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Double Jeopardy, Acquittal Appeals, and the Law-Fact Distinction

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NOTE

DOUBLE JEOPARDY, ACQUITTAL APPEALS, AND THE LAW-FACT DISTINCTION

Forrest G. Alogna†

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INTRODUCTION

If men were angels, no government would be necessary.

—*The Federalist*[1]

The Double Jeopardy Clause protects criminal defendants from most government appeals of acquittals, even where "the acquittal was based upon an egregiously erroneous foundation."[2] The ability to ap-

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1 THE FEDERALIST No. 51, at 319 (James Madison) (Isaac Kramnick ed., 1987).

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

peal criminal verdicts is asymmetrical.[3] When a court or jury finds a criminal defendant not guilty, that determination is normally unassailable, because the losing party—the government—may not appeal.[4] Criminal defendants, on the other hand, may appeal.[5] There is one exception to this asymmetry—prosecutors may appeal purely legal determinations which would require no further fact-finding.[6] Determining whether appeal is available thus hinges on whether the issue to be appealed implicates solely legal determinations. Because prosecutors so seldomly attempt to appeal acquittals, virtually no case law confronts the law-fact distinction in the acquittal appeal context.[7] In fact, law-fact distinction jurisprudence suggests the exception permitting acquittal appeals is far more broad than recognized.[8]

Although the following discussion is limited to federal bench trials,[9] constitutional double jeopardy protections have been applied to the states via the Fourteenth Amendment since 1969.[10] A novel perspective on the scope of constitutional prosecutorial appeals thus implicates both federal and state actions. Federal bench decisions are particularly amenable to review because a federal rule of criminal procedure requires judges to "find the facts specially" at a party's request.[11] Explicit factual findings are indispensable in determining

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3 This asymmetry does not apply until after "jeopardy" has "attached." In jury trials, jeopardy attaches at the empaneling of the jury. In a bench trial, jeopardy attaches at the swearing in of the first witness. Crist v. Bretz, 437 U.S. 28, 29 (1978); Serfass v. United States, 420 U.S. 377, 388 (1975).

4 *See infra* note 41 and accompanying text.

5 *See infra* note 42 and accompanying text.

6 *See infra* notes 43-50 and accompanying text.

7 *See infra* note 193 and accompanying text.

8 *See infra* Part II.

9 One drawback to permitting government appeals from bench trials alone is that criminal defendants might choose jury trials in order to forestall any danger of appeal. *See, e.g.*, OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, TRUTH IN CRIMINAL JUSTICE REP. NO. 6, REPORT TO THE ATTORNEY GENERAL ON DOUBLE JEOPARDY AND GOVERNMENT APPEALS OF ACQUITTALS (1987), *reprinted in* 22 U. MICH. J.L. REFORM 831, 896 (1989) [hereinafter OFFICE OF LEGAL POLICY]. But as the Office of Legal Policy reports:

> It is not at all clear that the proposed case law clarification would substantially affect a defendant's incentive to opt for a jury trial. Moreover, assuming proper federal court judicial supervision of jury trials, it is not apparent to what extent jury trials are more likely to yield wrongful acquittals. Finally, any wrongful acquittals attributable to jury trials would have to be weighed against any fall in wrongful acquittals stemming from government appeals of bench trial verdicts.

Id. at 896-97.

Courts could avert pro-jury trial bias by permitting appeals of errors of law from special verdicts in jury trials (and expanding use of such special verdicts) or disposing of problematic legal issues pretrial, when government appeal is generally still available. For a recommendation for further study on the constitutionality of the former, see *id.* For advocacy of the wisdom of the latter, see Kate Stith, *The Risk of Legal Error in Criminal Cases: Some Consequences of the Asymmetry in the Right to Appeal*, 57 U. CHI. L. REV. 1, 54 & n.140 (1990).

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

11 FED. R. CRIM. P. 23(c).

whether an error was purely legal and would require no further fact-finding. In 1999, bench trials accounted for roughly one-quarter of federal criminal trials.[12]

The rule prohibiting acquittal appeals is least controversial when a judge acquits a clearly innocent defendant. But judges sometimes err. At worst, "federal judges 'can be lazy, lack judicial temperament . . . [and] pursue a nakedly political agenda' without fear of removal."[13] As the volumes of the *Federal Reporter*[14] make clear, judges, in the view of other judges, sometimes get the law wrong. Normally, these "wrong" decisions may be corrected on appeal. Circuit courts correct district courts, and the Supreme Court corrects the circuits. This simple hierarchy collapses in this one corner of criminal law—acquittals—where the decisions of judges, even if "egregiously erroneous" are often immune from review, and thus uncorrectable.

But the Court has interpreted the Double Jeopardy Clause to prohibit most acquittal appeals for very good reasons. Defending oneself in any lawsuit is onerous. When the government is the plaintiff and the liability a prison term or death, the pressures of legal defense are substantial. Prolonging an individual defendant's exposure to these pressures may be unduly oppressive. Justice Black phrased this concern memorably in *Green v. United States*:[15]

> [T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[16]

Permitting government appeal protracts the hardship of criminal defense. To lessen the already substantial burden on criminal defendants, the Court has interpreted the Double Jeopardy Clause to prohibit many government appeals.

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12 SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1999: BUREAU OF JUSTICE STATISTICS 451 tbl.5.48 (Kathleen Maguire ed., 2000).

13 Neal Devins, *Reanimator: Mark Tushnet and the Second Coming of the Imperial Presidency*, 34 U. RICH. L. REV. 359, 364 (2000) (quoting RICHARD A. POSNER, OVERCOMING LAW 111 (1995) (alteration in original)); *cf.* Barry Friedman, *The History of the Countermajoritarian Difficulty: Law's Politics* (pt. 4), 148 U. PA. L. REV. 971, 972-73 (2000) (noting protections that insulate judges from political influences).

14 The *Federal Reporter* contains the opinions of the U.S. Courts of Appeals. BLACK'S LAW DICTIONARY 612 (6th ed. 1990).

15 355 U.S. 184 (1957) (5-4 decision).

16 *Id.* at 187-88; *see* United States v. Jenkins, 420 U.S. 358, 370 (1975) (quoting *Green*, 355 U.S. at 187), *overruled by* United States v. Scott, 437 U.S. 82 (1978); United States v. Lynch, 162 F.3d 732, 737 (2d Cir. 1998) (quoting *Jenkins*, 420 U.S. at 370 (quoting *Green*, 355 U.S. at 187)), *reh'g en banc denied*, 181 F.3d 330 (2d Cir. 1999).

The Court has traditionally interpreted the Clause by weighing the defendant's interest in closure against the state's interest in accurate adjudications.[17] Justices have disagreed on the relative weight of these interests, but accuracy and finality have remained the primary constitutional stakes. Consider *Palko v. Connecticut*,[18] in which the Court reaffirmed the constitutionality of acquittal appeals in state courts.[19] Justice Cardozo, noting the opportunity for defendants to correct adverse error, observed that "[t]he edifice of justice stands, its symmetry, to many, greater than before."[20] In Justice Cardozo's *Palko* analysis, accuracy outweighed finality. The balancing of these two constitutional stakes—the public interest against the defendant's interest—recurs throughout double jeopardy jurisprudence. When the Court overturned *Palko* in 1968, the majority emphasized the defendant's interest in finality.[21]

The constitutional interests at stake in double jeopardy jurisprudence are interesting—but they also bear a marked contemporary relevance. In a recent case, *United States v. Lynch*, federal prosecutors attempted to appeal an acquittal.[22] The Second Circuit panel's opinion grounded its lack of jurisdiction on constitutional double jeopardy grounds, although an appeal would have entailed no further fact-finding.[23] This recent rift within an erudite court punctuates just how controversial and unresolved are the parameters of the pure law exception.[24] Six months later, the Second Circuit denied the request for an en banc rehearing, despite half of the circuit voting in favor (a majority was required to hear the case).[25] Although the Constitution tolerates acquittal appeals which entail no further fact-finding, appel-

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17 *See* Fong Foo v. United States, 369 U.S. 141, 145 (1962) (Clark, J. dissenting). *Compare Green*, 355 U.S. at 187 ("[T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity . . . ."), *with id.* at 218-19 (Frankfurter, J., dissenting) (balancing defendant's rights of freedom from "oppression" against the "countervailing interest in the vindication of criminal justice").

18 302 U.S. 319 (1937), *overruled by* Benton v. Maryland, 395 U.S. 784, 794 (1969).

19 *Id.* at 328.

20 *Id.*

21 *Benton*, 395 U.S. at 795-96. For another expression of the competing principle, see Justice Clark's *Fong Foo* dissent: "It is fundamental in our criminal jurisprudence that the public has a right to have a person who stands legally indicted by a grand jury publicly tried on the charge." 369 U.S. at 145 (Clark, J., dissenting).

22 162 F.3d 732, 733 (2d Cir. 1998), *reh'g en banc denied*, 181 F.3d 330 (2d Cir. 1999).

23 *See infra* notes 138, 170-72 and accompanying text.

24 *See* Lynch, 181 F.3d at 330.

25 *See id.* ("Judges Kearse, Leval, Cabranes, Parker, Pooler, and Sotomayor dissent from the denial of en banc reconsideration."). The affirmative vote of a majority of the active judges on the circuit are required to trigger en banc review. 28 U.S.C. § 46(c) (1994). *Cf.* Peter Michael Madden, Comment, *In Banc Procedures in the United States Courts of Appeals*, 43 FORDHAM L. REV. 401, 420 (1974) (suggesting en banc review should be permitted without a majority); Note, *Playing with Numbers: Determining the Majority of Judges*

late courts have been loathe to discern a case which meets the exception.[26] If "[o]ne of the distinctive characteristics of the United States Court of Appeals for the Second Circuit is the infrequency of rehearings in banc,"[27] the *Lynch* case may portend a sea change in double jeopardy law. If federal prosecutors can convince another panel, as they nearly did in the Second Circuit, then some circuit may soon hear a prosecutorial appeal of an acquittal. But *Lynch* also exposes some difficulties in the *practice* of permitting acquittal appeals. No dearth of controversy exists over the *theoretical* underpinnings of double jeopardy jurisprudence—the constitutional interests at stake—but *Lynch* demonstrates that even if acquittal appeals are permitted in theory, difficulties remain in the practice, the mechanics, of acquittal appeals. The mechanics of acquittal appeals are the subject of this Note.

Under current double jeopardy case law, a prosecutor may appeal purely legal findings.[28] As a threshold to appeal, a prosecutor must demonstrate that the putative error is a legal holding, and not a factual finding. Yet the classification of a determination as factual or legal is a flexible, policy-driven exercise. Sometimes, as in the *Lynch* case, review would clearly implicate no further fact-finding. At other

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Required to Grant En Banc Sittings in the United States Courts of Appeals, 70 VA. L. REV. 1505, 1511-20 (1984) (surveying different approaches among circuits).

For a provocative editorial on dissents from denials of en banc hearings, see Indep. Ins. Agents of Am., Inc. v. Clarke, 965 F.2d 1077, 1080 (D.C. Cir. 1992) (per curiam) (separate statement of Randolph, J.), *rev'd sub nom.* U.S. Nat'l Bank v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439 (1993). Here Judge Randolph noted:

> Many years ago two wise judges found it a "dubious policy" if "any active judge may publish a dissent from any decision, although he did not participate in it and the Court has declined to review it *en banc* thereafter . . . especially since, if the issue is of real importance, further opportunities for expression will assuredly occur."

Id. (separate statement of Randolph, J.) (citing United States v. N.Y., New Haven & Hartford R.R., 276 F.2d 525, 553 (2d Cir. 1960) (statement of Friendly, J., joined by Lumbard, C.J.) (alteration in original)).

26 For further discussion, see *infra* note 122.

27 Jon O. Newman, *In Banc Practice in the Second Circuit: The Virtues of Restraint*, 50 BROOK. L. REV. 365, 365 (1984); *see also id.* at 380 ("As is true of the pattern of cases agreed to be reheard in banc, the most significant aspect of the Second Circuit's in banc polling is how infrequently it occurs. In the past five years, only 27 polls have been requested.").

The standard for en banc review is generally rather limited: "An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." FED. R. APP. P. 35(a). This recent rift within an erudite court punctuates just how controversial and unresolved is the prohibition on acquittal appeals, and the pure law exception.

