THE UNNECESSARY RULE OF CONSISTENCY IN CONSPIRACY TRIALS

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A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines.
—Ralph Waldo Emerson, *Self-Reliance.**

While symmetry of results may be intellectually satisfying, it is not required.
—Burger, C.J., in *Standefer v. United States.***

Consider the following hypothetical: Fran, a thirty-year-old college custodian with a long history of narcotics violations, approaches Nan, a freshman at the college, with a plan to provide Nan with cocaine for distribution at the college. Nan agrees to sell the cocaine despite a total lack of experience in the area, after Fran convinces her that the profits from the scheme will pay her way through college. After only a few sales, though, Nan's roommate, Jan, who has witnessed several transactions, informs the college administration of the arrangement, and Fran and Nan are indicted by a federal grand jury, inter alia, conspiracy to possess with intent to distribute cocaine. Jan, as the star witness for the prosecution, leaves the jury with no doubt that the elements of a conspiracy are in fact present. Accordingly, the jury convicts Fran. It acquits Nan, however, moved by her youth and lack of criminal record, by her passive role in the affair, and by its view that Nan was "punished enough" by her removal from the college. Following this verdict, Fran moves for acquittal, arguing that Nan's acquittal is inconsistent with her conviction. Under current federal law, Fran will almost certainly succeed. According to the common law rule of consistency[1] in conspiracy trials, "where all but one of the charged conspirators are acquitted, the verdict against the one will not stand."[2]

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* R.W. EMERSON, *Self-Reliance,* in ESSAYS, FIRST SERIES (1841).

** 447 U.S. 10, 25 (1980).

[1] Although this term is not generically applied by courts recognizing the doctrine, for purposes of simplicity it will be used throughout this Comment.

[2] United States v. Albert, 675 F.2d 712, 713 (5th Cir. 1982) (quoting Herman v.

The rule of consistency is subject, however, to several major limitations. First, many courts refuse to apply the rule where conspirators are tried separately, since inconsistent results in this context can be explained by differences in jury composition, proof offered at the trials, or other factors.[3] Similarly, application of the rule does not apply to a lone conspirator's conviction if the co-conspirators' cases were not disposed of on the merits.[4] Finally, the rule of consistency can be avoided where it is shown that a defendant, despite the acquittal of all indicted co-conspirators, conspired with "persons unknown."[5] In the above hypothetical, however, because Fran and Nan, like most co-conspirators, were tried jointly, and none of the other exceptions apply, the acquittal of Nan will result in the acquittal of Fran as well.

The logic underlying the rule of consistency and its exceptions is not difficult to grasp. The essence of the common law crime of conspiracy is an agreement between two persons to commit a criminal offense.[6] According to the Fifth Circuit, "the acquittal of all but one potential conspirator negates the possibility of an agreement between the sole remaining defendant and one of those acquitted of the conspiracy and thereby denies, by definition, the existence of any conspiracy at all."[7] Under this reasoning, the conspiracy conviction of a lone defendant is invalid because the "verdict . . . itself den[ies] the existence of the essential facts"[8] constituting a conspiracy.

United States, 289 F.2d 362, 368 (5th Cir.), *cert. denied,* 368 U.S. 897 (1961)).

[3] *See, e.g.,* United States v. Espinosa-Cerpa, 630 F.2d 328, 333 (5th Cir. 1980); Gardner v. State, 286 Md. 520, 527-28, 408 A.2d 1317, 1321 (1979); Platt v. State, 143 Neb. 131, 142-43, 8 N.W.2d 849, 855 (1943).

[4] For example, a grant of immunity to one conspirator does not preclude the conviction of the other, *see* Farnsworth v. Zerbst, 98 F.2d 541, 544 (5th Cir. 1938), nor does disposition of another's case by nolle prosqui, *see* United States v. Fox, 130 F.2d 56, 59 (3d Cir. 1942). *But see* State v. Jackson, 7 S.C. 283, 288 (1876) (effect of disposition of one charge by nolle prosqui is to "discontinue the [other] charge"). A defendant's conviction is not precluded by the death or disappearance of the defendant's alleged co-conspirators. *See* Rosenthal v. United States, 45 F.2d 1000, 1003 (8th Cir. 1930); People v. Nall, 242 Ill. 284, 292, 89 N.E. 1012, 1016 (1909).

[5] *See, e.g.,* United States v. Bell, 651 F.2d 1255, 1258 (8th Cir. 1981); *see also* P. MARCUS, PROSECUTION AND DEFENSE OF CRIMINAL CONSPIRACY CASES § 2.03, at 2-10 n.4 (1985) ("Many indictments . . . now 'contain the catch-all charge that defendants were also involved with other persons unknown.' ") (quoting People v. James, 189 Cal. App. 2d 14, 16, 10 Cal. Rptr. 809, 810 (1961)).

[6] *See* Rogers v. United States, 340 U.S. 367, 375 (1951) ("Of course, at least two persons are required to constitute a conspiracy."); 18 U.S.C. § 371 (1982) (A federal conspiracy requires "agreement between two persons."); W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 61, at 453-54 (1972); *cf.* United States v. Standefer, 610 F.2d 1076, 1099 (3d Cir. 1979) (Aldisert, J., concurring and dissenting) (stating that in an aiding and abetting case "you cannot clap with one hand; it takes two to tango"), *aff'd,* 447 U.S. 10 (1980).

[7] United States v. Espinosa-Cerpa, 630 F.2d 328, 331 (5th Cir. 1980).

[8] United States v. Austin-Bagley Corp., 31 F.2d 229, 233 (2d Cir. 1929).

The rule of consistency, at least as applied to joint conspiracy trials, is followed uniformly in both the federal and state courts.[9] A panel of the Third Circuit recently suggested, however, that "the rule of consistency may be a vestige of the past."[10] This Comment argues that the logical foundations of the rule of consistency are incompatible with the Supreme Court's understanding and approval of inconsistent verdicts as established in *Dunn v. United States,*[11] recently reaffirmed in *United States v. Powell,*[12] and as applied in *Standefer v. United States.*[13]

In *Standefer,* the Court recognized that a jury acquittal of an alleged principal in a separate trial was not dispositive of an accessory's noninvolvement in the criminal transaction; an acquittal may result from factors entirely unrelated to a defendant's guilt or innocence, such as jury lenity and the inadmissibility of evidence. In contrast, the fundamental premise of the rule of consistency is that a defendant's acquittal proves absolutely that she was not involved in the conspiracy at issue. Because the possibility that different evidence will be admissible as to different defendants and that jury acquittals will be due to extralegal factors is present in the conspiracy context as well as in the principal/accessory context at issue in *Standefer,* a jury acquittal should not be interpreted as a verdict of innocence in either case. Therefore, the rule of consistency should no longer be applied in either joint or separate conspiracy trials, and acquittal of one conspirator should be of no legal relevance to the conviction of the other conspirator. Instead, review of an inconsistent conspiracy conviction should be limited to examination of the sufficiency of the evidence supporting the conviction.

Part I of this Comment discusses the common law origins of the rule of consistency and demonstrates that the historical conditions surrounding its development no longer exist and that the rule is irrelevant and inappropriate in the modern legal context. Part II analyzes the rule of consistency in the context of the *Standefer* decision, in which the Court declined to require consistency in the results of separate trials of an alleged principal and his accessory, and concludes that the same

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[9] *See* Annotation, *Prosecution or Conviction of One Conspirator as Affected by Disposition of Case Against Coconspirators,* 19 A.L.R.4TH 192, 198-201 (1983).

[10] Government of the Virgin Islands v. Hoheb, 777 F.2d 138, 142 n.6 (3d Cir. 1985).

[11] 284 U.S. 390 (1932) (approving inconsistent verdicts for related charges of unlawful possession and sale of alcohol and maintenance of a nuisance by keeping alcohol for sale during the prohibition era).

[12] 469 U.S. 57 (1984) (approving inconsistent verdicts for related charges of possession of cocaine with intent to distribute, conspiracy to do so, and use of the telephone to facilitate narcotics violations).

