GUILTY BY REASONABLE DOUBT AND COUNTERFACTUAL INNOCENCE: ASYMMETRIC APPEALS IN PHILIPPINE DOUBLE JEOPARDY LAW*

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ABSTRACT

This paper proposes a reexamination of the asymmetric appeals regime in the law on double jeopardy in the Philippines on the ground that it is an economically inefficient system. It begins with an exposition of the historical development of the constitutional proscription against a second prosecution for the same offense along with a survey of the legal systems that apply the prohibition. This paper argues that the principle of double jeopardy *per se* does not require courts to bar prosecutorial appeals. It then proceeds to discuss the development of the principle in Philippine law to show that the asymmetric appeals regime was adopted from the United States without examination. After reiterating the normative cases for and against asymmetric appeal rights, the paper presents its main argument: that amidst imperfect information, there is a moral hazard on the part of judges to convict when there is reasonable doubt in order to externalize the cost of rendering an unjust judgment or to preserve difficult issues on appeal. To support this, the paper proposes and examines a social utility function and a utility function of a judge, employing game theory to illustrate the strategic behavior of lower court judges. The paper ends with a discussion of the viability of the proposal and calls for an independent examination of legal principles imported from foreign jurisdictions.

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INTRODUCTION

Suppose you are a judge, holed up in your chambers late one night, confronted with the decision whether to convict or acquit a prominent businessman accused of murdering his wife and only daughter. The trial brought forth some evidence of culpability: the accused's fingerprints were found on the neck of his wife's corpse, and a weapon matching the injuries of his daughter was found among his belongings. The businessman could offer no plausible excuse for either. However, the defense was able to produce passport stamps consistent with his alibi that he was in a different country at the time the murders occurred.

The law requires you to decide the following day, and because the trial was highly publicized, major news outlets were already setting up tents outside the courthouse the night before the verdict was set to be read in open court. If you find the businessman guilty, he will be allowed to appeal the verdict. If you rule otherwise, the case will be terminated for good, and the principle against double jeopardy will bar the prosecution from appealing to a higher court for a reversal of your decision. Would you acquit, knowing that you could also be setting someone possibly or probably guilty of a heinous crime free?

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The right against double jeopardy is a civil and political right recognized in most civil and common law jurisdictions. That it has attained near-universal recognition is best evidenced by its inclusion in multilateral human rights treaties such as the International Covenant on Civil and Political Rights,[1] the European Convention for the Protection of Human Rights and Fundamental Freedoms[2] where it is classified as a non-derogable right,[3] and the Rome Statute of the International Criminal Court under the principle of *ne bis in idem*.[4] Whether as a principle of international law or domestic law, the purpose of the proscription against double jeopardy is the same: "to protect

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[1] International Covenant on Civil and Political Rights art. 14(7), Dec. 19, 1966, 999 U.N.T.S. 171, 174.

[2] Protocol 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (as amended by Protocol 11) art. 4, Nov. 2, 1984, E.T.S. 117 [hereinafter "ECHR Protocol 7"].

[3] Art. 4(3) *in rel.* European Convention for the Protection of Human Rights and Fundamental Freedoms (as amended by Protocols 11 and 14) art. 15, Nov. 4, 1950, E.T.S. 5.

[4] Rome Statute of the International Criminal Court (amended 2010) art. 20, July 17, 1998, 2187 U.N.T.S. 90.

the individual against the arbitrary power of a state and to prevent a state from prosecuting someone for the same offense twice."[5]

That the principle prohibits multiple prosecutions for the same act is uncontroverted, but the consensus among States ends there. How double jeopardy is interpreted and implemented differs greatly from one jurisdiction to another due to the conceptual differences in criminal procedure across countries.[6] These conceptual differences have a direct bearing on the application of the principle.

Take the question of appeals in particular. The Anglo-American concept of double jeopardy ordains an asymmetric appeal rights regime where an accused may appeal a conviction rendered by a first-level court while the State is prohibited from seeking the reversal of an acquittal. Whereas, civil law countries generally provide for a symmetric appeals regime where both the accused and the State may appeal the first-level court judgment whenever either is aggrieved by the verdict. As will be explained later, this conflict arises from the differences in interpretation of other aspects of the right against double jeopardy, particularly, when a "first" jeopardy is terminated or completed as to bar further prosecutions.

Along with many other US principles, the asymmetric appeals system was adopted by Philippine courts during the American occupation (1898 – 1946) without much discussion. This was not always the situation when the Philippines was still a colony of Spain (1521 – 1898). Following Spanish criminal procedure, the Philippines followed a concept similar to the modern-day prohibition against double jeopardy as a second prosecution for the same offense had been proscribed. However, the "first" jeopardy was terminated only by a final judgment of conviction or acquittal by the *audiencia*, which was mandated to automatically review judgments of lower courts in criminal cases. During the first few years after its independence from Spain, the Philippine Supreme Court interpreted the double jeopardy principle in this manner—consistent with Spanish practice and criminal procedure.

This practice changed in 1904, under the American occupation, when the US Supreme Court decided *Kepner v. United States*[7] (hereinafter "Kepner")

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[5] VIVIENNE M. O'CONNOR & COLETTE RAUSCH ET AL., MODEL CODES FOR POST-CONFLICT CRIMINAL JUSTICE 51 (2007).

[6] The disparities in the exact content of the principle is the reason why, despite the widespread general recognition of double jeopardy as a right, publicists have refused to acknowledge it either as customary international law or a general principle of international law. *See* Gerard Conway, *Ne Bis in Idem in International Law*, 3 INT'L CRIM. L. REV. 217, 217-8 (2003).

[7] Kepner v. United States, 195 U.S. 100 (1904).

which prohibited the appeal by the State of a lower court acquittal. After *Kepner*, the resulting asymmetry appears to have never been questioned or seriously reexamined by the Philippine Supreme Court, even after the Philippines had already attained its independence from the United States and new Constitutions were crafted resultant thereto.

Double jeopardy as interpreted in *Kepner* is certainly not the first Anglo-American principle imported lock, stock and barrel into the Philippine legal system through a court decision. This notwithstanding, the unexamined adoption of American legal principles leads to two major problems.

First, the adopted principles are most likely based on different underlying philosophies. For example, the system of asymmetric appeals was interpreted for a regime which benefited from a jury trial and where a jury's verdict was generally treated as final.[8] In sharp contrast, first-level criminal convictions and acquittals in the Philippines have always been rendered solely by judges even during the American occupation.[9]

Second, American legal principles might not always work in the Philippine context where court dockets are not only clogged but judges are also constitutionally mandated to render decisions within a short period of time.[10]

In other words, these imported principles are neither founded on nor designed for the realities found in this jurisdiction. Although it is true that

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[8] Luis R. Mauricio, *The Need for a New Approach to the Doctrine of Double Jeopardy*, 29 PHIL. L.J. 481, 488-9 (1954).

Note however that the United States Supreme Court has recognized asymmetric appeals as a bar to the State's appeal of acquittals, whether they were rendered by a jury or the bench. "Since the Double Jeopardy Clause of the Fifth Amendment nowhere distinguishes between bench and jury trials, the principles given expression through that Clause apply to cases tried to a judge. While the protection against double jeopardy has most often been articulated in the context of jury trials, [...] [a] general finding of guilt by a judge may be analogized to a verdict of 'guilty' returned by a jury." United States v. Jenkins, 420 U.S. 358, 365-6 (1975).

[9] *See* Dorr v. United States, 195 U.S. 138 (1904). Dorr, decided on the very same day as *Kepner*, held that non-incorporated territories like the Philippines do not automatically enjoy the rights granted under the US Constitution to citizens of the United States. The US Supreme Court found that trial by jury was not expressly extended to the Philippines, noting that "the uncivilized parts of the archipelago were wholly unfitted to exercise the right of trial by jury." *Id.* at 145.

[10] For all lower courts, other than lower collegiate courts, cases must be decided within three months from the date of their submission for decision, which is reckoned upon the filing of the last pleading required by the Rules of Court or the deciding court itself. CONST. art. VIII, §15(1)-(2).

there is nothing abhorrent *per se* in importing a foreign legal principle, I submit that the same must at least find an independent, unique, and organic justification in the adopting legal system before it is embraced.

In this paper, it is argued that the Anglo-American principle of asymmetric appeals as applied to the Philippines is economically inefficient. The textbook argument is that an acquittal, which is irreversible even if erroneous, can operate to declare an accused to be counterfactually innocent. From an economic perspective, the absence of an appellate system operates to waive the benefits of error correction in cases of false acquittals when the accused is incorrectly exonerated. In turn, the fear of rendering false acquittals may increase the costs of accuracy in first-level judicial decision-making. Conceivably, an asymmetric appeals regime might also harbor corruption or "rent-seeking" among legal practitioners and members of the judiciary. In our story, if the judge were unscrupulous, he might solicit from the accused a sum in exchange for the latter's unalterable exoneration.

This paper will focus on the economic cost of false convictions. Just as the asymmetric appeals regime decreases the social benefits accruing from accurate criminal convictions, it also inadvertently increases the social costs of administering justice. This unexpected result ensues because an asymmetric appeals regime which coats false acquittals with finality and immutability effectively promotes false convictions as a means to preserve difficult factual or legal issues on appeal and encourages risk-averse judges to convict when there is reasonable doubt.

By analyzing a proposed utility function of judges, I will attempt to show that asymmetric appeals shift the costs of rendering an unjust judgment to the appellate system in its entirety, thereby giving incentives to judges in the lower courts to render false convictions. This moral hazard is amplified—and the incentive to render a false conviction is increased—particularly under two scenarios, namely: when there is reasonable doubt as to the guilt of the accused, contrary to what the present law ordains,[11] and when the speedy trial provisions of the Constitution[12] are strictly enforced. I will argue that in the case of false convictions, this cost-shifting phenomenon is detrimental to the operational efficiency of the criminal justice system and imposes a heavy burden on society as it results in the weakening of first-level judicial decision-making, the unsustainable longevity of cases, and appellate docket congestion.

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[11] Philippine law requires proof beyond reasonable doubt before an accused may be convicted of the crime charged. RULES OF COURT, Rule 133, § 2.

[12] CONST. art. III, § 14(2), § 16.

Whether discussed from the lens of false convictions or acquittals, the conclusion of inefficiency is the same. Thus, in light of the peculiarities of the Philippine legal system and the absence of an explicit mandate to establish an asymmetric appeals regime, I propose a reexamination of this aspect of double jeopardy law.

In Part I, I will begin with a discussion of the principle of double jeopardy as understood from civil law and common law perspectives.

In Part II, I will present the history and current status of the principle as applied in the Philippines, particularly with regard to the issue of appeals of criminal cases arising from lower courts.

In Part III, I will use economic analysis to forward the position that a symmetric—or at least, a less asymmetric—appeals system is more desirable than the system currently employed. The key premise is that the choice of an appeals regime for criminal cases must only consider the socially optimal result. The analysis will then mostly focus on the moral hazard existing under the current regime.

Part IV invites a reconsideration of the asymmetry in light of the inefficiencies brought about by false convictions and acquittals, and explains why a less symmetric system can lead to more preferred outcomes.

Finally, in Part V, I will discuss the viability of the proposal by showing how a symmetric or a less asymmetric appeals regime is not unconstitutional and how greater symmetry can be accommodated in the current legal framework. I will end this paper with a note on the need for a more circumspect adoption of foreign legal principles.

While it is true that the asymmetric appeals aspect of double jeopardy has been entrenched in the Philippine legal system for more than a century and has survived several constitutions and a change in sovereignty, I submit that this study retains practical significance. *First*, on the issue of double jeopardy itself, it invites the Court and the legal community to reassess not only the theoretical soundness of the principle, but also the practicality—or, as I will suggest, the impracticality—of asymmetric appeals from the perspective of social utility. *Second*, from a wider standpoint, it calls into question the practice of thoughtlessly transplanting foreign laws and legal principles incompatible with the municipal legal environment. *Finally*, the analysis can be replicated to assess the soundness of other facets of the criminal justice system where judges are also constrained to choose between two polar options in a cloud of imperfect information, such as whether or not

to impose capital punishment, or inflict hefty penalties in vaguely defined offenses.

In policy-making, there is an evident need for all the branches of the State to conduct an independent evaluation of the utility and feasibility of foreign legal principles. This paper hopes to propose such an assessment.

I. THE DEVELOPMENT OF THE LAW ON DOUBLE JEOPARDY

As with most principles of law, it is likely that double jeopardy and its different aspects evolved both as a result of and in order to forward particular policies. Sigler notes that the development of the law on double jeopardy was dependent on the growth of substantive and procedural criminal law.[13] This disparate but parallel development is likewise the reason why even when most States are in agreement as to what is generally prohibited by double jeopardy, the different sovereigns are still not in conformity as to the content and extent of the protection.

In order to simplify the discussion, particular attention will be given to the aspects of double jeopardy as defined by American and Philippine applications as these appear to be the most asymmetric insofar as criminal appeal rights are concerned. Nonetheless, for comparison and whenever necessary, this section will also include expositions of how other jurisdictions interpret the guarantees of the right against double jeopardy.

Notwithstanding the positive economic case for a regime change, it is submitted that the history and the contemporaneous interpretations of the principle against double jeopardy confirm that an asymmetric appeals system is not required in order to realize the social and even private purposes of the prohibition against a second prosecution for the same offense.

A. The Historical Development of Double Jeopardy

While all authorities agree that double jeopardy is an "ancient" right,[14] they do conflict as to when and as to where double jeopardy first arose as a legal principle. Some American authors have only gone so far as to trace it to

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[13] Jay Sigler, *A History of Double Jeopardy*, 7 AM. J. LEGAL HIST. 283, 287 (1963).

[14] *See, e.g.* Kyden Creekpaum, Note, *What's Wrong with a Little More Double Jeopardy? A 21st Century Recalibration of an Ancient Individual Right*, 33 AM. CR. L. REV. 1179 (2001); Rolando Arbues, *Double Jeopardy Revisited*, 35 PHIL. L.J. 1184, 1184 (1960).

the common law of England, without necessarily asserting that the protection was conceived on English soil.[15] Sigler notes, however, that even early Greek and Roman law, the Digest of Justinian, and canon law already contained proscriptions against a second "accusation" of a person who has already been acquitted of the same crime or a "double affliction" for the same offense.[16] Meanwhile, Conway traces double jeopardy to the Roman law principle of *nemo debet bis vexari pro una et eadam causa*.[17] That the exact origins of double jeopardy remain uncertain have led some courts and scholars to conclude that the principle "simply always existed."[18]

1. Double Jeopardy in Anglo-American Common Law

As far as the Anglo-American version of double jeopardy is concerned, the principle as it exists today has been at least 700 years in the making. By 1300 C.E., English common law recognized four pleas that "were very similar to the modern double jeopardy." These are: (1) former acquittal (or *autrefois acquit*), (2) former conviction (or *autrefois convict*), (3) dismissal, and (4) issue preclusion.[19]

While the prohibition against double jeopardy appears to have already been firmly established in the common law by the 1760s—as Blackstone "had summarized English double jeopardy jurisprudence in a pithy 'universal maxim [...] that no man is to be brought into jeopardy of his life more than once for the same offence'"[20]—efforts were nonetheless being made across the Atlantic to expressly include the principle in the United States Constitution.

