# The Heir to All the Ages: The Past, Present, and Future of Double Jeopardy

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Abstract: The legal doctrine of double jeopardy is one of the most august and long-standing principles in criminal procedure, yet the Magna Carta, the intellectual pantheon of liberties in western legal consciousness, noticeably does not mention the principle. This comparative examination of the history of double jeopardy shows that, while the doctrine arose in foreign legal traditions, it came – via medieval canon law – to influence the development of Common Law. This was manifested in the 12th century struggle for power between King Henry II (the progenitor of a law common throughout the English realm) and Thomas à Becket, the Archbishop of Canterbury, who in defending his clergy appealed to canon law, which included a prohibition on trying a man twice for the same offense. In contrast with most other legal traditions, even its Continental counterpart which arose within the same Western tradition, the Common Law developed a particularly unique interpretation of this doctrine. In the United States, this exceptional understanding was exhibited by the societal reverence for verdicts, particularly acquittals pronounced by a jury. These became, similar to ancient Roman law, so sacrosanct that judges could not overturn them, no matter how erroneous they may have been. More importantly, the state became unable to appeal an acquittal, despite some protestations to the contrary. In the 21st century, this doctrine has been modified by common law countries, including the United Kingdom, while the legal kulturkampf within the western tradition found its greatest apogee in the Amanda Knox saga. U.S. criminal procedure should reform this doctrine in extraordinary situations – for victims, society, and the rule of law.

Keywords: Common Law; Criminal Procedure; Jury Acquittal; Double Jeopardy; Amanda Knox

## *1. Introduction*

The prohibition of subjecting a criminal suspect to double jeopardy has a long heritage. Considered a fundamental right around the globe today, its exact historical provenance remains unclear. This article analyses the ancient legal doctrine from multiple perspectives – history, text, tradition, rationale – while specifically examining the American conception, which is distinguished not only from non-western legal traditions, but also from the other western branch, as typified by continental Europe. Today, the United States stands alone in its exalted conception, even from the United Kingdom (the birthplace of the common law), due to notions of individualism, excessive distrust of centralized authority, and emphasis (at least in theory) upon the sacrosanct authority of trial by jury. Once a jury has acquitted a defendant in a criminal case, the government is barred from appealing, despite mistakes or new evidence which may later emerge.

This article is divided into four sections. Part One provides a historical background of double jeopardy within global legal traditions, while Part Two briefly examines the story of Amanda Knox, the most famous case study in modern times. Part Three discusses rationales for this prohibition, particularly those advanced for the atypical conception in the United States, and Part Four gives concluding remarks. This article recommends that the U.S. criminal justice system modifies the long-standing doctrine, as other common law countries have done, to permit prosecutorial appeal of acquittals in extraordinary situations.

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## *2. Historical Origins*

Over a century ago, the Supreme Court of Oklahoma asserted that the doctrine of double jeopardy has forever been known to the Common Law and embedded in every system of jurisprudence[1]. Yet, in grave contrast to this "steady state" theory of eternal existence, the U.S. Supreme Court refused to apply the procedural protections of this doctrine to the states in 1937[2]. In *Palko*, although the defendant was charged with first-degree murder, he was convicted of second-degree murder. The State of Connecticut appealed and won a new trial, whereupon Palko was convicted of the initial charge and eventually executed. Justice Benjamin Cardozo, writing on behalf of the U.S. Supreme Court, upheld this ruling, noting that

> right-minded men could reasonably believe that, in espousing that conclusion, they were not favoring a practice repugnant to the conscience of mankind. Is double jeopardy in such circumstances, if double jeopardy it must be called, a denial of due process forbidden to the states? The tyranny of labels must not lead us to leap to a conclusion that a word which in one set of facts may stand for oppression or enormity is of like effect in every other[3].

Indeed, the Supreme Court did not fully incorporate double jeopardy to the States until three decades later, in 1969[4]. As noted by Justice

1. *Stout v. State*, 36 Okla 744, 756 (1913) ("It is impossible to trace the doctrine to any distinct origin. It seems to have been always embedded in the common law of England, as well as in the Roman law, and doubtless in every other system of jurisprudence, and, instead of having a specific origin, it simply always existed"). See also Jay A. Sigler, *A history of Double Jeopardy*, 7 Am J Legal Hist 283 (1963).
2. *Palko v. Connecticut*, 302 U.S. 319 (1937).
3. *Id.* at 323.
4. *Benton v. Maryland*, 395 U.S. 784 (1969) (The United States Supreme Court announced this decision within the context of incorporating numerous procedural protections laid out in the Bill of Rights to state governments throughout the 1960s, as part of the Warren Court Revolution. As Justice Thurgood Marshall, who wrote the decision in *Benton*, phrased it, "Our recent cases have thoroughly rejected the Palko notion that basic constitutional rights can be denied by the States as long as

Hugo Black, a 34-year member of the United States Supreme Court, a version of this principle was recognized in the days of classical antiquity[5]. The idea appears to have been so well known in Ancient Athens that the famed orator Demosthenes declared that "the laws forbid the same man to be tried twice on the same issue, be it a civil action, a scrutiny, a contested claim, or anything else of the sort"[6]. Yet, practice did not always follow theory. As Robert J. Bonner observed:

> A man could not be tried twice for the same offense. But the prosecutor of Euxitheus, a client of Antiphon, charged with murdering Herodes, contrived to expose him to the danger of being twice put in jeopardy of his life. Euxitheus protested vigorously at being tried as a 'malefactor' when the charge should have been murder – a strange protest, one might think. But the prosecutors, it was claimed, sought an advantage in bringing the lesser charge. They and their witnesses escaped the solemn oath required of all prosecutors and witnesses in homicide cases. The penalty for a 'malefactor' was assessable by the jury so the prosecutor could ask for capital punishment. Moreover, while a man charged with homicide was not incarcerated pending trial, the defendant indicted as a malefactor might be held in confinement and seriously hampered in his defense. If acquitted he would still be liable to be tried for murder [...] it is

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the totality of the circumstances does not disclose a denial of 'fundamental fairness.' Once it is decided that a particular Bill of Rights guarantee is 'fundamental to the American scheme of justice,' the same constitutional standards apply against both the State and Federal Governments. *Palko*'s roots had thus been cut away years ago. We today only recognize the inevitable" (*Benton*, 395 U.S. at 795)). See also *Fong Foo v. United States*, 369 U.S. 141 (1962) (where the Supreme Court ruled that even if an acquittal had been erroneously directed by the trial judge, it was not reviewable as that would constitute a violation of double jeopardy.)

5. *Bartkus v. Illinois*, 359 U.S. 121, 151-52 (1959) ("Fear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in western civilization. Its roots run deep into Greek and Roman times". (Black, J., dissenting)); See also Peter Westen and Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 S Ct Rev 81 (1978).

6. Demosthenes, *Olynthiacs Philippics; Minor public speeches; Speech against Leptines: I-XVII, XX*, § 147 at 589 (Harvard Univ. Press, 2d ed. 1998 [1st ed.1930]), cited in David S. Rudstein, *A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy*, 14 William & Mary Bill of Rights Journal, 193, 198 (2005).

> clear that [the prosecutor] exhibited [...] skill in achieving his purpose[7].

Furthermore, Ancient Rome – both in its republican and imperial phases – also provided for some legal protection against double jeopardy. Indeed, so engrained was this principle in Roman tradition that the historian Tacitus recorded that even the Emperor Tiberius was unable to overturn an acquittal rendered by a jury[8]. This example demonstrates how widespread the existing Roman cultural and legal *ethos* was that once a verdict of finality was pronounced, the accused could not be tried again for the same offense[9]. In other words, "if a jury court swerved to the right hand or to the left, there was no machinery by which it could easily be recalled to the narrow path of official orthodoxy [...] there was no appeal and no chance of reviewing the verdict of the jury"[10]. Notwithstanding these classical conceptions, debate over the doctrine's history, reach, and interpretation endures across great expanses of time and space.

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7. Robert J. Bonner, *Lawyers and Litigants In Ancient Athens: The Genesis of the Legal Profession* at 95 (The University of Chicago Press, 1st ed. 1927).

8. See Tac., *Annales* 3.38.2. See also James L. Strachan-Davidson, 2 *Problems of the Roman Criminal Law* at 157 (Cornell University Library, 1st ed. 1912) (noting that the inability of the Emperor Tiberius to overturn the jury verdict "fitted in ill with the imperial system, as it grew more and more arbitrary and despotic; and so the rulers lost no time in providing substitutes for trial by jury").

9. See Rudstein, *A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy* at 199 (cited in note 6), referring to Max Radin, *Handbook of Roman Law* at 475 (West Publishing Co., 1st ed. 1927). See also Sigler, *A history of Double Jeopardy* at 283 (cited in note 1) (observing that: "[t]his principle found final expression in the *Digest of Justinian* as the precept that 'the governor should not permit the same person to be again accused of a crime of which he had been acquitted'". In footnote 4, Sigler cites to D. 48.2.7 translated in Samuel P. Scott, *The Civil Law: including the Twelve tables, the Institutes of Gaius, the Rules of Ulpian, the Opinions of Paulus, the Enactments of Justinian, and the Constitutions of Leo,* § 17 (Central Trust Co. 1st ed. 1932) (this historical code of laws became the foundation for the development of the doctrine in the roman-canon law in Western Europe).

10. Strachan-Davidson, 2 *Problems of the Roman Criminal Law* at 155 (cited in note 8).

### *2.1. The Common Law*

In the beginning, it is imperative for scholars to examine the emergence of this doctrine in days of old for "[i]t is ancient common law that the state cannot twice put a man in jeopardy for the same offense"[11]. This categorical viewpoint is grounded within the larger myth of an unbroken continuity of the common law with the remote past[12]. Although classical antiquity knew of this doctrine, the modern incarnation does not extend as far back into the remote beginnings of the common law's origins as Coke and others constructed it through the ages[13]. The avowal that the origins of the double jeopardy doctrine lay within the mists of antiquity can be disproven by the simple fact that reference to it does not appear in several famous promulgations of rights; indeed, it does not appear even once in the Magna Carta

11. Comment, *Twice in Jeopardy*, 75 Yale L J 262 (1965).

12. John G.A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* at 37 (Cambridge University Press, 2d ed. 1987 [1st ed. 1957]) ("[B]y Coke's time the increasing activity of a nearly sovereign monarchy had made it seem to most common lawyers that if a right was to be rooted in custom [...] it must be shown to be immemorial in the full sense of 'traceable to no original act of foundation.' The idea of the immemorial therefore [...] ceased to be a convenient fiction and was heatedly asserted as literal historical truth; and the more that came to be known about remote ages, the more vigorously it was insisted that the law was before Abraham").

13. Ian Williams, *The Tudor Genesis of Edward Coke's Immemoral Common Law* 43 The Sixteenth Century Journal 103, 116-17 (2012) ("The order in which Coke and other common lawyers read their material is important. As a matter of chronology, Coke read backwards. He read the most recent material first and then moved farther into the past. Such an approach is unsurprising for a working lawyer whose first criterion for selecting reading material was probably its perceived utility in legal argument. Reading the texts in this order may have generated, or reinforced, a perception of continuity. Even in the nineteenth century, Maitland could explain that if read only the works written 'by lawyers for lawyers,' then 'we may read our way backwards [...] until we are in the reign of Henry of Anjou, and yet shall perceive that we are always reading of one and the same body of law'."). See also Roscoe Pound, *Interpretations of Legal History* at 8-9 (The MacMillan Company 1st ed. 1923) ("Coke's Second Institute is a history of public law in which he seeks to make the case of the common-law courts against the Stuart kings by setting forth the immemorial common-law rights of Englishmen, possessed by their forefathers from the beginning and declared by Magna Carta, by a long succession of statutes, and by a long and continuous succession of judicial decisions...The purpose is not to find a basis for authority but to identify authority").

of 1215, which is considered the most famous repository of liberties in the annals of the common law[14] Considered "a symbol, a battle cry against oppression"[15], the longstanding doctrine of double jeopardy in the intellectual pantheon of the common law is conspicuously absent from this Great Charter of Liberties.

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14. See Sigler, *A History of Double Jeopardy* at 284-85. (observing that "[o]ther parts of the Bill of Rights [...] show a clearer historical development than does the double jeopardy clause. Trial by jury was mentioned in the Assize of Clarendon of 1166 and, according to an eighteenth century commentator, 'this great Jewel of liberty [...] (had) no less than fifty-eight times since the Norman Conquest, been established and confirmed by the legislative power. Bail and habeas corpus were mentioned specifically in early statutes, most notably in the Bill of Rights of 1689. Yet, double jeopardy is not mentioned in English statute law before its adoption into the American Constitution"). See also Dan Jones, *Magna Carta: The Birth of Liberty* at 4-5 (Viking 1st ed. 2015) ("From surprisingly early in the thirteenth century the document's legend had begun to outgrow its terms, and that process has continued to the present day. The Magna Carta played an important role in the English Civil War and the Glorious Revolution of 1688. It provided a constitutional first principle for the rebellious colonists of New England who became the founding fathers of the United States and it informed the drafting of the Constitution. Its words are echoed in the clauses of the U.S. Bill of Rights and the United Nations' Universal Declaration of Human Rights, and it was cited by Nelson Mandela in his famous Rivonia speech in 1964. Three of the Magna Carta's sixty-three clauses remain law in England today, but as one constitutional scholar [...] noted, it has been quoted in constitutional debates more frequently than any other text except for the Bible"). See also Nicholas Vincent, *Magna Carta: The Foundation of Freedom, 1215-2015* at 13 (Third Millenium Pub, 1st ed. 2014); See also Rudstein, *A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy* at 210 (cited in note 6) ("The earliest treatise on the common law, purportedly written by Ranulf de Glanville in the last part of the twelfth century, does not mention any protection against double jeopardy, nor is it included in the Magna Carta, which was originally issued by King John in 1215 and reaffirmed by King Edward I in 1297").

