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ACCEPTANCE OF PARTIAL VERDICTS AS A SAFEGUARD AGAINST DOUBLE JEOPARDY

INTRODUCTION

Consider a criminal jury trial in which the indictment charges a person with a single homicide. Homicide encompasses the greater crime of murder in the first degree and the lesser included offenses of second degree murder and voluntary and involuntary manslaughter. Commission of the greater crime presupposes the simultaneous commission of the lesser offenses. Therefore, if the evidence is sufficient to support a murder conviction, it is also adequate to establish manslaughter. Assume that after ten weeks of trial the judge instructs the jury to consider all the greater and lesser offenses of homicide. Additionally, the jury is told to

1. The facts of the following hypothetical are based on Stone v. Superior Court, 31 Cal. 3d 503, 646 P.2d 809, 183 Cal. Rptr. 647 (1982) (en banc).
3. See, e.g., Sansone v. United States, 380 U.S. 343, 350 (1965) (lesser included offense is defined within elements of greater offense). Lesser included offenses are defined by statute in some states. See, e.g., Ind. Code Ann. § 35-41-1-16 (Burns Supp. 1984) (lesser included offense is established by proof of same material elements required to establish commission of offense charged); N.Y. Crim. Proc. Law § 1.20(37) (McKinney 1981) ("When it is impossible to commit a particular crime without concomitantly committing, by the same conduct, another offense of lesser grade or degree, the latter is, with respect to the former, a 'lesser included offense.'"); Wharton's Criminal Procedure § 375 (C. Torcia 12th ed. 1975) (if the greater cannot be committed without the lesser, the latter is necessarily included in the former). Courts use the term lesser included offense interchangeably with necessarily included offense, see Olais-Castro v. United States, 416 F.2d 1155, 1157 (9th Cir. 1969), but distinctions have been made between the two, see Koenig, The Many-Headed Hydra of Lesser Included Offenses: A Herculean Task for the Michigan Courts, 1975 Det. C.L. Rev. 41, 41-44 (necessarily included offenses are inevitably committed with greater; lesser included offenses are related to the greater, but exist on a fact-specific basis). For a discussion of the doctrine of lesser included offenses in federal court, see generally Ettinger, In Search of a Reasoned Approach to the Lesser Included Offense, 50 Brooklyn L. Rev. 191 (1984).
4. Cf. Harris v. Oklahoma, 433 U.S. 682, 682 (1977) (per curiam) (conviction for felony-murder committed in course of robbery precluded subsequent prosecution on robbery charge because all elements of robbery were proved in obtaining felony-murder conviction); Brown v. Ohio, 432 U.S. 161, 168 (1977) (prosecutor who has established auto theft has necessarily established joyriding because every element of joyriding is an element of auto theft).
5. In a capital case the trial judge must charge the jury on all lesser included offenses if the evidence could support a conviction. See Beck v. Alabama, 447 U.S. 625, 638 (1980). Otherwise there is no constitutional right to receive such instructions. See id. at 638 n.14; Keeble v. United States, 412 U.S. 205, 213 (1973). The accused is entitled to instruction on the lesser offenses if justified by the evidence, Berra v. United States, 351 U.S. 131, 134 (1956), and most courts require such an instruction, see, e.g., State v. Valencia, 121 Ariz. 191, 198, 589 P.2d 434, 441 (1979) (en banc); Commonwealth v. Santo, 375 Mass. 299, 305-06, 376 N.E.2d 866, 870-71 (1978); People v. Henderson, 41 N.Y.2d 233, 236, 359 N.E.2d 1357, 1360, 391 N.Y.S.2d 563, 566 (1976); see also Note, Submis-
begin deliberations with the greatest crime and, upon unanimous agreement to acquit, to move to the next included offense until a final decision is reached.\(^6\)

After a week the foreman reports that the jury is deadlocked:\(^7\) It is unable to decide between involuntary manslaughter and not guilty. The judge declares a mistrial,\(^8\) but before the jury is discharged the defendant asks the court to accept a partial verdict\(^9\) as to those offenses upon which the jury has unanimously agreed to acquit—in other words, on all those greater than involuntary manslaughter. This verdict will protect the defendant from being subject to reprosecution on those offenses.\(^10\)

