

DOUBLE JEOPARDY REFORM: THE NEW EVIDENCE EXCEPTION FOR ACQUITTALS

CHARLES PARKINSON*

I INTRODUCTION

A *Carroll's Case*

In 1973, a 17 month old girl in Queensland was abducted from her bedroom and murdered. Raymond Carroll was charged with the crime and found guilty by a jury in 1985. The Queensland Court of Appeal overturned the conviction due to lack of evidence.¹ Advances in forensic medicine have since helped to strengthen the case against Carroll. As he could not be charged with the same offence twice under the double jeopardy rule, Carroll was indicted for perjury, having denied committing the murder in court. A jury found him guilty of perjury. The Queensland Court of Appeal quashed this conviction on two grounds. First, the evidence against the appellant was so lacking in cogency and probative value that the jury should have acquitted the defendant. Secondly, the prosecution breached the criminal law doctrine of double jeopardy by retrying the same facts twice.² The prosecution appealed to the High Court of Australia, which upheld the decision of the Court of Appeal, relying on the double jeopardy rule.³ However, in their joint judgment, Gaudron and Gummow JJ noted that the conflict between protecting the integrity of the judicial process by convicting guilty persons and preventing successive prosecutions for the same elements of an offence 'is capable of legislative resolution in different ways and with various exceptions and qualifications'.⁴

Following the High Court's ruling in the *Carroll* case,⁵ *The Australian* newspaper ran a sustained campaign highlighting the unfairness of the double

* MA Candidate, University of Melbourne, DPhil Candidate, University of Oxford, UK Commonwealth Scholar, Trinity College, University of Oxford.

1 *Carroll v The Queen* (1985) 19 A Crim R 410.

2 *R v Carroll* [2001] QCA 394 (Unreported, McMurdo P, Williams JA and Holmes J, 21 September 2001).

3 *R v Carroll* (2002) 194 ALR 1, 30 (McHugh J) ('*Carroll*').

4 *Ibid* 21 (Gaudron and Gummow JJ).

5 'The head of the murder investigation believed in Carroll's guilt 110%, stating that he thought the "justice system has gone to the shit": Greg Roberts, 'Three Decades on, a Child's Death Sparks Call for Change', *The Age* (Melbourne), 16 December 2001.

jeopardy rule.⁶ This public pressure prompted Rod Welford and Bob Debus, Attorneys General of Queensland and New South Wales respectively, to request the Standing Committee of Attorneys General ('Committee') to review the double jeopardy rule.⁷ The Committee is currently examining the issue with the aim of creating a uniform national approach.⁸ It is expected to release its recommendations by the end of the year.⁹

Shortly after the *Carroll* case the New South Wales Government announced its intention to enact a new evidence exception for acquittals to the double jeopardy rule¹⁰ and on 3 September 2003 released a Consultation Draft Bill.¹¹ The proposed legislation is closely modelled on the United Kingdom's Criminal Justice Bill 2002, which was recently introduced into the United Kingdom Parliament by the Blair Government.¹²

B The Proposed Reform

The proposed reform will affect the defendant following his or her acquittal and involves a series of procedures.¹³ First, the Director of Public Prosecutions ('DPP') would need to give consent for the defendant to be reinvestigated. Secondly, only where 'compelling fresh evidence' emerges, which strongly suggests guilt and which could not reasonably have been available at the first trial, would the DPP be able to apply to the Court of Appeal to quash the acquittal.¹⁴ Thirdly, the Criminal Court of Appeal would then have the power to quash the acquittal and order a retrial where there is compelling new evidence of guilt and it is in the interests of justice to do so.¹⁵ Finally, whilst the reforms are to operate retrospectively, there could only be one retrial and the reforms will only apply to homicide offences (murder and manslaughter) and offences carrying a maximum penalty of life imprisonment.

This article considers the new evidence exception as proposed by the New South Wales Government. The historical development and growth of the double jeopardy doctrine both internationally and in Australia is reviewed, and the reform process that has led to the new evidence exception being adopted in the United Kingdom is examined and the validity of its assumptions questioned. The article then considers the impact of the new evidence exception on the double

6 *The Australian*, 6, 9, 10, 11 and 12 December 2002.

7 *Ibid.*

8 Editorial, *The Age* (Melbourne), 17 April 2003, 16; Alison Croweller and Ashleigh Wilson, 'Law Chiefs Test Double Jeopardy' *The Weekend Australian*, 12–13 April 2003, 19.

9 Paul Toohey, 'Matter of Principle', *The Weekend Australian*, 26–27 April 2003, 23.

10 Bob Carr, 'Carr Government to Overhaul "Double Jeopardy" Rule' (Press Release, 7 March 2003).

11 Criminal Appeal Amendment (Double Jeopardy) Bill 2003 (NSW).

12 Criminal Justice Bill 2003 (UK) as amended by Standing Committee B on 4 March 2003.

13 See Bob Carr, above n 10; See also Criminal Appeal Amendment (Double Jeopardy) Bill 2003 (NSW).

14 New evidence is at best an elastic concept, as old evidence can easily be repackaged as new: a witness with a better story, improved scientific techniques, etc. This problem, however, is beyond the scope of this study.

15 Both the Court of Appeal and the presiding judge of a new trial will retain the discretion to stay proceedings as an abuse of justice if publicity makes a fair retrial impossible. The Court may also order a media reporting restriction on any applications before it to ensure that the fairness of the trial is not compromised.

jeopardy rule. While the legislative reform is largely well conceived, it is argued that it nevertheless poses a significant incursion into the protected rights of the accused – specifically, the right to finality. It is acknowledged that the increased likelihood that the guilty will be convicted on a retrial benefits both the community and the particular victim. However, it is submitted that these benefits do not outweigh the detrimental effects that will ensue should the doctrine of double jeopardy be undermined. The benefit of finality in the criminal trial process is of fundamental importance as it embodies one of the main restrictions upon state power in a democracy. In this respect, it is submitted that the values that the rule protects outweigh the desirability of obtaining a slightly higher conviction rate for the offences that will be caught by the new evidence exception.

II THE DEVELOPMENT OF THE DOUBLE JEOPARDY DOCTRINE

The doctrine of double jeopardy can be traced at least as far back as ancient Athens.¹⁶ Given this historical background,¹⁷ it is not surprising that the doctrine is considered to be one of the formative common law rules.¹⁸ Martin Friedland has traced its origins in the common law to the dispute in the 12th century between King Henry II and Archbishop Thomas à Becket over whether clerks convicted in the ecclesiastic courts were exempt from further punishment in the King's courts.¹⁹ During the same period, Roman Law – which recognised both the principles of double jeopardy and *res judicata*²⁰ – was being taught at the University of Oxford. This further influenced the development of the doctrine at common law.²¹ While recognised by the courts, the rule was applied inconsistently over the following 500 years.²² It was not until the 1660s that the doctrine became one of the basic tenets of the common law, in part due to the

16 See Demosthenes, *Against Leptines* XX, 147 (translated in J Vince, *Demosthenes I* (1962) 589: 'Now 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 that sort'; Demosthenes *Against Timocrates* XXIV, 55 (translated in J Vince, *Demosthenes III* (1956) 406: 'The legislator does not permit any question once decided by judgment of the court to be put a second time.')

