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The Double Jeopardy Clause and Mistrials Granted on Defendant's Motion: What Kind of Prosecutorial Misconduct Precludes Reprosecution

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Comment

The Double Jeopardy Clause and Mistrials Granted on Defendant's Motion: What Kind of Prosecutorial Misconduct Precludes Reprosecution?

I. INTRODUCTION

The double jeopardy clause of the fifth amendment provides that no person shall "be subject to the same offence to be twice put in jeopardy of life or limb."[1] This constitutional proscription has been described as "one of the oldest ideas found in western civilization,"[2] with roots traceable to early Greek, Roman, and Canon Law.[3] Application of this seemingly straightforward command has, however, often proved to be a most difficult task for the judiciary, and the principle has perhaps engendered more confusion and uncertainty than any other constitutional provision.[4]

Although the protection originally afforded by the double jeopardy clause was narrowly circumscribed,[5] judicial interpretation has resulted in considerable expansion of the principle's safeguards. Leading cases have established that the proscription against double jeopardy is

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1. U.S. CONST. amend. V. The prohibition against double jeopardy applies not only to felonies but also to misdemeanors. J. SIGLER, DOUBLE JEOPARDY 20 (1969). The primary purpose served by the rule is analogous to that served by the doctrines of res judicata and collateral estoppel—to preserve the finality of judgments. *See* Crist v. Bretz, 437 U.S. 28, 33 (1978). *See also* Mayers & Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 HARV. L. REV. 1 (1960).

2. Bartkus v. Illinois, 359 U.S. 121, 151 (1959) (Black, J., dissenting).

3. *Id.* at 151-55 (Black, J., dissenting). *See also* United States v. Jenkins, 490 F.2d 868, 870-71 (2d Cir. 1973), *aff'd*, 420 U.S. 358 (1975). In *Jenkins*, Judge Friendly observed that "the draftsmen of the Bill of Rights intended to import into the Constitution the Common Law protections much as they were described by Blackstone." *Id.* at 873.

4. In fashioning applicable standards in this area, courts have often created distinctions that border on the imperceptible, and the area is replete with subtle anomalies. *See generally* Schulhofer, *Jeopardy and Mistrials*, 125 U. PA. L. REV. 449 (1977) [hereinafter cited as Schulhofer], in which the author notes that "the complexity of the competing interests and the infinite variety of circumstances in which they arise have continued to impede formulation of a standard whose application can be at once satisfying and predictable." *Id.* at 451.

5. *See* Schulhofer, *supra* note 4, at 452-55. *See also* Green v. United States, 355 U.S. 184, 201-02 (1957) (Frankfurter, J., dissenting) (debates by framers of fifth amendment provide little indication of the intended scope of double jeopardy protection).

not only designed to provide protection against multiple prosecutions[6] and punishment for the same offense,[7] but is also intended in certain instances to preclude retrial if the original prosecution ends in mistrial.[8] This prohibition against reprosecution represents a constitutional policy of finality in criminal proceedings[9] and seeks to reduce the occasions on which criminal defendants may be made to "run the gauntlet twice."[10]

One particularly troublesome aspect of the constitutional prohibition against double jeopardy emerges when a trial court declares a mistrial on the motion of the defendant. The ordinary approach in such instances has been to permit reprosecution, even if the defendant's mistrial motion was necessitated by prosecutorial or judicial error.[11] Justification of this permissive attitude toward reprosecution is premised upon the defendant's control of the situation: in the absence of a sua sponte mistrial declaration by the trial court, the defendant has primary command over the course to be followed in the event of error and may choose to retain the first jury and perhaps obtain an acquittal.[12] As a general rule, then, a defendant's mistrial request

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6. Situations that implicate the policy against multiple prosecutions include: (a) reprosecution after a final verdict is reached in a previous trial; (b) reprosecution after the first trial ends without a verdict; (c) successive prosecutions by different jurisdictions; (d) governmental appeal from a trial court's decision in the defendant's favor. *See* Commonwealth v. Bolden, 472 Pa. 602, 620, 373 A.2d 90, 98 (1977) (plurality opinion). *See also Ex Parte* Lange, 85 U.S. (18 Wall.) 163 (1874).

7. *See* Note, *Twice In Jeopardy*, 75 YALE L.J. 262, 266, n.13 (1965) (it is clear that preventing multiple punishment for the same offense was foremost in the minds of the framers of the double jeopardy clause). The Supreme Court has indicated that multiple punishment for the same offense at a single trial is forbidden by the double jeopardy clause. *See Ex Parte* Lange, 85 U.S. (18 Wall.) 163 (1874), in which the Court stated that "the Constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried." *Id.* at 173.

8. In Commonwealth v. Bolden, 472 Pa. 602, 619, 373 A.2d 90, 98 (1977) (plurality opinion), the Pennsylvania Supreme Court noted that "[t]he leading cases construing the double jeopardy clause have emphasized that its purpose is to prevent the retrial itself, not merely conviction and punishment." *See also* United States v. Ball, 163 U.S. 662, 669 (1896) (the prohibition is not against twice being punished, but against twice being put in jeopardy).

9. *See* United States v. Jorn, 400 U.S. 470, 479 (1971).

10. Gori v. United States, 367 U.S. 364, 373 (1961) (Douglas, J., dissenting).

11. *See* United States v. Jorn, 400 U.S. 470, 485 (1971); United States v. Kessler, 530 F.2d 1246, 1255 (5th Cir. 1976).

12. United States v. Jorn, 400 U.S. 470, 484-85 (1971). *See also* United States v. Dinitz, 424 U.S. 600, 608-09 (1976); United States v. Martin, 561 F.2d 135, 138 (8th Cir. 1977); Commonwealth v. Bolden, 472 Pa. 602, 639, 373 A.2d 90, 108 (1977) (plurality opinion). This situation has been contrasted with that which arises when the trial court declares the mistrial sua sponte, thereby depriving the defendant of his valued right to have his trial completed by a particular tribunal.

removes any constitutional barrier to retrial,[13] since a retrial is necessary to protect the public's interest in fair trials designed to end in just judgments.[14] By voluntarily requesting a mistrial declaration, the defendant may be said to have waived his constitutional rights against twice being placed in jeopardy.[15]

Although the general rule does implement a policy of waiver when a mistrial is granted on the defendant's motion, reprosecution may nevertheless be precluded when the defendant's request for a mistrial is attributable to governmental *overreaching*.[16] However, no United States Supreme Court decision has actually barred reprosecution following a successful defense motion for mistrial because of governmental misconduct, and therefore the type of misconduct embraced by

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13. United States v. Jorn, 400 U.S. 470, 485 (1971) (where circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error). *Accord* United States v. Dinitz, 424 U.S. 600 (1976); United States v. Wilson, 534 F.2d 76 (6th Cir. 1976); United States v. DiSilvio, 520 F.2d 247 (3d Cir. 1975).

14. United States v. Kessler, 530 F.2d 1246, 1255 (5th Cir. 1976). *See* Illinois v. Somerville, 410 U.S. 458, 470 (1973); Wade v. Hunter, 334 U.S. 684, 689 (1949). *See also* note 28 *infra*.

15. *See* Comment, *Double Jeopardy and Reprosecution After Mistrial: Is the Manifest Necessity Test Manifestly Necessary?* 69 NW. U.L. REV. 887, 889 (1975) [hereinafter cited as *Is the Manifest Necessity Test Manifestly Necessary*] (author suggests that if mistrial is declared upon motion by the defendant, retrial presents no greater problem than retrial after appeal). *See also* Leigh v. United States, 329 F.2d 883 (D.C. Cir. 1964) (a defendant cannot plead former jeopardy when the jury before whom he was first on trial was discharged on his own motion or with his consent); United States v. Burrell, 324 F.2d 115 (7th Cir. 1963) (defendant cannot successfully plead the bar of double jeopardy when mistrial was granted on his own motion and with his express consent); Roberts v. United States, 348 F. Supp. 563, 567 (E.D. Mo. 1972) (double jeopardy claim waived solely because all defendants made motion for mistrial). *But see* Comment, *Retrial After Mistrial: The Double Jeopardy Doctrine of Manifest Necessity*, 45 MISS. L.J. 1272, 1278 (1974) [hereinafter cited as *Retrial After Mistrial*] ("it is difficult to believe that the substantive rights of defendants may be determined by which attorney first gains the attention of the trial judge to move for mistrial").

16. United States v. Jorn, 400 U.S. 470, 485 n.12 (1971) (where a defendant's mistrial motion is necessitated by judicial or prosecutorial impropriety designed to avoid an acquittal, reprosecution might well be barred). *See* United States v. Romano, 482 F.2d 1183, 1188 (5th Cir. 1973), *cert. denied*, 414 U.S. 1129 (1974). *See also* United States v. Kessler, 530 F.2d 1246, 1255 (5th Cir. 1976) (the mere fact that the defendant has requested a mistrial should not be controlling); Note, *Double Jeopardy—Mistrial Granted Upon Motion by Defendant—Standard for Reprosecution*, 42 MO. L. REV. 485, 490 (1977) [hereinafter cited as *Standard for Reprosecution*]; Comment, *The Double Jeopardy Dilemma: Reprosecution After Mistrial on Defendant's Motion*, 63 IOWA L. REV. 975 (1978) [hereinafter cited as *The Double Jeopardy Dilemma*].

the term *overreaching* remains an open question. As a result, a dichotomy in views has emerged concerning the kind of misconduct that will subordinate the public interest in convicting those guilty of crimes to the defendant's right to be free from the mental and physical anxiety associated with a second trial.[17] Both state and federal courts apparently agree that the double jeopardy clause bars reprosecution when the first proceeding has been aborted at the defendant's request because of intentional misconduct by the prosecution designed to provoke a mistrial request or to avoid an acquittal.[18] Several courts have recently suggested, however, that the prosecution should be held to a stricter standard of conduct, and reprosecution precluded even in the absence of such egregious prosecutorial activity.

