The Limits of Double Jeopardy: A Course into the Dark

Anne Bowen Poulin
THE LIMITS OF DOUBLE JEOPARDY: A COURSE INTO THE DARK?
The Example: Commonwealth v. Smith

ANNE BOWEN POULIN*

Occasionally, the government’s behavior in a criminal prosecution so impinges on the defendant’s rights, or so offends notions of fairness, that a court will feel impelled to a drastic remedy. Commonwealth v. Smith\(^1\) is such a case. In a case that attracted widespread media attention,\(^2\) Jay Smith, a high school principal, was prosecuted for the murder of a teacher at his school and her two children.\(^3\) The defendant’s case was tried to a jury. Based on the circumstantial evidence connecting him with the murders, Smith was convicted and sentenced to death.\(^4\) During the trial, no conduct or error occurred that would have provoked a mistrial request. Additionally, the prosecutorial behavior did not create the appearance of extreme unfairness or overreaching. The evidence adduced at trial, although circumstantial, was sufficient to support the verdict of guilty.\(^5\) On direct appeal, Smith challenged his conviction on several grounds. The court reversed and remanded for a new trial because the trial court had improperly admitted a number of unreliable hearsay statements.\(^6\)

* Professor of Law, Villanova University School of Law. I would like to thank my research assistants, Michael Milone, Melissa Palat and Megan Pomeroy Whitcopf for their work in the preparation of this manuscript. I am also grateful to Dean Frankino and Villanova Law School for generously supporting my efforts.


2. In addition to ordinary press coverage, the case was the subject of two books and a television mini-series. Loretta Schwartz-Nobel, Engaged to Murder: The Inside Story of the Main Line Murders (1987); Joseph Wambaugh, Echoes in the Darkness (1987) (made into a 1987 CBS mini-series of the same name).

3. See Smith, 615 A.2d at 322 Susan Reinert and her two children were murdered in June, 1979. The theory of the prosecution was that Smith and William Bradfield, a fellow teacher who was Reinert’s fiancé and the beneficiary of her life insurance policy, formed a conspiracy to kill Reinert in order to collect the proceeds of her life insurance policies. See id.

4. See Commonwealth v. Smith, 568 A.2d 600, 602 (Pa. 1989). This circumstantial evidence included, among other things, hair similar to Susan Reinert’s found at Smith’s home, a green pin similar to one worn by Karen Reinert found under the seat of Smith’s car, certain fibers found on Susan Reinert’s body and a comb found under Susan Reinert’s dead body allegedly belonging to Smith. Id. at 604-05.

5. Smith, 615 A.2d at 322.

6. Id.
Only later, Smith discovered that he had been the victim of serious misconduct by the prosecution. Well after the trial concluded, Smith discovered that the prosecution had withheld exculpatory evidence and had concealed an existing agreement with a key prosecution witness. The course of conduct through which the prosecution suppressed this favorable information was, in the court's view, "egregious." First, the prosecution had not disclosed its agreement with a prosecution witness, thereby permitting the witness' false testimony to stand uncorrected and precluding effective impeachment. Second, the defense sought, but did not receive, evidence that sand was found between the victim's toes to support the defense theory that the murder was committed in Cape May, New Jersey. At trial, a former state trooper who had investigated the crime was called by the prosecution and testified on cross examination that he had used lifters to remove particles that looked like sand from between the victim's toes. The prosecution "excoriated" the witness and called other officers to establish that the testimony about the lifters was false. Then, while the "trial was still in progress," the state police found the missing lifters. The two violations at trial were compounded by the Commonwealth's post-trial conduct. The Commonwealth continued to conceal the existence of the lifters while arguing on appeal "that [the] court should affirm [Smith's] death sentence." The Commonwealth finally revealed the existence of the lifters more than two years after the trial. In light of these facts, the court concluded that the first trial had been more unfair than initially recognized and that the course of misconduct was so extreme that a new trial would unfairly oppress Smith. The court therefore barred further proceedings in the

7. Id. at 322-23.
8. Id. at 323.
9. Id.
10. Id. at 322. The sand was important because the scene of Reinert's murder was unresolved. William Bradfield, who was convicted of three counts of first degree murder for the death of Susan Reinert and her children, was in Cape May at the time of the actual killing. In his defense, Smith asserted that Bradfield committed the murder in Cape May and Smith was not involved in the conspiracy. See id.
11. Id.
12. Id. The prosecution recommended that the trooper be investigated for perjury. The prosecution also argued that the defense had paid the trooper to fabricate his story about the lifters. Id. at 323-24.
13. Id. at 323 (emphasis in original).
14. Id. at 324.
15. Id. at 323-24. The court observed that "even then, there seemed to be some hesitancy concerning the prosecutor's duty to disclose the evidence." Id. at 324.
case and discharged Smith.16

With its decision in Smith, the Pennsylvania Supreme Court shocked many who had followed the case.17 The court freed a notorious defendant who had been convicted of murder. The court’s decision to discharge the defendant, who had been convicted by a jury on sufficient evidence, is a startling departure from the usual remedy of granting a new trial.18 Through its decision, the court foreclosed any opportunity for the Commonwealth to correct its errors and seek a new conviction in a trial untainted by error. The case therefore raises compelling questions. Are there cases in which prosecutorial misconduct, discovered after a verdict, is so extreme that it warrants discharging the defendant? If so, what is the legal basis for this extreme remedy? Finally, how can courts identify the misconduct that requires this extreme response?

I. INTRODUCTION

Courts frequently must determine the consequences of government misconduct. The nature of the misconduct and the point in the proceedings at which it is discovered affect the court’s ability to remedy the problem in a way that protects the defendant without dissipating the public’s interest in the pursuit of justice. A claim of misconduct that is raised before a verdict is rendered can often be remedied without disrupting the trial.19 Those that cannot be handled so easily may require the trial court to declare a mistrial, a result that only rarely bars retrial.20 Smith, however, represents the most difficult type of case. The government misconduct was not apparent during the trial. Indeed, it was discovered only after both the verdict and the initial appeal.21 Moreover, unlike some types of

16. Id. at 325.
18. For a discussion of the more common remedy of retrial, see infra note 27 and accompanying text.
19. For example, a court can give curative instructions, strike testimony or grant a continuance to deal with misconduct during the trial. See, e.g., Darden v. Wainwright, 477 U.S. 168 (1986) (relying in part on curative instructions to support conclusion that prosecutor’s improper argument did not deprive defendant of fair trial). See generally Bennett Gersham, PROSECUTORIAL MISCONDUCT, §§ 13.1 et seq. (discussing efficacy of curative instructions, contempt orders, fines, reprimands, removal and disqualification).
20. For a discussion of when a mistrial bars retrial, see infra notes 33-35 and accompanying text.
misconduct, it affected the fairness of the trial.\textsuperscript{22}

Still, it does not follow that the defendant is automatically enti-
tled to the extreme remedy of discharge. In most instances, a de-
fendant whose trial was unfair simply receives a new trial. In some
cases, however, the misconduct may be so extreme or so prejudicial
to the defendant that the government should be foreclosed from
further prosecution. The Pennsylvania Supreme Court placed the
\textit{Smith} case in the latter category and, without raising any question of
Smith's guilt, discharged him on the grounds that reprosecution
would violate the Pennsylvania Constitution's protection against
double jeopardy.\textsuperscript{23} In the truest sense, the defendant went free be-
cause the constable blundered. This Article examines \textit{Smith} and
considers how to determine when a case falls in that small category
of cases in which double jeopardy protection bars further prosecu-
tion because of government misconduct in the first trial.

A case like \textit{Smith} raises questions concerning both the legal ba-
sis and the standard for barring further proceedings as a result of
misconduct discovered after conviction. Of the possible bases for
discharging a defendant because of such prosecutorial misbehavior,
the Pennsylvania Supreme Court chose double jeopardy.\textsuperscript{24} This Ar-
ticle will examine whether double jeopardy principles are appropri-
ately invoked to justify discharging a defendant like Smith and
whether double jeopardy lends itself to meaningful standards for
determining when discharge is appropriate.

Double jeopardy is only one possible basis for a decision like
that in \textit{Smith}. Two other possible bases—due process and the su-
ervisory power of the court—are beyond the scope of this Article.
Nevertheless, before considering the double jeopardy implications
of the case more fully, we should consider briefly why the Penn-
sylvania Supreme Court may have seen double jeopardy as the most
attractive basis on which to rest the decision in \textit{Smith}. To determine
the legal framework within which to evaluate cases like \textit{Smith}, we
need to identify the interests and concerns that impel the courts to
grant the defendant the drastic remedy of discharge.

As a general proposition, courts are reluctant to grant the ex-

\textsuperscript{22} Some types of misconduct, such as ethical infractions or violation of grand
jury rules, may not affect the fairness of the trial. \textit{See}, \textit{e.g.}, \textit{Gersham}, \textit{supra} note 19,
at §§ 2.1 et seq. (stating most grand jury misconduct affects investigation of case or
indictment but does not affect trial).

\textsuperscript{23} \textit{Smith}, 615 A.2d at 325. The Double Jeopardy Clause of the Pennsylvania
Constitution bars retrial when the conduct of the prosecutor is intended to preju-
dice the defendant and deny the right to a fair trial. \textit{Id.}

\textsuperscript{24} \textit{Id.}
treme remedy of discharge. Occasionally, a court is driven by a concern for governmental impropriety, regardless of its demonstrated impact on the defendant. In rare cases, courts have invoked the Due Process Clause and granted the dismissal of the charges against a defendant simply to deter or punish governmental misconduct.25

25. Some decisions seem to suggest that unrestrained government misconduct during the investigation and prosecution of a defendant may violate a defendant's right to due process of law, regardless of its effect upon the defendant's substantive rights. That is, tactics employed by the government may be so outrageous that they violate notions of fundamental fairness, entitling the defendant to a remedy on due process grounds even in the absence of demonstrated prejudice. See, e.g., United States v. Russell, 411 U.S. 423, 491-32 (1973) (noting that in situations where conduct of law enforcement agents is extremely outrageous, "due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction"); Spano v. New York, 360 U.S. 315, 324 (1959) (reversing conviction due to government use of involuntary confession); United States v. Twigg, 588 F.2d 373 (3d Cir. 1978) (dismissing charges against defendants because government conduct during undercover investigation violated "fundamental fairness"); Greene v. United States, 454 F.2d 783 (9th Cir. 1971) (dismissing charges against defendant due to outrageous government conduct). However, the support for this argument is limited. More often, the courts have granted relief only when the defendant demonstrated prejudice flowing from the government's misbehavior. See Bank of Nova Scotia v. United States, 487 U.S. 250, 263 (1988) (reversing district court's dismissal of indictment, due to prosecutorial misconduct, because there was no finding of prejudice); United States v. Bagley, 473 U.S. 667, 684 (1985) (holding that government misconduct is only grounds for relief if there is reasonable probability it affected outcome of trial).

An appealing argument can be made that the defendant should receive a remedy for some types of violations without demonstrating prejudice. For example, if the prosecution, acting in bad faith, fails to disclose exculpatory evidence, the misconduct can have a profound impact on the fairness of a trial. Moreover, unlike trial misconduct, which takes place in view of the court, such covert violations may never be discovered. Therefore, when a violation comes to light, the court's response should be strong enough to discourage other prosecutors from risking similar sanctions, even discounted for the likelihood that the violation will go undetected. See Richard A. Rosen, Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger, 65 N.C. L. Rev. 693 (1987) (noting that current system offers no real deterrent to prosecutorial non-disclosure and recommending overhaul of punishments for such violations, including bar disciplinary bodies reviewing opinions for possible misconduct, more severe sanctions and reversal of convictions where prosecutor intentionally suppressed exculpatory evidence); Walter W. Steele, Jr., Unethical Prosecutors and Inadequate Discipline, 38 Sw. L.J. 965 (1984) (calling for appellate courts, or proposed grievance board, to impose strict sanctions on unethical prosecutors and not merely reverse convictions, because reversal neither punishes prosecutor nor deters future violations).

