HOW DOES DOUBLE JEOPARDY HELP DEFENDANTS? (DRAFT)

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I. INTRODUCTION

Double Jeopardy has a long history in Anglo-American jurisprudence.[1] However, there has been little functional analysis of its likely effects on litigant behavior and possible trial outcomes.[2] This paper begins to address this gap by examining the incentive effects of the asymmetric appeal rights attached to Double Jeopardy. By this I mean the fact that the defendant can appeal convictions, but the prosecution has highly attenuated rights to appeal acquittals.[3]

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[1] *See, e.g.*, MARTIN L. FRIEDLAND, DOUBLE JEOPARDY (1969); GEORGE C. THOMAS III, DOUBLE JEOPARDY: THE HISTORY, THE LAW (1998).

[2] One paper that examines Double Jeopardy's effects on likely judicial behavior from a functional perspective is Kate Stith, *The Risk of Legal Error in Criminal Cases: Some Consequences of the Asymmetry in the Right to Appeal*, 57 U.CHI. L. REV. 1 *passim* (1990) (suggesting that asymmetric appeal rights contained within Double Jeopardy encourage a pro-defendant bias in the development of the law and pro-defendant rulings in trial court decisions).

[3] *See* Kepner v. United States, 195 U.S. 100, 133 (1904)(stating that the government may not appeal an acquittal).

On first blush this rule seems like it must unambiguously benefit defendants, but the critical question for this paper is *how* does it benefit defendants. The most common response is that the rule benefits defendants because it prevents the government from trying to overturn initial trial acquittals on appeal (thereby preventing false convictions from appeals) and saves the defendant from having to bear the costs of these appeals.[4] However, I argue that the effects of asymmetric appeal rights are, on closer inspection, considerably more complex than they might appear at first blush. In fact, the primary conclusion of this paper is that the standard justifications provided for asymmetric appeal rights (i.e., reducing false convictions and litigation costs) are not very persuasive and that we should consider alternative justifications, some of which are mentioned in this paper, that might provide stronger support for asymmetric appeal rights.

The kernel of my argument is that asymmetric appeal rights, which give the prosecution only one shot at obtaining a conviction (i.e., the initial trial), may induce the prosecution to spend even *more* in the initial trial than would be the case if appeal rights were symmetric. Such increased spending may, in some situations, *increase* (rather than decrease) the chance of a false conviction. In addition, increased prosecutorial spending in the initial trial could, in some situations, result in an *increase* in total litigation costs and an *increase* in the defendant's litigation costs. If so, then asymmetric appeal rights may, in some situations, have potentially perverse effects – increasing false convictions and increasing litigation costs. Whether and when these perverse effects may arise, and their significance, depends on a multitude of factors, but for now the critical point is that there is a potential for perverse effects.

The potential for these perverse effects is important for a number of reasons. First, it is important to know some of the effects of Double Jeopardy protection to assess whether it is achieving its objectives and whether it may be the best way to achieve those objectives. Second, asymmetric appeal rights do not appear explicitly

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[4] *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE 599 - 601(discussing values permeating double jeopardy) (2d ed., 1997) ; United States v. Scott, 437 U.S. 82, 91 (discussing the false convictions concern), 104 (discussing a concern with litigation costs) (1978). Indeed, Double Jeopardy protection is often justified by references to concerns with reducing false convictions and containing litigation costs. *See* DRESSLER, *supra* (discussing values permeating double jeopardy), at 612 – 613 (discussing these values in the context of asymmetric appeal rights).

in the text of the Constitution.[5] The Constitution was interpreted to allow for asymmetric appeal rights and the analysis provided here may help shed some new light on the on-going debate about whether, and when, such asymmetry is desirable.[6] Third, in many other parts of the world much more symmetric appeal rights are the norm rather than the type of asymmetric appeal rights found in the US.[7] Fourth, even in the US, asymmetric appeal rights are unique to those areas where Double Jeopardy attaches because the similar civil law doctrines (res judicata and collateral estoppel) do not prohibit either party from appealing.[8] In light of this, it is important to inquire into the likely effects of asymmetric appeal rights on litigant behavior and trial outcomes. Such an inquiry is particularly interesting because, as I argue, asymmetric appeal rights may not always clearly help defendants in the ways we think they might.

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[5] *See* Joshua Steinglass, *The Justice System in Jeopardy: The Prohibition of Government Appeals of Acquittals*, 31 IND. L. REV. 353, 355 (1998). The Double Jeopardy clause states "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." US CONST., AMEND. V. It, thus, does not explicitly mention appeals.

[6] *See Kepner, supra* note 3, at 133. The debate about the propriety of asymmetric appeal rights is on going. *See generally*, OFFICE OF LEGAL POLICY OF THE UNITED STATES DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL: DOUBLE JEOPARDY AND GOVERNMENT APPEALS OF ACQUITTALS (1987)[*hereinafter* DOJ REPORT] (discussing asymmetric appeal rights and suggesting some reforms that would allow the government to bring appeals on points of law, perhaps without disturbing the initial acquittal); Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 YALE L.J. 1807, 1841 – 43 (1997)(criticizing the *Kepner* rule); Daniel K. Meyers & Fletcher L. Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 HARV. L. REV. 1, 11 – 12, 38 - 39 (1960)(discussing the complexities of double jeopardy and collateral estoppel and suggesting an alternative interpretation of these doctrines that would consider both the state's and the defense's interests); Steinglass, *supra* note 5, *passim* (criticizing asymmetric appeal rights); Peter Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 MICH. L. REV. 1001, 1004 – 23 (discussing the ban on government appeals of acquittals and some policy concerns it implicates); Peter Westen & Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81, 122 – 55 (discussing the ban on government appeals following acquittals).

[7] *See generally* CRIMINAL PROCEDURE: A WORLDWIDE STUDY [*hereinafter* WORLDWIDE] 47 – 50 (discussing Argentinean law), 77 – 78 (discussing Canadian law), 89 – 91 (discussing Chinese law), 133 – 38 (discussing English and Welsh law), 178 – 84 (discussing French law), 211 – 15 (discussing German law), 236 (discussing Israeli law), 280 – 81 (discussing Italian law), 315 – 17 (discussing the law in the Russian Federation), 356 – 58 (discussing South African law), 392 – 93 (discussing Spanish law)(Craig M. Bradley ed., 1999); DOJ REPORT, *supra* note 6, at 49 – 53.

[8] *See Developments in the Law – Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1343 (1979).

This analysis suggests that, at a minimum, renewed discussion about the likely effects of, and justifications for, asymmetric appeal rights is warranted.

Part II describes the Double Jeopardy protection that attaches to acquittals and convictions from the initial trial. The general rule is that the government may not appeal an initial trial acquittal, subject to a few limited exceptions.[9] The defense, however, may appeal convictions.[10] Thus, appeal rights are asymmetric.

Part III examines whether some other countries, which recognize Double Jeopardy protection, also require asymmetric appeal rights. Generally, many other countries do not require the kind of asymmetry the US does, but rather they allow for a much greater measure of symmetry in appeal rights.[11]

Part IV discusses some reasons given for the asymmetric appeal rights attached to Double Jeopardy. These include the desire to reduce false convictions, reduce anxiety and expense for the defendant, permit a jury decision to stand (i.e., permit jury nullification), and to constrain self-interested prosecutors or constrain politically motivated or targeted prosecutions. I discuss the first two reasons in Part V and leave jury nullification and politically motivated prosecutions for later discussion in Part VIII.

Part V examines some effects of denying the prosecution appeal rights compared to the effects of symmetric appeal rights (i.e., prosecution and defense can appeal) on false convictions, false acquittals, and litigation costs. I conclude that the effects tend to be ambiguous and probably not very large. The ambiguity in effects is due largely to the countervailing effects that asymmetric appeal rights may have on errors and litigation costs.

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[9] *See* DRESSLER, *supra* note 4, at 610 – 11; *infra* Part II.

[10] *See id.* This was not always the case, as it appears that initially neither party had easy access to appealing the initial trial decision. *See* DOJ REPORT, *supra* note 6, at 7 – 14 (discussing the historical development of restrictions on prosecutorial appeals in England), 14 – 15 (discussing the relaxation of historical restrictions on defense appeals).

[11] *See generally* WORLDWIDE, *supra* note 7, at 47 – 50 (discussing Argentinean law), 77 – 78 (discussing Canadian law), 89 – 91 (discussing Chinese law), 133 – 38 (discussing English and Welsh law), 178 – 84 (discussing French law), 211 – 15 (discussing German law), 236 (discussing Israeli law), 280 – 81 (discussing Italian law), 315 – 17 (discussing the law in the Russian Federation), 356 – 58 (discussing South African law), 392 – 93 (discussing Spanish law); DOJ REPORT, *supra* note 6, at 49 – 53.

Consider first the countervailing effects on false convictions. Under asymmetric appeal rights we *decrease* the number of false convictions obtained from the government appealing correct acquittals, winning on appeal, and succeeding erroneously in obtaining a conviction on retrial because there are no government appeals. On the other hand, we may *increase* the number of false convictions because the prosecution increases its expenditures in the initial trial (this is now its only shot at obtaining a conviction) relative to expenditures under symmetric appeal rights and the defense may be unable, for whatever reason, to effectively counter this.

Similarly, consider the effects on false acquittals. We might *increase* the number of false acquittals because the government cannot appeal erroneous (even clearly erroneous) acquittals. Under symmetric appeal rights some of these incorrect acquittals might be corrected on appeal. On the other hand, we may *reduce* false acquittals because if the prosecution does spend more in the initial trial under asymmetric appeal rights then the acquittals obtained in such hard fought initial trials are more likely to be correct ones rather than false ones, relative to acquittals under symmetric appeal rights.

Finally, let us examine the effects on litigation costs. We might *increase* litigation costs in total because the prosecution and, potentially, the defense are spending more in initial trials and defense-initiated appeals than under symmetric appeal rights. On the other hand, we might *decrease* litigation costs in total because there are fewer prosecution appeals in asymmetric appeal rights regimes (there are none) compared to symmetric appeal rights regimes.

Thus, for errors and litigation costs we could have effects cutting in opposite directions. Whether these effects are significant and which effect will dominate depends on many factors, but the critical point is that the results appear ambiguous in general. Further, the net effect may be quite small for reasons explored in greater detail in Part V.

Part VI then examines some other factors that might reduce the potentially perverse effects associated with asymmetric appeal rights. First, criminal cases may have asymmetric *stakes* because the defendant typically has more to lose (e.g., deprivation of liberty for a few years) than the prosecutor has to gain (e.g., potential promotion and publicity, sense of fulfilling justice). The asymmetry in stakes may, under certain circumstances, induce the defendant to spend more than the prosecution, all else equal, thereby increasing the

chance of an acquittal and also a false acquittal.[12] Asymmetric appeal rights might counteract this effect by giving the prosecution an incentive to spend more in the initial trial as well. If so, then the increase in prosecutorial expenditure in the initial trial, due to asymmetric appeal rights, may be desirable to balance the increase in defense expenditure, due to asymmetric stakes. Second, there may be other doctrines that reduce the number of false convictions by limiting the prosecutor's "abusive behavior". I discuss both factors and highlight how they may *not* significantly reduce the potential for perverse effects.

Part VII considers other possible effects of asymmetric appeal rights including its effects on the development of the law, the timing of when issues are resolved, prosecutorial or police abuse of defendants' other rights, and the creation, maintenance, and use of multiple offenses against one defendant. On all these fronts asymmetric appeal rights could, in certain scenarios, have effects that do not help defendants.

Part VIII discusses both jury nullification and constraining politically motivated prosecutions and their potential application to asymmetric appeal rights. I suggest that constraining politically motivated prosecutions has benefits, in terms of reducing the costs associated with abuses of prosecutorial authority, that may provide a promising justification for asymmetric appeal rights. Part IX concludes.

Overall, my analysis shows that asymmetric appeal rights have complex effects on false convictions and litigation costs that

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[12] *See* William M. Landes, *An Economic Analysis of the Courts*, 14 J. L. & ECON. 61, 70 (1971)(noting that "for a group of defendants differing in their attitudes towards risk, we might expect to find a greater investment of resources on average for defendants charged with crimes carrying longer sentences"); Mark Liffman, *An Economic Analysis of Settlement and Litigation With Endogenous Litigation Expenditures*, 14 – 16, Draft, 1999 (on file with author) (discussing a model with endogenous litigation costs where asymmetry in stakes has ambiguous effects on litigation costs that depend on the interaction of the parties investment in litigation); Stephen J. Spurr, *An Economic Analysis of Collateral Estoppel*, 11 INT'L REV. L. & ECON. 47, 50 – 59 (1991) (discussing an exogenous litigation cost model in the context of collateral estoppel rules and finding that asymmetric stakes should induce the person facing the asymmetry to increase litigation expenditure). Note that innocent defendants may not have the socially optimal incentive to spend resources because they do not bear the government's full costs of prison. *See* Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEGAL STUD. 307, 368 (1994) (noting that when social costs of sanctions are high, as in the case of imprisonment, the innocent have too little incentive to prove their innocence relative to the social ideal).

may not be particularly large and that are highly dependent on context. Thus, concerns with false convictions and the defendant's litigation costs may not provide very complete justifications for asymmetric appeal rights. We may then need to focus on other justifications, such as constraining self-interested prosecutors or politically motivated prosecutions. This suggests, at a minimum, renewed discussion about whether, and why, asymmetry in appeal rights is desirable.

II. DOUBLE JEOPARDY AND ASYMMETRIC APPEAL RIGHTS

The Double Jeopardy rules regarding appeal rights vary with the disposition or outcome of the initial trial. If the defendant is convicted then the defendant may generally appeal this result.[13] If the defendant is acquitted then the prosecution may not normally appeal this result.[14] If the first trial results in a dismissal or mistrial then the kind of Double Jeopardy protection meted out depends on a number of factors. [15] However, given that this paper inquires into the

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[13] *See* United States v. Ball, 163 U.S. 662, 670 (1896); DRESSLER, *supra* note 4, at 615. Note that the prosecution may not appeal a conviction. *See* DRESSLER, *supra* at 615. Nonetheless, the prosecution may have broader appeal rights against the sentence if the defendant was convicted. *See id.*, at 619. However, as prosecutorial appeals of sentences are outside the scope of this paper I will not discuss them any further.

In the US, defense appeals are generally on points of law as appeals on points of fact are usually more difficult to win**.** *See* Craig M. Bradley, *United States in* WORLDWIDE, *supra* note 7, at 422 (discussing grounds for appeal in the US); collecting cites. Many other countries permit appeals on points of law and fact. *See infra* Part III for the approaches in other countries.

[14] *See Kepner, supra* note 3, at 133 (stating that the government may not appeal an acquittal). *See also* DRESSLER, *supra* note 4, at 610 - 612. Acquittal is defined as including "a 'not guilty' verdict by the jury or judge in a bench trial; … an 'implied' acquittal by the judge or jury; or… a ruling by the judge whatever label he attaches to it, that 'represents a resolution [in the defendant's favor],… of some or all of the factual elements of the offense charged.'" *Id.*, at 610 (cites omitted).

[15] *See* United States v. Perez, 22 U.S. (9 Wheat) 579, 580 (1824)(granting the government the right to re-prosecute after a mistrial, over the defense's objection, only where "there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated"). *See also* DRESSLER, *supra* note 4, at 601 – 607 (discussing the "manifest necessity" standard); Stephen J. Schulhofer, *Jeopardy and Mistrials*, 125 U. PA. L. REV. 449, 457 – 93 (discussing the 'manifest necessity' standard) (1977). *See also* V.S. Khanna, *The Mystery of Mistrials: Towards an Economic Understanding of Double Jeopardy*, Draft, 2001 (discussing whether the current state of Double Jeopardy jurisprudence on mistrials is consistent with an economic approach to the issue of mistrials and concluding that, generally, it is).

effects of denying the prosecution the opportunity to appeal an acquittal I will focus the discussion on that part of Double Jeopardy.

In *Kepner* v. *United States* the United States Supreme Court held that the government may not appeal an acquittal.[16] In that case Kepner, a practicing lawyer in the Philippine Islands, was charged for embezzlement, tried without a jury, and acquitted.[17] The United States appealed the case leading to the trial acquittal being reversed and Kepner being found guilty and sentenced.[18] Kepner appealed and the US Supreme Court held, 5 to 4, that the government may not appeal an acquittal.[19] Double Jeopardy generally prohibits the government from further trials against the defendant for the same offense once jeopardy in the first cause is considered complete.[20] The majority suggested that the appeal and potential retrial would be a separate jeopardy from the initial trial and hence the appeal would not be permitted.[21]

One reason for this may be that if we allowed the prosecution to appeal acquittals, and it was successful, then the result would not ordinarily be a conviction, but a retrial.[22] However, retrials (or second trials) are generally forbidden by the Double Jeopardy clause.[23] Thus, it is not the appeal, itself, we are concerned with, but

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[16] *See Kepner, supra* note 3. Although *Kepner* is the case cited for the asymmetry in appeal rights, the general rule against *reprosecution* after an acquittal is found in *Ball, supra* note 13, at 668.

[17] *See Kepner, supra* note 3, at 110.

[18] *See id.,* at 111.

[19] *See id.,* at 133.

[20] *See id.,* at 132 - 33.

[21] *See id.,* at 121 (noting that "the charge under the military order, as amended, made the judgment of the court of first instance final").

[22] *But see* Fong Foo v. United States, 369 U.S. 141, 143 – 144 (1962) (Harlan, J., concurring) (noting that there are circumstances under which a retrial would not be prevented by the double jeopardy clause); *see also* United States v. DiFrancesco, 449 U.S. 117, 130 (1980) (citing US v. Scott, 437 U.S. 82, 98-99 (1978) (noting that under the current system the prosecution may appeal decisions which dismiss criminal cases prior to final adjudication, and that reversal in the appeal would result in a retrial).

[23] *See* United States v. Wilson, 420 U.S. 332, 347-48 (1975) (noting that although retrials are sometimes permitted, a final verdict acquitting the defendant forecloses the possibility of a retrial and thus bars appellate review of such verdicts); *Fong Foo, supra* note 22, at 143 (concluding that the appellate court violated the double jeopardy clause when it set aside the defendant's acquittal and directed that he be retried); *Ball, supra* note 13, at 671 ("The verdict of acquittal was final and could not be reviewed, on error or otherwise, without putting him twice in jeopardy, and thereby violating the Constitution."); See *also* US CONST., AMEND. V.

the likelihood that if a prosecution appeal was successful then a retrial would occur. [24]

The decision was not, however, unanimous. The point of dissension between the majority and the dissent, authored by Justice Holmes, rested on whether the appeal and potential retrial was a separate jeopardy from the initial trial.[25] Justice Holmes partly justified his position of continuing jeopardy (i.e., that jeopardy in the first cause continues until the final decision of the highest appeals court with no further retrials) [26] on the grounds that banning prosecution appeals and retrials after an acquittal would conflict with the generally accepted principle of permitting the prosecution to re-try the defendant following successful *defense* appeals of initial trial convictions.[27] Thus,

> [a] man cannot be said to be more than once in jeopardy in the same cause, however often he may be tried. . . [H]e no more would be put in jeopardy a second time when retried for a mistake of law in his favor than he would be when retried for a mistake that did him harm.[28]

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[24] *See Kepner, supra* note 3, at 121. *See* DRESSLER, *supra* note 4, at 611 (discussing when the government may appeal, and the desire not to expose defendants to another trial). The rationale appears to be that protection from double jeopardy after acquittal is a derivative of the rule at common law that, where a person has been convicted and punished, the conviction is a bar to all further proceedings for the same offense. *See Kepner, supra* note 3, at 127. Thus, "[t]he rule that a person has been in jeopardy when he is regularly charged with a crime before a tribunal properly organized and competent to try him; certainly so after acquittal." *Id.*, at 128. *See* Coleman v. Tennessee, 97 U.S. 509 (1878); *Ball, supra* note 13, at 662.

Furthermore, the *Kepner* Court reasoned, "[I]f the judgment is upon acquittal the defendant will not seek to have it reversed, and [therefore] the government cannot." *Kepner, supra* note 3, at 130. *See also* Stith, *supra* note 2, at 7 n.14 (noting that "one can distinguish between twice being given an opportunity for acquittal, which the Constitution allows, and twice being 'put in jeopardy' of conviction, which the Constitution prohibits"); DOJ REPORT, *supra* note 6, at 29 – 30 (discussing *Kepner*). *See generally* James A. Strazzella, *The Relationship of Double Jeopardy to Prosecution Appeals*, 73 NOTRE DAME LAW REVIEW 1 *passim* (1997).

[25] *See Kepner, supra* note 3, at 134 – 136 (Holmes, J., dissenting).

[26] Justice Holmes, in a vigorous dissent, argued that "it is not logical or rational to prevent the government from appealing an acquittal because jeopardy is continuous; there can be but one jeopardy in a single case." *Kepner, supra* note 3, at 136 (Holmes, J., dissenting).

[27] *See id.*

[28] *Kepner, supra* note 3, at 134 - 35 (Holmes, J., dissenting)

The majority rejected this argument and held that acquittals in the initial trial prohibited government appeals.[29]

The *Kepner* rule, although not without controversy, has been reiterated in numerous Supreme Court cases and appears to be binding precedent.[30] Consequently, the government may not appeal an acquittal even when the initial trial was infected with erroneous legal rulings,[31] erroneous application of the exclusionary rule against the prosecution,[32] or even when the trial judge overstepped her authority in finding for the defendant.[33] As of current writing, there appear to be two exceptions to the otherwise absolute ban on prosecutorial appeals of acquittals.[34]

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[29] *See id.,* at 128. For a potential justification of this result see Stith, *supra* note 2, at 7 n.14 (noting that "one can distinguish between twice being given an opportunity for acquittal, which the Constitution allows, and twice being 'put in jeopardy' of conviction, which the Constitution prohibits").

