33 McGeorge L. Rev. 493

McGeorge Law Review
Spring, 2002

Article

THE MAULED VERDICT: THE KNOLLER CASE SHOWS WHY RES JUDICATA SHOULD PROTECT PARTIAL CONVICTIONS AS WELL AS ACQUITTALS

Mitchell Keiter [a1]

TABLE OF CONTENTS

I. INTRODUCTION

On January 26, 2001, two dogs fatally mauled Diane Whipple. [1] A San Francisco jury found dog owner Marjorie Knoller guilty of second-degree murder, concluding she acted with implied malice. [2] The trial court ordered a new ***494** trial due to the court's doubt about whether Knoller knew of the danger presented by her dogs, and thus whether she acted with the requisite malice. [3] The court had no doubt that Knoller was guilty of at least involuntary manslaughter, which does not require a subjective awareness of the danger presented. The perceived defect in the initial verdict thus resembles other procedural defects that warrant a new trial, like instructional error or juror misconduct.

In such cases, the trial has shown the defendant to be guilty of *murder or manslaughter, but not neither*. Retrial is thus warranted to determine of which offense the defendant is guilty. California, however, stands alone in prohibiting such a second trial to determine whether the defendant is guilty of murder or manslaughter. California law imposes on prosecutors a dilemma. They may elect to accept the manslaughter conviction, in which case they must forfeit the right to retry the defendant for murder, even though there may be very strong evidence of guilt. On the other hand, the People may elect to retry the defendant for murder, but the People must then forfeit the undisputedly valid manslaughter conviction. The defendant thus regains the presumption of innocence, notwithstanding the first jury's unanimous finding beyond a reasonable doubt that the defendant was guilty of some degree of homicide. Part II of this article shows this dilemma is not compelled by the double jeopardy rule and violates

its spirit. According preclusive effect to acquittals but not valid convictions distorts the truth-finding process and undermines the integrity of the jury system.

Not only should the People have the opportunity to retry the defendant for the greater offense of murder without forfeiting the valid lesser manslaughter conviction, retrial may appropriately be limited to the unresolved issue. For example, in *People v. Hogue*, [4] a jury convicted the defendant of penetrating a minor with a foreign object. The Court of Appeal reversed the conviction because the trial court had erroneously failed to instruct the jury that the defendant needed to have been at least ten years older than the victim, a material element of the offense. [5] Although the jury unanimously found beyond a reasonable doubt that the defendant had committed the charged sexual act and the only disputed issue was the age disparity, the Court of Appeal ordered a full retrial, reinvesting the defendant with a complete presumption of innocence ***495** regarding every element. [6] The Constitution does not require this result, and common sense does not support it.

The doctrine of res judicata [7] has long governed civil law, and the Supreme Court has authorized its expansion. In upholding preclusion in a civil context, the Court observed that relitigating proper, unanimous verdicts creates the "aura of a gaming table." [8] In *Ashe v. Swenson*, [9] the Court ruled criminal defendants were constitutionally entitled to the benefit of preclusion. Although the Court has not expressly decided whether criminal convictions may likewise enjoy preclusive effect, [10] it recently recognized the propriety of respecting properly returned verdicts. [11] Notwithstanding a limited instructional error concerning one element of the charged offense, the Court declined to "veer away from settled precedent" by allowing a retrial that would have erased properly returned findings of guilt. [12] Part III shows how precedent and policy support limiting retrials to disputed issues.

Part IV shows how the same principles support estopping certain defenses even where an initial verdict does not validly convict the defendant of anything. For example, a trial court's failure to instruct the jury on self-defense may mean that there is no lesser offense of which the defendant is necessarily guilty, because the homicide would be justifiable if the jury accepted the self-defense defense. If the first jury, however, unanimously rejected the defendant's provocation defense, he should not be able to reassert it at a second trial, where he should be limited to the defense of self-defense. Part V discusses the exceptional cases where the People should be entitled to preclusion in subsequent proceedings.

II. RETRIAL AND THE DOUBLE JEOPARDY RULE

The threshold issue in examining a "retain and retry" procedure (retaining convictions for lesser included offenses (LIO's) while retrying deadlocked or reversed greater included offenses (GIO's) is its constitutionality. For instance, if the People retain manslaughter convictions and retry murder charges, would the defendant be placed in jeopardy twice for the same offense? The United States ***496** Court of Appeals, Eighth Circuit, the only federal court to address the question, and all state courts that have conclusively decided the issue agree the procedure comports with the Fifth Amendment protection against double jeopardy.

In *United States v. Bordeaux*, [13] the Eighth Circuit Court of Appeals authorized a retrial. In the defendant's first trial, the jury deadlocked on the GIO of aggravated sexual abuse by force, [14] but convicted him of the LIO of abusive sexual contact by force. [15] Both parties agreed the LIO conviction had to be reversed due to instructional error, [16] but they disagreed on the retrial procedure. While the prosecution sought to retry the deadlocked GIO charge, Bordeaux claimed retrial could concern only the LIO, as retrial on the GIO would violate double jeopardy principles. Bordeaux cited *Green v. United States* [17] and *Price v. Georgia*, [18] where the juries convicted defendants of the LIO of second-degree murder and left blank the verdict form for the GIO of first-degree murder. [19] In those cases, the Supreme Court construed the blank forms as "implied acquittals" of first-degree murder, barring retrial on that charge. [20]

The Eighth Circuit distinguished *Green* and *Price*, where the jury expressed no opinion on the GIO, from *Bordeaux*, where the jury expressly indicated its inability to resolve the GIO charge. Treating the case as one of first impression in the federal courts, the *Bordeaux* court followed two state opinions, *Mauk v. State* [21] and *People v. Fields*, [22] which held the Double Jeopardy Clause permits retrying deadlocked GIO charges without disturbing the LIO convictions.

In *Mauk*, the initial jury deadlocked on the GIO of possession of marijuana with intent to distribute and convicted the defendant of the LIO of simple possession of marijuana. [23] Like Bordeaux, Mauk claimed retrial on the GIO would violate double jeopardy principles. [24] The Maryland Court of Special Appeals rejected this contention, explaining the crucial distinction between "sequential jeopardy" and "continuing jeopardy." [25]

***497** Sequential jeopardy occurred in *Brown v. Ohio*, [26] where a defendant pleaded guilty to and served a sentence for the LIO of joyriding. After his release, the prosecution charged him with the GIO of auto theft. [27] The Supreme Court held that the Double Jeopardy Clause barred these "successive prosecutions," which undermined the "constitutional policy of finality for the defendant's benefit." [28] Once the defendant's jeopardy for the charge terminated through the conviction or plea, the Double Jeopardy Clause barred a new prosecution for the "same offense;" a GIO or LIO. [29]

By contrast, a defendant faces continuing jeopardy where the prosecution charges several offenses, resolves only some of them through an initial plea (or jury verdict), and then continues to prosecute the unresolved charges. In *Ohio v. Johnson*, [30] the prosecution charged the defendant with murder, robbery, and their respective LIO's of manslaughter and theft. [31] When Johnson pleaded guilty to the LIO's (over the prosecution's objection), the trial court dismissed the GIO's. [32] The Supreme Court reversed, holding that the prosecution could proceed on the GIO's because the termination of jeopardy on the LIO counts had no crossover effect on other, already-charged counts.

> [Johnson argues] a determination of guilt and punishment on one count of a multicount indictment immediately raises a double jeopardy bar to continued prosecution on any remaining counts that are greater or lesser included offenses of the charge just concluded. We have never held that, and decline to hold it now. [33]

The Supreme Court distinguished *Brown*, where principles favoring finality and disfavoring prosecutorial overreaching barred retrial, from *Johnson*, where the prosecution did not have a full and fair opportunity to convict the defendant of the GIO's. [34] As in *Johnson*, defendants who face continuing jeopardy may be retried after mistrials or reversals on other counts. [35]

Like the *Bordeaux* court, the California Supreme Court distinguished *Price* and *Green*, where jury silence implied acquittal on the GIO, from *Fields*, where the jury convicted the defendant of the LIO (simple vehicular manslaughter while ***498** intoxicated) and expressly deadlocked on the GIO (gross vehicular manslaughter while intoxicated). [36] The California Supreme Court thus recognized and joined the consensus of state courts that affirm the constitutionality of retrying GIO's without disturbing LIO convictions. [37] The *Fields* court, however, barred retrial on state statutory grounds. [38] The court decided to enforce its "acquittal-first" doctrine, which prohibits a jury from convicting on an LIO unless it has first formally acquitted on the GIO. In cases where the jury agrees the defendant is guilty of the LIO but cannot agree on the GIO, the People cannot receive any benefit from the LIO unanimity; the entire case must be retried. [39] Where an appellate court reverses a conviction, but recognizes the evidence nevertheless supports the LIO, [40] the People are in a slightly better position. [41] They have the option of accepting the LIO conviction or retrying the GIO, but they may not do both. [42] This option resembles the 1970s game show "Let's Make a Deal," where contestants could exchange their modest winnings for the mystery prize behind the next curtain. California prosecutors face the same dilemma—they must trade in valid convictions for the chance to convict on the GIO, which risks a complete acquittal despite the first jury's conviction. [43] In contrast to California and its ***499** acquittal-first

procedure, the Eighth Circuit provides what may be deemed a "verdict-first" procedure. It instructs jurors first to consider the GIO, but allows them to convict on the LIO without necessarily deciding the GIO. "If your verdict [on the GIO] is not guilty, or if, after all reasonable efforts you are unable to reach a verdict, you should record that decision on the verdict form and go on to consider whether defendant is guilty of the [LIO]." [44]

