SPEEDY TRIAL AND THE CRIMINAL APPEALS ACT

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PREFACE

Its rich sixty-five year history, recent legislative revision and United States Supreme Court construction, and the paucity of treatment of the subject in legal periodical literature make the Criminal Appeals Act of 1907 and its subsequent changes an appropriate topic for a law review article at this time.

The unique purpose and language of the 1907 Criminal Appeals Act have caused courts construing it to seek to locate the boundaries between motion, trial and appeal and to analyze the constitutional stature of various pleas and rulings known to common law. Most difficult to locate and evaluate under the statute have been pleas of, and dismissals for, want of speedy trial. For that reason, the narrow topic of the paper is valuable not only as discussion of a pressing current issue, but also as an occasion to examine the relationship between common law and constitutional doctrines concerning criminal trials.

This paper involves, generally, the government's right to appeal in a federal criminal case. Its particular context may be stated as follows: in federal courts, both civilian and military, may the government ever appeal the granting of a motion to dismiss a criminal prosecution for want of speedy trial, and, if so, when may the government do so? Because the motion to dismiss for want of a speedy trial is difficult to categorize, and also because there has been a steady historical reliance on traditional pleading categories in the statutes governing the right of government appeal, the topic of this paper also presents a convenient vehicle to inquire into the division of function among motion, trial and appeal as well as among categories of motion and plea. Basically, then, the paper

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starts from the narrow question of appealability by the government of dismissal for want of speedy trial, and moves to a broader understanding of basic procedure in federal criminal cases.

I. THE HISTORY OF APPEALABILITY

The right of appeal in federal courts, even from a conviction, is a comparatively recent development.[1] The right of appeal developed gradually until, by 1911, defendants in all criminal cases—capital and non-capital—had a right of appeal from convictions to the Circuit Court of Appeals.[2]

One legislative step in this development allowed appeal directly to the Supreme Court "[in] any case that involves the construction or application of the Constitution of the United States."[3] But when the government attempted to use this statute to justify its appeal from the quashing of an indictment on constitutional grounds, the United States Supreme Court refused to allow the appeal.[4] The technical reason for rejecting the appeal was that the statute did not indicate any intention to allow the government to bring such an appeal. But the basic argument of the court is that the appeal would violate the constitutional provisions against double jeopardy.[5]

The jeopardy argument has long been criticized on the grounds that the jeopardy doctrine arose when defendant was not allowed to appeal a conviction; therefore, once defendant has been allowed to appeal, refusal to allow the government to appeal on the basis of jeopardy is absurd.[6] In addition, refusal of appeal on jeopardy

1. For a good summary analysis, *see* Carrol v. United States, 354 U.S. 394, 400-04 (1957).

2. Act of March 4, 1911, ch. 231, § 238, 36 Stat. 1157. This act completed the process by eliminating direct review of capital cases by the Supreme Court. Review of noncapital cases had been transferred to the Circuit Court of Appeals by Act of January 20, 1897, ch. 68, 29 Stat. 492.

3. Act of March 3, 1891, ch. 517, § 5; 26 Stat. 827, 828.

4. United States v. Sanges, 144 U.S. 310 (1892).

5. [U]nder the common law, as generally understood and administered in the United States, and in the absence of any statute expressly giving the right to the State, a writ of error cannot be sued out in a criminal case after a final judgment in favor of the defendant, whether that judgment has been rendered upon a verdict of acquittal, or upon a determination by the court of an issue of law. In either case, the defendant, having been once put upon his trial and discharged by the court, is not to be again vexed for the same cause, unless the legislature, acting within its constitutional authority, has made express provision for a review of the judgment at the instance of the government.

144 U.S. at 318.

6. *See* Miller, *Appeals by the State in Criminal Cases*, 36 YALE L.J. 486, 496 (1927):

grounds defeats the legitimate function of appeal as promulgation of prospective guides for trial courts.[7] One solution to this problem has been to allow moot appeals, in which the state may request a review of questions of law, with the result having no effect on the case from which review is sought.[8] But it is at least questionable whether such a procedure could meet the "case or controversy" requirement of the Constitution,[9] so as to be a viable form of appeal in federal court.

The first clear grant to the government of a right to appeal came in the Criminal Appeals Act of 1907. In its original form it read in pertinent part as follows:

> . . . That a writ of error may be taken by and on behalf of the United States from the district or circuit courts direct to the Supreme Court of the United States in all criminal cases, in the following instances, to wit:
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> > From a decision or judgment quashing, setting aside or sustaining a demurrer to, any indictment, or any court thereof, where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded.
> >
> > From a decision arresting a judgment of conviction for insufficiency of the indictment, where such decision is based upon the invalidity or construction of the statute upon which the indictment is founded.
> >
> > From the decision or judgment sustaining, a special plea in bar, when the defendant has not been put in jeopardy. . . .

The first significant amendment transferred to the United States Court of Appeals the power to hear appeals of rulings sustaining

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Reduced to its lowest terms, the use of the jeopardy doctrine in any degree to prevent appeal by the state results in an absurdity. What it amounts to is this: when the verdict of the jury favors the defendant, then the determination is and should be conclusive; when it favors the state, it is not and should not be conclusive.

7. In fact, the Criminal Appeals Act was enacted to remedy just this situation. WOLFSON AND KURLAND, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES 317 (1951).

8. *See, e.g.*, IOWA CODE ANN. § 793.20 (1950); MISS. CODE ANN. § 1153 (1956); NEB. REV. STAT. § 29-2316 (1956). For a complete list of states authorizing moot appeals, *see* Kronenberg, *Right of a State to Appeal in Criminal Cases*, 49 J. CRIM. L., C. & P.S. 473, 477 n. 27 (1959).

9. U.S. CONST. art. III, § 2.

10. Act of March 2, 1907, ch. 2564, 34 Stat. 1246, *as amended*, 18 U.S.C. § 3731 (1969). For an insightful critique of the Criminal Appeals Act, see Kurland, *The Mersky Case and the Criminal Appeals Act*, 28 U. CHI. L. REV. 410 (1960).

"pleas in abatement" and "motions to quash" directed to "any indictment" unless within the appellate jurisdiction of the Supreme Court.[11] Confusion as to the meaning of the language used in the statute led to litigation on technical points. For instance, defense counsel argued that the words "to any indictment" meant that only rulings directed in some sense to the indictment could be appealed by the government.[12] Decisions on appealability became an attempt to fit cases into the niches of "quash", "abatement," "bar" and "demurrer"; and appeal was denied when none of these four could be made to apply.[13]

Dismissal on the constitutional grounds of want of speedy trial did not readily fit into any one of the four legal niches.[14] None of the statutory authorities mentions dismissal for want of speedy trial as appealable, and no court has ever claimed that a "clear mandate" exists for it. In order to evaluate the wisdom of allowing the government a right of appeal on this issue, the similarity of such an appeal to existing categories in which the government may appeal should be examined.

II. Possible Categories For Determining Appealability

A. Jury Question vs. Non-Jury Question

One feature common to the questions on which the government has been allowed to appeal is that they are questions which are generally *not* determined by a jury. We might, then, by examining the right to a jury, shed some light on the appealability of less familiar categories of dispute such as the right of speedy trial.

The federal rule regulating right to jury trial in criminal cases, Rule 12(b)(4), reads as follows:

> A motion before trial raising defenses or objections shall be determined before trial unless the court orders that it be deferred for determination at the trial of the general issue. An issue of fact shall be tried by a jury if a jury trial is required under the Constitution or an act of Congress. All other issues of fact shall be determined by the court with or without a jury or on affidavits

11. Act of May 9, 1942, ch. 295, 56 Stat. 271. For an historical analysis of this amendment, *see* United States v. Apex Distributing Co., 270 F.2d 747 (9th Cir. 1959).

12. United States v. Janitz, 161 F.2d 19 (3rd Cir. 1947).

13. 270 F.2d at 750-59. Further confusion was added by the concurrent historical development of appeal procedures for the District of Columbia. *See, e.g.*, Carrol v. United States, 354 U.S. 394, 408-15 (1957); United States v. Burroughs, 289 U.S. 159 (1933); United States v. Cefaratti, 202 F.2d 13 (D.C. Cir. 1952).

14. *See, e.g.*, United States v. Pack, 247 F.2d 168 (3rd Cir. 1957).

or in such other manner as the court may direct.[15]

The rule speaks only of issues of fact, and even those are limited to constitutional or explicit statutory categories. Although the court has apparent discretion to refer other questions to a jury, that discretion is not without limits.[16] On the assumption that the government may appeal all non-jury determinations, Rule 12(b)(4) implies that all issues of law and some issues of fact may be appealable. But if the scope of issues referrable to a jury is, to some degree at least, regulated by Congress or by the court, is such regulation to have the effect of automatically changing the scope of appeal available either to the government or the accused? The intent of the legislative body to establish or change a certain scope in one area may not indicate an intent to change another.

Keeping in mind that the scope of the right to jury may not be determinative of the scope of appealability, we may examine some cases where there was a jury determination of troublesome issues. In *United States v. Watkins*,[18] accused moved to dismiss on what amounted to jurisdictional grounds[19] that he had been charged with three distinct offenses in three separate districts. In effect, accused was asking for severance of charges and separate trials. The court ruled that this question could not be handled on a motion to dismiss but should rather be answered at the trial.[20] As a result, referring the issue to trial gave the jury the power to determine its own appropriatness as the panel to hear the matter, and its own capacity for prejudice from hearing all charges against the accused. It is at least arguable that referring such questions to the jury burdens the accused regardless of the fact that the government cannot appeal the jury's determination. This is especially true since making it a jury issue implicitly limits defense appeal as well.

On the other hand, withholding issues from the jury can be even

15. FED. R. CRIM. P. 12(b)(4).

16. For instance, before Jackson v. Denno, 378 U.S. 368 (1964), voluntariness was often a jury issue. *See* United States *ex rel.* Townsend v. Ogilvie, 334 F.2d 837 (7th Cir. 1964); Witherspoon v. Ogilvie, 337 F.2d 427 (7th Cir. 1964).

17. Congress granted rule-making power to the Supreme Court in 18 U.S.C. § 3771 (1968), and to the president, in matters of military jurisdiction, in 10 U.S.C. § 836(a) (1956). Among other things, the president may prescribe "modes of proof" for courts-martial.

18. 120 F. Supp. 154 (D. Minn. 1954).

19. U.S. CONST. art. III, § 2, and amend. VI, have the effect of guaranteeing a trial by jury selected from the district of occurrence. Therefore what is, on its face, a question of venue, becomes a jurisdictional issue.

20. 120 F. Supp. at 158.

more burdensome to the jury. For instance, it is generally felt that referring to a jury issue of national or local condition, such as existence of "clear and present danger,"[21] makes conviction more difficult. Withholding such issues from the jury not only removes this advantage from the accused, but also denies him the protection from appeal (again, presuming that right to jury trial and government appealability are in tandem). The right to defense appeal is little compensation.

In brief, limiting government appeal to those issues not determined by a jury may, ironically, magnify the prejudice to the accused as, for instance, when the judge intrudes into the jury's power. So whether the court determines an issue or leaves it to a jury, either may be a protection or a burden, depending in part on the nature of the issue and also on the facts of the particular case. A good example of this is the former practice of allocating admissibility questions to judge or jury on the basis of the factual record presented to the judge on motion.[22] Such a procedure might well be defended as an attempt to provide the accused the benefit of jury determination where the requirement of unanimity is protective (for instance, where the facts are unsettled), while protecting him from unreviewable jury disregard of the law where the facts are clear. However, from many aspects such a procedure would be open to unfairness. It would at least thoroughly complicate a system of allowing government appeal only on non-jury issues, and would similarly influence availability of appeal to the defense.

In federal practice, the rule has been not to refer motions to dismiss for want of speedy trial to the jury.[23] If, as is likely, juries would sustain such pleas more often than do judges, to say that the government may appeal such pleas because they are non-jury issues amounts to a bootstrap argument.

B. Questions of Fact vs. Questions of Law

There is some authority for the proposition that only questions of law are appealable in the federal jurisdiction.[24] A law-fact test would seem, at first glance, to be a narrower test than the jury—nonjury test, since certain factual questions are considered

21. Dennis v. United States, 341 U.S. 494, 503-04 (1951).

22. This practice was invalidated in Jackson v. Denno, 378 U.S. 368 (1964).

23. FED. R. CRIM. P. 48(b).

24. *See, e.g.*, Downum v. United States, 372 U.S. 734 (1963); United States v. Tateo, 377 U.S. 463 (1964); MANUAL FOR COURTS-MARTIAL OF THE UNITED STATES, ¶ 67f (rev. ed. 1969) [hereinafter cited as M.C.M.].

only by judges and may not be referred to a jury.[25] But a closer look shows that it may be a very broad test if "question of law" is allowed to encompass determination of such things as the question of national or local condition referred to earlier. The test may also be redundant if, for instance, "question of law" is defined as a question about which the jury can have no concern. Since matters for the judge are traditionally designated as questions of law and interlocutory questions of fact, one would presume that a "question of law" limitation on government appeals differs from a "non-jury question" limitation. But more than likely the two tests become one in practice, where a ruling on whether a question is one of law or fact is usually given in the context of whether to put the matter to the jury or not.

Therefore the "law-fact" test must be carefully defined before its validity as an indicator of appealability can be established. Rule 12(b)(4) provides a method for this by declaring, in effect, that questions of law are always for the judge, while questions of fact are sometimes for the judge, and sometimes for the jury. Therefore, to locate the candidates for classification as questions of law, we may look at some of the questions not for the jury, and then ask what additional factor segregates those questions appealable by the government. Logically this same factor should be a determinant as to whether a question is one of law or fact. If no such "screen" exists, then the question-of-law formula has no separate force, but is synonymous with the judge-jury test and, as we have seen, ineffective to limit government appeal.

Dean Wigmore, writing about the admissibility of confessions, describes the process by which the judge makes such a determination as "based on average probabilities or possibilities only, . . ."[27] Questions of admissibility are for the judge, and, using as an example the voluntariness of confession, we may test the added conceptual factor of "average probabilities" as the determinant of what constitutes a question of law.

Wigmore's formulation is complicated by the problem of standards of proof in a criminal case. Should the issue of standard of

25. Jackson v. Denno, 378 U.S. 368 (1964). *See also* FED. R. CRIM. P. 12(b)(4), which divides questions of fact into those determined by a jury and those determined by the court.

26. This is at least arguably the test used in Dennis v. United States, 341 U.S. 494, 511-15 (1951).

27. III J. WIGMORE, EVIDENCE § 861 (3rd ed. 1940). For some reason this language was removed without comment in the Chadbourn revision. For an application of the principle, see United States v. Dykes, 5 U.S.C.M.A. 735, 19 C.M.R. 31 (1955).

proof be made an element of the judge-jury question?[28] The standard required in the threshold question of admissibility has an impact on the likely effect and importance of appealability. Further, a legislative or judicial change in the allocation of questions to judge or jury, or in the availability of appeal, does not necessarily imply an intent to change the standard used by a judge in determining such threshold questions. In sum, the allocation of questions to judge or jury, and the standards to be used by each in determining such questions, must be separate elements, to be considered separately in evaluating the overall fairness of a procedural system in criminal cases.

