court has ruled with finality on the appealed issue. . . .”\footnote{Id.} The majority of the Court disagreed with Justice Ginsburg’s position that the trial judge’s reconsideration of her midtrial acquittal ruling in Smith did not violate the guarantee against double jeopardy because “the acquittal was reconsidered ‘before the court of first instance ha[d] disassociated itself from the case or any issue in it.’”\footnote{Id. at 469 n.4 (opinion of the Court) (quoting id. at 477-78 (Ginsburg, J., dissenting)).} However, it seemed to agree with Justice Ginsburg “that the taking of an appeal
‘necessarily signals’ the finality of the order appealed.”

The Justices, of course, are correct when they state that a trial judge’s order must be final for it to be appealable: “‘Finality as a condition of review is [a] . . . characteristic of . . . appellate procedure . . . ’” in the United States. But an order need not be a “final judgment,” i.e., one that “terminates the criminal proceedings in the [trial] court,” to be “final” for purposes of appeal. Rather, a “final decision,” that is, one that “constitute[s] a complete, formal, and, in the trial court, final [determination] of a [party’s] . . . claim,” may sometimes be appealable. For example, in Abney v. United States, the Supreme Court held that a defendant in a federal criminal prosecution could immediately appeal a trial judge’s pretrial ruling denying a motion to dismiss the indictment on double jeopardy grounds, despite the ruling’s not being a “final judgment.” By expressly stating that the taking of an appeal signals the finality of the order being appealed, the majority in Smith seemed to distinguish between a final order, or decision, and a final judgment.

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205 Id.
209 Id. at 659 (emphasis added).
211 Id. at 657, 662.
Accordingly, because "there are instances in which a final decision is not a final judgment," a statute or rule of court arguably could, within the framework of current principles governing appeals, provide that: 1) a trial judge’s midtrial determination that the prosecution’s evidence fails to establish a prima facie case of guilt does not become effective immediately, i.e., is not a “final judgment” acquitting the defendant—in which case it would not bring into play the double jeopardy principles governing a “final” judgment of acquittal; 2) as a “final decision,” the trial judge’s ruling may be appealed by the prosecution; and 3) if the appellate court overturns the trial judge’s ruling, the defendant’s trial can be resumed or he can be tried a second time for the same offense. This is precisely what Parliament did in England in the Criminal Justice Act 2003, and what the legislatures did in those other countries that recognize the protection against double jeopardy yet permit the prosecution to appeal an acquittal.

212 Id. at 658 (quoting Stack v. Boyle, 342 U.S. 1, 12 (1951) (separate opinion of Jackson, J.)).


In effect, a statute or rule of court based upon the Criminal Justice Act would create a two-tiered process for the midtrial determination of the sufficiency of the prosecution’s evidence. If the trial judge finds the prosecution did not establish a prima facie case of guilt, that decision is not immediately final and may be appealed by the prosecution. If the prosecution avails itself of the opportunity to appeal, the ultimate decision on the sufficiency of the prosecution’s evidence will be made by the appellate court.216 Such a procedure arguably would be constitutionally permissible under the Supreme Court’s decision in Swisher v. Brady.217 In that case, the Court found no double-jeopardy violation in a juvenile court procedure under which the state, in a delinquency proceeding, could obtain a trial de novo by a juvenile court judge if it filed exceptions to a master’s proposed findings and recommendations that favored the juvenile. In reaching this result, the Court stated that “it is for the States . . . to designate and empower the factfinder and adjudicator.”218 Subsequently, in Smith v. Massachusetts,219 the Supreme Court explained that the result in Swisher was “a recognition that the initial jeopardy does not end until there is a final decision.”220 Arguably, a statute or rule of court based upon the Criminal Justice Act 2003 would do no more than designate the appellate court as “the factfinder and adjudicator”221 of a motion for a directed verdict of not guilty in

216 If the trial judge ruled against the defendant, i.e., found the prosecution’s case sufficient to establish the defendant’s guilt, that decision would stand for purposes of the trial, but, as under current practice, see, e.g., Burks v. United States, 437 U.S. 1, 3 (1978), the defendant could challenge the trial court’s ruling on appeal, if he is ultimately convicted by the jury.


218 Id. at 216.


220 Id. at 469 n.4.
those cases in which the trial judge decided the motion in favor of the accused and the state appealed. In such cases, a decision by the trial judge to allow the defendant’s motion would not be final, unless the state decided to accept the trial judge’s decision and not appeal.  

As the above analysis indicates, a statute or rule of court authorizing the prosecution to appeal a midtrial decision by a trial judge to direct a verdict of not guilty may be consistent with the Supreme Court’s cases interpreting the Double Jeopardy Clause. Nevertheless, the final decision about the constitutionality of such a statute or rule of court must depend upon how it comports with the policies underlying the guarantee against double jeopardy. The remainder of this section of the Article will examine that question.

C. Appeal of a Midtrial Acquittal Ruling and the Policies Underlying the Guarantee Against Double Jeopardy

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221 *Swisher*, 438 U.S. at 216.

222 Even if the state appealed, the trial judge’s decision might become final if the state failed to obtain leave to appeal or abandoned its appeal before the appellate court decided it. *See supra* text accompanying notes 190-91.
As previously stated, the Double Jeopardy Clause’s prohibition against prosecuting an acquitted individual a second time for the same offense serves a number of interrelated interests. See supra text accompanying notes 91-105. This section of the Article will examine how each of the policies underlying the Clause applies in the context of a statute or rule of court, based upon the Criminal Justice Act 2003, allowing the prosecution to appeal a trial judge’s decision to order a midtrial acquittal.

1. Preserving the Finality of Judgments

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223 See supra text accompanying notes 91-105.
The Supreme Court has stated “that ‘a’ or ‘the’ ‘primary purpose’ of the [Double Jeopardy] Clause was ‘to preserve the finality of judgments,’ or the ‘integrity’ of judgments.”224 Once an individual has been acquitted of an offense, the government must respect that judgment and cannot later bring a second prosecution against the same individual for the same offense, even if it disagrees with the result in the first trial.

Preserving the finality of a judgment by prohibiting a second prosecution for the same offense following an acquittal serves the “public interest”225 in a number of ways. For example, according absolute finality to a judgment of acquittal helps to conserve scarce prosecutorial and judicial resources.226 It also helps to maintain the public’s respect for, and confidence in, the legal system,227 and encourages efficient investigation and prosecution of crimes.228 The English Law Commission described another public interest served by according absolute finality to a judgment of acquittal when it stated:

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 and educative effect. The rule serves to emphasise commitment to


225 Arizona v. Washington, 434 U.S. 497, 503 (1978) (“The public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though ‘the acquittal was based upon an egregiously erroneous foundation.’” (quoting Fong Foo v. United States, 369 U.S. 141, 143 (1962) (per curiam))).

226 See infra text accompanying notes 362-63.

227 See infra text accompanying notes 371-76.

228 See infra text accompanying notes 385-89.
democratic values.  

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229 ENG. LAW COMM’N, REPORT NO. 267, supra note 11, para. 4.17.
According absolute finality to a judgment of acquittal also serves personal interests. An acquitted individual, as well as his family and friends, need not “live in a continuing state of anxiety and insecurity,”231 fearful that, despite the acquittal, the government will again drag him into court a second time and require him to defend himself against the same charge.232 Absent such a limitation, a person acquitted of a crime could never be sure the matter had ended, no matter how many times a trier of fact found him not guilty, for the government could continue to prosecute him again and again and again until it found a fact finder that would convict.

In addition to serving as an “antidote to distress and anxiety,”233 according finality to a judgment of acquittal allows the acquitted individual to consider the matter closed and to plan his future accordingly. In this “important sense,”234 stated the English Law Commission, “finality as a value . . . impact[s] . . . individual liberty or autonomy.”235 The Commission explained:

230 As the English Law Commission recognized, “[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.” Id. para. 4.16. See also AUSTRALIAN MODEL CRIMINAL CODE, DISCUSSION PAPER, supra note 20, at 3 (paraphrasing the English Law Commission and stating “the interests of finality also affect friends, family and others dealing with the person concerned”).


232 Id.; ENG. LAW COMM’N, CONSULTATION PAPER NO. 156, supra note 11, para. 4.9 (“In a serious case the prospect of going through the trial process at some future date is likely to cause great anxiety . . . . At least some acquitted defendant will be prey to a constant and persisting sence of doubt.”); AUSTRALIAN MODEL CRIMINAL CODE, DISCUSSION PAPER, supra note 20, at 3 (“[T]hose subject, or potentially subject, to any double jeopardy should not be subjected to the anxiety and distress occasioned by the fear that he or she may have to undergo the admittedly stressful trial process all over again.”).

233 ENG. LAW COMM’N, REPORT NO. 267, supra note 11, para. 4.11.

234 Id. para. 4.12.

235 Id.
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 visions of a good life. Lack of finality in criminal proceeding infringes 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 the danger of being once more subject to a criminal prosecution for the same alleged crime.\textsuperscript{236}

\textsuperscript{236} Id.
A statute or rule of court based upon the Criminal Justice Act 2003 would not contravene the policy of maintaining the finality of judgments, at least insofar as finality protects personal interests.237 For such a statute or court rule would provide that a trial judge’s midtrial ruling that the prosecution’s evidence was insufficient to establish the defendant’s guilt has no effect during the period in which the prosecution can decide whether to appeal the ruling,238 and if it does appeal, during the pendency of that appeal.239 Moreover, it would provide that the trial judge cannot “take any steps in consequence of the ruling,”240 and if she does take any steps, those steps are also to have no effect.241 As a result of these provisions, a trial judge’s decision to direct a verdict of not guilty would not become “final,” and the trial judge could not enter a valid final judgment of acquittal in the case, until either the period within which the prosecution can inform the trial judge of its intention to appeal the ruling expires without the prosecution’s having notified the trial court it intends to appeal,242 or, if the prosecution informs the judge in a timely manner that it intends to appeal the ruling, leave to appeal is not obtained,243 or, if leave is

237 The discussion that immediately follows in the text focuses primarily on the personal interests served by preserving the finality of a judgment of acquittal. Subsequent subsections will focus separately on particular public interests served by according absolute finality to a judgment of acquittal. See infra text accompanying notes 364-70 (conserving scarce prosecutorial and judicial resources), notes 375-82 (maintaining the public’s respect for, and confidence in, the legal system), and notes 388-400 (encouraging efficient investigation and prosecution of crimes).

238 See Criminal Justice Act, 2003, c. 44, § 58(3)-(4) (Eng.).

239 See id. § 58(1).

240 See id. § 58(11)(b).

241 See id. § 58(11)(c).

242 See id. § 58(3)-(4).

243 Under the Criminal Justice Act 2003, the prosecution must obtain leave to appeal, either from the trial judge or the Court of Appeal. See id. § 57(4). A ruling of no case to answer therefore would, in effect, become “final” (i.e., the defendant would be acquitted of the offense in question) if, and when, the prosecution failed to
granted, either the prosecution abandons the appeal,\textsuperscript{244} or the appellate court upholds the trial judge’s ruling that the prosecution failed to establish a prima facie case of guilt.\textsuperscript{245} Consequently, until one of these events occurs, there is no judgment whose “finality”\textsuperscript{246} must be preserved\textsuperscript{247} or whose “integrity”\textsuperscript{248} must be protected.\textsuperscript{249} Moreover, every criminal defendant would know at the outset of his trial that, should the trial judge find at the conclusion of the prosecution’s case in chief (or at any time thereafter before the case is submitted to the jury) that the prosecution’s evidence is insufficient to prove his guilt, that decision will not be final, and will not immediately acquit him of the offense in question.\textsuperscript{250} He also would know that if the prosecution appealed the trial judge’s ruling and succeeded in overturning the trial judge’s

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\textsuperscript{244} See Criminal Justice Act, 2003, § 58(8)-(9)(b).

\textsuperscript{245} See id. §§ 58(10)-(11), 61(1), (3), (7).


\textsuperscript{247} See supra text accompanying note 224.

\textsuperscript{248} United States v. Scott, 437 U.S. 82, 92 (1978).

\textsuperscript{249} See supra text accompanying note 224.