This verdict-first procedure enhances the very principles manifested by the acquittal-first doctrine, which implements the "unequivocal intent of the jury to unanimously acquit [the] defendant of the [GIO]." [45] The Eighth Circuit's rule likewise implements a jury's intent to resolve an LIO. Under the Eighth Circuit's balanced rule, the effect of the initial partial verdict does not depend on which party it favors. [46]

***500** The *Fields* court cryptically explained its reluctance to allow the People to retain the LIO conviction and retry the GIO. The court cited "numerous and formidable practical difficulties" to retrials. [47] If the retrying jury is informed of the LIO conviction, "there exists the potential for juror confusion and/or speculation." [48] But the court also found the other alternatives less than ideal. If instructed on only the GIO and acquittal, the jury might convict on the greater or acquit altogether, even if it thought the middle ground was appropriate. However, if the court instructed on the LIO, the second jury's acquitting the defendant would arguably invalidate the prior conviction. [49] While the simple solution to the court's doubts is to let the defense choose how to instruct the jury, since double jeopardy is a waivable protection, [50] the better approach is to inform the jury of the prior conviction and instruct it to determine only the presence or absence of the element that distinguishes the GIO from the LIO. Part III addresses the constitutionality of that procedure.

III. RES JUDICATA AND PARTIAL CONVICTIONS

May res judicata protect partial convictions as it protects partial acquittals? Mutual preclusion would provide the benefits of consistency, symmetry, and finality that res judicata offers in civil litigation. Lower courts have divided on the subject, which the United States Supreme Court has yet to address squarely. This Part traces the development of this debate from the 1960s to the present and concludes that res judicata may and ought to be applied to protect valid partial convictions.

A. People v. Ford

A Los Angeles jury convicted William Ford of burglary, possession of a concealable weapon by an ex-felon, first-degree robbery, kidnaping, assault with a deadly weapon, and first-degree murder. [51] The California Supreme Court ruled that an erroneous instruction regarding Ford's intoxication compelled reversal of his first-degree murder conviction, although the court affirmed Ford's other convictions. [52] The trial court invoked res judicata in instructing the jury on retrial, with the subsequent approval of the California Supreme Court:

> ***501** [On retrial, the trial court instructed] the jury, that [Ford] had been convicted of robbery, kidnaping and possession of a concealable weapon by an ex-felon, and reserved for the jury only the questions whether the homicide was perpetrated during the commission of any or all of these felonies, and whether he possessed the intent requisite to the various felonies at the time of the commission of the homicide. [53]

The court barred Ford from denying any element of the felonies of which he had been convicted by the first jury, holding their relitigation was barred by the doctrine of res judicata. [54] The second jury could consider only those issues that the first jury had not conclusively resolved. Accordingly, on retrial Ford could not deny his identity as the killer; his permitted defense could concern only timing (the homicide did not occur during his commission of the felonies), [55] or intent (he did not have the intent

to commit those felonies at the time of the homicide). [56] Otherwise, the People were "permitted the benefit of the felony-murder rule without the necessity of having to prove the elements of the respective felonies." [57]

The *Ford* court thus announced the following rule concerning the application of res judicata on limited retrials:

> The doctrine of res judicata applies to criminal ... proceedings and operates to conclude those matters in issue which the verdict determined though the offenses be different. Thus where a defendant is tried on multiple counts of a single information, each count being considered as a separate and distinct offense, the doctrine of res judicata operates to preclude the relitigation of issues finally determined upon retrial of only one count. It follows that the doctrine of res judicata justifies ***502** instructions, where relevant, that a defendant has been found guilty of crimes finally adjudicated which are charged as elements in another charge or charges then in the process of being retried. [58]

Some courts have questioned whether *Ford* has survived subsequent United States Supreme Court decisions. The rest of this Part shows that *Ford* remains good law and good policy, and it merits emulation.

B. Ashe v. Swenson

In *Ashe v. Swenson,* [59] the United States Supreme Court held that the doctrine of collateral estoppel is embodied in the Fifth Amendment's double jeopardy prohibition, by which the states are bound. [60] In *Ashe*, several robbers robbed six men who were playing poker. [61] A jury acquitted Ashe of robbing victim Knight. [62] The state then tried and convicted Ashe for the robbery of another victim, Roberts. [63] The Supreme Court reversed the conviction, finding the second prosecution violated Ashe's constitutional guarantee against double jeopardy. [64]

The Court held Ashe's initial acquittal barred further prosecution. Consistent with *Ford*, *Ashe* held the first jury's determination barred a second jury from contradicting the first jury's judgment. "[W]hen an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." [65] Both *Ford* and *Ashe* thus support the rule that a legally proper and conclusive disposition may not be challenged before another jury.

The Court's ruling in *Ashe* stemmed from the Court's objection to prosecutors' treating initial prosecutions as "no more than a dry run for the second prosecution." [66] Justice Brennan's concurring opinion amplified this concern:

> [T]he opportunities for multiple prosecutions for an essentially unitary criminal episode are frightening .... One must experience a sense of uneasiness with any double-jeopardy standard that would allow the State this second chance to plug up the holes in its case. The constitutional ***503** protection against double jeopardy is empty of meaning if the State may make "repeated attempts" to touch up its case by forcing the accused to "run the gantlet" as many times as there are victims of a single episode. [67]

Ashe enforced estoppel to benefit defendants who had successfully defended against a charge, where the "single rationally conceivable issue," when viewed from a "practical" and "realis[tic]" perspective, was raised anew. [68] The *Ashe* court reviewed Ashe's first acquittal, with "realism" and "rationality," and determined the jury had concluded there was a reasonable doubt that Ashe was one of the robbers. [69] Therefore, it would be improper to force Ashe "to 'run the gantlet' a second time." [70]

The following year, in *Simpson v. Florida*,[71] the Supreme Court acknowledged the doctrine did not offer symmetrical opportunities for preclusion to prosecutors.[72] Prosecutors could not sequentially prosecute defendants, deriving benefits from the verdicts returned during the first trial. If the first jury had convicted Simpson of robbing the store manager, and the prosecution then charged Simpson with robbing the customer, "the prosecutor could not ... have laid the first [conviction] before the trial judge and demanded an instruction to the jury that, as a matter of law, petitioner was one of the armed robbers in the store that night."[73]

Some state courts have suggested that *Ashe* and *Simpson* prevent the People from ever estopping a defendant, effectively disapproving *Ford*.[74] The holding of *Simpson*, however, was not so sweeping. The *Simpson* court simply held that the People, unlike the defense, could not draw "rational" or "practical" inferences from a verdict of guilt on a *prior* charge to compel a directed verdict for a conviction on a *new* charge, legally distinct albeit factually related to the first. This holding does not disturb the *Ford* rule that the People are entitled to verdicts *already decided* in their favor.[75]

***504** Both *Ford* and *Simpson* are in harmony with the two imperatives established by *Ashe*: (1) issues conclusively determined in a prior proceeding are not properly subject to relitigation,[76] and (2) the People should not derive tactical advantage from piecemeal, serial prosecutions.[77] The Supreme Court's decision in *Parklane Hosiery Co. v. Shore*[78] confirmed the significance of this second imperative, supporting the view that prosecutorial preclusion is proper when the People bring all charges together in the initial proceeding.

C. Parklane Hosiery Co. v. Shore

One year after *Ashe*, the Supreme Court expressly authorized nonmutual estoppel. In *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*,[79] the Court approved the use of estoppel by a party that was not involved in the initial litigation. More significantly, the Court broke further ground in 1979 by authorizing estoppel in an "offensive"[80] context in *Parklane Hosiery*.

Parklane Hosiery authorized the use of nonmutual estoppel against defendants as well as plaintiffs. The Securities and Exchange Commission brought an action in which the defendant corporation was found to have made a materially false statement.[81] After that action, a private shareholder brought a suit alleging essentially the same claim against the corporation. The Court estopped the defendant from denying the claim, due to the prior finding.[82]

The Supreme Court granted the lower courts discretion in applying offensive estoppel due to some of the problems associated with its application. The Court's primary concern paralleled its rationale in *Ashe*. Just as prosecutors might sequentially prosecute defendants for strategic advantage, civil plaintiffs might have a similar incentive to use offensive estoppel.
Since a plaintiff will be able to rely on a previous judgment against a defendant but will not be bound by that judgment if the defendant wins, ***505** the plaintiff has every incentive to adopt a "wait and see" attitude, in the hope that the first action by another plaintiff will result in a favorable judgment .... [P]otential plaintiffs will have *everything to gain and nothing to lose* by not intervening in the first action.[83]

The Court resolved the problem by granting discretion to lower courts for civil cases, but discretion is unnecessary in criminal cases. The *Simpson* rule, which denies estoppel to prosecutors who charge the defendant in sequential prosecutions, effectively eliminates any incentive for that practice. In *United States v. Dixon*,[84] the Court explained how *Ashe* and *Simpson* undermined the incentive by describing a hypothetical in which the People charged a defendant with murder committed during the course of a robbery and robbery with a firearm.