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[15] *See, e.g.* Joshua Steinglass, Note, *The Justice System in Jeopardy: The Prohibition on Government Appeals of Acquittals*, 31 IND. L. REV. 353, 354 (1998).

[16] Sigler, *supra* note 13, at 283-4. (Citations omitted.) Sigler's article is a comprehensive but succinct history of the Anglo-American principle of double jeopardy. It debunks common misconceptions often propagated, wittingly or unwittingly, by American courts: for example, that the right against double jeopardy was included in the Magna Carta. *See* State v. Felch, 92 Vt. 477, 481, 105 A. 23 (Vt. 1918); Commonwealth v. Olds, 5 Lilt. 137 (Ky. 1824). To this particular assertion, Sigler comments that "[n]o statement of the double jeopardy clause appears in Magna Charta, nor can it be discovered by implication," and that such apocryphal references were merely borne "out of reverence for the concept." Sigler, *supra* note 13, at 284.

[17] Conway, *supra* note 6, at 222. (Citations omitted.) Roughly translated to "no one can be twice vexed for one and the same offense."

[18] Stout v. State, 1913 Ok. 123, ¶ 21 (Okla. 1913).

[19] Creekpaum, *supra* note 14, at 1183 & 1183 n.24, *citing* GEORGE THOMAS, DOUBLE JEOPARDY: THE HISTORY, THE LAW 73-4 (1998).

[20] *Id.* at 1183, *citing* 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 335-6, *cited in* THOMAS, *supra* note 19, at 84.

On June 8, 1789, James Madison delivered a speech on the floor of the House of Representatives to propose certain amendments to the two-year-old federal basic law. The proposals included a guarantee that "no person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence[.]"[21] By March 1, 1792, said proposal became the Fifth Amendment to the United States Constitution[22] which reads:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; *nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb*; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.[23]

Nonetheless, in interpreting the Fifth Amendment's double jeopardy clause, the US Supreme Court later held that it merely embodied the principles of common law.[24] As to the extent of that protection, the same court ruled that the "common law not only prohibited a second punishment for the same offence, but it went further and for[bade] a second trial for the same offence, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted."[25] In turn, subsequent state and federal cases would define the metes and bounds of this principle, particularly as to what constitutes jeopardy, when it attaches, when it terminates, what comprises a "same offense," and when someone is put in jeopardy twice.[26]

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[21] *Id.* at 738.

[22] BERNARD SCHWARTZ, THE GREAT RIGHTS OF MANKIND: A HISTORY OF THE AMERICAN BILL OF RIGHTS 186 (2002).

[23] U.S. CONST. amend. V. (Emphasis supplied.)

[24] "It is very clearly the spirit of the instrument to prevent a second punishment under judicial proceedings for the same crime, so far as the common law gave that protection." Ex parte Lange, 85 U.S. 163, 170 (1873).

[25] *Id.* at 169.

[26] *See* Creekpaum, *supra* note 14, at 1183-7.

2. Ne Bis in Idem in the Laws of Continental Europe and in International Law

The foregoing developments in the Anglo-American concept of double jeopardy may mislead one into thinking that the civil law nations of Continental Europe did not provide for similar protection, although they did.

As early as 1255, Spain already had the principle in the *Fuero Real* and in the *Siete Partidas*. It even extended the protection to its former colonies, as shown in the case of the Philippines.[27] Although these codes have since been replaced by modern law, double jeopardy or *ne bis in idem*[28] remains to be a "well-recognized principle" in Spanish law. In fact, as recent as 1997, the Spanish Constitutional Court has held it to be "applicable in the Spanish legal system."[29] Still, as earlier intimated, the content of the principle in Spain is different from the Anglo-American version: the former appears to require the elements of *res judicata* such as generally a judgment on the merits,[30] unlike in the latter where a dismissal may under certain conditions already constitute a first jeopardy.

As for the rest of Continental Europe, members of the European Union today apply the principle of *ne bis in idem* within their national systems by virtue of Protocol 7 to the European Convention for the Protection of Human Rights and Freedoms (ECHR).[31] Under the law of the EU Community, there are two general prohibitions: one against double prosecution (*erledigungsprinzip*)[32] and another against double punishment (*anrechnungsprinzip*).[33] However, in recognition of the reality that no two countries are exactly alike in their interpretation of *ne bis in idem* (or double

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[27] Juanito Castañeda, Jr., *Should the State have the Right to Appeal Adverse Judgments in Criminal Cases?*, 51 PHIL. L.J. 164, 164-5 (1976), *citing* Kepner v. United States, 195 U.S. at 120-21.

[28] A note on the terminology: There is no inherent difference between double jeopardy or *ne bis in idem* because countries, even within the same tradition, hardly apply the principle identically. What is observable is that civil law countries and international law appear to use the latter term, while common law countries tend to use the former. Yet even among civil law countries (and, "conversely," common law countries), the application of the principle is not uniform. Hence, the use of either term should not automatically trigger associated concepts.

[29] LORENA BACHMAIER & ANTONIO DE MORAL GARCÍA, CRIMINAL LAW IN SPAIN 221 (2010).

[30] *Id.* at 221-2.

[31] ECHR Protocol 7, art. 4.

[32] BAS VAN BOCKEL, THE NE BIS IN IDEM PRINCIPLE IN EU LAW 31 (2010).

[33] *Id.* at 32.

jeopardy), Article 4 of Protocol 7 leaves the question of what constitutes final acquittal or conviction, as well as the criteria for the reopening of cases,[34] to each state-party "in accordance with the law and penal procedure of that State."[35] It is likewise worth mentioning that "a transnational *ne bis in idem* provision as may be found in Article 54 of the Convention on the Implementation of the Schengen Agreement"[36] also applies in the EU.[37]

Notably, this more liberal and deferential approach to *ne bis in idem* was also adopted by the United Nations Human Rights Committee when it interpreted the same right as guaranteed in the International Covenant on Civil and Political Rights.[38]

3. A Comparison of Official Policy Goals

To end this sub-section, it would be fitting to point out a key difference in the legal literature on Anglo-American double jeopardy and its European law counterpart. Courts and scholars who have studied the Anglo-American double jeopardy have often pointed out that the purpose of the protection is to secure the accused from the harassment of multiple trials for the same offense. This is consistent with the above exposition on the United States Fifth Amendment being designed to secure individual liberties. As concisely put by the US Supreme Court:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is 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.[39]

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[34] 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." ECHR Protocol 7 art. 4(2).

[35] Art. 4(1)-(2).

[36] Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at their Common Borders [hereinafter "Schengen Implementation Agreement"] art. 54, June 19, 1990, 30 I.L.M. 84.

[37] VAN BOCKEL, *supra* note 32, at 1.

[38] UN Human Rights Committee, Gen. Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial, 90th Sess., July 9-27, 2007, U.N. Doc. CCPR/C/GC/32, at 16 (Aug. 23, 2007).

[39] Green v. United States, 355 U.S. 184, 187 (1957), *cited in* Grady v. Corbin, 495 U.S. 508, 518 (1990).

European and international courts second this purpose.[40] However, scholars who studied European double jeopardy law have also framed *ne bis in idem* as a matter of state legitimacy and the rule of law:

> [T]he rule of law requires the state that initiates proceedings against one of its subjects to respect the outcome of the proceedings. The *ne bis in idem* principle upholds the respect for the finality of *res iudicata*, in the interest of the legitimacy of the State. It follows from this, as well as from the principle's purpose of promoting legal certainty, that the outcome of the first proceedings must have become final (*res iudicata*), in order to have the effect of barring a second prosecution (*bis*).[41]

To be clear, considerations of finality or integrity of judgments have also been recognized by the US Supreme Court as proper justifications for double jeopardy,[42] but they are often effectively treated as secondary to the protection of the accused.[43] In any event, the said systemic considerations, in turn, are likely the reasons why European law more explicitly focuses on the concurrence of the elements of *res judicata*[44] in deciding whether *ne bis in idem* properly applies.[45]

B. Comparing Appeals in Continental and Anglo-American Double Jeopardy

The above observations affirm the prevalence of the proscription against double jeopardy in various jurisdictions, but they also highlight that while there is a more-or-less common understanding as to what are generally protected by the right, the specific application of the principle varies from state to state. Despite the earlier caveat that double jeopardy is understood

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[40] O'CONNOR & RAUSCH, *supra* note 5.

[41] VAN BOCKEL, *supra* note 32, at 41. (Citations omitted.)

[42] "It has been said that 'a' or 'the' 'primary purpose' of the Clause was 'to preserve the finality of judgments,' Crist v. Bretz, 437 U.S., at 33, or the 'integrity' of judgments, United States v. Scott, 437 U.S. 82, at 92[.]" United States v. Di Francesco, 449 U.S. 117, 128 (1980).

[43] *See id.*, where after acknowledging the policies in the previous note, *supra* note 42, the court quickly returned to the unfairness of a second trial from the point of view of the accused. "Implicit in this is the thought that 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." *Id.* (Citations omitted.)

[44] *See* text accompanying note 30.

[45] This requirement is also covered by Anglo-American double jeopardy through the "same offense" requisite for its application. However, US courts generally frame double jeopardy cases as "rights of the accused" matters and do not discuss it in light of *res judicata*, unlike European courts.

and applied uniquely even among countries that fall within the same legal traditions, [46] I would nonetheless hazard to propose the following observations with regard to appeals of lower court judgments in criminal cases, which are the focus of this paper.

Generally, common law countries have asymmetric appeal rights. The American rule remains the most asymmetric—with no prosecutorial appeals being permitted except under very narrow exceptions—even as other common law jurisdictions such as England, India, Sri Lanka, New Zealand, and South Africa have already allowed for appeals on questions of law. On the other hand, civil law countries have symmetric appeal rights and permit the State to appeal acquittals.[47] But why the difference?

The key to a complete appreciation of this disparity is understanding the concept of jeopardy, as to when it attaches, and when it terminates.

It appears that for both common and civil law countries, *jeopardy* is generally understood as "the risk of conviction and punishment that a criminal defendant faces at trial."[48] As civil law countries refer to the principle of *ne bis in idem* in applying the prohibition, the concept of jeopardy is not discussed in exactly the same manner. However, authors on the civil law principle analogously discuss the "*bis*" aspect of the prohibition when writing about what an accused may not again be exposed to[49]—a second trial in which the criminal defendant faces the risk of conviction and punishment, not unlike jeopardy. The difference in appeal rights therefore does not likely spring from this aspect, but in the latter two.

Civil and common law countries generally differ as to when jeopardy attaches. Under US jurisprudence, attachment would depend on whether the trial is by jury or by bench: the "federal rule [is] that jeopardy attaches when the jury is empaneled and sworn," [50] while in non-jury trials or those conducted by a sole judge, "jeopardy attaches when the court begins to hear

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[46] *See supra* note 28.

[47] Vikramaditya S. Khanna, *Double Jeopardy's Asymmetric Appeal Rights: What Purpose Do They Serve?* 82 BOSTON U. L. REV. 341, 353-5 (2002). (Citations omitted.) Khanna appears to share these observations.

[48] BLACK'S LAW DICTIONARY 912 (9th ed. 2009).

[49] VAN BOCKEL, *supra* note 32, at 41 *et seq.* (Citations omitted.)

[50] Crist v. Bretz, 437 U.S. 28, 29 (1978); *See also* Downum v. United States, 372 U.S. 734 (1963).

the evidence."[51] Meanwhile, in civil law and international law, the time when *ne bis in idem* attaches is uncertain, in part because the "attachment" aspect of the American double jeopardy law does not have a perfect equivalent in *ne bis in idem* applications. However, a study of the Spanish application shows that the principle seems to contemplate a final sentence on the merits or a dismissal of the case when the facts in question do not constitute a crime.[52] The distinction therefore is that under American law, the courts have definitively held that "jeopardy attaches even before judgment becomes final,"[53] whereas courts in civil law jurisdictions have been less certain as to when *ne bis in idem* attaches.

Civil and common law countries also differ in the concept of when jeopardy terminates. This is crucial because "once jeopardy has attached, retrial is not barred until jeopardy is terminated."[54] Common law countries, particularly the United States, hold that jeopardy generally terminates with the lower court judgment. Hence, their systems forbid the appeals of lower court jury or non-jury acquittals since review by a higher court is seen effectively as a second prosecution for the same offense. Needless to state, a lower court conviction "does not automatically terminate jeopardy because the convicted person can appeal, and the *same* jeopardy is said to continue during the appellate process. This 'continuing jeopardy' theory allows for retrials after mistrials and hung juries."[55]

Some courts interpret an appeal of a conviction as a case where the accused himself waives this right in order to be able to contest the lower court judgment, but this "waiver theory" first pronounced in *Trono v. United States*[56] (hereinafter "Trono") was discredited by the court in *Green v. United States*[57] (hereinafter "Green"). According to the *Green* court, not only was *Trono* decided under the particular context of reviewing a procedural statute of the

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[51] Serfass v. United States, 420 U.S. 377, 388 (1975); Lee v. United States, 432 U.S. 23, 28 (1977).

[52] BACHMAIER & GARCÍA, *supra* note 29, 221-2. Authors who have studied *ne bis in idem* appear to be more concerned with whether the principle "attaches" in prosecutions before national and international tribunals when the criminal defendant has already been tried before either. *See* III M. CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW (INTERNATIONAL ENFORCEMENT) 548-9 (2008).

[53] Arizona v. Washington, 434 U.S. 497, 503 (1978).

[54] Creekpaum, *supra* note 14, at 1184, *citing* Sattazhan v. Pennsylvania, 537 U.S. 101, 106 (2003).

[55] *Id.*, *citing* Smalis v. Pennsylvania, 476 U.S. 140, 145 (1986). (Emphasis supplied.)

[56] Trono v. United States, 199 U.S. 521 (1905). Like *Kepner*, *Trono* was a case brought before the US Supreme Court on error to the Supreme Court of the Philippine Islands.

[57] Green v. United States [hereinafter "Green"], 355 U.S. 184, 189.

Philippine Islands (then an unincorporated territory whose inhabitants did not enjoy the full protection of the Federal Bill of Rights), but the "waiver theory" was also "totally unsound and indefensible."[58]

In any event, the practical effect of these doctrines is to sustain the concept of asymmetric appeals, whereby the State is effectively the only party barred from seeking a reconsideration or reversal of an adverse judgment.