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\(^7\) A deadlock describes a point at which, after a reasonable amount of time deliberating, it is highly improbable that the jury will reach a unanimous decision. This standard is usually expressed in state statutes. See, e.g., Ark. Stat. Ann. § 43-2140 (1977); Cal. Penal Code § 1140 (West 1970); Ohio Rev. Code Ann. § 2945.36(B) (Page 1982); see also American Bar Ass'n, Standards for Criminal Justice § 15-4.4(c), at 144 (2d ed. 1980) (deadlock exists if it appears that there is no reasonable probability of jury agreement). It is estimated that five percent of all juries deadlock. See H. Kalven & H. Zeisel, The American Jury 453 (1966).

\(^8\) It is left to the discretion of the trial judge to declare a mistrial when the jury is deadlocked. See Arizona v. Washington, 434 U.S. 497, 510 (1978); Gori v. United States, 367 U.S. 364, 368 (1961). Suggested factors for the trial judge to consider before declaring a deadlock are length of deliberations, volume and complexity of the case, and statements of the jury. American Bar Ass'n, Standards Relating to Trial by Jury § 5.4(a) comment at 157 (1968). On appeal great deference is given to the trial judge's decision to declare a deadlock. See, e.g., Keerl v. Montana, 213 U.S. 135, 137 (1909); Logan v. United States, 144 U.S. 263, 298 (1892). Declaring a mistrial is preferable to coercing the jury to reach a verdict; therefore less scrutiny is given to the decision to discharge a jury. See Arizona v. Washington, 434 U.S. at 509-10. For a discussion of coercion see infra notes 34-36 and accompanying text.

\(^9\) Declaration of a mistrial is required when a jury is deadlocked. See infra notes 33-35 and accompanying text.

\(^10\) A partial verdict relates only to that portion of the charge on which the jury has unanimously agreed. For an explanation of how a partial verdict might be received, and how it can be considered to be a final verdict, see infra notes 45-47 and accompanying text.

A partial verdict will be an acquittal on all offenses greater than those on which the jury has deadlocked. See infra notes 41-43 and accompanying text. An acquittal is defined as "a resolution [in defendant's favor], correct or not, of some or all of the factual elements of the offense charged," United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977) (emphasis added); see United States v. Scott, 437 U.S. 82, 96-97 (1978),
the trial judge grant the motion? In a majority of state courts, the answer would be an unequivocal no.\textsuperscript{11} Other states would respond that the fifth amendment mandates such a verdict.\textsuperscript{12}

This Note contends that the court must receive a partial verdict of acquittal on the greater offenses in order to protect the defendant’s right against double jeopardy. Part I outlines this constitutional safeguard. Part II argues that double jeopardy includes the right to a partial verdict in cases in which a jury is deadlocked on lesser included offenses. Part III explores procedural mechanisms for the receipt of partial verdicts.

I. **Double Jeopardy Protection under the Constitution**

A. **Purpose and Scope of the Protection**

The fifth amendment to the Constitution protects defendants from being placed in jeopardy twice for the same offense.\textsuperscript{13} This protection\textsuperscript{14} is and is an absolute bar to retrial, United States v. DiFrancesco, 449 U.S. 117, 127, 130 (1980) (it is a settled principle of double jeopardy protection that an acquittal prevents a retrial); United States v. Scott, 437 U.S. 82, 91 (1978) ("law attaches particular significance to an acquittal"); Martin Linen Supply Co., 430 U.S. at 571 (barring retrial after an acquittal is the "most fundamental rule in the history of double jeopardy jurisprudence"); United States v. Ball, 163 U.S. 662, 669 (1896) (acquittal is an absolute bar to retrial). Thus, even if it is later established that the acquittal was erroneous, retrial is prohibited. Burks v. United States, 437 U.S. 1, 16 (1978); Fong Foo v. United States, 369 U.S. 141, 143 (1962) (per curiam).


