University of Richmond Law Review

Volume 20 | Issue 3 Article 9

1986

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Recommended Citation

Roger D. Scott, *Double Jeopardy and the Commonwealth's Right to Writs of Error in Criminal Cases*, 20 U. Rich. L. Rev. 629 (1986).
Available at: http://scholarship.richmond.edu/lawreview/vol20/iss3/9

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NOTE

DOUBLE JEOPARDY AND THE COMMONWEALTH'S RIGHT TO WRITS OF ERROR IN CRIMINAL CASES*

In the 1986 legislative session, the Virginia General Assembly attempted to produce a constitutional amendment designed to expand the right of Commonwealth's Attorneys to appeal criminal cases. The Virginia Constitution prohibits appeals by the commonwealth in criminal cases in which the accused might be sentenced to death or imprisonment, unless the case involves state revenue.[1] Advocates of an amendment to expand prosecutorial appeals have never fully explained the historical context of the prohibition against such appeals and their complex relationship to other constitutional, statutory, and common law provisions. The subject of prosecutorial appeals involves such fundamental legal issues as former jeopardy, justification for the dismissal of a jury before verdict, the finality of judgments, and the reviewability of interlocutory orders. The piecemeal evolution of doctrines in these areas from the English common law to their present state has entangled the concept of criminal appeals by the commonwealth in a web of technical confusion. The issue of prosecutorial appeals also involves a confrontation between the public's interest in access to appellate review and the individual's interest in freedom from harassment and persecution by a powerful government. This article demonstrates that few types of prosecutorial appeals are inconsistent with other legal principles and suggests that greater access to appellate review would enhance the state's ability to protect society from crime without unfairly burdening the individual accused.

The first section of this article explores the development of the concept of former jeopardy and the plea of *autrefois acquit* in the common law of England.[2] The second section discusses how these common law doctrines were modified and applied in the United States.[3] Because the concept of double jeopardy limits the scope of prosecutorial appeals, the second section also outlines the current federal standards concerning double jeop-

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* This note was written by Roger D. Scott, J.D., 1986, University of Virginia, based on a one-year research project which he performed at the University of Virginia.

1. VA. CONST. art. VI, § 1. "No appeal shall be allowed to the Commonwealth in a case involving the life and liberty of a person, except that an appeal by the Commonwealth may be allowed in any case involving the violation of a law relating to the State revenue."

2. *See infra* notes 8-50 and accompanying text.

3. *See infra* notes 51-56 and accompanying text.

ardy and prosecutorial appeals.[4] The third section traces the development of the double jeopardy concept, the jury discharge rule, and the limit on prosecutorial appeals in Virginia.[5] An historical analysis of these concepts will demonstrate the fallacy of having incorporated into the 1902 Virginia Constitution an overly specific provision against prosecutorial appeals. The fourth section addresses the measures which should be taken to bring Virginia law into conformity with the practice in the overwhelming majority of the states and in the federal courts, suggesting that the Virginia Constitution be amended to allow more appeals by the commonwealth.[6] This section concludes the article by presenting a model statute designed to implement a broader right of appeal.[7]

I. The Common Law Background

A. *Former Jeopardy*

It is fairly well settled that the concept of double jeopardy did not exist in Anglo-Saxon law.[8] Whether the concept came to England through the ecclesiastical law or the civil law,[9] it was probably established in England in the twelfth century, shortly after the Norman Conquest, where it remains today an astonishingly simple legal doctrine. In contrast, one of the most enigmatic features of modern American law is its hypertrophied double jeopardy doctrine.

The guarantee against subjecting the accused to a second trial for the same offense would have been especially precious in medieval England where the penalties upon conviction of a serious offense were extremely harsh, most frequently death or disfigurement.[10] In early English law, a

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4. *See infra* notes 74-80, 102 and accompanying text.

5. *See infra* notes 127-70 and accompanying text.

6. *See infra* notes 180-214 and accompanying text.

7. *See infra* notes 215-25 and accompanying text.

8. Under the pre-Conquest criminal laws of King Cnut, King of England 1016-1035 A.D., trials for crime were by ordeal and habitual criminals were subjected to the "triple ordeal" (tried *thrice*). Prescribed penalties for failure at the second ordeal were removal of the hands, feet, or both. Penalties for failure at the third ordeal included blinding, excision of the nose, ears and upper lip, or scalping. Secular Laws of King Cnut, § 30, *reprinted in* 1 Ancient Laws and Institutes of England 393-95 (1840).

9. Note, *Double Jeopardy and Dual Sovereigns*, 35 Ind. L.J. 444, 446-47 (1960).

10. The Dantean penalty for false accusation was excision of the tongue. Secular Laws of King Cnut, § 16, *reprinted in* 1 Ancient Laws and Institutes of England, *supra* note 8, at 385. Slaves could be branded for a first offense and decapitated for a second offense. *Id.* at 397. "Untrustworthy men" who were "regarded with suspicion by the general public," and any who defended them, could be slain. *Id.* In order that those convicted under his laws might serve as living examples of his ready justice, William the Conqueror, King of England 1066-1087, banned the death penalty and required instead castration, blinding, or the removal of the hands or feet. 3 Willelmi Articuli Retractatis 17, *reprinted in* 1 Ancient Laws and Institutes of England, *supra* note 8, at 494. Henry I, King of England 1100-1135, reinstituted the death penalty by hanging or flaying. Leges Regis Henrici Primi §§ 12.2,

second accusation could quite literally twice place the defendant "in jeopardy of life or limb."[11] The influence of continental law after the Norman Conquest, however, was probably responsible for the formalization of the countervailing pleas in bar of a second indictment, *autrefois acquit* and *autrefois convict*.[12]

The concept of double jeopardy received its first detailed treatment in the writings of Sir Edward Coke, who forged a workable doctrine from scattered sources.[13] Coke's writings on double jeopardy established what is still the basic law on the subject in England. In *Vaux's Case*,[14] William Vaux, indicted for murder, answered that he had previously been indicted for the same offense and had been acquitted. However, because the first indictment had been defective in form, Vaux was not entitled to a plea of *autrefois acquit*.[15] "When the offender is discharged upon an insufficient indictment, there the law has not had its end; nor was the life of the party, in the judgment of the law, ever in jeopardy; and the wisdom of the law abhors that great offences should go unpunished . . . ."[16] A former valid indictment, trial on the merits, and acquittal based upon a determination of factual innocence were established as prerequisites to the valid-

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75.1, *reprinted in* 1 ANCIENT LAWS AND INSTITUTES OF ENGLAND, *supra* note 8, at 523, 579. Many lesser crimes were punishable by fines, but under King Henry, the punishment for second offenses was almost always death or mutilation. J. STEPHEN, 1 A HISTORY OF THE CRIMINAL LAW OF ENGLAND 58 (London 1883); *see also* THE CHRONICLE OF FLORENCE OF WORCESTER 216 (T. Forester trans. London 1854).

11. Until very late, the defense of former jeopardy was available only in cases of felony in which "life or limb" sentences could be awarded. Misdemeanor cases were punishable only by fine or a short term of imprisonment. 2 W. STAUNDFORDE, LESS PLEES DEL CORON 106 (London 1583). Doubt still existed whether a plea of former jeopardy would be available in misdemeanor cases into the twentieth century. 17 AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW, *Jeopardy* 582 (2d ed. 1900).

12. These maxims are both translated as "no one should be punished twice for the same offense." M. FRIEDLAND, DOUBLE JEOPARDY 5-6 (1969). It is impossible to determine when these pleas were first introduced. The case of Richard Old in 1203, 1 SELECT PLEAS OF THE CROWN 33 (F. Maitland ed. 1888), is the first recorded instance in English law of what appears to be a dismissal on the basis of a prior acquittal. The defendant was accused of murder and presented the defense that he and others had already been tried and acquitted of this murder. This defense, however, was not the only grounds for which the case was dismissed. It is not known for certain whether the plea of former acquittal standing alone would have resulted in a dismissal. *Old's Case* was an "appeal," a privately instituted proceeding, used in addition to proceedings instituted by the Crown to enforce early criminal law. *See* 1 AMERICAN AND ENGLISH ENCYCLOPAEDIA OF LAW, *Appeal* 628 (1887). The plea of former judgment based on a private appeal was at first not valid against a subsequent action by the Crown, although such a plea could preclude additional appeals. W. STAUNDFORDE, *supra* note 11, at 106.

13. *See* Sigler, *A History of Double Jeopardy*, 7 AM. J. LEGAL HIST. 283, 288-95 (1963) (surveying English cases and treatises containing primitive concepts of former jeopardy before Coke).

14. 4 Co. Rep. 44a, 76 Eng. Rep. 992 (K.B. 1591).

15. *Id.* at 45a, 76 Eng. Rep. at 993.

16. *Id.* at 45a, 76 Eng. Rep. at 994.

ity of a plea in bar of a second indictment for the same offense.[17]

The pleas of *autrefois acquit* and *convict* implemented the concept of former jeopardy and were founded upon a doctrine similar to *res judicata*, which holds that only a valid final judgment on the merits bars a subsequent suit.[18]

The rule that only a judgment of acquittal on the merits can bar reprosecution rings out clearly in English law from the Renaissance to the present.[19] The accused is protected from being twice adjudged, not from being twice subjected to legal proceedings. One accused of a crime might be in jeopardy of an adverse verdict as soon as a jury is in place, but he has not been in jeopardy of a lawful execution against his "life or limb" until a verdict and judgment have been given.[20] The early English rule emphasized the factual innocence or guilt of the accused; he could not have repose from the rigors of the criminal law until his guilt or innocence had been determined by a jury in legally correct proceedings.[21] The accused could not take advantage of technical errors committed by the prosecutor.[22]

B. *The Jury Discharge Rule*

Another unrelated English common law rule would later collide with the law of double jeopardy in America: the jury in a capital case should not be discharged prior to rendering a verdict, absent pressing necessity. The rule against pre-verdict discharge of the jury seems to have been founded upon considerations for both the accused and the government. Trial by jury was a fundamental right. Once the accused was in the charge of the jury, only the jury could decide his fate and only by unani-

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17. *Id.* at 45a, 76 Eng. Rep. at 993.

18. Through dictum in *Vaux*, Coke expressed the theory that a defendant could be tried again if *convicted* upon a defective indictment, as long as judgment had not been entered. *Id.* In English criminal law at Coke's time, a defendant could be tried a second time, regardless of the verdict, if a formal and legally sound final judgment had not been entered. In Wrote v. Wigges, 4 Co. Rep. 45b, 76 Eng. Rep. 994 (1591), the defendant confessed to manslaughter, but obtained clemency for the crime by claiming "benefit of clergy," such that no formal judgment against him was entered. Here again, Coke stated that the defendant had never been in jeopardy. *Id.* at 47a, 76 Eng. Rep. at 998.

19. *E.g.*, Rex v. Elia, 2 All Eng. Rep. 587 (1968).

20. When we talk of a man being twice tried, we mean a trial which proceeds to its legitimate and lawful conclusion by verdict; and when we speak of a man being twice put in jeopardy, we mean put in jeopardy by the verdict of a jury; and he is not tried nor put in jeopardy until the verdict is given.

The Queen v. Charlesworth, 1 B. & S. 460, 507, 121 Eng. Rep. 786, 804 (K.B. 1861).

21. Vaux's Case, 4 Co. Rep. 44a, 76 Eng. Rep. 992 (K.B. 1591).

22. The King v. Gilchrist, 168 Eng. Rep. 430, 2 Leach 657 (1795) (prisoner discharged from proceedings under defective indictment and remanded to prison to await reprosecution).

mous verdict.[23] The jury discharge rule expedited to conclusion the many cases heard by a travelling tribunal with a busy itinerary, accelerating the delivery of a unanimous verdict. This rule seems to have originated as a fabrication by Coke,[24] resting on no authority other than its own persuasive force.[25] Coke admitted no exceptions to the jury discharge rule.

During the seventeenth century reign of the Stuarts, however, courts began to discharge juries freely, permitting reprosecution when there appeared to be new evidence highly probative of guilt.[26]There was much dissatisfaction with this harsh practice, and in 1698, the rigor of Coke's rule was restored. In *The King v. Perkins*,[27] Chief Justice Holt declared that in a capital case the jury could not be discharged, even with the consent of the accused and the prosecutor; in a non-capital case only the consent of both the prosecutor and the accused could empower the judge to withdraw even a single juror.[28]

Arguments in favor of at least a limited discretionary power of the trial judge to discharge the jury ensued, and, in 1746, *The King v. Kinloch*[29] overruled *Perkins*. After prolonged study of this controversial issue, the *Kinloch* court held that juries should be discharged in cases where the circumstances of the prisoner or the demands of public justice so

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23. P. DEVLIN, TRIAL BY JURY 75, 78 (1956).

24. "A jury sworn and charged in case of life or member cannot be discharged by the court or any other, but they ought to give a verdict." 1 E. COKE, INSTITUTES *227b (1628); *see also* 3 E. COKE, INSTITUTES *110 (1644). Note the applicability of this rule to cases of "life or member," echoing the phrase "jeopardy of life or limb." The similarity of the word formulas probably contributed much later to the confusion of the two rules.

25. Commonwealth v. Cook, 6 Serg. & Rawle 577, 579 (Pa. 1822); People v. Olcott, 2 Johns. Cas. 301 (1801); M. FOSTER, A REPORT OF SOME PROCEEDINGS ON THE COMMISSION OF OYER AND TERMINER AND GAOL DELIVERY FOR THE TRIAL OF THE REBELS IN THE YEAR 1746, at 32-33 (Oxford 1762) [hereinafter M. FOSTER] (all finding Coke's single citation not supportive of his statement).

26. "For otherwise many notorious murders and burglaries may pass unpunished by the acquittal of a person probably guilty, where the full evidence is not searched out or given." 2 M. HALE, HISTORY OF THE PLEAS OF THE CROWN *243, *295. Justice Hale's treatise was sometimes cited in the eighteenth century as current authority for this oppressive practice, but his point of view was anachronistic when the first edition of his HISTORY OF THE PLEAS OF THE CROWN appeared posthumously in the edition of Sollom Emlyn in 1736. Hale had to have written this treatise before 1678, in the heyday of the jury discharge practice. 8 DICTIONARY OF NATIONAL BIOGRAPHY 902, 906 (Oxford 1917).

27. 90 Eng. Rep. 1122 (K.B. 1698).

28. *Id.* Justice Foster later raised serious doubts about the validity of this three sentence opinion, which purported to announce "the opinion of all the Judges of England." 2 M. FOSTER, *supra* note 25, at 37; *see also* Director of Public Prosecutions v. Nasralla, 2 All E.R. 161, 169 (1967) (reviewing the history of the jury discharge controversy in the eighteenth century). Serjeant Hawkins also repudiated the abusive exceptions to the rule against jury discharge, noting that the practice to the contrary in the reign of Charles II was an aberration. 2 W. HAWKINS, PLEAS OF THE CROWN *622.

29. 18 St. Tr. 395, 1 Wils. K.B. 157, 95 Eng. Rep. 547 (1746) (reported and commented upon at great length in 2 M. FOSTER, *supra* note 25, at 16-39).

required.[30]

The *Kinloch* discretionary rule against jury discharge became riddled with exceptions. Judges also slackened their observance of the related rule, reiterated earlier by Chief Justice Holt, that the jurors must be kept without "meat, drink, fire or candle 'till they all agree."[31] The law finally settled somewhere between Coke's absolute rule and confusion. Blackstone formulated the compromise position in a clause which has been echoed ever since: the jury should not be discharged "unless in cases of evident necessity."[32]

English law never deviated from the rule that only a final judgment of acquittal or conviction based upon a jury verdict on the merits entered in the record of the former trial would entitle the accused to a plea in bar. The trial judge had absolute, unreviewable discretion to discharge the jury in felony and misdemeanor cases without having to obtain the permission of either the accused or the prosecutor.[33] Throughout the controversial history of the jury discharge rule and its exceptions, it remained purely hortatory, and an unjustified discharge of the jury never barred reprosecution.[34]

C. *Finality of Judgments*

Few other rules were more entrenched in the common law than the rule that a writ of error would lie only from a final judgment.[35] The very nature of proceedings in error required such a rule. The writ of error instituted a separate proceeding, not a continuation of the trial below, and the plaintiff in error could only object to specific, prejudicial errors appearing on the face of a completed record.[36] Hence, a writ of error was available

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30. 18 St. Tr. 395, 1 Wils. K.B., 95 Eng. Rep. 547.

