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

David S. Rudstein

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Cover Page Footnote
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PROSECUTION APPEALS OF COURT-ORDERED MIDTRIAL ACQUITTALS: PERMISSIBLE UNDER THE DOUBLE JEOPARDY CLAUSE?

David S. Rudstein

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In 2003, the Parliament of the United Kingdom enacted the Criminal Justice Act 2003 (the Act)—a wide-ranging statute that introduced “radical

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innovations into . . . criminal procedure\textsuperscript{\texttrademark}\textsuperscript{1} in England and Wales.\textsuperscript{2} Among other things, in a trial upon an indictment,\textsuperscript{3} the Act grants the prosecution the right to appeal certain rulings of the trial judge.\textsuperscript{4} This includes the right to appeal a ruling that the defendant has no case to answer\textsuperscript{5} because the prosecution’s evidence was insufficient to prove the defendant’s guilt beyond a reasonable doubt,\textsuperscript{6} i.e., a directed verdict of not guilty.\textsuperscript{7} If the prosecution’s appeal succeeds, the Act allows the reviewing court to reverse the trial judge’s ruling\textsuperscript{8} and order either that the defendant’s trial be resumed or that he or she be tried a second time for the same offense.\textsuperscript{9} Before the Act’s effective date, a trial judge’s ruling of no case to answer in a trial upon an indictment would have ended the case permanently in favor of the accused.\textsuperscript{10} The ruling would have constituted an acquittal and prosecutors in England had no right to appeal,\textsuperscript{11} and would effectively have precluded from bringing a new charge for

1. Ian Dennis, Prosecution Appeals and Retrials for Serious Offences, 2004 CRIM. L.R. 619, 619.

2. Although England and Wales are separate countries, for the sake of convenience, this Article refers to “England” as encompassing both England and Wales.


4. Id. §§ 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).

5. Id. § 58(1)–(2), (7) (providing that, if “the ruling [being appealed by the prosecution is] a ruling that there is no case to answer,” the prosecution can also appeal other rulings related to the offense that is subject to the appeal).

6. See R v. N. Ltd., [2008] EWCA (Crim) 1223, [15] (Eng.), available at http://www.bailii.org/ew/cases/EWCA/Crim/2008/1223.html; see also ARCHBOLD: CRIMINAL PLEADING, EVIDENCE AND PRACTICE § 4-293 (J.P. Richardson ed., 2011) [hereinafter ARCHBOLD] (“A submission of no case should be allowed when there is no evidence upon which, if the evidence adduced were accepted, a reasonable jury, properly directed, could convict.”).

7. N. Ltd., [2008] EWCA (Crim) at [15]; JOHN SPRACK, A PRACTICAL APPROACH TO CRIMINAL PROCEDURE § 20.52 (13th ed. 2011); GLANVILLE WILLIAMS, TEXTBOOK OF CRIMINAL LAW 44 (2d ed. 1983). A submission of no case to answer normally should be made at the close of the prosecution’s case in chief. ARCHBOLD, supra note 6, § 4-292; SPRACK, supra, § 20.48. Nevertheless, in “exceptional case[s],” it is possible for a judge to consider a submission of no case to answer at the close of a defense case, or to decide on his or her own that there is no case to answer should the defendant fail to make the claim. R v. Collins, [2007] EWCA (Crim) 854, [47] (Eng.) (citing R v. Speechley, [2004] EWCA (Crim) 3067, [53] (Eng.), available at http://www.bailii.org/ew/cases/EWCA/crim/2004/3067.html), available at http://www.bailii.org/ew/cases/EWCA/crim/2009/854.html.


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); see also THE LAW COMM’N, CONSULTATION PAPER NO. 156: DOUBLE JEOPARDY paras. 2.11–.13 (1999) [hereinafter ENG. LAW COMM’N, CONSULTATION PAPER NO. 156] (noting that, “[i]n general[,] the prosecution has no right of appeal against an acquittal’’); THE LAW COMM’N, REPORT NO. 267: DOUBLE
the same offense by the plea of *autrefois acquit*. As one eighteenth century English defense lawyer put it: “*[W]henever, and by whatever means, there is an acquittal in a criminal prosecution, the scene is closed and the curtain drops.*”

The Act significantly changes English criminal procedure by allowing the retrial of an individual for the same offense, or allowing his or her aborted trial to resume, following a prosecutor’s successful appeal of a trial judge’s ruling of no case to answer. According to the English Law Commission, however, the second trial of the accused for the same offense, or the resumption of the initial trial, does not violate the double jeopardy rule, which prohibits a person from being tried twice for the same offense. The *autrefois* rule and

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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)). 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.).

12. 4 WILLIAM BLACKSTONE, COMMENTARIES *335. 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.” *Id.* The plea can be raised not only to an indictment for the same offense of which an individual previously has been acquitted, but also to an indictment for an offense that the individual, on a previous indictment, *could have been convicted*. Connelly v. D.P.P., [1964] A.C. 1254 (H.L.) 1305 (Lord Morris of Borth-y-Gest) (appeal taken from Eng.) (U.K.); ENG. LAW COMM’N, REPORT NO. 267, supra note 11, para. 2.2 (outlining the doctrines of *autrefois acquit* and *autrefois convict*). In practice, however, second prosecutions are not brought and therefore do not reach court. SPRACK, supra note 7, § 17.43. The plea, expressed in Norman-French, is spelled in various ways. In this Article, the Author will use the spelling *autrefois acquit*, except when quoting material using a different spelling.


14. See supra note 1 and accompanying text.


16. See 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. See ENG. LAW COMM’N, REPORT NO. 267, supra note 11, para. 2.2. The *autrefois* rule, comprising the pleas of *autrefois acquit* (a former acquittal) and *autrefois convict* (a former conviction), provides that no one may be tried twice for the same offense, and that when the defendant has been acquitted or convicted (or could have been convicted) of an offense, the *autrefois* plea will bar a subsequent prosecution for that offense. *Id.* Both pleas, Blackstone explained, are based upon the English common law maxim that “no man is to be brought into jeopardy of his life, more than once for the same offence.” 4 BLACKSTONE, supra note 12, at *335.

Recent legislation in England allows an acquittal to be quashed in certain circumstances and permits the prosecution to retry the previously acquitted individual. Criminal Justice Act, 2003, c. 44, § 76(1)-(4) (Eng.). Once the acquittal is quashed, the individual cannot raise the plea
the “special application of the abuse of process rules”\(^{18}\)—the two components of the protection against double jeopardy in England—merely “prevent a final acquittal or conviction from being re-opened.”\(^{19}\) An acquittal entered by a trial judge before the jury has considered the evidence is not considered final.\(^{20}\)

England is not alone in this position. Countries, or states therein, that recognize the rule against double jeopardy\(^{21}\) generally allow the prosecution to
challenge at least some acquittals by way of appeal.\textsuperscript{22} Many of these countries and states trace their legal heritage to England,\textsuperscript{23} including the Australian states of New South Wales, Tasmania, and Western Australia.\textsuperscript{24}


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 No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 4, \textit{opened for signature} Nov. 22, 1984, C.E.T.S. No. 117 (entered into force Jan. 11, 1988) (emphasis added).


\textsuperscript{24} New South Wales and Tasmania recognize a plea of former acquittal or former conviction. \textit{Criminal Procedure Act 1986} (NSW) s 156(1) (Austl.); \textit{Criminal Code Act 1924} (Tas) sch 1, s 355(1)(b) (Austl.). The Western Australia Criminal Code provides that “[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 convict[ed] of the offence with which he is charged, or has already been convicted or acquitted of an offence of which he might be convict[ed] upon the indictment or prosecution notice on which he is charged.” \textit{Criminal Code Compilation Act 1913} (WA) app. B, s 17 (Austl.). Each of these states nevertheless allows the prosecution to appeal some acquittals. In New South Wales, the prosecution can appeal an acquittal by a jury at the direction of the trial judge. \textit{Crimes (Appeal and Review) Act 2001} (NSW) s 107(1)(a), (2) (Austl.); \textit{see also}, e.g., \textit{R v R.K.}, [2008] NSWCCA 338, [1]–[2], [70], [73]–[75], [77]–[79] (Austl.) (upholding the trial judge’s decision to direct the jury to return a verdict of not guilty). The prosecution can also appeal an acquittal by the judge sitting without a jury in a trial of an indictable offense. \textit{Crimes (Appeal and Review) Act 2001} s 107(1)(b), (2). Such an appeal, however, is restricted to questions of law. \textit{Id.} s 107(2). If the Court of Appeal finds the trial judge committed error, it may quash the acquittal and order a new trial. \textit{Id.} s 107(5)–(6).

Tasmania allows the Attorney-General, with 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. \textit{Criminal Code Act 1924} sch. 1, s 401(2). If the Court of Appeal finds either that the verdict of the jury was unreasonable or cannot be supported by the evidence, that the trial court reached the wrong decision on a question of law, or that there was a miscarriage of justice, it can set aside the verdict or judgment, allow the appeal, and either enter a conviction or order a new trial. \textit{Id.} sch 1, s
These common law jurisdictions authorizing prosecutorial appeals of some acquittals typically permit an appeal of a trial judge’s directed verdict of not guilty and provide that, if the appeal is successful, the government can retry the accused. In the United States, however, neither the federal government nor any state expressly 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 that a provision authorizing such an appeal would not pass muster under the Double Jeopardy Clause of the United States Constitution’s Fifth Amendment 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 of whether a provision similar to that contained

402(1), (5)(b)–(c); see also, e.g., R v Pirimona, [1998] TASSC 136 (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 (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); id. at 30 (Chambers, J).

In Western Australia, the prosecution, “in relation to a charge of an indictable offence,” and with the leave of the Court of Appeal, can appeal “a judgment of acquittal . . . entered after a jury’s verdict of not guilty of a 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.” Criminal Appeals Act 2004 (WA) ss 24(2), 24(2)(da), 27(1). Appeals can also be filed against “a judgment of acquittal . . . entered in a trial by the judge alone,” or “entered after a decision by the judge that the accused has no case to answer on the charge.” Id. s 24(2)(e)(i)–(ii). If the Court of Appeal finds in favor of the prosecution, it can set aside the acquittal and order a new trial. Id. s 33(1), (2); see also, e.g., State v Tilbrook, [2007] WASCA 4, [1], [40]–[42] (Austl.) (ordering a new trial after setting aside judgments of acquittal entered by the trial judge who had found that the defendants did not have a case to answer).


27. Many jurisdictions in the United States have substituted, for a directed verdict of not guilty, the functionally equivalent court-ordered judgment of acquittal. See, e.g., Fed. R. Crim. P. 29(a); CAL. PENAL CODE § 1118.1 (West 2004); Fla. R. Crim. P. 3.380(a); MASS. R. CRIM. P. 25(a). For the sake of convenience, this Article uses the terms “directed verdict of not guilty,” “court-ordered acquittal,” and “required finding of not guilty” interchangeably.

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 possible that because so few directed verdicts of not guilty are rendered in a particular jurisdiction that the legislature does not perceive the possibility of a significant number of erroneous directed verdicts to be a problem worth its time and effort. See 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 1.8(i) n.110 (2d ed. 2003) (stating that, in most jurisdictions, statistics show directed verdicts are not granted in many cases (citing HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 508 (1966))).

This Article will proceed as follows: Part I details England’s Criminal Justice Act 2003 and demonstrates how the Act works in practice. Part II discusses the Fifth Amendment to the United States Constitution, specifically the Double Jeopardy Clause and significant Supreme Court jurisprudence interpreting it. Part III examines the implications of implementing the Act in the United States through a statute or court rule. Part III also analyzes the effect of such a statute or court rule by applying existing Supreme Court precedent and considering the policies that led to the Double Jeopardy Clause’s drafting. Part IV concludes that such a statute or court rule would thwart the policies underlying the Double Jeopardy Clause and, therefore, an implementation of the Act in the United States would not survive constitutional scrutiny.

