

THE DOUBLE JEOPARDY CLAUSE, NEWLY DISCOVERED
EVIDENCE, AND AN “UNOFFICIAL” EXCEPTION TO DOUBLE
JEOPARDY: A COMPARATIVE INTERNATIONAL
PERSPECTIVE

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I. INTRODUCTION

It is a common hypothetical posed to law students in criminal procedure classes: if a prosecutor comes across compelling evidence proving a person guilty of a crime of which they have already been acquitted, what can that prosecutor do? The Double Jeopardy Clause to the U.S. Constitution makes the answer patently clear: “[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb.”¹ However, perhaps even more so in recent years, the criminal justice systems in the United States and abroad have struggled with the concrete notion that finality and protection of individual rights must rule the day.² The United Kingdom’s history regarding double jeopardy prohibition started out much the same way,³ but in 2003, the parliament passed the Criminal Justice Act, which forever changed the way double jeopardy was applied in the United Kingdom.⁴ Under the Act, for certain, specified crimes, a prosecutor could appeal an acquittal and retry a defendant on the grounds that newly discovered evidence

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¹ U.S. CONST. amend. V.

² See *Benton v. Maryland*, 395 U.S. 784, 795 (1969); Kenneth G. Coffin, *Double Take: Evaluating Double Jeopardy Reform*, 85 NOTRE DAME L. REV. 771, 788–89 (2010).

³ Of course, a substantial portion of American law comes from English common law. See, e.g., Kathleen A. Keffer, *Choosing a Law to Live by Once the King Is Gone*, 24 REGENT U.L. REV. 147, 152–53 (2011).

⁴ See Criminal Justice Act, 2003, c. 44, §§ 76, 78 (U.K.).

incriminated him.⁵

The United States has remained steadfast in its prohibition of double jeopardy.⁶ The U.S. Supreme Court struck down a Maryland statute that allowed prosecutors to appeal acquittals, so even a federal statute allowing re-trial seems unlikely.⁷ Further, the repeal of the Fifth Amendment seems highly unlikely.⁸ However, research about actors involved in the criminal justice system demonstrates that attempts to curb prosecutorial discretion does not actually get rid of the discretion; it just shifts it to another level in the system.⁹

The question in this article is whether, with respect to double jeopardy, in the absence of an express statute or constitutional provision permitting re-trials for acquitted defendants, prosecutors could “unofficially” use their discretion to form a loophole to the prohibition against double jeopardy using perjury prosecutions and subsequent civil and forfeiture proceedings used against defendants acquitted of the original charge. Although none of the United States case examples involve defendants who were “re-tried” for perjury or in civil court *after* authorities found new evidence against them, whether this repackaging of essentially criminal re-trials as civil cases is done with that end in mind (finding a loophole to double jeopardy) is the question that this article confronts. While it is easy to attack such an outcome as academically dishonest and against both the letter and the spirit of the Double Jeopardy Clause,

⁵ *Id.* § 78.

⁶ U.S. CONST. amend. V. Double jeopardy is defined as “[t]he fact of being prosecuted or sentenced twice for substantially the same offense.” BLACK’S LAW DICTIONARY 564 (9th ed. 2009). This applies both when a person has been previously convicted and previously acquitted. Stephen N. Limbaugh, Jr., *The Case of Ex Parte Lange (or How the Double Jeopardy Clause Lost Its “Life or Limb”)*, 36 AM. CRIM. L. REV. 53, 62 (1999).

⁷ *Benton*, 395 U.S. at 795–96.

⁸ Repealing an amendment is exactly as difficult as passing an amendment: a proposal must receive a two-thirds majority in both houses of Congress, and then be ratified by three-quarters (thirty-eight) of the states, or by conventions held in three-fourths of the states. U.S. CONST. art. V. Over ten thousand bills have been proposed as constitutional amendments, with only seventeen (not including the Bill of Rights) surviving the arduous process, and only one (the Eighteenth Amendment) ever being repealed. U.S. CONST. amend. XVIII, *repealed* by U.S. CONST. amend. XXI; Michael J. Lynch, *The Other Amendments: Constitutional Amendments That Failed*, 93 LAW LIBR. J. 303, 309 (2001). By contrast, in the United Kingdom, what would be a “constitutional” change in the United States would only require a simple majority vote in parliament to make a change. Douglas W. Vick, *The Human Rights Act and the British Constitution*, 37 TEX. INT’L L.J. 329, 332–34 (2002).

⁹ See, e.g., John Wooldredge & Timothy Griffin, *Displaced Discretion Under Ohio Sentencing Guidelines*, 33 J. CRIM. JUST. 301, 302 (2005) (concluding that when discretion is curbed by determinate sentencing guidelines, judges and prosecutors just exercise their discretion earlier in the process: at the plea bargaining stage, instead of the sentencing stage).

it is difficult to ignore a civilized nation across the ocean such as the United Kingdom being able to retry the "acquitted but actually guilty" without having to resort to such measures.¹⁰

In Part II, I will discuss the history of double jeopardy in the United Kingdom and how the murder of Stephen Lawrence spawned an investigative report to overturn the preexisting prohibition against double jeopardy, culminating in its first application against William Dunlop for the murder of Julie Hogg, and most recently, against Stephen Lawrence's killers.¹¹ Part III examines the history of double jeopardy in the United States, and examines whether concurrent federal and state prosecutions, perjury prosecutions, and civil trials or forfeiture hearings would provide an ample alternative to direct criminal prosecutions with which U.K. prosecutors may proceed.¹² Finally, Part IV concludes that each of these alternatives is insufficient to cover the "wrongfully acquitted" in any meaningful way, and more importantly, are an end run around a historically valuable constitutional right enjoyed by defendants.¹³

II. THE HISTORY OF DOUBLE JEOPARDY IN THE UNITED KINGDOM

While sources differ on the precise beginning of the prohibition against double jeopardy, it can be said with confidence that it has existed for at least five hundred years.¹⁴ In the United Kingdom, while "[t]he double jeopardy doctrine appeared in cases as early as 1589," and predates case law on the issue by almost two centuries,¹⁵ King Henry VIII passed a law allowing him to try defendants in England who committed offenses in Wales.¹⁶ Moreover, judges could discharge juries that they feared would return an acquittal so the prosecution would get a second try, because jeopardy (according to U.K. law) had not yet attached.¹⁷ Finally, the prosecution was allowed to appeal an acquittal until 1819.¹⁸

¹⁰ See discussion *infra* Part II.

¹¹ See discussion *infra* Part II.

¹² See discussion *infra* Part III.

¹³ See discussion *infra* Part IV.

¹⁴ Some scholars attribute the right to the Magna Carta (1215), while others argue it was not until the sixteenth century. Limbaugh, Jr., *supra* note 6, at 62.

¹⁵ Nyssa Taylor, Comment, *England and Australia Relax the Double Jeopardy Privilege for Those Convicted of Serious Crimes*, 19 TEMP. INT'L & COMP. L.J. 189, 196 (2005).

¹⁶ *Id.*

¹⁷ See MARTIN L. FRIEDLAND, DOUBLE JEOPARDY 13 (1969).

¹⁸ DAVID S. RUDSTEIN, DOUBLE JEOPARDY: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 8–9 (Jack Stark ed., 2004).

While the prohibition existed, it was not made concrete until 1964, in *Connelly v. Director of Public Prosecutions*.¹⁹ In *Connelly*, the defendant was indicted for robbery with aggravation and murder, in separate indictments.²⁰ The defendant was convicted of murder, and the Court of Criminal Appeal vacated the conviction and entered a directed verdict of acquittal.²¹ The trial judge set aside the second indictment for robbery, waiting for the outcome at the Court of Criminal Appeal on the first indictment.²² However, after the appeal, the prosecution tried to move forward with the robbery count, and the defendant pleaded *autrefois acquit*.²³ The trial judge concluded that the jury had not acquitted the defendant on the robbery count and the judge refused to exercise his discretion and express an opinion that the prosecution should not proceed.²⁴ The defendant then was convicted of robbery, which was affirmed by the Court of Criminal Appeal, after which the defendant appealed to the House of Lords.²⁵ The House of Lords rejected the defendant's *autrefois acquit* argument, saying:

one test as to whether the rule [of *autrefois acquit*] applies is whether the evidence which is necessary to support the second indictment, or whether the facts which constitute the second offence, would have been sufficient to procure a legal conviction upon the first indictment either as to the offence charged or as to an offence of which, on the indictment, the accused could have been found guilty²⁶

Although the court denied Connelly relief through double jeopardy, the case is important because the House of Lords clarified the rules against double jeopardy.²⁷ The House of Lords prohibited

¹⁹ *Connelly v. Dir. of Pub. Prosecutions*, [1964] AC 1254 (H.L. 1963) (appeal taken from Eng.) (Eng.); Taylor, *supra* note 15, at 196.

²⁰ *Connelly*, [1964] A.C. at 1267.

²¹ *Id.*

²² *Id.*

²³ *Id.* at 1259. A plea of *autrefois acquit* is a plea where a defendant is stating that he has been charged with the same (or a factually similar crime) and was acquitted of that crime, and that re-trial is barred for violating double jeopardy. See, e.g., S.C. CODE ANN. § 17-23-10 (2012) ("In any plea of *autrefois acquit*, . . . it shall be sufficient for any defendant to state that he has been lawfully acquitted or convicted . . . of the offense charged in the indictment."); Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 YALE L.J. 1807, 1814 (1997) ("The . . . idea here is that if a person has, on a prior occasion (*autrefois*) been acquitted or convicted of the *exact same crime* (*la même felony*) with which he is now charged, he can plead the previous judgment as a bar to the second indictment.").

²⁴ *Connelly*, [1964] A.C. at 1259.

²⁵ *Id.*

²⁶ *Id.* at 1305.

²⁷ Taylor, *supra* note 15, at 198.

"prosecuting a defendant for lesser or greater offenses that could have been included within the initial indictment."²⁸ The three exceptions to this rule were: (1) re-trial of a defendant who was convicted of a lesser-included offense and retried for murder "if the death occur[red] after the acquittal or conviction on the lesser charge,"²⁹ (2) partial jury verdicts—where the jury cannot reach a unanimous decision on some of the lesser included offenses, the defendant could be retried for those offenses,³⁰ and (3) if the defendant agreed to have separate trials for two indictments.³¹

Unfortunately, courts continued to misinterpret double jeopardy after *Connelly* was decided.³² However, in 1997, the Court of Appeal further clarified *Connelly* in *Regina v. Beedie*.³³ The background that led up to the case was unorthodox: on November 29, 1993, Tracy Murphy died of carbon monoxide poisoning because her landlord, Thomas Sim Beedie, did not properly maintain the gas heater in her apartment.³⁴ In 1994, the landlord was prosecuted by the Health and Safety Executive,³⁵ and pled guilty to a breach of the duty to ensure that the appliance was maintained and was fined £1918.³⁶ On April 19, 1996, he first tried to plead *autrefois convict*³⁷

²⁸ *Id.* (footnote omitted) (citing *Connelly*, [1964] A.C. at 1305 (Morris, L.J.)).

²⁹ Taylor, *supra* note 15, at 198 (quoting *Connelly*, [1964] A.C. at 1332 (Hodson, L.J.)) (internal quotation marks omitted).

³⁰ Taylor, *supra* note 15, at 198 (quoting Claire de Than & Edwin Shorts, *Double Jeopardy—Double Trouble*, 64 J. CRIM. L. 624, 629 (2000)).

³¹ Lissa Griffin, *Two Sides of a "Sargasso Sea": Successive Prosecution for the "Same Offence" in the United States and the United Kingdom*, 37 U. RICH. L. REV. 471, 498 (2003).

