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THE THREE FACES OF DOUBLE JEOPARDY: REFLECTIONS ON GOVERNMENT APPEALS OF CRIMINAL SENTENCES

Peter Westen*

"O'Reilly was on trial for grand larceny. The jury returned and the foreman announced, 'Not guilty.'"

"'Wonderful,' O'Reilly exclaimed. 'Does that mean I can keep the money?'"[†]

Every now and then a case comes along that tests the fundamental premises of a body of law. *United States v. DiFrancesco*¹ presents such a test to the law of double jeopardy, raising the question whether the government may unilaterally appeal a defendant's criminal sentence for the purpose of increasing the sentence.² The question cannot be answered by facile reference to the text of the fifth amendment, because the terms of the double jeopardy clause are not self-defining. Nor can it be settled by reference to history, because the issue has not arisen with any frequency until now.³

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† *What's So Funny?*, PSYCH. TODAY, June, 1978, at 104.

1. 604 F.2d 769 (2d Cir. 1979), *cert. granted*, 100 S. Ct. 1012 (1980).

2. See note 157 *infra*.

3. Although several states allow the prosecution to cross-appeal a defendant's sentence for the purpose of seeking an increase on appeal *in response* to a defendant's prior appeal of sentence, no state permits the prosecution to *initiate* an appeal of sentence for the purpose of seeking an increase on appeal. See ABA STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES § 3.4, at 55 (Approved Draft, 1968); Note, *Twice in Jeopardy: Prosecutorial Appeals of Sentences*, 63 VA. L. REV. 325, 325-26 n.4 (1977). Massachusetts and Maine have identical statutes which appear to permit the prosecution to initiate an appeal of sentence for the purpose of seeking an increase, MASS. ANN. LAWS ch. 278, § 28B (Michie/Law. Co-op 1980), ME. REV. STAT. ANN. tit. 15, § 2142 (1980), but the Massachusetts statute has been construed to mean that the prosecution may not appeal except in response to a defendant's prior appeal. *Walsh v. Picard*, 446 F.2d 1209, 1211 (1st Cir. 1971), *cert. denied*, 407 U.S. 921 (1972). The Maine statute is presumably to be construed in the same fashion, particularly in light of the position taken by the United States Court of Appeals for the First Circuit that any other reading of the statute would be unconstitutional. See *Walsh v. Picard*, 446 F.2d at 1211. The federal government authorizes the prosecution to initiate an appeal of sentence only with respect to the relatively infrequent prosecution of dangerous special offenders such as the defendant in *United States v. DiFrancesco*, 604 F.2d 769 (2d Cir. 1979), *cert. granted*, 100 S. Ct. 1012 (1980), and even there only since 1970. See 18 U.S.C. § 3576 (Supp. 1980), as noted in S. REP. NO. 96-553, 96th Cong., 2d Sess. 1137 n.17 (1980), and 21 U.S.C. § 849(h) (1972) (a statutory provision almost identical to § 3576). It is no accident that the unique provision for government appeal of sentences in § 3576 (and in its twin, 21 U.S.C. § 849(h)) is so recent. It is only recently that Congress has authorized the government to take expanded appeals of any kind in criminal cases. For a statutory history of the federal government's authority to take

Moreover, although the issue has been lurking about for over a century,⁴ it finds no authoritative resolution in the vast jurisprudence of double jeopardy. The reason for this is that the Supreme Court's decisions are ambivalent. On the one hand, the Court has said in dictum that "to increase [a defendant's] penalty is to subject the defendant to double punishment for the same offense in violation of the Fifth Amendment to the Constitution."⁵ On the other hand, the Court has held that a court may increase a defendant's sentence in consequence of an appeal if the defendant himself initiates the appeal.⁶ To decide which line of cases is authoritative, one cannot rely exclusively on either one; initially, one must put them both aside and seek the answer in the fundamentals of double jeopardy. Thus, to decide whether the Court's earlier dictum should now be invoked in a case in which it would become a holding, one must decide whether the dictum is a sound reflection of the values inherent in the double jeopardy clause; similarly, to decide whether the Court's earlier holding should now be followed in a case in which the defendant himself is *not* taking an appeal, one must decide whether the presence or absence of an appeal by a defendant is significant in light of the purposes of double jeopardy.

This search for controlling values is necessary in every constitutional area, but it is especially important, and difficult, in the area of double jeopardy. For unlike other constitutional provisions, the double jeopardy clause is a triptych of three separate values: (1) the integrity of jury verdicts of not guilty, (2) the lawful administration of prescribed sentences, and (3) the interest in repose. Each value is entirely distinct from and theoretically independent of the others, all

appeals in criminal cases, see *United States v. Wilson*, 420 U.S. 332, 336-39 (1975) (describing the history of title III of the Omnibus Crime Control Act of 1970, now in effect as 18 U.S.C. § 3731 (Supp. 1980); *United States v. Sisson*, 399 U.S. 267, 307-08 (1970) (describing the statutory history of the predecessor statutes to § 3731). As a result, the problem of government-initiated requests for increases in sentence could not arise before 1970 except in the context of a government request to the trial court (as opposed to an appellate court) for a reconsideration of sentence, *e.g.*, *Bozza v. United States*, 330 U.S. 160 (1947), or a government petition to an appellate court for writ of mandamus (as opposed to an appeal) for the correction of an illegal sentence, *e.g.*, *United States v. Denson*, 603 F.2d 1143 (5th Cir. 1979).

4. See *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 173 (1873) (dictum), later taken as authority for the proposition that a trial court has no constitutional authority under the double jeopardy clause to increase a defendant's sentence at the government's request, *United States v. Benz*, 282 U.S. 304, 307 (1931). For a fuller discussion of *Lange*, see text accompanying notes 165-69 *infra*.

5. *United States v. Benz*, 282 U.S. 304, 307 (1931). The foregoing statement from *Benz* was dictum because the actual issue in *Benz* was not whether a trial court may *increase* a defendant's sentence at the government's request, but whether it may *reduce* a defendant's sentence at his request.

6. See *North Carolina v. Pearce*, 395 U.S. 711, 719-21 (1969).

being related to one another only by the "rubric"⁷ of the double jeopardy clause.⁸ To solve the problem of government appeals of criminal sentences — indeed, to solve any difficult problem of double jeopardy — one must identify the three values and match them to their respective weights, taking care not to use examples of one as authority for another.⁹ The foregoing approach not only promises to bring coherence to the jurisprudence of double jeopardy, but also works to transform complex cases into simple ones.

This tripartite approach to double jeopardy is particularly useful for the *DiFrancesco* problem of government appeals of criminal sentences. As we shall see, two of the three values of double jeopardy turn out to be irrelevant to *DiFrancesco*, while the weight of the third value is such as to render the resolution of *DiFrancesco* nearly self-evident. In short, *DiFrancesco* is a seemingly difficult case that analysis reveals to be actually rather easy.

I. THE THREE FACES OF DOUBLE JEOPARDY

Some constitutional provisions, having unitary purposes, lend themselves to textual analysis: one customarily begins with a phrase (or even a single word) from the Constitution and attempts to state its meaning in a manner consistent with its original purposes and developed jurisprudence.¹⁰ The double jeopardy clause is not such a provision. The double jeopardy clause does not lend itself to easy textual analysis, because its words and phrases change their meaning depending upon which of its three purposes is at issue. The three purposes are simply too distinct from one another to be usefully combined in any single formulation, and any effort to do so inevitably results in a statement too abstract and generalized to be capable of resolving particular cases.¹¹ To avoid confusion it helps to put

7. *Crist v. Bretz*, 437 U.S. 28, 46 (1978) (Powell, J., dissenting).

8. See *Illinois v. Vitale*, 100 S. Ct. 2260, 2264 (1980) ("[t]he constitutional prohibition of double jeopardy has been held to consist of three separate guarantees"); *United States v. Scott*, 437 U.S. 82, 92 (1978) (the double jeopardy clause serves several purposes — purposes that are "separate" yet "related").

9. See *Whalen v. United States*, 100 S. Ct. 1432, 1442 n.3 (1980) (Blackmun, J., concurring) (cases defining the "same" offense for purposes of successive prosecution should not be invoked as authority for the definition of the "same offense" for purposes of cumulative punishment).

10. For example, the constitutional meaning of a defendant's sixth amendment right to be "confronted" with the "witnesses against him" can be usefully investigated by inquiring into the meaning of the phrase, "witnesses against him." See Westen, *The Future of Confrontation*, 77 MICH. L. REV. 1185, 1187-90 (1979).

11. Perhaps the most striking example was Justice Black's statement that the essence of double jeopardy is that no one should have to "run the gantlet" more than "once." *Green v. United States*, 355 U.S. 184, 190 (1957). The obvious difficulty with Justice Black's "colorful and graphic phrase," *Ashe v. Swenson*, 397 U.S. 436, 465 (1970) (Burger, C.J., dissenting), is

aside the specific words of the fifth amendment and directly analyze its three underlying meanings; once its various meanings have been identified and separately formulated, one can then return to the original text and make the respective connections.¹²

A. *Acquittals: The Defendant's Interest in the Integrity of Jury Verdicts of Not Guilty*

We begin with the rule that is said to be "fundamental"¹³ to the double jeopardy clause: the constitutional right of a defendant not to be further prosecuted following a jury verdict of not guilty. This rule is assumed to be fundamental because it is the most "absolute."¹⁴ It not only operates without exception, but also applies even where the jury's verdict of not guilty is wholly implicit.¹⁵ The question, therefore, is whether the "absolute finality"¹⁶ of a jury verdict

that the terms, "gantlet," "run," and "once," are no more self-defining than the original phrasing of the fifth amendment. Accordingly, in order to decide what these new terms mean, one must follow the same path one takes in deciding what the original fifth amendment phrasing means — "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb." That is, in order to decide what the words of the fifth amendment mean, one must first ascertain what purposes they serve. When one does, one will discover, once again, that the purposes are "separate," *United States v. Scott*, 437 U.S. 82, 92 (1978), and, accordingly, that the meanings of the constituent terms change in accord with the several purposes for which they are invoked. *See Whalen v. United States*, 100 S. Ct. 1432, 1442 (1980) (Rehnquist, J., dissenting) ("the meaning of this phrase ['the same offense'] may vary from context to context"). To be sure, one can always take the step of subsuming all three meanings under a general notion of procedural "fairness;" but if one does, one will discover that "fairness" states the issue at too high a level of generality to be of any utility in resolving actual problems. To resolve real problems, one will be forced once again to reduce "fairness" to its separate constituent elements.

12. Consider, for example, the fifth amendment term "the same offense." With respect to whether a defendant may be tried for an offense after having already been convicted of a prior offense, the second offense is the "same" as the first if the second necessarily contains any statutorily sufficient elements in common with the first. *See Illinois v. Vitale*, 48 U.S.L.W. 4741, 4742-43, 4744 (U.S. June 19, 1980) (per White, J.). With respect to whether a defendant may be given multiple sentences for multiple offenses following a single trial for a given course of conduct, one offense is *not* the "same" as another if the legislature explicitly intended that they be cumulatively punished, even though one contains elements necessarily found in another. *See Whalen v. United States*, 100 S. Ct. 1432, 1440 (1980) (White, J., concurring). *See also* 100 S. Ct. at 1436. With respect to whether a defendant may be tried for an offense after having already been acquitted of a prior offense, the second offense is the "same" as the first if the prosecution attempts to prove any issue of fact in the second proceeding which it tried and failed to prove in the first, even though the legislature intended the two offenses to be cumulatively punishable, and even though the second offense contains no statutorily sufficient elements in common with the first. *See Ashe v. Swenson*, 397 U.S. 436 (1970). *See generally* *Brown v. Ohio*, 432 U.S. 161, 166-67 n.6 (1977). To try to formulate a single definition of "same offense" for these three separate purposes would produce a statement of such abstract generality as to be of no usefulness in resolving actual cases.

13. *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977).

14. *Burks v. United States*, 437 U.S. 1, 16 (1978).

15. *See Green v. United States*, 355 U.S. 184, 190 (1957).

16. *Burks v. United States*, 437 U.S. 1, 16 (1978).

of not guilty has any bearing on the authority of the government unilaterally to appeal for an increase in a defendant's sentence.

To answer the foregoing question one must first identify the constitutional value that underlies the jury-acquittal rule, and then determine the relevance of the value to government appeal of sentences. Although the Supreme Court has yet to explain the jury-acquittal rule, there appear to be three possible rationales: (1) the defendant's expectation of finality regarding jury verdicts of not guilty; (2) the jury's constitutional prerogative to find the facts; and (3) the jury's prerogative to acquit against the evidence.

1. *The Expectation of Finality*

The finality argument takes two separate forms — one based on the expectations a defendant *actually* has, and the other based on the expectations he is *entitled* to have. The argument from actual expectations must fail, because its implications are implausible. If the jury-acquittal rule were based on actual expectations, jury acquittals would never be final unless defendants were shown actually to have expected them to be final; yet jury acquittals are now treated as final without reference to any such showing, and even without any reasonable likelihood of such a showing.¹⁷ Moreover, if the jury-acquittal rule were based on actual expectations, the rule could be erased merely by making a prospective change in people's actual expectations; yet surely it would be unconstitutional to enact a statute for the appeal of jury acquittals, even if the statute were made wholly prospective and were applied only to defendants having notice of the new statute.¹⁸

17. Thus, the defendant in *Green v. United States*, 355 U.S. 184 (1957), *did not* show and *could not* have shown that he actually relied on the finality of the jury's decision implicitly to acquit him of first degree murder, because at the time he was tried, the prevailing rule in the federal courts was that an implicit acquittal is not an acquittal for double jeopardy purposes and does not operate to immunize a defendant from being retried on the charge of which he was implicitly acquitted. See *Trono v. United States*, 199 U.S. 521 (1905) (distinguished if not altogether overruled in *Green v. United States*, 355 U.S. at 194-98). The *Trono* rule was in effect at the time in a majority of the states that had considered it. See *Green v. United States*, 355 U.S. at 216-18 n.4 (Frankfurter, J., dissenting).

18. This was essentially the situation in *Benton v. Maryland*, 395 U.S. 784 (1969). The defendant in *Benton* was tried in a Maryland state court on two counts. After being explicitly acquitted on one and convicted on the other, he successfully challenged his conviction on the ground that the entire underlying indictment was invalid. Following the reversal of his conviction, he was retried and convicted on both counts, a disposition which was entirely in accord with the longstanding law of Maryland at the time of his original trial. The defendant in *Benton* could not have actually relied on the finality of his explicit acquittal, because at the time he moved to set aside his original conviction, he knew that the law of Maryland then in effect permitted the state to retry him on the count of which he had been acquitted following his successful challenge to the underlying indictment. See *Benton v. State*, 1 Md. App. 647, 650-51, 232 A.2d 541, 542-43 (1967) (collecting authorities). Nor could the defendant have

The stronger argument is that a defendant is *entitled* to an expectation of finality, regardless of whether he actually has such an expectation. This argument takes several forms. A favorite form is that if the state is allowed to re prosecute following jury acquittals, it will inevitably convict innocent defendants, because it will deliberately wear them down through repeated litigation, or intentionally persist in prosecuting them until it eventually finds a jury willing to convict.¹⁹ A variation of the argument is that if the state is allowed to re prosecute in such cases, it will obtain an unfair advantage over the defendant, because it will intentionally use the first trial as a discovery device for inspecting the defendant's case, or as a dry run for testing its own case.²⁰

The trouble with these arguments is not that they are bad, but that they are unresponsive: they do not explain the "absolute" nature of the jury-acquittal rule. If the rule were designed solely to protect innocent defendants, or solely to prevent the prosecution from using the first trial as a dry run or from shopping for a conviction-prone jury, the rule would be confined to abuses of that kind. It would be tailored to correspond to the separate double jeopardy standards that now govern re prosecution following mistrials and reversed convictions — namely, that once jeopardy attaches, the state may not retry a defendant over his objection solely for the deliberate purpose of improving upon its case, harassing the defendant, or shopping for a more favorable trier of fact.²¹ Instead, the jury-acquittal rule sweeps far more broadly than the rules for mistrials and reversed convictions — and far more broadly than reasonable to serve the foregoing purposes²² — because it accords absolute finality to jury acquittals even where the prosecution is acknowledged to

relied on the federal constitutional rule of double jeopardy to the contrary, because it was well understood at the time of his original trial that the double jeopardy clause of the fifth amendment did not apply to the states. *See Palko v. Connecticut*, 302 U.S. 319 (1937), *overruled in Benton v. Maryland*, 395 U.S. 784, 793-96 (1969).

19. *See Green v. United States*, 355 U.S. 184, 187-88 (1957) ("The underlying idea . . . 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 . . . enhancing the possibility that even though innocent he may be found guilty."). *See also Hoag v. New Jersey*, 356 U.S. 464, 474 (1958) (Warren, C.J., dissenting).

20. *See United States v. Scott*, 437 U.S. 82, 105 n.4 (1978) (Brennan, J., dissenting); *United States v. Wilson*, 420 U.S. 332, 352 (1975); *Ashe v. Swenson*, 397 U.S. 436, 447 (1970).

21. *See, e.g., United States v. Dinitz*, 424 U.S. 600, 611 (1976); *United States v. Jorn*, 400 U.S. 470, 485 & n.12 (1971) (plurality opinion).

22. *See Benton v. Maryland*, 395 U.S. 784, 810-13 & n.18 (1969) (Harlan, J., dissenting) (the federal constitutional rule, that a defendant may never be retried following an acquittal by a jury, goes further than is necessary to prevent the state from re prosecuting a defendant in bad faith or for no legitimate reason). *See also Palko v. Connecticut*, 302 U.S. 319, 328 (1937), *overruled in Benton v. Maryland*, 395 U.S. 784 (1969).

have acted in good faith and even where the acquittals are known to be "egregiously erroneous."²³

The next argument builds upon the former. The real problem, so the argument goes, is not that the state will retry a defendant *intentionally* to manipulate or harass, but that retrial will inevitably have those *effects*.²⁴ Thus, even if an error in the original trial is acknowledged not to be the fault of the prosecution, and even if the prosecution thus has a legitimate, good-faith reason for wishing to retry the defendant, retrial has the inevitable effect of both enabling the prosecution to improve upon its case and burdening the defendant with the onus and anxiety of further proceedings.

Notice that this argument avoids the problem surrounding the first justification. The first justification was based on a set of values which, though sound and well-accepted, were simply too narrow to support the sweeping scope of the jury-acquittal rule. The second argument avoids that problem by invoking a rationale that is sufficiently broad to support a rule of "absolute finality." The problem with the second argument, however, is that the value it invokes — *i.e.*, the absolute value in protecting defendants from the unintended burdens and tactical disadvantages of retrial — has been rejected by the Supreme Court in every other area of double jeopardy in which it has arisen. Thus, the Court has held that unless the state is shown to be retrying a defendant solely for the purpose of improving upon its case, shopping for a more favorable trier of fact, or harassing the defendant, the state may retry a defendant following pretrial fact-finding terminating in his favor,²⁵ following mistrials declared over his objection,²⁶ mistrials declared because of hung juries,²⁷ and convictions reversed on appeal;²⁸ and the state may do so even though the state itself is partly at fault for the wrongful way in which the initial proceeding terminated.²⁹

23. *Fong Foo v. United States*, 369 U.S. 141, 143 (1962) (per curiam).

24. *See Green v. United States*, 355 U.S. 184, 187 (1957) ("The underlying idea . . . 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 . . .").

25. *See, e.g., United States v. Sanford*, 429 U.S. 14 (1976); *Serfass v. United States*, 420 U.S. 377 (1975).

26. *See, e.g., Illinois v. Somerville*, 410 U.S. 458 (1973).

27. *See, e.g., Arizona v. Washington*, 434 U.S. 497 (1978).

28. *See, e.g., United States v. Ball*, 163 U.S. 662 (1896).

29. In *Illinois v. Somerville*, 410 U.S. 458 (1973) and *United States v. Ball*, 163 U.S. 662 (1896), the prosecution was responsible for the defect in the defendant's initial trial. In *United States v. Sanford*, 429 U.S. 14 (1976), and *Serfass v. United States*, 420 U.S. 377 (1975), the trial judge was responsible for the erroneous termination of the preliminary proceedings.

Perhaps the best example is the rule of *United States v. Ball*³⁰ that a defendant, who is wrongfully convicted at his original trial because of prejudicial error on the part of the state, may nonetheless be retried by the state following the setting aside of his conviction on appeal. *Ball* is directly on point, because as far as the burdens and tactical disadvantages of retrial are concerned, a defendant who is retried following an erroneous conviction is in precisely the same position as a defendant who is retried following an erroneous acquittal. Each defendant has already gone through one full trial; each of the original trials was infected with prejudicial error; each of the defendants, if now retried, faces both the burdens of renewed litigation and the tactical disadvantage of having disclosed his case to the prosecution. In short, whatever other differences may exist between retrial following an erroneous acquittal and retrial following an erroneous conviction, no differences exist regarding either litigation burdens on the defendant or strategic benefits to the prosecution.

The final argument for a defendant's expectation of finality focuses on the remaining difference between an erroneous acquittal and an erroneous conviction. The significant difference (so the argument goes) is that while a conviction terminates a case to a defendant's *disadvantage*, an acquittal terminates the case in his *favor*. Accordingly, the reason the double jeopardy clause affords greater finality to an erroneous acquittal than to an erroneous conviction is to safeguard the particular feelings of relief and desire for repose that only an acquitted defendant enjoys.

The foregoing argument contains several flaws. For one thing, it begs the question at issue by comparing the acquitted defendant to the convicted defendant at the wrong point in time. The relevant comparison is to the convicted defendant not at the time of conviction, but at the time his conviction is set aside on appeal.³¹ At the point when a conviction is set aside, a defendant who has prevailed on appeal experiences precisely the same feelings of relief and desires for repose as a defendant who has just been acquitted by a jury. If a convicted defendant's feelings and desires do not suffice to outweigh the state's interest in reprosecution following a successful appeal, it is hard to see why an acquitted defendant's feelings would suffice.³² Furthermore, the argument fails to explain why a defen-

30. 163 U.S. 662 (1896).

31. See *Kepner v. United States*, 195 U.S. 100, 136 (1904) (Holmes, J., dissenting) ("[w]e must consider [the convicted defendant's] position at the moment when his exceptions are sustained [on appeal]. The first verdict has been set aside. The jeopardy created by that is at an end, and the question is what shall be done with the prisoner").

32. Again, it begs the question to say that a convicted defendant, who chooses to continue

dant's feelings of relief and desire for repose do not suffice to accord absolute finality to the other kinds of erroneous rulings that terminate a case in his favor, such as dismissals before trial, dismissals at mid-trial, post-verdict judgments of acquittal, and appellate judgments of acquittal. If the defendant's feelings and desires were controlling, the latter rulings should confer the same kind of immunity from re prosecution that erroneous acquittals do. Yet they do not.³³

Accordingly, regardless of how much weight one attaches to a defendant's feelings of joy over a favorable outcome, there is no principled basis for according greater finality to an erroneous acquittal than to a reversed conviction.³⁴ Indeed, if anything, the erroneously convicted defendant is the more deserving of the two defendants because he was the unwilling victim of an error at trial and, but for the error, might have been acquitted; the erroneously acquitted defendant was probably the perpetrator of the error and, but for its commission, might well have been convicted.³⁵

To conclude, none of the previous arguments regarding expecta-

the proceedings by pursuing an appeal, waives or relinquishes his desire for repose; it can be equally (and more accurately) said that he relinquishes a desire for repose only insofar as necessary to obtain the relief to which he is entitled, *i.e.*, an appellate court order setting aside his conviction for error. *See* *Kepler v. United States*, 195 U.S. 100, 135 (1904) (Holmes, J., dissenting) (it cannot be said that a convicted defendant, who successfully appeals his conviction, thereby "waive[s]" his interest in not being retried, because "no such waiver is expressed or thought of"). For a discussion of the factors that underlie the fiction of waiver, see text accompanying notes 190-205 *infra*.