Using as a test the thesis that the judge determines questions allocated to him by rules based on average probabilities, and that the jury generally only considers the special facts of the particular case, we may examine some issues the allocation of which is generally accepted. For instance, probable cause for a search is within the province of the judge, while it is for the jury to determine whether the evidence obtained fits into a pattern of criminal conduct.[29]

Sentencing is generally an issue for the judge.[30] Presumably the "average probabilities" involved would be a general deterrence theory of sentencing. But is it an "average probabilities" question looked at from the aspect of rehabilitation, or even what might be called "special deterrence" dictated by the particular circumstances of the individual case? Should the government be allowed to appeal sentences? One reading of the cases discussed later in this paper involving *voir dire* would suggest that jury-imposed sentences could not constitutionally be appealed by the government. But such a conclusion is yet another example of trying to settle distinct questions all at one time.

But the generality weakens. In *United States v. Sobell*,[31] it was held a proper question for the jury to determine whether the offense took place "in time of war" for purposes of applying the maximum sentence for the offense of giving information concerning the national defense to a foreign government. Unless "time of

28. *See* Lego v. Twomey, 404 U.S. 477 (1972), in which the Supreme Court ruled that the prosecution has the burden of proving voluntariness, but need only do so by a preponderance of the probabilities; and once admitted by the judge, the defendant has no right to a jury instruction on the issue of voluntariness of the confession.

29. *See, e.g.*, Simmons v. United States, 206 F.2d 427 (D.C. Cir. 1953).

30. Krull v. United States, 240 F.2d 122 (5th Cir. 1957).

31. 314 F.2d 314 (2d Cir. 1963).

war" is somehow considered an element of the crime (as, for instance, by considering the peacetime version a different, perhaps lesser included, offense), the "average probabilities" test should direct that the court determine this question.

On the other hand, the same test clearly dictates that the question of insanity is one for the jury, since that is a special fact of a particular accused, and plays an integral part in establishing intent in many cases. Entrapment also appears to be a "special fact," since it goes to the "enticement" of the accused by the government.[33] Obedience to order by government or by a military superior are also accepted as "special facts" for jury consideration. The "average-special" distinction also makes sense of the distinction between authenticity of a confession (sometimes for the jury) and the accused's awareness and waiver of his rights regarding a confession (always for the judge).[35]

However, as we have already noted, reservation of venue or jurisdictional issues for the jury is hard to rationalize by the "average-special" test. Similarly it is difficult to conceive how the jury could be allowed to determine whether a subpoena was unduly broad, since this seems to be a general policy question.[36] There are also the marginal areas. For instance, the sincerity of a religious belief is obviously a special question, whereas whether a given belief is "religious" so as to come under First Amendment protection is a question of average probabilities.

Perhaps the most informative area for defining the place of average probability questions is that of statutes of limitations. There is some authority for holding that a statute-of-limitations question may be indistinguishable from a "time of commission"

32. *See, e.g.*, Smith v. United States, 353 F.2d 838 (D.C. Cir. 1965); Heard v. United States, 348 F.2d 43 (D.C. Cir. 1965). Both these cases are complicated by the fact that it was questionable whether there was sufficient evidence of insanity for the jury to consider the question.

33. United States v. Williams, 319 F.2d 479 (6th Cir. 1963); United States v. Riley, 363 F.2d 955 (2d Cir. 1966); United States v. Akins, 372 F.2d 291 (6th Cir. 1967). *But see* Walker v. United States, 285 F.2d 52 (5th Cir. 1960), for a directed verdict on the issue; and United States v. Pisano, 193 F.2d 355 (7th Cir. 1951), where the court refused to instruct because defense failed to raise the issue.

34. Universal Milk Bottle Service v. United States, 188 F.2d 959 (6th Cir. 1951); United States v. Kinder, 14 C.M.R. 742 (1954). *See also* M.C.M., ¶ 216d, which makes obedience to an order of a superior an objectively limited denial of *mens rea*.

35. *See, e.g.*, Oyler v. Taylor, 338 F.2d 260 (10th Cir. 1964).

36. *See* United States v. Byron, 167 F.2d 241 (D.C. Cir. 1947).

37. *See* United States v. Haramic, 125 F. Supp. 128 (W.D. Pa. 1954), and United States v. Cook, 84 U.S. (17 Wall.) 168 (1872).

definitional element of the crime. If this is true, then the question could be raised by demurrer, for failure to allege the element sufficiently, without presentation of evidence to judge or jury. More typically though, the issue is non-elemental and the determination is whether certain time periods will or will not consume part of the limitation period. This type of question may reasonably be deemed one of "average probabilities".[38]

On a second level, it should be noted that the trial judge's opinion as to the nature of the question is not always conclusive. This means that the question whether the issue is one of "average probabilities" is itself an "average probabilities" question. This follows from what may be termed the "law-fact continuum" implied by such motions as the motion for directed verdict, where the judge is called on to determine the qualitative value of the facts on record. Yet, even though such rulings are generally announced as findings as a matter of law, they are never appealable by the government.[39] It is submitted that such rulings should be considered "average probabilities" questions, even though they involve the prima facie case of a particular prosecution in a particular case. Such a position is supported by some of the *coram nobis* and vacation-of-judgment cases based on newly discovered evidence, as well as some of the cases involving the granting of motions for new trial because of newly discovered evidence.[40]

All of this suggests that, as a general principle, if any "average probabilities" question is raised, the government should be allowed to appeal it. As it is, appealability actually rests on the technicalities of pleading. For instance, in *United States v. Haramic*,[41] the defendant raised the issue of statute of limitations as a plea in bar to the government's indictment. The government argued that the judge was without authority to rule on the issue, and that the defense of statute of limitations may only be decided by the jury at trial. Older authorities had held, with regard to pleas in bar, that

38. *See, e.g.*, Grunewald v. United States, 353 U.S. 391 (1957).

39. This is true even in military courts. M.C.M. ¶ 57c provides that the board of officers may review an order of the president of the court at their own instance, but not at the request of the government. But cf. nn. 176, 185, 186 concerning appellate law-fact review and consider the civil practice device of motion for summary judgment on appellate review and its place in the law-fact continuum.

40. Comment, *Criminal Law—The Right of the State to Appeal in Criminal Cases*, 42 N.C.L. REV. 887 (1964). *Quaere*: is directed verdict not more on the law end of the law-fact continuum than appellate judgment n.o.v. and other orders appealable by the prosecution?

41. 125 F. Supp. 128 (W.D. Pa. 1954).

questions of law are presented in such motions only if the prosecution demurs to the plea and refrains from introducing evidence to support a transversal, whether by denial or by confession and avoidance.[42] The court, which apparently understood the subtleties of the pleading elements in such questions, ordered the government to "admit, traverse or otherwise reply" to the "fact pleaded in the motion"—*i.e.*, the statute of limitations question. Presumably one way to "otherwise reply" would be by demurrer. The obvious conclusion is that, instead of a systematic division of questions into law or fact based on the nature of the questions themselves, the determination is based on the type of response made by the government to the initial pleading; similarly, how the accused responds—by demurrer, dilatory plea, motion in bar or plea to the general issue—will determine whether the issues raised by the indictment will be treated as questions of law or questions of fact.

Whether an accused has been afforded a speedy trial has been considered frequently in the military jurisdiction, in contexts other than government appealability of the issue.[43] These cases generally refer to speedy trial as an issue of fact. In the case of defense appeals the categorization as question of law or of fact is not important, since courts of military review have jurisdiction to review the record and factual issues in all instances.[44] The purpose of such statements was to justify a policy of not giving the same consideration to all issues, rather than to make statements of jurisdiction. But in *United States v. Smith*,[45] the Court of Military Appeals may have gone further. The case appears to be an interpretation by that court of Art. 67(d), U.C.M.J.,[46] which limits the Court of Military Appeals to consideration of questions of law. Presumably these "matters of law" may be predicated on the record evidence and are not the same as "questions of law" for purposes of defining jeopardy or jurisdiction to hear government appeal. In *United States v. Boehm*,[47] the court, on different issues

42. *See, e.g.*, 4 R. WHARTON, CRIMINAL LAW AND PROCEDURE § 1907 (1957) [hereinafter cited as WHARTON].

43. *See, e.g.*, United States v. Smith, 17 U.S.C.M.A. 427, 38 C.M.R. 225 (1968); United States v. Parish, 17 U.S.C.M.A. 411, 38 C.M.R. 209 (1968); United States v. Lamphere, 16 U.S.C.M.A. 580, 37 C.M.R. 200 (1967); United States v. Brown, 13 U.S.C.M.A. 11, 32 C.M.R. 11 (1962). As the first case indicates, the Court of Military Appeals is limited to review on questions of law, but the Courts of Military Review are not so limited.

44. Uniform Code of Military Justice, 10 U.S.C. § 866(c) (1970).

45. 17 U.S.C.M.A. 530, 38 C.M.R. 328 (1968).

46. Uniform Code of Military Justice, 10 U.S.C. § 867(d) (1970).

47. 17 U.S.C.M.A. 530, 38 C.M.R. 328 (1968).

than those in *Smith*, volunteered that speedy trial does not reach the merits and is reviewable at the instance of the government under Art. 62, U.C.M.J.[48] The reveral of conviction on other grounds, however, left the issue open. In *Lowe v. Laird*,[49] a habeas corpus proceeding, *Boehm* was cited as authority forthe scope of Article 62. As the dissent pointed out, *Lowe* decides only the issue of legality of incarceration pending appeal, since the Court of Military Appeals hears cases for issuance of writs of habeas corpus only in aid of its jurisdiction, not as a final mode of review. The dissent points out that a different result could be reached in a later appeal. In *United States v. Garner*,[50] *Lowe* is cited in support of dicta to the same effect as *Boehm*. But reversal of conviction on other grounds again left the issue open. In none of those cases was any attention given to pleading aspects of the motion below. That is, the *Boehm, Lowe* and *Garner* cases seem to be attempts to consider only the question whether motions to dismiss are "average probabilities" questions or questions of particular facts, without considering whether the issue arose on pleadings only or on a factually contested hearing with evidence taken.

C. The Relation of Pleading to Appealability

Once having determined to keep an issue from the jury, should we also decide to allow government appeal of the ruling? Or should a ruling in favor of the accused be equally inviolable whether made by a judge or by a jury? In *Dennis v. United States*,[51] the judge had heard the evidence before giving the famous instruction on "clear and present danger." Had the evidence been different, or considered differently by a different judge, to show no danger, would the proper response be: a) dismissal for invalidity of the statute; b) directed verdict of acquittal; or c) some other style of relief? If a motion for acquittal were granted, the decision of the judge would be inviolable. But what if a motion to dismiss based on invalidity of the statute were granted? Are dismissals for invalidity and dismissals on demurrer the same? Can invalidity be asserted on demurrer? In *United States v. Cook*,[52] the court held that a limitation could not be asserted on demurrer unless the limitation were some-

48. Uniform Code of Military Justice, 10 U.S.C. § 862 (1970).
49. 18 U.S.C.M.A. 131, 39 C.M.R. 131 (1969).
50. 40 C.M.R. 778 (1969).
51. 341 U.S. 494 (1951).
52. 84 U.S. (17 Wall.) 168 (1872).

how part of the definition of the crime. This author feels that categorical invalidity—that is, a pleading that prosecution under a statute may never be had—should be considered a demurrer, albeit under the Constitution rather than the statute. But a constitutional doctrine like clear and present danger puts a statute in limbo, or rather, shifts the inquiry to whether there is reason to "justify the application."[53] That view makes "clear and present" constitutional limitations similar to time restrictions in statutes of limitation which cannot be raised by demurrer.

We have already noticed how issues of limitations can appear to merge with issues on the merits in the sense of guilt or innocence of definitional elements of crime. In a statute where some external element, such as time of commission, is established, such a confusion of the merits and constitutional or collateral statutory issues is possible.[54] When such a confusion exists, a ruling for the accused on a motion should arguably be as inviolable as a verdict.

Further problems of procedure emanating from the substantive law of crime are those involved with affirmative defenses going to mens rea.[55] They may be raised by the defense case even after a general plea of not guilty. But we have noted that in insanity and entrapment, the judge must decide if the issue has been raised, and, having done so, must decide what instructions are necessary and what ruling may be proper on motions for verdict based on insufficiency of the government case to rebut the defense. Consider a case in which the government is advised to present rebuttal, but declines to do so and stands on its case. This amounts to a demurrer by the government to the defense case. Whether an issue has been

53. Dennis v. United States, 341 U.S. 494, 510 (1951).

54. In a trivial sense the confusion always exists since it is necessary to plead and prove a reasonably certain time and place of commission at which time and place certain circumstances existed.

55. Traditionally these involve aspects of confession and avoidance and were raised first by the accused. *See* 1 CHITTY, CRIMINAL LAW 434 (1841 ed.) [hereinafter cited as CHITTY]. To be distinguished are certain defenses on the general issue [FED. R. CRIM. P. 12(b)(1)] like alibi and mistaken identity which admit no element of the crime, even *actus reus*, though perhaps admitting the *corpus delicti*. But these latter are often the subject of separate instructions nevertheless. *See* United States v. Moore, 15 U.S.C.M.A. 345, 35 C.M.R. 317 (1965). The common law concept of confession and avoidance and its modern code equivalent of affirmative defense are used broadly to mean any matter which the defense must raise including matters in bar (*e.g.*, A.L.I. Model Penal Code, sec. 3-2). But they refer more narrowly to certain principles (*e.g.*, A.L.I. Model Penal Code, Arts. 4-7) of substantive criminal liability negativing (*e.g.*, mistake) or excusing (*e.g.*, self-defense, necessity, justification) criminal act or mental state. In this paper the latter usage is intended unless otherwise stated.

sufficiently presented to require further hearing seems an "average probabilities" question, proper for the judge. If the government responds by demurrer to the defense case and refusal to reopen, an issue of law arises, even though predicated on record evidence. But there is apparently no case in which appeal by the government from a ruling on this type of question has been either sought or allowed. Yet rulings on proposed instructions are commonly mentioned as legal rulings. They are predicated on evidence, however, and thus are not questions of pleading.

The view that rulings in favor of the accused resting in part on substantive criminal law amount to findings of not guilty, however presented, is not the limit of the notion of rulings amounting to findings of not guilty. Justice Holmes, writing for the majority in *United States v. Oppenheimer*,[56] suggests that an issue of the statute of limitations can be one on the merits without going to the question of guilt or innocence of the substantive crime, and that dismissal for former jeopardy does amount to a finding of not guilty. The doctrine of res judicata motivated that conclusion. The government had argued that the doctrine of res judicata applies to criminal cases only to the extent of the Fifth Amendment provision against double jeopardy. That argument in part begged the question: that is, the question of how wide the Fifth Amendment protection should be was an issue presented. The argument was rejected by language itself begging the question. The opinion cited *United States v. Kissel* for the proposition that "it cannot be argued that a judgment of acquittal on the ground of the statute of limitations is less a protection against a second trial than a judgment upon the ground of innocence."[57] The statement is tautologically true because it assumes disposition on the ground of the statute of limitatons is a "judgment of acquittal." But again, whether a ruling on the motion should, for the purpose of applying the bar against double jeopardy, be equivalent to other judgments is just the issue. Decision in the case is clear, if the opinion is not. Where a former indictment is dismissed on motion asserting a limitation, a second indictment, alleging substantially the same acts, should properly be quashed without a new hearing on the

56. 242 U.S. 85 (1916). In United States v. Kissel, 218 U.S. 601, 610 (1910), it had been decided that a judgment of acquittal based on the statute of limitations as a defense within the general issue, is conclusive. United States v. Oppenheimer, 242 U.S. 85 (1916), extended the principle by declaring that a dismissal upon a special plea of the statute of limitations, ordered by the judge without a jury, would also be conclusive.