17 See generally Jill Hunter, 'The Development of the Rule against Double Jeopardy' (1984) 5 *Journal of Legal History* 3; Jay Sigler, 'A History of Double Jeopardy' (1963) 7 *American Journal of Legal History* 283; Martin Friedland, *Double Jeopardy* (1969); George Thomas, *Double Jeopardy: The History, The Law* (1998).

18 The ancient history of the doctrine of double jeopardy has been widely recognised by the courts. Double jeopardy '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': *Stout v Stout ex rel Caldwell* 130 P 553, 558 (Okla, 1913).

19 Friedland, above n 17, 5.

20 Herbert Jolowicz, *Roman Foundations of Modern Law* (1957) 87, 94–100. The phrase *res judicata* is an abbreviation of the latin maxim *res judicata pro veritate accipitur* (a matter decided is accepted as the truth).

21 Friedland, above n 17, 6.

22 Ibid 6–9.

writings of Lord Coke,²³ and in part as a reaction to the civil disorder caused by the English Civil War.²⁴ Sir William Blackstone's 1769 statement of the doctrine remains the standard definition:

The plea of autrefois acquit, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life or limb more than once for the same offence ... [T]he plea of autrefois convict, or a former conviction for the same identical crime ... is a good plea in bar to an indictment. And this depends upon the same principle as the former, that no man ought to be twice brought in danger of his life for one and the same crime.²⁵

As this quote suggests, the rule against double jeopardy was very narrowly defined, such that in 1866 Erle CJ declared in *R v Windsor* that '[t]he only pleas known to the law founded upon a former trial are pleas of a former conviction or a former acquittal for the same offence'.²⁶ This also represented the dominant view in Australia, at least until 1946, when Dixon J in *Broome v Chenoweth* limited the application of double jeopardy to later proceedings 'for the same offence'.²⁷ It was not until the 1964 case of *Connelly v Director of Public Prosecutions* that the House of Lords held that the courts possess an inherent jurisdiction to stay a prosecution for a charge that should have been included in the indictment at an earlier trial.²⁸ This broader approach was adopted by the High Court of Australia²⁹ and extended further to include interlocutory rulings in criminal proceedings that resulted in the conviction or acquittal of the accused.³⁰ Thus, the doctrine now comprises a core rule of criminal procedure, augmented by a judicial discretion to stay proceedings on the grounds of an abuse of process. This composite was noted by the High Court in the 1998 case of *Pearce v The Queen*:³¹

The expression 'double jeopardy' is not always used with a single meaning. Sometimes it is used to refer to the pleas in bar of autrefois acquit and autrefois convict; sometimes it is used to encompass what is said to be a wider principle that no one should be 'punished again for the same matter'.³² Further, 'double jeopardy' is an expression that is employed in relation to several different stages of the criminal justice process: prosecution, conviction and punishment.

23 Sigler, above n 17, 294–7.

24 Justice Twisden distinguished two earlier prosecution appeals from acquittals on the ground that they occurred during 'the late troubled times': *R v Read* (1660) 1 Lev 9; 83 ER 271. Followed in *Turner's Case* (1676) 1 Freem KB 221; 89 ER 158, 158. For a full analysis of the development of the English law see William Holdsworth, *A History of English Law* (3rd ed, 1927).

25 William Blackstone, *Commentaries on the Laws of England* (first published 1765–69, 17th ed) vol IV, 329.

26 (1866) 10 Cox CC 327, 329 (emphasis added).

27 (1946) 73 CLR 583, 599.

28 [1964] AC 1254, 1296, 1339–40, 1347, 1365–8 (Lord Devlin).

29 *Garrett v The Queen* (1977) 139 CLR 437, 445.

30 *Rogers v The Queen* (1994) 181 CLR 251, 256–7 (Mason CJ), 280 (Deane and Gaudron JJ).

31 (1998) 194 CLR 610, 614, cited with approval in *R v Carroll* (2002) 194 ALR 1, 4 (Gleeson CJ and Hayne J).

32 *Wemyss v Hopkins* (1975) LR 10 QB 378, 381 (Blackburn J).

Despite the general extension of the double jeopardy principle, retrials at common law are permissible in 'special circumstances'³³ and in some jurisdictions legislative reform permits the prosecution to appeal on points of law,³⁴ decisions to stay proceedings,³⁵ on quashed indictments³⁶ and tainted acquittals.³⁷

The recent common law trend towards extending the scope of the double jeopardy rule has also been reflected internationally. Both the *International Covenant on Civil and Political Rights*³⁸ and the *European Convention on Human Rights*³⁹ have double jeopardy provisions, while the doctrine is constitutionally guaranteed in New Zealand,⁴⁰ South Africa,⁴¹ the United States of America⁴² and Canada,⁴³ as well as in 50 other states.⁴⁴ It should be noted,

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- 33 *Connelly v DPP* [1964] AC 1254, 1360 (Lord Devlin). Such special circumstances include acquiescence by the defendant in separate trials of two indictments: *Connelly v DPP* [1964] AC 1254, 1360; cases where a further event occurs after the conclusion of the first trial, such as the death of an assault victim: *De Salvi* (1857) 10 Cox CC 481; *Thomas* [1950] 1 KB 26; and cases where new evidence showing guilt of a further offence is discovered after the first trial: *Attorney-General for Gibraltar v Leoni* (Unreported, Court of Appeal for Gibraltar, 19 March 1999) in Law Commission (UK), *Double Jeopardy*, Consultation Paper No 156 (1999) [2.24].
- 34 *Criminal Code 1913* (WA) ss 688(2)(b), 690(3); *Criminal Code 1924* (Tas) ss 401(2)(b), 402(5); *Criminal Code*, RSC 1985, c 46, s 676(1)(a) (Canada); *Crimes Act 1961* (NZ) ss 380, 383(2).
- 35 *Criminal Code 1899* (Qld) s 669(1A); *Criminal Code* RSC 1985, c 46, s 676(1)(c) (Canada); *Criminal Appeal Act 1912* (NSW) s 5F.
- 36 *Criminal Appeal Act 1912* (NSW) s 5C; *Criminal Code 1924* (Tas) s 401(2)(d); *Criminal Code 1913* (WA) s 699(2)(a); *Criminal Code* RSC 1985, c 46, s 676(1)(c) (Canada).
- 37 *Criminal Procedure and Investigation Act 1996* (UK) ss 54–7. These provisions have never been used: Law Commission (UK), *Double Jeopardy and Prosecution Appeals*, Report No 267 (2001) [2.26].
- 38 Article 14(7): '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': *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
- 39 Article 4(1) of the Seventh Protocol: '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': *European Convention on Human Rights* opened for signature 4 November 1950, ETS 005 (entered into force 3 September 1953).
- 40 *New Zealand Bill of Rights Act 1990* (NZ) s 26(2): 'No one who has been finally acquitted or convicted of, or pardoned of, an offence shall be tried or punished for it again'. This general principle is implemented by ss 358 and 359 of the *Crimes Act 1961* (NZ).
- 41 *Constitution of the Republic of South Africa 1996* s 35(3)(m): 'Every accused person has a right to a fair trial, which includes the right ... not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted ...'. The South African Law Commission has proposed changes to the rights of the prosecution to appeal against an acquittal on fact, but the South African Government has not yet acted upon the recommendation: South African Law Commission, *Simplification of Criminal Procedure (The Right of the Attorney-General to Appeal Questions of Fact)*, Third Interim Report, Project 73 (2000); South African Law Commission, *Simplification of Criminal Procedure (The Right of the Attorney-General to Appeal Questions of Fact)*, Discussion Paper 89, Project 73 (2000).
- 42 *United States Constitution* amendment V: 'nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb'; see also Akhil Reed Amar, 'Double Jeopardy Law Made Simple' (1997) 106 *Yale Law Journal* 1807; Jay Sigler, *Double Jeopardy* (1969); Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (1998) 116.