13. The amendment reads in relevant part: “nor shall any person be subject for the same offense to be twice put in jeopardy.” U.S. Const. amend V. It applies to the states through the fourteenth amendment. Benton v. Maryland, 395 U.S. 784, 794 (1969); see Crist v. Bretz, 437 U.S. 28, 32 (1978); Greene v. Massey, 437 U.S. 19, 24 (1978). Although most states have double jeopardy provisions in their constitutions, see American Law Institute, Administration of the Criminal Law: Double Jeopardy § 6 comment at 61-65 (1935), this Note will focus on the fifth amendment’s application to state criminal trials.

Offenses are not the same for double jeopardy purposes if conviction requires proof of different facts. Blockburger v. United States, 284 U.S. 299, 304 (1932). Because lesser included offenses are encompassed within the related greater offenses, conviction on the greater prevents a reprosecution on the lesser. Brown v. Ohio, 432 U.S. 161, 168-69 (1977); Jeffers v. United States, 432 U.S. 137, 150-51 (1977); see also In re Nielsen, 131 U.S. 176, 190 (1889) (person tried and convicted of crime which includes various incidents cannot be tried a second time for one of those incidents without being twice put in jeopardy).

14. There are actually three related protections under the double jeopardy clause: retrial is prohibited after an acquittal, retrial is prohibited after a conviction, and a de-
"deeply ingrained" in our judicial system and embraces the defendant's "valued right" to receive a final judgment from the first jury he faces whenever possible. Double jeopardy prevents the state from subjecting an individual to the emotional and financial burdens of multiple prosecutions. Furthermore, unlimited trials increase the likelihood that an innocent person may be convicted. Such an unjust conviction is a greater affront to our system of justice than acquittal of the guilty.


Wade v. Hunter, 336 U.S. 684, 689 (1949); see Illinois v. Somerville, 410 U.S. 458, 471 (1973) (defendant has a "weighty" interest in having his "fate determined by the jury first impaneled"); United States v. Jorn, 400 U.S. 470, 486 (1971) (plurality opinion) (defendant has a right to have his case completed by first trial "once and for all"); United States v. Ball, 163 U.S. 662, 669 (1896) (prohibition is not exclusively against being twice punished; thus whether convicted or acquitted, defendant is equally put in jeopardy at first trial).

Green v. United States, 355 U.S. 184, 187-88 (1957); see Oregon v. Kennedy, 456 U.S. 667, 676-77 (1982) (double jeopardy frees defendant from "extended anxiety" caused by trials); Abney v. United States, 431 U.S. 651, 661 (1977) (double jeopardy prevents defendants from "enduring the personal strain, public embarrassment, and expense of a criminal trial more than once"); Downum v. United States, 372 U.S. 734, 736 (1963) (double jeopardy protects defendant from harassment of successive prosecutions); Ex parte Lange, 85 U.S. (18 Wall.) 163, 171 (1873) (purpose of double jeopardy is to prevent state trials from being oppressive; therefore, to preserve the liberty of the defendant, only one conviction or acquittal is allowed) (quoting Commonwealth v. Olds, 11 Ky. (5 Litt.) 137 (1823)); cf. Duncan v. Louisiana, 391 U.S. 145, 156 (1968) (jury trials prevent government oppression and overzealous prosecution).

Green v. United States, 355 U.S. 184, 188 (1957); see Gori v. United States, 367 U.S. 364, 369 (1961) (double jeopardy safeguard prevents prosecution from obtaining a "more favorable opportunity to convict the accused"); United States v. Richardson, 702 F.2d 1079, 1085 & n.39 (D.C. Cir. 1983) (discussing probability of unjust convictions after repeated prosecutions), rev'd on other grounds, 104 S. Ct. 3081 (1984); Findlater, Retrial After a Hung Jury: The Double Jeopardy Problem, 129 U. Pa. L. Rev. 701, 713 (1981) (risk of innocent person being convicted increases on retrial because as the resources of defendant diminish it becomes more difficult to present an adequate defense); Note, Twice In Jeopardy, 75 Yale L.J. 262, 278 n.74 (1965) (statistical calculation of the possibility of unjust conviction on retrial) [hereinafter cited as Twice In Jeopardy].

