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Why Public Prosecutors cannot Appeal Acquittals*

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While defendants can always appeal convictions in trial, public prosecutors often face prohibition of appealing acquittals. This asymmetry twists the criminal procedure towards the interests of defendants. The paper first inquires the impact of asymmetrical appeal powers on the number of convictions, acquittals and errors of type I and type II. It then surveys the traditional justifications of asymmetric appeal powers. Finally it frames pro-defendant procedural safeguards, such as asymmetric appeal powers, into the Blackstonian precept that it is "better that ten guilty escape than that one innocent should suffer" (Blackstone, 1766)

(J.E.L: K4)

1. Introduction

"Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb". These are the words of the US constitution (fifth amendment), which most scholars refer to when discussing the impossibility of appealing acquittals by public prosecutors in criminal cases. This impossibility introduces a neat asymmetry in the procedure between the prosecutor and the defendant as the latter has much larger chances of appealing a conviction whereas the former can hardly obtain retrial after an acquittal. This doctrine is known in the US as double jeopardy. Indeed double jeopardy encompasses a larger set of rules meant at protecting the defendant against retrial, and in general, double jeopardy must be seen in the context of a range of pro-defendant devices that characterize the criminal procedure across jurisdictions and that have been consistently applied over time. These safe-

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guards include also a high standard of proof as well as double jeopardy clauses in their multiple declinations.

In the first part of the paper, we look at how asymmetric powers of appeal are implemented in different criminal procedures. We particularly focus on the doctrine of double jeopardy in the US law but we also overview other common law and civil law countries: we will see how asymmetric powers of appeal are a diffuse albeit not universal element of many present criminal procedures.

In the second section we depict a positive sketch of the criminal procedure through the construction of a generic model with two level of judgment, adversarial role of prosecutors *vis-à-vis* judges and we try to net out the impact of appeal powers in the asymmetric procedure (we will later use the subscription *-AT-* to indicate such a case) *vis-à-vis* the case for which both defendant and plaintiff have symmetric appellate powers (we call this case symmetric trial *-ST-*). We show that under asymmetric appeal powers, the procedure induces both less wrongful convictions of innocents as well as more wrongful acquittals of guilty individuals.

In section three we review the theoretical underpinnings of such provisions: we look at how scholars have generally explained and justified such an asymmetry in the procedure and we particularly focus on a recurrent justification: namely the need to reduce the number of erroneous convictions of innocents.

2. Prohibition of retrial after acquittal: a comparative perspective

In many countries, the criminal procedure is subject to a rule that prevents the public prosecutor or the corresponding governmental agency to appeal judicial terminations that favor defendants. Such a rule is of course declined in different ways but most of the time it entails the prohibition to appellate acquittals. This rule, with its numerous variants, belongs to a larger family of pro-defendant procedural rules usually known in the US as double jeopardy clause which, broadly speaking, is meant at preventing a defendant from being subject twice to punishment or to trial for the same offence.

2.1 History of the provision

Jay Sigler (1963) traces the origin of double jeopardy like rules back at least to the Romans. In the Digest of Justinian, it is stated that "the governor must not allow a man to be charged with the same offence of which he has already been acquitted"[1]. In the English legal tradition, also other latin sen-

[1] "Isdem criminibus, quibus liberatus est, non debet praeser pati eundem accusari". Book 48, Title 2, Note 7 As translated by Watson (1998).

tences such as "nemo debit bis puniri pro uno delicto"[2] are often cited and referred to as belonging to the Roman heritage although their precise framing and their application under roman law is not clearly known. Also under canon law, double jeopardy finds his room. In particular, it is made descending from the Bible's reading "there shall not rise up a double affliction"[3].

No open mention of double jeopardy is made in the Magna Charta although in early ages of common law jurisprudence it often surfaces and, by the 17th century, Coke (2002) recognizes the existence of four common law pleas: *autrefois acquit* (previous acquittal), *autrefrois convict* (previous conviction) *autrefois attaint* (previous attainder) and *pardon* that constitutes the core of double jeopardy protection of defendants. One century later, Judge Blackstone in particular explains *autrefois acquit* – the plea of a former acquittal – as:

> "grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence. Hence it is allowed as a consequence, that where a man is once fairly found not guilty upon an indictment, or other prosecution, before any court having competent jurisdiction of the offence, he may plead such acquittal in bar of any subsequent accusation for the same crime" (Blackstone 1766).

However it is with the American constitution that double jeopardy gains momentum and comes to be identified as a defined set of pro-defendant rules in criminal proceedings.

2.2 Double Jeopardy in the US

The debate of whether and under which circumstances prosecutors can appeal acquittals has largely taken place in the framework of the double jeopardy clause. In the United States, the double jeopardy clause is constitutionalized through the Fifth Amendment provision stating, "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." The clause, which was ratified in 1791, and the scope of which has been extended by the Supreme Court with successive cases usually entails three kinds of pro-defendant features: (i) protection from being punished multiple times for the same offence; (ii) protection from retrial after a conviction; and (iii) protection from being retried for the same crime after an acquittal[4]. The

[2] Other variants often cited are: "Nemo bis punitur pro eodem delicto; Non bis in idem; Nemo debet bis vexari pro una et eadem causa"

[3] "Non consurget duplex tribulatio". Latin Vulgate Bible St. Jerome 382 AD 1 Nahum 9. Cited in Sigler (1963).