however, that some jurists consider the whole concept of double jeopardy to be irrational.⁴⁵

III DOUBLE JEOPARDY REFORM IN THE UNITED KINGDOM

A The Reform Process

The recent review of the double jeopardy law in the United Kingdom was a response to a recommendation from the 1999 Macpherson Inquiry into the racially motivated murder of Stephen Lawrence in 1992.⁴⁶ Three of the five suspects in the Lawrence case were acquitted of the murder following a botched police investigation amid allegations of institutionalised racism. The operation of the double jeopardy rule prevented further prosecution of the acquitted suspects.⁴⁷ Upon considering the relevant issues,⁴⁸ the Macpherson Inquiry recommended '[t]hat consideration should be given to the Court of Appeal being given power to permit prosecution after acquittal where fresh and viable evidence is presented'.⁴⁹ Prior to this Inquiry, there had been no public agitation for double jeopardy reform.⁵⁰

In 1999, the Home Secretary referred the Macpherson Inquiry recommendation on double jeopardy to the United Kingdom Law Commission ('Law Commission'). The Law Commission quickly produced a Consultation Paper with proposed reforms to the double jeopardy rule.⁵¹ The House of Commons Select Committee on Home Affairs simultaneously began a separate

43 'Any person charged with an offence has the right ... if finally acquitted of the offence, not to be tried for it again': s 11(h) of the *Canadian Charter of Rights and Freedoms*, being pt I to the *Constitution Act 1982*, being sch B to the *Canada Act 1982* (UK) c 11.

44 Chief Cassiouni, 'Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions' (1993) 3 *Duke Journal of Comparative and International Law* 235, 288–9. Australia, New Zealand, Canada, Scotland, Germany, Belgium, The Netherlands, Italy, Spain, Denmark and Finland were reviewed as part of the Law Commission's consultation paper: Law Commission (UK), *Double Jeopardy*, Consultation Paper No 156 (1999) Appendix B. For a general discussion of the double jeopardy rule throughout the world, see Craig Bradley, *Criminal Procedure: A Worldwide Study* (1999).

45 For example, in *Kepner v United States*, 195 US 100, 134 (1904) Justice Oliver Wendell Holmes Jr stated 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. ... He no more would be put in jeopardy a second time when retried because of a mistake of law in his favor, than he would be when retried for a mistake that did him harm.

The majority of the United States Supreme Court disagreed: 130.

46 Sir William Macpherson, *The Stephen Lawrence Inquiry – Report*, Cm 4262-I (1999) ('*Macpherson Inquiry*').

47 *Ibid* 291.

48 *Ibid* [7.46], [39.48], [43.47].

49 *Ibid* Recommendation 38.

50 Home Affairs Committee, United Kingdom, *Third Report: The Double Jeopardy Rule*, House of Commons Session 1999–2000 (2000) Minutes of Evidence, Q114 (Andrew Trollope QC).

51 Law Commission (UK), *Double Jeopardy*, Consultation Paper No 156 (1999).

inquiry into double jeopardy reform,⁵² with its report being debated in the House.⁵³ These reports culminated in the final reform recommendations of the Law Commission.⁵⁴ Subsequent Home Office policy documents⁵⁵ and the Queen's speech opening Parliament on 20 June 2001 placed double jeopardy law reform high on the Government's agenda.⁵⁶ This was followed by a major review of criminal procedure by Sir Robin Auld.⁵⁷

The extensive reform process resulted in the Criminal Justice Bill⁵⁸ (the main features of which are set out in the Introduction, above), which was submitted to the United Kingdom Parliament in December 2002.⁵⁹ It is worth noting that during the debate over the Second Reading Speech⁶⁰ and in the Standing Committee,⁶¹ many MPs expressed the opinion that the abrogation of the double jeopardy rule should be extended well beyond a mere 'new evidence exception'.⁶²

B Methodology of the Key Reform Reports

The Criminal Justice Bill 2002 (UK) was drawn principally from the recommendations of two reports: the Law Commission Report on 'Double Jeopardy and Prosecution Appeals' (March 2001) and Sir Robin Auld's 'Review of the Criminal Courts of England and Wales' (September 2001).

The aim of the Law Commission – as explained in its Consultation Paper – was to carry out a balancing exercise between an improvement in the accuracy of outcome and any loss to procedural fairness.⁶³ In a highly influential article critiquing the Law Commission's methodology,⁶⁴ Professor Ian Dennis argued that 'balancing' is inappropriate because the two values being balanced are not of equal weight: accuracy far outweighs procedural fairness because without accuracy the criminal justice system would lack legitimacy.⁶⁵ As a result, the Law Commission decided to prioritise accuracy over all other process values in its final recommendations.⁶⁶ That said, however, the Law Commission

52 Home Affairs Committee, *Third Report: The Double Jeopardy Rule*, above n 50.

53 United Kingdom, *Parliamentary Debates*, House of Commons, 26 October 2000, cols 115WH–154WH.

54 Law Commission (UK), *Double Jeopardy and Prosecution Appeals*, Report No 267 (2001).

55 UK Government, *Criminal Justice: The Way Ahead*, Cm 5074 (2001) [3.55]; Home Office Department (UK), *Justice For All*, Cm 5563 (2002) [4.64]–[4.66].

56 'Double Jeopardy Rule to be Abolished', *The Times* (UK), 21 June 2001, 9.

57 Sir Robin Auld, *Review of the Criminal Courts of England and Wales: Report* (2001) 627–34.

58 Criminal Justice Bill 2003 (UK).

59 United Kingdom, *Parliamentary Debates*, House of Commons, 4 December 2002, cols 910–20 (David Blunkett, Secretary of State for the Home Department).

