U.S. Department of Justice
Office of Legal Policy

Report to the Attorney General

Double Jeopardy and Government Appeals of Acquittals

July 31, 1987

Truth in Criminal Justice Series
Report No. 6

REPORT TO THE ATTORNEY GENERAL

ON

DOUBLE JEOPARDY AND GOVERNMENT APPEALS OF ACQUITTALS

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The function of the criminal justice system might best be summed up as the protection of the innocent. In criminal prosecutions, an extensive system of rights and procedures guards against the conviction of an innocent person. Equally important, enforcement of the criminal law in all its phases -- crime prevention, police investigations, criminal prosecutions and corrections -- also aims at protection of the innocent. By detecting, convicting and punishing those who break our laws, we protect innocent people from the depredations of criminals.

To protect the innocent effectively, the criminal justice system must be devoted to discovering the truth. The truth is the surest protection an innocent defendant can have. Uncovering the truth and presenting it fully and fairly in criminal proceedings is also of critical importance to the effort to restrain and deter those who prey on the innocent.

Over the past thirty years, however, a variety of new rules have emerged that impede the discovery of reliable evidence at the investigative stages of the criminal justice process and that require the concealment of relevant facts at trial. This trend has been a cause of grave concern to many Americans, who perceive such rules as being at odds with the goals of the criminal justice system. Within the legal profession and the law enforcement community, debate over these rules has been complicated by disagreements about the extent to which constitutional principles or valid policy concerns require the subordination of the search for truth to other interests.

This report is a contribution to that debate. It was prepared by the Office of Legal Policy, a component of the Department of Justice which acts as a principal policy development body for the Department. At my request, the Office of Legal Policy has undertaken a series of studies on the current status of the truth-seeking function of the criminal justice system.

This volume, "Double Jeopardy and Government Appeals of Acquittals," is the sixth in that series. It examines the constitutional and policy considerations affecting the review of adverse decisions in criminal cases at the instance of the

government. The topics covered include the original meaning of the double jeopardy clause of the Fifth Amendment as it bears on government appeals of acquittals, major Supreme Court decisions on this issue, and government appeal rights at the state level and in foreign jurisdictions. It also contains recommendations for strengthening the government's appeal rights in criminal cases in the circumstances in which review of adverse determinations is constitutionally permissible.

In light of the general importance of the issues raised in this report and its companion volumes, it is fitting that they be available to the public. They will generate considerable thought on topics of great national importance, and merit the attention of anyone interested in a serious examination of these issues.

Edwin Meese III

EDWIN MEESE III
Attorney General

Executive Summary

The attached paper examines the language, history and purpose of the double jeopardy clause of the Fifth Amendment. It concludes that the clause prohibits government appeals in felony cases whenever a reversal would result in a new trial.

As the report points out, the government's inability to appeal from acquittals where the appeal would result in a new trial does impede the search for truth in criminal justice. However, this inability to appeal in felony cases is well grounded in the original meaning of the Fifth Amendment's guarantee that no person shall be "subject for the same offence to be twice put in jeopardy of life or limb".

Although historical evidence suggests that the prohibition on government appeals which would result in new trials does not apply where the acquittal was based on a defective indictment, the report does not recommend challenging a venerable line of cases to the contrary. Similarly, while the evidence is quite strong that the prohibition applies only to felonies, precedent invoking the double jeopardy clause in misdemeanor cases is firmly enough established to counsel against urging the distinction between felonies and misdemeanors.

The report does, however, recommend that the Department consider seeking explicit judicial recognition of the government's right to appeal errors of law in a bench trial, when findings of fact clearly support a guilty verdict on proper application of the substantive law. Such an appeal right is fully supported by the Fifth Amendment's original meaning, and does not appear to be at odds with recent case law. On the negative side, judicial recognition of such an appeal right might encourage a larger proportion of defendants to opt for a trial by jury, rather than a bench trial. Such a development might increase the incidence of wrongful acquittals.

Finally, the report suggests that a further study be undertaken to explore additional ways of accomodating the government's need to seek correction of legal error, while still preserving the defendant's constitutional immunity from retrial. Such a study might examine: (1) whether government appeals of errors of law in jury trial by special verdict could be allowed, consistent with the Sixth Amendment's guarantee of a trial by jury in criminal prosecutions; and (2) the possible use of pretrial appealable orders framing charges to the jury, and resolving evidentiary issues in advance of trial.

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INTRODUCTION

As part of a continuing series of papers on impediments to the search for truth in criminal investigation and adjudication, the Office of Legal Policy has carried out a review of the law governing double jeopardy prohibitions on federal government appeals of criminal acquittals. These prohibitions undermine the search for truth in criminal adjudication by allowing some wrongly acquitted, culpable individuals to go unpunished. The results of our review are set out in this report.

Under current American law, state and federal prosecutors are not authorized to appeal a judgment of acquittal handed down by the finder of fact, despite any errors favorable to the defendant that may have been committed at trial. A convicted defendant is not, however, similarly restricted; he is authorized to appeal on grounds of error. This disparity of treatment undermines the search for truth in criminal justice. Culpable individuals who have been convicted may nevertheless be set free as a result of technical errors committed at trial. At the same time, culpable individuals who have erroneously been acquitted because of mistakes by the fact finder or errors of law are shielded from government appeals that could have corrected trial court errors. As a result, society's interest in ferreting out the truth and punishing those who have committed crimes is compromised. As Justice Holmes stated in arguing for the constitutionality of federal government appeals of acquittals, '[a]t the present time in this country there is more danger that criminals will escape justice than that they will be subjected to tyranny." *Kepner v. United States*, 195 U.S. 100, 134 (1904) (Holmes, J., dissenting). That statement rings even truer today than it did over 80 years ago. Allowing prosecutors to appeal erroneous acquittals would not lead to governmental tyranny; to the contrary, it would further the interests of justice.

Whether appeals of acquittals are constitutionally permissible is, however, an entirely separate question. In order to address that question in a principled fashion, this report analyzes the original meaning of the double jeopardy clause.

Section I of this report examines the original meaning of the double jeopardy clause. After setting forth 18th century definitions of the double jeopardy clause's key terms and tracing the development of the double jeopardy concept in England and in the American colonies, Section I analyzes the insertion of the double jeopardy clause into the Fifth Amendment of the Constitution. An analysis of the circumstances

surrounding that clause's enactment in light of the 18th century understanding of the double jeopardy principle reveals that the double jeopardy clause in general was aimed at preventing multiple trials or punishments for the same felony. That purpose suggests that government appeals of felony acquittals resulting in new trials, subject to a few possible exceptions, would run afoul of the double jeopardy clause. The evils of multiple trials or punishments would not, however, be implicated by government appeals of felony acquittals not resulting in new trials. Accordingly, while the matter is not free from doubt, we conclude that the double jeopardy clause should not be read to prohibit government appeals of felony acquittals that do not result in new trials. We also conclude that the double jeopardy clause, read in accordance with its original meaning, does not apply to misdemeanor cases.

Section II of the report surveys federal case law development of the Constitution's double jeopardy clause, with particular attention paid to the treatment of appeals from verdicts. This survey reveals that the federal courts have consistently adhered to the rule that the double jeopardy clause bars federal government appeals of acquittals, if those appeals would result in new trials. Nevertheless, recent case law indicates that the government retains substantial authority to appeal judicial determinations providing for the release of criminal defendants, as long as those determinations do not constitute "acquittals" by the trier of fact.

Section III of the report briefly reviews the double jeopardy treatment of government appeals from acquittals in the states and in selected foreign jurisdictions. Early state case law holdings did not authorize government appeals of acquittals. Before 1969 (the year in which the federal double jeopardy clause was made fully applicable to the states through the Fourteenth Amendment) the vast majority of the states barred the government from appealing acquittals. Only two jurisdictions (Connecticut and Wisconsin) explicitly authorized such appeals from errors of law in all cases. Two additional states (Arkansas and West Virginia) only allowed appeals of acquittals when the infraction charged was a minor misdemeanor not punishable by imprisonment. Four jurisdictions (Arkansas, Kentucky, Mississippi, and North Carolina) only allowed appeals of acquittals secured by the defendant's fraud or collusion. England does not authorize the government to appeal acquittals. Several commonwealth nations, however (Canada, New Zealand, India, Ceylon, South Africa, and the Australian State of Tasmania) allow questions of law to be appealed following an acquittal. The government generally may appeal acquittals in civil law nations.

Section IV briefly explores the policy ramifications of the double jeopardy clause's application to appeals of acquittals. First, we quickly survey policy arguments advanced in favor of allowing the government to appeal acquittals. We conclude that while those policy arguments are strong, they must give way to the results of our original meaning analysis, which suggests that subject to a few exceptions, only appeals not requiring new trials in felony cases are constitutionally permissible. Next, we suggest a possible approach, rooted in recent case law, for highlighting the proper scope of the United States' ability to make constitutionally permissible appeals of acquittals. Such an approach might emphasize that the double jeopardy clause in no way bars appeals of acquittals, when such appeals do not result in new trials. Consistent with this approach, we recommend that the Justice Department consider seeking an appropriate case to argue that the government is entitled to appeal a bench trial acquittal, on the ground of legal error, when correction of the error would allow a verdict of guilty to be entered without a new trial. We discuss the potential drawbacks, as well as the possible benefits, of establishing a limited governmental right to appeal bench trial acquittals. We close this report by suggesting that a follow-up study be done of additional ways in which society's interest in ascertaining the truth in criminal proceedings can be served through government appeals that do not violate the double jeopardy clause. Such a study might examine (1) whether government appeals of errors of law in jury trials by special verdict could be allowed, consistent with the Sixth Amendment's guarantee of the right to a trial by jury in criminal prosecutions; and (2) the possible use of pretrial appealable orders (agreed upon at a pretrial conference) framing charges to the jury and resolving evidentiary issues.

I. THE ORIGINAL MEANING OF THE DOUBLE JEOPARDY CLAUSE

Section I of this report assesses the original meaning of the double jeopardy clause, with particular reference to the appealability of acquittals. First, we survey 18th century definitions of the double jeopardy clause's key terms. Because these definitions, in and of themselves, shed relatively little light on the appealability of acquittals, we then turn to historical sources. After surveying the history of the double jeopardy concept in England and in America, we discuss the circumstances surrounding the adoption of the United States Constitution's double jeopardy clause. Finally, taking into account 18th century

definitions and historical analysis, we then set forth what we believe to be the probable original meaning of the double jeopardy clause, as applied to government appeals of acquittals.

A. The Words of the Double Jeopardy Clause

The Fifth Amendment's double jeopardy clause specifies, 'nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." An effort to understand the original meaning of this provision should begin with an examination of 18th and early 19th century dictionary definitions of its key terms -- "same," "offense," "twice," "jeopardy," "life," and "limb."

Noah Webster's 1828 American Dictionary defines "same" as "[i]dentical; not different or other." [1] This definition confirms the commonsense understanding that the double jeopardy clause prohibits the government from placing a person twice in jeopardy for the identical offense.

"Offense" ['offence'] is defined by Samuel Johnson's 1755 Dictionary as "crime; act of wickedness." [2] Giles Jacob's 1772 Law Dictionary defines "offense" ['offence'] as "an act committed against a law or omitted where the law requires it, and punishable by it. . . . [A]ll offenses are capital, or not: capital, those for which the offender shall lose his life: not capital, where an offender may forfeit his lands and goods, be fined and suffer corporal punishment, or both; but not loss of life." [3] Similarly, Webster defines "offense" as "[a]ny transgression of law, divine or human." [4] In short, it appears that the word "offense" in the double jeopardy clause should be read as having meant originally a crime punishable by law.

The word "twice" is defined by Webster as "[t]wo times . . . . [d]oubly." [5] This definition accords with the modern understanding of that word, indicating that the double jeopardy clause prohibits the

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[1] N. Webster, *American Dictionary of the English Language* (1828) (reissued 1967) (hereinafter cited as "*Webster's Dictionary*").

[2] S. Johnson, *A Dictionary of the English Language* (2d ed. 1755) (hereinafter cited as "*Johnson's Dictionary*").

[3] G. Jacob, *New Law Dictionary* (9th ed. 1772) (hereinafter cited as "*Jacob's Dictionary*").

[4] *Webster's Dictionary, supra.*

[5] *Ibid.*

government from placing an individual two times ("doubly") in jeopardy. The word "jeopardy" is not defined by Johnson or by Jacob, but Webster's Dictionary states that "jeopardy" means "[e]xposure to death, loss or injury; hazard; danger; peril." [6] This suggests that the word "jeopardy" in the double jeopardy clause should be read to have meant "risk," "danger," or "peril." While the phrase "twice in jeopardy" or "double jeopardy" presumably was a term of art, we have identified only one 18th century case law or treatise reference to "double jeopardy." In *Respublika v. Shaffer*, 1 Dall. 137 (Pa. Oyer and Terminer 1788), a Pennsylvania court stated without citation, that "[b]y the [common] law it is declared that no man shall be twice put in jeopardy for the same offense. . . . [This prohibits] the oppression of a double trial." *Respublika v. Shaffer*, 1 Dall. 137 (Pa. Oyer and Terminer 1788). This statement suggests that "double jeopardy" or "twice in jeopardy" possibly may have been viewed as a shorthand reference to prohibitions on retrials for the same offense. We believe, however, that this possible inference should not be accorded a great deal of weight, given the absence of any other recorded references to double jeopardy as a term of art. Other 18th century American lawyers and judges may have assigned a somewhat different meaning (or, alternatively, the same meaning) to the phrase "double jeopardy"; we simply do not know.

The term "life or limb" is not defined in the 18th and early 19th century dictionaries that we have examined. "Life" is defined by Jacob as "[u]nion and co-operation of soul with body; enjoyment or possession of terrestrial existence." [7] Similarly, Webster states that "in man, [life is] that state of being in which the soul and body are united." [8] Webster states that a "limb" is "an extremity of the human body; a member; . . . as the arm or leg." [9] The verb "to limb" is, according to Johnson, "[t]o tear asunder"; [10] Webster defines "to limb" as "[t]o dismember; to tear off the limbs." [11] Read literally, these definitions would appear to suggest

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[6] *Ibid.* Our research provides no indication that the phrases "jeopardy" or "double jeopardy" were legal terms of art in the 18th century.

[7] *Jacob's Dictionary, supra.*

[8] *Webster's Dictionary, supra.*

[9] *Webster's Dictionary, supra.* Similarly, *Johnson's Dictionary, supra*, states that a limb is "a member".

[10] *Johnson's Dictionary, supra.*

[11] *Johnson's Dictionary, supra.*

that jeopardy to "life or limb" referred to processes that put a person in peril of losing his life or having his limb dismembered.

We believe, however, that the term "life or limb" was a term of art that was not meant to be read literally. The historical meaning of this term can be gleaned by reference to Lord Coke's 17th century definition of the phrase "life or member." [12] The Second Part of Coke's *Commentaries* defines the phrase "judgment of life or member" ("jugment de vie et de membre") as meaning "he shall be attainted of felony." [13] Similarly, the Third Part of the *Commentaries* says of the term "[j]udgment of life or member" that "[t]hese words do imply felony." [14] Consistent with these definitions, the 1848 edition of Dwarris' *Treatise on Statutes* states that "[e]very crime, the perpetrator of which is, by any statute, ordained to have judgment of 'life or member,' is a felony: although the word felony be not contained in the statute." [15] This statement in an early 19th century treatise strongly suggests that Lord Coke's 17th century understanding of the term "life or member" still held sway in the 18th century. Accordingly, substituting the word "limb" for "member," we believe it highly probable that the term "life or limb" originally was meant as a reference to crimes punishable as felonies. Felonies were offenses punishable by forfeiture of lands or goods, plus additional punishment, if so specified by the law. [16]

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[12] Given the fact that *Webster's Dictionary* defines "limb" as "member" (*see* text accompanying note 9, *supra*), we believe that it is entirely justifiable to read the phrase "life or limb" merely as an alternative formulation of the term "life or member."

[13] E. Coke, *The Second Part of the Institutes of the Laws of England* 434 (6th ed. 1681).

[14] E. Coke, *The Third Part of the Institutes of the Laws of England* 91 (1644 ed.).

[15] F. Dwarris, *A General Treatise on Statutes* 673 (2d ed. 1848).

[16] Blackstone defined a "felony" as "an offense which occasions a forfeiture of either land or goods, or both, at the common law, and to which capital or other punishment may be superadded, according to the degree of guilt." 4 W. Blackstone, *Commentaries on the Laws of England* *96 (W. Jones ed. 1916) (original ed. 1769) (hereinafter "4 W. Blackstone"). According to Blackstone, felonies included, among others, such crimes as murder, petit larceny, robbery, arson, desertion from the King's army, rape, and bigamy. *See Id.* *97, *98, *99, *102, *163, *194, *210, *221, and *242. Blackstone added that, "in common usage, the word 'crimes' is made to denote such offenses as are of a deeper and more atrocious dye; while smaller faults, and omissions of less consequence, are comprised under the gentler term of 'misdemeanors' only." *Id.* *5. These definitions do not establish the clear distinction between felonies and misdemeanors found in modern American law. Indeed, Blackstone's statement that "properly speaking, [crimes and misdemeanors] are mere synonymous terms" (*id.* *5) appears to

Putting these definitions together, the words of the double jeopardy clause appear to prohibit the government from twice placing any person in peril of twice suffering punishment as a felon for the same act. It is conceivable -- though by no means certain -- that the clause may also have been understood to prohibit the retrial of an individual on the same felony charge. This reading, in and of itself, is not highly illuminating -- it tells us very little about the practical scope of the double jeopardy clause. Specifically, it does not answer the questions of whether and under what circumstances government appeals of acquittals would violate the clause. To shed light on these questions, it is necessary to consider the historical development of the double jeopardy concept in England and in America.

B. Historical Development of the Double Jeopardy Concept

The double jeopardy concept has a long and complicated history.[17] The following discussion will summarize those aspects of that history that are relevant to the issue of government appeals of acquittals. After reviewing the development of the double jeopardy concept in England and in America, we will examine the formulation of the Bill of Rights' double jeopardy clause.

