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When Guilt Should be Irrelevant: Government Overreaching as a Bar to Reprosecution under the Double Jeopardy Clause after Oregon v. Kennedy

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WHEN GUILT SHOULD BE IRRELEVANT: GOVERNMENT OVERREACHING AS A BAR TO REPROSECUTION UNDER THE DOUBLE JEOPARDY CLAUSE AFTER *OREGON V. KENNEDY*

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One of the recurring patterns of the Burger Court jurisprudence in criminal cases is its focus upon the guilt or innocence of the accused rather than upon "collateral" concerns arising under the Bill of Rights.[1] The Court has sought to deemphasize the effects of prosecutorial misconduct or overreaching,[2] concerns that traditionally have been relevant to and raised in such contexts as entrapment,[3] failure of pretrial disclo-

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1 *See, e.g.,* Manson v. Brathwaite, 432 U.S. 98, 112-13 (1977); United States v. Peltier, 422 U.S. 531, 535 (1975). This trend has been the subject of academic comment. *See* Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court,* 86 YALE L.J. 1035 (1977); Grano, Kirby, Biggers & Ash, *Do Any Constitutional Safeguards Remain Against The Danger of Convicting the Innocent?,* 72 MICH. L. REV. 717, 719 (1974).

For an interesting if somewhat cynical opposing view, see Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure,* 80 COLUM. L. REV. 436 (1980). Seidman argues that although the Burger Court expresses concern for the central role of guilt determination in individual cases, it is actually more interested in the broader social policy of deterring crime. He concludes that, "[t]here may be societies in which . . . a true jurisprudence of guilt or innocence might be possible. But that is not our society." *Id.* at 502.

2 Although sometimes used interchangeably, the terms "misconduct" and "overreaching" are not synonymous. Generally, the courts define virtually any government error in conduct as misconduct. Overreaching, a narrow subcategory of misconduct, ties that conduct and the intended goal of achieving a conviction to some greater degree of mens rea. *See, e.g.,* United States v. Kessler, 530 F.2d 1246 (5th Cir. 1976) (discussed *infra* at text accompanying notes 102-03).

3 The Burger Court has applied a "subjective" test for entrapment in which the conduct of the police is largely irrelevant. *See, e.g.,* United States v. Russell, 411 U.S. 423 (1973). MODEL PENAL CODE § 2.13(1) (Official Draft 1962) and several state courts focus primarily upon police misconduct, viewing the entrapment defense as prophylactic. *See, e.g.,* People v. Barraza, 23 Cal. 3d 675, 591 P.2d 947, 153 Cal. Rptr. 459 (1979) (California Supreme Court rejects *Russell*).

sure,[4] and suppression hearings.[5] Because the relevance of prosecutorial misconduct in a criminal trial has been judicially defined in each of these contexts, the Court acts within its discretion in focusing its attention on the fundamental question of guilt or innocence.[6]

The Burger Court's shift of attention away from prosecutorial conduct has been most evident in its developing double jeopardy jurisprudence; significantly, it is only in this area of the law that the language of the Constitution presumptively and directly limits judicial discretion to ignore prosecutorial misconduct.[7] In *Oregon v. Kennedy,*[8] the Court held that prosecutorial misconduct bars reprosecution after a mistrial only if that conduct was specifically designed to cause a mistrial,[9] regardless of its unlawfulness and impact upon the integrity of the trial. The primary rationale for the Court's holding was that any test that barred re-

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4 *Compare* United States v. Agurs, 427 U.S. 97, 112 (1976) (when evaluating effect of nondisclosure, standard must reflect "overriding concern with the justice of finding of guilt") *with* Mooney v. Holohan, 294 U.S. 103, 112 (1935) (per curiam) (presentation of testimony known to be perjured is denial of due process). The current due process test to determine the significance of a failure of government disclosure emphasizes the materiality of the withheld information rather than government culpability in obtaining or withholding it.

5 *Compare* Rakas v. Illinois, 439 U.S. 128, 148-49 (1978) (petitioners not entitled to challenge legality of search where they did not own searched vehicle) *with* Jones v. United States, 362 U.S. 257, 267 (1960) (legitimate presence on searched premises entitles one to challenge legality of search). Although *Rakas* was nominally a fourth amendment standing case, its result is to render evidence of an unlawful police search irrelevant in many cases, despite the prophylactic role of the exclusionary rules.

6 The assumption by the Burger Court and many commentators that the Court's fundamental purpose is to enhance the reliability of guilt determination begs the question addressed in this article. *See* Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments,* 38 U. CHI. L. REV. 142 (1970). The framers of the Bill of Rights believed that government utilization of oppressive conduct to investigate and prosecute the accused had substantial social and political costs, even if criminals were punished and the crime rate was reduced. The premises of this article are, first, that an over resourceful prosecution effort will not necessarily enhance truth-seeking procedures, and second, that even if our society could thereby achieve such a goal, the values underlying the double jeopardy clause should serve to restrain the executive branch from obtaining convictions through improper conduct. *See generally* L. LEVY, AGAINST THE LAW (1974).

7 The mandatory language of the clause, "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb," precludes a second jeopardy regardless of factual guilt or innocence. The original draft of the clause prepared by Madison protected an accused against "more than one trial or one punishment for the same offence . . . ." That language was modified slightly to protect the individual from the harshness of the English rule, which precluded all requests for a new trial. I ANNALS OF CONG. 434, 753 (J. Gales ed. 1789). See 2 W. HAWKINS, PLEAS OF THE CROWN 515-22 (8th ed. 1824); Note, *Statutory Implementation of Double Jeopardy Clauses: New Life for Moribund Constitutional Guarantee,* 65 YALE L.J. 339 (1956). Under the modern theory, a defendant seeks dismissal of the indictment, not a new trial, when invoking the double jeopardy clause in a pretrial motion. It is the government, rather than the defendant, that initiates reprosecution once a court has vacated a conviction or terminated a trial. *See, e.g.,* Burks v. United States, 437 U.S. 1 (1978).

8 456 U.S. 667 (1982). The Court's decision to grant review in *Kennedy* was anticipated by Justice Marshall's dissent from the denial of certiorari in Green v. United States, 451 U.S. 929 (1981).

9 456 U.S. at 679.

prosecution based upon government misconduct or overreaching during the first trial would be standardless and arbitrary.[10] The Court's decision in *Oregon v. Kennedy* narrows prior interpretations of the double jeopardy clause and reflects the Burger Court's continuing emphasis on guilt determination as the primary function of the criminal justice system.

This article examines the effect of *Oregon v. Kennedy* on the Burger Court's double jeopardy jurisprudence in cases where government misconduct has interfered with the integrity of a first trial.[11] The article proposes the complete elimination of current distinctions between mistrial and appellate reversal cases for double jeopardy analysis, on the ground that those distinctions no longer have intellectual or practical support. Moreover, against the contention of the Court in *Oregon v. Kennedy* that any test for overreaching necessarily would be standardless, this article proposes the adoption of a "plain error" standard. Under this test, "plain" government error, engaged in with the purpose of improperly seeking a conviction, that results in a mistrial or appellate reversal will preclude a second jeopardy. This proposal is premised upon the Court's consistent assertion that

> [t]he underlying idea [of the double jeopardy clause], 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 allowed 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.[12]

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10 *Id.* at 677-79. Justice Stevens, concurring in the judgment only, provided a standard for overreaching previously utilized by some lower courts. *Id.* at 681 (Stevens, J., concurring).

11 *Oregon v. Kennedy* has left several questions unanswered. For example, will a second jeopardy be barred only on a finding that the prosecutor's sole objective was to cause a mistrial, or will the existence of a general intent to prejudice the defendant be sufficient? If an appellate court disagrees with the trial court's progovernment resolution of the issue of prosecutorial intent, may it direct a dismissal of the indictment notwithstanding the *Ball* rule (discussed *infra* at text accompanying notes 64-70)? These unanswered questions are likely to produce confusion in the lower federal courts and in the state courts. Every state incorporates some form of double jeopardy protection in its constitution or common law. *See* Benton v. Maryland, 395 U.S. 784, 795-96 (1969); Brennan, *State Constitutions and the Protection of Individual Rights,* 90 HARV. L. REV. 489 (1977); Collins, *Reliance on State Constitutions—Away From A Reactionary Approach,* 9 HASTINGS CONST. L.Q. 1 (1981). Of course a state is free to interpret its double jeopardy protection more expansively than the Court in *Oregon v. Kennedy.* Justice Brennan in a separate opinion concurring in the judgment but dissenting from the rationale of the majority, stated that nothing in the Court's holding would prevent the Oregon court, on remand, from concluding that retrial would violate the provision of the Oregon Constitution that prohibits double jeopardy. 456 U.S. at 666-67 (Brennan, J., concurring in the judgment).

