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# Articles, Reports, and Notes OF THE NATIONAL ASSOCIATION OF COUNTY AND PROSECUTING ATTORNEYS

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*Editor: Patrick Brennan, Prosecuting Attorney, South Bend, Indiana*

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## RIGHT OF A STATE TO APPEAL IN CRIMINAL CASES

JERRY KRONENBERG\*

Whether or not a wise administration of the criminal law permits giving to the State a right of appeal is a familiar problem to those who have concerned themselves with justice for the individual in an ordered society.<sup>1</sup> The issue is framed in terms of requiring an election of a lesser evil: should the State be allowed to appeal, at the risk of possible harassment of the accused; or should an acquitted person be protected from further proceedings, at the possible expense of requiring society to reabsorb a criminal whose freedom was gained through a lapse in the proper functioning of the judicial machinery at the lower levels?

Today, in most states, the election is made in large part by statute. But these statutes must be interpreted insofar as they are ambiguous. Moreover, problems with respect to the state's right to appeal may arise which cannot be settled by an existing statute. Most statutes deal with explicit problems; controversies outside of the specific legislative expression must be decided by the

courts independently of the statutes. To the extent that the courts refuse to allow the state to appeal in such cases, the reasons assigned are twofold: the common law recognized no such right; and to grant it would result in placing the accused in double jeopardy.<sup>2</sup>

The first section of this paper will examine the validity of these two assertions since they may control the disposition of cases not decided by express statutory authority; the second section will deal with the statutes themselves; the last section will be devoted to the policy considerations bearing on the issue of appeals by the State in criminal cases.

### The Common Law

"At common law," according to one text writer, "the state cannot appeal or sue out a writ of error to review a judgment for the defendant in a criminal case, even on demurrer, much less on a verdict of acquittal...."<sup>3</sup> However, there is impressive

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<sup>1</sup> Dean Roscoe Pound concerned himself with the problem over fifty years ago, resolving it in favor of state appeals. Pound, *Inherent and Acquired Difficulties in the Administration of Punitive Justice*, 4 PROC. AM. POL. SCI. ASS'N. 222, 237 (1907). Also see his *Dedictory Address*, 24 GEO. WASH. U. BULL. 15, 19 (1925).

<sup>2</sup> This is a frequent suggestion of text writers, for example, ORFIELD, *CRIMINAL APPEALS IN AMERICA*, 57-8 (1939); and 2 WILLOUGHBY, *CONSTITUTIONAL LAW* 822 (1910). In addition the cases have held that the right to appeal in criminal cases is unknown at the common law, that the right is a constitutional or statutory one, that the right must be strictly limited to express statements awarding it. *State v. Bilton*, 156 S.C. 324, 153 S.E. 269 (1930); *State v. Lewis*, 113 Ore. 359, 230 Pac. 543 (1925); *State v. Peck*, 83 Mont. 327, 329, 271 Pac. 707 (1928).

<sup>3</sup> CLARK, *CRIMINAL PROCEDURE* 393 (1918). The same conclusion was reached by the United States Supreme Court in *United States v. Sanges*, 144 U.S.

evidence of the existence of a common law right of state appeal. The writings of distinguished English commentators<sup>4</sup> and a number of reported cases<sup>5</sup> indicate that the Crown did have access to writs of error in criminal cases.

While this review was of a more or less formal and direct sort, there existed as well informal, perhaps indirect, but equally successful means for the Crown to review prior decisions by virtue of which an accused had been freed. In an "appeal by felony,"<sup>6</sup> where the victim or his family proceeded

310 (1892), although the Court was somewhat less positive than Clark: "The law of England on this matter is not wholly free from doubt."

<sup>4</sup> Lord Coke, commenting on the common law wrote: "It appeareth . . . that if a man be erroneously acquitted of felony by verdict and judgment thereon given . . . in the case of erroneous judgment of acquittal that no writ of error needeth to be brought by the King, but the offender may be newly indicted." *THIRD INSTITUTES OF THE LAWS OF ENGLAND*, 214 (1860). Presumably in a proper case, where the need did arise, a writ of error could be brought. Similarly Chitty, in discussing the English criminal law, wrote that a writ of error originally issued in any case only at the will of the King. When he would exercise it in his own behalf, that was review by the Crown, hence a kind of state appeal. I CHITTY, *A PRACTICAL TREATISE ON THE CRIMINAL LAW*, 659 (1819). In addition, Bishop states that "... writs of error seem allowable to the Crown in criminal causes." I BISHOP, *NEW COMMENTARIES ON THE CRIMINAL LAW* §1024 (9th ed. 1923).

The same point is made in ARCHBOLD, *PLEADING, EVIDENCE AND PRACTICE IN CRIMINAL CASES* 279 (23rd ed. 1905), and by Lord Hale who was explicit that where an erroneous verdict of acquittal was given it was nonetheless conclusive against the Crown "... till the judgment be reversed by error," and that an accused was free after acquittal "... till the judgment of acquittal were reversed," and further that an accused could not be re-indicted "... till the judgment be reversed by writ of error." II *HISTORIA PLACITORUM CORONAE* 248, 394-5 (1st American ed. 1778).

An early Maryland court, relying solely on the statements of Lord Hale, granted the state the right to bring a writ of error in a criminal case. *State v. Buchanan*, 5 Har. & J. 317 (1821).

<sup>5</sup> *Regina v. Houston*, 2 Craw. & Dix 191 (1841); *Regina v. Chadwick*, 11 Q.B. 205, 116 Eng. Rep. 452 (Q.B. 1847); *Regina v. Millis*, 10 Cl. & Fin. 534, 8 Eng. Rep. 844 (Q.B. 1844). The last case was heard before Lords Coleridge, Ellensborough, and Brougham, none of whom seemed to have had any doubt about the Crown's right to bring the writ.