1. The Development of Double Jeopardy in England[18]

No reference to double jeopardy appears in the Magna Carta. Nevertheless, by the late 13th century the glimmerings of a former judgment barrier offering partial protection from reprosecution were apparent.[19] The attempt to restrain private complainants from instigating repeated prosecutions was codified in 1281 in the Statute of

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imply that, according to "proper" usage (as opposed to "common" usage), felonies are a *subcategory* of the class of all misdemeanors (or crimes).

[17] For comprehensive overviews of the double jeopardy concept's historical development, *see* M. Friedland, *Double Jeopardy* (1969) (hereinafter cited as "M. Friedland") and J. Sigler, *Double Jeopardy* (1969) (hereinafter cited as "Sigler").

[18] The following discussion of the early development of double jeopardy draws largely upon Sigler, *supra*, at 1-37.

[19] *See* Sigler at 12-13, *citing* 1 Britton, *De Legibus Anglicanes* 104, 112 (Nichols trans. 1865). According to Sigler, an acquitted individual could not be reprosecuted at the instance of the original accusing private party, but apparently could be reprosecuted at the instance of the crown.

Westminster.[20] By the 14th century, the plea of "autrefois acquit," or "formerly acquitted," had begun to develop, whereby a defendant could seek to block a second trial by citing his previous acquittal of the same offense.

During double jeopardy's early development, criminal procedures could be instituted either by common law "appeal" (at the behest of a private party) or by "indictment" (at the behest of the crown).[21] By the early 15th century it was settled by statute that an acquittal after a jury trial on charges initiated by appeal was a bar to prosecution for the same offense by subsequent indictment.[22] Conversely, an acquittal on an indictment was deemed a bar to the initiation of a suit by appeal on the part of the injured party,[23] but this was altered by the Statute of 1487.[24] After the Statute, neither a conviction nor an acquittal on an indictment acted as a bar to a prosecution by way of appeal, for the same offense, if the appeal was brought within a year and a day of the conviction or acquittal.

By the 17th century, English double jeopardy protection had evolved into four common law pleas: autrefois acquit (former acquittal), autrefois convict (former conviction), autrefois attaint (former attainder), and pardon. Those pleas, referred to in Coke's *Institutes*,[25] were described in some detail a century later in Blackstone's *Commentaries*.[26] They prevented the retrial of a person who had previously been acquitted, convicted, attainted (adjudged worthy of punishment), or pardoned for the same offense. Blackstone explained autrefois acquit as follows:

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[20] 13 Edw. I, c. 12 (1281). The Statute of Westminster stipulated that the fact that "the life of the defendant was in jeopardy" in a previous case resulting in the defendant's acquittal was the basis for a suit of malicious prosecution against the appellors.

[21] The criminal appeal was not abolished (by statute) until 1819. *See* 59 Geo. III, c. 46 (1819).

[22] 9 Hen. V, f. 2, pl. 7 (1421); 34 Hen. VI, f. 9, pl. 19 (1455).

[23] Trin. 21 Edw. III, f. 23, pl. 16 (1346); Mich. 44 Edw. III, f. 38, pl. 35 (1369).

[24] 9 Hen. VII, c. 1 (1487).

[25] *See* E. Coke, *The Third Part of the Institutes of the Laws of England* 212-14 (1797 ed.) (1st ed. 1642).

[26] *See* 4 W. Blackstone, *supra*, *335-*337.

> First, the plea of autrefois acquit, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offense. Hence it is allowed as a consequence that when a man is once fairly found not guilty upon any indictment, or other prosecution, before any court having competent jurisdiction of the offense, he may plead such acquittal in bar of any subsequent accusation for the same crime. Therefore, an acquittal on an appeal is a good bar to an indictment on the same offense. So, also, was an acquittal on an indictment a good bar to an appeal by the common law; and therefore a general practice was introduced not to try any person on indictment of homicide till after the year and day within which appeals may be brought were past, by which time it often happened that the witnesses died, or the whole was forgotten. To remedy which inconvenience the statute (Star Chamber, 1487), enacts that indictments shall be proceeded on, immediately, at the king's suit for the death of a man, without waiting for bringing an appeal, and that the plea of autrefois acquit on an indictment shall be no bar to the prosecuting of any appeal.[27]

In short, according to Blackstone, once an individual had been "fairly" tried and acquitted of a crime in a proceeding brought by common law appeal, he could not be charged with the same offense in a subsequent indictment. By virtue of being found "not guilty," an acquitted individual would be "forever quit and discharged of the accusation, except he be appealed of felony within the time limited by law."[28] While an acquittal following an indictment in principle did not bar a future prosecution by way of common law appeal, Blackstone

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[27] *Id.* *335. (In this passage Blackstone employed the term "appeal" to designate a criminal charge brought at the behest of a private party -- not to signify an appellate proceeding in the modern sense.) In a similar vein, Hawkins' analysis of autrefois acquit revealed "that an Acquittal in one County for [a particular offense] . . . may be pleaded in Bar of a subsequent Prosecution for the same [offense] . . . in another County". 2 W. Hawkins, *A Treatise of the Pleas of the Crown* (1724 ed.), *reprinted in American Law: The Formative Years* 370 (S. Katz & M. Horwitz eds. 1972).

[28] 4 W. Blackstone, *supra*, *362.

stated that by his time private appeals had "ceased to be in common use." [29]

In 18th century England, the pleas of autrefois acquit and autrefois convict could be interposed only on the basis of an actual verdict of acquittal or conviction. [30] Accordingly, in modern American terms, "jeopardy attached" for purposes of invoking those pleas at the time an acquittal or conviction was entered. This standard for determining when jeopardy attaches remains in force today in England. [31]

A richer understanding of the development of double jeopardy during the 17th and 18th centuries can be gleaned from English cases. In 1660, the Court of King's Bench held that the Crown prosecutor had no right to seek a new trial after an acquittal. *Rex v. Read*, 1 Lev. 9, 83 Eng. Rep. 271 (K.B. 1660). The court noted (without specific citation) that on two instances during Cromwell's rule a prosecutor's appeal had been allowed. Those holdings, however, were deemed non-binding, inasmuch as they were "in the late troublesome times, and by the parties assent." *Id.* Why the accused assented to a new trial was not explained. One year later, in *Rex v. Jackson*, 1 Lev. 124, 83 Eng. Rep. 330 (K.B. 1661), the court denied a motion for a new trial following an acquittal for perjury. The court noted that the acquittal had been secured by the beating and private imprisonment of the witnesses to perjury. The court reporter explained simply that the new trial motion "was denied, it being in a criminal case, wherein the party being once acquitted, shall never be tried again." *Id.* The court reaffirmed these holdings in *Rex v. Fenwick & Holt*, 1 Keb. 546, 83 Eng. Rep. 1104 (1663). The court's reasoning in *Fenwick & Holt* was summarized by the 18th century legal treatise writer Charles Viner:

> [A] report of this case communicated to me from a manuscript of Lord Chief Justice Kelyng, he says, that Hyde C. J. Twisden and himself agreed, that no trial ought to be where the party was once acquitted for any crime that concerns life, or

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[29] *Id.* *316. The unpopularity of private appeals stemmed from the fact that the appellor would be imprisoned and fined in the event of the appellee's acquittal. *Id.* As stated in note 21, *supra*, the private appeal was formally abolished in 1819.

[30] The requirement of a verdict of conviction or acquittal was definitively established in *Turner's Case*, 89 Eng. Rep. 158 (1676). *See also* J. Archbold, *Pleading, Evidence & Practice in Criminal Cases* §§ 435-459 (35th ed. 1962).

[31] *See* 11 *Halsbury's Laws of England* ¶ 242 (4th ed. 1976).

> member, or which would make the party infamous; and says the mischief might be very great if the party should be put to a new trial, for then his adversary would see where he failed, and might use ill means to prove what he failed in before; and that upon search, no precedent was found that ever any new trial was granted in such case except two in the time of the late troubles, which his brother Twisden said were by consent, and that the Court did not regard those precedents, as differing from all in good time.[32]

This language indicates a belief that the prosecution should not be entitled to "see where it failed" at the first trial in order to perfect its case at retrial.

Subsequent holdings adhered to the principle that no new trial would be granted following an acquittal. For example, in *Rex v. Davis*, 1 Show. 336, 89 Eng. Rep. 609 (K.B. 1691), following defendants' acquittal for assault, the prosecution obtained affidavits of fact tending to show defendants' guilt. The court denied the prosecution's motion for a new trial, stating that "there could be no precedent shown for it [a new trial] in case of acquittal." *Id.* In *Rex v. Jones*, 8 Mod. 201, 207, 88 Eng. Rep. 146, 149 (K.B. 1724), the court opined that "it is inconsistent with reason not to grant a new trial where a man is acquitted by his own artifice of a crime not capital; for it is unjust (as hath been observed), that where a man hath committed one crime, he shall have it in his power to avoid justice by committing another." Despite this policy concern, however, the court "admitt[ed] [it] to be law" that an acquittal could not be appealed.[33] Other cases held similarly.[34]

There were a few extremely limited exceptions to the rule forbidding appeals of acquittals. In *Rex v. Furser*, 96 Eng. Rep. 813 (K.B. 1753), the defendant, who had been indicted, "had entered notice of trial in the [court's] office book," apparently without giving direct notice to the prosecutor. The defendant was then acquitted, apparently without the prosecutor's knowledge. The court granted a new trial, citing a

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[32] C. Viner, *A General Abridgement of Law and Equity* 479 (2d ed. 1793).

[33] 88 Eng. Rep. at 149. This case involved a *quo warranto* proceeding against individuals who had falsely claimed to hold a public office; several judges opined that this was not a criminal proceeding at all.

[34] *See, e.g., Rex v. Praed*, 4 Burr. 2257, 98 Eng. Rep. 177 (K.B. 1768); *Rex v. Mawbey*, 6 T.R. 619, 625, 638, 101 Eng. Rep. 736, 739, 746 (K.B. 1796).

statute (5 W. & M. c. 11) that required defendant to give notice of trial. The extremely brief (14 line) case report gives no indication that any precedent prohibiting a new trial after acquittal was being overturned, or even being considered. Accordingly, this case is perhaps best viewed as *sui generis*. It may merely reflect an understanding that the prosecution must be allowed to appear at trial and thereby prosecute an indictment.

The other possible exceptions involved acquittals when indictments had been preferred to test a civil right -- mainly indictments for non-repair of a highway. Eighteenth century and early 19th century cases did not allow appeals from such acquittals.[35] By the mid-19th century, however, new trials were allowed in such cases.[36] This exception was a narrow one: if the accused was in danger of imprisonment, a new trial would not be granted.[37]

One late 18th century case allowed an appeal in a *quo warranto* proceeding. *Rex v. Francis*, 2 T.R. 484, 100 Eng. Rep. 261 (K.B. 1788). This case, however, did not constitute an exception to the rule against appeals of acquittals in criminal cases: the court plainly stated "that of late years a quo warranto information ha[s] been considered merely in the nature of a *civil* proceeding." *Id.* (emphasis added). Similarly, *Wilson v. Rastall*, 4 T.R. 753, 100 Eng. Rep. 1238 (K.B. 1792), and *Calcraft v. Gibbs*, 5 T.R. 19, 101 Eng. Rep. 11 (K.B. 1792), are not exceptions. In *Wilson* the court allowed a new trial to recover penalties for bribery, when judicial error had yielded an initial verdict favorable to the defendant. Justice Kenyon stated that while a new trial could not be allowed in a criminal case, "I consider this as a civil action." 100 Eng. Rep. at 1286. *Calcraft* involved a dispute as to whether defendant had been poaching on lands formerly owned by his master. In allowing a retrial following a judgment for defendant, Justice Kenyon, citing judicial error, implicitly assumed that this was not a criminal proceeding.

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[35] *See, e.g., Rex v. Silverton*, 1 Wils. 298, 95 Eng. Rep. 628 (K.B. 1751); *Rex v. Reynell*, 6 East 315, 102 Eng. Rep. 1307 (K.B. 1805); *Rex v. Burbon*, 5 M. & S. 392, 105 Eng. Rep. 1094 (K.B. 1816).

[36] *See, e.g., Regina v. Cricklade*, St. Sampson (1849), referred to in *Regina v. Russell*, 3 El. & Bl. 942, 118 Eng. Rep. 1394, 1396 (Q.B. 1854).

[37] *Regina v. Duncan*, 7 Q.B.D. 198 (Q.B. 1881) (cited in M. Friedland, *supra*, at 286, n. 8); *Regina v. Russell*, 3 El. & Bi. 942, 118 Eng. Rep. 1394 (Q.B. 1854).

The Crown apparently did have a limited right to bring a writ of error in 18th century England. The 1788 edition of Hawkins' *Pleas of the Crown* summarized the scope of this right as follows:

> I take it to be settled at this day, that wherever the indictment, or appeal, whereon a man is acquitted, is so far erroneous (either for want of substance in setting out the crime, or of authority in the judge before whom it was taken), that no good judgment could have been given upon it against the defendant, the acquittal can be no bar of a subsequent indictment or appeal, because in judgment of law the defendant was never in danger of his life from the first; for the law will presume *prima facie* that the judges would not have given a judgment, which would have been liable to have been reversed. But if there be no error in the indictment or appeal, but only in the process, it seems agreed, that the acquittal will be a good bar of a subsequent prosecution, notwithstanding such error; the best reason whereof seems to be this, That such error is salved by the appearance. [38]

In short, Hawkins' summary appears to indicate that a writ of error could be filed following an acquittal only if the initial indictment was "defective" in that it failed to state an offense ("want of substance in setting out the crime") or the trial court lacked jurisdiction ("want . . . of authority in the judge before whom it was taken"). In those special situations, the defendant never was in jeopardy in the first place. If, however, there was error "in the process" by which an individual was brought within a court's jurisdiction, an acquittal would bar that individual's reprosecution, since the defendant's appearance "corrected" the error. [39] Elsewhere Hawkins deemed it 'settled" (presumably subject to the exceptions noted above) that a court could not "set aside, a verdict which acquits a defendant of a prosecution properly criminal." [40]

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[38] W. Hawkins, 2 *A Treatise of the Pleas of the Crown* 528 (6th ed. 1788).

[39] Consistent with Hawkins' conclusion, Chitty's *Treatise* states that "[a] mere error in the former process . . . will not render that prosecution [which resulted in an acquittal] nugatory, because the reason which relates to errors in the indictment will not apply, and the defendant might legally have been convicted." J. Chitty, 1 *A Practical Treatise of the Criminal Law* 458 (Am. ed. 1836).

[40] W. Hawkins, *supra*, at 628.

Hale's *Pleas of the Crown* also discussed the writ of error following an acquittal.[41] Hale implicitly indicated that a writ of error could be brought if an individual was found by special verdict to have committed an act that constituted a "murder or other felony," but the court mistakenly adjudged the act committed not to be a felony. If no writ of error was brought, a plea of "autrefois acquit" would bar a subsequent prosecution, according to Hale. Hale also indicated that a judgment of acquittal could be reversed if the acquittal was due to the defectiveness of the indictment.[42] Hale advanced no other possible grounds for granting writs of error brought by the prosecution following an acquittal.

In sum, 18th century English sources indicate that the prosecution apparently could appeal a criminal acquittal (bring a writ of error) in only three situations: (1) when the trial court lacked jurisdiction (and thus the defendant was not legally in jeopardy); (2) when the initial indictment was fatally flawed (and thus the defendant was not legally in jeopardy); and (3) when facts were found indicating the offense charged had been committed, but the trial court erroneously held that the offense found did not constitute a crime. Under all other circumstances an acquittal could not be appealed (and the plea of autrefois acquit would bar a new trial), even if errors were committed at trial. While a few 18th century instances of new trials following "acquittals" in *civil* actions for penalties are recorded, new trials following acquittals in *criminal* proceedings were strictly barred.

By the 18th century the defendant's rights of appeal were substantially broader than the prosecution's. Starting in the 1670's, the court of King's Bench began to hold that a defendant could obtain a new trial under certain circumstances.[43] Those holdings overturned earlier precedents denying defendants the right to a new trial upon proof of error in

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[41] The following discussion is based on M. Hale, 2 *The History of the Pleas of the Crown* 247-248, 394-395 (1778 ed.).

[42] In advancing this proposition, Hale, *id.*, at 394-395, discussed Vaux's Case, 4 Co. Rep. 44a, 77 Eng. Rep. 992 (Q.B. 1592). In that case, Vaux was acquitted of poisoning Ridley, on the ground that the indictment was defective because it did not expressly allege that Ridley had received and imbibed poison. A retrial was allowed after this defect was cured, and Vaux was convicted.

[43] *See, e.g.*, Rex v. Latham & Collins, 3 Keble 143, 84 Eng.Rep. 642 (K.B. 1673); Rex v. Cornelius, 3 Keble 525, 84 Eng.Rep. 858 (K.B. 1675).

the initial trial.[44] There remained, however, substantial restrictions on defendants' appeal rights. Even in the 18th century, the defendant's writ of error could not be taken in capital cases without the crown's permission.[45] According to one commentator, the court could grant a new trial after defendant brought a writ of error, "[n]ot on the merits, but only for irregularity in the proceedings."[46] The writ of error was discretionary in misdemeanor cases, but by the end of the 18th century a writ of error could be brought "for notorious mistakes in the record."[47]

In sum, by the end of the 18th century the double jeopardy principle was well entrenched in English law.[48] That principle generally barred the crown from obtaining the reindictment and retrial of an individual who had been acquitted of a crime. The crown was, however, apparently authorized to appeal acquittals when the original indictment was defective; when the original trial court lacked jurisdiction; or when an error of law caused a special verdict's factual finding of felony mistakenly to be characterized as no felony. At the same time, English law was beginning to recognize the right of the individual to appeal convictions obtained in proceedings tainted by error.

2. The Development of Double Jeopardy in America

The double jeopardy concept was exported to England's American colonies in the 17th century. The Massachusetts *Body of Liberties* of 1641, an early compilation of legal principles, provided that "[n]o man shall be twice sentenced by civil justice for one and the same crime,

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[44] *See, e.g.*, Rex v. Lewin, 2 Keble 396, 84 Eng.Rep. 248 (K.B. 1663); Rex v. Marchant, 2 Keble 403, 84 Eng.Rep. 253 (K.B. 1663).