12 This description of the principles underlying the double jeopardy clause was first articulated by Justice Black in his opinion for the Court in Green v. United States, 355 U.S. 184, 187-88 (1957), and was reiterated by the Court in Benton v. Maryland, 395 U.S. 784, 795-96 (1969), and in United States v. DiFrancesco, 449 U.S. 117, 127-28 (1980).

The article concludes that the principles that have evolved in recent double jeopardy decisions undercut both the mandatory language of the clause and its "underlying idea."

I
THE POLICIES UNDERLYING THE DOUBLE JEOPARDY CLAUSE

The double jeopardy clause of the fifth amendment to the United States Constitution provides, "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."[13] Recently, in *United States v. DiFrancesco,*[14] the Supreme Court observed that the application of this provision "has not proved to be facile or routine"[15] and noted that recent double jeopardy cases reflect "acknowledged changes in direction or in emphasis."[16] Nevertheless, the Court concluded that certain "general principles emerge from the Court's double jeopardy decisions and may be regarded as essentially settled."[17] Two of those allegedly settled principles are the focus of this article. First, under the long-standing rule of *United States v. Perez,*[18] despite the apparently mandatory language of the clause, a defendant may be retried and thus placed in jeopardy a second time where a trial judge declares a mistrial sua sponte or at the request of the prosecutor on grounds of "manifest necessity," thereby aborting the first trial prior to a verdict. Second, "reprosecution of a defendant who has successfully moved for a mistrial is not barred, so long as the Government did not deliberately seek to provoke the mistrial request."[19]

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13 U.S. CONST. amend. V. The recent increase in double jeopardy litigation stems from the application of double jeopardy protection to state as well as federal proceedings. *See* Benton v. Maryland, 395 U.S. 784, 793-96 (1969).

14 449 U.S. 117 (1980).

15 *Id.* at 127.

16 *Id.* Such "changes in direction" have included, for example, the holding in United States v. Scott, 437 U.S. 82 (1978), authorizing the reprosecution of a defendant who successfully terminated his prosecution prior to verdict. *Scott* expressly overruled the contrary holding in United States v. Jenkins, 420 U.S. 358 (1975).

17 *Id.*

18 22 U.S. (9 Wheat.) 579 (1824). At the time of *Perez,* the Congress had not yet granted defendants a statutory right to appeal wrongful convictions. *See generally* United States v. Gibert, 25 F. Cas. 1287, 1294-95 (C.C.D. Mass. 1834) (No. 15,204) (denying writ of error on ground that double jeopardy precluded second trial). Although *Gibert* did not survive, United States v. Harding, 26 F. Cas. 131, 137 (C.C.E.D. Pa. 1846) (No. 15,301), its elimination was not based upon any erosion of double jeopardy protection.

19 United States v. DiFrancesco, 449 U.S. 117, 130 (1980). The Court cited United States v. Dinitz, 424 U.S. 600, 606-11 (1976), another recent Burger Court double jeopardy decision, as authority for this proposition. *See infra* notes 38-53 and accompanying text. Although the Court adopted the language from *Dinitz* and *DiFrancesco* in *Oregon v. Kennedy, see* 456 U.S. at 673-74, Justice Stevens characterized the Court's holding as one that "gratuitously lops off a portion of the previously recognized exception." *Id.* at 681 (Stevens, J., concurring in judgment). Justice Stevens stated that a reprosecution was barred in cases where

In *Oregon v. Kennedy,* the Court considered the issue of whether government intent to provoke a mistrial was the sole basis for precluding retrial after a mistrial.[20] In a five-to-four vote marked by broad disagreement between Justices Rehnquist and Stevens, an ambiguous concurrence by Justice Powell, and an "about-face" by Justice White,[21] the Court concluded that, unless the challenged prosecutorial "overreaching" was intended to abort the trial, it cannot be raised to bar reprosecution under the double jeopardy clause.[22]

Premising all double jeopardy analysis is a literal reading of the double jeopardy clause that would preclude every second jeopardy without exception. The history of that clause and of the Bill of Rights generally, demonstrates a fundamental concern for preventing various forms of government overreaching common during the 18th century, including successive prosecutions designed to oppress citizens.[23] Presumably,

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"the prosecutor intended to provoke a mistrial, or otherwise engaged in 'overreaching' or 'harassment.'" *Id.* at 683.

The Court stated another arguably settled double jeopardy principle in United States v. Scott, 437 U.S. 82, 98-99 (1976): "[T]he defendant, by deliberately choosing to seek termination of the proceedings against him on a basis unrelated to factual guilt or innocence of the offense of which he is accused, suffers no injury cognizable under the Double Jeopardy Clause if the Government is permitted to appeal." In *Scott,* the double jeopardy issue arose following a preverdict dismissal of the indictment, rather than following a midtrial declaration of mistrial, as is more usually the case.

20 Justice Marshall, in his dissent from the denial of certiorari in *Green v. United States,* stated:

> Regardless of whether the Government's misbehavior was designed specifically to provoke a mistrial or was simply intended to reduce the chances of an acquittal, the net effect on the defendant is the same: he is faced with the burdens and risks of a second trial solely because the Government has deliberately undermined the integrity of the first proceeding.

451 U.S. 929, 931 (1981) (Marshall, J., dissenting).

21 Justice White, who had dissented in United States v. Scott, 437 U.S. 82 (1978), *see supra* note 19, and also in Illinois v. Somerville, 410 U.S. 458 (1973) (discussed *infra* at text accompanying notes 33-36), joined the majority in *Oregon v. Kennedy.* Justice Powell, concurring with the majority and providing the swing vote, wrote separately to indicate that, had there been "objective" evidence of prosecutorial intent to cause a mistrial, he might have voted differently. 456 U.S. at 679-80 (Powell, J., concurring in judgment). The Court's decision was unanimous in reversing the Oregon court's judgment, which had found overreaching and precluded retrial. Justice Stevens in his concurring opinion agreed with the result but disagreed with the rule established by the majority that prosecutorial conduct was relevant only if it evidenced an intent to cause a mistrial.

22 The alleged prosecutorial misconduct in *Oregon v. Kennedy* consisted of questioning by the prosecutor of an expert witness in which the prosecutor asked whether the witness had declined to do business with the defendant "because [the defendant] is a crook." 456 U.S. at 669. The prosecutor thus arguably communicated his personal opinion of the defendant to the jury, relating facts not in evidence. The trial court immediately granted the defense motion for a mistrial. *Id.*

For a recent lower court application of *Oregon v. Kennedy,* see United States v. Poe, 713 F.2d 579 (10th Cir. 1983), where the court of appeals reinstated an indictment after the indictment had been dismissed by the trial court on grounds of governmental overreaching.

23 *See* Kepner v. United States, 195 U.S. 100 (1904); *Ex parte* Lange, 85 U.S. (18 Wall) 163 (1873); Note, *supra* note 7, at 350.

judicial interpretations of the clause therefore should defer to the mandatory language of the Constitution, unless a clear policy consistent with the clause can be maintained.

The Court's interpretations of the principles underlying double jeopardy protection demonstrate two primary concerns: "protection of the defendant from harassment, and preservation of the defendant's opportunity to obtain a favorable verdict by the first tribunal he confronts."[24] An understanding of the relationship between these interests reveals the inadequacy of the Court's present analysis, which wrongly assumes that the Court's sole constitutional function is to defer to jury determinations of guilt or innocence whenever such determinations occur. A conceptual foundation for double jeopardy protection is that a jury's guilt determination may be less reliable if it occurs after a second trial, when the government has familiarized itself with the defense and marshalled its forces through the effective creation, control, and modification of the evidence.

A defendant's "valued right to have his trial completed by a particular tribunal" was first formulated in those terms by Justice Black in his decision for the Court in *Wade v. Hunter.*[25] Justice Black recognized that the protection of a defendant's interest in a particular forum is a necessary result of the attachment of double jeopardy protection before final verdict, a distinctive feature of the American justice system that "displays a much greater sensitivity for the individual rights of the criminal defendant."[26] Justice Black noted, however, that the defendant's interest "must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments"[27] and found under the unique facts of *Wade* that the double jeopardy clause posed no bar to retrial.[28]

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24 Comment, *Double Jeopardy and Reprosecution After Mistrial: Is the Manifest Necessity Test Manifestly Necessary?,* 69 NW. U.L. REV. 887, 888 (1975).

25 336 U.S. 684, 689 (1949).