15. Mary D. Stenton, *Magna Carta* (Encyclopedia Britannica, August 31, 2021), available at: https://www.britannica.com/topic/Magna-Carta (last visited November 20, 2021) ("Whenever liberty seemed in danger, men spoke of the charter as their defense. It follows that the great and beneficent influence of Magna Carta in England and in every land across the sea in which Englishmen have settled has come not from the detailed expression of the feudal relationship between lord and man but from the more general clauses in which every generation could see its own protection. In England the Petition of Right in 1628 [in which Edward Coke played a role] and the Habeas Corpus act of 1679 look directly back to clause 39 of the 1215 charter. When in 17th-century America individual states were shaping their own fundamental laws, the very words of Magna Carta were worked into them. The fundamental rights of man embodied in the federal constitution of 1787 have echoes of the charter. Even as late as 1868 the 14th amendment can trace its ancestry to Magna Carta").

Yet, notwithstanding its exact historical provenance, the most important aspect of the doctrine is the finality of the verdict or judicial decision, as that is when jeopardy traditionally attached. "This requirement of finality was implicit in the four recognized special pleas in bar [as Coke categorized them] – *autrefois acquit*, *autrefois convict*, *autrefois attaint*, and former pardon".[16] *Autrefois acquit* is tantamount to a plea of a former acquittal[17], *autrefois convict* is a plea of prior conviction, whereas *autrefois attaint* is quite similar to that claim (a plea of having already been charged and thus "attainted" by a felony)[18] and, a former pardon is readily understandable. Importantly, the attainder was a plea that effectively argued "the party is dead in law by the first attainder, and hath forfeited all that he can forfeit"[19], though exceptions existed for this category[20]. William Hawkins distinguished between attainder and conviction by acknowledging that while "every attainder includes a conviction"[21], the reverse was not necessarily true. It was thus up to every individual judge to decide whether attainder applied in each case.

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16. Note, *Double Jeopardy: The Reprosecution Problem*, 77 Harv L Rev 1272, 1273 (1964). See also Sigler, *A History of Double Jeopardy* at 296-97 (cited in note 1) ("The contemporary categories of double jeopardy are contained in Coke's three pleas of *autrefois acquit*, *autrefois convict*, and former pardon [...]. To a considerable degree, Coke improvised the law of double jeopardy. He admitted that in his *Institutes* he had set down his own opinion [...] Coke may have strengthened the double jeopardy protection in his desire to ameliorate harsh English criminal penalties while weakening the king's power").

17. William Hawkins, 2 *Serjeant at Law, A Treatise of the Pleas of the Crown Or, A System of the Principal Matters Relating to that Subject, Digested Under Proper Heads "Of Courts of Criminal Jurisdiction and the Modes of Proceeding Therein",* at 515-16 (Law Booksellers and Publishers, 8th ed. 1824 [1st ed. 1716]): ("The plea of *autrefoits acquit* is grounded on this maxim, that a man shall not be brought into danger of his life for one and the same offence, more than once. From whence it is generally taken, by all the books, as an undoubted consequence, that where a man is once found 'not guilty' on an indictment or appeal free from error, and well commenced before any court which hath jurisdiction of the cause, he may, by the common law, in all cases whatsoever plead such acquittal in bar of any subsequent indictment or appeal for the same crime").

18. *Id.* at 524.

19. *Ibid.*

20. *Id.* at 525-26.

21. *Id.* at 526-27.

In 1201, the annals of history recorded the first "mention in English law of an individual raising a plea of a former acquittal to bar a prosecution for the same offense"[22]. Goscelin, the son of Walter, brought a private lawsuit (known as an "appeal") against Adam de Rupe for having slain his brother, Ailnoth. "Adam claimed that 'on another occasion' Ailnoth's wife brought an appeal against him for the same killing and that 'withdrew quit therein by judgment of the lord king's court'"[23]. The court rejected the appeal, ruling "'the appealed has withdrawn quit therein"[24], thus recognizing the plea[25].

Most tantalizingly, this case appeared in English law prior to the proclamation of the Magna Carta. This perhaps helps to answer the question as to why double jeopardy is not referenced in that document – for though it occurred nearly a decade and a half before Magna Charta – this case was the first legal usage in English history. A most vivid example of double jeopardy comes down to us from the days of William "Rufus" II, who succeeded his father to the Throne of England twenty years after the Norman Conquest. Fifty men were forced to undergo the ordeal of hot iron[26]. Every man passed. Notwithstanding this "acquittal", the King "declared he would try them again by the judgment of his court, and would not abide by the pretended judgment of God"[27]. This sentiment was similarly expressed by Henry II,

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22. Rudstein, *A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy* at 202 (cited in note 6).

23. *Id*. at 203.

24. *Id*. at 199

25. *Id*. at 203-05 (observing that "[o]ver the next five hundred years, the guarantee against double jeopardy became firmly entrenched in the common law in the form of the pleas of *autrefois acquit* (a former acquittal), *autrefois convict* (a former conviction), and pardon"). For an alternative perspective, however, see Sigler, *A History of Double Jeopardy* at 290 (cited in note 1) ("Although it may be tempting to declare this [a similar case in 1203] a double jeopardy plea, it must be recalled that this is not even a criminal case. The state merely provided a forum for what was essentially a civil suit with criminal overtones, resolved as a claim in contract by the doctrine of accord and satisfaction...It is submitted that these cases are not strictly criminal matters, and thus do not involve the double jeopardy concept").

26. For more information on use of ordeals, see Isaac Amon, *The Timeless Quest for Truth in a World of Doubt: Re-Examining Modes of Proof in the Medieval Era*, 11 *Przegląd Prawniczy Uniwersytetu Im. Adama Mickiewicza* 141 (2020).

27. See John Reeve, 1 *History of the English Law* at 234 (Reeves & Turner 1st ed. 1869) as cited in Sigler, *A History of Double Jeopardy* at 286 (cited in note 1). See also

the progenitor of the common law, who "would not allow an acquittal awarded on the basis of trial by ordeal to prevent the possibility of a second trial"[28]. As Pollock and Maitland observed, "Henry II had declared when an indicted man came clean from the water, he was none the less to abjure the realm, if his repute among his neighbours was of the worst"[29]. Although English law knew of the doctrine, it was not always practiced[30].

In the future United States, the doctrine of double jeopardy appears to have first been recognized in 1641. The Massachusetts Body of Liberties, one of the earliest constitutional documents in American history and "the first legal code established by European colonists in

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Frederick Pollock and Frederic W. Maitland, 2 *The History of English Law: Before the Time of Edward I* at 599 (Cambridge University Press, 2d ed. 1968 [1st ed.1898]) ("Of fifty men sent to the ordeal of iron all had escaped. This certainly looks as if some bishop or clerk had preferred his own judgment to the judgment of God, and the king did well to be angry").

28. See 6 *The Laws of King Ethelred III* translated in Commissioners of the Public Records of the Kingdom, *Ancient Laws and Institutes of England* (1840) as cited in Sigler, *A History of Double Jeopardy* at 286.

29. Pollock and Maitland, 2 *The History of English Law: Before the Time of Edward I* at 599 (cited in note 27).

30. See Sigler, *A History of Double Jeopardy* at 289 (cited in note 1) ("There is some evidence of a plea somewhat similar to double jeopardy as early as the fourteenth century. The context in which the need arose was in the transition from the older procedure to the indictment. It was settled that an acquittal on an appeal after a trial by jury was a bar to a prosecution for the same offense by subsequent indictment. Conversely, an acquittal on an indictment was held a bar to the suit of the injured party seeking an appeal, but this was altered by the Statute of 1487. [...] 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. As late as 1709 it was possible for Chief Justice Holt to order an appeal on the same offense for which a man had been acquitted, against the evidence, on a prior indictment for murder"). See also John Baker, *R v Saunders and Archer (1573)*, in Philip Handler, Henry Mares and Ian Williams (eds.), *Landmark Cases in Criminal Law* at 37-39 (Hart Publishing 1st ed. 2017) (referring to the *Vaux*'s Case, where the defendant, indicted for murder, pleaded a previous acquittal as he had already been tried. Circumventing any question of twice placing him in jeopardy, judges held the original indictment to be defective). See also *Vaux's* Case, 76 English Report 992 (K.B. 1591) ("Since the defect rendered his trial a nullity, there was no bar to his being tried again. He was evidently then tried and convicted"). See also Harlan R. Harrison, *Federalism and Double Jeopardy: A Study in the Frustration of Human Rights*, 17 U Miami L Rev 306, 307 (1963).

New England"[31], declared that "No man shall be twise [sic] sentenced by Civill [sic] Justice for one and the same Crime, offence or Trespass"[32]. The doctrine of double jeopardy cannot be separated from the coercive power of the state[33], its historical development[34], nor the role of the jury[35]. Roman law's absolute bar thus foreshadowed current U.S. law which underpins the utter finality of the jury's verdict. As Richard Lippke has written:

> The extent to which legal doctrine in the United States pays deference to the verdicts of juries in criminal cases, especially when they are acquittals, is nothing short of remarkable. Juries are [...] [not] required [...] to explain how they arrived at their verdicts, or to provide reasons for them. Their verdicts are left standing when they are blatantly inconsistent. Though

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31. *Massachusetts Body of Liberties* (State Library of Massachusetts, available at https://www.mass.gov/service-details/massachusetts-body-of-liberties (last visited November 20, 2021).

32. See Harrison, *Federalism and Double Jeopardy: A Study in the Frustration of Human Rights* at 307 (cited in note 30). See also *1641: Massachusetts Body of Liberties*, § 42 (Online Library of Liberty), available at https://oll.libertyfund.org/pages/1641-massachusetts-body-of-liberties (last visited November 20, 2021).

33. See Sigler, *A History of Double Jeopardy* at 288 (cited in note 1) ("Since double jeopardy involves a limitation upon the power of the state to bring suit, criminal procedure must have developed to a point where the state has the power to conduct criminal actions at its discretion. This state of affairs did not obtain in England until quite late in its legal history").

34. *Id.* at 294 ("The fifteenth century double jeopardy concept was still not the same as that found in later English or American law. For example, attachment of jeopardy occurs, according to the American rule, at the time of the opening of the prosecution's case. The English rule requires a final verdict before jeopardy can be said to begin. But English double jeopardy in 1482 attached at the time of the plea of not guilty, since [...] [t]he defendant has pleaded a plea 'not guilty' by which he has put his life in jeopardy[...]. By 1676, the rule required an acquittal or conviction to constitute a prior jeopardy, the modern English rule. The period of the development of double jeopardy paralleled the rise of the modern state").

35. Akhil R. Amar and Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 Colum L Rev 1, 56-57 (1995) ("The Double Jeopardy Clause in America has always, in important respects, piggybacked onto the right of jury trial in criminal cases. The two ideas work in tandem [...] [as] the absolute finality of jury acquittals ultimately draws its strength from certain historical and structural ideas about the constitutional role of juries [...]. (This is why pro-defendant decisions by judges are not as final in double jeopardy case law as pro-defendant decisions by juries).").

> defendants who are convicted can appeal to have their verdicts overturned [...] the state is granted no comparable right of appeal. Acquittals cannot be overturned even if [...] judges made [...] errors [...] [and] even when it is clear that juries ruled 'against the evidence'[36].

While the genesis of this doctrine was thus not clearly known in the annals of the common law, it was developed over time and came to be seen as an integral part of English legal history, venerated as a custom since time immemorial[37]. The colonists who crossed the Atlantic took these ideas with them and this legal principle was adopted by the governing framework of the nascent American Republic, which constitutionalized the double jeopardy doctrine in the 1791 Bill of Rights[38]. The 5th Amendment, which declares that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb"[39], has been the subject of extensive judicial and academic debate. In *Gamble v. United States*, issued in June 2019, the United States Supreme Court announced its most recent opinion on double jeopardy[40]. The majority upheld the long-standing principle of "dual sovereignty" in our constitutional scheme, re-affirming that the constitutional protection

36. Richard L. Lippke, *Modifying Double Jeopardy*, 15 New Criminal Law Review 511, 511-512 (2012).

37. Roscoe Pound, *Interpretations of Legal History* at 8 (cited in note 13) ("English legal history-writing prior to the nineteenth century...ha[d] an immediate practical purpose of setting up a historical sketch as a basis for the legal order. Fortescue writes a historical sketch to show that England had always been governed by the same customs from pre-Roman Britain. He could not claim the authority of Justinian nor of any other sovereign law-giver for the unwritten common law of England. But the 'written law' laid down that immemorial custom had authority as well as, and in the absence of, written laws, and the common law of England was shown by history to be the body of rules by which Englishmen had always been wont to adjudge controversies and to guide their conduct").