[13] 447 U.S. 10 (1980) (approving inconsistent verdicts in separate conspiracy trials of an alleged principal and his accessory).

rule should be applied in the conspiracy context.

I. HISTORICAL FOUNDATIONS OF THE RULE OF CONSISTENCY

The conspiracy rule of consistency, like the crime from which it is derived, is firmly rooted in the common law. There is, however, considerable debate over the validity of the crime of conspiracy itself.[14] One commentator has characterized the development of the law in the area as "a veritable quicksand of shifting opinion and ill-considered thought."[15] The common law development of the rule of consistency and its subsequent importation into American criminal law also fit this description. Although the rule may originally have served a beneficial purpose, it lacks value in the context of the modern American criminal justice system.

A. *The Development of the Rule of Consistency in England*

In the late nineteenth century, Lord Coleridge observed that the rule that two conspirators "both must be convicted or both must be acquitted . . . [was] determined, or, if not determined, taken for granted from very early times."[16] The lineage of the rule can be traced back almost four centuries to the case of *Marsh v. Vauhan.*[17] In that case, two defendants were indicted and tried jointly for conspiracy, with the result that one was convicted, and the other acquitted. The court quashed the lone defendant's conviction, reasoning in a paragraph-long opinion that "one cannot conspire alone."[18] By the late nineteenth century, subsequent decisions addressing this issue had firmly planted the *Marsh* rule into the common law.[19]

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[14] *See* Marcus, *Conspiracy: The Criminal Agreement in Theory and in Practice,* 65 GEO. L.J. 925, 926-27 nn. 3-7 (1977) (citing sources supporting and opposing the crime of conspiracy).

[15] Sayre, *Criminal Conspiracy,* 35 HARV. L. REV. 393 (1922). *See generally* Johnson, *The Unnecessary Crime of Conspiracy,* 16 CALIF. L. REV. 1137 (1973) (advocating abolition of the crime of conspiracy).

[16] R. v. Manning, [1883] 12 Q.B.D. 241, 245, *quoted in* R. v. Shannon, [1974] 2 All E.R. 1009, 1013 (C.A. 1973).

[17] 78 Eng. Rep. 937 (Q.B. 1599); *cf.* Harison v. Errington, 79 Eng. Rep. 1291, 1292 (Q.B. 1627) (stating that because the crime of riot requires participation by three, a conviction of only one is invalid).

[18] *Marsh,* 78 Eng. Rep. at 937.

[19] *See, e.g.,* R. v. Grimes, 87 Eng. Rep. 142 (K.B. 1688) (When two conspirators are indicted jointly, the acquittal of one is the acquittal of both.); R. v. Kinnersley, 93 Eng. Rep. 467, 469 (K.B. 1719) (One conspirator may be tried before another, but the later acquittal of the other would vindicate both.); R. v. Niccolls, 93 Eng. Rep. 1148 (K.B. 1745) ("[C]ontradictory verdicts" are not possible where one of two conspirators is dead.); R. v. Cooke, 108 Eng. Rep. 201, 204 (K.B. 1826) (Where only one of two conspirators is convicted with the trial of the third pending, "[i]f the other defendant

In the 1974 case of *R. v. Shannon,*[20] the British Court of Appeal, Criminal Division and, on review, the House of Lords, conducted exhaustive examinations of these decisions. The appeals court reluctantly adhered to the rule of consistency in quashing the defendant's conviction pursuant to a guilty plea where his alleged co-conspirator was subsequently acquitted. The House of Lords held that the rule did not apply in this context and restored the conviction. Both courts' historical analyses concluded that the "fundamental principle" articulated in *Marsh*—that a conspiracy requires agreement by two—ultimately led to the British courts' acceptance of the rule of consistency.[21] The link between the plurality requirement of conspiracy and the rule of consistency, however, is tenuous. For example, in *R. v. Thompson,*[22] A, B, and C were indicted and tried jointly for conspiracy. The jury convicted A but acquitted both B and C, saying that although it was certain that A had conspired with one of the two, it was not certain which. The court held that since both of A's alleged co-conspirators had been acquitted, the verdict against A could not stand, although the court expressed regret that A should "escape" as the result of such a rule.[23]

Clearly, this situation is incompatible with the underlying premise of the rule of consistency—that a jury acquittal of all but one defendant presents the impossible result that the lone convicted defendant conspired with herself. In *Thompson,* the jury clearly articulated its certainty of the existence of a criminal agreement between two persons and its certainty of the participation in that agreement by the defendant it convicted. Since the verdict cannot be interpreted as a conclusion by the jury that the defendant conspired alone, the court's application of the rule of consistency is difficult to justify.[24]

The development of the rule of consistency, however, actually had more to do with the pre-twentieth century English system of criminal appellate review than with the rule's logical foundation. Prior to 1907, a criminal defendant could seek review of a conviction only through a

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[is] hereafter acquitted, perhaps [the conviction] may be reversed."); R. v. Thompson, 117 Eng. Rep. 1100, 1105 (Q.B. 1851) (When a jury acquits two of three conspirators, the conviction of the third cannot stand.).

[20] [1974] 2 All E.R. 1009 (C.A. 1973), *conviction restored,* [1974] 2 All E.R. 1025 (H.L. 1974).

[21] *See id.* at 1013 (C.A.), 1048 (H.L.).

[22] 117 Eng. Rep. 1100 (Q.B. 1851).

[23] *See id.* at 1106.

[24] For perhaps the most extreme example of the application of the rule, see R. v. Plummer, [1902] 2 K.B. 339, 345, where the court invalidated a conspiracy conviction pursuant to a guilty plea after the defendant's two alleged co-conspirators were acquitted. *Contra* State v. Oats, 32 N.J. Super. 435, 108 A.2d 641 (App. Div. 1954). The *Plummer* result was expressly overruled in *Shannon. See* [1974] 2 All E.R. at 1025 (H.L.).

writ of error. Under this system, judicial review was limited to an appraisal of the formal record of the case—"the arraignment, the plea, the issue and the verdict."[25] The inability of appellate courts to secure justice through review of the most common sources of trial error, such as wrongly admitted evidence or jury misdirections,[26] forced these courts to "adopt a strict and technical approach to errors on the record as a means of widening the process of review."[27]

Thus the development of the rule of consistency must be viewed in the context of the appellate system in which it arose.[28] A conspiracy trial verdict showing the acquittal of one conspirator and the conviction of the other presented an inconsistency on the face of the record. Since the reviewing court was entirely unable to examine the substance of the proceedings leading to such a result, the conclusion that a "technically" wrong verdict was invalid as a matter of law[29] ultimately represented the only method of protecting a criminal defendant against jury prejudice or misapplication of the law.[30] Thus, the rule of consistency worked as a quasi-appellate method of review for courts with little other recourse.

In 1907, however, review by writ of error was abolished in England by the Criminal Appeal Act.[31] For the first time, the reviewing court was permitted to look beyond the formal record of the case and correct any errors arising in the trial proceedings. As the court in *Shannon* concluded:

> Where only the record could be looked at, it was no doubt right to give great weight to repugnancy but now since 1907 as the evidence can be examined and regard had to what actually took place at the trial, there seems no valid reason why such importance should be attached to the appearance of repugnancy on the record.[32]

The judges particularly stressed the appellate courts' post-1907 ability

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[25] W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 215 (7th ed. 1956); *see also* Nissenbaum v. State, 135 Me. 393, 395-396, 197 A. 915, 917 (1938) (stating that "[a] writ of error is based upon the record facts alone").

[26] *See* W. HOLDSWORTH, *supra* note 25, at 215-16.

[27] *Shannon*, [1974] 2 All E.R. at 1020 (C.A.).

[28] *See Shannon*, [1974] 2 All E.R. at 1030 (H.L.).

