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# Emerging Standards in Supreme Court Double Jeopardy Analysis

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# RECENT DEVELOPMENT

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### I. INTRODUCTION

The fifth amendment to the United States Constitution provides in part that "[n]o person . . . shall . . . be subject for the

same offence to be twice put in jeopardy of life or limb . . . ."[1] Although simply worded, the amendment has created conceptual difficulties both in academic circles[2] and in the Supreme Court.[3] The amendment has been interpreted to prohibit multiple prosecutions and punishments for the same offense.[4] Because criminal laws and procedures vary widely from jurisdiction to jurisdiction within the American federal system, however, the Supreme Court has established little consistency in its double jeopardy analysis until recently.

In its last two terms, the Court attempted to refine the scope of the double jeopardy clause and to achieve greater uniformity in its analysis of double jeopardy problems.[5] The Court did not develop, however, a uniform approach to all double jeopardy cases. The Court instead recognized several distinct double jeopardy problems and, after classifying its precedents according to the type of

1. U.S. CONST. amend. V.

2. For example, law school casebooks in criminal procedure approach the double jeopardy clause in conceptually different ways. *Compare* Y. KAMISAR, W. LAFAVE, & J. ISRAEL, MODERN CRIMINAL PROCEDURE 1424-78 (4th ed. 1974) *with* S. KADISH & M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES 1379-1426 (3d ed. 1975) *and* A. GOLDSTEIN & L. ORLAND, CRIMINAL PROCEDURE 997-1043 (1974 & Supp. 1978). One commentator expressed his frustration in his introduction to a student law review article:

> Two features complicate our law of double jeopardy. The prohibition is not one rule but several, each applying to a different situation; and each rule is marooned in a sea of exceptions. Thus a general rule shields a convicted man from retrial for the same offense. But the state may retry a defendant whose conviction was reversed on appeal. Even if the defendant was entitled to a directed verdict of acquittal, he is said to have "waived" his double jeopardy right by appealing . . . . These fictions and rationalizations are the characteristic signs of doctrinal senility.

Note, *Twice in Jeopardy*, 75 YALE L.J. 262, 263-64 (1965) (footnotes omitted).

3. The Court has expressed confusion on more than one occasion. *See* Crist v. Bretz, 437 U.S. 28, 32 (1978) ("The Double Jeopardy Clause of the Fifth Amendment is stated in brief compass . . . . But this deceptively plain language has given rise to problems both subtle and complex . . . ."); Burks v. United States, 437 U.S. 1, 9 (1978) ("The Court's holdings in this area . . . can hardly be characterized as models of consistency and clarity."). *But see* United States v. Scott, 437 U.S. 82, 115 (1978) (Brennan, J., dissenting) ("It is regrettable that the Court should introduce . . . confusion in an area of the law that, until today, had been crystal clear.").

4. The fifth amendment guarantee against double jeopardy is threefold, in that it protects against a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711, 717 (1969). When the double jeopardy clause is applicable, "its sweep is absolute." Burks v. United States, 437 U.S. 1, 11 n.6 (1978). It prevents a trial from taking place at all; it does not prescribe the procedural rules that govern the conduct of a trial. Blackledge v. Perry, 417 U.S. 21, 31 (1974); Robinson v. Neil, 409 U.S. 505, 509 (1973).

5. The Court decided 18 double jeopardy cases in the 1976 and 1977 Terms, compared to 21 in the preceding six terms. This tally includes per curiam opinions but does not include memorandum cases.

problem raised, purported to develop a simple and easily applied standard in each problem area.

Last term the Court handed down nine double jeopardy decisions, five on the same day,[6] in which it addressed four distinct double jeopardy problems: the question of when jeopardy attaches in a criminal proceeding such that if the proceeding is terminated before jeopardy attaches no double jeopardy plea can be raised by the defendant;[7] the question whether the double jeopardy clause bars successive prosecutions for the same offense by courts of separate jurisdictions within the American federal system;[8] the question whether termination of a criminal proceeding after jeopardy attaches but prior to or notwithstanding a jury verdict constitutes a completed prosecution so that the double jeopardy clause bars reprosecution for the same offense;[9] and the question whether appellate reversal of a judgment rendered during a criminal proceeding raises a double jeopardy bar to reprosecution for the same offense.[10]

The opinions of the Court articulated separate and somewhat

6. The Court handed down five double jeopardy decisions on June 14, 1978: United States v. Scott, 437 U.S. 82 (1978); Sanabria v. United States, 437 U.S. 54 (1978); Crist v. Bretz, 437 U.S. 28 (1978); Greene v. Massey, 437 U.S. 19 (1978); Burks v. United States, 437 U.S. 1 (1978). The other four cases, in reverse order of decision, were Swisher v. Brady, 98 S. Ct. 2699 (1978); United States v. Wheeler, 437 U.S. 313 (1978); Arizona v. Washington, 434 U.S. 497 (1978); and Rinaldi v. United States, 434 U.S. 22 (1977).

7. *See* Swisher v. Brady, 98 S. Ct. 2699 (1978); Crist v. Bretz, 437 U.S. 28 (1978); Greene v. Massey, 437 U.S. 19 (1978). This type of double jeopardy problem will be noted hereinafter as the attachment of jeopardy problem.

8. United States v. Wheeler, 435 U.S. 313 (1978); Rinaldi v. United States, 434 U.S. 22 (1977). This type of double jeopardy problem will be noted hereinafter as the dual sovereignty problem. *See generally* L. MILLER, DOUBLE JEOPARDY AND THE FEDERAL SYSTEM (1968).

9. Crist v. Bretz, 437 U.S. 28 (1978); Arizona v. Washington, 434 U.S. 497 (1978). This type of double jeopardy problem will be noted hereinafter as the multiple prosecutions problem.

10. United States v. Scott, 437 U.S. 82 (1978); Sanabria v. United States, 437 U.S. 54 (1978); Greene v. Massey, 437 U.S. 19 (1978); Burks v. United States, 437 U.S. 1 (1978). This type of double jeopardy problem will be noted hereinafter as the appealability problem.

The Supreme Court's double jeopardy cases defy easy classification; often a single case will present more than one of these four problem areas. *E.g.*, Crist v. Bretz, 437 U.S. 28 (1978); Greene v. Massey, 437 U.S. 19 (1978). Editors of criminal procedure casebooks have noted, however, the presence of one or more of these problems as recurring themes in double jeopardy cases. *See, e.g.*, A. GOLDSTEIN & L. ORLAND, *supra* note 2, at 997-1008. Scholars and commentators have also pointed out two additional, recurring double jeopardy problems: the question whether a defendant convicted or acquitted of one charge in an indictment may subsequently be reprosecuted on a related charge arising out of the same criminal act or transaction (the problem of defining the unit of prosecution), and the question whether multiple punishments may be inflicted on a defendant convicted of one or more charges arising out of the same act or transaction (the multiple punishments problem). *See, e.g.*, M. FRIEDLAND, DOUBLE JEOPARDY 109-10 (1969); A. GOLDSTEIN & L. ORLAND, *supra* note 2, at 1008-43; Note, *supra* note 2, at 268, 302-10. Since the Court did not address either of these issues in its last Term, they are not addressed in this Recent Development.

inconsistent standards in analyzing these problems. The Court resolved cases raising the attachment of jeopardy problem by holding the federal attachment rule in jury trials binding on the states through the due process clause of the fourteenth amendment.[11] The Court resolved one case raising the dual sovereignty problem by holding that native American tribal courts and federal courts are instrumentalities of "separate sovereigns" within the American federal system and therefore that conviction in one of the two jurisdictions does not bar reprosecution in the other for the same offense.[12] Finally, the Court developed a common approach to cases involving multiple prosecutions and appealability problems, which this Recent Development will refer to as the resolution of culpability standard. Under its new standard, which is in some cases applied expressly and in others merely implicit in the Court's reasoning, the Court scrutinizes the method in which a particular criminal proceeding was terminated, inquires whether the method of termination resolved the issue of the defendant's guilt or innocence, and raises a double jeopardy bar to reprosecution only when it appears that the termination was tantamount to conviction or acquittal of the crime charged.

The standards that the Court developed in the 1977 Term may reduce the doctrinal confusion that has characterized its double jeopardy analysis. The Court's decisions, however, raise questions about the continuing vitality of the double jeopardy clause as a defense in criminal proceedings. These decisions make it more difficult for criminal defendants to exit the judicial process without a binding determination of their guilt or innocence. In creating largely mechanical tests for resolving double jeopardy challenges, the Court has seemingly ignored that the facts of a particular case may warrant raising a double jeopardy bar to reprosecution as a deterrent to heinous abuses of criminal procedure by the prosecution or by the trial judge even though the defendant's guilt or innocence has not been resolved. Moreover, insofar as the Court's standards are based on considerations having little to do with the facts of particular cases, they have considerably limited the discretion of appellate courts in reviewing double jeopardy cases.

The purposes of this Recent Development are as follows: to identify and evaluate recent modifications in the Court's double jeopardy analysis, to propose that the Court's 1977 Term double jeopardy standards dilute the double jeopardy protection previously

11. Crist v. Bretz, 437 U.S. 28 (1978).
12. United States v. Wheeler, 435 U.S. 313 (1978).

afforded to criminal defendants, and to suggest that the Court should permit a broader scope of appellate review in double jeopardy cases.

## II. A FUNDAMENTAL POLICY DEBATE

The common law provided that no man was to be brought into jeopardy of his life more than once for the same offense.[13] The common law rule not only prohibited a second punishment for the same offense but also forbade a second trial for the same offense, whether or not the accused had suffered punishment and whether in the former trial he had been acquitted or convicted.[14] The state in a criminal trial therefore cannot appeal from a judgment of acquittal even if the judgment was clearly erroneous,[15] nor can it try a defendant for an offense after he is convicted of a lesser included offense.[16]

A primary purpose of the double jeopardy clause is to protect the defendant's right to have his trial completed by the particular tribunal that he has selected.[17] In addition, the Supreme Court has consistently recognized that, without the protection of the double jeopardy clause, the prosecution would be allowed to make repeated attempts to convict a defendant for the same offense, "subjecting him to embarassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."[18] The double jeopardy protection afforded by the fifth amendment represents a constitutional safeguard against oppressive practices and abuses of criminal procedure by the prosecution or by the trial judge.[19]

When there is no evidence of oppressive practices, however, and when application of the double jeopardy clause would create an insuperable obstacle to the administration of justice,[20] the Court has

13. *See* 4 W. BLACKSTONE, COMMENTARIES 335-38; 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1781 (1833).