M. Saks, Jury Verdicts 69 (1977); Douglas, Foreward to J. Frank & B. Frank, Not Guilty 11 (1957) ("we believe that it is better for ten guilty people to be set free than for one innocent man to be unjustly imprisoned"). See generally J. Frank & B. Frank, supra (compilation of unjust conviction cases).
Thus, underlying the double jeopardy provision is the premise that the state has "one, and only one" opportunity to present all of its evidence against the defendant. Any other rule would give the prosecutor who failed to convict in the first instance additional time to use the vast resources of the state to gather new evidence. Moreover, a retrial would be conducted with the invaluable experience of a "dress rehearsal". Witnesses would be better able to convey their stories, and arguments that appeared weak at the first trial could be strengthened.

The defendant's right to be free from a second trial attaches when the first jury is sworn and impaneled. Retrial is barred if that jury is discharged without the defendant's consent before a final verdict unless there is showing of "manifest necessity."
B. The Manifest Necessity Test

A trial court may discharge a jury over defendant’s objections whenever “taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated.” Double jeopardy will not bar a second trial when this manifest necessity test is met.

Exceptions to double jeopardy ensure that defendants will not be freed because of intervening events over which the court has no control. For example, when an advancing army threatened the trial, discharge of the jury prior to its reaching a verdict did not prevent a retrial. Under such circumstances, double jeopardy concerns are outweighed by the public interest in final judgments that resolve the issues and thus assure that the accused is brought to justice. At the same time, the defendant has the right to have his innocence proclaimed so that charges are not outstanding against him.


For a discussion of the various ways in which the manifest necessity test has been interpreted, including its ambiguities and application, see Findlater, supra note 18, at 702-10; Schulhofer, supra note 23, at 490-93; Manifest Necessity, supra note 23, at 891-904.

30. See id. at 691-92.
31. Id. at 689; see Crist v. Bretz, 437 U.S. 28, 33 (1978) (a primary purpose of double jeopardy clause is to preserve “finality” of judgments); Arizona v. Washington, 434 U.S. 497, 503 (1978) (public interest in finality is so strong that an acquitted defendant cannot be retried even if acquittal was an egregious error) (citing Fong Foo v. United States, 369 U.S. 141, 143 (1962)); United States v. Wilson, 420 U.S. 332, 352 (1975) (freely granting retrials “diserves [s] the defendant’s legitimate interest in the finality of a verdict”); Illinois v. Somerville, 410 U.S. 458, 463 (1973) (public interest in finality prohibits application of “rigid rules” that would prevent reaching a verdict). Without the concept of finality the government could continue to prosecute until it obtained a conviction. See Twice in Jeopardy, supra note 18, at 267. Other reasons for avoiding retrial are discussed supra notes 17-19 and accompanying text.


A hung jury remains the "prototypical example" of manifest necessity justifying the declaration of a mistrial.\(^3\) If a deadlock prevented retrials, the judge might pressure the jury to reach a conclusion.\(^3\) Jurors might exert similar pressure on their peers who are causing the deadlock.\(^3\) Such a coerced verdict is antithetical to the concept of a fair trial, which is based on the notion that convictions should be the product of reasoned deliberation and not of "starv[ing the jury] into a verdict."\(^3\)

II. ACCEPTANCE OF A PARTIAL VERDICT AS AN ALTERNATIVE TO DECLARING A MISTRIAL

Under the manifest necessity test it is within the trial judge's discretion to abort a trial before a final judgment is reached.\(^3\) This authority, however, "ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes."\(^3\) Nevertheless, many
judges ignore the unique situation presented by a jury deadlocked on lesser offenses, and mechanically disregard the defendant's request for a partial verdict. 39

