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Acceptance of Partial Verdicts as a Safeguard Against Double Jeopardy

Mary S. O'Keefe

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.[1] 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.[2] Commission of the greater crime presupposes the simultaneous commission of the lesser offenses.[3] Therefore, if the evidence is sufficient to support a murder conviction, it is also adequate to establish manslaughter.[4] Assume that after ten weeks of trial the judge instructs the jury to consider all the greater and lesser offenses of homicide.[5] 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).

2. *See* Stevenson v. United States, 162 U.S. 313, 314 (1896); Gray v. State, 463 P.2d 897, 906 (Alaska 1970); State v. Vickers, 129 Ariz. 506, 512, 633 P.2d 315, 321 (1981) (en banc); Stone v. Superior Court, 31 Cal. 3d 503, 507, 646 P.2d 809, 812, 183 Cal. Rptr. 647, 650 (1982) (en banc); State v. Castrillo, 90 N.M. 608, 610, 566 P.2d 1146, 1148 (1977).

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] Should

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sion of Lesser Crimes, 56 Colum. L. Rev. 888, 893-99 (1956) (discussing the amount of evidence required to warrant instruction on lesser offenses).

6. This instruction has been approved in most jurisdictions. *See, e.g.*, Nell v. State, 642 P.2d 1361, 1367 (Alaska 1982); State v. Wussler, 139 Ariz. 428, 430, 679 P.2d 74, 76 (1984) (en banc); Stone v. Superior Court, 31 Cal. 3d 503, 519, 646 P.2d 809, 820, 183 Cal. Rptr. 647, 658 (1982) (en banc); Lamar v. State, 243 Ga. 401, 402-03, 254 S.E.2d 353, 355, *appeal dismissed*, 444 U.S. 803 (1979); State v. McNeal, 95 Wis. 2d 63, 68-69, 288 N.W.2d 874, 876 (1980); *see also* E. Devitt & C. Blackmar, Federal Jury Practice & Instructions § 18.05, at 582 (3d ed. 1977) (if jury unanimously finds accused not guilty of crime charged in indictment, it must proceed to determine guilt or innocence of lesser offense necessarily included in the crime). *But see* People v. West, 408 Mich. 332, 342, 291 N.W.2d 48, 52 (1980) (such instructions are unduly coercive or intrude on jury's deliberations); State v. Ogden, 35 Or. App. 91, 96-97, 580 P.2d 1049, 1052 (1978) (en banc) (supplemental instructions interfered with jury deliberations).

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).

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(c) 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.

8. Declaration of a mistrial is required when a jury is deadlocked. See *infra* notes 33-35 and accompanying text.

9. 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.

10. 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.[11] Other states would respond that the fifth amendment mandates such a verdict.[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.[13] This protection[14] is

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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).

11. *See, e.g.*, Walters v. State, 255 Ark. 904, 906, 503 S.W.2d 895, 897, *cert. denied*, 419 U.S. 833 (1974); People v. Hall, 25 Ill. App. 3d 992, 995, 324 N.E.2d 50, 52-53 (1975); A Juvenile v. Commonwealth, 392 Mass. 52, 56-57, 465 N.E.2d 240, 243 (1984); People v. Hickey, 103 Mich. App. 350, 353, 303 N.W.2d 19, 21 (1981); State v. Hutter, 145 Neb. 798, 806-07, 18 N.W.2d 203, 209 (1945); State v. Booker, 306 N.C. 302, 305-06, 293 S.E.2d 78, 80 (1982).

12. *See, e.g.*, Stone v. Superior Court, 31 Cal. 3d 503, 519, 646 P.2d 809, 820, 183 Cal. Rptr. 647, 658 (1982) (en banc); State v. Pugliese, 120 N.H. 728, 730, 422 A.2d 1319, 1321 (1980) (per curiam); State v. Castrillo, 90 N.M. 608, 613, 566 P.2d 1146, 1151 (1977).

