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August 21, 2010

BARGAINING WITH DOUBLE JEOPARDY

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Bargaining with Double Jeopardy

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Virtually every legal system specifies a variety of burdens of proof for different kinds of claims, and then secures each specification with another, nominally unrelated rule pertaining to relitigation. In criminal law, where a prosecutor might be required to prove guilt beyond a reasonable doubt, the prosecutor is prevented from repeatedly drawing from the urn, as it were, by the familiar and nearly universal rule of double jeopardy. Nevertheless, this Article suggests that if law were to weaken the protection, or more likely to permit the defendant to waive the double jeopardy protection, both private and social benefits might follow. The benefits derive from the notion that with a simple double jeopardy rule, the prosecutor – like most people who take a test knowing that there is no opportunity for retesting – will overinvest in preparation. This starting point also illuminates relitigation, or retesting, in other areas, far from criminal law. Thus, deficit spending by a legislature can be understood as a product of a system in which spending proposals that are rebuffed can be pushed forward again, while those that pass are often irreversible. Our focus is on the idea that a prosecutor might offer defendants the option of waiving their double jeopardy protection, in return for a reduction in prosecutorial investment in the “first” trial and perhaps other benefits. In response, innocent defendants might be more likely to accept the prosecutor’s offer, in which case there will be socially beneficial sorting of criminal defendants.

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I. INTRODUCTION

The protection against being “twice put in jeopardy” of serious punishment “for the same offense” is in uneasy equilibrium.\(^1\) It has found a resting place amidst theoretical currents and practical problems that tug in several directions. The protection could be stronger. For example, if a jury trial ends, which is to say is abandoned, after an 8-4 vote for acquittal, there is no protection for the accused, and the prosecutor is entitled to try again.\(^2\)

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\(^2\) The trial is regarded as having been aborted, with the mistrial a manifest necessity because the jury could not reach a unanimous (or other acceptable supermajority) verdict. Richardson v. United States, 468 U.S. 317 (1984) (recognizing society’s interest in giving prosecution
But the protection is also surprisingly strong. If the trial judge errs in finding that the defendant was entrapped, for instance, the defendant cannot be tried again. Such remarkable doctrinal developments, or even anomalies, normally reflect multiple aims, or clashing theories about the purpose, of law.

In this Article we suggest that by expanding the scope of inquiry beyond criminal law, and piling on the peculiarities, it is possible to see double jeopardy in a new light. The fundamental question is not (or not only) whether the defendant is sufficiently protected against the government’s power to impose burdens by repeated prosecution, but rather how to set burdens of proof in coordination with opportunities for retesting. The goal, presumably, is to get accurate results. Put this way, we can say that virtually every legal system specifies a variety of burdens of proof for different kinds of claims, and then secures each specification with another, nominally unrelated rule pertaining to relitigation. In criminal law, where a prosecutor might be required to prove guilt beyond a reasonable doubt, the prosecutor is prevented from repeatedly drawing from the urn, as it were, by the familiar and nearly universal rule of double jeopardy. Despite surprises of the kind noted above, there is predictable uniformity with regard to the core characteristics of this rule. Everywhere, even in the least protective jurisdictions, the rule prevents the government from relitigating a case where a defendant was acquitted and where no new evidence (of the original crime or of a “tainted” first trial by virtue of perjury or corruption) has materialized. Without the double jeopardy rule, the government might...
bring charges over and over again until it won.\footnote{To be clear, under existing law, supra note 2, it can try again when there is no win or loss.} “Beyond a reasonable doubt” would have a very different meaning, in both probabilistic and deontological terms, if the government could try again even when a unanimous jury found that the government failed in its first attempt to meet its burden of proof. Less robust forms of the double jeopardy protection are widespread, but in all such jurisdictions the idea of preventing repeated draws from the urn retains its force. Where the protection is stronger, as where the government may not relitigate even when significant new evidence of guilt materializes, the “repeated draw” idea is yet clearer. The strength of the protection is highlighted by the fact that it does not appear to be one of those rights that a defendant may waive. Nevertheless, one aim of this Article is to suggest that if law were to weaken the protection, or more likely to permit the defendant to waive the double jeopardy protection, both private and social benefits might follow.

There are, to be sure, other perspectives on the double jeopardy rule, and we have already hinted that double jeopardy doctrine reflects multiple goals. At least three theories stand out for their pedigree and longevity, and these have little connection to the high burden of proof required for criminal convictions. There is the notion that without the double jeopardy protection, a defendant could be unfairly harassed by the
government, or by an individual prosecutor. An accused normally suffers financially, reputationally, and emotionally; repeated prosecution for the same crime might overload even the most innocent and patient citizen. This “harassment theory,” as we might call it, differs from a “nullification theory” under which the double jeopardy rule stands guard over the power of a jury to nullify a criminal law. We prefer to think of the nullification theory as part of the repeated-draw perspective sketched above, because at its root is the danger that the prosecutor will reverse the jury’s act of nullification by appealing to a new jury and even screening recruits to that second effort. One might also regard the idea that the double jeopardy rule provides “finality” as something of a theory of the doctrine. It allows the


8 A defendant might feel harassed by a prosecutor’s ability to try the defendant again if the first trial ended in a mistrial or if there is a dismissal of the case where such dismissal does not amount to an acquittal. But if the harassment theory is understood as getting at the problem of a prosecutor’s pursuing and harassing a defendant, then the theory is not weakened, for in these cases the prosecution can hardly count on the first trial’s premature conclusion or failure to reach a conclusion.

9 See Peter Westen, supra note 7, at 1005–10 (examining the various versions of the finality theory of Double Jeopardy); Peter Westen & Richard Drubel, Toward a General Theory of Double Jeopardy, 1978 Sup. Ct. Rev. 81, 85–106 (1978) (describing the finality theory of Double Jeopardy, but noting that it is the least important of three theoretical justifications for the rule); GEORGE C. THOMAS III, DOUBLE JEOPARDY: THE HISTORY, THE LAW 14–16 (1998) (reviewing the finality theory from a procedural perspective); Peter J. Henning, Precedents
parties to allocate their resources intelligently when litigating, for it assures them that when the game is over it is truly done. If the rule were otherwise, it is mostly defendants who would be disadvantaged, so that the finality and harassment theories are related. But finality is what allows the parties to invest wisely in the first – which is to say the final – round of litigation, though, as we will see, this might not always be the optimal arrangement.

The repeated-draw perspective is by its nature more protean than
the harassment and finality theories because the former can illuminate the
two-way character of the double jeopardy rule – though it must immediately be emphasized that in most jurisdictions, and along many dimensions, it is two-way but, nevertheless, asymmetrical. If a convicted defendant could ask for another trial, and expect to be released after obtaining a single acquittal, the government would in many cases be held to something much more severe than a beyond-a-reasonable-doubt standard. It is possible that many juries or judges would weigh the same package of physical evidence, hear from an identical or even strategically varied set of witnesses, and receive comparable instructions prior to deliberation – and then all return the same guilty verdict. After all, if twelve jurors perceived no reasonable doubt, then perhaps twenty-four or one hundred and twenty jurors, assembled for two or ten trials, would all do the same. But for our purposes it is useful to assume, or imagine, that although reasonable doubt refers to the quality of the evidence, it carries over to the probability of conviction based on that evidence. Even the most passionate proponent of a double jeopardy protection would not claim that the high burden of proof means that a criminal defendant ought to be entitled to test the state’s case in repeated fashion. The defendant is widely held to have the right to appeal a conviction on a question of law (but generally then to face retrial under the new rules of the game, unless that first conviction contained in it an implicit acquittal of the new charge),10 and is in most places and

10 Although the criminal defendant does not enjoy a constitutionally protected right to appeal, see McKane v. Durston, 153 U.S. 684, 687 (1894), every U.S. state as well as the federal system provides for at least one appeal as of right following a conviction. See Charles H. Whitebread & Christopher Slobogin, Criminal Procedure: An Analysis of Cases and Concepts 810–11 (4th Ed 2000). See, e.g., NY CLS CPL § 450.10 (granting criminal defendant an appeal as of right).
circumstances entitled to a retrial when dramatic new evidence develops after the earlier trial is complete, \(^{11}\) but these rights are a far cry from the notion that a convicted defendant be allowed to try and try again for a lucky day, a sympathetic jury, or the chance that a key witness will suddenly prove unavailable. The individual right, or protection against double jeopardy, such as that found in the Fifth Amendment of the U.S. Constitution, is thus written as something the individual enjoys against an overbearing, or overeager, government, but that is in part because constitutional protections, and lists of protected individual rights, are often written in this manner and need not address “protections” in favor of the government, the majority, or parties to civil actions (or burdens of proof for that matter), whose interests are left to normal nonconstitutional lawmaker.

Finally, there is another perspective to be introduced here. It is that limitations on relitigation have something to do with whether the relevant conduct or facts are located in the past or in the future, or perhaps whether they are fixed or in flux. Part II exploits this distinction and aims to make sense of that part of double jeopardy that is or might be applicable to civil litigation, legislation, and other matters. The discussion deploys, rather than sets aside, the repeated-draw idea. Part III then incorporates the conventional harassment theory and suggests that there are situations in which defendants ought to be able to waive the double jeopardy protection. The claim is most striking for criminal law, with its stringent burden of proof, and that is where we focus our attention.