As regards civil law countries, jeopardy "continues" even after the first-level court renders its judgment and attaches only upon a final decision of conviction or acquittal by an appellate court. This is clear from the wording of the *ne bis in idem* principle in Protocol 7 to the ECHR, which protects a criminal defendant from a second prosecution "for an offence for which he has already been *finally* acquitted or convicted."[59]

Yet even prior to the ECHR, it appears that this rule has already been observed. Spanish laws from a century or more ago expressly provided for the appeal by the Government in criminal cases.[60] Moreover, as found by the US Supreme Court:

> Under [the Spanish] system of law it seems that a person was not regarded as being in jeopardy in the legal sense until there had been a final judgment in the court of last resort. The lower courts were deemed examining courts, having preliminary jurisdiction, and the accused was not finally convicted or acquitted until the case had been passed upon in the *audiencia*, or Supreme Court, whose judgment was subject to review in the Supreme Court at Madrid for errors of law, with power to grant a new trial. The trial was regarded as one continuous proceeding, and the protection given was against a second conviction after this final trial had been concluded in due form of law.[61]

The disagreement between the two traditions over this question of when jeopardy terminates appears to give rise to the concomitant variance in their respective appeals regimes.

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[58] *Id.*, at 197.

[59] ECHR Protocol 7 art. 4(1). (Emphasis supplied.)

[60] Simplicio B. Peña, *The Constitutionality of the Government's Right to Appeal in Criminal Cases Other than Those Allowed by Section 44 of General Orders, No. 58, as amended by Act No. 2886*, 7 PHIL. L.J. 8, 13 (1927), *citing* Reglamento de Justicia, art. 51 (1835); La Real Cedula, cap. III, § 2, art. 51, ¶ 8 (1855); Ley de 1878, tit. 1, cap. 1, art. 16 (1878); Ley Prov. de Enj. Crim., § VI, art. 873-78 (1872); Ley Prov. de 1886, ¶ 78 (1886).

[61] *Kepner*, 195 U.S. at 121.

II. DOUBLE JEOPARDY IN PHILIPPINE LAW

Save for certain exceptions, the Philippine concept of double jeopardy today is almost completely hewn from the Anglo-American version—adapted, of course, to certain features of Philippine law such as the absence of jury trials, the lack of multiple sovereignties,[62] and express Constitutional provisions. The Philippines being a civil law jurisdiction,[63] the provisions are quoted whenever possible for a complete understanding of the principle.

A. Basic Concepts

The right against double jeopardy has been inscribed in the present Constitution of the Philippines, which provides:

> No person shall be twice put in jeopardy of punishment for the same offense. If an act is punished by a law and an ordinance, conviction or acquittal under either shall constitute a bar to another prosecution for the same act.[64]

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[62] Under the dual sovereignty doctrine in US double jeopardy law, "successive prosecutions by two States for the same conduct are not barred by the Double Jeopardy Clause. [...] The dual sovereignty doctrine is founded on the common law conception of crime as an offense against the sovereignty of the government. When a defendant in a single act violates the 'peace and dignity' of two sovereigns by breaking the laws of each, he has committed two distinct 'offences.' [...] [T]he [US Supreme] Court has uniformly held that the States [of the Union] are separate sovereigns with respect to the Federal Government because each State's power to prosecute is derived from its own 'inherent sovereignty,' not from the Federal Government." Heath v. Alabama, 474 U.S. 82, 87-8 (1985).

Unlike the United States, the Philippines follows a unitary system, hence the non-application of the dual sovereignty doctrine. Municipal corporations (termed "local governments" under the 1987 Constitution) are allowed to pass locally-applicable ordinances with a penal character, but the Constitution has an express rule with regard to the application of double jeopardy for offenses punishable by both national statutes and municipal ordinances. *See* second sentence of CONST. art. III, § 21.

See also People v. Relova, G.R. No. 45129, 148 SCRA 292, Mar. 6, 1987, which interpreted a similar provision in the 1973 Constitution. It held that the constitutional right "against double jeopardy *is* available although the prior offense charged under an ordinance be different from the offense charged subsequently under a national statute such as the Revised Penal Code, *provided* that both offenses spring from the same act or set of acts." *Id.* at 302. (Emphasis in the original.)

[63] Except that Supreme Court decisions are considered as binding precedent and form part of the legal system, *see* CIVIL CODE, art. 8. This limited *stare decisis* aspect of Philippine jurisprudence is a remnant of the American occupation.

[64] CONST. art. III, § 21.

In the Philippines, this provision is the basis for "three related protections, namely: (1) against a second prosecution for the same offense after acquittal, (2) against a second prosecution for the same offense after conviction, and (3) against multiple punishments for the same offense."[65]

This right is further interpreted by the Rules of Court, as promulgated by the Philippine Supreme Court, in several sections under the Rules on Criminal Procedure. The first and foremost of the latter is Rule 117, Section 7, which partially reads as follows:

> Section 7. *Former conviction or acquittal; double jeopardy.* — When an accused has been convicted or acquitted, or the case against him dismissed or otherwise terminated without his express consent by a court of competent jurisdiction, upon a valid complaint or information or other formal charge sufficient in form and substance to sustain a conviction and after the accused had pleaded to the charge, the conviction or acquittal of the accused or the dismissal of the case shall be a bar to another prosecution for the offense charged, or for any attempt to commit the same or frustration thereof, or for any offense which necessarily includes or is necessarily included in the offense charged in the former complaint or information. [...][66]

This section reflects and summarizes crucial aspects of double jeopardy law in the Philippines which had been developed through the years. Thus, the following observations can be made.

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[65] People v. Dela Torre, G.R. No. 137953, 380 SCRA 596, 605, Apr. 11, 2002. (Citations omitted.)

[66] The latter half of the section was removed from the main text to simplify the discussion. It ends as follows:

> However, the conviction of the accused shall not be a bar to another prosecution for an offense which necessarily includes the offense charged in the former complaint or information under any of the following instances:
>
> (a) the graver offense developed due to supervening facts arising from the same act or omission constituting the former charge;
>
> (b) the facts constituting the graver charge became known or were discovered only after a plea was entered in the former complaint or information; or
>
> (c) the plea of guilty to the lesser offense was made without the consent of the prosecutor and of the offended party except as provided in section 1 (f) of Rule 116.
>
> In any of the foregoing cases, where the accused satisfies or serves in whole or in part the judgment, he shall be credited with the same in the event of conviction for the graver offense. RULES OF COURT, Rule 117, § 7.

First, jeopardy constitutes "another prosecution."

Second, the "same offense" is not only that charged in the Information, but also includes "any attempt to commit the same or frustration thereof, or for any offense which necessarily includes or is necessarily included in the offense charged in the former complaint or information."

Third, jeopardy attaches when the accused has pleaded to a formal charge sufficient in form and substance. This means that prior to arraignment, the charge against the accused may still be amended if a mistake was made in charging the offense.[67]

Fourth, jeopardy generally terminates not only when the accused is acquitted or convicted by the lower court but also when the case is "dismissed or otherwise terminated without his express consent by a court of competent jurisdiction." As a caveat, there are cases where, even with the consent of the accused, a dismissal would operate to terminate a jeopardy, such as a dismissal for violations of the constitutional and statutory right to a speedy trial.[68]

Fifth and finally, the court must be one of competent jurisdiction. This last requirement, while seemingly superfluous, remains distinct and important. Under present Philippine law, and as will be explained further later, contesting jurisdiction appears to be the only way by which an acquittal may be vacated.

Thus, the requisites for the application of double jeopardy have been enumerated by the Philippine Supreme Court, as follows:

> (1) there is a complaint or information or other formal charge sufficient in form and substance to sustain a conviction; (2) the same is filed before a court of competent jurisdiction; (3) there is a valid arraignment or plea to

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[67] "If it appears at any time before judgment that a mistake has been made in charging the proper offense, the court shall dismiss the original complaint or information upon the filing of a new one charging the proper offense [...] provided the accused shall not be placed in double jeopardy." RULES OF COURT, Rule 110, § 14(3).

[68] "If the accused is not brought to trial within the time limit required by Section 1(g), Rule 116 and Section 1, as extended by Section 6 of this Rule, the information may be dismissed on motion of the accused on the ground of denial of his right of speedy trial. [...] The dismissal shall be subject to the rules on double jeopardy." RULES OF COURT, Rule 119, § 9(1), *in rel. to* CONST. art. III, § 16. For an illustration of this principle, *see* Flores v. People, G.R. No. 25769, 61 SCRA 331, Dec. 10, 1974. *Flores* predates the 1987 Constitution, but the right to a speedy trial was already guaranteed in the Constitution then in force. *See* CONST. (1935), art. III, § 1(17); CONST. (1973), art. IV, § 19.

> the charges; and (4) the accused is convicted or acquitted or the case is otherwise dismissed or terminated without his express consent."[69]

Notably, this is simply Rule 119, Section 7 broken down into its several elements.

B. Appeals of Criminal Cases in Philippine Law

As worded, there is nothing in the text of the Constitution which ordains asymmetric appeals. Nonetheless, the Supreme Court has invariably interpreted the constitutional right as one prohibiting the Government's appeal of acquittals, whether rendered by the first-level court or a lower appellate court.

1. A Review of the Kepner *Cases*

The asymmetry in the right to seek the correction of a verdict has not always been the rule. Initially, the Philippine Supreme Court interpreted the principle as allowing appeals by the government following Spanish procedural law. This interpretation subsisted even during the early years of the American military government subsequent to the Treaty of Paris. Thus, on April 23, 1900, the US military government issued General Order No. 58, amending certain portions of the Code of Criminal Procedure.[70] In particular, Sections 43 and 44 of this General Order allowed the United States to appeal from a judgment in favor of the defendant.

Two years later, on July 1, 1902, the United States Congress passed the Philippine Organic Act of 1902,[71] which sought to temporarily provide for the administration of the Philippine Islands. In the process, the Organic Act also extended certain civil and political rights[72] to the inhabitants of the Philippines, including the right against double jeopardy.[73]

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[69] *See, e.g.* Javier v. Sandiganbayan, G.R. No. 147026, 599 SCRA 324, 343-4, Sept. 11, 2009; *See also* People v. Jardin, G.R. No. L-33037, 124 SCRA 167, 174, Aug. 17, 1983.

[70] United States v. Ocampo, G.R. L-5527, 18 Phil. 1 (1910).

[71] Pub. L. No. 57-235, 32 Stat. 691 (1902).

[72] § 5, *id.* at 692.

[73] "That no person shall be held to answer for a criminal offense without due process of law; and *no person for the same offense shall be twice put in jeopardy of punishment*, nor shall be compelled in any criminal case to be a witness against himself." § 5, ¶ 3, *id.* (Emphasis supplied.)

These were the laws in force when Thomas E. Kepner, a lawyer practicing in the Philippines, was charged with *estafa* (deceit) before the Court of First Instance. Upon Kepner's acquittal, the prosecuting attorney appealed the judgment on behalf of the State to the Philippine Supreme Court. Kepner moved to dismiss the case, claiming that the Organic Act's provisions on double jeopardy must be read in light of the supposed standing rule in the various states of the Union. His theory was that because the common law then allegedly prohibited appeals of acquittals, the Organic Act must therefore be considered to have repealed the relevant portions of General Order No. 58.[74] On the other hand, it was the position of the military government that the Organic Act did not repeal General Order No. 58 insofar as symmetric appeal rights were concerned. The government asserted that in passing the Act, Congress "had in view the conditions and circumstances existing in the Philippine Islands and the laws in force there on the subject of criminal procedure, and to have legislated with special reference thereto."[75]

The Philippine Supreme Court decided in favor of the military government, ruling primarily against the argument of implied repeal of General Order No. 58 by the Organic Act. According to the Court, the Act of Congress was not inconsistent with General Order No. 58 as the former did not aim to alter the state of criminal procedure existing in the Philippines prior to the change in sovereignty.[76] In ascertaining the legislative intent, the Philippine Supreme Court held that Congress could not have intended to impose the state courts' appreciation of double jeopardy because it also chose not to extend the right to jury trials, on which the prohibition on appeals was based.[77] Moreover, the Philippine Supreme Court upheld the policies and purposes sought to be forwarded by symmetric appeals, which it identified as uniformity in the administration of justice, equity (as both the state and the defendant can be aggrieved by the tyranny of a sole judge), and "the ultimate

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[74] United States v. Kepner, 1 Phil. 397, 397-8 (1902) (resolving the motion to dismiss).

[75] *Kepner*, 195 U.S. 100, 106 (Arguments of the United States).

[76] United States v. Kepner, 1 Phil. 397, 401 (1902).

[77] *Id.* at 400. "Formerly, in England, the right to plead jeopardy after an acquittal or conviction was the necessary adjunct, the indispensable auxiliary of the trial by jury, inasmuch as the right of trial by his peers, reluctantly conceded as a remedy for judicial abuses, would have availed the citizen but little if the verdict of the twelve men, good and true, had been *left to the mercy of a pliant judiciary who were the mere creatures of the authority or influence which made them.*

"Hence, no appeal was permitted from the verdict of the jury or from the judgment entered in conformity with it. Both were final, and therefore the jeopardy became complete, not because there had been a conviction or an acquittal but because *the question of innocence or guilt, of punishment or no punishment, had been finally determined beyond all possibility of judicial change or alteration.*" *Id.* at 398-9 (1902). (Emphasis supplied.)

purpose of all jurisprudence—a correct judgment, legally obtained."[78] Hence, the Court denied Kepner's motion to dismiss the government's appeal, thereby convicting Kepner for appropriating his client's funds.[79]

Kepner brought a writ of error before the US Supreme Court in the landmark case of *Kepner* where the American court reversed the Philippine Supreme Court and made two significant rulings. First, the United States Supreme Court held that the Organic Act guaranteed for the inhabitants of the Philippines the fundamental right against double jeopardy even though it withheld the right to jury trials from them. This latter fact notwithstanding, double jeopardy must be applied in a manner consistent with "the common law from which it was taken"[80] because it was the "intention of Congress to carry some at least of the essential principles of American constitutional jurisprudence to these islands."[81]

But what exactly did the common law require or prohibit as to appeals in criminal cases? This was the second and more significant ruling made by the Court in *Kepner*. The Court found that "[a]t the common law, protection from second jeopardy for the same offense clearly included immunity from second prosecution where the court having jurisdiction had acquitted the accused of the offense."[82] Thus, it held that the appeal of the lower court acquittal was constitutionally impermissible.

The soundness of this latter ruling was questioned in a vigorous dissent by Justice Holmes, who argued that the jeopardy is one that is "continuing." Justice Holmes likewise sought to distinguish *Kepner* from the precedents cited by the majority, as the latter all involved an independent new trial and not an appeal for the same case.[83]

As to the ruling particularly applicable to the Philippines, Justice Brown found it "impossible to suppose that Congress intended to place in the hands of a single judge the great and dangerous power of finally acquitting the most notorious criminals."[84]

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[78] *Id.*

[79] United States v. Kepner, 1 Phil. 519 (1902) (reversing the acquittal of the lower court); *See also* United States v. Kepner, 1 Phil. 727 (1903) (denying reconsideration of the reversal).

[80] *Kepner*, at 125.

[81] *Id.* at 121.

[82] *Id.* at 126.

[83] *Id.* at 134 (Holmes, *J.*, dissenting).

[84] *Id.* at 137 (Brown, *J.*, dissenting).