Manifest necessity requires courts to consider and employ any procedures that would prevent the first trial from becoming a nullity. 40 The jury instructed on lesser included offenses can, at the end of its deliberations on all of the charges, simply state in open court those charges on which they have unanimously agreed to acquit the defendant. 41 The court can then enter a partial verdict of not guilty as to these offenses 42 and double jeopardy will bar only their retrial. 43 If a partial verdict is not accepted, the defendant faces reprosecution for crimes of which he has already been acquitted. This directly contravenes the fifth amendment's mandate that the government have "one, and only one" opportunity to prove its case. 44

A partial verdict on the greater offenses also satisfies the judicial standard for finality of judgments. 45 A final verdict must be received and recorded in open court at the end of the jury's deliberations. 46 A partial


40. See, e.g., Arizona v. Washington, 434 U.S. 497, 526-27 (1978) (Marshall, J., dissenting) (no manifest necessity to declare mistrial because trial judge did not explore alternatives); United States v. Jorn, 400 U.S. 470, 485 (1971) (plurality opinion) (because alternative of interrupting trial was available, manifest necessity not met when judge declared mistrial); Downum v. United States, 372 U.S. 734, 737-38 (1963) (manifest necessity not met when witness essential to two of six counts unavailable); State v. Pugliese, 120 N.H. 728, 730, 422 A.2d 1319, 1321 (1980) (per curiam) (partial verdict required as alternative to declaring mistrial when jury deadlocks on lesser included offenses but agrees on greater offense); State v. Castrillo, 90 N.M. 608, 611, 566 P.2d 1146, 1149 (1977) (same); see also Beck v. Alabama, 447 U.S. 625, 644 (1980) (“invoking the mistrial option in a case in which the jury agrees that the defendant is guilty of some offense . . . would require the jurors to violate their oaths to acquit in a proper case”) (emphasis in original).

41. See infra notes 46-47 and accompanying text for a discussion of how a partial verdict can be a final verdict.


43. See Arizona v. Washington, 434 U.S. 497, 503 (1978) (“If the innocence of the accused has been confirmed . . . the Constitution conclusively presumes that a second trial [is] unfair”). See supra note 10 and accompanying text.

44. See supra notes 20-23 and accompanying text.

45. See infra notes 48-49 and accompanying text.

46. This is true in most jurisdictions. See, e.g., Fed. R. Crim. P. 31(a); Mo. Rev. Stat. § 546.390 (1959); Ga. Code Ann. § 17-9-21 (1982); Colo. R. Crim. P. 31(a); Mass. R. Crim. P. 31(a); N.M. R. Crim. P. 44(a); Unif. R. Crim. P. 535(a), (b).
verdict can easily meet these requirements. Thus such verdicts preserve
the public's interest in final judgments and the defendant's constitutional
rights. In addition, limiting the scope of retrial frees courts from the bur-
densome task of rehearing the same case against the defendant.

III. CRIMINAL PROCEDURE

A. Trial Procedure

Standard criminal procedure allows a jury charged on multiple crimes,
such as robbery and kidnapping, to return a verdict as to any offenses
upon which they have agreed at any time during their deliberations.
Receipt of such a verdict neither ends these deliberations nor precludes a
retrial on any offenses upon which the jury was unable to agree; it is
merely a partial verdict on the charge. However, a jury considering a
single charge with lesser included offenses is generally not permitted to

a special verdict on specific facts or issues. See, e.g., Mont. Code Ann. § 46-16-603(1)
At least one court interpreted this rule as preventing the receipt of a partial verdict on the
greater offense. See A Juvenile v. Commonwealth, 392 Mass. 52, 56-57, 465 N.E.2d 240,

