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Judicial Equity: An Argument for Post-Acquittal Retrial When the Judicial Process Is Fundamentally Defective

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The federal criminal system is a functional institution that affords a defendant extensive judicial review of the process that resulted in his conviction. Direct review after a conviction is undertaken by the district court pursuant to a motion for a new trial, and by the circuit court on appeal. In addition, collateral review is provided for after the conviction is affirmed through post-conviction proceedings.

In undertaking direct review, the courts have never been reluctant to upset a judgment of conviction that is the product of an error of law by the district court or misconduct by the prosecutor. When a conviction is

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1. See Napue v. Illinois, 360 U.S. 264, 265, 272 (1958) (reversing a conviction based upon the prosecution's failure to cure a witness's misleading testimony that the prosecution knew to be false); Alcorta v. Texas, 355 U.S. 28, 31-32 (1957) (reversing a conviction based upon the prosecution's solicitation of misleading testimony); United States v. Tomlinson, 67 F.3d 508, 514 (4th Cir. 1995) (en banc) (reversing a conviction based on the district court's failure to give instruction on a scienter requirement); United States v. Torres, 65 F.3d 1241, 1248 (4th Cir. 1995) (reversing judgment on grounds that the conviction was obtained by the use of illegally seized evidence); United States v. Burgos, 55 F.3d 933, 934 (4th Cir. 1995) (reversing a conviction based on the district court's improper Allen charge); United States v. Lewis, 53 F.3d 29, 35 (4th Cir. 1995) (reversing a conviction based on the district court's failure to give complete jury instruction on conspiracy law); United States v. Mason, 52 F.3d 1286, 1293-94 (4th Cir. 1995) (remanding a case because the district court failed to conduct a competency hearing); United States v. Acker, 52 F.3d 509, 511 (4th Cir. 1995) (reversing a conviction based on the district court's erroneous evidentiary ruling); United States v. Floresca, 38 F.3d 706, 714 (4th Cir. 1994) (reversing a conviction based on the district court's constructive amendment of the indictment); United States v. Kelly, 35 F.3d 929, 938 (4th Cir. 1994) (reversing a conviction based on the prosecution's failure to disclose material evidence affecting credibility of government witness); United States v. Solivan, 937 F.2d 1146, 1150 (6th Cir. 1991) (reversing a defendant's conviction after finding the prosecution's misstep "so destructive" as to constitute reversible error); United States v. Boyd, 833 F. Supp. 1277, 1366 (N.D. Ill. 1993) (granting a new trial after a conviction based on prosecutorial misconduct). But see United States v. Barlin, 686 F.2d 81 (2d
infected by error or misconduct the judgment is vacated and the defendant is retried. A reversal and the resultant burden of a second trial is accepted because the legitimacy and integrity of the justice system is dependent on a criminal process that results in respectable judgments. However, there is no symmetry in the criminal process.

Unlike a conviction, the criminal process tolerates and accepts an acquittal that not only is infected by error, but is the product of plain error of law by a district court, jury and witness intimidation or tampering, or misconduct by defense counsel.

A defendant has no right to benefit from an acquittal obtained through a judicial process that is defective in some fundamental respect. Judicial review and retrial after an acquittal should be permitted when the judgment of acquittal calls into question the legitimacy and integrity of the criminal process. This clearly occurs when the acquittal is the product of plain error by the district court, jury and witness intimidation or tampering, or misconduct by defense counsel. Unfortunately, the prosecution is not permitted to seek judicial review and retry a defendant in order to nullify plain error, intimidation, tampering, or misconduct. The reason articulated for the absolute preclusion against judicial review and retrial after an acquittal is the protection afforded by the Double Jeopardy Clause of the Fifth Amendment.2

Although the express language of the Double Jeopardy Clause does not preclude judicial review and retrial after an acquittal, the Supreme Court has held that the scope of the intended protection unequivocally prohibits the prosecution from seeking to set aside a judgment of acquittal and retrying an accused.3 This absolute preclusion holds true even when the judgment of acquittal was obtained through a judicial process that was defective in some fundamental respect.4 The reason for the absolute preclusion of a retrial after an acquittal is grounded in terms of fundamental fairness.5 The central assumption is that a second prosecution after an acquittal is unduly burdensome and prejudicial to the ac-

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2. The Fifth Amendment provides in pertinent part: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ." U.S. Const. amend. V.


5. See Washington, 434 U.S. at 503 ("[I]f the innocence of the accused has been confirmed by a final judgment, the Constitution conclusively presumes that a second trial would be unfair.").
cused because of increased financial and emotional strain on him and because the prosecution is provided with a more favorable opportunity to secure a conviction.\(^6\)

The clear mandate of the Double Jeopardy Clause is to preclude the government from abusing the power of prosecution by making repeated attempts to convict or punish an accused. Despite this premise, the criminal process must also be structured to afford the public, through the prosecution, a fair opportunity to enforce its criminal laws. An acquittal that is the product of a clear and obvious error of law by the district court, witness intimidation or tampering, or misconduct by defense counsel, denies the prosecution a fair opportunity to present the case and the public a fair opportunity to enforce its criminal laws.

There are three reasons for permitting limited judicial review and retrial in the event of a faulty judgment of acquittal. First, permitting limited judicial review and retrial does not undermine the protection provided by the Double Jeopardy Clause. Second, the rationale behind double jeopardy protection yields to judicial review and retrial in less compelling circumstances. Third, permitting review of a judgment of acquittal that is the product of plain error by the district court, witness intimidation or tampering, or misconduct, promotes the legitimacy of the criminal justice system.

Although preclusion of a retrial after an acquittal is considered a matter of unassailable doctrine, it is time that the Supreme Court reconsider the absolute preclusion of judicial review after an acquittal when the judgment is fundamentally defective. A criminal process that is wrought with plain error of law, jury and witness intimidation or tampering, or misconduct by defense counsel, is defective in a fundamental respect. The Supreme Court should acknowledge these flaws and issue a strong decision permitting the government to seek judicial review.

I. Contaminated Judgment of Acquittal

Imagine the following scenario. Seven defendants, all former city police officers, are indicted by the federal grand jury and charged with conspiracy, extortion, obstruction of justice, and civil rights violations arising out of more than thirty state narcotics prosecutions over a period of five years. During trial, the prosecution presents evidence establishing that during the time charged in the indictment, the officers extorted money from drug dealers, used excessive force, fabricated evidence, and lied

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\(^6\) See Green, 355 U.S. at 187-88.
under oath to win convictions in state court.\textsuperscript{7} At the conclusion of the trial, counsel for the defendants make lengthy closing arguments. In impassioned pleas, counsel air improper and highly prejudicial statements before the jury. More particularly, counsel refer to facts not in evidence and personally vouch for the credibility of their witnesses. Counsel further remark that they are all former Assistant United States Attorneys and have devoted much of their professional careers to prosecuting criminals. They state that while they firmly believe that criminals should be convicted, their clients are innocent. The prosecution repeatedly objects and requests a mistrial. The district court refuses to find manifest necessity, and therefore, denies the motion for a mistrial.\textsuperscript{8} The trial court finds that a curative instruction is sufficient to remedy any prejudice. The district court then proceeds to instruct the jury that they are to decide the case based on the evidence before them and that argument of counsel is not evidence. After three hours of deliberation, the jury acquits all defendants. Later, the prosecution learns that one of the jurors voted for an acquittal because her family was threatened by one of the defendants. The government cannot appeal the acquittals. The defendants have escaped responsibility for their conduct and counsel have benefitted from their outrageous conduct.

A second example, although apparently benign, is equally demonstrative. A criminal trial in district court, charging the defendant with bankruptcy fraud in violation of 18 U.S.C. § 152, has concluded. Counsel for the government and the defendant meet in chambers to discuss the jury instructions. The district court rules that the Supreme Court’s decision in \textit{Ratzlaf v. United States}\textsuperscript{9} requires that the prosecution prove that the de-

\begin{itemize}
\item \textsuperscript{7} See generally George James, \textit{Corrupt Officer Draws 5 Years}, N.Y. TIMES, Nov. 22, 1995, at B6 (describing instances of misconduct by New York City Police officers); George James, \textit{Officer Draws Jail Sentence for Perjury}, N.Y. TIMES, Oct. 17, 1995, at B3 (same).
\item \textsuperscript{8} See United States v. Shaw, 829 F.2d 714, 720 (9th Cir. 1987) (finding that defense counsel’s opening remarks that potentially provoked juror bias created manifest necessity to declare a mistrial).
\item \textsuperscript{9} 510 U.S. 135 (1994). In \textit{Ratzlaf}, the Court held that to convict a defendant of willfully violating 31 U.S.C. §§ 5322(a) and 5324(3), prohibiting the structuring of currency transactions, the government had to establish that the defendant knew that his conduct was unlawful. See id. at 149.
\end{itemize}
fendant knew that his conduct was a crime. The prosecution is now in jeopardy. The government, not having anticipated that the district court would radically alter its burden of proof by reading an additional element into the statute, has not offered any evidence that the defendant knew that his conduct was a crime. The defendant had not even argued such a proposition at the close of the government’s case in connection with his motion for judgment of acquittal.

