Dowling v. United States: A Failure of the Criminal Justice System

I. INTRODUCTION

The United States justice system creates a presumption of innocence for an accused in a criminal trial. However, this presumption is shamefully weakened when a prosecutor is allowed to admit evidence of other criminal conduct for which the defendant had been acquitted in a prior action. On January 10, 1990, the United States Supreme Court, in a six-to-three decision, specifically addressed this issue in *Dowling v. United States*.[1] The Court focused on two major questions: First, whether the admission of evidence of other criminal conduct of which a defendant has been acquitted in a prior action violates the collateral estoppel component of the fifth amendment double jeopardy clause; and second, whether the introduction of such evidence violates the due process test of "fundamental fairness."[2] The *Dowling* Court held that the admission of evidence under Federal Rule of Evidence 404(b) did not violate the collateral estoppel doctrine and that the evidence was not fundamentally unfair. This holding is contradictory to the practices in many state courts[3] and rejects strong policy rationales for excluding such evidence. This Comment will show that the Court erred in allowing the admission of prior criminal conduct for which the defendant had been acquitted. Additionally, this Comment will argue that an absolute exclusion is needed for this type of evidence.

In Part II, this Comment will review Federal Rule of Evidence 404(b) and its application by the courts. Part III will discuss the doctrine of collateral estoppel generally. Part IV will examine state and federal courts that have addressed the problem of evidence from a prior acquittal. Part V will explain the facts of the *Dowling* case and its holding. Part VI will explore the reasons for creating an absolute exclusion for prior criminal conduct evidence after an acquittal.

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[1] 110 S. Ct. 668 (1990). This decision resolved a conflict among the courts of appeals. Prior to *Dowling*, the circuit courts took a number of approaches in admitting evidence of prior criminal conduct for which the defendant had been acquitted. *See generally* United States v. Phillips, 401 F.2d 301 (7th Cir. 1968) (holding the prejudicial effect of the evidence necessarily outweighs its probative value); United States v. Citro, 853 F.2d 1055 (2d Cir. 1988) (applying the doctrine of collateral estoppel to determine the admissibility).

[2] Dowling v. United States, 110 S. Ct. 668 (1990).

[3] *See infra* notes 50-55 and accompanying text.

II. FEDERAL RULE OF EVIDENCE 404(b)

At common law, evidence which tended to show that the accused was guilty of other criminal conduct was not admissible in a subsequent trial to show the commission of the particular crime charged.[4] Federal Rule of Evidence 404(b) adopted this rule and found evidence of prior crimes inadmissible for purposes of showing the bad character of the defendant.[5] Specifically, Federal Rule of Evidence 404(b) states that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith."[6] However, the Rule permits this type of evidence "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[7] These exceptions create a loophole in the general exclusionary rule, and have been "characterized as the 'Prosecutor's Delight,' for it seems that few cases will arise in which the prosecutor will be unable to link evidence of prior acts to such nebulous material propositions."[8] However, the exceptions were deemed necessary due to the difficulty in proving these material propositions with direct evidence.[9] Also, one state court has stated: "[N]o man can by multiplying crimes diminish the volume of testimony against him."[10] Therefore, courts allow the use of this type of circumstantial evidence.

Once the prosecutor is able to link the evidence of the prior act "to such nebulous material propositions,"[11] the Advisory Committee's Note to Rule 404(b) states, a "determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403."[12] Rule 403 allows relevant evidence to be excluded only "if its probative value is *substantially* outweighed by the

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[4] United States v. Fawcett, 115 F.2d 764, 768 (3d Cir. 1940).

[5] FED. R. EVID. 404(b). *See also* Michelson v. United States, 335 U.S. 469 (1948); United States v. Woods, 484 F.2d 127 (4th Cir. 1973).

[6] FED. R. EVID. 404(b).

[7] *Id.*

[8] Comment, *Exclusion of Prior Acquittals: An Attack on the Prosecutor's Delight*, 21 UCLA L. REV. 892, 896 (1974).

[9] Comment, *supra* note 8, at 897. *See also* United States v. Castro-Castro, 464 F.2d 336, 337 (9th Cir. 1972), *cert. denied*, 410 U.S. 916 (1973).

[10] State v. Hopkins, 68 Mont. 504, 510, 219 P. 1106, 1108 (1923).

[11] Comment, *supra* note 8, at 896.

[12] FED. R. EVID. 404(b) advisory committee's note.

danger of unfair prejudice [or] confusion of the issues . . . ."[13] Yet, major problems exist when using the Rule 403 balancing approach for Rule 404(b) evidence.

First, the balancing test lacks firm discernible guidelines for its application, and therefore, any appellate review is frequently unsatisfactory.[14] If a trial judge is impartial in balancing, appellate review is relatively meaningless, for there will rarely be any abuse of discretion upon which to base a reversal.[15] Yet time has shown that trial judges infrequently exclude the prior criminal conduct, based on the "overriding policy of presenting all relevant evidence to the jury . . . ."[16] Because the question of admissibility is a discretionary decision for the trial judge, appellate reversal is practically nonexistent.

