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## Introduction

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## NOTE

### Evidence of Prior Acquitted Conduct Under Rule 404(b): Why Collateral Estoppel Is No Bar in Unrelated Criminal Trials

#### *Introduction*

As a general rule, evidence of a criminal defendant's prior misconduct is not admissible to prove the defendant's propensity to act in accord with past behavior.<sup>1</sup> Even so, evidence of prior misconduct may be admissible for a number of other purposes.<sup>2</sup> To be considered relevant, however, the evidence of prior misconduct must be such that a reasonable jury could find by a preponderance of the evidence that the defendant in fact engaged in the prior misconduct.<sup>3</sup>

One particularly troubling question regarding the evidentiary use of prior misconduct concerns the treatment to be afforded evidence related to crimes for which the defendant has been acquitted. A number of defendants have contended that a prior jury's factual determinations<sup>4</sup> should be given preclusive effect in subsequent, unrelated criminal proceedings.<sup>5</sup> These arguments are generally based on the double jeopardy clause, the collateral estoppel doctrine, and the due process clause.

1. Rule 404(b) of the Federal Rules of Evidence states:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

FED. R. EVID. 404(b).

2. *Id.*

3. See *Huddleston v. United States*, 485 U.S. 681, 689 (1988) ("In the Rule 404(b) context, similar act evidence is relevant only if the jury can reasonably conclude the act occurred and that the defendant was the actor.").

4. Hereinafter, prior acquitted conduct will refer to facts determined by a previous jury which were necessary to the previous judgment. These facts are generally referred to as ultimate facts. For example, if the jury fails to find that the defendant was present when the crime occurred, the determination would be an ultimate fact if the defendant's presence is required to return a guilty verdict.

5. The subject of this note is limited to those situations in which the prior acquitted conduct is introduced in subsequent criminal trials arising from transactions distinct from the facts giving rise to the prior criminal proceeding. In subsequent criminal trials related to the same transaction as the prior acquitted conduct, double jeopardy concerns may be present that are not applicable when the evidence is introduced under rule 404(b) in an unrelated criminal trial. See generally Poulin, *Collateral Estoppel in Criminal Cases: Reuse of Evidence After Acquittal*, 58 U. CIN. L. REV. 1 (1989). Throughout this note, "unrelated criminal trial" refers to a trial arising from a transaction distinct from the prior acquitted conduct.

Should a jury verdict in the defendant's favor preclude introduction of this evidence in an unrelated criminal trial? One might reflexively answer "yes" to this question. However, in *Dowling v. United States*,<sup>6</sup> the United States Supreme Court held that a rigid exclusion of this type of evidence is not required by the double jeopardy clause, the doctrine of collateral estoppel, or the due process clause. This note will examine the validity of the Court's rationale in relation to the double jeopardy clause and the doctrine of collateral estoppel as it has developed in the criminal context.

### *Double Jeopardy and Collateral Estoppel*

Embodied within the fifth amendment of the United States Constitution is the guarantee that persons will not be placed in jeopardy twice for the same offense.<sup>7</sup> Although the concept seems simple enough, one writer has noted that the rule remains "more commonly revered than understood."<sup>8</sup> Two questions appear to generate most misunderstandings regarding the double jeopardy clause. First, what is jeopardy?<sup>9</sup> And second, what

6. 110 S. Ct. 668, 669, 672 (1990).

7. U.S. CONST. amend. V. "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

8. Comment, *Twice in Jeopardy*, 75 YALE L.J. 262, 263 (1965) [hereinafter *Twice in Jeopardy*]. Two basic principles underlie the double jeopardy clause. The first principle forbids the state from retrying a defendant following a conviction or acquittal. The principle is expressed in the maxim *nemo debet bis vexari pro una et eadem causa*: "no one should be twice vexed for one and the same cause." *Id.* at 265 & n.11. At least three policies support the application of the first principle. First, following an acquittal, the prosecution should not be allowed to try the case before several juries in an attempt to find a jury that is sympathetic to the state's case concerning guilt. Second, following a conviction, the prosecution should not be allowed to search for a judge who will impose a more severe penalty. Third, prosecutors should not be allowed to use successive trials to harass defendants. *Id.* at 266-67. Clearly, these policies focus on preventing unacceptable conduct on the part of the state.

One commentator has summed up the underlying principle by stating, "once acquitted or convicted of crime for his conduct in a particular transaction, a defendant should be able to consider the matter closed and plan his life ahead without the threat of subsequent prosecution and possible imprisonment for the same conduct." Note, *Statutory Implementation of Double Jeopardy Clauses: New Life for a Moribund Constitutional Guarantee*, 65 YALE L.J. 339, 341 (1956) [hereinafter *Statutory Implementation*].

The second principle forbids the state from imposing multiple punishments upon the defendant for the same offense. The principle is expressed in the maxim *nemo debet bis puniri pro uno delicto*: "one punishment for one wrong." *Twice in Jeopardy, supra*, at 265 & n.12.

One author has characterized the prohibition against multiple trials as a "procedural" protection, while characterizing the prohibition against multiple punishment as a "substantive" protection. *Statutory Implementation, supra*, at 341. Under this dichotomy, the substantive policies underlying the double jeopardy clause protect the defendant's interest in escaping multiple punishment, while the procedural policies should operate to protect the defendant from overreaching or harassment by the government. *Id.*

9. *Twice in Jeopardy, supra* note 8, at 263 n.3. Most controversies involving the meaning of jeopardy appear to concern the question of when jeopardy first attaches. *Id.* However, in *Wingate v. Wainwright*, 464 F.2d 209 (5th Cir. 1972), the court addressed the

constitutes the same offense?<sup>10</sup>

The question of whether prior acquitted conduct may be used as evidence in a subsequent prosecution is no exception. At the heart of the controversy concerning the evidentiary use of prior acquitted conduct is the question of what constitutes jeopardy.<sup>11</sup> In addition, the question of what constitutes the same offense is at the heart of those cases establishing the collateral estoppel doctrine as a component of the protection against double jeopardy.<sup>12</sup>

In *Ashe v. Swenson*,<sup>13</sup> the United States Supreme Court determined that the doctrine of collateral estoppel is included within the prohibition against double jeopardy.<sup>14</sup> In *Ashe*, the defendant was charged with taking part in the concurrent robbery of six poker players. The state proceeded to trial, charging the defendant with the robbery of one of the players. Because it was clear that each of the six men had in fact been robbed, the only real issue was whether the defendant had been one of the robbers.<sup>15</sup>

Following an acquittal on the charge of robbing the first player, the defendant was tried and convicted for robbing a second player. Because the second jury found the defendant guilty of the same transaction that had formed the basis of the prior acquittal, the defendant challenged his conviction on double jeopardy grounds.

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question of whether the defendant had been placed in "jeopardy" a second time. See *infra* notes 34-44 and accompanying text.