60 Ibid cols 910–1016.

61 House of Commons Standing Committee B, Criminal Justice Bill, 16–23 January 2003 <www.publications.parliament.uk/pa/cm200203/cmstand/b/cmcrim.html> at 20 November 2003.

62 See UK House of Commons, *The Criminal Justice Bill: Double Jeopardy and Prosecution Appeals Bill 8 of 2002–2003*, Research Paper 02/74 (2002).

63 Law Commission (UK), *Double Jeopardy*, Consultation Paper No 156 (1999) [3.6]–[3.13].

64 Law Commission (UK), *Double Jeopardy and Prosecution Appeals*, Report No 267 (2001) [4.4].

65 Ian Dennis, 'Rethinking Double Jeopardy: Justice and Finality in Criminal Process' [2000] *Criminal Law Review* 933.

66 'Accuracy of outcome is more important than finality' Law Commission (UK), *Double Jeopardy and Prosecution Appeals*, Report No 267 (2001) [4.7].

acknowledged the fundamental value of double jeopardy in a liberal democracy and recommended that the only crimes that warranted any abrogation of the rule for the purposes of a new evidence exception were murder and genocide.⁶⁷

Sir Robin Auld's approach was informed by two propositions. First, he asserted that the double jeopardy principle was born out of 'harsher times when trials were crude affairs affording accused persons little effective means of defending or of appeal, and when the consequence of conviction was often death'.⁶⁸ The second proposition was that:

the general justifying aim of the administration of criminal justice is to control crime by detecting, convicting and duly sentencing the guilty. It is not part of that aim, simply a necessary incident of it, that the system should acquit those not proved to be guilty.⁶⁹

It is, however, unclear why acquitting the innocent should not equally be an aim of the criminal justice system. It was, after all, one of Blackstone's basic precepts that 'it is better that ten guilty persons escape, than one innocent suffer'.⁷⁰ Nevertheless, owing to his view of the criminal justice system, Sir Robin Auld recommended that the exception to double jeopardy should extend to all offences with a maximum punishment of life imprisonment.⁷¹ This recommendation was incorporated into the Criminal Justice Bill.⁷²

C Aims of the Proposed Reform in the United Kingdom and Australia

According to the Law Commission, the purpose of the proposed reforms contained in the Criminal Justice Bill⁷³ was twofold. First, by permitting the retrial of acquitted persons if new evidence of guilt becomes available, the accuracy of the criminal justice system would be increased by convicting a greater number of guilty persons.⁷⁴ Second, it would reassert the legitimacy of the criminal justice system by ensuring that persons known to be guilty, owing to the discovery of new evidence, are convicted and punished for their crimes.⁷⁵

1 *Increased Accuracy of the Criminal Justice System in Convicting the Guilty*

⁶⁷ Ibid [4.23]–[4.42] and Recommendation 1.

⁶⁸ Sir Robin Auld, above n 57, [50].

⁶⁹ Ibid [51].

⁷⁰ Blackstone, above n 25, 352.

⁷¹ Sir Robin Auld, above n 57, [51].

⁷² Criminal Justice Bill 2003 (UK).

⁷³ Criminal Justice Bill 2003 (UK).

⁷⁴ Law Commission (UK), *Double Jeopardy and Prosecution Appeals*, Report No 267 (2001) [4.4].

⁷⁵ Ibid [4.5]. This assumes that persons, where new evidence becomes available, are in fact guilty. Such an assumption would be flawed because the only body able to ascertain criminal guilt is a court of law, and without a trial guilt can never be determined. A better expression of this aim would have been to state that the legitimacy of the criminal justice system would be reasserted in cases where new evidence of guilt emerges by allowing the evidence to be tested in a court of law to determine the guilt of an acquitted person.

At a practical level, however, the outcome of the reform package is uncertain. Sir William Macpherson, author of the Macpherson Inquiry, acknowledged that even if the Law Commission's proposals were adopted, the youths acquitted of the Stephen Lawrence murder could not be retried because there was no fresh evidence.⁷⁶ For the same reason Raymond Carroll could not be retried.⁷⁷ In fact, the number of cases that would fall within the reform is very small indeed. Lord Falconer, the Home Office Minister, predicted that the number would be unlikely to be more than 'a handful a year'.⁷⁸ When pressed by the Home Affairs Committee to name a single case that would fall within the proposed reforms (recognising that the reforms operate retrospectively), the Director of Public Prosecutions conceded that '[w]e have been very hard put to it to come up with a single case'.⁷⁹ A recent study by Dr Chris Corns identified only three potential cases for retrial within Australia.⁸⁰ Hence there exists the incongruous – but by no means unprecedented⁸¹ – position in both the United Kingdom and Australia that this significant law reform will in all probability have a negligible impact on the criminal justice system. This must seriously challenge the validity of the aforementioned aim to increase accuracy in convicting the guilty. In addition, it suggests that the importance of the proposed reform lies predominately in its symbolic significance in reasserting the legitimacy of the criminal justice system, rather than its practical impact.⁸²

2 Reasserting the Legitimacy of the System by Allowing Retrials for New Evidence

It has been argued that the legitimacy of the criminal justice system is threatened when new evidence of an acquitted person's guilt is discovered and he

76 Alan Travis, 'Double Jeopardy No Threat to Lawrence Suspects', *The Guardian* (UK), 1 August 2002. One of the incongruous elements of the reform process and commentary upon it was the incorrect assumption that the proposed reform would permit the retrial of the Lawrence murder suspects. See, eg, the comments by Clare Short cited in 'Double Jeopardy: The Defendant's Friend', *bbconline*, 24 February 1999 <<http://news.bbc.co.uk/1/hi/uk/284934.stm>> at 20 November 2003: 'You really have to take a wider perspective. The process of law really cannot be based on the individual circumstances of one case, because then you lose all the objectivity that is required'.

77 *R v Carroll* [2001] QCA 394 (Unreported, McMurdo P, Williams JA and Holmes J, 21 September 2001).

78 'Justice in Jeopardy', *The Guardian* (UK), 22 November 2002, 1.

79 Home Affairs Committee, *Third Report: The Double Jeopardy Rule*, above n 50, [20]. However, it is noted that police would typically stop looking for new evidence following the acquittal of a defendant for the same reason that the double jeopardy rule prevents retrial.

80 Dr Corns identifies the cases of Scott Breedon in the Northern Territory and Jason van der Bann in NSW. He also identified John Carroll. The fact that there is no new evidence in the *Carroll* case, and that appellate courts overturned Carroll's convictions on two separate occasions for lack of evidence to sustain a verdict of guilty throws doubt over the validity of Corns' assertions: Paul Toohey, 'Matter of Principle' *The Weekend Australian*, 26–27 April 2003, 23.