31. *Perkins*, 90 Eng. Rep. 1122 (K.B. 1698).

32. 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *329, *360; J. PROFFAT, A TREATISE ON TRIAL BY JURY §§ 478-79 (1877); *see also* the lengthy 1810 editorial note to Trial of Thomas Whitebread, 7 St. Tr. 497 (1679) (condemning the oppressive jury discharge practice in *Whitebread*, agreeing with Foster and Blackstone).

33. The Queen v. Winsor, 10 Cox C.C. 276 (1865) (felony); The Queen v. Charlesworth, 1 B. & S. 460, 121 Eng. Rep. 786 (1861) (misdemeanor).

34. M. FRIEDLAND, *supra* note 12, at 23 & nn. 2-5; J. PROFFAT, *supra* note 32, at §§ 475-82. Even after the passage of the Criminal Appeals Act in 1907, which dramatically expanded the rights of defendants to appellate review, the decision to discharge the jury remained a matter within the absolute, unreviewable discretion of the trial court. M. FRIEDLAND, *supra* note 12, at 25.

35. The very words of the writ of error itself demonstrate that it was designed to permit review of final judgments, "si judicium redditum sit." 3 M. BACON, A NEW ABRIDGEMENT OF THE LAW *325 ("if a judgment has been returned").

36. 2 G. CROMPTON, THE PRACTICE OF THE COURTS OF KINGS BENCH AND COMMON PLEAS *362-63; A. FITZHERBERT, THE NEW NATURA BREVIUM 45F, *47.

only from final judgments of courts of record.[37] As the verdict of a jury without the entry of a final judgment would not support a plea of *autrefois acquit*,[38] a bare verdict would not entitle a party to a writ of error.[39] Nothing short of an acquittal or conviction was considered a final judgment in an English criminal trial; therefore, a writ of error for the prosecution meant review of an acquittal based upon a verdict of not guilty.

Many legal scholars assumed that acquittals could be reversed for error,[40] and this is a step in their explanation of why an accused acquitted on a defective indictment could be reindicted. These scholars postulated that if an acquittal were so defective as to be subject to reversal upon a hypothetical writ of error, then it would not be sufficient to bar reprosecution.[41] However, this logic skips what would be an essential formal step in American procedure, appellate reversal of the defective judgment, and seems to presume that a defective judgment is not simply voidable in a higher court but is already void and can be overlooked by a lower court. There is, therefore, a remarkable dearth of appellate cases in which acquittals were actually reversed,[42] leading to sharp disagreement among modern scholars as to whether the crown could appeal judgments in favor

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37. It seems that this rule was based on consideration for the competency of the trial judge and judicial economy. The record could not be in two places at once, removing it would interfere with the proceedings below and the error might be corrected before the trial judge entered a final judgment. Crick, *The Final Judgement as a Basis for Appeal*, 41 YALE L.J. 539, 541-43 (1932). Whether a ruling made below had been prejudicial to the plaintiff in error could be determined only if the outcome of the whole trial, as embodied in the final judgment, had been prejudicial to the plaintiff in error. Otherwise, a trial might be punctuated with appeals by either party of every ruling.

38. 2 H. HALE, *supra* note 26, at *248 ("*auterfoits convict* or *auterfoits acquit* by verdict . . . is no plea, unless judgement be given upon the conviction or acquittal"); 2 W. HAWKINS, PLEAS OF THE CROWN *516.

39. Samuel v. Judin, 6 East R. 333, 102 Eng. Rep. 1314 (K.B. 1805); *see also* 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *384, "a judgement may be reversed, by *writ of error*: which lies from all inferior criminal jurisdictions to the court of king's bench, and from the king's bench to the house of peers, and may be brought for notorious mistakes in the judgment or other parts of the record." *Id.*

40. J. CHITTY, *A Practical Treatise on the Criminal Law* *458-59 ("if a judgment in favor of a prisoner be reversed, he may be arraigned and tried de novo"); 2. W. HAWKINS, *supra* note 38, at *521; 2 M. HALE, *supra* note 26, at *247, *395; 2 W. STAUNDFORDE, *supra* note 11, at *106.

41. *E.g.*, 2 W. HAWKINS, *supra* note 26.

42. M. FRIEDLAND, *supra* note 12, at 287; *see* United States v. Sanges, 144 U.S. 310, 312 (1891) (surveying the major treatise writers and the handful of cases on point, unable to decide whether acquittals could be reversed). *But see* J. BISHOP, COMMENTARIES ON THE CRIMINAL LAW § 664 (Boston 1856) ("In England, writs of error, the practical object of which is usually to bring the matter under the review of a higher tribunal, seem to be allowable to the crown in criminal cases . . . ."); 3 F. WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES § 3052 (6th ed. Philadephia 1868).

of the defendant.[43]

The nature of the record in criminal cases, to which review upon writs of error was restricted, was such that only alleged defects in the indictment would be preserved.[44] Even if a higher court could reverse an acquittal for error in the indictment, it could not convict the accused. A new trial was required.[45] But the prosecutor already had access to a new trial without the need for a reversal. If the indictment was defective, the accused could simply be reprosecuted even if the jury had actually acquitted him on the merits.[46] Upon reprosecution, the legitimacy of an alleged former acquittal would be determined from the record produced to support a plea of *autrefois acquit*. Moreover, if in mid-course the trial had taken a turn unfavorable to the prosecutor, he could enter a *nolle prosecui*, which would never bar reprosecution.[47]

Whatever the common law might really have been on the matter, Blackstone confidently asserted that "there hath yet been no instance of granting a new trial where the prisoner was acquitted upon the first."[48] American courts interpreted this statement to mean that no appeal or writ of error was available to the prosecution.[49]

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43. *See* Arizona v. Manypenny, 451 U.S. 232, 245 n.20, *cert. denied*, 459 U.S. 850 (1981) (collecting key articles).

44. *See* United States v. Jenkins, 490 F.2d 868, 871 (2d Cir. 1973), *aff'd*, 420 U.S. 358 (1974) (Friendly, J., discussing writs of error for the crown).

45. The Queen v. Houston, 4 Ir. L. Rep. 174, 2 Cra. & Dix 191 (1841); M. FRIEDLAND, *supra* note 12, at 287-88 & n.4. *Cf.* The King v. Simpson, 2 Crim. App. 128, 130 (1909) (construing the 1907 Criminal Appeals Act with respect to the possibility of an appellate *acquittal* of the accused: "[the Act was] never meant to substitute another form of trial for trial by jury."); MAGNA CARTA, cl. 39, (A. Howard ed. 1964).

46. Commonwealth v. Myers, 3 Va. (1 Va. Cas.) 188, 206 (1811) ("The writ of error is not allowed to the crown, because an acquittal on an erroneous indictment is no bar to a future prosecution."); Vaux's Case, 4 Co. Rep. 44a, 70 Eng. Rep. 992 (K.B. 1591); M. FRIEDLAND, *supra* note 12, at 74 (the reason given for this harsh rule is that it would not always be possible to determine from the record whether he had actually been acquitted on the merits or for the defect).

47. M. FRIEDLAND, *supra* note 12, at 30-32. Hence, even if it were allowable, the writ of error seems not to have been used by the Crown to obtain the reversal of acquittals. Instead, there is some evidence that the Crown may have used the writ of error to obtain the reversal of convictions which were deemed harsh. J. CHITTY, *supra* note 40, at *748, *751-72. This study does not address situations in which the prosecutor might wish to appeal a conviction if the accused were convicted of a lesser included offense of the offense charged in the indictment. Today, conviction of a lesser included offense is an implied acquittal of the greater offense. Green v. United States, 355 U.S. 184 (1957) (conviction for second degree murder implied acquittal of charge for first degree murder); R. BACIGAL, VIRGINIA CRIMINAL PROCEDURE § 14-17 (1983).

48. 4 W. BLACKSTONE, *supra* note 39, at *361; *see Sanges*, 144 U.S. at 312 (citing numerous "textbooks" in accord).

49. *See generally* 17 C.J.S. *Criminal Law* § 3310 (1919); 16 C.J.S. *Constitutional Law* § 674 (1919); 2 ENCYCLOPAEDIA OF PLEADING AND PRACTICE *Appeals* § 33 (1895) ("At common law no writ of error could be sued out on behalf of the prosecution from a judgment of

Three principles relevant to the development of American law emerge from the English common law: (1) the plea of *autrefois acquit* protected the accused against reprosecution where there had been a prior final judgment of acquittal founded upon a jury verdict on the merits in a court of valid jurisdiction pursuant to a valid indictment; (2) judges had unreviewable discretion to determine if some "evident necessity" required the dismissal of a jury before verdict in a criminal trial; and (3) writs of error on behalf of the prosecution were not a feature of the common law of England.

II. Former Jeopardy and Prosecutorial Appeals in American Law

A. *The Jury Discharge/Double Jeopardy Rule*

These English common law principles were the touchstones from which American law on double jeopardy and prosecutorial appeals evolved.[50] In fact, the history of the fifth amendment indicates that the framers merely constitutionalized the English double jeopardy concept,[51] and so it was interpreted by the early federal courts.[52] Justice Washington's holding that "jeopardy [meant] nothing short of the acquittal or conviction of the prisoner, and the judgment of the court thereupon"[53] expressed the prevailing American view.

In the first American case to deviate from common law precedent, *State v. Garriques*,[54] a "hung jury" was allowed to separate prior to giving verdict, resulting in a mistrial. The Attorney General moved to rep-

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acquittal for the defendant in a criminal case.").

50. Sigler, *supra* note 13, at 298-308, describes the numerous early American constitutional provisions, statutes, and court decisions dealing with the concept of double jeopardy, demonstrating that throughout the early period of American history, the law adhered to the *res judicata* concept in the English pleas of *autrefois acquit* and *convict*.

51. *See* United States v. Wilson, 420 U.S. 332, 340-43 (1974); Green v. United States, 355 U.S. 184, 199-203 (1957) (Frankfurter, J., dissenting); United States v. Jenkins, 490 F.2d 868, 873 (2d Cir. 1973); Sigler, *supra* note 13, at 304-07.

52. *E.g.*, United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824); United States v. Haskell, 26 F. Cas. 207 (E.D. Pa. 1823) (no. 15,321); *see also* Crist v. Bretz, 437 U.S. 28, 33 (1978) (discussing 3 J. Story, Commentaries on the Constitution (1833)); M. Friedland, *supra* note 12, at 26-27 & n.7; 3 J. Story, Commentaries on the Constitution § 1781 (1833) (fifth amendment constitutionalized the right to pleas of *autrefois acquit* and *convict*); F. Wharton, Treatise on the Criminal Law of the United States 268, 270-72 (3d ed. Philadelphia 1855).

53. *Haskell*, 26 F. Cas. at 212. This classic view was not finally extinguished until the Supreme Court applied a hybrid jury discharge/jeopardy rule to the states in 1969. Benton v. Maryland, 395 U.S. 784 (1969). As an example of the tenacity of the older rule, the Mississippi Constitution still reads: "there must be an actual acquittal or conviction on the merits to bar another prosecution." Miss. Const. art. III, § 22; *see* J. Sigler, Double Jeopardy 33-34 (1969) (in 1969, seven states still did not bar reprosecution unless there had been a prior acquittal).

54. 2 N.C. (1 Hayw.) 188 (1795).

rosecute the defendant, but the court barred reprosecution, citing Coke's unqualified rule against pre-verdict jury discharge.[55] The court did not perceive the exhortations against jury discharge in English law as stating a mere procedural guideline.[56] The English cases and legal scholars had only considered whether a trial judge should have the power to discharge a jury under any circumstances. The dispute arose over a handful of unjust mistrials during the Stuart period. However, over one hundred years later, the *Garriques* court referred to the period of this "abhorrent" practice and announced that "[we] will not again put [defendant's] life in jeopardy."[57]

The common law persevered for a long time in many jurisdictions. Early New York cases were frequently cited for their tenacious adherence to the relatively simple common law concept of jeopardy. Most notable is *People v. Goodwin*.[58] Goodwin expressed a novel argument, based primarily on the fifth amendment of the United States Constitution and a fanciful reading of the word "jeopardy," maintaining that he had already been in fear of "danger" or "jeopardy" to his "life or limb" in anticipating the first jury's verdict before the jury was discharged for failure to agree. The court, however, correctly noted that the fifth amendment did not apply to the states, and even if it did, "the defendant, if sent to another jury, will not be put twice in *jeopardy*, nor *twice tried*; for there never has been a trial in which the merits of the case have been decided upon."[59]

The defense in *Goodwin* became the basis for revamping the whole concept of double jeopardy. Goodwin's argument measured the defendant's "jeopardy" not with a view to the legitimacy of proceedings, but by the defendant's trepidation, which may be incited by any proceeding. Jeopardy should have meant that the accused previously had been lawfully acquitted or convicted. The normal criminal legal process recognized no other outcome as final.

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55. *See supra* note 24.

56. Kirk, *"Jeopardy" During the Period of the Year Books*, 82 U. PA. L. REV. 602, 603, 611-12 (1934); *see also Crist*, 437 U.S. at 46 (Powell, J., dissenting) ("[G]iven this rather unreflective incorporation of a common-law rule of jury practice into the guarantee against double jeopardy, it is not surprising that the state courts also generally fix the attachment of jeopardy at the swearing of the jury.").

57. *Garrigues*, 2 N.C. (1 Hayw.) at 189. The court reasoned that the inability of the jury to agree was evidence of innocence. *Cf.* Arizona v. Washington, 434 U.S. 497, 509 (1978) ("The argument that a jury's inability to agree establishes reasonable doubt as to the defendant's guilt, and therefore requires acquittal, has been uniformly rejected in this country."). It is ironic that the first case to employ the jury discharge/jeopardy rule did so on the basis of reasoning which has been universally repudiated.

58. 18 Johns. 188 (1820).

59. *Id.* at 193-94 (emphasis in original). The case is notorious for its detailed historical analysis of authorities on the right to discharge juries, *autrefois acquit*, and the meaning of "jeopardy of life or limb."

"Jeopardy," as English authors used the term in discussing the plea of *autrefois acquit*, did not encompass the possibility of an abortive trial. Recall that it was not finally settled before Blackstone's time that a trial judge had the power to declare a mistrial and discharge the jury under any circumstances, even on behalf of the accused. After judges began to freely discharge juries, a defendant's trepidation experienced in an abortive trial was never legally cognizable in support of the pleas of either *autrefois acquit* or *convict*.

The policy behind the rule against premature discharge of a criminal jury is compelling;[60] however, not every good policy is the subject of a constitutional right. The first step in the constitutional fortification of this policy should have been a discussion of the defendant's right to an uninterrupted trial before the first jury sworn to try him.[61] Courts simply assumed this right. Dissatisfied with leaving this right to the conscience and discretion of trial judges,[62] early American courts gradually incorporated the English jury discharge rule into the constitutional double jeopardy concept, spawning a new breed of acquittal. If the defendant were in "jeopardy" as soon as the jury was charged with his deliverance, then a new trial at any time after this point would constitute a second jeopardy. But this is an arbitrary measure of the commencement of jeopardy. From the defendant's point of view, jeopardy commences much earlier in the course of criminal proceedings.[63]

The jury discharge rule transformed the double jeopardy clause. A remedy for the unjustified dismissal of a jury would have no relevance before a jury existed. Because trial preclusion was the sole remedy under the

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60. [T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual . . ., 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.

