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## Second Chance for Justice: Reevaluation of the United States Double Jeopardy Standard, 40 J. Marshall L. Rev. 371 (2006)

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# SECOND CHANCE FOR JUSTICE: REEVALUATION OF THE UNITED STATES DOUBLE JEOPARDY STANDARD

ANDREA KOKLYS\*

## I. INTRODUCTION

Imagine this scenario: An eighteen-year-old woman is murdered in the United States and a man is indicted and tried for the crime. The jury grants an acquittal, but a few years later the man confesses to the murder. The United States Constitution, prevents the government from retrying this man and presenting the confession as new evidence.<sup>1</sup> Now imagine that a twenty-two-year-old woman is murdered in England. A man is tried, and the jury grants an acquittal. Years later, he too confesses to the murder. However, despite England's long history of preventing the trial of a person twice for the same crime,<sup>2</sup> new Parliament legislation may allow this man to be retried for the crime on the basis of his confession, now made admissible as evidence.<sup>3</sup> From these two factually similar scenarios come radically different results, prompting analysis of England's new double jeopardy standard and potentially calling into question the United States' current constitutional standard modeled after England's old approach.<sup>4</sup>

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1. See U.S. CONST. amend. V (providing, in pertinent part, "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb").

2. Protection against double jeopardy attained recognition, in some form, in England around the middle of the thirteenth century. DAVID S. RUDSTEIN, DOUBLE JEOPARDY: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 4 (2004).

3. See Criminal Justice Act, 2003, c. 44, §§ 75-83 (Eng.) (listing the elements of the new double jeopardy standard recently adopted in England).

4. The first appearance of the rule against double jeopardy in North America appeared in England's colonies. RUDSTEIN, *supra* note 2, at 11. The Act for the Liberties of the People, notably, "the first American Bill of Rights," was enacted in 1639. *Id.* With the exception of slaves, the Act guaranteed the inhabitants of the Colony the same "rights[,] liberties[,] immunities[,] and

Part II of this Comment will briefly discuss the history of the prohibition against double jeopardy in England and describe Parliament's new standard and the events that led to the rejection of the longstanding double jeopardy rule in favor of the new standard. It will also look at the status of the current reevaluation of the double jeopardy standard in Australia and New Zealand, countries following England's lead. Then, Part II will introduce the history of the Double Jeopardy Clause of the United States Constitution, address how England's common law system influenced its development, and introduce the proposition that the United States currently faces problems similar to those that prompted the legislative changes in England.

Part III will briefly discuss the differences between the procedures of constitutional amendment in England, Australia, New Zealand, and the United States. Then, it will address concerns about the practical application of England's new double jeopardy standard to a case that is under reexamination there, as well as how it could be applied in Australia and New Zealand. Lastly, Part IV will propose how the United States can use the changes in these countries as a reference point to reevaluate the Double Jeopardy Clause and explore opportunities to modify that standard in order to prevent future injustices.

## II. BACKGROUND

### A. *Getting Away With Murder*

The previously mentioned scenario in the United States is more than mere imagination. It is the story of Brenda Spicer, an eighteen-year-old student at Northeast Louisiana University who was murdered in 1987.<sup>5</sup> Spicer's strangled, dead body was found in a dumpster on her college campus.<sup>6</sup> The prosecution's case was primarily circumstantial, and though physical evidence was present at the crime scene, the prosecution was unable to conclusively link defendant Irvin Bolden, Jr. to the victim.<sup>7</sup> Though Bolden testified at the original trial that he had nothing to do with the murder, years later he confessed to killing Spicer in a

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privileges" of natural-born citizens of England. *Id.* at 67 (citing the Maryland Act as reprinted in 1 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 67 (1971)).

5. *Bolden v. Warden, W. Tenn. High Sec. Facility*, 194 F.3d 579, 580-81 (5th Cir. 1999), *cert. denied* 529 U.S. 1112 (2000) (presenting a statement of the facts surrounding the murder scene at the original murder trial of Irvin Bolden Jr.).

6. *Id.* at 580.

7. *Id.* at 581. Though the coroner found sperm and saliva on the victim, tests conducted showed that eighty percent of the population, including Bolden, matched the secretor type. *Id.*

jealous rage and was charged with perjury for his testimony at the original trial.<sup>8</sup> Despite this subsequent confession, the United States Constitution absolutely precludes prosecutors from retrying Bolden for the murder of Brenda Spicer.<sup>9</sup>

The scenario in England is but one of several high-profile cases<sup>10</sup> that prompted the Law Commission<sup>11</sup> to reevaluate and change the common law double jeopardy standard. The case involves a subsequent confession by William Dunlop to the 1989 murder of Julie Hogg<sup>12</sup> after a court charged, tried, and acquitted the former boyfriend.<sup>13</sup> However, while serving a later sentence for an unrelated assault charge,<sup>14</sup> Dunlop confessed to a prison guard that he had, in fact, murdered Hogg and had lied at trial to avoid conviction.<sup>15</sup> Dunlop was tried and convicted for perjury, and sentenced to six years in prison.<sup>16</sup> Based on the Criminal Justice Act,<sup>17</sup> the Crown Prosecution Service was able to review the case and submit a request to the Court of Appeal to quash Dunlop's acquittal and allow retrial.<sup>18</sup> If the court agrees that Dunlop's

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8. Bolden was charged with perjury for giving false testimony at the Spicer murder trial. *Id.* at 582. This murder trial was not Bolden's last interaction with the law. Spicer had been a friend of Bolden's girlfriend Joel Tillis. *Id.* at 581. A year later Tillis' dead body was found. *Id.* Although Bolden was initially a suspect in Tillis' murder, he was never arrested. *Id.* However, after filing a complaint against a later girlfriend, Jennifer Spurlock, Bolden again encountered police. *Id.* It was during the investigation surrounding this complaint that Bolden admitted killing both Spicer and Tillis. *Id.*

9. U.S. CONST. amend. V.

10. For example, in his autobiography MEMOIRS AND CONFESSIONS, reputed gangster Ronnie Knight admitted his involvement in the 1974 murder of Alfredo "Italian Tony" Zomparelli. Chris Summers, *Deaths Linked to Gangland Feud*, BBC NEWS ONLINE, Dec. 11, 1999, <http://news.bbc.co.uk/1/hi/uk/558849.stm> (last visited Jan. 9, 2007). Knight was acquitted of any involvement in the crime at his trial in 1980. *Id.* In his book, Knight admitted he had hired someone to shoot Zomparelli to avenge the death of his brother David, who died after a fight at a nightclub in 1970. *Id.*

11. See Law Commissions Act, 1965, c. 22 (Eng.), available at <http://www.lawcom.gov.uk/act.htm>.

12. See *R v. Dunlop*, (2001) 2 Crim. App. 133 (U.K.) (stating the facts of the murder of Julie Hogg, who was reported missing on November 16, 1989). Three months after Julie Hogg's death, her mother found her decomposing body behind the bath in her home. *Id.*

13. *Id.*

14. Dunlop's assault charge involved the stabbing of another ex-girlfriend several times and the beating of that ex-girlfriend's current boyfriend in the face with a baseball bat. *Id.*

15. *Id.*

16. *Id.*

17. See Criminal Justice Act, 2003, c. 44, §§ 75-81 (Eng.) (stating the specific changes to the old double jeopardy standard).

18. BBC News Online, *Man Faces Double Jeopardy Retrial*, <http://news.bbc.co.uk/1/hi/england/tees/4426038.stm> (last visited Jan. 9, 2007).

confession meets the standards set forth in the new legislation, the prosecution will be permitted to retry Dunlop for murder, and use his subsequent confession as evidence.<sup>19</sup>

### B. Brief History of Double Jeopardy in England

The English double jeopardy standard was established as long as eight hundred years ago.<sup>20</sup> By the early eighteenth century, prosecutions by appeal were "all but practically obsolete,"<sup>21</sup> and the British Parliament formally abolished prosecution by appeal in 1819.<sup>22</sup> Until the recent legislation, the English standard was based on "the principal that 'no man is to be brought into jeopardy of his life, more than once for the same offense.'"<sup>23</sup> The standard applied to pleas of *autrefois acquit*,<sup>24</sup>

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In November 2005, Dunlop's case was approved for application to the Court of Appeal in England. *Id.* That court will determine if retrial is appropriate. *Id.*

19. *Id.* In fact, in September 2006, Dunlop was retried and pleaded guilty to the murder. Associated Press, *Man Convicted in Murder in First Test of Double Jeopardy Change*, September 12, 2006, available at <http://www.law.com/jsp/article.jsp?id=1157978122610&rss=newswire>. In October 2006, he was sentenced to life, and required to serve at least 17 years for the crime. Nick Morris, *Killer "Billy" Dunlop Gets Life After Retrial Following the Axing of Double Jeopardy Law*, NEW CRIMINOLOGIST ONLINE EDITION, October 6, 2006, <http://www.newcriminologist.com/news.asp?id=-1705388537>.