57. 242 U.S. 85, 87 (1916).

motion or other opportunity of the government to traverse the reassertion of the limitation. Whether the decision was premised on the Fifth Amendment or on a res judicata doctrine broader than the Fifth Amendment protection is uncertain.

It appears that the language of the government brief in an earlier case, *United States v. Barber*,[58] had come back to haunt the government. In that earlier case a dismissal for limitation was appealed by the government. The defense (and the trial court) insisted that a ruling on a plea in abatement was involved and the Supreme Court did not have jurisdiction. In the course of sustaining its own jurisdiction, the Court adapted language of the government brief to say that a "plea of the statute of limitations does not question the validity of the indictment, but is directed to the merits of the case; and if found in favor of the defendant the judgment is necessarily an acquittal—and not a mere abatement—and is a plea in bar and not in abatement."[59] Simultaneous reference to "acquittal" and "the merits" on one hand, and on the other hand to "plea in bar" is confusing to the modern reader. Given the statutory reference[60] to "plea in bar" as a test of Supreme Court jurisdiction and the fact that jurisdiction was the issue presented, it appears that the decision in *Barber* can only have decided that a plea of limitation is a plea "in bar" of trial, whatever else it might also be. But the dicta suggest that any plea other than demurrer questioning the sufficiency of the indictment goes to the merits. The narrowness of the decision indicates that the dicta were not well considered by either the brief writer or the author of the majority opinion. And the later *Oppenheimer* case, in obiter dicta, suggests that even a judgment upon a demurrer to the merits would be a bar to a second indictment in the same words. Such a broad rule of bar against reindictment is some indication that the justices had in mind a res judicata rule broader than the constitutional double jeopardy bar.

The linguistic form a trial judge uses to caption a ruling indicates his intention that he be reviewed in many cases. The trial judge in *Barber* apparently tried to avoid being reviewed when he referred to his dismissal as a ruling on a plea in abatement.[61] Also,

58. A broad reading of the dicta in United States v. Barber, 219 U.S. 72 (1911), could support a view that any plea not questioning the validity or sufficiency of the indictment goes to the merits.

59. *Id.* at 78.

60. *Id.* at 73.

61. For an example of the contrary inclination, namely, judges seeking to be instructed,

in *United States v. Janitz*,[62] the trial judge suppressed evidence, then denied a motion for a finding of not guilty on the failure of the government to present sufficient evidence, but invited and granted a motion "to dismiss." The court of appeals properly determined that it did not have jurisdiction to entertain the government appeal since no demurrer or plea in abatement existed. This was despite the fact that the court of appeals regarded the suppression erroneous.

Government appeal, in a case of dismissal "with prejudice" by a district judge for failure of the government to comply with an order to produce pre-trial statements of government witnesses was held not in its power by the circuit court of appeals in *United States v. Apex*,[63] despite its view that dismissal should not have been "with prejudice." Whether re-indictment is possible in such a case is not clear. Indeed, under a broad reading of *Barber* and *Oppenheimer*, dismissal without prejudice may be impossible unless an order in terms with prejudice is not adjudicatory. For example, in the *Apex* case the term of the dismissal "with prejudice" was apparently discipline of government counsel rather than a finding of fact or ruling of law. Upon re-indictment, if a second trial judge found that the terms "with prejudice" of the earlier dismissal order were disciplinary and not adjudicatory, but decided to vindicate the earlier judge and dismiss, again with prejudice, would the latter order be appealable? If a finding that the time to arrest or indict has passed amounts to acquittal, why would a finding that reasonable time to try has passed not also be an acquittal? The answer may be that the two questions are more different than first appears, the former being a matter in bar, the latter not.

D. Pleas in Bar

We are led by the preceding discussion to a comparison of motions to dismiss for want of prosecution and motions to dismiss for want of speedy trial.[64] Rule 48 appears to govern each.[65] But the extent to which motions under Rule 48(b) are governed by Rule

see United States v. Johnpier, 12 U.S.C.M.A. 90, 30 C.M.R. 90 (1961), overruling United States v. Turkali, 6 U.S.C.M.A. 340, 20 C.M.R. 56 (1955).

62. 161 F.2d 19 (3rd Cir. 1947).

63. 270 F.2d 747 (9th Cir. 1959).

64. *See, e.g.*, Ex Parte Altman, 34 F. Supp. 106 (S.D. Cal. 1940).

65. FED. R. CRIM. P. 48; L. ORFIELD, CRIMINAL PROCEDURE UNDER THE FEDERAL RULES, §§ 48.13-.16, 48.32 (1967). §§ 48.13-.16 deal with the substantive law of delay; § 48.32 discusses the relationship between Rules 12 and 48.

12 provisions on jury trial is not certain. Commentaries to Rule 12 indicate that the drafters intended to adopt the earlier common law of "special pleas in bar."[66] Review of successive editions of presidential orders in the MANUAL FOR COURTS-MARTIAL indicates that the law of special pleas in bar has been retained there too.[67] But it is not clear whether motions to dismiss for speedy trial were regarded by the anonymous authors of the manuals as among such pleas in bar until recently.[68] Review of rulings favorable to the accused on pleas in bar is one of the powers within Supreme Court jurisdictions as are pleas of constitutional invalidity.[69] Rulings favorable to the accused on pleas in abatement or demurrers not alleging invalidity of a statute are within the jurisdiction of the courts of appeals.[70] Thus the content of these traditional pleading categories is determinative of appellate jurisdiction; categories not falling in any one of those are not appealable.

The older authorities on common law pleading discuss demurrers, pleas to jurisdiction, pleas in abatement, pleas in bar, pleas to the general issue and pleas in confession and avoidance and group them in various ways.[71] Jurisdictional pleas and matters in abatement are called "dilatory." Those pleas of confession and avoidance which were predecessors to elemental affirmative defenses and the general pleas of guilty and not guilty are pleas to the merits. Special pleas in bar include the statute of limitations in ordinary cases and are not dilatory but, like pleas to the general issue, are peremptory—that is, sufficient to raise a finally triable issue.[72] Demurrers may be dilatory only, not barring re-indictment in different words re-alleging similar facts, as Justice Holmes commented in *Oppenheimer*. An allegation of statutory invalidity under the "higher law" of the Constitution is not readily classifiable under common law forms, which had no such ground of dis-

66. COMMENTARY, FED. R. CRIM. P. 12(a).

67. *Compare* MANUAL FOR COURT MARTIAL, ¶¶ 40, 50, 51 (1928) *with* MANUAL FOR COURT MARTIAL, ¶¶ 65-69 (1949). *See also* United States v. Knudson, 16 C.M.R. 161 (1954). Uniform Code of Military Justice, 10 U.S.C. § 836(a) (1970) requires the President to conform to rules applicable in district courts so far as practical.

68. M.C.M. ¶ 215e is a new section. *See* note 65 and accompanying text, *supra*, regarding the Federal Rules of Criminal Procedure.

69. 18 U.S.C. § 3731 (1970).

70. *Id.*

71. CHITTY at 434-35; WHARTON §§ 899-911, at 767-783. *See also* n.55, *supra.*

72. I. EDMONDS, COMMON LAW FORMS OF PLEADING AND PRACTICE § 64, at 78 (1931) [hereinafter cited as EDMONDS]. § 57 of the same work discusses the order of pleadings traditionally required.

missal. Regarding the "higher law" positivistically, such pleas are but demurrers to the indictment with reference to the dominant legislation—that is, challenges that a crime has not been stated under the "higher law." Yet the dispositive effect of a ruling in favor of the accused on grounds of constitutional invalidity of a statute is great, since it does not permit the government to plead again under that statute. If such pleas be demurrers, they are non-dilatory. Findings in favor of the accused on pleas to the merits are dispositive—that is the core of the doctrine of jeopardy. What the dispositive effect of a ruling for defendant on a plea in bar should be has been a troubling question since before the Criminal Appeals Act.

Besides the dilatory-peremptory distinction, these pleas may also be arranged by the source of the issues raised by the plea. Pleas in bar are said to raise issues *dehors* the indictment. Similarly pleas in "abatement," as that term was used in 1942 and before, raised issues not apparent from the indictment itself. As an example of the relationship of these categories, consider referral of charges to a court-martial by a disqualified "accuser."[73] This appears to be in the nature of a defect in procurement, but the military law considers the defect jurisdictional, perhaps because "convening authority" is considered an "office" with certain "powers."[74] In any case the defect is dilatory only, as opposed to the general plea of not guilty which denies the allegations of the indictment itself. Affirmative defenses, while no longer confessing some elements of the charge, do introduce new issues in the sense of increase factual issues. But, as our earlier discussion of the affirmative defense of entrapment indicates, a certain view of substantive criminal law would make such issues special parts of elements which must in general form be alleged in the indictment, so that plea of an affirmative defense is not *dehors* the indictment.

The source of jurisdictional issues varies. The plea to personal jurisdiction of a foreign ambassador on an indictment improperly referred to an inferior federal court appears *dehors* the indictment. Congressional immunity from prosecution in any court for misdemeanors during sessions under sec. 6 of Art. I of the Constitution is distinguished from ambassadorial quasi-immunity from prose-

73. Uniform Code of Military Justice, 10 U.S.C. §§ 801(9), 823(b), 833(a); M.C.M. 5a(3), 5c. *But see* FED. R. CRIM. P. 6(b)(2).

74. Uniform Code of Military Justice, 10 U.S.C. § 837(a) (1970); FED. R. CRIM. P. 6(b)(2).

cutions in any court except the Supreme Court under Art. III, sec. 2 of the Constitution. That is, a plea of immunity is a plea in bar, or in abatement if not permanent, not one in jurisdiction. Whichever of the latter it be, immunity is typically *dehors* the indictment.[75] The requirements of specificity sufficient to appraise the accused of the charges he must meet imply that territorial limitations of federal court power must appear in the indictment. Subject-matter jurisdictional issues must often but not always appear in the charge. But the test of court-martial subject-matter jurisdiction adpopted in *O'Callahan v. Parker*[76] requires consideration, outside the charge, of the reasons for military concern with the subject matter.[77]

Whether a matter may be pleaded by motion to quash an indictment has also been a labeling distinction made jurisdictionally important by the 1942 statute.[78] The *Apex* court concluded that quashing the indictment was the remedy appropriate to cure matters already of record.[79] Defects in procurement of indictment of record (e.g., presence of prejudicial inadmissible evidence in the

75. But sufficient allegations of a crime in which possession of office is an element (*e.g.*, receipt of bribes) implies that the issue of immunity will appear in the indictment of a member of Congress. Various statutory immunities are collected at Annot., 5 L. Ed. 2d 249 and 8 J. WIGMORE, EVIDENCE § 2281 n. 11 (3d ed. 1961). *See also* 12 AM. JUR. *Criminal Law* §§ 146-53 which learnedly compares approvement at common law (which was not itself a bar to trial but a proceeding related to pardon and suggests the bar of condonation known in military law); equitable immunity enforceable by continuances or, more rarely, by directed verdicts; and modern statutory immunity of two sorts both thought of as matters in bar of trial (bar by rule of court on an accused to testify and bar by contract with the prosecution, the latter being analogous to covenants not to sue in civil practice). *Quaere*: How does immunity differ from a principle of nonresponsibility such as infancy? *See* n.55, *supra*, and Art. 6, A.L.I. MODEL PENAL CODE.

76. 395 U.S. 258 (1969); *see also* Wurtzel, *O'Callahan v. Parker: Where Are We Now?*, 56 A.B.A.J. 686 (1970).

77. *Quaere*: Is not O'Callahan v. Parker really a doctrine of personal jurisdiction rather than subject matter jurisdiction? Reid v. Covert, 354 U.S. 1 (1957), mentioned in the O'Callahan opinion, was decided as a question of personal jurisdiction. Is it possible to suggest that lawfully off-post, off-duty, and out of uniform, O'Callahan became, like Mrs. Reid, a person not amenable to trial by court martial for acts committed during the duration of the status? *See* Duke and Vogel, *The Constitution and the Standing Army*, 13 VAND. L. REV. 435 (1960). *Cf.* Hackenworth v. Torlog, 283 F.2d 250 (10th Cir. 1960). What difference it might make is suggested by the notion that defects in personal jurisdiction, unlike defects in subject matter jurisdiction, are waivable. Some defendants may prefer trial by court martial to trial in district court or, say, a foreign national court. *See* FED. R. CRIM. P. 12(b)(1), 12(b)(2) and 34.

78. Act of May 9, 1942, ch. 295, 56 Stat. 271.

79. Where illegally obtained evidence was presented to the grand jury, the illegality may be the premise for a motion to suppress. *See* United States v. Orta, 253 F.2d 312 (5th Cir. 1957); United States v. Sugden, 226 F.2d 281 (9th Cir. 1955).

grand jury transcript) would then be matters determinable by motion to quash. Thus such events as misbehavior, by the prosecutor or by one of the grand jurors, not of record, leading to indictment are more likely to be the type of defect in procurement to which *Apex* refers in its discussion of pleas in abatement. Demurrers may be raised by motion to quash, "set aside" and "quash" being redundant in the *Apex* court's view. But the obiter dicta of Justice Holmes in *Oppenheimer* indicates that matters in bar are not appropriately raised by motion to quash. In particular, a plea of res judicata concerning an issue of limitation may not, in the view of Justice Holmes, be raised on motion to quash.

The law-fact distinction does not segregate these various pleas known to common law. All of them, if traversed by the government, present issues of fact.

Whether motions to dismiss for want of speedy trial fall into any of the traditional pleas is the question presented by government appeal of speedy trial dismissal. Federal Rule 48 discusses it separately. But it is not enough to say that such a plea may not be classified as a plea in bar. It has been said that Rule 48 overlaps with Rule 12 and its incorporated law concerning pleading categories. Mention of some of the recognized pleas in bar may be made as an aid in deciding if speedy trial be such a plea. *United States v. Heath*[80] mentions prior acquittal, prior conviction or attainder and executive pardon as matters in bar. Prior nonjudicial punishment and, in the case of a charge of desertion, condonation by the general court-martial convening authority are recognized matters in bar of trial by court-martial.[81] Misnomer and defects, not of record, in procurement of indictment have been mentioned earlier as examples of matters in abatement.

If a plea of want of speedy trial is without a place in any of the traditional pleadings, it is not alone. Motions to suppress evidence are not among them and have not been appealable until recently.[82] Neither are grants of motions by accused for continuance appealable. Before recent legislation, cases appearing to allow appeal of suppression orders rested on the finality notion of 28

80. 260 F.2d 623 (9th Cir. 1958).

81. M.C.M. 215. *See also* FED. R. CRIM. P. 58, form 19.

82. Pub. L. No. 90-351 (1968) changed the law. Considering the prior tradition, the change was radical. Ironically, the military equivalent, motions to exclude evidence, are not appealable under M.C.M. ¶ 67f and prevailing case law [United States v. Knudson, 16 C.M.R. 161 (1954)]. However, the President may change the manual to allow government appeal of suppression orders.

U.S.C. 1291. That, for example, is the reading given to *United States v. Ponder*[83] by the Supreme Court in *Carroll v. United States*,[84] as will be noted later. The government has attempted to find finality by regarding motions to suppress as determinations of right to property constituting the evidence.