28 *See, e.g.*, United States v. Wilson, 420 U.S. 332, 345 (1975) ("[A] defendant has no legitimate claim to benefit from an error of law when that error could be corrected without subjecting him to a second trial before a second trier of fact."); *see also* OFFICE OF LEGAL POLICY, *supra* note 9, at 893-97 (recommending that the Justice Department develop a program aimed at vindicating a prosecutor's capacity to appeal certain acquittals).

times, whether the inquiry is legal or factual is more difficult to discern. This Note argues that law-fact distinction jurisprudence encourages appellate courts to construe inquiries as legal in the context of acquittal appeals. By liberally construing inquiries as legal, courts of appeal can review acquittals without disturbing Court precedent. Defendants would not be subject to additional trials, but trial court rulings could be reviewed. Given the pliability of the law-fact distinction, and the desirability of appellate review of judicial errors, significant opportunities exist to broadly permit appeals of acquittals in a sympathetic circuit or Court.

Although a law-fact distinction inquiry is a threshold to any acquittal appeal, the interaction between law-fact distinction jurisprudence and double jeopardy law has never been critically examined. Authorities have characterized both areas independently as murky.[29] This Note attempts to shine some light into this morass, in an effort to render translucent the overlap of these two opaque spheres. Part I briefly surveys double jeopardy jurisprudence, surveying how the Supreme Court has repeatedly affirmed the constitutionality of appeals of acquittals which would require no further fact-finding. Although the Supreme Court's statements on the subject should be conclusive, Part I reexamines some of the policy factors bearing in favor of acquittal appeals of legal determinations. Far more persuasive authorities have discussed these policies extensively elsewhere[30]—this Note glosses that already substantial body of work, adding some novel analysis, particularly regarding judicial nullification. Using *Lynch* as an example, Part II explores the mechanics of appeals through the lens of the law-fact distinction. The constitutionality of acquittal appeals of legal error and the pro-review orientation of the law-fact distinction in this context both bear in favor of far more acquittal appeals.

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29 *See, e.g.*, Miller v. Fenton, 474 U.S. 104, 113 (1985) ("[T]he appropriate methodology for distinguishing questions of fact from questions of law has been, to say the least, elusive."); Albernaz v. United States, 450 U.S. 333, 343 (1981) (observing double jeopardy "decisional law . . . is a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator.").

30 *See, e.g.*, Palko v. Connecticut, 302 U.S. 319, 328 (1937) (Cardozo, J.) (8-1 decision), *overruled by* Benton v. Maryland, 395 U.S. 784, 794 (1969); Kepner v. United States, 195 U.S. 100, 135 (1904) (Holmes, J., dissenting); OFFICE OF LEGAL POLICY, *supra* note 9; Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 YALE L.J. 1807 (1997); James A. Strazzella, *The Relationship of Double Jeopardy to Prosecution Appeals*, 73 NOTRE DAME L. REV. 1 (1997).

I
A Brief Survey of Double Jeopardy Law

The doctrine of double jeopardy is an ancient one,[31] perhaps universal among systems of adjudication.[32] The Double Jeopardy Clause of the Fifth Amendment provides that "[no] person be subject for the same offence to be twice put in jeopardy of life or limb."[33] Despite the simplicity of the Clause, the related law is far from straightforward.[34] As one Justice observed, "the decisional law . . . is a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator."[35] Commentators and courts have proposed numerous—and at times conflicting—policies in applying double jeopardy.[36]

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31 *See* United States v. Lynch, 162 F.3d 732, 737-39 (2d Cir. 1998) (Sack, J., concurring), *reh'g en banc denied*, 181 F.3d 330 (2d Cir. 1999); Martin L. Friedland, Double Jeopardy 5-16 (1969); George C. Thomas III, Double Jeopardy: The History, the Law 1 (1998) ("[L]aws against changing a final judgment can be traced to the Code of Hammurabi."); Jay A. Sigler, *A History of Double Jeopardy*, 7 Am. J. Legal Hist. 283, 283 (1963) ("The principle of double jeopardy was not entirely unknown to the Greeks and Romans . . . .").

32 *See* Thomas, *supra* note 31, at 1 ("No legal system can survive without some bar against relitigating the same issue over and over."); *see, e.g.*, Office of Legal Policy, *supra* note 9, at 885-88 (France, Japan, Italy, and several countries within the British Commonwealth); Friedland, *supra* note 31 (England); K.N. Chandrasekharan Pillai, Double Jeopardy Protection: A Comparative Overview (1988) (India, England, Canada and the U.S.); R. A. Moodie, *Autrefois Acquit and Autrefois Convict in New Zealand Criminal Law* (pt. 1), 1974 N.Z. L.J. 169 (New Zealand); R. A. Moodie, *Autrefois Acquit and Convict in Canada and New Zealand*, 17 Crim. L.Q. 72 (1974) (Canada and New Zealand) [hereinafter Moodie, *Canada and New Zealand*]; Thomas E. Towe, *Fundamental Rights in the Soviet Union: A Comparative Approach*, 115 U. Pa. L. Rev. 1251 (1967) (former U.S.S.R.); Gary DiBianco, Note, *Truly Constitutional? The American Double Jeopardy Clause and Its Australian Analogues*, 33 Am. Crim. L. Rev. 123 (1995) (Australia).

33 U.S. Const. amend. V. Note the similarity to the language of the English common-law doctrine: "a man shall not be brought into danger of his life for one and the same offence more than once." Moodie, *Canada and New Zealand*, *supra* note 32, at 72 (citing 2 William Hawkins, Treatise of the Pleas of the Crown 368 (1721)).

34 *See* Albernaz v. United States, 450 U.S. 333, 343 (1981); *Lynch*, 162 F.3d at 738 (Sack, J., concurring); Thomas, *supra* note 31; Amar, *supra* note 30, at 1807-09.

35 *Albernaz*, 450 U.S. at 343 (Rehnquist, J.).

36 *See, e.g.*, *Lynch*, 162 F.3d at 737, 738 (to protect private citizens from the power of the state); Thomas, *supra* note 31, at 1, 215, 219 (principles of judicial economy); Amar, *supra* note 30, at 1815 n.48 (protecting the "innocent from erroneous conviction") (emphasis omitted); *id.* at 1834-35 (to protect defendants from prosecutorial vindictiveness); Thomas M. DiBiagio, *Judicial Equity: An Argument for Post-Acquittal Retrial When the Judicial Process Is Fundamentally Defective*, 46 Cath. U. L. Rev. 77, 89 (1996) ("[to] prevent [the prosecutor] from improving upon the weaknesses in his original argument" (discussing *United States v. Wilson*, 420 U.S. 332, 352 (1975))). *Compare* Green v. United States, 355 U.S. 184, 187 (1957) (5-4 decision) ("[T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity . . . ."), *with id.* at 218-19 (Frankfurter, J., dissenting) (balancing defendant's rights of freedom from "oppression" against the "countervailing interest in the vindication of criminal justice").

Some core touchstones are discernable however. Currently, the Double Jeopardy Clause protects defendants in government-initiated penalty actions[37] from multiple exposures to determinations of culpability,[38] conducted by the same sovereign[39] arising out of the same alleged conduct.[40] In other words, the same government entity cannot try criminal defendants twice for the same crime.

A. Acquittal Appeals

The focus of this Note lies outside the core protections discussed above. Although nowhere expressly stated in the Clause, double jeopardy currently prohibits appeals of most acquittals.[41] Current criminal procedure permits post-conviction appeals.[42] In other words, defendants may appeal guilty verdicts while prosecutors may not appeal adverse rulings after jeopardy has attached. The criminal appellate process is asymmetrical.

But Supreme Court reasoning and dicta reveal an exception to this prohibition on appeals of acquittals. Prosecutorial appeals are permitted when the error is purely legal, and no further fact-finding would be necessary.[43] Thus:

> Although review of any ruling of law discharging a defendant obviously enhances the likelihood of conviction and subjects him to continuing expense and anxiety, a defendant has no legitimate claim to benefit from an error of law when that error could be cor-

37 *See* U.S. CONST. amend. V ("life or limb"); Hudson v. United States, 522 U.S. 93, 98-99 (1997); *Ex parte* Lange, 85 U.S. (18 Wall.) 163, 170 (1873); William H. Comley, *Former Jeopardy*, 35 YALE L.J. 674, 675-76 (1926) (interpreting "life or limb" to mean criminal as opposed to civil cases); Kevin M. Smith et al., *Double Jeopardy, Twenty-Eighth Annual Review of Criminal Procedure*, 87 GEO. L.J. 1475, 1475-77 (1999); *cf.* Amar, *supra* note 30, at 1807, 1810-12 (criticizing expansion of double jeopardy protection to some civil actions).

38 *See* U.S. CONST. amend. V ("twice put in jeopardy"); *Lynch*, 162 F.3d at 738; Amar, *supra* note 30, at 1808-09; Smith et al., *supra* note 37, at 1478-79, 1496-1501.

39 *See* United States v. Rezaq, 134 F.3d 1121, 1128 (D.C. Cir. 1998); Smith et al., *supra* note 37, at 1501-05.

40 *See* U.S. CONST. amend. V ("same offense"); Amar, *supra* note 30, at 1807, 1813-37; Smith et al., *supra* note 37, at 1488-96.

41 *See* Arizona v. Washington, 434 U.S. 497, 503 (1978); United States v. Jenkins, 420 U.S. 358, 365-66 (1975), *overruled by* United States v. Scott, 437 U.S. 82 (1978); Fong Foo v. United States, 369 U.S. 141, 143 (1962); Green v. United States, 355 U.S. 184, 192, 198 (1957). Supplemental findings are also barred following a reversal "because of insufficient evidence . . . or [following] a mistrial ruling not prompted by manifest necessity." Swisher v. Brady, 438 U.S. 204, 218 (1978) (internal citation omitted).

42 *See* Evitts v. Lucey, 469 U.S. 387, 339-40 (1985) (acknowledging defendant's right to appeal convictions); DiBiagio, *supra* note 36, at 77 n.1; *cf. id.*, at 81 ("At the time the Fifth Amendment was adopted, there was no judicial review after a judgment in a criminal case.").

43 *See* United States v. DiFrancesco, 449 U.S. 117, 127-30 (1980); *Swisher*, 438 U.S. at 218; *Scott*, 437 U.S. at 91, 99-100; United States v. Martin Linen Supply Co., 430 U.S. 564, 569-70 (1977); *Jenkins*, 420 U.S. at 365, 370; United States v. Wilson, 420 U.S. 332, 344-45, 353 (1975); *Lynch*, 162 F.3d at 735; OFFICE OF LEGAL POLICY, *supra* note 9, at 894 n.260.

rected without subjecting him to a second trial before a second trier of fact.[44]

A similar exception exists in Canada, where prosecutorial appeal is permitted "on a question of law alone."[45] A number of other common-law countries follow the Canadian approach, including India, New Zealand, Sri Lanka, and South Africa.[46] England, notably, does not permit such appeals.[47] Most civil-law countries permit review of legal questions following acquittals.[48]

Earlier double jeopardy jurisprudence supports permitting appeals of purely legal questions following acquittal. For example, in *United States v. Wilson* the Court observed, "[t]he development of the Double Jeopardy Clause from its common-law origins thus suggests . . . [the Clause was not directed] at Government appeals, at least where those appeals would not require a new trial."[49] Analysis of early authorities, including Coke, Hawkins, and Hale, supports the Court's observation.[50]

In dicta, the Supreme Court has construed the Double Jeopardy Clause to permit prosecutorial appeals of purely legal issues. Ordinarily, Supreme Court dicta is persuasive authority.[51] Precedent alone should be enough to require lower courts to hear appeals of acquittals which require no further fact-finding. Reasonable minds can disagree on the precise boundaries of the exception, as evidenced by the recent even split within the Second Circuit.[52] Although the Court has traditionally balanced a defendant's interest in finality against the government's interest in accuracy, some additional factors also appear in Court opinions. As background to discerning the limits of the exception, this Note now briefly surveys some of the policies for and against a prohibition of acquittal appeals of legal issues.

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44 *Wilson*, 420 U.S. at 345; *see also Jenkins*, 420 U.S at 365 ("[T]he Double Jeopardy Clause does not prohibit an appeal by the Government providing that a retrial would not be required in the event the Government is successful in its appeal.").

45 C. David Freeman, *Double Jeopardy Protection in Canada: A Consideration of Development, Doctrine and a Current Controversy*, 12 CRIM. L.J. 3, 19-22 (1988).

46 OFFICE OF LEGAL POLICY, *supra* note 9, at 887.

47 *Id.* at 885-86.