³² *Id.* at 497.

³³ *Id.*; *Regina v. Beedie*, [1998] Q.B. 356 (Eng.).

³⁴ *Beedie*, [1998] Q.B. at 358–59.

³⁵ The Health and Safety Executive ("HSE") is responsible for enforcing workplace safety standards in the United Kingdom. HEALTH & SAFETY EXEC., ENFORCEMENT POLICY STATEMENT 2–3 (2009) [hereinafter HSE, ENFORCEMENT POLICY STATEMENT], available at <http://www.hse.gov.uk/pubns/hse41.pdf>. Analogous to municipal inspectors in the United States, the HSE is an independent inspective and investigative agency created in 1833 to ensure compliance with the safety regulations of England, Scotland, and Wales. *The History of HSE*, HEALTH & SAFETY EXECUTIVE, <http://www.hse.gov.uk/aboutus/timeline/index.htm> (last visited Feb. 27, 2013). However, unlike municipal inspectors, the HSE is empowered to actually prosecute people who violate health and safety codes in the United Kingdom through Approval and Litigation Officers. *How HSE Enforces Health and Safety*, HEALTH & SAFETY EXECUTIVE, <http://www.hse.gov.uk/enforce/enforce.htm#enfpro> (last visited Feb. 27, 2013). The HSE's work is not limited to prosecuting violations of health and safety codes; they also conduct research and propose legislation to improve health and safety conditions at work. *About HSE*, HEALTH & SAFETY EXECUTIVE, <http://www.hse.gov.uk/aboutus/index.htm> (last visited Feb. 27, 2013).

³⁶ *Beedie*, [1998] Q.B. at 357, 359. In 1994, the exchange rate for American dollars to U.K. pounds was about \$1.53 per £1, so £1918 was worth approximately \$2935. See *Foreign Exchange Rate- U.K. Pound/ USD*, DATA360, http://www.data360.org/dsg.aspx?Data_Set_Group_Id=579&count=all (last visited Feb. 19, 2013).

because he had already been convicted of a lesser offense related to the conduct that occurred (and the victim did not subsequently die after the plea).³⁸ The court rejected his plea.³⁹

He subsequently pled guilty to manslaughter and was sentenced to eighteen months' imprisonment, but the sentence was suspended for two years.⁴⁰ Beedie appealed his sentence, and the court quashed the conviction, holding that none of the "special circumstances" cited in *Connelly* justified the subsequent prosecution.⁴¹ The Court of Appeal rejected the trial court's balancing of "public interests"⁴² against the defendant's rights and explained that *Connelly* stood for the principle that subsequent prosecutions for offenses based upon the same operative facts are presumptively barred absent specified circumstances.⁴³ Also irrelevant was the fact that different bodies led the prosecutions (the HSE led the first, and the CPS led the second).⁴⁴

While the fallout was not immediately recognized, Sir William MacPherson compiled a report suggesting drastic changes to police activity.⁴⁵ Two years later, the Law Commission too⁴⁶ released a

³⁷ *Autrefois convict* is a plea made by a defendant that he or she has already been convicted of the conduct that he is currently accused of. David S. Rudstein, *Retrying the Acquitted in England, Part I: The Exception to the Rule Against Double Jeopardy for "New and Compelling Evidence"*, 8 SAN DIEGO INT'L L.J. 387, 398 (2007). A plea of *autrefois acquit* is a plea that a defendant has previously been acquitted of the conduct he currently stands accused of. *Id.*

³⁸ *Beedie*, [1998] Q.B. at 360.

³⁹ *Id.* at 360–61.

⁴⁰ *Id.* at 357.

⁴¹ *Id.*

⁴² The lower court found that concerns for the victim's family constituted public interest sufficient to allow a re-trial. *Id.* at 366. While the Court of Appeal found the lower court's analysis to be incorrect, it was quick to point out that submissions made by the Crown Prosecutor might have misled the lower court into thinking that this was the correct standard. *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 360, 366–67. The court argued that there could have been a joint prosecution by both offices with manslaughter being included, concluding that "[w]e understand that liaison between the separate prosecuting authorities in the North East has now improved so that the history of the present prosecution should not be repeated in other cases." *Id.* at 366–67. While it is not entirely clear why the parties did not engage in a joint prosecution, the prosecutorial bodies' respective jurisdiction suggests that the HSE would not prosecute a manslaughter charge. See HSE, ENFORCEMENT POLICY STATEMENT, *supra* note 35, at 9.

⁴⁵ See HOME OFFICE, THE STEPHEN LAWRENCE INQUIRY: REPORT OF AN INQUIRY BY SIR WILLIAM MCPHERSON OF CLUNY ch. 47 (1999) [hereinafter THE STEPHEN LAWRENCE INQUIRY], available at <http://www.archive.official-documents.co.uk/document/cm42/4262/4262.htm>. Note that while the report did not specifically reference abrogating double jeopardy, it did state that based upon a botched investigation and acquittals, the accused who were believed to be guilty "**can never be tried again in any circumstances in the present state of the law.**" *Id.* ¶ 2.3 (emphasis in original).

report supporting reform in the United Kingdom's prohibition of double jeopardy and other areas of criminal law, citing to the *Beedie* case in support.⁴⁷

A. *The Stephen Lawrence Murder, Investigation, and Aftermath*

The *Beedie* case may have frustrated people who saw him walk free from the manslaughter, but the United Kingdom still remained firm in its prohibition of double jeopardy until a brutal murder combined to make the "perfect storm": ugly racial implications, undertones of police misconduct, and an increased sense of public unrest—leading the charge to change double jeopardy.

On April 22, 1993, Stephen Lawrence died after being stabbed twice by "five or six" white men at a bus stop in South London, according to his friend Duwayne Brooks, who was present at the scene.⁴⁸ While Lawrence's family was outraged at the apparent inaction by the police,⁴⁹ from May to June 1993, the Crown Prosecution Service ("CPS") investigated and arrested Jamie and Neil Acourt, Gary Dobson, Luke Knight, and David Norris, eventually charging both Acourts and Knight with murder.⁵⁰ But just a month later, they dropped the charges against Neil Acourt and Knight for insufficient evidence,⁵¹ despite receiving twenty-six

⁴⁶ The Law Commission is a statutorily created independent body employed to study the law and suggest changes to it. L. COMMISSION, <http://lawcommission.justice.gov.uk> (last visited Feb. 27, 2013). They make recommendations to the Lord Chancellor to undertake projects in certain areas of the law that they deem need reform. *How We Work*, L. COMMISSION, <http://lawcommission.justice.gov.uk/about/how-we-work.htm> (last visited Feb. 27, 2013).

⁴⁷ THE LAW COMM'N, DOUBLE JEOPARDY AND PROSECUTION APPEALS ¶¶ 2.19–2.20 (2001), available at http://lawcommission.justice.gov.uk/docs/lc267_Double_Jeopardy_Report.pdf.

⁴⁸ SIOBHAN HOLOHAN, THE SEARCH FOR JUSTICE IN A MEDIA AGE: READING STEPHEN LAWRENCE AND LOUISE WOODWARD 84 (2005); HOME AFFAIRS COMM., MACPHERSON REPORT—TEN YEARS ON ¶ 1 (2009), available at <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmhaff/427/427.pdf>.

⁴⁹ See Michael Seamark, *A Mother's Torment; I Gave a Police Officer the Five Suspects' Names. He Folded the Paper into a Small Ball. I Was So Angry*, DAILY MAIL (London), Mar. 26, 1998, at 19 (describing an incident where Chief Superintendent William Ilsley crumpled up a piece of paper with five suspects' names on it, which had come from Lawrence's mother). The police were criticized for spending too much time investigating Stephen Lawrence, the victim. *Id.* Lawrence's mother Doreen noted that "[w]e were not told his death was being investigated. We were never made aware of anything that was happening. That was the frustration of the whole thing," adding that "[t]he only thing I could gather from them being there was that they wanted information about Stephen. They used to ask whether he was part of a gang." *Id.* (internal quotation marks omitted).

⁵⁰ David Collins & Russell Myers, *Justice at Last: DNA Breakthrough May Finally Decide Lawrence Murder Case After 17 Years*, PEOPLE (Eng.), July 18, 2010, at 4.

⁵¹ *Id.*

tips that “point[ed] to the gang as racists who carried knives.”⁵² The CPS dropped its case against the remaining three defendants (Dobson, Norris, and Neil Acourt) the following year due to insufficient evidence.⁵³

All hope was not lost, however: in the United Kingdom, an individual can initiate a private prosecution against a suspect instead of the CPS, which operates as the public prosecutor.⁵⁴ In 1995, Lawrence’s parents began a private prosecution of the suspects, and Neil Acourt, Knight, and Dobson were arrested for the third time.⁵⁵ Jamie Acourt and Norris were again released for insufficient evidence, but Dobson, Neil Acourt, and Knight stood trial for murder.⁵⁶ Unfortunately for Lawrence’s parents, all three were acquitted after the trial judge excluded Brooks’s identification of the defendants as the ones who stabbed Lawrence, and four witnesses gave Dobson an alibi somewhere else the day Lawrence was killed.⁵⁷ A year after the trial, an inquest jury was convened, headed by Sir Montague Levine.⁵⁸ The jury returned a verdict of unlawful killing, finding that “Stephen Lawrence was unlawfully killed in a completely unprovoked racist attack by five youths.”⁵⁹

The aftermath of Lawrence’s death and his killers’ acquittals took

⁵² *Id.*

⁵³ HOLOHAN, *supra* note 48, at 84; Collins & Myers, *supra* note 50, at 4. According to a member of the Crown Prosecution Service, the decision came after the Metropolitan Police gave the Crown Prosecution Service a detailed report discussing other assaults in the area around where Lawrence was killed, which was given “full consideration” in deciding whether to bring charges, “[b]ut it was clear there was no evidence.” Dru Sharpling, Letter, *No Evidence Found in Lawrence Case*, INDEPENDENT (London), Aug. 1, 2006, at 28.

⁵⁴ Stephen Wright, *Police Bugged Their Homes, Cars, Pubs and Snooker Halls. They Even Bought a House Next Door and Befriended Suspect*, DAILY MAIL (London), Jan. 4, 2012; *see also* Prosecution of Offences Act, 1985, c. 23, §§ 1, 6 (Eng.) (establishing a private citizen’s right to prosecute offenses).

⁵⁵ HOLOHAN, *supra* note 48, at 85. It should be noted how rare the private prosecution route was: the Lawrence prosecution was just the fourth private prosecution for murder in 130 years. *Suspects Could Face Retrial If Law Changes*, THIS IS LOCAL LONDON, June 26, 2001.

⁵⁶ *Id.*

⁵⁷ Q & A: *Stephen Lawrence Murder*, BBC NEWS (May 5, 2004), http://news.bbc.co.uk/2/hi/uk_news/3685733.stm.

⁵⁸ HOLOHAN, *supra* note 48, at 85. An inquest jury is convened where, among many other things, a death is caused by reason other than natural causes, or occurred in suspicious circumstances, where a jury is asked to ascertain the identity of the deceased, the time and place of death, and the cause of death. *Regina v. H.M. Coroner for N. Humberside & Scunthorpe, ex parte Jamieson* [1995] Q.B. 1, 23 (Eng.); Coroners Act, 1988, c. 13, § 8 (Eng.); Coroners Rules, 1984, S.I. 1984/552, art. 4, ¶¶ 36, 42. Note, however, that it is not the inquest jury’s job to assess civil or criminal liability for a person’s death. Coroners Rules, 1984, S.I. 1984/552, r.42.