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* Neilsen, 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"[15] in our judicial system and embraces the defendant's "valued right" to receive a final judgment from the first jury he faces whenever possible.[16] Double jeopardy prevents the state from subjecting an individual to the emotional and financial burdens of multiple prosecutions.[17] Furthermore, unlimited trials increase the likelihood that an innocent person may be convicted.[18] Such an unjust conviction is a greater affront to our system of justice than acquittal of the guilty.[19]

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fendant cannot be twice punished for the same offense. *See* North Carolina v. Pearce, 395 U.S. 711, 717 (1969).

15. This phrase comes from a frequently quoted passage concerning double jeopardy:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be 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.

Green v. United States, 355 U.S. 184, 187-88 (1957). It is cited in many double jeopardy cases. *See, e.g.*, Crist v. Bretz, 437 U.S. 28, 35 (1978); Serfass v. United States, 420 U.S. 377, 387-88 (1975); United States v. Jorn, 400 U.S. 470, 479 (1971) (plurality opinion). For a history of the Court's view of double jeopardy protection see United States v. DiFrancesco, 449 U.S. 117, 126-31 (1980); Arizona v. Washington, 434 U.S. 497, 503-14 (1978); Green v. United States, 355 U.S. 184, 199-211 (1957) (Frankfurter, J., dissenting).

16. 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).

17. 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 "endur[ing] 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).

18. 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*].

19. 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.[20] 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.[21] Moreover, a retrial would be conducted with the invaluable experience of a "dress rehearsal":[22] Witnesses would be better able to convey their stories, and arguments that appeared weak at the first trial could be strengthened.[23]

The defendant's right to be free from a second trial attaches when the first jury is sworn and impaneled.[24] Retrial is barred if that jury is discharged without the defendant's consent[25] before a final verdict unless there is showing of "manifest necessity."[26]

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20. Arizona v. Washington, 434 U.S. 497, 505 (1978). See *supra* note 18.

21. *See* Burks v. United States, 437 U.S. 1, 11 (1978); Green v. United States, 355 U.S. 184, 187-88 (1957). While the defendant also has additional time, he does not have the same advantage because of his limited access to resources. *See* Findlater, *supra* note 18, at 713; Mayers & Yarbrough, Bis Vexari: *New Trials and Successive Prosecutions*, 74 Harv. L. Rev. 1, 32 (1960).

22. State v. Castrillo, 90 N.M. 608, 612, 566 P.2d 1146, 1150 (1977); *see* Tibbs v. Florida, 457 U.S. 31, 41 (1982); United States v. DiFrancesco, 449 U.S. 117, 128 (1980); United States v. Scott, 437 U.S. 82, 105 n.4 (1978) (Brennan, J., dissenting); Arizona v. Washington, 434 U.S. 497, 508 n.24 (1978); Findlater, *supra* note 18, at 713; *Twice in Jeopardy*, *supra* note 18, at 287-88.

23. *See* Findlater, *supra* note 18, at 713 ("witnesses may be encouraged to do further soul-searching or [the prosecutor may coach] until recollection accords with [his] goals"); Schulhofer, *Jeopardy and Mistrials*, 125 U. Pa. L. Rev. 449, 504-06 (1977) (prosecution obtains two advantages from retrial: any tactical problem in the first trial may be remedied in the second and on retrial prosecution has more insight into defense strategy); Comment, *Double Jeopardy and Reprosecution After Mistrial: Is the Manifest Necessity Test Manifestly Necessary?*, 69 Nw. U.L. Rev. 887, 907 (1975) (repeated attempts at prosecution permit "unnecessary expense and [condone] incompetence" because the prosecutor knows he will have another chance to refine his case) [hereinafter cited as *Manifest Necessity*].