33. *See, e.g.*, *Serfass v. United States*, 420 U.S. 377 (1975) (defendant may be retried following an erroneous termination of a case in his favor before trial); *Lee v. United States*, 432 U.S. 23 (1977) (defendant may be retried following dismissal, on defendant's motion, of defective information at mid-trial); *United States v. Ceccolini*, 435 U.S. 268, 270-71 (1978) (government may appeal a trial judge's judgment of acquittal for insufficiency of evidence, if the result of the appeal is to reinstate the trial judge's prior finding of guilty); *Forman v. United States*, 361 U.S. 416, 426 (1960) (government may appeal or seek certiorari from an appellate court's erroneous judgment of acquittal for insufficiency of evidence, if the result of the appeal is to reinstate a prior valid verdict of guilty).

34. *See* notes 148, 221 *infra*. The same is also true of erroneous rulings by judges in a defendant's favor in the course of jury trials. Thus, it has been suggested that when a trial judge makes a post-verdict ruling in a defendant's favor — however erroneous the ruling may be — the defendant's interest in feelings of relief and desires for repose become sufficiently strong to preclude the government from appealing the ruling. The Court has rejected this argument, holding that a defendant's interest in such repose is not legitimate if it sacrifices the state's interest in an error-free trial. *See* *United States v. Jenkins*, 420 U.S. 358, 365 (1975):

To be sure, the defendant would prefer that the Government not be permitted to appeal [an erroneous ruling in his favor] or that the judgment of conviction not be entered, but this interest of the defendant is not one that the Double Jeopardy Clause was designed to protect.

See also *Swisher v. Brady*, 438 U.S. 204, 216 (1978).

35. 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. If the trial had been infected with error adverse to the accused, there might have been review at his instance, and as often as necessary to purge the vicious taint. A reciprocal privilege . . . has now been granted to

tions of finality are capable of explaining why the jury-acquittal rule is so much more "absolute" than its companion principles of double jeopardy. This does not mean that expectations of finality are vacuous, or that a defendant's desire for repose remains entirely unprotected. Finality *is* an important value and, as we shall see, it plays a crucial role in limiting the constitutional authority of the state to continue to prosecute defendants following mistrials, dismissals, and reversed convictions. The fact remains, however, that the finality value, though substantial, is not so powerful as to confer immunity on a defendant whenever an error causes a trial to terminate in his favor. There is an obvious reason for the reluctance to treat finality as an absolute value: claims for finality — like claims regarding preindictment delay, speedy trial, and statutes of limitation — are highly threatening to the legal order because they operate to confer blanket immunity on defendants without regard to their factual guilt or innocence. The greater weight that is accorded the finality value, the greater the frequency that factually guilty defendants will go free. It is not surprising, therefore, that the finality value itself is not absolute, and that it is always carefully balanced against "society[']s . . . valid concern for insuring that the guilty are punished."³⁶

2. *The Jury's Prerogative To Find Facts*

The next justification for the jury-acquittal rule avoids the inherent problems of finality. Claims of finality are problematical because they do not distinguish between factually innocent and factually guilty defendants. The instant argument, in contrast, purports to make that distinction, thus avoiding the problem of invoking blanket immunity on behalf of guilty and innocent defendants alike. The reason jury acquittals are final, so the argument goes, is that they represent factual findings of innocence by a body that has unreviewable authority to find facts. The same reason explains why acquittals are different from convictions. Jury acquittals are final (and jury convictions are not) because jury acquittals are statements of actual innocence. If the state is allowed to retry defendants follow-

the state. There is here no seismic innovation. The edifice of justice stands, its symmetry, to many, greater than before.

Palko v. Connecticut, 302 U.S. 319, 328 (1937) (citations omitted), *overruled in* Benton v. Maryland, 395 U.S. 784 (1969). *See also* Kepner v. United States, 195 U.S. 100, 135 (1904) (Holmes, J., dissenting) (a defendant is "no more . . . put in jeopardy a second time when retried because of a mistake . . . in his favor, than he [is] . . . when retried for a mistake that did him harm").

36. *Burks v. United States*, 437 U.S. 1, 15 (1978).

ing jury acquittals, it creates an unacceptable risk that innocent defendants will be convicted.

The foregoing argument would be perfectly sound if the jury-acquittal rule were confined to error-free acquittals. An error-free acquittal *is* probative evidence of factual innocence; indeed, it is often the best such evidence known to the law. If the state were to retry defendants in the face of such evidence, it would be running a high risk of convicting factually innocent persons.³⁷

Unfortunately, while the innocence argument explains why error-free acquittals should be final, it does not explain the finality of *erroneous* acquittals, much less "egregiously erroneous"³⁸ acquittals. An erroneous acquittal, by definition, is a verdict which is tainted to a material degree by some defect in the fact-finding process — perhaps because the probative incriminating evidence was wrongfully excluded, or because unprobative exculpatory evidence was wrongfully admitted, or because the jury was wrongfully impaneled or instructed. As the product of faulty fact-finding, an erroneous jury acquittal says nothing about a defendant's actual innocence because it says nothing about what an error-free process would have revealed.³⁹ Indeed, an erroneous conviction may be more probative of innocence than an erroneous acquittal: a defendant whose conviction is set aside on appeal because of prejudicial error is always someone who, but for the error, could reasonably have been acquitted, and he is sometimes someone who now has to be acquitted; a person whose acquittal is based on an error harmful to the prosecution is always someone who, but for the error, could reasonably have been convicted, and he is sometimes someone who would now rea-

37. See *Benton v. Maryland*, 395 U.S. 784, 809-13 (1969) (Harlan, J., dissenting).

38. See note 23 *supra*.

39. The best analogy is to the seventh amendment right to trial by jury in civil cases. The seventh amendment specifically provides that "no fact tried by a [civil] jury shall be otherwise examined in any court of the United States." U.S. CONST., amend. VII. Yet it is well established that a finding of fact by a civil jury *may* be appealed without violating the seventh amendment when a party can show that the jury's findings were based on legal errors in the fact-finding process. See *Capital Traction Co. v. Hof*, 174 U.S. 1, 13 (1899). The reason for this is that findings of fact possess no integrity if based on defects in the fact-finding process. Cf. *United States v. Scott*, 437 U.S. 82, 106 (1978) (Brennan, J., dissenting) (verdicts of acquittal that are based on legal errors in the fact-finding process do not establish anything regarding the defendant's actual innocence).

The same is true of erroneous rulings by a judge in a defendant's favor in the course of a jury trial. An *erroneous* application by a judge of the law to the facts says nothing about a defendant's actual innocence because it says nothing about what would have resulted from a *correct* application of the law to the facts. See *United States v. Scott*, 437 U.S. 82, 106-07 (1978) (Brennan, J., dissenting). See also *United States v. Wilson*, 420 U.S. 332, 352 (1975) ("A system permitting review of all claimed legal errors would have symmetry to recommend it and would avoid the release of some defendants who have benefited from instructions or evidentiary rulings that are unduly favorable to them").

sonably have to be convicted.⁴⁰

3. *The Jury's Prerogative To Acquit Against the Evidence*

The last justification for the absolute finality of jury acquittals, and the most coherent, is that the rule is a consequence of the jury's prerogative to acquit against the evidence. This justification differs from the previous one. It is based not on the jury's authority to find facts, but on its authority to nullify the law in individual criminal cases. When a jury acquits *against* the evidence, it is not making a factual determination regarding the disputed items of evidence; if that were so — that is, if the jury were simply resolving disputed issues of fact in the defendant's favor under prevailing standards of proof — it would be acquitting *on* the evidence, not against the evidence. Nor can the jury be said to be faithfully applying the legal standard of conduct prescribed by the legislature; if the jury were doing so — if the evidence justified an acquittal under a faithful application of the legislative standard of criminal conduct — the acquittal, again, would be based *on* the evidence, not against it. To say that a jury acquits against the evidence means that it acts against what the law prescribes as the legal consequence of the facts as the jury knows them to be. By being lenient toward a defendant where the law does not prescribe lenience, the jury is exercising a species of legislative power. More precisely, it is exercising a veto power: the power to veto legislation in particular cases by fashioning a standard for adjudging the past conduct of particular defendants that is distinct from and more lenient than the standard prescribed by the legislature.⁴¹

The authority of the criminal jury to veto or nullify the rigor of

40. A "prejudicial" error is a "material" error, an error which can reasonably be said to have had a potential effect on the outcome of trial. See Westen, *Compulsory Process II*, 74 MICH. L. REV. 191, 214-20 (1975). Accordingly, a defendant whose conviction is set aside on appeal because of prejudicial error is necessarily someone who, but for the error, could reasonably have been acquitted. Moreover, a sub-class of such cases is made up of those in which the prejudicial error consisted of admitting evidence which is crucial to the prosecution's case against the defendant. In those latter cases, an appellate reversal for prejudicial error means that the defendant is not only someone who *could* reasonably have been acquitted at this initial trial, but someone who, if retried now, will *have* to be acquitted at the close of the state's case.

By the same token, a defendant who is wrongfully acquitted at trial because of an error prejudicial to the prosecution is necessarily someone who, but for the error, might reasonably have been convicted. Moreover, if the error was truly crucial, the defendant may be left with such a weak case that if trial courts were permitted to direct verdicts against defendants in criminal cases, a court would have to so direct the jury.

41. See *Beck v. Alabama*, 100 S. Ct. 2382, 2390 (1980) (when juries acquit against the evidence, they are "creat[ing] their own sentencing discretion" in place of the standards prescribed by the legislature).

the criminal law distinguishes the sixth-amendment criminal jury from the seventh-amendment civil jury. Although both have inviolate constitutional authority to find facts, the civil jury can be *confined* to the province of fact-finding. The most common jury-control devices (such as directed verdicts,⁴² judgments notwithstanding the verdict,⁴³ special verdicts,⁴⁴ partial directed verdicts,⁴⁵ interrogato-

42. Directed verdicts are commonly employed in civil trials, both against plaintiffs and against defendants. *See, e.g.*, FED. R. CIV. P. 50. Directed verdicts are also commonly employed against the prosecution in criminal cases. *See* FED. R. CRIM. P. 29. Yet it is assumed to be unconstitutional to direct a verdict against a defendant in a criminal case. *See* Jackson v. Virginia, 443 U.S. 307, 317 n.10 (1979); United States v. Martin Linen Supply Co., 430 U.S. 564, 572-73 (1977); United Bhd. of Carpenters & Joiners of America v. United States, 330 U.S. 395, 408 (1947); Sparf & Hansen v. United States, 156 U.S. 51, 105 (1895).

The prohibition of directed verdicts against defendants in criminal cases cannot be based on a desire to allow the jury to find facts, because directed verdicts are only employed where facts are not in dispute and where any verdict to the contrary would represent nullification of the law. *See* Currie, *Thoughts on Directed Verdicts and Summary Judgments*, 45 U. CHI. L. REV. 72 (1977). Consequently, if directed verdicts are constitutionally prohibited in criminal cases, it must be because the criminal jury cannot be constitutionally prevented from nullifying the law.

Now it might be argued that the reason directed verdicts of guilty are prohibited in criminal cases is that they would inevitably intrude to *some* extent, however minor, on the jury's authority to find facts. When a trial judge directs a verdict, so the argument goes, he invariably makes some assessment of the credibility of witnesses and the probative nature of the evidence. Such assessments may be tolerable in civil cases, where the issues are less sensitive, but the sixth amendment reflects the judgment that judges are not to be trusted to make such assessments adversely to defendants in criminal cases. In other words, so the argument goes, judges are not to be trusted to say that evidence of guilt is so overwhelming that "reasonable" jurors would have to convict.

There are at least two problems with the foregoing argument. First, it disregards authority to the effect that when a trial judge directs a verdict in a criminal case, he is *not* making factual determinations. *See* Burks v. United States, 437 U.S. 1, 16 (1978). Second, even if it is true that directed verdicts involve some assessment of facts, the same is not true of special verdicts. Special verdicts do not intrude in any way upon a jury's authority to find facts; the only function special verdicts perform is to prevent the jury, once it has found the facts, from reaching a conclusion which is contrary to the legally mandated consequence of such facts. Yet special verdicts, too, are prohibited in criminal cases. *See* note 44 *infra*. If special verdicts are prohibited in criminal cases, it cannot be because they interfere with the jury's authority to find facts; it must be because they interfere with the jury's authority to render a general verdict of not guilty in the face of what its special findings of fact dictate. This supports the view that the same latter value also underlies the prohibition on directed verdicts in criminal cases.

43. Judgments notwithstanding the verdict are common in civil cases, against both plaintiffs and defendants. *See* FED. R. CIV. P. 50. Judgments notwithstanding verdicts are also employed in criminal cases against the prosecution. *See* FED. R. CRIM. P. 29(c). Yet such judgments, which have been called "hang-fire cousins" of directed verdicts, Cooper, *Directions for Directed Verdicts: A Compass for Federal Courts*, 55 MINN. L. REV. 903, 903 (1971), are constitutionally prohibited from being entered against an accused in a criminal case for the same reason that directed verdicts are prohibited. *See* Standefer v. United States, 100 S. Ct. 1999, 2007 (1980); Jackson v. Virginia, 443 U.S. 307, 317 n.10 (1979).

44. Special verdicts are used in civil jury trials, both against plaintiffs and against defendants. *See, e.g.*, FED. R. CIV. P. 49(a). Nor is there presumably any constitutional bar to their use in criminal cases at a defendant's request. Yet it is commonly assumed to be unconstitutional to require a criminal jury, over a defendant's objection, to return special verdicts in place of a general verdict. *See* Sparf & Hansen v. United States, 156 U.S. 51, 80-81, 83, 87, 94-95 (1895); United States v. Ogull, 149 F. Supp. 272, 276 (S.D.N.Y. 1957), *aff'd sub nom.* United States v. Gernie, 252 F.2d 664 (2d Cir.), *cert. denied*, 356 U.S. 968 (1958); G. CLEMENTSON,

ries to accompany general verdicts,⁴⁶ the ordering of new trials for inconsistent verdicts,⁴⁷ judicial comment on the evidence,⁴⁸ issue

SPECIAL VERDICTS AND SPECIAL FINDINGS BY JURIES 49 (1905); 2 C. WRIGHT, FEDERAL PRACTICE & PROCEDURE § 512, at 365 (1969).

The constitutional prohibition on special verdicts in criminal cases cannot be based on a desire to give the jury full rein to find facts, because special verdicts operate to give the jury just as much authority to find facts, and to apply the law to the facts, as juries enjoy under a general verdict procedure. See 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 2509, at 510 (1971). Indeed, as far as the jury is concerned, it has just as much authority under special verdicts as under a general verdict, with one exception: not knowing the legal consequence of its constituent findings of fact, the jury cannot manipulate its particular findings to reach a result it otherwise desires, nor can it reach an outcome that departs from the automatic legal consequence of the particular findings it returns. That is to say, it cannot nullify the law by returning a general verdict which is inconsistent with the automatic and self-evident legal effect of its special findings. See *Id.* at 511-12. Thus, the sole purpose of special verdicts is to deny the jury the opportunity for nullifying the law that the jury would possess under a general-verdict procedure. See Sunderland, *Verdicts, General and Special*, 29 YALE L.J. 253, 258 (1920). Since the criminal jury is constitutionally entitled to return a general verdict in place of special verdicts, it must be because the criminal jury has a constitutional prerogative to nullify the law by returning general verdicts of not guilty in cases in which the jury's constituent findings of fact would dictate verdicts of guilty.

45. Trial judges have authority to remove from a civil jury's consideration those portions of a case about which there is no genuine dispute. See, e.g., FED. R. CIV. P. 56(d). Trial judges presumably have constitutional power to enter such partial judgments in criminal cases, too, at a defendant's request. Yet it is assumed to be unconstitutional to direct a partial verdict against a defendant in a criminal case. See *United States v. Hayward*, 420 F.2d 142 (D.C. Cir. 1969); *United States v. England*, 347 F.2d 425 (7th Cir. 1965). See also 2 C. WRIGHT, FEDERAL PRACTICE & PROCEDURE § 461, at 243 n.8 (1969).

The prohibition on partial directed verdicts in criminal cases cannot be based on a desire to allow the criminal jury to find facts, because such partial judgments are not entered when facts are genuinely in dispute. See note 42 *supra*. Nor can it be based on the ground that partial directed verdicts would altogether prevent juries from acquitting against the evidence, because juries would still retain the authority to return a general verdict. Rather, it must be based on the assumption that by removing crucial portions of a case from a jury's consideration, the trial judge precludes the jury from seeing the "whole picture" of a defendant's conduct and thereby denies the jury an informational basis for exercising its veto power. See also note 49 *infra*.

46. Trial judges have authority to request a civil jury to supplement its general verdicts with answers to specific interrogatories, the purpose being to prevent the jury from returning a general verdict that is inconsistent with its specific findings. See, e.g., FED. R. CIV. P. 49(b). Yet it would be unconstitutional to require a criminal jury to answer such interrogatories over a defendant's objection, for the same reason that it is unconstitutional to require a criminal jury to return special verdicts: each procedure is designed to prevent a jury from nullifying the law by returning a general verdict that is inconsistent with its specific findings. Indeed, interrogatories are so disfavored that they may be unconstitutional even if they are used solely for informational value, and not as a basis for attacking a general verdict. See *Heald v. Mullaney*, 505 F.2d 1241, 1245-46 (1st Cir. 1974) (use of interrogatories in some criminal proceedings is unconstitutional), *cert. denied*, 420 U.S. 955 (1975); *Spock v. United States*, 416 F.2d 165, 180-83 (1st Cir. 1969) (*but see* *Heald v. Mullaney*, 505 F.2d at 1245, suggesting case was decided on basis of court's supervisory powers).

The prohibition on interrogatories accompanying a general verdict cannot be based on a desire to allow the criminal jury to find facts, because the interrogatory procedure is designed to clarify its findings of fact. Rather, it must be based on the assumption that the criminal jury cannot constitutionally be confined to making findings of fact and, instead, must be allowed to return general verdicts of not guilty that are inconsistent with its findings of fact.

47. Trial judges have authority to order new trials in civil cases whenever a civil jury returns inconsistent verdicts. See, e.g., FED. R. CIV. P. 59; 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 2810, at 69 (1973). A federal judge may also order a new trial in a criminal case when a jury returns two inconsistent verdicts of guilty. See, e.g., *United*

preclusion based on previous fact-finding,⁴⁹ and appeals and new trial orders based on legal errors affecting verdicts⁵⁰) are all regularly used in civil jury trials. These devices may be constitutionally employed in civil cases because they do not intrude upon any function the civil jury is constitutionally entitled to perform. Since these devices are all designed to prevent the jury from misapplying the law, and since the civil jury has no authority to decide the law differently from the legislature, these jury-control devices have no effect on the constitutional right of jury trial in civil cases.⁵¹

States v. Daigle, 149 F. Supp. 409, 414 (D.D.C.), *aff'd*, 248 F.2d 608 (D.C. Cir. 1957), *cert. denied*, 355 U.S. 913 (1958). Yet a federal judge may not order a new trial when a criminal jury returns a verdict of not guilty that is inconsistent with an accompanying verdict of guilty. *See* Dunn v. United States, 284 U.S. 390 (1932).

The prohibition on new trials for inconsistent verdicts in criminal cases cannot be based on a desire to allow the jury to find facts, because the inconsistency demonstrates the failure of coherent fact-finding. Rather, it must be based on the assumption that a criminal jury has authority to acquit a defendant of one charge even if the acquittal is factually inconsistent with the jury's determination that he is factually guilty of another. *See* note 61 *infra*.

48. Federal judges have authority to comment on the evidence in civil cases. *See* 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 2557 (1971). Yet regardless of how overwhelming the evidence of guilt may be in a criminal case, it is unconstitutional for a trial judge to comment to that effect, for the same reason that it is unconstitutional for a trial judge to direct a verdict of guilty in a criminal case. *See* United States v. England, 347 F.2d 425, 433-35 (7th Cir. 1965). *See also* United States v. Murdock, 290 U.S. 389 (1933); Horning v. District of Columbia, 254 U.S. 135, 139 (1920) (Brandeis, J., dissenting).

49. Principles of collateral estoppel can be invoked in a civil case by plaintiffs and defendants alike to preclude a party from relitigating any issue that has already been adjudicated adversely to the party in a prior litigation. *See, e.g.*, Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979); Blonder-Tongue Laboratories v. University of Illinois Foundation, 402 U.S. 313 (1971). Collateral estoppel may also be invoked by a defendant against the prosecution in a criminal case. *See, e.g.*, Ashe v. Swenson, 397 U.S. 436 (1970). Yet it is assumed to be unconstitutional to estop a defendant in a criminal case from relitigating an issue that he has tried and failed to litigate successfully in a prior criminal proceeding. *See* Simpson v. Florida, 403 U.S. 384, 386 (1971); United States v. De Angelo, 138 F.2d 466, 468 (3d Cir. 1943); United States v. Panetta, 436 F. Supp. 114 (E.D. Pa. 1977), *aff'd*, 568 F.2d 771 (3d Cir. 1978); State v. Stiefel, 256 So. 2d 581 (Fla. Dist. Ct. App. 1972). *But see* United States v. Colacurcio, 514 F.2d 1, 6 (9th Cir. 1975) (dictum).

The prohibition on collateral estoppel against an accused in a criminal case cannot be based on a desire to allow juries to find facts, because the prohibition applies even where a prior jury has already found facts adverse to the accused. Nor can it be based on a desire to accord a defendant a right to be heard by a jury or to confront witnesses, or to enjoy his other procedural guarantees at trial, because, again, the doctrine applies even where a defendant enjoyed those guarantees at the prior proceeding. Rather, it must be based on the notion that by removing certain issues from a jury's consideration, collateral estoppel blinds the jury to the "whole picture" of a defendant's conduct and thus denies the jury an informational basis on which to exercise its veto power. *See* the discussion of partial directed verdicts at note 45 *supra*.

50. Appeals may be taken in civil cases, and new trials sought, by plaintiffs and defendants alike whenever they can show that a civil jury verdict is infected by legal error. *See, e.g.*, 28 U.S.C. § 1291 (1976); FED. R. CIV. P. 59-60. Moreover, defendants in criminal cases can appeal from erroneous jury verdicts of conviction. Yet it is unconstitutional for the prosecution to appeal from, or seek a new trial following, a jury verdict of acquittal in a criminal case. *See* Standefer v. United States, 100 S. Ct. 1999, 2007 (1980).

51. *See* Galloway v. United States, 319 U.S. 372 (1943); Cooper, *supra* note 43, at 912, 915.

By the same token, however, such jury-control devices cannot be constitutionally used by the prosecution in criminal cases,⁵² because insofar as the criminal jury may dispense mercy to defendants by vetoing or nullifying the law, the criminal jury does possess authority to decide the law. The use (and nonuse) of directed verdicts illustrates this distinction. Directed verdicts are commonly used against plaintiffs and defendants alike in civil cases, and against the prosecution in criminal cases, but they are never used against defendants in criminal cases. Indeed, it is universally assumed to be unconstitutional to direct a verdict against a defendant in a criminal case.⁵³

Why this exception? Why prohibit the prosecution from using a device designed to confine the criminal jury to the province of fact-finding? It cannot be based on a desire to let the jury find the facts, because directed verdicts are used only where facts are not in dispute.⁵⁴ Nor can it be based upon the stringent burden of proof applicable in criminal cases (and upon the consequent difficulty of saying that the state's evidence of guilt is so overwhelming that reasonable men would have to convict), because that is precisely the assessment that trial judges now make in finding criminal defendants guilty in trials to the bench, and that appellate courts now make in declaring constitutional errors to be harmless beyond a reasonable doubt.⁵⁵

Nor can the prohibition on directed verdicts be based on a belief that while the criminal jury has no legitimate *right* to nullify the law, it somehow has an unpreventable *power* to do so.⁵⁶ After all, the

52. See notes 42-50 *supra*.

53. See note 42 *supra*.

54. See Cooper, *supra* note 43, at 907-08, 912, 916-17, 918-21; Currie, *supra* note 42. In addition, see note 42 *supra*.