[The] concern that prosecutors will bring separate prosecutions in order to perfect their case seems unjustified. They have *little to gain and much to lose* from such a strategy. Under *Ashe*, an acquittal in the first prosecution might well bar litigation of certain facts essential to the second one—though a conviction in the first prosecution would not excuse the Government from proving the same facts a second time. [85]

In other words, the *Ashe-Simpson* rule reversed the former incentive for piecemeal litigation; the current rule effectively induces prosecutors to charge all related offenses together.

Parklane Hosiery thus furthered the preclusion principle. So long as plaintiffs do not engage in piecemeal litigation for tactical purposes, they are entitled to benefit from the conclusive determinations of prior proceedings.

D. People v. Goss and United States v. Pelullo

In 1994, both the Michigan Supreme Court, in *People v. Goss*, [86] and the United States Court of Appeals, Third Circuit, in *United States v. Pelullo*, [87] rejected the use of res judicata by the prosecution. [88] The cases involved similar procedural predicates. In *Goss*, as in *Ford*, the first jury convicted the defendant of robbery and murder, but the murder conviction was overturned on appeal. [89] In ***506** *Pelullo*, the first jury convicted Pelullo of the substantive offense of wire fraud, and of racketeering in violation of the Racketeer Influenced and Corrupt Organization Act (RICO). [90] When the racketeering conviction was overturned on appeal, the prosecution sought to use the wire fraud conviction as evidence of a predicate offense in the racketeering retrial. [91] The *Goss* and *Pelullo* courts offered four objections to the prosecutorial preclusion: The practice (1) undermined the defendant's right to a jury trial, (2) undermined the second jury's opportunity to determine all the issues, (3) restricted the defendant's ability to present his defense, and (4) undermined the defendant's presumption of innocence. Careful analysis reveals the flaws of these objections.

1. The Right to a Jury Trial

The *Pelullo* court held that estopping the defendant from disputing the already-resolved charge would undermine his right to a jury trial. The Third Circuit cited Justice Rehnquist's dissent in *Parklane Hosiery*, which asserted the majority opinion undermined a defendant's right to a jury trial. [92] Justice Rehnquist's *Parklane* dissent, however, turned on that case's facts. The defendant corporation never received a jury trial in either the first or second proceeding. The first proceeding, which estopped the corporation from later asserting innocence, was tried by the District Court. [93] Justice Rehnquist expressly noted that the use of offensive estoppel and the denial of Parklane's jury trial right were distinct—the former could occur without the latter. [94]

Where a jury decides the first proceeding, there is no denial of a jury trial right because the resolved issues have been decided by a jury. “[T]here is no further fact-finding for the jury to perform, since the common factual issues have been resolved in the previous action.” [95] The Third Circuit dismissed this precedent in a footnote that asserted the Supreme Court “declined to extend *Parklane* to criminal cases.” [96] This assertion misinterprets the Court's opinion in *Standefer v. United States*, [97] which limited the use of nonmutual defensive estoppel, rather than mutual offensive estoppel. [98]

***507** The prosecution charged Standefer with aiding and abetting, after the principal had already been acquitted of the substantive offense. [99] Standefer unsuccessfully argued the prosecution should be estopped from prosecuting him because the first jury acquitted the individual whom Standefer had allegedly aided and abetted.

The *Standefer* court recalled it had authorized "nonmutual collateral estoppel" in both *Blonder-Tongue* and *Parklane Hosiery*. [100] As an aside, the Court noted the nonmutual estoppel applied in *Parklane* was "offensive." [101] However, Standefer did not seek offensive estoppel (he sought defensive estoppel); rather, he "urge[d] [the Court] to apply *nonmutual* estoppel against the Government." [102] The Court distinguished *Standefer* from both *Blonder-Tongue* and *Parklane Hosiery*, [103] and rejected the "application of nonmutual estoppel in criminal cases." [104]

In both its express holding and its reasoning, *Standefer* restricted the application of only nonmutual estoppel in criminal cases. It never discussed offensive mutual estoppel, and its analysis implicitly condoned its operation. [105] The defendant in *Standefer* demanded asymmetrical preclusion— acquitting a principal would preclude prosecutions of aiders and abettors, but convictions of principals would be immaterial in prosecutions of aiders and abettors. In accordance with the logic of *Parklane Hosiery*, such a rule would both distort the truth-finding process by offering preclusion only to pro-defense verdicts, and offer defendants an incentive to delay their own trial to obtain a possible benefit from their accomplice's verdict.

Accordingly, nothing in *Standefer* entitles criminal defendants to relitigate offenses that have been conclusively found by a prior jury.

> [W]hen a prosecutor seeks to use collateral estoppel a jury has already passed on the defendant's claims. The fact that it was a different jury at a prior trial does not seem to lessen the force of the contention that the ***508** defendant's right to trial by jury on every element of the crime has been respected. [106]

2. The Second Jury's Opportunity to Determine All the Issues

In *Goss*, the Michigan Supreme Court affirmed the defendant's conviction for robbery, but reversed his conviction for murder committed during the robbery. [107] The lead opinion considered the jury's determination of the robbery charge to be independent of the jury finding the robbery-element of the robbery-murder. Citing *United States v. Powell* [108] and *People v. Lewis*, [109] which allowed juries to return inconsistent verdicts, the lead opinion in *Goss* held the retrying jury was entitled to "[consider] afresh the armed-robbery element of the felony-murder charge" as the first jury would have been allowed to find Goss guilty of armed robbery, while finding the armed-robbery element of felony-murder was not proven. [110]

The opinion, however, misinterpreted *Powell*. The United States Supreme Court *permits* juries to return inconsistent verdicts; it does not *presume* they will. The *Powell* court recognized that the doctrine of collateral estoppel rests on the contrary presumption —that juries act consistently. "The problem is that the same jury reached inconsistent results; once that is established principles of collateral estoppel—which are predicated on the assumption that the jury acted rationally and found certain facts in reaching its verdict—are no longer useful." [111]

The *Goss* court's presumption of inconsistency would thus eviscerate *Ashe*. [112] If Ashe had been tried for both offenses in one proceeding, he could have been convicted of robbing victim Roberts and acquitted of robbing victim Knight. [113] The *Goss* court would apparently allow sequential prosecutions in which juries could consider afresh the charges because the first jury was legally entitled to return inconsistent verdicts. This rule would be contrary to the United States Supreme Court's holdings in *Ashe*, *Simpson*, and *Powell*, which establish that the Court tolerates inconsistency in a single proceeding but does not presume that successive juries will reach directly contradictory results. No doctrine of preclusion could operate if future juries are invited to consider afresh verdicts that a former jury has properly returned.

509** ***3. The Right to Present a Defense

In both *Ford* and *Goss*, the defendant had his murder conviction reversed but his robbery conviction affirmed. An important issue in each case was how the defendant could defend himself against the murder charge on retrial. The lead *Goss* opinion distinguished *Ford*, finding that estoppel in *Goss* would bar the defendant from asserting his preferred defense of mistaken identity; whereas Ford was allowed to present his preferred defense that he lacked the intent to commit the underlying felonies at the time of the homicide. [114] But no meaningful distinction exists. The People sought to bar Goss from offering a defense (identity) that had been conclusively rejected by a unanimous jury, just as Ford had been barred from offering an identity defense. Ford, however, could dispute whether he had the specific intent to commit the felonies because the first jury had not resolved that issue. [115]

Courts must use an objective test in determining the issues subject to estoppel, namely, those issues that were conclusively resolved by the first jury's verdict. A subjective test, whereby estoppel is valid only where it does not impinge upon the defendant's preferred defense, enables a defendant to veto estoppel simply by asserting the defense that the first jury rejected. [116]

4. The Presumption of Innocence

Perhaps the strongest criticism of applying res judicata in *Goss* was the concurring opinion's concern that instructing the jury "of the first jury's finding of guilt with regard to armed robbery would unfairly prejudice the second jury's ability to presume the defendant innocent of felony murder." [117] The concurring justices feared the jury's knowledge of Goss's guilt on the robbery count would invariably taint its consideration of the remaining murder count, of which Goss was still presumed innocent. This knowledge, however, would impair the presumption of innocence much less than other accepted retrial procedures.

In many jurisdictions, after a jury convicts a defendant of the highest degree of murder, the jury must next decide the penalty. If the jury deadlocks, or has its ***510** capital sentence reversed on appeal, a second jury is empanelled to decide only the sentence. The second jury is informed of the first jury's conviction and is instructed to decide the limited question of penalty. [118] The prejudice inherent in informing a new jury of the defendant's first-degree murder conviction exceeds the prejudice in *Goss* of informing a second jury of a robbery conviction.

