

THE JUSTICE SYSTEM IN JEOPARDY: THE PROHIBITION ON GOVERNMENT APPEALS OF ACQUITTALS

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INTRODUCTION

The “trial of the century” ended two years ago when the jury acquitted O.J. Simpson of murder after just four hours of deliberation. In a trial plagued by gross judicial error favoring both sides, the government found itself without recourse in the appellate court system. Mr. Simpson’s team of high-priced attorneys, however, had long since begun to scrutinize the trial record for appealable errors that would allow him to challenge a conviction. This asymmetry in the right of appeal has produced a series of problems in the administration of the criminal law.

This Article briefly surveys the various rationales that support the prohibition on government appeals of acquittals. The Article then takes a critical perspective on these purported rationales and demonstrates how their periodic application has produced a virtually incoherent body of precedent. Thirty years ago, one commentator wrote that “policy confusion is the chief confusion in double

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jeopardy law.”¹ These words are even more true today in light of the barrage of overturned cases and futile attempts to distinguish the indistinguishable that have characterized the more recent decisional law in this area. The Article then analyzes a host of problems generated by the prohibition on government appeals. Finally, the Article advocates permitting government appeals of erroneous acquittals and addresses potential objections to such endeavors.

I. A BRIEF HISTORY

Opponents of reform are quick to point out that the prohibition on government appeals extends back to pre-colonial English common law. At common law neither the state nor the defendant could appeal the judgment of the trial court.² The defendant could, however, obtain a writ of grace from the crown if the proceedings were found to be grossly violative of his rights.³ It must also be recalled that criminal defendants enjoyed far less protection from prosecutorial abuse at that time than they do now.⁴

Initially, judicial consideration of the Double Jeopardy Clause of the Fifth Amendment⁵ rested on statutory rather than constitutional analysis. In *United States v. Sanges*,⁶ the Court held that the government had no right of appeal in a criminal case absent statutory authorization.⁷ The maxim of strict interpretation of statutes in derogation of the common law required that the authorization be explicit and unambiguous.⁸

Around the turn of the century, however, several successive Attorney

1. Note, *Twice in Jeopardy*, 75 YALE L.J. 262, 266 n.14 (1965).

2. See *Bartkus v. Illinois*, 359 U.S. 121, 152 n.5 (1959) (Black, J., dissenting); *Ex Parte Lange*, 85 U.S. 163, 169 (1873); *State v. Lee*, 30 A. 1110, 1112 (Conn. 1894). See generally LESTER B. ORFIELD, *CRIMINAL APPEALS IN AMERICA* 61 (1939); JAY A. SIGLER, *DOUBLE JEOPARDY* (1969).

3. This is essentially the position taken by Justice Story. He thought that the Double Jeopardy Clause prohibited retrial following appeal by either the government or the defendant. See *Lange*, 85 U.S. at 201 (“[A] party shall not be tried a second time for the same offense after he has once been convicted or acquitted of the offense charged by the verdict of a jury, and judgment has passed thereon for or against him.”) (citing 2 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1787 (2d ed. 1851)); see also OFFICE OF LEGAL POLICY OF THE UNITED STATES DEP’T OF JUSTICE, *REPORT TO THE ATTORNEY GENERAL: DOUBLE JEOPARDY AND GOVERNMENT APPEALS OF ACQUITTALS* 21 (1987) [hereinafter *REPORT TO THE ATTORNEY GENERAL*].

4. Note, *Statutory Implementation of Double Jeopardy Clauses: New Life for a Moribund Constitutional Guarantee*, 65 YALE L.J. 339, 343 (1956).

5. The relevant part of the Fifth Amendment reads, “nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.” U.S. CONST. amend. V.

6. 144 U.S. 310 (1892).

7. *Id.* at 318.

8. *Id.*

Generals pressed for the expansion of statutory authorization.⁹ The impetus for reform was underscored by the landmark 1904 decision, *Kepner v. United States*,¹⁰ which held that government appeals of acquittals were prohibited by a statute using the same language as the Double Jeopardy Clause in the constitution.¹¹ *Kepner* and its progeny significantly expanded the common law protection against multiple trials and multiple punishments.¹² In 1907, Congress responded to the pressure with the Criminal Appeals Act.¹³ The more radical House proposal, which contemplated virtual symmetry, was eviscerated by the Senate and the bill that passed the conference committee was rather limited.¹⁴

In *Palko v. Connecticut*,¹⁵ the Court first addressed the question of whether the Due Process Clause of the Fourteenth Amendment incorporated the Double Jeopardy Clause, thus rendering it applicable against the states. With only one dissenter, the Court held that the prohibition against government appeals was not so fundamental to the concept of liberty that due process required its application to the states.¹⁶ Thirty-two years later, the Court overruled *Palko* and incorporated the Double Jeopardy Clause.¹⁷ About the same time, Congress entered the colloquy with significant amendments to the Criminal Appeals Act in 1968 and 1971. Together, these amendments provided a blanket statutory authorization of government appeals whenever such appeals would not be violative of the Fifth Amendment.¹⁸ Particularly significant in determining Congressional intent was the final paragraph added in 1971 which mandated that "[t]he provisions of this section shall be liberally construed to effectuate its purposes."¹⁹ The Court recognized that the Criminal Appeals Act was intended by Congress to remove all statutory barriers to government appeals, fully constitutionalizing the issue.²⁰

9. See generally *United States v. Sisson*, 399 U.S. 267, 293 (1970) (discussing recommendations of the Attorneys General of the United States, beginning in 1892, to pass legislation allowing government to appeal in criminal cases).

10. 195 U.S. 100 (1904).

11. *Id.* at 133-34. *Kepner* was tried in the Philippine Islands. Therefore, the Bill of Rights did not apply to him, but a statute containing several identically worded provisions did. In deciding the case on "statutory" grounds, the Court made it clear the governing principles were the same under the Constitution. See *id.* at 124, 133. Indeed, *Kepner* has been so interpreted.

12. See William S. McAninch, *Unfolding the Law of Double Jeopardy*, 44 S.C. L. REV. 411, 413 (1993); Justin Miller, *Appeals by the State in Criminal Cases*, 36 YALE L.J. 486, 492 n.36 (1927).

13. Criminal Appeals Act, ch. 2564, 34 Stat. 1246 (1907) (codified as amended at 18 U.S.C. § 3731 (1994)).

14. See *United States v. Sisson*, 399 U.S. 267, 294-96 (1970).

15. 302 U.S. 319 (1937).

16. *Id.* at 328.

17. *Benton v. Maryland*, 395 U.S. 784 (1969).

18. See 18 U.S.C. § 3731 (1994).

19. *Id.*; see also H.R. CONF. REP. No. 91-1768 (1970).

20. See *United States v. Scott*, 437 U.S. 82, 85 (1978); *United States v. Wilson*, 420 U.S. 332, 337-38 (1975).

II. DEBUNKING OSTENSIBLE RATIONALES

A. Values Protected by the Double Jeopardy Clause

The Supreme Court has stated that the Double Jeopardy Clause consists of “three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.”²¹ The prohibition on retrials after acquittals has been given special weight.²² Several policy justifications have been offered in defense of these prohibitions. Justice Black described the policy underlying the Double Jeopardy Clause in *Green v. United States*²³ as follows:

The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.²⁴

Numerous other Supreme Court decisions and academic articles have supplemented this list of rationales purportedly supporting the prohibition on government appeals of acquittals.²⁵ These rationales can be separated into five basic categories, and are described below in order of descending importance.

First, as the Court indicated in *Green*, the guarantee is said to minimize the anxiety, fear, and expense to the defendant associated with a second trial.²⁶ Defense attorney fees can be exorbitant and particularly burdensome to those whose financial situation just barely disqualifies them from receiving court-appointed counsel. In addition, defendants may have to forego salary and spend

21. *United States v. DiFrancesco*, 449 U.S. 117, 129 (1980) (quoting *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969)) (footnotes omitted); *see also* Note, *supra* note 1, at 265-66.

22. *See DiFrancesco*, 449 U.S. at 129; *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977).

23. 355 U.S. 184 (1957).

24. *Id.* at 187-88; *see also Scott*, 437 U.S. at 87.

25. *See infra* notes 26-32 and accompanying text.

26. *See DiFrancesco*, 449 U.S. at 136; *Serfass v. United States*, 420 U.S. 377, 391 (1975); *Illinois v. Somerville*, 410 U.S. 458, 472 (1973) (White, J., dissenting); *United States v. Jorn*, 400 U.S. 470, 479 (1971); *Downum v. United States*, 372 U.S. 734, 741-42 (1963) (Clark, J., dissenting); *see also* REPORT TO THE ATTORNEY GENERAL, *supra* note 3, *passim*; Peter Westen & Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81, 84. For the purposes of this discussion, we consider only the anxiety, expense, and fear that would accompany a second trial. Government appeals that are successful and would not require a retrial and government appeals of pre-trial motions would not involve these concerns.

time in jail if they are unable to make bail. Even if released on bail, pending criminal litigation may strictly limit a defendant's ability to travel and may also affect his or her ability to maintain employment. A second rationale behind the Double Jeopardy Clause is the desire to preserve finality in judicial proceedings.²⁷ Government appeals of acquittals would clearly lengthen the appellate court docket, and trial courts would be faced with retrials in cases where government appeals were successful. The third value protected by the Fifth Amendment guarantee recognized by the Court in *Green* is the reduction in the likelihood of a wrongful conviction.²⁸ The Supreme Court has expressed concern that authorizing government appeals of acquittals may permit the prosecutor to use a first trial as a discovery device.²⁹ The prosecution is likely to gain more than the defense from such a "dry run" because disclosure requirements are typically asymmetric. A fourth rationale behind the Double Jeopardy Clause, according to both courts and commentators, is the right of the accused to have his trial completed by a particular tribunal.³⁰ Finally, the Double Jeopardy Clause protects the jury's power to engage in nullification. Some commentators argue that this is the only tenable rationale behind the prohibition on government appeals of erroneous acquittals.³¹ Each of these policy considerations will be examined in various contexts in which double jeopardy questions arise.³²

27. See *Scott*, 437 U.S. at 92 (referring to finality as a "primary purpose of the Double Jeopardy Clause"); *Crist v. Bretz*, 437 U.S. 28, 33 (1978); *Jorn*, 400 U.S. at 479; *State v. Lee*, 30 A. 1110, 1112 (Conn. 1894) (discussing common law protection from double jeopardy and stating that finality is the principle underlying common law rule); Lawrence J. Baldasare, Comment, *The Double Jeopardy Clause and Mistrials Granted on Defendant's Motion: What Kind of Prosecutorial Misconduct Precludes Reprosecution?*, 18 DUQ. L. REV. 103, 104 (1979).