14. Grafton v. United States, 206 U.S. 333 (1907); *Ex parte* Lange, 85 U.S. (18 Wall.) 163, 169 (1873).

15. Fong Foo v. United States, 369 U.S. 141, 143 (1962) (per curiam). *See also* United States v. Oppenheimer, 242 U.S. 85 (1916) (defendant acquitted because statute of limitations had run).

16. Price v. Georgia, 398 U.S. 323, 326-27 (1970).

17. Wade v. Hunter, 336 U.S. 684, 689 (1949).

18. Green v. United States, 355 U.S. 184, 187-88 (1957).

19. A trial judge may harass the defendant, for example, by declaring a mistrial for the sole purpose of affording the prosecution a more favorable opportunity to convict. *See* Downum v. United States, 372 U.S. 734 (1963).

20. Wade v. Hunter, 336 U.S. 688, 689 (1949). In 1971 the Court explained its position in *Wade:*

refused to raise double jeopardy bars to reprosecution.[21] Counterbalancing the defendant's right to be subjected to only one prosecution is "the public's interest in fair trials designed to end in just judgments."[22] The Court balances these competing policies in every double jeopardy case, regardless of the particular problem presented.[23] The 1977 Term double jeopardy decisions, however, reflect the Court's increasing tendency to hold that the public's interest in convicting the guilty outweighs the defendant's interest in having his trial completed in a single proceeding.[24] This underlying policy shift, which pervaded all the 1977 Term decisions, partly explains the multiple standards the Court articulated in analyzing double jeopardy problems.

## III. DUE PROCESS, INCORPORATION, AND ATTACHMENT OF JEOPARDY

### A. *The Incorporation Controversy from* Palko *to* Benton *and Beyond*

In *Palko v. Connecticut*[25] the Court held that the double jeopardy clause did not extend to the states through the due process clause of the fourteenth amendment,[26] explaining that only those provisions of the Bill of Rights that "have been found to be implicit in the concept of ordered liberty" are incorporated in the fourteenth amendment.[27] The Court overruled *Palko* thirty-two years later in

> [A] criminal trial is, even in the best of circumstances, a complicated affair to manage. The proceedings are dependent in the first instance on the most elementary sort of considerations, *e.g.*, the health of the various witnesses, parties, attorneys, jurors, etc., all of whom must be prepared to arrive at the courthouse at set times. And when one adds the scheduling problems arising from case overloads, and the Sixth Amendment's requirement that the single trial to which the double jeopardy provision restricts the Government be conducted speedily, it becomes readily apparent that a mechanical rule prohibiting retrial whenever circumstances compel the discharge of a jury without the defendant's consent would be too high a price to pay for the added assurance of personal security and freedom from government harassment which such a mechanical rule would provide.

United States v. Jorn, 400 U.S. 470, 479-80 (1971) (plurality opinion).

21. *See, e.g.*, Arizona v. Washington, 434 U.S. 497 (1978).

22. 336 U.S. at 689. The Court recently observed that this interest is protected by affording the prosecutor one full opportunity to present his evidence to the jury. 434 U.S. at 505.

23. The result of the balancing process may hinge on whether the defendant consented to the termination. *See, e.g.*, Jeffers v. United States, 432 U.S. 137, 152-54 (1977); Lee v. United States, 432 U.S. 23, 31-32 (1977). The issue is whether defendant waived his double jeopardy rights by moving for a mistrial or mid-trial dismissal. United States v. Dinitz, 424 U.S. 600, 606-08 (1976).

24. *See, e.g.*, 434 U.S. at 508.

25. 302 U.S. 319 (1937).

26. *Id.*

27. *Id.* at 325.

*Benton v. Maryland*[28] and extended the double jeopardy clause to the states through the fourteenth amendment, deeming its protection "fundamental to the American scheme of justice."[29] This reversal reflects the general trend toward incorporation; by the end of the 1976 Term, almost all of the guarantees specifically enumerated in the Bill of Rights had been incorporated through the fourteenth amendment,[30] as well as a number of protections beyond those specified in the Bill of Rights.[31] The incorporation debate continued, however, into the 1977 Term.[32] Although *Benton* incorporated the double jeopardy clause through the fourteenth amendment, it did not make clear whether all elements of the federal approach to double jeopardy were similarly incorporated. The Court partially addressed that question in three of its 1977 Term double jeopardy cases: *Crist v. Bretz*,[33] *Greene v. Massey*,[34] and *Swisher v. Brady*.[35]

### *B. The Federal Attachment Rule in Jury Trials*

At common law, double jeopardy considerations came into play only when a jury had rendered a judgment of conviction or acquittal in a criminal trial.[36] Jeopardy did not "attach" until the jury ren-

28. 395 U.S. 784 (1969).

29. *Id.* at 795 (quoting Duncan v. Louisiana, 391 U.S. 145, 149 (1968)).

30. *See* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 541-42 (9th ed. 1975 & Supp. 1978). The only unincorporated provisions in the original Bill of Rights (the first eight amendments) are the grand jury indictment requirement of the fifth amendment and the civil cases jury trial guarantee of the seventh amendment. *Id.* at 542.

31. *Id.; see, e.g., In re* Winship, 397 U.S. 358 (1970) ("proof beyond a reasonable doubt" requirement imposed in state juvenile delinquency proceedings).

32. In Williams v. Florida, 399 U.S. 78 (1970), the Court held that, although the fourteenth amendment incorporates the sixth amendment jury trial guarantee, a twelve-member jury is not a necessary ingredient of the sixth amendment guarantee and is therefore not binding on the states. *Id.* at 102-03. Justice Harlan, concurring in the result, accused the Court of having diluted a federal guarantee to reconcile the incorporation doctrine, which he characterized as "The 'jot-for-jot and case-for-case' application of the federal right to the States . . . ." *Id.* at 129. In Apodaca v. Oregon, 406 U.S. 404 (1972), four Justices held that the incorporation of the sixth amendment does not require a unanimous jury verdict in state courts, *id.* at 406, while four dissented. Justice Powell cast his decisive vote with the four Justices who opposed incorporation. Justice Powell reasoned that imposing every detail of incorporated federal guarantees upon a state would deprive the states of freedom to experiment with adjudicatory processes different from the federal model. Johnson v. Louisiana, 406 U.S. 356, 375 (1972) (Powell, J., concurring) (this opinion applied to both *Johnson* and *Apodaca*, which the Court decided the same day). In Ballew v. Georgia, 435 U.S. 223 (1978), the Court held that a five-member jury in serious criminal cases violates the sixth amendment as incorporated by the fourteenth amendment. Justice Powell, in a concurring opinion, disagreed with the majority approach because it assumed full incorporation of the sixth amendment. *Id.* at 246.

33. 437 U.S. 28 (1978).

34. 437 U.S. 19 (1978).

35. 98 S. Ct. 2699 (1978).

36. *See* note 13 *supra* and accompanying text.

dered a verdict. A number of nineteenth-century Supreme Court cases indicated, however, that a defendant might be placed in jeopardy even if a trial did not end in a verdict.[37] Expansion of the attachment concept beyond its common law boundaries culminated in *Downum v. United States*[38] in which the Court held that a defendant in a federal criminal prosecution was twice put in jeopardy within the meaning of the fifth amendment when a second jury was empaneled to try him two days after the first jury was selected, sworn, and then discharged over the defendant's objection.[39] The Court did not hold as a matter of law that jeopardy attaches at the time the jury is empaneled and sworn, but subsequent cases have cited *Downum* for that proposition.[40] Thus the rule in federal jury trials is that jeopardy attaches when the jury is empaneled and sworn; a dismissal or other termination of a federal criminal trial before this time precludes the defendant from arguing that the terminated proceeding bars retrial for the same offense. Conversely, a defendant may raise a double jeopardy plea at any subsequent time in a trial.[41] The trial court will then analyze his plea and will determine whether the termination raises a double jeopardy bar to a subsequent prosecution.[42]

### C. *Incorporating the Federal Attachment Rule:* Crist v. Bretz

Defendant in *Crist* was tried in a Montana court on charges of grand larceny, obtaining money and property by false pretenses, and preparing or offering false evidence. A jury was empaneled and

37. *See, e.g.*, United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824). For a more detailed discussion of *Perez* and its progeny, see notes 105-10 *infra* and accompanying text.

38. 372 U.S. 734 (1963).

39. *Id.*

40. Serfass v. United States, 420 U.S. 377, 388 (1975); Illinois v. Somerville, 410 U.S. 458, 467 (1973); *see* United States v. Martin Linen Supply Co., 430 U.S. 564, 569 (1977). *See also* United States v. Sisson, 399 U.S. 267, 305 (1970). In *Serfass* the Court described the federal attachment rule as an administrative convenience:

> As an aid to the decision of cases in which the prohibition of the Double Jeopardy Clause has been invoked, the courts have found it useful to define a point in criminal proceedings at which the constitutional purposes and policies are implicated by resort to the concept of "attachment of jeopardy."

420 U.S. at 388.

41. In the 1977 Term, the Court emphasized that attachment of jeopardy is a threshold argument only. Crist v. Bretz, 437 U.S. 28, 32-33 (1978) ("only if that point [of attachment] has once been reached does any subsequent prosecution of the defendant bring the guarantee against double jeopardy even potentially into play").