10. Generally, there are two approaches for determining what constitutes the "same offense" for double jeopardy purposes. The first defines "same offense" based on the defendant's actions. Under this approach, the same offense includes all of the defendant's actions that can reasonably be characterized as the "same transaction." See *Ashe v. Swenson*, 397 U.S. 436, 448-60 (1970) (Brennan, J., concurring, joined by Douglas, J., and Marshall, J.). For example, if a defendant robs a store and murders a clerk during the course of the robbery, each crime is part of the same offense under the same transaction test.

The second approach defines "same offense" based on the evidence necessary to convict the defendant. Under this approach, the same offense includes those statutorily defined crimes which are supported by the same evidence. In the above example, the robbery and the murder would constitute two offenses under the same evidence analysis. Because robbery and murder each require elements not required by the other, the same evidence will not support a conviction for both. Thus, the crimes are two offenses under the same evidence approach. For an in depth discussion of the different approaches defining the "same offense," see *Twice in Jeopardy*, *supra* note 8. See also Thomas, *The Prohibition of Successive Prosecutions for the Same Offense: In Search of a Definition*, 71 IOWA L. REV. 323 (1986).

11. See *Wingate v. Wainwright*, 464 F.2d 209 (5th Cir. 1972).

12. *Ashe v. Swenson*, 397 U.S. 436 (1970) introduced the doctrine of collateral estoppel as a constitutional component of the double jeopardy clause to avoid a strict application of the "same evidence" approach to defining the "same offense" after an acquittal. See *infra* notes 13-19 and accompanying text.

13. 397 U.S. 436 (1970).

14. *Id.* at 443.

15. *Id.* at 445.

In overturning the defendant's conviction, the Court held that the collateral estoppel doctrine is a part of the fifth amendment's protection against double jeopardy.<sup>16</sup> In so doing, the Court significantly expanded the scope of "same offense."<sup>17</sup> The Court reasoned that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit."<sup>18</sup> Apparently, the plurality in *Ashe* used the doctrine of collateral estoppel to expand the same offense concept when the prior trial results in acquittal, while avoiding the more expansive "same transaction"<sup>19</sup> test advocated by the three concurring justices. Although the plurality in *Ashe* used the collateral estoppel doctrine as a tool to limit the scope of the same offense concept, some courts have lifted *Ashe's* words out of context and used the holding as a "springboard"<sup>20</sup> to dispose with the same offense component of double jeopardy altogether. Courts have accomplished this result by expanding the concept of jeopardy to include not only retrial on charges necessarily determined by the first trial, but also relitigation of determined issues used as evidence in subsequent trials.<sup>21</sup>

Since *Ashe*, courts have struggled with the proper scope of the collateral estoppel doctrine as applied in subsequent criminal trials. Generally, courts have taken three positions regarding the evidentiary use of facts previously litigated in criminal trials.<sup>22</sup> Two of the three approaches bar

16. *Id.*

17. Before *Ashe*, the two prosecutions would not have been barred by the double jeopardy clause. See *Hoag v. New Jersey*, 356 U.S. 464, 466-67 (1958). Under a strict application of the "same evidence" test, the crime of robbing the first player would have constituted an offense separate from the offense of robbing the second player. Because there were two victims, evidence regarding the victim of the robbery was necessarily different in the second trial.

18. *Ashe*, 397 U.S. at 443. The Court's lack of precision in defining collateral estoppel gave rise to the split among the circuit courts and the subject of this note. Traditionally, collateral estoppel only applied when the fact determined was an ultimate fact in the first trial as well as an ultimate issue in the second trial. Since *Ashe*, however, courts have taken various positions as to whether the collateral estoppel doctrine applies when the determined issue constitutes only an evidentiary fact in a subsequent criminal trial. Taken literally, *Ashe's* definition of collateral estoppel would seem to bar even the evidentiary use of prior acquitted conduct in an unrelated criminal trial. 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, 519 (1974) [hereinafter *Expanding Double Jeopardy*].

19. In *Ashe*, three concurring justices favored including within the definition of "same offense" all crimes which constituted a single criminal transaction. The "same transaction" approach would not only preclude relitigation of an issue constituting an ultimate issue in the first and second trial, but would also require the prosecution to join all criminal charges arising from a criminal transaction into one trial under most circumstances. *Ashe*, 397 U.S. at 448-60.

20. *Expanding Double Jeopardy*, *supra* note 18, at 529.

21. See, e.g., *United States v. Mulherin*, 710 F.2d 731 (11th Cir.), cert. denied, 464 U.S. 964 (1983), cert. denied, 465 U.S. 1034 (1984); *United States v. Mespouledé*, 597 F.2d 329 (2d Cir. 1979); *Wingate v. Wainwright*, 464 F.2d 209 (5th Cir. 1972).

22. This statement refers only to courts' treatment of the issue in the collateral estoppel

the introduction of evidence forming the basis of a prior acquittal.<sup>23</sup> The third approach refuses to extend collateral estoppel, double jeopardy, or the due process clause to rigidly bar evidence related to prior acquittals. The third approach has been followed by the majority of courts since *Ashe*<sup>24</sup> and has recently been mandated in the federal courts by the Supreme Court's decision in *Dowling v. United States*.<sup>25</sup>

### *Expanding the Scope of Collateral Estoppel*

Prior to *Dowling*, some federal courts barred the evidentiary use of prior acquitted conduct by invoking the collateral estoppel doctrine without concluding that the introduction of prior acquitted conduct places the defendant in jeopardy.<sup>26</sup> In *United States v. Johnson*,<sup>27</sup> the defendants were charged with counterfeiting United States currency. The defendants claimed they lacked the requisite intent to commit the alleged crime.

To counter this defense, the prosecution sought to introduce evidence of the defendants' involvement in a prior scheme<sup>28</sup> to counterfeit currency.

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and double jeopardy context. Courts also exclude the evidentiary use of prior acquitted conduct on other grounds.

These courts reason that the evidentiary use of prior acquitted conduct would be fundamentally unfair to the criminal defendant or that the prejudicial nature of the evidence necessarily outweighs the probative value. *See, e.g.*, *State v. Little*, 87 Ariz. 295, 350 P.2d 756 (1960); *State v. Perkins*, 349 So. 2d 161 (Fla. 1977); *State v. Wakefield*, 278 N.W.2d 307 (Minn. 1979); *State v. Holman*, 611 S.W.2d 411 (Tenn. 1981).

23. One approach bars the evidentiary use of prior acquitted conduct based on the doctrine of collateral estoppel without invoking double jeopardy analysis. *See, e.g.*, *United States v. Dowling*, 855 F.2d 114 (3d Cir. 1988), *aff'd*, 110 S. Ct. 668 (1990); *United States v. Johnson*, 697 F.2d 735 (6th Cir. 1983); *United States v. Keller*, 624 F.2d 1154 (3d Cir. 1980).