\textsuperscript{250} Cf. Smith v. Massachusetts, 543 U.S. 462, 473 (2005) (“If, after a facially unqualified midtrial dismissal of one count [because of the insufficiency of the prosecution’s evidence], the trial has proceeded to the defendant’s introduction of evidence [on another count of the indictment], the acquittal must be treated as final [under the Double Jeopardy Clause], unless the availability of reconsideration has been plainly established by pre-existing rule or case authority expressly applicable to midtrial rulings on the sufficiency of the evidence.” (emphasis added)).
ruling, his trial could be resumed,\textsuperscript{251} or he could be subjected to a new trial for the same offense.\textsuperscript{252}

On the other hand, once a court-ordered acquittal became “final” and the defendant was acquitted of the offense in question,\textsuperscript{253} the Double Jeopardy Clause would protect the now-acquitted individual from a second prosecution for the same offense. Moreover, by continuing to recognize that it could not bring a second prosecution for the same offense following a \textit{final} judgment of acquittal, the state would still acknowledge “that it respects the principle of limited government and the liberty of the subject.”\textsuperscript{254}

\textbf{2. Minimizing the Ordeal of the Trial Process}

\textsuperscript{251} See Criminal Justice Act, 2003, c. 44, § 61(4)(a) (Eng.).

\textsuperscript{252} See \textit{id.} § 61(4)(b).

\textsuperscript{253} See \textit{supra} text accompanying notes 242-45.

\textsuperscript{254} ENG. LAW COMM’N, REPORT NO. 267, \textit{supra} note 11, para. 4.17. See \textit{supra} text accompanying notes 229 & 233-36.
Another purpose of the Double Jeopardy Clause is to prevent “the State with all its resources and power [from] . . . mak[ing] repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal.”255 As Professor Glanville Williams explained, it would be “hard on the defendant if, after he has at great cost in money and anxiety secured a favorable verdict from a jury on a particular issue, he must fight the battle over again.”256

255 Green v. United States, 355 U.S. 184, 187 (1957). Accord Abney v. United States, 431 U.S. 651, 661 (1977) (“[T]he guarantee against double jeopardy assures an individual that, among other things, he will not be forced, with certain exceptions, to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense.”).

256 WILLIAMS, supra note 6, at 164. Although Professor Williams was writing about a subsequent prosecution for a different offense, but one arising out of the same facts as the first, “clearly the principle also applies to true autrefois cases,” ENG. LAW COMM’N, CONSULTATION PAPER NO. 156, supra note 11, para. 4.6 n.14, i.e., a subsequent prosecution for the same offense. See supra notes 13 & 17.
As these statements indicate, defending oneself against a criminal charge can be an arduous task for a person. For one thing, it can place a heavy financial burden on him.\footnote{257} Those who can afford it nearly always hire an attorney to represent them.\footnote{258} They also may hire an investigator to help locate witnesses and find evidence favorable to their defense, and may employ experts and other specialists to assist in the preparation of their case and to testify in their behalf at the trial. Even in cases in which the accused is indigent and entitled to legal assistance from the state,\footnote{259} he can still suffer a financial burden. For example, if he is employed, he may miss time at work to appear in court or to meet with his lawyer to help prepare his defense, or he might even lose his job because of the pending criminal charges.\footnote{260}

\footnote{257} According to a long-time criminal defense lawyer in Chicago, a private attorney charges $15,000-$20,000 to represent an individual in an armed robbery case in the Circuit Court of Cook County, Illinois, the exact amount depending on such things as whether the individual is being held in jail or is free on bond, the type of motions that will need to be filed, and the individual’s background. In addition to the attorney’s fee, there might be investigative expenses. E-mail from Richard Kling, Clinical Professor of Law, Chicago-Kent College of Law, to David S. Rudstein, Professor of Law, Chicago-Kent College of Law (May 13, 2012, 11:02 CDT) (on file with author). See also Susan Chandler, Free Ryan Defense Could Get Expensive If Mistrial Declared, Rerun Would Be Costly, CHICAGO TRIBUNE, Mar. 30, 2006, at Business 1, available at 2006 WLNR 7238109 (stating the defense costs in the fraud trial of former Illinois Governor George H. Ryan stood at $10 million as of November of 2005, and noting that the defendant’s lead lawyer bills at the rate of $750 per hour); Kristi Pihl, Franklin May Have to Turn to Reserves to Cover Trial Costs, TRI-CITY HERALD (Kennewick, Wash.), Apr. 19, 2011, at B1, available at 2011 WLNR 7707015 (stating that public defense costs for the year in four pending murder cases stood at $17,528 as of April 2011, and $66,695 since 2010, the bulk of which were for attorney’s fees, with public defense attorneys being paid at the regular rate of $75 per hour).

\footnote{258} 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.”).

\footnote{259} See, e.g., id. at 339-45 (holding an indigent defendant charged with a felony is constitutionally entitled to counsel at state expense); Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (holding an indigent defendant charged with a misdemeanor, petty offense, or felony cannot be imprisoned unless he is represented by counsel at trial); Ake v. Oklahoma, 470 U.S. 68, 83 (1985) (holding that when an indigent “defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense”).

\footnote{260} See NEW SOUTH WALES LAW REFORM COMMISSION, REPORT 77: DIRECTED VERDICTS OF ACQUITTAL para. 2.12 (1996) [hereinafter N.S.W. LAW REFORM COMM’N, REPORT 77] (stating that even in cases in which the accused is entitled to legal aid, “the financial burden can still be felt by the accused in other substantial ways, for example, the disruption to normal employment or business”).
Defending oneself in a criminal prosecution also can cause stress to an individual, affecting him, as well as his family, both emotionally and physically. A criminal charge generally embarrasses the accused, and it may cause his friends, neighbors, colleagues, and even relatives to disapprove of him, be suspicious and distrustful of him, and perhaps even shun him. Additionally, an accused who has a family and a job will likely be concerned about the effect the pending charge—and possible conviction—will have on his family life and employment. Perhaps even more importantly, though, the individual will be concerned about his impending trial and the possibility he will be convicted and sentenced to a term of imprisonment. These various concerns may exact not only a psychological toll on the accused, but a physical one as well.

The Law Reform Commission of New South Wales, whose work product is cited in this and subsequent notes, was established by the Law Reform Commission Act 1967. It comprises a Chairman and at least two other members, all appointed by the Governor. Its purpose is, with references made to it, “to consider the law, enacted or promulgated by the Legislature of New South Wales . . . with a view to, or for the purpose of: (i) eliminating defects and anachronisms in the law, (ii) repealing obsolete or unnecessary enactments, (iii) consolidating, codifying or revising the law, (iv) simplifying or modernising the law by bringing it into accord with current conditions, (v) adopting new or more effective methods for the administration of the law and the dispensation of justice, (vi) systematically developing and reforming the law,” id. § 10(a), and to “consider proposals relating to matters in respect of which it is competent for the Legislature of New South Wales . . . to enact or promulgate laws.” Id. § 10(b).

261 Eng. Law Comm’n, Consultation Paper No. 156, supra note 11, para. 4.7.


This "heavy personal strain"\textsuperscript{264} inevitably accompanies any criminal charge, as does the expense that must be borne by a defendant who is not indigent. The Double Jeopardy Clause, 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,\textsuperscript{265} to that arising from a single trial.\textsuperscript{266} An individual who is acquitted,\textsuperscript{267} or convicted,\textsuperscript{268} of a particular offense need never again have to undergo the ordeal of the trial process for that same offense. A statute or rule of court allowing the prosecution to appeal a trial judge’s midtrial acquittal ruling could frustrate this purpose, because, at a minimum, it would require some defendants to endure the rigors of the appellate process before the trial judge’s ruling can take effect and they can be formally acquitted, and at the extreme, by compelling some defendants to undergo a second trial for the same offense if the prosecution succeeds in its appeal.


\textsuperscript{265} Second trials for the same offense are sometimes permitted by the Double Jeopardy Clause. See supra notes 76 & 129, and infra note 279 and text accompanying notes 279-82 & 320. See generally RUDSTEIN, supra note 20, at 132-48.


\textsuperscript{267} See supra text accompanying notes 72-74.

\textsuperscript{268} See supra text accompanying notes 75-76.
In those cases in which the prosecution decides to appeal the trial judge’s decision to direct a verdict of not guilty the seemingly-acquitted defendant will have to “defend” himself in the appellate court. If he is not indigent, he “is likely to carry an enormous burden if, in addition to defending himself or herself at trial, the additional expense of an appeal . . . is to be borne.”269 Even if the defendant is represented by appointed counsel,270 he may bear a heavy financial burden during the pendency of the appeal because of the continued disruption to his employment or business.271

269 N.S.W. LAW REFORM COMM’N, REPORT 77, supra note 259, para. 2.12.
An attorney retained by an individual on a flat-fee basis to conduct the individual’s defense at trial, see supra note 257, will charge an additional fee to represent the individual on an interlocutory appeal. E-mail from Richard Kling, Clinical Professor of Law, Chicago-Kent College of Law, to David S. Rudstein, Professor of Law, Chicago-Kent College of Law (May 21, 2012, 11:00 CDT) (on file with author). If the trial attorney were retained on an hourly basis, see supra note 257, the hours would continue to mount as the attorney worked to respond to the prosecution’s appeal. It is also possible that the trial attorney would not represent the defendant in the appeal, so the defendant would have to hire an attorney specializing in appeals to represent him in the appellate court.

270 See, e.g., ARIZ. REV. STAT. ANN. § 11-584 (West, Westlaw through legislation effective May 9, 2012) (“A. The public defender shall, on order of the court, defend, advise and counsel any person who is entitled to counsel as a matter of law and who is not financially able to employ counsel in the following proceedings and circumstances: 1. Offenses triable in the superior court or justice courts at all stages of the proceedings . . . . 7. Appeals to a higher court or courts.”); N.Y. COUNTY LAW § 717 (McKinney 2004) (“1. The public defender shall represent, without charge, at the request of the defendant, or by order of the court with the consent of the defendant, each indigent defendant who is charged with a crime . . . in the county or counties in which such public defender serves. When representing an indigent defendant, the public defender shall counsel and represent him at every stage of the proceedings following arrest, shall initiate such proceedings as in his judgment are necessary to protect the rights of the accused, and may, in his discretion, prosecute any appeal, if in his judgment the facts and circumstances warrant such appeal. (emphasis added)).

271 N.S.W. LAW REFORM COMM’N, REPORT 77, supra note 259, para. 2.12.
Assuming the prosecution obtains leave to appeal, see supra notes 4 & 32, the severity of this financial burden may depend upon the length of time it takes the appellate court to decide the appeal. In England, under the Criminal Justice Act 2003, some defendants have had to wait over six months for the Court of Appeal to decide an appeal by the prosecution of a trial judge’s ruling. R v. M.H., [2011] EWCA (Crim) 1508, [3], [38] (Eng.) (219 days); R v. S.H., [2010] EWCA (Crim) 1931, [1], [44], [64], [2011] 1 Crim. App. 14, at 184, 195, 201 (Eng.) (386 days); R v. W., [2010] EWCA (Crim) 927, [1], [42] (no jur. given) (214 days); R v. N.T., [2010] EWCA (Crim) 711, [9], [15], [2010] 2 Crim. App. 12, at 87, 89 (Eng.) (230 days); CPS v. Mattu, [2009] EWCA (Crim) 1483, [1], [22] (Eng.) (232 days); R v. M.K., [2009] EWCA (Crim) 952, [1], [8], [21], [27], [30] (Eng.) (324 days); R v. L., [2008] EWCA (Crim) 1970, [6]-[7], [36]-[37], [2009] 1 Crim. App. 16, at 232, 233, 242 (Eng.) (212 days); R v. N.W., [2008] EWCA (Crim) 2, [1], [39] (Eng.) (271 days); R v. P., [2007] EWCA (Crim) 3484, [1]-[2], [13] (Eng.) (somewhere around 319 days).
One must remember, however, that a trial judge’s decision to order an acquittal normally will occur at the conclusion of the prosecution’s case in chief and will end the defendant’s trial (at least for the moment) before the accused begins presenting his defense. The appellate proceedings therefore can be viewed, in effect, as a substitute for the remainder of the defendant’s trial. During the pendency of the appeal, the accused will not have to face the stress, embarrassment, and expense of the remainder of his trial. And while he still must “defend” himself in the appellate court, doing so under these circumstances may be less stressful and embarrassing than defending himself at trial,272 in large part because the trial judge has already decided to rule in his favor after concluding the prosecution did not prove its case.273 On the other hand, the appellate process almost certainly will last longer than it would have taken to complete the defendant’s trial,274 so whatever stress and embarrassment the appellate process does produce will last longer than that which would have resulted from the completion of the defendant’s trial.275 In addition, the appeal may be more expensive for a non-indigent

272 *Cf.* United States v. DiFrancesco, 449 U.S. 117, 136 (1980) (“This limited appeal [by the prosecution of a convicted defendant’s sentence] does not involve a retrial or approximate the ordeal of a trial on the basic issue of guilt or innocence. Under [the applicable statute], the appeal is to be taken promptly and is essentially on the record of the sentencing court.”).