28. See *DiFrancesco*, 449 U.S. at 130 (quoting *Green*, 355 U.S. at 188); see also *Scott*, 437 U.S. at 91, 101; James D. Gordon III, *Double Jeopardy and Appeal of Dismissals: A Before-and-After Approach*, 69 CAL. L. REV. 863, 865-66 (1981); Cathleen C. Herasimchuk, *Criminal Justice and the State's Right to Appeal*, 51 TEX. BAR. J. 242, 245 (1988); Note, *supra* note 1, at 266-67.

29. *DiFrancesco*, 449 U.S. at 128.

30. See *Oregon v. Kennedy*, 456 U.S. 667, 671-72 (1982); *DiFrancesco*, 449 U.S. at 128; *Arizona v. Washington*, 434 U.S. 497, 503 (1978). *But see* *Wade v. Hunter*, 336 U.S. 684, 689 (1949) (stating that defendant's right to trial by particular tribunal must, in some cases, be subordinated to public's interest in fair trials).

31. See *Westen & Drubel*, *supra* note 26, at 84; Peter Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 MICH. L. REV. 1001, 1012-23 (1980); Gordon, *supra* note 28, at 866-67. The Supreme Court has never explicitly recognized the Double Jeopardy Clause as protecting jury nullification. In a footnote in *DiFrancesco*, 449 U.S. at 130 n.11, Justice Blackmun quotes Professor Westen's nullification argument but suggests that it is simply another way of stating what the Court has said in *Green*, 355 U.S. at 184, and *Burks v. United States*, 437 U.S. 1 (1978). Neither *Green* nor *Burks*, however, involved jury nullification. See *Green*, 355 U.S. at 188; *Burks*, 437 U.S. at 16.

32. Professors Westen and Drubel catalogue the policy rationales somewhat differently. According to them, there are three basic interests which the Double Jeopardy Clause protects. First,

B. Problems with the Current State of Double Jeopardy Jurisprudence

1. *Incoherent Precedents.*—Perhaps the most striking aspect of Double Jeopardy Clause jurisprudence is its inconsistency. Barely distinguishable cases are routinely distinguished and the line separating the permissible from the impermissible becomes more crooked in each instance.³³ Recently decided cases are overruled with uncharacteristic frequency.³⁴ Such precedential confusion has been dubbed “doctrinal senility” by one commentator.³⁵ Justice Rehnquist himself wrote that “the decisional law in the [double jeopardy] area is a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator.”³⁶ The waters have become even less navigable in the seventeen years since Justice Rehnquist’s eloquent observation. A brief survey of the relevant precedents will demonstrate the untenable nature of the distinction between government appeals of erroneous acquittals and other repeat proceedings which the Court has held to be permissible.³⁷ The basic point is that the Court has indicated a willingness to depart from each of the values embodied by the Double

the *defendant’s* interest in finality is preserved (which includes his interest in avoiding embarrassment, expense, and ordeal; his interest in avoiding a continuing state of anxiety; the possibility of a wrongful conviction; and the right to the original tribunal). Westen & Drubel, *supra* note 26, at 85-106. Second, double jeopardy protects the interest in avoiding double punishment. *Id.* at 106-22. Finally, the interest in protecting jury nullification is protected. *Id.* at 122-55. There is little relevant difference between the first two subsets of Westen and Drubel’s first interest. Both involve unpleasant circumstances for the defendant if there were to be a second trial. Together, they are identified here as the most important rationale. The possibility of wrongful conviction has implications beyond the individual defendant. It is also a systemic concern that should be considered separately. Similarly, the loss of the right to the first tribunal would not in and of itself necessarily adversely affect the defendant. It cannot be lumped together with anxiety and expense as unequivocal costs that must be borne by the defendant if he is retried. Westen and Drubel’s second interest is less of a value underlying double jeopardy than a context in which it arises. The tripartite analysis which they employ also fails to acknowledge the interest of the judiciary in preventing cluttered court dockets—“finality” in the sense in which it is used here. *Green* notwithstanding, the categories utilized by this Article correspond more closely to judicial opinion and academic analysis. That said, the discussion here does not hinge upon the way in which the values underlying the Double Jeopardy Clause are categorized.

33. See, e.g., *infra* note 67 and accompanying text.

34. See, e.g., *United States v. Dixon*, 509 U.S. 688 (1993) (overruling *Grady v. Corbin*, 495 U.S. 508 (1990)); *United States v. Scott*, 437 U.S. 82 (1978) (overruling *United States v. Jenkins*, 420 U.S. 358 (1975)); *Benton v. Maryland*, 395 U.S. 784 (1969) (overruling *Palko v. Connecticut*, 302 U.S. 319 (1937)).

35. Note, *supra* note 1, at 264.

36. *Albernaz v. United States*, 450 U.S. 333, 343 (1981).

37. It is not my intention in this section to provide a comprehensive analysis of the legal topography, but rather to summarize current Supreme Court doctrine in order to appreciate the doctrinal inconsistencies.

Jeopardy Clause, even when several or all of them are implicated simultaneously. The relationship between the various contexts in which double jeopardy claims arise and the values ostensibly protected by the Double Jeopardy Clause are represented diagrammatically on the chart in the Appendix. The chart is designed to accompany the following discussion and should be frequently referenced.

There is no doubt that pre-trial motions are appealable by the government.³⁸ In a jury trial, jeopardy is not said to "attach" until the jury is sworn.³⁹ In bench trials, jeopardy attaches when the court begins to receive evidence.⁴⁰ Appeal may be permitted if taken before jeopardy attaches even if there has been some factual inquiry.⁴¹ The reason that government appeals of pre-trial motions do not violate double jeopardy is usually expressed in terms of our first rationale: "[w]hen a criminal prosecution is terminated prior to trial, an accused is often spared much of the expense, delay, strain, and embarrassment which attend a trial."⁴² The chart indicates that only one of the double jeopardy values is implicated in the case of government appeals of pre-trial motions. A pre-trial ruling cannot be said to involve the same finality concerns involved in post-verdict appeals. Very little courtroom time has been wasted when pre-trial motions are in order. The interest in retaining the original tribunal, certainly, is not even touched upon when a jury has not been impaneled. Similarly, there is no possibility that a jury could engage in nullification before it is selected. The only double jeopardy case that can be made is that the likelihood of a wrongful conviction is increased any time the government is permitted to seek reversal of an unfavorable pre-trial motion. Evidently, the Court does not regard this value as important enough to preclude government appeals in the context of pre-trial motions.

Double jeopardy law concerning mistrials is more complicated. The key distinction the Court draws is whether or not the defendant meaningfully consented to the mistrial declaration.⁴³ When the defendant moves for a mistrial or consents to a motion for a mistrial by the prosecution or *sua sponte* mistrial declaration by the judge, retrial will likely be permitted.⁴⁴ In fact, retrial is permitted even if necessitated by prosecutorial or judicial error as long as it is not

38. See *Serfass v. United States*, 420 U.S., 377, 394 (1975) (holding that government appeal of pre-trial order dismissing indictment was not barred by Double Jeopardy Clause); Herasimchuk, *supra* note 28, at 245.

39. See *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977); *Serfass*, 420 U.S. at 388.

40. See *Martin Linen*, 430 U.S. at 569; *Serfass*, 420 U.S. at 388.

41. *Serfass*, 420 U.S. at 390-91.

42. *Id.* at 391.

43. *Oregon v. Kennedy*, 456 U.S. 667, 683-86 (1982) (Stevens, J., concurring in part and dissenting in part); Anne Bowen Poulin, *Double Jeopardy and Judicial Accountability: When is an Acquittal Not an Acquittal?*, 27 ARIZ. ST. L.J. 953, 966 (1995). The Court has refused to characterize a defendant's consent to mistrial with the knowledge that a new trial might take place as a waiver of double jeopardy claims. See, e.g., *United States v. Scott*, 437 U.S. 82, 98-99 (1978); *United States v. Dinitz*, 424 U.S. 600, 608 (1976).

44. See, e.g., *United States v. DiFrancesco*, 449 U.S. 117, 130 (1980).

in bad faith or intended to goad the defendant into moving for a mistrial.⁴⁵ Prosecutorial or judicial misconduct is not enough to bar retrial absent evidence that the conduct was intended to “harass or prejudice the [defendant].”⁴⁶ Thus, retrial was not barred when the judge expelled lead defense counsel after he had disregarded explicit warnings about his opening statement and the defendant consequently moved for a mistrial.⁴⁷ Similarly, retrial was permitted in a case where the defendant moved for a mistrial after the prosecutor asked a witness if the reason he did not do business with the defendant was because the latter “is a crook.”⁴⁸ Returning to the chart, we find that at least two of the double jeopardy values are implicated in this situation. Whether retrial constitutes a significant financial and/or psychological burden on the defendant depends on the progress of the first trial when the mistrial was granted. Obviously, the costs to the defendant become more significant as the trial continues. The Court, however, does not draw any temporal distinctions. Further, permitting retrial after mistrial declarations increases the chances of wrongful conviction. This fact, too, does not make such retrials impermissible on double jeopardy grounds. The defendant’s right to have his trial completed by the first tribunal also falls by the wayside when such retrials are permitted. Because the jury never reaches a verdict, neither the interest of the judiciary in finality nor the interest of the defendant in protecting jury nullification is implicated in this context.

Where a mistrial is granted over the objection of the defendant, the Court has adopted the “manifest necessity” test first articulated in *United States v. Perez*.⁴⁹ Retrial is permitted only when there is “a manifest necessity for the [mistrial declaration], or the end of public justice would otherwise be defeated.”⁵⁰ Although the *Perez* Court stated that this “power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes,”⁵¹ there is much deference to the trial court in the determination of manifest necessity.⁵² The Court does not require an explicit finding of “manifest necessity,” but rather permits retrial when “the mistrial order is supported by [a]

45. See *Arizona v. Washington*, 434 U.S. 497, 508 (1978); *Dinitz*, 424 U.S. at 611, overruled by *Scott*, 437 U.S. at 82; see also Akhil Reed Amar & Johnathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1, 53 (1995); Baldasare, *supra* note 27, at 104.

46. *Dinitz*, 424 U.S. at 611. The focus on the intent of the prosecutor is necessarily difficult because the trial judge must engage in speculation. See Baldasare, *supra* note 27, at 131.