[45] *See* Rex v. Wilkes, 4 Burr. 2527, 2551, 98 Eng.Rep. 327, 340 (K.B. 1770); The Ailsbury Case (Anonymous), 1 Salk 264, 91 Eng.Rep. 232 (K.B. 1699).

[46] 1 J. Chitty, *supra*, at 654 (Am. ed. 1836).

[47] 4 Stephen, *New Commentaries on the Laws of England* 456 (1845 ed.). According to Stephen, if the defendant won a reversal, "he remains liable to another prosecution for the same offence; for the first being erroneous, he never was in jeopardy thereby." *Id.* at 458.

[48] The precise nature of double jeopardy protection was apparently not, however, fully settled in 18th century England. Viner, for example, provided various "examples of shifting double jeopardy rules in eighteenth century English practice." Sigler, *supra*, at 21, *citing* C. Viner, *A General Abridgement of Law and Equity* 368-73, 375 (1st ed. 1785).

offense, or trespass."[49] That principle, reiterated in the Massachusetts Code of 1648, influenced the development of the law in Connecticut, Pennsylvania, New York, and New Jersey.[50]

Eighteenth century colonial legal developments confirm the recognition accorded the double jeopardy principle in the colonies. In New York, even though the plea of autrefois acquit generally was not employed, double jeopardy protection was bestowed upon individuals, reportedly owing to "the solicitude of royal officials that there be no double prosecutions."[51] Specifically, it was agreed in colonial New York (consistent with English practice) that a "motion [for a new trial] did not lie after acquittal."[52] A 1783 Connecticut decision forbade the second trial of a citizen once he had been acquitted;[53] another contemporaneous Connecticut holding proclaimed that "a new trial is not to be granted, in a criminal cause, to a prosecutor, unless the acquittal was procured by some fraud or malpractice."[54] The status of double jeopardy in Pennsylvania is reflected in a 1788 common law decision stating that "[b]y the law it is declared that no man shall be twice put in jeopardy for the same offense . . . [This prohibits] the oppression of a double trial."[55] In colonial Virginia a criminal defendant was entitled to make a special plea alleging a former acquittal or conviction of the identical crime charged, or a former attainder for any felony, as well as the fact of a pardon.[56] A 1788 South Carolina case held that in a qui tam or penal action, "the court will seldom grant [the state] a new trial, as these kind of penal actions are considered as hard and rigorous ones."[57]

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[49] *The Laws and Liberties of Massachusetts* 46 (M. Farrand ed. 1929).

[50] *See* Sigler, *supra*, at 22.

[51] Sigler, *supra*, at 25, *quoting* J. Goebel & T. Naughton, *Law Enforcement in Colonial New York* 589 (1944). According to Sigler, "in New York the sovereign authority restricted its use of its own powers." Sigler, *id.*, at 25.

[52] J. Goebel & T. Naughton, *supra* note 51, at 279.

[53] *Gilbert v. Marcy*, 1 Kirby 401 (Conn. 1783).

[54] *Hannaball v. Spaulding*, 1 Root 86, 87 (Conn. 1783).

[55] *Respublika v. Shaffer*, 1 Dall. 137 (Pa. Oyer and Terminer 1788).

[56] Sigler, *supra*, at 24. Those pleas, which replicate the double jeopardy pleas described by Blackstone, reflect the fact that "[t]he Virginia criminal law tended to be closer to English law than that of most colonies". *Id.*

[57] *Steel v. Roach*, 1 S.C.L. (1 Bay) 63, 64 (1788) (denying government's motion for new trial following verdict for defendant in trial for evasion of state revenue laws). It is

The double jeopardy concept was first accorded constitutional status in the New Hampshire Constitution of 1781.[58] Article XVI of the Constitution's Bill of Rights provided in pertinent part: "No subject shall be liable to be tried, after an acquittal, for the same crime or offence."[59] No other constitution adopted during the revolutionary period contained a double jeopardy clause.

3. Double Jeopardy in the Federal Constitution

A double jeopardy clause was not included in the original federal Constitution. During the state ratifying conventions, however, Maryland and New York drafted prohibitions against double jeopardy for possible inclusion in the Constitution's Bill of Rights. The Maryland clause provided "that there be no appeal from matter of fact, or second trial after acquittal; but this provision shall not extend to such cases as may arise in the government of the land or naval forces."[60] The New York clause stated "[t]hat no Person ought to be put twice in Jeopardy of Life or Limb for one and the same Offence, nor, unless in case of

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unclear from this short case report whether new trials were *ever* granted in qui tam or penal actions.

[58] One colonial constitution contained a *res judicata* clause. Section 64 of the Fundamental Constitutions of [North] Carolina (1669) provided that "[n]o cause shall be twice tried in any one court, upon any reason or pretence whatsoever." Sigler, *supra*, at 28, n. 119. That clause was dropped in the state's 1776 constitution. Sigler, *id.*, at 28.

[59] Art. XVI, New Hampshire Bill of Rights (1783), *reprinted in* 1 B. Schwartz, *The Bill of Rights: A Documentary History* 377 (1971) (hereinafter cited as "Schwartz"). The second sentence in article XVI forbade the passage of laws imposing capital punishment, without trial by jury. The New Hampshire Constitution was drafted in 1781 and ratified by New Hampshire citizens in 1783; it went into effect in 1784. Schwartz, *id.*, at 374.

[60] Schwartz, *supra*, at 732. This was the third of thirteen amendments approved by a majority of a committee appointed by the Maryland ratifying convention to draft constitutional amendments. Those amendments were drafted at the end of April, 1788. After a minority on the committee insisted on their right to present alternative amendments to the full state convention, the committee majority elected not to forward any recommendations. Accordingly, the double jeopardy amendment was not officially adopted by the Maryland convention; it was, however, circulated in pamphlet form. *See* Schwartz, *id.*, at 729.

impeachment, be punished more than once for the same Offence." [61] No other state conventions proposed a double jeopardy clause.

James Madison included a double jeopardy clause in his original draft of the Bill of Rights. On June 8, 1789, Madison's double jeopardy provision was proposed in the House of Representatives as a constitutional amendment. It read as follows: "No person shall be subject, except in cases of impeachment, to more than one punishment or trial for the same offense." [62]

The House debated the double jeopardy provision on August 17, 1789. Representative Egbert Benson of New York stated that the House (sitting as a committee of the whole) could not agree to the amendment as it stood, because its meaning was rather doubtful. In providing that no person should be tried more than once for the same offense, the clause was contrary to the established principle that a defendant was entitled to more than one trial, according to Benson. Benson presumed that the "humane intention of the clause" was to prohibit more than one punishment; accordingly, he moved to amend the clause by striking the words "or trial." [63]

Representative Roger Sherman of Connecticut approved of Benson's motion. According to Sherman, if a person were acquitted at an initial trial, he ought not to be tried a second time; but if anything should appear in the record of the first trial, suggesting that the conviction should have been set aside, the defendant was entitled to the benefit of a second trial. Representative Theodore Sedgwick of Massachusetts agreed with Sherman, insisting that instead of securing the liberty of the subject, the clause as drafted would abridge the privileges of those who were prosecuted. [64]

Representative Samuel Livermore of New Hampshire approved of the clause as drafted, which he deemed declaratory of the law as it stood. He feared that changing the clause might make it appear that Congress

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[61] Schwartz, *supra*, at 912. The New York convention ratified the federal Constitution, accompanied by a proposed bill of rights (including the double jeopardy clause), on July 26, 1788. *Id.* at 854.

[62] 1 Annals of Cong. 434 (1789), *reprinted in* Schwartz, *supra*, at 1027.

[63] 1 Annals of Cong. 753 (1789), *reprinted in* Schwartz, *supra*, at 1111.

[64] 1 Annals of Cong. 753-54, *reprinted in* Schwartz, *supra*, at 1111. The record does not reveal what Representative Sedgwick believed those "privileges" included.

desired to change the law by implication, and expose a man to the danger of more than one trial. Representative Livermore added that according to the "universal practice" in Great Britain and the United States, persons who are guilty of crimes -- but who are acquitted for want of evidence -- shall not be tried a second time for the same offense. [65] Representative Livermore apparently did not address the question of whether an acquittal due to errors of law warranted a second trial.

Upon being put to a vote, Benson's motion to amend the double jeopardy clause lost by a considerable majority. Representative George Partridge of Massachusetts then moved to insert after the words "same offense" the words "by any law of the United States." That motion also was defeated. [66]

On August 20, 1789, the double jeopardy clause as phrased by Madison was approved by the House. On August 24, 1789, the constitutional amendments that had been approved by the House were submitted to the Senate. As submitted, the double jeopardy clause remained unchanged. [67] On September 3, 1789, the Senate substantially changed the double jeopardy clause to read that "no person shall be twice put in jeopardy of life or limb by any public prosecution." [68] The reasons underlying this change in wording are not recorded. On September 9, 1789, the Senate combined and renumbered the proposed constitutional amendments; the present day Fifth Amendment, which included the double jeopardy clause, was designated Article VII. [69]

A conference committee of Madison, Sherman, and John Vining of Delaware from the House met with Senate appointees on September 21 to resolve differences with respect to the proposed Bill of Rights. At some point, the conference committee eliminated the words "by any public prosecution" from the Senate's double jeopardy clause. The circumstanc-

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[65] *Id.*

[66] *Id.* Sigler states that the defeat of Partridge's motion permits "the speculation by negative inference that double jeopardy may have been intended to apply to the states and the federal government alike." Sigler, *supra*, at 30-31.

[67] Sigler, *supra*, at 31, *citing* 1 S. Jour. 105 (1789).

[68] Schwartz, *supra*, at 1149, *citing* 1 S. Jour. 160-78 (1789). No explanation for this change in wording appears in the record.

[69] Sigler, *supra*, at 31, *citing* 1 S. Jour. 119, 130 (1789). Although Congress proposed twelve initial amendments to the Constitution, the first two were not ratified by the states, so the remaining ten became the Bill of Rights.

es surrounding this change are not recorded. On September 25, 1789, the Senate concurred in the amendments to be proposed to the state legislatures, as amended. [70]

In summary, the draft double jeopardy clause changed in form significantly during its consideration by the First Congress. The June 1789 House version read "no person shall be subject, except in cases of impeachment, to more than one punishment or trial for the same offense." The subsequent September 1789 Senate version stated "that no person shall twicc be put in jeopardy of life or limb by any public prosecution." The September 1789 House-Senate conference committee version read 'no person shall twice be put in jeopardy of life or limb." The final clause as adopted by Congress (after being joined with other clauses in the Fifth Amendment) read "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

The double jeopardy clause, now embedded in the Fifth Amendment, was ratified by the requisite number of states, although according to one scholar, "many state legislators were not certain of its meaning." [71] Over time, the federal double jeopardy clause influenced state constitutional development. At present, 35 state constitutions in total contain double jeopardy clauses that closely resemble the federal provision. [72]

2 C. The Probable Meaning of the Double Jeopardy Clause

As the foregoing historical review suggests, the text and enactment history of the double jeopardy clause do not clearly establish its meaning. There is no historical evidence as to what the Congress intended when it altered Madison's version of the double jeopardy clause. [73] The insertion

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[70] Sigler, *supra*, at 61-62, *citing* 1 Annals of Cong. 83, 88 (1789).

[71] Sigler, *supra*, at 33. Sigler adds that "it is doubtful that Massachusetts ever ratified the portion of the fifth amendment which affects double jeopardy." Sigler, *id.*, *citing* Dangel, *Double Jeopardy in Massachusetts*, 16 B.U.L. Rev. 384 (1936). Unfortunately, there is virtually no recorded information on the states' reaction to the double jeopardy clause during the ratification period.

[72] Sigler, *supra*, at 33-34. According to Sigler, seven states provide constitutional protection against subsequent trials only in cases of prior acquittal. *Id.* at 34. All in all, 45 state constitutions contain double jeopardy clauses.

[73] Sigler states that "[i]n all probability, the drafters of the clause intended to alter Madison's proposal only with a view to its clarification." Sigler, *supra*, at 32.

of references to "jeopardy" and "life or limb" suggests the possibility that New York's proposed double jeopardy clause served as a model. [74] It also strongly indicates that the clause was meant to protect individuals charged with a felony, given the apparent 18th century English understanding that crimes punishable by "life or member" were felonies. [75] While the phrase "life or limb" may define the class of individuals (accused felons) protected by the clause, that phrase does nothing to clarify the scope of the protection afforded them. In order to address the scope of the clause's protection, we must consult extrinsic historical sources.

In his 1833 *Commentaries on the Constitution*, Joseph Story opined that the double jeopardy clause applies generally to bar second trials for the same offense, no matter what the punishment. [76] Story's position was probably largely correct, if the term "offense" is interpreted as meaning "felony." As previously indicated, at least one late 18th century American case -- *Respublika v. Shaffer* -- deemed the rule against being put "twice in jeopardy" as a prohibition against a "double trial." Furthermore, as the preceding historical discussion illustrates, by the late 18th century it seems to have been a generally accepted principle in England and America that, subject to a few exceptions, an individual could not be retried for the same felonious transgression at the behest of the government. [77]

That principle, embodied in Madison's version of the double jeopardy clause, was agreed to by the House of Representatives; the only

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[74] *See* text accompanying note 57, *supra*.

[75] *See* text accompanying notes 12-15, *supra*.

[76] J. Story, 3 *Commentaries on the Constitution of the United States* 659 (1833). According to Story, the double jeopardy clause "is another great privilege secured by the common law. The meaning of it is, that a party shall not be tried a second time for the same offence, after he has once been convicted, or acquitted of the offence charged, by the verdict of a jury, and judgment has passed thereon for or against him." *Id.*, *citing* 2 Hawkins, *Pleas of the Crown* ch. 35; 4 W. Blackstone, *Commentaries* *335.

[77] As the preceding discussion of 18th century English law indicates, new trials following "acquittals" could only be granted in *civil* proceedings for penalties. This statement does not apply, however, to new trials following criminal acquittals because the trial court lacked jurisdiction; because the indictment was defective; or because the trial court erroneously ruled that an offense which was found to have been committed was not a felony. *See* text accompanying notes 38-42, *supra*. In the first two cases, the defendant was never legally in jeopardy, and in the third case, facts were found that supported a verdict of guilty.

controversy in that body centered around whether the clause should be refined to negate an implication that a defendant could not be tried again following an erroneous conviction. As will be recalled, the original House draft of the double jeopardy clause specifically prohibited "more than one . . . . trial for the same offense." The House of Representatives debate on this version (previously summarized) shows unanimous support (among the debaters) for the proposition that an acquitted defendant should not be subject to a new trial. (Indeed, Representative Livermore went so far as to state that even clearly guilty individuals who had been acquitted for want of evidence should not be retried.) Each of the debaters focused on how best to protect the accused individual's rights; no concern was expressed at all about promoting any governmental interest in securing convictions. To the contrary, the one concern expressed was that the House's version of the double jeopardy clause might by its terms unfairly preclude *convicted* defendants from securing a new trial. Roger Sherman, who had supported the convicted defendant's right to obtain a new trial in appropriate circumstances, sat on the House-Senate conference committee that eliminated the House's language prohibiting "more than one trial." In and of itself, this does not demonstrate that the final double jeopardy clause established a convicted defendant's right to a retrial. This evidence does render unlikely, however, the possibility that the House-Senate version was not meant to protect an acquitted individual's right to avoid being retried.

In short, the rapid approval (apparently with little debate) of the Senate's substitute double jeopardy clause in no way suggests an essential departure from the general understanding of the House's double jeopardy concept.[78] The prohibition on placing a person "twice . . . in jeopardy" certainly echoes the Madisonian bar to "more than one punishment or trial."[79] Historical treatises indicate that "life or limb" is probably best read as a shorthand phrase for a crime punishable as a

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[78] The deletion of Madison's prohibition on more than one trial conceivably might be interpreted as a concession to those who believed that a convicted defendant might be entitled to a second trial under appropriate circumstances.

[79] A second trial posing the risk of punishment would once again expose an acquitted individual to the danger of 'death, loss or injury," Webster's definition of "jeopardy." *See* text accompanying note 6, *supra*. Furthermore, as previously shown, the bar against being place "twice in jeopardy" was viewed by at least one court as prohibiting a second trial following an acquittal. *See Respublika v. Shaffer*, 1 Dall. 137 (Pa. Oyer and Terminer 1788).

felony.[80] In sum, while the matter is not free from doubt,[81] it seems probable that the double jeopardy clause originally was meant to bar the second punishment or second trial of an individual acquitted of a felony, except perhaps in the few special situations noted above.

1. Government Appeals Resulting in New Trials

Consistent with this most probable interpretation of the double jeopardy clause, it would appear to follow that the clause bars the government from appealing an acquittal of a felony, in order to obtain a new trial, except perhaps in a few special cases. As previously noted, Hale and Hawkins indicated that appeals of acquittals (writs of error) were not authorized in 18th century England, except in three special situations: (1) the initial trial court lacked jurisdiction; (2) the initial indictment was defective; and (3) facts were found demonstrating that an offense had been committed, but the court erroneously held as a matter of law that the offense was not a felony.[82] Alternatively stated, the third exception would appear to allow the government to appeal an "acquittal" that clearly would have been a "conviction," had the law correctly been applied to undisputed findings of fact.

We have found no evidence bearing on the question of whether these exceptions to the "no appeal" rule were recognized in the American colonies. Even assuming that they were, however (on the ground that

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[80] *See* text accompanying notes 12-15, *supra*.