This comment will analyze the delicate problems raised by the permissibility of reprosecution where prosecutorial misconduct has been the basis of a successful defense motion for mistrial. Initially, this comment will examine the historical development of double jeopardy protection and the significance and implications of the important United States Supreme Court decisions which have considered in general the constitutional permissibility of retrial following mistrial. Thereafter, those decisions which have suggested that the prosecution should be held to a higher standard of conduct will be discussed, and the Pennsylvania experience analyzed as an illustration of the problems and uncertainty confronted by courts that have attempted to resolve the issue. Finally, this comment will suggest an appropriate resolution of the conflicting interests at stake.

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17. *See* Green v. United States, 355 U.S. 184 (1957). In *Green*, Justice Black concisely articulated the fundamental underpinnings of the double jeopardy clause as follows:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the state with all its resources and power should not be able to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Since *Green*, courts have consistently seized upon this influential passage for guidance in determining whether to subject the defendant to a second prosecution.

18. *See, e.g.*, Commonwealth v. Warfield, 424 Pa. 555, 227 A.2d 177 (1967) (where district attorney openly acknowledged that he had deliberately caused mistrial in first degree murder case, and mistrial was not caused by any act of the defendant, jeopardy attached and reprosecution was barred). Aside from *Warfield*, however, there is a noticeable absence of case law in which a court has barred retrial because of the existence of intentional misconduct by the prosecution. *See also Standard for Reprosecution*, *supra* note 16, at 490 (the few cases in which the conduct of the prosecution has been held to bar reprosecution seem to indicate that the prosecutor's intent to precipitate a mistrial must be obvious).

II. HISTORICAL DEVELOPMENT OF DOUBLE JEOPARDY PROTECTION

At early common law jeopardy did not attach until a final verdict was rendered.[19] The English system preserves this common law rule of finality and thus avoids the difficulties of reprosecution after mistrial.[20] In the United States, however, a rule quite different from that applied under the English common law has emerged. Despite finding little enlightenment in the debates of the framers of the United States Constitution regarding the intended scope of double jeopardy protection and no evidence to suggest that the framers intended to preclude reprosecution in those instances in which the trial is prematurely terminated,[21] the United States Supreme Court has nevertheless recognized that the proscription against double jeopardy must extend to trials aborted after the initiation of formal proceedings but before a final verdict has been reached.[22] By ascertaining that jeopardy attaches at a time before a final verdict has been rendered, the principle in the United States reflects a greater concern for the rights of the individual defendant by seeking to protect him from an abuse of the government's awesome prosecutorial powers.[23]

As a result, in the United States, jeopardy attaches when the jury has been impaneled and sworn,[24] and in a nonjury trial at the time at

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19. *See* 4 W. BLACKSTONE, COMMENTARIES *335-36 and n.p. (3d Kerr ed. 1862). That finality was a requirement was implicit in the four recognized pleas at bar—*autrefois acquit, autrefois convict, autrefois attaint,* and former pardon. *Id.* at *335-38. For a discussion of the use of these pleas in English and American Law, see *Ex Parte* Lange, 85 U.S. (18 Wall.) 163, 169-74 (1873). *See also* J. ARCHBOLD, PLEADING, EVIDENCE & PRACTICE IN CRIMINAL CASES §§ 435-60 (35th ed. T.R.F. Butler & M. Garsia 1969).

20. For a discussion of the English rule and the suggestion that this was likewise the intent of the framers of the Constitution, see Note, *Double Jeopardy: The Reprosecution Problem,* 77 HARV. L. REV. 1272, 1273 (1964) [hereinafter cited as *The Reprosecution Problem*]. *See also Is the Manifest Necessity Test Manifestly Necessary, supra* note 15, at 888.

21. *See* Green v. United States, 355 U.S. 184, 201-02 (1957) (Frankfurter, J., dissenting). *See also* R. PERKINS, CRIMINAL LAW AND PROCEDURE 805 (2d ed. 1959); *The Reprosecution Problem, supra* note 20, at 1276-77.

22. *Retrial After Mistrial, supra* note 15, at 1272.

23. It has been suggested that the American system is more consistent with the aims of double jeopardy protection. *Is the Manifest Necessity Test Manifestly Necessary, supra* note 15, at 888. The English system clearly emphasized the vindication of society's interest in prosecuting and punishing alleged criminals; the American system, on the other hand, displays a much greater sensitivity for the individual rights of the criminal defendant.

24. It is generally recognized that Downum v. United States, 372 U.S. 734 (1963), is explicit authority for the proposition that jeopardy attaches when the jury is impaneled and sworn. That jeopardy attaches when the jury is impaneled and sworn is predicated upon a recognition of the need to protect the interest of an accused in retaining a chosen jury. *See* Crist v. Bretz, 437 U.S. 28, 38 (1978) (the federal rule that jeopardy attaches

which the first evidence is presented.[25] Once jeopardy has attached, the general constitutional mandate operates to prevent the government[26] from reprosecuting a defendant regardless of whether the trial ended in a verdict or was aborted prior to a verdict.[27] Although this proscription against double jeopardy could have been construed as an absolute one, the American system of criminal justice has attempted to strike a delicate balance between the rights of the individual and the competing societal interests. If the original proceeding has been aborted prior to verdict, the propriety of any subsequent prosecution must be evaluated in light of the competing equities of bringing the guilty to justice[28] while securing to the defendant his rights to protection from harassment and anxiety and to have his trial completed by a particular tribunal.[29] Thus, once jeopardy has attached, the accused may thereafter be retried only if one of the recognized exceptions that will defeat a plea of former jeopardy can be shown.[30]

III. *UNITED STATES V. PEREZ* AND THE DEVELOPMENT OF THE MANIFEST NECESSITY EXCEPTION

In 1824, the United States Supreme Court first considered the permissibility of reprosecution after mistrial in the landmark decision of *United States v. Perez*,[31] in which the Court articulated a standard that

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when the jury is impaneled and sworn is an integral part of the constitutional guarantee against double jeopardy and therefore is applicable to the states through the fourteenth amendment). *See also* United States v. Martin Linen Supply Co., 430 U.S. 564 (1977).

25. Serfass v. United States, 420 U.S. 377, 388 (1975); McCarthy v. Zerbst, 85 F.2d 640, 642 (10th Cir.), *cert. denied*, 299 U.S. 610 (1936); Corneno v. United States, 48 F.2d 69 (9th Cir. 1931).

26. The double jeopardy provision of the fifth amendment was made directly applicable to the states in Benton v. Maryland, 395 U.S. 784 (1969). Prior to *Benton*, federal double jeopardy standards were not applicable against the states. Only when a kind of jeopardy subjected a defendant to "a hardship so acute and shocking that our polity will not endure it" did the fourteenth amendment apply. *See id.* at 793 (citing Palko v. Connecticut, 302 U.S. 319, 328 (1937)).

27. *See Retrial After Mistrial*, *supra* note 15, at 1272. *See also* Illinois v. Somerville, 410 U.S. 458 (1973); United States v. Jorn, 400 U.S. 470 (1971); Downum v. United States, 372 U.S. 734 (1963).

28. *See The Reprosecution Problem*, *supra* note 20, at 1274 (pronouncement of the policies to be served by the double jeopardy clause should not obscure the presence of important countervailing considerations—the public's interest in fair trials designed to end in just judgments and in preventing the guilty from going unpunished).

29. *See Is the Manifest Necessity Test Manifestly Necessary*, *supra* note 15, at 889.

30. *See* notes 39-42 and accompanying text *infra*. *See also* notes 11-15 and accompanying text *supra*.

31. 22 U.S. (9 Wheat.) 579 (1824).

has since become the fountainhead of double jeopardy jurisprudence in the context of mistrials. In *Perez*, jurors who were unable to agree on a verdict were discharged without the consent of the defendant. When the defendant was thereafter held for retrial, his double jeopardy plea was rejected, and he appealed his conviction on those grounds. The Supreme Court concluded that reprosecution was not barred because the trial court had properly declared the mistrial.[32]

Speaking through Justice Story, the Court stated that "the law has invested Courts of Justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated."[33] The Court emphasized that the trial judge was to exercise sound discretion when determining whether the particular circumstances warranted a mistrial declaration.[34] Moreover, this discretion, the Court warned, "ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes."[35]

The inherent vagueness of the *Perez* standard has spawned divergent views regarding its intended meaning, and has historically enabled the Court to accommodate differing perceptions of the double jeopardy proscription without noticeably violating the mandate of *Perez*.[36] The language in *Perez* had suggested that mistrial declarations would be carefully scrutinized by appellate courts, and that reprosecution would be permitted only when a true "manifest necessity" existed for the mistrial declaration. However, since the language in *Perez* also required trial judges to exercise sound discretion and empowered them to declare a mistrial for plain and obvious causes only, appellate courts

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32. *Id.* at 580. For a more complete discussion of the implications of *Perez*, see *Is the Manifest Necessity Test Manifestly Necessary*, *supra* note 15, at 893, in which it is suggested that there are three possible interpretations of the *Perez* standard. The first standard is that either "manifest necessity" or the "ends of public justice" may justify a mistrial declaration. A second interpretation results in a test in which only "manifest necessity" justifies declaring a mistrial; the "ends of public justice" are viewed as justifying not the mistrial declaration, but rather subjection of the accused to a second jeopardy. The third interpretation requires the concurrence of both factors.

33. 22 U.S. (9 Wheat.) at 580.

34. *Id.*

35. *Id.*

36. *See generally Is the Manifest Necessity Test Manifestly Necessary*, *supra* note 15, at 890. The Supreme Court has also repeatedly emphasized that application of the manifest necessity standard does not lend itself to rigid rules, and each case must "turn on the particular facts." *See* Downum v. United States, 372 U.S. 734, 737 (1963). *Accord*, Illinois v. Somerville, 410 U.S. 45 (1973). *See also* United States *ex rel.* Russo v. Superior Court, 483 F.2d 7, 13 (3d Cir.), *cert. denied*, 414 U.S. 1023 (1973); Commonwealth v. Shaffer, 447 Pa. 91, 97, 288 A.2d 727, 731, *cert. denied*, 409 U.S. 867 (1972).

began to display an inordinate amount of deference to a trial court's decision to abort a criminal prosecution because of manifest necessity, and essentially engaged in a process of rubber-stamping the decisions of trial judges.[37] *Perez* thus came to be recognized for the proposition that the authority of appellate courts to question the discretion of the trial court in declaring a mistrial is narrowly circumscribed.[38] As a result, circumstances in which a second trial may be held even though the first jury was discharged without reaching a verdict and without the defendant's consent include, *inter alia*, jury deadlock,[39] jury bias,[40] and illness of the judge[41] or of a member of the jury.[42]

In the last two decades, however, there has emerged in the Court a discernible trend toward prescribing certain flexible guidelines for lower courts to utilize in determining whether to abort a trial without incurring the risk that the defendant will be insulated from reprosecution. Unfortunately, the Court's pronouncements in attempting to clarify this area have lacked consistency, and although the manifest necessity standard has been adhered to repeatedly, the emergence of these conflicting interpretations has created a considerable amount of confusion in the lower courts.

