ACQUITTALS IN JEOPARDY: CRIMINAL COLLATERAL ESTOPPEL AND THE USE OF ACQUITTED ACT EVIDENCE

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INTRODUCTION

A man is tried for attempting to rob a home while using a mask and gun. In spite of the victim's positive identification, he is acquitted. Later, he is brought to trial for a bank robbery committed with a mask and gun. At the second trial, the prosecution introduces evidence of the first robbery to prove defendant's identity as the masked man.¹ Persuaded that the defendant is a habitual criminal, the jury convicts. The judge, taking evidence of the earlier robbery into account during sentencing, imposes a harsher sentence.²

Was this defendant tried and punished for a crime for which he had already been acquitted? If so, should the Double Jeopardy Clause protect him? These questions, long debated in the lower courts,³ were recently addressed by the Supreme Court in Dowling.

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¹ This hypothetical closely resembles the facts of Dowling v. United States, 493 U.S. 342 (1990). Although Rule 404(b) of the Federal Rules of Evidence prohibits the use of evidence of other crimes or acts "to prove the character of a person in order to show action in conformity therewith," it allows such evidence 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). In Dowling, the trial court allowed evidence of a defendant's prior robbery acquittal to prove identity. In the prior case, the victim testified that the same defendant robbed her house while using a mask and gun. See Dowling, 493 U.S. at 344. For further discussion of this aspect of Rule 404(b), see infra notes 114-17 and accompanying text.

In this Comment, evidence of another crime or act of a defendant will be referred to as "other act evidence." If the defendant was acquitted of a crime in the earlier trial, evidence of involvement in the crime will be called "acquitted act evidence."

² Because the standard for admitting evidence of collateral acts in a sentencing hearing is lower than the reasonable doubt standard required for conviction, evidence of acquitted acts may be considered in such hearings. See infra notes 101-03 and accompanying text.

³ See Christopher Bello, Annotation, Admissibility of Evidence as to Other Offense as Affected by Defendant's Acquittal of That Offense, 25 A.L.R.4th 934, 939 (1983) ("The various jurisdictions are divided on the approach to be followed in determining the admissibility of evidence of another crime where the defendant has previously been acquitted of the other crime.").
v. United States. The Court held that the Double Jeopardy Clause does not bar the use, as other act evidence under Federal Rule of Evidence 404(b), of an act for which the defendant has previously been acquitted.

The issue presented in Dowling involves a complex interaction between the Double Jeopardy Clause, collateral estoppel doctrine, and the Federal Rules of Evidence. Longstanding precedent establishes that the protection of the Double Jeopardy Clause includes a collateral estoppel component. That is, the Double Jeopardy Clause prohibits the relitigation of any issue determined by a valid and final criminal judgment in a prior trial. However, the doctrine of collateral estoppel, developed in the civil context, requires a clear identification of the issues decided, which is

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5 See id. at 344.
6 Collateral estoppel, a doctrine developed in a civil context, prevents an issue that has been fully and fairly litigated in one suit from being relitigated in another suit between the same parties. See infra note 8.
7 See Ashe v. Swenson, 397 U.S. 436, 443 (1970) ("Although first developed in civil litigation, collateral estoppel has been an established rule of federal criminal law at least since this Court's decision more than 50 years ago in United States v. Oppenheimer, 242 U.S. 85 [1916]."). For an extended discussion of Ashe and its progeny, see infra notes 24-60 and accompanying text.
8 The Restatement of Judgments defines the doctrine of collateral estoppel in a civil context as follows:

A valid and final personal judgment is conclusive between the parties, except on appeal or other direct review, to the following extent:

(3) A judgment in favor of either the plaintiff or the defendant is conclusive, in a subsequent action between them on the same or a different claim, with respect to any issue actually litigated and determined if its determination was essential to that judgment.

RESTATEMENT (SECOND) OF JUDGMENTS § 17 (1980). This definition requires a finding that a given issue was necessary to a judgment before it may be given preclusive effect. Section 28 of the Restatement enumerates exceptions to the collateral estoppel doctrine:

Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:

(4) 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.

Id. § 28. This exception requires that an issue to be precluded must have been proved under the same burden of proof in the first action as would be required in the second action.
frustrated in the criminal context by the heavy burden of proof required for conviction and the overwhelming use of general verdicts.\textsuperscript{9}

It is difficult to apply collateral estoppel to criminal verdicts because a general verdict of acquittal does not specify which element of the offense was not proved beyond a reasonable doubt by the prosecution,\textsuperscript{10} and the rules of collateral estoppel do not allow a verdict to have preclusive effect in a subsequent proceeding where the burden of proof is lighter.\textsuperscript{11} These problems are evident in the \textit{Dowling} Court's analysis. The Court's holding rests on two conclusions: 1) the defendant, acquitted by general verdict, could not meet his burden of showing that the issue he sought to foreclose was necessary to the acquittal; and 2) collateral estoppel could not apply because the burden of proof for conviction is higher than the burden of proof for admitting other act evidence under Rule 404(b) of the Federal Rules of Evidence.\textsuperscript{12}

Although this reasoning follows logically from the civil collateral estoppel doctrine and from the Court's earlier limitations on the use of criminal collateral estoppel,\textsuperscript{13} it nonetheless appears to thwart the purposes of the Double Jeopardy Clause by "effectively forc[ing] petitioner to defend against charges for which he has already been acquitted . . . ."\textsuperscript{14} In other words, though the specific holdings of \textit{Dowling} are consistent with precedent, the Court does not adequately address an important question arising in this factual situation: is it fair to compel defendants, on pain of conviction and enhanced punishment, to defend a charge for which a jury has already acquitted them?

The Court acknowledges that the use of evidence of acquitted conduct may be unfair to defendants,\textsuperscript{15} but it asserts that "non-constitutional sources like the Federal Rules of Evidence" are adequate to deal with the "potential for abuse"\textsuperscript{16} and suggests

\textsuperscript{9} See infra notes 72-84 and accompanying text.

\textsuperscript{10} See infra note 30 for a description of the characteristics of general and special verdicts.

\textsuperscript{11} See supra note 8.


\textsuperscript{13} See infra notes 72-84 and accompanying text.

\textsuperscript{14} \textit{Dowling}, 493 U.S. at 354 (Brennan, J., dissenting).

\textsuperscript{15} See id. at 352 ("We recognize that the introduction of evidence in circumstances like those involved here has the potential to prejudice the jury or unfairly force the defendant to spend time and money relitigating matters considered at the first trial.").

\textsuperscript{16} Id. at 353 (asserting "that the trial court's authority to exclude potentially prejudicial evidence adequately addresses th[e] possibility that a jury will "convict the
therefore that constitutional protection is not only inappropriate but unnecessary. This Comment argues that the doctrine of criminal collateral estoppel, as limited by the *Dowling* decision, is inadequate to protect criminal defendants' rights under the Double Jeopardy Clause and that rules of evidence, as exemplified by the Federal Rules of Evidence,\(^1\) are inherently ineffective in counteracting the unfairness posed by the use of acquitted act evidence. Because such evidence can be extremely dangerous and prejudicial to criminal defendants, this Comment will suggest a more effective means of limiting its use while staying within the constitutional boundaries established by *Dowling*.

Part I of this Comment examines the development and purposes of the criminal collateral estoppel doctrine and its relationship to the Double Jeopardy Clause. Part II analyzes the *Dowling* decision and argues that, in emphasizing an overly formalistic interpretation of the requirements of collateral estoppel, the Court ignores substantial double jeopardy concerns and fails to protect defendants from unfair prejudice and burdensome relitigation. Part III analyzes the relationship between the purposes of criminal collateral estoppel and those of the Federal Rules of Evidence and challenges the *Dowling* Court's assumption that the Federal Rules of Evidence are sufficient to counter the risk of unfairness inherent in the use of acquitted act evidence. Finally, Part IV formulates a solution—supplemental special interrogatories for acquitted defendants—that would more effectively reduce this risk and protect the rights of defendants under the Double Jeopardy Clause without threatening defendant on the basis of inferences drawn from the acquitted conduct*).

17 The Federal Rules of Evidence obviously apply only in federal court, and thus the issue of whether state evidence codes can protect defendants from the unfair prejudice arising from the use of acquitted act evidence presents a related, but different, question. In making the argument that rules of evidence are insufficient to combat this prejudice, this Comment uses the Federal Rules of Evidence as an example, addressing in the notes any relevant variations in the state codes or common law of evidence. This Comment focuses on the Federal Rules not only because the *Dowling* Court specifically suggests that the Federal Rules provide adequate protection against the dangers discussed herein, but because the Federal Rules have become a model code of evidence, adopted in whole or in part by many state legislatures, and representing the law of evidence as it exists in almost half of all U.S. jurisdictions. See ERIC D. GREEN & CHARLES R. NESSON, PROBLEMS, CASES, AND MATERIALS ON EVIDENCE xxvi (1983) ("States in growing numbers (22 as of the date this book went to press) have revised their own rules to conform to the Federal Rules, thus making the Federal Rules truly a model code."). In particular, the Federal Rules closely parallel the law in most other U.S. jurisdictions regarding the admission of other act evidence. See infra note 114.
the integrity of the collateral estoppel doctrine or violating the rule of Dowling.

I. THE DEVELOPMENT AND PURPOSES OF CRIMINAL COLLATERAL ESTOPPEL

A. The Double Jeopardy Clause

The Double Jeopardy Clause of the Fifth Amendment provides that no person "shall... be subject for the same offence to be twice put in jeopardy of life or limb." The animating principle behind the Double Jeopardy Clause is the prevention of multiple trials. Numerous justifications have been advanced in support of this principle. First, multiple prosecutions would give the state a chance to use the first trial as a "dry run" and then perfect its case before going to trial again, increasing the likelihood that innocent defendants will be convicted in the subsequent prosecution. Second, barring multiple trials relieves defendants of the anxiety of anticipating reprosecution and of the time and expense of further defending against charges for which a jury has already exonerated them. Finally, judicial economy is also served by protecting the finality of judgments.

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18 U.S. CONST. amend. V. In Benton v. Maryland, 395 U.S. 784 (1969), the Court held that the Double Jeopardy Clause applies to the states through the Due Process Clause of the Fourteenth Amendment. See id. at 794.


21 See United States v. Scott, 437 U.S. 82, 91 (1978) ("To permit a second trial after an acquittal, however mistaken the acquittal may have been, would present an unacceptably high risk that the Government, with its vastly superior resources, might wear down the defendant so that 'even though innocent he may be found guilty.'" (quoting Green v. United States, 355 U.S. 184, 188 (1957))). This concern is also expressed in Ashe v. Swenson, 397 U.S. 436 (1970). See infra text accompanying note 27.

22 See Green, 355 U.S. at 187 (holding that a defendant should not be forced to "live in a continuing state of anxiety and insecurity" about reprosecution).

B. The Origin of Criminal Collateral Estoppel

It was with these concerns in mind that the Supreme Court in *Ashe v. Swenson*, extending the protection of the Double Jeopardy Clause to incorporate the doctrine of collateral estoppel, held that when an issue of ultimate fact is settled by a valid and final criminal judgment, it may not be relitigated by the same parties in any future prosecution.

In *Ashe*, the defendant was one of a group of men accused of robbing six players at a poker game. The defendant had been acquitted in a previous trial for robbery of one of the victims, despite the trial court's instruction that a finding of participation in the robbery as a whole was sufficient to convict even if the defendant had not personally robbed that victim. Following his acquittal, the defendant was tried again for the robbery of another one of the victims and was convicted. In holding the second prosecution to be a violation of the Double Jeopardy Clause, the Court focused on the fact that, despite the different charges and different evidence distinguishing the second trial from the first, the issue of whether the defendant was one of the robbers was the same: "The question is . . . simply whether, after a jury determined by its verdict that the petitioner was not one of the robbers, the State could constitutionally hale him before a new jury to litigate that issue again."

The clearly stated rationale for the Court's holding in *Ashe* reflects traditional justifications for double jeopardy protection, both in terms of preventing prosecutorial overreaching and of protecting defendants from the ordeal of multiple trials. Discussing the improvement of the state's evidence in the second trial, the Court stated: "'No doubt the prosecutor felt the state had a provable case on the first charge and, when he lost, he did what every good attorney would do—he refined his presentation in light of the turn of events at the first trial.' But this is precisely what the constitutional guarantee forbids." Addressing its incorporation of the collateral estoppel doctrine into double jeopardy protection, the Court also stated: "For whatever else that constitutional

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v. Jorn, 400 U.S. 470, 479 (1971)).
25 See id. at 443.
26 Id. at 446.
27 Id. at 447 (quoting Missouri's brief).
guarantee may embrace, . . . it surely protects a man who has been acquitted from having to 'run the gauntlet' a second time.”