47. *Dinitz*, 424 U.S. at 611-12.

48. *Oregon v. Kennedy*, 456 U.S. 667, 669 (1982).

49. 22 U.S. (9 Wheat.) 579 (1824).

50. *Id.* at 580; see also *United States v. DiFrancesco*, 449 U.S. 117, 130 (1980); *United States v. Wilson*, 420 U.S. 332, 344 (1975); *Downum v. United States*, 372 U.S. 734, 736 (1963); *Wade v. Hunter*, 336 U.S. 684, 690 (1949); Note, *Double Jeopardy: The Reprosecution Problem*, 77 HARV. L. REV. 1272, 1276-81 (1964).

51. *Perez*, 22 U.S. at 579.

52. See *Arizona v. Washington*, 434 U.S. 497, 513-16 (1978); Baldasare, *supra* note 27, at 110-11.

high degree of necessity.”⁵³

The classic case in which a declaration of a mistrial, without the consent of the defendant, does not bar retrial is in the case of a hung jury.⁵⁴ If the jury acquits on some counts and is hung on others, retrial is permitted on the counts upon which the jury was hung.⁵⁵ Retrial is also permitted when the government moves for a mistrial because it discovers a defect in the indictment which is not curable by amendment, even though the defect was the fault of the prosecutor.⁵⁶ The potential for abuse is apparently outweighed by the futility involved in forcing the prosecution to complete a trial that would be automatically reversed if there were a conviction.⁵⁷ The Court also has allowed retrial when a mistrial was granted over the objection of the defendant because defense counsel made inappropriate allusions to prosecutorial misconduct that had necessitated a previous mistrial declaration.⁵⁸ Gross judicial error in *sua sponte* mistrial declarations has been held not to invoke a double jeopardy bar. In *Gori v. United States*,⁵⁹ the Court permitted retrial when the trial judge, on his own motion, declared a mistrial because he thought the prosecutor was *about* to introduce evidence of the prior convictions of the defendant.⁶⁰ The Court's decision to allow retrial was based partly on its belief that the trial judge in that case was said to be acting “in the sole interest of the defendant.”⁶¹ In another case, further proceedings were permitted after a wartime court martial was adjourned because of tactical developments and the unavailability of key witnesses due to illness.⁶²

In other cases, the Court has held that a mistrial declaration barred reprosecution. For example, in *Downum v. United States*,⁶³ double jeopardy precluded retrial when a mistrial was declared because the first government witness was not in court and had not been served with a summons.⁶⁴ Even though a new jury was impaneled two days later and the witness was prepared to testify,⁶⁵ the Court deemed further prosecution impermissible. In reaching its

53. *Washington*, 434 U.S. at 516.

54. *See, e.g., Perez*, 22 U.S. at 579.

55. *Richardson v. United States*, 468 U.S. 317 (1984). The Court relies on the fact that the original jeopardy never terminated. *Id.* at 325-26. The concept of continuing jeopardy was strongly defended by Justice Holmes in his famous dissent in *Kepner v. United States*, 195 U.S. 100, 134-135 (1904) (Holmes, J., dissenting). Elsewhere, the Court has vehemently rejected the concept of continuing jeopardy. *See, e.g., Jenkins*, 420 U.S. at 369; *Green v. United States*, 355 U.S. 184, 193 (1957). *See also infra* text accompanying notes 183-85.

56. *Illinois v. Somerville*, 410 U.S. 458, 466-71 (1973).

57. *Id.* at 469.

58. *Arizona v. Washington*, 434 U.S. 497, 510-14 (1978).

59. 367 U.S. 364 (1961).

60. *Id.* at 366-67.

61. *Id.* at 369.

62. *Wade v. Hunter*, 336 U.S. 684 (1949).

63. 372 U.S. 734 (1963).

64. *Id.* at 738.

65. *Id.* at 735.

conclusion, the Court placed much weight on the right of the accused to have the trial completed by the original tribunal⁶⁶—a value which had been all but ignored in *Illinois v. Somerville*,⁶⁷ a remarkably similar case. Retrial was also barred in *United States v. Jorn*,⁶⁸ in which the judge declared a mistrial so that prosecution witnesses could discuss with their attorneys the possibility that their testimony would constitute self-incrimination.⁶⁹ The judge ordered the mistrial in spite of the prosecutor's assurance that the witnesses had been advised of their rights.⁷⁰

Applying the rationales behind the Double Jeopardy Clause in the context of mistrials, it is difficult to discern any difference between mistrials declared with the consent of the defendant and those declared without his consent. Indeed, the chart indicates that the situations are identical. The attempt to distinguish between these two situations by invoking the Double Jeopardy Clause has produced contradictory results. In terms of the specific values that the Double Jeopardy Clause is said to protect, there should be no difference between *Gori* and *Jorn* or between *Somerville* and *Downum*. Rather, the only relevant inquiry should be whether the prosecution has abused its discretion and purposely attempted to induce a mistrial. It is only in those cases that the Double Jeopardy Clause should bar re prosecution. We shall return to this proposal in a later section.

Dismissals are another area in which retrials may or may not be precluded. The test is whether the trial judge's action, whatever its label, represents a resolution, correct or not, of some or all of the factual elements of the offense charged.⁷¹ If so, the Court reasons that dismissal is tantamount to an acquittal.⁷²

On the other hand, retrial is permitted when the defense moves for dismissal on grounds unrelated to guilt or innocence.⁷³ In *United States v. Scott*, for example, the Court allowed a second trial after the original trial judge granted a defense motion for dismissal based on a defective indictment.⁷⁴

66. *See id.* at 736.

67. 410 U.S. 458, 478 (1973) (Marshall, J., dissenting); *see also* McAninch, *supra* note 12, at 479.

68. 400 U.S. 470 (1971). *Jorn* is actually a four justice plurality opinion. Justices Black and Brennan held that the court had no jurisdiction over the case but sided with the plurality on the merits. *Id.* at 488.

69. *See id.* at 473.

70. *Id.*

71. *See* *United States v. Scott*, 437 U.S. 82, 87, 97 (1978) (overturning the three-year old holding in *United States v. Jenkins*, 420 U.S. 358 (1975)). The Court in *Jenkins* held that government appeals after dismissals were prohibited if they would require "further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged." *Jenkins*, 420 U.S. at 358. At least one commentator has argued that the new test fails to provide adequate protections for the defendant. *See generally* Gordon, *supra* note 28. *See also* *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 570 (1977).

72. Gordon, *supra* note 28, at 863.

73. *Scott*, 437 U.S. at 82.

74. *Id.* at 98-99. While rejecting the concept of waiver, the Court placed much emphasis

In other instances, the Court has held that the Double Jeopardy Clause bars retrial following dismissal. In *United States v. Martin Linen Supply Co.*,⁷⁵ the Court held that a judgment of acquittal following a hung jury is not appealable.⁷⁶ The decision appears at odds with the Court's holding in *United States v. Perez*.⁷⁷ If the evidence were truly so inadequate as to preclude any reasonable jury from returning a guilty verdict, then there was no reason to let the issue go to the jury in the first place. Certainly, the fact that the jury could not reach a verdict should not alter the manner in which the judge weighs the evidence in making this determination. At the very least, *Martin Linen* points out the difficulty in administering the *Scott* test to cases where the relevant judicial act involves mixed questions of law and fact.⁷⁸ If government appeals of erroneous acquittals were permitted, as this Article advocates, the *Scott* test would be irrelevant. Indeed, in terms of the values protected by the Double Jeopardy Clause, there is scant justification for a rule which permits retrial when the judge (erroneously or otherwise) grants a dismissal for a defective indictment after the trial is substantially underway, but prohibits it when the judge misapplies a legal standard to the facts and grants a dismissal. In both cases, the ordeal the defendant must face depends upon when the motion is granted, not upon whether it is based on a partial factual resolution or not. The same can be said for the increased chances of wrongful conviction and the loss of the defendant's right to the first jury. In neither case is there a verdict, thus the interest in finality and the interest in jury nullification are not implicated. Again, the values and rationales that underlie the Double Jeopardy Clause in the context of dismissals are neither fully adhered to nor explain the distinction drawn by the Court in *Scott*.

Judgments of acquittal notwithstanding the verdict (jnovs) provide yet

on the fact that the defendant voluntarily moved for dismissal. *Id.* In doing so, the Court not only conflated the issue of voluntariness with the issue of factual resolution but also engaged in profoundly curious reasoning. It is a sheer mystery how the Court reconciled the two sentences in the following quotation: "We do not thereby adopt the doctrine of 'waiver' of double jeopardy rejected in *Green*. Rather, we conclude that the Double Jeopardy Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice." *Id.* at 99 (footnotes omitted). One cannot resist recalling a dialogue between an interviewer and the manager of an old rock and roll band in the 1984 movie, *This Is Spinal Tap*. Says the interviewer (Rob Reiner): "The last time Tap toured America, they were booked into 10,000 seat arenas and 15,000 seat venues and it seems that now, on the current tour, they're being booked into 1200 seat arenas and 1500 seat arenas and I was just wondering, does this mean that the popularity of the group is waning?" And the response from the manager: "Oh no no no no no no no no. Not at all. I . . . I . . . I just think the, uh, that their appeal is becoming more selective." See also *Lee v. United States*, 432 U.S. 23 (1977) (holding similarly despite judge's comments as to defendant's probable guilt or innocence).

75. 430 U.S. 564 (1977).

76. *Id.* at 575.

77. 22 U.S. (9 Wheat.) 579 (1824).

78. *Martin Linen*, 430 U.S. at 583 (Burger, C.J., dissenting).

another example of a context in which the Supreme Court has permitted government appeals.⁷⁹ In *United States v. Sisson*,⁸⁰ the Court held that directed verdicts after verdicts of conviction bar government appeal. However, the decision appears to be based upon a statutory interpretation of the Criminal Appeals Act before the blanket authorization granted by the 1971 amendments.⁸¹ The appealability of such judgments does not hinge on the label assigned by the trial judge. Thus, the government could take an appeal from a post-verdict "dismissal" for pre-indictment delay.⁸²

In upholding the government's right to appeal jnovs, the Supreme Court relies heavily on the fact that an appellate reversal would not necessitate retrial but could simply involve reinstatement of the original jury verdict. Aside from the fact that it is profoundly curious that an automatic reinstatement of a conviction is *less* constitutionally questionable than an order for a new trial, the fact that the defendant will not have to be retried concerns only two of the five double jeopardy values. True, the defendant will not have to undergo the ordeal of a second trial. Further, because there will be no retrial, the defendant's right to the original tribunal is not violated. The jury nullification rationale is also not implicated since there was never a jury acquittal. But government appeals of jnovs violate the finality interest of the judiciary, though not to the same extent as would a second trial. Finally, the chances of a wrongful conviction are certainly increased. It must be assumed that at least a small percentage of the criminal defendants who are convicted by the jury and then acquitted by the trial judge, but who have their convictions reinstated by the appellate court, are indeed factually innocent.