I. THE ENGLISH MODEL

The Criminal Justice Act 2003 grants the prosecution, in a trial upon an indictment, the right to appeal to the Court of Appeal. After obtaining leave to do so, the prosecution may appeal certain rulings of the trial judge, including a ruling that the defendant has no case to answer. The prosecution

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31. Id. § 57(3).
32. Id. § 57(4) (stating that such leave must be obtained from either the trial judge or the Court of Appeal). Under the Criminal Procedure Rules adopted pursuant to the Act, if the prosecution seeks leave to appeal from the trial judge, it must do so by applying either orally following the contested ruling or in writing should it receive an adjournment. See Criminal Procedure Rules, 2011, S.I. 2011/1709, 67.5(1)(a)–(b) (Eng.). When the prosecution seeks leave to appeal from the trial judge, the trial judge must decide whether to grant leave on the day of its application. Id. 67.5(4). In deciding whether to allow leave to appeal, the Court of Appeal, and presumably the trial judge, should consider the fair interests of justice rather than simply looking at the case’s merits and prospect of success. R v. Al-Ali, [2008] EWCA (Crim) 2186, [8], [2009] 1 W.L.R. 1661, 1663 (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 the ruling in accordance with this section,” which applies to “ruling[s made by] a judge . . . in relation to a trial on indictment . . . [where] the ruling relates to one or more offences included in the indictment.” Criminal Justice Act, 2003, § 58(1)–(2). The Act characterizes a “ruling” to include “a decision, determination, direction, finding, notice, order, refusal, rejection or requirement.” Id. § 74(1). It is clear, however, that the prosecution can appeal a trial 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 related to the offense); id. § 61(6) – (8) (dealing with situations in which “the appeal relates to a ruling that there is no case
can appeal such a ruling only if, “immediately after the ruling,”34 it “informs the court that it intends to appeal”35 or, alternatively, “immediately after the ruling,”36 it requests an adjournment37 and, if one is granted,38 it “informs the court following the adjournment that it intends to appeal.”39 The prosecution may not inform the court that it intends to appeal, however, “unless, at or before that time,”40 it also informs the court that it agrees that the defendant should be acquitted of the offense in question if either leave to appeal is not obtained or the prosecution abandons its appeal before the Court of Appeal determines it.41

When “the prosecution informs the court . . . that it intends to appeal, the [trial] judge must decide whether . . . the appeal should be expedited.”42 If the judge determines that the appeal should be expedited, he or she can order an

to answer and one or more other rulings”); R v. G.S., [2012] EWCA (Crim) 398, [1], [4], [28], 2012 WL 1015871, at *136 (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, [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], 2010 WL 495574 (Eng.) (dismissing an appeal of a ruling of no case to answer).


36. Criminal Procedure Rules, 67.2(2)(a); accord Mian, [2012] EWCA (Crim) 792, [28], 2012 WL 1357999, at *112 (“It is clear that . . . an adjournment must be sought immediately . . . .”); see also supra note 34.


39. Criminal Justice Act, 2003, § 58(4)(b). The judge normally should grant a request for an adjournment. Criminal Procedure Rules, 67.2(2)(b). It also indicates that the adjournment generally should last only one day. Id. But see R v. H., [2008] EWCA (Crim) 483, [10]–[12], 2008 WL 576851 (Eng.) (holding that the court has the power to grant longer adjournments).

40. Criminal Justice Act, 2003, § 58(4)(b). If the prosecution informs the court that 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.

41. Id. § 58(8)–(9). The prosecution’s agreement to this effect has been labeled an “acquittal agreement” or an “acquittal undertaking.” See, e.g., Mian, [2012] EWCA (Crim) 792, [9], 2012 WL 1357999, at *107 (classifying the agreement as an “acquittal agreement”); R v. B. & T., [2009] EWCA (Crim) 99, [14], [23], 2009 WL 289371 (Eng.) (characterizing the agreement as an “acquittal undertaking”). 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. R v. N.T., [2010] EWCA (Crim) 711, [18] 2010 WL 91062 (Eng.); CPS v. C., [2009] EWCA (Crim) 2614, [40]–[41], 2009 WL 4666893 (Eng.).

42. Criminal Justice Act, 2003, § 59(1). The prosecution must request an expedited appeal and provide reasons for its request. Criminal Procedure Rules, 67.6(1).
adjournment of the trial. If, on the other hand, the judge determines that the appeal should not be expedited, he or she 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 that it intends to appeal the ruling, nor during the pendency of any appeal it decides to pursue. In addition, the ruling’s consequences have no effect and “the [trial] judge may not take any steps in consequence of the ruling.”

On appeal, the Court of Appeal may confirm, reverse[,] or vary [the trial judge’s] ruling. It may not, however, reverse a ruling unless satisfied that the ruling either “was wrong in law,” “involved an error in law or principle,” or “was a ruling that was not reasonable for the judge to have made.” If the ruling is confirmed, the Court of Appeal must acquit the defendant of the offense or offenses in question. If the court reverses or varies the ruling, it must, with respect to each offense in question, either allow proceedings for the offense to resume or allow for a new trial. If, though, the court determines that the defendant could not receive a fair trial were the original trial resumed or a new trial initiated, the court must acquit the defendant of the offense in question. The decision of the Court of Appeal can, with leave, be appealed to the Supreme Court of the United Kingdom by either the defendant or the prosecution.

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). Should the trial judge take any steps in consequence of the ruling, those steps are to have no effect. Id. § 58(11)(c).
50. Id. § 58(12). If the prosecution does not obtain leave to appeal, or if it abandons the appeal before the Court of Appeal makes a determination, the defendant must be acquitted of the offense in question. Id.
51. Id. § 61(1).
52. Id. § 67.
53. Id. § 61(3), (6)-(7).
54. Id. § 61(4)(a); see also id. § 61(6), (8) (addressing appeals to additional rulings).
55. Id. § 61(4)(b).
56. Id. § 61(5).
57. Id. § 61(4)(c); see also id. § 61(8).
58. Criminal Appeal Act, 1968, c. 19, § 33(2) (Eng.). Leave to appeal must be obtained from either the Court of Appeal or the Supreme Court of the United Kingdom. Id. To be granted, the Court of Appeal must certify that the case involves “a point of law of general public importance” and, in addition, it must appear to the Court of Appeal or the Supreme Court (as the case may be) that the point is one that “ought to be considered.” Id.
59. Id. § 33(1), as amended by Criminal Justice Act, 2003, § 68(1).
II. THE DOUBLE JEOPARDY CLAUSE OF THE U.S. CONSTITUTION

The Fifth Amendment’s Double Jeopardy Clause provides that “[n]o person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb.”60 More than a half-century ago, in *Green v. United States*,61 the Supreme Court articulated the overall design of this provision. The Court 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 its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.62

The prohibition against double jeopardy contained in the Fifth Amendment is “fundamental to the American scheme of justice.”63 As such, it is incorporated into the Due Process Clause of the Fourteenth Amendment64 and applies to the states as well as the federal government.65

The constitutional safeguard against double jeopardy stems from the common-law pleas of *autrefois acquit* (a former acquittal), *autrefois convict* (a former conviction), and pardon,66 and the provision encompasses several protections. Like the common-law plea of *autrefois acquit*,67 the Double Jeopardy Clause bars the government from prosecuting a person a second time.

60. U.S. CONST. amend. V.
62. Id. at 187–88.
63. 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 . . . .”).
64. U.S. CONST. amend. XIV, § 1. 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.” Id.
67. See supra notes 12, 17.
for the same offense after acquittal. Like the common-law plea of _autrefois convict_, the Clause prohibits the government from prosecuting an individual a second time for the same offense after already being convicted. In addition, the Clause bars the government from imposing multiple punishments upon a person for the same offense in separate proceedings. In some circumstances, it prohibits the government from prosecuting a person a second time for the same offense after a judge prematurely terminates the individual’s first trial, either by declaring a mistrial or by dismissing the charges against him or her before the fact-finder reaches a verdict in the case.

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70. _See supra_ note 17.


73. United States v. Jorn, 400 U.S. 470, 486–87 (1971) (plurality opinion) (noting that the trial judge sua sponte declared 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) (upholding the 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_ RUDSTEIN, _supra_ note 68, at 43–73 (discussing the nature of “jeopardy” generally).

74. United States v. Gaytan, 115 F.3d 737, 740, 744 (9th Cir. 1997) (barring retrial where the trial judge sua sponte dismissed the charge against the defendant because of discovery violations by the prosecution); United States v. Govro, 833 F.2d 135, 137 (9th Cir. 1987) (barring retrial because the trial judge sua sponte dismissed the charge against the defendant based on matters independent of factual guilt); State v. Bell, 753 So. 2d 619, 620 (Fla. Dist. Ct. App. 2000) (precluding retrial where the trial judge sua sponte dismissed the charge against the defendant because of the lack of credibility of the prosecution’s witnesses); _see also_ Scott, 437 U.S. at 98–99 (concluding that defendants who seek a ruling on the offense based on procedure rather than factual guilt suffer no harm when the prosecution successfully appeals and retries them, but implying that the government could not always retry them if the dismissal was either sua sponte or was the result of a prosecution motion).
A. Reprosecution Following an Acquittal

On numerous occasions, the Supreme Court has stated that the Double Jeopardy Clause accords “absolute finality” to an acquittal. Finality prevents the government from trying an individual a second time for the same offense following his or her acquittal, whether the acquittal was rendered by a jury, a judge in a bench trial, or a judge in a jury trial. Moreover, the finality of an acquittal applies even if “based upon an egregiously erroneous foundation.”

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76. See Smith v. Massachusetts, 543 U.S. 462, 467 (2005) (“The Double Jeopardy Clause . . . prohibits reexamination of a court-decreed acquittal to the same extent it prohibits reexamination of an acquittal by a jury . . . .”); 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))); 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 Ball, 163 U.S. at 671 (alteration in Fong Foo))).

77. Smith, 543 U.S. at 467; Smalis v. Pennsylvania, 476 U.S. 140, 145–46 (1986); DiFrancesco, 449 U.S. at 129; Scott, 437 U.S. at 88; Sanabria, 437 U.S. at 64; Burks, 437 U.S. at 10–11; Martin Linen, 430 U.S. at 575–76; Price v. Georgia, 398 U.S. 323, 329 (1970); Benton v. Maryland, 395 U.S. 784, 797 (1969); Fong Foo, 369 U.S. at 143; Green v. United States, 355 U.S. 184, 188, 192 (1957); Ball, 163 U.S. at 671.

78. Price, 398 U.S. at 329 (implying acquittal of the charged greater offense by conviction for the lesser offense); Benton, 395 U.S. at 797; Green, 355 U.S. at 198 (implying acquittal of charged greater offense by conviction for lesser offense); Ball, 163 U.S. at 671.

79. Martin Linen, 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.”).

80. Smith, 543 U.S. at 467; Sanabria, 437 U.S. at 64; Martin Linen, 430 U.S. at 571; Fong Foo, 369 U.S. at 142, 143.

81. Fong Foo, 369 U.S. at 143 (indicating that, although the trial judge improperly acquitted the defendants, re-examination of the acquittal would violate the Double Jeopardy Clause); accord DiFrancesco, 449 U.S. at 129 (quoting Fong Foo, 369 U.S. at 143); Sanabria, 437 U.S. at 78; see also Smith, 543 U.S. at 473 (“The 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 (finding that only the accuracy of an acquittal is affected by an erroneous evidentiary ruling, not its character); 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 stating that finality is granted no matter how egregious the decision); Green, 355 U.S. at 224 (determining that the state cannot appeal even if the acquittal may have been erroneous).
In a bench trial, or when the judge intervenes in a jury trial, what constitutes an “acquittal” for purposes of double jeopardy “is not . . . controlled by the form of the judge’s action;” rather, a trial judge’s ruling constitutes an “acquittal” only when it constitutes a resolution, in favor of the defendant, of all 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 . . . is an acquittal under the Double Jeopardy Clause.”

The Supreme Court has identified a number of related individual and societal interests served by the double jeopardy rule. One purpose served in the interest of both the individual and society is that the Double Jeopardy Clause preserves the finality of judgments while protecting the “integrity” of those judgments. Additionally, the guarantee serves to minimize the financial, psychological, and physical ordeal of the trial process, and 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 is thus a constitutional policy of finality for the defendant’s benefit.

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82. *Martin Linen*, 430 U.S. at 571; *accord Scott*, 437 U.S. at 96 (stating that a judge’s characterization of his own ruling does not control its essence).


84. *Smalis*, 476 U.S. at 144; *see also Smith*, 543 U.S. at 467–68 (holding that a state rule requiring the trial judge to enter a finding of not guilty where the evidence is insufficient as a matter of law meets the definition of an acquittal for double jeopardy purposes); *Martin Linen*, 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.”).


86. *Scott*, 437 U.S. at 92.

87. *Green v. United States*, 355 U.S. 184, 187 (1957) (noting that the state often has more resources than a defendant); *see also infra* notes 203–18 and accompanying text.


89. *Wilson*, 420 U.S. at 352; *see also infra* notes 246–58 and accompanying text.
jeopardy also protects the power of the jury to nullify the law by acquitting the defendant “against the evidence.”