The sentencing determination may involve not merely the decision of whether to extend mercy to a defendant, but may also involve specific factual findings. For instance, if a California defendant, like Ford, is convicted of robbery-murder, the jury must then determine whether the murder was committed to advance the felonious purpose, or if the robbery was "merely incidental" to the murder. [119] If the jury deadlocks in deciding whether the special circumstance allegations are true, or has its findings overturned on appeal, the People could retry those allegations. [120] On retrial, the court would inform the second jury that the defendant had been convicted of first-degree murder. [121] The court could even inform the jury that the defendant had been convicted of the underlying felonies. [122]

This kind of instruction challenges the jury's ability to presume the defendant innocent more than the instruction condemned by the *Goss* concurrence. Whereas raising a felony to first-degree felony-murder requires the jury to find the element of homicide, raising a first-degree felony-murder to a special circumstance felony-murder does not require the finding of any additional act. [123] Furthermore, first-degree murder is a far more serious offense than any underlying felony, and thus learning of a defendant's first-degree murder conviction would likely prejudice a second jury far more than learning of his earlier robbery conviction. *A fortiori*, as juries can properly follow instructions and determine a felony-murder special circumstance allegation upon being informed of the defendant's convictions of both first-degree murder and the underlying felony, juries may likewise properly determine a defendant's guilt of first-degree felony-murder upon being informed of the defendant's earlier conviction of the underlying felony.

Courts also inform juries about defendants' underlying offenses in nonmurder proceedings. When a jury convicts a defendant of possession of cocaine for sale, but deadlocks on whether the amount exceeded twenty-five pounds, the court will empanel a new jury, which will learn of the defendant's conviction and determine only the amount possessed. [124] Similarly, when a jury agrees the ***511** defendant committed a felony but cannot decide whether he inflicted great bodily injury on the victim, a second jury will learn of the felony conviction and decide only the injury issue. [125] When the second jury learns the defendant committed a felony, it is a difference only in degree between whether that jury must decide if the defendant committed a homicide during the felony (as in *Ford* or *Goss*) or merely inflicted great bodily injury (as in *Schulz*). [126] These procedures belie the *Goss* concurrence's assertion that a jury's learning of LIO convictions will unconstitutionally erode the presumption of innocence.

Accordingly, the arguments raised by the *Goss* and *Pelullo* courts erroneously construe the holdings of *Standefer, Powell*, and *Ford*, and overlook the general procedures of retrials.

The Constitution guarantees the right to present a defense, to a fair trial by an impartial jury, to the presumption of innocence, to due process, and to proof beyond a reasonable doubt. But it does not guarantee a defendant the right to exploit those guarantees over and over again to determine the same issue. [127]

Neither constitutional principles nor public policy bars prosecutorial preclusion.

E. Neder v. United States

Nearly three decades after *Ashe*, the United States Supreme Court implicitly endorsed the logic supporting prosecutorial preclusion in *Neder v. United States*. [128] In *Neder*, the jury properly found all the elements of the charged fraud offenses except materiality, because the trial court erroneously withdrew that element from the jury's consideration and determined it to be true. [129] The Supreme Court held that when a trial court misinstructs the jury, either by omitting or misdescribing an element, the error is reviewable for prejudice and does not require automatic reversal. [130] This rule exposes the weakness of objections to res judicata for convictions.

***512** If a jury convicts a defendant of robbery, but the court fails to instruct (or does so incorrectly) on the element that the property must be taken from the victim's immediate presence, what should be the result? The principle established in *Ford* allows a larceny conviction to stand with a retrial set to determine only the unresolved element of personal presence. [131] *Neder* now allows the appellate court to note the jury's verdict that reliably found a larceny and then review the record and determine that no reasonable jury could have failed to find the immediate presence element. [132] If an appellate court may examine the evidence and decide for itself what a reasonable jury would have found, *a fortiori*, there can be no objection to a new jury's examining the evidence and finding the existence of the element for itself. [133]

The *Neder* court alluded to the significance of preclusion, acknowledging the defendant had no constitutional right to relitigate issues that an earlier jury had properly and conclusively determined against him. If only the materiality element had not been properly decided, Neder did not deserve a retrial on the elements that the jury had properly determined.

Reversal without [harmless error analysis] would send the case back for retrial-a retrial not focused at all on the issue of materiality, but on contested issues on which the jury was properly instructed. We do not think the Sixth Amendment requires us to *veer away from settled precedent to reach such a result*. [134]

Neder therefore broke new ground in rejecting the view that the Constitution or policy entitles defendants to relitigate questions already resolved by another jury.

F. Conclusion

In *Ford*, the California Supreme Court approved the use of res judicata in criminal cases "to preclude the relitigation of issues finally determined" in an earlier proceeding. [135] The logical force of that holding has only grown over time. The U.S Supreme Court has since issued several decisions that have furthered the ***513** preclusive effect of former verdicts. In *Ashe*, it held that defendants were entitled to the preclusive effect of earlier acquittals as a constitutional imperative. In *Blonder-Tongue* and *Parklane Hosiery*, the Court authorized preclusion even in the absence of mutuality. *Parklane Hosiery* held that defendants as well as plaintiffs could be bound by prior judgments, so long as the precluding party had not failed to join an earlier action for tactical reasons. Finally, *Neder* allowed appellate courts to decide the existence of elements on which there had been incomplete or imperfect instruction, undermining objections to juries' performing that function themselves. The *Neder* court expressly decided defendants had no Sixth Amendment right to relitigate issues properly decided by an earlier jury. Reciprocal res judicata both comports with constitutional norms and enhances the integrity of the jury system.

IV. PRECLUDING DEFENSES

Part III examined the subject of precluding defendants from disputing findings that they had committed lesser offenses. A problem that occurs frequently, however, is that a first jury may find only certain *elements*, which do not constitute a complete offense. For instance, a murder conviction cannot stand if the court erroneously fails to instruct the jury on self-defense, and a rape conviction cannot stand if the jury receives no instruction regarding consent. The omitted instruction negates the existence of any "settled precedent" for conviction. This Part examines the proper procedures when an initial trial fails to resolve conclusively the initial charges.

In *People v. McCoy*, [136] the jury convicted the defendant of first-degree murder, but the trial court failed to instruct the jury correctly on the mitigating ground of "imperfect" self-defense. [137] Because the jury received instruction on reasonable self-defense and the jury declined to find the homicide was justifiable, there could be no challenge to the conclusion that the defendant was guilty of homicide. The only unresolved question was whether the defendant was guilty of first-degree murder or voluntary manslaughter by operation of the imperfect self-defense doctrine. After twelve jurors had unanimously found that the defendant committed an unjustifiable homicide, there is no reason to allow him to dispute either his identity as the killer or the reasonableness of the killing. Although the appellate court [138] remanded by offering the People a choice of accepting a voluntary manslaughter conviction or retrying the defendant with a complete ***514** presumption of innocence, my proposed estoppel of defendant is consistent with the California Supreme Court's decision in the *People v. Christian S.* [139]

The Court's reasoning in *Christian S.* shows that a defendant may dispute only those issues that were not conclusively resolved in the first proceeding. A trial court found Christian guilty of second-degree murder. [140] It was unclear, however, whether the trial court was aware that Christian would be guilty of only voluntary manslaughter if he killed under the actual but unreasonable belief that the killing was necessary for his self-defense. The Supreme Court thus could not determine whether the trial court decided that imperfect defense did not apply as a matter of fact, meaning Christian was guilty of murder, or as a matter of law, meaning Christian might have been found guilty of only voluntary manslaughter if the court had been aware of the defense's possible application. Because of the trial court's uncertainty on the law, the case resembled one where the jury was not properly instructed on the lesser offense of voluntary manslaughter.

The Supreme Court remanded the case to the trial court, with instructions to enter its factual finding of whether the defendant killed with an actual belief in the need for self-defense. [141] The remand signaled two available options: Christian could be guilty of murder or manslaughter. Any "instructional" uncertainty concerned the limited issue of malice. Because the trial court determined that the defendant committed an unjustified homicide, there was no need to retry the issues of the reasonableness of the self-defense or Christian's identity as the killer.

The limited scope of the remand was possible because it was a court trial and the trial judge was still alive. But the correct resolution of a case ought not depend on such fortuitous circumstances. If the range of proper outcomes encompasses second-degree murder and voluntary manslaughter, the defendant does not deserve a retrial in which complete acquittal is an option. *A limited trial error should not provide an unlimited reversal.*

Not only should the first trial narrow the range of offenses available, it should also narrow the range of available defenses. If a conviction for murder cannot stand only because the jury was not instructed on imperfect self-defense, there is no reason to instruct the jury on heat-of-passion voluntary manslaughter if the first trier of fact rejected that alternative.