\(^{11}\) On the defendant’s ability to gain a second chance when new evidence develops, see Lissa Griffin, *The Correction of Wrongful Convictions: A Comparative Perspective*, 16 Am. U. Int’l. L. Rev. 1241 (2001) (reviewing high standard required in numerous legal systems before new trial will be granted, but making clear that in the United States the defendant can gain release or new trial based on new evidence (significant enough that no rational juror would have convicted) while the prosecution cannot try to convict a once-acquitted defendant even if there is new and compelling evidence).
II. BACKWARD AND FORWARD-LOOKING DETERMINATIONS

A. Civil Trials and other Noncriminal Law Tests

Any theory or practice of double jeopardy is usefully applied, or compared, to rules applicable to civil lawsuits, and perhaps even to those developed in private arrangements. Just as finality implies that a criminal defendant who is acquitted cannot be retried, so too plaintiffs and defendants in a civil case will know that some matters, once fully litigated, are closed. These parties might also regard themselves as harassed if the rule were otherwise, and repeated litigation were allowed.\(^\text{12}\)

One obvious way to test the limits and utility of this comparison is to explore situations where repeat litigation, or simply evaluation, is permitted.\(^\text{13}\) Many licensing schemes incorporate examinations, and most of these permit retesting.\(^\text{14}\) Thus, A may fail a road test for a driver’s license, a

\(^\text{12}\) It is difficult to generalize about repeated draws in civil litigation. Preclusion rules obviously limit repeated draws, but there are certainly cases where a plaintiff is not precluded from going after a second defendant after losing to a first. We could say that no defendant is subject to repeated draws, and that the expected value associated with suing defendants separately or in one swoop is the same except in those cases where law asymmetrically creates precedent or where plaintiff gains by testing various strategies against separate defendants, and thus benefits by bringing test cases.

\(^\text{13}\) We know to look where the formal double jeopardy rule is inapplicable but we do not know whether to look where the burden of proof, or standard, is particularly high or low. Consider, for example, whether the test to begin training as a fighter pilot is likely to be final, or capable of “relitigation.” The burden of proof, or standard, is likely to be high. But one can imagine a system where the test is impossibly difficult and applicants can retake it until they pass, even as another system might set the bar a bit lower but allow one test per applicant. Among other things, the different designs might reflect a difference in the costs of test development. But in this example the burden of proof is part of the design, while in most criminal law systems, the “beyond a reasonable doubt” or comparable standard is exogenously supplied.

\(^\text{14}\) The College Board reports that at least half of the students taking the SAT (Scholastic Aptitude Test) take it twice. The College Board allows students to send their best combined scores to colleges. See The College Board, WHEN TO TAKE THE TEST, http://sat.collegeboard.com/register/when-to-take-sat (last visited Apr 16, 2010). Prospective law students may take the LSAT (Law School Admissions Test) up to three times within two years, and schools can report to the American Bar Association the highest of these scores, if they choose to do so. See Law School Admissions Council, “Frequently Asked Questions,” online at http://www.lsac.org/aboutlsac/faqs-and-support-lsat.asp#test-repeats (visited Apr
pilot’s licensing exam, a vehicle safety check, a bar exam, or the requirements of securities law and, in each of these settings, re-application and retesting is permitted. In some circumstances or jurisdictions there is, in the end, a limit to the retesting; in some there are waiting periods before one can be retested; and here and there one must disclose prior failures and perhaps be subject to stricter review (though this is more common in private markets than in public law).

The harassment and nullification theories, in particular, suggest that there is little to learn about criminal law and procedure from the presence or absence of “double jeopardy” in licensing or other test situations. In criminal cases, the government can impose costs on defendants, and the double jeopardy protection controls the government’s behavior and the accused’s costs. There is neither a comparable losing party nor a special value associated with finality in the licensing arena. But the idea of the repeated draw, and its interaction with the burden of proof, does connect double jeopardy in criminal cases with the question of second chances where tests and licenses are concerned.

In the overwhelming majority of circumstances, it must be noted, there is nothing equivalent to a protection against double jeopardy. One obvious explanation for this difference between criminal trials and licensing

16, 2010). In California, applicants for a driver’s license can take the written test up to three times. See California Department of Motor Vehicles, DRIVERS LICENSE AND IDENTIFICATION (ID) CARD INFORMATION, http://www.dmv.ca.gov/dl/dl_info.htm#2500 (last visited Apr 16, 2010). Medical Students who fail the United States Medical Licensing Examination (“the boards”) may retake them, but students may not retake the boards simply to improve their score. See United States Medical Licensing Examination, USMLE BULLETIN – ELIGIBILITY (2008), http://www.usmle.org/General_Information/bulletin/2008/eligibility.html#tl (last visited Apr 16, 2010). For an example of a waiting period between attempts, candidates seeking to become a Certified Public Accountant must take four separate exams. Each exam may be repeated in the event of failure, although not within a two-month testing window. See American Institute of Certified Public Accountants, THE UNIFORM CPA EXAMINATION CANDIDATE BULLETIN (2010), http://www.nasba.org/nasba/web/NASBAWeb.nsf/FNAL/CandidateBulletin?opendocument (last visited May 9, 2010).


16 For example, university applicants are asked about prior applications.
tests is that the more liberal rules allow for learning and improvement between tests; the point is not to refine or stabilize a burden of proof. Indeed, in some of these cases there is periodic retesting of those who are licensed, and so perhaps a kind of symmetry. When this is combined with a requirement of continuing education we perceive an attempt to monitor and encourage the acquisition of a proficiency and the ability to perform well in the near future. In contrast, most criminal trials aim to determine whether a defendant violated a law in the past; the inquiry concerns a relatively fixed situation. The jury is not asked about the defendant’s current or likely future behavior. Deterrence (for others) or retribution, perhaps, looks to past behavior. In contrast, licensing regimes appraise future behavior or capability. Still, there is something to be learned from licensing exams that may be taken multiple times. To the extent that a test contains a random element, or some subjective judging, the repeat test-taker will in the end face a lower standard than one who is limited to one testing opportunity. In turn, the testing authority can make the test more difficult in order to recalibrate the effective passing score, or standard for licensing.

Why would a licensing authority prefer multiple test-taking with a higher passing score over a single test with a lower passing grade? The latter saves transaction costs and would seem preferable. A practical answer is that the ability to re-test reduces the political and other costs associated with a single-chance regime in which claimants will expend resources in order to show that there was something awry with the single test or with their capacity for test-taking at the set time. These costs are avoided when the disappointed test-taker can simply be told to submit to retesting. There is also the likelihood that false positive and negatives are not equally weighted, and that the test’s imperfections cause us to prefer a system in which there is retesting even though this will bring about the

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17 There are certainly many civil trials in which part of the inquiry is directed toward the future, as when a court estimates plaintiff’s tort damages without full knowledge of the recovery from injuries or of future employment. Finality trumps accuracy. At other times, courts are forward looking but there is no promise of finality, as when courts are asked to assess future consequences and decide whether to issue injunctions.

18 Of course, if the decisionmaker profits from administering the test, as is the case for many standardized exams used for admission to colleges and university programs, then we should expect multiple test-taking to be encouraged by a “policy” that encourages the use of the highest score or the average score across multiple exams. Some constituents will like these policies because they, in turn, will be able to report “higher” scores.
licensing or acceptance of applicants who would fail a perfect test. Indeed, when the error costs are the other way around, and false positives are perceived as costly, the licensing authority may require the test-taker to pass repeatedly, or an employer might require a series of interviewers to approve a job candidate.

Trials are more expensive and detailed than most conventional tests. Indeed, when a test is long, costly, and individualized, and thus more like a trial, retesting is usually disallowed. For example, high schools do not allow students to repeat a year or two of high school in order to improve—or make more accurate—their grades. Nor would we expect colleges to take seriously grades earned by a repeating student. Similarly, an employer that engages in a day-long set of interviews with a candidate for employment, and then rejects the applicant, rarely calls back that candidate for another interview, even or especially in a subsequent employment season.\footnote{There are exceptions. A fanciful but interesting example is that voters are sometimes willing to consider candidates for high office even when these aspirants have been inspected and rejected in previous elections.}

The first of these cases is normally, and perhaps correctly, understood as a means of ensuring that high school students compete for grades with similarly situated classmates. But the larger story is about the cost of evaluation and the potential for improvement. A college will often admit a previously rejected applicant after that candidate takes a year or two to improve his or her skills. The college, like a typical motor vehicle bureau, is looking for evidence of likely future behavior and accomplishments. A criminal trial does not do so. In the case of the employer, the months spent elsewhere are unlikely to change the character, problem-solving ability, or fit with teammates that the employer observed earlier, and at sufficient length.

Little thus far distinguishes civil trials from criminal trials. And indeed the law of issue preclusion and claim preclusion, in the United States and elsewhere, reflects many of the values that have been ascribed to the law of double jeopardy.\footnote{See Anne Bowen Poulin, Double Jeopardy Protection from Successive Prosecution: A Proposed Approach, 92 Geo. L.J. 1185, 1250–51 (2003-4) (comparing double jeopardy to \textit{res judicata} in civil trials); Comment, \textit{Twice in Jeopardy}, 75 Yale L.J. 262, 296–99 (1965) (same).} There are the ideas of finality and nonharassment of private litigants (and in the civil context also that of
conserving judicial resources), while ensuring that affected parties had the opportunity to participate in earlier cases that will – in any way or in every way – be binding on them. A more sophisticated version of the idea would emphasize that these parties should have enough information about future preclusion (or not) in order to participate in and invest optimally in those early cases. Very little depends on the claim that double jeopardy and issue or claim preclusion are two sides of the same coin. Thus, we do not maintain that a jurisdiction with a relatively strong double jeopardy protection will also be one with relatively strong preclusion rules. Both calculations may reflect the harassment and the finality theories, but only one will reflect the nullification idea and, in any event, a stronger or weaker double jeopardy rule may be a function of the real burden of proof that the jurisdiction seeks to maintain in disparate areas of law. Moreover, to the extent that these rules reflect the repeated-draw notion, they need not track one another because, once again, the burden of proof is chosen deliberately in civil and criminal law and might vary across jurisdictions.