273 The defendant will of course be worried about having to undergo a new trial, or the resumption of his original trial, and his life may be put on “hold” during the pendency of the appellate process. Those concerns were discussed earlier. *See supra* text accompanying notes 230-54.

274 As previously noted, some defendants in England have had to wait over six months for the Court of Appeal to decide the prosecution’s appeal. *See supra* note 271. Even if it took the appellate court only a few days to decide an appeal by the prosecution, *see infra* note 275, that period is still likely to exceed the time it would have taken for the defendant to have presented his case in the trial court, for rebuttal by the prosecution, and for the jury to have reached its verdict.

275 One way to limit the stress and embarrassment during the pendency of the prosecution’s appeal would be to expedite all such appeals and, with perhaps some exceptions, such as for death penalty cases, give them priority over other appeals pending in the appellate court. Given the limited issue involved, an appellate court could decide such an appeal in a very short period of time. *E.g.*, R v. J.G., [2006] EWCA (Crim) 3276, [1], [15] (Eng.) (the trial judge ruled on Dec. 4, 2006, that the defendant had no case to answer, and the Court of Appeal dismissed the prosecution’s appeal four days later, on Dec. 8, 2006).
defendant than would the completion of the trial. On balance, then, one might reasonably conclude that the distress and trauma, and perhaps also the financial cost, of the appellate process that has replaced that which would have resulted had the trial judge denied the defendant’s motion for a court-ordered acquittal and allowed the trial to continue until the jury reached a verdict will to some extent increase the overall stress and anxiety caused by the criminal process.

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276 See supra note 269.

277 See N.S.W. LAW REFORM COMM’N, REPORT 77, supra note 259, para. 2.13 (“If, in fact, there were no mistake, and, ultimately, an appeal court were to find the original verdict of acquittal sound, then the accused has faced an unnecessary emotional and financial burden.”).
Moreover, if the appellate court disagrees with the trial judge and orders a new trial, the defendant will suffer the anxiety, embarrassment, and perhaps expense of a second trial for the same offense, thus frustrating one of the major purposes of the Double Jeopardy Clause. It is true, of course, that the double jeopardy provision does not in all circumstances bar a second trial for the same offense. A second trial for the same offense is permissible, for example, when the trial judge in the defendant’s first trial declares a mistrial, either at the request of the defendant or with his consent, or, regardless of the defendant’s consent, because of the jury’s inability to reach a verdict or some other valid reason. In each of these situations, though, the defendant might order the resumption of the defendant’s initial trial, see Criminal Justice Act, 2003, c. 44, § 61(4)(a) (Eng.), which would also cause the defendant additional anxiety, embarrassment, and perhaps expense.


Oregon v. Kennedy, 456 U.S. 667, (1982) (holding a retrial is constitutionally permissible following a mistrial declared at the request of the defendant, except when the prosecution engaged in conduct “intended to ‘goad’ the defendant into moving for [the] mistrial”); United States v. Dinitz, 424 U.S. 600, 607-08, 611 (1976) (holding a retrial is permissible following a mistrial declared at the request of the defendant or with his consent, even if his request were necessitated by judicial or prosecutorial error).

United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824) (holding a retrial is constitutionally permissible following a mistrial brought about by a deadlocked jury). Accord Blueford v. Arkansas, 132 S. Ct. ___, ___ (2012), 2012 WL 1868066, at *7 (May 24, 2012) (“[T]he trial court’s reason for declaring a mistrial here— that the jury was unable to reach a verdict—has long been considered the ‘classic basis’ establishing . . . a [manifest] necessity [to declare a mistrial without barring a subsequent trial].”).

Perez, 22 U.S. (9 Wheat.) at 580 (holding the Double Jeopardy Clause does not preclude retrial when a trial judge, without the defendant’s consent, declares a mistrial because “there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated”). Accord Blueford, 132 S. Ct. at ___, 2012 WL 1868066, at *7 (May 24, 2012) (“[A] trial can be discontinued without barring a subsequent one for the same offense when ‘particular circumstances manifest a necessity’ to declare a mistrial.” (quoting Wade v. Hunter, 336 U.S. 684, 690 (1949)); Arizona v. Washington, 434 U.S. 497, 505, 516 (1978) (holding a retrial is constitutionally permissible following a mistrial brought about by a “manifest necessity”).
defendant’s trial ended without a decision—the defendant was neither convicted nor acquitted—and it can be persuasively argued that the interests of justice require the defendant undergo a second trial for the same offense so the question of his guilt or innocence can be resolved one way or the other.283 In addition, when the defendant moved for a mistrial, or consented to one, it is by no means unfair to allow him to be tried anew for the same offense, for he himself sought to end his trial, or at least consented to have his trial end, before the fact finder reached a decision on his guilt or innocence.284 Indeed, in seeking, or agreeing, to have the jury discharged because error infected the trial, the defendant most likely contemplated he would be subject to a new trial.285

283 See Illinois v. Somerville, 410 U.S. 458, 463 (1973) (recognizing the public has an “interest . . . in seeing that a criminal prosecution proceed to verdict, either of acquittal or conviction”). With respect to the situation involving a hung jury, there are additional considerations. If a jury verdict, whether a conviction or acquittal, requires unanimity, as in federal criminal trials, see Apodaca v. Oregon, 406 U.S. 404, 369 (Powell, J., concurring in judgment) (concluding the Sixth Amendment requires a unanimous verdict in federal criminal trial); id. at 414-15 (1972) (Stewart, J., joined by Brennan and Stewart, JJ., dissenting) (concluding the Sixth Amendment, as applicable to the states requires a unanimous verdict in both state and federal criminal trials); id. at 388, 394 (Douglas, J., joined by Brennan and Marshall, JJ., dissenting) (same), and most states, see 6 LAFAVE ET AL., supra note 99, § 22.1(e), or in some circumstances the agreement of a specified number, such as ten members of a twelve-person jury, LA. CONST. art. 1, § 17 (“A case in which punishment is necessarily confinement at hard labor shall be tried before a jury of twelve persons, ten of whom must concur to render a verdict.”); OR. CONST. art. I, § 11 (“[I]n the circuit court ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by a unanimous verdict . . . .”); see also P.R. CONST. art. II, § 11 (“In all prosecutions for a felony the accused shall have the right of trial by an impartial jury composed of twelve residents of the district, who may render their verdict by a majority vote which in no case may be less than nine.”), precluding retrial when the jury cannot meet the requirements for a verdict, for example, when it is split 9-3 in favor of conviction, or 8-4 in favor of acquittal, would actually change the requirements for a verdict of not guilty to provide, in effect, that a jury reaches a verdict of not guilty whenever a sufficient number do not agree to convict. While some may prefer such a rule, it has never been the law in Anglo-American legal systems. Moreover, although “fault” can sometimes be attributed to one party or the other when a mistrial is declared before the case is sent to the jury—in the sense that the prosecutor or defense counsel engaged in some (mis)conduct that gave rise to the request for a mistrial (or to the judge’s sua sponte declaration of a mistrial)—neither party can be “faulted” for the jury’s inability to reach a verdict.


285 See id. at 608. The trial court, in granting the mistrial, most certainly also anticipated the defendant would be retried. United States v. Scott, 437 U.S. 82, 92 (1978) (“When a trial court declares a mistrial, it all but invariably contemplates that the prosecutor will be permitted to proceed anew notwithstanding the defendant’s plea of double
jeopardy.")}.
The above reasoning does not apply, however, when a trial judge erroneously ends a defendant’s trial by ruling the prosecution’s evidence failed to establish a prima facie case of guilt. First, unlike the situation involving the declaration of a mistrial, when a trial judge concludes the prosecution’s evidence is insufficient, there is (or at least will be) a decision in the case—the trial judge has concluded the prosecution failed to prove its case and the defendant should be acquitted. If retrial is barred, the charge against the defendant will not stand unresolved. Second, although the defendant moved for a court-ordered acquittal, and in that sense is “responsible” for the trial judge’s ruling, the defendant—unlike in the situation in which he asks for or consents to a mistrial because of some error in the proceedings—sought to end the trial with a decision on his guilt or innocence. He did not desire a new trial, nor did he contemplate one would take place if the judge granted his motion; rather he wanted the case to end then and there with his acquittal, and thought that if the judge granted his motion it would do so.

That the trial judge might have “erred” in ruling the defendant was entitled to a directed verdict of not guilty is not the defendant’s fault. So why should he have to “pay” for it by

286 Compare Scott, 437 U.S. at 96 (“[T]he defendant elected to seek termination of the trial on grounds unrelated to guilt or innocence. This is scarcely a picture of an all-powerful state relentlessly pursuing a defendant who had either been found not guilty or who had at least insisted on having the issue of guilt submitted to the first trier of fact.” (emphasis added)); id. at 98-99 (“[T]he defendant, by deliberately choosing to seek termination of the proceedings against him on a basis unrelated to factual guilt or innocence of the offense of which he is accused, suffers no injury cognizable under the Double Jeopardy Clause if the government is permitted to appeal from such a ruling of the trial court in favor of the defendant.”) (emphasis added)).

287 The word “erred” is enclosed in quotation marks because a ruling by a trial judge is deemed to be erroneous whenever the majority of an appellate court disagrees with her decision. In fact, the ruling may not be an “error” at all. For it is quite conceivable (as illustrated by the numerous cases in which a supreme court has reversed the decision of an appellate court that disagreed with a ruling of the trial judge) the trial judge—not the appellate court—reached the “correct” result. See ENG. LAW COMM’N, CONSULTATION PAPER NO. 158, supra note 15, para. 3.19 n.21 (acknowledging that “appeal courts . . . can make mistakes”). However, because the appellate court is a “higher” court than the trial court, its decision will stand (unless, of course, an even higher court overturns its decision).
undergoing a new trial? Although a trial judge in a common law system plays a neutral role in the trial, he “is more closely allied with the government than with the accused,” and is employed and paid by the state. Why should that same state, as represented by the prosecution, be entitled to drag an individual into court a second time and require him to undergo the ordeal of a second trial because one of its own actors made a mistake? As one judge put it, “[i]f the [trial] judge makes a mistake and the accused is acquitted, then the setting aside of the verdict may involve the accused in the emotional ordeal of going through it all again, although the mistake was something over which he had no control.”

One therefore must conclude that a statute or rule of court allowing the prosecution to appeal a trial judge’s decision to order an acquittal, and to try the defendant again for the same offense if the appeal succeeds, frustrates the Double Jeopardy Clause’s purpose of limiting the ordeal of the trial process to that arising from a single trial.

3. Reducing the Risk of an Erroneous Conviction

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288 N.S.W. LAW REFORM COMM’N, REPORT 77, supra note 259, para.2.13.
289 FRIEDLAND, supra note 11, at 298.
Prohibiting the government from prosecuting an acquitted individual a second time 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” and thereby reduces the risk of erroneously convicting an innocent person. As the Supreme Court recognized in *Green v. United States*, if the government were allowed to make repeated attempts to convict an individual for an offense, it would “enhanc[e] the possibility that even though innocent he may be found guilty.” The risk of an erroneous conviction would increase for a number of reasons. First, if an innocent person accused of a crime could face additional trials for the same offense, even after being acquitted, he might decide to dispense with a trial and plead guilty to the charge against him. Second, and more importantly, permitting a second trial for the same offense, despite an acquittal, would allow the government to use the first trial as a “dress rehearsal,” giving it the opportunity to “hon[e] its trial strategies and perfect[] its evidence” in light of what it learned at the first trial about the weaknesses of its case and the strengths.