C. The Relationship Between the Double Jeopardy Clause and the Collateral Estoppel Doctrine

Despite its finding that a doctrine of criminal collateral estoppel is necessary to prevent unfair relitigation, the Ashe Court recognized that criminal verdicts do not easily lend themselves to the identification of issues necessary for collateral estoppel to operate. Courts applying collateral estoppel must determine exactly which issues were finally decided by the jury,29 a determination made extremely difficult by the general verdict delivered in most criminal trials.30

28 Id. at 445-46 (quoting Green v. United States, 355 U.S. 184, 190 (1957)).
29 See supra note 25 and accompanying text.
30 A general verdict is “[a] verdict whereby the jury find [sic] either for the plaintiff or for the defendant in general terms.” BLACK'S LAW DICTIONARY 1560 (6th ed. 1990) (citing Glenn v. Sumner, 132 U.S. 152, 156 (1989)). In criminal cases, a general verdict of acquittal takes the form of a finding that the defendant is “not guilty” of the crimes charged. See id. at 1061 (defining not guilty as “the form of the verdict in criminal cases where the jury acquits the defendant”). The general verdict is distinguished from the special verdict, which takes the form of findings by the jury on specific issues of fact, from which findings the judge determines which party should prevail under the law. See FED. R. CIV. P. 49(a) (providing for special verdicts in civil cases at the judge's discretion). A third option is to require the jury to return both a general verdict and “special interrogatories,” or questions “upon one or more issues of fact the decision of which is necessary to a verdict.” BLACK'S LAW DICTIONARY, supra, at 1560. The purpose of the interrogatories is to clarify the bases for the verdict. Rule 49(b) of the Federal Rules of Civil Procedure provides for the use of special interrogatories in civil cases, and provides that the verdict may be remanded to the jury if there are inconsistencies between the verdict and the answers to the interrogatories. See FED. R. CIV. P. 49(b).

Although the use of special verdicts and special interrogatories is common and accepted in civil cases, the general verdict is still the overwhelmingly predominant form in criminal trials. One reason for this may be that, while some states have enacted specific provisions for the use of special verdicts and special interrogatories in criminal cases, see, e.g., CAL. PENAL CODE § 1150 (West 1985) and MASS. R. CRIM. P. 27(c), many have not. The Federal Rules of Criminal Procedure do not make any specific provision for their use and courts have read the omission as significant. As the First Circuit has noted:

The submission of questions to the jury in civil cases is an everyday occurrence. In criminal cases, outside of a special, narrow area, the government is not only without precedent, but faces a formidable array of objections. The simplest is that the Federal Rules of Criminal Procedure contain no provision complementing [Federal Rule of Civil Procedure] 49 covering the civil practice . . . . While the absence of a rule is not necessarily determinative, particularly in light of [Federal Rule of Criminal Procedure] 57(b), it is highly suggestive.
The prosecution must prove each element of a crime, including the identity of the perpetrator, the occurrence of the act,\(^1\) and the requisite level of intent,\(^2\) beyond a reasonable doubt.\(^3\) Since defense attorneys often assert multiple or alternative defenses, it may not be clear from a general verdict of "not guilty" which element or elements were not so proved. The Ashe Court exhorted its successors to approach this problem with "realism and rationality,"\(^4\) and to examine the entire record in order to determine the issue on which a rational jury would have grounded its verdict.\(^5\) Although this determination is necessarily inexact, the Court warned that any more restrictive test would "amount to a rejection of the rule of collateral estoppel in criminal proceedings."\(^6\)

The Court's approach, which represents a compromise between the strict application of preclusion law and the purposes served by double jeopardy protection,\(^7\) highlights the tension between these two legal doctrines underlying the operation of criminal collateral estoppel. The Double Jeopardy Clause aims to protect the individual criminal defendant by ensuring that she is not compelled to relitigate alleged criminal actions after a jury has found her not guilty. The collateral estoppel doctrine, in contrast, is intended to promote larger goals of the legal system itself, such as efficiency, fairness, and truth determination. As one commentator remarked,

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United States v. Spock, 416 F.2d 165, 180 (1st Cir. 1969). The arguments advanced in Spock against the use of special interrogatories in criminal cases are further addressed at infra notes 166-86 and accompanying text, in which this Comment argues that special interrogatories should be more widely used.

\(^1\) See, e.g., MODEL PENAL CODE § 2.01(1) ("A person is not guilty of an offense unless his liability is based on conduct which includes a voluntary act or the omission to perform an act of which he is physically capable.").

\(^2\) See, e.g., id. § 2.02(1) ("A person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense.").

\(^3\) See, e.g., id. § 1.12(1) ("No person may be convicted of an offense unless each element of such offense is proved beyond a reasonable doubt. In the absence of such proof, the innocence of the defendant is assumed.").


\(^5\) See id.

\(^6\) Id.

\(^7\) See Richard A. Brown, Comment, The Double Jeopardy Clause: Refining the Constitutional Proscription Against Successive Criminal Prosecutions, 19 UCLA L. REV. 804, 831-32 ("In Ashe, because the jury could have grounded its decision on facts which would not have negated Ashe’s guilt, the Supreme Court apparently took a broader view of an ultimate issue of fact than would be taken for purposes of civil collateral estoppel.").
Double jeopardy is concerned primarily with protecting criminal defendants from multiple prosecutions. Res judicata, on the other hand, is concerned primarily with the effects of judgments on parties to a dispute. The emphasis is more on the efficient and fair functioning of the legal system as an institution than on the relationship to personal rights of the parties.\footnote{Id. at 805 n.13.}

To promote the goal of efficiency without sacrificing the goal of truth determination, the rules of collateral estoppel, as articulated in the Restatement (Second) of Judgments, are designed to ensure that only those issues that were actually determined by a prior jury will be given preclusive effect.\footnote{See RESTATEMENT (SECOND) OF JUDGMENTS, supra note 8, § 17.} This goal conflicts with the aims of the Double Jeopardy Clause in the criminal context where the general verdict, designed to protect defendants, also frustrates the clear identification of issues necessary for the efficient operation of collateral estoppel. If collateral estoppel were applied strictly in cases like \textit{Ashe}, defendants would have no protection from burdensome relitigation.

Application of collateral estoppel in the criminal context is similarly frustrated by the heavy burden of proof required in criminal cases. Prosecutors must prove the defendant's guilt beyond a reasonable doubt.\footnote{See MODEL PENAL CODE § 1.12(1).} Whether a criminal acquittal should collaterally estop the state from relitigating the same issue in a subsequent civil trial under the more lenient preponderance of the evidence standard was not clear until the Supreme Court's 1972 case \textit{One Lot Emerald Cut Stones v. United States.}\footnote{409 U.S. 232 (1972).} In that case the Court held that an acquittal on smuggling charges did not collaterally estop the government from relitigating the smuggling issue in a subsequent civil forfeiture action. The Court found that the difference in the burden of proof in criminal and civil cases precluded the application of collateral estoppel because the acquittal "may have only represented 'an adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused'" and that "as to the issues raised, [the acquittal] does not constitute an adjudication on the preponderance-of-the-evidence burden applicable in civil proceedings."\footnote{Id. at 235 (quoting Helvering v. Mitchell, 303 U.S. 391, 397 (1938)) (citations omitted).} Thus, under this refinement of the \textit{Ashe} doctrine, an ultimate issue of fact deter-
mined by a valid and final criminal judgment can be relitigated between the same parties if the burden of proof is lighter in the second suit.

Because the second suit was a civil forfeiture action in which no criminal penalty was at risk, the Court asserted that double jeopardy concerns were not implicated. Since the constitutional rights of the defendant were not at issue, the Court saw no reason to depart from the civil rule of collateral estoppel, which would not protect the defendant from relitigating this issue. In other words, the interest of the judicial system in truth determination, which might be advanced by permitting the smuggling issue to be relitigated under a lighter standard of proof at the second trial, outweighed any concerns about subjecting the defendant to multiple prosecutions.

Under the logic of One Lot Emerald Cut Stones, concerns about the defendant's rights under the Double Jeopardy Clause would be much stronger if the second suit were criminal rather than civil. Such a case arose shortly after One Lot Emerald Cut Stones was decided, and, as might be expected, a contrary result was reached. In Wingate v. Wainwright, the Fifth Circuit held that criminal collateral estoppel forbids the relitigation of ultimate facts, even when they are only evidentiary in a second proceeding, if the second proceeding is a criminal trial. In Wingate, the defendant was

45 See id. at 235-36 ("Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense." (quoting Helvering v. Mitchell, 303 U.S. 391, 399 (1938)); see also United States v. One Assortment of 89 Firearms, 465 U.S. 354, 366 (1984) (holding that the Double Jeopardy Clause has no application where the second proceeding is not "criminal and punitive" in nature).

It should be noted, however, that with its 1986 amendment of the forfeiture statute at issue in One Lot Emerald Cut Stones, Congress effectively overruled the case's specific holding. Congress concluded that, at least in some cases, it would be unfair to allow the government to proceed with a forfeiture action if the defendant has been acquitted of the underlying crime at issue. See 18 U.S.C. § 924 (1988) ("Upon acquittal of the owner or possessor... the seized firearms or ammunition shall be returned forthwith to the owner or possessor...") (emphasis added).

44 See RESTATEMENT (SECOND) OF JUDGMENTS, supra note 8, § 28.

46 See id. at 218-15. An ultimate fact is one that is essential to the maintenance of the lawsuit, including the statutory elements of the crime. Evidentiary facts are "[t]hose facts which are necessary for determination of the ultimate facts; they are the premises upon which conclusions of ultimate facts are based." BLACK'S LAW DICTIONARY 557 (6th ed. 1990) (citing Womack v. Industrial Comm'n, 451 P.2d 761, 764 (Colo. 1969), as originating the definition). For example, in a rape case, the issue
tried for allegedly robbing a store. To prove the defendant's identity as the robber, the government introduced *modus operandi* evidence in the form of testimony from two other store owners suggesting that Wingate had robbed their stores in the past. This testimony was introduced despite Wingate's prior acquittal of each of these offenses.

This factual situation is analogous to that in *One Lot Emerald Cut Stones* in that the standard of proof necessary for the admission of other act evidence is lighter than the standard of proof needed for criminal conviction. Thus, under the rule of *One Lot Emerald Cut Stones*, the acquittal would not preclude the government from reusing this evidence. Unlike the Court in *One Lot Emerald Cut Stones*, however, the *Wingate* court found that the Double Jeopardy Clause clearly applied because the second trial was a criminal trial and the defendant thus bore the same burden (complete litigation of the issue) and faced the same risk (conviction and criminal

of whether the victim consented is an issue of ultimate fact because its resolution will determine the outcome of the prosecution. The issue of whether the victim had sexual relations with the defendant in the past is an evidentiary fact because the resolution of this question will only make it more or less likely that she consented on the occasion in question. For further explication of this distinction, see Miguel M. Delao, 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, 1036 n.20 (1989) ("Ultimate facts are those facts which must be proved to convict the defendant; they are the 'sine qua non' of the charge. [They] include, but are not limited to, the statutory elements of the crime.") (citation omitted); Paul Harper, Note, *Evidentiary Use of Prior Acquittals: When Analysis Exceeds Reality*, 24 AKRON L. REV. 199, 200 & n.13 (1990).

47 See infra notes 83 and 109 and accompanying text for a definition of *modus operandi* evidence.

48 The standard under which a party must prove that an act occurred before it may be introduced as other act evidence has always been lighter than the standard of proof necessary for criminal conviction. Recently, the Supreme Court decided in *Huddleston v. United States*, 485 U.S. 681 (1988), that other act evidence is admissible if there is sufficient evidence for a reasonable jury to conclude by a preponderance of the evidence that the other act occurred. *See id.* at 689-90. Prior to this decision, however, a variety of admissibility standards were used. Some jurisdictions, for example, prohibited the introduction of other act evidence unless the trial court first found by a preponderance of the evidence that the defendant had committed the other act. *See, e.g.*, United States v. Leonard, 524 F.2d 1076, 1090-91 (2d Cir. 1975), *cert. denied*, 425 U.S. 958 (1976). Other jurisdictions only allowed introduction of such evidence if the state proved to the court by "clear and convincing evidence" that the defendant had committed the other act. *See, e.g.*, United States v. Leight, 818 F.2d 1297, 1302 (7th Cir.), *cert. denied*, 484 U.S. 958 (1987). No jurisdiction, however, required such a finding beyond a reasonable doubt. *See Huddleston*, 485 U.S. at 685 n.2 (summarizing the standards in effect in various circuits).
punishment) as he had in the first trial. In holding that the Double Jeopardy Clause prohibited this evidentiary use of acquitted conduct, the Fifth Circuit stated that it did not "perceive any meaningful difference in the quality of 'jeopardy' to which a defendant is again subjected" when a settled issue is relitigated as an evidentiary fact:

In both instances the state is attempting to prove the defendant guilty of an offense other than the one of which he was acquitted. 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 again against charges or factual allegations which he overcame in the earlier trial.