[4] This articulation of double jeopardy law is found in Comments and Notes (1965) and restated by the same Supreme court in *North Carolina v Pearce* 395 US 711 (1969) and later sentences.

later meaning is currently intended also to include the impossibility of appealing acquittals by the government. For the purpose of our inquiry we focus on the narrower third meaning, however it should be noticed that there is no identity between double jeopardy clause and the prohibition of appealing acquittals by public prosecutors: on one hand, the double jeopardy covers a broader range of cases for which there is a risk of exposing the defendant to multiple punishment or at least trials for the same crime, on the other hand the double jeopardy clause does not completely rule out the possibility of appealing acquittals although it largely limits them. Indeed it can be safely affirmed that double jeopardy law does not itself bar appeals by the prosecutor, despite frequent assertions of the contrary (Strazzella 1997 clarifies this point). The extension of the coverage of double jeopardy to prosecutorial appeals first happened in 1904 when the Supreme Court in *Kepner vs United States*[5], argued that reversing an acquittal in appeal amounted to being tried twice for the same crime, and therefore this possibility should be confined by the double jeopardy constitutional provision. Approved with a five to four majority, the decision has since then spurred controversy. In his dissenting opinion, Justice Holmes argued that the path of any trial, including the possibility of appealing judicial terminations at various stages of the process had to be considered as part of a "continuing jeopardy" and thus did not necessarily entail the granting of fifth amendment safeguards to the defendant. He also argued that the decision was inconsistent with precedents allowing retrials after hung juries and after appellate reversal of convictions. Scholars have discussed the decision in *Kepner vs US* ever since. The wording of the amendment have been put through scrutiny and whether actually it encompasses such a provision is still an open question. In fact, whereas nobody doubts that the fifth amendment prohibits the government from twice placing any person in peril of suffering punishment as a felon for the same act, and it is widely agreed that the fifth amendment prohibits to expose individuals to retrial on the same charge[6], it is more difficult to see a clear assessment of whether government's appeals of acquittals violate the clause (United States. Dept. of Justice, 1987) unless the equation between reversal and re-prosecution is accepted (Atlas 1974). Few years after Kepner, Congress intervened through the *Criminal appeal act*[7]. The more radical proposal of the House, introducing virtually symmetrical powers of appeal was watered down by the Senate and the novelty introduced by Kepner survived nearly unimpaired[8].

[5] *Kepner v. United States 195 U.S. 100 (1904).* Kepner was a lawyer acquitted of embezzlement. An appeals court reversing the acquittal, found the lawyer guilty.
[6] For an analysis of the wording see also (Amar, 1997).
[7] *Criminals Appeal act*, ch 2564, 34 Stat. 1246 (1907)
[8] The *Criminal Appeal Act* of 1907, was only marginally concerned with double jeopardy implications of appeals, but precluded certain appeals when double jeopardy was at stake. See Steinglass (1998).

Another statutory reform was approved in 1970[9]. However, most of the content of double jeopardy law is a 20th century product and in large part is a result of motions to dismiss appeals filed by federal prosecutors in the framework of these two successive statutes broadening their right to appeal (Strazzella 1997).

The Supreme Court, through successive ruling has further refined the boundaries of non-appeallable acquittals. Under current case law, the prohibition of appealing acquittals applies also to implied acquittals[10]; to acquittals when a judge is the fact-trier[11]; or when a judge acquits in face of a deadlocked jury[12]; and even to acquittals granted on the basis of an error of law[13]. On the contrary, the government can still obtain a retrial after an hung jury[14], and after an acquittal obtained at the appellate level[15] unless it is based on insufficient evidence[16]. Moreover the double jeopardy does not prevent appeals of pre-trial dismissals[17], mid-trial acquittals if early termination is obtained on ground unrelated to his guilt or innocence[18] or post-trial discharges following conviction by the trier of fact, if the new verdict van be reinstated without exposing the defendant to a second trial before a second trier[19].

In a nutshell, the great season of the extension of double jeopardy as to cover governmental appeal of acquittals, had begun at the rise of the 20th century with a very bold take by the Supreme Court in *Kepner*. Since then, through two major statutory revisions of prosecutors' appeal powers and major Supreme Court cases, the scope of double jeopardy safeguards applied to the possibility of appealing acquittals has been marginally, but consistent-

[9] The *Criminal appeal act* of 1970 allows further certain appeals but make them contingent on whether double jeopardy would imply further proceeding. See Strazzella (1997).

[10] *Green v. United States, 355 US 184, 190-191 (1957)*. The defendant in Green was convicted in appeal with a greater charge of first degree murder compared to the first trial where he was convicted of second degree murder. The Supreme Court concluded that although the first jury did not explicitly acknowledge an acquittal for the charge of murder of first degree, the jury conviction of the lesser offence still constituted an implied acquittal of the greater charge and thus ruled out a retrial for the higher charge.

[11] *United States v. Morrison, 429 US 1, 3 (1976)*. The prohibition of appealing acquittals extends also to bench trials, where a judge rather then a jury is the fact-finder.

[12] *United States v. Martin Linen Supply Co., 430 US 564 (1977)*. An acquittal granted in face of a deadlocked jury cannot be appealed if it implies a second prosecution and thus the government appeal was barred.

[13] In *Sanabria v. United States, 437 US 54 (1978)* the judge acquitted the defendant before a final verdict was rendered and blatantly misinterpreting the relevant statute. The government appealed and the court granted a new trial. The Supreme Court eventually reversed arguing that "there is no exception permitting retrial once the defendant has been acquitted, no matter how "egregiously erroneous" ...the legal ruling leading to that judgment might be." Sanabria 437 US 75.

[14] *See Richardson v. United States, 104 S. CT. 2081 (1984)*.

[15] *See United States v. Ball 163 US 662, 672 (1896)*.

[16] *See Burks v. United States, 437 US 1 (1978)*.

[17] *See Serfass v. United States, 420 US 377 (1975)*.

[18] *See United States v. Scott, 437 US 82 (1978)*.

[19] *See United States v. Wilson 420 US 332 (1975)*.

ly narrowed down. Indeed the jurisprudence on double jeopardy has been highly controversial and inconsistent, and defined a "doctrinal senility" (Notes 1965), "a veritable Sarggasso sea which could not fail to challenge the most intrepid judicial navigator"[20]; "riddled with inconsistency" (Steinglass 1998); "frequently misunderstood, seldom clearly discussed, often misstated in statues and cases, even by Supreme Court" (Strazzella 1997). The controversy is reflected in the copious stream of literature trying to systematize the rational of courts decision[21]; literature that is sometimes frankly critical[22]. Nevertheless, the US criminal procedure arguably still possesses the strongest safeguards against prosecutor's appeal of acquittals.