The utility of the repeated draw idea as applied to preclusion rules, might extend to a comparison of jurisdictions. Where the British Rule regarding litigation costs is in effect, a private litigant who loses in one case will be less inclined to relitigate than will one where each side bears its own costs.²¹ After all, the loss at trial provides information and probably causes the losing party to revise downward its estimate of the likelihood of a better result in the next draw. This is simply another way of saying that an alternative to double jeopardy is a rule that imposes an extra cost on any loser who seeks to try again. The conventional double jeopardy rule in criminal law represents something of an extreme version in which the “cost” is prohibitive. The discussion in Part III considers other cost structures.

We have suggested that double jeopardy applies with greatest force and consistency to questions about past facts, or unchanging situations. The prosecutor and the defendant, following some preliminary hearings and inquiries, get one full-scale trial to determine as best possible whether the defendant really did, to pick one example, rob a convenience store a year

²¹ See John J. Donohue III, Opting for the British Rule, Or If Posner and Shavell Can't Remember the Coase Theorem, Who Will?, 104 HARV. L. REV. 1093 (1991) (detailing the incentives created by the British rule – but not addressing incentives where second chances are permitted).
ago. The burden of proof emphasizes the importance of the single trial and encourages the government to be selective in its prosecutions and to invest heavily when it proceeds with cases. In contrast, a candidate who takes a driving test or sits for a standardized exam before applying to college or law school, knows that if the “trial” results are disappointing, the test can be retaken. In the case of the driving test, the government is bound, at least for a while, if the test is passed, but the applicant is merely inconvenienced by a failure. There is, of course, a cost to retesting and this encourages the applicant to improve his or her skills before testing again. The test is forward looking and the circumstances are capable of changing. Standardized exams for university study are not particularly “forward looking,” and indeed applicants are encouraged to believe that further study will not significantly improve scores. One who retakes the test thus draws again from the urn, though the schools that evaluate the applicants are free to discount scores because of the repeated draws. It is probably fair to say that one or two returns to the urn are conventionally accepted in order to reduce the transaction costs associated with evaluating claims that a single test was not representative, as it might be if marred by illness or conditions at the testing center.

When backward-looking inquiries afford the opportunity for repeated draws, it is apparent that the test-taker can conserve resources. But it is a mistake to think that criminal law consistently protects defendants by forbidding the government second chances – and thus the opportunity to conserve law-enforcement resources. For example, when the government fails in an effort to detain a suspect or to obtain a search warrant, it is free to try again. It will normally invest more in support if its request, inasmuch as it has learned that its previous claim for detention or search was insufficiently supported by the evidence. The prosecutor is even free to impanel another grand jury when an indictment was not returned on the first try. And of course a prisoner can seek parole even if parole was

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23 See Andrew D. Leipold, Why Grand Juries Do Not (and Cannot) Protect the Accused, 80 Cornell L. Rev. 260, 266-67 n.30 (1994) (noting that because jeopardy is said not to attach at the indictment stage, the government can continue to prosecute the suspect for the same
previously denied.\textsuperscript{24} It is apparent that a single-chance, or strict double jeopardy, rule reduces the cost of testing itself, but can increase the cost of a party’s preparation for the test. And when the question is whether to draw again, or repeat the test, in a forward-looking inquiry, there is the added possibility of changed circumstances or improvements. We return to preparation costs and the question of overinvestment in Part III.

\textit{B. Legislation: Irreversibility, Deficits, and Retroactivity}

The past-future, or fixed-flux, distinction is most useful when we turn to the legislative chamber. Many pieces of legislation are renewed or simply take on a life of their own, and we might think of these as cases where legislators regard themselves as bound by something like precedent. It is conventional to say that this influence of the past comes from political pressure or sunk costs rather than some legal requirement, but of course the political pressure might come from the same kind of reliance or expectations that motivate stare decisis within the judiciary. In any event, the most interesting cases are those where an interest group has lost in legislatures past. If, for example, the losing proposal was that a new bridge be built, then we might understand reconsideration in one legislative session after another as sometimes efficient or sensible because population or technological changes might make the proposed bridge a better or worse investment than it was in the past. If after several tries the bridge is approved and funds are appropriated, it is plausible that the cost-benefit calculus has simply changed. But what if there is legislative approval but no such cost-benefit change after the proposal was repeatedly rejected in previous legislative sessions? Perhaps elections have brought a different coalition of political groups into power, and in that case the question is why this repeated draw of the urn should be tolerated with respect to legislation regarding bridge-building, charter schools, or airbags, for example, but not with respect to criminal cases, or even most civil litigation? The contrast is most interesting where the change is essentially irreversible. Airbag

crime by seeking another indictment after no indictment bill was returned by the grand jury); United States v. Williams, 112 S. Ct. 1735, 1743 (1992); United States v. Thompson, 251 U.S. 407, 413-14 (1920); United States v. Pabian, 704 F.2d 1533, 1533-1537 (11th Cir. 1983).

requirements are easily reversed, but that example drives home the importance of new evidence— and of course many legal systems also dispense with the double jeopardy protection in criminal law when there is important new evidence. The bridge, however, may have been proposed and rejected five times, but once it is approved and built it will be pointless to tear it down. There may be new evidence, but a repeated-draw theory troubles the skeptic. Moreover, there may be interest groups for and against the bridge, and when the bridge is finally approved, we may look back and describe the opponents as worn down and harassed, much as the leading theory of double jeopardy in the criminal law is concerned with the harassment of a disfavored citizen by a powerful government. We might defend or rationalize the judicial-legislative distinction with the observation that the criminal law protection is an individual protection. Put differently, normal legislation is not only prospective but also broad; potentially impacted groups are meant to protect themselves in the political arena. It is true that groups are sometimes involved in litigation but, where this is so, preclusion rules are in fact often less robust.  

The distinction is more troubling from the perspective of the repeated-draw theory. It is possible that the bridge is no better or worse an investment than it was in the past, but that there is variability in outcomes because different representatives are in the legislative chamber at a given moment, because personal favors or animosities rain on the legislative process, or because unexpected tax revenues or failures in other projects suddenly make a bridge seem like a good or bad idea. A hyper-rational and experienced legislature might take all these things into account, so that the result should be the same no matter how many times a proposal is brought to the floor. But of course in reality no legislature is so farsighted and rational, and it can only be advantageous to have one’s proposal, if rejected, repeatedly come before the legislature.

We speculate that the absence of a double-jeopardy-like rule in the legislative arena is an important cause of government deficits. After all, proposals to cut or to avoid spending might only defer projects; proposals to

25 Where legislation is reversible, the repeated draw “problem” is symmetrical; interest groups on both sides can try again, and in a sense the burden of proof does not change. In criminal cases, if repeat draws were permitted, the burden of proof necessarily changes, especially if we think that new evidence appears in a proportion different from the required burden of proof.
spend are in some sense irreversible, as we have seen. If proposals, defined in some way, could be voted on only once, government spending would surely be lower. At the same time, and in anticipation of Part III, it should be noted that if there were such a single-consideration rule for legislation, then proponents of a project would work much harder for its passage the first, and only, time around. Defeat would, after all, be fatal. Opponents might also invest more, whereas under current law they know that they should conserve resources because if they succeed in defeating the bridge proposal the first time, they might need to battle again at a future date. The important point is that a double-jeopardy-like rule can lead to more investment in the first vote, or trial, by one or both sides. With this in mind, it is easy to see that the parties might wish they could agree to change the rules of the game in order to reduce the need to invest in the first time period.

As a positive matter, there is of course no single-consideration rule running from one legislative session to another.\(^\text{26}\) Here too we might say that because it is sufficiently likely that there will be changed circumstances – flux rather than fixity – no legislative system is designed with a double jeopardy-like rule. In contrast, but trivially, it is common to have such restrictions within a single legislative session, though these are often easy to circumvent by redesigning the bill in question. While the constraint is normally explained as a control on cycling (for otherwise votes might never come to a close), we can also see a single-consideration rule as reflecting the idea that there has not been enough time to entertain the possibility of new evidence or changed circumstances. We do not expect to find a motor vehicle bureau, or an academic department administering comprehensive examinations, permitting a test-taker to return many times in one day until he or she passes. To do so would be to absorb the cost of the repeated draw from the urn – and thus higher test administration costs along with a changed standard – without the benefit of learning and improvement. In

\(^{26}\) The argument in the text does not require a discussion of the rules for reconsideration within a legislative session. In most legislative assemblies, one who has voted with the prevailing side can, within a short period of time, ask that it be reconsidered. But once that window is closed, reconsideration requires a considerable supermajority. See Saul Levmore, *Parliamentary Law, Majority Decisionmaking, and the Voting Paradox*, 75 Va. L. Rev. 971, 1022 (1989) (noting and offering explanation for hurdles to reconsideration). An underlying problem is that it is difficult to define a proposal or bill that cannot be voted on twice; defining “same offense” in the criminal law context is also difficult but more manageable.
contrast, from one legislative session to another circumstances are likely to have changed and new representatives elected; any other rule would also raise the problem of strategic votes in order to bind future legislatures.