42. The federal attachment rule in nonjury cases, that jeopardy attaches when the judge begins to hear evidence, evolved in a similar way. Serfass v. United States, 420 U.S. 377, 388 (1975); United States v. Jorn, 400 U.S. 470, 479 (1971) (plurality opinion); Wade v. Hunter, 336 U.S. 684, 688 (1949); McCarthy v. Zerbst, 85 F.2d 640 (10th Cir.), *cert. denied*, 299 U.S. 610 (1936).

sworn, but before the first witness could give testimony, defense counsel objected to the information, claiming in effect that the false pretenses charge did not state a cause of action.[43] The prosecutor moved to amend the information, but the trial court denied the motion, dismissing the false pretenses count.[44] After an unsuccessful appeal, the prosecution moved to dismiss the entire information. The court granted the motion and dismissed the jury. The prosecution then filed a new information, identical to the first except that the error in the false pretenses count had been corrected. After a second jury was empaneled and sworn, defendant moved to dismiss the new information on double jeopardy grounds. The motion was denied, and defendant was subsequently convicted on the false pretenses count. The Montana Supreme Court affirmed, explaining that under Montana law jeopardy did not attach until the first witness was sworn,[45] and the United States District Court for the District of Montana denied federal habeas corpus relief on the same grounds.[46] The United States Court of Appeals for the Ninth Circuit reversed, however, holding that the federal attachment rule was an integral part of the double jeopardy clause and was consequently binding on the states.[47]

The Supreme Court affirmed, holding that Montana's attachment law was unconstitutional.[48] The Court reasoned that because the federal attachment rule was an integral part of the incorporated constitutional guarantee against double jeopardy, the due process

43. The information alleged that defendant's illegal conduct began on January 13, 1974, thirteen days after the Montana legislature repealed the state's false pretenses statute. *See* MONT. REV. CODES ANN. § 94-1805 (1947) (replaced by MONT. CRIM. CODE § 94-6-307 (1973)). Defendant's motion asked that the prosecution's evidence be limited to events occurring during the time period identified in the information. Crist v. Bretz, 437 U.S. 28, 30 n.3 (1978).

44. The prosecution claimed that "1974" in the false pretenses count was a typographical error and that the date on which defendant's alleged violation of the statute had commenced was actually January 13, 1973, well before the Montana false pretenses statute was repealed. 437 U.S. at 30.

45. Bretz v. Sheriff, 167 Mont. 363, 539 P.2d 1191 (1975) (per curiam) (citing State v. Cunningham, 166 Mont. 530, 535 P.2d 186 (1975)). MONT. REV. CODES ANN. § 95-1711(3) (1947) (current version at MONT. REV. CODES ANN. § 95-1711(3) (Supp. 1977)) provided in pertinent part:

> [A] prosecution based upon the same transaction as a former prosecution is barred by such former prosecution under the following circumstances:
>
> . . . .
>
> (d) The former prosecution was improperly terminated. Except as provided in this subsection (d), there is an improper termination of a prosecution whenever the termination is for reasons not amounting to an acquittal and takes place after the first witness is sworn but before verdict.

46. Cunningham v. District Ct., 406 F. Supp. 430 (D. Mont. 1975). The *Cunningham* case, which raised an identical issue, was consolidated with defendant's case.

47. Bretz v. Crist, 546 F.2d 1336, 1343 (9th Cir. 1976).

48. Crist v. Bretz, 437 U.S. 28 (1978).

clause of the fourteenth amendment incorporated the federal attachment rule.[49] Under the *Crist* holding, a state may not constitutionally attach jeopardy at a time after the jury is empaneled and sworn.[50] The Court did not address, however, two questions that may give rise to further litigation—whether the fourteenth amendment similarly incorporates the federal attachment rule in bench trials,[51] and whether in jury trials a state may constitutionally attach jeopardy at a point before the jury is empaneled and sworn.

The Court in *Crist* expanded the scope of double jeopardy protection by enabling a defendant to plead double jeopardy between the time jeopardy attaches and the time the jury hears its first evidence. Attachment of jeopardy is, however, only a threshold argument in a double jeopardy case;[52] once jeopardy has attached and the defendant pleads double jeopardy, the trial court must examine the merits of the plea before determining whether to bar a second prosecution for the same offense. Consequently, *Crist* does not necessarily afford a defendant greater protection than prior law. In fact, because the Court in the 1977 Term articulated a resolution of culpability standard in cases addressing the merits of a defendant's double jeopardy plea that makes it more difficult for a defendant to prevent reprosecution for the same offense after jeopardy has attached,[53] a defendant may now have less protection than under prior law.

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49. *Id.* at 38. The Court noted that the primary policy concern of the double jeopardy clause was to protect the defendant's right to have his trial completed by the tribunal he selected. *Id.* at 36. The Court concluded that the federal attachment rule protected that right. *Id.* at 38. *See* notes 17-19 *supra* and accompanying text.

50. In a brief concurring opinion, Justice Blackmun emphasized that the defendant's right to a particular jury "reaches its highest plateau" at the time the jury is empaneled and sworn, 437 U.S. at 39, but expressed concern that protection of that right would also support a holding that jeopardy attaches at the very beginning of the jury selection process. *Id. See generally* Schulhofer, *Jeopardy and Mistrials,* 125 U. PA. L. REV. 449, 512-14 (1977).

In a lengthy dissent Justice Powell argued that the fifth amendment does not require attachment of jeopardy at the swearing of the jury. 437 U.S. at 40. Justice Powell described the federal attachment rule as the product of historical accident, resulting from nineteenth-century state court decisions that confused the common law rule prohibiting needless discharge of juries and the constitutional guarantee against double jeopardy. *Id.* at 40-41, 43-47. Noting that the attachment rules for jury and bench trials were different, Justice Powell further asserted that the defendant's right to trial before a particular tribunal should not depend on the form of trial chosen. *Id.* at 48-49.

51. *See* note 40 *supra* and accompanying text.

52. *See* note 41 *supra* and accompanying text.

53. *See* text accompanying notes 177-78 *infra.*

### D. *A "Fully Applicable" Standard of Incorporation: Conflict Between* Crist *and* Greene v. Massey

In *Burks v. United States*[54] the Court held that the double jeopardy clause precludes a second trial once a reviewing court has determined that the evidence introduced at trial is insufficient to sustain a conviction. The defendant in *Burks* had been convicted in a federal district court. In *Greene v. Massey*,[55] a companion case, defendant had been convicted in a state court. Reasoning that the constitutional prohibition against double jeopardy is "fully applicable" to state criminal proceedings, the Court applied the *Burks* standard in *Greene*.[56] The scope of the *Greene* incorporation standard, however, is far from clear. By holding the double jeopardy clause fully applicable to the states, the *Greene* Court seemingly incorporated all federal aspects of the double jeopardy clause. This approach appears to be inconsistent with the more restrictive "integral part" standard articulated the same day in *Crist*. If the constitutional prohibition against double jeopardy is fully applicable to state criminal proceedings, it is unclear why the *Crist* Court attempted to justify incorporation of the federal attachment rule in terms of its "integral role." Moreover, the rationale adopted in *Greene* suggests that other aspects of the federal rule, such as the federal attachment rule in bench trials, will be deemed incorporated.

### E. *Attachment in State Juvenile Delinquency Proceedings:* Swisher v. Brady

The Court on several occasions has addressed the attachment problems posed by state juvenile proceedings.[57] In *Breed v. Jones*[58] the Court held that a juvenile is placed twice in jeopardy when, after an adjudicatory hearing in juvenile court on a charge of delinquent conduct, he is transferred to adult criminal court, tried, and con-

54. 437 U.S. 1 (1978). For a more detailed discussion of *Burks*, see notes 139-44 *infra* and accompanying text.

55. 437 U.S. 19 (1978).

56. *Id.* at 24. Two short concurring opinions by Justices Powell and Rehnquist challenged the majority's "fully applicable" notion, both citing Justice Powell's dissent in *Crist*. *Id.* at 27. *See* note 50 *supra*. Emphasizing that states have adopted a wide variety of practices with respect to motions for a new trial and other challenges to the sufficiency of the evidence, Justice Rehnquist predicted that under the majority view the scope of the double jeopardy clause would differ in similar proceedings to the extent state practice differed from federal practice. 437 U.S. at 27. For a more detailed discussion of *Greene*, see notes 145-51 *infra* and accompanying text.

57. For a concise summary of the Court's major decisions in this area, see S. Fox, The Law of Juvenile Courts in a Nutshell 60-65 (2d ed. 1977).

58. 421 U.S. 519 (1975).

victed for the same conduct.[59] Although the parties in *Breed* agreed that jeopardy did not attach until the second proceeding in criminal court,[60] the Court concluded that jeopardy attached during the first proceeding.[61]

In *Swisher v. Brady*,[62] the Court upheld, in the face of a double jeopardy challenge, a two-tiered Maryland system for adjudicating delinquency. The Maryland system allowed the prosecution to file with a juvenile court judge exceptions to a master's proposed findings and recommendations of nondelinquency. The judge could accept, reject, or modify those findings after examining the record.[63] Noting that the state legislature had the power to designate the factfinder in such proceedings and that Maryland by statute had conferred those powers only on the juvenile court judge who presided over the second proceeding, the Court reasoned that juvenile defendants were not tried by two factfinders in succession, but only one.[64] Thus the Court concluded that the Maryland system constituted a single proceeding for double jeopardy purposes.

The *Swisher* holding affords the states greater leeway in devising systems to deal with court congestion stemming from heavy juvenile caseloads.[65] In reaching its holding, however, the *Swisher* Court carved out an exception to the federal attachment rule applicable in bench trials. The Court attached jeopardy during the first hearing in the Maryland system[66] but concluded that only the second presiding officer, a juvenile court judge, could be considered a factfinder. Application of the federal bench trial attachment rule would have required the Court to attach jeopardy during the second proceeding, when the factfinder began to hear evidence.[67] Such a

59. *Id.* at 541.

60. *Id.* at 527.

61. *Id.* at 529.

62. 98 S. Ct. 2699 (1978).

63. The Court explained the operation of the Maryland system in detail. *Id.* at 2702-05. The Court noted, however, that the system in operation at the time *Swisher* was initiated at the district court level had been altered by statute while the suit was pending and that the earlier system had more closely resembled the one declared unconstitutional in *Breed*. *Id.* at 2702.

64. *Id.* at 2707-08. A strongly worded dissent by Justice Marshall, who was joined by Justices Brennan and Powell, condemned the Maryland system as a "novel redefinition of trial and appellate functions in a quasi-criminal proceeding, intentionally designed to avoid the constraints of the Double Jeopardy Clause." *Id.* at 2710. Although agreeing with the Court that jeopardy attached at the first proceeding in the Maryland system, *id.* at 2709, Justice Marshall disputed the Court's designation of a single factfinder, comparing the two-tiered system to "a trial judge and an appellate court with unusually broad powers of review." *Id.* at 2710.

65. [1978] 23 CRIM. L. REP. (BNA) 4117 (commenting on *Swisher*).