The Supreme Court has approved implied verdicts, if the jury's intent is clear. See
Green v. United States, 355 U.S. 184, 191 (1957); see also Carver v. Martin, 664 F.2d 932,
935 (4th Cir. 1981) ("verdict is sufficient if the jury's intention can be ascertained with
reasonable certainty from the language used in the verdict") (quoting People v. Tannahill,
38 Ill. App. 3d 767, 773, 348 N.E.2d 847, 852 (1976)); Stone v. Superior Court, 31
(verdict need only represent the intent of the jury). But see People v. Hall, 25 Ill. App. 3d
992, 994, 324 N.E.2d 50, 52 (1975) (only way to recognize a verdict is by formal return
by jury to court). In State v. Hutter, 145 Neb. 798, 18 N.W.2d 203 (1945), the court held
that no verdict can be considered a prior conviction or acquittal until there has been a
final determination on the entire count charged. Id. at 804-05, 18 N.W.2d at 208. There
are two problems with relying on the holding in Hutter to justify denying the defendant's
request for a partial verdict. First, the holding is based on common law definitions of
homicide that distinguish degrees of that crime only for the purpose of punishment. See
id. at 802-04, 18 N.W.2d at 207-08. Second, in Hutter the jury was deadlocked on man-
slaughter; the defendant wanted to give weight to the trial judge's decision to withdraw
the charges of first and second degree murder from the jury's consideration. The court
held that the judge's action could not amount to an acquittal. See id. at 805, 18 N.W.2d at
208. This is markedly different from recognizing an implied acquittal when a jury has
considered all of the greater and lesser offenses and has deadlocked only on the lesser
crimes. See infra notes 72-76 and accompanying text.

47. See Stone v. Superior Court, 31 Cal. 3d 503, 517-18, 646 P.2d 809, 819, 183 Cal.
Rptr. 647, 657 (1982) (en banc); N.Y. Crim. Proc. Law § 310.70(1)(a) (McKinney 1982);
N.M. R. Crim. P. 44(d).

48. See Twice in Jeopardy, supra note 18, at 277.

49. See, e.g., Selvester v. United States, 170 U.S. 262, 269-70 (1898); United States v.
Varkonyi, 611 F.2d 84, 86 (5th Cir.), cert. denied, 446 U.S. 945 (1980); Cal. Penal Code
§ 1160 (West 1970); N.Y. Crim. Proc. Law § 310.70(1) (McKinney 1982); 3 C. Wright
Federal Practice and Procedure § 513 (2d ed. 1982).

50. See N.Y. Crim. Proc. Law § 310.70 (1)(b)(j) (McKinney 1982). Receipt of a ver-
dict on separate offenses is also a "partial verdict." See supra note 49 and accompanying
text.
return any verdict when it deadlocks.51

Lesser offenses can be treated procedurally in the same manner as multiple offenses. Acceptance of a partial verdict of acquittal on murder in the first degree when the jury deadlocks on the second degree charge is indistinguishable from receiving a verdict of not guilty on robbery when the jury cannot agree on the accompanying kidnapping charge.52 The oft-quoted rationale for accepting the latter verdict yet rejecting the former is that “the weight of final adjudication should not be given to any jury action that is not returned in a final verdict.”53 This argument is unsupported because, as has been demonstrated, the partial verdict meets the requirements of a final verdict.54

The contention that a partial verdict would be coercive because it requires an “unwarranted and unwise intrusion into the province of the jury”55 is equally unsupported by the facts surrounding the receipt of a partial verdict. Coercion is only a concern when the jury is still considering its verdict.56 A deadlocked jury has completed its deliberations; inquiry into whether a partial verdict has been reached will therefore not be intrusive.57

Alternative procedures for receipt of a partial verdict include: giving verdict forms to the jury for each included offense and instructing them


54. See supra notes 45-47 and accompanying text.


56. See supra notes 34-36 and accompanying text. See State v. Castrillo, 90 N.M. 608, 612, 566 P.2d 1146, 1150 (1977) (inquiring into jury’s vote on included offenses does not violate the policy of discouraging intrusion into the jury).

to return a verdict of guilty or not guilty for each offense; or leaving the jury to their deliberations, and in the event of a deadlock polling the jury to determine if there is unanimous intent to acquit the defendant on any of the charges.

Courts currently employ both alternatives. Submitting individual forms for each offense assures the court that a jury's decision is based upon full knowledge of its options, but this procedure may be perceived as coercive because it suggests that the jury compromise for the sake of reaching a conclusion. However, a jury unaware of its alternatives might return an unwarranted conviction on the greater crime if the option to convict on the lesser offense is not apparent. Thus, providing the jury with forms for all offenses is a procedural safeguard against unjust convictions.