In this light, let us return to the modest claim that there is something to the fixed-flux distinction, and in particular to the difference between a trial about facts rooted in the past and one that aims to test skills or otherwise look forward. Imagine that a group asks the legislature for payments for a past wrong it suffered. Perhaps persons with disabilities ask for compensation for years in the past when buildings were not required to be accessible in the manner they are at present. Imagine next a proposal to require landlords who complied with past law to pay a kind of tax for the failure to anticipate present building codes – so that the revenues received might be used to pay those who ask for reparations. In most legal systems such legislation is permissible but unusual. In the U.S., for example, ex post facto criminal laws are constitutionally prohibited but explicitly retroactive civil legislation is decried but normally permitted. There are two points to be made here, as they relate to the larger topic of double jeopardy. First, the hostility to – even if it is not the unconstitutionality of – retroactive legislation may reflect the problem of repeated draws. If the persons seeking payment eventually win, it may be not because of any new evidence, or changed cost-benefit analysis, but rather because of the advantages of multiple draws. There is a weak claim with respect to learning over time, but for the most part the facts are fixed. The repeated-draw point is even stronger if the aim or remedy involves a burden on landlords, rather than the public fisc, because this group must then defend itself against the harassment of multiple claims. The spirit of double jeopardy, stronger for an identifiable group (though not as strong as it would be for a single individual), might in this way be reflected in the antipathy with which most (patently) retroactive legislation is regarded.

The second point is something of a restatement of the first but focuses on repeated draws at two different urns, in a manner of speaking. Retroactive legislation runs the risk of undoing preclusion rules within the judicial system. In the criminal law arena this is blocked by the “fact” or convention that the legislature does not directly impose criminal penalties on individuals. But in the civil context, a disappointed litigant can go to the legislature and try to undo an unfavorable court decision. Thus, today’s superfund payments may come from one who won a previous lawsuit and was absolved of liability for dumping a waste product. The easy response to this apparent unfairness is, again, that legislation normally applies to
groups, and groups are left to fend for themselves and have no double jeopardy protection. Of course, that solution is a weak one because preclusion rules in civil law do apply through class actions and other means of coordinating groups. We do not advance a normative view of the difficult questions that arise when individual litigants try to reverse judicial results in the legislature. A plaintiff who fails to get money damages from a defendant will normally not succeed in gaining at the expense of that very landlord through post-trial legislation. A litigant who failed to get a court to force his landlord to provide a disability accommodation, and failed to gain damages for the injury suffered in the absence of that accommodation, might succeed in gaining a new legislative mandate applicable to all landlords, and may even succeed in gaining retroactive compensation, but it would be most unusual to gain recovery at the expense of the once-victorious landlord. The spirit of double jeopardy, the idea behind the harassment theory, and the problem of repeated draws will combine to protect this landlord.

III. OPTING OUT OF DOUBLE JEOPARDY

A. Overinvestment with a Double Jeopardy Rule

In the criminal law, we can think of the double jeopardy protection as a restriction on the prosecution. Without the protection, the prosecution might harass the defendant, it might seek to benefit from repeated draws, and it might try to undo an acquittal that reflected jury nullification. In the absence of the protection, no “finality” would attach to an acquittal. The familiar rule, giving the prosecutor just one chance, responds to all these issues. Even if the prosecutor means not to harass the defendant, but instead responds to an assessment that the first jury (or judge) was wrong, or that key witnesses had been unavailable or unusually flustered during the first trial, it is arguable that to allow a second trial imposes a serious burden on the defendant. The argument is strongest if the prosecutor’s motives are questionable, or simply not perfectly aligned with the public good, but either way the defendant seems burdened by any relaxation of the double jeopardy rule. In this Part we advance the idea that this is not necessarily so, and then develop the case for giving the prosecutor a “second chance” in certain situations. The key step in the argument is that when the prosecutor
is limited to a single chance, the prosecutor has an incentive to invest more in the first and only trial.\textsuperscript{27} A prosecutor who knows she has two chances, and has limited resources, will often invest less in the first trial, and this can benefit some defendants, who might therefore willingly give up the double jeopardy protection if put to a choice in advance of any trial.\textsuperscript{28}

One way to think about this idea is to refer again to conventional testing, or licensing. If applicants were limited to one driving test or one bar exam, it is easy to imagine much greater investments in test preparation. It is difficult to prove that such preparation is inefficient, but we rely on readers to share the intuition that such is the case. Similarly, the prosecutor may overinvest in a world with the double jeopardy protection. Of course, the burden of a second trial imposes costs on the prosecutor and the defendant, and there is no counterpart to the latter’s costs in the world of large-scale testing. Once the matter is framed as one of overinvestment in a single trial, or test, there arises the question whether it is not also true that the defendant will overinvest. A defendant who can try again after a

\textsuperscript{27} Cf. Vikramaditya S. Khanna, \textit{Double Jeopardy’s Asymmetric Appeal Rights: What Purpose do They Serve?}, 82 B.U. L. Rev. 341 (2002) (discussing the asymmetric appeal rights of defendants and prosecution – unlike parties in civil litigation – as one important consequence of the double jeopardy protection, and developing the argument that when there is no right of appeal available to the prosecution, the prosecution can invest more in the first and only trial, often to ill effect). \textit{See also} David S. Rudstein, \textit{Retrying the Acquitted in England, Part I: The Exception to the Rule Against Double Jeopardy for “New and Compelling Evidence,”} 8 San Diego Int’l L. J. 387 (2006-7), for the argument that the double jeopardy rule encourages investment in the first and only trial. We argue that this is an overinvestment. For the argument that the asymmetric appeal rights affect the development of criminal procedure and evidence, \textit{see} Kate Stith, \textit{The Risk of Legal Error in Criminal Cases: Some Consequences of the Asymmetry in the Right to Appeal}, 57 U. Chi. L. Rev. 1 (1990).

\textsuperscript{28} There are imperfect and misleading analogies to be avoided. Thus, a general is unlikely to throw all the resources at his disposal into the first battle, but there the enemy might prefer that the general do so. An important difference is that the defendant in a criminal trial might be innocent, and might think that the prosecutor will reassess her own estimation of that likelihood as a result of the first trial – or even as a result of the defendant’s preferring to give up the right to a single battle for victory or defeat.

We should again emphasize that even in the United States, with a fairly strong double jeopardy protection, the prosecutor gets a second chance in the event of a mistrial. But inasmuch as judges encourage juries rather strongly to reach verdicts, and not to deadlock, it seems fair to simplify the discussion and assume that the prosecutor does not deploy resources so as to take advantage of deadlocks and the opportunity to re-try the defendant.
conviction will also invest less in the first trial; this, in turn, might benefit
the prosecutor who might therefore also prefer some scheme where the first
trial is not all-important. 29 In its simplest form, this approach is less
interesting than the asymmetrical one because it simply suggests that parties
to a trial might prefer some pre-trial exercise in order to encourage
settlement or inform their own trial strategy. Even parties to a criminal trial
are already free to engage in such nonbinding exercises, and so we do not
dwell on them here. Moreover, the asymmetrical burden of proof in
criminal law suggests the asymmetric relaxation of the double jeopardy
rule. If conviction required only the preponderance of the evidence, we
would be back in the symmetrical world of civil trials. 30 The double
jeopardy rule is more interesting where it interacts with an asymmetric
standard of proof, as it does in criminal law. For the most part, we proceed
with the asymmetric situation, and the idea of a second chance after
acquittal – but not after conviction – for the reasons just noted, and then
also because we intend to exploit the idea of some sorting between guilty
and innocent defendants. 31 In the end, however, the analysis offered here
can incorporate the symmetrical case and the desire of a defendant to avoid
overinvesting in the first trial. It does so by allowing for the possibility that
the defendant can require the prosecutor to switch to a second-chance
regime, with the defendant running the risk of a second trial in return for
the value of sending a kind of signal or (the expectation of) a lower initial
investment by the prosecutor.

29 Cf. Omri Ben-Shahar, Legal Durability, 1 REV. L. ECON. 1, 15 (2005) (arguing that there
is a tradeoff between “durability,” or the stability of legal allocations, and costs especially
when viewed properly from an ex ante perspective). Double jeopardy is, in this sense, a
durable rule, because acquittals are final, but one must take into account the initial
investments, or costs to the parties, in producing the single trial result.

30 There are, of course, other differences. The civil trial will, in many jurisdictions, generate
a winner by a supermajority vote, while the criminal trial, in most places, requires
unanimity. We try in this Article not to vary this rule (as by offering the defendant a deal in
which a greater supermajority is required in a second trial) in order to retain the possibility
that every trial is held before a judge sitting without a jury (usually because the defendant
opts for that method and the prosecution does not veto this waiver of the right to a jury trial).
See infra note 57.