66. 98 S. Ct. at 2706 n.12.

67. *See* note 42 *supra*. The *Swisher* Court did not decide whether the fourteenth amend-

holding, however, would have been contrary to the *Breed* rule. The Court avoided this dilemma by relegating the attachment problem to a footnote and holding that Maryland's two-tiered system constituted a single proceeding.

To afford maximum double jeopardy protection to juvenile defendants in Maryland, however, the Court should have held that the two-tiered system more closely resembled a network of trial and appellate courts than a single proceeding. Considering substance over form, the Court could have observed that the Maryland legislature's characterization of the juvenile court judge as the sole factfinder in such proceedings did not alter the fact that juvenile defendants were subjected to two fact-finding processes identical to those the Court condemned in *Breed.* The *Swisher* Court's holding might be partially explained by reference to the resolution of culpability standard. The Court might have considered that a master's recommendations of delinquency or nondelinquency would never resolve a juvenile defendant's culpability and that resolution would only take place in the second proceeding in juvenile court. No such consideration, however, appears in the *Swisher* opinion. By holding that Maryland's two-tiered system constituted a single proceeding for double jeopardy purposes, the Court diluted the protection otherwise afforded a defendant by its decision that jeopardy attaches at an early point in the proceedings.

## IV. THE DUAL SOVEREIGNTY PROBLEM

### A. *The Dual Sovereignty Doctrine*

The dual sovereignty doctrine in double jeopardy analysis addresses the problem of successive prosecutions and double punishment caused by overlapping state and federal criminal statutes.[68] The Court recognized as early as 1820[69] the double jeopardy implications of successive state and federal prosecutions for the same offense. The dual sovereignty doctrine developed slowly,[70] but the

ment due process guarantee incorporated the federal attachment rule in bench trials. In McKeiver v. Pennsylvania, 403 U.S. 528 (1971), a procedural due process case, the Court held that the sixth amendment jury trial guarantee did not extend to state juvenile delinquency proceedings. *Id.* at 545. The *Swisher* Court cited *McKeiver* with approval. 98 S. Ct. at 2707.

68. L. MILLER, *supra* note 8, at 10.

69. In Houston v. Moore, 18 U.S. (5 Wheat.) 1 (1820), the Court raised these issues in dictum accompanying a supremacy clause opinion. *Id.* at 74.

70. *See* Moore v. Illinois, 55 U.S. (14 How.) 13 (1852); United States v. Marigold, 50 U.S. (9 How.) 560 (1850); Fox v. Ohio, 46 U.S. (5 How.) 410 (1847). For a discussion of these cases and their impact on the development of the dual sovereignty doctrine, see L. MILLER, *supra* note 8, at 10-33.

Court's 1922 decision in *United States v. Lanza*[71] established the rule that "an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each."[72]

The Warren Court developed two facets of the dual sovereignty doctrine. In *Bartkus v. Illinois*[73] defendant was acquitted following a federal prosecution for bank robbery, but subsequently was convicted of bank robbery by a state court on an indictment that recited facts identical to those alleged in the federal indictment. The Supreme Court upheld the conviction, holding that conviction or acquittal in a federal court raised no double jeopardy bar to a subsequent prosecution in state court for a similar offense.[74] A companion case, *Abbate v. United States,*[75] established the converse of the *Bartkus* rule. Defendants were convicted in a state court of conspiring to injure or destroy the property of another. Thereafter, defendants were convicted by a federal district court in another state on charges, based on identical facts, of having conspired to destroy parts of a federally operated and controlled communications system. The Court affirmed the convictions, holding that the double jeopardy clause does not bar a federal prosecution after a prior state conviction for the same offense.[76] Thus the standard in dual sovereignty cases is that if a defendant is successively prosecuted under two laws or in two court systems that are creations of separate sovereigns, no bar is raised to the second proceeding. If, however, the two laws or court systems are creations of the same sovereign, a double jeopardy bar prevents a second prosecution.[77]

### *B.* United States v. Wheeler

In *United States v. Wheeler*[78] the Navajo Tribal Court convicted defendant, a member of the Navajo Tribe, of contributing to the delinquency of a minor. Thereafter, defendant was charged with statutory rape in a federal district court. The district court dis-

71. 260 U.S. 377 (1922).

72. *Id.* at 382.

73. 359 U.S. 121 (1959).

74. *Id.* at 136.

75. 359 U.S. 187 (1959).

76. *Id.* at 195-96.

77. Waller v. Florida, 397 U.S. 387 (1970); Puerto Rico v. Shell Co., 302 U.S. 253 (1937); Grafton v. United States, 206 U.S. 333 (1907). *See generally* Note, *Stepping Into the Breach: Basing Defendants' Rights on State Rather Than Federal Law,* 15 AM. CRIM. L. REV. 339, 364-65 (1978).

78. 435 U.S. 313 (1978). *See generally* Comment, *Tribal Courts, Double Jeopardy and the Dual Sovereignty Doctrine,* 13 GONZ. L. REV. 467 (1978).

missed the indictment, holding that since the tribal offense was a lesser included offense of the federal statutory rape charge, the double jeopardy clause barred the federal prosecution.[79] The United States Court of Appeals for the Ninth Circuit affirmed.[80] The Supreme Court reversed and remanded, holding that because the Navajo Tribe was a separate sovereign for purposes of the dual sovereignty doctrine, the double jeopardy clause did not bar reprosecution in federal court.[81] Prior to *Wheeler,* the Supreme Court handed down similar rules that states are separate sovereigns vis-à-vis the federal government,[82] that municipalities are not separate sovereigns vis-à-vis state governments,[83] and that neither territories[84] nor the Commonwealth of Puerto Rico[85] is a separate sovereign vis-à-vis the federal government.[86] The dual sovereignty doctrine consequently leaves appellate courts little discretion in reviewing double jeopardy cases because the determination whether reprosecution is barred depends solely upon the relationship of the prosecuting entities rather than upon the facts of particular cases. The doctrine also permits successive prosecutions for the same offense, in violation of the policy objectives of the double jeopardy clause, whenever state and federal statutes proscribe the same conduct. An approach more consistent with the protective aims of the double jeopardy clause would be to allow appellate tribunals to scrutinize the substantive criminal offenses with which a particular defendant is charged, raising a double jeopardy bar to reprosecution only if the statutes are substantially similar.

79. The district court opinion was unreported. *See* 435 U.S. at 316 & n.5.

80. United States v. Wheeler, 545 F.2d 1255 (9th Cir. 1976).

81. 435 U.S. at 30-32.

82. Abbate v. United States, 359 U.S. 187 (1959); Bartkus v. Illinois, 359 U.S. 121 (1959).

83. Waller v. Florida, 397 U.S. 387 (1970).

84. Grafton v. United States, 206 U.S. 333 (1907).

85. Puerto Rico v. Shell Co., 302 U.S. 253 (1937).

86. It is questionable whether tribal courts are in fact instrumentalities of a separate sovereign vis-à-vis the federal government, for most tribal affairs are governed by federal statutes and administrative agencies. The *Wheeler* Court explained its approach by asserting that the Navajo Tribe never gave up its sovereign power to punish tribal offenders. 435 U.S. at 323. The Court reasoned that, although no longer possessing the full attributes of sovereignty, native American tribes nevertheless possess those aspects of tribal sovereignty not withdrawn by treaty, statute, or "by implication as a necessary result of their dependent status." *Id. See also* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). The Court indicated, however, that native American tribes had lost their sovereign power to prosecute nonmembers of the tribe. 435 U.S. at 326.

### C. *The* Petite *Policy: A Limitation on the Dual Sovereignty Doctrine*

Carried to its logical extreme, the dual sovereignty doctrine would permit consecutive prosecutions by state and federal governments in every case involving overlapping state and federal statutes.[87] To partially prevent this result, the Justice Department has imposed a limitation on the doctrine, barring a federal trial following a state prosecution for a similar offense "unless the reasons are compelling."[88] The Supreme Court approved the Department's policy in *Petite v. United States,*[89] explaining that it was dictated "by considerations both of fairness to defendants and of efficient and orderly law enforcement."[90] The decision to implement the "*Petite* policy" in a particular case, however, rests entirely in the hands of the Justice Department.[91]

### D. Rinaldi v. United States

In *Rinaldi v. United States*[92] defendant was convicted in a state court of conspiracy to commit robbery, conspiracy to commit grand larceny, and carrying a concealed weapon. During the state trial a federal indictment charged defendant with conspiracy to affect interstate commerce by robbery in violation of federal law. The federal prosecution ended in a mistrial after the convictions in state court, but the federal prosecutor refused to terminate prosecution, claiming that he had been instructed by his superiors to proceed because of their concern that the state convictions might be reversed on appeal.[93] Defendant was convicted in a second federal trial, and two of the three state convictions were affirmed on appeal.[94] On

87. This two-pronged approach has been the subject of intense debate. For an argument supporting the Court's analysis in *Bartkus* and *Abbate,* see L. MILLER, *supra* note 8, at 128-32. For arguments criticizing the two decisions, see Brant, *Overruling* Bartkus *and* Abbate: *A New Standard for Double Jeopardy,* 11 WASHBURN L.J. 188 (1972); Note, *Multiple Prosecution: Federalism vs. Individual Rights,* 20 U. FLA. L. REV. 355 (1968).

88. Rinaldi v. United States, 434 U.S. 22, 24 n.5 (1978).

89. 361 U.S. 529 (1960) (per curiam).

90. *Id.* at 530.

91. A United States attorney contemplating a federal prosecution in these circumstances is required to obtain authorization from an Assistant Attorney General before proceeding with a prosecution otherwise barred by the *Petite* policy. 434 U.S. at 24 n.5.

92. 434 U.S. 22 (1978) (per curiam).