[30] *See, e.g.,* Green v. United States, 355 U.S. 184, 190 – 91 (accepting the *Kepner* rule and extending it to cases of implicit acquittals) (1957); *Fong Foo, supra* note 22, at 143 (accepting the *Kepner* rule even when the acquittal was erroneous); United States v. Morrison, 429 U.S. 1, 3 (noting that the *Kepner* rule applied to bench trials as well); Burks v. United States, 437 U.S. 1, 16 (extending the bar on prosecutorial appeals to cases where a conviction was entered, then appealed and reversed on the grounds on evidentiary insufficiency as this amounted to an acquittal in the initial trial).

However, even though the majority rejected Justice Holmes' "continuing jeopardy" theory, other Supreme Court decisions appear to have relied on it, but in contexts different than government appeals of acquittals. *See* Justices of Boston Municipal Court v. Lydon, 466 U.S. 294 (1984 (relying on the concept of continuing jeopardy in discussing Massachusetts' two-tier trial system); Divver v. State, 356 Md. 379, 379 A.2d 71 (Md., Oct. 15, 1999) (explaining *Justices of Boston Municipal Court*). How these decisions might be reconciled or what implications they may have for the continuation of the *Kepner* rule are outside the scope of this paper. *See* Steinglass, *supra* note 5, at 379 (noting this issue).

[31] *See* Sanabria v. United States, 437 U.S. 54 (1978); United States v. Scott, 437 U.S. 82 (1978).

[32] *See* Sanabria v. United States, 437 U.S. 54 (1978); United States v. Scott, 437 U.S. 82 (1978). Note that many issues of evidence suppression may be raised in pre-trial interlocutory appeals. *See infra* Part VII. B. Such appeals are permitted because they occur before jeopardy has attached (i.e., pre-trial) or become complete. *See generally*, KAMISAR, ET AL., *infra* note 68, at 1581 – 85 (discussing interlocutory appeals). Also note that these appeals are limited in scope and hence may not serve as a significant counter-balance to the asymmetry in appeal rights upon completion of the initial trial. *See id.* Even if they did they would be subject to the concerns raised in *infra* Part VII.B.

[33] *See Fong Foo, supra* note 22, at 141.

[34] I am focusing on exceptions at the federal level. Some states allow government appeals on points of law that would not disturb the initial verdict of acquittal. *See* KAMISAR, ET AL., *infra* note 68, at 1500 – 08.

The first exception is where a successful government appeal would not result in a retrial of the defendant.[35] In *United States* v. *Wilson*, the Supreme Court held that where a trial judge replaced a verdict of conviction with a judgment notwithstanding the verdict for the defendant then the government could appeal.[36] This is because a successful appeal would not require the defendant to be retried, but would simply reinstate the initial verdict of conviction. [37] Thus,

> Double Jeopardy exists to protect defendants from broad government appeals that allow prosecutors to persuade a second trier of fact of the defendant's guilt, to permit the prosecutor to re-examine the weaknesses in the first presentation and strengthen it, and to deprive the defendant of the finality of a verdict of acquittal.[38]

The rationale supporting the *Wilson* exception is that none of these dangers are present.[39] Rather, "correction of an error of law at that stage would not grant the prosecutor a new trial or subject the defendant to the harassment traditionally associated with multiple prosecutions."[40]

Another exception may arise when the defendant has bribed a juror or the judge as then the initial trial never *really* placed the defendant in jeopardy.[41] In *People* v. *Aleman* the Illinois court held

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[35] *See* United States v. Wilson, 420 U.S. 332, 352 – 53 (1975); *See* DRESSLER, *supra* note 4, at 611.

[36] *See Wilson*, *supra* note 35, at 352 – 53 (applying the rule to any favorable post-conviction motion sought by the defendant).

[37] *See id. See also Scott*, *supra* note 31, at 91 n.7 (noting that the prosecution could appeal any post-conviction motion in which the court overturns a conviction or finds in favor of the defendant). The only exception is where the judge finds insufficient evidence for a jury to find guilt, which would be treated as an acquittal in the initial trial. *See* Smalis v. Pennsylvania, 476 U.S. 140 (1986); Burks v. United States, 437 U.S. 1 (1978).

[38] *Wilson*, *supra* note 35, at 351.

[39] *See id.*

[40] *Wilson*, *supra* note 35, at 351. *Cf.* Amar, *supra* note 6, at 1841 – 44 (arguing that these concerns might be better addressed under the Due Process clause of the Constitution rather than under Double Jeopardy).

[41] As a policy matter the exception for bribery seems necessary because otherwise the justice system would become seriously handicapped. For example, if Double Jeopardy applied to all acquittals (even those obtained by bribery) then defendants may have an increased incentive to bribe the judge/jury compared to when Double Jeopardy did not apply to such acquittals. Consider the situation of a

that an acquittal, procured by bribing the trial judge, did not place the defendant in jeopardy.[42] Therefore, the defendant could be re-prosecuted for the same crime.[43] The court reasoned that the protections afforded by the Double Jeopardy Clause are not absolute.[44] Two exceptions were relevant to *Aleman*. First, a sham trial which results in an acquittal because the state submits no evidence is not protected by the Double Jeopardy Clause.[45] Second, a trial conducted under fraud or collusion does not subject a defendant to the hazards of trial and possible conviction.[46]

In summary, the prosecution cannot appeal acquittals unless a successful appeal would not lead to a retrial or where the defendant successfully bribed the trial judge or a juror or there was some other reason to believe the initial trial was a sham or fraud.[47] On the other

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defendant facing a murder charge who is deciding whether or not to try to bribe the judge/jury. The defendant would make a bribe if the expected penalty from not making a bribe exceeded the expected penalty from making a bribe (including the costs of the bribe). If Double Jeopardy applies (case 1), and the murder charge carries a heavier sanction than the bribery charge, then the expected penalty from making a bribe is lower than when Double Jeopardy does not apply (case 2). This is because if the bribe succeeds under case 1 the defendant only faces the expected sanction for bribery, whereas in case 2 the defendant faces the expected sanction for the bribe and for the murder charge. Further, if the bribe does not succeed then case 1 and 2 are essentially identical (expected sanctions for the bribe and murder). Thus, applying Double Jeopardy to acquittals obtained by bribery should generally give defendants an increased incentive to engage in bribery relative to where Double Jeopardy does not apply. From a policy perspective, encouraging bribery does not seem a palatable choice and hence may guide us away from applying Double Jeopardy to acquittals obtained by bribery.

For some discussion of the effects of and methods of potentially addressing corruption and bribery see A. Mitchell Polinsky & Steven Shavell, *Corruption and Optimal Law Enforcement*, Presented at the Harvard Law School Conference on the Economics of Law Enforcement, Oct. 16 – 17 (1998)(on file with author); Dilip Mookherjee & I.P.L. Png, *Corruptible Law Enforcers: How Should They Be Compensated?*, 105 ECONOMIC JOURNAL 145 (1995); Susan Rose-Ackerman, *The Economics of Corruption*, 4 J. PUB. ECON. 187 (1975).

[42] *See* People v. Aleman, 667 N.E.2d 615 (1996). *See also* David Rudstein, *Double Jeopardy and the Fraudulently Obtained Acquittal*, 60 MO. L. REV. 607, 638 (1995) (discussing the *Aleman* case).

[43] *See* DRESSLER, *supra* note 4, at 626.

[44] *See id.*, at 624.

[45] *See id.*, at 625 (citing People v. Deems, 410 N.E.2d 8 (1980)).

[46] *See id.*, at 625 (citing Serfass v. United States, 420 U.S. 377 (1975)). England appears to allow this exception as well. *See* Regina v. Dorking Justices, ex parte Harrington, 3 W.L.R. 142 (1984) (holding that prosecutorial appeals are permitted if the initial trial had so many flaws that it did not amount to any real jeopardy).

[47] *See* DRESSLER, *supra* note 4, at 612 – 13.

hand, a defendant can generally appeal convictions.[48] Hence, appeal rights in criminal cases are asymmetric.

III. DOUBLE JEOPARDY AND ASYMMETRIC APPEAL RIGHTS IN OTHER COUNTRIES

The US is not the only place that recognizes Double Jeopardy protection. Many other countries have something like Double Jeopardy protection, but do not tend to have the kind of asymmetric appeal rights found in the US. I will begin the discussion with the law in some common law jurisdictions and then move on to consider the law in some civil law jurisdictions.

In England the treatment of government appeals of acquittals is generally quite similar to the US.[49] However, England differs from the US in that it allows the prosecution, in certain cases, to bring appeals against acquittals on points of law.[50] For example, § 36(1) of the English Criminal Justice Act 1972 permits the prosecution to ask for a determination from a higher court on a point of law.[51] This

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[48] *See id.* The asymmetry is even greater if one considers the collateral grounds for attacking a conviction, such as *habeas* petitions (there are no collateral grounds for attacking acquittals for the prosecution). *See infra* note 130.

[49] *See* DOJ REPORT, *supra* note 6, at 51. An exception occurs where the "initial summary trial before magistrates was so fundamentally flawed that it was not a trial at all". *See id.* (citing to *Regina* v. *Dorking Justices, ex parte Harrington*, 3 W.L.R. 142 (1984)).

[50] *See* David J. Feldman, *England and Wales in* WORLDWIDE, *supra* note 7, at 134 (discussing prosecutorial appeals on points of law from Magistrates' Courts to the High Court), 136 (discussing appeals on points of law under § 36(1) of The Criminal Justice Act 1972). English law is more nuanced than suggested in the text. In particular, a great deal depends on the court of first instance. *See id.*, at 133. The prosecution may not appeal convictions from the Magistrate's Courts to the Crown Courts. *See id.*, at 133 (noting that only the defense can appeal against conviction and/or sentence, that such appeals are frequent, and further that the defendant's sentence could be increased on appeal). The prosecution may, however, appeal Magistrates' Courts decisions on points of law to the High Court and if successful could obtain a conviction even where the Magistrates' Court acquitted the defendant in the first trial. *See id.*, at 134 (noting the existence of such appeals and their rarity). The prosecution cannot appeal against a decision of the Crown Court from an indictment based trial, except as provided in § 36(1) of The Criminal Justice Act 1972 as discussed *infra* notes 51 & 52. *See id.*, at 135 – 36.

[51] *See* DOJ REPORT, *supra* note 6, at 51 n.127 (citing to Criminal Justice Act 1972 §36(1) which states "[t]he Attorney General may, if he desires the opinion of the Court of Appeal on a point of law which has arisen in the case, refer that point to the court, and the court shall, in accordance with this section, consider the point and give

provision only allows the law to be debated and clarified, but it would not disturb the initial acquittal verdict for the particular defendant. [52]

Other common law jurisdictions seem to vary in their approach. Australia appears closest to the US and England with a rule that generally bars government appeals.[53] Canada,[54] India,[55] Sri Lanka,[56] New Zealand,[57] and South Africa appear to allow appeals only on questions of law.[58] Israel permits both the prosecution and defense the same rights of appeal.[59]

Civil law jurisdictions generally allow the government to appeal acquittals. In Germany it appears that the government may appeal acquittals.[60] In addition, France appears to grant the

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their opinion on it"). *See also* Feldman, WORLDWIDE, *supra* note 7, at 136 (discussing the same section).

[52] *See* Feldman, WORLDWIDE, *supra* note 7, at 136 (noting this procedure and also stating that "[f]ew cases are referred in this way (usually fewer than ten per year), but the procedure performs a useful function in clarifying the law without putting the defendant in renewed jeopardy"). Some states in the US permit government appeals on points of law that would not disturb the initial acquittal. *See* KAMISAR, ET AL., *infra* note 68, at 1500 – 08.

[53] *See Regina* v. *Story and Another*, 140 C.L.R. 364 (1978). *But see* DOJ REPORT, *supra* note 6, at 51 – 52 (noting that "Tasmania, for example, permits Crown appeals, while New South Wales allows 'moot appeals' of legal questions that leave an acquittal undisturbed").

[54] *See* Kent Roach, *Canada in* WORLDWIDE, *supra* note 7, at 77 – 78 (discussing Canadian law and noting that appeals can be taken on points of law and the sentence by the prosecution). *See also* CANADIAN CHARTER OF RIGHTS AND FREEDOMS, Section 11(h) (providing that "[a]ny person charged with an offence has the right if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried for it again or punished for it again.") The word "finally" in this section was held to permit government appeals of acquittals on questions of law in *Regina* v. *Morgentaler, Smoling and Scott*, 22 D.L.R. 4th 641 (S.Ct.Can. 1985).

[55] *See* DOJ REPORT, *supra* note 6, at 51 n. 129(noting the law in India).

[56] *See id.* (noting the law in Ceylon [Sri Lanka]).

[57] *See id.* (noting the law in New Zealand).

[58] *See id.* (noting the law in South Africa); Pamela Schwikkard & Stephan van der Merve, *South Africa in* WORLDWIDE, *supra* note 7, at 357 (stating that "[t]he prosecution has no right to appeal against an acquittal on the fact. It does, however, have a right of appeal against a court's decision on law or a court's decision to release an accused on bail").

[59] *See* Eliahu Harnon & Alex Stein, *Israel in* WORLDWIDE, *supra* note 7, at 236 (noting that appeals can be taken from both convictions and acquittals).

[60] *See* Thomas Weigand, *Germany in* WORLDWIDE, *supra* note 7, at 211 – 15 (discussing the German approach to criminal appeals). In fact, in Germany the government has even wider appeal rights than the defense because the government

government appeal rights similar to those given to the defense.[61] Italy,[62] Spain,[63] Argentina,[64] The Russian Federation,[65] China,[66] and Japan all appear to permit government appeals of acquittals as well.[67]

Thus, American law creates the greatest asymmetry in appeal rights by denying the government the opportunity to appeal acquittals in most instances. England and Australia come next with a general ban on government appeals, although England allows appeals to clarify a point of law without disturbing the initial verdict. Canada, New Zealand, Sri Lanka, India, and South Africa permit appeals on points of law. Civil law jurisdictions and Israel come next

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can appeal convictions and acquittals, whereas the defendant may appeal a conviction and in limited situations may appeal an acquittal. *See id.*, at 211.

[61] *See* Richard S. Frase, *France in* WORLDWIDE, *supra* note 7, at 178 – 84 (discussing the French approach to criminal appeals). The rules in France are somewhat more nuanced than suggested in the text. First, both prosecutor and defendant may appeal decisions by Indicting Chambers, Courts of Appeal, Correctional and Police Courts, and Assize Courts (jury-like trials). *See id.,* at 178 – 79. However, on appeal from an Assize court the initial trial acquittal cannot be overturned and such appeals are primarily to clarify the law. *See id.*, 179 – 80. *See generally* G. STEFANI, G. LEVASSEUR, & P. BOULOC. DALLOZ, PROCEDURE PENALE (1993) (translation by Karine Barthelemy, LL.M. 2000, Boston University School of Law).

[62] *See* Rachel VanCleave, *Italy in* WORLDWIDE, *supra* note 7, at 280 - 81 (discussing Italian law which permits both prosecution and defense the right to appeal on issues of fact or law).

[63] *See* Richard Vogler, *Spain in* WORLDWIDE, *supra* note 7, at 392 – 93 (discussing Spanish law which permits both prosecution and defense the right to appeal on questions of law or procedure). Appeals on questions of fact appear limited, but symmetrical, for both prosecution and defense. *See id.*, at 392.

[64] *See* Alejandro Carrio & Alejandro M. Garro, *Argentina in* WORLDWIDE, *supra* note 7, at 47 – 50 (discussing the law in Argentina which permits both the prosecution and the defense the right to appeal decisions on either issues of fact or of law, decisions of an investigative magistrate, and on issues of law only if a decision of a trial court).

[65] *See* Catherine Newcombe, *Russian Federation in* WORLDWIDE, *supra* note 7, at 315 – 18 (discussing the appeals rights regime in the Russian Federation). The law in the Russian Federation is somewhat more fine-tuned than suggested in the text. First, both the prosecution and the defense can appeal decisions on issues of fact and / or law. *See id.*, at 315 – 16. However, in jury trials both prosecutor and defendant can only appeal on questions of law. *See id.*, at 315. Finally, note that the defense may not be able to move for certain kinds of appellate review that the prosecution can seek. *See id.,* at 316 – 17 (discussing the requirements for "supervisory review (*nadzornaya instansiya*)").

[66] *See* Liling Yue, *China in* WORLDWIDE, *supra* note 7, at 89 (discussing Chinese law which permits both the prosecution and the defense the right to appeal on issues of law and / or fact, but the right to appeal is limited to one appeal only).

[67] *See* DOJ REPORT, *supra* note 6, at 52 – 53 (discussing Japanese law).

with near symmetrical appeal rights. American law thus occupies an extreme point on the continuum when it comes to government appeal rights in criminal cases. It may then prove useful to consider the purported rationales for this position.

IV. PURPOSES OF DOUBLE JEOPARDY PROTECTION

Double Jeopardy protection is said to serve many different, yet related, functions. In this part I examine four functions that are frequently provided for such protection.[68] Although Double Jeopardy overall may serve other purposes, the ban on government appeals of acquittals appears driven by these four purposes.[69]

A. Concern With Reducing False Convictions.

One of the functions underlying Double Jeopardy's asymmetric appeal rights appears to be the reduction or avoidance of false convictions as stated in *United States* v. *Scott*:

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[68] *See* DRESSLER, *supra* note 4, at 599 – 601; YALE KAMISAR, WAYNE R. LAFAVE, JEROLD H. ISRAEL, & NANCY J. KING, MODERN CRIMINAL PROCEDURE 1500 – 07 (discussing United States v. Scott, 437 U.S. 82 (1978) and noting some possible purposes of the ban on government appeals of acquittals)(9th ed., 1999); Westen & Drubel, *supra* note 6, at 84 (discussing some purposes of the prohibition on government appeals of acquittals and preferring jury nullification as the most compelling rationale); Amar, *supra* note 6, at 1815 (discussing concerns with false convictions and litigation costs), 1843 (discussing jury nullification, but suggesting that it might be better addressed through the Sixth Amendment's right to a jury trial). *Green*, *supra* note 30, at 187 (discussing the hazards posed by multiple trials and possible convictions for a single alleged offense).

[69] In fact, even the other purposes associated with Double Jeopardy may be quite close to (and perhaps subsumed within) the four discussed in the text. For examples that appear concerned with limiting litigation costs, *see Green*, *supra* note 30, at 187 (noting that Double Jeopardy is designed in part to protect the defendant from "embarrassment, expense, and ordeal [which] compels him to live in a continuing state of anxiety and insecurity"); *Scott*, *supra* note 31, at 82 (same). For justifications reflecting a concern with limiting false convictions *see* Ashe v. Swenson, 397 U.S. 436, 447 (1970)(suggesting a function of stopping the prosecutor from using the initial trial as a "dry run"). For some that appear to touch upon concerns with constraining politically motivated prosecutions *see generally* Wade v. Hunter, 336 U.S. 684, 689 (1949)(discussing the value of having a trial completed by a single tribunal, especially in the context of repeated mistrials); Crist v. Betz, 437 U.S. 28, 33 (1978)(noting a concern with preserving the finality of judgments). *See also* DRESSLER, *supra* note 4, at 599 – 600 (discussing Double Jeopardy's role in reducing the embarrassment, anxiety and cost of trials, reducing false convictions, preserving the finality of judgments, and preserving the right to a decision by a particular tribunal).

> To permit a second trial after an acquittal, however mistaken the acquittal may have been, would present an unacceptably high risk that the Government, with its vastly superior resources, might wear down the defendant so that "even though innocent he may be found guilty."[70]

In addition to case law, numerous commentaries identify reduction or avoidance of false convictions as an important function of the ban on government appeals. [71] Although this particular justification is controversial,[72] I will treat it as a given and ask whether asymmetric appeal rights are likely to reduce the incidence of false convictions.

Of course, false convictions are only one type of error the legal system may make. The other, false acquittals,[73] are also possible

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[70] *See Scott*, *supra* note 31, at 91(quoting Green v. United States, 355 U.S. 184, 188 (1957)).

[71] *See* DRESSLER, *supra* note 4, at 599 – 600; Khanna, *infra* note 75, at 1513; Amar, *supra* note 6, at 1815; Westen & Drubel, *supra* note 6, at 86 (quoting *Green*).

[72] *See* Westen & Drubel, *supra* note 6, at 124 – 29; DRESSLER, *supra* note 4, at 601 – 09.

[73] *See* Stith, *supra* note 2, at 3 (discussing the types of errors in trials). *See generally*, John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 VA. L. REV. 965, 967 - 73 (1984)(discussing the kinds of legal error that might arise from uncertainty in legal standards).

I recognize that the term "error" is not free from difficulty. For our purposes I do not enter the jurisprudential debate over whether "error" is conceptually clear. *Cf.* Stith, *supra* note 2, at 11 n 30. However, the term "error" may mean a number of different things. Stith identifies three kinds of errors – "outcome error" (i.e., a guilty person is acquitted or an innocent is convicted), "factual error" (i.e., errors in identifying the relevant facts), and "legal error" (i.e., errors in applying the legal standard). *See* Stith, *supra*, at 4 n 7. Defense appeals in the US are generally appeals on legal errors, as appeals on factual errors are usually more difficult to win. *See* Craig M. Bradley, *United States in* WORLDWIDE, *supra* note 7, at 422 (discussing grounds for appeal in the US); collecting cites. Other countries often permit appeals on points of law and of fact (i.e., factual errors). *See infra* Part III for the approaches in other countries. When referring to false convictions and false acquittals we are normally referring to outcome errors. *See* Stith, *supra*, at 5 n 8. Not all legal errors, even if corrected on appeal, might lead to a correction of outcome errors. *See id.* My argument, however, is that denying the prosecution the right to appeal errors, say legal ones, results in the prosecution saving the funds it would have used to pursue appeals of acquittals. These savings could then be used by the prosecution to increase spending in the initial trial and thereby potentially increase the chances of a conviction (and maybe false conviction) in the initial trial. My general argument

and it would appear, on first blush, that banning government appeals of acquittals would leave trial court false acquittals without scope for correction on appeal. Although I ask whether asymmetric appeal rights are likely to increase false acquittals in total, we may still wonder whether favoring a reduction in false convictions, when it may lead to an increase in false acquittals, can be justified.