55. See *Harrington v. California*, 395 U.S. 250, 254 (1969).

56. For an expression of this view, see *Roberts v. Louisiana*, 428 U.S. 325, 347 (1976) (White, J., dissenting) (referring to the "raw power of nullification"); *Dunn v. United States*, 284 U.S. 390, 393 (1932) (Holmes, J.), *quoting from* *Steckler v. United States*, 7 F.2d 59, 60 (2d Cir. 1925) (L. Hand, J.) (referring to jury nullification as the "assumption" by a jury of a "power" which it has "no right to exercise"). But compare *Standefor v. United States*, 100 S. Ct. 1999, 2007 (1980) ("The absence of these remedial [jury-control] procedures in criminal cases *permits* juries to acquit out of compassion . . .") (emphasis added); *Gregg v. Georgia*, 428 U.S. 153, 199-200 n.50 (1976) (plurality opinion) (it would be "unconstitutional" to use jury control devices to prevent juries from engaging in "discretionary act[s] of jury nullification").

The most fascinating question is, why did judges like Holmes and Hand, who must have known better, nonetheless feel obliged to intone the message that juries possess only the "power," and not the "right," to acquit against the evidence. Perhaps the answer is that such a message was their *own* form of "pious perjury." Cf. 4 W. BLACKSTONE, COMMENTARIES ON THE LAW 239 (1769) (jury nullification is the jury's form of "pious perjury"). That is, they may have known, consciously or subconsciously, that the message is false and that juries do possess the "right" to acquit against the evidence, and yet felt that they must continue to say otherwise, for the same reason that juries are not instructed that they are entitled to acquit against the

very purpose of the directed verdict (and other jury-control devices) is to prevent juries from exercising the power to decide the law when they have no right to do so. If the legal system wished to prevent the criminal jury from nullifying the law, it would respond the way it does in civil cases — by directing verdicts whenever the trial evidence contains no genuine issues of fact. To say that a judge may not constitutionally direct a verdict against a defendant in a criminal case means that he may not constitutionally confine the criminal jury to the role of fact-finding.⁵⁷ The same is true, too, of other jury-control devices. By eschewing the use of jury-control devices that would cabin the criminal jury in a fact-finding role, the system reveals that the jury's prerogative to acquit against the evidence is not only a "power," but a power the jury exercises as of "right."⁵⁸

The instant rule of double jeopardy, that the state may not take

evidence: because if juries begin to learn that they may acquit against the evidence as of "right," their exercise of nullification will become self-conscious and will have a distorting effect on competing and coexisting values inherent in trial by jury. *Cf.* *United States v. Dougherty*, 473 F.2d 1113, 1130-36 (D.C. Cir. 1973) (jurors, who possess the prerogative to acquit against the evidence, should not be so instructed, because by rendering nullification self-conscious, such instructions may have a distorting effect on other procedural values).

57. *See Jackson v. Virginia*, 443 U.S. 307, 317 n.10 (1979) (to say that "there can be no appeal from a judgment of acquittal, even if the evidence of guilt is overwhelming," means, as a "logical corollary," that the jury is "permitted" to acquit against the evidence) (emphasis added).

58. *See Jackson v. Virginia*, 443 U.S. 307, 317 n.10 (1979); *Gregg v. Georgia*, 428 U.S. 153, 199-200 n.50 (1976) (plurality opinion); M. KADISH & S. KADISH, *DISCRETION TO DISOBEY* 57 (1973).

It does not follow that, because jurors have a constitutionally protected prerogative to acquit against the evidence, they must be told that they do, or that they must be subject to voir dire in such a light, or that they must be allowed to hear evidence relevant to such a decision. There are persuasive reasons why the latter procedures would not only be difficult to administer, but would also have an adverse impact on coexisting and competing values in trial by jury. *See Sparf & Hansen v. United States*, 156 U.S. 51 (1895) (it does not follow that, because criminal jurors have a constitutional right to return a general verdict of not guilty, they also have a right to be instructed on lesser-included offenses not supported by the evidence); *United States v. Dougherty*, 473 F.2d 1113, 1130-37 (D.C. Cir. 1972) (it does not follow that, because criminal jurors have a constitutional prerogative to acquit against the evidence, they also have a right to be instructed on the prerogative). Thus, it is perfectly rational to affirm the value of jury nullification while simultaneously refraining from encumbering it with accompanying procedural devices.

Nor does it follow that because juries have a constitutionally protected prerogative to acquit against the evidence, the exercise of that prerogative is always beyond challenge. On the contrary, the Court has held in the death-penalty context that jury nullification, if unguided by standards, may have the effect of rendering the pattern of death sentences so arbitrary as to violate the eighth amendment. *See Woodson v. North Carolina*, 428 U.S. 280, 302-03 (1976) (plurality opinion). But compare 428 U.S. at 315 (Rehnquist, J., dissenting); *Gregg v. Georgia*, 428 U.S. 153, 203 (1976) (plurality opinion).

Finally, it does not follow that because juries have a prerogative to acquit against the evidence, erroneous jury verdicts of not guilty must always be upheld. On the contrary, one could rationally distinguish between errors (such as the exclusion of incriminating evidence) that affect a jury's decision to nullify and errors that do not, and reverse for the former while continuing to dismiss for the latter. *See Westen & Drubel, Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81, 130 n.230.

an appeal from an erroneous jury verdict of not guilty, is an aspect of the broader principle of jury nullification: the jury-acquittal rule derives from the criminal jury's constitutional prerogative to acquit against the evidence. To say that a verdict is erroneous means that it is the end product of a trial that did not conform to the rules governing opening statements, evidence, jury instructions, closing statements, and so forth. The purpose of such rules is to insure that a case is tried in accord with the legislative standard governing guilt or innocence. Yet as long as the criminal jury has authority to acquit against the evidence, *viz.*, authority to alter legislative standards in favor of more lenient standards of its own, trial errors of that kind may be immaterial. One cannot tell whether an "erroneous" acquittal is the product of legal error, or whether it is the fruit of the jury's desire to nullify the law by which the case was tried. Since the jury verdict itself is opaque,⁵⁹ and since the jury cannot be easily examined about its verdict without skewing its deliberations,⁶⁰ two alternatives remain: either to reject all "erroneous" jury verdicts, knowing full well that some of them will be based on the jury's desire to nullify, or to accept all such verdicts, knowing that some of them will be the product of legal errors. As between the two alternatives, the jury-acquittal rule opts for the latter, reflecting the judgment that it is ultimately better to err in favor of nullification than against it.⁶¹

59. As part of its authority to acquit against the evidence, the criminal jury has the constitutional prerogative to return a general verdict, and it cannot constitutionally be compelled to return special verdicts instead. *See Sparf & Hansen v. United States*, 156 U.S. 51, 81, 83, 87, 94-95 (1895). In addition, *see* note 44 *supra*.

60. *See Dunn v. United States*, 284 U.S. 390, 394 (1932) ("That the [inconsistent] verdict may have been the result of compromise, or of a mistake on the part of the jury, is possible. But verdicts cannot be upset by . . . inquiry into such matters"); *United States v. D'Angelo*, 598 F.2d 1002, 1004-05 (5th Cir. 1979) (collecting authorities); *United States v. Spock*, 416 F.2d 165, 182 (1st Cir. 1969) (inquiry into the grounds for a jury verdict may skew its conclusions). *See generally* Note, *Constitutional Propriety of State Judges' Inquiries into the Numerical Division of Deadlocked Juries: Ellis v. Reed*, 64 MINN. L. REV. 813 (1980).

61. The decision to tip the balance in favor of nullification is not unusual, because the same decision underlies the rule that a defendant who has been convicted by a jury on one count and acquitted on another cannot challenge his conviction on grounds of inconsistency between the two verdicts. When a jury returns inconsistent verdicts, its behavior can be explained in one of two ways: either it has misunderstood its instructions and, therefore, erred; or it has deliberately acted out of "compassion or compromise," *Standefer v. United States*, 100 S. Ct. 1999, 2007 (1980), by acquitting the defendant of a count of which it could have convicted him. Without examining the jury about its verdict, *see* note 60 *supra*, the trial court has no way of knowing which of the two potentialities occurred. Accordingly, the court can respond either by setting aside all inconsistent convictions for error, knowing all along that at least some of them are the product of jury compassion, or by upholding all inconsistent convictions in the interest of nullification, knowing that some of them may be the product of error on the part of the jury. The majority rule is that an appellate court may not set aside inconsistent jury verdicts of guilty that can plausibly be explained as the product of "lenity" on the part of the jury. *See* Note, 35 MD. L. REV. 535, 541 (1976), *quoting Dunn v. United States*, 284

Now having identified the value or rationale underlying the jury-acquittal rule, we can return to our original question. What is the relationship between the jury-acquittal rule of double jeopardy and the government's authority to appeal criminal sentences? What does the constitutional finality of jury acquittals say about the finality of trial court determinations of sentence? The answer depends upon whether the prerogative to nullify is possessed not only by juries, but also by trial judges, and upon whether the scope of nullification extends not only to issues of guilt or innocence, but also to the length of sentence. If the authority to nullify is not shared by judges as well as by juries, or if it does not apply to sentencing, the jury-acquittal rule has nothing to say about government appeals of criminal sentences. If, on the other hand, nullification extends to judges as well as juries, and if it encompasses sentencing as well as guilt or innocence, the constitutional value underlying the jury-acquittal rule would prohibit the government from seeking to increase a defendant's sentence on appeal.

The foregoing issues cannot be resolved purely by means of logic. As a matter of logic, one can rationally imagine regimes in which the authority to nullify is possessed by both juries and judges, or by neither juries or judges, or by one but not the other; by the same token, one can rationally conceive of systems in which the authority to nullify encompasses both guilt and sentence, or neither, or one but not the other. The real issue, therefore, is not what our constitutional system rationally *could be*, but what it actually *is*.

Based on the same sort of data that suggest that criminal juries

U.S. 390, 393 (1932) (Holmes, J.). The majority rule thus reflects a decision that if error must occur, it is better to err in the interest of preserving jury nullification. See Bickel, *Judge and Jury — Inconsistent Verdicts in the Federal Courts*, 63 HARV. L. REV. 649, 651-52 (1950). See also *United States v. Carbone*, 378 F.2d 420, 422-23 (2d Cir.) ("It is true, as both Judge Hand and Mr. Justice Holmes recognized, that allowing inconsistent verdicts in criminal trials runs the risk that an occasional conviction may have been the result of compromise. But the advantage of leaving the jury free to exercise its historic power of lenity has been correctly thought to outweigh that danger.") (citations omitted), *cert. denied*, 389 U.S. 914 (1967).

To be sure, the existing rule might be different if, as a result of reversing a conviction for inconsistency, the government were allowed to retry the defendant on the count on which he was acquitted. In that event, a defendant would have to choose his theory of what motivated the jury in returning inconsistent verdicts. If he decided the jury was motivated by "lenity," he would be barred from appealing his conviction. If he decided the jury was motivated by error, he would be barred from complaining about being retried on the count on which he was acquitted. In either event, he would be precluded from doing what he may now do: appeal his conviction on grounds of error, while defending his acquittal on grounds of lenity. Before such a new rule could be adopted, however, the courts would have to decide whether the interest in jury lenity is an interest possessed only by defendants; for if the government, too, has an interest in the occurrence of nullification, then it could complain about the reversal of an inconsistent verdict of guilty even if the defendant were willing to be retried on the count on which he was acquitted.

do possess sixth amendment authority to acquit against the evidence, it is fair to conclude that trial judges do *not* possess comparable fifth and fourteenth amendment authority. Judges (unlike juries) may be reversed for legal errors favorable to the defense, regardless of whether the favorable rulings occur before or after the case has been submitted to the jury,⁶² and regardless of whether reversal of the favorable ruling necessitates retrial of the general issue.⁶³ Moreover, and more significantly still, trial magistrates can be reversed for fact-finding favorable to the defense, provided that the reversal is based on the record as taken at trial and does not require the taking of new evidence. Thus, the Court held in *Swisher v. Brady*⁶⁴ that a state

62. See *United States v. Scott*, 437 U.S. 82 (1978) (before); *Lee v. United States*, 432 U.S. 23 (1977) (before); *United States v. Ceccolini*, 435 U.S. 268 (1978) (after); *United States v. Wilson*, 420 U.S. 332 (1975) (after).

To be sure, the Court has also held that a trial judge may not be reversed for certain kinds of erroneous rulings favorable to a defendant, *i.e.*, resolutions of factual elements relating to a defendant's guilt or innocence, if reversal would require that a defendant be retried. See *Sanabria v. United States*, 437 U.S. 54, 71-73 (1978); *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977). Yet if trial judges truly possessed the prerogative to nullify, then favorable rulings by trial judges on issues of guilt or innocence would be final and nonappealable, regardless of whether the rulings were entered before trial or afterwards, and regardless of whether reversal would result in retrial. But they are not. See *United States v. Scott*, 437 U.S. 82, 91 n.7 (1978) (government may appeal an erroneous resolution of a factual issue relating to a defendant's guilt or innocence if appeal will result in reinstatement of an existing and valid verdict of guilty); *United States v. Ceccolini*, 435 U.S. 268 (1978) (same); *Forman v. United States*, 361 U.S. 416, 426 (1960) (same); *United States v. Sanford*, 429 U.S. 14 (1976) (government may always appeal an erroneous ruling in a defendant's favor if the ruling is entered before trial); *Serfass v. United States*, 420 U.S. 377 (1975) (same). Whatever the justification for the finality of the rulings in *Sanabria* and *Martin Linen*, therefore, the justification cannot be that trial judges possess the prerogative to acquit against the evidence.

63. See, *e.g.*, *United States v. Scott*, 437 U.S. 82 (1978).

64. 438 U.S. 204 (1978). To be sure, the *Swisher* Court held that the Maryland procedure consisted not of "two trials," 438 U.S. at 217, but of a "single proceeding," 438 U.S. at 215, for double jeopardy purposes. But it should be obvious that to say the Maryland procedure is a "single proceeding" for double jeopardy purposes is like saying it is a regime of "continuing jeopardy": the statement is a *conclusion*, not an explanation. See *Breed v. Jones*, 421 U.S. 519, 534 (1975) ("The phrase 'continuing jeopardy' describes . . . a conclusion"). That is, to call the Maryland procedure a "single proceeding" for double jeopardy purposes is simply to say that the discrete procedural steps prescribed by Maryland law will be *treated* as a "continuing" procedure for constitutional purposes. It does not explain *why* the discrete steps should be so treated. If the Court's conclusion is sound, it is because for double jeopardy purposes there is nothing wrong with a system of bench trials in which the findings made by the magistrate who hears the evidence and compiles the record are not final until accepted by a higher tribunal.

The same is true of the *Swisher* Court's statements that the trial magistrate was a "master" rather than a "judge," 438 U.S. at 216, and that he was authorized only to make "proposed findings" rather than to enter final "judgment[s]." 438 U.S. at 217 n.15. These statements, again, are entirely conclusory. They describe the double jeopardy effects of the Maryland procedure, but they do not explain its constitutional rationale.

The foregoing point can be illustrated by assuming that Maryland now provides that all *juries* shall henceforth act as "master[s]," and that they shall have the authority to return only "proposed findings," rather than final "judgment[s]." What would the Court say about such a system? Would it accept for double jeopardy purposes Maryland's characterization of its procedure as a "single proceeding"? Presumably not. Presumably it would say that while the procedure was a "single proceeding" for purposes of Maryland law, it was *not* a single proceeding for double jeopardy purposes, because the double jeopardy clause prohibits the states

may provide for a system of bench trials in criminal cases in which a trial magistrate not only lacks the authority to acquit against the evidence, but cannot make final rulings of law *or* fact — including findings of not guilty — until affirmed on appeal by a higher tribunal. This stands in marked contrast to the criminal jury whose verdicts are constitutionally immune from appeal both on law and fact.

Furthermore, even if the prerogative of nullification extended to judges, it does not extend to sentencing. If it did, criminal sentences (like jury verdicts of not guilty) would be absolutely final. Yet the Court has repeatedly and consistently held that, where a defendant appeals his conviction, a trial judge's determination of sentence can be expunged and the defendant sentenced *de novo*, something that cannot happen to a jury finding of not guilty.⁶⁵ Indeed, the Court appears to adhere to the view that where sentencing is explicitly left to a jury, even jury sentences may be set aside and reexamined *de novo*.⁶⁶

from treating jury verdicts of not guilty as nonfinal. The latter conclusion is significant because it underscores the double jeopardy differences between the kind of proceeding at issue in *Swisher* and a typical jury trial. If it is true that there is a constitutional difference between the finality of the *Swisher* magistrate's "proposed findings" and the finality of a jury's verdict of not guilty (and the *Swisher* Court held there *was*), it is not because of any fifth amendment notions of finality, but because of sixth amendment notions of trial by jury that the double jeopardy clause incorporates by reference. See note 99 *infra*. That is, what distinguishes *Swisher* from the jury case is not that the *Swisher* magistrate's findings were only tentative, but that Maryland was constitutionally *allowed* to treat them as tentative. And the reason Maryland was allowed to treat the magistrate's findings as tentative is because he was a *magistrate* rather than a *jury*. See Westen & Drubel, *supra* note 58, at 132-37. Indeed, to the extent that favorable findings or rulings by a judge *are* final for double jeopardy purposes, this is so only because the double jeopardy clause incorporates by reference standards of finality that are otherwise provided by law. For the extent to which the due process clause and/or the domestic law may prevent an appellate court from disregarding a trial judge's assessment of raw facts, see the discussion of Justice Marshall's dissenting opinion in *Swisher* in note 99 *infra*, and the discussion of *Martin Linen* in note 146 *infra*. For the extent to which a procedural regime may *choose* to vest nullification authority in a trial judge without having been constitutionally *compelled* to do so, see the discussion of *Kepner v. United States*, 195 U.S. 100 (1904), in Westen & Drubel, *supra* note 58, at 132-37.

65. See, e.g., *North Carolina v. Pearce*, 395 U.S. 711, 719-21 (1969). It is true, of course, that the defendant in *Pearce* appealed his conviction, but it does not follow that he was willing to be resentenced *de novo* in the event his conviction was reversed on appeal. More importantly, when a defendant has been implicitly acquitted by a jury on a greater charge, he cannot be retried on that charge, even if he does appeal his underlying conviction. See *Green v. United States*, 355 U.S. 184 (1957). Thus, a comparison of *Pearce* to *Green* demonstrates that a judge's determination of sentence in a defendant's favor does not enjoy the constitutional measure of finality possessed by a jury verdict in a defendant's favor.

66. See *Chaffin v. Stynchcombe*, 412 U.S. 17, 23-24 (1973); *Stroud v. United States*, 251 U.S. 15 (1919). It is true, of course, that the defendants in *Chaffin* and *Stroud* took the initiative in appealing the original convictions that underlay their original jury sentences. Nonetheless, even if they can be said to have waived their interest in the finality of their original jury sentences by appealing their underlying convictions, it is significant that they could *not* have been found to have waived their interest in finality if the original juries' favorable decisions had related to the elements of the alleged offenses, rather than to the length of their sentences. See *Green v. United States*, 355 U.S. 184, 191-92 (1957). Thus, even assuming *arguendo* that

The upshot is that the constitutional rule of "absolute finality" for jury acquittals is confined to jury verdicts of not guilty, and does not extend either to findings of not guilty by the bench or to determinations of sentence. There is nothing arbitrary in this. There are significant differences between juries and judges that would justify — though not necessitate — giving juries alone the prerogative to acquit against the evidence.⁶⁷ Similarly, there are significant differences between determinations of guilt or innocence and determinations of sentences that would justify confining nullification to the former.⁶⁸ To say that the jury-acquittal rule does not extend to

the doctrine of waiver has some vitality, the Court draws a significant distinction between a favorable judgment by a jury regarding the elements of an offense (which cannot be waived) and a favorable judgment by a jury regarding the length of a sentence (which can be waived).

The foregoing distinction between guilt or innocence, on the one hand, and length of sentence, on the other, is best illustrated by *Cichos v. Indiana*, 385 U.S. 76 (1966). The defendant in *Cichos* was tried on two counts: involuntary manslaughter, punishable by two to twenty-one years imprisonment; and reckless homicide, punishable by one to five years imprisonment. He was originally found guilty of reckless homicide and sentenced to one to five years. After successfully appealing his conviction, he was retried again on both counts and again sentenced to one to five years in prison. He appealed, arguing that he had been placed twice in jeopardy for the same offense by being retried for the greater offense of involuntary manslaughter after the original jury had implicitly acquitted him of involuntary manslaughter. That is, the defendant relied on the principle of "implicit acquittal" that the court had already accepted in *Green v. United States*, 355 U.S. 184 (1957), and later reaffirmed in *Price v. Georgia*, 398 U.S. 323 (1970) (it is a violation of double jeopardy not only to *convict* a defendant of a charge of which he has been implicitly acquitted, but also to *retry* him for that offense, even where retrial results again in an implicit acquittal of that offense). The Court in *Cichos* found it unnecessary to decide whether the double jeopardy clause applied to the states, because the Court held that even if the clause applied, it was not violated in *Cichos*, because *Cichos* was significantly different from *Green*. In *Green*, the defendant was originally tried on two separate offenses, each having distinct elements of its own and one being more serious than the other; in *Cichos*, on the other hand, the two offenses of involuntary manslaughter and reckless homicide contained *identical* elements, the difference between them being solely a difference in the length of sentence. This distinction is significant, the Court held, because the doctrine of implicit acquittal only applies to favorable determinations by a jury regarding the elements of an offense, and not to favorable determinations by a jury regarding the length of sentence. In sum, the Court distinguishes for double jeopardy purposes between favorable determinations regarding guilt or innocence and favorable determinations regarding the length of sentence, and it makes the distinction even in cases in which both determinations are made by juries.

For a discussion of the justification for treating determinations of sentence differently from determinations of guilt or innocence, see note 68 *infra*.

67. See *United States v. Maybury*, 274 F.2d 899, 902-03 (2d Cir. 1960), noted in *Mayers & Yarbrough, Bis Vexari: New Trials and Successive Prosecutions*, 74 HARV. L. REV. 1, 27-28, 42-43 (1960). See also *Curtis, The Trial Judge and the Jury*, 5 VAND. L. REV. 150, 157-66 (1951).

68. The differences are threefold. First, decisions regarding guilt or innocence are either/or decisions, while decisions regarding sentence are finely graded decisions on a spectrum. In deciding guilt or innocence, the trier of facts makes gross decisions to convict or acquit, or to convict on a greater offense or convict on a significantly different lesser offense; in fixing a precise sentence, in contrast, the trier of fact chooses from among an almost infinite array of possibilities. Second, decisions regarding guilt or innocence are approximate, while designations of sentence are fully informed. When a trier of fact decides between convicting or acquitting, or between convicting on a higher or convicting on a lower offense, it does not know the precise consequence to the defendant of the various alternatives; when a trier of fact fixes a particular sentence from within a range of sentences, in contrast, it knows precisely

judges or to sentences is simply to say that ours is a constitutional regime that has reasonably opted for less nullification where it could conceivably have opted for more.

In summary, the first of the three rules of double jeopardy (that a defendant cannot be further prosecuted following an "acquittal") imposes no limitation on the authority of the government to appeal a criminal sentence. A trial judge who sentences a defendant does not implicitly "acquit" him of all higher sentences, because given the values that underlie double jeopardy, "acquittals" for double jeopardy purposes are confined to jury verdicts of not guilty. That does not mean, however, that the double jeopardy clause necessarily condones government appeals of sentence. It means, rather, that if double jeopardy prohibits such appeals, it does so not because of the rule against prosecution following an acquittal, but because of separate rules that remain to be explored.

B. *Double Punishment: A Defendant's Interest in the Lawful Administration of Prescribed Sentences*

Another potential limitation on government appeals of sentence is the prohibition of double, or "multiple,"⁶⁹ punishment. This rule of double jeopardy, that a defendant may not be punished "twice"

what the consequence to the defendant will be. Third, decisions regarding guilt or innocence are guided by instructions regarding particular and limited elements constituting the underlying offenses, and by the requirements of proof beyond a reasonable doubt. Decisions regarding sentence are more open-textured. When a trier of fact decides to convict or acquit, or to convict of a greater or lesser offense, its decision is guided by its instructions regarding the particular elements of the underlying offenses; when a trier of fact fixes a sentence, in contrast, it may receive no guidance at all regarding either the standards for sentencing or the burdens of proof to be employed.