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37. *See, e.g.*, Scott v. United States, 202 F.2d 354 (D.C. Cir.), *cert. denied*, 344 U.S. 879 (1952); United States v. Potash, 118 F.2d 54 (2d Cir.), *cert. denied*, 313 U.S. 584 (1941).

38. *See* Gori v. United States, 367 U.S. 364 (1961). Perhaps the most egregious application of this discretionary standard occurred in Brock v. North Carolina, 344 U.S. 424 (1953). In *Brock*, the trial judge declared a mistrial after two of the prosecution's corroborating witnesses refused to testify, invoking the privilege against self-incrimination. Although it was clear that the mistrial was declared to enable the prosecutor to benefit from the testimony of the witnesses after pending charges against them were resolved, the Supreme Court found no constitutional bar to retrial. *See generally* Schulhofer, note 4 *supra* (suggesting that the large degree of deference exhibited to trial judges is often misplaced).

39. *See, e.g.*, Keerl v. Montana, 213 U.S. 135 (1909); Logan v. United States, 144 U.S. 263 (1892); United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824).

40. *See, e.g.*, Thompson v. United States, 155 U.S. 271 (1894) (reprosecution not barred when mistrial declared following discovery that one member of jury was disqualified because a member of the grand jury that had indicted the defendant); Simmons v. United States, 142 U.S. 148 (1891) (juror disqualified because acquainted with the defendant); United States v. Cimino, 224 F.2d 274 (2d Cir. 1955).

41. *See, e.g.*, Freeman v. United States, 237 F. 815 (2d Cir. 1916); Commonwealth v. Robson, 461 Pa. 615, 337 A.2d 573, *cert. denied*, 423 U.S. 934 (1975) (illness of the judge preventing continuation of the trial for a period of several weeks at the least constitutes manifest necessity for the declaration of a mistrial).

42. *See, e.g.*, United States v. Potash, 118 F.2d 54 (2d Cir.), *cert. denied*, 313 U.S. 584 (1941) (mistrial declaration upheld because juror was "incapacitated to continue"); Stocks v. State, 91 Ga. 831, 18 S.E. 847 (1893) (illness in the family of a juror).

A. Gori v. United States: Vesting Maximum Discretion in the Trial Judge

The analytical point of departure is *Gori v. United States*,[43] decided in 1961, in which the Court first undertook to define the "manifest necessity" test. In doing so, the Court established a standard for determining the propriety of a mistrial declaration that would vest nearly unbridled discretion in the trial judge when making the appropriate determination.[44] The trial judge in *Gori* declared a mistrial sua sponte and with neither approval of nor objection by the defendant's counsel, apparently because of his belief that the line of questioning employed by the prosecuting attorney presaged inquiry calculated to inform the jury of other crimes by the accused. Speaking through Justice Frankfurter, the Supreme Court acknowledged that since the record on its face failed to reveal the basis for the mistrial declaration, the reasons which induced the trial court to declare the mistrial were unclear;[45] but the Court nevertheless deferred to the discretion of the trial judge.[46] In reaching its conclusion, the Court stated that it had consistently declined to sharply scrutinize the exercise of that discretion since the trial judge is best situated to make such a reasoned decision.[47] More importantly, however, the Court emphasized its unwillingness to bar retrial "where it clearly appears that a mistrial has been granted in the sole interest of the defendant."[48]

Justice Douglas, joined by Justices Black and Brennan, and Chief Justice Warren, sharply disagreed with the majority's analysis of the scope of discretion conferred by *Perez* and its broad application of the manifest necessity standard.[49] Although the dissenters agreed that the propriety of a mistrial declaration rests within the sound discretion of the trial court, they admonished the majority by reminding that such discretion should be narrowly confined within certain guidelines and exercised "only in very extraordinary and striking circumstances."[50]

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43. 367 U.S. 364 (1961).

44. The Court stated: "It is also clear that 'This Court has long favored the rule of discretion in the trial judge to declare a mistrial and to require another panel to try the defendant if the ends of justice will be best served . . . .'" *Id.* at 368 (citing Brock v. North Carolina, 344 U.S. 424, 427 (1953)). *See* notes 37-38 and accompanying text *supra*.

45. *Id.* at 365-66.

46. *Id.* at 368.

47. *Id.*

48. *Id.* at 369.

49. *Id.* at 370 (Douglas, J., dissenting).

50. *Id.* at 371-72 (citing United States v. Coolidge, 25 F. Cas. 622 (No. 14,858) (C.C.D. Mass. 1815)).

B. Downum and Jorn: Imposing Constraints Upon the Trial Judge's Discretion While Establishing More Concrete Guidelines

The dissent in *Gori* foreshadowed the outcome of the Court's 1963 decision in *Downum v. United States*,[51] in which it held for the first time that a second prosecution was barred following a mistrial declaration. In *Downum*, the trial judge discharged the jury on the prosecution's motion and over the defendant's objection when a key prosecution witness failed to appear in court.[52] When a second jury was impaneled two days later, the defendant pleaded double jeopardy, but his plea was overruled and a conviction followed. A majority of the Court reversed that conviction,[53] however, and, speaking through Justice Douglas, again emphasized that the application of the constitutional guarantee against double jeopardy is not limited to extreme instances. The trial judge's discretion to discharge the jury, the Court reasoned, is to be exercised only when there is an "imperious necessity" to do so.[54] The Court acknowledged that there are times when a defendant's valued right to have his trial completed by a particular tribunal must be subordinated to the public interest,[55] but maintained that in evaluating the competing interests any doubt about the propriety of a mistrial declaration should be resolved in favor of the liberty of the citizen.[56] Accordingly, since the mistrial declaration in *Downum* was subject to prosecutorial manipulation because it provided the state with a more favorable opportunity to convict the defendant at a subsequent trial, reprosecution was clearly impermissible under the double jeopardy clause.[57]

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51. 372 U.S. 734 (1963). This change in the Court's philosophy was probably attributable to the departure of Justices Whittaker and Frankfurter, members of the majority in *Gori*, who were replaced by Justices White and Goldberg. Justice Goldberg became the fifth member of the majority in *Downum*.

52. *Id.* at 735.

53. The majority in *Downum* included Justices Douglas, Black, Brennan, Goldberg, and Chief Justice Warren. Justices Clark, Harlan, Stewart, and White dissented.

54. *Id.* (citing Wade v. Hunter, 336 U.S. 684 (1949)).

55. *Id.*

56. *Id.* at 738. Although the Court's decision in *Downum* apparently conflicted with the broad discretionary standard announced in *Gori*, at least one commentator has suggested that *Downum* was not a departure from the *Gori* standard of review, but rather an application of that standard to a particular series of events. *See* Comment, *Mistrial and Double Jeopardy*, 49 N.Y.U. L. REV. 937, 943 (1974) [hereinafter cited as *Mistrial and Double Jeopardy*]. *But see The Reprosecution Problem*, *supra* note 20, at 1278-79 (although *Gori* and *Downum* are theoretically reconcilable, the cases cannot be reconciled on their facts).

57. 372 U.S. at 737.

In 1971, a plurality of the Court[58] in *United States v. Jorn*[59] reaffirmed the position it had adopted in *Downum* of requiring appellate courts to carefully scrutinize the appropriateness of the trial court's mistrial declaration.[60] In *Jorn*, the defendant was tried for willfully assisting in the preparation of fraudulent income tax returns. Among the witnesses prepared to testify for the government were five taxpayers whose income tax returns the defendant had allegedly falsely prepared. After the first of these witnesses was called, but prior to the commencement of direct examination, defense counsel suggested that these witnesses be warned of their constitutional rights. Although the initial witness expressed a willingness to testify and informed the court that he had been apprised of his rights when first contacted by the Internal Revenue Service, the trial judge indicated that he did not believe any warnings had been given and refused to permit the witness to testify until he had consulted an attorney.[61] When the trial judge learned that the prosecution intended to call four other similarly situated witnesses, he declared a mistrial sua sponte to afford each of the witnesses an opportunity to consult with counsel.[62] In upholding the lower court's dismissal of the information on the ground of former jeopardy, the Court emphasized the defendant's right to have his trial completed by a particular tribunal.[63] Justice Harlan maintained that a mistrial declaration imposes an inordinate amount of strain upon a defendant regardless of the trial judge's motivation.[64] He concluded, therefore, that the double jeopardy clause commands trial judges to scrupulously examine viable alternatives before declaring a mistrial.[65]

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58. The opinion of the Court in *Jorn* is technically a plurality opinion since only four of the Justices—Harlan, Douglas, Marshall, and Burger—could agree on the threshold issue of appealability. Justices Black and Brennan believed that the Court lacked proper jurisdiction to reach the merits of the case. But because the Court decided to reach the merits, they concurred in the judgment. The dissenting Justices—Blackmun, Stewart, and White—agreed with the plurality on the jurisdiction issue, but dissented from the plurality's double jeopardy analysis. In light of the fact that only a plurality of the Court could agree in *Jorn*, not all lower courts have followed the decision when resolving similar double jeopardy issues. *See, e.g.*, Baker v. State, 15 Md. App. 73, 87-89, 289 A.2d 348, 356-58 (Ct. Spec. App. 1972). *But see* Somerville v. Illinois, 401 U.S. 1007 (1971) (per curiam) (Court directed United States Court of Appeals for the Seventh Circuit to follow *Downum* and *Jorn* even though the latter was a plurality opinion).

59. 400 U.S. 470 (1971).

60. *Id.* at 486-87.