⁵⁹ Q & A: *Stephen Lawrence Murder*, *supra* note 57.

a toll on the public, and Lawrence's parents.⁶⁰ Following the verdicts, in 1997, the Home Secretary⁶¹ asked Former High Court Judge Sir William Macpherson of Cluny to conduct an investigation about how Lawrence's murder was prosecuted.⁶² Macpherson published a report in 1999,⁶³ which spurred support for a law overturning the prohibition against double jeopardy.⁶⁴ Of course, most of Macpherson's report requested that changes be made to confront the incompetence, fatal investigative errors, and institutional racism he determined was present throughout the police department, stemming even to the first aid given to Lawrence at the scene.⁶⁵ On the other hand, he also recommended creating exceptions to the prohibition against double jeopardy "where fresh and viable evidence is presented."⁶⁶

His other recommendations should not be overlooked, though, as he was heavily criticized for publishing the names of people who identified Lawrence's killers in the report.⁶⁷ The repercussions of that report are still felt today as police practices were institutionally changed, from investigation techniques to implementing racial target quotas in recruiting applicants.⁶⁸ However, for our purposes, the importance of the report is that it spearheaded a campaign to draft legislation permitting re-prosecutions for certain appropriate and severe crimes. All that was left was the actual passage of the

⁶⁰ See Kathy Marks, *Lawrences Divorce After 29 Years*, INDEPENDENT (London), July 10, 1999, at 11.

⁶¹ The Home Secretary is a parliamentary position responsible for "all Home Office business" including security, terrorism, some policing issues, as well as legislative and expenditure issues. *Home Secretary*, HOME OFFICE, <http://www.homeoffice.gov.uk/about-us/our-organisation/ministers/home-secretary> (last visited Feb. 27, 2013) (discussing the duties of incumbent Home Secretary Theresa May); see *Our Organisation*, HOME OFFICE, <http://www.homeoffice.gov.uk/about-us/our-organisation> (last visited Feb. 5, 2013) (laying out Home Office duties).

⁶² HOLOHAN, *supra* note 48, at 85; RANETA LAWSON MACK, COMPARATIVE CRIMINAL PROCEDURE: HISTORY, PROCESSES AND CASE STUDIES 490 (2008); Tom Whitehead, *Shadow of Failure That Hung Over the Yard for Years*, DAILY TELEGRAPH (London), Jan. 4, 2012, at 7.

⁶³ THE STEPHEN LAWRENCE INQUIRY, *supra* note 45.

⁶⁴ See *New Trial Ban Rule May Go—Double Jeopardy Law Is Expected to Be Scrapped*, EVENING CHRON. (U.K.), Mar. 6, 2001, at 6.

⁶⁵ THE STEPHEN LAWRENCE INQUIRY, *supra* note 45, ¶¶ 47.01–.12, 47.45–.47.

⁶⁶ *Id.* ¶¶ 47.02, 47.38; see also Stephen Wright, *Racism Across the Ranks Let Lawrence Killers Walk Free*, DAILY MAIL (London), Dec. 21, 1998, at 4 ("From the very early stages of the investigation, officers were guilty of dreadful mistakes. . . . includ[ing] not sealing off the murder scene adequately and preserving potentially vital forensic evidence. No senior officer took charge of the investigation . . . [which] resulted in a lack of co-ordination and direction. Sir William . . . believe[d] that . . . detectives failed to carry out the investigation with vigour because Stephen was black.")

⁶⁷ Tony Parsons, *Racism Report Does Us No Justice*, MIRROR (London), Mar. 1, 1999, at 10.

⁶⁸ Whitehead, *supra* note 62, at 7.

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law.⁶⁹

B. *The Criminal Justice Act of 2003*

In 2002, the “Criminal Justice Bill” was introduced into parliament as a comprehensive effort “to rebalance the criminal justice system in favour of the victim and the community so as to reduce crime and bring more offenders to justice.”⁷⁰ The bill was but a comprehensive revision to the existing criminal justice system, of which an exception to double jeopardy was just a part.⁷¹ Twenty-nine types of crimes are eligible for re-prosecution under the Act, which can broadly be categorized into the crimes of murder, rape, kidnapping, arson, and major drug trafficking.⁷² The Criminal Justice Act received royal approval on November 20, 2003.⁷³ Subsequently, it passed the House of Commons on December 8, 2004, and the House of Lords on December 14, 2004.⁷⁴

Of course, with such a drastic change to the system, the Act was met with some hostility, particularly from the General Counsel of the Bar and Criminal Bar Association, which released a briefing on the concerns about passage of the Act.⁷⁵ The briefing expressed

⁶⁹ See Stephen Lawrence—*Ten Years On*, LOCAL GOV. CHRON. (London) (Apr. 22, 2003), <http://www.lgcplus.com/lgc-news/stephen-lawrence-ten-years-on/1267480.article> (discussing a statement by Lord Falconer, the then-Home Office Minister, which connects the Stephen Lawrence inquiry to the Criminal Justice Bill, which attempted to create an exemption from the prohibition against double jeopardy).

⁷⁰ David S. Rudstein, *Retrying the Acquitted in England Part III: Prosecution Appeals Against Judges’ Rulings of “No Case to Answer”*, 13 SAN DIEGO INT’L L.J. 5, 20 (2012) (quoting HOME OFFICE, JUSTICE FOR ALL 14 (2002), available at <http://www.cps.gov.uk/publications/docs/jfawhitepaper.pdf>) (internal quotations marks omitted).

⁷¹ Cindy S. Kui, Note, *Right to an Impartial Jury: United Kingdom Parliament’s Order to Disclose Previous Convictions and Its Impact on Defendants*, 33 SYRACUSE J. INT’L. L. & COM. 495, 504–05 (2006).

⁷² *Retrial of Serious Offences—Annex A: Schedule of Qualifying Offences for Retrial of Serious Offences*, CROWN PROSECUTION SERVICE, http://web.archive.org/web/20071118034802/http://www.cps.gov.uk/legal/section19/chapter_j_annex_a.html (last visited Feb. 28, 2013).

⁷³ *Criminal Justice Act 2003: An Act Making Provision About Criminal Justice, Including the Powers and Duties of the Police*, GUARDIAN (U.K.) (Jan. 19, 2009), <http://www.guardian.co.uk/commentisfree/libertycentral/2008/dec/16/criminal-justice-act>.

⁷⁴ *Evidence of Bad Character to be Disclosed to Juries*, GOV’T NEWS (U.K.) (Dec. 15, 2004), http://www.gov-news.org/gov/uk/news/evidence_evidence_of_bad_character_to_be_disclosed/81349.html.

⁷⁵ See GEN. COUNCIL OF THE BAR & CRIM. BAR ASS’N, COMMONS CONSIDERATION OF THE CRIMINAL JUSTICE BILL: BAR COUNCIL BRIEFING ON THE BILL AS AMENDED IN STANDING COMMITTEE 3 & Annex A (2003), available at <http://www.docstoc.com/docs/105863178/CRIMINAL-JUSTICE-BILL-WORKING-GROUP>.

After three readings, a committee stage, and an amendment process, a bill is made law by a majority vote in both the House of Commons and the House of Lords. *Bills*, BBC NEWS,

concerns that many other nations did not have such a system, and that prosecutors and investigators, pressured by the media for a conviction, would immediately resume investigations following an acquittal, that the second trial would not be procedurally fair, and that the prosecution could gain a strategic advantage over the defendant, having already seen the defendant's case-in-chief at the first trial.⁷⁶ However, most of the originally proposed procedures with respect to double jeopardy were included in the Act and it gained the majority in parliament necessary for enactment within about twelve months.⁷⁷

Within the Act is a specified procedure that prosecutors must follow, along with a few tests as well. Assuming that the underlying offense qualifies as one that can be retried under the Act, a prosecutor can apply to the Court of Appeal for an order "quashing [the defendant's] acquittal" and ordering them to be retried for the same offense.⁷⁸ The Court of Criminal Appeal will only quash an acquittal "in the interests of justice."⁷⁹ The court will base the interests of justice on four factors:

- (1) "whether existing circumstances make a fair trial unlikely;"
- (2) "the length of time since the qualifying offence was allegedly committed;"
- (3) "whether it is likely that the new evidence would have been adduced in the earlier proceedings against the acquitted person but for a failure by an officer or by a prosecutor to act with due diligence or expedition," and
- (4) "whether, since those proceedings or, if later . . . any officer or prosecutor has failed to act with due diligence or expedition."⁸⁰

The prosecutor must obtain the written consent of the Director of Public Prosecutions,⁸¹ who will only consent if there is "new and

http://news.bbc.co.uk/2/hi/uk_news/politics/81906.stm (last updated Oct. 7, 2008). While royal assent (the Queen's approval) on a bill is required, it is but a foregone conclusion today. *Id.*

⁷⁶ GEN. COUNCIL OF THE BAR & CRIM. BAR ASS'N, *supra* note 75, at 8–9, 24.

⁷⁷ See *Criminal Justice Act 2003: An Act Making Provision About Criminal Justice, Including the Powers and Duties of the Police*, *supra* note 73.

⁷⁸ Criminal Justice Act, 2003, c. 44, § 76(1)(a) (U.K.); see also Taylor, *supra* note 15, at 190 ("[T]he prosecutor may apply to the Court of Appeal for an order 'quashing a person's acquittal' and 'ordering him to be retried for the qualifying offence.'") (quoting Criminal Justice Act, 2003, c. 44, § 76(1) (U.K.)).

⁷⁹ Criminal Justice Act, 2003, c. 44, § 82 (U.K.).

⁸⁰ *Id.* § 79(2); Taylor, *supra* note 15, at 216–17.

⁸¹ Criminal Justice Act, 2003, c. 44, § 76(3) (U.K.). The Director of Public Prosecutions is the head of the Crown Prosecution Service which is the public prosecutor for the United

compelling evidence” and “it is in the public interest for the application to proceed.”⁸²

“New” evidence is defined as: “[e]vidence . . . not adduced in the proceedings in which the person was acquitted (nor, if those were appeal proceedings, in earlier proceedings to which the appeal related).”⁸³ “Compelling” evidence is defined as “reliable,” “substantial,” and “in the context of the outstanding issues . . . highly probative of the case against the acquitted person.”⁸⁴ The prosecutor may only make this application once.⁸⁵ However, both a prosecutor and a defendant can appeal the ruling of the Court of Criminal Appeal to the House of Lords.⁸⁶

There is another wrinkle: the police cannot investigate an acquitted suspect without written consent from the Director of Public Prosecutions.⁸⁷ An officer may not make such an application unless he or she is satisfied that “new evidence has been obtained” or that there are “reasonable grounds for believing that such new evidence is likely to be obtained as a result of the investigation.”⁸⁸ The officer must obtain the Director’s written consent before arresting, questioning, or searching a suspect or his premises.⁸⁹ The Director cannot grant that consent unless “(a) there is, or there is likely as a result of the investigation to be, sufficient new evidence to warrant the conduct of the investigation, and (b) it is in the public interest for the investigation to proceed.”⁹⁰

This requirement is undercut somewhat by section 86 of the Act, which allows for an officer to “tak[e] any action for the purposes of an investigation” so long as “the action is necessary as a matter of urgency to prevent the investigation [from] being substantially and irrevocably prejudiced.”⁹¹ To investigate under section 86, an officer must show that “there has been no undue delay in applying for consent,” “consent has not [already] been refused,” and “taking into account the urgency of the situation, it is not reasonably practicable

Kingdom. *Facts About the CPS*, CPS, <http://www.cps.gov.uk/about/facts.html> (last visited Feb. 28, 2013).

⁸² Criminal Justice Act, 2003, c. 44, § 76(4)(b) (U.K.); *id.* § 78(1).

⁸³ *Id.* § 78(2).

⁸⁴ *Id.* § 78(3).