Thus, when the subsequent trial is a criminal trial, the concerns of the Double Jeopardy Clause outweigh the purposes served by a hypertechnical application of the collateral estoppel doctrine.

Seven years after Wingate, the Second Circuit adopted the Fifth Circuit's analysis in United States v. Mespoulede. In holding that Mespoulede's acquittal on cocaine possession charges precluded the government from relitigating the issue of possession in a subsequent conspiracy trial, the court emphasized that the second trial's criminal context implicated the Double Jeopardy Clause whereas a civil trial would not. Rather than facing "sanctions or penalties of quite a different order than those he escaped through acquittal on criminal charges," the defendant runs the risk of incurring "criminal sanctions that, realistically, may be imposed in large part because the second jury is persuaded that he possessed cocaine . . . ."

Similarly, in United States v. Keller, the Third Circuit held that evidence of acquitted drug crimes could not be used to impeach the defendant in a subsequent drug conspiracy trial. Again, in reaching this conclusion, the court emphasized that the unjust burden on defendants of having to relitigate previously decided issues is not substantially affected by the status of that issue as necessary or unnecessary to the second charge. Referring to the language in Ashe urging "realism and rationality" when applying the criminal collateral estoppel doctrine, the Third Circuit concluded that not only could criminal collateral estoppel be applied to established

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49 Wingate, 464 F.2d at 213.
50 Id. at 213-14.
51 Mespoulede, 597 F.2d 329, 334-35 (2d Cir. 1979).
52 Id. at 335.
53 Keller, 624 F.2d 1154 (3d Cir. 1980).
facts not necessary to sustain the conviction sought at retrial, but that Ashe "could be interpreted . . . to bar any use in subsequent prosecutions of evidence previously determined in defendant's favor by a prior . . . acquittal." Following this view, the Third Circuit held in Dowling v. United States, that even when the burden of proof required for admission of the evidence in the second trial is manifestly and significantly lighter than the reasonable doubt standard required for conviction in the first trial, it is still inappropriate to allow a second jury to conclude that the defendant committed an act for which another jury had acquitted her.

At the time the Supreme Court decided Dowling v. United States, a majority of the federal circuit courts, adopting the reasoning of Wingate, barred any reuse of evidence in subsequent criminal trials of acts for which a defendant had previously been acquitted. A significant minority of state courts had also adopted this position. In Dowling, the Supreme Court resolved the

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54 Id. at 1158-60 & nn. 4-5.
56 The burden of proof required for admission of other act evidence under Rule 404(b) of the Federal Rules of Evidence is now very light: the judge need not find by a preponderance of the evidence that the act occurred, but need only find that a reasonable jury could conclude by a preponderance of the evidence that they occurred. See infra note 48.
57 See Dowling, 855 F.2d at 122.
59 Specifically, the District of Columbia, First, Second, Third, Seventh, and Eleventh Circuits adopted this position and held that an issue of ultimate fact, which has been resolved in the defendant's favor by a valid and final judgment in a prior criminal case, cannot be litigated again between the same parties. See United States v. Day, 591 F.2d 861, 869 n.18 (D.C. Cir. 1978); United States v. Gonzalez-Sanchez, 825 F.2d 572, 583-84 (1st Cir.), cert. denied sub nom. Latorre v. United States, 484 U.S. 989 (1987); United States v. Mespoulede, 597 F.2d 329, 335-36 (2d Cir. 1979); United States v. Keller, 624 F.2d 1154, 1160 (3d Cir. 1980); United States v. Castro, 629 F.2d 456, 464-65 (7th Cir. 1980); United States v. Hogue, 812 F.2d 1568, 1578 (11th Cir. 1987); Albert v. Montgomery, 732 F.2d 865, 869 (11th Cir. 1984).

On the other hand, the Fourth, Eighth, Ninth and Tenth Circuits had adopted the opposing view, i.e., that collateral estoppel does not preclude the use of acquitted act evidence as other act evidence in a subsequent trial. See United States v. Bice-Bey, 701 F.2d 1086, 1089 (4th Cir.), cert. denied, 464 U.S. 837 (1983); United States v. Riley, 684 F.2d 542, 546 (8th Cir. 1982), cert. denied, 459 U.S. 1111 (1983); United States v. Castro-Castro, 464 F.2d 336, 337 (9th Cir. 1972), cert. denied, 410 U.S. 916 (1973); United States v. Van Cleave, 599 F.2d 954, 957 (10th Cir. 1979). See generally Delao, supra note 46, at 1037-38 & nn. 24-43 (analyzing the positions of various circuits).
60 The position of the Wingate court had been adopted in Arizona, Florida, Georgia, Illinois, Minnesota, Nevada, New York, Tennessee, Texas and Virginia. See, e.g., State v. Little, 350 P.2d 756 (Ariz. 1960); State v. Perkins, 349 So. 2d 161 (Fla.
circuit split by implicitly rejecting the reasoning of Wingate and applying the rule of One Lot Emerald Cut Stones in the context of a criminal trial, thus foreclosing the argument that double jeopardy concerns should make the doctrine of collateral estoppel operate differently in the criminal, as opposed to the civil, context.

II. THE SUPREME COURT SPEAKS: DOWLING V. UNITED STATES

In Dowling, the defendant was convicted of robbing a bank while wearing a ski mask and carrying a gun. At trial, the government introduced, under Rule 404(b) of the Federal Rules of Evidence, the testimony of Mrs. Vena Henry, who stated that some time after the bank robbery the defendant had attempted to rob her house using a mask and gun. The trial court allowed this evidence even though Dowling had already been tried and acquitted for the attempted robbery of Mrs. Henry. The government had two purposes in introducing Mrs. Henry's testimony: first, it wanted to strengthen its identification of Dowling as the bank robber, and second, it wanted further to link Dowling with Delroy Christian, who was positively identified at the scene of both crimes. The trial judge instructed the jury that Dowling had been acquitted of the attempted robbery and that the jury should only consider Mrs. Henry's testimony for the limited purpose for which it was introduced. On appeal, the Third Circuit held that the acquittal


61 See Dowling, 493 U.S. at 349 ("Our decision is consistent with other cases where we have held that an acquittal in a criminal case does not preclude the Government from relitigating an issue . . . in a subsequent action governed by a lower standard of proof.").

62 See Dowling, 493 U.S. at 344.

63 See id. at 344-45.

64 See id. at 345.

65 Federal Rule of Evidence 404(b) prohibits the use of evidence of other "crimes, wrongs, or acts" to show bad character, but allows such evidence for other purposes, such as to show identity or intent. FED. R. EVID. 404(b); see also infra notes 114-22 and accompanying text.

66 See Dowling, 493 U.S. at 345.

67 See id. at 346.
collaterally estopped the government from introducing Mrs. Henry's evidence. The court affirmed Dowling's conviction, however, because the other evidence against him was "overwhelming" and hence the introduction of Mrs. Henry's testimony was harmless error.

The Supreme Court granted certiorari to determine whether the collateral estoppel component of the Double Jeopardy Clause should have precluded the admission of Mrs. Henry's testimony. It held that collateral estoppel did not apply in these circumstances, both because the standard of proof was lighter in the second trial than in the first and because the defendant could not prove that the issue he sought to preclude was essential to the first judgment.

A. Relative Standards of Proof

In Dowling, the Court asserted that the standard of proof required for a verdict in the defendant's prior criminal trial was much higher than that required to introduce the same evidence in a second criminal trial. After the Court's decision in Huddleston v. United States, a trial judge may allow evidence of other acts to be admitted if she finds that a reasonable jury could find by a preponderance of the evidence that the alleged acts occurred. The standards of proof being unequal, the Court, citing One Lot Emerald Cut Stones, held that the prior acquittal could not preclude a second jury's consideration of the issue under the lighter standard for admission of the acquitted act evidence. In other words, an acquittal only establishes that reasonable doubt exists as to the defendant's guilt and does not function as a determination of innocence. Under this reasoning, a second jury's conclusion that the defendant was more likely than not to have committed the first robbery is not inconsistent with the first jury's finding of reasonable doubt.

The Court's analysis, although logically consistent, applies civil doctrine in a criminal context without considering how the criminal

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68 See United States v. Dowling, 855 F.2d 114, 120-22 (3d Cir. 1988), aff'd, 493 U.S. 342 (1990). Alternatively, the court held that the evidence should have been excluded under Rules 404(b) and 403 of the Federal Rules of Evidence. See id. at 122.
69 See id. at 122-24.
70 See Dowling, 493 U.S. at 348-50.
71 See id. at 348-49.
73 See id. at 681; see also supra note 48 for a discussion of Huddleston.
74 See Dowling, 493 U.S. at 349-50.
context alters the significance of the double jeopardy interests at stake. The Court in *One Lot Emerald Cut Stones* was careful to point out that its holding had no double jeopardy implications since the second trial was civil and the government has the right to impose both civil and criminal sanctions for the same offense.\(^7\) In *Dowling*, as in *Wingate* and its progeny, the second trial was criminal and involved a criminal penalty as great or greater than the one avoided by the acquittal. As Justice Brennan pointed out in his dissent in *Dowling*, when the state seeks to punish a defendant, “the concern for fairness is much more acute.”\(^7\) In this case, as in *Wingate*, the evidentiary purpose for which the issue was introduced in the second trial did not change the fact that the defendant had to “mount a second defense” to a crime for which he had been acquitted, or that such relitigation increased the risk that the jury would wrongly find him guilty of that offense, particularly since the second jury only had to make this finding by a preponderance of the evidence.\(^7\) This finding, in turn, bore significantly on defendant’s guilt in the second trial. Thus, in insisting on a strict application of the civil collateral estoppel doctrine, the Court ignored substantial double jeopardy concerns.

**B. Determination of Issues Essential to the Judgment**

The *Dowling* Court also held that collateral estoppel did not prevent the introduction of the acquitted act evidence because the general verdict of not guilty in the first trial failed to establish conclusively that Dowling was not the perpetrator of the alleged robbery.\(^7\) The Court reasoned that the verdict could have been based on a finding that Dowling was the man who entered Mrs. Henry’s house, but that the prosecution failed to prove the elements of the crimes charged. Since it could not be shown that the acquittal was based on Dowling’s identity, it should not preclude

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\(^7\) See *supra* notes 41-44 and accompanying text.

\(^7\) *Dowling*, 493 U.S. at 361 (Brennan, J., dissenting) (footnote omitted).

\(^7\) See id. at 362.

\(^7\) The Court made this determination based on a reported conversation between the prosecutor, Dowling’s attorney, and the district judge in which the prosecutor contended that Dowling had “not disputed identity” in the first trial, but had merely denied that a robbery had taken place. See id. at 351. The Court took notice of the fact that the district judge believed that Dowling’s presence in the house had not been “seriously contested,” even though Dowling had stated a general defense and did not testify. See id.
Mrs. Henry's testimony that Dowling was the man who entered her house with a mask and gun.

This holding, although technically accurate, fails to employ the "realism and rationality" urged by the Court in Ashe v. Swenson when applying criminal collateral estoppel. First, as Justice Brennan noted in his dissent, there was sufficient evidence to suggest strongly that Dowling's first jury did acquit on the basis of identity. Second, and more importantly, whatever the basis of the jury's acquittal, it does indicate a finding that the defendant did not commit attempted robbery. Even if the jury's acquittal was based on a lack of intent rather than identity, the verdict would then mean that, although Dowling may have been present at Mrs. Henry's house, he did not attempt a robbery.