61. *Id.* at 472-73. The trial judge was, of course, apprehensive that the witnesses might incriminate themselves.

62. *Id.*

63. *Id.* at 480 (citing Wade v. Hunter, 334 U.S. 684, 689 (1949)).

64. *Id.* at 483. *Compare* the text accompanying note 48 *supra*.

65. *Id.* at 485 & 487.

Moreover, the Court indicated in *Jorn* that retrial might well be barred even when the mistrial was granted on the defendant's motion if the request had been precipitated by judicial or prosecutorial overreaching designed to avoid an acquittal.[66]

When viewed in combination with *Downum*, *Jorn* seemingly imposed considerable constraints upon the nearly unbridled discretion previously enjoyed by trial judges in determining whether to abort a trial prior to verdict. Any trial judge considering the possibility of declaring a mistrial would now have to evaluate all reasonable alternatives when deciding if the necessity of mistrial outweighs the defendant's right to have his trial completed by the originally impaneled jury.[67] Consequently, *Jorn* would appear to be the foremost effort undertaken by the Court to provide guidance for lower courts addressing the mistrial dilemma.

Jorn, however, was not the final pronouncement of the Court, and did not terminate the controversy over the appropriate interpretation of the *Perez* standard.[68] Shortly thereafter, a reorganization of the Court occurred,[69] and subsequent decisions cast considerable doubt upon the continued vitality of the *Downum-Jorn* standard.

C. Somerville and Dinitz: A Retreat by the Burger Court

In its 1973 decision of *Illinois v. Somerville*,[70] the Burger Court initially considered the double jeopardy problem in the context of retrial following a mistrial declaration. Because of a fatally defective indictment not curable under Illinois law, the trial court granted the prosecutor's motion for a mistrial after the jury had been impaneled and sworn.[71] A second indictment was then handed down and a second trial

66. *See id.* at 484-85 & n.12.

67. *See* 400 U.S. at 487. *See also* United States v. Grasso, 552 F.2d 46, 52 (2d Cir. 1977); United States v. Lansdown, 460 F.2d 164, 168-69 (4th Cir. 1972); United States v. Brahm, 459 F.2d 546, 549-50 (3d Cir.), *cert. denied*, 409 U.S. 873 (1972).

68. For a list of cases after *Jorn* that adopted the *Gori* analysis, see Comment, *Criminal Procedure—Double Jeopardy—Trial Courts Granted Broad Discretion To Determine "Manifest Necessity" for Mistrial*, 26 RUTGERS L. REV. 682, 688 n.55 (1973). Pennsylvania, however, has chosen to follow the plurality opinion in *Jorn*. *See* Commonwealth v. Shaffer, 447 Pa. 91, 288 A.2d 727 (1972) (prejudicial comment by prosecutor); Commonwealth v. Ferguson, 446 Pa. 24, 285 A.2d 189 (1971) (state witness absent); Commonwealth v. Richbourg, 442 Pa. 147, 275 A.2d 345 (1971) (prosecutor feared his own error would result in unjust acquittal).

69. Justices Harlan and Black were replaced by Justices Powell and Rehnquist.

70. 410 U.S. 458 (1973).

71. Under the applicable Illinois criminal statute, intent is a necessary element of the crime of theft, the omission of which rendered the indictment insufficient to charge a crime; the defect was thus a "jurisdictional" one. The defect would undoubtedly have been

commenced after the defendant's double jeopardy plea was overruled. The jury returned a verdict of guilty, sentence was imposed, and the Illinois courts upheld the conviction.[72] The defendant sought federal habeas corpus relief, but his petition was denied. The Supreme Court granted certiorari, and remanded the case for reconsideration in light of its intervening decision in *Jorn*.[73] On remand, the United States Court of Appeals for the Seventh Circuit granted the requested relief, concluding that retrial was precluded by *Jorn*.[74] But the Supreme Court reversed, and implicitly eradicated the standard of review established in *Downum* and *Jorn* by holding that retrial was justified on the ground of "furthering the ends of public justice."[75] In reaching its conclusion that the prosecutor's conduct erected no constitutional barrier to retrial, the Court, speaking through Justice Rehnquist, attempted to distinguish *Downum* and *Jorn* by suggesting that the delay caused by the mistrial declaration did not enable the prosecution to strengthen its case and by emphasizing that no less drastic alternatives were available.[76] Moreover, although the Court acknowledged that the possibility of prosecutorial manipulation would present a different question, it apparently perceived any misconduct by the prosecutor in *Somerville* to be, at most, mere negligence that should not preclude reprosecution.[77]

By relying upon the "ends of public justice" aspect of the *Perez* standard, rather than the "manifest necessity" aspect,[78] the *Somerville* Court resolved the process of balancing interests in evaluating the propriety of a mistrial declaration in favor of the state's interest in pros-

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raised on appeal, and the trial court therefore concluded that further proceedings were useless. *Id.* at 459-60.

72. *Id.* at 460.

73. *Id.*

74. United States *ex rel.* Somerville v. Illinois, 447 F.2d 733 (7th Cir. 1971), *rev'd*, 410 U.S. 458 (1973).

75. 410 U.S. at 464 & 469. *See* text accompanying note 33 *supra*.

76. *Id.* at 469. *See* note 71 *supra*. *See also The Double Jeopardy Dilemma*, *supra* note 16, at 981 n.73 (*Somerville* might have weak precedential value as a result of its unique factual situation based upon Illinois' established rules of criminal procedure).

77. 410 U.S. at 464. *See* text accompanying notes 97-98 *infra*. The *Somerville* Court thus placed the burden of suffering the ramifications of the government's negligence upon the defendant, and apparently reduced to a "mere weighty consideration" the defendant's right to have his trial completed by a particular tribunal. *Id.* at 471. The Court specifically noted that "the trial judge's action was a rational determination designed to implement a legitimate state policy, with no suggestion that the implementation of that policy in this manner could be manipulated so as to prejudice the defendant." *Id.* at 469.

78. *Id.* at 464 & 469. *See* text accompanying note 33 *supra*.

ecuting criminal defendants.[79] Although the Court attempted to distinguish *Downum* and *Jorn*, it appears that the impropriety that precluded retrial in those cases was no more egregious than that which occurred in *Somerville*. Ostensibly, the strict manifest necessity standard of *Downum* and *Jorn* would have mandated a contrary result.[80]

United States v. Dinitz[81] represents the Supreme Court's most recent pronouncement in this area. In *Dinitz*, one of the defendant's two attorneys was expelled from the courtroom by the trial judge for engaging in improper conduct. Upon learning that the defendant's remaining counsel was not prepared to proceed with the trial, the court posited three possible alternatives from which the defendant might choose, one of which was the declaration of a mistrial.[82] The defendant moved for a mistrial, the government prosecutor did not oppose the motion, and the trial judge granted the mistrial request, expressing his belief that such a course would serve the interest of justice. Before his second trial, the defendant moved to dismiss the indictment on the ground that retrial would violate the double jeopardy clause because his mistrial request had been induced by judicial overreaching. His motion was denied, and he was convicted by a jury.[83] On direct appeal, the United States Court of Appeals for the Fifth Circuit reversed en banc,[84] concluding that the defendant's request for a mistrial should be ignored and the case treated as though the trial judge had declared a mistrial over the objection of the defendant.[85] Accordingly, the double jeopardy clause precluded retrial because there had been no manifest

79. Justice Rehnquist's opinion in *Somerville* contains numerous allusions to overriding principles of federalism. For example, he stated: "We believe that in light of the State's established rules of criminal procedure, the trial judge's declaration of a mistrial was not an abuse of discretion . . . Federal courts should not be quick to conclude that simply because a state procedure does not conform to the corresponding federal statute or rule, it does not serve a legitimate state policy." 410 U.S. at 468.

80. *See Is the Manifest Necessity Test Manifestly Necessary, supra* note 15, at 904.

81. 424 U.S. 600 (1976).

82. *Id.* at 611. The defendant was also given the choices of a stay or recess pending application to the court of appeals for review of the propriety of expelling counsel, or continuing the trial with remaining counsel.

83. *Id.* at 603-05. At his second trial, the defendant, a third year law student at the time of his arrest, chose to defend himself. *Id.* at 605 n.4.

84. 504 F.2d 854 (5th Cir. 1974) (en banc) (per curiam), *rev'd*, 424 U.S. 600 (1976). Initially, a divided panel of the court of appeals reversed the defendant's conviction, holding that retrial violated the defendant's constitutional right not to be twice put in jeopardy. 492 F.2d 53 (5th Cir.), *aff'd en banc*, 504 F.2d 854 (5th Cir. 1974), *rev'd*, 424 U.S. 600 (1976). Upon rehearing, the en banc per curiam opinion essentially adopted the reasoning of the panel majority.

85. 492 F.2d at 58-59.

necessity requiring the expulsion of trial counsel.[86] The court of appeals perceived the necessity of requiring something more substantial than a "Hobson's choice" before a defendant can be said to have relinquished voluntarily his right to proceed before the first jury.[87]

The Supreme Court reversed. Speaking through Justice Stewart, the Court acknowledged that in such circumstances the defendant generally does face a "Hobson's choice" between relinquishing his first jury and continuing a trial tainted by prejudicial prosecutorial or judicial error. The Court nevertheless believed that the conclusion reached by the court of appeals—that the manifest necessity standard should be applied to a mistrial motion when the defendant has no choice but to request a mistrial—undermines, rather than furthers, the protections of the double jeopardy clause.[88] Stewart emphasized that traditional waiver concepts have little relevance when the defendant must determine whether or not to request or consent to a mistrial in response to judicial or prosecutorial error; the paramount consideration is the defendant's retention of control over the course to be followed in the event that such error occurs.[89] Although it again noted that the double jeopardy clause does protect a defendant against governmental actions intended to provoke mistrial requests, the Court found no such bad faith conduct since the defendant chose to move for a mistrial rather than continue with his other attorney.[90]

Thus, while the decisions in *Downum* and *Jorn* indicated a movement toward establishing more concrete guidelines in evaluating double jeopardy problems in the context of reprosecution following a mistrial declaration, the subsequent decisions in *Somerville* and *Dinitz* suggest a return to an unstructured case-by-case analysis.[91]

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86. *Id.* at 60-61.