48 *Id.* at 887-88 (discussing generally and specifying France and Japan).

49 *Wilson*, 420 U.S. at 342.

50 *See* THOMAS, *supra* note 31, at 261-62 (discussing the historical roots of double jeopardy in Coke, Hawkins, and Hale).

51 *See* Nichol v. Pullman Standard, Inc., 889 F.2d 115, 120 n.8 (7th Cir. 1989); United States v. Underwood, 717 F.2d 482, 486 (9th Cir. 1983) (en banc); United States v. Bell, 524 F.2d 202, 206 (2d Cir. 1975) (Supreme Court dicta "must be given considerable weight"); Lewis v. Sava, 602 F. Supp. 571, 573 (S.D.N.Y. 1984); *cf.* Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2026 (suggesting some lower courts reject the view that superior court dicta is binding, although concluding "prudent lower courts" will follow dicta).

52 *See* United States v. Lynch, 181 F.3d 330, 333 (2d Cir. 1999) (Cabranes, J., dissenting), *reh'g en banc denied*, 181 F.3d 330 (2d Cir. 1999).

B. Policies and Constitutional Stakes

The policies and stakes discussed below are largely culled from double jeopardy jurisprudence and scholarship. Because the case law regarding acquittal appeals of legal issues is marked most distinctly by its paucity, this Note imports liberally from general discussions of acquittal appeals.

1. *Finality Versus Accuracy*

The constitutional analysis has traditionally weighed the state's interest in accuracy against the burden to an individual defendant in defending the appeal.[53] The "State with all its resources and power"[54] policy is the most oft cited in favor of finality.[55] The state has ample resources, while criminal defendants are often "too poor to afford private counsel."[56] Under this approach, some guilty defendants are acquitted in order to protect all defendants from overreaching by the state.[57]

Prosecutors, commentators, and dissenters argue accuracy does outweigh finality.[58] As one commentator notes, "[t]he community incurs an incalculable expense when the vast machinery constructed to bring criminals to justice can be felled by the simple error of a single unreviewable judge."[59] Greater accuracy decreases acquittals of guilty defendants.[60] Public perceptions of inaccuracy and inconsistency in the legal system may lessen the deterrent effect of punishment.[61] Nor

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53 *See, e.g.*, Green v. United States, 355 U.S. 184, 218-19 (1957) (Frankfurter, J., dissenting).

54 *Green*, 355 U.S. at 187.

55 *See, e.g.*, *supra* notes 15-16 and accompanying text.

56 William J. Genego, *The New Adversary*, 54 BROOK. L. REV. 781, 786 (1988). Criminal defendant demographics have changed somewhat in the last quarter century. Since the 1970s, federal prosecutors have become "increasingly interested in white collar offenses and, more recently, in the prosecution of drug related offenses." *Id.* at 787. Some defendants today can afford vigorous defense and expensive representation. *Id.*

57 *See, e.g.*, *Lynch*, 162 F.3d at 740 (Sack, J., concurring) ("We may assume, . . . that inasmuch as judges are human and the trial process imperfect, some of the acquittals resulted in the guilty going free. . . . There is a price, but it is one carefully exacted by the Fifth Amendment.").

58 *See* Kepner v. United States, 195 U.S. 100, 134 (1904) (Holmes, J., dissenting) ("[T]here is more danger that criminals will escape justice than that they will be subjected to tyranny."); *supra* note 20 and accompanying text.

59 Scott J. Shapiro, *Reviewing the Unreviewable Judge: Federal Prosecution Appeals of Mid-Trial Evidentiary Rulings*, 99 YALE L.J. 905, 906 (1990).

60 *See, e.g.*, Edwin Meese III, *Foreword* to OFFICE OF LEGAL POLICY, *supra* note 9 (arguing in favor of greater appellate review of acquittals in order to better "protect innocent people from the depredations of criminals"); Stith, *supra* note 9, at 3-4.

61 *See* DiBiagio, *supra* note 36, at 107; *cf.* Note, *A Probabilistic Analysis of the Doctrine of Mutuality of Collateral Estoppel*, 76 MICH. L. REV. 612, 618-19 (1978) (noting that sanctions perceived as randomly imposed lose their deterrent effect).

are the government's financial resources limitless.[62] If the criminal justice system is an effective response to crime, increased accuracy means that society is more effectively processing crime.

Permitting defendants free appeal while handicapping prosecutorial appeal is asymmetrical. Asymmetrical appeal deviates from the adversarial system's archetype.[63] In a criminal justice system in which accuracy is the primary goal, barring some other asymmetry, appeals of acquittals and convictions should be roughly equal.[64] Because they are unbalanced, asymmetrical appeals are less reliable determinations of culpability.[65] For example, when courts abandoned the mutuality doctrine in civil actions, inaccurate determinations became more likely.[66] The asymmetrical apportionment of the capacity to appeal skews the likelihood of success in the criminal adjudication process in favor of the defendant.[67]

But the analogy with the civil system is suspect. After all, "[t]he harm caused by a false acquittal . . . is not the crime itself but failure to punish the crime—which, given the uncertain benefits of punishment, is a significantly different matter."[68] Although the justice system strives to accurately identify and sanction criminal actors, the Constitution instantiates a competing goal—protecting citizens from false or unfair convictions.[69] Weighing the repugnance of a false conviction—of sending an innocent person to jail[70]—inaccuracy may be more acceptable. Recent investigations have documented some disturbing antidefendant inaccuracies in state justice systems. For example, the error rate for false capital convictions in Illinois may exceed

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62 *See* James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1542-43 (1981).

63 One obvious way to ensure symmetry would be for the legislature to deny criminal defendants the right to appeal. Criminal defendant appeal is permitted by legislative grace—it is not constitutionally protected. *See* Marc M. Arkin, *Rethinking the Constitutional Right to a Criminal Appeal*, 39 UCLA L. REV. 503, 503-04 (1992); Harlon Leigh Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L.J. 62, 62 n.4 (1985). This Note does not entertain legislative retraction of defendant appeals as a reasonable response to court-imposed double jeopardy appeal asymmetry. For a digest of policy weighing against such a rescission, see Dalton, *supra*, at 101-03.

64 *See* Stith, *supra* note 9, at 5.

65 *See, e.g.*, DiBiagio, *supra* note 36, at 107 (contrasting Justice Powell's dissent in *Bullington v. Missouri*, 451 U.S. 430 (1981), suggesting appeals of acquittals lead to greater accuracy, with Justice Brennan's dissent in *United States v. Scott*, 437 U.S. 82 (1978), insisting the contrary); Stith, *supra* note 9, at 3.

66 Note, *supra* note 61, at 619, 622-24, 640-43, 645, 679.

67 Stith, *supra* note 9, at 3.

68 Stephen J. Ceci & Richard D. Friedman, *The Suggestibility of Children: Scientific Research and Legal Implications*, 86 CORNELL L. REV. 33, 76 (2000).

69 *E.g.*, U.S. CONST. amends. IV-VI, XIV; *In re* Winship, 397 U.S. 358, 364 (1970).

70 *See, e.g.*, 4 WILLIAM BLACKSTONE, COMMENTARIES *352 ("[I]t is better that ten guilty persons escape, than that one innocent suffer."); Ceci & Friedman, *supra* note 68, at 74-76; Alexander Volokh, n *Guilty Men*, 146 U. PA. L. REV. 173, 173-77 (1997) (contemplating the appropriate ratio of false to true convictions).

three percent.[71] Although both the civil and criminal systems rely on an adversarial approach, perhaps criminal adjudications should be less accurate, with the burden of that handicap borne by the state.

Other commentators respond that if the government's resources make the criminal justice process unfair, a crude prohibition on prosecutorial appeals is an inappropriate remedy.[72] A direct response would more effectively respond. For example, a few states and the Congress have recently moved toward providing greater resources to court-appointed lawyers for indigent defendants.[73] By directly countering the government's superior resources, such a response increases fairness, without sacrificing accuracy. Procedural protections such as the higher standard of proof ("beyond a reasonable doubt") already distinguish criminal adjudications from the civil paradigm, decreasing the likelihood that the innocent will be convicted at the cost of increasing the probability that guilty parties will be freed.[74]

2. *Externalities*

The distortion of the adversarial system attributable to the prohibition on acquittal appeals may have repercussions which extend outside the realm of criminal procedure. Commentators have suggested asymmetrical appeals encourage plea bargains,[75] prompt lawmakers to find other routes via which to ensure conviction,[76] and motivate misconduct by defense attorneys.[77] When the prosecution has no forum in which to complain, trial judges who find being overturned on appeal distasteful have an incentive to favor the defendant. One commentator observes that "[m]uch anecdotal evidence suggests that inferior court judges fear being reversed on appeal because their

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71 Leigh B. Bienen, *The Quality of Justice in Capital Cases: Illinois as a Case Study*, LAW & CONTEMP. PROBS., Autumn 1998, at 193, 214 ("In Illinois, ten persons have been freed since 1977—eight in the last four years—from Illinois's death row because of acquittals on retrial or prosecutorial decisions to drop further charges. This constitutes a rate of error of more than three percent.").

72 *See, e.g., infra* notes 75-80 (citing commentators discussing distortions of criminal law arising from the prohibition of post-acquittal appeals).

73 *See* John Harwood, *Death Reconsidered: Despite McVeigh Case, Curbs on Executions Are Gaining Support*, WALL ST. J., May 22, 2001, at A1 ("Arkansas and North Carolina[ ] have . . . beef[ed] up standards or taxpayer funds for the representation of indigent defendants. . . . U.S. Rep. Ray LaHood . . . . is co-sponsoring the Innocence Protection Act, which would encourage states to provide death-row convicts with access to DNA testing and 'competent counsel.'").

74 *See In re Winship*, 397 U.S. at 364; V. C. Ball, *The Moment of Truth: Probability Theory and Standards of Proof*, 14 VAND. L. REV. 807, 815-17 (1961); Ceci & Friedman, *supra* note 68, at 74; Stith, *supra* note 9, at 3.

75 Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 153 (1989).

76 Daniel K. Mayers & Fletcher L. Yarbrough, Bis Vexari*: New Trials and Successive Prosecutions*, 74 HARV. L. REV. 1, 14-15 (1960).

77 Justin Miller, *Appeals by the State in Criminal Cases*, 36 YALE L.J. 486, 508-10 (1927).

professional audience (colleagues, practitioners, and scholars) may question their legal judgement or abilities."[78] Pro-prosecutor judges have the opposite incentive. As Professor Andrew Leipold notes, "[t]he absolute finality of an acquittal thus may lead a cautious judge to give the government the benefit of the doubt, particularly if there is strong evidence of the defendant's guilt."[79] Professor Kate Stith has argued asymmetrical appeal even distorts substantive criminal law by manipulating the issues heard on appeal.[80]

3. *Pro-Prosecutorial Bias in the Justice System*

Others argue that by prohibiting acquittal appeals, courts protect defendants from pro-prosecutorial bias in the justice system.[81] This prohibition provides an indirect remedy to putative prosecutorial bias, because it prohibits acquittal appeals, not pro-prosecutorial bias. Some commentators point out that indirect remedies to prosecutorial bias can be a precarious solution: "[D]ifferent types of bias may not offset each other . . . . [P]ro-defendant distortions in the evolution and application of legal standards do[ ] not necessarily negate or counteract discrimination against defendants by decision makers in the criminal justice system."[82] Furthermore, a prohibition on acquittal appeals may actually foment such favoritism rather than offset pro-prosecutorial biases. Some commentators cite to compelling examples of pro-government bias clearly attributable to the perceived discrimination against the state due to asymmetrical appeals.[83] Direct limits on prosecutorial power might better protect defendants and more effectively serve the law. There is no dearth of scholarship proposing direct remedies to pro-prosecutorial bias in the justice system.[84]

Courts also defend asymmetrical appeals as counterbalancing the effects of malicious or overzealous prosecution.[85] Thus, in *Lynch*, a

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78 Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 827 n.40 (1994) (citing Paul L. Colby, *Two Views on the Legitimacy of Nonacquiescence in Judicial Opinions*, 61 TUL. L. REV. 1041, 1051 (1987); Jonathan R. Macey, *The Internal and External Costs and Benefits of Stare Decisis*, 65 CHI.-KENT L. REV. 93, 111 (1989)); *see also* Miller, *supra* note 77, at 511 ("Some trial judges very frankly tell their prosecuting attorneys that they do not propose to take any chances of being reversed by giving instructions favoring the state on points disputed by counsel for the defendant.").