⁸⁵ *Id.* § 76(5).

⁸⁶ Criminal Appeal Act, 1968, c. 19, § 33(1B) (U.K.).

⁸⁷ Criminal Justice Act, 2003, c. 44, § 85(2) (U.K.).

⁸⁸ *Id.* § 85(5).

⁸⁹ *Id.* § 85(2)–(3).

⁹⁰ *Id.* § 85(6).

⁹¹ *Id.* § 86(1).

to obtain that consent before taking the action.”⁹²

It was originally proposed that the prosecution had to demonstrate that the evidence sought to be presented at the re-trial could not have been introduced at the first trial, had the police acted with due diligence.⁹³ Ultimately, this stricter standard was not adopted as part of the Act.⁹⁴ The decision was based upon two main arguments: the stricter standard would not deter police misconduct because the Act only applied to certain serious offenses, so there was enough pressure on the police to adequately investigate and the public ought not to be deprived of criminal justice (convicting the actually guilty defendant) because of police misconduct.⁹⁵ Even the Law Commission, who initially pushed for the due diligence standard, admitted that such a standard was unworkable because the very concept of “new evidence” is “elastic . . . since ‘old’ evidence can often be repackaged, or reinterpreted as ‘new,’” and therefore “[a]ny skilled prosecutor should be able to convince a court that the ‘new evidence’ test has been satisfied.”⁹⁶

The lack of a due diligence standard presents a problematic issue: the prosecution theoretically could not present key evidence, assuming that the jury would acquit the defendant, at which time they could present the missing evidence—along with any other evidence gathered between the trials—to the second jury.⁹⁷ While it will be clearer as more cases are decided on the issue, section 79, the Criminal Court of Appeal’s original finding that quashing an acquittal is in the interests of justice is based in part, upon whether the prosecution and police acted in good faith, so there is, at least in theory, a way to combat misconduct.⁹⁸ Although the Act passed in 2003, it would be a couple of years before it was applied to its first

⁹² *Id.* § 86(2).

⁹³ THE LAW COMM’N, DOUBLE JEOPARDY AND PROSECUTION APPEALS ¶ 4.73 (2001), available at http://lawcommission.justice.gov.uk/docs/lc267__Double_Jeopardy_Report.pdf; Taylor, *supra* note 15, at 210.

⁹⁴ Taylor, *supra* note 15, at 210; THE LAW COMM’N, *supra* note 93, ¶ 4.73.

⁹⁵ THE LAW COMM’N, *supra* note 93, ¶¶ 4.73–.77.

⁹⁶ Taylor, *supra* note 15, at 211 (footnotes omitted) (quoting Paul Roberts, *Double Jeopardy Law Reform: A Criminal Justice Commentary*, 65 MOD. L. REV. 393, 419 (2002); THE LAW COMM’N, *supra* note 93, at 54) (internal quotation marks omitted).

⁹⁷ Taylor, *supra* note 15, at 193; see also Ben Fitzpatrick, *Double Jeopardy: One Idea and Two Myths from the Criminal Justice Bill 2002*, 67 J. CRIM. L. 149, 154 (2003) (discussing the pros and cons of relaxing the rule of double jeopardy). While both authors were referring to the Criminal Appeal Amendment (Double Jeopardy) Act (Amendment) passed in Australia, the bills have similar provisions with respect to requiring “new” evidence, and as such, present similar problems with prosecutorial dishonesty in withholding evidence at the first trial. Fitzpatrick, *supra*, at 154; Taylor, *supra* note 15, at 189, 191–93.

⁹⁸ Criminal Justice Act, 2003, c. 44, § 79 (U.K.); Taylor, *supra* note 15, at 193.

defendant, William Dunlop.

C. The First Application of the Criminal Justice Act of 2003: Regina v. Dunlop

Julie Hogg was reported missing on November 17, 1989, one day after her employer had dropped her off at her home in Teesside, England.⁹⁹ On February 5, 1990, her body was found behind a bath panel in her home.¹⁰⁰ The evidence against William Dunlop, a man with whom Hogg had a brief relationship, was largely circumstantial: he could not be found by 4:00 a.m., ninety minutes after Dunlop told his friend he would visit Julie.¹⁰¹ He was found fully clothed in bed four and one-half hours later, had keys and a fob with his fingerprints on it that belonged to Ms. Hogg underneath his floorboards, and nine fibers extracted from the blanket in which Ms. Hogg's body was buried matched a rugby shirt that he owned.¹⁰² After two mistrials, under then-existing law, the prosecution was not permitted to seek a third trial, so Dunlop was free as of 1991.¹⁰³

Seven years later, Mr. Dunlop pled guilty to two counts of "[s]hooting or attempting to shoot, or wounding with [i]ntent to do grievous bodily [h]arm," and was sentenced to two concurrent terms of seven years' imprisonment.¹⁰⁴ In 1999, while in prison, Dunlop spoke with a nurse and admitted that he had murdered Julie Hogg.¹⁰⁵ He also wrote letters to friends and admitted in his daughter's child custody proceeding: "I have admitted that I was responsible for the death of Julie Hogg. I stood trial at Newcastle Crown Court for her murder and [I] was acquitted. I denied the offence and I accept that I lied."¹⁰⁶ At that time, the Crown was barred from retrying Dunlop for the murder, so they indicted and tried him for two counts of perjury based on his false testimony at his last trial.¹⁰⁷ On April 14, 2000, he entered a plea of guilty to

⁹⁹ Regina v. Dunlop, [2007] 1 W.L.R. 1657, at 1661 (Eng.); Coffin, *supra* note 2, at 771; *see also Double Jeopardy Man Admits Guilt*, BBC NEWS (Sept. 11, 2006), http://news.bbc.co.uk/2/hi/uk_news/england/5144722.stm (stating that Hogg's body was found months after she was initially reported missing).

¹⁰⁰ Dunlop, [2007] 1 W.L.R. at 1661.

¹⁰¹ *See id.*

¹⁰² *Id.*

¹⁰³ *See id.*; Coffin, *supra* note 2, at 771.

¹⁰⁴ Dunlop, [2007] 1 W.L.R. at 1661; Offences Against the Person Act, 1861, c. 100, § 18 (U.K.).

¹⁰⁵ Dunlop, [2007] 1 W.L.R. at 1661; Coffin, *supra* note 2, at 771.

¹⁰⁶ Dunlop, [2007] 1 W.L.R. at 1661; Coffin, *supra* note 2, at 771.

¹⁰⁷ Dunlop, [2007] 1 W.L.R. at 1661; Coffin, *supra* note 2, at 771–72.

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both counts and was sentenced to concurrent terms of six years' imprisonment.¹⁰⁸ Before the passage of the Criminal Justice Act of 2003, and in analogous American cases, that would have been the extent of the criminal prosecution against him.¹⁰⁹ However, in light of the new Act, the Crown re-indicted him.¹¹⁰ Dunlop was the first person convicted under the new statute.¹¹¹ On October 6, 2006, Dunlop was sentenced to seventeen years' imprisonment.¹¹² Dunlop pled guilty before trial—while the first person to be convicted after trial based upon new forensic evidence post-Criminal Justice Act was Mark Weston, who also committed murder.¹¹³

D. The First Subsequent Re-Trial Under the Act

The facts of Mark Weston's crime are equally disturbing: on August 12, 1995, Vikki Thompson, a mother of two, was walking the family dog when Weston apparently caught Thompson seeing him masturbate.¹¹⁴ Weston chased Thompson and bludgeoned her in the head, dragged her across a field, and left her for dead¹¹⁵ near a railroad track.¹¹⁶ Vikki's husband, Jonathan Thompson, began to look for his wife, and found her bracelet along with "her semi-conscious body" three hours after the attack, about one-half of a mile from the family home.¹¹⁷ Thompson died six days later.¹¹⁸ Weston was promptly arrested by police,¹¹⁹ and stood trial in 1996 in Oxford Crown Court.¹²⁰ Police recovered "a plastic bag near the scene containing two bras stained with semen matching the DNA

¹⁰⁸ *Dunlop*, [2007] 1 W.L.R. at 1661.

¹⁰⁹ Coffin, *supra* note 2, at 772.

¹¹⁰ *Id.*

¹¹¹ *Third Time Unlucky: New Rules On Double Jeopardy Score a First Conviction*, ECONOMIST, Sept. 16, 2006, at 66.

¹¹² Luke Salkeld, *17 Years for Double Jeopardy Killer*, DAILY MAIL (London), Oct. 7, 2006, at 6.

¹¹³ *Man Found Guilty of Vikki Thompson Murder*, OXFORD TIMES, Dec. 13, 2010; see Shona Gossip, *Man Jailed for Murder 15 Years After Walking Free From Court*, ABERDEEN PRESS & J. (Scot.), Dec. 14, 2010, at 10.

¹¹⁴ *Man Found Guilty of Vikki Thompson Murder*, *supra* note 113; Gossip, *supra* note 113, at 10.

¹¹⁵ Barbara McMahon, *Detectives Quiz Man Over Vikki Murder*, EVENING STANDARD (London), Sept. 13, 1995, at 2.

¹¹⁶ Elisa Crawford, *Vikki Murder Trial: Weston 'Seen Covered in Sweat'*, PRESS ASS'N (Eng.), Nov. 15, 1996.

¹¹⁷ *I Battled to Keep My Dying Wife Alive; Hubby Relives Horror; Mark Weston Charged with Murder of Vikki Thompson*, DAILY RECORD (Eng.), Nov. 14, 1996, at 29.

¹¹⁸ *Id.*

¹¹⁹ *See id.*

¹²⁰ *Man Found Guilty of Vikki Thompson Murder*, *supra* note 113, at 10.

profile of Weston.”¹²¹ However, the trial judge excluded the evidence as too prejudicial because “it was impossible to link the clothing to Mrs. Thompson.”¹²² Moreover, despite a witness who testified that she saw Weston “covered in sweat and stumbling away from the village where Vikki Thompson was battered less than an hour after the attack,”¹²³ Weston was acquitted in December 1996.¹²⁴ It took this jury fifty minutes to acquit.¹²⁵ After the trial, the jury foreman even contacted Weston to tell him that he should sue the police department for malicious prosecution.¹²⁶

Following the acquittal (and the passage of the Criminal Justice Act), the prosecution strengthened its case. Forensic scientists discovered that they had overlooked two specks of the victim’s blood from Weston’s boots recovered at the scene, retained since the first trial.¹²⁷ According to those experts, because the blood was wet when it came into contact with Weston’s boots, there was no chance that the blood could have been contaminated while they were in police custody.¹²⁸ Weston was rearrested in 2009, and was re-tried in 2010.¹²⁹ This time, the jury saw the forensics and convicted him; he was sentenced to a minimum of thirteen years’ imprisonment.¹³⁰ This was the first time newly discovered forensic evidence was used to secure a conviction following an acquittal in the United Kingdom.¹³¹ Weston was but the first of several prominent defendants to be retried and Stephen Lawrence’s killers were next.

E. Stephen Lawrence Inquiry Reopened and Regina v. Dobson

Julie Hogg received the final justice she sought; next, it was time for Stephen Lawrence—the man whose murder arguably put the entire 2003 Criminal Justice Act into motion—to get his. Shortly before the Macpherson Report was published, the Metropolitan Police¹³² undertook a large “no holds barred” investigation into the

¹²¹ *Id.*

¹²² *Murdered Vikki’s Husband: ‘Til Sue Acquitted Man’*, PRESS ASS’N (Eng.), Dec. 7, 1996.

¹²³ Crawford, *supra* note 116.

¹²⁴ *See Murdered Vikki’s Husband: ‘Til Sue Acquitted Man’*, *supra* note 122.