81 *Criminal Procedure and Investigation Act 1996* (UK) ss 54–7. These provisions have never been used: Law Commission (UK), *Double Jeopardy*, Consultation Paper No 156 (1999) [2.26].

82 It is possible to posit other aims for the proposed reform, such as the improvement of public safety, the administration of justice, a mark of society's disapproval, and the achievement of resolution and healing for other parties involved. However, as the number of cases expected to fall within the narrow parameters of the proposed reform is miniscule, all rationales except that of maintaining the legitimacy of the criminal justice system become insignificant.

or she cannot be retried due to the operation of the double jeopardy rule. According to this view, a retrial will absolve the illegitimacy of the first acquittal.⁸³ It should be recognised, however, that the presumption of innocence underpins the Australian legal system so that every person must be considered innocent unless they are convicted by a court of law. Thus the better view is that the real lack of legitimacy derives from the inability of the court to re-examine the case in light of the new evidence, rather than in remedying an earlier wrongful decision.

To restore legitimacy, the Law Commission recommended permitting one retrial.⁸⁴ On this issue, Dennis writes:

Any further attempts by the state to reopen the matter will look like an unwillingness to accept the adjudications of its own institutions, vindictiveness against the defendant and an abuse of state power in continuing to devote resources to further prosecutions against the defendant. In these circumstances it would be doubtful how far any subsequent verdict of guilt could carry the necessary moral authority.⁸⁵

This raises the question as to why a retrial would necessarily be exempt from the problems associated with the initial trial given that subsequent evidence would have come to light. If new evidence can undermine the validity of the first acquittal, then subsequent new evidence could equally undermine the validity of every subsequent acquittal. Thus, the provision of one retrial under the new evidence exception does not satisfactorily resolve the argument that the criminal justice system's legitimacy is undermined by the inability of the system to retry an acquitted person when new evidence of his or her guilt is discovered.

IV IMPACT OF THE DOUBLE JEOPARDY REFORM

A Does the Reform Undermine the Double Jeopardy Doctrine?

The Law Commission usefully identified four key procedural safeguards provided by the double jeopardy rule. The rule protects:

- (1) against the risk of wrongful conviction;
- (2) efficient investigation and prosecution;
- (3) against the distress to the participants of the trial process; and
- (4) finality.⁸⁶

⁸³ Dennis, above n 65, 945.

⁸⁴ The Consultation Paper recommended having two retrials (Law Commission (UK), *Double Jeopardy*, Consultation Paper No 156 (1999) [5.58]) which the Law Commission restricted to a single application for a retrial: Law Commission (UK), *Double Jeopardy and Prosecution Appeals*, Report No 267 (2001) [4.95].

⁸⁵ Dennis, above n 65, 949.

⁸⁶ Law Commission (UK), *Double Jeopardy*, Consultation Paper No 156 (1999) [4.5] (risk of wrongful conviction); [4.6] (distress of the trial process); [4.8] (finality); [4.11] (promotion of efficient investigation and prosecution).

This section considers each of these criteria in turn and assesses how the reform affects the important procedural values they uphold.⁸⁷ Although the reform does, on balance, support the first three outcomes, it is argued that the new evidence exception will seriously erode the procedural value of finality. In consequence, it is submitted that the new evidence exception reform package should not be adopted.

1 *The Risk of Wrongful Convictions*

One of the traditional rationales for the double jeopardy rule is that it decreases the risk of wrongly convicting the innocent. It is submitted that the reform would not significantly undermine this procedural value.

First, it is often argued in support of the double jeopardy rule that having only one trial allows the greatest opportunity for a defendant to properly defend a charge. The corollary being that more than one prosecution may reduce the capacity of innocent defendants to successfully defend themselves due to a depletion of stamina and the requisite resources.⁸⁸ Although the reform permits one retrial, the requirement that the DPP assemble compelling, fresh evidence is likely to result in a considerable time delay between prosecutions. This will reduce the likelihood that the defendant will be unduly burdened by the second trial.⁸⁹

Secondly, in support of the double jeopardy doctrine it has been suggested that even one retrial will increase the statistical probability of a guilty verdict against an innocent defendant. This argument relies on the nature of the criminal adjudication system, which is a human scheme and, therefore, fallible.⁹⁰ There will always remain a possibility that an innocent defendant will be convicted on weak or unreliable evidence as juries do occasionally return perverse verdicts. Therefore, the chance that a particular defendant will be wrongfully convicted will increase each time he or she is retried.⁹¹ Assuming that the probability of obtaining a guilty verdict remains constant through each trial (and is greater than

87 There are, of course, other rationales, but these will not be considered because they do not impact upon the reform. Jury nullification, however, deserves mention. Double jeopardy may be justified when an acquittal is the product of the jury's legitimate authority to acquit despite evidence of guilt. Such an acquittal could be due to a misunderstanding of the facts or a deliberate decision to acquit. Thus, without the capacity to examine the rationale of the jury's decision, permitting multiple prosecutions would detract from the jury's ability to nullify. The jury's power of nullification allows the jury to soften, and in extreme cases, to nullify the application of the law to protect against unjust judgments. Thus, this power may be viewed as a check on potential prosecutorial abuses. The new evidence reform, however, does not in fact undermine this principle because the jury will only have exercised their power of nullification on the limited facts available to them: Peter Westen and Richard Drubel, 'Towards a General Theory of Double Jeopardy' [1987] *Supreme Court Review* 81, 130, 133–7.

88 *R v Carroll* [2002] 194 ALR 1, 6–7 (Gleeson CJ and Hayne J).

89 This assumes that the defendant would have had an opportunity to replenish his or her financial resources during the gap between trials. It is recognised, however, that owing to other circumstances the defendant could equally have greater or lesser financial resources at the time of the second trial.

90 'Using numbers has the advantage of making one face the unpleasant fact that conviction in a criminal case on a probability of 0.95, high though that may seem at first sight, involves convicting one innocent person in 20': Glanville Williams, 'The Mathematics of Proof I & II' [1979] *Criminal Law Review* 297, 340, 305–6.

91 Law Commission (UK), *Double Jeopardy*, Consultation Paper No 156 (1999) [4.5].

zero), and that the prosecutor can retry endlessly, a conviction will eventually be obtained, regardless of the likelihood of conviction in each trial.⁹² However, this analysis is unreliable for the new evidence exception. This is so for three main reasons: first, the reform only permits one retrial; secondly, the probability would not remain constant, given that compelling fresh evidence is required before a retrial can be permitted; and finally, the empirical foundations of arguments based on probabilities are unknowable – it is impossible to determine objectively a person's guilt or innocence.⁹³

In his normative examination of the effect of double jeopardy on the wrongful conviction of innocent persons, Professor Vikramaditya Khanna argued that the double jeopardy rule has complex effects on false convictions. He concluded that the impact of the double jeopardy rule in protecting innocent defendants was so small that it 'may not provide a very complete justification'.⁹⁴ Given that proof beyond reasonable doubt is required for conviction,⁹⁵ and given the safeguards in the prosecutorial process, Khanna assumed that the majority of defendants acquitted were in fact guilty. This assumption provides a better basis for analysis, given that the new evidence exception requires compelling new evidence *of guilt*; it would not, therefore, appear to materially increase the risk of wrongfully convicting innocent defendants.⁹⁶

2 The Efficiency of the Investigation

The new reform package, it is submitted, will not significantly affect the efficiency of the investigation process despite the argument to the contrary that the double jeopardy rule promotes efficient investigation and prosecution of offenders because police and prosecutors are limited to one attempt at obtaining a conviction. As the pressure on police and prosecutors to investigate fully and obtain convictions for serious crimes is high, the impact of the double jeopardy doctrine on the behaviour of investigators will be small, especially as retrials are to be restricted to cases where new evidence has become available that was not reasonably discoverable before the first trial.