38. See Sigler, *A History of Double Jeopardy* at 285 (cited in note 1) ("[D]ouble jeopardy is not mentioned in English statute law before its adoption into the American Constitution. From this it may be concluded that either it was not so fundamental a privilege, or that it was obvious and well-established before the great writs of English history. Both propositions are tenable, but the former is much more probable than the latter in view of the development of English criminal law itself").

39. US Const Amend V, cl. 2.

40. *Gamble v. United States*, 139 S Ct 1960 (2019)

does not apply to successive prosecution of the same individual for the same criminal conduct by state and federal governments[41]. In dissent, two justices vigorously contended that the majority's ruling "diminish[es] the individual rights shielded by the Double Jeopardy Clause"[42] and that "the separate sovereigns exception was wrong when it was invented, and it remains wrong today"[43].

### *2.2. The Continental Law*

Traditional Roman law had articulated a well-established antecedent of this doctrine[44], known today by the maxim "*ne bis in idem*". Upon Western Europe's rediscovery of the "Digest of Justinian" in the eleventh and twelfth centuries, and the subsequent teaching of this sixth-century work, the medieval Catholic Church and canonists looked to this code of laws as an additional legal source to help explicate its canonical rules[45]. Medieval scholars and canonists found biblical

41. *Ibid*.

42. *Id*. at 1996 (Ginsburg dissenting).

43. *Id*. at 2009 (Gorsuch dissenting).

44. In Roman law, the so called "*ne bis in idem*" principle was relevant both in civil and criminal procedure. On the one hand, in civil procedure - in the "*per formulas*" trial - the effects of the principle unfolded during the "*litis contestatio*" phase, during which the parties accepted the "*iudicium*" - the terms established by the magistrate on the basis of which the private judge would have decided on the merits of the controversy. Because of the *litis contestatio*, the *actio* (lawsuit) could have not been proposed again, regardless of the outcome of the process. So, the "*ne bis in idem*" in civil procedure determined a foreclosure, linked to the extinction of the right inferred in court. On the other hand, in criminal procedure there was not the *litis contestatio*, but the foreclosure effects were however produced, as it is remarked in Ulp., 7 *de off. procons*., D. 48.2.7.2. ("*Isdem criminibus, quibus quis liberatus est, non debet praeses pati eundem accusari, et ita divus Pius Salvio Valenti rescripsit: sed hoc, utrum ab eodem an nec ab alio accusari possit, videndum est. et putem, quoniam res inter alios iudicatae alii non praeiudicant, si is, qui nunc accusator exstitit, suum dolorem persequatur doceatque ignorasse se accusationem ab alio institutam, magna ex causa admitti eum ad accusationem debere*"); C. 9.2.9-pr. ("*Qui de crimine publico in accusationem deductus est, ab alio super eodem crimine deferri non potest*").

45. See Peter De Cruz, *Comparative Law in a Changing World* at 56-57 (Routledge, 1st ed. 2007) ("Over the eleventh and twelfth centuries, in keeping with the Renaissance in philosophy, canon law and theology, Roman law studies also experienced a rebirth and revival [...] it is difficult to assign a single reason for this event, but some writers place central importance on the lectures given in the late eleventh century by

support for the claim that no individual could be twice judged for the same offense[46]. For example, the Book of Nahum states that "God does not judge twice in the same matter"[47], which was then included into Gratian's *Decretum*[48] and in canonist procedural literature[49].

Connected with the principle of double jeopardy was that of presumption of innocence. Even more powerful support for the proposition that divine law provided this presumption was found in the Book of Genesis. The biblical narrative of the primordial couple, and their struggles with the wily serpent– culminating in humanity's expulsion from their "birthplace" in the primordial Garden of Eden – at least provided a silver lining. Upon having disobeyed the divine command by eating from the Tree of Knowledge of Good and Evil, Adam and Eve "realized that they were naked"[50]. Whereupon, "God called out to the man and said to him, 'where are you?'"[51]. Hence, the biblical narrative concludes with a dialogue between man and the omniscient,

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Irnerius (c 1055-1130), who gave the first university lectures on the *Digest* at Bologna, the first modern European university where law was a major subject [...] Irnerius' lectures at Bologna heralded the study of the *Corpus Juris* in Western Europe as a coherent, systematic body of law. By the middle of the twelfth century, there were about 10,000 students in Bologna. The Italian universities became the centre of learning for scholars all over Europe, from whence it spread.").

46. Heikki Pihlajamaki & Mia Korpiola, *Medieval Canon Law: The Origins of Modern Criminal Law*, in Markus D. Dubber et al. (eds.), *The Oxford Handbook of Criminal Law* at 215 (Oxford University Press 1st ed. 2014).

47. *Tanakh*, *Book of Nahum*, § 1 at 9 (Chabad), available at https://www.chabad.org/library/bible_cdo/aid/16194/jewish/Chapter-1.htm (last visited, November 20, 2021).

48. See C. 23, q. 5 c. 6.

49. Pihlajamaki and Korpiola, *Medieval Canon Law: The Origins of Modern Criminal Law* at 215 (cited in note 46). One of the most influential lay jurists, Bartolus de Saxoferrato, recognized the doctrine, for example, in *In secundam Digesti novi partem commentaria*, Venice, 1585, l. *Si cui*, § *Iisdem*, tit. *De accusationibus*, n. 1 ("*Absolutus non potest de eodem crimine accusari ad eodem vel ab alio, nisi fuerit ingnorans et suam iniuriam persequatur*") and, again, in *ibidem*, l. *Divus Adrianus*, tit. *De custodia et exhibitione reorum*, n.11, where the principle is affirmed to be valid for the *accusatio* as well as for the *inquisitio* ("*Finaliter credo idem iuris esse sive quis absolvitur super denunciatione, sive super accusatione, sive super inquisitione*").

50. *Genesis* at 3.7, in Nosson Scherman, *The Chumash : the Torah : Haftaros and five Megillos with a commentary anthologized from the Rabbinic writings* at 17 (Mesorah Publications 7th ed. 1997).

51. *Genesis* at 3.9 in Scherman, *The Chumash : the Torah : Haftaros and five Megillos with a commentary anthologized from the Rabbinic writings* at 17 (cited in note 49).

omnipotent, and omnipresent Creator. The significance of this extended dialogue is that the Creator offered man a chance to explain himself before pronouncing judgment and sentence[52]. Thus, how much more so did man have to presume innocence when sitting in judgment upon fellow men.

Medieval canonists – by finding divine origins in legal presumption of innocence in criminal cases –combined heavenly imprimatur with the evolution through the medieval era of the doctrine of double jeopardy. These ranged from the Thirteenth century writings of William Durand, who observed that "particularly of those who are accused that they cannot be accused of the same crime by anyone if they are absolved" – to the "writings of leading Sixteenth-century jurists such as Prospero Farinacci (1554-1618) and Julius Clarus (1525-1575)"[53]. Hence, it appears this amalgamation of traditional Roman law and medieval canon law collectively crystallized into the continental law conception of double jeopardy[54]. This doctrine evolved around the same time in both common and continental law. Indeed, the *Fuero Real* of 1255 – produced during the reign of the famous King Alfonso X of Castile and Leon – proclaimed that

> After a man, accused of any crime, has been acquitted by the court, no one can afterwards accuse him of the same offence... Several years later, *Las Sietas Partidas*, also promulgated by Alfonso X, was completed. It proclaimed: 'Where a man has been acquitted, by a valid judgment, of some offense of which he was accused, no one can afterwards charge him with the

52. See Kenneth Pennington, *Innocent unitl proven guilty: the origins of a legal maxim,* 63 Jurist: Studies in Church Law & Ministry 106, 113 (2003).

53. Pihlajamaki and Korpiola, *Mediaval Canon Law: The Origins of Modern Criminal Law* at 215 (cited in note 46).

54. *Ibid.* See also Theodor Mommsen, 1 *The History of Rome* at 188 (Macmillan Co. 1st ed 1908) (although canonists did not develop double jeopardy in all its details, it influenced later development. History thus permits later generations to "acquire some idea of the breadth of the gulf which separates our modes of thinking and feeling from those of the civilized nations of antiquity. Tradition, with its confused mass of national names and its dim legends, resembles withered leaves which with difficulty we recognize to have once been green").

> same offense [except when he colluded in bringing the original charge and suppressed evidence...][55].

While it is not exactly clear whether Roman law directly influenced English law or if the latter evolved independently, at least one scholar has advanced the proposition that English law was influenced, in stark contrast to Sir Edward Coke (and his devotees') contention that the common law remained impervious to outside influence, following the Norman Conquest of the English Realm[56]. Yet, even if the common law was influenced by foreign law and tradition, double jeopardy appears not to have been appealed to as a defense in the Realm until the early Thirteenth Century[57]. Coke's forceful assertion that the common law – with its attendant doctrines, including double jeopardy – dated unchanged to time immemorial thus does not pass muster[58]. An alternative perspective which has been advanced is that double jeopardy originated in the common law due to the bitter fight between Archbishop Thomas à Becket and King Henry II in the late twelfth century, a microcosm of the larger medieval power struggle between church and state[59].

The Constitution of Clarendon– convened by Henry II in 1164 – promulgated "a formal statement embodying the previous customs concerning the jurisdiction of the Church in certain matters"[60]. This statement attempted to restrict ecclesiastical privilege, including a canonical version of double jeopardy[61]. The Church had traditionally been permitted to try clergymen in their own ecclesiastical courts

55. See Rudstein, *A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy* at 213 (cited in note 6), quoting Robert I. Burns, 5 *Las Siete Partidas* at 1309 (University of Pennsylvania Press, 1st ed 2001) (Samuel Parsons trans).

56. See Rudstein, *A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy* at 205 (cited in note 6).

57. An example is represented by the case of Adam de Rupe, as discussed above in this article at § 2.1.

58. See Rudstein, *A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy* at 213-14 (cited in note 6).

59. *Id.* at 205.

60. *Id.* at 206.

61. *Id.* at 207.

and punish them in accordance with canon law[62]. This ecclesiastical prerogative severely undermined secular power, and Henry II was determined to assert royal supremacy[63]. Therefore, in cases where clergymen were accused of secular crimes, the king declared that they were to first be tried in the royal courts, and "from there be sent to the church court, where they were to be tried, unfrocked after conviction in the presence of a royal officer, and then sent back under guard to the king's court to be punished as laymen"[64]. Their property or goods would subsequently be attainted and would accordingly be confiscated by the Crown[65].

Becket vigorously protested, arguing that "clerics could be tried and punished only in an ecclesiastical court and that a cleric convicted in such a court and deposed from his orders could not subsequently be brought to the royal court for punishment"[66]. He reasoned that this edict would be tantamount to punishing the same individual twice for the same offense, violating the longstanding ecclesiastical (and thus divine) prohibition; "*nec enim Deus iudicat bis in idipsum*"[67]. For this repeated defiance, the Archbishop was slain by knights loyal to Henry on 29 December 1170[68]. His assassination elevated him to sainthood

62. *Id*. at 205; see also Newman F. Baker, *Benefit of Clergy - A Legal Anomaly* 15 Ky L J 85 (1927).

63. See John Guy, *Thomas Becket: Warrior, Priest, reel; A Nine-Hundred-Year-Old Story Retold* at 93 (Penguin 1st ed. 2012) ("Henry's intention was to win control of both the opening and closing stages of every trial and to make unfrocking and delivery of criminous clerks to the secular power for capital punishment or mutilation the automatic and invariable sentence, so that the royal judges should not be handicapped by the church in any way. What had...been allowed in highly exceptional cases was now to be turned into a general rule. From the church's viewpoint, this was not a compromise but a rout").

64. *Id.* at 192-93.

65. See Rudstein, *A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy* at 207 (cited in note 6).

66. *Ibid*.

67. *Ibid*. See also Pollock and Maintland, *1 The History of English Law: Before the Time of Edward I* at 448 (cited in note 26).

68. See Winston S. Churchill, 1 *A History of the English- Speaking People*s at 166 (Cassell 1st ed. 1956) ("The scene and the tragedy are famous. He confronted [the four knights] with Cross and mitre, fearless and resolute in warlike action, a master of the histrionic arts. After haggard parleys they fell upon him, cut him down with their swords, and left him bleeding like Julius Caesar, with a score of wounds to cry for vengeance").

and won him, and his Church, a posthumous victory in this contest for supremacy[69]. Becket's view of ecclesiastical superiority prevailed for several centuries until the rise of increased skepticism. "Until the Reformation the Church retained the system of ecclesiastical courts independent of the royal authority, and the right of appeal to Rome, two of the major points upon which Becket had defied the king"[70].

Most importantly, Becket's appeal to canon law in his dispute with Henry II was historic for two reasons. First, while "a maxim may be little more than a slogan, concealing rather than revealing a meaning"[71], his dramatic invocation of canon law – a mere century after the Norman Conquest – confirms that Roman-canon law influenced the development of the double jeopardy doctrine. Second, Becket's defense appeared more than four decades before the first recorded use of the plea of *autrefois acquit*, in the case of Adam de Rupe. Indeed, his appeal could well be the first time that an argument of double jeopardy had been invoked in the Realm, directly predicated upon a long-standing legal maxim of the Church.