2. The Current State of Philippine Law on Asymmetric Appeals

The reservations of Justices Holmes and Brown notwithstanding, *Kepner*, which was decided more than a century ago, is still the standing rule for both the US and the Philippines insofar as appeals in criminal cases are concerned. This is evident in the post-*Kepner* decisions of the Philippine Supreme Court, as well as the Rules on Criminal Procedure promulgated by and for the judiciary.[85]

i. Post-*Kepner* Jurisprudence on Double Jeopardy

Even after gaining independence from the United States in 1946, the Philippine Supreme Court has unblinkingly adhered to the American application of the principle of double jeopardy. Cases after *Kepner* did contribute to and enrich Philippine double jeopardy law, but also rigidly affirmed the prohibition on prosecutorial appeals.

In 1987, the Supreme Court held in *Heirs of Rillorta v. Firme*[86] that the adequacy of the damages awarded in a criminal case can be appealed by the heirs of the victim of the crime without violating double jeopardy.[87] However, because the heirs in *Rillorta* prayed for an increase in the award because they believed that the accused should have been found guilty of homicide and not only less serious physical injuries, the Court found that the nature of the appeal actually covered both civil and criminal aspects of the lower court judgment.[88] Thus, the high court barred the appeal because it effectively sought the aggravation of the offense for which the accused was already convicted in the guise of merely increasing the civil award.

In *People v. Dela Torre*,[89] the trial court convicted the accused of two counts of acts of lasciviousness[90] and four counts of rape of a minor who was also the daughter of his common-law wife. The accused was sentenced to at least 30 years for each count of rape, but believing that the circumstances of the crime called for the imposition of the death penalty, the prosecution appealed the decision of the trial court. The Supreme Court refused to modify the lower court's decision and held that an appeal by the prosecution for the

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[85] RULES OF COURT, Rules 110-127.

[86] Heirs of Rillorta v. Firme, G.R. No. 54904, 157 SCRA 518, Jan. 29, 1988.

[87] Appeals by the private offended party is further discussed in Part II.B.2.iii, *infra*.

[88] *Id.* at 522.

[89] People v. Dela Torre, G.R. No. 137953, 380 SCRA 596, Apr. 11, 2002.

[90] *See* REV. PEN. CODE, art. 336.

purpose of increasing the penalty to be imposed on the convict would violate the rule against double jeopardy.[91]

Meanwhile, in *People v. Alarcon*,[92] the accused was convicted by the lower court of two counts of rape of a 10-year old minor. When the convictions were challenged by the accused before the Court of Appeals, the appellate court upheld one of the rape counts but downgraded the other to acts of lasciviousness since the element of carnal knowledge was not proven. The rape having been committed against a minor, both the trial and appellate courts imposed the death penalty. Because Philippine criminal procedure[93] requires the automatic review by the Supreme Court of judgments imposing the death penalty, the case went up to that tribunal. Relevant to the issue of double jeopardy, the Supreme Court refused to revisit the part of the Court of Appeals decision which demoted one of the charges of rape on the ground that "the right against double jeopardy [...] proscribes an appeal from a judgment of acquittal or for the purpose of increasing the penalty imposed upon the accused."[94] The Court then limited the review to the rape charge that was upheld by both lower courts.

These three cases are only a sampling of the post-*Kepner* Philippine jurisprudence on double jeopardy. While the cited decisions ruled on different points, they all stiffly upheld the asymmetric appeals regime amidst the submissions of several authorities and lower courts who have either pointed out the faulty reasoning of the *Kepner* ruling[95] or advocated a return to the Spanish interpretation.[96]

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[91] People v. Dela Torre, 380 SCRA 596, 604.

[92] People v. Alarcon G.R. No. 174199, 517 SCRA 778, Mar. 7, 2007.

[93] *See generally* RULES OF COURT, Rule 122, § 10; People v. Mateo, G.R. No. 147678, 433 SCRA 640, July 7, 2004.

[94] People v. Alarcon, 517 SCRA 778, 784.

[95] Mauricio, *supra* note 8, at 485 *et seq.* Mauricio argues that the "American decision in the *Kepner* case is shot through with defects," *id.* at 485, and points out that *United States v. Sanges*, 144 U.S. 310 (1892) and *United States v. Ball*, 163 U.S. 662 (1986) were cases that both involved defective first indictments. He argues that the *Kepner* court "should not have relied on the *Sanges* and *Ball* cases because the *Kepner* case did not involve a defective first indictment but an error in law," and that these rulings "were not really applicable to the *Kepner* case." Mauricio, *supra* note 8, at 486-7.

[96] *See* Mauricio, *supra* note 8; Peña, *supra* note 60; Angel Cruz, Comment, *Double Jeopardy as a Limitation to the Right of Appeal by the People in Criminal Cases*, 22 PHIL. L.J. 205 (1947); Ambrosio Padilla, *Suggested Reforms*, 32 PHIL. L.J. 355, 358-9 (1957). Padilla was former Solicitor General of the Philippines; his office is in charge of responding on behalf of the State in all criminal appeals filed before the Court of Appeals and the Supreme Court. *See* Pres. Dec. No. 478 (1974), § 1 (Defining the Powers and Functions of the Office of the Solicitor General).

This insistence on asymmetry has created an awkward (if not absurd) situation where the accused can be made by the appellate court to suffer a more severe penalty when he *himself* appeals the lower court conviction. This situation was illustrated in 1968 in *Quemuel v. Court of Appeals*,[97] where the accused was convicted of libel before the trial court. On appeal, the Court of Appeals affirmed the conviction and the prison sentence but modified the judgment by additionally imposing a fine and civil indemnity. When this ruling was questioned before the Supreme Court, it instead upheld the modification and ruled that the fact the defendant had not appealed this as error, or that the offended party had not appealed, was insignificant. The Court reasoned, in words that have since become axiomatic, that an "appeal in a criminal case opens the *whole* case for review and this includes the penalty, which may be increased[.]"[98]

In other words, while the State is prohibited from seeking a reconsideration or reversal of the conviction, the accused may do so but at the risk that the judgment will be reexamined in favor of a greater penalty or conviction for the original or more burdensome charge.

ii. May the State Ever Appeal an Acquittal?

Since *Kepner*, the Rules of Court have included provisions which impliedly prohibit appeals or retrials initiated by the State.[99] This can be seen in the prohibitions against the government seeking a reconsideration of a lower court judgment or a new trial before the lower court, which reinforces the immutable nature of an acquittal.[100] Meanwhile, the provision on appeals in the Rules on Criminal Procedure states that "[a]ny party may appeal from a judgment or final order, unless the accused will be placed in double jeopardy."[101] Hence, while the government is not expressly barred from filing an appeal, the broad prohibition in Rule 117, Section 7, as earlier quoted, limits the right of the government to appeal the quashal of the charge only when the same is founded on non-substantive grounds—those brought before an

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[97] Quemuel v. CA, G.R. No. 22794, 22 SCRA 44, Jan. 16, 1968.

[98] *Id.* at 46. (Emphasis in the original.)

[99] Note that under Philippine law, the promulgation of procedural rules is within the exclusive domain of the Supreme Court. CONST. art VIII, § 5(5). It is therefore understandable that the Rules of Court would most likely reflect the Court's jurisprudence, especially with regard to well-established rules like asymmetric appeal rights in double jeopardy.

[100] "At any time before a judgment of conviction becomes final, the court may, on motion of the accused or at its own instance but with the consent of the accused, grant a new trial or reconsideration." RULES OF COURT, Rule 121, § 1.

[101] RULES OF COURT, Rule 122, § 1.

accused pleads to the charges, both parties present their evidence, and the court rules on the merits.[102]

As already shown, Supreme Court decisions have also been categorical and absolute in upholding the asymmetry in the right to appeal. Authors, nevertheless, have identified certain "exceptions" to this aspect of the prohibition on double jeopardy, such as: (1) when "the prisoner himself appeals and a new trial is ordered," (2) there is "no redress for errors or mistake made in the course of the trial [in] favor of the defendant," or (3) there is no opportunity to correct such errors or mistakes.[103] Whether these may be properly termed as exceptions has been the subject of debate, the consequences of which are more conceptual than practical.

The supposed exceptions in jurisprudence, such as when the criminal trial was a sham trial,[104] do not actually sanction appeals. Because review by an appellate court in these cases is initiated through a separate petition for *certiorari*,[105] it is limited to correcting errors of jurisdiction, which is done by the superior court nullifying the judgment of and proceedings in the inferior court and ordering retrial. Strictly speaking, these cases are not exceptions to the bar on appeals by the State; if they were, the appellate court would have had the power to reverse or modify the verdict due to errors of fact or law.

Nullification often occurs when a lower court is found to have acted with "grave abuse of discretion" sufficient to invalidate the judgment or the proceedings. This term of art in Philippine law has been described by the Supreme Court as follows:

> Grave abuse of discretion defies exact definition, but it generally refers to "capricious or whimsical exercise of judgment as is equivalent to lack of jurisdiction." The abuse of discretion must be patent and gross as to amount to an evasion of a positive duty or a virtual refusal to perform a duty enjoined by law, or to act at all in contemplation of law, as where the power is exercised in an arbitrary and despotic manner by reason of passion and hostility.[106]

The Court voided a lower tribunal's dismissal or acquittal in cases where there are serious defects in the procedure in the first-level courts which

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[102] *See* RULES OF COURT, Rule 117, § 3.

[103] Arbues, *supra* note 14, at 1205.

[104] *See* Galman v. Sandiganbayan, G.R. No. 72670, 144 SCRA 43, Sept. 12, 1986.

[105] RULES OF COURT, Rule 65.

[106] People v. Tan, G.R. No. 167526, 625 SCRA 388, 397, July 26, 2010.

resulted in the State being deprived of due process in the criminal case.[107] For example, in *Galman v. Sandiganbayan*,[108] more than two dozen activists and leaders of civil society filed a petition for *certiorari* before the Supreme Court to question the acquittal of several military men who were earlier indicted in the Sandiganbayan, the anti-graft court, for the 1983 assassination of Senator Benigno Aquino, Jr. The petitioners claimed that there were "serious irregularities constituting mistrial and resulting in miscarriage of justice,"[109] and they prayed that the judgment of the anti-graft court be vacated and a new trial ordered. The respondents in that petition, consisting of the accused in the case before the lower court, moved to dismiss the petition on the ground that it was barred by the said acquittal.

The high court refused to do so. It further ruled that the judgment of the Sandiganbayan was void, and ordered a retrial.[110] The Court found that because the judgment of acquittal was rendered after a trial specifically orchestrated by former President Marcos, Senator Aquino's political opponent, to protect the accused, there was no first jeopardy to speak of. In strong terms and with particular reference to the facts of *Galman*, the Supreme Court made a pronouncement that a "dictated, coerced and scripted verdict of acquittal [...] is a void judgment. In legal contemplation, it is no judgment at all."[111]

What *Galman* and similar cases essentially hold is that in the absence of due process, the judgment of acquittal or the dismissal of the case is null and void.[112] Hence, technically, there was no termination of the jeopardy before the lower court. In any case, the Supreme Court has very cautiously guarded against the use of *certiorari* as a substitute for appeal, especially in cases of lower court acquittals, by refusing to vacate lower court judgments when they only raise errors of law, or when the procedural defects are not grave so as to invalidate the entire proceeding.[113]

In sum, legally and accurately speaking, there is no exception to the prohibition on the government appealing an acquittal under the present state of Philippine law.

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[107] *See* People v. Bocar, G.R. No. 27935, 138 SCRA 166, Aug. 16, 1985, where the prosecution was not allowed to finish presenting its evidence before the lower court.

[108] Galman v. Sandiganbayan, G.R. No. 72670, 144 SCRA 43, Sept. 12, 1986.

[109] *Id.* at 59.

[110] *Id.* at 95.

[111] *Id.* at 88.

[112] People v. Balisacan, G.R. No. 26376, 17 SCRA 1119, 1123, Aug. 31, 1966.

[113] *See* People v. Tan, 625 SCRA 388, 401.

iii. Appeals by the Private Offended Party

To be clear, the asymmetric appeals regime bars only the State from seeking a reconsideration or a reversal of a lower court criminal judgment. It does not prohibit a private offended party from appealing the *civil liability* imposed, or lack thereof, on the accused.

While, in legal contemplation, crimes are essentially offenses against the State,[114] Philippine law generally recognizes that "[e]very person criminally liable for a felony is also civilly liable."[115] By default, the institution of a criminal action also includes the civil liability owed to the private offended party.[116] The objective of this liability is the restitution of, reparation of the damage caused to, or indemnification for consequential damages suffered by the private offended party.[117]

The law then treats the private offended party as having an interest independent from that of the State. Because of this, for as long as the trial court acquits due to reasonable doubt and not because the act complained of did not at all exist, an acquittal would only extinguish the penal action but not the civil action instituted with it.[118] Consequently, whenever aggrieved, a private offended party may resort to an appeal of the civil liability and may prosecute the same before the appellate court.

Thus, once an acquittal is rendered, the State itself loses its interest in the judgment, which is final and executory as to the criminal aspect.[119] This is simply the natural consequence of an asymmetric appeal rights system. Nevertheless, the private complainant's interest in the civil liability of the accused survives, and he enjoys the right to file an appeal subject to the limitations against double jeopardy.[120]

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[114] *See* Sasot v. People, G.R. No. 143193, 462 SCRA 138, 148, June 29, 2005.

[115] REV. PEN. CODE, art. 100. Offenses which do not have a concomitant civil liability are commonly called "victimless crimes" because, in such cases, there is no private offended party.

[116] RULES OF COURT, Rule 111, § 1(a).

[117] REV. PEN. CODE, art. 104.

[118] RULES OF COURT, Rule 111, § 2.

[119] Cruz v. CA, G.R. No. 123340, 388 SCRA 72, 78, Aug. 29, 2002.

[120] *See* Heirs of Rillorta v. Firme, 157 SCRA 518, and accompanying text, *supra* notes 86-8.

III. ASYMMETRIC APPEALS AND MORAL HAZARD

The previous two sections sought to establish, among others, the following: *First*, the development of the principle of double jeopardy has not been uniform across jurisdictions, save for the basic protection against multiple prosecutions and punishments for the same offense. *Second*, the limitation on the governments' right to appeal acquittals appears to be a fairly young creature of common law, and is therefore not integral to the right. *Third*, despite the opportunity to interpret appeal rights in criminal cases to fit the particular context of the Philippines, the Supreme Court has desisted from doing so and has instead clung to the *Kepner* ruling without independently finding a justification for the local interpretation of the principle.

This section will attempt to present the positive case for reform in the criminal appellate system by showing that the current Philippine regime is more socially costly. This is largely because the asymmetric appeals system creates a moral hazard—not unlike that in insurance cases—where there is an incentive on the economic agent (the judge) to shift the cost of the disutility (the chance of rendering an unjust acquittal) to the system which bears the risk (the appellate system).

A. The Normative Cases For and Against Asymmetric Appeals

To start, it would be apt to first consider the normative justifications for and criticisms against the asymmetric appeals system. The normative debate on the merits and demerits of prohibiting the State from appealing lower court criminal judgments can provide some insight into the policies effectively forwarded with the way different appeals regimes are structured.

