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Bargaining with Double Jeopardy

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ABSTRACT

Virtually every burden of proof is influenced by a rule regarding relitigation. In criminal law, the prosecutor is prevented from repeatedly drawing from the urn, as it were, by the double-jeopardy rule, which reinforces the beyond-a-reasonable-doubt standard. We suggest that if law were to permit defendants to waive double-jeopardy protection, private and social benefits might follow. The benefits derive from the likelihood that prosecutors—like most people who can take a test but once—overinvest in preparation. Somewhat similarly, though far afield, deficit spending by a legislature might be linked to the fact that spending proposals that are rebuffed can be retested or revisited. We contemplate offering defendants the option of waiving their double-jeopardy protection in anticipation of reduced prosecutorial investment. Innocent defendants might then be more likely to waive, in which case there will be socially beneficial sorting of defendants.

1. INTRODUCTION

The protection against being "twice put in jeopardy" of serious punishment "for the same offense" is in uneasy equilibrium.[1] The protection could be stronger. For example, if a jury trial ends, which is to say is abandoned, after an 8–4 vote for acquittal, there is no protection for

1. U.S. Constitution, amend. 5: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." For comparable rules in other jurisdictions, see U.S. Department of Justice (1987, sec. 3B).

the accused, and the prosecutor is entitled to try again.[2] But the protection is also surprisingly strong. If the trial judge errs in finding that the defendant was entrapped, for instance, the defendant cannot be tried again (*United States v. Scott,* 437 U.S. 82 [1978]). Such remarkable doctrinal developments, or even anomalies, normally reflect multiple aims, or clashing theories about the purpose, of law.

We suggest that by expanding the scope of inquiry beyond criminal law, and piling on the peculiarities, it is possible to see double jeopardy in a new light. The fundamental question is not (or not only) whether the defendant is sufficiently protected against the government's power to impose burdens by repeated prosecution, but rather how to set burdens of proof in coordination with opportunities for retesting. The goal, presumably, is to get accurate results. Put this way, we can say that virtually every legal system specifies a variety of burdens of proof for different kinds of claims and then secures each specification with another, nominally unrelated rule pertaining to relitigation. In criminal law, where a prosecutor might be required to prove guilt beyond a reasonable doubt, the prosecutor is prevented from repeatedly drawing from the urn, as it were, by the familiar and nearly universal rule of double jeopardy. Everywhere, even in the least protective jurisdictions, the rule prevents the government from relitigating a case where a defendant was acquitted and where no new evidence (of the original crime or of a tainted first trial by virtue of perjury or corruption) has materialized.[3]

Without the double-jeopardy rule, the government might bring charges over and over again until it won. "Beyond a reasonable doubt" would have a very different meaning, in both probabilistic and deontological terms, if the government could try again even when a unanimous jury found that the government failed in its first attempt to meet its burden of proof. Less robust forms of the double-jeopardy protection are widespread, but in all such jurisdictions the idea of preventing repeated draws from the urn retains its force. Where the protection is

2. The trial is regarded as having been aborted, with the mistrial a manifest necessity because the jury could not reach a unanimous (or other acceptable supermajority) verdict. *Richardson v. United States*, 468 U.S. 317 (1984). See also Amar (1997).

3. There is considerable variety with respect to the government's ability to go to trial a second time after new evidence has materialized. The United States is at one end of the spectrum; evidence of judge or jury corruption in the first trial might make that less than one complete trial (see Rudstein 2007–8, p. 218 n. 18). In England, the Criminal Justice Act of 2003 applies to certain serious offenses and eliminates an acquitted defendant's double-jeopardy right if "new and compelling" evidence against him is discovered. See Rudstein (2006–7).

stronger, as where the government may not relitigate even when significant new evidence of guilt materializes, the repeated-draw idea is yet clearer.

There are, to be sure, other perspectives on the double-jeopardy rule, and we have already hinted that double-jeopardy doctrine reflects multiple goals. At least three theories stand out for their pedigree and longevity, and these have little connection to the high burden of proof required for criminal convictions. There is the notion that without the double-jeopardy protection, a defendant could be unfairly harassed by the government or by an individual prosecutor (see *Green v. United States*, 355 U.S. 184, 187–88 [1957]; Thomas 1998, pp. 50–52). This harassment theory, as we might call it, differs from a nullification theory under which the double-jeopardy rule stands guard over the power of a jury to nullify a criminal law (Westen 1979–80; Westen and Drubel 1978). We prefer to think of the nullification theory as part of the repeated-draw perspective sketched above, because at its root is the danger that the prosecutor will reverse the jury's act of nullification by appealing to a new jury and even screening recruits to that second effort. One might also regard the idea that the double-jeopardy rule provides finality as something of a theory about the doctrine (Westen 1979–80). It allows the parties to allocate their resources intelligently when litigating, for it assures them that when the game is over it is truly done. If the rule were otherwise, it is mostly defendants who would be disadvantaged, so the finality and harassment theories are related. But finality is what allows the parties to invest wisely in the first—which is to say the final—round of litigation, though, as we will see, this might not always be the optimal arrangement.

The repeated-draw perspective is by its nature more protean than the harassment and finality theories because the former can illuminate the two-way character of the double-jeopardy rule—though it must immediately be emphasized that in most jurisdictions, and along many dimensions, it is two-way but, nevertheless, asymmetrical. Only the defendant is widely held to have the right to appeal a conviction on a question of law (but generally then to face retrial under the new rules of the game, unless that first conviction contained in it an implicit acquittal of the new charge)[4] and is in most places and circumstances

4. Although the criminal defendant does not enjoy a constitutionally protected right to appeal (see *McKane v. Durston*, 153 U.S. 684, 687 [1894]), every U.S. state as well as the federal system provides for at least one appeal as of right following a conviction. See Whitebread and Slobogin (2000, pp. 810–11).

entitled to a retrial when dramatic new evidence develops after the earlier trial is complete (Griffin 2001).