The status of this event as a crime, however, and particularly as attempted robbery, is what makes it relevant as other act evidence in the second trial—it is being introduced to show Dowling's identity as a robber. If no attempted robbery occurred, the event is irrelevant in Dowling's second trial for bank robbery. Mrs. Henry's testimony would only be relevant if she characterized the event in her house as an attempted robbery, and it is clear from the record that she did so. Given this fact, the Supreme Court's reasoning

80 See supra notes 35-36 and accompanying text for a discussion of Ashe.
81 See Dowling, 493 U.S. at 358 (Brennan, J., dissenting). Because Dowling was charged with numerous offenses relating to the incident at Mrs. Henry's house, Justice Brennan reasoned that if Dowling had been acquitted of attempted robbery because he lacked the requisite intent he would still have been found guilty of a weapons offense. The jury did not make such a finding, however, leading to the rational conclusion that the "jury rested its verdict on the belief that the petitioner was not present in the Henry home." Id.
82 The verdict further indicates a finding that Dowling committed no crime of any kind in Mrs. Henry's home since he was acquitted of all charges. See id.
83 When used to prove identity, evidence of another crime normally must reveal a similar modus operandi, such that it is highly likely that the same person committed both crimes. See EDWARD W. CLEARY, MCCORMICK ON EVIDENCE § 190, at 559 (3d ed. 1984) [hereinafter MCCORMICK ON EVIDENCE] (stating that other crimes evidence may be used "to prove other crimes by the accused so nearly identical in method as to earmark them as the handiwork of the accused"). Unless the event at Mrs. Henry's house was a robbery, there is no connection between that event and the bank robbery sufficient to suggest a modus operandi.
84 See Dowling, 493 U.S. at 344-45; United States v. Dowling, 855 F.2d 114, 120 (3d Cir. 1988) ("Vena Henry... described how a man wearing a knitted mask with cut out eyes... and carrying a small handgun... broke into her home... and how, in a struggle, she pulled the mask off the intruder, whom she identified as Dowling. Dowling was thereafter charged... with burglary, [and] attempted robbery..."), aff'd, 493 U.S. 342 (1990).
in holding that the acquittal did not preclude Mrs. Henry's testimony was essentially that, even though there was no possible basis for the acquittal consistent with the jury's believing all of Mrs. Henry's testimony, none of it was precluded because it was impossible to determine which part the jury did not believe. This technical approach to collateral estoppel realizes the fear expressed in *Ashe* that a strict application of the doctrine would make it ineffectual in a criminal context.

III. THE INSUFFICIENCY OF THE DOWLING DOCTRINE TO PROTECT ACQUITTED DEFENDANTS FROM UNFAIR PREJUDICE

The clear implication of *Dowling* is that criminal collateral estoppel will bar relitigation only in those cases in which the issue to be precluded is an "ultimate fact" in the second trial as well as the first, which essentially means that both trials arise out of the same criminal transaction and that the disputed issue is essential to prove both crimes. In addition, for a criminal defendant to assert successfully a collateral estoppel defense, she will bear the burden of demonstrating that the issue to be precluded was in fact the basis of the first jury's general verdict of acquittal. In practice, this means that collateral estoppel offers very little protection to the acquitted defendant because the basis for an acquittal will only

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85 The *Dowling* Court asserted:

[In *Ashe v. Swenson*, 397 U.S. 436 (1970),] the acquittal verdict could only have meant that the jury was unable to conclude beyond a reasonable doubt that the defendant was one of the bandits. A second prosecution was impermissible because, to have convicted the defendant in the second trial, the second jury had to have reached a directly contrary conclusion.

*Dowling* contends that, by the same principle, his prior acquittal precluded the Government from introducing into evidence Henry's testimony... in the bank robbery case. We disagree because, unlike the situation in *Ashe v. Swenson*, the prior acquittal did not determine an ultimate issue in the present case.

*Dowling*, 493 U.S. at 348 (citation omitted).

86 Unfortunately, the impotence of the collateral estoppel doctrine is not restricted to the introduction of an acquitted act as acquitted act evidence. For example, the government has used evidence of acquitted acts as proof of overt acts to support a conspiracy charge. See *United States v. Irvin*, 787 F.2d 1506, 1515-16 (11th Cir. 1986) (holding that the doctrine of collateral estoppel did not bar the United States from introducing evidence of assaults committed against an employee as overt acts in furtherance of a conspiracy to violate the civil rights of his employer, even though defendant had been acquitted of these assaults). The government has also introduced evidence of acquitted acts to support a charge of aiding and abetting. See *United States v. Nelson*, 599 F.2d 714, 716-17 (5th Cir. 1979) (holding that acquittal on drug conspiracy charges did not collaterally estop the government from
be clear when only one defense was presented. Placing the burden of demonstrating the basis of an acquittal on defendants ensures that the vast majority of acquittals will have no preclusive effect.

In addition, by resting its holding on a strict application of civil collateral estoppel, the Court ignored the underlying double jeopardy issue of whether the real burdens and risks imposed on defendants who must defend acquitted conduct as an evidentiary fact are significantly different than those imposed when the conduct constitutes an ultimate fact. Realistically, these burdens are very similar: evidence that defendant committed other crimes is extremely prejudicial and must be defended to the same extent as the presently charged crime. Furthermore, as will be shown, the Federal Rules of Evidence, which the Dowling Court believed would sufficiently protect the defendant from unfairness, are inherently inadequate to overcome the danger of unfair prejudice resulting from the introduction of acquitted act evidence.

A. The Danger to Defendants of Introducing Other Act Evidence

Rule 404(b) of the Federal Rules of Evidence prohibits the use of evidence of other "crimes, wrongs, or acts" to show that the defendant acted in conformity with past behavior. Such evidence is excluded because of its tendency to be unfairly prejudicial

prosecuting the defendant as an aider and abettor of the same underlying offenses, so long as the government did not rely on evidence tending to show a conspiracy. Finally, prosecutors have also used acquitted act evidence as the basis for tax prosecutions. See United States v. Crispino, 586 F. Supp. 1525, 1529-32 (D.N.J. 1984) (holding that acquittal on narcotics charges did not collaterally estop the government from advancing a theory of narcotics trafficking as the basis for its case that defendant received large amounts of unreported income). For an overview of the areas where defendants may be forced to redefend acquittal verdicts if collateral estoppel is strictly applied, see Anne B. Poulin, Collateral Estoppel in Criminal Cases: Reuse of Evidence After Acquittal, 58 U. Cin. L. Rev. 1 (1989).

87 See Dowling, 493 U.S. at 352; see also supra notes 15-16 and accompanying text.

88 Rule 404 of the Federal Rules of Evidence provides in pertinent part:

(a) Character evidence generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving action in conformity therewith on a particular occasion . . .
(b) Other crimes, wrongs, or acts. 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(a)-(b). Each state also has a similar rule, although the wording differs, particularly as to the permitted uses of other act evidence. See infra note 114.
to defendants. As the Advisory Committee explains, bad character evidence permits the jury to "'punish the bad man because of [his] character[] despite what the evidence in the case shows actually happened.'"89 Commentators have identified at least three other reasons why other act evidence prejudices defendants. First, juries tend to regard defendants who have committed prior crimes as more likely to have committed the crime at issue, believing that past criminality shows a propensity towards criminal behavior.90 Second, evidence of prior crimes may cause the jury to regard the defendant as a habitual criminal and to care less whether she is actually guilty or innocent of the current crime alleged.91 For this reason, a jury might decide a close case in favor of conviction rather than acquittal because the perceived moral consequences of a wrong verdict are much lighter.92 Finally, juries are less likely to believe the testimony of a defendant who they think has committed other crimes because of the general societal belief that criminals are dishonest.93 Even if the defendant does not testify, the credibility of any version of events put forward by the defense is lessened if she is perceived as dishonest. For all these reasons, it is almost impossible for juries not to misuse and overestimate the value of evidence that the defendant committed other crimes.94

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89 FED. R. EVID. 404(a) advisory committee's note (quoting CALIFORNIA LAW REVISION COMM'N, TENTATIVE RECOMMENDATION AND A STUDY RELATING TO THE UNIFORM RULES OF EVIDENCE 615 (1964)).
90 See 1A JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 192, at 1857 (1983) (noting that "the impulse to argue from [a defendant's] former bad deed . . . directly to his doing . . . the bad deed charged is perhaps a natural one"); 22 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5239, at 456 (1978) (suggesting that since the natural tendency of the human mind is to generalize, the introduction of other crimes evidence could lead to a bias against the accused); Richard B. Kuhns, The Propensity to Misunderstand the Character of Specific Acts Evidence, 66 IOWA L. REV. 777, 777-78 (1981) (noting that upon learning about a defendant's past criminal behavior, a factfinder might be more willing to convict despite any reasonable doubt as to her guilt).
91 See RICHARD O. LEMPERT & STEPHEN A. SALTBURG, A MODERN APPROACH TO EVIDENCE 164-65 (2d ed. 1982) (noting that "knowledge that an individual has been guilty of past crimes may change the regret which the fact finder associates with mistakenly finding that that person is guilty"); Calvin W. Sharpe, Two-Step Balancing and the Admissibility of Other Crimes Evidence: A Sliding Scale of Proof, 59 NOTRE DAME L. REV. 556, 566 (1984) (noting that other crimes evidence may make the jury "less concerned about reaching a wrong verdict").
92 Professor Sharpe refers to this phenomenon as altering the jury's "regret matrix." See Sharpe, supra note 91, at 566.
93 See Comment, Other Crimes Evidence at Trial: Of Balancing and Other Matters, 70 YALE L.J. 763, 764 (1961) (stating that other crimes evidence may lead "jurors generally to distrust all the evidence offered by the accused").
94 See United States v. Shelton, 628 F.2d 54, 56 (D.C. Cir. 1980) ("We have
sor Wigmore stated, "[t]he natural and inevitable tendency of the tribunal—whether judge or jury—is to give excessive weight to the vicious record of crime . . . ." 95 As one court asserted, once other act evidence has been admitted, the presumption of the defendant’s innocence—the right of all defendants, past criminal or not—will be severely tainted. 96

When the other act in question was subject to acquittal in the first trial, the prejudice resulting from jury overestimation in the second proceeding is further intensified. First, the jury might be outraged that the defendant escaped punishment for her earlier crime and was allowed “back on the street” to commit further criminal acts. 97 Second, acquittal significantly lessens the probative worth of the evidence because it is much less likely that the act occurred in the first place. An acquittal represents, at the very least, a determination that a reasonable doubt exists as to the occurrence of the other act, but it may also represent an affirmative belief on the part of the jury that the defendant was entirely innocent. Where the occurrence of an other act is in doubt, the chances greatly increase that truly innocent defendants will be deprived of a much-needed presumption that they are law abiding citizens, and that juries will make prejudicial determinations based not only on an inaccurate understanding of criminal propensity, 98 but on inaccurate facts. For this reason, the argument is frequently made that the probative value of acquitted act evidence is almost always outweighed by the unfair prejudice likely to result from its introduction. 99

recognized before that juries are prone to draw illogical and incorrect inferences from [other act] evidence.”); Delao, supra note 46, at 1046 (stating that “juries give prior convictions immense weight, and the prejudice engendered by revelations of past criminal conduct is nearly insurmountable”); Sharpe, supra note 91, at 562 n.27 (“Whatever the true probability that commission of a crime will be followed by other criminal acts, it is highly unlikely that the aggregate intuitions of a jury will produce an accurate assessment of the worth of such evidence.”).

95 WIGMORE, supra note 90, § 58.2, at 1212.
96 See United States v. Daniels, 770 F.2d 1111, 1118 (D.C. Cir. 1985) (“[O]nce evidence of prior crimes reaches the jury, 'it is most difficult, if not impossible, to assume continued integrity of the presumption of innocence. A drop of ink cannot be removed from a glass of milk.'” (quoting Virgin Islands v. Toto, 529 F.2d 278, 283 (3d Cir. 1976))).
97 See LEMPERT & SALTZBURG, supra note 91, at 218 (noting the danger that a jury may vote to convict only because they believe the defendant deserves to be punished for a series of immoral actions).
98 See supra notes 90-94 and accompanying text.
99 See United States v. Doliole, 597 F.2d 102, 107 (7th Cir. 1979) (“Unless the
With this degree of prejudice at risk, defendants have no choice but vigorously to defend themselves against other act evidence. Despite its status as evidentiary rather than ultimately factual, such evidence can be the basis of a conviction in the second trial.\textsuperscript{100} Furthermore, because the standard for admitting "collateral act" evidence in sentencing hearings may be lower than the reasonable doubt standard,\textsuperscript{101} the Dowling analysis would permit a judge to consider other act evidence when sentencing the defendant for the subsequent crime and maybe enhance the defendant's punishment accordingly.\textsuperscript{102} The judge, like the jury at trial, may make her own determination of the defendant's guilt under a preponderance standard. The consequences of allowing acquitted acts to be considered in sentencing are quite severe, as the punishment for a given crime may be substantially increased if there are aggravating circumstances or if the defendant is a repeat offender.\textsuperscript{103} Thus,

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prior crime evidence is clear and convincing its probative value simply cannot justify its potential for prejudice.
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\textsuperscript{100} See, e.g., United States v. Mespoulede, 597 F.2d 329, 335 (2d Cir. 1979) (stating that, "realistically", the jury in the second trial convicted "in large part" because it was persuaded that the defendant committed an act for which he was acquitted but which was introduced as other act evidence).