How American courts have chosen to interpret double jeopardy to require asymmetric appeals has been determined by certain policies that their legal system seeks to promote. Authors have identified these "traditional justifications" as reducing false convictions,[121] reducing litigation costs of the defendant and society,[122] constraining the prosecution from acting in self-interest or from political motivation,[123] and protecting jury nullification—a measure of equity which is based on the "notion that a jury has the power to

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[121] *See, e.g.* Khanna, *supra* note 47, at 355-7.
[122] *Id.* at 358.
[123] *Id.* at 359.

acquit against the evidence as a means of tempering or softening the law in a particular instance."[124]

US courts have mostly focused on the second justification.[125] This pro-defendant bias is rooted in the assertion that the costs generated by a false conviction are greater than those generated by a false acquittal, since in the former, the state "denies liberty to an individual[,] [...] inflict[s] irreparable harm to an individual's reputation, and weaken[s] the moral force or authority with which the criminal law speaks."[126] Meanwhile, the third and fourth reasons appear to have been recently more favored by scholars.[127] For example, Hylton and Khanna justify asymmetric appeal rights by suggesting that it dampens rent-seeking in the prosecutorial service. Their theory is that a prosecutor who can appeal acquittals *ad infinitum* would be "much more vulnerable to selective enforcement pressures than one where they could not."[128]

At the opposite end, papers examining the political and legal soundness of the asymmetry have attacked the above normative justifications. Stith complains that "because of the prohibition on government appeal of acquittals," the "government bears most of [the] risk of [legal] error in a criminal trial[.]" In turn, "because of the asymmetric risk of error in criminal cases[,] there are more acquittals than there would be under symmetric risk of error, *ceteris paribus*."[129]

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[124] *Id.* at 358. (Citations omitted.) "Nullification occurs when a jury—based on its own sense of justice or fairness—refuses to follow the law and convict in a particular case even though the facts seem to allow no other conclusion but guilt." *See* Jack B. Weinstein, *Considering Jury "Nullification": When May and Should a Jury Reject the Law to do Justice*, 30 AM. CRIM. L. REV. 239, 23 (1993).

[125] *See Green*, 355 U.S. at 187.

[126] Hylton and Khanna find that this reason has been adopted by the US Supreme Court in *In re Winship*, 397 U.S. 358 (1970), *infra* note 129, at 62-3.

[127] *See, e.g.* Khanna, who "makes the critical argument that this effect of Double Jeopardy, rather than error and litigation costs concerns, might in the end justify asymmetric appeal rights." Khanna, *supra* note 47, at 360. He also recognizes the two-fold value of jury nullification as an expression of the popular will and in allowing the jury "to soften, and in the extreme case, to nullify the application of the law in order to avoid unjust judgments," *Id.* at 397, *quoting* Peter Westen & Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81, 130. Khanna, however, values the former justification more than jury nullification.

[128] Keith N. Hylton & Vikramaditya Khanna, *A Public Choice Theory of Criminal Procedure*, 15 S. CT. ECON. REV. 61, 97 (2007).

[129] 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, 3 (1990).

In arguing for a judicial reinterpretation of the principle, Kokyls anchors her proposal on the flaw in a system which allows a person who is, for example, factually guilty of murder to remain free after an acquittal and even after the emergence of newly-discovered, compelling evidence.[130] This observation was based on the changes in English law through the Criminal Justice Act of 2003. The Act permitted the quashal of an acquittal and a retrial in special circumstances, such as when the accused later confesses to the crime, whether in or out of court, after he is initially exonerated after a trial.[131] While Kokyls mainly advocated the reinterpretation of the prohibition on retrials—a different but related aspect of double jeopardy law—her point on the absurdity of the State's incapacity to seek the reversal of a clearly erroneous verdict is worth considering as it applies with equal force to the unequal situation created by an asymmetric appeals system.

In the Philippines, the opposition to asymmetric appeals has also mostly focused on normative rebuttals of the traditional justifications. The main objection has been the perpetuation of error, with Filipino authors averse to asymmetric appeals arguing that the State has as much an interest in securing the just conviction of criminals as innocent defendants have in securing their liberty.[132] These authors further argue that the appellate system could serve as an effective check against the arbitrariness of judges.[133]

B. An Alternative Positive Assessment

The normative reasons thrown against asymmetric appeals appear to be as persuasive as those for maintaining the regime. If the policy to be adopted were to rely purely on the balance of these assertions, the system would be susceptible to ideological shifts or changes in the composition of the Supreme Court. Because it is given the exclusive power to promulgate rules of procedure in all courts of justice[134] and in light of *stare decisis*, the Supreme Court can judicially reinterpret the right against double jeopardy to either accommodate or bar prosecutorial appeals with all the potency of a simple amendment to the Rules of Court or a single decision. Hence, I

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[130] Andrea Koklys, Note, *Second Chance for Justice: Reevaluation of the United States Double Jeopardy Standard*, 40 J. MARSHALL L. REV. 371, 394 (2006).

[131] *See* Creekpaum, *supra* note 14, at 1196-1200.

[132] Mauricio, *supra* note 8, at 501.

[133] Padilla, *supra* note 96, at 359.

[134] CONST. art. VIII, § 5(5). While under previous Constitutions, the power to promulgate rules of procedure was widely understood to be shared by the legislature, under the present basic law, "the power to promulgate rules of pleading, practice and procedure is no longer shared by [the Supreme Court] with Congress." *See* Echegaray v. Secretary of Justice, G.R. No. 132601, 301 SCRA 96, 112, Jan. 19, 1999.

propose a more positive justification for reconsidering the current prohibition against government appeals in criminal cases—one that is founded on maximizing social utility.

In essence, I submit that under an asymmetric appeals regime, judges are encouraged to "pass on" or "externalize" the cost of rendering an unjust judgment to higher courts in the appellate system. This can be shown by an analysis of judge-centric incentives and disincentives in relation to social utility.

The challenge with economic modelling is how to present a simulation that is simple but adequate enough to explain complicated phenomena. It requires that certain assumptions be made if only to facilitate the analysis of the finer points sought to be explained by the model. Of course, the critical reader will require that these assumptions be grounded on reality. Thus, in the rest of this section, I take pains to verbalize the intuition behind the premises of my analysis—to the most practicable extent—to show the reasonableness of my position.

I begin the analysis by describing the environment in which judges decide cases.

1. The Socially Optimal Outcome: Accuracy Versus Finality

First, I assume that social utility in relation to criminal adjudication is reliant on two factors, namely, accuracy and finality.[135] On the one hand, accuracy is concerned with the "absence of error" in, among others, "the determination of whether or not a person is liable."[136] On the other hand, finality is concerned with ending litigation and is the foundation of *res judicata*.[137] These two factors were not plucked out of thin air. The consensus is that they are components of systemic legitimacy, or "the people's general notion that the judicial system is basically fair and worthy of respect and adherence."[138]

Hence, in effect, choosing between asymmetric or symmetric appeal rights involves two equally important but conflicting policy goals: one is

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[135] Creekpaum, *supra* note 14, at 1187 *et seq.*

[136] SHAVELL, *infra* note 172, at 450.

[137] *See* Tan-Suyco v. Javier, 21 Phil. 82, 88 (1911).

[138] Creekpaum, *supra* note 14, at 1187 *et seq.* "The traditional objective of the law and of the actions of legal authorities is to gain public compliance with the law." Tom Tyler, *Legitimacy and Criminal Justice: The Benefits of Self-Regulation*, 7 OHIO STATE J. CRIM. L. 307, 307 (2009).

concerned with arriving at just decisions (which is related to accuracy), while the other seeks to keep an efficient legal system (which is promoted by finality).

The key premise of my analysis is that the socially desirable choice is one that will maximize net social utility—an outcome that will reflect the highest social utility at the least possible cost.

Increasing accuracy, in particular, can be "socially costly as it requires a lengthier and higher-quality legal process."[139] Maintaining the legal system has concomitant costs, which may take the form of establishing an appellate system or investing in improving first-level adjudication.[140] Either of these may involve budgetary appropriations for new courts or seats and the training of judges and court staff. These costs may then be multiplied or exacerbated by longer periods of adjudication.

This problem of choosing the socially optimal outcome may also be viewed from a cost-reduction perspective. As alternatively summarized by Posner, the "objective of a procedural system, viewed economically, is to minimize the sum of two types of cost. The first is the cost of erroneous judicial decisions. [...] [The second is] the cost of operating the procedural system."[141]

However, when considered from either standpoint, the result would be the same: adjusted for the first premise, the socially-optimal appeals regime will balance the above two important social considerations, which are both important to the legitimacy of a legal system, at the least economic expense.

2. The Judge as a Rational, Utility-Maximizing Agent

Second, I assume that judges are rational, risk-averse, utility-maximizing agents who are motivated foremost by self-interest. Perhaps in any other context, this assumption would be contumacious. After all, judges are vested with the power to definitively settle controversies and, especially in criminal cases, impose penalties involving life, liberty, and property. They are bound by strict ethical codes that are more exacting than those set for ordinary

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[139] SHAVELL, *infra* note 172, at 451.

[140] RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 456-7 (7th ed. 2007).

[141] *Id.* at 593.

lawyers.[142] However, "[t]he economist assumes that judges, like other people, seek to maximize their utility,"[143] and because what I attempt in this paper is a positive economic analysis, this premise is necessary and must be made explicit. This is not an unreasonable assumption: while clothed with the majesty of the State and vested with its all-encompassing power to adjudicate rights, obligations, privileges, and liabilities, court benches are staffed by judges who are humans too.

On this point, there have been several proposed models of judicial utility maximization.[144] Posner's simple model proposed that judicial utility was "a function mainly of income, leisure, and judicial voting."[145] Yet this model was meant to explain essentially the choice between judging and leisure, so even if it is a rich source of economic insight on the behavior of judges (and, to a larger extent, the administration of justice), it might not be able to explain how a judge in the Philippine setting would rule for or against the accused in a situation where there is no certainty as to the facts of a criminal case.

Hence, for the purposes of this analysis, I therefore assume that for judges, correct (or just) judgments increase such private utility, and incorrect (or unjust) judgments decrease such satisfaction. An important clarification is that the judge is *ultimately* concerned with the correctness of the *final*

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[142] *Compare* CODE OF JUDICIAL CONDUCT (1989) *with* CODE OF PROFESSIONAL RESPONSIBILITY (1988).

[143] POSNER (2007), *supra* note 140, at 569.

[144] *See, e.g.,* Richard Posner, *What do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 S. CT. ECON. REV. 1 (1993). Judge Posner's seminal work on the utility maximization of judges proposes a formal model which holds that judicial utility is a function of time spent on judging, which is a valued consumption activity and a pure consumption element in the judicial utility function (meaning that adjudication by itself is considered by the ordinary rational judge as a source of utility, *id.* at 16); the time spent devoted to leisure (or all activities other than judging); pecuniary income; reputation; and other sources of judicial utility besides voting. Posner's model suggests and assumes that the last three are invariant. The formal model, *id.* at 31, partially rephrased, is as follows:

$$U = U(t_j, t_l, I, R, O)$$

Where
t_j = Number of hours per day that the judge devotes to judging
t_l = Number of hours per day that the judge devotes to leisure (i.e. non-judging)
I = Income
R = Reputation
O = Other sources of judicial utility (e.g. popularity, prestige, and avoiding reversal).

[145] *Id.* at 2.

judgment—that which can no longer be reversed or set aside. In other words, an unjust result for a judge would consist of either a factually innocent man being incarcerated, or factually guilty man being set free. Therefore, under this assumption, a false acquittal[146] or a false final conviction would each result in a decrease in a judge's private utility.

3. The Duty of the Judge to Decide Cases in a Fog of Imperfect Information

Third, I further assume that judges do not decide with perfect information. They do not rule on criminal cases with absolute certainty, and are mandated to acquit whenever there is reasonable doubt.[147] The first aspect of this premise—adjudication in a fog of imperfect information—is concisely described by the concept of moral hazard.

Moral hazard is the "risk (*hazard*) that [one party] might engage in activities that are undesirable (*immoral*) from the [other party's] point of view," which is brought about by asymmetric information after the occurrence of a transaction.[148] Asymmetric information, meanwhile, is an inequality which results when one party "does not know enough about the other party to make accurate decisions."[149]

These two interrelated concepts are useful in a variety of contexts—from its conventional applications in investment in financial markets and contract law to its use as an analytical tool in assessing new problems in international law.[150] But moral hazard, in the context of asymmetric appeal rights, more closely resembles that associated with insurance contracts[151] in

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[146] All of which, in the asymmetric appeal rights regime, are final in character.

[147] RULES OF COURT, Rule 133, § 2.

[148] FREDERIC MISHKIN, UNDERSTANDING THE ECONOMICS OF MONEY, BANKING, AND FINANCIAL MARKETS 38 (8th ed., 2007). (Emphasis in the original.)

[149] *Id.* at 37. This is not to be confused with and is completely unrelated to asymmetric appeals.

[150] *See, e.g.* Alan Kuperman, *The Moral Hazard of Humanitarian Intervention: Lessons from the Balkans*, 52 INT'L STUD. Q. 49 (2008). Kuperman makes the case that the emerging principle of Responsibility to Protect has increased the moral hazard for secessionist groups, who are emboldened to unilaterally secede from their parent states in the expectation that the international community will help. This has resulted in the rise of secessionist movements despite the relatively low chances of success and the high risk that official retaliation will result in genocide and other humanitarian atrocities.

[151] Moral hazard in insurance contracts is centered on the immoral acts of the insured, whereas the moral hazard associated with loans and investments focuses on its discouraging effects on lenders and investors. From a theoretical economic perspective,

that the appellate system functions as insurance for errors in convictions. In this case, moral hazard is defined as a "tendency [for] an insured to relax his efforts to prevent the occurrence of the risk that he has insured against because he has shifted the risk to an insurance company[.]"[152]

In criminal adjudication (or any adjudication, for that matter), there is imperfect information because judges are not omniscient—they do not rule with sure knowledge of all the facts in a case. This is the reason why all standards of proof contemplate doubt. Taking this with the assumption that incorrect decisions reduce judicial utility, the result is that if judges were only to have their way, being risk-averse agents, they would not decide a doubtful case, since the risk of rendering an incorrect or unjust judgment would discourage them from making a decision in light of the lack of information.[153]

Unfortunately for the self-interested judge, the law does require them to decide cases,[154] perhaps precisely to ensure systemic stability and the final resolution of disputes. Furthermore, the Constitution itself requires them to decide with expediency—to be exact, three months from the submission of a case for decision.[155] If only to emphasize the mandatory character of this dictate, the Supreme Court, which has administrative supervision over all courts in the Philippines, has imposed sanctions on judges who decide beyond the periods set by the fundamental law.[156]

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however, these two aspects of moral hazard are two sides of the same coin—the hazard in insurance contracts is compensated for by premiums, while that in loans is compensated for by interest.

[152] POSNER (2007), *supra* note 140, at 109.