[81] One commentary argues that "[t]he fact that 'jeopardy' was substituted for 'trial' in the final version of the [Fifth] [a]mendment may suggest an alternative explanation of the *Ball* doctrine [which flatly bars second trials of acquitted defendants]. If the evil about which the framers were concerned was harassment of a defendant by successive prosecutions for the same activity, a jeopardy properly may be thought of as continuing until the final settlement of any one prosecution. Thus . . . the correction of error upon appeal may be viewed as a continuation of both the jeopardy and the proceeding from which it arises." Mayers & Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 Harv. L. Rev. 1, 7 (1960) (citations omitted). We do not find this argument convincing. No textual or historical evidence is presented in support of the implicit suggestion that the substitution of the word "jeopardy" for "trial" manifests an original understanding that, as part of "one prosecution," the second trial of an acquitted person could be allowed following a government appeal. Moreover, as the commentary acknowledges, the "one continuing jeopardy" theory "*declines* to take as the analytical touchstone of the constitutional prohibition [of double jeopardy] the pre-1790 English common law." 74 Harv. L. Rev. at 7 (emphasis added and citation omitted).

[82] *See* text accompanying notes 38-42, *supra*.

colonial lawyers viewed Hale's and Hawkins' *Pleas of the Crown* as persuasive authorities), the general rule barring appeals of acquittals is done very little harm. In the first two situations cited above, the proceedings were invalid *ab initio*; the accused individual actually was not placed in jeopardy. In the third situation, the defendant's guilt actually had been established; the defendant had in reality been "convicted," according to a correct legal classification of his actions.

2. Government Appeals Not Resulting in New Trials

We have found no textual or historical evidence bearing on the status of government appeals of felony acquittals that do not result in new trials.[83] An appeal not for the purpose of securing a new trial presumably would not contravene the plain words of Madison's double jeopardy clause, which merely prohibited "more than one punishment or trial for the same offense." Whether such an appeal would contravene the Constitution's double jeopardy clause -- which prohibits an accused individual being "twice put in jeopardy" -- is less than apparent. Two alternative positions are colorable.

On the one hand, to the extent such an appeal is viewed merely as the continuation of a single criminal proceeding, that appeal arguably does not twice expose an accused individual to "danger" or "peril." In support of this position, it might be noted that Webster defines "to appeal" as "[t]o call or remove a cause from an inferior court to a superior judge or court." Thus, an appeal involves the removal of a *single* cause (involving a single jeopardy in the criminal context) to a new court, rather than the creation of a *second* cause.

On the other hand, to the extent a felony "acquittal" definitively sets an individual free from a charge, any appeal by its very nature arguably exposes that individual anew to the possibility of harm implied by the word "jeopardy." In support of this position, it might be noted that Webster defines "acquittal" as "[a] judicial setting free from the charge of an offense; as, by verdict of a jury, or sentence of a court." If an acquittal "sets an individual free" from a charge, the initial jeopardy flowing from that charge has, presumably, been terminated. Thus,

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[83] As discussed in section IV of this report, *infra*, the appeal of an acquittal on the ground of legal error might not result in a new trial, if correct application of the law to undisputed findings of fact in the initial proceeding would have supported a verdict of guilty.

according to this logic, the appeal of an acquittal (even an appeal that would not require a new trial) inevitably exposes an individual to jeopardy of punishment for a second time.

While the matter is not free from doubt, we believe that the better reading is that the double jeopardy clause, as originally understood, probably does not preclude government appeals of felony acquittals, if such appeals would not result in new trials. Eighteenth century commentaries and formulations of the double jeopardy principle stressed the principle's prohibition against second trials of individuals who had been acquitted -- they were not cast in terms of a prohibition against government appeals that did not bring about new trials. [84] Similarly, Madison's draft of the double jeopardy clause prohibited multiple trials or punishments, not appeals. The limited discussion of Madison's draft in the House of Representatives focused not on appeals, but, rather, on multiple punishments and multiple trials. (Indeed, it may be that none of the debaters had contemplated the possibility of an appeal not resulting in a new trial.) There is no evidence to suggest that the final version of the double jeopardy clause was aimed at anything other than the twin evils of multiple punishments and multiple trials. Appeals not resulting in new trials do not implicate those evils. For all of these reasons, we have tentatively concluded that the double jeopardy clause should not be deemed a barrier to appeals of felony acquittals that would not result in new trials. We acknowledge, however, that we have been unable to unearth any case law evidence bearing directly on this conclusion.

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[84] This statement arguably should be slightly qualified; the Maryland state constitutional convention's draft double jeopardy clause provided "that there be no appeal from matter of fact, or second trial after acquittal". Because this clause was phrased in the disjunctive, it is arguable that an "appeal from matter of fact" may have included appeals that did *not* involve a new trial. This argument is undermined, however, by the absence of any evidence regarding the existence in the 18th century of appeals that did *not* involve new trials. Morevover, as previously noted, this double jeopardy proposal was not adopted by the Maryland convention. *See* note 60, *supra*. Blackstone's statement that "an acquittal on an indictment [was] a good bar to an appeal by the common law" (*see* text accompanying note 27, *supra*) is not a second possible qualification. In that passage, Blackstone employed the word "appeal" to designate an original criminal proceeding brought at the behest of a harmed individual; he was not referring to the removal of a criminal proceeding from a lower court to a higher court.

D. Summary

Analysis of the double jeopardy clause's original meaning prompts the following three tentative conclusions: (1) the clause was intended to apply only to felony cases (i.e., individuals acquitted of misdemeanors do not appear to be protected by the double jeopardy clause);[85] (2) the clause appears to prohibit the government from appealing an acquittal of a felony, if a successful appeal would result in a new trial -- except perhaps when the trial court lacked jurisdiction, the initial indictment was defective,[86] or the law was mistakenly applied to undisputed findings of fact indicating guilt; and (3) while the matter is subject to doubt, the clause probably does not prohibit the government from appealing an acquittal of a felony, if a successful appeal would not result in a new trial.

II. FEDERAL CASE LAW DEVELOPMENT OF THE FEDERAL DOUBLE JEOPARDY CLAUSE WITH PARTICULAR ATTENTION TO APPEALS

The double jeopardy clause of the Fifth Amendment provides "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."[87] This section briefly surveys the federal case law development of that provision, with particular attention to its applicability to appeals.

A. Historical Summary of the Cases

1. Key 19th Century Cases

The first Supreme Court decision to provide a substantive construction of the double jeopardy clause was *Ex Parte Lange*, 85 U.S. (18 Wall.) 163 (1873).[88] A jury convicted the defendant in *Lange* of violating

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[85] This conclusion is at odds with the Supreme Court's holding in *Ex Parte Lange*, 85 U.S. (18 Wall.) 163 (1873), discussed *infra*.

[86] This conclusion is at odds with *United States v. Ball*, 163 U.S. 662 (1896), discussed *infra*.

[87] U.S. Const. amend. V.

[88] The few earlier Supreme Court cases dealing with the double jeopardy clause had not attempted to define the scope of protection afforded by that clause. For example, in *United States v. Perez*, 22 U.S. (9 Wheat.) 579 (1824) (Story, J.), the Court never even directly mentioned the clause in holding that the discharge of an individual charged with a capital offense due to a hung jury did not preclude that inidividual's retrial.

a federal statute that prohibited the theft of mail bags. The statute specified a penalty of imprisonment for not more than one year *or* a fine of not more than $200. The trial judge, however, sentenced the convicted defendant to one year in prison *and* a $200 fine. The defendant began his prison term immediately and paid the fine the next day. After five days, the defendant was returned to the trial court for the purpose of vacating the prior judgment. The court vacated the first judgment and sentenced the defendant to one year in prison, without giving defendant credit for the fine paid or reimbursing him. On appeal, the Supreme Court held that the resentencing of the defendant violated the double jeopardy clause. (Thus, the court ordered that the prisoner be released, inasmuch as the sentence under which he was being held was without authority.) The Court's interpretation of the clause, 85 U.S. at 168, has been cited in numerous subsequent double jeopardy cases:

> If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense. And although there have been nice questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offence, or to bring the party within the jurisdiction of more than one court, there has never been any doubt of its entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offense.[89]

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[89] The Court in *Lange*, 85 U.S. (18 Wall.) at 173, also concluded that the double jeopardy clause protects individuals charged with misdemeanors as well as those accused of felonies:

> If we reflect that at the time this maxim [that no man shall more than once be placed in peril upon the same accusation] came into existence almost every offense was punished with death or other punishment touching the person, and that these pleas [autrefois acquit and autrefois convict] are now held valid in felonies, minor crimes, and misdemeanors alike, . . . we shall see ample reason for holding that the principle intended to be asserted by the constitutional provision [the double jeopardy clause] must be applied to all cases where a second punishment is attempted to be inflicted for the same offense by a judicial sentence.

This holding appears to be at odds with original meaning: the term "life or limb" apparently was understood as referring to felonies in the 18th century. *See* text accompanying notes 12-15, *supra*. We do not believe, however, that any attempt to overturn the *Lange* holding would be successful. This holding is, we believe, far too well entrenched to be overruled.

Nineteen years later, in *United States v. Sanges*, 144 U.S. 310 (1892), the Supreme Court rejected the suggestion that the government had a common law right to appeal an unfavorable judgment. Absent express statutory authority, the Court stated, the government could not appeal an adverse final judgment, whether resulting from a verdict of acquittal or from a pretrial ruling on a question of law.[90] While the Court implied that Congress could authorize appeals by the government, 144 U.S. at 318, it did not address the constitutionally permissible scope of such legislation.

United States v. Ball, 163 U.S. 662 (1896), involved the applicability of the double jeopardy clause to reprosecution after an acquittal and to retrial after appellate reversal of a conviction. The government indicted Ball and two others for murder. The jury acquitted Millard F. Ball but found his codefendants (John C. Ball and Robert E. Boutwell) guilty, and the trial judge entered judgment on the verdicts. The Supreme Court, on a writ of error, reversed the convictions because the indictments were fatally defective.[91] On remand, the trial court dismissed the indictments and the grand jury reindicted all three defendants for murder. After the judge denied Millard F. Ball's plea of former acquittal and codefendants' plea of former conviction, the jury returned verdicts of guilty on all three. The Supreme Court, per Justice Gray, reversed Millard F. Ball's conviction but upheld the other two convictions. Addressing himself first to Millard F. Ball's reindictment, he rejected the "English rule" that defective indictments could not legally place an individual in jeopardy.[92] Justice Gray reasoned that the rule would unfairly grant a prosecutor a second opportunity to convict whenever he could discover a defect in the original indictment. The Court held that a verdict of acquittal on the general issue of guilt on an indictment whose defect is not objected to before verdict bars a second indictment for the same offense. Justice

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[90] 144 U.S. at 318. The government had sued out a writ of error after the trial judge sustained the defendant's demurrer and quashed the indictment. Strictly construed, *Sanges* proscribed only review by writ of error, but the rationale applies equally to review by appeal. Under current law, the United States is authorized to appeal from a district court's dismissal of an indictment except where the double jeopardy clause forbids further prosecution. 18 U.S.C. § 3731 (1982).

[91] *Ball v. United States*, 140 U.S. 118 (1891). The indictments failed to allege that the victim died within a year and a day of the assault, an essential element of the crime.

[92] *See Vaux's Case*, 76 Eng. Rep. 992 (Q.B. 1591). As previously indicated, it appears that the rule in this case continued to hold sway in 18th century England. *See* text accompanying notes 38-39, *supra*.

Gray distinguished between a void judgment of acquittal before a court lacking jurisdiction, which did not bar reindictment, and a voidable judgment on a defective indictment, which could be challenged by defendant but not by the government. In dictum, Justice Gray stated that *Sanges* supported this proposition: "The verdict of acquittal was final, and could not be reviewed, on error or otherwise, without putting [the defendant] twice in jeopardy, and thereby violating the Constitution." 163 U.S. at 669. Justice Gray upheld, however the convictions of John C. Ball and Robert E. Boutwell, "because it is quite clear that a defendant, who procures a judgment against him upon an indictment to be set aside, may be tried anew upon the same indictment, or upon another indictment, for the same offense of which he has been convicted" 163 U.S. at 672 (citations omitted).

2. The *Kepner* Decision's Rejection of "Continuing Jeopardy"

The Supreme Court squarely addressed the double jeopardy status of federal acquittals in *Kepner v. United States*, 195 U.S. 100 (1904). Sitting without a jury, a trial judge found Kepner, a Philippine attorney, not guilty of embezzlement. Consistent with local custom, the government appealed to the Philippine Supreme Court, which reversed Kepner's acquittal, found him guilty, and sentenced him to prison. Kepner appealed to the United States Supreme Court, arguing that a double jeopardy provision in the Philippines' organic law extended Fifth Amendment protection to the Islands. A five to four majority of the Court agreed with Kepner's interpretation of the organic law. The majority adopted Justice Gray's *Ball* dictum as conclusive and held that the government could not appeal from an acquittal.[93] In dissent, Justice Holmes formulated the "continuing jeopardy" concept: "[I]t seems to me that logically and rationally a man cannot be said to be more than once in jeopardy in the same cause, however often he may be tried. The jeopardy is one continuing jeopardy from its beginning to the end of the cause." 195 U.S. at 134. Holmes asserted that a rule prohibiting appeals was inconsistent with existing precedents allowing retrial after hung juries

[93] Analyzing the majority's opinion, one commentator stated that "the Court apparently equated appeal with reprosecution within the constitutional prohibition. Either the Court believed that reversal on appeal results in a constitutionally proscribed retrial or that the appeal itself violates the constitutional ban, because both represent a threat to the defendant's freedom." Comment, *Double Jeopardy and Government Appeals of Criminal Dismissals*, 52 Tex. L. Rev. 303, 314 (1974).

and after appellate reversals of convictions. While Holmes specified that his analysis applied only to government appeals from errors of law, 195 U.S. at 135, it has been pointed out that the "continuing jeopardy" concept justifies appellate review of factfinding as well. [94]

3. 20th Century Rejections of Appeals of Acquittals

Over half a century later, the Supreme Court held that even an "implicit acquittal" entitled a defendant to protection from double jeopardy. *Green v. United States*, 355 U.S. 184, 190-91 (1957). The defendant in *Green* was charged with first degree murder. The judge instructed the jury that it could find the defendant guilty of either first or second degree murder, and the jury convicted the defendant of the lesser offense. The conviction was overturned on appeal and the defendant was awarded a new trial. The defendant was charged with and convicted of first degree murder at the second trial. The defendant objected to the first degree charge on double jeopardy grounds, and the Supreme Court upheld this claim. The Court held that, although the first jury had not returned an express verdict of acquittal as to the first degree charge, the jury's conviction of the lesser offense constituted an implied acquittal of the greater charge. Adhering to the premise that verdicts of acquittal are final, the Court concluded that the implicit acquittal absolutely barred a second trial for first degree murder, thereby treating the implicit acquittal as if it had been an express verdict.

The Supreme Court next squarely dealt with appellate review of an acquittal in 1962. In *Fong Foo v. United States*, 369 U.S. 141 (1962) (per curiam), the trial judge determined during testimony at trial that the prosecutor had refreshed the memory of an important witness. Citing this "prosecutorial misconduct" and the "lack of credibility" of two other government witnesses, the judge directed the jury to acquit. The court of appeals issued a writ of mandamus ordering the trial judge to vacate the acquittal and reassign the case for trial. The Supreme Court reversed, per curiam. Relying on the *Ball* dictum, the Court held that a final judgment of acquittal by a court with jurisdiction in a trial on a final indictment is unreviewable. In doing so, the Court distinguished an acquittal from a prejudgment termination such as a mistrial. 369 U.S. at 143. [95] Justice Clark dissented. He objected to the majority's reliance on

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[94] *See id.* at 315.

[95] The distinction between mistrial and acquittal has been criticized on the ground that an improper mistrial has the same harmful effect on the accused's interest in being

a mid-trial acquittal as grounds for automatically precluding retrial. Reasoning that the retrial issue should be a policy decision, Justice Clark stated that "[t]he word 'acquittal' . . . is no magic open sesame. . . ." 369 U.S. at 144.

One Supreme Court decision that affects the double jeopardy status of all state criminal proceedings (including appeals of acquittals) deserves brief mention. In *Benton v. Maryland*, 395 U.S. 784 (1969), the Supreme Court held that the double jeopardy clause applies fully to the states. Benton was convicted of burglary and acquitted of larceny in a Maryland trial court and he appealed. Defendant's case was remanded to the trial court by the Maryland Court of Appeals for reindictment and new trial. On retrial, Benton was convicted of both burglary and larceny and he appealed. The Maryland Court of Special Appeals affirmed the conviction, and the Supreme Court granted certiorari. The Court, per Justice Marshall, held that Benton's retrial on the larceny count after an initial acquittal violated the double jeopardy clause. In so holding, the Court overruled *Palko v. Connecticut*, 302 U.S. 319 (1937), which had held that federal double jeopardy standards were not applicable against the states. The Court found "that the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and that it should apply to the states through the Fourteenth Amendment." 395 U.S. at 794.

Seven years after *Benton*, in *United States v. Morrison*, 429 U.S. 1, 3 (1976), the Court made it clear that the prohibition against government appeals of acquittals also applied to bench trials, in which a judge rather than a jury acts as the trier of fact. The Court stated that "[s]ince the Double Jeopardy Clause of the Fifth Amendment nowhere distinguishes between bench and jury trials, the principles given expression through that clause apply to cases tried to a judge." 429 U.S. at 3.

One year later, in *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977), the Supreme Court held that the double jeopardy clause bars an appeal by the government from a trial judge's judgment of

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absolved as an erroneously declared acquittal. *See* Note, *Double Jeopardy: The Reprosecution Problem*, 77 Harv. L. Rev. 1272, 1286 (1964). One commentator has belittled this criticism, stating that it "overlooks a functional justification for distinguishing the two: an acquittal not only connotes finality, but also signifies a decision on the merits, even if erroneous. Mistrial, by contrast, contemplates another trial and provides a valuable tool for just and effective criminal administration." Comment, *supra*, 52 Tex. L. Rev. at 316 n.71.

acquittal after a deadlocked jury is discharged. The Court reasoned that the "controlling constitutional principle" of the double jeopardy clause is the prohibition against multiple trials. The Court stated that "where a government appeal presents no threat of successive prosecutions, the Double Jeopardy Clause is not offended." 430 U.S. at 569-70. In *Martin Linen Supply* a second prosecution would have been required had the government's appeal been successful; accordingly, the government appeal was barred.