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Collateral act evidence is evidence of other crimes which can function as aggravating circumstances under a sentencing scheme, resulting in a harsher sentence. See infra note 103. In McMillan v. Pennsylvania, 477 U.S. 79 (1986), the Supreme Court upheld the constitutionality of a sentencing that required proof of a collateral act by a preponderance of the evidence.
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\textsuperscript{101} Justice Brennan identified this concern in his dissent in Dowling v. United States, 493 U.S. 342, 353 (1990), and his fears appear to have been realized. Several circuits have interpreted Dowling to allow the use of acquitted act evidence in sentencing. See, e.g., United States v. Averi, 922 F.2d 765, 766 (11th Cir. 1991) ("Acquited conduct may be considered by a sentencing court because a verdict of acquittal demonstrates a lack of proof sufficient to meet a beyond-a-reasonable-doubt standard—a standard of proof higher than that required for consideration of relevant conduct at sentencing."); United States v. Fonner, 920 F.2d 1330, 1333 (7th Cir. 1990) ("It follows [from the difference in the standard of proof] that judges may consider prior misconduct despite the defendant's acquittal on charges arising out of that misconduct."). Furthermore, the Supreme Court recently considered a case in which acquitted act evidence was used by the judge to change the defendant's sentence from life imprisonment to the death penalty. See Florida v. Burr, 496 U.S. 914, 915 (1990). In remanding the case for reconsideration in light of Dowling, the Court suggests that this use of collateral act evidence is permissible. See id. at 914.

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\textsuperscript{102} See, e.g., U.S. SENTENCING COMM'N, FEDERAL SENTENCING GUIDELINES MANUAL
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a defendant may not only be convicted on the basis of crimes for which she has already been acquitted, but she may be punished for them as well. These are precisely the kind of dangers against which the double jeopardy clause is intended to protect defendants,\textsuperscript{104} and the \textit{Dowling} Court's failure to recognize them leaves defendants extremely vulnerable to unfair prejudice and the burdens of repeated litigation.

\textbf{B. The Limitations of the Federal Rules of Evidence}

The \textit{Dowling} Court did acknowledge that the use of an acquitted act as other crime evidence could "prejudice the jury or unfairly force the defendant to spend time and money relitigating matters considered at the first trial."\textsuperscript{105} It suggested, however, that the "potential for abuse" could be decreased through "non-constitutional [prophylactics] like the Federal Rules of Evidence."\textsuperscript{106} The Court's faith is misplaced, however: neither the Federal Rules of Evidence nor any state code of evidence\textsuperscript{107} is clearly adequate to address the potential for unfairness resulting from the introduction of acquitted act evidence.

The most significant and obvious shortcoming of the Rules of Evidence is that they are primarily concerned with the effect of a given piece of evidence in the present trial, and therefore, do not weigh the detrimental consequences of forcing defendants to relitigate the same facts or issues in trial after trial. Rule 403 is the rule which governs the exclusion of relevant evidence on the grounds of prejudice.\textsuperscript{108} Rule 403 provides that evidence may be

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\textsuperscript{104} See supra notes 18-23 and accompanying text.
\textsuperscript{105} \textit{Dowling}, 493 U.S. at 352.
\textsuperscript{106} \textit{Id.}
\textsuperscript{107} See supra note 17.
\textsuperscript{108} Rule 403 is "a typical formulation of the prejudice rule and one after which many state rules have been patterned." \cite{Wigmore} supra note 90, at 679. In many states, the rule regarding exclusion of relevant evidence on the ground of prejudice is identical to Rule 403. See, e.g., Fla. Stat. Ann. § 90.403 (West 1987); S.D. Codified Laws Ann. § 19-12-3 (1987); Iowa R. Evid. 403; Minn. R. Evid. 403; N.C. R. Evid. 403; N.D. R. Evid. 403; Tex. R. Evid. 403; Vt. R. Evid. 403. Many other states have enacted a substantially similar rule. See, e.g., Cal. Evid. Code § 352 (West 1966) ("The Court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice . . . .") ; Nev. Rev. Stat. § 48.035 (1986) (similar language); Ohio R. Evid. 403 (similar language); Utah R. Evid. 403 (similar language). In addition, many other states which have not legislated the prejudice rule
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excluded if its probative value is substantially outweighed by the danger of unfair prejudice. However, "unfair prejudice" in this context has a limited meaning. The Advisory Committee's Note defines unfair prejudice not in the sense of being damaging to the party against whom it is offered, but as "suggest[ing] [a] decision on an improper basis, commonly, though not necessarily, an emotional one," such as "sympathy, hatred, contempt, retribution, or horror." Under this definition, unfair prejudice is strictly limited to the effect of a given piece of evidence on the factfinder and does not encompass larger concerns of fairness to the parties. The probative value of a piece of evidence is not balanced against the burden on the defendant of having to refute that evidence, nor against any interest in protecting the defendant from multiple prosecutions.

Therefore, the concern that motivated the lower court's holding in Dowling and the reasoning in Wingate and its progeny—that defendants should not be "forced to defend again against charges

have adopted similar language in caselaw. See, e.g., Fridenn v. Evans, 622 P.2d 463, 467 (Ariz. 1980) ("[R]elevant evidence [may] . . . be excluded only when its probative value is substantially outweighed by the danger of unfair prejudice . . . ."), State v. Alexander, 401 S.E.2d 146, 149 (S.C. 1991) ("We now adopt the language, in pertinent part, of Federal Rule of Evidence 403 that, 'although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.'" (quoting FED. R. EVID. 403)); Independent Milk Producer's Co-op v. Stoffel, 298 N.W.2d 102, 107 (Wis. Ct. App. 1980) ("The exclusion of [relevant] evidence is within the trial court's discretion after balancing the probative value and possible prejudice.").

The limitations of Rule 403 discussed above in the text accompanying this note apply with equal force to these formulations of the prejudice rule.

See FED. R. EVID. 403. For the text of Rule 403, see infra note 124. Other rules, such as Rule 404(b), which provide for evidence to be excluded on the grounds of prejudice, refer back to the standard articulated in Rule 403.

See WIGMORE, supra note 90, at 684 (discussing how the prejudice rule is designed to prevent jury confusion). Wigmore discussed how jury misdecision might occur:

The primary aim of the prejudice rule is to prevent jury "misdecision." Jury misdecision may occur in several ways:

1) the jury attributes greater evidential value to the evidence than is warranted;

2) the jury does not misestimate the evidential value of the evidence, but the facts established by the evidence (to the satisfaction of the jury) lead the jury to apply substantive standards that are not in conformity with the substantive law; and

3) the evidence, though relevant, confuses the jury. The prejudice rule is designed to avert these dangers.

Id. (footnote omitted).
or factual allegations which [they] overcame in an earlier trial—is entirely left out of the equation under the Federal Rules of Evidence. Clearly, the Federal Rules do not contemplate, and are patently inadequate to deal with, the possibility that other act evidence will “force the defendant to spend time and money relitigating matters considered at the first trial.”

In addition to this overarching problem with the scope of the Federal Rules, individually, the rules offer acquitted defendants very little protection from the unfair prejudice likely to result from the admission of acquitted act evidence. As will be shown, none of the three rules governing the admissibility of other act evidence—404(b), 403, and 105—accounts for the significance of a prior acquittal in determining whether other act evidence should be admitted.

1. Rule 404(b)

The wording of Rule 404(b) suggests, and courts increasingly have explicitly held, that it is a rule of inclusion, meaning that evidence of an other act may be admitted for any purpose except to prove the defendant's bad character. Clever prosecutors can,
however, usually advance plausible reasons why the evidence serves a purpose other than to show bad character. Dowling itself is a good example. In Dowling, the prosecution introduced the evidence of attempted robbery to show identity. Other act evidence is generally unhelpful on the question of identity, however, unless the defendant's modus operandi is so unique that it is highly likely that both crimes were committed by the same person. In Dowling, the only features linking the two crimes were the use of a mask and gun—impliments that are hardly unusual in robberies. Moreover, Mrs. Henry's testimony revealed that the mask worn by

384 (Conn. 1982) ("Evidence of other misconduct, although not ordinarily admissible to prove the bad character or criminal tendencies of the accused, may be allowed for the purpose of proving many different things, such as intent, identity, motive or a system of criminal activity."); People v. Allweiss, 396 N.E.2d 735, 738 (N.Y. 1979) ("[E]vidence of other crimes may be admitted to show motive, intent, the absence of mistake or accident, or a common scheme or plan or the identity of the guilty party. The list, of course, is not exhaustive.") (citations omitted).

Although most jurisdictions have adopted an inclusionary version of the rule, some jurisdictions continue to treat the rule as exclusionary, meaning that "evidence is excluded except when offered for certain specific purposes. These purposes usually include those purposes presented illustratively in Rule 404(b)." LEMPERT & SALTZBURG, supra note 91, at 216. See, e.g., People v. Bayer, 513 N.E.2d 457, 459 (Ill. App. Ct.) ("It is well established that evidence of defendant's other crimes . . . is inadmissible to show his propensity to commit a crime . . . . There are, however, well-recognized exceptions to this rule. Such evidence may be admitted to demonstrate knowledge, intent, identity, motive, common design or scheme, or modus operandi.") (citations omitted), appeal denied, 517 N.E.2d 1088 (Ill. 1987); Moore v. State, 533 A.2d 1, 5 (Md. Ct. Spec. App. 1987) ("For the [other act] evidence even to qualify for admission, it must fall within one of the exceptions that the court has recognized or would be willing to recognize as having an independent relevance . . . . "), cert, denied, 537 A.2d 273 (Md. 1988); Thomas v. State, 620 P.2d 1321, 1323 (Okla. Crim. App. 1980) ("The law in this State concerning evidence of crimes other than the one for which the accused is being tried is that such evidence is inadmissible unless used to show motive, intent, absence of mistake or accident, identity or a common scheme or plan."). In jurisdictions where this stricter rule is in effect, prosecutors have somewhat less flexibility in articulating permissible non-character purposes for other act evidence, but Lempert and Saltzburg suggest that the difference is minimal in practice: "[I]t matters little whether a jurisdiction adopts the inclusionary or exclusionary version of the . . . rule. Those courts which exclude evidence of other crimes except when offered for specific purposes exhibit great ingenuity in fitting other crimes evidence into one of the permitted categories." LEMPERT & SALTZBURG, supra note 91, at 216.

115 See Kuhns, supra note 90, at 799 ("[G]iven the elusive nature of the term 'character' and the fact that the list of permissible uses for specific acts evidence in rule 404(b) is not exclusive, it should be relatively easy . . . to articulate some noncharacter purpose for which any particular specific act is relevant.") (footnotes omitted).

116 See MCCORMICK ON EVIDENCE, supra note 83, § 190, at 559 (advocating admission of other act evidence to identify handiwork unique to the accused).
the intruder at her house was of a different color than the one used in the bank robbery.117 Clearly, the main purpose for which this evidence was introduced was not to illustrate a unique modus operandi, but to suggest to the jury that the defendant, having robbed before, was more likely than not to have committed the bank robbery for which he was being tried—precisely the purpose which the rule forbids. The fact that such a weak connection between the modus operandi of the two crimes was nonetheless sufficient for introduction of the evidence reveals the extent to which the category of admissible other act evidence can be manipulated by prosecutors to circumvent the prohibited bad character evidence exception to admissibility.

In addition to the fact that Rule 404(b) favors admissibility, it does not provide any protection against the unique prejudice likely to result from the admission of acquitted act evidence. In an article urging re-evaluation of Rule 404(b), Richard Kuhns noted that the factors determining whether other act evidence is admissible or inadmissible do not sufficiently incorporate the notion of prejudice.118 The rule allows or forbids such evidence to be used based on the use to which it will be put in trial (e.g., to show identity or intent), rather than on the extent to which the particular information will unfairly influence the jury against the defendant. According to Kuhns, a rule of exclusion based on the concept of “character evidence”—the notion that the probative value of past


118 Kuhns explained the operation of these factors as follows:

The primary determinants in applying the character prohibition appear to be the probative value of the specific acts evidence and whether the relevant propensity can, as a matter of common usage, readily be labeled as a character trait. Prejudice, however, is not a function of either of these factors. The degree of prejudice associated with any specific act evidence is a function of how the factfinder is likely to respond to the badness of the act. Consider, for example, two prosecutions for heroin possession. In one case the defendant claims he did not know the substance was heroin. In the other, the defendant claims that the heroin was in the sole possession of his companion. To rebut the first defendant’s claimed absence of knowledge, the prosecutor offers to prove that the defendant had previously sold heroin to school children. To establish the second defendant’s possession the prosecutor offers to prove that on two previous occasions the defendant had possessed heroin. The latter evidence is more likely than the former to fall within the character evidence prohibition, but in the eyes of the factfinder the sale of heroin to school children is likely to be more prejudicial.