20. Scholars disagree about when the prohibition against double jeopardy became law in England. Some believe it dates back to the Magna Carta in 1215; others argue it was developed over time, and truly established much later. See Hon. Stephen N. Limbaugh, Jr., *The Case of Ex Parte Lange (or How the Double Jeopardy Clause Lost its "Life or Limb")*, 36 AM. CRIM. L. REV. 53, 62 n.53 (stating that to prevent this mischief "the ancient common law, as well as Magna Charta itself, provided that one acquittal or conviction should satisfy the law" (citing *Ex parte Lange*, 85 U.S. 163, 170-71 (1873))). Limbaugh argues that although "popular belief" is that protection against double jeopardy was one of the "fundamental rights" set out in the Magna Carta, it was not in fact adopted into the English common law until 1557, when Sir William Staunford's *LES PLEES DEL CORON* (The Pleas of the Crown) was published. *Id.* However, Limbaugh admits "the concept, in one form or another, appeared sporadically in English law over the next three hundred years, evolving slowly into a maxim of the common law." *Id.* See also Nyssa Taylor, *England and Australia Relax the Double Jeopardy Privilege for Those Convicted of Serious Crimes*, 19 TEMP. INT'L & COMP. L.J. 189, 196 (2005) (stating that it was a "12th Century controversy between King Henry II and Archbishop Thomas Becket [that] brought the double jeopardy privilege into the common law" (citing MARTIN L. FRIEDLAND, *DOUBLE JEOPARDY* 5 (1969))); RUDSTEIN, *supra* note 2, at 4-11 (discussing the various procedural milestones in the development of England's rule against double jeopardy, dating back to as early as the Norman Conquest in 1066).

21. See RUDSTEIN, *supra* note 2, at 9 (citing JAMES FITZJAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW IN ENGLAND* 244-50 (MacMillan & Co. 1883)).

22. *Id.* at 8-9.

23. See *id.* at 4 (citing 4 WILLIAM BLACKSTONE, *COMMENTARIES*, 335).

24. Translating to "former acquittal," the plea ensured that once the defendant obtained an acquittal, he was saved from the prospect of retrial,

however, public outrage in response to defendants like Dunlop confessing post-acquittal or other new evidence surfacing, prompted scrutiny of the age-old standard.<sup>25</sup>

### C. Injustice Leads to Reform

In what has been called “the greatest reform of England’s criminal justice system in years,”<sup>26</sup> the controversial and highly-criticized<sup>27</sup> Criminal Justice Act (the “Act”) was signed into law by

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regardless of whether new evidence subsequently surfaced. *Id.* The standard also applies to pleas of *autrefois convict* (former conviction) and pardons. *Id.*

25. Julie Hogg’s mother, Ann Ming, is credited with “spearhead[ing]” the reform because of her twelve-year commitment to seeing her daughter’s killer convicted. Hayley Gyllenspetz & Andrew Douglas, *Pizza Girl ‘Killer’ May Face New Trial*, THE NORTHERN ECHO, July 18, 2002, available at <http://archive.thenorthernecho.co.uk/2002/7/18/127905.html>.

Additionally, a 1999 report by Sir William Macpherson followed an inquiry into the London police’s investigation of the 1993 murder of Stephen Lawrence, an eighteen-year-old African-American student. SIR WILLIAM MACPHERSON, THE STEPHEN LAWRENCE INQUIRY: REPORT OF AN INQUIRY BY SIR WILLIAM MACPHERSON OF CLUNY (1999) available at <http://www.archive.official-documents.co.uk/document/cm42/4262/4262.htm>. The report, initiated at the insistence of Lawrence’s parents, chronicles and criticizes the steps London police took in the days following Lawrence’s murder. *Id.* Specifically, five white teenagers were accused of the crime. BBC News Online, Steven Lawrence: Chronology of Events, [http://news.bbc.co.uk/hi/english/static/stephen\\_lawrence/timeline.htm](http://news.bbc.co.uk/hi/english/static/stephen_lawrence/timeline.htm) (last visited Jan. 9, 2007). The court determined that there was insufficient evidence against two of the defendants and dropped the charges. *Id.* The remaining three were acquitted after trial for lack of evidence. *Id.* Two years after acquittal, the inquiry discovered a hidden-camera and police-made videotape depicting one of the acquitted defendants as “brandishing knives and expressing violent racist views.” *Id.*

After analysis of the investigation and subsequent trial, the Macpherson report made several recommendations. See BBC News Online, Race: The Macpherson Report, [http://news.bbc.co.uk/vote2001/hi/english/main\\_issues/sections/facts/newsid\\_1190000/1190971.stm](http://news.bbc.co.uk/vote2001/hi/english/main_issues/sections/facts/newsid_1190000/1190971.stm) (last visited Jan. 9, 2007) (“The most controversial proposal was to amend the law of ‘double jeopardy’ so that in certain circumstances a person could be tried twice for the same crime.”).

26. Taylor, *supra* note 20, at 190.

27. Bar Council Chairman Matthias Kelly QC argued against the new legislation, saying: “We have maintained a consistent and principled opposition to those aspects which threaten the equilibrium of our justice system . . . . People trust juries as the best form of justice — we do too.” Daniel Coysh, *Judges Square up to Blunkett; Criminal Justice Bill Sparks Legal Fury*, MORNING STAR (U.K.), June 16, 2003, at 1. Liberty Director John Wadham called the Act a “shameful attack at justice,” arguing that innocent people will be forced to spend years in jail if the legislation passes. *Id.*

Critics of the new legislation are also quick to assume that it will have a preemptive effect on police conduct in investigations. See Law4u.com, Geoffrey Winn, What is Double Jeopardy?, [http://www.law4u.com.au/li/ls\\_double\\_jeopardy.html](http://www.law4u.com.au/li/ls_double_jeopardy.html) (last visited Jan. 9, 2007) [hereinafter What is Double Jeopardy?] (suggesting that if the police and the prosecution know

Queen Elizabeth II,<sup>28</sup> and became effective on April 4, 2005. The Act allows for the potential retrial of a criminal defendant acquitted of a “qualifying offence”<sup>29</sup> in England or Wales under circumstances where there is “new and compelling evidence against the acquitted person.”<sup>30</sup> Specifically, the new legislation, proposed by England’s Law Commission (the Commission),<sup>31</sup> recommends that retrial be allowed in certain situations that comprise a “very limited exception” to the rule.<sup>32</sup> Primarily, “in murder cases only, the Court of Appeal should have power to quash an acquittal where there is reliable and compelling new evidence of guilt and a retrial would be in the interests of justice.”<sup>33</sup>

#### D. Australia and New Zealand Follow Suit

England is not the only common law country that recognized a need to change the double jeopardy standard. Taking England’s lead, legal communities in both Australia and New Zealand have proposed similar changes to double jeopardy protection, mirroring England’s new law. In Australia, suggested changes came in the form of the Model Criminal Code Officers Committee’s (the “MCCOC”) discussion paper.<sup>34</sup> The MCCOC paper was drafted

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they will get a second chance at conviction, they do not need to, nor will they try as hard to get a conviction the first time).

28. Criminal Justice Act, 2003, c.44 (Eng.).

29. The list of qualifying offenses includes, but is not limited to murder, attempted murder and manslaughter, and conspiracy to commit any of the aforementioned crimes. Criminal Justice Act, 2003, c.44, § 75 (Eng.).

30. Criminal Justice Act, 2003, c.44, § 78 (Eng.).

31. The Law Commissions Act of 1965 established England’s Law Commission “[f]or the purpose of promoting the reform of the law [of England and Wales].” Law Commissions Act, 1965, c. 22 (Eng.), *available at* <http://www.lawcom.gov.uk/act.htm>. In 2001, the Commission published a report analyzing the then-current state of double jeopardy protection in England and recommended several changes. See THE LAW COMMISSION, DOUBLE JEOPARDY AND PROSECUTION APPEALS: REPORT ON TWO REFERENCES UNDER SECTION 3(1)(E) OF THE LAW COMMISSIONS ACT 1965 127 (2001), *available at* [http://www.lawcom.gov.uk/docs/lc267\(1\).pdf](http://www.lawcom.gov.uk/docs/lc267(1).pdf) (suggesting specific changes that should be made to the double jeopardy clause).