¹²⁵ *Man Found Guilty of Vikki Thompson Murder*, *supra* note 113.

¹²⁶ *See* Peter Wilson, *Double Jeopardy Left for Dead by UK Trial*, AUSTRALIAN, Dec. 15, 2010, at 11.

¹²⁷ Stephen Bates, *‘Loner’ Convicted of Dog Walker’s Murder in Double Jeopardy Retrial*, GUARDIAN (Eng.), Dec. 14, 2010, at 13.

¹²⁸ Wilson, *supra* note 126.

¹²⁹ Chris Greenwood, *How Killer Was Tried Twice*, PRESS ASS’N (Eng.), Dec. 13, 2010.

¹³⁰ Bates, *supra* note 127, at 13.

¹³¹ *Id.*

¹³² The Metropolitan Police are “responsible for policing Greater London (but not the City

allegations of police misconduct that lasted four years.¹³³ Two months later, the five suspects in the Lawrence case were interviewed on ITV's *Tonight with Trevor McDonald*.¹³⁴ While the police were in close contact with the producers of the show, the officers were careful not to tell the producers what questions to ask for fear of the show acting as an agent of the government—which could have required exclusion of any incriminating statements that the suspects might give.¹³⁵ Following the interview, the task force observed the five by helicopter when they played golf and placed listening devices on their golf carts, but neither tactic was successful.¹³⁶

Following the Act's passage, there was great public outcry for the re-trial of the killers whose acquittal had a great influence on its passage in the first place.¹³⁷ Using new "micro" DNA techniques, police were able to arrest and charge all five of Lawrence's killers (including the previously acquitted Dobson, Acourt, and Knight).¹³⁸ In the interim, Neil Acourt and David Norris had been sentenced though eighteen months in prison for "throw[ing] a drink at [an] officer, [and] shouting 'ni[****]'" before the pair drove off laughing,"¹³⁹ though they were paroled after serving just eight months due to prison overcrowding.¹⁴⁰ When Acourt and Norris protested that the Stephen Lawrence investigation had disrupted their lives, the sentencing judge responded:

I make it plain I have no concern as far as that other matter is concerned. However, I think it is relevant in that you both complain of that persecution and isolation, resulting from that matter which led to such notoriety and you commit this present offence about half a mile away from where that murder took place¹⁴¹

of London itself)." *Scotland Yard*, ROBINSON LIBR., <http://www.robinsonlibrary.com/social/pathology/criminal/police/scotyard.htm> (last updated July 27, 2011).

¹³³ Wright, *supra* note 54.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ See Maura Derrane, *A Law That Should Be Put in Jeopardy*, SUNDAY MIRROR (U.K.), Sept. 17, 2006, at 27.

¹³⁸ Collins & Myers, *supra* note 50.

¹³⁹ Terri Judd, *Lawrence Suspects Are Jailed for Racial Abuse*, INDEPENDENT (London), Sept. 7, 2002, at 2.

¹⁴⁰ Hugh Muir & David Taylor, *Lawrence Suspects Let Out of Jail Early*, EVENING STANDARD (Eng.), Jan. 24, 2003, at 1.

¹⁴¹ Judd, *supra* note 139, at 2 (internal quotation marks omitted).

The newly discovered evidence showed that “[a] tiny drop of Stephen’s blood was found on a jacket belonging to Dobson” and “[t]wo strands of his hair were found on jeans belonging to Norris.”¹⁴² Also, the investigation unearthed red fibers similar to Lawrence’s polo shirt on clothes belonging to both defendants.¹⁴³ The second prosecution and investigation proved probative: the fibers were not found during the first police investigation “because it was like ‘looking for a needle in a haystack.’”¹⁴⁴ The private firm hired to complete the investigation was able to examine 4500 fibers (including the one matching Lawrence’s DNA) while the previous investigation only examined 1071.¹⁴⁵ On May 18, 2011, after considering the DNA evidence presented, Lord Judge quashed Dobson’s and Norris’s acquittals.¹⁴⁶

It took a £4,000,000 police investigation,¹⁴⁷ a seven-week trial, and an unsuccessful plea from Dobson and Norris’s attorney that the new DNA evidence presented at trial had been contaminated over the eighteen years, but on January 3, 2012, Dobson and Norris were convicted of murder.¹⁴⁸ Because they were seventeen and sixteen at the time of the murder, they were sentenced as juveniles to terms of at least fifteen and fourteen years of imprisonment, respectively.¹⁴⁹ They were sentenced under guidelines that existed at the time of Lawrence’s murder.¹⁵⁰ Attorney General Dominic Grieve chose not to appeal the sentences as “unduly lenient.”¹⁵¹ The sentencing judge acknowledged that their crime was serious, but that they were juveniles at the time.¹⁵² Both men have sought leave to appeal their convictions.¹⁵³

¹⁴² Mark Hughes & Martin Evans, *Justice After 18 Years*, DAILY TELEGRAPH (London), Jan. 4, 2012, at 1.

¹⁴³ Tom Parry, *Fibres Link to Stephen ‘Was Tricky’*, MIRROR (London), Nov. 26, 2011, at 11.

¹⁴⁴ *Id.* (quoting a forensic expert from the Steven Lawrence trial)

¹⁴⁵ *Id.*

¹⁴⁶ See Terri Judd, *Eighteen Years on, Two of Original Suspects in Stephen Lawrence Murder to Stand Trial*, INDEPENDENT (London), May 19, 2011, at 4.

¹⁴⁷ Hughes & Evans, *supra* note 142. It is notable, however, that the entire nineteen-year investigation “is estimated to have cost up to £650,000,000.” See Wright, *supra* note 54.

¹⁴⁸ Hughes & Evans, *supra* note 142; Wright, *supra* note 54.

¹⁴⁹ Paddy McGuffin, *The Long Road to Justice*, MORNING STAR (Eng.), Jan. 6, 2012; *Sentences for Lawrence Killers Won’t Be Reviewed*, DAILY MAIL (London), Feb. 2, 2012.

¹⁵⁰ Sandra Laville, *Killers Are Still at Large, Says Lawrence Judge: New Pressure on Police to Pursue Other Suspects as Dobson and Norris Jailed*, GUARDIAN (London), Jan. 5, 2012, at 1. Interestingly enough, the Criminal Justice Act of 2003 also set the sentencing guidelines for a knife murder with a defendant under age eighteen; while an adult would serve thirty years, the minimum term for a juvenile would have been twelve years. *Id.*

¹⁵¹ *Sentences for Lawrence Killers Won’t Be Reviewed*, *supra* note 149.

¹⁵² See Laville, *supra* note 150, at 1.

¹⁵³ *Sentences for Lawrence Killers Won’t Be Reviewed*, *supra* note 149.

The verdict provided Lawrence's parents with some closure at last, and inspired other families to seek justice for their loved ones' acquitted killers.¹⁵⁴ It would seem that prosecutors in England will have their hands full for a while; an estimated ninety-six murders have occurred for race-related reasons since 1991.¹⁵⁵ That being said, it was evident from statements made by the trial judge at the re-trial that the Stephen Lawrence inquiry was not through. The trial judge called the Detective Chief Investigator into the witness box, "acknowledg[ing] the [Metropolitan Police]'s hard work and professionalism in recent times, but ma[king] clear that what had been achieved was 'a measure of justice' and he now expected the other suspects . . . to be investigated again."¹⁵⁶ The change to double jeopardy was met with a largely positive reaction,¹⁵⁷ though to be fair, some of that might have been because of the police misconduct uncovered in the MacPherson Report.¹⁵⁸

There you have it. The United Kingdom confronted a problem of institutional racism and bungling and it reacted by passing a law that explicitly permits re-trials to right these wrongs. The United States was aware of the Dobson conviction and the repeal of double jeopardy,¹⁵⁹ but to date, despite very similar histories regarding double jeopardy, the constitutional process, as opposed to the parliamentary process, has stood in the way of reform. It too suffers from instances where factually guilty walk free due to procedural errors or police mistakes. At the beginning, I hypothesized that if the United States will unlikely amend the constitution to permit double jeopardy, there would be no other effective way to consistently retry the wrongly acquitted. The rest of this article is devoted to the history of double jeopardy in the United States, and three examples of "quasi-re-trial" if you will, none of which are as

¹⁵⁴ See, e.g., Auslan Cramb, *Family of Murdered Waiter Want Case Retried After Lawrence Verdict*, DAILY TELEGRAPH (London), Jan. 9, 2012, at 4.

¹⁵⁵ Jerome Taylor et al., *Now Solve These...; Two of Stephen Lawrence's Killers Are Behind Bars. But for Other Families of Victims of Racist Attacks, the Wait for Justice Goes on.*, INDEPENDENT (London), Jan. 5, 2012, at 1. Note that this does not include any non-racially motivated acquitted killers. *Id.*

¹⁵⁶ Laville, *supra* note 150, at 1.

¹⁵⁷ But see, e.g., *N-Word Row over BBC's Lawrence Verdict Report*, DAILY TELEGRAPH (Scot.), Jan. 7, 2012, at 6 (describing an incident where a man appeared on an interview saying the verdict was a "stitch-up" job, using the n-word to describe Lawrence, and saying that Dobson and Norris were not guilty).

¹⁵⁸ Rebecca Taylor, *Stephen Lawrence: Then and Now*, TIME OUT (Eng.), Jan. 12, 2012, at 8.

¹⁵⁹ See John F. Burns, *Guilty Verdicts in 1993 Racial Murder Case That Changed Justice in Britain*, N.Y. TIMES, Jan. 4, 2012, at A8; Alan Cowell, *Soccer Holds Up an Uncomfortable Mirror*, N.Y. TIMES, Feb. 23, 2012, at A6.

effective as what the United Kingdom has chosen to do.

III. THE HISTORY OF DOUBLE JEOPARDY IN THE UNITED STATES

Deriving some of its basic common law principles from the United Kingdom, the United States ratified the Constitution, which provided in the Fifth Amendment that double jeopardy was absolutely prohibited.¹⁶⁰ While there was some disagreement about whether an accused could be put on trial more than once, the prohibition as it was written in the amendment was readily accepted.¹⁶¹ Several standards have been set by the U.S. Supreme Court in the twentieth century to determine precisely when a defendant is placed in jeopardy, but under each standard, jeopardy would attach to a verdict of acquittal.¹⁶² While the Supreme Court originally did not incorporate the prohibition against double jeopardy to the states,¹⁶³ in 1969, it incorporated it through the Fourteenth Amendment.¹⁶⁴

¹⁶⁰ U.S. CONST. amend. V.

¹⁶¹ *Id.*; Coffin, *supra* note 2, at 778–79. The cornerstone behind the prohibition was saving the accused from repeated embarrassment, financial, and mental hardship. *Green v. United States*, 355 U.S. 184, 187–88 (1957) (“[T]he 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.”); Andrea Koklys, *Second Chance for Justice: Reevaluation of the United States Double Jeopardy Standard*, 40 J. MARSHALL L. REV. 371, 379 (2006). Remember the financial hardship prong was particularly stinging because prior to *Gideon v. Wainwright*, the accused did not have the right to counsel except in capital or other “special circumstance” cases. *Betts v. Brady*, 316 U.S. 455, 462–63 (1942), *overruled by* *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Powell v. Alabama*, 287 U.S. 45, 71 (1932).

¹⁶² For more information about the Supreme Court tests, see *Mont. Dep’t of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 777–80, 783 (1994) (citing *United States v. Halper*, 490 U.S. 435, 448–49 (1989)); *Grady v. Corbin*, 495 U.S. 508, 510 (1990) (“same-conduct” test), *overruled by* *United States v. Dixon*, 509 U.S. 688, 697 (1993) (stating it was “compellingly clear” that the *Grady* decision was “a mistake”); *Ashe v. Swenson*, 397 U.S. 436, 453–54 (1970) (Brennan, J., concurring) (describing the “same transaction” test); *Blockburger v. United States*, 284 U.S. 299, 304 (1932) (citations omitted) (applying the “same elements” test); Griffin, *supra* note 31, at 471–73.