87. *Id.* at 59.

88. 424 U.S. at 609-10. The Court reasoned that if severely prejudicial error did exist, the defendant might well consider an immediate new trial preferable to the alternative of a probable conviction followed by an appeal, a reversal of the conviction, and a later retrial. *See* United States v. Ball, 163 U.S. 662 (1896) (double jeopardy clause presents no obstacle to retrial if conviction is set aside by the trial judge or reversed on appeal). Thus, the Court rejected the court of appeals rationale since it essentially instructed trial judges to reject the most meritorious mistrial motion in the absence of manifest necessity and instead required the trial to proceed to its conclusion despite a legitimate claim of seriously prejudicial error.

89. 424 U.S. at 609.

90. *Id.* at 611-12.

91. *See* Illinois v. Somerville, 410 U.S. 458, 464-67 (1973) (Court has eschewed rigid mechanical rules since *Perez*, and virtually all of the cases turn on the particular facts and thus escape meaningful categorization).

IV. REPROSECUTION AFTER MISTRIAL GRANTED ON DEFENDANT'S MOTION

In evaluating a double jeopardy challenge following a successful defense motion for mistrial, courts are now confronted not only with the seemingly inconsistent pronouncements of the Supreme Court, but also with the recognition that no Supreme Court decision has actually barred reprosecution following a successful defense motion for mistrial because of governmental misconduct. Thus, because of the absence of any principled statement regarding this facet of the double jeopardy clause, any challenge in this area must be examined against the background and general framework provided by the foregoing case law.

A starting point for analysis is to ascertain whether the defendant's motion for mistrial is clearly voluntary and thus removes any constitutional barrier to reprosecution.[92] When the events that precipitated the defendant's mistrial motion are attributable to factors beyond governmental control, permitting reprosecution is easily understood[93] because of society's interest in punishing the guilty.

On the other hand, when the defendant's mistrial motion is attributable to governmental misconduct, the constitutional barrier to retrial should not be automatically removed.[94] Rather, the reviewing court should carefully analyze the activities of the prosecutor or judge which led to the defendant's mistrial motion to determine whether reprosecution should be barred, since permitting reprosecution as a matter of course in such instances would seemingly ignore the defendant's interest in having his trial completed by a particular tribunal free from the taint of prejudicial error. When such misconduct is present, the defendant technically does retain the opportunity to complete his trial before the first jury chosen. But because the taint of error significantly increases the possibility of conviction that may not be corrected on appeal, the defendant's decision to request a mistrial rather

92. *See, e.g.*, United States v. Dinitz, 424 U.S. 600, 607 (1976); United States v. Jorn, 400 U.S. 470, 485 (1971); United States v. Tateo, 377 U.S. 463, 467 (1964).

93. *See* Schulhofer, *supra* note 4, at 532.

94. Until rather recently, lower courts automatically rejected double jeopardy challenges whenever the defense made a successful mistrial motion. *See, e.g.*, Leigh v. United States, 329 F.2d 883 (D.C. Cir. 1964) (a defendant cannot plead former jeopardy when the jury before whom he was first on trial was discharged on his own motion or with his consent); United States v. Burrell, 324 F.2d 115 (7th Cir. 1963) (defendant cannot successfully plead the bar of double jeopardy when mistrial was granted on his own motion and with his express consent); Roberts v. United States, 348 F. Supp. 563, 567 (E.D. Mo. 1972) (double jeopardy claims waived solely because all defendants made motion for mistrial).

than retain his first jury cannot be characterized as a purely voluntary one. Thus, the justification traditionally offered in support of reprosecution—that the defendant retains the right to proceed before the original tribunal and perhaps obtain an acquittal—is significantly diluted when the element of misconduct has tainted the proceedings.

In *Dinitz*, *Somerville*, and *Jorn*, the Supreme Court recognized this "Hobson's choice" situation, and in each instance stated in dictum that a defendant's double jeopardy claim must be "considered" if his mistrial motion was the product of prosecutorial manipulation or overreaching.[95] However, the type of misconduct embraced by the term *overreaching* is a question that remains largely unanswered.[96] The critical inquiry thus becomes one of determining the maximum kind of misconduct that can be endured before it is viewed as manipulation or overreaching that will actually bar reprosecution even though the mistrial declaration has been granted on the defendant's motion.

Under any Supreme Court language, mere negligence on the part of the prosecutor apparently erects no constitutional barrier to retrial.[97] As yet, no court has concluded that mere prosecutorial negligence precludes reprosecution, for the imposition of this standard would place an unreasonable burden on the prosecutor to conduct flawless trials; apparently, society's interest in seeing criminal justice completed operates to prevent the prosecution from being subjected to such a rigid standard of conduct. Also, a mere negligence standard might have the anomalous effect of reducing, rather than increasing, the amount of protection afforded criminal defendants. As a practical matter, if reprosecution were precluded each time a mistrial is declared on the defendant's motion because of prosecutorial error, trial judges could conceivably be encouraged to reject mistrial requests as a matter of course regardless of how egregious the error on the part of the prosecutor. Criminal defendants would thus have to rely upon the appellate process to correct any error, and would still be required to endure a second prosecution even if the error were corrected on ap-

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95. *See* United States v. Dinitz, 424 U.S. 600, 611 (1976); Illinois v. Somerville, 410 U.S. 458 (1973); United States v. Jorn, 400 U.S. 470, 484 & 485 n.12 (1971).

96. *See* United States v. Wilson, 534 F.2d 76, 80 n.6 (6th Cir. 1976) (it is unclear from the *Dinitz* opinion whether overreaching is limited to intentional misconduct or whether it should extend to gross negligence on the part of the judge or prosecutor which led to mistrial); Commonwealth v. Bolden, 472 Pa. 602, 640, 373 A.2d 90, 108 (1977) (plurality opinion) (it is unclear from the United States Supreme Court cases whether overreaching extends to grossly negligent acts by the prosecutor).

97. *See* Illinois v. Somerville, 410 U.S. 458, 464 (1973); United States v. Martin, 561 F.2d 135, 139 (8th Cir. 1977); Commonwealth v. Bolden, 472 Pa. 602, 373 A.2d 90 (1977) (plurality opinion).

peal.[98] Moreover, mere prosecutorial negligence probably would not taint the proceeding in a manner that would significantly enhance the possibility of conviction, and therefore the defendant would not be confronted with a true "Hobson's choice" situation.

On the other hand, it seems clear that a showing of bad faith intent designed to provoke a mistrial request should trigger the double jeopardy proscription[99] and vitiate the fact that the mistrial was technically granted at the request of the defendant. Any other result would seemingly encourage the government to abuse its awesome prosecutorial powers, especially in those instances where an acquittal seems to be apparent. Moreover, a contrary result would eviscerate the constitutional mandate that was designed to erect safeguards against repeated prosecutions and to prohibit continuing embarrassment, expense, and anxiety to the defendant.[100]

The few cases in which the conduct of the prosecution has been held to preclude a second trial seem to indicate that the prosecutor's intent to precipitate a mistrial must be obvious.[101] But the very fact that so few cases do exist in which reprosecution has actually been barred because of bad faith prosecutorial misconduct[102] suggests that such a standard may not be broad enough in scope to adequately safeguard the rights of criminal defendants against the government's awesome prosecutorial powers. Likewise, it reflects that establishing the requisite mental state of the prosecutor is an awesome burden, if not an insuperable one, in the absence of an express declaration by the prosecutor that he is engaging in the activity for the explicit purpose of provoking a mistrial request. Furthermore, since such blatant misconduct would ordinarily result in a sua sponte mistrial declaration,[103] the defendant would never be in a situation where he must actually request the mistrial; thus the existence of such a standard may be conceptually sterile for all practical purposes.

Despite the fact that the vast majority of courts which have construed the term *overreaching* have concluded that reprosecution

98. *See* United States v. Ball, 163 U.S. 662 (1896) (when a conviction is set aside because of trial error the double jeopardy clause does not preclude reprosecution).

99. *See* United States v. Dinitz, 424 U.S. 600, 611 (1976); United States v. Jorn, 400 U.S. 470, 485 & n.12 (1971); Downum v. United States, 372 U.S. 734, 736 (1963).

100. *See* note 17 *supra*.

101. *See Standard for Reprosecution*, *supra* note 16, at 490. *See also* note 18 *supra*.

102. *See* note 18 *supra*. Perhaps the noticeable absence of authority also suggests that it is highly unlikely that a prosecutor will engage in such egregious activity and incur the risk of having a second prosecution barred.

103. *See Retrial After Mistrial*, *supra* note 15, at 1279; *The Double Jeopardy Dilemma*, *supra* note 16, at 982.

should be barred only upon a showing of bad faith intent on the part of the prosecutor,[104] several recent decisions have undertaken to provide greater safeguards to the criminal defendant by requiring the prosecution to conform to a more stringent standard of conduct.

In the 1973 decision of *United States v. Beasley*,[105] the United States Court of Appeals for the Fifth Circuit announced that "when a mistrial results from prosecutorial error which does not amount to gross negligence or intentional misconduct, the state is not barred from reprosecuting the defendant."[106] Because the court of appeals in *Beasley* found that the record disclosed no evidence of gross negligence or intentional misconduct on the part of the prosecutor, it concluded that there was no constitutional barrier to retrial and conviction.[107] Since *Beasley*, however, several courts have seized upon the "gross negligence or intentional misconduct" standard for guidance in determining whether to bar reprosecution after misconduct by the prosecutor has induced the defendant to move for a mistrial.

In *United States v. Kessler*,[108] the United States Court of Appeals for the Fifth Circuit relied upon the standard it had announced in *Beasley* and concluded that reprosecution should be barred because the government had engaged in intentional misconduct, even though there was no showing of bad-faith intent to produce a mistrial request by the defendant.[109] In *Kessler*, the government was permitted to introduce, over objection, allegedly admissible testimony from several witnesses under the well-recognized co-conspirator exception to the hearsay rule as well as demonstrative evidence on the foundation laid by these declarations.[110] During the course of trial, it became clear that not only

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104. *See, e.g.*, United States v. Sanabria, 548 F.2d 1, 7 (1st Cir. 1976), *rev'd on other grounds*, 98 S. Ct. 2170 (1978); United States v. Romano, 482 F.2d 1183, 1188 (5th Cir. 1973), *cert. denied*, 414 U.S. 1129 (1974); Commonwealth v. Potter, 478 Pa. 251, 386 A.2d 918 (1978) (per curiam).