The second approach bars the evidence based on constitutionally mandated collateral estoppel analysis. These courts extend *Ashe's* constitutional collateral estoppel analysis to include the evidentiary use of prior acquitted conduct even when the second trial has no relation to the first. *See, e.g.*, *Buck v. Maschner*, 878 F.2d 344 (10th Cir. 1989); *United States v. Gonzalez-Sanchez*, 825 F.2d 572 (1st Cir.), *cert. denied*, 484 U.S. 989 (1987); *Albert v. Montgomery*, 732 F.2d 865 (11th Cir. 1984); *Blackburn v. Cross*, 510 F.2d 1014 (5th Cir. 1975); *Wingate v. Wainwright*, 464 F.2d 209 (5th Cir. 1972). *Cf.* *United States v. Mespouledé*, 597 F.2d 329 (2d Cir. 1979) (Although the second criminal trial was related to the prior acquitted conduct, the court appeared to endorse a blanket exclusion of prior acquitted conduct evidence.).

24. Comment, *Admissibility of Prior Acquitted Crimes Under Rule 404(b): Why the Majority Should Adopt the Minority Rule*, 16 FLA. ST. U.L. REV. 1033, 1035 (1989) [hereinafter *Prior Acquitted Crimes*]; Annotation, *Admissibility of Evidence as to Other Offense as Affected by Defendant's Acquittal of That Offense*, 25 A.L.R. 4th 934, 939-40 (1983). *See, e.g.*, *United States v. Riley*, 684 F.2d 542 (8th Cir. 1982), *cert. denied*, 459 U.S. 1111 (1983); *King v. Brewer*, 577 F.2d 435 (8th Cir. 1978), *cert. denied*, 440 U.S. 918 (1979); *Smith v. State*, 409 So. 2d 455 (Ala. Crim. App. 1981); *People v. Bolden*, 92 Mich. App. 421, 285 N.W.2d 210 (1979); *State v. Smith*, 271 Or. 294, 532 P.2d 9 (1975).

25. 110 S. Ct. 668 (1990).

26. *See supra* note 23.

27. 697 F.2d 735 (6th Cir. 1983).

28. Although evidence showing the existence of a common scheme or plan may be

Although the defendants had been acquitted of the previous charges, the record was unclear as to the basis of the acquittal.<sup>29</sup>

*Johnson* held that the evidence could be barred by the collateral estoppel doctrine if the first jury had determined that the defendants did not engage in the prior acts.<sup>30</sup> The court noted, however, that the double jeopardy clause was not applicable because the prior acquittal was based on a distinct transaction.<sup>31</sup>

In holding that the collateral estoppel doctrine could bar the prior acquitted conduct evidence, the Sixth Circuit significantly expanded the doctrine in two respects. First, the court ignored the traditional distinction between "ultimate" and "evidentiary" facts.<sup>32</sup> Second, the court departed from a recognized exception to the doctrine that applies when the parties are litigating the issue under a different burden of proof in the second trial.<sup>33</sup>

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admissible under rule 404(b), in *Johnson* the government sought to introduce the prior action by the defendants as evidence of the defendants' state of mind. *Johnson*, 697 F.2d at 738.

29. From the record available on appeal, the court could not determine whether the jury determined that the defendants did not engage in the alleged acts or whether the jury failed to find the requisite criminal intent. *Id.* at 740.

30. *Id.*

31. *Id.* at 739.

32. An ultimate fact is a fact necessary for a judgment, while an evidentiary fact is a fact from which an ultimate fact can be inferred. The *Evergreens v. Nunan*, 141 F.2d 927, 928 (2d Cir.), cert. denied, 323 U.S. 720 (1944). In *Yates v. United States*, the Court stated, "The normal rule is that a prior judgment need be given no conclusive effect at all unless it establishes one of the ultimate facts in issue in the subsequent proceeding. So far as merely evidentiary or 'mediate' facts are concerned, the doctrine of collateral estoppel is inoperative." *Yates v. United States*, 354 U.S. 298, 338 (1957), overruled, 437 U.S. 1 (1978).

One writer has noted that the rule "appears to be based on the belief that it is unfair to allow issues determined at the first proceeding to be conclusive in a subsequent situation when it would have been highly unlikely at the time of the first suit to appreciate the future importance and use of those issues." *Expanding Double Jeopardy*, *supra* note 18, at 519 n.42.

The Restatement has addressed this concern by providing for an exception to the application of collateral estoppel when "it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action . . . ." RESTATEMENT (SECOND) OF JUDGMENTS § 28(5)(b) (1980). Based on these justifications, the distinction between ultimate and evidentiary facts does not appear to be warranted in the context of criminal proceedings. Most prosecutors would likely "appreciate the future importance and use" of evidence related to criminal acts.

However, another justification for the distinction between ultimate and evidentiary facts exists in criminal trials. In a criminal trial, ultimate facts and evidentiary facts are subject to different standards of proof. See *infra* text accompanying notes 53-57.

33. The *Restatement (Second) of Judgments*, setting forth the general rule regarding collateral estoppel, states: "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1980).

However, the *Restatement* also lists several recognized exceptions to the general rule. In

### *Expanding the Scope of Jeopardy*

In *Wingate v. Wainright*,<sup>34</sup> the Fifth Circuit not only expanded the collateral estoppel doctrine, but also adopted a novel and expansive view of jeopardy under the double jeopardy clause.<sup>35</sup> Unlike *Johnson*, *Wingate* held that the double jeopardy clause was applicable even though the two trials did not arise from the same transaction.<sup>36</sup>

Because the trials arose from distinct transactions, *Wingate* reasoned that the double jeopardy clause did not bar the second prosecution.<sup>37</sup> Nevertheless, the court held that the introduction of evidence related to the prior acquittal subjected the defendant to "jeopardy" which was prohibited by the double jeopardy clause.<sup>38</sup>

*Wingate* based its expansive holding upon two premises. First, the court quoted *Ashe's* definition of collateral estoppel.<sup>39</sup> Because *Ashe* had not limited its language to address only those cases in which the relitigated issue was an ultimate fact in the second trial, the Fifth Circuit found no reason to limit the doctrine to the circumstances addressed in *Ashe*.<sup>40</sup> Apparently, *Wingate* reasoned that *Ashe's* rejection of the same transaction test advocated by the concurring justices allowed for an expansion of collateral estoppel beyond the facts in *Ashe*.<sup>41</sup> However, *Wingate's* reliance on the *Ashe* plurality for this result was misplaced.<sup>42</sup>

Second, *Wingate* reasoned that the evidentiary use of prior acquitted conduct placed the defendant in the same "quality of jeopardy"<sup>43</sup> as

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*Johnson*, the court did not address the exception to collateral estoppel that applies when:

The party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; the burden has shifted to his adversary; or the adversary has a significantly heavier burden than he had in the first action . . . .