2.3 Double Jeopardy in England and in the Commonwealth

Double Jeopardy jurisprudence was greatly refined during the 17th and 18th century through cases. By the end of 18th century, a criminal acquittal could be appealed by prosecutors only in very limited number of cases: when a trial court lacked jurisdiction; when the initial indictment was irremediably defective; and when, facts demonstrating that the offence charged had been committed were found, but at the same time, the trial court erroneously acquitted supposing that the offence fund was not a crime (United States. Dept. of Justice, 1987).

Although double jeopardy is generally considered settled law in England, in the last decades the scope and applicability of the clause has gone through some restrictions. Under the *Criminal Justice act* of 1972 for instance, the English prosecutor received a limited right to request an appellate review of a disputed point of law following a criminal acquittal. However, this proceeding does not affect the acquittal itself and was only meant at correcting the flaws "before a potentially false decision of law has too wide circulations in the courts"[23]. In 1984, the House of Lord held that prosecutorial appeals are permitted if the initial trial had so many flaws that it did not amount to any real jeopardy[24]. And with the 2003 *Criminal Justice Act* of the parliament, the scope of double jeopardy safeguards has been narrowed again: now retrials are permitted only for a number of very serious offences and where new and compelling evidence is discovered[25]. The removal of these restric-

[20] Justice Rehnquist in Albernaz v United States, 450 US 333, 343 (1981).
[21] See among other Westen (1978), Amar (1997) and Khanna (2002).
[22] See among others Comments and Notes (1965) and United States. Dept. of Justice (1987)} and Steinglass (1998).
[23] *Re Attorney-General's Reference (No. 1 of 1975), Q.B. 773, 778* as cited in (United States. Dept. of Justice, 1987 note 128).
[24] *Regina v. Dorking Justices, ex parte Harrington, 3 W.L.R. 142 (1984).*
[25] On this point see Roberts (2002) commenting on the proposals of reforms of double jeopardy in the white paper on criminal justice reform (Secretary of State for the Home Department, 2002 par 4.63-4.66). See also: Retrial of Serious Offences, Crown Prosecution Service website: http://www.cps.gov.uk/legal/section19/chapter_j.html#01. Accessed on 24 May 2006.

tions seems to be carefully tailored at separating the cases where double jeopardy is misused by the guilty to escape conviction instead of as a safeguard to abuses by the prosecutor to the innocent.

Another common law country puts double jeopardy at the core of its system of criminal procedure. Section 11(h) of the Canadian charter of rights and freedoms states that "any person charged with an offence has the right [...] (h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again". However, as opposed to the American case, double jeopardy safeguard is narrower insofar as it applies only after the trial is finally concluded, and also because it allows a broader range of possibilities for the prosecution to appeal questions of law (Khanna 2002) from an acquittal (Quigley 1997: 395).

Indeed most countries of the Commonwealth adopt double jeopardy clauses either in their constitution or by common law. However it is worth noticing that countries such as New Zealand, India, Ceylon and South Africa have also introduced provisions that open some room for the prosecutor to appeal acquittals on a point of law[26].

2.4 Prosecutors' appeal in civil law countries

Conversely, most of civil law jurisdictions allow prosecutors to appeal acquittals. Notice that symmetrical appeal powers are the dominant rule in France, Germany, Spain, Argentina, the Russian Federation, Israel, China and Japan (Khanna 2001). Also protocol 7 of the European Convention on Human Rights[27] which includes typical double jeopardy safeguards against multiple punishment and retrial, makes the point that where the clause against prosecutor appeals is in place, it shall not be used to circumvent the law (2005).

Italy has always had a symmetrical appeal system along the lines of most civil law jurisdictions (Panzavolta 2005), but in 2006 introduced asymmetric powers of appeal[28]. The law conceded that appeals on a matter of law could be made via the court of cassation, and a last minute change to the law[29] intro-

[26] Specific cases and statutes are cited in United States. Dept. of Justice. Office of Legal Policy (1987) and Khanna (2001).

[27] Article 4 of the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms states "The provisions [...] paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case".

[28] Ddl 4604/C-3600/S of 2006, titled "Modifiche al codice di procedura penale, in materia di inappellabilità delle sentenze di proscioglimento" (modifications to the code of criminal procedure on as regard to the non-appealability of acquittals).

[29] After a first approval by the parliament, on January 20th 2006 the president of the republic resubmitted the law to the chambers and in the successive and definitive approval on the February 14th 2006, the rewritten article 593.2 of the criminal procedure code explicitly admits the possibility of appealing acquittals if new and decisive evidence is produced.

duced also the possibility of appealing if the prosecutor could produce new and decisive evidence. The history of this law is troublesome. Although there has been a previous limited debate among Italian scholars (see in particular Stella (2004) and Padovani (2003) on the possibility of introducing the non-appealability of acquittals mostly as a device to address the chronicle and pathological length of the Italian criminal process (Coppi 2003), most observers have linked the introduction of the law to the particular judiciary needs of the then prime minister (*The Economist*, 2006). The law has lasted only one year and was declared unconstitutional by the Italian Supreme Court in 2007[30].

To conclude, the American criminal procedure maintains the greatest asymmetry in the appeal powers of prosecutors *vis-à-vis* defendants by banning appeals in most of the cases. Common law countries generally permit appeals on the point of law. It is worth noticing that England, where double jeopardy has long been a rooted principle, first moved in the 70s to the position allowing appeals on the point of law and recently even further allowing appeals when new decisive evidence is uncovered. Civil law jurisdictions generally allow near symmetrical appeal powers.