26 Comment, *The Double Jeopardy Clause and Mistrials Granted on Defendant's Motion: What Kind of Prosecutorial Misconduct Precludes Reprosecution?,* 18 DUQ. L. REV. 103, 107 n.23 (1979). In England, retrial after the declaration of mistrial raises no double jeopardy issue because under the English law jeopardy does not attach until a final verdict is rendered. One commentator has suggested that the framers of the Constitution did not intend to adopt a different rule for American criminal proceedings. *See* Note, *Double Jeopardy: The Reprosecution Problem,* 77 HARV. L. REV. 1272, 1273 (1964). Nevertheless, it is well settled that, in the United States, jeopardy attaches when the jury has been sworn in a jury trial and when evidence is first presented in a nonjury trial. *See* Crist v. Bretz, 437 U.S. 28 (1978) (federal rule on attachment of jeopardy is binding on states); Serfass v. United States, 420 U.S. 377 (1975) (jeopardy attaches in nonjury trial when evidence is first presented); Downum v. United States, 372 U.S. 734 (1963) (jeopardy attaches when jury is impaneled and sworn). *See generally* Comment, *supra* note 24, at 888-89.

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

28 In *Wade,* a World War II court-martial was dissolved because of military considerations and transferred to a different tribunal for retrial. The original court-martial was composed of officers of the Third Army at the time of the Allied invasion of Germany in March

In *United States v. Jorn,*[29] the Court renewed its examination of the right to a particular forum and distinguished it from the defendant's interest in protection from prosecutorial or judicial overreaching. The Court observed:

> If that right to go to a particular tribunal is valued, it is because, independent of the threat of bad-faith conduct by judge or prosecutor, the defendant has a significant interest in the decision whether or not to take the case from the jury when circumstances occur which might be thought to warrant a declaration of mistrial. . . . In the absence of [a motion by the defendant for mistrial] the *Perez* doctrine of manifest necessity stands as a command to trial judges not to foreclose the defendant's option until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings.[30]

The Court applied the *Perez* doctrine in *Simmons v. United States,*[31] holding that the presence of jury bias created a manifest necessity for mistrial and that denial of a retrial would defeat the ends of justice.[32]

1945. The Court found that there was manifest necessity for the termination of the original proceedings in stating that "[m]omentous issues hung on the invasion and we cannot assume that these court-martial officers were not needed to perform their military functions." *Id.* at 692.

29 400 U.S. 470 (1971) (plurality opinion). In *Jorn*, the trial judge declared a mistrial sua sponte to ensure that witnesses for the prosecution were fully apprised of their fifth amendment right against self-incrimination.

30 *Id.* at 485. The *Perez* doctrine referred to by the Court in *Jorn* is the starting point for any consideration of double jeopardy issues relating to mistrial. In United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824), the Court stated:

> We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes . . . .

The evolution of the *Perez* manifest necessity test has generated extensive commentary. *See* Holleman, *Mistrials and the Double Jeopardy Clause,* 14 GA. L. REV. 45 (1979) (Supreme Court's mistrial decisions rely on procedural mechanisms in order to protect double jeopardy interests of defendants); Schulhofer, *Jeopardy and Mistrials,* 125 U. PA. L. REV. 449 (1977); Comment, *The Double Jeopardy Dilemma: Reprosecution After Mistrial on Defendant's Motion,* 63 IOWA L. REV. 975, 977-82 (1978); Comment, *supra* note 24, at 891-904.

31 142 U.S. 148 (1891).

32 The Court did not directly examine the *Perez* standard again until *Wade,* decided more than half a century after *Simmons.* The Court's expansion of *Perez* after *Wade* can be traced chronologically through the following cases: Gori v. United States, 367 U.S. 364 (1961) (retrial permissible where trial judge declared mistrial for defendant's benefit); Downum v. United States, 372 U.S. 734 (1963) (retrial barred where mistrial granted at prosecutor's request because one of prosecution's witnesses failed to appear for trial); United States v. Jorn, 400 U.S. 470 (1971) (retrial barred where judge, acting without defendant's consent, aborted trial to ensure that prosecution witnesses were fully apprised of their right against self-incrimination); United States v. Dinitz, 424 U.S. 600 (1976) (retrial permissible after defense request for mistrial where trial judge's expulsion of defendant's trial attorney was not in bad faith);

At the beginning of the Burger Court era of double jeopardy jurisprudence, the Court in *Illinois v. Somerville*[33] again emphasized the distinction between the defendant's interests in a particular forum and his interest in avoiding governmental overreaching. In that case, the defendant was indicted under Illinois law for theft, but it was discovered during trial that the indictment was fatally deficient for failure to allege a necessary element of that offense.[34] Under Illinois law, this defect could not be cured by amendment,[35] leaving mistrial and reindictment as the only possible remedies. The Court found that

> where the declaration of a mistrial implements a reasonable state policy and aborts a proceeding that at best would have produced a verdict that could have been upset at will by one of the parties, the defendant's interest in proceeding to verdict is outweighed by the competing and equally legitimate demand for public justice.[36]

Significantly, however, the Court recognized that "the declaration of a mistrial on the basis of a rule or a defective procedure that would lend itself to prosecutorial manipulation would involve an entirely different question . . . ."[37]

Although *Wade, Jorn,* and *Somerville* reinforced the understanding that mistrial cases implicate two distinct double jeopardy interests, *United States v. Dinitz,*[38] marked the first time that the Court explored the potential conflict between those considerations. The defendant, Nathan Dinitz, was charged with conspiracy to distribute, and actual distribution of, LSD.[39] Dinitz retained one attorney on the day of his arrest and retained additional counsel five days before trial to conduct his defense.[40] The trial judge ordered Dinitz's trial counsel to leave the

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Arizona v. Washington, 434 U.S. 497, 514-17 (1978) (retrial permissible where trial judge exercised "sound discretion" in declaring mistrial because of prejudicial comment during defense counsel's opening statement despite fact that judge failed to make explicit finding of "manifest necessity").

33 410 U.S. 458 (1973).

34 *Id.* at 459.

35 *Id.* at 460.

36 *Id.* at 471 (citation omitted).

37 *Id.* at 464. In finding that the danger of prosecutorial manipulation was not present in *Somerville,* the Court distinguished the earlier case of Downum v. United States, 372 U.S. 734 (1963). In *Downum* the trial judge declared a mistrial when the prosecution failed to produce a witness. The Court noted that the situation in *Somerville* was "unlike *Downum,* where the mistrial entailed not only a delay for the defendant, but also operated as a post-jeopardy continuance to allow the prosecution an opportunity to strengthen its case." *Somerville,* 410 U.S. at 469.

38 424 U.S. 600 (1976).

39 *Id.* at 601-02.

40 *Id.* at 602. Dinitz's trial counsel was permitted to appear before the court pro hac vice because he had not been admitted to practice before the United States District Court for the Northern District of Florida. Dinitz also had retained a third attorney, a law professor, to assist with the issues of law.

courthouse because of repeated misconduct.[41] Dinitz's other attorneys were not prepared to proceed, and moved for a mistrial.[42] The court of appeals concluded that the trial judge's decision to exclude Dinitz's trial attorney left the defendant with no choice but to move for a mistrial.[43] The appellate court based its review of the impact of Dinitz's mistrial motion on his double jeopardy claim on the theory that only a voluntary waiver of his constitutional right would permit a retrial.[44] Because the defendant had no real choice, the appellate court ignored Dinitz's motion for mistrial and instead analyzed the circumstances under the manifest necessity test of *United States v. Perez* as if the trial judge had declared a mistrial over Dinitz's objection. The court of appeals found that the actions of the judge were not supported by manifest necessity given the availability of options less drastic than expelling defendant's counsel.[45] The court thus concluded that retrial violated the defendant's right not to be twice put in jeopardy.[46]

The Supreme Court reversed, attacking the court of appeals' reliance on waiver analysis. The Court found little merit in the appellate court's conclusion that it could disregard Dinitz's motion for mistrial because it viewed that motion as the involuntary product of a "Hobson's choice" and not as a voluntary waiver of double jeopardy protection. The Court emphasized that "traditional waiver concepts have little relevance where the defendant must determine whether or not to request or consent to a mistrial in response to judicial or prosecutorial error."[47] It asserted that waiver analysis

> erroneously treats the defendant's interest in going forward before the first jury as a constitutional right comparable to the right to counsel. It fails to recognize that the protection against the burden of multiple prosecutions underlying the constitutional prohibition against double jeopardy may be served by a mistrial declaration and the concomitant

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41 *Id.* at 603.

42 The trial court offered Dinitz three options: "(1) a stay or recess pending application to the Court of Appeals to review the propriety of expelling Wagner [the attorney guilty of misconduct], (2) continuation of the trial with Meldon and Baldwin as counsel, or (3) a declaration of a mistrial which would permit the respondent to obtain other counsel." *Id.* at 604.

43 United States v. Dinitz, 492 F.2d 53, 59 (5th Cir.), *aff'd on reh'g,* 504 F.2d 854 (5th Cir. 1974) (en banc), *rev'd,* 424 U.S. 600 (1976).