292 According to Professor Martin L. Friedland, the increased chances of convicting an innocent person at a second trial for the same offense “is at the core of the problem.” FRIEDLAND, supra note 11, at 4.
293 355 U.S. 184 (1957).
294 Id. at 188. See also ENG. LAW COMM’N, CONSULTATION PAPER NO. 156, supra note 11, para. 4.5; AUSTRALIAN MODEL CRIMINAL CODE, DISCUSSION PAPER, supra note 20, at 2.
295 FRIEDLAND, supra note 11, at 4.
and weaknesses of the defendant’s case.\textsuperscript{300} With that knowledge, the government could, for example, “‘supply evidence which it failed to muster in the first proceeding.’”\textsuperscript{301} Third, if the government could repeatedly prosecute an individual for the same offense, it could, with its vastly superior resources,\textsuperscript{302} wear down the defendant—financially,\textsuperscript{303} emotionally,\textsuperscript{304} and

\textsuperscript{299} \textit{DiFrancesco}, 449 U.S. at 128.

\textsuperscript{300} Professor Friedland writes that at a second trial the defendant may be at a greater disadvantage than he was at the first trial because he will normally have disclosed his complete defence at the former trial. Moreover, he may have entered the witness-box himself. The prosecutor can study the transcript and may thereby find apparent defects and inconsistencies in the defence evidence to use at the second trial.

\textit{FRIEDLAND, supra} note 11, at 4. \textit{See also ENG. LAW COMM’N, CONSULTATION PAPER NO. 156, supra} note 11, para. 4.5 (“[B]ecause there has already been one trial at which the defence has shown its hand, the prosecution may enjoy a tactical advantage at a second trial; and this will increase the likelihood of a conviction, whether the defendant is guilty or innocent.”); \textit{ENG. LAW COMM’N, REPORT NO. 267, supra} note 11, para. 7.65 (“[A]t a retrial witnesses will have had a dry run, tactics will have been revealed and weaknesses in the prosecution case will have been spotted and possibly plugged.”). \textit{Cf. Arizona v. Washington}, 434 U.S. 497, 504 n.14 (1978) (quoting Judge Leventhal’s description in \textit{Carsey v. United States}, 392 F.2d 810, 813-14 (D.C. Cir. 1967) (concurring opinion), of how some of the Government’s witnesses subtly changed their testimony over the course of four trials so it became more favorable to the Government); \textit{Ashe v. Swenson}, 397 U.S. 436, 447 (1970) (in a prosecution for robbing a participant in a poker game, following the defendant’s acquittal of robbing another participant in the same poker game, the State conceded that when the prosecutor lost the first trial, “‘he did what every good attorney would do—he refined his presentation in light of the turn of events at the first trial’”); \textit{Hoag v. New Jersey}, 356 U.S. 464, 465-66 (1958) (in a prosecution for robbing a person at a tavern, following the defendant’s acquittal of robbing three other individuals at the tavern in the same incident, the State 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.” \textit{Dennis, supra} note 104, at 939. The defendant’s resources, however, pale in comparison to those of the government, \textit{see infra} note 302, and the defendant might be financially, emotionally, and physically worn out after the first trial. \textit{See infra} text accompanying notes 303-05. The defendant might therefore decide to plead guilty before the retrial because of his inability to undergo the burden of a second trial. \textit{Cf.} text accompanying note 294. Even if he opts to undergo a second trial, 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, with his limited resources, 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 jury from convicting him “contrary to the evidence” at his second trial. \textit{See infra} text accompanying notes 307-08.

\textsuperscript{301} \textit{Tibbs}, 457 U.S. at 11 (quoting \textit{Burks v. United States}, 437 U.S. 1, 11 (1978)).

\textsuperscript{302} The government possesses an enormous advantage in resources over those of an individual accused of crime, typically allowing it to do much more in its efforts to convict the individual than the individual can do in his defense. For example, if the prosecution knows a particular person’s testimony would be favorable to it, but does
physically—\footnote{See supra text accompanying notes 257-60.} and obtain a conviction “through sheer governmental perseverance.”\footnote{Tibbs, 457 U.S. at 41. \textit{See also} Friedland, \emph{supra} note 11, at 4 (“In many cases an innocent person will not have the stamina or resources effectively to fight a second charge.”).} Finally, if it is accepted that juries do sometimes return a guilty verdict “contrary to the evidence,”\footnote{\textit{Black’s}, \emph{supra} note 16, at 1697 (defining a “perverse verdict” as “[a] verdict so contrary to the evidence that it justifies the granting of a new trial”).} “the chance that a particular defendant will be perversely convicted must increase if he is tried more than once.”\footnote{\textit{Eng. Law Comm’n}, \emph{Consultation Paper No. 156, supra} note 11, para. 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—a case which would fall only into the category formerly described as ‘lurking doubt’ cases”).} In sum, as Professor 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.”\footnote{Akhil Reed Amar \\ & Jonathan L. Marcus, \textit{Double Jeopardy After Rodney King}, 95 \textit{Colum. L. Rev.} 1, 31 n.158 (1995). \textit{See also} Comment, \textit{Twice in Jeopardy}, 75 \textit{Yale L.J.} 262, 278 n.74 (1965) (attempting to illustrate the point through a mathematical equation).}

not know the person’s whereabouts, it can spend huge sums of money to track down the missing witness, perhaps even using the police department to help it. Moreover, not only can the prosecution assign numerous staff attorneys to prepare and present its case, it also can use doctors, scientists, and other forensic experts on the government payroll (or it can hire such individuals on a case-by-case basis) to help in the investigation, preparation, and presentation of its case. In sum, the prosecution can spend “whatever it takes” in a particular case to obtain a conviction. On the other hand, it is unlikely that all but the wealthiest criminal defendants could afford to retain an attorney and then match, or even come close to matching, the government’s spending to allow the attorney to investigate the facts in the case and to prepare for trial. Nor is it likely that a court-appointed attorney would be permitted to expend substantial sums from the public coffers for such purposes.
A statute or rule of court allowing the prosecution to appeal a trial judge’s decision to
direct a verdict of not guilty will frustrate this purpose of the Double Jeopardy Clause.310
Whenever the prosecution, acting in good faith, brings an individual to trial on a criminal charge,
it believes it has sufficient evidence to prove the individual’s guilt beyond a reasonable doubt.311
In trials that run their course, the prosecution may learn its belief was wrong when the jury
acquits the defendant, but at that point the Double Jeopardy Clause prevents the prosecution
from strengthening its case and bringing a second prosecution against the acquitted individual
for the same offense. When, however, a trial judge decides at the close of the prosecution’s case
in chief that the prosecution’s evidence is insufficient to prove the defendant’s guilt, the
prosecution learns at an earlier time that its evidence may not be as strong as it initially believed.
Yet, allowing the prosecution to appeal the trial judge’s ruling may result in the prosecution’s
being able to retry the “acquitted” defendant for the same offense.312 And certainly if it
succeeds in its appeal and obtains a new trial, it will not merely present the same evidence that
initially resulted in the trial judge’s decision to order an acquittal.313 For even if the appellate

310 See N.S.W. LAW REFORM COMM’N, REPORT 77, supra note 259, para. 2.6 (“[T]he ultimate consequence
of allowing an appeal from a directed verdict of acquittal may be a retrial. The accused’s position in that event is
unlikely to be exactly the same as it was at the original trial, and, in fact, more likely to be prejudiced in comparison
with the earlier position.”); Anne Bowen Poulin, Double Jeopardy and Judicial Accountability: When is an Acquittal
defendant] is most acute when either the court or the jury has assessed the prosecution’s case and found it
wanting.”).

311 See STANDARDS FOR CRIMINAL JUSTICE § 3-3.9 (“A prosecutor should not institute, cause to be
instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to
support a conviction.”).

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

313 The only exception might be when the appellate court reverses the trial judge’s ruling because the trial
judge based her ruling on the absence of any evidence of what the trial judge concluded constituted a required
element of the offense, see 1 LAFAVE, supra note 28, § 1.8(1) (“The prosecution may have proved all of the required
elements of the crime except one, but a lack of proof concerning one element requires a directed verdict.”), but
court were correct and the prosecution did present a prima facie case of guilt, the prosecution will have been put on notice that, at least in the eyes of a trained, professional judge, its case against the defendant was not a particularly strong one, and it “presumably will be spurred to greater efforts in gathering and presenting proof of guilt”\(^\text{314}\) at the defendant’s second trial. Moreover, if the trial judge gave a detailed explanation of her reasons for finding the prosecution’s case insufficient, the prosecution will have a road map marking the areas in which it needs to strengthen its case at the retrial.\(^\text{315}\) For example, it may try to strengthen its case against the defendant by presenting additional evidence on a particular factual issue;\(^\text{316}\) or it may work with a witness so the witness comes across more credibly while testifying at the second trial than he did at the first trial; or perhaps it will refrain from calling a particular witness whose testimony at the first trial was confused or somewhat contradictory.\(^\text{317}\) In effect, it will treat the first, aborted, trial as a “dry run”\(^\text{318}\) for the second trial. And the prosecution will gain an advantage over the defendant even though the defendant did not put on his case at the first trial.

As the English Law Commission explained,

\(^{314}\) Poulin, supra note 310, at 977.

\(^{315}\) Professor Poulin concludes that, “if it is accompanied by a statement of reasons, a judicial determination of inadequacy will be a more effective spur to the prosecution [to correct the deficiency in its case] than [would] a general verdict of not guilty.” Id.

\(^{316}\) Cf. Ashe v. Swenson, 397 U.S. 436, 439-40 (1970) (at the defendant’s trial for the armed robbery of a participant in a poker game, following the defendant’s acquittal of armed robbery of another participant, the prosecution elicited stronger identification testimony from three of the witnesses who had testified at the defendant’s first trial and declined to call the robbery victim whose identification testimony at the first trial had been negative).


\(^{318}\) Ashe, 397 U.S. at 445.
the defence may have tested [the prosecution’s evidence] in cross-examination. In doing so the defence may have revealed some or all of its strategy, although it will not have begun to present its case. It may also have provided the prosecution witnesses who have given evidence with a ‘dry run’. Accordingly, in these ways the defence would be disadvantaged at a retrial by facing a prosecution potentially better prepared.319

319  ENG. LAW COMM’N, CONSULTATION PAPER NO. 158, supra note 15, para. 6.3 (stating, however, that, “[c]onversely, the defence will have available for cross-examination on the retrial an additional version of events from prosecution witnesses on the basis of which it may be able to mount a challenge to witnesses’ reliability, based on inconsistencies in their various accounts”).
It is true of course that retrials are a routine feature of the criminal justice system in the United States, occurring most frequently after a convicted defendant successfully appeals his conviction, or after the trial judge declares a mistrial in the defendant’s initial trial, either because the jury could not reach a verdict or because of an error that infected the trial. Retrials are permitted in these situations even though the prosecution is likely to have an additional advantage over the defendant at the second trial.\(^{320}\) Consequently, it could be argued that the prosecution’s ability to strengthen its case at a retrial following the prosecution’s successful appeal of a trial judge’s midtrial acquittal ruling should not be a reason for barring the prosecution from taking such appeals. This reasoning is flawed, however. Merely because the legal system sometimes allows the prosecution to enjoy an additional advantage over the defendant at a retrial does not mean it should always permit it to do so. One must remember that the prosecution’s ability to strengthen its case at a retrial raises a concern because it increases the possibility that an innocent person will be convicted. Furthermore, each of the

\(^{320}\) See supra notes 76, 129 & 279, and text accompanying notes 279-82.

The extent of the additional advantage may depend upon the stage at which the defendant’s first trial ended. The prosecution is likely to have learned very little about the defense case, or any weaknesses in its own case, when the first trial ended before the prosecution began presenting its evidence, such as during the prosecutor’s opening statement. As a general matter, though, it is likely that the prosecution will have learned significantly more about the defense strategy and evidence, and perhaps about any weaknesses in its own case, when the trial judge aborted the initial trial during, or immediately following the completion of, the prosecution’s case. For even when the trial was halted before the defense presented its case, the prosecution may have learned something about the defendant’s strategy. See supra text accompanying note 319. Of course, it is likely the prosecution will have gained the most if the defendant’s first trial ran its course, that is, after both the prosecution and the defense fully presented their cases, as in the situations of a hung jury or a successful defense appeal of a conviction.

Even if the appellate court merely ordered the resumption of the defendant’s initial trial upon finding the trial judge erred in concluding the prosecution did not establish a prima facie case of the defendant’s guilt, and the prosecution were not allowed to reopen its case upon the resumption of the trial, it could still, if the defendant presents a case, attempt to strengthen its attack on certain aspects of the defendant’s case and attempt to strengthen its own case in its rebuttal. Moreover, given the practicalities of the situation, it will be a rare case in which the defendant’s original trial can be resumed. For the appellate process in most jurisdictions in the United States takes time, and it would be difficult to keep the jury empanelled during the time it would take for the appellate court to decide the prosecution’s appeal.
situations mentioned above in which retrials are common is distinguishable from the situation in which a retrial follows the reversal of a trial judge’s midtrial acquittal ruling.