[153] In assessing the risk of legal error, Stith classifies them into two: a false negative ("acquittals of 'factually guilty' persons") or a false positive (convictions of 'factually innocent' persons"). *See* Stith, *supra* note 129, at 3. For easier identification and because, unlike Stith, this paper does not involve a probability model, I will call the first a *false acquittal* and the second a *false conviction*.

For the purposes of this paper, I will also define an unjust judgment as an incorrect judgment, i.e. a false acquittal or a false conviction.

[154] "No judge or court shall decline to render judgment by reason of the silence, obscurity or insufficiency of the laws." CIVIL CODE, art. 9. This provision is widely understood to reflect the legal duty on the courts to decide cases brought before them. *See* I ARTURO M. TOLENTINO, COMMENTARIES AND JURISPRUDENCE ON THE CIVIL CODE OF THE PHILIPPINES 38-9 (1990 ed.).

[155] CONST. art. VIII, § 15(1). A case is "deemed submitted for decision or resolution upon the filing of the last pleading, brief, or memorandum required by the Rules of Court or by the court itself." § 15(2).

[156] *See, e.g.* Office of the Court Administrator v. Bagundang, A.M. No. RTJ-05-1937, 542 SCRA 153, Jan. 22, 2008. As to this period, the Court has declared that "[f]ailure to decide even a single case within the required period, absent sufficient justification, constitutes gross inefficiency meriting administrative sanction. A member of the bench cannot pay mere lip

Given this quandary, there is a high incentive for judges to shift the costs of rendering an unjust judgment to the higher courts in the appellate system, especially when the evidence is strong enough to suggest guilt but not clear enough to support moral certainty.

4. What about the Accused?

Looking at the social utility function and the private judicial utility described above, one might ask whether the accused even figures in this paper's analysis. Does the analysis forego an important policy consideration, which is securing as many rights of the accused as possible? This seems to be a fair question since, intuitively, a system that assures the accused his rights,[157] which he enjoys whether or not he is in fact guilty of the offense charged, is the socially desirable system because it forwards timeless precepts of justice.

On the surface, this consideration appears to go into the balance between the social and private benefits of the legal system, but I submit that the welfare of the accused does fall into the social utility function earlier proposed. This is because the rights of the accused have a social purpose, which is to buttress the legitimacy of the legal system. But if only to simplify the analysis, these rights may generally fall under the "finality" consideration. Rights such as that to speedy trial, testimonial disqualifications and privileges, exclusionary rules of evidence, and similar measures all effectively limit the ways by which the State may secure a conviction. In other words, they allow the resolution of criminal cases despite the risk of error, consistent with the defendant's interest in being shielded from the anxiety and expense of further trials.

C. Models of Social and Judicial Utility

The first and second assumptions above can be expressed through formal models.

As to the first assumption, I reiterate that social utility is a function of accuracy and finality, and that, unfortunately, there is a trade-off between the two. Thus, *optimal* social utility is determined by the combination of these two factors that will result in the highest possible satisfaction within the budget constraint. Formally expressed, social utility, U_s, is

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service to the 90-day requirement; he should instead persevere in its implementation." *Id.* at 162.

[157] *See generally* CONST. art III, § 12 *et seq.*

$$U_s = U(A, F)$$

Where
A = Accuracy; and
F = Finality.

As regards the second assumption, it is submitted that judicial utility in criminal adjudication is a function of correct acquittals and correct final convictions, including several other variables, such as: reputation, reversal avoidance,[158] and income as fixed by law. Finally, considerations of the public interest—other than rendering a just judgment, such as forwarding a particular judicial policy—are also relevant in this analysis only insofar as they enhance his utility.[159] Therefore, a judge's utility, U_J, can be formally described as follows:

$$U_J = U(V, R, I, D, P, O)$$

Where
V = Criminal verdict
R = Reputation
I = Income
D = Affirmance (or reversal avoidance)
P = Public interest; and
O = Other considerations.

To simplify the analysis, these last considerations should be treated as fixed. In the Philippine context, reputation is perhaps more a function of perceived incorruptibility and fairness than correct decision-making. This is because, unlike in the American common law system, the Philippine legal system treats decisions of the Supreme Court alone as precedent-making. Thus, Philippine lower court judges do not create judge-made law. More importantly, judges enjoy security of tenure, thus depressing any disutility from poor reputation.

That lower court judgments are not precedent-setting is likewise partly the reason why reversal avoidance is also of little utility to judges. Lower

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[158] Posner believes that avoiding reversals is a minor consideration for judges, especially because they are rare and they do not affect a judge's chances of promotion. *Id.* at 14-5, *citing* Richard Higgins & Paul Rubin, *Judicial Discretion*, 9 J. LEGAL STUD. 129 (1980).

[159] Posner's model, which assumes judges to be ordinary and rational (and therefore primarily motivated by self-interest), makes a similar assumption. *Id.* at 14.

courts are mainly triers of fact, implying that a judge will likely not derive disutility from an appellate court's reversal of his legal conclusions as he has no personal stake in their affirmance.[160] Furthermore, judges in the Philippines carry a notoriously heavy caseload such that they are not expected to write perfect decisions. For instance, in the years 2006 to 2009, each judge had an annual average of 644 cases in their dockets.[161] Therefore, since the risk of reversal is high, it can be predicted that judges will be largely indifferent to it.

Income and other considerations are either fixed by law or are relatively minor for the purposes of this analysis, as judges can do little to change them. Meanwhile, considerations of the public interest are also muted in lower court adjudication in the Philippines since, as earlier explained, their decisions are not precedent-setting and are even of little persuasive value in terms of creating law. Save in exceptional cases, lower court judgments very rarely create ripples in public policy, which means that judges derive little utility, if any, from this factor.

We can also disregard any utility derived from dismissals of criminal cases. Unless they amount to an acquittal, a dismissal only kicks the can down the road since there is generally nothing which prohibits the State from re-prosecuting the case.

Holding most of the factors as constant, we are thus left with criminal verdicts. The second assumption holds that only correct acquittals, all of which under an asymmetric appeal rights regime are final, and correct final convictions will increase utility. Considering the reverse of these outcomes, we therefore have two "goods," the additional consumption of which increases the consumer's (or the judge's) utility, and two "bads," which it can be implied, that every additional unit of which decreases the consumer's satisfaction.[162]

Hence, formally expressed, utility from acquittals and final convictions is as follows:

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[160] *Compare* Posner (1993), *supra* note 144, at 17 *et seq.* Even Judge Posner downplays the utility common law judges derive from reputation and reversal avoidance. *Id.*

[161] Jose Ramon G. Albert, *The Philippine Criminal Justice System: Do we have enough judges to act on filed cases?*, Beyond the Numbers, PHIL. STATISTICS AUTH'Y WEBSITE, June 14, 2013, *at* http://nap.psa.gov.ph/beyondthenumbers/2013/06132013_jrga_courts.asp#table4 (last accessed May 3, 2016).

[162] HAL R. VARIAN, INTERMEDIATE ECONOMICS: A MODERN APPROACH 41 (7th ed. 2006).

$$U(I) \begin{cases} > 0, \text{ if } V = Q_t \\ < 0, \text{ if } V = Q_f \\ > 0, \text{ if } V = C_t \\ < 0, \text{ if } V = C_f \end{cases}$$

Where

Q_t = correct (or probably correct) or true acquittal;
Q_f = incorrect (or probably incorrect) or false acquittal;
C_t = correct (or probably correct) or true final conviction;
C_f = incorrect (or probably incorrect) or false final conviction.

In reality, if a judge can honestly and definitely rule for or against a criminal defendant, confident with the facts he has on his hands or on the balance of probabilities,[163] he would choose to "consume" the "goods." In other words, he would choose to render a true conviction or a true acquittal. Thus, the moral hazard is only manifested when the information is so imperfect that the judge cannot decide one way or the other. To further simplify the analysis, we can disregard these "guilt-free" choices for now.

Furthermore, while the second assumption holds that the utility of a judge is increased only with a final conviction or acquittal, a judge by himself does not always render a *final* conviction. The immutability of that verdict relies on whether or not the accused will appeal the case and, if he does, whether or not the appellate court will uphold the trial court's decision.

Flowing from the third assumption and because of the asymmetric appeals regime, all lower court convictions are insured against error (or injustice) by the appellate system, while acquittals carry with it no such insurance. When a judge therefore convicts a criminal defendant, he insures himself against rendering a final and irreversible error. Notably, the insurance is automatic and is built into the justice system—the choice of whether to appeal or not being given to the aggrieved criminal defendant, and not the judge. In economic terms, the asymmetry in appeals distorts the judicial utility function, and therefore limits the judge's options.

This means that the risk of rendering a false conviction is completely shifted to the appellate court. Due to this systemic insurance, a false

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[163] Recall that in criminal cases, a judge is not required to rule with *absolute* certainty, but only *moral* certainty—on proof beyond reasonable doubt. *See* People v. Lavarias, G.R. No. 24339, 23 SCRA 1301, June 29, 1968.

conviction by a lower court becomes, at worst, a neutral good. Further modified by these constraints, the resulting model now appears as follows:

$$U(V)' \begin{cases} < 0, \text{ if } V = Q_f \\ = 0, \text{ if } V = C_f' \end{cases}$$

Where

Q_f = incorrect (or probably incorrect) or false acquittal;
C_f' = incorrect (or probably incorrect) or false lower court conviction.

A good is a neutral good when the consumer does not care whether or not he consumes it.[164] In consumption bundles such as our example, the consumer's choices would be defined by the non-neutral good. The last version of the model shows that every false acquittal reduces the judge's overall utility. However, because the legal system requires the judge to choose and render a verdict, in doubtful cases such as our last model, the only rational choice for the judge would be to select the false conviction—the neutral good.

D. Exacerbation of Moral Hazard

Intuitively, the result predicted by the last model is what happens when the facts of the case are unclear to the judge, when there is an optimal level of doubt as to the guilt or innocence of the accused, or when the questions of law are difficult such that the judge would rather preserve the issue on appeal.[165]

It must be noted that, as proposed, utility is determined by what is "probably" a correct or incorrect verdict. This is because we can safely assume that a judge would render a conviction when the facts as proven clearly point to criminal culpability of the accused, and an acquittal when the evidence leads to the opposite conclusion. Hence, moral hazard is exacerbated in the gray area between these poles—where the evidence presented points neither to clear criminal liability nor clear exculpation.

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[164] VARIAN, *supra* note 162, 41-2.

[165] *See* Mirjan Damaška, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure*, 121 U. PA. L. REV. 506, 520 n.22 (1973). "Judges tend to rule in favor of the prosecution in close cases so as to preserve reviewability of their rulings." *Id.*

There is another factor which can worsen moral hazard. The Constitutional mandate for lower courts to decide cases in three months after the case is submitted for decision further constrains the decision-making process of judges by requiring them to rule within the period specified—regardless of the difficulty of the case—under pain of an administrative sanction.[166] Faced with a choice between convicting an accused who is possibly innocent and acquitting one who is possibly guilty, the rational judge is expected to choose the first outcome because it is insured against the risk of error, unlike the second outcome which, under the asymmetric appeals regime, is final and immutable.

There is, of course, a provision in the Constitution which effectively allows the Chief Justice to extend this period to decide,[167] but such extensions are on a case-to-case basis and must be justified. The unpredictability in securing such extensions makes the measure an ineffective safety valve, incapable of reducing systemic moral hazard.

E. An Illustration Using Game Theory

The relationship between, on one hand, the choice of rendering a false acquittal or a false conviction and, on the other, reversal, under an asymmetric appeals regime can be illustrated by using game theory, a branch in the field of economics that is "concerned with the general analysis of strategic interaction."[168] The premise of the game would generally be the same as our utility model, except that game theory explicitly presupposes that the participants are rational and make their decisions with the expectation that other participants in the game would behave rationally as well.[169]

We can illustrate the strategic choices of judges through Figure 1, below.

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[166] *See, e.g.* Office of the Court Administrator v. Bagundang, 542 SCRA 153, and text accompanying *supra* note 156.

[167] "Upon the expiration of the corresponding period, a certification to this effect signed by the Chief Justice or the presiding judge shall forthwith be issued and a copy thereof attached to the record of the case or matter, and served upon the parties. The certification shall state why a decision or resolution has not been rendered or issued within said period." CONST. art. VIII, § 15(3).

[168] VARIAN, *supra* note 162, at 504, *et seq.*

[169] *See* Randal C. Picker, *An Introduction to Game Theory and the Law*, Coase-Sandor Institute for Law & Economics Working Paper No. 22, at 9-10 (1994).

FIGURE 1
Payoff Matrix

		Higher Court	
		Conviction on Appeal	Acquittal on Appeal
Lower Court	*Conviction*	(*10*, 10)	(*0*, 10)
	Acquittal	(*-10*, -10)	(*10*, 10)

Payoffs: (Lower Court, Higher Court)

This game features two players: the Lower Court (or the trial judge) and the Higher Court. Because we are really just concerned with the Lower Court, we can further assume that the Higher Court will make the probably correct decision—an assumption that is embedded in the judicial hierarchy and reflected by the more exacting qualifications for higher court benches. In light of this last assumption, we can also say that the choices of the Higher Court reflect that of a well-informed Society. For purposes of illustration, we assign values ranging from -10 to 10 to represent the satisfaction or dissatisfaction of either economic agent under each scenario. Finally, the matrix assigns values for the Higher Court when the lower court chooses to acquit, even when under an asymmetric appeals regime, they would not even be given the chance to choose. The choices of the Higher Court (or society), in this case, reflects the verdict they would have rendered had they been given the opportunity.

In light of the discussion in the earlier sections, it would be easier to label the choices of the lower court, as shown in Figure 2.

FIGURE 2
Payoff Matrix with Choices of Lower Court Identified

		Higher Court	
		Conviction on Appeal	Acquittal on Appeal
Lower Court	*Conviction*	(*10*, 10) [True Conviction]	(*0*, 10) [False Conviction]
	Acquittal	(*-10*, -10) [False Acquittal]	(*10*, 10) [True Acquittal]

Payoffs: (Lower Court, Higher Court)

The utility is highest for both the Lower Court and the Higher Court (or Society, since we are assuming that the appellate court is correct) in the cases of true convictions and true acquittals, or those where the Lower Court rendered a correct or probably correct verdict. The utility of the Lower Court is 0 when it renders a false conviction that is corrected by the Higher Court, since as our model assumes, the Lower Court is ultimately concerned with a correct final judgment.[170] The utility is negative for both players only in a false acquittal, because it would have set a guilty man free without the Higher Court having a chance to correct it.

It is clear from this game that the Lower Court has a dominant strategy in choosing to convict. Here, a conviction is the "one optimal choice of strategy for each player no matter what the other player does"[171] because, at best, the Lower Court will render a correct verdict and receive a payoff of 10, and at worst, it will receive a payoff of 0 after being corrected by the Higher Court. The game actually just reflects our utility function $U(I')$, which shows that when the facts and issues are not clear, the utility-maximizing judge has no choice but to render a possibly false conviction.

[170] Nevertheless, such a payoff is realistically not assigned a value of 10 for the Lower Court; while it is concerned with the correctness of the ultimate or final verdict (as determined by the Higher Court), it would have preferred to be correct also.