While in these cases the propriety of the writs was simply assumed and acted upon, in *Regina v. Wilson*, 6 Q.B. 620, 115 Eng. Rep. 233 (Q.B. 1844), the court was more explicit if less direct. There the state sued out a writ of certiorari to reverse an order quashing an indictment. Although Lord Coleridge denied the request on the grounds that here the writ was not appropriate, he did say that "... if a writ of error be brought we shall inquire whether what Sessions did was erroneous or not."

<sup>6</sup> I STEPHEN, *HISTORY OF THE CRIMINAL LAW OF ENGLAND* 244 (1883), gives a more detailed account of this proceeding.

with the Crown's permission against the accused in a criminal proceeding, if the defendant were acquitted he could nonetheless be indicted subsequently by the Crown to stand trial before another jury for the same crime.<sup>7</sup>

While the practice of two prosecutions for the same offense was not, strictly speaking, an appeal in the modern sense, nevertheless it did give the Crown a second chance at a defendant who, having been acquitted of a crime by a jury, could thereafter be indicted to stand trial again, also before a jury, for the same crime.

A somewhat similar device was the practice of "attaint" which was a means available to the Crown for reviewing decisions of a jury.<sup>8</sup> When an unfavorable verdict was returned, a second, larger jury could be impaneled to review the correctness of that verdict, with power to reverse it.<sup>9</sup> As a result of the practice of "attaint," until it was abolished in 1825, the Crown's right to have a prior jury's determination reviewed was very much like current notions of appeal.<sup>10</sup>

The common law writ of "certiorari," available to the Crown to review questions of law in some

<sup>7</sup> CARTER, *A HISTORY OF ENGLISH COURTS* (5th ed. 1927). Thus in *Young v. Sloughterford*, 11 Mod. 217, 228, 88 Eng. Rep. 999, 1007 (Q.B. 1709), following the accused's acquittal on an indictment of murder, Chief Justice Holt ordered an appeal brought against him for the same offense. On this appeal he was convicted by a jury and sentenced to death. In another case, *Smith v. Bowen*, 11 Mod. 216, 230, 88 Eng. Rep. 998, 1008 (Q.B. 1709), the accused was convicted on an indictment and was then pardoned. Nonetheless he was later appealed for the same offense and convicted (though he was again pardoned). Further illustrations appear in I STEPHEN, *HISTORY OF THE CRIMINAL LAW OF ENGLAND* 345 (1883).

<sup>8</sup> I HOLDSWORTH, *HISTORY OF ENGLISH LAW* 337 (7th ed. 1956).

<sup>9</sup> When such a reversal occurred, the prior jurors could be jailed, deprived of their chattels, and labeled infamous. It is a matter for conjecture with what reluctance a jury would find against the Crown, particularly in a reasonably close case. THAYER, *EVIDENCE AT THE COMMON LAW* 156 (1898).

<sup>10</sup> There is some dispute, however, as to the extent attaint was available to the Crown in a criminal case. Holdsworth and Thayer have expressed doubts as to its availability. I HOLDSWORTH, *supra*, note 8 at 340; THAYER, *supra*, note 9. On the other hand HALE, 2 PLEAS OF THE CROWN 310 was convinced that attaint lay even in case of an acquittal. A middle ground was taken in Sibley, *Appeal on Matter of Fact in Criminal Cases*, 32 LAW MAG. REV. 314, 319 (1907), who conceded that attaint lay though it was not often used. At least some support for that view is found in Farley, *Instructions to Juries—Their Role in the Judicial Process*, 42 YALE L. J. 194, 197 (1932), where it is reported that jurors were fined for not bringing in satisfactory verdicts, as by acquitting murderous felons.

rather narrowly prescribed areas,<sup>11</sup> and the right, granted to the Crown about the middle of the seventeenth century to have a new trial in all misdemeanors and some felony cases,<sup>12</sup> were further common law rights which, like attainder and the possibility of double prosecutions in early appeals by felony, had roughly the same effect as twentieth century appeal.<sup>13</sup>

When these informal appellate practices are viewed together with the common law cases and the statements of distinguished common law commentators relative to the granting of writs of error, it is difficult to escape the conclusion that the Crown (or the State) could review adverse decisions at the common law. Thus American courts which refuse to allow such review by the State on the ground solely that such a right did not exist at common law seem to base their refusal on an insubstantial, or in any event, a highly arguable ground.

The second legal basis which is invoked by the courts, in the absence of an explicit statutory prohibition, to justify refusing the state the right to appeal in criminal cases, is that to do so would

<sup>11</sup> These are described in Goodnow, *The Writ of Certiorari*, 6 POL. SC. Q. 493, 497 (1896).

<sup>12</sup> The relative ease with which new trials could be had in misdemeanor cases is recorded in ARCHBOLD, PLEADING, EVIDENCE AND PRACTICE IN CRIMINAL CASES 291 (23rd ed. 1905). It appears that a new trial was granted in *Regina v. Scaife*, 17 Q.B. 238, 117 Eng. Rep. 1271 (1851), a felony case, but that does not seem to have been a frequent result.