A defendant who complains of lost or destroyed evidence will sometimes win the drastic remedy of dismissal of the charges. If important exculpatory evidence is permanently unavailable to the defendant, then a fair trial is foreclosed and no other remedy will redress the unfairness. See Arizona v. Youngblood, 488 U.S. 51, 69 (1988) (Blackmun, J., dissenting) (arguing that Court should look to numerous factors such as type of evidence, possibility that such evidence would have been exculpatory and existence of other similar evidence, "[r]ather than allow a State's ineptitude to saddle a defendant with an impossible burden"). To determine whether loss or destruction of evidence violates the defendant's right to due process of law, the Court focuses on more than just the behavior of the law enforce-
Never popular, this approach is certainly not in favor with modern courts. More often, therefore, the defendant must point to a defense interest requiring vindication through the extreme remedy of dismissal. The defendant’s interest in receiving a fair trial will not suffice to justify discharge. That interest justifies only a retrial, in which the prosecution may obtain a valid conviction. Thus, only an interest of an unusual nature will support the outright discharge of a defendant on grounds of previously undiscovered prosecutorial misconduct.

The Double Jeopardy Clause is intended to protect such unusual interests. It does not shield the defendant’s right to a fair trial. Moreover, the only relief appropriate to protect the defendant’s Double Jeopardy interest is to bar further prosecution. Thus, double jeopardy may bar further prosecution even if the first trial was fair. For that reason double jeopardy may have seemed an inviting basis for the decision in Smith. Moreover, as this Article concludes, a case like Smith implicates the defendant’s Double Jeopardy interests to an extent that warrants double jeopardy protection.

26. See, e.g., United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992) (rejecting argument that trial of defendant who was forcibly abducted from Mexico would violate due process); Moran v. Burbine, 475 U.S. 412 (1986) (holding that due process did not require exclusion of statements taken from suspect who was not informed by police that his sister had already obtained counsel for him); United States v. Payner, 447 U.S. 727, 733 (1980) (holding that evidence could be admitted against defendant, even though it was seized from third party by “unconstitutional and possibly criminal behavior”).

27. Even a retrial is not always granted. Courts are reluctant to reverse convictions and grant new trials. Indeed, the courts often rely on the doctrine of harmless error to affirm convictions when the trial was procedurally unfair but the verdict is strongly supported by the evidence. See generally Steven H. Goldberg, Harmless Error: Constitutional Sneak Thief, 71 J. CRIM. L. & CRIMINOLOGY 421, 428 (1980) (stating that following line of confusing Supreme Court decisions, “an appellate court faced with an error of constitutional dimension should make its own independent evaluation of the evidence, and reverse the conviction only if it was persuaded that the average jury would have changed its verdict”); Tom Stacey & Kim Dayton, Rethinking Harmless Constitutional Error, 88 COLUM. L. REV. 79, 80 (1988) (noting that Supreme Court has adopted view that “constitutional error generally does not necessitate automatic reversal of a criminal conviction: error is harmless and the conviction must be upheld when an appellate court concludes beyond a reasonable doubt that the error had no impact on the ultimate finding of guilt”).

28. For a discussion of appropriate double jeopardy relief, see infra notes 34-35 and accompanying text.
II. The Double Jeopardy Interests

Because the Pennsylvania Supreme Court based its decision in Smith on the Double Jeopardy Clause of the Pennsylvania Constitution, the decision raises questions concerning whether double jeopardy jurisprudence provides a solid legal basis and helpful standards to determine when prosecutorial misconduct requires the court to discharge a defendant rather than order a new trial. It is not clear whether the Pennsylvania court has steered out of the mainstream and is now navigating uncharted double jeopardy waters or whether the court has merely followed the charted course of double jeopardy law to a new but inevitable conclusion. Although the United States Supreme Court appears to have narrowed the protections afforded by the Double Jeopardy Clause of the United States Constitution, the issue is not settled. The Court has not addressed the precise question raised by Smith and has, in other decisions, demonstrated a tendency to change course in its effort to interpret the Double Jeopardy Clause. In addition, although many states follow the rules decided by the United States Supreme Court, states are free to interpret their own constitutions to provide greater double jeopardy protection than the United States Constitution. Therefore, the issue warrants scrutiny.

Double jeopardy protects the defendant's interest in freedom

29. PA. CONST. art. I, § 10. The section reads in pertinent part: "No person shall, for the same offense, be twice put in jeopardy of life or limb . . . ."

30. For a discussion of the United States Supreme Court's narrow interpretation of the Double Jeopardy Clause, see infra notes 47-54 and accompanying text.

31. The Court's difficulty in defining the scope of double jeopardy protection is reflected in two instances in which the Court overruled decisions within a few years of each other. The Court was struggling with the reasons for and corresponding application of double jeopardy. See United States v. Dixon, 113 S. Ct. 2849, 2851 (1993) (stating that "same conduct rule" announced three years prior is "wholly inconsistent with earlier Supreme Court precedent and with clear common-law understanding of double jeopardy"), overruling Grady v. Corbin, 495 U.S. 508 (1990); United States v. Scott, 437 U.S. 82, 87 (1978) (holding that United States v. Jenkins "placed an unwarrantedly great emphasis on the defendant's right to have his guilt decided by the first jury empaneled to try him"), overruling United States v. Jenkins, 420 U.S. 358 (1975).


33. See, e.g., Pool v. Superior Court, 677 P.2d 261, 270 (Ariz. 1984) (barring retrial when prosecutor "intentionally engaged in improper conduct for the purpose of forcing defendant to seek a mistrial so that the prosecution could procure a new indictment with correct charges"); State v. Kennedy, 666 P.2d 1316 (Or. 1983) (holding that retrial is barred when prosecutor knowingly acts in manner so improper that mistrial must be declared). See generally State v. Cochran, 751 P.2d 1194 (Wash. Ct. App.), cert. denied, 110 Wash. 2d 1017 (1988) (discussing criteria
from multiple trials and multiple punishments, rather than the defendant's right to a fair trial.\textsuperscript{34} Unlike protections addressed to the defendant's interest in a fair trial, double jeopardy protection sometimes bars retrial of a defendant even though the defendant could receive a fair trial and there is no demonstrated deficiency in the prosecution's evidence.\textsuperscript{35} It may be that double jeopardy interests, as in Smith, require the courts to bar retrial and discharge a defendant who was convicted on sufficient evidence in the first trial.

Such a case, however, poses extremely difficult double jeopardy questions. Double jeopardy jurisprudence, as developed by the United States Supreme Court and followed in many states, does not readily accommodate the argument of a defendant in Smith's position.\textsuperscript{36} The Court has articulated rules and analytical approaches for specific types of cases, but none of those rules provides a double jeopardy bar to retrial after a defendant is convicted on sufficient evidence in a single complete trial. To assess the double jeopardy implications of Smith's situation, we must identify the relevant rules, articulate the reasons for those rules, and scrutinize their relevance to the situation posited.

The Double Jeopardy Clause prohibits the government from forcing the defendant through successive proceedings. Successive prosecutions may result when the government seeks another opportunity to try the defendant on the same charges.\textsuperscript{37} An acquittal absolutely eliminates this possibility.\textsuperscript{38} Therefore, the government by which to determine whether state constitution should be interpreted in accord with federal constitution).

34. See Green v. United States, 355 U.S. 184, 187 (1957) (noting that "‘double jeopardy’ was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once").

35. See, e.g., United States v. Jorn, 400 U.S. 470 (1971) (plurality opinion) (barring retrial when lower court judge dismissed jury in absence of manifest necessity); Downum v. United States, 372 U.S. 734 (1963) (barring retrial when lower court judge discharged first jury, over petitioner's objection, because key prosecution witness was not present).

36. For a general discussion of the principles guiding application of the Double Jeopardy Clause, see infra notes 40-43 and accompanying text.

37. Another way to achieve successive prosecutions is to bring additional charges arising out of the same criminal episode. If the additional charges are closely enough related to those first prosecuted, double jeopardy bars the later proceedings. See Brown v. Ohio, 432 U.S. 161 (1977) (prohibiting prosecution for theft of automobile after defendant had already pled guilty to operating same automobile without owner's consent); see also Blockburger v. United States, 284 U.S. 299 (1932) (defining "same offense" test for when Double Jeopardy will bar further proceedings).

38. See United States v. Scott, 457 U.S. 82 (1978) (holding that second trial should not be permitted after acquittal, even if acquittal was mistaken); Sanabria v.
may manipulate the first trial to avoid a probable verdict of acquittal and keep open the option of retrying the defendant. A mistrial may achieve this result for the prosecution. To obtain a mistrial, the prosecution can either persuade the trial court to declare a mistrial sua sponte or on the government’s motion, or the prosecution can successfully goad the defendant to stop the trial. The double jeopardy rules define the tests to be applied in those situations.\textsuperscript{39} \textit{Smith} involves a different means of avoiding possible acquittal—covert manipulation of the evidence.

Certain clearly established double jeopardy principles restrict the government’s freedom to pursue successive prosecutions in these ways and bear on the issues raised by \textit{Smith}. First, a verdict not overturned on appeal is final and bars further prosecution for the same offense.\textsuperscript{40} Second, reversal of a conviction does not bar retrial unless the reversal rests on the insufficiency of the evidence presented at trial.\textsuperscript{41} Third, a proceeding that becomes so tainted that it leads to a mistrial will raise a double jeopardy bar to further proceedings in only two circumstances. If the mistrial was granted without the defendant’s consent, it will bar retrial unless it was dictated by manifest necessity.\textsuperscript{42} If the mistrial was granted with the defendant’s consent, it will bar retrial if it was prompted by prosecutorial misconduct intended to goad the defendant to seek a

\begin{flushright}
United States, 437 U.S. 54 (1978) (holding acquittal, though erroneous, is “final and unreviewable”); Fong Foo v. United States, 369 U.S. 141 (1962) (holding acquittal is final even though judge improperly directed acquittal); United States v. Ball, 163 U.S. 662 (1896) (holding that when jury returns verdict of not guilty, further prosecution is barred).
\end{flushright}

\textsuperscript{39} For a discussion of when mistrial may bar retrial under double jeopardy rules, see \textit{infra} notes 42-43 and accompanying text.

\textsuperscript{40} \textit{See} \textit{Ball}, 163 U.S. at 670 (“If the judgment is upon an acquittal, the defendant, indeed, will not seek to have it reversed; and the government cannot.”).

\textsuperscript{41} \textit{See} Lockhart v. Nelson, 488 U.S. 33 (1988) (holding that, although double jeopardy bars retrial when appellate court sets aside conviction based on insufficiency of evidence at trial, retrial is permitted if prosecution introduced sufficient evidence at first trial even though essential evidence was improperly admitted); Tibbs v. Florida, 457 U.S. 31, 32 (1982) (holding that “a reversal based on the weight, rather than the sufficiency, of the evidence permits the State to initiate a new prosecution”); Burks v. United States, 437 U.S. 1, 18 (1978) (holding that “the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient”); Commonwealth v. Green, 556 A.2d 436, 438 (Pa. Super. Ct. 1988) (“Because appellant was granted a new trial as a result of an appellate determination that prejudicial hearsay had been admitted in his first trial . . . double jeopardy may not be invoked as a bar to his retrial.”).

\textsuperscript{42} \textit{See} United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824) (holding that court may discharge jury before verdict only if there is manifest necessity); \textit{see also} Arizona v. Washington, 434 U.S. 497, 505 (1978) (“The prosecutor must demonstrate ‘manifest necessity’ for any mistrial declared over the objection of the defendant.”).
mistrail.\textsuperscript{43} While barring retrial in some situations, these rules contemplate that a defendant who is convicted on sufficient evidence and demonstrates error in the trial will not be discharged but will be retried.