3. Asymmetric powers of appeal: a simple model

We can think of a population normalized to 1, from which a certain fraction of individuals is brought to trial. p_Y is the probability that a criminal is involved in the trial whereas p_N is the probability that an innocent is brought to court[31]. Let q be the probability of being convicted on trial for the guilty and m the probability of being convicted for the innocent. The probability of conviction is here assumed exogenous[32] and we assume that $q \geq m$[33]. Now suppose that all trials are appealed in the following period. Let r be the probability of conviction on appeal, for all guilty agents and let t be the probability of conviction of all innocent agents. We further assume that $r > t$; that is, the

[30] See *Ruling 26 of the Constitutional Court. Feb 6, 2007*.

[31] The number of criminals that escape trial is thus (1-pY) fraction of the criminal population. It could be zero, meaning that the system screens all criminals plus some innocents or that some of these criminals are not detected at all. The important assumption here is that this number remains constant when varying the procedure, which may be reasonable since it depends only on the technology of detection, not on the architecture of the procedure. An interesting variation is represented by the model of Khanna (2002). Here the asymmetric procedure frees some budgetary resources available to the public prosecutor that can thus invest more in detection.

[32] Indeed it may depend upon several variables, the most important of which is a variation of the burden of proof. On how the burden of proof affects the probability of conviction see -inter alia- Yilankaya (2002) and Stith (1990). The exogeneity is here assumed as a useful simplification. Some other models endogenize the variable: see for instance Friedman and Wickelgren (2006) where the probability of conviction dependent on Bayesian beliefs of jurors as concern to the likelihood of guiltiness of the defendant.

[33] The assumption can be justified in as much as we expect that proving that a defendant is guilty when in fact he is innocent should be no more difficult than proving his guiltyness when he actually is guilty.

probability of conviction on appeal is higher when the claimant has really committed the crime[34]. The outcome of this procedure is either the conviction of a guilty; the acquittal of an innocent, the mistaken conviction of an innocent or the mistaken acquittal of a guilty defendant; we rule out other kinds of errors[35].

We denote this more general case, where both the defendant and the public prosecutor can appeal, as the symmetric procedure (*ST*) and we compare it with the case of a procedure where, *ceteris paribus*, acquittals in trial cannot be appealed. Therefore we reach the second level of judgment only in case there is a conviction in the first instance. We distinguish this second stage as a trial under asymmetric procedure (*AT*).

In Figure 1 the two architectures are confronted. Let us denote with φ the probability of conviction for the guilty agent at the end of the process. Given p_Y – the portion of guilty individuals involved in the criminal process – what are the chances for a guilty of being eventually convicted? In the symmetrical trial case, $\varphi_{ST}=r$[36] while under the double jeopardy case $\varphi_{AT}=qr$. Given that $1>p_N,p_Y,q,r>0$, we can safely conclude that:

(i) $\varphi_{ST}> \varphi_{AT}$

False acquittals of guilty criminals under the symmetrical trial case amount to $1-\varphi_{ST}$ or $(1-r)$ while under double jeopardy they are $1-\varphi_{AT}$ or $(1-qr)$.

Let us denote with σ the probability of conviction of an innocent person at the end of the process and observe that $\sigma_{ST}=t$ whereas $\sigma_{AT}=mt$ therefore we conclude that also

(ii) $s_{ST}> s_{AT}$

At the same time the probability of correct acquittals of innocents are $1-\sigma_{ST}$ and $1-\sigma_{AT}$ respectively.

Remark 1: Asymmetric procedure generates both fewer convictions of innocents and fewer convictions of guilty defendants.

In statistical terms the previous discourse can be reformulated as follows:

[34] Similarly to the previous case, we assume that convincing an appellate court of the guiltyness of an innocent should be more difficult than convicting the same court of the guiltiness of a factually guilty defendant. As noted by Shavell (1995), this is a necessary condition in order to justify the existence of a second level of trial. Shavell observes that if the probability that an error at trial is reversed in appeal is greater than the probability that a correct decision at trial is reversed in appeal, then the two-stage process is superior to a one shot process.

[35] Generally, three kind of errors can be identified: *outcome errors*, for which a guilty individual is acquitted or an innocent one is convicted; *actual errors*, for which the relevant facts are erroneously identified, and *legal errors* for which the proper legal standard is mistakenly assessed (Khanna 2002). We refer only to the first type of error.

[36] As all of the following quantities denoted with greek letters, φ_{ST} is here obtained aggregating the probabilities that any of the eight possible different outcomes (six under double jeopardy) happen. In this case $\varphi_{ST}=p_Y(qr+r-qr)$. Given that ? is the probability of conviction for the guilty agent and that all agents in p_Y are guilty, $\varphi_{ST}=r$ and $\varphi_{AT}=qr$.