Perhaps just as significantly, this clash between Thomas à Becket and Henry II places the development of criminal procedure in a vastly different context. It truly evokes a different past, one at odds with the traditional narrative of the common law. Their clash stands not just as one between two men, or even between church and state, but between the development of a law common to the realm (the "common law') and the more-established roman-canon legal tradition. The common law had just begun to be developed; it was around this time that "[a] new mode of proof was penetrating and dislocating [the ordeals], namely, the proof given by the verdict of a sworn inquest of

69. *Ibid.*

70. *Id.* at 167. See also Baker, *Benefit of Clergy - A Legal Anomaly* at 94 (cited in note 61) ("[Following Becket's murder] Henry was forced to admit the right of the Church to the privilege of benefit of clergy...in 1176, an agreement on the subject was made between Henry and the Papal Legate Hugo. This agreement provided that in criminal cases in the future, no clerk should be tried in person before a secular judge [...]. Thus, we find benefit of clergy firmly established and respected by civil authorities largely because of the martyrdom of Archbishop Becket").

71. See Sigler, *A History of Double Jeopardy* at 298 (cited in note 1).

neighbours"[72]. Trial by jury thus began at Clarendon in 1166[73], which temporally pre-empted the introduction of the continental inquest into common law[74].

In the end, the power struggle between Henry II and Thomas à Becket will remain indispensable to the annals of western legal history, for it irrevocably altered the story of criminal procedure[75], and strongly shows an intimate link between the development of the common and continental systems of criminal law[76].

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72. Pollock and Maintland, 2 *The History of English Law: Before the Time of Edward I* at 604 (cited in note 26).

73. See John H. Baker, *An Introduction to English Legal History* at 73 (Oxford University Press, 4th ed. 2007 [1st ed. 1990]).

74. See Pollock and Maintland, 2 *The History of English Law: Before the Time of Edward I* at 604 (cited in note 26). See also Peter De Cruz, *Comparative Law in a Changing World* at 59 (cited in note 45) ("The common law of Europe that eventually emerged towards the end of the Middle Ages was, therefore, a mixture of local statutes and customs, and a form of Roman law as interpreted by the various schools of thought and canon law. The unity achieved by the reception of Roman law into the civil law was further reinforced by canon law, which had become the universal law of the Western Church and which remained in use even in the darkest days of Roman law. English courts, on the other hand, never received Roman law at all, despite the fact that it was known and taught, due to centralisation of courts at an early stage, powerful monarchs and the pragmatic character of early English law).

75. See Rudstein, *A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy* at 209 (cited in note 6) ("[T]he origin of the protection against double jeopardy in English law 'is, and undoubtedly will remain, a matter of speculation,' because 'much of Western law derives from a common fund of shared judicial concepts'").

76. See David J. Seipp, *The Reception of Canon Law and Civil Law in the Common Law Courts before 1600*, 13(3) Oxford J Legal Stud 388, 392 (1993) ("Over the period from 1400 to 1600, common lawyers came to invoke these other bodies of law in more and different circumstances. Common lawyers also came into more and more frequent contact with the exponents of those other laws, the doctors of civil law and canon law. This increasing interest in the bodies of law shared with continental Europe is one sign that the community of English common lawyers gradually adopted a more sophisticated, cosmopolitan outlook. Their growing acquaintance with the other laws led English common lawyers to engage in more reflective and comparative study of their own law").

### *2.3. Jewish Law*

The panoply of procedural protections that *Halacha* (Jewish law) afforded to the defendant are noteworthy[77]. Especially in capital cases, *Halacha* recognized and strictly enforced the doctrine of double jeopardy. Indeed, so similar is the *Halacha* to the categorical rule in the American criminal justice system today (in stark contrast to European law and even modern English law, as will be seen) that "in capital cases, an acquittal may not be reversed"[78]. In Tractate Sanhedrin of the Babylonian Talmud[79], the rabbis, as interpreters of the Law, developed the categorical rule that, in capital cases, only convictions could be reversed, as they ruled that "they are not reversed in favor of conviction"[80].

Indeed, the rabbis had advanced the principle that the absolute bar on double jeopardy – like canon law – was of divine origin. They identified it, however, in a different location than the canonists deriving it

77. See Irene Merker Rosenberg and Yale L. Rosenberg, *Comparative American and Talmudic Criminal Law* 2016 University of Houston Law Center, Public Law and Legal Theory Research Paper Series at 1, 11-13 (2016): ("The rabbinic legal system itself is sui generis and so extreme in protecting both the innocent and the guilty that some the safeguards afforded the defendants in criminal cases were merely idealistic and pedagogical, and were never actually implemented...[Nonetheless] it is undisputed that the rules constraining the rabbinic courts in criminal cases constitute normative Jewish law. The various evidentiary, procedural, and substantive barriers to imposition of punishment by the rabbinic courts amount a supercharged Bill of Rights [...] it is clear that normative Jewish law operative in the rabbinic courts would make that judicial system a criminal defense attorney's dream tribunal and a prosecutor's worst nightmare").

78. See Rudstein, *A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy* at 197 (cited in note 6).

79. ee Nathan Ausubel, *The Work of Jewish Knowledge: An Encyclopedia of Judaism and the Jewish People, Covering All Elements of Jewish Life from Biblical Times to the Present* at 442-43 (Crown Publishers, 1st ed. 1964) ("The Talmud...is not just one work – as is commonly taken for granted – but a collection of many works...It is, in fact, a virtual library of treatises which dwell on the Rabbinic laws and regulations, traditions, customs, rites and ceremonies, and civil and criminal laws...[It] contains opinions, discussions and debates, and moralistic aphorisms and biographic exempla of the Rabbinic sages...").

80. *Babylonian Talmud: Tractate Sanhedrin* at 33a-33b (Halakhah), available at: https://halakhah.com/sanhedrin/sanhedrin_33.html (last accessed, November 20, 2021).

from the Book of Exodus (23:7): "Distance yourself from a false word; do not execute the innocent or the righteous, for I shall not exonerate the wicked"[81]. The influential rabbinic commentator Rashi, who lived in France during the Norman Conquest, explained the implications of this biblical verse:

> How do we know that if one leaves the court convicted and sentenced to death, and someone says, 'I am able to argue in his favor and prove his innocence,' that they return him to the courtroom and renew their deliberations? The Torah says, 'Do not kill one who is innocent,' even though he is not 'righteous,' in that he was not vindicated by the court; nonetheless, he is free from the death penalty because you have grounds to acquit him if his would-be defender has legitimate proof of his innocence. And how do we know that one who leaves the court acquitted, and someone says, 'I am able to argue against him and prove his guilt,' that they do not return him to the courtroom to retry him? The Torah says, 'Do not kill someone who is righteous,' and this one is righteous, for he has been vindicated[82].

Rashi therefore concluded that divine action would be taken, if necessary, against the individual[83]. David S. Rudstein identifies numerous references throughout the Babylonian Talmud that declare in no uncertain terms an absolute bar on double jeopardy. For example, he references the opinion of Rabbi Akiva – one of the most famous Jewish sages – in Tractate Makkoth (13b) that an individual who is liable for the death penalty is not permitted to be flogged, for he would then be tried twice for the same offense, which would constitute a violation of the divine law, as detailed in the Book of Deuteronomy[84]. A

81. *Genesis* 23:7 in Scherman, *The Chumash : the Torah : Haftaros and five Megillos with a commentary anthologized from the Rabbinic writings* at 435 (cited in note 49).

82. Yisrael Herczeg, 1 *Saperstein Edition: The Torah With Rashi's Commentary Translated, Annotated, and Elucidated, Book of Exodus* at 299 (Mesorah Publications 1st ed. 1995).

83. *Ibid*.

84. See Rudstein, *A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy* at 197 (cited in note 6), quoting Isidore Epstein, *Babylonian Talmud, Tractate Makkoth 13b*, (Soncino Press, 1935) (H.M. Lazarus, trans). See also *Deuteronomy* at 25:2, in Scherman, *The Chumash : the Torah : Haftaros and five Megillos with a commentary*

further Talmudic source is Tractate Kethuboth 32b, where Rabbi Johanan argues "that a man who engaged in forcible sexual intercourse with his maiden sister would be liable only for the lashes", and not for a monetary fine in addition to it, on the ground of the same biblical verse used by Rabbi Akiva. Another biblical source that is strongly indicative of an explicit antecedent to the doctrine of double jeopardy relates back to whence medieval canonists located the doctrine: the Book of Genesis. After condemning Cain to perpetual exile for the horrific crime of fratricide, God subsequently decreed that no additional punishment, including the slaying of Cain, would be divinely countenanced.[85] Ultimately, this absolute bar in Jewish law on reversing acquittals appears peculiar amongst religious traditions and approximates current legal practice in the U.S.[86].

### *2.4. Islamic Law*

Islamic law does not appear to explicitly prohibit double jeopardy, but this doctrine has been derived by scholars from general principles

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*anthologized from the Rabbinic writings* at 1063 (cited in note 49) ("[I]t will be that if the wicked one is liable to lashes, the judge shall cast him down and strike him, before him, according to his wickedness, by a count". Rabbi Akiva apparently derived from this biblical verse that "'you make [the guilty man] liable to punishment for one misdeed, but you cannot hold him liable [...] for two misdeeds [...] [i.e., death and lashes]'").

85. See Rudstein, *A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy* at 197-98 (cited in note 6). See also generally *Genesis* 4:13-15 in Scherman, *The Chumash : the Torah : Haftaros and five Megillos with a commentary anthologized from the Rabbinic writings* at 21. See also *Ex Parte Lange*, 85 US 163, 168 (1873) ("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 offence").

86. See Rosenberg and Rosenberg, *Comparative American and Talmudic Criminal Law* at 24 (cited in note 76) ("Indeed, Jewish law is a fundamental building block of Western civilization. Consciously or not, the United States has adopted basic concepts of Jewish criminal procedure, such as double jeopardy, the privilege against self-incrimination, notice, and the ex post facto prohibition. Moreover, the Supreme Court itself has referred to Jewish law in support of some of its most important rulings. Finally, notwithstanding their differences, both systems address the core concern of dealing properly with those accused of crime, and both set up rules limiting and canalizing the criminalization process".)

of the *Shari'a*. As Farhad Malekian has noted[87], the Quran stresses intent, as far as it recognizes that:

> God will not burden any soul beyond its power. It shall enjoy the good which it hath acquired, and shall bear the evil for the acquirement of which it laboured. O our Lord! punish us not if we forget, or fall into sin [...] and lay not on us a load like that which thou hast laid on those who have been before us [...] and lay not on us that for which we have not strength: but blot out our sins and forgive us, and have pity on us[88].

Islam thus highlights the divine role of mercy and emphasizes an unbending insistence upon the administration of justice as one of the first principles of the faith[89]. However, there is no clear prohibition in Islamic law[90]. Thus, Islamic countries in the modern world have often incorporated various aspects of the *Shari'a* along with western legal concepts. Accordingly, the doctrine of double jeopardy appears to be the result of this respective amalgamation[91]. This mélange is best

87. See Farhad Malekian, *Corpus Juris of Islamic International Criminal Justice* at 231 (Cambridge Scholars Publishing 1st ed. 2017).

88. *The Koran* at 2:286 (W&N 1st ed. 2001) (Alan Jones ed, J.M. Rodwell trans).

89. See Malekian, *Corpus Juris of Islamic International Criminal Justice* at 231 (cited in note 86). See also Silvia Tellenbach, *Islamic Criminal Law*, in Dubber et al. (eds.), *The Oxford Handbook of Criminal Law* at 253 (cited in note 46) ("God is omnipotent and merciful; therefore, he does not need to insist upon the punishment of crimes against claims. This is why it is nevertheless, in many cases, possible to avoid a hadd punishment").

90. See Richard J. Terrill, *World Criminal Justice Systems: A Comparative Survey* at 569 (Routledge 9th ed. 2016) ("The Quran consists of 114 chapters or surats (surah, singular) and 6,342 verses or ayas (ayah, singular) [...] [many of the legal verses] are concerned with religious duties, such as prayer and fasting [...]. Some were revealed with the aim of repealing objectionable customs such as infanticide, usury, gambling and unlimited polygamy. Others laid down penalties with which to enforce the reforms that the Quran had introduced. But on the whole, the Quran confirmed and upheld the existing customs and institutions of Arab society and only introduced changes that were deemed necessary. It was further estimated that approximately 30 verses dealt with crimes and corresponding sanctions, while another 30 pertained to matters of justice, equality, and rights and obligations of people").

91. See Tellenbach, *Islamic Criminal Law* at 266 (cited in note 88) ("In the category of crimes punished with ta'zir punishments – a category that in practice comprises far more than 90% of crimes even in states such as Iran and Pakistan – Islamic

exemplified by the Arab Charter on Human Rights. Promulgated in Cairo in 1994 by member states of the Arab League, this document intended to bridge the cultural *ethos* of both East and West. "Being proud of the humanitarian values and principles for which it firmly established in the course of its long history"[92] declares the Preamble, the Arab World is accordingly an ideal "international focal point for seekers of knowledge, culture and wisdom"[93]. Article 16(1) explicitly protects against double jeopardy, affirming that "No one shall be tried twice for the same offence"[94]. Although the pleas of *autrefois acquit* or *autrefois convict*, or its functional Latin equivalent, *ne bis in idem*, are not explicitly stated, Article 16(2) permits an individual who suffers a double jeopardy violation to demand their release[95], and declares that "they shall be entitled to compensation"[96].