105. 479 F.2d 1124 (5th Cir.), *cert. denied*, 414 U.S. 924, *reh. denied*, 414 U.S. 1052 (1973).

106. *Id.* at 1126.

107. *Id.* at 1127. In *Beasley*, a mistrial had been granted at the defendant's request as the result of a single question put to the defendant's chief alibi witness during cross-examination. Defense counsel had requested the mistrial on the basis that the prosecutor's question was so highly prejudicial that it would preclude the defendant from receiving a fair jury trial. Although the court of appeals was cognizant that the question was undoubtedly an improper one, it found nothing in the record to suggest that the prosecutor intended to abort the proceedings in order to improve the chances of conviction upon retrial. *Id.* at 1126-27.

108. 530 F.2d 1246 (5th Cir. 1976).

109. *Id.* at 1257-58.

110. *Id.* at 1249-51.

were the declarations inadmissible because outside the scope of the co-conspirator exception, but also that the demonstrative evidence had no nexus with the alleged conspiracy. The defendants then moved for a mistrial, which the trial court granted despite the government's opposition.[111] When the second trial commenced, the defendants' motions to dismiss the indictments were granted by the trial court.[112] On appeal, the court of appeals emphasized that to find prosecutorial overreaching, the prosecutor must have engaged in either grossly negligent or intentional misconduct.[113] Finding that the government knew in advance of trial that the hearsay declarations and demonstrative evidence were clearly inadmissible under the circumstances, the court of appeals concluded that there was intentional misconduct by the government which caused serious prejudice to the defendants' right to a fair jury trial, and therefore barred reprosecution.[114]

A recent decision of the United States Court of Appeals for the Eighth Circuit represents the most significant endeavor undertaken by an appellate court to expand the double jeopardy safeguards afforded criminal defendants where prosecutorial misconduct has occurred. In *United States v. Martin*,[115] the defendant was charged with making a false oath and account by fraudulently transferring and concealing assets in contemplation of bankruptcy in violation of a federal statute.[116] Martin filed a motion *in limine* requesting the trial court to prohibit any reference to student loans because of previous inimical publicity.[117] This motion was granted, but the court denied Martin's request to prohibit the government's attorney from reading Martin's grand jury testimony as substantive evidence, since the prosecutor assured the court that the irrelevant statements contained in the grand jury testimony had been excluded. The trial court indicated, however, that Martin's objection to the use of the grand jury

111. *Id.* at 1251-52.

112. *Id.* at 1252.

113. *Id.* at 1256 and n.15 (citing United States v. Beasley, 479 F.2d 1124 (5th Cir.), *cert. denied*, 414 U.S. 924, *reh. denied*, 414 U.S. 1052 (1973)).

114. *Id.* at 1257.

115. 561 F.2d 135 (8th Cir. 1977). For an analysis of the *Martin* decision and its implications, see *The Double Jeopardy Dilemma*, note 16 *supra*.

116. *Id.* at 136. *See* 18 U.S.C. § 152 (1976). In the first count, Martin was charged with concealing money and cash totalling $565.12. The second count charged Martin with concealing assets in the amount of $2060.12.

117. 561 F.2d at 137. Martin attached as exhibits to his motion *in limine* 22 Arkansas Gazette newspaper articles illustrating the publicity which accompanied his attempt to discharge the student loan debts. In addition to the newspaper articles, Martin and his wife filed affidavits attesting to obscene and racial remarks directed at them as a result of their bankruptcy petition.

testimony would be treated as a continuing objection.[118] Early in the trial, the prosecutor read a substantial portion of the grand jury testimony to the jury, but failed to delete the disputed material.[119] Martin then moved for a mistrial, which the district court granted.[120] Between his first and second trials, Martin filed a motion to dismiss the indictment contending, *inter alia*, that the double jeopardy clause foreclosed a second prosecution. Martin's motion was denied, and he was convicted on both counts of the indictment.[121]

On appeal, the court of appeals reversed, concluding that the trial court had erred in denying Martin's motion to dismiss since the reading of the irrelevant grand jury testimony constituted prosecutorial overreaching that gave Martin no choice but to move for a mistrial and subject himself to the ordeal of a second trial.[122] In analyzing the question of whether the double jeopardy clause foreclosed a second trial, the court of appeals emphasized that even if the government's actions of reading the testimony were not designed to provoke a mistrial request, at a minimum they constituted gross negligence.[123] Acknowledging that mere negligence by the prosecutor is not the type of overreaching contemplated by *Dinitz*,[124] the court of appeals nevertheless believed that gross negligence constitutes prosecutorial error undertaken to harass or prejudice the defendant—that gross negligence can be accurately characterized as the type of prosecutorial overreaching which the double jeopardy clause seeks to bar.[125]

Dissenting, Judge Henley maintained that no Supreme Court case existed in which the Court had held that gross negligence, or intentional prosecutorial error not calculated to produce a mistrial, will support a claim of double jeopardy by one who moves for a mistrial.[126] Judge Henley read *Dinitz*[127] and *Jorn*[128] as requiring either that the prosecution act with intent to induce a request for mistrial by the defendant or that the prosecution deliberately prejudice the defendant by procuring a trial at a different time and under circumstances less

118. *Id.*
119. *Id.*
120. *Id.* The district court maintained that since any conviction would be set aside on appeal because of the error, there was no alternative other than to declare a mistrial.
121. *Id.* at 138.
122. *Id.* at 141.
123. *Id.* at 140.
124. *Id.* at 139. *See* notes 81-90 and accompanying text *supra*.
125. 561 F.2d at 140.
126. *Id.* at 142 (Henley, J., dissenting).
127. *See* notes 81-90 and accompanying text *supra*.
128. *See* notes 58-67 and accompanying text *supra*.

favorable to the defendant.[129] He therefore concluded that the double jeopardy proscription was inapplicable because of the absence of any egregious error by the prosecution compelling a finding of intentional harassment or intent to abort the trial.[130]

V. THE PENNSYLVANIA EXPERIENCE: AN ILLUSTRATION OF THE SPECTRE OF UNCERTAINTY CREATED BY *PEREZ* AND ITS PROGENY

An examination of Pennsylvania case law since 1970 provides a clear illustration of the problems and uncertainty confronted by courts that have attempted to interpret the Supreme Court pronouncements and to articulate a principal statement of the kind of governmental misconduct that should preclude a second prosecution. It also reveals the subjectivity employed by these courts in their attempt to define the kind of misconduct embraced by the term *overreaching:* specifically, that the definitions are predicated upon the philosophical persuasions of each individual court member regarding the intended scope of the double jeopardy clause and the policies which that clause was designed to implement.

Prior to 1977, the Pennsylvania Supreme Court applied a standard that strongly favored reprosecution whenever the first trial had been aborted at the defendant's request, even if the mistrial request were prompted by prosecutorial misconduct. For example, in its 1970 decision in *Commonwealth v. Wright,*[131] the court, after canvassing the salient Pennsylvania cases in this area,[132] concluded that a defendant who has moved for a mistrial in response to prosecutorial misconduct could be retried if the prosecution has not invited the mistrial in order to secure another, more favorable opportunity to convict the accused.[133] Although the court recognized that such a rule places a heavy burden

129. 561 F.2d at 142 (Henley, J., dissenting).

130. *Id.* at 141.

131. 439 Pa. 198, 266 A.2d 651 (1970) (unanimous decision).

132. *See* Commonwealth v. Metz, 425 Pa. 188, 228 A.2d 729 (1967) (reprosecution not barred simply because trial terminates prior to verdict where mistrial is necessary and circumstances do not create danger that the accused will be subjected to successive, oppressive prosecutions); Commonwealth v. Warfield, 424 Pa. 555, 227 A.2d 177 (1967) (where district attorney openly acknowledged that he had deliberately caused mistrial in first degree murder case, and mistrial was not caused by any act of the defendant, jeopardy attached and reprosecution was barred); Commonwealth *ex rel.* Montgomery v. Myers, 422 Pa. 180, 220 A.2d 859 (1966) (reprosecution permitted where remarks of prosecutor not calculated to precipitate a mistrial in order to secure another, possibly more favorable opportunity to convict the accused).

133. 439 Pa. at 201, 266 A.2d at 653. *See* note 132 *supra.*

on the defendant to justify his double jeopardy claim, the court nevertheless reasoned that society's interest in preventing the guilty from going unpunished outweighs the risk of harassment and the burdens imposed upon a defendant in enduring a second trial.[134]

In *Wright*, the defendant had requested of the trial court a ruling, in advance of any offer by the Commonwealth, as to the admissibility of his prior record in the event he elected to testify in his own behalf. The trial court eventually ruled that any evidence of the defendant's prior record was to be excluded. After the defendant had testified on direct examination, and cross-examination had proceeded for a short period of time, the district attorney attempted to offer into evidence the prior record of the defendant.[135] The defendant then moved for a mistrial which the trial court granted. Before the defendant's second trial commenced, he pleaded double jeopardy, but his plea was denied and he was convicted.[136] The Pennsylvania Superior Court affirmed the decision of the trial court.[137]

In reaching its conclusion that the double jeopardy clause did not preclude a second trial in *Wright*, the Pennsylvania Supreme Court emphasized that the trial judge is in a better position to observe the events and make an informed judgment and does not merely have a dry record from which to work.[138] Therefore, the court stated that unless the record indicates the relevant motives of the prosecutor, the decision of the trial judge should be affirmed absent an abuse of discretion on his part.[139] The record clearly indicated to the court that the prosecutor intended, from the moment he began his cross-examination, to offer into evidence Wright's prior record.[140] But the court nevertheless concluded that the trial judge had properly exercised his discretion in finding that the prosecutor did not intentionally cause the mistrial in order to secure a second opportunity to convict the defendant under more favorable circumstances.[141] The *Wright* court thus strongly suggested that reprosecution should not be barred unless there is an express declaration by the prosecutor that he is engaging

134. *Id.*

135. *Id.* at 200-01, 266 A.2d at 652-53. Wright was being tried on a charge of burglary, and the district attorney attempted to offer the defendant's record which contained six previous burglary convictions.