93. *Id.* at 24. The Justice Department official who instructed trial counsel to insist upon a retrial had not obtained the requisite approval from an Assistant Attorney General. *Id.* at 24 n.5; *see* note 91 *supra.*

94. 434 U.S. at 23 n.4. Defendant's conviction of conspiracy to commit grand larceny was reversed on appeal, but his convictions on the other two counts were affirmed. Scaldeferri v. State, 294 So. 2d 407 (Fla. App.), *cert. denied sub nom.* Pompeo v. State, 303 So. 2d 21 (Fla.), *cert. denied sub nom.* Washington v. Florida, 419 U.S. 993 (1974).

appeal to the United States Court of Appeals for the Fifth Circuit, the government acknowledged that the *Petite* policy had been violated and moved to remand the case to the district court for dismissal. The Fifth Circuit granted the motion,[95] but on remand the district court denied the government's motion to dismiss.[96] Both defendant and the government appealed the ruling, which the Fifth Circuit affirmed twice.[97] The Supreme Court vacated the defendant's federal conviction and remanded to the district court for dismissal, reasoning that federal courts should be "receptive, not circumspect," when the government seeks to implement the *Petite* policy.[98] Thus the Court concluded that the district court had abused its discretion by refusing to grant the government's motion to dismiss.[99]

The Court's holding mandates a deferential judicial approach to *Petite* policy decisions by federal prosecutors. It appears to benefit the defendant by granting the Justice Department broad power to dismiss its own prosecutions with little judicial interference. Yet the Court's approach also makes it possible for the government to prosecute a defendant after a prior state conviction, obtain a guilty verdict, and then wait to see if the state conviction is reversed on appeal. If the state conviction is reversed, the federal conviction would be allowed to stand; if affirmed, the federal government would move to dismiss its indictment by invoking the *Petite* policy.[100] By making such a procedure possible, *Rinaldi* circumvented

95. The Fifth Circuit's decision is apparently unreported. *See* 434 U.S. at 25.

96. The district court denied the motion for two reasons: the prosecutor did not move for dismissal until after the trial had terminated, and he had acted in bad faith by representing that he had been instructed to pursue prosecution in violation of the *Petite* policy. *Id.*

97. *In re* Washington, 531 F.2d 1297 (5th Cir.), *aff'd on rehearing,* 544 F.2d 203 (5th Cir. 1976). On rehearing, all members of the court agreed that the government's motion to dismiss was timely, but they disagreed on the question whether the prosecutor's bad faith justified the district court's refusal to set aside the defendant's conviction. 544 F.2d at 208-13.

98. 434 U.S. at 29.

99. *Id.* at 32. A strongly worded dissent by Justice Rehnquist, joined by Justice White, suggested that a federal conviction is nevertheless valid if the government admits an administrative error not touching upon the issue of defendant's guilt or innocence. *Id.* at 87-88. The dissent suggested that the majority approach not only contravened *Federal Rule of Criminal Procedure* 48(a), which allows government motions to dismiss only by leave of court, but also made possible the type of prosecutorial persecution that the double jeopardy clause was designed to prohibit. *See id.* at 32-34. An example of potential overreaching that Justice Rehnquist apparently had in mind appears in the text accompanying note 100 *infra.*

100. On the facts of the *Rinaldi* case, the Justice Department would have won no matter which way the Court ruled. By deciding the case as it did, the Court gave broad discretionary powers to the Department in some double jeopardy cases. If the Court had affirmed the district court's determination, however, it would have upheld defendant's federal conviction

one of the primary goals of the double jeopardy clause—to prevent repeated attempts to convict a defendant for the same offense. The Court should have avoided this result by revamping the dual sovereignty doctrine to reduce the potential for harm that made the *Petite* policy necessary in the first place.[101]

## V. Multiple Prosecutions and Appealability: An Emerging Resolution of Culpability Standard

### A. *Multiple Prosecutions*

The multiple prosecution problem arises when a criminal trial is terminated at some point after the attachment of jeopardy but before a judgment of acquittal or conviction. The Supreme Court's double jeopardy cases in this area have fallen into two categories—trials terminated by a declaration of mistrial[102] and trials terminated by a mid-trial dismissal.[103] In both categories the prosecution may attempt to retry the defendant for the same offense without appealing the trial court's termination of the initial proceeding.[104]

#### (1) Mistrials

In *United States v. Perez*,[105] the Court first addressed the question whether a declaration of mistrial by the trial court raises a double jeopardy bar to a second proceeding. The *Perez* Court established a "manifest necessity" standard, which provides that a declaration of mistrial is no bar to a subsequent proceeding if the trial court's declaration was based on a manifest necessity.[106] Under this

and thereby would have aggravated the harm that defendant had already suffered by violation of his rights under the double jeopardy clause. Defendant, not the Justice Department, would have suffered from such a holding. The Court in reaching its result may consequently have balanced the competing harms and concluded that reversing the district court posed the lesser of two evils.

101. One possible approach was suggested in Part IV(B) *supra*.

102. *E.g.*, Arizona v. Washington, 434 U.S. 497 (1978).

103. *E.g.*, Crist v. Bretz, 437 U.S. 28 (1978).

104. The double jeopardy problems raised when the prosecution appeals the termination are more complex. *See* Part V(B) *infra*.

105. 22 U.S. (9 Wheat.) 579 (1824).

106. The Court has addressed the question of what constitutes a manifest necessity on several occasions. *See* United States v. Sanford, 429 U.S. 14 (1976) (per curiam) (hung jury); Lovato v. New Mexico, 242 U.S. 199 (1916) (jury dismissed pending rearraignment of defendant and then reempaneled); Dreyer v. Illinois, 187 U.S. 71 (1902) (hung jury); Thompson v. United States, 155 U.S. 271 (1894) (mistrial declared upon discovery that juror had been member of grand jury that indicted defendant); Logan v. United States, 144 U.S. 263 (1892) (hung jury); Simmons v. United States, 142 U.S. 148 (1891) (mistrial declared upon discovery of biased jurors). In all of these cases, the Court upheld the trial court's finding of manifest necessity, holding that the declaration of mistrial imposed no bar to a second proceeding. *But see* Downum v. United States, 372 U.S. 734 (1963) (double jeopardy clause violated when

standard, a mistrial may not be declared in bad faith,[107] nor "to afford the prosecution a more favorable opportunity to convict."[108] A court may exercise its discretion to declare a mistrial on manifest necessity grounds only in extraordinary circumstances.[109] Because of the trial judge's broad discretion, however, no mechanical formula is applied in scrutinizing the propriety of a mistrial declaration based on manifest necessity.[110]

During the 1977 Term the Supreme Court reexamined the scope of a trial judge's discretion in declaring mistrials. In *Arizona v. Washington*[111] defendant was convicted of murder in a state court, but an appellate court reversed the conviction and ordered a new trial because the prosecutor had withheld exculpatory evidence from the defense. In his opening statement at the second trial, defense counsel called the prosecutor's misconduct to the jury's attention.[112] The prosecution moved for a mistrial,[113] and after extended deliberation[114] the trial judge granted the motion. The trial judge did not expressly find manifest necessity for a mistrial, however, nor did he explicitly state that he had considered alternative solutions to a mistrial before dismissing the jury. The United States District Court for the District of Arizona granted defendant's petition for a writ of habeas corpus, noting that a trial judge is required to find manifest necessity before granting a mistrial motion.[115] The United States Court of Appeals for the Ninth Circuit affirmed.[116] The Su-

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second jury is empaneled two days after first jury was discharged because of prosecution's failure to locate a key witness).

107. United States v. Jorn, 400 U.S. 470, 485 (1971) (plurality opinion), *quoted in* United States v. Dinitz, 424 U.S. 600, 611 (1976).

108. Downum v. United States, 372 U.S. 734, 736 (1963).

109. *Id. See* note 106 *supra.*

110. Illinois v. Somerville, 410 U.S. 458, 462 (1973). For an exhaustive treatment of the Court's application of the manifest necessity standard to mistrials, see Schulhofer, *supra* note 50. *See also* 63 IOWA L. REV. 975 (1978).

111. 434 U.S. 497 (1978).

112. Defense counsel told the jury he would produce evidence of the prosecution's alleged misconduct during the first trial. *Id.* at 499.

113. The prosecution argued that evidence concerning the reasons for the new trial was inadmissible because it was irrelevant to the issue of guilt or innocence. The prosecution further argued that cautionary instructions from the bench could not repair prejudice to the jury caused by defense counsel's opening remarks. *Id.*

114. The court at first denied the motion and adjourned the trial to give the defense counsel an opportunity to prove that the evidence was admissible. When the next day defense counsel was not prepared to cite authority supporting his belief, the court declared a mistrial. *Id.* at 500-01.

115. *Id.* at 501.

116. Arizona v. Washington, 546 F.2d 829 (9th Cir. 1976). Absent a finding of manifest necessity or an explicit consideration of alternatives by the trial judge, the Ninth Circuit refused to infer that the jury was prevented from arriving at a fair and impartial verdict. 434 U.S. at 502.

preme Court reversed, holding that a trial judge's declarations of mistrial are entitled to "great deference" by an appellate court and that absence of an explicit finding of manifest necessity does not render a mistrial order constitutionally defective if the trial record adequately discloses the basis for the order.[117] The Court based its holding upon its high degree of respect for a trial judge's discretion in evaluating the effect of an improper comment on a jury's impartiality.[118] The Court's adequate basis standard does not require the appellate court to scrutinize the trial record and make its own determination whether manifest necessity justified the mistrial declaration. The Court's emphasis on the great deferences due the trial judge's determination suggests rather that an appellate court is to apply a less rigorous standard than that of manifest necessity.

A second line of analysis is discernible in *Washington.* In its summary of the trial record, the Court emphasized the trial judge's opinion that evidence of prior prosecutorial misconduct was irrelevant to the issue of defendant's guilt or innocence and the trial judge's concern that an erroneous mistrial declaration would preclude another trial, which would leave the issue of defendant's culpability unresolved.[119] The Court again focused on the issue of defendant's culpability when it distinguished mistrials based on the unavailability of critical prosecution evidence, which trigger strict appellate scrutiny, from mistrials based on the factfinder's inability to reach a verdict, which require only minimal scrutiny.[120] If the state harasses a defendant or cannot produce a key witness at trial, it has not made out its case against the defendant. Because the issue of culpability has arguably been resolved in favor of the defendant's innocence, a declaration of mistrial by the trial judge, which would potentially allow reprosecution, must be closely scrutinized to de-

117. *Id.* at 509, 516-17.