Islamic law scholars have described the doctrine of double jeopardy as "the most decisive axiom among the international human rights law instruments and is regarded as an obligatory norm in international criminal law instruments"[97]. However, not every Islamic country follows it as strictly as it has been construed in the Western legal tradition. For example, the Iranian Criminal Code, promulgated after the 1979 Islamic Revolution, "does not apply the *ne bis in idem* rule [...] in cases in which a perpetrator has been judged and punished abroad before being brought before an Iranian court"[98]. The potential imposition of a second punishment in this case can be traced to a clash between differing legal traditions, or perhaps as importantly, as

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criminal law exhibits a very high degree of flexibility. As a result, states that apply Islamic law can still adopt [...] portions of Western criminal codes or [...] use Western law as a model").

92. Arab Charter on Human Rights, Preamble (League of Arab States, March 22, 2014) available at https://www.refworld.org/docid/3ae6b38540.html (last visited November 20, 2021).

93. *Ibid*.

94. Arab Charter on Human Rights, Art 16, cl 1 (cited in note 91).

95. Arab Charter on Human Rights, Art 16, cl 2 (cited in note 91).

96. Arab Charter on Human Rights, Art 16, cl 3 (cited in note 91).

97. Mansour Rahmdel, *The 'Ne bis in idem" rule in Iranian criminal law,* 11 Journal of Financial Crime 277, 280 (2004).

98. See Tellenbach, *Islamic Criminal Law* at 322 (cited in note 89). See also *Islamic Penal Code of Iran*, Art. 7 (20 November 1991) available at: https://www.refworld.org/docid/518a19404.html (last visited November 20, 2021).

an Islamic country refusing to recognize a judgment by a non-Islamic court[99].

A similar case study is that of Pakistan, which gained independence as a secular state in 1947 under the leadership of Muhammad Ali Jinnah. The legal system was heavily influenced by British law during their long occupation of the Indian subcontinent; it has retained several common law features. This includes, *inter alia*, Article 13(a) of the 1973 Constitution, last revised in 2012, which proclaims that "No person shall be prosecuted or punished for the same offence more than once"[100]. After General Zia-ul Haq became President in 1979 – the same year as the Iranian Revolution – the criminal justice system began to be "islamized," so that by the early 1980s, *hadd* offenses (any offence specifically stated in the Quran or Sunna, the traditions of the Prophet) were formally incorporated into the criminal law.[101] Although these divinely mandated punishments have been the subject of some scholarly interpretation, "[t]he most well-known text

99. See Ralf Michaels, *Recognition and Enforcement of Foreign Judgments*, in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* at 3 (2009) ("In the absence of treaty commitments, countries are under no obligation to recognize and/or enforce foreign judgments. Although nearly all countries now do so regularly, this State practice is not considered specific enough to create actual rules of customary international law"; *Id.* at 7: "[A]ll legal systems and virtually all more recent conventions allow States to deny recognition to foreign judgments that violate the enforcing State's public policy. For example, the Middle Eastern conventions from 1983 and 1995 (see para. 19) allow Member States to refuse recognition to foreign judgments that are contrary to Islamic Law; this can, if read literally, become a broad restriction").

100. *The Constitution of the Islamic Republic of Pakistan*, Article 13(a) (modified 2012), available at http://na.gov.pk/uploads/documents/1333523681_951.pdf (last visited November 20, 2021).

101. Martin Lau, *Twenty-Five Years of Hudood Ordinances – A Review*, 64 Wash & Lee L Rev 1291, 1292 (2007) ("The ordinances introduced into the legal system of Pakistan were ostensibly Islamic criminal laws. As a result, theft, consumption of intoxicants including alcohol, extra-marital sex including rape, and making false allegations of adultery were all governed by Islamic criminal law. Until 1979 these offenses had been governed by the purely secular Pakistani Penal Code – legislation enacted in 1860 by the British colonial government and later adopted in Pakistan at the time of independence in 1947").

[of a hadd] is [...] 'As for the thief, both male and female, cut off their hands'"[102].

The significant aspect of this "islamization" of criminal offenses was that it "created not only the entirely new criminal offenses of adultery and fornication, behavior that had not been treated as criminal under the provisions of the Pakistan Penal Code, but also the new punishments of whipping and stoning to death"[103]. While this period of rapid islamization thus modernized remnants of British law that had remained legally binding, use of these strengthened blasphemy laws over the period 1987-2015 resulted in 1,500 allegations against Muslims, Hindus, Christians, and Ahmadis[104].

Created in the 1980s, the Federal Shariat Court ("FSC") "was to be composed of eight Muslim judges who were qualified to sit as High Court judges"[105]. Importantly, its jurisdiction exceeds that of the High Court, as the former "can, either on its own or in response to a citizen's petition, review any provision of Pakistani law to determine"[106] whether it truly violates the *Shari'a*. "If it finds the law repugnant, the FSC can declare the law invalid and force the legislature either to amend it or to let it lapse"[107]. Most significantly, after examining a criminal case decided under the *Hadd* laws, the Federal Shariat Court can "change any finding or sentence...includ[ing] the ability to change an acquittal to a conviction"[108].

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102. H. Patrick Glenn, Legal Traditions of the World at 197 (Oxford University Press 4th ed. 2010).

103. Lau, *Twenty-Five Years of Hudood Ordinances* at 1296 (cited in note 100).

104. BBC, *What are Pakistan's blasphemy laws?* (BBC News, May 8, 2019), available at: https://www.bbc.com/news/world-asia-48204815 (last visited November 20, 2021).

105. Dorothy Q. Thomas, *Double Jeopardy: Police Abuse of Women In Pakistan* at 48 (Human Rights Watch 1st ed. 2012).

106. *Ibid.*

107. *Ibid.*

108. *Ibid.* See also *Asia Bibi v. The State, Criminal Appeal* (Supreme Court of Pakistan, 2015) at 9-10, available at: https://www.supremecourt.gov.pk/downloads_judgements/Crl.A._39_L_2015.pdf (last visited November 20, 2021) (holding:"[a]s per this provision, the act of blasphemy was made culpable and the sentence provided was either death or imprisonment for life along with a fine. The validity of this provision was considered by the Federal Shariat Court in the case *Muhammad Ismail Qureshi v. Pakistan through Secretary, Law and Parliamentary Affairs* (Supreme Court of Pakistan, 2010) wherein the Court ruled that Section 295-C of PPC was repugnant to the

This judicial power perhaps finds its greatest expression in the Zina Ordinance. Most challengingly, this law has resulted in many women being convicted of adultery after claiming they had been raped, for under the *Shari'a*, four witnesses must have been present for the act, which is exceedingly unlikely to occur in practice[109]. If a woman alleges rape, without this necessary number of witnesses, the allegation can be directed against her, as she can be accused of adultery or extra-marital sex[110]. Yet, similar to the Iranian Penal Code, this special authority may also express an Islamic court's refusal to acknowledge a secular ruling, particularly if committed – in the eyes of the FSC – against the *Shari'a*. The most intriguing aspect of this clash between two legal traditions is that it occurs within the same country's justice system[111].

### *2.5 Confucianism*

East Asia is comprised of different legal traditions and societies, though the region has been heavily influenced by Chinese tradition, due to its sheer geographical size and the immense Confucian legacy. Traditional dynasties in Chinese history – notably the Sui, Tang, and Ming – all compiled detailed written penal codes, centuries before their counterparts in the western legal tradition (the continental model) imitated this practice[112]. In general, it can thus reasonably be

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fundamental principles of Islam to the extent that it provided for the punishment of life imprisonment which acted as an alternative to a death sentence. It was held that the penalty for contempt of the Holy Prophet (صلى الله عليه وسلم is death. It was further held that if the President of the Islamic Republic of Pakistan did not take any action to amend the law before 30th April, 1991, then Section 295-C would stand amended by the said ruling'").

109. Lau, *Twenty-Five Years of Hudood Ordinances* at 1297 (cited in note 100).

110. *Id.* ("Described as "double jeopardy," the criminalization of any sexual intercourse outside a valid marriage, irrespective of consent, turned the offense of rape on its head by exposing the victim to the risk of punishment for adultery".)

111. Peter G. Strasser, *The Evolving Pakistani Criminal Justice System: A Study of the Raymond David Matter*, 23 Tulane Journal of International & Comparative Law 139 (2014) n. 51 ("Created by General Zia-ul-Haq, the Federal Shariat Court theoretically falls within the purview of the Supreme Court but amounts to a parallel Islamic judicial system").

112. Geoffrey MacCormack and W. Feng-Xin,*The Tang Code: Early Chinese Law*, 18 Irish Jurist 132 (1983) ("In itself the T'ang legal code represents a great intellectual

said that tradition in East Asia is heavily predicated upon immense respect for ancestral memories, practices, and customs[113].

Descriptive terms for this general legal culture are the "*parental*" model that Karl Llewellyn originally applied to Native American tribes[114], the "*benevolent paternalism*" model that Daniel Foote has used to describe the Japanese criminal justice system,[115] or even the "*family*" model as advanced by John Griffiths[116]. Not surprisingly, the common denominator among all these descriptions of the "criminal justice system" is the inner essence of all legal traditions: inquisitorialism. The core objective of the Confucian *ethos* consisted of inquiring into criminal behavior followed by emphasis upon the subsequent rehabilitation and reintegration of defendants into their communities, through confession, penance, and personal responsibility[117]. The individual was not seen as possessing agency or autonomy; instead, they

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achievement and it is not due to Chinese conservatism alone that a number of its rules and distinctions still appear many centuries later in the code of the [Q]ing dynasty which formed the basis of Chinese law until 1911. Its merits secured its adoption in other countries of south-east Asia, Vietnam, Korea and Japan. Generally in Asia it has had an influence comparable to that of the French and German codes in the West [...]. [I]n 581 A.D. a new [Sui] code was drawn up and applied to the whole empire , and it was this code which formed the basis of the code adopted by the early T'ang emperors in the succeeding century").

113. R. Dalton, et al., *Authority Orientations and Democratic Attitudes: A Test of the 'Asian Values' Hypothesis*, 6 Japanese Journal of Political Science 212-13 (2005): "According to 'Asian values' proponents, because of Confucian traditions, East Asian societies are paternalistic, accept hierarchic society, and are community-oriented-characteristics that promote order and consensus...Perhaps the strongest statement comes from Yung-Myung Kim who states, 'Confucian ideas are antithetical to Anglo-American democracy'." While there are opponents, this view is deeply rooted in societal consciousness.

114. Karl N. Llewellyn, *Jurisprudence: Realism in Theory and Practice* at 439 (The University of Chicago Press 1st ed. 1962).

115. Daniel H. Foote, *The Benevolent Paternalism of Japanese Criminal Justice*, 80 Cal L Rev 317 (1992).

116. John Griffiths, *Ideology in Criminal Procedure or a Third 'Model' of the Criminal Process*, 79 Yale L J 359 (1970).

117. hi-Yu Cheng, *The Chinese Theory of Criminal Law*, 39 J Crim L. & Crimin 461 (1949).

were identified via contextual relationships with other individuals in society via their status or occupation[118].

Thus, the development of the principle of double jeopardy, as understood by the modern concept, was historically unknown in East Asia, yet the possible argument that a similar principle existed stems from the intense cultural emphasis upon confession in the Confucian legal tradition[119]. Once a suspect confessed, traditional codes of criminal procedure could be quite lenient in their treatment of the offender. If the individual confessed and accepted full responsibility – prior to arrest and interrogation – traditional Chinese law would forswear a formal punishment, which appears to have made this practice rather exclusive:

> Nor is it surprising that police and judicial authorities the world over, in a natural desire to see their actions and decisions neatly supported by confessions, have tended to grant some degree of leniency toward those who would cooperate. However, the Chinese have been somewhat unique in writing into their law... provisions for the reduction or remission of punishment for offenders who voluntarily surrender and confess before their offense has been discovered. This particular type of confession is technically known as *tzu-shou* and is distinguished from *tzu-pai*...an ordinary confession...made after...discovery of an offense[120].

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118. Daniel K. Gardner, *Confucianism: A Very Short Introduction* at 10 (Oxford University Press 1st ed. 2014). See also Keith N. Knapp, *Three Fundamental Bonds and Five Constant Virtues*, in Linsun Cheng (ed.), 5 *Berkshire Encyclopedia of China* at 2252 ss. (Berkshire Publishing Group 1st ed. 2009). See also Glenn, *Legal traditions of the world* at 336 (cited in note 101) ("There is proclamation of the primacy of communities and relations within which individuals can easily recognize themselves, while individual worth and aspiration are recognized and praised in the maintenance and prospering of these communities and relations. The individual is not meant to be left out of this reasoning, but rather swept up in it. It is all part of the inseparable, interdependent world. You can no more separate individuals from the relations in which they exist than you can separate day from night, yet this in no way denigrates day or night, or individual people").

119. Pei-Yi Wu, *Self-Examination and Confession of Sins in Traditional China*, 39(1) Harvard Journal of Asiatic Studies 5 at 6 ss. (1979).

120. W. Allyn Rickett, *Voluntary Surrender and Confession in Chinese Law: The Problem of Continuity*, 30 The Journal of Asian Studies 797 (1971).

Accordingly, within this context, as the suspect already confessed to a criminal offense and the state exercised its sovereign authority, the individual could not be punished for that same offense again[121].