[29] *See, e.g.*, R. v. Plummer, [1902] 2 K.B. 339, 346 ("One being acquitted on record, the conviction of his companion on the same record must be directly repugnant and contradictory to the other.") (quoting R. v. Nichols, 104 Eng. Rep. 429, 430 n.a (K.B. 1742)).

[30] *See Shannon*, [1974] 2 All E.R. at 1030 (H.L.).

[31] Criminal Appeal Act, 1907, 7 Edw. 7, ch. 23, § 20(1).

[32] *Shannon*, [1974] 2 All E.R. at 1040 (H.L.).

to determine whether differential admissibility of evidence as between two defendants in fact produced inconsistencies more apparent than real[33] and concluded that the rule of consistency was inapplicable to separate trials of co-conspirators.[34] The *Shannon* result was subsequently codified and extended to joint trials in the Criminal Law Act of 1977.[35]

B. *Treatment of the Rule of Consistency in American Courts*

The logical and historical foundations of the rule of consistency have seldom been questioned by American courts, aside from the issue of the rule's applicability to separate trials.[36] A notable and instructive exception, however, is the Fifth Circuit's decision in *United States v. Espinosa-Cerpa.*[37] Although the facts of this case fit neatly within the "separate trials" exception to the rule, the court questioned the soundness of the rule itself. Noting that the rule of consistency "undoubtedly was originally simply transplanted from the English system,"[38] the court concluded that the review by the House of Lords in *Shannon* of the origins of the rule of consistency in the writ system "makes abundantly clear its inappropriateness to a modern American criminal jus-

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[33] *See id.* at 1029.

[34] The facts of *Shannon* did not present for resolution the issue of the applicability of the rule to an inconsistent verdict rendered by a single jury.

[35] Criminal Law Act, 1977, ch. 45.

> The fact that the . . . persons who . . . were the only other parties to the agreement on which [any person's conspiracy] conviction was based have been acquitted of conspiracy by reference to that agreement (whether after being tried with the person convicted or separately) shall not be a ground for quashing the conviction unless under all the circumstances of the case his conviction is inconsistent with the acquittal of the other . . . persons in question.

Id. § 5(8). In 1980, the British Court of Appeal, Criminal Division noted that this Act "complet[ed] the process begun . . . in *R. v. Shannon* . . . of abandoning the well-established [rule of consistency]." R. v. Holmes, [1980] 2 All E.R. 458, 461 (C.A.). The British view of what constitutes problematic inconsistency is actually much stricter than the American view. *Compare* R. v. Drury, 56 Crim. App. 104, 114 (1972) (When counts of theft and obtaining by deception depended upon the same facts, jury conviction on only the latter was quashed.) *with* United States v. Powell, 469 U.S. 57, 69 (1984) (upholding jury conviction for telephone facilitation of narcotics violations even though same jury acquitted defendant of narcotics violations).

[36] *See supra* notes 3 & 10 and accompanying text.

[37] 630 F.2d 328 (5th Cir. 1980); *see also* Government of the Virgin Islands v. Hoheb, 777 F.2d 138, 142 n.6 (3d Cir. 1985) (indicating that the continuing validity of the rule of consistency is questionable); *id.* at 143 (Garth, J., concurring) (arguing that the rule of consistency should be abandoned).

[38] *Espinosa-Cerpa,* 630 F.2d at 332 n.5. This assertion seems to be correct. *See* Feder v. United States, 257 F. 694, 696 (2d Cir. 1919); State v. Tom, 13 N.C. (2 Dev.) 569, 574-78 (1830); Casper v. State, 47 Wis. 535, 543-44, 2 N.W. 1117, 1119 (1879) (all invoking the rule of consistency based on English precedent).

tice system in which all verdicts obviously are, and always have been, subject to independent review for evidentiary support."[39]

The Supreme Court, however, has not acted under its supervisory power over the federal courts to foreclose the application of the conspiracy rule of consistency. In fact, the Court itself has on at least one occasion reversed a conspiracy conviction on the ground of inconsistency.[40] In *Standefer v. United States,*[41] however, the Court upheld a conviction for aiding and abetting the commission of a federal offense despite the prior acquittal of the alleged principal.[42] The Court has not attempted to reconcile the tension between its earlier application of the rule of consistency and its decision in *Standefer.*

II. THE RULE OF CONSISTENCY IS NOT CONSISTENT WITH *Standefer*

The factors underlying the *Standefer* decision indicate that the rule of consistency is no longer tenable in joint or separate conspiracy trials. The *Standefer* decision rested on the differential admissibility of evidence as between defendants and the existence of jury lenity leading to inconsistent verdicts. These problems are also present when conspirators are tried jointly.

A. *The* Standefer *Decision and the Rule of Consistency*

In *Standefer v. United States,*[43] the Supreme Court considered the effect of an alleged principal's acquittal on the case against his accessory. The defendant had been convicted of aiding and abetting an Internal Revenue Service agent in accepting illegal payments. The agent, however, had been previously tried and acquitted of receiving the illegal payments. In felony cases under common law, "an accessory could not

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[39] *Espinosa-Cerpa,* 630 F.2d at 333 n.5.

[40] In Hartzel v. United States, 322 U.S. 680 (1944), the Court held that the trial court's setting aside of the convictions of all of a defendant's alleged conspirators "make[s] it impossible to sustain [the] . . . conviction upon . . . the conspiracy count." *Id.* at 682 n.3. Other cases in which the Court arguably applied the rule of consistency are Morrison v. California, 291 U.S. 82, 93 (1934) and Gebardi v. United States, 287 U.S. 112, 122 (1932). It appears equally possible, though, that as one commentator noted with regard to *Gebardi,* these cases do not rely on the rule, but merely reverse conspiracy convictions because "all of the other alleged participants could not have been guilty of conspiracy as a matter of law." Note, *Developments in the Law—Criminal Conspiracy,* 72 HARV. L. REV. 920, 974 n.400 (1959); *cf.* Shuttlesworth v. Birmingham, 373 U.S. 262 (1963) (When the law violated by the principal is constitutionally invalid, the conviction of the accessory cannot stand.).

[41] 447 U.S. 10 (1980).

[42] *See id.* at 20.

[43] 447 U.S. 10 (1980).

be convicted without the prior conviction of the principal offender."[44] The Supreme Court did not follow this common law rule in *Standefer;* rather, it held, without dissent, that a principal's prior acquittal is irrelevant to the prosecution of the accessory and therefore affirmed the conviction. The defendant argued that the federal aiding and abetting statute[45] did not authorize this result. The Court's analysis of the legislative history of the statute, however, led it to conclude that Congress intended to make "all participants in conduct violating a federal criminal statute . . . punishable for their criminal conduct; the fate of other participants is irrelevant."[46] Further, the defendant contended that the doctrine of nonmutual collateral estoppel prevented the prosecution. Under this doctrine, a party may not assert a claim it has previously lost against another defendant.[47] The defendant argued that the IRS agent's prior acquittal barred the government from relitigating the issue of the agent's guilt in connection with the defendant's own prosecution. The Court rejected this argument, holding that the application of nonmutual collateral estoppel against the criminal prosecution was entirely inappropriate.[48] This conclusion implicitly recognizes that a verdict of not guilty is not a verdict of innocence and that no particular meaning can be attached to a jury acquittal. The Court noted that inconsistent results in separate trials may arise from several factors unrelated to the guilt or innocence of the respective defendants, such as evidence admissible against one but not the other,[49] or the exercise of lenity by a jury with respect to one of the defendants.[50] The inability of a court to interpret the meaning of a jury acquittal, then, underlies the Court's conclusion that although the rejection of nonmutual collateral estoppel in criminal cases may on occasion produce seemingly inconsistent results, "symmetry of results may be intellectually satisfying, [but] . . . is not required."[51]

The *Standefer* decision casts serious doubt on the application of the rule of consistency, where conspirators are tried separately. As the court in *United States v. Espinosa-Cerpa*[52] noted, application of the rule in this context "would be blatantly inconsistent with the Supreme

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[44] *Id.* at 15.
[45] 18 U.S.C. § 2 (1982).
[46] *Standefer,* 447 U.S. at 20.
[47] *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 329 (1979). *See generally* Blonder-Tongue Laboratories v. University of Ill. Found., 402 U.S. 313, 320-350 (1971) (discussing the evolution of the nonmutual collateral estoppel doctrine).
[48] *See Standefer,* 447 U.S. at 22-26.
[49] *Id.* at 23-24.
[50] *Id.* at 22-23.
[51] *Id.* at 25.
[52] 630 F.2d 328 (5th Cir. 1980).