The difficult question raised by Smith is whether the prosecution violates the prohibition of double jeopardy if it injects unfairness into the trial to ensure a conviction, or at least to avoid an acquittal. Unlike government manipulation to obtain a second trial at which to pursue the public interest, such behavior does not contemplate that an additional proceeding will be required to achieve the prosecution's goal of conviction. In this situation, the public interest in convicting the defendant will be adequately served by the first trial. However, the defendant's interest in a fair trial cannot be served without an additional proceeding. The Double Jeopardy Clause does not primarily protect the defendant's interest in a fair trial. That protection lies elsewhere in the Constitution.\textsuperscript{44} The question, then, is whether the Double Jeopardy Clause prohibits the prosecution from conditioning the defendant's access to a fair trial on the defendant's willingness to endure a second trial.

The established double jeopardy rules set out above have limited utility in solving the problem raised by Smith. These rules have developed in response to cases in which the conduct or other circumstances supporting the defendant's double jeopardy argument were fully apparent at the first trial. For example, in the mistrial cases, an error or event is identified during trial and allegedly infects the proceedings.\textsuperscript{45} When the trial judge rules on the mistrial motion, the judge, the prosecutor and the defendant are all fully apprised of the basis for the motion, and each can assess whether the trial is so tainted that it must be aborted or whether some less drastic solution will serve the defendant's interest and the ends of justice.

The existing rules do not apply when, as in Smith, government misconduct remains undetected throughout the first trial and is then invoked as the basis for a double jeopardy bar. Indeed, those

\textsuperscript{43} See Oregon v. Kennedy, 456 U.S. 667, 679 (1982) (holding that double jeopardy bars retrial if "the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial"); Commonwealth v. Lively, 610 A.2d 7, 9 (Pa. 1992) (holding that retrial is barred if defendant intentionally was provoked into moving for mistrial).

\textsuperscript{44} For example, both the general right to due process of law and the Sixth Amendment guarantees of confrontation, compulsory process and assistance of counsel protect the defendant's interest in a fair trial.

\textsuperscript{45} For a discussion of cases involving mistrials, see supra notes 42-43.
rules are designed to protect a defendant from government use of process to force a defendant through successive trials, either to avoid a likely acquittal through a mistrial or for the purpose of harassment.46 The Supreme Court has not evaluated the defendant's double jeopardy interest when an error, not calculated to force a second trial, seriously compromises the first trial but is kept secret until after the verdict. Reading Smith, one must ask whether applying double jeopardy to this situation draws double jeopardy jurisprudence too far away from its intended area of application and inappropriately employs principles that have been developed for other situations.

To determine whether double jeopardy has an appropriate role in resolving the defendant's claim, we must scrutinize the reasons behind the rule. The Court has articulated a number of interests that underlie double jeopardy protection.47 Three must be

---

46. See United States v. Wilson, 420 U.S. 332, 342 (1975) (noting that Double Jeopardy Clause was directed at "threat of multiple prosecutions").

47. See United States v. DiFrancesco, 449 U.S. 117, 127-28 (1980) (noting that double jeopardy preserves finality of judgments, serves as barrier to affording prosecutors another opportunity to supply evidence absent from first proceeding and protects defendant's right to have trial completed by particular tribunal); Crist v. Bretz, 437 U.S. 28 (1978) (recognizing that double jeopardy preserves finality of judgments, prevents prosecutors from making repeated attempts to convict for same offense and protects interest of accused in retaining chosen jury); Green v. United States, 355 U.S. 184, 187-88 (1957) ("The underlying idea . . . is that the State . . . should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."); Wade v. Hunter, 336 U.S. 684 (1949) (indicating that right to have trial completed by particular tribunal is protected by Double Jeopardy Clause); United States v. Ball, 163 U.S. 662 (1896) (noting that allowing defendant to be brought into danger more than once for same offense is very similar to permitting party to take advantage of its own wrong). See generally JAY A. SIGLER, DOUBLE JEOPARDY: THE DEVELOPMENT OF A LEGAL AND SOCIAL POLICY (1969) (noting that double jeopardy protects interests in avoiding unnecessary harassment, avoiding social stigma, economy of time and money, and interest in psychological security); James F. Ponsoldt, When Guilt Should Be Irrelevant: Government Overreaching as a Bar to Reprosecution Under the Double Jeopardy Clause After Oregon v. Kennedy, 69 CORNELL L. REV. 76, 89 (1983) (indicating that double jeopardy protects defendant's interest in particular forum and avoidance of governmental overreaching); George C. Thomas III, An Elegant Theory of Double Jeopardy, 1988 U. ILL. L. REV. 827 (discussing that double jeopardy promotes verdict finality and limits multiple punishments); Peter Westen & Richard Drubel, Toward a General Theory of Double Jeopardy, 1978 Sup. Ct. REV. 81 (indicating that three main interests are protected by Double Jeopardy Clause: interest in finality, interest in avoiding double punishment and interest in nullification or allowing system to acquit against evidence); Donald E. Burton, Note, A Closer Look at the Supreme Court and the Double Jeopardy Clause, 49 OHIO ST. L.J. 799, 805 (1988) (noting that Double Jeopardy Clause implicates five interests: (1) protecting finality of verdicts, (2) preventing prosecutors from wearing down innocent defendants, (3) protecting integrity of jury acquittals, (4)
considered here. First, like the doctrine of res judicata, double jeopardy preserves the finality of judgments. It permits a winning party to invoke its final judgment to bar further proceedings in the same case. Second, double jeopardy protects the defendant's "valued right to have his trial completed by a particular tribunal." Whereas res judicata serves only to protect the finality of judgments, double jeopardy also protects the criminal defendant's interest in having the case resolved by the first empaneled fact-finder. Unlike res judicata, double jeopardy bars further proceedings in some cases in which no verdict was obtained from the initial fact-finder. Third, double jeopardy protects the defendant from "harrowing exposure to the harrowing experience of a criminal trial." It shields the defendant's interest in freedom from undergoing the stress of successive trials. Of these three interests, the latter two provide the strongest support for the argument that an unfair conviction can implicate the defendant's double jeopardy interest. As the following discussion illustrates, an assessment of the impact of an unfair conviction on the defendant reveals that serious misconduct in a completed trial can implicate these double jeopardy interests. Nevertheless, double jeopardy principles should be applied only rarely to bar reprosecution after conviction. The interests, while implicated, are not strongly threatened by misconduct in this context. Except in unusual cases, the remedy of a total bar

preventing judges from imposing punishments not authorized by legislation and (5) preventing excessive prosecutorial discretion); Mary J. Fahey, Comment, Double Jeopardy: An Illusory Remedy for Governmental Overreaching at Trial, 29 BUFF. L. REV. 759, 761 (1980) (discussing defendant's interest in being judged by first tribunal).

48. See DiFrancesco, 449 U.S. at 128 (recognizing that one purpose of Double Jeopardy Clause is to preserve finality of judgments); United States v. Scott, 437 U.S. 92, 92 (1978) (noting that "the primary purpose of the Double Jeopardy Clause [is] to protect the integrity of a final judgment"); Crist, 437 U.S. at 33 (noting that primary purpose of Double Jeopardy Clause is to preserve finality of judgments).

49. Wade, 336 U.S. at 689; see Crist, 487 U.S. at 35-36 (discussing need to protect interest of accused in retaining chosen jury).

50. See Crist, 487 U.S. at 35-36.


52. Crist, 437 U.S. at 38; see Green v. United States, 355 U.S. 184, 188 (1957) (noting that prosecutors should be restricted from making repeated attempts to convict).
rather than a retrial overvalues the defendant’s interest and undervalues the public’s interest.

A. Finality

The original purpose of double jeopardy protection and its predecessors was to preserve the finality of judgments.53 An acquittal is absolutely final.54 A conviction is final unless the defendant challenges it.55 Still, double jeopardy does not absolutely forbid the government from subjecting a defendant to successive proceedings. For example, the Supreme Court’s narrow definition of “same offense” leaves ample room for the government, regardless of motive, to subject the defendant to successive proceedings based on a single criminal episode.56 Nevertheless, if the offenses are the “same offense” within the meaning of double jeopardy, the interest in finality is served by the assurance that no further proceedings may be brought while a valid final judgment exists, whether an acquittal or a conviction.57

The starting point in a case like Smith is the rule of United States v. Ball.58 In Ball, the Court held that if a defendant successfully challenges a conviction, the slate is wiped clean; there is no final judgment, and further proceedings may take place.59 The Ball Court stated the rule but neglected to articulate the underlying reasoning. The Court devoted no more than a paragraph to the proposition, merely declaring that “it is quite clear that a defendant,

53. For a brief discussion of double jeopardy as a preserver of the finality of judgments, see supra note 48.
54. For a list of cases that discuss the finality of acquittals, see supra note 38.
55. See Thomas, supra note 47, at 854 (noting that “undisturbed” verdicts are final but that convictions are sometimes overturned).
56. See United States v. Dixon, 113 S. Ct. 2849, 2864 (1993) (rejecting “same conduct” test established in Grady v. Corbin), overruling Grady v. Corbin, 495 U.S. 508 (1989); Blockburger v. United States, 284 U.S. 299, 304 (1932) (reasoning that “where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not”); see also Ashe v. Swenson, 397 U.S. 436 (1970). In Ashe v. Swenson, the Court held that successive prosecutions of the defendant arising from a single criminal episode were barred only because the first trial resolved the issue of identity in the defendant’s favor and therefore gave the defendant the benefit of collateral estoppel. Id. at 445. The Court concluded that the separate indictments did not charge the same offense, and, had the first trial not precluded further litigation of the issue of identity, the prosecution would have been free to try the defendant on each indictment regardless of motive. Id. at 446.
57. See Thomas, supra note 47, at 854-55 (noting that unreversed convictions and acquittals are final).
58. 163 U.S. 662 (1896).
59. Id. at 672.
who procures a judgment against him upon an indictment to be set aside, may be tried anew upon the same indictment, or upon another indictment, for the same offence [sic] of which he had been convicted."60 In later decisions, the Court provided the missing justification for the Ball rule. In United States v. Tateo,61 the Court stated:

While different theories have been advanced to support the permissibility of retrial, of greater importance than the conceptual abstractions employed to explain the Ball principle are the implications of that principle for the sound administration of justice. Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendants’ rights as well as society’s interest.62

The Court thus recognized both a strong governmental interest in retrial that weighs against the defendant’s interest in freedom from successive prosecutions, and a practical concern that appellate courts would be reluctant to recognize error if the price would be

60. Id.
62. Id. at 466; see Burks v. United States, 437 U.S. 1, 15 (1978) (describing reasoning of Tateo as “the most reasonable justification”); see also Tibbs v. Florida, 457 U.S. 31, 40 (1982).

In Tibbs v. Florida, the Court recognized the Tateo and Burks justification for the rule in Ball, but also stated as a second reason for the rule that “the Court has concluded that retrial after reversal of a conviction is not the type of governmental oppression targeted by the Double Jeopardy Clause.” Tibbs, 457 U.S. at 40; see also United States v. DiFrancesco, 449 U.S. 117, 131 (1980) (noting that rule was supported by high price society would pay if defendants were immune from punishment as well as by lack of government oppression); United States v. Scott, 437 U.S. 82, 91 (1978) (stating that retrial after defendant upsets first conviction on appeal is not act of government oppression prohibited by Double Jeopardy Clause).
discharge of the defendant rather than retrial.\textsuperscript{63}

Thus, the rule reflects a practical balance between the defendant’s double jeopardy interests and the public’s interest in punishing the guilty defendant. Also implicated is an assessment of the oppressiveness of the retrial. The balance may be struck differently given facts like those of \textit{Smith}. In \textit{Smith}, the level of government infraction goes beyond ordinary reversible error and arguably warrants requiring society to pay the high price of dismissal for the misconduct of its prosecutorial agents. In addition, forcing the defendant to endure retrial after reversal due to egregious misconduct may be viewed as significantly more oppressive than retrial after a routine reversal.\textsuperscript{64} Unusual governmental misconduct like that in \textit{Smith} may therefore require that the \textit{Ball} rule give way to an exception.