The foregoing distinctions help explain why a legal system might wish to confine the prerogative of nullification to determinations of guilt or innocence. It is precisely because nullification regarding guilt or innocence is less finely tuned, less self-conscious, less informed and less guided that a legal system may allow it to operate there, while not allowing nullification with respect to the more finely tuned, more informed and more self-conscious process of sentencing. This does not mean that the legal system is opposed to nullification. It simply means that the value of nullification must be balanced against other competing interests, and that if nullification becomes too self-conscious and too explicit, it will have a distorting effect on those other interests. See *United States v. Dougherty*, 473 F.2d 1113, 1130-37 (D.C. Cir. 1972) (it does not follow that because the criminal jury has a constitutional prerogative to acquit against the evidence, it must also be explicitly instructed that it possesses such prerogatives); *M. KADISH & S. KADISH*, *supra* note 58, at 64-65 (same).

The foregoing distinctions also suggest that the more closely a sentencing decision approximates a decision regarding guilt or innocence, the more persuasive the defendant's claim for finality. See *State ex rel. Westfall v. Mason*, 594 S.W.2d 908, 921-22 (Mo. 1980) (Bardgett, C.J., dissenting) (the death penalty is authorized only if the jury finds beyond a reasonable doubt that a statutory aggravating circumstance exists; failure of the jury to make that finding should be treated as an implicit acquittal that immunizes the defendant from being retried and resentence to death).

69. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

for the "same" offense, was first invoked by the Court over a hundred years ago in the first of its great double jeopardy decisions.⁷⁰ Unfortunately, despite the rule's venerable antiquity, the Court has never clearly identified the constitutional value, or rationale, that informs the rule. To determine whether the prohibition has any bearing on unilateral government appeal of sentences, therefore, one must begin by identifying the purpose of the prohibition on double punishment.

This much is clear: the double jeopardy clause prohibits the state from punishing a person twice for conduct that, by law, can be punished only once. That is to say, the state may not "double up" on a defendant's sentence by punishing him "again" after he has fully served the proper sentence prescribed by law for an offense. The real task is to identify the source and content of the law that defines the proper sentence for proscribed conduct. One cannot know whether a defendant is being punished *twice* without knowing whether he has yet been fully punished *once*, and one cannot know whether a defendant has been punished once without identifying the law that governs sentences for particular conduct.

Paradoxically, the two sources of law most commonly advanced are both ultimately untenable. It is sometimes suggested, on the one hand, that the double jeopardy clause contains an independent standard of its own for defining the existence of a criminal offense and for establishing the maximum permissible sentence for such an offense. According to that view, a state violates the prohibition of double punishment whenever it defines criminal offenses in such a way as to "double up" on what the double jeopardy clause itself defines to be the maximum sentence for an underlying offense.⁷¹

The obvious problem with the foregoing view is that the Constitution contains few (if any) standards for defining the constituent elements of criminal offenses, and even fewer standards for determining the maximum permissible length of criminal sentences. At most, the Constitution prohibits the state from imposing serious criminal penalties on defendants for conduct for which they are not personally at fault,⁷² and from imposing sentences which are "ex-

70. *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873).

71. See *Iannelli v. United States*, 420 U.S. 770, 792-94 (1975) (Douglas, J., dissenting) (arguing that even if Congress intended multiple punishments, the imposition of such punishment violated the double jeopardy clause).

72. See Jeffries & Stephan, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325, 1370-76 (1979) (collecting authorities).

treme[ly]" disproportionate to the severity of a crime.⁷³ Beyond those very minimum prerequisites, the elements of a criminal offense and "the length of the sentence" are "purely . . . matter[s] of legislative prerogative."⁷⁴ Thus, if the principle of double punishment is based on a *constitutional* definition of criminal offenses and on a *constitutional* measure of excessive sentences, it is both superfluous and innocuous: superfluous, because it adds nothing to the protection already provided by the cruel and unusual punishment clause of the eighth amendment and the due process clauses of the fifth and fourteenth amendments; innocuous, because the limitations it prescribes are too lax and too general ever realistically to come into play.

It is also said, on the other hand, that the double jeopardy clause merely incorporates by reference whatever the domestic law — state or federal — defines as an offense and as a lawful sentence for an offense; hence, a court violates the double jeopardy clause if it imposes a sentence in excess of what the legislature intended as the full penalty for a particular offense.⁷⁵ Unfortunately, this formulation, too, is flawed because it produces a principle of double punishment that will always be either superfluous or irrelevant: if a court is applying statutes enacted by its own respective legislature, double punishment becomes irrelevant because the court's constitutional analysis will always be identical to, and entirely derivative from, its statutory analysis of legislative intent; if a court is reviewing the statutes of a sister jurisdiction, double punishment becomes irrelevant because the court will always be bound by the sister jurisdiction's interpretation of its own statutes.

Assume, for example, that a federal defendant who has been tried and convicted of violating federal law now raises a claim of double punishment in a federal court. If the double jeopardy clause merely incorporates by reference whatever the federal legislature has defined certain offenses and sentences to be, then in order to determine whether double punishment has occurred, the federal court must interpret federal law. If its interpretation shows that the federal legislature intended the offenses and sentences to accumulate, the defendant's punishment will be lawful both under federal law and under the double jeopardy laws; if its interpretation shows that the federal legislature did *not* intend the offenses and sentences to accu-

73. *Rummel v. Estelle*, 100 S. Ct. 1133, 1139 (1980). See also 100 S. Ct. at 1136; *Weems v. United States*, 217 U.S. 349, 367 (1910).

74. *Rummel v. Estelle*, 100 S. Ct. at 1139.

75. See *Whalen v. United States*, 100 S. Ct. 1432, 1443-45 (1980) (Rehnquist, J., dissenting).

mulate, the defendant's punishment will be *unlawful* under both federal law and the fifth amendment. In either event, the foregoing notion of double punishment is superfluous because its conclusions are always dependent upon the results already reached by means of statutory interpretation.⁷⁶

Now assume, on the other hand, that a state-court defendant who has been convicted of violating state law now raises a claim of double punishment in a federal court. Since federal courts are bound by state interpretations of state law, the federal court's analysis of double punishment can never come into play. If the state courts have concluded that the state offenses and sentences were intended to accumulate, the federal court will have to accept their conclusion, because it has no constitutional basis for setting it aside. If the state courts have already concluded that the state offenses and sentences were not intended to accumulate, the defendant will have already prevailed on his claim and will have nothing further to request from the federal court. In either event, the claim of double punishment is irrelevant because it adds nothing to what the defendant has already received in state courts under state law.⁷⁷

Fortunately, there exists still a third view of double punishment, a view that falls in between the other two and yet avoids the problems they present: the double jeopardy clause operates as a *presumption* against finding that domestic law intends multiple offenses and multiple punishment, a presumption that can be overcome only by "clear and unmistakable"⁷⁸ evidence that the domestic law intends offenses and sentences to be cumulated.⁷⁹ This solution avoids both horns of the dilemma. It frees the legislature to define offenses and parcel out sentences in the way the legislature desires, by requir-

76. [I]f the only question confronting this Court is whether Congress intended to authorize cumulative punishments for rape and for felony murder based upon rape, this Court need decide no constitutional question whatsoever.

Whalen v. United States, 100 S. Ct. 1432, 1443 (1980) (Rehnquist, J., dissenting).

77. To the extent that the Court implies that a state court can ever err in the interpretation of its own law and that such an error would create a federal question reviewable by this Court, I believe it clearly wrong.

Whalen v. United States, 100 S. Ct. 1432, 1446 (1980) (Rehnquist, J., dissenting) (footnote omitted).

The only exception is in state criminal cases removed from prosecution to a federal court under 28 U.S.C. §§ 1442-1443 (1976). In that event, the federal court would have to construe state law as applied to the defendant without any prior construction by a state court. The double jeopardy clause would not in that event be irrelevant, but it would be superfluous, because it would lead to no different construction of state law than the federal law would reach anyway as a matter of statutory construction.

78. Iannelli v. United States, 420 U.S. 770, 791 (1975).

79. For an excellent discussion of this theory, see Comment, *Twice in Jeopardy*, 75 YALE L.J. 262 (1965).

ing the courts to adhere to legislative schemes of punishment that are "clear and unmistakable."⁸⁰ Yet it also permits the courts to reject judicial interpretations of domestic law, by authorizing the courts to subject multiple punishment to constitutional review, and to invalidate such punishment wherever the evidence for its intended existence is less than clear.⁸¹

This principle, that the double jeopardy clause operates as a rebuttable presumption against multiple punishment, has several virtues. It is the only formulation of this facet of the double jeopardy clause that can give constitutional content to the clause without intruding upon the legislature's authority to define offenses and penalties, because other constructions inevitably render the double jeopardy clause either unduly intrusive or entirely meaningless. In addition, it fully accords with the Supreme Court's decisions regarding double punishment.⁸² Finally, it corresponds with comparable

80. The only constitutional limitations on the authority of the legislature to impose punishments that it clearly intends are limitations that are found in provisions of the Constitution other than the double jeopardy clause. See *Whalen v. United States*, 100 S. Ct. 1432, 1436 n.3 (1980).

81. A constitutional presumption of this kind does not place a federal court in the untenable position of either passively parroting or wrongfully second-guessing a domestic court's interpretation of domestic law, see notes 75-77 *supra*, because the *substantive content* of the constitutional rule requires a court to strike down multiple sentences unless domestic law "clearly and unmistakably" intends them. As an illustration, consider the constitutional rule that courts must invalidate any criminal statute that is too vague to give citizens notice of the kinds of conduct that are prohibited. When a federal court examines a state criminal statute for vagueness, it does not feel bound by the state court's determination as to the clarity of the state statute. See *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) (holding a Florida vagrancy statute unconstitutional on grounds of vagueness), *reversing* *Brown v. City of Jacksonville*, 236 So. 2d 141 (Fla. Dist. Ct. App. 1970) (declaring that the state vagrancy statute was not vague). At the same time, however, in determining vagueness a federal court is not entitled to disregard a state court's construction of its own statute. See *Wainwright v. Stone*, 414 U.S. 21, 22-23 (1973) ("For the purpose of determining whether a state statute is too vague and indefinite to constitute valid legislation, 'we must take the statute as though it read precisely as the highest court of the State has interpreted it'" (citation omitted)). Instead, while taking the state statute to mean what the state court says it does, the federal court then goes on to decide whether that interpretation renders the prohibition impermissibly vague. See 414 U.S. at 23 ("When a state statute has been construed to forbid identifiable conduct . . . claims of impermissible vagueness must be judged in that light.").

The same is true of the presumption against double punishment. In applying the presumption, a federal court is not bound by a state court's determination as to the *clarity* of the state legislature's intention to impose multiple punishment. At the same time, a federal court is not free to reject the state court's interpretation of its own law. Instead, while accepting the state court's determination of its own law, the federal court goes on to decide whether the state law is sufficiently "clear and unmistakable" to justify the imposition of multiple punishment. See *Whalen v. United States*, 100 S. Ct. 1432, 1439 (1980) (invalidating multiple punishment, not because the domestic court's interpretation of domestic statutes was in obvious error, but because the domestic law as interpreted was not sufficiently clear under scrutiny of the double jeopardy clause to justify multiple punishment).

82. The Court's decisions as to whether the state may impose multiple sentences for a single course of conduct following a single trial fall into two categories: (1) cases in which the Court *rejects* the claim of multiple punishment; and (2) cases in which the Court *sustains* the claim of multiple punishment. I have found no cases in category (1) in which a claim of

values underlying the constitutional prohibition of vague criminal statutes⁸³ and the constitutional rule that criminal statutes be nar-

double punishment was rejected in the face of a legislative desire for single punishment; instead, the Court has rejected such claims where it has found that the legislature intended multiple punishment for a single offense. *See, e.g., Iannelli v. United States*, 420 U.S. 770 (1975); *Callanan v. United States*, 364 U.S. 587 (1961); *United States v. Brown*, 333 U.S. 18 (1948); *American Tobacco Co. v. United States*, 328 U.S. 781 (1946); *Pinkerton v. United States*, 328 U.S. 640 (1946); *Blockburger v. United States*, 284 U.S. 299 (1932); *United States v. Adams*, 281 U.S. 202 (1930); *Albrecht v. United States*, 273 U.S. 1 (1927); *United States v. Daugherty*, 269 U.S. 360 (1926); *Ebeling v. Morgan*, 237 U.S. 625 (1915); *Gavieres v. United States*, 220 U.S. 338 (1911); *Burton v. United States*, 202 U.S. 344 (1906). Perhaps the closest cases to the contrary are *Gore v. United States*, 357 U.S. 386 (1958) (upholding consecutive sentences under separate statutory provisions for a single sale of narcotics) and *Holiday v. Johnston*, 313 U.S. 342, 349 (1941) (stating that the erroneous imposition of cumulative sentences in a single case raises no issue of double jeopardy) (dictum). Yet in *Gore* the majority held that it could not "reasonably" be "maintained" that Congress intended that a single punishment be imposed for the conduct engaged in. 357 U.S. at 389. As for *Holiday*, the Court's statement was not only dictum, 313 U.S. at 349, but it was made without any supporting authority whatsoever, and has not been cited as authority by the Court in any subsequent decisions. To be sure, Justice Rehnquist suggested in *Whalen* that *Ladner v. United States*, 358 U.S. 169, 173 (1958), held that the erroneous imposition of multiple punishment raises "no constitutional issue." *Whalen v. United States*, 100 S. Ct. 1432, 1444 (1980) (Rehnquist, J., dissenting). Examination shows, however, that the *Ladner* Court was saying not that the erroneous imposition of multiple sentence can *never* present an issue of double jeopardy, but rather that the alleged erroneous imposition of the multiple punishment in *Ladner* did not present such an issue because it had not been properly raised by the defendant.

As for category (2), I have found no cases in which the Court sustained a claim of double punishment where the legislature could reasonably be said to have intended multiple punishment; instead, the Court has sustained such claims where it has found that Congress did *not* intend double punishment, *see, e.g., Simpson v. United States*, 435 U.S. 6 (1978); *Jeffers v. United States*, 432 U.S. 137 (1977); *Milanovich v. United States*, 365 U.S. 551 (1961); *Heflin v. United States*, 358 U.S. 415 (1959); *Ladner v. United States*, 358 U.S. 169 (1958); *Prince v. United States*, 352 U.S. 322 (1957); *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218 (1952), or where it has not found congressional intent to impose multiple punishment, *see, e.g., Braverman v. United States*, 317 U.S. 49 (1942). In all the cases cited to the contrary, multiple punishments were imposed in the course of *successive* prosecution, rather than at a single prosecution. *See, e.g., Harris v. Oklahoma*, 433 U.S. 682 (1977) (*per curiam*); *Brown v. Ohio*, 432 U.S. 161 (1977). These cases are distinguishable, however, because they present issues not of multiple punishment, but of successive prosecutions. *Whalen v. United States*, 100 S. Ct. 1432, 1441 (1980) (Blackmun, J., concurring).

83. The void-for-vagueness decisions fall into two categories for our purposes: (1) cases in which statutes are too vague to give persons notice of the kinds of conduct that are prohibited; and (2) cases in which notice is immaterial, but in which statutes are too vague to give executive officials guidance as to what the legislature intended. *See Amsterdam, Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like*, 3 CRIM. L. BULL. 205, 216-24 (1967).

It is the second category of cases that is pertinent here. When a court strikes down such statutes for being unconstitutionally vague, it is not because the statutes fail to give persons requisite notice, but because the statutes represent an unconstitutional delegation of legislative power to courts, prosecutors, and policemen to define crimes and punishment. *See Giaccio v. Pennsylvania*, 382 U.S. 399, 403 (1966); *NAACP v. Button*, 371 U.S. 415, 433 (1963); *Herndon v. Lowry*, 301 U.S. 242, 263 (1937). The real gravamen, in other words, is not that citizens will not be able to conform their behavior to the requirements of the criminal law, but that prosecutors and courts will punish persons whom the legislature may not have clearly intended to punish. This is the same constitutional principle that underlies the prohibition on multiple punishment, *viz.*, that the prosecutors and courts impose multiple punishments only where the legislature's desire for them is "clear and unmistakable."

Consider, for example, *United States v. Evans*, 333 U.S. 483 (1948). The defendant in *Evans* was charged with harboring an illegal alien in violation of a statute which "clear[ly]"

rowly construed.⁸⁴ Indeed, each of these constitutional doctrines, *viz.*, the rebuttable presumption against double punishment, the prohibition of vague criminal statutes, and the canon of narrow construction for criminal statutes, are all part of the more general principle that no one should be criminally punished except for conduct clearly prohibited by the domestic law,⁸⁵ and that when in

defined harboring to be a crime, but which was "neither clear nor . . . helpful" in designating the respective punishment for harboring from among "the possible penal consequences Congress may have had in mind." 333 U.S. at 485. The defendant did not pretend that he lacked notice that harboring illegal aliens was a crime; he admitted that he knew that harboring was unlawful. He argued, instead, that although *he* had notice as to the nature of the prohibited conduct, the courts had no clear guidelines as to the punishment Congress intended and, lacking such guidelines, should not proceed to impose a punishment that Congress did not intend. The Court agreed. It invalidated the prohibition on harboring illegal aliens, on the ground that the statute was so vague as to the intended punishment that no punishment could be imposed without running the risk that the Court would be imposing a sentence that Congress did not intend.

84. The so-called "rule of lenity" is often described as merely a rule of statutory construction, *see* *Basic v. United States*, 100 S. Ct. 1747, 1753 (1980), but there is also authority that it also operates as a constitutional canon of construction. Thus, both the majority of the Court in *Whalen v. United States*, 100 S. Ct. 1432 (1980), and Justice Blackmun in concurrence took the position that the Constitution precludes a court from deferring to a lower court construction of a criminal statute if the consequence of such "customary deference" causes a court to impose punishment the legislature did not "clearly" intend. 100 S. Ct. at 1436, 1439; 100 S. Ct. at 1440 (Blackmun, J., concurring). Moreover, as authority for the proposition that constitutional issues of multiple punishment cannot be resolved without reference to legislative intent, the *Whalen* majority specifically cited *Bell v. United States*, 349 U.S. 81, 82 (1955). 100 S. Ct. at 1436. The citation to *Bell* may be significant because, while *Bell* itself presented no constitutional issue of double punishment, it *was* the case in which the Court first announced the rule of "lenity." Thus, in citing *Bell* (which was not a double jeopardy case) as authority for the proper constitutional analysis of double punishment problems, the *Whalen* Court may have been referring to the doctrine for which *Bell* is best known — the rule of lenity. Finally, in explaining why it was inappropriate to defer the lower court's construction of the two statutes, the *Whalen* majority emphasized that defendants have a "constitutional right" not to be "deprived of liberty as punishment for criminal conduct" except as "authorized" by the legislature. 100 S. Ct. at 1437. The Court's emphasis may be significant because, if the lower court's interpretation of the statute had been taken at face value, *Whalen* was a case in which the legislature *had* authorized the punishment. This implies that with respect to the interpretation of criminal statutes, the Constitution precludes a court from accepting a lower court's interpretation at face value and requires, instead, that the court proceed with caution lest it punish a person whom the legislature did not intend to punish.

85. It may be tempting to assume that no person may constitutionally be punished for a criminal offense unless his conduct is prohibited not only by domestic law, but by domestic law in a form of a *statute* (as opposed to a common-law crime). Indeed, the Court has suggested as much, by stating that principles of separation of powers and due process prohibit the federal courts and state courts from punishing persons except to the extent authorized by the legislature. *See Whalen v. United States*, 100 S. Ct. 1432, 1436-37 & n.4 (1980). This suggestion is troublesome because it implies that common-law crimes (which still exist in nearly thirty states) are all unconstitutional, something the Court has never intimated. *See United States v. Davis*, 167 F.2d 228 (D.C. Cir.), *cert. denied*, 334 U.S. 849 (1948) (upholding a conviction in the District of Columbia for the common-law crime of negligently permitting a prisoner to escape); W. LA FAVE & A. SCOTT, *HANDBOOK ON CRIMINAL LAW* § 9, at 61-69 (1972). It is more plausible to assume, therefore, that the *Whalen* Court would uphold criminal punishment that was *either* clearly prescribed by the legislature *or* so clearly accepted as a common-law crime that legislative silence can be taken as implicit ratification. In either event, the essential principle is that no person should be subjected to criminal punishment unless the punishment is based on the kind of broad political consensus that is reflected in explicit or

doubt, a court should construe criminal statutes so as to avoid the risk of punishing a person for conduct the legislature has not proscribed.⁸⁶

The foregoing analysis finds support in *Whalen v. United States*,⁸⁷ the most recent of the Court's double punishment cases. The defendant in *Whalen* was simultaneously tried in the District of Columbia for the local offense of felony murder (punishable by twenty years to life imprisonment) and the lesser included felony of rape (punishable by any term up to life in prison). He was convicted of both offenses and given consecutive sentences of twenty years to life for felony murder, and fifteen years to life for rape. He appealed to the D.C. Court of Appeals, arguing among other things that the

implicit legislative enactment. If this is what the *Whalen* Court meant, it lends further support to the view that the Constitution contains a presumption against multiple punishment, a presumption that can be overcome only by a clear showing that the domestic law intends it to be imposed.

86. This also suggests a role for the courts under the eighth amendment in reviewing the length of criminal sentences. As things now stand, the Court appears to feel caught in the dilemma between either abdicating judicial review of the length of criminal sentences, regardless of how disproportionate they may seem, or imposing its own subjective views on the states by drawing lines where no objective criteria exist. The harshness of the dilemma was the dominant theme in *Rummel v. Estelle*, 100 S. Ct. 1133 (1980), the most recent of the Court's constitutional decisions regarding the length of sentences. Under Texas law, the defendant in *Rummel* received a mandatory life sentence as a two-time recidivist for having been convicted of three separate crimes of larceny. He challenged his sentence, arguing that a life sentence was grossly disproportionate and, therefore, cruel and unusual as a punishment for what were essentially three nonviolent and "petty" property offenses. The Court approached the case as if it had only two choices: either to abstain from all judicial review of the length of sentences, or to draw arbitrary lines unsupported by objective criteria. The majority (per Justice Rehnquist) responded to the self-imposed dilemma by opting for the former, holding that, in the absence of "objective criteria," any "line-drawing" would "merely" reflect the "subjective views of individual Justices." 100 S. Ct. at 1140. The four dissenters (per Justice Powell) opted for the other horn of the dilemma, taking the view that the Texas sentence was so disproportionate to the criminal sentences in other states and even in Texas itself, that it "would be viewed as grossly unjust by virtually every layman and lawyer" in the country. 100 S. Ct. at 1156 (Powell, J., dissenting).

Significantly, however, there is a way out of the *Rummel* dilemma, a way that lies down the path the Court has followed in *Whalen*. The Court could have struck down the sentence of life imprisonment on the ground that the sentence was so out of line with sentences in Texas and elsewhere that the Court could not presume that the Texas legislature intended it to apply to "petty property offenses" like *Rummel's*, leaving it open to the Texas legislature to come back and make it clear prospectively that it *did* intend mandatory life sentences for defendants such as *Rummel*. This solution would appear to satisfy both the majority and the dissenters in *Rummel*. It would satisfy the majority because it would take the courts out of the business of irrevocably imposing their "subjective" views on the popular branches of government, by giving legislatures the final say on the length of criminal sentences. Yet it would also satisfy the dissenters because it would protect defendants from sentences that the courts believe "virtually every layman and lawyer" would consider unjust, by protecting defendants from sentences that do not enjoy wide political support. (If the Texas legislature were to respond by reaffirming its statute — in the way state legislatures responded to *Furman v. Georgia*, 408 U.S. 238 (1972), by re-enacting death penalty statutes — the dissenters in *Rummel* would presumably conclude that they were wrong in believing that the life sentence would be viewed as "grossly unjust by virtually every layman and lawyer" in the country.)

87. 100 S. Ct. 1432 (1980).

combined sentences violated congressional intent by cumulating punishments that Congress intended to merge. The Court of Appeals affirmed the conviction, finding as a matter of statutory interpretation that Congress intended the two crimes to be separately punishable. The defendant sought further review in the United States Supreme Court arguing (1) that Congress did not intend the two crimes to be separately punished, and (2) that even if Congress did so intend, the imposition of consecutive sentences subjected him to double punishment in violation of the double jeopardy clause.