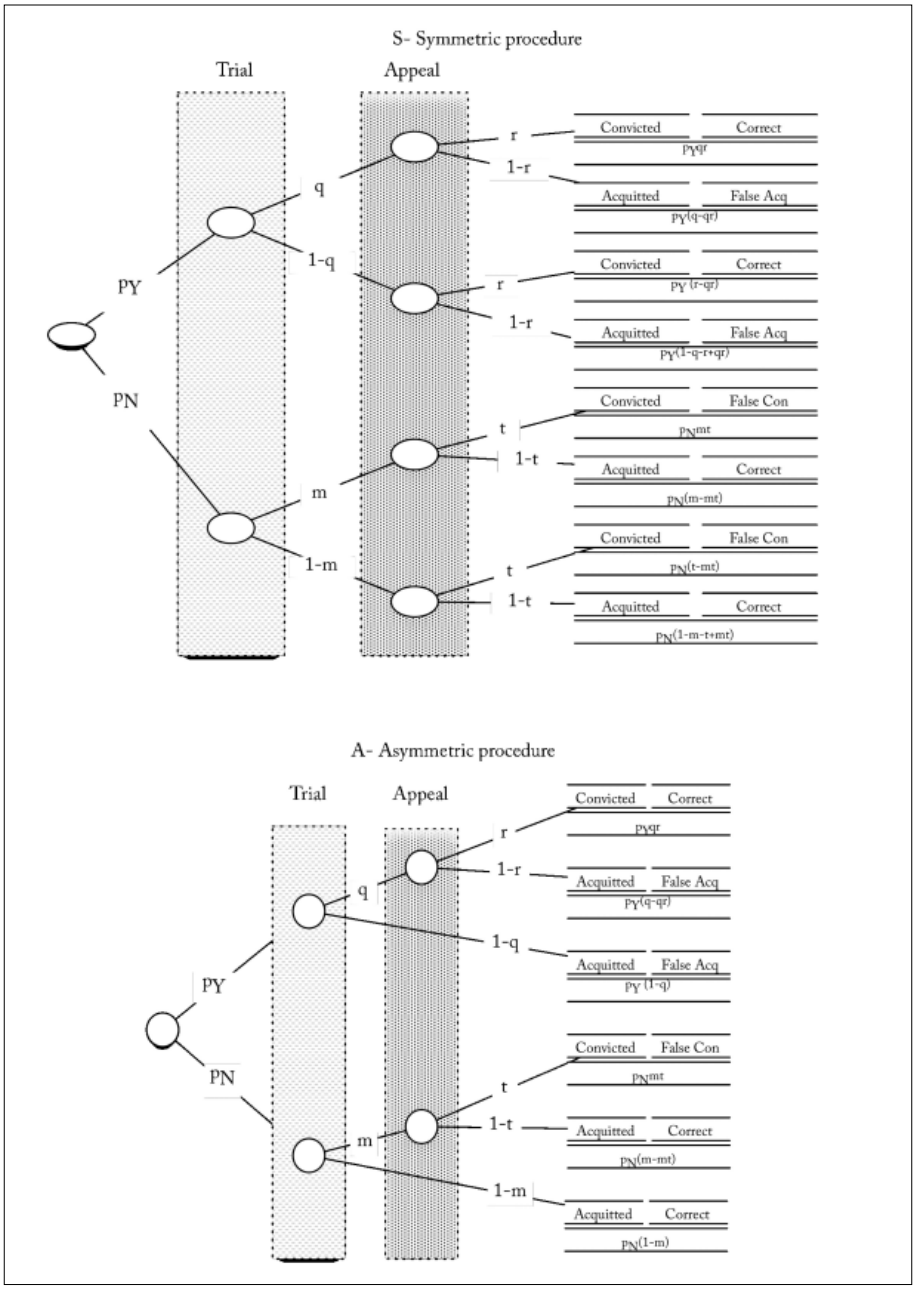


Fig.1 - The probability of going to court being either guilty (pY) or innocent (pN) is combined with the probability of being found guilty in trial (q,m) and appeal (r,t). We make a comparison of the outcomes under the two different schemes.

the null hypothesis[37] is set on the presumption that the defendant is innocent and the different procedure affects the level of evidence that must be reached in order to reject the null hypothesis (see also Miceli 1990; Yilankaya 2002). An incorrect acceptance of the null hypothesis correspond to the acquittal of the guilt $(1-\varphi)$ and it is described as a type II error whereas an incorrect rejection of the null amounts to the conviction of the innocent (σ) and implies a type I error (see also Davis 1994).

Remark 2: As of (i) asymmetric procedure generates more errors of type II and as of (ii) asymmetric procedure generate less errors of type I.

For a given population of criminals, and assuming the probabilities of conviction and acquittal at each instance of the trial to be independent of the procedure, asymmetric appeal powers imply an aggregated lower probability of conviction of the guilty (φ), an aggregated higher probability of erroneous acquittal (type II error $1-\varphi$) and a lower probability of erroneous conviction of the innocent (type I error, σ). We can observe that the total number of correct decisions (the conviction of the guilt and the acquittal of the innocent) is in the case of the symmetrical trial equal to $p_Y\varphi_{ST}+p_N(1-\sigma_{ST})$ or $p_Yr+p_N-p_Nt$ whereas under asymmetric procedure, it is $p_Y\varphi_{AT}+p_N(1-\sigma_{AT})$ or $p_Yqr+p_N-p_Nmt$. Moving from *ST* to *AT* then produces an ambiguous result on the probability of correct sentences[38].

These simple structures have other properties worth noticing.

Total convictions (including mistaken ones) are respectively equal to $\varphi_{ST}+\sigma_{ST}=p_Yr+p_Nt$ *and* $\varphi_{AT}+\sigma_{AT}= p_Yqr+p_Nmt$. Moreover

(iii) $\varphi_{ST}+\sigma_{ST} > \varphi_{AT}+\sigma_{AT}$[39]

and thus total convictions under asymmetric appeal powers decrease.

Le us also observe that the rate of erroneous convictions over correct ones is respectively $\sigma_{ST}/\varphi_{ST}=p_Yt/pYr$ and $\sigma_{AT}/\varphi_{AT}=p_Ymt/p_Yqr$ and therefore

(iv) $\sigma_{ST}/\varphi_{ST}\geq\sigma_{AT}/\varphi_{AT}$

The rate of false convictions over rightful convictions is the same both under asymmetric and under symmetric trial at least when $q=m$.

The construction of this architecture is trivial. It certainly ignores other effects of the change in architecture that may affect the probabilities of conviction, acquittal and relative errors as – for instance – a more aggressive behavior or a larger budget available to prosecutors[40]. The goal is only to sys-

[37] Here we se definition of the null hypothesis on the presumption of innocence. Other papers define the null hypothesis on the option that the defendant is guilty and thus obtain definitions of type I and type II errors that mirror the ones defined here. See among all as of Polinsky and Shavell (2000).

[38] To see why let us see whether $[p_Yr+p_N-p_Nt]-[p_Yqr+p_N-p_Nmt]>0$ and thus whether $p_Yr(1-q)+p_Nt(m-1)>0$.