There are at least two general instances where we might prefer to reduce false convictions even though that might result in an increase in false acquittals.[74] First, if the social costs associated with a false conviction exceed the social costs associated with a false acquittal.[75] It has been argued that a false conviction in the criminal context may trigger the wrongful imposition of prison or other severe sanctions, which carry large social costs, which are likely to exceed the social costs of a false acquittal.[76] Compare this to the civil context where the "the costs of a false finding of liability are about the same as the costs of a false finding of no liability because the sanction, such as a cash award, is a [socially] low-cost sanction."[77] Thus, in the criminal context we might expect to see a greater concern with false convictions, relative to false acquittals, than we might see in the civil context.

Second, even if the social costs of false convictions and false acquittals are roughly equal we may still favor reducing false

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should apply regardless of the grounds for appeal, but the magnitude of the resource savings may vary.

One definition of error that precludes much of my analysis is one where a correct decision is simply whatever the jury decides. Collect cites. In this context there are no errors as long as a jury has decided in one direction or the other. If this definition were used then asymmetric appeal rights should definitely reduce errors because they prevent jury decisions (i.e., conclusively correct decisions) from being appealed. Note that this justification also counsels for preventing defense appeals of convictions because if the conviction arose from a jury decision then it too would be correct (under this approach to correct decisions).

[74] *See generally*, Khanna, *infra* note 75, at 1512 – 14.

[75] A number of authors have noted this point. *See generally* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 605 (5th ed., 1998); Kaplow, *supra* note 12, at 360 – 61 & n. 150; V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1513 (1996).

[76] *See* POSNER, *supra* note 75, at 604 – 05 (noting that "[t]he net social cost of acquitting a guilty person is [in contrast to the cost of an erroneous conviction] apt to be low"); Stith, *supra* note 2, at 4 (stating that "in the Anglo-American tradition the social cost of factual error against the defendant … is deemed greater than the social cost of factual errors against the government"); Kaplow, *supra* note 12, at 360 – 61 & n. 150; Khanna, *supra* note 75, at 1513.

[77] Khanna, *supra* note 75, at 1513.

convictions over false acquittals if the procedure we wanted to use (e.g., higher standard of proof, asymmetric appeal rights) reduced "the number of false convictions by more than it would increase the number of false acquittals".[78] Whether this is a plausible justification will likely vary with the type of wrongdoing at issue.[79] Nonetheless, it provides a supplemental basis for favoring reductions in false convictions over false acquittals even if the social costs of both errors are about the same.[80]

In the standard criminal context the first basis is considered persuasive and the second may sometimes be important as well.[81] Consequently, there may be merit in being more concerned about false convictions than false acquittals in the standard criminal context.

B. Concern With Reducing Litigation Costs.

A sizeable portion of the literature discussing the functions of Double Jeopardy identifies reducing or limiting the costs of litigation to the defendant (and, perhaps, society) as being an important function of Double Jeopardy.[82] For example, Justice Brennan while dissenting in *Scott* suggested that one reason for asymmetric appeal rights is to avoid "[subjecting] the defendant to the expense and anxiety of a second trial."[83] In addition, commentators have also noted that a value behind Double Jeopardy's prohibitions may be to prevent or avoid "subjecting [a defendant] to embarrassment,

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[78] *Id.*

[79] *See id.*, at 1513 (noting that in the corporate context there are likely to be few false convictions and perhaps many false acquittals).

[80] The discussion in the text raises a basic question about Double Jeopardy – why is it needed given that we already have the beyond reasonable doubt standard of proof to weigh in favor of false convictions relative to false acquittals. For greater discussion see Hylton & Khanna, *infra* note 90.

[81] *See generally* POSNER, *supra* note 75, at 605 (agreeing with this notion in the context of discussing the beyond a reasonable doubt standard of proof in criminal cases); WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 1057 (West 2d 1992) (discussing how the "danger of an erroneous conviction is too great to acknowledge any exception to the absolute finality of the acquittal"); CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS 793 (3rd ed., 1992); Khanna, *supra* note 75, at 1513.

[82] *See* DRESSLER, *supra* note 4, at 600 (citing *Green*); KAMISAR, ET AL., *supra* note 68, at 1500 – 07; Amar, *supra* note 6, at 1815.

[83] *See Scott*, *supra* note 31, at 106.

expense, and ordeal and … compelling him to live in a continuing state of anxiety and insecurity."[84]

This too is a controversial reason for asymmetric appeal rights.[85] However, instead of entering that debate I will again treat this concern as being a motivating factor behind asymmetric appeal rights and ask whether litigation costs are likely to be reduced.

C. Protecting Jury Nullification.

Some scholars have identified protection of jury nullification as being an objective behind some aspects of Double Jeopardy protection.[86] Jury nullification is the notion that the jury has the power to acquit against the evidence as a means of tempering or softening the law in a particular instance.[87] Further, in *United States* v. *DiFrancesco*, the Supreme Court appears to acknowledge jury nullification as a potential rationale for asymmetric appeal rights.[88]

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[84] Westen & Drubel, *supra* note 6, at 86 (quoting U.S. v. Green, 255 U.S. 184, 187 – 88, (1957). *See generally*, Steinglass, *supra* note 5, at 356 (noting that "[d]efense attorney fees can be exorbitant and particularly burdensome to those whose financial situation just barely disqualifies them from receiving court-appointed counsel"), 373 (citing US v. Jenkins, 490 F.2d 868, 884 (2d Cir. 1973) (Lombard, J., dissenting)); *Scott*, *supra* note 31, at 104.

[85] *See* Westen & Drubel, *supra* note 6, at 87 – 97 (arguing that this is not a particularly compelling justification). For further discussion of Professors Westen & Drubel's arguments, *see* KAMISAR, ET AL., *supra* note 68, at 1506 – 07 (discussing some of the commentary on this purpose of Double Jeopardy); DRESSLER, *supra* note 4, at 599 – 600.

The concern for reducing the defendant's legal costs, or more generally in keeping litigation costs from spiraling out of control, is an important one. It is, however, not something linked specifically to criminal trials. Even civil trials might merit some measures to reduce litigation costs. Nonetheless, in the criminal context, Double Jeopardy may help to reduce costs from multiple suits by denying the government the opportunity to bring them. *See* POSNER, *supra* note 75, at 622 (discussing the importance of litigation costs to the analysis of procedural rules). *But see*, Bruce L. Hay, *Some Settlement Effects of Preclusion*, 1993 U. ILL. L. REV. 21 *passim* (noting preclusion rules may not be necessary to limit litigation costs, as parties themselves may choose to do that, but preclusion rules might be helpful in guiding *actual* settlement amounts towards the expected settlement award).

[86] *See* Westen & Drubel, *supra* note 6, at 129.

[87] *See id.*, at 122 – 24.

[88] *See* United States v. DiFrancesco, 449 U.S. 117, 130 n.11 (citing Westen & Drubel, *supra* note 6, at 1012, 1063 approvingly)(1980). Some other courts have also noted the importance of jury nullification. *See* Westen & Drubel, *supra* note 6, at 84.

Although this is a hotly debated purpose of Double Jeopardy,[89] I will defer discussion of it until Part VIII. This is primarily to focus the analysis on the more common justifications given for asymmetric appeal rights – reducing false convictions and reducing defendant's litigation costs.

D. Constraining Self-Interested Prosecutors or Constraining Politically Motivated or Targeted Prosecutions.

Some scholars and judicial opinions suggest that Double Jeopardy and asymmetric appeal rights may constrain self-interested prosecutors or constrain politically motivated or targeted prosecutions by limiting the ability of the prosecution to "wear down" the defendant.[90] If such targeted prosecutions were likely one might be concerned that this might induce, amongst other things, lobbying of prosecutors by the politically more dominant groups (and potentially even by the politically less powerful groups) to enforce the law in selective ways to benefit that particular group.[91]

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[89] *See* KAMISAR, *supra* note 68, at 1361 – 63 (discussing whether the jury should be advised of its power to nullify); Westen & Drubel, *supra* note 6, at 122 – 55 (discussing jury nullification in the Double Jeopardy context); Eric L. Muller, *The Hobgoblin of little Minds? Our Foolish Law of Inconsistent Verdicts*, 111 HARV. L. REV. 771, 835 (1998) (discussing how courts have resisted special verdicts in criminal cases because such verdicts would endanger the jury's capacity to be merciful).

[90] *See* Lockhart v. Nelson, 488 U.S. 33 (1988)(evincing a concern with government oppression); *Scott, supra* note 31, at 91 (noting the danger that the defendant will be "worn down" by the superior resources of the government); *Green, supra* note 30, at 187 - 88; Ohio v. Johnson, 467 U.S. 493, 498 - 99 (1984). *See* Keith N. Hylton & V.S. Khanna, *Towards an Economic Theory of Pro-Defendant Criminal Procedure*, Draft 2001 (on file with author)(discussing how concerns with the costs associated with misuses of prosecutorial authority in the criminal context may provide a strong justification for many procedural protections including asymmetric appeal rights); Kenneth Rosenthal, *Prosecutor Misconduct, Convictions and Double Jeopardy: Case Studies in an Emerging Jurisprudence*, 71 TEMP. L. REV. 887, 960 (1998) (noting the win at all cost mentality of some prosecutors and stating that "The double jeopardy clause…provides the one express constitutional limit on the exercise of the prosecutor's otherwise unchecked power."). I thank Keith Hylton for his very helpful thoughts and comments and for suggesting this line of inquiry.

[91] *See* Hylton & Khanna, *supra* note 90. For discussions of the costs associated with lobbying or rent-seeking see generally, TOWARD A THEORY OF THE RENT-SEEKING SOCIETY (JAMES M. BUCHANAN, ROBERT D. TOLLSION & GORDON TULLOCK, EDS., 1980); David Friedman, *Why Not Hang Them All: The Virtues of Inefficient Punishment*, 107 J. POL. ECON. S259 (1999)(arguing that prison may prove to be a more desirable sanction than execution or fines because it makes misuse of the criminal process more costly and difficult).

The abuse of prosecutorial authority that results in selective law enforcement generates costs, in terms of the resources expended in the lobbying process and the costs related to the reduced deterrent effect of the law when it is perceived to be "political", which are largely wasteful from society's perspective.[92] Further, these costs might arise regardless of whether the defendant was "guilty" or not.[93]

This is also a controversial basis for Double Jeopardy protection,[94] which I discuss in greater detail in Part VIII. This is primarily to focus the analysis on the potential for asymmetric appeal rights to reduce false convictions and reduce defendant's litigation costs.

V. INCENTIVE EFFECTS OF DOUBLE JEOPARDY'S ASYMMETRIC APPEAL RIGHTS

In this Part I examine the incentive effects of asymmetric appeal rights along two dimensions. First, what is likely to happen to the number of errors (i.e., false convictions and false acquittals) and second, the likely effects on litigation costs under asymmetric appeal rights. However, before delving into the detailed arguments it may prove helpful to discuss some of the basic intuitions at work behind the analysis.

To begin, we know that asymmetric appeal rights impose a constraint on prosecutors in that prosecutors are denied the

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[92] *See* Ronald A. Cass and Keith N. Hylton, *Preserving Competition: Economic Analysis, Legal Standards and Microsoft,* 8 GEO. MASON L. REV. 1, 33 (1999) (noting that rent-seeking litigation is an undesirable, yet common effect of legal rules).

[93] *See* Hylton & Khanna, *supra* note 90. Note that a defendant may be guilty and still subjected to a politically motivated prosecution. *See* Paul Hoffman, *Double Jeopardy Wars: The Case for a Civil Rights "Exception",* 41 UCLA L. REV. 649, 668 (1994) (discussing how guilty police officers were still subjected to politically motivated prosecutions). This would occur for example where enforcement was only brought against one kind of guilty party but not others or against one group and not others. *See* Pamela Cothran, Project, *Twenty-Third Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1992-1993,* 82 GEO. L.J. 771, 775 (1994). If the defendant was actually innocent then the costs of such politically motivated prosecutions might be the costs of potential false convictions, litigation costs, and lobbying and other related rent-seeking costs (e.g., reduction in deterrence). If the defendant was actually guilty then the costs of politically motivated prosecutions would not include the costs of a false conviction.

[94] Note that this concern might also be addressed under the Due Process clause. For greater discussion of the use of Due Process to address concerns sometimes raised under Double Jeopardy see *infra* Part VI.B.

opportunity to appeal an acquittal. In most instances when someone is constrained that should reduce that person's utility relative to where they were not constrained.[95] We would then expect that prosecutorial constraints (like asymmetric appeal rights) should reduce the utility of prosecutors. The issue then becomes what factors go into the utility function of prosecutors – or more generally – what are prosecutors trying to maximize.

Prosecutors could be trying to maximize many different things. To simplify, let us make a few assumptions, which we can relax later. First, assume that prosecutors are trying to maximize social welfare, by which I mean trying to maximize correct convictions and minimize false convictions, subject to a budget constraint (I use this as a proxy for what society wants).[96] Also, let us

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[95] If there is a "hands tying" argument (i.e., there may be a gain in constraining short term actions to benefit long run goals) then things may be different, but I will assume for now there is no "hands tying" argument. On "hands tying" *see generally* Henry Hansmann & Reinier Kraakman, *Hands-Tying Contracts: Book Publishing, Venture Capital Financing, and Secured Debt*, 8 J. L. ECON. & ORG'N 628 (1992); Christine Jolls, *Contracts As Bilateral Commitments: A New Concern About Contract Modification*, 26 J. LEGAL STUD. ___ (1997); collecting cites.

[96] Another way to put this is that I assume that prosecutors are subject to a budget constraint and that their utility functions are increasing in the probability of correct convictions and strictly decreasing in the probability of false convictions. Before proceeding further a couple of points of clarification are in order.

First, I chose this particular prosecutorial utility function to provide a baseline for comparison. Because this utility function is the same as society we are abstracting away from any agency issues between prosecutors and society. Later analysis brings in the agency problem more directly. *See infra text accompanying note* 101.

Second, I have chosen increasing the *number of convictions* as a goal of prosecutors rather than increasing *expected sentence lengths* for expositional ease. The results developed here could be extended to consider maximizing expected sentence lengths. *Cf.* Landes, *supra* note 12, at 63 – 64 (examining a model based on prosecutors trying to maximize expected sentence lengths subject to a budget constraint); Edward P. Schwartz, *Unequal Under the Law: A Comparative Analysis of State Lesser Included Offense Doctrine*, Draft Paper presented at the Harvard Law School *Conference on the Economics of Law Enforcement*, Oct. 16 – 17, 1998, at 9 - 13 (on file with author)(same, except with little discussion of budget constraints), 20 – 25 (modeling the concern with convictions rather than expected sentence lengths as a form of prosecutorial risk aversion). Or, put another way, my description is the equivalent of trying to maximize expected sentence lengths when the sentence lengths are the same for all crimes. In addition to ease of exposition, it is noteworthy that many states elect their District Attorneys and often conviction rates, rather than sentence lengths, seem to be considered important in such elections. *See* Dirk G. Christensen, *Incentives vs. NonPartisanship: The Prosecutorial Dilemma in an Adversary System*, 1981 DUKE L.J. 311, 325 (1981) (noting that prosecutors are increasingly rewarded on their effectiveness,

assume that prosecutorial budgets under symmetric and asymmetric appeal rights are the same and that there are no plea bargains.[97] Under these assumptions, because society's / prosecutors utility is composed of increasing correct convictions and reducing false convictions any constraint on prosecutors may have detrimental effects on both correct convictions and false convictions. Thus, asymmetric appeal rights may lead to reduced correct convictions and increased false convictions relative to symmetric appeal rights.

A more detailed reason for this is that under symmetric appeal rights the prosecutor would presumably spend resources at the different trial levels (e.g., initial trial, appeal initiated by prosecutor, appeal initiated by defense) to equate marginal costs (from false convictions and litigation costs) with marginal gains (from correct convictions).[98] This should lead to the highest level of

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which is usually defined in terms of number of convictions). *See also* Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 307 (1983) (noting that a prosecutor's personal interests, such as career advancement and professional reputation, may influence their discretionary decisions); Edward L. Glaeser, Daniel P. Kessler & Anne Morrison Piehl, *What Do Prosecutors Maximize? An Analysis of Drug Offenders and Concurrent Jurisdiction*, *forthcoming* AMERICAN LAW AND ECONOMICS REVIEW (2000) [*hereinafter* Glaeser, et al.](suggesting prosecutors' motivated by career advancement and providing some empirical evidence to support that conclusion).

Finally, there are reasons for believing that prosecutors may care about more than simply maximizing convictions. *See* Ake v. Oklahoma, 470 U.S. 68, 79 (1985) ("The State's interest in prevailing at trial – unlike that of a private litigant – is necessarily tempered by its interest in the fair and accurate adjudication of criminal cases."). *See also* Edward L. Glaeser & Andrei Schleifer, *Incentives for Enforcement*, Draft Paper presented at the Research Seminar in Law and Economics, Harvard Law School, Feb. 2000 (on file with author) [*hereinafter* Glaeser & Schleifer] (suggesting the adjudicator receives utility from "doing justice" and from punishing suspects, regardless of actual guilt); Scott Baker & Claudio Mezzetti, *Prosecutorial Resources, Plea Bargaining, and the Decision to Go To Trial*, *forthcoming* 17 J. L. ECON. & ORG'N (2001) (using a model where prosecutors are concerned about correct convictions and false convictions amongst other things). *See* further discussion in Part V.D. (Litigation Costs).

I am also assuming that litigation costs are endogenous. *Cf., e.g.*, Liffman, *supra* note 12.

[97] These are relaxed later in the paper – *see infra* Part V.E.

[98] If this were not true then the prosecution could increase its net benefits from convictions, false convictions, and litigation costs by substituting expenditure at one trial level for another. This process would go on until the marginal benefits of an additional dollar of expenditure were equal across trial levels.

We could permit more levels of trial or explicitly bring in consideration of retrials. However, the qualitative nature of the results (i.e., a potential increase in false convictions) would not change – their magnitude might.

utility for the prosecutor because he can adjust across all the margins (i.e., trial levels). [99] However, under asymmetric appeal rights the prosecutor can adjust expenditures across fewer margins (i.e., fewer trial levels because there is no right to appeal acquittals) and this

[99] The gain to prosecutors should be higher under symmetric rather than asymmetric appeal rights. This is because under symmetric appeal rights if increasing spending in the initial trial is the prosecutor's best method of obtaining his goals in a particular case then he can achieve that by voluntarily refusing to appeal. Further, even if appealing acquittals is the prosecutor's best method of obtaining her goals then she can pursue that by promising to appeal under symmetric appeal rights. However, under asymmetric appeal rights the latter option cannot be taken. Thus, where prosecutors have such control over spending the number of convictions must be higher under symmetric appeal rights than under asymmetric appeal rights.

The issue is then do prosecutors have this kind of spending control? For the prosecutor's threat of overspending (or promise not to appeal) to be credible it seems that prosecutorial budgets would need to be determined on a case-by-case basis, which they probably are not. Prosecutorial budgets are generally determined on an annual basis. *See* Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 777 n.131 (noting various budgets for prosecutors in the United States that were determined on an annual basis) ; 734 – 37 (discussing the internal management of prosecution offices and allocation of resources and that internal management varies with each office)(1996). If budgets are determined annually and if crimes occur throughout the year then I am not sure how a prosecutor could credibly commit not to bring an appeal by overspending in the initial trial because the prosecutor does not know how many trials she may have to bring during the year.

For example, assume in any year that the prosecution thinks there may be either 3 or 4 crimes a year (occurring throughout the year) and that each case costs the prosecution the same amount. In the first trial of the year the prosecution could spend 25% of its budget on the initial trial to convey the idea that it has no resources to appeal. However, for this to be credible we need a few things to happen.

First, we need three other crimes during the year. If it turns out that there are only 2 more crimes that year then the prosecution does have resources to spend on appeals. Given that crime rates may vary over the years it seems reasonable to assume that prosecutors cannot easily estimate how many crimes per year they are going to prosecute. Further, political pressures may be brought to bear in certain cases (say, extremely heinous crimes) so that even if we always have 4 crimes a year we may find prosecutors willing to spend more than 25% on one case if it stands out for some reason. This effect is probably even larger where prosecutors are elected to office. *See* James Q. Wilson, *Hate and Punishment: Does a Criminal Motive Matter?*, 9/13/99 NAT'L. REV. 18, 22 (noting that prosecutors will often try to "make a name for themselves" in high-profile cases); Carol S. Steiker, *Death, Taxes, and Punishment? A Response to Braithwaite and Tonry*, 46 UCLA L. REV. 1793, 1798 (1999) (noting that elected prosecutors must make a special effort to prevail in high-profile cases.)

In addition, it seems unrealistic to assume the cost of each case will be the same (i.e., some cases may cost more or less than 25% of the budget). If the costs vary then the prosecutor's promise to overspend or not appeal becomes even less credible. For example, if the second case would cost only 15% to obtain a conviction then even after spending 25% in the first case the prosecution still has 10% left for appeals because second case costs only 15%.

should in equilibrium lead to fewer correct convictions and more false convictions.[100]

Thus, when prosecutors are maximizing what society wants then any constraint on them should reduce social welfare. Although this may seem obvious, it provides a useful baseline. Let us then consider the other extreme view of prosecutors – that they care only about maximizing convictions (subject to a budget constraint) regardless of whether they are correct ones or not.[101]

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[100] A very simple (and incomplete) functional form of the prosecutor's utility function for symmetric appeal rights, under the assumptions I have provided, could be as follows: $U = aP_{cc}(A_p, A_d, T) - bP_{fc}(A_p, A_d, T) - xR$.