The government objects to the instruction. The court quickly denies the government’s objection and proceeds to instruct the jury that the government must prove and the jury must find that the defendant acted voluntarily and with criminal intent. Counsel for the defendant seizes on this instruction and effectively argues that the government has failed to offer evidence of all the elements of the offense. Because there is no evidence that the defendant knew that his conduct was a crime, the jury acquits the defendant.

The district court has committed an egregious error of law. The resulting judgment of acquittal is unquestionably the product of plain error of law. Nevertheless, the government cannot appeal the acquittal and the defendant avoids all responsibility for his conduct.

II. THE DOUBLE JEOPARDY CLAUSE

A. General Principles

The government is precluded from seeking judicial review and retrying an accused after an acquittal. This absolute preclusion, a creation of the courts, is drawn from the prohibition against successive prosecutions set forth in the Double Jeopardy Clause of the Fifth Amendment of the Constitution. The deliberately general text of the twenty words that make up the Double Jeopardy Clause does not expressly preclude the prosecution from appealing a judgment of acquittal and retrying a defendant. At the time the Fifth Amendment was adopted, there was no judicial review after a judgment in a criminal case. The judgment of conviction or acquit-

10. The district court’s ruling is incorrect, for the standard announced in Ratzlaf is clearly not the law for violations of 18 U.S.C. § 152. See United States v. Zehrbach, 47 F.3d 1252, 1261 (3rd Cir.) (holding that “proof of knowledge of illegality is not a burden of the government in a bankruptcy fraud case”), cert. denied sub nom. Mervis v. United States, 115 S. Ct. 1699 (1995); cf. United States v. Daughtry, 48 F.3d 829, 832 (4th Cir. 1995) (concluding that the term “willfully” in a false statement statute does not require proof that the defendant knowingly violated the law).

11. For a discussion of why the district court’s instruction is incorrect, see supra note 10.

tal ended the matter with no retrials. As a result, the full scope of the protection is more learned by the courts than innate.

With the advent and development of judicial review in criminal cases, courts began to define the protection of the Double Jeopardy Clause. The courts have fashioned the absolute preclusion against appeal after an acquittal to further the intent behind the Double Jeopardy Clause as a safeguard against government tyranny. Because the intent and product of judicial review after an acquittal would be to upset the acquittal and retry a defendant, the courts have barred judicial review in such cases. As a consequence, any reconsideration of the absolute preclusion against judicial review and retrial after an acquittal must be framed by the intent behind double jeopardy protection. If a limited appeal after an acquittal does not offend the intent of that protection, then absolute preclusion is not well founded.

Review of a judgment of acquittal, under limited circumstances where the integrity of the criminal process is in question, would enhance the role and function of the courts as the guardian of individual rights. Any concern that an accused's rights will be sacrificed by permitting judicial review fails to consider that courts are neither cautious nor compliant when ensuring that the criminal process is fundamentally fair to the accused. The courts will continue to view the law not as a fixed rule, but as a set of values assigned to ensure a fundamentally fair criminal process for the accused. Certainly, any review would consider both the merits and the fairness of a second prosecution. One point is clear: judicial review would obviate any attempt by the prosecution to abuse its power.

13. See id. at 88.


15. See, e.g., supra note 1; see also Philadelphia Feels Effects of Injury, N.Y. TIMES, Mar. 24, 1996, at 35 (indicating that numerous convictions have been set aside because investigating officers lied, tampered with evidence, and conducted illegal searches).

16. A retrial may be subject to a motion to dismiss on the grounds of selective or vindictive prosecution. See United States v. Montoya, 45 F.3d 1286, 1299 (9th Cir.) ("To establish a prima facie case of prosecutorial vindictiveness, a defendant must show either direct evidence of actual vindictiveness or facts that warrant an appearance of such.") (quoting United States v. Sinigaglio, 942 F.2d 581, 584 (9th Cir. 1991)), cert. denied, 116 S. Ct. 67 (1995); United States v. Davis, 36 F.3d 1424, 1432 (9th Cir. 1994) (setting forth the elements of a selective prosecution claim), cert. denied, 115 S. Ct. 1147 (1995); see also United States v. Williams, 47 F.3d 658, 660 (4th Cir. 1995) (holding that the prosecution cannot seek a more severe punishment upon retrial as a method of retaliation against the defendant).
B. Supreme Court Precedent

The Supreme Court has read double jeopardy protection as an unequivocal prohibition against appeal and retrial, even if the acquittal is "'based upon an egregiously erroneous foundation.'"\(^\text{17}\) Despite the Supreme Court's position, a number of cases call into question the continued validity of absolute preclusion.

In United States v. Sanges,\(^\text{18}\) the Supreme Court held that the prosecution did not have a right to appeal an acquittal in a criminal case absent an express grant of authority by the legislature.\(^\text{19}\) The Court did not hold that the Constitution precluded judicial review and retrial after an acquittal; rather, the Court found that the "rule" against successive prosecutions was of such "vital importance" it could not yield to judicial review and retrial after an acquittal absent "express words" in the statute.\(^\text{20}\) The Court relied on a statement from the Supreme Court of Tennessee, explaining that the common law prohibits an individual from being tried twice for the same offense, with all procedural errors favoring the defendant rather than harming him.\(^\text{21}\) The importance of this rule in maintaining personal safety from government interference was such that any exception to double jeopardy could only be by express words.\(^\text{22}\)

In United States v. Ball,\(^\text{23}\) the Court went further than Sanges and held that the Constitution precludes retrial after an acquittal.\(^\text{24}\) In Ball, after three defendants were indicted and charged with murder,\(^\text{25}\) two were convicted and the third was acquitted.\(^\text{26}\) On appeal, the Court reversed the convictions because the initial indictment was defective.\(^\text{27}\) All three de-
fendants were then reindicted, retried, and found guilty. On appeal, the Court determined that the initial acquittal barred the subsequent prosecution of the acquitted defendant. The Court found that a review of the acquittal would violate the Constitution by placing the defendant in double jeopardy, regardless of the reason for the review. The Court permitted, however, retrials of the other two defendants because the previous indictment upon which they were convicted was set aside.

Eight years later, in a compelling dissenting opinion, Justice Holmes took exception to Ball. In Kepner v. United States, the defendant was acquitted of an embezzling charge following a nonjury trial in a Philippine Islands court. The United States government took an appeal to the Supreme Court of the Philippines, which reversed the trial court and found the defendant guilty. Because the Philippines was a United States territory, appeal was granted to the United States Supreme Court. Relying on Ball, the Court reversed, holding that the defendant had been exposed to a second trial in violation of the constitutional protection.

Justice Holmes dissented and argued that the majority’s opinion was legally dubious and established damaging precedent. In a withering rebuke, he wrote that an appeal and retrial were permitted whether the defendant was acquitted or convicted because the protection against successive prosecutions did not attach until the proceeding was final.

Justice Holmes reasoned that a trial and retrial constituted one procedure, entailing one continuous jeopardy, and that no second jeopardy ensued until a conviction or acquittal, free from legal error, had been obtained. Recognizing the value that symmetry would bring to the criminal process, Justice Holmes argued that proceedings did not become final until appeals by both the prosecution and the defendant were ex-

28. See id. at 665-66.
29. See id. at 671.
30. See id.
31. See id. at 672.
32. See Kepner v. United States, 195 U.S. 100, 135 (1904) (Holmes, J., dissenting).
33. 195 U.S. 100 (1904).
34. See id. at 110.
35. See id. at 110-11.
36. See id. at 116-20 (discussing the Supreme Court’s jurisdiction over the Philippine Islands as granted through congressional enactment).
37. See id. at 133-34.
38. See id. at 134 (Holmes, J., dissenting). Justices White and McKenna joined Justice Holmes in dissent. See id.
39. See id. at 135-37.
40. See id.
Justice Holmes argued that a second trial was merely "a continuation of the jeopardy" beginning with the original prosecution. Justice Holmes did not dispute that double jeopardy protection forbids retrial after acquittal; nor did he, however, find this preclusion to be absolute. Justice Holmes argued that the first jeopardy should be treated as continuing until both sides had exhausted their appeals on claimed errors of law, regardless of the possibility that the defendant may be subjected to retrial.