¹⁶³ *Palko v. Connecticut*, 302 U.S. 319, 322, 328 (1937) (declining to apply the Fifth Amendment’s double jeopardy protection against the states), *overruled by* *Benton v. Maryland*, 395 U.S. 784, 794 (1969) (“[T]he double jeopardy prohibition of the *Fifth Amendment* represents a fundamental ideal in our constitutional heritage, and . . . should apply to the States through the *Fourteenth Amendment*.” (emphasis added)).

¹⁶⁴ *Benton*, 395 U.S. at 794–95 (rejecting the old inquiry of whether denying the right was “shocking to the universal sense of justice” in favor of a rule that incorporates the Bill of Rights guarantee at issue if it is “fundamental to the American scheme of justice” (quoting *Betts*, 316 U.S. at 462; *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968)) (internal quotation marks omitted)). This transition from all civilized societies to America becomes all the more important with the passage of the Criminal Justice Act of 2003 in the United Kingdom. See discussion *supra* Part II.

A jury verdict of acquittal is *almost* impermeable.¹⁶⁵ Even when members of a jury have allowed improper motives to acquit a defendant, the verdict stands.¹⁶⁶ One exception to this prohibition is when there is an outside influence on the jury will the acquittal be disturbed.¹⁶⁷ Now that the foundation for double jeopardy jurisprudence in the United States has been laid, there are several unofficial "exceptions" which are proposed as ways around a constitutional amendment, but for the reasons that follow, none serve as a consistently effective method.

A. Subsequent Federal Prosecutions for State Crimes (and Vice Versa): The Rare Case of Robert Angleton

While no defendant may be tried twice in America, however, the concept of dual sovereignty is of some aid. Dual sovereignty means that only where a person is tried twice by the same governmental body is he or she protected by the Double Jeopardy Clause.¹⁶⁸ Therefore, if a prosecutor acquired newly discovered evidence, he or she could have a new prosecution commenced in a sister state or by the federal government. Perhaps there was no newly discovered evidence, but Robert Angleton is nonetheless an important anecdote in the viability (or lack thereof) of subsequent federal prosecutions.

In April 1997, Doris Angleton was killed by a gunshot wound in her Houston home.¹⁶⁹ Houston Police investigating the murder turned to Doris's husband, Robert, when they found out that Doris

¹⁶⁵ *Green*, 355 U.S. at 188 (citing *Ball v. United States*, 163 U.S. 662 (1896); *Peters v. Hobby*, 349 U.S. 331 (1955)) ("[I]t is one of the elemental principles of our criminal law that the Government cannot secure a new trial by means of an appeal even though an acquittal may appear to be erroneous.").

¹⁶⁶ See FED. R. EVID. 606(b)(1). The Supreme Court precedent on point is *Tanner v. United States*, where statements that "jurors consumed alcohol during . . . lunch breaks" and a later affidavit that "[o]ne juror sold a quarter pound of marijuana to another juror during the trial, and took marijuana, cocaine, and drug paraphernalia into the courthouse" were insufficient to overturn the jury verdict, given that "full and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of postverdict scrutiny of juror conduct." *Tanner v. United States*, 483 U.S. 107, 113, 115–16, 120–21, 127, 137 (1987) (citing Note, *Public Disclosures of Jury Deliberations*, 96 HARV. L. REV. 886, 888 (1983)). Only when a jury has been subjected to outside influence is the verdict reversible. *Tanner*, 483 U.S. at 117 (citing *Mattox v. United States*, 146 U.S. 140, 149 (1892)).

¹⁶⁷ FED. R. EVID. 606(b)(2).

¹⁶⁸ *Heath v. Alabama*, 474 U.S. 82, 88 (1985). "The dual sovereignty doctrine is founded on the common-law conception of crime as an offense against the sovereignty of the government. When a defendant in a single act violates the 'peace and dignity' of two sovereigns by breaking the laws of each, he has committed two distinct 'offences.'" *Id.* at 88 (quoting *United States v. Lanza*, 260 U.S. 377, 382 (1922)).

¹⁶⁹ *United States v. Angleton*, 221 F. Supp. 2d 696, 699 (S.D. Tex. 2002).

was seeking a divorce from Robert.¹⁷⁰ As the district court noted, “Robert Angleton was familiar to state and federal law enforcement officers as a professional bookmaker who cooperated with local and federal law enforcement agencies, working as an informant while continuing his illegal activities.”¹⁷¹ Police suspected that Robert and his brother, Roger Angleton, were both involved in Doris’s murder.¹⁷² In the fall of 1997, Robert was arrested and indicted for capital murder for hire.¹⁷³ Roger committed suicide and left a note saying “he alone was responsible for Doris Angleton’s murder.”¹⁷⁴

Robert Angleton proceeded to trial alone and on August 12, 1998, the jury acquitted him of the capital murder charge.¹⁷⁵ Two years later, state officials asked the U.S. Attorney’s Office to investigate Robert Angleton for his role in his wife’s murder.¹⁷⁶ Using 18 U.S.C. § 1958(a),¹⁷⁷ in January 2002, prosecutors indicted Angleton again for causing the death of his wife.¹⁷⁸ Days before his re-trial, Angleton fled to the Netherlands, avoiding re-prosecution because of the Netherlands’s refusal to grant extradition.¹⁷⁹

One might look at this case study and think subsequent federal prosecutions would be a valid tool for re-prosecution upon discovery of newly discovered evidence. However, there are important limitations on its zone of application. First, the U.S. Department of

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 700.

¹⁷⁶ *Id.*

¹⁷⁷ This statute provides in part that:

Whoever travels in or causes another . . . to travel in interstate or foreign commerce, or uses or causes another . . . to use the mail or any facility of interstate or foreign commerce, with intent that a murder be committed in violation of the laws of any State or the United States as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value, or who conspires to do so . . . if death results, shall be punished by death or life imprisonment.

18 U.S.C. § 1958(a) (2006).

¹⁷⁸ *Angleton*, 221 F. Supp. 2d at 701. Note that this principle has also been applied to subsequent state prosecutions. *Heath v. Alabama*, 474 U.S. 82, 88 (1985). In *Heath*, the defendant hired men to kill his wife; the men kidnapped her from her Alabama home and dumped her body in Georgia. *Id.* at 83–84. Heath pled guilty in Georgia in exchange for a life sentence, but an Alabama court convicted him for the same murder and he was sentenced to death. *Id.* at 84–86. The Supreme Court upheld his conviction under the doctrine of dual sovereignty. *Id.* at 93–94. However, they did not reach the question of whether Alabama had jurisdiction to prosecute a murder where forensic testing showed that the victim was killed in Georgia because the defendant did not raise that claim on appeal. *Id.* at 87.

¹⁷⁹ *Information Issued by the U.S. Attorney’s Office for the Southern District of Texas on Dec. 16: Robert Angleton Pleads Guilty to Passport Fraud*, U.S. FED. NEWS, Dec. 16, 2004. Before absconding, Angleton also pled guilty to unrelated passport fraud charges. *Id.*

Justice limited the use of subsequent prosecutions by enacting the "*Petite* Policy" which requires a federal prosecutor to seek approval from an Assistant Attorney General before bringing a case following a state acquittal where the cases arise out of the same conduct.¹⁸⁰ A prosecutor must show that the original prosecution "left a substantial federal interest demonstrably unvindicated," to overcome the "presumption that the prior prosecution vindicated the federal right."¹⁸¹ While defendants have no standing to challenge the Department of Justice's decision to give "*Petite* approval," the decision to do so is "rare."¹⁸² Second, and perhaps more importantly, federal prosecutions have a narrow zone of application because of the limited subject-matter jurisdiction for federal prosecutions.¹⁸³ This is a problem for states as well: when a state re-prosecutes a defendant after a sister state's acquittal, at least one (if not both) of the states must rely on an extraterritorial theory of prosecution, which can be dicey when the actual criminal conduct did not take place within the state's borders.¹⁸⁴

Federal prosecutions generally fail to provide relief to prosecutors with a defendant who has been acquitted in a state court in the same way that another state prosecution generally fails to provide relief for a defendant acquitted in another state. The ongoing problem is a lack of jurisdiction: it is difficult for the federal government to have jurisdiction over a prosecution when another state government has it. However, another exception would be to use the defendant's own words on the stand against him or her—through a perjury prosecution.

¹⁸⁰ David Bryan Owsley, Note, *Accepting the Dual Sovereignty Exception to Double Jeopardy: A Hard Case Study*, 81 WASH. U.L. Q. 765, 779 (2003). The policy derives its name from *Petite v. United States*, 361 U.S. 529, 530–31 (1960), in which the U.S. Supreme Court vacated a federal indictment charging conduct which had been the subject of a previous prosecution which the defendant pled guilty to in state court. Owsley, *supra*, at 779 n.80.

¹⁸¹ Owsley, *supra* note 180, at 779 & n.82.

¹⁸² Joel Cohen, Second Bite at the Apple: Successive and Concurrent Prosecutions, N.Y.L.J., May 12, 2003, at 4.

¹⁸³ LAURIE L. LEVENSON, FEDERAL CRIMINAL RULES HANDBOOK § 1.3 (2012) (discussing how Congress may only enact criminal statutes pursuant to its Commerce Clause powers). To be fair, however, the Commerce Clause has been liberally construed in recent years. Compare *United States v. Morrison*, 529 U.S. 598, 616–17 (2000) and *United States v. Lopez*, 514 U.S. 549, 567–68 (1995) (proscribing Congress's authority to regulate criminality), with *Gonzales v. Raich*, 545 U.S. 1, 31–33 (2005) (expanding Congress's power to enact criminal statutes). But see *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2591–93, 2609 (2012) (diminishing congressional authority under the Commerce Clause).

¹⁸⁴ See, e.g., *People v. Zimmerman*, 881 N.E.2d 193, 198–99 (N.Y. 2007) (rejecting a theory of extraterritorial jurisdiction in a different county where the defendant's conduct allegedly "impact[ed]" the county in which he was tried); *Steingut v. Gold*, 366 N.E.2d 854, 858 (N.Y. 1977) (same).

B. If Not Murder, How About Perjury? Bolden v. Warden, West Tennessee High Security Facility—A Case Example

On March 6, 1987, Brenda Spicer was found dead in a Northeast Louisiana University campus trash bin.¹⁸⁵ She was killed by Irvin Bolden, Jr.¹⁸⁶ The coroner found sperm inside the victim, as well as “saliva on her breasts, but no [evidence] of sexual trauma.”¹⁸⁷ The following year, Bolden was tried and acquitted in Louisiana state court.¹⁸⁸ He testified at his trial that he “didn’t have any contact with [Spicer] at all physically” and stated he “never” had sexual intercourse with her.¹⁸⁹ Moreover, he neither killed nor had any physical contact with Spicer on the day of her death.¹⁹⁰ In 1991, Bolden entered an *Alford* plea to involuntary manslaughter for his involvement in the death of Joel Tillis, a case unrelated to Spicer’s death, and received ten years’ imprisonment.¹⁹¹ In 1992, shortly after he pled guilty, Bolden was charged with perjury for his statements at the 1987 trial.¹⁹² A year before his perjury trial, he was taken to the Burlington County, New Jersey prosecutor’s office where he gave a statement admitting that “he strangled Spicer at a mini-storage warehouse in Monroe [and] then drove her body to the NLU campus and placed it in the trash dumpster.”¹⁹³

Perjury prosecutions are one way to hold a defendant responsible for criminal conduct somewhat related to the underlying offense.¹⁹⁴ However, the conduct that is being prosecuted is different. Here, it is the statement that the defendant made surrounding the underlying act he committed, as opposed to being prosecuted for the underlying conduct itself.¹⁹⁵ As a result, there are four problems with using perjury prosecutions as an end run around the Fifth

¹⁸⁵ State v. Bolden (*Bolden II*), 95-749, p. 3 (La. App. 3 Cir. 4/17/96); 680 So. 2d 6, 10.