32. THE LAW COMMISSION, *supra* note 31, at 127.

33. *Id.*

34. MODEL CRIMINAL CODE OFFICERS COMMITTEE OF THE STANDING COMMITTEE OF ATTORNEYS-GENERAL, DISCUSSION PAPER ch. 2 (2003), *available at*

[http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/CFD7369FCAE9B8F32F341DBE097801FF\)-0+Double+Jeopardy+discusion+paper.pdf/\\$file/0+Double+Jeopardy+discusion+paper.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/CFD7369FCAE9B8F32F341DBE097801FF)-0+Double+Jeopardy+discusion+paper.pdf/$file/0+Double+Jeopardy+discusion+paper.pdf) [hereinafter MODEL CRIMINAL CODE DISCUSSION PAPER]. The Model Criminal Code is a project developed by the Commonwealth, State, and Territory governments of Australia tasked to “review the current state of the criminal law in Australia and to develop legislation based on best practice.” LawLink New South Wales, Criminal Law Review Division: New South Wales, Model Criminal Code, [http://www.lawlink.nsw.gov.au/lawlink/clrd/ll\\_clrd.nsf/pages/4464E13C84D47](http://www.lawlink.nsw.gov.au/lawlink/clrd/ll_clrd.nsf/pages/4464E13C84D47)

primarily in response to public outcry after the Australian High Court's decision in *R v. Carroll*.<sup>35</sup> In that case, the court held that Raymond John Carroll could not later be convicted of perjury for his original false testimony even after new evidence in the form of a post-acquittal confession and fresh expert testimony regarding forensic odontology arose, further implicating Carroll's guilt. The court so held because the later conviction would contradict the directed verdict of acquittal following Carroll's initial conviction for the murder of infant Deidre Maree Kennedy.<sup>36</sup>

As in England, the MCCOC paper suggests that the Australian government allow retrial of an acquitted defendant who was tried for "a very serious offence"<sup>37</sup> when the prosecution presents "fresh and compelling evidence."<sup>38</sup> In addition to the "fresh and compelling" standard,<sup>39</sup> the MCCOC suggests the

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B374A256DFE003245BA?OpenDocument (last visited Jan. 9, 2007). The Model Criminal Code Officers Committee releases reports based on these reviews. *Id.* The document was created at the request of the Australian Standing Committee of Attorneys-General, a subsidiary of the Australian Attorneys-General Office, tasked to "harmonise legislative and other action within the portfolio responsibilities of its members." Directory.gov.au, Australian Government: Government Online Directory, Standing Committee of Attorneys-General, <http://gold.directory.gov.au/index.php> (search the directory for "Standing Committee of Attorneys-General" under search type "Organisations") (last visited Sept. 12, 2006).

35. *R v. Carroll*, (2002) 194 A.L.R. 1 (Austl.).

36. The original murder trial of Raymond John Carroll began in 1985. *Id.* Deidre Kennedy's seventeen-month-old body was found in Ipswich, Queensland in 1973 with bite marks and bruises on her legs. *Id.* She died of strangulation. *Id.* Evidence suggested that the bite marks matched Carroll's teeth. *Id.* Carroll, however, claimed that he was "attending a course at an RAAF base in South Australia at the time of the murder." Rowena Jones, Briefing Paper on Double Jeopardy (Aug. 2003), available at <http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/0/89C20D04902F4102CA256ECF00098187>. However, the trial court convicted him. *R v. Carroll*, (2002) 194 A.L.R. 1 (Austl.). The court of appeal found insufficient evidence proving the prosecution's claims and reversed the initial conviction. *Id.* In 1999, police received new evidence in the form of a witness who came forward claiming Carroll was, in fact, in Ipswich at the time of the killing, contrary to his testimony at trial. Jones, *supra*. Another witness, who had been in jail with Carroll, claimed he admitted to the murder. *Id.* In addition, evidence matching teeth marks on the victim's leg to Carroll's was also obtained. *Id.*

37. The Committee found this threshold very important. MODEL CRIMINAL CODE DISCUSSION PAPER, *supra* note 34. Among the requirements for meeting the standard is an offense carrying a mandatory sentence of at least fifteen years in prison. *Id.* Examples of such offenses include murder, terrorism, rape, armed robbery, and drug trafficking. *Id.*

38. MODEL CRIMINAL CODE DISCUSSION PAPER, *supra* note 34. To qualify as "fresh," the evidence cannot have been known by the prosecution prior to the original trial. *Id.* The Committee suggested that a typical example of "fresh and compelling evidence" might be DNA evidence. *Id.*

39. *Id.*



evidence must be “reliable, substantial and highly probative of the case against the acquitted person.”<sup>40</sup> As in England, the proposed changes face strong scrutiny.<sup>41</sup>

Following England’s and Australia’s lead, the New Zealand Law Commission<sup>42</sup> also recommended a “limited exception”<sup>43</sup> to the longstanding rule against double jeopardy.<sup>44</sup> In 2005, the Law and Order Committee of New Zealand presented the Criminal Procedures Bill of 2004,<sup>45</sup> which would allow retrial in instances where “new and compelling evidence” that was not available at trial “indicates with a high degree of probability that the accused is guilty of the offence acquitted.”<sup>46</sup> Again, as in England and Australia, proposed changes to double jeopardy protection in New Zealand face fierce opposition.<sup>47</sup>

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40. *Id.*

41. In 2003, Victorian Attorney-General Rob Hulls said that a review of the double jeopardy principle should be undertaken, but clarified that “[t]o abolish the rule of double jeopardy w[ould] mean that a person accused of a crime will be perpetually considered a criminal even if acquitted.” Fergus Shiel, *Double Jeopardy Rule Faces Review*, THE AGE, April 12, 2003, available at <http://www.theage.com.au/articles/2003/04/11/1049567875545.html>. “Double jeopardy, for some [eight hundred] years has been safeguarding against the oppressive nature of criminal proceedings and ensures the basic right of a person to freedom after acquittal,” Hulls added. *Id.*

42. The New Zealand Law Commission is an independent government-funded organization tasked to review areas of the law that “need updating, reforming or developing.” Law Commission, About Us, <http://www.lawcom.govt.nz/AboutUs.aspx> (last visited Jan. 9, 2007). The Commission makes recommendations to Parliament in an effort to “ensure that the law provides effectively for the current and future needs of our rapidly changing society.” *Id.* The Commission proclaims its goal as “achieving laws that are just, principled, accessible, and that reflect the heritage and aspirations of the peoples of New Zealand.” *Id.*

43. LAW COMMISSION, REPORT 70: ACQUITTAL FOLLOWING PERVERSION IN THE COURSE OF JUSTICE 11 (2001), available at [http://www.lawcom.govt.nz/UploadFiles/Publications/Publication\\_77\\_166\\_R70.pdf](http://www.lawcom.govt.nz/UploadFiles/Publications/Publication_77_166_R70.pdf).

44. See New Zealand Bill of Rights Act 1990, § 26(2) (N.Z.), available at <http://www.justice.govt.nz/pubs/reports/2004/bill-of-rights-guidelines/section26.html#section26.2> (“No one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again.”).

45. Criminal Procedure Bill 2004, 2005 No. 158-2 (N.Z.).

46. *Id.* at 2.

47. National justice spokesman Richard Worth called the exception “unsafe and unwise.” Kevin Taylor, *Law to Allow Double Jeopardy*, N.Z. HERALD, May 14, 2004, at 1. “It seems completely wrong and inconsistent with the principles on which any sound legal system is based that if the Crown fails to prove for whatever reason the guilt of a person, that they can have an opportunity of coming again,” Worth added. *Id.* New Zealand Attorney General Margaret Wilson agreed, saying “[t]he proposal will result in all persons who were accused and acquitted of these charges . . . having to live with the possibility of continued police investigation, renewed prosecution and other onerous consequences of exposure to the criminal justice system.” Tracy Watkins, *Majority Verdict Bill Introduced*, THE DOMINION POST (N.Z.), June 23, 2004, at 4.

The proposed changes in New Zealand are in response to the High Court and Court of Appeal's decision in *R v. Moore*.<sup>48</sup> Kevin Moore was one of two defendants tried and acquitted in 1992 for the murder of a Mr. Jillings.<sup>49</sup> Though evidence in the form of Moore's fingerprints was found at the scene of the crime, a witness, Mr. M., testified that the fingerprints were there because Moore was at the location during an earlier, unrelated drug purchase.<sup>50</sup> Mr. M. later confessed that he had lied on the stand, and he and Moore were tried and convicted for perjury.<sup>51</sup> Moore appealed and the conviction was reversed.<sup>52</sup> The New Zealand Law Commission argued that in circumstances such as these, where later evidence of perjured testimony implicates guilt, an acquitted defendant should potentially face retrial, despite the traditional protection from double jeopardy.<sup>53</sup>

### *E. The American Approach*

The Double Jeopardy Clause of the Fifth Amendment of the Constitution of the United States of America was modeled after England's common law double jeopardy approach.<sup>54</sup> Although the states did not formally ratify the Double Jeopardy Clause until 1791,<sup>55</sup> in earlier years the colonies frequently recognized protections against double jeopardy.<sup>56</sup> As was once true in England, the clause absolutely prevents retrial of a criminal defendant, regardless of any new evidence that surfaces.<sup>57</sup> For more than two centuries, it has been considered a cornerstone of the United States Constitution and a fundamental right of United States citizens,<sup>58</sup> intended to protect a defendant from undue mental, emotional, and financial hardship.<sup>59</sup>

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48. *R v. Moore*, [1999] 3 N.Z.L.R. 385, 1999 N.Z.L.R. LEXIS 20 (H.C.).