24. *See* Downum v. United States, 372 U.S. 734, 737-38 (1963). In a nonjury trial, double jeopardy attaches when the evidence is first introduced. Serfass v. United States, 420 U.S. 377, 388 (1975). This was made part of the constitutional protection by the Supreme Court in Crist v. Bretz, 437 U.S. 28, 32-33 (1978). The defendant has an interest in retaining the first jury because it may be more favorably disposed to his case. *See, e.g., id.* at 35; Illinois v. Somerville, 410 U.S. 458, 474-75 (1973) (White, J., dissenting) (citing United States v. Jorn, 400 U.S. 470, 484 (1971) (plurality opinion)); United States v. Jorn, 400 U.S. 470, 486 (1971) (plurality opinion); *see also* Schulhofer, *supra* note 23, at 512-14 (defendant's interest in retaining the more favorable jury would be better served by a rule that made double jeopardy attach at the opening of voir dire). *But see* Crist v. Bretz, 437 U.S. 28, 51 (1978) (Powell, J., dissenting) (double jeopardy does protect defendant's interest in a more favorable factfinder).

25. *See* United States v. Scott, 437 U.S. 82, 96 (1978); People v. Strauss, 48 Misc. 2d 1006, 1007, 266 N.Y.S.2d 431, 433 (Crim. Ct. 1965); State v. Deas, 25 N.C. App. 294, 297, 212 S.E.2d 693, 695, *cert. denied*, 287 N.C. 467, 215 S.E.2d 626 (1975); *see also* Oregon v. Kennedy, 456 U.S. 667, 676 (1982) (no consent will be found when defendant's motion for mistrial is provoked by intentional prosecutorial or judicial misconduct); United States v. Dinitz, 424 U.S. 600, 607-10 (1976) (same); United States v. Tateo, 377 U.S. 463, 466-67 (1964) (same).

26. See *infra* notes 27-28 and accompanying text for a discussion of the manifest necessity test.

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."[27] Double jeopardy will not bar a second trial when this manifest necessity test is met.[28]

Exceptions to double jeopardy ensure that defendants will not be freed because of intervening events over which the court has no control.[29] For example, when an advancing army threatened the trial, discharge of the jury prior to its reaching a verdict did not prevent a retrial.[30] 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.[31] At the same time, the defendant has the right to have his innocence proclaimed so that charges are not outstanding against him.[32]

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27. United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824).

28. *Id.* at 579. Manifest necessity is met under a variety of circumstances. *See, e.g.*, Arizona v. Washington, 434 U.S. 497, 510-11 (1978) (prejudicial statements of defense counsel in opening argument); Illinois v. Somerville, 410 U.S. 458, 468-69 (1973) (indictment incurably defective); Thompson v. United States, 155 U.S. 271, 273-74 (1894) (juror member of the grand jury that indicted defendant); Simmons v. United States, 142 U.S. 148, 154 (1891) (juror acquainted with defendant but denied it on voir dire).

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.

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

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 "disserve[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.

The Court has also suggested the need to balance the interests of defendant and state. *See, e.g.*, United States v. Scott, 437 U.S. 82, 100 & n.13 (1978); Arizona v. Washington, 434 U.S. 497, 505 (1978); Illinois v. Somerville, 410 U.S. 458, 471 (1973); Green v. United States, 355 U.S. 184, 187-88 (1957); Findlater, *supra* note 18, at 712-18. *But see* Crist v. Bretz, 437 U.S. 28, 37 n.16 (1978) (suggests that such balancing not always required); Burks v. United States, 437 U.S. 1, 11 n.6 (1978) (same).

32. *See* Arizona v. Washington, 434 U.S. 497, 503-04 (1978) (second prosecution "prolongs the period in which [defendant] is stigmatized by an unresolved accusation of wrongdoing"); Green v. United States, 355 U.S. 184, 187-88 (1957) (retrials embarrass defendant and compel "him to live in a continuing state of anxiety and insecurity"); *cf.* Mayers & Yarbrough, *supra* note 21, at 31 (finality in civil cases allows litigant to plan his financial future without risk of paying an outstanding judgment). Similarly, criminal defendants should be able to plan their lives without the constant fear of punishment. *Cf.*

A hung jury remains the "prototypical example" of manifest necessity justifying the declaration of a mistrial.[33] If a deadlock prevented retrials, the judge might pressure the jury to reach a conclusion.[34] Jurors might exert similar pressure on their peers who are causing the deadlock.[35] 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."[36]

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.[37] This authority, however, "ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes."[38] Nevertheless, many

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Missouri v. Hunter, 459 U.S. 359, 373 (1983) (Marshall, J., dissenting) (criminal convictions impose stigma and cause damage to the reputation of the accused).