The protection against double jeopardy serves other purposes in addition to those expressly identified by the Supreme Court. Not only does it help to prevent police and prosecutors from using the criminal process to harass an individual who was already tried and acquitted for an offense, but it also helps to conserve prosecutorial and judicial resources and assists in maintaining the public’s respect for, and confidence in, the criminal justice system. By generally providing the government with “but one chance to convict a defendant[, precluding double jeopardy] operates as a powerful incentive to efficient and exhaustive investigation” and prosecution from the outset.

B. Prosecutorial Appeals

The Supreme Court has remarked that “the primary purpose of the Double Jeopardy Clause [is] to prevent successive trials, and not [g]overnment appeals per se.” Accordingly, a prosecutor’s appeal does not invoke the Double Jeopardy Clause so long as it does not present a threat of successive


91. MARTIN L. FRIEDLAND, DOUBLE JEOPARDY 3–4 (1969); AUSTRALIAN MODEL CRIMINAL CODE, DISCUSSION PAPER, supra note 21, at 2; ENG. LAW COMM’N, REPORT NO. 267, supra note 11, para. 4.14; see also infra text notes 295–300 and accompanying text.

92. FRIEDLAND, supra note 91, at 4; see also infra notes 309–17 and accompanying text.

93. FRIEDLAND, supra note 91, at 4; Connelly v. DPP, [1964] A.C. 1254, 1346 (H.L.), 1353 (Lord Devlin) (appeal taken from Eng.) (noting that predictability in rulings builds confidence); see also infra notes 318–27 and accompanying text.

94. ENG. LAW COMM’N, CONSULTATION PAPER NO. 156, supra note 11, para. 4.11; see also FRIEDLAND, supra note 91, at 4; Ian Dennis, Rethinking Double Jeopardy: Justice and Finality in Criminal Process, 2000 CRIM. L.R. 933, 941.

95. See infra text accompanying notes 328–42.

96. Sanabria v. United States, 437 U.S. 54, 63 (1978); see also United States v. DiFrancesco, 449 U.S. 117, 131 (1980) (declaring that the Double Jeopardy Clause is not an absolute bar to prosecutorial appeals); United States v. Martin Linen Supply Co., 430 U.S. 564, 568–69 (1977) (holding that the Double Jeopardy Clause aims to prevent multiple prosecutions and not to prevent appeals by the government); United States v. Wilson, 420 U.S. 332, 342 (1975) (“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.”).
prosecutions. For example, double jeopardy 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 a new trial would be unnecessary. The appellate court, instead, could merely reverse the trial judge’s decision, thereby reinstating the jury’s original verdict of guilty. For the same reason, the prosecution can appeal an acquittal when the judge, in a bench trial, sets aside a finding of guilty and instead enters an acquittal after concluding that there was reliance on inadmissible evidence without which the prosecution would have failed to prove the defendant’s guilt beyond a reasonable doubt. Similarly, the Double Jeopardy Clause does not bar the prosecution from appealing the sentence imposed on a convicted defendant, in part, because a revision of the defendant’s sentence does not require him or her to undergo a second trial.

However, when reversal of an acquittal by the appellate court would lead to either a second trial or “further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged,” such as a resumption of the appellee’s trial, the Double Jeopardy Clause prohibits an appeal by the prosecution. In Smalis v. Pennsylvania, a

98. Martin Linen, 430 U.S. at 568–70; accord DiFrancesco, 449 U.S. at 132. For the prosecution to appeal, local law must authorize that appeal. See United States v. Sanges, 144 U.S. 310, 312 (1892) (“[I]t is settled by an overwhelming weight of American authority, that the state has no right to sue out a writ of error upon a judgment in favor of the defendant in a criminal case, except under accordance with express statutes . . . .”); see also LAFAVE ET AL., supra note 90, § 27.3(b) (noting that specific statutory authorization is required for appeals); Wilson, 420 U.S. at 336–42 (providing a brief overview of how Congress and the Supreme Court have dealt with prosecutorial appeals in federal courts).


102. DiFrancesco, 449 U.S. at 136–38, 143 (noting that such an appeal does not question the defendant’s guilt).

103. Smalis v. Pennsylvania, 476 U.S. 140, 145–46 (1986) (finding such an appeal to have no purpose); Scott, 437 U.S. at 91; Martin Linen, 430 U.S. at 570–71 (precluding an appeal where subsequent proceedings are sought to resolve factual disputes related to the offense); Wilson, 420 U.S. at 336.

104. Smalis, 476 U.S. at 146 (quoting Martin Linen, 430 U.S. at 570–71 (internal quotation marks omitted)).

105. Id. at 145 (rejecting the prosecution’s contention that its appeal was permissible because resuming the defendant’s trial would only put him in “continuing jeopardy”); see also Smith, 543 U.S. at 467 (concluding that further fact-finding proceedings related to guilt were impermissible).

106. See Smith, 543 U.S. at 469 n.4 (affirming that a final acquittal is not reviewable); Sanabria, 437 U.S. at 69 (establishing that even erroneous acquittals by the trial court are not reviewable); Martin Linen, 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
husband and wife, charged with various offenses stemming from a suspicious fire in a building that they owned, challenged the sufficiency of the evidence offered in their bench trial by filing a demurrer at the close of the prosecution’s case.108 The trial court sustained the demurrer on three of the charges, stating that, after considering all the facts and reasonable inferences therefrom, the court was not presented with enough evidence to conclude guilt beyond a reasonable doubt.109 The prosecution appealed110 and, although the Pennsylvania Supreme Court held that the appeal could proceed,111 the U.S. Supreme Court unanimously held that the Double Jeopardy Clause barred the prosecution’s appeal.112 The Court found that the trial judge’s ruling that the prosecution’s evidence was insufficient as a matter of law to prove factual guilt was equivalent to an acquittal for double jeopardy purposes.113 It further explicated that a reversal of the ruling would require further “factfinding proceedings going to guilt or innocence”114 that would place the defendants in jeopardy a second time for the same offense.115

To reach its holding in Smalis, the Supreme Court rejected the prosecution’s argument that resumption of the bench trial following a successful appeal would “simply constitute ‘continuing jeopardy,’”116 reasoning that the trial judge’s acquittal terminated the initial jeopardy.117

This “continuing jeopardy” argument relied upon by the prosecution in Smalis was espoused by Justice Oliver Wendell Holmes in his Kepner v. United States dissent.118 In Kepner, Justice Holmes observed:

subject to review by . . . appeal . . . .”); United States v. Ball, 163 U.S. 662, 671 (1896) (stating that a constitutional violation would occur where a final verdict was reviewed); Fong Foo, 369 U.S. 141, 143 (1962) (per curiam) (addressing Ball and reversing the issuance of a writ of mandamus that vacated the acquittal and ordered a new trial).

107. 476 U.S. at 141–42.
108. Id. at 141.
109. Id. at 141–42 (quoting App. to Pet. for Cert. 101a-102a). The charges were for murder, voluntary manslaughter, and causing a catastrophe. Id. at 141.
110. Id. at 142.
111. Commonwealth v. Zoller, 490 A.2d 394, 401 (Pa. 1985) (characterizing demurrers and acquittals differently, therefore permitting the prosecution to appeal from an order sustaining a defendant’s demurrer).
112. Smalis, 476 U.S. at 146.
113. Id. at 144 (stating that the defendant sought a ruling that would establish his factual guilt).
114. Id. at 145.
115. Id. at 145–46 (observing that such a result is against the defendant’s interest in obtaining finality).
116. Id. at 145.
117. Id. (noting the difference between acquittals, which terminate the initial jeopardy, and convictions, which do not).
118. 195 U.S. 100, 134–37 (1904) (Holmes, J., dissenting).
[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 . . . .

This argument, however, has not been accepted by the Court. Moreover, although the Supreme Court has recognized that a legal system that reviewed all alleged legal errors would prevent releasing defendants who benefitted from such error, the Court rejected that position, concluding “that the policies underlying the Double Jeopardy Clause militate against permitting the government to appeal after a verdict of acquittal.” In United States v. Wilson, the Court explained that a broad grant of appeal rights is in conflict with providing the defendant finality. Perhaps more importantly, allowing an appeal provides a second opportunity to the prosecutor to convince a fact-finder of the defendant’s guilt and permits that same prosecutor to strengthen the weaknesses in his or her original presentation. Also, a state, with its superior resources, can wear down the defendant, “thereby ‘enhancing the possibility that even though innocent he may be found guilty.’”

119. Id. at 134–35 (citations omitted).
120. United States v. Scott, 437 U.S. 82, 90 n.6 (1978); see also Green v. United States, 355 U.S. 184, 192 (1957) (noting that Holmes’s “continuing jeopardy” argument has been consistently rejected).
121. United States v. Wilson, 420 U.S. 332, 352 (1975) (stating that such a broad grant of appeals to the government would result in a diminution of the interests that the public and individuals have in obtaining a final judgment).
122. Id.; see also Smalis, 476 U.S. at 145 (explaining that successful post-acquittal appeals in violation of the Double Jeopardy Clause serve no proper purpose and frustrate the defendant’s interest in obtaining a final judgment).
123. Wilson, 420 U.S. at 352.
124. Scott, 437 U.S. at 91 (citing Green, 355 U.S. at188).
III. THE CRIMINAL JUSTICE ACT 2003 IN THE UNITED STATES: WOULD ENACTMENT OF A STATUTE OR COURT RULE ALLOWING FURTHER PROCEEDINGS VIOLATE THE DOUBLE JEOPARDY CLAUSE?

In all of the cases just discussed, it was evident that the trial judge’s acquittal was a final judgment and that the prosecution was barred from bringing an appeal because of the Double Jeopardy Clause. But, what if a state or the federal government enacted a statute or adopted a court rule based upon England’s Criminal Justice Act 2003, providing that a trial judge’s pre-verdict decision to order an acquittal does not become “final” until the expiration of a specified period of time during which the prosecution could decide to appeal that decision? Further, what if the statute or court rule provided that, if the prosecution avails 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 of guilt 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?

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

The Supreme Court’s decision in Smith v. Massachusetts can support 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.125 Smith involved a trial judge’s reconsideration of her initial midtrial acquittal ruling on a charge against the accused.126 Smith and his codefendant elected to have a jury trial and, at the close of the prosecution’s case-in-chief, Smith moved “for a required finding of not guilty” on a firearm-possession charge127 pursuant to Massachusetts Rule of Criminal Procedure 25(a).128 Smith asserted that the prosecution had not proved that the

126. Id. at 464.
127. Id. at 465 (citing MASS. R. CRIM. P. 25(a)).
128. Rule 25(a) of the Massachusetts Rules of Criminal Procedure provides:
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
barrel of the gun in question was less than sixteen inches, a required element of
the charge.\textsuperscript{129} Although the victim testified that Smith had shot him with a .32
or .38 revolver, Smith’s motion was granted because the trial judge found no
evidence that the barrel of the gun was less than sixteen inches.\textsuperscript{130} Towards
the conclusion of the trial, the trial judge, who had not notified the jury of Smith’s
acquittal on the firearm-possession charge, reversed her ruling and allowed the
jury to consider that charge.\textsuperscript{131} The jury convicted Smith of all three offenses
and the state appellate court affirmed.\textsuperscript{132}

Following a grant of certiorari, the U.S. Supreme Court reversed the firearm-
possession conviction.\textsuperscript{133} The Court held that the Double Jeopardy Clause
precluded the trial judge from reconsidering the midtrial acquittal and
submitting the charge to the jury.\textsuperscript{134} This was founded on the determination
that the judge’s ruling constituted an “acquittal,”\textsuperscript{135} which could not be
reconsidered on appeal once final.\textsuperscript{136} The Court reasoned that Smith was
subjected to further proceedings determining his guilt—prohibited by \textit{Smalis v. Pennsylvania}.\textsuperscript{137}

In reaching its result, the Court first concluded that an acquittal was reached
when the not guilty finding was entered and the trial judge concluded that the
evidence presented could not sustain a conviction as a matter of law.\textsuperscript{138} The
Court next considered whether the Double Jeopardy Clause barred the trial

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\textit{guilty is made at the close of the Commonwealth’s evidence, it shall be ruled upon at}
that time. . . . \textit{Mass. R. Crim. P. 25(a)}.
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\textsuperscript{129} \textit{Smith}, 543 U.S. at 464–65.
\textsuperscript{130} \textit{Id. at 465}.
\textsuperscript{131} \textit{Id.}
\textsuperscript{132} \textit{Id. at 466}. With respect to the firearm-possession charge, the Appeals Court of
Massachusetts held that the trial judge’s reconsideration of her midtrial ruling did not violate the
Double Jeopardy Clause because it did not subject Smith to a second trial or proceeding. \textit{Id}. The
appellate court also found that Rule 25(a), which mandates that a motion for a required finding of
not guilty be made at the close of the prosecution’s case “be ruled upon at that time,” did not
preclude the trial judge from correcting her initial ruling. \textit{Commonwealth v. Smith}, 788 N.E.2d
977, 982–83 (Mass. App. Ct. 2003); \textit{see also supra} note 128. The Supreme Judicial Court of
\textsuperscript{133} \textit{Smith}, 543 U.S. at 475.
\textsuperscript{134} \textit{Id. at 473}.
\textsuperscript{135} \textit{Id. at 467–68} (citing \textit{United States v. Martin Linen Supply Co.}, 430 U.S. 564, 571
(1977)); \textit{see also id. at 469} (re stating that the Court “concluded that the judge acquitted” Smith).
\textsuperscript{136} \textit{Id. at 469 n.4}. “[T]he Double Jeopardy Clause of the Fifth Amendment prohibits
reexamination of a court-decree d 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.” \textit{Id. at 467} (citations omitted).
\textsuperscript{137} \textit{Id. at 467} (quoting \textit{Smalis v. Pennsylvania}, 476 U.S. 140, 145 (1986)).
\textsuperscript{138} \textit{Id. at 467–68} (finding the ruling to be an acquittal because it was a resolution that went
to the defendant’s guilt).
judge from reconsidering her ruling. The Court began its analysis by noting that Smith had no reason to doubt the acquittal’s finality because: (1) the prosecution did not move for reconsideration of the ruling or reserve such a motion; (2) it did not request a continuance to provide favorable authority to the court; and (3) the trial judge’s ruling did not “appear on its face to be tentative.”