Kuhns, supra note 90, at 796 (footnote omitted).
acts as an indicator of the defendant's behavior on a given occasion is low—is too narrow because it fails to consider the unique prejudice\footnote{Other act evidence is uniquely prejudicial because of its tendency to destroy in the jury's mind the presumption of the defendant's innocence. See supra notes 89-100 and accompanying text.} that other act evidence engenders, regardless of its status as "character" or "noncharacter" evidence.\footnote{Kuhns, supra note 90, at 798. Professor Kuhns argues that the only "functional purpose" served by the distinction articulated in Rule 404(b) is to "exclude evidence of low probative value," as opposed to other rules of exclusion that serve some extrinsic policy. Id. In his view, the unique prejudice associated with other act evidence, rather than any notion of character, should animate the exclusionary rule. Thus, he suggests a balancing rule similar to Rule 403 except with a presumption of inadmissibility, which can be overcome only when the probative value of the evidence is very strong. See id. This solution, although helpful to acquitted defendants, would still be inadequate because it does not address the unfairness of having defendants relitigate conduct for which they have been acquitted. See supra notes 112-13 and accompanying text.} It is this fear of prejudice, after all, that underlies the traditional and modern rules excluding other act evidence.\footnote{See McCormick on Evidence, supra note 83, §§ 185-87 (explaining that rules that prohibit other act evidence are created because of a fear of prejudice).} Thus, the notion that "extrinsic acts evidence is fraught with dangers of prejudice—extraordinary dangers not presented by other types of evidence"\footnote{Kuhns, supra note 90, at 803 (quoting United States v. Beechum, 582 F.2d 898, 912 (5th Cir. 1978) (en banc) (Goldberg, J., dissenting), cert. denied, 440 U.S. 920 (1979)).} does not inform the operation of Rule 404(b) beyond the narrow category of "character" evidence.

Recognition of this particular danger of prejudice is essential to protect the previously acquitted defendant. The damage that other act evidence may do to the defendant's credibility and to any assumption by the jury that she is a law-abiding citizen is doubly unfair if the other act never occurred. This is the "unfair prejudice" which the Dowling Court referred to when it stated that the Federal Rules of Evidence were sufficient to protect acquitted defendants.\footnote{See Dowling v. United States, 493 U.S. 342, 352 (1990) (suggesting it was "acceptable" to deal with the "potential for abuse" of acquitted act evidence "through nonconstitutional sources like the Federal Rules of Evidence"); see also supra notes 15-16 and accompanying text.} Rule 404(b), however, does not even address this danger.
2. Rule 403

Because of this loophole in the formulation of Rule 404(b), "noncharacter" other act evidence (that is, any evidence for which a prosecutor can plausibly advance a noncharacter justification) is unfairly prejudicial only if it meets the test of Rule 403, the rule to which all evidence is subject. Unfortunately, Rule 403 is also inadequate to protect against the prejudice which the introduction of acquitted act evidence engenders.

Before admitting evidence under Rule 404(b), a trial judge must determine, under Rule 403, whether the probative value of the evidence is substantially outweighed by its potential for unfair prejudice. Unfortunately for the defendant trying to bar the admission of acquitted act evidence, Rule 403, like Rule 404(b), is an inclusive rule that favors the admissibility of evidence. Moreover, although this rule may protect defendants in some cases, it does not operate in a principled and uniform manner to distinguish and exclude evidence that may be unfairly prejudicial to the defendant. Because of the loose wording of the rule and the necessity of evaluating the disputed evidence in the context of the trial as a whole, trial judges virtually have complete discretion in making Rule 403 determinations. Their decisions are essentially unreviewable; appeals courts use an especially deferential abuse of discretion standard because of their reluctance to re-evaluate the subjective balancing test required by Rule 403. As a result, trial judges' determinations are essentially subjective, unpredictable, and arbitrary.

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124 Rule 403 provides as follows: "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.

125 Rule 403 provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Id. (emphasis added). This language strikes the balance strongly in favor of admission. See WIGMORE, supra note 90, at 680. ("The term 'substantially' is meaningful because it reminds the judge that he should place a high premium on probative evidence in making his calculation of losses and profits."). The term "substantially" also appears in most state law versions of the prejudice rule. See supra note 108.

126 For example, in United States v. Long, 574 F.2d 761 (3d Cir.), cert. denied, 439 U.S. 985 (1978), the court held that Rule 403 determinations were intended to be left to the sole discretion of the trial judge and that such determinations would be left undisturbed unless the judge acted irrationally. See id. at 767. The court commented, "[i]f judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal." Id.

127 As the Long court points out:
This imprecise, open-ended formulation of Rule 403 provides dubious protection from the specific evils of other act evidence in general.\textsuperscript{128} It is especially inadequate when the prior act was the subject of an acquittal. In such a case, the trial judge's analysis of the probative value of the other act evidence does not require any consideration of the fact that the occurrence of the prior act may be in doubt. Probative value should be determined by considering the relevance of the evidence,\textsuperscript{129} the need for the evidence in light of evidence already presented, and, as the advisory committee note to the rule suggests, the probable effectiveness of a limiting instruction.\textsuperscript{130} As Professor Patterson points out, Rule 403 "is designed to deal with the strength of the inference from the other crime to the ultimate issue it is offered to prove, and thus assumes that the other crime has been proved; hence, the sufficiency of the proof of the other crime is an entirely different question."\textsuperscript{131} Under Rule 403, the judge need not consider how likely it is that the other act occurred in making a determination of its probative worth.\textsuperscript{132}

\[I\]t is manifest that the draftsmen [of the Federal Rules] intended that the trial judge be given a very substantial discretion in "balancing" probative value on the one hand and "unfair prejudice" on the other . . . . This inference is strengthened by the fact that the Rule does not establish a mere imbalance as the standard, but rather requires that evidence "may" be barred only if its probative value is "substantially outweighed" by prejudice. *Long*, 574 F.2d at 767.

\textsuperscript{128} See supra notes 88-96 and accompanying text.

\textsuperscript{129} Relevance is defined in Rule 401 as follows: "Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401.

\textsuperscript{130} See FED. R. EVID. 403 advisory committee's note ("In reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness of a limiting instruction.").

\textsuperscript{131} Patterson, supra note 99, at 356 (quoting EDMUND M. MORGAN, BASIC PROBLEMS OF EVIDENCE 45-49 (1961)).

\textsuperscript{132} In spite of the fact that Rule 403 does not require any consideration of the sufficiency of proof of other acts in weighing their probative value, some courts have taken it upon themselves to factor in this variable when deciding to admit other act evidence under Rule 404(b). See, e.g., United States v. Shavers, 615 F.2d 266, 271 (5th Cir. 1980) (explaining that doubt as to whether the extrinsic offense was committed reduces its probative value); United States v. Herrera-Medina, 609 F.2d 376, 380 (9th Cir. 1979) (similar analysis); United States v. Dolliole, 597 F.2d 102, 106 (7th Cir. 1979) (similar analysis). Nonetheless, any decision to consider the sufficiency of proof is entirely within the discretion of the judge. No precedent has been established that affirmatively directs the lower courts to consider it in their Rule 403 determinations under Rules 404(b) and 408.
Furthermore, even if a judge wanted to consider the sufficiency of proof of the other act in deciding whether to admit it under Rule 403, the Supreme Court's decision in *Huddleston v. United States* limits her ability to do so. In that case, the Court held that other act evidence may be admitted if a reasonable jury could conclude that the act occurred. When considering the admissibility of other act evidence under Rule 403, a judge may not, after *Huddleston*, exclude other act evidence which meets this standard of proof on the ground that its probative value, not otherwise outweighed by unfair prejudice, is so outweighed because the act was insufficiently proved. Such reasoning would directly violate *Huddleston*’s holding. The lenient standards for admission under both Rules 403 and 404(b), combined with the lack of any required consideration of sufficiency of proof in Rule 403 determinations of probative value, provide defendants little or no protection from the unfair prejudice that can result from the admission of acquitted act evidence.

3. Rule 105

The advisory committee note to Rule 403 provides that where other act evidence is admitted for a proper purpose, the judge should give a limiting instruction pursuant to Rule 105, instructing jurors to consider the evidence only for the limited purpose for which it was offered. Whatever the effectiveness of such instructions in other contexts, courts and commentators have recognized that it is difficult, if not impossible, for juries to ignore the prejudicial implications of other act evidence. Juries

134 A scheme incorporating sufficiency of proof into the balancing test under Rules 404(b) and 403 has been proposed by Professor Calvin Sharpe. See Sharpe, *supra* note 91, at 565-66. Professor Sharpe suggested that Rules 404(b) and 403 incorporate a “sliding scale of proof,” where the level of proof required before the other act evidence can be admitted increases according to the amount of unfair prejudice at risk. See *id.* at 585. This scheme, however, was clearly invalidated by *Huddleston*.
135 Rule 105 provides as follows: “When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.” *FED. R. EVID.* 105.
136 See *supra* note 130.
137 See Kuhns, *supra* note 90, at 794-96 (arguing that the distinction between evidence to show “propensity” (prohibited character evidence) and evidence for other purposes is slippery and ineffective for restricting the jury’s access to prejudicial
respond irrationally to such evidence and reach unjustified conclusions about the defendant's guilt—which is why it has traditionally been considered a highly prejudicial and dangerous type of evidence in the first place. It is unlikely that simply because such evidence is introduced for some other limited purpose, juries will respond to it with any more reason and judgment than they otherwise would, or that they will ignore its obvious character implications. Courts have long recognized the futility of instructing jurors not to consider these implications, referring to the use of limiting instructions with other act evidence as "mental gymnastics" requiring "human beings to act with a measure of dispassion and exactitude well beyond mortal capacities." One past Supreme Court Justice has even called the suggestion that juries follow such instructions an "unmitigated fiction."

Because other act evidence is freely admitted for a variety of purposes, because exclusion of other act evidence on the ground of undue prejudice is a limited and arbitrary protection, and because limiting instructions do little to counter the prejudice arising from other act evidence, it is clear that the Federal Rules of Evidence are an inadequate device for protecting defendants from the burden of having to relitigate acquitted conduct. An alternative form of protection is clearly needed.

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information); Comment, supra note 93, at 777 (arguing that jury instructions are almost always fruitless and discussing jury examinations showing an inability and reluctance by jurors to follow the court's instruction regarding the use of defendant's prior criminal record as evidence).

See supra notes 88-96 and accompanying text.


United States v. Daniels, 770 F.2d 1111, 1118 (D.C. Cir. 1985); see also United States v. Carter, 482 F.2d 738, 740 (D.C. Cir. 1973) ("Even when the prior criminal record is brought into the evidence in an appropriate manner, there is the well-nigh inescapable prejudice on the issue of guilt notwithstanding the trial court carefully instructs the jury as to the limited consideration it may accord the evidence."); United States v. Bailey, 426 F.2d 1256, 1240 (D.C. Cir. 1970) ("The ultimate question is whether in the search for truth the value of the evidence for the limited purpose for which it is admissible is outweighed by these various factors, the most important of which . . . is the prejudice resulting from the jury's inability to limit its influence . . .").