Shortly thereafter, in *Sanabria v. United States*, 437 U.S. 54 (1978), the Supreme Court addressed the status of pre-verdict acquittals that are issued as a matter of law. In *Sanabria* the trial judge acquitted the defendant after trial had commenced but before a final verdict was rendered. The judge based his ruling on a clearly erroneous interpretation of the statute in question (a federal anti-gambling statute, 18 U.S.C. § 1955) and on the insufficiency of evidence created by his erroneous exclusion (at the defendant's request) of certain prosecutorial evidence. 437 U.S. at 59, 68. The government appealed on the ground that the judgment of acquittal, though unreviewable as to one basis of liability, was reviewable as to a second, discrete basis of liability. The court of appeals agreed, and remanded for a new trial of the purportedly reviewable charge. The Supreme Court, per Justice Marshall, reversed. The Court first rejected the theory that the single-count indictment contained two discrete bases of liability, then stated flatly that "there is no exception permitting retrial once the defendant has been acquitted, no matter how 'egregiously erroneous' . . . the legal rulings leading to that judgment might be." 437 U.S. at 75 (citations omitted). In a brief one paragraph dissent, Justice Blackmun, joined by Justice Rehnquist, stated that "there is misdescription by the trial court of its order, and, [therefore], . . . the defendant petitioner's maneuvers [defendant's successful motion to exclude certain prosecutorial evidence] should result in a surrender of his right to receive a verdict by the jury that had been drawn." 437 U.S. at 80-81.

4. Sufficiency of the Evidence and Acquittals

Unlike acquittals at the trial court level, appellate court rulings that are tantamount to acquittals do not invariably bar retrials. From *United States v. Ball*, 163 U.S. 662, 672 (1896) to *Burks v. United States*, 437 U.S. 1 (1978), it appeared to be "[a]n established principle of [federal] criminal procedure . . . that a defendant can be retried for an offense when his prior conviction for that offense has been set aside on

appeal."[96] In *Burks*, however, the Court held that when an appellate court reverses a conviction on the grounds of insufficient evidence at trial, a defendant cannot be retried. A jury convicted Burks of using a dangerous weapon while committing a bank robbery. His principal defense was insanity. The trial court denied defendant's motions for acquittal and new trial, and he appealed from these denials. The appeals court agreed with Burks that the government's evidence was insufficient as a matter of law to refute the insanity plea, and remanded to the district court for a determination of whether a directed verdict of acquittal should be entered or a new trial ordered. *United States v. Burks*, 547 F.2d 968, 970 (6th Cir. 1976). The Supreme Court granted certiorari and ruled that the double jeopardy clause barred further prosecution of the defendant. The Court stated:

> Since we necessarily afford absolute finality to a jury's *verdict* of acquittal -- no matter how erroneous its decision -- it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty.

437 U.S. at 16 (1978).

Four years later, in *Tibbs v. Florida*, 457 U.S. 31 (1982), the Supreme Court narrowed the *Burks* exception by distinguishing between reversals due to insufficient evidence and reversals due to the weight of the evidence. In *Tibbs* the Florida Supreme Court reversed defendant's murder and rape convictions at a jury trial, citing its disagreement with the weight accorded the evidence by the jury. The trial court denied the state's motion for a retrial on double jeopardy grounds. On appeal, the Florida Supreme Court reversed, granting the state's motion. The United States Supreme Court affirmed the Florida Supreme Court's ruling. The Court pointed out that a reversal due to insufficient evidence means a rational factfinder could not convict the defendant when viewing the evidence in the light most favorable to the prosecution. 457 U.S. at 40-41. In contrast, a reversal due to the weight of the evidence is appropriate when a reviewing court finds that, although the evidence was sufficient to

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[96]Noonan, *Criminal Procedure III: Double Jeopardy*, 1985 Annual Survey Am. L. 309, 310 (citation omitted). Prior to *Burks*, federal courts had held that a defendant "waived" his double jeopardy right by requesting a new trial on appeal. *See Yates v. United States*, 354 U.S. 298 (1957); *Bryan v. United States*, 338 U.S. 552 (1950).

submit the question to the jury, it disagrees with the jury's resolution of conflicting evidence. 457 U.S. at 42-43. The Court ruled that the defendant could only be retried in the latter situation. 457 U.S. at 42-43 (1978). Justice White's dissent (joined by Justices Brennan, Marshall, and Blackmun) expressed concern that some defendants who merited acquittal at trial would be retried because reviewing judges who actually doubted the sufficiency of the evidence might base reversal on the weight of the evidence.

The Supreme Court further limited *Burks* in *Justices of Boston Municipal Court v. Lydon*, 104 S. Ct. 1805 (1984), upholding Massachusetts' two-tier trial system that permits a defendant to be retried without appellate review of the sufficiency of the evidence at his first-tier trial. A criminal defendant can choose a jury or a bench trial under Massachusetts law.[97] A defendant can appeal a jury conviction but not a bench trial conviction; he may, however, petition for trial *de novo* in the latter case. Lydon was convicted of possessing tools for breaking into automobiles at a bench trial. He then requested trial *de novo*, but before it began, he moved for dismissal of the trial judge's decision on the ground of evidentiary insufficiency. The motion was denied, and the Supreme Judicial Court of Massachusetts rejected Lydon's appeal, reasoning that a defendant is not placed in double jeopardy when trial *de novo* is the only relief available from a conviction allegedly based on insufficient evidence. Lydon then petitioned for a writ of habeas corpus, and the district court held that *Burks* conferred on the defendant the constitutional right not to be retried if the evidence was insufficient at his first trial.[98] The court of appeals affirmed. *Lydon v. Justices of Boston Municipal Court*, 698 F.2d 1 (1982).

The Supreme Court reversed.[99] Writing for the Court, Justice White relied on Holmes' "continuing jeopardy" concept (set forth in

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[97] Mass. Gen. Laws Ann. ch. 218, §§ 26, 27A (1984).

[98] *Lydon v. Justices of Boston Municipal Court*, 536 F.Supp. 647 (1982). The district court granted the writ, concluding that Lydon was "in custody" and had exhausted state remedies. The court relied on the Supreme Court's 1969 holding that the double jeopardy clause is fully enforceable against the states through the Fourteenth Amendment. *See Benton v. Maryland*, 395 U.S. 784 (1969), discussed in the text between notes 95-96, *supra*.

[99] In reversing, the Court relied heavily on its decision in *Ludwig v. Massachusetts*, 427 U.S. 618 (1976), which upheld from double jeopardy attack an earlier version of Massachusetts' two-tier system. In *Lydon* the Court stressed that the two-tier system

Kepner). According to the Court, "continuing jeopardy" underlies the general rule allowing retrial after an appellate reversal. The two-tier system can be regarded as "a single, continuous course of judicial proceedings" terminated neither by Lydon's first-tier conviction nor by his claim of evidentiary insufficiency. 104 S. Ct. at 1812. In *Burks*, the Court merely held that appellate reversals due to insufficient evidence are the equivalent of trial level acquittals and thus terminate the initial jeopardy. *Burks* did not determine whether a defendant who alleged evidentiary insufficiency has the right to appellate review, before retrial, of the evidence at his first trial. Justice White concluded that the right to trial *de novo* gives "a defendant more -- rather than less -- of the process normally extended to defendants in this nation." 104 S. Ct. at 1814. Accordingly, the Massachusetts system passed constitutional muster; it provided benefits to the defendant without allowing "governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect." 104 S. Ct. at 1114. Justice Brennan, joined by Justice Marshall, concurred in the judgment but rejected the majority's reliance on the "overly formalistic and abstract" notion of continuing jeopardy. Justice Brennan viewed "continuing jeopardy" as little more than a label that had never been accepted by a majority of the Court. 104 S. Ct. at 1817-18.

The Supreme Court further underscored the limited scope of the *Burks* holding in *Richardson v. United States*, 104 S. Ct. 3081 (1984). Richardson had been tried for three narcotics violations. The jury acquitted him of one count and failed to return a unanimous verdict on the remaining two. A mistrial was declared as to the latter two counts. The trial court denied Richardson's motion for acquittal based on evidentiary insufficiency and scheduled a retrial. Richardson argued on appeal that *Burks* and *Abney v. United States*[100] entitled him to interlocutory review of the evidence at his first trial. The Supreme Court disagreed. Justice Rehnquist's majority opinion stressed that the double jeopardy clause's protections are relevant only when there has been an event terminating the original jeopardy. Retrial following a hung jury

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merely allows a convicted defendant a second chance at acquittal on the facts. 104 S. Ct. at 1811-12 (citing *Ludwig*, 427 U.S. at 632).

[100] 431 U.S. 651 (1977). The Court in *Abney* held that the special nature of the double jeopardy right placed a pretrial order denying defendant's double jeopardy claim within the "collateral order" exception to the final judgment rule, rendering the order appealable.

does not violate the double jeopardy clause, [101] given society's "interest in giving the prosecution one complete opportunity to convict those who have violated its laws." 104 S. Ct. at 3085. The Court concluded that a different rule would interfere with the administration of justice. 104 S. Ct. at 3086. In dissent, Justice Brennan reasoned that, under *Burks*, the defendant had the right to appellate review of his evidentiary insufficiency claim prior to a new trial. Justice Brennan argued that the majority's approach contravened the double jeopardy principle of allowing the state only one fair opportunity to prove its case. He emphasized that under the Court's holding a defendant constitutionally entitled to an acquittal at trial who is not acquitted cannot avoid retrial. Nevertheless, a defendant who is tried before a judge or jury that demands sufficient evidence or a defendant who was convicted despite mistakes of fact or law will not be retried. 104 S. Ct. at 3087. Justice Brennan deemed such diverse outcomes logically inconsistent.

Very recently, in *Smalis v. Pennsylvania*, 106 S. Ct. 1745 (1986), a unanimous Court ruled that a trial judge's granting of a demurrer based on insufficiency of the evidence constitutes a non-appealable acquittal for double jeopardy purposes. Petitioners were charged with various crimes in connection with a fire in a building they owned that killed two tenants. Following the close of the prosecution's case in chief at their Pennsylvania state court bench trial, petitioners filed a demurrer challenging the sufficiency of the evidence. The trial court sustained the demurrer, and the Pennsylvania Superior Court quashed the state's appeal on the ground that it was barred by the double jeopardy clause. The Pennsylvania Supreme Court reversed, holding that the granting of a demurrer is not the functional equivalent of an acquittal and that, for double jeopardy purposes, a defendant who demurs at the close of the prosecution's case in chief "elects to seek dismissal on grounds unrelated to his factual guilt or innocence."

The Supreme Court granted certiorari and reversed. Citing *Sanabria*, Justice White's opinion stated that "a ruling that as a matter of law the State's evidence is insufficient to establish his factual guilt . . . . is an acquittal under the Double Jeopardy Clause." 106 S. Ct. at 1748. Justice White rejected Pennsylvania's argument, based on *Lydon*, that resumption of petitioners' bench trial following a reversal on appeal would merely constitute "continuing jeopardy." According to Justice White,

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[101] *United States v. Perez*, 22 U.S. (9 Wheat.) 579 (1824).

"*Lydon* teaches that '[a]cquittals, unlike convictions, terminate the initial jeopardy.' . . . . Thus, whether the trial is to a jury or to the bench, subjecting the defendant to postacquittal factfinding proceedings going to guilt or innocence violates the Double Jeopardy Clause." 106 S. Ct. at 1749. In short, "[w]hen a successful postacquittal appeal by the prosecution would lead to proceedings that violate the Double Jeopardy Clause, the appeal itself has no proper purpose. Allowing such an appeal would frustrate the interest of the accused in having an end to the proceedings against him." *Id.*

5. Appealable Discharges Not Constituting "Acquittals'

Pre-trial discharges have been held not to pose the double jeopardy obstacles presented by acquittals. In *Serfass v. United States*, 420 U.S. 377 (1975), the Supreme Court pointed out that a pre-trial dismissal occurs prior to the time when jeopardy attaches, and held, therefore, that a defendant is not exposed to double jeopardy if the government appeals and subsequently resumes prosecution. In *Serfass*, an indictment for draft evasion was dismissed upon the defendant's pre-trial motion alleging that he had been denied full consideration of his conscientious objector status. The court of appeals rejected defendant's double jeopardy objections to the government's appeal of the dismissal, and the Supreme Court affirmed. The Court ruled that "[w]ithout risk of a determination of guilt, jeopardy does not attach, and neither an appeal nor further prosecution constitutes double jeopardy." 420 U.S. at 391-92.

Double jeopardy likewise does not bar government appeal of a judge's post-trial discharge following conviction by the trier of fact. [102] According to the Supreme Court, this follows from the fact that a successful government appeal of a post-conviction judgment would allow reinstatement of the guilty verdict without threat of actual reprosecution. *United States v. Wilson*, 420 U.S. 332 (1975). A jury found Wilson guilty of unlawful conversion of union funds, but the trial judge granted defendant's post-verdict motion to dismiss on grounds of pre-indictment delay. The court of appeals rejected the government's appeal on double jeopardy grounds, deeming the dismissal an unreviewable acquittal. The Supreme Court reversed, noting that a new trial was not required for reinstatement of the guilty verdict. The Court stated that "a defendant has no legitimate claim to benefit from an error of law when that error

[102] Such post-trial discharges in federal court are authorized by Fed. R. Crim. P. 29(c).

could be corrected without subjecting him to a second trial before a second trier of fact." 420 U.S. at 345.

The Supreme Court applied the principle laid down in *Wilson* to bench trials in *United States v. Jenkins*, 420 U.S. 358 (1975). Following a bench trial, the trial judge dismissed Jenkins' indictment for failing to report for induction into the armed services. The judge reasoned that it would be unfair to apply retroactively a Supreme Court ruling that local draft boards need not consider post-induction-order claims for conscientious objector status. The Second Circuit dismissed the government's appeal for lack of jurisdiction under the Criminal Appeals Act; [103] the court of appeals believed that Jenkins had been acquitted and that appeal was barred regardless of the need for a second trial. *United States v. Jenkins*, 490 F.2d 868, 880 (2d Cir. 1973).

The Supreme Court affirmed, but on grounds different from those relied upon by the Second Circuit. According to Justice Rehnquist, *Wilson* held that "[w]hen a case has been tried to a jury, the Double Jeopardy Clause does not prohibit an appeal by the Government providing that a retrial would not be required in the event the Government is successful in its appeal." 420 U.S. at 365. That principle applied in the instant case, since the double jeopardy clause does not distinguish between bench and jury trials. Because the Court could not discover a clear resolution of the factual issues against Jenkins in the trial court, the dismissal of the government's appeal was allowed to stand. The Court noted that, with no finding of guilt to reinstate, remand to the trial court for additional findings would have been required if the government's appeal succeeded. The Court concluded that such a remand would be inappropriate: "The trial, which could have resulted in a judgment of conviction, has long since terminated in [Jenkins'] favor. To subject him to any further such proceedings at this stage would further violate the Double Jeopardy Clause. . . ." 420 U.S. at 370. [104]

The Supreme Court also has held that a mid-trial dismissal secured by defendant on grounds unrelated to guilt or innocence does not create a double jeopardy bar to government appeals. *United States v. Scott*, 437 U.S. 82 (1978). After hearing all of the evidence and before submitting

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[103] 18 U.S.C. § 3731 (1970).

[104] *Jenkins* was subsequently rejected by the Court in *United States v. Scott*, 437 U.S. 82 (1978), to the extent that it barred every reversal of a mid-trial dismissal that would lead to the resolution of factual issues on remand. *See* note 105, *infra*.

the case to the jury, the trial judge granted Scott's motion to dismiss the first two counts of a three count indictment for distribution of narcotics. The judge ruled that Scott had been prejudiced by pre-indictment delay. Thereafter the jury rendered a verdict of not guilty as to the third count. The court of appeals denied the government's appeal of the two trial court dismissals. The Supreme Court reversed the court of appeals and remanded to that court for consideration of the merits of the government's appeal. [105] The Court pointed out that Scott could have awaited verdict, and, in the event he was found guilty, entered a post-verdict motion for dismissal. (If such a motion had been granted, the government could have appealed. See *United States v. Wilson, infra.*) Instead, Scott elected to seek early termination of his trial on grounds unrelated to his guilt or innocence. His motion prevented the government from continuing its production of evidence tending to show Scott's guilt. *See* 437 U.S. at 96-99. Accordingly, Scott had no double jeopardy right to avoid a second trial. As one commentator has noted, *Scott* indicates that dismissals based on legal grounds -- which do not implicate factual guilt or innocence -- are to be treated differently than dismissals based on factual grounds. [106] The latter dismissals are barred from reconsideration on double jeopardy grounds, while the former are not. Justice Brennan's dissenting opinion, joined by three other Justices, rejected this "fact/law" distinction as "insupportable in either logic or policy." 437 U.S. at 103.

The "fact/law" distinction set forth in *Scott* was discussed most recently in *Rodrigues v. Hawaii*, 469 U.S. 1078 (1984) (dissent from denial of certiorari). Rodrigues was indicted on several counts of sodomy and rape. Prior to the empanelling of a jury, Rodrigues' attorney raised the defense of mental disease. The trial judge suspended the preliminary proceedings, and, after a ten day hearing on the insanity issue, entered an acquittal on grounds of insanity. The state appealed, and the Supreme Court of Hawaii, in a divided opinion, reversed and remanded on the ground that the trial court erred in weighing the evidence as to insanity. The Supreme Court denied certiorari, and Justice Brennan, joined by Justice Marshall, dissented. The dissent noted that the trial judge

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[105] In doing so the Court (by a five to four majority) overruled its holding in *United States v. Jenkins*, 420 U.S. 358 (1975), that any mid-trial discharge of a defendant would bar further proceedings if a resolution of factual issues would be required on reversal and remand.

[106] *See* Note, *Double Jeopardy: When is an Acquittal an Acquittal?*, 20 B.C.L. Rev. 925, 939-940 (1979).

concededly had sat as a "trier of fact" on the insanity issue. As Justice Brennan pointed out, "[t]he issue in the instant case -- an issue neither discussed nor addressed in *Serfass* -- is whether jeopardy attaches to an acquittal based upon a resolution of a *factual* element of the crime that occurred prior to the empanelling of a jury or the calling of the first witness. . . . Because we have not addressed the question and because it is of some importance, I believe that plenary consideration is appropriate." 105 S. Ct. at 582.