A majority of the Court, while ruling for the defendant, rejected both of the standard arguments usually advanced in the area of double punishment. The Court refused to say (as Justice Blackmun said in concurrence) that the double jeopardy clause "*only*"⁸⁸ serves to incorporate by reference whatever the legislature intends regarding the calculation of punishment; similarly, the Court refused to say (as Justice White said in concurrence) that the case could be decided purely on *statutory* grounds.⁸⁹ Instead, the Court based its decision squarely on the double jeopardy clause, emphasizing that the double jeopardy clause "at the very least"⁹⁰ precludes a court from imposing multiple sentences where the legislature intends a single sentence. On the other hand, the Court also refused to say (as the defendant said in argument) that the double jeopardy clause defines punishments and sentences independently of legislative intent. Instead, the Court emphasized that "the question whether punishments imposed by a court after a defendant's conviction upon criminal charges are unconstitutionally multiple cannot be resolved without determining what punishments the Legislative Branch has authorized."⁹¹

Where, then, did this leave the *Whalen* Court? What role was left for the double jeopardy clause? If the double jeopardy clause does not passively incorporate legislative intent by reference, and if it does not prescribe independent standards of its own, what does it do? The answer is that while the double jeopardy clause prohibits the courts from imposing multiple punishment where the legislature does not intend it, and while it permits the courts to impose multiple punishment where the legislature "clearly"⁹² intends it, it operates in all middle areas as a presumption against multiple punishment. It is a constitutional rule of construction that reverses the "customary

88. 100 S. Ct. at 1441 (Blackmun, J., concurring) (emphasis original).

89. 100 S. Ct. at 1440 (White, J., concurring).

90. 100 S. Ct. at 1436.

91. 100 S. Ct. at 1436.

92. 100 S. Ct. at 1439.

deference"⁹³ owed to domestic interpretations of domestic law, requiring, instead, that courts strike down multiple punishments unless the domestic law "clearly"⁹⁴ intends them to be imposed.⁹⁵

Now back to the starting question: given the constitutional values that are understood to underlie the prohibition of double punishment, what effect does the prohibition have on the alleged authority of the state to appeal criminal sentences? The answer is that it has none at all. The prohibition of double punishment is part of a larger constitutional presumption of lenity in the criminal law, a presumption against punishing defendants in excess of the true intention of the domestic law. The presumption against double punishment serves to protect defendants from receiving multiple sentences where domestic intent is less than "clear and unmistakable." Needless to say, this rebuttable presumption against multiple sentence has no bearing on the authority of the government to appeal a single sentence. When the government appeals a criminal sentence for alleged abuse by the sentencing judge, it is not asking the appellate court to conjoin a new and complete sentence to the sentence already imposed at trial. It is not seeking multiple sentences of any kind at all, much less multiple sentences unauthorized by domestic law. It is seeking a single, authorized sentence; it is asking the appellate court to replace an allegedly abusive sentence with a single lawful one.

93. 100 S. Ct. at 1436. Justice White, concurring separately, agreed that the lower court's determination of legislative intent was "not entitled to the usual deference," but not for the constitutional reason stated by the majority. He would have justified disregarding the lower court's construction purely on the statutory ground that the lower court had made an egregious error in interpreting the statute. 100 S. Ct. at 1440 (White, J., concurring) (citing *Pernell v. Southall Realty*, 416 U.S. 363, 369 (1974)). The majority, in contrast, did *not* review the lower court's interpretation because it thought the lower court made an "obvious error," *Pernell v. Southall Realty*, 416 U.S. 363, 369 (1974), but because the double jeopardy clause required the Court to make an independent determination of legislative intent. 100 S. Ct. at 1436. Compare 100 S. Ct. at 1440 (Blackmun, J., concurring) (agreeing that no deference was owed to the lower court, *both* for the constitutional reason stated by the majority and for the statutory reason stated by Justice White). In other words, the *Whalen* majority reviewed and reversed the lower court's interpretation of the District of Columbia statute, not because the interpretation was in "obvious error," but because it was not so "clearly" correct as to justify the imposition of multiple punishment.

94. 100 S. Ct. at 1439.

95. This view of the double jeopardy clause in the area of multiple punishment — like the analogous view of the eighth amendment, *see* note 86 *supra* — is not an aberrant notion of judicial review. It is part of a broader judgment that the proper function of judicial review is not to abstain from the imposition of substantive values (if that is even possible) or to have the *final* say on substantive values, but to articulate substantive values in the context of procedures that permit the political branches to have the final say if they feel strongly to the contrary. *See* Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037, 1058-59 (1980) (discussing the "'suspensive' veto" school of constitutional theory). *But cf.* Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980) (implicitly denying the possibility that the courts can articulate substantive values without also having the final say in imposing such values).

Accordingly, as long as the government's avenue of appeal is clearly authorized by the domestic law, and as long as the appellate court's superseding sentence is also authorized, the increase in sentence on appeal presents no issues of double punishment.

This does not mean that the double jeopardy clause necessarily permits the government to appeal a criminal sentence. It means, rather, that such appeals are not prohibited by either the rule regarding "acquittals," or the rule regarding double punishment, and that if such appeals are prohibited by double jeopardy, it must be because of some third principle of double jeopardy yet to be discussed.

C. *Finality*

To establish a double jeopardy claim against a government appeal of sentence, a defendant is left to proceed under the third of the double jeopardy values — the ever-present interest of a defendant in *finality*. When a defendant challenges a government appeal of sentence, he is not suggesting that the trial judge speaks with such an authoritative voice that his sentences should be absolutely final (as would be true of the jury's verdict of not guilty). Nor is he suggesting that the substitution of an increased sentence on appeal violates the intent of the domestic law (as would be true of a multiple punishment). He is asserting, instead, that any further inquiry into sentence following the sentencing proceeding at trial would cause him undue anxiety. Even if the trial judge's sentence is flawed, and even if it could be replaced on appeal by a single and lawful domestic sentence, the trial judge's sentence should stand (the defendant would say) because any further litigation to correct it would impose an undue "ordeal"⁹⁶ on him. In short, the defendant is relying upon what the Supreme Court calls a defendant's interest in "finality":⁹⁷ an interest in an end to the "embarrassment, expense and . . . anxiety"⁹⁸ of criminal prosecution.

The finality value of double jeopardy is unique in several ways. For one thing, it is essentially more indigenous to the double jeopardy clause than its two companion values. The other values of double jeopardy are essentially derivative. The prerogative of the criminal jury to acquit against the evidence, though enforced through the jury acquittal rule of double jeopardy, has its true origin

96. *Green v. United States*, 355 U.S. 184, 187 (1957).

97. *United States v. Jorn*, 400 U.S. 470, 479 (1971) (plurality opinion). See also *Brown v. Ohio*, 432 U.S. 161, 165 (1977).

98. *Green v. United States*, 355 U.S. 184, 187 (1957).

in the sixth amendment right to trial by jury.⁹⁹ Similarly, the presumption against double punishment, though operating through the double jeopardy clause, is essentially an aspect of a broader constitutional presumption against punishing defendants in excess of domestic command.¹⁰⁰ The finality value, in contrast, is not derivative, but originates directly in the double jeopardy clause. Perhaps that is what the Court means in saying that the principle of finality is at the "heart"¹⁰¹ of the double jeopardy clause.

Furthermore, the problems of finality are significantly different from other problems of double jeopardy. The difficulty with acquittals and double punishment is to identify the precise nature of the constitutional values that underlie the two rules. Once the respective

99. See *Gregg v. Georgia*, 428 U.S. 153, 199-200 n.50 (1976) (plurality opinion) (to enter a judgment of conviction notwithstanding a jury verdict of acquittal, or to retry a defendant following a jury verdict of acquittal, would violate *both* a defendant's sixth amendment right to trial by jury *and* his right not to be twice placed in jeopardy for the same offense). To say that the double jeopardy guarantee is *derivative* means that it depends entirely for its scope and content on an anterior notion of right to trial by jury. That explains why the government may take an appeal from a trial judge's finding of not guilty while not being able to appeal from a jury verdict of not guilty: the double jeopardy rules regarding government appeals derives not from any notion regarding the finality of a trial judgment, but from a sixth amendment notion regarding the finality of jury verdicts. Thus, if the sixth amendment were amended in such a way as to eliminate any prerogative in the jury to acquit against the evidence, the double jeopardy rules regarding the finality of jury verdicts of acquittal would lose their constitutional foundation and, to be coherent, would have to be altered to bring them into line with the rules governing the finality of favorable rulings from the bench. Conversely, the sixth amendment notions of trial by jury do not depend on preexisting or coexisting rules of double jeopardy. Assume, for example, that the federal courts re-embraced the procedural rules by which they operated during the first half of the nineteenth century, rules that contain no provision for appeals by either the plaintiff or defendants in criminal cases. See P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 34-35 (2d ed. 1973). In that event, double jeopardy rules regarding government appeals of jury verdicts of not guilty would not exist because there would be no basis for their ever coming into play. Yet the constitutional prohibitions on directed verdicts and on other jury-control devices designed to prevent a jury from acquitting against the evidence would still operate as fully as ever because they derive, not from fifth amendment notions of double jeopardy, but from anterior sixth amendment notions of right to trial by jury.

This insight into the *derivative* nature of the jury-acquittal rule may also help illuminate the nature of the double jeopardy rules against government appeals of a judge's rulings in a defendant's favor. Justice Marshall has argued that it violates the due process clause to isolate the judge who actually hears evidence from the judge who eventually finds the facts based on the evidence. See *Swisher v. Brady*, 438 U.S. 204, 229-32 (1978) (Marshall, J., dissenting). In other words, while appellate courts may reverse trial judges for *legal* errors, appellate courts may not reverse trial judges for *factual* rulings that depend upon trial assessments of demeanor and credibility. If Justice Marshall is right, a judge's factual rulings in a defendant's favor, which the due process clause requires be final, could not be appealed by the government without also violating the double jeopardy clause. See Cooper, *Government Appeals in Criminal Cases: The 1978 Decisions*, 81 F.R.D. 539, 549-59 (1979) (suggesting that the Court's recent double jeopardy decisions can be rationalized on the ground that trial judges have final authority to find facts). Again, however, if such appeals violate double jeopardy, it is only because the double jeopardy clause incorporates by reference the due process limitations that otherwise apply to the redetermination of factual findings by trial judges in criminal cases.

100. See notes 82-86 *supra*.

101. *Jeffers v. United States*, 432 U.S. 137, 150 (1977) (plurality opinion).

values are identified, the rest is easy because there is no dispute about the weight the values deserve. The converse is true of finality. Problems of finality are difficult, not because of uncertainty regarding the *nature* of the finality interest, but because of uncertainty regarding its *weight*. Everyone understands the nature of a defendant's interest in finality: it is his interest in seeing that criminal proceedings against him are brought to an end, "once and for all."¹⁰² The real problem is to ascertain how much weight finality deserves when finality is juxtaposed (as it almost always is) against "society[']s . . . valid concern for insuring that the guilty are punished."¹⁰³

The task of ascribing weight to finality can be illustrated by reference to imaginary systems in which the problems of weight are absent. Imagine, for example, that a system believes that a defendant's interest in finality is nearly absolute and, hence, that the prosecution should be confined to having a single opportunity to obtain the judgment and sentence it seeks.¹⁰⁴ No court in such a system would ever have to weigh or balance a defendant's interest in finality against "the public interest in assuring that each defendant shall be subject to a just judgment on the merits of his case,"¹⁰⁵ because the defendant's interest would always prevail. Once prosecuted, a defendant would be entitled to immunity from reprosecution any time his initial trial happened to end in a mistrial, whatever the grounds for the mistrial.¹⁰⁶ Once convicted, a defendant would be entitled to immunity from reprosecution any time his conviction was reversed on appeal, whatever the grounds for reversal.¹⁰⁷ Once convicted and sentenced, a defendant would be entitled to immunity from review of his initial sentence, however illegal the sentence might be.

Now imagine, conversely, that a legal system believes that a soci-

102. *United States v. Jorn*, 400 U.S. 470, 486 (1971) (plurality opinion).

103. *Burks v. United States*, 437 U.S. 1, 15 (1978).

104. This was apparently the view accepted by Justice Murphy. *See Wade v. Hunter*, 336 U.S. 684, 694 (1949) (Murphy, J., dissenting).

105. *United States v. Scott*, 437 U.S. 82, 101 (1978).

106. *See* note 104 *supra*. Also, *see United States v. Dinitz*, 424 U.S. 600, 613 (1976) (Brennan, J., dissenting) (taking the position that a defendant is immune from reprosecution following a mistrial, even if the mistrial was declared at his request, if he requested the mistrial in response to a government error); *United States v. Tateo*, 377 U.S. 463, 473 (1964) (Goldberg, J., dissenting) (taking the position that a defendant is immune from reprosecution following a mistrial declared over his objection whenever the mistrial can be attributed to fault on the government).

107. This appears to be the rule in England, namely that a defendant cannot be retried following the reversal of his conviction on appeal. *See United States v. Tateo*, 377 U.S. 463, 473 (1964) (Goldberg, J., dissenting).

ety's interest in "insuring that the guilty are punished"¹⁰⁸ is nearly absolute and, hence, that society should have a "complete opportunity to convict those who have violated its laws."¹⁰⁹ Again, no court would have to weigh or balance the state's interest against the defendant's interest in finality, because the state would always win: the state would be allowed to retry a defendant — whether following a mistrial, reversed conviction, or reversed ruling in the defendant's favor — whenever it could show that the defendant's "guilt is clear,"¹¹⁰ and, hence, that the prior proceedings did not "end in just judgments."¹¹¹

The American doctrine of double jeopardy eschews both of the aforementioned extremes. The double jeopardy clause represents a "balancing"¹¹² of the defendant's interest in finality against "the societal interest in [law enforcement]."¹¹³ One must weigh the gravity of the state's interest in further prosecution against the magnitude of the defendant's interest in finality,¹¹⁴ while taking into account both the potential risks of official abuse¹¹⁵ and the possibility of adopting less drastic alternative means.¹¹⁶

108. See note 103 *supra*.

109. *Arizona v. Washington*, 434 U.S. 497, 509 (1978). See *Downum v. United States*, 372 U.S. 734, 742 (1963) (Clark, J., dissenting) (taking the position that a defendant is never immune from reprosecution following a mistrial, even a mistrial declared over his objection, unless the mistrial was deliberately engineered by the state for tactical purposes or for purposes of harassment).

110. *United States v. Tateo*, 377 U.S. 463, 466 (1964).

111. *Wade v. Hunter*, 336 U.S. 684, 689 (1949).

112. *United States v. Scott*, 437 U.S. 82, 92 (1978); *Finch v. United States*, 433 U.S. 676, 680 (1977) (Rehnquist, J., dissenting); *Illinois v. Somerville*, 410 U.S. 458, 477 (1973) (Marshall, J., dissenting). See also *Arizona v. Washington*, 434 U.S. 497, 505 (1978); *Illinois v. Somerville*, 410 U.S. 458, 469-71 (1973).

113. *United States v. Tateo*, 377 U.S. 463, 466 (1964).

114. Compare *United States v. Tateo*, 377 U.S. 463, 466 (1964) (state has a great interest in being able to retry the defendant, because it has no other alternative for convicting the guilty), with *Breed v. Jones*, 421 U.S. 519 (1975) (state has no substantial interest in putting the defendant through two complete trials, because it could satisfy its interest by giving the juvenile court judge authority to make a transfer decision without also giving him the authority to find the defendant guilty). In addition, compare *Ludwig v. Massachusetts*, 427 U.S. 618 (1976) (defendant has no substantial interest in finality regarding the initial proceeding because the trial judge at the initial proceeding has no final authority to find him guilty), with *Breed v. Jones*, 421 U.S. 519 (1975) (defendant has a substantial interest in the finality of the first proceeding because the juvenile judge at that proceeding has final authority to find him guilty). See also *Westen & Drubel*, *supra* note 58, at 89 n.47.

115. Compare *Illinois v. Somerville*, 410 U.S. 458 (1973) (where no possibility existed that the mistrial was triggered by overreaching), with *Downum v. United States*, 372 U.S. 734 (1963) (where a real possibility existed that a mistrial was triggered in bad faith). See also *Westen & Drubel*, *supra* note 58, at 92-93.

116. Compare *United States v. Wilson*, 420 U.S. 332 (1975) (where appeal was the only feasible mechanism for fulfilling the state's interest in an error free trial), with *Breed v. Jones*, 421 U.S. 519 (1975) (where the state had alternative means for satisfying its interests in allowing a juvenile court judge to make a transfer decision for adult trial).

The American law of double jeopardy is a product of such balancing. Thus, although the state may firmly believe it can prove a defendant guilty if given another opportunity, it may not retry a defendant following a mistrial declared over his objection if the declaration was capable of being "manipulated . . . to allow the prosecution an opportunity to strengthen its case";¹¹⁷ nor following a declaration of any mistrial or the reversal of any conviction caused by deliberate prosecutorial harassment or overreaching;¹¹⁸ nor following a conviction for either *exactly* the same conduct¹¹⁹ or *nearly* the same conduct,¹²⁰ where the second prosecution is based solely on the failure of coordinate governments to synchronize their prosecutorial decisions;¹²¹ nor following a trial that ultimately terminates in a basic failure of proof.¹²² The reason for this, the Court would say, 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."¹²³

By the same token, although a defendant may fervently desire an end to the ordeal of prosecution, he can be retried following a mistrial declared at his request for reasons other than deliberate prosecutorial harassment or overreaching;¹²⁴ following the reversal of a conviction for reasons other than deliberate harassment or overreaching;¹²⁵ and following an erroneous dismissal of the charges in his favor.¹²⁶ The reason for this, the court would say, is "that the Double Jeopardy Clause does not guarantee a defendant that the Government will be prepared, in all circumstances, to vindicate the social interest in law enforcement through the vehicle of a single pro-

117. *Illinois v. Somerville*, 410 U.S. 458, 469 (1973).

118. *See United States v. Dinitz*, 424 U.S. 600, 611 (1976). *See also* Westen & Drubel, *supra* note 58, at 102.

119. *See Waller v. Florida*, 397 U.S. 387 (1970).

120. *See Brown v. Ohio*, 432 U.S. 161 (1977). Although the state in *Brown* attempted to re prosecute the defendants for a crime that contained additional elements not included in the previous conviction, the Court nonetheless held retrial to be barred. Thus the Court implicitly held that once a defendant has been tried and convicted for an offense, he cannot be retried for crimes arising out of the same transaction — the "same transaction" being defined, at the very least, as crimes so interconnected with regard to proof, that they consist in substantial part of elements already put to proof in the previous trial. *Accord, In re Nielsen*, 131 U.S. 176 (1889). *See* Westen & Drubel, *supra* note 58, at 160-63.

121. *See Brown v. Ohio*, 432 U.S. 161, 164 n.4 (1977). The same is not true of governments sufficiently distinct that coordinating their prosecutorial decisions would impose an undue burden on them. *See United States v. Wheeler*, 435 U.S. 313, 316-22 (1978).

122. *See Burks v. United States*, 437 U.S. 1 (1978).

123. *Green v. United States*, 355 U.S. 184, 187 (1957).

124. *See United States v. Dinitz*, 424 U.S. 600 (1976).

125. *See United States v. Ball*, 163 U.S. 662 (1896).

126. *See, e.g., United States v. Scott*, 437 U.S. 82 (1978).

ceeding for a given offense.”¹²⁷ In each case, the Court is striking a balance between the defendant’s interest in finality and the state’s contrary interest in nonfinality — sometimes favoring the former, sometimes favoring the latter.

To resolve the validity of unilateral government appeals of sentence — indeed, to resolve *any* constitutional problem of finality in a criminal case — one must first extract from the jurisprudence of double jeopardy the controlling criteria of finality, and then apply those general criteria to the particular issue at hand. The controlling criteria, for present purposes, appear to be fourfold.¹²⁸ First, in weighing a defendant’s interest in finality against the state’s interest in prosecution, the Court gives special weight to the “expense”¹²⁹ and “anxiety”¹³⁰ entailed in an adversary presentation of evidence on the general issue of guilt or innocence at trial. This heightened concern for the “ordeal”¹³¹ to a defendant of the trial phase of a criminal proceeding is evidenced in several places: (a) in the rule to the effect that “jeopardy” (*i.e.*, the personal “risk”¹³² to a defendant that is such as to require the prosecution to “shoulder” the “heavy”¹³³ burden of justifying the termination and recommencement of a criminal proceeding) does not “attach” until the trial phase actually begins;¹³⁴ (b) in the rule to the effect that “jeopardy,” having once attached, comes to some extent to be *unattached* following the completion of the trial phase;¹³⁵ (c) in the rule that an appellate court may reverse a trial judge’s finding of not guilty and enter a conviction in its place if the appellate court does so on the basis of the record compiled at trial, but not if the appellate court reopens the record for *de novo* fact-finding on appeal;¹³⁶ and (d) in the rule that

127. *United States v. Jorn*, 400 U.S. 470, 483-84 (1971) (plurality opinion).

128. An additional criterion, which is not relevant to government appeals of sentence, is whether the defendant is being deprived of his interest in being able “to go to the first jury and, perhaps, end the dispute then and there with an acquittal.” *United States v. Jorn*, 400 U.S. 470, 484 (1971) (plurality opinion). *See also* *Wade v. Hunter*, 336 U.S. 684, 689 (1949) (referring to a defendant’s “valued right to have his trial completed by a particular tribunal”). This particular criterion does not apply to government appeals of sentence because the appeal does not occur until after a defendant has been heard and judged by the first jury impaneled.

129. *Green v. United States*, 355 U.S. 184, 187 (1957).

130. 355 U.S. at 187.

131. 355 U.S. at 187.

132. *Price v. Georgia*, 398 U.S. 323, 329 (1970).

133. *Arizona v. Washington*, 434 U.S. 497, 505 (1978).

134. *See Crist v. Bretz*, 437 U.S. 28 (1978).

135. *See, e.g., United States v. Sanford*, 429 U.S. 14 (1976) (*per curiam*).

136. *See Swisher v. Brady*, 438 U.S. 204 (1978). The foregoing statement is not necessarily inconsistent with the Court’s decision in *Kepner v. United States*, 195 U.S. 100 (1904). In that case, the trial court, acting without a jury, had found the defendant not guilty. The Court held that the appellate court’s reversal of the acquittal had placed the defendant in double jeopardy.

the state may subject a defendant to an involuntary two-tiered system of fact-finding if one of the tiers is merely a probable cause hearing (or the other tier is merely an appellate review on the record compiled at trial), but not if each tier consists of a full trial on the merits.¹³⁷

Second, in weighing a defendant's interests against the state's, the Court allows the state to take an appeal from any erroneous ruling in a defendant's favor that is otherwise appealable and that can be remedied on appeal without retrying the defendant or reopening the record.¹³⁸ This willingness to allow further proceedings on the record may be based on the belief that the burdens of an involuntary appeal are qualitatively different (and less onerous) than the "personal strain"¹³⁹ of trial, or because the appellate process is not subject to the kinds of prosecutorial harassment, tactical manipulation, and overreaching that may occur at trial. Whichever the reason, the state may always take an appeal from an erroneous ruling by a judge in a defendant's favor, including presumably an erroneous judgment of acquittal based on insufficiency of evidence, provided that the appellate disposition merely has the effect of reinstating an existing and valid jury verdict of guilty;¹⁴⁰ and the state may appeal an erroneous finding of not guilty in a trial to the bench if the original trial record is such as to permit the appellate court to reverse the trial court and enter a finding of guilty without hearing new evidence.¹⁴¹

Third, despite its genuine concern for the ordeal of trial, the Court allows the state to retry a defendant following the reversal on appeal of a judge's erroneous ruling not followed by a jury acquittal,

Kepner can be justified on one or both of two separate grounds: on the ground that the trial judge's finding of not guilty was based on a personal assessment of raw facts of a kind that due process precludes an appellate court from reviewing or disregarding on a cold record, *see* discussion of Justice Marshall's dissenting opinion in *Swisher*, *supra* note 99 and discussion of *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977), *infra* note 146; or on the ground that the trial judge's finding of not guilty was an exercise of a prerogative of nullification that the domestic law had vested in trial judges, *see* *Westen & Drubel*, *supra* note 58, at 132-37.