### *2.6. Global Perspective*

A bar on successive prosecution – upon a final verdict of acquittal or conviction – has been recognized in Article 14(7) of the International Covenant on Civil and Political Rights[122], Optional Protocol 7 to the European Convention of Human Rights[123], Article 8(4) of

121. See Rosenberg and Rosenberg, *Comparative Criminal Law* at 239 (cited in note 76) (This particular approach stands in contrast to the Jewish perspective. "Offenses warranting capital punishment or flogging generally had to be viewed as more serious. In such cases, therefore, purification of the offender required more severe means than those used in connection with violations punishable by fine. To assure expiation, punishment was prescribed notwithstanding the defendant's confession and contrition. Moreover, as a practical matter, to allow confessing defendants in criminal cases to be immunized, even though there was independent evidence sufficient to establish guilt, would have undercut the deterrent effect of sanctions. Malefactors might then commit crimes in the hope that their later insincere confessions would be deemed genuine acts of penitence precluding punishment").

122. International Covenant on Civil and Political Rights, Art.14(7), available at: https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx (last visited November 20, 2021) ("No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country").

123. Dinah Shelton, *International Human Rights Law: Principled, Double, or Absent Standards*, 25 Minnesota Journal of Law & Inequalities 467, 480 n 70 (2007): ("The Council of Europe has adopted fourteen protocols to the ECHR, expanding the list of guaranteed civil and political right [...]. See also Protocol No. 7 to the European Convention on Human Rights (November 22, 1984) 117 Eur Treaty Ser §86, available at https://www.echr.coe.int/Documents/Convention_ENG.pdf (last visited November 20, 2021) (according aliens various due process safeguards [...] [including] "*protection against double jeopardy* [...]" (Emphasis Added). Article 4; "Right not to be tried or punished twice:" 1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State. 2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case. 3. No derogation from this Article shall be made under Article 15 of the Convention).

the American Convention on Human Rights[124], and Article 16(1) of the Arab Charter on Human Rights[125]. The American and Jewish approaches to double jeopardy appear to be unique in the annals of legal history as alternative models of criminal procedure – across the spectrum of inquisitorialism – have not embraced as broad a definition. With the latter having ceased to exercise jurisdiction over criminal cases two millennia ago, the American criminal justice system now stands alone, a testament to its perception of its exceptionalism. And, while doctrinal reforms have occurred – after court cases – in common law countries such as Australia, New Zealand, and the United Kingdom[126], the future of this doctrine can only be imagined by gazing back into its long past.

### *3. Brief Case Study: the Amanda Knox Saga*

The trial (and initial appeal) of Amanda Knox, which lasted 1, 427 days[127], remains well-known throughout Western public opinion. It captured the attention of the world and showcased the differences between the continental and common law criminal justice systems, which arose from the same tradition.

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124. American Convention on Human Rights, Art 8(4), available at https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm (last visited November 20, 2021) ("An accused person acquitted by a nonappealable judgment shall not be subjected to a new trial for the same cause".

125. Arab Charter on Human Rights, Art 16(1) (cited in note 91) ("No one can be tried twice for the same crime." However, this right does not appear to be referenced in either the African Charter on Human and People's Rights or the Universal Declaration of Human Rights. see African Charter on Human and Peoples' Rights, available at https://www.achpr.org/legalinstruments/detail?id=49 (last visited November 20, 2021) and The Universal Declaration of Human Rights, available at http://www.un.org/en/universal-declaration-human-rights/ (last visited November 20, 2021)).

126. Ann Black, *Double Jeopardy Revisited: Why Several Common Law Countries Are Tinkering with One of the Law's Most Treasured Principles*, 1 NJA Law Journal 142 (2007) ("[T]he single greatest catalyst for a reviewing the rule against double jeopardy came directly from court cases: murder cases whose outcomes were seen as unpalatable in the eyes of the public. Each case was quite distinctive and different in the dimension of the rule against double jeopardy it exposed as flawed and unjust").

127. Danielle Lenth, *Life, Liberty, and the Pursuit of Justice: A Comparative Legal Study of the Amanda Knox Case*, 45 McGeorge Law Review 347, 349 (2013).

Knox, a young woman from Seattle, studied abroad in Perugia, Italy in 2007. On November 2 of that year, the bloodied body of her British roommate Meredith Kercher was found lying in their shared apartment[128]. Suspicion immediately fell upon Knox as well as her then Italian boyfriend, Raffaele Sollecito[129]. While journalists around the world extensively covered the proceedings, "many American legal scholars, including some very prominent ones, fueled the media assault on the Italian system"[130]. In contrast to their perceptions, which mostly derided the case as "a scandal of the first order"[131] and the system as "not among Europe's most distinguished"[132], Italy's modern criminal justice system is not purely inquisitorial[133]. Revised in 1989, it is a hybrid system of adversarial procedures imposed upon an inquisitorial foundation[134]. This significantly includes joining of civil and criminal cases on one hand, and judges who are involved in deliberations with lay juries, who must write an opinion justifying the verdict[135].

In December 2009, the Criminal Trial Court of Perugia convicted both Knox and Sollecito and sentenced them to roughly a quarter of a century behind bars.[136] The defense appealed the conviction to the

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128. *Meredith Kercher Timeline*, (The Guardian, December 9, 2009), available at: https://www.theguardian.com/world/2009/dec/04/meredith-kercher-murder-timeline (last visited November 20, 2021).

129. Barbie Latza Nadeau, Amanda Knox decision explained by Italian court (CNN News, September 8, 2015) available at: https://www.cnn.com/2015/09/08/europe/italy-court-amanda-knox/index.html (last visited November 20, 2021).

130. Michael Vitiello, *Bargained-for-Justice: Lessons from the Italians?*, 48 University of the Pacific Law Review 247, 249 (2017).

131. *Id.* at 250.

132. *Ibid.*

133. Mirjan Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 University of Pacific Law Review 506, 569 (1973)) ("[In the eyes of many Americans] the only alternative to some lofty conceptions of Due Process is a lapse into the horrors of a procedural system where charges are not specific, the accused is not afforded the benefit of doubt, his confession is coerced, his detention before trial is unlimited, he has no right to counsel, and is not advised of his constitutional rights").

134. Julia Grace Mirabella, *Scales of Justice: Assessing Italian Criminal Procedure Through The Amanda Knox Trial*, 30 BU Intl L J 229, 232 (2012).

135. See Vitiello, *Bargained-for-Justice* at 251-252 (cited in note 126).

136. See Corte d'Assise di Perugia, March 4, 2010 no. 7/2009 ("[T]he Court [...] declares Knox Amanda [...] and Sollecito Raffaele guilty of the crimes attributed to them [...] and sentences Knox to 26 years of imprisonment and Sollectio to 25 years of

Appellate Court, *Corte d'Assise d'Appello*. In October 2011, the Appellate Court, reviewing trial verdicts *de novo*, reversed the trial verdict.[137] In Italy, "when [...] cases are appealed, the criminal appellate court... reviews both findings of law and fact, allowing 'supervision of the trial fact-finder's evidentiary material, the rationality of his enquiry into the facts, and whether the data that his judgment is based on are complete'. Thus, Knox's criminal trial was in no way her last chance to provide or contest the evidence against her; the case was not over as it might have been in the American adversarial system"[138].

The Supreme Court of Cassation – Italy's Supreme Court – subsequently reversed the Appellate Court's acquittal and ordered a retrial before the Criminal Trial Court of Florence[139]. Reversal of acquittal – no matter how erroneous it may have been – is unconceivable in the U.S. criminal justice system for it is believed to be a fundamental violation of procedural due process. The Trial Court of Florence found

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imprisonment" (orig. "[L]a Corte [...] dichiara Knox Amanda [...] e Sollecito Raffaele colpevoli dei reati loro ascritti [...] e li condanna alla pena di anni 26 di reclusione la Knox e alla pena di anni 25 di reclusione il Sollecito"). available at https://archiviodpc.dirittopenaleuomo.org/upload/ASSISE%20PERUGIA%20KNOX%20SOLLECITO.pdf (last visited November 20, 2021). See also *Amanda Knox guilty of Meredith Kercher murder* (BBC News December 5, 2009), available at http://news.bbc.co.uk/1/hi/8394750.stm (last visited November 20, 2021).

137. See Corte d'Assise d'Appello di Perugia, December 15, 2011, no 4/2011 at 143 ("The Court [...] acquits both defendants [from the crime of murder] for not having committed the fact" (orig. "La Corte [...] assolve entrambi gli imputati [dal reato di omicidio] per non aver commesso il fatto"), available at: https://archiviodpc.dirittopenaleuomo.org/upload/sent%204%20%2011%20CAA%20knox.PDF (last visited November 20, 2021). See also Elisabetta Povoledo, *Amanda Knox Freed After Appeal in Italian Court* (The New York Times, October 3, 2011) available at: https://www.nytimes.com/2011/10/04/world/europe/amanda-knox-defends-herself-in-italian-court.html (last visited November 20, 2021).

138. See Mirabella, *Scales of Justice* at 253 (cited in note 133).

139. See Cassazione penale, March 26, 2013 no 26455 at 74 ("[The Court] cancels the contested sentence [...] and refers to the Court of Assizes of Appeal of Florence for a new judgment" (orig. "[La Corte] annulla la sentenza impugnata limitatamente ai reati di cui ai capi A (in esso assorbito il capo C), B, D, E ed all'aggravante di cui all'art. 61 c.p., n. 2 contestata in relazione al capo F) e rinvia per nuovo giudizio alla Corte d'assise d'Appello di Firenze"), available at: https://archiviodpc.dirittopenaleuomo.org/upload/1371656014PROVVISORIO%20Cassazione%20omicidio%20Perugia.pdf (last visited November 20, 2021). See also *Meredith Kercher murder: Amanda Knox retrial opens* (BBC News, September 30, 2013) available at: https://www.bbc.co.uk/news/world-europe-24327338 (last visited November 20, 2021).

Knox and Sollecito guilty once more[140]. They appealed once more to the Court of Cassation, which fully acquitted them[141]. The Court of Cassation excoriated the prosecutorial rush to judgment, its "sensational failures" in the investigational phase, and "culpable omissions" by the lower courts[142]. Thus, "[t]he appellate process is one of the features

140. Corte d'Assise di Firenze, April 29, 2014 at 400, available at https://archiviopenale.it/prove--corte-d-ass-d-app-firenze-29-aprile-2014-(ud-30-gennaio-2014)-knox-e-altro/contenuti/3119#:~:text=%C2%A0Sentenza%20(parte%20IV (last visited November 20, 2021). See also Johnny Brayson, *Why Were Amanda Knox & Raffaele Sollecito Convicted Twice? Italy's Legal system is Complicated* (Bustle, September 30, 2016), available at https://www.bustle.com/articles/186353-why-were-amanda-knox-raffaele-sollecito-convicted-twice-italys-legal-system-is-complicated (last visited November 20, 2021).

141. Cass. Pen., 27 March 2015 n. 36080 p. 52 available at: https://www.giurisprudenzapenale.com/wp-content/uploads/2015/09/cass-pen-2015-36080.pdf ("The Court [...] cancels without retrial the contested sentence [...] for the applicants have not committed the fact") (orig. "La Corte [...] annulla senza rinvio la sentenza impugnata per non avere i ricorrenti commesso il fatto"). See also Stephanie Kirchgaessner, *Amanda Knox acquitted because of 'stunning flaws' in investigation* (The Guardian, September 7, 2015), available at: https://www.theguardian.com/us-news/2015/sep/07/amanda-knox-acquitted-because-of-stunning-flaws-in-investigation (last visited November 20, 2021).

142. See Cass. Pen. 27 March 2015 n. 36080 p. 23 ("It is evident that the history of this process is characterized by a troubled and intrinsically contradictory path [...] [It has been a]n objectively wavering process, whose fluctuations are, however, also the result of sensational investigative defaillances or "amnesia" and culpable omissions of investigative activities, which, if carried out properly, would, in all likelihood, have allowed, immediately, to outline a picture, if not of certainty, at least of tranquilizing reliability, in the perspective of either the guilt or the innocence of today's applicants. Such a scenario, intrinsically contradictory, constitutes, in itself, a first, eloquent, signal of an evidential ensemble that is anything but marked by evidence beyond reasonable doubt".)(orig. "Non può, intanto, sfuggire, in questa prima approssimazione d'assieme, che la storia di questo processo è caratterizzata da un percorso travagliato ed intrinsecamente contraddittorio [...]. Un iter obiettivamente ondivago, le cui oscillazioni sono, però, la risultante anche di clamorose defaillances o "amnesie" investigative e di colpevoli omissioni di attività d'indagine, che, ove poste in essere, avrebbero, con ogni probabilità, consentito, sin da subito, di delineare un quadro, se non di certezza, quanto meno di tranquillante affidabilità, nella prospettiva vuoi della colpevolezza vuoi dell'estraneità degli odierni ricorrenti. Un siffatto scenario, intrinsecamente contraddittorio, costituisce, già in sé, un primo, eloquente, segnale di un insieme probatorio tutt'altro che contrassegnato da evidenza oltre il ragionevole dubbio." See also Tim Stelloh and Alex Johnson, *'Stunning Weakness,' 'Glaring Errors' Cited in Amanda Knox Acquittal* (NBC News, September 8, 2015), available at: https://www.nbcnews.com/news/world/

that sets continental justice most sharply apart from the common law. The common law permits only extremely limited appellate review in criminal matters. In a tradition stretching far back into the Middle Ages (indeed into early medieval trial by combat), the common law does not ordinarily permit the state to appeal acquittals, and of course there is never de novo review"[143]. This saga exacerbated the *ethos* of "anti-inquisitorialism" which pervades American jurisprudence"[144]. Paradoxically, this *de novo* appellate review of facts, which ultimately exonerated Knox, does not exist in the United States[145], for "[i]n adversarial systems, efforts to prevent insufficiently probative evidence and provide fair processes creates an assumption that 'whenever fair rules have been applied in the trial contest [...] the result is necessarily just'. As a result, trials in the United States can only be appealed on narrow questions of law, not fact, and claims of innocence are not considered constitutional questions"[146]. Yet, this inconvenient truth matters not to critics of the continental legal tradition for "the clear message was that the United States system has it right and that failing to adhere to the same rules is likely to produce unjust results"[147]. This modern-day *kulturkampf* best represents the clash between differing legal, cultural, and historical *ethos*, centered around dueling conceptions of double jeopardy within the western tradition and *weltanschauung*.