Retrials should be limited to retry only unresolved questions, even where there is no offense of which the defendant stands properly convicted. For instance, if a jury convicts a defendant of murder, but the trial court fails to instruct the jury correctly on reasonable self-defense, the defendant cannot be deemed guilty of any charge, because reasonable self-defense supports a ***515** complete acquittal. Nonetheless, there is no reason to allow the defendant to dispute identity on retrial. In *People* v. *Anderson*, [142] the defendant was tried and convicted for forcible rape; the jury determined that the victims did not consent to the sexual acts. The conviction was overturned because the jury was not instructed on the defense of reasonable belief in consent. [143] The retrying jury should therefore have been instructed on the reasonable belief defense. But as the first jury properly determined beyond a reasonable doubt that Anderson had engaged in sexual intercourse with the minor victims and did so without their actual consent, there was no reason to offer Anderson an opportunity to impeach the first jury's verdict by disputing either identity or actual consent on retrial. [144]

"Defense preclusion" involves the same constitutional and policy issues as the "offense preclusion" discussed in Part III. Part III showed that where a jury properly found all the elements of first-degree murder except premeditation, a second jury could learn of the prior conviction, and decide only the premeditation element. By parallel logic, where a jury finds all the elements of murder, except the absence of self-defense, it is proper to allow a new jury to decide only that limited issue and preclude its consideration of other defenses. [145]

The cases discussed in Part IV involved a retrial where all charges were brought in the initial proceeding. The holdings of *Simpson* [146] and *Dixon* [147] appear to preclude such collateral estoppel when the People have not brought all available charges in the first proceeding. Part V suggests the possibility of several exceptions to the general rule depriving the People of the benefits of preclusion in sequential prosecutions.

V. FACT PRECLUSION IN SUBSEQUENT PROCEEDINGS

In *Dixon*, the Supreme Court explained that prosecutors may not use verdicts from former proceedings to estop defendants in subsequent proceedings. This rule effectively enforces the policy of deterring sequential prosecutions for tactical advantage. [148] The rule, although generally correct, should be subject to exceptions in cases where the People could not bring all charges together. Such ***516** inability may result from either (1) the defendant's request for separate proceedings, or (2) the subsequently-charged crime's lack of completion at the time of the first prosecution. In these circumstances, because the People are not engaging in sequential prosecution for tactical advantage, the *Simpson* bar should not apply.

A. Bifurcation

One circumstance that might justifiably excuse the People for not bringing all charges together is the defense's request for separation. One case where this occurred, *State v. Ingenito*, [149] served as perhaps the most persuasive authority to the courts in *Goss* [150] and *Pelullo* [151] and thus warrants careful analysis.

The prosecution charged Ingenito with, *inter alia*, unlicensed transfer of a weapon and possession of a weapon by a convicted felon. [152] Ingenito successfully requested that the charges be bifurcated so the jury would not learn of his convicted felon status before deciding the unlicensed transfer charge. [153] After the jury convicted Ingenito of the unlicensed transfer, the prosecution proceeded with the possession by a convicted felon charge. The prosecution relied on Ingenito's unlicensed transfer conviction to prove the possession element. The New Jersey Supreme Court held this reliance violated Ingenito's right to a fair trial. [154]

The *Ingenito* court relied on the "pronounced and preeminent" responsibility of the jury [155] in holding that the Sixth Amendment right to a jury trial "ordinarily includes the right to have the *same* trier of fact decide *all* of the elements of the charged offense." [156] Such construction of the Sixth Amendment is no longer tenable in light of *Neder*. The *Neder* court ruled that, where the instant jury found true all the alleged elements except one, the reviewing court could examine the record and decide for itself that undetermined element. [157] *A fortiori*, there can be no constitutional objection to allowing that element to be conclusively determined by another jury. [158]

***517** When the Superior Court's Appellate Division reviewed the case, Justice Morgan's concurring opinion correctly observed that the defendant was not entitled to a second jury determining the same issue, whether he possessed a weapon, which the first jury had determined against him.

> There can be no doubt but that the first jury concluded beyond a reasonable doubt that defendant actually or constructively possessed the weapons he was found guilty of having transferred. I see no reason in law, constitutional or statutory, or in considerations of policy, why a defendant should be entitled to a second jury determination of this same issue .... It makes little sense to conclude ... that in all such bifurcated cases the second trial must be a plenary one in every sense. Defendant cannot contend that he was denied a jury trial with respect to the issue of his possession. [159]

Justice Morgan correctly realized Ingenito did not deserve to have multiple determinations to provide him with "one fair jury to find [Ingenito possessed the weapon] and another fair jury to find he did not." [160]

Such multiple determinations provide the same benefits as sequential prosecutions provided to the prosecution in *Ashe*, or to the plaintiffs through the holding of *Parklane Hosiery*. Under the logic of *Ingenito*, defendants would be wise to divide the prosecution into as many stages as possible. "Since a [defendant] will be able to rely on a previous [acquittal] ... but will not be bound by [a guilty verdict], the plaintiff has every incentive" to bifurcate. [161] Furthermore, the defense will enjoy the tactical advantage, found improper in *Ashe*, of seeing the People's case in a "dry run" for the subsequent prosecution.

Justice Morgan's concurring opinion correctly observed the distinction between the defendant's right to bifurcate the proceedings and his right to invalidate a properly returned jury verdict. In a prosecution for unlicensed transfer, Ingenito's prior conviction was immaterial, and therefore prejudicial. Ingenito was entitled to have the prosecution proceed first in deciding the unlicensed transfer charge. By contrast, in the second prosecution for possession by a convicted felon, the unlicensed transfer was not immaterial; it was an already-proven element of the offense.

B. Incompletion

The other context where collaterally estopping defendants is proper is where the offense of which the prior conviction is an element was not completed at the time of the prior conviction. For instance, the concurring opinion in *Goss* ***518** observed that collateral estoppel had been approved in many cases where the defendant's status was in issue. [162] Such status could be either alienage [163] or paternity. [164] In such cases, earlier proceedings determined that the defendant was either not a citizen of the United States or was the father of the subject minor. The subsequent prosecution was brought when the alien/father committed an act or omission (entering the United States without proper documentation or failing to provide for the child) that was criminal

due to the defendant's status. The unlawful-entry or failure to provide charge, however, could not be brought before the criminal act or omission, although the status had already been determined.

Prosecutors are also unable to bring charges of recidivism against defendants when they are convicted of earlier crimes that serve as the predicate for findings of recidivism. [165] Therefore, when a defendant is convicted of a crime in 1989, he may not relitigate the validity of the conviction the following year when the People seek to use the prior conviction to enhance his sentence upon conviction of a subsequent crime. [166]

A third example of where the People are unable to bring all charges simultaneously is when the victim dies after the initial prosecution. In *Commonwealth v. Evans*, [167] a defendant's assault conviction barred him from asserting self-defense when he was charged with manslaughter after the victim died. In *Carmody v. Seventh Judicial District Court*, [168] the defendant's former conviction for robbery barred him from denying such conduct when he was tried for the victim's subsequent death. [169]

The strongest argument against allowing such exceptions to the general rule against preclusion in subsequent prosecutions is that defendants may have an insufficient motive to defend against the initial charges when the stakes are relatively small. "A defendant can hardly be expected to defend against a prosecution for assault as vigorously as he would against one for murder." [170]

***519** *Simpson* generally bars the People from estopping defendants in subsequent criminal proceedings. The contexts of bifurcation and incompletion, however, do not involve the use of preclusion for tactical advantage. Because the People are unable to bring all charges together, the general reason for barring such collateral estoppel is not present.

VI. CONCLUSION

The process of ascertaining truth must be a two-way street. [171] Res judicata principles hold that a party that has had a full and fair opportunity to litigate a claim or issue is not entitled to relitigate merely because the verdict is unfavorable. [172] This principle applies in criminal as well as civil proceedings. [173] Parties are not deprived of procedural protections when they are precluded from relitigating positions already rejected in prior civil proceedings; the same logic applies when defendants enjoy in their initial proceedings the greater protections offered in criminal cases. [174]

United States Supreme Court decisions of the past generation have properly expanded the preclusive effect of judgments, applying the principle to protect criminal acquittals in *Ashe* and to protect plaintiff victories in *Parklane Hosiery*. Their reasoning supports extending the doctrine to protect partial criminal convictions, as the California Supreme Court did in *Ford*.

In the *Knoller* case, the jury's verdict established that Marjorie Knoller is certainly guilty of criminal homicide—at least manslaughter and possibly murder. Because the issue of Knoller's subjective awareness of the danger presented by her dogs (and thus malice) remains unresolved, a second jury should have the opportunity to resolve it. Both a retrial for murder and the present manslaughter conviction are valid, and the People should not be compelled to forfeit one to obtain the other.

The current asymmetrical application of preclusion, which operates to memorialize acquittals but never convictions, distorts the truth-ascertainment function of trials. The legitimacy of a verdict cannot depend on its content. Defendants have the right to reverse a judgment where there is demonstrable error. The People have a reciprocal right to preserve a judgment where there is none.

Footnotes

a1 Judicial Attorney, California Supreme Court, Chambers of Justice Janice Rogers Brown. This article represents the author's personal opinion only. Special thanks are due to Richard Rochman, Blair Hoffman, Sheila Tuller Keiter, and Akhil Amar.

1 Jaxon Van Derbeken, *Unrepentant Knoller Gets Maximum Term*, S.F. CHRON., July 16, 2002, at A1.

2 *Id.* A California defendant acts with implied malice when she acts in conscious disregard for life by intentionally performing an act, the natural consequences of which are dangerous to life, knowing the conduct is life-endangering. People v. Earp, 978 P.2d 15, 53 (Cal. 1999).

3 The court's determining the verdict to be "contrary" to the evidence under section 1181 of the California Penal Code did not preclude a new trial on double jeopardy grounds, as would a determination that no rational trier of fact could have found the defendant guilty. *See* People v. Lagunas, 884 P.2d 1015, 1020-21 n.6 (Cal. 1994).