To date, however, the only exception to the \textit{Ball} rule recognized by the Court is the exception established in \textit{Burks v. United States}.\textsuperscript{65} In \textit{Burks}, the Court held that reprosecution is barred when a conviction is reversed because it was not supported by sufficient evidence.\textsuperscript{66} \textit{Burks} rests on the proposition that the defendant should not be subject to further proceedings because the defendant’s first trial should have ended in an acquittal.\textsuperscript{67} The trial court, having before it the prosecution’s case, ruled erroneously when it denied the defendant’s motion for acquittal.\textsuperscript{68} In \textit{Burks}, the Court specifically distinguished reversals based upon insufficient evidence from those based upon trial error, such as prosecutorial misconduct, which might necessitate reversal but would not bar a new trial.\textsuperscript{69} As the Court noted, trial error “implies nothing with respect to the guilt or innocence of the defendant.”\textsuperscript{70} For example, the misconduct in \textit{Smith} would not have mandated discharge of the defendant had it been discovered during the trial. At most, the defendant would have received the benefit of the exculpatory evidence and, perhaps, some remedial action against the prosecution. The defense might then have prevailed, but the law does not

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{63} See Ponsoldt, supra note 47, at 88 (criticizing \textit{Ball} as unjustified incursion on defendant’s double jeopardy protection).
\item \textsuperscript{64} For a discussion of reversal due to egregious conduct compared to a routine reversal, see infra notes 111-14 and accompanying text.
\item \textsuperscript{65} 437 U.S. 1 (1977).
\item \textsuperscript{66} Id. at 18.
\item \textsuperscript{67} Id. at 16.
\item \textsuperscript{68} Id. at 11.
\item \textsuperscript{69} Id. at 15.
\item \textsuperscript{70} Id.
\end{enumerate}
\end{footnotesize}
compel that result in the way the law compelled the acquittal in *Burks*. It is also possible that the defendant would have been convicted despite early discovery of the prosecution misconduct and the suppressed exculpatory evidence. Thus the *Burks* decision does not support the argument that double jeopardy bars reprosecution in the *Smith* case.

Moreover, the rules do not address covert prosecutorial misconduct. When an appellate court reverses a conviction due to insufficient evidence and thereby raises a double jeopardy bar to further proceedings, the court relies exclusively on facts that were known to the trial judge and the parties during the trial.71 During the trial, the parties argued and the trial judge assessed the sufficiency of the evidence. A reversal for insufficient evidence reflects the appellate court's disagreement with the trial court's evaluation of the sufficiency of the evidence.72 Indeed, in *Lockhart v. Nelson*,73 the Supreme Court held that double jeopardy does not bar further proceedings when the appellate court rules that evidence, essential to the prosecution's case, was erroneously admitted at trial.74 The Court explained that in *Burks*, the appellate court reviewed the same quantum of evidence as had the trial court.75 In *Lockhart*, the Court assumed that, had the trial court excluded the challenged evidence, it would have given the prosecution an opportunity to fill the resulting gap with admissible evidence.76 Therefore, by permitting a new hearing, the Court "merely recreates the situation that would have been obtained if the trial court had excluded the evidence."77 Thus, the *Lockhart* Court declined to assess the sufficiency of the evidence on the basis of an evidentiary ruling that had not been contemplated by the trial court or the prosecutor, and would have changed the evidence before the trial court. *Burks* did not control in *Lockhart* because the prosecution had produced sufficient evidence before the trial court.

In addition, when the error requiring reversal does not reflect

72. See id. at 39 (noting that when appellate court reversed based on insufficiency of evidence, trial court should have entered acquittal); *Burks*, 437 U.S. at 16-17 (noting that trial court and appellate court must apply same standard when evaluating sufficiency of evidence).
74. Id. at 34.
75. Id. at 42.
76. Id. The Court found that "the trial judge would presumably have allowed the prosecution an opportunity to offer admissible evidence." Id.
77. Id.
a weakness in the prosecution’s case, one basis for the Burks exception is missing. Like the rule guaranteeing the absolute finality of acquittals, Burks rests, at least in part, on a concern that the prosecution could make a weak initial evidentiary presentation and then employ a retrial to strengthen its case.\textsuperscript{78} To permit retrial would therefore entail the risk that the government would convict an innocent person. A case like Smith represents a different situation altogether. In Smith, the undetected government misconduct created the risk that an innocent person would be convicted in the first trial. If retrial is permitted, the prosecution’s case is likely to become weaker, rather than stronger, because the defendant now has the exculpatory evidence.\textsuperscript{79} If the evidence is as powerful as the defendant contends, the new trial should lead to an acquittal.

The double jeopardy argument in the Smith case thus gains little support from the rules developed to protect the interest in the finality of judgments. A defendant who is convicted after a complete trial cannot normally complain that the double jeopardy interest in the finality of the verdict is disserved when the verdict is overturned and retrial permitted. Although a defendant who was the victim of covert government misconduct may credibly argue that a different balance should be struck, the defendant must identify stronger double jeopardy interests that tip the balance. Therefore, the defendant’s double jeopardy argument must rest to a large extent on other double jeopardy interests.

B. \textit{First Fact-Finder}

The defendant’s double jeopardy interest in having the case resolved by the initial fact-finder is stressed in many of the decisions considering whether terminating the first trial before a verdict bars retrial.\textsuperscript{80} At first glance, it may appear that the interest in resolu-

\textsuperscript{78} See Burks v. United States, 437 U.S. 1, 11 (1977) (holding that Double Jeopardy Clause prohibits second trial because second trial gives prosecution opportunity to present evidence not presented in first trial).

\textsuperscript{79} The district court noted this distinction in Buffington v. Copeland, 687 F. Supp. 1089, 1094 (W.D. Tex. 1988). The Buffington court observed that: '[I]t is difficult to imagine that the government in this case will be advantaged in a second trial. If anything, the government’s case may be significantly weaker due to the lapse of time and the fact that the defendant will be able to effectively cross-examine [the witness whose impeachment material was concealed].

\textit{Id.}

\textsuperscript{80} See, e.g., Crist v. Bretz, 437 U.S. 28, 36 (1978) (holding that defendant’s “valued right to have his trial completed by a particular tribunal” is within protection of Double Jeopardy Clause); Arizona v. Washington, 434 U.S. 497, 503 (1978) (holding that right to have trial completed by particular tribunal is constitutionally
tion of the case by the first fact-finder is not threatened when the defendant receives a complete trial, albeit flawed by undetected governmental misconduct, and the fact-finder returns a verdict of guilty. On closer examination, however, it appears that the government's conduct interferes substantially with the defendant's interest in the first fact-finder. Whether that interference warrants a double jeopardy bar is another question.

The Court recognizes that a defendant's double jeopardy interest in having the case resolved by the first fact-finder is threatened when circumstances prevent the fact-finder from reaching a verdict in the case. 81 However, the weight of that double jeopardy interest is often insufficient to generate a double jeopardy bar. 82 Even if the defendant does not agree to the mid-trial termination, the government interest may outweigh the defendant's interest in having the case resolved by the first fact-finder. 83 If the jury is deadlocked, for example, the trial court can declare a mistrial and order a new trial. 84 Similarly, if a mistrial is manifestly necessary because of circumstances that taint the trial and make a fair resolution of the case impossible, the trial court can declare a mistrial without raising a double jeopardy bar. 85 In these situations, the defendant's interest

protected); Illinois v. Somerville, 410 U.S. 458, 471 (1973) (noting that interest of defendant in having fate determined by initial jury is weighty one); Wade v. Hunter, 336 U.S. 684, 689 (1949) (recognizing defendant's "valued right" to have trial completed by particular jury).

81. See, e.g., Crist, 407 U.S. at 35 (concluding that double jeopardy interest implicated when case was dismissed due to typographical error in information after jury was empaneled and sworn); Washington, 434 U.S. at 511 (finding no violation of double jeopardy right when mistrial resulted from improper opening statement by defense); Somerville, 410 U.S. at 471 (finding no violation of double jeopardy right when mistrial resulted from defect in indictment); Wade, 336 U.S. at 684 (concluding that no double jeopardy violation occurred when first court-martial dissolved due to military necessity).

82. See, e.g., Washington, 434 U.S. at 511 (finding no violation of double jeopardy when mistrial resulted from improper opening statement by defense); Somerville, 410 U.S. at 471 (holding that "where the declaration of a mistrial implements a reasonable state policy and aborts a proceeding that . . . could have been upset at will by one of the parties, the defendant's interest in proceeding to verdict is outweighed by the competing and equally legitimate demand for public justice").

83. See Washington, 434 U.S. at 516 (noting that "the public's interest in fair trials designed to end in just judgments must prevail over the defendant's 'valued right' to have his trial concluded before the first jury impaneled") (citation omitted).

84. See United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824) (holding that discharge of jury without defendant's consent, because jury was unable to agree, was not bar to new trial); see also United States v. DiFrancesco, 449 U.S. 117, 130 (1980) (noting that retrial is permitted after mistrial due to hung jury).

85. See Washington, 434 U.S. at 516 (holding that improper opening statement by defense created manifest necessity for mistrial so retrial was permitted); Reiss, supra note 51, at 1424 (stating that constitutionality of retrial turns on whether
in having the case resolved by the first fact-finder is insufficient to support a double jeopardy bar to retrial.

In cases applying the manifest necessity test, governmental overreaching has been a significant factor favorable to the defendant seeking a double jeopardy bar to retrial. 86 Government overreaching has also been a key factor in defining when retrial is barred, even though the defendant consented to a mistrial. Normally, if the defendant consents to the mistrial or asks for some other form of mid-trial resolution, that action signals the defendant's "deliberate election . . . to forgo" the right to resolution by the first fact-finder and no double jeopardy bar arises. 87 In Oregon v. Kennedy, 88 the Court refined the standard to determine when a defense-requested mistrial raises a double jeopardy bar. The Kennedy majority emphasized that the defendant, by moving for the mistrial, chose to forgo the interest in the first fact-finder. 89 The Court remarked that "[t]he important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of [prosecutorial] error." 90 The Court rejected the argument that the mistrial should bar further proceedings if the mistrial was prompted by prosecutorial overreaching. Instead, the Court held that the mistrial raised a double jeopardy bar only if the prosecutor intended to goad the defendant into moving for a mistrial. 91

Kennedy reflects the Court's assessment of the weight of the defendant's interest in the first fact-finder. The defendant who makes

86. See generally Stephen J. Schulhofer, Jeopardy and Mistrials, 125 U. Pa. L. Rev. 449, 471-93 (1977) (discussing application of manifest necessity doctrine); Thomas, supra note 47, at 871 ("The [government oppression] theory . . . reduces finality to a determination of whether the prosecutor's conduct overreaches in a particular case."); Comment, supra note 85, at 910 (proposing that intentional misconduct by prosecutor aimed at inducing mistrial should bar further prosecution irrespective of whether defendant consents to mistrial).


89. Id. at 676. The Court found that "[a] defendant's motion for mistrial constitutes 'a deliberate election on his part to forgo his valued right to have his guilt or innocence determined before the first trier of fact.'" Id. (citation omitted).

90. Id. (quoting United States v. Dinitz, 424 U.S. 600, 609 (1976)). See generally Fahey, supra note 47, at 763-67 (discussing Supreme Court's emphasis on defendant's choice).

a meaningful choice to abort the trial effectively relinquishes that double jeopardy interest. Similarly, in *United States v. Scott*, the Court also emphasized that it was the defendant's choice to seek mid-trial termination of the proceedings. The Court went on to hold that the government could appeal the trial court's ruling in the defendant's favor, even though a new trial would be necessary if the government prevailed on appeal.