¹⁸⁶ See *id.* at 11.

¹⁸⁷ *Id.* at 10.

¹⁸⁸ *Id.*

¹⁸⁹ State v. Bolden (*Bolden I*), 93-1933, p. 3 (La. 7/5/94), 639 So. 2d 721, 722.

¹⁹⁰ *Id.*

¹⁹¹ *Bolden II*, 680 So. 2d at 11. An *Alford* plea is a defendant’s recognition that enough evidence exists to prove his guilt beyond a reasonable doubt, without actually admitting that he committed the acts constituting the crime. See North Carolina v. Alford, 400 U.S. 25, 37 (1970).

¹⁹² *Bolden II*, 680 So. 2d at 11.

¹⁹³ *Id.*

¹⁹⁴ I use causation very loosely here. The argument is that the defendant would not have been arrested or testified in court but-for the underlying conduct. One need not actually prove that a person was acquitted to prosecute someone for perjury. See, e.g., 18 U.S.C. § 1621 (2006) (federal criminal perjury statute).

¹⁹⁵ See *id.*

Amendment: (1) a defendant can only be punished for perjury if he were to take the stand;¹⁹⁶ (2) the punishment for perjury is generally less than that for murder, especially if a defendant were to confess to more than one murder which became the basis for the perjury prosecution;¹⁹⁷ (3) not all defendants will confess to a crime after they have been acquitted;¹⁹⁸ and (4) perjury prosecutions are exceedingly rare and are difficult to prove.¹⁹⁹ Even if there was compelling evidence incriminating a defendant for a crime that he has been previously acquitted, unless he perjured himself, the prosecution is helpless. Based on these problems, a perjury trial after an acquittal would not be an effective loophole around double jeopardy. We then turn to another controversial topic: civil trials after criminal acquittals.

C. How About Subsequent Civil Trials and Administrative Hearings?

The Fifth Amendment states that "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb."²⁰⁰ However, the phrases "offense" and "jeopardy of life or limb" have been interpreted as meaning criminal prosecutions.²⁰¹ "[T]he Double Jeopardy Clause does not prohibit the imposition of all additional sanctions that could, 'in common parlance,' be described as punishment."²⁰² "Only criminal punishment subject[s] the defendant to jeopardy within the constitutional meaning."²⁰³

¹⁹⁶ See *Bolden II*, 680 So. 2d at 11.

¹⁹⁷ See, e.g., 18 U.S.C. § 1621 (providing that perjury convictions are punishable by "imprison[ment] [of] not more than five years").

¹⁹⁸ See Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1449–50, 1495 (2005) ("Criminal defendants rarely speak. . . . Over ninety-five percent [of defendants] never go to trial, only half of those who do testify, and some defendants do not even speak at their own sentencings.").

¹⁹⁹ "A witness testifying under oath [commits perjury] if she gives false testimony concerning a material matter with the *willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory*." *United States v. Dunnigan*, 507 U.S. 87, 94 (1993) (emphasis added) (citing 18 U.S.C. § 1621(1)). This process is made more difficult by the "two witness rule" whereby a prosecutor must show that two independent witnesses, or a witness and some independent evidence, corroborate that the defendant willfully and intentionally testified falsely. See *Weiler v. United States*, 323 U.S. 606, 608–09 (1945).

²⁰⁰ U.S. CONST. amend. V.

²⁰¹ See *Hudson v. United States*, 522 U.S. 93, 98–99 (1997).

²⁰² *Id.* (quoting *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 549 (1943), *superseded by statute*, 31 U.S.C. § 3730(b)(4) (1982)). See *Moore v. Illinois*, 55 U.S. (14 How.) 13, 19 (1852).

²⁰³ *Hudson*, 522 U.S. at 99 (alteration in original) (quoting *Hess*, 317 U.S. at 548–49) (internal quotation marks omitted). See also *Breed v. Jones*, 421 U.S. 519, 528 (1975) ("Jeopardy denotes risk. In the constitutional sense, jeopardy describes the risk that is

Therefore, by contrapositive, the Double Jeopardy Clause does not apply to a non-criminal proceeding following an acquittal at a criminal proceeding.²⁰⁴ This can be quite burdensome for a defendant who is subjected to a very serious civil penalty after either being acquitted or convicted of parallel criminal charges. Worse, the burden on a defendant to prove that a civil penalty is criminal in nature and thus covered by the Double Jeopardy Clause is exceedingly high.²⁰⁵

Consider the following case study: on January 20, 1977, the Bureau of Alcohol, Tobacco, and Firearms seized a number of firearms from Patrick Mulcahey's home.²⁰⁶ Mulcahey was later indicted for selling firearms without a license, a violation of 18 U.S.C. § 922(a)(1).²⁰⁷ While Mulcahey admitted at trial that he lacked the license required to legally sell firearms, he asserted that he was entrapped by police, and the jury returned a verdict of not guilty.²⁰⁸ Following the acquittal, the United States commenced an *in rem* action for forfeiture of the weapons seized under 18 U.S.C. § 924(d).²⁰⁹ Mulcahey asserted that collateral estoppel and res judicata precluded the subsequent forfeiture proceeding, but the U.S. Supreme Court ruled against him.²¹⁰ The Court undertook a

traditionally associated with a criminal prosecution.”).

²⁰⁴ See *Hudson*, 522 U.S. at 99; *Helvering v. Mitchell*, 303 U.S. 391, 397 (1938) (citing *Stone v. United States*, 167 U.S. 178, 188 (1897)) (“That acquittal on a criminal charge is not a bar to a civil action by the Government, remedial in its nature, arising out of the same facts on which the criminal proceeding was based has long been settled.”). Note that the doctrine of res judicata can bar successive civil actions for the same claim where the party raised or could have raised them in the first claim. See *Allen v. McCurry*, 449 U.S. 90, 94 (1980); Anne Bowen Poulin, *Double Jeopardy Protection From Successive Prosecution: A Proposed Approach*, 92 GEO. L.J. 1183, 1250 (2004). However, there is no federal constitutional protection against res judicata. See *Richards v. Jefferson Cnty., Ala.*, 517 U.S. 793, 797–98 (1996). Finally, a civil forfeiture proceeding can violate the Eighth Amendment prohibition against excessive fines. *Austin v. United States*, 509 U.S. 602, 621–22 (1993). It can also violate the Self-Incrimination Clause of the Fifth Amendment. *Marchetti v. United States*, 390 U.S. 39, 60 (1968).

²⁰⁵ See *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 362–63, 365 (1984).

²⁰⁶ *Id.* at 355.

²⁰⁷ *Id.* at 355–56; 18 U.S.C. § 922(a)(1) (2006).

²⁰⁸ *One Assortment of 89 Firearms*, 465 U.S. at 356.

²⁰⁹ *Id.* 18 U.S.C. § 924(d) provides in relevant part that:

Any firearm or ammunition involved in or used in any . . . willful violation of any other provision of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, . . . where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure and forfeiture, and all provisions of the Internal Revenue Code of 1986 relating to the seizure, forfeiture, and disposition of firearms . . . shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter

18 U.S.C. § 924(d) (2006).

²¹⁰ *One Assortment of 89 Firearms*, 465 U.S. at 356–57.

two-part test to determine if the statute giving rise to the forfeiture proceeding was punitive, and thus criminal, or remedial, and thus civil.²¹¹

First, the Court concluded that forfeiture under the statute was remedial and civil in nature because Congress created a "distinctly civil procedure[]" for forfeitures such as summary administrative procedures for items valued at \$2,500 or less, that the provision furthers "broad remedial aims" by "[k]eeping potentially dangerous weapons out of the hands of unlicensed dealers" as well as intending the civil statute to cover a broader range of firearms than the parallel criminal statute.²¹²

Having determined that the action was civil in nature, the Court analyzed "whether the statutory scheme [was] so punitive either in purpose or effect as to negate Congress' intention to establish a civil remedial mechanism."²¹³ But the Court has repeatedly made it clear that "[o]nly the clearest proof that the purpose and effect of the forfeiture are punitive will suffice to override Congress' manifest preference for a civil sanction."²¹⁴ The Court found only one of the seven *Mendoza-Martinez* factors²¹⁵ pointed towards criminal punishment—whether the proscribed behavior was already a crime, and thus concluded that the forfeiture was constitutional.²¹⁶ Finally, the Court stated:

"[t]he difference in degree in the burden of proof in criminal and civil cases precludes application of the doctrine of *res judicata*." . . . [A]n acquittal on criminal charges does not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt.²¹⁷

The Court went through the same process and reached the same

²¹¹ *Id.* at 362–63.

²¹² *Id.* at 363–64 ("Congress has 'indicate[d] clearly that it intended a civil, not a criminal, sanction.'") (alteration in original) (quoting *Helvering v. Mitchell*, 303 U.S. 391, 402 (1938)).

²¹³ *One Assortment of 89 Firearms*, 465 U.S. at 365 (quoting *United States v. Ward*, 448 U.S. 242, 248–49 (1980)).

²¹⁴ *One Assortment of 89 Firearms*, 465 U.S. at 365 (quoting *Ward*, 448 U.S. at 249).

²¹⁵ The Court created a "list of considerations" which, although not comprehensive, guided evaluation as to whether a statute is civil or criminal in nature:

[w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69 (1963); see *Ward*, 448 U.S. at 249–50.

²¹⁶ *One Assortment of 89 Firearms*, 465 U.S. at 365–66.

²¹⁷ *Id.* at 359, 361 (alteration in original) (quoting *Helvering*, 303 U.S. at 397).

conclusion in *United States v. Ursery*;²¹⁸ the only difference was that in *Ursery*, the defendant was convicted of the underlying criminal offense that gave rise to the civil prosecution, while in *One Assortment of 89 Firearms*, the defendant was acquitted.²¹⁹ However, the Court did note that in personam civil judgments had been analyzed differently in contrast to the *in rem* proceedings against the defendants in *One Assortment of 89 Firearms* and *Ursery*.²²⁰

It is clear that civil penalties are not an adequate substitute for imprisonment. The public outcry following the guilty verdict in O.J. Simpson's 1997 civil trial following an acquittal in the criminal trial is evidence of this.²²¹ Notwithstanding the Supreme Court's exceedingly lax scrutiny with respect to civil statutes,²²² civil penalties do not suffice as an adequate double jeopardy loophole for the simple reason that there are not always civil counterparts to criminal statutes, for example perjury²²³ and intellectual property law.²²⁴ In those cases, the prosecutor is left without a remedy.

Moreover, using subsequent civil trials as a "quasi re-prosecution" method is intellectually dishonest. It tortures our understanding of double jeopardy and criminal punishment to knowingly label severe

²¹⁸ *United States v. Ursery*, 518 U.S. 267 (1996).

²¹⁹ *Compare id.* at 271 (noting that *Ursery* was convicted of criminal charges for manufacturing marijuana and sentenced to sixty-three months in prison), with *One Assortment of 89 Firearms*, 465 U.S. at 355–56 (noting that the defendant, Mulcahey, was acquitted of criminal charges accusing him of knowingly engaging in the business of dealing in firearms without a license).