118. *Id.* at 511. After articulating its deferential standard, the Court found that the mistrial order was a result of manifest necessity, reasoning that the trial judge acted responsibly, that he accorded careful consideration to defendant's interests in having his trial completed in a single proceeding, and that he exercised sound discretion in evaluating the possibility of juror bias. *Id.* at 514-15. In reaching this conclusion, the Court emphasized the trial judge's hesitation before granting the prosecution's mistrial motion. *See* note 114 *supra* and accompanying text. The Court also based its holding on policy considerations, explaining that a contrary ruling would encourage unscrupulous defense counsel to obtain mistrials by improper opening statements and other acts of professional misconduct. 434 U.S. at 513 & n.32. A dissenting opinion by Justice Marshall, joined by Justice Brennan, asserted that the manifest necessity standard requires a clear showing on the record that the trial judge "scrupulously considered" less drastic alternatives to a mistrial. *Id.* at 525. Justice White filed a short separate dissent, *id.* at 517-19, and Justice Blackmun concurred in the result, without opinion.

119. *Id.* at 499, 501 & n.5.

120. *Id.* at 508-09.

termine whether it was in fact necessary. Conversely, when the basis for a mistrial is a hung jury, no resolution of the defendant's guilt or innocence has taken place. In such cases, a declaration of mistrial will trigger only minimal scrutiny.

Concern that double jeopardy may release a defendant from the judicial process without a resolution of his guilt or innocence is also evident in the Court's emphasis on possible juror bias as the motive behind the trial judge's declaration of mistrial in *Washington,* for a verdict by a biased jury does not conclusively resolve the issue of defendant's culpability. The *Washington* opinion is consequently susceptible to a second interpretation—that the Court will uphold declarations of mistrial despite double jeopardy objections whenever the issue of defendant's guilt or innocence has been left unresolved.

Under either interpretation, *Washington* restructured double jeopardy protection in mistrial cases. Under prior law, a declaration of mistrial raised a bar to reprosecution for the same offense unless compelled by manifest necessity, a standard applied only in extreme circumstances. The prosecutor bore the heavy burden of proving the manifest necessity of a mistrial.[121] Under the *Washington* standard, a declaration of mistrial over defendant's objection[122] will be upheld whenever adequately supported by the record. Moreover, the Court's deferential approach suggests that the burden of proof has been shifted to the defendant, who must now demonstrate an inadequate basis for the mistrial declaration.

### (2) Mid-Trial Dismissals

In *Crist v. Bretz*[123] the Court confronted an unusual fact situation. In the ordinary case, the defendant seeks a mid-trial dismissal of the indictment, and if it is granted, the prosecution appeals.[124] In *Crist,* however, the prosecution moved to dismiss its own indictment after discovering an error therein. When the court granted the motion, the prosecution corrected the error and reprosecuted on an otherwise identical indictment. The defendant raised two issues on appeal—whether jeopardy had attached at the time the first trial

121. *Id.* at 505.

122. The Court has consistently ruled that when a defendant obtains a mistrial on his own motion, the prosecution is not barred from retrying him. *E.g.,* United States v. Dinitz, 424 U.S. 600, 606-08 (1976); United States v. Tateo, 377 U.S. 463, 467 (1964).

123. 437 U.S. 28 (1978); *see* Part III(C) *supra.*

124. *E.g.,* United States v. Scott, 437 U.S. 82 (1978) (mid-trial dismissal granted); Sanabria v. United States, 437 U.S. 54 (1978) (proceeded to verdict).

was terminated and whether manifest necessity supported the first dismissal.[125]

The district court, denying defendant's petition for habeas corpus, held not only that jeopardy did not attach under Montana law until the first witness is sworn, but also that manifest necessity supported the mid-trial dismissal.[126] The United States Court of Appeals for the Ninth Circuit reversed, holding that the federal attachment rule was binding on the states through the fourteenth amendment and that manifest necessity did not support the mid-trial dismissal.[127] Because the prosecution waived any challenge to the Ninth Circuit's ruling on the manifest necessity ruling,[128] the Supreme Court decided *Crist* on the attachment issue alone, holding the federal attachment rule binding on the states through the fourteenth amendment.[129]

In broadly worded dictum, however, the Court suggested that it would apply the manifest necessity standard to mid-trial dismissals as well as to mistrials. The Court cited *Perez* and *Kepner v. United States*[130] for the proposition that "a defendant could be put in jeopardy even in a prosecution that did not culminate in a conviction or an acquittal."[131] Under the *Crist* dictum, it may be inferred that the manifest necessity standard will be applied not only in cases involving mistrials, but also in cases involving termination between the time jeopardy attaches and the time the defendant is convicted or acquitted.[132]

125. 437 U.S. at 31.

126. Cunningham v. District Ct. 406 F. Supp. 430, 434 (D. Mont. 1975).

127. Bretz v. Crist, 546 F.2d 1336, 1343, 1346-47 (9th Cir. 1976).

128. 437 U.S. at 31 n.5.

129. *Id.* at 38.

130. 195 U.S. 100 (1904).

131. 437 U.S. at 45 & n.10. *Perez,* however, addressed the double jeopardy implications of mistrials only, see notes 105-06 *supra* and accompanying text, and *Kepner* held unconstitutional a prosecutorial appeal from a judgment of acquittal. 195 U.S. at 110-11, 133-34.

132. In Lee v. United States, 432 U.S. 23 (1977), a case not cited in *Crist,* defendant successfully moved to dismiss an information, arguing that it failed to allege all the requisite elements of theft under a state statute. Thereafter, defendant was charged with the same theft in a valid indictment and was convicted in the same district court in which he had previously appeared. The Supreme Court affirmed, holding that the dismissal was the functional equivalent of a mistrial because it had not been predicated on any judgment that defendant could never be prosecuted, but rather in contemplation of just such a reprosecution. The Court concluded that established double jeopardy principles governing the permissibility of retrial after mistrial declarations were fully applicable. *Id.* at 30-31. The *Crist* Court appears to have adopted the same reasoning.

### B. *Appealability*

#### (1) Appeals by the Defense

In *United States v. Ball*[133] the Court articulated the general rule that a defendant who successfully appeals a conviction may be retried for the same offense.[134] The reason for the rule is that by appealing, the defendant waives his right to the plea of double jeopardy and asks the court to award him a new trial.[135] In *United States v. Tateo*[136] the Court held that the *Ball* rule applies when an error in the proceedings leads to reversal on appeal.[137] A number of Supreme Court decisions extended the *Ball* rule, however, to cases in which a conviction was overturned on appeal because of insufficient evidence.[138]

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133. 163 U.S. 662 (1896).

134. *Id.* at 672.

135. Trono v. United States, 199 U.S. 521, 534 (1905). *See also* Louisiana v. Resweber, 329 U.S. 459, 462 (1947).

136. 377 U.S. 463 (1964).

137. *Id.* at 465. The Court reasoned that "[i]t would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction." *Id.* at 466.

138. This line of authority began with Bryan v. United States, 338 U.S. 552 (1950). Defendant in *Bryan,* convicted of attempting to evade income tax laws, moved for a judgment of acquittal or, in the alternative, a new trial. The motion was denied. On appeal, the Fifth Circuit reversed because of insufficient evidence and remanded the case to the district court for a new trial. The Supreme Court upheld the Fifth Circuit on statutory grounds, dismissing defendant's double jeopardy argument in one paragraph by quoting the *Ball* rule. *Id.* at 560. The Court explained that the Fifth Circuit's power to remand for a new trial was governed by 28 U.S.C. § 2106 (1976), which authorizes federal appellate courts to require such further proceedings on remand as may be just under the circumstances, and not by *Federal Rule of Criminal Procedure* 29(a), which requires a judgment of acquittal when an appellate court finds the evidence insufficient to sustain a verdict.

In Sapir v. United States, 348 U.S. 373 (1955) (per curiam), the Supreme Court affirmed without explanation a Tenth Circuit opinion that had reversed defendant's conviction because of insufficient evidence and remanded with instructions to dismiss the indictment. In a brief concurring opinion, Justice Douglas noted no difference between a jury verdict of acquittal and an appellate judgment of acquittal for lack of evidence, because both conclude the controversy. Justice Douglas admitted, however, that in the light of *Bryan,* the result would be different if defendant requested a new trial on appeal. *Id.* at 374. In Yates v. United States, 354 U.S. 298 (1957), defendants on appeal asked in the alternative for a new trial or a judgment of acquittal. The Court granted judgments of acquittal to some defendants because of insufficient evidence and new trials to others, noting, however, that when defendants ask for a new trial the Court is compelled to deny acquittal even in the face of insufficient evidence. *Id.* at 328. Finally, in Forman v. United States, 361 U.S. 416 (1960), the Ninth Circuit reversed defendant's conviction because of an improper jury instruction and remanded for a new trial. The Supreme Court affirmed. Rejecting defendant's double jeopardy argument that a judgment of acquittal should have been granted under *Sapir,* the Court explained that a decisive factor in *Sapir* was defendant's failure to move for a new trial. *Id.* at 426.

In *Burks v. United States,*[139] one of the Court's 1977 Term cases, defendant was convicted of bank robbery in a federal district court, having unsuccessfully moved for a judgment of acquittal. Defendant then moved for a new trial. The court denied his motion, but the United States Court of Appeals for the Sixth Circuit reversed, holding that the government had not fulfilled its burden of proving defendant's sanity beyond a reasonable doubt, and remanded for a determination of whether a judgment of acquittal or a new trial should be granted.[140] The Supreme Court reversed and remanded, holding that the double jeopardy clause precludes a second trial when defendant's conviction is reversed solely for lack of sufficient evidence, even though defendant seeks a new trial as one of his remedies or even as his sole remedy.[141] Overruling all contrary authority,[142] a unanimous Court asserted that, because a reviewing court's reversal of a conviction for lack of sufficient evidence is tantamount to a judgment of acquittal,[143] the double jeopardy clause does not afford the prosecution a second opportunity to supply evidence that it failed to introduce in the first proceeding. The Court indicated it would continue to apply the *Ball* rule, however, when a conviction is reversed because of trial error.[144]

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139. 437 U.S. 1 (1978).

140. United States v. Burks, 547 F.2d 968, 970-71 (6th Cir. 1977).

141. 437 U.S. at 17-18.

142. The Court overruled *Bryan, Sapir, Yates* and *Forman* insofar as those decisions were inconsistent with the *Burks* holding.

