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

Forrest G. Alogna

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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-

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 prosecutor 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.
   
   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).
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.\(^\text{12}\)

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 temperam
. . . [and] pursue a nakedly political agenda’ without fear of re-
moval."\(^\text{13}\) As the volumes of the Federal Reporter\(^\text{14}\) 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—
aquittals—where the decisions of judges, even if "egregiously errone-
ous" are often immune from review, and thus uncorrectable.

But the Court has interpreted the Double Jeopardy Clause to pro-
hibit 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 con-
cern memorably in *Green v. United States*:\(^\text{15}\)

> [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.\(^\text{16}\)

Permitting government appeal protracts the hardship of criminal de-
fense. To lessen the already substantial burden on criminal defend-
ants, the Court has interpreted the Double Jeopardy Clause to
prohibit many government appeals.


\(^{15}\) 355 U.S. 184 (1957) (5-4 decision).

The Court has traditionally interpreted the Clause by weighing the defendant's interest in closure against the state's interest in accurate adjudications. Justices have disagreed on the relative weight of these interests, but accuracy and finality have remained the primary constitutional stakes. Consider *Palko v. Connecticut,* in which the Court reaffirmed the constitutionality of acquittal appeals in state courts. 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." 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.

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. 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. This recent rift within an erudite court punctuates just how controversial and unresolved are the parameters of the pure law exception. 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).

Although the Constitution tolerates acquittal appeals which entail no further fact-finding, appeal-
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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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.").

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 899-97 (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. 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—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.

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.").

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 "[n]o 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.\(^{36}\)


\(^{33}\) 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) ("[t]o 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 "counter-vailing 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\textsuperscript{37} from multiple exposures to determinations of culpability,\textsuperscript{38} conducted by the same sovereign\textsuperscript{39} arising out of the same alleged conduct.\textsuperscript{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.\textsuperscript{41} Current criminal procedure permits post-conviction appeals.\textsuperscript{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. Prosecutor appeals are permitted when the error is purely legal, and no further fact-finding would be necessary.\textsuperscript{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-

\textsuperscript{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).

\textsuperscript{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.

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

\textsuperscript{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.


\textsuperscript{42} See Evitts v. Lucey, 469 U.S. 387, 390-91 (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.").

rected without subjecting him to a second trial before a second trier of fact.\textsuperscript{44}

A similar exception exists in Canada, where prosecutorial appeal is permitted "on a question of law alone."\textsuperscript{45} A number of other common-law countries follow the Canadian approach, including India, New Zealand, Sri Lanka, and South Africa.\textsuperscript{46} England, notably, does not permit such appeals.\textsuperscript{47} Most civil-law countries permit review of legal questions following acquittals.\textsuperscript{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."\textsuperscript{49} Analysis of early authorities, including Coke, Hawkins, and Hale, supports the Court's observation.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.

\textsuperscript{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.").


\textsuperscript{46} Office of Legal Policy, supra note 9, at 887.

\textsuperscript{47} Id. at 885-86.

\textsuperscript{48} Id. at 887-88 (discussing generally and specifying France and Japan).

\textsuperscript{49} Wilson, 420 U.S. at 342.

\textsuperscript{50} See Thomas, supra note 31, at 261-62 (discussing the historical roots of double jeopardy in Coke, Hawkins, and Hale).

\textsuperscript{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).

\textsuperscript{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. The "State with all its resources and power" policy is the most oft cited in favor of finality. The state has ample resources, while criminal defendants are often "too poor to afford private counsel." Under this approach, some guilty defendants are acquitted in order to protect all defendants from overreaching by the state.