Second, the effective use of the limiting jury instruction to diminish the prejudicial effect of the evidence is questionable to doubtful.[17] One commentator noted that "[o]nce such evidence is before the jury the damaging prejudicial effect cannot be wiped out by subsequent limitation."[18] Moreover, empirical evidence shows a positive correlation between the admission into evidence of prior criminal acts and the likelihood of conviction. Indeed, "[i]n one study, it was found that jurors in criminal cases involving similar charges and similar evidence convicted 27 percent more often when informed of a prior conviction . . . than where there was no criminal record."[19] Further, some of the statistics indicate that prospective jurors do not care whether the criminal record consists of a conviction or an acquittal, "for it is still a criminal record and thus its owner is an

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[13] FED. R. EVID. 403 (emphasis added).

[14] Comment, *supra* note 8, at 899.

[15] *Id.*

[16] Note, *Expanding Double Jeopardy: Collateral Estoppel and the Evidentiary Use of Prior Crimes of Which the Defendant Has Been Acquitted*, 2 FLA. ST. U.L. REV. 511, 523 (1974).

[17] *See infra* notes 137-42 and accompanying text for an expanded discussion on this issue.

[18] Comment, *supra* note 8, at 913. *See also* People v. Sorge, 301 N.Y. 198, 200, 93 N.E.2d 637, 639 (1950).

[19] Comment, *supra* note 8, at 910. *See also* H. KALVEN & H. ZEISL, THE AMERICAN JURY 160, 179 (1970).

undesirable."[20] As a consequence, the damaging prejudicial effect cannot be wiped out effectively by a limiting jury instruction.

The final problem concerns the method of admitting similar act evidence. In *United States v. Huddleston*,[21] the United States Supreme Court held that it is not necessary for the trial judge to make a preliminary finding that the prosecutor has proven the prior act by a preponderance of the evidence.[22] However, the Court further explained that to prevent the prosecutor from "parad[ing] past the jury a litany of potentially prejudicial similar acts," the evidence must be relevant.[23] Yet, "'[r]elevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case.'"[24] In the Rule 404(b) context, prior criminal conduct evidence is only relevant when "the jury can reasonably conclude that the act occurred and that the defendant was the actor."[25] However, this low standard of proof actually provides the skillful prosecutor with a virtually free hand in presenting prejudicial evidence to the jury.

The combination of these three factors demonstrates the need for additional protection for defendants who have been acquitted of the prior criminal conduct. Regardless of whether the defendant has an opportunity to prove his prior acquittal,[26] the damage occurs when the evidence is presented to the jury.[27] Therefore, many federal and state courts have developed safeguards to protect further the rights of defendants acquitted of prior criminal conduct.

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[20] Comment, *supra* note 8, at 910. *See also* PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE REPORT: THE CHALLENGE OF CRIME IN A FREE SOCIETY 75 (1967); Schwartz & Skolnick, *Two Studies of Legal Stigma*, 10 SOC. PROB. 133, 136 (1962).

[21] 485 U.S. 681 (1988).

[22] *Id.* at 689.

[23] *Id.*

[24] *Id.* (quoting FED. R. EVID. 401 advisory committee's note).

[25] *Id.* Prior to *Huddleston*, the standard of proof was a divisive issue for the lower federal courts. *See generally* United States v. Dolliole, 597 F.2d 102 (7th Cir. 1979) (clear and convincing evidence required); United States v. Beechum, 582 F.2d 898 (5th Cir. 1978) (preponderance of the evidence required); United States v. DeJohn, 638 F.2d 1048 (7th Cir. 1981) (only certain exceptions required clear and convincing evidence before admission).

[26] *See infra* notes 131-34 and accompanying text.

[27] Dowling v. United States, 110 S. Ct. 668, 679 (1990) (Brennan, J., dissenting).

III. COLLATERAL ESTOPPEL

The fifth amendment provides in part: "No person shall be . . . subject for the same offence to be *twice* put in *jeopardy* of life or limb . . . ."[28] The double jeopardy clause embodies three separate guarantees: "It prohibits against a second prosecution after acquittal, against a second prosecution after conviction, and against multiple punishments for the same offense."[29] The United States Supreme Court, in the landmark case *Ashe v. Swenson*,[30] explained the significance of the double jeopardy clause. The Court stated that the double jeopardy clause incorporates collateral estoppel as a constitutional requirement.[31] Collateral estoppel simply means "that when an issue of ultimate fact once has been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in a future lawsuit."[32] In *Ashe*, the Court applied the collateral estoppel doctrine to reverse a conviction when there was just one issue in dispute that had been decided in the prior acquittal.[33] The Court noted that when a previous judgment of acquittal was based upon a general verdict,[34] the court must examine the record of the prior proceeding and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.[35] *Ashe* significantly expanded a criminal defendant's protection under Rule 404(b) by prohibiting the introduction of prior criminal conduct evidence when the issue was decided in the prior judgment. However, the Court did not further address whether the collateral estoppel doctrine mandated the absolute exclusion of evidence from a prior acquittal at the current trial, regardless of whether the issue was necessarily decided in the prior action.[36] This topic will be explored in Parts IV, V, and VI of this Comment.

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[28] U.S. CONST. amend. V (emphasis added).

[29] United States v. Crispino, 568 F. Supp. 1525, 1528 (D.N.J. 1984). *See also* Illinois v. Vitale, 447 U.S. 410, 415 (1980); North Carolina v. Pearce, 395 U.S. 711, 717 (1969); United States v. Engle, 458 F.2d 1021, 1025 (6th Cir. 1972).