²²⁰ *Ursery*, 518 U.S. at 275 (discussing the differences between *in rem* forfeiture proceedings and *in personam* civil penalties). See *Various Items of Pers. Prop. v. United States*, 282 U.S. 577, 581 (1931) (concluding that the Double Jeopardy Clause did not apply to forfeiture proceedings); see also *United States v. La Franca*, 282 U.S. 568, 569–70, 576–77 (1931) (concluding that \$2,004.68 in tax penalties imposed upon the Respondent after he had been convicted and fined for selling alcohol under a different statute violated double jeopardy).

²²¹ See, e.g., *Oppression and Malice: The O.J. Simpson Civil Trial*, PBS NEWSHOUR (Feb. 5, 1997), http://www.pbs.org/newshour/bb/law/jan-june97/simpson_2-5.html (concluding that some of the public was frustrated at the outcome because even this civil suit did not necessarily affect Simpson's status in subsequent child custody proceedings in the way that a criminal conviction would have).

²²² See Barbara A. Mack, *Double Jeopardy—Civil Forfeitures and Criminal Punishment: Who Determines What Punishments Fit the Crime?*, 19 SEATTLE U. L. REV. 217, 251–52 (1996).

²²³ There is no charge that would be the equivalent of perjury at the federal level except in Title 18 of the United States Code (crimes and criminal procedure). 18 U.S.C. § 1621 (2006); see also Stephen Gillers, *The Perjury Loophole*, N.Y. TIMES, Feb. 18, 1998, at A21 (discussing why it is difficult to even prosecute perjury as a crime when committed in a civil proceeding).

²²⁴ NICHOLAS MACFARLANE ET AL., CRIMINAL LAW SANCTIONS WITH REGARD TO THE INFRINGEMENT OF INTELLECTUAL PROPERTY RIGHTS 1, available at <http://www.aippi.org.uk/docs/Q169.UK%20Group%20Response.2001-11-28.pdf>.

liberty restrictions as "not punishment" that might be considered punishment by contemporary standards. While it does not appear that we have taken that extreme step, the United States already allows for liberty curtailment without being considered "punishment,"²²⁵ such as sexual offender registration, civil commitments, and forfeiture proceedings. Finally, civil punishments generally involve payment of damages, as opposed to imprisonment; this takes away society's feeling of safety when offenders are incapacitated.²²⁶ These are important penological functions of criminal punishment, which cannot be given back no matter how large a check the defendant must write.²²⁷

IV. CONCLUSION

There is no loophole to the Double Jeopardy Clause of the U.S. Constitution. The Double Jeopardy Clause is analogous to an old quilt whose patchwork has begun to thin out in some spots; those are the places where these case examples may fit, but there have been no clear holes blown through it. To be fair, the prosecution only had new evidence in two of the examples (subsequent federal prosecution and perjury); the thought of using newly discovered evidence through these avenues was merely a hypothetical question. However, it is of no consequence. No evidence exists to indicate that prosecutors are moving discretion from the criminal courts to the civil courts, because doing so would not accomplish their original goals anyway.

While subsequent federal and sister state prosecutions, subsequent perjury prosecutions, and subsequent civil trials are hypothetically the best alternatives the United States has available; there are significant problems with using civil statutes to "right" criminal wrongs. Second, the "intellectually honest" method of explicitly passing a law allowing for the re-trial of an acquitted defendant would be preferred, but there are several problems with implementing such a law, beyond the hurdles the United States would have just in passing it. There of course would be procedural hurdles based on the problems that the United Kingdom faces as a

²²⁵ See *supra* text accompanying notes 205–07.

²²⁶ See Carly B. Ouellette, *The Injustices Inflicted on Nonviolent Offenders in the U.S. Correctional System*, at 7, 10 (Dec. 8, 2008) (B.A. thesis, Salve Regina University), available at http://escholar.salve.edu/cgi/viewcontent.cgi?article=1022&context=pell_theses&sei-redir (stating that two of the traditional goals of imprisonment were to deter the public and to incapacitate them, allowing for greater public safety).

²²⁷ See *id.*

result of passing the Criminal Justice Act of 2003. Most significantly, ensuring that the second trial for the defendant was fair would be an enormous struggle because there is a high likelihood that the people who make up the second jury pool would have been aware of the outcome of the first trial and seen news accounts of newly discovered evidence, making a prejudicial decision in their mind as to the defendant's guilt. While there are some provisions which help ensure fairness, it is uncertain whether these will adequately protect individual rights.²²⁸ The Stephen Lawrence re-trial is a prime example of this: there was concern that the judge and jury would have been biased based on the negative press reports circulated about the defendants.²²⁹ One could argue, though, that the United States faces the same problem after an "obviously guilty" defendant has a conviction vacated and is re-tried: "recruiting a fresh jury" given our 'media-driven culture' may be all but impossible."²³⁰

The United States and the United Kingdom are similar in that they had roughly the same history as individual right protectorates. However, the United Kingdom came to the conclusion that legitimacy of the system was not defined solely by protection of individual rights, but rather, by accurately punishing the factually guilty; in other words, strengthening the truth-seeking process,²³¹ thus restoring public confidence in the judicial system.²³² After all, the accused has the right to appeal; thus, the prosecution should be allowed to pursue the parallel right.²³³ On the other hand, given the fact that it is the accused's liberty at stake, the system purposely stacks the deck in favor of the accused;²³⁴ it is unfair that a prosecutor can play "heads-we-win, tails-let's-play-again"²³⁵ with someone's liberty.

²²⁸ Criminal Justice Act, 2003, c. 44 §§ 78, 82 (U.K.) (allowing the Court of Criminal Appeal to consider the possibility of a subsequent fair trial and allowing the Court to suppress news articles that could inflame the second jury about a subsequent trial); Taylor, *supra* note 15, at 216–18.

²²⁹ Rod Liddle, *Do Gary Dobson and David Norris Really Have Any Chance of a Fair Trial?*, SPECTATOR (U.K.), Nov. 19, 2011, at 17 (evincing concern about the re-trial based on the suspects' racism and familial ties to gangsters for three of the five suspects).

²³⁰ Taylor, *supra* note 15, at 215 (quoting Fitzpatrick, *supra* note 97, at 157).

²³¹ Taylor, *supra* note 15, at 208–10.

²³² Michelle Edgely, *Truth or Justice? Double Jeopardy Reform for Queensland: Rights in Jeopardy*, 7 QUEENSLAND U. TECH. L. & JUST. J. 108, 119, 131 (2007).

²³³ Taylor, *supra* note 15, at 210.

²³⁴ *See id.*

²³⁵ Paul Roberts, *Double Jeopardy Law Reform: A Criminal Justice Commentary*, 65 MOD. L. REV. 393, 411 (2002) (quoting Amar, *supra* note 23, at 1815) (internal quotation marks omitted).

While the United States has not allowed prosecutors to appeal judgments, they have made contemporary decisions that favor law enforcement in furtherance of the truth-seeking process with respect to the Fourth and Fifth Amendments.²³⁶ The Court has deemed newly discovered evidence "typically reliable and often the most probative information bearing on the guilt or innocence of the defendant."²³⁷

By contrast, for example, statements taken in violation of *Miranda* rights are deemed to be less reliable, so the interest in furthering of the truth-seeking function is reduced.²³⁸ No matter. We still have constitutional protections in place, even though the Court has admitted that there is a "public interest in prosecuting those accused of [a] crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth."²³⁹

The Court has steadfastly applied to the prohibition against double jeopardy even though that public interest is ever-growing with the prevalence of DNA testing and surveillance. The Court defends this stubbornness to change because it is trying to be faithful to the interpretation the framers wanted applied at the time of ratification.²⁴⁰ An entire overhaul of the Constitution would be a fruitless and potentially disastrous foray, but given the outcry of several recent cases (i.e., O.J. Simpson and Casey Anthony),²⁴¹ it is time to decide that the public contemporary interest for justice so outweighs the three-century old individual right interest such that it is time for a change. That is not to suggest that there are no critics of the prohibition against double jeopardy,²⁴² but it does appear that popular support in abolishing double jeopardy is

²³⁶ See, e.g., *Oregon v. Elstad*, 470 U.S. 298, 301–02, 306 (1985) (declining to apply the "fruit of the poisonous tree" exclusionary rule to physical evidence found as a direct result of statements taken in violation of *Miranda*); *United States v. Leon*, 468 U.S. 897, 919–21 (1984) (recognizing a good faith exception to the exclusionary rule); *Harris v. New York*, 401 U.S. 222, 223–25 (1971) (concluding that a statement taken in violation of one's *Miranda* rights can be used for impeachment purposes).

²³⁷ *Withrow v. Williams*, 507 U.S. 680, 691 (1993) (quoting *Stone v. Powell*, 428 U.S. 465, 490 (1976)) (internal quotation marks omitted).

²³⁸ See *Michigan v. Tucker*, 417 U.S. 433, 448 n.23 (1974).

²³⁹ *Powell*, 428 U.S. at 489 (quoting *Alderman v. United States*, 394 U.S. 165, 175 (1969)) (internal quotation marks omitted).

²⁴⁰ *Weeks v. United States*, 232 U.S. 383, 389–90 (1914).

²⁴¹ Nicholas A. Battaglia, Comment, *The Casey Anthony Trial and Wrongful Exonerations: How "Trial By Media" Cases Diminish Public Confidence in the Criminal Justice System*, 75 ALB. L. REV. 1579, 1584–87, 1598–1602 (2012).

²⁴² Carissa Byrne Hessick & F. Andrew Hessick, *Double Jeopardy as a Limit on Punishment*, 97 CORNELL L. REV. 45, 45–46 (2011) (arguing that recidivist enhancements violate double jeopardy).

increasing.

The Criminal Justice Act of 2003 limits inquiry into cases where there is new and compelling evidence; by contrast, the United States has taken the approach that no assault on individual rights is permissible, and no DNA evidence,²⁴³ no matter how accurate, can counteract.²⁴⁴ In any event, if the United States is to overcome the individual right protectorate, it will have to do so through constitutional reform. None of the three alternatives explored in this paper—federal and sister state prosecutions, subsequent perjury trials, and civil trials or forfeiture hearings—can provide the consistent, operative justice that retrying the factually guilty can. In the United Kingdom, the government has dealt with this problem head on by passing a statute that balances the rights of the accused against the rights of society, instead of mechanically applying the double jeopardy prohibition.²⁴⁵ As was previously mentioned, the United States cannot pass such a law based upon the constitutional system.²⁴⁶ Because of this failsafe, no one can say what *will* work to re-prosecute the factually guilty. For today, it must suffice that the three “quasi re-prosecution” alternatives will not.

²⁴³ Credit must be given to the private LGC Forensics Lab for their work in catching Stephen Lawrence's killers, as well as some of Britain's most notorious killers, such as the killers of Rachel Nickell, Joanna Yeates, Damilola Taylor, Milly Dowler, and Vikki Thompson. See Jon Henley, *G2: Welcome to CSI Oxford: They Are Responsible for the Conviction of the Killers in Some of Britain's Highest-Profile Murders, Including Those of Stephen Lawrence, Damilola Taylor, and Rachel Nickell. What's the Secret of Their Success? Jon Henley Meets the Scientists Behind LGC Forensics*, GUARDIAN (U.K.), Jan. 18, 2012, at 9 (describing the techniques used to catch the killers, as well as the staff's rich expertise).

²⁴⁴ See Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 9–23 (1964) (discussing opposing models of criminal justice; the due process model refuses to convict defendants because of procedural deficiencies no matter how strong the evidence).

²⁴⁵ See discussion *supra* Part II.B.

²⁴⁶ See *supra* text accompanying notes 5–8.