The Supreme Court has also held that the government may appeal sentences.⁸³ In *North Carolina v. Pearce*,⁸⁴ the Court held that a retrial following an appeal by the defense could result in a longer sentence than the one originally given so long as the heftier sentence was not imposed as a punishment for taking the appeal in the first place.⁸⁵ Eleven years later, the Court held that the government can appeal sentences directly, without an intervening trial granted

79. See *United States v. Ceccolini*, 435 U.S. 268, 270-71 (1978); REPORT TO THE ATTORNEY GENERAL, *supra* note 3, at 2; Herasimchuk, *supra* note 28, at 245.

80. 399 U.S. 267 (1970).

81. *Id.* at 286.

82. See *United States v. Wilson*, 420 U.S. 332, 352-53 (1975). The decision did not turn on the fact that the dismissal was predicated on nonfactual grounds. The Court treated the trial judge's action as a judgment notwithstanding the verdict.

83. *United States v. DiFrancesco*, 449 U.S. 117, 132 (1980); see also Richard P. O'Hanley III, *Double Jeopardy and Prosecutorial Appeal of Sentences: DiFrancesco, Bullington, and the Criminal Code Reform Act of 1981*, 35 VAND. L. REV. 709, 710-11 (1982).

84. 395 U.S. 711, 724 (1969).

85. *Id.* The dissenters from *Pearce* and its progeny liken the situation to that in *Green*. They reasoned that the original sentence constituted an "implied acquittal" of any greater sentence and should therefore be barred. *Id.* at 745-46 (Harlan, J., concurring in part and dissenting in part). See also *DiFrancesco*, 449 U.S. at 152-54 (Stevens, J., dissenting).

at the request of the defendant.⁸⁶ Subsequently, the Court refused to extend *DiFrancesco* to permit the augmentation of a sentence to death following a government appeal.⁸⁷ Sentencing in death penalty cases, the Court reasoned, is done by the jury in separate proceedings and is actually more akin to a trial than a typical sentencing.⁸⁸ Looking at the chart, it is not difficult to see why government appeals of sentences are allowed. The only value violated when the government takes such appeals is the judicial interest in finality and even that value is not implicated as much as it would be if there were a second trial. Indeed, the Court reasons that government appeals of sentences involve no danger of retrial, less finality than acquittals, and do not place a previously acquitted defendant in the same precarious position as he was during the trial.⁸⁹

English common law notwithstanding, retrials following defendant appeals of convictions have never been prohibited in this country.⁹⁰ Similarly, a successful collateral attack on a guilty judgment following a coerced guilty plea does not bar retrial.⁹¹ The Court explained its reasoning in this way:

Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he was [sic] obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. From the standpoint of a defendant, it is at least as doubtful that appellate courts would be as zealous as they are now in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution.⁹²

Additionally, the Supreme Court has also upheld the action of an appellate court in ordering a new trial after a rehearing when that court had originally entered an acquittal.⁹³

The only exception to the rule allowing retrial after reversed convictions occurs when the reversal is based on insufficiency of the evidence.⁹⁴ If no reasonable jury could convict on the evidence, the Court reasons that an appellate reversal is tantamount to an acquittal, even if the insufficiency of the evidence

86. *DiFrancesco*, 449 U.S. at 139-43.

87. *Bullington v. Missouri*, 451 U.S. 430 (1981); see O'Hanley, *supra* note 83, at 711.

88. *DiFrancesco*, 449 U.S. at 139-43.

89. *Id.* at 132-36.

90. See *Forman v. United States*, 361 U.S. 416, 425 (1960) (referring to this right as "elementary in our law"); *Bryan v. United States*, 338 U.S. 552, 560 (1950); *Ball v. United States*, 163 U.S. 662, 666 (1896); Note, *supra* note 50, at 1283-85.

91. See *United States v. Tateo*, 377 U.S. 463 (1964).

92. *Id.* at 466; see also *DiFrancesco*, 449 U.S. at 131.

93. *Forman*, 361 U.S. at 426.

94. *Burks v. United States*, 437 U.S. 1, 11 (1978); see also *DiFrancesco*, 449 U.S. at 131.

stems from erroneous exclusions by the trial court judge.⁹⁵ However, in *Tibbs v. Florida*,⁹⁶ the Court drew a distinction between reversals based upon the sufficiency of the evidence and those based upon the weight of the evidence. In the latter case, a simple disagreement about the proper weight to be assigned to certain evidence is not enough to invoke a double jeopardy bar.⁹⁷

The state of affairs whereby defendants can be retried following reversed convictions must, for purposes of double jeopardy analysis, be compared to a hypothetical situation where appellate reversal would bar retrial. It is clearly possible to prohibit retrials after reversed convictions without denying the defendant the right to appeal at all. When retrials after reversed convictions are permitted, as they are according to current double jeopardy jurisprudence, several of the double jeopardy values are violated. Most importantly, the defendant is subject to a second trial and all the attendant hardships. Indeed, as the Court noted in *Kepner v. United States*,⁹⁸ “[t]he prohibition is not against being twice punished, but against being twice put in jeopardy; and the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial.”⁹⁹ Similarly, the judicial interest in finality is wholly violated when the slate is essentially wiped clean and a new trial commences. Again, the possibility of wrongful conviction is enhanced if we compare current doctrine to a state of affairs in which reversed convictions barred retrial. Finally, the defendant’s right to have his case completed by the original tribunal is violated, although the defendant is likely to appreciate a new jury rather than the one that originally convicted him. Because the original jury did not acquit the defendant, the jury nullification value is not implicated in the context of defendant appeals.

In the context of multiple trials for similar offenses, the precedents are even more incoherent.¹⁰⁰ According to one commentator, precedent in this area “has led to confusion and inconsistency which has very nearly made the constitutional provision meaningless.”¹⁰¹ Following Westen and Drubel,¹⁰² we can distinguish between “double description” cases and “unit of prosecution.” cases. In either context, the test, derived from *Blockburger v. United States*,¹⁰³ is whether one offense requires proof of a fact that the other does not.¹⁰⁴ An exception to this

95. *Burks*, 437 U.S. at 1, 2.

96. 457 U.S. 31, 46-47 (1982); see also REPORT TO THE ATTORNEY GENERAL, *supra* note 3, at 33.

97. See *Richardson v. United States*, 468 U.S. 317 (1984).

98. 195 U.S. 100 (1904).

99. *Id.* at 129 (quoting *Ball v. United States*, 163 U.S. 662, 669 (1896)).

100. Mirjan Damaška, *Structures of Authority and Comparative Criminal Procedure*, 84 YALE L.J. 480, 518 (1975); Note, *supra* note 4, at 344.

101. Note, *supra* note 4, at 368.

102. See *supra* note 26, at 111.

103. 284 U.S. 299, 304 (1932).

104. See also *Rutledge v. United States*, 116 S. Ct. 1241, 1245 (1996); *Brown v. Ohio*, 432 U.S. 161, 166 (1977); *United States v. Dockery*, 49 F. Supp. 907, 908 (E.D.N.Y. 1943); McAninch, *supra* note 12, at 447 n.270. Thus, the constitutionality of retrial depends upon the definition of

rule may occur, however, where the State is unable to proceed on the more serious charge at the outset because additional facts have not yet occurred or have not been discovered despite due diligence.¹⁰⁵

Unit of prosecution cases arise when multiple counts of the same general offense are tried in succession. In *Hoag v. New Jersey*,¹⁰⁶ the Court permitted a defendant who had been acquitted of robbing three people to be reprosecuted for robbing a fourth person even though all four robberies supposedly occurred in the same transaction. Twelve years later the Court held that even though a defendant could be retried under such circumstances, he could rely on collateral estoppel to preclude relitigation of facts previously resolved in his favor.¹⁰⁷ There could be a second trial as long as "a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration."¹⁰⁸

Double description cases involve offenses which constitute violations of discrete criminal statutes. In determining whether multiple punishment and/or multiple trials are permitted in such cases, the Supreme Court has adopted a rule of lenity.¹⁰⁹ Although the Double Jeopardy Clause does not appear to contain inherent prohibitions on how the legislature may define offenses, the rule of lenity dictates that the Court construe statutory language strictly. Absent clear language to the contrary, the Court will presume that the legislature did not intend to provide for multiple punishments for the same criminal act. In *Sanabria v. United States*,¹¹⁰ the defendant was charged in one count under both a horse betting theory and a numbers betting theory. The court of appeals held that it had jurisdiction for appeal and that the two theories each constituted separate counts. Therefore, the court could hear the appeal of the numbers betting count from which the defendant had been granted a dismissal. However, the Supreme Court held that "the discrete violations of state law which that business may have committed are not severable in order to avoid the Double Jeopardy Clause's bar on retrials for the 'same offense.'"¹¹¹

The general rule articulated by the Supreme Court is that successive trials of

the offense in the penal code. See Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 YALE L.J. 1807, 1817-18 (1997).

105. *Brown*, 432 U.S. at 169 n.7; see also McAninch, *supra* note 12, at 452 n.305.

106. 356 U.S. 464 (1958); see also Note, *supra* note 1, at 280.

107. *Ashe v. Swenson*, 397 U.S. 436 (1970).

108. *Id.* at 444 (quoting Daniel K. Mayers & Fletcher L. Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 HARV. L. REV. 1, 38-39 (1960)). Given the possibility of jury nullification, a defendant whose trial is based upon only one factual determination and who was acquitted because the jury chose to nullify could not be retried if a conviction would necessitate relitigation of the same factual determination. This is so even though the jury may have resolved that factual issue against the defendant but elected nonetheless to nullify.

109. See *Rutledge v. United States*, 116 S. Ct. 1241, 1250 (1996); Westen, *supra* note 31, at 1023-33; Westen & Drubel, *supra* note 26, at 116-22.

110. 437 U.S. 54 (1978).