92 Suppose the probability of conviction in one trial is 'p'. If the prosecutor can bring an infinite number of successive actions, each with the same probability of conviction, the likelihood of eventual conviction is: $p + (1-p)^2 + \dots + (1-p)^n p$, which approaches 1 as the number of successive retrials approaches infinity. For example, if p is 30 per cent against an innocent individual then by the fourth trial the cumulative probability of conviction rises to approximately 75 per cent. A more sophisticated mathematical model using game theory found that double jeopardy slightly improves the ability of the criminal justice system to protect the innocent: Daniel Seidmann and Alex Stein, 'The Right to Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege' (2000) 114 *Harvard Law Review* 430.

93 See Adrian Zuckerman, 'Law, Fact or Justice?' (1986) 66 *Boston University Law Review* 487; Adrian Zuckerman, *The Principles of Criminal Evidence* (1989) chs 2–3.

94 Vikramaditya Khanna, 'Double Jeopardy and Asymmetrical Appeal Rights: What Purpose do they Serve?' (2002) 82 *Boston University Law Review* 341, 346.

95 The same standard exists in the Anglo-Australian legal systems: *Woolmington v Director of Public Prosecutions* [1935] AC 462.

96 Further, the risk of an anomalous jury conviction is not deemed sufficient to halt subsequent retrials where there has been a hung jury or in the case of a court ordered retrial. But, assuming a person were innocent, the likelihood of two perverse juries would be minimal.

A more serious concern is the possibility that a second prosecution may give police officers, who believe that an acquitted defendant is guilty, an incentive to fabricate 'new' evidence. This is a real risk given recent examples of police corruption.⁹⁷ Yet there is no reason to suppose that a corrupt police officer would be any more likely to manufacture evidence in a second trial than in the initial proceedings.⁹⁸ To base the design of such a law on the assumption of illegal police actions would be contrary to public policy. On balance, therefore, the reform would appear to have a minimal impact upon the efficiency of the investigation.

3 *Distress of the Trial Process*

An increase in the distress to the participants in the trial process is an insufficient reason to reject the reform. Although having just one trial minimises the distress of the trial process to the participants, it is argued that a greater level of distress is an insufficient reason to reject the reform. One of the old common law maxims often cited in support of double jeopardy is *nemo debet bis vexari pro una et eadem causa*.⁹⁹ Its aim is to protect defendants from the trauma, stigma, inconvenience and expense associated with a retrial, as well as to remove the constant fear and insecurity at the prospect of a future prosecution. The maxim derives from the traditional duty of the liberal democratic state to afford all citizens dignity, respect and the right to personal autonomy.¹⁰⁰ This rationale has been highly influential in the development of the law. During the 1907 debate in the House of Lords about the establishment of the Criminal Court of Appeal, Lord Loreburn LC claimed that it 'approaches the confines of torture to put a man on trial twice for the same offence'.¹⁰¹ Despite this emotive rhetoric, personal distress is not considered a sufficient reason to halt subsequent trials in other circumstances. For example, the Court of Appeal often orders a retrial and retrials are held when there is a hung jury. In both of these circumstances the defendant and all other participants in the process must endure the trauma and distress of another trial.¹⁰² Further, if strong new evidence emerged of a defendant's possible guilt following an acquittal, it is quite likely that the victim and any witnesses would be willing to suffer the distress of a retrial as the necessary price of obtaining justice. The distress of the defendant at having to

97 Queensland, Royal Commission into Possible Illegal Activities and Associated Police Misconduct, *Final Report* (1987); NSW, Royal Commission into the NSW Police Service, *Final Report* (1997).

98 Dennis, above n 65, 943.

99 Loosely translated, it reads: 'no one shall be twice vexed for the same matter': *R v Carroll* [2002] 194 ALR 1, 21 (Gaudron and Gummow JJ).

100 'In a liberal democracy, it is a fundamental political and social objective to allow individuals as much personal autonomy as possible, to allow people the space to live their own lives and pursue their own visions of the good life. Lack of finality in criminal proceedings impinges on this to a significant degree': Law Commission (UK), *Double Jeopardy and Prosecution Appeals*, Report No 267 (2001) [4.12]; Josphe Raz, *The Morality of Freedom* (1986) pts iii–v.

101 United Kingdom, *Parliamentary Debates*, House of Lords, (1907) vol 179, col 1437.

102 The difference, however, is that with a hung jury no verdict has been entered and thus the jeopardy is a continuing one. Further, in the case of a court ordered retrial, it is the defendant who has requested the retrial.

submit to another trial cannot be said to outweigh the societal desire to convict the guilty.¹⁰³ Hence, the reform does not significantly undermine this procedural value by making the distress of the trial process unbearable to the participants.

4 Finality

Finality is a broad concept. For the purposes of considering the impact of the reform upon the procedural value of finality, this section will consider four discrete issues. It will be argued that the first two issues, finality as a check on government abuse and legitimacy, do not undermine the reform. However, it is submitted that the latter two issues, socio-political considerations and asymmetrical appeal rights, so seriously weaken the procedural value of finality that they warrant the reconsideration of the reform.

(a) Finality as a Check on Government Abuse

It is the principle of finality in the double jeopardy rule that acts as a restraint over the abuse of executive power and government oppression.¹⁰⁴ In fact, this was one of the main reasons that the House of Lords extended the double jeopardy principle in *Connelly v Director of Public Prosecutions*. As Lord Devlin famously said: '[t]he courts cannot contemplate for a moment the transfer to the Executive of the responsibility for seeing that the process of law is not abused'.¹⁰⁵ The power to re-prosecute could be used to intimidate members of the community, especially those from disadvantaged groups. There is a 'win at all costs' mentality of some prosecutors, and the double jeopardy rule provides an important limit on the exercise of the prosecutor's otherwise unchecked power.¹⁰⁶ It constrains self-interested prosecutors and politically motivated prosecutions.¹⁰⁷ That said, however, the safeguards of the reform – including the requirements that the DPP must personally endorse *any* reinvestigation and that the Court of Appeal must quash the acquittal before a retrial – provide sufficient protection against the possibility of government abuse resulting from an abrogation of the double jeopardy rule.