<sup>13</sup> This result no longer obtains in England because of statutory modifications. The informal methods of appeal were abolished in the early nineteenth century, 59 Geo. III, c. 46, (1819), and writs of error were outlawed by the Criminal Appeals Act of 1907, 7 Edw. 7, c. 23. As a consequence the Crown today has no right of appeal except to the House of Lords in a very few cases where the defendant has successfully appealed a conviction to the Court of Criminal Appeal and the case is deemed by the Attorney General one of extraordinary interest in the development of English criminal law. ARCHBOLD, CRIMINAL PLEADING, EVIDENCE AND PRACTICE (28th ed. 1931) reports at 313: "(The Criminal Appeal Act) makes no provision for appeals in case of acquittal or where judgment has been given against the Crown on a demurrer or motion to quash an indictment or to arrest judgment, and it makes no provision for granting a new trial, even where the conviction on the first trial is quashed for technical reasons." Also see ORFIELD, CRIMINAL APPEALS IN AMERICA 57 (1939), where the author writes: "Even at the present time the prosecution cannot appeal to the Court of Criminal Appeals in England on any matter, including not only acquittal, but orders of the court."

Whatever the merits of this current English practice, it has been the result of statutory development, and does not negative the existence of prior common law rights of appeal.

subject the defendant to *double jeopardy*. It is true that the great majority of the states have enacted constitutional provisions prohibiting the placing of an accused in jeopardy twice for the same offense;<sup>14</sup> but inasmuch as the concept of "jeopardy" has not been defined in the various constitutions, the courts have, for the most part, been free to define their own limits in the application of this phrase. For a definition of those limits the common law has not been of much help; in fact the historical background of the concept of double jeopardy is rather confusing.

At common law, the concept of jeopardy did not constitute a legal bar to a retrial of a defendant for an offense of which he had already been acquitted. Jeopardy was said to attach upon an accused person's plea of not guilty,<sup>15</sup> and if the action was thereafter terminated, any subsequent *re-indictment* for the same crime would constitute double jeopardy. But the second proceeding on the original charge would not be barred for that reason. Accordingly, many instances are found in the common law reports where a jury was discharged after the accused's pleading and after the swearing of the jury as well, and this jury discharge did not bar a future trial for the same offense—despite the clear existence of the double jeopardy concept.<sup>16</sup> How-

<sup>14</sup> Only five states appear to have no constitutional provision prohibiting double jeopardy. These are Connecticut, Maryland, Massachusetts, North Carolina, and Vermont.

<sup>15</sup> Counsel argued in an early case, *Trin. 9 Hen. V. f. 7, pl. 21* (1421), that jeopardy had *already* attached by the time the jury was sworn. The court did not dispute this contention. In another, *Hil. 16 Edw. IV, f. 11, pl. 7* (1477), the defendant had pleaded not guilty and was said to have been in jeopardy although the jury had not yet appeared and been sworn. Justice Fairfax, in a frequently quoted opinion, declared in response to a request for a postponement: "That would be against reason, for the defendant has pleaded a plea (not guilty) by which he has put his life in jeopardy; . . ." *Trin. 22 Edw. IV, f. 19, pl. 46* (1482).

<sup>16</sup> Maitland informs us that in cases tried at the Eyre of Kent the record shows ". . . that cases were adjourned once or twice, or even oftener for further evidence. Perhaps one might go so far as to say that they were revived when some forgotten evidence was recovered or remembered." MAITLAND, 24 SELD. SOC., EYRE OF KENT XLVI (1909). Again, when jurors were sworn by indictment of felony and when it was found that the roll containing an entry of the indictment was not ready in court, the jurors were allowed to go at large and "they were later sworn anew as if they had never appeared before." *Hil. 7 Hen. IV, f. 39, pl. 2* (1406). "So in several cases a man shall put his life twice in jeopardy" said Justice Ascue in *Hil. 21 Hen. VI, f. 28 pl. 12* (1443). BROOKE, ABRIDGEMENT tit. APPEAL 41 (1576), cites examples of this fact and tit. JURORS 51 states that in the event of a juror's illness or death before verdict, a new trial could be held. This

ever, an altogether different concept, *autrefois acquit*, barred new proceedings after an acquittal. The nature of this common law bar, as stated by Blackstone, was:

"The plea of *autrefois acquit*, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offense, and hence it is allowed as a consequence, that when a man is once *fairly* found not guilty upon an indictment, or other prosecution, before any court having competent jurisdiction of the offense, he may plead such acquittal in bar of any subsequent accusation for the same crime."<sup>17</sup> (Emphasis added.)

It is apparent, therefore, that only a "*fairly found*" jury verdict barred a new trial at common law,<sup>18</sup> and that double jeopardy reflected only a *policy* against trying a man more than once for the same crime, and that policy found its *legal* expression in the separate and different concept of *autrefois acquit*.

In the United States today there is nearly total judicial agreement that *double jeopardy itself* constitutes the *legal* bar to retrial for the same crime. Moreover, the time at which jeopardy attaches in a criminal case is neither when the defendant pleads nor when the jury renders its acquittal (as its common law antecedents of jeopardy or *autrefois acquit* would seem to require), but rather when the jury is impaneled, sworn, and charged with the prisoner; that if the jury is discharged at any time thereafter (except for certain specific and compelling reasons such as the illness of the judge or juror or in the case of a "hung jury") there has been the equivalent of an acquittal and the defendant must go free.<sup>19</sup> Thus the American practice

appears to be the common law forerunner of the modern practice of abandoning jeopardy after it has attached in cases of necessity, thus allowing the state to retry the defendant.

<sup>17</sup> 4 BLACKSTONE, COMMENTARIES \*335.

<sup>18</sup> A number of cases direct themselves to the proposition that only a jury verdict precludes appeal (to the extent that it is precluded at all): *Windsor v. Queen*, [1866] 1 Q.B. 289, 303, 309; *Regina v. Charlesworth*, 1 B & S 460, 507, 121 Eng. Rep. 786, 804 (Q.B. 1861); *United States v. Bigelow*, 3 Mack 393, 421 (D.C. 1884).