RESTATEMENT (SECOND) OF JUDGMENTS § 28(4) (1980).

34. 464 F.2d 209 (5th Cir. 1972).

35. *Wingate* appears to be the first court to find the evidentiary use of prior acquitted conduct prohibited under the double jeopardy clause. *Expanding Double Jeopardy*, *supra* note 18, at 523.

36. *Wingate*, 464 F.2d at 214.

37. *Id.*

38. *Id.*

39. *Id.* at 212.

40. *Id.* at 213.

41. *Id.*

42. Because the plurality in *Ashe* invoked the doctrine of collateral estoppel to avoid the expansiveness of the same transaction test advocated by the concurring justices, it would seem unlikely that the Court intended the doctrine to apply to cases having no relation at all to the first trial. See *Expanding Double Jeopardy*, *supra* note 18, at 528.

43. The court reasoned:

We do not perceive any meaningful difference in the quality of "jeopardy" to which a defendant is again subjected when the state attempts to prove his guilt by relitigating a settled fact issue which depends upon whether the relitigated issue is one of "ultimate" fact or merely an "evidentiary" fact in the second prosecution. In both instances the state is attempting to prove the defendant guilty of an offense other than the one of which he was acquitted.



retrying an issue constituting an ultimate fact in the first and second trial. By inventing this expansive view of jeopardy, the court escaped the obvious conclusion that the two trials were not based upon the same offense.<sup>44</sup>

*Dowling v. United States*

Reuben Dowling was charged with robbing a bank while wearing a ski mask and carrying a small pistol. At his trial for bank robbery, the prosecution introduced the testimony of Vena Henry. Henry testified that Dowling, together with another man, Christian, had entered her home wearing a ski mask and carrying a small pistol approximately two weeks after the bank robbery.<sup>45</sup>

Although Dowling had been tried and acquitted of the charges arising from Henry's testimony,<sup>46</sup> the trial judge allowed the evidence to be introduced for two purposes. First, the evidence corroborated eyewitness testimony concerning the identity of the masked bank robber. Second, the testimony was admitted as circumstantial evidence linking Dowling to Christian who had been seen in front of the bank immediately prior to the robbery.<sup>47</sup>

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In both instances the relitigated proof is offered to prove some element of the second offense. In both instances the defendant is forced to defend against charges or factual allegations which he overcame in the earlier trial.

*Wingate*, 464 F.2d at 213-14.

44. *Wingate's* quality of jeopardy argument seems to be based upon the court's notions of fairness rather than a principled application of either the collateral estoppel doctrine or the policies underlying the double jeopardy clause. See *infra* notes 83-90 and accompanying text. Indeed, the court stated: "It is fundamentally unfair and totally incongruous with our basic concepts of justice to permit the sovereign to offer proof that a defendant committed a specific crime which a jury of that sovereign has concluded he did not commit." *Wingate*, 464 F.2d at 215. See also *United States v. Mespouledé*, 597 F.2d 329, 335 (2d Cir. 1979) ("To put it bluntly, to refuse to allow the assertion of collateral estoppel in this case would simply be inequitable.").

45. At each trial, Henry testified that during a struggle between herself and Dowling she had removed Dowling's mask and thus was able to identify him as the person who had entered her home.

46. It appears likely that the prior acquittal in the Henry case was not based upon the jury's failure to find that Dowling was present in the Henry home. The trial judge who heard both cases against Dowling noted, "Mr. Dowling's presence in the house was not seriously contested in the case . . ." *Dowling*, 110 S. Ct. at 674.

47. Henry testified that Christian was with Dowling when they broke into her house. The prosecution had also presented evidence that Dowling had borrowed a white Volkswagen the day before the robbery. The prosecution sought to link Dowling to Christian because a police officer testified that Christian and another individual were sitting outside the bank in a white Volkswagen with the door open immediately prior to the robbery. After the police officer instructed Christian to close the door, Christian drove away from the bank, and the police officer followed. Witnesses testified that the bank robber ran from the bank and "looked up and down the street outside the bank before commandeering a taxi van." Respondent's Brief at 6, *Dowling v. United States*, 110 S. Ct. 668 (1990) (No. 88-6025).

On appeal to the Third Circuit, Dowling claimed that the introduction of Henry's testimony constituted error. The Third Circuit agreed, concluding that the evidence was barred by nonconstitutional collateral estoppel and by the Federal Rules of Evidence.<sup>48</sup> However, the court determined that the error was harmless under the standard of review for nonconstitutional error.<sup>49</sup>

On appeal to the United States Supreme Court, Dowling contended that the evidence should have been barred under the double jeopardy and due process clauses of the United States Constitution. Based on the assertions of constitutional error, Dowling claimed that the Third Circuit erred in applying the standard of review for nonconstitutional error.

In a 6-3 opinion,<sup>50</sup> the Court rejected Dowling's double jeopardy and due process claims and upheld the conviction.<sup>51</sup> In addition, the majority criticized the Third Circuit's use of collateral estoppel to mechanically bar all evidence of prior acquitted conduct in subsequent criminal trials.<sup>52</sup> In dispensing with Dowling's claims, the Court based its holding on three principles.

First, the Court employed a straight-forward rationale concerning the different standards for proving guilt and introducing evidence.<sup>53</sup> In the first trial, the government was required to prove beyond a reasonable doubt that Dowling was present in Henry's home. However, to introduce

48. The Third Circuit based its holding upon two premises. First, the court held that the evidence should have been barred under nonconstitutional collateral estoppel similar to the approach in *Johnson. Dowling*, 855 F.2d at 121.

Second, the court held that the prejudicial nature of the evidence substantially outweighed its probative value under rule 403 of the Federal Rules of Evidence. *Id.* at 122. Rule 403 states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

49. Under *Chapman v. California*, when constitutional error is found, the government must "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24 (1967).

Because the Third Circuit deemed the error to be nonconstitutional in nature, the court applied the "highly probable" standard in reviewing whether the error was harmless. Under the "highly probable" standard, the court must have a "sure conviction that the error did not prejudice the defendant." However, the court "need not disprove every 'reasonable possibility' of prejudice." *Dowling*, 855 F.2d at 122-23 (*quoting* *United States v. Grayson*, 795 F.2d 278, 290 (3d Cir. 1986), *cert. denied*, 479 U.S. 1054 (1987), *cert. denied*, 481 U.S. 1018 (1987)).

50. Justice White authored the Court's opinion, joined by Chief Justice Rehnquist and Justices Blackmun, O'Connor, Scalia and Kennedy. Justice Brennan dissented, joined by Justices Marshall and Stevens. Today the vote would likely be 7-2 upholding the constitutionality of admitting prior acquitted conduct in subsequent criminal proceedings. *See State v. Sefton*, 125 N.H. 533, 485 A.2d 284 (1984) (then-New Hampshire Supreme Court Judge Souter writing for a unanimous court upholding the constitutionality of admitting prior acquitted conduct in a subsequent criminal trial).

