WHEN DOUBLE JEOPARDY SHOULD BAR RETRIAL IN CASES OF PROSECUTORIAL MISCONDUCT: A CALL FOR BROADER STATE PROTECTIONS

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In Oregon v. Kennedy, *the Supreme Court held that the Double Jeopardy Clause does not bar the reprosecution of a defendant in cases in which prosecutorial misconduct causes the defendant to move for a mistrial. The Court established only one exception to this rule: If the prosecutor's misconduct was intended to provoke the defendant into moving for a mistrial, the Double Jeopardy Clause bars the retrial of the defendant. The* Kennedy *standard thus allows for the retrial of a defendant in any case in which prosecutorial misconduct was aimed at securing the conviction of the defendant.*

Since Kennedy *was decided, only seven states have determined that their state double jeopardy clauses provide defendants with broader protection against retrial in cases of prosecutorial misconduct. Each provides that a defendant cannot be retried in cases of egregious or overly prejudicial prosecutorial misconduct, regardless of whether the misconduct was aimed at goading the defendant to move for a mistrial.*

This Note argues that all states ought to adopt standards broader than Kennedy *under their state constitutions. Broader standards better uphold the purpose of double jeopardy by more rigorously protecting defendants' rights while also accommodating the interests of society in preventing crime. Additionally, this Note argues that lower courts in the seven states that have adopted broader standards have not struggled to apply these standards, and the Supreme Court's concern that judges will not grant mistrials under broader standards has not been borne out by experience.*

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INTRODUCTION

In 1983, Fernando Melchor-Gloria was convicted of second-degree murder for the death of Juan Mena,[1] who was stabbed to death inside a room at the Grand Hotel in Reno, Nevada.[2] At the heart of the prosecution's case against Melchor-Gloria were several incriminating statements that he made while being interrogated by the police.[3] The police had

1. Melchor-Gloria v. State, 660 P.2d 109, 110 (Nev. 1983).
2. Mistrial Declared in Murder Case, Reno Evening Gazette, Dec. 13, 1979, at 21.
3. See *Melchor-Gloria*, 660 P.2d at 111.

failed to read Melchor-Gloria his full *Miranda* rights before this interrogation began,[4] however, so these statements were inadmissible at trial.[5] Despite previously discussing the inadequacy of Melchor-Gloria's *Miranda* warnings with defense counsel and having transcripts of the interrogation in which the deficiencies were clear, the prosecutor referenced these incriminating statements during his opening argument to the jury.[6] In response, Melchor-Gloria moved for a mistrial, and the judge granted the motion without prejudice to the prosecution.[7]

Melchor-Gloria then moved to bar retrial under the Double Jeopardy Clause of the United States or Nevada Constitutions.[8] The federal Double Jeopardy Clause guarantees that "[n]o person shall be . . . subject for the same offense to be twice put in jeopardy of life or limb."[9] Generally, in cases in which the defendant moves for or consents to the mistrial, a retrial is not barred by double jeopardy.[10] Melchor-Gloria argued, though, that retrial ought to be barred because the mistrial was caused by prosecutorial misconduct.[11]

On appeal, the Nevada Supreme Court applied the Supreme Court's test from *Oregon v. Kennedy* to determine whether the federal Double Jeopardy Clause barred the retrial of Melchor-Gloria.[12] *Kennedy* affirmed the "general rule" that in cases in which the defendant moves for a mistrial, "the double jeopardy clause does not bar reprosecution."[13] *Kennedy* also recognized a narrow exception to this rule, though: Reprosecution is barred if the state "intended to goad the defendant into moving for a mistrial."[14] The Nevada Supreme Court deferred to the trial court's finding that "there was no intentional conduct on the part of the prosecutor which could be classified as bad faith" and found that the *Kennedy* exception was

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4. See id. The Fifth Amendment requires that criminal suspects in police custody be informed of their right to silence—including their right to refuse to answer questions or provide information to law enforcement—and their right to obtain an attorney during police interrogations. See Miranda v. Arizona, 384 U.S. 436, 444–45 (1966) ("Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.").

5. See *Miranda*, 384 U.S. at 479 ("[U]nless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.").

6. *Melchor-Gloria*, 660 P.2d at 111.

7. Id.

8. Id.

9. U.S. Const. amend. V.

10. See infra section I.B.

11. *Melchor-Gloria*, 660 P.2d at 111.

12. Id. at 111–12.

13. Oregon v. Kennedy (*Kennedy I*), 456 U.S. 667, 670 (1982) (internal quotation marks omitted) (quoting United States v. Jorn, 400 U.S. 470, 485 (1971) (plurality opinion)).

14. Id. at 676.

not applicable in Melchor-Gloria's case.[15] Thus, the retrial of Melchor-Gloria was not barred by the federal Double Jeopardy Clause.[16]

The Nevada Supreme Court also considered whether the double jeopardy clause of the Nevada Constitution[17] barred the reprosecution of Melchor-Gloria. While *Kennedy* set the standard for the federal Double Jeopardy Clause, the Nevada Supreme Court was free to determine that the state's own constitution provided more protection for defendants.[18] Instead, the Nevada Supreme Court adopted the federal *Kennedy* test as the proper standard under the Nevada Constitution's double jeopardy clause. The Nevada Supreme Court did not explain its reasons for doing so, noting only that "[t]hese double jeopardy principles have been made obligatory upon the states."[19] The court held that "prosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on defendant's motion, does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause."[20] Finding no prosecutorial intent to force the defendant to move for a mistrial, the Nevada Supreme Court affirmed Melchor-Gloria's conviction.[21]

Until 2017, Nevada courts continued to read the Nevada Constitution's double jeopardy clause in line with *Kennedy*.[22] In *Thomas v. Eighth Judicial District Court of Nevada*, however, the Nevada Supreme Court once again considered whether the state's double jeopardy protections extend to defendants in cases in which prosecutorial misconduct or prejudicial error causes the first trial to result in a mistrial.[23] The defendant in *Thomas* was the former CEO of the University Medical Center in Nevada and was charged with five counts of theft and official misconduct for entering into

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15. *Melchor-Gloria*, 660 P.2d at 112.

16. Id.

17. Nev. Const. art. I, § 8 ("No person shall be subject to be twice put in jeopardy for the same offense.").

18. See, e.g., Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980) (recognizing "the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution" (citing Cooper v. California, 386 U.S. 58, 62 (1967))); Palmieri v. Clark County, 367 P.3d 442, 464 (Nev. 2015) (recognizing that "a state is free to 'impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so'" (citing *Cooper*, 386 U.S. at 62)).

19. *Melchor-Gloria*, 660 P.2d at 112 (citing Benton v. Maryland, 395 U.S. 784, 793–96 (1969)).

20. Id.

21. Id. at 116–17.

22. See, e.g., O'Dell v. Eighth Jud. Dist. Ct. of State ex rel Cnty. of Clark, No. 63534, 2013 WL 3967118, at *1 (Nev. July 29, 2013) (applying the *Kennedy* standard); Rudin v. State, 86 P.3d 572, 586 n.30 (Nev. 2004) (same); Benson v. State, 895 P.2d 1323, 1326 (Nev. 1995) (same); Gaitor v. State, 801 P.2d 1372, 1374–75 (Nev. 1990), overruled in part by Barone v. State, 866 P.2d 291 (1983) (same).

23. 402 P.3d 619, 624–28 (Nev. 2017).

business contracts with companies owned by personal friends.[24] At trial, an attorney for one of the companies told Thomas's attorney outside of court that there was a binder of documents that might exculpate Thomas.[25] The documents had been provided to the detectives investigating Thomas but had never been shown to his attorney.[26] Thomas moved for a mistrial because of the prosecution's failure to disclose this evidence, and the district court granted the motion.[27] Thomas then moved to dismiss the charges under the federal and state double jeopardy clauses.[28] The district court, finding that the prosecution had not withheld the documents from Thomas with the intent to provoke a mistrial, denied the motion.[29]

Taking up the case, the Nevada Supreme Court determined that the Nevada Constitution's double jeopardy clause did bar the reprosecution of Thomas[30]—a significant change from its interpretation in *Melchor-Gloria*. Citing the difficulties of applying the *Kennedy* standard and the deficient double jeopardy protections that it affords, the Nevada Supreme Court held that "the protections of Article 1, Section 8 of the Nevada Constitution . . . attach to those instances when a prosecutor intentionally proceeds in a course of egregious and improper conduct that causes prejudice to the defendant which cannot be cured by means short of a mistrial."[31] With the *Thomas* decision, Nevada became the seventh state to adopt an interpretation of its state double jeopardy clause that protects defendants in cases of prosecutorial error or misconduct more broadly than *Kennedy*.[32]

This Note argues that these broader state standards protect the double jeopardy rights of defendants more adequately than the *Kennedy* standard while also advancing the interests of the public in law enforcement. This Note also argues that the Supreme Court's concerns that broader standards cannot be implemented by lower courts are unfounded. Part I provides an overview of the interests protected by the Double Jeopardy Clause and how double jeopardy applies in the mistrial context; it then describes the *Kennedy* standard and broader state standards. Part II details the opposing rationales for adopting the *Kennedy* standard and adopting broader standards. Part II also presents the findings of a state-by-state review of the standard applied in each state, which demonstrate that, while the majority of states have adopted the *Kennedy* standard, very few did so after considering whether it was the appropriate standard under their state constitutions. Part III analyzes the justifications for adopting *Kennedy* and broader standards to determine which standard better upholds double

24. Id. at 622.
25. Id.
26. Id.
27. Id.
28. See id. at 623.
29. See id.
30. Id. at 624–30.
31. Id. at 626.
32. See infra notes 112–119 and accompanying text.

jeopardy interests and also considers the practical implications of adopting either standard. Ultimately, this Note calls on states that have adopted the *Kennedy* standard to adopt broader standards under their state constitutions.

I. DOUBLE JEOPARDY, *OREGON V. KENNEDY*, AND STATE RESPONSES

The Fifth Amendment of the U.S. Constitution provides that "[n]o person shall be . . . subject for the same offense to be twice put in jeopardy of life or limb."[33] Known as the Double Jeopardy Clause, these words protect defendants from multiple punishments for the same offense, including multiple prosecutions for the same offense after acquittal or conviction.[34] Perhaps most importantly, the clause ensures that a defendant cannot be further prosecuted after a jury has returned a verdict of not guilty.[35] There are limits to the clause's protections, however, which have been determined through considerable judicial interpretation of the clause.

This Part reviews the current law governing the applicability of double jeopardy in cases that result in a mistrial due to prosecutorial misconduct. Section I.A describes the interests protected by the federal Double Jeopardy Clause. Section I.B explores how the Double Jeopardy Clause applies in trials that result in a mistrial generally. Section I.C then details how the Double Jeopardy Clause applies in cases in which prosecutorial misconduct causes a defendant to move for a mistrial and describes how this standard varies by jurisdiction.