If the case goes to verdict, however, the questions are somewhat different. If misconduct taints the trial, but the trial court denies the defendant's request for a mistrial and lets the case proceed to verdict, the double jeopardy analysis may change. In *Kennedy*, the Court did not consider whether, in that situation, the defendant could raise a double jeopardy bar. Courts discussing this situation have generally come to the conclusion that the *Kennedy* test applies, although none have barred retrial on that basis.

93. Id. at 99.
94. See id. ("In [this] situation, the defendant [is] not . . . deprived of [the] option to go to the first jury . . . .") (quoting *United States v. Jorn*, 400 U.S. 470, 484 (1971)). Similarly, in *Tibbs v. Florida*, the Court held that double jeopardy did not bar retrial after the state appellate court reversed the defendant's conviction on the grounds that the conviction was against the weight of the evidence. 457 U.S. 31, 42 (1982). In *Tibbs*, the defendant chose to persuade the appellate court to disagree with the first fact-finder and reverse the conviction. Id. at 47. Consequently, the defendant received "a second opportunity." Id. at 44. Because the defendant persuaded the appellate court that the fact-finder had improperly assessed the evidence, he could not successfully complain that his double jeopardy protection precluded a retrial. Id. at 47. The Supreme Court viewed the result as analogous to a hung jury, rather than an acquittal based on insufficient evidence. Id. at 42.
95. 456 U.S. 667 (1982). In *Kennedy*, a defendant who was granted a mistrial by the trial court attempted to raise a double jeopardy bar to further prosecution. Id.
96. See, e.g., *United States v. Singer*, 785 F.2d 228, 241 (8th Cir.) (holding that retrial was proper course after reversal of conviction when prior defense motion for mistrial was denied), cert. denied, 479 U.S. 883 (1986); Robinson v. Wade, 686 F.2d 298, 310 (5th Cir. 1982) (allowing retrial after denial of defense motion to dismiss); *United States v. Curtis*, 683 F.2d 769, 778 (3d Cir.) (allowing retrial after denial of defense motion for mistrial), cert. denied, 459 U.S. 1018 (1982); *United States v. Singleterry*, 683 F.2d 122, 124 (5th Cir.) ("[T]he Double Jeopardy Clause is concerned only with prosecutorial conduct that is intended to provoke a mistrial. When a mistrial is not declared, the prosecutor's efforts have been unsuccessful."). cert. denied, 459 U.S. 1021 (1982); Gully v. Kunzman, 592 F.2d 283, 289 (6th Cir.) (rejecting analogy between reversal prompted by prosecutorial misconduct and mistrial provoked by prosecutorial misconduct), cert. denied, 442 U.S. 924 (1979); Buffington v. Copeland, 687 F. Supp. 1089, 1092 (W.D. Tex. 1988) (holding that prosecutorial misconduct not resulting in mistrial does not bar retrial). See generally Ponsoldt, supra note 47, at 89-91 (proposing rule to eliminate distinction between mistrial and appellate reversal cases where government overreaching has occurred); Fahey, supra note 47, at 774 ("The threshold argument could be that the trial court erred in denying the mistrial motion, and that if the appellate
courts assume that double jeopardy will bar reprosecution if the conviction is reversed due to prosecutorial error that was intended to, and did in fact, provoke the defendant to move for a mistrial. The courts have articulated two reasons for this conclusion: the perceived need for consistency in outcome regardless of when the impropriety of the prosecution’s behavior is recognized,97 and the practical implications of permitting the trial court to avoid a double jeopardy bar merely by denying the defendant’s motion for mistrial.98

The defendant’s constitutional protection in this situation should also be analyzed in reference to the interests that underlie Kennedy—the defendant’s double jeopardy interest in the first fact-finder and the prosecution’s interest in retrying the defendant. The level of constitutional protection afforded the defendant is determined by a balancing of these interests. For example, the defendant signals a lack of interest in the first fact-finder, upon a showing of prosecutorial misconduct. In addition, by engaging in misconduct intended to precipitate a mistrial, the prosecution has weakened its claim to an interest in retrial.

The situation becomes even more complex when, as in Smith, the fact-finder is tainted by undiscovered government misconduct and the defendant therefore has no chance to choose whether to proceed to verdict with the first fact-finder despite that taint. The trial proceeds to verdict with the first fact-finder because the defendant is ignorant of the misconduct. Yet the defendant, while receiving a verdict, loses the benefit of the first fact-finder in a significant sense.99 The government’s action deprives the fact-finder’s court found that the mistrial motion by the defendant had been provoked by governmental overreaching, the conviction should be reversed, and retrial prohibited.”).

97. See Robinson, 686 F.2d at 306-08 (noting that it should not matter at what point in judicial process mistrial motion is found to be “meritorious”); Curtis, 685 F.2d at 774 (“It would appear inconsistent to afford a defendant less constitutional protection simply because a trial judge erred in denying a mistrial request.”); Singletary, 683 F.2d at 124 (“It seems anomalous to say that identical prosecutorial misconduct will create a constitutional bar to retrial when the district court grants a mistrial, but not when the district court erroneously denies the mistrial request.”).

98. See Kennedy, 456 U.S. at 676 (observing that “the judge . . . might well be more loath to grant a defendant’s motion for mistrial”); Curtis, 685 F.2d at 775 (noting that trial court could ensure retrial by denying any motion for mistrial during trial).

99. See Schulhofer, supra note 86, at 585. Professor Schulhofer characterizes the defendant’s interest recognized by the Court as “pursuing the first trial to completion when this course appears tactically advantageous.” Id. In a case like Smith, the government’s improper conduct misleads the defendant into believing that completing the first trial is tactically advantageous. If the defendant knew that the
verdict of its validity. On one hand, the defendant has lost a possible acquittal. The government foreclosed that possibility both by suppressing information that might have swayed the jury to acquit and by creating a false impression at trial that may have swayed the jury to convict. On the other hand, the prosecution deprived the defendant of the opportunity to settle the case through a fair conviction. The misconduct prevents the fact-finder from functioning appropriately and renders the opportunity to complete the trial before that fact-finder illusory. Thus, like the conduct in some mistrial cases, the intentional government conduct in a case like Smith raises double jeopardy concerns because it manipulates the judicial process in order to prevent the defendant from receiving a fair trial with the first fact-finder.

In addition, the government interest in retrial is likely to be weaker when covert misconduct leads to a reversal, as compared with the situation where a case ends in mistrial. In Smith, for example, the prosecution had one full opportunity to present the case to the jury. Nothing in the first trial was unfair to the prosecution. Thus, "the public interest in affording the prosecutor one full and fair opportunity" to present evidence to the jury was fully served by the trial court's conduct of the trial. Only the prosecutor's carefully concealed and late-detected misconduct interfered with that interest. Consequently, the interference with the defendant's interest in resolution of the case by the first fact-finder is not counterbalanced by any strong government interest, and, therefore, may warrant double jeopardy protection.

This interference with the performance of the first fact-finder may violate the defendant's double jeopardy rights. The problem is to determine when government misconduct so hobbles the jury that the defendant cannot be said to have received the benefit of the first fact-finder and further proceedings would violate the defendant's double jeopardy protection. Taken to its logical extreme, this reasoning suggests that any reversible government error bars retrial. The Court has long since rejected that position. Thus, double jeopardy provides a useful analytical tool and source of pro-fact-finder would reach its verdict without significant exculpatory evidence, the defendant might well assess the wisdom of proceeding to verdict in that trial differently.

100. See United States v. Jorn, 400 U.S. 470, 486 (1971) (plurality opinion). In Jorn, Justice Harlan recognized that the defendant has a double jeopardy interest "once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate." Id.


102. For a discussion of the government's right to retry a defendant whose
tection only if a principled standard can be articulated that defines when government misconduct rises to a level that implicates double jeopardy protection. Section II, below, discusses possible ways to approach this task.

C. Freedom from the Burden of Repeated Trials

The government is normally entitled to try the defendant once, but only once, to verdict. The Court in Green v. United States\(^\text{103}\) stated:

[T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.\(^\text{104}\)

This point was emphasized in Arizona v. Washington,\(^\text{105}\) where the Court observed that the government is entitled to "one, and only one, opportunity to require an accused to stand trial."\(^\text{106}\) Similarly, in United States v. Scott, the Court noted that the government has an interest in one full and fair opportunity to present the evidence to the jury.\(^\text{107}\)

In limited circumstances, however, the Double Jeopardy Clause permits the government to try a defendant more than once for the same offense.\(^\text{108}\) In many instances, a defendant whose first trial ends in mistrial may be retried. Moreover, as noted above, a defendant who persuades the courts to reverse a conviction may also be retried.\(^\text{109}\) The government is permitted to strike "hard but fair

\(^{103}\) 355 U.S. 184 (1957).

\(^{104}\) Id. at 187-88.

\(^{105}\) 434 U.S. 497 (1978).

\(^{106}\) Id. at 505.


\(^{108}\) See United States v. Tateo, 377 U.S. 463, 463 (1964) (holding that "retrial of a defendant whose conviction is set aside on collateral attack for error in the proceedings leading to conviction is not barred for double jeopardy.").

\(^{109}\) The defendant's request wipes the slate clean and the government interest in a fair opportunity to prove its case outweighs the defendant's double jeopardy interest in avoiding successive trials. See Burks v. United States, 437 U.S. 1, 12 (1978) (noting that when defendant obtains reversal of conviction on grounds other than insufficient evidence, new trial does not violate double jeopardy rights); Tateo, 377 U.S. at 465 ("[double jeopardy] does not preclude the Government's
blows." Thus, retrial is permitted even if the conviction is reversed because the prosecution's adversarial zeal at the first trial won erroneous rulings from the trial court on questions of admissibility of evidence and propriety of conduct.

The double jeopardy analysis should change however, when the reversal results from the government's covert misconduct. The defendant has a strong interest in avoiding the stress, expense and anxiety of the second trial. A conviction followed by a waiting period and a new trial prolongs the defendant's oppression and anxiety, leaving the defendant under the cloud of his or her initial conviction. The burden on a defendant who must vindicate the interest in a fair trial, by facing another trial, is far more onerous than the burden imposed on a defendant whose first trial is terminated through mistrial in its early stages and is quickly succeeded by a new trial.

In addition, the countervailing government interest is less compelling when there is covert government misconduct than after a more usual reversal of a conviction. The hidden nature of the misconduct places responsibility for the reversal solely on the government. The government's deceit deprives the trial court of the opportunity to address and resolve the problem in a manner that avoids the need for two trials. This deception also deprives the

10. United States v. Ebens, 800 F.2d 1422, 1439 (6th Cir. 1986) (holding that prosecution's aggressive closing arguments were fair).

11. See Green v. United States, 355 U.S. 184, 187-88 (1957) (recognizing that one concept underlying Double Jeopardy Clause "is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity").

12. See Commonwealth v. Smith, 615 A.2d 321, 323-24 (Pa. 1992). In Smith, the defendant was sentenced to death. Id. The Commonwealth continued to press for the death penalty while attempting to sustain its ill-gotten conviction on appeal. Id. at 324.

13. See Illinois v. Somerville, 410 U.S. 458, 470 (1973) (permitting new trial after court declared mistrial due to defective indictment; court granted new trial after jury was sworn but before evidence was presented).

14. By contrast, most errors must be raised at trial to avoid waiver. This provides the trial court an opportunity to address the defendant's claim that the government's behavior is improper and, if necessary, remedy the problem in the first trial. Thus, if the trial proceeds and the defendant is convicted, both the court and the prosecution have taken a position on the legality of the aspect of the trial raised as error on appeal. Only plain error is exempt from this requirement. The rationale for the exemption is that the trial court should recognize the impropriety
defendant of the chance to argue the legal significance of the government misconduct and to propose remedies that could be implemented in the first trial.