Thirty-three years after Kepner, the Supreme Court in Palko v. Connecticut held that a state prosecutor could appeal an acquittal and retry the defendant without violating any "fundamental principles of liberty and justice." The Court reasoned that the state's interest in obtaining a trial "free from the corrosion of substantial legal error" was sufficient to permit an appeal and retrial. In Palko, the State of Connecticut in-
dicted the defendant for first degree murder.48 A jury found the defendant guilty of second degree murder.49 Pursuant to state law, the prosecution appealed on the grounds that the trial court erred when it excluded material evidence and instructed the jury as to the difference between first and second degree murder.50 The defendant was retried, found guilty of first degree murder,51 and appealed to the Supreme Court, claiming that the Double Jeopardy Clause of the Fifth Amendment attached to the states via the Fourteenth Amendment and that his retrial violated such protection.52 The Court held that the Fifth Amendment did not apply to the states and upheld the conviction on due process grounds.53 Justice Cardozo, author of the opinion, cited Kepner and specifically noted the dissenting opinions of Justices Holmes and Brown.54 He then appealed to principles of fundamental fairness, stating:

Right-minded men . . . could reasonably, even if mistakenly, believe that a second trial was lawful in prosecutions subject to the Fifth Amendment, if it was all in the same case. Even more plainly, right-minded men could reasonably believe that in espousing that conclusion they were not favoring a practice repugnant to the conscience of mankind.55

48. See id. at 320.
49. See id. at 320-21.
50. See id. at 321 & n.1.
51. See id. at 321. The defendant was sentenced to death. See id. at 321-22.
52. See id. at 322.
53. See id. at 322-23.
55. Palko, 302 U.S. at 323. Justice Cardozo further explained that:

Is that kind of double jeopardy to which the statute has subjected him a hardship so acute and shocking that our polity will not endure it? Does it violate those “fundamental principles of liberty and justice which lie at the base of all our civil and political institutions”? The answer surely must be “no.” What the answer would have to be if the state were permitted after a trial free from error to try the accused over again or to bring another case against him, we have no occasion to consider. We deal with the statute before us and no other. The state is not attempting to wear the accused out by a multitude of cases with accumulated trials. It asks no more than this, that the case against him shall go on until there shall be a trial free from the corrosion of substantial legal error. This is not cruelty at all, nor even vexation in any immoderate degree. If the trial had been infected with error adverse to the accused, there might have been review at his insistence, and as often as necessary to purge the vicious taint. A reciprocal privilege, subject at all times to the discretion of the presiding judge, has now been granted to the
In 1957, the Supreme Court in *Green v. United States*\(^{56}\) held that retrial after an acquittal violates the rule against double jeopardy.\(^{57}\) In *Green*, a case very similar to *Ball*, the defendant was charged with arson and first degree murder.\(^{58}\) After the jury convicted the defendant of arson and second degree murder, he obtained a reversal on appeal.\(^{59}\) The defendant was tried again, under the original indictment, for first degree murder;\(^{60}\) this second time, the defendant was convicted of arson and first degree murder.\(^{61}\) The Supreme Court reversed, holding that the defendant’s original acquittal of first degree murder at his first trial barred successive prosecution on that charge.\(^{62}\) The Court rejected the government’s assertion that the appeal and reversal exposed the defendant to retrial on all of the original charges.\(^{63}\) Writing for the majority, Justice Black emphasized the danger to a criminal defendant where the government is permitted to make repeated attempts at conviction.\(^{64}\)

Four Justices dissented,\(^{65}\) however, questioning the majority’s interpretation of the purpose of the Double Jeopardy Clause, and citing a strong societal interest in a fair criminal justice system.\(^{66}\) The dissent found that

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\(^{56}\) *355 U.S. 184* (1957).

\(^{57}\) See *id.* at 198.

\(^{58}\) See *id.* at 185. For a detailed discussion of *Ball v. United States*, see *supra* notes 23-31 and accompanying text.

\(^{59}\) See *Green*, *355 U.S.* at 186.

\(^{60}\) See *id.*

\(^{61}\) See *id.* Based upon his conviction, Green received a mandatory penalty of death.

\(^{62}\) See *id.* at 198.

\(^{63}\) See *id.* at 191.

\(^{64}\) See *id.* at 187-88. Justice Black’s reasoning has become the cornerstone of all subsequent decisions defining the scope of double jeopardy protection:

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.

*Id.*

\(^{65}\) Justice Frankfurter authored the dissent which Justices Burton, Clark, and Harlan joined. See *id.* at 198 (Frankfurter, J., dissenting).

\(^{66}\) See *id.* at 216-19. Specifically, Justice Frankfurter asserted, “Such an approach misconceives the purposes of the double jeopardy provision, and without warrant from the Constitution makes an absolute of the interests of the accused in disregard of the interests of society.” *Id.* at 216.
the defendant could be retried on the original charges because both
the defendant and the prosecution were entitled to an error-free
proceeding.67

In United States v. Wilson,68 the Supreme Court directly addressed the
boundaries of the prosecution’s right to appeal in criminal cases.
Although the Court found that the appeal in that case was permissible, it
rejected granting the prosecution “broad” appellate rights.69 In Wilson,
the defendant was convicted of several federal charges arising out of the
misuse of union funds.70 The conviction was set aside by the district court
and the indictment dismissed due to unreasonable preindictment delay.71
The government appealed the district court’s post-conviction dismissal to
the United States Court of Appeals for the Sixth Circuit, which held that
the Double Jeopardy Clause barred review.72 After granting certiorari,73
however, the Supreme Court ruled that the appeal was permissible be-
cause the district court’s action was not an acquittal.74

The Court found that the Double Jeopardy Clause did not impose any
general ban on appeals by the prosecution where appellate review would
not result in a second trial.75 Because the appeal in the instant matter
would not result in such a trial, the interest underlying the double jeop-
dardy protection, to preclude the government from twice “punishing” a
defendant for a particular crime by way of successive trials or multiple
sentences, was not offended.76 The Court reasoned, “Since reversal on
appeal would merely reinstate the jury’s verdict, review of such an order
does not offend the policy against multiple prosecution.”77

The Court then rejected granting the prosecution “broad” appellate
rights after an acquittal in criminal cases because of the “policies underly-

67. See id. at 216. Justice Frankfurter explained that while the framers of the Bill of
Rights were focused on protecting defendants from “oppression” and the “callousness of
repeated prosecutions,” they also were aware of the “countervailing interest in the vindica-
tion of criminal justice.” Id. at 218-19.
68. 420 U.S. 332 (1975).
69. See id. at 352.
71. See id. at 621.
72. See United States v. Wilson, 492 F.2d 1345, 1347-48 (3d Cir. 1973), rev’d, 420 U.S.
332 (1975).
75. See id. at 342.
76. See id. at 343-45.
77. Id. at 344-45. The Court explained that “a defendant has no legitimate claim to
benefit from an error of law when that error could be corrected without subjecting him to a
second trial before a second trier of fact.” Id. at 345 (footnote omitted).
In particular, the Court emphasized that rejecting such broad rights would deny the prosecutor the opportunity to persuade a second trier of fact of the defendant's guilt after an unsuccessful first attempt, it would prevent him from improving upon the weaknesses in his original argument, and it would protect the defendant's "legitimate interest in the finality of a verdict of acquittal."  

*United States v. Scott* demonstrates one of the narrow grounds upon which the government may appeal. In *Scott*, the defendant was indicted for three counts of narcotics distribution. At the close of the evidence, the district court dismissed two counts of the indictment based on pre-indictment delay. The jury acquitted the defendant on the third count. The government appealed the dismissal of the first two counts to the United States Court of Appeals for the Sixth Circuit, which dismissed the appeal. The government appealed the dismissal of the first count to the Supreme Court, which found that because the dismissal did not resolve any factual elements of the offense charged in the defendant's favor, it was not an acquittal. The Court held that an appeal and retrial in such a situation would not offend the protection afforded by the Double Jeopardy Clause. Justice Brennan dissented and wrote an eloquent opinion supporting the strict and absolute preclusion of a government appeal and retrial after an acquittal. Justice Brennan reasoned that the "agony" of requiring the accused to undergo a retrial outweighed the government's interest in enforcing its criminal laws.

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78. *Id.* at 352.
79. *Id.*
81. *See id.* at 84.
82. *See id.*
83. *See id.*
84. *See id.*
85. *See id.* at 84, 98-99.
86. *See id.* at 100.
87. *See id.* at 103 (Brennan, J., dissenting).
88. *See id.* at 105. Justice Brennan reasoned that:

The purpose of the Clause, which the Court today fails sufficiently to appreciate, is to protect the accused against the agony and risks attendant upon undergoing more than one criminal trial for any single offense. A retrial increases the financial and emotional burden that any criminal trial represents for the accused, prolongs the period of the unresolved accusation of wrongdoing, and enhances the risk that an innocent defendant may be convicted. Society's ""willingness to limit the Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws"" bespeaks society's recognition of the gross unfairness of requiring the accused to undergo the strain and agony of more than one trial for any single offense. Accordingly, the policies of the Double Jeopardy Clause mandate that the Government be afforded but one complete opportunity
C. Reasons for the Protection

The culmination of the numerous Supreme Court decisions establishes that the Double Jeopardy Clause provides three separate protections:\(^9\)

1. against a second prosecution for the same offense after a judgment of acquittal;\(^0\)
2. against a second prosecution for the same offense after a judgment of conviction;\(^1\)
3. and against multiple punishments for the same offense.\(^2\)

A reconsideration of the absolute preclusion against judicial review of an acquittal must focus precisely on the intent of the protection and ideal expressed in the Double Jeopardy Clause. A diagnosis of the pathology underlying this absolute preclusion reveals that the ideal has not taken a sinuous path.