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

61. Wade v. Hunter, 336 U.S. 684, 689 (1949) ("defendant's valued right to have his trial completed by a particular tribunal"). As Justice Powell pointed out, however, in his dissent in *Crist*, 437 U.S. at 49, 53, no one has ever located a source for this right.

62. *E.g.*, Commonwealth v. Clue, 3 Rawle *498, *501 ("A right which depends upon the will of the magistrate is essentially no right at all.").

63. Jeopardy could be said to "attach" upon the beginning of testimony by the prosecutor's first witness, as it does in a modern bench trial, Serfass v. United States, 420 U.S. 377 (1975), or the swearing of the prosecutor's first witness, as was the rule in Montana before *Crist*, 437 U.S. at 29 n.1, or upon the entry of a plea of "not guilty," Kirk, *supra* note 56, at 611-12, 617, or at the beginning of the *voir dire* process, Schulhofer, *Jeopardy and Mistrials*, 125 U. PA. L. REV. 449, 512-14 (1977). Jeopardy could also attach upon arraignment, which would have even greater ceremonial value than the swearing of the jury, marking the commencement of formal proceedings by the state against the accused. If jeopardy were said to attach at some point even earlier in pre-trial proceedings, the policies behind the double jeopardy clause would be even better served: preservation of judicial resources and court facilities, and prevention of harassment and embarrassment of the accused.

double jeopardy concept, the law evolved that jeopardy, like *hysteron proteron*, did not begin until the swearing of the jury. The concept of previous acquittal on the merits paled before the force of the new doctrine, as the jeopardy clause changed from a principle akin to *res judicata* into a trial-counting talisman which measured many "non-merits" terminations as equivalent to acquittal by verdict. Apparently, the cost to society in jeopardizing a final factual determination of innocence or guilt was less than the potential cost to the accused of aggressive trial techniques.[64]

The jury discharge rule and double jeopardy made strange bedfellows, whose union generated complications unforeseen by their early matchmakers. One such complication was the introduction into the double jeopardy doctrine of the "evident necessity" exception to the jury discharge rule. The definition of these constitutionalized necessities became the subject of many cases.[65]

Justice Washington noted, however, that if "jeopardy" was to relate to the discharge of juries, the United States Constitution made no exception for "necessity"[66] nor did the double jeopardy clauses in various state constitutions contain such an exception. This creates a ridiculous situation. How many other unqualified constitutional protections accorded criminal defendants can the government breach simply on the basis of necessity? Could the right to a trial by jury be dispensed with in cases of "evident necessity?" Could the accused be forced to incriminate himself if the judge ruled that his testimony was evidently necessary to prevent injustice?

Commonwealth v. Cook[67] led the jury discharge/jeopardy revolution. In *Cook*, the court noted that "the provision that no person can be put twice in jeopardy of life or limb, means something more than that he shall not be twice tried for the same offence. . . . There is a wide difference between a verdict given and jeopardy of a verdict."[68] The court was aston-

64. *But see* M. FRIEDLAND, *supra* note 12, at 222-23 ("To enter an acquittal in a case where the accused is most probably guilty but has not had the matter properly adjudicated upon by a jury does not adequately protect society, demoralizes law enforcement and tends to turn the administration of justice into a game.").

65. *See, e.g.*, Annotation, *Separation of Jury in Criminal Case*, 79 A.L.R. 821 (1932); Annotation, *Plea of Double Jeopardy Where Jury was Discharged Because of Inability of the Prosecution to Present Testimony*, 74 A.L.R. 803 (1931); Annotation, *Illness or Death of Member of Juror's Family as Justification for Declaring Mistrial and Discharging Jury in Criminal Case*, 53 A.L.R. 1062 (1928); Annotation, *Plea of Former Jeopardy Where Jury Discharged Because of Misconduct or Disqualification of one or More of their Number*, 38 A.L.R. 706 (1925); Annotation, *Separation of Jury in Criminal Case*, 34 A.L.R. 1115 (1925).

66. *Haskell*, 26 F. Cas. at 212 ("[T]he exception of necessity is not to be found in any part of the constitution; and I should consider this court as stepping beyond its duty in interpolating it into that instrument.").

67. 6 Serg. & Rawle *577.

68. *Id.* at *598.

ished that "the jury was discharged solely on their declaration, that they could not agree, and that there was not the least probability they ever would," and concluded "this discharge amounted to an acquittal."[69]

During the nineteenth century, the *Cook* doctrine spread throughout the states, while a few states continued to adhere to the common law.[70] By 1900, a majority of the states had adopted the jury discharge/jeopardy rule.[71] Moreover, by the early twentieth century, double jeopardy rules, exceptions, and exceptions to exceptions had grown to extravagant proportion[72]—a far cry from the original simplicity of "acquittal on the merits bars reprosecution."

The federal courts, however, were relatively slow in adopting the new standard. The first case clearly advocating the change, *Kepner v. United States*,[73] evoked a stinging dissent from Justice Holmes,[74] who focused not on how many times the defendant might be tried, but on whether a final judgment on the merits had been reached. Holmes' view, however, was not destined to prevail. In 1963, the Supreme Court barred reprosecution after a mistrial by explicitly adopting what numerous cases had suggested since *Kepner*: jeopardy attached upon the swearing of the jury.[75] In 1969, the jury discharge/jeopardy rule was applied to the states in *Benton v. Maryland*[76] and *Crist v. Bretz*,[77] dictating that the states

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69. *Id.* Like *Garrigues*, this case, which first sets out the jury discharge/jeopardy doctrine at length, is founded upon facts which today would unquestionably not bar reprosecution. *See supra* note 57; J. BISHOP, *supra* note 42, §§ 659, 668 (noting that as early as 1856, the majority view among the states allowed reprosecution after the discharge of a "hung jury").

70. *Crist*, 437 U.S. at 45 n.10 (Powell, J., dissenting) (listing cases on both sides); *see also* J. PROFFAT, *supra* note 32, at 537-45 (focusing on "necessity" justifying discharge); R. MOSCHZISKER, *Trial by Jury* 119-23 (1922) (focusing on Pennsylvania progeny of *Cook*); F. WHARTON, *supra* note 52, at 263-73 (jury discharge/jeopardy rule adopted in Pennsylvania, North Carolina, Tennessee, Alabama, Virginia (dictum); common-law rule defended in federal courts, Massachusetts, New York, Illinois, Kentucky, Mississippi, Missouri, and advocated by most treatise writers).

71. 17 AMERICAN AND ENGLISH ENCYCLOPAEDIA OF LAW, *Jeopardy*, at 584-85 (2d ed. 1900). Six states and the federal courts are listed as adhering to the common-law rule, by this time considered an unusual exception. *Id.* at 585 n.1.

72. *See* 16 C.J.S. *Constitutional Law* §§ 363-432, at 236-59 (1919).

73. 195 U.S. 100 (1904).

74. *Id.* at 134 (Holmes, White and McKenna, JJ., dissenting):

> At the present time in this country there is more danger that criminals will escape justice than that they will be subjected to tyranny . . . . [L]ogically 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.

Id.

75. Downum v. United States, 372 U.S. 734 (1963). The Court had endorsed the rule in Wade v. Hunter, 336 U.S. 684 (1949), but found that military exigencies justified the disruption of the trial.

76. 395 U.S. 784 (1969).

77. 437 U.S. 28 (1978).

must count the swearing of the jury as the attachment point for jeopardy.[78] At this point, national double jeopardy doctrine insisted, ahistorically, that the double jeopardy clause was intended to limit to one the number of times an accused could be put upon his defense. This extreme view makes the Constitution count not judgments, nor even juries, but the defense attorney's trips to the courthouse.[79]

B. *Prosecutorial Appeals*

American courts generally denied writs of error to the prosecution unless specifically authorized by statute or a constitutional provision.[80] This general prohibition was the basis for the Supreme Court's first holding on the issue of appeals by the government in *United States v. Sanges*.[81] A presumption against the validity of all appeals by the prosecution was not necessitated by the concept of double jeopardy because only an appeal which sought reprosecution after an acquittal (whether on the merits by jury verdict or by operation of law after an unjustified jury discharge) implicated the guarantee against a second jeopardy.

The English common law rule that only final judgments are subject to review in actions at law (including criminal proceedings) has always been

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78. *Id.* at 38.

79. The classic articulation of the one shot prosecution theory of double jeopardy may be found in United States v. Jenkins, 420 U.S. 358, 368-70 (1974) (dismissal of indictment, whether on the merits or not, bars reprosecution), overruled by United States v. Scott, 437 U.S. 82, 97 (1978) (double jeopardy does not bar reprosecution unless dismissal of the indictment was based on a merits determination against the prosecution of at least one element of the offense charged). *See The Constitution of the United States of America*, S. Doc. No. 39, 88th Cong., 1st Sess. 947 (1964) ("By the common law not only was a second punishment for the same offense prohibited, but a second trial was forbidden whether or not the accused had suffered punishment or had been acquitted or convicted."). The validity of this statement should be tested against statements by Coke, *supra* notes 15-17; Hale, *supra* note 26; Hawkins, *supra* notes 28 & 38; Blackstone, *supra* notes 32 & 39; and the court in *Charlesworth*, 1 B. & S. 460, 121 Eng. Prep. 786 (K.B. 1861), all indicating that the common law did not count trials, but counted judgments. Suggestions that the guarantee against double jeopardy was a matter of counting any terminated criminal proceedings as conclusive pre-existed the Supreme Court's fancy for such a rule. *See* J. BISHOP, *supra* note 42, at §§ 664, 665. In Commonwealth v. Perrow, 124 Va. 805, 97 S.E. 820 (1919), the Virginia Supreme Court of Appeals had inflated the "spirit" of the double jeopardy immunity to include a pre-attachment dismissal on purely legal grounds as a former jeopardy, holding that the commonwealth's right to appeal and obtain a reversal had therefore been extinguished *proprio vigore*.

80. *See, e.g.*, United States v. Sanges, 144 U.S. 310, 312-18 (1892) (reviewing prior decisions in state courts); Commonwealth v. Cummings, 57 Mass. (3 Cush.) 212 (1849) (construing REV. STAT., ch. 54, p. 227 (1842) against the state, the statute provided for appeals but did not specify to which party they would lie). *See generally* 17 C.J.S. *Criminal Law* § 3310 (1919).

81. 144 U.S. 310 (1892); *see also* United States v. Jenkins, 490 F.2d 868, 874 (2d Cir. 1973) (Friendly, J.) (construing *Sanges*, 144 U.S. at 310).

firmly established in American law.[82] Early American courts generally recognized only two kinds of final judgments in criminal cases: conviction with a sentence set forth on the record;[83] and acquittal based upon a jury verdict, or later, by operation of law for the unwarranted discharge of the jury.[84] Because only final judgments were reviewable and only an acquittal was considered a final judgment adverse to the prosecution, the concept of prosecutorial appeals strongly suggested attempts to reverse ac-

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82. Until the late nineteenth century, the rule applied equally to cases in equity in the federal courts. McLish v. Roff, 141 U.S. 661, 665-67 (1891); Forgay v. Conrad, 47 U.S. (6 How.) 201, 205 (1848); Judiciary Act of 1789, ch. 20, §§ 21, 22, 25, 1 Stat. 73, 83, 84, 85 (current version at 28 U.S.C. § 1291 (1982)). It was not until 1891 that the federal government began to allow interlocutory appeals of injunctions. Act of Mar. 3, 1891, ch. 517, §§ 6, 7, 26 Stat. 828 (current version at 28 U.S.C. § 1292a (Supp. 1985)).

In Virginia, the rule that only final judgments are appealable has been rigorously enforced in criminal cases. *See, e.g.*, Fuller v. Commonwealth, 189 Va. 327, 330, 53 S.E.2d 26, 28 (1949); Sturgill v. Commonwealth, 175 Va. 584, 7 S.E.2d 141 (1940) (where statute granting right of appeal is silent, final judgment as prerequisite is presumed); Read v. Commonwealth, 90 Va. 168, 169, 17 S.E. 855, 855 (1893) (as the measure of finality required for appealability of a conviction, "[t]he record must affirmatively show the sentence itself"). *But see* Abney v. United States , 431 U.S. 651, 657-62 (1977); United States v. Lansdowne, 460 F.2d 164 (4th Cir. 1972) (allowing interlocutory appeal of denial of plea of former jeopardy under the federal collateral order exception created by Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949)). On the application of the *Cohen* doctrine to interlocutory appeals by criminal defendants, see Special Project, *Criminal Procedure*, 71 GEO. L.J. 339, 730-37 (1982). The policy against interlocutory appeals by the government in criminal cases has been stronger because piecemeal litigation and delays in the trial might implicate the sixth amendment right to a speedy trial. *See, e.g.*, DiBella v. United States, 369 U.S. 121 (1962). The Criminal Appeals Act of 1971, however, allowed the federal government to appeal potentially outcome determinative interlocutory orders for return of seized property and suppression of evidence. 18 U.S.C. § 3731 (1985).

83. *See, e.g.*, Read v. Commonwealth, 90 Va. 168, 17 S.E. 855 (1893); 17 C.J.S. *Criminal Law* § 3293 (1919) ("Ordinarily, final judgment in a criminal case is the sentence of the court.").

84. At common-law, the trial judge also had power to direct a verdict of acquittal for insufficiency of evidence. J. CHITTY, *supra* note 40, at 458. The opposite view was maintained until relatively late in Virginia. *See, e.g.*, Montgomery v. Commonwealth, 98 Va. 852, 37 S.E. 1 (1900). A similar rule applied to the appellate court in Virginia, and the only appellate remedy available to the accused was a new trial. *See* 5B MICHIE'S JUR. *Criminal Procedure* § 69, at 337 nn.5-7 (1983) (noting that Virginia courts are now authorized to enter acquittals); R. BACIGAL, *supra* note 47, §§ 21-2, -3, at 259-60 (1983) (discussing Va. Rule of Court 3A:22(c): "If the trial court sets aside the verdict because of insufficiency of the evidence, the court must enter a judgment of acquittal. If the court sets aside the verdict because of error committed during trial, the appropriate remedy is to grant a new trial."). The power of courts to direct verdicts of acquittal was fairly well established by the early twentieth century. Annotation, *Power and Duty of Court to Direct or Advise Acquittal in Criminal Case for Insufficiency of Evidence*, 17 A.L.R. 910 (1922). The current trend is to abandon the artificiality of directing verdicts of acquittal, and authorize the trial judge to enter acquittals for insufficiency of evidence even after a jury verdict of guilty. FED. R. CRIM. P. 29(c); 23A C.J.S. *Criminal Law* § 1145(1) (1961 & Supp. 1984); 5B MICHIE'S JUR. *Criminal Procedure* § 369, at 377 (1983). Acquittal at the instance of the court for insufficiency of evidence, in the jurisdictions which allow such an acquittal, will be treated as any other acquittal for the purposes of this study. *See infra* note 123.

quittals.[85] This conceptual basis for the early American prejudice against prosecutorial appeals was exacerbated by the fact that several jurisdictions had actually reversed acquittals and ordered new trials.[86] The prospect of appellate courts reversing acquittals stimulated a great deal of protesting literature and case dicta.[87]

The jury discharge/jeopardy rule created doubts whether the accused could ever be retried after the swearing of a jury, even pursuant to his own motion for a new trial.[88] Most state constitutional double jeopardy clauses simply read that no person could be placed twice in jeopardy for the same offense. If jeopardy commenced upon the swearing of the jury, the clause literally meant that a second jury could not be sworn. Courts resolved this problem by holding that because the double jeopardy clause was designed to protect the accused, he should be able to waive that protection and request a new trial.[89] However, some scholars adhered to the "continuing jeopardy theory," which dictated that the accused's jeopardy would continue uninterrupted through a new trial until a judgment was reached.[90]

No matter which theory was cited, if the accused had moved for and

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85. *See generally* 2 ENCYCLOPAEDIA OF PLEADING AND PRACTICE *Appeals* § 33 (a), (b), at 146 (1895).