31 There is, of course, the possibility of jury deadlock in the first trial. A defendant might
adopt a strategy that tries to convince a minority of jurors to hold out for acquittal, knowing
that prosecutors are often loathe to invest in a second trial when the first has ended in a
mistrial.
B. Alternatives to Double Jeopardy

The weaker the double jeopardy protection, the less likely or less serious the prosecutor’s overinvestment. We can think of some legal systems as adjusting the protection in order to achieve a desired balance. Thus, the prosecutor might be allowed to bring the defendant to a second trial if new evidence emerges; this development seems more likely where criminal defendants are permitted to return to trial when new evidence in their favor materializes.\(^{32}\) The rule, or rules, can lead to protracted litigation because there is something of a mini-trial needed to determine whether there is truly new evidence or the losing party is simply seeking a second draw from the urn. Still, the more new evidence allows the prosecutor a second chance, the more the prosecutor (along with the police) can relax her investigation, if not overall effort, in the first round. Another strategy would be to allow the prosecutor to appeal a trial judge’s acquittal decision regarding such things as entrapment or jury instructions – and then re-try the once-acquitted defendant if the appellate court finds serious error on the trial court’s part. This is hardly a novel suggestion,\(^ {33}\) and we do not pursue it here as an alternative to current double jeopardy law, because it bears little relation to the problem of overinvestment in the first trial. Even if – as is the case in several countries\(^ {34}\) – the prosecutor can appeal all legal decisions raised at a trial that acquitted the defendant, the investment in the initial trial is unlikely to change because successful appeals will be rare and unknowable at the time of the investment decision.

\(^{32}\) See supra notes 1, 27 (noting English law). New and compelling evidence may, of course, be a good reason to modify the double jeopardy protection everywhere. For present purposes, the best examples are ones where the evidence might have been discovered if the prosecution (and police) had invested more resources in the first trial. Current law (outside the United States) is more interested in whether the government did all it could to develop its case for the first trial. If not, the government gets little sympathy when it wishes to impose a second round of costs on defendant. Our approach is to ask instead whether all or most parties might gain by discouraging the government from trying so hard the first time around.

\(^{33}\) See Akhil Reed Amar, Double Jeopardy Made Simple, 106 Yale L.J. 1807, 1841 (1997) (arguing that appellate court ought to be able to review errors and regard the double jeopardy protection as protecting a “suitably error-free result” once reached).

\(^{34}\) In Canada, the prosecution may appeal “against a judgment or verdict of acquittal of a trial court in proceedings by indictment of any ground of appeal that involves a question of law.” See K.N. Chandresekharan Pillai, Double Jeopardy Protection: A Comparative Approach 292–94 (1988). The prosecution enjoys a similarly wide right of appeal in India. Id. at 309–12.
A stronger strategy for reducing prosecutorial overinvestment would be, rather simply, to give the prosecutor a second chance. It is of course difficult, at least in the United States, to compensate with any increase in the burden of proof, unless perhaps jury size were to be increased. But the discussion in Part II suggests that giving the government a second chance is unlikely to be the strategy, or rule, anywhere or anytime. After all, it is nearly equivalent to a single-chance rule with a lower standard for conviction, and that would certainly be unacceptable. More generally, when a test is inexpensive to administer and forward looking, multiple chances are to be expected. But when it is backward looking, we expect a single test, especially where testing is expensive, because multiple tests appear to be the equivalent of (inefficiently) reducing the passing grade. The double jeopardy protection in criminal law thus fits the general pattern of testing and retesting. Yet it remains the case that a single test might inefficiently raise investment in preparation. If only one “side” prepares, as in a bar exam, then multiple chances seem right. If both sides bear significant costs, as in a trial, the best approach is likely unknowable, or at least is not the same in all cases.

In this Article we do not advocate any means of directly weakening the double jeopardy protection in order to reduce overinvestment in the first trial; we suggest instead modest and consensual change. We contemplate a rule under which prosecutors can choose when to offer defendants the “right” to waive the double jeopardy protection and thus provide the prosecution with the option of a second chance. Defendants might do this when they think that the prosecutor will then invest less in the first trial and

35 Of course, double jeopardy law could also be more protective of the defendant. The Double Jeopardy Clause might have been read to mean that the prosecutor has one chance to convict; even an 11-1 vote in favor of conviction would preclude the prosecutor from trying again. In such a system, the prosecutor would invest yet more in the first trial. Inasmuch as we attempt in this Article to develop a serious proposal, or experiment, for dealing with the overinvestment problem, we use the baseline of current double jeopardy law, and devote no serious effort to strengthening the protection. But note that some means of strengthening the protection are better than others because they are less likely to exacerbate the overinvestment problem. For example, mistrials and certainly errors by the trial judge could trigger the double jeopardy protection without giving the prosecutor much to count on.

36 When put this way it does not matter whether the prosecutor offers the deal or it is simply always available, because there is no promise of payment – just the expectation of less investment in the first trial.
– if that trial ends in acquittal – choose not to proceed to a second trial, perhaps because the defendant now appears more likely to be innocent. Defendants might waive the familiar protection more often if the prosecutor offered or was required to pay something for the option, perhaps in the form of a higher standard for conviction in either or both trials, or a lesser punishment in the event of conviction. Alternatively, the rule might be that the defendant can agree that the prosecutor can try again after acquittal only if a magistrate or other decisionmaker certifies that there is new evidence that was not presented at the first trial. Of course, the less the prosecutor invests in the first trial, the more likely it is that there will be such new evidence for a second. Finally, we might also imagine a scheme in which the prosecutor has no choice but the defendant can always relinquish his protection and thus “impose” a second chance regime on the government. This is equivalent to a rule in which the prosecutor must always offer the defendant the option of giving up the protection.37

In short, assuming we continue with the idea that the familiar protection is normally the defendant’s to keep or relinquish, there are at least four interesting kinds of second-chance agreements: an option that the defendant can require,38 an option that the prosecution offers when so inclined, an option to try again if there is new evidence, and an option to try again upon payment to the defendant – in the form of money that the defendant might spend to offset the costs of trial or harassment, a tougher standard for conviction in the second trial or in both trials,39 or reduced punishment in the event of conviction. These four types of second-chance agreements will seem increasingly attractive to defendants – though many defendants would surely reject all these offers or options, even if some

37 Readers who think that prosecutors do not sufficiently protect the interests of victims might analyze these alternatives differently.

38 One reason to put the decision in defendant’s hands goes to the heart of the harassment theory. Some defendants, perhaps politicians whose careers are legally or practically disabled by the shadow of prosecution, want speedier trials than law provides. If we think that prosecutors have strategic or political reasons for disabling these defendants, then it is easy to build the case for an option in defendant’s hands – if that encourages the prosecutor to proceed more quickly with the first trial. It is likely, however, that a better solution to this problem, if it is that, is a stronger requirement for speedy prosecution.

might accept all of them. As a normative matter, it may already be clear that it is difficult to favor one of these options over the others without knowing the unknowable, namely the decisionmaking process of the prosecutor, or what the prosecutor “maximizes.”40 We do not, therefore, try to convince readers that the double jeopardy protection should be repealed or seriously weakened; we concentrate on the idea that it be modified so as to be waivable, and we proceed to investigate the notion that prosecutors and some defendants may be willing to proceed to trial with an agreement that a conviction is final but an acquittal is not.

C. The Benefit of an Alternative to the Double Jeopardy Rule

At first blush, a system with a second chance for the prosecution will produce a higher conviction rate, much as it is easier to get a license if an applicant has two chances to pass a test of given difficulty. The prosecutor’s preference for a second-chance rule seems obvious. If the prosecution has limited resources this preference is yet clearer. But as we will see, the assumption of limited resources suggests why even defendants might prefer to give two chances. The key is to see that the system can conserve resources by investing less in first trials; the savings can then, in one way or another, be shared with defendants as a group.

Imagine then a world where the double jeopardy protection can be waived, or simply where there is no such protection, and where the prosecutor has a $1 million budget.41 If many defendants have waived the protection (or if there is none), a prosecutor who might have invested $10,000 in each of 100 cases with double jeopardy protection, might now invest $7,000 per case, bring ten more cases (we can imagine a supply curve of increasingly difficult cases but there is no need for that here) and

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40 Khanna, supra note 27, at 361, n.89, gathers and incorporates a variety of theories about prosecutors’ goals. See generally William M Landes, An Economic Analysis of the Courts, 14 J. L. ECON. 61 (1971) (modeling behavior of prosecutors and defendants and considering their resources, length of sentence, probability of conviction, and deterrence interests); Frank H. Easterbrook, Criminal Procedure as a Market System, 12 J. LEG. STUD. 289 (1983) (suggesting that prosecutors, operating with great discretion, maximize their returns within budget constraints, while legal rules squeeze maximum deterrence out of their budgets).

41 The assumption of a fixed budget for the prosecutor simplifies much of the analysis. If we were to complicate things we could posit a budget-maximizing prosecutor, who sought to increase the rate or number of convictions in order to generate a larger budget.
reserve $230,000 for second trials deemed worth bringing. Perhaps the prosecutor now loses 30 out of 110 cases, and under the single trial rule would have lost 15 of 100. The lower success rate reflects not the greater number of trials but the smaller investments in first trials. The prosecutor might now choose to try again in one-half the lost cases, and she can afford $15,000 for each of those second trials. If she wins 10 of these 15, or two-thirds of the second trials (a rate which might reflect learning from the first trial plus the much greater investment in the second trials pursued), she emerges with 90 convictions (80+10) in this second-chance regime, instead of 85 under the single-chance rule. Of course, the prosecutor need not invest equally in all of the cases pursued in each round. The point is simply that each second-chance agreement allows the prosecutor to invest less in first trials, and then to choose how to allocate the savings between new cases and heavier expenditures in some seconds.