[30] 397 U.S. 436 (1970).

[31] *Id.*

[32] *Id.* at 443.

[33] *Id.* at 436.

[34] A general verdict is "[a] verdict whereby the jury find either for the plaintiff or for the defendant in general terms; the ordinary form of a verdict." BLACK'S LAW DICTIONARY 1560 (6th ed. 1990).

[35] *Ashe*, 397 U.S. at 444-45.

[36] E. IMWINKELREID, UNCHARGED MISCONDUCT EVID. § 10:03, at 8 (1984).

IV. FEDERAL AND STATE COURT DECISIONS

Nearly every jurisdiction, both in federal and state courts, has addressed the problem of the admissibility of evidence of prior criminal conduct for which the defendant has been acquitted.[37] The various jurisdictions have approached the problem differently and four basic lines of cases have ensued. First, some jurisdictions never admit the evidence under the rationale that the prejudicial effect of such evidence necessarily outweighs its probative value.[38] This is a per se exclusionary rule because the evidence will never be admitted under Rule 403 (or state equivalent) balancing.[39] Second, other courts also apply an absolute exclusion, holding such evidence inadmissible due to fundamental fairness.[40] Third, a majority of courts appear to apply a Rule 403 balancing test, without a per se exclusionary rule.[41] This approach is similar to the first approach, except that the prejudicial effect does not necessarily outweigh the probative value. Finally, some courts combine the collateral estoppel doctrine with a Rule 403 balancing test.[42]

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[37] *See infra* notes 38–71 and accompanying text. *See also* Annotation, *Admissibility of Evidence as to Other Offense as Affected by Defendant's Acquittal of that Offense*, 25 A.L.R.4th 934–76 (1983).

[38] *See infra* notes 43–49 and accompanying text. *See also* State v. Little, 87 Ariz. 295, 350 P.2d 756 (1960); State v. Holman, 611 S.W.2d 411 (Tenn. 1981).

[39] *See supra* notes 12–13 and accompanying text.

[40] *See infra* notes 50–55 and accompanying text. *See also* State v. Perkins, 349 So. 2d 161 (Fla. 1977); State v. Wakefield, 278 N.W.2d 307 (Minn. 1979).

[41] *See infra* notes 56–64 and accompanying text. *See also* United States v. Van Cleave, 599 F.2d 954 (10th Cir. 1979); *Ex parte* Bayne, 375 So. 2d 1239 (Ala. 1979); Ladd v. State, 568 P.2d 960 (Alaska 1977), *cert. denied*, 435 U.S. 928 (1978); People v. Follette, 74 Cal. App. 178, 240 P. 502 (1925); State v. Sunclades, 305 N.W.2d 491 (Iowa 1981); Bingham v. Commonwealth, 308 Ky. 737, 215 S.W.2d 845 (1948); People v. Oliphant, 399 Mich. 472, 250 N.W.2d 443 (1976); State v. Cooksey, 499 S.W.2d 485 (Mo. 1973); Williams v. State, 118 Neb. 281, 224 N.W. 286 (1929); State v. Zainsky, 143 N.J. Super. 35, 362 A.2d 611 (1976), *aff'd*, 75 N.J. 101, 380 A.2d 685 (1977); State v. Heaton, 56 N.D. 357, 217 N.W. 531 (1927); Patterson v. State, 96 Ohio St. 90, 117 N.E. 169 (1917); State v. Smith, 271 Or. 294, 532 P.2d 9 (1975); Commonwealth v. Manuszak, 155 Pa. Super. 309, 38 A.2d 355 (1944); State v. Houston, 17 S.C.L. (1 Bail.) 300 (1829); State v. Feela, 101 Wis. 2d 249, 304 N.W.2d 152 (Ct. App. 1981). *See also* Annotation, *supra* note 37, at 943–54.

[42] *See infra* notes 65–71 and accompanying text. *See also* Ashe v. Swenson, 397 U.S. 436 (1970); United States v. Citron, 853 F.2d 1055 (2d Cir. 1988); Crooker v. United States, 620 F.2d 313 (1st Cir. 1980).

In *State v. Little*,[43] the Supreme Court of Arizona adopted the first line of cases. In *Little*, the court held that the prejudicial effect of admitting evidence of prior criminal conduct for which the defendant had been acquitted necessarily outweighed its probative value.[44] Although the court recognized that this evidence had probative value, the court found that the acquittal tended to reduce the probative value of the evidence, thus tipping the scale toward inadmissibility.[45] Specifically, the court stated that "the relevance of the evidence of the prior offense depends upon the court's or jury's drawing . . . inferences, thus lessening the probative weight of such evidence . . . ."[46] The Supreme Court of Tennessee also precluded the admission of evidence from a prior acquittal and expanded on the concept of jury inferences. In *State v. Holman*,[47] the Tennessee court found that: "For such evidence to have any relevance or use in the case on trial, the jury would have to infer that, despite the acquittal, the defendant nevertheless was guilty of the prior crime."[48] The court further explained that no such inference could be properly drawn from an acquittal, especially when the acquittal was "based on insufficient evidence to sustain a guilty verdict."[49] Even though the Arizona and Tennessee courts have adopted a per se exclusionary rule, only a minority of courts have taken this view.

