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OPINION

■ DOUBLE JEOPARDY IN THE U.K.

We should not follow suit

By *Daniel H. Erskine* SPECIAL TO THE NATIONAL LAW JOURNAL

IF YOU ARE an attorney practicing in the United States, you probably did not know that the rule against double jeopardy—a bastion of American criminal practice—passed away in 2003. The passing of this centuries-old rule occurred not in America, but in the United Kingdom, with the passage and recent use of the Criminal Justice Act 2003. In the United Kingdom, an acquittal is no longer a bar to retrial of a criminal defendant for the same offense.

The demise of such a time-honored and democratic rule in the birthplace of the common law illustrates how comparative law assists in evaluating American legal concepts. If the locale where the rule against double jeopardy achieved its most robust protection has determined it is no longer necessary in modern judicial proceedings, should Americans now consider following this precedent?

All are aware that an American defendant could be tried in both a state and federal court for the same crime, assuming the offense committed violated both state and federal law. If the U.K. legislation were adopted in the United States, prosecutors could retry a criminal defendant for a state crime (if originally tried in a state court) despite the fact he or she was acquitted in the prosecuting state's judicial system. The same would hold true if the defendant was tried and acquitted in a federal court.

The U.K. 2003 act, in sections 75 and 76, permits a prosecutor to apply to the Court of Appeal for an order quashing a defendant's acquittal of certain serious criminal offenses. The Court of Appeal determines whether the prosecutor's application contains "new and compelling evidence," and retrial of the criminal defendant is in the "interests of justice."

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Section 78 of the act defines new and compelling evidence as reliable, substantial and highly probative material undiscovered during the trial or appellate phases of a criminal prosecution. Admissibility of the evidence in the prior prosecution is immaterial to the Court of Appeal's determination of whether to quash the defendant's acquittal and order retrial of the defendant.

Section 79 of the act articulates that the interests of justice are served when a fair retrial may occur, the new evidence adduced could not have been produced at the first trial through the ordinary diligence of the prosecutor or the police, and the length of time between the acquittal and retrial is not unreasonable.

The provisions of the 2003 act came into operation on April 4, 2005, through the Criminal Justice Act 2003, Order, (2005) S.I. 2005/ 950. New court rules were similarly enacted and are contained within Part 41 of the Criminal Procedure Rules. The serious criminal offenses for which a prosecutor may seek to quash an acquittal and retry the defendant are limited. Examples are murder, attempted murder, soliciting murder, manslaughter, kidnapping, rape, intercourse with a girl under 13, incest by a man with a girl under 13, importing or exporting narcotics, arson, war crimes, taking hostages, directing a terrorist organization and conspiracy.

Prosecutors get a second shot

The effect of such legislation is to give the prosecution an additional shot at convicting the defendant. Imagine if the Los Angeles County prosecutors got a second shot at trying O.J. Simpson. Surely those infamous leather gloves would not appear on the defendant's hands. The fact that the gloves did not fit and the jury did acquit Simpson of murder would not matter in the least—if prosecutors could rustle up new and compelling evidence.

That is exactly what happened to a defendant acquitted of an 1989 murder in an English court in 1991. Adam Fresco in his Sept. 11, 2006, article,

"Murderer makes legal history in double jeopardy case," in the *London Times*, reports that Billy Dunlop was the first individual re-prosecuted after the 2003 Criminal Justice Act came into effect. Fresco reports that 15 years ago Dunlop was tried and acquitted of the murder of his girlfriend, Julie Hogg. Years after his acquittal, Fresco recounts, Dunlop confessed to murdering Hogg. On Sept. 11, Dunlop pleaded guilty to the same murder charge he had been acquitted of 15 years before.

So, should American legislators rush to propose constitutional amendments to eviscerate the Fifth Amendment's prohibition on double jeopardy? While the U.K. act appears reasonable because of the strong public interest in removing individuals who commit serious criminal offenses from society, it should not be emulated by American law. The rule against double jeopardy requires thorough evidentiary investigation and preparation for a criminal prosecution, which protects U.S. citizens from arbitrary governmental action and ensures vigorous adjudication.

Nonetheless, attentiveness to such drastic alterations of fundamental legal concepts overseas helps U.S. lawyers guard against comparable encroachments. Similarly, awareness of the legal activities of other countries helps U.S. attorneys embrace positive foreign legal innovations and guard against negative developments. As the world shrinks in this new millennium, Americans must engage foreign legal concepts. Familiarity with the law of other nations provides U.S. lawyers with both an appreciation for their own law as well as a perspective on how similar precepts are interpreted outside of their nation's boundaries. Such interaction ensures that U.S. law retains its vigor and that its advocates preserve their ingenuity. **NLJ**

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