49. *Moore*, 1999 N.Z.L.R. LEXIS 20, at \*1.

50. *Moore*, 1999 N.Z.L.R. LEXIS 20, at \*6.

51. *Id.*

52. *Moore*, 1999 N.Z.L.R. LEXIS 20, at \*39.

53. See LAW COMMISSION, *supra* note 43, at vii ("We recommend a limited and principled exception to [double jeopardy protection] in cases where an accused has secured apparently unmerited acquittal in the most serious classes of case by perjury or other conduct designed to defeat the course of justice.").

54. See RUDSTEIN, *supra* note 2 and accompanying text and endnotes (discussing England's legislative history behind the double jeopardy standard).

55. *Id.* at 15.

56. See *id.* at 11-13 (discussing various examples of how the Colonies recognized double jeopardy protections starting in 1641).

57. See U.S. CONST. amend. V (stating "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb.").

58. RUDSTEIN, *supra* note 2, at 15.

59. See 4 JOSEPH G. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED ch. 29, at 113 (3d ed. 1996) (citing *Green v. United States*, 355 U.S. 184 (1957)). The *Green* court described the idea:

Nevertheless, the convicted defendant has the opportunity to appeal his conviction.<sup>60</sup> This "asymmetrical appeal right[],"<sup>61</sup> as the current standard in American jurisprudence, should be reconsidered in light of the aggressive changes made to England's double jeopardy protection. As one scholar comments, this "unalterable rule . . . fails to weigh against the individual's very proper interest in not experiencing the anxiety, expense, and harassment that a second trial brings, the equally considerable interest of society in the fair, just, and sensible administration of criminal justice."<sup>62</sup> The disparate effect of the current imbalance in the United States is illustrated by the forbidden retrial of Irvin Bolden, Jr., as well as other acquitted defendants who confessed after their trials, or new evidence was discovered.<sup>63</sup> The potential

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[T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

355 U.S. at 187-88; see also Forrest G. Alogna, *Double Jeopardy, Acquittal Appeals, and the Law-Fact Distinction*, 86 CORNELL L. REV. 1131, 1133 (2001) (stating that courts have a good reason for interpreting the Double Jeopardy Clause as preventing undue hardship to criminal defendants). "Defending oneself in any lawsuit is onerous. When the government is the plaintiff and the liability a prison term or death, the pressures of legal defense are substantial. Prolonging an individual defendant's exposure to these pressures may be unduly oppressive." *Id.*

60. See Jeremiah E. Goulka, *The First Constitutional Right to Criminal Appeal: Louisiana's Constitution of 1845 and the Clash of the Common Law and Natural Law Traditions*, 17 TUL. EUR. & CIV. L.F. 151, 152 (2002) (stating that despite an explicit constitutional right to appeal, the right can be considered "an important aspect of due process and fundamental fairness"); see also Marc M. Arkin, *Rethinking the Constitutional Right to a Criminal Appeal*, 39 UCLA L. REV. 503, 513 (1992) (reporting that forty-seven of the fifty states allow a criminal defendant at least one appeal without court consent).

61. See generally Vikramaditya S. Khanna, *Double Jeopardy's Asymmetric Appeal Rights: What Purpose Do They Serve?*, 82 B.U.L. REV. 341, 344 (2002).

62. See Joshua Steinglass, *The Justice System in Jeopardy: The Prohibition on Government Appeals of Acquittals*, 31 IND. L. REV. 353, 374 (1998) (citing *United States v. Jenkins*, 490 F.2d 868, 884 (2d Cir. 1973) (Lumbard, J., dissenting)). The court in *Jenkins* held that the government could not appeal from an acquittal, even for an error of law by the trial judge, because double jeopardy protection prohibits a second prosecution when the defendant was acquitted on the merits. *United States v. Jenkins*, 490 F.2d 868 (2d Cir. 1973).

63. Lemrick Nelson was accused, tried and acquitted of the 1991 murder of Yankel Rosenbaum. Brian Levin, *Disorder in the Courts*, INTELLIGENCE REPORT, Spring 2004, available at <http://www.splcenter.org/intel/intelreport/article.jsp?aid=388>. Strong evidence included Nelson fleeing from the scene, the victim identifying him, and police finding a knife with blood on it containing DNA consistent with Rosenbaum's. *Id.* Nelson also confessed twice to police. *Id.* However, despite the evidence a jury acquitted him. *Id.* In a subsequent civil rights charge, new evidence was introduced, including

injustice prompts scrutiny of the recent developments in double jeopardy protection in England, Australia, and New Zealand and discussion of the feasibility of similar changes in the United States.

### III. ANALYSIS

Analysis of the new law in England and the proposed legislation in Australia and New Zealand provides the appropriate backdrop against which to analyze the possibility of similar changes in the United States. First, though England, Australia, and New Zealand have drafted acts or bills laying out the new double jeopardy standards, those countries do not have to contend with the strict amendment requirements of the United States Constitution, and, therefore, are working in an environment more conducive to change.<sup>64</sup> Second, though a thorough analysis of the effect of change in England, Australia, and New Zealand is difficult to ascertain, it is possible to hypothesize what the results will be by looking at the language of the new and proposed legislation. Nevertheless, as critics of the current double jeopardy standard in the United States argue, the inequality of appeal rights between the prosecution and the defendant “undermines the search for truth in criminal justice,”<sup>65</sup> and that “[s]ociety’s interest

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photographs and a post-acquittal confession he made to a girlfriend. *Id.* The jury in that trial convicted Nelson and sentenced him to twenty years in prison. *Id.*

Emmett Till was an African-American teenager from Chicago who was lynched in the Mississippi Delta in August 1955. PBS, Timeline: The Murder of Emmett Till, <http://www.pbs.org/wgbh/amex/till/timeline/index.html> (last visited Jan. 9, 2007). It is believed that Roy Bryant and his half brother, J.W. Milam, kidnapped Till and drove him to a plantation shed in a neighboring county. PBS, Timeline: The Murder of Emmett Till, <http://www.pbs.org/wgbh/amex/till/timeline/timeline2.html>. Bryant and Milam later described “brutally beating him, taking him to the edge of the Tallahatchie River, shooting him in the head, fastening a large metal fan used for ginning cotton to his neck with barbed wire, and pushing the body into the river.” *Id.* A few months after Emmett Till’s murder, LOOK magazine published an article in which Roy Bryant and J. W. Milam confessed to the crime. William Bradford Huie, *The Shocking Story of Approved Killing in Mississippi*, LOOK, January 1956, available at [http://www.pbs.org/wgbh/amex/till/sfeature/sf\\_look\\_confession.html](http://www.pbs.org/wgbh/amex/till/sfeature/sf_look_confession.html). The magazine article contains a detailed description of the murder, as related by Huie based on his interview with Bryant and Milam. *Id.*

64. See discussion *infra* Part III.A. and accompanying endnotes (discussing the constitutions of England, Australia, and New Zealand and their respective amendment processes).

65. Department of Justice, Office of Legal Policy, *Truth in Criminal Justice Series’ Office of Legal Policy: Double Jeopardy and Government Appeals of Acquittals*, 22 U. MICH. J.L. REFORM 831, 837 (1989). Defendants who have been wrongfully acquitted “are shielded from government appeals that could have corrected trial court errors.” *Id.*

in ferreting out the truth and punishing those who have committed crimes is compromised”<sup>66</sup> because of current double jeopardy protection.<sup>67</sup>

#### A. Constitutional Protection: The Ease of Change

In England, there is no central, written document forming a constitution.<sup>68</sup> Because the English constitution is considered “uncodified,”<sup>69</sup> and the concept of entrenchment,<sup>70</sup> as seen in other constitutional systems, does not exist,<sup>71</sup> Parliament can reform or amend their constitution simply by passing an act amending or abolishing any element of the constitution.<sup>72</sup> Parliament did just that in passing the Criminal Justice Act of 2003.

Conversely, Australia and New Zealand follow procedures similar to the United States amendment process,<sup>73</sup> requiring the legislature to approve any changes,<sup>74</sup> which may explain why the

66. *Id.*

67. See Khanna, *supra* note 61, at 383 (describing the reasons for the asymmetrical appeal rights, though admitting that the government’s inability to appeal acquittals not only reduces the chance of a false conviction, but also “increase[s] the chance that a false acquittal in the initial trial would go uncorrected”).