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top-italian-court-throws-out-amanda-knox-murder-conviction-n423006 (last visited November 20, 2021).

143. James Q. Whitman, *Presumption of Innocence or Presumption of Mercy? Weighing Two Western Modes of Justice*, 94 Texas L. Rev. 987-88 (2016).

144. David Alan Sklansky, *Anti-Inquisitorialism*, 122 Harv. L. Rev. 1634, 1668 (2009). See also Whitman, *Presumption of Innocence or Presumption of Mercy?* at 942 (cited in note 142) (as Whitman noted, "from the American point of view, the law of continental Europe does look [...] at times perilously supine in the face of state investigative and prosecutorial power").

145. See Danielle Lenth, *Life, Liberty, and the Pursuit of Justice: A Comparative Legal Study of the Amanda Knox Case*, 45 McGeorge L. Rev. 347 (2013) at 349.

146. Mirabella, *Scales of Justice* at 253 (cited in note 133).

147. Vitiello, *Bargained-for-Justice* at 250 (cited in note 126).

*5. Rationales*

There does not appear to be a single clear justification for the double jeopardy doctrine[148] although possible reasons have been proffered over the centuries. Foremost among them appears to be "protection against wrongful convictions and [the preservation of] the moral integrity of the criminal justice process"[149]. Another strong reason is the defendant's core interest in having finality attached to the criminal proceedings, which further "plays a role in upholding public confidence in the justice system and respect for judicial proceedings, with the additional practical benefit of conserving judicial resources"[150]. As articulated by Justice Hugo Black over six decades ago, an end to criminal proceedings is necessary for the victim, their family, society, and most of all, for the defendant:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of

148. See *Twice in Jeopardy*, 75 Yale Law Journal 262, 266 (1965) ("The courts understand these rules as expressions of self-evident moral principles: it is wrong to retry a man for a crime of which he previously has been found innocent, wrong to harass him with vexatious prosecution, and wrong to punish him twice for the same crime. Inquiry usually stops here. We are rarely told why it is wrong to retry for the same crime or punish twice. We never learn precisely what constitutes harassment, nor when it will bar reprosecution. The judiciary is content to apply the double jeopardy prohibition with a reverent nod to its policies"), available at: https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=9210&context=ylj (last visited November 20, 2021).

149. Andrew L.-T. Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings* at 17 (Oxford University Press 2nd ed. 2008); Gavin Dingwall, *Prosecutorial Policy Double Jeopardy and the Public Interest*, 63 The Modern Law Review 268 (2000).

150. Lorraine Finley, *Does the International Criminal Court Protect Against Double Jeopardy: An Analysis of Article 20 of the Rome* Statute, U.C. Davis Journal of International Law & Policy 221, 223 (2009).

> anxiety and insecurity; as well as enhancing the possibility that even though innocent he may be found guilty[151].

Westen and Drubel identify a fourth factor in the defendant's "valued right to have his trial completed by a particular tribunal"[152]. Lippke, a modern critic of the absolute bar on overturning acquittals in American jurisprudence, concedes "that the state will usually have an advantage in the resources it can muster for trials".[153] His critique of the absolute prohibition on even reviewing acquittals is formidable.

> Suppose that subsequent to a defendant's acquittal on a serious criminal charge, persuasive new evidence emerges that more or less conclusively demonstrates his guilt. To anyone not already convinced of the merits on the ban on double jeopardy, it will seem puzzling why we should prohibit the state from going after the defendant again. His acquittal appears mistaken; if his crime was grave, the failure to punish him justly and, if he has continuing criminal proclivities [...] must surely exert some pull on our consciences[154].

Indeed, an answer for the question 'how has justice been done in this particular case?' is needed. The defendant should certainly not have the constant pressure of the state repeatedly charging them for the same offense, but this mindset at its core evinces a deep-seated mistrust of government. Moreover, an absolute bar is necessary, proponents argue, "[not because] the state will retry a defendant intentionally to manipulate or harass, but that retrial will inevitably have those effects...of both enabling the prosecution to improve upon its case and burdening the defendant with the onus and anxiety of

151. *Green v. United States*, 355 U.S. 184, 187-88 (1957); Peter Westen and Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 The Supreme Court Review 81, 86 (1978).

152. Westen and Drubel, *Toward a General Theory of Double Jeopardy* citing Wade v. Hunter, 336 U.S. 684, 689 (1949).

153. Richard Lippke, *Modifying Double Jeopardy*, 15 New Criminal Law Review 511, 515 (2012).

154. *Id*. at 513.

further proceedings"[155]. Indeed, if new evidence emerges after an acquittal has been rendered that proves the defendant committed the crime (for example, murder or rape, as a crime of this magnitude compels even supporters of an absolute ban to rethink their deep-seated opposition), why should the state be prohibited from retrying them? And, at that point, "why exactly should we care that the state's persistence in attempting to punish her causes repeated embarrassment and expense or wears her down?"[156]. While the principle of finality is important in the criminal justice system, it should not provide the defendant complete immunity, for "the greater weight that is accorded the finality value, the greater the frequency that factually guilty defendants will go free"[157].

The emphasis upon finality and an end to repeated harassment of the defendant begs a further question: at what point does jeopardy attach? "Suppose, for example, that a prosecutor subjects the defendant to repeated and burdensome pretrial proceedings – such as repeated bail or probable-cause hearings – solely for the purpose of causing him embarrassment, anxiety, and expense"[158]. Is this sufficient for jeopardy to have attached? After all, the defendant could prove the very concerns – at this early stage of the pretrial proceedings – that supposedly underpin the very foundation of the doctrine of double jeopardy within the American criminal justice system. Current American law is unique because alone of the world's legal traditions and modern criminal justice systems, jeopardy formally attaches prior to final verdict[159].

This is in stark contrast to the practice of other countries – even those who share the same common pot of intellectual and judicial ideas. For example, English law traditionally deemed jeopardy to have

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155. Peter K. Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 Michigan Law Review 1001, 1007 (1980).

156. Lippke, *Modifying Double Jeopardy* at 513 (cited in note 153).

157. Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences* at 1010 (cited in note 155).

158. Westen and Drubel, *Toward a General Theory of Double Jeopardy* at 97 (cited in note 151).

159. See *Double Jeopardy: The Reprosecution Problem*, 77 Harvard Law Review 1272, 1275 (1964) ("In contrast to the English practice of conditioning jeopardy upon entry of a verdict of acquittal or conviction, jeopardy attaches in the federal courts when the jury has been impaneled and sworn, or when the court in a nonjury trial has begun to hear evidence").

attached when a final verdict, acquittal or conviction, was issued. Modification came in 1993, however, when Stephen Lawrence, a black teenager, was brutally slain[160]. Five men, including Gary Dobson, were charged with the crime; Dobson was acquitted. Such a verdict was attended with public outrage and led to the commission of an official Inquiry ("MacPherson Report"), which recommended considering empowering the Court of Appeal to permit prosecution after acquittal where fresh and viable is presented.[161] In 2003, as a result of this case and its aftermath, the British Parliament adopted the Criminal Justice Act, which modified the common law doctrine of double jeopardy, shifting it closer to a more overt inquisitorial approach. Accordingly, as Section 76(1) makes clear, "[a] prosecutor may appeal to the Court of Appeal for an order – (a) quashing a person's acquittal in proceedings within section 75(1), and (b) ordering him to be retried for the qualifying offence"[162].

Following this legislative change, and in light of new evidence which had appeared since the initial verdict, the appellate court quashed the acquittal and ordered a retrial in May 2011[163]. In 2012, Gary Dobson was retried, convicted and sentenced to life in prison for the slaying of Stephen Lawrence[164]. It is this perfect storm - a crime of this magnitude, an acquittal, and the emergence of new evidence – which would arguably shock even the conscience of "that omnipresent hypothetical 'reasonable man' who rules our legal theory"[165], (to utilize the

160. *Q&A: Stephen Lawrence murder, BBC news* (May 5, 2004), available at http://news.bbc.co.uk/2/hi/uk_news/3685733.stm (last visited November 20, 2021).

161. *The Stephen Lawrence Inquiry: Report of an Inquiry by Sir William MacPherson of Cluny, Recommendation 38*, 379 (February 1999), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/277111/4262.pdf (last visited November 20, 2021).

162. *Criminal Justice Act 2003, Section 76(1), Part 10*, available at: https://www.legislation.gov.uk/ukpga/2003/44/part/10/crossheading/application-for-retrial (last visited January 10, 2021).

163. Joshua Rozenberg, *Change in double jeopardy law led to Gary Dobson's retrial, The Guardian* (January 3, 2012), available at https://www.theguardian.com/law/2012/jan/03/double-jeopardy-change-law-retrial (last visited January 10, 2021).

164. Guy Birchall, *Where is Gary Dobson now and why did he kill Stephen Lawrence? The Sun* (August 11, 2020) available at https://www.thesun.co.uk/news/6047523/gary-dobson-stephen-lawrence-murder-family/ (last visited January 10, 2021).

165. K. N. Llewellyn, *The Bramble Bush: On Our Law and Its Study* at 33 (Oceana Publications 1951).

20th century legal scholar Karl Llewellyn's metaphor) if the state had no right to appeal an adverse ruling in this extraordinary situation.

At its core, the underlying foundation behind this doctrine, particularly as expressed in American law, is the array of procedural obstacles as part of a systemic trade-off; the value the law places upon the guilty being set free is subordinated to the value of ensuring that an innocent person is not convicted. As articulated six centuries before Blackstone by the illustrious medieval Jewish philosopher Maimonides:

> If we do not inflict punishment even when the offense is most probable, the worst that can happen is that someone who is really guilty will be exonerated. But if punishment is given based on estimation and circumstantial evidence, it is possible that someday an innocent person will be executed. It is better that even a thousand guilty people be exonerated than to someday execute even one innocent person[166].

It is asserted that this robust insistence on defending the guilty – even the devil – ultimately prevents the conviction of the innocent and consequently protects the general society[167]. We must not forget the immense importance that society has in ensuring the guilty are not set free. Thus, "[w]hile overemphasis of this factor may lead to abuse and a deprivation of the rights of the accused, in circumstances where the risk of harassment is slight and that of improper acquittal is great

166. Maimonides, *Sefer HaMitzvot*, Negative Commandment 290, as quoted in *Crime and Consequence* at 67 (2018).

167. Robert Bolt, *A Man for All Seasons*, Act I, Scene VII: ("As Sir Thomas More said to his son-in-law, "And when the last law was down, and the Devil turned around on you--where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast--man's laws, not God's--and if you cut them down [...] do you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake"). See also *Twice in Jeopardy* at 267 (cited in note 148) ("[Double jeopardy rules] prevent prosecutors and courts from prosecuting and punishing arbitrarily, without legitimate justification").

the state's interest in securing convictions should be given considerable weight"[168]. That is the approach taken by several other countries[169].

In contrast to this absolute bar on reversing or the state even appealing an acquittal in U.S. law, legal changes developed at different stages coalesced into a different approach to double jeopardy, as remains the case in other countries. First, the defendant was not placed in jeopardy until a final verdict had been obtained: U.S. criminal procedure remains exceptionally unique in this regard[170]. In 1904, two years after being appointed to the U.S. Supreme Court by Theodore Roosevelt, Oliver Wendell Holmes, Jr., advocated this approach, though it did not carry the day, then or now[171].

Second – as a corollary of the first principle – the prosecution could appeal an acquittal. This was not considered a violation of double jeopardy, for the case had not yet concluded; without a final verdict, jeopardy has yet to attach. This is the practice throughout a multitude of distinct legal traditions around the globe[172]. Indeed, the well-known

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168. *Double Jeopardy: The Reprosecution Problem* at 1274 (cited in note 159).

169. Common law countries that modified this doctrine include the United Kingdom, Australia, and New Zealand. See Ann Black, *Double Jeopardy Revisited: Why Several Common Law Countries Are Tinkering with One of the Law's Most Treasured Principles*, 1 *National Judicial Academy Law Journal* 142 (2007): ("[T]he single greatest catalyst for reviewing the rule against double jeopardy came directly from [...] murder cases whose outcomes were seen as unpalatable in the eyes of the public. Each case was quite distinctive and different in the dimension of the rule against double jeopardy it exposed as flawed and unjust").