IV. FORMULATING A MORE EFFECTIVE PROTECTION FOR ACQUITTED DEFENDANTS

A. The Difficulties Inherent in Interpreting the General Verdict

Essentially, the major obstacle to a clear determination of the preclusive effect of an acquittal under strict rules of collateral estoppel is the criminal verdict itself. The factual findings on which an acquittal is based are often unclear, yet for an acquittal to have any preclusive effect it is necessary for a court to equate an acquittal with an affirmative finding of innocence by a preponderance of the evidence.\textsuperscript{142} This is the equation the \textit{Dowling} Court rejected when it stated that an acquittal does not prove innocence but rather merely proves the existence of a reasonable doubt as to guilt.\textsuperscript{143}

Although there are strong arguments for the proposition that an acquittal should categorically function as a determination of innocence,\textsuperscript{144} and the rights of criminal defendants under the Double Jeopardy Clause would certainly be protected if this were the rule, there are a number of problems with this approach. Most importantly, as the \textit{Dowling} Court points out, treating an acquittal as a determination of innocence may not always be realistic.\textsuperscript{145} The burden of proof required for conviction is heavy. No matter how far the balance of evidence tips in favor of the government, juries are compelled to acquit if any reasonable doubt is left unresolved. Common sense suggests that many acquittals would not

\begin{footnotesize}
\begin{enumerate}
\item The "identity of the issue" requirement of collateral estoppel dictates that the issue must have been decided under the same standard of proof in the first action as is required for its admission in the second action. \textit{See supra} note 8. After Huddleston v. United States, 485 U.S. 681 (1988), the standard of proof for a finding that an other act occurred is preponderance of the evidence. \textit{See supra} note 48 and text accompanying note 73.
\item See \textit{Dowling} v. United States, 493 U.S. 342, 349 (1990) ("[The acquittal did] not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt." (quoting United States v. One Assortment of 89 Firearms, 465 U.S. 354, 361-62 (1984))).
\item See, e.g., \textit{Dowling}, 493 U.S. at 361 (Brennan, J., dissenting) (arguing that introducing evidence of other bad acts fatally undermines the presumption of innocence in the second trial, a result that is particularly unfair in the case of an acquittal since that presumption was never defeated in the first trial); Craig L. Crawford, Comment, \textit{Dowling} v. United States: A Failure of the Criminal Justice System, 52 OHIO ST. L.J. 991, 1006-09 (1991) (arguing that the presumption of innocence in our justice system means that if a defendant is acquitted, she should thereafter be considered innocent of those charges).
\item \textit{See supra} note 143.
\end{enumerate}
\end{footnotesize}
stand if they had to be justified under a preponderance of the evidence standard.

Furthermore, the general verdict, used in almost every criminal case,\textsuperscript{146} gives criminal juries an implicit privilege to acquit, in spite of overwhelming evidence, out of compassion or disagreement with the law.\textsuperscript{147} Given these facts, it is clear that an acquittal can represent many things other than a jury’s positive determination that a defendant is innocent of the charges alleged. To treat the two as equivalent ignores the “identity of the issues” requirement of collateral estoppel,\textsuperscript{148} thereby frustrating the interest of the judicial system in truth determination,\textsuperscript{149} which is one of its central and most important goals.\textsuperscript{150}

Similarly, a general verdict of acquittal cannot be said to resolve all ultimate issues in a defendant’s favor, as required by collateral estoppel. Defendants often assert general or alternative defenses, and the bases for acquittals are usually mysterious.\textsuperscript{151} To allow defendants to foreclose any issue that might have been determined by a general verdict would again stretch the collateral estoppel doctrine beyond its role in a truth seeking system.

Although many courts have held and commentators have argued that the rights of criminal defendants under the Double Jeopardy Clause are more important than strict adherence to the principles underlying the collateral estoppel doctrine,\textsuperscript{152} it is clear, in light of the Dowling decision, that the Supreme Court takes these

\textsuperscript{146} See supra note 30.
\textsuperscript{147} See United States v. Spock, 416 F.2d 165, 182 (1st Cir. 1969) (noting that the jury, as conscience of the community, may acquit for reasons of generosity, mercy, sympathy, or because they think the law is wrong). For analysis of the ways in which juries tend to nullify the law, see generally Chaya Weinberg-Brodt, Jury Nullification and Jury-Control Procedures, 65 N.Y.U. L. Rev. 825 (1990) (explaining that juries have the power to nullify the law for equitable or arbitrary reasons).
\textsuperscript{148} See supra note 8.
\textsuperscript{149} See supra text accompanying notes 37-39.
\textsuperscript{150} See United States v. Havens, 446 U.S. 620, 626 (1980) (“There is no gainsaying that arriving at the truth is a fundamental goal of our legal system.”).
\textsuperscript{151} See Skidmore v. Baltimore & O.R.R., 167 F.2d 54, 61 (2d Cir. 1948) (asserting that the general verdict obscures the facts, the law, and the application of the law to the facts, thereby “confer[ring] on the jury a vast power to commit error and do mischief by . . . aggregating instead of segregating the issues”).
\textsuperscript{152} See supra text accompanying notes 45-57, 86; see also Crawford, supra note 144, at 1009 (“The approach taken by the Supreme Court in Dowling is simply repugnant to the concepts of due process and double jeopardy.”); Delao, supra note 46, at 1050 (“The introduction of prior acquittals results in retrying the defendant for the earlier crime . . . . However, our judicial system treats an acquittal as a verdict of innocence.” (citations omitted)).
collateral estoppel concerns seriously and will safeguard them even at the expense of other important interests. Thus, any attempt to protect defendants from multiple prosecutions in the context of other crimes evidence must stay within the established boundaries of the collateral estoppel doctrine.

B. A Solution—Special Interrogatories at Acquitted Defendants' Request

One way to satisfy both defendants' double jeopardy interests and the state's concern for truth determination is to offer defendants the option of requesting supplemental special interrogatories with an acquittal. These interrogatories would establish the jury's findings on all issues which the jury was required to consider in reaching its verdict, and the answers would be given preclusive effect in all subsequent litigation between the defendant and the prosecuting entity. Special interrogatories have not been used in this manner before. As this Comment will argue, however, there is no reason, either of procedure or policy, why defendants should not be allowed to request such interrogatories, or why judges should not approve them. While special interrogatories are now rarely used in criminal cases, few jurisdictions categorically forbid their use, and there is some favorable

153 "Special interrogatories" are generally defined as questions put to the jury regarding issues essential to the verdict. The answers to the questions are returned together with a general verdict. See supra note 30. "Supplemental special interrogatories," as used in this Comment, are questions which are propounded only after the jury reaches a verdict, and which thus do not affect the outcome of the jury's deliberations on guilt and cannot be used to challenge the general verdict. See infra notes 159, 178-86 and accompanying text. In particular, supplemental special interrogatories are distinguished from the model of special interrogatories articulated in Fed. R. Civ. P. 49(b), which directs the court to submit the questions at the same time that it sends the jury out to deliberate on the general verdict, and provides that the answers to the questions can be used to challenge or reverse the general verdict.

154 To use the Dowling case as an example, a negative answer to an interrogatory regarding whether, under a preponderance standard, the jury would find that defendant was present in Mrs. Henry's home would have prevented the government from ever presenting evidence of defendant's presence in Mrs. Henry's home in any subsequent lawsuit, civil or criminal. Similarly, a negative answer to an interrogatory regarding defendant's intent to commit robbery in Mrs. Henry's home would preclude the government from ever characterizing this event as an attempted robbery. If the jury was unable to make any findings by a preponderance of the evidence, it could have indicated which issue was not proven beyond a reasonable doubt, precluding any related litigation requiring proof of that issue for conviction.

155 See supra note 30.

156 Although the issue raises some due process questions, see infra note 167, courts
precedent for the use of supplemental157 special interrogatories in other criminal contexts.158

To address most effectively the concerns raised by the Dowling doctrine, interrogatories with an acquittal should be supplemental to the verdict, that is, the interrogatories should be answered only after the jury reaches a general verdict of acquittal, for the sole purpose of determining the preclusive effect of that acquittal. Because they would not be essential to the validity of the general verdict, and would not influence the jury's deliberations on the general verdict, such interrogatories could be answered under the preponderance of the evidence standard.159 Any issues of fact

have repeatedly held that, while the use of special interrogatories in criminal cases is frowned on, it is not prohibited. See, e.g., Heald v. Mullaney, 505 F.2d 1241, 1245 (1st Cir. 1974) ("[W]e do not believe that a mechanical . . . rule of unconstitutionality is warranted for all special questions in criminal cases."); cert. denied, 420 U.S. 955 (1975); United States v. Ogull, 149 F. Supp. 272, 278 (S.D.N.Y. 1957) (stating that "departures from the unqualified general verdict" are sometimes acceptable); People v. Sequoia Books, Inc., 513 N.E.2d 468, 474 (Ill. 1987) (acknowledging that special interrogatories have been permitted for limited purposes), cert. denied, 488 U.S. 868 (1988); Commonwealth v. Licciardi, 443 N.E.2d 386, 390 (Mass. 1982) ("There are instances in which special questions in a criminal case will aid in the disposition of a case."); State v. Simon, 398 A.2d 861, 866 (N.J. 1979) (noting that the prejudicial effect of special interrogatories might by mitigated if the questions are integrated with a jury's final deliberations); see also Brown, supra note 37, at 831 ("[I]t is clear that [there is no] basis, constitutional or otherwise, for generally denying a defendant the right to submit special interrogatories in a criminal case.").

The Federal Rules of Criminal Procedure do not specifically provide for the use of special interrogatories, but Rule 57(b) provides that a court may, at its discretion, allow procedures not provided for in the rules so long as they are "not inconsistent with [the] rules or with any applicable statute." FED. R. CRIM. P. 57(b). Some state codes actually do provide for the use of special interrogatories in certain circumstances. See, e.g., CAL. PENAL CODE § 1150 (West 1985) (allowing juries to find special verdicts when legal issues are unclear); MASS. R. CRIM. P. 27(c) ("The trial judge may submit special questions to the jury.").

157 See supra note 155.

158 See infra notes 177-80 and accompanying text.

159 It is important to note that there is no specific precedent, either in civil or criminal procedure, for allowing special interrogatories to be answered under a different standard of proof than the one required for the verdict itself. This issue would be unlikely to ever arise in a civil suit, where the preponderance of the evidence standard is generally in effect for all issues, including the ultimate verdict. However, there is no reason why this innovation should not be allowed. Since the interrogatories would be supplemental to the verdict and would not be used to challenge it, no adverse consequences would arise from allowing the jury to articulate its findings more specifically than the criminal verdict requires. If the jury could not answer the interrogatories or if it gave answers inconsistent with the verdict, the acquittal would simply have no preclusive effect. See infra text accompanying notes 187-90.
determined in the defendant's favor under that standard would be given preclusive effect in subsequent prosecutions or civil suits.

The scheme proposed here offers several advantages. First, it allows defendants to avoid unfair and prejudicial multiple prosecutions by permitting one jury to resolve trial issues in a way that maximizes their preclusive effect. Relitigation of issues raised in the earlier trial could not be justified based on any uncertainty about the jury's factual findings or the standard of proof under which such findings were made. Any acquittal which in fact represents a jury's affirmative belief in the defendant's innocence would be recorded as such for the defendant's benefit. Second, interrogatories serve defendants' interests without altering the collateral estoppel doctrine as it now operates in a civil context. The use of special interrogatories is now common and accepted in civil practice, and the collateral estoppel benefits of special interrogatories in civil suits are well recognized. Finally, interrogatories conserve judicial, prosecutorial, and defense resources by preventing relitigation of issues that have already been decided by a jury. Special interrogatories answered in the defendant's favor would not only preclude the introduction of other act evidence in subsequent criminal trials, but would also prevent any civil suits based on the same facts as the criminal prosecution.

In analyzing the feasibility of this proposal, it is important to examine the use of special interrogatories in criminal trials generally. Although special interrogatories are not common in criminal cases, they have occasionally been used. Increasingly, courts are using special interrogatories in RICO cases to compel the jury to specify the predicate acts upon which a RICO conviction is based. Furthermore, supplemental special interrogatories are

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160 See, e.g., FED. R. CIV. P. 49(b) ("The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact . . ."). Answers to special interrogatories clearly determine for collateral estoppel purposes which issues were essential to the jury's verdict.

161 See, e.g., Mark S. Brodin, Accuracy, Efficiency, and Accountability in the Litigation Process—the Case for the Fact Verdict, 59 U. Cin. L. Rev. 15, 71 (1990) ("The disclosure of fact determinations achieved by the special verdict is also extremely helpful in the application of collateral estoppel (issue preclusion) . . . since it must be demonstrated that the issue in question had been resolved in a particular way in the previous case . . .").

162 The societal concern for conserving judicial resources, which is one animating factor of the civil collateral estoppel doctrine, is arguably even more significant in a criminal context because taxpayers not only pay for the time and efforts of the judge and the court, but also of the prosecutors and many of the defense attorneys.

163 See Robert M. Grass, Note, Bifurcated Jury Deliberations in Criminal RICO Trials,
often used to determine issues for sentencing, and to clarify issues for appeal. Still, the use of special interrogatories in the criminal context is by no means universally accepted. It is therefore important to address the well-entrenched objections to using interrogatories in criminal trials. The most important of these objections is based on the concern that compelling juries to answer interrogatories will unduly influence their deliberations on the issue of guilt. Additionally, there are significant concerns about how such interrogatories would be administered in the criminal context.