When a convicted defendant appeals his conviction on the ground that error infected his trial, he is the one asking that the case against him not end with the judgment entered upon the jury’s verdict of guilty, and at the time he appeals, it would seem he would be quite content if the appellate court overturned his conviction and granted him a new trial, even though the prosecution might have an additional advantage at a second trial. That certainly is not the case when the prosecution appeals a trial judge’s decision to order an acquittal. Should the appellate court disagree with the trial judge and remand the case for a new trial, or the resumption of the initial trial, the defendant will be forced to surrender a decision favorable to him (i.e., an acquittal ruling), and one that, absent the appeal, would have forever ended the case against him for that offense;\(^{321}\) in addition, he may be forced to undergo a second trial at which he is likely to be at an additional disadvantage. In short, while it may not be unfair to retry a convicted defendant who seeks to overturn his conviction and obtain a new trial, it may well be unfair to compel a defendant who has benefitted from the trial judge’s ruling ordering an acquittal to give up that favorable ruling and undergo a new trial.

\(^{321}\) See supra text accompanying notes 71-74 & 80-86.
As explained earlier, when a jury, after hearing all the evidence in the case, cannot reach a verdict, there is no decision in the case.\textsuperscript{322} Moreover, neither party can be blamed for the jury’s inability to reach a decision. Under such circumstances, the interests of justice require a second trial for the same offense so the charges against the defendant can be resolved.\textsuperscript{323} Prohibiting a retrial in such situations would frustrate the public interest in resolving the charges against the accused,\textsuperscript{324} and in effect, would eliminate the requirement that a prescribed number of jurors agree upon a “not guilty” verdict for a defendant to be acquitted.\textsuperscript{325} Unlike the case of a hung jury, however, when a trial judge decides to order an acquittal there will be (absent a right of appeal) a decision in the case—the trial judge has concluded the prosecution failed to meet its burden of proof and the defendant therefore should be acquitted. Furthermore, even if the trial judge erred in finding that the prosecution failed to meet its burden of proof, that error can be attributed to an agent of the state—the trial judge.\textsuperscript{326} Clearly, the error was not the defendant’s fault, and he should not have to “pay” for it by being forced to undergo a new trial.\textsuperscript{327}

Finally, the declaration of a mistrial during the defendant’s initial trial because of some error that infected the trial—like the situation involving a deadlocked jury, but unlike the situation

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\textsuperscript{322} See supra text accompanying notes 281 & 283.
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\textsuperscript{324} See Illinois v. Somerville, 410 U.S. 458, 463 (1973) (recognizing that the public has an “interest . . . in seeing that a criminal prosecution proceed to verdict, either of acquittal or conviction”).
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\textsuperscript{327} N.S.W. LAW REFORM COMM’N, REPORT 77, supra note 259, para. 2.13.
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involving a trial judge’s decision to order an acquittal—ends that trial without a determination of
the defendant’s guilt or innocence. It therefore can again be argued that the interests of justice
require the case against the defendant be resolved one way or the other. 328 Moreover, when the
trial judge declares a mistrial at the request of the defendant, or with his consent, the defendant
in nearly all circumstances contemplates being tried again for the same offense. 329 Indeed, in
most situations in which the defendant moves for a mistrial, he wants a retrial because he thinks
the error that gave rise to his motion would increase the chances of his being convicted at the
first trial and would in any event necessitate a retrial following a successful appeal. 330 This is
not true when a defendant moves for a directed verdict of not guilty or its equivalent. A
defendant who files such a motion seeks to end the trial with a decision on his guilt or
innocence. 331

Thus, although retrials in criminal cases occur with some frequency in the United States,
such retrials should be limited to those situations in which a convicted defendant successfully
appeals his conviction or those in which there was no decision in the case, either because of a

328 See Illinois v. Somerville, 410 U.S. 458, 463 (1973) (recognizing that the public has an “interest . . . in
seeing that a criminal prosecution proceed to verdict, either of acquittal or conviction”).


330 See Dinitz, 424 U.S. at 608, 610.

331 Compare Scott, 437 U.S. at 96 (“[T]he defendant elected to seek termination of the trial on grounds
unrelated to guilt or innocence. This is scarcely a picture of an all-powerful state relentlessly pursuing a defendant
who had either been found not guilty or who had at least insisted on having the issue of guilt submitted to the first
trier of fact.” (emphasis added)); id. at 98-99 (“[T]he defendant, by deliberately choosing to seek termination of the
proceedings against him on a basis unrelated to factual guilt or innocence of the offense of which he is accused,
suffers no injury cognizable under the Double Jeopardy Clause if the [g]overnment is permitted to appeal from such
a ruling of the trial court in favor of the defendant.” (emphasis added)).
“hung” jury or the declaration of a mistrial based upon trial error. Such a limitation will keep to a minimum the number of cases in which the additional advantages enjoyed by the prosecution at a retrial could lead to the conviction of an innocent person.

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

Another purpose of the Double Jeopardy Clause identified by the Supreme Court is to protect the prerogative of the jury, acting “as the conscience of the community in applying the law,”332 “to acquit against the evidence,”333 that is, to find the defendant not guilty “even when its findings as to the facts, if literally applied to the law as stated by the judge, would have resulted in a conviction.”334 A jury may exercise this power to “nullify” the law in a particular case for one of a variety of reasons,335 such as its belief that the conduct in question should not be a crime,336 or its feeling that the punishment for the crime in question is too severe.337

332 Westen & Drubel, supra note 97, at 130.


334 6 LAFAVE, ET AL., supra note 99, § 22.1(g).

335 See generally CLAY S. CONRAD, JURY NULLIFICATION: THE EVOLUTION OF A DOCTRINE (1998); 6 LAFAVE ET AL., supra note 99, § 22.1(g).

336 For instance, a jury might be unwilling to convict an individual of murder when, at the request of a terminally-ill spouse, relative, friend, or patient, he intentionally killed that person. See, e.g., Three Acquitted of Mercy Killing, TOWNSVILLE BULLETIN (Austl.), Oct. 24, 2001, at 16, available at 2001 WLNR 5392278 (reporting the acquittal by a jury of a doctor who used a lethal injection to kill a terminally-ill patient hours after the patient begged another doctor to end her suffering). Or, a jury might acquit a battered wife of murder for intentionally killing her abusive husband despite several days having passed since he last beat her, thereby eliminating any valid self-defense claim). See Melissa Jenkins, Sniper Mother Walks Free–Murder Acquittal Sets New Defence for Battered Wives, DAILY TELEGRAPH (Sydney), Mar. 4, 2006, at 1, available at 2006 WLNR 3677321 (reporting a jury found a battered woman who laid in wait before shooting her husband to death not guilty of either murder or manslaughter). See also CONRAD, supra note 335, at 151-52.
CONRAD, supra note 335, at 147-49. See also KALVEN & ZEISEL, supra note 28, at 306-12.
Permitting the prosecution to appeal a trial judge’s ruling allowing a motion for a directed verdict of not guilty does not frustrate this policy. For such a ruling ends the case, at least temporarily, in the defendant’s favor before the jury has even had an opportunity to consider the evidence and decide whether to exercise its power to nullify the law and acquit the defendant despite its finding the defendant committed the crime in question. Moreover, although a defendant possesses a “‘valued right to have his trial completed by a particular tribunal’”—one “he might believe to be favorably disposed to his fate”—by moving for a court-ordered acquittal, he has asked the trial judge to end the case before the particular jury


This right has particular significance in the context of mistrials. After the start of a trial, the prosecution might, for a variety of reasons, find the case “going badly,” Gori v. United States, 367 U.S. 364, 369 (1961), for it. Rather than continue the trial to what it believes would likely be an acquittal, the prosecution might prefer to have “another, more favorable opportunity to convict the accused,” id., by starting the trial anew. Doing so, however, would “depriv[e] the defendant of his option to go to the first jury and, perhaps, end the dispute then and there with an acquittal.” Jorn, 400 U.S. at 484 (plurality opinion). Consequently, the Double Jeopardy Clause prohibits a retrial if the trial judge declares a mistrial, either sua sponte or at the request of the prosecution, without the defendant’s consent, see, e.g., United States v. Jorn, 400 U.S. 470, 486-87 (1971) (plurality opinion) (concluding the double jeopardy provision prohibited retrial following the trial judge’s sua sponte declaration of a mistrial to allow several government witnesses the opportunity to consult with attorneys about their privilege against self-incrimination); Downum v. United States, 372 U.S. 734, 737-38 (1963) (holding 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 also Oregon v. Kennedy, 456 U.S. 667, (1982) (holding the Double Jeopardy Clause bars retrial following a mistrial declared at the request of the defendant when the prosecution engaged in conduct “intended to ‘goad’ the defendant into moving for [the] mistrial”), and in the absence of a “manifest necessity.” United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824) (holding the Double Jeopardy Clause does not preclude retrial when a trial judge, without the defendant’s consent, declares a mistrial because “there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated”). Accord Blueford v. Arkansas, 132 S. Ct. ___ (2012), 2012 WL 1868066, at *7 (May 24, 2012) (“[A] trial can be discontinued without barring a subsequent one for the same offense when ‘particular circumstances manifest a necessity’ to declare a mistrial.” (quoting Wade v. Hunter, 336 U.S. 684, 690 (1949))). See also Renico v. Lett, 130 S. Ct. 1855, 1862-64 (2010) (discussing “the ‘clearly established Federal law’ in this area” (quoting 28 U.S.C. § 2254(d)(1) (2006))); Washington, 434 U.S. at 505-17 (discussing the meaning of “manifest necessity”).

340 It is of course possible for the trial judge, on her own motion, to decide to order an acquittal.
reached a verdict. By doing so, he has shown his preference that the case end then and there, and deliberately elected “to forgo his valued right to have his guilt or innocence determined”341 by the jury hearing the case.342 In other words, by filing his motion for a directed verdict of not guilty he voluntarily gave up any opportunity he may have had for the jury to acquit him against the evidence. If he believed the jury would have acquitted him regardless of the evidence of his guilt, he could have refrained from moving for a directed verdict and allowed the case to run its course. Having chosen instead to make such a motion, he cannot convincingly claim that allowing the prosecution to appeal the trial judge’s decision interfered with the policy of allowing the jury to acquit against the evidence.343

LAFAVE, supra note 28, § 1.8(i); e.g., FED. R. CRIM. P. 29(a) (“After the government closes its evidence or after the close of all the evidence, . . . the court may on its own consider whether the evidence is insufficient to sustain a conviction.” (emphasis added)); CAL. PENAL CODE § 1118.1 (West _2004) (“In a case tried before a jury, the court . . . on its own motion, at the close of the evidence on either side and before the case is submitted to the jury for decision, shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal.” (emphasis added)); FLA. R. CRIM. P. 3.380(a) (“If, at the close of the evidence for the state or at the close of all the evidence in the cause, the court is of the opinion that the evidence is insufficient to warrant a conviction, it may . . . enter a judgment of acquittal.”); MASS. R. CRIM. P. 25(a) (“The judge . . . on his own motion shall enter a finding of not guilty of the offense charged in an indictment or complaint or any part thereof after the evidence on either side is closed if the evidence is insufficient as a matter of law to sustain a conviction on the charge.” (emphasis added)). Such situations are rare, however.


342 Cf. id. at 93-94 (“[A] motion by the defendant [for mistrial] is deemed to be a deliberate election on his part to forgo his valued right to have his guilt or innocence determined before the first trier of fact. ‘The important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of [prosecutorial or judicial] error.’” (quoting United States v. Dinitz, 424 U.S. 600, 609 (1976))).