33. Oregon v. Kennedy, 456 U.S. 667, 672 (1982); *see* Richardson v. United States, 104 S. Ct. 3081, 3085 (1984) ("established for 160 years . . . that a failure . . . to agree on a verdict was an instance of 'manifest necessity' "). Since Perez v. United States, 22 U.S. (9 Wheat.) 579 (1824), the Supreme Court has decided only a handful of cases that directly involved a deadlocked jury. *See, e.g.*, Keerl v. Montana, 213 U.S. 135, 137-38 (1909); Dreyer v. Illinois, 187 U.S. 71, 85-86 (1902); Logan v. United States, 144 U.S. 263, 297-98 (1892). In dictum, however, the Court consistently mentions the hung jury as a settled exception to double jeopardy. *See* Arizona v. Washington, 434 U.S. 497, 509 (1978); Illinois v. Somerville, 410 U.S. 458, 463 (1973).

34. *See* Arizona v. Washington, 434 U.S. 497, 509-10 (1978); *see also* Brasfield v. United States, 272 U.S. 448, 449-50 (1926) (coercive for judge to inquire into numerical division of hung jury in middle of deliberations); United States v. Edwards, 469 F.2d 1362, 1367 (5th Cir. 1972) (coercive to force doubtful juror to state his or her verdict in presence of court).

Judicial pressure is difficult to measure. The seminal case on the limitation of the judge's charge to a jury is Allen v. United States, 164 U.S. 492 (1896). See *infra* note 37. Additional instructions given to a jury are referred to as an "*Allen charge*" and are the subject of much criticism and comment. An analysis of the appropriateness of an *Allen* charge is beyond the scope of this Note. For a discussion of the various criticisms see American Bar Ass'n, *supra* note 6, § 5.4(b) comment at 149-56.

35. In Allen v. United States, 164 U.S. 492 (1896), the judge warned the jurors to base their decision on independent reasoning and not to "acquiesc[e] in the conclusion of [their] fellows." *Id.* at 501. A hung jury is actually considered to be an indication of independent reasoning by the jury. *See* H. Kalven & H. Zeisel, *supra* note 7, at 453.

36. State v. M'Kee, 17 S.C.L. (1 Bail.) 651, 653 (1830); *see* Arizona v. Washington, 434 U.S. 497, 510 & n.27 (1978) (coercion frustrates the public interest in just judgments); United States v. Martin Linen Supply Co., 430 U.S. 564, 572-73 (1977) (interference with independence of the jury is prohibited); Findlater, *supra* note 18, at 711-12 nn.42-43 (forcing a deadlocked jury to conclude is coercive).

37. United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824); *see* Gori v. United States, 367 U.S. 364, 368 (1961) (trial judge is "best situated intelligently to make such a decision"); Wade v. Hunter, 336 U.S. 684, 689 (1949) (trial judge is far more "conversant with factors relevant to the determination [of whether to declare a mistrial]").

38. United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824); *see* Arizona v. Washington, 434 U.S. 497, 506 (1978) ("manifest necessity cannot be applied mechanically"; attention to the particular problem confronting the court is required); United States v. Jorn, 400 U.S. 470, 486 (1971) (plurality opinion) ("judge must always temper the deci-

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

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sion [to declare a mistrial]" by considering the defendant's right to "conclude his confrontation with society").

39. *See, e.g.*, Walters v. State, 255 Ark. 904, 905-06, 503 S.W.2d 895, 896-97, *cert. denied*, 419 U.S. 833 (1974) (defendant's request to receive a partial verdict dismissed in two page opinon based solely on manifest necessity because of hung jury); People v. Hickey, 103 Mich. App. 350, 353, 303 N.W.2d 19, 21 (1981) (defendant's request denied based on California case of People v. Griffin, 66 Cal. 2d 459, 464, 426 P.2d 507, 510, 58 Cal. Rptr. 107, 110 (1967) (en banc), which did not even address the issue); State v. Booker, 306 N.C. 302, 305-06, 293 S.E.2d 78, 80-81 (1982) (addressing the issue by quoting the entire discussion in *Hickey*).