44 492 F.2d at 58-59.

45 The court of appeals stated:

> [T]he judge could have warned Wagner that he would be cited for contempt if such practices continued. He could have actually cited him for contempt and imposed post trial sanctions for each citation, if he thought Wagner's conduct amounted to obstructing the performance of his judicial duty . . . . The trial judge could have caused a complaint to be filed with the grievance committee of the state bar or taken post trial steps to prevent him from being admitted to practice before the Northern District of Florida.

Id. at 60-61.

46 *Id.* at 54.

47 United States v. Dinitz, 424 U.S. 600, 608-09 (1976).

> relinquishment of the opportunity to obtain a verdict from the first jury.[48]

Relying on its prior holdings that the double jeopardy clause presents no barrier to retrial when a conviction is overturned on appeal,[49] the Court observed that a defendant might find it in his own interest, when faced with prejudicial error, to choose an immediate retrial following mistrial instead of proceeding to a tainted conviction followed by an appeal, reversal, and eventual retrial.[50] "In such circumstances, a defendant's mistrial request has objectives not unlike the interests served by the Double Jeopardy Clause—the avoidance of anxiety, expense, and delay occasioned by multiple prosecutions."[51] Given these possible objectives, the Court found that "[t]he important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of [prosecutorial or judicial] error."[52] Thus, the Court in rejecting waiver analysis as a basis for reviewing a defendant's double jeopardy claim, erected a more limited rule that would vitiate double jeopardy protection whenever the defendant formally initiated the procedure resulting in the need for a second jeopardy. *Dinitz* thus marks a radical departure from prior case law regarding the waiver of constitutional rights.[53]

Having established a formalistic rule of defendant choice in situations involving prosecutorial or judicial error, the *Dinitz* Court nevertheless articulated a crucial qualification. The Court reaffirmed the understanding that

> [t]he Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions. It bars retrials where "bad-faith conduct by judge or prosecutor," threatens the "[h]arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict" the defendant.[54]

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48 *Id.* at 609 n.11.

49 *See* United States v. Ball, 163 U.S. 662, 672 (1896); *infra* notes 64-86 and accompanying text.

50 424 U.S. at 610.

51 *Id.* at 608.

52 *Id.* at 609.

53 The double jeopardy protection has been effectively relegated, without explanation, to some lesser category of rights, which can more easily be waived. By comparison, the sixth amendment right to assistance of counsel may be waived only if the waiver is an intelligent and competent one. *See* Carnley v. Cochran, 369 U.S. 506 (1962); Johnson v. Zerbst, 304 U.S. 458 (1938). For a discussion of waiver analysis as it relates to mistrial and dismissal cases and the double jeopardy clause, see Note, *A Resolution of the Mistrial—Dismissal Dichotomy in Double Jeopardy Contexts,* 64 IOWA L. REV. 903, 914-18 (1979). *See generally* Comment, *Double Jeopardy: The Prevention of Multiple Prosecutions,* 54 CHI.[-]KENT L. REV. 549 (1977).

54 424 U.S. at 611 (quoting United States v. Jorn, 400 U.S. 470, 485 (1971) and Downum v. United States, 372 U.S. 734, 736 (1963)) (citations omitted).

Thus, the Court still recognized that regardless of defendant choice, some level of prosecutorial or judicial conduct always should bar retrial following a mistrial.

In *Arizona v. Washington,*[55] the Court reiterated the qualification stated in *Dinitz.* As in *Dinitz,* the trial judge in *Washington* declared a mistrial because of improper comments made by defense counsel in the opening statement.[56] The trial judge in *Washington,* however, declared a mistrial at the behest of the prosecutor, rather than at the defendant's request. The Supreme Court observed that in assessing a trial judge's decision to declare a mistrial, "the strictest scrutiny is appropriate when the basis for the mistrial is the unavailability of critical prosecution evidence, or when there is reason to believe that the prosecutor is using the superior resources of the State to harass or to achieve a tactical advantage over the accused."[57] The Court concluded, however, that in the absence of such considerations, "a trial judge's decision to declare a mistrial based on his assessment of the prejudicial impact of improper argument is entitled to great deference."[58]

The cases discussed above reveal two distinct situations that implicate the considerations of protecting the defendant's right to a particular forum and ensuring that the defendant is free from government harassment. In cases such as *Jorn*, in which the judge declares a mistrial sua sponte, and *Washington,* in which the trial judge declares mistrial on the prosecution motion, the mistrial might function to give the prosecutor an advantage at retrial. In order to avoid this possibility, the Court has asserted that "[h]arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict are examples when jeopardy attaches."[59] In these cases, the defendant's right to a particular forum complements his interest in being free of governmental harassment. If the government seeks to use mistrial as a device for strengthening its cases for future proceedings, protection of the defendant's right to proceed before the first forum serves to protect the defendant's interest in avoiding such governmental harassment. Both interests are vindicated if the trial judge allows the defendant to continue before the first forum until there is a clear showing of manifest necessity for mistrial that rests on circumstances that do not lend themselves to prosecutorial

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55 434 U.S. 497 (1978).

56 *Id.* at 501.

57 *Id.* at 508 (footnotes omitted). For an analysis of the precedential value of *Washington,* see Holleman, *supra* note 30, at 55-68.

58 434 U.S. at 514. The Court in *Washington* concluded that the trial judge had used "sound discretion" in granting a mistrial and reversed the court of appeals holding that the defendant had made a valid double jeopardy claim. *Id.* at 516.

59 *Id.* at 508 n.25 (quoting Downum v. United States, 372 U.S. 734, 736 (1963)).

manipulation.[60]

Different considerations attach in cases such as *Dinitz* where the defendant himself moves for mistrial.[61] Where the defendant's motion is made in the face of prejudicial prosecutorial conduct or judicial error, the interest in proceeding before the first forum is in potential conflict with the interest in avoiding governmental harassment. Often, in such cases the government does not seek to provoke a mistrial, preferring instead the opportunity to prevail in the first forum based on its prejudicial activities. Thus, continuing in the first forum will not protect the defendant from harassment. In order to protect defendants from this conduct, the Court in *Dinitz* and *Washington* recognized that despite the defendant's right to choose whether to proceed before the initial forum, some level of misconduct must be viewed as barring retrial if the double jeopardy clause is to have significance.[62] This limitation on the right to retry defendants is necessary to protect citizens from governmental abuses of power; a goal which is, after all, the fundamental principle underlying the mandatory language of the double jeopardy clause. Current double jeopardy jurisprudence, however, provides no analytical basis for this protective rule, a legal vacuum that the Supreme Court recognized and relied upon in *Oregon v. Kennedy.*[63]

II
THE SEARCH FOR ANALYTICAL CONSISTENCY: ELIMINATING THE DISTINCTION BETWEEN MISTRIAL AND APPELLATE REVERSAL CASES

In 1896 the Supreme Court stated in *United States v. Ball*[64] that "it is quite clear that a defendant, who procures a judgment against him

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60 *See* Illinois v. Somerville, 410 U.S. 458, 464 (1973). The means by which the government seeks to force the defendant to move for mistrial may also destroy the defendant's interest in the first forum. In such a case, proceeding before the first forum will not protect the defendant from harassment. If the defendant fails to move for mistrial in the face of governmental overreaching, the judge must declare a mistrial sua sponte in order to protect the defendant from harassment. *See* Comment, *supra* note 26, at 120; Comment, *supra* note 30, at 982; Comment, *Retrial After Mistrial: The Double Jeopardy Doctrine of Manifest Necessity,* 45 MISS. L.J. 1272, 1279 (1974).

61 *See supra* note 60. The need to bar retrial as a remedy for harassment also may arise in cases where the defendant does not move for mistrial. Even if the defendant retains "primary control over the course to be followed," United States v. Dinitz, 424 U.S. 600, 609 (1976), there should be some level of misconduct that mandates an end to the original proceedings and a bar to retrial. Thus, judges may be under a duty to declare mistrials sua sponte on the grounds of prosecutorial or judicial overreaching.

62 Arizona v. Washington, 434 U.S. at 508; United States v. Dinitz, 424 U.S. at 611.

63 456 U.S. 667, 679 (1982). The Court recognized that its earlier decisions had created confusion as to the appropriate standard for determining when retrial is barred after defendant's successful motion for a mistrial.