137. Compare *Swisher v. Brady*, 438 U.S. 204 (1978) (two-tiered system allowed), with *Breed v. Jones*, 421 U.S. 519 (1975) (two-tiered system not allowed).

138. *See, e.g.*, *United States v. Ceccolini*, 435 U.S. 268 (1978); *United States v. Wilson*, 420 U.S. 332 (1975).

139. *United States v. Jorn*, 400 U.S. 470, 479 (1971) (plurality opinion).

140. *See* *United States v. Scott*, 437 U.S. 82, 91 n.7 (1978); *United States v. Ceccolini*, 435 U.S. 268 (1978). The Court in *Scott* distinguished *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977), on the ground that there was no outstanding jury verdict of guilty in *Martin Linen* and, thus, reversal of the trial judge's ruling on sufficiency would have required retrial. 437 U.S. at 90, 91 n.7. For further discussion of *Martin Linen*, *see* note 146 *infra*.

141. *See* *Swisher v. Brady*, 438 U.S. 204 (1978). For a discussion resolving the inconsistencies between *Swisher* and *Kepner v. United States*, 195 U.S. 100 (1904), *see* note 136 *supra*.

unless the error was the product of deliberate prosecutorial harassment or overreaching. This is clearly true where a ruling *against* a defendant is reversed on appeal.¹⁴² This is the famous *Ball* principle, the principle that distinguishes American criminal procedure from systems (such as English criminal procedure) where the state may *not* retry a defendant following the reversal of his initial conviction for lack of a fair trial.¹⁴³ Because of its antiquity, and because its significance has until recently been masked by the fiction of waiver, the *Ball* principle is only now being recognized for what it is: the marking of a fundamental balance between a defendant's interest in finality and the state's interest in prosecution.¹⁴⁴ *Ball* represents a basic assessment that even though the state is responsible for denying a defendant a fair trial the first time around, the state's interest in law enforcement is too great to justify immunizing a defendant from reprosecution. The state is thus entitled to retry a defendant following a tainted trial unless he can show that the taint was a product of deliberate harassment or overreaching. The classic statement comes from Justice Harlan:

Certainly it is clear beyond question that the Double Jeopardy Clause does not guarantee a defendant that the Government will be prepared, in all circumstances, to vindicate the social interest in law enforcement through the vehicle of a single proceeding for a given offense. Thus, for example, reprosecution for the same offense is permitted where the defendant wins a reversal on appeal of a conviction. *United States v. Ball*, 163 U.S. 662 (1896) The determination to allow reprosecution in these circumstances reflects the judgment that the defendant's double jeopardy interests, however defined, do not go so far as to compel society to so mobilize its decisionmaking resources that it will be prepared to assure the defendant a single proceeding free from harmful governmental or judicial error.¹⁴⁵

Significantly, the Court also allows the state to retry a defendant following the reversal on appeal of an erroneous ruling by a judge *in his favor*, except where the ruling is followed by a jury acquittal or where the ruling represents deliberate harassment or overreaching. To be sure the foregoing statement is not entirely consistent with all of the Court's recent decisions (because the Court's recent decisions are not consistent with one another),¹⁴⁶ but it is the most *coherent*

142. See notes 117-18, 124 *supra*.

143. See *United States v. Tateo*, 377 U.S. 463, 473 (1964) (Goldberg, J., dissenting); *United States v. Ball*, 163 U.S. 662 (1896).

144. See *Burks v. United States*, 437 U.S. 1, 15 (1978); *Benton v. Maryland*, 395 U.S. 784, 811-12 (1969) (Harlan, J., dissenting) (citing *United States v. Tateo*, 377 U.S. 463, 466 (1964)).

145. *United States v. Jorn*, 400 U.S. 470, 483-84 (1971) (plurality opinion).

146. See *Cooper*, *supra* note 99 (*Sanabria v. United States*, 437 U.S. 54 (1978), is inconsistent with *United States v. Scott*, 437 U.S. 82 (1978)); *Westen & Drubel*, *supra* note 58, at 151,

principle that emerges from those decisions.¹⁴⁷ It is coherent because it corresponds with the established balance of values — *i.e.*, the balance between a defendant's interest in finality and the state's interest in prosecution — that underlies the *Ball* principle. It brings coherence to the jurisprudence of double jeopardy by rendering the two lines of cases consistent with one another. It gives the state the same right to retry a defendant following an erroneous ruling by a judge in his favor as the state now has to retry him following an erroneous judgment against him. And it does so based on the premise that there is no distinction regarding either the defendant's interest in

n.304 (Finch v. United States, 433 U.S. 676 (1977) (per curiam), is inconsistent with Swisher v. Brady, 438 U.S. 204 (1978)).

United States v. Martin Linnen Supply Co., 430 U.S. 564 (1977), may also be inconsistent with whole lines of cases, depending upon how it is construed. If *Martin Linnen* means that there can never be any further review of an erroneous ruling by a trial judge in a defendant's favor if the ruling "represents a resolution, correct or not, of some or all of the factual elements of the offense charged," 430 U.S. at 571, it is inconsistent with United States v. Ceccolini, 435 U.S. 268 (1978), holding that the government *can* appeal such a ruling if it merely results in the reinstatement of an existing and valid verdict of guilty. If *Martin Linnen* means that there can never be any further review of such a ruling *if* review would lead to "further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged," United States v. Jenkins, 420 U.S. 358, 370 (1975), *overruled*, United States v. Scott, 437 U.S. 82, 87 (1978), it is inconsistent with Serfass v. United States, 420 U.S. 377 (1975), which holds that the government can appeal such rulings, *despite* such "further proceedings." If *Martin Linnen* means that there can be no further review of such a ruling if it leads to "further proceedings," and *if* jeopardy has already once attached, it is inconsistent with United States v. Sanford, 429 U.S. 14 (1976), which holds that the government can review such a ruling even if it leads to "further proceedings" and even though jeopardy has already once attached, provided that the government is not at fault for the way in which the initial proceeding terminated.

In my judgment, there is only one way in which *Martin Linnen* can be reconciled with the surrounding jurisprudence of double jeopardy, and even that way is not entirely satisfactory. One can argue that what distinguishes the favorable ruling in *Martin Linnen* from all other "resolution[s] . . . of some or all of the factual elements of the offense charged" is that the trial judge in *Martin Linnen* was not merely making a *legal* ruling; he was also making a *factual* ruling. That is, in ruling on the sufficiency of the evidence, he was not simply applying the sufficiency standard to the facts as they uncontestedly appeared in the record; he was also making some personal factual assessment of the weight and credibility of the evidence. If one is prepared to assume that that is what the trial judge did, it explains several things. It explains why the government could not take an appeal from the ruling on insufficiency: appellate courts are simply in no position to review or reverse trial judges for rulings that are based on determinations of credibility that do not appear in the record. See discussion of Justice Marshall's dissenting opinion in Swisher v. Brady, 438 U.S. 204, 229-32 (1978), *supra* note 99; and Cooper, *supra* note 99, at 549-50. It also explains why the double jeopardy clause precluded the government from simply retrying the defendant: the prior proceeding had terminated in an unreversed (and irreversible) finding that there was insufficient evidence by which the jury could find the defendant guilty beyond a reasonable doubt. The only difficulty with the foregoing explanation for *Martin Linnen* is that it conflicts with the general rule that in passing on sufficiency of the evidence, federal judges should *not* make determinations of credibility or weight of evidence. See Burks v. United States, 437 U.S. 1, 16 (1978). But see United States v. Melillo, 275 F. Supp. 314, 319-20 (E.D.N.Y. 1967). For a further discussion of the foregoing explanation, for *Martin Linnen*, see Westen & Drubel, *supra* note 58, at 151-54.

147. To say that the principle is "coherent" means that it harmonizes with the well-accepted principles that underlie the Court's decisions in related lines of double jeopardy decisions.

finality or the state's interest in prosecution that justifies according greater finality to an erroneous judge-made ruling in a defendant's favor than to an erroneous ruling against him.¹⁴⁸

Finally, the Court does *not* allow the state to subject a defendant to retrial on guilt or innocence if the state's reasons for desiring a retrial are both *systemic* (as opposed to being accidental) and *avoidable* (as opposed to being in necessary furtherance of an important state interest). Thus, the state in *Breed v. Jones*¹⁴⁹ was not allowed to subject a juvenile delinquent to a second full trial on the issue of guilt or innocence where the second trial was made necessary by a bifurcated system in which the juvenile court judge did not decide until the end of the first trial whether to make a binding determination of guilt or innocence or to transfer the case to an adult court for trial de novo. The state's reasons for retrying the juvenile delinquent in *Breed* were both systemic and avoidable: systemic, because the second trial was a predictable, deliberate, and essentially desired feature of the state's regime for processing juvenile delinquents; avoidable because the state's interest in giving the juvenile court judge an option between trying a defendant and transferring him for trial to an adult court could have been served by allowing the juvenile judge to conduct a separate transfer proceeding in advance of any trial on guilt or innocence.¹⁵⁰

Breed is thus to be distinguished from *United States v. Ball*,¹⁵¹ where the second trial was made necessary by the occurrence of prejudicial error against the defendant in the first proceeding. The basis for the retrial in *Ball* was accidental (rather than systemic), because it was unpredictable, unintended, and undesired. The retrial in *Ball* was also unavoidable, not because the state had any necessary interest in committing the error, but because criminal trials

148. See notes 17-35, 37-40 *supra* and accompanying text. See Comley, *Former Jeopardy*, 35 YALE L.J. 674, 677-79 (1926); Cooper, *supra* note 99, at 550, 555; Fisher, *Double Jeopardy: Six Common Boners Summarized*, 15 UCLA L. REV. 81, 83, n.4 (1967); Horack, *Prosecution Appeals in West Virginia*, 41 W. VA. L. Q. 50, 52-60 (1934); Mayers & Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 HARV. L. REV. 1, 8-15, authorities cited at 4 n.11 (1960); Miller, *Appeals by the State in Criminal Cases*, 36 YALE L.J. 486, 493-97, 504-05 (1927); Note, *Right of a State to Appeal in Criminal Cases*, 49 J. CRIM. L.C. & P.S. 473, 479-82 (1959).

149. 421 U.S. 519 (1975).

150. 421 U.S. at 535-41. The evil of the bifurcated procedure in *Breed* was precisely its predictability. If a defendant knows in advance that he may well be subjected to two separate and complete trials, he faces a dilemma. If he discloses his whole case in the trial to the juvenile judge (and the juvenile judge then transfers the case to adult court), the defendant gives the prosecution gratuitous discovery of his case. On the other hand, if the defendant withholds his defense from the juvenile judge (and the juvenile judge does *not* transfer), the defendant foregoes his opportunity to put on a defense. This dilemma does not arise when the second proceeding is the unanticipated consequence of accidental error.

151. 163 U.S. 662 (1896).

are too elaborate and protective of defendants to be easily administered on an error-free basis.¹⁵² The difference between *Breed* and *Ball* is that retrial in *Breed* was based on a desired and consciously chosen feature of a particular procedural system, while retrial in *Ball* was based on an undesired and unavoidable defect in all procedural systems. The difference is that the unanticipated reasons for retrial in cases like *Ball* can never be wholly eliminated as long as criminal trials are as complex as they are.

Now what does this all mean for government appeals of sentence? How do the foregoing criteria of finality bear on the authority of the government to unilaterally appeal a defendant's sentence for the purpose of increasing the sentence? The answer by now is plain: even if one assumes, *arguendo*, that a defendant's finality interest in the length of his sentence is as great as his finality interest in guilt or innocence,¹⁵³ none of the criteria set forth above weigh against the appeal of sentence in *DiFrancesco*. The appeal will not necessarily result in a repetition of the ordeal of trial because the appellate court is authorized to order an increase in sentence based on the record as compiled by the sentencing judge, without either taking any new evidence itself or remanding for further fact-finding.¹⁵⁴ This presents no problem of double jeopardy, because it is now understood that the government may always appeal an erroneous ruling in a defendant's favor (other than a jury verdict of not guilty), as long as the appeal results in an entry on the record of a ruling that was lawfully mandated in the first place.

Moreover, even if the appellate court in *DiFrancesco* remands for

152. As Justice Harlan observed, there is a mutual relationship between the willingness of the system to accord defendants complex and rigorous trial rights, on the one hand, and its ability to retry him if, perchance, the defendant is convicted as a result of error in the implementation of those rights. See *United States v. Tateo*, 377 U.S. 463, 466 (1964):

From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are 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. In reality, therefore, the practice of retrial serves defendants' rights as well as society's interest.

153. For the suggestion that this assumption is not warranted, see notes 66, 68 *supra*, and 175-83 *infra*.

154. The statute, 18 U.S.C. § 3576 (1976), is not entirely clear on this issue. While providing for the increase in sentence on appeal, § 3576 also stipulates that no such increase shall be imposed by an appellate court "except . . . after [a] hearing" (emphasis added). Although "hearing" is ambiguous, legislative history suggests that it refers to an appellate court hearing (rather than to a trial court hearing on remand). See *Organized Crime Control: Hearings on S.30 Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. 174 (1970) (statement of Attorney General Mitchell). The former construction is also more sensible because some increases in sentences — such as the imposition of mandatory prison terms or special parole terms in cases in which the trial judge omitted them — do not involve discretion or the taking of evidence and would render any further "hearing" on remand in the trial entirely superfluous.

further fact-finding in connection with an increase in sentence, it will do so only where it can show that the trial judge's favorable sentence was either "clearly erroneous" as a matter of fact or an "abus[e]" of discretion as a matter of law.¹⁵⁵ Again, this presents no problem of double jeopardy, for the government should be allowed to retry a defendant following an erroneous ruling in his favor for the same reasons it may retry a defendant following an erroneous ruling against him: in the absence of deliberate harassment or overreaching, "the defendant's double jeopardy interests . . . do not go so far as to compel society to so mobilize its decisionmaking resources that it will be prepared to assure the defendant a single proceeding free from harmful governmental or judicial error."¹⁵⁶

Finally, even if the appellate court in *DiFrancesco* were to remand for a new sentencing hearing, the remand would be based on events that were both accidental (rather than systemic) and unavoidable. The government's appeal in *DiFrancesco* was not the product of a systemic desire for two sentencing hearings; it was not the product of a bifurcated procedure used to enable components of the system to work at their best. Nor was the appeal based on a preference for two hearings where one hearing would serve the state's interest equally well. Rather, the government appeal of sentence in *DiFrancesco* is an effort to cope with unintended, undesired and unavoidable defects in the original sentencing stage. It is an effort to cope with errors of the kind that will always occur, regardless of how refined a procedural system may be. It is designed to serve a state interest that cannot be adequately served by any alternative means. The statutory scheme utilizes appellate review of sentences for the same reason it resorts to appellate review of convictions: appellate review (and remand, where appropriate) is the only feasible mechanism for insuring the integrity and uniformity of sentencing standards. In short, just as retrial was justified in *Ball* in response to an accidental and unavoidable trial-court error, resentencing is justified in *DiFrancesco* in response to the comparable error in sentencing that was alleged to have occurred there.¹⁵⁷

155. 18 U.S.C. § 3576 (Supp. 1980). For differences between reversal for "abuse of discretion" and reversal for "illegality," see note 157 *infra*.

156. *United States v. Jorn*, 400 U.S. 470, 484 (1971) (plurality opinion).

157. Ironically, the best authority for this proposition, *Bozza v. United States*, 330 U.S. 160, 166-67 (1947), is often overlooked because of a misconception as to what an appellate court really does when it reverses a sentence for "abuse of discretion." The *Bozza* Court held that it does not violate double jeopardy for a trial judge to take the initiative in increasing a sentence if the increase is "required" in order to replace an "invalid punishment" with a "valid" one. 330 U.S. at 167. The United States Court of Appeals in *DiFrancesco* distinguished *Bozza* on the ground that the original sentence in *Bozza* was "invalid," while the

II. THREE FACES ILLUSTRATED: *North Carolina v. Pearce*

The purpose of the foregoing theory is to bring coherence to the jurisprudence of double jeopardy. The ultimate test of its validity, therefore, is its usefulness in rationalizing and simplifying complex cases. *North Carolina v. Pearce*¹⁵⁸ is such a case, because *Pearce* not only appears to implicate each of the three component values of double jeopardy, but does so in the particular context of a defendant's objection to an increase in sentence. Thus, an analysis of *Pearce* will not only cast light on the usefulness of a tripartite theory of double jeopardy, but will illuminate the particular issue of government appeals of sentence as well.

The essential facts of *Pearce* are simple. The defendant was tried and convicted in state court in 1961 for aggravated assault and sentenced to a term of twelve to fifteen years in prison. Four years later he initiated post-conviction proceedings which resulted in an appellate reversal of the conviction on the ground that evidence had been introduced against him at trial in violation of his privilege against self-incrimination. Following the reversal of his conviction, *Pearce* was retried, convicted, and sentenced in 1966 to a flat term of fifteen years in prison with credit for the some seven years he had already

sentence in *DiFrancesco* was "within that legally authorized." *United States v. DiFrancesco*, 604 F.2d 769, 781 n.14 (2d Cir. 1979), *cert. granted*, 100 S. Ct. 1012 (1980). The distinction is unpersuasive. The government argues that after finding *DiFrancesco* to be a dangerous special offender, the trial judge abused his discretion under the dangerous special offender statute by giving *DiFrancesco* a sentence for racketeering that was only one year longer than the concurrent sentence *DiFrancesco* was already serving, and that was no longer than the sentence *DiFrancesco* could have received as a nondangerous and ordinary offender. That is, the government argues that the trial judge exceeded his lawful authority under the dangerous special offender statute, 18 U.S.C. § 3575 (1976), by giving *DiFrancesco* a sentence that was legally insufficient as measured by the statute's aggravated sentencing standards. If the government is correct in its assertion, the trial judge's sentence in *DiFrancesco* was just as invalid as the sentence in *Bozza*. A sentence which is the product of an "abuse of discretion" under prevailing legislative standards is as unlawful as a sentence which violates the explicit terms of a sentencing statute. See generally Greenawalt, *Discretion and Judicial Decision: The Illusive Quest for the Fetters That Bind Judges*, 75 COLUM. L. REV. 359 (1975). It makes no difference that the alleged sentencing standard in *DiFrancesco* is one that must be inferred from the dangerous special offender statute by process of statutory interpretation, because once the statute is so construed, the resulting sentencing standard is just as much a part of the statute as the legislative standard in *Bozza*. Thus, the only difference between the two cases is that the sentence in *Bozza* was invalid on its face (*i.e.*, necessarily invalid, given the sentencing standards of the pertinent statute), while the sentence in *DiFrancesco* is allegedly invalid as applied (*i.e.*, invalid, given an application of the pertinent sentencing standard to the facts). This distinction between *facial* invalidity and invalidity *as applied* may be meaningful for some purposes, but it is difficult to see why it should make any difference for double jeopardy purposes. Cf. *Ocampo v. United States*, 234 U.S. 91, 101-03 (1914) (in response to a defendant's appeal on the record, an appellate court may increase the defendant's sentence on grounds of abuse of discretion without violating the double jeopardy provisions of the congressionally enacted Philippine Bill of Rights).

158. 395 U.S. 711 (1969).

served in prison.¹⁵⁹ Thus, having originally received a sentence in 1961 which would have permitted him to have been released on parole after twelve years in prison, Pearce was given a new sentence following his retrial and reconviction in 1966 which required that he spend a total of fifteen years in prison. He challenged the new sentence, arguing that by increasing his original sentence, the state had twice held him in jeopardy for the same offense. The state admitted that the second sentence was harsher than the first, but denied that the new sentence violated the principles of double jeopardy.

A. *Implicit Acquittal*

One should approach *Pearce* in the way one approaches all complex double jeopardy cases. One must identify the separate values of double jeopardy, ascribe to them their respective weights, and then apply the resulting standards to the particular issue in dispute. Beginning with the first of the double jeopardy values, Pearce challenged the increase in sentence on the ground that it violated the prohibition against further prosecution following an *acquittal*. He based the challenge on an analogy to the rule in *Green v. United States*¹⁶⁰ that a defendant who is convicted by a jury of a lesser-included offense, and whose conviction is set aside on appeal, may not be retried on the greater offense of which he was "implicit[ly]"¹⁶¹ acquitted by the jury. Just as the jury in *Green* implicitly acquitted Green of any greater offense by explicitly convicting him solely of the lesser offense (so Pearce argued), the sentencing judge at Pearce's original trial should be understood to have implicitly acquitted him of any greater sentence by explicitly giving him a sentence of twelve to fifteen years in prison. As Justice Harlan stated, agreeing with Pearce:

Every consideration enunciated by the Court in support of the decision in *Green* applies with equal force to the situation at bar. In each instance, the defendant was once subjected to the risk of receiving a maximum punishment, but it was determined by legal process that he should receive only a specified punishment less than the maximum. . . . And the concept or fiction of an "implicit acquittal" of the greater offense [in *Green*] applies equally to the greater sentence [in *Pearce*]: in each case it was determined at the former trial that the

159. The credit of seven years was based on (1) the time spent in jail between the time of arrest and the entry of conviction, (2) time served in prison between conviction and the entry of the new sentence following retrial, and (3) credit earned for good time. See 395 U.S. at 713 n.1; *State v. Pearce*, 268 N.C. 707, 708, 151 S.E.2d 571, 572 (1966) (per curiam); *State v. Pearce*, 266 N.C. 234, 236-37, 145 S.E.2d 918, 920-21 (1966).

160. 355 U.S. 184 (1957).

161. 355 U.S. at 190.

defendant or his offense was of a certain limited degree of "badness" or gravity only, and therefore merited only a certain limited punishment.¹⁶²

The *Pearce* majority passed over this argument in complete silence, thereby raising a question in some minds as to whether *Green* (and the principle of implicit acquittal) could be satisfactorily distinguished from a subsequent increase in sentence.¹⁶³ Yet by now the distinctions are plain. The controlling difference between the favorable original verdict in *Green* and the favorable original sentence in *Pearce* — and the reason the former was absolutely final and the latter was not — is that *Green* involved a favorable verdict by a *jury* on an issue of guilt or innocence, while *Pearce* involved a favorable ruling by a *judge* on a matter of sentence. The reason jury verdicts of acquittal are absolutely final is not because they are favorable, or because they are thought to be reliable, or because the defendant has actually relied on them, or because he should be entitled to rely on them. They are final because any effort to set them aside would intrude upon the jury's exclusive prerogative to acquit against the evidence. By the same token, the reason why favorable rulings by a judge are not absolutely final — and the reason why erroneous acquittals and erroneous findings of not guilty by judges *can* be set aside — is that judges do not possess comparable constitutional authority. And even if they did, the authority to acquit against the evidence on issues of guilt or innocence would not necessarily attach to determinations of sentence.¹⁶⁴

In short, the defendant in *Pearce* fell into the trap that awaits all who argue by analogy. He tried to benefit from the result in *Green* by arguing that the two cases were essentially the same, without making the effort to root either his own case or *Green* in the basic values underlying the double jeopardy clause. He tried to avoid the task of assessing fundamental values by riding piggyback on a decision which *he* said was not significantly different from his own. The problem was that one can never tell whether two cases are truly the same for double jeopardy purposes without first understanding what those purposes are; for one can never know whether one thing is like another, or different from it, without first ascertaining the standard that determines likeness and difference. Once the standards of

162. *North Carolina v. Pearce*, 395 U.S. at 746 (Harlan, J., concurring and dissenting).

163. Four years later, in *Chaffin v. Stynchcombe*, 412 U.S. 17 (1973), the defendant made precisely the same argument based on *Green* that was implicitly rejected in *Pearce*, presumably because he felt that the Court had not fully considered it earlier. Once again, the Court rejected it, this time explicitly. See 412 U.S. at 23-24.

164. See notes 65-68 *supra*.

double jeopardy are identified, it becomes clear that a finding of not guilty by a judge is *not* the same as an acquittal by a jury, and a determination of sentence is *not* the same as a judgment of guilt or innocence, because the determining standard is whether the trier of fact has the prerogative to acquit against the evidence. The analogy of *Pearce* to *Green* was fundamentally flawed because differences *Pearce* took to be trivial were in reality dispositive.