4 279 Cal. Rptr. 647 (Ct. App. 1991).

5 *Id.* at 648. Even without resort to estoppel, the reversal was incorrect because the jury found the requisite ten-year disparity on another count. This established, the jury necessarily determined the omitted element against the defendant, which, according to then-prevailing California law, obviated the need for retrial. People v. Sedeno, 518 P.2d 913 (Cal. 1974). Since *Hogue*, the California Supreme Court has established there is no need for retrial when the instructional error is harmless beyond a reasonable doubt. People v. Flood, 957 P.2d 869 (Cal. 1998).

6 *Hogue*, 279 Cal. Rptr. at 649-50.

7 The term res judicata applies generally to the preclusive effect of judgments. RESTATEMENT (SECOND) OF JUDGMENTS, Introduction (1982). Res judicata also applies specifically to the preclusions of claims, which, in a criminal context, amounts to discrete criminal offenses charged. When the matter precluded is an issue or element, the preclusion may be deemed "direct estoppel" when the preclusion occurs in the same proceeding, or "collateral estoppel" when it occurs in a subsequent proceeding.

8 Parklane Hosiery Co. v. Shore, 439 U.S. 322, 328 (1979) (quoting Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 329 (1971)).

9 397 U.S. 436, 445 (1970).

10 United States v. Gallardo-Mendez, 150 F.3d 1240, 1242 (10th Cir. 1998).

11 Neder v. United States, 527 U.S. 1 (1999).

12 *Id.* at 15.

13 121 F.3d 1187 (8th Cir. 1997).

14 *Bordeaux*, 121 F.3d at 1188; 18 U.S.C.A. § 2241(a)(1) (West 2000).

15 *Bordeaux*, 121 F.3d at 1188; 18 U.S.C.A. § 2244(a)(1) (West 2000).

16 Although the district court vacated the conviction due to instructional error and ordered a new trial, the Eighth Circuit vacated the district court order, thereby reinstating the LIO conviction. United States v. Bordeaux, 92 F.3d 606, 608 (8th Cir. 1996). On subsequent review, however, the Circuit agreed the instructional error compelled reversal of the LIO. *Bordeaux*, 121 F.3d at 1190.

17 355 U.S. 184 (1957).

18 398 U.S. 323 (1970).

19 *Bordeaux*, 121 F.3d at 1190.

20 *Price*, 398 U.S. at 329; *Green*, 355 U.S. at 190.

21 605 A.2d 157 (Md. Ct. Spec. App. 1992).

22 914 P.2d 832 (Cal. 1996). The author briefed and argued the case before the California Supreme Court.

23 *Mauk*, 605 A.2d at 158. In *Mauk* and *Fields*, but not *Bordeaux*, the LIO conviction had not been reversed prior to appeal.

24 *Id.* at 159.

25 *Id.* at 165-70.

26 432 U.S. 161 (1977).

27 *Id.* at 162-63.

28 *Id.* at 165 (quoting United States v. Jorn, 400 U.S. 470, 479 (1971)).

29 *Id.* at 168-69. The *Brown* court relied on the statutory elements test of *Blockburger v. United States*, 284 U.S. 299 (1932), in observing that joyriding involved no elements that were not elements of auto theft. The offenses were thus the "same," and reprosecution on the GIO was barred.

30 467 U.S. 493 (1984).

31 *Id.* at 495.

32 *Id.* at 496.

33 *Id.* at 501.

34 *Id.* at 501-02.

35 Jeffers v. United States, 432 U.S. 137, 152 (1970); *Mauk*, 605 A.2d at 170-71.

36 *Fields*, 914 P.2d at 837-38.

37 *E.g.*, Alley v. State, 704 P.2d 233 (Alaska Ct. App. 1985); State v. Rodriguez, 7 P.3d 148 (Ariz. Ct. App. 2000); United States v. Allen, 755 A.2d 402 (D.C. 2000); Bell v. State, 292 S.E.2d 402 (Ga. 1982); State v. Klinger, 698 N.E.2d 1199 (Ind. Ct. App. 1998); Commonwealth v. Pinero, 729 N.E.2d 679 (Mass. App. Ct. 2000); People v. Gonzalez, 496 N.W.2d 312 (Mich. Ct. App. 1992); State v. Snellbaker, 639 A.2d 384 (N.J. Super. Ct. 1994); People v. Martinez, 905 P.2d 715 (N.M. 1995); Commonwealth v. McCane, 539 A.2d 340 (Pa. 1988). Illinois has yet to resolve the issue. *Compare* People v. Fisher, 632 N.E.2d 689 (Ill. App. Ct. 1994), *with* People v. Kettler, 446 N.E.2d 550 (Ill. App. Ct. 1983).

38 *Fields*, 914 P.2d at 840-41. Because the only obstacle is statutory, there is room for legislative reform.

39 People v. Kurtzman, 758 P.2d 572, 577 (Cal. 1988).

40 For instance, in *In re Brown*, 952 P.2d 715, 726-27 (Cal. 1998), the error invalidated the premeditation and deliberation element and thus compelled reversal of the *first-degree* murder conviction, but a second-degree murder conviction was still proper.

41 There is some justification for the disparate positions. In cases of appellate reversals, the LIO conviction has been affirmed on appeal and thus tested by the appellate process, whereas there is no comparable guarantee that the LIO conviction found by the deadlocked jury would withstand appellate review. Section 1049 of the California Code of Civil Procedure thus bars the application of res judicata on judgments that are pending on appeal, in contrast to the national majority rule. Sandoval v. Super. Ct. of Kings County, 190 Cal. Rptr. 29, 32 n.2 (Ct. App. 1983).

42 For example, in *People v. Edwards*, 702 P.2d 555, 556, 562 (Cal. 1985), the jury convicted the defendant of second-degree murder, but the California Supreme Court found the trial court should have instructed the jury on involuntary manslaughter, of which the defendant conceded he was guilty. The court offered the People the choice of either retrying the defendant with a complete presumption of innocence, or accepting as final an involuntary manslaughter conviction. *Id.* at 562.

43 The *Fields* opinion creates several inconsistencies in California law by prescribing separate retrial rules for offense-elements and sentencing enhancements. California law had recognized that prosecutors may retry issues classified as "enhancements" (like weapon

use or the infliction of great bodily injury) on which the jury deadlocked without needing to forfeit the underlying conviction. People v. Guillen, 31 Cal. Rptr. 2d 653, 656-57 (Ct. App. 1994); People v. Schulz, 7 Cal. Rptr. 2d 269, 271-72 (Ct. App. 1992). But the very same issue may be an element or an enhancement depending on the context. The United States Supreme Court has therefore recognized "when the term 'sentence enhancement' is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict." Apprendi v. New Jersey, 530 U.S. 466, 494 n.19 (2000). The *Apprendi* court thus authorized the same trial procedures regardless of whether the Legislature had described the fact in question as an element or an enhancement.

Premeditation is an element of first-degree murder in California but an enhancement of attempted murder. People v. Bright, 909 P.2d 1354, 1364 (Cal. 1996). Therefore, where the jury agrees the defendant intended to kill the victim (to support a murder or attempted murder charge) but deadlocks on whether there was premeditation and deliberation, the People may retry the limited issue of premeditation without forfeiting the attempted murder conviction so long as the victim survived. If the victim died, however, the People may not retry the premeditation element of murder unless they agree to forfeit the unanimous conviction for the LIO of second-degree (unpremeditated) murder.

Similarly, deadly weapon use during a robbery is an enhancement; deadly weapon use during an assault is an element of aggravated assault. CAL. PENAL CODE § § 211 (West 1999 & Supp. 2002), 245(a)(1) (West 1999), 12022(b)(1) (West Supp. 2002). Thus, if the jury agrees the defendant said, "Pay up or I'll hurt you," but deadlocks over whether he used a weapon, the weapon issue may be retried without disturbing the robbery conviction. By contrast, if the jury agrees he said, "Shut up or I'll hurt you," but deadlocks on the weapon question, the People must forfeit the simple assault conviction to reprosecute for weapon use. The permissibility of retrial should not turn on the "constitutionally novel and elusive distinction between 'elements' and 'sentencing factors."' *Apprendi*, 530 U.S. at 494; *see also* Monge v. California, 524 U.S. 721, 737 (1998) (Scalia, J., dissenting).

44 *Bordeaux*, 121 F.3d at 1190 n.5.

45 Stone v. Super. Ct., 646 P.2d 809, 812 (Cal. 1982).

46 A close examination of *Stone* reveals how it distorts the truth-finding function of trials. In *Stone*, the People charged defendant Stone with murder and the LIO of manslaughter. *Id.* The jury deadlocked, with eight jurors voting for manslaughter and four deciding Stone committed a justifiable homicide. *Id.* at 813. Because all twelve jurors agreed Stone was not guilty of murder, the California Supreme Court held a retrial could offer the second jury only the choices of manslaughter or acquittal. The court decided to "accord the terminal effect of a verdict to such an unequivocally expressed conclusion of a jury." *Id.* at 814. Although the jury failed to decide what Stone had done (commit manslaughter or justifiable homicide), it agreed unanimously on what he had not done; commit a murder.