143. The Court explained:

> By deciding that the Government had failed to come forward with sufficient proof of [defendant's] capacity to be responsible for criminal acts, [the Sixth Circuit] was clearly saying that Burks' criminal culpability had not been established. If the District Court had so held in the first instance, as the reviewing court said it should have done, a judgment of acquittal would have been entered . . . .

437 U.S. at 10-11.

144. The Court explained that the policy objectives of the double jeopardy clause mandated the distinction between trial error and insufficient evidence:

> [R]eversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, *e.g.,* incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct. When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished.

*Id.* at 15. The Court's explanation precluded the possibility that a procedural error may in some cases be so contrary to the constitutional fair trial guarantee as to require invocation of the double jeopardy clause irrespective of the defendant's guilt or innocence. The defendant's interest in protecting himself against prosecutorial harassment, for example, may in some cases be so overwhelming as to outweigh the public's interest in punishing the guilty. The double jeopardy clause should in such a case be applied to deter the official misconduct.

In *Greene v. Massey,*[145] a companion case, defendant was convicted of first-degree murder in a state court. On appeal, the Florida Supreme Court reversed because of insufficient evidence and remanded for a new trial.[146] Three of the four justices who joined in the state court's per curiam opinion filed a separate concurrence, however, in which they asserted that the judgment should be reversed and remanded because of trial error and agreed with the per curiam opinion doing so.[147] It was unclear, therefore, whether trial error or insufficient evidence was the rationale for the Florida Supreme Court's opinion.[148] Defendant was retried and convicted of first-degree murder. A federal district court denied defendant's petition for habeas corpus,[149] and the United States Court of Appeals for the Fifth Circuit affirmed.[150] After attempting to reconcile the two Florida Supreme Court opinions, the Supreme Court reversed and remanded for further consideration in the light of *Burks.*[151]

The decisions in *Burks* and *Greene* extend the resolution of culpability standard, applied *sub rosa* in the *Washington* decision,[152] to appealability cases. The Court determined that if the appellate court's reversal of a conviction is tantamount to a judgment of acquittal, the double jeopardy clause bars a subsequent proceeding. Consequently, *Burks* modifies the rigid *Ball* rule that appellate reversals of a conviction invariably permit retrial, but assures that appeals of double jeopardy pleas by defense counsel will not result in a defendant's release when the issue of his guilt or innocence has not been resolved.[153]

145. 437 U.S. 19 (1978).

146. Sosa v. State, 215 So. 2d 736 (Fla. 1968) (per curiam).

147. *Id.* at 737-46 (Ervin, Drew, & Thornal, JJ., concurring).

148. The confusion did not become significant until after *Burks.* Under the *Burks* rule, as noted above, insufficient evidence raises a double jeopardy bar to a second proceeding, but trial error does not.

149. The district court's order was unreported. 437 U.S. at 23 n.5.

150. Greene v. Massey, 546 F.2d 51 (5th Cir. 1977 .

151. 437 U.S. at 26 & n.9. According to the Court's attempted reconciliation of the two opinions, the three concurring justices meant to say that once inadmissible hearsay evidence (the "trial error") was discounted, there was insufficient evidence to permit the jury to convict; in other words, the "legally competent" evidence introduced at the first trial was insufficient to prove guilt. The Court refused, however, to predict the double jeopardy implications of its interpretation. *Id.* at 25-27.

152. *See* Part V(A)(1) *supra.*

153. The Court, in a number of cases, has addressed the related question whether a trial court can impose a more severe sentence upon a defendant if retrial after a successful appeal leads to a second conviction. *See, e.g.,* Chaffin v. Stynchcombe, 412 U.S. 17 (1973); North Carolina v. Rice, 404 U.S. 244 (1971); North Carolina v. Pearce, 395 U.S. 711 (1969). The Court has consistently held that the double jeopardy clause imposes no bar to a more severe sentence upon reconviction.

(2) Appeals by the Prosecution

Although a defendant may always appeal a judgment of conviction, the Supreme Court has consistently ruled that the prosecution may not appeal a judgment of acquittal without violating the double jeopardy clause.[154] The Court in recent years has confronted a more difficult problem—whether the prosecution may appeal a mid-trial dismissal of its case.[155] In 1907, Congress enacted the Criminal Appeals Act,[156] which in its present form permits government appeals from federal criminal trials except when prohibited by the double jeopardy clause.[157] Whether a prosecutorial appeal violates the double jeopardy clause is a question that the federal courts must resolve, and the Supreme Court has addressed a number of problems raised by this legislation.[158]

The Court has interpreted the Criminal Appeals Act broadly. In *United States v. Wilson*,[159] after reviewing the Act's legislative history, the Court concluded that Congress intended to allow government appeals in federal criminal proceedings whenever the Constitution permits them.[160] The Court consequently held that the double jeopardy clause barred government appeals only when a new trial would be required on remand.[161] In *United States v. Jenkins*[162]

154. *See, e.g.*, United States v. Wilson, 420 U.S. 332, 341 n.9 (1975); Fong Foo v. United States, 369 U.S. 141, 143 (1962); Kepner v. United States, 195 U.S. 100, 130 (1904); United States v. Sanges, 144 U.S. 310, 323 (1892).

155. *See generally* Friedenthal, *Government Appeals in Federal Criminal Cases*, 12 STAN. L. REV. 71 (1959); Wurzburg & Gross, *Double Jeopardy: Dismissal and Government Appeal*, 13 GONZ. L. REV. 337 (1978); Note, *Double Jeopardy: The Prevention of Multiple Prosecutions*, 54 CHI.-KENT L. REV. 549 (1977); Note, *Double Jeopardy and Government Appeals in Criminal Cases*, 12 COLUM. J.L. & SOC. PROB. 295 (1976).

156. Act of Mar. 2, 1907, Pub. L. No. 59-223, ch. 2564, 34 Stat. 1246 (current version at 18 U.S.C. § 3731 (1976)). For a thorough account of the enactment and development of this act, see United States v. Sisson, 399 U.S. 267, 291-96 (1970).

157. 18 U.S.C. § 3731 (1976) provides in pertinent part:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

158. *See* United States v. Wilson, 420 U.S. 332, 338-39 (1975). Shortly after the current language of 18 U.S.C. § 3731 was adopted in the Omnibus Crime Control Act of 1970, Pub. L. No. 91-644, 84 Stat. 1890 (codified in scattered sections of 5, 18, 42 U.S.C.), the Court remarked that "[t]he end of our problems with [18 U.S.C. § 3731] is finally in sight [because] . . . [t]his Court's appellate jurisdiction of Government appeals in federal criminal cases has thus been eliminated." United States v. Weller, 401 U.S. 254, 255 n.1 (1971). The Court later remarked that this observation was made "with more optimism than prescience." United States v. Scott, 437 U.S. 82, 85 (1978).

159. 420 U.S. 332 (1975).

160. *Id.* at 337.

161. *Id.* at 342.

162. 420 U.S. 358 (1975).

the Court refined and expanded its *Wilson* rule, holding that the government has no right to appeal whenever "further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged," would be required on remand.[163] The *Jenkins* standard, as applied in subsequent cases, provided that the double jeopardy clause bars government appeals of mid-trial dismissals only when such dismissals are tantamount to an acquittal. Subsequent cases following *Jenkins* defined "acquittal" broadly, however, as "a resolution, correct or not, of some or all of the factual elements of the offense charged."[164]

The Supreme Court overruled *Jenkins* last term in *United States v. Scott.*[165] Defendant was tried in a federal district court on a three-count narcotics indictment. Both before and twice during his trial, defendant moved to dismiss two of the counts on the grounds that preindictment delay had prejudiced his defense. The court granted defendant's motion after hearing all the evidence. The government appealed, but the United States Court of Appeals for the Sixth Circuit dismissed, explaining that under *Jenkins* the double jeopardy clause barred any further prosecution of defendant.[166] The Supreme Court reversed and remanded, holding that the government's appeal invaded no interest protected by the double jeopardy clause because defendant himself had sought to have his trial terminated without any decision by either judge or jury as to his guilt or innocence.[167]

Four Justices dissented in *Scott,* accusing the majority of adopting an overly restrictive definition of acquittal as a finding of

163. *Id.* at 370.

164. United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977). *See also* Lee v. United States, 432 U.S. 23, 29-30 (1977). In a brief concurring opinion in *Lee,* Justice Rehnquist, who had written the majority opinion in *Jenkins,* indicated that subsequent Supreme Court cases had expanded *Jenkins* in a manner contrary to his expectations. Justice Rehnquist concluded that "I feel free to re-examine the assumptions I made when writing Jenkins . . . ." *Id.* at 37.

165. 437 U.S. 82, 87 (1978). The majority opinion by Justice Rehnquist explained that the *Jenkins* standard had overemphasized the defendant's right to have his guilt decided by the first jury empaneled to try him and had improperly included cases in which the defendant sought to terminate his trial on grounds unrelated to guilt or innocence. *Id.* at 86-87.

166. United States v. Scott, 544 F.2d 903 (6th Cir. 1976) (per curiam).

167. 437 U.S. at 98-99. The Court explained that the double jeopardy clause does not bar reprosecution when a defendant successfully seeks to avoid his trial by a mistrial motion, see notes 23 & 122 *supra,* and that a mid-trial dismissal is functionally indistinguishable from a mistrial declaration. 437 U.S. at 94. *But see* Sanabria v. United States, 437 U.S. 54, 78 (1978) ("To hold that a defendant waives his double jeopardy protection whenever a trial court error in his favor on a midtrial motion leads to an acquittal would undercut the adversarial assumption on which our system of criminal justice rests."). The Court found that a dismissal for preindictment delay does not resolve the issue of defendant's culpability. 437 U.S. at 98.

factual innocence rather than a resolution, correct or not, of some or all of the factual elements of the offense.[168] The dissenting Justices argued in favor of retaining the more expansive definition in *Jenkins*[169] and expressed their hope that the *Scott* standard would only be applied in cases involving "disfavored doctrines like preaccusation delay."[170]

In *Sanabria v. United States,*[171] decided the same day as *Scott,* defendant was charged in a single-count indictment with participating in a gambling business that combined numbers betting and bookmaking operations in violation of Massachusetts law. At the close of the government's case at trial, defendant moved for an acquittal, arguing that the government had failed to prove violation of the state statute, which applied only to bookmaking and not to numbers betting. The district court denied the motion, but after the defense rested, the court granted its motion to strike all evidence of numbers betting. The court then granted a subsequent motion to acquit because the government had introduced no evidence connecting defendant with bookmaking operations. The government appealed, and the United States Court of Appeals for the First Circuit vacated the judgment of acquittal, remanding the case for a new trial on the numbers betting charge.[172] The Supreme Court reversed, holding that the district court's ruling more closely resembled a nonappealable acquittal than an appealable dismissal.[173] In a footnote, the Court added that the Criminal Appeals Act as amended would pose no barrier to a government appeal from an order dismissing only a portion of a count.[174]

168. 437 U.S. at 103, 108 (Brennan, J., dissenting). Justices White, Marshall and Stevens joined Justice Brennan in dissent.