[39] Observe that $[p_Yr+p_Nt]-[p_Yqr+p_Nmt]>0$ *because* $[p_Yr/p_Nt]>[(m-1)/(1-q)]$ is always verified as the left-hand side is always above 1 and the right-hand side is negative since $p_Y>p_N$, $r>t$ and $q>m$ by assumption.

[40] For instance prosecutors under asymmetric appeal powers might be more conservative in choosing the cases to pursue (thus lowering further the rate of convictions) since they know they have a unique chance to obtain conviction or conversely become more aggressive (thus partly or totally offsetting the reduction

tematize the simple intuition that tilting the procedural architecture towards the defendant, other things being equal – results in fewer innocents convicted, but at the same time it creates other concurrent effects on the number of criminal convicted and erroneously acquitted.

4. Asymmetric powers of appeal: what purpose do they serve?

We have so far established that asymmetric appeal powers are quite a common feature of criminal procedures and we have depicted a simple model of what happens when moving from one system to the other in terms of correct convictions and acquittals and erroneous ones as well. The fundamental question remains why many jurisdictions across space and time have tilted the procedure of the criminal process towards the defendant and against the prosecutor by introducing an asymmetry in the power of seeking appeal.

4.1 Why do we have the appeal process?

However, in order to address the question of why we might want such an asymmetry, we first briefly ask why we have the appeal process in the first place. In the law and economic literature the appeal process is understood as a means of error correction: by assuming that litigants posses private information about the occurrence of error and assuming that appeal courts can verify these errors with higher precision than trial courts, then litigants will have the incentive to appeal only when they know an error is actually occurred. This is because the litigant can anticipate whether a mistaken judgment will be reversed or confirmed and thus it will choose to appeal accordingly. Consider instead an equivalent setting where one-shot trials are conducted. In order to obtain the same reduction in errors, society needs to invest more in accuracy[41]. Therefore, not only the appeal process corrects errors in the first trial (indeed this could be done by improving costly accuracy) but it does it more cheaply by harnessing private information from the parties. However, how do the asymmetric appeal powers fit into this picture? In the literature it is possible to find a number of concurrent explanations that we briefly revise hereafter. We will focus especially on the last one of our list and further develop upon it.

in conviction rates) given they now have a one shot chance to win the case. Hylton and Khanna (2001) make the case that the resources freed by the lack of appeal are spent by prosecutors in the first trial thus they increase the number of people brought to trial along with the number of innocents convicted. See also note 50.

[41] Indeed Kaplow (1994) argues that the gains of the improved accuracy be weighted against their costs: more powers of appeal are valuable insofar as they result in an improvement in behaviour that justifies the additional costs of adjudication. If the model of Shavell (1995) holds, the appeal process is clearly a superior mean of adjudication since it obtains more cheaply the same level of accuracy as compared to the one-shot trial, by harnessing private information from the litigants.

4.2 Asymmetrical appeal powers to reduce social costs of litigation

A first explanation can be found in the need of reducing the costs of litigation by bounding the possibilities of reverting sentences over successive instances of trial. For every step of the trial, all parties sustain sizeable costs of litigations and reducing the articulation of the process hints into these costs. Several declinations of this argument can be found in the literature. First, let us consider the costs to the state of running the trial process: we can generally argue that there exists a trade-off between accuracy and social costs of trial errors (Kaplow 1994). Cutting off on the possibility of appealing acquittals and thus reducing the total number of cases brought to court, may save part of the costs of justice to the state[42].

4.3 Asymmetrical appeal powers to reduce defendant's costs of litigation

As argued by Joshua Steinglass (1998): "defense attorney fees can be exorbitant and particularly burdensome to those whose financial situation just barely disqualifies them from receiving court-appointed counsel. In addition, defendant may have to forego salary and spend time in jail if they are unable to make bail. Even if released on bail, pending criminal litigation may strictly limit a defendant's ability to travel and may also affect his or her ability to maintain employment". The concern here is with the capability of an individual to sustain the costs of the trial in a formally adversarial system but where the prosecutor can take advantage of – usually – vastly superior resources to pursue its goals. By disempowering the prosecutor of the chance to appeal an acquittal – so the argument runs – part of this balance is restored[43].

4.4 Asymmetrical appeal powers to avoid jury nullification

Another stream of legal literature emphasizes how the non -ppealability of acquittals is linked with the particular status recognized to verdicts produced by a jury in common law jurisdictions[44]. Westen (1980) argues that this concern is particularly strong in the US where the jury has the constitutional mandate to represent the conscience of the community in applying the law and this empowers it to soften and even to nullify the law in order to avoid

[42] In discussing his support to the introduction of the inappealability of acquittals in the Italian criminal procedure Coppi (2003) argues mostly along the line that such a measure would greatly reduce the number of cases brought to appellate courts and thus help the relief of the much clogged Italian justice system. In the Kaplow and Shavell framework mentioned above, avoiding appeal would amount to reducing the costs by decreasing accuracy. By avoiding only the appeal of acquittals, we generally obtain more errors of type I and thus the burden of such a socially costly choice is not put on the shoulders of defendants.

[43] However this might not be necessarily the case. Khanna (2002) shows that the prosecutor, saving a substantial part of his budget on appeals, can attack more cases on trial, and, under, certain conditions, the percentage of innocents brought to court and eventually convicted, thereby offsetting the goal of rebalancing prosecutorial power via double jeopardy.

[44] Also in some civil law jurisdictions juries are used to evaluate the most serious crimes in the court of assizes. For the use of the court in the Italian criminal system see Pizzi (2004).

unjust punishment. Having the jury the legitimate authority of acquitting against evidence, it would be inconsistent to let a prosecutor contest such a conclusion.

4.5 Asymmetrical appeal powers to defend the interest in finality

Another recurrent legal argument in support of inappealability of acquittals is grounded in the observation that the defendant has an interest in having the process concluded once and for all. In *Arizona vs. Washington*, Justice Blackmum argues that "the public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though "the acquittal was based upon an egregiously erroneous foundation"[45].