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.

42. *See* Stone v. Superior Court, 31 Cal. 3d 503, 514, 646 P.2d 809, 816, 183 Cal. Rptr. 647, 654 (1982); State v. Castrillo, 90 N.M. 608, 613, 566 P.2d 1146, 1151 (1977).

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).

In addition, many states require a general verdict on the entire charge and do not allow

verdict can easily meet these requirements.[47] 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 burdensome task of rehearing the same case against the defendant.[48]

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.[49] 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.[50] However, a jury considering a single charge with lesser included offenses is generally not permitted to

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a special verdict on specific facts or issues. *See, e.g.*, Mont. Code Ann. § 46-16-603(1) (1983); Tex. Code Crim. Proc. art. 37.07(1)(a) (Vernon 1981); Mass. R. Crim. P. 27(a). 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, 243 (1984).

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 Cal. 3d 503, 511, 646 P.2d 809, 814-15, 183 Cal. Rptr. 647, 652-53 (1982) (en banc) (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 manslaughter; 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)(i) (McKinney 1982). Receipt of a verdict 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

51. *See, e.g.*, Walters v. State, 255 Ark. 904, 906, 503 S.W.2d 895, 897, *cert. denied*, 419 U.S. 833 (1974); People v. Hall, 25 Ill. App. 3d 992, 993-94, 324 N.E.2d 50, 51-52 (1975); A Juvenile v. Commonwealth, 392 Mass. 52, 56-57, 465 N.E.2d 240, 243-44 (1984). Instead of accepting partial verdicts, these courts discharged the juries on the basis of manifest necessity. See *supra* notes 27-28 and accompanying text.

52. *See* Stone v. Superior Court, 31 Cal. 3d 503, 517-18, 646 P.2d 809, 819, 183 Cal. Rptr. 647, 657 (1982) (en banc).

53. A Juvenile v. Commonwealth, 392 Mass. 52, 56, 465 N.E.2d 240, 244 (1984) (quoting People v. Hickey, 103 Mich. App. 350, 353, 303 N.W.2d 19, 21 (1981)); State v. Booker, 306 N.C. 302, 306, 293 S.E.2d 78, 81 (1982) (same). These cases and the case of People v. Hall, 25 Ill. App. 3d 992, 994, 324 N.E.2d 50, 52 (1975), rely in part on People v. Griffin, 66 Cal. 2d 459, 426 P.2d 507, 58 Cal. Rptr. 107 (1967) (en banc), which held that a verdict of a deadlocked jury is not final because it represents a compromise, *see id.* at 464, 426 P.2d at 510, 58 Cal. Rptr. at 110. Reliance on *Griffin* is misplaced because "[t]he primary concern of the *Griffin* court was to insure that a verdict represents the definite and final expression of the jury's intent." Stone v. Superior Court, 31 Cal. 3d 503, 514, 646 P.2d 809, 816, 183 Cal. Rptr. 647, 654 (1982) (en banc). The *Griffin* court was asked to challenge the verdict *after* the jury had been discharged. *Id.* at 514, 646 P.2d at 816, 183 Cal. Rptr. at 654. Moreover, the *Stone* court subsequently approved of accepting a verdict from a deadlocked jury charged on lesser included offenses. *See id.* at 519-20, 646 P.2d at 820, 183 Cal. Rptr. at 658.

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

55. People v. Hickey, 103 Mich. App. 350, 353, 303 N.W.2d 19, 21 (1981); *see* A Juvenile v. Commonwealth, 392 Mass. 52, 56, 465 N.E.2d 240, 244 (1984) (citing *Hickey*, 103 Mich. App. at 353, 303 N.W.2d at 21); State v. Booker, 306 N.C. 302, 306, 293 S.E.2d 78, 81 (1982) (same).