111. *Id.* at 73.

greater and lesser included offenses are prohibited. In *Grady v. Corbin*,¹¹² the Court devised the “same conduct test” which essentially added a second prong to the original *Blockburger* test. According to the Court in *Grady*, the Double Jeopardy Clause bars retrial “if, to establish an essential element of an offense charged in [the second] prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted.”¹¹³ Three years later the Court rejected the same conduct test as confusing and historically insupportable, and in so doing, explicitly overruled *Grady*.¹¹⁴ The general rule also applies to cases in which a defendant is convicted of a lesser offense, but the jury remains silent on the greater offense. If the defendant appeals his conviction, he cannot be retried for the greater offense. Jury silence, according to the Court, constitutes an implied acquittal on the greater offense.¹¹⁵

In practice, the Supreme Court has taken a somewhat restrictive approach towards double definition cases. In *Brown v. Ohio*,¹¹⁶ the Court expressed skepticism about prosecutorial attempts to sever the same criminal act into discrete temporal violations. Thus, when a defendant was charged with auto theft and joyriding, which the prosecution argued occurred on different days, Justice Powell wrote that “[t]he Double Jeopardy Clause is not such a fragile guarantee that . . . its limitations [can be avoided] by the simple expedient of dividing a single crime into a series of temporal or spatial units.”¹¹⁷ Double definition questions frequently arise under catchall statutes such as RICO and continuing criminal enterprise (CCE) laws. In 1996, the Court held that conspiracy is a lesser included offense of CCE and a trial of the former bars later reprosecution for the latter.¹¹⁸ However, previous prosecution of a predicate offense other than conspiracy does not bar subsequent prosecution for CCE.¹¹⁹

Multiple trials for similar offenses violate every single value embodied by the Double Jeopardy Clause. There is a second trial with all of the accompanying expense, embarrassment, and anxiety for the defendant. The judicial interest in finality is clearly violated by a second trial. Multiple trials also increase the odds

112. 495 U.S. 508, 521 (1990).

113. *Id.* at 510.

114. *United States v. Dixon*, 509 U.S. 688, 708-09 (1993); *see also* *Rutledge v. United States*, 116 S. Ct. 1241, 1245 (1996) (unanimous opinion utilizing original *Blockburger* test); *McAninch*, *supra* note 12, at 465.

115. *Green v. United States*, 355 U.S. 184, 189-90 (1957).

116. 432 U.S. 161, 169-70 (1977).

117. *Id.* at 169.

118. *Rutledge*, 116 S. Ct. at 1247. A conviction for engaging in a CCE requires proof of three underlying offenses. A prior trial for conspiracy does not bar retrial for CCE if the conspiracy is not one of the three underlying offenses. In *Jeffers v. United States*, 432 U.S. 137, 152 (1977), the Court reached the same result but permitted retrial because the defendant had specifically opposed the government’s efforts to try the cases together. In doing so, the Court seemed to rely once again on the concept of waiver, a formulation which, as we have seen, has been rejected elsewhere. *Id.* at 152-54.

119. *Garrett v. United States*, 471 U.S. 773, 779 (1985).

of wrongful conviction and the danger that the state will wear down the defendant through repeated prosecutions. A second trial means a second jury, violating the defendant's right to the original tribunal—a particularly significant violation if he was acquitted by the first jury. Finally, multiple trials for similar offenses deprive the defendant of the benefits of jury nullification if the first jury engaged in such a practice. Despite all these violations, the Supreme Court has not held that the Double Jeopardy Clause precludes these multiple trials.

A similar situation arises in the context of concurrent jurisdiction.¹²⁰ The same criminal act can be prosecuted by the federal government after a state trial,¹²¹ by the state government after a federal trial,¹²² or by the state government after a trial in a different state.¹²³ This so-called “dual sovereignty doctrine” is precisely what permitted Rodney King's assailants to be reprosecuted in federal court for civil rights violations following acquittals for assault in California state court, even though both charges stemmed from the same alleged criminal act. In *Heath v. Alabama*,¹²⁴ the Court permitted one state to retry a defendant and impose the death sentence after he had been tried and sentenced to life imprisonment in another state. Here, too, each and every double jeopardy value is violated; the analysis is exactly the same as in the context of similar offenses. Recognizing this problem, the Model Penal Code severely restricts multiple prosecutions under the dual sovereignty doctrine.¹²⁵

We finally come to the realm of government appeals of acquittals. The state may not appeal acquittals even if the trial was replete with erroneous evidentiary rulings favoring the defendant.¹²⁶ In the case that has come to stand for this proposition, *Fong Foo v. United States*,¹²⁷ the trial judge dismissed the case based on lack of credibility of the early prosecution witnesses.¹²⁸ The trial judge grossly exceeded the scope of his authority in ordering a premature dismissal after hearing only the testimony of preliminary witnesses. Nonetheless, the Court held that the Double Jeopardy Clause barred retrial. The potential for this holding to subvert the ends of justice is reinforced by the exclusionary rule

120. See generally Amar & Marcus, *supra* note 45.

121. *Ábbate v. United States*, 359 U.S. 187, 195 (1959). The “Petite Policy,” however, restricts federal trials following state trials to cases which involve compelling federal interests and which have secured the authorization of the Attorney General. McAninch, *supra* note 12, at 426; Poulin, *supra* note 43, at 962 n.32.

122. *Bartkus v. Illinois*, 359 U.S. 121, 137 (1959); Margaret Jones, *What Constitutes Double Jeopardy?*, 38 J. CRIM. L.C. & P.S. 379, 380 (1947). Such prosecutions may be limited by state law, however. Poulin, *supra* note 43, at 962 n.32.

123. See Poulin, *supra* note 43, at 962 n.32.

124. 474 U.S. 82 (1985).

125. MODEL PENAL CODE § 1.10 explanatory note (1985).

126. See *Sanabria v. United States*, 437 U.S. 54, 68-69 (1978); *Kepner v. United States*, 195 U.S. 100, 131-32 (1904); *Ball v. United States*, 163 U.S. 662, 671 (1896).

127. 369 U.S. 141 (1962).

128. *Id.* at 141. A dismissal based on factual findings is tantamount to an acquittal under the *Scott* test.

jurisprudence. Illegally obtained evidence or confessions are not admissible. If pivotal evidence is excluded because the trial judge, misapplies the exclusionary rule after jeopardy has attached, there is no recourse. It is difficult to see how such prejudicial error results in any less of a "tainted" trial than does an error which precipitates a mistrial declaration after which the defendant may be retried.¹²⁹ In the words of one commentator:

The more logical view seems to be that the same fundamental principle of justice which allows a re-trial because a juror has been legally disqualified, should allow a re-trial when an error has been committed at the trial, such as, the admission of illegal evidence or the exclusion of legal evidence.¹³⁰

Nevertheless, the Supreme Court has expressed remarkable persistence in its refusal to depart from the double jeopardy values in the context of an acquittal that it so readily discards in the other contexts we have considered.¹³¹

Doctrinal uncertainty manifests itself in everyday affairs. Appellate dockets lengthen as the government attempts to capitalize on inconsistent precedent. Case by case analysis has particularly bogged down appellate courts in the context of mistrials.¹³² The uncertainty also has ramifications for police, attorneys, and judges.¹³³ When erroneous pro-defendant rulings occur in trials that result in acquittals, the trial judge's decision is insulated from review. His ruling becomes the law in his courtroom and propriety in evidence gathering can hinge upon which judge's name is pulled from the hat. At best, the police are not provided with uniform guidelines; at worst, they are provided with flatly inconsistent judicial directives.

2. *Criminals Go Free*.—Courts and commentators alike recognize that the values represented by the Double Jeopardy Clause must, to some extent, be balanced against the competing interests of society in seeing the guilty punished

129. See, e.g., *State v. Lee*, 30 A. 1110, 1112 (Conn. 1894). Retrial is not permitted even if it can be established that the defendant bribed or intimidated members of the jury.

130. Jones, *supra* note 122, at 388.

131. Federal courts of appeals have quietly endeavored to get around the prohibition on government appeals, however. See Scott J. Shapiro, Note, *Reviewing the Unreviewable Judge: Federal Prosecution Appeals of Midtrial Evidentiary Rulings*, 99 YALE L.J. 905, 913-14 (1990). One approach is to require the defendant to waive his double jeopardy rights with respect to a certain evidentiary matter or forego consideration of the motion. The Fifth Circuit legitimized this approach in *United States v. Kington*, 801 F.2d 733 (5th Cir. 1986). A second approach is to declare a mistrial so that the evidentiary matter can be considered in a pre-trial motion. The Fifth Circuit also validated this approach in *United States v. Moon*, 491 F.2d 1047 (5th Cir. 1974). These approaches seem to flatly contradict the values underlying the Double Jeopardy Clause. Furthermore, even if otherwise proper, both approaches require the acquiescence of the trial judge, which may not be forthcoming.

132. Baldasare, *supra* note 27, at 117.

133. Herasimchuk, *supra* note 28, at 242; PRESIDENTIAL COMMITTEE, CHALLENGE OF CRIME IN A FREE SOCIETY 40 (1967).

and ensuring the consistent and efficient administration of the criminal justice system.¹³⁴ As Judge Lumbard writes, "I believe that the 'ends of public justice' will not be served if we permit a defendant who is clearly guilty to go free because of the trial judge's erroneous interpretation of the controlling law."¹³⁵ To put the point slightly differently, "[w]ithout a method of trapping error, society is cheated out of a just trial."¹³⁶

When the government does not have the right to appeal, the defense has every incentive to attempt to prejudice the jury in his favor.¹³⁷ Absent truly aggressive judging, the only remedy is a declaration of a mistrial. Yet, as we have seen, in order for retrial to be permissible after a mistrial declaration to which the defendant does not consent, the state must prove "manifest necessity." This extraordinarily bizarre result unduly handicaps the prosecution in a system which already tips the scales significantly toward the defendant.

When the justice system habitually turns criminals loose because of improper legal rulings by the trial judge, demoralization abounds.¹³⁸ One bang of the gavel can wipe away enormous financial and personal investments. A diligent and hardworking prosecutor can lose months of hard work without any fault on his part. This demoralization is not confined to the players in the criminal justice game. Unpunished criminals engender a widespread lack of respect for the criminal justice system among the general public and potential wrongdoers themselves.¹³⁹

3. *Perverse Incentives for Trial Judges.*—Also to be considered are the effects of the asymmetric right of appeal on the trial judge. Although it is theoretically possible that judges, in order to ensure correctness, might favor the prosecution when ruling on close questions of law to preserve reviewability,¹⁴⁰ it seems far more likely that trial judges will favor defendants to preempt reversal.¹⁴¹ In a thoughtful and highly provocative article, Kate Stith endeavors

134. See *Oregon v. Kennedy*, 456 U.S. 667, 672 (1982); *United States v. DiFrancesco*, 449 U.S. 117, 131 (1980); *Illinois v. Somerville*, 410 U.S. 458, 464 (1973); *United States v. Tateo*, 377 U.S. 463, 466 (1964); *Downum v. United States*, 372 U.S. 734, 743 (1963) (Clark, J., dissenting); *Wade v. Hunter*, 336 U.S. 684, 688-89 (1949); Gordon, *supra* note 28, at 867; Mayers & Yarbrough, *supra* note 108, at 33; see also Baldasare, *supra* note 27, at 108; Note, *supra* note 50, at 1274.