The intent underlying the Double Jeopardy Clause is to guard against possible state tyranny and abuse of the criminal process.\(^3\) The central goal is to deny the prosecution a potent instrument of intimidation and oppression by denying the government the ability to freely subject a citizen to a second trial for the same offense.\(^4\) This protection, however, is not a mere grace note, and where the protection afforded by the Double

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\(^{89}\) See generally Comment, Twice in Jeopardy, 75 YALE L.J. 262, 265-66 (1965) (analyzing the three rules that are "central to the double jeopardy prohibition").

\(^{90}\) See generally Comment, Twice in Jeopardy, 75 YALE L.J. 262, 265-66 (1965) (analyzing the three rules that are "central to the double jeopardy prohibition").

\(^{91}\) See id. at 106.

\(^{92}\) See generally Comment, Twice in Jeopardy, 75 YALE L.J. 262, 265-66 (1965) (analyzing the three rules that are "central to the double jeopardy prohibition").

\(^{93}\) See United States v. Wilson, 420 U.S. 332, 343 (1975).

\(^{94}\) See Martin Linen Supply Co., 430 U.S. 564, 575 (1977) (stating that "the Double Jeopardy Clause bars appeal from an acquittal entered under Rule 29 [of the Federal Rules of Criminal Procedure]"); United States v. Mackins, 32 F.3d 134, 137 (4th Cir. 1994) ("The Double Jeopardy Clause prevents a retrial after an acquittal, and it prevents an appeal from a judgment of acquittal if a successful appeal would require further factual proceedings against the defendant.").
Jeopardy Clause is not offended, an absolute preclusion is not warranted. The prejudice resulting from any repeated attempt by the prosecution to convict the accused has been viewed as being offensive to principles of fundamental fairness in two ways. First, a retrial would subject the accused to prolonged embarrassment and expense, while imposing a continuing state of anxiety and instability. Second, a retrial would afford the government an unfair advantage to convict the accused by permitting the prosecution a second opportunity to present its case, and, thereby, perfect its trial strategy. Implicit in this rationale is the thought that if the government may repudiate, it gains an advantage from what it learns at the first trial about the strengths of the defendant's case and the weaknesses of its own. Following this logic, repeated attempts to convict an individual for the same offense through successive prosecutions increase the likelihood that, even though innocent, the accused eventually will be overwhelmed by the prosecution's resources and found guilty.

95. See Wilson, 420 U.S. at 344; cf. Arizona v. Evans, 115 S. Ct. 1185, 1191 (1995) (finding that use of the exclusionary rule is unjustified where no "appreciable deterrence" results (quoting United States v. Janis, 428 U.S. 433, 454 (1976)).

96. See Schiro, 510 U.S. at 229-30 (finding that protection operates to preclude repeated attempts to convict accused and subject "the defendant to embarrassment, expense, anxiety, and insecurity" (quoting United States v. DiFrancesco, 449 U.S. 117, 136 (1980)); cf. United States v. Jorn, 400 U.S. 470, 479 (1971) ("A power in government to subject the individual to repeated prosecutions for the same offense would cut deeply into the frameworks of procedural protections which the Constitution establishes for the conduct of a criminal trial.").


98. See Ponsoldt, supra note 14, at 81 ("A conceptual foundation for double jeopardy protection is that a jury's guilt determination may be less reliable if it occurs after a second trial, when the government has familiarized itself with the defense and marshalled its forces through the effective creation, control, and modification of the evidence.").

99. See Ohio v. Johnson, 467 U.S. 493, 498-99 (1984) (stating that a "bar to retrial following acquittal or conviction ensures that the State does not make repeated attempts to convict an individual, thereby exposing him to continued embarrassment, anxiety, and expense, while increasing the risk of an erroneous conviction or an impermissibly enhanced sentence"); Tibbs v. Florida, 457 U.S. 31, 42-43 (1982) (finding that double jeopardy protection granted by the Fifth Amendment prohibits a second trial for the purpose of affording the prosecution another opportunity to provide evidence which it failed to present in the first proceeding); DiFrancesco, 449 U.S. at 131 (holding that the state may not retry defendant after a conviction is reversed on the ground of insufficiency of the evidence); Burks v. United States, 437 U.S. 1, 11 (1978) (finding central to the objectives of the prohibition against successive trials is the barrier to "affording the prosecution another opportunity to supply evidence which it failed to produce in the first proceeding"); Gilliam v. Foster, 61 F.3d 1070, 1079 (4th Cir. 1995) (asserting that the double jeopardy protection granted by the Fifth Amendment permits only a single opportunity for prosecution to present evidence against a defendant), cert. denied, 116 S.Ct. 1849 (1996); United States v. Sloan, 36 F.3d 386, 403 (4th Cir. 1994) (Niemeyer, J., dissenting) (stating that double jeop-
D. Erroneous Judgments

The Supreme Court has held that the prosecution is precluded from appealing an acquittal even if it is the product of erroneous evidentiary rulings or erroneous interpretations of governing legal principles. Likewise, an acquittal that is the product of jury or witness intimidation or tampering cannot be set aside.

In Fong Foo v. United States, the district court directed judgments of acquittal before the conclusion of the government's case. Although the Supreme Court found that the district court lacked the authority to order judgments of acquittal, the Court held that the double jeopardy protection prohibited a retrial. The Court, relying on Ball, reasoned that a review of the acquittal would place the defendants twice in jeopardy.

It should be noted that in civil cases, the plaintiff is free to seek judicial review and retry his case after a judgment in favor of the defendant. Thus, the civil justice system tolerates the increased financial and emotional burden as well as affords, in theory, the plaintiff a more favorable opportunity to obtain a judgment in his favor in a retrial after a defense verdict is vacated or reversed. Moreover, a wrongful death civil suit may be brought against a defendant after he is acquitted in a criminal trial. For example, although O.J. Simpson was acquitted of the killings of Nicole Brown Simpson and Ronald Goldman, the families of the victims filed wrongful death suits against him. See Complaint for Damages-Survival Action (No. SC 36876), available in LEXIS, Hottop Library, EXTRA File; Complaint for damages for Wrongful Death (No. SC 36340), available in LEXIS, Hottop Library, EXTRA File.

The Court reaffirmed this principle in United States v. Scott: What may seem superficially to be a disparity in the rules governing a defendant's liability to be tried again is explainable by reference to the underlying purposes of the Double Jeopardy Clause. As Kepner and Fong Foo illustrate, the law attaches particular significance to an acquittal. To permit a second trial after an acquittal, however mistaken the acquittal may have been, would present an unacceptably high risk that the Government, with its vastly superior resources, might wear down the defendant so that "even though innocent he may be found guilty."
In a dissenting opinion, Justice Clark argued that the district court had neither the power to direct a verdict of acquittal nor the power to enter a judgment thereon. In fact, he argued that no judge has the power to prejudge the government’s proof before hearing the testimony, and then to enter a judgment of acquittal. Such action by the court frustrates the government’s ability to prosecute those persons who violate the law. Furthermore, such action robs the public of its fundamental right to have a person, legally indicted by a grand jury, publicly tried on the charges.

III. Reconsideration

A. Permitting Retrial Under Limited Circumstances and After Judicial Review Does Not Undermine Double Jeopardy Protection Afforded Against Government Tyranny

An accused has a legitimate and important interest in being protected from a retrial that is motivated by the government’s vindictive and predatory attempt to convict him. It is readily conceded that an accused whose acquittal is based on insufficiency of evidence, rather than plain error by the district court, intimidation, tampering, or misconduct, cannot be retried. Under these circumstances, the preclusion should not be trivialized or traduced. The Double Jeopardy Clause should continue to preclude a retrial after an acquittal that is the product of an error-free proceeding. Where the remedial objectives of this protection are not offended, however, an absolute preclusion is not warranted.

Permitting a retrial under limited circumstances and after judicial review would not be a troubling departure from a criminal justice system that has traditionally ensured fair treatment to the accused. For instance, if an acquittal is found to be the product of plain error, intimidation, tampering, or misconduct, a retrial would not represent abuse by the prosecution. Under these limited circumstances, the protection afforded the accused is not diminished for several reasons. First, the authority to permit a retrial would not be left to the discretion of the prosecutor; instead, a retrial would be permitted only after judicial review vacates or reverses

105. See Fong Foo, 369 U.S. at 144 (Clark, J., dissenting).
106. See id. at 145-46.
107. See id. at 145.
108. See id.
109. Cf. Arizona v. Evans, 115 S. Ct. 1185, 1191 (1995) (stating that the exclusionary rule, as with any remedial device, should be applied only in those instances where its remedial purposes are served).
the adjudication. Judicial review under these circumstances would be limited and the standard to vacate or reverse a judgment of acquittal would be meaningful. The procedure to guarantee a fair trial would continue in any successive prosecution. Furthermore, the prosecutor’s decision to seek review and retrial would be subject to a deliberative process. Lastly, under the limited circumstances proposed here, the prejudice imposed upon the accused as a result of the judicial review is insubstantial.