Court's decision in *Standefer*. Whether or not labelled as nonmutual collateral estoppel, it would operate in an almost identical manner . . . ."[53] Indeed, the position that the prior acquittal of an alleged conspirator bars the relitigation in subsequent trials of the fact of her criminal complicity with others is similar to the argument that the Supreme Court rejected in *Standefer*.[54] Although *Standefer* concerned the crime of aiding and abetting rather than that of conspiracy, the reasoning underlying the decision is equally persuasive in the context of separate conspiracy trials.

Because the decision in *Standefer* concerned consistency in the context of separate trials, the federal circuits continue to apply the rule of consistency in joint conspiracy cases despite *Standefer*.[55] One commentator has explained the rule's persistence in this context as evidence that "the fact of separate juries reaching separate results"[56] is central to the application of *Standefer*. Some courts seem to agree.[57] Yet, as several other courts have recognized, the factors underlying the *Standefer* decision—the jury's prerogative to acquit for any reason and possible differential admissibility of evidence as between defendants—"apply with almost equal force against [application of] the common law rule [of consistency in] a single trial."[58] These courts have observed that for substantially the same reasons that nonmutual collateral estoppel is inapplicable in the criminal context, the requirement of consistency

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[53] *Id.* at 333.

[54] *See* P. MARCUS, *supra* note 5, at § 2.03, at 2-13 (noting that *Standefer* reasoning is identical to that of courts which have rejected the rule of consistency in separate trials).

[55] *See, e.g.*, United States v. Figueroa, 720 F.2d 1239, 1247 (11th Cir. 1983) (stating that where codefendant's conspiracy conviction was reversed, defendant was also entitled to reversal on conspiracy count); United States v. Hopkins, 716 F.2d 739, 748-49 (10th Cir. 1982) (reversing conspiracy conviction where jury acquitted all other conspirators), *withdrawn*, 744 F.2d 716 (10th Cir. 1984) (en banc) (dismissing the conspiracy conviction for insufficient evidence, without mentioning consistency); United States v. Morales, 677 F.2d 1, 3 (1st Cir. 1982) (stating that a "conspiracy conviction of one defendant will not be upheld when all other alleged coconspirators are acquitted in the same trial"); United States v. Sheikh, 654 F.2d 1057, 1062-64 (5th Cir. 1981) (reversing conspiracy conviction absent evidence of unnamed coconspirator where named conspirators were acquitted at jury trial), *cert. denied*, 455 U.S. 991 (1982).

[56] P. MARCUS, *supra* note 5, at § 2.03, at 2-14.

[57] *See, e.g.*, Government of the Virgin Islands v. Hoheb, 777 F.2d 138, 142 n.2 (3d Cir. 1985) (stating that *Standefer* is not applicable where there are inconsistent verdicts in a single trial); *Hopkins*, 716 F.2d at 748 (holding that *Standefer* does not apply to inconsistent verdicts rendered by a single jury).

[58] United States v. Albert, 675 F.2d 712, 713 (5th Cir. 1982); *see also* United States v. Ranney, 719 F.2d 1183, 1186 n.6 (1st Cir. 1983) (stating that most of the factors cited in *Standefer* apply equally to joint and separate trials); *Espinosa-Cerpa*, 630 F.2d at 330-33 (arguing that the principles underlying *Standefer* generally preclude application of the rule of consistency).

within a single jury's verdicts is of questionable merit.

B. *Differential Admissibility of Evidence as Between Defendants*

One of the major obstacles to the application of nonmutual collateral estoppel in the criminal context, the *Standefer* Court explained, is that "[i]t is frequently true in criminal cases that evidence inadmissible against one defendant is admissible against another."[59] The Court recognized that when the government was unable to present all of its proof against one defendant in a previous trial, it would be inappropriate to foreclose litigation of the issue of that defendant's criminal involvement with others in its subsequent prosecutions of other defendants against whom the proof can be admitted.[60] This result is logical; an acquittal obtained by the exclusion of relevant evidence would not afford the government a "full and fair opportunity to litigate"[61] and should not preclude litigation of the issue of another defendant's guilt.[62]

The problem of differential admissibility of evidence clearly should prevent the rule of consistency from operating in separate trials. The problem also exists, however, where conspirators are tried jointly,[63] typical in the majority of cases. The Fifth Circuit's observation that "[g]enerally, persons jointly indicted should be tried together, especially in conspiracy cases,"[64] reflects the general federal policy of joinder of defendants accused of criminal complicity in the interests of judicial convenience and economy.[65] Under Rule 14 of the Federal Rules of Criminal Procedure, a defendant may seek severance if such joinder would be prejudicial; however, such severance is within the discretion of the trial court.[66] "[A] defendant is not automatically entitled to sever-

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[59] *Standefer,* 447 U.S. at 23.

[60] *See id.* at 23-24.

[61] Blonder-Tongue Laboratories v. University of Ill. Found., 402 U.S. 313, 329 (1971).

[62] The double jeopardy clause, U.S. CONST. amend. V, however, would preclude further litigation against the defendant acquitted. *See* Kepner v. United States, 195 U.S. 100, 125-34 (1904) (holding that double jeopardy clause bars government appeal of acquittal).

[63] Under the federal rules, defendants may be so joined where "they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense . . . ." FED. R. CRIM. P. 8(b).

[64] United States v. Wilson, 657 F.2d 755, 765 (5th Cir. 1981), *cert. denied,* 455 U.S. 951 (1982).

[65] *See* United States v. Kulp, 365 F. Supp. 747, 765 (E.D. Pa. 1973), *aff'd,* 497 F.2d 921 (3d Cir. 1974).

[66] If denied severance, the defendant must demonstrate on appeal that she is "unable to obtain a fair trial without a severance," and that she will suffer "compelling prejudice against which the trial court will be unable to afford protection." United States v. Swanson, 572 F.2d 523, 528 (5th Cir.), *cert. denied,* 439 U.S. 848 (1978).

ance because the evidence against a codefendant is more damaging than the evidence against him."[67]

In many joint conspiracy trials, the evidence of complicity may vary substantially as between defendants.[68] In *Blumenthal v. United States,*[69] the Supreme Court cited with approval a now standard remedy in such circumstances: the jury should be instructed that "the guilt or innocence of each defendant must be determined by the jury *separately.* Each defendant has the same right to that kind of consideration on your part as if he were being tried alone."[70] Such an instruction is designed to limit the "dangers of transference of guilt"[71] by the jury to one defendant on the basis of evidence admissible only against another, thereby "individualiz[ing] each defendant in his relation to the mass."[72] Consistency should not be required where a jury is so instructed. In such cases, if the jury follows its instructions to consider the evidence separately as against each defendant,[73] it makes little sense to require that the verdicts against each defendant be consistent. If such a result were required, a jury might well "ponder . . . [the] observation . . . that 'The law may sometimes be an ass, but it cannot be so asinine as that.' "[74] Thus, the rule of consistency is itself inconsistent with the settled rule that juries are to consider evidence separately as to each defendant, and that, for this reason, "verdicts against multiple defendants are to be considered separately as to each defendant . . . ."[75]

The problem of differential admissibility of evidence seriously undermines the application of the rule of consistency in joint conspiracy trials. A situation discussed by the Court in *Standefer* illustrates the difficulties. Where evidence has been obtained against one defendant in violation of her constitutional rights, for instance in a search and seizure illegal under the fourth amendment,[76] the exclusionary rule

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[67] United States v. Fuel, 583 F.2d 978, 988 (8th Cir. 1978).