Among the perspectives introduced here is the notion that limitations on relitigation have something to do with whether the relevant conduct or facts are located in the past or in the future, or perhaps whether they are fixed or in flux. Section 2 exploits this distinction and aims to make sense of that part of double jeopardy that is or might be applicable to civil litigation, legislation, and other matters. The discussion deploys the repeated-draw idea. Section 3 then incorporates the conventional harassment theory and suggests that there are situations in which it might be sensible to allow criminal defendants to be able to waive the double-jeopardy protection. Defendants might accept the risk of asymmetric, multiple draws from the urn in return for the likelihood that the prosecutor will invest less in the first trial. It is plausible that it is the innocent defendants who will be more likely to take this chance.

2. BACKWARD- AND FORWARD-LOOKING DETERMINATIONS

2.1. Civil Trials and Tests

Protection against double jeopardy is not limited to criminal trials, though it travels under the banner of preclusion rules in civil litigation, where a single defendant is also protected against repeated draws. In other settings, repeat evaluation is permitted. Many licensing schemes incorporate examinations, and most of these permit retesting. Thus, person A may fail a road test for a driver's license, a pilot's licensing exam, a vehicle safety check, a bar exam, or the requirements of securities law, and, in each of these settings, reapplication and retesting are permitted. In some circumstances or jurisdictions there is, in the end, a limit to the retesting; in some there are waiting periods before one can be retested; and here and there one must disclose prior failures and perhaps be subject to stricter review.

In most of these situations there is nothing equivalent to a protection against double jeopardy. One obvious explanation for this difference between criminal trials and other tests is that the more liberal rules allow for learning and improvement between tests. The point is not to refine or stabilize a burden of proof with regard to past events but to qualify candidates for future performance. In contrast, most criminal trials aim to determine whether a defendant violated a law in the past. The inquiry concerns a relatively fixed situation, and the fact finder is not asked to

predict the defendant's future behavior.[5] Still, there is something to be learned from licensing exams that may be taken multiple times. To the extent that a test's outcome is random or subjective, the repeat test taker will face a lower standard than one who is limited to a single testing opportunity. In turn, the testing authority can raise the burden of proof in order to recalibrate the effective passing score or standard for licensing.

Why would a licensing authority prefer multiple test taking with a higher passing score over a single test with a lower passing grade? A practical answer is that the ability to retest reduces the political and other costs associated with a single-chance regime in which claimants will expend resources in order to show that there was something awry with the single test or with their capacity for test taking at the appointed time. These costs are avoided when the disappointed test taker can simply be told to submit to retesting. There is also the likelihood that false positives and negatives are not equally weighted and that the test's imperfections cause us to prefer a system in which there is retesting even though this will bring about the licensing or acceptance of applicants who would fail a perfect test. Indeed, when the error costs are the other way around, and false positives are perceived as costly, the licensing authority may require the test taker to pass repeatedly, or an employer might require a series of interviewers to approve a job candidate.

Trials are among the most expensive and detailed of tests. Indeed, when a conventional test is long, costly, and individualized, and thus like a trial, retesting is usually disallowed. For example, high schools do not allow students to repeat a year or two of school in order to improve—or make more accurate—their grades. Nor would we expect colleges to take seriously grades earned by a repeating student. Similarly, an employer that engages in a day-long set of interviews with a candidate for employment, and then rejects the applicant, rarely calls back that candidate for another interview, even or especially in a subsequent employment season. The first of these cases is normally, and perhaps correctly, understood as a means of ensuring that high school students compete for grades with similarly situated classmates. But the larger story is about the cost of evaluation and the potential for improvement. A college will often admit a previously rejected applicant after that can-

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5. There are certainly many civil trials in which part of the inquiry is directed toward the future, as when a court estimates a plaintiff's tort damages without full knowledge of the recovery from injuries or of future employment or when courts are asked to assess future consequences and decide whether to issue injunctions.

didate takes a year or two to improve his or her skills. The college, like a typical motor vehicle bureau, is looking for evidence of likely future behavior and accomplishments. A criminal trial does not do so. In the case of the employer, the months spent elsewhere are unlikely to change the character, problem-solving ability, or fit with teammates that the employer observed earlier, and at sufficient length.

Little thus far distinguishes civil trials from criminal trials. And indeed the law of issue preclusion and claim preclusion, in the United States and elsewhere, similarly protects single defendants and shares other attributes with the law of double jeopardy (Poulin 2003–4). There are the ideas of finality and nonharassment of private litigants. A more sophisticated view of preclusion rules emphasizes that the litigating parties should have enough information about future preclusion (or not) in order to participate and invest optimally in the early cases. Very little depends on the claim that double jeopardy and issue or claim preclusion are two sides of the same coin. Thus, we do not maintain that a jurisdiction with relatively strong double-jeopardy protection will also be one with relatively strong preclusion rules. Both calculations may reflect the harassment, finality, and repeated-draw concerns, but only one will reflect the nullification idea, and, in any event, a stronger or weaker double-jeopardy rule may be a function of the real burden of proof that the jurisdiction seeks to maintain in disparate areas of law.