The second line of cases also applies a per se exclusionary rule for evidence of prior criminal conduct for which the defendant has been acquitted. Two state supreme courts have held, on the grounds of fundamental fairness, that such evidence is never admissible.[50] Although Florida courts have taken various approaches to evidence from prior acquittals, the Florida Supreme Court, in a 1977 decision, stated that it is fundamentally unfair to a defendant to admit evidence of acquitted crimes.[51] The court explained that "to the extent that evidence of the acquitted crime tends to prove that it was indeed committed, the defendant is forced to reestablish a defense against it."[52] Therefore, the court held that evidence

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[43] 87 Ariz. 295, 350 P.2d 756 (1960).

[44] *Id.* at 307, 350 P.2d at 763.

[45] *Id.* at 307, 350 P.2d at 764.

[46] *Id.*

[47] 611 S.W.2d 411 (Tenn. 1981).

[48] *Id.* at 413.

[49] *Id.*

[50] *See generally* State v. Perkins, 349 So. 2d 161 (Fla. 1977); State v. Wakefield, 278 N.W.2d 307 (Minn. 1979).

[51] *Perkins*, 349 So. 2d at 163.

[52] *Id.*

of such crimes is not admissible in a subsequent trial.[53] The Supreme Court of Minnesota also championed this view in *State v. Wakefield*.[54] The court declared:

> [I]t is a basic tenant of our jurisprudence that once the state has mustered its evidence against a defendant and failed, the matter is done. In the eyes of the law the acquitted defendant is to be treated as an innocent and in the interests of fairness and finality made no more to answer for his alleged crime. It is our view that the admission into a trial of evidence of crimes of which the defendant has been acquitted prejudices and burdens the defendant in contravention of this basic principle and is fundamentally unfair. Therefore, we conclude that under no circumstances is evidence of a crime other than that for which a defendant is on trial admissible when the defendant has been acquitted of that crime.[55]

This minority view powerfully explains the strong policy reasons for adopting a per se exclusionary rule.

In yet another approach, courts have determined the admissibility of evidence of prior criminal conduct by employing a balancing test—the probative value of the evidence versus the prejudicial effect to the defendant—without regard to collateral estoppel.[56] These courts find that otherwise relevant and admissible evidence is not rendered inadmissible by the fact that the defendant was previously acquitted, although the prior acquittal is relevant to the trial court's relevance analysis;[57] the acquittal tends to diminish the probative value of the evidence, and the trial judge should factor the acquittal in the balancing test.[58] However, for the many courts that adhere to this view, the balance is usually found to weigh in favor of the probative value, and hence, the evidence is admitted.[59] The Supreme Court of Michigan expressed this view in the rape case of *People v.*

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[53] *Id.*

[54] 278 N.W.2d 307 (Minn. 1979).

[55] *Id.* at 308–09.

[56] *See supra* note 41.

[57] *See* E. IMWINKELREID, *supra* note 36, § 10:06, at 12. *See also* Bray, *Evidence of Prior Uncharged Offenses and the Growth of Constitutional Restrictions*, 28 U. MIAMI L. REV. 489, 515 n.106 (1974); United States v. Smith, 446 F.2d 200 (4th Cir. 1971); United States v. Bussey, 432 F.2d 1330 (D.C. Cir. 1970) (dictum).

[58] *See* E. IMWINKELREID, *supra* note 36, § 10:06, at 12. *See also* United States v. Smith, 446 F.2d 200 (4th Cir. 1971).

[59] Annotation, *supra* note 37, at 943.

Oliphant.[60] The court held that when the complainant and defendant substantially agreed except for the key issue of consent, testimony of three witnesses who testified that they had been raped by the defendant under similar circumstances could be found to have sufficient probative value to outweigh the prejudicial effect.[61] The court went on to state that such evidence was offered in this case to show scheme, plan, and system and not to convict the defendant of previous rapes.[62] Therefore, double jeopardy and collateral estoppel did not apply.[63] In the past, most state courts and some federal courts have championed this view.[64]

However, many courts have begun to apply a combination of Rule 403 balancing with the collateral estoppel doctrine to the subsequent use of evidence of prior criminal conduct of which the defendant has been acquitted.[65] These courts do not automatically exclude evidence of a prior act because of an acquittal. Rather, these courts bar the evidence whenever its admission violates collateral estoppel or when the probative value is substantially outweighed by the danger of unfair prejudice to the defendant. The courts that have adopted this approach usually read the United States Supreme Court decision in *Ashe v. Swenson*[66] liberally.[67] For collateral estoppel to bar the subsequent use of prior acquittal evidence, two factors must exist: First, the cases must involve the same sovereign;[68] and second, the defendant must demonstrate that the first acquittal verdict rested on the trier-of-fact's conclusion that the defendant was in fact innocent.[69] If the first trial ended a general verdict, the defendant may have an impossible task to make that demonstration unless the issue in question was the only element

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[60] 399 Mich. 472, 250 N.W.2d 443 (1976).

[61] *Id.* at 473, 250 N.W.2d at 446.

[62] *Id.* at 472, 250 N.W.2d at 446 (the defendant was acquitted of all three rape charges).

[63] *Id.* at 473, 250 N.W.2d at 443.

[64] *See supra* note 41.

[65] *See supra* note 42.

[66] 397 U.S. 436 (1970).