343 The argument that permitting the prosecution to appeal the trial judge’s decision to allow a motion for a directed verdict interferes with a policy of permitting acts of “judicial nullification,” i.e., allowing the trial judge to “acquit for reasons of personal conscience, irrespective of the defendant’s actual guilt,” Westen & Drubel, supra note 97, at 134, is unpersuasive. A trial judge’s midtrial acquittal of a defendant in a jury trial is, for several reasons, unlikely to be one against the evidence. First, judges, unlike most jurors, are professional actors in the criminal justice system and on a daily basis are asked to supervise trials and apply the law in a neutral manner. Consequently, they are likely to view it as their professional responsibility to follow the law, certainly more so than would individual members of the community who are thrust, perhaps unwillingly, into the role of a juror on a one-time, or at most occasional, basis. Second, in those jurisdictions in which trial judges are appointed to their
5. Preventing the Government from Harassing an Individual

positions, a trial judge would most likely conclude that, unlike a jury, she would not be acting as a representative of the community, see, e.g., United State v. Maybury, 274 F.2d 899, 903 (2d Cir. 1960) (Friendly, J.) (stating, in a case involving an appointed judge, that “the judge is hardly the ‘voice of the community,’ even when he sits in the jury’s place”), if, despite sufficient evidence of the defendant’s guilt, she were to acquit him against the evidence by allowing a motion for a directed verdict of not guilty. Finally, a judge in a jury trial–even one elected by the voters in the community–would probably believe that any decision to nullify the law should be made by the true representatives of the community in the case–the jury–and would be reluctant to interfere by engaging in an act of “judicial nullification” under the guise of a directed verdict of not guilty. Thus, because of only a slight possibility that a trial judge’s decision to allow a motion for a directed verdict actually constitutes an instance of “judicial nullification,” allowing the prosecution to appeal such a decision does not frustrate the policy of allowing “the judicial system to temper the legislature’s generalized standards of criminal responsibility with lenity in particular cases.” Westen & Drubel, supra note 97, at 134.
The guarantee against double jeopardy also is intended “to prevent the harassment of the accused by repeated prosecution for the same matter.”\textsuperscript{344} Allowing the government to prosecute an individual for the same offense following his acquittal would grant it a power that “could be used illegitimately by ill-intentioned state servants.”\textsuperscript{345} In the absence of a rule against double jeopardy, it is possible that “the police, unhappy at [an individual’s] being found not guilty, would unfairly pursue the person in order to try to bring about a second trial,”\textsuperscript{346} or that a “disgruntled prosecutor”\textsuperscript{347} who believed a fact finder wrongly acquitted a guilty person could harass and oppress that person by prosecuting him a second time for the same offense, or by continuing to investigate him for the same offense, hoping to find additional evidence of his

\textsuperscript{344} New Zealand Law Commission, Report 70: Acquittal Following Perversion of the Course of Justice para. 12 (2001) [hereinafter N.Z. Law Comm’N, Report 70]. See also N.S.W. Law Reform Comm’N, Report 77, supra note 259, para. 2.8 (“The development of the principle [of double jeopardy] has gone beyond prohibiting multiple punishment for the same offence, to adopting practices to prevent undue prolongation of the criminal process. To allow otherwise is to risk harassment of an accused, who is, after all presumed innocent.”).

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

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

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

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

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


\textsuperscript{345} Eng. Law Comm’n, Report No. 267, supra note 11, para. 4.14 (emphasis deleted).

\textsuperscript{346} Select Committee on Home Affairs, The Double Jeopardy Rule, supra note 13, para. 19.

\textsuperscript{347} Thompson v Mastertouch T.V. Service Pty. Ltd. (No. 3), (1978) 38 FLR 397, 408 (Fed. Ct. Austl.) (Deane, J., with Smithers & Riley, JJ., agreeing).
guilt. Even if the second trial again resulted in the defendant’s being found not guilty, or if
the police and the prosecutor did not discover any additional evidence of the acquitted person’s
guilt and did not prosecute him a second time for the same offense, they may be satisfied with
having caused the person additional embarrassment, anxiety, and perhaps expense arising from
the second trial or the continued investigation.

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348 See SELECT COMMITTEE ON HOME AFFAIRS, THE DOUBLE JEOPARDY RULE, supra note 13, para. 19.
See also FRIEDLAND, supra note 11, at 3-4 (“The main rationale of the rule against double jeopardy is that it prevents
the unwarranted harassment of the accused by multiple prosecutions.”); AUSTRALIAN MODEL CRIMINAL CODE,
DISCUSSION PAPER, supra note 20, at 2 (one of the policies underlying the rule against double jeopardy is “the
protection of citizens from harassment by the State. . .”).
Without any safeguards, a statute or rule of court permitting the prosecution to appeal a trial judge’s decision to direct a verdict of not guilty could open the door to government harassment of the seemingly-acquitted defendant. An unscrupulous prosecutor, upset at the trial judge’s ruling and determined to harass the individual who would otherwise be acquitted of the offense in question, could appeal the trial judge’s ruling even though he realized the appeal had little chance succeeding.\footnote{Allowing the prosecution to appeal a court-ordered acquittal would not make it possible for the police to harass the seemingly-acquitted defendant by trying to find new evidence against him. For any inculpatory evidence discovered by the police following the trial judge’s ruling would be of no value to the prosecution unless it succeeded in obtaining a new trial of the accused. Moreover, because the only issue in the prosecution’s appeal would be whether the evidence \textit{already presented in the prosecution’s case in chief} sufficed to prove the defendant’s guilt, any newly-discovered evidence could not enhance the prosecution’s chances of succeeding in its appeal. Thus, the fact that the prosecution was appealing a trial judge’s decision to direct a verdict of not guilty would not give the police an incentive to continue their investigation of the accused. Indeed, it would seem the police would not want to waste their time further investigating an individual whom a judge had already “acquitted.”} By doing so, the prosecutor would force the individual to continue to defend himself against a charge that a judge had already found to be unsubstantiated. Even if the prosecutor failed to convince the appellate court that the trial judge erred, and the case ended at that point with the acquittal of the accused, the prosecutor would have compelled the accused to undergo the anxiety, distress, and perhaps expense of the appellate process.\footnote{See supra text accompanying notes 269-77.} On the other hand, if the unscrupulous prosecutor succeeded in convincing the appellate court that the trial judge erred in ruling the prosecution had not established a prima facie case, the defendant might be compelled to undergo a second trial for the same offense.\footnote{See Criminal Justice Act, 2003, c. 44, § 61(4)(b) (Eng.).} Even if the prosecutor failed to obtain a conviction at the second trial, he will have required the accused to undergo the “heavy personal strain”\footnote{United States v. Martin Linen Supply Co., 430 U.S. 564, 569 (1977) (quoting United States v. Jorn, 400 U.S. 470, 479 (1971) (plurality opinion)).} of further judicial proceedings in the matter, thereby frustrating the guarantee.
against double jeopardy’s purpose of preventing the government from harassing an individual through repeated trials for the same offense.

The appeal process authorized by the Criminal Justice Act 2003, however, includes a significant safeguard for individuals who benefit from a trial judge’s ruling that the prosecution failed to prove its case, and for that reason a statute or rule of court containing provisions similar to those in the Act is unlikely to open the door to government harassment. Such a statute or rule of court would allow the prosecution to appeal a decision to order an acquittal only after obtaining leave to appeal from either the trial judge or the appellate court.353 It is unlikely that either the trial judge or the appellate court would grant such leave if she, or it, suspected the prosecution sought to appeal merely to harass the accused.354 Such an oversight provision would enhance the probability that the trial judge or the appellate court would weed out any appeals undertaken by the prosecution merely for the purpose of obtaining a second trial to harass the “acquitted” individual. Such a provision would thus provide a significant protection for the accused against government harassment, because the prosecution could not appeal a court-ordered acquittal merely on its own initiative and without any judicial oversight.

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354 If the prosecution’s evidence were clearly insufficient to establish the defendant’s guilt, and the prosecution sought to appeal the trial judge’s ruling merely to harass the defendant, it is almost certain that neither the trial judge nor the appellate court would allow leave to appeal. Moreover, as stated earlier, see supra note 32, in deciding whether to allow leave to appeal, the appellate court and the trial judge could be required to “look rather more widely at the interests of justice than simply . . . ask[ing] [itself] whether an appeal has a realistic prospect of success, or some other test directed solely at the merits of the appeal.” R v. A., [2009] EWCA 2186, [8], [2009] 1 Crim. App. 21, at 283 (Eng.). Appeals undertaken by the prosecution merely to harass the accused would be unlikely to meet this standard.
Moreover, because the prosecution would be required to seek leave to appeal from the trial judge either “immediately after the ruling against which [it] wants to appeal,”\(^\text{355}\) or, if it receives an adjournment “until the next business day,”\(^\text{356}\) to consider whether to appeal,\(^\text{357}\) following the adjournment and because the trial judge must decide whether to allow leave to appeal “on the day that the application for permission is made,”\(^\text{358}\) no significant time will intervene between the trial judge’s decision to direct a verdict, or enter a required finding of not guilty, and the denial of leave by the trial judge. And although it may take a bit longer for the appellate court to consider and deny an application for leave to appeal, any harassment of the accused by the prosecution from merely seeking to leave to appeal will be relatively minor.

Even if an unscrupulous prosecutor successfully disguised his intention to obtain a new trial merely to harass the “acquitted” individual and managed to obtain leave to appeal, a second trial could occur only if the appellate court found the trial judge erred in ruling the prosecution’s evidence failed to establish the defendant’s guilt.\(^\text{360}\) Unlike the situation in a legal system that did not recognize the rule against double jeopardy, a second trial could not be brought merely at the whim of the prosecution. The existence of such oversight makes it probable that appeals filed by the prosecution merely to harass the “acquitted” individual would be weeded out and the

\(^{355}\) Criminal Procedure Rules, 2011, S.I. 2011/1709, 67.5(1)(a) (Eng.).

\(^{356}\) Id. 67.2(2)(b).  \textit{But see} R v. H., [2008] EWCA (Crim) 483, [10]-[12] (Eng.) (holding the court has the power to grant a greater extension of time than “until the next business day”).

\(^{357}\) See Criminal Justice Act, 2003, c. 44, § 58(4)(a)(ii) (Eng.).


\(^{359}\) Id. 67.5(4).

\(^{360}\) And also its finding that the defendant could receive a “fair trial” if the court ordered his initial trial resumed or that a new trial take place.  \textit{See} Criminal Justice Act, 2003, § 61(5).
“acquitted” individual would not have to undergo a second trial for the same offense.

It is true, of course, that the prosecution might not care if it succeeds in obtaining a second trial. Rather, its motive may merely be to harass the individual by subjecting him to the anxiety and expense brought about by the appellate process. However, even if the prosecution managed to obtain leave to appeal, the anxiety and expense of the appellate process is likely to be far less than the anxiety and expense the “acquitted” defendant would be forced to undergo at a second trial for the same offense.361

6. Conserving Scarce Prosecutorial and Judicial Resources

Barring the government from trying an individual a second time for the same offense following his acquittal also helps to conserve scarce prosecutorial and judicial resources. It prevents the prosecution from spending additional time, money, and effort investigating and prosecuting an acquitted individual for the same offense again and again until it achieves the desired result—a conviction.362 It also prevents prosecutors from tying up courtrooms, judges, and court personnel in successive attempts to obtain a conviction.363

361 See supra text accompanying notes 272-77.

362 Cf. Ashe v. Swenson, 397 U.S. 436 (1970) (the State of Missouri charged an individual with robbing each of six participants in a poker game, and after he was tried and acquitted of robbing one participant, the State tried him for robbing a second participant); Hoag v. New Jersey, 356 U.S. 464 (1958) (after an individual was tried and acquitted of robbing three people at a tavern, the State tried him for robbing a fourth person who had been robbed in the same incident). See also Ciucci v. Illinois, 356 U.S. 571 (1958) (per curiam) (in separate indictments, the State charged an individual with murdering his wife and three children and tried and convicted 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—until it obtained the sentence it wanted, the death penalty).

363 FRIEDLAND, supra note 11, at 4.
A statute or rule of court allowing the prosecution to appeal a court-ordered acquittal frustrates this policy to some extent. Absent a right to appeal, a trial judge’s decision to direct a verdict of not guilty would end the case then and there in favor of the accused, and would force the prosecution to move on to its next case without “imposing further on scarce financial and court resources.”\textsuperscript{364} In a legal system that permits the prosecution to appeal a court-ordered acquittal, a prosecutor who files an appeal will spend additional time, money, and effort on a case that has already been “decided.” Given the limited resources generally available to the prosecution, this means that an appeal of a court-ordered acquittal will divert time and resources from cases that have not yet been tried.\textsuperscript{365} If the prosecution succeeds in its appeal and obtains a new trial,\textsuperscript{366} or is allowed to resume the initial trial,\textsuperscript{367} it will have to divert further resources from untried cases to undertake the prosecution at that new, or resumed, trial.\textsuperscript{368} The reduced amount of time, effort, and money spent on some of these untried cases could result in acquittals

\textsuperscript{364} N.S.W. LAW REFORM COMM’N, REPORT 77, supra note 259, para. 2.28.