Where U is the prosecutor's utility, P_{cc} is the probability of a correct conviction, P_{fc} is the probability of a false conviction, T is the prosecutor's expenditure in initial trials, A_d is the prosecutor's expenditure in defense-initiated appeals (if they are brought) including retrial costs, and A_p is the prosecutor's expenditure in prosecutorial appeals (if they are brought) including retrial costs, a is the value to the prosecutor of a correct conviction, b is the value to the prosecutor of a false conviction, and x is the value of the litigation costs / resources expended (R) that a prosecutor internalizes. Note that P_{cc} and P_{fc} are increasing, concave functions of the prosecutor's expenditure (i.e., A_p, A_d, and T) and that investment in litigation is endogenous. *Cf.* Liffman, *supra* note 12 (discussing endogenous litigation costs). We could break down the items in T, A_d, and A_p further, but that might not change the results in a significant manner. The prosecutor would then adjust spending across the different trial levels to obtain the highest net gain for herself.

Under asymmetric appeal rights, however, the prosecutor must spend all the resources in T and A_d (initial trials and defense-initiated appeals) rather than T, A_d, and A_p (prosecution-initiated appeals). Thus, the prosecutor is adjusting across only T and A_d (i.e., has fewer "levers-to-pull") and this may reduce the number of correct convictions and increase false convictions relative to where the prosecutor adjusted resources across T, A_d, and A_p.

[101] There are many other versions of what prosecutors are trying to maximize between perfect alignment with social interests and only maximizing convictions. I would anticipate that the results would be similar for other models too.

Consider, for example, the following assumption – prosecutors maximize the same items that society does (i.e., maximize correct and minimize false convictions), but places different weights on them compared to society. For example, prosecutors may not receive the same disutility from a false conviction as society might. This is probably because prosecutors place high value on convictions as they are most likely to have the most direct influence on their future prospects. *See* Glaeser, et al., *supra* note 96; Schwartz, *supra* note 96, at 20 – 25. *Cf.* Landes, *supra* note 12, at 63 – 64 (using a model which leads to this conclusion). Further, prosecutors probably do not place as high a value on false convictions (as they do not tend to impact prosecutors' future prospects as directly as convictions) as society might want them to. *See* Glaeser, et al., *supra* note 96; Schwartz, *supra* note 96, at 20 – 25. *Cf.* Landes, *supra* note 12, at 63 – 64 (using a model which leads to this conclusion). Further, false convictions may go undiscovered and the more obvious ones were probably not brought to trial by the prosecution because the chances of success would probably

Constraining prosecutors interested only in maximizing convictions should result in a reduction in the number of convictions relative to where there is no constraint. Thus, for prosecutors interested only in convictions, asymmetric appeal rights should result in a decrease in convictions.[102] Although convictions may drop, we do not necessarily know whether *false convictions*, a matter of interest to us, have increased or decreased.

False convictions may decrease because the total number of convictions drops so this reduces the base of convictions from whence false convictions arise. However, false convictions may also increase. This is because when the prosecutor cannot bring appeals, and has the same budget as under symmetric appeal rights, he has some funds (those not used in prosecutorial appeals) to spend. [103] The prosecutor might spend those funds on current cases or in bringing new cases (or some mix of both). In either event there would be an increase in spending in the initial trial.

The increase in prosecutorial expenditure in the initial trial may lead to an increase in convictions in the initial trial, *holding all else equal*, relative to symmetric appeal rights.[104] However, these new initial trial convictions are more likely to contain false convictions than the initial trial convictions obtained under symmetric appeal rights. This is because the new initial trial convictions, by definition, come from the group of cases that, under symmetric appeal rights, were either acquittals or not prosecuted.[105] This means that these new

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have been low and this would have been fairly clear to the prosecutor. *Cf.* KAMISAR, ET AL., *supra* note 68, at 30 (noting the significant pre-filing screening that occurs).

For greater discussion of the divergence between litigants' (e.g., prosecutors) and society's interests *see generally***,** Steven Shavell, *The Fundamental Divergence between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575, 577 – 79 (1997) (noting that society's interest in litigation may not match the private party's interest, a point which can easily be extrapolated to prosecutors); Glaeser, et al., *supra* note 96, (suggesting a divergence between prosecutorial interests and society's interests).

[102] There is an analogous argument in Ben-Shahar, *infra* note 134.

[103] I assume that these savings would not be returned to the government fisc. For consideration of what might happen if they were *see infra* Part V.E.1.

[104] Although convictions in the *initial trial* may increase, the total number of convictions (over initial trials and appeals and retrials) should drop due to the arguments accompanying *supra* notes 95 & 101.

[105] This presumes that the prosecutor would bring the easy-to-win cases first. This seems a sensible approach for prosecutors because this approach increases the number of convictions. There is some evidence that some screening does occur. *See* KAMISAR, ET AL., *supra* note 68, at 30 (noting that "of the felony arrestees, roughly anywhere from 30% to 50% [will have] dispositions in their favor . . . through pre-

convictions are more marginal and hence "closer calls" than the convictions obtained under symmetric appeal rights, which were presumably clearer cases for convictions.[106] As such the rate of error in the marginal cases (i.e., the new convictions) is probably higher than the rate of error in the convictions obtained under symmetric appeal rights. As these "closer calls" cases are now increasing under asymmetric appeal rights the chance of a false conviction in the initial trial is increasing.[107]

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filing police and prosecutor screening, or before the trial, either through *nolle prosequi* motions of judicial and grand jury screening procedures."). *Cf.* Mark Ramseyer & Eric Rasmusen, *Why are Japanese Conviction Rates So High?*, ___ J. LEGAL STUD. __ (2001) (noting that one reason for the high Japanese conviction rate may be that prosecutors bring their best cases first).

[106] This is probably true because the convictions under symmetric appeal rights would also be convictions under asymmetric appeal rights, but the new initial trial convictions would only be convictions under asymmetric appeal rights and not symmetric appeal rights (by assumption). This suggests the new initial trial convictions are closer to call than the convictions under symmetric appeal rights. *Cf.* Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1358-60 (1997) (discussing false convictions that occur in more questionable cases).

[107] To illustrate these points I use the following numerical example. Assume that under symmetric appeal rights prosecutors bring 1000 cases a year and 900 result in convictions in the initial trial and of these convictions 90 are false and remain uncorrected. Further, assume under symmetric appeal rights prosecutors appeal 50 of the 100 acquittals and obtain 40 further convictions of which 3 are false and are uncorrected. Thus, we have a total of 940 convictions of which 93 are false.

Now let us compare what may happen under asymmetric appeal rights. The prosecution now faces 900 convictions in the initial trial (90 of which are false) and 100 acquittals, but cannot bring appeals. The prosecution then has the choice of what to do with the saved resources from not appealing the 50 acquittals it would otherwise have appealed. The prosecution could invest the saved resources into the current cases and thereby increase the chance of conviction. This should increase the number of convictions in the initial trial to above 900, but not to more than 940 or else the prosecution would have overspent in the initial trials under symmetric appeal rights to preclude appeals to obtain more than 940 convictions in total. *See supra text accompanying notes* 95 & 101. Let us say convictions increase to 930 under asymmetric appeal rights. The incremental 30 convictions may contain some false convictions. Further, the rate of false convictions (which was initially 10% of convictions – 90 out of 900) should increase because these 30 convictions are from cases that were not as easy to prove as the other 900 and hence were "closer calls" and thus more likely to contain true acquittals. So let us say that of these 30 convictions 4 were false – now we have 94 false convictions and 930 convictions. In other words fewer convictions, but more false convictions than under symmetric appeal rights.

Another scenario might be that the prosecutor does not spend any more on the current cases, but decides to bring more cases (i.e., increase the total case intake to 1050 rather than 1000). We still have 900 convictions (90 of which are false) and now some more convictions from the extra 50 trials being brought (again not more than

Thus, when prosecutors are only interested in maximizing convictions, asymmetric appeal rights could result in an overall decrease in convictions, but either an increase or decrease in false convictions. The issue is then which effect – the increase or decrease in false convictions – is likely to dominate. Although it is difficult to say in the abstract there are good reasons for thinking that whichever way the effects cut the net effects are likely to be quite small. This is because for the effects on errors and litigation costs to be significant we would need to believe that under symmetric appeal rights there would be a significant number of prosecutorial appeals and some resources spent on them. This requires a significant number of acquittals and that the prosecution appeal many of them. This does not seem likely because there are generally few acquittals in initial trials (under both symmetric and asymmetric appeals rights regimes) and in those countries where prosecutors are permitted to appeal they do so infrequently.[108] Thus, the effects are likely to be quite small because the resources tied up with prosecutorial appeals may not be great. To flesh this argument out more fully the remaining discussion in this Part examines some reasons for why the results on errors and litigation costs are likely to be insignificant overall.

A. Reducing False Conviction Errors

To more fully explore the effects of asymmetric appeal rights, I compare them to the likely effects under symmetric appeal rights (where the government may appeal an acquittal). Under symmetric appeal rights assume that the government appeals some false acquittals and some correct acquittals.[109] This means that the appeals court may (i) overturn some false acquittals remitting them for retrial which may result in a correct conviction, (ii) overturn some false

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940 in total or else this would have been done under symmetric appeal rights) – say 30 new convictions. Further, of the new 30 convictions we have 4 false convictions (we again expect the rate of false convictions to convictions to increase as these new 30 are more marginal cases). Thus, we again have more false convictions (94), although fewer convictions (930) than under symmetric appeal rights.

Of course, we could postulate numbers where the number of false convictions also drops (e.g., only 2 new false convictions). However, my point is not that false convictions will *always* increase, but simply that they *may* increase even if prosecutors want to only maximize convictions given their budgets.

[108] *See infra* Part V.A.1 & 2.

[109] The government may appeal some number of both kinds of acquittals for a number of reasons, including that it does not normally know *for certain*, in all cases, which acquittals are correct and which are not.

acquittals remitting them for retrial which may result in a false acquittal, (iii) leave some false acquittals undisturbed, (iv) leave some correct acquittals undisturbed, (v) overturn some correct acquittals remitting them for retrial which may result in a correct acquittal, and (vi) overturn some correct acquittals remitting them for retrial which may result in a false conviction.[110] By preventing appeals from acquittals (under an asymmetric appeal rights regime) we are denying the appeals court the opportunity to increase false convictions (point vi) and reduce false acquittals (point i). Thus, asymmetric appeal rights may result in fewer false convictions and more false acquittals than symmetric appeal rights.[111]

However, we should be cautious in giving too much weight to the argument that asymmetric appeal rights reduce false convictions. This is because there are many reasons to expect that appeals courts would only infrequently overturn correct acquittals leading to retrials which might result in false convictions.

At least four things must happen before prosecutorial appeals of acquittals could lead to a significant increase in false convictions. First, there must be some acquittals in the initial trials from which to appeal. The fewer the number of acquittals the lesser the prospect for reducing potential false convictions by denying appeals from these few acquittals. Second, assuming there are some acquittals, we must think that the government would appeal some correct acquittals in order to generate a false conviction.[112] If the government largely

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[110] I am assuming only one level of appeal. If there were more levels of appeal the number of potential outcomes would increase, but the qualitative results would not change. Thus, I do not discuss more levels of appeal for analytical simplicity.

See also Ronald A. Cass, *Principle and Interest in Libel Law After New York Times: An Incentive Analysis*, *in* THE COST IF LIBEL: ECONOMIC AND POLICY IMPLICATIONS 114 – 115 n. 132 (Everette E. Dennis & Eli M. Noam eds., 1989)(discussing how other kinds of asymmetry may influence outcomes, in particular asymmetry in budgetary constraints). My thanks to Ron Cass for suggesting this line of inquiry.

[111] Throughout the analysis, unless otherwise specified, I will assume all cases are litigated and there are no settlements (plea bargains). For a brief discussion of plea bargaining *see infra* Part V.E.2.

[112] *See* Steven Shavell, *The Appeals Process As A Means Of Error Correction*, 24 J. LEGAL STUD. 379, 381, 384 – 85 (1995)(discussing why erroneous decisions are more likely to be appealed than correct decisions). A similar result is obtained in Bruce L. Hay, *Relitigation: Screening, Learning, and Standards of Decision*, Harvard Law School Seminar in Law & Economics, 19 – 20, 22 – 24 (discussing the screening effect that may make relitigation desirable) (November 12, 1996)(on file with author); Andrew F. Daughety & Jennifer F. Reinganum, *Appealing Judgments*, Working Paper No. 99-3,

appeals incorrect acquittals then the scope for generating false convictions is limited. When *incorrect* acquittals are appealed, overturned, and a conviction entered on retrial then that is not, by definition, a *false* conviction – it is a *correct* conviction. Third, even if the government appeals correct acquittals we would need to think that the appeals court would err and overturn the acquittal remitting it for retrial. If the chance of this is low then once again the chance of a false conviction being generated is low. Fourth, even if the government appeals correct acquittals and appeals courts err then we still need to think that the retrial will err and result in a false conviction. Once again, if this is not likely then the scope for generating false convictions is limited.

There are reasons to believe that at each of these stages there is a winnowing effect that would result in few correct acquittals being appealed, erroneously overturned, and then erroneously turned into false convictions on retrial. Consequently, the number of false convictions avoided by denying government appeals of acquittals is probably quite small.

1. There may be few acquittals in the initial trial.

For government appeals of acquittals to have any significant impact we must first expect some acquittals. For example, if there are only 10 acquittals and 10,000 convictions a year then the number of false convictions avoided by preventing appeals of acquittals may not be very great (only 10 at most). Simply put, for government appeals of acquittals to matter there must first be some acquittals.

In the US, the current conviction rate is quite high suggesting few acquittals.[113] Although the rate in the US is under asymmetric appeal rights even when we look at countries where appeal rights are more symmetric we witness high conviction rates.[114] This suggests

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Vanderbilt University Law School, Joe C. Davis Working Paper Series (discussing the use of decisions to appeal in garnering information about the suit) (1999)(on file with author).

[113] *See* KAMISAR, ET AL., *supra* note 68, at 30 (noting that there are roughly "3 convictions for every acquittal" from full trial outcomes). This understates the number of guilty results because it ignores guilty pleas, which can range amongst jurisdictions from a "ratio of 11 pleas for every trial, with one jurisdiction having as many as 37 pleas for each trial." *Id.*, at 28.

[114] *See* KAMISAR, ET AL., *supra* note 68, at 30 (noting a conviction rate of nearly 75% or so in cases resulting in a complete trial in the US). Conviction rates are quite high in other countries. *See* Ramseyer & Rasmusen, *supra* note 105 (noting a

that there are few acquittals which in turn suggests a small potential for avoiding false convictions by denying government appeals of acquittals.

2. Screening of appeals by the government.

Even if there are some acquittals that does not mean, by itself, that permitting government appeals of acquittals may generate false convictions. For that to happen we need the government to appeal *correct acquittals*, which might then later be turned into false convictions through the appeals and retrials process. However, there are good reasons to think that the government would more likely appeal false acquittals rather than correct acquittals. To explore this further let us consider the following numerical example under the assumption that appeals courts tend to overturn incorrect trial court decisions more frequently than correct trial court decisions.[115]

Assume that the appeals court overturns false acquittals 80% of the time and correct acquittals 20% of the time and that an appeal costs the government $30,000. [116] Also, assume that the gain from a conviction (correct or not) to the prosecutor is $100,000. On these numbers appealing a false acquittal leads to an expected value to the prosecutor of $50,000 (i.e., ($100,000)(0.80) - $30,000). Appealing a

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greater than 99% conviction rate in Japan). The conviction rates *in initial trials* from 1986 to 1990 in Germany ranged from roughly 75% to 78%, in England and Wales from roughly 73% to 83%, in Israel from roughly 83% to 85%, in China from roughly 87% to 91%, and in the Russian Federation from roughly 81% to 93%. These numbers were gleaned from data provided through the United Nations Survey of Crime Trends and Operation of Criminal Justice Systems. *See* GLOBAL REPORT ON CRIME AND JUSTICE (last modified July 5, 2000) http://www.ifs.univie.ac.at/uncjin/mosaic/wcs.html. The significantly higher conviction rates in certain countries may reflect factors specific to those countries. *See e.g.*, Ramseyer & Rasmusen, *supra* note 105 (discussing why the Japanese rate is so high).

[115] *See id.*, at 383 n.9 (noting that absent this assumption appeals are undesirable). Throughout the analysis, unless otherwise stated, I will assume that defendants and prosecutors do not know for certain the outcome in a particular appeal, but they do know that the probability that a "guilty" person will be convicted is higher than the probability that an "innocent" person will be convicted. *See id.* I am assuming that appeals courts do not use the decision by the prosecutor to appeal as an indication that this is a case involving an error. If courts did this that might lead to an unraveling of the separation effect described in the text. *See id.*, at 393; Daughety & Reinganum, *supra* note 112.

[116] Shavell provides an analogous example. *See* Shavell, *supra* note 112, at 384 – 85.

correct acquittal leads to an expected value of - $10,000 (i.e., ($100,000)(0.20) - $30,000). [117]

Thus, appealing correct acquittals leads to a negative expected value and appealing a false acquittal leads to a positive expected value. If the prosecutor knew when a false acquittal occurred, or was generally good at telling the difference between a false acquittal and a correct one after the initial trial (i.e., had acquired some private knowledge during or after the initial trial), then the prosecutor will find it in his interest to appeal cases that have, on average, a greater chance of being false acquittals than correct acquittals.[118] This separation in acquittals being appealed would be even more dramatic if the prosecutor faced (as is likely) greater costs in appealing correct acquittals (e.g., costs in irritating the court) than in appealing incorrect acquittals.[119] The separation effect would also become greater if the costs of a potential retrial following a successful appeal were included.

Although this example is based on numerous simplifying assumptions relaxing them would not change the qualitative results as long as (1) there is some correlation between perceived errors by the prosecutor and actual errors (i.e., the prosecutor gains information about the likelihood of error through the trial) and (2) the appeals court overturns incorrect decisions more frequently than correct ones. [120]

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[117] It is easy to see that if we allow a correct conviction to be worth more to the prosecutor than a false conviction then the gap in expected returns becomes even larger. For example, assume all the same numbers except that the prosecutor gains $100,000 from correct convictions and $60,000 from false convictions. Now appealing false acquittals has an expected value of $50,000 (i.e., ($100,000)(0.80) - $30,000) and appealing correct acquittals has an expected value of -$18, 000 (i.e., ($60,000)(0.20) - $30,000). The loss from appealing correct acquittals is even larger than in the text.

[118] *See* Shavell, *supra* note 112, at 382, 384 – 85 (discussing the consequences of this assumption for the desirability of the appeals process).

[119] *See id.*; Stith, *supra* note 2, at 30.

[120] *See* Shavell, *supra* note 112, at 384 – 85 (discussing the basic intuitions), 388 – 393 (discussing what happens if the model's assumptions are relaxed and concluding that the qualitative results do not change).

There is some evidence that the prosecution does engage in screening. For example, in Germany (where there are symmetric appeal rights) the proportion of appeals that are defense-initiated are somewhere between 85% to 95%, most of which are disposed of without a full hearing. *See* Weigend, WORLDWIDE, *supra* note 7, at 212 nn. 133 & 135. To see why prosecutorial screening appears likely let us assume that in Germany 1000 criminal cases are brought per year and that 75% of them result in convictions (I am using the lower figure from the range provided in *supra* note 114) or simply 750 convictions. Assume further that there are a total of 400 appeals each year

The argument does turn on the prosecution being concerned about the costs of appeals.[121] However, one could argue that the prosecution, in contrast to a private litigant, may not care about litigation costs as they do not directly bear them (i.e., they do not come out of their "pocket" per se).[122] This is only partly true, because

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(both prosecution and defense). If the defense brings 85% of them (the lower point of the range noted above in this note) that means that the defense brings 340 appeals and the prosecution brings 60. Thus, the defense appeals roughly 45% of convictions and the prosecution appeals roughly 24% of acquittals. There appears to be some prosecutorial screening at work. However, even if the defense appealed a higher number of convictions we would still expect some prosecutorial screening on the numbers we have. For example, if the defense in the above example appealed all convictions then (assuming the prosecution still brings 15% of all appeals) then the prosecution would bring roughly 83 appeals or would appeal about 33% of acquittals (when the prosecution appeals all acquittals). Note that a higher rate of defense appeals may also be consistent not only with prosecutorial screening, but also with very high conviction rates.

[121] Using the numerical example in the text it is easy to see that if the prosecution did not care about the costs of appeals it would appeal every decision – correct or otherwise because any possibility of success would generate a net benefit for the prosecution (i.e., $80,000 for false acquittals and $20,000 for correct acquittals). It seems unlikely that prosecutors do not care about the costs of appeals because then we would expect to see prosecutors appealing every acquittal where they are permitted to appeal. However, such is not the case. Indeed, prosecutorial appeals of acquittals, where permitted, are not very frequent. *See* Weigend, WORLDWIDE, *supra* note 7, at 212 nn. 133 & 135 (noting that defense appeals in Germany represent roughly 85% to 95% of all appeals, most of which are disposed of without a full hearing). *See supra* note 120 for greater discussion of prosecutorial screening using these numbers.

[122] A private party bears their own costs of appeals in civil cases (absent fee-shifting or other similar measures), but the prosecutor only bears some fraction of the litigation costs because the prosecutor does not personally pay the litigation costs, but is in some sense responsible for them. *Cf.* Landes, *supra* note 12, at 64 (making a similar assumption with regard to the prosecution)

Arguments made here do not necessarily apply to criminal appeals taken by *defendants* because they often do not bear the costs of the appeals process as the government subsidizes such appeals. *See* Shavell, *supra* note 112, at 422 n.84 (noting this point). It is not surprising then that over 90% (sometimes 100%) of convictions are appealed. *See id.*, at 421 n.80 (noting that nearly all federal criminal convictions are appealed); Stith, *supra* note 2, at 13 n. 39 (noting that "nearly every conviction is appealed in the federal system and many state systems"). Even though so many convictions are appealed very few appeals turn out in favor of the defense. *See* Shavell, *supra* note 112, at 421 n.80 (noting that in 1990 "the rate of reversal of criminal appeals [in the federal system] was only 8.4%" (citing to Federal Judicial Workload Statistics 20, 23 (1990)). *See also,* KAMISAR, ET AL., *supra* note 68, at 32 (noting only a 5% to 10% success rate in the state systems). Note that this does not tell us how many successful appeals there might be under a symmetric appeal rights regime, because the 8.4% refers to the successful appeals rate under our current asymmetric appeals

if prosecutors face any kind of budget constraint, or monitoring of their behavior, or any ire from the court for bringing baseless appeals then they would be concerned with the costs of appeals and appealing likely errors.[123] Each of these constraints seems plausible to some extent.[124] Thus, we would expect prosecutors to screen cases they appeal and hence the appeals process should have some separation effect resulting, on average, in fewer correct acquittals being appealed and more false acquittals being appealed. If there are few correct acquittals being appealed then the scope for false convictions from the appeals process (which requires the appeal of correct acquittals) is limited.