(b) Legitimacy

This section argues that the reform does not undermine the legitimacy of the criminal justice system by permitting inconsistent verdicts from two successive trials. Double jeopardy is important to the legitimacy of the system because it touches upon matters fundamental to the structure and operation of the legal

103 Westen and Drubel, above n 87, 87–97.

104 *Lockhart v Nelson*, 488 US 33, 42 (1988); *R v Carroll* [2002] 194 ALR 1, 6–7 (Gleeson CJ and Hayne J).

105 [1964] AC 1254, 1354.

106 Kenneth Rosenthal, 'Prosecutor Misconduct, Convictions and Double Jeopardy: Case Studies in an Emerging Jurisprudence' (1998) 71 *Temple Law Review* 887, 960.

107 A strong argument has been made that the costs associated with the misuses of prosecutorial authority may provide a strong justification for many of the procedural protections for defendants. This rationale has been used to support the double jeopardy rule: Keith Hylton and Vikramaditya Khanna, *Towards a Economic Theory of Pro-Defendant Criminal Procedure* (2002) 17–65.

system and to the nature of judicial power. As Gaudron and Gummow JJ stated in *R v Carroll*:¹⁰⁸

First, there is the public interest in concluding litigation through judicial determinations which are final, binding and conclusive.¹⁰⁹ Secondly, there is the need for orders and other solemn acts of the courts (unless set aside or quashed) to be treated as incontrovertibly correct.¹¹⁰ This reduces the scope for conflicting judicial decisions, which would tend to bring the administration of justice into disrepute.¹¹¹ ... Finally, there is the principle that a cause of action is changed by judgment recovered in a court of record into a matter of record, which is of a higher nature.¹¹²

In other words, there is a presumption that a final verdict reached after a fair trial is factually correct and morally authoritative. The legitimacy of the criminal justice system rests on this presumption.¹¹³ The basis for this assertion is that if multiple trials were held, there would be a serious danger of inconsistent outcomes based on the same evidence. This would create an insoluble problem of legitimacy. However, lack of legitimacy is not a problem where there has been a conviction that is later overturned on appeal. In such cases two inconsistent verdicts do not undermine the legitimacy of the system because the appeal court's decision quashes the first and replaces it with a new one. The same rationale would apply for an acquittal. The acquittal would be appealed to a higher court and quashed, and a second trial held. Further, owing to the reform's new evidence requirement, the second verdict would not be inconsistent with the first because the second trial would be based upon different evidence. Thus, the reform would not undermine the legitimacy of the criminal justice system by allowing inconsistent verdicts.

(c) Socio-political Considerations

By contrast, the reform does seriously undermine the important socio-political values that the double jeopardy doctrine upholds. In *R v Carroll*,¹¹⁴ the High Court quoted with approval the comment made by Lord Wilberforce in *The Amphil Peerage* that:

Any determination of disputable fact may, the law recognises, be imperfect: the law aims at providing the best and safest solution compatible with human fallibility and

108 *R v Carroll* [2002] 194 ALR 1, 21.

109 Expressed in the maxim *interest reipublicae ut sit finis litium*.

110 Expressed in the maxim *res judicata pro veritate accipitur*.

111 Cf *Abebe v The Commonwealth* (1999) 197 CLR 510.

112 Expressed in the maxim *transit in rem judicatam*.

113 Legitimacy is itself a slightly ambiguous concept, capable of supporting contradictory assertions. For example, the traditional bar on prosecution appeals against acquittals according to the rule of double jeopardy is said to create legitimacy in the criminal justice system: NSW Law Reform Commission, *Directed Verdicts of Acquittal*, Discussion Paper No 37 (1995) [4.12]. On the other hand, a recent commentator has argued that because a judge's decision to acquit is not subject to judicial review, it lacks legitimacy: Rosemary Pattenden, 'Prosecution Appeals Against Judges' Rulings' [2000] *Criminal Law Review* 971, 985.

114 *R v Carroll* [2002] 194 ALR 1, 6–7 (Gleeson CJ and Hayne J).

having reached that solution it closes the book. The law knows, and we all know, that some fresh material may be found, which perhaps might lead to a different result, but, in the interest of peace, certainty and security it prevents further inquiry. It is said that in doing this, the law is preferring justice to truth. That may be so: these values cannot always coincide. The law does its best to reduce the gap. But there are cases where the certainty of justice prevails over the possibility of truth ... and these are cases where the law insists on finality.¹¹⁵

Chief Justice Gleeson and Justice Hayne recognised that '[t]o pursue what is thought to be the objectively correct outcome of criminal proceedings is inconsistent with finality'.¹¹⁶ This commitment can be understood as a prioritisation of procedural consistency over individual determinations of justice.¹¹⁷ Many commentators consider the value of finality in the double jeopardy rule to be one of the fundamental principles of political morality in liberal states.¹¹⁸ Finality has its roots in the right to personal freedom and individual autonomy.¹¹⁹ However, its true value lies in its political dimension, which focuses on its collective social value, rather than solely in the welfare and personal rights of the accused. Hence, the finality associated with double jeopardy serves to delineate the boundary of state power and represents a 'resounding acknowledgment by the state that it respects the principle of limited government and the liberty of the subject'.¹²⁰ The rule is 'a symbol of the rule of law and can have a pervasive educative effect ... [which] serves to emphasise commitment to democratic values'.¹²¹

This fundamental limit on the state's moral authority to censure individuals more than once for the same crime has been conceptualised in two ways. Some commentators view the doctrine within a Rousseauist construct as a social contract between man and state where the state has and uses its coercive powers only with the consent of its citizens.¹²² Other commentators, heavily influenced by the jurisprudence of the fifth amendment of the *United States Constitution*, state that:

Defendants asserting double jeopardy protection act almost as private attorneys general, policing the boundaries of legitimacy in criminal law enforcement, keeping state power in check for the benefit of all who value democracy and personal freedom.¹²³

Thus, having once submitted to the criminal process and having been found innocent or guilty, the state's moral and political authority to subject the citizen

115 [1977] AC 547, 569 in Law Commission (New Zealand), *Acquittals Following Perversion of the Course of Justice*, Report No 70 (2001) 6.

116 *R v Carroll* [2002] 194 ALR 1, 13 (Gleeson CJ and Hayne J).

117 Duncan Kennedy, 'Form and Substance in Private Law Adjudication' (1976) 89 *Harvard Law Review* 1685.

118 *Green v United States*, 355 US 184, 187–8 (1957) (Black J). Andrew Choo states that 'it preserves the moral integrity of the criminal justice process': *Abuse of Process and Judicial Stays of Criminal Proceedings* (1993) 17.

119 Raz, above n 100, pts iii–v.

120 Law Commission (UK), *Double Jeopardy and Prosecution Appeals*, Report No 267 (2001) [4.13], [4.17].

121 *Ibid* [4.17].