[171] VARIAN, *supra* note 162, at 505.

IV. REVISITING THE ASYMMETRY

The earlier sections explained the two basic evils of asymmetry: the likelihood that a factually innocent accused will be convicted to preserve difficult issues on appeal (a problem reflected by false convictions), and reduced accuracy (in the form of false acquittals). These evils, put together, result in an economically inefficient justice system.

False convictions, in particular, are pernicious as they result in an unconstitutional outcome. By convicting an accused instead of acquitting him whenever there is doubt, the constitutional guarantee of a presumption of innocence is violated. Furthermore, the likelihood that the presumption will be violated increases as the level of difficulty of deciding the case rises.

Combining the previous expositions on social utility and private judicial utility, I submit that a symmetric appeals system, or one with less asymmetry (through well-crafted exceptions), will expectedly increase social utility by increasing accuracy and efficiency.

A. Expected Effects on Accuracy of Decision-Making in Criminal Cases

Shavell's concise note on the economic view on accuracy in the legal system is worth quoting. He writes:

> The traditional view of legal scholars about accuracy has several features. One is that accuracy is of intrinsic value; this is inconsistent with the economic view. A second strand of traditional thinking is that *accuracy is necessary in order to maintain the legitimacy of the legal process.* The economic view is not inconsistent with this point, for if individuals respect the legal system and cooperate in its application, it will work more effectively to further social ends. A third element of traditional writing on accuracy is that accuracy serves instrumental purposes. This, of course, is entirely consistent with the economic view, but the instrumental purposes of accuracy are rarely analyzed in a sustained way by traditional scholars, whereas these purposes are the focus of economic analysis.[172]

Therefore, by itself, there is no social utility in accuracy as it is a concern of private parties. However, taken with its nature as a key component

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[172] STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 454 (2004). (Emphasis supplied.)

of a legal system's legitimacy, society has a real economic interest in improving the accuracy of decision-making.

From an economic perspective, Shavell posits that the social value of accuracy is in (1) an improved control of behavior (by increasing the expectations that violations of the law would result in penal sanctions, thereby incentivizing observance of the law), (2) a reduction of the social costs from litigation and from the imposition of sanctions (by incentivizing settlements, which result in private and public savings in litigation costs), and (3) a lowered cost of risk-bearing (as liability becomes more predictable).[173]

Accuracy is ultimately increased in light of the error-correction function of the appellate system. Posner writes that the "right to appeal serves two social purposes: it reduces the cost of legal error [...] and it enables uniform rules of law to be created and maintained."[174] Asymmetric appeals do allow for corrections of false convictions, but they do not allow for the correction of false acquittals. Thus, the immediate effect of opening up the system—by reducing or removing the asymmetry and allowing appeals by either the accused or the State—is to conceivably improve accuracy.

B. Social and Systemic Efficiency Gains

The efficiency of the legal system is also increased at a minimum economic cost.

First, as in insurance cases, reducing moral hazard will incentivize the economic agent (here, the judge) to exercise a higher standard of care. Following the analysis in the previous section, reducing the asymmetry is akin to "excluding coverage of losses that the insured (the lower court judge) could prevent very easily."[175] Hence, less asymmetry will conceivably improve the quality of first-level decision-making.

Second, compelling the judge to internalize the risks and costs of rendering an unjust judgment will also reduce the social costs of administering justice as a whole. A judicial system where there is a smaller moral hazard problem will pressure judges into intelligently and diligently choosing between two outcomes, instead of merely relying on a default verdict of conviction when there is an equipoise in the evidence or when pressed for time. The expectation is that better crafted decisions will reduce the probability of

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[173] *Id.* at 451-4.

[174] POSNER (2007), *supra* note 140, at 631.

[175] *Id.* at 110.

reversal on appeal; hence, litigants will have to think twice about seeking a review given the costs of litigation. Improved decision-making sets the stage for what Shavell calls the "separation of disappointed litigants," a phenomenon where "those who are the victims of error find it worthwhile to bring appeals and those who are not the victims of error do not find it worthwhile to bring the appeals."[176]

This is what is suggested by our last utility function, $U(I')$. In the current regime where a false conviction is a neutral good, there is little to no incentive on the part of the lower court judge to render a well-considered opinion, as the conviction will be effectively reargued anyway before the appellate court. Intuitively, this increases the cost of hearing the appeal, as appellate court judges or justices would have to spend more time (or hire more clerks) to review the evidence on record, the lower court opinion being presumptively unreliable.

From another perspective, less asymmetry will also prevent or minimize the distortion of a judge's utility function. Because the fear of reversal will compel him to produce well-reasoned judgments, parties in turn will either desist from appealing, given the reduced chances of success, or will appeal less errors, in line with Shavell's theory. Viewed either way, less asymmetry will effectively reduce the number of patently unmeritorious appeals and shorten the lifespan of cases in the long run.

Third, scholars have written much on a strong appellate system being a more efficient way of ensuring accuracy. Their reasoning applies with equal force to criminal cases independently of reducing moral hazard. Generally, increasing the accuracy of decision-making is costly because it "requires a lengthier and higher-quality legal process." The optimal level of accuracy therefore must "reflect a compromise between the value of increasing accuracy and the cost of achieving it."[177] This may be most effectively done through an appellate system. Posner elegantly explains this argument as follows:

> If appeals are more likely if the lower court committed an error—and they are, if there are nontrivial fixed costs of appealing—then allowing appeals a method of error correction may be superior to investing more resources in the quality of the lower courts in order to reduce the probability of errors by those courts. Those resources

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[176] SHAVELL, *supra* note 172, at 459.

[177] *Id.* at 451.

> would be expended in all cases, whereas the cost of an appeal is borne only in those cases—a modest fraction of the total—that are appealed.[178]

Fourth and finally, any negative effects on the consideration of finality in our social utility function would be limited and compensated by the positive effects of allowing a symmetric appeal. They are limited in the sense that an appellate system does not result in appeals *ad infinitum*,[179] but only postpone the finality of the case until the lower court's errors have been properly considered and corrected whenever necessary. In a symmetric system, once the conviction or acquittal is finally affirmed by the appellate court, the judgment becomes immutable and acquires the character of *res judicata*, as explained in the earlier sections of this paper. The fear of endless prosecutions is more imagined than real as double jeopardy will continue to bar them—not unlike how *ne ibis in idem* prevents the same in civil law countries.

Furthermore, any decrease in utility from finality would be offset by the increase in accuracy. Authors have desisted from deciding which between accuracy or finality is more important to the legitimacy of the legal system (and therefore social utility); therefore, any choice that results in overall social utility would be the preferred outcome. Following our social utility framework, overall utility is not decreased, *ceteris paribus*.

C. Refuting the Arguments against the Cost-Shifting Hypothesis

Several authors have also contemplated this cost-shifting hypothesis but have rejected it.[180] I submit that their rejections might have been founded on different considerations.

For one, those who rejected the hypothesis did not apply an analysis of judge-centered incentives and disincentives particularly with regard to the risk of rendering unjust judgments. Khanna employed an economic analysis by assessing the utility functions of prosecutors,[181] who have markedly different considerations and constraints from judges. For one and most importantly, prosecutors have the option to choose which cases to pursue, and may therefore reallocate their resources to suit their utility.

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[178] POSNER (2007), *supra* note 140, *citing* Steven Shavell, *The Appeals Process as a Means of Error Correction*, 24 J. LEGAL STUD. 379 (1995).

[179] Hylton & Khanna, *supra* note 128.

[180] Khanna, *supra* note 47, at 391.

[181] *Id.* at 363 n.93.

Stith, meanwhile, dismisses the proposal that asymmetric appeals encourages judges to always rule in favor of the government in order to preserve issues on appeal, stating that the "adoption of such an extreme decision rule is quite inconsistent with the trial court's conception of its role in a hierarchical system and its commitment to the rule of law."[182] Her premise is then quite different from this paper, which assumes that judges are rational and, in the economic sense, primarily self-interested.

The reality is probably not as extreme as suggested by Stith or this paper. Judges are subjected to a fairly rigorous selection process which, due to the importance of the judicial role, is heavily debated.[183] At the same time, an analysis that would place too much weight on the altruism of ordinary judges would be highly unworkable and unrealistic. Further, while an economic analysis of incentives certainly does not ensure a better result (especially as the analysis remains largely hypothetical due to the absence of readily available empirical data), at the very least, it shows a facet of the arguments that have not been examined in these other works.

Moreover, the said papers were written in the context of developed countries in the western world where legal systems are more efficient, enabling judges to arrive at arguably better decisions. Under this climate, the risk of rendering an unjust judgment is significantly lowered by the fairer opportunity afforded to litigants.

Finally, many of these papers were written in the context of the jury system—a mechanism which by itself disperses the costs of rendering an unjust judgment, as the correctness of the verdict relies on the judgment of several persons.

D. Limited Pressure from Moral Hazard in a Symmetric Appeals System

Furthermore, one might say that under a symmetric appeals system, there is also a moral hazard that a judge will simply pass the buck to higher courts since their decisions are subject to review in either case.

Analyzing a proposed utility function for judges and relaxing the assumption that the other factors are fixed (except for income, which remains

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[182] Stith, *supra* note 129, at 39.

[183] *See* Gilat Levy, *Careerist Judges and the Appeals Process*, 36 RAND J. ECON. 275 (2005).

fixed by law) does not seem to be persuasive. Reputation and reversal avoidance still form part of judicial utility (although, for the purpose of the previous section, they were held to be constant). Both of these will suffer with each reversal by an appellate court.[184]

The relaxation is justified in this part of the analysis. While this utility function generally remains the same whether the appellate system is symmetric or asymmetric, the asymmetry distorts judicial utility by imposing a constraint unavailable in a symmetric system. This constraint increases the moral hazard of rendering false convictions and effectively negates the reputation and affirmation variables of a judge's utility function.

Asymmetry distorts reputation because a judge knows that while "passing the buck" is socially inefficient, it remains socially acceptable for the sole reason that it is the more prudent option; as opposed to rendering a false acquittal, a false conviction preserves the legal issues for a "second opinion." Asymmetry also distorts reversal avoidance because a judge shifts the burden knowing fully that a reversal is common.

Moreover, even assuming that there is an equally strong moral hazard in the alternative proposed, a healthy balance can be reached by crafting judicial exceptions to the asymmetry of appeals. For instance, the exception as to grave abuse of discretion can be incorporated as a limited ground for appeal, and not merely a ground for the nullification of the *entire* proceeding, as a reversal on appeal would allow the appellate court to either rule on the merits of the petition or remand it to the lower courts for retrial.[185]

V. VIABILITY

In the preceding sections, I used a positive analysis to argue that allowing the State to appeal lower court acquittals would result in societal and systemic gains. The question then turns to whether this is even legally possible in the Philippines where prosecutorial appeals have been barred for more than a hundred years.

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[184] Posner recognizes that in cases where judges derive utility from being able to impose their policy preferences on society, there is an "extreme sensitivity of some judges to being reversed by a higher court: The reversal wipes out the effect of the judge's decision both on the parties to the immediate case and on others, similarly situated, whose behavior might be influenced by the rule declared by the judge." POSNER (2007), *supra* note 140, at 571.

[185] *See* RULES OF COURT, Rule 124, § 11. "The Court of Appeals may reverse, affirm, or modify the judgment and increase or reduce the penalty imposed by the trial court, remand the case to the Regional Trial Court for new trial or retrial, or dismiss the case." *Id.*

Here, I will show that there is nothing in the Philippine legal system that prohibits the adoption of a purely symmetric appeals regime. By applying the basic rules of constitutional construction, reducing the asymmetry in appeal rights becomes a legally feasible option. Moreover, any change that will reduce asymmetry will not require a constitutional amendment, since appeal rights reform can be expediently introduced by the Supreme Court through decisions in appropriate cases or the revision of its Rules on Criminal Procedure. Thus, given the historical development of double jeopardy in the Philippines, as well as both the positive and normative justifications for a more symmetric appeals system, the current absolute asymmetry in appeal rights should at least be reconsidered.

A. The Text of the Constitution Does Not Require Asymmetry

Under the *verba legis* rule of construction, the fundamental law is applied with foremost reference to its express terms. This rule is founded on the theory that the Constitution is "not primarily a lawyer's document,"[186] and that in order to allow the people who directly ratified the basic law to keep the fundamental law always in their "consciousness[,] its language as much as possible should be understood in the sense they have in common use."[187] Since wherever possible, the words used in the Constitution must be "given their ordinary meaning except where technical terms are employed,"[188] we must first look at the text of the double jeopardy clause in the 1987 Constitution.

The relevant portion of the clause simply states that "[n]o person shall be twice put in jeopardy of punishment for the same offense."[189] The potentially contentious word, "jeopardy," simply means "the danger that an accused person is subjected to when duly put upon trial for a criminal offense."[190] This definition is consistent with the aspect of double jeopardy law that is universally applied across different jurisdictions, that is, that one may not be punished more than once for the same crime. Furthermore, as previously discussed, the choice of appeals regime is actually determined by the moment a court considers jeopardy to have been terminated, or alternatively, whether or not the trial is deemed to be just one continuous

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[186] J.M. Tuason & Co. v. Land Tenure Administration, G.R. No. 21064, 31 SCRA 413, 422-3, Feb. 18, 1970.

[187] *Id.*

[188] Francisco v. House of Representatives, G.R. No. 160261, 415 SCRA 44, 126, Nov. 10, 2003.

[189] CONST. art. III, § 21.

[190] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1213 (2002).

proceeding (or jeopardy) across the different levels of the appellate system. All these indicate that the asymmetry is not grounded on the words of the double jeopardy clause itself, and that read in its common meaning, the Constitutional provision does not *per se* prohibit appeals by the State.

We can take this analysis further and consider "jeopardy" as a technical term. Yet, even under this premise, the common and technical meaning would be the same. Consulting a legal dictionary would not yield a markedly different definition, as it describes the term as the "risk of conviction and punishment that a criminal defendant faces at trial." [191] Hence, interpreting "twice put in jeopardy of punishment" does not necessarily require courts to bar appeals from lower court acquittals.

This last conclusion is strengthened by the fact that the double jeopardy clause has already been previously construed to allow prosecutorial appeals. As earlier explained, the Philippine Supreme Court that decided the first *Kepner* case interpreted an almost identically-worded provision in the Philippine Organic Act[192] in light of the symmetric appeals regime then prevailing in the territory. The Court essentially held that the double jeopardy clause in the Organic Act did not serve as a "limitation on legislative power to provide for a proper remedy for the correction of judicial errors and mistakes"[193] through symmetric appeal rights.

That ruling would have been the law if it were not reversed by the US Supreme Court, which required that the principle be read with all the supposed protections of the common law. [194] Because, since then, the Philippine Supreme Court has itself recognized that the "umbilical cord" between these two legal systems has been cut,[195] there appears to be no reason why the Philippines should be bound by how the common law has developed in the United States. I would even argue that had the Philippine Supreme Court decided *Kepner* in the present day, its interpretation of the double jeopardy clause would have been legally sound, the same not having been subject to the common law of the United States as divined by the US Supreme Court.