64 163 U.S. 662 (1896).

upon an indictment to be set aside, may be tried anew upon the same indictment, or upon another indictment, for the same offence of which he had been convicted."[65] The rationale of the rule, which runs contrary to the English view that generally bars retrial of defendants who have their convictions overturned on appeal,[66] has never been clearly established:[67]

> Judicial efforts to account for the *Ball* doctrine in terms of "waiver" of the defendant's immunity from retrial or in terms of a single "continuing jeopardy" generally are conceded to be conceptually sterile, and the only real justification for the doctrine is the practical importance of preventing every trial defect from conferring immunity upon the accused.[68]

Application of the *Ball* rule uniformly allowing retrial after convictions are overturned on appeal lacks any principled legal foundation. Despite this absence, the *Ball* rule may have had a significant impact on the

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65 *Id.* at 672 (citations omitted).

66 *See* Schulhofer, *supra* note 30, at 456 n.28; Note, *supra* note 26, at 1280.

67 Several theories attempt to account for the result in *Ball.* The most widely accepted rationale has probably been that "[b]y appealing, a defendant is considered to have 'waived' his double jeopardy protection by asking the court for a new trial. He either accepts the first verdict or consents to being placed in jeopardy again in order to seek a more favorable verdict." Comment, *supra* note 24, at 889 (footnote omitted). The waiver rationale, however, has been criticized. *See* Mayer & Yarbrough, Bis Vexari: *New Trials and Successive Prosecutions,* 74 HARV. L. REV. 1, 4-15 (1960). More recent double jeopardy decisions have also eroded the waiver notion. *See* United States v. Scott, 437 U.S. 82, 99 (1978); Green v. United States, 355 U.S. 184, 191-92 (1957).

Justice Holmes proposed a theory of "continuing jeopardy" to explain why retrial after reversal on appeal is permissible. Holmes argued that "logically and rationally a man cannot be said to be more than once in jeopardy in the same cause, however often he may be tried. The jeopardy is one continuing jeopardy from its beginning to the end of the cause." Kepner v. United States, 195 U.S. 100, 134 (1904) (Holmes, J., dissenting). The Court has rejected this theory, at least with respect to "previous trial[s] ending in an acquittal; in a conviction either not reversed on appeal or reversed because of insufficient evidence; and in mistrial rulings not prompted by manifest necessity." Swisher v. Brady, 438 U.S. 204, 218 (1978) (citations omitted).

68 Schulhofer, *supra* note 30, at 456-57 (footnote omitted). In preserving the *Ball* rule the Court has noted:

> While different theories have been advanced to support the permissibility of retrial, of greater importance than the conceptual abstractions employed to explain the *Ball* principle are the implications of that principle for the sound administration of justice. Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendants' rights as well as society's interest.

United States v. Tateo, 377 U.S. 463, 466 (1964).

narrowing of the mistrial rule begun in *Dinitz* that "[t]he Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrial requests."[69] The *Ball* rule had created an incentive for trial judges to deny meritorious motions for mistrial made on the grounds of prosecutorial overreaching, and certainly to avoid declarations of mistrial on their own motion. This was because a trial judge might believe "that society will be better served by completing a trial, even after clear error has arisen and the defendant seeks the mistrial, than the alternative of a mistrial and the possible bar of double jeopardy based on the error."[70] After *Oregon v. Kennedy,* the trial judge need only assure that sufficient evidence exists to support a conclusion that the prosecutor did not deliberately seek a mistrial. On such a showing, a retrial will not be barred, and thus trial judges may be more willing to declare a mistrial.

Several commentators have identified a different approach, more consistent with basic double jeopardy policy: "In order to avoid judicial reluctance to declare a mistrial for fear of immunizing the accused from further trial, the appeals court should unrestrainedly reverse a conviction and bar retrial on the ground that a mistrial should have been declared."[71] Recently, in *United States v. Opager,*[72] the Court of Appeals for the Fifth Circuit discussed the issue of "whether retrial must be barred where prosecutorial overreaching exists, motions to dismiss are denied and the case proceeds to conviction and subsequent reversal on the grounds of overreaching by the government."[73] The court recognized that "[t]he policies underlying the double jeopardy clause may be undermined by a tainted proceeding allowed to be completed only because of a trial judge's erroneous denial of motions for mistrial or motions to dismiss."[74] Responding to the government's argument that the court should not bar retrial because Opager retained her valued right to proceed before the initial forum, the court noted that "this 'valued right' does not constitute a complete statement of the interests protected by the double jeopardy clause."[75]

Indeed, in order to protect defendants from abuses of government

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69 424 U.S. at 611; *see also* Arizona v. Washington, 434 U.S. 497, 513 (1978).

70 *Dinitz,* 424 U.S. at 610 n.12 (quoting United States v. Dinitz, 492 F.2d 53, 63 (5th Cir. 1974) (Bell, J., dissenting)).

71 Comment, *supra* note 30, at 989 (footnote omitted); *see also* Note, *supra* note 26, at 1280; Comment, *supra* note 24, at 909.

The Comment discussed *supra* at note 30, ultimately rejects this approach on the grounds that it "would de-emphasize the [trial] judge's duty to cure possible error when feasible, and ignore the defendant who may desire to continue a proceeding that is clearly tainted by reversible error for reasons of trial strategy." *Id.* at 989.

72 616 F.2d 231 (5th Cir. 1980).

73 *Id.* at 235.

74 *Id.*

75 *Id.*

power, courts should prohibit retrial in some cases despite a defendant's right to a particular forum. In fact, more support exists in the common law to preclude retrial after reversal than after mistrial; at common law, jeopardy did not attach prior to the verdict.[76] To the extent that the legally sterile rule of *United States v. Ball* encourages trial courts to deny double jeopardy protection in mistrial contexts and eliminates the protection in appellate reversal contexts, a reconsideration of the rule is appropriate.

The only remaining explanation for the *Ball* doctrine is the Court's extra-legal beliefs that the "societal interest in punishing one whose guilt is clear" overrides the individual's double jeopardy right, and that immunizing an accused "from punishment because of any defect sufficient to constitute reversible error"[77] would cause appellate courts to overlook trial error and affirm otherwise reversible convictions. This nonconstitutional rationale for the *Ball* rule amounts to judicial nullification; it assumes a judicial role and judicial authority that the Bill of Rights pretermits. Preclusion of reprosecution under the double jeopardy clause, unlike the exclusionary rule, is not a court-created prophylactic rule but rather a constitutionally mandated bar prohibiting the executive branch from submitting an accused person to the guilt determination process more than once. In short, the fifth amendment already has balanced the "societal interest" in guilt determination and punishment against the citizen's interest in avoiding a second jeopardy and has specifically disposed of the policy question.[78] Unless the Court can fashion a rule which interprets the fifth amendment consistently with its goal—such as, for example, adopting the English rule that jeopardy does not attach until the verdict[79] in the mistrial context—the Court subjects it-

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76 *See* Note, *supra* note 26, at 1280.

77 United States v. Tateo, 377 U.S. 463, 466 (1964). For a somewhat ideosyncratic reductionist view supporting the *Ball* rule, see Posner, *Excessive Sanctions for Governmental Misconduct in Criminal Cases,* 57 WASH. L. REV. 635 (1982).

78 For a judge's view of the policy issue see Fleming, *The Price of Perfect Justice,* 58 JUDICATURE 340, 344 (1975). Judge Fleming writes that

> [i]f on appeal after judgment of conviction the trial is found substantially defective or unfair the judgment should be reversed and the defendant go free. . . . This proposal may sound revolutionary, but it is actually a return to first principles. The English have always had a system of only one trial to final judgment.

Id. at 344. Judge Fleming thus would bar retrial whenever trial error was not "harmless" within the meaning of rule 52(a) of the Federal Rules of Criminal Procedure. This article proposes a more modest rule, which would bar retrial only when the trial error was "plain" within the meaning of rule 52(b) and was directly caused by governmental conduct designed improperly to convict.

For a recent decision discussing the difference between nonharmless errors, requiring reversal under rule 52(a) if noticed at trial, and plain errors, requiring reversal under rule 52(b) even when not noticed at trial, see United States v. Blackwell, 694 F.2d 1325, 1340-43 (D.C. Cir. 1982).

79 *See, e.g.,* Schulhofer, *supra* note 30, at 453 & n.8.

self to political censure when it substitutes its policy judgment for that of the constitutional convention.

Perhaps more importantly, the *Ball* rule is based upon flawed premises. First, the *Ball* rule assumes that multiple trials enhance the reliability of the truth-seeking process. Even if the primary goal of the Bill of Rights in the context of criminal justice administration were truth-determination, however, the Court has acknowledged several times that a second jeopardy, more often than not, increases the possibility of fabrication and erroneous dispositions.[80] The adversary nature of criminal investigations and trials undercuts any presumption of increased reliability.[81] Adherents of the *Ball* rule also assume that appellate courts regularly reverse convictions on the grounds of mere technical defects and that if the *Ball* rule were modified, these courts would instead affirm those convictions. This assumption—central to the *Ball* decision—has become plainly untenable in light of the scope of the harmless error rule.[82] At the time of *Ball,* "even a trivial error at trial resulted in reversal."[83] In response to judicial overreliance upon formal defects, in 1919 Congress enacted the harmless error rule prohibiting reversals of judgments based upon "technical errors" that do not affect the "substantial rights of the parties."[84] In more recent years the federal courts have relied upon this rule to affirm convictions in the face of increasingly serious procedural or evidentiary errors,[85] so that very few criminal convictions are reversed for any reason. These few reversals[86] generally occur in cases where, notwithstanding a jury verdict, the defendant's guilt is less than obvious.