3. The appeals court would infrequently overturn correct acquittals.

Even if correct acquittals were appealed we would still need the appeals court to err before any chance of a false conviction could be generated. However, one would expect that appeals courts would

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rights regime. However, one would not expect the successful appeals rate under a symmetric appeals regime to be tremendously higher. *See e.g.*, Weigend, WORLDWIDE, *supra* note 7, at 212 nn. 133 & 135 (noting that defense appeals in Germany represent roughly 85% to 95% of all appeals, most of which are disposed of without a full hearing).

The fact that the separation effect may be very weak for defendant-initiated appeals does not affect our conclusions because we are concerned about false convictions from the appeals process which can only arise when the *prosecution* brings appeals of correct acquittals and the appeals court erroneously overturns these creating the chance for a false conviction on retrial. The defendant's motives in seeking appeal are thus not of particular import to my basic point.

[123] For example, if there is a binding budget constraint that requires prosecutors to divide their resources over their cases then they would want to keep track of how much they are spending on appeals lest they handicap themselves in other trials due to a shortfall of resources. *Cf.* Landes, *supra* note 12, at 63 – 64 (analyzing a model based on a similar assumption); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 23-25 (1997) (discussing prosecutors' behavior given the budget constraints they face).

See also Stith, *supra* note 2, at 30 (noting that "[r]aising a claim of dubious legal merit imposes greater costs on prosecutors, so that . . . we would expect the government to assert fewer claims that it is likely to lose. In addition to litigation costs and the consequences of irritating the court, the prosecution has another significant disincentive to disputing a legal issue at trial: the possibility of reversal if it succeeds in the trial court"). *See also* Hay, *supra* note 112, at 19 – 20, 22 – 24 (discussing the value of screening cases for the desirability of permitting relitigation).

[124] *See* Landes, *supra* note 12, at 63 - 64 (on budget constraints); Stith, *supra* note 2, at 30 (on court's irritation); Stuntz, *supra* note 123, at 23 – 24 (on behavior of prosecution).

overturn false acquittals more frequently than they would overturn correct acquittals.[125] If this condition is not met then the desirability of an appeals system is in serious doubt.[126] In light of this, the few correct acquittals that might be appealed would most likely not be overturned.

This is further strengthened by the common perception that appeals courts tend to defer to trial courts (i.e., clearly erroneous standard of review) so that initial trial decisions are not overturned absent some convincing reasons to overturn.[127] Thus, if an appeals court did overturn a trial court decision we might expect that the decision to overturn would more likely be correct rather than incorrect. The combined effect of reasonably accurate appeals courts and deference to trial court decisions suggests that appeals courts would not err frequently, and if they were to err it might be to uphold an erroneous trial court decision (i.e., false acquittal) rather than to overturn a correct trial court decision leading to the possibility of generating a false conviction on retrial.

4. Retrials leading to false convictions.

Even if the government appealed some correct acquittals, which the appeals court erroneously overturned and sent down for retrial, we still have not generated a false conviction yet. For that to occur the retrial must result in a conviction of what is a correct acquittal. Although there is little data on this point (as we currently do not normally permit government appeals of acquittals) we might suspect that few retrials would lead to false convictions of what are correct acquittals. This is because as the case progresses through trial and appeal more information would be gathered which should, all else equal, make more accurate decisions by the decision-makers more likely.[128] If so, then the retrial should also result in an acquittal

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[125] *See* Shavell, *supra* note 112, at 383 n.9.

[126] *See id.*

[127] *See* POSNER, *supra* note 75, at 643; Stith, *supra* note 2, at 27 – 28 nn. 71 – 73 (discussing appellate court deference to trial court decisions); Hay, *supra* note 112, at 22 – 25, 32 – 49 (discussing the value of the later-in-time tribunal placing some weight on the earlier-in-time tribunal's findings to make relitigation desirable). *See* Cynthia K. Y. Lee, *A New "Sliding Scale of Deference" Approach to Abuse of Discretion: Appelate Review of District Court Departures Under the Federal Sentencing Guidelines*, 35 AM. CRIM. L. REV. 1, 2 (1997) (noting that a trial court's decision is not likely to be reversed when the clearly erroneous standard is applied).

[128] *See* Kaplow, *supra* note 12, at 356 - 57.

(for correct acquittals) in most instances. Nonetheless, there is still some chance that the retrial would result in a false conviction, but this chance is probably not very great.

Thus, we might anticipate that if the government were allowed to appeal acquittals few correct acquittals would be appealed because there are not many acquittals from the initial trial and the government has an incentive to appeal incorrect acquittals not correct acquittals (given the arguments in sections 1 and 2). Further, from the few correct acquittals that are appealed it is unlikely that the appeals court would overturn creating a possibility of a false conviction on retrial (given the arguments in section 3) or that the retrial court would turn the correct acquittal into a false conviction (given the arguments in section 4). For these reasons, we should expect very few false convictions to be created by allowing the government to appeal acquittals. Conversely, this means few false convictions would be avoided by denying the government the opportunity to appeal.

B. Increasing False Conviction Errors?

The potential decrease in false convictions is not the only effect of asymmetric appeal rights. It is possible that asymmetric appeal rights could increase false convictions as well. [129] If the prosecutor cannot appeal acquittals then the prosecutor has only one shot at obtaining a conviction – the initial trial. Thus, *obtaining a conviction in the initial trial* may be more important to a prosecutor who only has the initial trial in which to achieve a conviction relative to a prosecutor who could obtain a conviction in the initial trial or in a later appeal followed by a retrial.[130] The increased importance of

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[129] Note that evidence on the rate of false convictions under our current system is equivocal. *See* Dripps, *infra* note 152, at 259 – 61.

[130] The situation is analogous to that under non-mutual collateral estoppel. *See* Spurr, *supra* note 12, at 50 – 59; Eli J. Richardson, *Taking Issue with Preclusion: Reinventing Collateral Estoppel*, 65 MISS. L. J. 41, 54-56 (1995) (discussing the effects of non-mutual collateral estoppel). The effects I discuss arise from the *asymmetry* in appeal rights between the prosecution and the defense. Thus, if appeal rights were symmetric and neither party could challenge a final court's decision then these effects may not be present.

My analysis may, thus, raise some interesting questions for *habeas corpus* review, but given the relative infrequency of such review, compared to the number of convictions, the limited grounds for this procedure, and the fairly small success rate I have some doubt that *habeas corpus* would have significant effects on errors. *See* KAMISAR, ET AL., *supra* note 68, at 1612 – 61 (discussing habeas corpus), 32 – 33 (noting

the initial trial to the prosecutor may lead the prosecutor to spend more resources in the *initial trial* under asymmetric appeal rights relative to the prosecutorial resources spent in the initial trial under symmetric appeal rights.[131] As prosecutors increase the resources spent in the initial trial the chance of conviction (in the initial trial) should increase *all else equal.*[132] Some of these convictions may be

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that roughly 18, 000 *habeas* petitions are usually received per year and the success rate is about 3%); 32 (noting that in New York City alone there were 27,800 felony convictions in 1988 so that 18,000 *habeas* petitions in the entire *country* seems small).

[131] Another way to look at asymmetric appeal rights is to view them as a simultaneous increase in stakes in the initial trial and asymmetry in stake in the initial trial. Asymmetry in appeal rights increases the *stakes in the initial trial* for both the defendant (*see infra* Part V.B.3.) and the prosecution because the initial trial is now more important for both parties than it was under symmetric appeal rights. This effect increases the total litigation investment in the initial trial with both parties' litigation investment rising or only one party's litigation investment rising and the other's dropping (but the rise in one party's investment exceeds the drop in the other's). *See* Liffman, *supra* note 12, at 7 – 10. However, asymmetric appeal rights not only increase the stakes in the initial trial, but also create something analogous to asymmetric stakes for the prosecution relative to a symmetric appeals regime. This is because the prosecution values a conviction in the initial trial more, all else equal, than the defendant because the prosecution has only one shot at obtaining a conviction (and the defendant has more than one shot at obtaining an acquittal, by appealing – *see infra* Parts V.B.3.b. & VI.A). *Asymmetric stakes* may result in both parties decreasing the resources expended in litigation, or both parties increasing the resources expended in litigation, or the prosecutor increasing resources expended and the defendant decreasing resources expended. *See* Liffman, *supra,* at 14 – 16. *See generally*, Spurr, *supra* note 12. Much depends on how changes in one party's resources placed in litigation affects the other party's productivity of further increasing resources in litigation (i.e., on how the endogenous elements of litigation costs react). *See* Liffman, *supra,* at 15.

When we combine an *increase in stakes* with an *asymmetry in stakes* we should expect total investment in litigation *in the initial trial* to rise (it cannot drop in total due to the effect of the increase in stakes). Thus, either both parties increase their expenditure in the initial trial or the prosecution increases its expenditure and the defense does not increase or may decrease its expenditure (the total litigation cost in the *initial trial* must still rise though). The latter scenario I do not consider likely because most defendants have their litigation costs subsidized by the state and that should increase the incentive to spend resources. *See* Landes, *supra* note 12, at 100 (noting that the government subsidy probably leads to more trials and increased expenditure on behalf of the defendant compared to the results with no subsidy), Shavell, *supra* note 112, at 421 n.80 (noting that most defendants are subsidized), Stith, *supra* note 2, at 29 - 30 (same).

[132] *See, e.g.*, Liffman, *supra* note 12, at 14 – 16 (discussing the effects of asymmetric stakes for the defendant, which include increasing the defendant's expenditure); Spurr, *supra* note 12, at 50 – 59 (discussing the effects of some rules of collateral estoppel creating asymmetric stakes). These results would also be impacted

false convictions and hence, the increased expenditure by the prosecutor may result in an increase in false convictions in the initial trial that might remain even after a defense appeal.[133]

Although the increase in false convictions is possible, it (like the decrease is false convictions effect) is also subject to a number of winnowing-like effects.[134] The following sections elaborate some reasons for why this might be.

1. How large is the increase in false convictions likely to be?

The magnitude of the increase in false convictions depends on the amount of resources the prosecution saves by not appealing acquittals. If prosecutors would appeal few acquittals under symmetric appeal rights (for whatever reason) then few resources are tied up in prosecutorial appeals. If so, then few resources would be saved by prohibiting these appeals and thus there would be few

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if spending decisions were made in different ways (e.g., sequentially). My thanks to Ron Cass for this suggestion.

Note that the chance of a conviction in the *initial trial* increases – not necessarily the probability of conviction *overall* (which depends on convictions in the initial trial and convictions from successful prosecution appeals followed by retrials). *See supra text accompanying notes* 101 – 107.

[133] Defense appeals are generally not very successful. *See* KAMISAR, *supra* note 68, at 32 (noting only a 5% to 10% success rate in the state systems); Shavell, *supra* note 112, at 421 n.80 (noting that in 1990 "the rate of reversal of criminal appeals [in the federal system] was only 8.4%" (citing to Federal Judicial Workload Statistics 20, 23 (1990)); Stith, *supra* note 2, at 13 n. 39 (noting that "nearly every conviction is appealed in the federal system and many state systems").

These low rates may not be too surprising if prosecutors select cases well (so there are few truly innocent defendants who are brought to trial) and there are reasons to think this is the case. *See* KAMISAR, ET AL., *supra* note 68, at 30 (noting that "of the felony arrestees, roughly anywhere from 30% to 50% [will have] dispositions in their favor . . . through pre-filing police and prosecutor screening, or before the trial, either through *nolle prosequi* motions of judicial and grand jury screening procedures").

[134] For discussion of offsetting effects similar to the effects on false convictions from asymmetric appeal rights *Cf. generally*, Omri Ben-Shahar, *The Erosion of Rights by Past Breach*, 1 AMERICAN LAW & ECONOMICS REVIEW 190, 201 – 215 (discussing the irrelevance proposition, in the context of adverse possession rules and the related doctrines, suggesting that the offsetting effects should exactly cancel each other out, except where the irrelevance proposition does not hold)(1999). *Cf. id.*, at 215 – 223 (discussing exceptions to the irrelevance proposition such as endogenous litigation costs (a matter I discuss in the text), imperfect information (e.g., court errors, imperfect detection), and many others which suggest that the particular rule does matter).

resources available to invest into initial trials under asymmetric appeal rights. [135]

In addition to this, it is worth noting that the resources saved by avoiding appeals may not change the result in the initial trial in all (or even most) instances. For example, assume that prohibiting prosecutorial appeals saves the prosecution resources. Given that prosecutorial appeals are probably fewer and cheaper than initial trials the amount saved by prohibiting appeals is probably not too great in relation to the amount spent in the initial trial. For example, assume the savings from bringing no appeals amount to $5,000 in total. Also assume there are 10 initial trials each costing $50,000. If the $5,000 savings are split evenly amongst the 10 trials then the added prosecutorial resources are only $500 per trial on top of the $50,000 already spent. This does not seem likely to cause *too* great an increase in the probability of conviction.[136] Thus, there are reasons for thinking that the amount saved by prohibiting appeals will not provide too great a boost to prosecutorial resources to enable many more false convictions in initial trials.

2. What if prosecutor's extra effort or investment leads to exculpatory evidence?

Even if there are some resources saved by prohibiting appeals and thus available for use in the initial trial that does not mean false convictions will increase much. This is because increased effort by the prosecutor in the initial trial might produce more inculpatory evidence against the truly guilty and provide more exculpatory

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[135] The argument in the text should be distinguished from one that suggests that because there are *few prosecutorial appeals of correct acquittals* (as suggested in sections A.1 & 2 of this Part) that there are few resources saved.

Even though there may be few prosecutorial appeals of *correct acquittals* that does not mean that there are few prosecutorial appeals. It may be that the prosecution brings a number of appeals (of false acquittals) and few of correct acquittals. Thus, avoiding prosecutorial appeals saves the prosecution resources not just of the few correct acquittals it might appeal, but also of the false acquittals it may appeal.

Note that asymmetric appeal rights may also result in a change in the kinds of cases the prosecution selects for trial and charging and plea bargaining. For further discussion see *infra* Part V.E.2.

[136] In fact, if we assume that resources have diminishing returns then the added $500 may have very little impact indeed. *See generally* Shavell, *supra* note 112, at 409 (noting that greater accuracy in the appeals court means that trial court errors are more likely to be reversed, which induces greater effort at trial).

evidence for the truly innocent so that the chance of a conviction might increase, but the chance of a *false conviction* might decrease.[137] The intuition here is that increased effort is likely to improve accuracy, which means that the truly correct acquittals should end up being acquittals rather than convictions. [138] If so, then the prospects for too many false convictions being generated by increased prosecutorial expenditure in the initial trial are reduced.

In spite of this there are some reasons to be sanguine about the potential of this to reduce false convictions. First, not all increased prosecutorial effort may go towards gathering information – it may also go to researching case law and matters unrelated to unearthing greater facts (exculpatory or not).[139] Second, once the prosecutor has decided that a particular suspect appears "guilty" enough to charge, [140] then one would expect that the prosecution's increased effort would go towards looking for evidence to convict the current defendant rather than towards looking for other suspects.[141] Simply put, both these factors suggest that sometimes the extra effort will not go towards finding exculpatory evidence, and if you are not looking for exculpatory evidence you are less likely to find it.[142] Further, even if you were to find exculpatory evidence, it is not so clear that all prosecutors would necessarily turn it over. Although prosecutors are required under current law to turn over exculpatory evidence,[143] there is some anecdotal and perhaps empirical support

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[137] *See* Kaplow, *supra* note 12, at 347.

[138] *See id.*

[139] *See* Imbler v. Pachtman, 424 U.S. 409, 430-431 (1976) (noting that prosecutors have varied duties, e.g. they act as administrators, investigators, and advocates). To the extent that the increased effort garners greater information by violating defendant's fourth amendment or other rights see *infra* Part VII.C.

[140] A concern for false convictions by the prosecutor might lead the prosecutor not to bring cases that appear likely to be false convictions (i.e., where the defendant appears innocent). *See* Ross Galin, *Above the Law: The Prosecutor's Duty to Seek Justice and the Performance of Substantial Assistance Agreements*, 68 FORDHAM L. REV. 1245, 1267-68 (2000) (noting that the ethical duty of a prosecutor goes beyond simply gaining convictions); Stuntz, *supra* note 123, at 46 - 47 (noting prosecutors judge odds of conviction before making charges). *Cf.* KAMISAR, ET AL., *supra* note 68, at 30 (noting that "of the felony arrestees, roughly anywhere from 30% to 50% [will have] dispositions in their favor. . . through pre-filing police and prosecutor screening"). *See also* Dripps, *infra* note 152, at 261.

[141] *See* Dripps, *infra* note 152, at 261.

[142] *See id.*

[143] *See* Brady v. Maryland, 373 U.S. 83, 87-88 (1963) (holding that prosecutors cannot withhold exculpatory evidence requested by the defendant).; *See* ABA RULES OF PROFESSIONAL CONDUCT, Rule 3.8, "Special Responsibilities of a Prosecutor". *See*

for the notion that prosecutors may not always hand over exculpatory evidence.[144]

Of course, it would be a gross oversimplification (and injustice to many noble prosecutors) to argue that all prosecutors deliberately conceal exculpatory evidence. However, it is possible that prosecutors, when deciding where to spend their efforts, will spend them on obtaining convictions rather than on finding reasons to acquit people who appeared, to the prosecutor, guilty enough to indict. Some small number of prosecutors may also not hand over exculpatory evidence they discover.[145] This may occur because the prosecutor does not realize that this is truly exculpatory evidence (i.e., prosecutorial error), believes the suspect is still guilty in spite of the apparently exculpatory evidence and inculpatory evidence is difficult to find, or because the prosecutor simply wants a conviction.[146] Thus, although the potential for unearthing exculpatory evidence might reduce the number of false convictions, it may not eradicate them.

3. What about defendant's response to increased prosecutorial expenditure in the initial trial.

An important part of the argument suggesting an increase in false convictions is that the defendant may not adequately respond to

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also United States v. Argus, 427 U.S. 97, 112 (1976) (ruling that only "material" evidence must be turned over, but that such evidence must be given to the defense even in the absence of a request).

[144] *See* POSNER, *supra* note 75, at 601-02 (discussing prosecutorial withholding of exculpatory evidence); Stanley Z. Fisher, *Just the Facts Ma'am: Lying and Omission of Exculpatory Evidence in Police Reports*, 28 NEW ENG. L. REV. 1 (1993) (discussing instances where police and prosecutors have omitted exculpatory evidence); Joseph R. Weeks, *No Wrong Without A Remedy: Ineffective Enforcement of Duty of Prosecutor to Disclose Exculpatory Evidence*, 22 OKLA. CITY L. REV. 833 (1997) (noting the extent to which a prosecutor's obligation to disclose exculpatory evidence has been ignored); Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations*, 65 N.C. L. REV. 693, 697-703 (1987) (examining cases of intentional prosecutorial withholding of exculpatory evidence).

[145] *See* Rosen, *supra* note 144, at 697. *Cf.* Landes, *supra* note 12, at 64 (*assuming* prosecutors conceal exculpatory evidence).

[146] *See* Rosen, *supra* note 144, at 697 - 98 (commenting that some claims of prosecutorial suppression occur because the prosecutor did not personally know of the falsity of the evidence or the existence of suppressed evidence or the suppressed evidence was only arguably exculpatory).

the increase in prosecutorial expenditure in the initial trial.[147] In the next few paragraphs I discuss whether the defense normally could respond adequately.

a. The defendant may also increase his initial trial investment and effort.

Because success in the initial trial under asymmetric appeal rights essentially ensures the defendant an incontrovertible acquittal, the defendant's incentive to spend resources in the initial trial increases relative to his incentive under symmetric appeal rights.[148] In addition, under asymmetric appeal rights the defendant also saves some resources from not having to face a prosecutorial appeal following an acquittal. These resources could, in theory, be used by the defendant to counteract the prosecutor's greater expenditure in the initial trial or in an appeal the defendant initiates.[149]

Although defendants may have greater incentives to win the first trial under asymmetric appeal rights relative to symmetric appeal rights, we may still have good reason for thinking that this will not completely avoid the threat of increasing false convictions. First, the defendant's incentives may still not match the prosecutor's.[150] This is because the prosecutor cannot correct an initial trial acquittal he considers wrong, whereas the defendant can still correct an initial trial conviction he considers wrong by appealing. Thus, the prosecutor still has only one shot at obtaining a

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[147] If the defense cannot respond adequately then an increase in false convictions may be likely. However, if the defendant can respond adequately then perhaps these effects may not arise or could be mitigated.

[148] This has the effect of increasing stakes in the initial trial for both parties. *See supra* note 131; Liffman, *supra* note 12, at 7 – 14. *See* Landes, *supra* note 12, at 69 – 71 (discussing the effects of higher sentences on risk neutral and risk averse defendants) .

[149] Even apart from increasing its expenditure in the initial trial the defense has an incentive to play more "dirty tricks" in asymmetric appeal rights regimes than symmetric appeal rights regimes. This is because if such tricks succeed they cannot be corrected/appealed in an asymmetric appeal rights regime. *See* Steinglass, *supra* note 5, at 371; *See* Rosemary Nidiry, *Restraining Adversarial Excess in Closing Argument*, 96 COLUM. L. REV. 1299, 1315-18 (noting that occurrences of defense misconduct are difficult to find in case law because of the absence of appellate review of improper acquittals, but evidence exists suggesting that they are similar to prosecutorial misconduct).