1. Judicial Review

The principal role of an independent judiciary is to review government action for compliance with the Constitution. A retrial motivated by the prosecution’s desire to misuse the government’s resources to injure and coerce an accused would not survive scrutiny by the courts. A retrial would occur only after an appellate court finds that the judgment of acquittal was the product of an egregious error of law by the district court, or after a district court finds that the verdict was the product of jury intimidation, jury tampering or intimidation, or misconduct. Accordingly, retrial under these limited circumstances would neither offend principles of fundamental fairness nor represent an abuse by the prosecution. While some of the accused’s interests may be infringed upon, the protection against government tyranny would not. To require a criminal defendant to stand trial again following an acquittal and an appeal reversing his acquittal is not an act of government oppression against which the Double Jeopardy Clause was intended to protect.

A retrial following an error-free trial and acquittal would violate the Double Jeopardy Clause. The protection against any corrupted vicissitudes of the government, however, is not offended by a retrial that occurs after a finding of plain error, jury intimidation or tampering, or misconduct. Although the initial prosecution is instituted at the discretion of the prosecution, a retrial would not be within its discretion. Instead, dispassionate review by the court would act as a firewall against any abuse or vindictiveness by the prosecution.110

2. Standard of Review

Exceptions to absolute preclusion and protection should not be found casually. The acquittal must amount to a miscarriage of justice. This oc-

110. In addition, a second trial may be subject to a motion to dismiss on the ground of selective prosecution. To establish a prima facie case of selective prosecution, a defendant would need to prove: (1) that others similarly situated have not been retried; and (2) that the second trial is based on an impermissible motive. See United States v. Davis, 36 F.3d 1424, 1432 (9th Cir. 1994), cert. denied sub nom. Williams v. United States, 115 S. Ct. 1147 (1995).
curs when the proceedings are so contaminated by error or misconduct that the adjudication is fundamentally unfair so as to do violence to the concept of justice. Accordingly, to retry the accused, the prosecution would be required to show three things: (1) that the district court committed plain error, that the jury or witnesses were intimidated or tampered with, or that there was misconduct by defense counsel; (2) that the judgment of acquittal was the product of this error, intimidation, tampering or misconduct; and (3) that absent the error or misconduct, there is a reasonable likelihood that the result of the proceedings would have been different. In essence, the prosecution would be required to prove that it was denied a fair trial. Such error or misconduct risks an unreliable trial outcome and impeaches the integrity of the criminal process; a retrial would be sensible and appropriate.

The party seeking relief from a judgment of acquittal would carry the burden of showing error, jury intimidation or tampering, or misconduct, and materiality of the error or act.111 Materiality or prejudice must be sufficient to risk an unreliable trial outcome.112 In the case of juror intimidation or tampering, the government would be required to prove that a juror was paid or threatened to vote for an acquittal. Once the government proves that such contact occurred, the burden would shift to the defendant to demonstrate that the contact was harmless.113 If a reasonable probability existed that the extrinsic contact influenced the jury’s deliberations, then a new trial would be warranted.114 A suggestion of

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111. The standard of proof governing a motion for a new trial based on witness and jury intimidation or tampering would be by a preponderance of the evidence.

112. See United States v. Custis, 988 F.2d 1355, 1359 (4th Cir. 1993) (establishing five necessary elements for a new trial based on newly discovered evidence: (1) evidence newly discovered; (2) facts which imply diligence on the part of the movant; (3) evidence relied on must not be merely cumulative or impeaching; (4) evidence must be material; and (5) evidence would more than likely produce an acquittal), aff'd, 511 U.S. 485 (1994); see also United States v. Washington, 44 F.3d 1271, 1282 (5th Cir.) (finding that even if a prosecutor knowingly uses perjured testimony, reversal is required only if the testimony is material (i.e., if its use would likely have affected the outcome of the trial)), cert. denied, 115 S. Ct. 2011 (1995); United States v. Francisco, 35 F.3d 116, 120 (4th Cir. 1994) (finding prosecutorial misconduct to be reversible error if the “conduct prejudicially affected the defendant’s substantial rights so as to deprive her of a fair trial”), cert. denied, 115 S. Ct. 950 (1995).

113. See United States v. Martinez, 14 F.3d 543, 550 (11th Cir. 1994) (holding that prejudice is presumed the moment extrinsic contact with the jury is established by the accused).

114. See id. at 554 (holding that a new trial was required because a reasonable probability existed that the jury deliberations were tainted by extrinsic contact); United States v. Acker, 52 F.3d 509, 516 (4th Cir. 1995) (affirming a trial judge’s decision to deny defendant’s motion for a new trial because the defendant failed to show that extraneous prejudicial information was brought to the attention of a juror or that outside influence was brought to bear on a juror), cert. denied, 116 S. Ct. 796 (1996).
improper contact with a juror, however, would not automatically translate into a new trial. If the jury voted in favor of an acquittal, the government would need to prove that at least one vote for an acquittal was actually or constructively coerced or corrupted. If the government suspected witness intimidation or tampering, it would be required to prove that a witness gave false testimony and that this testimony was material to the judgment of acquittal. The government would not be entitled to a new trial if the false testimony related to a collateral matter.

In the case of an error of law by the district court, appeal and reversal would lie only for plain error. The error must be obvious, affect substantial rights, and also affect "the fairness, integrity or public reputation of judicial proceedings." Stated another way, the error cannot be harmless: it must be egregious and contaminate the judgment of acquittal so as to inflict a substantial and injurious effect on the verdict. Although the protection provided by the Double Jeopardy Clause is important, it is not unreasonable to find that this right is subordinate to the public’s interest in affording the prosecution one full and fair opportunity to present its evidence to an impartial jury.

115. See, e.g., United States v. Heater, 63 F.3d 311, 321-22 (4th Cir. 1995) (holding that a mere proffer without further support is insufficient to create a colorable claim of jury tampering).

116. To demonstrate perjury, the government would be required to prove that the testimony was false, concerned a material matter, and was given with the willful intent to deceive. See United States v. Smith, 62 F.3d 641, 646 (4th Cir. 1995).


119. See, e.g., United States v. Lewis, 53 F.3d 29, 35 (4th Cir. 1995) (holding that the district court’s failure to give a requested jury instruction seriously impaired the defendant’s ability to conduct his defense).

120. "[T]he public's interest in 'fair trials designed to end in just judgments' is not to be undermined casually." United States v. Sloan, 36 F.3d 386, 404 (4th Cir. 1994) (quoting Arizona v. Washington, 434 U.S. 497, 516 (1978)). Furthermore, "the Double Jeopardy Clause recognizes society's interest in 'giving the prosecution one complete opportunity to convict those who have violated its laws.'" Id. at 405 (quoting Washington, 434 U.S. at 509). "[P]ublic justice demands that the government be given the opportunity to complete a prosecution." Id.
3. **Fair Retrial**

A second trial would not displace the phalanx of procedures that ensures a defendant is afforded a fair trial. The accused would continue to receive all the protections currently in place to ensure that the proceedings are fundamentally fair. An accused’s right to cross-examine witnesses, challenge evidence, or call witnesses on his behalf would not be infringed. The government would be required to prove, and the jury would be required to find, guilt beyond a reasonable doubt.

4. **Prosecutorial Judgment**

The initiation of the criminal investigation and pursuit of a criminal prosecution represents an awesome use of government authority, requiring detached and sober judgment. The decision to prosecute can destroy a person’s life and reputation. An accused’s life is held captive and under appreciable personal and financial strain. Consequently, the public

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121. Fundamental to the criminal process is that the defendant be afforded a fair trial. As Justice Frankfurter wrote in *Irvin v. Dowd*:

More than one student of society has expressed the view that not the least significant test of the quality of a civilization is its treatment of those charged with crime, particularly with offenses which arouse the passions of a community. One of the rightful boasts of Western civilization is that the State has the burden of establishing guilt solely on the basis of evidence produced in court and under circumstances assuring an accused all the safeguards of a fair procedure. *Irvin v. Dowd*, 366 U.S. 717, 729 (1961) (Frankfurter, J., concurring).

Compare *Irvin* with Justice Black’s opinion in *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963), which stated, “From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law.” *Id.*

What is advanced here for reconsideration does not alter or amend the fundamental principle that the defendant is entitled to a fair trial.

122. A corollary is that, in addition to judicial review, the jury system itself would stand as a buffer between tyranny and the accused.

123. The present absolute preclusion brings with it the appearance of the fairness regarding a mechanism that operates to displace a potential abuse of the criminal process. The criminal process, however, is intended to be one of human construction. An absolute preclusion displaces any vindictive behaviors of prosecutors and, with it, any threat of capriciousness. With this security, however, the talents and sense of justice that only individuals can bring to the process is, likewise, forfeited. For example, see Rachel L. Swarns, *Prosecutor Resists Pataki Pressure on Death Penalty*, N.Y. Times, Mar. 21, 1996, at B1, describing Bronx District Attorney Robert T. Johnson’s refusal to be pressured into seeking the death penalty by Governor George E. Pataki in connection with prosecution of person accused of killing a New York City police officer. In a related article, Jan Hoffman wrote that: “The philosophical foundation of any prosecutor’s office is discretion—the prosecutor’s right to choose which crimes to investigate, who to charge and what sentencing deals to offer, all decisions that are based on a complex, shifting set of factors.” Jan Hoffman, *Death Penalty Raises Issue of Obligation of Prosecutor*, N.Y. Times, Mar. 17, 1996, at 33-35.
is served by decisions to prosecute that arise from a sense of humility, reserve, proportion, and restraint. Although much maligned, most prosecutions are not driven by the vaulting ambitions of the individual prosecutor. Rather, decisions to prosecute are driven by a genuine connection to the values and ideals of the criminal justice system. The decision to seek reversal and retry a defendant would be subject to this deliberate judgment.