[68] *See* P. MARCUS, *supra* note 5, at § 6.03 [4](a), at 6-34.

[69] 332 U.S. 539 (1947).

[70] *Id.* at 560 (emphasis added); *see also* United States v. Shelton, 669 F.2d 446, 461 (7th Cir.) (noting with approval the trial court's directions to the jury to consider the evidence separately as to each defendant), *cert. denied,* 456 U.S. 934 (1982).

[71] Kotteakos v. United States, 328 U.S. 750, 774 (1946).

[72] *Id.* at 773.

[73] According to Judge Lumbard of the Second Circuit, juries in multiple defendant cases do in fact take care to isolate evidence with respect to particular defendants. *See* Marcus, *supra* note 14, at 945 n.69.

[74] R. v. Shannon, [1974] 2 All E.R. 1009, 1024 (C.A.) (quoting Haughton v. Smith, [1973] 3 All E.R. 1109, 1121 (H.L.)).

[75] United States v. Dunn, 564 F.2d 348, 360 (9th Cir. 1977); *see also id.* at n.24 (noting that the rule of consistency is an exception to the general rule).

[76] U.S. CONST. amend. IV.

bars the admission of that evidence against that defendant.[77] As the Court noted, however, "the same evidence . . . may be admissible against other parties to the crime 'whose rights were [not] violated,' "[78] and who thus lack standing to assert the exclusionary rule.[79] This situation may also arise where conspiracy defendants are tried jointly.

The requirement of consistency between a jury's conspiracy verdicts is no more tenable than the application of nonmutual collateral estoppel in the criminal context rejected by the *Standefer* Court. Inherent in both positions is the fallacious notion that a criminal acquittal is the equivalent of a verdict of innocence. The court in *R. v. Shannon*[80] explained the problem inherent in such a proposition and in the rule of consistency:

> The law in action is not concerned with absolute truth, but with proof . . . in accordance with . . . rules relating to admissibility of evidence. No doubt, in the realm of the absolute, A could not conspire with B without B also conspiring with A. But it by no means follows that it cannot be proved forensically that A conspired with B . . . notwithstanding a total failure of forensic proof, as against B, that B conspired with A . . . .[81]

Thus, in cases where differential admissibility of evidence exists between conspiracy defendants, the rule of consistency will operate to invalidate jury verdicts that, according to the rules of evidence, are not only possible but appropriate. The rule has been criticized on this ground by commentators since 1865[82] and by courts in rejecting the rule as applied to separate trials. No logical distinction justifies the rule's application to a joint conspiracy trial, where the evidence presented against each defendant is similarly susceptible to variance.

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[77] *See* United States v. Weeks, 232 U.S. 383, 398 (1914) (Evidence obtained through illegal search and seizure is inadmissible at trial.); *see also* Mapp v. Ohio, 367 U.S. 643, 655 (1961) (applying *Weeks* to states through the due process clause of the fourteenth amendment).

[78] *Standefer,* 447 U.S. at 24 (quoting Alderman v. United States, 394 U.S. 165, 171-72 (1969)).

[79] *See Alderman,* 394 U.S. at 171-75 (Defendant cannot invoke the exclusionary rule as to evidence obtained in violation of another's constitutional rights.); *accord* Rakas v. Illinois, 439 U.S. 128 (1978) (stating that illegal search and seizure of a third person producing damaging evidence against defendant does not infringe upon any of defendant's fourth amendment rights).

[80] [1974] 2 All E.R. 1009 (C.A. 1983), *conviction restored,* [1974] 2 All E.R. 1025 (H.L. 1974).

[81] *Id.* at 1042 (C.A.).

[82] *See* W. RUSSELL, CRIMES AND MISDEMEANORS 144-45 (C.S. Greaves 4th ed. 1865); G. WILLIAMS, CRIMINAL LAW § 213 (3d ed. 1961).

Finally, application of the rule of consistency in joint conspiracy trials would tend to undermine the rules developed by the Supreme Court governing a defendant's right to assert the exclusionary rule. Under the rule of consistency, the acquittal of one defendant, possibly resulting from the exclusion of evidence, would necessarily involve the acquittal of the other against whom the evidence *was* admissible. Certainly this result subverts the rule that certain constitutional rights "may not be vicariously asserted"[83] by affording a defendant whose rights were not violated the benefits of suppression—a result condemned by the Court in *Standefer*.[84]

The *Standefer* Court's conclusion that differential admissibility of evidence as between defendants precludes the application of nonmutual collateral estoppel should also preclude the application of the rule of consistency in both separate and joint conspiracy trials where such evidentiary problems exist. Under such circumstances, the rule may operate to invalidate jury verdicts rendered in accord with both the judge's instructions and the evidence. Furthermore, the rule serves to extend the vicarious benefit of suppression of evidence to those who have "suffered no encroachment on [their] liberty,"[85] thereby allowing "guilty defendants to go free without serving any countervailing purpose."[86] The rule of consistency should not "remedy" a situation where, according to the rules of evidence, no inconsistency is present.

C. *Jury Lenity and Inconsistent Verdicts*

In many joint conspiracy trials the evidence admitted against each defendant will be the same.[87] In such cases, " 'error,' in the sense that the jury has not followed the court's instructions, most certainly has occurred"[88] when the jury convicts only one of two or more defendants in a conspiracy trial. It is difficult to interpret such a result: was the jury convinced of the guilt of all, but chose for unknown reasons to acquit particular defendants; did it single out and convict a particular defendant out of passion or prejudice; or did it simply misunderstand the plurality requirement of conspiracy?

The rule of consistency is based on the assumption that inconsis-

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[83] Alderman v. United States, 394 U.S. 165, 174 (1969).

[84] *See Standefer*, 447 U.S. at 24 n.19; *cf.* United States v. Azadian, 436 F.2d 81, 82-83 (9th Cir. 1971) (A principal's entrapment defense is not vicariously available to defendant accessory who was not entrapped.).

[85] United States v. Standefer, 610 F.2d 1076, 1090 (3d Cir. 1979), *aff'd*, 447 U.S. 10 (1980).

[86] *Id.*

[87] *See* P. MARCUS, *supra* note 5, at §6.03 [4][a][i], at 6-34.

[88] United States v. Powell, 469 U.S. 57, 65 (1984).

tent dispositions of conspiracy charges are invalid because they result from a jury's passion or misunderstanding. In *Standefer,* however, the Court rejected this reasoning by holding that the acquittal of a principal offender does not estop the government from prosecuting an accessory to the alleged criminal offense.[89] Citing *Dunn v. United States,*[90] the Court's seminal statement on inconsistent verdicts, the *Standefer* Court noted that since American juries are permitted "to acquit out of compassion or compromise,"[91] a jury acquittal should not preclude litigating the issue of a defendant's guilt for the purposes of subsequent proceedings against others accused of a joint criminal endeavor involving that defendant.[92] The Court's refusal to accept an acquittal as proof of innocence invalidates the premise of the rule of consistency. If a guilty person may be acquitted, a co-conspirator's acquittal is not necessarily inconsistent with her partner's conviction. The Supreme Court generally accepts inconsistent verdicts, as demonstrated by its decisions in *Dunn v. United States*[93] and *United States v. Powell.*[94]

1. The *Dunn* Doctrine of Inconsistent Verdicts

Dunn involved liquor law violations in the prohibition era. During prohibition, juries frequently arrived at verdicts seemingly devoid of logic. A fairly common result, exemplified by *Dunn,* was the acquittal of a defendant on counts of unlawful possession and unlawful sale of alcohol, joined with a conviction for maintenance of a nuisance by keeping alcohol for sale. The liquor laws were unpopular[95] and ultimately were repealed in 1933.[96] It is a fair inference that inconsistent verdicts in liquor law prosecutions reflected juries' unwillingness to expose defendants to criminal liability for multiple violations of laws that they did not support.[97] The federal circuits split on the issue of whether nuisance convictions were valid notwithstanding acquittals on counts alleging the possession and sale of alcohol.[98]

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[89] *See Standefer,* 447 U.S. at 21-26.