The Court then observed that, at the time of Smith’s trial, Massachusetts did not provide, either by statute, rule of court, or case law that a trial judge’s midtrial determination of the sufficiency of the prosecution’s evidence was not final and that the judge could later reconsider his or her decision. Although the Supreme Court acknowledged that appellate courts might be able to announce a state rule finding midtrial acquittals tentative where reconsideration does not create any prejudice, it held that an appellate court could not do so in a case such as Smith, where prejudice was created because the defense had presented its case. The Court remarked that allowing a court to reconsider its initial ruling at that point would allow the Double Jeopardy Clause’s guarantee “to become a potential snare for those who reasonably rely upon it.”

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139. *Id.* at 469.
140. *Id.* at 470.
141. *Id.* The Supreme Court observed that the prosecutor ultimately obtained the reconsideration during a fifteen-minute recess before closing and that, had a continuance been requested when the motion was made, it would have been resolved before the defendant went forward. *Id.* at 474–75.
142. *Id.* at 470. The Supreme Court pointed out that Massachusetts’s procedure did not permit deferment on Smith’s motion or require the defendants to present their cases while the prosecution reserved the right to present more evidence. *Id.* The Court also observed that the prosecution’s request to reopen the case was denied because it was time to rule on Smith’s motion. *Id.*
143. *Id.* at 471 (characterizing the rule as one of “nonfinality”).
144. *Id.* The prosecution argued that interlocutory rulings could be reviewed, but the Supreme Court rejected the argument, stating that the cases relied upon did not extend to determinations that would end the case. *Id.*
145. *Id.* at 470 (remarking that there was no instance of any state having done so by statute or rule of court). The Court went on to cite instances where states had found—through case law or by exercising their supervisory authority—that an acquittal does not become effective immediately upon its announcement by the trial judge. *Id.* at 470–71.
146. *Id.* at 471–72. The Supreme Court identified two sources of potential prejudice. First, a defendant may be induced to defend undismissed charges when he should be silent. *Id.* at 472. In jurisdictions reviewing sufficiency of the evidence challenges on the entire record, a defendant who presents evidence for undismissed charges may bolster the prosecution’s case so much as to support a guilty verdict on the initially dismissed count. *Id.*
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.” *Id.*
147. *Id.* at 473.
Two statements 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.”\(^{148}\) 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 pre-existing rule or case authority* expressly applicable to midtrial rulings on the sufficiency of the evidence.”\(^{149}\) All four dissenters in *Smith* agreed with these statements by the majority and, therefore, as Justice Ginsburg pointed out in her dissenting opinion, the Court *unanimously* concluded that double jeopardy does not preclude trial judges from reviewing midtrial acquittals on less than all counts of an indictment.\(^{150}\) Accordingly, a jurisdiction can provide such reconsideration authority to trial judges by statute, court rule, case law, or judicial oversight.\(^{151}\)

**B. Double Jeopardy and Appeal of a Midtrial Acquittal Ruling: Extending Smith**

The *Smith* Court was concerned only with whether the Double Jeopardy Clause prohibits a trial judge from reconsidering his or her initial ruling, made at the close of the prosecution’s case-in-chief, allowing the defendant’s motion for a court-ordered acquittal.\(^{152}\) Nevertheless, the *Smith* Court’s statements and reasoning arguably can be extended to support the constitutional validity of a statute or court rule modeled after the Criminal Justice Act 2003.\(^{153}\)

\(^{148}\) *Id.* at 470 (emphasis added).

\(^{149}\) *Id.* at 473 (emphasis added).

\(^{150}\) *Id.* at 475 (Ginsburg, J., dissenting).

\(^{151}\) *Id.; see also, e.g.*, People v. Madison, 176 P.3d 793, 800 (Colo. App. 2007) (holding that the trial court did not violate the Double Jeopardy Clause when 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 could reverse a court-ordered acquittal before the jury is dismissed provided there is no opportunity for prejudice to the defense).

The lone exception to the general rule stated in the text is that an appellate court cannot announce a new rule and apply it retroactively to the case before it when the trial judge’s acquittal reconsideration occurred after the defendant began presentation of his case. *See supra* notes 147–48 and accompanying text; *cf.* Price v. Vincent, 538 U.S. 634, 635 (2003) (holding that 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 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).

\(^{152}\) *Smith*, 543 U.S. at 469.

\(^{153}\) *See supra* notes 29–59 and accompanying text.
The Smith Court unanimously agreed that if the state had previously provided by statute or otherwise that a midtrial acquittal ruling could be reconsidered by the trial judge, it would not have been final for double jeopardy purposes. The Criminal Justice Act 2003 accomplishes the same result with respect to an appeal by the prosecution of a ruling of no case to answer. The Act 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. 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 that it intends to appeal the ruling expires without the prosecution informing the trial court of such an intention; (2) the Court of Appeal denies leave to appeal after the prosecution timely informed the trial court that it intended to appeal; (3) the prosecution abandons its appeal before the Court of Appeal determines the appeal; or (4) the Court of Appeal affirms the trial judge’s ruling.

Under a statute or court rule based on the Act, 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 a final acquittal may not be reviewed. Such a statute or court rule would also be consistent with

154. Smith, 543 U.S. at 470, 473.
155. Criminal Justice Act, 2003, c. 44, § 58(3) (Eng.).
156. See supra notes 34–39 and accompanying text. 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 notes 34–39 and accompanying text. 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.
157. Criminal Justice Act, 2003, § 58(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. § 58(9)(a).
158. Id. § 58(8), (9)(b).
159. 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 because the Act provides that the prosecution can appeal to the Supreme Court of the United Kingdom following an adverse decision by the Court of Appeal. Criminal Appeal Act, 1968, c. 19, § 33(1)-(2) (Eng.). In fact, neither the Supreme Court of the United Kingdom, nor its predecessor, the House of Lords, has decided such an appeal. See Constitutional Reform Act, 2005, c. 4, Preamble, § 23, sch. 9, ¶ 16 (U.K.), available at http://www.legislation.gov.uk/ukpga/2005/4/pdfs/ukpga_20050004_en.pdf (indicating the transition from the House of Lords to the Supreme Court as the body to decide appeals).
160. Smith, 543 U.S. at 469 n.4; see also Blueford v. Arkansas, 132 S. Ct. 2044, 2050 (2012) (concluding that a foreperson’s report to the trial judge concerning jury deliberations was not final because deliberations continued after the report and therefore did not constitute an acquittal); id. at 2051 (stating that the foreperson’s report was not a final decision); United States v. DiFrancesco, 449 U.S. 117, 129 (1980) (“If the innocence of the accused has been confirmed by
the unanimous view in Smith that a state can make merely provisional what would otherwise be a “final” acquittal 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 was not a final resolution in favor of the defendant that went to the defendant’s guilt. In addition, a pre-existing statute or court rule would provide notice to the accused that such a ruling was not final.

Are there any differences between allowing a trial judge to reconsider his or her midtrial acquittal ruling and allowing an appellate court to review such a ruling—differences that would preclude extending the Supreme Court’s holding in Smith? In her Smith dissent, Justice Ginsburg expressly distinguished the two situations. Justice Ginsburg believed that a trial judge’s reconsideration of a midtrial acquittal ruling would not violate the Double Jeopardy Clause (at least in the absence of any prejudice to the accused’s defense) because further proceedings in the case would merely be “continuing proceedings before the initial tribunal prior to the rendition of a final adjudication.” Nevertheless, Justice Ginsburg also thought that acquittal reconsiderations by an appellate court would be precluded “because reversal would lead to a remand for further trial proceedings.”

...
that an appealed ruling seemingly has finality after moving to the appellate forum.\footnote{168} The majority of the Court disagreed with Justice Ginsburg’s position on the grounds that “the acquittal was reconsidered ‘before the court of first instance ha[d] disassociated itself from the case or any issue in it.’”\footnote{169} However, the majority did seem to agree with Justice Ginsburg that finality is reached when the appealed ruling moves into the appellate forum.\footnote{170}

The Justices are correct when they imply that a trial judge’s order must be final to be appealable; finality is a required element for review in the United States.\footnote{171} An order, however, need not be a “final judgment,” i.e., one that concludes the trial court’s criminal proceedings,\footnote{172} to be “final” for purposes of appeal. Rather, a “final decision,”—one that “constitute[s] a complete, formal, and, in the trial court, final [determination] of a [party’s] . . . claim,”\footnote{173}—may sometimes be appealable. For example, in \textit{Abney v. United States}, the 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 not being a “final judgment.”\footnote{174} By expressly stating that the taking of an appeal signals the finality of the \textit{order} being appealed, the majority in \textit{Smith} seemed to distinguish between a final \textit{order}, or decision, and a final \textit{judgment}.

Accordingly, because a final decision is not always a final judgment,\footnote{175} a statute or court rule 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 and is therefore not a “final judgment” constrained by double jeopardy principles;\footnote{176} (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 the defendant can be tried a second time for the same offense. This is precisely

\footnotesize{168. \textit{Id.}}
\footnotesize{169. \textit{Id.} at 469 n.4 (majority opinion) (stating that the absence of an appeal does not necessarily connote nonfinality (quoting \textit{id.} at 477–78 (Ginsburg, J., dissenting))).}
\footnotesize{170. \textit{Id.}}
\footnotesize{172. \textit{Abney v. United States}, 431 U.S. 651, 657 (1977).}
\footnotesize{173. \textit{Id.} at 659 (emphasis added).}
\footnotesize{174. \textit{Id.} at 657, 662.}
\footnotesize{175. \textit{Id.} at 658 (discussing factors to be considered in characterizing a rule as a final decision (quoting Stack v. Boyle, 342 U.S. 1, 12 (1951))).}
\footnotesize{176. See \textit{Smith v. Massachusetts}, 543 U.S. 462, 469 n.4 (2005) (“An acquittal, once final, may not be reconsidered on appeal.”) (emphasis added)); see also supra note 160 (citing decisions in which the Supreme Court stated that a second trial is barred when an accused’s innocence has been determined by a final judgment)).}
what Parliament did in England with the Criminal Justice Act 2003. Many other countries similarly recognize the protection against double jeopardy, yet permit the prosecution to appeal an acquittal.

In effect, a statute or court rule based on the Act would create a two-tiered process for the midtrial determination of the sufficiency of the prosecution’s evidence. If the trial judge finds that 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 appellate court will ultimately decide the sufficiency of the prosecution’s evidence. Such a procedure arguably would be constitutional under Swisher v. Brady. 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 noted that states have the authority to choose and authorize the fact-finder and adjudicator. Subsequently, in Smith v. Massachusetts, the Supreme Court explained that Swisher stood for the notion that a defendant’s jeopardy continues until a final decision is made. Arguably, a statute or court rule based upon the Act would do no more than designate the appellate court as “the factfinder and adjudicator” of a motion for a directed verdict of not guilty in those cases in which the trial judge decided the motion in favor of the accused and the state appealed. In such cases, a trial judge’s decision to allow the defendant’s motion would not be final unless the state decided to accept the trial judge’s decision without appeal.