An argument against imposing a double jeopardy bar in this context could be based on the absence of one risk of retrial that has been stressed by the Court: The possibility that the government will improve its case when the defendant is retried.\textsuperscript{115} To the contrary, the government's case will be weaker because the defendant now has the previously concealed evidence. In some cases, the likelihood of an improved government case has been treated as crucial to the defendant's double jeopardy claim.\textsuperscript{116} This approach, however, undervalues the defendant's interest in freedom from the oppression, stress, anxiety and expense of enduring the second trial.\textsuperscript{117} When the government adopts deceptive tactics to avoid a feared acquittal in the initial trial, forcing the defendant to endure a second trial may violate the defendant's right to double jeopardy protection.

II. \textbf{Looking for a Workable Standard}

Forcing a defendant to endure a second trial because the first trial was tainted by covert government misconduct thus implicates two core double jeopardy interests.\textsuperscript{118} In some cases, a strong argument can be made that double jeopardy should bar further proceedings.\textsuperscript{119} The problem with this argument is differentiating those instances from the more typical cases in which the remedy for the government error is reversal and remand for retrial. If double jeopardy principles require discharge in some cases, a principled and workable standard must be defined to identify those cases.

\begin{footnotes}
\item[115] See United States v. DiFrancesco, 449 U.S. 117, 128 (1980) (noting that one purpose of double jeopardy is to prevent prosecution from having opportunity to produce additional evidence, thereby improving its case).
\item[116] See Buffington v. Copeland, 687 F. Supp. 1089, 1095 (W.D. Tex. 1988) (noting significance of whether prosecutor has more favorable opportunity to convict).
\item[117] For a case that discusses the defendant's interest in freedom from the stress, anxiety and expense of second trial, see \textit{supra} note 111.
\item[118] For a discussion of the two core double jeopardy interests implicated by covert prosecutorial misconduct, see \textit{supra} notes 80-117 and accompanying text.
\item[119] See Commonwealth v. Smith, 615 A.2d 321, 325 (Pa. 1992). The \textit{Smith} court accepted this argument, holding "the double jeopardy clause of the Pennsylvania Constitution prohibits retrial of a defendant . . . when the conduct of the prosecutor is intentionally undertaken to prejudice the defendant to the point of denial of a fair trial." \textit{Id.}
\end{footnotes}
Certainly, double jeopardy should not bar reprosecution when the prosecutorial error is merely a necessary incident of the adversarial process. However, it should bar further prosecution if the prosecutorial error sufficiently undermines the defendant's double jeopardy interest in freedom from successive proceedings. Ultimately, a workable standard must recognize the range of reasons for multiple proceedings and differentiate among them on grounds related to the basis of double jeopardy protection.

A. Intent Based Tests

Courts have gravitated toward intent-based tests to determine when prosecutorial misconduct raises a double jeopardy bar to reprosecution. Indeed, the Smith court established an intent-based test, holding that retrial is barred if "the conduct of the prosecutor is intentionally undertaken to prejudice the defendant to the point of the denial of a fair trial." Intent-based tests are attractive for two reasons. First, a test based on prosecutorial intent limits the number of cases in which the defendant will receive the drastic relief of discharge. By requiring a finding of intent, the courts permit retrial if inadvertent, or even grossly negligent, prosecutorial misconduct has a deleterious impact on the defendant. Second, intent-based tests offer practical advantages. A test based on subjective prosecutorial intent is specific and, in one sense, easy to apply because it turns on a determination of fact—the prosecutor's intent. The trial court must make this factual determination.

120. For example, even the state courts applying a more protective standard after Kennedy require a finding of prosecutorial intent. See Pool v. Superior Court, 677 P.2d 261, 271-72 (Ariz. 1984) (requiring "intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial or reversal"); State v. Kennedy, 666 P.2d 1316, 1327 (Or. 1983) (requiring "knowing misconduct coupled with indifference toward the probable risk of a mistrial").

121. Smith, 615 A.2d at 925. Applying this test, the Smith court concluded that a second trial would violate the appellant's double jeopardy rights under the Pennsylvania Constitution.

122. See State v. Rademacher, 433 N.W.2d 754, 757 (Iowa 1988) (holding trend to be that "the finding of subjective intent ... must be made in the first instance by the trial court"); People v. Dawson, 427 N.W.2d 886, 897 n.57 (Mich. 1988) (noting that "[p]rosecution] goad[ed] the defendant into moving for a mistrial standard calls for a finding of fact by the court . . . , an inquiry for which the trial court is best suited." (quoting United States v. Posner, 764 F.2d 1535, 1539 n.56 (11th Cir. 1985))). Petrucci v. Smith provides interesting insight into the process of making the required finding of prosecutorial intent. 544 F. Supp. 627 (W.D.N.Y. 1982), reconsidered sub nom. Petrucci v. Coombe, 569 F. Supp. 1523 (W.D.N.Y. 1983), order vacated by, 735 F.2d 684 (2d Cir. 1984). Initially, the trial court concluded that the prosecutor deliberately goaded the defendant into moving for a mistrial. Id. The trial court subsequently was persuaded to hold a hear-
Thus, the role of the appellate court in considering the issue is limited.

However, intent-based tests generate certain problems. For example, defendants and courts must grapple with the challenge of discovering and assessing evidence of governmental intent. The relative weight of subjective and objective indications of intent in a particular case can be difficult to assess.\textsuperscript{123} Courts also must determine whether the prosecutor's intent alone is determinative or if that of other government agents should be considered.\textsuperscript{124} Despite these potential problems, the courts have adopted tests based on subjective prosecutorial intent.

A more important question is whether prosecutorial intent, either subjective or objective, has a significant relationship to double jeopardy interests and protection. The Double Jeopardy Clause was included in the Bill of Rights in response to the fear that the government would use its power to subject a defendant to repeated criminal proceedings.\textsuperscript{125} Some courts have noted that a central purpose of the Double Jeopardy Clause is to protect the defendant from the harassment of successive proceedings.\textsuperscript{126} The courts often have read the term "harassment" to connote improper prosecutorial intent or motivation, or governmental intent to manipulate the system to a defendant's detriment.\textsuperscript{127}

\begin{footnotesize}
\textsuperscript{123} Compare Coombe, 569 F. Supp. at 1523 (holding that facts did not warrant double jeopardy bar of defendant's second trial due to lack of prosecutorial bad faith) with Smith, 544 F. Supp. at 627 (holding that inference of prosecutorial bad faith was permissible due to prosecutorial misconduct that was "deliberate [and] indefensible . . . throughout defendant's first trial"). For a discussion of intent based tests, see generally Fahey, supra note 47, at 771-73; Reiss, supra note 51, at 1365-429.

\textsuperscript{124} See Oregon v. Kennedy, 456 U.S. 667, 673-75 (1982). For example, Kennedy focuses on the intent of the prosecutor and not on that of any other law enforcement official. Id. In contrast, whether the failure to preserve evidence represents a violation of due process turns on the bad faith of the law enforcement officers in the case. See Arizona v. Youngblood, 488 U.S. 51, 58 (1988) (requiring criminal defendant to show bad faith by police in order for failure to preserve evidence to constitute violation of due process). For a discussion of the Kennedy test, see generally Reiss, supra note 51, at 1425-29.

\textsuperscript{125} For a discussion of the origins of the Double Jeopardy Clause, see Sigler, supra note 47.

\textsuperscript{126} But see Frank Holleman, Mistrials and the Double Jeopardy Clause, 14 GA. L. REV. 45, 76 (1979) (arguing that protecting defendant from harassment is not central purpose of Double Jeopardy Clause).

\textsuperscript{127} See, e.g., State v. Kennedy, 666 P.2d 1316, 1324 (Or. 1983) ("We agree with the state, however, that a guarantee against 'harassment' implies a requirement of some conscious choice of prejudicial action . . . [n]egligent error, 'gross' or otherwise, is not enough.").
\end{footnotesize}
language of the Fifth Amendment includes neither the term "harassment" nor any other term connoting the need for intent. The scope of constitutional protection thus turns on the prosecutor's intent only if that intent itself has some effect on the existence or weight of constitutionally protected interests.

1. The Federal Standard: The Kennedy Test

In Oregon v. Kennedy, a plurality of the Supreme Court adopted a test that bars retrial after a defense requested mistrial only if the request for a mistrial was prompted by prosecutorial misconduct intended to provoke a mistrial. This subjective intent test reflects the Court's perception of the limited reach of double jeopardy protection after the defendant elects to abort a trial. Accordingly, the defendant must demonstrate more than governmental overreaching and efforts to secure an elusive conviction. Under Kennedy, a double jeopardy bar arises only if the misconduct was intended to generate a second chance to convict, specifically by provoking a defense-requested mistrial.

In Kennedy, the Court was drawn to the practical advantages of an intent-based test, but also appeared to conclude that the prosecutor’s intent has constitutional significance in defining the scope of double jeopardy protection. A defendant who chooses to terminate a trial before verdict normally forgoes any double jeopardy interest in avoiding retrial. The Court has emphasized the importance of the defendant's control of the decision to abort the

---

Even absent the intent to pursue improper goals, the government may precipitate multiple proceedings out of carelessness or overly aggressive prosecutorial tactics. See id. at 1325. However, there are frequently governmental goals that may generate improper motivation to bring successive prosecutions. See Commonwealth v. Smith, 625 A.2d 321, 324 (Pa. 1992). For example, three possible improper motivations could cause the government to bring successive proceedings in a case like Smith. First, the government might be persistently seeking an elusive conviction. Id. (citing Commonwealth v. Starks, 416 A.2d 498, 500 (Pa. 1980)). Second, the government might merely be harassing and oppressing the defendant without particular concern for conviction and punishment. Id. Third, while less likely to be a motivating factor in Smith, the government might seek further punishment for the defendant after obtaining a conviction.

128. See U.S. Const. amend. V.
129. See Smith, 615 A.2d at 325 (holding that prosecutorial conduct at trial implicated interests protected by Double Jeopardy Clause of Pennsylvania Constitution).
131. Id. at 673.
132. Id. at 674.
133. Id. at 674-76.
134. Id. at 676. The Court found that "a defendant's motion for a mistrial constitutes 'a deliberate election on his part to forgo his valued right to have his
trial.\textsuperscript{135} In the view of the \textit{Kennedy} Court’s holding however, intentional prosecutorial efforts to provoke a mistrial deprive the defendant of meaningful control over the decision to proceed to verdict with the first fact-finder.\textsuperscript{136} Although some courts disagree with the Court’s assessment, the \textit{Kennedy} test places prosecutorial intent at the heart of the constitutional analysis.\textsuperscript{137} Consequently, the \textit{Kennedy} test gives the trial court control through a principled, yet understandable, determination subject to limited review.\textsuperscript{138}

While courts also have applied the \textit{Kennedy} test to double jeopardy claims based on error at trial that did not precipitate a mistrial, this standard offers little guidance when the prosecutorial misconduct remains undisclosed at trial.\textsuperscript{139} The \textit{Kennedy} test turns entirely on factors relevant only when the misconduct is discovered during trial, primarily the defendant’s control and the prosecutor’s intent to provoke a mistrial.\textsuperscript{140} In contrast, covert misconduct does not affect the defendant’s control of the continuation of the trial and is not driven by intent to provoke a mistrial. The prosecutor who engages in such misconduct is not focused on the defendant’s double jeopardy interests or on a second chance to convict. Indeed, the prosecutor who suppresses exculpatory information arguably does not intend to avoid a verdict from an unfavorable fact-finder or abort a trial that is going poorly.\textsuperscript{141} Instead, the prosecutor seeks to

guilt or innocence determined before the first trier of fact.’” \textit{Id.} (quoting United States v. Scott, 437 U.S. 82, 93 (1978)).

\textsuperscript{135} \textit{Id.} The Court noted that in the context of a mistrial due to prosecutorial error, “[t]he important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of such error.” \textit{Id.} (quoting United States v. Dinitz, 424 U.S. 600, 609 (1976)).