[90] 284 U.S. 390 (1932).

[91] *Standefer,* 447 U.S. at 22.

[92] *See id.* at 23.

[93] 284 U.S. 390 (1932).

[94] 469 U.S. 57 (1984).

[95] *See* C. MERZ, THE DRY DECADE 208-32, 334 (1969) (discussing public opposition to prohibition).

[96] *See* U.S. CONST. amend. XXI.

[97] There may also be other reasons for an acquittal. *See* Note, *Validity of Inconsistent Verdicts,* 1961 DUKE L.J. 133, 137 n.15 (juries may hesitate to convict on many counts when potential liability is high).

[98] *Compare* Steckler v. United States, 7 F.2d 59 (2d Cir. 1925) (affirming conviction despite inconsistent verdicts) *with* John Hohenandel Brewing Co. v. United States,

The Supreme Court resolved this conflict in *Dunn,* holding that the defendant's conviction for a nuisance by keeping alcohol for sale was valid, irrespective of clearly inconsistent acquittals by the same jury on charges of possession and sale of alcohol.[99] The defendant asserted that the acquittal on the possession count rendered the nuisance conviction inconsistent and invalid, since the proof of both counts "consist[ed] of identical evidence."[100] The Court, quoting the Second Circuit, replied:

> "The most that can be said . . . is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but . . . not . . . that they were not convinced of the defendant's guilt. We interpret the acquittal as no more than their assumption of a power . . . to which they were disposed through lenity."[101]

This conclusion seems reasonable, given the circumstances of the case. The facts of *Dunn* suggest that the defendant, owner of a "speakeasy," was caught redhanded in blatant violation of the liquor laws.[102] The public, however, strongly opposed the laws; prohibition would be repealed only three years later. Thus, the Court in *Dunn* interpretation of the jury's inconsistent acquittals on the alcohol possession and sales charges as an exercise of lenity rather than a negation of the facts embodied in these counts was a realistic and sensible appraisal of the ver-

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295 F. 489, 490 (3d Cir. 1924) (holding that where verdict was guilty on one count and not guilty on other counts, the verdict of guilty had to be based on evidence other than that pleaded in support of the other counts). *See also* Peru v. United States, 4 F.2d 881 (8th Cir. 1925) (holding that inconsistency renders nuisance conviction invalid where the identical evidence was introduced to support all counts).

[99] *See Dunn,* 284 U.S. at 393. *But see id.* at 397-98 (Butler, J., dissenting) (arguing that the jury's verdict was necessarily inconsistent).

[100] *Id.* at 392.

[101] *Id.* at 393 (quoting Steckler v. United States, 7 F.2d 59, 60 (2d Cir. 1925)). The Court's holding was also based on the assumption that "[i]f separate indictments had been presented against the defendant for possession and for maintenance of a nuisance, and had been separately tried, . . . an acquittal on one could not be pleaded as *res judicata* of the other." *Id.* Although later cases of the Court have discredited this notion, *see* Ashe v. Swenson, 397 U.S. 436 (1970) (When doubt as to defendant's identity led to acquittal for robbery of one of several victims present at the scene of the crime, the double jeopardy clause bars prosecution for robbery of another of the victims.); Sealfon v. United States, 332 U.S. 575 (1948) (Res judicata precludes aiding and abetting conviction when defendant was previously acquitted of conspiracy on same facts.), the Court recently affirmed that *Dunn* "rests on a sound rationale that is independent of its theories of res judicata." *Powell,* 469 U.S. at 64-65.

[102] "Two prohibition officers testified they entered the premises . . . [and] . . . called for drinks . . . which were served over the bar without any apparent attempt at secrecy." Dunn v. United States, 50 F.2d 779, 780 (9th Cir. 1931), *aff'd,* 284 U.S. 390 (1932).

dict and its surrounding circumstances. In its approval of the jury's balancing of the law and justice, the Court implicitly recognized the jury's role as "the voice of the country."[103] The result in *Dunn* therefore reflects a concomitant reluctance to give a defendant a windfall exceeding that already obtained through jury lenity—that is, acquittal on all counts based on the "inconsistency" of convictions on particular counts with legally questionable acquittals on other counts. The *Dunn* case represents a practical and just compromise between "the jury's role in seeing that the individual gets justice with mercy"[104] and "the important federal interest in the enforcement of the criminal law."[105]

2. *United States v. Powell:* Reaffirmation and Clarification of the *Dunn* Doctrine

Although the Supreme Court has had several occasions to invoke the *Dunn* principle,[106] the Court has not attempted to elaborate on the *Dunn* case's brief explanation until the present decade. Faced with several recent circuit decisions which "ha[d] begun to carve exceptions out of the *Dunn* rule,"[107] the Court reassessed the *Dunn* doctrine of inconsistent verdicts in *United States v. Powell.*[108] Powell is the modern factual analogue of *Dunn*. The defendant had been indicted on counts of, inter alia, possession of cocaine with intent to distribute, conspiracy to do so, and use of the telephone to facilitate narcotics violations.[109] The Ninth Circuit, without citing *Dunn*, reversed a jury verdict convicting

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[103] United States v. Maybury, 274 F.2d 899, 903 (2d Cir. 1960).

[104] Bickel, *Judge and Jury-Inconsistent Verdicts in the Federal Courts,* 63 HARV. L. REV. 649, 655 (1950).

[105] *Standefer,* 447 U.S. at 24.

[106] *See* United States v. Dotterweich, 320 U.S. 277, 279 (1943) (Where jury convicted corporate president, but not corporation, of shipping misbranded drugs in interstate commerce, inconsistency is not grounds for reversal.); *see also* Hamling v. United States, 418 U.S. 87, 101 (1974) (Jury's inability to reach verdict on charge that defendants used mail to distribute allegedly obscene book did not preclude finding that defendants' mailing of advertisements that described how to obtain book constituted distribution of obscene materials.).

[107] *Powell,* 469 U.S. at 63. As examples of cases in which the circuit courts of appeals had recognized exceptions to the *Dunn* rule, the *Powell* Court referred to: United States v. Brooks, 703 F.2d 1273, 1278-79 (11th Cir. 1983) (*Dunn* rule is inapplicable where defendant was charged with conspiracy in one count and, in a separate count, with using a telephone in furtherance of the conspiracy.); United States v. Morales, 677 F.2d 1, 2 (1st Cir. 1982) (Where jury found defendant guilty of conspiracy to misapply monies of a federally insured bank, but not guilty of the substantive crime of fraudulent check cashing, such findings constituted plain error.); and United States v. Hannah, 584 F.2d 27, 30 (3d Cir. 1978) (Government's theory of prosecution—that acts constituting a felony with which defendant was charged were same acts constituting an alleged conspiracy—precluded an inconsistent verdict by the jury.).

[108] 469 U.S. 57 (1984).

[109] *See id.* at 59-60.

the defendant on the telephone charge but acquitting on all others,[110] following other circuit decisions holding that convictions on this charge "must be reversed where the conviction on the underlying conspiracy counts is reversed."[111]

The Supreme Court, in an unanimous decision, reversed the Ninth Circuit and reinstated the defendant's telephone facilitation conviction. In doing so, the Court rejected the line of circuit decisions attempting to distinguish the reversals of inconsistent telephone facilitation acquittals from the *Dunn* rule and strongly reaffirmed the validity of the rule itself.[112] The Court presented a detailed analysis of the factors embodied in the *Dunn* rule. First, courts are not able to interpret the reasons for a jury acquittal.[113] Second, the jury's power to exercise leniency is valuable.[114] Third, courts should not speculate about jury deliberations.[115] Finally, evidentiary review safeguards against erroneous verdicts.[116] These factors make clear the continuing relevancy and appropriateness of the *Dunn* approach to inconsistent verdicts in the American criminal justice system.