The utility of the repeated-draw idea as applied to preclusion rules might extend to a comparison of jurisdictions. Where the British rule regarding litigation costs is in effect, a private litigant who loses in one case will be less inclined to relitigate than will one where each side bears its own costs. After all, the loss at trial provides information and probably causes the losing party to revise downward its estimate of the likelihood of a better result in the next draw. This is simply another way of saying that an alternative to double jeopardy is a rule that imposes an extra cost on any loser who seeks to try again. The conventional double-jeopardy rule in criminal law represents something of an extreme version in which the cost is prohibitive.

When backward-looking inquiries afford the opportunity for repeated draws, it is apparent that the test taker can conserve resources. But it is a mistake to think that criminal law consistently protects defendants by forbidding the government second chances—and thus the opportunity to conserve law-enforcement resources. For example, when the government fails in an effort to detain a suspect or to obtain a search

warrant, it is free to try again.[6] It will normally invest more in support of its request, inasmuch as it has learned that its previous claim for detention or search was insufficiently supported by the evidence. The prosecutor is even free to impanel another grand jury when an indictment was not returned on the first try (*United States v. Williams*, 112 S. Ct. 1735, 1743 [1992]; *United States v. Thompson*, 251 U.S. 407, 413–14 [1920]; *United States v. Pabian*, 704 F.2d 1533, 1533–37 [11th Cir. 1983]). And of course a prisoner can seek parole even if parole was previously denied.[7] It is apparent that a single-chance, or strict double-jeopardy, rule reduces the cost of testing itself but can increase the cost of a party's preparation for the test.

2.2. Legislation

The past-future, or fixed-flux, distinction is most useful when we turn to the legislative chamber. Many pieces of legislation are renewed or simply take on a life of their own, and we might think of these as cases where legislators regard themselves as bound by something like precedent. It is conventional to say that this influence of the past comes from political pressure or sunk costs rather than some legal requirement, but of course the political pressure might come from the same kind of reliance or expectations that motivate stare decisis within the judiciary. In any event, the most interesting cases are those where an interest group has lost in legislatures past. If, for example, the losing proposal was that a new bridge be built, then we might understand reconsideration in one legislative session after another as sometimes efficient or sensible because population or technological changes might make the proposed bridge a better or worse investment than it was in the past. If after several tries the bridge is approved and funds are appropriated, it is plausible that the cost-benefit calculus has simply changed.

But what if there is legislative approval but no such cost-benefit change after the proposal was repeatedly rejected in previous legislative sessions? Perhaps elections have brought a different coalition of political groups into power, and in that case the question is why this repeated draw from the urn should be tolerated with respect to legislation regarding bridge building, charter schools, or airbags, for example, but

6. Evidence suggests that warrant applications are rarely rejected, in part because information can be added during the application process. See Van Duizend, Sutton, and Carter (1985, pp. 30–31); Price (2002, pp. 153–54).

7. See United States Parole Commission, *Rules and Procedures Manual*, sec. 2.14 (June 30, 2010) (http://www.justice.gov/uspc/rules_procedures/uspc-manual111507.pdf).

not with respect to criminal cases, or even most civil litigation. The contrast is most interesting where the change is essentially irreversible. Airbag requirements are easily reversed, but that example drives home the importance of new evidence—and of course many legal systems also dispense with the double-jeopardy protection in criminal law when there is important new evidence. The bridge, however, may have been proposed and rejected five times, but once it is approved and built it will be pointless to tear it down. There may be new evidence, but a repeated-draw theory troubles the skeptic. Moreover, there may be interest groups for and against the bridge, and when the bridge is finally approved, we may look back and describe the opponents as worn down and harassed, much as the leading theory of double jeopardy in the criminal law is concerned with the harassment of a disfavored citizen by a powerful government. We might defend or rationalize the judicial-legislative distinction with the observation that the criminal law protection is an individual protection. Put differently, normal legislation is not only prospective but also brushes broadly; potentially impacted groups are meant to protect themselves in the political arena. It is true that groups are sometimes involved in litigation, but where this is so, preclusion rules are in fact often less robust.[8]

The distinction is more troubling from the perspective of the repeated-draw theory. It is possible that the bridge is no better or worse an investment than it was in the past but that there is variability in outcomes because different representatives are in the legislative chamber at a given moment, because personal favors or animosities rain on the legislative process, or because unexpected tax revenues or failures in other projects suddenly make a bridge seem like a good or bad idea. A hyperrational and experienced legislature might take all these things into account, so the result should be the same no matter how many times a proposal is brought to the floor. But of course in reality no legislature is so farsighted and rational, and it can only be advantageous to have one's proposal, if rejected, repeatedly come before the legislature.

We speculate that the absence of a double-jeopardy-like rule in the legislative arena is an important cause of government deficits. After all, proposals to cut or to avoid spending might only defer projects; proposals to

8. Where legislation is reversible, the repeated-draw problem is symmetrical; interest groups on both sides can try again, and in a sense the burden of proof does not change. In criminal cases, if repeat draws are permitted, the burden of proof necessarily changes, especially if we think that new evidence appears in a proportion different from the required burden of proof.

spend are in some sense irreversible, as we have seen. If proposals, defined in some way, could be voted on only once, government spending would surely be lower. At the same time, and in anticipation of Section 3, it should be noted that if there were such a single-consideration rule for legislation, then proponents of a project would work much harder for its passage the first, and only, time around. Defeat would, after all, be fatal. Opponents might also invest more, whereas under current law they know that they should conserve resources because if they succeed in defeating the bridge proposal the first time, they might need to battle again at a future date. The important point is that a double-jeopardy-like rule can lead to more investment in the first vote, or trial, by one or both sides. With this in mind, it is easy to see that the parties might wish they could agree to change the rules of the game in order to reduce the need to invest in the first time period.