The suppression of evidence and defense insistence of prompt trial converged in *United States v. Packs*.[85] Its evidence suppressed, the government could not proceed with its case and the defense motion to dismiss was granted. The government appealed but the appeal was dismissed, the court of appeals commenting that neither dismissal for speedy trial nor suppression of evidence are appealable and citing the requirement of clear mandate applicable to each. The trial judge in *Packs* and, to an even greater degree, the trial judge in *United States v. Janitz*[86] desired to allow government appeal. In *Janitz*, defense counsel at first moved, not for dismissal, but for a judgment of acquittal for failure of the government to present any evidence tending to show guilt. In dismissing the appeal the appellate court relied on the policy against government appeals and the principle of strict construction of the pleading categories in the Criminal Appeals Act rather than on the fact that the ruling amounted to a finding of not guilty. The question arises whether, if government appeal of dismissal for want of speedy trial were allowed, an order closing the government case and granting a motion for judgment of acquittal could be appealed. The decision of the trial judge in the *Apex* case to dismiss with prejudice, criticized by the court of appeals, could be viewed as a finding by the trial judge that the government had chosen to close its case by failing to produce witness statements, thereby disqualifying all the potential government testimony. Distinguishable from government intransigence is government bungling. In *Heath* defendant had surrendered various of his records to the government, and these records led the government to certain other evidence. Then

83. 238 F.2d 825 (4th Cir. 1956).

84. 354 U.S. 394 (1957). *See* United States v. Ponder, 238 F.2d 825 (4th Cir. 1956) and United States v. Rossenwasser, 145 F.2d 1015 (9th Cir. 1944). *See also* the opinion of Justice Brandeis in Cogen v. United States, 278 U.S. 221 (1929) and the following cases: United States v. Mattingly, 285 F.922 (D.C. Cir. 1922) and United States v. Marquette, 270 F.214 (9th Cir. 1921). United States v. Carroll, 354 U.S. 394 (1957), summarizes the above cases to state four requirements for governmental appeal in a criminal case, under 28 U.S.C. § 1291 (1970). *See also* United States v. Kirschenblatt, 16 F.2d 202 (2nd Cir. 1926); Annot., 51 A.L.R. 416.

85. 247 F.2d 168 (3rd Cir. 1957).

86. 161 F.2d 19 (3rd Cir. 1947).

the government somehow lost defendant's records. Presentation of the government case was upheld and production of the records was ordered. Unable to obey the production order, the government suffered dismissal for want of speedy trial. The court of appeals dismissed the appeal of the government, reasoning that the trial ruling was not on a matter in bar, since the government could have proceeded with trial if it had found the lost records before the time given to produce them. But the appeals court also said that the dismissal for delay was equivalent to a judgment of acquittal. Perhaps the court of appeals regarded the dismissal order as mandatory closure of the impeded government case. As suggested above, the effect of dismissal orders on the government's case differs with different approaches by the government.

In summary, we find that motions for continuance, motions to suppress, motions to dismiss for want of prosecution following suppression of evidence, and motions to dismiss with prejudice for failure to produce witness statements do not fit into any of the common law pleading categories in the Criminal Appeals Act. In *Heath*, dismissal for want of speedy trial following failure of the government to produce records was held not appealable for two reasons: (1) it was not within the pleading categories of the Criminal Appeals Act; and (2) it amounted to acquittal.

Since on its facts *Heath*, unlike *Apex*, is not a good example of failure by the government to present a *prima facie* case, and since it was motivated by failure of the government to adequately respond to interlocutory orders, it is not clearly a constitutional speedy trial dismissal. That is, the government may not have been guilty of failure to provide speedy trial as the duty has been substantively defined in cases on defense appeal.[87] Rather than affirmative attempts to effectuate the rights of the accused, *Heath, Apex, Janitz* and *Packs* may be merely assertions of the inherent institu-

87. On the substantive law of speedy trial consider United States v. Williams, 16 U.S.C.M.A. 589, 37 C.M.R. 209 (1967); United States v. Tibbs, 15 U.S.C.M.A. 350, 35 C.M.R. 322 (1965); United States v. Schalk, 14 U.S.C.M.A. 371, 34 C.M.R. 151 (1964); United States v. Williams, 12 U.S.C.M.A. 81, 30 C.M.R. 81 (1961); United States v. Batson, 12 U.S.C.M.A. 48, 30 C.M.R. 48 (1960); United States v. Davis, 11 U.S.C.M.A. 410, 29 C.M.R. 226 (1960); United States v. Brown, 10 U.S.C.M.A. 498, 28 C.M.R. 64 (1959); United States v. Wilson, 10 U.S.C.M.A. 398, 27 C.M.R. 472 (1959); United States v. Callahan, 10 U.S.C.M.A. 156, 27 C.M.R. 230 (1959); United States v. Hounshell, 7 U.S.C.M.A. 3, 21 C.M.R. 129 (1956); FED. R. CRIM. P. 48(b); M.C.M. ¶ 215e. *See also*, note 65 and accompanying text *supra* for federal lower court cases, and Annot., 21 L. Ed. 2d 905 (1969) for Supreme Court cases. *See generally* Note, *Speedy Trial*, 20 STAN. L. REV. 476 and 21 AM. JUR.2D *Criminal Law* § 241 (1965).

tional power of federal courts to discipline the government once it has referred its case to trial, and a refusal by the judges themselves to be parties to questionable government delay.[88]

In summary, insofar as plea of want of speedy trial resembles plea of want of prosecution, it appears not to be regarded as a plea in bar. The *Cohen* case and the *Apex*[89] case purport to give all the leading cases in which the Supreme Court or Courts of Appeal found jurisdiction to entertain government appeal. None of those cases cited involves an appeal of dismissal for want of speedy trail. One case, United States v. *Provoo*,[90] may have had speedy trial properly pleaded. But the per curiam order, although filed on motion to affirm, does not indicate clearly whether dismissal of the appeal is for want of Supreme Court jurisdiction or on the merits of the appeal. There clearly is no case found in which the United States Supreme Court has found both jurisdiction to undertake government appeal of dismissal for want of speedy trial and merit to the government appeal itself.

United States v. Cohen,[91] arising on defense appeal rather than government appeal, indicates speedy trial is not matter in bar. The accused in *Cohen* was reindicted after his indictment for mail fraud was dismissed for want of speedy trial. Upon conviction, Cohen assigned denial of his motion to dismiss the second indictment as error. Cohen had urged the finding by the first trial judge of denial of speedy trial on the first indictment as a bar to any subsequent trial. The second trial judge found the first judge intended to dismiss only for want of prosecution. The opinion does not make clear whether its reason for affirming conviction was agreement with the second trial judge on the intended effect of the earlier order of the first trial judge, or an opinion of the court of appeals that a finding of want of speedy trial is not a bar to trial.

The *Cohen* case cites and discusses *United States v. Mann*[92] in a manner indicating that its ground was a view of speedy trial as

88. *See, e.g.*, Ex parte Altman, 34 F. Supp. 106 (S.D. Cal. 1940). *See also* the dissent of Justice Rutledge in Yakus v. United States, 321 U.S. 414, 467 (1944).

89. United States v. Cohen, 366 F.2d 363 (9th Cir. 1966) and United States v. Apex, 270 F.2d 747, 758 (9th Cir. 1959).

90. 350 U.S. 857 (1955).

91. 366 F.2d 363 (9th Cir. 1966). The court could find no authority for want of speedy trial as a plea in bar except dicta in United States v. Mann, 304 F.2d 394 (D.C. Cir. 1962), which the court criticized. *See also* United States v. McWilliams, 163 F.2d 695 (D.C. Cir. 1947) as prior authority for the *Mann* dicta. It appears that the Ninth Circuit and the D.C. Circuit are in conflict.

92. 304 F.2d 394 (D.C. Cir. 1962).

matter not in bar of trial. In *Mann* an indictment was dismissed "without prejudice" after a seven month delay without trial. Reindicted and convicted after denial of his second motion to dismiss for want of speedy trial and for violation of Rule 48, Mann appealed. In denying the appeal, the court of appeals suggested that dismissal with prejudice is proper where speedy trial is the ground but decided that dismissal under Rule 48 includes more than dismissal for speedy trial. The court stated that, on the record before it, principles of speedy trial would not "decide this case."[93] The *Cohen* decision emphasizes the last quoted phrase by way of distinguishing the *Mann* comment that dismissal "*with* prejudice" is proper where speedy trial is the premise. The *Cohen* court is correct; the *Mann* comment was dicta not necessary to the *Mann* decision, as the opinion itself admits. The alternative reading of *Cohen*—that the effect of an explicit finding by the first trial judge may be explored by another judge in a later indictment charging the same crime—would diminish the force of the doctrine of res judicata generally in the Ninth Circuit. Since the court of appeals would be expeccted to discuss such issues before casting such shadows, the latter reading of *Cohen* is not the rationale probably intended.

State cases vary, but the general rule is that persons whose prosecutions have been dismissed for want of speedy trial are reindictable.[94] It appears that classification of pleas as raising or not raising matters in bar of trial in essence is a determination of when the doctrine of res judicata will apply to certain issues occurring in the prosecutorial process. Some of the discussion of the statute of limitatons as a bar to trial is confusing, as we noted in the *Barber* case where the government brief was quoted to the effect that the issue of limitations is one on the merits. Similar dicta in *Oppenheimer* would reverse the relation between res judicata and pleas in bar. That is, the *Barber* and *Oppenheimer* cases decide that a finding that the statute of limitations has been exceeded will be res judicata; therefore a plea of limitations is a plea in bar within the original appellate jurisdiction of the Supreme Court. In *Oppenheimer*, which was government appeal of the second indictment, the notion of res judicata of the unappealed dismissal of the

93. *Id.* at 397.

94. *See* Annot., 50 A.L.R. 943.

95. *See, e.g.*, United States v. Barber, 219 U.S. 72 (1911). The language categorizing limitation as an issue on the merits was taken from the government brief. *See* Annot., 55 L. Ed. 71 (1911).

first indictment is the ground for the second dismissal and the affirmance of it. Thus, government appeal of a second dismissal premised on an earlier order of dismissal finding the statute of limitations has run can never succeed. A policy statement to the same effect would be salutory and would explain the result in *Barber* (which was appeal of dismissal of the original indictment) where the government prevailed and the case was returned for trial. The dicta in the *Barber* case to the effect that a plea of the statute of limitations is on the merits are particularly confusing, and contrary to the decision: that is, not only did the court declare its own jurisdiction, it found the merits of the appeal for the government.

Referral by convening order to a second court-martial has not been generally adopted in the military cases. We have noted dicta in those cases, notably *Lowe v. Laird*,[96] that plea of want of speedy trial is a plea in bar. The *Lowe* case was heard on habeas corpus petition and not on appeal. The issue alleged in the petition was a lack of jurisdiction of the convening authority to overrule the military judge. Although lack of jurisdiction is the classic basis for habeas corpus, the distinction between appeal and habeas corpus is important, since the court in *Lowe* presumed power to issue the writ only where necessary in aid of its own jurisdiction, and not upon every finding of want of jurisdiction.

Aside from the issue of limitations, the other recognized pleas in bar—pardon, condonation, former acquittal, former conviction or attainder, immunity, prior punishment—concern government behavior, as does speedy trial. But, unlike speedy trial, the government behavior recognized traditionally as barring trial is directed to adjustment for the criminal act and is something like *quid pro quo* for the crime. It is considered to be voluntary action by the government and represents discretion and choice in disposition. For instance, pardon may be compared to the release in private law. But denial of speedy trial is usually not deliberate choice among alternative dispositions. Mistaken government behavior is not the kernel of motions in bar. We have noted earlier that many issues of government behavior are issues on the merits.

Since statutes of limitations are the most familiar of the pleas in bar, special attention to the difference between limitations and speedy trial is appropriate. Limitatons may be related to the substantive crime or cause of action like the other matters in bar. Given a statute of limitation, commission of a crime creates only

96. 18 U.S.C.M.A. 131, 39 C.M.R. 131 (1969).

an inchoate cause of prosecutorial action which disappears if not perfected by arrest or indictment within a certain time. Thus, like the other matters in bar, limitations go to the existence or non-existence of the substantive cause of action and have analogies in civil law. But speedy trial is a unique doctrine of criminal procedure. Its only analogy in civil law is the dismissal for want of prosecution, which is not thought of as matter defeating the cause of action.

The concern with time in which to proceed is the only similarity between limitatons and speedy trial. The rules for time in which to proceed, when statutes of limitations are involved, are fixed and do not vary with government zeal or attention to the case, as they do when failure to provide speedy trial is the issue. If limitations issues can be said to concern government tardiness at all, they concern delayed apprehension, unlike speedy trial which concerns delay after arrest or indictment, depending on which occurs first. The policy of limiting actions is one recognizing the difficulties in achieving a fair trial due to failing memory. The policy in favor of speedy trial expresses concern that an accused not be damaged by long detention or other restriction pending trial.[97]

The point of considering whether want of speedy trial is a bar to trial has been, first, to consider whether re-indictment is possible, second, to determine if *any* court has jurisdiction to hear appeal of the issue by the government, and, third, to determine which court has such jurisdiction. The answer to the first point is a factor bearing on the second.

The first point was not raised in *United States v. Brodson*,[98] and the court there assumed the answer to the second point. A motion to dismiss was granted for want of due process and fair trial on a showing that government levy and assessment on the property of defendant during pendency of his indictment prevented him from financing his defense. The seventh circuit entertained the appeal in an opinion indicating transfer to the Supreme Court was the only alternative considered. The defects pleaded may have been curable by the government by return of property to defendant, so the court's view that the motion did not raise matter in bar of trial may be correct. But the conclusion that it is therefore matter in abate-

97. *See* United States v. Marion, 404 U.S. 307 (1971).

98. 234 F.2d 97 (7th Cir. 1956). *Cf.* United States v. Nardolillo, 252 F.2d 755 (1st Cir. 1958), where a government appeal was dismissed after dismissal at trial for refusal of the government to produce certain Jencks Act [18 U.S.C. § 3500 (1964)] witness statements.

ment, reviewable by the court of appeals, is not supported. Pleas in bar and pleas in abatement do not exhaust all pleading. The possibility that the motion may be neither one of those was overlooked. The earlier *Janitz* case was not cited. The later *Apex* case distinguished and criticized *Brodson* for failing to consider the alternative of dismissal of the appeal for want of jurisdiction. The first point, re-indictment, presents the notion of former jeopardy.

E. The Idea of Former Jeopardy

In this section we will consider the former jeopardy bar to trial, both as an insight to the notion of bar and as a background to constitutional criticism of government appeal as violative of the prohibition against successive jeopardy.

In the federal appeal statute prior to 1971, the notion of jeopardy was not stated as s principle relevant to the entire text but was mentioned only in one part of the enumeration of matters appealable by the government, namely, pleas in bar. The statutory draftsmen apparently considered the policy of jeopardy to be inapplicable to demurrers and challenges of unconstitutionality, which usually arise on pleadings only; on the other hand, pleas in bar often raise issues of fact, disposed of by hearing evidence, so that sometimes jeopardy attaches when a plea in bar is decided. When the government demurs to the plea, the effect is like demurrer to the indictment and the defendant should not enjoy the jeopardy doctrine protection. When evidence is taken and the issue is presented to the jury, jeopardy has attached.[99] The middle case is a plea in bar decided by a judge as an issue of fact on evidence taken. Disposition of pleas of want of speedy trial are in that middle ground.