Prosecutors, commentators, and dissenters argue accuracy does outweigh finality. 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." Greater accuracy decreases acquittals of guilty defendants. Public perceptions of inaccuracy and inconsistency in the legal system may lessen the deterrent effect of punishment. Nor...
are the government's financial resources limitless.\textsuperscript{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.\textsuperscript{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.\textsuperscript{64} Be-
cause they are unbalanced, asymmetrical appeals are less reliable
determinations of culpability.\textsuperscript{65} For example, when courts abandoned
the mutuality doctrine in civil actions, inaccurate determinations be-
came more likely.\textsuperscript{66} The asymmetrical apportionment of the capacity
to appeal skews the likelihood of success in the criminal adjudication
process in favor of the defendant.\textsuperscript{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 punish-
ment, is a significantly different matter."\textsuperscript{68} Although the justice sys-
tem strives to accurately identify and sanction criminal actors, the
Constitution instantiates a competing goal—protecting citizens from
false or unfair convictions.\textsuperscript{69} Weighing the repugnance of a false con-
viction—of sending an innocent person to jail—\textsuperscript{70} inaccuracy may be
more acceptable. Recent investigations have documented some dis-
turbing antidefendant inaccuracies in state justice systems. For ex-
ample, the error rate for false capital convictions in Illinois may exceed

\textsuperscript{62} See James Vorenberg, Decent Restraint of Prosecutorial Power, 94 HARV. L. REV. 1521,

\textsuperscript{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, 99 U. CALIF. L. REV. 503, 503-04 (1992); Harlon Leigh Dalton, Tack-
ing 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.

\textsuperscript{64} See Stith, supra note 9, at 5.

\textsuperscript{65} See, e.g., DiBiagio, supra note 36, at 107 (contrasting Justice Powell's dissent in Bull-
ington 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.

\textsuperscript{66} Note, supra note 61, at 619, 622-24, 640-43, 645, 679.

\textsuperscript{67} Stith, supra note 9, at 3.

\textsuperscript{68} Stephen J. Ceci & Richard D. Friedman, The Suggestibility of Children: Scientific Re-

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

\textsuperscript{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;
appropriate ratio of false to true convictions).
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. 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. 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.

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, prompt lawmakers to find other routes via which to ensure conviction, and motivate misconduct by defense attorneys. 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; Stih, supra note 9, at 3.


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." 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." Professor Kate Stith has argued asymmetrical appeal even distorts substantive criminal law by manipulating the issues heard on appeal.

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. 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." 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. 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.

Courts also defend asymmetrical appeals as counterbalancing the effects of malicious or overzealous prosecution. 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.").
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).
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," 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, and in negotiating plea bargains.

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

The President has the power to remove abusive federal prose-

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).

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

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

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


[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.


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)).

DiBiagio, supra note 36, at 82 n.16.
double jeopardy

cutors from office, either directly or indirectly. 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 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." 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. 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. Pro-defendant jury nullification is often defended by appeal to the Sixth Amendment. 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. 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.

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 earthly wisdom of the jury box is limited to determinations which favor defendants.
98 See supra notes 66-74 and accompanying text.
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."\footnote{100} Professor Simson’s equal protection argument also applies to judicial nullification. Consider the predicament of the defendant faced with a prosecutor judge.\footnote{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.\footnote{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."\footnote{103} Although this precept has not gone unquestioned, it stands on firm footing.\footnote{104} By analogy, consider the duty of jurors to uphold the law.\footnote{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.\footnote{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.

\footnotesize{\begin{itemize}
    \item \footnote{100}{Gary J. Simson, Jury Nullification in the American System: A Skeptical View, 54 Tex. L. Rev. 488, 518 (1976).}
    \item \footnote{101}{See supra note 79 and accompanying text.}
    \item \footnote{102}{See supra note 78 and accompanying text.}
    \item \footnote{103}{1B JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE ¶ 0.401 (2d ed. 1993); Caminker, supra note 78, at 818 n.2.}
    \item \footnote{104}{See Caminker, supra note 78, at 872-73.}
    \item \footnote{105}{Thomas v. United States, 116 F.3d 606, 614-15 (2d Cir. 1997).}
    \item \footnote{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.}
\end{itemize}}
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.
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").
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 "dishonest, 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.”

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. 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.”

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

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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.
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." 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."