[67] *See* E. IMWINKELREID, *supra* note 36, § 10:05, at 10. *See also* Sabin v. Israel, 554 F. Supp. 390, 391 (E.D. Wis. 1983).

[68] *See generally* Crooker v. United States, 620 F.2d 313, 313–14 (1st Cir. 1980), *cert. denied*, 449 U.S. 857 (1980); United States v. Smith, 446 F.2d 200, 202 (4th Cir. 1971). The following is an illustration of the same sovereign principle: If the acquittal occurs in a state trial and the current prosecution is a federal case, or vice versa, the doctrine of collateral estoppel will not bar the evidence. E. IMWINKELREID, *supra* note 36, § 10:05, at 10.

[69] *See generally* United States v. Johnson, 697 F.2d 735, 740 (6th Cir. 1983).

in dispute in the prior offense.[70] Additionally, some courts have required the additional burden that the defendant prove the acquittal *necessarily* rested on that conclusion.[71]

The United States Supreme Court followed this last approach in *Dowling*. Further, the Court provided some guidance for the proper application and administration of this dual test—collateral estoppel and balancing. However, by basing its analysis on a hypertechnical view of an acquittal, the Court essentially disregarded the doctrine of collateral estoppel.

V. *DOWLING V. UNITED STATES*

A. *The Facts*

On July 8, 1985, a man wearing a ski mask and carrying a small gun robbed a bank in Frederiksted, St. Croix, Virgin Islands.[72] The robber ran from the bank and "commandeered" a passing taxi.[73] While driving away from the scene, the robber pulled off his mask.[74] An eyewitness observed the robber removing his mask and at trial identified the man as Reuben Dowling.[75] Other witnesses testified that they had seen Dowling driving the hijacked taxi around the streets of Frederiksted shortly after the bank robbery.[76]

At the trial for the bank robbery, the prosecution sought to introduce the testimony of Vena Henry. Henry stated that a similarly masked and armed Dowling and an accomplice, Delroy Christian, entered her home two weeks after the bank robbery.[77] She testified further that in an ensuing struggle,

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[70] *See generally* Hernandez v. United States, 370 F.2d 171 (9th Cir. 1966). *See also* E. IMWINKELREID, *supra* note 36, § 10:05, at 11; Comment, *Impeachment of the Criminal Defendant by Prior Acquittals—Beyond the Bounds of Reason*, 17 WAKE FOREST L. REV. 561, 582 (1981).

[71] *See* E. IMWINKELREID, *supra* note 36, § 10:05, at 11. *See also* United States v. Patterson, 827 F.2d 184 (7th Cir. 1987); United States v. Boldin, 818 F.2d 771 (11th Cir. 1987); United States v. Gentile, 816 F.2d 1157 (7th Cir. 1987); United States v. Johnson, 697 F.2d 735 (6th Cir. 1983); United States v. Medina, 563 F. Supp. 979 (S.D.N.Y. 1983); State v. Paradis, 106 Idaho 117, 676 P.2d 31 (1983), *cert. denied*, 468 U.S. 1220 (1984).

[72] Dowling v. United States, 110 S. Ct. 668, 670 (1990).

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.* at 669.

she unmasked Dowling.[78] Dowling's defense in the first action did not dispute his identity or his association with Christian, but claimed that he and Christian had come to Henry's home to retrieve money rightfully belonging to him.[79] The jury acquitted Dowling in the Henry case.[80]

The prosecution sought to introduce this testimony to help establish identity in the bank robbery trial. Dowling's identity was proven by showing similar attire (mask and small gun) and his association with Christian, who was spotted in the vicinity of the bank immediately prior to the robbery.[81] The prosecution theorized that Christian was driving the intended getaway car and his chance encounter with the police—who did not know a bank robbery was taking place—frightened him away.[82]

Despite Dowling's acquittal in the Henry case, the United States District Court of the Virgin Islands (St. Croix) admitted the testimony at the bank robbery trial, but instructed the jury on the limited purpose for which the testimony had been admitted.[83] The Court of Appeals for the Third Circuit held that the prosecution was collaterally estopped by the acquittal from using Henry's testimony.[84] Relying on previous Third Circuit decisions, the court stated that the doctrine of collateral estoppel bars "the evidentiary use of crimes for which the defendant has been acquitted."[85] However, in this particular case, the court held that the admission of the Henry testimony was harmless error, and therefore, the conviction was upheld.[86]

B. *The Court's Holding*

In a six-to-three decision, the United States Supreme Court allowed the admission of the Henry testimony. Specifically, the Court held that the admission of the evidence did not violate the collateral estoppel component of the double jeopardy clause nor was the evidence fundamentally unfair.

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[78] *Id.* at 670.

[79] *Id.* at 674.

[80] *Id.* at 670.

[81] *Id.*

[82] *Id.*

[83] *Id.* at 669.

[84] United States v. Dowling, 855 F.2d 114, 122 (3d Cir. 1988), *aff'd*, 493 U.S. 342 (1990).

[85] *Id.* at 121 (citing United States v. Keller, 624 F.2d 1154, 1160 (3d Cir. 1980)).

[86] *Id.* at 124.