79 Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253, 282 (1996).

80 Stith, *supra* note 9, at 5.

81 *See, e.g.*, OFFICE OF LEGAL POLICY, *supra* note 9, at 891-92.

82 Stith, *supra* note 9, at 6; *see also* Karl N. Llewellyn, Book Review, 52 HARV. L. REV. 700, 702-03 (1939) (criticizing indirect remedies in the contracts context).

83 *See, e.g.*, Mayers & Yarbrough, *supra* note 76, at 14-15.

84 *See, e.g.*, Vorenberg, *supra* note 62, at 1560-73 (proposing methods to increase prosecutorial accountability and reduce prosecutorial leverage in plea bargaining).

85 *See e.g.*, *Ex parte* Lange, 85 U.S. 163, 171 (1873) (noting the potential for abuse in criminal prosecutions); OFFICE OF LEGAL POLICY, *supra* note 9, at 891 (noting that "un-

court of appeals judge observed: "[W]e would be oblivious if we were not aware that [the defendants'] behavior was thus directed to one of the most highly charged political and moral issues of our time,"[86] implying the Department of Justice inappropriately exercised its prosecutorial discretion. Prosecutors do enjoy a great degree of discretion in determining which suspects to pursue, deciding whether to charge a defendant,[87] and in negotiating plea bargains.[88]

Opponents of this view can point to three criticisms. First, prosecutorial discretion is normally an executive prerogative.[89] Second, prosecutors are least likely to overreach during the scrutiny of appeal. Third, courts, voters, and others already directly police gross prosecutorial overreaching.[90] Thus, "[a] retrial may be subject to a motion to dismiss on the grounds of selective or vindictive prosecution."[91] The President has the power to remove abusive federal prose-

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restricted government appeals of acquittals could lead to unjustified harassment of individuals"); Amar, *supra* note 30, at 1834-35 (discussing how double jeopardy may inhibit opportunities for prosecutorial vindictiveness). *But see* Fong Foo v. United States, 369 U.S. 141, 146 (1962) (Clark, J., dissenting) ("[I]f there had been misconduct, the remedy would have been to declare a mistrial and impose appropriate punishment upon the [prosecutor], rather than upon the public."); Amar, *supra* note 30, at 1844 n.163 (discussing how some currently unconstitutional acquittal appeals provide no greater opportunities for vexation than other permitted procedures).

86 United States v. Lynch, 181 F.3d 330, 331 (2d Cir. 1999).

87 Vorenberg, *supra* note 62, at 1524 n.10 (citing studies which demonstrate "only a minority of matters received by prosecutors result in charges").

88 *See id.* at 1523 (surveying and criticizing the broad scope of prosecutorial discretion).

89 Prosecutorial discretion emerges from constitutional and prudential considerations. On the constitutional side, separation of powers is especially significant. *See* United States v. Greene, 697 F.2d 1229, 1235 (5th Cir. 1983); Neil B. Eisenstadt, Note, *Let's Make a Deal: A Look at* United States v. Dailey *and Prosecutor-Witness Cooperation Agreements*, 67 B.U. L. REV. 749, 764-65 (1987). A congeries of prudential concerns also limits review:

> [B]road discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. Judicial supervision in this area, moreover, entails systemic costs of particular concern. Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy. All these are substantial concerns that make the courts properly hesitant to examine the decision whether to prosecute.

Wayte v. United States, 470 U.S. 598, 607-08 (1985).

90 Eisenstadt, *supra* note 89, at 764-65 ("Prosecutorial discretion, however, is not unlimited. Courts balance the constitutional duty of prosecutors as members of the executive branch with the judiciary's own responsibility for protecting individuals from abuses of prosecutorial discretion that violate constitutional rights." (footnote omitted)).

91 DiBiagio, *supra* note 36, at 82 n.16.

cutors from office, either directly or indirectly.[92] State and local prosecutors are often elected, and therefore subject to popular restraint. Recent legislation provides defendants with additional protections. For example, the Citizen Protection Act[93] subjects federal prosecutors to the same rules of conduct as local attorneys. "[T]he CPA [was] intended to regulate federal prosecutors more stringently and to limit their powers."[94] Competing political constituencies battle over the limits of prosecutorial power, with some degree of success on both sides. Judicial mediation of prosecutorial power via a prohibition on acquittal appeals may be neither appropriate or effective.

4. *Nullification*

More controversially, prohibiting appeals of legal issues following acquittals insulates nullification from review.[95] A decision maker nullifies when she passes judgment on the basis of considerations other than existing law. For example, when a juror votes to find a defendant not guilty based on her personal sympathy for the defendant rather than the weight of the evidence, that juror nullifies. Whether nullification by juries should be encouraged or stamped out is the subject of a controversial contemporary debate.[96] Pro-defendant jury nullification is often defended by appeal to the Sixth Amendment.[97] No corollary constitutional provision can be invoked to defend the right of a judge to nullify the law. Appeals are designed to prevent and correct judicial error.[98] Particularly when the Double Jeopardy Clause shelters self-conscious judicial lawlessness from appellate review, a judge's intentional nullification raises serious ethical and constitutional questions.[99]

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92 *See* 28 U.S.C. § 541(a) (1994).

93 28 U.S.C. § 530B (Supp IV. 1998).

94 Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207, 215 (2000).

95 *See* Alschuler, *supra* note 75, at 211-33; Nancy J. King, *Silencing Nullification Advocacy Inside the Jury Room and Outside the Courtroom*, 65 U. CHI. L. REV. 433, 436, 472 (1998); Leipold, *supra* note 79, at 260-63.

96 *See, e.g.*, King, *supra* note 95, at 433; Leipold, *supra* note 79, at 253; *cf.* SIR PATRICK DEVLIN, TRIAL BY JURY 14 (1956) ("The jury was in its origin as oracular as the ordeal: neither was conceived in reason: the verdict, no more than the result of the ordeal, was open to rational criticism. This immunity has been largely retained . . . .").

97 A jury trial nullification *against* the defendant is *not* protected by the Sixth Amendment. *See, e.g.*, Jackson v. Virginia, 443 U.S. 307, 317 n.10 (1979); Am. Tobacco Co. v. United States, 328 U.S. 781, 787 n.4 (1946); CHARLES ALAN WRIGHT, 2A FEDERAL PRACTICE AND PROCEDURE § 467, at 307 (3d ed. 2000). The deference of courts to the earthy wisdom of the jury box is limited to determinations which favor defendants.

98 *See supra* notes 66-74 and accompanying text.

99 *See, e.g.*, Pamela S. Karlan, *Two Concepts of Judicial Independence*, 72 S. CAL. L. REV. 535, 556-57 (1999).

a. *Equal Protection*

Professor Simson has argued that juror nullification is unconstitutional because it violates equal protection, "since . . . jury nullification would almost inevitably mean widely disparate treatment of persons similarly situated in terms of the nature of their acts."[100] Professor Simson's equal protection argument also applies to judicial nullification. Consider the predicament of the defendant faced with a pro-prosecutor judge.[101] The judge, fearing an unappealable acquittal, gives the government the benefit of the doubt. Compare this unfortunate defendant with the defendant assigned a judge who finds being overturned on appeal distasteful.[102] Both are similarly situated, yet the state, via its judicial agents, dispenses disparate treatment—disparate treatment fostered and insulated from correction by the estoppel of government appeal.

b. *The Duty to Follow Precedent*

Judges who nullify breach their duty to follow the law. One practice manual observes as axiomatic that "in a hierarchical system of courts, the duty of a subordinate court to follow the laws as announced by superior courts is theoretically absolute."[103] Although this precept has not gone unquestioned, it stands on firm footing.[104] By analogy, consider the duty of jurors to uphold the law.[105]

> A jury has no more "*right*" to find a "guilty" defendant "not guilty" than it has to find a "not guilty" defendant guilty, and the fact that the former cannot be corrected by a court, while the latter can be, does not create a right out of the power to misapply the law. Such verdicts are lawless, a denial of due process and constitute an exercise of erroneously seized power.[106]

Surely a judge has no more right to nullify than a juror. If a judge has no right to ignore the law, nullification oversteps the bounds of power granted her under Article III.

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100 Gary J. Simson, *Jury Nullification in the American System: A Skeptical View*, 54 TEX. L. REV. 488, 518 (1976).

101 *See supra* note 79 and accompanying text.

102 *See supra* note 78 and accompanying text.

103 1B JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 0.401 (2d ed. 1993); Caminker, *supra* note 78, at 818 n.2.

104 *See* Caminker, *supra* note 78, at 872-73.

105 Thomas v. United States, 116 F.3d 606, 614-15 (2d Cir. 1997).

106 United States v. Washington, 705 F.2d 489, 494 (D.C. Cir. 1983), *quoted in Thomas*, 116 F.3d at 615-16; *see* Simson, *supra* note 100, at 524 & n.156.

c. *Ethical Considerations*

Under the *ABA Model Code of Judicial Conduct*, judges have an ethical obligation to "respect and comply with the law."[107] Although the *Model Code* is not designed as a basis for criminal or civil liability, violations of the rules should often trigger disciplinary action.[108] By definition, judges who nullify fail to comply with the law.[109] Federal judges take an oath of office to "faithfully and impartially discharge and perform all the duties [of a judge] under the Constitution and laws of the United States."[110] Nullification violates this oath. Insulating the product of such unethical judicial behavior from review would seem to compound the original wrong.

d. *Civil Disobedience*

Judge Posner has defended judicial nullification as a form of civil disobedience:

> If judges are carefully selected, as is generally true of federal judges, a judge's civil disobedience—his refusal to enforce a law "as written" because it violates his deepest moral feelings—is a significant datum. It is a portent of a possible revolt by the elite, which is the sort of thing that ought to give the political authorities pause.[111]

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107 MODEL CODE OF JUDICIAL CONDUCT canon 2 (1990); *id.* canon 1 cmt.

108 *Id.* pmbl.; *cf.* Charles Gardner Geyh, *Informal Methods of Judicial Discipline*, 142 U. PA. L. REV. 243 (1993) (evaluating quasi-disciplinary mechanisms for judicial misconduct); Peter M. Shane, *Who May Discipline or Remove Federal Judges? A Constitutional Analysis*, 142 U. PA. L. REV. 209 (1993) (examining the separation-of-powers implications of judicial discipline).

109 *See* MOORE ET AL., *supra* note 103, ¶ 0.401 ("As applied in a hierarchical system of courts, the duty of a subordinate court to follow the laws as announced by superior courts is theoretically absolute."); *see also* Caminker, *supra* note 78, at 873 (concluding "hierarchical precedent is sensible and, in the main, persuasively justified").

110 28 U.S.C. § 453 (1994); *Thomas*, 116 F.3d at 616.

111 Richard A. Posner, *The Problems of Moral and Legal Theory*, 111 HARV. L. REV. 1637, 1708 (1998). *But cf.* Caminker, *supra* note 78, at 860-65 (rejecting the argument that lower courts may decline to follow precedent to stimulate reform). Judge Posner's stance on *agency* nullification (or "nonacquiescence") is less easygoing. *See, e.g.*, Nielsen Lithographing Co. v. NLRB, 854 F.2d 1063, 1067 (7th Cir. 1988) (criticizing failure of independent agency to provide rationale for nonacquiescence as "disingenuous, evasive, and in short dishonest"). In fairness, the subject of Posner's ire in *Nielsen* is an independent agency refusing to follow the judicial branch. In the block quote above, Judge Posner defends a judicial refusal to heed the legislature. The separation-of-powers balances for the two situations may be quite different, given the dramatic differences in power between the branches. *Cf.* Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 723-32 (1989) (exploring separation of powers issues implicated by agency nonacquiescence).

The distribution of power between the branches is uneven. Alexander Hamilton, in a discussion which touches on judicial nullification, points out the varying powers of the branches in relation to each other. The judicial power is, by design, a weaker, dependent power. THE FEDERALIST No. 78, at 437 (Alexander Hamilton) (Isaac Kramnick ed., 1987) ("[The judiciary] may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm for the efficacious exercise

But it is one thing for a judge's nullification to be a "significant datum" that gives "pause" to the "political authorities." It is quite another to fortify nullification against any review. "[T]he damage to our judicial system is exponentially greater when a judge, in whom the Constitution entrusts the power 'to say what the law is,' . . . engag[es] in the very same lawless usurpation of power that he is bound to do his utmost to prevent."[112] At the very least, permitting review in such cases would provide a forum in which to explore and debate the propriety of judicial nullification.