\textsuperscript{365} In addition to, or perhaps instead of, diverting resources from untried case, the prosecution might divert resources from cases pending on appeal. Some of these appeals might be by convicted defendants who are challenging their conviction or sentence, or both. Others may be by the prosecution and might involve either the claim that the sentence imposed upon a convicted defendant was too lenient, or a challenge to a ruling made by a trial judge, such as one excluding a confession made by a defendant, see Miranda v. Arizona, 384 U.S. 436 444-45 (1966) (holding inadmissible in the prosecution’s case in chief incriminating statements obtained by the police from the defendant in the absence of certain procedural safeguards), or excluding crucial physical evidence. E.g., Mapp v. Ohio, 367 U.S. 643, 655 (1961) (holding inadmissible in the prosecution’s case in chief evidence obtained by law enforcement authorities in an unreasonable search or seizure). The diversion of resources from appeals could result in the reversal of convictions or the affirmance of rulings excluding prosecution evidence, in cases in which the appellate court would otherwise have, or at least should have, affirmed the convictions or reversed the rulings excluding evidence, and this could ultimately result in dangerous criminals being acquitted and going free. Such a diversion of resources also could result in the appellate court’s upholding unduly lenient sentences, or reducing the length of some sentences that should not have been reduced, leading to the release of convicted criminals into the community at an earlier date than they might otherwise have been released.

\textsuperscript{366} See Criminal Justice Act, 2003, c. 44, § 61(4)(b) (Eng.).

\textsuperscript{367} See id. § 61(4)(a).

\textsuperscript{368} It may also divert resources from pending appeals. See supra note 365.
that would otherwise have been—or at least should have been—convictions, perhaps resulting in
dangerous criminals going free. Moreover, if the prosecution’s appeal fails,369 or if it succeeds
in its appeal but the defendant is acquitted in his new, or resumed, trial, the prosecution’s
diversion of its limited resources will have been for naught.370

Allowing the prosecution to appeal a trial judge’s decision to direct a verdict of not guilty
also diverts limited judicial resources. Instead of dealing with pending appeals—some of which
might involve incarcerated individuals convicted at trials infected with legal error and whose
appeals ultimately will be granted—appellate court judges will be deciding appeals of
court-ordered acquittals. Similarly, when the appellate reverses a court-ordered acquittal and
orders a new trial, or the resumption of the defendant’s initial trial, the trial court might have to
delay other trials so it can conduct the retrial or resume the initial trial—other trials that could
involve a guilty defendant who is free in the community on bail or an innocent person being held
in custody awaiting trial.

369 The appeal would fail if the prosecution did not obtain leave to appeal, see Criminal Justice Act, 2003,
§ 57(4), (8)-(9), or if the appellate court affirmed the trial judge’s ruling on the merits. See id. § 66(1), 2(c). It
would also “fail” if appellate court reversed the trial judge’s ruling but nevertheless ordered the defendant’s acquittal
because it concluded he could not receive a fair trial at either a new trial or the resumption of his initial trial. See id.
§ 61(4)(c), (5).

370 Of course, it is impossible to determine the ramifications of the prosecution’s decision to spend its
limited resources on appealing a court-ordered acquittal, rather than on untried cases or pending appeals. But even
if it were possible, it would still be difficult, if not impossible, to access whether the appeal, if successful, achieved
an overall benefit for society. To illustrate, assume the prosecution obtained one additional burglary conviction in a
given time period because of its successful appeal of a trial judge’s court-ordered acquittal. At first glance, one
would conclude that society gained by the prosecution’s expenditure of resources to appeal the trial judge’s ruling.
But would that be true if, during the same time period, the prosecution expended resources to appeal, unsuccessfully,
three other court-ordered acquittals in prosecutions for various property offenses, and because of its expenditure of
resources on the four appeals, diverted time, effort, and money from a rape trial that resulted in the defendant’s
acquittal (and release into the community) that, with the infusion of more time, effort, and money, would otherwise
have resulted in a conviction and the incarceration of a dangerous individual?
7. Maintaining the Public’s Respect for, and Confidence in, the Legal System

As Professor Martin L. Friedland points out, the rule against double jeopardy protects “not just the accused,”\textsuperscript{371} but also “the legal system itself.”\textsuperscript{372} “By preventing harassment and inconsistent results,” he explains, “the rule assists in ensuring that court proceedings . . . ‘command the respect and confidence of the public.’”\textsuperscript{373} The public would almost certainly lose respect for the legal system if the government were allowed to prosecute an individual again and again for the same offense, despite repeated acquittals. In most cases, the public would perceive the multiple prosecutions as government harassment.\textsuperscript{374} Moreover, if the government ultimately obtained a conviction after a previous acquittal, the inconsistent verdicts could affect the public’s confidence in the accuracy of the legal system and dilute the moral force of the criminal law,\textsuperscript{375} because it would “leave[] people in doubt whether innocent men are being condemned.”\textsuperscript{376}

\textsuperscript{371} Friedland, supra note 11, at 4.

\textsuperscript{372} Id.  See also N.Z. Law Comm’n, Report 70, supra note 344, para. 14 (“A consequence of the rule against double jeopardy is protection of the administration of justice itself.”).

\textsuperscript{373} Friedland, supra note 11, at 4 (quoting Connelly v. DPP, [1964] A.C. 1254 (H.L.) 1353 (Lord Devlin) (appeal taken from Eng.) (U.K.)).

\textsuperscript{374} See N.Z. Law Comm’n, Report 70, supra note 344, para. 14.

\textsuperscript{375} Id.

\textsuperscript{376} In re Winship, 397 U.S. 358, 364 (1970).
Members of the community also might view a right to appeal a court-ordered acquittal as a tool the government could use to dismantle what would otherwise be an acquittal, and they might ultimately conclude that the government is not always bound by an acquittal with which it disagrees and that citizens therefore are not adequately protected. This would be especially true if significant numbers of court-ordered acquittals were overturned by the appellate court.

Moreover, the more court-ordered acquittals the appellate courts reverse, the more likely the public will question the legal ability of its trial judges. Perhaps more importantly, many may ask: If trial judges keep getting it “wrong” in the important matter of whether the prosecution’s evidence is sufficient to prove the defendant’s guilt beyond a reasonable doubt, are they likely to be getting it “right” on other “less important” issues arising in a trial, such as evidentiary rulings, that could ultimately lead to the conviction of innocent individuals or the acquittal of guilty people? Questions could also arise about the legal ability of the appellate court judges if cases in which they reverse a court-ordered acquittal and order a new, or resumed, trial ultimately result in the jury’s finding the defendant not guilty.

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

378 See id. § 61(4)(a).

379 In fact, no inconsistency necessarily exists between a finding that the prosecution presented sufficient evidence to establish the defendant’s guilt and a jury’s subsequent verdict acquitting the defendant. For in determining whether the prosecution’s case is sufficient to convict, the trial judge must “view[] the evidence in the light most favorable to the prosecution” to determine whether “any rational trier of fact could [find] the essential elements of the crime beyond a reasonable doubt.” Jackson v. Virginia, 443 U.S. 307, 319 (1979) (first emphasis added); see also 6 LAFAVE ET AL., supra note 99, § 24.6(c), and, in addition, she normally makes her decision before the defendant presents his case. The jury, on the other hand, must consider not only the prosecution’s evidence, but also the defense case; it also must judge the credibility of the witnesses, both those called by the prosecution and those called by the defendant. See Jackson, supra, at 320 (stating it is “the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts”); Kansas v. Ventris, 556 U.S. 586, 594 n.* (2009) (“Our legal system . . . is built on the premise that it is the province of the jury to weigh the credibility of competing witnesses . . . ”). Thus, the jury might not believe some testimony that, if believed, would have proven the prosecution’s case; or, despite the sufficiency of the prosecution’s evidence, the jury might nevertheless find the defendant not guilty after hearing his evidence,
including perhaps his own testimony. Laypersons, however, may not make these distinctions. Rather, they may well reason that because the jury acquitted the defendant, which is what the trial judge initially did by deciding to direct a verdict of not guilty, the appellate court must have been wrong when it overturned the trial judge’s initial ruling.
It is true, of course, that in those cases in which the appellate court reverses the trial judge’s decision to direct a verdict of not guilty and the jury ultimately convicts the accused, members of the community might conclude that the existence of the right to appeal prevented a miscarriage of justice that would have resulted in the acquittal of a factually guilty individual, and may thereby gain confidence in the legal system. Indeed, absent a right of appeal on the part of the prosecution, acquittals in cases involving serious offenses can give rise to anger and frustration in the community at large, and can cause the public, or a large segment of it, to lose

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380 The New South Wales Law Reform Commission recognized this fact when it stated in its report on directed verdicts of acquittal that “understandable community outrage . . . would result in the event of a worst case occurring, the acquittal by manifest error of an accused charged with an extremely serious offence, without an opportunity for the jury to deliberate properly upon the evidence or for the Crown to appeal the acquittal.” N.S.W. LAW REFORM COMM’N, REPORT 77, supra note 259, para. 3.5. However, for the reason stated in the text, see infra text accompanying note 382, the Commission concluded that “[s]uch a scenario . . . is very unlikely.” N.S.W. LAW REFORM COMM’N, REPORT 77, supra note 259, para. 3.5 (also noting that a senior public defender stated that “in his experience it is very rare for a judge to direct a verdict in a murder case”).

faith in the criminal justice system. But such cases are likely to be rare. For it is a “reasonable assumption . . . that the more serious the charge, the less likely the [trial] judge
would be to intervene and direct a verdict where there is credible evidence to be put to the jury.” Perhaps more importantly, though, “[a]n obvious result of the rule against double jeopardy is that occasionally guilty persons will escape punishment,” and members of the community might well recognize this fact and accept it as an “inevitable [part of the] system of justice.” On balance, then, it seems the negative effect on the community’s respect for, and confidence in, the legal system of allowing the prosecution a right to appeal a trial judge’s decision to enter a required finding of not guilty outweighs any positive effect it may have, and therefore will, to some extent, frustrate this purpose of the rule against double jeopardy.

8. Encouraging Efficient Investigation and Prosecution

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381 ENG. LAW COMM’N, REPORT NO. 267, supra note 11, para. 7.56. See also N.S.W. LAW REFORM COMM’N, REPORT 77, supra note 259, para. 2.15 (“[T]he public may regard [a directed verdict based upon a judicial error] as a miscarriage of justice for failing to impose a sanction for wrongdoing, or to safeguard the public in cases where the danger posed by a guilty party would have rendered a custodial sentence appropriate. Members of the public may be left with the impression that a guilty person has escaped justice because of a legal technicality, a perception which can lead to a weakening of public confidence in the judicial system.”).

382 N.S.W. LAW REFORM COMM’N, REPORT 77, supra note 259, para. 3.5.

383 FRIEDLAND, supra note 11, at 4.

384 Id.
As a general matter, allowing the government to try a previously-acquitted individual a second time for the same offense could give rise to the danger that the police would not initially investigate the matter, and prosecutors would not initially prosecute the case, as diligently as they otherwise might. For they would know that if the first prosecution failed, they would get a "second bite at the apple," and could carry out a more thorough investigation before, and conduct a more vigorous prosecution at, the individual’s second trial. The fact that the rule against double jeopardy generally provides the government only one opportunity to convict an individual of an offense “operates as a powerful incentive to efficient and exhaustive investigation” and prosecution.

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385 ENG. LAW COMM’N, CONSULTATION PAPER NO. 156, supra note 11, para. 4.11; AUSTRALIAN MODEL CRIMINAL CODE, DISCUSSION PAPER, supra note 20, at 2. See also FRIEDLAND, supra note 11, at 4 (“It is to the first trial . . . that [the] efforts [of the police] should be directed.”); SELECT COMMITTEE ON HOME AFFAIRS, THE DOUBLE JEOPARDY RULE, supra note 13, para. 19 (noting that one of the arguments against creating exceptions to the traditional rule barring retrial following an acquittal is that “a second opportunity to prosecute would encourage the police to be less thorough in their initial investigation”).