A. *Interests Protected by the Federal Double Jeopardy Clause*

The federal Double Jeopardy Clause protects defendants from multiple attempts by the government to prove them guilty.[36] Defendants are afforded this right, in large part, because of the fundamental imbalance

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33. U.S. Const. amend. V.

34. United States v. Wilson, 420 U.S. 332, 343 (1975); see also Jessica L. Edwards, Note, Prosecutorial Misconduct and the Double Jeopardy Clause: An Attempt to Find a Universally Acceptable Standard, 37 Suffolk U. L. Rev. 145, 150 (2004).

35. See Peter Westen, The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences, 78 Mich. L. Rev. 1001, 1004 (1980) (observing that "the constitutional right of a defendant not to be further prosecuted following a jury verdict of not guilty" is "fundamental" to the Double Jeopardy Clause).

36. See Benton v. Maryland, 395 U.S. 784, 794 (1969) (noting that the guarantee against double jeopardy, like the right to trial by jury, is "'fundamental to the American scheme of justice'" and "represents a fundamental ideal in our constitutional heritage" (quoting Duncan v. Louisiana, 391 U.S. 145, 149 (1968))); see also Anne Bowen Poulin, Double Jeopardy Protection From Successive Prosecution: A Proposed Approach, 92 Geo. L.J. 1183, 1186 (2004) (noting that "[t]he [double jeopardy] provision in the Constitution was intended to shield defendants against multiple prosecutions for a single offense").

of power between the government and the accused.[37] The Court has recognized that the government, "*with all its resources and power*[,] should not be allowed to make repeated attempts to convict an individual for an alleged offense."[38] The Double Jeopardy Clause restricts the state's power by requiring that it bring its best case to the first trial and by imposing restrictions on when the state can bring a second prosecution.

Defendants have several interests that are protected by restricting the government to one opportunity to prosecute.[39] First, the Court has consistently recognized that defendants have a right to be free from the "financial and emotional burden[s]" of undergoing successive prosecutions at the hands of the state.[40] Allowing a defendant to be retried subjects the defendant to the "embarrassment, expense and ordeal" of a second trial, as well as the "continuing state of anxiety and insecurity" of enduring successive prosecutions.[41] Furthermore, the protection against successive prosecutions prevents the state from using multiple trials (or the threat thereof) as a method of harassing defendants.[42]

Second, the Court has recognized that defendants are more likely to be convicted and found guilty if subjected to successive trials.[43] For example, the government may have the chance to try out different theories of guilt or test how juries respond to certain evidence in the first trial and use this enhanced understanding of the case to its benefit in the second trial.[44] The Double Jeopardy Clause prevents the government from having the chance to gather or refine evidence that it "failed to muster in the first proceeding."[45] Thus, the clause prohibits the state from getting a second

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37. See Bennett L. Gershman, The New Prosecutors, 53 U. Pitt. L. Rev. 393, 393–423 (1992) (describing how "prosecutors wield vastly more power than ever before," including investigative powers, charging powers, convicting powers, and sentencing powers); Kenneth Rosenthal, Prosecutor Misconduct, Convictions, and Double Jeopardy: Case Studies in an Emerging Jurisprudence, 71 Temp. L. Rev. 887, 896–98 (1998) (describing the "extensive" and "unique privileges and resources" of the prosecutor's office).

38. Green v. United States, 355 U.S. 184, 187–88 (1957) (emphasis added).

39. See, e.g., Peter Westen & Richard Drubel, Toward a General Theory of Double Jeopardy, 1978 Sup. Ct. Rev. 81, 84 (describing the three primary interests protected by Double Jeopardy Clause as: (1) interest in finality, (2) interest in avoiding double punishment, and (3) interest in nullification or allowing the 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) (explaining that the Double Jeopardy Clause protects the finality of verdicts and the integrity of jury acquittals and prevents prosecutors from wearing down innocent defendants and engaging in excessive prosecutorial discretion).

40. Arizona v. Washington, 434 U.S. 497, 503 (1978).

41. *Green*, 355 U.S. at 187–88.

42. *Washington*, 434 U.S. at 508.

43. *Green*, 355 U.S at 187–88 (noting that "repeated attempts to convict" may "enhanc[e] the possibility that even though innocent he may be found guilty").

44. See United States v. DiFrancesco, 449 U.S. 117, 128 (1980) ("Implicit in this is the thought that if the Government may reprosecute, it gains an advantage from what it learns in the first trial about the strengths of the defense case and the weaknesses of its own.").

45. Burks v. United States, 437 U.S. 1, 11 (1978).

opportunity to leverage its power to bring a better case in a second trial. Similarly, were the state able to pursue multiple trials against the same individuals until they were found guilty, there is a risk that defendants would be convicted simply because they were worn down by the burden of numerous trials.[46]

Third, defendants have a related interest in the finality of a verdict from the first tribunal to hear their cases.[47] Regardless of the verdict of the first trial, defendants are entitled to a "repose" from again being put on trial by the state.[48] At the conclusion of the first full trial, a defendant is secure in the knowledge that the case is closed unless he or she chooses to appeal the verdict. In the words of the Supreme Court, a defendant has an interest to conclude "once and for all . . . his confrontation with society."[49] The protection of this interest is arguably most important in cases of acquittal. When the jury finds that a defendant is not guilty, the state cannot initiate a second trial because of the defendant's right to the finality of the first verdict.[50] This protection extends to cases in which the jury chooses to acquit a defendant against the evidence (a process called jury nullification). In these cases, the defendant's right to the finality of the acquittal still applies.[51]

At the same time, however, the court must balance the defendant's multiple interests against the interests of society when determining when the Double Jeopardy Clause bars reprosecution (unless, as noted,[52] the defendant has been acquitted, in which case the defendant's interests will

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46. See William S. McAninch, Unfolding the Law of Double Jeopardy, 44 S.C. L. Rev. 411, 433 (1993) ("The essence of double jeopardy protection, prohibiting retrial following either acquittal or its functional equivalent, is that the government must not risk convicting innocent citizens by wearing down defendants through repeated trials . . . .").

47. See Edwards, supra note 34, at 150 (citing United States v. Jorn, 400 U.S. 470, 479 (1971) (plurality opinion)).

48. Rick A. Bierschbach, Note, One Bite at the Apple: Reversals of Convictions Tainted by Prosecutorial Misconduct and the Ban on Double Jeopardy, 94 Mich. L. Rev. 1346, 1350 (1996); see also David L. Botsford & Stanley G. Schneider, The "Law Game": Why Prosecutors Should Be Prevented From a Rematch; Double Jeopardy Concerns Stemming From Prosecutorial Misconduct, 47 S. Tex. L. Rev. 729, 756 (2006) ("The burden of multiple prosecutions on the accused is readily apparent when the State attempts to retry him in the face of an extant conviction or acquittal.").

49. *Jorn*, 400 U.S. at 486.

50. See supra notes 34–35 and accompanying text.

51. See Westen, supra note 35, at 1012–18 ("The instant rule of double jeopardy, that the state may not take an appeal from an erroneous jury verdict of not guilty, is an aspect of the broader principle of jury nullification: the jury-acquittal rule derives from the criminal jury's constitutional prerogative to acquit against the evidence."); Bierschbach, supra note 48, at 1351 ("Pre-verdict trial terminations deprive a defendant of the 'option to go to the first jury and, perhaps, end the dispute then and there with an acquittal.'" (quoting *Jorn*, 400 U.S. at 484)).

52. See supra notes 34–35 and accompanying text.

always outweigh society's interests).[53] Primarily, society has an interest in enforcing laws and protecting the public against potential perpetrators of crime.[54] Some courts have expressed concern that a liberal application of the Double Jeopardy Clause would allow defendants who have likely committed crimes to avoid conviction, which would threaten the safety of the community.[55] As the Supreme Court explained in *United States v. Tateo*, "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."[56] Thus, in cases of minor prosecutorial error, the state's interest in preventing crime outweighs a defendant's interest in only being subjected to one trial. The proper remedy in most cases of routine prosecutorial error is therefore to grant a mistrial and allow the state to retry the case.

Based on this balancing approach, the Court has established several categorical rules and standards to determine when double jeopardy protections bar the retrial of a defendant.[57] The next section describes the standards that courts apply in cases that result in a mistrial, and section I.C then discusses more specifically how double jeopardy applies in mistrials caused by prosecutorial misconduct.

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53. See, e.g., *Kennedy I*, 456 U.S. 667, 682 (1982) (Stevens, J., concurring in the judgment) ("The defendant's interest in finality . . . must be balanced against society's interest in affording the prosecutor one full and fair opportunity to present his evidence to the jury."); Wade v. Hunter, 336 U.S. 684, 689 (1949) ("[A] defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments."); State v. Rogan, 984 P.2d 1231, 1242 (Haw. 1999) ("These protections seek to balance two primary and sometimes countervailing interests underlying double jeopardy—defendants' interests and societal interests."). But see George C. Thomas III, An Elegant Theory of Double Jeopardy, 1988 U. Ill. L. Rev. 827, 883 (arguing that the balancing approach should be discarded in favor of a verdict-finality theory, under which the government cannot relitigate any part of culpability after the fact-finder has returned a verdict).

54. See, e.g., United States v. Tateo, 377 U.S. 463, 466 (1964) (noting the "societal interest in punishing one whose guilt is clear"); Edwards, supra note 34, at 151–52 (noting the public's interest in "effective law enforcement to deter others from committing crimes and to protect the public when guilty defendants escape imprisonment through attorney misconduct"); Jaclyn Kurin, Note, Once Was Enough: Extending the Double Jeopardy Clause to Prohibit the Reprosecution of Defendants Who Were Wrongfully Convicted Because of Official Misconduct, 16 Conn. Pub. Int. L.J. 131, 152 (2017) (noting opposition to a double jeopardy bar in cases of official misconduct because of the potential risk to the public).

55. See, e.g., State v. Torres, 744 A.2d 699, 703–04 (N.J. Super. Ct. App. Div. 2000) (noting that the public has a right to "the fair and vigilant enforcement of the criminal laws" and speculating that "[t]o set free criminal suspects whenever a trial is aborted would deny the innocent the protection due them").

56. *Tateo*, 377 U.S. at 466.

57. See generally McAninch, supra note 46 (describing the different cases when double jeopardy attaches and when jeopardy continues).