As a positive matter, there is of course no single-consideration rule running from one legislative session to another. Here too we might say that because it is sufficiently likely that there will be changed circumstances—flux rather than fixity—no legislative system is designed with a double-jeopardy-like rule. In contrast, but trivially, it is common to have such restrictions within a single legislative session, though these are often easy to circumvent by redesigning the bill in question. While the constraint is normally explained as a control on cycling (for otherwise votes might never come to a close), we can also see a single-consideration rule as reflecting the idea that there has not been enough time to entertain the possibility of new evidence or changed circumstances. We do not expect to find a motor vehicle bureau, or an academic department administering comprehensive examinations, permitting a test taker to return many times in one day until he or she passes. To do so would be to absorb the cost of the repeated draw from the urn—and thus higher test administration costs along with a changed standard—without the benefit of learning and improvement. In contrast, from one legislative session to another circumstances are likely to have changed and new representatives elected; any other rule would also raise the problem of strategic votes in order to bind future legislatures.

Let us return now to the modest claim that there is something to the fixed-flux distinction, and in particular to the difference between a trial about facts rooted in the past and one that aims to test skills or otherwise look forward. Imagine that a group asks the legislature for payments for a past wrong it suffered. Perhaps persons with disabilities ask for compensation for years in the past when buildings were not required to

be accessible in the manner they are at present. Imagine next a proposal to require landlords who complied with past law to pay a kind of tax for the failure to anticipate present building codes—so that the revenues received might be used to pay those who ask for reparations. In most legal systems such legislation is permissible but unusual. In the United States, for example, ex post facto criminal laws are constitutionally prohibited, but explicitly retroactive civil legislation is decried but normally permitted. This hostility to retroactive legislation may reflect the problem of repeated draws. If the persons seeking payment eventually win, it may be not because of any new evidence, or changed cost-benefit analysis, but rather because of the advantages of multiple draws. There is a weak claim with respect to learning over time, but for the most part the facts are fixed. The repeated-draw point is even stronger if the aim or remedy involves a burden on landlords, rather than the public fisc, because this group must then defend itself against the harassment of multiple claims. The spirit of double jeopardy, stronger for an identifiable group (though not as strong as it would be for a single individual), might in this way be reflected in the antipathy with which most (patently) retroactive legislation is regarded.

3. OPTING OUT OF DOUBLE JEOPARDY

3.1. Overinvestment with a Double-Jeopardy Rule

In the criminal law, we can think of double-jeopardy protection as a restriction on the prosecution. Without the protection, the prosecution might harass the defendant, it might seek to benefit from repeated draws, and it might try to undo an acquittal that reflected jury nullification. In the absence of the protection, no finality would attach to an acquittal. The familiar rule, giving the prosecutor just one chance, responds to all these issues and also unburdens the defendant when the prosecutor wishes to retry the defendant because of new evidence or a good-faith belief that the first trial reached the wrong result.

In this section we advance the counterintuitive idea that both sides might at times benefit if the prosecutor has a second chance. The key step in the argument is that when the prosecutor is limited to a single chance, the prosecutor has an incentive to invest more in the first and only trial. (For earlier work on this overinvestment idea, see Khanna 2002; Rudstein 2006–7.) A prosecutor who knows that she has two chances, and has limited resources, will often invest less in the first trial

than would one who has but a single chance. In turn, this produces a social benefit and even a benefit to some or most defendants.

One way to think about this idea is to refer again to conventional testing or licensing. If applicants were limited to one driving test or one bar exam, it is easy to imagine much greater investments in test preparation. It is difficult to prove that such preparation is inefficient, but we rely on readers to share the intuition that such is the case, and perhaps similarly so for criminal defendants. Similarly, the prosecutor may overinvest in a world with double-jeopardy protection. If the defendant could also try again when disappointed with the first draw, both parties might invest less in the first round or settle. But the double-jeopardy rule is more interesting where it interacts with an asymmetric standard of proof, as it does in criminal law. We proceed with the asymmetric situation and the idea of a second chance after acquittal—but not after conviction—though it would be possible to expand the analysis to include two-way second chances.[9]

3.2. Alternatives to Double Jeopardy

The weaker the double-jeopardy protection, the less serious the prosecutor's overinvestment. We can think of some legal systems as adjusting the protection in order to achieve a desired balance. Thus, the prosecutor might be allowed to bring the defendant to a second trial if new evidence emerges; this development seems more likely where criminal defendants are permitted to return to trial when new evidence in their favor materializes. The rule, or rules, can lead to protracted litigation because something of a minitrial is needed to determine whether there is truly new evidence or the losing party is simply seeking a second draw from the urn. Still, the more new evidence allows the prosecutor a second chance, the more the prosecutor (along with the police) can relax her investigation, if not overall effort, in the first round. Another strategy would be to allow the prosecutor to appeal a trial judge's acquittal decision regarding such things as entrapment or jury instructions—and then retry the once-acquitted defendant if the appellate court finds serious error on the trial court's part. This is hardly a novel suggestion (Amar 1997, p. 1841), and we do not pursue it here as an alternative

9. Ben-Shahar (2005) argues that there is a trade-off between durability, or the stability of legal allocations, and costs, especially when viewed properly from an ex ante perspective. Double jeopardy is, in this sense, a durable rule because acquittals are final, but one must take into account the initial investments, or costs to the parties, in producing the single-trial result.

to current double-jeopardy law because it bears little relation to the problem of overinvestment in the first trial. Even if—as is the case in several countries[10]—the prosecutor can appeal all legal decisions raised at a trial where a defendant was acquitted, the investment in the initial trial is unlikely to change because successful appeals will be rare and unknowable at the time of the investment decision.