68. *E.g.* Eurolegal Services, The Constitution of the UK, <http://www.eurolegal.org/britpages/ukconstset.htm> (last visited Jan. 9, 2007).

69. See *id.* (describing the unwritten conventions of the English constitution)

70. In England sovereignty belongs to Parliament. See Douglas W. Vick, *The Human Rights Act and the British Constitution*, 37 TEX. INT’L L.J. 329, 335-36 (2002).

71. *Id.* at 335-36.

72. See *id.* at 336 (describing the supremacy of Parliament).

73. See generally James A. Thomson, *American and Australian Constitutions: Continuing Adventures in Comparative Constitutional Law*, 30 J. MARSHALL L. REV. 627 (1997) (comparing the Australian and United States constitutions).

74. Australian government is created by and follows the Constitution of the Commonwealth of Australia. Parliament of Australia, Education: Parliament An Overview, <http://www.aph.gov.au/parl.htm>. The text of the Constitution was originally a part of the Commonwealth of Australia Constitution Act of 1900, an Act of the Parliament of the United Kingdom. Wikipedia, Constitution of Australia, [http://en.wikipedia.org/wiki/Australian\\_constitution](http://en.wikipedia.org/wiki/Australian_constitution) (last visited Jan. 9, 2007). Australia is now an independent country, so the text of the Constitution is now regarded as being fully separated from the text in the original Act. *Id.* It can only be amended by the people. *Id.*

New Zealand is considered a constitutional monarchy, meaning it operates under a “monarch,” or “head of state” combined with a “representative democracy.” Wikipedia, Constitutional Monarchy, [http://en.wikipedia.org/wiki/Constitutional\\_monarchy](http://en.wikipedia.org/wiki/Constitutional_monarchy) (last visited Oct. 22, 2006). New Zealand has no single written constitution, but “the Constitution Act of 1986 is the principal formal statement” of New Zealand’s constitutional structure. Department of the Prime Minister and Cabinet, The Cabinet Manual, On the Constitution of New Zealand: An Introduction to the Foundations of the Current Form of Government, <http://www.dpmc.govt.nz/cabinet/manual/>

recommendations for change to the double jeopardy standard in those countries have not yet been effected into law.<sup>76</sup> Though closer to the requirements of amending the United States Constitution, the processes in both Australia and New Zealand still make amendment easier than in the United States.

In contrast to these countries' constitutions, the United States Constitution sets forth strict requirements for amendment in Article V.<sup>76</sup> With such strict procedural requirements, though many amendments have been proposed to the Constitution in United States history,<sup>77</sup> few have passed.<sup>78</sup> Thus, on the surface, it seems that it would be difficult for the United States to follow England, Australia, and New Zealand's lead, even if the

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intro.html. Under this system, amendments to the constitution are "passed by a simple majority of the Members of Parliament." *Id.*

75. As of October 2005, the MCCOC had not yet issued a final report, so legislators are waiting for those results before considering signing the bill. University of NSW, Council for Civil Liberties, Double Jeopardy in NSW, <http://www.nswccl.org.au/unswwcl/issues/double%20jeopardy%20nsw.php>. The Commonwealth, Queensland, New South Wales, and Western Australia have agreed that fresh and compelling evidence may provide an exception to the double jeopardy rule "in strict circumstances." Minister of Justice and Customs, Double Jeopardy Reform Still on the Agenda, [http://www.ag.gov.au/agd/WWW/justiceministerHome.nsf/Page/Media\\_Release\\_s\\_2004\\_1st\\_Quarter\\_22\\_March\\_2004\\_-\\_Double\\_jeopardy\\_reform\\_still\\_on\\_the\\_agenda](http://www.ag.gov.au/agd/WWW/justiceministerHome.nsf/Page/Media_Release_s_2004_1st_Quarter_22_March_2004_-_Double_jeopardy_reform_still_on_the_agenda). However, the remaining states and territories have not yet been able to agree on the issue. *Id.*

The New Australian attorney general recently refused to consider the changes. *Technology Opens Up Legal Debate*, GOLD COAST BULLETIN (Austl.), Jan. 28, 2006, at 11. She believed that the issue had to be addressed nationally. *Id.* Justice de Jersey recently noted that DNA technology, "which can scientifically link a person to an old crime, 'gives teeth' to the push for change." *Id.* "It should not be lightly overturned, finality is important, but what of a case where recent DNA analysis puts guilt not only beyond reasonable doubt but any shadow of doubt?" the justice is quoted. *Id.* "What of a case where it plainly emerges that one or more of the acquitting jurors were bribed or the accused giving evidence in his own defence committed perjury?" *Id.*

76. The United States Constitution is clear on the process of amendment. U.S. CONST. art. V. The process includes either proposal by two-thirds of both the House of Representatives and the Senate or a proposal through a convention of the legislatures of two-thirds of the states. *Id.* After the proposal, passage of the amendment requires ratification by the legislatures of three-fourths of the states. *Id.*

77. The first ten amendments, the Bill of Rights, were ratified in 1789. U.S. Constitution Online, Ratification of Constitutional Amendments, <http://www.usconstitution.net/constamrat.html> (last visited Jan. 9, 2007). In the more than two hundred years that have followed, only seventeen amendments have been ratified. *Id.*

78. Since 1789, more than ten thousand amendments have been proposed. Thirty-three of those were sent to the states for ratification, and twenty-seven were ratified. C-Span.org, Congress, <http://www.c-span.org/questions/weekly54.asp> (last visited Jan. 9, 2007). Nearly nine hundred amendments have been proposed in the last decade. *Id.*

legislature determined it would be in the interest of justice. Moreover, to make such a determination, the legislature would need to look at the effects of change in England, Australia, and New Zealand, which are difficult to ascertain at this point because no defendant has been subjected to retrial in those countries.

*B. The Difference Between Theory and Practice: The Difficult Application of Change*

In England, it remains unclear what effect the new law will have on the criminal justice system because the approved legislation is very recent, and only one acquitted defendant's case has been referred to the Court of Appeal to determine whether he can be retried.<sup>79</sup> However, it is possible to hypothesize, using the language of the Act and the proposed legislation in Australia and New Zealand, how the new standards might apply to the previously discussed cases that prompted the changes in those countries, as well as how they would apply to cases in the United States if similar changes, in the form of amendment, were made to the Constitution.

*1. The limited exception standard*

First, it is important to note that the concept of a "limited exception" requirement is a constant in all three proposed changes to double jeopardy protection.<sup>80</sup> In England, the exception is limited to "serious" crimes.<sup>81</sup> In Australia, the proposed legislation suggests that the new standard be applied only to "a very serious offense."<sup>82</sup> Similarly, New Zealand's proposed changes suggest that the exception should only apply to "exceptional

circumstances,"<sup>83</sup> but do not indicate specifically to what type of crimes the new legislation would apply.<sup>84</sup>

Attempting to ensure that a prosecutor cannot use retrial as a tool providing more than one shot at every criminal trial, these standards suggest that any given case will very rarely meet the

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79. Man Faces Double Jeopardy Retrial, *supra* note 18.

80. Criminal Justice Act, 2003, c. 44 (Eng.); MODEL CRIMINAL CODE DISCUSSION PAPER, *supra* note 34; Criminal Procedure Bill 2004, 2005 No. 158-2 (N.Z.).

81. Criminal Justice Act, 2003, c. 44 (Eng.). This standard contemplates that defendants acquitted of any of about thirty crimes, ranging from murder to conspiracy, could potentially face retrial, making England's exception standard the broadest.

82. See MODEL CRIMINAL CODE DISCUSSION PAPER, *supra* note 34, § 2.8.1, at 91 (stating the type of offenses to which the new legislation would apply). Examples of such offenses include murder, terrorism, rape, armed robbery and drug trafficking. *Id.*

83. Criminal Procedure Bill 2004, 2005 No. 158-2 (N.Z.).

84. *Id.*

requirements.<sup>86</sup> The small number of cases discussed here support this argument. Recall that each case involved murder: one of the most serious of crimes one may commit. More notably, though England has the broadest exception requirement, the country has, to date, only *reevaluated* the case of acquitted defendant William Dunlop, his subsequent confession to Julie Hogg's murder, and the potential of his retrial based on the new evidence.<sup>86</sup> Hence, the scope of cases that potentially face retrial in England, Australia, and New Zealand appears to be truly limited.

## 2. The "new and compelling" and "highly probative" evidentiary standards

As provided for in both the recently enacted double jeopardy standard in England and the proposed double jeopardy standards in Australia and New Zealand, a strict requirement exists that, for a defendant to be retried, new evidence must be discovered. Moreover, that new evidence must be either "new"<sup>87</sup> or "fresh,"<sup>88</sup> and "compelling."<sup>89</sup> But first, a necessary determination must be made as to what qualifies as *new*. In England, evidence may be used in the evaluation of potential retrial if it was not used at the original trial.<sup>90</sup> Both Australia and New Zealand's proposed legislation require that the prosecution at the original trial cannot have known that the evidence existed.<sup>91</sup> All examples previously discussed satisfy the first prong of this standard, as both the confessions of the acquitted defendant's and the corroborating evidence were unknown to the prosecution at their respective original trials.