The issue is complicated by sympathetic instances of "benevolent" nullification. For example, in the nineteenth century, juries acquitted defendants prosecuted under the fugitive slave laws.[113] But, as a Second Circuit judge recently observed, "more recent history presents numerous and notorious examples of jurors nullifying," giving as illustrations "shameful examples of how nullification has been used to sanction murder and lynching."[114]

A judge's duties include a "duty to forestall or prevent [juror nullification]."[115] Just as a juror should be dismissed if she threatens to nullify,[116] surely a judge who finds herself unable to apply the law in good conscience should recuse herself.[117] By statute, a federal judge should recuse himself "in any proceeding in which his impartiality might be questioned."[118]

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even of this faculty."). Hamilton downplays any danger from the weakest branch: "[The weakness of the judiciary] equally proves, that, though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter . . . ." *Id.* Because the judiciary is dependent, a failure of the other branches to follow its judgments may be more deserving of clamorous protest. The very weakness of the judiciary may vindicate any judicial stance, even an unconstitutional one, against the might of the executive or legislative branches.

Judge Posner himself has rarely provided the significant datum he discusses in the text above, at least regarding the judicial rather than the legislative will—he has been punctilious in following precedent, even where he vociferously disagrees with it. *See, e.g.*, Kahn v. State Oil Co., 93 F.3d 1358, 1363-64 (7th Cir. 1996) ("[*Albrecht*] should be overruled. Someday, we expect, it will be. . . . We have been told by our judicial superiors not to read the sibylline leaves of the *U.S. Reports* for prophetic clues to overruling. It is not our place to overrule *Albrecht* . . . ."). Of course, precedent comes from the judicial branch, from the same branch—in the quote in the text above Judge Posner is defending judicial nullification of the legislative branch.

112 United States v. Lynch, 181 F.3d 330, 338 (2d Cir. 1999) (Cabranes, J., dissenting) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

113 *See* United States v. Thomas, 116 F.3d 606, 614 (2d Cir. 1997) (citing to a number of such instances).

114 *Id.* at 617.

115 *Id.* at 616.

116 *Id.* at 616-17.

117 *See, e.g.*, John H. Garvey & Amy V. Coney, *Catholic Judges in Capital Cases*, 81 MARQ. L. REV. 303, 303-04, 331-33 (1998) (arguing judges should recuse themselves when they cannot in good conscience follow the law); *cf.* Richard B. Saphire, *Religion and Recusal*, 81 MARQ. L. REV. 351 (1998) (critiquing same).

118 28 U.S.C. § 455 (1994).

Acquittal appeals stand at the interstices of a variety of concerns. The Constitution endures as the humble defendant's champion against a plenipotentiary prosecutor. Law ought not to oppress the innocent. Conversely, "justice, though due to the accused, is due to the accuser also."[119] Thus, in *Snyder v. Massachusetts*, Justice Cardozo held that the prosecutor's interest in justice goes so far as to counterbalance "[p]rivileges [of an accused] so fundamental as to be inherent in every concept of a fair trial."[120]

This Note provides only a brief, and prejudiced, survey of some of the factors in favor of permitting judicial review of legal issues following acquittal. Most determinative is that the Court has spoken quite favorably regarding acquittal appeals of purely legal issues.[121] That approval was in dicta, but the Court cannot voice anything but dicta until squarely confronted with the controversy. Since the Court decided *Jenkins* and *Wilson*, only two circuits confronted an appeal of an acquittal which would require no further fact-finding.[122] The circuit most recently confronted with such an appeal refused jurisdiction. This Note turns now to that controversy.

C. *United States v. Lynch*

In a recent Second Circuit case, *United States v. Lynch*,[123] the Department of Justice's attempt to appeal an acquittal on a purely legal issue culminated in an evenly split en banc circuit.[124] A majority of the initial court of appeals panel justified its refusal to hear the case in

119 Snyder v. Massachusetts, 291 U.S. 97, 122 (1934) (Cardozo, J.).

120 *Id.*

121 *See supra* notes 49-51 and accompanying text.

122 My research has uncovered only three acquittal appeal cases other than *Lynch* where no further fact-finding was facially necessary. *See* United States v. Fayer, 573 F.2d 741 (2d Cir. 1978); United States v. Dyer, 546 F.2d 1313 (7th Cir. 1976); United States v. Certified Grocers Co-op, 546 F.2d 1308 (7th Cir. 1976).

All except *Dyer* are distinguishable, and *Dyer* and *Certified Grocers*, although penned by the same judge, appear inconsistent. For further discussion of *Dyer* and *Certified Grocers*, see *infra* note 172. In *Fayer* fact-sifting was not possible "in light of the judge's other findings and statements which explicitly contradict such an implicit reading of the findings." *Fayer*, 573 F.2d at 664. The court felt constrained "to conclude that findings 'against the defendant on all issues necessary to establish guilt' as required by *Jenkins* are not at all 'clear.' Rather, on a remand, additional findings of fact would have to be made . . . ." *Id.*

Panels on the Tenth Circuit and the Air Force Court of Criminal Appeals recently cited *Lynch* regarding appeals of acquittals. *See* United States v. Hunt, 212 F.3d 539, 544 (10th Cir. 2000); United States v. Adams, 52 M.J. 836, 838 (A.F. Ct. Crim. App. 2000). Both cases would have required further fact-finding, however. In *Hunt*, the district court failed to make factual findings which would have been sufficient to prove the defendants' guilt. *Hunt*, 212 F.3d at 549-50 & n.6. As the court put it: "[T]here are no factual findings for us to reinstate on appeal were we to reverse the district court on the merits. Instead, we would have to remand for further fact-finding proceedings." *Id.* at 550.

123 162 F.3d 732 (2d Cir. 1998), *reh'g en banc denied*, 181 F.3d 330 (2d Cir. 1999).

124 *Lynch*, 181 F.3d at 330-31.

the Double Jeopardy Clause.[125] Half of the en banc circuit voted in favor of a rehearing,[126] failing the required majority by a single vote.[127]

In the underlying case, two antiabortion protesters were charged with violating a court order by blocking access to a medical clinic. Their crime was an act of civil disobedience.[128] In the bench trial, Judge Sprizzo, the district court judge, refused to find contempt, holding that the defendants were not "willful" because they were acting without any "bad" intent, but according to heartfelt religious feeling.[129] Every judge who reviewed this definition of willfulness agreed that Judge Sprizzo erred.[130] A number of commentators have cited Judge Sprizzo's *Lynch* decision as an example of judicial nullification.[131]

Despite the unanimous view that Judge Sprizzo erred, the panel majority refused jurisdiction because they accepted Judge Sprizzo's characterization of his finding of no willfulness as a factual judgment. Factual determinations which lead to acquittal are immune under the Double Jeopardy Clause from further review on appeal.[132] As the panel majority noted, "[i]t does not matter that this factual finding was arrived at under the influence of an erroneous view of the law."[133] The court extended this double jeopardy protection of findings of fact to bench trials.[134]

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125 *Id.*

126 *See id.*

127 "The Second Circuit's refusal . . . was a close decision: . . . Judge Feinberg . . . [who] almost certainly would have voted for rehearing en banc[ ] was precluded from casting a vote due to his senior status." Comment, United States v. Lynch, *181 F.3d 330 (2d Cir. 1999)*, 113 HARV. L. REV. 1252, 1252 n.4 (2000); *see Lynch*, 181 F.3d at 333 & n.1 (Cabranes, J., dissenting).

128 Synopses of the case are available. *See, e.g.*, Mark R. Kravitz, *Developments in the Second Circuit: 1998-99*, 32 CONN. L. REV. 949, 987-91 (2000); Comment, *supra* note 127, at 1252-53.

129 *See* United States v. Lynch, 952 F. Supp. 167, 170 (S.D.N.Y. 1997).

130 *See Lynch*, 181 F.3d at 332 (Sack, J., concurring); *Lynch*, 162 F.3d at 735; *id.* at 747 (Feinberg, J., dissenting).

131 *See, e.g.*, Eric L. Muller, *The Hobgoblin of Little Minds? Our Foolish Law of Inconsistent Verdicts*, 111 HARV. L. REV. 771, 802 n.159 (1998); Jack B. Sarno, Note, *A Natural Law Defense of* Buckley v. Valeo, 66 FORDHAM L. REV. 2693, 2725-26 n.246 (1998).

132 *Lynch*, 162 F.3d at 735-36; *see Lynch*, 181 F.3d at 330 (Sack, J., concurring).

133 *Lynch*, 162 F.3d at 735.

134 *See id.* at 736. Note that both the majority and concurrence suggest double jeopardy protection of a finding of fact in a bench trial is not necessarily inherent to the Constitution. *See id.* (majority opinion); *id.* (Sack, J., concurring). This suggests the right to a trial by jury is a more accurate justification for a prohibition on post-acquittal appeals of factual issues. *See, e.g.*, Amar, *supra* note 30, at 1843, 1846. *Cf.* THOMAS, *supra* note 31, at 259 ("[J]ury nullification . . . is logically located in the right to a jury trial. No particular reason exists to call this a double jeopardy protection.").

All of the judges who confronted the question agreed that the Clause does not protect purely legal errors.[135] Appellate jurisdiction thus turned on whether the district court would have to make additional findings of fact on remand. According to the panel majority and concurrence, additional findings of fact would have been necessary,[136] so the court found the *Lynch* appeal beyond its purview.[137]

The dissent maintained that an appeal would involve no retrial of factual issues.[138] Under dicta in Supreme Court cases,[139]

> it may be possible upon sifting [the] findings [of fact in a bench trial] to determine that the court's finding of "not guilty" is attributable to an erroneous conception of the law whereas the court has resolved against the defendant all of the factual issues necessary to support a finding of guilt under the correct legal standard.[140]

By "sifting" the trial record and bench findings for the "implied" findings of fact, an appellate court may be able to discern the findings of fact the trial court reached but, because of legal error, failed to apply.[141] Using this approach, the dissent sifted the district court's finding of facts, determining the defendants acted willfully.[142] The dissent sifted the findings by excising the legal error from the preexisting factual determination.[143] By protecting the original finding of facts, sifting circumvents any possibility of subjecting the defendants to further fact-finder scrutiny. By avoiding further fact-finding, sifting permits

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135 *See Lynch*, 162 F.3d at 738-39 (Sack, J., concurring); *id.* at 740-41 (Feinberg, J., dissenting); *see also* OFFICE OF LEGAL POLICY, *supra* note 9, at 895 ("We believe that the Department would stand an excellent chance of obtaining sanction for government appeals of errors of law in a bench trial, when findings of fact clearly support a guilty verdict."); *supra* note 43 and accompanying text (citing cases that support prosecutorial appeals when the error is purely legal).

136 *Lynch*, 162 F.3d 734-35; *id.* at 740 (Sack, J., concurring). Because the majority accepted the trial court's characterization of its determination of willfulness as a finding of fact, any alteration of that determination would necessarily require further fact-finding. *Id.*; *cf. infra* note 146 (impugning the propriety of appellate courts accepting trial court characterizations of inquiries as legal or factual).

137 *Lynch*, 162 F.3d at 736.

138 *Id.* at 740-41 (Feinberg, J., dissenting).

139 *See, e.g.*, United States v. Martin Linen Supply Co., 430 U.S. 564, 569-70 (1977); United States v. Jenkins, 420 U.S. 358, 365 (1975), *overruled by* United States v. Scott, 437 U.S. 82 (1978); United States v. Wilson, 420 U.S. 332, 345 (1975); OFFICE OF LEGAL POLICY, *supra* note 9, at 894 n.260 (citing *Martin Linen*, *Jenkins*, and *Wilson*).

140 *Lynch*, 162 F.3d at 743 (Feinberg, J., dissenting) (quoting *Jenkins*, 420 U.S. at 366-67).

141 *See id.* at 744-45 (Feinberg, J., dissenting). For further discussion of fact-sifting, see *infra* note 172 and accompanying text.

142 *See id.* (Feinberg, J., dissenting)

143 *See id.* at 746 ("In sum, the district court impliedly found the element of willfulness against Lynch and Moscinski and in favor of the prosecution. Since all four elements of criminal contempt were thus resolved against the defendants, no further factfinding would be necessary on remand.").

an appellate court to exercise jurisdiction without affronting the Double Jeopardy Clause.