136. *Id.* at 201, 266 A.2d at 653.

137. 216 Pa. Super. Ct. 773, 260 A.2d 503 (1970) (per curiam), *aff'd*, 439 Pa. 198, 266 A.2d 651 (1970).

138. 439 Pa. at 204, 266 A.2d at 654-55.

139. *Id.* at 204-05, 266 A.2d at 655.

140. *Id.* at 203-04, 266 A.2d at 654.

141. *Id.* at 205, 266 A.2d at 655.

in prohibited conduct for the manifest purpose of provoking a mistrial request.[142]

In its 1977 decision of *Commonwealth v. Bolden*,[143] the Pennsylvania Supreme Court ostensibly abjured the *Wright* standard, and announced an approach that would provide greater double jeopardy protection for criminal defendants who have successfully requested mistrials because of prosecutorial misconduct. In *Bolden*, the court explicitly held that the double jeopardy clause precludes retrial whenever the defendant's mistrial motion is predicated by either intentional misconduct or gross negligence on the part of the prosecution.[144] The court, speaking through Justice Roberts, noted that it is unclear from the United States Supreme Court cases whether *overreaching* is limited to intentional misconduct or whether it extends to grossly negligent acts by the prosecutor.[145] Therefore, the court maintained, since it is extremely difficult to establish that prosecutorial error was intentional, a defendant's rights may not be adequately protected if he is required to prove that the errors were intentional.[146] Accordingly, the court believed that application of the standard announced in *Beasley*[147] and followed in *Kessler*[148] was warranted in order to implement the policies underlying the double jeopardy clause.[149] Upon examining the factual situation in *Bolden*, the court concluded that the prosecutor's conduct did not constitute *overreaching* within the meaning of the delineated standard, and therefore the double jeopardy clause did not bar retrial.[150]

Because only Justice Manderino joined in the opinion of Justice Roberts, the significance and precedential value of the *Bolden* decision

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142. *See* note 19 *supra*. *See also* text accompanying note 101 *supra*.

143. 472 Pa. 602, 373 A.2d 90 (1977) (plurality opinion).

144. *Id.* at 641-42, 373 A.2d at 109. The court did not believe that *Dinitz* compelled a contrary result. The court recognized that certain language in *Dinitz* may be interpreted to set forth the requirement that the misconduct be intentional, but nonetheless believed that the *Dinitz* Court did not explicitly rule out a gross negligence standard. *See id.* at n.39. *But see* text accompanying note 171 *infra*.

145. *Id.* at 640, 373 A.2d at 108. *See* United States v. Wilson, 534 F.2d 76, 80 n.6 (6th Cir. 1976) (it is unclear from the *Dinitz* opinion whether overreaching is limited to intentional misconduct or whether it should extend to gross negligence on the part of the judge or prosecutor which led to mistrial).

146. 472 Pa. at 640, 373 A.2d at 108.

147. United States v. Beasley, 479 F.2d 1124 (5th Cir.), *cert. denied*, 414 U.S. 924, *reh. denied*, 414 U.S. 1052 (1973). *See* text accompanying notes 105-07 *supra*.

148. United States v. Kessler, 530 F.2d 1246 (5th Cir. 1976). *See* text accompanying notes 108-14 *supra*.

149. 472 Pa. at 641, 373 A.2d at 108.

150. *Id.* at 642-45, 373 A.2d at 109-10.

remained in doubt.[151] Chief Justice Eagen merely concurred in the result reached by a majority of the court.[152] And although Justice Pomeroy likewise concurred in the result,[153] he expressed sharp dissatisfaction with the plurality opinion for reaching the issue regarding the degree of misconduct by the prosecution that will preclude retrial, since the prosecutor's conduct constituted neither grossly negligent nor intentional misconduct.[154] He therefore characterized the purported holding concerning gross negligence as "gratuitous and mere dictum."[155]

In its most recent pronouncement in this area, the Pennsylvania Supreme Court rejected the standard adopted by Justice Roberts in *Bolden* and instead required a showing of intentional misconduct. In *Commonwealth v. Potter*,[156] the defendant was tried on three separate occasions for murder, and each time he was convicted.[157] In Potter's second trial, he moved for a mistrial several times, but his motions were denied. It was later determined by the trial court en banc that a new trial was necessary because the defendant's constitutional right to a fair trial had been transgressed.[158] On appeal after the defendant's

151. The threshold question addressed by the *Bolden* court was whether an appeal from a defendant's pre-trial motion to dismiss an indictment is a final appealable order, or whether the defendant may appeal only from a judgment of sentence. Four members of the court—Justices Roberts, Manderino, and Pomeroy, and Chief Justice Eagen—concluded that a denial of a pre-trial application to dismiss an indictment on double jeopardy grounds may be appealed before the new trial is held. 472 Pa. at 633, 373 A.2d at 105. Justices Nix and O'Brien dissented from the court's disposition of this issue, maintaining that immediate appellate review was unwarranted. *Id.* at 652-60, 373 A.2d at 114-18 (Nix, J., dissenting).

152. *Id.* at 646, 373 A.2d at 111 (Eagen, C. J., concurring).

153. *Id.* (Pomeroy, J., concurring).

154. *Id.* at 651-52, 373 A.2d at 114.

155. *Id.* at 652, 373 A.2d at 114.

156. 478 Pa. 251, 386 A.2d 918 (1978) (per curiam).

157. Potter's first conviction was set aside by the Pennsylvania Supreme Court because of an improper expression of opinion by the prosecuting attorney as to the guilt of the accused. Commonwealth v. Potter, 445 Pa. 284, 285 A.2d 492 (1971). His second conviction was set aside on a post-trial motion by the court of common pleas en banc because of improper references to the defendant's juvenile record. *See* 478 Pa. at 255 n.1, 386 A.2d at 919 n.1.

158. 478 Pa. at 257, 386 A.2d at 920. The court addressed the procedural circumstances in *Potter* in somewhat of an unusual manner. *Potter* was not a situation in which the court was evaluating a double jeopardy plea following a mistrial declaration granted at the defendant's request because of prosecutorial misconduct. In *Potter*, there was no mistrial declaration; rather, the trial court en banc had awarded a new trial because it believed the trial judge had erred in refusing to grant Potter's mistrial motions during his second trial. Ordinarily, when a conviction is set aside because of trial error, as was Potter's conviction, the double jeopardy clause does not preclude reprosecution. *See*

third conviction, he contended that misconduct by the prosecution at his second trial should have foreclosed reprosecution and thus a third conviction.[159] In raising the double jeopardy challenge, the defendant relied upon *Bolden* and urged the court to construe the term *overreaching* as embracing not only deliberate prosecutorial misconduct, but also recklessness or gross negligence.[160] The court, speaking through Justice Pomeroy, analyzed the various interests implicated by the double jeopardy prohibition and concluded that the standard urged by the defendant was unwarranted.[161]

The *Potter* court recognized that in *Bolden* it had defined the term *prosecutorial overreaching* as embracing not only intentional misconduct but also gross negligence.[162] But the court noted that the opinion in *Bolden* represented the views of only Justices Roberts and Manderino,[163] and the court further maintained that the decisions in *Beasley*[164] and *Kessler*,[165] upon which the *Bolden* court relied, used gross negligence standards in dictum and were therefore "frail reeds upon which to posit such a holding."[166] The court also characterized the subsequent court of appeals decision in *Martin*[167] as highly suspect;

United States v. Ball, 163 U.S. 622 (1896). But the *Potter* court agreed that the distinction between granting a new trial at the defendant's request and ordering a mistrial at his request is without significance for purposes of double jeopardy analysis. The court thus determined that it should apply the same standard that would be applied in deciding whether or not retrial should be barred if a mistrial declaration had been granted at the defendant's request. Were the permissibility of reprosecution to be governed by a more relaxed standard where a trial verdict is set aside post-trial, the court stated, trial judges might be led to reject the most meritorious mistrial motion and instead require the trial to proceed to its conclusion despite a legitimate claim of serious prejudicial error.

159. 478 Pa. at 256, 386 A.2d at 920. Prior to the commencement of his third trial, Potter filed a motion to dismiss the case and to be discharged on double jeopardy grounds. The motion was denied and no appeal was taken from the order of denial at that time. Although a majority of the court in *Bolden* had agreed that an order denying a motion to dismiss pre-trial on double jeopardy grounds is immediately appealable, the court did not construe Potter's failure to appeal as a waiver of his double jeopardy claim since Potter filed his appeal a substantial period of time prior to the *Bolden* decision. *See* note 151 *supra*.

160. 478 Pa. at 262, 386 A.2d at 923.

161. *Id.* at 258-62, 386 A.2d at 921-23. *See* notes 17 & 28 *supra*.

162. *Id.* at 262, 386 A.2d at 923. *See* text accompanying notes 144-49 *supra*.

163. 478 Pa. at 262 n.5, 386 A.2d at 923 n.5.

164. United States v. Beasley, 479 F.2d 1124 (5th Cir.), *cert. denied*, 414 U.S. 924, *reh. denied*, 414 U.S. 1052 (1973). *See* text accompanying notes 105-07 *supra*.

165. United States v. Kessler, 530 F.2d 1246 (5th Cir. 1976). *See* text accompanying notes 108-14 *supra*.

166. 478 Pa. at 262-63 & n.5, 386 A.2d at 923 & n.5.