The general formulation of jeopardy is that of a bar to subsequent trial arising, or "attaching," in certain dispositions after arraignment and plea on a valid charge or indictment in a court of competent jurisdiction, properly assembled.[100] Impaneling the jury or assembling the personnel of the court martial composes the court in those cases and jeopardy attaches at that time. Testimony of the first witness causes jeopardy to attach in bench trial.[101]

99. United States v. Celestine, 215 U.S. 278 (1909). Celestine was followed in United States v. Sisson, 399 U.S. 267 (1970).

100. WHARTON, at §§ 136-44. Compare the civil practice doctrine of Merger and Bar by prior judgment or decree.

101. *Quaere:* in a trial to the court, as in the case of *ad hoc* tribunals such as courts martial, should proper assembly for trial cause jeopardy to attach before the first witness

Trial in a court without jurisdiction is not a bar to later trial, no distinction apparently being made between personal and subject matter jurisdiction.[102] The valid charge requirement is more subtle than the jurisdiction requirement. A distinction is drawn between void and voidable indictments. Jeopardy attaches on the latter but not the former. Trial on a charge not stating a crime is not jeopardy, for example, but trial on a charge improperly procured is. Similar are void and voidable judgments. Accused may choose not to appeal and serve a sentence under a voidable judgment. The conviction is a bar to later prosecution. But a void judgment, for example one adjudged by a court without jurisdiction, is not a bar.

The bar of jeopardy is waivable. Where one convicted seeks reversal or new trial, either on appeal or by collateral attack, he waives jeopardy and submits to the possibility of new trial. But recent federal cases appear to decide that complete waiver of lenient sentence cannot be required as a condition to appeal.[103]

A mistrial forinsufficient verdict or inability to arrive at a verdict is not a bar, but abusive mistrial will bar retrial on grounds of jeopardy. Dismissal of a jury, other than for persistent inability to reach a verdict on any count, for reasons requested by the accused, or for extreme necessity, is abusive mistrial. Entry of a nolle prosequi after arraignment does not generally stop jeopardy. But mistrial or nolle prosequi are not jeopardy where there is a variance in proof from indictment as distinguished from insufficiency of proof. A variance is proof of a crime, under the substantive statute involved, committed however at a different time or place than those stated in the indictment. Re-indictment alleging a different time and place alleges a different crime and should not be barred. But consider the recent United States Supreme Court cases on scope of jeopardy upon re-indictment alleging a different victim.[104] Prior to those cases, it was said that jeopardy barred only trial for the same offense and involving the same named victims.[105]

The notions of lesser included offense and overlapping offense have caused substantial litigation. This is particularly true where

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is sworn, on the analogy of jury impanelment? The position of military judge is not a continuous office or standing court but only a certified qualification to appointment to office in particular proceedings under the Uniform Code of Military Justice, 10 U.S.C. § 826 (1970). *See* M.C.M. ¶ 56(b), especially the final subparagraph. *Compare* FED. R. CRIM. P. 23(c) and 25.

102. WHARTON, at § 139.

103. Young, *Review of Recent Supreme Court Decisions*, 56 A.B.A.J. 884 (1970).

104. *See, e.g.*, Ashe v. Swenson, 397 U.S. 436 (1970).

105. WHARTON, at § 144.

the issue is whether acquittal of a greater offense bars trial for a lesser offense "included" in the greater. Prior conviction, acquittal or trial are said only to bar subsequent trial by the same sovereign.

Jeopardy may attach before res judicata where no determination of any issue has been had. It is probably still possible also to say that res judicata may attach though jeopardy does not, as where there is no identity of offenses but some overlapping issues. The last proposition is severely undercut by the recent decision that the Fifth Amendment bars prosecution for robbery of one victim where the accused was earlier acquitted of armed robbery of another victim at the same time and place.[106] The notion of collateral estoppel as to some elements of a case, though not raised to constitutional stature, was employed before *Ashe v. Severson.*[107]

As noted before, the *Oppenheimer* case suggests that jeopardy attaches upon a plea of the statute of limitations even when made before the jury is empaneled. We have already suggested that the case may have used that language improvidently. The dicta in the case makes something extra out of former jeopardy. In addition to being itself a plea in bar to trial, it becomes a sort of constitutional elevator to the other pleas in bar, such as the statute of limitations, once the accused has established such a plea.

Does the suggestion in *Oppenheimer* of constitutional elevation via jeopardy apply only to the pleas in bar? We have already noted that dismissal for want of prosecution does not prevent reindictment, and neither does dismissal for want of speedy trial, dicta to the contrary notwithstanding.[108]

A comparison of limitation and jeopardy may be made by

106. Ashe v. Swenson, 397 U.S. 436 (1970). *See also* Young, *Review of Recent Supreme Court Decisions*, 56 A.B.A.J. 884 (1970).

It was not until Benton v. Maryland, 395 U.S. 784 (1969), that the federal prohibition of double jeopardy was expressly held to be incorporated by the Fourteenth Amendment. Prior to 1969 the case of Palko v. Connecticut, 302 U.S. 319 (1937) governed. In that case conviction upon retrial following acquittal and state appeal was affirmed as not contrary to the Fourteenth Amendment or inconsistent with "ordered liberty", though Justice Cardozo presumed that the state procedure was a violation of the principle of double jeopardy. However, Benton v. Maryland was a case of *reindictment* after acquittal by jury verdict on the general issue where the error in the first trial was *urged by the defense. Quaere:* is it not still probable that retrial upon remand for error is constitutionally available to the prosecution? While Benton v. Maryland cuts the ground of "ordered liberty" from under Palko v. Connecticut, it does not discuss the same Sixth Amendment substantive raised by Palko v. Connecticut and only assumed—not decided—by the Cardozo opinion.

107. 397 U.S. 436 (1970). *See* FED. R. CRIM. P. 8(a). 14, 23(c), 31 and 32(b); M.C.M. ¶ 71b and 215b.

108. *But see* United States v. Mann, 304 F.2d 394 (D.C. Cir. 1962) which states that a dismissal for want of speedy trial may be with prejudice.

considering the effect on each of the notion of "continuing offense." The claim of "continuing offense" would appear to be a proper demurrer to a plea of limitations, although not to a plea of former jeopardy. The notion of "continuing offense" has nevertheless been asserted in appeals of dismissals for former jeopardy to suggest that reindictment for a *third* time is permissible where there has been an acquittal once, and dismissal for former jeopardy in a second proceeding.[109] But the notion of "continuing offense" could not conceivably support a demurrer to a plea of want of speedy trial.

A bar of former jeopardy may exist in respect of matter usually raised by plea in bar if such matter is reserved for trial, especially if the view prevails that any disposition favorable to the accused after trial has commenced bars later trials.[110] The opposite extreme allows a grant of motion for a finding of not guilty to be reconsidered by a jury.[111]

If a plea of want of speedy trial is not a plea in bar, does discussion of jeopardy help in determining appealability by the government of a ruling sustaining such a plea? The original version of the Criminal Appeals Act limits government appeal to situations where the accused has not been put in jeopardy only in the case of pleas in bar and general verdict. If, on motion of the accused, the issue raised by plea of want of speedy trial were submitted to a jury and sustained, could the government appeal? Experiments in employment of the jury and the implications for appealability may now be considered.

III. The Weakness of the Judge-Jury Distinction

Before discussing certain statutory phases we considered briefly the extent of the right to jury trial. We now return to that topic, having in the interim discussed the notions of question of law, equivalence to a finding of not guilty, jeopardy and plea in bar. We found question of law to mean a question raised by pleading or, more broadly and differently, an "average probabilities" question. In both senses, questions of law are usually for the judge. We found "amounting to a finding of not guilty" to include, at a minimum,

109. 35 N.C.L. Rev. 219 (1957).

110. *See* United States v. Haramic, 125 F. Supp. 128 (W.D. Pa. 1954).

111. United States v. Edwards, 39 C.M.R. 952, *rev. denied*, 18 U.S.C.M.A. 634, (1968); 57a, 57c, 71a. Fed. R. Crim. P. 29(b) allows the district judge to reserve a ruling on a motion for acquittal made before submission of a case to the jury until after the jury returns a verdict.

findings on factually contested issues of substantive law and on questions of procedure closely intertwined with such substantive factual issues. We have noticed that the issues raised by pleas in bar and even by pleas to jurisdiction are variously tried by judge or jury, but that the cases appealed by the government have been rulings assumed by the trial judge.

We may conclude that the propriety of referral to a jury of an issue tends to show that the tests for government appeal are not met, but this broad statement must be qualified. This section demonstrates that various other distinctions operate to determine whether an issue goes to the jury, and that these other distinctions may bear no relationship to government appealability. In addition, this section shows that referral to juries of many questions is different in various jurisdictions, so that government appealability should not rest alone on a tradition of referring an issue to judge rather than jury.

One distinction used to divide collaterial issues between judge and jury is competence-relevance.[112] If the competence of A rests on B, B is for the judge. But if the relevance of A rests on B, B is for the jury. An example of sorts is the "voluntary-credible" distinction used with regard to confessions. Some jurisdictions allow the jury to consider both issues after the judge has considered the first. Other jurisdictions insist that the jury has no power to disregard a confession as involuntary after admission by the judge, unless they find the involuntariness so great as to make the confession incredible.[113] Such insistence notwithstanding, the issue of voluntariness is heard by both judge and jury.[114] Prior to federal intervention, some jurisdictions held voluntariness to be a jury issue for all but extreme cases.[115] But authenticity questions, while sometimes for the jury, are usually for the judge, since they are purely issues of competency. It has been held that admission of a confession was appealable even where the jury rejected it as incre-

112. *See* United States v. Dykes, 5 U.S.C.M.A. 735, 19 C.M.R. 31 (1955), and Morgan, *Functions of Judge and Jury in the Determination of Preliminary Questions of Fact*, 43 HARV. L. REV. 165 (1929).

113. *Id. See also* State v. Crank, 105 Vt. 332, 142 P.2d 178 (1943).

114. United States v Batchelor, 7 U.S.C.M.A. 354, 19 C.M.R. 452 (1955) interprets United States v. Kykes, 5 U.S.C.M.A. 735, 19 C.M.R. 31 (1955) to say that the jury is at liberty to disregard a confession which it considers involuntary. However, the rationale of the case is different (corroboration of a confession).

115. The dangers of confusion of role in such systems have been noted: namely, inattention to the issue by the judge and prejudice of the jury by admission of questionable evidence.

dible on grounds of involuntariness.[116] Admissibility of the fruits of search have been for judge alone, although the issue of consent to search seems analogous to voluntariness of a confession.[117]

In the federal system, Rule 12(b)(4) allows a judge to rule on motions raising defenses and objections, or to defer the issue to trial. The right of government appeal may depend on the choice of the trial judge since 18 U.S.C. § 3731 allows appeals of motions in bar only when the defendant "has not been put in jeopardy." The statute of limitation bar, as noted, has been a particular battleground, in some cases the issue being held one for trial, in some cases the issue being held properly disposed of on motion before trial.[118] Art. 62 of the Uniform Code of Military Justice allows review at government instance only of dismissals "on motion." The latter limitation is arguably more restrictive than the following language in the Criminal Appeals Act—"when the defendant has not been put in jeopardy"—though the intent may have been merely a more modern statement inthe 1968 military code of the older 18 U.S.C. § 3731 language, especially since Rule 12 substituted the phrase "motion raising defense" for the older "pleas" of various sorts.[119] Saying that the language of the Criminal Appeals Act is more restrictive implies the attachment of jeopardy once trial of the general issue commences, regardless of the ground of disposition thereafter. This is obviously a wide view of jeopardy. If the effect of the trial court's discretion upon government appealability is disquieting, consider the power given to defense strategy in the case of demurrers and pleas to jurisdiction, which are not waived even though not raised until after trial has commenced under Rule 12(b)(2).

We have noticed that venue issues may be deferred to trial, and that certain defenses such as entrapment may not be raised before trial in any case, although the judge may decide the issue on motions for directed verdict or for judgment of acquittal.[120] We have noted earlier that judges have referred limitations and venue issues

116. United States v. Dykes, 5 U.S.M.C.A. 735, 19 C.M.R. 31 (1955).

117. The *Dykes* case notes that inquiry into the lawfulness of search and seizure is for the judge alone. *See also* FED. R. CRIM. P. 41(e).

118. *Compare* United States v. Haramic, 125 F. Supp. 128 (W.D. Pa. 1954) *with* Grunewald v. United States, 353 U.S. 391 (1957).

119. FED. R. CRIM. P. 54(c). *See also* Cummings, *The Third Great Adventure*, 29 A.B.A.J. 654 (1943).

120. *See* cases collected at 17 MODERN FEDERAL PRACTICE DIGEST S739 (1967). But *quaere*: should evidence obtained by trick or in the course of entrapment be suppressible on motion before trial?

to trial when the facts initially appearing or alleged caused the limitation or venue issue to become intertwined with the issues of substantive criminal law. But should the government be denied a right to appeal where the trial judge mistakenly concludes that such issues are intertwined with substantive issues? Entrapment may categorically be involved with the issues of substantive criminal law, dominating the police procedural policies implicit in the doctrine. But that cannot be said of the defenses and objections, including plea of want of speedy trial, typically raised by motion.

Given the varieties of formulas used to define the role of the jury, jury power to consider an issue should not alone preclude government appeal. That is, there are institutions, such as courts-martial, where the equation determining when the issues will be referred to trial results in such referral more often than in district court proceedings.[121] This observation will support the conclusion that many jury questions are "average probabilities" questions. And in the view of advocates of jury power, jury consideration properly includes ad hoc veto power over legislation.[122] On such a view of jury power, appeal of jury findings by the government is not really inconsistent with limitation of government appeal to questions of law.

A sort of intem veto or revision of substantive criminal law by juries has also been tolerated in felony-murder and larceny prosecutions. Subject to prohibitions against compromise verdicts, triers of fact have found defendants guilty of wrongful misappropriation, when larceny was charged and when the facts alleged could not raise the former crime; and such jury findings have been affirmed. The Court in *United States v. Hitt*[123] found the accused guilty of an offense not within the specification (theft and conversion of currency). There is no logical way to reconcile the

121. United States v. Ornelas, 2 U.S.C.M.A. 96, 6 C.M.R. 96 (1952); United States v. Capuro, 38 C.M.R. 861, *rev. denied*, 17 U.S.C.M.A. 666 (1968); M.C.M. ¶¶ 38, 39, 41, 51, 51(b), 67(e).

122. It is the veto power of a jury to annul law in a particular case that makes *voir dire* so critical in certain cases. *See* Maxwell, *The Case of the Rebellious Juror*, 56 A.B.A.J. 838 (1970), discussing Witherspoon v. Illinois, 391 U.S. 510 (1968) and Swain v. Alabama, 380 U.S. 202 (1965). The article also discusses the cases incorporating the Sixth Amendment right of jury trial in criminal cases, including contempt proceedings, within the Fourth Amendment. Whether juries of 12 persons, voting unanimously, are required, is beyond the scope of both the cited article and this article. *See* FED. R. CRIM. P. 23(a), 23(b).