These numbers are, of course, illustrative. The conclusion, however, depends on the notions that the prosecutor’s expected success in first trials is a function of her investment in those trials and, indeed, we assume that the prosecutor gains convictions with increasing investment,\(^42\) that there is some chance of new evidence, and that some investment (perhaps greater, perhaps not, depending on whether there is substantial new evidence and whether it comes because of costly investment or not) in some second trials will bring about convictions even where the first trial ended in acquittal. No doubt we would be in for some surprises if the system we have in mind were tried. Perhaps the first acquittal should or would be known to the second jury – after all, witnesses might have a hard time playing along with a rule to the contrary, and both sides might want to grill a witness about any inconsistency between his or her testimony at the two trials. It seems both inevitable if not desirable for the second jury to know that the first trial ended in acquittal (or in a mistrial). It may turn out to be difficult to secure a conviction with the second chance. If so, the prosecutor will rarely attempt a second trial, and the defendant will exact only a very small payment for waiving his double jeopardy protection. The number of second trials might be very small.

\(^42\) It is tempting to say that as the prosecutor invests more she also learns of the innocence of those who are accused but actually innocent. Such an assumption complicates the sorting argument discussed presently, and we leave complications for future work or for analysis of actual experiments.
On the other hand, the prosecutor might learn a good deal at the first trial. The defendant must, after all, take the first trial seriously because he has no option to try again. The prosecutor is, at the very least, buying an excellent mock trial. She will learn about the weaknesses and strengths of the case, and about the reactions of a real judge and jury. This information might redirect the prosecutor’s efforts in preparing for a second trial or it might show the prosecutor that her resources are better spent on other matters. She might even be convinced of the defendant’s innocence, and then be pleased by the cost savings.\(^{43}\)

The argument thus far is not terribly different from that which explains a prosecutor’s interest in pleas bargains. All defendants, were they organized into a single bargaining unit, might well prefer a rule against plea bargains because if conviction required lengthy trials, then the prosecutor’s resource constraints would make the average, or even every, defendant much better off. The prosecutor would have less to invest in each trial, and would probably prosecute less and less well. In fact, the prosecutor has the option of offering a plea bargain, and seems therefore only to benefit from the existence of that institution.\(^{44}\) Similarly, the option of offering a second-chance regime would seem unambiguously beneficial for the prosecution. It may, however, be hard to see just yet why a defendant should accept the second-chance regime, even as it is obvious why individual defendants prefer the option of plea bargains.

Still, the analysis can and probably should be made more complicated by relaxing the implicit assumption that a switch to a second-

\(^{43}\) Of course mock trials and pre-trial negotiations are already available, so one might wonder what the prosecutor actually learns from the first trial. The prosecutor might learn that a large fraction of convictions is possible with a much smaller investment in first trials. We should not expect a prosecutor to proceed to a second trial when there has been a large investment in the first, any more than prosecutors presently try again when the first jury is unable to reach a unanimous decision. In any event, parties at a mock trial have different incentives from those governing the same parties at a real trial, as they try to signal one another and gain settlement advantage.

chance regime would not change the burden of proof unless the prosecutor specifically offered such an alternative to the defendant. We have seen that there is a close relationship between the burden of proof and the number of times the prosecution is permitted to draw from the urn. When the prosecutor has a second chance, the overall burden of proof necessary for a single conviction is, in an important sense, reduced. Even if some defendants explicitly agreed to the second-chance regime, or prosecutorial option, it is plausible that judges or juries, or even the legal system (in the form of a constitutional ruling), would subtly or openly increase the threshold for conviction, perhaps by instructing juries that they might cumulate tiny doubts to create one reasonable doubt, or simply by using more severe language like “beyond a reasonable doubt, however small.” We might even imagine a law of conservation of convictions, or of the probability of conviction for a given accused person. At the very least, it is reasonable to assume some increase in the difficulty of obtaining a conviction under a second-chance rule – even if there is no explicit change in standards. This assumption is supported by evidence that judges and jurors respond to legislatively decreed increases in penalties by reducing convictions.45 In both settings, judges and juries would be resisting increases in expected penalties. If, of course, such resistance is extreme, so that there is no increase at all in the rate of conviction, then the second-chance scheme is somewhat less attractive to prosecutors; on the one hand they will be able to obtain more convictions – because it is unlikely that the judges and juries will offset the impact of bringing of more cases – but, on the other hand, it will be much harder to secure convictions at the second trial, and most likely at the first trial as well. Intuitively, we might say that, where there has been a double jeopardy waiver, jurors in the first trial will resolve even the tiniest doubt in favor of forcing the prosecutor to proceed with a second trial. In turn, the jury at the second trial may be strongly influenced by the knowledge of the apparent, earlier acquittal. Under these assumptions, waivers from a set of defendants have little impact on those defendants; most experience shorter trials, and some are tried twice. The effect is on the capacity of the prosecutor to bring other accused persons to trial. On the other hand, it is possible that any second-chance agreement should and could be kept hidden from the first jury. In that case, even if the

45 Ehud Guttel & Doron Teichman, The Probative Function of Punishment: Criminal Sanctions in the Defense of the Innocent (on file with authors) (arguing that increasing penalties could decrease the level of convictions).
second jury increases the burden of proof, there is room, overall, for a higher rate of convictions.\footnote{We do not dwell on this detail here, and suspect that there would be unintended consequences to examine. Thus, a first trial ought to elicit a lesser investment by the prosecution – and indeed the agreement itself might promise some form of shorter trial or lower investment – and that in turn will sometimes cause juries to wonder why the prosecution did not bring certain witnesses forward. Once juries learn about the possible existence of a second-chance agreement, they might reason that missing witnesses or other evidence is a product of such an agreement.}

Before examining the defendants’ perspective more carefully, it is useful to point out that there are other costs and benefits to a second-chance regime. Unfortunately, most of these are also difficult to sort out, especially in the absence of live experiments. For example, some witnesses will benefit from the smaller prosecutorial investment in the first trial – but of course others will need to testify twice if there are two trials. In some cases, defendants will face higher costs because they will need to retain evidence, including relationships with witnesses, in the event that the prosecutor proceeds with a second trial.\footnote{Again, the idea of allowing the prosecutor to choose whether to offer the defendant the option to waive the double jeopardy protection is more attractive the more positively one views prosecutors. Thus, one straightforward approach to double jeopardy – in all the settings described here – is to ask whether the information at issue is improving or depreciating with time. A trial will reach a more accurate result if it can be held when the information is at its best. It takes time to gather witnesses, but all along their memories fade. Ideally, a prosecutor will decline to offer a second chance scheme when she judges that a second trial would take place when information is relatively unreliable. In any event, one can hardly claim that current law succeeds in holding single trials when information is most reliable.}

These costs are, of course, offset by the fact that a prosecutor with a second-chance option will more quickly go to the first trial, so that the defendant’s costs will be lower. Moreover, we anticipate that in a second trial, judges and juries will take into account the fact that time may have made the defense’s present task more difficult. Time may also bring out the truth from witnesses who were less truthful the first time around, but inasmuch as there was an acquittal, this is now likely to benefit the prosecution.\footnote{We set aside the possibility that the double jeopardy protection is best understood as serving witnesses, jurors, and other citizens who might be called to multiple trials because the prosecutor undervalues their time. We hesitate to set aside the victim’s perspective, but it is unclear whether the protection serves most victims’ interests, for it makes it less likely that they will need to suffer twice through the agony of a trial, or whether most would prefer a...} But our goal here is to propose a rethinking of...
double jeopardy, and not to insist that any one version of a second-chance regime is necessarily superior. We simply note some secondary effects and continue on with the central themes.

**D. Sorting Innocent and Guilty Defendants**

1. Beyond a Reasonable Doubt

The argument thus far might be sufficient to convince most thoughtful citizens to rethink double jeopardy, and perhaps to support the idea that the protection is one that ought to be waivable, much as one who pleas can trade away the right to a trial. In this Section, however, we add to the case for a second-chance option – that is, neither a mandatory rule nor repeal of the double jeopardy protection – with the claim that the option will likely benefit innocent defendants and disadvantage guilty defendants. A system that sorts defendants in this fashion is likely to be welcome. Indeed, even if there were somehow a requirement to maintain the expected level of punishment, a system can be made more efficient by sorting defendants according to their guilt.

Imagine first that the burden of proof does not change, explicitly or implicitly, when a second-chance rule has been agreed upon. A second-chance agreement is unattractive to defendants who know they are guilty because they run the risk that the prosecution will come across new evidence or simply choose to draw again from the urn. It is true that such a defendant will prefer for the prosecutor to invest less in the first trial, and then hope that the prosecutor does not proceed with a second, but inasmuch as the prosecutor has the second-chance option, there is every reason to think that a competent prosecutor will take or offer the second-chance higher conviction rate. If we allow the prosecutor to choose whether to offer a waiver, and we are prepared to assume that most prosecutors will be sensitive to the circumstances of the victims they encounter, then the case for an asymmetric waiver is fairly strong.