51. *Dowling*, 110 S. Ct. at 675.

52. *Id.* at 673.

53. *Id.* at 672-73.

evidence of prior misconduct under the Federal Rules of Evidence,<sup>54</sup> the evidence must be such that a reasonable jury could find by a preponderance of the evidence that the defendant engaged in the misconduct.<sup>55</sup> Thus, a reasonable jury could find that Henry's testimony met the standard for admissibility even though it was not sufficient to convince a jury beyond a reasonable doubt.<sup>56</sup> For the purpose of admissibility, the issue was not decided in the prior proceeding.

Of course, this rationale not only disposed of Dowling's claim of constitutional collateral estoppel, but also invalidated the exclusion of this type of evidence under common-law collateral estoppel.<sup>57</sup> As shall be discussed below, the Court was correct on both points.

Second, the Court reaffirmed the principle which requires the party seeking exclusion of an issue to prove that the issue was actually determined in the first trial.<sup>58</sup> Because Dowling failed to show that the first jury disbelieved Henry's testimony, the Court noted that Dowling would not prevail in any event.<sup>59</sup>

Third, the Court held that the introduction of the evidence was not "fundamentally unfair" under the due process clause.<sup>60</sup> While recognizing the potential for unfair prejudice which might arise from the evidentiary use of prior acquitted conduct, the Court held that nonconstitutional provisions are sufficient to safeguard the defendant's right to a fair trial.<sup>61</sup>

### *Inapplicability of Collateral Estoppel*

In *Huddleston v. United States*,<sup>62</sup> the Court held that the relevance of prior misconduct evidence is established if a reasonable jury could find by a preponderance of the evidence that the defendant engaged in the prior misconduct.<sup>63</sup> The threshold relevancy requirement is satisfied if this lower burden of proof is met. An adjudication of a fact under the "beyond a reasonable doubt" standard does not determine the fact for admissibility in a subsequent trial in which the fact is not required for a final determination.

54. FED. R. EVID. 404(b).

55. *Huddleston v. United States*, 485 U.S. 681, 689 (1988).

56. For an explanation of the "relative burdens of proof" rationale, see Note, *Evidentiary Use of Prior Acquired Crimes: The "Relative Burdens of Proof" Rationale*, 64 WASH. U.L.Q. 189 (1986) [hereinafter *Evidentiary Use*].

57. The "relative burdens of proof" rationale provided the basis for the Court's criticism of the Third Circuit for its use of nonconstitutional collateral estoppel to mechanically bar the evidentiary use of prior acquitted conduct. *Dowling*, 110 S. Ct. at 673.

58. *Id.*

59. *Id.* at 674.

60. *Id.*

61. The Court noted that the trial judge's ability to exclude prejudicial evidence under Federal Rule of Evidence 403 provides a safeguard sufficient to ensure the defendant's interest in excluding unduly prejudicial evidence. *Id.* at 675.

62. 485 U.S. 681 (1988).

63. *Id.* at 689.

In *United States v. One Assortment of 89 Firearms*,<sup>64</sup> the Court recognized and accepted the “relative burdens of proof” rationale in a unanimous decision.<sup>65</sup> In *89 Firearms*, the defendant had been tried and acquitted of charges of engaging in the business of selling firearms without a license. Following the acquittal, the government instituted a civil forfeiture proceeding to retain the defendant’s guns which were seized as a result of the criminal charge.

On appeal, the defendant claimed that his innocence was established in the criminal trial and that the forfeiture proceeding was barred by the doctrine of collateral estoppel and the double jeopardy clause. In refusing to bar the forfeiture proceeding, the Court based its holding on two distinct lines of reasoning. First, because the forfeiture proceeding was not a criminal proceeding, the action was not barred by the double jeopardy clause.<sup>66</sup>

Second, because the civil proceeding was to be conducted under a lower burden of proof, the collateral estoppel doctrine was inapplicable.<sup>67</sup> Although *89 Firearms* involved a subsequent civil trial rather than a subsequent criminal trial, the reasoning is clearly applicable to unrelated criminal cases involving the evidentiary use of prior acquittals.<sup>68</sup>

Even though the government arguably sought to relitigate an issue which was an ultimate fact in both trials,<sup>69</sup> the Court held that the doctrine of collateral estoppel was no bar to the subsequent forfeiture proceeding.<sup>70</sup> The Court’s reasoning rested squarely on the differing burdens of proof applicable in the two proceedings. In the words of the Court,

[A]n acquittal on criminal charges does not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt. . . . [T]he jury verdict in the criminal action did not negate the possibility that a preponderance of the evidence could show that [the defendant] was engaged in an unlicensed firearms business.<sup>71</sup>

Of course, *89 Firearms* was not novel in holding that the doctrine of collateral estoppel is inapplicable when the issue sought to be precluded

64. 465 U.S. 354 (1984).

65. *Id.* at 361-62.

66. *Id.* at 362.

67. *Id.* at 361-62.

68. See *Evidentiary Use*, *supra* note 56.

69. In the criminal trial, it was essential for the government to prove that the defendant had engaged in the business of selling firearms without a license. The Fourth Circuit held that the elements necessary for the government to prevail in the forfeiture proceeding had been determined against the government in the prior criminal proceeding. *United States v. One Assortment of 89 Firearms*, 685 F.2d 913, 917 (4th Cir. 1982), *rev’d*, 465 U.S. 354 (1984). Thus, the government arguably sought to relitigate the issue of whether the defendant had engaged in the business of selling firearms without a license, and a determination against the defendant was required for the government to prevail in either trial.

70. *89 Firearms*, 465 U.S. at 362.

71. *Id.* at 361-62.

is subject to different burdens of proof in the two separate actions.<sup>72</sup> Even so, in the context of subsequent criminal trials, several courts and commentators have either ignored the logic of this approach or attacked the argument while recognizing the soundness of the underlying reasoning.<sup>73</sup> Indeed, one commentator has stated that the approach "rests on technically logical reasoning," but attacks the rationale on the basis that it "ignores human nature and concepts of justice."<sup>74</sup>

### *Opposition to Dowling*

As the three-justice dissent in *Dowling* illustrates, acceptance of the majority rule regarding the evidentiary use of prior acquitted conduct remains far from universal.<sup>75</sup> Although accurately categorizing all of the opposing views is difficult, it appears that few, if any, attack the reasoning supporting the "burdens of proof" rationale except when it is applied to the evidentiary standard in a subsequent criminal trial.<sup>76</sup>

Most arguments challenging the evidentiary use of prior acquitted conduct in subsequent criminal proceedings advance policy justifications for departing from the historical application of the collateral estoppel doctrine

72. See, e.g., *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232 (1972); *Helvering v. Mitchell*, 303 U.S. 391 (1938); *Lewis v. Frick*, 233 U.S. 291 (1914). The *Restatement (Second) of Judgments* notes:

To apply issue preclusion . . . would be to hold, in effect, that the losing party in the first action would also have lost had a significantly different burden been imposed . . . This is a major reason for the general rule that, even when the parties are the same, an acquittal in a criminal proceeding is not conclusive in a subsequent civil action arising out of the same event.