When a jury renders a truly inconsistent verdict, "it is unclear whose ox has been gored."[117] Such a verdict is ambiguous as to which of the convictions or acquittals the jury really meant. Under these circumstances, as one court has noted, "it might be possible to speculate indefinitely as to what paths the jury followed in reaching its conclusions . . . . [Yet] . . . we have no reliable way to discover what lies behind . . . inconsistent verdicts."[118] Furthermore, as the *Powell* Court noted, the double jeopardy clause[119] insulates a jury acquittal from judicial review. Under these circumstances, the Court recognized that to invalidate a jury's conviction on the basis of its inconsistent acquittal improperly assumes the validity of the acquittal, which is neither subject to review nor susceptible to interpretation.[120]

Thus, it is clear that the *Powell* Court accepted the *Dunn* ration-

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[110] *See* United States v. Powell, 708 F.2d 455, 456 (9th Cir.), *reh'g denied,* 719 F.2d 1480 (9th Cir. 1983), *cert. denied,* 467 U.S. 1254, *rev'd,* 469 U.S. 57 (1984). On denying the government's petition for rehearing, however, the Ninth Circuit stated that its result was an "exception[] to the application of the *Dunn* rule." 719 F.2d at 1480.

[111] *Powell,* 708 F.2d at 456; *accord* United States v. Bailey, 607 F.2d 237, 245 (9th Cir. 1979), *cert. denied,* 445 U.S. 934 (1980).

[112] *See Powell,* 469 U.S. at 62-67.

[113] *See id.* at 64-65.

[114] *See id.* at 65-66.

[115] *See id.* at 66-67.

[116] *See id.*

[117] *Id.* at 65.

[118] DeSacia v. State, 469 P.2d 369, 378 (Alaska 1970).

[119] U.S. CONST. amend. V; *see supra* note 64.

[120] *See Powell,* 469 U.S. at 65-67.

ale that inconsistent verdicts are often a product of jury lenity.[121] The jury's acquittal may be based on extralegal factors irrelevant to the validity of the conviction. One commentator has suggested that this position is merely an assumption and that "[r]eliance on such an assumption is a serious breach of the systematic protections designed to ensure a sound basis for conviction of criminal defendants."[122] An examination of the factors underlying this assumption, however, reveals that the *Dunn* doctrine does not reflect a wholesale rejection of defendants' rights, but a prudent balancing of the role of the jury and the need to ensure the accuracy of criminal convictions.

The *Powell* Court's assertion that verdict inconsistency "often" results from juries' exercises of leniency has not been tested empirically.[123] Aside from the question of how often jurors exercise such leniency, it must be recognized that to require consistency in all jury verdicts would severely limit their ability to exercise leniency at all. Under the rule of consistency a jury could not acquit one defendant on the basis of leniency without being forced to acquit the other as well. A jury may well forego any acquittal if that is the only possible result. A jury should be able to apply leniency in "the difficult cases where [it] wishes to avoid an all-or-nothing verdict,"[124] regardless of the inconsistency in results thereby produced. Though some commentators question the jury's ability to exercise such discretion properly,[125] the result in *Powell* implicitly recognizes:

> Law and Justice are from time to time inevitably in conflict. That is because law is a general rule . . . ; while justice is the fairness of this precise case under *all* its circumstances.

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[121] *See id.* at 65.

[122] Wax, *Inconsistent and Repugnant Verdicts in Criminal Trials,* 24 N.Y.L. SCH. L. REV. 713, 739 (1979).

[123] The *Powell* Court's assertion, however, is supported by the literature concerning the impact of extralegal factors on jury decisions. In H. KALVEN & H. ZEISEL, THE AMERICAN JURY (1966), the authors collected judges' reports on over 3500 criminal trials in order to assess both the extent of and reasons for juries' deviations from the judges' views of the legally prescribed results in these trials. Particularly relevant in the context of inconsistent verdicts is the study's descriptions of the "sympathetic defendant," a defendant particularly appealing to the jury in terms of sex, race, age, appearance, courtroom demeanor, and other factors, as a substantial and consistent source of judge-jury disagreement, *see id.* at 193-218, and of the juries' tendency to exercise leniency where a defendant's misfortunes resulting from the commission of the crime lead them to believe that she has been "punished enough." *See id.* at 301-05. This study indicates a substantial basis for the *Powell* Court's conclusion that, in the context of inconsistent verdicts, it is not unlikely that extralegal factors have played a role in the jury's decision.

[124] *Powell,* 469 U.S. at 65-66 (citing Bickel, *supra* note 104, at 652).

[125] *See* Note, *Toward Principles of Jury Equity,* 83 YALE L.J. 1023, 1026-28 (1974) (discussing criticisms of jury sovereignty).

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> . . . The jury . . . adjusts the general rule of law to the justice of the particular case.
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> . . . It supplies that flexibility of legal rules which is essential to justice and popular contentment.[126]

The jury's ability to interpose its own sense of justice between the rigor of legal principle and the equities of a particular case underlies "the jury's historic function, in criminal trials, as a check against arbitrary or oppressive exercises of power by the Executive Branch."[127] The jury's ability to deliver an inconsistent verdict permits the community to provide its judgment on whether the punishment fits the crime. To deny the jury this power is a serious encroachment on its essential function. If courts were to analyze and dismiss jury verdicts for inconsistencies, " 'they would miss the very thing for which they are looking, the opinion of the country.' "[128] Thus, the *Powell* Court's reaffirmation of the *Dunn* doctrine is based in part upon its recognition of the jury's role as a guardian of individual liberty, at the cost of verdicts which on occasion are legally "incorrect."

Furthermore, as the *Powell* Court noted, an attempt to assess the consistency of a jury verdict "would be based either on pure speculation, or would require inquiries into the jury's deliberations that courts generally will not undertake."[129] Such post hoc examinations of juries' deliberative processes have been limited in the federal courts to cases of "extraneous influences" on the processes, including outside publicity received by jurors, consideration by the jury of evidence not admitted in court, and jurors' communications with third parties.[130] In contrast, "matters which essentially inhere in the verdict itself,"[131] including both "the mental process of any juror or the jury in arriving at a verdict"[132] and "the method by which the verdict is reached,"[133] are not

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[126] Wigmore, *A Program for the Trial of Jury Trial,* 12 J. AM. JUDICATURE SOC'Y 166, 170 (1929); *see also* Note, *supra* note 125, at 1028-54 (discussing support for jury sovereignty and suggesting that jurors share commonly held notions of equity).

[127] *Powell,* 469 U.S. at 65.

[128] United States v. Maybury, 274 F.2d 899, 908 (2d Cir. 1960) (quoting 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 624 (2d ed. 1898)).

[129] *Powell,* 469 U.S. at 66.

[130] *See* United States v. Campbell, 684 F.2d 141, 151-52 (D.C. Cir. 1982); United States v. Wilson, 534 F.2d 375, 378-79 (D.C. Cir. 1976); Government of the Virgin Islands v. Gereau, 523 F.2d 140, 149-50 (3d Cir. 1975), *cert. denied,* 424 U.S. 917 (1976).

[131] Hyde v. United States, 225 U.S. 347, 384 (1912).

[132] Capella v. Baumgartner, 59 F.R.D. 312, 315 (S.D. Fla. 1973).

