Daily Journal 7/13/98

Final Jeopardy

Convictions Deserve the Same Preclusive Effect as Acquittals

By Mitchell Keiter

The Constitution ensures that all findings of innocence are conclusive, and immune from relitigation. *Ashe v. Swenson*, 397 U.S. 436 (1970). But what about findings of guilt determined to be free of error?

As the state Supreme Court recognized three months ago in *In re Brown*, 17 Cal.4th 873 (1998), convictions in California may be erased without cause. The result is a "heads-I-win, tails-we—flip-again" approach that is contrary to the law of other states, California law in other contexts and the integrity of the jury system.

In *Brown*, the defendant was convicted of first-degree murder. Although the Supreme Court found an erroneous exclusion of evidence prejudicial with respect to the premeditation element, the court held Brown was certainly guilty of at least second-degree murder. The retrial should then determine whether Brown is guilty of first-degree (premeditated) or second-degree (unpremeditated) murder.

Instead, the court held the people could not retry Brown for first-degree murder if they wanted to retain the murder conviction. If they retried Brown, they would start the prosecution from square one, and the murder conviction would be erased. The choice resembles the game show "Let's Make a Deal," where a contestant has to trade her winnings "for what's behind Door No. 2."

The better approach is to inform the new jurors of the first conviction and instruct them to consider only the disputed issue.

But what makes exciting television does not produce justice. "Our courts are not gambling halls but forums for the discovery of truth." *People v. Geiger*, 35 Cal.3d 510, 520 (1904).

The seven other states that have resolved the issue do not impose this dilemma on prosecutors. They allow retrial on a deadlocked or reversed greater offense (i.e., first degree) without forcing prosecutors to "trade in" the lesser conviction. A limited error does not create an unlimited reversal.

California likewise recognizes the res judicata value of lesser convictions in many contexts. Where a defendant is convicted of a felony, but the jury deadlocks or is reversed on a felony-murder count, the people need not forfeit the felony conviction to retry for felony murder. Similarly, an attempted murder or battery conviction remains undisturbed if the victim later dies, and murder charges are brought.

Our Supreme Court protected a proper attempted murder conviction when the jury deadlocked only on whether the crime was premeditated. *People v. Bright*, 12 Cal.4th 652 (1996). The court permitted a retrial to resolve the premeditation issue because premeditation signifies a greater degree in murder cases, but simply a penalty provision in attempted murder cases: A jury considers a penalty provision only after deciding the truth of the underlying offense.

But this distinction rests more on semantics than principle. Even in murder cases, the jury will consider the question of premeditation only after it has decided the defendant is guilty of murder. The same policy that allows premeditation retrials when victims live should allow retrials when they die.

Three months after *Bright*, the court recognized the constitutionality of greater-offense retrials. *People v. Fields*, 13 Cal.4th 289 (1996). In rejecting the procedure on statutory grounds, the court explained its concern over the practice: how to instruct the second jury.

If the court instructs the jury it may convict on the lesser offense, the defendant could be convicted twice of the same offense, in violation of the Double Jeopardy Clause. If the court does not so instruct, it could present the jury with an all-or-nothing choice, which could harm the defense, as the jury might want to convict of *something*. Because double jeopardy is a waivable protection, the easy solution is to allow the defendant to choose how to instruct the second jury.

But the better approach to *Brown* is to inform the new jurors of the first conviction and instruct them to consider only the disputed issue. After all, absent the error, the premeditation question would have been decided by the jury that had determined Brown was guilty of murder. After 12 jurors found Brown guilty of murder beyond a reasonable doubt, why should retrial entitle him to a fresh 12 who must presume him innocent of any wrongdoing?

"The doctrine of res judicata applies to criminal ... proceedings and operates to conclude those matters in issue which the [first] verdict determined. ... [R]es judicata justifies instructions ... that a defendant has been found guilty of crimes finally adjudicated which are charged as elements of another charge ... being retried." *People v. Ford*, 65 Cal.2d 41, 50 (1966). Ford's (second) felony-murder jury learned of his earlier felony conviction; Brown's second premeditated murder jury should learn of his earlier murder conviction.