<sup>19</sup> A brief historical introduction and explanation of the American practice appears in the introductory note to the *Double Jeopardy* volume of ALI, ADMINISTRATION OF THE CRIMINAL LAW (1935). A summary and survey of the practice in individual states can be found in 22 C.J.S., *Criminal Law* §241 (1940), and 15 AM. JUR., *Criminal Law* §369 (1938, Supp. 1958). See, for example, *Hunter v. Wade*, 169 F.2d 973, *aff'd* 336 U.S. 684 (1948), and *People v. Watson*, 394 Ill. 177, 68 N.E.2d 265 (1946).

which is so lenient to defendants is not consonant with the earlier common law procedures. It makes no difference, so far as adherence to common law is concerned, that American courts may mean *autrefois acquit* when they speak of jeopardy, since not even *autrefois acquit* could prevent Crown appeals or second trials, as the previous discussion of appeals by felony and attainit has demonstrated. Moreover, from Blackstone's statement that one must be "*fairly found not guilty*," it is at least arguable that at the common law not even a jury acquittal would preclude subsequent action when the acquittal was the result of error in the trial court.<sup>20</sup>

The purpose of this section is not to establish conclusively that the right of appeal existed for the prosecution at common law. The purpose is, instead, to suggest that there is sufficient evidence of the existence of that right that American courts, absent specific constitutional<sup>21</sup> or statutory provisions, should not deny it to the State solely on the ground that it did not exist at common law. It is also suggested that double jeopardy considerations did not bar retrials at common law and that courts which now bar state appeals on double jeopardy grounds do so on the basis of policy considerations and not by reason of a legal construction of the double jeopardy clause. (This policy factor will be explored in detail in the last section of this paper.)

### The Statutes

The American Law Institute has proposed a section in its Code of Criminal Procedure which reads as follows:

"An appeal may be taken by the State (Commonwealth or People) from: (a) an order quashing an indictment or information or any count thereof. (b) an order granting a new trial (c) an order arresting judgment. (d) a ruling on a question of law adverse to the State where the defendant was convicted and appeals from the judgment. (e) the sentence, on the grounds that it is illegal."<sup>22</sup>

<sup>20</sup> This is the position taken by the Connecticut courts. *State v. Lee*, 65 Conn. 265, 30 Atl. 1110 (1894) and *State v. Palko*, 122 Conn. 529, 191 Atl. 320 (1937), *aff'd* 302 U.S. 319 (1937).

<sup>21</sup> The Texas constitution prohibits state appeals. TEX. CONST. art. 5, §26.

<sup>22</sup> ALI CODE OF CRIMINAL PROCEDURE §428 (1930). However, the ALI ADMINISTRATION OF THE CRIMINAL LAW §13 (1935), would, in addition, allow the state the right to a new trial when there was a material error prejudicial to the state, despite a prior acquittal.

Many states have enacted quite similar statutes, although no state has adopted the precise form of the proposed statute.<sup>23</sup> In general, the great majority of states allow, with only insignificant deviations from the model code, appeals from orders of the court but not from a judgment of acquittal, although the latter limitation is imposed more by the cases interpreting the statutes than by any explicit statements in the statutes themselves. In two of these states, Colorado and North Carolina, an appeal may be taken by the Attorney General not merely from orders but from a declaration that the statute is unconstitutional.<sup>24</sup> In Michigan the state may appeal from an order to quash or to arrest judgment *only* when these orders are based on the unconstitutionality of a statute.<sup>25</sup> The Alabama statute provides that the state may appeal when the act of the legislature under which the indictment or information is brought is held to be unconstitutional. The state's *case law* has made this the only occasion for appeal.<sup>26</sup>

In some states it has been provided that the attorney general may, with the court's permission, bring an appeal to the supreme court to deter-

<sup>23</sup> In Washington, for example, the state may appeal orders to quash, in arrest of judgment, or for a new trial, but in addition has the right to appeal from "... any order which abates the action otherwise than by an acquittal of the defendant by the jury." WASH. REV. CODE §10-73.020 (Supp. 1954). Under this provision a directed verdict can be appealed from, *State v. Bruhn*, 22 Wash.2d 120, 154 P.2d 826 (1945), although this is not allowed in the model statute. Similarly, Florida has adopted a statute exactly like the model statute except that in addition it allows an appeal from a judgment discharging the defendant on habeas corpus. FLA. STAT. §924.02 (1941).

<sup>24</sup> ARIZ. REV. STAT. ANN. §§13-1711-12 (1956); CAL. PEN. CODE §1466; COLO. REV. STAT. ANN. §§39-7-24, 27 (1953); FLA. STAT. §924.02 (1941); IDAHO CODE ANN. §19-2801 (1948); IND. ANN. STAT. §9-2304 (1956). Section 9-2305 gives the state the right to appeal any question not one of fact in misdemeanor cases; KAN. GEN. STAT. ANN. §62-1703 (1949); LA. REV. STAT. tit. 15, §540 (1950); MD. ANN. CODE art. 5, §14 (1957); MISS. CODE ANN. §1153 (1942); MO. REV. STAT. §§547.200, 210, 230 (1953); MONT. REV. CODES ANN. §94-8104 (1947); NEV. REV. STAT. §177.060 (1955); N.M. STAT. ANN. §§41-15-3, 6 (1953); N.Y. CODE CRIM. PROC. §518; N.C. GEN. STAT. §15-179 (1953); N.D. REV. CODE §29-2807 (1943); OKLA. STAT. tit. 22, §1053 (1951); ORE. REV. STAT. §§138.020, 60 (1953); S.D. CODE §34-4101 (1939); WASH. REV. CODE §10-73.020 (Supp. 1954). Tennessee's statute is much simpler; it provides that the state may appeal to the Supreme Court just as it may in civil cases *except* where the defendant has been acquitted in the trial court; TENN. CODE ANN. §40-3401 (1956), and *State v. Malouf*, 199 Tenn. 496, 287 S.W.2d 79 (1956).