B. *Double Jeopardy Clause and Mistrials*

Due to this balancing of interests—and despite the clause's expansive language—the Double Jeopardy Clause does not bar reprosecution every time a defendant comes before a court more than once on the same charge. In fact, courts have never interpreted the clause to mean that a defendant can only ever be subjected to one trial for a single offense.[58] In *United States v. Ball*, the Supreme Court recognized that a defendant whose conviction was reversed on appeal may properly be retried.[59] Limitations to the applicability of double jeopardy are necessary, in part, because "[i]f the law were otherwise, 'the purpose of law to protect society from those guilty of crimes frequently would be frustrated by denying courts power to put the defendant to trial again.'"[60]

In cases resulting in a mistrial, the law governing when the Double Jeopardy Clause applies is somewhat of a tangled knot.[61] At its core, the Double Jeopardy Clause protects acquittals and the finality of acquittal verdicts.[62] A mistrial prevents the first fact-finder from potentially acquitting the defendant and thus interferes with this protection. If the state were able to cause mistrials to avoid an acquittal (if the government actor sensed the first trial was going poorly, for example), then the defendant's right to a decision from the first jury empaneled to hear the case would be violated.[63]

Thus, in the mistrial context, the determination of whether a defendant can be retried depends on the party that moved for the mistrial. If the government requests the mistrial over protests from the defendant, then the state has the burden of showing that the mistrial was a "manifest

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58. See Botsford & Schneider, supra note 48, at 765 ("The Double Jeopardy Clause of the Fifth Amendment is not designed and has never been construed by the Supreme Court to guarantee the accused the chimerical right to have his case tried to the verdict before his first tribunal absent a fundamentally fair proceeding.").

59. 163 U.S. 662, 672 (1896) ("[A] defendant, 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 offense of which he has been convicted."). The Court has since recognized an exception to this rule in cases in which reversal was due to insufficient evidence. Burks v. United States, 437 U.S. 1, 18 (1978) ("[W]e hold today that the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient . . . .").

60. *Kennedy I*, 456 U.S. 667, 672 (1982) (quoting Wade v. Hunter, 336 U.S. 684, 689 (1949)).

61. See McAninch, supra note 46, at 414 (providing a detailed "chart through the difficult waters of double jeopardy" and analyzing its application in a wide range of scenarios).

62. See, e.g., Botsford & Schneider, supra note 48, at 755–56 (noting that conduct that interferes with a potential acquittal triggers the federal Double Jeopardy Clause because "the initial proceeding would otherwise be fairly decided" and could be decided against the state).

63. See Bierschbach, supra note 48, at 1359–60 ("[I]f the Government simply could abort any proceeding that it perceived as going poorly, the defendant's protected interest in the finality of the verdict would be little more than a 'hollow shell.'" (quoting *Kennedy I*, 456 U.S. at 673)).

necessity" in order to retry the defendant.[64] On the other hand, if the defendant moves for or consents to the mistrial, then retrial of the defendant is presumptively permitted.[65] In mistrials requested or consented to by the defendant, the defendant has "waive[d]" his or her right to double jeopardy protection by forfeiting the opportunity to have the first jury decide his or her case.[66] In these cases, the action that prompted the defendant to move for the mistrial is of little consequence; it matters only that "the defendant retain[ed] primary control over the course to be followed."[67] If the defendant freely made the decision to move for a mistrial, the Double Jeopardy Clause does not bar a retrial.

The analysis becomes more complicated in cases in which the defendant moves for a mistrial because of the state's misconduct. If the misconduct is minor, the court will generally grant the mistrial and allow the defendant to be retried under the waiver analysis previously described.[68] If the misconduct is intentional or egregious,[69] however, the question of

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64. See 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."); United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824) ("We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all circumstances into consideration, there is a manifest necessity for the act . . . .").

65. See United States v. Dinitz, 424 U.S. 600, 607 (1976) ("[W]here circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution . . . ." (quoting United States v. Jorn, 400 U.S. 470, 485 (1971) (plurality opinion))).

66. Id. at 608–09.

67. Id.

68. Id.

69. The Supreme Court has described prosecutorial misconduct as that which "overstep[s] the bounds of that propriety and fairness which should characterize the conduct of . . . an officer in the prosecution of a criminal offense." Berger v. United States, 295 U.S. 78, 84 (1935). For a list of actions that have been found to be prosecutorial misconduct, see id. at 84–85; Peter A. Joy, The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System, 2006 Wis. L. Rev. 399, 402–03. Statistics on prosecutorial misconduct are hard to come by, partly because misconduct can be difficult to define, but also largely because some misconduct is rarely discovered. Emily M. West, Innocence Project, Court Findings of Prosecutorial Misconduct Claims in Post-Conviction Appeals and Civil Suits Among the First 255 DNA Exoneration Cases 1 (2010), https://www.innocenceproject.org/wp-content/uploads/2016/04/pmc_appeals_255_final_oct_2011.pdf [https://perma.cc/QQQ2-WECF]. Studies looking at DNA exonerations have identified wrongful convictions based on prosecutorial misconduct in many cases, however. See Samuel R. Gross, Maurice J. Possley, Kaitlin Jackson Roll & Klara Huber Stephens, Nat'l Registry of Exonerations, Government Misconduct and Convicting the Innocent: The Role of Prosecutors, Police and Other Law Enforcement 7, 11 (2020), http://www.law.umich.edu/special/exoneration/Documents/Government_Misconduct_and_Convicting_the_Innocent.pdf [https://perma.cc/QX3G-JKF2] (finding that "[o]fficial misconduct contributed to the conviction of innocent defendants in 54% of known exonerations," in a sample size of 2,663 exoneration cases); West, supra, at 2 (finding prosecutorial misconduct in 25% of 255 DNA exoneration cases). For recent examples of egregious prosecutorial misconduct, see Botsford & Schneider, supra note 48, at 734–42.

whether the defendant can be retried depends on the specific intent of the prosecutor and the jurisdiction of the court hearing the case. The nuances of how double jeopardy applies in cases that result in a mistrial due to prosecutorial misconduct are discussed further in the next section.

C. *Double Jeopardy Protection in Cases of Prosecutorial Misconduct*

1. *Supreme Court Precedent Prior to* Kennedy*: Basis for a Broader Approach.* — Prior to its decision in *Oregon v. Kennedy*, the Supreme Court had considered on several occasions how the Double Jeopardy Clause protects defendants in cases of prosecutorial misconduct and had suggested that retrial of a defendant may be barred when the prosecutorial conduct was "overreaching." In a plurality opinion in *United States v. Jorn*, the Supreme Court explained that when a defendant moves for a mistrial, the Double Jeopardy Clause does not bar reprosecution because the defendant made the "decision whether or not to take the case from the jury."[70] Importantly, though, the plurality distinguished circumstances that are "attributable to prosecutorial or judicial overreaching" from situations of "prosecutorial or judicial error"—recognizing that in the latter, reprosecution is not barred, but leaving open the possibility that it may be barred in the former.[71]

Several years later, in *United States v. Dinitz*, the Supreme Court quoted its *Jorn* opinion and reaffirmed the distinction between "circumstances . . . attributable to prosecutorial or judicial overreaching" and other cases in which the defendant may move for a mistrial.[72] The Court explained that when the defendant moves for a mistrial because of prosecutorial "overreaching," he or she does not have a real choice between continuing the "tainted proceeding" (which is likely to result in a conviction) and moving for a mistrial.[73] In these cases, the Court reasoned, "a defendant's mistrial request has objectives not unlike the interest served by the Double Jeopardy Clause—the avoidance of the anxiety, expense, and delay occasioned by multiple prosecutions."[74] Though dicta, these opinions suggested to lower courts that they ought to apply an "overreaching" standard to determine whether reprosecution was barred when prosecutorial misconduct caused the defendant to move for the mistrial.[75]

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70. 400 U.S. 470, 485 (1971).

71. Id.

72. 424 U.S. 600, 607 (1976) (quoting *Jorn*, 400 U.S. at 485).

73. Id. at 607–09.

74. Id. at 608.

75. See, e.g., United States v. Kessler, 530 F.2d 1246, 1255–56 (5th Cir. 1976) ("Where 'prosecutorial overreaching' is present, the interests protected by the Double Jeopardy Clause outweigh the public interest in conducting a second trial ending in acquittal or conviction." (citing *Jorn*, 400 U.S. at 485)); State v. Marquez, 558 P.2d 692, 695 (Ariz. 1976) (citing to *Dinitz* while holding that double jeopardy bars reprosecution in cases of "judicial or prosecutorial overreaching intentionally calculated to force a mistrial"); State v. Pulawa, 569 P.2d 900, 905–06 (Haw. 1977), overruled by State v. Rogan, 984 P.2d 1231 (1999) (citing

The "overreaching" standard considered in *Jorn* and *Dinitz* recognized that the degree of the prosecutorial error or misconduct impacts the validity of a trial—and the outcome for the defendant—more than the prosecutor's intent behind committing the erroneous act.[76] By distinguishing "overreaching" conduct from mere "error," the Court recognized that in some cases, the prosecutor's actions are prejudicial enough to violate the defendant's double jeopardy rights, while in other cases, the "error"—though prejudicial—does not trigger double jeopardy concerns.[77] The Court removed this distinction in *Kennedy*, which focused on the intent behind the misconduct rather than its impact on the defendant's double jeopardy rights.[78] Nonetheless, this "overreaching" standard has continued to serve as a framework for states that seek to broaden their standards beyond *Kennedy*.[79] As section II.B describes, several courts have decided that it is, in fact, the depth of prejudice caused by the error, rather than the motivation behind the error, that matters when considering the defendant's double jeopardy rights.

2. *The Federal Standard:* Oregon v. Kennedy. — In *Oregon v. Kennedy*, the Supreme Court again considered whether the Double Jeopardy Clause prevents retrial after a defendant's successful motion for a mistrial made in response to prosecutorial misconduct.[80] In its decision, the Court moved away from the "overreaching" standard implied in *Jorn* and *Dinitz* and held that the reprosecution of a defendant is barred only in cases in which the prosecutorial misconduct or error was intended to goad the defendant into moving for a mistrial.[81] The Court recognized that *Jorn* and *Dinitz* "may well [have] suggest[ed] a broader rule" by implying the use of

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to *Dinitz* while holding that "where the defendant is provoked by judicial or prosecutorial overreaching into requesting a mistrial and his motion is granted, he may not be retried for the same offense"); State v. Cannon, 383 So. 2d. 389, 395 (La. 1980) (finding that *Dinitz* requires "such prosecutorial overreaching as to bar further proceedings against defendant"); see also Edwards, supra note 34, at 153–54 (explaining that, under the *Dinitz* holding, "any misconduct motivated by bad faith, or misconduct that harassed or prejudiced the defendant, barred retrial").