86. *See, e.g.*, People v. Corning, 2 N.Y. (2 Comstock) 9, *reprinted in* 49 Am. Dec. 364 (1848) (reviewing and overruling prior New York cases in which acquittals were reversed); 17 C.J.S. *Criminal Law* § 3318 (1919). Connecticut and Kentucky permitted appeals of misdemeanors; Virginia permitted appeals of revenue cases, and in general, reversal of an acquittal was permissible if not barred by the state constitution.

87. *E.g.*, J. BISHOP, *supra* note 42, § 658, at 544 n.4 ("a verdict of acquittal . . . can never . . . be set aside and a new trial granted"); Editorial note following State v. Solomons, ___ Tenn. (6 Yer.) 360 (1834), *reprinted in* 27 Am. Dec. 471 (1881) (an acquittal in any case, no matter how erroneous, should be absolute). An acquittal, no matter how erroneous, still may not be reversed or appealed. Sanabria v. United States, 437 U.S. 54, 64, 69, 75, 78 (1977) (acquittal held absolute, even though "[t]he trial court's rulings here led to an erroneous resolution in the defendant's favor on the merits of the charge"); Fong Foo v. United States, 369 U.S. 141, 143 (1962) (acquittal is absolute, even if "based upon an egregiously erroneous foundation").

88. *See, e.g.*, United States v. Gibert, 25 F. Cas. 1287 (C.C. Mass. 1834) (No. 15, 204). This was the same question raised by the English rule of jury practice, and resolved by Justice Foster a century before in The King v. Kinloch, 18 St. Tr. 395, 1 Wils. K.B. 157, 95 Eng. Rep. 547 (1746).

89. Green v. United States, 355 U.S. 184, 203-04 (1957) (Frankfurter, J., dissenting) (collecting early cases); *see* M. Kohler, *Methods of Review in Criminal Cases in the United States*, *reprinted in* THE NECESSITY FOR CRIMINAL APPEAL 505-06 (J. Levy ed. 1899) ("[T]his view was adopted in every jurisdiction in the country prior to the middle of the [nineteenth] century."); *cf.* Trono v. United States, 199 U.S. 521, 533 (1905) (when the accused has appealed, reversal of his conviction "opens up the whole controversy and acts upon the original judgment as if it had never been").

90. State v. Lee, 65 Conn. 265, 273, 30 A. 1110, 1111 (1894) ("putting in jeopardy means a jeopardy which is real and has continued through every stage of one prosecution . . . [and] while such prosecution remains undetermined the one jeopardy has not been exhausted").

been granted a new trial or had otherwise consented to a discharge of the jury, reprosecution would not be barred by the interruption of the first trial.[91] Double jeopardy theory would not prevent a prosecutorial appeal of an order prematurely ending a proceeding at the defendant's request. Although such an order was not an appealable final judgment at common law, an overriding statute could remove this obstacle.

A defective indictment could also be assailed by a post-verdict motion in arrest of judgment.[92] Whether the defendant took this action before or during trial or after verdict, judgment might be arrested, leaving no former jeopardy to bar a new trial nor a final judgment upon which an appeal might be based.[93] A statute, however, could render orders in arrest of judgment appealable by the prosecutor. Similarly, an appellate court could reverse a judgment of conviction pursuant to the defendant's writ of error, but until modern times could not grant an acquittal.[94] The reversal of a conviction in an appellate court was comparable to an order in arrest of judgment in the trial court. Because the accused could be retried after securing an appellate reversal of a conviction,[95] a statute would not offend double jeopardy doctrine by allowing the prosecutor to appeal to a higher appellate court.[96]

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91. United States v. Ball, 163 U.S. 662 (1896); F. WHARTON, *supra* note 42, § 591, at 387.

92. United States v. Wilson, 420 U.S. 332, 348-49 (1975); United States v. Sisson, 399 U.S. 267, 280-82 (1970); M. FRIEDLAND, *supra* note 12, at 275. In later American law, other prejudicial errors which might not appear in the indictment, but would still appear on the face of the record, could be attacked by a motion in arrest of judgment. F. WHARTON, *supra* note 52, at 975; *see also* Annotation, *Appealability of Order Arresting Judgment in Criminal Case*, 98 A.L.R.2d 737, 738 (1964); 5B MICHIE'S JUR. *Criminal Procedure* § 69, at 328 (Repl. Vol. 1983): "A motion in arrest of judgment lies in the trial court only for material error apparent on the fact [sic] [read "face"], of the record, such as lack of jurisdiction, or a substantial defect in the indictment."

93. M. FRIEDLAND, *supra* note 12, at 65 ("Whatever form of attack was pursued by the accused, whether it was by demurrer, motion to quash, motion in arrest of judgment . . . the accused could be recharged because there was no judgment."); *see* F. WHARTON, *supra* note 42, § 551, at 351-52; *see also* 17 AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW, *Jeopardy* 588 (1900) (defective indictment "will not support a valid judgment").

94. *See* The King v. Simpson, 2 Cr. App. Rep. 128, 130 (1909). The writ of error was the sole remedy for errors in criminal proceedings and only questions of law appearing on the face of the record were reviewable. The court in proceedings in error was unable to review questions of fact or mixed questions of law and fact. 7 ENCYCLOPAEDIA OF PLEADING AND PRACTICE *Error, Writ of*, at 847-50 (1898).

95. *See supra* note 89; *see also* 3 W. BLACKSTONE, *supra* note 32 (reversal for error nullifies jeopardy).

96. Even a strict procedure-counting point of view would not be offended by appeals of either an order in arrest of judgment upon a verdict of guilty, or the reversal of a conviction by an intermediate appellate court because, in both instances, the court entertaining the appeal need not order a new trial. A court ruling favorably on a prosecutorial appeal from an order arresting judgment may simply reinstate the guilty verdict and order that judgment be entered. *See* United States v. Wilson, 420 U.S. 332 (1975) (appeal of post-verdict order dismissing indictment for delay). Likewise, a court of last resort could reverse an intermediate appellate court's reversal and reinstate a trial court's judgment of conviction.

A defective indictment was held to vitiate any judgment delivered upon it, whether before or after the swearing of a jury.[97] Even if a state had adopted the jury discharge rule, the dismissal of an indictment *before* the swearing of a jury would not bar a new trial because the defendant had never been in jeopardy.[98] Pre-trial dismissal of an indictment was not considered a final judgment for purposes of appeal; however, prosecutorial appeals of such a dismissal could be allowed by statute.[99] Statutes authorizing appeals of dismissals of defective indictments began to appear during the nineteenth century.[100] Such appeals were allowed by the first Federal Criminal Appeals Act in 1907,[101] and the federal government's right to such appeals today is preserved by statute.[102]

Today, appeals *per se* are not barred by the jury discharge/jeopardy rule after any type of trial termination, including an acquittal on the merits.[103] The doctrine of former jeopardy protects against successive trials—not appeals. Hence, after an acquittal on the merits, the prosecutor can take a "moot" appeal.[104] Such appeals can be undertaken to review questions of law without affecting the acquitted defendant.[105] The prosecutor can also appeal to test the "evident necessity" of an allegedly unjus-

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See, e.g., Village of Shelby v. Boenau, 40 Ohio St. 253 (1883). Today, this type of prosecutorial appeal is preserved statutorily in Ohio. *See generally* 17 C.J.S. *Criminal Law* § 3322, at 47 (1919).

97. Souther v. Commonwealth, 48 Va. (7 Gratt.) 673 (1851) (quashing of former indictment does not bar reprosecution); Vaux's Case, 4 Co. Rep. 44a, 76 Eng. Rep. 992 (1591); J. BISHOP, *supra* note 42, § 663, at 548; 1F. WHARTON, *supra* note 42, § 551, at 351. *Vaux* was partially repudiated in 1848 in Virginia (acquittal on the merits would bar reprosecution, notwithstanding defects in the indictment). *See infra* note 136. The United States Supreme Court finally rejected *Vaux*'s concept of the "tainted acquittal" in United States v. Ball, 163 U.S. 662 (1896).

98. *See* Serfass v. United States, 420 U.S. 377, 389 (1975) (before jeopardy attaches the trial court is "without power to make any determination regarding petitioner's guilt or innocence"); Crist v. Bretz, 437 U.S. 28 (1978) (jeopardy attaches upon the swearing of the jury).

99. Such appellate rights became very common by the early twentieth century. *See, e.g.*, Prosecuting Attorney v. Judge of Recorder's Court, 59 Mich. 529, 541, 26 N.W. 694, 695 (1886) ("It is very well settled that a decision quashing an indictment may be reviewed."). Annotation, *Right of Prosecution to Review of Decision Quashing or Dismissing Indictment or Information, or Sustaining Demurrer Thereto*, 92 A.L.R. 1137 (1934).

100. *See, e.g.*, Editorial note following State v. Solomons, ___ Tenn. (6 Yer.) 360 (1834), *reprinted in* 27 Am. Dec. 469, 478-79 (1881). M. Kohler, *supra* note 89, at 512-13 (discussion of the New York statute of 1852).

101. 34 Stat. 1246 (1907).

102. 18 U.S.C. § 3731 (1976); *see also* Annotation, *Dismissal of Indictment or Information as Reviewable on Appeal by United States under 18 USCS § 3731, as Amended by Omnibus Crime Control Act of 1970*, 30 A.L.R. FED. 655 (1976).

103. United States v. Wilson, 420 U.S. 332, 342 (1975).

104. California, Kansas, Maryland, Oregon and Texas had statutes allowing "moot" appeals, i.e., review of legal questions in a case without affecting the defendant. *See* Editorial note, *supra* note 100.

105. *See infra* note 156 and accompanying text (discussing the possibility of allowing moot appeals in Virginia).

tified premature dismissal of a jury. Various state statutes also may provide for appeals from any non-terminal interlocutory ruling. Such rulings include orders suppressing evidence or confessions, returning seized property, or reducing the charge in an indictment to a lesser included offense. The area of intersection between the jury discharge/jeopardy rule and prosecutorial appeals is narrow indeed. For the most part, the two issues are unrelated.

In the early nineteenth century, the number of states having adopted the new jury discharge/jeopardy rule and the number allowing appeals were five and six respectively.[106] By 1918, thirty states and the District of Columbia had adopted the jury discharge/jeopardy rule;[107] thirty-two states and the District of Columbia had allowed appeals by the prosecution, twenty-nine by statute, and four by court decision.[108] By 1985, the new jeopardy rule applied to all of the states, the federal government, and the District of Columbia. All of these jurisdictions, with the exception of New Hampshire, now also have the right to some form of appellate review in criminal cases.[109] This seemingly parallel development might be an accident of history. There is little evidence that the spread of the jury discharge/jeopardy rule stimulated legislatures to provide for prosecutorial

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106. J. BISHOP, *supra* note 42, § 664, at 549 n.6 (appeals) and § 659, at 546 n.2 (new jeopardy rule); F. WHARTON, *supra* note 42, § 3050, at 496 (appeals) and § 575, at 372 (new jeopardy rule).

107. 16 C.J.S. *Constitutional Law* § 363, at 236-37 & n.25 (1919).

108. 17 C.J.S. *Criminal Law* § 3310, at 39-40 & n.19, § 3313, at 41-42 & nn.39, 43 (1919).

109. 18 U.S.C. § 3731 (1983); ALA. CODE §§ 12-12-10, 12-22-91 (1975); ALASKA STAT. §§ 12.55.120, 22.10.020(a), 22.15.240 (1982); ARIZ. REV. STAT. ANN. §§ 13-4031 to -4032 (Supp. 1984); ARK. STAT. ANN. §§ 43-2720 to -2722, -2733 (1977); CAL. PENAL CODE §§ 1235, 1238 (West 1982); COLO. REV. STAT. § 16-12-102 (1973); CONN. GEN. STAT. § 54-96 (Supp. 1983); DEL. CODE ANN. tit. 10, §§ 9902-9903 (1974); D.C. CODE ANN. § 23-104 (1981); FLA. STAT. ANN. §§ 924.02, -.071, -.07 (1982 & Supp. 1983); GA. CODE ANN. § 5-7-1 to -7-2 (Supp. 1984); HAWAII REV. STAT. § 641-13 (Supp. 1983); IDAHO CODE § 19-2801 (1979); ILL. ANN. STAT. ch. 110(A), §§ 315(a), 604(a) (Smith-Hurd Supp. 1984); IND. CODE ANN. § 35-38-4-2 (Burns Supp. 1984); IOWA CODE § 814.5 (1979); KAN. STAT. ANN. §§ 22-3602 to -3603 (1981); KY. REV. STAT. § 22A .020(4) (1980); LA. CODE CRIM. PROC. ANN. arts. 911-912 (West 1984); ME. REV. STAT. ANN. tit. 15, § 2115-A (1980); MD. CTS. & JUD. PROC. CODE ANN. §§ 12-301, -401 (1984); MASS. GEN. LAWS ANN. ch. 278, § 28E (1981); MICH. COMP. LAWS ANN. § 770.12 (West 1982); MINN. STAT. ANN. § 244.11 (West Supp. 1984); MISS. CODE ANN. § 99-35-103 (1972); MO. REV. STAT. § 547.210 (1978); MONT. CODE ANN. §§ 46-20-103 (1983); NEB. REV. STAT. §§ 29-2316, -2319 (1979); NEV. REV. STAT. § 177.085 (1979); N.H. REV. STAT. ANN. § 490:4 (1983); N.J. R. APP. PROC. 2.3-1; N.J. R. CRIM. PRAC. 3:24; N.M. STAT. ANN. § 39-3-3 (1978); N.Y. CRIM. PROC. LAW §§ 450.20, -.30, -.40, -.50, -.80 (Consol. 1983); N.C. GEN. STAT. §§ 15A-979, -1432, -1445, -1446 (1983); N.D. CENT. CODE § 29-28-07 (Supp. 1983); OHIO REV. CODE ANN. § 2953.14 (Page 1982); OKLA. STAT. ANN. tit. 22, §§ 1053, 1053.1 (West Supp. 1984); OR. REV. STAT. §§ 138.020, -.060 (1983); 42 PA. CONS. STAT. ANN. §§ 9712(d), 9713(e), 9714(e), 9715(d), 9781 (Purdon 1982); R.I. GEN. LAWS § 9-24-32 (Supp. 1984); S.D. CODIFIED LAWS ANN. §§ 23A-32-4 to -32-5 (1979); TENN. R. APP. PROC. 3(c), 9, 10, 11; TEX. CODE CRIM. PROC. ANN. art. 44.01 (Vernon Supp. 1985); UTAH CODE ANN. § 77-35-26 (Supp. 1983); VT. STAT. ANN. tit. 13, § 7403 (Supp. 1984); WASH. R. APP. PROC. 2.2(b), 2.3; W. VA. CODE § 58-5-30 (1966); WIS. STAT. ANN. § 974.05 (West 1985); WYO. STAT. §§ 7-12-102 to -103 (Supp. 1984).

appeals. The spread of such appeals seems primarily to have been the result of another legal development—the growth of the concept that any ruling or judgment which ends a proceeding in favor of the accused must be reversed in an appellate court before he can be reprosecuted, even if double jeopardy is not at issue.[110]

Today, all statutes authorizing prosecutorial appeals must observe the constraints imposed by the federal double jeopardy clause, as interpreted by the Supreme Court. One author has aptly summarized these limitations in a single sentence: "The prosecution may appeal (without fear of triggering the double jeopardy prohibition) any decision before jeopardy attaches, as well as any post-attachment decision that does not go to the merits."[111] Legal discourse on double jeopardy and prosecutorial appeals has otherwise become a morass of confused, equivocal verbiage, balancing tests, and interest analyses.[112]

C. *Overview*

The current black letter law may be summarized under five headings which correspond to five potential interfaces between the doctrine of double jeopardy and the subject of prosecutorial appeals:

(1) *Acquittal.* Acquittal on the merits by jury verdict, or order of the court in a bench or jury trial, is absolute, notwithstanding any errors in the trial.[113]

(2) *Conviction.* Conviction bars reprosecution.[114] If, however, a conviction is set aside by the trial court or reversed on appeal, reprosecution will not be barred.[115] If the reversal was based upon the *insufficiency* of

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110. MODEL PENAL CODE § 1.08(2) (A.L.I. Official Draft 1962).