In some cases, the public’s interest will be better served when the prosecution is terminated after an acquittal regardless of whether the proceeding was error free. On the other hand, society pays too high a price for an acquittal when the government’s ability to pursue judicial review of plain error, intimidation, tampering, or misconduct is foreclosed. It is within this context that the criminal process would benefit from permitting the prosecution to seek judicial review to reverse a judgment of acquittal that is the product of a defective judicial process.124

5. Prejudice to an Accused

Permitting judicial review does not subject an accused to such agony and expense that permitting limited appeals would be contrary to principles of fundamental fairness. Certainly, there would be some anxiety and expense associated with responding to a motion for a new trial or an appeal. This burden, however, does not outweigh the public’s right to a fair opportunity to enforce its criminal laws. In the event of a retrial, the burden on an accused is less compelling. Although the court could factor in the burden on a defendant in deciding whether to set aside the acquittal and order retrial, in most cases and under these limited circumstances, requiring a defendant to defend himself in a second trial is not unduly prejudicial when considering the benefit to the integrity of the criminal process. This is simply because a defendant has no right to benefit from an acquittal obtained through a judicial process that is defective in some fundamental respect.125

In addition, a retrial under these limited circumstances does not unfairly aid the prosecution. Similar to the prosecution, the defendant also gains an advantage from what he learns at the first trial about the strengths of the government’s case and the weaknesses of his own defense. A retrial would permit the defendant to rework his defense, to

124. What is unsaid is that the absolute preclusion erroneously assumes prosecutorial oppression. This assumption is not well considered or obvious. An equal assumption is that the prosecution operates in an environment where oppressive and vindictive prosecutions are not tolerated or likely to thrive.

perfect his trial strategy, and to supply evidence that he failed to present in the first trial. As a result, an overwhelming majority of retrials would not result in an unfair advantage to the prosecution or undue prejudice to the defendant.

B. The Rationale Behind the Double Jeopardy Protection Yields to Retrials in Less Compelling Circumstances

The rationale underlying the protection against successive prosecutions was put in place expressly to (1) avoid having an accused endure a constant state of anxiety and insecurity; and (2) avoid giving the government an unfair opportunity to convict an accused by using information obtained during the first trial concerning the strengths and weaknesses of its case.\(^{126}\) The rationale behind precluding judicial review of plain error, tampering, or misconduct is hollow, however, considering that it yields to retrials in less compelling circumstances.

An accused is subject to the adverse effects of successive prosecution when (1) the first trial results in a mistrial due to a hung jury and the accused is retried;\(^ {127}\) (2) the first trial results in a mistrial for reasons other than a hung jury and the defendant is retried;\(^ {128}\) (3) the first trial results in a conviction, but the defendant is retried after he obtains a reversal of his conviction on appeal on a ground other than sufficiency of


\(^{127}\) A retrial following a “hung jury” does not violate the Double Jeopardy Clause. See Arizona v. Washington, 434 U.S. 497, 509 (1978); United States v. Ndane, 87 F.3d 114, 115 (4th Cir. 1996); see also Kenneth B. Noble, Menendez Brothers Guilty of Killing Their Parents, N.Y. TIMES, Mar. 21, 1996, at A12 (examining how the defendants were convicted of killing their parents in a second trial after the first proceeding ended in hung jury); Richard Sandomir, After Mistrial, King Is Headed Back To Court, N.Y. TIMES, Nov. 18, 1995, at A29 (announcing prosecution’s intent to retry a boxing promoter on wire fraud charges following mistrial after the jury deadlocked at the first trial).

\(^{128}\) If a judge declares a mistrial over the defendant’s objection or without the defendant’s consent, the defendant cannot be retried unless there was “manifest necessity” for the termination of the first trial. Washington, 434 U.S. at 505; see United States v. Givens, 88 F.3d 608, 614 (8th Cir. 1996) (finding that a declaration of mistrial was in error and barring retrial); Ham v. United States, 58 F.3d 78, 82 (4th Cir.), cert. denied, 116 S. Ct. 513 (1995); see also United States v. Johnson, 55 F.3d 976, 978 (4th Cir. 1995) (explaining that the government is not precluded from retrying a defendant when first trial ends on the defendant’s motion for a mistrial); United States v. Sammaripa, 55 F.3d 433, 434 (9th Cir. 1995) (holding that a defendant’s exercise of his peremptory challenges in violation of Batson v. Kentucky manifested a necessity to declare a mistrial, and, therefore, subsequent prosecution of the defendant was permitted); Weston, 50 F.3d at 636 (holding that “upon declaration of a mistrial, retrial will only be permitted if the defendant consented to the mistrial or if the mistrial was caused by ‘manifest necessity’” (quoting Washington, 434 U.S. at 505)). An exception to this rule occurs when the government induces the defendant into moving for a mistrial. See Oregon v. Kennedy, 456 U.S. 667, 675-79 (1982).
the evidence;\textsuperscript{129} and (4) the accused is retried in federal court after an acquittal or conviction in the state court.\textsuperscript{130} In light of these exceptions, an absolute preclusion lacks any obvious cohesion.

The government's ability to supplement its evidence and retry an accused is particularly remarkable when it retries an individual in federal court after a state court prosecution results in an acquittal.\textsuperscript{131} Under the dual sovereignty doctrine, double jeopardy protection does not bar a defendant's federal trial and conviction after a state prosecution for the same


The Second Circuit has relied on two points to explain the rationale behind permitting retrial after a conviction is reversed: first, by appealing his conviction, the defendant has waived the double jeopardy defense; and second, "the first jeopardy does not end with conviction, but rather continues through the appeal, and if successful, the remand and retrial are part of the original jeopardy." Boyd v. Meachum, 77 F.3d 60, 63 (2d Cir. 1996) \textit{cert. denied sub nom.} Boyd v. Armstrong, No. 95-9111, 1996 U.S. LEXIS 5053, at *1 (U.S. Oct. 7, 1996); \textit{see also} United States v. Hawkins, 76 F.3d 545, 553 (4th Cir. 1996) (holding that "the prohibition of the Double Jeopardy Clause against successive prosecutions does not preclude retrial of a defendant whose original conviction is set aside because of some error in the proceedings leading to conviction"); United States v. Wacker, 72 F.3d 1453, 1480 (10th Cir. 1995) (holding that double jeopardy does not bar reprosecution when the conviction is reversed solely for failure to prove an element of the offense that was not understood to be part of the crime at the time of trial); Jacob v. Clarke, 52 F.3d 178, 180 (8th Cir.) (permitting retrial after a conviction was reversed because material evidence was erroneously admitted at trial), \textit{cert. denied}, 116 S. Ct. 323 (1995); United States v. Cote, 51 F.3d 178, 182-83 (9th Cir. 1995) (holding that the reversal of a conviction based on an incorrect jury instruction does not prevent retrial); United States v. Akpi, 26 F.3d 24, 25 (4th Cir. 1994) (holding that double jeopardy does not bar the retrial of a defendant who has been convicted of a crime but whose conviction has been overturned on appeal due to an error in the proceedings leading to conviction).

Only one exception to this rule has been adopted by the Supreme Court: "[R]etrial is barred if a conviction is reversed on the ground of legally insufficient evidence because such reversal is equivalent, for double jeopardy purposes, to a jury verdict of acquittal." \textit{Jacob}, 52 F.3d at 180 (citing United States v. DiFrancesco, 449 U.S. 117, 131 (1980)); \textit{Burks}, 437 U.S. at 16-18.

\textsuperscript{130} \textit{See} United States v. McKinley, 23 F.3d 181, 184 (7th Cir. 1994) (noting that federal prosecution after a state guilty plea did not violate double jeopardy). A federal prosecution after a state court conviction is reversed on appeal on grounds barring a second trial in the state system is also permitted. \textit{See}, e.g., Amy L. Miller, \textit{Man Freed After Conviction is Indicted in Kidnapping}, \textit{The Sun} (Carroll County), Nov. 10, 1995, at B1 (indicating that a defendant was indicted on federal kidnapping charges after his state murder conviction was dismissed on appeal).