76. Steven Paul Shreder, Note, *Oregon v. Kennedy*: Avoiding the Double Jeopardy Bar, 36 Okla. L. Rev. 697, 700 (1983) ("Under the overreaching standard, the conduct of a prosecutor or a judge determined whether reprosecution was barred by the double jeopardy clause . . . . [O]bjectionable conduct on the part of the prosecutor might raise the bar absent a specific intent.").

77. See 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, 87 (1983) (noting that *Dinitz* recognized that in some cases of "prejudicial prosecutorial conduct or judicial error, the interest in proceeding before the first forum is in potential conflict with the interest in avoiding governmental harassment").

78. For a description of the defendant's double jeopardy interests, see supra section I.A.

79. See Edwards, supra note 34, at 158–59 (describing states that have adopted broader standards than *Kennedy* as "refin[ing] the pre-*Kennedy* standard, providing a more specific explanation of prosecutorial 'overreaching'").

80. *Kennedy I*, 456 U.S. 667, 668–69 (1982).

81. Id. at 673 (quoting United States v. Dinitz, 424 U.S. 600, 611 (1976)).

an "overreaching" standard and noted that there was "confusion" among the courts about the use of the "overreaching" standard.[82] Nevertheless, the Court explained that the *Jorn* and *Dinitz* reasoning was clarified by dicta in *United States v. DiFrancesco*, in which the Court had stated that "reprosecution of a defendant who has successfully moved for a mistrial is not barred, so long as the Government did not deliberately seek to provoke the mistrial request."[83] The Court in *DiFrancesco* had not sought to square this dicta with the "overreaching" standard,[84] however, so the Court in *Kennedy* addressed its reasons for adopting a more narrow standard for the first time.[85]

Kennedy involved a defendant who was charged with the theft of an oriental rug.[86] At trial, the prosecution called an expert witness to testify as to the value and identity of the rug.[87] During cross-examination, the defense tried to get the expert witness to admit that he had once filed a criminal complaint against the defendant in order to establish potential bias on the part of the expert witness.[88] After the witness acknowledged that he had indeed filed a complaint against Kennedy, the prosecution on redirect examination tried to elicit his reason for doing so.[89] The prosecutor asked the witness, "Have you ever done business with the Kennedys?"[90] When the witness responded that he had not, the prosecutor asked, "Is that because he is a crook?"[91] At this point, the defendant moved for a mistrial because of the prejudicial attack against his character, which the court granted.[92] When the state later sought to retry Kennedy, he moved to dismiss the retrial under the Double Jeopardy Clause.[93]

The Oregon Court of Appeals found that the prosecutor's conduct amounted to "overreaching" and held that retrial was barred under the federal Double Jeopardy Clause.[94] The State of Oregon petitioned the Supreme Court to review the case and resolve the "conflict among various

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82. Id. at 677–79.

83. Id. at 678 n.8 (quoting United States v. DiFrancesco, 449 U.S. 117, 130 (1980)). But see Shreder, supra note 76, at 701 (arguing that it was "questionable" that the *DiFrancesco* opinion controlled the issue in *Kennedy* because "it was not a holding").

84. See *DiFrancesco*, 449 U.S. at 130.

85. See infra section II.A.1 (describing the Court's rationale for adopting the *Kennedy* standard).

86. *Kennedy I*, 456 U.S. at 669.

87. Id.

88. Id.

89. Id.

90. Id.

91. Id.

92. See id. at 669–71.

93. Id. at 669.

94. Id. at 670.

federal and state jurisdictions in their interpretations of the Double Jeopardy Clause of the United States Constitution as applied to cases of alleged prosecutorial misconduct."[95]

The Supreme Court granted the state's motion for certiorari and held in a 5-4 opinion that a defendant who moves for a mistrial will ordinarily be deemed to have waived the protection of the Double Jeopardy Clause and can be retried.[96] The Court announced a narrow exception to this rule: In "those cases in which the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial," the Double Jeopardy Clause bars reprosecution of the defendant.[97] Applying the holding to the facts of *Kennedy*, the Supreme Court accepted the trial court's finding that the prosecutor's misconduct—though intentional in the sense that he knowingly asked a prejudicial question—was not intended to cause a mistrial.[98] Thus, under the newly adopted standard, it was constitutional for the state to retry Kennedy.

The *Kennedy* standard significantly reduced protections for defendants as compared to the "overreaching" standard. Under *Kennedy*, the state may retry a defendant in cases in which a prosecutor's misconduct was intentional and egregious, as long as the motive was not to force the defendant into moving for a mistrial. In any case in which the official misconduct was intended solely to avoid acquittal or secure a conviction, a defendant could properly be retried following a mistrial. Thus, in many cases in which the prosecutor's misconduct is purposeful and the cause of the mistrial, the prosecutor is still permitted to retry the defendant.

The case of *Rutherford v. State* clearly illustrates this limitation of the *Kennedy* standard.[99] In *Rutherford*, the defendant was charged with robbery and murder of an elderly woman in Florida.[100] At trial, the prosecution sought and elicited testimony from two witnesses that the defendant had told the witnesses in advance that he planned to kill the elderly woman.[101] The court had previously agreed to a demand from the defense that the prosecution disclose any evidence that suggested such premeditated intent before trial.[102] The prosecution failed, however, to disclose the expected testimony from these two witnesses about premeditation during

95. Petition for a Writ of Certiorari, *Kennedy I*, 456 U.S. 667 (1982) (No. 80-1991), 1981 U.S. S. Ct. Briefs LEXIS 2195, at *11.

96. See *Kennedy I*, 456 U.S. at 668, 679.

97. Id. at 679.

98. Id. For an explanation of the Court's reasoning in reaching its *Kennedy* decision, see infra section II.A.1.

99. 545 So. 2d 853 (Fla. 1989).

100. Id. at 854.

101. Id. at 854–55.

102. Id. at 855.

discovery.[103] The defendant moved for a mistrial, which the court granted, and then moved to bar retrial on double jeopardy grounds.[104]

The prosecutor in this case intentionally erred by withholding evidence that the state was required to disclose to the defense counsel. The court found that the prosecutor's failure to disclose this evidence was "willful."[105] The court also found, though, that the misconduct was not intended to prompt a mistrial; instead, "the prosecutor's motive was to introduce evidence that tended to convict Rutherford, not to create error that would force a new trial."[106] Thus, under the *Kennedy* standard, the retrial of Rutherford was not barred, despite the prosecutor's intentional and egregious violation of the court order.

3. *State Adoption of the* Kennedy *Standard.* — A majority of state courts have adopted the *Kennedy* standard under their state constitutions. A review of state law conducted by this author found that the highest courts in thirty-four states have followed *Kennedy* since the Supreme Court adopted the standard,[107] while seven states have adopted standards that protect defendants in cases of prosecutorial misconduct more broadly than *Kennedy*.[108] In addition to these thirty-four states that have formally adopted *Kennedy*, in five additional states, a state appellate court has applied the *Kennedy* standard and the highest court has not yet spoken on the issue.[109] Despite this seemingly large majority, however, very few of

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103. Id.

104. Id.

105. Id.

106. Id.

107. Ex parte Cochran, 500 So. 2d 1179, 1181–82 (Ala. 1985); Espinosa v. State, 876 S.W.2d 569, 571 (Ark. 1994); People v. Espinoza, 666 P.2d 555, 559 (Colo. 1983) (en banc); State v. Butler, 810 A.2d 791, 797 (Conn. 2002); State v. Long, No. 367-1992, 1993 WL 245367, at *1 (Del. June 21, 1993); *Rutherford*, 545 So. 2d at 855; Williams v. State, 369 S.E.2d 232, 236–37 (Ga. 1988); State v. Sharp, 662 P.2d 1135, 1137–38 (Idaho 1983); People v. Nelson, 737 N.E.2d 632, 635 (Ill. 2000); Woods v. State, 484 N.E.2d 3, 5–6 (Ind. 1985); State v. Bell, 322 N.W.2d 93, 94 (Iowa 1982); State v. Muck, 939 P.2d 896, 901–02 (Kan. 1997); Stamps v. Commonwealth, 648 S.W.2d 868, 869 (Ky. 1983); State v. Chapman, 496 A.2d 297, 300 (Me. 1985); Thanos v. State, 625 A.2d 932, 937 (Md. 1993); Poretta v. Commonwealth, 569 N.E.2d 794, 795 (Mass. 1991); People v. Hicks, 528 N.W.2d 136, 140 & n.15 (Mich. 1994); Davenport v. State, 662 So. 2d 629, 632 (Miss. 1995); State v. Clover, 924 S.W.2d 853, 857 (Mo. 1996) (en banc); State v. Laster, 724 P.2d 721, 722–23, 726 (Mont. 1986); State v. Muhannad, 837 N.W.2d 792, 801 (Neb. 2013); State v. Duhamel, 512 A.2d 420, 422–23 (N.H. 1986); State v. Brown, 201 A.3d 77, 95 (N.J. 2019); Davis v. Brown, 664 N.E.2d 884, 886–87 (N.Y. 1996); State v. White, 369 S.E.2d 813, 815 (N.C. 1988); City of West Fargo v. Ekstrom, 938 N.W.2d 915, 918–20 (N.D. 2020); State v. Loza, 641 N.E.2d 1082, 1097 (Ohio 1994); Napier v. State, 821 P.2d 1062, 1064–65 (Okla. Crim. App. 1991); State v. Diaz, 521 A.2d 129, 132–33 (R.I. 1987); State v. Parker, 707 S.E.2d 799, 801–02 (S.C. 2011); State v. Catch the Bear, 352 N.W.2d 637, 639 (S.D. 1984); Ex parte Lewis, 219 S.W.3d 335, 336–37 (Tex. Crim. App. 2007); State v. Pennington, 365 S.E.2d 803, 815–16 (W. Va. 1987); State v. Newman, 88 P.3d 445, 453 (Wyo. 2004).

108. See infra section I.C.4.

109. State v. Koelemay, 497 So. 2d 321, 323–25 (La. Ct. App. 1986); State v. Tucker, 728 S.W.2d 27, 29–32 (Tenn. Crim. App. 1986); Salt Lake City v. Reyes-Gutierrez, 405 P.3d 781,

these courts have explicitly discussed their reasons for adopting the *Kennedy* standard. In fact, at least twenty-four states have applied the *Kennedy* standard without ever analyzing its merits or debating whether to adopt a broader standard.[110] Thus, considering only the courts that have explicitly analyzed whether the *Kennedy* standard is aligned with the interests protected by their constitutions' double jeopardy clauses, there is an almost even split between the courts that have adopted *Kennedy* and those that have adopted broader standards.[111] Section II.A.2 further describes the states that did discuss their reasons for adopting the *Kennedy* standard or that considered an alternative standard.