111. C. WHITEBREAD, CRIMINAL PROCEDURE § 24.06, at 512 (1980).

112. Westen and Drubel, *Toward A General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 82 n.6.

113. *See* United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977) (defining acquittal as "a resolution, correct or not, of some or all of the factual elements of the offense charged"). There are now four types of conclusive acquittals: 1) by verdict in a jury trial; 2) by the judge in a bench trial; 3) entry of acquittal by the judge for insufficiency of the evidence in a jury trial. *See supra* note 84. A judge's power to acquit in a jury trial can be modified by statute. *Martin Linen*, 430 U.S. at 567 (affirming the power of acquittal granted by FED. R. CRIM. P. 29(c)). *But cf.* State v. Brunn, 22 Wash. 2d 120, 154 P.2d 826 (1945) (statute granting the state power to appeal a judge acquittal in a jury trial abolished the finality of such an acquittal); 4) the reversal of a conviction by an appellate court for insufficiency of the evidence. Burks v. United States, 437 U.S. 1, 18 (1978). Conviction or acquittal of a greater offense is an implied acquittal of lesser included offenses, and conviction or acquittal of a lesser included offense is usually an implied acquittal of the greater offense. *See, e.g.*, Martin v. Commonwealth, 221 Va. 720, 273 S.E.2d 778 (1981).

114. Multiple punishments stemming from a single conviction are also prohibited. Ex Parte Lange, 85 U.S. (18 Wall.) 163 (1873).

115. Tibbs v. Florida, 457 U.S. 31, 40 (1982); United States v. Tateo, 377 U.S. 463, 465

the evidence, then the reversal will operate as an acquittal.[116] If the reversal was based merely upon the *weight* of the evidence, it will not operate as an acquittal.[117]

(3) *Dismissals.* If the prosecution is dismissed for any reason before the attachment of jeopardy,[118] reprosecution will not be barred.[119] If the prosecution is dismissed *after* the attachment of jeopardy, reprosecution will be barred only if the dismissal was based on a factual resolution against the prosecution of at least one element of the offense.[120]

(4) *Mistrial—Discharge of the Jury.* The defendant may be reprosecuted if he consents to a mistrial declared because of defense misconduct, or granted pursuant to a defense motion,[121] unless the government

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(1964); United States v. Ball, 163 U.S. 662 (1896). The Court has returned to the view held in *Ball* and *Tateo* (that the accused may be retried after he procures a reversal), after a brief period during which the Court held that reprosecution would be barred. *See* United States v. Wilson, 420 U.S. 332 (1974). The jeopardy yardstick used by the Court during the *Wilson* period was described in United States v. Jenkins, 420 U.S. 358 (1974). After the accused obtained a reversal of his conviction, double jeopardy would bar "further proceedings . . . devoted to the resolution of factual issues going to the elements of the offense charged . . . ." *Id.* at 370. Even under the *Wilson* one-shot prosecution standard, however, *appeals* were not barred if the appellate court could simply reinstate a former guilty verdict, or a former conviction. *See supra* note 96. This standard produced cases such as Finch v. United States, 433 U.S. 676 (1977) (per curiam), in which the Court held that because there was no guilty verdict to reinstate upon reversal, the government could not appeal a nonmerits post-jeopardy dismissal even though the parties had submitted an agreed stipulation of facts to the trial court for the resolution of legal issues. The Court's retreat from this bright line distinction set forth in *Wilson* and *Jenkins* has been reaffirmed in Justices of Boston Municipal Court v. Lydon, 466 U.S. 294, 308 (1984) ("The general rule is that the Clause does not bar reprosecution of a defendant whose conviction is overturned on appeal.").

116. *Burks*, 437 U.S. at 1. The standard for "insufficiency" is that "the government's case was so lacking that it should not have even been *submitted* to the jury." *Id.* at 16 (emphasis in original).

117. *Tibbs*, 457 U.S. at 40 (in such a case the appellate court merely sits as a "thirteenth juror" and disagrees with the conviction).

118. *Crist*, 437 U.S. at 28 (swearing of the jury); *Serfass*, 420 U.S. at 377 (first presentation of evidence in a bench trial).

119. *Serfass*, 420 U.S. at 393 ("[A]n accused must suffer jeopardy before he can suffer double jeopardy."). The Court in *Serfass* held emphatically that a pre-jeopardy dismissal, even if based on a defense going to the merits of the case, would not bar reprosecution. *Id.* at 394. *But cf.* Richardson v. United States, 468 U.S. 317, 326 (1984). "[T]he Government, like the defendant, is entitled to resolution of the case by verdict from the jury . . . ." *Id.*

120. United States v. Scott, 437 U.S. 82 (1978) (applying the *Martin Linen* acquittal standard to post-jeopardy dismissals). Hence, a trial terminated after the "attachment" of jeopardy for defects in the indictment or information has been held not to bar reprosecution. *See* Lee v. United States, 432 U.S. 23 (1977) (dismissal at close of evidence pursuant to defendant's motion); Illinois v. Somerville, 410 U.S. 458 (1973) (dismissal before presentation of evidence pursuant to prosecutor's motion).

121. *See* Oregon v. Kennedy, 456 U.S. 667, 672-76 (1982); United States v. Dinitz, 424 U.S. 600, 606-08 (1976).

acted *deliberately* to " 'goad' the defendant into moving for a mistrial."[122] The court can declare a mistrial *sua sponte* or the prosecutor may move for a mistrial. In either case, if the defendant *objects* there must be "manifest necessity" to justify the mistrial, or it will preclude reprosecution.[123]

(5) *Sentences.* Sentences which are below a statutory minimum, or otherwise unlawful, or even too lenient, may be appealed.[124]

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122. *Kennedy*, 456 U.S. at 676. The standard to be applied is that the prosecutorial misconduct must manifest "intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause." *Id.* Although such a case has not been decided squarely by the Supreme Court, it is very clear that judicial misconduct designed to avoid an acquittal by provoking the accused to move for a mistrial would also bar reprosecution. *See* United States v. Jorn, 400 U.S. 470, 485 n.12 (1970).

123. Arizona v. Washington, 434 U.S. 497, 505-06 (1970); United States v. Perez, 22 U.S. (9 Wheat) 579, 580 (1824). What constitutes "manifest necessity" can not be stated with any exactitude, but the Court seems most interested in applying the exculpatory jury discharge rule to cases involving governmental bad faith, rather than negligence. *See* C. WHITEBREAD, *supra* note 111, § 24.03, at 489-92. *Kennedy*, 456 U.S. at 675, supports this conclusion, in that the Court now requires a showing of "intent" on the part of the prosecutor to circumvent the accused's constitutional rights against a second jeopardy before reprosecution will be barred. In *Lydon*, 466 U.S. 294, the Court rejected respondent's double jeopardy claim on the grounds that the operation of the Massachusetts dual court system did not constitute "governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect." *Id.* at 1814 (quoting United States v. Scott, 437 U.S. 82, 91 (1978)). The conclusion that the Court is retreating from a mechanical application of the jury discharge/jeopardy rule to an application aimed more directly at bad faith conduct is supported by analogy to the recent "good faith exception" to the exclusionary rule. The Court has moved to restore that judicially created technical rule, which also tends to exculpate without adjudication of the merits, to the context of intentional governmental oppression. Massachusetts v. Sheppard, 468 U.S. 981 (1984) (search upheld as in good faith, although warrant was technically defective); United States v. Leon, 468 U.S. 897 (1984) (search upheld as in good faith, although probable cause was lacking). United States v. Martinez, 667 F.2d 886 (10th Cir. 1981), *cert. denied*, 456 U.S. 1008 (1982), is a perfect example of the jury discharge rule operating within its proper scope. Martinez was indicted for possession and mailing of unregistered explosives. On the evening of the third day of trial, the judge held a secret meeting in his hotel room with the prosecutors, court personnel, and several government witnesses. The judge was concerned about subtle intimidation of the jury by spectator friends of the defendant. He planned to install hidden cameras to record the intimidating gestures and demeanor of the spectators and defense attorneys during the pending presentation of the defense's case. The judge then planned to declare a mistrial by having an officer blurt out testimony previously held inadmissible, thus ensuring that the defendant would either move for a mistrial, or join the judge's *sua sponte* declaration of a mistrial, avoiding a possible appellate inquiry into "manifest necessity." After this plot materialized, the defendant appealed and the circuit court barred reprosecution.

124. United States v. DiFrancesco, 449 U.S. 117 (1980). Two rationales explain the appealability of sentences: (1) an illegal sentence is *coram non judice*; therefore no jeopardy consequences attach to an order or judgment which a court does not have jurisdiction to pronounce; and (2) a corrected or modified sentence is not multiple punishment, but rather a revision of a single punishment.

Presumptive sentencing statutes and statutes authorizing prosecutorial appeals of sentences began to spread in the 1970's. State v. Roth, 95 N.J. 334, 347-51, 471 A.2d 370,

In all of the circumstances above where double jeopardy would not bar reprosecution, a statute may allow the prosecutor to appeal. This is exactly what Congress has done by statute authorizing prosecutorial appeals to the very limits of double jeopardy.[125]

The Supreme Court's recent emphasis on the need for a determination of the merits of a case before further proceedings will be barred signals a return to a view akin to the traditional doctrine embodied in the pleas in bar.[126] The double jeopardy clause now serves its original function of fi-

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376-79 (1984) (documenting the ascendency of "offense-oriented, non-individualized determinative sentencing" in academic literature and statutes). *See generally* von Hirsch and Hanrahan, *Determinative Penalty Systems in America, an Overview*, 27 CRIME AND DELINQ. 289 (1981); von Hirsch, *Recent Trends in American Criminal Sentencing Theory*, 42 MD. L. REV. 6, 31-32 (1983) (considering the role of statutory parole release guidelines in the presumptive sentencing movement). Currently, prosecutors in more than half of the states can appeal sentences. Recent Pennsylvania legislation exemplifies the trend, establishing a minimum sentence of five years imprisonment for specific grave offenses committed with the use of a firearm, or committed on public transportation, or for second or subsequent such offenses. 42 PA. CONS. STAT. ANN. §§ 9712-9714 (Purdon 1982). Sentencing guidelines also appear in VA. CODE ANN. §§ 18.2-10, 18.2-11 (Repl. Vol. 1982), but, because the commonwealth may not appeal illegally lenient sentences, the minimum sentence provisions are, in effect, advisory only.

There is one caveat related to the concept of double jeopardy in sentencing: if a defendant procures the reversal of a conviction, upon reconviction at a new trial, if he is awarded a greater sentence, due process requires that the sentencing judge affirmatively set forth in the record the justification for the greater sentence. This rule aims to prevent chilling of the right to appeal for fear of retaliatory sentencing at a second trial. A lesser sentence is not an implied "acquittal" of all greater sentences. *See* North Carolina v. Pearce, 395 U.S. 711 (1969).

125. *See* Annotation, *Dismissal of Indictment or Information as Reviewable on Appeal by United States under* 18 U.S.C.S. § 3731, *as amended by Omnibus Crime Control Act of 1970*, 30 A.L.R. FED. 655, 661-63 (1976).

126. The Court has begun to use the language of "continuing jeopardy," which derives from the neglected case of State v. Lee, 65 Conn. 265, 30 A. 110 (1894). *Lydon*, 466 U.S. 294 (Brennan, Marshall, J.J., concurring in part); Richardson v. United States, 468 U.S. 317 (1984). The theory of "continuing jeopardy" was espoused by Justice Holmes in Kepner v. United States, 195 U.S. 100 (1904) (Holmes, J., dissenting). The gist of the theory, in its original form, is that jeopardy continues until a judgment on the merits free from reversible error is obtained, regardless of the number of "trials" or presentations of evidence required. Thus, a judgment is truly final only when affirmed by the court of last resort. The Supreme Court once refused to overturn a famous Connecticut judgment embodying this doctrine. Connecticut v. Palko, 122 Conn. 529, 191 A. 320 (1938), *aff'd*, 302 U.S. 319 (1937). At the time of the *Palko* decision, the Connecticut Constitution did not contain a double jeopardy clause, and the Supreme Court declined to apply the double jeopardy clause in the Bill of Rights as a requirement of "due process" under the fourteenth amendment. Hence, the state could appeal jury acquittals allegedly tainted by legal error until a pure verdict on the merits was obtained. This theory does not recognize the doctrine of jury nullification in that it holds that a jury acquittal based on legal error is reversible. The doctrine of jury nullification is now, however, a constitutionally mandated aspect of double jeopardy, and will allow the jury to acquit against the law. Hence, there can be no reversible error in a jury acquittal. United States v. Powell, 447 U.S. 530, 540 (1980); *see supra* note 87. While it is doubtful that the Supreme Court will ever adopt the "continuing jeopardy" theory in its most sinewy

nalizing acquittals and convictions, and the jury discharge aspect of the clause has been pared back to the policing of intentional governmental oppression. The jury discharge/jeopardy rule developed to protect the accused from abusive practices which were designed to increase the likelihood of conviction, and the Court has been careful to preserve this function.

III. The Development of Double Jeopardy Doctrine in Virginia

A. *Historical Background*

The English doctrines surrounding the pleas of *autrefois acquit* and *convict* were part of the common law heritage of Virginia.[127] Virginia also inherited an unsettled state of law concerning the discharge of juries and followed a discretionary rule even before that rule emerged in England.[128] Virginia was one of the first states to deny the prosecution the right to writs of error in criminal cases in the absence of a statute or constitutional provision.[129] However, Virginia was among the first states to enact a provision authorizing prosecutorial appeals. In 1840, the Virginia legislature provided that "[i]n all motions or prosecutions for the violations of

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form, allowing reversals of acquittals, the language associated with the theory at least serves well to explain the demise of the *Wilson* and *Jenkins* one-shot prosecution approach, and what has been, to some, the Court's puzzling "new" focus on guilt or innocence (a tack back towards the common law pleas in bar). If jeopardy were held to continue uninterrupted through judicial proceedings at least until the merits of the case were decided, erroneously or not, the accused would not be placed, literally, twice in jeopardy until entitled, as at common law, to a plea of *autrefois acquit* or *convict*. For more information on the continuing jeopardy theory, see Note, *Right of State to Appeal in Criminal Cases*, 4 Va. L. Reg. 923 (1919) (new series).

127. J. Randolph & E. Barradall, II Virginia Colonial Decisions B50-B51 (1909). The defendant could be retried after a dismissal because the *venire facias* had been awarded to the wrong county. The defendant's life was never in jeopardy because the first proceeding had been defective.

> The common law of England, so far as it is not repugnant to the bill of rights and constitution of this state, shall continue in full force within the same, and be the rule of decision in ascertaining and punishing all offenses against the state, except in those respects where it is, or shall be altered by the General Assembly.

1847-1848 Va. Acts 120, § 1, p.93. It is still one of the most fundamental principles of law in this country that the living tradition of the common law controls where a constitution or legislative enactment does not contradict it. *E.g.*, Va. Code Ann. § 1-10 (Repl. Vol. 1979); *see also* Sigler, *supra* note 13, at 300-01.