<sup>25</sup> MICH. STAT. ANN. §28.1109 (1954).

<sup>26</sup> ALA. CODE tit. 15, §370 (1940); *State v. Gray*, 256 Ala. 31, 55 So.2d 354, 8 (1951).

mine a disputed point of law, although this determination would not affect any defendant who may already have been acquitted. In at least eight states,<sup>27</sup> this right accompanies the right to appeal from preliminary orders, or as in North Carolina, from the labelling of a statute as unconstitutional. In five states<sup>28</sup> this form of moot appeal not affecting the defendant is the only appeal which the statutes permit.

In at least three states there is no right of appeal by the State at all. Texas is most explicit: it has enacted a constitutional provision which declares that "the state shall have no right of appeal in criminal cases."<sup>29</sup> In Georgia<sup>30</sup> and Minnesota<sup>31</sup> the right is denied by omitting mention of the state in the statutory provisions authorizing whatever appeal is allowed in criminal cases. Not far removed from such statutes is that of Illinois where the state's sole right to appeal extends only to orders to quash or set aside the indictment.<sup>32</sup>

The law of Virginia and West Virginia is unique, due to the rather unusual constitutional provisions in these two states. Virginia's constitution<sup>33</sup> gives the state the right to appeal only in those criminal cases involving the violation of a law relating to the state revenue, while in West Virginia<sup>34</sup> the state can appeal in cases relating to the public revenue and "such other...as may be prescribed by law."<sup>35</sup> The courts of West Virginia have taken this to mean that an appeal is proper from preliminary orders but not from an acquittal, so as not to place the defendant in jeopardy twice.<sup>36</sup>

The double jeopardy rationale of the West

<sup>27</sup> Idaho, Indiana, Kansas, Mississippi, Montana, North Carolina, North Dakota, and Oklahoma; probably also in Michigan, Kentucky, Ky. CRIM. CODE §§335, 169, 177, 178 (Baldwin 1948).

<sup>28</sup> ARK. STAT. §§43-2720, 22 (1947); OHIO REV. CODE §§2945.67-70 (1953). The statutes have been construed to allow an appeal only to fix the law for the future, not to get a reversal. *State v. Lynch*, 81 Ohio 336, 340, 90 N.E. 935 (1910); NEB. REV. STAT. §§29-2314, 16 (1943); WYO. COMP. STAT. ANN. §10-1308, 11 (1945).

<sup>29</sup> TEX. CONST. art. 5, §26. It is interesting to note that this section is found in the article devoted to the judiciary and does not seem to be associated with the prohibition against double jeopardy which is found in art. 1, §14. Moreover, the introductory commentary to the section lists the reasons usually cited in defense of a denial to the state of the right to appeal, and double jeopardy is not one of them.

<sup>30</sup> GA. CODE §6-901 (1935).

<sup>31</sup> MINN. STAT. ANN. §§632.01, 05 (1949).

<sup>32</sup> ILL. REV. STAT. c. 38, §747 (1955).

<sup>33</sup> VA. CONST. art. 6, §88.

<sup>34</sup> W. VA. CONST. art. 8, §3.

<sup>35</sup> W. VA. CODE ANN. §5182 (1955).

<sup>36</sup> *Ex parte Bornee*, 76 W.Va. 360, 85 S.E. 529 (1915).

Virginia court points up the principal *legal* basis given for statutes which limit the state's right of appeal to preliminary orders of the court. In the great majority of states jeopardy attaches at the swearing and impaneling of the jury;<sup>37</sup> thereafter no appeal or new trial is allowed unless the defendant waives the jeopardy, as by moving to arrest judgment, or because of dire necessity, as when the judge dies. Consequently, when the jury renders a verdict for acquittal, clearly, under this rationale, no appeal or new trial can be available. This accounts for the decision of the courts of West Virginia to limit state appeal to preliminary orders. But this seems merely a policy decision; surely the courts could have allowed an appeal even from an acquittal on the basis of the broad authorization in the West Virginia constitution. The constitution of Virginia does not mold its state appeals practice to conform to the jeopardy theory, since in revenue cases the state can appeal even where the liberty of the defendant is involved, irrespective apparently of jeopardy, and in non-revenue cases the state cannot appeal even when there has been no jeopardy.<sup>38</sup>

While the West Virginia courts, having broad constitutional authorization, construed it to preclude appeal of an acquittal, Wisconsin, on the other hand, with an express constitutional prohibition against placing an accused twice in jeopardy,<sup>39</sup> nonetheless allows the state to appeal even from an acquittal. A Wisconsin statute specifically permits the appeal.<sup>40</sup> Wisconsin has been able to do this since it holds jeopardy to attach only after a final judgment is rendered and the accused is discharged. Thus if an appeal is requested immediately upon the verdict of acquittal, jeopardy has not attached and cannot bar subsequent proceedings.<sup>41</sup> As a result, in Wisconsin the state has in effect an unlimited right to appeal, provided it is promptly applied for by the prosecution.