Ultimately, the likelihood that appellate courts would not reverse a decision if reversal precluded retrial is extremely marginal, especially where reversal is based upon governmental overreaching. This article thus proposes only a limited modification of the *Ball* rule to eliminate the distinction between mistrial and appellate reversal cases where material government overreaching has occurred and to make double jeopardy jurisprudence consistent with the underlying constitutional

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80 *See* Oregon v. Kennedy, 456 U.S. 667, 686-90 nn.19-30 (and cases cited therein) (Stevens, J., concurring in judgment).

81 *See* Alschuler, *Courtroom Misconduct By Prosecutors and Judges,* 50 TEX. L. REV. 629, 633 (1972); *see also* Dunlop v. United States, 165 U.S. 486, 498 (1897).

82 FED. R. CRIM. P. 52(a); *see* United States v. Blackwell, 694 F.2d 1325 (D.C. Cir. 1982); R. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 81 (1970).

83 Note, *Harmful Use of Harmless Error in Criminal Cases,* 64 CORNELL L. REV. 538, 540 (1979).

84 Act of Feb. 26, 1919, ch. 48, 40 Stat. 1181 (current version at 28 U.S.C. § 2111 (1976)).

85 *See, e.g.,* United States v. Beasley, 576 F.2d 626, 632-33 (5th Cir. 1978); Wright v. Estelle, 572 F.2d 1071, 1080-82 (5th Cir. 1978) (en banc) (Godbold, J., dissenting).

86 For a discussion of the increasing frequency with which courts use the harmless error doctrine, see Note, *supra* note 83, at 544-61.

principles. The more plausible argument today may be that appellate courts, mindful of the increasing expense of trial and retrial, would be less inclined to order a new trial than to terminate the prosecution completely in the face of demonstrated overreaching.

In *Burks v. United States*,[87] the Supreme Court unanimously held that categorical distinctions beween appellate reversals and mistrials in the context of double jeopardy law situations are not tenable.[88] The Court's analysis supports the elimination of a distinction between mistrial and appellate reversal cases involving judicial or prosecutorial overreaching, at least where the overreaching was obvious and intentional and sufficiently affected the defendant's fundamental rights within the meaning of the plain error doctrine to require a court to notice the error even in the absence of a defense objection or motion.[89] In *Burks*, the petitioner argued

> that had the District Court found the evidence at the first trial inadequate, as the Court of Appeals said it should have done, a second trial would violate the Double Jeopardy Clause. . . . [I]t makes no difference that the determination of evidentiary insufficiency was made by a *reviewing* court since the double jeopardy considerations are the same, regardless of which court decides that a judgment of acquittal is in order.[90]

The Court ruled in Burks's favor stating that "[t]o hold otherwise would create a purely arbitrary distinction between those in petitioner's position and others who would enjoy the benefit of a correct decision by the District Court."[91] By analogy, in a case involving prosecutorial or judicial overreaching, it should make no difference that the determination of overreaching is made on appeal as opposed to during trial. As a practical matter, overreaching may not be discovered until appellate review.[92] If courts fail to bar retrial, regardless of the level of review at which prosecutorial overreaching is found, government conduct will go uncensured, the integrity of the judicial process will be tainted, and the double jeopardy clause will be judicially undermined.[93]

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87 437 U.S. 1 (1978).

88 *Id.* at 16-18.

89 *See generally* Fleming, *supra* note 78, at 344 (advocating elimination of *Ball* rule).

Most recently, the Supreme Court has held that the plain error rule should be "used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." United States v. Frady, 456 U.S. 152, 163 n.14 (1982).

90 437 U.S. at 5-6.

91 *Id.* at 11.

92 In some cases the defendant may not move for mistrial because he is not aware of the full extent of governmental misconduct. A primary example of such misconduct would be subornation of or acquiescence in perjury. The defendant should not be without a remedy when such overreaching is discovered at the appellate level merely because the government was initially able to conceal its conduct. *See* Westen & Drubel, *Toward a General Theory of Double Jeopardy,* 1978 SUP. CT. REV. 81, 103.

93 Barring retrial not only deters prosecutorial or judicial misconduct but also protects

This proposed expansion of *Burks* would constitute an exception to the *Ball* rule, and would admittedly conflict with the Court's statement

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the integrity of the judicial process itself. *Compare* Rose v. Mitchell, 443 U.S. 545 (1979) (judicial process implicated) *with* Stone v. Powell, 428 U.S. 465 (1976) (deterring police misconduct). *See also* Vaccari, *Governmental Misconduct and the Right of Liberty,* 9 FORDHAM URB. L.J. 279 (1980) (asserting that due process analysis should be expanded to protect defendants more fully from governmental misconduct).

These concerns underlie the due process clause as well. In Giglio v. United States, 405 U.S. 150 (1972), where the Court required a new trial after the prosecutor failed to reveal that a government witness had been promised leniency in return for his testimony, the Court summarized its application of due process analysis to trial misconduct:

> As long ago as *Mooney v. Holohan,* 294 U.S. 103, 112 (1935), this Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with "rudimentary demands of justice." This was reaffirmed in *Pyle v. Kansas,* 317 U.S. 213 (1942). In *Napue v. Illinois,* 360 U.S. 264 (1959), we said, "[t]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Id.,* at 269. Thereafter *Brady v. Maryland,* 373 U.S. [83, 87 (1963)], held that suppression of material evidence justifies a new trial "irrespective of the good faith or bad faith of the prosecution."

Id. at 153. The Court further refined these due process principles in United States v. Agurs, 427 U.S. 97 (1976). There the Court recognized that "[a]lthough in *Mooney* the Court had been primarily concerned with the willful misbehavior of the prosecutor, in *Brady* the Court focused on the harm to the defendant resulting from nondisclosure." *Id.* at 104 n.10. The Court in *Agurs* adopted the reasoning of *Brady* and emphasized that the constitutional duty to disclose information cannot be

> measured by the moral culpability, or the willfulness, of the prosecutor. If evidence highly probative of innocence is in his file, he should be presumed to recognize its significance, even if he had actually overlooked it. Conversely, if evidence actually has no probative significance at all, no purpose would be served by requiring a new trial simply because an inept prosecutor incorrectly believed he was suppressing a fact that would be vital to the defense. If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor.

Id. at 110 (citation and footnote omitted). Thus, due process analysis focuses on the impact of nondisclosed or perjured testimony on the determination of factual guilt. A court finding a due process violation must overturn the unconstitutional conviction. Such a finding, however, does not bar retrial for the purpose of protecting the defendant from embarrassment, expense, and ordeal caused by governmental misconduct. Due process only limits the right to retry a defendant when there is danger that the decision to reprosecute will be vindictive:

> Due Process of law . . . requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.

North Carolina v. Pearce, 395 U.S. 711, 725 (1969). Likewise, "[a] person convicted of an offense is entitled to pursue his statutory right to a trial *de novo,* without apprehension that the State will retaliate by substituting a more serious charge for the original one, thus subjecting him to a significantly increased potential period of incarceration." Blackledge v. Perry, 417 U.S. 21, 28 (1974). *But see* Bordenkircher v. Hayes, 434 U.S. 357 (1978) (due process not violated when prosecutor carries out threat made during plea negotiations to reindict defendant if he does not plead guilty to original offense).

This article proposes that the *Mooney-Giglio* line of cases be analyzed, for perhaps the first time, under the double jeopardy clause and its policies.

in *United States v. Scott,*[94] that "[t]he successful appeal of a judgment of conviction, on any ground other than the insufficiency of the evidence to support the verdict . . . poses no bar to further prosecution on the same charge."[95] This dictum, however, must be read in light of the Court's recognition of the exceptions for prosecutorial overreaching.[96]

III

MAINTAINING DOUBLE JEOPARDY PROTECTION IN THE FACE OF GOVERNMENT MISCONDUCT

Until *Oregon v. Kennedy,* the Court had not set forth explicit guidelines delineating the types of prosecutorial misconduct that would pre-

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94 437 U.S. 82 (1978).