128. Before *Winsor*, 10 Cox C.C. 276 (1865), the Virginia Court held in Commonwealth v. Fells, 36 Va. (Leigh) 613 (1838), that judges did possess discretionary power to discharge juries before verdict even in felony cases and that such discharges could not result in acquittal. The court exhorted that this power be exercised cautiously in cases of necessity and interpreted the fifth amendment jeopardy clause in the United States Constitution as perfectly consistent with the common law. *Id.* at 619.

129. Commonwealth v. Harrison, 4 Va. (2 Va. Cas.) 202 (1820); Commonwealth v. Myers, 4 Va. (2 Va. Cas.) 160 (1819); Commonwealth v. Highland Crowe, 3 Va. (1 Va. Cas.) 125 (1800).

any act relating to the revenue, the commonwealth shall have the right to appeal or obtain a writ of error."[130] The commonwealth's right to writs of error was later expanded to cases in which a trial court held unconstitutional the statute upon which an indictment had been founded.[131] Because the nineteenth century Virginia Constitution did not contain a double jeopardy clause, the full scope of the power conferred by these statutes included the reversal of acquittals.

By the middle of the nineteenth century, many states' courts had adopted the jury discharge/jeopardy rule.[132] In *Williams v. Commonwealth*,[133] the Virginia general court suggested that it had adopted the new rule.[134] However, the judiciary's potentially expansive interpretation of former jeopardy was checked by the legislature which statutorily codified the traditional rules in 1848. The first of the new enactments consisted of two sections.[135] One section expressed the *res judicata* concept underlying the plea of *autrefois acquit*, modifying the *Vaux* rule so that an acquittal on the merits would not be vitiated by technical defects in the indictment.[136] The other section specified that a discharge *solely* because of a defect in the indictment would *not* bar reprosecution;[137] an

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130. 1840 Va. Acts 2, § 37, p.15.

131. 1898 Va. Acts 592, § 1, codified at VA. CODE § 4052 (Supp. 1898).

132. *E.g.*, Commonwealth v. Cook, 6 Serg. & Rawle 577 (Pa. 1822); *see also supra* note 70 (sources describing the spread of the jury discharge/jeopardy rule).

133. 43 Va. (2 Gratt.) 568 (1845).

134. *Williams*, however, was a habeas corpus case in which the court ordered the release of the defendant still being held in custody after a deadlocked jury had been discharged. The court freed Williams without pronouncing him acquitted. A second indictment had not been brought against him, and the court did not hold that reprosecution would be barred. The precise rule established by the case was that the state could not detain a defendant after an abortive trial. The court did endorse the new jeopardy rule, but instructed that it would have approved if the jury had been kept together until the end of the lower court's term, when the jury would have been discharged by operation of law. *Id.* at 570-71. Such a practice evidences the original understanding of the new jeopardy rule as a guarantee only against governmental overreaching.

135. 1848 Va. Acts 120, §§ 10-11 (codified at VA. CODE ch. 199, §§ 15-16 (1849)).

136. No person shall be held to answer on a second indictment . . . for any offense of which he has been acquitted by the jury, upon the facts and merits, on a former trial; but such acquittal may be pleaded by him in bar of any prosecution for the same offense, notwithstanding any defect in the form, or in the substance of the indictment . . . on which he was acquitted.

1848 Va. Acts 120, § 10. This section recognizes the power of "jury nullification," or the power of a jury to acquit contrary to law and facts. *See also* Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 MICH. L. REV. 1001, 1012-23 (1980).

137. Any person indicted . . . [for] an offense, who on his trial shall be acquitted upon the ground of a variance between the allegations and the proof, or upon any exception to the form or substance of the indictment . . . may be arraigned again on a new indictment . . . and tried and convicted for the same offense, nowwithstanding such former acquittal.

1848 Va. Acts 120, § 11.

affirmative finding of factual innocence would be both necessary and sufficient to shield the accused from reprosecution. The second 1848 legislative enactment specifically addressed the dictum in *Williams*: "[t]he court may discharge the jury in *any criminal prosecution* . . . [when it] appear[s] that they cannot agree in their verdict, or that there is a manifest necessity for such discharge."[138]

The nineteenth century Virginia law on former jeopardy rejected the intrusion of the jury discharge rule, as demonstrated by *Robinson v. Commonwealth*.[139] In *Robinson*, the court upheld a conviction for larceny obtained upon reprosecution. After discovering a discrepancy in the indictment, the trial court discharged the jury over the defendant's objection. At the subsequent trial on a new indictment, the defendant entered a plea of former jeopardy, which the court overruled. The court of appeals granted the defendant's petition for a writ of error and upheld the conviction. Defendant's counsel argued for a jury discharge/jeopardy rule, citing many cases from the growing number of jurisdictions which had adopted the rule. The legislature had decided, however, that an abortive trial could not result in an acquittal. The court noted that "our statute puts that question at rest forever."[140]

B. *Constitutional Prohibition*

The Virginia Constitution provisions prohibiting double jeopardy and appeals by the commonwealth in criminal cases first appeared in 1902.[141]

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138. *Id.* at 21, § 23 (emphasis added) (codified at VA. CODE tit. 55, ch. 208, § 12 (1860). The provision survives today in VA. CODE ANN. § 8.01-36 (Repl. Vol. 1984).

139. 73 Va. (32 Gratt) 866 (1879).

140. *Id.* at 872. The court reiterated the traditional rules in Price v. Commonwealth, 74 Va. (33 Gratt.) 819, 824-25 (1880), and the two former jeopardy provisions appeared unchanged in the new 1887 Code. VA. CODE §§ 3893-3894 (1887). The "question," however, did not rest for long. In Dulin v. Lillard, 91 Va. 718, 20 S.E. 821 (1895), a new supreme court of appeals resumed agitation for the jury discharge rule:

> In order to make such a defense [of former jeopardy] with success, the party relying upon it must show that he has been put upon his trial before a court which has jurisdiction, upon indictment or information which is sufficient in form and substance to sustain a conviction, and that a jury has been empaneled and sworn, and thus charged with his deliverance. Anything short of this, is insufficient to raise a bar against a new indictment or prosecution for the same offense.

Id. at 722, 20 S.E. at 822. This passage reads like a hornbook recipe for the new jury discharge/jeopardy rule. *See, e.g.*, T. COOLEY, *Constitutional Limitations* *326-27. The *Dulin* court could not apply the rule, however, because the indictment had been dismissed before the jury was empanelled. At the turn of the century the court threatened to adopt the new rule in spite of the legislature's attempt to forestall it statutorily. The change in the court's mood between *Robinson* and *Dulin* might be attributable to the fact that all of the members of the Court changed. The post-war Constitution of 1869 established a new court providing for five judges and a reporter, to serve twelve-year terms. *Dulin* was the first case decided by the new court, on January 17, 1895. *See* 91 Va. xix-xxi (Preface) (1895).

141. The two provisions were embodied, respectively, in the Bill of Rights, art. I, § 8, and

The framers of these provisions equated prosecutorial appeals with the reversal of acquittals and attempted to constitutionalize the common law right to the pleas in bar by denying writs of error to the commonwealth, except in revenue cases. Berryman Green, Chairman of the Committee on Preamble and Bill of Rights, presented the recommendations of that committee to the convention, explaining the committee's proposal to add "nor shall any person be twice put in jeopardy for the same offense"[142] to article I, section 8 of the constitution.[143] The committee recommended that the traditional finality of the trial process be constitutionally declared to guard against future encroachment. It was assumed that a trial would be tried to completion and the case determined, after which the law would direct either punishment or freedom. However, in none of the records of the convention do any of the representatives mention the jury discharge rule or indicate that the double jeopardy clause would alter the law as practiced.[144]

As soon as the convention approved the double jeopardy provision prepared by Berryman Green's committee,[145] an exception to the double

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art. VI, § 38.

142. REPORT OF COMMITTEE ON PREAMBLE, BILL OF RIGHTS, ETC., COMMITTEE REPORTS, JOURNAL OF THE CONSTITUTIONAL CONVENTION OF VIRGINIA 1-4 (1901) [hereinafter JOURNAL].

143. [T]hose words have never before appeared in a Virginia Constitution or in the Bill of Rights. . . . [W]e have heretofore relied upon the fundamental principle of English law, which protects the accused from everlasting persecution by the powerful arm of the State. But it has so long been practiced, it has been so long accepted as an absolute right of a person accused of crime, that he shall not be everlastingly harassed by the power of the State, but shall have his fair and honest trial and then go to punishment or to freedom, as the law may direct and as the case may be determined, that it does seem to me if there is a fundamental right in the world which ought to be declared, it is the right that a man shall not twice be put in jeopardy for the same offence . . . .

No man can tell when it may be thought necessary to provide that a man shall not be tried more than once.

1 REPORT OF THE PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION 102 (J. Lindsay ed. 1906) [hereinafter REPORT OF THE PROCEEDINGS]. Concerning the importance of the debates at this constitutional convention in construing the language of the constitution, see the editorial note of an unnamed member of the same 1901-02 Committee on Preamble, Bill of Rights, which Mr. Green chaired, in 9 VA. L. REG. 960 (1904).

144. William B. Pettit, recent President of the Virginia Bar Association and another member of the Committee on Preamble, Bill of Rights, dissented to this prophylactic provision. "No person was ever liable, under the law of the land . . . to be twice put in jeopardy for the same offence [sic]. Why forbid a thing that was already interdicted—a thing that could never occur in Virginia . . . ." MINORITY REPORT OF THE COMMITTEE ON PREAMBLE, ETC. JOURNAL *supra* note 142. Mr. Green's speech indicated that the provision was not adopted as a remedy for existing wrongs. *See supra* note 143 ("no man can tell when it may be thought necessary . . . ."). See also the speech of D.Q. Eggleston in 7 REPORT OF THE PROCEEDINGS, *supra* note 143, at 1632. "The principle of common law which provides that no man shall twice be put in jeopardy for the same offense, has been inviolate in this State from time immemorial." *Id.*

145. REPORT OF THE PROCEEDINGS, *supra* note 143, at 393.

jeopardy clause was proposed for revenue cases.[146] It was thought that an exception was needed for revenue appeals because standing alone the double jeopardy clause would render meaningless the statute authorizing prosecutorial appeals.[147] The perceived need for such an exception points to the conclusion that, when the convention broadly prohibited prosecutorial appeals, its members thought that all such appeals sought to disturb acquittals. The anti-appeal provision was, therefore, no more than a restatement of the double jeopardy concept. The constitution finally produced by the convention contained the double jeopardy clause, a revenue exception, and the Committee on Judiciary's original proposal on prosecutorial appeals.[148]

In the next edition of the Virginia Code, the statutes concerning the effect of a former acquittal and the commonwealth's right to writs of error appeared exactly as they had before the constitutional convention.[149] The annotations to section 3894 of the code found the new former jeopardy provision in section 8 of the constitution perfectly harmonious with the pre-existing common law tradition: "[t]o avail of the defence of twice in jeopardy, the defendant must plead autrefois acquit or convict."[150] However, advocates of the jury discharge rule began to rally around a new banner. The constitution contained that magic word, "jeopardy."[151]

Commonwealth v. Perrow[152] was the first post-constitution case to substantially affect Virginia law on former jeopardy and prosecutorial appeals. Upon Perrow's appeal from a district court conviction, the circuit court held unconstitutional a state revenue law requiring labor agents in Buckingham County to obtain licenses, thereby quashing the warrant for Perrow's arrest and discharging him. Violation of the statute, in its own terms, was a misdemeanor punishable only by fine. In dismissing the

146. *Id.* "Except that an appeal may be allowed to the Commonwealth in all cases for the violation of a law relating to the State revenue." *Id.* This exception was proposed by Attorney Eppa Hunton, Chairman of the Committee on Judiciary.

147. *Id.* at 394. "[U]nless that amendment is adopted a statute of the State of Virginia, which has been upon its statute books for years, will be nullified and rendered unconstitutional." *Id.*

148. THE CONSTITUTION OF THE STATE OF VIRGINIA ADOPTED BY THE CONVENTION OF 1901-2, IN JOURNAL art. I, § 8, and art. VI, § 88, *supra* note 142, at 2-3, 22, respectively. This document was promulgated in July of 1902 and affirmed by the supreme court of appeals, defects in the process of its creation notwithstanding. Taylor v. Commonwealth, 101 Va. 829, 44 S.E. 754 (1903).

149. VA. CODE ANN. §§ 3893-94, 4052 (1904).

150. *Id.* § 3894 (quoting Justice v. Commonwealth, 81 Va. 209 (1885)).

151. In 1904, an article entitled *Former Jeopardy* appeared in the Virginia Law Register, campaigning for the new jury discharge/jeopardy rule. Harvey, *Former Jeopardy*, 10 VA. L. REG. 410 (1904). An editorial note following this article, however, defended the traditional Virginia position, maintaining that the new provision in the constitution "merely makes *lex scripta* what was already *lex non scripta*," and should be interpreted in light of sections 3893 and 3894 of the Code. 10 VA. L. REG. 419, 419-20 (1904) (editor's note).

152. 124 Va. 805, 97 S.E. 820 (1919).

commonwealth's petition for a writ of error, the supreme court of appeals navigated the relevant constitutional sections in four tacks.

First, section 88 of the constitution barred appeals of cases involving "life and liberty" punishment, but permitted appeals of all state revenue cases, regardless of the authorized sentence. *Perrow* was not a "life and liberty" case, and therefore did not fall within the proscription of section 88.[153] Judge Kelly's analysis seemed to authorize the legislature to reenact a provision allowing prosecutorial appeals of constitutionality rulings in cases involving a fine only.[154] However, what he gave with this ruling, he took back with the next.

Second, section 8 of the constitution, the double jeopardy clause, did apply to cases involving fines only and barred the commonwealth's appeal.[155] The court held that in *any* case not involving state revenue it could not reverse a judgment for the accused and order a new trial. Moreover, the court did not have jurisdiction to hear an appeal which sought such a reversal.[156]

Third, by adopting an expanded version of the new jury discharge/jeopardy rule, the court was able to hold that *any discharge* of the defendant upon the *law or facts* at *any time* during trial (or upon appeal from a conviction) would be treated as an acquittal, thus barring future

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153. *Id.* at 810-11, 97 S.E. at 822.

154. "[T]hus leaving the Legislature, so far as this particular section [§ 88] of the Constitution is concerned, a free hand with reference to appeals in criminal cases where no other punishment than a fine is prescribed." *Id.*

155. *Id.*

156. The influence of the philosophy in Judge Burks' article, Burks, *Former Jeopardy*, 6 VA. L. REG. 243 (1900), is apparent in the court's opinion:

> When the purpose of an appeal in a criminal case is to procure on behalf of the State a reversal of the judgment and a new trial of the accused (as distinguished from a mere review and decision on the legal question involved for use as a precedent in future cases) the rule against a second jeopardy for the same offense operates *proprio vigore* to destroy the right of appeal. The matter is jurisdictional, and the accused is not obliged to first abide the result of the appeal, and, in the event of a reversal, resort to his plea of *autrefois acquit* or *autrefois convict* to avoid a second trial.