RESTATEMENT (SECOND) OF JUDGMENTS § 28 comment f (1980).

73. See *supra* note 23.

74. *Prior Acquitted Crimes*, *supra* note 24, at 1051. The author argues that prior acquitted conduct should not be excluded in a subsequent civil trial such as *89 Firearms*, but argues that the evidence should be excluded in subsequent criminal cases such as *Dowling* even though the standard of admissibility is the same in both. The author purports to support this argument by stating that a criminal trial involves rights much more fundamental than the monetary stakes involved in *89 Firearms*. *Id.*

But as the Fourth Circuit noted in *89 Firearms*, the subsequent relitigation in a criminal and civil suit "amounts to substantially the same thing, with a difference only in the consequences following a judgment adverse to the claimant." *United States v. One Assortment of 89 Firearms*, 685 F.2d at 915 (quoting *Coffey v. United States*, 116 U.S. 436, 443 (1886)). If anything, the equities weigh more heavily in admitting the evidence in a subsequent criminal suit. This is true for two reasons. First, the defendant will never be faced with the prior acquittal in an unrelated criminal trial unless the government presents probable cause to believe the defendant has committed another crime. This is not the case in a subsequent civil trial. Second, the public's interest in the criminal outcome is far greater than in a civil forfeiture proceeding. In a criminal trial, the stakes are higher not only for the defendant, but for the public as well. See *infra* notes 97-110 and accompanying text.

75. *Dowling*, 110 S. Ct. at 675-80.

76. In *89 Firearms*, the Court unanimously approved the rationale in the context of a subsequent civil trial. *89 Firearms*, 465 U.S. at 362.

and the double jeopardy clause. Though closely related, the arguments generally fall within three categories.

First, opponents contend that forcing the defendant to meet evidence of prior acquitted conduct in a subsequent trial constitutes jeopardy under the double jeopardy clause.<sup>77</sup> Second, opponents contend that once a person is acquitted of a crime, that person should be viewed as innocent in the eyes of the law and no longer held to answer for the acquitted conduct.<sup>78</sup> Third, opponents contend that the inherently prejudicial and collateral nature of the evidence always substantially outweighs its probative value.<sup>79</sup>

The first category of criticism is best represented by the Fifth Circuit's approach in *Wingate v. Wainwright*.<sup>80</sup> In *Wingate*, the court held that the defendant's burden in meeting evidence of prior acquitted conduct is equal to the burden of being retried for a criminal offense.<sup>81</sup> As previously noted, the court escaped the recognized bounds of the same offense component by radically expanding the scope of jeopardy under the fifth amendment.<sup>82</sup>

The *Wingate* approach is unpersuasive. Although the court purported to uphold the policies embodied in the guarantee against double jeopardy, even commentators sympathetic to the approach recognize that the holding expanded the doctrine of jeopardy beyond the traditional policies supporting the rule.<sup>83</sup> Although the defendant is indeed subject to a burden when faced with such evidence, clearly that burden alone cannot constitute jeopardy under the double jeopardy clause.<sup>84</sup>

77. See *supra* note 23.

78. In *Dowling*, Justice Brennan stated, "Unlike the majority of the Court, I believe that at least with respect to subsequent criminal prosecutions, 'the acquitted defendant is to be treated as innocent and in the interests of fairness and finality made no more to answer for his alleged crime.'" *Dowling*, 110 S. Ct. at 679 n.6 (Brennan, J., dissenting, joined by Marshall, J., and Stevens, J., quoting *State v. Wakefield*, 278 N.W.2d 307, 308 (Minn. 1979)).

79. Although the dissent in *Dowling* did not propose a ruling based on a rationale that the prejudicial nature of the evidence always substantially outweighs the probative value, much of the dissenting opinion is devoted to the prejudicial nature of "extrinsic offense evidence" and the jury's propensity to misuse such evidence. *Dowling*, 110 S. Ct. at 679. See generally *Prior Acquitted Crimes*, *supra* note 24.

80. 464 F.2d 209 (5th Cir. 1972).

81. *Id.* at 213-14.

82. See *supra* note 43.

83. "[T]he Fifth Circuit has succeeded in expanding the double jeopardy clause beyond its traditional operational limits and beyond its traditional policy purposes." *Expanding Double Jeopardy*, *supra* note 18, at 535. See also, *Blackburn v. Cross*, 510 F.2d 1014, 1017 (5th Cir. 1975) ("In *Wingate v. Wainwright*, 464 F.2d 209 (5th Cir. 1972) this Circuit significantly expanded the *Ashe* holding.").

84. If the burden of meeting evidence of a prior acquittal alone constituted jeopardy, its use in subsequent civil proceedings would also seem to violate the double jeopardy clause. A rejection of this formulation of jeopardy is implicit in the Court's holding in *89 Firearms*. See *supra* notes 64-72 and accompanying text.

Moreover, if the burden of meeting evidence of prior misconduct in an unrelated criminal

If the burden of meeting evidence were sufficient to trigger the protection of the double jeopardy clause, then the exclusion of prior convictions would also be mandated. As previously noted, the double jeopardy clause prevents a defendant from being placed twice in jeopardy regardless of whether the previous crime resulted in a conviction or acquittal.<sup>85</sup>

Further, the defendant faces no criminal penalty for the prior offense.<sup>86</sup> While the defendant may be faced with prejudicial evidence,<sup>87</sup> in other instances of potentially prejudicial evidence, the trial judge is expected to weigh the prejudicial nature of the evidence against its probative value.<sup>88</sup> The existing rules of evidence provide sufficient safeguards to the defendant without instituting a rigid exclusion of the evidence.<sup>89</sup>

Finally, the very fact that the defendant is standing trial for a separate and distinct offense protects the defendant from the evils which the double jeopardy clause was traditionally meant to bar.<sup>90</sup> The fact that the defendant is standing trial for a distinct offense means that the government has presented evidence sufficient to establish probable cause to believe the defendant committed a second crime. Unless the government can meet this burden, there will be no trial at which to present evidence of the defendant's prior acquitted conduct. This requirement of probable cause

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trial could constitute jeopardy under the double jeopardy clause, a subsequent criminal charge based on uncharged prior misconduct evidence would seem to be precluded if evidence of the uncharged conduct was presented against a defendant in an unrelated trial. Under the logic of the *Wingate* definition of "jeopardy," jeopardy would seem to attach to prior uncharged criminal activity introduced in a criminal proceeding simply by virtue of the fact that the defendant has been forced to defend against the allegation of prior, uncharged criminal misconduct.