122 *Ibid* [4.19].

123 Paul Roberts, 'Acquitted Misconduct Evidence and Double Jeopardy Principles, from *Sambasivam* to *Z*' [2000] *Criminal Law Review* 952, 954.

to continued scrutiny for that act is exhausted.¹²⁴ According to this analysis, the citizen is in fact keeping state power in check for society's benefit by upholding the values of personal freedom.¹²⁵ It is this political dimension of the double jeopardy rule that is its most compelling feature, and any derogation of the rule is a symbolic devaluation by the state of its commitment to civil rights. It is concluded, therefore, that the reforms would greatly undermine the socio-political values of the double jeopardy rule.

(d) Asymmetrical appeal rights

It is also argued that the reform undermines the principled asymmetry between appeals from convictions and acquittals. The Law Commission justified its recommendation to override finality on the ground that finality is not always given primacy. The example presented was the subsumption of finality to accuracy in cases where convictions are quashed on appeal. A conviction can be appealed at any stage on the grounds of mistake, miscarriage of justice or the discovery of new information. This analogy, however, is imperfect because it ignores the principled asymmetry between convictions and acquittals. The notion that the accused deserves fair treatment is a cornerstone of the moral foundations of criminal justice. One aspect of this is the absolute right to appeal a conviction, a notion explicitly recognised in three international human rights instruments and 45 national constitutions.¹²⁶ The stain of criminal conviction lasts a lifetime, and involves personal and social consequences, as well as material deprivation during state incarceration.¹²⁷ As a result, the state has a positive obligation to rectify its mistake, for in such cases the values of liberty and human dignity override the procedural value of finality. Further, when the defence appeals against a conviction,¹²⁸ it is the accused who sets the appeal in motion and necessarily waives the double jeopardy protection for the course of the appellate process.¹²⁹ On the other hand, victims do not have an absolute right to have their attackers caught, tried and convicted.¹³⁰ It is not possible for any state to offer its citizens a guarantee of full enforcement of the criminal law because of the paucity of

124 Daniel Meltzer, 'Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General' (1988) 88 *Columbia Law Review* 247.

125 Roberts, above n 123, 954.

126 See, eg, *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 14(5) (entered into force 23 March 1976). This article states: 'Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law': Cassiouni, above n 44, 286–8.

127 *R v Carroll* [2002] 194 ALR 1, 6–7 (Gleeson CJ and Hayne J).

128 *Davern v Messel* (1984) 155 CLR 21, 60 (Mason CJ).

129 'Once the case is in the appellate hierarchy there is no logical reason why the matter should not be determined – assuming that the point involved is of sufficient importance to warrant the attention of the Court – by the very highest tribunal. There can be no surprise or unfairness; the accused simply takes the appellate structure as he finds it': Friedland, above n 17, 293, cited with approval by Mason CJ in *R v Benz* (1989) 168 CLR 110, 112.

130 This analysis is based on the difference between acts and omissions, a distinction that is one of the building blocks of deontological ethics: Warren Quinn, 'Actions, Intentions, and Consequences: The Doctrine of Doing and Allowing' (1989) 98 *Philosophical Review* 287.

resources and other demands on public finances.¹³¹ Therefore the reform undermines the principled basis for asymmetrical appeal rights.

B Does the Reform Breach International Law Norms?

Article 14(7) of the United Nations ('UN') *International Covenant on Civil and Political Rights* states that '[n]o 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'.¹³² Read literally, this article prohibits the reopening of acquittals. It does not apply to appeals from convictions.¹³³ In its General Comment on article 14(7),¹³⁴ however, the UN Human Rights Committee stated that the reopening of criminal proceedings, where this was 'justified by exceptional circumstances', did not infringe the principle of double jeopardy – the meaning of 'exceptional circumstances' was not defined. The Committee considered that article 14(7) permitted the 'resumption' of criminal proceedings but strictly prohibited 'retrial'. This view has been reflected in article 4(2) of Protocol 7 to the *European Convention on Human Rights* (1994).¹³⁵ The reform, therefore, would not infringe upon the norms of international law.

V CONCLUSION

This article has argued against the adoption of the new evidence exception for acquittals in Australia based on the reform's effect upon aspects of finality. The purpose of the proposed reform is twofold: to increase the accuracy of the criminal justice system by convicting acquitted persons where compelling new evidence of guilt is discovered and to reassert the legitimacy of the criminal justice system. However, the reform does little to significantly increase the accuracy of the criminal justice system. Throughout Australia there are only three

131 On the nature of unenforceable rights, see Andrei Marmor, 'On the Limits of Rights' (1997) 16 *Law and Philosophy* 1.

132 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

133 'Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law': *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 14(5) (entered into force 23 March 1976).

134 Human Rights Committee General Comment No 13 (21), art 14, adopted at its 516th meeting (21st session) (12 April 1984) [19].

135 *Protocol 7 of the European Convention on Human Rights*, opened for signature 4 November 1950, ETS 117, art 4(2) (entered into force 22 November 1984). Article 4 of Protocol 7 states:

- (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.

identified cases that would fit within the narrow legislative criteria for a retrial. Hence, the proposed reform would be more important for its symbolic significance (that the criminal law will not allow acquitted persons to escape justice where new evidence of guilt emerges) than for its practical impact. However, the logic of permitting just one retrial for the purpose of re-establishing the legitimacy of the criminal justice system is questionable because the retrial is subject to the same problem as the original trial. The same logic would require yet another retrial if more 'new' evidence is discovered. As a result of a public outcry over the tragic *Carroll* case there is now a reform proposal in New South Wales which is expected to have little, if any, effect on criminal convictions and which contributes nothing to overcoming the problems of legitimacy.

The Law Commission identified four procedural values that the double jeopardy rule protects. This article assessed the impact of these procedural values and concluded that the reform neither increases the likelihood of wrongful conviction of the innocent, nor acts as a disincentive for efficient investigation and prosecution, nor does it unduly increase the distress of the participants in the trial process. In this respect, it must be recognised that the reform has been well constructed. That said, the reform does, however, significantly undermine the state's affirmation of the civil and political rights of its citizens as embodied in the value of finality. It has been submitted in this article that the reform materially weakens the values protected by finality, specifically its socio-political considerations and its asymmetrical appeal rights. As the New Zealand Law Commission noted when it rejected a new evidence exception as unworthy of serious consideration, '[a]ny dilution of the double jeopardy rule tends to impair the important values that it protects'.¹³⁶ Therefore, if the new evidence exception is adopted in New South Wales, and potentially Australia-wide, there will be a minimal benefit in terms of increased accuracy in the criminal justice system and a serious abrogation of the socio-political rights and asymmetrical appeal rights protected by the double jeopardy doctrine.

136 Law Commission (New Zealand), *Acquittal Following Perversion of the Course of Justice*, Report No 70 (2001) viii, [1], [20].