Connecticut follows a similar practice. There appeals "may be taken by the state, with the permission of the presiding judge, to the Supreme Court of Errors, in the same manner and to the same effect as if made by the accused."<sup>42</sup> Despite the fact that the Connecticut constitution contains no prohibition against double jeopardy, the courts have felt compelled to reconcile the result reached

under the statute with the jeopardy concept. Accordingly, it is said that a single jeopardy is exhausted only when there has been a final judgment free from error. The basis for the Connecticut view is well stated in *State v. Lee*.<sup>43</sup> "The principle which protects an individual from the jeopardy involved in a second trial for the same offense is well established, and fully recognized. The question, however, as to what constitutes a trial, depends upon the course of procedure of the particular jurisdiction in which it is had, and the construction of the courts there with respect to it."

Connecticut thus suggests one means available for allowing a departure from traditional procedure. Pennsylvania suggests another. Its statute says only that the state may except to any decision or ruling in cases charging the offense of nuisance or forcible entry and detainer, or forcible detainer.<sup>44</sup> Through court interpretation, this statute has not prevented the state from appealing from an acquittal in cases not explicitly mentioned in the statute.<sup>45</sup> The state may also appeal from orders presenting questions of law generally,<sup>46</sup> and in cases where there is a question raised about the constitutionality of an act upon which the indictment is based.<sup>47</sup> By treating the statute as non-inclusive of all state remedies, the Pennsylvania courts have been able to expand the concept of state appeal.

This survey of the statutes bearing on the state's right to appeal indicates the wide variety of positions which are taken. It would seem that the significant factors in the statutory scheme are, first, that there is a considerable diversity of practice among the states; and second, that the relevant constitutional and statutory provisions allow some degree of latitude for the courts to explain, to interpret, and thus to make the law. In only nine states do the statutes themselves specify that the *listed* opportunities for state appeal are exhaustive.<sup>48</sup>

<sup>37</sup> 65 Conn. 265, 30 Atl. 1110 (1894).

<sup>38</sup> PA. STAT. (Purdum) §1188 (1930).

<sup>39</sup> Milk Control Comm. v. Hollinger, 170 Pa. Super. 180, 84 A.2d 794 (1952).

<sup>40</sup> Commonwealth v. Dolon, 155 Pa. Super. 453, 38 A.2d 497 (1944).

<sup>41</sup> Commonwealth v. Frank, 159 Pa. Super. 271, 48 A.2d 10 (1946).

<sup>42</sup> This express statement seems to be present in only the statutes of Arizona, Illinois, Kansas, Louisiana, Missouri, New Mexico, North Carolina, Oklahoma, and Oregon. It is not so much the statutes as it is the cases which make the stated remedies exclusive; for example: *State v. Huebner*, 233 Ind. 566, 122 N.E. 2d 88 (1954), *People v. Ballots*, 252 Mich. 282, 233 N.W. 229 (1930), *State v. Peck*, 83 Mont. 327, 271 Pac. 707 (1928).

<sup>37</sup> See note 19, *supra*.

<sup>38</sup> *Commissioner v. Perrow*, 124 Va. 805, 97 S.E. 820 (1919).

<sup>39</sup> WIS. CONST. art. 1, §8.

<sup>40</sup> WIS. STAT. §958.12 (1955).

<sup>41</sup> *State v. King*, 262 Wis. 193, 54 N.W.2d 181 (1952).

<sup>42</sup> CONN. GEN. STAT. §8812 (1949).

Therefore, since most courts are free to define when jeopardy attaches, they can, if they wish, adopt the Connecticut-Wisconsin view.<sup>49</sup> Therefore, if a court is inclined to adopt the Connecticut-Wisconsin position it should not be deterred by reason of any double jeopardy concern.

To the extent that the courts have this freedom and the jeopardy problem is thus eliminated, resort to the common law will not suffice as an excuse to deny the state the right to appeal.<sup>50</sup>

### The Policy Factors

To the extent that the state is allowed no appeal, the refusal is an historical reaction from a procedure which gave to the Crown inordinate advantages in the prosecution of an accused.<sup>51</sup> Because of this factor, modern society has developed a practice which inhibits the state to such an extent that today the accused has the decided advantages in criminal prosecution, e.g., in the presumption of innocence, the doctrine of privileged communications, the guarantee against self-incrimination and the right of practically unlimited appeal. Although it might have been wise to limit the state's rights to an appeal in the days when the accused did not have the many rights he now has, it is highly questionable whether the "no appeal" policy of today is a wise one in view of the many other protections accorded accused persons.<sup>52</sup>

Those who oppose state appeal cite two principal policy arguments in their support: the hardships

<sup>49</sup> This statement must be qualified to the extent that eight states have constitutional provisions providing that no person shall, after acquittal, be tried for the same offense: Iowa, Michigan, Mississippi, New Hampshire, New Jersey, Oklahoma and Rhode Island.

<sup>50</sup> See the first section of this article for the detailed reasons in support of this conclusion.

<sup>51</sup> ORFIELD, *CRIMINAL APPEALS IN AMERICA* 56-7 (1939).

<sup>52</sup> "Under the criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve. Why in addition he should in advance have the whole audience against him to pick over at his leisure, and make his defense, fairly or foully, I have never been able to see. No doubt grand juries err and indictments are calamities to honest men, but we must work with human beings and we can correct such errors only at too large a price. Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime." *United States v. Garsson*, 291 Fed. 646, 649 (1923).

caused defendants who have been acquitted, and the benefits of a jury trial.<sup>53</sup> They argue that defendants in criminal cases are rarely wealthy and that once they have borne the costs of the initial trial it is undue harassment to require the added expenditure on appeal for counsel, transcripts, and the other necessary costs. Particularly is this true when the state may thereafter appeal from the intermediate to the ultimate appellate tribunal. Moreover, the hardships are not only of a financial nature, but there is also the factor of time consumed on appeal, of the probability of frivolous appeals by the prosecutor, and the further damage to the accused's reputation. An additional argument is the proposition that a jury verdict represents a societal judgment, an opportunity for public opinion to make itself felt in the administration of criminal law. State appeal, presumably, would eliminate these advantages.