The *Lynch* dissent accepted the double jeopardy restraint prohibiting appeals which would entail further fact-finding.[144] However, the dissent would narrow the meaning of "further fact-finding" to exclude appellate "fact-sifting."[145] Thus, when appellate courts can compartmentalize bench legal error, they may apply appellate determinations of law to the record to resuscitate the findings of fact. Although the government would not gain an opportunity to twice present its case to a fact-finder, the prosecution could appeal legal error.

No member of the *Lynch* panel confronted whether the district judge's "finding of fact" was a finding of fact, a finding of law, or an application of law to fact. The panel majority accepted the district court's characterization of its willfulness determination as factual. But "[t]he trial court's decision as to whether an issue is one of fact or one of law is itself reviewed as a question of law."[146] Whether Judge Sprizzo's finding was one of fact or law was an issue for the court of appeals to determine de novo. Under *Wilson* and *Jenkins*, to determine whether jurisdiction is available, the court must ascertain if any legal "error could be corrected without subjecting [the defendant] to a second trial before a second trier of fact."[147] But, of the five opinions[148] written regarding the *Lynch* appeal, none confront the conceptual difficulty of discerning the difference between a finding of fact and a finding of law.[149] Yet the original panel was split, and half the

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144 *Id.* (Feinberg, J., dissenting)

145 *See id.* (Feinberg, J., dissenting).

146 Steven Alan Childress & Martha S. Davis, 2 Federal Standards of Review § 11.28, at 11-115 to 11-116 (3d ed. 1999) (in the context of submission of issues to a jury); *see also* Stephen A. Weiner, *The Civil Nonjury Trial and the Law-Fact Distinction*, 55 Cal. L. Rev. 1020, 1021 & n.11 (1967) (citing to civil cases where "'true nature' of trial judge's holdings [was] 'not determined by their labels'" (quoting Benrose Fabrics Corp. v. Rosenstein, 183 F.2d 355, 357 (7th Cir. 1950))).

147 United States v. Wilson, 420 U.S. 332, 345 (1975); *see also* United States v. Jenkins, 420 U.S. 358, 365 (1975) (describing the *Wilson* rule), *overruled by* United States v. Scott, 437 U.S. 82 (1978). "The question of jurisdiction, under the standard set forth in *United States v. Jenkins*, is intertwined with the merits." United States v. Certified Grocers Co-op, 546 F.2d 1308, 1309 (7th Cir. 1976) (citation omitted). For further discussion of *Certified Grocers*, see *infra* note 172.

148 United States v. Lynch, 181 F.3d 330, 330 (2d Cir. 1999) (Sacks, J., concurring); *id.* at 332 (Cabranes, J., with whom Judges Parker, Pooler, and Sotomayer concurred, and with whom Judge Leval concurred in part, dissenting); *Lynch*, 162 F.3d at 733 (Jacobs, J.) (panel majority); *id.* at 736 (Sacks, J., concurring); *id.* at 740 (Feinberg, J., dissenting).

149 *Cf. Lynch*, 181 F.3d at 336-37 & n.10 (Cabranes, J., dissenting) (asserting the district court's findings of fact should be "considered in conjunction with its conclusions of law" and suggesting "[t]he en banc court might have considered whether the district court designated its decision as a 'factual' determination in an effort to insulate the acquittal from appeal"); *Lynch*, 162 F.3d at 735 (asserting, in its cursory discussion of the law-fact distinction: "the district court's error of law influenced its finding as to wilfulness and is integral to that element; it cannot be deemed . . . to be an additional, distinct, and severa-

Second Circuit Court of Appeals was convinced an en banc rehearing was appropriate,[150] presumably based on precisely this distinction.[151]

This Note has argued that appeals of legal issues in acquittals are constitutional and well-advised. In *Lynch*, Second Circuit judges agreed acquittal appeals of legal issues are permitted, but were split on the mechanics. This Note now explores those mechanics.

II
THE LAW-FACT DISTINCTION AND DOUBLE JEOPARDY

Augmenting the analysis of double jeopardy with an understanding of the law-fact distinction, fact-sifting quickly turns out to be a routine appellate tool. Law-fact distinction jurisprudence invites an expansive view of appellate review of acquittals.

A. The Law-Fact Distinction

Appellate courts have traditionally focused on the law-fact distinction in determining the reviewability of trial-level determinations.[152] Because appellate scope of review depends on an appellate court's classification of a decision as legal or factual, "appellate courts potentially exercise considerable power over the ultimate fact-findings of trial level decision makers."[153] Like double jeopardy law, the principles demarcating questions of fact from questions of law are murky[154]

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ble element"); CHILDRESS & DAVIS, *supra* note 146, § 11.28 (asserting the trial court's resolution of law-fact distinction is subject to de novo appellate review as a legal question).

150 *Lynch*, 181 F.3d at 333 (Cabranes, J., dissenting).

151 The majority en banc decision is terse. Presumably, the majority accepts *Jenkins* and *Wilson*, but rejects their applicability in this context—although they may, of course, have had independent reasons for not wishing to revisit the *Lynch* case en banc. *Cf. Lynch*, 162 F.3d at 740 n.4 (Sacks, J., concurring) (asserting "we write on the assumption that [*Jenkins*] is good law").

152 *See, e.g.*, Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion*, 64 N.C. L. REV. 993, 993 (1986) (asserting, in the civil context, that review of errors "is popularly governed by the familiar distinction between fact and law"); Weiner, *supra* note 146, at 1021 (discussing standards of review in the civil context).

153 Louis, *supra* note 152, at 997.

154 *See* Miller v. Fenton, 474 U.S. 104, 113-14 (1985); Pullman-Standard v. Swint, 456 U.S. 273, 288 (1982); Baumgartner v. United States, 322 U.S. 665, 671 (1944); CHILDRESS & DAVIS, *supra* note 146, § 7.05; George C. Christie, *Judicial Review of Findings of Fact*, 87 NW. U. L. REV. 14, 14-15 (1992); Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 232 (1985); *cf.* Stephen A. Weiner, *The Civil Jury Trial and the Law-Fact Distinction*, 54 CAL. L. REV. 1867 (1966) (discussing the law-fact distinction in the civil context).

Following the Supreme Court, this Note distinguishes civil fact-finding from criminal fact-finding. *See* United States v. Gaudin, 515 U.S. 506, 517 (1995); Colleen P. Murphy, *Context and the Allocation of Decisionmaking: Reflections on* United States v. Gaudin, 82 VA. L. REV. 961, 963 (1996). *But see id.* at 964, 972-75 (asserting the Court has "overstat[ed] the civil/criminal dichotomy").

and ancient.[155] Despite the "elusive"[156] character of a technique for distinguishing fact from law, consistent criteria are discernable.[157]

Generally, a court must make two interrelated determinations to distinguish between fact and law. First, the court must classify the putative error as purely factual, purely legal, or an application of law to fact.[158] The second, corollary determination, and the fuzzy part of the test, is whether the appellate court owes deference to the trial court's determination regardless of the analytic classification of the error as one of law or application of law to fact.

B. Law and Fact Analytically

Broadly speaking, a determination of law possesses a universal quality—legal principles have general normative and prescriptive significance. Determinations of law are abstract, permitting application to diverse patterns of conduct.[159] For example, as a matter of pure law, "wilfulness" is generally defined as acting while "aware [one's] conduct is of the required nature."[160] Thus, persons who act while aware their conduct violates a court order act with "wilfulness."[161]

Factual determinations, on the other hand, are specific assessments of what actually occurred, in a historical or scientific sense.[162] "[Factual] assertions . . . generally respond to inquiries about who, when, what, and where—inquiries that can be made 'by a person who is ignorant of the applicable law.'"[163] For example, the parties in the

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155 *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1176 (1989) (citing Aristotle).

156 *Miller*, 474 U.S. at 113.

157 *Cf.* Christie, *supra* note 154, at 14. Professor Christie observes:

> It seems as if no term goes by without a violent disagreement among the members of the Court over whether some trial court determination is a question of law or a mixed question of law and fact, and thus open for re-examination, or a question of fact, whose re-examination is thus foreclosed.

Id.

158 *Cf.* Colleen P. Murphy, *Integrating the Constitutional Authority of Civil and Criminal Juries*, 61 GEO. WASH. L. REV. 723, 729-33 (1993) (proposing five analytic categories, rather than the traditional three).

159 *See* Monaghan, *supra* note 154, at 235; Adrian A.S. Zuckerman, *Law, Fact or Justice?*, 66 B.U. L. REV. 487, 487 (1986); *cf.* Weiner, *supra* note 154, at 1868-69 (discussing questions of law in similar terms in the civil context).

160 MODEL PENAL CODE § 2.02 cmt. 2 (1985). The Model Penal Code equates willfulness with acting knowingly. *Id.* § 2.02(8).

161 *See, e.g.*, United States v. Lynch, 162 F.3d 732, 735 (2d Cir. 1998) ("Wilfulness merely requires 'a specific intent to consciously disregard an order of the court.'") (quoting United States v. Cutler, 58 F.3d 825, 837 (2d Cir. 1995) (quoting United States v. Berardelli, 565 F.2d 24, 30 (2d Cir. 1977))), *reh'g en banc denied*, 181 F.3d 330 (2d Cir. 1999).

162 *See* Monaghan, *supra* note 154, at 235-36; Zuckerman, *supra* note 159, at 487; *cf.* Weiner, *supra* note 154, at 1869-71 (discussing questions of fact in similar terms in the civil context).

163 Monaghan, *supra* note 154, at 235 (quoting LOUIS JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 548 (1965)). Such determinations include assessments of an actor's

Lynch case stipulated that "at approximately 7:50 a.m. a police officer informed the defendants that 'they were in violation of the law and that if they did not leave the area immediately they would be arrested.' The defendants 'acknowledged the warning and refused to leave.'"[164] This stipulation was an agreement between the parties regarding facts. Findings of fact often involve discretion; they are cases which "could go either way."[165] Despite this seeming clarity the nodes of fact and law are not necessarily distinct; they may blur together.[166]

The application of law to fact is a third category.[167] A decision maker applies law to fact when she assesses whether the general legal principle is applicable to the specific facts. Application of law to facts entails a judgment that *this* law is relevant to *these* facts, or stated conversely, that the facts, by meeting the standard instantiated in the law, trigger legal consequences.[168] Although the application of law to fact may represent an analytically distinct category, applications of law to fact are classified as either legal or factual for purposes of allocating primary decision-making responsibility.[169]

In the district court's published opinion in *Lynch*, Judge Sprizzo stated: "[T]he Court finds as a matter of fact that Lynch's and Moscinski's sincere, genuine, objectively based and, indeed, conscience-driven religious belief, precludes a finding of willfulness."[170] From a purely analytic perspective, Judge Sprizzo's statement smacks of the general applicability that characterizes findings of law. The principle expressed, while clearly erroneous,[171] is a simple axiom: Willfulness

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objective mental state. *Cf.* Weiner, *supra* note 154, at 1870-71 (discussing mental state in the civil context).

164 *Lynch*, 162 F.3d at 742 n.1 (quoting from Judge Sprizzo's injunction).

165 Scalia, *supra* note 155, at 1181; *see also* Zuckerman, *supra* note 159, at 493 & n.21 (recognizing that decisions of fact are those that "warrant determination either way").

166 For example, consider *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 501 n.17 (1984). Here the Court explained:

> A finding of fact in some cases is inseparable from the principles through which it was deduced. At some point, the reasoning by which a fact is "found" crosses the line between application of those ordinary principles of logic and common experience which are ordinarily entrusted to the finder of fact into the realm of a legal rule upon which the reviewing court must exercise its own independent judgment. Where the line is drawn varies according to the nature of the substantive law at issue.

Id. at 501 n.17; *see also* Scalia, *supra* note 155, at 1187-88 (comparing Justice Holmes in *Baltimore & Ohio Railroad v. Goodman*, 275 U.S. 66 (1927), and Justice Cardozo in *Pokora v. Wabash Railway*, 292 U.S. 98 (1934), to illustrate how difficult it is to draw the line between fact and law).

167 *See* Monaghan, *supra* note 154, at 236-38; *cf.* Weiner, *supra* note 154, at 1874-76 (discussing the application of law to fact in the civil context).

168 *See* Monaghan, *supra* note 154, at 236.

169 *See* Louis, *supra* note 152, at 998, 1002. There is no intermediary level of review. *See id.* at 1002.