Appeals of sentences, unlike appeals of acquittals, are not barred by the double jeopardy clause. In *United States v. DiFrancesco*, 449 U.S. 117 (1980), the Supreme Court upheld the constitutionality of 18 U.S.C. § 3576, which allows the United States to appeal to the court of appeals the sentence given a "dangerous special offender" by a district court, and allows the court of appeals to affirm the sentence, impose a different sentence, or remand to the district court for further sentencing procedures. The Court deemed it well established that a sentence in a non-capital case "does not have the qualities of constitutional finality that attend an acquittal." 449 U.S. at 134. The Court emphasized that "the prosecution's statutorily granted right to review a sentence . . . does not involve a retrial or approximate the ordeal of a trial on the basic issue of guilt or innocence." 449 U.S. at 437.

Before closing this discussion, a brief comment concerning the "attachment" of jeopardy is in order. As previously noted,[107] under English law an individual is not considered "in jeopardy" until a verdict of acquittal or conviction is entered. In contrast, under American case law, jeopardy is said to attach in a jury trial when the jury is empaneled and sworn. *See Crist v. Betz*, 437 U.S. 28, 35-36 (1978); *Downum v. United States*, 372 U.S. 734, 735-38 (1963). In a bench trial, attachment occurs when the judge begins to hear the evidence. *See United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977). As Justice Powell's dissent in *Crist v. Betz* points out, the rule that jeopardy attaches when a jury has been empaneled and sworn appears to confuse a common law rule of jury practice with the concept of double jeopardy. *See* 437 U.S. at 43-46 (1978). Justice Powell marshals evidence suggesting that in the early 19th century, the double jeopardy clause was not deemed to bar retrials of individuals in cases in which a jury had been dismissed prior to rendering a verdict. According to Justice Powell, it was understood

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[107] *See* text accompanying notes 30-31, *supra*.

during that period that jeopardy attached at the time of conviction or acquittal and not before. *See id.* at 44.[108]

Nevertheless, the question of when jeopardy attaches has no direct bearing on the central issue addressed by this report -- the appealability of acquittals. Whether or not jeopardy attaches at an earlier stage, it is clear, at the very least, that jeopardy has attached by the time an acquittal is entered. There is no 18th century evidence, nor evidence in contemporary English practice to suggest that jeopardy does not attach until *after* the government has appealed an acquittal. Thus, even if American case law were to revert to 18th century norms and hold that jeopardy attaches at the time of conviction or acquittal, the government's right to appeal an acquittal could not justifiably be expanded. In any event, despite the technical rules of attachment, the preceding case law discussion reveals that the courts have seen fit to allow government appeals in a variety of situations after evidence has begun to be heard or a jury has been empaneled. For these reasons, this report does not concern itself further with the "attachment of jeopardy" question.

B. Summary of Case Law Principles

The preceding case law discussion illuminates double jeopardy obstacles to federal government appeals of judicial terminations that favor defendants. Under current case law, it is well-established that terminations deemed "acquittals" cannot be appealed by the government (*Kepner*). This rule, which is aimed at forestalling successive prosecutions, applies to implied acquittals (*Green*); to acquittals by the judge as trier of fact (*Morrison*); and to a trial judge's judgment of acquittal in the face of a deadlocked jury (*Martin Linen Supply*). The rule holds even when an acquittal is due to trial court errors of law (*Sanabria*). Whether a trial is to the jury or to the bench, this rule protects defendants from

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[108] Justice Powell notes that Justices Washington and Story originally believed that jeopardy attached at the time of conviction or acquittal. *See United States v. Coolidge*, 25 Fed. Cas. 622 (No. 14,858) (C.C.D. Mass. 1815) (Story, J.); *United States v. Haskell*, 26 Fed. Cas. 207, 212 (No. 15,321) (C.C.D. Pa. 1823) (Washington, J.) ("the jeopardy spoken of in [the Fifth Amendment] can be interpreted to mean nothing short of the acquittal or conviction of the prisoner, and the judgment of the court thereupon.") As late as 1833, Justice Story opined that the double jeopardy clause meant "that a party shall not be tried a second time for the same offense, after he has once been convicted, or acquitted of the offense charged, by the verdict of a jury, and judgment has passed thereon for or against him." 3 J. Story, *Commentaries on the Constitution* 659 (1833).

post-acquittal factfinding proceedings going to guilt or innocence (*Smalis*).

Despite the flat rule barring appeals of acquittals, the government retains substantial latitude to obtain new trials when the jury is unable to reach a verdict at the initial trial or when convictions are set aside, and to appeal dismissals in criminal cases. The double jeopardy clause does not bar a retrial following a hung jury (*Richardson*), nor does it bar retrials following appellate court rulings that set aside convictions, provided those rulings are not based on insufficiency of the evidence (*Burks*). Furthermore, appellate court reversals of convictions based on different interpretations of the weight accorded the evidence do not bar retrials (*Tibbs*). Convicted defendants in "two-tier trial" jurisdictions do not appear to have a double jeopardy right to appeal, based on sufficiency of the evidence, as long as a trial *de novo* is available (*Lydon*). In addition, the double jeopardy clause does not bar government appeals of pre-trial discharges (*Serfass*), mid-trial dismissals on legal grounds unrelated to guilt or innocence (*Scott*), or post-trial discharges following conviction by the trier of fact (*Wilson*). Finally, there is no double jeopardy bar to government appeals of sentences (*DiFrancesco*).

In sum, current judicial precedents allow the government to appeal a wide variety of pre-trial, mid-trial, and post-trial determinations providing for the release of criminal defendants. Only acquittals by the trier of fact -- whether explicit or implicit -- invoke the double jeopardy clause's prohibition on government appeals.

III. DOUBLE JEOPARDY TREATMENT OF GOVERNMENT APPEALS OF ACQUITTALS IN OTHER JURISDICTIONS

We now briefly survey the double jeopardy treatment of government appeals of acquittals as it developed in the fifty states and in foreign jurisdictions. Our discussion of state double jeopardy law covers the period prior to 1969, when the Supreme Court held in *Benton v. Maryland*, 395 U.S. 784 (1969), that the federal Constitution's double jeopardy clause is fully enforceable against the states through the Fourteenth Amendment. Since *Benton*, federal constitutional restrictions on appeals of acquittals have applied fully to the states.

A. The Treatment of Government Appeals of Acquittals in the 50 States[109]

The adoption of the federal double jeopardy clause inspired various states to adopt state constitutional double jeopardy provisions. Pennsylvania adopted a double jeopardy clause in 1790, followed by Kentucky and Delaware in 1792. Large numbers of states followed suit in the 19th century. By the time of *Benton v. Maryland*, 45 of the 50 state constitutions contained double jeopardy clauses.[110] Thirty-seven state constitutions largely followed the federal formula that no person shall be twice put in "jeopardy," while eight constitutions provided that after an acquittal a person shall not be tried again for the same offense (the New Hampshire formula). No state constitution, however, indicated (and none indicates today) what is meant by "jeopardy" or by "the same offense." Furthermore, no state constitution addressed (or today addresses) the status of government appeals of acquittals.

Early and mid-19th century state cases indicate a widely held understanding that, at common law, the state could not bring a writ of error following an acquittal. The Supreme Court of Tennessee, in dismissing an appeal by the state after an acquittal of perjury, stated that "[a] writ of error, or appeal in the nature of a writ of error, will not lie for the State in such a case. It is a rule of the common law that no one shall be brought into jeopardy for one and the same offense. . . . Because of this rule it is that a new trial cannot be granted in a criminal case, where the defendant is acquitted. A writ of error will lie for the defendant, but not against him." *State v. Reynolds*, 4 Haywood 110 (Tenn. 1817). In 1820, the General Court of Virginia dismissed a writ of error filed by the Commonwealth's attorney to reverse a judgment for defendant on demurrer to an information for unlawful gaming. The Court simply stated that "no writ of error lies in a criminal case *for* the Commonwealth." *Commonwealth v. Harrison*, 2 Va. Cas. 202 (1820) (emphasis in

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[109] The discussion of the double jeopardy status of appeals in the 50 states draws upon our independent research into early American case law. A good overview of the state law treatment of double jeopardy is found in Sigler, *supra*, at 77-115.

[110] Sigler, *id.*, at 78-79. Maryland, Connecticut, Massachusetts, North Carolina, and Vermont were the only five states whose constitutions contained no double jeopardy clause. *Id.* at 79, n. 6. The list of state constitutions lacking a double jeopardy clause has not changed. Sachs, *Fundamental Liberties and Rights: A 50-State Index* 47 (1980), in *Constitutions of the United States: National and State* (updated periodically).

the original). In 1836, the Illinois Supreme Court summarily dismissed a writ of error sued out by the state to reverse a judgment of acquittal upon exceptions taken at a trial by jury. The Court held that, under common law, a writ of error would not lie on behalf of the people in a criminal case. *People v. Dill*, 1 Scammon's Ill. Rep. 257 (1836). In 1848, the New York State Court of Appeals dismissed the state's writ of error following judgment for defendant on a demurrer to an indictment for perjury. After consulting historical precedents, the Court concluded that "[t]he weight of authority seems to be against the right of the government to bring error in a criminal case." *People v. Corning*, 2 N.Y. 9, 17 (1848). In 1849 the Supreme Judicial Court of Massachusetts ruled in companion cases that a writ of error did not lie in a criminal case on behalf of the Commonwealth. *Commonwealth v. Cummings* and *Same v. McGinnis*, 3 Cush. 212 (Mass. 1849). In the same year, the Supreme Court of Georgia dismissed a writ of error sued out by the state upon a judgment quashing an indictment against the defendant. The Court concluded that "the rule seems to be well settled in England, that in criminal cases a new trial is not grantable to the Crown after verdict of acquittal, even though the acquittal be founded on the misdirection of the judge. This is the general rule, and obtains in the states of our union." *State v. Jones*, 7 Ga. 422, 424 (1849). Similarly, decisions in Wisconsin and Florida held that the state was not entitled to a writ of error to reverse a judgment quashing an indictment, and discharging the accused. *State v. Kemp*, 17 Wis. 669 (1864); *State v. Burns*, 18 Fla. 185 (1881).

Early case holdings in four jurisdictions -- North Carolina, Maryland, Pennsylvania, and Louisiana -- accorded some recognition to the state's right to file writs of error in criminal cases. None of those holdings, however, clearly established the right of the state to appeal an acquittal.

In *State v. Haddock*, 2 Haywood 162 (N.C. 1802), an individual who had been convicted of stealing a bell moved for arrest of judgment on the ground that the indictment did not set forth whose property the bell was. The Pitt County Court arrested the judgment, and the North Carolina Superior Court affirmed. In a very brief, rather confusing one paragraph opinion, the Superior Court stated that "an appeal will lie for the State where the defendant is acquitted or otherwise discharged upon an indictment, as well as for the defendant who is convicted. Though, . . . were this *res integra*, [I] should not be of that opinion upon the words of the acts relative to appeals." *Id.* The Court went on to affirm the arrest of judgment on the ground that the indictment's failure to specify the

property's owner was "a matter of substance." *Id.* Because this case involved an initial conviction, rather than an acquittal, the Court's statement that "an appeal will lie . . . when the defendant is acquitted" should be read as dictum. [111] Consistent with this conclusion, the North Carolina Superior Court held in *State v. Jones*, 5 N.C. 257 (1809), that the state prosecutor could not appeal Jones' acquittal of an unspecified crime. Accordingly to the court, "[t]he state, in a criminal prosecution, is not entitled to an appeal under any of the provisions of the act of Assembly regulating appeals: this appeal, therefore, must be dismissed." *Id.*

In 1821 the Maryland Court of Appeals sustained a writ of error by the state to reverse a judgment in favor of defendants on demurrer to an indictment for conspiring to occupy the premises of a bank building without the permission of the building owners. *State v. Buchanan*, 5 Har. & Johns 317 (Md. 1821). In support of allowing the state's appeal, the court cited a number of unreported cases handed down in Maryland between 1793 and 1817. The court also noted Lord Hale's statements (discussed *supra* in this Report) to the effect that the crown could bring a writ of error in the cases of: (1) a defective indictment; or (2) conduct found by the jury to have occurred that is incorrectly characterized by the court as not being a felony. It must be recognized, nevertheless, that no acquittal actually had been handed down in the *Buchanan* case -- rather, the trial court merely had granted a demurrer to the indictment. Moreover, the Maryland Court of Appeals subsequently changed its position and barred government appeals of acquittals. In *State v. Shields*, 49 Md. 301 (1878), that court denied the state's motion for a new trial following defendant's acquittal of forgery, despite an 1872 statute granting both the accused and the state authority to tender bills of exceptions to trial court rulings in criminal cases. The court concluded that "absent some clear and definite expression of the legislative will to" the contrary, the "settled rule of the common law," which prohibited retrial following an acquittal, would stand. 49 Md. at 303. The statute under review in *Shields* did not clearly displace the common law rule, the court concluded.

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[111] The peculiar reference to "*res integra*" or "a single cause" may have reflected the fact that the defendant originally was convicted of stealing the bell but simultaneously was acquitted of stealing a heifer. (Presumably these two alleged thefts involved the same transaction and were tried together, though the brief Superior Court opinion does not make this absolutely clear). If so, the court may have been suggesting that it would not have entertained an appeal by the state of that acquittal.

In several early cases, the Supreme Court of Pennsylvania entertained writs of error by the prosecution in criminal cases. None of these cases, however, involved appeals of aquittals. In *Commonwealth v. Taylor*, 5 Binney 277 (Pa. 1812), defendant was convicted of breaking and entering and thereby inducing a miscarriage by the aggrieved homeowner's wife. The trial court arrested judgment upon the ground that the offense charged was not indictable, and the state brought a writ of error. The Supreme Court entertained the writ (without commenting upon its authority to do so) and reversed the trial court's ruling, thereby allowing the conviction to be reinstated. In *Commonwealth v. McKission*, 8 S.& R. 420 (Pa. 1822), the trial court granted defendant's motion to quash an indictment for fraudulently tricking a farmer out of his heifer, on the ground "that the assertion of a falsehood which common prudence could guard against is not indictable." 8 S.& R. at 421. The state filed a writ of error and the Supreme Court reinstated the indictment, reasoning that the offense charged was indictable. Once again, the Supreme Court did not seek to justify its decision to hear the appeal. Similarly, in *Commonwealth v. Church*, 1 Penn St. 105 (1845), the Pennsylvania Supreme Court entertained, without comment, prosecution's writ of error following the trial court's quashing of an indictment for criminally damming a river. The Supreme Court reinstated the indictment, ruling that the trial court had erred in determining, as a preliminary matter, that the dam in question was not covered by Pennsylvania's statute prohibiting the erection of certain dams.

Two early Louisiana cases entertained state appeals from quashals of indictments. In *State v. Jones*, 8 Rob. 573 (La. 1845), the trial court quashed defendant's indictment for assault with a dangerous weapon, and the state appealed. The state prosecutor "admitted that no appeal could be prosecuted by the State so as to affect a verdict of acquittal." *Id.* The Louisiana Court of Errors and Appeals reinstated the indictment, holding that a Louisiana statute allowed the state to appeal quashals of indictments. At the same time, the court emphasized that according to the common law of England and of most of the states -- and the general opinion of the bar -- the state could not bring a writ of error in a criminal case. Similarly, in *State v. Ellis*, 12 La. Ann. 390 (1857), the Louisiana Supreme Court reinstated an indictment for assault with a dangerous weapon that had been quashed before trial. The Supreme Court ruled that the Louisiana Constitution authorized the state to file criminal appeals "where the indictment has been quashed before a trial, or held

bad upon a demurrer . . . [, because] [i]f the prisoner has not been tried he has not been in jeopardy." 12 La. Ann. at 391.

In sum, the few early state cases that authorized prosecutorial appeals in criminal cases involved pre-verdict quashals of indictments, or trial court decisions to set aside guilty verdicts. None of these cases evinces a historical understanding that the state could appeal acquittals. Indeed, a number of these cases contain strong language to the contrary.

Most states continued to view government appeals of acquittals unfavorably throughout the 19th century. A 1935 American Law Institute (ALI) survey revealed that only in Connecticut (whose constitution contained no double jeopardy clause) could the state "appeal from an *acquittal* of the defendant for error on the trial; . . . [i]n all of the other states the state [wa]s not allowed a new trial after an acquittal for errors prejudicial to the state upon the original trial." [112] According to the ALI, state decisions disallowing government appeals were "based, in some cases, on the fact that there is no common law or statutory authority for such procedure, in others on the fact that the constitution either prohibits a second trial for the same offense after an acquittal, or provides that no person shall be twice put in jeopardy for the same offense." [113] The ALI cited Indiana, Iowa, Maryland, Mississippi, Nevada, North Carolina, Tennessee, and Washington cases as illustrating appeal prohibitions based on the theory that there was no statutory or common law authority for such procedure. [114] Michigan, Missouri, Rhode Island, and Texas cases were given as examples of the view that retrial was barred by state constitutional provisions prohibiting

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[112] A.L.I., *Administration of the Criminal Law: Double Jeopardy* 111 (Official Draft 1935) (commentary to § 13) (hereinafter cited as *ALI: Double Jeopardy*). As of 1935, the only state statute authorizing the government to appeal an acquittal was Conn. Gen. Stat., § 6494, which authorized the State of Connecticut to appeal "all questions of law arising on the trial of criminal cases." *ALI: Double Jeopardy* at 112. Applying this statute, the Connecticut Supreme Court held in *State v. Lee*, 65 Conn. 265 (1894), that where the defendant was indicted for murder and at trial the court excluded evidence material to the state, the state could have a new trial following defendant's acquittal. This decision viewed the government's appeal as the continuation of "one single jeopardy."