Such instruction does not prejudice the defense. Prosecutors currently invite juries that have convicted defendants of first-degree murder to find "special circumstances" to support capital or life-without-parole sentences. If the jury deadlocks, or its positive finding is reversed on appeal, a new jury learns of the murder conviction and decides only the special circumstance. As juries may properly learn about first-degree murder convictions, a fortiori, they may properly learn of any lesser conviction.

Juries may also impose enhancements on convictions where the crime involved a deadly weapon or inflicted serious injury. As with special circumstances, deadlocked or reversed enhancement issues can be presented to second juries deciding only the enhancements. Because two-stage prosecutions are proper for murder with firearm, they are proper for murder with premeditation.

The same weapon use that is an enhancement to some crimes, such as robbery or murder, is an element of others, such as aggravated assault or battery. When a jury agrees the defendant said, "Pay up or I'll hurt you," but is unsure if he held a knife, the people may retry that issue without losing the robbery conviction. But if the defendant said, "Shut up or I'll hurt you," the people must forfeit the assault conviction to retry for assault with a deadly weapon. This disparity is indefensible.

In *Fields*, the Supreme Court held retrying disputed issues without discarding the first jury's work was constitutional, barred only by Penal Code Section 1023, a statute designed to implement double jeopardy principles. The statute should be repealed, as its current application undermines the res judicata principles behind double jeopardy.

Acquittals are properly deemed conclusive. They estop prosecutors from relitigating already-resolved issues before a second jury. For the jury system to have integrity, convictions deserve the same respect.

Mitchell Keiter, a Los Angeles prosecutor, briefed and argued *Fields*. This article reflects his personal opinion only.

just how well deregulation has performed. Consider:

- Prices are down. Airline ticket prices have dropped 40 percent from their 1978 level.
- There's more service. The number of airline departures has risen from 5 million in 1978 to 8.2 million in 1997 — a 63 percent increase. Airlines served roughly 250 million passengers in 1978, but about 600 million in 1997.
- The skies are safer. In the 15 years prior to deregulation, airlines averaged one fatal accident for every 830,000 flights. In 15 years after deregulation, airlines averaged only one fatal accident for every 1,400,000 flights.

Despite the evidence of deregulation's success, some see an even brighter future if government would reimpose strict pricing and service rules. There's a better way to achieve even lower prices and increased competition, but it involves a different policy prescription: getting government out of the airline business altogether.

The drive to reregulate airlines is not surprising since members of Congress left out a few important details when they deregulated the industry in 1978. To begin with, they ignored airports. Almost all airports in America remain publicly owned and operated. Not surprisingly, airports remain as poorly managed as your local Department of Motor Vehicles. This causes all sorts of problems for airlines and travelers alike, notably congestion on the runways and a lack of competition at certain airports.

The solution is not more regulation. It is turning over airport management to private companies more responsive to the needs of consumers. Cities could contract out various management functions or sell the airport outright to investors with an incentive to increase competition and decrease congestion, since that's the only way to satisfy customers and make a profit.

Another oversight during deregulation: Lawmakers left in place protectionist policies that shield U.S. airlines from competition. Most Americans don't realize it, but they're not allowed to choose foreign airlines for domestic travel. Essentially, the law forbids foreign airlines from offering Americans service even though the benefits of such competition are obvious.

After all, just think how uncompetitive our automobile or electronics industry would be today if Congress had restricted foreign competition. Consumers would be denied countless choices and pay higher prices for goods of inferior quality. Maybe Pat Buchanan and Ralph Nader want to live in a world without foreign cars and VCRs, but most American consumers don't.

Why then do we accept protectionist rules in the airline industry? We shouldn't. Any foreign airline should be allowed to offer domestic flights on the same terms as U.S. carriers.

Some will quibble that letting foreign airlines operate here poses a national security risk. That's absurd. Most competition would come from Britain and Japan, hardly enemies of the United States. And if Iraq tried to penetrate the U.S. market with "Saddam Airways" we could just say no.

Airline deregulation produced lower prices and more air travel because it exposed the U.S. airline industry to domestic competition. The way to continue this trend is to open the U.S. airline industry to foreign competition, not reregulate it.

Adam D. Thierer is a fellow in economic policy at the Heritage Foundation, a Washington, D.C.-based public policy research institute.