135. *United States v. Jenkins*, 490 F.2d 868, 884 (2d Cir. 1973) (Lumbard, J., dissenting).

136. Shapiro, *supra* note 131, at 919; see also Baldasare, *supra* note 27, at 114-15.

137. If the recent allegations of jury tampering in the O.J. Simpson case prove to be correct, all the sanctions which the legal community can heap upon the defense team will not allow a retrial of Simpson.

138. Miller, *supra* note 12, at 503-04; Shapiro, *supra* note 131, at 907.

139. Herasimchuk, *supra* note 28, at 244; Miller, *supra* note 12, at 504.

140. See Mirjan Damaška, *Evidentiary Barrier to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 520 n.22 (1973).

141. Kate Stith, *The Risk of Legal Error in Criminal Cases: Some Consequences of the Asymmetry in the Right to Appeal*, 57 U. CHI. L. REV. 1, 37-38 (1990); REPORT TO THE ATTORNEY GENERAL, *supra* note 3, at 64; Herasimchuk, *supra* note 28, at 242, 244; Miller, *supra* note 12, at

to demonstrate the effects of asymmetry.¹⁴² She concludes that, except in areas where the law is highly uncertain, trial judges will favor defendants for at least two major reasons. First, judges are not inclined to clutter an already cluttered system. Because the defense can appeal erroneous rulings of law if he is convicted, one way to reduce the number of issues on appeal is to rule close questions in favor of the defense.¹⁴³ Second, the perceived magnitude of injustice is greater if an erroneous ruling allows a guilty man to walk than if such a ruling paves the way towards an erroneous conviction.¹⁴⁴ Both points indicate that the defendant benefits from the asymmetry in the right of appeal at the trial level as well.

4. *Shifts in the Body of the Law.*—Professor Stith also explains how this asymmetry effects evidence law as a whole.¹⁴⁵ When Isaac Newton said that every action has an equal and opposite reaction, he had not considered the world of criminal appeals. There is no countervailing force to oppose the migration of evidence law in a pro-defendant direction.¹⁴⁶ Defense attorneys can and do take frequent appeals which not only lay down the law but also reverse convictions if there are prejudicial errors which favor the government. There are no corresponding appeals for the state. Erroneous pro-defendant rulings are unreversible and, with time, may even gain legitimacy. Furthermore, there will be more erroneous reversals than erroneous affirmations for at least two related reasons. First, appellate judges often view themselves as error seekers—a fact which disinclines them to consistently affirm judgments. The second reason is easier to see in the context of a specific type of ruling. Let us adopt Professor Stith's example of a ruling as to the voluntariness, and hence the admissibility, of a confession. For simplicity sake, we will share her assumption that the ruling on this point is determinative of the outcome of the case. Because defense attorneys are unlikely to take wholly frivolous appeals, the clearly voluntary confessions will not come before the appellate court. Thus, that court might mistake *relative* involuntariness for *actual* involuntariness because of its skewed sample. This phenomenon, too, might lead the appellate court to gradually push evidence law in a direction which favors the defendant.

It may be argued that permitting the government to take advisory appeals would provide an appropriate countervailing force. Although it is true that such appeals would clarify the law and slow the unidirectional drift, it is unlikely that the force would be adequate. Psychologically, there is much more at stake when a reversal of an erroneous conviction will spare a man from a prison term than when a reversal of an erroneous acquittal will merely clarify the law. In any

511.

142. Stith, *supra* note 141, at 41.

143. *Id.*

144. *Id.*

145. See also Miller, *supra* note 12, at 506. The same can be said for the law of criminal procedure.

146. It should be noted that pre-trial motions in limine can be appealed by the prosecution—a phenomenon which provides some force in the other direction. This check, however, is inadequate.

event, the overwhelming majority of states and the federal courts prohibit moot appeals.¹⁴⁷

5. *Potential for Judicial Abuse.*—As we have seen, the state may not appeal mid-trial evidentiary rulings. This judicial unreviewability greatly compromises the administration of justice.¹⁴⁸ Judges are free to behave in a lawless manner as long as they do so in a way which furthers the defense. They may bully the prosecution, for example, by forcing the government to begin the trial when key witnesses are absent.¹⁴⁹ There are only two checks on such overt judicial abuse: mandamus from a higher court and impeachment or other disciplinary actions, both of which are utilized only in rare situations.¹⁵⁰

Although evidentiary rulings are appealable if raised in pre-trial motions, there are at least two reasons why such a provision is inadequate. First, during the course of the trial, innumerable unanticipated questions will emerge regarding, among other things, relevance, prejudice, hearsay, and jury instructions.¹⁵¹ Second, as noted previously, judges may deliberately delay rulings on pre-trial motions until jeopardy attaches, making the decisions essentially unreviewable.¹⁵² There is an obvious incentive for the defense to withhold its own evidentiary motions, as well as attempt to delay those of the prosecution, until jeopardy attaches.¹⁵³

6. *Potential Adverse Effects on Defendant.*—Several scholars have speculated that there is a correlation between the asymmetric right of appeal and the lack of an impetus to reform liberal reprosecution rules in the context of similar offenses and, especially, in concurrent jurisdictions.¹⁵⁴ In the words of one commentator:

There is probably some correlation between the slighting of this interest [the interest of society in preventing the guilty from going unpunished] and the development of rules allowing a liberal splitting of offenses and multijurisdictional prosecutions: when one slip may result in total immunity from prosecution for an offense, the temptation to multiply the

147. *Mills v. Green*, 159 U.S. 651, 653 (1895). Compare *State v. Viers*, 469 P.2d 53, 53 (1970) (moot appeals are unconstitutional); *State v. Martin*, 658 P.2d 1024, 1025 (Kan. 1983) (advisory appeals taken by state are permissible only when they involve questions of statewide interest that are vital to correct and uniform administration of criminal law).

148. See *Herasimchuk*, *supra* note 28, at 244; *Miller*, *supra* note 12, at 505.

149. *Poulin*, *supra* note 43, at 956; *Shapiro*, *supra* note 131, at 905-06.

150. *Stith*, *supra* note 141, at 37-38.

151. *Shapiro*, *supra* note 131, at 906.

152. *Id.* at 912-13.

153. Recognizing this problem, the First Circuit made some effort to restrict judges' ability to take this approach. See *United States v. Barletta*, 492 F. Supp. 910, 912-14 (D. Mass. 1980), cited in *Shapiro*, *supra* note 131, at 92-93.

154. See, e.g., *Jones*, *supra* note 122, at 380; *Mayers & Yarbrough*, *supra* note 108, at 14; Note, *supra* note 50, at 1274.

number of bites at the apple may become irresistible.¹⁵⁵

This Article advocates permitting government appeals from criminal acquittals as well as instituting compulsory joinder.¹⁵⁶

C. Policy Justifications Reconsidered

Now that we have surveyed double jeopardy jurisprudence and the problems caused by the asymmetric right to appeal, it is useful to re-examine the values embodied by the Double Jeopardy Clause. Upon doing so, it will become readily apparent that doctrine has departed from rationale and that each of the double jeopardy values has been discarded when the Supreme Court has deemed it pragmatic to do so. Government appeals from erroneous acquittals do not necessarily violate all these rationales and, even if they do, the corresponding government interest in the fair and efficient administration of criminal justice warrants lifting the prohibition on such appeals.

Justice Cardozo doubted that government appeals of criminal acquittals constituted an impermissible hardship for the defendant. As he wrote in *Palko v. Connecticut*,

The state is not attempting to wear the accused out by a multitude of cases with accumulated trials. It asks no more than this, that the case against him shall go on until there shall be a trial free from the corrosion of substantial legal error. This is not cruelty at all, nor even vexation in any immoderate degree. . . . The edifice of justice stands, its symmetry, to many, greater than before.¹⁵⁷

Judge Lumbard eloquently reminds us that the defendants' interest in avoiding a second trial must be weighed against the competing interests of the state. He states:

An unalterable rule that the Double Jeopardy Clause bars all government appeals from acquittals, fails to weigh against the individual's very proper interest in not experiencing the anxiety, expense, and harassment that a second trial brings, the equally considerable interest of society in the fair, just, and sensible administration of criminal justice.¹⁵⁸

We have witnessed the Supreme Court's willingness to allow the defendant to incur a second trial and all the attendant hardship. Indeed, the chart demonstrates that this value—the most important of those protected by the Double Jeopardy Clause—is all but ignored in the contexts of mistrials granted with the defendant's consent or because of a manifest necessity, dismissals based on nonfactual issues, reversed convictions, similar offenses, and concurrent

155. Note, *supra* note 50, at 1274.

156. See *infra* text accompanying notes 191-94.

157. 302 U.S. 319, 328 (1932) (internal citations omitted).

158. *United States v. Jenkins*, 490 F.2d 868, 884 (2d Cir. 1973) (Lumbard, J., dissenting).

jurisdiction.¹⁵⁹ The Court in *Jeffers* openly admitted that “the policy behind the Double Jeopardy Clause does not require prohibition of the second trial.”¹⁶⁰ It is profoundly ironic that retrial is permitted after an error-free trial that culminates in a hung jury, but not when prejudice, inserted into the proceedings by a crafty defense lawyer, results in an acquittal.¹⁶¹ In his dissent in *Scott*, Justice Brennan goes so far as to suggest that the value of protecting the defendant from the hardships of a second trial is not central. He writes, “[w]hile the Double Jeopardy Clause often has the effect of protecting the accused’s interest in the finality of particular favorable determinations, this is not its objective. For the Clause often permits Government appeals from final judgments favorable to the accused.”¹⁶² Given the willingness of the Court to abandon this value when expediency so requires, it cannot be accorded such sacred status in the context of government appeals of acquittals. At the very least, we should heed Judge Lumbard’s advice and weigh this rationale against the importance of a fair and efficient criminal justice system.