C. *The Court's Reasoning*

1. *Collateral Estoppel*

In *Dowling*, the Court began its analysis by reviewing and defining the doctrine of collateral estoppel[87] and then applying the fact pattern to that definition. The Court presented two fundamental reasons for declining to extend the collateral estoppel doctrine to this particular case. First, the Court focused on the different standards of proof required in both actions.[88] Then, the Court looked to whether the issue was necessarily decided in the prior action.[89]

a. *Standard of Proof*

The Court began by holding that "an acquittal in a criminal case does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof."[90] The Court based this decision on prior cases that "supported" this proposition.[91]

In *United States v. One Assortment of 89 Firearms*,[92] Patrick Mulcahey was indicted on federal charges of knowingly engaging in the business of dealing in firearms without a license.[93] Mulcahey admitted that he had no license to deal in firearms.[94] In his defense, however, he claimed that he had been entrapped into making the illegal transactions.[95] The jury returned a verdict of not guilty.[96] Following his acquittal of the criminal charges, the prosecutor instituted an in rem action for the forfeiture of the seized firearms.[97] The Court held that Mulcahey's acquittal on criminal charges did not estop the Government from proving in a civil action that the firearms should be forfeited.[98] The Court reasoned that "the jury verdict in the

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[87] *See supra* note 32 and accompanying text.

[88] *See infra* notes 90–109 and accompanying text.

[89] *See infra* notes 110–15 and accompanying text.

[90] Dowling v. United States, 110 S. Ct. 668, 669 (1990).

[91] *Id.* at 672.

[92] 465 U.S. 354 (1984).

[93] *Id.* This was in violation of 18 U.S.C. § 922(a)(1).

[94] *Firearms*, 465 U.S. at 356.

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] *Id.* at 356–57.

criminal action did not negate the possibility that a preponderance of the evidence could show that Mulcahey was engaged in an unlicensed firearms business."[99] Therefore, the Court concluded that the difference in relative burdens of proof in the criminal and civil actions precluded the application of the collateral estoppel doctrine.

The Court also precluded the application of the doctrine of collateral estoppel in *One Lot Emerald Cut Stones v. United States*.[100] In *Emerald Cut Stones*, Francisco Klementova entered the United States without declaring to United States Customs one lot of emerald cut stones and one ring.[101] Klementova was tried and acquitted of charges of smuggling the articles into the United States without submitting to the required customs procedures.[102] Following his acquittal, the Government instituted an in rem action for the forfeiture of the articles.[103] Klementova argued that his prior acquittal on the criminal charges barred the forfeiture action.[104] The Supreme Court disagreed. The Court found that the "acquittal of the criminal charges may have only represented 'an adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused.'"[105] But as to the issues raised in the forfeiture action, "it does not constitute an adjudication on the preponderance-of-the-evidence burden applicable in civil proceedings."[106]

Indeed, both the *Firearms* and *Emerald Cut Stones* decisions recognized the importance that the subsequent action was civil in nature. The Court allowed the evidence to be admitted "partly because the clearly lower standard of proof in the subsequent civil proceeding and partly because the later proceeding was remedial rather than punitive in nature."[107] The Court explicitly stated in *Firearms* that "[u]nless the forfeiture sanction was intended as punishment, so that the proceeding is essentially criminal in character, the Double Jeopardy Clause is not applicable."[108] In *Emerald*

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[99] *Id.* at 354.

[100] 409 U.S. 232 (1972) (per curiam).

[101] *Id.* at 232-33.

[102] *Id.*

[103] *Id.* at 233.

[104] *Id.*

[105] *Id.* at 235 (quoting Helvering v. Mitchell, 303 U.S. 391, 397 (1938)).

[106] *Id. See also* Murphy v. United States, 272 U.S. 630 (1926); Stone v. United States, 167 U.S. 178 (1897).

[107] United States v. Crispino, 586 F. Supp. 1525, 1533 (D.N.J. 1984) (interpreting One Lot Emerald Cut Stones v. United States, 409 U.S. 232 (1972) (per curiam)).

[108] *Firearms*, 465 U.S. at 362.

Cut Stones, the Court also emphasized that "[i]f for no other reason, the forfeiture is not barred by the Double Jeopardy Clause of the Fifth Amendment because it involves neither two criminal trials nor two criminal punishments."[109] In *Dowling*, both actions involved criminal trials and criminal punishments. Hence, the *Dowling* Court's reliance on the *Firearms* and *Emerald Cut Stones* decisions is unjustified and its rationale for doing so is at best attenuated.

b. *Issue Necessarily Decided*

In *Dowling*, the Court did not end its analysis of collateral estoppel by focusing solely on the varying standards of proof. Rather, the Court stated that even if the lower burden of proof at the second proceeding did not serve to avoid the collateral estoppel component of the double jeopardy clause, the evidence, nevertheless, was admissible. The Court reasoned that Dowling had failed to demonstrate that his acquittal in the first proceeding represented a jury determination that he was not one of the men who entered Henry's home.[110] The Court found numerous grounds upon which the jury could have based its acquittal in the prior action (in fact, the identity of Dowling was not at all at issue in the first case), and thus the prosecution was not collaterally estopped from introducing the evidence.[111] The Court distinguished *Ashe* because, there, the issue in the second case had been necessarily decided in the defendant's favor in the first case.[112] Whereas, in *Dowling*, the Court held that the issues of Dowling's identity and association with Christian had not been necessarily decided in the defendant's favor in the prior criminal action.[113] However, the *Dowling* Court seemed to forget the approach required in ascertaining whether an issue has been necessarily decided. In *Ashe*, the Court previously had stated:

> The federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality . . . . The inquiry must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings. Any test more technically

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[109] *Emerald Cut Stones*, 409 U.S. at 235.