While it is true that some hardship will fall to the accused on an appeal by the state, there are compensating values which make the right of a state appeal desirable. Means can be found to minimize the hardships. The expenses on appeal can be borne by the state. Expenses involved in providing such items as the transcripts need present no problems. Counsel can be selected by the accused or provided by the court from a group recommended or at least approved by the various bar associations, with payment of more or less standard fees by the court. The concrete form of the plan is less a problem than the decision to adopt some such procedure. Some states have already done so.<sup>54</sup> The effect of its adoption would be not merely to relieve the accused of financial burdens on appeal but it would also discourage the prosecution of frivolous appeals since the state would have to pay for them and justify the expense to the public each election year. In addition, preference can be given to state appeals on the courts' calendars so that an early, final determination would result without impairing even the spirit of the guarantee of a speedy trial. While it is true that an acquitted defendant's reputation may not be enhanced by forcing him to defend an appeal, at the same time it is not likely to be injured either. The fact of appeal is ordinarily not publicized as is the trial and the jury verdict. If the appellate court sustains the lower court judg-

<sup>53</sup> For a typical exposition of these views see ORFIELD, *supra*, note 51 at 62, 71.

<sup>54</sup> In Nebraska, for example, the court appoints counsel to anyone opposing the state and pays a fee not to exceed \$100.00.

ment (and this will be quickly ascertained if state criminal appeals are given preference in appellate courts) the acquittal itself becomes completely free of the taint which often accompanies a jury verdict. Moreover, if the state is allowed an appeal as of right, it seems likely that to the public mind it will be treated only as a matter of course when it is exercised. In many states, whatever right of appeal the state has is to the state supreme court, foregoing the intermediate appellate tribunals.<sup>55</sup> This seems altogether fair; the accused should not have to defend more than a single quickly expedited appeal and the state should not have to pay for more.

With regard to the effect of a jury trial, it is a debatable question whether society's best interests are always served by this institution.<sup>56</sup> Assuming, however, that they are, the right of state appeal would not lessen its salutary effects. Appeal would be on questions of law alone. Fact finding is the jury's prerogative; although a reviewing court might disagree with the jury's verdict it could rarely say that the jury erred in not being convinced "beyond a reasonable doubt." Thus the ultimate question of fact remains for the jury to determine. Appeal assures that the jury will have considered only proper evidence and instructions, and that counsel's conduct was also legally proper. The jury would remain free to apply "community standards" and to render "moral judgments," for they could still disregard the evidence and the court's instructions.

The greatest advantage to accrue from according the state the right to appeal would be the protection thereby afforded society from the criminals who now avoid convictions because of improper conduct of defense counsel, the erroneous exclusion of admissible evidence, the erroneous refusal of the trial court to give certain state requested instructions and the giving of erroneous instructions favorable to the defense. Today such matters are not subject to review, regardless of how outrageous the errors may be.<sup>57</sup>

<sup>55</sup> This provision is incorporated in most statutes authorizing appeal. TENN. CODE ANN. §40-3401 (1956) begins: "Either party to a criminal proceeding may . . . pray an appeal in the nature of a writ of error to the Supreme Court. . . ." MICH. STAT. ANN. §28.1109 (1954), uses the words "... direct to the Supreme Court."

<sup>56</sup> A. F. Triplett, *Trial By Jury—A Farce*, 7 ARK. L. REV. 215 (1953); McWhorter, *Abolish the Jury*, 57 AM. L. REV. 42 (1923); Sebille, *Trial By Jury: An Ineffective Survival*, 10 AM. B. J. 53 (1924).

<sup>57</sup> See the discussion of the statutes in Part II.

The experience in jurisdictions permitting state appeals clearly indicates that there need be no fear of abuses of this right; the right has rarely been exercised.<sup>58</sup> This is probably due largely to the fact that when the court and both parties know that an appeal may be taken by either side they are all likely to be more zealous in an attempt to avoid error. Thus, paradoxically, the right to appeal may obviate the need to appeal. Moreover, the relatively few instances of state appeal also establish as unwarranted the fear that prosecutors will take numerous or frivolous appeals if granted the opportunity. To the extent, however, that this fear persists, appeal by the state could be restricted to such cases where the trial judge or the appellate court or a justice thereof has probable cause to think the appeal might be successful or might constructively contribute to an efficient legal system, and only with such consent may it proceed.<sup>59</sup>

A second advantage in state appeals is the effect it would have on trial judges. It would curb to a considerable extent the corrupt or politically motivated conduct on the part of some judges who can now act with impunity. Other judges, too, would be more careful in their rulings and conduct, for which they can only be corrected now when they make errors prejudicial to the accused. Permissive state appeals would effect a very desirable improvement with respect to both these factors.<sup>60</sup>

The third great advantage which accrues to society when the state can appeal is that the resulting decisions will develop the criminal law both as to its procedural aspects, as in appeals from orders, and as to substance, when an appeal of an acquittal allows an examination of the trial court's rulings and instructions. Thus an initial error would not perpetuate itself as it can today, when, in most states, even the most patent errors cannot be cor-

<sup>58</sup> Such statistics are collected in PERKINS, IOWA CRIMINAL JUSTICE 68 (1932); SHERILL, CRIMINAL PROCEDURE IN NORTH CAROLINA 23 (1930); and Beattie, *Criminal Appeals in California*, 24 CALIF. L. REV. 623, 25, 29 (1936). Statistics collected in Miller, *Appeals by the State in Criminal Cases*, 36 YALE L. J. 486 (1927) indicate that in Connecticut within a sixteen year period (volumes 82 to 98) the state appealed in only seven cases. There were as many reversals, percentage-wise, when the state appealed as there were when the defendant appealed.