However it is difficult to square this interest with the need of asymmetric appeal powers since it is easy to see that finality is less of a concern when a defendant seeks appeal of a conviction[46]. Indeed, when courts have a manifest interest in pursuing a second trial, can and do easily circumvent defendant's presumed interest in finality within the boundaries of the double jeopardy clause (see Westen & Drubel 1978; Steinglass 1998).

4.6 Asymmetrical appeal powers to constrain prosecutorial power

Another argument concerns the role of inappealability in constraining prosecutorial power. In *Green v. US* Justice Black affirmed that "the 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"[47]. Indeed "the Prosecutor has more control over life, liberty and reputation than any other person in America. His discretion is tremendous" (Jackson 1940). Such a discretionary power may lead to broad misconducts to the detriment of defendants and society as a whole[48]. Why would prosecutors behave in such a manner? Hylton and Khanna (2001) took a public choice approach to criminal procedure[49] and argued that, the goals of individuals in prosecution may not necessarily be aligned with the ends of the justice system and of society as a whole. Absent some constraint in behavior, prosecutors might be tempted to use the criminal process to benefit themselves for the sake of success or

[45] *Arizona v. Washington*, *434 US 497, 503 (1978)*. See also Stern (1990: 55).
[46] For a more sophisticated reflection of the differences in the defendant interest in finality after acqittal vis-à-vis a conviction see Westen (1980).
[47] *Green v. US, 355 US 184 (1957).*
[48] See Rosenthal (1998). Also Shavell (2006) looks at the appeal process as a mean of keeping judges on check by threatening "adjudicators whose decisions would deviate too much from socially desirable ones".
[49] For other law and economics approaches to prosecutors behavior see also Glaeser *et al* (2000) and Baker and Mezzetti (2001).

expose themselves to the capture by lobbies and other potential rent-seekers. This thus explains why the power of the prosecutor always receives sever scrutiny. In the adversarial process, the power balance among the parties can be obtained by keeping the prosecutorial discretion on check through several safeguards of the criminal procedure: from due process to high standard of proof and to inappealability of acquittals. Indeed, the prosecutor could gain an hedge over the defendant by using initial trials strategically as discovering devices: "if the government may reprosecute, it gains an advantage from what it learns at the first trial about the strengths of the defense case and the weaknesses of its own"[50]. As a general matter, double jeopardy reduces the prosecutor's power to selectively enforce or abuse his discretion by impeding repeated trials in order to eventually learn how to convict the defendant on weak evidence (2001).

4.7 Asymmetrical appeal powers to reduce type I errors

Another recurring motivation is based on the intuition that by forbidding appeals, correct acquittals cannot be wrongfully reverted by courts. As seen in *Remark 2* above, asymmetric appeal powers reduce the rate of false convictions. Under symmetric procedure, some of the individuals acquitted in trial would end up convicted in appeal. Among these, there could be some innocents. Therefore under asymmetric procedure we obtain both a decrease in the total number of convictions (Remark 1) and also a decrease in the number of innocents mistakenly convicted (Remark 2).

This rationale is popular both in courts as well as among scholars to justifpy inappealability of acquittals. For instance in United States v. Scott, the Supreme Court affirms that: "no permit a second trial after an acquittal, however mistaken the acquittal may have been, would present an unacceptably high risk that the Government, with its vastly superior resources, might wear down the defendant so that "even though innocent he may be found guilty"[51].

Also commentators routinely cite this rationale in their account of asymmetric appeal powers[52]. However, the zeal for acquitting all innocents involved in the criminal trial run short of arguments once one realizes that, by tilting the criminal procedure towards the defendant, not only there are less innocents mistakenly convicted but there are also more criminals going free. The tradeoff is cumbersome. And indeed there are scholars that look with skepticism at asymmetric appeal powers moving their critiques along these lines[53].

[50] *Di Francesco v US 449 US 117 (1980).*
[51] *United States v. Scott 437 US 82 (1978).*
[52] See for instance Westen and Drubel (1978), Lackey (1976) and Stern (1990).
[53] See for instance Stith (1990) and United States. Dept. of Justice (1987). Khanna (2002) goes one step further when he argues that under asymmetrical appeal powers, given a larger budget available to prosecution, the total number of convictions (and hence false convictions) may increase.

4.8 The error type tradeoff in context

The trade-off between type I and type II errors has been known and discussed by lawyers and philosophers for a long time. Courts make recurrent mention of it and this seems to point at the case of a conscious and intentional, albeit not systematized, pursue of a specific ratio of innocent convicted to guilty acquitted more favorable to the innocents. How much favorable? While every court and scholar would agree that it is desirable to lower type I errors, how many more type II errors are we willing to tolerate in order to achieve this goal? Every student of law might cite Judge Blackstone statement "that it is better that ten guilty persons escape, than that one innocent suffer" (1766: 352). Even the Supreme Court recalled the Blackstone principle although it never committed to such a precise number[54]. Countless scholars have mentioned a precise number for this tradeoff, however, as it has been pointed out by Alexander Volokh, there is great uncertainty on what this number should be (1997). Volokh finds mentions of the *n-guilty men* [acquitted for every innocent convicted] rule that dates back to the Genesis[55] and historically varies at least between the *n=1000*[56] to *n=1*[57]. Even in more recent times, the variance of n seems to keep quite high. In fact Blackstone asserts that *n=10*. However this is a severe underestimation if compared to for instance Benjamin Franklin's figures[58] (*n=100*) and some other severely inflated numbers mentioned in the literature[59] but at the same time it looks pretty generous if compared with – inter alia – Hale's *n=5*[60] or Ayatollah Hossein Ali Montazeri n=1[61].