4. *Broader State Standards: More Protection Than* Kennedy. — Seven states have explicitly declined to adopt *Kennedy* and have established standards that provide greater protection for defendants in cases of prosecutorial misconduct that result in a mistrial. The Supreme Court of Oregon, hearing *Oregon v. Kennedy* on remand, was the first state to adopt a broader standard than *Kennedy*.[112] More recently, in 2017, Nevada became the seventh state to adopt a broader standard,[113] and in 2020, Pennsylvania

785–86 (Utah Ct. App. 2017); MacKenzie v. Commonwealth, 380 S.E.2d 173, 175 (Va. Ct. App. 1989); State v. Quinn, 486 N.W.2d 542, 544–45 (Wis. Ct. App. 1992). Additionally, neither the Alaska Supreme Court nor the Alaska Court of Appeals has considered the issue. And in the three remaining states—Minnesota, Vermont, and Washington—the state supreme courts have explicitly left open the question of what standard applies under their state constitutions. State v. Fuller, 374 N.W.2d. 722, 727 (Minn. 1985); State v. Wood, 498 A.2d 494, 495 (Vt. 1985); State v. Hopson, 778 P.2d 1014, 1019 (Wash. 1989) (en banc); see also John R. Tunheim, Criminal Justice: Expanded Protections Under the Minnesota Constitution, 20 Wm. Mitchell L. Rev. 465, 478–79 (1994) (arguing that it is likely that Minnesota will end up adopting a broader standard similar to Arizona's or Pennsylvania's standard).

110. *Ex parte Cochran*, 500 So. 2d at 1181–82; *Espinosa*, 876 S.W.2d at 571; *Long*, 1993 WL 24536, at *1; *Rutherford*, 545 So. 2d at 855; *Williams*, 369 S.E.2d at 236–37; *Sharp*, 662 P.2d at 1137–38; *Nelson*, 737 N.E.2d at 635; *Woods*, 484 N.E.2d at 5–6; *Bell*, 322 N.W.2d at 94; *Stamps*, 648 S.W.2d at 869; *Chapman*, 496 A.2d at 300; *Hicks*, 528 N.W.2d at 140 & n.15; *Davenport*, 662 So. 2d at 632; *Clover*, 924 S.W.2d at 857 (en banc); *Laster*, 724 P.2d at 722–23, 726; *Duhamel*, 512 A.2d at 422–23; *Brown*, 201 A.3d at 95; *Davis*, 664 N.E.2d at 886–87; *Loza*, 641 N.E.2d at 1097; *Napier*, 821 P.2d at 1064–65; *Parker*, 707 S.E.2d at 801–02; *Catch the Bear*, 352 N.W.2d at 639; *Pennington*, 365 S.E.2d at 815–16; *Newman*, 88 P.3d at 453.

111. One notable oddity is Texas. Texas adopted a broader standard than *Kennedy* in Bauder v. State, 921 S.W.2d 696, 699 (Tex. Crim. App. 1996). However, it reversed its course and adopted the *Kennedy* standard in *Ex parte Lewis*, 219 S.W.3d at 336–37. For an analysis of Texas's *Bauder* decision to adopt a broader standard, see generally Michael V. Young, Note, *Bauder v. State*, 921 S.W.2d 969 (Tex. Crim. App. 1996), 27 Tex. Tech. L. Rev. 1631 (1996).

112. State v. Kennedy (*Kennedy II*), 666 P.2d 1316, 1326 (Or. 1983).

113. Thomas v. Eighth Jud. Dist. Ct., 402 P.3d 619, 626 (Nev. 2017).

expanded its standard for a second time.[114] Arizona,[115] California,[116] Hawaii,[117] and New Mexico[118] have also interpreted the double jeopardy clauses of their state constitutions more broadly than the federal standard.[119]

Though the standards that these states have adopted vary somewhat, they all recognize that, in some cases, prosecutorial misconduct or prejudicial error triggers double jeopardy protections against successive prosecutions of the defendant—even if that misconduct or error is not intended to goad the defendant into moving for a mistrial. California, for example, found that its state constitution bars the reprosecution of a defendant not only in cases in which the *Kennedy* exception would apply but also in cases in which the prosecution, "believing in view of events that unfold during an ongoing trial that the defendant is likely to secure an acquittal at that trial," intentionally commits misconduct "in order to thwart . . . acquittal."[120] Under the California standard, the court must make a finding that the misconduct did, in fact, "deprive[] the defendant of a reasonable prospect of an acquittal."[121] Of the seven states that have adopted standards broader than *Kennedy*, California's is arguably the narrowest because it requires the defendant to show that he or she was "likely to secure an acquittal at that trial" and that the prosecutor was aware of this likely outcome.[122]

The other six states have adopted standards that are even more protective of defendants' double jeopardy rights than California's test because they do not require a specific showing regarding the likely outcome of the defendant's case. Hearing *Oregon v. Kennedy* on remand, the Oregon Supreme Court determined that retrial is barred "when improper official conduct is so prejudicial to the defendant that it cannot be cured by means short of a mistrial, and if the official knows that the conduct is improper

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114. Commonwealth v. Johnson, 231 A.3d 807, 826 (Pa. 2020). Pennsylvania first adopted a broader standard in Commonwealth v. Smith, 615 A.2d 321, 325 (Pa. 1992). For a detailed account of these cases, see generally Anne Bowen Poulin, The Limits of Double Jeopardy: A Course Into the Dark?: The Example: *Commonwealth v. Smith*, 39 Vill. L. Rev. 627 (1994); Marc Vernon Skyer, Recent Decision, *Commonwealth v. Smith*, 615 A.2d 321 (Pa. 1992), 67 Temp. L. Rev. 825 (1994).

115. Pool v. Superior Ct., 677 P.2d 261, 271–72 (Ariz. 1984) (en banc).

116. People v. Batts, 68 P.3d 357, 380 (Cal. 2003). For a detailed account of *Batts*, see generally Elizabeth Kearney, Note, *People v. Batts*, 68 P.3d 357 (Cal. 2003), 35 Rutgers L.J. 1429 (2004).

117. State v. Rogan, 984 P.2d 1231, 1249 (Haw. 1999).

118. State v. Breit, 930 P.2d 792, 803 (N.M. 1996). For a detailed account of *Breit*, see generally Rosario Dyana Vega, Note, *State v. Breit*, 28 N.M. L. Rev. 151 (1998).

119. See Edwards, supra note 34, at 158 (noting that, in 2004, the states that had adopted broader standards were: Arizona, Hawaii, Michigan, New Mexico, Oregon, Pennsylvania, and Texas).

120. *Batts*, 68 P.3d at 380.

121. Id. at 381.

122. Id. at 380.

and prejudicial and either intends or is indifferent to the resulting mistrial or reversal."[123] Breaking this down into elements, Oregon requires the prosecutorial misconduct to be (1) prejudicial to the defendant; (2) done knowing that the conduct was improper or prejudicial; and (3) done intentionally or with indifference to the outcome for the defendant. New Mexico adopted a similar standard, differing only in that it requires willful disregard of the impact of the misconduct on the defendant.[124]

Arizona, meanwhile, established three explicit conditions that must be met for retrial to be barred under its state constitution:

> 1. Mistrial is granted because of improper conduct or actions by the prosecutor; and
>
> 2. such conduct is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to 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; and
>
> 3. the conduct causes prejudice to the defendant which cannot be cured by means short of a mistrial.[125]

Nevada agreed with Arizona's approach and adopted the three-part test under the Nevada Constitution as well.[126] This standard is similar to Oregon's and New Mexico's standards but imposes a slightly higher burden of proof on the defendant by requiring that the act be intentional and be pursued for an improper purpose.

Pennsylvania adopted an even broader standard than Arizona and Nevada and does not require the defendant to establish intentional conduct of any kind. In *Commonwealth v. Smith*, Pennsylvania first rejected the *Kennedy* test and instead chose to bar reprosecution in cases of prosecutorial misconduct "intentionally undertaken to prejudice the defendant to the point of the denial of a fair trial."[127] In 2020, Pennsylvania decided that

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123. *Kennedy II*, 666 P.2d 1316, 1326 (Or. 1983).

124. State v. Breit, 930 P.2d 792, 803 (N.M. 1996).

125. Pool v. Superior Ct., 677 P.2d 261, 271–72 (Ariz. 1984) (en banc) (footnote omitted).

126. Thomas v. Eighth Jud. Dist. Ct., 402 P.3d 619, 626 (Nev. 2017). The Arizona Supreme Court later extended this reasoning to cases on appeal if the prosecutorial misconduct was concealed through the duration of the first trial. See State v. Minnitt, 55 P.3d 774, 782 (Ariz. 2002) (en banc). In these cases, if the misconduct would have prompted a mistrial had it been known during the original trial, double jeopardy principles bar any subsequent prosecution of the defendant. Id.; see also Roopali H. Desai, Case Note, *State v. Minnitt*: Extending Double Jeopardy Protections in the Context of Prosecutorial Misconduct, 46 Ariz. L. Rev. 415, 421 (2004). For a discussion of the distinctions between double jeopardy in mistrials and cases reversed on appeal, see infra notes 197–200 and accompanying text.

127. 615 A.2d 321, 325 (Pa. 1992). The defendant in *Smith* was originally convicted and appealed his first trial on the grounds that the state had insufficient evidence. Commonwealth v. Smith, 568 A.2d 600, 602 (Pa. 1989). Despite finding sufficient evidence for conviction, the Pennsylvania Supreme Court reversed and remanded for a new trial because the

even this broader standard did not afford defendants enough double jeopardy protection and once again expanded the standard. In *Commonwealth v. Johnson*, the court prohibited the reprosecution of a defendant in cases of "prosecutorial overreaching sufficient to invoke double jeopardy protections" that "deprives the defendant of his right to a fair trial" and that was "undertaken recklessly, that is, with a conscious disregard for a substantial risk" that the defendant will lose his or her right to a fair trial.[128] Though the Pennsylvania standard requires a showing of reckless disregard, it does not require that the defendant prove that the prosecutor knew his or her actions were wrong. By removing the previously required showing of specific intent, Pennsylvania recognized that, regardless of whether the prosecutor intended to make a prejudicial mistake or error, the outcome for the defendant is the same: an unfair trial.