As the above analysis indicates, a statute or court rule authorizing the prosecution to appeal a midtrial decision by a trial judge to direct a verdict of

177. See supra notes 15–19, 156–60 and accompanying text.
178. See supra notes 21–26 and accompanying text.
179. See Criminal Justice Act, 2003, c. 44, § 58(1)–(2) (Eng.).
180. See id. § 61(1). If the trial judge found the prosecution’s case sufficient to establish the defendant’s guilt, that decision would stand for purposes of the trial; however, as under current practice, the defendant could challenge the trial court’s ruling on appeal if he or she is ultimately convicted by the jury. See, e.g., Burks v. United States, 437 U.S. 1, 3 (1978).
182. Id. at 206, 210–11, 215.
183. Id. at 216 (stating that Maryland had conferred this role on the Juvenile Court judge and that he was, therefore, empowered to accept, modify, or reject proposals).
185. Swisher, 438 U.S. at 216.
186. 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 notes 156–59 and accompanying text.
not guilty may be consistent with the Supreme Court’s cases interpreting the Double Jeopardy Clause. 187 Nevertheless, the final decision about the constitutionality of such a statute or court rule must depend on how it comports with the policies underlying the guarantee against double jeopardy.

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

1. Preserving the Finality of Judgments

A statute or court rule 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. 188 Such a statute or court rule would provide that a trial judge’s midtrial acquittal has no effect during the period in which the prosecution can decide whether to appeal the ruling. 189 If the prosecution does appeal, the judge’s ruling would also have no effect during the pendency of that appeal. 190 Moreover, the statute or court rule would provide that the trial judge cannot “take any steps in consequence of the ruling” 191 and, if the judge does take any steps, those steps would have no effect. 192

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: (1) the prosecution fails to notify the trial judge of its intention to appeal during the period in which it is permitted to do so; 193 (2) the prosecution informs the judge in a timely manner that it intends to appeal the ruling, but leave to appeal is not obtained; 194 or (3) if leave is obtained, either the prosecution abandons the appeal, 195 or the appellate court upholds the trial judge’s ruling that the prosecution failed to

187. See supra notes 179–86 and accompanying text.
188. See infra notes 189–207 and accompanying text (focusing on personal interests served by preserving the finality of an acquittal judgment); see also infra notes 309–27 (outlining public interests served by preserving the finality of an acquittal judgment).
189. See Criminal Justice Act, 2003, c. 44, § 58(3)–(4) (Eng.).
190. See id. § 58(10).
191. See id. § 58(11)(b).
192. See id. § 58(11)(c).
193. See id. § 58(3)–(4).
194. See id. § 57(4) (requiring the prosecution to obtain leave to appeal, either from the trial judge or from the Court of Appeal). A ruling of no case to answer, therefore, would become “final” if the prosecution failed to obtain leave to appeal because, pursuant to the required “acquittal agreement” terms undertaken by the prosecution as a condition of taking the appeal, “the defendant . . . [must] be acquitted of [the] offense [in question] if [leave to appeal to the Court of Appeal is not obtained].” Id. § 58(8)–(9)(a); see also supra notes 40–41 and accompanying text.
establish a prima facie case of guilt. Consequently, until one of these events occurs, there is no judgment for which “finality” must be preserved or “integrity” protected. Moreover, every criminal defendant would know at the outset of his or her trial that, should the trial judge find the prosecution’s evidence insufficient to prove his or her guilt before the case is submitted to the jury, the decision will not be final and therefore will not immediately acquit the defendant of the offense in question. The defendant would also know that, if the prosecution appealed the trial judge’s ruling and succeeded in overturning it, his or her trial may be resumed, or the defendant could be subjected to a new trial for the same offense.

In contrast, once a court-ordered acquittal became “final” and the defendant was acquitted of the offense in question, the Double Jeopardy Clause would protect the now-acquitted individual from a second prosecution for the same offense. Therefore, the state would still acknowledge “that it respects the principle of limited government and the liberty of the [citizen].”

2. Minimizing the Ordeal of the Trial Process

The Double Jeopardy Clause also serves to prevent the government from “mak[ing] repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal.” As Professor Glanville Williams explained, it would be trying on any defendant, after expending a large amount of money and energy in obtaining a favorable verdict, to have to repeat the entire ordeal.

196. See id. §§ 58(10)–(11), 61(1), (3), (7); see also supra note 160 (arguing that a ruling of no case to answer might not be final under the Criminal Justice Act 2003 because it provides that the prosecution can appeal an adverse Court of Appeal ruling).

197. See Criminal Justice Act, 2003, § 58(1)–(2); 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, 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)).


199. See id. § 61(4)(b).

200. See supra notes 193–96 and accompanying text.


202. ENG. LAW COMM’N, REPORT NO. 267, supra note 11, para. 4.17 (noting that the rule promotes democratic values).


204. WILLIAMS, supra note 7, at 164. Although Professor Williams discussed subsequent prosecutions for a different offense arising from the same facts, this principle is applicable to autrefois cases as well. ENG. LAW COMM’N, CONSULTATION PAPER NO. 156, supra note 11, para. 4.6 n.14; see also supra notes 12, 17.
Presenting an adequate defense to a criminal charge comes with a heavy financial burden. Defendants with sufficient resources nearly always hire legal representation and may seek out investigators or experts to gather evidence or to testify at trial. Even an indigent defendant can suffer financial burdens despite the fact that he or she is entitled to state-funded assistance; if the defendant is employed, he or she may miss work for court appearances and meetings with counsel and could even lose his or her job because of the pending criminal charge(s).

Mounting a defense can also cause personal stress, affecting both the accused and his or her family. A criminal charge can be embarrassing, and it has the potential to cause disapproval and distrust among family, friends, and colleagues. Consequently, a defendant has reason to be concerned about the impact of the charge on his or her personal life and, perhaps more importantly, the possibility of a conviction and subsequent incarceration. This apprehension can understandably have both physical and psychological consequences for the accused.

"[H]eavy personal strain and financial hardship accompany any criminal charge; accordingly, the Double Jeopardy Clause is intended, in part, to minimize the expense, distress, and trauma caused by the legal process by..."
precluding a second trial\textsuperscript{215} in most cases.\textsuperscript{216} An individual who is acquitted or convicted of a particular crime need never again face trial for the same infraction.\textsuperscript{217} Allowing the prosecution to appeal a midtrial judgment of acquittal is contradictory to this goal; the defendant will, essentially, be forced to undergo another proceeding, either by defending him- or herself on appeal or by withstanding a second trial.\textsuperscript{218}

In those cases in which the prosecution appeals the grant of a motion for judgment of acquittal, the defendant will still need to appear before the appellate court; if the defendant is not indigent, he or she will be forced to pay for the added expense imposed by an appeal.\textsuperscript{219} Even if appointed counsel represents the defendant,\textsuperscript{220} he or she may bear a financial burden during the pendency of the appeal because of the continued disruption to his or her employment or business.\textsuperscript{221}

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, ending the defendant’s trial (at least for the moment) before the accused begins presenting his or her defense.\textsuperscript{222} Arguably, appellate court

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{215} \emph{Abney}, 431 U.S. at 661; \textit{accord} Smalis v. Pennsylvania, 476 U.S. 140, 143 n.4 (1986); \emph{Breed}, 421 U.S. at 529–30.
\item \textsuperscript{216} Second trials for the same offense are sometimes permitted by the Double Jeopardy Clause. \textit{See} LAFAVE ET AL., supra note 90, \textsection 27.1 (stating that, in general, a convicted felon can appeal his conviction). 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); \textit{see also} RUDSTEIN, supra note 68, at 132–48 (outlining the situations in which a defendant may be prosecuted again, without violating the Double Jeopardy Clause, after an acquittal); \textit{supra} note 71 and accompanying text; \textit{infra} notes 233–36, 270–72 and accompanying text.
\item \textsuperscript{217} \textit{See supra} notes 68–69 and accompanying text.
\item \textsuperscript{219} NSW LAW REFORM COMM’N, REPORT 77, supra note 208, \textsection para. 2.12. A defense attorney retained on a flat-fee basis 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 author (May 21, 2012, 11:00 CDT) (on file with author).
\item \textsuperscript{220} \textit{See}, e.g., ARIZ. REV. STAT. ANN. \textsection 11-584 (2012); N.Y. COUNTY LAW \textsection 717 (McKinney 2004).
\item \textsuperscript{221} NSW LAW REFORM COMM’N, REPORT 77, supra note 208, \textsection para. 2.12. Assuming the prosecution obtains leave to appeal, the severity of this financial burden may depend on the length of time it takes the court to decide the appeal. In England, many defendants are forced to wait for more than six months from the date of the trial court decision. \textit{See}, e.g., R v. S.H., [2010] EWCA (Crim) 1931, [1]–[2] (Eng.), \textit{available at} http://www.bailii.org/ew/cases/EWCA/crim/2012/1931.html (acquitting the defendant on July 13, 2009, and deciding the appeal on August 3, 2010); R v. N.T., [2010] EWCA (Crim) 711, [1] (Eng.), 2010 WL 910162 (staying indictment on August 12, 2009, and issuing an appellate opinion on March 31, 2010).
\item \textsuperscript{222} \textit{See}, e.g., FED. R. CRIM. P. 29(a) (citing the time period “after the government closes its evidence” as an appropriate juncture at which the court may grant a defendant’s timely motion for a judgment of acquittal).
\end{enumerate}
\end{footnotesize}
proceedings can be considered a surrogate for the remainder of the defendant’s trial. Although the defendant must still counter the government’s appeal, it is unlikely that the defendant will face the same difficulties of a trial. The appeal is likely to be less demanding on the defendant, in large part because the trial judge has already rendered a decision, in the defendant’s favor, on the merits of the case. Conversely, the appellate process could last longer than the time it would take to present a defense; therefore, any inconvenience or hardship could eclipse that caused by merely enduring the completion of the defendant’s original trial. In conjunction with these concerns, non-indigent defendants may incur additional expenses that they would not have had had they continued in the trial court. Consequently, a motion for judgment of acquittal and subsequent appeal could presumably result in a needless increase in the defendant’s anxiety and hardship because of the criminal process. Furthermore, if the appellate court overturns the decision and orders a new trial, the defendant will suffer the negative effects of the appeal as well as those of a second trial, frustrating a primary purpose of the Double Jeopardy Clause.

It is true, of course, that double jeopardy does not categorically preclude a second trial for the same offense. For example, a second trial is permissible in the event of a mistrial, whether at the request of the defendant, or

223. *Cf.* United States v. DiFrancesco, 449 U.S. 117, 136 (1980) (stating that a prosecution’s review of the accused’s sentence does not involve the same trials and tribulations involved in a retrial or original prosecution).

224. *Fed. R. Crim. P.* 29(a) (requiring the trial judge to grant the defendant’s request for acquittal if the prosecution fails to present sufficient evidence). If this decision is appealable, the defendant will still face the possibility of reversal and relitigation as well as the effects of continued proceedings on his personal life. *See supra* notes 193–99, 219–21 and accompanying text.

225. *See supra* note 221 (noting that many defendants in England have had to wait more than six months before their appeals were decided). Even if the appellate court issued a decision within a matter of days, this could still exceed the duration of the trial following the government’s case-in-chief. *See, e.g., R v. J.G., [2006] EWCA (Crim) 3276, [1] (Eng.), 2006 WL 3485353 (dismissing the appeal from the trial court within four days).

226. One way to limit the trial’s negative effects would be to expedite prosecutorial appeals. Because of the issue’s narrow scope, the court could decide the case quickly. *See supra* note 224.

227. *See supra* notes 219–21 and accompanying text.

228. *See NSW LAW REFORM COMM’N, REPORT 77, supra* note 208, 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.”).

229. Alternatively, the appellate court might order the resumption of the defendant’s initial trial, which, by analogy, could cause prolonged anxiety, embarrassment, or expense. *See Criminal Justice Act, 2003, c. 44, § 61(4)(a) (Eng.).

230. *See supra* notes 203–04 and accompanying text (stating that one of the major purposes of the Double Jeopardy Clause is to avoid the consequences of relitigating the same offense).

231. *See supra* note 216 and accompanying text.

granted sua sponte by the trial judge because of the jury’s inability to reach a verdict, or some other valid reason. In such situations, however, a decision has not been reached on the merits, so a second trial may be appropriate in the interest of justice to resolve the question of the defendant’s guilt or innocence. Fairness dictates that, because the defendant sought the end of his or her own trial before the trier of fact could consider the case, holding a second trial does not violate the Double Jeopardy Clause. Indeed, by allowing his or her trial to end based on error rather than the substance of the charge, the defendant most likely anticipates a second trial.