A stronger strategy for reducing prosecutorial overinvestment would be, rather simply, to give the prosecutor a second chance. It is of course difficult, at least in the United States, to compensate with any increase in the burden of proof, unless perhaps jury size were to be increased. But the discussion in Section 2 suggests that giving the government a second chance is unlikely to be the strategy, or rule, anywhere or anytime. After all, it is nearly equivalent to a single-chance rule with a lower standard for conviction, and that would certainly be unacceptable. More generally, when a test is inexpensive to administer and forward looking, multiple chances are to be expected. But when it is backward looking, we expect a single test, especially where testing is expensive, because multiple tests appear to be the equivalent of (inefficiently) reducing the passing grade. The double-jeopardy protection in criminal law thus fits the general pattern of testing and retesting. Yet it remains the case that a single test might inefficiently raise investment in preparation. If only one side prepares, as in a bar exam, then multiple chances seem right. If both sides bear significant costs, as in a trial, the best approach is likely unknowable, or at least is not the same in all cases.

We do not advocate any direct weakening of double-jeopardy protection in order to reduce overinvestment in the first trial but rather contemplate a rule under which prosecutors can choose when to offer defendants the right to waive the double-jeopardy protection and thus provide the prosecution with the option of a second chance. Defendants might do this when they think that the prosecutor will then invest less in the first trial and—if that trial ends in acquittal—choose not to proceed to a second trial, perhaps because the defendant now appears more likely to be innocent. Defendants might waive the familiar protection more often if the prosecutor offered or was required to pay something for the option, perhaps in the form of a higher standard for conviction in either or both trials, or a lesser punishment in the event of conviction, or even

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10. In Canada, the prosecution may appeal "against a judgment or verdict of acquittal of a trial court in proceedings by indictment of any ground of appeal that involves a question of law" (Pillai 1988, pp. 292–94).

a monetary payment to cover the defendant's costs in the event of a second trial. Alternatively, the rule might be that the defendant can agree that the prosecutor can try again after acquittal only if a magistrate or other decision maker certifies that there is new evidence that was not presented at the first trial. Of course, the less the prosecutor invests in the first trial, the more likely it is that there will be such new evidence for a second. Finally, we might also imagine a scheme in which the prosecutor has no choice but the defendant can always relinquish his protection and thus impose a second-chance regime on the government.

In short, if we continue with the idea that the familiar protection is normally the defendant's to keep or relinquish, there are at least four interesting kinds of second-chance agreements: an option that the defendant can require,[11] an option that the prosecution offers when so inclined, an option to try again if there is new evidence, and an option to try again upon payment to the defendant including, perhaps, a tougher standard for conviction in the second trial or in both trials or reduced punishment in the event of conviction. The last of these four types of second-chance agreements will seem most attractive to defendants—though many defendants would surely reject all these offers or options, even if some might accept all of them.

3.3. The Benefit of Relaxing the Double-Jeopardy Rule

At first blush, a system with a second chance for the prosecution will produce a higher conviction rate, much as an applicant with two chances to pass a test of given difficulty will find it easier to obtain a license. The prosecutor's preference for a second-chance rule seems obvious. If the prosecution has limited resources, this preference is yet clearer. But as we will see, the assumption of limited resources suggests why even defendants might prefer to relax the double-jeopardy rule. The key is to see that the system can conserve resources by investing less in first trials; the savings can then, in one way or another, be shared with defendants as a group.

Imagine then a world where the double-jeopardy protection can be

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11. One reason to put the decision in the defendant's hands goes to the heart of the harassment theory. Some defendants, perhaps politicians whose careers are legally or practically disabled by the shadow of prosecution, want speedier trials than law provides. If we think that prosecutors have strategic or political reasons for disabling these defendants, then it is easy to build the case for an option in the defendant's hands—if that encourages the prosecutor to proceed more quickly with the first trial. It is likely, however, that a better solution to this problem, if it is that, is a stronger requirement for speedy prosecution.

waived, or simply where there is no such protection, and where the prosecutor has a fixed $1 million budget. If many defendants have waived the protection (or if there is none), a prosecutor who might have invested $10,000 in each of 100 cases with double-jeopardy protection might now invest $7,000 per case, bring 10 more cases (we can imagine a supply curve of increasingly difficult cases, but there is no need for that here), and reserve $230,000 for second trials deemed worth bringing. Perhaps the prosecutor now loses 30 out of 110 cases and under the single-trial rule would have lost 15 of 100. The lower success rate reflects not the greater number of trials but the smaller investments in first trials. The prosecutor might now choose to try again in one-half the lost cases, and she can afford $15,000 for each of those second trials. If she wins 10 of the 15 second trials, or two-thirds (a rate that might reflect learning from the first trial plus the much greater investment in the second trials pursued), she emerges with 90 convictions (80 + 10) in this second-chance regime, instead of 85 under the single-chance rule. Of course, the prosecutor need not invest equally in all of the cases pursued in each round. The point is simply that each second-chance agreement allows the prosecutor to invest less in first trials and then to choose how to allocate the savings between new cases and heavier expenditures in some second trials.