386 Dennis, supra note 104, at 941. See also FRIEDLAND, supra note 11, at 4 (“It is to the first trial . . . that [the] efforts [of the prosecutor] should be directed.”).


388 ENG. LAW COMM’N, CONSULTATION PAPER NO. 156, supra note 11, para. 4.11. See also N.Z. LAW COMM’N, REPORT 70, supra note 344, para. 16 (stating that the argument that the rule against double jeopardy “promot[es] . . . efficient investigation preceding prosecution of the original trial” “has obvious force”). But see SELECT COMMITTEE ON HOME AFFAIRS, THE DOUBLE JEOPARDY RULE, supra note 13, paras. 46-48 (reporting that neither the Director of Public Prosecutions nor the Chief Constable of Kent agreed that an exception to the traditional rule against double jeopardy allowing a second trial when new and compelling evidence of an acquitted defendant’s guilt is discovered would “allow the police to proceed without due diligence” in their initial investigation, and concluding that “[w]e do not expect that the proposed relaxation of the double jeopardy rule would have an adverse impact on the quality of future police investigations” (emphasis deleted)).

389 Dennis, supra note 104, at 941.
Nevertheless, it is highly unlikely that a statute or rule of court permitting the prosecution to appeal a court-ordered acquittal and to retry him, or resume his initial trial, if the appeal succeeds, would cause police and prosecutors to be less efficient in their initial investigation and prosecution of crimes. When police are investigating a crime and when prosecutors are preparing for a criminal trial, they have every incentive, given the rule against double jeopardy, to obtain and present as much evidence as possible to establish the guilt of the individual suspected of, or charged with, the crime in question. For they cannot accurately predict whether the trial judge will determine that some of their evidence is inadmissible at trial or, perhaps more importantly, whether the fact finder will reject as unreliable some of the evidence introduced by the prosecution at trial or refuse to draw the desired inferences from the prosecution’s evidence. Limiting the scope of an investigation or the amount of evidence presented at trial would increase the chances the jury (or the judge in a bench trial) will conclude that the evidence the prosecution introduced at trial fails to establish a prima facie case of guilt and therefore find the defendant not guilty. Such a result of course would put an end to the case without a conviction. For the Double Jeopardy Clause precludes the prosecution from appealing a jury’s verdict (or in a bench trial, the trial judge’s finding) of not guilty.


391 Kepner v. United States, 195 U.S. 100, 130, 133 (1904) (although the decision was based on a statute extending double jeopardy protection to the Philippines, not on the Double Jeopardy Clause, the Supreme Court in United States v. DiFrancesco, 449 U.S. 117, 133 n.13 (1980), stated that it “has accepted [the] decision [in Kepner] as having correctly stated the relevant double jeopardy principles” (internal quotation marks omitted)). See also United States v. Martin Linen Supply Co., 430 U.S. 564, 573 n.12 (1977) (dictum) (“In the situation where a criminal prosecution is tried to a judge alone, there is no question that the Double Jeopardy Clause accords his determination in favor of a defendant full constitutional effect.”).
Permitting the prosecution to appeal a trial judge’s decision to direct a verdict of not guilty does not change the incentives. As a result, police are not likely to wrap up their investigation immediately upon concluding the evidence they had so far obtained was sufficient to survive a motion for a court-ordered acquittal, or that prosecutors would seek and present only enough evidence to meet this standard. For even if their assessment of the evidence is right and the limited amount of evidence survives a motion for a directed verdict, the particular jury trying the case (or the judge in a bench trial) might not make the inferences desired by the prosecution or might view the credibility of the prosecution’s witnesses differently than the police and prosecutors, or the jury (or judge in a bench trial) might credit the evidence introduced by the accused, and acquit the accused, thereby ending the case once and for all.

Moreover, evidence thought by the police and prosecutors to be sufficient to establish the defendant’s guilt might be viewed differently by the trial judge, and she might end the case without even permitting the jury to consider the case (or, in a bench trial, without requiring the

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392 Most police officers do not have a legal education, and they almost certainly do not have experience in trying cases. In addition, the police are unlikely to have knowledge of all the evidence against the suspect possessed by prosecutors. Consequently, the police probably would not even know when their investigation had reached the point that the evidence against the suspect would suffice to establish a prima facie case of guilt, if indeed such point is identifiable. Moreover, even if the police ended their investigation at the point at which the evidence would be just sufficient to survive a motion for a court-ordered acquittal, prosecutors, after reviewing the evidence, would realize the case against the suspect was marginal at best and would probably insist the police resume their investigation in an attempt to discover additional evidence implicating the suspect in the crime in question.

393 In deciding a motion for a court-ordered acquittal, the trial judge must take the evidence in the light most favorable to the prosecution. A jury (or a judge in a bench trial), however, must consider not only the prosecution’s evidence, but also the defense case, and in addition, must judge the credibility of the witnesses for each side. See supra note 379.

394 See supra text accompanying notes 71-74 & 80-86.

defense to present its case\textsuperscript{396}) by allowing a defense motion for a court-ordered acquittal. If the prosecution could appeal such a decision only with leave to appeal, as provided in the Criminal Justice Act 2003,\textsuperscript{397} and it was unable to obtain such leave,\textsuperscript{398} the trial judge’s ruling would stand, the defendant would be acquitted, and the prosecution would lose its case.\textsuperscript{399} Even if the prosecution obtained leave to appeal, it would have no guarantee the appellate court, in what almost by definition would be a "close case,"\textsuperscript{400} would find the trial judge erred in concluding the defendant was entitled to a court-ordered acquittal and would reverse that ruling and order either a new trial or the resumption of the initial trial.\textsuperscript{401} Accordingly, even if the prosecution could by statute or rule of court appeal a trial judge’s decision to allow a motion for a directed verdict, police and prosecutors could never be certain—or for that matter, even reasonably


\textsuperscript{397} Criminal Justice Act, 2003, c. 44, § 57(4) (Eng.) (requiring the prosecution to obtain leave to appeal from either the trial judge of the Court of Appeal).

\textsuperscript{398} In England, the Court of Appeal, and presumably the trial judge, in deciding whether to allow leave to appeal a ruling of no case to answer, must “look rather more widely at the interests of justice than simply . . . ask . . . the question whether an appeal has a realistic prospect of success, or some other test directed solely at the merits of the appeal.” R v. A., [2008] EWCA (Crim) 2186, [8], [2009] 1 Crim. App. 21, at 283 (Eng.). Under this standard, the Court of Appeal might deny leave to appeal even if it the trial judge erred in concluding the prosecution’s evidence failed to establish a prima facie case of guilt.

\textsuperscript{399} See Criminal Justice Act, 2003, § 58(8)-(9)(a) (providing that the prosecution can appeal only if it informs the trial court it agrees the defendant should be acquitted if, inter alia, “leave to appeal to the Court of Appeal is not obtained”).

\textsuperscript{400} The trial judge certainly would not have ruled in the defendant’s favor and allowed his motion for a court-ordered acquittal if the prosecution’s evidence clearly established a prima facie case of the defendant’s guilt. Moreover, if the accused could appeal only with leave, it would be unlikely the appellate court (or the trial judge) would have allowed such leave if the evidence in the prosecution’s case in chief clearly entitled the defendant to a court-ordered acquittal, that is, if the prosecution’s evidence undeniably failed to establish the defendant’s guilt. The fact that the appellate court (or the trial judge) allowed leave to appeal strongly indicates the question of the sufficiency of the evidence was a close one.

\textsuperscript{401} Under the Criminal Justice Act 2003, the Court of Appeal could reverse the trial judge’s ruling of no case to answer but still order the defendant be acquitted if it concluded the defendant could not receive a fair trial if his initial trial were resumed or if a fresh trial were ordered. Criminal Justice Act, 2003, § 61(4)(c), (5).
sure—they would get a “second bite at the apple”\textsuperscript{402} should the trial judge rule the prosecution failed to introduce evidence sufficient to prove the defendant guilty beyond a reasonable doubt. As a result, they would have every incentive to put forth their best efforts to investigate the crime, and convict the defendant, from the outset.

\textbf{VI.}
\textbf{CONCLUSION}

\footnote{\textsuperscript{402} Burks v. United States, 437 U.S. 1, 17 (1978).}
The Criminal Justice Act 2003 changed criminal procedure in England by, *inter alia*, allowing the prosecution to appeal a trial judge’s ruling of no case to answer, i.e., a directed verdict of not guilty, and to retry the defendant for the same offense, or resume his initial trial, if the Court of Appeal overturns the trial judge’s ruling. An argument can be made that a state or federal statute or rule of court based upon these provisions of the Act would be consistent with the Supreme Court’s decision in *Smith v. Massachusetts*[^403] and would pass constitutional muster under the Double Jeopardy Clause. However, even if one accepts the argument that the provisions of such a statute or rule of court would not be inconsistent with current case law, an analysis of the policies underlying the guarantee against double jeopardy reveals that several of those policies would be thwarted by such a provision.

One of the most important purposes of the Double Jeopardy Clause is to minimize the ordeal of the trial process[^404]. Permitting the prosecution to appeal a trial judge’s court-ordered acquittal frustrates this purpose, because, if the prosecution’s appeal succeeds, the accused, through no fault of his own, will in most cases be required to undergo a second trial and will suffer the embarrassment, distress, and perhaps expense brought about by that second trial even though the trial judge already decided he should be acquitted of the offense[^405].


[^404]: *See supra* text accompanying notes 94 & 255-68.

[^405]: *See supra* text accompanying notes 269-90.

At a minimum, the defendant would be subjected to additional proceedings going to his guilt or innocence, i.e., the resumption of his initial trial. But as previously explained, the resumption of the original trial is unlikely to be a viable option in most cases. *See supra* note 320. Accordingly, this section of the Article will merely focus on the double jeopardy ramifications of a second trial for the same offense.
Perhaps more importantly, permitting a second trial for the same offense following a successful appeal by the prosecution would increase the risk of erroneously convicting an innocent person, primarily because the prosecution almost certainly will attempt to strengthen its case at the second trial.\textsuperscript{406} This would undermine a major purpose\textsuperscript{407} of the Double Jeopardy Clause. Moreover, convicting an innocent person is of particular concern in the United States, for 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.""\textsuperscript{408}

In addition, permitting the prosecution to retry an individual for the same offense after it successfully appeals a court-ordered acquittal would undermine two other purposes of the rule against double jeopardy. First, it would frustrate the rule’s policy\textsuperscript{409} of conserving scarce prosecutorial and judicial resources.\textsuperscript{410} And second, it also might, at least to some extent, cause the public to lose respect for, and confidence in, the criminal justice system.\textsuperscript{411}

\begin{footnotes}
\footnote{406} See supra text accompanying notes 310-31.
\footnote{407} See supra text accompanying notes 95-96.
As stated earlier, see supra note 292, Professor Friedland asserts that the increased chances of convicting an innocent person at a second trial for the same offense “is at the core of the problem.” FRIEDLAND, supra note 11, at 4.
\footnote{408} Schlup v. Delo, 513 U.S. 298, 325 (1995) (quoting In re Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring)). See also Furman v. Georgia, 408 U.S. 238, 367 n.158 (1972) (Marshall, J., concurring) (“We believe that it is better for ten guilty people to be set free than for one innocent man to be unjustly imprisoned.” (quoting William O. Douglas. Foreword to JEROME FRANK & BARBARA FRANK, NOT GUILTY, at 11-12 (1957))); 2 BLACKSTONE, supra note 12, at *358 (“[T]he law hold that it is better that ten guilty persons escape than one innocent suffer.” (quoted in Coffin v. United States, 156 U.S. 432, 456 (1995))).
Justice Harlan put it another way when he stated: “In 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).
\footnote{409} See supra text accompanying notes 101 & 362-63.
\footnote{410} See supra text accompanying notes 364-71.
\footnote{411} See supra text accompanying notes 372-84.
\end{footnotes}
In light of the purposes of the rule against double jeopardy, it is highly probable that a retrial for the same offense following a prosecution appeal of a trial judge’s midtrial acquittal ruling would violate the guarantee against double jeopardy. Accordingly, any appeal by the prosecution authorized by statute or rule of court would not serve a “proper purpose” and therefore would be impermissible under the Double Jeopardy Clause of the Fifth Amendment.

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413 Id. (“When a successful postacquittal appeal by the prosecution would lead to proceedings that violate the Double Jeopardy Clause, the appeal has no proper purpose. Allowing such an appeal would frustrate the interest of the accused in having an end to the proceedings against him.”).