[113] *Id.*

[114] *Id.* at 114-115, *citing State v. Newkirk*, 80 Ind. 131 (1881); *State v. Johnson*, 2 Iowa 549 (1856); *State v. Shields*, 49 Md. 301 (1878); *State v. Anderson*, 3 Sm. & M. 751 (Miss. 1844); *State v. Hall*, 3 Nev. 172 (1867); *State v. Herrick*, 3 Nev. 259 (1867); *State v. Credle*, 63 N.C. 506 (1869); *State v. Reynolds*, 4 Hayw. 110 (Tenn. 1817); *State v. Solomons*, 6 Yerg. 360 (Tenn. 1834); and *State v. Hubbell*, 18 Wash. 482 (1898).

an acquitted person from be tried again for the same offense.[115] Precedents from Arkansas, California, Illinois, Kentucky, Mississippi, Washington, and West Virginia were offered as instances in which new trials were prohibited because of state constitutional provisions that no person shall be twice put in jeopardy for the same offense.[116]

The universally held (except in Connecticut) principle that the state could not appeal an acquittal on grounds of error was subject to two slight qualifications in a few jurisdictions. First, a few cases in Arkansas, Kentucky, Mississippi, and North Carolina held that an acquittal procured unfairly by the fraud or collusion of the defendant constituted no bar to a second prosecution for the same offense.[117] In contrast, an Indiana case held that where fraud had been perpetrated through bribery of the state's attorney by persons acting in the defendant's interest, the acquittal obtained could not be collaterally attacked and was a bar to a second prosecution for the same offense.[118] Second, courts in Arkansas and West Virginia upheld statutes that permitted state appeals of acquittals in misdemeanor cases punishable by fine only, on the ground that such appeals did not involve a threat to the defendant's life or limb.[119]

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[115] *Id.* at 115, *citing People v. Swift*, 59 Mich. 529 (1886); *State v. Spear*, 6 Mo. 644 (1840); State v. Lee, 10 R.I. 494 (1873); and *State v. Burris*, 3 Tex. 118 (1848).

[116] *Id.* at 115-116, *citing State v. Hand*, 6 Ark. 169 (1845); *People v. Webb*, 38 Cal. 467 (1869); People v. Royal, 1 Scam. 557 (Ill. 1839); *Commonwealth v. Ball*, 126 Ky. 542 (1907) (appeal not allowed although clear error of fact produced acquittal); *State v. Anderson*, 3 Sm. & M. 751, 753 (Miss. 1844); *State v. Hubbell*, 18 Wash. 482 (1898); and *Ex Parte Bornee*, 76 W. Va. 360 (1915) (appeal not allowed despite state's claim that verdict of acquittal was contrary to the law and the evidence).

[117] *Id.* at 104, *citing State v. Ketchum*, 113 Ark. 68 (1914) ("rigged" initial prosecution instituted at defendant's behest and tried before defendant's cronies deemed not to have constituted an initial jeopardy); *McDermott v. Commonwealth*, 30 Ky. Law. 1227 (1907); *Price v. State*, 104 Miss. 288 (1913); *State v. Swepson*, 79 N.C. 632 (1878).

[118] *Shideler v. State*, 129 Ind. 523 (1891), *cited in ALI: Double Jeopardy* at 105.

[119] *Jones v. State*, 15 Ark. 261 (1854); *Taylor v. State*, 36 Ark. 84 (1880); *Moundsville v. Fountain*, 27 W. Va. 182 (1885). In *Ex Parte Bornee*, 76 W. Va. 360, 366 (1915), the West Virginia Supreme Court clarified its *Moundsville* holding by stating that the state could not constitutionally appeal the acquittal of any crime punishable by fine *and* imprisonment -- even a misdemeanor. The U.S. Supreme Court held that the federal Constitution's double jeopardy clause applied to misdemeanors in *Ex Parte Lange*, 85 U.S. (18 Wall.) 163 (1873).

State law holdings that prohibited government appeals of acquittals remained largely intact between 1935 (the year the ALI surveyed state double jeopardy law) and 1969 (the year *Benton v. Maryland* was handed down). One state, Wisconsin, emulated Connecticut's example by enacting a statute that allowed the state as well as the accused to appeal criminal judgments "upon all questions of law." [120] This law was upheld as consistent with Wisconsin's constitution in 1943. [121] No other state followed suit.

In sum, prior to the incorporation of the double jeopardy clause, only two states, Connecticut (whose constitution contained no double jeopardy clause) and Wisconsin, authorized the government to appeal an acquittal on the basis of error. Courts in four other jurisdictions (Arkansas, Kentucky, Mississippi, and North Carolina) held that acquittals resulting from the defendant's fraud or collusion did not bar a second prosecution. Courts in two states (Arkansas and West Virginia) only upheld appeals of acquittals involving misdemeanors not punishable by imprisonment. The settled rule in the vast majority of states was that the double jeopardy principle (whether as a matter of constitutional law, statutory law, or common law) barred the state from appealing an acquittal.

B. The Double Jeopardy Treatment of Government Appeals of Acquittals in Foreign Countries

Foreign jurisdictions take differing views as to the double jeopardy status of government appeals of acquittals. Below we briefly survey the treatment accorded such appeals in several common law and civil law jurisdictions.

Canada, unlike the United States, grants the government a limited right to appeal from acquittals. Section 11(h) of the Canadian Charter of Rights and Freedoms provides that "[a]ny person charged with an offence has the right if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried for it again or punished for it again." [122] The Canadian courts have

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[120] 1941 Wis. Laws ch. 306, *adding* Wis. Stat. § 358.12(8) (1941).

[121] *State v. Witte*, 243 Wis. 423 (1943).

[122] Constitution Act 1982, pt. I (Canadian Charter of Rights and Freedoms), § 11(h), *reprinted in* 1 Can. Charter of Rights Ann. 1-3 (1987).

stated that this clause does not abridge the government's right to appeal questions of law following an acquittal. In *Regina v. Morgentaler, Smoling and Scott*, 22 D.L.R.4th 641 (S. Ct. Can. 1985), the Supreme Court of Canada held that section 11(h)

> does not preclude the limited right of appeal against an acquittal, given to the Crown in indictable matters on questions of law alone, by s. 605 of the *Criminal Code*. Such a right of appeal existed in Canada for almost 100 years prior to enactment of the Charter [of Rights] and has become an established part of the criminal process. The word "finally" in this paragraph [section 11(h)] was obviously intended to avoid abrogating this well-established right of appeal. There are valid policy reasons for permitting Crown appeals on questions of law alone to ensure the correct and uniform interpretation of the criminal law. [123]

English double jeopardy law has been summarized as follows:

> In England there is a common law prohibition against a person being twice put in peril for the same offense. Statutory provision is made that no offender shall be liable to be punished twice for the same offense, even as to summary proceedings in the magistrate's courts. *The Crown has no right of appeal in the case of an acquittal or where the trial court has sustained a demurrer or motion to quash* [judgment]. [124]

The general English prohibition against government appeals of acquittals was emphasized in *Regina v. Middlesex Quarter Sessions (Chairman), ex parte Director of Public Prosecutions*, 2 Q.B. 758 (1952). In this case the (appellate) Divisional Court refused to quash an acquittal, despite the trial judge's "deplorably irregular" decision to direct a verdict of not guilty shortly after the prosecution had opened its

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[123] This case holding is summarized in 2 Can. Charter of Rights Ann. 16-7-11 (Sept.-Oct. 1986).

[124] National Ass'n of County and Prosecuting Attorneys, *A Comparative Study of Criminal Law Administration in the United States and Great Britain*, 50 J. Crim. L.C. & P.S. 67 (1959) (emphasis added), *quoted in* Sigler, *supra*, at 125.Accordingly, in at least one sense the English treatment of appeals is more favorable to defendants than the American rule; when a conviction has been quashed on appeal, the English criminal defendant is put in the same position as if he had been acquitted by the jury on the trial level. *See* Sigler at 130.

case. In upholding the acquittal, "however improperly obtained," Lord Chief Justice Goddard twice referred to the absence of a single case setting aside an acquittal after the recording of a verdict of not guilty. [125] The general prohibition against government appeals of acquittals remains settled law in England. [126] Section 36(1) of the Criminal Justice Act 1972 for the first time gave the English prosecutor a limited right to request an appellate review of a disputed point of law following a criminal acquittal. [127] This procedure is not, however, an appeal: the acquittal stands, without regard to the legal interpretation rendered by the appellate court. [128] The House of Lords has held, however, that an acquittal is not a bar to subsequent criminal proceedings where the initial summary trial before magistrates was so fundamentally flawed that it was not a trial at all. *Regina v. Dorking Justices, ex parte Harrington*, 3 W.L.R. 142 (1984).

The double jeopardy principle is accorded great respect throughout the British Commonwealth. Chief Justice Barwick of the High Court of Australia has stated, for example, that "[a] verdict of acquittal must not be challenged in a subsequent trial, nor may the accused be denied the full benefit of such a verdict." *Regina v. Story and Another*, 140 C.L.R. 364 (1978). At the same time, however, New Zealand, India, Ceylon, and South Africa have passed laws authorizing a government appeal from an acquittal on a point of law. [129] The Australian states are divided on the

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[125] This case is summarized in Note, *Double Jeopardy: Appeals and Foreign Convictions*, 101 L.Q. Rev. 15, 16 (1985).

[126] *See id.* at 15-17.

[127] Criminal Appeal Act 1972, § 36(1), states that "[t]he Attorney General may, if he desires the opinion of the Court of Appeal on a point of law which has arisen in the case, refer that point to the court, and the court shall, in accordance with this section, consider the point and give their opinion on it." Section 36(1) is discussed in Walker & Walker, *The English Legal System* 506 (1980).

[128] Criminal Appeal Act 1972, § 36(7), specifically provides that the outcome of an appellate reference under section 36(1) shall have no effect upon the acquittal in that case. Walker & Walker, *id.* Indeed, the acquittal defendant's identity "must not be disclosed during the proceedings in the Court of Appeal except by his consent." *Id.* In short, section 36(1) is not designed to affect the outcome of the particular case in which the prosecution files a post-acquittal appellate reference. Rather, that section is meant to facilitate "quick ruling" by the Court of Appeals "before a potentially false decision of law has too wide a circulation in the courts." *Re Attorney-General's Reference (No. 1 of 1975)*, [1975] Q.B. 773, 778, *cited in* Walker & Walker, *supra*, at 506.

[129] M. Friedland, *supra*, at 281 (*citing* New Zealand Crimes Act of 1961, 380-382; Gledhill, *The British Commonwealth: India* 222 (2d ed. 1964); *Aggarwal v. State of Maharashtra*

question of Crown appeals. Tasmania, for example, permits a Crown appeal, while New South Wales allows "moot appeals" of legal questions that leave an acquittal undisturbed. [130]

Unlike the common law jurisdictions, countries with civil law systems generally allow the government to appeal acquittals:

> The French criminal procedure, like most of the civil law systems, allows the prosecution a right of appeal from the judgment of the court of first instance in most cases. This is permitted even though the purpose be to secure a more severe sentence, and "since this procedure is generally alien to common law concepts, there may be a tendency to regard it with suspicion and to ask whether it is not counter to the constitutional right against double jeopardy or to due process of law." [131]

Thus, for example, even Japan -- apparently the only civil law jurisdiction to have enacted a constitutional double jeopardy clause [132] -- permits state appeals from prior acquittals. [133] The government, however, must apply to the Japanese Supreme Court before filing an appeal. [134] In Italy, a "criminal judgment may be reviewed as to fact or law, or both . . . [all of] the parties to the initial proceedings [the judge, the public prosecutor, and the accused] have a complete discretion as to the

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(India, 1962); Jennings & Tambiah, *The British Commonwealth: Ceylon* 297-298 (1952); and Lansdown, *Outlines of South African Criminal Law and Procedure* 305 ff. (2d ed. 1960)).

[130] M. Friedland, *supra*, at 281, 299, *citing* Tasmanian Criminal Code of 1924, §§ 399 ff.; *Vallance v. Regina* (Tasmania, 1961); and *Regina v. S.* (New South Wales, 1953), 53 S.R. (N.S.W.) 460.

[131] Sigler, *supra*, at 140, *quoting* Snee and Pye, *Due Process in Criminal Procedure: A Comparison of Two Systems*, 21 Ohio St. L.J. 467, 499 (1960). While Sigler mentioned appeals of *sentences*, it appears clear from context that Sigler was referring to appeals of acquittals as well as convictions.

[132] Sigler, *id.*, at 141, *citing* article 39 of the Japanese Bill of Rights, which provides that "no person shall be held criminally liable for an act which was lawful at the time it was committed, or of which he has been acquitted, nor shall he be placed in double jeopardy."

[133] Sigler, *id.*, at 144, *citing* Abe, *Criminal Procedure in Japan*, 48 J. Crim. L.C. & P. S. 365 (1957).

[134] *Ibid.*

initiation of any further proceedings for the review of the decision of first instance." [135]

In short, England does not permit the government to appeal acquittals. England does, however, allow the subsequent criminal prosecution of an acquitted defendant if the initial proceeding was so "fundamentally flawed" that it was not a trial at all. Several Commonwealth jurisdictions (Canada, India, New Zealand, Ceylon, South Africa, and two Australian states) afford the government some right to appeal questions of law following an acquittal. The government generally is allowed to appeal criminal trial court determinations -- including acquittals -- in civil law jurisdictions.

IV. POLICY RAMIFICATIONS

This section briefly considers the policy ramifications of the double jeopardy clause's application to appeals of acquittals. The discussion begins with a review and assessment of the policy arguments for and against allowing government appeals of acquittals. Although the arguments favoring appeals seem strongest, it appears that they generally must be rejected in light of the double jeopardy clause's original meaning. The discussion then turns to a possible limited program the government may wish to consider pursuing in order to secure some additional convictions of culpable individuals in the face of unfavorable trial court dispositions. Such a program might stress that the double jeopardy clause in no way precludes government appeals in criminal trials, when such appeals would not result in new trial. The Justice Department might consider seeking explicit judicial recognition of the government's right to appeal errors of law in a bench trial, when findings of fact clearly support a guilty verdict. The report closes by suggesting that a follow-up study be done of additional ways in which society's interest in ascertaining the truth in criminal proceedings might be served through government appeals that do not violate the double jeopardy clause. Such a study might examine: (1) whether government appeals of errors of law in jury trials by special verdict could be allowed, consistent with the Sixth Amendment's guarantee of a trial by jury in criminal prosecutions; and (2) the possible use of pretrial appealable orders (agreed upon at a pretrial conference) framing charges to the jury, and resolving evidentiary questions in advance of trial.

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[135] G. Certoma, *The Italian Legal System* 248 (1985).

A. Policy Arguments For and Against Allowing Government Appeals

Policy arguments in favor of allowing government appeals of acquittals have been advanced since the early part of this century. In his dissent in *United States v. Kepner*, 195 U.S. 100, 134-37 (1904), Justice Holmes stressed that since convicted defendants were allowed to appeal errors at the trial court level, by a parity of reasoning the government should be entitled to appeal errors prejudicial to its interests that resulted in acquittals. Both situations, according to Holmes, involved "one continuing jeopardy," rather than double jeopardy.

Over 20 years later, a *Yale Law Journal* commentary deemed it an "absurdity" that a verdict favoring the defendant (an acquittal) should be treated as conclusive, while a verdict favoring the government (a conviction) should be treated as inconclusive.[136] According to that commentary, state laws authorizing government appeals of acquittals would help ensure that a higher proportion of culpable individuals are brought to justice; would prevent individual miscarriages of justice; would improve the quality of substantive and procedural law by correcting trial court errors; and would encourage better behavior by counsel for defendants, thereby increasing the prestige of criminal law practice.[137]

In 1935, the American Law Institute (ALI) voted to approve a final draft on *Administration of the Criminal Law* which set forth the following rule: "Where a person has been acquitted generally, and in the course of the trial a material error has been made to the prejudice of the State, the State shall be entitled to a new trial."[138] In adopting this rule, the American Law Institute implicitly relied on the theory that the appeal of an acquittal involves "one continuing jeopardy."[139]

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[136] Miller, *Appeals by the State in Criminal Cases*, 36 Yale L.J. 486, 496 (1927).

[137] *See id.* at 503-512. At the time this commentary was written, state statutes permitting government appeals of acquittals were not deemed contrary to the federal Constitution; the Supreme Court did not hold that the double jeopardy clause applied to the States (through the Fourteenth Amendment) until 1969. *See Benton v. Maryland*, 395 U.S. 784 (1969).

[138] *ALI: Double Jeopardy, supra*, § 13, at 13.

[139] *Id.* at 112 (commentary on § 13, citing Connecticut cases). The ALI acknowledged that its proposal ran counter to the trend in the law, admitting that "[t]he only state in which the state may after an acquittal secure a new trial for errors on the first trial

A 1960 *Harvard Law Review* article concluded that, in place of the rigid constitutional rule forbiding government appeals of convictions, "a flexible rule balancing protection of the individual against the state's interest in securing convictions seems preferable." [140] According to that article, it is not clear that allowing government appeals would necessarily diminish the protection afforded defendants. The article maintained that, if appeals were allowed, the government would come under constitutional pressure to present all its claims at one trial, rather than withhold some claims and pursue a new indictment and trial in the event the first trial resulted in an acquittal. [141] Consistent with this reasoning, another commentary concluded that "a procedure allowing retrial only where error existed should be preferred by an accused to the present system, under which the prosecution may secure retrial without regard to the fairness of the first trial by obtaining a second indictment almost indistinguishable from the first." [142]

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prejudicial to the state is Connecticut." *Id.* The ALI has not revisited the double jeopardy issue since 1935.

[140] *Bis Vexari, supra,* 74 Harv. L. Rev. 1, 14 (1960).

[141] *See id* . The article also speculated that the doctrine of collateral estoppel has been applied restrictively, to the defendant's detriment, "perhaps again as a product of the innate desire to afford the state a chance at some point to present a case against the defendant free from error." *Id.* at 14-15 (citation omitted). "Under current law, a defendant, whether acquitted or convicted at a first trial, may be confronted with identical evidence at a second trial for an offense that could have been joined and tried in the initial prosecution. The [double jeopardy] clause bars such an action only if the offenses in each trial are the 'same.'" Note, *The Double Jeopardy Clause as a Bar to Reintroducing Evidence,* 89 Yale L.J. 962, 963 (1980). *See also* Thomas, *The Prohibition of Successive Prosecutions for the Same Offense: In Search of a Definition,* 71 Iowa L. Rev. 323 (1986) (discussing Supreme Court standards for determining whether successive prosecutions are aimed at the 'same offense.")