123. 19 C.M.R. 897, *rev. denied*, 6 U.S.C.M.A. 829 (1955). This was a larceny prosecution. The finding, guilty of the lesser offense of misappropriation, was highly improbable because the specification was a theft of currency rather than of identifiable goods. *See* FED. R. CRIM. P. 31(c).

charge—theft—with the verdict—wrongful misappropriation. If the accused can argue for reversal or for new trial in such a case, should not the government be allowed to appeal and request entry of judgment of conviction ofthe greater offense in an appellate court, or, if not that, new trial for reason of mistrial? Should special findings on "average probabilities" issues made by a jury be appealable by the government? If the issue of existence of a clear and present danger had been referred to the jury by the trial judge in *Dennis*, would the accused be prejudiced by allowing government appeal from the finding? Would it be any less a question of law? Should government appeal of instructions be allowed when an issue of a type sometimes heard by the judge alone is referred to the jury? The *Hitt* case suggests that an accused cannot complain about an instruction to the jury to disregard those issues outside the scope of their power, but acknowledges a "power" of the jury to consider the issue anyway. Allowing government appeal would, at least in part, close the "Hohfeldian gap"[124] and make the power of the jury co-extensive with the right of the jury. That result motivates some opposition to schemes of government appeal, but the objection is largely eliminated by strictly limiting government appeal to the record only.[125]

But the Hohfeldian power may recently have become a right of the accused, if not of the jury. Recent cases indicate that jurors cannot be excluded because of their reluctant view of the law unless they explicitly admit that they could not or would not follow the law.[126] Such cases may cast a suspicious shadow on the charge to the jury in the *Dennis* trial that applicability of the statute is an issue about which they should not be concerned.

The last sentence of federal rule 12(b)(4), earlier military law provisions, and equity tradition all sanction use of advisory jurors or boards. Given the voir dire cases,[127] can it be argued that denial of a motion to empanel such a body may in some instances be an abuse of discretion? And, as the *rightful* role of the jury changes, should the scope of government appeal change to encompass review of jury findings? Does new matter in jury jurisdiction come within a jeopardy doctrine formed earlier, including implicit limits on government appeal?

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124. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1914) and 25 YALE L.J. 710 (1917).

125. Comment, *State Appeals in Criminal Cases*, 32 TENN. L.R. 449, 465 (1965).

126. *See* note 122 and accompanying text *supra*.

127. *Id.*

The preceding comments are offered to suggest that the practice of deciding pleas of want of speedy trial without a jury is not a sufficient reason to allow or disallow government appeal on the issue.

Prior to 1971, the Criminal Appeals Act spoke of plea in bar when the defendant has not been put in jeopardy. This leads us to consider when a hearing on a motion in bar constitutes jeopardy. In general, upon seating of a juror or introduction of evidence on the issue of guilt or innocence, jeopardy attaches.[128] Thus not only a jury decision, but even a delayed decision on a question of law by the judge, may present a jeopardy-attaching ruling.[129] But declaration of mistrial before announcement of a jury finding of not guilty may remove the jeopardy, at least as regards the questions of law. This possibility exists in the military jurisdiction.[130]

When mistrial should be allowed in the cases of delayed rulings by judge requires consideration of burden of proof. Proof by a preponderance of evidence is generally the burden of defendant in pleas in bar, subject to government burden of proof beyond reasonable doubt where the issue in bar is insisted on as a part of a plea on the general issue as well.[131] But however categorized, the plea of want of speedy trial places the burden of proof on the government.[132] If, on a delayed ruling, the judge finds a plea proved by defendant where the issue is part of a defense to the general issue, then the ruling implicitly amounts to a finding of not guilty.[133] This is so because the government has the burden of proving all the issues with the general issue beyond a reasonable doubt. By analogy, such a ruling should amount to a finding of not guilty even if the proof be presented in a threshold session, though it could have been reserved for trial of the general issue.[134]

128. Uniform Code of Military Justice, 10 U.S.C. § 844(c); FED. R. CRIM. P. 23-31, 48(a).

129. ¶¶ 53d(1), 67e; Uniform Code of Military Justice, 10 U.S.C. § 839(a) (1970); FED. R. CRIM. P. 12(b)(4), 29(b).

130. Deferred rulings are not favored, however. United States v. Strand, 6 U.S.C.M.A. 297, 20 C.M.R. 13 (1955).

131. M.C.M. ¶ 57g(1). *Compare* Lego v. Twomey, 404 U.S. 477 (1972) *with* M.C.M. ¶¶ 56b, 67e, 68c. *See also* United States v. Boehm, 17 U.S.C.M.A. 530, 38 C.M.R. 328 (1968); United States v. Carson, 15 U.S.C.M.A. 407, 35 C.M.R. 379 (1965); FED. R. CRIM. P. 12(a).

132. ¶¶ 68i, 215e. Where the government has the burden on interlocutory issues, its burden is the standard of proof by a preponderance of the probabilities. *See* note 28 and accompanying text *supra*.

133. M.C.M. ¶¶ 57b, 67e.

134. Uniform Code of Military Justice, 10 U.S.C. 839(a) (1970); FED. R. CRIM. P. 12(b)(4); M.C.M. ¶ 52d.

Since both the Criminal Appeals Act and the Uniform Code of Military Justice[135] withhold jurisdiction to review rulings amounting to acquittal, and since the opinions rely in part on that prohibition in cases refusing to undertake government appeal of orders sustaining pleas in bar, it is difficult to distinguish the test "not amounting to acquittal."[136] That is to say, where a plea in bar is triable by a jury, a ruling in favor of the accused is like a directed verdict. But where the accused is in effect discharged on a directed verdict, the policy against repeated jeopardy should bar retrial. In other words, if jurisdiction to hear government appeal be denied because a ruling on a plea in bar is found to amount to a finding of not guilty, dismissal of the appeal (or of reindictment for that matter) might as well be ordered, because the defendant has been "put in jeopardy." But the converse is not implied. If a judge reserves ruling on a plea in bar, not insisted as a defense under a plea of not guilty, until after trial of the general issue has commenced, jeopardy has attached, but the ruling may not amount to a finding of not guilty. Whether the jeopardy doctrine should prohibit government appeal in those situations should involve a variety of questions. When was the plea asserted? Was a separate preliminary hearing requested? Was the government case on the general issue strong or weak? Had the defense case commenced and did it contain surprise evidence? Would new trial, after granting appeal, give the government an advantage not had previously? The case law defining government appealability does not discuss these factors. The cases on abusive nolle prosequi or mistrial might be a source of guidance if such inquiry were undertaken.[137]

Instead the Criminal Appeals Act has announced a strict rule against government appeal of rulings which are delayed until after commencement of the trial of the general issue. In *United States v. Celestine*,[138] the rule was announced that jeopardy shall be deemed a bar to government appeal in a case where trial of the general issue has begun, even though the dismissal is on grounds of matter in bar of trial. The case arose on government demurrer to a jurisdictional plea in a prosecution for murder on an Indian

135. Uniform Code of Military Justice, 10 U.S.C. 862(b)(1) (1970); M.C.M. ¶ 67f.

136. *Compare* Criminal Appeals Act, 18 U.S.C. § 3731 (1964) *with* Uniform Code of Military Justice, 10 U.S.C. § 862 (1964).

137. Wade v. Hunter, 336 U.S. 684 (1949); United States v. Walter, 14 U.S.C.M.A. 142, 33 C.M.R. 354 (1963); United States v. Williams, 11 U.S.C.M.A. 459, 29 C.M.R. 275 (1960). *See also* M.C.M. ¶¶ 56a, b, c, e.

138. 215 U.S. 278 (1909).

reservation. The *Celestine* rule has been followed. The furthest that proceedings have gone without lapse of the right of government appeal was the record in *United States v. Goldman*,[139] involving an information alleging contempt for disobedience of a decree in an earlier Sherman Act case. The case was dismissed on the grounds that on the face of the information, the statute of limitations had run. The dismissal was granted after an order was given for a "special examiner" to take testimony "in anticipation and preparation for trial." The government demurred to the plea of limitations. From the opinion it appears that the order to take evidence was without prejudice to either side to recall any witness for *viva voce* testimony before the court. The court decided that a contempt motion was a criminal case under the Criminal Appeals Act, even though it was not a criminal prosecution for Sixth Amendment purposes. The court found that the trial court had not "commenced its setting for trial," so that jeopardy had not attached. The opinion indicates an acceptance of the *Celestine* doctrine. However, the former equity practice of taking testimony before masters in lieu of *viva voce* testimony suggests that given the equity context of a contempt motion, the trial had begun. In that sense, *Goldman* could be cited as upholding Supreme Court jurisdiction to hear government appeals of delayed dismissals upon pleas in bar of trial.

The *Goldman* case illustrates the distinction between the test "not put in jeopardy" and the notion of "question of law." The time lapse asserted as a limitation in *Goldman* appeared on the face of the information, and the government demurred to the plea of limitation. The issue of limitation was purely one of law. Yet jeopardy was asserted as a jurisdictional deficiency in the Supreme Court and received careful attention as a separate problem in the opinion. The court implied, in *Goldman*, that it would be without jurisdiction to hear the appeal if the limitation issue had not been raised by the indictment on its face and been demurred to by the government. The construction of the Criminal Appeals Act implied in *Goldman* is, as we shall see, consistent with common law practice.

An issue of speedy trial could arise after trial on the general issue had commenced. It is not clear whether the plea of denial of speedy trial is waived by failure to assert it before trial.[140] In such

139. 277 U.S. 229 (1928). *See also* Annots. 2 L. Ed. 2d 1815; 87 L. Ed. 207.

140. United States v. Shalck, 14 U.S.C.M.A. 371, 34 C.M.R. 151; FED. R. CRIM. P. 12(b)(2); M.C.M. ¶¶ 67a, b, d, 68i.

a case jeopardy has attached, and government appeal is prohibited under the *Celestine* doctrine, whether or not a ruling on the speedy trial issue be itself equivalent to an acquittal.

In one sense, the fact that, under a plea of denial of speedy trial, the burden of proof is on the government makes the issue more like the general issue than the established pleas in bar.[141] The plea of denial of speedy trial does not seem readily susceptible to government demurrer, but rather seems by nature to raise issues of fact. Yet it is the practice to allocate the function of ruling on such pleas to the judge. However, at common law the law-fact distinction was used to determine the extent of the right to jury trial on motions in bar. When the government demurred to a plea in bar, the judge determined the issue;[142] and the power of the judge to rule in such cases was continued under the federal constitution, and was followed in the military jurisdiction as well.[143] But upon government denial or "traversal" of the allegations of a plea the issue was decided by the jury.[144] The early federal practice was the same, except that submission of the special plea issues simultaneously with the general issue has long been permitted.[145] Since the right of trial by jury under the constitution has been interpreted to include jury trial of the scope known at common law,[146] Rule 12(b)(4), in directing use of a jury when required by the Constitution, does not change the result, as case law under the rules admit.[147]

Older military authorities explicitly acknowledged a right of trial by board of officers in such factually contested cases.[148] More recent provisions are less clear, but the recent military case law

141. M.C.M. ¶¶ 68i, 215e. Burden of proof and the substantive law of speedy trial may be explored further in these cases: United States v. Williams, 16 U.S.C.M.A. 589, 37 C.M.R. 209 (1967); United States v. Tibbs, 15 U.S.C.M.A. 350, 35 C.M.R. 322 (1965); United States v. Schalck, 14 U.S.C.M.A. 371, 34 C.M.R. 151 (1964); United States v. Williams, 12 U.S.C.M.A. 81, 30 C.M.R. 81 (1961); United States v. Batson, 12 U.S.C.M.A. 48, 30 C.M.R. 48 (1960); United States v. Davis, 11 U.S.C.M.A. 410, 29 C.M.R. 226 (1960); United States v. Brown, 10 U.S.C.M.A. 498, 28 C.M.R. 64 (1959); United States v. Wilson, 10 U.S.C.M.A. 398, 27 C.M.R. 472 (1959); United States v. Callahan, 10 U.S.C.M.A. 156, 27 C.M.R. 230 (1959).

142. CHITTY, at 434-35.

143. Peters v. United States, 87 F. 984, *cert. denied*, 176 U.S. 684 (1900).

144. CHITTY, at 434.

145. United States v. Kissel, 218 U.S. 601 (1910); Thompson v. United States, 155 U.S. 271 (1894).

146. Sparf v. United States, 156 U.S. 51 (1895).

147. United States v. Haramic, 125 F. Supp. 128 (1954); United States v. J.R. Watkins Co., 120 F. Supp. 154 (1954).

148. M.C.M. ¶¶ 40, 50, 51 (1928).

indicates such a right to "jury" trial of pleas in bar will be preserved, whether by separate proceeding or by submission of the plea in bar along with the general issue.[149]

Thus, a factual contest on a plea in bar is a trial of the accused, whether trial of the general issue has commenced or not. Where a jury is demanded, a trial of a plea in bar traversed by the government is a constitutional right. For that reason, government appeal of a ruling or verdict sustaining a plea in bar is authorized only where both of the following conditions obtain. First, the plea must have been raised in a manner susceptible of demurrer, and the government must have demurred. Second, either trial of the general issue must not have commenced, or, in the military jurisdiction, good reason for the judge to defer legal ruling must exist. Otherwise, the accused either has been acquitted or, at least, been "put in jeopardy."[150]

Since the burden of proof is on the government in speedy trial pleas, the first condition is not likely to obtain. The result is that, in the typical case, a ruling for the accused on a plea of want of speedy trial is not appealable by the government under the Criminal Appeals Act, even if it be classified as a plea in bar; under this construction the ninth circuit cases reach the correct conclusion.[151]

IV. The Scope of Appellate Review

A. General Rules

The current trend to broaden the effect of findings by a jury so as to bar retrial has occurred simultaneously with the voir dire cases mentioned above. In the past, jeopardy was a bar to retrial of the same offense even if a case was terminated without a finding on any plea, whereas res adjudicata was a bar to trial for any offense, if, but only if, an issue necessarily determinative of the later indictment had been both put in issue and directly found and determined by a court of competent jurisdiction.[152] Thus res adjudi-

149. United States v. Berry, 20 C.M.R. 325, *rev. denied*, 8 U.S.C.M.A. 769 (1956); United States v. Ornelas, 2 U.S.C.M.A. 96, 6 C.M.R. 96 (1952).

150. Supporting this conclusion is United States v. Sisson, 399 U.S. 267 (1970), where the Court distinguished the test of "acquittal". The Court noted that the attachment of jeopardy does not prevent the appeal of orders granting motions in arrest of judgment but correctly indicated, citing both common law authorities and legislative history, that such motions are but delayed demurrers asserting "the failure of the indictment to charge a criminal offense."

151. United States v. Apex, 270 F.2d 747 (9th Cir. 1959); United States v. Heath, 260 F.2d 623 (9th Cir. 1958).

152. WHARTON, at 406-18.

cata may stop the government from presenting proof of some fact without barring indictment for a different crime which is related to a crime charged earlier.[153]

The doctrine of res adjudicata is not available to the government. For example, in *United States v. Coopwood*[154] the judge denied a motion to dismiss for lack of speedy trial but granted a motion for further discovery and pre-trial hearing. The charge was withdrawn altogether, re-alleged and again brought to trial. The issue of want of speedy trial was reasserted but the court found for the government on the prior record without taking new evidence. The conviction was reversed with the comment that only the more recent record was presented for review.[155] The opinion implies that the defendant may appeal to a previous determination of lack of speedy trial as res judicata. That would be consistent with the application of res adjudicata in *Oppenheimer* to a second indictment, where the first indictment for the same crime had been dismissed on a plea of the statute of limitations; however, it is not consistent with *United States v. Cohen*, which was a speedy trial case.