[133] *Gereau,* 523 F.2d at 149.

competent to impeach a jury verdict.[134] This distinction relies on the traditional sovereignty of the jury as the "voice of the country": where the defendant has received a fair trial, and where no outside forces have distorted the jury's message, its conclusion should not be questioned.[135] Thus, absent allegations of extraneous influences on the jury, verdict inconsistency should not be interpreted as more than "the give-and-take within [the] microcosm of the community."[136] "[T]hrough this deference," the *Powell* Court noted, "the jury brings to the criminal process, in addition to the collective judgment of the community, an element of needed finality."[137]

Underlying these notions of jury sovereignty is the *Powell* Court's recognition that criminal defendants are already "afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence undertaken by the trial and appellate courts."[138] Under the federal rules, a defendant may move for acquittal "if the evidence is insufficient to sustain a conviction" after the evidence on either side is closed,[139] and where the jury returns a verdict of guilty.[140] Due process requires that before an accused can be convicted, the prosecution must present "proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[141] Recently, in *Jackson v. Virginia,*[142] the Court clarified the proof beyond a reasonable doubt standard. To meet the standard on review of a conviction, it must be found that "the record evidence could reasonably support a finding of guilt beyond a reasonable doubt."[143] Thus, where a jury's conviction on one count is inconsistent with its acquittals on others, both the trial and the appellate courts may directly review the substance of the evidence supporting that conviction for sufficiency. Where such evidence is in fact found sufficient, an interpretation of such inconsistencies as unreviewable products of jury lenity is warranted, and absent a showing of jury misconduct, necessary to preserve the role of the criminal jury. Evidentiary review ensures that the preservation of jury sovereignty through tolerance of verdict inconsistency

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[134] *See id.* at 148-50.

[135] *See id.* at 149-50 (distinguishing between extra-jury and intra-jury influences).

[136] United States v. Campbell, 684 F.2d 141, 151 (D.C. Cir. 1982).

[137] *Powell,* 469 U.S. at 67.

[138] *Id.*

[139] FED. R. CRIM. P. 29(a).

[140] FED. R. CRIM. P. 29(c).

[141] *In re* Winship, 397 U.S. 358, 363-64 (1970).

[142] 443 U.S. 307 (1979).

[143] *Id.* at 318; *see also* Glasser v. United States, 315 U.S. 60, 80 (1942) ("The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it.").

will not be at the expense of the defendant's fundamental right to a reliable conviction.

3. The Rule of Consistency and the *Dunn* Doctrine of Inconsistent Verdicts

The Supreme Court's approval of inconsistent verdicts springs from its recognition that a criminal acquittal may arise from jury leniency or other extralegal factors, and thus that acquittal is not dispositive of a defendant's innocence "in the sense of having done the act charged."[144] This recognition underlies the Court's refusal to extend nonmutual collateral estoppel to an accessory following the acquittal of the principal in *Standefer v. United States.*[145] Furthermore, that evidence may be inadmissible in the principal's trial but admissible against the accessory may also explain an inconsistent verdict.[146]

Application of the rule of consistency in joint conspiracy trials where only one of two or more defendants is convicted also presents these difficulties. First, evidence may be admissible against only one of two conspiracy defendants, rendering such a result only superficially inconsistent. Further, even where no such evidentiary problems exist, the Supreme Court's *Dunn* and *Powell* analyses ultimately require interpretation of the inconsistent verdicts as an exercise by the jury of its power to acquit for extralegal reasons. As in *Standefer,* then, such an acquittal is of no relevance to the validity of an inconsistent conviction. Lastly, the rejection of the nonmutual estoppel doctrine in criminal cases in *Standefer* was based on the possibility that a jury acquittal *might* contain irrationality. A jury verdict convicting only one of several conspiracy defendants clearly indicates that the jury has not followed the judge's directions. In a strictly legal sense, such a verdict lacks a rational basis. Where this is so, according to *Powell,* "principles of collateral estoppel—which are predicated on the assumption that the jury acted rationally and found certain facts in reaching its verdict—are no longer useful."[147] Thus, the rule of consistency, which operates to bar a jury conviction of one conspirator based on its own acquittal of a fellow conspirator, is itself inconsistent with the principles of collateral estop-

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[144] Bickel, *supra* note 104, at 652.

[145] 447 U.S. 10 (1980).

[146] *See id.* at 22-24. The *Standefer* Court noted, finally, that "the important federal interest in the enforcement of the criminal law" outweighs the concerns of judicial economy underlying the doctrine of collateral estoppel. *See id.* at 24-25. Because this Comment concerns inconsistent verdicts rendered by a single jury, the interest of judicial economy is not of primary concern.

[147] *Powell,* 469 U.S. at 68.

pel underlying the *Standefer* decision and with the fundamental acceptability of such verdicts embodied in the Court's *Dunn* and *Powell* decisions.

This Comment proposes, then, that the rule of consistency, even in its presently narrow application,[148] has no subsisting validity and should be abandoned. In place of this mechanical rule, which operates to invalidate automatically any jury conspiracy verdict containing an apparent inconsistency, a reviewing court should simply examine the inconsistent conviction for evidentiary support. A recent First Circuit decision, *United States v. Cyr,*[149] although falling within the "separate trials" exception to the rule of consistency, serves to illustrate the proper disposition of an inconsistent conspiracy verdict in the absence of a per se rule of consistency. In this case, the defendants, C, a would-be restaurateur, B and K, business associates of C, and M, a bank loan officer, were indicted for, inter alia, conspiring to misapply bank funds in connection with a wide-ranging scheme of loans fraudulently obtained for the use of C's restaurant business. The trial jury convicted C but acquitted K and M on the conspiracy count.[150] In response to C's challenge to the consistency of this conviction, the court first noted, in accordance with *Dunn,* that a jury's verdict should not be set aside solely on grounds of inconsistency.[151] Next, the court noted that it was "clear that the evidence established beyond a reasonable doubt that [C and M] conspired together to misapply bank funds . . . ."[152] Finally, the court, though recognizing that it was under no obligation to do so, pointed out several factors that may have produced the inconsistency in results, including that only C personally profited from the loans, that there was testimony indicating M's honesty and integrity, and that according to C's own testimony "she was responsible for [M's] downfall."[153] The court's enumeration of these factors suggests at the very least that circumstances evoking jury compassion and leniency can and do arise within the ambit of a conspiracy trial. Accordingly, the *Cyr* court properly limited its review of the lone conspiracy conviction to the

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[148] *See supra* notes 3-5 and accompanying text.

[149] 712 F.2d 729 (1st Cir. 1983).

[150] *See id.* at 731-32.

[151] *See id.* at 732 (quoting Harris v. Rivera, 454 U.S. 339, 354 (1981)). In *Cyr,* one of the alleged conspirators became ill during the trial, and therefore received a severance. Thus, the "separate trials" exception to the rule of consistency seems to have barred the application of the rule in this case. The court does not mention the rule in its opinion. Under the reasoning of the court and this Comment, however, the presence and acquittal of this defendant would not, but for the rule of consistency, have affected its result.

[152] *Id.* at 734.

[153] *Id.*

sufficiency of the evidence. Under the principles enumerated by the Supreme Court in *Standefer, Dunn,* and *Powell,* a defendant is "entitled to no less—and to no more."[154]

CONCLUSION

The essence, and fundamental flaw, of the rule of consistency lies in the assumption that a jury acquittal conclusively demonstrates a defendant's lack of involvement in a criminal transaction. Such an assumption is incompatible with the Supreme Court's well-settled approval of inconsistent verdicts and its recognition that criminal acquittals may result from a number of factors unrelated to a defendant's guilt, including the inadmissibility of evidence and the exercise of lenity by a jury.

For these reasons, the ultimate effect of the rule of consistency may often be a purposeless grant of immunity to one defendant based on factors personal to a codefendant and ultimately unrelated to the actual existence of a conspiracy. As such, review of inconsistent conspiracy convictions should be limited to consideration of the sufficiency of the supporting evidence and should disregard the legally irrelevant acquittals of a conspirator's lucky cohorts.

[154] *Standefer,* 447 U.S. at 26.

NOYES LEECH

The *University of Pennsylvania Law Review* dedicates this issue to Professor Noyes Leech, William A. Schnader Professor of Law and a former Editor-in-Chief of this journal. The selections that follow paint a rich portrait of a distinguished scholar whose dedication to service, commitment to rigorous academic standards, and concern for the well-being of others had a profound effect on his colleagues and students. The *Law Review* wishes Professor Leech well in his future endeavors.