[110] Dowling v. United States, 110 S. Ct. 668, 673 (1990).

[111] *Id.* at 672.

[112] *Id.*

[113] *Id.* at 673.

> restrictive would, of course, simply amount to a rejection of the rule of collateral estoppel in criminal proceedings . . . .[114]

Yet, in *Dowling*, the Court based its holding on a hypertechnical view of an acquittal.[115]

2. *Fundamental Fairness*

The Court finally addressed whether admitting the evidence violated the due process test of "fundamental fairness." In addition to protection against double jeopardy, the fifth amendment provides that "[n]o person shall be . . . deprived of life, liberty, or property, without *due process* of law . . . ."[116] The *Dowling* Court recognized that the introduction of evidence in this circumstance had the potential to prejudice the jury and to unfairly force the defendant to spend time and money relitigating issues that may have been determined in the defendant's favor in the first trial.[117] However, the Court stated that the question "is whether it is acceptable to deal with the potential for abuse through nonconstitutional sources like the Federal Rules of Evidence, or whether the introduction of this type of evidence is so extremely unfair that its admission violates 'fundamental conceptions of justice.'"[118] The Court then noted that only actions that offend those "'fundamental conceptions of justice which lie at the base of our civil and political institutions,' and which define 'the community's sense of fair play and decency'" violate the due process test of fundamental fairness.[119]

In light of the limiting instructions provided by the trial judge, the Court felt that the testimony was not fundamentally unfair. The Court reasoned that: a) the jury was free to assess the truthfulness and significance of the testimony;[120] b) the trial court's authority to exclude potentially prejudicial evidence adequately addressed the possibility that introduction of such evidence would create a risk that the jury would convict a defendant based on inferences drawn from the acquitted conduct;[121] c) inconsistent verdicts

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[114] Ashe v. Swenson, 397 U.S. 436, 444 (1970) (citations omitted).

[115] *Dowling*, 110 S. Ct. at 680 (Brennan, J., dissenting).

[116] U.S. CONST. amend. V (emphasis added).

[117] *Dowling*, 110 S. Ct. at 674.

[118] *Id.*

[119] *Id.* (quoting Mooney v. Holohan, 294 U.S. 103, 112 (1935); Rochin v. California, 342 U.S. 165, 173 (1952)).

[120] *Id.* at 349.

[121] *Id.*

are constitutionally permitted;[122] and d) the tradition that the prosecution may not force a person acquitted in one trial to defend against the same accusation in a subsequent proceeding is amply protected by the double jeopardy clause and collateral estoppel.[123] Relying on these four policies, the Court did not find a violation of fundamental fairness.

VI. NEED FOR ABSOLUTE EXCLUSION

By allowing the admission of evidence of prior criminal conduct for which the defendant has been acquitted, the criminal justice system fails to treat the acquitted defendant as innocent. In *Dowling*, the Court permitted the prosecution to continue forcing the acquitted defendant to answer for his prior alleged criminal acts. Instead, the Court should have placed an absolute bar on the subsequent use of evidence from a prior acquittal for a number of reasons.

First, the admission of evidence concerning a prior acquittal requires the defendant to relitigate facts from the previous case at a lower standard of proof. In *Huddleston*, the Court allowed the introduction of similar act evidence when "the jury can reasonably conclude that the act occurred and that the defendant was the actor."[124] Yet, whenever a defendant is forced to relitigate facts from a prior action, there is a strong "risk that the jury erroneously will decide that he is guilty of that offense."[125] That risk is heightened when the jury is allowed to conclude that the defendant committed the prior offense under a lower standard of proof.[126] Justice Brennan stated, in dissent, that facts relating to the prior offense, used only as evidence of another crime, do "not reduce the burden on the defendant; he is still required to defend against the prior charges."[127] Ironically, under the majority's reasoning, a prosecutor may be able "to rely on a prior criminal offense (despite an acquittal) as evidence in a trial for an offense which is part of the *same transaction* as the prior offense."[128] In fact, the Government may force the defendant to relitigate these facts in trial after trial.[129] Finally, under the majority's reasoning, evidence from a prior

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[122] *Id.*

[123] *Id.*

[124] United States v. Huddleston, 485 U.S. 681, 689 (1988).

[125] *Dowling*, 110 S. Ct. at 679 (Brennan, J., dissenting).

[126] *Id.*

[127] *Id.*

[128] *Id.* at 680 (emphasis in original).

[129] *Id.*

acquittal may be used to enhance a defendant's sentence under a sentencing scheme that requires a lower standard of proof.[130] Surely, the Court should find these situations to be offensive to the doctrine of collateral estoppel.

Second, many courts that permit the evidence of prior criminal conduct do not allow the defendant to inform the jury of his prior acquittal.[131] These courts base this decision on several basic theories: a) the evidence of the acquittal itself is not relevant to the present case;[132] b) the jury should not be confused by the additional information of an acquittal which could mislead them into believing that the defendant absolutely did not commit the prior similar acts;[133] and c) the Federal Rules of Evidence except from the operation of the hearsay rule only judgments of conviction, not judgments of acquittal.[134] By preventing the defendant from informing the trier of fact of his prior acquittal, a court essentially disregards the innocence of the defendant.