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. 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. 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, the Department of Justice's attempt to appeal an acquittal on a purely legal issue culminated in an evenly split en banc circuit. A majority of the initial court of appeals panel justified its refusal to hear the case in

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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 599, 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).
the Double Jeopardy Clause.\textsuperscript{125} Half of the en banc circuit voted in favor of a rehearing,\textsuperscript{126} failing the required majority by a single vote.\textsuperscript{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.\textsuperscript{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.\textsuperscript{129} Every judge who reviewed this definition of willfulness agreed that Judge Sprizzo erred.\textsuperscript{130} A number of commentators have cited Judge Sprizzo's \textit{Lynch} decision as an example of judicial nullification.\textsuperscript{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.\textsuperscript{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."\textsuperscript{133} The court extended this double jeopardy protection of findings of fact to bench trials.\textsuperscript{134}

\begin{footnotes}
\item[125] Id.
\item[126] See id.
\item[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).
\item[130] See \textit{Lynch}, 181 F.3d at 332 (Sack, J., concurring); \textit{Lynch}, 162 F.3d at 735; \textit{id.} at 747 (Feinberg, J., dissenting).
\item[132] \textit{Lynch}, 162 F.3d at 735-36; see \textit{Lynch}, 181 F.3d at 330 (Sack, J., concurring).
\item[133] \textit{Lynch}, 162 F.3d at 735.
\item[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); \textit{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. \textit{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.").
\end{footnotes}
All of the judges who confronted the question agreed that the Clause does not protect purely legal errors.\textsuperscript{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,\textsuperscript{136} so the court found the \textit{Lynch} appeal beyond its purview.\textsuperscript{137}

The dissent maintained that an appeal would involve no retrial of factual issues.\textsuperscript{138} Under dicta in Supreme Court cases,\textsuperscript{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.\textsuperscript{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.\textsuperscript{141} Using this approach, the dissent sifted the district court’s finding of facts, determining the defendants acted willfully.\textsuperscript{142} The dissent sifted the findings by excising the legal error from the preexisting factual determination.\textsuperscript{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

\textsuperscript{135} See \textit{Lynch}, 162 F.3d at 738-39 (Sack, J., concurring); \textit{id.} at 740-41 (Feinberg, J., dissenting); see also \textit{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.”); \textit{supra} note 43 and accompanying text (citing cases that support prosecutorial appeals when the error is purely legal).

\textsuperscript{136} \textit{Lynch}, 162 F.3d 734-35; \textit{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. \textit{Id.; cf. infra} note 146 (impugning the propriety of appellate courts accepting trial court characterizations of inquiries as legal or factual).

\textsuperscript{137} \textit{Lynch}, 162 F.3d at 736.

\textsuperscript{138} \textit{Id.} at 740-41 (Feinberg, J., dissenting).


\textsuperscript{140} \textit{Lynch}, 162 F.3d at 743 (Feinberg, J., dissenting) (quoting \textit{Jenkins}, 420 U.S. at 366-67).

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

\textsuperscript{142} \textit{See id.} (Feinberg, J., dissenting)

\textsuperscript{143} \textit{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 fact-finding 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.\textsuperscript{144} However, the dissent would narrow the meaning of “further fact-finding” to exclude appellate “fact-sifting.”\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{147} But, of the five opinions\textsuperscript{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.\textsuperscript{149} Yet the original panel was split, and half the

\textsuperscript{144} Id. (Feinberg, J., dissenting).
\textsuperscript{145} See id. (Feinberg, J., dissenting).
\textsuperscript{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. Rosen-stein, 183 F.2d 355, 357 (7th Cir. 1950))).
\textsuperscript{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).
\textsuperscript{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 willfulness 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, presumably based on precisely this distinction. 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. 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.” Like double jeopardy law, the principles demarcating questions of fact from questions of law are murky

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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.

and ancient.\footnote{See Antonin Scalia, \textit{The Rule of Law as a Law of Rules}, 56 U. Chi. L. Rev. 1175, 1176 (1989) (citing Aristotle).} Despite the "elusive"\footnote{Miller, 474 U.S. at 113.} character of a technique for distinguishing fact from law, consistent criteria are discernable.\footnote{Cf. Christie, \textit{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. \textit{Id.}}

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.\footnote{Cf. Colleen P. Murphy, \textit{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).} 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.