This rationale for permitting a second trial is not applicable when a trial judge incorrectly grants a motion for judgment of acquittal based on insufficient evidence. An acquittal differs fundamentally from a mistrial because there is a decision on the merits of the case. This creates a sense of finality, recognized by the Double Jeopardy Clause, that is not a component of a mistrial. By seeking this midtrial determination of culpability, the defendant successfully appeals his conviction on the basis of trial error. United States v. Ball, 163 U.S. 662, 671–72 (1896); see also United States v. Tateo, 377 U.S. 463, 465–66 (1971) (articulating the rationale for allowing a second trial); infra text accompanying notes 270, 272–74 (discussing the reason for distinguishing the prosecution’s appeal of an acquittal from the defendant’s appeal for error).

Dinitz, 424 U.S. at 607–08, 611 (1976) (explaining that a second trial does not contravene the Double Jeopardy Clause even if the defendant’s request is necessitated by judicial or prosecutorial error); see also Oregon v. Kennedy, 456 U.S. 667, 676 (1982) (excluding situations in which the prosecution engaged in conduct “intended to ‘goad’ the defendant into moving for [the] mistrial” from the list of exceptions to the Double Jeopardy Clause).

Id. (holding that a second trial is permissible following a trial judge’s declaration of a mistrial even without the defendant’s consent because “there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated”); see also Blueford v. Arkansas, 132 S. Ct. 2044, 2050 (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 Illinois v. Somerville, 410 U.S. 458, 463 (1973) (recognizing the public interest in criminal proceedings of obtaining a verdict, regardless of whether it is an acquittal or a conviction).

See Dinitz, 424 U.S. at 607–08 (quoting Jorn, 400 U.S. at 485) (distinguishing a mistrial requested by the defendant from one granted sua sponte, and finding that a second trial in this context was consistent with the Double Jeopardy Clause).

See id. (considering a defendant’s request for a mistrial strategic in that he or she may do so in order to receive a fair trial absent misconduct). Trial courts, in granting mistrials, most likely also anticipate that a defendant will be retried. United States v. Scott, 437 U.S. 82, 92 (1978).

See United States v. Ball, 163 U.S. 662, 671 (1896) (considering a judgment of acquittal “final” and “conclusive”). Contra Rudstein, supra note 68, at 132 (“[S]ome criminal trials end without a final judgment of acquittal or conviction. A ‘mistrial’ occurs when a judge terminates a trial without a determination of the factual guilt or innocence of the accused, either because of
defendant has demonstrated a desire to end the proceedings permanently.\textsuperscript{240} The government may be precluded from challenging the validity of this acquittal\textsuperscript{241} because, unlike a mistrial, a trial judge has rendered a decision based on the sufficiency of the evidence and on the defendant’s guilt or innocence.\textsuperscript{242}

That the trial judge may have incorrectly acquitted a defendant is not the fault of the defendant; therefore the defendant should not be required to mitigate the Court’s mistake by having to undergo the hardships of a new trial.\textsuperscript{243} Although a trial judge is, by nature, a neutral party, the judge is an official state employee.\textsuperscript{244} Why, then, should the state be permitted to rectify its own mistake at the defendant’s expense? As one Australian jurist explained, “if the [trial] judge makes a mistake and the accused is acquitted, then the setting aside of the verdict may involve the accused in the emotional ordeal of going through it all again, although the mistake was something over which he had no control.”\textsuperscript{245} It is therefore reasonable to conclude that the ability to appeal a decision of acquittal, thus allowing for a second trial if that appeal succeeds, contravenes the Double Jeopardy Clause by prolonging the ordeal beyond a single trial.

3. Reducing the Risk of an Erroneous Conviction

Precluding a second trial following acquittal prevents the government from attempting to persuade a second fact-finder of the defendant’s guilt “after having failed with the first,”\textsuperscript{246} thereby reducing the risk of erroneously

\textsuperscript{240} See Ball, 163 U.S. at 671 (describing “the verdict of acquittal [as] conclusive in favor of” the defendant and releasing him). Contra Scott, 437 U.S. at 96 (holding that “the 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)).

\textsuperscript{241} Green v. United States, 355 U.S. 184, 188 (1957).

\textsuperscript{242} FED. R. CRIM. P. 29(a) (providing that a trial judge makes his or her decision on the merits of the government’s case).

\textsuperscript{243} NSW LAW REFORM COMM’N, REPORT 77, supra note 208, para. 2.13.

\textsuperscript{244} FRIEDLAND, supra note 91, at 298. Judges are generally compensated by the state pursuant to statute. See, e.g., ALA. CODE § 12-17-68 (LexisNexis 2005) (explaining that district judges are compensated by the state); ARIZ. REV. STAT. ANN. § 12-128 (2003) (dividing the payment of judges’ salaries equally between the state and the county); KAN. STAT. ANN. § 75-3120g (Supp. 2009) (providing the exact salary to be paid to district judges).


\textsuperscript{246} United States v. Wilson, 420 U.S. 332, 352 (1975).
convicting an innocent person. As the Supreme Court recognized in *Green v. United States*, if the government were allowed to repeatedly attempt to prosecute an individual for an offense, innocent people could be convicted.

The risk of an erroneous conviction would increase for a number of reasons. First, an innocent person faced with additional trials for the same offense, even after being acquitted, might decide to plead guilty to avoid the possibility of numerous trials. 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” to hear the defendant’s arguments and thereby “hon[e] its trial strategies and perfect[] its evidence.” Third, if the government could repeatedly prosecute an individual for the same crime, it

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247. FRIEDLAND, *supra* note 91, at 4 (stating that the increased chances of convicting an innocent person at a second trial for the same offense “is at the core of the problem”).


251. It can also assess the defendant’s case and change its strategies accordingly. With the knowledge of both parties’ strengths and weaknesses, the prosecution could “supply evidence which it failed to muster in the first proceeding.” *Tibbs v. Florida*, 457 U.S. 31, 41 (1982) (quoting *Burks v. United States*, 437 U.S. 1, 11 (1978)). 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.

FRIEDLAND, *supra* note 91, at 4; *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.”); 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.”). *Cf. Ashe v. Swenson*, 397 U.S. 436, 447 (1970) (discussing how a prosecutor who lost the first trial, like any “good attorney would do,” adopted a new approach at the defendant’s second trial for an offense based on the same event as the charge in the first trial); *Hoag v. New Jersey*, 356 U.S. 464, 465–66 (1958) (explaining how the State, following an acquittal, altered its presentation of proof at the defendant’s second trial—for an offense based on the same event as the charge in the defendant’s first trial—by calling only the witness who had testified most favorably to it in the first trial).

could, with its vastly superior resources, wear down the defendant—financially, emotionally, and physically—and obtain a conviction “through sheer governmental perseverance.” Finally, if it is accepted that juries do sometimes return perverse verdicts unsupported by the evidence, repeated attempts at conviction will result in a higher probability that the accused will be found guilty eventually. In sum, as Professor Akhil Reed Amar and Jonathan L. Marcus eloquently stated, “[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.”

A statute or court rule that allows the prosecution to appeal a trial judge’s decision to acquit will frustrate this purpose of the Double Jeopardy Clause. Whenever the prosecution, acting in good faith, brings an individual to trial on a criminal charge, it presumably believes it has sufficient evidence to prove the individual’s guilt beyond a reasonable doubt. During the trial, the prosecution may learn that its belief was misplaced when the jury acquits the defendant, but the Double Jeopardy Clause prevents the prosecution from strengthening its case and bringing subsequent claims against the acquitted

253. Richard A. Posner, An Economic Approach to the Law of Evidence, 51 STAN. L. REV. 1477, 1505 n.59 (1999) (citing a statistic that cities with a population of one million or more budget over $25 million for the local prosecutor’s office). In his article, Posner goes on to note that defense counsel, especially those who are court-appointed, are subject to strict budgetary constraints, and that the high burden of proof is only a “partial offset” to the inequality of party resources. Id. at 1505.

254. See supra notes 205–13 and accompanying text.

255. Tibbs, 457 U.S. at 41; see also FRIEDLAND, supra note 91, at 4 (arguing that often the accused will not have the energy or finances to withstand another prosecution).

256. BLACK’S, 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”).

257. ENG. LAW COMM’N, CONSULTATION PAPER NO. 156, supra note 11, para. 4.5 (stating that, if nothing else, the prosecution has a chance to improve its case because it has seen the defense’s arguments in the first trial).

258. Akhil Reed Amar & Jonathan L. Marcus, Double Jeopardy After Rodney King, 95 COLUM. L. REV. 1, 31 n.158 (1995) (declaring that one purpose of the Double Jeopardy Clause is to protect the innocent); see also Comment, Twice in Jeopardy, 75 YALE L.J. 262, 278 n.74 (1965) (attempting to illustrate the heightened probability of conviction after repeated attempts).

259. See NSW LAW REFORM COMM’N, REPORT 77, supra note 208, para. 2.6 (stating that allowing acquittal appeals may result in a retrial and that the accused at the second trial will likely be more prejudiced than before); Anne Bowen Poulin, Double Jeopardy and Judicial Accountability: When Is an Acquittal Not an Acquittal?, 27 ARIZ. ST. L.J. 953, 977 (1995) (“Th[e] risk [that the prosecution will convict an innocent defendant] is most acute when either the court or the jury has assessed the prosecution’s case and found it wanting.”).

260. See STANDARDS FOR CRIMINAL JUSTICE § 3–3.9 (1986) (“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.”).
individual for the same offense. When, however, a trial judge decides at the close of the prosecution’s case that the evidence presented is insufficient to prove the defendant’s guilt, the prosecution learns at an earlier stage that its evidence is weaker than it initially believed. Yet, allowing the prosecution to appeal this ruling may result in a retrial for the same offense, in which the prosecution will likely present more evidence to overcome the initial acquittal. Even if the appellate court were correct and the prosecution did present a prima facie case of guilt at the trial level, the prosecution will have been put on notice that, at least in the eyes of the trial judge, its case against the defendant was not strong and therefore will make efforts to strengthen its case at the second trial.

Cases in which the trial judge has outlined the weakness of the prosecution’s evidence are particularly troubling because the prosecution will have a guide book identifying the areas in which it needs to strengthen its case at the retrial. Presenting additional evidence and working with witnesses are just two ways the prosecution can adjust its approach in the second trial so as to improve its chances of obtaining a conviction. The result of the appeal is to make the first trial simply a “dry run” so that the prosecution can practice its strategy. As the English Law Commission explained,

> the defence may have tested [the prosecution’s evidence] in cross-examination. In doing so the defence may have revealed some or all of its strategy, although it will not have begun to present its case. It may also have provided the prosecution witnesses who have given evidence with a ‘dry run.’ Accordingly, in these ways the

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261. See supra text accompanying notes 75–80.
262. See Criminal Justice Act, 2003, c. 44, § 61(4)(b) (Eng.).
263. See supra note 255 and accompanying text. The only exception might be when the appellate court reverses the trial judge’s ruling because the trial judge based his or her ruling on the absence of any evidence of what the trial judge erroneously concluded constituted a required element of the offense. Saul Levmore & Ariel Porat, Bargaining with Double Jeopardy, 40 J. LEGAL STUD. 273, 278–79 (2011).

If the appellate court orders the resumption of the defendant’s initial trial, rather than a new trial, the prosecution would almost certainly seek to reopen its case to present additional evidence when the trial is resumed. Criminal Justice Act, 2003, § 61(4)(a).

264. Poulin, supra note 259, at 977.
265. Id. (concluding that, in cases in which reasoning accompanies the verdict, the prosecution has even more incentive to correct the deficiency in its case).
266. Cf. Ashe v. Swenson, 397 U.S. 436, 439–40 (1970) (discussing how the prosecution elicited stronger identification from three witnesses who testified at the defendant’s first trial and how it declined to call the victim whose identification testimony at the first trial and had been negative); see also Hoag v. New Jersey, 356 U.S. 464, 465–66 (1958) (detailing how the State altered its presentation of proof by calling only the witness who had testified that the defendant was the robber in his first trial).
267. Ashe, 397 U.S. at 447 (noting that the State, in its brief, admitted that after the acquittal it treated the first trial as merely a practice run).
defence would be disadvantaged at a retrial by facing a prosecution potentially better prepared.268

Retrials are a routine feature of the criminal justice system in the United States, occurring most frequently after a defendant successfully appeals his or her conviction on the basis of trial error269 or after the trial judge declares a mistrial.270 Retrials are permitted in these situations even though the prosecution is likely to have an additional advantage over the defendant at the second trial.271 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 midtrial acquittal ruling should not be a reason for barring the prosecution from taking such appeals. This reasoning, however, is flawed. Just 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. 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.272 Furthermore, each of the situations mentioned above, where retrials are common, are distinguishable from the situation in which a retrial follows the reversal of a trial judge’s midtrial acquittal ruling.