170 United States v. Lynch, 952 F. Supp. 167, 170 (S.D.N.Y. 1997).

171 *See supra* notes 129-30 and accompanying text.

does not include conscience-driven motivation. Judge Sprizzo's statement is both a finding of law (crimes motivated by conscience are not willful) and an application of this novel legal principle to the facts of the case at bar (Lynch and Moscinski were motivated by conscience and therefore did not act willfully). While the statement includes factual determinations regarding the defendants' state of mind (they were "sincere," etc.), these factual determinations, however accurate, are irrelevant to an application of the correct law to the facts.

The sifting of these findings of fact from the incorrect finding of law, and the application of the correct law to facts is elementary.[172] Analytically, the district court's "finding of fact" is a conjoined finding of law and application of law to fact. Given the correct law, the fact that Lynch and Moscinski were sincere is completely irrelevant. Ignoring such irrelevant facts requires no further fact-finding. Nor would further fact-finding be required if Judge Sprizzo's standard was correct—the appeals court could simply affirm the acquittal. So, according to ordinary definitions of law and fact, no further fact-finding was needed to correct Judge Sprizzo's error.

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172 Thus, an appellate court sifts facts when it takes facts previously determined by an underlying decision maker, and applies the appropriate law to those facts. *See, e.g.*, United States v. Jenkins, 420 U.S. 358, 366-67 (1975), *overruled by* United States v. Scott, 437 U.S. 82 (1987). For discussion of *American Tobacco Co. v. United States*, 328 U.S. 781 (1946), a Supreme Court case which explicitly condones thus-defined fact sifting, see *infra* notes 191-92 and accompanying text.

For another case attempting fact-sifting, see *United States v. Certified Grocers Co-op*, 546 F.2d 1308, 1313 (7th Cir. 1976) (Tone, J.) (dicta), in which the court of appeals attempted to sift the facts following a bench trial. Citing *Jenkins*, the court of appeals contemplated making an inference as a matter of law based on the trial court's fact-finding. *See id.* at 1312-13; *cf.* Zuckerman, *supra* note 159, at 493 (observing "questions admitting of only one answer are [often] characterized as questions of law"). However, on the available record, the appeals court determined the findings were too sparse to permit such a ruling. *See Certified Grocers*, 546 F.2d at 1313. Judge Tone's dicta in *Certified Grocers* is obfuscated by his opinion in a case decided the same day, *United States v. Dyer*, 546 F.2d 1313 (7th Cir. 1976), which appears irreconcilable with the former:

> While a rational mind could hardly conclude [the defendant was not guilty of an essential element of the crime under the law as proposed by the Government on appeal], no finding was made on the point. It is for the trier of fact to draw the inferences, however obvious, and we have no power to do so.

Id. at 1316. Like in *Certified Grocers*, the trial findings were the product of a bench trial. *See id.* at 1314. If "a rational mind could hardly conclude" otherwise, it is difficult to imagine why a finding of law would not be permitted under *Jenkins* and *Certified Grocers*. *Cf.* Scalia, *supra* note 155, at 1181 (citing civil cases for the proposition that extreme factual determinations become questions of law); Weiner, *supra* note 146, at 1021 (asserting, in the civil bench trial context, "a 'factual' finding by the trial judge may be reversed as a 'legal' error if not supported by substantial evidence"); Zuckerman, *supra* note 159, at 493 ("'All these cases in which the facts warrant a determination either way can be described as questions of degree and, therefore, as questions of fact.'" (citation omitted)).

C. Law and Fact Synthetically

Ascertaining whether an inquiry is analytically "factual" or "legal" is not necessarily determinative.[173] The determination also involves practical considerations regarding the allocation of decision making which often supersede analytic classification.[174] As set forth in *Miller v. Fenton*:

> At least in those instances in which Congress has not spoken and in which the issue falls somewhere between a pristine legal standard and a simple historical fact, the fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question.[175]

This inquiry is the second prong of the intertwined law-fact test: *Should* the trial court's determination be accorded deference on appeal? Thus, disconcertingly, an inquiry may be factual in one context, and legal in another.[176] This pragmatic allocative inquiry is especially pertinent in determining which decision maker should apply law to fact.[177]

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173 Because the standard of appellate review is split between law and fact, with no third category, I will only refer to these two categories in general discussions. *See supra* note 169 and accompanying text.

174 *See* Miller v. Fenton, 474 U.S. 104, 113-14, 116 (1985) ("putting to one side whether 'voluntariness' is analytically more akin to a fact or legal conclusion"); Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 501 n.17 (1974); CHILDRESS & DAVIS, *supra* note 146, § 7.03, at 7-26; Monaghan, *supra* note 154, at 237 ("The real issue is not analytic, but allocative: what decisionmaker should decide the issue?"); *cf.* Weiner, *supra* note 154, at 1868 (asserting, in the civil context, that "a question of law or a question of fact is a mere synonym for a judge question or a jury question"). *But see* Murphy, *supra* note 154, at 963-64 (arguing against contemporary Supreme Court jurisprudence, that "context is too easily employed as a substitute for analysis").

175 *Miller*, 474 U.S. at 114; *see also* Monaghan, *supra* note 154, at 234 (allocation determined by "appropriateness").

176 *See* United States v. Gaudin, 515 U.S. 506, 520-22 (1995); Weidner v. Thieret, 866 F.2d 958, 961 (7th Cir. 1989) (Posner, J.) ("It is nowhere written that the law-fact distinction must be treated the same in 18 U.S.C. § 2254(d) and in Fed.R.Civ.P. 52(a)."); *cf.* Murphy, *supra* note 154, at 971-72 (criticizing this confusing state).

177 *See Gaudin*, 515 U.S. at 522; Salve Regina Coll. v. Russell, 499 U.S. 225, 231-32 (1991); Monaghan, *supra* note 154, at 237; *cf.* Louis, *supra* note 152, at 1000 (asserting, in the civil context, that "[t]he law/fact dichotomy does quite well in predicting how appellate courts will review trial level determinations of 'pure' law and 'pure' or historical fact"). Justice Holmes was in favor of broader appellate review; he accordingly defined determinations of law broadly. *See* Balt. & Ohio R.R. v. Goodman, 275 U.S. 66, 70 (1927); O.W. HOLMES, JR., THE COMMON LAW 120-24 (1881); Louis, *supra* note 152, at 1021-22; Scalia, *supra* note 155, at 1187-88. Expressing a similar sentiment, Justice O'Connor noted that "hybrid" inquiries, "subsuming . . . a 'complex of values,'" ought not to be treated as inquiries of "simple historical fact." *Miller*, 474 U.S. at 116 (quoting Blackburn v. Alabama, 361 U.S. 199, 207 (1960)). *But compare Gaudin*, 515 U.S. at 512 (Scalia, J.) (noting that the application of law to fact is generally a task for the jury), *and* Weiner, *supra* note 154, at 1919-21 (asserting the right to a jury trial generally provides for the jury to apply law to fact in the civil context), *with Gaudin*, 515 U.S. at 525-26 (Rehnquist, J., concurring) (citing a

Although the synthetic analysis is even more flexible than the analytic inquiry, there are a few touchstones which guide courts in making this determination.

1. *The Constitution*

The Constitution most heavily influences the allocation of decision-making responsibility, and thus affects the classification of inquiries as factual or legal.[178] Under the constitutional fact doctrine[179] determinations implicating constitutional rights become legal inquiries in order to permit Supreme Court review.[180] In First Amendment cases, appellate judges have a *duty* to review lower court application of law to fact.[181] This duty "reflects a deeply held conviction that

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number of application of law to fact inquiries which "remain the proper domain of the trial court").

Professor Martin Louis has argued that the current legal climate favors categorizing application of law to fact as factual determinations. Louis, *supra* note 152, at 1003-04, 1007. He explains this bias through judicial economy. Given contemporary caseloads, appellate courts simply do not have the time to act as supplementary decision makers. *See id.* at 998, 1006, 1013 & nn.140-43. By classifying inquiries as purely factual, appellate courts limit their own capacity to review trial decisions. *See id.* at 1006. When deferring to trial courts' factual determinations, appellate courts lighten their own responsibilities. *See id.* Deferring to trial decision makers may also result in less conservative determinations. *See id.* at 1022.

178 Where the allocation equation involves a jury, the Sixth Amendment exerts a powerful influence. *See, e.g., Gaudin*, 515 U.S. at 522; Murphy, *supra* note 154, at 969; *see also supra* notes 97-102 and accompanying text (discussing nullification). *But see* Leipold, *supra* note 79, at 284-96 (arguing the Constitution does not protect nullification).

In a bench trial, however, allocations of decision making justified via the Sixth Amendment jury right become far less compelling. *See* United States v. U.S. Gypsum Co., 333 U.S. 364, 394-95 (1948); *cf.* Louis, *supra* note 152, at 994 (asserting tbat "traditionally the degree of deference has varied slightly depending on whether the factual findings were made by a jury, an agency, or a trial judge"). *But see* Christie, *supra* note 154, at 16-17 (asserting that deference accorded to juries has often been extended to trial judges); Louis, *supra* note 152, at 998, 1002 (arguing that the distinction in deference between juries and judges is eroding).

Neither do bench judgments share the historical lineage of jury determinations. For example, the roots of Federal Rule of Criminal Procedure 29, permitting directed verdicts of acquittal, were innovations of the latter half of the nineteenth century. *See* Theodore W. Phillips, Note, *The Motion for Acquittal: A Neglected Safeguard*, 70 YALE L.J. 1151, 1152 & n.8 (1961). These innovations "developed as a corollary to the directed verdict in civil cases, with little apparent thought or reasoning." Richard Sauber & Michael Waldman, *Unlimited Power: Rule 29(a) and the Unreviewability of Directed Judgments of Acquittal*, 44 AM. U. L. REV. 433, 434 (1994); *see also id.* at 439 & n.30, 440-41 (discussing the history of judgments of acquittal).

179 The Supreme Court appears to be moving toward a more candid acceptance of the doctrine. *See, e.g., Miller*, 474 U.S. at 117; Scalia, *supra* note 155, at 1182. *But see* Monaghan, *supra* note 154, at 231 n.17 (suggesting the Court may be wary of openly adopting the doctrine).

180 *See* Monaghan, *supra* note 154, at 230-31.

181 *See* Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 514 (1984); *cf.* Monaghan, *supra* note 154, at 229 (characterizing the Court's direction to courts of appeals as an imperative and criticizing the imposition of such an obligation).

judges—and particularly Members of this Court—must exercise such review in order to preserve the precious liberties established and ordained by the Constitution."[182]

The Court determines the minimum constitutional decencies. Yet, as the court of last resort, the Court must also determine the outer limits of constitutional protections.[183] When one party is systematically denied review of unfavorable determinations, substantive law may be distorted.[184] Commenting on proposed amendments to the Criminal Appeals Act which were later enacted, Will Wilson, Assistant Attorney General in 1970, argued in favor of the revisions because they would permit review of constitutional errors masquerading as acquittals.[185]

2. *Stare Decisis*

When no constitutional interests compete, a primary consideration in determining whether an inquiry is one of law or fact is a matter of stare decisis.[186] When appellate courts have traditionally exercised review, or when a particular sort of inquiry has traditionally been classified as one of fact or law, precedent counsels in favor of consistent classification.[187]

But precedent runs counter to the *Lynch* ruling. A long line of Second Circuit civil cases has held that the application of law to fact is a legal inquiry.[188] Thus, in *Karavos Compania Naviera S.A. v. Atlantica*

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[182] *Bose*, 466 U.S. at 510-11.

[183] *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

[184] *See supra* note 80 and accompanying text. To alleviate such distortion, commentators have proposed permitting a sort of declaratory judgment for the government. Equal advocacy at the appellate level would ensure symmetrical development of the criminal law, while saving defendants from an interminable exposure to uncertainty regarding their fate. Some states provide for such declaratory judgments. "A few [states] have allowed the state to appeal the disputed claim only as a means of clarifying future proceedings without affecting the present defendant; the enthusiasm with which the prosecution will utilize such procedure is open to doubt." Mayers & Yarbrough, *supra* note 76, at 10 (citing State v. Gray, 111 P.2d 514 (Okla. 1941)); *see also* Leipold, *supra* note 79, at 261 n.22 (citing to Kansas and Nebraska statutes permitting such declaratory judgments).

[185] *See* S. REP. No. 91-1296, at 24 (1970). "Where to the contrary . . . the judge's opinion indicates unmistakably that the purported 'acquittal' is in reality founded on a determination that the underlying statute is unconstitutional, the labeling of it as an acquittal would not, and obviously should not, prevent it from being appealed." *Id.*

[186] *See* Miller v. Fenton, 474 U.S. 104, 115 (1985).