\textsuperscript{131} \textit{See}, e.g., Joseph P. Fried, \textit{Judge Asked to Dismiss Charges in Crown Heights Stabbing Case}, \textit{N.Y. Times}, Nov. 18, 1995, at 27 (reporting that an accused was indicted by a federal grand jury for violating the civil rights of a Hasidic scholar killed in racial violence in Crown Heights, New York, in 1991 after the accused was acquitted on state murder charges).
For example, in United States v. Koon, four officers were tried in state court in Simi Valley, California, on charges of excessive use of force by a police officer and assault with a deadly weapon. The jury acquitted the four officers on all charges, with the exception of one count against one of the officers on which the jury hung. The officers were later indicted by a federal grand jury and charged with federal civil rights violations based on the same conduct that was the basis of the state court acquittal. Two of the officers were convicted as a result of this federal prosecution. On appeal, the officers argued for a reversal on the grounds that because there was collusion between federal and state authorities, the Due Process Clause precluded the subsequent prosecution. More particularly, the defendants contended that the federal government's prosecution was the product of state and federal collusion sufficiently extensive to amount to a second prosecution by the state. The Ninth Circuit rejected the defendant's contention, holding that under the dual sovereignty doctrine, consecutive prosecutions based on the same underlying conduct did not violate the Double Jeopardy Clause.

The court found that the federal prosecution was pursued to vindicate the separate interests of the second sovereign and was not a pretense on behalf of the first sovereign to prosecute. The court explained that to establish a successful double jeopardy challenge, the defendants must show more than mere evidence of cooperation between federal and state authorities. Rather, the defendants were required to prove that the subsequent prosecution and prosecuting entity were merely a tool for the first, or that the proceeding was a sham done at the behest of the prior authority. The court held that there was nothing to suggest that the federal prosecution was pretextual. The court specifically recognized that the federal government had conducted its own investigation, weakening the collusion argument and indicating that the federal government had not been a tool of state authorities. Moreover, the mere fact that evidence developed from the state trial was used in the federal trial did not create a double jeopardy problem. In sum, there was "no evidence

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133. 34 F.3d 1416 (9th Cir. 1994).
134. See id. at 1425.
135. See id.
136. See id.
137. See id.
138. See id. at 1439.
139. See id. at 1438.
that the federal prosecution was a 'sham' or a 'cover' for the state prosecution”.

C. Legitimacy Of The Criminal Justice System

The Supreme Court has ruled that there is no exception to the rule precluding an appeal and retrial after an acquittal even if the judgment is the product of a criminal process that is defective in some fundamental respect.141 These rulings incorrectly view the law as a fixed rule and not a set of values assigned to protect and foster the legitimacy of the criminal process. The absolute preclusion of judicial review and retrial after an acquittal is essentially grounded on value judgments made in divided Supreme Court opinions that have stated that the legitimacy of the criminal justice system is best served by precluding review and retrial after an acquittal. However, there are equal, if not more compelling, judgments that support the opposite conclusion.

The byplay between Justice Brennan's dissent in Scott and the dissents of Justice Holmes in Kepner, Justice Frankfurter in Green, and Justice Cardozo's opinion in Palko, present the best thoughts on the two conflicting views. Admittedly, the conflict has a raw edge to it. Most compelling is that, beyond the sensible approach expressed by the narrative force of Justice Holmes, Justice Frankfurter, and Justice Cardozo, the abiding concern expressed by Justice Brennan behind the absolute preclusion is not offended or undermined by permitting judicial review and retrial when an acquittal is the product of plain error, jury intimidation or tampering, or misconduct. Adjudication that is defective in some fundamental respect undermines the public confidence in the criminal justice system. Permitting limited judicial review would be a recognition of the public's interest in enforcing its criminal laws by affording the prosecution a fair opportunity to present its case, and would bolster the integrity of the criminal

140. Id. at 1439; see also Abbate v. United States, 359 U.S. 187, 196 (1959) (upholding a federal prosecution following a state conviction); Bartkus v. Illinois, 359 U.S. 121, 134-39 (1959) (upholding a state prosecution following a federal acquittal); United States v. Robinson, 42 F.3d 433, 434 (7th Cir. 1994) (holding that under the dual sovereignty doctrine the Double Jeopardy Clause did not bar defendant's federal conviction after state conviction for same conduct); United States v. Zarnes, 33 F.3d 1454, 1470 (7th Cir. 1994) (permitting federal prosecution of the defendant after he was acquitted of state charges based on same conduct), cert. denied sub nom. Bland v. United States, 115 S. Ct. 2286 (1995). But see United States v. All Assets of G.P.S. Automotive Corp., 66 F.3d 483, 493-99 (2d Cir. 1995) (questioning the continued validity of the dual sovereignty doctrine).

process by assuring that trials are fundamentally fair to both participants
in the adversarial system of the criminal process.\textsuperscript{142}

The legitimacy of the federal criminal justice system is based on public
confidence in its fairness and integrity. A judgment of acquittal that calls
into question the fairness, integrity, and public reputation of the criminal
process is needlessly tolerated.\textsuperscript{143} Plain error of law by the trial court,
witness and jury intimidation or tampering, and defense counsel miscon-
duct, are acts and events of such grave dimension that adjudications pro-
duced by these acts and events inflict an injurious effect on the criminal
process. Consequently, permitting these results to stand fosters a de-
crease in public confidence in the criminal process. In this context, per-
mitting judicial review would not carve out a harmful exception. Rather,
it would send the signal that the criminal process will not tolerate tainted
adjudications. This message would bolster the public confidence in the
legitimacy and integrity of the criminal process by assuring that rules are
consistent and trials are fundamentally fair.

The courts have recognized society's interest in giving the prosecution
one complete and fair opportunity to convict those who have violated its
laws.\textsuperscript{144} In essence, the prosecution is entitled to a fair trial. Public jus-
tice should not be forsaken by a rigid and inflexible rule. The interest of
the public in seeing a criminal prosecution proceed to verdict in an error-
free proceeding is intertwined with the quest for truth. These interests
become fundamentally flawed if the defendant is acquitted as a result of a
judicial process that is defective in some fundamental respect.

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\textsuperscript{142} See Pollard v. United States, 352 U.S. 354, 362 (1957) ("Error in the course of a
prosecution resulting [in] conviction calls for the correction of the error, not the release of
the accused."). Likewise, an error in the course of the prosecution resulting in acquittal
calls for the correction of the error, not the release of the accused.

\textsuperscript{143} See Akhil Reed Amar & Jonathan L. Marcus, Double Jeopardy Law After Rodney

Disregarding a tainted acquittal would not be wholly illogical or unprecedented.
In many state courts, acting under double jeopardy clauses in state constitutions
or analogous common-law principles, it seems that a judgment of acquittal proc-
cured by an accused by fraud or collusion is a nullity and does not put the defend-
ant in jeopardy. Consequently, it does not bar a second trial for the same offence.
This proposition is supported by various distinguished treatises, and even appears
in Corpus Juris Secundum as a rule of hornbook law. And the proposition has
considerable common sense to commend it.

\textsuperscript{144} Double jeopardy protection is sometimes held inferior to the public's interest in
providing the prosecution a meaningful opportunity to present its case. See United States
v. Sammaripa, 55 F.3d 433, 434 (9th Cir. 1995); United States v. Sloan, 36 F.3d 386, 405 (4th
Cir. 1994); cf. Arizona v. Washington, 434 U.S. 497, 505 (1978) (requiring the prosecution
to demonstrate a "manifest necessity" to establish grounds for a retrial).
Furthermore, the public has an interest in establishing and maintaining a system of public justice that is structured to achieve fair trials designed to end in respectable judgments. Public confidence in the integrity of the criminal justice system is essential for preserving the legitimacy of the criminal process.\textsuperscript{145} Legitimacy is not achieved by a one-dimensional criminal process that tolerates plain error in favor of the defendant, jury and witness intimidation or tampering, or misconduct by defense counsel. The integrity of the criminal process is furthered by having a process that is symmetrical and balanced, that affords both an accused and the prosecution a fair opportunity to present their cases, as well as judicial review of a proceeding that is infected with error.\textsuperscript{146} Permitting review of a judgment of acquittal that is the product of plain error, intimidation, tampering, or misconduct, fosters symmetry, consistency, predictability, and balance in the federal criminal process. This symmetry cannot be achieved without conducting the criminal process in a manner that affords the right to an error-free proceeding to the prosecution in a credible manner.\textsuperscript{147}

The defendant is afforded the right to a fair trial and the right to judicial review to ensure an error-free proceeding. The prosecution should also be afforded both a fair opportunity to present its case to the jury and the right to an error-free proceeding.\textsuperscript{148} The comparison is not dispro-

\textsuperscript{145} The proposition is a simple one. The first responsibility of a democratic government is to protect its citizens. This responsibility is frustrated by a criminal process that overly tolerates adjudications obtained through a judicial process that is defective in some fundamental respect. As confidence in the system of justice is depleted, the public becomes estranged and disengaged from the criminal process.

\textsuperscript{146} See Snyder v. Massachusetts, 291 U.S. 97, 122 (1934). As Justice Cardozo explained:

The law, as we have seen, is sedulous in maintaining for a defendant charged with crime whatever forms of procedure are of the essence of an opportunity to defend. Privileges so fundamental as to be inherent in every concept of a fair trial that could be acceptable to the thought of reasonable men will be kept inviolate and inviolable, however crushing may be the pressure of incriminating proof. But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.