85. See *supra* note 8.

86. The *Wingate* approach argues that the defendant faced with evidence of a prior acquittal in a subsequent trial is faced with a criminal penalty related to the prior offense. However, this is only another argument that the jury might misuse the evidence and base its verdict in the subsequent proceeding on prejudice rather than the defendant's guilt of the subsequent offense. While the argument is persuasive on the question of excluding the evidence under rule 403 of the Federal Rules of Evidence, it offers no justification for treating this type of prejudicial evidence differently from other prejudicial evidence.

87. *Dowling*, 110 S. Ct. at 673.

88. FED. R. EVID. 403.

89. *Dowling*, 110 S. Ct. at 675.

90. The double jeopardy clause protects the defendant from governmental harassment and overreaching. See *supra* note 8. The requirement of probable cause to believe the defendant committed a second crime prevents the government from arbitrarily harassing the acquitted defendant.

Some commentators seem to argue that the double jeopardy clause is meant to protect the defendant from inconvenience rather than potential governmental misconduct. See, e.g., *Prior Acquitted Crimes*, *supra* note 24. However, the argument is not consistent with the application of the double jeopardy clause in other contexts. As one author has noted, "[h]arassment is not a synonym for inconvenience." *Twice in Jeopardy*, *supra* note 8, at 286. If the defendant's convenience were the only consideration, retrial following a successful appeal or mistrial would always be barred. Yet such is not the case. Generally, retrial is only barred when there are some circumstances which could give rise to prosecutorial harassment. "Harassment, at least in double jeopardy law, involves misconduct by the prosecutor as well as hardship to the defendant." *Id.*

protects the defendant from the prosecutorial harassment sought to be barred by the double jeopardy clause.

The second criticism of the *Dowling* approach argues that, once acquitted, the defendant should be viewed as innocent in the eyes of the law.<sup>91</sup> While the defendant should be viewed as innocent in relation to the prospect of receiving a criminal penalty for the acquitted conduct, it does not follow that the defendant should never be required to face evidence related to the acquitted conduct. A person who has been accused of a crime but not tried is also considered “innocent” until proven guilty, but evidence of uncharged misconduct is admissible in criminal trials subsequent to the misconduct.<sup>92</sup>

The flaw in rigidly barring evidence of prior acquitted conduct lies in the unrealistic assumption that the defendant is “factually innocent”<sup>93</sup> of the charges forming the basis of the acquitted conduct. The Court recognized the unrealistic nature of this assumption in *89 Firearms* when the potential costs of an unbending exclusion were far less than those encountered in criminal trials.<sup>94</sup>

Third, critics of the *Dowling* approach argue that the prejudicial nature of prior acquitted conduct must always outweigh the probative value of the evidence.<sup>95</sup> Under this approach, prior acquitted conduct evidence is generally characterized as unreliable. Evidently, the belief that the evidence is unreliable arises from the fact that a jury was unable to conclude beyond a reasonable doubt that the defendant engaged in the conduct.

Nevertheless, this approach fails to recognize the cumulative nature of evidence in an adjudicatory proceeding. The Supreme Court has noted that “individual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it. The sum of an evidentiary presentation may well be greater than its constituent parts.”<sup>96</sup>

### *Costs of the Wingate Approach*

The potential for unfair prejudice arising from prior misconduct evidence cannot be disputed. However, under some circumstances the intro-

91. See *supra* note 78.

92. See *Prior Acquitted Crimes*, *supra* note 24, at 1035.

93. *Evidentiary Use*, *supra* note 56, at 200.

94. In a criminal trial, the societal costs related to a mechanical exclusion of evidence are far higher than those related to evidentiary exclusion in the civil context. See *infra* notes 97-110 and accompanying text.

Opponents of *Dowling* correctly assert that the dangers related to the introduction of prior acquitted conduct evidence are heightened when the evidence is introduced in a subsequent criminal, rather than civil, trial. See, e.g., *Prior Acquitted Crimes*, *supra* note 24, at 1051; see also *United States v. Mespouledé*, 597 F.2d 329, 335 (2d Cir. 1979). The answer to this argument, however, is found in the trial judge's ability to exclude evidence when its prejudicial nature so warrants. When the interests of society and the defendant must be weighed, an equitable solution cannot be reached with an appellate court's thumb on the scale.

95. See *Prior Acquitted Crimes*, *supra* note 24, at 1046.

96. *Bourjaily v. United States*, 483 U.S. 171, 179-80 (1987).



duction of such evidence is so probative that its value in serving the truth-finding function outweighs the potential for prejudice.

In advocating a rigid rule of exclusion, proponents of the *Wingate* approach "attempt to raise to a federal constitutional level [the] claim that certain evidence should [be] excluded because the jury might . . . misuse[ ] it."<sup>97</sup> In doing so, the *Wingate* approach ignores the societal costs that accrue when the truth-finding process is thwarted through the use of mechanical rules to exclude relevant evidence in criminal proceedings. *Oliphant v. Koehler*<sup>98</sup> provides a useful illustration of the necessity of prior acquitted conduct in certain circumstances and the potential costs associated with mandating a rigid exclusion of prior acquitted conduct evidence under the *Wingate* approach.

In *Oliphant*, the defendant was charged with the forcible rape of a young college student. The complainant testified that she had met the defendant while "window shopping" on her way back to her college campus. After an initial exchange of friendly conversation, the defendant asked the complainant to accompany him to a bar where each of them drank a beer and talked.

Afterward, the defendant asked the complainant to accompany him to a place where they could dance. After stopping at three bars, the complainant indicated that she wanted to return to the campus. At this point, the defendant's friendly demeanor suddenly changed. The complainant testified that she was then driven to an unfamiliar area and raped.<sup>99</sup> During the drive, the defendant claimed that he had a knife or a gun and would "take care of" the complainant if she refused to remove her clothing and engage in sex. The complainant testified that after repeated threats she complied with the defendant's orders.

The complainant also testified that after the rape, the defendant drove her back to her dormitory and advised her that she could not prove that he had raped her. As the complainant departed from the defendant's car, the defendant told her to write down the license plate number of his car.<sup>100</sup>

At trial, the defendant admitted to engaging in sexual acts with the complainant and corroborated the complainant's testimony up to the point at which she claimed that his friendly demeanor changed. The defendant testified that the complainant had consented to the sexual acts and that

97. *Oliphant v. Koehler*, 594 F.2d 547, 555 (6th Cir.), cert. denied, 444 U.S. 877 (1979).

98. 594 F.2d 547 (6th Cir. 1979).

99. The complainant testified that during the drive she could not escape because the door handle on the car's passenger side was missing. One of the witnesses testifying to the defendant's alleged prior misconduct detailed how the defendant removed the handle to prevent her escape from the car.