Independent decisionmaking is also crucial to the deliberation process. Polling the jury after they have been given forms for all of the charges and reached a genuine impasse thus provides additional assurance against a coerced verdict. When a jury deadlocks on the lesser offenses, yet agrees to a final verdict on the greater, the judge can simply apply the same procedures used to poll a jury when a final verdict is reached on the entire charge.

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60. See supra notes 59-60.
66. Such a rule would combine the procedures now used by courts in New York and New Mexico, see N.Y. Crim. Proc. Law § 310.70 (McKinney 1982); N.M. R. Crim. P. 44(d), and suggested as alternatives by California, see Stone v. Superior Court, 31 Cal. 3d 503, 519-20, 646 P.2d 809, 820, 183 Cal. Rptr. 647, 658 (1982).
B. Post-Trial Procedure

If the court does not apply one of the procedures outlined above, an appellate or second trial court must infer acquittal on the greater offense. Collateral estoppel precludes relitigation of issues that have been decided in a final and valid judgment between the same parties. Application of this doctrine requires the ability to ascertain exactly what the first jury decided. If it is clear from the trial record that the jury deadlocked on the lesser offenses and a partial verdict on the greater crime is not inferred by the second court, the defendant is forced to relitigate issues already finalized by the first jury.

An implicit acquittal on a greater offense is a widely employed procedure which the Supreme Court made part of double jeopardy in *Green v. United States.* The Court held that when a defendant has been put
through the ordeal of a trial, conviction on the lesser offense when the jury expressed no judgment as to the greater is indistinguishable from an acquittal on the greater crime.\textsuperscript{73} Similarly, because the jury has been instructed to consider lesser included offenses only after acquitting on the greater crimes, a deadlock on the former is equivalent to an acquittal on the latter.\textsuperscript{74} A second prosecution on the greater charge is thus necessarily barred.\textsuperscript{75} Of course the defendant may be reprosecuted on the lesser offenses in accordance with the "manifest necessity" standard.\textsuperscript{76} The public interest in finality, judicial economy and fairness is served by the implication of a final verdict on the greater offenses and retrial on the lesser.\textsuperscript{77}

Furthermore, by failing to give weight to the first jury's implicit acquittal, courts are promulgating an unfair standard of double jeopardy protection. \textit{Green} protects defendants convicted of lesser offenses against retrial on the greater offenses,\textsuperscript{78} but the person whose case raises serious doubts in the jurors' minds with respect to the lesser offenses risks reprosecution on the greater.\textsuperscript{79}

\textbf{Conclusion}

The double jeopardy protection granted individuals by the fifth amendment requires that charges against an individual be resolved, whenever possible, at the first trial. When the jury reaches a unanimous decision of acquittal on a greater crime but deadlocks on a lesser offense, failure to receive a partial verdict on the greater crime violates the defendant's double jeopardy protection by allowing the state to reprosecute him for an offense of which he has been acquitted.

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\textsuperscript{73} See id.

\textsuperscript{74} In \textit{Green v. United States}, 355 U.S. 184 (1957), the Court refused to allow the defendant's right to turn on procedural distinctions. The fact that he was charged with murder in one count did not prevent the jury from returning a verdict on the lesser charge and implying a verdict on the greater. \textit{Id.} at 190 n.10; see Stone v. Superior Court, 31 Cal. 3d 503, 518, 646 P.2d 809, 819, 183 Cal. Rptr. 647, 657 (1982) (citing \textit{Green}, 355 U.S. at 190 n.10).

\textsuperscript{75} See \textit{supra} note 10 and accompanying text for a discussion of acquittal as an absolute bar to retrial.

\textsuperscript{76} See \textit{supra} notes 27-28 and accompanying text for a discussion of the manifest necessity standard.


\textsuperscript{78} \textit{Green v. United States}, 355 U.S. 184, 190-91 (1957). See \textit{supra} notes 72-73 and accompanying text.

\textsuperscript{79} See \textit{supra} note 11 for cases holding that the defendant can be retried on a charge on which he was effectively acquitted in a previous trial.