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).

57. *See* State v. Castrillo, 90 N.M. 608, 612, 566 P.2d 1146, 1150 (1977).

to return a verdict of guilty or not guilty for each offense;[58] 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.[59]

Courts currently employ both alternatives.[60] Submitting individual forms for each offense assures the court that a jury's decision is based upon full knowledge of its options,[61] but this procedure may be perceived as coercive because it suggests that the jury compromise for the sake of reaching a conclusion.[62] 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.[63] Thus, providing the jury with forms for all offenses is a procedural safeguard against unjust convictions.[64]

Independent decisionmaking is also crucial to the deliberation process.[65] 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.[66] 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.[67]

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58. *See* Stone v. Superior Court, 31 Cal. 3d 503, 519, 646 P.2d 809, 820, 183 Cal. Rptr. 647, 658 (1982) (en banc); State v. Castrillo, 90 N.M. 608, 611, 566 P.2d 1146, 1149 (1977); N.Y. Crim. Proc. Law § 310.70 (McKinney 1982).

59. *See* Stone v. Superior Court, 31 Cal. 3d 503, 520, 646 P.2d 809, 820, 183 Cal. Rptr. 647, 658 (1982); State v. Castrillo, 90 N.M. 608, 611, 566 P.2d 1146, 1149 (1977); N.M. R. Crim. P. 44(d).

60. See *supra* notes 59-60.

61. *See* Beck v. Alabama, 447 U.S. 625, 637 (1980).

62. *See* Missouri v. Hunter, 459 U.S. 359, 372 (1983) (Marshall, J., dissenting). *But see* Standefer v. United States, 447 U.S. 10, 22 (1980) (jury is permitted to acquit out of compassion or compromise); Dunn v. United States, 284 U.S. 390, 393-94 (1932) (verdicts resulting from compromise will not be overturned); United States v. Campbell, 684 F.2d 141, 151 (D.C. Cir. 1982) (compromise verdicts are not unacceptable); *cf.* Hamling v. United States, 418 U.S. 87, 101 (1974) (that different juries reach different results is a consequence of our system).

63. *See* People v. Hall, 25 Ill. App. 3d 992, 995, 324 N.E.2d 50, 52 (1975).

64. *Cf.* Beck v. Alabama, 447 U.S. 625, 637 (1980) (lesser included offense instruction is a procedural safeguard).

65. *See* United States v. Martin Linen Supply Co., 430 U.S. 564, 572-73 (1977).

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).

67. Polling enables the court and the parties "to ascertain for a certainty that each of the jurors approves of the verdict as returned." Humphries v. District of Columbia, 174 U.S. 190, 194 (1899). In most states the parties have a right to poll the jury. *See, e.g.*, Ruffin v. State, 123 A.2d 461, 467 (Del. 1956); Shouse v. State, 231 Ga. 716, 717, 203 S.E.2d 537, 539 (1974). In some states, however, polling is at the discretion of the court. *See, e.g*, Commonwealth v. Valliere, 366 Mass. 479, 497, 321 N.E.2d 625, 637 (1974); Annot., 49 A.L.R.2d 619 (1956). There is no rule as to the form of questioning when polling. *See* White v. Seaboard Coast Line R.R., 139 Ga. App. 829, 833, 229 S.E.2d 775, 777-78 (1976). For polling in federal court, see Fed. R. Crim. P. 31(d). Polling before the

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.[68] Collateral estoppel precludes relitigation of issues that have been decided in a final and valid judgment between the same parties.[69] Application of this doctrine requires the ability to ascertain exactly what the first jury decided.[70] If it is clear from the trial record that the jury deadlocked on the lesser offenses[71] 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*.[72] The Court held that when a defendant has been put