It is possible that courts would readily accept a defendant’s waiver of the double jeopardy protection, but we proceed cautiously.

scheme when it makes conviction more likely. A second trial increases the chances of conviction, both because of the increased prosecutorial investment and because of the second draw from the urn; it also increases pretrial and trial costs for many defendants. Moreover, to the extent that a guilty defendant can win at trial by surprising the prosecution – in a way that the latter cannot surprise the former because of the stricter requirement of revealing witnesses and strategies before trial\(^{51}\) – the guilty defendant loses much of this advantage when agreeing to the possibility of a second trial. No doubt, some guilty persons would benefit because they would be acquitted as a result of the prosecution’s smaller investments in their first trials followed by decisions not to proceed with second trials. Moreover, the prosecutor’s reduced investment in a single trial will often translate into lower pretrial and trial costs for the accused as well. Still, inasmuch as the guilty defendants, as a group, will be subject to a higher risk of conviction than under the double jeopardy rule, we can say that, under reasonable assumptions, guilty defendants will not want to switch to a second-chance regime.\(^{52}\)

We turn then to defendants who know they are innocent. Such a defendant has less to fear from a second trial because there is less reason to expect that further effort by the prosecution will generate incriminating evidence.\(^{53}\) The typical innocent defendant is less likely than his guilty counterpart to face a second trial and less likely to lose in a second trial. Moreover, the innocent defendant is less likely to benefit from the ability to surprise the prosecution. And yet the prosecutor’s ability to draw again from the urn lowers the effective burden of proof. Thus, assuming no

\(^{51}\) See William J. Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?* [1963] WASH. UNIV. L. Q. 279, 289 (1963) (citing State v. Tune, 13 N.J. 203, 211-212 (1953) (the state is completely at the mercy of the defendant who can produce surprise evidence at the trial, can take the stand or not as he wishes, and generally can introduce any sort of unforeseeable evidence he desires in his own defense)).

\(^{52}\) In theory even these defendants could be made better off by a switch that included reduced punishments in order to take the extra costs, including extra convictions, into account. Much as plea bargains can be in “everyone’s” interest, if the savings in trial costs and incarceration costs are shared, so too second-chance schemes can be made (nearly) universally attractive. Note that defendants bear costs even when they do not pay their attorneys.

\(^{53}\) Thus, the easiest path to this sorting result is to posit that the conviction is more likely with greater investment by the prosecutor, but that the return for each invested dollar is greater where the defendant is actually guilty.
implicit or explicit change in the burden of proof, it is hard to say whether any or many innocents will find it attractive to waive the double jeopardy protection. The chance of conviction at the first trial drops, because the prosecutor will invest less in the first trial. But the possibility of a second trial leaves the situation unclear. There is a greater chance of (false) conviction at the second trial and a lower chance of (false) conviction in the first.

In sum, and following our illustration, a switch from a double jeopardy rule to a second chance rule increased the number of convictions. Moreover, the group of convicted persons has a higher percentage of guilty persons than with an unalterable double jeopardy rule. This change reflects the idea that innocent defendants will be more likely to waive the protection than will guilty defendants.


If, instead, the burden of proof does become more rigorous as the double jeopardy protection is removed, so that the total number of convictions stays constant (aside from new cases the prosecutor can now afford), the cost to guilty defendants drops but probably not enough to make the switch attractive. This conclusion, or intuition, is easiest to see if we think, preliminarily, about innocent defendants and assume, for the first time, that it is easier to convict the guilty than to convict the innocent. Innocent and guilty defendants benefit from the prosecutor’s lower investment in the first trial, which is expected to yield a lower conviction rate, and all the more so if the burden of proof changes. The prosecutor’s reduced investment also leads to lower pretrial and trial costs for defendants. But now the prosecution’s second chance is presumably less threatening to the innocent than to the guilty, because new evidence, or any other product of reallocation or increased effort by the prosecution that might harm the innocent defendant, is simply less likely to hurt the innocent. Inasmuch as we have posited that the total number of convictions remains the same, and the switch to a second-chance rule is less threatening to the innocent than it is to the guilty defendants, there is the implication that the second-chance rule, with the specified tightening of the burden of
proof, will lead to more convictions of guilty defendants and fewer convictions of innocent ones.54

Note that following the analysis to this point, a defendant who offers the prosecutor a second chance, or who accepts such an offer from the prosecutor, will signal his innocence. And to decline a second-chance scheme might be to signal guilt. As with all signaling mechanisms, there is then the likelihood that as innocent defendants gravitate toward a second-chance rule, some guilty defendants will do so as well in order to give the appearance of innocence to the prosecution, or even to a jury. If so, the signal will be less reliable. Still, inasmuch as the second trial is much more costly to the guilty than to the innocent, at least under the assumptions made here, we can be confident that there will be some sorting of defendants.55

54 Another version of this argument conjures a world where the prosecutor seeks to find the truth rather than to maximize convictions. Now we can imagine the trial as a draw from the urn, but following a process in which a greater investment returned more rewards for the prosecutor where the defendant was actually guilty. A guilty defendant prefers no investment by the police or prosecution and then, we might imagine, expects some chance of acquittal at trial. Perhaps eight of ten defendants are “really” guilty, and with no information, and thus no ability to sort defendants, the guilty defendant simply has a 20% chance of a lucky acquittal. As the investment in investigation and prosecutorial preparation increases, the system improves in terms of separating the guilty from the innocent. In this hypothetical universe, the good-faith prosecutor or jury always discovers and releases the innocent defendant (who might also prefer no investment by the prosecutor) if the investment is large enough – but perhaps the prosecutor has no incentive to search quite that hard for the truth. In any event, so long as an increased investment has a higher chance of paying off (for the prosecution) when the defendant is really guilty than when he is innocent, the second-chance scheme allows the prosecutor to embrace greater resources in the more “difficult” cases, and this in turn sorts guilty and innocent defendants. This hyperbolic example suggests that so long as an increased investment has a higher chance (on average) of paying off (for the prosecution) when the defendant is really guilty than when he is innocent, the second-chance scheme allows the prosecutor to expend greater resources on the more “difficult” cases, and this in turn sorts guilty and innocent defendants. On the other hand, under these assumptions, the innocent defendant might prefer rather than abhor greater investment by the prosecutor in his first case, because the investment might absolve him. The “game” is thus hard to model without many assumptions; an innocent might be indifferent between a zero investment and a very large investment. Much will then depend on the shape of the investment-return curve.

55 Public figures might be especially likely to give up the double jeopardy protection, even if they are guilty, because they bear the most serious costs when under a cloud of accusation. On the other hand, the cloud may not lift with a single acquittal.
In short, innocent defendants (except for the newly charged) may benefit from any switch to a second-chance regime. It is more likely that they benefit if the switch is accompanied by an increase in the burden of proof in both trials. It is virtually certain that they benefit if they receive yet further consideration, but as a practical matter this brings us to the proposition of switching to a second-chance rule only when defendants have agreed to do so and, of course, we normally expect both parties to a bargain to benefit from it. In turn, guilty defendants will normally be disadvantaged if they lose the double jeopardy protection, unless the prosecutor can pay them sufficiently out of the savings from her decreased preparation costs with respect to first trials. This possibility deserves mention, however, inasmuch as there are likely to be defendants who do not know whether they are innocent or guilty, and there are certainly likely to be defense attorneys who are unsure of the guilt of their clients. The uncertainty may come about because of a lapse in memory, uncertainty or ambiguity in the criminal law, an inability to assess the state of one’s own mind, or uncertainty as to whether a defendant who is guilty of one thing but charged with another will be found guilty. Such defendants not only add complexity to the analysis but also suggest the idea of some form of payment to defendants who waive the double jeopardy protection. We pursue this idea in the next Section.

Any evaluation of the proposal to allow waivers of the double jeopardy protection must also take into account the additional cases that the prosecutor will be able to pursue either because of the fixed budget assumption or because a more “efficient” prosecutor might attract more funds. In our illustration, the second-chance rule generated 15 more cases against defendants who might have been left alone, released, or managed with plea bargains. Some of these alternatives raise the possibility that the original conservation of resources will bring on new social costs rather than benefits. When accused persons are released because of budgetary constraints, we might say that the taxpayers have made choices. And we do not know how to quantify the desirability or cost of plea bargains, as opposed to trials. But the additional cases do imply additional convictions, and inasmuch as we have been counting correct and incorrect convictions, it is only fair to concede that there will be additional incorrect convictions. On the other hand there is no reason to think that newly charged defendants under a second-chance rule would be more likely to be incorrectly convicted than any other defendants. And, of course, if the burden of proof is elevated, the added social cost of wrongful convictions is almost surely reduced rather than increased.
More troubling is the possibility that the lower investment by the prosecution in first trials will so reduce the convictions of guilty defendants that the guilty will opt out of the double jeopardy protection and run the relatively low risk, if it is that, of conviction in a second trial. Socially desirable sorting would certainly be achieved if innocent defendants were less afraid of first trials than were guilty defendants; it is easy to see why this might be a reasonable assumption – especially if we believe that the prosecutor is able to allocate resources to cases that require greater investment – but it is possible that it is otherwise, and even that a second chance rule does more harm than good. But even if we just assume that the innocent and guilty are equally benefited from reduced rates of conviction in the first trial, desirable sorting seems likely if we are prepared to assume that substantially increased investment by the government is more likely to produce incriminating evidence where the guilty – and not the innocent – are concerned.

E. Compensating or Inducing Defendants

The question whether procedural or evidentiary rules meant to protect criminal defendants can be waived by them is a difficult one, and unlikely to be satisfied with a single answer. We do not advance a normative or positive theory here as to the (general) waivability of constitutional or other protections. In some cases (like torture) the answer appears to be never, in some (like search and seizure) the conventional answer appears to be that waiver is permitted if more or less contemporaneous with the search, and in some the accepted practice is that waivers can be purchased or otherwise agreed to, long in advance. As a doctrinal matter, it is plausible that courts – assuming well-represented defendants – would be willing to tolerate the bargains or waivers proposed here with respect to double jeopardy, if only because it is already the case that waiver figures in double jeopardy law; a defendant who appeals after conviction is treated as having waived the double jeopardy protection, so that a court can reverse an evidentiary or other ruling without freeing the defendant, who is likely to face trial again.56 Our proposal would simply add another waiver to the mix – and it would be one for which the defendant, or at least many defendants, received something in return. American readers might think this a weak ground for hope, but in other

56 See Westen & Drubel, supra note 7, at 104.
jurisdictions, defendants’ own cries for quicker trials (in order to reduce harassment by prosecutors who might be politically motivated) may help make the case for experimenting with second-chance bargains.