The second prong in all three proposals, requiring that the evidence be "compelling," requires further analysis in each case. The standard set forth in England's new legislation is mirrored in both Australia's and New Zealand's proposed double jeopardy changes. To qualify, the evidence must be "reliable[,] . . .

85. The National Crime Faculty of England has estimated that thirty-five murder cases might result in the acquitted defendant being retried. BBC News Online, Jon Silverman, DNA Advances to be Retrial Key, <http://news.bbc.co.uk/1/hi/uk/4408001.stm> (last visited Sept. 12, 2006). "But the bar to a second prosecution will be placed at a high level." *Id.*

86. Man Faces Double Jeopardy Retrial, *supra* note 18.

87. Criminal Justice Act, 2003, c. 44, § 78 (Eng.).

88. MODEL CRIMINAL CODE DISCUSSION PAPER, *supra* note 34, § 2.8.5, at 106-07, § 2.8.6, at 108-09.

89. Criminal Justice Act, 2003, c. 44, § 78 (Eng.); MODEL CRIMINAL CODE DISCUSSION PAPER, *supra* note 34; Criminal Procedure Bill 2004, 2005 No. 158-2 (N.Z.).

90. The Act states: "Evidence is new if it was not adduced in the proceedings in which the person was acquitted." Criminal Justice Act, 2003, c. 44, § 78 (Eng.).

91. MODEL CRIMINAL CODE DISCUSSION PAPER, *supra* note 34, § 2.8.6, at 109; Criminal Procedure Bill, 2004, 2005 No. 158-2 (N.Z.).



substantial and . . . highly probative of the case.<sup>92</sup> A reasonable analysis of this standard prompts the question: if the judge or jury had received this information at the original trial, is it more likely than not that the verdict would have been different?

Consider the examples of the subsequent-confessions: a main criticism, for example, of acquitted defendant William Dunlop's potential retrial, based on his subsequent confession, is the quality of the evidence that is being considered.<sup>93</sup> Without corroborating evidence, a subsequent confession may not be enough to convince a fact-finder that the initial verdict was incorrect. Scientific studies have shown that the conditions surrounding the confession — including where, when and how it was made — affect its reliability.<sup>94</sup> Namely, the possibility that a confession was coerced makes the evidence less reliable, and therefore less compelling.<sup>95</sup> Before determining whether the confession is enough to warrant retrial, the fact-finder should investigate the conditions surrounding the confession to determine whether coercion was present. Even in the absence of coercion, the confession *alone* might not be considered probative of guilt, and retrial still denied.

A confession supported by corroborating evidence, however, is even more compelling. In the case of Raymond John Carroll in Australia, two witnesses came forward: one claimed that Carroll admitted to the murder; the other discredited the alibi Carroll presented at trial.<sup>96</sup> More importantly, new expert testimony regarding teeth marks on the victim and linking Carroll to the crime was obtained.<sup>97</sup> The two witnesses' statements and forensic odontological evidence, in addition to the post-acquittal confession, are more compelling than a confession alone, since scientific fact

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92. Criminal Justice Act, 2003, c. 44, § 78 (Eng.).

93. A Crown Prosecution Service spokeswoman stated that, "Just because someone is reported to have confessed — in a book or a newspaper interview — does not necessarily mean that is evidence in a form we could use." BBC News Online, Double Jeopardy Law Ushered Out, <http://news.bbc.co.uk/1/hi/uk/4406129.stm> (last visited Jan. 9, 2007).

94. See University of Iowa, Ian Stewart, The Interrogators Fallacy, <http://www.uiowa.edu/~030116/116/articles/mathrec1.htm> (last visited Jan. 9, 2007) (citing a study that offers a mathematical formula to determine the reliability of a confession made in various circumstances). In fact, evidence shows that coercion by police often causes false confessions and wrongful convictions, because people believe that innocent defendants will not confess. Jacqueline McMurtrie, *The Role of the Social Sciences in Preventing Wrongful Convictions*, 42 AM. CRIM. L. REV. 1271, 1280 (2005). In fourteen to twenty-five percent of cases studied, false confessions were the suggested cause of wrongful convictions. *Id.*

95. See Stewart, *supra* note 94 (discussing how existence of a confession may actually reduce likelihood of guilt).

96. See *R v. Carroll*, (2002) 194 A.L.R. 1 (Austl.).

97. *Id.*

backs up the claim.<sup>98</sup> A fact-finder could find this evidence more probative of guilt.<sup>99</sup>

Similarly, in the New Zealand case of Kevin Moore, new evidence was also present in addition to the subsequent confession.<sup>100</sup> The fact that Moore's fingerprints were at the scene *and* were not, in fact, deposited there from an earlier drug purchase<sup>101</sup> combined with the confession is certainly more compelling than the confession alone, thus making it more likely that Moore could face potential retrial if the suggested changes are signed into law.

### 3. Utilizing advances in technology

In the Australian and New Zealand cases, the advancement in technology has made evidence, seemingly useless at the time of the initial trial, now potentially conclusive of guilt. The same is true in the case of Irvin Bolden, Jr. in the United States. Notwithstanding the difficulties of constitutional amendment in the United States, applying standards similar to those in England, Australia, and New Zealand to Bolden's case would likely lead to similar results. His post-acquittal confession to the murder of Brenda Spicer would satisfy a "new" requirement, but whether that confession alone could be considered "compelling" or "highly probative of guilt" would face substantial scrutiny. The question of coercion inevitably surfaces, and a fact-finder would have to examine the circumstances surrounding the confession to determine its reliability. However, it is possible that physical evidence taken from the victim's body, if properly preserved, could

be re-analyzed with advanced technology and might implicate Bolden as the offender more conclusively.

DNA analysis has come to the forefront of criminal investigations only in the last fifteen years.<sup>102</sup> While most investigations commenced since the technological advancement

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98. DNA evidence is "fundamental" to resolving crimes by comparing crime scene evidence to samples taken from victims and suspects. Frederick R. Bieber, *Science and Technology of Forensic DNA Profiling: Current Use and Future Directions*, in *DNA AND THE CRIMINAL JUSTICE SYSTEM: THE TECHNOLOGY OF JUSTICE* 23, 23 (David Lazer ed., 2004) [hereinafter *DNA AND THE CRIMINAL JUSTICE SYSTEM*]. Currently, "even minimal trace evidentiary biological samples . . . can be used for highly discriminating DNA profiling." *Id.* at 27.

99. In fact, Australia's proposed legislation specifically notes DNA evidence as a typical example of fresh and compelling evidence. MODEL CRIMINAL CODE DISCUSSION PAPER, *supra* note 34.

100. *R v. Moore*, [1999] 3 N.Z.L.R. 385, 1999 N.Z.L.R. LEXIS 20, at \*6 (H.C.).

101. *Id.*

102. LAWRENCE KOBILINSKY, THOMAS F. LOTTI & JAMEL OESER-SWEAT, *DNA FORENSIC AND LEGAL APPLICATIONS* 275-76 (2005).

"routinely" involve DNA testing,<sup>103</sup> there are investigations from past crimes that did not involve this conclusive, scientific evidence,<sup>104</sup> which may have ended in a wrongful acquittal or wrongful conviction.<sup>105</sup> Experts suggest that the "interim problem" of a lack of DNA evidence in past cases "has highlighted flawed assumptions and failings in our criminal justice system that will continue to require attention."<sup>106</sup>

It is in analyzing this type of evidence that the imbalance in current double jeopardy jurisprudence lies. The United States legal system has gone to great lengths to protect the innocent, convicted criminal defendant from injustice. This protection does not stop at allowing a convicted defendant to exhaust his or her appeals. In fact, legal scholars have formed entire organizations aimed to protect these individuals by analyzing DNA years after their conviction to prove their innocence,<sup>107</sup> and they have succeeded.<sup>108</sup> However, agencies like these do not exist to help the

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103. Margaret A. Berger, *Lessons from DNA: Restriking the Balance Between Finality and Justice*, in DNA AND THE CRIMINAL JUSTICE SYSTEM, *supra* note 98 at 109. "Postconviction testing will gradually become passé . . . as DNA technology reaches the point at which future retesting will not provide any more definitive answers when initial results are inconclusive." *Id.*