\textsuperscript{136} \textit{Id.}

\textsuperscript{137} For a criticism of the \textit{Kennedy} test, see Ponsoldt, \textit{supra} note 47, at 94-100.

\textsuperscript{138} The standard for review is lenient. \textit{See}, \textit{e.g.}, Robinson v. Wade, 686 F.2d 298, 309 (5th Cir. 1982) (clearly erroneous); United States v. Curtis, 683 F.2d 769 (3d Cir.) (clearly erroneous), \textit{cert. denied}, 459 U.S. 1018 (1982); People v. Dawson, 427 N.W.2d 886, 897 (Mich. 1988) (clearly erroneous); State v. Laster, 724 P.2d 721, 726 (Mont. 1986) (abuse of discretion). Even under this lenient standard, the trial court will sometimes be reversed. \textit{See}, \textit{e.g.}, Curtis, 683 F.2d at 778 (reversing lower court decision under clearly erroneous standard).

\textsuperscript{139} For a discussion of the application of the \textit{Kennedy} test where the trial court does not grant a mistrial, see \textit{supra} notes 95-98 and accompanying text.

\textsuperscript{140} Even when a \textit{Brady} violation is discovered mid-trial, the court is unlikely to conclude that the initial failure to disclose resulted from intent to generate a mistrial. \textit{See} State v. Williams, 478 So. 2d 983 (La. Ct. App. 1985) (holding that bad faith conduct by state was not intended to cause future mistrial), \textit{cert. denied}, 483 So. 2d 1019 (La.) \textit{and cert. denied}, 488 So. 2d 1029 (1986).

\textsuperscript{141} \textit{See} United States v. Rivera, 634 F. Supp. 204, 211 (S.D.N.Y.) (concluding that where trial court and prosecutor concealed information from defendants, “the alleged intent was actually to \textit{prevent}, not provoke, a mistrial at the defendants’
guarantee and preserve the conviction at the first trial by gaining an unfair evidentiary advantage that is concealed from the defendant and the court.

In Buffington v. Copeland,142 the United States District Court for the Western District of Texas applied the Kennedy test to facts similar to Smith and concluded that double jeopardy did not bar retrial.143 In Buffington, the prosecution edited out key portions of a prosecution witness' statement.144 The misconduct impeded the defendant's efforts to impeach the witness, but was not discovered until after conviction.145 The district court noted that the prosecutor's "deplorable actions were motivated by a more general desire to prejudice the defendant and obtain a conviction."146 In addition to concluding that the defendant had failed to satisfy the test defined in Kennedy, the Buffington court remarked that mistrial was not the likely remedy for the prosecutorial wrong, even if the defendant and the court had discovered the misconduct during the trial.147 Thus, the intent-based test adopted for mistrials in Kennedy offers no help in evaluating the double jeopardy claim of a defendant in Smith's position.

2. The Pre-Kennedy Test

Prior to Kennedy, courts assumed that double jeopardy barred reprosecution in a broader range of cases. The assumption rested on dictum in United States v. Dinitz,148 in which the Supreme Court condemned conduct intended to provoke a mistrial as well as conduct that threatened "harassment of an accused by successive prosecutions."149 Some states have interpreted their constitutions as barring retrial in this broader range of cases, still focusing in part on the prosecutor's intent and attitude toward the risk of mistrial or

request," and that double jeopardy did not bar retrial (emphasis added)), aff'd, 801 F.2d 392 (2d Cir.), 802 F.2d 598 (2d Cir. 1986) and 812 F.2d 713 (2d Cir. 1987).

143. Id. at 1092.
144. Id. at 1093.
145. Id. at 1090.
146. Id. at 1093; see also United States v. Singleterry, 683 F.2d 122, 124 (5th Cir.) (remarking that "it seems unlikely that any prosecutor would intentionally lay a basis for appellate reversal in order 'to subvert the protections afforded by the Double Jeopardy Clause'"), cert. denied, 459 U.S. 1021 (1982) (quoting Oregon v. Kennedy, 456 U.S. 667, 676 (1982)).

147. Buffington, 687 F. Supp. at 1093 n.2.
149. Id. at 611 (quoting Downum v. United States, 372 U.S. 734, 736 (1963)).
reversal.\textsuperscript{150} However, even a test including a focus on the intent to undermine the defendant's interest in freedom from successive prosecution through means other than mistrial would not address the particular problem posed by cases of covert governmental misconduct.

The more broadly focused intent test does not fit a case like Smith, because a prosecutor who engages in the type of misconduct involved in Smith does not act with intent to force the defendant through successive trials.\textsuperscript{151} The apparent intent of the prosecutor is to obtain a conviction through violation of the defendant's right to disclosure of exculpatory evidence and to avoid any further trial of the case.\textsuperscript{152} Thus, the improper intent, if any, is directed toward the defendant's right to a fair trial before the initial fact-finder, rather than to the defendant's double jeopardy right to be free of successive prosecutions.\textsuperscript{153}

3. Alternative Intent-Based Tests

A differently focused intent-based test may provide a useful analytical tool to assess complaints of covert misconduct. This test, to be of any utility in analyzing such complaints, must focus on the prosecutor's intent in relation to the misconduct, the fairness of the defendant's initial trial and the prosecutor's intent to obtain a second trial or to risk reversal. A workable standard would bar retrial if two requirements were met: (1) the prosecutor intended to deprive the defendant of a fair trial and, (2) the misconduct had that effect. In Smith, the Pennsylvania Supreme Court adopted this two-pronged approach, which uses intent to gauge the severity of the prosecutor's misconduct, distinguishing between routine or negligent error and serious, egregious error.\textsuperscript{154}

\textsuperscript{150} See Pool v. Superior Court, 677 P.2d 261, 271-72 (Ariz. 1984) (finding that Arizona Constitution bars retrial as only means of curing prejudice to defendant when prosecutor's deliberate misconduct results in mistrial); State v. Kennedy, 666 P.2d 1316, 1326 (Or. 1983) (holding that when prosecutor acts improperly, either intending to cause or with indifference toward possible mistrial, Oregon Constitution bars retrial to remedy prejudice to defendant).

\textsuperscript{151} See Buffington, 687 F. Supp. at 1093 (finding prosecutor, under facts similar to Smith, was motivated by desire to prejudice defendant and obtain conviction, not desire to force defendant through successive proceedings).

\textsuperscript{152} See id.

\textsuperscript{153} For example, the facts of Smith suggest that the prosecution knowingly suppressed exculpatory evidence and should have known that misconduct would deprive the defendant of a fair trial. Commonwealth v. Smith, 615 A.2d 321, 324 (Pa. 1992). The facts do not suggest that the prosecution contemplated a second trial, even though Smith would have to endure a second trial to obtain a fair resolution of his case. Id. at 323.

\textsuperscript{154} Id. at 325.
In *Smith*, however, the court appeared to adopt a subjective definition of intent. The *Smith* court stated that retrial would be barred when prosecutorial misconduct “is intentionally undertaken to prejudice the defendant to the point of the denial of a fair trial.”\(^{155}\) In addition, the court related the test to the subjective intent-based test of *Kennedy*, and invoked no language to suggest an objective approach to intent.\(^{156}\) A subjective intent test forces the court to plumb the prosecutors’ mind to assess their subjective state while engaged in serious acts of misconduct.

By contrast, a test that rests on an objective determination of intent—finding intent if the prosecutor “knew or should have known”—offers some advantages. Such a test relieves the trial court of the burden of assessing the subjective intent of the lawyer appearing before the court. A trial court applying the “knew or should have known” test may look to subjective intent, but need not. This test also invites appellate courts to engage in more meaningful review than does a subjective intent test.\(^{157}\) Appellate review will not be limited to whether the trial court’s fact finding is supported by substantial evidence. Instead, the appellate courts may also consider whether objective factors signal that the prosecutor “should have known” that the misconduct would deprive the defendant of a fair trial. Through this process, the courts should develop defined standards of absolutely unacceptable governmental conduct.

More importantly, the objective intent test strikes the appropriate double jeopardy balance. Misconduct that the prosecutor “knew or should have known” would deprive the defendant of a fair trial is extremely serious. The intentional nature of the government misconduct impacts on the double jeopardy analysis. Reversal normally does not foreclose retrial according to the balance struck by the Supreme Court in *Ball*.\(^{158}\) However, there is reason to strike a different balance when intentional conduct by the government renders the first trial unfair. The government interest in retrial is significantly diminished by the governmental malfeasance, and such intentional misconduct directly attacks the defendant’s

\(^{155}\) *Id.*

\(^{156}\) *Id.* The Pennsylvania Supreme Court stated that “the double jeopardy clause of the Pennsylvania Constitution prohibits retrial of a defendant . . . when the conduct of the prosecutor is intentionally undertaken to prejudice the defendant to the point of denial of a fair trial.” *Id.*

\(^{157}\) For a discussion of the standard of appellate review under the subjective intent test, see *supra* note 138.

\(^{158}\) United States v. Ball, 163 U.S. 662, 672 (1896).
significant interests in both the first fact-finder\textsuperscript{159} and the freedom from the oppression of successive trials.\textsuperscript{160} Thus, such conduct so seriously implicates double jeopardy interests that retrial should be barred.

The major drawback of an objective intent test is the risk that it potentially would bar retrial in an unacceptably large number of cases. While it appears that prosecutors rarely engage in misconduct intending to provoke mistrial motions from the defense, prosecutors more frequently err in ways they know or should know will deprive the defendant of a fair trial.\textsuperscript{161}

Any case in which the prosecution knowingly fails to disclose material exculpatory evidence could arguably satisfy this test. Thus, an objective intent-based double jeopardy test may add a layer of evaluation to cases in which the defendant claims a violation due to non-disclosure of exculpatory evidence. The decisions that define when non-disclosure of exculpatory evidence is constitutional error eschew reliance on governmental intent.\textsuperscript{162} The Court has held that failure to disclose exculpatory evidence violates due process if the evidence is "material." The Court defines "material" in terms of its likely affect on the outcome of the trial but does not link the

\textsuperscript{159} For a discussion of the impact of covert prosecutorial misconduct on the defendant's interest in the first fact-finder, see supra notes 99-101 and accompanying text.

\textsuperscript{160} For a discussion of the impact of covert prosecutorial misconduct on the defendant's interest in freedom from the oppression of successive trials, see supra notes 111-17 and accompanying text.

\textsuperscript{161} Generally, when a criminal case goes to trial, the prosecutor has some hope of obtaining a conviction. The prosecutor's natural instinct is to zealously pursue a guilty verdict. The number of criminal appeals pointing to prosecutorial improprieties reveals that prosecutorial behavior that underlines the defendant's rights and risks an unfair trial is a common occurrence in criminal trials. If the trial ends without a conviction, as it does when a mistrial is declared, the prosecution must expend limited resources to retry the case. The result is rarely a happy one for the prosecution. By contrast, the defendant who avoids a conviction through mistrial gains a second opportunity to demonstrate the weaknesses in the prosecution's case and to encounter a jury inclined to acquit.