Commonwealth v. Perrow, 124 Va. 805, 811, 97 S.E. 820, 822 (1919). The court seems to assume that there are only two possible purposes for a prosecutorial appeal, the reversal of an acquittal or the resolution of moot legal questions (the same assumptions made by Judge Burks in 1900). Moot proceedings, however, were renounced by the Virginia Supreme Court of Appeals, both before and after the publication of Judge Burks' article. *See* Hamer v. Commonwealth, 107 Va. 636, 637, 59 S.E. 400, 401 (1908); Franklin v. Peers, 95 Va. 602, 89 S.E. 321 (1898). *But see* 1976-77 Op. Va. Att'y. Gen. 10 (advisory appeals would not involve life and liberty, avoiding VA. CONST. art. 6, § 1, and would not violate the double jeopardy clause); 2 A. HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 716-17 (1974) (moot appellate review in Virginia not prohibited by a constitutional "case" or "controversy" requirement, as in U.S. CONST. art. 3, § 2). There was no such thing as a moot appeal in Virginia in 1919, notwithstanding the seemingly favorable mention of such a chimera in *Perrow*.

proceedings.[157]

The final question remaining was whether the law involved in *Perrow* might indeed qualify as a *state* revenue law exempted from the double jeopardy provision in section 8. Although the law in question was a state licensing law,[158] the court held that it served a *local* policing purpose and was not the kind of state revenue law the constitution had intended to exempt. By construing the statute outside of the revenue exception, the constitutional double jeopardy provision decided the case. The new one-shot-prosecution jeopardy rule had finally been announced not as dictum,[159] but as binding precedent.[160]

The court in *Perrow* held that reprosecution would be prohibited "whenever a defendant . . . [had] been . . . discharged upon a defense constituting a bar to the proceeding, whether the defense rested upon the law or the facts."[161] This holding, in effect, made a final judgment of acquittal out of any discharge of the defendant at any point in the trial, including the dismissal of an indictment in pre-trial proceedings based on

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157. There was no jury trial in the instant case, and we have not overlooked the fact that jeopardy, as ordinarily understood in legal parlance, refers to the danger of conviction and punishment which a defendant incurs in a criminal case where a jury has been empaneled and sworn. But we are of opinion that the spirit and purpose of the immunity intended to be secured by the doctrine in question will be violated whenever a defendant in any criminal case has been formerly tried by competent authority—whether court or jury—and discharged upon a defense constituting a bar to the proceeding, whether that defense be rested upon the law or the facts.

Perrow, 124 Va. at 815, 97 S.E. at 823. This broad reading of section 8 in *Perrow* has had resounding effects on Virginia law. *See, e.g.*, 1958-59 Op. Va. Att'y Gen. 88 (letter to Commonwealth's Attorney for Arlington County, advising that discharge of defendant on grounds of unconstitutionality of statute was unreviewable, although only a fine was involved. Section 8, the opinion asserted, precluded appeal because it precluded reprosecution, even though the case had been dismissed before jeopardy would ordinarily be said to have attached). *Perrow's* strict one-shot prosecution rule abrogated even the ancient rule that a defendant could be reprosecuted after obtaining the reversal of his conviction. *Perrow* does not even allow the reinstatement of a former conviction *without* reprosecution because an appeal would be destroyed *proprio vigore*.

158. 1900 Va. Acts 868. The Act, part of the State Tax Code, is construed in *Perrow*, 124 Va. at 815-16, 97 S.E. at 823-24.

159. *See* Commonwealth v. Wilcox, 111 Va. 849, 69 S.E. 1027 (1911). The court dismissed the Attorney General's petition for a writ of error sought under the authority of the 1898 provision which allowed appeals of cases in which statutes had been declared unconstitutional. The court declared that in cases involving "life or liberty" section 88 of the constitution had preserved the right to a writ of error for the commonwealth only if a revenue law were involved. The court indicated that it had adopted the jury discharge rule, but that the facts in the case did not present that issue, and the holding, therefore, did not depend on it.

160. The next edition of the Code after *Perrow*, in 1924, featured a three and one-half page annotation to § 4774 (acquittal), with 141 citations. VA. CODE ANN. § 4774, (1924). An editorial note following *Perrow* in the Virginia Law Register began the dissent immediately. Note, *Right of State to Appeal in Criminal Cases*, 4 VA. LAW REG. 923 (1919). The note presented the "continuing jeopardy" theory.

161. *Perrow*, 124 Va. at 815, 97 S.E. at 823.

technical defects or the unconstitutionality of a statute. At the time the constitution was created, there was only one kind of acquittal—"by the jury, upon the facts and merits."[162] Under *Perrow*'s radical form of one-shot-prosecution jeopardy doctrine, however, all trial terminations in favor of the defendant are "acquittals." *Perrow* eliminated the prosecutor's common law "horizontal" access to new proceedings as well as any access to "vertical" appellate proceedings which managed to survive the "life and liberty" anti-prosecutorial appeal clause in the constitution.

The *Perrow* rule, was applied in *Adkins v. Commonwealth.*[163] In *Adkins*, the indictment had been dismissed. Although no jury had been sworn and the commonwealth had not introduced evidence, the court held that dismissal barred reindictment, notwithstanding the fact that the appellate court believed the trial court's assessment of the law had been erroneous and that the evidence of the accused's factual guilt was clear.[164]

Perrow and *Adkins* exerted a tremendous influence over Virginia law. In 1981, the Virginia Supreme Court was still trying to explain how Adkins had been conclusively acquitted by a pre-jeopardy non-merits dismissal,[165] while holding that a dismissal would not bar reprosecution unless granted pursuant to a factual defense.[166] The 1982 case of *Greenwalt v. Commonwealth*[167] reaffirmed this holding; however, it is still unclear whether a dismissal on the merits will bar reprosecution if the case is dismissed before the attachment of jeopardy.[168] Otherwise, Virginia law on double jeopardy now closely parallels federal law. By the middle of the twentieth century, the Virginia Supreme Court had decided that, for purposes of determining the preclusive effect of mistrial declarations, jeopardy attaches when the defendant is put to trial before the trier of fact, and the trial can be terminated prematurely for manifest necessity without barring further proceedings.[169]

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162. *See supra* notes 136, 137, 150.

163. 175 Va. 590, 9 S.E.2d 349 (1940).

164. *Id.* at 597, 9 S.E.2d at 352.

165. "Adkins had . . . been fully discharged . . . by a ruling which as a *matter of law* barred further proceedings . . . . Therefore his discharge constituted a true acquittal upon a defense which barred his reprosecution." Johnson v. Commonwealth, 221 Va. 736, 742-43, 273 S.E.2d 784, 788-89 (emphasis added), *cert. denied*, 454 U.S. 920 (1981).

166. 221 Va. at 743-44, 273 S.E.2d at 789 (following United States v. Scott, 437 U.S. 82 (1978)).

167. 224 Va. 498, 297 S.E.2d 709 (1982).

168. The court decided in Moore v. Commonwealth, 218 Va. 388, 237 S.E.2d 187 (1977), that dismissal of a felony warrant in a preliminary hearing would not bar further proceedings. Jeopardy had not attached, but this result might have following because the district court did not have jurisdiction to try a felony.

169. Rosser v. Commonwealth, 159 Va. 1028, 167 S.E. 257 (1933), clarified that, at least with respect to mistrials, Virginia would follow the rule that in a trial to the bench, jeopardy attaches when the court begins to hear evidence, and in a jury trial, upon the swearing of

With respect to appeals by the state, however, Virginia law is conspicuously out of step. Prosecutorial appeals spread rapidly during the twentieth century, the most significant development being the Federal Criminal Appeals Act of 1907,[170] which served as a model for many state statutes. Other state prosecutors have been granted broad rights of appeal in order to test and define the complex protective features of modern criminal law. Unfortunately, the development of such appellate rights in Virginia has been stymied by the constitution.

IV. Updating the Virginia Constitution and the Code

A commission appointed by the Governor to study the Virginia Constitution and recommend revisions submitted its report in 1969, advocating prosecutorial appeals to the limits prescribed by the concept of double jeopardy.[171] The commission recommended that the prohibition against commonwealth's appeals in section 8 be removed, as an issue "best left to the General Assembly rather than frozen into the Constitution."[172]

The objective of the commission was to give back to the legislature the ability to determine by statute when commonwealth's appeals would be needed in order to keep pace with other developments in criminal procedure and double jeopardy philosophy. The double jeopardy provision in section 8 and the federal standard under the fifth amendment would mark the limit to which the legislature could grant commonwealth's appeals.[173] However, the same appeal provision which formerly appeared in section 8 was restored by the House of Delegates in what emerged from the 1969-70 session as article VI, section 1, of the current constitution.[174]

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the jury. Mack v. Commonwealth, 177 Va. 921, 15 S.E.2d 62 (1941), reaffirmed the rule in *Rosser*, but did not disturb *Perrow* with respect to dismissals. By the end of the next decade, the court had also established firmly that if the accused moved to set aside a verdict of guilty, or requested a new trial after conviction, he waived his former jeopardy. *See* Cross v. Commonwealth, 195 Va. 62, 77 S.E.2d 447 (1953); Mealy v. Commonwealth, 193 Va. 216, 68 S.E.2d 507 (1952).

170. 34 Stat. 1246 (1907).

171. American Bar Association Project on Standards for Criminal Justice, Standards Relating to Criminal Appeals (Approved Draft) § 1.4, at 33-40 (1970) [hereinafter Standards].

172. Report of the Commission on Constitutional Revision 186 (1969). The commission consisted of such prominent members of the Virginia legal community as Lewis F. Powell, Jr., Justices Harrison, Cochran, and Harmon of the Virginia Supreme Court, Federal District Court Judges Bryan and Dalton, Professors Colgate, W. Darden, Hardy Cross Dillard and constitutional scholar A.E. Dick Howard.

173. A. Howard, *supra* note 156, at 715-16.

174. The House Standing Committee on Courts of Justice received the recommendations of the Revision Commission, and restored the provision denying the commonwealth the right to appeal, except in state revenue cases, before submitting the judiciary article as H.R.J. Res. 12. The Senate agreed to the version of art. VI, § 1, submitted by the Senate Committee for Courts of Justice (S.J.Res. 12), which did not contain the old provision bar-

Recommendations for the amendment of the constitution to allow prosecutorial appeals have continued. In 1976, a Joint Bar Study Commission, appointed by the Virginia Judicial Council to study the *American Bar Association Standards for Criminal Justice*,[175] recommended that the Virginia Constitution be amended to allow prosecutorial appeals.[176] The issue has since been studied by the Attorney General's Office and the General Assembly's Joint Courts of Justice Subcommittee on Prosecution Appeals.[177] Recently, two different amendments have been considered by the legislature.[178]

Earnest attempts to remove the constitutional restriction on prosecutorial appeals have been made. House Joint Resolution 133 (H.J.R. 133) in 1983 would have allowed prosecutorial appeals from orders quashing warrants or indictments or suppressing evidence and requiring the return of seized property, all prior to the attachment of jeopardy.[179] H.J.R. 96 in 1984 was restricted to felony cases and specified the attachment points for jeopardy in jury and bench trials.[180] This resolution would have allowed appeals of only those orders dismissing warrants, indictments, or information on grounds of unconstitutionality of a statute and orders suppressing evidence by operation of the exclusionary rule provided that the prosecutor certified the essentiality of the excluded

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ring appeals. PROCEEDINGS AND DEBATES OF THE SENATE OF VIRGINIA PERTAINING TO AMENDMENT OF THE CONSTITUTION, 33-035, 109, (C. Woltz ed. 1969-70). The House of Delegates, however, insisted that its version of article VI, section 1, be adopted. A conference committee was appointed to draft a compromise resolution, and the version finally approved contained the clause from old section 88. *Id.* at 504-05, 508, 514, 530, 834. In presenting H.R.J. RES. 12 to the House, Mr. Moore, Chairman of the Standing Committee for Courts of Justice, reported "the Committee's thought that this specific statement [former § 88] should . . . be in the constitution to assure that the commonwealth cannot appeal generally in criminal cases and harass people unnecessarily; also to preserve the specific right of appeal on revenue matters." Both of the reasons given by Mr. Moore are difficult to defend. The Supreme Court of Virginia has not granted a writ of error under the revenue exception in a reported case since Roanoke v. Donckers, 187 Va. 491, 47 S.E.2d 440 (1948), and even there the court held that the exception did not apply. Thus, the revenue exception, though apparently highly esteemed by Mr. Moore, is of somewhat limited utility. Moreover, the commonwealth would not be able to "appeal generally" if the legislature restricted appeals by statute, or simply gave the appellate court discretionary power to grant or refuse writs of error.

175. *See supra* note 171.

176. REPORT OF THE JOINT BAR COMMITTEE STUDY OF THE AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE 88-90 (October 7, 1976). The recommendations of this commission are also noted in OFFICE OF THE SECRETARY, COMPREHENSIVE JUDICIAL PLAN, H-26-H-27 (1977).

177. The subcommittee was appointed pursuant to H.R.J. RES. 159, 1983 Va. Acts 1310, to study the expansion of appellate rights for the accused, and to prepare implementing legislation for a proposed constitutional amendment to allow prosecutorial appeals.

178. H.R.J. RES. 133, 1983 Va. Acts 1241 and H.R.J. RES. 96, x Sess. 1984 Sess., Va. (stricken on February 2, 1985).

179. H.R.J. RES. 133, 1983 Va. Acts 1241.

180. H.R.J. RES. 96.

evidence.[181]

Senate Joint Resolution 53 (S.J.R. 53) (which contained the provision originally proposed in H.J.R. 133) and the newer provision in H.J.R. 96 were both considered by the General Assembly in the 1985 session. The house and senate ultimately approved a version of H.J.R. 96; this proposal became S.J.R. 53 by substitution. After election of house members in November 1985, the General Assembly approved H.J.R. 126[182] in the 1986 session, an unamended version of S.J.R. 53. House Bill 699 (1986) provides for a voter referendum on the issue in the November 1987 election.[183]

Although the proposal in H.J.R. 126 represents some progress towards modernizing Virginia's outdated one-way appellate avenue, its provisions, when viewed in light of the very broad prosecutorial appellate rights in other states, are timorously narrow.[184] In felony cases, the resolution allows appeal of an order dismissing an indictment on the grounds that the underlying statute is unconstitutional and of an order to suppress evidence or a confession on the grounds that it was obtained in a manner violative of the United States or Virginia Constitutions. While these two types of orders are among the most controversial, and the right to appeal them is most desired by prosecutors, there are many other judgments and orders which are not listed in H.J.R. 126 which have great potential for error prejudicial to the interests of the citizens of the commonwealth.[185]

Still more disappointing is the fact that the General Assembly seems compelled to immunize its first halting steps in the constitution. Texas is the only other state which has a constitutional limitation on prosecutorial appeals, and this provision has been circumvented by creative legislation which has been supported by the Texas courts.[186] The Virginia General Assembly, presumably fearing a future runaway statutory expansion of prosecutorial appellate rights, is attempting to exert dead-hand control over the future of prosecutorial appeals by refusing to simply remove the constitutional prohibition of such appeals. The legislature could remove

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181. *Id.*

182. H.R.J. RES. 126, 1986 Sess., Va.

183. H.R. 699, 1986 Sess., Va.

184. *See supra* note 109.

185. *E.g.*, People v. Vilt, 119 Ill. App. 3d 832, 457 N.E.2d 136 (1983) (appeal from a double jeopardy dismissal); People v. Rehlman, 62 Cal. 2d 135, 396 P.2d 913, 41 Cal. Rptr. 457 (1964) (review of exculpatory miscalculations of time with respect to statute of limitations). Proposed amendments to the Virginia Constitution have provided for appeals of orders suppressing evidence allegedly obtained in violation of the constitution (H.R.J. RES. 96), but not for evidence allegedly violative of the confrontation clause. The errors not provided for in the amendments can damage the commonwealth's case as irreparably as the suppression of evidence erroneously held to have been illegally obtained.

186. Todd v. State, 661 S.W. 2d 116 (TEX. Crim. App. 1983); TEX. CRIM. PROC. CODE ANN. art. 4401 (Vernon Supp. 1985).

the constitutional provision and write a statute like H.J.R. 126, allowing future legislatures to expand, contract, and "tune" the statute to fit the needs of the criminal justice system. This is now the manner in which authorization for prosecutorial appeals is handled in almost every other state. The experience of other states has shown that prosecutorial appeals are rarely used, even if authorized up to the limits of double jeopardy. The trend throughout the United States has been towards expanding prosecutorial appellate rights.[187] However, measures being taken by the Virginia General Assembly are unduly conservative and may manifest a fear of imagined future widespread oppression of defendants.