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jury reaches a verdict is generally not permitted. *See, e.g.*, Favors v. State, 234 Ga. 80, 88-89, 214 S.E.2d 645, 652 (1975); People v. Hanna, 2 Ill. App. 3d 672, 674, 276 N.E.2d 796, 798 (1971); Commonwealth v. Pacini, 224 Pa. Super. 497, 500, 307 A.2d 346, 348 (1973). The jury charged with lesser included offenses can reach a verdict as to some of the charges, see *supra* notes 49-51 and accompanying text, so that the rule against preverdict polling will not be violated. The federal courts do not require a partial verdict on greater offenses when the jury deadlocks on lesser included offenses. *See* Winston v. Moore, 452 U.S. 944, 946-47 (1981) (Rehnquist, J., dissenting from denial of certiorari); United States v. Medansky, 486 F.2d 807, 813 (7th Cir. 1973), *cert. denied*, 415 U.S. 989 (1974).

68. Stone v. Superior Court, 31 Cal. 3d 503, 519-20, 646 P.2d 809, 820, 183 Cal. Rptr. 647, 658 (1982); State v. Castrillo, 90 N.M. 608, 611-12, 566 P.2d 1146, 1149-50 (1977). By accepting a partial verdict the court does not challenge the longstanding rule that a jury's verdict cannot be impeached by an affidavit produced after its valid return. *See* People v. Hall, 25 Ill. App. 3d 992, 994, 324 N.E.2d 50, 52 (1975); A Juvenile v. Commonwealth, 392 Mass. 52, 57, 465 N.E.2d 240, 244 (1984). Implying a partial verdict is only appropriate when the trial record establishes the clear intent of the jury. See *infra* note 72.

69. Restatement (Second) of Judgments § 27 (1982). The doctrine requires that "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the same parties, whether on the same or a different claim." *Id.* Collateral estoppel was made part of double jeopardy protection by Ashe v. Swenson, 397 U.S. 436, 445 (1970). For a history of the doctrine in criminal law, see Mayers & Yarbrough, *supra* note 22, at 29-41; *cf.* 1B J. Moore, J. Lucas & T. Currier, Moore's Federal Practice ¶¶ .441-.448 (2d ed. 1984) (discussing collateral estoppel in civil context); Scott, *Collateral Estoppel by Judgment*, 56 Harv. L. Rev. 1 (1942) (same).

70. Hoag v. New Jersey, 356 U.S. 464, 472 (1958). If the record is unclear regarding where the jury deadlocked, the greatest protection defendant could receive is to be retried only on the least included offense. *See* State v. Castrillo, 90 N.M. 608, 613-14, 566 P.2d 1146, 1151-52 (1977). But a partial verdict should not be implied unless the record unequivocally states the intent of the jury to acquit on that offense. See *infra* note 72.

71. *See, e.g.*, Stone v. Superior Court, 31 Cal. 3d 503, 514, 646 P.2d 809, 816-17, 183 Cal. Rptr. 647, 654-55 (1982). *But see* Walters v. State, 255 Ark. 904, 906-07, 503 S.W.2d 895, 897 (trial record clear that jury deadlocked between involuntary manslaughter and not guilty but it did not justify an implicit acquittal on any of the greater offenses), *cert. denied*, 419 U.S. 833 (1974); State v. Booker, 306 N.C. 302, 304, 293 S.E.2d 78, 79 (1982) (note from foreman indicating that jury was deadlocked at second degree murder did not warrant implicit acquittal on the first degree murder charge).

72. *See* 355 U.S. 184, 190-91 (1957).

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.[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.[74] A second prosecution on the greater charge is thus necessarily barred.[75] Of course the defendant may be reprosecuted on the lesser offenses in accordance with the "manifest necessity" standard.[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.[77]

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

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.

Mary S. O'Keefe

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73. *See id.*

74. In 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. *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 *Green*, 355 U.S. at 190 n.10).

75. See *supra* note 10 and accompanying text for a discussion of acquittal as an absolute bar to retrial.

76. See *supra* notes 27-28 and accompanying text for a discussion of the manifest necessity standard.

77. *See* State v. Castrillo, 90 N.M. 608, 612, 566 P.2d 1146, 1150 (1977). See *supra* note 31 and accompanying text for a discussion of the public's interest in finality.

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

79. See *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.