An agreeable defendant’s compensation might be implicit or explicit. The former is more interesting as a matter of theory. A defendant who agrees to a second-chance rule can calculate that the prosecutor is likely to invest less in the first trial. Even apart from the prosecutorial incentives discussed earlier, there is the likelihood that the prosecutor will want to establish a reputation for investing less in first trials in order to induce more defendants to agree to a second-chance rule. The defendant might also calculate that the second jury, if a second trial indeed takes place, will require more for conviction than would a jury deliberating on a clean slate, with no prior acquittal. Still, defendants, or law, might require explicit compensation – and this is more difficult to fashion, especially in the absence of any experience with the obvious alternatives. Outright cash compensation is, ironically, likely to be the option most disfavored by law. In exchange for the second-chance option, the prosecutor might offer an explicit cap on her effort in the first trial, measured by man-hours, by speed (starting date), by length of trial, or by number of witnesses. Alternatively, the compensation might be aimed at the conviction rate rather than at prosecutorial effort. The prosecutor might offer a higher burden of proof or a tighter range of available punishments. One can whimsically imagine that the second trial, or even both trials, requires unanimity on the part of twenty jurors, rather than a mere twelve. But one problem with these currencies is that they might induce the prosecutor to invest more rather than less (even) in the first trial.

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57 More generally, if a jurisdiction required a mere majority or a supermajority short of unanimity, then the prosecutor or the law could raise the burden by varying the required number of votes for conviction. Note that unanimity in the United States is only required at the federal level, or with small juries; 10-2 convictions have been approved, and even 7-3 supermajorities might be possible. See supra notes 2, 30.
F. Variations on the Theme and Multiple Jurisdictions

1. Other Consideration

We recognize that some observers will think the analysis thus far all too optimistic about human behavior. Of course, if prosecutors are not to be trusted, defendants may simply refuse to accept any of the second-chance offers we have sketched. But it may be that law ought to play a stronger role in fashioning the move away from a nearly pure double jeopardy rule. We have already suggested that it (or the bargaining process itself) might insist on limiting second chances to cases where there is new evidence, or even new and compelling evidence, perhaps as determined by a third party. We have already seen that some jurisdictions allow retrials where there is evidence that sheds new light on the defendant’s guilt – and that was not available and could not reasonably be expected to have been available to the prosecution at the time of the first trial.\(^{58}\) Such a scheme is a variation on our theme, rather than a serious check on overeager prosecutors.

Another version of a second-chance rule would limit the police and prosecutor’s ability to interrogate or otherwise impose costs on the once-acquitted defendant. If the idea is to offer a second draw at the urn, the prosecutor might even be forced to begin the second trial within a specified period following the first trial.

A more dramatic variation requires the prosecutor to pay in order to exercise her (voluntarily obtained) option. Perhaps the prosecutor should pay the defendant’s costs or damages, including reputational, emotional, and financial losses, if the second trial also results in acquittal. A strict liability alternative would have the prosecutor pay all or part of these costs every time the second-chance option is exercised. We hesitate to endorse either of these versions (even assuming, as seems correct, that no defendant will purposely lose in the first trial in order to gain damages in the second) on grounds that the rule causes the prosecutor to internalize the defendant’s costs, both because the prosecutor is an agent who does not bear these costs personally and because it is impossible for the prosecutor to bear all the social costs of over- and underprosecution. Moreover, there is the danger

\(^{58}\) See supra note 4 and accompanying text.
that as the second trial taxes the prosecutor’s budget more heavily, the prosecutor will simply be induced to overinvest in the first trial, and the advantages of the second-chance regime will be compromised.\textsuperscript{59}

Nor have we addressed all the practical questions associated with agreement to waive the double jeopardy protection. There is the question, noted above, as to what each jury ought to know. There are also questions associated with appeals that might be taken from the first trial, and resolved before the second. But we do not claim here that any one version of the second-chance rule is the right rule. Our aim is to encourage some rethinking of the double jeopardy rule, and then perhaps some experimentation.

2. Multiple Jurisdictions

Some readers will think that we have deferred too long the point that under current law prosecutors do often get second chances. An acquittal under state law can be followed by prosecution under federal law, even for the same activity by the defendant, if federal law separately criminalizes the matter. Thus, an acquittal (or conviction) in state court, where the charge is assault or murder, can be followed by federal prosecution under the civil rights laws.\textsuperscript{60} It is less common for a federal prosecution to precede a state criminal case, but the Double Jeopardy Clause does not bar the second case. A somewhat different – but also often permitted – pattern is for one state to prosecute after another sovereign (state, country, or Indian tribe) has tried and acquitted the defendant.\textsuperscript{61}

\textsuperscript{59}There is of course the possibility of a fault-based regime in which the prosecutor pays for “wrongfully” proceeding with a second trial. This suffers from the problem and cost of determining fault, and then runs the risk of underinvestment in the first trial by a prosecutor who is confident that her choice to continue with a second trial will be found reasonable. The argument here reflects the idea that a negligence rule, unlike a strict liability rule, might not provide incentives for efficient activity levels.


\textsuperscript{61}There is also the question piling a criminal sanction on top of a regulatory penalty, whether imposed by the same or a different sovereign. See Nuno Garoupa & Fernando Gomez-Pomar, \textit{Punish Once or Punish Twice: A Theory of the Use of Criminal Sanctions in Addition to Regulatory Penalties}, 6 AMERICAN L. ECON. REV. 410 (2004) (arguing that there are cases where the double jeopardy protection should not prevent criminal \textit{and} regulatory
Under the harassment theory we might say, optimistically, that where two sovereigns are concerned, two different prosecutors are at work, and therefore there is not a single person or government determined to harass or otherwise impose costs on the defendant. The repeated draw idea does worse, as a positive matter, because if the defendant is brought to trial twice, even if in two different jurisdictions, the overall burden of proof for conviction will decrease. The nullification theory can be applied in two ways. On the one hand, a jury’s nullification is undone if retrial is possible by crossing boundaries or simply entering another courtroom. On the other hand, the sensibilities of some citizens may be different from others. Perhaps this theory supports the idea of retrial in another state or country – but not where it is a matter of going from state to federal court, or the other way around, if a jury is to be used in both places. Finally, the idea emphasized here, that the prosecutor in the first case will overinvest if there is double jeopardy protection, makes this particular softening of the protection puzzling because the prosecutor is not likely to lower her investment simply because her counterpart in another jurisdiction can pick up the pieces later on.

One can also think of the double jeopardy protection as dissipating when boundaries are crossed because, or when, one jurisdiction may not trust another or may have different values with respect to the criminal behavior. If a hate crime generates an acquittal, or a very light punishment, in one state, then the national government might step in because it lacks confidence in a local jury, or simply in the first acquittal. At present, this might be the best positive explanation for the law of double jeopardy where multiple jurisdictions are concerned. In turn, the law might satisfy this goal without eliminating the protection to which a defendant is apparently entitled. Perhaps the defendant should be able to force the two sovereigns to bargain in advance and agree as which one will prosecute. As a practical matter this is a poor solution to the problem of trustworthiness because the federal prosecutor, for example, might not know before the state trial that the state’s prosecutor is to be distrusted. In any event, the problem of mistrust is real enough that current law in this regard need not be thought of as strong evidence against any of the theories of the double jeopardy protection. Nor does it implicate the argument advanced in this Article or the potential for waivers or bargains.
IV. CONCLUSION

We have suggested that single-chance tests are limited to high cost, backward-looking inquiries, like trials. Where there is but a single chance, however, there is the problem of overpreparation, or overinvestment. In the criminal law context, this overinvestment gives room for the prosecutor and defendant to bargain for a waiver of the traditional double jeopardy protection in order to allow the possibility of a second trial, and thus the elimination of the incentive to overinvest. Defendants would give up their protection, if permitted to do so, knowing that on average the prosecutor would then invest less in the first trial. Innocent defendants might be especially inclined to make the bargain. These bargains, and this sort of sorting, is more likely if the prosecutor “pays” for the defendant’s waiver, and we have explored various forms of such payment.

Once one unsettles the conventional double jeopardy rule, there are many ways to proceed, or to extend the analysis offered here. There is room to play with different waivers and payments, and with options that run in both directions, and not just in the prosecutor’s favor. There is the possibility of burrowing into criminal law, and subdividing the field, so that a different rule would apply to different crimes, to different kinds of defendants, or to situations where the defendant faced multiple charges. We have hinted at some of these possibilities, but there is room for much more. There is also the possibility of expansion outside of criminal law. It is possible that legislation or plebiscites – though normally forward looking – should be sprinkled with the flavor of double jeopardy, so that repeated draws from the urn are not free. For the present, we are satisfied to make the claim that the familiar double jeopardy protection likely generates overinvestment – and that the savings available from a relaxation of the rule can be shared in a way that makes everyone, or at least everyone but guilty defendants, better off.