Third, there should be an absolute bar on evidence from a prior acquittal because a court runs the risk that the jury will convict the defendant based on his prior criminal conduct.[135] One lower federal court has stated:

> One of the dangers inherent in the admission of extrinsic offense evidence is that the jury may convict the defendant not for the offense charged but for the extrinsic evidence. This danger is particularly great where . . . the extrinsic activity was not the subject of a conviction; the jury may feel the defendant should be punished for that activity *even if he is not guilty of the offense charged.*[136]

Hence, a jury may find the accused innocent of the present charge, yet want to convict the accused because they feel the accused was guilty of the prior acquitted charge. Thus, the inherently prejudicial nature of such evidence

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[130] *Id.*

[131] *See* United States v. Jones, 808 F.2d 561 (7th Cir. 1986), *cert. denied*, 481 U.S. 1006 (1987); United States v. Viserto, 596 F.2d 531 (2d Cir. 1979); State v. Feela, 101 Wis. 2d 249, 304 N.W.2d 152 (Ct. App. 1981); People v. Bolden, 98 Mich. App. 452, 296 N.W.2d 613 (1980).

[132] *Feela*, 101 Wis. 2d at 264, 304 N.W.2d at 159.

[133] *Bolden*, 98 Mich. App. at 461, 296 N.W.2d at 617.

[134] *Viserto*, 596 F.2d at 537.

[135] Yet, a state may not punish a person for his character; the state may only criminalize anti-social acts. *See* E. IMWINKELREID, *supra* note 36, § 1:03, at 5.

[136] United States v. Beechum, 582 F.2d 898, 914 (5th Cir. 1978) (en banc) (citations omitted) (emphasis added).

increases the risk that the jury erroneously will convict the defendant of the present charge.

Finally, fundamental fairness mandates the exclusion of evidence of prior criminal conduct for which the defendant has been acquitted. In *Dowling*, the Court placed too much credence in the "effective" use of jury limiting instructions under Federal Rule of Evidence 106. There is no guarantee that a jury will not draw the inference that the defendant is a "bad" person or has the propensity for criminal conduct.[137] Indeed, the evidence unquestionably tends to prove the defendant's character, and the jury may succumb to the "he did it once before syndrome."[138] In his classic work, *Convicting the Innocent*,[139] Professor Borchard examined the cases of sixty-five wrongfully convicted defendants. He found that at many of the defendants' trials, the introduction of their prior criminal conduct was "fatal" to their case.[140] The evidence "inspired" a "prejudice . . . in the minds of the jury."[141] A more recent study found that juries are twenty-seven percent more likely to convict a defendant when informed of his prior criminal conduct.[142]

VII. CONCLUSION

The Supreme Court failed to recognize important policy considerations when it decided *Dowling*. Not only did the Court misapply prior doctrine,[143] the Court also forgot the importance of an acquittal.[144] The Court should have looked to the real purpose for excluding prejudicial evidence:

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[137] FED. R. EVID 403.

[138] *See* Note, *Limiting the Use of Prior Bad Act and Convictions to Impeach the Defendant-Witness*, 45 ALB. L. REV. 1099, 1104 (1981).

[139] E. BORCHARD, CONVICTING THE INNOCENT (1932).

[140] E. BORCHARD, *supra* note 139, at xvi. *See also* Jones, *Convicting the Innocent—Revisited: A Remedy Afforded by Federal Rule 609*, 38 MO. B.J. 168 (April-May 1982).

[141] E. BORCHARD, *supra* note 139, at xvi. *See also* Jones, *supra* note 140, at 168; Reed, *Admission of Other Criminal Act Evidence After Adoption of the Federal Rules of Evidence*, 53 U. CIN. L. REV. 113 (1984).

[142] *See supra* note 19 and accompanying text. *See generally supra* notes 17–20 and accompanying text.

[143] *See supra* notes 90–115 and accompanying text.

[144] *See* Tibbs v. Florida, 457 U.S. 31, 41 (1982) (stating that the double jeopardy clause attaches "great weight" to an acquittal). *See also* United States V. DiFrancesco, 449 U.S. 117, 129 (1980).

> "It may almost be said that it is because of this indubitable Relevance of such evidence that it is excluded. It is objectionable, not because it has no appreciable probative value, but because it has too much. The natural and inevitable tendency of the tribunal—whether judge or jury—is to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge."[145]

When a defendant is acquitted of a prior crime, he should "be treated as an innocent and in the interests of fairness and finality made no more to answer for his alleged crime."[146] The approach taken by the Supreme Court in *Dowling* is simply repugnant to the concepts of due process and double jeopardy. An absolute exclusion would better serve the interests of society and the policies underlying the United States Constitution. It is commonly said that a defendant in a criminal case is presumed innocent until proven guilty. However, by admitting evidence from a prior acquittal, the defendant is no longer treated as an innocent. Rather, the acquitted defendant must continue to answer for his prior alleged crime.

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[145] State v. Little, 87 Ariz. 295, 306, 350 P.2d 756, 763 (1960) (quoting 1 J. WIGMORE, WIGMORE ON EVIDENCE § 194 (3d ed. 1939)).

[146] State v. Wakefield, 278 N.W.2d 307, 308 (Minn. 1979).