104. DNA is highly probative because, "with the exception of identical twins, no two people have the same DNA." U.S. Department of Justice, Office of Justice Programs Website, Understanding DNA Evidence: A Guide For Victim Service Providers, [http://www.ojp.usdoj.gov/nij/publications/dna\\_evbro/2.html](http://www.ojp.usdoj.gov/nij/publications/dna_evbro/2.html) [hereinafter Understanding DNA Evidence] (last visited Sept. 12, 2006). Therefore, DNA evidence collected from a crime scene can conclusively link a suspect to a victim, thus making it highly reliable. *Id.*

105. Bieber, *supra* note 98. Not all subsequent tests prove the innocence of a convicted defendant. ABC News Online, DNA Test Confirms Guilt in 1992 Execution, <http://abcnews.go.com/US/wireStory?id=1501861> (last visited Jan. 9, 2007). DNA evidence taken from Roger Keith Coleman, an executed prisoner, confirmed that he was in fact guilty of the rape and murder of his sister-in-law, of which he was convicted. *Id.*

106. Bieber, *supra* note 98.

107. One of the larger organizations performing these inquiries is the Innocence Project at the Benjamin N. Cardozo Law School of Yeshiva University in New York. KOBILINSKI, LIOTTI & OESER-SWEAT, *supra* note 102, at 275-76. For more than ten years, law students and attorneys have volunteered to work on the project, in hopes of using their knowledge to exonerate the innocently convicted. *Id.* According to the project, approximately fifty percent of cases where biological evidence has been preserved result in exonerations. *Id.* In 2001, twenty-three inmates were exonerated because of the efforts of the Innocence Project. *Id.* The organization maintains an internet site dedicated to the history and mission of the project, press mentions, and a list of pending and solved cases. The Innocence project, <http://www.innocenceproject.org> (last visited Jan. 9, 2007). The website boasts that as of January 9, 2007, 189 people have been exonerated because of the project's efforts. *Id.*

108. Beginning in the 1990s, several cases have resulted in DNA tests proving the actual innocence of convicted defendants. KOBILINSKI, LIOTTI & OESER-SWEAT, *supra* note 102, at 276. A judge freed Alan Crotzer after

prosecution prove an acquitted defendant's guilt by analyzing DNA evidence years after acquittal. Though the advancement of technology could allow preserved evidence to prove guilt as clearly as it has proven innocence, the current legal climate in the United States does not allow this type of quest for truth. Were such tests to be conducted, and the results highly probative of guilt, nothing could be done based on the current double jeopardy standard.

#### IV. PROPOSAL

In the United States, eighty-three percent of murder trials end in convictions.<sup>109</sup> Superficially, it would seem that the system works a large percentage of the time. However, miscarriages of justice continue to abound.<sup>110</sup> Irvin Bolden, Jr. is probably not the only person get away with murder under the United States' current double jeopardy standard.<sup>111</sup> An obvious way to avoid such injustice is to allow a retrial when new and compelling evidence is

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twenty-four years in prison when DNA testing and other evidence proved he was not involved in the 1981 armed robbery and rapes of which he was originally convicted. MSNBC, *Man Exonerated by DNA is Freed After 24 Years*, <http://www.msnbc.msn.com/id/10995872/>. More than three years before his release, he contacted the Innocence Project. *Id.*

The Rocky Mountain Innocence Center is another organization tasked to test available DNA evidence to prove convicted inmates are factually innocent. Truth in Justice, *Inmate Being Freed After DNA Clears Him*, <http://www.truthinjustice.org/Bruce-Goodman.htm> (last visited Jan. 9, 2007). After nineteen years in prison, Bruce Dallas Goodman was freed from prison when new DNA testing conclusively determined that Goodman was not involved in the 1984 rape and murder of his girlfriend. *Id.*

Another Innocence Project in Cincinnati Ohio recently assisted in the exoneration of Christopher Bennett. "Armed with new evidence — including DNA analysis and new witness testimony" — the students maintained that Bennett's conviction for aggravated vehicular homicide should be reversed because the evidence proved he was not driving. Sharon Coolidge, *UC Group Frees Ohio Inmate: Innocence Project Exonerates Second Wrongly Convicted*, THE CINCINNATI ENQUIRER, Jan. 24, 2006, at 2B.

109. In U.S. federal courts, prosecutors win eighty-five percent of all criminal cases and convict eighty-three percent of murder defendants. J. Mark Ramseyer & Eric B. Rasmusen, *Why Is the Japanese Conviction Rate So High?*, 30 J. LEGAL STUD. 53, 55 (2001). This includes cases where defendants plead no contest to the charges. *Id.*

110. See Timeline: The Murder of Emmett Till, *supra* note 63 (discussing the events surrounding Till's death and the subsequent confession of the acquitted defendants); see also Levin, *supra* note 63 (discussing the acquittal of Lemrick Nelson and the subsequent evidence discovered after the original trial); *Bolden*, 194 F.3d at 579 (discussing the circumstances surrounding the acquittal of Bolden, and his subsequent confession to the murder of which he was accused).

111. A Google search for "unsolved murders in the United States" resulted in more than 500,000 sites dedicated to finding the murderers of victims whose deaths have not yet been explained. Google.com, <http://google.com/search?hl=en&lr=7q=unsolved+murders=united=states> (last visited Jan. 9, 2007).

discovered that implicates guilt. There are two things the United States should do to allow a retrial under these circumstances. First, legislators should consider proposing an amendment to the Constitution similar to the Criminal Justice Act adopted in England and the changes suggested in Australia and New Zealand. Second, in the alternative to such an amendment, the courts should use the new law in England and the proposed legislation in Australia and New Zealand as a reference for interpretation of the current double jeopardy protection to allow for retrial in circumstances where new evidence surfaces implicating the guilt of the acquitted defendant.

#### *A.. Constitutional Amendment*

The proposed amendment to the Constitution should be a hybrid of the new law in England and the suggested legislation in Australia and New Zealand.

First, any amendment to the Double Jeopardy Clause of the United States Constitution must be severely limited to avoid a potential onslaught of retrial appeals that would render the judicial system's efficiency useless. The amendment should only apply to murder cases. Violent crimes that result in the death of an innocent person should not remain unsolved, nor should the individual responsible for the death be allowed to go free simply because evidence implicating guilt was not presented to the fact-finder at the original trial.

Second, once it is established that there is evidence available that was not presented at the original trial, the amendment to the Double Jeopardy Clause of the United States Constitution must insist that such evidence be truly new, unavailable to the prosecution at the original trial, as specified in Australia and New Zealand.<sup>112</sup> Prosecutors in the United States bear the burden of presenting a full case, and an amendment should not limit that duty. If the evidence was available to the prosecution at the original trial and it neglected to use it, an amendment should specify that this type of post-trial disclosure cannot be used to make a case for retrial. If, however, the evidence was not available to the prosecution — for example, a post-acquittal confession or DNA evidence that was undetectable before the original trial — then the amendment should allow such evidence to be admitted in an appeal for retrial.

Once the evidence satisfies the "new" requirement, any proposed amendment still must insist that the newly discovered evidence be compelling and highly probative of the acquitted defendant's guilt. This is particularly relevant in the United States when considering whether a subsequent confession to a

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112. MODEL CRIMINAL CODE DISCUSSION PAPER, *supra* note 34, at 109.

member of law enforcement should be considered as new evidence in light of the problem of the coerced confession.<sup>113</sup> Law enforcement officials should not be allowed to use the prospect of retrial following acquittal to excuse follow-up investigative techniques that include coercing confessions. If post-acquittal confessions are allowed, there must be specific inquiry into the circumstances of the confession. When law enforcement officials obtain post-trial confessions, there can be no evidence of coercion or the confession would be inadmissible in an application for retrial. If the confession is made to family or friends, however, it should be considered more reliable because coercion is presumptively less likely. Conversely, evidence such as DNA<sup>114</sup> or fingerprint identification would be considered very compelling and highly probative of guilt.<sup>115</sup> Therefore, these forms of evidence

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113. Historically, scholars have criticized the United States for using this technique. Crime Library: Criminal Minds and Methods, Forcing the Issue, [http://www.crimelibrary.com/notorious\\_murders/not\\_guilty/coerced\\_confessions/2.html](http://www.crimelibrary.com/notorious_murders/not_guilty/coerced_confessions/2.html) (last visited Jan. 9, 2007). "Techniques utilized by inexperienced or unscrupulous police interrogators, such as deception, fear tactics, long interviews, sleep or food deprivation, and exaggerating or minimizing the crime, are blamed for a majority of all documented false confessions." *Id.* See also Issues In Forensic Psychology, Terrence Campbell, Coerced Confessions, <http://www.campsyh.com/coerced.htm>. (suggesting that police officers are trained in ways to gain a confession from a suspect).