When a defendant appeals his or her conviction on the ground that error infected the trial, the defendant is the one asking that the case not end with the judgment entered upon the jury’s guilty verdict. At the time the defendant appeals, it would seem that he or she would be quite content if the appellate court overturned the conviction and granted 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 a resumption of the initial trial, the defendant will be forced to surrender a favorable decision that would have forever ended the case for that offense.273 In addition, the defendant may be forced to undergo a second trial at which he or she is likely to be at an

268. ENG. LAW COMM’N, CONSULTATION PAPER NO. 158, supra note 15, para. 6.3 (stating, however, that there is the possibility that differing accounts from witnesses may make available to the defense a challenge to the prosecution witnesses’ credibility).
269. See supra notes 71, 216, 232.
270. See supra notes 233–36 and accompanying text.
271. ENG. LAW COMM’N, CONSULTATION PAPER NO. 158, supra note 15, para. 6.3. On the other hand, the extent of the additional advantage may depend upon the stage at which the defendant’s first trial ended. See supra notes 262–68 (discussing those advantages assumed when a trial judge rules at the end of the prosecution’s case). The prosecution is likely to have learned very little about the defense’s 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.
273. See supra notes 68–69, 75–81 and accompanying text.
additional disadvantage. In short, although it may be fair to retry a convicted defendant who seeks to overturn a conviction and obtain a new trial, it would be unfair to compel a defendant who has benefitted from the initial acquittal to undergo a new trial.

As explained previously, when there is a hung jury, no decision in the case is made. 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 that the charges against the defendant can be resolved. Prohibiting a retrial in such situations would frustrate the public interest in resolving the charges against the accused and would effectively eliminate the requirement that a prescribed number of jurors agree upon a “not guilty” verdict for an acquittal. 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. 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—and the defendant should not be penalized for that error by being forced to undergo a new trial.

Similarly, unlike the trial judge’s decision to order an acquittal, the declaration of a mistrial during the defendant’s initial trial because of some error ends that trial without a determination of the defendant’s guilt or innocence. Therefore, it can be argued that the interests of justice require the case against the defendant be resolved one way or the other. Moreover, when the trial judge declares a mistrial at the defendant’s request or with his or her consent, the defendant contemplates being tried again for the same offense. Indeed, in most situations where the defendant moves for a

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274. See supra notes 263–72 (stating ways in which a prosecution takes advantage of a second trial).
275. See supra notes 235, 237 and accompanying text.
277. 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”).
278. A jury verdict, whether a conviction or an acquittal, requires either unanimity, or in some states, the agreement of a specified number of jurors. See LAFAVE ET AL., supra note 90, § 22.1(e) (requiring unanimity); see also L.A. CONST. art. 1, § 17 (requiring the agreement of ten members of a twelve-person jury to convict the accused in a non-capital case); OR. CONST. art. 1, § 11 (specifying the consonance of ten jurors for criminal trials to support guilt).
279. See supra notes 244–45 and accompanying text.
280. See United States v. Dinitz, 424 U.S. 600, 608 (1976). The trial court, in granting the mistrial, most likely also contemplated that 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
mistrial, he or she wants a retrial because the defendant thinks the error would increase the chances of being convicted at the first trial and would necessitate a retrial following a successful appeal. On the other hand, when a defendant moves for a directed verdict of not guilty or its equivalent, he or she seeks to end the trial with a decision regarding guilt or innocence.

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 a conviction or to those in which there was no decision in the case. Such a limitation will minimize the number of cases in which the prosecution’s upper hand may 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,” “to acquit against the evidence,” where application of the law and subsequent conviction would be unjust. A jury may exercise this power to “nullify” the law in a particular case for a variety of reasons, including its belief that the conduct in question should not be a

contemplates that the prosecutor will be permitted to proceed anew notwithstanding the defendant’s plea of double jeopardy.”).

283. See Dinitz, 424 U.S. at 608, 610 (stating that the immediate request for a retrial is preferable to the lengthy process of going through with the trial, having an appeal, and then a retrial).

284. See 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)); see also id. at 98–99 (declaring that a defendant’s request for trial termination on a procedural issue rather than one of guilt does not preclude a government appeal of the defendant’s favorable ruling).

285. Westen & Drubel, supra note 90, at 130.


287. Westen & Drubel, supra note 90, at 130 (stating that “erroneous acquittals” can be explained as an extralegal judgment to acquit by a jury); see also Westen, supra note 90, at 1063 (finding one prohibition on retrial to be the jury’s prerogative to “acquit against the evidence”).

crime or its feeling that the punishment for the crime in question is too severe.

Permitting the prosecution to appeal a trial judge’s acquittal does not frustrate this policy because the acquittal ends the case, at least temporarily, in the defendant’s favor before the jury decides whether to nullify the law and acquit the defendant despite its finding the defendant committed the crime in question. Moreover, although a defendant possesses the right to have a trial completed by a particular tribunal, especially one believed by him or her to be favorable, a request for a court-ordered acquittal has taken the verdict decision from that particular jury and given it to the judge. By doing so, the defendant has deliberately elected “to forgo his [or her] valued right to have his [or her] guilt or innocence determined” by the jury hearing the case. A defendant who believes that the jury would acquit him or her, regardless of the evidence of guilt, can refrain from moving for a directed verdict and allow the case to run its course. Having chosen instead to request the directed verdict, the defendant is unable to convincingly claim that allowing the prosecution to appeal the trial judge’s decision interferes with the policy of allowing the jury to acquit against the evidence.

5. Preventing the Government from Harassing an Individual

The guarantee against double jeopardy is also intended “to prevent the harassment of the accused by repeated prosecution for the same matter.” Allowing the government to prosecute an individual for the same offense following an acquittal would grant the government a power that “could be used

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289. See, e.g., Three Acquitted of Mercy Killing, TOWNSVILLE BULLETIN (Austl.), Oct. 24, 2001, 2001 WLNR 5392278 (showing that juries may be unwilling to render guilty verdicts for the murder of terminally ill patients).

290. CONRAD, supra note 288, at 147–49 (noting that some judges have faulted in affecting jury deliberations by revealing the punishment or using adjectives such as “draconian” to characterize the punishment); see also KALVEN & ZEISEL, supra note 28, at 306–12 (claiming a threatened penalty may overwhelm jury deliberations).


293. LAFAVE, supra note 28, § 1.8(i) (stating that most jurisdictions allow directed verdicts of acquittals); see also, e.g., FED. R. CRIM. P. 29(a); CAL. PENAL CODE § 1118.1 (West 2004); Fla. R. CRIM. P. 3.380(a); Mass. R. CRIM. P. 25(a).

294. See United States v. Scott, 437 U.S. 82, 93–94 (1978) (arguing that the important consideration to keep in mind is that the defendant has control over procedural matters in the event of a mistrial); see also United States v. Dinitz, 424 U.S. 600, 609 (1976).

295. NEW ZEALAND LAW COMMISSION, REPORT 70: ACQUITTAL FOLLOWING PERVERSION OF THE COURSE OF JUSTICE para. 12 (2001) [hereinafter NZ LAW COMM’N, REPORT 70]; see also NSW LAW REFORM COMM’N, REPORT 77, supra note 208, para. 2.8 (finding that double jeopardy principles seek to prevent the undue prolongation of criminal trials).
illegitimately by ill-intentioned state servants."\(^296\) 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,”\(^297\) or that a “disgruntled prosecutor” who disagrees with the verdict could attempt to prosecute a second time or search for additional evidence to bring the charge once more.\(^298\) Even if the second trial again resulted in the defendant’s acquittal, or if the police and the prosecutor were unable to discover additional evidence and did not prosecute the defendant 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.\(^299\)

Therefore, without any safeguards prohibiting the prosecution to appeal a trial judge’s acquittal, a statute or court rule allowing such devices could open the door to government harassment of a seemingly acquitted defendant, frustrating the purposes of the Double Jeopardy Clause.\(^300\)

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,\(^301\) which suggests that similar statutes or court rules are unlikely to permit government harassment. Such a statute or court rule would allow the prosecution to appeal a trial judge’s decision to order an acquittal only after obtaining leave to appeal from either the trial judge or the appellate court.\(^302\) It is unlikely that a court would grant such leave if it suspected that the prosecution sought to appeal merely to harass the accused.\(^303\)

\(^{296}\) ENGL. LAW COMM’N, REPORT NO. 267, supra note 11, para. 4.14.


\(^{298}\) Thompson v Mastertouch T.V. Serv. Pty. Ltd. (No. 3), (1978) 38 FLR 397, 408 (Fed. Ct. Austl.) (Deane, J, with Smithers & Riley, JJ, concurring) (speculating that departure from double jeopardy principles would subject appeals to prosecutorial whims); see also FRIEDLAND, supra note 91, at 3–4 (stating that the main purpose of the Double Jeopardy Clause is to prevent unwarranted harassment as a result of repeated prosecution for the same offense); AUSTRALIAN MODEL CRIMINAL CODE, DISCUSSION PAPER, supra note 21, at 2 (stating that one of the policies underlying the rule against double jeopardy is citizen protection from state harassment).

\(^{299}\) See supra text accompanying notes 219–30.

\(^{300}\) See supra note 92 and accompanying text.

\(^{301}\) Criminal Justice Act, 2003, c. 44, § 57(4) (Eng.) (requiring leave to be granted by a judge or the Court of Appeal).

\(^{302}\) Id.

\(^{303}\) See R v. Al-Ali, [2009] EWCA 2186, [8], 1 W.L.R. 1661 [8] (Eng.) (stating that the appellate court and 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.”). Appeals undertaken by the prosecution merely to harass the accused would be unlikely to meet this standard.
probability that courts would weed out any appeals undertaken by the prosecution merely for the purpose of obtaining a second trial to harass the “acquitted” individual, thereby protecting the accused from government harassment.

Moreover, because the prosecution would be required to request an appeal directly following the opposed ruling or following an adjournment up until the next day, and because the trial judge must decide whether to allow leave to appeal on the day it is requested, no significant time will elapse between the trial judge’s directed verdict and the denial of leave by the court. Although it may take longer for the appellate court to consider and deny an application for leave to appeal, any harassment of the accused by the prosecution from only seeking leave to appeal will be minor.

Even if an unscrupulous prosecutor successfully disguises his or her intention to obtain a new trial merely to harass the “acquitted” individual and manages to obtain leave to appeal, a second trial could occur only if the appellate court finds that the trial judge erred in ruling that the prosecution’s evidence failed to establish the defendant’s guilt. Unlike in a legal system that fails to recognize the rule against double jeopardy, a second trial in this system could not be brought solely at the prosecution’s whim. The existence of such oversight makes it probable that appeals filed by the prosecution merely to harass the “acquitted” individual would be identified by the appellate court and the “acquitted” individual would not have to undergo a second trial for the same offense. This oversight would also result in lower anxiety and expense on the part of the defendants who would be exposed to the appellate process rather than a second trial.