[142] Note, *Statutory Implementation of Double Jeopardy Clauses: New Life for a Moribund Constitutional Guarantee,* 65 Yale L.J. 339, 362 (1956). According to that commentary, "[t]he interest of the community in convicting the guilty would be advanced under a system that would guarantee one fair and full opportunity to try the case against the accused instead of conditioning allowance of a second trial on the accident of whether more than one 'offense' can be squeezed out of a criminal transaction, or on the artfulness of a prosecutor framing indictments." *Id. See also* Kirchheimer, *The Act, the Offense and Double Jeopardy,* 58 Yale L.J. 513, 542 (1949) (stressing that "prosecutors often utilize the 'different offense' -- 'same evidence' technique only in order to further the goals of justice, i.e., where the previous proceedings have ended with a legally unjustifiable acquittal which cannot be reversed due to statutory prohibition of state appeals.")

Although there is considerable force to these policy arguments in support of allowing government appeals of acquittals, it must be acknowledged that not all commentaries have viewed such appeals in a favorable light. It has been argued, for example: (1) that a rule barring retrials following an acquittal by the factfinder has the desirable effect of preventing the wrongful conviction of some innocent people; [143] (2) that unrestricted government appeals of acquittals could lead to unjustified harassment of individuals; [144] (3) that the government appeal of an acquittal unjustifiably frustrates the defendant's interests by increasing the chance of an erroneous conviction; [145] and (4) that government should not be allowed to capitalize on increased probability of conviction resulting from reprosecution of an acquitted defendant. [146] The first, third, and fourth points are essentially variations of the same argument.

We find totally unconvincing the non-constitutional policy arguments against allowing appeals of acquittals. Any trial creates a theoretical risk of convicting the innocent. There is no reason to believe that this risk is any greater on retrial following an erroneous conviction than at an initial trial. Furthermore, because retrials following acquittals would be premised on trial court error, we believe that such retrials would far more often yield additional convictions of guilty individuals than the wrongful convictions of innocent persons. As a result, society's vital interest in bringing culpable criminals to justice would be advanced significantly. In any event, because government appeals would only be pressed when error caused the unjust acquittal of apparently *culpable* individuals, we are unconvinced that such appeals would actually bring about the conviction of some innocent persons. Allowing government appeals would do no more than accord recognition to society's interest in ferreting out the truth and bringing criminals to bar. That interest certainly merits at least as much protection as the accused defendant's right to air his case as fully as possible -- and to appeal verdicts unfavorable to him. It should be added that the defendant's rights would no more be "jeopardized" by appeals of acquittals than by mistrials or

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[143] *See* Stern, *Government Appeals of Sentences: A Constitutional Response to Arbitrary and Unreasonable Sentences*, 18 Am. Crim. L. Rev. 51, 71-72 (1980).

[144] *See* Comment, *Double Jeopardy Limitations on Appeals by the Government in Criminal Cases*, 80 Dick. L. Rev. 525, 535 (1980).

[145] *See* Comment, *Double Jeopardy and Government Appeals of Criminal Dismissals*, 52 Tex. L. Rev. 303, 349 (1974).

[146] *See* Note, *Twice in Jeopardy*, 75 Yale L.J. 262, 267 (1965).

hung juries that resulted in new trials. Since the government can proceed anew after a hung jury or mistrial (situations where guilt may be uncertain), by logic it certainly should be allowed to appeal a wrongful acquittal (a situation where the government believes guilt would have been established, but for the trial court's error).

Furthermore, in light of the great solicitude accorded the rights of the individual under our criminal justice system, we believe that government appeals generally would not bring about "unjustified harassment" of individuals. The possibility of a government appeal on the ground of error would, however, diminish defendants' incentive to interject legal and factual errors into trial proceedings, in the hope of securing unjustified acquittals. It is an unfortunate fact that criminal defense lawyers have too often secured acquittals for their culpable clients through tactics that undermine the search for truth and justice. [147]

In sum, we believe that a government right of appeal would tend to promote the fairness and expeditiousness of criminal trials, thus increasing the probability of correct verdicts and enhancing the efficiency of criminal adjudication. The search for truth in criminal justice would thereby be promoted.

Nevertheless, we believe that a general rule authorizing the government to appeal all acquittals -- at least to the extent such appeals result in new trials -- must be rejected on constitutional grounds. As section I of this report demonstrates, the double jeopardy clause, read in accordance with its original meaning, does not appear to permit the government to appeal an acquittal of a felony in order to obtain a new trial, except perhaps in three special cases. [148] While the Constitution could, of course, be amended to allow the government to appeal acquittals, we do not recommend that the Department advocate such an amendment. Given the longstanding English and American legal tradition that looks upon appeals of acquittals with disfavor (a tradition

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[147] Criminal defense lawyers' role in obscuring the truth is discussed in M. Frankel, *Partisan Justice* 10-39, 87-101 (1978).

[148] These three cases, recognized by Hawkins and Hale, would authorize a government appeal when the trial court lacked jurisdiction, when the initial indictment was defective, or when the law was mistakenly applied to findings of fact supporting a guilty verdict. *See* section I.D., *supra.* Contrary to the Supreme Court's 1873 *Ex Parte Lange* holding, original meaning analysis suggests that there should be no constitutional barrier to government appeals of acquittals in misdemeanor cases.

reflected in the practice of most states before incorporation), an amendment authorizing appeals would predictably generate a furor. Accordingly, despite the strong public policy reasons in favor of allowing government appeals, we believe that such a constitutional modification would stand no realistic chance of being adopted.

Nevertheless, we are not precluded from advancing a more limited program, aimed at securing some additional convictions of culpable individuals in the face of unfavorable trial court dispositions. Possible initiatives that might be pursued as part of such a program are considered below.

B. Vindication of the Government's Right to Appeal Certain Acquittals

In light of the original meaning principles derived in this report, the Justice Department may wish to develop a program aimed at vindicating the government's right to appeal acquittals in certain limited, well-defined situations. The Department may wish to set the stage for this program through speeches highlighting the original meaning of the double jeopardy clause, as applied to government appeals.

First, the Department could emphasize that the double jeopardy clause in no way precludes government appeals in criminal cases, when such appeals would not result in new trials. This fundamental proposition repeatedly has been recognized by the Supreme Court in recent years. *See United States v. Wilson*, 420 U.S. 332, 345 (1975) ("a defendant has no legitimate claim to benefit from an error of law when that error could be corrected without subjecting him to a second trial before a second trier of fact"); *United States v. Jenkins*, 420 U.S. 358, 365 (1975) ("the Double Jeopardy Clause does not prohibit an appeal by the Government provided that a retrial would not be required in the event the Government is successful in its appeal"); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569-70 (1977) ("where a government appeal presents no threat of successive prosecutions, the Double Jeopardy Clause is not offended"). Analysis of the double jeopardy clause's original meaning (set forth in section II, *supra*) tends to support that proposition: the evil at which the clause generally appears to have been directed is the threat of multiple trials or multiple punishments.

The Department could emphasize the importance of that principle in public pronouncements and in briefs filed in court. In addition to case

law references, our argument could be supported by strong policy statements. Thus, we might focus on the important public interest in promoting the search for truth in criminal trials to ensure that criminally culpable individuals are brought to justice. Government appeals may advance that vital goal by overturning erroneous court rulings that would otherwise allow criminals to go free. The incarceration or other punishment of a higher proportion of criminals would provide socially desired response to wrongful activity. It would also further protect the public, by removing dangerous individuals from the streets and by creating additonal disincentives to criminal conduct. We also should emphasize that the appellate determination of questions of law, arising out of appeals that would not bring about new trials, would not constitute harassment of defendants. Justice Department controls over the filing of appeals would further minimize the risk of unfairness to defendants. In short, we should take advantage of favorable legal precedents and policy considerations to argue that all government appeals of acquittals are permissible, when such appeals are based on errors of law and do not require retrial of the defendant.

Second, Department speeches could point out that while the double jeopardy clause bars most government appeals of acquittals, there are certain exceptions to this rule. Specifically, given the writings of Hawkins and Hale, the Department could explain that the double jeopardy clause, properly understood, does not bar the government from appealing an acquittal when the law was mistakenly applied in a bench trial to findings of fact supporting a guilty verdict. [149]

We recommend that the Department consider seeking an appropriate case to argue that the government is entitled to appeal a bench trial acquittal, when correction of the error would allow a verdict of guilty to be entered without a new trial. The following discussion focuses on the merits -- and possible drawbacks -- of this initiative. [150] This discussion

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[149] Department speeches could also mention the existence of original meaning evidence supporting the government's right to appeal an acquittal: (1) in a misdemeanor case; (2) when the trial court lacked jurisdiction; and (3) when the initial indictment was defective. We suggest, however, that speeches not focus heavily (if at all) on these areas, inasmuch as we do not recommend that appeals be brought invoking these three exceptions.

[150] We do not recommend that the Department seek to appeal a misdemeanor acquittal on the ground that the double jeopardy clause does not apply to misdemeanors. It is extremely unlikely that the Supreme Court would overturn *Ex Parte Lange* (1873),

proceeds in light of the fact that the United States, under 18 U.S.C. § 3731, enjoys broad statutory authority to file appeals in criminal cases, subject to the limitations imposed by the double jeopardy clause.[151]

We believe that the Department would stand an excellent chance of obtaining judicial recognition of its right to appeal errors of law in a bench trial, when findings of fact clearly support a guilty verdict. In a bench trial, an erroneous interpretation of law or a misapplication of law to the facts may yield a "legally defective" verdict of acquittal. If an appellate court determines that the trial judge actually resolved against the defendant all of the factual issues necessary to support a finding of guilt, and would have found him guilty under the correct legal standard, it would be appropriate for the higher court to order the entry of a verdict of guilty in place of the "mistaken" verdict of acquittal. By not requiring a new trial, such an action by the reviewing court would remain faithful to the apparent general purpose of the constitutional double jeopardy principle.

Support for this approach can be drawn from the following statement in *United States v. Jenkins*, 420 U.S. 358, 367 (1975):

> If the [trial] court prepares special findings of fact . . . it may be possible upon sifting those findings to determine that the court's finding of 'not guilty' is attributable to an erroneous conception of law whereas the court has resolved against the

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which holds to the contrary. Similarly, we do not recommend that the Department seek to appeal an acquittal on the ground that the original indictment was defective. *United States v. Ball* (1896), which holds that even legally defective indictments place an individual in jeopardy, would not likely be overruled by the Supreme Court. Moreover, an attempt to overturn *Ball* would undoubtedly confront the argument that such a reversal of well-established precendent would "unfairly" authorize government prosecutors to benefit from their own mistakes (defective indictments). Finally, we do not recommend that the Department seek to appeal an acquittal on the ground that the trial court lacked jurisdiction. We presume that in federal criminal adjudications that proceed through trial to a final verdict, the trial court will always (or virtually always) have had subject matter jurisdiction over the matter that was adjudicated.

[151] The first paragraph of 18 U.S.C. § 3731 specifies that "[i]n a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information or granting a new trial after verdict or judgment, as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution."

defendant all of the factual issues necessary to support a finding of guilt under the correct legal standard. [152]

Once an appellate court's "sifting" of the facts indicates that a verdict of guilty should have been entered, it follows logically that such a verdict can be entered immediately. The conclusion is supported by the Supreme Court's recognition (based on its holding in *United States v. Wilson*) "that the Double Jeopardy Clause does not bar an appeal when errors of law may be corrected and the result of such correction will simply be a reinstatement of a jury's verdict of guilty or a judge's finding of guilt." *United States v. Jenkins*, 420 U.S. 358, 368 (1975).

The proposed judicial clarification of the United States' authority to appeal errors of law at bench trial does, however, have one drawback: by allowing certain appeals from bench trial acquittals it somewhat increases a defendant's incentive to request a jury trial, rather than a bench trial. As a result, the proportion of bench trials relative to jury trials may fall. To the extent bench trials are less likely to result in the wrongful acquittal of a culpable defendant, the greater use of jury trials might paradoxically bring about a fall (rather than a rise) in the conviction rate of guilty inidividuals.

The likelihood of this paradoxical result occurring may, however, be rather small. It is not at all clear that the proposed case law clarification would substantially affect a defendant's incentive to opt for a jury trial. Moreover, assuming proper federal court judicial supervision of jury trials, it is far from apparent to what extent jury trials are more likely than bench trials to yield wrongful acquittals. Finally, any rise in wrongful acquittals attributable to jury trials would have to be weighed against any fall in wrongful acquittals stemming from government appeals of bench trial verdicts.

On balance, we believe that a judicial recognition of the government's authority to appeal from a bench trial acquittal on the ground of

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[152] Fed. R. Crim. P. 23(c) reads:

> In a case tried without a jury the court shall make a general finding and shall in addition on request find the facts specially. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein.

The Supreme Court's reference to "special findings" in *Jenkins* was dictum, since the Court could not find a clear trial court resolution of factual issues against the defendant in that case.

legal error probably would be desirable. Nevertheless, the Department should not fail to weigh the possibility that such a judicial recognition paradoxically would increase (rather than decrease) the incidence of wrongful acquittal, in deciding whether to pursue an appeal of legal error committed at bench trial.

C. Follow-Up Study on Government Appeals of Acquittals

This report closes by recommending that a follow-up study be done of additional ways in which society's interest in ascertaining the truth in criminal proceedings might be served through government appeals that do not violate the double jeopardy clause. Such a study might examine: (1) whether government appeals of errors of law in jury trials by special verdict could be allowed, consistent with the Sixth Amendment's guarantee of a trial by jury in criminal prosecutions;[153] and (2) the possible use of pretrial appealable orders (agreed upon at a pretrial conference) framing charges to the jury, and resolving evidentiary issues.

1. Government Appeal of an Acquittal, Based on Errors of Law, in a Jury Trial by Special Verdict

First, the follow-up study might explore whether the government has the authority to appeal, on the ground of legal error, an acquittal in a criminal jury trial by special verdict, when the findings of fact support a guilty verdict. In justifying such an appeal, the Department could invoke the 18th century understanding (expressed by Hale) that an appeal is not barred when facts adduced at trial supported a finding of guilt, but the trial court erroneously held that the act committed was not a crime. The Department could also point out in support of such an appeal right that the correction of trial court legal errors would not require a new trial. Because a special verdict (similar to a bench trial) sets forth with precision the factual predicates underlying a verdict, the correction of legal error on appeal presumably would allow a verdict of guilty to be entered without further trial court proceedings. Thus, constitutional objections to appeals resulting in new trials could not legitimately be raised.

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[153] The Sixth Amendment question is whether the original meaning of the criminal jury trial guarantee permits verdicts on special questions.

Nevertheless, opponents of such an appeal right undoubtedly would point to a lack of documentary evidence indicating that 18th century American lawyers accepted Hale's understanding that legal errors undermining convictions could be reversed on appeal.[154] Perhaps more significantly, critics might argue that the displacement of a special verdict of acquittal would violate a criminal defendant's Sixth Amendment right to a trial by jury. In order to assess (and, if appropriate, rebut) such an argument, the follow-up study should explore the original meaning of the Sixth Amendment's jury trial guarantee.

2. Pretrial Appealable Orders, Framing Charges to the Jury

Second, the follow-up study might explore the use of pretrial appealable orders, framing charges to the jury and resolving evidentiary issues. Such orders would be arrived at in a pretrial conference involving the judge, the prosecution, and the defendant. They would permit the government to appeal from legal error, while subjecting the defendant to only one trial. Government authorization to appeal pretrial orders dealing with jury instructions and resolving evidentiary issues would require an appropriate amendment to the federal government appeals statute, 18 U.S.C. § 3731.[155]

Opponents of such a statutory reform might refer to the difficulty of deciding upon appropriate jury instructions at the pretrial stage. They might also cite the general policy that disfavors expansion of interlocutory appeals, given the serious delays that afflict the federal court system. Accordingly, the follow-up report should discuss possible ways of countering these arguments. For example, the government might respond that in most criminal prosecutions the issues would have been sufficiently well developed by the time of trial as to permit draft jury instructions. When this was not the case, the statute would not require that jury charges be prepared. Furthermore, the government might stress that the

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[154] The only early American case we have found that (approvingly) cites Hale for this proposition is *State v. Buchanan*, 5 Har. & Johns 317 (Md. 1821), discussed in the text between notes 111 and 112, *supra*.

[155] The second paragraph of 18 U.S.C. § 3731 already provides for appeal by the government "from a decision or order of a district court suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information."

social benefits stemming from the correction of plain errors would outweigh the additional burden on the judicial system associated with a few government appeals of jury instructions. Finally, and perhaps most significantly, the government might point out to the defense bar that authorizing the appealability of jury instructions might at times work in the defendant's favor. At present, some judges may have an incentive to "bend over backward" in close cases and not frame questionable jury instructions that would favor the defendant, since judges know that the government cannot appeal instructions on the ground of legal error after an acquittal. This incentive would be eliminated by a provision allowing the government to appeal jury charges.

In short, a statutory change providing for the pretrial framing of appealable jury instructions might promote the search for truth in a manner not unduly adverse to defendants' interests. Accordingly, such a modification merits serious consideration in a follow-up report.

V. CONCLUSIONS

The review of the policies implicated by government appeals of acquittals prompts two general conclusions. First, based on constitutional considerations, the Department generally should not assert a general right to appeal acquittals. Second, this general conclusion is subject to a few exceptions. In light of those exceptions, the Department should consider seeking an appropriate case to argue that the government is entitled to appeal a bench trial acquittal, on the ground of legal error, when correction of the error would allow a verdict of guilty to be entered without a new trial. The Department should weigh the benefits against the potential drawbacks of such an initiative. Finally, this report closes by recommending that a follow-up study be done of additional ways in which society's interest in ascertaining the truth in criminal proceedings might be served through government appeals that do not violate the double jeopardy clause.

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