Hawaii has implemented perhaps the most protective standard for defendants. In *State v. Rogan*, the Hawaii Supreme Court held that under the state constitution the "reprosecution of a defendant after a mistrial or reversal on appeal as a result of prosecutorial misconduct is barred where the prosecutorial misconduct is so egregious that, from an objective standpoint, it clearly denied a defendant his or her right to a fair trial."[129] Under this standard, the defendant does not need to make any showing regarding the prosecutor's intent or state of mind. The only proof that the defendant must supply is that the misconduct or error had an "egregious" impact on his or her "right to a fair trial"—a burden that the defendant should be able to meet in any case of egregious misconduct.[130]

Notably, almost all of these states apply the broader standards not only to mistrial cases but also to cases in which the defendant's conviction is reversed on appeal due to a tainted first trial. This is a significant expansion beyond the federal standard for reversals on appeal as well. However, a more nuanced discussion of how double jeopardy should apply when an appellate court reverses a conviction due to prosecutorial misconduct is beyond the scope of this Note.[131]

Despite the slight differences in the tests adopted by these states, each of these state standards provides more protection for defendants than the

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trial court admitted impermissible hearsay testimony. Id. at 605–10. During the appeals process, though, the defendant discovered evidence of prosecutorial misconduct during the original trial. *Smith*, 615 A.2d at 322. Before the defendant could be retried, he filed a motion to preclude a new trial based on double jeopardy grounds because of the prosecutorial misconduct in the original trial. Id. Though *Smith* was originally a case of retrial after appellate reversal, the *Smith* test has been applied in cases of mistrial directly following misconduct in the original trial. See, e.g., Commonwealth v. Burke, 781 A.2d 1136, 1144–45 (Pa. 2001). For a discussion of how double jeopardy applies in cases of appellate reversal, see generally Bierschbach, supra note 48.

128. 231 A.3d 807, 826 (Pa. 2020).

129. 984 P.2d 1231, 1249 (Haw. 1999).

130. Id.

131. For an explanation of how the mistrial and reversed conviction contexts involve distinct double jeopardy interests, see infra notes 197–204 and accompanying text.

Kennedy standard. These states do not require that a defendant show that the prosecutor intentionally engaged in misconduct with the specific purpose to force the defendant into moving for a mistrial—a requirement that these states have recognized is nearly impossible to meet.[132] Section II.B addresses the reasons these states have given for adopting broader standards, and Part III argues that these broader standards better protect defendants and uphold the balance of double jeopardy interests.

II. TWO THEORIES OF DOUBLE JEOPARDY: THE REASONING BEHIND *KENNEDY* AND BROADER STATE STANDARDS

As Part I demonstrates, seven state courts have diverged from the Supreme Court in their interpretations of their state double jeopardy clauses. The Supreme Court, followed by a majority of state supreme courts, has interpreted the Double Jeopardy Clause to apply only in cases in which the prosecutor erred intending to provoke the defendant into moving for a mistrial.[133] On the other hand, seven state supreme courts have found that their state constitutions afford greater protection for defendants than *Kennedy* and do not require that the prosecutor's misconduct be aimed at provoking the defendant to move for a mistrial.[134] This Part explains the reasons given by the Supreme Court and the seven state supreme courts for adopting these diverging standards in section II.A and section II.B respectively.

A. *Justifications for the* Kennedy *Standard*

1. *The Supreme Court's* Kennedy *Decision.* — In its *Kennedy* decision, the Supreme Court provided two primary reasons for adopting the rule that double jeopardy only bars reprosecution in cases in which the prosecutor intended to goad the defendant into moving for a mistrial. First, the Court stressed "the desirability of an easily applied principle" and argued that the intent to goad standard was "manageable," while a broader standard would be more difficult for lower courts to apply.[135] The Court argued that because the *Kennedy* standard only called for a finding of fact, lower courts could easily apply the standard.[136] The Court emphasized that lower courts are used to "[i]nferring the existence or nonexistence of intent from objective facts and circumstances."[137] Additionally, the court argued that

132. See infra section II.B.1.
133. See supra sections I.C.1, I.C.3.
134. See supra section I.C.4.
135. *Kennedy I*, 456 U.S. 667, 675 (1982).
136. Id.
137. Id.

broader standards, such as the "overreaching" standard that the Court previously supported,[138] "offer virtually no standards for their application."[139]

Second, the Court argued that, under a broader standard, judges in criminal cases may "be more loath to grant a defendant's motion for a mistrial."[140] If the judge knows that granting a mistrial would allow the defendant to walk free entirely, the judge may feel pressure to continue with the tainted trial. The Court reasoned that if judges were to grant fewer mistrial requests, defendants collectively would be harmed because they would be forced to continue with prejudiced trials more frequently.[141]

In addition to providing these justifications, the Court recognized the need to balance the defendant's right to have "the first jury empaneled to try him" hear his case with society's interest in "the enforcement of the criminal laws."[142] The Court only briefly addressed, though, how the adopted standard would balance these interests. It first explained that when a defendant "has elected to terminate the proceedings against him," he has waived his "valued right to have his trial completed by a particular tribunal."[143] Regarding the exception to the rule, the Court explained that "there would be great difficulty in applying [the waiver rule] where the prosecutor's actions giving rise to the motion for mistrial were done" intentionally to provoke the mistrial.[144] But the Court failed to address why it is voluntary for a defendant to waive this "valued right" in cases in which a prosecutor intentionally erred in order to secure a conviction but not when the prosecutor intentionally erred in order to provoke the defendant into moving for a mistrial. In both cases, the outcome for defendants and their double jeopardy interests is the same—either they can proceed with trials that are prejudiced against them or they can request a new trial and endure the accompanying hardships.[145] Though the Court recognized the need to balance defendants' double jeopardy interests against society's interests, it failed to explain how the defendants' interests were not harmed in cases in which the prosecutorial misconduct sought to secure a conviction or avoid acquittal.

Ultimately, the Court seemed more concerned with the practical outcome of the *Kennedy* decision—how lower courts would apply the standard and how the standard could impact judges' decisions—than with ensuring that the decision protected defendants' double jeopardy interests. Justice John Paul Stevens's concurrence in *Kennedy* addressed these flaws, noting that "the rationale for the exception extends beyond the situation in which

138. See supra notes 70–75 and accompanying text.

139. *Kennedy I*, 456 U.S. at 674.

140. Id. at 676.

141. Id.

142. Id. at 672–73.

143. Id. at 671–72 (quoting Wade v. Hunter, 336 U.S. 684, 689 (1949)).

144. Id. at 673.

145. See supra notes 41–51 and accompanying text.

the prosecutor intends to provoke a mistrial" and that "[t]here are other situations in which the defendant's double jeopardy interests outweigh society's interest."[146] Several states recognized the gaps in the Supreme Court's reasoning as well and came to a different conclusion about the scope of a defendant's double jeopardy rights in cases of prosecutorial misconduct under their state constitutions. Section II.B below discusses in more detail the states' reasoning for adopting broader standards.

2. *Additional State Reasoning for Adopting* Kennedy. — Despite the fact that a majority of states have adopted the *Kennedy* standard, there is little discussion on the desirability of the standard in the state court opinions. An overwhelming majority of states that have adopted *Kennedy* (twenty-four out of thirty-four) did so without a meaningful analysis of the proper standard under their state constitutions. Instead, these courts merely cited to the Supreme Court's decision while applying the *Kennedy* standard for the first time.[147] Further, even the states that have explained their reasons for adopting *Kennedy* have provided perfunctory explanations, such as asserting that their state constitutions should be read in line with the Federal Constitution or parroting the reasoning of the Supreme Court.

In North Carolina, for example, the state supreme court adopted the *Kennedy* standard and provided the same two practical reasons as the Supreme Court: The *Kennedy* standard is easier to apply, and judges may be more reluctant to grant a mistrial based on prosecutorial misconduct if they know that doing so will trigger the defendant's double jeopardy rights.[148] Notably, the North Carolina Supreme Court's decision overturned the North Carolina Court of Appeals, which had indicated support for Justice Stevens's concurring opinion in *Kennedy* and for adoption of a broader standard.[149] Likewise, in Rhode Island the state supreme court adopted the *Kennedy* standard and explained only that the Supreme Court had "attempted to reach a careful balance between the right of a defendant to obtain a completion of his trial by the first tribunal assembled to pass in judgment upon him and the societal interest in apprehending and punishing those who are guilty of serious crimes."[150]

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146. *Kennedy I*, 456 U.S. at 689 (Stevens, J., concurring in the judgment). Justice Stevens agreed with the majority that the prosecutor's conduct in *Kennedy* would not have triggered the Double Jeopardy Clause even under the "overreaching" standard because the gist of the prosecutor's comment that the defendant was a "crook" could have been fairly elicited from the witness since the defense counsel first raised the topic of the witness's bias toward the defendant. Id. at 692.

147. See supra note 110 and accompanying text.

148. State v. White, 369 S.E.2d 813, 815 (N.C. 1988).

149. State v. White, 354 S.E.2d 324, 329 (N.C. Ct. App. 1987) ("In our view, the better reasoned arguments support the broader test that includes bad faith prosecutorial overreaching or harassment aimed at prejudicing the defendant's chances for acquittal . . . ."), aff'd and remanded, 369 S.E.2d 813.

150. State v. Diaz, 521 A.2d 129, 133 (R.I. 1987); see also Michael P. Reagan, Note, *State v. Mallet*, 604 A.2d 1263 (R.I. 1992), 27 Suffolk U. L. Rev. 484, 487–88 (1993) (arguing that

Nebraska, too, has been asked on several occasions to consider adopting a broader standard than *Kennedy*.[151] Each time, the court maintained the *Kennedy* standard, reasoning that it has consistently held that the Nebraska Constitution's double jeopardy clause is to be read in line with the Federal Constitution. North Dakota has provided the same justification: The framers of the North Dakota Constitution did not intend the state's double jeopardy clause to be interpreted differently than the federal Double Jeopardy Clause.[152] North Dakota has provided the same justification: The framers of the North Dakota Constitution did not intend the state's Double Jeopardy Clause to be interpreted differently than the federal Double Jeopardy Clause.[153] The Massachusetts Supreme Court also applied the *Kennedy* standard, explaining only that "the standard for barring retrial on double jeopardy grounds is 'substantially the same' under Federal and Massachusetts law."[154]

States' reasoning for adopting the *Kennedy* standard rarely considered the merits of the standard compared to a broader standard. The states described here chose to defer to the Supreme Court's reasoning rather than engage in an independent analysis of whether the *Kennedy* standard upheld the double jeopardy interests protected by their state constitutions. Notably, though, these states provided more explanation of why they adopted the *Kennedy* standard than the twenty-four states that merely cited to the Supreme Court's decision without discussing any other potential standards.[155]

B. *Justifications for Broader State Standards*

The seven states that have adopted broader state standards have all provided similar justifications for expanding double jeopardy protection for defendants beyond *Kennedy*. Each of these states provided at least one of the following three justifications for adopting a broader standard than *Kennedy*: (1) the specific intent requirement under *Kennedy* is too difficult to prove;[156] (2) the *Kennedy* standard does not adequately protect the defendant's double jeopardy interests when unintentional prosecutorial

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the Rhode Island Supreme Court's use of the *Kennedy* "intent" standard in a later case, *State v. Mallet*, balanced the rights of the defendant against the interests of society).