Among the most vocal opponents of a broad authorization of prosecutorial appeals is Delegate Theodore V. Morrison, Jr., D-Newport News. Morrison demonstrated a general confusion as to the relationship of double jeopardy to prosecutorial appeals. He objected to the H.J.R. 133 proposal because it allowed the state to appeal "from any decision, judgment, or order dismissing a warrant or indictment or information as to any one or more counts . . . prior to the defendant's being placed in jeopardy."[188] He felt that "some future General Assembly might decide that defendants are not in jeopardy until the end of a trial and might permit the state to appeal any ruling against it during the course of a trial."[189]

Jeopardy currently "attaches" upon the swearing of a jury in a jury trial, and in a bench trial upon the swearing of the first witness or when the prosecutor begins to introduce evidence. H.J.R. 96, favored by Morrison, specifies these events as the point in a trial after which no prosecutorial appeals can be taken. H.J.R. 133, on the other hand, speaks only of the attachment of jeopardy. Therefore, the argument goes, a future General Assembly could decide to move the point at which jeopardy attaches to some time later in the trial, thus extending the point up to which the prosecutor could appeal. Morrison's argument is flawed on its face. The Supreme Court has decided when jeopardy attaches, and it is not within the authority of the General Assembly or the Virginia Supreme Court to decide otherwise. Furthermore, the only significance of the attachment of jeopardy is that if a mistrial is afterwards declared the defendant must consent, or there must be "manifest necessity" to prevent injustice, else he will be technically acquitted. The concept of double jeopardy functions primarily to prohibit reprosecution after an acquittal on the merits, or a constructive acquittal, and the "attachment" point is significant only in determining some point after which a constructive acquittal might be the result of a mistrial declaration. Hence, appeals of other orders and judgments may be taken throughout the course of a

187. *See supra* note 109.

188. H.R.J. RES. 133, currently S.J.RES. 126.

189. Two Prosecution Appeal Amendments Survive, Richmond Times Dispatch, Jan. 24, 1984, at A7, Col. 1.

trial. *Forty-six states, the District of Columbia, and the federal courts allow appeals of orders and judgments after the attachment of jeopardy.* Only Massachusetts, New Hampshire, Rhode Island and West Virginia restrict appeals to pre-jeopardy orders and judgments.[190] Post-attachment orders and judgments which are routinely appealable in other jurisdictions include sentences, orders in arrest of judgment, the grant or denial of a new trial, and modification of a jury verdict.

Arguments in favor of very limited prosecutorial appeals assert the defendant's interest in finality. However, to assert that a defendant has an interest in finality says very little. First, he would acknowledge no interest in the finality of a conviction and would embrace the right to appeal. More importantly, every defendant has an interest in the finality of any order or judgment in his favor, however erroneous. The public has a countervailing interest in fair, legally correct proceedings "designed to end in just judgments."[191] The balancing of these interests should produce a rule which entitles the defendant to finality in an acquittal by his peers.[192] The public's interest in ensuring that a trial proceeds to a verdict on the merits without substantial prejudicial error to either the state or the defendant is at the root of our criminal justice system. In the face of widespread public dissatisfaction with defendant-oriented criminal procedure, one response of the Supreme Court has been to work the operation of the double jeopardy clause back to a merits-orientation, thus diminishing its power to produce technical acquittals[193] and opening the door to a broader range of prosecutorial appeals. The people of Virginia are also concerned about the swift and efficient administration of criminal justice which adequately accounts for the people's right to determine guilt or innocence and to punish accordingly.

A broad right of the commonwealth to appeal can be justified on numerous grounds. Foremost, the law should be applied uniformly. Uniformity contributes to the integrity and organization of the judiciary as part of the overall system of government. Broader appellate jurisdiction

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190. MASS. GEN. LAWS ANN. ch. 278, § 28E (West 1981); N.H. REV. STAT. ANN. § 490:4 (1983); R.I. GEN. LAWS § 9-24-23 (Supp. 1984); W. VA. CODE § 58-5-30 (1966).

191. Wade v. Hunter, 336 U.S. 684, 689 (1949). The Court has also decribed to the public an "interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury." Arizona v. Washington, 434 U.S. 497, 505 (1978). Moreover, "the Government, like the defendant, is entitled to resolution of the case by verdict from the jury." Richardson v. United States, 468 U.S. 317, 326 (1984).

192. *E.g.*, Note, *Twice in Jeopardy: Prosecutorial Appeals of Sentences*, 63 VA. L. REV. 325 (1977) (proposing a balancing test between the defendant's interest in finality and the government's interest in uniformity in sentencing). Proponents of an expanded concept of finality usually rely on one-shot prosecution balms and nostrums: "The double jeopardy clause is a limitation on the *number of proceedings* in which the government can subject the criminal defendant to the risk of penal sanctions." *Id.* at 325 (emphasis added). This is an orphaned point of view. *See supra* note 115, United States v. Scott, 437 U.S. 82 (1978).

193. *See supra* notes 123, 126.

in this supreme body ensures that more issues will be brought before it, not just those decided against defendants. The state's citizens also have an interest in the even application of the law. Uniformity will increase public confidence in the legal system and stimulate public support and respect for laws, lawyers, and judges.

Prosecutorial appeals also tend to control the conduct of individual judges. The judicial process needs a system of checks which exposes the actions of lower courts to appellate review. Without prosecutorial appeals, however, there is no vehicle for such a check. The quality of judgments by trial judges will be improved by the ability of both parties to appeal, even if prosecutors do not in fact appeal frequently.

In individual cases, the state finds itself in the position of having a right without a remedy. While the people are not entitled to a perfect trial, they are at least entitled to a fair trial free of substantial prejudicial error. Without the right to appeal, the people's right rests solely in the discretion of the trial judge. Allowing the prosecutor to appeal is not a drastic remedy to enforce this right to justice. Nor is it fundamentally unfair to allow the prosecutor to appeal interlocutory rulings which could not be appealed by the defendant.[194] The defendant can appeal any alleged error which occurred during the course of the trial if he is convicted, but the prosecutor may not appeal after an acquittal. He must take his appeals at stages of the trial before verdict if alleged error is to be corrected.[195]

The Virginia Constitution should be amended simply by deleting the sentence which provides that: "No appeal shall be allowed to the Commonwealth in a case involving the life or liberty of a person, except that an appeal by the Commonwealth may be allowed in any case involving the violation of a law relating to the State revenue." Moreover, in view of the broad statutory provisions managed by other states,[196] the following statute authorizing prosecutorial appeals is suggested once the constitutional restriction is removed.

Appeals by Commonwealth

1. *To the Court of Appeals.*

A. *Final Orders.* An appeal may be taken by the commonwealth by right to the court of appeals from:

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194. United States v. Bitty, 208 U.S. 393, 400 (1907) (defendant is not constitutionally entitled to appellate rights perfectly parallel to the government's).

195. The narrow *Abney* doctrine does allow interlocutory appeals by defendants of certain highly prejudicial orders. Abney v. United States, 431 U.S. 651 (1977).

196. *See supra* note 109.

(1) an order quashing or dismissing[197] a charging instrument or any count thereof,

(2) an order sustaining a plea in bar, including pleas of former jeopardy, denial of speedy trial, and expiration of the statute of limitations,[198]

(3) an order granting or denying a new trial,[199]

(4) an order arresting judgment or setting aside a jury verdict,

(5) any post-verdict order or judgment prejudicial to a substantial interest of the commonwealth, except that the commonwealth may not appeal the grant of a motion for a directed acquittal based on the legal insufficiency of the evidence.[200]

B. *Interlocutory Orders.* The commonwealth may appeal interlocutory orders if the Commonwealth's Attorney and Attorney General certify that the appeal is not taken for purposes of delay and the order involves a substantial question of law which will seriously impair or have the effect of terminating a prosecution if not reversed.[201]

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197. The words "quashing" and "dismissing" are both used in case a court interprets the word "quash" narrowly as applicable only to highly technical defects in the form of the indictment. *See* United States v. Carnes, 618 F.2d 68 (C.C. Ariz.), *cert. denied*, 447 U.S. 929 (1980); Abbot v. Superior Court, 86 Ariz. 309, 345 P.2d 776 (1957).

198. The pleas in bar are specifically included because if sustained they discharge the defendant without regard for the clearest indications of guilt, and the law surrounding speedy trial and double jeopardy can be especially confusing and susceptible to abuse or error.

199. Orders granting or denying a new trial may be more prejudicial than they first appear. Any such order embodies a resolution of some controversial issue raised during trial. The defendant or his counsel may have engaged in conduct, for example, which intimidates the jury or a witness, or which unfairly prejudices the proceeding by interjecting inadmissible, prejudicial statements concerning the prosecutor or a witness. The prosecutor may also have good cause to protest the grant of a new trial if, for example, witnesses may be unavailable at a later trial or if the motion is sustained late in the trial after substantial expenditure of resources and time. An order granting or denying a new trial would be difficult to handle on appeal if given before verdict. The appellate court should have to hear and decide the appeal quickly. In the District of Columbia an interlocutory appeal may be taken at any point during a trial. The court declares a recess for a specified maximum time (90 days), without selecting a new jury. *See* D.C. CODE ANN. § 23-104 (1981).

200. A(4) and (5) recognize a special solicitousness for the jury's prerogative to decide a case, taking into account the Virginia procedural device of the directed acquittal. Post-verdict orders prejudicial to a substantial interest of the state would include orders suspending sentence, awarding probation, reducing a conviction to a lesser degree of the same offense, or to a lesser included offense.

201. A good faith certification is thought necessary in the case of interlocutory appeals because the pre-trial delay created by such appeals implicates the defendant's right to a speedy trial. The constitutional parameters of the speedy trial guarantee, however, are very flexible, and pre-trial appeals do not seriously threaten the defendant's right. The United States Supreme Court has long recognized that what constitutes a speedy trial is not quantifiable. Delay itself does not violate the right to a speedy trial, but it has been long settled

(1) *By right.* The following interlocutory orders, occurring at any point in a trial, may be appealed to the court of appeals by right:

(a) orders suppressing evidence or a confession on the grounds that the use of such evidence at trial would violate the United States or Virginia Constitutions,[202]

(b) orders quashing an arrest or search warrant on constitutional or statutory grounds.

(2) *By petition.* Any other interlocutory order may be the subject of a petition for a writ of error to the court of appeals, except that after the attachment of jeopardy the only interlocutory orders which may be the subject of appellate review are those listed in subsections 1B(1)(a) and 1B(1)(b) of this statute.[203]

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that delay can not be purposefully oppressive. *E.g.*, Pollard v. United States, 352 U.S. 354 (1957). Hence, a good faith certification that an interlocutory appeal has not been taken for the purpose of delay addresses this most basic concern. Otherwise, delays of different lengths of time are allowable in different situations, calling for an *ad hoc* evaluation of each case. To assist the analysis of individual cases, the Supreme Court has identified three purposes of the speedy trial guarantee: 1) to prevent undue and oppressive incarceration before trial; 2) to minimize the anxiety of public accusation; and 3) to limit the possibility that lengthy delay will impair the ability of a defendant to prepare his case. Smith v. Hooey, 393 U.S. 374 (1967); United States v. Ewell, 383 U.S. 116 (1966). Using these criteria, courts achieved such inconsistent results that the Supreme Court later felt compelled to devise a more elaborate test. Although the Court declined to adopt a "bright-line" rule, based either on a specific number of days, or the demand-waiver theory (which held that a defendant waived his right to a trial as long as he did not formally demand trial), the Court did help alleviate some confusion by devising a balancing test. The constitutional barometer was unveiled in Barker v. Wingo, 407 U.S. 514, 530-32 (1971), which provides for the balancing of four elements: 1) the length of the delay; 2) the government's justification for the delay; 3) whether the defendant asserted his right to a speedy trial, and how vigorously; and 4) actual prejudice to the defendant, assessed in light of the three factors announced in *Ewell* and *Hooey*. The continuing vitality of this four-prong *Barker* speedy trial test has been affirmed recently by Justice O'Connor, writing for the Court in a forfeiture case, United States v. Eight Thousand Eight Hundred and Fifty Dollars, 461 U.S. 555, 564 (1983).

202. H.R.J. RES. 126 allows interlocutory appeals of suppression orders based on the grounds that evidence was *obtained* in a manner violative of a constitutional right. The model statute is expressed in terms of evidence the *use* of which at trial would violate the constitution. This wording reaches farther than H.R.J. RES. 126 in that it would allow appeals of orders suppressing prior recorded testimony on the grounds that it violates the "confrontation clause" of U.S. CONST. amend. VI. The provision in the model statute also takes account of the "fruit of the poisonous tree" doctrine. Evidence obtained in a search incident to arrest may be excluded as tainted if the arrest warrant itself is stricken as unlawful.

203. This provision would provide additional insurance against frivolous appeals by granting the appellate court discretion to refuse to entertain unworthy appeals. The limitation to orders before the attachment of jeopardy would prevent the interruption of the trial once it was underway, although such an interruption would not violate the double jeopardy clause. Interlocutory orders which might be the subject of a writ of error under this section include orders for a change of venue, for severance of offenses into separate trials, or the exclusion of probative evidence on other than constitutional grounds.

2. *To the Supreme Court.*

A. Appeals in the following instances shall be by right, and may only be taken directly to the Supreme Court of Virginia:

(1) orders dismissing a charging instrument on the grounds that the statute upon which it was founded is unconstitutional,[204]

(2) any order or judgment in subsections 1A or 1B(1) of this statute in a capital case.[205]

B. The commonwealth shall also have the right to appeal to the Supreme Court of Virginia from an order of the court of appeals which reverses or vacates a conviction.[206]

V. CONCLUSION

While other states have made enlightened developments in the area of prosecutorial appeals, the evolution of law in this area in Virginia has been retarded by article 6, section 1 of the constitution. The framers of this provision intended to bar only appeals of acquittals and barred all prosecutorial appeals in broad language because no other types of prosecutorial appeals were foreseen.

A commission appointed by the Governor of Virginia studied the state constitution and recommended that the prohibition of commonwealth's appeals be removed as an issue "best left to the General Assembly rather than frozen into the Constitution."[207] However, the provision has remained and, in 1986, the Virginia General Assembly voted whether to freeze into the constitution a replacement provision which reads even more like a statute, H.J.R. 126.[208] The state which once led this nation in lawmaking and was home for the country's great legal giants is now furthest behind in coming to grips with the concept of double jeopardy and its relationship to appeals by the government.

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204. Such constitutionality questions present the clearest demand for uniformity and an authoritative pronouncement from the highest judicial body.

205. The highest judicial body should decide such grave questions as those which concern a prosecution involving the death penalty.

206. In such a case, the Supreme Court need only reinstate the conviction if it disagrees with the court of appeals. The words "reversing or vacating" are used to ensure that the prosecution can appeal if the intermediate court reverses a conviction and purports to acquit the defendant, or if it vacates a conviction and remands for a new trial. In either case, substantial public resources will probably have been spent to obtain a conviction. This type of appeal is merely an extension of the defendant's appeal from his conviction. *See* STANDARDS, *supra* note 171, § 1.4, at 40.

207. *See supra* note 172, at 474-75.

208. In November 1986, a proposed amendment to the Virginia Constitution, which would give the State a right to appeal certain preliminary dismissals and exclusions of evidence in felony cases, was approved by voter referendum.

It is submitted that the best course would be to start from scratch and eliminate the clause barring appeals, which by the mere evolution of legal language has taken on a meaning it was never intended to have. By statutorily specifying the conditions under which prosecutorial appeals will be allowed, future General Assemblies will be able to conform the law to the legal philosophy of their own time, and will not be bound by an outmoded constitutional monolith erected to 1986 attitudes.

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