1. Avoiding Undue Influence on the Jury

Historically, the use of special verdicts and special interrogatories in criminal cases has been frowned on as an unwarranted judicial intrusion into the jury's function. Requiring specific findings for criminal verdicts is seen as encroaching on a defendant's right to unfettered juries that may acquit for any reason. One "historic function" of juries, particularly in criminal cases, is to "temper[] rules of law by common sense brought to bear upon the facts of a specific case." The use of special interrogatories restricts this function by compelling jurors to justify their findings and by making it more difficult to depart from strict rules of

57 FORDHAM L. REV. 745, 752 (1989) (citing cases in which special interrogatories have supplemented general verdicts in RICO convictions).

164 See infra notes 178-80 and accompanying text.

165 See Commonwealth v. Licciardi, 443 N.E.2d 386, 390-91 (Mass. 1982) (approving the use of special interrogatories to determine whether the jury's guilty verdict on a charge of first degree murder was based on a finding of premeditation or felony-murder, and if finding was based on felony-murder, to determine which felony was involved in order to clarify the issue for appeal).

166 See supra note 30.

167 See United States v. Spock, 416 F.2d 165, 180-83 (1st Cir. 1969). In this classic and much-quoted opinion, the court analyzes the long history of the general verdict in criminal cases and the reasons for preserving it, arguing that special verdicts represent impermissible judicial pressure on the jury's right to acquit despite evidence of guilt and to nullify the law. Both are liberties that are protected by the Due Process Clause and the right to trial by jury; see also United States v. Desmond, 670 F.2d 414, 420 (3d Cir. 1982) (Aldisert, J., dissenting) (arguing that special verdicts and special interrogatories in criminal cases attack the fundamental character of the criminal jury and should be prohibited in almost all cases); State v. Beavers, 364 So. 2d 1004, 1009 (La. 1978) ("[T]here is grave danger that special verdicts in criminal cases would prevent the jury from performing its most important . . . function, of providing the defendant with a safeguard against arbitrary, unchecked governmental power through community participation in the determination of guilt or innocence." (citations omitted)).

Furthermore, it prevents the jury from reaching a consensus on the result even if they disagree on the factual basis for it, which decreases the possibility of compromise verdicts and increases the possibility of hung juries.

These concerns can be addressed without sacrificing the use of special interrogatories, however. First, and most important, it is clear that the courts that have rejected special interrogatories have done so to protect the interests of defendants. In situations where interrogatories are not forced on defendants, or where increased risk of conviction is not an issue, courts have been much more receptive to their use. For example, in United States v. O'Looney, the Ninth Circuit upheld a trial judge's use of a special verdict, designed to clarify issues for a confused jury because the defendant did not object and the wording was not suggestive of guilt. In State v. Propps, the Supreme Court of Iowa allowed the use of special interrogatories to clarify the jury's factual

169 As the First Circuit asserted:

There is no easier way to reach, and perhaps force, a verdict of guilty than to approach it step by step. . . . By a progression of questions each of which seems to require an answer unfavorable to the defendant, a reluctant juror may be led to vote for a conviction which . . . he would have resisted. Spock, 416 F.2d at 182. Similarly, the New Jersey Supreme Court stated:

The singular vice of special interrogatories, particularly in a criminal trial, is their potential for destroying the ability of the jury to deliberate upon the issue of guilt or innocence free of extraneous influences. This potential for harm inheres in the subtly coercive effect interrogatories can have upon the course of a jury's deliberations. State v. Simon, 398 A.2d 861, 865 (N.J. 1979).

170 See Samuel M. Driver, The Special Verdict—Theory and Practice, 26 WASH. L. REV. 21, 24 (1951) ("[J]ury verdicts often represent compromises, and it is not so easy to reach separate compromise agreements on several factfindings of a special verdict as it is to agree on one all-inclusive general verdict.").

171 See United States v. Desmond, 670 F.2d 414, 417-18 (3d Cir. 1982) (arguing that "lack of judicial enthusiasm" for special interrogatories in criminal trials is based on the "the feeling that denial of a general verdict might deprive the defendant of the right to a jury's finding based more on external circumstances than the strict letter of the law" (citations omitted)).

172 544 F.2d 385 (9th Cir. 1976), cert. denied, 429 U.S. 1023 (1976).

173 See also People v. Sequoia Books, Inc., 513 N.E.2d 468, 475 (Ill. 1987) (allowing the use of special interrogatories because "rather than harm[ing] the defendant, the use of special interrogatories ... actually benefitted the defendant"); State v. Fournier, 554 A.2d 1184, 1188 (Me. 1989) (finding no reversible error in the use of special interrogatories because the defendant did not object at trial and because the "verdict form did not 'lead the jurors down the guilty trail'" (quoting State v. Heald, 307 A.2d 188, 193 (Me. 1973))).

174 190 N.W.2d 408 (Iowa 1971).
findings because the defendant requested them. In *United States v. Coonan*, the Second Circuit upheld a trial judge's use of special interrogatories requiring a factual finding that each RICO defendant had participated in at least two predicate acts. The court approved these special interrogatories because their purpose was to benefit defendants by preventing "prejudicial spillover" that might result in the convictions of marginally involved defendants. If proposed interrogatories are intended to benefit defendants rather than the government, and particularly if they can only be used at the request of defendants, most objections to their use disappear.

The question of whether special interrogatories influence the jury's deliberations of the defendant's guilt can be addressed by allowing the jury to answer the interrogatories only after it has reached a decision to acquit. Courts are more likely to approve requests for special interrogatories in criminal cases where they are supplemental to the verdict, that is, where they do not directly affect the outcome of deliberations. For example, in *United States v. Stassi*, the Second Circuit held that special interrogatories were permissible when they related to sentencing rather than to guilt. In *Newman v. United States*, the Tenth Circuit actually vacated a conviction based on a general verdict and remanded the case, requiring special interrogatories to assure that individual conspiracy defendants were not sentenced too harshly.

Similarly, special interrogatories could become more palatable in general by isolating the jury's deliberation process from its consideration of the special interrogatories. This could be effected by giving the questionnaire to the jury in a sealed envelope that would be returned unopened in the event of a conviction. A similar approach has been approved by several courts dealing with sentencing issues. For example, in *United States v. Gernie*, the

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175 839 F.2d 886 (2d Cir. 1988).
176 Id. at 890.
177 See United States v. Desmond, 670 F.2d 414, 420 (3d Cir. 1982) (Aldisert, J., dissenting) (denouncing special verdicts and special interrogatories in criminal cases, but providing an exception in cases where they are "specifically requested by the defendant for cause shown").
179 817 F.2d 635 (10th Cir. 1987).
180 The interrogatories directed the jury to determine which type of drugs the defendant had conspired to distribute because non-narcotic drug distribution carried a lighter sentence. See id. at 637.
Second Circuit approved the use of a special interrogatory regarding defendant's membership in a conspiracy after a crucial date, which affected his sentence, only after the jury reached a general verdict of guilty. Similarly, the Supreme Court of Washington in *State v. Slaughter* 182 allowed the use of a special interrogatory regarding whether or not the defendant was armed only after a guilty verdict was reached. The First Circuit in *United States v. Spock* 183 actually suggested this approach to cure the defect it perceived in submitting special interrogatories to the jury during its deliberation of the defendant's guilt:

If the procedure was, as we hold, prejudicial to the rights of the defendants, it is not saved by the propriety of the court's motive, doubtless a strong one in this particular case where difficult legal issues were involved, of avoiding an appellate court's dilemma due to ignorance of what theory the jury based its verdict upon. Assuming this to be proper, as to which we express no final opinion, it could have been accomplished by sending the jury out to answer special questions after it had returned its general verdict. 184

For the same reason, a Second Circuit justice suggested that special interrogatories in a RICO trial should be submitted to establish predicate acts, but only after the jury returned a conviction. 185 This would also free defendants from having to weigh the potential effects of any questions, no matter how sympathetically worded, on the deliberation process against the collateral estoppel benefits to be obtained from the interrogatories. 186

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183 416 F.2d 165, 180-83 (1st Cir. 1969).
184 *Id.* at 183 n.42 (citations omitted). This suggestion responds to a "dilemma" similar to that posed by any attempt to apply collateral estoppel to a criminal verdict. 185 *See United States v. Ruggiero*, 726 F.2d 913, 925-28 (2d Cir.) (Newman, J., concurring in part and dissenting in part), *cert. denied*, 469 U.S. 831 (1984).
186 Interestingly, one commentator has proposed that defendants be allowed to submit special interrogatories after the jury returns a verdict of guilty, both for double jeopardy purposes and to enable the defendant to challenge any conviction not clearly based on the appropriate factual findings:

It does not follow [from *Spock*] that the jury should also be empowered to convict against the weight of the evidence. . . . [S]pecial verdicts might often prevent a jury from convicting on the basis of passion or prejudice. . . .

. . .

. . . If a guilty verdict were returned, the defendant would have the option of submitting special verdicts. A failure by the jury to agree on factual findings consistent with the guilty verdict would result in a new trial, or . . . an acquittal.
2. Resolving Administrative Issues

The wider use of special interrogatories in criminal trials would add some administrative burden to the criminal justice system. Typical complaints about special interrogatories are that they increase jury deliberation time,\textsuperscript{187} yield ambiguous or inconsistent answers, and lead to disputes or additional litigation over the wording of the interrogatories.\textsuperscript{188} To be effective and practical, special interrogatories for collateral estoppel purposes must be as simple as possible to administer.

The issues in a criminal case are rarely complex. Effective interrogatories would therefore be limited to the essential elements of the crime and would require only yes or no answers. This would reduce any jury confusion or tendency to return ambiguous answers. Defendant's counsel would propose the interrogatories subject to approval by the court. Disputes between the prosecutor and defense counsel would be unlikely since by definition the interrogatories could not affect the jury's deliberations on the verdict.

Because any findings generated pursuant to the interrogatories would be made under a preponderance of the evidence standard rather than under the heavier reasonable doubt measure required for criminal conviction, any apparent inconsistencies between the verdict and the interrogatories would not be problematic. If none of the questions are resolved in defendant's favor, future courts may conclude that, although the jury found reasonable doubt as to defendant's guilt, it could not determine any element of the offense in defendant's favor by a preponderance of the evidence. The acquittal would, therefore, have no preclusive effect.

Finally, the amount of time jurors spend answering the interrogatories need not be excessive. If jurors cannot agree on a particular question, they can simply refuse to answer it. There is some precedent for this, even where the special interrogatories are intended to accompany the verdict. In \textit{Brennan v. United States},\textsuperscript{189} the jury refused to answer the special interrogatories, and instead

\textsuperscript{187} See Driver, \textit{supra} note 170, at 24 ("Juries seem to have more trouble reaching an agreement on special verdicts. Most of them were obliged to deliberate for twelve hours or longer.").

\textsuperscript{188} See Brodin, \textit{supra} note 161, at 73-83 (discussing cases in which the interrogatories were either confusing or misleading, or the jury answers were contradictory).

submitted a general verdict that was affirmed. Alternatively, the trial court could decide that the answers need not be unanimous, particularly if the district permits non-unanimous verdicts in civil matters.

Streamlined in this manner, special interrogatories for acquittals could be routinely used in criminal trials. Such routine use would do much to protect the interests of defendants by preserving the finality of their acquittals and to prevent needless and expensive relitigation of previously determined issues.

CONCLUSION

In Dowling v. United States, the Court chose to apply strictly collateral estoppel doctrine and to protect the judicial interest in truth determination at the expense of defendants' double jeopardy rights by holding that acquittals should not be permitted to preclude all future relitigation of the facts and issues raised in the first trial. Unfortunately, the natural result of the Dowling decision is that defendants have little protection from the unfair burden of relitigating conduct for which they have already been acquitted. This Comment has proposed that the interests of criminal defendants can be better reconciled with the Dowling decision by allowing them to request supplemental interrogatories with acquittals. Supplemental interrogatories would make criminal collateral estoppel work more efficiently by protecting determinations of innocence and by preventing multiple litigation, thereby conserving judicial resources and alleviating double jeopardy concerns without interfering with the state's interest in truth determination or allowing defendants the ongoing benefit of erroneous acquittals.

190 Defendants could be expected to ask for the interrogatories routinely even if they have no expectation of ever being prosecuted again because the interrogatories only exist to serve their interests and impose no costs on them. Because the prosecution cannot object, there is little to prevent interrogatories from becoming standard practice if judges allow their use.