By contrast, if the initial jury deadlocked between murder and manslaughter, with not one juror believing the defendant was not guilty of homicide, the second jury would receive instruction on all three possibilities: murder, manslaughter, and acquittal. Even though, as in *Stone*, the first jury had unanimously rejected one of the three options (murder, manslaughter, acquittal), the retrying jury would still have the option of acquitting the defendant, contrary to the first jury's findings.

Combining these trials reveals the distortion of justice. If an initial jury deadlocked between murder and manslaughter only, the second jury would have a full choice of murder, manslaughter, and acquittal. If that second jury deadlocked between manslaughter and acquittal, the third jury would be limited to those two options. The second jury's findings would thus bind the third jury's deliberations, but the first jury's findings would not. The result is a structural preference for acquittals, which impedes the search for truth.

47 *Fields*, 914 P.2d at 842.

48 *Id.* at 842 n.5.

49 *Id.*

50 *See* Paul v. Henderson, 698 F.2d 589, 592 (2d Cir. 1983) (quoting United States v. Perez, 565 F.2d 1227, 1232 (2d Cir. 1977)).

51 People v. Ford, 388 P.2d 892, 895 (Cal. 1964).

52 *Id.*

53 People v. Ford, 416 P.2d 132, 137 (1966).

54 *Id.* at 138-39.

55 California law provides the felony-murder doctrine does not apply if the felony has been completed, or has not yet begun, at the time the fatal wound is inflicted. People v. Hayes, 802 P.2d 376, 408-09 (Cal. 1990); People v. Gonzales, 426 P.2d 929, 932 (Cal. 1967).

56 California law provides the felony-murder doctrine applies only where the defendant has the specific intent to commit the underlying felony. People v. Hernandez, 763 P.2d 1289, 1307 (Cal. 1988); People v. Sears, 401 P.2d 938, 943 (Cal. 1965). The felonies of kidnaping and possession of a concealed weapon by an ex-felon required only a general intent for their commission (People v. Thornton, 523 P.2d 267, 285 (Cal. 1974); People v. Oliver, 361 P.2d 593, 596-97 (Cal. 1961) [kidnaping]; People v. Vanderburg, 29 Cal. Rptr. 553, 557 (Ct. App. 1963) [weapon possession]), and thus Ford's conviction did not prove that he specifically intended to commit the felonies. On retrial, Ford could still offer evidence showing that he did not have the specific intent to commit those felonies, and thus they could not support a conviction for felony-murder.

57 The *Ford* court referred to its decision in *Teitelbaum Furs, Inc.* v. *Dominion Ins. Co. Ltd.*, 375 P.2d 439, 441 (Cal. 1962), where it had observed, "[s]tability of judgments and expeditious trials are served and no injustice done, when criminal defendants are estopped from relitigating issues determined in conformity with [rigorous] safeguards." 416 P.2d at 138-39. *See also* People v. Super. Ct. (Scofield), 57 Cal. Rptr. 818, 823 (Ct. App. 1967) "Once the prosecutor has convinced a trier of fact to find a certain fact (and that determination becomes final), he should not have the burden of proving again and again that same fact in court after court."

58 *Ford*, 416 P.2d at 137-38 (citation omitted).

59 397 U.S. 436 (1970).

60 *Id.* at 443-45. By 1970, the states were bound by the Fifth Amendment's Double Jeopardy rule. Benton v. Maryland, 395 U.S. 784 (1969). By contrast, in 1956, the Court decided a case involving nearly identical facts as *Ashe* differently because the Court had not yet found this provision was part of the Fourteenth Amendment's Due Process Clause. Hoag v. New Jersey, 356 U.S. 464 (1958).

61 *Ashe*, 397 U.S. at 437.

62 *Id.* at 439.

63 *Id.* at 439-40.

64 *Id.* at 447.

65 *Id.* at 443.

66 *Id.* at 447.

67 *Id.* at 452, 459 (Brennan, J., concurring).

68 *Id.* at 444-45.

69 *Id.* at 439, 444-45.

70 *Id.* at 446. "Once a jury had determined upon conflicting testimony that there was at least a reasonable doubt that the petitioner was one of the robbers, the State could not present the same or different identification evidence in a second prosecution for the robbery of Knight in the hope that a different jury might find that evidence more convincing." *Id.*

71 403 U.S. 384 (1971).

72 Simpson was convicted of robbing a store manager. An appellate court reversed the conviction due to instructional error. *Id.* at 384. On retrial, the jury acquitted Simpson of that robbery. He was then tried and convicted of robbing a store customer during the same incident. *Id.* at 384-85. The Supreme Court held, in accordance with *Ashe*, the second jury's finding that Simpson was not guilty precluded his being charged with robbing a different victim. *Id.* at 385-87.

73 *Id.* at 386; United States v. Dixon, 509 U.S. 688, 710-11 n.15 (1993).

74 People v. Goss, 521 N.W.2d 312, 320 (Mich. 1994); Gutierrez v. Super. Ct., 29 Cal. Rptr. 2d 376, 386 (Ct. App. 1994) *contra* Hernandez-Uribe v. United States, 515 F.2d 20, 21-22 (8th Cir. 1975); United States v. Colacurcio, 514 F.2d 1, 5-6 (9th Cir. 1975).

75 *Ford* held that if the People initially charged a defendant with the robbery and murder of victim X, and the jury convicted him of the robbery but deadlocked on murder, the People could retain the robbery conviction against victim X. 416 P.2d at 132. *Simpson* held the People could not use the conviction for robbery against X to direct a verdict in a future prosecution for the robbery of victim Y. 403 U.S. at 384. There is no inconsistency between the two holdings.

76 *Ashe*, 397 U.S. at 443.

77 *Id.* at 447.

78 439 U.S. 322 (1979).

79 402 U.S. 313 (1971).

80 As the Court explained, offensive use of collateral estoppel occurs when the plaintiff seeks to foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully in an action with another party. Defensive use occurs when a defendant seeks to prevent a plaintiff from asserting a claim the plaintiff has previously litigated unsuccessfully against another defendant. *Parklane Hosiery*, 439 U.S. at 326 n.4.

81 *Id.* at 324-35.

82 *Id.* at 332-33.

83 *Id.* at 330 (emphasis added).

84 509 U.S. 688, 710-11, n.15 (1993).

85 *Id.* (emphasis added) (citation omitted).

86 521 N.W.2d 312 (Mich. 1994).

87 14 F.3d 881 (3d Cir. 1994).

88 That same year, the California Court of Appeal reached a similar conclusion in *Gutierrez v. Superior Court*, 29 Cal. Rptr. 2d 376 (Ct. App. 1994). After a jury convicted Gutierrez of attempted murder, his victim died. The People then charged Gutierrez with murder. *Id.* at 377.

89 *Goss*, 521 N.W.2d at 312-13.

90 *Pelullo*, 14 F.3d at 885.

91 *Id.* at 885-86, 889.

92 *Id.* at 894 n.7 (citing *Parklane Hosiery*, 439 U.S. at 348 (Rehnquist, J., dissenting)).

93 *Parklane Hosiery*, 439 U.S. at 324-25.

94 "Because I believe that the use of offensive collateral estoppel in this particular case was improper, it is not necessary for me to decide whether I would approve *its use in circumstances where the defendant's right to a jury trial was not impaired." Id.* at 339 n.1 (Rehnquist, J., dissenting) (emphasis added).

95 *Id.* at 336.

96 *Pelullo*, 14 F.3d at 894 n.7 (citing Standefer v. United States, 447 U.S. 10, 21-25 (1980)).

97 447 U.S. 10 (1980).

98 *Id.* at 21-24.

99 *Id.* at 11-13.

100 *Id.* at 21.

101 *Id.*

102 *Id.* (emphasis added).

103 Although the *Standefer* court distinguished that case from *Blonder-Tongue* and *Parklane Hosiery* equally, never mentioning one without the other, the *Pelullo* court misleadingly implied *Standefer* limited *Parklane Hosiery* only. *Pellulo*, 14 F.3d at 894 n.7.

104 *Id.* at 23. The *Standefer* court's analysis showed why *nonmutual defensive* estoppel was inappropriate in criminal cases. The Court observed the possibility of an erroneous acquittal, due perhaps to jury lenity, which may not be prevented by a directed verdict, by a judgment notwithstanding the verdict, or by appellate review of the evidence. The Court perceived the danger in allowing such an erroneous verdict to multiply by binding future juries. *Id.* at 22-23.

105 *Id.* at 21-24.

106 *In re* Gutierrez, 60 Cal. Rptr. 2d 332, 341 (Ct. App. 1997) (Woods, J., concurring) (quoting Comment, 74 Harv. L. Rev. 752, 763 n.68 (1961)).

107 *Goss*, 521 N.W.2d at 312.

108 469 U.S. 57 (1984).

109 330 N.W.2d 16 (Mich. 1982).

110 *Goss*, 521 N.W.2d at 316.

111 *Powell*, 469 U.S. at 68.

112 United States v. Seley, 957 F.2d 717, 723 (9th Cir. 1992).

113 *Powell* did not announce a new rule. It merely affirmed a longstanding principle that permitted a single jury to return inconsistent verdicts. Dunn v. United States, 284 U.S. 390 (1932).