<sup>59</sup> The statutes of Connecticut and Missouri, for example, have such a requirement.

<sup>60</sup> In PUTTKAMMER, ADMINISTRATION OF CRIMINAL LAW 236 (1953), the author suggests that to the extent that more attention is focused on judges through an opportunity to appeal all their decisions, and they are therefore required to be more responsible, to that extent the judgeships will attract better men.

rected through appeal after an acquittal. State appeal would also promote uniformity within the state, as where in separate districts separate trial courts may have ruled differently on the same issue. Unless the defendant initiates an appeal in one of these districts, the state's law will not be uniform. And when a trial court directs the acquittal of a defendant because of a mistaken doubt as to the constitutionality of the statute, as, for example, in defining his offense, and at the same time the state is allowed no appeal, then in effect the trial courts can, at least on occasion, become the final authority of the act's validity. Since the defendant cannot be expected to appeal the cases which he wins and since these are precisely the cases with which the state is chiefly concerned, especially when it feels they are the results of errors, the appeals of the defendant alone cannot, as some authorities argue, be expected to develop, unify, or clarify the law.<sup>61</sup> Particularly is this true when for financial reasons, most defendants do not appeal when they lose in the trial court, no matter how persuasive their cases would be on appeal.<sup>62</sup>

<sup>61</sup> ORFIELD, *supra*, note 51 at 73.

<sup>62</sup> Many states recognize the need for a clear determination of what the law is and hence have provided, where the state can appeal not at all or only from preliminary orders, for the attorney general to take questions of law to the Supreme Court of the state although the result can have no effect upon the defendant once he has been acquitted. See part II of this article. The federal government allows no such moot appeal. *United States v. Evans*, 213 U.S. 297, 300 (1909). It is submitted that this means of development of the law is not desirable. Historically and traditionally, decision of moot questions has not been considered a proper function for the courts, and the right to this sort of appeal has little practical value. See Cooper, *Is the Deciding of Moot Questions a Judicial Function?*, 7 ORE. L. REV. 228 (1928). The constitutional problems which such suits present are discussed in the *Evans* case, and in Munson, *The Decision of Moot Cases by Courts of Law*, 9 COLUM. L. REV. 667 (1909). The prosecutor is always busy with more cases than he has time to try. He isn't likely to spend his limited time prosecuting an appeal when a reversal won't do him any practical good; the defendant still goes free and the likelihood of ever getting another case during his term in office which raises the same legal problems in the same way is not statistically good. Nor will the publicity attendant on a successful appeal equal that of a successful prosecution of a new case at the trial level. At the same time an appeal advertises, to the extent it becomes known, the prosecutor's failure in the court below. Moreover, there is also something demoralizing, when the appeal succeeds, in the knowledge that there is at large in society an acquitted defendant who is guilty of a crime and that society is powerless to retry him.

But eliminating all of these considerations, the problem as to who defends the appeal remains. An acquitted defendant has no interest in the further proceedings. If the court appoints counsel to argue the

The two *legal* objections made to state appeals have already been touched upon in the first section of this article. It was suggested that a state appeal may have existed at common law and that concepts of double jeopardy were no bar. It was also suggested that American courts today have constructed a double jeopardy bar to state appeals on *policy* grounds in order to prevent such appeals. It is submitted that such policy constructions of the double jeopardy clause are unsupportable and that courts which want to come to the conclusion that state appeals are a good thing may do so in spite of the double jeopardy arguments which are usually raised against such a result.

*Kepner v. United States*<sup>63</sup> is usually cited by those who insist that state appeal would subject an acquitted defendant to double jeopardy. It is true that a majority of the United States Supreme Court came to this conclusion, but only in the face of a powerful dissent by Justice Holmes, who said:

"... it seems to me that logically and rationally a man cannot be said to be more than once in jeopardy in the *same cause*, however often he may be tried. The jeopardy is one continuing jeopardy from its beginning to the end of the cause. Everybody agrees that the principle in its origin was a rule forbidding a trial *in a new and independent case* where a man already had been tried once. But there is no rule that a man may not be tried twice *in the same case*."<sup>64</sup> (Emphasis added.)

The Connecticut courts have reached the same conclusion. In *State v. Lee*,<sup>65</sup> the classic case allowing a state appeal despite double jeopardy objections, the court resolved the supposed conflict between the concept of double jeopardy and the right of the state to a fair trial, free from error, in this manner:

"The function of courts is to settle controversies according to law. The object of settlement is secured by the principle of finality of judgments. The object of settlement in accordance with law the same in all cases, is secured

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case it is highly unlikely that he will offer the best defense available without the incentive of having a client whose life or freedom depends upon his knowledge, perseverance and skill. In either case, irrespective of who defends this moot appeal, the court is not likely to hear more than the state's appeal in its fullest, most persuasive form.

<sup>63</sup> 195 U.S. 100 (1904).

<sup>64</sup> 195 U.S. at 134.

<sup>65</sup> 65 Conn. 265, 30 Atl. 1110 (1894).