However, *Cohen* did not discuss res judicata, but rather concentrated on the question whether assertion of speedy trial is a plea in bar of trial. It is possible to apply res judicata to rulings regarding speedy trial so that a finding of want of speedy trial would bar retrial, without categorizing assertion of speedy trial as a plea in bar for purposes of construing the Criminal Appeals Act. That is, what is a "bar" for one purpose is not necessarily a "bar" for another. The distinction between bar by virtue of res adjudicata and bar by virtue of a ruling on a plea in bar may explain the *Mann* case.[156]

Though the opinion used the vocabulary of pleas in bar and stated, in obiter dicta, that speedy trial is matter in bar of trial, the court found that the dismissal of the first of two indictments was not on the ground of speedy trial. That is, the court concluded that speedy trial had not been put in issue in the first case. It should also be emphasized that the *Mann* case involved an appeal by the

153. United States v. Perrone, 161 F. Supp. 252 (S.D.N.Y. 1958).

154. 40 C.M.R. 664 (1968).

155. But in a recent defense appeal, Simpson v. Florida, 403 U.S. 384 (1971), it was held error for a state appellate court not to review the record in a prior proceeding upon a plea of former jeopardy, under the doctrine of Ashe v. Swenson, 397 U.S. 436 (1970).

156. United States v. Mann, 304 F.2d 394 (D.C. Cir. 1962).

defense, so that construction of the Criminal Appeals Act was not required.

One facet of the *Oppenheimer* case[157] warrants special mention at this time. In the first paragraph of the opinion, Justice Holmes indicated that a Supreme Court case decided after the dismissal changed the ruling case law of limitations under criminal provisions relating to concealment of assets by a bankrupt; as a result, the first dismissal would have been clear error had it been made later. Thus trial court rulings are immune from reconsideration, on account of a change in law, in the trial court. It appears that res adjudicata includes a trial-court level law of the case doctrine in federal criminal procedure.[158] But the issue in *Oppenheimer* concerned a plea in bar (limitations) within the power of the government to appeal. The ruling in the first *Oppenheimer* indictment, though appealable, had not been appealed. Should the doctrine of res adjudicata include legal issues where the ruling is not appealable?[159]

Law of the case was explicitly applied to the trial court level in courts-martial prior to *United States v. DeLeon*.[160] There the contents of a telephone call were excluded on motion, but other evidence discovered as a result of the call was admitted over defense objection. On appeal by the accused from a conviction, the government argued that the exclusion of the telephone call was itself error. The court rejected the rejoinder by appellant that the ruling on the telepnone call was the law of the case. The court affirmed the conviction, commenting that the ruling on the phone call was the law of the case as to the call itself; however, that was merely a way of saying the government did not have a right of appeal of evidentiary rulings.

The government has asserted some notions of waiver in an apparent attempt to invoke the law of the case doctrine at trial

157. United States v. Oppenheimer, 242 U.S. 85 (1916).

158. *See* United States v. Anders, 23 C.M.R. 448, *rev. denied*, 7 U.S.C.M.A. 765 (1956) (erroneous instruction as law of the case); United States v. DeLeon, 5 U.S.C.M.A. 747, 19 C.M.R. 43 (1955) (exclusion of evidence as law of the case). *See also* Comment, *Law of the Case*, 5 STAN. L. REV. 751 (1953).

159. By comparison, the doctrine of "law of the case" typically binds the highest appellate court in a jurisdiction only when the former appeal did not reach the highest appellate court. *See* Comment, *Law of the Case*, 5 STAN. L. REV. 751, 753 (1953).

160. 5 U.S.C.M.A. 747, 19 C.M.R. 43 (1955). The dicta in the case discusses the relationship between res judicata and law of the case in a rehearing ordered on appeal. *See also* People v. Kissane, 347 Ill. 385, 179 N.E. 850 (1932), refusing to apply res judicata to search and seizure questions.

level, but these asserted waivers have been unsuccessful.[161] The doctrine of the law of the case indicates that, in criminal law as in civil practice, the primary function of appellate adjudication is to determine the rights of the particular parties, and that the production of official decisions on broad legal issues is subordinate to this particular goal.

If a change in the law of speedy trial is announced after a first dismissal, should the government be permitted on reindictment, to argue the new law and also present additional evidence of its efforts to bring the case to trial? The issue of government appealability of a speedy trial ruling should be a factor bearing on the question.

B. The Scope of Government Appeal

The scope of government appeal when allowed is typically not different from that of defense appeals. Reviewing authorities are limited to the record of proceedings below, although matters outside the record may be considered on the issue of jurisdiction and, in the military system, evidence of insanity of the accused may also be considered.[162] Where a reindictment is appealed, it is said that only the most recent record is before the court.[163] But the *Mann*, *Cohen*, and *Oppenheimer* cases indicate a willingness to inquire into the earlier of two proceedings. As noted previously, the government attempted unsuccessfully to assert res adjudicata in the *Coopwood* case.[164] The comment about the "most recent record" may amount to no more than a restatement of the policy against allowing the government to assert res adjudicata. On the other hand, the *Oppenheimer* court refused to allow the government to appeal the second dismissal, founded on an earlier dismissal, even though there was obvious error in the first trial court proceeding.

The cases which call speedy trial a factual issue, and the requirement that the government affirmatively show its efforts to bring the case to trial expeditiously, indicate that the range of review of dismissal for speedy trial, if generally authorized, would

161. United States v. Himel, 34 C.M.R. 533. The ruling on waiver in the case may be dicta since both the admission of the disputed evidence, and the finding of guilty, were affirmed.

162. M.C.M. ¶ 67f. Review by the Convening Authority after trial is limited to the record by M.C.M. ¶¶ 84a and 87a(3), the only exceptions being evidence of insanity (United States v. Burns, 2 U.S.C.M.A. 400, 9 C.M.R. 30 (1953)), and jurisdictional facts (United States v. Schultz, 4 C.M.R. 104 (1952)). Courts of Military Review are limited to the record by M.C.M. ¶ 101.

163. *See* United States v. Coopwood, 40 C.M.R. 664 (1968).

164. *Id.*

be restricted by comparison with review of the established pleas in bar and pleas in abatement.

The method of deciding government appeals, where appellate jurisdiction has been found, has been to affirm dismissal or to remand for trial of the general issue. The form of remand is usually one which may be viewed as a return of the case to the trial court for all purposes, so that accused could present more evidence on the issue reversed if granted leave by the trial court.[165] The accused should have the opportunity to rebut the government showing of expeditious processing, if he has any evidence to the contrary.

In sum, limitation of government appeals to the record preserves jury power to exercise their ad hoc veto over general legislation, and removes objection to government appeal as contrary to the policy against double jeopardy. As noted previously, government appeal is generally limited to consideration of questions of law; but this limitation usually, though not always, restricts defense appeal as well.[166]

V. THE BASIC OBJECTIONS TO GOVERNMENT APPEAL

The law review literature indicates that the sentiment against repeated trials of an accused on the same allegations is the major objection to prosecutorial appeal.[167] Statutes often allow prosecutorial appeal subject to the policy against repeated jeopardy, as for example that part of the Criminal Appeals Act concerning appeals of pleas in bar. "Jeopardy" is the touchstone word.

The writers frequently comment that retrial following appeal of "legal" questions does not violate the jeopardy policy, though even that position is sometimes denied.[168] Commentators generally take the view that a total limitation on the state's right to appeal "is a throwback to the days when the defendant appeared in court

165. There is authority for the proposition that the mandate or order granting government appeal must be by way of a reasoned opinion; *e.g.*, M.C.M. ¶ 67f requires the officer taking action to state in writing his reasons for returning the record.

166. *See, e.g.*, Uniform Code of Military Justice, 10 U.S.C. 866(c) (1970).

167. *See, e.g.*, Comment, *Criminal Law—The Right of the State to Appeal in Criminal Cases*, 42 N.C. L. REV. 887 (1964). *See also* Note, *Appeals by the State in Criminal Proceedings*, 47 YALE L.J. 489 (1938), in which the author criticizes the dissent of Justice Holmes in Kepner v. United States, 195 U.S. 100 (1904) as potentially destructive of the bar of former jeopardy, on the grounds that the Holmes view of retrial upon government appeal as part of a unitary proceeding could also justify government appeal predicated on the evidence.

168. In Texas, state appeal, even on questions of law, is prohibited. Comment, *The State Right to Appeal: Has Maine Been Too Cautious?* 21 MAINE L. REV. 221, 225 (1969).

laboring under a decided disadvantage in relation to the accusing party."[169] There seems to be a consensus that appeal of an acquittal for want of sufficient evidence is not appeal of a legal question, and does violate the policy against repeated jeopardy even where remanded trial is viewed as part of a continuing, unitary case proceeding.[170] Such a process of dividing permissible from impermissible prosecutorial appeal by recourse to the jeopardy concept is criticized by one forceful writer as an historical anomaly.[171]

Jeopardy was the rational of dismissal of the government appeal in *Kepner v. United States*,[172] decided prior to the Criminal Appeals Act. The dissent of Justice Holmes insisted that trial on remand, if ordered upon consideration of government appeal, would be part of one proceeding. The fact that the second trial would require duplication of the same contest, and would give the government a second chance at conviction, was not impressive to the dissenter.[173] The curious thing is that Holmes does not reject the jeopardy doctrine as an anomaly but implicitly views it as a proper analysis; nevertheless, he then proceeds to find no existence of jeopardy, on a rarified distinction between continuing and unitary proceedings, while ignoring the practical novelty of a trial after remand.

In any case, the Holmes unitary-distinct analysis proves too much, since it would justify government appeal of acquittal or dismissal on the ground of insufficient evidence.[175] That this is so is illustrated by discussion prompted by the attempt of British prosecutors to use writs of certiorari to quash trial court acquittal. In *Regina v. Middlesex*,[176] prosecution evidence had been suppressed. Thus the crown position in seeking such a writ could be

169. Note, *Appeals by the Prosecution and Protection of the Accused in State Criminal Proceedings*, 35 U. CIN. L. REV. 501, 506 (1966).

170. Note, *Appeals by the State in Criminal Proceedings*, 47 YALE L.J. 489 (1938).

171. Miller. *Appeals by the State in Criminal Cases*, 36 YALE L.J. 486 (1927).

172. 195 U.S. 100 (1904).

173. The opinion of Justice Cardozo in Palko v. Connecticut, 302 U.S. 319 (1937) is consistent with Justice Holmes' opinion in Kepner v. United States, 195 U.S. 100 (1904). Cardozo agreed that the principle against former jeopardy was violated by the state appeal from acquital presented in that case but, on federalism grounds, refused to reverse the conviction on subsequent trial.

174. *See, e.g.*, Winchester v. Winn, 225 Mo. App. 288, 29 S.W.2d 188 (1930).

175. Note, *Appeals by the State in Criminal Proceedings*, 47 YALE L.J. 489 (1938).

176. 2 All E.R. 312 (1952). *See also* 69 LAW Q. REVIEW 175 (1953) analyzing a number of modern English cases including the *Middlesex* case. But the English cases appear to reversals for record errors of law rather than reversals on comprehensive factual review of the record. Cf. n. 185 *infra.*

conceived as an attempt to seek limited review of an interlocutory matter concerning the record and an order only to take a more complete record. That is, the notion of continuing proceeding and emphasis on the form of review might have been invoked to justify a contrary conclusion. But the justices concluded that the policy against repeated jeopardy would be breached by undertaking review of those matters by whatever form.

If on defense appeal, the reviewing court finds for defendant on the merits, it is within their jurisdiction to grant a new trial rather than a judgment of acquittal, notwithstanding the policy against double jeopardy, by a theory of waiver.[176] But the scope of waiver is limited. Where accused has been acquitted of one offense but convicted of a lesser included offense, his appeal of the latter conviction is said not to be a waiver of the partial acquittal. Thus, retrial only for the lessor offense is permitted, retrial for the greater offense being barred by former jeopardy.[178] Similarly, where a case has been remanded for a second trial, imposition of a more severe sentence is limited by the Fifth Amendment.[179] But trial on a different statutory offense based on the same transaction is permitted within the federal constitution on remand, even though the prior conviction would bar reindictment absent an appeal.[180]

The whole waiver theory has been criticized for conditioning one constitutional right on surrender of another.[181] It is suggested, however, that the extravagance of the waiver theory is occasioned by the extravagant scope given the jeopardy notion. That is, it may be argued that trials on remand do not, in the first instance, violate the policies grounding the doctrine of former jeopardy, and no notion of waiver is necessary to vindicate mandates for such trials. Consider, for example, the rules for review of decisions in the courts of appeal by the Supreme Court. Appeal by various modes

177. For the English history of waiver of objection to retrial on the ground of former jeopardy *see* Note, *Appeals by the State in Criminal Proceedings*, 47 YALE L.J. 489, 491 (1938).

178. Green v. United States, 355 U.S. 184 (1957). This same rule is applicable in state courts. Hetinyi v. Wilkins, 348 F.2d 844 (2d Cir. 1965). Prior to *Hetinyi*, state courts were divided. *See* Annot., 59 A.L.R. 1160.

179. North Carolina v. Pearce, 395 U.S. 711 (1969).

180. United States v. Ewell, 383 U.S. 116 (1969) states that a defendant may be so tried. However, the statement may be merely dicta since the Court also found the offence not to be the "same offence" for purposes of the bar of former jeopardy.

181. *See, e.g.*, Note, *Appeals by the State in Criminal Proceedings*, 47 YALE L.J. 489, 491 (1938).

is permitted to either side, and no mention of any notion like jeopardy is found in the statute.[182]

The same holds true for Supreme Court review of state court cases.[183] Nor is review by the government or the state limited to certain issues under those provisions.[184] Similarly, certiorari to quash appellate reversal of conviction may be sought in Britain.[185] The one suggestion of want of jurisdiction, for reasons of jeopardy, to review an appellate decision at the instance of the prosecution was resolved by a finding of jurisdiction.[186] This feature of mutual availability is a distinction between direct review and collateral review, perhaps motivating the government to support expansion of direct review at the expense of collateral review.[187]

Whether the objection to government appeal on grounds of jeopardy is stronger or weaker in the case of dismissal for want of speedy trial than in other dismissals is unclear. Of all pleas, that of speedy trial is most removed from the substantive criminal law issues and most certain to be heard by judge alone. Thus, reversal of speedy trial dismissals and remand by appellate mandate will not result in duplicate trial contests of the sort suggested by "jeopardy." The cases permitting reindictment have already rejected the application of the jeopardy doctrine to speedy trial dismissals. If those cases are sound, government appeal of the issue cannot be criticized as violative of the jeopardy rule, since reindictment gives the government another opportunity to recontest the issue on a new record in any case of dismissal, certainly a broader opportunity in many cases than an appeal limited to a closed record.

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182. 28 U.S.C. § 1254 (1964). But may the Supreme Court review reversals for insufficient record evidence? Cf. nn. 176 and 185.

183. 28 U.S.C. § 1259 (1964). Generally the court limits its review to narrow questions of law. Cf. nn. 176 and 185.

184. United States v. DeLeon, 5 U.S.C.M.A. 747, 19 C.M.R. 43 (1955).

185. For a summary of cases allowing certiorari to quash appellate reversal of conviction see 69 LAW Q. REV. 175 (1953). Yet, a judgment of acquittal in an appellate court may be predicated on the record evidence as well as on the pleadings in many jurisdictions. Especially interesting would be acquittal in an appellate court on grounds not of prejudicial error of prosecutor or judge, but of insufficiency of evidence or conviction contrary to the manifest weight of the record evidence. *See* Uniform Code of Military Justice, 10 U.S.C. §§ 866(c), 867(d) (1970).