100. This testimony closely resembled the testimony of another witness against the defendant who testified that following the alleged prior rape, the defendant offered the witness his college identification, name, and address. The prosecution alleged that the defendant supplied his identification because lack of consent would be harder to prove if the complainant appeared to know the alleged rapist.

she only became upset after intercourse had occurred. The defendant also denied the state's contention that he had orchestrated the events before and after the attack to frustrate any attempt by the complainant to prove rape.<sup>101</sup>

In an effort to rebut the defendant's claim that he had not orchestrated the events surrounding the rape, the prosecution introduced three witnesses to testify to prior acts by the defendant.<sup>102</sup> All three witnesses claimed to have been raped by the defendant within five months prior to the episode described by the complainant. Two of the three witnesses had filed charges of rape against the defendant, but the defendant was acquitted on each count. One witness claimed that she had been raped, but the defendant had not been tried on the charge. All three women were students at the complainant's college.

The three witnesses related extremely similar stories concerning the events prior to and after the alleged rapes.<sup>103</sup> Because the stories tended to prove that the defendant had an "elaborate scheme"<sup>104</sup> to discredit potential complainants' testimony, the trial court allowed the testimony and gave a limiting instruction to the jury.

Although the Sixth Circuit upheld the use of the testimony,<sup>105</sup> one commentator has noted that the testimony would have been barred under

101. *Oliphant*, 594 F.2d at 549.

102. The prior acts evidence was offered in accordance with Michigan's similar acts statute, which states:

In any criminal case where the defendant's motive, intent, the absence of, mistake or accident on his part, or the defendant's scheme, plan or system in doing an act, is material, any like acts or other acts of the defendant which may tend to show his motive, intent, the absence of, mistake or accident on his part, or the defendant's scheme, plan or system in doing the act, in question, may be proved, whether they are contemporaneous with or prior or subsequent thereto; notwithstanding that such proof may show or tend to show the commission of another or prior or subsequent crime by the defendant.

MICH. COMP. LAWS ANN. § 768.27 (West 1982).

103. Each of the four alleged rapes involved college-aged women. Each began with a public meeting and friendly conversation concerning marijuana and the defendant's problems related to racial prejudice. In each of the cases, the women went with the defendant voluntarily and had opportunities to flee before the defendant demanded sex, but not after. All four were threatened with a weapon that was never produced. Two of the women were supplied with the defendant's identification.

104. *Oliphant*, 594 F.2d at 549.

105. The Sixth Circuit prior to *Dowling* excluded some evidence of prior acquitted conduct based on the common-law doctrine of collateral estoppel. In *Oliphant*, the court appeared to strain the doctrine, holding that the prior acquittals were not necessarily based upon a finding by the juries that the defendant lacked a plan to rape young women. The court reasoned that the juries could have found that the defendant had a plan to orchestrate raping young women and still have found that the prior events resulted in consensual sex. *Id.* at 555.

Although the court professed to follow the doctrine of collateral estoppel to preclude evidence of issues determined in prior acquittals, authors have noted that the court's reasoning was flawed. The witnesses' testimony was simply not probative unless the jury was free to infer that the defendant raped the witnesses. *Prior Acquitted Crimes*, *supra* note 24, at 1052; *see also* Poulin, *supra* note 5, at 30.

the *Wingate* approach.<sup>106</sup> The circumstances described in *Oliphant* highlight the flaws in the *Wingate* approach to barring prior acquitted conduct.

First, *Oliphant* illustrates why prior acquitted conduct is not necessarily unreliable. The fact that each witness's testimony was insufficient, standing alone, to convince a jury of the defendant's guilt beyond a reasonable doubt does not indicate that the testimony was unreliable when presented as part of an "evidentiary presentation."<sup>107</sup> Little doubt exists that the three witnesses' testimony, taken together, was reliable and highly probative when received as evidence of the defendant's scheme to orchestrate the rapes to avoid detection.

To be sure, the defendant in *Oliphant* faced the burden of meeting evidence related to crimes for which he had been acquitted. One of the inconveniences defendants face when charged with a crime is the burden of meeting evidence tending to show guilt.

However, the fact that the defendant is faced with the evidentiary use of prior acquitted conduct is no reason to infer that the government is attempting to harass or persecute the defendant.<sup>108</sup> If the prosecution fails to establish probable cause to believe the defendant has committed a second crime, the defendant will never be faced with evidence of his alleged prior misconduct. The prosecution's burden of showing probable cause provides an adequate safeguard against those evils which the double jeopardy clause prohibits.

Finally, the defendant in *Oliphant* was deemed innocent of the prior charges for purposes of suffering criminal penalties for his alleged conduct. However, it would be naive and unrealistic to suggest that the prior acquittals established his "factual innocence"<sup>109</sup> of the crimes for which he was charged. An adjudication of "innocence" does not require the suppression of relevant facts which could not be proven beyond a reasonable doubt in a criminal proceeding. Such a result is not required when the issue is introduced subject to a lower standard of proof in a subsequent proceeding whether civil or criminal. Otherwise, the truth-finding process is frustrated based on an "absolutist standard"<sup>110</sup> which is founded upon unrealistic assumptions.

### Conclusion

In expanding the double jeopardy clause to include the doctrine of collateral estoppel, *Ash* provides defendants with important protection from receiving criminal penalties for conduct forming the basis of an acquittal.<sup>111</sup> Such a result is consistent with the historical policies served by the double jeopardy clause. The double jeopardy clause protects de-

106. *Prior Acquitted Crimes*, *supra* note 24, at 1052 & n.158.

107. *Bourjaily v. United States*, 483 U.S. 171, 180 (1987).

108. *See supra* note 90.

109. *Evidentiary Use*, *supra* note 56, at 200.

110. *Prior Acquitted Crimes*, *supra* note 24, at 1053.

111. *See supra* notes 8-17 and accompanying text.

defendants from those abuses which are inherent when the government may repeatedly attempt to impose criminal penalties for one offense.<sup>112</sup> However, the protection has limits which should be observed.

In relation to the evidentiary use of prior acquitted conduct in an unrelated criminal trial, the policies served by the double jeopardy clause are adequately protected by the prosecution's burden of showing probable cause before the defendant can be required to answer subsequent charges.

No doubt exists that evidence of prior acquitted conduct can be unduly prejudicial or collateral to the issues properly presented in a subsequent criminal trial. However, the answer to the prejudicial or collateral nature of the evidence does not lie in an unbending rule imposed on trial judges. Judges are adequately equipped to exclude evidence when its probative value is outweighed by its prejudicial effect.<sup>113</sup>

*Dowling v. United States* adopted a sensible approach to this problem without forcing society to bear the costs of a rigid exclusion of evidence that is unyielding to the particular circumstances of the case. While unbending rules may be justified to deter governmental misconduct in certain circumstances, the justifications for such a drastic mandate are not present when the defendant is faced with evidence of prior acquitted conduct in an unrelated criminal trial.

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112. *See supra* note 8.

113. FED. R. EVID. 403.