B. *The Prohibition of Double Punishment*

Turning to the second of the double jeopardy values, the defendant in *Pearce* argued that his subsequent increase in sentence also violated the prohibition of double punishment. He relied for authority on *Ex parte Lange*,¹⁶⁵ the first and still foremost decision regarding double punishment. The defendant in *Lange* was tried and convicted by a jury for postal theft under a statute making the offense punishable by imprisonment for not more than one year or a fine of not more than \$200. The trial judge imposed a sentence of one year in prison plus a \$200 fine. The defendant immediately paid the fine and commenced the serving of his sentence. Some five days later, after the \$200 payment had been deposited to the credit of the United States and, thus, had passed irrevocably out of the court's control,¹⁶⁶ the sentencing judge vacated the original sentence and imposed a new sentence of one year in prison with no credit for the five days already served and no provision for reimbursement of the fine. The defendant sought relief in the Supreme Court, arguing that the subsequent sentence of one year in prison violated the double jeopardy clause. The Court, agreeing, held in memorable language that by vacating the defendant's original sentence and resentencing him to one year in prison, the trial court punished Lange twice for the same offense:

If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence. And though there have been nice questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offence, or to bring the party within the jurisdiction of more than one court, there has never been any doubt of its entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts,

165. 85 U.S. (18 Wall.) 163 (1874).

166. The Court in *Lange* assumed that the \$200 fine, which had been deposited to the credit of the Treasurer of the United States, could not be recalled by the Court and could not be returned to the defendant without an act of Congress. See 85 U.S. (18 Wall.) at 175; 85 U.S. (18 Wall.) at 200 (Clifford, J., dissenting).

for the same statutory offence.¹⁶⁷

The defendant in *Pearce* argued that his case was directly analogous to *Lange*. Just as the state was prohibited in *Lange* from vacating the defendant's original sentence (a \$200 fine plus one year in prison) and replacing it with a longer sentence (a \$200 fine plus one year and five days in prison), so, *Pearce* argued, the state was prohibited in his case from vacating his original sentence of twelve to fifteen years and replacing it with a flat sentence of fifteen years. As Justice Harlan said in *Pearce*:

[I]t has long been established that once a prisoner commences service of sentence, the [Double Jeopardy] Clause prevents a court from vacating the sentence and then imposing a greater one.¹⁶⁸

Not surprisingly, *Pearce's* analogy to *Lange* was flawed for the same reason as his analogy to *Green*. It proceeded on the premise that the similarities between *Lange* and *Pearce* predominated over their differences, and yet it failed to root such similarities and differences in the purposes of double jeopardy. That is to say, the defendant in *Pearce* tried to argue that the two cases were alike in significant ways (and different in insignificant ways) without articulating the double jeopardy standard for determining "likeness" in the area of double punishment. Having once identified the controlling value, one discovers that *Pearce* is as different from *Lange* as it is from *Green*.

As we have seen, the ban on double punishment is designed to prohibit the state from doubling up on what the "law" defines as the proper sentence for a given offense, the law being the domestic definition of offenses and penalties. By that standard, the defendant in *Lange* was a victim of double punishment. He was punished twice for a single offense — "twice" being defined by reference to the domestic law's own standards. The domestic law made his conduct punishable by *either* a \$200 fine *or* one year in prison. By imposing a fresh one-year sentence without granting the defendant credit for the \$200 fine already paid, the trial judge effectively sentenced the defendant to *both* a \$200 fine *and* a year in prison. To that extent, the judge imposed two penalties where the domestic law prescribed only one. Indeed, even apart from the \$200 fine, the judge's fresh sentence of one year in prison still constituted double punishment because it resulted in an effective sentence of one year plus five days for an offense punishable by a maximum of one year. By imposing a fresh sentence of one year in prison without giving the defendant

167. 85 U.S. (18 Wall.) at 168.

168. *North Carolina v. Pearce*, 395 U.S. 711, 747 (1969) (Harlan, J., dissenting).

credit for the five days already served, the sentencing judge "doubled up" on the defendant's sentence by causing him to serve five days of his lawful one year sentence twice.

Not so in *Pearce*. There was no "doubling up" in *Pearce*. The defendant there was not punished in excess of the domestic law, nor was he given two penalties where the domestic law prescribed only one. His original sentence of twelve to fifteen years was within the statutory maximum of fifteen years. His subsequent sentence can be stated, alternatively, as either a fifteen-year sentence with credit for the seven years already served, or an eight-year sentence without credit for the seven years served. In either event, the combined effect of the new sentence and the old was fifteen years in prison, the precise term of the statutory maximum. It would have been double punishment if the trial judge had given the defendant a fifteen-year sentence without credit for the time served, or if he had given the defendant a sentence which, when combined with the time already served, would have exceeded fifteen years.¹⁶⁹ Since he did neither,

169. Interestingly, having reasoned that a defendant is constitutionally entitled to credit for time already served if the denial of credit produces a sentence in excess of the statutory maximum, the *Pearce* Court went on to hold in a companion case, *Simpson v. Rice*, 395 U.S. 711 (1969), that a defendant is *also* constitutionally entitled to credit even if the denial does *not* produce a combined sentence in excess of the statutory maximum. As the Court put it, if the state violates double jeopardy when it denies a defendant credit in such a manner as to produce a combined sentence that exceeds the statutory maximum, "the same . . . holds true" when the state denies a defendant credit in such a fashion as *not* to exceed the statutory maximum. 395 U.S. at 718.

At first glance, the Court appears to have been in error because the two cases are not at all equivalent. If the purpose of double jeopardy is to protect the defendants from being punished in excess of legislative intent, double jeopardy is not violated by a denial of credit that results in a sentence that is well within legislative parameters. Indeed, this would seem to follow from the *Pearce* Court's own recognition that unless statutory maximums are implicated, there is *no functional difference* between, say, a ten-year sentence without credit for five years already served and a fifteen-year sentence with credit for five years already served. See 395 U.S. at 719 n.14.

There is, nevertheless, an explanation for the Court's decision that a defendant is entitled to credit even where statutory maximums are not implicated. It will be recalled that the trial judge in *Rice* gave the defendant a sentence of twenty-five years in prison without credit for the two and one-half years the defendant had already served. 395 U.S. at 714, 716. The trial judge may have done so, not because he wanted to give the defendant a functional equivalent of twenty-seven and one-half years with credit, but because he assumed that the legislature wished him to treat all prior proceedings and sentences in the case as null and void. If the trial judge was mistaken in his assumption, he ended up giving the defendant a sentence that exceeded what the legislature intended him to impose. Hence, absent clear evidence that a trial judge intends to deny credit, or absent clear evidence that, in denying credit, the trial judge gave the defendant the functional equivalent of the sentence he could and would have given the defendant irrespective of any legislative desire to extend credit, the double jeopardy clause requires that a defendant be credited with all portions of a sentence previously served. To that extent, the requirement of credit is simply an aspect of the broader presumption against punishing a defendant in excess of legislative intent, by operating to resolve in a defendant's favor all doubts regarding the legislature's views regarding time already served. For further discussion of this point, see *Westen & Drubel*, *supra* note 58, at 107-11.

his new fifteen-year sentence was no more a violation of double punishment than an original fifteen-year sentence would have been.

C. Finality

Pearce was thus relegated to the third and last of the double jeopardy values, *viz.*, the interest in finality. The interest is easy to articulate: it is a need for "repose,"¹⁷⁰ a desire to know the exact extent of one's liability, an interest in knowing "once and for all"¹⁷¹ how many years one will have to spend in prison. The difficulty is not in articulating the finality value, but in weighing it against the state's contrary interest in accurate punishment; because, as we have seen, the finality value of double jeopardy must be balanced against the state's interest in the "punishment" of defendants "whose guilt is clear."¹⁷² Unfortunately, the *Pearce* Court made no explicit effort to weigh the two interests or to explain why the state's interest in imposing a new sentence should predominate. It simply announced that by appealing his original conviction, the defendant at his own "behest"¹⁷³ had caused "the slate" to be "wiped clean."¹⁷⁴ To understand what the Court meant by "the slate" having been "wiped clean," one must uncover the balance of values that lies concealed under the Court's *ipse dixit*. One must assess the interaction of the government's interest in resentencing and the defendant's interest in finality, as they are presented in the context of resentencing upon retrial following the reversal of the defendant's original conviction upon appeal.

As a start, a defendant appears to have less of a finality interest in determination of sentence than in the determination of guilt or innocence. This lesser degree of protection is apparently based on the belief that a defendant has less of a legitimate interest in the precise length of a sentence than in whether a sentence will be imposed at all — less of an interest in getting out of prison early than in not going to prison at all. Thus, a defendant enjoys more constitutional protection on the trial of his guilt or innocence than on the determination of his sentence,¹⁷⁵ and more constitutional protection regarding

170. *Benton v. Maryland*, 395 U.S. 784, 810 (1969) (Harlan, J., dissenting).

171. *United States v. Jorn*, 400 U.S. 470, 486 (1971) (plurality opinion).

172. *United States v. Tateo*, 377 U.S. 463, 466 (1964).

173. *North Carolina v. Pearce*, 395 U.S. at 721.

174. 395 U.S. at 721.

175. *See Gardner v. Florida*, 430 U.S. 349, 358 & n.9 (1977) (plurality opinion). *See generally* Note, *Procedural Due Process at Judicial Sentencing for Felony*, 81 HARV. L. REV. 821 (1968).

the *revocation* of his parole than regarding his *release* on parole.¹⁷⁶

This differentiation also means that a defendant is assumed to have a greater interest in knowing how he stands regarding guilt or innocence than how he stands regarding the length of his sentence. Thus, almost every state has statutes of limitation that require the state to prosecute and try defendants within certain definite periods of time; yet many also have indeterminate sentencing statutes that permit the state to defer the fixing of sentence for indefinite periods of time.¹⁷⁷ By the same token, while the states are under some constitutional obligation to prosecute and try defendants in a timely fashion, they have no constitutional obligation to make sentences definite within limited periods of time if doing so would frustrate reasonable sentencing goals.¹⁷⁸ Thus, the state may give a defendant a tentative parole release date, and then postpone it by reexamining its assessment of him;¹⁷⁹ the state may give a defendant a tentative parole release date, and then postpone it by revoking his earned good time;¹⁸⁰ the state may fix a definite maximum for a previously indeterminate sentence, and then rescind the designated maximum by replacing it with a longer determinate or indeterminate term;¹⁸¹ the state may release a defendant on conditional probation or parole, and then increase the terms of his release by adding to the conditions of his release;¹⁸² the state may release a defendant on conditional probation or parole, and then increase its duration by adding additional periods of time.¹⁸³ This all suggests that if a defendant has a finality interest regarding the length of his sentence, it is less than his finality interests regarding guilt or innocence, and, being less, it can more easily be outweighed by a countervailing interest on the part of the state.

As for the state, its interest in being able to increase a defendant's sentence following reconviction is both greater and lesser than its

176. Compare *Morrissey v. Brewer*, 408 U.S. 471 (1972) (parole revocation), with *Greenholtz v. Inmates of Neb. Penal Complex*, 442 U.S. 1, 9-11 (1979) (parole release).

177. See generally *Prettyman, The Indeterminate Sentence and the Right to Treatment*, 11 AM. CRIM. L. REV. 7 (1972).

178. See *United States v. Howard*, 577 F.2d 269 (5th Cir. 1978); *Burgener v. California Adult Auth.*, 407 F. Supp. 561, 564-65 (N.D. Cal. 1976). Cf. *Moody v. Daggett*, 429 U.S. 78, 86 (1976) (federal parolee has no constitutional right to a prompt parole revocation hearing).

179. See, e.g., *In re McLain*, 55 Cal. 2d 78, 357 P.2d 1080, 9 Cal. Rptr. 824 (1960), *appeal dismissed*, 368 U.S. 10 (1961).

180. See S. RUBIN, LAW OF CRIMINAL CORRECTION 350-57 (2d ed. 1973).

181. See *Sturm v. California Adult Auth.*, 395 F.2d 446 (9th Cir. 1967), *cert. denied*, 395 U.S. 947 (1969); *Hayes v. Field*, 298 F. Supp. 309 (C.D. Cal. 1969); *In re Lynch*, 8 Cal. 3d 410, 418, 503 P.2d 921, 925, 105 Cal. Rptr. 217, 221 (1972).

182. See 18 U.S.C. §§ 3651, 4209 (1976).

183. See 18 U.S.C. § 3653 (1976).

interest in being able to retry him following the reversal of his original conviction. When a conviction is set aside on appeal, a defendant is restored to the position of legal innocence he enjoyed before trial; unless the state is allowed to retry him, it must set him free regardless of what the evidence may show regarding his guilt. To that extent, the state's interest in retrying a defendant following the reversal of his conviction on appeal is its "valid concern for insuring that the guilty are punished."¹⁸⁴ With respect to resentencing, the situation is different. If the state were not allowed to increase the defendant's sentence following reconviction, it would not be denied the power to give the defendant any sentence at all; it would merely be confined to the ceiling represented by the presumptively valid sentence the defendant received following his original trial.¹⁸⁵

On the other hand, the state may at times have a greater interest in increasing a defendant's sentence than in retrying him. When a state seeks to retry a defendant following the reversal of his original conviction, it is essentially asking for an opportunity to give the defendant the kind of fair trial that it *could* and *should* have afforded him the first time; it is asking for relief from the consequences of its own error. In contrast, when the state seeks an increase in sentence, it is not necessarily acknowledging that it committed an avoidable error in setting the original sentence. Rather, it may be seeking to take account of sentencing information that *was not* and *could not* have been available originally. This is particularly true where sentences are based on an ongoing reassessment of a defendant's progress toward rehabilitation. The very institution of the indeterminate sentence is based on the belief that the kinds of information needed for the fixing of a release date come to light during the course of a defendant's behavior in prison and cannot be known at the time of sentencing. Consequently, if the state were not allowed to readjust a defendant's expected release date from prison, including readjustments upward, it would be denied the flexibility it needs for rehabilitation sentencing, through no fault of its own.¹⁸⁶

184. *Burks v. United States*, 437 U.S. 1, 15 (1978).

185. See *Chaffin v. Stynchcombe*, 412 U.S. 17, 43 & n.5, 46 (1973) (Marshall, J., dissenting).

186. See *In re McVickers*, 29 Cal. 2d 264, 271-72, 176 P.2d 40, 45 (1946) (dictum). To be sure, it might be argued that the solution is to give a defendant such a long sentence at the outset that no adjustment upwards will ever be necessary, or even *possible*. This, until recently, was the practice in California, where defendants convicted of major crimes were sentenced for indeterminate terms of up to life in prison. CAL. PENAL CODE § 1168 (West 1970), amended, CAL. PENAL CODE § 1168 (West Supp. 1980). See generally Note, *Sentencing Criminals in California — A Study in Haphazard Legislation*, 13 STAN. L. REV. 340 (1961). This induced some courts to conclude that the problem of upward adjustments in sentence had been eliminated, because every sentence was set at such a high maximum — life imprisonment

Now what does this all mean for *Pearce*? What does *Pearce* necessarily imply regarding the countervailing values of finality and prosecution? Essentially, *Pearce* can be explained in one of two ways. The first approach attributes no weight at all to the defendant's appeal of his original conviction, to his retrial, or to his reconviction. It approaches the issue without reference to the defendant's retrial and reconviction, treating the case as if the state had arbitrarily selected Pearce from other inmates in prison and, after conducting a hearing into his sentence, had increased the sentence. The state may increase a defendant's sentence (so the argument goes) because its interest in obtaining an optimum sentence is so great, and a defendant's interest in the finality of his sentence is so small, that the state may reexamine sentences whenever it so desires, and, having reexamined them, it may increase them whenever the evidence supports an increase.¹⁸⁷

The trouble with the foregoing argument is that it appears to give too much weight to the state's interest in resentencing, and too little weight to a defendant's interest in finality. A defendant's interest in the eventual length of his sentence may be less than his interest in an eventual judgment on guilt or innocence, but it is a legitimate interest nonetheless, particularly if he has already fully served the sentence as originally imposed.¹⁸⁸ By the same token, while the state

— that it could never be adjusted upward, *see, e.g.*, *People v. Leiva*, 134 Cal. App. 2d 100, 103, 285 P.2d 46, 49 (1955). In reality, of course, it was a fiction all along to assume that such state prisoners were truly serving life sentences. *See Sturm v. California Adult Auth.*, 395 F.2d 446, 449 (9th Cir. 1967) (Browning, J., concurring). Not only were the very great majority of state prisoners released before the expiration of their "life" sentences, but it would have been unconstitutional to hold all of them in prison for their full lives. *See In re Lynch*, 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972). Thus, the pretense of a certain sentence of up to life was, in reality, a fiction masking the state's desire to postpone the designation of a defendant's actual sentence until his in-prison behavior could be studied by the California Adult Authority.

187. Justice Douglas seems to have attributed this position to the petitioner in *North Carolina v. Pearce*. *See* 395 U.S. 711, 736-37 (1969) (Douglas, J., concurring).

188. Justice Harlan assumed in *Pearce* that the majority would not allow the state to increase a defendant's sentence upon retrial if the increase resulted in remanding to prison a defendant who had already fully executed his initial sentence. *See* 395 U.S. at 749 n.7 (Harlan, J., concurring and dissenting). The assumption may be based on the recognition that a person suffers a greater loss of liberty in being remanded to prison for an additional period of time than in continuing to be detained in prison for the same period of time. *See* note 176 *supra*.

It is sometimes said that while the state may seek an increase in sentence *before* a defendant commences to serve his sentence, it may not seek such an increase *after* commencement of a sentence. *See United States v. Durbin*, 542 F.2d 486 (8th Cir. 1976). If this means that the state may never seek to increase a partially executed sentence, regardless of how promptly the state endeavors to do so, the argument finds no support in the jurisprudence of double jeopardy. *See Dunskey, The Constitutionality of Increasing Sentences on Appellate Review*, 69 J. CRIM. L. & CRIMINOLOGY 19, 29-33 (1978). On the other hand, if it means that the state must move promptly with respect to its reasons for seeking an increase, the argument has considerable force. After all, the only reason increases are ever allowed is because the state's interest in

has a significant interest in adjusting a defendant's sentence to accord with his progress on rehabilitation, that does not explain why the state wished to reexamine the sentence in *Pearce*. It does not explain why the state of North Carolina wished to readjust only *some* sentences, or why (if it wished to reexamine only some) it selected Pearce's sentence as the candidate.¹⁸⁹ Consequently, if the re-sentencing in *Pearce* is to be disconnected from the happenstance of Pearce's appeal, retrial, and reconviction, it is difficult to justify, except on the dubious assumption that a defendant's interest in the finality of his sentence is so weak that it must yield whenever the state randomly wishes to reexamine his sentence.

The second argument *is* connected to the defendant's appeal of his original conviction, its reversal, and his retrial. It has the advantage of explaining why the state picked out Pearce from the pool of inmates similarly situated and designated him alone for an increase in sentence. It also explains why the State of North Carolina, in trying to justify its decision to increase Pearce's sentence, argued that Pearce "waived"¹⁹⁰ his interest in the finality of his sentence by appealing his original conviction. It explains, too, why the Supreme Court implicitly rejected the language of "waiver" and, yet, rationalized the increase in sentence on the ground that Pearce's successful appeal had left "the slate wiped clean."¹⁹¹

To appreciate the connection between Pearce's successful appeal and his subsequent increase in sentence, one must understand something about the two ways in which constitutional rights may be validly relinquished. One way is by *direct* choice: a defendant has a constitutional right to do X — that is, a constitutionally protected opportunity to do X without having to suffer certain adverse consequences as a result. He also is allowed (and sometimes even entitled)¹⁹² to forego X, as long as his decision to do so is properly

obtaining an accurate sentence is thought to outweigh a defendant's interest in finality. Accordingly, if the state moves as promptly as possible in light of its reasons for seeking an increase, it cannot be blamed for any resulting delay. This explains both the seven-year delay following retrial in *Pearce* and the even longer periods of delay that occur in the fixing of an indeterminate sentence: each period of delay is unavoidable given the state's reasons for seeking an increase. However, the situation is different if the state is fully able to seek an increase, and yet delays its request for long periods of time for no legitimate reason. In that event, the unnecessary execution of even a portion of a defendant's sentence may be sufficient to preclude the state from seeking an increase.

189. See 395 U.S. at 736-37 (Douglas, J., concurring).

190. Brief for the Petitioners at 18-19, *North Carolina v. Pearce*, 395 U.S. 711 (1969).

191. 395 U.S. at 721.

192. It does not follow that because a person has a constitutional right to do X, he must also have a constitutional right to *waive* or forego X. See *Singer v. United States*, 380 U.S. 24 (1965) (a defendant, who possesses a right to a jury trial but would prefer to be tried by a

informed. If he makes an informed decision to forego his free opportunity to do X, and if the state relies to its disadvantage on his decision, he will be deemed to have relinquished X.¹⁹³ This is the paradigm of *waiver*.

The other way of relinquishing rights is by *conditioned* choice: a defendant has a constitutional right to do X'; he also has a conditioned legal right to do B, the condition being that if he does B, he foregoes X' as a matter of law. Hence, if the defendant does B, he will be deemed to relinquish X', regardless of his state of mind regarding X' or his desire to retain X'. The latter is not an instance of waiver — it is the paradigm of *forfeiture*.¹⁹⁴

The difference between waiver and forfeiture is easily illustrated. Consider a defendant who, having both a constitutional right not to take the witness stand at his own trial and a constitutional right not to answer incriminating questions,¹⁹⁵ decides to testify on his own behalf. If he makes a free and informed decision to testify, his decision will result in his relinquishing both constitutional rights — one

judge, has no right *not* to have a jury trial and, indeed, can be compelled to have a jury trial over his objection). If a person (who has a right to do X) also has a right to waive or forego X, it is either because of the peculiar interests underlying his right to X or because of independent constitutional interests having nothing to do with his right to do X. See *Faretta v. California*, 422 U.S. 806 (1975) (the right of a defendant to represent himself, and, thus, to waive his right to counsel, does not derive from his right to counsel, but from his independent sixth amendment interest in being able to represent himself).

193. The preclusion results not simply because a person willingly decides to forego X, but because the state thereafter relies to its disadvantage on his decision. See *Simons, Rescinding a Waiver of a Constitutional Right*, 68 GEO. L.J. 919 (1980).

194. See *Green v. United States*, 355 U.S. 184, 193-94 (1957) ("Conditioning an appeal of one offense on a coerced surrender of a valid plea of former jeopardy on another offense exacts a *forfeiture* in plain conflict with the constitutional bar against double jeopardy.") (emphasis added; footnote omitted). Although Justice Black used the term "forfeiture" pejoratively in *Green* to refer to a conditioned choice that was unconstitutional, the term also applies to conditioned choices that are constitutional. See text accompanying notes 201-05 *infra*. For a general discussion of forfeiture, see Westen, *Forfeiture by Guilty Plea — A Reply*, 76 MICH. L. REV. 1308 (1978); Westen, *Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 MICH. L. REV. 1214 (1977).

The foregoing distinction between waiver and forfeiture is more a distinction in emphasis than in kind. In each case, a constitutional right is lost because the defendant has taken *action* which has placed himself in a relationship to the state such that its interest in foreclosing a right *outweighs* his interest in asserting it. Thus, in the case of forfeiture, the action consists of his doing B; in the case of waiver, the action consists in his causing the state to rely to its detriment on his open renunciation of X. See Westen, *Forfeiture by Guilty Plea*, *supra*, at 1338-39. In that sense, waivers are simply a subclass of a larger class of forfeitures. See Westen, *Away from Waiver*, *supra*, at 1260-61.