These numbers are, of course, illustrative. The conclusion, however, depends on the notions that the prosecutor's expected success in first trials is a function of her investment in those trials—and, indeed, we assume that the prosecutor gains convictions with increasing investment—that there is some chance of new evidence, and that investment in some second trials will bring about convictions even where the first trial ended in acquittal. There is room for surprise. Perhaps the first acquittal should or would be known to the second jury—after all, witnesses might have a hard time playing along with a rule to the contrary, and both sides might want to grill a witness about any inconsistency between his or her testimony at the two trials. It seems inevitable if not desirable for the second jury to know that the first trial ended in acquittal (or in a mistrial), and therefore it may turn out to be difficult to secure a conviction with the second chance. If so, the prosecutor will rarely attempt a second trial, and the defendant will exact only a very small payment for waiving his double-jeopardy protection. On the other hand, the prosecutor might learn a good deal at the first trial. It might redirect her efforts in preparing for a second trial, or it might show the prosecutor that her resources are better spent on other matters. She might even be

convinced of the defendant's innocence and then be pleased by the cost savings.

The argument thus far is not terribly different from that which explains a prosecutor's interest in plea bargains. All defendants, were they organized into a single bargaining unit, might well prefer a rule against plea bargains because if conviction required lengthy trials, then the prosecutor's resource constraints would make the average, or even every, defendant much better off. The prosecutor would have less to invest in each trial and would probably prosecute less and less well. In fact, the prosecutor has the option of offering a plea bargain and seems therefore only to benefit from the existence of that institution (Scott and Stuntz 1992, pp. 1935–49; Bar-Gill and Ben-Shahar 2009). Similarly, the option of offering a second-chance regime would seem unambiguously beneficial for the prosecution. It may, however, be hard to see just yet why a defendant should accept the second-chance regime, even as it is obvious why individual defendants prefer the option of plea bargains.

Still, the analysis can and probably should be made more complicated by relaxing the implicit assumption that a switch to a second-chance regime would not change the burden of proof unless the prosecutor specifically offered such an alternative to the defendant. When the prosecutor has a second chance, the overall burden of proof necessary for a single conviction is, in an important sense, reduced. Even if some defendants explicitly agreed to the second-chance regime, or prosecutorial option, it is plausible that judges or juries, or even the legal system (in the form of a constitutional ruling), would subtly or openly increase the threshold for conviction, perhaps by instructing juries that they might cumulate tiny doubts to create one reasonable doubt, or simply by using more severe language like "beyond a reasonable doubt, however small." At the very least, it is reasonable to assume some increase in the difficulty of obtaining a conviction under a second-chance rule—even if there is no explicit change in standards. In both settings, judges and juries would be resisting increases in expected penalties. If, of course, such resistance is extreme, so there is no increase at all in the rate of conviction, then the second-chance scheme will be less attractive to prosecutors.

Before examining the defendants' perspective more carefully, it is useful to point out that there are other costs and benefits to a second-chance regime. Unfortunately, most of these are also difficult to sort out, especially in the absence of live experiments. For example, some witnesses will benefit from the smaller prosecutorial investment in the first trial—but of course others will need to testify twice if there are two

trials. In some cases, defendants will face higher costs because they will need to retain evidence, including relationships with witnesses, in the event that the prosecutor proceeds with a second trial.[12] These costs are, of course, offset by the fact that a prosecutor with a second-chance option will more quickly go to the first trial, so the defendant's costs will be lower. Moreover, we anticipate that in a second trial, judges and juries will take into account the fact that time may have made the defense's present task more difficult. Time may also bring out the truth from witnesses who were less truthful the first time around, but inasmuch as there was an acquittal, this is now likely to benefit the prosecution. But our goal here is to propose a rethinking of double jeopardy and not to insist that any one version of a second-chance regime is necessarily superior.

3.4. Sorting Innocent and Guilty Defendants

3.4.1. Beyond a Reasonable Doubt.
The argument thus far might be sufficient to convince most thoughtful citizens to rethink double jeopardy and perhaps to support the idea that the protection is one that ought to be waivable, much as one who pleas can trade away the right to a trial.[13] In this section, however, we add to the case for a second-chance option by developing the possibility that the option would benefit innocent defendants and disadvantage guilty defendants. Indeed, even if there were somehow a requirement to maintain the expected level of punishment, a system can be made more efficient by sorting defendants according to their guilt.[14]

Imagine first that the burden of proof does not change when a second-chance rule has been agreed upon. A second-chance agreement is often unattractive to defendants who know they are guilty because they run

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12. Again, the idea of allowing the prosecutor to choose whether to offer the defendant the option to waive the double-jeopardy protection is more attractive the more positively one views prosecutors. Thus, one straightforward approach to double jeopardy—in all the settings described here—is to ask whether the information at issue is improving or depreciating with time. A trial will reach a more accurate result if it can be held when the information is at its best. It takes time to gather witnesses, but all along their memories fade. Ideally, a prosecutor will decline to offer a second-chance scheme when she judges that a second trial will take place when information is relatively unreliable. In any event, one can hardly claim that current law succeeds in holding single trials when information is most reliable.

13. It is possible that courts would readily accept a defendant's waiver of the double-jeopardy protection, but we proceed cautiously.

14. For a sorting argument with respect to the right against self-incrimination, see Seidmann and Stein (2000); Stein (2008).

the risk that the prosecution will come across new evidence or simply choose to draw again from the urn. A second trial, therefore, may well increase the overall chance of conviction; it also increases pretrial and trial costs for many defendants. Moreover, to the extent that a guilty defendant can win at trial by surprising the prosecution—in a way that the latter cannot surprise the former because of the stricter requirement of revealing witnesses and strategies before trial (see Brennan 1963)—the guilty defendant loses much of this advantage when agreeing to the possibility of a second trial. No doubt, some guilty persons will benefit because they will be acquitted as a result of the prosecution's smaller investments in their first trials followed by decisions not to proceed with second trials. Moreover, the prosecutor's reduced investment in a single trial will often translate into lower pretrial and trial costs for the accused as well. Still, inasmuch as the guilty defendants will be subject to a higher risk of conviction than under the double-jeopardy rule because of the relatively high likelihood of second trials, it is most plausible that guilty defendants will prefer not to be subject to a second-chance regime.