95 *Id.* at 90-91. *Scott* involved a dismissal as opposed to a mistrial. Lee v. United States, 432 U.S. 23 (1977) established that dismissals may in some cases be treated the same as mistrials. Justice Rehnquist, writing for the majority in *Scott,* emphasized that a case in which a defendant moves for a dismissal

> is scarcely a picture of an all-powerful state relentlessly pursuing a defendant who had either been found not guilty or who had at least insisted on having the issue of guilt submitted to the first trier of fact. It is instead a picture of a defendant who chooses to avoid conviction and imprisonment, not because of his assertion that the Government failed to make out a case against him, but because of a legal claim that the Government's case against him must fail even though it might satisfy the trier of fact that he was guilty beyond a reasonable doubt.

Id. at 96. Justice Rehnquist asserted that

> the defendant, by deliberately choosing to seek termination of the proceedings against him on a basis unrelated to factual guilt or innocence of the offense of which he is accused, suffers no injury cognizable under the Double Jeopardy Clause if the Government is permitted to appeal from such a ruling of the trial court in favor of the defendant.

Id. at 98-99. Logically, there must be some level of governmental misconduct that can be characterized as an example of the "all-powerful state relentlessly pursuing a defendant." Once that level of conduct is present, further proceedings should not be allowed, regardless of whether there has been a final determination of the defendant's guilt or innocence. In *Scott,* the aspect of *Dinitz* that emphasized the defendant's continuing control over the course to be followed was applied to a dismissal case. The crucial qualification enunciated in *Dinitz,* requiring that retrial be barred in some instances regardless of defendant choice, should also be applied to dismissal cases. *See generally* Note, *supra* note 53; Note, *Double Jeopardy Consequence of Dismissals,* 58 WASH. U.L.Q. 117 (1980).

96 437 U.S. at 94. Justice Rehnquist based this dictum on Burks v. United States, 437 U.S. 1 (1978), where the Court stated that

> reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, e.g., incorrect receipt or rejection of evidence, incorrect instructions, or *prosecutorial misconduct.*

Id. at 15 (emphasis added). Nothing in this language necessarily cuts against the need to bar retrial in cases involving prosecutorial overreaching constituting plain error intended to interfere with the proper and lawful functioning of judicial process and necessary to avoid acquittal, as opposed to erroneous conduct that could not be said to have affected the defendant's substantial rights.

clude reprosecution after a defendant's motion for mistrial. In *United States v. Jorn,* the Court held that "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."[97] In a footnote, the Court developed the difference between overreaching and mere error, asserting that "where a defendant's mistrial motion is necessitated by judicial or prosecutorial impropriety designed to avoid an acquittal, reprosecution might well be barred."[98] As noted earlier,[99] however, the *Dinitz* Court stated that governmental acts must be "intended to provoke mistrial requests" before they will be held to bar reprosecution.[100] Most recently, in *DiFrancesco* and *Oregon v. Kennedy,* the Court interpreted *Dinitz* to mean that "reprosecution of a defendant who has successfully moved for a mistrial is not barred, so long as the Government did not deliberately seek to provoke the mistrial request."[101]

Despite the ambiguous dicta in the Court's pre-*Oregon v. Kennedy* decisions suggesting that reprosecution would be barred only when the government actually intended to provoke mistrial, several lower courts read these decisions broadly, thereby expanding the scope of this remedy. In *United States v. Kessler,*[102] for example, the government knowingly introduced into evidence a rifle that was totally unrelated to the conspiracy at issue in the trial, thereby attempting to mislead the jury. The Court of Appeals for the Fifth Circuit, in barring reprosecution, stated: "To find 'prosecutorial overreaching,' the Government must have, through 'gross negligence or intentional misconduct,' caused aggravated circumstances to develop which 'seriously prejudice[d] a defendant' causing him to 'reasonably conclude that a continuation of the tainted proceeding would result in a conviction.' "[103] In *United States v. Martin,*[104] the prosecutor read prejudicial portions of the defendant's grand jury testimony to the jury in violation of his assurances to the judge that he had deleted the irrelevant and prejudicial statements contained in that testimony. Barring reprosecution on the grounds of prosecutorial overreaching, the Court of Appeals for the Eighth Circuit stated that even "[i]f the government's actions in reading this irrelevant and highly prejudicial testimony to the jury were not intentionally designed to provoke a mistrial request, at a minimum they constitute

97 400 U.S. at 485 (footnote omitted).
98 *Id.* at 485 n.12.
99 *See supra* notes 19, 69 and accompanying text.
100 424 U.S. at 611.
101 *DiFrancesco,* 449 U.S. at 130.
102 530 F.2d 1246 (5th Cir. 1976).
103 *Id.* at 1256 (footnote omitted).
104 561 F.2d 135 (8th Cir. 1977).

gross negligence. [Such actions] can best be described as prosecutorial error undertaken to harass or prejudice the defendant—prosecutorial overreaching."[105]

Notwithstanding language to the contrary in *Jorn* and the Fifth and Eighth Circuit decisions in *Kessler* and *Martin,* the Supreme Court, in *Oregon v. Kennedy,* held that

> [p]rosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on defendant's motion, . . . does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause. . . . Only where the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion.[106]

The majority opinion in *Oregon v. Kennedy* offers no example of prosecutorial conduct specifically designed to provoke a mistrial rather

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105 *Id.* at 140 (footnote omitted). For a discussion of the interpretation given prosecutorial overreaching by other lower courts, see Comment, *supra* note 26, at 121-30; Comment, *supra* note 30, at 982-90. Other circuits have not adopted the liberal position taken by the Fifth and Eighth Circuits that permits a finding of prosecutorial overreaching in instances of gross negligence by the prosecutor. *Accord* Government of V.I. v. Scuito, 623 F.2d 869, 872 n.5 (3d Cir. 1980) (noting that only Fifth and Eighth Circuits have accepted this standard). The Tenth Circuit, by contrast, has taken an especially hard-line stance on this issue, requiring a showing of bad faith on the part of the prosecutor to goad the defendant into requesting a mistrial. *See, e.g.,* United States v. Leonard, 593 F.2d 951 (10th Cir. 1979); United States v. Nelson, 582 F.2d 1246 (10th Cir. 1978); United States v. Buzzard, 540 F.2d 1383 (10th Cir. 1976).

Recent cases in which courts have considered the double jeopardy issue where the defendant alleged government overreaching are collected in State v. Harrell, 85 Wis. 2d 331, 336, 270 N.W.2d 428, 431-32 (1978).

In United States v. Broderick, 425 F. Supp. 93 (S.D. Fla. 1977), the court, citing *Kessler,* barred retrial on double jeopardy grounds, because the prosecutor had deliberately elicited a hearsay statement from a witness despite two warnings from the court not to do so. Furthermore, the prosecutor's conduct was in violation of a preliminary evidentiary agreement between the two parties that had been ratified by the court. Where a defense lawyer engages in such conduct, the normal response is to hold the attorney in criminal contempt. *See, e.g.,* United States v. Moschiano, 695 F.2d 236, 247-53 (7th Cir. 1982).

106 456 U.S. at 675-76. The majority recognized that its holding conflicted with the language in some earlier opinions that suggested a broader rule. *See id.* at 677-78. The holding acknowledges that defendants, after a mistrial but prior to reprosecution, still may move to dismiss on double jeopardy grounds where prosecutorial "conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial." *Id.* at 679.

Thus, the majority opinion suggests a subjective test focusing on the prosecutor's mental state, rather than an objective test focusing on the prosecutor's conduct as a reasonable defense counsel would perceive it. By contrast, the "objective facts and circumstances" that Justice Powell would rely on in determining intent should prevent a district court from simply adopting a prosecutor's disavowal of an intent to cause a mistrial and should allow more flexible appellate review of such a trial court determination. *Id.* at 679-80 (Powell, J., concurring).

than gain a conviction.[107] Nor does it suggest how a trial court should respond when it not only finds that the prosecutor's primary intent was to gain a conviction, but also finds a secondary intent to avoid acquittal by way of a mistrial. Thus the opinion does not clearly indicate whether retrial would be barred under circumstances such as those in *Kessler* or *Martin,* where the government knowingly introduced prejudicial and inadmissible evidence to the jury.[108] Because the trial courts will retain substantial discretion in determining intent, double jeopardy jurisprudence will develop whimsically, at best.

The Court's rationale for eroding double jeopardy protection in the context of prosecutorial misconduct is difficult to ascertain. Justice Rehnquist pointed to the lack of any standard by which to measure overreaching. Perhaps a more convincing explanation for the decision is to be found in the Court's desire to reduce double jeopardy litigation in the trial and appellate courts.[109]

Although the Court has rejected traditional waiver analysis as a basis for judicially created exceptions to the double jeopardy clause,[110] *Oregon v. Kennedy* seems to rely upon a hybrid waiver theory originated in *Dinitz* and *Scott.* In those cases the Court focused on the alleged "deliberate election" of the defendant to terminate the trial, thus allowing the defendant to retain "primary control" over the course of the litigation. Of course, the entire discussion regarding prosecutorial overreach-

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107 Justice Stevens's opinion, concurring in the judgment, does offer such examples. *See, e.g.,* 456 U.S. at 683, n.13, 688 n.23. *But see id.* at 688 n.24, (quoting Justice Marshall's skepticism as to whether government ever tailors its misconduct specifically to provoke defendant to move for mistrial instead of more generally attempting to prejudice defendant). As a result of the decision in *Oregon v. Kennedy,* prosecutors will be careful to demonstrate that they actually intended to cause the more extreme form of prejudice, namely conviction.