Campbell's study shows that some of the techniques police officers employ to gain a confession include:

- (1) Confront[ing] the suspect with his supposed guilt, (2) Develop[ing] psychological themes to justify or excuse the crime, (3) Interrupt[ing] any statements of denial expressed by the suspect, (4) Overcom[ing] the suspect's insisting he could not have committed the crime, (5) Interferes with the suspect "tuning-out" during the interrogation, (6) Demonstrat[ing] sympathy and understanding while urging the suspect to "tell the truth," (7) Provid[ing] the suspect a face-saving explanation for his alleged crime, (8) Lead[ing] the suspect into recounting the details of the supposed crime, and (9) Convert[ing] these apparent details into a written confession.

*Id.*

Another technique employed by police includes "maximization," which involves intimidation of the suspect by overstating the seriousness of the charges, and even making false claims about available evidence. *Id.* The hope is that the police can convince the suspect that if they do not confess, they could face even larger penalties. *Id.* "Minimization techniques" involve the police officer indicating that there are "socially acceptable rationales" for the suspect's alleged conduct. *Id.* The police use this technique to "lull suspects into a mistaken sense of security." *Id.*

114. An example of DNA evidence includes genetic fingerprinting which is used to match suspects to samples of blood, hair, saliva, or semen collected from a crime scene. Wikipedia, Genetic Fingerprinting, [http://en.wikipedia.org/wiki/Genetic\\_fingerprinting](http://en.wikipedia.org/wiki/Genetic_fingerprinting) (last visited Jan. 9, 2006). "[T]he theoretical risk of a coincidental match is 1 in 100 billion." *Id.*

115. See Understanding DNA Evidence, *supra* note 104 and accompanying text (discussing the reliability of DNA evidence).

would weigh heavily towards retrial under the proposed amendment.

Adoption of such an amendment cannot allow for law enforcement to become lax in their duties. Even if there was an amendment to the Constitution to allow potential retrial in the limited circumstance of evidence discovered post-acquittal implicating guilt, the effect of the amendment on the original investigation should be extremely limited. United States police officers are tasked to perform a thorough investigation of a suspect prior to the original trial. One of the main criticisms facing the new legislation in England is the concern that investigators may do an inadequate job during the investigation prior to the original trial if they know they will get a second chance.<sup>116</sup> Nor should this be allowed in the United States. Police officers should retain the burden of conducting a careful investigation, gathering all available evidence that implicates the suspect's guilt before the trial commences. If new evidence is discovered, it must be truly new, and not discoverable during the initial investigation. Complete investigations may take years of police work, but it is better to be thorough than to put a suspect on trial without enough evidence to convict, risking an acquittal that cannot be revisited.

### B. Judicial Interpretation

Absent a constitutional amendment, courts should use the new law in England, and the proposed legislation in Australia and New Zealand as a reference for expanding the interpretation of the current double jeopardy protection to allow for retrial in circumstances where new evidence surfaces implicating the guilt of the acquitted defendant. Though past attempts to use foreign law to assist in constitutional interpretation have been highly criticized,<sup>117</sup> some judges are willing to look at international

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116. What is Double Jeopardy?, *supra* note 27.

117. The Supreme Court of the United States is not completely unwilling to reinterpret and modify constitutional protections. A recent trend has been to look at international law when making decisions. CBS News Online, Justices Defend Supreme Court Way, <http://www.cbsnews.com/stories/2005/04/21/politics/main690080.shtml> (last visited Jan. 9, 2007) [hereinafter Justices Defend Supreme Court Way]. For example, in March 2005, the court decided by a 5-4 vote to outlaw the death penalty for juveniles convicted of murder. *Id.* Cited in the opinion were international statements against imposing the penalty. *Id.* Such practice has not gone without criticism. *Id.* The Court is split on whether international law has any relevance to its decisions. *Id.* Justice Scalia, the late Chief Justice Rehnquist and Justice Thomas have criticized the relevance of foreign law. *Id.* Justice O'Connor responded to the criticism: "Our Constitution is one that evolves. What's the best way to know? State legislatures — but it doesn't hurt to know what other countries are doing." *Id.*

Members of Congress are chiming in with the criticisms. Congress of the United States House of Representatives, Reaffirmation of American

jurisprudence when faced with difficult questions.<sup>118</sup>

In rare cases, judges in the United States have already interpreted the Constitution to allow retrial.<sup>119</sup> The circumstances surrounding these exceptions require that the original acquittal be obtained through “fraud” or “collusion.”<sup>120</sup> This begs the question of whether false testimony at trial can be considered fraudulent. Courts should interpret the Double Jeopardy Clause to allow for

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Independence Resolution Approved, [http://www.house.gov/apps/list/press/fl24\\_feeney/ResConstitutionSubPassage.html](http://www.house.gov/apps/list/press/fl24_feeney/ResConstitutionSubPassage.html). Representative Tom Feeney proposed a resolution in 2004, rejecting the Court’s reference to foreign laws in its decisions. *Id.* He says of the resolution’s approval: “Today’s approval is a salute to the framers of the Constitution and a victory for those dedicated to the protection of American sovereignty. This resolution reminds the Supreme Court that its role is interpreting U.S. law, not importing foreign law.” *Id.* House Majority Leader Tom DeLay called Justice Kennedy’s work “incredibly outrageous” and “activist.” DeLay accuses Kennedy of using international law and citing by “do[ing] his own research on the Internet.” Justices Defend Supreme Court Way, *supra*.

In a recent address at the University of Chicago Law School, Attorney General Alberto Gonzalez stated,

I want to discuss with you today a trend I see in our courts . . . that I fear may undermine the long tradition of reverence that Americans have for the supreme law of the land — the Constitution of the United States. I am referring to the growing tendency by some judges to interpret the Constitution by reference to the laws and judicial decisions of foreign nations . . . . I agree that foreign law has a role to play in the interpretation of the Constitution, but I think it is a limited one.

WashingtonPost.com, Fred Barbash, AG Gonzales worried about SCOTUS “Reliance on Foreign Law,” [http://blogs.washingtonpost.com/campaignforthe court/2005/11/ag\\_gonzales\\_wor.html](http://blogs.washingtonpost.com/campaignforthe court/2005/11/ag_gonzales_wor.html) (last visited Jan. 9, 2007).

118. Justice Breyer said, “It’s appropriate in some instances to look at other places. It’s not binding by any means. But if they have a way of working out a problem that’s relevant to us, it’s worth reading.” Justices Defend Supreme Court Way, *supra* note 117. In a juvenile death penalty case, Justice O’Connor said in her dissenting opinion that although she did not agree with the decision, she did agree that “the existence of an international consensus . . . can serve to confirm the reasonableness of a consonant and genuine American consensus.” *Roper v. Simmons*, 543 U.S. 551, 605 (2005) (O’Connor, J., dissenting). Justice Scalia disagreed, arguing that “modern foreign legal materials can never be relevant to an interpretation of . . . the meaning of the U.S. Constitution.” Jodi Bart, *Is There Room for the World In Our Courts?*, WASH. POST, Mar. 20, 2005, at B.04; *see also Roper*, 543 U.S. at 619-28. Justice Clarence Thomas agreed with Scalia, and criticized the Court for “impos[ing] foreign moods, fads, or fashions on Americans.” Bart, *supra*.

119. *See State v. Johnson*, 149 S.E.2d 348, 350 (S.C. 1966) (holding that an acquittal obtained by “fraud” or “collusion” does not put the defendant in jeopardy and is not a bar to a second prosecution); *see also People v. Aleman*, 667 N.E.2d 615, 624 (Ill. App. Ct. 1996) (holding that an exception to double jeopardy protection exists when an acquittal is obtained by fraud or collusion).

120. *Johnson*, 149 S.E.2d at 350; *Aleman*, 667 N.E.2d at 625. Specifically, in the *Aleman* case, the Illinois Appellate Court determined that because Aleman had bribed a judge to secure his acquittal, he was never placed in jeopardy, and therefore could be retried for the crime of murder. *Aleman*, 667 N.E.2d at 625.



retrial when the acquittal is the result of perjury on behalf of the defendant. Technically, a defendant who takes the stand and lies to the judge and jurors is performing a fraud upon the court. If a defendant later confesses, or other new evidence arises implicating guilt, a court should conclude jeopardy did not attach at the original trial, and that the Constitution does not bar retrial.

## V. CONCLUSION

The government of the United States must realize that the system, as it currently exists, is flawed. When faced with letting a person factually guilty of murder remain free after an acquittal and after newly-discovered, compelling evidence exists, retrial should be allowed either by constitutional amendment or through judicial interpretation of the existing clause. The United States cannot ignore that the legal system in England, from which our double jeopardy clause is derived, has drastically changed the rules in the interest of justice.

Yet, retrial should certainly not be allowed in every instance. If, in murder cases only, when police investigation prior to the initial trial is complete, new evidence subsequently arises strongly implicating the guilt of the acquitted defendant, and the evidence was not discoverable during the initial investigation, retrial should be allowed. Taking its cue from the England, Australia, and New Zealand, the United States should recognize the need for change to avoid the continued injustice of acquitting murderers.