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[191] BLACK'S LAW DICTIONARY 963 (10th ed., 2014).

[192] "[N]o person for the same offense shall be twice put in jeopardy of punishment; [...]" Pub. L. No. 285, 32 Stat. 691, 692 (1902), § 5.

[193] United States v. Kepner, 1 Phil. 397, 400 (1902).

[194] Kepner v. United States, 195 U.S. 100, 125 (1904).

[195] *See* Francisco v. House of Representatives, 415 SCRA 44, 126. (Citations omitted.)

B. The Intent of the Framers is Merely Persuasive

Nevertheless, one may argue that we must also refer to the deliberations of the 49-member Commission which drafted the present Constitution. This is in line with the second rule of constitutional construction, *ratio legis est anima*, which provides that "where there is ambiguity, [...] the words of the Constitution should be interpreted in accordance with the [i]ntent of its framers."[196]

Without conceding that there is an ambiguity in the text, I do acknowledge that the framers of the 1987 Constitution intended to impose an asymmetric appeals regime. This was very clear in the Record of the 1986 Constitutional Commission. When it was initially proposed to the Commission, the double jeopardy provision in the Bill of Rights expressly gave the State the right to appeal in exceptional situations, such as the manifest disregard of the evidence by the trial court and grave abuse of discretion on the part of the trial judge.[197] According to Commissioner Padilla, the change was grounded on the interest of the state to ensure the "correct and sound administration of justice[,]" to be secure against "a trial judge [who] does not act as an impartial judge for good administration of justice" and who would "acquit the accused for some extraneous reasons other than the merits of the case, perhaps, through bribery, superior order, under influence of others or for whatever reason," and the faulty reasoning of the US Supreme Court's 1904 *Kepner* ruling.

This was met by a strong opposition from Commissioner Delos Reyes, who mainly spoke about the Padilla proposal being a "radical departure from the usual concept of double jeopardy," the existence of a safeguard in the "exception" for judgments rendered in grave abuse of discretion, and the mischiefs sought to be prevented by asymmetric appeals. On the last point, he said:

> I, therefore, believe, that the mischief sought to be prevented by allowing the state to appeal due to occasional mistakes of the lower court in acquitting, perhaps, a guilty person is nothing compared to the mischief and injustice a poor accused will suffer. It will open the gates to endless appeals. It will clog the dockets of the Supreme

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[196] *Id.* at 127. (Emphasis omitted.)

[197] The proposal was worded as follows: "[...] An acquittal by a trial court is however appealable, provided that in such event the accused shall not be detained or required to put up bail." Joint Working Draft on the Bill of Rights (Resolution No. 4, as amended by the Committee, in relation to Resolution No. 84 and others), art. III, § 24.

> Court which will be hard put in determining even preliminarily the existence of a ground that the decision was manifestly against the evidence and with grave abuse of discretion.[198]

To this, the framers agreed. On the next session, Commissioner Bernas moved for an amendment of the proposed double jeopardy clause, removing the portion expressly allowing appeals by the State. While Commissioner Bernas believed that the proposal did not change the state of the law,[199] he also said that the proposal was a dangerous superfluity that could be misinterpreted by fiscals. The Bernas amendment was passed by the Commission and the Padilla proposal was abandoned.[200]

Notably, this is not the first time that such a proposal to amend the double jeopardy clause was defeated. The framers of the 1935 Constitution likewise refused a reconsideration of asymmetric appeals, even when Senator Vicente Francisco expressly sought a reinterpretation on the Convention floor.[201]

But to equate the admittedly evident intent of the unelected framers with the spirit of the law would be a mistake. Despite the persuasiveness of the "intent of the framers," the Supreme Court has in fact refused to give the same a binding character. In *Civil Liberties Union v. The Executive Secretary*, the Court famously pronounced:

> While it is permissible in this jurisdiction to consult the debates and proceedings of the constitutional convention in order to arrive at the reason and purpose of the resulting Constitution, resort thereto may be had only when other guides fail as said proceedings are powerless to vary the terms of the Constitution when the meaning is clear. Debates in the constitutional convention "are of value as showing the views of the individual members, and as indicating the reasons for their votes, but they give us no light as to the views of the large majority who did not talk, much less of the mass of our fellow citizens whose votes at the polls gave that instrument the force of fundamental law. We think it safer to construe the constitution from what appears upon its face." *The proper*

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[198] I REC. CONST. COMM'N NO. 28 (July 11, 1986).

[199] I submit that it would have, because all of the cases where the Supreme Court vacated a lower court acquittal were on *certiorari*, not on appeal.

[200] I REC. CONST. COMM'N NO. 29 (July 14, 1986).

[201] *See* Cruz, *supra* note 96, at 208.

> *interpretation therefore depends more on how it was understood by the people adopting it than in the framers' understanding thereof.*[202]

There is a more compelling reason against giving Constitutional deliberations a binding character. Arguably and as a matter of judicial policy, it is better to interpret the Constitution according to the *present* times—in favor of the people whose tacit consent gives it life—than to adhere to the understanding of its original framers. The strong originalist inclination on the part of the Supreme Court to fix the interpretation of an already rigid and inflexible Constitution onto 1986 risks rendering the basic law obsolete and incompatible with changing needs of society.[203] Thus, despite the clear intent of the framers, the same should not constrain the courts in their application of the double jeopardy clause.

Finally, the viability of this proposal is bolstered by the third and last rule of constitutional construction, *ut magis valeat quam pereat*, which requires courts to interpret the Constitution as a whole.[204] While the right against double jeopardy is one of those secured by the Bill of Rights in favor of the accused, it must be read in light of other State interests, expressly or impliedly promoted by the Constitution, including the rule of law[205] and general considerations of justice.

C. Implementation by Judicial Fiat

That the Constitution does not prohibit symmetric appeal rights in criminal cases concomitantly means that reducing the asymmetry would not require its amendment. How, then, can the system shift to greater symmetry?

The legislature can provide for symmetric appeals rights by passing a statute expressly giving courts appellate jurisdiction over appeals of convictions and acquittals in criminal cases. The problem with this mode is it will ultimately be ineffective, as the current asymmetry is not grounded on statutes. The portions of the Judiciary Reorganization Act of 1980 granting

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[202] Civil Liberties Union v. Exec. Sec., G.R. No. 83896, 194 SCRA 317, 337-8, Feb. 22, 1991. (Emphasis supplied, citations omitted.) "[R]esort thereto may be had only when other guides fail as said proceedings are powerless to vary the terms of the Constitution when the meaning is clear." *Civil Liberties Union*, 194 SCRA 317, 337. (Citations omitted.)

[203] *See* John Glenn C. Agbayani & Paolo S. Tamase, Note, *Assessing Compliance with Foreign Ownership Restrictions under Narra Nickel*, 89 PHIL. L.J. 297, 318-9 (2015).

[204] Francisco v. House of Representatives, 415 SCRA 44, 127.

[205] CONST. preamble.

criminal appellate jurisdiction to the Court of Appeals[206] and Regional Trial Courts[207] are generally worded, such that they could be construed either for or against symmetry.[208] The statutes defining the appellate jurisdiction of the Sandiganbayan[209] and the Court of Tax Appeals[210] in criminal cases are also broadly phrased.

This leads to the conclusion that asymmetry in appeal rights is a judicial creation, embodied in the decisions of the Supreme Court all the way from *Kepner*[211] and in the Rules of Court. Therefore, reducing the asymmetry also requires a judicial solution, which may take one (or both) of two forms.

First, the Supreme Court, in a proper case, can interpret the double jeopardy clause under the continuing jeopardy theory: until a case is finally decided, either by an appellate court or a lower court whose verdict has lapsed into finality, jeopardy is not terminated and an acquittal can be reversed without violating the fundamental rights of the accused. This solution is ideal if the Court does not intend to establish full symmetry. Reducing asymmetry through precedent will enable the Court to slowly carve out exceptions for those cases where barring the appeal of an acquittal is arguably most unreasonable.[212]

The difficulty with this strategy is that it is too reliant on extraneous factors. A proper case would have to be elevated to the Supreme Court, but because asymmetry has been engrafted into Philippine double jeopardy law by innumerable decisions, there is little incentive for cash-strapped State prosecutorial offices to themselves file appeals of lower court acquittals.

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[206] Over judgments of Regional Trial Courts. *See* B.P. Blg. 129 (1980), § 9, ¶ 3.

[207] Over judgments of Municipal Trial Courts. *See* B.P. Blg. 129 (1980), § 22.

[208] For instance, the appellate jurisdiction of the Regional Trial Courts is worded as follows: "*Appellate jurisdiction.* – Regional Trial Courts shall exercise appellate jurisdiction over all cases decided by Metropolitan Trial Courts, Municipal Trial Courts, and Municipal Circuit Trial Courts in their respective territorial jurisdictions. Such cases shall be decided on the basis of the entire record of the proceedings had in the court of origin and such memoranda and/or briefs as may be submitted by the parties or required by the Regional Trial Courts. The decision of the Regional Trial Courts in such cases shall be appealable by petition for review to the Court of Appeals which may give it due course only when the petition shows *prima facie* that the lower court has committed an error of fact or law that will warrant a reversal or modification of the decision or judgment sought to be reviewed." B.P. Blg. 129 (1980), § 22.

[209] Over cases decided by Regional Trial Courts, generally in anti-graft cases of lower-ranked public officers. *See* Pres. Dec. No. 1606 (1978), § 4, ¶ 7.

[210] Over cases decided by Regional Trial Courts, generally in tax evasion cases involving smaller tax liabilities. *See* Rep. Act No. 1125 (1954), *as amended*, § 7(b)(3).

[211] As reviewed and reversed by the US Supreme Court.

[212] *See infra* Pt. V.D.

Hence, a proper case might never arise. More importantly, because it would reverse prevailing doctrine, the decision would have to be rendered by the Supreme Court *en banc* in order for the same to become a precedent.[213] Certainly, reversals of otherwise long-standing doctrine are neither necessarily improper nor impossible, but it will most likely require a highly politicized, notorious, or publicized case to disturb precedent that has set in.[214]

Second, the Supreme Court can amend the Rules of Court, specifically the sections of the Rules on Criminal Procedure which implicitly ordain an asymmetric appeal rights regime.[215] This can be done by the insertion of a provision which expressly allows the State to appeal acquittals. An amendment of the Rules would allow the Court to implement immediate and widespread changes in appeal rights. Unlike in a precedent-based reinterpretation of double jeopardy, the new rule need not be read in light of the facts of the particular case, and the Court can simply and instantly decree full symmetry. But this expediency is also the disadvantage of this solution: the changes may result to instability in criminal procedure, as the prosecutorial system and the judiciary itself would have to adjust to new practical realities, whether foreseen or unforeseen.

D. Choosing the Right Amount of Symmetry

Eventually, the choice of solution would be a function of how less asymmetric the Supreme Court is willing to go, and at which pace. The first factor is the threshold consideration.

Admittedly, it would be impossible to implement full symmetry without systemic shocks. While I predicted that a symmetric appeals system would lead to docket decongestion,[216] this is a long-run outcome. Most likely, the short-term outcome of full symmetry, *ceteris paribus*, would be to further

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[213] CONST. art. VIII, § 4 (3).

[214] *See, e.g.* Belgica v. Ochoa, G.R. No. 208566, 710 SCRA 1, Nov. 19, 2013. *Belgica* reversed at least two textbook constitutional law cases—Phil. Const. Assoc. v. Enriquez, G.R. No. 113105, 235 SCRA 506, Aug. 19, 1994; Lawyers Against Monopoly & Poverty v. Sec'y of Budget & Management, G.R. No. 164987, 670 SCRA 373, Apr. 24, 2012—to declare that the then-current form of congressional pork barrel was unconstitutional. The unexpected reversal was preceded by widespread public anger over the perceived corruption of the members of Congress who allegedly channeled their pork barrel funds to shell entities masking as non-governmental organizations.

[215] *See supra* provisions cited in Pt. II.B.2.ii.

[216] Because there would be an incentive for prosecutors and defenders to build strong cases at the trial level, more invested judges would write well-formed judgments, and thus only verdicts that are clearly erroneous would be elevated on appeal.

clog court dockets as either party may now, by default, appeal judgments unfavorable to them. This is why while full symmetry is still desirable, prudent policy-making requires that it be achieved on a gradual basis and in conjunction with other systemic reforms.

The Supreme Court can begin reducing asymmetry by crafting exceptions to the bar on prosecutorial appeals through jurisprudence. It would be best to start with cases where insisting on a lower court acquittal would plainly result in injustice, such as when the accused confesses to the crime after conviction,[217] the evidence presented is manifestly disregarded by the trial court, or when convincing evidence is later discovered.[218]

These exceptions forward the societal interest of improving the accuracy of criminal verdicts. Once it becomes apparent that the system can actually accommodate a symmetric appeals regime, the Court can then shift to even less asymmetry, if not full symmetry, to promote administrative efficiency and the social utility as discussed in this paper.

CONCLUSION

The literature on double jeopardy is rife with normative arguments for and against the policy on asymmetric appeals. Ultimately, in criminal cases where the State is the plaintiff and a private individual is the criminal defendant, the policy-maker weighs two major competing interests: that of the society in ensuring accurate judgments, and that of the individual in being protected from the tyranny of the State.

In this paper, I attempted to present a positive justification for overturning the prohibition on the government's appeal of criminal acquittals, essentially arguing that the socially optimal choice is less asymmetry or complete symmetry. The positive case, taken with the normative arguments for reform, aims to seek a reconsideration of a century-old rule imposed by a foreign court and maintained despite our judicial system's independence from that legal system.

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[217] *See* Criminal Justice Act, 2003 c. 44 (U.K.), which provided this exception.

[218] Under the current Rules on Criminal Procedure, only the accused (or the court, with the consent of the accused), after his conviction, is allowed to move for retrial on the ground of newly discovered evidence. RULES OF COURT, Rule 121, § 1.

In any event, the considerations exposed in this paper, both for and against asymmetric appeals, should drive judicial policy-making in criminal and constitutional law, instead of an unexamined adoption of US principles.

The judge-centric analysis of asymmetric appeals and the particular methodology of this paper may be extended to other instances where judges are also made to select between two extreme choices when the parties before them present equally strong cases. For instance, another interesting case might be a statute that imposes heavy penalties for an offense that is amorphous or difficult to prove.[219] In the face of uncertainty, the judge can either acquit against the evidence—not unlike jury nullification—or convict to preserve the difficult legal issue.

To a law student, reducing magistrates to self-interested, risk-averse economic agents might be a small scandal. After all, we are taught to respect the bench, which is placed on a pedestal—literally in every courtroom, and figuratively in society. But even the most circumspect, impartial, and upright of judges are humans, not unlike us, who are swayed by incentives and disincentives. Grounding our analyses of the administration of justice on this reality is the first step in designing a workable and sustainable justice system.

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[219] *See, e.g.* Rep. Act No. 8049 (1995), The Philippine Anti-Hazing Law.

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