114 *Goss*, 521 N.W.2d at 320. In distinguishing *Ford*, the *Goss* court followed the analysis of the California Court of Appeal in *Gutierrez v. Superior Court*, 29 Cal. Rptr. 2d 376, 386-87 (Ct. App. 1994).

115 *Ford*, 416 P.2d at 137. The California Court of Appeal similarly tried to distinguish *Ford* in *Gutierrez*. The first jury convicted Gutierrez of attempted premeditated murder; after the trial, the victim died. The Court of Appeal barred the People from using the attempted murder conviction to establish Gutierrez' identity as the shooter on retrial. *Gutierrez*, 29 Cal. Rptr. 2d at 386-87. The Court of Appeal, like the Michigan Supreme Court, found res judicata would impinge upon Gutierrez' preferred identity defense. *Id.* at 385-86.

116 A better distinction between *Gutierrez* and *Ford* was available to the California Court of Appeal. As one commentator has argued, "collateral estoppel against the accused should not be permitted when the first trial was for a lesser offense. A defendant can hardly be expected to defend against a prosecution for assault as vigorously as he would against one for murder." Comment, *The Use of Collateral Estoppel Against the Accused*, 69 COLUM. L. REV. 515, 523-24 (1969) [hereinafter *Use of Collateral Estoppel*].

117 *Goss*, 521 N.W.2d at 325 (Brickley, J., concurring).

118 Green v. Zant, 738 F.2d 1529, 1542 (11th Cir. 1984). Holland v. State, 705 So. 2d 307, 330-31 Miss. 1997).

119 People v. Cain, 892 P.2d 1224, 1249-50 (Cal. 1995).

120 Wade v. Calderon, 29 F.3d 1312, 1323 n.7 (9th Cir. 1994); People v. Roy, 255 Cal. Rptr. 214, 223 (Ct. App. 1989).

121 People v. Ghent, 739 P.2d 1250, 1264 (Cal. 1987).

122 *Id.*

123 People v. Kimble, 749 P.2d 803 (Cal. 1988); People v. Berryman, 864 P.2d 40 (Cal. 1993).

124 *See* People v. Guillen, 31 Cal. Rptr. 2d at 653, 655-57 (Ct. App. 1994) (describing an instance where the defendant waived a jury trial as to the amount possessed).

125 People v. Schulz, 7 Cal. Rptr. 2d at 269, 271-72 (Ct. App. 1992).

126 In fact, under section 12022.53 of the California Penal Code, a defendant's sentence will be enhanced by at least twenty-five years if during the crime he shoots a firearm and *either* seriously injures *or* kills his victim.

127 *In re Gutierrez*, 60 Cal. Rptr. 2d at 341 (Woods, J., concurring).

128 527 U.S. 1 (1999).

129 *Id.* at 6.

130 *Id.* at 13-15. The Court found such error to be reviewable for prejudice in *Johnson v. United States*, 520 U.S. 461 (1997). *Johnson* presented an easier case, as Johnson failed to object to the trial court's deciding the element for itself. *Id.* at 465. Neder did object, which prompted Justice Scalia to write a concurring and dissenting opinion, which Justices Souter and Ginsburg joined, distinguishing the two cases. *Neder*, 527 U.S. at 30-40 (Scalia, J., dissenting).

131 Larceny is an LIO of robbery, which requires the defendant take the property from the immediate presence of the victim. As many prosecutors explain to juries, if someone steals your pants, it's larceny; if you are wearing them at the time, it's robbery.

132 The *Neder* court applied the test described in *Chapman v. California*, 386 U.S. 18 (1967), determining whether "it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."' *Neder*, 527 U.S. at 15 (quoting *Chapman*, 386 U.S. at 24).

133 As the Court has since observed, "there is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact ...." *Apprendi*, 530 U.S. at 496.

134 *Neder*, 527 U.S. at 15 (emphasis added).

135 *Ford*, 416 P.2d at 138.

136 24 P.3d 1210 (Cal. 2001).

137 *Id.* at 1212. The California Supreme Court first recognized the defense of "imperfect self-defense" in *People v. Flannel*, 603 P.2d 1 (Cal. 1980). The *Flannel* court held a defendant who killed with an actual but unreasonable belief in the need for self-defense did not act with malice and was thus guilty of only manslaughter. *Id.*

138 The Court of Appeal remanded on this basis. People v. McCoy, 93 Cal. Rptr. 827, 841-42 (Ct. App. 2000). The Supreme Court reviewed the case for another issue, and declined to review the Court of Appeal's conclusion. People v. McCoy, 24 P.3d 1210, 1213 (Cal. 2001).

139 872 P.2d 574 (Cal. 1994). The *Christian S.* court held the doctrine of imperfect self-defense remained viable after the state Legislature amended section 28 of the California Penal Code to abolish the "diminished capacity" defense.

140 *Id.* at 575-76.

141 *Id.* at 583-84.

142 192 Cal. Rptr. 409 (Ct. App. 1983).

143 *Id.* at 414. See, e.g., *People v. Mayberry*, 542 P.2d 1337 (Cal. 1975), which held a defendant who engages in sexual intercourse while reasonably but incorrectly believing in the victim's consent is not guilty of rape.

144 Because Anderson had not testified at his first trial (*Anderson*, 192 Cal. Rptr. at 411), the People would be unable to impeach him on retrial if he denied committing the acts.

145 If anything, such a retrial is even less susceptible to constitutional objection than the retrial approved in *Ford*. The People retain the burden of proving the homicide beyond a reasonable doubt, whereas a defendant may bear the burden of proving an affirmative defense such as self-defense. Martin v. Ohio, 480 U.S. 228, 233-36 (1987).

146 403 U.S. at 386.

147 509 U.S. at 710-11 n.15.

148 *Id.*

149 432 A.2d 912 (N.J. 1981).

150 521 N.W.2d 312, 313, 317 (Mich. 1994).

151 14 F.3d 881, 892, 896 (3d Cir. 1994).

152 *Ingenito*, 432 A.2d at 913.

153 *Id.*

154 *Id.* at 919.

155 *Id.* at 916.

156 *Id.* at 919.

157 *Neder*, 527 U.S. at 9-10.

158 The *Ingenito* court's asymmetrical reasoning led the court to cite *Dunn v. United States*, 284 U.S. 390 (1932) for the proposition that "we accept inconsistent verdicts that accrue to the benefit of a defendant." *Ingenito*, 432 A.2d at 916. As the Supreme Court explained in reaffirming *Dunn*, such inconsistent verdicts are accepted regardless of whether they accrue to the benefit of the defense or prosecution. *Powell*, 469 U.S. at 65.

159 State v. Ingenito, 405 A.2d 418, 422 (N.J. App. Div. 1979) (Morgan, J., concurring).

160 *Gutierrez*, 29 Cal. Rptr. 2d at 391 (Woods, J., dissenting).

161 *Parklane Hosiery*, 439 U.S. at 330.

162 *Goss*, 521 N.W.2d at 325-26 n.8 (Brickley, J., concurring).

163 United States v. Bejar-Matrecios, 618 F.2d 81 (9th Cir. 1980); Hernandez-Uribe v. United States, 515 F.2d 20 (8th Cir. 1975); Pena-Cabanillas v. United States, 394 F.2d 785 (9th Cir. 1968); United States v. Rangel-Perez, 179 F. Supp. 619 (S.D. Cal. 1959).

164 State v. Braskett, 162 N.E.2d 922 (Ohio Ct. App. 1959); People v Mojado, 70 P.2d 1015 (Cal. Ct. App. 1937); Commonwealth v. Ellis, 35 N.E. 773 (Mass. 1893).

165 State v. Kelly, 942 P.2d 579, 586-87 (Kan. 1997).

166 *Id.* at 587.

167 101 Mass. 25 (1869).

168 398 P.2d 706 (Nev. 1965).

169 *Id.* at 707 (dictum). The California Court of Appeal held otherwise in *Gutierrez v. Superior Court*, 29 Cal. Rptr. 2d 376 (1994). *Gutierrez*, like *Goss*, held preclusion would improperly limit the defendant's choice of his defense, thereby allowing the defendant unilaterally to defeat the application of estoppel against him. *See supra* Part III.D.3.

170 *Use of Collateral Estoppel*, *supra* note 116, at 523-24. The defendant's expectations also support limiting the estoppel effect of guilty pleas. Because the plea's purpose is to effect an agreement between the parties, it violates the "meeting of the minds" to use a plea to a lesser offense, which the defense offers to resolve the charges, to convict the defendant of a greater charge. It may also deter defendants from pleading guilty. United States v. Gallardo-Mendez, 150 F.3d 1240, 1243-46 (10th Cir. 1998).

171 *See* Prudhomme v. Super. Ct., 466 P.2d 673, 675 (Cal. 1970) (discussing how discovery is a valuable tool in ascertaining the truth).

172 RESTATEMENT (SECOND) OF JUDGMENTS, Introduction (1982).

173 Allen v. McCurry, 449 U.S. 90, 104 n.22 (1980); Emich Motors Corp. v. Gen. Motors Corp., 340 U.S. 558, 568 (1951).

174 United States v. Beaty, 245 F.3d 617, 624 (6th Cir. 2001).