We turn then to defendants who know they are innocent. Such a defendant has less to fear from a second trial because there is less reason to expect that further effort by the prosecution will generate incriminating evidence. The typical innocent defendant is less likely than his guilty counterpart to face a second trial, to benefit from surprising the prosecution, and to lose in a second trial. And yet the prosecutor's ability to draw again from the urn lowers the effective burden of proof. Thus, assuming no implicit or explicit change in the burden of proof, it is hard to say whether any or many innocents will find it attractive to waive the double-jeopardy protection. The chance of conviction at the first trial drops because the prosecutor will invest less in the first trial. But the possibility of a second trial leaves the situation unclear. There is a greater chance of (false) conviction at the second trial and a lower chance of (false) conviction in the first.

In sum, and following our illustration, a switch from a double-jeopardy rule to a second-chance rule likely increases the number of convictions. Moreover, the set of convicted persons contains a higher percentage of guilty persons than with an unalterable double-jeopardy rule. The illustration and underlying intuitions suggest that innocent defendants will be more likely to waive the protection than will guilty defendants.

3.4.2. A Second-Chance Rule with an Elevated Burden of Proof. If the burden of proof also becomes more rigorous as double-jeopardy protection

is removed, so the total number of convictions stays constant (aside from new cases the prosecutor can now afford), the risk and cost of first trials to guilty defendants drop but perhaps not enough to make the switch attractive. This intuition is easiest to see if we begin with innocent defendants and assume that it is easier to convict the guilty than to convict the innocent.

Innocent and guilty defendants benefit from the prosecutor's lower investment in the first trial, which is expected to yield a lower conviction rate, and all the more so if the burden of proof changes. The prosecutor's reduced investment also leads to lower pretrial and trial costs for defendants. But now the prosecution's second chance is presumably less threatening to the innocent than to the guilty, because new evidence, or any other product of reallocation or increased effort by the prosecution that might harm the defendant, is simply less likely to hurt the innocent defendant. Inasmuch as we have posited that the total number of convictions remains the same, and the switch to a second-chance rule is less threatening to the innocent than it is to the guilty defendants, there is the implication that the second-chance rule, with the specified tightening of the burden of proof, will lead to more convictions of guilty defendants and fewer convictions of innocent ones.[15]

15. Another version of this argument conjures a world where the prosecutor seeks to find the truth rather than to maximize convictions. Now we can imagine the trial as a draw from the urn, but following a process in which a greater investment returns more rewards for the prosecutor where the defendant is actually guilty. A guilty defendant prefers no investment by the police or prosecution and then, we might imagine, expects some chance of acquittal at trial. Perhaps eight of 10 defendants are really guilty, and with no information, and thus no ability to sort defendants, the guilty defendant simply has a 20 percent chance of a lucky acquittal. As the investment in investigation and prosecutorial preparation increases, the system improves in terms of separating the guilty from the innocent. In this hypothetical universe, the good-faith prosecutor or jury always discovers and releases the innocent defendant (who might also prefer no investment by the prosecutor) if the investment is large enough—but perhaps the prosecutor has no incentive to search quite that hard for the truth. In any event, so long as an increased investment has a higher chance of paying off (for the prosecution) when the defendant is really guilty than when he is innocent, the second-chance scheme allows the prosecutor to expend greater resources on the more difficult cases, and this in turn naturally sorts guilty and innocent defendants. This hyperbolic example suggests that so long as an increased investment has a higher chance (on average) of paying off (for the prosecution) when the defendant is really guilty than when he is innocent, the second-chance scheme allows the prosecutor to expend greater resources on the more difficult cases, and this in turn sorts guilty and innocent defendants. On the other hand, under these assumptions, the innocent defendant might prefer rather than abhor greater investment by the prosecutor in his first case, because the investment might absolve him. The game is thus hard to model without many assumptions; an innocent might be indifferent between a zero investment and a very large investment. Much will then depend on the shape of the investment-return curve.

A defendant who offers the prosecutor a second chance, or who accepts such an offer from the prosecutor, would appear to signal his innocence. And to decline a second-chance scheme might signal guilt. As with all signaling mechanisms, there is then the likelihood that as innocent defendants gravitate toward a second-chance rule, some guilty defendants will do so as well in order to give the appearance of innocence to the prosecution, or even to a jury. If so, the signal will be less reliable. But if, despite the signaling effect just described, the costs of the second trial to the guilty are higher than to the innocent, then we can hope that there will still be some useful sorting of defendants.

In short, innocent defendants (except for the newly charged) may benefit from any switch to a second-chance regime. It is more likely that they benefit if the switch is accompanied by an increase in the burden of proof in both trials. In turn, guilty defendants will normally be disadvantaged if they lose the double-jeopardy protection, unless they receive something in return. There is then the added complication associated with defendants who do not know whether they are innocent or guilty, as well as defense attorneys who are unsure of the guilt of their clients.

Any evaluation of the proposal to allow waivers of the double-jeopardy protection must also take into account the additional cases that the prosecutor will be able to pursue either because of the fixed-budget assumption or because a more efficient prosecutor might attract more funds. In our illustration, the second-chance rule generated 15 more cases against defendants who might have been left alone, released, or managed with plea bargains. Some of these alternatives raise the possibility that the original conservation of resources will bring on new social costs rather than benefits. When accused persons are released because of budgetary constraints, we might say that the taxpayers have made choices. And we do not know how to quantify the desirability or cost of plea bargains, as opposed to trials. But the additional cases do imply additional convictions, and inasmuch as we have been counting correct and incorrect convictions, it is only fair to concede that there will be additional incorrect convictions. On the other hand, there is no reason to think that newly charged defendants under a second-chance rule will be more likely to be incorrectly convicted than any other defendants.