[150] This captures the asymmetry in stakes created by asymmetric appeal rights. *See supra* note 131.

conviction, whereas the defendant has more than one shot to achieve an acquittal.

Second, if the defendant is indigent (as is the case in about 75% of criminal trials) then the state will appoint counsel for him at no cost to him.[151] Such defendants do not save any of their resources (because they have invested none, except time and effort) by having to contend with fewer prosecution appeals. Nonetheless, the public defenders office does save those funds and might use them. However, one suspects that most indigent defendants are not in a position to instruct the public defender to invest more effort or resources into his case (initial trial or appeal) as might a defendant who was paying his own lawyer.[152]

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[151] *See* Stith, *supra* note 2, at 29 n. 76. Note that the budget for defense appeals and defense initial trials may not be under the same office or may be accounted for separately. Collect cites.

[152] Some anecdotal evidence suggests that the quality of public defense counsel is on average not as high as prosecutors (perhaps because of lack of funding). *See* Donald A. Dripps, *Ineffective Assistance of Counsel: The Case For An Ex Ante Parity Standard*, 88 J. CRIM. L. & CRIMINOLOGY 242, 245 (noting that "[d]efenders. . . are usually paid less than prosecutors, and many prosecutors are poorly paid") (1997). *See also id.*, at 245 n.9 (stating that "many observers of the criminal trial scene are of the opinion that today only a few lawyers who undertake criminal defense cases are equal matches for career prosecutors whose intimate familiarity with a wide variety of criminal charges and prosecutorial techniques makes them formidable adversaries").

Many reasons have been forwarded for why public defense tends to be ineffective. First, the most common concern is the amount of funding provided for public defenders office. *See* Dripps, *supra*, at 251 – 52 (noting that "the resources provided for [public defense] are simply inadequate"). Flowing from this is the argument that because public defenders must pick and choose where to invest their limited resources we cannot be very confident that the plea bargain or other outcome of a particular case was in the best interests of that particular client or of society. *See id.*, at 252. Adding to this is the notion that succeeding in winning cases for the defense may represent something of a winner's curse. *See id.*, at 252 (noting that "[a] lawyer paid by the government must account for the possibility that success may cut off the flow of government funding… [public] defenders have lost their positions for trying too many cases or otherwise litigating too vigorously on behalf of their putative clients").

These problems do not seem significantly addressed by contracting out defense work to private attorneys. First, private attorneys who represent indigent defendants do not receive full compensation for their services. *See id.*, at 254 (noting that "[a] lawyer who receives a lump sum to represent indigent defendants will receive no more if the caseload is larger than anticipated. . . [and defense] lawyers representing indigent defendants by appointment, who bill the court for the services rendered theoretically have an incentive to overinvestigate and overlitigate, because the costs of representation fall on the court not the client. Typically, however, the schedule of compensation does not include the costs of legal services [which leads

Further, for both indigent and non-indigent defendants the savings gained by facing no prosecutorial appeals may still not be sufficient. This is because the defendant and prosecution may not spend the same amounts in appeals initiated by the prosecution. The party appealing an adverse decision is likely to spend more than the party responding to it because the burden is on the appellant (prosecution) to prove an error and appeals courts tend to defer to trial court decisions.[153] If the prosecution does spend more in prosecution-initiated appeals then the resources it saves (and the resources it can now use in the initial trial) are likely to be greater than the defendant's.[154]

Thus, whatever the defense saves from not facing prosecutorial appeals may not be sufficient to completely counteract an increase in the prosecutor's expenditures in the initial trial. [155] Nonetheless, increased defense expenditure reduces the likely magnitude of the increase in false convictions from increased prosecutorial spending.

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lawyers to prioritize away from public defense work]"). Second, the lack of full compensation should lead to a warping of incentives. *See id.*, at 254 (concluding that "the rational and self-interested attorney will slight the representation of the nonpaying clients. If the lawyer is not rational and self-interested, her rational and self-interested paying clients will find another lawyer [who is]".)

Some empirical evidence appears to support the idea that there is a gap between the service normally provided by well-paid defense attorneys and cash-strapped public defenders. *See id.*, at 250 (noting that "[i]n five large systems with public defender offices, defendants represented by publicly appointed counsel were incarcerated 71.5% of the time; those represented by private counsel were incarcerated only 50.5% of the time").

[153] *Cf.* POSNER, *supra* note 75, at 643; Hay, *supra* note 112, at 22 – 24, 32 – 49 (noting the presence and value of deference to decisions of the first tribunal which hears a case). LAFAVE & ISRAEL, *supra* note 81, at 29 (noting that the rate of reversals on appeal is low perhaps reflecting some trial court deference). *See also* GENE R. SHREVE & PETER RAVEN-HANSEN, UNDERSTANDING CIVIL PROCEDURE 432 (1994) (explaining that an appellant must usually pay a filing fee at the time of the appeal, post a bond for costs on appeal, and post a *supersedeas* bond to suspend the enforcement of a money judgment); Lee, *supra* note 127, at 2 (discussing the difficulty of reversing trial court decisions under the clearly erroneous standard).

[154] We may also think the prosecution could outspend the defendant because it tends to have more resources in total (indeed, a frequent justification for criminal procedural protections is the "vastly superior resources [of the state]"). *Scott, supra* note 31, at 91.

[155] *See* Jerold H. Israel, *Excessive Criminal Justice Caseloads: Challenging the Conventional Wisdom*, 48 FLA. L. REV. 761, 766 (1996) (discussing how prosecutors' expenditures are monitored by their ability to keep abreast of growing dockets).

b. Defendants might appeal more frequently under asymmetric appeal rights.

Besides, or in addition to, increased spending in the initial trial the defense could also invest some of saved resources from not responding to prosecutorial appeals into its own appeals. The defendant, under asymmetric appeal rights, may bring more appeals than under symmetric appeal rights because there may be more initial trial convictions and the defendant may think more of them are false due to increased prosecutorial effort in the initial trial.[156]

Although this argument is alluring (given that virtually all convictions are appealed at present)[157] it is unlikely to significantly change the results for a few reasons. First, the current success rate on appeals from convictions is roughly somewhere between 4% to 8% (i.e., before retrial), and when we take into account how many defendants are finally acquitted after retrial the rate likely drops even further.[158] These are the numbers under our asymmetric appeal rights regime.[159] Further, if the small percentage of successful defense appeals are simply correcting false convictions generated by increased prosecutorial expenditure in the initial trial, then, on net, asymmetric appeal rights may have only increased litigation costs for defendants.[160]

Second, false convictions obtained due to increased prosecutorial expenditure, under asymmetric appeal rights, should be more difficult to overturn than false convictions obtained with less prosecutorial expenditure, under symmetric appeal rights. If more

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[156] This is premised on there being more false convictions in the initial trials under asymmetric appeal rights and defendants being generally aware of this.

[157] *See* Shavell, *supra* note 112, at 421 n.80; Stith, *supra* note 2, at 13 n.39.

[158] *See* KAMISAR, ET AL., *supra* note 68, at 35 (noting both the 4% to 5% success rate in state based criminal appeals and the roughly 10% success rate in federal criminal appeals); Shavell, *supra* note 112, at 421 n.80 (discussing the 8.4% success rate in federal criminal appeals).

[159] *See id.* In France the appeals "success" rate is about 11%- 12%. *See* Frase, WORLDWIDE, *supra* note 7, at 180. One could look at these numbers in another way. If we assume that prosecutors screen cases carefully before bringing them then it may be that only 5% to 10% of initial trials involve actually innocent people so that low appeal success rates may be near optimal. However, the number of appeals might then be excessive (appeals in 100% of cases to net a 5% to 10% correction rate), unless the vast majority of unsuccessful appeals are disposed of quickly and cheaply. *See supra* note 120 (discussing screening and early and quick disposition in Germany of many defense appeals).

[160] *See discussion infra* Part V.D (litigation costs).

false convictions are obtained because of greater prosecutorial effort then one might surmise that it will take greater effort and resources on appeal to overturn this outcome relative to the efforts needed when the initial conviction was obtained with less prosecutorial effort.[161]

Third, appeals courts are often deferential to trial court decisions further reducing the probability that an appeal would likely overturn a trial court result (incorrect or otherwise).[162] This suggests that appealing adverse outcomes for the defendant may not be a particularly attractive response to increased prosecutorial expenditure in the initial trial leading to an increase in false convictions in the initial trial. Thus, defense appeals may ameliorate some of the increased false convictions, but probably not all of them. Nonetheless, this is another reason to suspect that the potential increase in false convictions from increased prosecutorial expenditure in the initial trial will not be very great.

Taking the arguments in sections 1 through 3 and those in section A, we are left with asymmetric appeal rights having small offsetting effects on false convictions. Thus, it seems that asymmetric appeal rights have ambiguous and insignificant effects on false convictions from trials. We can then examine the potential effects of asymmetric appeal rights on false acquittal errors and litigation costs.

C. False Acquittal Errors

Earlier I noted that denying the government the opportunity to appeal acquittals reduced the chance of a false conviction from erroneous appeals court decisions, but also increased the chance of a false acquittal in the initial trial going uncorrected. Thus, false

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[161] *See* Note, *Prosecutorial Vindictiveness in the Criminal Appellate Process: Due Process Protection after* United States *v.* Goodwin, 81 MICH. L. REV. 194, 211 (1982) (noting that prosecutors often have powerful incentives to try to deter appeals); Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393 (1992) (commenting that harmless error review often preserves convictions obtained by prosecutors at the trial level). *Cf.* Erika E. Pedersen, *You Only Get What You Can Pay For: Dzubiak v. Mott and Its Warning to The Indigent Defendant*, 44 DEPAUL L. REV. 999, 1005 - 06 (1995) (noting that inadequate funding of public defenders officers prevents public defenders from being able to doing everything required to defend their clients).

[162] *See* Hay, *supra* note 112, at 22 – 24, 32 – 49 (discussing the presence and value of deference to trial court decisions); Stith, *supra* note 2, at 25. See LAFAVE & ISRAEL, *supra* 81, at 29 (indicating that very few cases are reversed on appeal); SHREVE & RAVEN-HANSEN, *supra* note 153 at 418 (noting that most trial court rulings are affirmed).

acquittals might increase under asymmetric appeal rights relative to symmetric appeals (where some false acquittals are corrected on appeal). However, this is not the only effect on false acquittals. Asymmetric appeal rights may also *decrease* the number of false acquittals in the initial trial.

If the prosecution does spend greater resources in the initial trial as a result of asymmetric appeal rights then any acquittal in the initial trial is much more likely to be a correct acquittal than under symmetric appeal rights. If greater prosecutorial expenditure increased the chance of a conviction (and false convictions) in the initial trial then obtaining an acquittal under such a "stacked" initial trial is something of an achievement for the defense. Such hard won initial trial acquittals are likely to be correct acquittals compared to acquittals obtained under symmetric appeal rights when the prosecution spent less resources (i.e., was not trying as hard).[163] Thus, we might expect that the number of *false* acquittals in the initial trial under asymmetric appeal rights would drop, compared to symmetric appeals rights.

However, the false acquittals that still remain in the asymmetric appeal rights regime cannot be corrected through the appeals mechanism, whereas some might be corrected under a symmetric appeal rights regime. The net effect on false acquittals is unclear in the abstract for many of the same reasons that the net effect on false convictions is unclear in the abstract.

D. Litigation Costs

Asymmetric appeals rights not only influence the likelihood and incidence of error, but also the total litigation costs of the criminal justice system. With increased expenditure in the initial trial and more defense-initiated appeals under asymmetric appeal rights we might expect an increase in litigation costs relative to symmetric appeal rights. On the other hand, with no prosecution-initiated appeals we might expect a decrease in litigation costs relative to symmetric appeal rights. Whether the net effect is to

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[163] *Cf.* Matthew Spitzer & Eric Talley, *Judicial Auditing*, 34 J. LEGAL STUD. 649, 652 – 59 (assuming that judicial decision makers try to arrive at legal outcomes that are as consistent as possible with their own policy preferences as well as any empirical information that is available and that appellate courts can use this to decide which cases are worth taking on appeal) .

increase or decrease litigation costs and for whom will depend greatly on context. [164]

For example, if we assume the prosecution has a fixed budget (that is the same under symmetric and asymmetric appeal rights) then the amount it saves from not pursuing appeals of acquittals simply gets redistributed to increased spending in initial trials and responding to defense appeals. The total amount spent over all criminal cases for the prosecution would remain roughly the same.[165]

This may not, however, be true for the defendant whose litigation expenditures are financed through private funds and subsidies from the state.[166] Under asymmetric appeal rights the defendant saves resources from not having to respond to prosecution appeals, but then spends more in the initial trial and has more convictions from which the defense may appeal. The increase in defense expenditure in the initial trials and defense initiated appeals needs to be balanced against the defense resources saved from not having to respond to prosecution initiated appeals. It is possible, in the abstract, that either the increased expenditure may dominate or the savings may dominate.

However, given the relatively small number of prosecution appeals that might occur under symmetric appeal rights we might expect that the effects on litigation costs would be fairly small.[167]

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[164] I treat litigation costs as including the costs to the defense and the prosecution, not court costs.

[165] The other extreme assumption, that the prosecutor does not use the saved funds, seems implausible. *See supra* Part V.E.1 for discussion of what happens to errors if the government reduces funding under asymmetric appeal rights.

[166] *See* Shavell, *supra* note 112, at 422 nn.83 – 85 (discussing subsidization of defense legal expenses); Stith, *supra* note 2, at 13, n.39, 29 – 30 nn. 76 & 77 (discussing defense appeal rates and subsidies); Landes, *supra* note 12, at 73 n.29, 86 n.50 (noting subsidization of defendants).

[167] This conclusion is not significantly affected by the fact that the defendant's costs of many initial trials and virtually all defense appeals are subsidized by the state. *See* Shavell, *supra* note 112, at 422 nn.83 – 85 (discussing subsidization of defense legal expenses); Stith, *supra* note 2, at 13, n.39, 29 – 30 nn. 76 & 77 (discussing defense appeal rates and subsidies); Landes, *supra* note 12, at 73 n.29, 86 n.50 (noting subsidization of defendants). This only means that the defendants themselves may not be out of pocket, but the state will and that means that the state may find itself with less funds to use in defense cases in total. *See* Ellen Yankiver Suni, *Who Stole the Cookie from the Cookie Jar?: The Law and Ethics of Shifting Blame in Criminal Cases*, 68 FORDHAM L. REV. 1643, 1688 (2000) (noting the limited resources available to public defenders).

Nonetheless, the crucial point is that litigation costs may not unambiguously drop under asymmetric appeal rights.[168]

In summary, there are many factors that are important in determining whether asymmetric appeal rights help defendants in terms of error reduction and litigation costs. **[169]** These factors, which often cut in different directions, make general conclusions difficult to draw about the impact of asymmetric appeal rights.

E. Relaxing Some Assumptions

The analysis so far has assumed that prosecutors received the same budget under both kinds of appeal rights regimes and that all cases went to trial. In this section I relax both those assumptions and provide some thoughts on their effects.

1. Would the prosecutor's budget stay the same under symmetric and asymmetric appeal rights?

Throughout the analysis I have assumed that the prosecutor's budget was the same under symmetric and asymmetric appeal rights. It was due to this that there were "savings" from bringing no prosecutorial appeals. However, it is possible that the state may

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[168] *See* Liffman, *supra* note 12 (coming to this conclusion for rules of collateral estoppel).

Another issue of some interest is that the prosecution may also change the mix of cases it brings in response to asymmetric appeal rights. This raises interesting questions about what kind of mix of cases prosecutors might bring under both appeals rights regimes. For example, prosecutors might prefer to spend resources on easy-to-obtain convictions (as that increases prosecutor's gains) rather than cases that might be more difficult to win, but would be worth more to society. Whether asymmetric appeal rights increase this sort of behavior is outside the scope of this paper.

[169] These factors include the relative accuracy of appellate courts to trial courts, the effectiveness of expenditures at different trial levels, the amount of resources each party saves by not having prosecutorial appeals, how the endogenous elements of litigation costs react to changes in parties' investment in litigation, the parties' resource constraints, and a host of other matters. *See* Liffman, *supra* note 12 (discussing an endogenous litigation cost model). For example, we might expect that asymmetric appeal rights tend to be more expensive for the defense as the incremental expenditures in the initial trial (and defense appeals) increase, as the frequency of defense appeals increases, as the frequency of prosecutorial appeals, (under symmetric appeal rights) decreases, and as the cost in each prosecutorial appeal decreases. These are likely to be influenced by the factors discussed earlier in this note.

decide to reduce prosecutorial budgets under asymmetric appeal rights, relative to symmetric appeal rights, on the logic that the prosecution needs less funding because it cannot appeal. [170] If so, then most of the effects identified here would not arise (as there would be no savings).[171] However, if the government wants to avoid spending resources on prosecuting crime then might it not be easier to simply reduce prosecutorial funding directly or perhaps increase sanctions and reduce enforcement effort rather than create asymmetric appeal rights to reduce funding? [172]

2. Plea Bargaining

For much of the analysis I have not discussed the impact of

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[170] Similar arguments might arise if funding for public defenders increased under symmetric appeal rights (relative to asymmetric appeal rights) because defendants now need more funds to respond to prosecutorial appeals. Although given the current level of funding for public defenders (which is often considered inadequate) one may doubt if such an increase in funding is likely. *See* Randall Coyne and Lyn Entzeroth, *Report Regarding Implementation of the American Bar Association's Recommendations and Resolutions Concerning the Death Penalty and Calling for a Moratorium on Executions*, 4 GEO. J. ON FIGHTING POVERTY 3, 14 (noting that inadequate funding of public defender's offices has made it impossible for them to provide effective representation); Order, 561 So. 2d, at 1131, (Florida's Supreme Court recognized that the Florida Public Defender's Offices received "woefully inadequate funding…despite repeated appeals to the legislature for assistance).; *cf.* 1999 State Roundup, 14 WTR CRIM. JUST. 51, 51 (2000) ("[In 1999] [m]ost states either increased appropriations for indigent defense. . . or maintained stable funding."). Nonetheless, providing prosecutors with appeals could provide an impetus for increased funding for public defenders (to respond to these appeals) and thereby potentially weaken the increasing false convictions effect.

[171] A budget reduction results in no increase in false convictions if the budget under asymmetric appeal rights is equal to (or is trivially different to) the amount spent on initial trials under symmetric appeal rights. If the state can reduce the budget in this manner then the increasing false convictions effect would largely evaporate. Even if the state does reduce funding there are now extra resources the state can use for other things. I make no comment on how these other resources could be spent and whether the resources are better used in prosecution or in other state activities. How prosecutors address their budget constraints is an interesting topic, but one outside the scope of this paper. *See generally* Rebecca A. Pinto, *The Public Interest and Private Financing of Criminal Prosecutions*, 77 WASH. U. L.Q. 1343, 1350 (1999) (discussing how selective enforcement exists due to the fact that law enforcement agencies have limited resources); Misner, *supra* note 99, at 720 (noting that prosecutors do not directly consider all resources when making charging, bargaining or sentencing decisions).

[172] Perhaps, there needs to be a reason to reduce funding and denying appeals provides that, but nonetheless this still seems a somewhat odd way to achieve the goal of reducing expenditure on prosecutions.

asymmetric appeal rights on plea-bargaining. As plea-bargaining is an important component of the criminal justice system in the US,[173] it is important to consider what impact asymmetry in appeal rights may have on plea-bargaining. Although this topic is worthy of at least its own separate paper(s), a full analysis is outside the scope of this paper.[174] Nonetheless, some preliminary thoughts may suggest what direction the plea bargaining analysis might take.

At an intuitive level the impact of asymmetric appeal rights on plea-bargaining should be influenced in large measure by the impact of asymmetric appeal rights on likely trial outcomes.[175] If asymmetric appeal rights lead to trials becoming less attractive for defendants then we should expect more pleas and higher sentences in pleas.[176] Similarly, if trials become more attractive for defendants then we should expect fewer pleas and lower sentences in pleas.[177]

If, as I suggest in this paper, there are very small and ambiguous effects on trial outcomes then we should expect ambiguous overall effects on pleas.[178] One might get different results if we partitioned out specific kinds of defendants (e.g., effects on innocent defendants as opposed to effects on guilty defendants,

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[173] *See generally*, KAMISAR, ET AL., *supra* note 68, at 28 (discussing the rather large slice of cases that end in plea bargains containing guilty pleas); Landes, *supra* note 12, at 66; POSNER, *supra* note 75, at 608 - 10. Collecting cites.

[174] There are a number of excellent analyses of plea-bargaining. To name just a few *see* Albert Alschuler, *The Prosecutor 's Role in Plea Bargaining*, 36 U. CHI. L REV. 50 (1968); Baker & Mezzetti, *supra* note 96; Gene Grossman & Michael Katz, *Plea Bargaining and Social Welfare*, 73 AM. ECON. REV. 749 (1983); Bruce Kobayashi & John R. Lott, *In Defense of Criminal Expenditures and Plea Bargaining*, 16 INT'L REV. L & ECON. 397 (1996); Landes, *supra* note 12; Jennifer Reinganum, *Plea Bargaining and Prosecutorial Discretion*, 78 AM. ECON. REV. 713 (1988); *Note, The Unconstitutionality of Plea Bargaining*, 83 HARV. L. REV. 1387 (1970); Collecting cites.

[175] Collecting cites (proposition seems implicit in many papers).

[176] Collecting Cites. See Robert Bone's model on plea bargaining (on file with author).

[177] Collecting Cites. *See* Bone, *supra* note 176.