186. 16 U. DET. L.J. 145 (1953).

187. Providing for direct review from appellate courts gives the government a right of review equal to that of the defense. The absence of such direct review abbreviates the time before collateral review may begin at the instance of the defense only, because such absence limits the number of remedies to be exhausted before collateral attack. *See* Fay v. Noia, 372 U.S. 391 (1963); Burns v. Wilson, 346 U.S. 137 (1953); Doab, *The Case Against Modern Federal Habeas Corpus*, 57 A.B.A.J. 323 (1971).

VI. Alternative Grounds for Government Appeal

Where evidence has not been taken on the factual issues defined by substantive criminal law, so that the argument from jeopardy is weakest, government appeal is most liable to criticism as interlocutory appeal. And in such a view the concept of continuing proceeding is more persuasive.[188] But ironically the government has sought to assert a number of preliminary rulings as "final" orders and so to use the notion of finality as an alternative, additional source of government right to appeal, rather than a limiting principle. The *Carrol* case[189] notes the use of 28 U.S.C. § 1291 to support government appeal. Such appeals arise from proceedings before indictment, or in supplemental proceedings in another district, or after dismissal of indictment or in proceedings trying right to property.[190] An example of an earlier attempt is *United States v. Rossenwasser*,[191] a prosecution for unfair labor practices. Not only was evidence suppressed in that case, but property was ordered returned and the government was enjoined from using the evidence in any way. The appeal by the government was dismissed. The court concluded that where the private party is an accused person, the Criminal Appeals Act is the only source of appellate jurisdiction. Cases after *Rossenwasser* but before 1968, such as *United States v. Ponder*[192] allowing appeal of suppression orders, have been rationalized as finality appeals and otherwise have been disapproved.

The case first allowing government appeal of a suppression order as a "final" order was *United States v. Cefaratti*.[193] *Cefaratti* distinguished cases like *Rossenwasser* on the grounds that the indictment in those cases had not been dismissed at the time of government appeal. The *Cefaratti* court considered the case before it as being more similar to earlier cases where government appeal had been permitted, involving orders made before indictment. The case disregards the functional test of *Cogen v. United States*[194] announced by Justice Brandeis. In the Brandeis opinion the test was not the time of the order, but whether or not

188. Kepner v. United States, 195 U.S. 100 (1904).
189. Carroll v. United States, 354 U.S. 394 (1957).
190. *Id.* at 403-404.
191. 145 F.2d 1015 (9th Cir. 1944).
192. 238 F.2d 825 (4th Cir. 1956).
193. 202 F.2d 13 (D.C. Cir. 1953).
194. 278 U.S. 221 (1929).

the subject of the order appealed is distinct from the general subject of the criminal litigation. Trial of the right to property taken as contraband is an example of the distinct subject matter aspect required, after the *Cogen* decision, to support government appeal outside the Criminal Appeals Act.

Cefaratti relied on the D.C. Code Sec. 23-105[195] as well as 28 U.S.C. § 1291. The court of appeals had been presented with the argument that because of a peculiar statutory history,[196] the government of the District of Columbia had a right to appeal interlocutory orders, even though the defendant did not. The defense argued that the history showed a legislative intent that changes of defense appellate rights effected a corresponding change in government appealability, by the mutuality provision of sec. 935 of the D.C. Code of 1901. The history of the D.C. Code has been summarized in the text discussing the *Carrol* case.[197]

Just as prohibition or inconvenience of direct defense appeal has motivated defense use of collateral review, alternatives to direct appeal have been adopted by prosecutors.[198] Examples are reindictments for similar offenses, trial by different sovereigns, and entry of nolle prosequi before attachment of jeopardy. Perhaps most dramatic is mandamus of the trial judge.[199] Certiorari to correct a record erroneously omitting certain objections by the state has been used,[200] and there has been attempted certiorari to quash acquittal.[201] The re-indictment of "continuing" offenses is another prosecutorial alternative to appeal.[202] The restrictions on the finality cases indicate the primacy of the Criminal Appeals

195. D.C. CODE § 23-105 (1951).

196. The involved District of Columbia Code history discussed in United States v. Carroll, 354 U.S. 394 (1957), in part led to the conclusion in United States v. Cefaratti, 202 F.2d 13 (D.C. Cir. 1953) that suppression orders could be appealed by the government as final orders. This conclusion was disapproved in *Carroll*, decided before enactment of 18 U.S.C. § 3731 (1970). *See* note 11 and accompanying text *supra*.

197. 354 U.S. 394 (1957). *See also* 21 GEO. WASH. L. REV. 631 (1953).

198. For a comprehensive list of prosecutorial strategies which may be substituted for the absence of a right to appeal see Comment, *The State Right to Appeal: Has Maine Been too Cautious?* 21 MAINE L. REV. 221 (1969). Some of these include: reindictment for a similar offence (Gore v. United States, 357 U.S. 386 (1958); Hogg v. New Jersey, 356 U.S. 464 (1958)); Nolle Prosequi (Kepner v. United States, 195 U.S. 100 (1904)); surrender to a different sovereign (United States v. Lanza, 260 U.S. 377 (1922)).

199. Will v. United States, 389 U.S. 90 (1967), a mandamus proceeding.

200. Comment, *Criminal Law—The Right of the State to Appeal in Criminal Cases*, 42 N.C.L. REV. 887, 903 (1964).

201. *See* note 176 and accompanying text *supra*.

202. *See* State v. Wilson, 234 N.C. 562, 67 S.E.2d 748 (1951).

Act, as do the generality of cases, like *Heath*,[203] which hold dismissals under Rule 48 not appealable under the Criminal Appeals Act.

VII. Comparison With State Laws

The law of the various states may be contrasted with federal limits on government appeal in order to put the federal tests in perspective. Retrial by a state upon remand after state appeal was permitted in *Palko v. Connecticut*,[204] but the rationale was nonincorporation of the bar against double jeopardy. On that rationale, discussion whether the Connecticut statutory scheme came within the notion of double jeopardy was dicta. But Justice Cardozo assumed that the statute did violate the double jeopardy principle. Subsequently, in *Benton v. Maryland*,[205] the United States Supreme Court ruled that the constitutional policy against double jeopardy had been incorporated by the Fourteenth Amendment and made applicable to the states. The Criminal Appeals Act and its judicial gloss may become the sole permissible pattern for all jurisdictions. That is not the only pattern existing.

Three patterns of prosecutorial appeal have been identified: complete prohibition of state appeal; appeal of questions of law (for example, demurrers), and of certain fact questions, not involving factual findings, on issues defined by substantive criminal law and subject to the policy against double jeopardy; and a right of appeal mutual in scope with defense appeal.[206] The moot appeal may be considered a fourth type, although it is something of an oddity.

Allowing the government a right of appeal mutual in scope with defense appeal includes the possibility of appeal from acquittal. This is rationalized in the state courts in two different ways. The Holmes theory of "continuing proceeding" is the first. Second is the Wisconsin view that jeopardy does not attach until affirmance of conviction by the highest reviewing authority.[207] The latter notion admits that a second trial on remand is a distinct hearing, but more candidly rejects the applicability of jeopardy analysis to state appeals.

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203. United States v. Heath, 260 F.2d 623 (1958).

204. 302 U.S. 319 (1937).

205. 395 U.S. 784 (1969).

206. Note, *Criminal Procedure—Right of State to Appeal*, 45 KEN. L.J. 628 (1957).

207. *See* Comment, *The State Right to Appeal: Has Maine Been too Cautious?* 21 MAINE L. REV. 221, 225-35 (1969).

The second of the patterns of state appeal schemes is the federal type of scheme, allowing state appeal of some non-substantive criminal law factual issues and of pure questions of law, notably rulings sustaining demurrers to charges. North Carolina is one example.[208] Rulings sustaining demurrers and delayed demurrers or motions in arrest of judgment may be appealed in that state, as may findings of unconstitutionality of a statute. Rulings granting motions "to quash" indictments may be appealed. These are interpreted in North Carolina to mean pleas in abatement and pleas in bar. Since factual issues are involved in state appeal from the quashing of an indictment in North Carolina, the issue of jeopardy has been noted in respect of that category of state appeal. Appeal of acquittal is possible only where special interrogatories have been propounded to, and determined by, the trier of fact. The appeal may not question the special findings but only the judgment entered thereon. Grants of motions for new trial were made appealable in North Carolina by statutory amendment overruling case law to the contrary. The issue whether the alleged evidence is "newly discovered" is the reviewable issue.[209]

VIII. THE RECENT REVISIONS OF THE CRIMINAL APPEALS ACT

The first paragraph of 18 U.S.C. § 3731 as revised replaces the first seven paragraphs of the prior 18 U.S.C. § 3731.[210] Pleading categories are not mentioned, but the following proviso is included: "No appeal shall lie where the double jeopardy clause of the U.S. Constitution prohibits further prosecution." The jeopardy bar is now stated as an explicit limit to all appeals under the first paragraph whereas "jeopardy" had been mentioned before only in the fourth paragraph, dealing with pleas in bar. That would suggest that appeals are available to the government less frequently now than prior to January 2, 1971. That is, by simply referring us to the Constitution, the statute arguably returns us to the point at

208. Comment, *Criminal Law—The Right of the State to Appeal in Criminal Cases*, 42 N.C.L. REV. 887, 888-903 (1964).

209. If such remedy is not constitutionally required, the criticism of state appeal is in a sense ungrateful. There is no federal requirement that appeal from conviction be available [McKane v. Durston, 153 U.S. 684 (1894)] but only that, when afforded at all, it be afforded on an equal protection basis. [Griffin v. United States, 351 U.S. 12 (1956)]. The same view should apply to collateral review. One appellate defense counsel, however, suggested in Case v. Nebraska, 381 U.S. 336 (1965), that the Supreme Court mandate a state supreme court to establish a system of post-conviction hearings to vindicate federal constitutional rights of convicted prisoners.

210. 18 U.S.C. § 373 (1970). Compare 18 U.S.C. § 3731 (1964).

which the law existed in *United States v. Sanges*,[211] where even review of a ruling calling a statute in question under the Constitution was declined by the Supreme Court in a ruling based, at least in part, on regard for the policy against repeated jeopardy. House and Senate reports are of no help.[212] But the Conference Report,[213] less than one page long, suggests that the Congress appreciated the breadth of the concept of "jeopardy," and used it advisedly. The revision of the Criminal Appeals Act originated in the Senate, where it had been proposed to allow government appeal of "any decision or order terminating a prosecution except an acquittal." But the conference substituted the reference to the jeopardy concept, a notion which, as we have seen, includes more than acquittal. Nor have we seen the last of the phrase "put in jeopardy" which occurs now in the second paragraph of 18 U.S.C. § 3731 for the first time.

The last clause of the Criminal Appeals Act, urging liberal construction, is not explained in the Conference Report, but is merely repeated without comment. Perhaps it was inserted as a sop to the senators whose version not mentioning "jeopardy" but only "acquittal" was overhauled. The clause is exhortatory only and, at that, may encourage restriction of government appeal if one first concludes that the purpose of the amendment was restriction of government appeal.

The undisputed effect of the amendment is to eliminate the distinction between Supreme Court jurisdiction and court of appeals jurisdiction. Apparently it is the intent of Congress to also eliminate any reference to the pleading categories used to express that distinction. But, as we noted in our discussion of *United States v. Brodson*,[214] *allocation* of business between Supreme Court and the appellate courts is a question distinct from the scope of government appeals over all. Elimination of reference to pleading categories may signify a change only in allocation of business, while saying nothing about the scope of government appeal.

On balance, it is fair to conclude that the courts of appeal have

211. 144 U.S. 310 (1892). However, United States v. Sisson, 399 U.S. 267 (1970), suggests, without citing authority, that the attachment of jeopardy would not, in all cases involving motions in bar, constitutionally prevent government appeal. The discussion brings to mind the dissent of Justice Holmes in Kepner v. United States, 195 U.S. 100 (1904).

212. H.R. REP. No. 1174, 91st Cong., 1st Sess. (1969); S. REP. No. 1253, 91st Cong., 1st Sess. (1969).

213. H.R. REP. No. 1768, 91st Cong., 1st Sess. 21 (1969).

214. 234 F.2d 97 (7th Cir. 1956).

all the jurisdiction which both they and the Supreme Court had under the Criminal Appeals Act prior to January 2, 1971, but no more than the sum of the two. The amended act and its sparse legislative history provide no "clear legislative mandate"[215] to expand the constitutionally fragile and indefinitely located boundaries of the Criminal Appeals Act.[216]

IX. SAFEGUARDS TO ABUSE OF GOVERNMENT APPEAL

The question of treatment of the accused during the pendency of prosecutorial appeal arises under all schemes. Congress noted the hardship to the accused in authorizing government appeal.[217] The protection provided includes expedited appeal and release of the accused on his own recognizance. Advocates of state appeals often concede some of these provisions as necessary. But keeping guilty criminals in jail is a major motive of some advocates, discipline of defense counsel another motive; greater care by trial judges is also sought.[218]

As the intensity of such proponents indicates, government appeal in criminal cases presents the danger of abuse, and appeal of dismissal for want of speedy trial presents special dangers of abuse. Such dismissal implies a finding of unreasonable prosecutorial delay and unfair restriction of the accused. Permitting appeal by

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215. *See* note 1 and accompanying text, *supra*.

216. "Indefinite" may be an understatement. In what will be one of the last cases decided under the act prior to the amendment of January 2, 1971, United States v. Horn, 400 U.S. 470 (1971), the Supreme Court could not agree on an opinion. The government had appealed after a mistrial, declared by the judge, *sua sponte*, after jury empanelment, for failure to advise government witnesses of their Fifth Amendment rights, was ruled former jeopardy by the trial court upon motion to dismiss the re-information. Three justices agreed that the court had jurisdiction and voted to sustain the government appeal. Two justices disputed jurisdiction, but voted to affirm the dismissal on the merits of the appeal when the jurisdictional issue went the other way. The problem lies in the fact that four justices found jurisdiction (implying that the defendant had not been put in jeopardy) but found no merit to the government appeal (implying that the dismissal was correct because the defendant had been put in jeopardy).

217. The opinion in United States v. Apex Distributing Co., 270 F.2d 747 (9th Cir. 1959), notes the legislative concern, in committee reports attending the 1942 expansion of the Criminal Appeals Act, to limit hardship on the accused.

218. The effect of prosecutorial appeal on public safety or deterrence of crime is uncertain. Presentation of general issues of importance in a concrete fashion, is, in any case, a second reason for permitting prosecutorial appeal that goes beyond removal of particular defendants from the community. Vicarious discipline of defense counsel by punishment of the client is unfair and likely not effective. The impossibility, in a positivistic sense, for the trial judge to err on the side of the accused where government appeal is not available creates a theoretical bias. However, complaint of trial level bias in favor of defendants and against the prosecution is not frequently heard.

the prosecution in such cases allows further delay to review a finding of delay which has already been found unreasonable, and gives the prosecutor an opportunity to penalize the accused for criticizing the inefficiency or unfairness of the prosecution. For those reasons release of the accused on recognizance and the other protections in the Criminal Appeals Act should be most vigorously insisted upon, as a condition to prosecutorial appeal in the case of dismissal for want of speedy trial.