The overburdened judiciary certainly has a powerful interest in the finality of verdicts which proceed a fair trial. However, when a trial is marred by legal error, whichever side it favors, the trial is quite simply unfair:

The end is not reached, the cause is not finished, until both the facts and the law applicable to the facts are finally determined. The principle of finality is essential; but not more essential than the principle of justice. A final settlement is not more vital than a right settlement.¹⁶³

The Supreme Court has shown a readiness to discard this value as well in the contexts of judgments notwithstanding the verdict, sentences, reversed convictions, similar offenses, and concurrent jurisdiction.

Both society and individual defendants have a vital interest in ensuring that persons are not wrongfully convicted. State appeals of criminal acquittals would necessitate retrial and any trial brings with it the possibility that the defendant will be wrongfully convicted.¹⁶⁴ The number of wrongful convictions could just as well be reduced by prohibiting the prosecution of every fourth defendant, but no one would seriously entertain such a proposal. An acquittal following a trial marred by significant legal error¹⁶⁵ which favors the defendant does not suggest in any way that the defendant is not guilty. As Justice Brennan wrote, “[t]he rule

159. See *United States v. DiFrancesco*, 449 U.S. 117, 149 (1980) (Brennan, J., dissenting).

160. *Jeffers v. United States*, 432 U.S. 137, 152 (1977).

161. *Mayers & Yarbrough*, *supra* note 108, at 12.

162. *United States v. Scott*, 437 U.S. 82, 104 (1978); see also *Westen & Drubel*, *supra* note 26, at 125-29.

163. *State v. Lee*, 30 A. 1110, 1110-11 (Conn. 1894).

164. See *REPORT TO THE ATTORNEY GENERAL*, *supra* note 3, at 56.

165. I am not advocating allowing the state to retry defendants whenever it can demonstrate prejudicial error. The concept of “harmless error” should be applied to error which prejudices the state just as it is applied to those errors which prejudice the defendant. Only when the trial judge’s error could have had a substantial impact on the verdict should the case be retriable.

prohibiting retrials following acquittals does not and could not rest on a conclusion that the accused was factually innocent in any meaningful sense. If that were the basis for the rule, the decisions that have held that even egregiously erroneous acquittals preclude retrials were erroneous."¹⁶⁶ Moreover, as Justice White opined in *Patterson v. New York*, "[d]ue process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person."¹⁶⁷ The possibility of a wrongful conviction is also present in the contexts of pre-trial motions, mistrials, dismissals, judgments notwithstanding the verdict, retrials following reversed convictions, similar offenses, and concurrent jurisdiction. Yet the Court has determined that the Double Jeopardy Clause does not bar government appeals in these instances.

The Supreme Court has retreated from a stance that accords significant weight to the accused's right to have his trial completed by the original tribunal. In overruling *Jenkins*, the Court in *Scott* noted that "our vastly increased exposure to the various facets of the Double Jeopardy Clause has now convinced us that *Jenkins* was wrongly decided. It placed an unwarrantedly great emphasis on the defendant's right to have his guilt decided by the first jury empaneled to try him"¹⁶⁸ Elsewhere, the Court acknowledged the need to balance this interest with the competing interests of the state: "a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments."¹⁶⁹ If the defendant's right to have his trial completed by the original jury were essential to the double jeopardy guarantee, we could imagine that there would be some distinction between jury verdicts and bench verdicts. Yet this is a distinction the Court has refused to draw. Furthermore, a quick glance at the chart indicates the contexts in which the Court has allowed this value to be superseded. These contexts include mistrials granted with the defendant's consent or because of a manifest necessity, dismissals based on nonfactual issues, reversed convictions, similar offenses, and concurrent jurisdiction.

Professors Westen and Drubel maintain that jury nullification is the only viable rationale behind the Double Jeopardy Clause.¹⁷⁰ A consideration of the propriety of jury nullification is beyond the scope of this article. For our purposes, it is enough to acknowledge that jury nullification is far from an absolute right.¹⁷¹ In fact, the leading federal decision on jury nullification regards

166. *Scott*, 437 U.S. at 108 (Brennan, J., dissenting) (citations omitted); see also Westen & Drubel, *supra* note 26, at 128.

167. 432 U.S. 197, 208 (1977).

168. *Scott*, 437 U.S. at 86-87.

169. *Richardson v. United States*, 468 U.S. 317, 324-25 (1984) (quoting *Wade v. Hunter*, 336 U.S. 684, 689 (1949)); see also *Burks v. United States*, 437 U.S. 1, 11 n.6 (1978); *Arizona v. Washington*, 434 U.S. 497, 516 (1978); *Illinois v. Somerville*, 410 U.S. 458, 470-71 (1973); *United States v. Jorn*, 400 U.S. 470, 480 (1971).

170. Westen & Drubel, *supra* note 26; see also Westen, *supra* note 31.

171. In a recent, highly controversial article, Paul Butler defends jury nullification as a moral good, particularly when practiced by black jurors who sit on cases in which black defendants are

it less as a right than as something we know we cannot prevent. According to *United States v. Dougherty*,¹⁷² the jury has the power to acquit against the evidence but the defendant is not entitled to an instruction advising the jury of that power. Yet the right of jury nullification is implicitly recognized in our criminal justice system. It explains the prohibition on directed verdicts and special verdicts; it explains why the prosecution cannot challenge a verdict for inconsistency; and it explains why the doctrine of collateral estoppel cannot be applied against the defendant in subsequent trials for previously litigated factual disputes.¹⁷³

Allowing government appeals of acquittals would not necessarily eradicate the defendant's "right" to enjoy the benefits of jury nullification. This value can be largely safeguarded by prohibiting government appeals for sufficiency of the evidence, that is, prohibiting retrial or the entering of a guilty judgment when the appellate court determines that no rational jury could have voted to acquit. This approach would not bring about complete symmetry because the defendant could still appeal on the grounds of insufficiency of the evidence (which would bar retrial under *Burks*) or weight of the evidence (which would allow retrial under *Tibbs*).¹⁷⁴ The problem arises when a jury acquits in a case where there has been substantial legal error favoring the defendant. In such cases, there would be no way to ascertain whether the jury might have convicted if erroneously excluded evidence were admitted, or whether they were engaging in jury nullification and would have acquitted regardless of the evidentiary ruling. But we cannot elevate the practice of jury nullification to the status of overt legitimacy—indeed, sacrosanctity—by refusing to retry a defendant whose original trial was tainted with favorable prejudicial errors simply because the jury *might* have acquitted against the evidence.¹⁷⁵

Again, if jury nullification were truly the rationale behind the double jeopardy guarantee, Double Jeopardy Clause jurisprudence would distinguish

accused of non-violent crimes. Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995). Yet he candidly admits that his goal is "the subversion of the present criminal justice system." *Id.* at 706 n.158. I share neither his disrespect for the criminal justice system nor his vehement support of the supposed "right" of jury nullification.

172. 473 F.2d 1113, 1136 (D.C. Cir. 1972).

173. See Westen, *supra* note 31, at 1012-17; Westen & Drubel, *supra* note 26, at 131-32.

174. See *supra* text accompanying note 94-97.

175. At least one commentator has suggested that this problem can be avoided by using the same jury for the retrial. Amar, *supra* note 104, at 1843. The possibility of utilizing the original jury on retrial to allow them to nullify again if that was, in fact, their original intent, is impractical. Aside from the logistical difficulties in reconvening a dismissed group of citizens, the members of the first jury could hardly be said to be unbiased. They will already have heard any evidence that the appellate court later deemed inadmissible or any instructions that the appellate court later deemed inappropriate. A second jury, of course, would have the power to engage in jury nullification.

between jury trials and bench trials.¹⁷⁶ Furthermore, the chart demonstrates that the value of jury nullification is severely diminished in the contexts of similar offenses and concurrent jurisdiction. In summary, all of the values embodied by the Double Jeopardy Clause are important to the administration of criminal justice. Yet they are not absolutes. The Supreme Court has acknowledged circumstances in which each and every one of these values must take a second seat to the equally fundamental interest of society in convicting the guilty.¹⁷⁷ The prohibition of government appeals of acquittals unduly exalts the interests of the defendant over those of society—and the entire criminal justice system suffers as a result.

III. POTENTIAL OBJECTIONS TO ALLOWING THE STATE TO APPEAL ERRONEOUS ACQUITTALS

This paper has argued that the government should be able to take appeals from acquittals if the trial was tainted with error prejudicial to the state. In the first half of this century, the American Law Institute took a similar view.¹⁷⁸ In order to limit the potential for prosecutorial abuse, appeals should be prohibited in cases where the prosecutor has engaged in misconduct designed to provoke a mistrial or inserted appealable error into the proceedings to avoid an unfavorable verdict. This determination should be made by the trial judge subject to appellate

176. Poulin, *supra* note 43, at 968; Westen, *supra* note 31, at 1019-21; Westen & Drubel, *supra* note 26, at 132-34. Some commentators, however, defend a corresponding “judge nullification.” See Poulin, *supra* note 43, at 977 (citing Westen & Drubel, *supra* note 26, at 133).

177. See *supra* text accompanying notes 157-76. It should be noted that retrial is allowed in civil cases when the trial is tainted with legal error prejudicial to the plaintiff. There, too, defendants must face the expense, anxiety, and harassment of a second trial—a trial whose attorney fees need not be borne by the state, even when the defendant is indigent. Similarly, the possibility of wrongful judgment favoring the plaintiff is increased. Finally, the case is not completed by the first tribunal. Obviously, the stakes are lower when the defendant does not face a jail term and no one seriously contends that the Double Jeopardy Clause applies to civil trials. The point is that the values theoretically embraced by the Double Jeopardy Clause are wholly disregarded in the context of civil trials—often no less of an ordeal for the defendant. This phenomenon is even more remarkable when one considers the fact that the competing interest of the state in ensuring a just settlement of a dispute between private parties pales before its competing interest in ensuring that those who violate its laws are convicted.

Moreover, civil tort actions for wrongful death or battery do not violate the Double Jeopardy Clause when they follow criminal acquittals on charges of murder and assault respectively—a fact which allowed private suits against O.J. Simpson and Bernard Goetz. The civil standard of proof which is “by a preponderance of the evidence,” is, of course, a lesser standard than proof “beyond a reasonable doubt,” which is the standard required in criminal cases. Nonetheless, each and every one of the double jeopardy values is violated when the defendant must undergo virtually identical proceedings after he has been acquitted, though the stakes are arguably less significant.