[178] The effects do not seem immediately obvious at this stage. For example, we know that prosecutors probably screen out the most obviously innocent defendants. *See* KAMISAR, ET AL., *supra* note 68, at 30 (noting that "of the felony arrestees, roughly anywhere from 30% to 50% [will have] dispositions in the their favor . . . through pre-filing police and prosecutor screening, or before the trial, either through *nolle prosequi* motions of judicial and grand jury screening procedures."). Further, the most clearly guilty defendants will probably try to plea bargain early on. *See* KAMISAR, ET AL., *supra* note 68, at 28 (noting high rate of plea bargains resulting in guilty pleas). That leaves the defendants somewhere between clearly innocent and clearly guilty. The impact on these defendants could cut both ways as described in the text.

effects on indigent defendants), but that is left for future work in this area.[179] However, as a general matter if asymmetric appeal rights were to lead, in some group of defendants, to an increase in false convictions then we might expect, in that group of defendants, a higher average sentence in plea deals. [180] Analogous effects might be expected if the effects were significant on other groups of defendants. The overall impact would then need to be examined. Nonetheless, at this stage, given that there appear to be fairly small effects on errors and litigation costs we would not expect significant impacts on plea rates and sentences due to the effects on errors and litigation costs.

Of course, if asymmetric appeal rights were to have significant effects on something besides errors and litigation costs then that might be a reason for thinking there may be a significant impact on plea rates and sentences. I leave for greater discussion, in Part VIII, some other potential effects of asymmetric appeal rights that might be significant. [181]

Overall, the analysis in this part has shown that asymmetric appeal rights may, in some situations, have potentially perverse effects on both the incidence of error and on the total litigation costs of the criminal justice system. However, in net terms the effects may be quite small and often ambiguous. Nonetheless, this suggests that asymmetric appeal rights have effects that sometimes run counter to some of the stated objectives of Double Jeopardy. At a minimum, this suggests that we should re-examine the ban on government appeals of acquittals or, at least, consider other justifications for it.

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[179] For example, if conviction rates were to drop (and false conviction rates stayed the same) then the trial alternative becomes more attractive for the guilty defendants and they become less likely to accept pleas. This does not seem a desirable result, especially if there is no impact on innocent defendants, which there should not be if false conviction rates are the same.

[180] Collecting Cites; Baker & Mezzetti, *supra* note 96 (discussing effects of increasing prosecutorial resources on plea bargaining and decisions to go to trial).

[181] In Part VIII.B I discuss another effect of asymmetric appeal rights that might be significant – constraining self-interested prosecutors from using the criminal process to benefit themselves. If this is so and it provides a justification for asymmetric appeal rights then we might expect it to have an impact on plea rates and sentences (e.g., if it made the trial more attractive to defendants then it would reduce the sentences in pleas, which might be desirable if prosecutors were pursuing a defendant for personal or political gain).

VI. FACTORS THAT MAY REDUCE THE PERVERSE EFFECTS OF ASYMMETRIC APPEAL RIGHTS.

Although asymmetric appeal rights may result in some perverse effects it might be that our legal system has some measures in place to reduce or at least ameliorate such perverse effects. I will consider two such measures.

A. Might The Defendant Already Have A Large Incentive To Spend Resources In The Initial Trial?

Perhaps asymmetric appeals rights might actually combat a problem we face in the criminal process with the defendant's incentives to respond to a charge. Let us assume that we have symmetric appeal rights, but that criminal cases have asymmetric *stakes* because the defendant typically has more to lose (e.g., deprivation of liberty for a few years) than the prosecutor has to gain (e.g., potential promotion and publicity, sense of fulfilling justice).[182] The asymmetry in stakes may, under certain circumstances, induce the defendant to spend more thereby increasing the chance of an acquittal and also a false acquittal.[183] Further, if appeals courts are deferential to trial court decisions then many false acquittals would not be corrected even if the prosecution could appeal.[184]

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[182] These high sanctions may be necessary because monetary sanctions may be insufficient for deterrence purposes (e.g., defendant is judgment proof with respect to the optimal sanction). *See* Khanna, *supra* note 75, 1527 (discussing when such severe sanctions may generally be desirable); A. Mitchell Polinsky and Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 369 (1998); A. Mitchell Polinsky and Steven Shavell, *Should Employees Be Subject to Fines and Imprisonment Given the Existence of Corporate Liability?*, 13 INT'L REV. L. & ECON. 239 (1993).

[183] *See* Spurr, *supra* note 12, at 50 – 59 (discussing the effect of asymmetric stakes in an exogenous litigation cost model when comparing collateral estoppel rules and concluding that the litigant facing the asymmetry will increase litigation expenditures); Liffman, *supra* note 12, at 14 – 16 (concluding that asymmetry in stakes may have ambiguous effects in an endogenous litigation costs model including to increase litigation expenditures). Note the term "more" in the text means more than when sanctions were not so severe not necessarily more than is socially optimal. *See* Kaplow, *supra* note 12, at 368 (noting that when social costs of sanctions are high, as in the case of imprisonment, the innocent have too little incentive to prove their innocence relative to the social ideal).

[184] *See* Hay, *supra* note 112, at 22 – 24, 32 – 49 (noting the presence and value of trial court deference); Stith, *supra* note 2, at 29 – 30 nn. 76 & 77 (noting trial court deference).

Asymmetric appeal rights might combat the tendency towards too many false acquittals, by giving the prosecutor an incentive to spend more in the initial trial than under symmetric appeal rights. If so, then *asymmetric appeal rights* help combat a situation created by *asymmetric stakes* and thereby might lead to a reduction in error, albeit at a potentially higher litigation cost per trial. [185]

Although this argument sounds compelling and appealingly counter-intuitive it has some weaknesses. In particular, it seems to require that the typical defendant will spend more because of higher sanctions. This is limited by a number of factors.

First, one may doubt that the typical criminal defendant has many resources to use that might result in an increase in the chance of a false acquittal.[186] Further, the presence of state subsidization for indigent defendants may not improve matters much because the defendant may not always be able to compel a public defender to expend more effort on his case just because of asymmetric stakes.[187] Thus, although the defendant or public defender may actually spend more than when sanctions were lower it is doubtful that the amount spent would increase much or have much effect for the typical resource-strapped defendant.[188]

In addition, even if the defendant does spend more in criminal trials than in trials with non-criminal sanctions the prosecutor's incentive to spend in the initial criminal trial may already be increased by the presence of the criminal standard of

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[185] *See* Christensen, *supra* note 96, at 325 (noting that prosecutors are increasingly rewarded on their effectiveness, which is usually defined in terms of number of convictions). It follows that a prosecutor will spend more time in the initial trial when he or she knows that a conviction may not be obtained later under an asymmetric appeal rights regime.

[186] Normally, wealthier defendants spend more under asymmetric stakes, but most defendants are not wealthy. *See* Landes, *supra* note 12, at 69 - 71; Stith, *supra* note 2, at 13 n.39 (describing 75% of defendants as indigent).

[187] *See supra text accompanying notes* 151 & 152.

[188] Given the general perception that the state has superior resources compared to the typical defendant it seems unlikely that the defendant's greater expenditure would have much impact. *See Scott*, *supra* note 31, at 91.

Note that prior work has shown that simply increasing sanctions may not lead risk averse defendants to increase their expenditures in trial. *See* Landes, *supra* note 12, at 69 – 71 (discussing the effect of increasing sanctions on risk averse defendants and concluding in the abstract the effects are ambiguous). If so, then the hypothesis of increased defense expenditure may not be tenable across some cases.

proof.[189] Thus, adding asymmetric appeal rights may not be necessary, or worse yet may be excessive, when it comes to inducing prosecutorial expenditures in the initial trial.

B. Other Measures To Reign In The Effects Of Increased Prosecutorial Expenditures In The Initial Trial.

Another approach to mitigating the potentially perverse effects of asymmetric appeal rights is to rely on some other Constitutional doctrines to constrain prosecutorial behavior. In particular, one might consider reliance on the Due Process clause.[190] Courts may rely on this clause [191] and at least one commentator has suggested greater use of this clause in situations that have come under Double Jeopardy's purview. [192]

In any such case I suspect the critical issue would probably be whether the increased prosecutorial expenditure in the initial trials and defense-initiated appeals amounted to the kind of behavior (e.g., prosecutorial abuse) which the Due Process clause is designed to address.[193] There may be some difficulty in categorizing an increase in the resources invested in a case, without any particular malice towards a particular defendant, as "abuse" or behavior within the scope of the Due Process clause.[194] However, I cannot rule out the application of the Due Process clause to such behavior either.

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[189] *See* Khanna, *supra* note 75, 1512 - 13 (discussing the increasing difficulty and costs of obtaining convictions under the criminal standard of proof).

[190] "[n]or shall any State deprive any person of life, liberty, or property, without due process of law". U.S. CONST. AMEND XIV, § 1.

[191] *See* Hudson v. United States, 522 U.S. 93, 118 S. Ct. 488, 495 (1997) (noting that some abuses currently addressed under some Double Jeopardy jurisprudence may be better handled by the Due Process clause and the Eighth Amendment); United States v. Bajakajian, 118 S.Ct. 2028, 2033 (1998)(discussing application of the Eighth Amendment Excessive Fines Clause in the context of a potential Double Jeopardy claim).

[192] *See* Amar, *supra* note 6, at 1809, 1842 (arguing that the Due Process clause, with it case-specific approach, is much better suited than Double Jeopardy to dealing with some of the abuses that are currently handled under Double Jeopardy jurisprudence).

[193] For cases discussing Due Process in contexts akin to Double Jeopardy *see* Kansas v. Hendricks, 521 U.S. 346, at 371(1997) (holding that civil commitment does not violate Due Process or Double Jeopardy); Hudson v. U.S., 522 U.S. 93, at 103 (1997) (noting that the Due Process Clause protects against irrational sanctions).

[194] *See* WHITEBREAD & SLOBOGIN, *supra* note 81, at 162, 369 - 76, 470 - 78, 607 - 08 (noting that bodily intrusion, coerced confessions, entrapment, and undue pre-accusation delay are some examples of abuses of Due Process).

Even if the Due Process clause might apply it would require the defense to bring suit claiming a violation of Due Process and hence might increase litigation costs even if false convictions were not in the end increased significantly.[195] Indeed, one potential enforcement advantage of Double Jeopardy over Due Process is that Double Jeopardy is a pre-trial plea and may be cheaper for the defense to rely on than a Due Process claim.[196]

VII. OTHER INCENTIVE EFFECTS OF ASYMMETRIC APPEAL RIGHTS

The analysis so far has taken two of the stated objectives of Double Jeopardy as given and asked whether asymmetric appeal rights further those objectives. Asymmetric appeal rights may, however, have other effects outside of these objectives. This Part discusses some of those other effects and the impact they may have on the analysis.

A. Asymmetric Appeal Rights And Judicial Behavior.

Asymmetric appeal rights not only influence the behavior of the litigants, but also they may influence the behavior of judges. There are at least two ways in which this may happen. First, if trial court judges are interested in avoiding reversal then they might consider ruling for the defense to ensure that they can not be reversed.[197] Pro-defense rulings also have the added advantage of

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[195] Due process violations may be redressed in a number of ways. See, e.g., 42 U.S.C.A. 1983 (providing a civil cause of action for violation of due process); STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE: CASES AND COMMENTARY 1307 (4th ed. 1992) (noting that a defendant may make an application for habeas corpus relief if his custody is in violation of the Constitution. A due process violation is cognizable on collateral review); William Burnham, *Separating Constitutional Law and Common Law Torts: A Critique and A Proposed Constitutional Theory of Duty*, 73 MINN. L. REV. 515, 518-20 (1989) (describing constitutional tort cases that involve violation of due process); Jack M. Beermann, *Common Law Elements of the Section 1983 Action*, 72 CHI-KENT L. REV. 695, 712 (discussing the *Heck* case on damages for Constitutional violations in the criminal context).

[196] *See* Marcy D. Hirschfeld et al., Project, *Eighteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1987-1988*, 77 GEO. L.J. 878, 885 (1989) (on double jeopardy as a pre-trial plea).

[197] *See* Stith, *supra* note 2, at 37 – 41 (discussing this argument); Ronald A. Cass, *Judging: Norms and Incentives of Retrospective Decision-Making*, 75 B.U.L.REV. 941, 984 n. 148 (1995); Richard S. Higgins & Paul H. Rubin, *Judicial Discretion*, 9 J. LEGAL STUD. 129, 130 (1980) (noting that judges attempt to avoid being overruled); Richard

reducing the caseload of the courts because pro-defense rulings cannot be appealed, whereas pro-prosecution rulings can. [198]

The second effect on judicial behavior might be to set in motion a drift in legal standards in a pro-defendant direction.[199] Asymmetric appeal rights mean that appeals courts hear only defense appeals. This changes the distribution of appeals compared to symmetric appeal rights where the appeals courts hear some defense and some prosecution appeals.[200] The change in appeals distribution may result in the development of pro-defendant appellate law.[201]

One reason for this might be that appellate courts might view their task as "error correction"[202] and if they consistently find for the prosecution then they might think they were using a pro-prosecution standard (even though in reality they are not).[203] To counter-act this perceived bias appellate courts might tighten the law in a pro-defendant direction. [204] In addition, given the skewed sample appellate courts might, as a psychological matter, begin to analyze the legality of cases by reference to the other appeal cases rather than against the actual legal standard.[205] For example, if in one case the evidence appears relatively inadmissible (relative to the other appeal cases) then it might be declared inadmissible, even though measured according to the legal standard it might be admissible.[206] These reasons, amongst others, might lead to a pro-defendant bias in the law.[207]

A. Posner, *What Do Judges and Justices Maximize? (the Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 14(1993) (on the same point).

[198] *See* Stith, *supra* note 2, at 41.

[199] *See id.*, at 18 – 28.

[200] *See id.*, at 16 – 18.

[201] *See id.*, at 18 – 28.

[202] *See id.*, at 25 – 27.

[203] *See id.*, at 25 – 26.

[204] *See id.*, at 25.

[205] *See id.*, at 25 – 26.

[206] *See id.*, at 25 – 26 (discussing the same argument in the context of the voluntariness of confessions).

[207] Further, given that appeal courts are only asked to tighten standards (i.e., make them more pro-defendant) rather than make them looser one might expect that some courts would succumb and tighten the law over time. *See id.*, at 25 – 27.

One may wonder how we might have a net increase in false convictions (the argument from Part V.B.) and still get pro-defendant bias in law, which requires more false acquittals than false convictions under asymmetric appeal rights relative to symmetric appeal rights. *Cf. id.*, at 18 – 25. This can happen in a number of ways, but for example assume that we start with the same number of false convictions and false

On the other hand, there may be reasons to think that courts might develop a pro-prosecution bias as well. For example, courts might preserve issues for appeal by holding for the prosecution.[208] Holding for the defense would generally preclude prosecutorial appeals. In addition, if appellate courts see many defendants raising questionable appeals there may be a tendency to become skeptical of defense appeals, suggesting a bias in favor of the prosecution.[209] In addition, as an empirical matter, one might inquire as to the significance of any drift in appellate law. With only about 4% to 8% of defense appeals succeeding it seems somewhat unlikely that there is a pro-defendant bias (presumably that might result in higher reversal rates). [210] Finally, even if there is a pro-defendant bias the appellate courts and other governmental bodies could take measures to combat this (e.g., the doctrine of harmless error, adjusting the legal standard in favor of the prosecution). [211] In the end it is not certain that a particular bias in appellate law may develop.[212]

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acquittals under symmetric appeal rights and then by going to asymmetric appeal rights we increase the total number of errors, but in the process create more false acquittals than false convictions. Or, to provide a numerical example, assume we start with 5 false convictions and 5 false acquittals under symmetric appeal rights. Under asymmetric appeal rights we might end up with 6 false convictions and 7 false acquittals – thus leading to an increase in false convictions (relative to symmetric appeal rights) and more false acquittals than false convictions.

[208] *See* Stith, *supra* note 2, at 38 – 42 (discussing Professor Damaska's argument that judges may produce pro-prosecution rulings in order to preserve an issue for appeal and concluding that it is not likely to dominate the effect noted in the text).

[209] *See* Stith, *supra* note 2, at 48 - 49 (noting that appellate courts may be biased against appellants who have already been "found" guilty especially when evidence of their guilt is strong).

[210] *See* KAMISAR, ET AL., *supra* note 68, at 35; Shavell, *supra* note 112, at 421 n.80.

[211] *See* Stith, *supra* note 2, at 28 - 36 (discussing prosecutors raising meritless claims, the courts themselves re-adjusting the law, strategic appellate litigation by the prosecution and potentially the legislature re-adjusting the law and concluding that these measures would be only partially effective).

[212] Indeed, there has been an ebb and flow in defendant's rights suggesting that there may not be a general drift in favor of defendants. *See e.g.,* Yale Kamisar, *Can (Did) Congress "Overrule" Miranda?*, 85 CORNELL L. REV. 883, 951 (2000) (noting that *Miranda* has not fared well in the post-Warren Court era). *See also* Dickerson v. United States, 120 S.Ct. 2326 (2000) (holding that *Miranda* governs the admissibility of statements made during custodial interrogation). Nonetheless, a concern with a drift in the law may be at least a partial explanation for the law in England that allows prosecutorial appeals of acquittals on points of law only without disturbing the initial acquittal verdict. *See supra text accompanying notes* 49 – 52.

B. Moving Appealable Issues To An Earlier Stage In Proceedings.

Double Jeopardy bars appeals of trial court decisions and rulings, however, Congress has the power to move issues to the pre-trial stage or create interlocutory appeals.[213] In other words, Congress may move issues to some point earlier in the trial and pre-trial process and by so doing prevent Double Jeopardy's ban on government appeals of acquittals from taking force (i.e., jeopardy has not yet attached or become complete).[214] Congress has already done this when considering whether a confession is sufficiently voluntary to be admitted into evidence.[215]

This may seem a simple solution to the concerns with asymmetric appeal rights. However, this move is not without costs. Moving issues for determination earlier in trial means that these decisions are likely to be made with less information than if the decision was made later in trial.[216] Consequently, we increase the prospect of erroneous decisions on these specific issues.[217]

On the other hand, early decisions might reduce the likelihood of decisions being influenced by other matters that come up during the trial.[218] Thus, whether more accurate decisions result

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[213] *See* KAMISAR, ET AL., *supra* note 68, at 1581 – 85 (discussing interlocutory appeals and Double Jeopardy implications).

[214] *See id.;* Stith, *supra* note 2, at 14.

[215] *See* Stith, *supra* note 2, at 14 n.44 (discussing interlocutory appeals on the suppression of evidence and on the voluntariness of confessions).

[216] *See* Steven Shavell, *The Optimal Structure of Law Enforcement*, 36 J.L.& ECON. 255, 266 (1993); POSNER, *supra* note 75, at 621 (discussing the cost of appeal as each party gathers more information); William M. Landes & Richard A. Posner, *The Economics of Anticipatory Adjudication*, 23 J. LEGAL STUD. 683, 715 - 19 (1994) (discussing how early adjudication is often based on less information).

[217] *See* Landes & Posner, *supra* note 216, 707 – 08. On a different note, deciding the issue early may have some advantages, such as reducing litigation costs, because it might induce early plea-bargaining as it informs parties of whether some evidence will be admissible or not. Collecting cites.

Also note that any errors in pre-trial proceedings may be corrected on interlocutory appeal, but there is no guarantee of such correction (as the appellate court also has little information), and increasing such procedures may increase the costs of trials for both parties. However, if we are in regime of asymmetric appeal rights, it might be better to have such interlocutory appeals rather than asymmetric appeal rights with no interlocutory appeals.

[218] *See* Christopher R. Drahozal, *Judicial Incentives and the Appeals Process*, 51 SMU. L. REV. 469, 474-6 (1998) (noting that judges seek to maximize their utility and may take into account other factors such as leisure and opportunity for promotion as trials continue on).

may depend again on many factors.[219] Note also that such appeals are not available for all issues that might result in an acquittal.[220]

C. Increase In Prosecutorial Abuse Of Defendant's Rights.

If asymmetric appeal rights increase the prosecutor's incentive to win in the initial trial then the prosecutor might not only spend greater resources in the initial trial, but also may be more willing to trample over some of the defendant's other rights to obtain a conviction. With only one chance to obtain a conviction some prosecutors might think that it is better to obtain damning evidence, even by stepping on the defendant's rights (and take their chances on a defendant's potential appeal or challenge), rather than not step on defendant's rights and almost certainly lose the initial trial with no further recourse. [221]

If so, then asymmetric appeal rights have a few further negative consequences. First, they may increase the frequency of violations of the defendant's rights (e.g., unreasonable search and seizure, questionable arrest and interrogation practices) relative to symmetric appeal rights.[222] This means that the social costs associated with violating defendant's rights might rise with asymmetric appeal rights.[223] Second, even if the defense can successfully appeal a conviction obtained through such methods, we still have the defense bearing greater anxiety and litigation costs (e.g., defense must appeal this point more frequently now). Thus,

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[219] *See* Kaplow, *supra* note 12, at 345 (noting that accuracy depends on the level of enforcement effort and level of sanctions). If plea bargaining is brought into the picture then the effects become even more complex. For example, if the appeals court finds for the prosecution early on that might increase the chance of a plea-bargain. However, if the appeals court finds for the defense that might delay a plea-bargain. *See also supra* Part V.E.2.

[220] *See* KAMISAR, ET AL., *supra* note 68, at 1581 – 85.

[221] *See* Gershman, *supra* note 161, at 430 (noting that prosecutors are well aware of the impact of inadmissible evidence on a jury and that they realize they are more likely to benefit from using inadmissible proof). The prosecutor may also decide that such a case is not worth pursuing, but that again results in a distortion of the choice of socially desirable cases as in Shavell, *supra* note 101.

[222] *See* POSNER, *supra* note 75, at 601 (noting that flouting the rules presumably increases probability of conviction), Weeks, *supra* note 144, at 834 (explaining how "railroading" a defendant often results in greater convictions).

[223] *See generally* Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights*, 1973 DUKE L.J. 1153, 1172-77 (1973) (discussing the values that are furthered by allowing a person to litigate and the need for procedural safeguards).

asymmetric appeal rights may have one further perverse effect – increasing abuse of the defendant's other Constitutional rights.