169. *Id.* at 107. The dissent also claimed that the *Scott* rule would increase the double jeopardy caseload in federal courts. *Id.* at 114.

170. *Id.* at 115. The dissent reasoned that few affirmative defenses can be deemed unrelated to factual innocence. *Id.*

171. 437 U.S. 54 (1978).

172. United States v. Sanabria, 548 F.2d 1, 8 (1st Cir. 1976).

173. 437 U.S. at 68-69. The Court noted that the trial court's decision to strike the government's evidence of numbers betting was erroneous, but concluded that its subsequent decision to acquit defendant nevertheless raised a bar to reprosecution. *Id.* at 69. The Court reasoned that "[w]hile form is not to be exalted over substance in determining the double jeopardy consequences of a ruling terminating a prosecution, neither is it appropriate entirely to ignore the form of order entered by the trial court." *Id.* at 66 (citations omitted).

174. *Id.* at 69 n.23. In a concurring opinion, Justice Stevens disagreed with this point, explaining that 18 U.S.C. § 3731 does not refer to subunits of an indictment or portions of a count but only to counts, which he described as "a well-known and unambiguous term of art." *Id.* at 79. A dissenting opinion by Justice Blackmun, joined by Justice Rehnquist, expressed doubt that *Sanabria* would have much precedential value. *Id.* at 80-81.

The *Sanabria* Court also confronted an overlapping statutes problem, holding that the

The Court in *Scott* and *Sanabria* extended the resolution of culpability standard to cases involving prosecutorial appeals. In *Scott* the Court held that the prosecution can appeal any mid-trial order favorable to defendant unless the order resolves the issue of defendant's culpability. The dissenting Justices in *Scott* agreed that a double jeopardy bar should be raised whenever the trial court hands down a final judgment favorable to the accused but challenged the majority's restrictive definition of acquittal. In *Sanabria* the Court distinguished an appealable dismissal from a nonappealable acquittal, holding that an erroneous evidentiary ruling leading to acquittal for insufficient evidence raises a double jeopardy bar to a subsequent proceeding. As noted in the 1977 Term cases involving appeals by the defense, an acquittal for insufficient evidence is considered tantamount to a jury verdict of acquittal in that both resolve the issue of defendant's culpability.

### C. *The Primacy of the Resolution of Culpability Standard*

An examination of the Supreme Court's 1977 Term double jeopardy decisions reveals that the Court applied a consistent standard in its analysis of multiple prosecution and appealability problems.[175]

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acquittal of a defendant charged with participating in a gambling business engaged in horse-betting bars any further prosecution for participating in the same gambling business during the same time period on a numbers betting theory. *Id.* at 72-73. The Court explained that because the double jeopardy clause imposes no limitations on the legislative power to define offenses, the congressional definition of a statutory offense determines the scope of protection afforded by a prior conviction or acquittal thereunder. When the government charges only a single gambling business, the Court concluded, the discrete violations of state law that the business may have committed cannot be severed in order to avoid a double jeopardy bar on retrial. *Id.* at 69-70, 73 & n.32.

The Court's holding suggests that a federal statute constitutes a single offense for double jeopardy purposes even if the definitions of key terms therein depend on more than one state law. The Court, however, left open several avenues through which the government can circumvent the *Sanabria* rule. The government can, for example, allege two separate gambling businesses. *Id.* at 74 n.33. Moreover, because the lower courts in *Sanabria* made no factual determination that defendant engaged in numbers betting, the Court suggested that its holding would raise no collateral estoppel bar to a prosecution under a numbers betting statute. *Id.* at 73 n.31. *See also* Ashe v. Swenson, 397 U.S. 436 (1970). Finally, the "same time period" requirement in the *Sanabria* rule would enable the government to avoid a bar on reprosecution by splitting the time-period during which the alleged gambling operation existed. For example, if the government in *Sanabria* had had proof that the alleged illegal gambling business was in operation for five years, it could have initially alleged operation for only three of those years. If unsuccessful, the government could then have reprosecuted defendant for participating in an illegal gambling business engaged in numbers betting during the remaining two years. Each time period would have had to be in excess of 30 days unless gross revenue from the operation exceeded $2000 in any single day. 18 U.S.C. § 1955 (b)(1)(iii) (1976).

175. Although the Justices have strongly disagreed on the scope of the definition of

In each case, after scrutinizing the form in which a particular criminal proceeding was terminated, the Court applied the same analysis: if the termination resolved the issue of the defendant's guilt or innocence, the Court raised a double jeopardy bar to reprosecution for the same offense; if not, the Court allowed the proceeding to continue until it resolved the issue of defendant's culpability.

Thus viewed, the resolution of culpability standard is little more than a sophisticated version of the common law rule that double jeopardy did not come into play until a jury has rendered a verdict of conviction or acquittal.[176] The Court in the 1977 Term consequently limited the double jeopardy protection to its pre-1789 scope. This result can be explained in part by an examination of the policy shift limiting double jeopardy protection for defendants, which underlies the Court's 1977 Term decisions. The evolution of a standard that requires a final resolution of defendant's culpability indicates that the Court has attached greater significance to the public's interest in convicting the guilty than to the defendant's interest in being exposed to only one proceeding.

When the 1977 Term attachment of jeopardy and resolution of culpability cases are compared, it may appear at first blush that the Court was working at cross-purposes. In the attachment area the Court has enabled a defendant to plead double jeopardy at an earlier time in his trial than some state statutes had previously allowed. On the other hand, by adopting the resolution of culpability standard, the Court has made it more difficult for a defendant to escape a final resolution of his culpability when a mistrial or a mid-trial dismissal terminates his trial. This inconsistency may be partially explained by the decision in *Greene v. Massey,* in which the Court held that the double jeopardy clause bars a second state court trial after a reviewing court has determined that the evidence introduced at trial is insufficient to sustain a conviction.[177] To justify its holding, the Court stated that the constitutional prohibition against double jeopardy is fully applicable to state criminal proceedings. In view of this result, a failure to incorporate the federal attachment rule would have been difficult to defend. More importantly, however, it must be recalled that the question of when jeopardy attaches is only a threshold question. Once jeopardy has attached in a crimi-

acquittal for purposes of the resolution of culpability standard, see text accompanying notes 168-69 *supra,* no fewer than four Justices have applied the standard in writing majority opinions in the 1977 Term: Chief Justice Burger in *Burks* and *Greene,* Justice Marshall in *Sanabria,* Justice Rehnquist in *Scott,* and Justice Stevens in *Washington.*

176. *See* text accompanying note 36 *supra.*

177. *See* notes 55-56 *supra* and accompanying text.

nal trial, a defendant may then raise double jeopardy challenges to any attempt at a second prosecution. Because reviewing courts must resolve double jeopardy questions by applying the resolution of culpability standard, defendants in effect receive less protection than under prior law, despite the earlier time of attachment.[178]

## VI. CONCLUSION

By making it more difficult for criminal defendants to exit the judicial process without a binding determination of their guilt or innocence, the Court's 1977 Term double jeopardy analysis dilutes the protection previously afforded defendants. One of the most important policy justifications for the double jeopardy clause is its value as a deterrent to abuses of the criminal process and harassment of defendants by prosecutors and trial judges. This justification would support application of double jeopardy principles in some cases even though the defendant's guilt or innocence has not been resolved. The Court's new resolution of culpability standard, however, precludes such application.[179] By adopting such a standard, the Court implies that official harassment of accused persons can never be sufficiently shocking to outweigh the public interest in resolving the culpability of those accused of violating the law.

Moreover, although the Court's standards of double jeopardy analysis are easily applied, they may not be flexible enough to meet the changing circumstances of each new case. By emphasizing considerations that do not require an intensive scrutiny of the trial

178. Reconciling the Court's dual sovereignty and resolution of culpability cases presents a more difficult task because of the federalism problems unique to dual sovereignty cases. In 1971, the National Commission on Reform of Federal Criminal Laws suggested such a reconciliation in its Proposed Federal Criminal Code. NAT'L COMM'N ON REFORM OF FEDERAL CRIMINAL LAWS, FINAL REPORT: A PROPOSED NEW FEDERAL CRIMINAL CODE §§ 707-708 (1971). Section 707 proposed that a prosecution by a "local government" (including a state), or a foreign nation constitute a bar to federal prosecution for the same offense when the first prosecution ends in an acquittal, conviction, or judgment tantamount to acquittal or conviction. Section 708 proposed that a federal prosecution constitute a bar to local government prosecution for the same offense under like circumstances. These two provisions were deleted, however, when the Code was introduced in the Senate. 119 CONG. REC. 989, 1015 (1973) (remarks of Sen. McClellan); *see Reform of the Federal Criminal Laws: Hearings on S.1 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 4211 (1973) [hereinafter cited as *Hearings*]. The Senate Subcommittee assigned to review the Commission's final report was concerned that the sections would cause "races to the courthouse between Federal and State authorities." *Hearings, supra*, at 931 (statement of Andrew P. Miller). The fact that both Congress and the courts are concerned with the federalism problems posed by prosecutions under overlapping state and federal criminal statutes as well as with the resolution of the defendant's culpability suggests that the two areas are mutually exclusive and incapable of reconciliation.

179. *See* note 144 *supra* and accompanying text.

record, such as the interrelationship of governmental units within the American federal system and the form in which a criminal trial is terminated, the Court's new standards leave little room for discretion in appellate review of double jeopardy pleas. The multiplicity of factual situations that give rise to double jeopardy problems mandates that appellate courts be permitted to take all relevant factors into account in double jeopardy cases. The Court should consequently permit a broader scope of appellate review in future decisions.

CLIFFORD R. ENNICO