178. SIGLER, *supra* note 2, § 13; see also ORFIELD, *supra* note 2, at 61; REPORT TO THE ATTORNEY GENERAL, *supra* note 3, at 54.

review. The possibility of government appeal will significantly reduce the incentives of defense counsel to engage in suspect practices. According to a report to the Attorney General from the Office of Legal Policy of the Department of Justice,

[t]he possibility of a government appeal on the ground of error would, however, diminish defendants' incentive to interject legal and factual errors into trial proceedings, in the hope of securing unjustified acquittals. It is an unfortunate fact that criminal defense lawyers have too often secured acquittals for their culpable clients through tactics that undermine the search for truth and justice.¹⁷⁹

Greater symmetry would also eliminate the perverse incentives of trial judges to rule in favor of the defendant on close legal questions to avoid review and retard the movement of evidence in a pro-defendant direction.

Despite the attractiveness of such a policy, there are several potential objections. First and foremost, opponents would argue that government appeals of criminal acquittals violate the constitution. Although that is certainly the case according to current Double Jeopardy Clause jurisprudence, it is far from clear that the founders felt that way.¹⁸⁰ As late as 1937, the Supreme Court placed the double jeopardy guarantee alongside the group of rights that "are not of the very essence of a scheme of ordered liberty. To abolish them is not to violate a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."¹⁸¹ It was not until *Benton* that the Double Jeopardy Clause attained the status of "fundamental."¹⁸²

One theory that has been offered to explain why the Double Jeopardy Clause does not prohibit government appeals of acquittals is Justice Holmes' concept of "continuing jeopardy." As he wrote in his famous dissent in *Kepner*:

The jeopardy is one continuing jeopardy, from its beginning to the end of the cause. Everybody agrees that the principle in its origin was a rule forbidding a trial in a new and independent case where a man already had been tried once. But there is no rule that a man may not be tried twice in the same case. . . . He no more would be put in jeopardy a second time when retried because of a mistake of law in his favor, than he would be when retried for a mistake that did him harm.¹⁸³

Although a majority of the court has never accepted the concept of "continuing

179. REPORT TO THE ATTORNEY GENERAL, *supra* note 3, at 57.

180. *Id.* at 20; *see Note, supra* note 4, at 1.

181. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (internal quotes and citations omitted).

182. *Benton v. Maryland*, 395 U.S. 784, 794 (1969).

183. *Kepner v. United States*, 195 U.S. 100, 134-35 (1904); *Justices of Boston Mun. Court v. Lydon*, 466 U.S. 294, 309-11 (1984) (Holmes, J., dissenting); *Burks v. United States*, 437 U.S. 1, 15 n.9 (1978); *Jeffers v. United States*, 432 U.S. 137, 152 (1977); *Amar, supra* note 104, at 1842-45; *ORFIELD, supra* note 2, at 59-60; *Jones, supra* note 122, at 389; *Mayers & Yarbrough, supra* note 108, at 7-8; *McAninch, supra* note 12, at 6.

jeopardy,"¹⁸⁴ the Court relied on the fact that original jeopardy never terminated in *Richardson v. United States*.¹⁸⁵

Another theory which holds that government appeals do not violate the Double Jeopardy Clause relies on the fact that a criminal defendant is never put in jeopardy in a trial tainted with error which prejudices the state: "the 'putting in jeopardy' means a jeopardy which is real, and has continued through every stage of one prosecution, as fixed by existing laws relating to procedure."¹⁸⁶ Recently, English courts have held that the English counterpart of the Double Jeopardy Clause is not violated when a retrial follows a trial that was so flawed that it was not really a trial at all.¹⁸⁷

Assuming, *arguendo*, that government appeals of acquittals do violate the Constitution, the analysis here does not change. This paper seeks to examine the policy considerations surrounding asymmetric appeals. If implementation of the proposal herein recommended would necessitate a constitutional amendment, then that is precisely what sound policy requires.

Opponents may also point to the fact that government appeals of acquittals potentially could involve additional hardship for the innocent. To begin with, the availability of government appeal does not mean that appeals will be taken with any regularity.¹⁸⁸ As one commentator noted, the "main object of that officer is to get rid of his cases as quickly, albeit as gracefully as possible."¹⁸⁹ Furthermore, priority docketing of criminal appeals can help minimize this hardship. Finally, as we saw above, reluctance to impose compulsory joinder of similar offenses may be linked to negative sentiment concerning the prohibition

184. See, e.g., *United States v. Jenkins*, 420 U.S. 358, 369 (1975); *Green v. United States*, 355 U.S. 184, 193 (1957).

185. *Richardson v. United States*, 468 U.S. 317, 325-26 (1984); *id.* at 327 (Brennan, J., concurring in part and dissenting in part). According to Mayers and Yarbrough, the Court relied upon the concept of continuing jeopardy in *Palko*. Mayers & Yarbrough, *supra* note 108, at 11-12.

186. *State v. Lee*, 30 A. 1110, 1111 (Conn. 1894); see also ORFIELD, *supra* note 2, at 69.

187. *Regina v. Dorking Justices*, 3 W.L.R. 142 (1984), cited in REPORT TO THE ATTORNEY GENERAL, *supra* note 3, at 51. In fact, most other common law countries, including New Zealand, India, Ceylon, South Africa, some Australian states, and Canada, permit government appeal of acquittals. REPORT TO THE ATTORNEY GENERAL, *supra* note 3, at 50-53. Government appeal is also permitted in most civil law countries, including Japan which has a Double Jeopardy Clause of its own. *Id.* at 2, 53. Finally, such appeals are usually permitted on the Continent, especially in Germany which has very liberal appellate review for both sides. See John H. Langbein, *Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?*, AM. B. FOUND. RES. J. 195 (1981).

188. One way in which we can reduce the capacity for governmental abuse is to adopt a deferential standard such that retrials would be permitted only when the acquittal represented a misapplication of the law *and* that there is a reasonable probability that the outcome was affected by the error. See Amar, *supra* note 104, at 1843. This standard would be similar to the Court's deferential test for ineffective assistance of counsel. See *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984).

189. Miller, *supra* note 12, at 500.

of government appeals.¹⁹⁰ Compulsory joinder has been advocated by judge and commentator alike.¹⁹¹ The Model Penal Code provides for compulsory joinder.¹⁹² Two commentators suggest that *Brown v. Ohio* was a significant step in that direction.¹⁹³ Paradoxically, then, permitting government appeal of erroneous acquittals might decrease the potential for abuse.

There are at least two additional objections to permitting government appeal of acquittals. First, allowing such appeals could only add to the costs of the criminal justice system both in terms of judicial resources and state expenditures for defense counsel for indigent defendants.¹⁹⁴ But at the risk of sounding melodramatic, justice is priceless. If we can improve the fairness of the administration of criminal justice and protect the interest of the state in punishing the guilty, we should be willing to bear the additional burden.¹⁹⁵ Second, opponents may argue that allowing government appeals from acquittals may prompt prosecutors to attempt to use initial trials as discovery devices. As Justice Blackmun opined in *DiFrancesco*, "if the government may reprosecute, it gains an advantage from what it learns at the first trial about the strengths of the defense case and the weaknesses of its own."¹⁹⁶ The simple answer to this concern is to foreclose government appeal when the prosecutor has deliberately inserted error. This prohibition is akin to the current prohibition of retrials after the prosecutor intentionally goads the defendant into moving for mistrial.¹⁹⁷ In short, none of these concerns warrant perpetuation of the asymmetric right to appeal and the plethora of problems which accompany it.

CONCLUSION

Double Jeopardy Clause jurisprudence is riddled with inconsistency. Skillful defense attorneys can exploit the asymmetry in criminal appeals to their culpable clients' interests. A rule that consistently requires criminal defendants to be set free after erroneous legal rulings by trial judges breeds demoralization and cynicism among players and disrespect among laymen. At the trial level, judges have an incentive to favor the defendant in close legal determinations in order to insulate themselves from appellate review—a phenomenon which contributes to

190. See *supra* text accompanying notes 148-50.

191. See *Ashe v. Swenson*, 397 U.S. 436, 453-54 (1970) (Brennen, J., concurring); see also Note, *supra* note 1, at 269, 292-96.

192. MODEL PENAL CODE § 1.08 (1985).

193. Westen & Drubel, *supra* note 26, at 162.

194. See Herasimchuk, *supra* note 28, at 244.

195. It should be recalled that crime, particularly white collar crime, has enormous economic costs. If more criminals were brought to justice, not only could the state reclaim some of this loss, but the deterrent effect of punishment on would-be criminals would increase in a commensurate fashion.

196. *United States v. DiFrancesco*, 449 U.S. 117, 128 (1980); see *supra* text accompanying notes 28-29; see also Gordon, *supra* note 28, at 856-66.

197. See Westen, *supra* note 31, at 1006.

the subversion of justice. The unreviewable trial judge dictates the law in his courtroom—a fact which has profound effects on the way evidence is gathered during criminal investigations. The asymmetric right of appeal gradually pushes the body of evidence law farther and farther towards the interests of the defendant and farther and farther away from the interests of society.

The values represented in the Double Jeopardy Clause are essential to our system of justice, but they are not absolutes. The Court has balanced and should continue to balance these values against the competing interest of society in maintaining a fair justice system that maximizes correct results while still protecting the rights of the defendant. In a system that already stacks the deck in favor of the defendant, it is unnecessary and unwise to deny the government the right to take appeals when criminal trials are tainted by erroneous legal determinations.

Appendix—The Chart

VALUE

<u>CONTEXT</u>	Ordeal for Plaintiff	Finality with respect to Courts	Poss. of Wrongful Conviction	Same Tribunal	Jury Nullification	Double Jeopardy Bar?
Pre-trial Motions	NV	NV	****	NV	NV	NO
Mistrials With Def. Consent	Depends	NV	****	****	NV	NO
Without Consent	Depends	NV	****	****	NV	YES
Dismissals Factual	Depends	NV	****	****	NV	YES
Non-Factual	Depends	NV	****	****	NV	NO
Jnovs	NV	****	****	NV	NV	NO
Sentences	NV	****	NV	NV	NV	NO
Def. Appeals	****	****	****	****	NV	NO
Similar Offenses	****	****	****	****	****	NO
Concurrent Jurisdiction	****	****	****	****	****	NO
Acquittals	****	****	****	****	****	YES

Key:

**** = the value represented by this cell would be violated if there were no double jeopardy bar

NV = the value represented by this cell would **not** be violated if there were no double jeopardy bar