6. Conserving Scarce Prosecutorial and Judicial Resources

Precluding subsequent prosecutions for the same offense following an acquittal also helps to conserve scarce prosecutorial and judicial resources. It prevents the government from spending additional time, money, and effort investigating and prosecuting an acquitted individual until it achieves a

306. See Criminal Procedure Rules, 67.5(4).
308. See supra note 224 and accompanying text.
conviction.\footnote{Cf. Ashe v. Swenson, 397 U.S. 436, 438–39 (1970) (involving a case in which Missouri brought a charge for robbing one of six victims and altered its approach after the defendant was acquitted in his initial trial for robbing another of the victims); Hoag v. New Jersey, 356 U.S. 464, 465–66 (1958) (involving a case in which the State tried the defendant for robbing a fourth person after he was acquitted in his initial trial for robbing three others in the same incident).} It also prevents prosecutors from monopolizing courtrooms, judges, and court personnel in successive attempts to obtain a conviction.\footnote{FRIEDLAND, supra note 91, at 4 (stating that it is not only the individual, but also the legal system itself that is protected).}

Allowing the prosecution to appeal a court-ordered acquittal frustrates this policy. Absent a right to appeal, a trial judge’s decision to direct a verdict of not guilty would end the case in favor of the accused and would force the prosecution to move on to its next case without further depleting its funds and abusing court resources.\footnote{NSW LAW REFORM COMM’N, REPORT 77, supra note 208, para. 2.28.} 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 an acquittal will divert time and resources from cases that have yet to be tried.\footnote{See supra note 312 (noting that resources may be diverted from the judicial process).} If the prosecution succeeds in its appeal and obtains a new trial\footnote{See Criminal Justice Act, 2003, c. 44, § 61(4)(b) (Eng.).} or is allowed to resume the initial trial,\footnote{See id. § 61(4)(a).} it will have to divert further resources from untried cases to undertake the defendant’s new or resumed trial.\footnote{It may also divert resources from pending appeals. See supra note 312 (noting that resources may be diverted from the judicial process).} The reduced amount of time, effort, and money spent on some of these untried cases could result in acquittals that would otherwise have been convictions. Moreover, if the prosecution’s appeal fails\footnote{See Criminal Justice Act, 2003, § 57(4), (8)–(9) (stating that the appeal would fail if the prosecution did not obtain leave to appeal); see id. § 66(1), 2(c) (stating that the appeal fails if the appellate court confirms the trial judge’s ruling or reverses that ruling but nevertheless orders the acquittal because it concludes that the defendant could not receive a fair trial at either a new trial or the resumption of his initial trial. See id. § 61(4)(c), (5).} or the defendant is acquitted following the prosecution’s successful appeal, the prosecution’s diversion of its limited resources will have been for naught.

Allowing the prosecution to appeal a trial judge’s directed acquittal also diverts limited judicial resources.\footnote{See supra notes 310–16 and accompanying text.} Instead of dealing with pending appeals, such as those involving convicted defendants who might be innocent, appellate court judges will be deciding appeals of court-ordered acquittals. Similarly, when the appellate court reverses a court-ordered acquittal and orders a new trial, or the resumption of the defendant’s initial trial, the trial court might have

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\footnote{Cf. Ashe v. Swenson, 397 U.S. 436, 438–39 (1970) (involving a case in which Missouri brought a charge for robbing one of six victims and altered its approach after the defendant was acquitted in his initial trial for robbing another of the victims); Hoag v. New Jersey, 356 U.S. 464, 465–66 (1958) (involving a case in which the State tried the defendant for robbing a fourth person after he was acquitted in his initial trial for robbing three others in the same incident).}
to delay other trials so that it can conduct the retrial or resume the defendant’s initial trial. This result could allow a guilty defendant to be free in the community on bail or an innocent person to be held in custody awaiting trial.

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 both defendants and the criminal justice system itself. Protecting the accused from state harassment and giving consistent rulings maintains the public’s respect and confidence in the legal process. The public would almost certainly lose respect for the legal system if the government were allowed to prosecute an individual repeatedly for the same offense, despite consistent acquittals. In most cases, the public would perceive the multiple prosecutions as government harassment. 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 criminal law because it would “leave[] people in doubt whether innocent men are being condemned.”

Members of the community also might view a right to appeal a court-ordered acquittal as a governmental tool to dismantle what would otherwise be an acquittal. The public may ultimately conclude that the government is not always bound by an acquittal with which it disagrees and that citizens, therefore, are not adequately protected, particularly if significant numbers of court-ordered acquittals are overturned. Moreover, the greater the number of court-ordered acquittals the appellate courts reverse, the more likely the public will question the legal ability of the trial judges. Perhaps more importantly, many may ask: If trial judges cannot determine whether the prosecution’s evidence is sufficient to prove the defendant’s guilt beyond a reasonable doubt, are they competent to address other “less important” issues that could ultimately lead to an innocent person’s conviction or a guilty individual’s acquittal? Questions could also arise about the appellate court judges’ legal ability if subsequent proceedings following an overturned acquittal result in the jury finding the defendant not guilty.

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318. FRIEDLAND, supra note 91, at 4; see also NZ LAW COMM’N, REPORT 70, supra note 295, para. 14 (“A consequence of the rule against double jeopardy is protection of the administration of justice itself.”).

319. FRIEDLAND, supra note 91, at 4.

320. See NZ LAW COMM’N, REPORT 70, supra note 295, para. 14.

321. Id.

322. In re Winship, 397 U.S. 358, 364 (1970) (arguing that the reasonable doubt standard is necessary so that the public has faith in the “moral force of criminal law”).

323. See Criminal Justice Act, 2003, c. 44, § 61(4)(b) (Eng.) (ordering a new trial after acquittal); see also id. § 61(4)(a) (ordering a resumption of the initial trial).
When, however, a jury convicts an accused following a reversal of an acquittal, members of the community might conclude that the existence of the right to appeal prevented a miscarriage of justice that would have resulted in a guilty individual’s acquittal, 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, and can cause the public to lose faith in the criminal justice system. But such cases are likely to be rare because a judge is not likely to intervene in those serious cases in which credible evidence can be put before a jury. Perhaps more importantly, some guilty defendants will not be convicted, but the public may recognize this and accept this balance as a part of the criminal process. On balance, then, it seems that the negative effect on the community’s respect for the legal system outweighs any positive effect it may have, and therefore will, to some extent, frustrate this purpose of the Double Jeopardy Clause.

8. Encouraging Efficient Investigation and Prosecution

As a general matter, allowing the government to retry an acquitted individual for the same offense could lead to the police failing to investigate offenses initially and prosecutors initially not prosecuting cases as diligently as they otherwise might. Both the police and prosecutors would know that, if

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324. NSW LAW REFORM COMM’N, REPORT 77, supra note 208, para. 3.5 (recognizing that the public would be upset in the event that a defendant accused of a serious crime was acquitted without the jury having the opportunity to weigh the evidence or without the prosecution having a chance to appeal, but also citing a senior public defender as stating that it was rare for a judge to direct a verdict in a murder case); see also Stan Grossfeld, Locked in on the Hoop, BOSTON GLOBE, Dec. 10, 2008, at C5 (stating that the not guilty verdict in O.J. Simpson’s murder trial “polarized America along racial lines”); Angry Callers Flood Times Switchboard, L.A. TIMES, Apr. 30, 1992, at A23 (reporting that shortly after the announcement of the verdict acquitting four white Los Angeles police officers on charges brought in connection with the videotaped beating of Rodney King, the Los Angeles Times switchboard was flooded with angry calls from the public).

325. ENG. LAW COMM’N, REPORT NO. 267, supra note 11, para. 7.56; NSW LAW REFORM COMM’N, REPORT 77, supra note 208, para. 2.15.

326. NSW LAW REFORM COMM’N, REPORT 77, supra note 208, para. 3.5.

327. FRIEDLAND, supra note 91, at 4 (stating that there is no way to tell if a defendant is in this class, so it is something that is inevitable).

328. ENG. LAW COMM’N, CONSULTATION PAPER No. 156, supra note 11, para. 4.11; AUSTRALIAN MODEL CRIMINAL CODE, DISCUSSION PAPER, supra note 21, at 2; see also FRIEDLAND, supra note 91, 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 297, 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”); Dennis, supra note 95, at 941.
the first prosecution failed, they would get a “second bite at the apple” and could spend more time on the investigation and prosecution at the second trial. Allowing the government only one opportunity to convict an individual of an offense “operates as a powerful incentive to efficient and exhaustive investigation” and prosecution.

Nevertheless, it is highly unlikely that a statute or court rule permitting the prosecution to appeal a court-ordered acquittal and to retry a defendant, or resume his or her initial trial, would cause police and prosecutors to be less efficient in their initial investigation and prosecution of crimes. When police are investigating a crime and 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 an individual’s guilt. Limiting the scope of an investigation or the amount of evidence presented at trial could increase the chances that the jury (or the judge in a bench trial) will conclude that the prosecution’s evidence fails to establish the defendant’s guilt. Such a result would put an end to the case without a conviction because 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.

Permitting the prosecution to appeal a trial judge’s directed verdict of not guilty does not change the incentives. Police are not likely to terminate their investigation immediately upon concluding that their evidence is sufficient to survive a motion for a court-ordered acquittal, nor will the prosecution seek and present only enough evidence to make a prima facie case, because even if their assessment of the evidence is correct, and the limited 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. Further, the jury (or judge in a bench trial) might credit the evidence introduced by the accused and render an acquittal, thereby ending the case.

330. ENG. LAW COMM’N, CONSULTATION PAPER NO. 156, supra note 11, para. 4.11; see also NZ LAW COMM’N, REPORT 70, supra note 295, para. 16 (stating that the rule against double jeopardy promotes investigating thoroughly before trying the original case).
331. Dennis, supra note 95, at 941.
333. See supra note 79.
334. 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) (emphasis added); see also LAFAYE ET AL., supra note 90, § 24.6(G) (outlining the basic standard of review). The jury, on the other hand, must consider both parties’ evidence, including the witnesses’ credibility; it must also judge the credibility of the witnesses called by both sides. See Jackson, 443 U.S. at 319 (stating that it
permanently. 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 who may end the case without even permitting the jury to consider the case (or, in a bench trial, without requiring the defense to present its case) 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, and it was unable to obtain such leave, the trial judge’s ruling would stand, the defendant would be acquitted, and the prosecution would lose its case. Even if the prosecution obtained leave to appeal, it would have no guarantee that the appellate court, in what almost by definition would be a “close case,” would find that the trial judge erred in acquitting the defendant and therefore reverse that ruling. Accordingly, even if the prosecution could, by statute or court rule, appeal a trial judge’s decision to allow a motion for a directed verdict, police and prosecutors could never be certain that they would get a “second bite at the apple.” As a result, they would have every incentive from the outset to put forth their best efforts to investigate the crime and convict the defendant.

IV. CONCLUSION

The Criminal Justice Act 2003 changed criminal procedure in England by 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

335. See supra notes 68–69, 75–81 and accompanying text.
338. Criminal Justice Act, 2003, c. 44, § 57(4) (Eng.).
339. See supra note 303 and accompanying text (outlining a possible standard that courts could be required to undertake). Under this standard, the Court of Appeal might deny leave to appeal even if the trial judge erred in concluding that the prosecution’s evidence failed to establish a prima facie case of guilt.
340. See Criminal Justice Act, 2003, § 58(8)–(9)(a) (providing that the prosecution can appeal only if it informs the trial court that it agrees the defendant should be acquitted if, inter alia, “leave to appeal to the Court of Appeal is not obtained”).
341. 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 acquitted if it concluded that the defendant could not receive a fair trial if his or her initial trial were resumed or if a fresh trial were ordered. Criminal Justice Act, 2003, § 61(4)(c), (5).
offense, or resume his or her initial trial, if the Court of Appeal overturns the trial judge’s ruling. An argument can be made that, in the United States, a statute or court rule based upon these provisions of the Act would be consistent with the Supreme Court’s decision in *Smith v. Massachusetts*[^343] 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 court rule 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.[^344] Permitting the prosecution to appeal a trial judge’s court-ordered acquittal frustrates this purpose, because if the prosecution’s appeal succeeds, the accused will undergo a second trial and will suffer the embarrassment, distress, and perhaps expense brought about by that second trial.

Perhaps more importantly, permitting a second trial for the same offense would increase the risk of erroneously convicting an innocent person.[^345] This would undermine a major purpose of the Double Jeopardy Clause.[^346] 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.’”[^347]

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[^348] of conserving scarce prosecutorial and judicial resources.[^349] Second, it also might cause the public to lose respect for, and confidence in, the criminal justice system.[^350]

[^343]: Smith v. Massachusetts, 543 U.S. 462 (2005); see also supra notes 154–79 and accompanying text.
[^344]: See supra text accompanying notes 87, 203–18.
[^345]: See supra text accompanying notes 256–84.
[^346]: See supra notes 88–89, 246–48 and accompanying text (stating that a major purpose of the Double Jeopardy Clause is to prevent the government from trying to persuade a second fact-finder of the accused’s guilt).
[^348]: See supra notes 92, 309–10 and accompanying text.
[^349]: See supra notes 311–16 and accompanying text.
[^350]: See supra notes 318–27 and accompanying text.
In light of the purposes of the rule against double jeopardy, it is highly probable that a retrial for the same offense following a prosecutorial 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 court rule would not serve a “proper purpose” and therefore would be impermissible under the Fifth Amendment’s Double Jeopardy Clause.\textsuperscript{351}

\textsuperscript{351} Smalis v. Pennsylvania, 476 U.S. 140, 145 (1986) (declaring that a postacquittal appeal in violation of the Double Jeopardy Clause has no proper purpose and that such an appeal frustrates the accused’s finality interests).