4.9 The n-guilty men *rule in economic terms*

Out of irony, the *n-guilty men rule* in its extremely variegate declinations,

[54] The Suprem Court cited Blackstone in *Coffin v. U.S., 156 U.S. 432 (1895)*. For direct mention of the trade-off see for instance *Herny v. United States 61 U.S. 98 (1959)* "It is better, so the Fourth Amendment teaches, that the guilty sometimes go free than that citizens be subject to easy arrest", or the concurrent opinion of Judge Harlan in *In re Winship 397 U.S. 358 (1970)* where he states: "I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.

[55] Where it says *Oh let not the Lord be angry, and I will speak yet but this once: Peradventure ten shall be found there. And he said, I will not destroy it for ten's sake*. Genesis 18:23-32.

[56] Moses Maimonidies, a judeo Spanish legal theorist, interpreting the commandments of Exodus. Cited in Volokh (1997).

[57] Dig. 48.19.5 pr. (Ulpianus 7 de off. procons.) "sed nec de suspicionibus debere aliquem damnari divus traianus adsidio severo rescripsit: satius enim esse impunitum relinqui facinus nocentis quam innocentem damnari". Also cited in Volokh (1997).

[58] "It is better one hundred guilty Persons should escape than that one innocent Person should suffer". Letter from Benjamin Franklin to Benjamin Vaughan (Mar. 14, 1785), *in* Franklin (1970) cited in Volokh (1997).

[59] See also Reiman and van den Haag (Reiman & van den Haag, 1990).

[60] See Hale and Sollom (1736) cited in May (1875).

[61] In Islam, it is better if a guilty person escapes justice than that an innocent man receives punishment." *International news*, Reuters, November 23, 1985; Cited in (1997).

expresses a widespread perception that it is better that the procedure devoted to convict criminals produces more mistakes against society (acquittal of the criminal) than against the individual (the conviction of the innocent), assumed that the number of mistakes, given a certain technology of fact-finding, is irreducible below a certain threshold[62]. Better some criminals set free than any innocent in jail, or, in the words of Judge Harlan: it is far worse to convict an innocent man than to let a guilty man go free"[63].

In economic terms the *n-guilty men rule* is surely consistent with the Posnerian assertion that the social costs of convicting an innocent far outweigh the costs of acquitting a criminal (Posner 1998: 605). But why is this the case? Hylton mentions the costs of diluted deterrence and the costs associated with putting someone in prison wrongfully (Hylton & Khanna 2001), however both explanations seems unsatisfactory as the first one does not consider that both type of errors, and not only type II, undermine deterrence (Polinsky & Shavell 2000) and the second one seems tautological. Miceli (1991) introduces an *ex-post* perspective of the criminal activity and, by incorporating considerations of fairness, deals with the different weights that society may give to the two types of errors. Lando[64] also introduces justice concerns to weight differently the costs of type I vis-à-vis type II errors in the standard Beckerian model. Perhaps an explanation based on social contract may imply that risk-adverse individuals would less favorably join a society that convicts innocents with a high probability of errors[65]. However, to our knowledge, no systematic inquiry of the economic rationale of the *n-guilty men* rule has been conducted so far.

[62] See also Hylton and Khanna (2001). Indeed by improving the level of accuracy, both mistakes of type I and type II could be reduced (Shavell, 2003). However there but are also willing to lower the level of mistakes of type I (conviction of the innocent) at the cost of reducing the number of correct convictions and therefore increasing the number of guilty going free. Notably, it is much less common to find support for claims that higher accuracy (and thus more guilty condemned) should be achieved even if this implies an increase in the number of innocents convicted (Volokh 1997).

[63] *In re Winship v United States 397 U.S. 358 (1970)* see note 79.

[64] Lando (2003) then derives the two weights in case of sex-related crimes from a short survey conducted among students of the Copenhagen Business School to which he asks the following two questions: "How many guilty people are you willing to let go free to avoid that someone is wrongly convicted of sexual violation?" and "How many sexual violations can you/are you willing to accept in order to avoid that someone is wrongly convicted of sexual violation?"

[65] Goldstein (1960 pg 1150) seems to suggest this when she says that: "In addition to satisfying the public demand for retribution and deterrence [the criminal trial] permits the ready identification of the same public, now in another mood, with the plight of the accused. Both demand and identification root deep in the view that all men are offenders, at least on a psychological level. And from the moment the offender is perceived as a surrogate self, this identification calls for a "fair trial" for him before he is punished, as we would have it for ourselves".

Conclusions

Asymmetry in prosecutorial powers of appeal is a predominant feature of criminal procedures in many countries. The bar on appealing acquittals must be seen in the context of a set of pro-defendant safeguards that characterize the criminal procedure across jurisdictions and that have been consistently applied over time. These safeguards include high standards of proof, mandatory disclosure, right to silence as well as double jeopardy clauses in their multiple declinations. Also the introduction of the appeal process in adjudication, within and outside courts, is mostly considered to be a pro-defendant safeguard of the procedure. However, some criminal procedures have gone even further and have banned the possibility for prosecutors to appeal acquittals after the first instance. We have here surveyed the most recurrent explanations of this safeguards provided in the literature; prosecutors may be banned from appealing an acquittal in order to reduce social costs of the trial both for the state and for the defendant (see 4.2 and 4.3); in order not to have juries' decisions invalidate by non-elected officials, (see 4.4); in order to reduce uncertainty (4.5) and in order to constrain prosecutors' potential opportunistic behavior (4.6). Last comes the justification of inappealability of acquittals as a mean of type I error reduction (4.7). With the simple model provided in section 3 we have shown how asymmetric appeal powers trigger the reduction of type I errors as well as the increase of type II errors. There exists an uncompressible (unless the technology of fact-finding improves) tradeoff between an higher number of criminals put behind bars and more innocents mistakenly convicted. We have seen that countless legal, moral and philosophical scholars have been aware in the past of the existence of this tradeoff. And yet, societies have consistently accepted an error ratio favorable to defendants. Such an enduring social preference has being mostly justified on moral grounds. However convincing economic explanations of why *it is better that ten guilty persons escape, than that one innocent suffer* (Blackstone 1766) seem still to be lacking.

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