170. *Double Jeopardy: The Reprosecution Problem* at 1275 ("In contrast to the English practice of conditioning jeopardy upon entry of a verdict of acquittal or conviction, jeopardy attaches in the federal courts when the jury has been impaneled and sworn, or when the court in a nonjury trial has begun to hear evidence").

171. *Kepner v. U.S.*, 195 U.S. 100, 135 (1904) (Justice Holmes dissenting) ("At the present time in this country, there is more danger that criminals will escape justice than that they will be subjected to tyranny [...]. It is more pertinent to observe that it seems to me that, logically and rationally, a man cannot be said to be more than once in jeopardy in the same cause, however often he may be tried. The jeopardy is one continuing jeopardy from its beginning to the end of the cause. Everybody agrees that the principle, in its origin, was a rule forbidding a trial in a new and independent case where a man already had been tried once. But there is no rule that a man may not be tried twice in the same case"). See also *Double jeopardy: The Reprosecution Problem* at 1285 (cited in note 159).

172. See *Twice in Jeopardy,* 8 Harvard Law Review 354 (1895) (In 1895 Connecticut, a defendant was acquitted at trial for having caused the death of another

recognition that the double jeopardy doctrine "reflects not only our demand for speedy justice, but all of our civilized caution about [...] our aversion to needless punishment, our distinction between prosecution and persecution"[173], is universally recognized.

Third, even if the general rule is that acquittals in criminal cases cannot be overturned, certain extraordinary situations (such as the Stephen Lawrence case) demand that exceptions be made. For this reason, even English law has modified this aspect of the doctrine. In the United States, the claim has been repeatedly advanced – similar to the idea that prosecutors select individuals to prosecute before discovering a crime[174] - that once individuals have been charged, law enforcement and prosecutors "employ dubious tactics to secure convictions that, more often than we would like to admit, distort the search for the truth"[175]. Nonetheless, this potential fear of prosecutorial tyranny seems excessive to absolutely bar the appeal of an acquittal when new evidence has emerged or the defendant has formally confessed to the crime[176].

This end point is the unique feature of the American criminal justice system, that is the jury[177]. To permit an appeal by the state once a

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individual. He was subjected to a second trial, pursuant to a decision of the Connecticut Supreme Court. Did this constitute a double jeopardy violation? As the late 19th century Harvard Law Review article confessed, "[a]s a matter of justice, it is difficult to see why the State should not have a new trial if there has been error in the proceedings. Why the rule forbidding a second jeopardy should apply here [...] is not very plain as a matter of abstract justice [...]. For, until within a comparatively recent time, carrying a criminal case up has generally been regarded a further means of defence [...]. Has not the time come to put the State on the same footing as the prisoner with regard to all means of modifying or reversing a judgment and obtaining a new trial?").

173. *Twice in Jeopardy* at 278 (cited in note 148).

174. Harvey Silverglate, *Three Felonies a Day: How the Feds Target the Innocent* (Encounter Books 1st ed. 2011).

175. See Lippke, *Modifying Double Jeopardy* at 519 (cited in note 153); Keith A. Findley and Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2 Wisconsin Law Review 291 (2006).

176. See Lippke, *Modifying Double Jeopardy* at 519 (cited in note 153): "But that seems a flimsy basis on which to erect a legal doctrine that categorically bans the quashing of acquittals, no matter how likely the guilt of those who have won them, while permitting endless retrials of individuals unfortunate enough to have been wrongly convicted at their initial trials".

177. Westen and Drubel, *Toward a General Theory of Double Jeopardy* at 131 (cited in note 151): "It suffices to say that at some level, at least, nullification is implicit in the

jury has pronounced innocence would effectively mean to nullify the verdict of the people, as expressed through the jury[178]. The absolute finality of the jury's verdict, like other procedural niceties of American law, stems from a similar fear of potential tyranny[179]. "Jury acquittal on criminal charges might be the last line of defense a defendant has against over-reaching by state officials or the unfairness of application of a general rule to the facts of her case"[180]. As Westen and Drubel note, this finality "allows the jury to exercise its constitutional function as the conscience of the community in applying the law: to soften, and in the extreme case, to nullify the application of the law in order to avoid unjust judgements"[181]. Richard Lippke proposed to modify the double jeopardy doctrine to grant the State the right to appeal an acquittal of extremely grave crimes, if the State could "demonstrate to an appropriate tribunal that it has fresh, reliable, and compelling evidence of the individual's guilt"[182]. If the tribunal were to grant it, then a re-prosecution of the acquitted individual could occur[183]. This legal model should be considered, if not adopted, by U.S. legislators, judges, and policy-makers.

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constitutional notion of trial by jury, because nothing else explains why a criminal defendant has a right to resist a directed verdict of conviction".

178. Lippke, *Modifying Double Jeopardy* at 520 (cited in note 153): ("To quash verdicts would be to effectively deprive juries of the power to decide that though defendants appear guilty beyond a reasonable doubt, they should be acquitted for some reason...Yet jury nullification is a pretty insecure peg on which to hang the ban on double jeopardy. The power of juries to acquit against the evidence can be exercised on behalf of noble causes, but it can equally be exercised on behalf of ignominious ones").

179. *Id*. at 521: ("It will be argued that juries acquit against the evidence for other, more respectable reasons. They do so because they believe that police or prosecutors are engaged in some kind of objectionable harassment of the defendant, or because they believe that enforcement of the law in question would, given the facts of the case before them, produce an injustice of some kind". See also Westen and Drubel, *Toward a General Theory of Double Jeopardy* at 129 (cited in note 151): "There remains a persuasive rationale for the finality of verdicts of acquittal, namely, that a defendant may not be retried following an erroneous acquittal because the acquittal may be a product of the jury's legitimate authority to acquit against the evidence").

180. Lippke, *Modifying Double Jeopardy* at 521 (cited in note 153).

181. Westen and Drubel, *Toward a General Theory of Double Jeopardy* at 130 (cited in note 151).

182. Lippke, *Modifying Double Jeopardy* at 523 (cited in note 153).

183. *Ibid*.

The potential apprehension that prosecutorial persecution of innocent defendants will occur "is, if not sheer fantasy, at least a bit unrealistic"[184]. And while Lippke concludes his proposed reforms by asserting that "[l]imited substantive corrections of this procedural hegemony will hardly turn our legal system into an inquisitorial one"[185], that assertion is arguably inaccurate. After all, the common law is already an inquisitorial system – albeit one that is extremely decentralized, less actively inquisitorial (at trial which has all but disappeared in favor of alternatives, especially plea bargaining), and preoccupied with guarding against the potential injustice of convicting the innocent[186].

The remaining chink in the procedural armor of the double jeopardy doctrine is that of "dual sovereignty"[187], whereby both the federal government and state governments may prosecute the same individual for the same offense[188]. The rationale is that the "guarantee against double jeopardy applie[s] only to the situation where one government, that is, the federal government, tries a defendant twice, not where two governments each try him once"[189]. If American law is to revise the doctrine of double jeopardy, this ambiguity should be eliminated. As the *Gamble* dissenters emphasized, while this exception may have once played an important role, it affords government a loophole (however rarely employed) to prosecute an individual more than once for effectively the same conduct, which is forbidden in other cases.

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184. *Id*. at 531.

185. *Id*. at 537.

186. Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 Cornell Law Review 1181 (2005).

187. *United States v. Lanza*, 260 U.S. 377 (1922); *Abbate v. United States*, 359 U.S. 187 (1959); *Bartkus v. Illinois*, 359 U.S. 121 (1959).

188. Harlan R. Harrison, *Federalism and Double Jeopardy: A Study in the Frustration of Human Rights*, 17 Miami Law Review 306, 312 (1963) at fns. 36-38, referencing Supreme Court's decisions in *Fox v. Ohio*, 46 U.S. (5 How.) 410 (1847); *United States v. Marigold*, 50 U.S. (9 How.) 560 (1850); and *Moore v. Illinois*, 55 U.S. (14 How.) 13 (1852).

189. Harrison, *Federalism and Double Jeopardy: A Study in the Frustration of Human Rights* at 314 (cited in note 188); Anthony J. Colangelo, *Double Jeopardy and Multiple Sovereigns: A Jurisdictional Theory*, 86 Washington University Law Review 769 (2009); see also *Gamble v. U.S.*, 139 S. Ct. 1960 (2019), where the U.S. Supreme Court was asked to overrule this doctrine. As aforementioned, the Court upheld the existence of this "separate sovereignties" exception.

## *7. Conclusion*

By recognizing that distinct legal traditions are interrelated, our procedures, laws, and criminal justice system will break the shackles of chronological and legal isolationism. Learning from the jurisprudential development of other nations and legal systems does not diminish our national experiences but situates them all as respective contributions to the global community of nations[190]. It will also show that the quest for justice is common to all societies, best exemplified by the Amanda Knox saga, where legal conceptions on either side of the Atlantic disagreed with one another[191]. While the U.S. Supreme Court's interpretation of the Fifth Amendment's double jeopardy clause undoubtedly helps to prevent the conviction of the innocent (though additional issues are present in the American model ), guilty individuals can be, and are, set free to the detriment of society. As developed by the continental legal model, advanced by early 20th century U.S. Supreme Court Justice Oliver Wendell Holmes, Jr., and later adopted by common law countries, double jeopardy has evolved over time. It now means that erroneous acquittals can be overturned in extraordinary situations, without fear of a defendant suffering repeated

190. Amartya Sen, *The Argumentative Indian: Writings on Indian History, Culture, and Identity* at 85 (Allen Lane 1st ed. 2005): "Even though contemporary attacks on intellectual globalization tend to come not only from traditional isolationists but also from modern separatists, we have to recognize that our global civilization is a world heritage – not just a collection of disparate local cultures". See also:Thomas Bingham, *Widening Horizons: The Influence of Comparative Law and International Law on Domestic Law* at 5 (Cambridge University Press 1st ed. 2010)("Those who see, and would wish to see, the law [...] as an 'island, entire of itself'[...] may care to think of our law as a pure-bred, home-grown product of our national genius, the truth is otherwise. It is a mongrel, gaining in vigour and intelligence what it has lost in purity of pedigree").

191. Julia Grace Mirabella, *Scales of Justice: Assessing Italian Criminal Procedure Through the Amanda Knox Trial*, 30 Boston University International Law Journal 230, 259-260 (2012) ("The Amanda Knox case and the resulting criticism of Italian criminal procedure have led scholars to question the entire Italian criminal system. Before engaging in a hasty denouement [...] [we must] recognize the biases we bring to bear when engaging in comparison [...] [and bearing that in mind] despite the media frenzy and flood of opinions on the Knox trial, the procedures of the court and the opinion accompanying the verdict did not represent either an invidious criminal procedure, or a country out to convict an innocent. Instead, the differences in procedure from the American trial process represent choices by a country with different procedural foundations but with a similar goal, justice").

harassment by the State in a malevolent effort to convict them[192]. This model should be implemented in the U.S. today.

As this analysis has shown, the idea of double jeopardy was known in the days of classical antiquity, formed a key part of roman-canonical law and tradition, and appeared in the Jewish and Islamic religious traditions. The Common Law, far from creating the doctrine, was indelibly influenced by canon law's prohibition on trying a man twice for the same offense, manifested most powerfully by Archbishop Thomas à Becket's appeal to it in his disagreement with King Henry II. The medieval era witnessed the emergence of sanctified principles of criminal procedure, which did not emerge from the Common Law. This verity lies in contrast to "[c]laims about the maxim's Anglo-Saxon roots [which] are sometimes quite stirring and display a peculiarly British capacity to create intellectual Camelots – on their side of the Channel"[193].

Historical re-examination of double jeopardy compels adoption of the belief that the United States should modify its atypical conception, as other common law countries have done, for the benefit of victims, society, and the rule of law. Comparative analysis rejects the common law's declared chronological and legal isolationism, through recognizing the enduring contributions of foreign law, history, and traditions. In the end, periodic re-evaluation of sacred ideas, even those which arose in antiquity, empowers all the generations across the ages to make their own contribution to this ongoing dialectic[194],

192. Whitman, *Presumption of Innocence or Presumption of Mercy?: Weighing Two Western Modes of Justice* at 950 (cited in note 143) ("For if we overcome our shock and acquire a better appreciation of the values of continental justice, we will also acquire a healthy sense of the dangers in our own approach – dangers that are too grave, growing, and too easily neglected by Americans too attached to the idea that the most urgent danger we face is the danger that a malevolent out-of-control state will target citizens who are in fact innocent").

193. Scherman, *The Stone Edition of the Chumash: The Torah, Haftaros and Five Megillos with a Commentary Anthologized from the Rabbinic Writings* at *Genesis* 3:9 (cited in note 51)

194. Clarence Day, *The story of the Yale University Press told by a friend* at 7 (New Haven: At the Earl Trumbull Williams Memorial 1st ed. 1920) ("The world of books is the most remarkable creation of man. Nothing else that he builds ever lasts. Monuments fall, nations perish, civilizations grow old and die out, and after an era new races build others. But in the world of books are volumes that have seen this happen

and in this process, to "catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law"[195].

again and again and yet live on, still young, still as fresh as the day they were written, still telling men's hearts of the hearts of men centuries dead").

195. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harvard Law Review 457, 478 (1897).