167. United States v. Martin, 561 F.2d 135 (8th Cir. 1977). *See* text accompanying notes 115-25 *supra*.

since *Dinitz*[168] required a showing of conduct "undertaken to harass or prejudice the defendant,"[169] Justice Pomeroy could not perceive how the *Martin* court could equate grossly negligent conduct with conduct which is undertaken with a particular end in view. Such conduct is not negligent conduct, but rather intentional conduct.[170]

In contrast to Justice Roberts' opinion in *Bolden*, the *Potter* court concluded that the phrase "undertaken to harass or prejudice the defendant" does not include the concept of grossly negligent conduct simply because it fails to exclude that idea.[171] The public interest in convicting those guilty of crimes was seen as too important an interest to be subordinated to the concept of a prosecuting attorney's negligence, even though it be labeled gross. Criminal defendants are adequately protected, Justice Pomeroy maintained, by the sanction of complete discharge which is imposed when the government's agent acts with intent to abort the trial.[172]

Justice Roberts dissented,[173] finding totally unpersuasive the reasons advanced by Justice Pomeroy for requiring an intentional misconduct standard.[174] Justice Roberts maintained not only that the interests embraced by the double jeopardy clause are inadequately protected by such a standard,[175] but also that an intentional misconduct standard ignores the public interest in the prompt and proper resolution of criminal litigation.[176] A gross negligence standard, Justice Roberts alleged, promotes the public's interest in ensuring that its resources are utilized most effectively without the burdens of delays and mistrials.[177] Finally, Justice Roberts noted that criminal defendants should not be forced to bear the heavy burdens incident to reprosecu-

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168. United States v. Dinitz, 424 U.S. 600 (1976). *See* text accompanying notes 81-90 *supra*.

169. 424 U.S. at 611.

170. 478 Pa. at 263-64, 386 A.2d at 923-24.

171. *Id.* at 265, 386 A.2d at 925.

172. *Id.* at 267, 386 A.2d at 925.

173. Former Chief Justice Jones did not participate in the decision in *Potter*. Only Chief Justice Eagen and Justice O'Brien joined in the opinion of Justice Pomeroy. Justices Roberts and Manderino dissented separately from the court's evaluation of Potter's double jeopardy challenge. Justice Nix agreed with Justice Pomeroy's double jeopardy analysis, but voted to reverse the judgment of sentence and award a new trial on other grounds. Therefore, since the court was equally divided, the judgment of sentence imposed by the lower court was affirmed.

174. 478 Pa. at 277, 386 A.2d at 931 (Roberts, J., dissenting).

175. *Id.* at 282-83, 386 A.2d at 933-34.

176. *Id.* at 277 & 283-84, 386 A.2d at 931 & 934.

177. *Id.*

tion because of prosecutorial misconduct so conspicuously below professional standards.[178]

Justice Manderino also dissented from the reasoning employed by the majority regarding the double jeopardy issue. He acknowledged the difficulty or precisely defining such terms as *gross negligence*, but nevertheless believed it to be clear that the prosecutor's acts in *Potter* were so unreasonable, were done with such manifest disregard of the defendant's rights to a fair trial, and were so removed from the conduct deemed proper of a prosecutor that they should be treated as if intended to cause a mistrial.[179]

VI. CONCLUSION

In theory, the general rule that permits a second prosecution when the first proceeding has been terminated at the request of the defendant seems sound, for the defendant has voluntarily decided to relinquish his right to proceed before the first jury and instead has chosen to withstand the expense and anxiety associated with a second trial. The general rule is also consistent with the principle that permits a second prosecution when a conviction is overturned on appeal because of prejudicial error at the trial level.[180]

Often, however, prosecutorial misconduct will be the activity that prompts an affirmative defense motion for mistrial so as to avoid the risk that a conviction will follow primarily because of the taint of prejudicial error.[181] In such instances, merely focusing on who moved for the mistrial is an inadequate resolution to the problem of whether a second prosecution should be permitted.[182] The defendant may technically retain the right to choose between continuing with the tainted proceeding or subjecting himself to the burdens of a second trial, but the defendant's preference for a mistrial is clearly not a voluntary one if

178. *Id.* at 285, 386 A.2d at 935.

179. *Id.* at 298, 386 A.2d at 941 (Manderino, J., dissenting).

180. *See* United States v Ball, 163 U.S. 662 (1896) (double jeopardy clause presents no obstacle to retrial if conviction is set aside by the trial judge or reversed on appeal).

181. Deciding whether to request a mistrial in such circumstances clearly presents a most difficult problem for the defendant, since the value of a verdict by the first tribunal is obviously extremely important to the defendant. *See* United States v. Tateo, 337 U.S. 463, 474 (1964) (Goldberg, J., dissenting) (many juries acquit defendants after trials in which reversible error has been committed, and many experienced lawyers will forego a motion for mistrial in favor of having the case decided by the first jury).

182. *See Retrial After Mistrial*, *supra* note 15, at 1278 ("it is difficult to believe that the substantive rights of criminal defendants may be determined by which attorney first gains the attention of the trial judge to move for mistrial").

the government was responsible for initially creating the dilemma.[183] It would seemingly be inconsistent with the administration of justice in the United States to conclude that an accused must barter away his constitutional protection against the oppression of multiple prosecutions in order to avoid the hazards of continuing a proceeding tainted with prejudicial error.[184]

By construing *overreaching* to embrace any intentional or grossly negligent misconduct by the government, the decisions in *Kessler*,[185] *Martin*,[186] and *Bolden*[187] represent a justifiable attempt at resolving the dilemma confronted by the defendant who must otherwise endure the ramifications of the misconduct or waive his right to plead double jeopardy. Clearly, the *Kessler*, *Martin*, and *Bolden* decisions are intended to provide greater protection for criminal defendants in this area. The standard applied in those decisions eases the nearly insurmountable burden previously confronted by defendants who were required to demonstrate that the prosecutor deliberately caused the mistrial in order to avoid an acquittal or secure another opportunity to convict the accused under more favorable circumstances. But this standard also recognizes that simple negligence should not bar reprosecution because it would place upon the prosecutor an unreasonable burden to conduct flawless trials and would create the undesirable result of permitting criminal defendants to go free because of minor error. Thus, the intentional or grossly negligent misconduct standard seems to maintain a desirable equilibrium between the competing interests at stake: it protects the defendant's right to a fair trial free from prejudicial error without unduly subordinating the public interest in convicting those guilty of crimes.

This standard does, however, possess certain inherent shortcomings. First, any inquiry into the mental state of the prosecutor is, of course, a difficult one,[188] and the precise point at which an impropriety becomes gross negligence is difficult to isolate. Moreover, such a standard might have the anomalous effect of leading trial judges to cautiously reject possible meritorious mistrial requests and instead permit the trial to proceed to its logical conclusion despite a legitimate

183. *See generally* Schulhofer, *supra* note 4, at 533.

184. *See* Commonwealth *ex rel.* Montgomery v. Myers, 422 Pa. 180, 220 A.2d 859 (1966).

185. *See* text accompanying notes 108-14 *supra*.

186. *See* notes 115-25 and accompanying text *supra*.

187. *See* text accompanying notes 144-49 *supra*.

188. *See Mistrial and Double Jeopardy*, *supra* note 56, at 951.

claim of prejudicial error. In other words, rather than recognize the defendant's mistrial request and create the possibility that a second prosecution will be barred, trial judges might ignore such requests and thereby force the defendant to endure a second prosecution if and when the error is corrected on appeal.[189] This result would thus impose upon the defendant the precise burden and expense against which the double jeopardy clause is supposed to provide protection.[190]

Despite these apparent shortcomings, however, the intentional or grossly negligent misconduct standard has the positive effect of placing the burden of suffering the ramifications of serious governmental impropriety upon the party responsible for the misconduct. Also, a possible solution to the potential problem of trial judges rejecting meritorious mistrial requests has been suggested by the Pennsylvania Supreme Court. In *Commonwealth v. Potter*,[191] the court concluded that when the defendant's mistrial request is ignored but his conviction is subsequently set aside on a post-trial motion because of trial error, the permissibility of reprosecution should be governed by the same standard that is applied when a mistrial declaration has been granted at the defendant's request because of improper prosecutorial conduct.[192] This approach thus helps to eliminate the possibility that the intentional or grossly negligent misconduct standard might reduce rather than increase the protection afforded to criminal defendants; misconduct of this type will preclude a second prosecution regardless of whether the defendant's mistrial request is granted or ignored.

Most importantly, however, such a standard will at least encourage prosecutorial competence, and deter the prosecutor from abusing his authoritative power. The prosecutor, as a public official, does not play a purely adversary role and should be deterred as much as possible from abusing his authority by introducing injustices into the adjudicatory process.[193] It is as much his duty to refrain from engaging in improper conduct that might produce a wrongful conviction as it is to use every legitimate means to bring about a just one.[194] Additionally, the prosecutor has a duty as a public official to safeguard the public's

189. *See* United States v. Martin, 561 F.2d 135, 142 (8th Cir. 1977) (Henley, J., dissenting) (citing United States v. Dinitz, 492 F.2d 53, 63 (5th Cir. 1974) (Bell, J., dissenting), *rev'd*, 424 U.S. 600 (1976)).

190. *See* Schulhofer, *supra* note 4, at 535.

191. 478 Pa. 251, 386 A.2d 918 (1978) (per curiam).

192. *Id.* at 256-60, 386 A.2d at 920-22. *See* note 158 *supra*.

193. *See* Note, 82 HARV. L. REV. 1752, 1756 (1969).

194. *See* Berger v. United States, 295 U.S. 78, 88 (1935).

interest in seeing that its resources are utilized most effectively and without the burdens of delays and mistrials.[195]

When a defendant's mistrial motion is based upon error by the prosecution, the difficult conflict between the public's interest in convicting those guilty of crimes and the defendant's rights to a fair trial free from the taint of prejudicial error and to be safeguarded against the oppression of multiple prosecutions is most clearly brought into focus. *Somerville* and *Dinitz* reflect the general willingness of the Burger Court to permit reprosecution after a mistrial declaration and apparent heightened solicitude for the public's interest in convicting the criminally accused. Therefore, it seems unlikely that a present majority of the Court would find prosecutorial overreaching absent a clear showing of bad faith intent designed to provoke a mistrial request. But such a standard seems to unreasonably restrict the constitutional rights of the accused, and fails to adequately place constraints on prosecutorial misconduct. A broadening of the concept of overreaching to embrace any intentional or grossly negligent transgressions by the prosecutor would seem properly to take into account the competing interests at stake.

Lawrence J. Baldasare

195. *See* Commonwealth v. Potter, 478 Pa. 251, 283-84, 386 A.2d 918, 934 (1978) (per curiam) (Roberts, J., dissenting).