\textsuperscript{162} See Brady v. Maryland, 378 U.S. 83, 87 (1963). In Brady, the Court held that the "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Id. Indeed, the defendant can establish a Brady violation if the exculpatory evidence was in the hands of a governmental agency, even if it was unknown to the prosecution. Id. at 87-88; see also United States v. Bagley, 473 U.S. 667, 678-80 (1985) (clarifying test for constitutional violation, which considers prosecutorial intent only when claimed violation is prosecutorial use of perjured testimony). But see Reiss, supra note 51, at 1465 (arguing that standard for assessing due process violation depends on prosecutorial intent and that this approach may be necessary "because nonintent-based schemes are either impractical or substantially alter the shape of the adversary process").
term to an assessment of governmental bad faith.\footnote{163} Under the suggested objective intent double jeopardy test, the court would first evaluate the significance of the exculpatory evidence, and then assess the prosecutor's actual or constructive awareness of the existence and value of the evidence. Initially, a \textit{Brady} violation would not exist unless the undisclosed evidence probably would have affected the outcome of the case.\footnote{164} Thus, the determinative factor for double jeopardy protection becomes whether the prosecutor "knew" of the undisclosed evidence, and other material facts, such that the prosecutor should have known that the failure to disclose the evidence likely would render the trial unfair.\footnote{165}

The prospect of such broad application of the double jeopardy test raises the other concern underlying \textit{Ball}; that the justice system cannot function if the price of reversal is discharge.\footnote{166} Although that concern is of questionable constitutional significance, it has received the Court's recognition and is likely to play a role in circumscribing double jeopardy protection in cases like \textit{Smith}.\footnote{167} Therefore, even though the defendant's interest is greater than the government's diminished interest after a reversal for egregious governmental misconduct, the courts may fear an undesirable impact on the administration of the justice system. Consequently, the courts may hesitate to recognize a different rule based on the balancing of these interests.\footnote{168} Nevertheless, the courts should recognize an impact on double jeopardy interests and bar reprosecution when the prosecution "knows or should have known" that its mis-

\footnote{163} Bagley, 473 U.S. at 678-82 ("[A] constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial."). Interestingly, the \textit{Smith} court did not evaluate the materiality of the evidence withheld from the defendant. See Commonwealth v. Smith, 615 A.2d 321 (Pa. 1992). The court merely asserted that the misconduct was "clearly in violation of the rule of \textit{Brady} v. \textit{Maryland}, and, if proved, would, at the very least, entitle the appellant to a new trial . . . ." \textit{Id.} at 322 (citation omitted).

\footnote{164} For a discussion of the definition of a \textit{Brady} violation, see supra notes 162-63 and accompanying text.

\footnote{165} For a discussion of the benefits of a test based on an objective standard of intent, see supra notes 157-60 and accompanying text.

\footnote{166} For a discussion of the concerns underlying the Court's decision in \textit{Ball}, see supra notes 61-63 and accompanying text. For a discussion of the concern that the justice system cannot function if the price of reversal is discharge, see Ponsoldt, supra note 47, at 90-95.

\footnote{167} See United States v. Tateo, 377 U.S. 468, 466 (1964) (discussing practical effect on administration of justice if price of reversal were discharge).

\footnote{168} Cf. Oregon v. Kennedy, 456 U.S. 667, 676-79 (1982). The Court in \textit{Kennedy} rejected a broad standard of double jeopardy protection in the context of a mistrial, citing as one ground the fact that "the judge presiding over the first trial might well be more loath to grant a defendant's motion for mistrial." \textit{Id.} at 676.
conduct would deprive the defendant of a fair trial or when the prosecution actually intended this result.

B. Conduct-Based Tests

Alternatively, the courts could craft a test focusing on the impact of governmental misconduct on the defendant, rather than on the governmental intent driving that conduct.\(^{169}\) However, a double jeopardy bar is justified only in instances of very serious governmental misconduct.\(^{170}\) Defining the conduct that would bar reprosecution is a daunting task.\(^{171}\)

Consequently, when courts and commentators seek to identify conduct that will bar retrial, they generally inject an intent requirement into the test.\(^{172}\) For example, a conduct-based standard commonly suggested is governmental "overreaching."\(^{173}\) However, on its face, the term gives little guidance. Courts, therefore, have complained that the term "overreaching" is too vague and fails to give adequate direction to the courts charged with enforcing double jeopardy protection.\(^{174}\) Courts give content to the term by defining overreaching as misconduct carried out in bad faith or with awareness of its likely impact on the defendant, thereby injecting an element of intent.\(^{175}\) Some courts have defined overreaching to include grossly negligent misconduct.\(^{176}\) However, this standard

---

\(^{169}\) See Reiss, supra note 51, at 1472-76. Professor Reiss proposes a non-intent-based test that uses a "plain error" standard. Id. at 1472-73. This test "would take into account (1) the magnitude of the misconduct and (2) the availability of alternative remedies." Id. at 1472. For a discussion of the "plain error" standard, see infra note 178.


\(^{171}\) For a discussion of conduct-based arguments under the Due Process Clause, see supra notes 21-23 and accompanying text.

\(^{172}\) See, e.g., Kennedy, 456 U.S. at 679 (holding that double jeopardy bars retrial where prosecutor engaged in conduct intended to provoke defendant to move for mistrial); Commonwealth v. Smith, 615 A.2d 921, 925 (Pa. 1992) (holding that Double Jeopardy Clause of Pennsylvania Constitution bars retrial where prosecutor engaged in conduct intended to prejudice defendant and thereby deny fair trial).

\(^{173}\) United States v. Kessler, 530 F.2d 1246, 1255-56 (5th Cir. 1976) (holding that intentional prosecutorial misconduct constitutes "overreaching" which triggers double jeopardy).

\(^{174}\) See State v. Kennedy, 666 P.2d 1916, 1925 (Or. 1986) ("overreaching" too vague to be workable due to lack of practical standards for its application and difficulty of proving the intent to cause mistrial).

\(^{175}\) See Kessler, 530 F.2d at 1255-56 (defining "overreaching" as grossly negligent or intentional conduct).

\(^{176}\) See, e.g., United States v. Martin, 561 F.2d 135, 140 (8th Cir. 1977) (concluding that "[i]f the government's [misconduct] was not intentionally designed to
would result in permitting the extreme relief of dismissal and discharge in an unacceptably large number of cases.

The basis for recognizing a bar is the balance between the defendant's double jeopardy interests and the government's interest in retrying the case. When the government's misconduct is intentional, the defendant's interest is increased and the government's interest is sufficiently diminished, that the defendant's interest arguably outweighs the government's. By contrast, when the government's misconduct merely constitutes gross negligence, the argument that the balance shifts in the defendant's favor is much weaker.\(^{177}\)

Like the "overreaching" standard, the "plain error" standard proposed by some commentators actually requires the determination of governmental \textit{mens rea}.\(^{178}\) Like the objective intent-based test, the "plain error" test involves the assessment that "any competent prosecutor" would know the conduct was error.\(^{179}\) Thus, the "plain error" test, like the "knew or should have known" test, does provoke a mistrial request, at a minimum [it] constitute[d] gross negligence" and represented prosecutorial overreaching that barred retrial); Kessler, 530 F.2d at 1258 (holding that overreaching included grossly negligent misconduct, but barring retrial on basis of intentional misconduct and not on basis of gross negligence); People v. Reyher, 728 P.2d 333, 336 (Colo. Ct. App. 1986) (affirming trial court's ruling that mistrial did not bar retrial because governmental conduct was neither grossly negligent nor intended to provoke mistrial). See generally Lawrence J. Baldasare, Comment, The Double Jeopardy Clause and Mistrials Granted on Defendant's Motion: What Kind of Prosecutorial Misconduct Precludes Reproduction, 18 DUQ. L. REV. 103 (1979) (analyzing difficult problems raised by permitting reproduction where mistrial is granted on prosecutorial misconduct grounds). For an interesting discussion of the gross negligence standard, see Commonwealth v. Potter, 386 A.2d 918 (Pa. 1978).

\(^{177}\) For a discussion of how the courts treat gross negligence of the government, see supra note 176 and accompanying text.

\(^{178}\) For a discussion of the "plain error" standard, see Ponsoldt, supra note 47, at 94-100; Reiss \textit{supra} note 51, at 1472-73. The test proposed by Professor Reiss relies on the trial court's evaluation of whether a mistrial can be avoided and other means employed to cure the plain error committed by the prosecution. Reiss, \textit{supra} note 51, at 1474-75. Professor Reiss assumes that the trial court will have the opportunity to evaluate fully the double jeopardy implications of the situation before declaring or refusing a mistrial. See id. at 1475-77. The reported cases seem to reflect to the contrary that trial courts often do not assess the double jeopardy implications of their mistrial decisions. As a result, the appellate court ruling on the defendant's double jeopardy claim has no chance to select an alternate procedural remedy, but must simply determine the consequences of the trial court's action. Of course, when the double jeopardy claim rests on covert prosecutorial misconduct, no court has the opportunity to engage in the suggested evaluation during the first trial. See Commonwealth v. Smith, 615 A.2d 321 (Pa. 1992).

\(^{179}\) For a discussion of the application of the "plain error" test, see Reiss, \textit{supra} note 51, at 1473.
not require a finding of subjective intent but relies on an objective assessment of prosecutorial intent.

III. CONCLUSION

Smith is a special case, but it is not likely to be unique. The prosecutorial misconduct in the case was so extreme that it called for a stern judicial response. Yet, given its procedural course, the case does not fit readily within traditional double jeopardy rules. The misconduct that precipitated the dismissal in Smith was undiscovered at trial. Consequently, the case proceeded to a conviction based on sufficient evidence of guilt. The Pennsylvania Supreme Court's application of double jeopardy principles to a fully tried case, where the prosecution produced sufficient evidence, pushes that doctrine into uncharted territory.

Nevertheless, although it is unusual, the double jeopardy bar to further proceedings against Smith is warranted by the harm to his Double Jeopardy interests. Two double jeopardy interests warrant barring retrial: (1) the interest in the first fact-finder and, (2) the interest in avoiding the burdens of a second trial. The prosecutorial misconduct in Smith threatened the defendant's interest in the first fact-finder by covertly undermining the validity of that fact-finder's verdict. In addition, by compromising the fairness of the first trial, the prosecution forced Smith to seek a second trial in order to obtain a fair trial. Clearly Smith's interest in avoiding the oppression of a second trial was harmed. Although the threat to these double jeopardy interests was less direct and defined than when a mistrial or failure to produce proof beyond a reasonable doubt raises a double jeopardy bar, it was still genuine and serious.

This threat to the defendant's double jeopardy interests must be balanced against the public interest in full and fair prosecu-

180. Smith, 615 A.2d at 324-25.
181. Id. at 325.
182. Id. at 321.
183. For a discussion of the defendant's interest in the first fact-finder, see supra notes 80-101 and accompanying text. For a discussion of the defendant's interest in avoiding the burden of a second trial, see supra notes 103-17 and accompanying text.
184. For a discussion of the effect of covert misconduct on the defendant's interest in the first fact-finder, see supra notes 99-101 and accompanying text.
185. For a discussion of the effect of covert misconduct on the defendant's interest in avoiding the oppression of a second trial, see supra notes 111-17 and accompanying text.
tion. By concealing the misconduct until after trial, the prosecution subverted the opportunity to evaluate and remedy the resulting harm during the first trial. Thus, although the public interest in retrial is greater than it is if the prosecution fails to produce sufficient proof, the weight of that interest is diminished by the governmental role in creating the problem.

A standard that focuses on the prosecutor’s intent will identify those cases in which the defendant’s interest is substantial and outweighs the public interest. The subjective intent Smith test—barring reprosecution when the prosecutor intentionally deprives the defendant of a fair trial—homes in on the cases in which the assault on the defendant’s protected interests is strongest and the public interest, correspondingly, is weakest. An objective intent test—barring reprosecution if the prosecutor “knew or should have known” that the misconduct was likely to deprive the defendant of a fair trial—sweeps more broadly. Still, it identifies cases in which the prosecutor has severely threatened the defendant’s double jeopardy interests in a manner that diminishes the weight of the public interest in retrial. Either test can be clearly articulated and easily applied. In addition, neither will lead to such broad application of double jeopardy principles that the courts will be deterred from enforcing double jeopardy protection to vindicate the defendant’s interests, even after trial to verdict. The Smith case, while currently defining the limits of double jeopardy protection, does not chart a course outside those limits.

186. For a discussion of the government’s interest in a full and fair prosecution, see supra notes 105-10 and accompanying text.
187. For a discussion of the Smith test, see supra notes 154-56 and accompanying text.
188. For a discussion of the objective intent test, see supra notes 157-68 and accompanying text.