[187] *See, e.g.*, Scalia, *supra* note 155, at 1178, 1180-81.

[188] *See, e.g.*, Andrew Crispo Gallery v. Comm'r, 86 F.3d 42, 46 (2d Cir. 1996) ("Thus, findings based upon an 'improper standard' . . . , or 'a misunderstanding of the governing rule of law' . . . may be corrected as a matter of law." (citations omitted)); Greenapple v. Detroit Edison Co., 618 F.2d 198, 205 (2d Cir. 1980) ("Since the only issue presented concerns the application of a legal standard to undisputed facts, we have a vantage point as commanding as the court below, and are therefore free to reject its conclusions."); Louis, *supra* note 152, at 1003 n.73 ("[S]ome courts of appeal . . . say that if the historical facts are not in dispute, the ultimate fact is a question of law."). Professor Louis takes issue with this

Export Corp.,[189] Judge Friendly cited to "this court's long-held position" that application of law to fact is a question of law, reviewable de novo.[190] In *American Tobacco Co. v. United States*,[191] the Supreme Court explicitly applied law to facts in a criminal case: "The present opinion is not a finding by this Court one way or the other on the many closely contested issues of fact. The present opinion is an application of the law to the facts as they were found by the jury . . . ."[192]

Little precedent exists on the subject of prosecutorial appeals, and on where precisely the law-fact distinction ought to lie in this particular context. As the *Lynch* dissent noted, the issues presented embodied a case of first impression.[193] Given the policy arguments this Note proffers, the application of law to fact should remain a question of law in acquittal appeals.

3. *Competence*

Another important criterion in making the law-fact distinction is the competence of the decision maker.[194] In a naked evaluation of generic competence, panels of appellate court judges are generally viewed as superior decision makers in the application of law to fact.[195]

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view, grounding his disagreement in the Seventh Amendment and the jury's putative insight into ordinary life. *See id.* At the very least, these considerations have little place in evaluating the scope of review for a bench trial.

189 588 F.2d 1 (2d Cir. 1978).

190 *Id.* at 7-8.

191 328 U.S. 781 (1946).

192 *Id.* at 787. This application of correct law to facts that were previously determined by an underlying decision maker is all that *Jenkins*'s sifting really requires. *See, e.g.*, United States v. Jenkins, 420 U.S. 358, 366-67 (1975), *overruled by* United States v. Scott, 437 U.S. 82 (1978); *see also supra* note 172 (discussing *Certified Grocers*).

193 *See* United States v. Lynch, 181 F.3d 330, 334 (2d Cir. 1998) (Cabranes, J., dissenting) ("The case before us is one of first impression . . . .").

194 *See, e.g.*, Miller v. Fenton, 474 U.S. 105, 113-14 (1985).

195 *See* Louis, *supra* note 152, at 1013-14; Murphy, *supra* note 158, at 971 (citing the opportunity for "reflective dialogue and collective judgment" by circuit panels); Ellen E. Sward, *Appellate Review of Judicial Fact-Finding*, 40 U. KAN. L. REV. 1, 14-16, 33-34 (1991) (emphasizing the "fairness" and "efficiency" of appellate law declaration and application to fact (citing Salve Regina Coll. v. Russell, 499 U.S. 225, 232 (1991))); *cf.* Louis, *supra* note 152, at 1010-11 (suggesting that expertise does not justify deference to agencies and juries).

Because exposure to witnesses is unique to the trial, appellate competence is diminished where evaluations of witness "credibility and demeanor" are decisive. *See Miller*, 474 U.S. at 116-17; Anderson v. City of Bessemer City, 470 U.S. 564, 547-75 (1985). Rule 52(a) of the Federal Rules of Civil Procedure and the Supreme Court overturned precedent that accorded deference only to inferences and findings informed by credibility judgments. *Anderson*, 470 U.S. at 574; Louis, *supra* note 152, at 1000. Yet, in the criminal context, where no analogue to Rule 52(a) constrains appellate review, cases in favor of "de novo review over findings not based on credibility determinations" weigh in favor of broadly construing findings of law to permit review. *Anderson*, 470 U.S. at 574 (citing Lydle v. United States, 635 F.2d 763, 765 n.1 (6th Cir. 1981); Swanson v. Baker Indus., Inc., 615 F.2d 479, 483 (8th Cir. 1980); Orvis v. Higgins, 180 F.2d 537 (2d Cir. 1950)).

Additional scrutiny may be especially appropriate where there is any suggestion a particular decision maker is uniquely *in*competent.[196]

Appeal is the primary mechanism for preventing and correcting trial error.[197] When the trial error is material to the verdict, arguments in favor of review become extremely compelling.

> To permit a trial court to end a federal prosecution without possibility of review runs directly counter to the principles . . . of appellate review. In our system, the privilege to be infallible is bestowed only along with the coincidence of finality, and the Supreme Court is the only federal court whose word is final.[198]

Appeal furthers the correction of inadvertent errors.[199] Appellate review also permits the correction of willful error, or nullification.

A decision maker nullifies the law when she purposefully passes judgment on the basis of considerations other than existing law. While the law derives great strength from judicial ingenuity, review ensures that the mutation of legal doctrine is an orderly evolution. Permitting judicial nullification raises grave doubts as to the accuracy and credibility of the culpability determination. A judge whose rulings are founded in personal prejudice impugns her own competence. Her decisions should be accessible to review.[200]

In *Lynch*, the court of appeals failed to classify the judge's application of law to fact as an inquiry of law, despite the facially apparent

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196 *See, e.g.*, Louis, *supra* note 152, at 1002, 1015-16 & nn.159, 160.

197 *See* Dalton, *supra* note 63, at 69; Sauber & Waldman, *supra* note 178, at 452-53. Error can be defined tautologically as a heteroclite interpretation of law. Thus, appeal corrects error by imposing homogeneity. *Cf. id.* at 453 ("Appeals help assure uniformity and evenhandedness."). This homogeneity is the very foundation of justice and law. Denying appeal of heteroclite law defiles the ideal of an impartial judge trying successive litigants by the same standard.

198 Sauber & Waldman, *supra* note 178, at 434. As discussed at note 88 and accompanying text, *supra*, significant distortions of the substantive law may occur where review is asymmetrical. For example, the standard for pre-verdict directed judgments of acquittal under Rule 29 of the Federal Rules of Criminal Procedure is currently unreviewable. *See* Fong Foo v. United States, 369 U.S. 141, 145 (1962) (Clark, J., dissenting) (asserting the trial court's exercise of Rule 29 was inappropriate); Sauber & Waldman, *supra* note 178, at 435 & n.8 (citing district court cases directing verdicts inappropriately "despite . . . the clear language of [Rule 29]").

199 *See* Sauber & Waldman, *supra* note 178, at 452-53.

200 Of course, appellate review is no panacea for nullification. Indeed, it may be all too easy for a wily trial judge to smuggle her nullification in through more subtle means. For example, by making a false finding of fact based directly on a witnesses's testimony, a trial judge can easily justify an inaccurate decision without resort to legal distortion. *See* Dalton *supra* note 63, at 88-89 & n.90; Louis, *supra* note 152, at 1015. However, inquiries into the psychology of nullifying judges and the means by which they nullify are far beyond the scope of this Note. *Cf.* Dalton, *supra* note 63, at 88-91 (providing a glib foray into the psychology of trial judges regarding appeal).

legal error and the strong suggestion of judicial nullification.[201] Unique appellate competence, particularly in cases suggesting judicial nullification, strongly favors appellate review.

4. *Judicial Economy*

Judicial economy is a related consideration that sometimes favors calling an inquiry factual rather than legal.[202] For example, in *Weidner v. Thieret*, Judge Posner declined jurisdiction at the court of appeals level, where a district court had already applied plenary review to a state court decision.[203] Naturally, political tax cuts and budget balancing limit judicial resources. But a distinction exists between appropriately thrifty judicial economizing, like Judge Posner espouses in *Weidner*, where a lower court had already examined a state decision, and the miserly dispensation of jurisdiction, which denies review entirely. While limited judicial resources may justify judicial economizing, false necessity should not deform justice. Appeal is provided for criminal defendants.[204] Judicial economy does not weigh against providing a secondary forum for the accused. The expense of asymmetry may be by far the greater.[205]

5. *Double Jeopardy Policies*

Finally, the policies against the double jeopardy prohibition of acquittal appeals favor broadly discerning inquiries as legal. Society's interest in accurate criminal trials, externalities such as the possible distortion of substantive criminal law, and the danger of nullification all favor limiting double jeopardy protections in the appellate context.[206]

The second, synthetic, prong of the law-fact test is flexible, particularly in the application of law to fact. Because of this flexibility, despite the relatively well-defined analytic categories of law and fact,

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201 A further rationale offered in favor of granting appeals generally is that appellate oversight increases public perceptions of fairness. *See, e.g.*, Dalton, *supra* note 63, at 98-101; Sauber & Waldman, *supra* note 178, at 454-55.

202 *See* Anderson v. City of Bessemer City, 470 U.S. 564, 574-75 (1985); Weidner v. Thieret, 866 F.2d 958, 961 (7th Cir. 1989) (Posner, J.). If the value of an individual procedure is greater than its cost, the judicial-economy syllogism may demonstrate only the necessity of allocating greater resources to the judiciary.

203 866 F.2d at 961 ("The fact that *Miller* requires the federal district court to take a fresh look at the issue . . . does not entail that we should do so as well.").

204 The Double Jeopardy Clause, on the other hand, generally prevents review of acquittals. Arizona v. Washington, 434 U.S. 497, 503 (1978); Fong Foo v. United States, 369 U.S. 141, 143 (1962) (per curiam); Green v. United States, 355 U.S. 184, 192, 198 (1957); 2A WRIGHT, *supra* note 97, § 468, at 315.

205 "The community incurs an incalculable expense when the vast machinery constructed to bring criminals to justice can be felled by the simple error of a single unreviewable judge." Shapiro, *supra* note 59, at 906.

206 *See supra* Part I.B.1-3.

classifying inquiries as legal or factual is often a naked allocation of decision-making power between appeals and trial courts. In these circumstances, to call a determination "factual" provides no more insight than to establish the inquiry is a jury question.[207] Synthetically, and analytically, the *Lynch* appeal raised questions which would have implicated no further fact-finding.

CONCLUSION

Legal and policy issues weigh in favor of permitting acquittal appeals of purely legal errors. Legally, Supreme Court precedent consistently sanctions appellate review of legal errors which would require no further fact-finding. Policy-wise, the prohibition of acquittals appeals fails to resolve the problems which prompted it, and causes other problems. Thus, for example, judicial nullification is fostered and protected from review. Permitting review of purely legal errors redresses many of the difficulties raised by the prohibition.

Despite precedent and policy, appellate courts have yet to permit an acquittal appeal which implicates no further fact-finding.[208] The exception to the prohibition of acquittal appeals, authorized in theory, is forbidden in practice. One reason for this may be the mechanics of applying appellate law to trial facts. Under the pure law exception, an appellate court must apply the correct law to the previously determined trial facts. The trial facts must be "sifted" or separated from the erroneous trial law. The process of fact-sifting, or separating the trial facts from the erroneous trial law, turns out to be a routine appellate tool. The law-fact distinction often sanctions appellate applications of law to previously determined facts. Many applications of law to fact should be deemed legal inquiries for purposes of determining whether an appeal of an acquittal is permitted.

The requirement, under the pure law exception, that a defendant be subject to no further fact-finding means simply that there shall be no remand to a trial level decision maker, but determinations appropriate for the court of appeals shall lie with the court of appeals.[209] Thus, in Canada, where prosecutorial appeals on "a question of law alone" are permitted, the flexibility of the law-fact distinction can sanction broad appellate review.[210] By liberally construing inquiries as legal, as law-fact distinction jurisprudence recommends, courts of appeals can review acquittals consistent with constitutional jurispru-

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207 *See* Weiner, *supra* note 154, at 1868-69.

208 *See supra* notes 25 and 122 and accompanying text.

209 *See* United States v. Jenkins, 420 U.S. 358, 370 (1975), *overruled by* United States v. Scott, 437 U.S. 82 (1978).

210 *See* Freeman, *supra* note 45, at 21 (quoting Sunbeam Corp. (Can.) v. The Queen, [1969] 2 S.C.R. 221 (Can.)).

dence. In another circuit, or on another try in the Second Circuit, the pliability of the law-fact distinction offers significant opportunities to appeal acquittal legal errors.