More troubling is the possibility that the lower investment by the prosecution in first trials will so reduce the convictions of guilty defendants that the guilty will opt out of the double-jeopardy protection and run the relatively low risk, if it is that, of conviction in a second trial. Socially desirable sorting would certainly be achieved if innocent defen-

dants were less afraid of first trials than were guilty defendants; it is easy to see why this might be a reasonable assumption—especially if we believe that the prosecutor is able to allocate resources to cases that require greater investment—but it is possible that it is otherwise, and even that a second-chance rule does more harm than good. Again, our aim has been to develop the idea of bargaining with double jeopardy rather than to insist that we can identify the best possible set of rules.

4. CONCLUSION

We have suggested that single-chance tests are limited to high-cost, backward-looking inquiries, like trials. Where there is but a single chance, however, there is the problem of overpreparation, or overinvestment. In the criminal law context, this overinvestment gives room for the prosecutor and defendant to bargain for a waiver of the traditional double-jeopardy protection in order to allow the possibility of a second trial, and thus the elimination of the incentive to overinvest. Defendants might give up their protection, if permitted to do so, knowing that on average the prosecutor would then invest less in the first trial. It is even possible that innocent defendants might be especially inclined to make the bargain.

Once one unsettles the conventional double-jeopardy rule, there are many ways to proceed or to extend the analysis offered here. There is room to play with different waivers and payments to those who waive, and with options that run in both directions, not just in the prosecutor's favor. There is the possibility of burrowing into criminal law, and subdividing the field, so that a different rule would apply to different crimes, to different kinds of defendants, or to situations where the defendant faced multiple charges or charges in multiple jurisdictions. There is also the possibility of expansion outside of criminal law. It is possible that legislation or plebiscites—though normally forward looking—should be sprinkled with the flavor of double jeopardy, so that repeated draws from the urn are not free. For the present, we are satisfied to make the claim that the familiar double-jeopardy protection likely generates overinvestment—and that the savings available from a relaxation of the rule might be shared in a way that makes almost everyone (but guilty defendants) better off.

REFERENCES

Amar, Akhil R. 1997. Double Jeopardy Law Made Simple. *Yale Law Journal* 106:1807–40.

Bar-Gill, Oren, and Omri Ben-Shahar. 2009. The Prisoners' (Plea Bargain) Dilemma. *Journal of Legal Analysis* 38:737–74.

Ben-Shahar, Omri. 2005. Legal Durability. *Review of Law and Economics* 1: 15–53.

Brennan, William J. 1963. The Criminal Prosecution: Sporting Event or Quest for Truth? *Washington University Law Quarterly* 1963:279–95.

Duizend, Richard Van, L. Paul Sutton, and Charlotte A. Carter. 1985. *The Search Warrant Process: Preconceptions, Perceptions, Practices*. Williamsburg, Va.: National Center for State Courts.

Griffin, Lissa. 2001. The Correction of Wrongful Convictions: A Comparative Perspective. *American University International Law Review* 16:1241–1308.

Khanna, Vikramaditya S. 2002. Double Jeopardy's Asymmetric Appeal Rights: What Purpose Do They Serve? *Boston University Law Review* 82:341–405.

Pillai, Chandrasekharan K. N. 1988. *Double Jeopardy Protection: A Comparative Overview*. Delhi: Mittal.

Poulin, Anne Bowen. 2004. Double Jeopardy Protection from Successive Prosecution: A Proposed Approach. *Georgetown Law Journal* 92:1185–1288.

Price, Ronald M. 2002. *Search and Seizure*. Den Bosch: BookWorld.

Rudstein, David S. 2006–7. Retrying the Acquitted in England, Part I: The Exception to the Rule against Double Jeopardy for "New and Compelling Evidence." *San Diego International Law Journal* 8:387–458.

———. 2007–8. Retrying the Acquitted in England, Part II: The Exception to the Rule against Double Jeopardy for "Tainted Acquittals." *San Diego International Law Journal* 9:217–92.

Scott, Robert E., and William J. Stuntz. 1992. Plea Bargaining as Contract. *Yale Law Journal* 101:1909–68.

Seidmann, Daniel J., and Alex Stein. 2000. The Right to Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege. *Harvard Law Review* 114:430–510.

Stein, Alex. 2008. The Right to Silence Helps the Innocent: A Response to Critics. *Cardozo Law Review* 30:1115–40.

Thomas, George C., III. 1998. *Double Jeopardy: The History, The Law*. New York: New York University Press.

U.S. Department of Justice. Office of Legal Policy. 1987. *Report to the Attorney General on Double Jeopardy and Government Appeals of Acquittals*. Truth in Criminal Justice Report No. 6. Washington, D.C.: Government Printing Office.

Westen, Peter. 1979–80. The Three Faces of Double Jeopardy: Reflections on Government Appeals in Criminal Sentences. *Michigan Law Review* 78:1001–65.

Westen, Peter, and Richard Drubel. 1978. Toward a General Theory of Double Jeopardy. *Supreme Court Review* 1978:81–170.

Whitebread, Charles H., and Christopher Slobogin. 2000. *Criminal Procedure: An Analysis of Cases and Concepts*. 4th ed. New York: Foundation Press.