151. See, e.g., State v. Bedolla, 905 N.W.2d 629, 634 (Neb. 2018); State v. Muhannad, 837 N.W.2d 792, 801 (Neb. 2013).

152. See *Bedolla*, 905 N.W.2d at 634; *Muhannad*, 837 N.W.2d at 801. The Nebraska Supreme Court not only declined to broaden *Kennedy*, however, but also refused to interpret any part of its state double jeopardy clause beyond the scope of the U.S. Constitution. See *Bedolla*, 905 N.W.2d at 635 ("[W]e have consistently held that the Double Jeopardy Clause of the Nebraska Constitution provides no greater protection than that of the U.S. Constitution . . . .").

153. City of West Fargo v. Ekstrom, 938 N.W.2d 915, 919 (N.D. 2020).

154. Poretta v. Commonwealth, 569 N.E.2d 794, 796 (Mass. 1991) (quoting Commonwealth v. Smith, 532 N.E.2d 1207, 1209 (Mass. 1989)).

155. See supra note 110.

156. See infra section II.B.1.

error or intentional prosecutorial error not directed at provoking a mistrial prejudices the trial;[157] and (3) the intent of the prosecutor does not affect the defendant's double jeopardy rights and the *Kennedy* standard incorrectly entangles the two.[158]

1. *The Intent Standard Under* Kennedy *Is Too Difficult to Prove.* — Four of the seven states that adopted broader standards have disparaged the near impossibility of a defendant proving that the prosecutor intended to force the defendant to move for a mistrial, as required by *Kennedy*. Arizona,[159] Hawaii,[160] Nevada,[161] and New Mexico[162] included some form of this reasoning in their decisions to adopt a broader standard. These states recognize that the *Kennedy* standard places a heavy burden on defendants to prove that the prosecutor specifically intended to goad the defendant into moving for a mistrial. As Justice Stevens wrote in his *Kennedy* concurrence, which many of these states cite to, "[i]t is almost inconceivable that a defendant could prove that the prosecutor's deliberate misconduct was motivated by an intent to provoke a mistrial instead of an intent simply to prejudice the defendant."[163]

Several distinct critiques have been proffered against *Kennedy*'s specific intent standard. First, in most cases, defendants lack the ability to meet their burden of proof because "the subjective intentions of the prosecutor are inherently unknowable."[164] As the Supreme Court of Hawaii put it, "determining the prosecutor's subjective intent inherently requires a guess."[165] Furthermore, defendants face extreme difficulty in proving, with the evidence available to them (such as the prosecutor's overall conduct at trial), that the prosecutorial misconduct was aimed to provoke a mistrial rather than to prejudice the defendant in another way.[166] Given that a prosecutor who decides to force the defendant into moving for a

157. See infra section II.B.2.

158. See infra section II.B.3.

159. Pool v. Superior Ct., 677 P.2d 261, 271 (Ariz. 1984) (en banc) ("[S]o specific an intent [as required by *Kennedy*] must necessarily involve a subjective inquiry and is too difficult to determine.").

160. State v. Rogan, 984 P.2d 1231, 1248 (Haw. 1999) ("[A] defendant will seldom be able to prove that the prosecutor had the specific intent to goad him or her into moving for a mistrial with the purpose of obtaining a better chance of obtaining a conviction.").

161. Thomas v. Eighth Jud. Dist. Ct., 402 P.3d 619, 625 (Nev. 2017) (agreeing with Justice Stevens's concurrence that "[i]t is almost inconceivable that a defendant could prove" that the prosecutor intended to force the defendant to move for a mistrial (internal quotation marks omitted) (quoting *Kennedy I*, 456 U.S. 667, 688 (1982) (Stevens, J., concurring in the judgment))).

162. State v. Breit, 930 P.2d 792, 800 (N.M. 1996) ("One of the most persuasive criticisms of the *Kennedy* rule is that the subjective intentions of the prosecutor are inherently unknowable.").

163. *Kennedy I*, 456 U.S. at 688 (Stevens, J., concurring in the judgment).

164. *Breit*, 930 P.2d. at 800.

165. *Rogan*, 984 P.2d at 1248.

166. Id.

mistrial may do so in the heat of the moment—when he or she sees the first trial going awry, for example—it is unlikely that the defendant would have evidence sufficient to establish the prosecutor's specific intent. Similarly, scholars have argued that this standard requires an almost premeditated intent to throw the case that rarely happens in practice and is nearly impossible to prove.[167] And judges may hesitate to find that a prosecutor's misconduct was done to provoke a mistrial because of the severe personal and professional consequences that would follow such a finding.[168]

The difficulty of proving the prosecutor's specific intent to provoke a mistrial was noted by a trial court in Minnesota, where the *Kennedy* standard is applied.[169] In *State v. Handt*, the prosecutor alluded to the defendant's prior contact with police during opening statements.[170] The trial court found that the prosecutor had acted with "knowing misconduct coupled with indifference toward the probable mistrial" and that the prosecutor "knew or should have known he could not get into evidence [information regarding prior bad acts] under the rules of evidence for many reasons."[171] Nevertheless, the judge found that he was unable to determine that the prosecutor had acted with the intent to force the defendant into a mistrial as required by the *Kennedy* standard.[172] He noted that finding this specific intent would essentially require the prosecutor "to admit that they did it on purpose, that they tried to get the defense to request a mistrial" and stated that it was "hard to imagine a situation in which . . . the prosecutor would make that admission."[173]

In sum, these four states argue that, because the *Kennedy* standard requires proof that the defendant is virtually never going to have, the exception established by *Kennedy* is meaningless.[174] Notably, this author was able to find only a handful of cases in which an appellate court found

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167. See Peter J. Henning, Prosecutorial Misconduct and Constitutional Remedies, 77 Wash. U. L.Q. 713, 807 (1999) ("Unless evidence of the prosecutor's subjective intent, such as an admission of the prosecutor's reason for pursuing an improper strategy, is available, it is unlikely a court will have sufficient objective evidence to show the government goaded a defendant into seeking a mistrial . . . ."); Rosenthal, supra note 37, at 911 ("[T]he connection between misconduct and the double jeopardy right to acquittal in the mistrial setting with which *Kennedy* was dealing revolves around subjective premeditation and idiosyncratic motivation that is . . . virtually impossible to prove.").

168. Steven Alan Reiss, Prosecutorial Intent in Constitutional Criminal Procedure, 135 U. Pa. L. Rev. 1365, 1426–27 (1987).

169. State v. Handt, No. A03-1459, 2004 WL 1152831, at *1 (Minn. Ct. App. May 24, 2004).

170. Id. at *2. Typically, the government is not allowed to introduce evidence regarding a defendant's prior "crime, wrong, or act" in order to prove that the defendant committed the crime in the present case. See Fed. R. Evid. 404(b); Minn. Court R. 404(b).

171. *Handt*, 2004 WL 1152831, at *1.

172. Id.

173. Id.

174. See, e.g., State v. Breit, 930 P.2d 792, 800 (N.M. 1996) ("One of the most persuasive criticisms of the *Kennedy* rule is that the subjective intentions of the prosecutor are inherently unknowable.").

that the demanding intent to goad standard was met in a review of over one hundred cases deciding the issue, lending some support to the notion that the intent to goad standard is extremely difficult for a defendant to meet.[175]

2. *The* Kennedy *Standard Does Not Adequately Protect Defendants' Double Jeopardy Rights.* — All seven states that have adopted broader standards reasoned that *Kennedy* does not adequately protect defendants' interests in cases in which the first trial was "tainted" due to prosecutorial misconduct or error that was not intended to provoke a mistrial. This argument counters the Supreme Court's assertion that defendants waive their double jeopardy rights by moving for a mistrial.[176] Instead, these states argue that if a defendant moves for a mistrial due to official misconduct that prejudices the trial, then the motion does not arise from a free "preference to start anew."[177] Justice Stevens called this situation a "Hobson's Choice"[178]—a seemingly free choice with no real alternative.[179] Unless the defendant wants to proceed with a biased trial, he or she must move for a mistrial.[180]

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175. See State v. Thomas, 562 S.E.2d 501, 503 (Ga. 2002); Beck v. State, 412 S.E.2d 530, 531 (Ga. 1992); State v. Rademacher, 433 N.W.2d 754, 755, 760 (Iowa 1988); State v. Laster, 724 P.2d 721, 726 (Mont. 1986). This research focused primarily on appellate level cases because the majority of trial court decisions do not produce written opinions, and those that do produce written opinions do not make them accessible online.

176. See *Kennedy I*, 456 U.S. 667, 672 (1982); see also supra note 143 and accompanying text.

177. Pool v. Superior Ct., 677 P.2d 261, 272 (Ariz. 1984) (en banc) ("[W]hen [misconduct] occurs the burden of another trial cannot be attributed to defendant's preference to start anew rather than 'completing the trial infected by error. . . .'" (quoting *Kennedy II*, 666 P.2d 1316, 1326 (Or. 1983))); People v. Batts, 68 P.3d 357, 376 (Cal. 2003) (noting the "narrow scope and limitations" of the *Kennedy* test in cases in which the prosecutor "intentionally committed their misconduct *not* to cause a mistrial," but instead to avoid acquittal); State v. Rogan, 984 P.2d 1231, 1249 (Haw. 1999) ("[W]hen egregious prosecutorial misconduct results in a reprosecution either by mistrial or a reversal on appeal, the burden of another trial cannot be attributed to defendant's preference to start anew rather than to complete the trial before the original tribunal."); Thomas v. Eighth Jud. Dist. Ct., 402 P.3d 619, 625 (Nev. 2017) ("[W]hether dismissal results from goading or other intentional misconduct, 'the burden of a second trial is not attributable to the defendant's preference for a new trial over completing trial infected by error.'" (quoting *Kennedy II*, 666 P.2d at 1326)); *Breit*, 930 P.2d at 799 ("The weakness of the *Kennedy* rule is highlighted by the fact that other forms of misconduct and harassment and bad faith can also leave a defendant with little choice."); *Kennedy II*, 666 P.2d at 1324; Commonwealth v. Johnson, 231 A.3d 807, 826 (Pa. 2020) (noting that, regardless of the intent of the prosecutor, improper conduct that is "sufficiently damaging to undercut the fairness of a trial" still imposes a "Hobson's choice" on the defendant).

178. *Kennedy I*, 456 U.S. at 685 (Stevens, J., concurring in the judgment).