\section*{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.\footnote{See Monaghan, \textit{supra} note 154, at 235; Adrian A.S. Zuckerman, \textit{Law, Fact or Justice?}, 66 B.U. L. Rev. 487, 487 (1986); \textit{cf.} Weiner, \textit{supra} note 154, at 1868-69 (discussing questions of law in similar terms in the civil context).} For example, as a matter of pure law, "wilfulness" is generally defined as acting while "aware [one's] conduct is of the required nature."\footnote{\textit{Model Penal Code} § 2.02 cmt. 2 (1985). The Model Penal Code equates willfulness with acting knowingly. \textit{Id.} § 2.02(8).} Thus, persons who act while aware their conduct violates a court order act with "wilfulness."\footnote{\textit{Id.} § 2.02(8).}

Factual determinations, on the other hand, are specific assessments of what actually occurred, in a historical or scientific sense.\footnote{\textit{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. Gutler, 58 F.3d 825, 837 (2d Cir. 1995) (quoting United States v. Berardelli, 565 F.2d 24, 30 (2d Cir. 1977))), \textit{reh'g en banc denied}, 181 F.3d 330 (2d Cir. 1999)).} "[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.'"\footnote{See Monaghan, \textit{supra} note 154, at 235-36; Zuckerman, \textit{supra} note 159, at 487; \textit{cf.} Weiner, \textit{supra} note 154, at 1869-71 (discussing questions of fact in similar terms in the civil context).} For example, the parties in the
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 Polk 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 226-38; 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.


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. 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.


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. The determination also involves practical considerations regarding the allocation of decision making which often supersede analytic classification. 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.

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. This pragmatic allocative inquiry is especially pertinent in determining which decision maker should apply law to fact.

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, 520-32 (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. 65, 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.\textsuperscript{178} Under the constitutional fact doctrine\textsuperscript{179} determinations implicating constitutional rights become legal inquiries in order to permit Supreme Court review.\textsuperscript{180} In First Amendment cases, appellate judges have a duty to review lower court application of law to fact.\textsuperscript{181} This duty "reflects a deeply held conviction that number of application of law to fact inquiries which "remain the proper domain of the trial court".

Professor Martín 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, 1005, 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.

\textsuperscript{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 that “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, 114 U. Pa. L. Rev. 433, 434 (1994); see also id. at 439 & n.30, 440-41 (discussing the history of judgments of acquittal).

\textsuperscript{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).

\textsuperscript{180} See Monaghan, supra note 154, at 230-31.

\textsuperscript{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.”

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. When one party is systematically denied review of unfavorable determinations, substantive law may be distorted. 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.

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. 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.

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. Thus, in *Karavos Compania Naviera S.A. v. Atlantica*
Judge Friendly cited to "this court's long-held position" that application of law to fact is a question of law, reviewable de novo. In American Tobacco Co. v. United States, 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 . . . ."

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. 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. 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.

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**Footnotes:**

189 Export Corp., 588 F.2d 1 (2d Cir. 1978).
189 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 . . . .").

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 Lytle v. United States, 635 F.2d 763, 765 n.1 (6th Cir. 1981); Swanson v. Baker Litho., 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 incompetent. Appeal is the primary mechanism for preventing and correcting trial error. 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.

Appeal furthers the correction of inadvertent errors. 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.

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
legal error and the strong suggestion of judicial nullification. 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. 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. 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. Judicial economy does not weigh against providing a secondary forum for the accused. The expense of asymmetry may be by far the greater.

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.

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

CONCLUSION

Legal and policy issues weigh in favor of permitting acquittal ap-
peals of purely legal errors. Legally, Supreme Court precedent con-
sistently sanctions appellate review of legal errors which would require
no further fact-finding. Policy-wise, the prohibition of acquittals ap-
peals 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. The
exception to the prohibition of acquittal appeals, authorized in the-
ory, is forbidden in practice. One reason for this may be the mechan-
ics of applying appellate law to trial facts. Under the pure law
exception, an appellate court must apply the correct law to the previ-
ously determined trial facts. The trial facts must be "sifted" or sepa-
rated 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 appel-
late applications of law to previously determined facts. Many applica-
tions 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 defen-
dant 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 ap-
peals. 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. By liberally construing inquir-
ies 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.
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.