\textit{Id.}

\textsuperscript{147} As Judge Hand wrote: "The protection of the individual from oppression and abuse by the police and other enforcing officers is indeed a major interest in a free society; but so is the effective prosecution of crime, an interest which at times seems to be forgotten." \textit{In re Fried}, 161 F.2d 453, 465 (2d Cir. 1947) (Hand, J., dissenting in part).

portionate. When the trial is infected by plain error, intimidation, tampering, or misconduct that produces a judgment of acquittal, the government should be permitted to seek the setting aside of that judgment. This would be consistent with the way that courts have long treated fundamental defects in the criminal process. The current rule is inconsistent and immunizes a defendant from punishment when his acquittal is the product of plain error, intimidation, tampering, or misconduct. This exacts too high a price from the efficient and credible administration of justice.\(^9\) The criminal justice system simply cannot afford to deny the public a fair opportunity to enforce its criminal laws because of an inflexible and rigid process.\(^{10}\)

Balancing the criminal process by affording the prosecution the right to limited judicial review and retrial would further the administration of justice in three fundamental ways.\(^{11}\) First, an appeal after an acquittal would be a credible deterrence against witness and jury intimidation and tampering. Unfortunately, with the rise of urban violence and narco-cor-

Niemeyer set forth the rationale for permitting a retrial after a defendant obtains a reversal of his conviction due to an error in the proceedings:

A rule that would immunize a defendant from punishment when his trial contained any error sufficient to require a reversal would exact too high a price from law enforcement efforts because the complexity of courtroom procedure must inevitably lead to some errors, even when attorneys and judges are at their best. Our criminal justice system simply cannot afford to let guilty defendants walk free because of the criminal procedure's complexity, particularly when the complexity is attributable to efforts to protect the innocent and to convict only the guilty. . . . In short, retrial after reversal due to trial error is not an abuse that was intended to be prohibited by the Double Jeopardy Clause.

_id._ (citation omitted). This rationale also supports retrial after an acquittal is reversed on the limited grounds advocated here.

149. See _O'Neal v. McAninch_, 115 S. Ct. 992, 997 (1995) (explaining that in a habeas proceeding, plain error risks an unreliable trial outcome and calls into question the integrity of the criminal process).

150. An alternative is an appeal during the trial proceeding and prior to a verdict. See, e.g., David Margolick, _California Court Overturns Ruling In Simpson Trial_, N.Y. TIMES, Sept. 9, 1995, at 1 (reporting an appeals court’s overturning of a trial court’s intended jury instruction). Because appeals of right have been authorized, however, there has been a firm policy against interlocutory or “piecemeal” appeals, and courts have consistently given effect to that policy. See _Abney v. United States_, 431 U.S. 651, 657-58 (1977) (finding intermediate appeals disruptive to the criminal process).

151. The Supreme Court has recognized the benefit of symmetry in the criminal process in its commitment to establishing a criminal procedure where jury selection procedures are fair and nondiscriminatory to both the defendant and the prosecution. See _Georgia v. McCollum_, 505 U.S. 42, 48-50 (1992) (precluding a criminal defendant from engaging in purposeful racial discrimination in exercise of preemptory challenge); _Baton v. Kentucky_, 476 U.S. 79, 96-98 (1986) (barring a prosecutor's discriminatory use of preemptory challenges). In _McCollum_, the Court extended the rule in _Baton_ to the defendant because it found that a discriminatory jury selection procedure in favor of the defendant undermines the public confidence in the criminal process. See _McCollum_, 505 U.S. at 49.
ruption, the stain of witness intimidation is increasingly making its impression upon the criminal justice system.\textsuperscript{152} By permitting judicial review, the defendant would no longer benefit from an acquittal obtained through these corrupt means. The threat of having an acquittal reversed as a result of jury or witness intimidation or tampering should be an acute deterrence to any misconduct.

Second, an appeal after an acquittal would be a potent deterrent against any misconduct by defense counsel. It is common practice in a criminal trial for defense counsel to press every advantage. Unfortunately, this is used as a license for impermissible remarks and conduct. Permitting appellate review of defense counsel's conduct would create a credible deterrence and a shared culture that would subject him to the same standards that apply to the prosecutor. This may moderate the system and lessen the incentive to act ruthlessly in pressing every advantage. In sum, permitting judicial review would create a balanced disincentive that should encourage both the prosecutor and defense counsel to be principled participants.

Finally, rather than a potentially chilling impact, a balanced criminal process should encourage trial courts to be more zealous in protecting against the effects of improprieties by the prosecution. Any reluctance to rule against the government because it would jeopardize a prosecution would no longer be present. A district court could rule with confidence against the government in matters, even to the point of terminating a prosecution, without the risk of erroneously ending the prosecution. The matter would be reviewable on appeal, and, if the trial court was erroneous, the prosecution would be allowed to proceed. Thus, an error by the


Jury tampering is also a formidable problem. See, e.g., James C. McKinley Jr., \textit{Prison Time for Lawyer Convicted of Bribery}, \textit{N.Y. Times}, Sept. 13, 1995, at B2 (reporting that a lawyer was sentenced to eight months in jail in connection with arranging to pay a witness $3,000 to offer false testimony in murder trial); Charles Strum, 2 \textit{Top New Jersey Crime Figures Admit Juror Bribery in U.S. Trials}, \textit{N.Y. Times}, Sept. 21, 1993, at B1 (reporting that two members of the Luccheses crime family in New Jersey admitted in federal court that they bribed or tried to bribe jurors in federal racketeering trials). Jury tampering and intimidation was also vividly detailed in Brian Gibson's film \textit{The Juror} (Columbia Pictures 1996).
trial court in favor of the defendant would not put the accused irrevocably beyond the reach of further prosecution.

IV. Conclusion

At the centerpiece of American jurisprudence is maintaining a legitimate criminal process that results in respectable judgments. Neither the interest in precluding tyranny by the state nor the interest in ensuring a fair opportunity for the prosecution to present its case are to be undermined casually. A failure in either regard adversely affects the quest for truth and undermines the public confidence in the integrity of the criminal process. As a consequence, innocence and guilt are relevant.

Contrary to Justice Brennan's dissent in United States v. Scott, the fact that an acquittal results from a fundamental defect does affect the accuracy of that determination and does alter the essential character of the adjudication.153 Public confidence in the criminal system is diminished when a judgment of acquittal is the product of plain error, jury intimidation or tampering, or misconduct. Thus, under limited circumstances the criminal justice system would be best served by permitting judicial review and retrial after an acquittal. In the extraordinary case, where the judgment of acquittal calls into question the integrity of the criminal process, the protection against double jeopardy afforded an accused should accommodate the public's interest in providing the prosecution a fair opportunity to present its case to the jury.

The position advocated here does not seek to annul criminal laws in order to compromise the rights of the accused. The original intent remains trenchant. When the safeguards against government tyranny remain in place, however, it is a distortion of the intent of double jeopardy protection to block judicial review and retrial. Judicial review and retrial, under the limited circumstances advocated here, are not the sort of government oppression at which the Double Jeopardy Clause is aimed. They merely permit the government a fair opportunity to prove its case in accordance with the applicable law.154

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Underlying the question of guilt or innocence is an objective truth: the defendant, in fact, did or did not commit the acts constituting the crime charged. From the time an accused is first suspected to the time the decision on guilt or innocence is made, our criminal justice system is designed to enable the trier of fact to discover that truth according to law.

Id. at 450 (Powell, J., dissenting).

154. See United States v. Weems, 49 F.3d 528, 531 (9th Cir. 1995) (holding that a retrial was permitted after a reversal of conviction based on a change in the law after trial).
The law is not routine. It may change in direction and emphasis. In this context, it remains a prerogative of commentators on the law to probe regions deemed to be off-limits. Unconstrained by inflexibility, commentators have long performed the function of finding new ways to look at established doctrine. Such exploitation is often viewed as transgressive, and sometimes shocking. Because even long-entrenched dogma is not impervious to change, however, these commentaries often become extremely relevant. What is advanced here is a serious and sensible innovation in criminal jurisprudence to further the legitimacy and integrity of the criminal process. Contrary to the established proposition, the absolute preclusion against judicial review and retrial after an acquittal is not an irreversible and infallible doctrine laser printed on parchment and requiring full assent. Moreover, judicial review and retrial under limited circumstances is not contrary to the principles of fundamental fairness protected by the Double Jeopardy Clause.

The present absolute preclusion overly tolerates judgments that are obtained through judicial processes that are defective in some fundamental respect. This is a form of tyranny that takes a tangible toll on the legitimacy and integrity of the criminal justice process and discredits the concept of fair trials. Accordingly, because an acquittal that is defective in some fundamental respect seriously affects the fairness, integrity, or public reputation of the judicial proceeding, the Supreme Court should interpret the Double Jeopardy Clause to permit judicial review and retrial following reversal based on plain error, intimidation, tampering, or misconduct.

155. See, e.g., United States v. Virginia, 116 S. Ct. 2264, 2291-92 (1996) ("The virtue of a democratic system with a First Amendment is that it readily enables the people, over time, to be persuaded that what they took for granted is not so, and to change their laws accordingly.") (Scalia, J., dissenting).