195. These two constitutional interests are separate and independent of one another. See E. CLEARY, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 116 (2d ed. 1972). Thus, a witness who is not himself on trial as a defendant has a right not to be compelled to answer incriminating questions, but no right not to take the witness stand; conversely, a defendant on trial for a criminal offense, who has been granted use immunity, has no constitutional right not to answer incriminating questions outside the presence of the jury, but he does have a right not to take the witness stand in the presence of the jury.

by waiver, the other by forfeiture. He will waive his right not to take the witness stand because to say that he makes a free and informed decision to be a witness at his own trial *means* that he makes a free and informed decision to forego not being a witness at his own trial. At the same time, however, he also forfeits his separate right not to be interrogated about the subject matter of his testimony because his legal right to testify on his own behalf is conditioned on his subsequently answering potentially incriminating questions on cross-examination.¹⁹⁶ As the Court says, when a defendant "elects to waive" his right not to be a witness by electing to take the witness stand and testify in his own behalf, he is then "not *permitted* to stop, but *must* go on" and "subject" himself to "cross-examination."¹⁹⁷

Notice, again, the distinct ways in which the two foregoing rights are relinquished. The defendant loses the right not to take the witness stand by making a free and informed decision to do the logical converse, *i.e.*, to take the witness stand and testify. The defendant relinquishes his right not to answer incriminating questions in a very different way. He relinquishes it not because he wants to be cross-examined, or because his decision to take the witness stand logically entails being cross-examined,¹⁹⁸ or because he necessarily knows he will be cross-examined, but because cross-examination is the price or condition of his giving direct testimony. He does not choose to be cross-examined; he is *made* to choose. He does not waive his right to be free from having to answer incriminating questions; he *forfeits* it.

In addition to possessing different elements, waiver and forfeiture are governed by different standards of validity. The validity of a waiver (*i.e.*, the validity of a decision to forego X) turns on a defendant's state of mind at the time he chooses to forego X: the defendant's decision to forego X is valid if, at the time, the decision is sufficiently free of adverse consequences to be deemed "voluntary"¹⁹⁹ and sufficiently informed to be "knowing" and "intelli-

196. Once a defendant decides to testify, "[t]he interests of the other party and regard for the function of the courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination."

Jenkins v. Anderson, 100 S. Ct. 2124, 2129 (1980) (quoting Brown v. United States, 356 U.S. 148, 156 (1958)).

197. Brown v. Walker, 161 U.S. 591, 597-98 (1896) (emphasis added).

198. It would be perfectly conceivable to allow a defendant to take the witness stand in his own behalf and to give testimony on direct examination, and yet immunize him from being interrogated by the prosecution by means of cross-examination. Indeed, that was essentially the practice until recently in Georgia. See Ferguson v. Georgia, 365 U.S. 570 (1961).

199. To say that an action is "voluntary" means that in addition to being an act of will (as opposed to a reflex action), it is free of those pressures on a defendant's state of mind that are deemed to be unacceptable as a matter of law. For a discussion of the kinds of pressures that

gent."²⁰⁰ The validity of a forfeiture (*i.e.*, the relinquishment of X' as a necessary condition of doing B) turns on the *connection* between the occurrence of B and the continued existence of X': the forfeiture of X' is valid if, as a result of doing B, the defendant has placed the state in such a position that its interests now outweigh his countervailing interests in X'.²⁰¹

The validity of forfeiture thus depends on the constitutional sufficiency of the change in the state's position. To illustrate such changes of position in a double jeopardy context, compare *United States v. Ball*²⁰² with *Burks v. United States*.²⁰³ The *Ball* Court held that a defendant, who has already been tried and convicted once, forfeits his right not to be retried again by successfully appealing his original conviction. Why? Not because the defendant *wants* to be tried; or because he knows he will thereafter be retried; or because he could be retried anyway in the absence of a successful appeal; but, rather, because his successful appeal deprives the state of the benefit of an otherwise valid conviction for reasons that do not justify immunizing defendants from reprosecution. In other words, the successful appeal in *Ball* had the inevitable effect of placing the state in the same position vis-à-vis the defendant that it occupied before *Ball's* original trial and that it would have occupied had the original trial ended in a mistrial declared over his objection for non-manipulable error — that is, a position in which its interest in prosecution simply outweighed his interest in finality.²⁰⁴

In contrast, the *Burks* Court held that a defendant, who has been tried and convicted once and who otherwise cannot be tried again, does *not* forfeit his right not to be retried again by successfully appealing his original conviction on grounds of insufficiency of evi-

are acceptable (and unacceptable) in the context of the entry of a guilty plea, see Westen & Westin, *A Constitutional Law of Remedies for Broken Plea Bargains*, 66 CALIF. L. REV. 471, 477-501 (1978).

200. To say that an action is "knowing" and "intelligent" means that it is based on the kinds of information that the state is required to provide a defendant as a matter of law. For the kinds of information that the state is required to provide in the context of guilty pleas, see Westen & Westin, *supra* note 199, at 501-12.

201. If the state's interests do not outweigh the defendant's, the condition is unconstitutional and the forfeiture is invalid. If the state's interest do outweigh the defendant's, the condition is constitutional and the forfeiture is valid. In that sense, forfeiture is the consequence of a constitutional condition. For more on constitutional and unconstitutional conditions, see O'Neil, *Unconstitutional Conditions: Welfare Benefits with Strings Attached*, 54 CALIF. L. REV. 443, 467-70 (1966); Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595, 1600 (1960); Note, *Another Look at Unconstitutional Conditions*, 117 U. Pa. L. Rev. 144, 151, 156-57 (1968).

202. 163 U.S. 662 (1896).

203. 437 U.S. 1 (1978).

204. See *United States v. Tateo*, 377 U.S. 463, 466 (1964).

dence. Why the difference between *Ball* and *Burks*? Why should the grounds for the defendant's successful appeal in *Burks* have any bearing on whether he could be retried? The answer is that the defendant's successful appeal in *Burks* did not place the state in the kind of position — or restore it to the kind of position — that outweighed the defendant's interest in finality. The state's interest in prosecution is never sufficient to outweigh a defendant's interest in finality where reprosecution is simply an effort to improve upon a case that failed for factual insufficiency the first time around.²⁰⁵ The successful appeal in *Burks* merely restored the state to the position it would have occupied if the trial judge had done his duty and dismissed the case for insufficient evidence at trial. The defendant's appeal in *Burks* did not work a forfeiture of his right not to be retried because while it produced a change in the state's position, the change left the state in no worse a position than it would have occupied if the trial judge had himself taken the initiative (as he should have) and dismissed the case for insufficiency of evidence.

Now back to *Pearce*. As between waiver and forfeiture, *Pearce* is clearly a case of forfeiture. *Pearce*, by appealing his conviction, did not *ask* to be resentenced; nor did he *want* to be resentenced. He wanted the same thing as the defendant in *Ball*: he wanted the appellate court to reverse his conviction and, having reversed it, to announce that the state's proceedings against him were forever at an end. Instead, like the defendant in *Ball*, *Pearce* discovered that a successful appeal was conditioned on his automatically relinquishing his finality interests, whether he wished to relinquish them or not. Just as the defendant in *Ball* learned that a successful appeal was conditioned on his being subject to retrial, *Pearce* learned that a suc-

205. In short, reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. . . . When [such reversal] occurs, . . . society maintains a valid concern for insuring that the guilty are punished

The same cannot be said when a defendant's conviction has been overturned due to a failure of proof at trial, in which case the prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble. . . .

. . . Given the requirements for entry of a judgment of acquittal, the purposes of the [Double Jeopardy] Clause would be negated were we to afford the government an opportunity for the proverbial "second bite at the apple."

Burks v. United States, 437 U.S. 1, 15-17 (1978).

The situation in *Burks* — simple insufficiency — should be contrasted with cases in which the government's evidence is insufficient after incriminating evidence, erroneously admitted at trial, is excluded. In that event, the prosecution may not be at fault for the insufficiency of the evidence presented the first time around. See *Greene v. Massey*, 437 U.S. 19, 26 & n.9 (1978) (reserving the question whether *Burks* applies in such a situation); *United States v. Mandel*, 591 F.2d 1347, 1373-74 (4th Cir. 1979) (ordinarily an appellate court should remand for retrial in such a situation).

cessful appeal was conditioned on his being subject to retrial *and* resentencing.

Significantly, the *Pearce* Court seemed to recognize that it was dealing with forfeiture.²⁰⁶ The Court implicitly rejected the state's invitation that it base its decision on the fiction of waiver. It refused to pretend that Pearce actually *wanted* to be resentenced under a procedure by which he might receive an increase in sentence. Nor did it suggest that a defendant's interest in the finality of his sentence is so flaccid that it must always yield whenever the state wishes to reexamine his sentence. Instead, speaking in the language of forfeiture, the Court emphasized the *connection* between Pearce's successful appeal and his subsequent increase in sentence, thus suggesting that the state's sentencing procedure was a constitutional consequence or condition of his having taken a successful appeal. As the Court said, Pearce could constitutionally be subjected to a possible increase in sentence because — whether or not he wanted to be resentenced, and whether or not other defendants could be so resentenced — his successful appeal and reconviction effectively “wiped” the “slate . . . clean”²⁰⁷ as a matter of law.

What, then, is the precise connection between Pearce's successful appeal and his subsequent increase in sentence? How did the successful appeal produce a change in the state's position vis-à-vis the original sentence? Why was the change in position so significant that the State of North Carolina could resentence Pearce but could not resentence other *non-appealing* defendants who (like Pearce) were serving presumptively legal sentences? The answer is that in successfully appealing his original conviction, Pearce placed the state in the position of having to retry him. In retrying him, the state was forced to present a fresh record of his criminal conduct. In reconvicting him on the fresh record, the trial judge was forced to say something about the consequent sentence. In resentencing Pearce without reference to his original sentence, the trial judge was able to base his

206. See notes 190-91 and accompanying text. Indeed, the Court has always been skeptical about speaking the language of “waiver” to describe the conditioned choices that confront defendants in the area of double jeopardy. See *United States v. Scott*, 437 U.S. 82, 99 (1978); *Burks v. United States*, 437 U.S. 1, 15 & n.9, 17 (1978); *United States v. Dinitz*, 424 U.S. 600, 609 n.11 (1976); *United States v. Wilson*, 420 U.S. 332, 343-44 n.11 (1975); *Benton v. Maryland*, 395 U.S. 784, 796-97 (1969); 395 U.S. at 811-12 (Harlan, J., dissenting); *United States v. Tateo*, 377 U.S. 463, 466 (1964); *Green v. United States*, 355 U.S. 184, 191-92, 197 (1957). See also *Kepner v. United States* 195 U.S. 100, 136 (1904) (Holmes, J., dissenting). When the Court does speak of “waiver,” it uses it as a “conceptual fiction,” *North Carolina v. Pearce*, 395 U.S. 711, 749 (1969) (Harlan, J., concurring and dissenting), to mask what it has determined to be a valid forfeiture resulting from a constitutionally conditioned choice. See *Price v. Georgia*, 398 U.S. 323, 329 n.4 (1970).

207. *North Carolina v. Pearce*, 395 U.S. at 721.

sentence on the fresh record as it then appeared before him. In short, the trial judge's interest in being able to impose a fresh sentence on the basis of the probative evidence before him was the same interest a court always has in being able to base its current judgments on the probative evidence actually before it.

The foregoing interest is substantial. Indeed, it is ultimately what motivates most opponents of the fourth amendment exclusionary rule. The advocates of the exclusionary rule make an argument that is difficult to resist. The state cannot honestly object to the exclusion at trial of illegally seized evidence (they say), because if the state had behaved legally, it would never have possessed the evidence in the first place. Thus, the exclusionary rule does no real harm, because it merely excludes from trial evidence that would otherwise have been absent anyway.²⁰⁸ No, say their opponents. The two positions are not equivalent because there is a fundamental difference between acquitting a defendant for *lack* of probative incriminating evidence and acquitting him *despite* probative incriminating evidence. There is a difference between true ignorance and pretended ignorance. Regardless of how the probative evidence comes before a court, one cannot ask a court to enter a judgment that it *knows* is contrary to the evidence before it, without imposing real costs on the system.²⁰⁹

To be sure, people can reasonably differ as to whether the costs of the exclusionary rule are outweighed by its countervailing value, but no one can deny the reality of the cost. It is the cost of deliberately requiring judges to enter judgments that they *know* to be false upon the evidence before them. Moreover, while *Mapp v. Ohio*²¹⁰ may stand for the proposition that the cost of requiring the entry of false judgments is outweighed by fourth amendment values, *Pearce* implies that the cost is not outweighed by a defendant's double jeopardy interest in the finality of his original sentence. This is significant, because it means that even if a defendant's finality interest suffices to prevent a court from *initiating* an inquiry into an otherwise legal sentence, it does not suffice to prevent a court that must impose a fresh sentence anyway from basing the fresh sentence on probative evidence actually before it.

Ultimately, *Pearce* also means something for *DiFrancesco* because, whichever of the two rationales is adopted, *Pearce* becomes

208. See Kamisar, *The Exclusionary Rule in Historical Perspective: The Struggle to Make the Fourth Amendment More Than 'An Empty Blessing'*, 62 JUDICATURE 337, 344 (1979).

209. See J. KAPLAN, CRIMINAL JUSTICE: INTRODUCTORY CASES AND MATERIALS 215-16 (2d ed. 1978).

210. 367 U.S. 643 (1961).

authority for the position that the government may appeal an erroneous sentence without violating double jeopardy. If *Pearce* stands for the proposition that a defendant's interest in the finality of his sentence is so tenuous that the government may reopen even a valid sentence and increase it whenever it so chooses, then it follows that the government may promptly move to reopen a sentence which it can show to be clearly erroneous and replace it with whatever increase in sentence is necessary to correct the error. Similarly, if *Pearce* means that a trial judge may increase a presumptively *valid* sentence whenever a defendant's appeal and retrial produces a fresh record that now justifies a higher sentence, then it follows *a fortiori* that an appellate court may increase a defendant's sentence on appeal whenever evidence already in the appellate record shows that the trial judge's sentence is *invalid*. In either case, having recognized what *Pearce* implicitly says about the relatively light weight of a defendant's interest in the finality of his sentence, one discovers that *DiFrancesco* is truly an easy case.

CONCLUSION

The Supreme Court has a favorite saying about double jeopardy. The Court found the saying in a law review article, adopted it as its own in *Pearce*, and has repeated it ever since. The saying is short and punchy, and partly true. It goes like this:

[T]he Fifth Amendment guarantee against double jeopardy . . . has been said to consist of three separate constitutional protections. [1] It protects against a second prosecution for the same offense after acquittal. [2] It protects against a second prosecution for the same offense after conviction. [3] And it protects against multiple punishment for the same offense.²¹¹

The foregoing synopsis of double jeopardy is half true, half false. Ironically, like all half-truths, it is ultimately more hazardous than an untruth, because the true half tends to mask the false half and, disguising it, allows the falsity to work its mischief unnoticed. The truth of it is, the double jeopardy clause *is* comprised of three distinct principles; and the three principles *are* connected to the rules governing retrial following acquittal, retrial following conviction, and multiple punishment. These points are true and significant, and

211. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969) (footnotes omitted). The Court was relying on an analysis in Note, *Twice in Jeopardy*, 75 YALE L.J. 262, 265-66 (1965). The Court has relied on this three-part analysis ever since. See *Illinois v. Vitale*, 100 S. Ct. 2260, 2264 (1980); *Whalen v. United States*, 100 S. Ct. 1432, 1442 (1980) (Rehnquist, J., dissenting); *Brown v. Ohio*, 432 U.S. 161, 165 (1977); *United States v. Wilson*, 420 U.S. 332, 343 (1975).

the *Pearce* Court advanced the jurisprudence of double jeopardy by recognizing them.

The flaw is that by failing to identify the governing values that underlie the three rules, the Court has no way of knowing what the rules really *mean*. Consider the prohibition of multiple punishment. Every member of the Court appears to agree that the double jeopardy clause prohibits multiple punishment. But because they have never collectively focused on the values that inform the prohibition, they have no common idea as to what the prohibition itself means; and not knowing what they mean by it, they disagree on its application.²¹² So it is, too, for individual justices. Thus, after announcing three years ago that double punishment meant one thing, Justice Blackmun now admits that it means something quite different.²¹³ He has changed his position, not because he believes double punishment should no longer be prohibited, but because he now understands what double punishment has really meant all along.

The same is also true of the second of the three rules, the prohibition on retrial following a conviction. By juxtaposing the second rule with the first rule (*i.e.*, the rule prohibiting retrial following an *acquittal*), the Court implied that the two prohibitions are of equal strength. Yet, in reality, the prohibition on retrial following an acquittal is far stronger because the value giving it meaning is more absolute. The prohibition on retrial following an acquittal is based on a jury's prerogative to acquit against the evidence, and the prohibition is nearly "absolute."²¹⁴ The prohibition on retrial following a conviction is based upon a weaker interest in finality, and is a product of "balancing."²¹⁵ The reality is that a defendant usually *can* be retried following a conviction (and following most dismissals and mistrials), because a state's interest in reprosecution usually suffices to outweigh the relatively weak interest of defendants in finality.

In many ways, however, the most serious problem is the first of the three rules — the prohibition on retrial following an acquittal. The Court experiences more "confusion,"²¹⁶ overrules more prior

212. Compare *Whalen v. United States*, 100 S. Ct. 1432, 1436-37 (1980) (treating the double jeopardy clause as a presumption against punishing a defendant in excess of what the legislature may have intended), with 100 S. Ct. at 1442-50 (Rehnquist, J., dissenting) (treating the double jeopardy clause as adding nothing to ordinary rules of statutory construction).

213. 100 S. Ct. at 1440-41 (Blackmun, J., concurring) (expressing a view of multiple punishment distinct from the view he expressed in *Jeffers v. United States*, 432 U.S. 137, 155 (1977) (opinion of Blackmun, J.)).

214. *Burks v. United States*, 437 U.S. 1, 16 (1978).

215. See note 112 *supra*.

216. *Burks v. United States*, 437 U.S. 1, 15 (1978). See also *Sanabria v. United States*, 437 U.S. 54, 80 (1978) (Blackmun, J., dissenting) (referring to "the Court's continuing struggle to

decisions,²¹⁷ and faces more unresolved issues²¹⁸ in the field of acquittals than any other area of double jeopardy. The Court's problem, once again, is that it proclaims a rule without articulating the rule's rationale and, not identifying the rationale, has no clear idea as to what the rule really means.²¹⁹ The Court proclaims the absolute finality of "acquittals" (as opposed to the lesser finality of "convictions"); but because the Court has failed to identify the values that justify such finality, it has no way of knowing what kinds of judicial rulings qualify as "acquittals" within the meaning of its rule.²²⁰

Once the Court understands why acquittals are accorded such a high degree of finality, it will know what distinguishes acquittals from other favorable rulings. The one value that seems to justify such finality for acquittals is the value in allowing a jury to acquit against the evidence. If that is so, the implications are revealing. It means that the only judicial rulings that qualify as acquittals for double jeopardy purposes are jury verdicts of not guilty.²²¹ It means that the other rulings that are sometimes associated with acquittals

create order and understanding out of the confusion of the lengthening list of its decisions [regarding acquittals] on the Double Jeopardy Clause").

217. See *United States v. Scott*, 437 U.S. 82 (1978) (overruling *United States v. Jenkins*, 420 U.S. 358 (1975)); *Burks v. United States*, 437 U.S. 1 (1978) (overruling *Bryan v. United States*, 338 U.S. 552 (1950)); *United States v. Wilson*, 420 U.S. 332, 348-51 (1975) (overruling what many had taken to be the double jeopardy definition of "acquittal" in *United States v. Sisson*, 399 U.S. 267 (1970)).

218. See, e.g., *Greene v. Massey*, 437 U.S. 19, 25 n.7, 26 nn. 9-10 (1978) (reserving three separate questions for future consideration). See also *Cooper*, *supra* note 99, at 539 ("the Court has not yet succeeded in articulating constitutional concepts that are clear enough to resolve many of the important questions").

219. "The word ['acquittal'] itself has no talismanic quality for purposes of the Double Jeopardy Clause." *Serfass v. United States*, 420 U.S. 377, 392 (1975). See also *Fong Foo v. United States*, 369 U.S. 141, 144 (1962) (Clark, J., dissenting) ("[t]he word 'acquittal' . . . is no magic open sesame").

220. Significantly, the Court appears to recognize that its experience with government appeals has been too limited and of too recent a vintage to enable it to mark out a definitive position. Thus, the Court candidly admits that its initial efforts to define "acquittals" have been unsuccessful and that as its experience grows, it considers itself free to correct its mistakes. See *United States v. Scott*, 437 U.S. 82, 84-87 (1978). This process of backing and filling can be expected to continue. As Professor Edward Cooper has said, "It is difficult to believe that the Court has yet charted the course it will ultimately follow." *Cooper*, *supra* note 99, at 540.

221. The Court has held that a judge-made ruling in a defendant's favor in the course of a jury trial is an "acquittal" for double jeopardy purposes if it is "a resolution, correct or not, of some or all of the factual elements of the offense charged." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977). Accord, *United States v. Scott*, 437 U.S. 82, 97 (1978); *Sanabria v. United States*, 437 U.S. 54, 71 (1978); *Lee v. United States*, 432 U.S. 23, 30 n.8 (1977). There are two major problems with the foregoing formulation. First, there is no principled reason why a defendant should enjoy a greater degree of finality following a legally erroneous ruling in his favor than he enjoys following the reversal of an erroneous ruling against him. See *Cooper*, *supra* note 99, at 555 (referring to "the increasingly cogent argument

are not acquittals at all, including judge-made findings of not guilty in trials to the bench, judge-ordered dismissals in a defendant's favor, whether made before, during or after trial, judge-entered judgments of acquittal for insufficiency of evidence, appellate reversals for insufficiency of evidence, and determinations of sentence, whether by judge or jury. It means, finally, that since they are not acquittals for double jeopardy purposes, the finality of these latter rulings is governed by some other double jeopardy standard. Not being governed by the prohibition on retrial following an acquittal, they must be governed by the only standard that remains — the standard of finality that governs retrials following mistrials and reversed convictions.²²²

In conclusion, the Court applies two distinct standards of finality in double jeopardy cases: a strong standard for "acquittals," a weaker standard for convictions. Once one understands the distinction between the two cases, one realizes that nothing qualifies as an acquittal except a jury verdict of not guilty, and that all other rulings are governed by the same standards of finality as govern convictions. That does not mean that judge-made rulings in a defendant's favor are never final. It means that they are no *more* final than mistrials, dismissals, reversed convictions, and findings of insufficiency of evidence, because for purposes of finality, they are all indistinguishable.

that the double jeopardy clause should not be read to bar government appeals that rest only on matters of law"). See also text accompanying notes 17-35, 37-40 *supra*, and note 148 *supra*.

Second, the foregoing definition of acquittals is inconsistent with the Court's other decisions. If an erroneous ruling by a judge comes *after* a jury verdict of guilty, it should be appealable for reasons set forth in *United States v. Wilson*, 420 U.S. 332 (1975): reversal on appeal will result in the reinstatement of an existing and valid verdict of guilty. If the ruling comes *before* the case is submitted to the jury and in *response* to a motion by the defendant, it should be appealable for the reasons set forth in *Lee v. United States*, 432 U.S. 23 (1977): the initial proceeding terminated at the defendant's request without any showing of bad faith by the prosecution.

222. See generally *Westen & Drubel*, *supra* note 58, at 148-55. This explains why the defendant could not be retried following the trial judge's favorable (but "egregiously erroneous") ruling in *Fong Foo v. United States*, 369 U.S. 141 (1962) (per curiam). Although the Court treated the trial judge's ruling in *Fong Foo* as an "'acquittal [that] was final, and could not be reviewed . . . without putting [the petitioners] twice in jeopardy, and thereby violating the Constitution,'" 396 U.S. at 143, *quoting* *United States v. Ball*, 163 U.S. 662, 671 (1896), it should be clear by now that it was not an acquittal for double jeopardy purposes, because it was not a jury verdict of not guilty. Yet that does not mean that the judge's ruling was not final for double jeopardy purposes. It was final for the same reason as the trial judge's erroneous declaration of a mistrial in *United States v. Jorn*, 400 U.S. 470, 484 (1971) (plurality opinion): because without first obtaining the defendant's consent, the trial judge denied the defendant an opportunity "to go to the first jury and, perhaps, end the dispute then and there with an acquittal," and he did so for the kind of arbitrary reasons that do not justify subjecting a defendant to retrial. See *Westen & Drubel*, *supra* note 58, at 149-50.