108 The relevant questions are what was the prosecutor's intent and how should a trial court make this determination. The overly aggressive prosecutor, for example, rather than delaying trial to allow missing witnesses to appear would be more likely to risk mistrial by soliciting hearsay evidence from other witnesses or otherwise attempting to fabricate evidence. In such a case, the prosecutor honestly could state that he was seeking a conviction rather than a mistrial. Even under the standard proposed by Justice Powell, *see supra* note 106, the trial court would have to allow retrial. Thus, *Oregon v. Kennedy* has the unfortunate effect of encouraging the more outrageous forms of misconduct.

109 456 U.S. at 677-78. The combination of the *Jorn* rule, which allows defendants to move for dismissal on double jeopardy grounds after having successfully moved for a mistrial on grounds of government overreaching, the *Burks* rule, discussed at *supra* notes 87-96 and accompanying text, and the Court's decision in Abney v. United States, 431 U.S. 651 (1977), authorizing interlocutory appeals from the denial of pretrial double jeopardy motions, has increased the number of double jeopardy appeals in the last decade.

Justice Rehnquist believes that a reduction in double jeopardy litigation will actually benefit defendants. *See* 456 U.S. at 676-77. The opinion repeats the premise that the possibility of a subsequent double jeopardy motion by a defendant moving for a mistrial will induce trial courts to deny defendant's motion. Eliminating the untenable distinction between mistrial and appellate reversal cases would solve this problem.

110 *See* United States v. Dinitz, 424 U.S. at 609; *see also supra* notes 47-53, 64-69 and accompanying text.

ing assumes that overreaching deprives the defendant of any real control or choice regarding the trial. Seen from this vantage, *Oregon v. Kennedy* draws no support from the language of or policy underlying the double jeopardy clause, prior Court decisions, or legal reasoning. Rather, the holding is a naked exercise in judicial administrative rulemaking—the direct opposite of the Court's decision to fashion the exclusionary rule in the absence of explicit authority in the Bill of Rights.

It is clear that the Fifth and Eighth Circuits, in *Kessler* and *Martin,* intended to provide greater protection for criminal defendants. At the time of those decisions, it was unclear whether the Supreme Court would adopt a similar position if directly faced with the issue. Despite the Court's decision to the contrary, there are compelling reasons for adopting a broad definition of overreaching, aside from the literal wording of the clause, the English rule, and the language in *Jorn.* If retrial is barred on grounds of overreaching only when a defendant can show that the government intended to provoke a mistrial, then defendants have no protection from unlawful government acts intended to prejudice or harm the defendant but not to provoke a mistrial, and which surely would result in a conviction if no mistrial were granted. Such a restrictive application of double jeopardy protection would give the government an incentive to use tactics that abridge the rights of defendants. These tactics are difficult to detect at trial or, if detected, are never remedied as envisioned by the clause. After all, would a prosecutor ever seek solely to provoke a mistrial rather than gain a conviction?

An additional consideration favoring the broader definition of overreaching is that an inquiry into the mental state of the judge or prosecutor would be an extremely controversial and inadequate means of implementing double jeopardy policy. One commentator states the problem pointedly:

> [R]egardless of the prosecutorial motive, the defendant suffers severe deprivation of his rights. Constitutional rights are to be protected irrespective of the motive or intent of the actor whose conduct has occasioned an infringement of them . . . . [S]uch rights should not ultimately be forced to rely for protection upon as subjective and illusory a determination as intent.[111]

To provide citizens with adequate protection from government harassment and defendants a meaningful choice to proceed before a chosen jury, the fundamental premises of the double jeopardy clause dictate that courts bar retrial in instances of judicial or prosecutorial misconduct sufficient in magnitude and clarity to implicate the plain error rule,[112] regardless of whether that conduct was narrowly intended to

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111 Comment, *supra* note 24, at 907.

112 The plain error rule is set forth in FED. R. CRIM. P. 52(b). Plain errors are those that

provoke a mistrial.

Under this test, valid overreaching claims would be stated only in those few cases where the judge, prosecutor, or perhaps the chief investigator as government witness, intentionally and unambiguously interfered with the proper functioning of the judicial process after jeopardy has attached in such a way as to affect materially the likely outcome of the trial. Despite Justice Rehnquist's assertions to the contrary in *Oregon v. Kennedy,* an overreaching standard can be defined as requiring: (1) governmental misconduct occurring or continuing after jeopardy attaches, (2) accomplished with the requisite *mens rea,* (3) which is likely to affect the outcome of the trial by eliminating a reasonable doubt as to the defendant's guilt that might otherwise have existed.[113]

A particularly obnoxious effect of the *Oregon v. Kennedy* rule, which the above standard would nullify, is that it creates inducements for the prosecutor to avoid the appearance of seeking or benefiting from a mistrial. Thus, even where manifest necessity might otherwise exist for a mistrial on the government's motion, or where the government and court might normally agree that apparently unintentional or nonfundamental error should abort the proceeding at the defendant's request, the prosecutor is likely to argue against mistrial and may take extra-legal steps to seek a conviction.[114]

CONCLUSION

Recognizing that the double jeopardy clause implicates two fundamental interests—the right to proceed before a particular forum and the right to be free from government harassment—the Supreme Court has attempted to protect both interests while simultaneously cutting back on the seemingly mandatory language of the clause. In cases in which judicial or prosecutorial overreaching forced the defendant to move for a mistrial, the traditional manifest necessity and waiver tests have

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are so fundamental a violation of the defendant's rights that they require reversal regardless of the defendant's failure to object to them at trial. 3A C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 851, at 294-95 (2d ed. 1982).

113 Professor Wright further elaborates on the plain error rule, stating that the level of error involved must be "obvious and substantial" or so "serious and manifest" that it affects the very integrity of the trial process. *See* 3A C. WRIGHT, *supra* note 112, § 856, at 336. Justice Powell has characterized plain error as an " 'inexcusable procedural default.' " Estelle v. Williams, 425 U.S. 501, 513 (Powell, J., concurring). *See generally* United States v. Frady, 456 U.S. 152, 163-64 (1982)(discussing purpose of plain error rule); Wangerin, *"Plain Error" and "Fundamental Fairness": Toward a Definition of Exceptions to the Rules of Procedural Default,* 29 DE PAUL L. REV. 753, 771-78 (1980) (discussing evolution of plain error rule in Supreme Court cases).

114 *See generally* Vaccari, *supra* note 93 and accompanying discussion. Whereas the cases cited in the Vaccari article rely upon the due process clause as precluding prosecution in the face of government misconduct, traditional due process analysis would support only vacating a particular conviction. This article hypothesizes that the double jeopardy clause provides a more specific and direct remedy for individuals confronted with government overreaching.

proved inadequate to vindicate a defendant's right to be free from harassment. The Court, therefore, has acknowledged that in some cases courts must bar retrial regardless of whether the defendant's right to choose to proceed before the first forum was preserved. To supply this remedy with an analytical foundation consistent with fifth amendment policy, however, it is necessary to look beyond the "settled" principles of law summarized in *United States v. DiFrancesco.* Fully implementing this protection against governmental harassment requires that the long-standing rule of *United States v. Ball* be further reevaluated, following the lead of *Burks v. United States,* to permit elimination of the artificial and untenable distinctions between mistrial and appellate reversal cases. Trial courts should bar reprosecution when they declare a mistrial on the grounds of governmental overreaching. Similarly, appellate courts should bar reprosecution upon discovering overreaching founded upon unambiguous bad faith prosecutorial or judicial conduct serious enough to eliminate any reasonable doubt of guilt that otherwise may have existed.

To the extent that *Oregon v. Kennedy* permits courts to consider only a nebulous intent by the prosecutor to provoke a mistrial, it will cause widely disparate results in apparently similar situations and perhaps ultimately might lead to a de facto judicial repeal of the double jeopardy clause. The Court should reconsider its decision. State courts, free to interpret their own constitutional provisions regarding double jeopardy, should do so more broadly than the Court has in *Oregon v. Kennedy.* Defendants should not lose their double jeopardy protection simply because a prosecutor intends to seek a conviction rather than provoke a mistrial through conduct that could accomplish either result.