D. Asymmetric Appeal Rights May Lead To Multiple Criminal Offenses That Defendant May Be Charged With Later.

If Congress thought that asymmetric appeal rights were resulting in a great denial of justice (i.e., too many false acquittals) then one response could be to increase the number of offenses that a defendant can be charged with from a simple act or not to remove duplicative offenses for the same act that have developed over time.[224] If drafted properly these duplicative offenses may not fall foul of the Double Jeopardy clause. [225] The prosecutor might then decide to only bring one charge in this trial and save the other potential charges for later trials in case this first trial does not succeed. This would give the prosecution more than the initial trial in which to convict the defendant – or more than one bite at the apple.

This move has policy implications. Increasing the number of potential offenses (or maintaining too high a number of offenses) and allowing multiple trials should both increase the chance of a false conviction and increase litigation costs for the defense.[226] Subjecting a defendant to multiple full trials may cost the defense and state more than subjecting the defendant to appeals (appeals tend to be focused on a few issues only).[227] This might happen if the prosecution could

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[224] *See* Steinglass, *supra* note 5, at 373 (suggesting that asymmetric appeal rights might be behind "the lack of impetus to reform liberal reprosecution rules in the context of similar offenses"). Multiple offenses may reduce the prosecutor's incentive to spend more in the initial trial on the first charge, but they create the perverse effects I describe in the text.

[225] *See* DRESSLER, *supra* note 4, at 621 – 28 (discussing how the courts have attempted to define "same", quite restrictively, for purposes of Double Jeopardy). *See id.*, at 627 (explaining that even if two statutory provisions constitute the "same offense" under the applicable law, multiple prosecutions are not barred in all circumstances).

[226] This is exactly what Double Jeopardy is designed to prevent – wearing down the defense with multiple trials. *See supra text accompanying notes* 90 – 94. There appear to be certain states that have drafted "anti-carving" legislation that appears designed to force prosecutors to bring all their charges in one trial. Collect cites. This suggests that splitting charges is something that is of concern to some legislatures. Collect cites.

[227] *See* David Lopez, *Why Texas Courts are Defenseless Against Frivolous Appeals: A Historical Analysis with Proposals for Reform*, 48 BAYLOR L. REV. 51, 157 n. 468 (1996) (discussing how California courts determine the average cost per appeal by using a complicated formula that includes total annual judicial hours, cost per

bring two or more extra trials (e.g., one act triggered three separate offenses) because then the costs of three full trials would probably exceed the cost of one full trial, an appeal, and a potential retrial.[228] In other words, this result may be even worse than asymmetric appeal rights or symmetric appeal rights by themselves.[229]

Another concern with multiple offenses is that we might overdeter defendants. For example, assume the defendant is actually guilty of one offense and if convicted should, under an optimal scheme, serve 10 years in prison (case 1). If we split the offense into two offenses, to combat problems caused by asymmetry in appeal rights, then the defendant might face two offenses in two trials – one with a 10 year prison term and another with an 8 year prison term (case 2). The expected sanction in case 2 might be greater than the expected sanction in case 1 leading to overdeterrence if the sanction in case 1 was initially optimal.[230]

Thus, the harmful effects of asymmetric appeal rights might spread beyond the effects on error rates and litigation costs. In light of this litany of potential concerns with asymmetric appeal rights some greater consideration of the role and justifications for asymmetric appeal rights appears warranted. I conclude this paper with a discussion of two other purposes of asymmetric appeal rights that might still make them worthwhile in spite of all the above-enumerated potential effects.

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average "judge hour" and several other factors). Lopez determined that the average cost of an appeal in Texas was $1,909.

[228] The key factor is that there must be more than 2 offenses that the defendant can be separately charged with. If there are only two offenses then the defense faces two full trials (under a multiple offense regime and asymmetric appeal rights) versus one full trial, a potential appeal, and a potential retrial under a symmetric appeal rights regime and only one offense.

[229] In addition, multiple offenses place a heavier burden on the judiciary to define "same" offense to try to deal with such strategic behavior under Double Jeopardy or use other constitutional prohibitions to do so. *See also* Amar, *supra* note 6, at 1813 – 37 (discussing the awkward attempts to define "same" in the Double Jeopardy clause).

[230] I expect overdeterrence because in case 2 the defendant faces some chance of receiving the 10 year sanction as in case 1, but also faces an additional chance of bearing the 8 year sanction.

Note that if the sanction in case 1 underdeterred to begin with then case 2 might improve on matters. However, in such a scenario we should simply increase the sanction in case 1.

VIII. OTHER JUSTIFICATIONS FOR ASYMMETRIC APPEAL RIGHTS

The discussion so far has focused on the incentive effects of Double Jeopardy's asymmetric appeal rights. However, Double Jeopardy and, most specifically, asymmetric appeal rights may be motivated by a desire to protect jury nullification or to constrain self-interested prosecutors or constrain politically motivated or targeted prosecutions.[231] This Part examines how these two concerns may affect or qualify the analysis.

A. Jury Nullification.

The prohibition on government appeals of acquittals may be justified "because the acquittal may be a product of the jury's legitimate authority to acquit against the evidence."[232] In other words, the jury's power appears to include the power to ignore the facts and acquit the defendant.[233] Further, following an acquittal it is not clear whether the reason for the result is because the jury misinterpreted the facts or because the jury simply decided to acquit in spite of the facts.[234] Thus, one may argue that we cannot speculate

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[231] *See* Westen & Drubel, *supra* note 6, at 122 – 55 (discussing jury nullification as an operative factor in Double Jeopardy jurisprudence).

[232] *See id.*, at 129.

[233] *See id.*, at 129 – 30.

[234] *See id.*, at 130. Note that if we required (or allowed) special verdicts then we might be able to ascertain the cause of the acquittal and could treat acquittals arising from erroneous interpretations of the facts differently from acquittals reflecting nullification. One may argue that this would not help us because we would not know whether, even if the jury had the facts right, they would still have acquitted the defendant. Presumably, that could also be answered by asking the jury at the time of the initial verdict whether if the facts were different (i.e., more favorable to the prosecutor) they would vote differently. At present, I can see two problems with this – first for some cases this may result in extremely complex verdict forms. Second, it may indicate to the jury that they have the power to nullify the law – something courts have been remarkably coy or shy to do. This second factor only raises the broader question of why do we hide the jury's right / power to nullify the law from jurors. *See* David N. Dorfman & Chris K. Iijima, *Fictions, Faults, and Forgiveness: Jury Nullification in a New Context*, 28 U. MICH. J.L. REFORM 861, 894-95 (1995) (discussing the reasoning for not informing a jury of its nullification power). Note that not telling the jury about this power may provide an interesting method for ensuring that the power is used in exceptional cases. In other words, cases where the result according to the strict reading of the law is so offensive to community notions of justice that jurors acquit even when they do not know they have the power to do so. This suggests that refusing to inform the jury of its power to nullify may serve as a screen to ensure that only the most egregious instances of oppression are remedied.

as to the causes for the acquittal without potentially running afoul of the jury's authority to nullify. [235]

Using jury nullification as a justification for asymmetric appeal rights requires us to examine at least two questions. First, what is the value of jury nullification and how might it be brought into our analysis. Second, how well does jury nullification explain the ban on government appeals of acquittals.

1. The value of jury nullification.

Jury nullification may be of value for at least two reasons. First, we may value jury decisions simply for themselves – as an expression of the popular will.[236] In this case, the desire to protect jury nullification is the desire to keep the benefits arising from the expression of popular will.

If this is the benefit of jury nullification then my analysis has identified some potential costs associated with obtaining this benefit and may allow us to consider whether the benefits are worth the costs. However, there may be some reasons to doubt that jury nullification represents *simply* the desire to protect an expression of popular will.

If we wanted to protect the jury's expression then presumably we would do that by protecting both its acquittals and its convictions. However, we do not protect jury convictions from appeal by the defendant.[237]

Perhaps, another reason for jury nullification is that it works to protect the *defendant* in some way rather than simply to protect the

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Collecting cites. In addition, one would have to consider the current constitutional ban on special verdicts (although this does not seem to stop the jury from providing special verdicts, but simply prevent the judge from forcing them to give special verdicts over the defendant's objections). *See* LAFAVE & ISRAEL, *supra* note 81, at 1050 (noting that special verdicts in criminal cases are not favored); Eric L. Muller, *The Hobgoblin of little Minds? Our Foolish Law of Inconsistent Verdicts*, 111 HARV. L. REV. 771, 835 (1998) (discussing how courts have resisted special verdicts in criminal cases because such verdicts would endanger the jury's capacity to be merciful). *See* Westen & Drubel, *supra* note 6, at 130 – 132.

[235] *See* Westen & Drubel, *supra* note 6, at 129 – 30.

[236] *See* Paul H. Robinson, *The Federal Sentencing Guidelines Ten Years Later: An Introduction and Comments*, 91 NW. U. L. REV. 1231, 1245 (1997); Dan M. Kahan, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269 (1996); Dan M. Kahan, *Social Meaning and Economic Analysis of Crime*, 27 J. LEGAL. STUD. 609 (1998).

[237] *See supra* Part II.

jury's expression of popular will.[238] As Westen & Drubel suggest jury nullification may reflect a desire to allow the jury "to soften, and in the extreme case, to nullify the application of the law in order to avoid unjust judgments."[239] This suggests that the jury's power to nullify is some kind of check on government oppression through the misuse of the criminal process or simply a check on abuses of prosecutorial authority. [240] How valuable jury nullification is as a check on these kinds of abuses depends on one's beliefs about the likelihood of government or prosecutorial abuse and how effective the other criminal procedural protections (and juries) are at preventing or containing it.

As I shall discuss in Part VIII.B, abuses of prosecutorial authority may generate significant costs and may provide a justification for asymmetric appeal rights. However, focusing on abuses of prosecutorial authority changes the argument from jury nullification justifying asymmetric appeal rights to concerns about the costs of abuses of prosecutorial authority potentially justifying jury nullification and asymmetric appeal rights. Consequently, jury nullification may not be the most important *purpose* behind asymmetric appeal rights, but it might be a *manifestation* of that purpose.[241]

Before discussing in more detail some of the costs associated with abuses of prosecutorial authority I consider whether jury nullification could explain the broad contours of asymmetric appeal rights as they apply in practice. It would appear that it does not.

2. Jury nullification and asymmetric appeal rights.

Jury nullification does not appear to fully explain the ban on appeals of acquittals. For example, asymmetric appeal rights apply

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[238] *See* Westen & Drubel, *supra* note 6, at 130.

[239] *See id.*

[240] This seems to be what Westen & Drubel suggest is the primary function of jury nullification. *See id.*, at 130, 134. *See also* Dorfman & Iijima, *supra* note 234, at 892 (recognizing the importance of jury nullification because of the fact that the "jury plays a unique role in the judicial process independent from that of other government actors.")

[241] *See, e.g.*, Anne Bowen Poulin, *The Limits of Double Jeopardy: A Course Into The Dark? The Example: Commonwealth v. Smith*, 39 VILL. L. REV. 627 (1994); Andrew D. Leipold, *Race-Based Jury Nullification: Rebuttal (Part A)*, 30 J. MARSHALL L. REV. 923 (1997); James Joseph Duane, *Jury Nullification: The Top Secret Constitutional Right*, 22 No. 4 LITIGATION 6, 7 (1996) (noting that the roots of jury nullification run deep into the Double Jeopardy Clause).

whether the initial trial was adjudicated by a judge or a jury, whereas jury nullification, by definition, is limited to jury trials.[242]

In addition, consider the exception to the rule prohibiting appeals on acquittals that allows government appeals when bribery may have been involved in the initial trial. [243] We could ask why we permit these appeals given that we cannot know whether the jury would have acquitted if there had been no bribery – just the same as one cannot know whether the jury would have acquitted if erroneously excluded evidence (prejudicial to the defendant) had been admitted. Perhaps, one could argue that evidence of bribery suggests that the jury is somehow tainted and that its authority to nullify is thereby cast in doubt. I suppose this may be a justification for the exception, but it is not clear why the jury result is not tainted if the judge makes multiple errors favoring the defense at trial. [244]

Perhaps the best argument for the exception is that the jury is tainted *by the defendant's behavior* rather than anyone else's behavior and that the defendant should not be permitted to benefit from such

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[242] *See* U.S. v. Jenkins, 420 U.S. 358, 365 (1975)(Rehnquist, J., holding that "[s]ince the Double Jeopardy Clause of the Fifth Amendment nowhere distinguishes between bench and jury trials, the principles given expression through that Clause apply to cases tried to a judge"). *See* Westen & Drubel, *supra* note 6, at 132 – 33. Note also that *Kepner* is a case involving a bench trial. *See supra text accompanying notes* 16 - 21.

Perhaps the decision to vest nullification authority in a judge is designed to prevent defendants from selecting a jury trial just to take advantage of its nullification power. *See* Westen &Drubel, *supra* note 6, at 132 – 33. Although this is plausible, it raises a number of interesting questions. First, it is not entirely clear why we would want to prevent defendants from choosing jury trials in this manner. Is there some greater value to the justice system in bench trials rather than jury trials that might drive us to discourage the choice of jury trials? Perhaps, bench trials are cheaper than jury trials and hence we want the defendant to save the state some resources in the trial. Jury trials cost more in terms of evidence admission and sequestering juries, etc… . *See* Khanna, *supra* note 75, at 1518 (1996). *See also* KAMISAR, ET AL., *supra* note 68, at 30 (noting that "[o]ver the country as a whole, however, roughly 70% of all felony trials [are] tried to a jury"). Perhaps bench trials are more accurate than jury trials. If so, then we would want to make it harder to obtain jury trials, whereas our system tends to make it easier (by giving a Constitutional right to it, for example). *See* Duane, *supra* note 241, at 6 (discussing how the Sixth Amendment grants the accused an inviolable right to a jury determination of his guilt or innocence in all criminal prosecutions for serious offenses).

[243] *See supra text accompanying notes* 41 – 46.

[244] Note that if the judge made multiple errors favoring the *prosecution* that might amount to being "biased" and result in the conviction being immediately overturned. *See* DRESSLER, *supra* note 4, at 60 (noting that if a judge is considered biased that would result in a reversal of the conviction automatically).

activity. Although this sounds compelling it is not clear why this same argument cannot be made to overturn acquittals obtained because the defendant deliberately injects prejudicial error.[245]

In this section I have argued that either jury nullification is a wobbly justification for, and does not explain certain parts of, asymmetric appeal rights or that jury nullification may be a manifestation of a deeper concern that might justify asymmetric appeal rights – constraining abuses of the criminal process.

B. Constraining Self-Interested Prosecutors or Constraining Politically Motivated or Targeted Prosecutions.

Double Jeopardy and asymmetric appeal rights, by limiting the number of times the prosecution may go after and "wear down" a particular defendant, may constrain self-interested prosecutors or constrain politically motivated or targeted prosecutions.[246] If targeted or selective prosecutions were likely one might be concerned that this might induce, amongst other things, lobbying of prosecutors by the politically more dominant groups (and potentially even by the politically less powerful groups) to enforce the law in selective ways to benefit that particular group.[247]

However, the abuses of prosecutorial authority resulting in selective law enforcement generate costs, in terms of the resources expended in the lobbying process and costs related to the reduced

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[245] This may be a sufficient ground for granting a mistrial. *See* DRESSLER, *supra* note 4, at 605 (discussing *Arizona v. Washington*, 434 U.S. 497 (1978) where the judge granted a mistrial following "improper" remarks by defense counsel).

[246] *See* Lockhart v. Nelson, 488 U.S. 33 (1988)(evincing a concern with government oppression); *Scott, supra* note 31, at 91 (noting the danger that the defendant will be "worn down" by the superior resources of the government); Green, *supra* note 30, at 187-88; Ohio v. Johnson, 467 U.S. 493, 498-99 (1984). *See* Hylton & Khanna, *supra* note 90 *(*discussing how concerns with the costs associated with misuses of prosecutorial authority in the criminal context may provide a justification for many procedural protections); Rosenthal, *supra* note 90, at 960 (noting the win at all cost mentality of some prosecutors and stating that "The double jeopardy clause…provides the one express constitutional limit on the exercise of the prosecutor's otherwise unchecked power."). I thank Keith Hylton for his very helpful thoughts and comments and for suggesting this line of inquiry.

[247] *See* Hylton & Khanna, *supra* note 90, at 19 – 21 (discussing lobbying related costs), 21 – 24 (discussing deterrence related costs when the law is perceived to be selectively enforced and "political" which include reduced deterrent effects, reduced stigma and expressive effects, and potentially increased enforcement costs). For discussions of lobbying associated costs or rent-seeking see generally, BUCHANAN, ET AL., *supra* note 91; Friedman, *supra* note 91.

deterrent effect of the law when it is perceived to be "political", which are largely wasteful from society's perspective.[248] Further, these costs might arise regardless of whether the defendant was actually guilty or not.[249] These costs could be quite large and may, together with some of the other justifications discussed in this paper, provide a sufficient justification for asymmetric appeal rights even at the expense of some increased errors and litigation costs.[250] In addition, reducing costs associated with abuses of prosecutorial authority provides a justification that squares more cleanly with current practice (e.g., asymmetric appeal rights apply to bench and jury trials, which seems more consistent with reducing abuses of prosecutorial authority rather than simply jury nullification).

The question is then how might asymmetric appeal rights constrain prosecutors? Asymmetric appeal rights may constrain the politically motivated prosecutor by providing him with only one trial in which to convict the defendant. Limiting the number of trials a prosecutor has against one defendant makes it harder to effectively use the criminal process at the behest of a particular group, which makes the payoff from lobbying smaller.[251] This may discourage lobbying activities more than symmetric appeal rights.[252]

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[248] *See* Ronald A. Cass and Keith N. Hylton, *Preserving Competition: Economic Analysis, Legal Standards and Microsoft*, 8 GEO. MASON L. REV. 1, 33 (1999) (noting that rent-seeking litigation is an undesirable, yet common effect of legal rules).

[249] *See* Hylton & Khanna, *supra* note 90. Note that a defendant may be guilty and still subjected to a politically motivated prosecution. *See* Paul Hoffman, *Double Jeopardy Wars: The Case for a Civil Rights "Exception"*, 41 UCLA L. REV. 649, 668 (1994) (discussing how guilty police officers were still subjected to politically motivated prosecutions). This would occur for example where enforcement was only brought against one kind of guilty party but not others or against one group and not others. *See* Pamela Cothran, Project, *Twenty-Third Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1992-1993*, 82 GEO. L.J. 771, 775 (1994). If the defendant was actually innocent then the costs of such politically motivated prosecutions might be the costs of potential false convictions, litigation costs, and rent-seeking related costs (i.e., lobbying and dilution of deterrence). If the defendant was actually guilty then the costs of politically motivated prosecutions would not include the costs of a false conviction.

[250] *See* Hylton & Khanna, *supra* note 90. *See also* Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, *in* BUCHANAN, ET AL., *supra* note 91, at 39 - 50 (suggesting that the truly significant social costs of monopolies are not the reduction in output, but the costs associated with lobbying and trying to maintain a monopoly (i.e., rent-seeking)).

[251] *See* Hylton & Khanna, *supra* note 90, at 16 – 17.

[252] *See* Hylton & Khanna, *supra* note 90, at 16 - 17. *Cf.* Friedman, *supra* note 91, at S261 – 64.

In conclusion, the reduction of the costs associated with abuses of prosecutorial authority may indeed be a justification for asymmetric appeal rights, and perhaps its most convincing one. This suggests that an additional matter of inquiry is warranted in this area – focusing on how various rules might reduce "abuses of authority" costs in addition to how the various rules affect errors and litigation costs.

IX. CONCLUSION

Double Jeopardy is a frequently discussed topic. However, there has been little effort to examine what effects Double Jeopardy might have on litigant behavior and trial outcomes. This paper examines one aspect of Double Jeopardy, asymmetric appeal rights, and inquires into what effects that may have on litigant behavior and trial outcomes. My analysis shows that asymmetric appeal rights may generally have ambiguous effects on false convictions, false acquittals, and litigation costs. Thus, it is not at all clear that asymmetric appeal rights are likely to help defendants or that they help defendants much as far as false convictions and litigation costs

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Although this sounds like quite an interesting and compelling justification for asymmetric appeal rights, some cautionary points are, perhaps, in order. First, the correct question should be: *what are the net benefits of asymmetric appeal rights versus the net benefits of symmetric appeal rights and which net benefit is higher.* Asymmetric appeal rights may constrain the costs associated with abuses of prosecutorial authority somewhat better than symmetric appeal rights and allow for greater jury nullification, but may, in some situations, induce more errors and greater litigation costs than symmetric appeal rights. Whether the reduction in these "abuses of authority" costs is worth bearing the other potential costs is a matter worthy of further inquiry. One could treat the "abuses of authority" costs as being another cost of a false conviction. However, I refrain from doing that because it is possible to have abuses of authority costs even if the defendant is actually guilty. *See supra* note 249.

Second, if my analysis in Part VII.D is correct (that asymmetric appeal rights might induce the creation or maintenance of multiple offenses) then asymmetric appeal rights may provide prosecutors with even more "weapons" to use against political foes or politically unpopular defendants thereby undermining the very benefit that asymmetry might provide. The presence of multiple offenses does not necessarily mean there will be multiple trials, but it does increase the possibility of it relative to where there are no multiple offenses. One point to note is that the legislature can create multiple offenses under symmetric appeal rights too, but my argument is that the incentive to do so is less under symmetric relative to asymmetric appeal rights.

Note the analysis may also urge for perhaps a broader definition of "same offense" in the Double Jeopardy context or some other means of constraining this type of prosecutorial abuse.

are concerned. In addition, asymmetric appeal rights could lead to skewed development in the law and trial court rulings, potentially undesirable movement of issue resolution to earlier points in the trial, increased violations of defendants' other Constitutional rights, and the creation or maintenance of multiple offenses to convict the defendant.

In spite of these potential costs, concerns with reducing politically motivated prosecutions, and the costs they generate, may provide a justification for asymmetric appeal rights. How far this goes, however, is a matter for further debate.

At a minimum, my analysis suggests that simply focusing on how various rules affect errors and litigation costs may not provide a complete picture. One may need to look more broadly at how the various rules influence uses and abuses of prosecutorial authority to ascertain when, and how, might defendants be helped by the asymmetric appeal rights attached to Double Jeopardy.