179. Hobson's Choice, Merriam Webster, https://www.merriam-webster.com/dictionary/Hobson%27s%20choice [https://perma.cc/727V-64P6] (last visited Aug. 30, 2021).

180. For a description of Rutherford v. State, 545 So. 2d 853 (Fla. 1989)—an example of a case in which the defendant faced such a choice—see supra notes 99–105 and accompanying text.

Kennedy, however, protects the defendant's rights in cases only where the error was intended to provoke the mistrial. In other cases, the defendant is said to have given up his or her right to double jeopardy interests by requesting a new trial. The states that rejected the *Kennedy* standard argue that the defendants' double jeopardy interests are implicated in any case in which prejudicial error is introduced by the prosecutor.[181] The *Kennedy* distinction is artificial, providing rights in some cases of prosecutorial misconduct or error but not in others—even though the impact on the defendant is the same in all cases of prejudicial error. Under the *Kennedy* standard, a defendant's double jeopardy interests in avoiding the burdens of a successive prosecution and having his or her case heard by the first tribunal are threatened.[182] These seven states reasoned that a broader standard would better protect defendants' double jeopardy rights in any case of prejudicial error or misconduct.

3. *The Intent of the Prosecutor Is Irrelevant to the Defendant's Double Jeopardy Rights.* — Five of the seven states that have adopted standards broader than *Kennedy* take the previous argument a step further, arguing that the *Kennedy* standard incorrectly assumes that the defendant's double jeopardy rights are based on the prosecutor's intent. Hawaii,[183] Nevada,[184] New Mexico,[185] Oregon,[186] and Pennsylvania[187] argue that the defendant's constitutional rights to have his or her case heard by a particular tribunal and

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181. See, e.g., *Batts*, 68 P.3d at 376 (en banc) (explaining that *Kennedy* "does much to deny any protection of the [double jeopardy] right" in cases in which prosecutorial misconduct was "prompted by improper motives other than the intent to provoke a mistrial" (internal quotation marks omitted) (quoting Reiss, supra note 168, at 1426)); *Johnson*, 231 A.3d at 826 ("When the government engages in improper actions sufficiently damaging to undercut the fairness of a trial, it matters little to the accused whether such course of conduct was undertaken with an express purpose to have that effect or with a less culpable mental state.").

182. See, e.g., *Pool*, 677 P.2d at 272 (noting the "burdens" on the defendant when the prosecution "exposed the defendant to multiple trials for the same crime").

183. State v. Rogan, 984 P.2d 1231, 1248 (Haw. 1999) ("[T]he prosecutor's subjective intent is irrelevant for purposes of determining a defendant's constitutional double jeopardy rights.").

184. Thomas v. Eighth Jud. Dist. Ct., 402 P.3d 619, 625 (Nev. 2017) (agreeing with the New Mexico Supreme Court in *Breit* that the purpose of double jeopardy protections is not to punish prosecutors, but to protect defendants' interests).

185. State v. Breit, 930 P.2d 792, 800 (N.M. 1996) ("The object of constitutional double-jeopardy provisions is not to punish disreputable prosecutors. The purpose, rather, is to protect the defendant's interest in having the prosecution completed by the original tribunal before whom the trial commenced.").

186. *Kennedy II*, 666 P.2d 1316, 1324 (Or. 1983) ("[A] bar against prosecution must be derived from the constitutional objective to protect defendants against 'the harassment, embarrassment and risk of successive prosecutions for the same offense' and '[i]t is not a sanction to be applied for the punishment of prosecutorial or judicial error.'" (quoting Brief for Petitioner, *Kennedy II*, 666 P.2d 1316 (Or. 1983) (No. 80-1991), 1981 WL 390227, at *8)).

187. *Johnson*, 231 A.3d at 826 ("It is established that the jeopardy prohibition is not primarily intended to penalize prosecutorial error, but to protect citizens from the 'embarrassment, expense, and ordeal' of a second trial for the same offense and from 'com-

to avoid harassment in a second proceeding are entirely separate from the intent behind the prosecutor's misconduct.[188] This argument resembles that described in the prior section; however, in addition to noting *Kennedy*'s inadequate protection in some cases of prosecutorial misconduct, these states reject the fundamental logic of the *Kennedy* standard.[189]

When applying the *Kennedy* standard, lower courts must consider the "'motivation and purpose' of the prosecutor in committing the error that prompted the defense request for a mistrial."[190] The standard does not require an inquiry into "the impact of the error upon the defendant."[191] The purpose of double jeopardy, however, is to supply rights to the defendant, rather than to police the actions or intent of the prosecutor. It is well established that the Double Jeopardy Clause is not invoked in cases to penalize the state but is instead a check against the state's power.[192] Focusing on the prosecutor's intent incorrectly brings in questions of the culpability of the state. The inquiry required by the *Kennedy* standard, then, is inconsistent with foundational principles of the Double Jeopardy Clause.[193]

Relying on these three primary reasons, seven state supreme courts interpreted their state double jeopardy clauses more broadly than the federal counterpart and crafted standards that are more protective of defendants' double jeopardy interests than *Kennedy*. With its *Kennedy* holding, the Supreme Court left defendants unprotected in ways that these courts found repugnant to the guarantee that "[n]o person shall be . . . twice put in jeopardy of life or limb."[194] The Supreme Court's focus on the practical outcomes of the *Kennedy* decision is at odds with these states' analyses of

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pelling [them] to live in a continuing state of anxiety and insecurity . . . .'" (quoting Green v. United States, 355 U.S. 184, 187–88 (1957))).

188. See supra notes 183–192; see also Ponsoldt, supra note 77, at 98. On the flip side of the equation, when the defendant moves for a mistrial, the defendant's motivation is similarly of no consequence to the outcome of the motion (retrial). The motivation of the defendant in that case is typically of no consequence to the outcome (retrial). See supra notes 65–67 and accompanying text.

189. See, e.g., *Kennedy II*, 666 P.2d at 1324 ("[T]o see the double jeopardy guarantee as protection rather than as sanction has implications for the rule against reprosecutions . . . . If the rule were viewed as a penalty against the state, it might reasonably be limited to penalizing only intentional misconduct.").

190. Giddins v. State, 878 A.2d 687, 698–700 (Md. Ct. Spec. App. 2005) (quoting Tabbs v. State, 403 A.2d 796, 805 (Md. Ct. Spec. App. 1979)).

191. Id.

192. See, e.g., State v. Jorgenson, 10 P.3d 1177, 1180 (Ariz. 2000).

193. This understanding of double jeopardy also underpins the Court's longstanding holding that, in most cases, defendants waive their double jeopardy rights when they move for a mistrial. See United States v. Dinitz, 424 U.S. 600, 608–09 (1976). The Court has found that the ultimate concern is whether the defendant has control over the decision to move for a mistrial, not the actions that prompted that decision. Id. at 609. The state courts that have adopted broader standards, though, recognize that the defendant does not have a real choice whether to move for a mistrial in cases of egregious prosecutorial misconduct.

194. U.S. Const. amend. V.

the constitutional protections of their double jeopardy clauses. And yet, a large majority of states have adopted the *Kennedy* standard without question.[195] Part III urges these states that have adopted the Kennedy standard to adopt a broader standard, based on an analysis of the purpose of double jeopardy protections and the manageability of applying broader state standards.

III. THE BALANCE OF DOUBLE JEOPARDY RIGHTS UNDER *KENNEDY* AND BROADER STATE STANDARDS

Parts I and II demonstrate that there are two types of standards that courts apply in cases in which prosecutorial misconduct results in a mistrial and two distinct lines of reasoning behind these differing standards. The Supreme Court—concerned with tasking lower courts with implementing broader standards—adopted a more restrictive standard. In response, seven states—noting the deficiencies in the *Kennedy* standard—adopted standards that provide more protection for defendants' double jeopardy interests. This Part analyzes these two competing lines of reasoning to determine which standard ought to be adopted by states. Sections III.A and III.B argue that broader standards are more protective of both defendants' and society's double jeopardy interests. Section III.C argues that the Supreme Court's concern that broader standards are unmanageable is unfounded. Ultimately, this Part seeks to persuade state courts that they should adopt a broader standard akin to those adopted by Arizona, California, Hawaii, Nevada, New Mexico, Oregon, and Pennsylvania.[196]

The analysis in this Part focuses on the mistrial context and specifically advocates for expanding the protections for defendants in cases that result in mistrials. Some scholars have argued that double jeopardy protections should also be expanded in cases in which a defendant is convicted and the verdict is later reversed on appeal due to prosecutorial misconduct during the initial trial.[197] While both situations involve prosecutorial misconduct that results in a flawed trial for the defendant, the mistrial context is distinct because of the defendant's loss of the right to

195. See supra section II.A.2 (describing how a large majority of states have adopted *Kennedy* without analyzing the standard or its alternatives).

196. See supra section I.C.4.

197. See, e.g., Botsford & Schneider, supra note 48, at 755–57 (arguing that *Kennedy* should be extended to cases in which a conviction is reversed due to prosecutorial misconduct because *Kennedy* leaves "an unimpaired incentive to commit an error that would not be discovered until after the trial" (internal quotation marks omitted) (quoting United States v. Catton, 130 F.3d 805, 807 (7th Cir. 1997))); Rosenthal, supra note 37, at 940–41 ("There is nothing in the language, and nothing in the logic [of the Double Jeopardy Clause,] . . . which suggests that abuse of power both aimed, and successful, at avoiding acquittal through an egregiously tainted verdict, rather than through mistrial, is any less offensive to the underlying principles of double jeopardy."); Adam M. Harris, Note, Two Constitutional Wrongs Do Not Make a Right: Double Jeopardy and Prosecutorial Misconduct Under the *Brady* Doctrine, 28 Cardozo L. Rev. 931, 952–53 (2006) (arguing that jeopardy should attach when an intentional *Brady* violation is found on appeal).

"have his trial completed by a particular tribunal."[198] Most importantly, a mistrial prevents the first tribunal from potentially acquitting the defendant—including through jury nullification[199]—while a reversal on appeal does not. This is certainly not to say that misconduct that results in a conviction is less harmful to the defendant, but only that the two situations involve a consideration of distinct interests.[200] Thus, this analysis focuses solely on the mistrial context, and an analysis of what standard ought to apply to cases of prosecutorial misconduct that result in conviction and reversal on appeal is beyond the scope of this Note.

A. *Defendants' Double Jeopardy Interests Under* Kennedy *and Broader State Standards*

As section I.A describes, the Double Jeopardy Clause is intended to provide protection against successive prosecutions of a defendant while also balancing the public's interests in convicting those responsible for crimes. This section and section III.B analyze whether the *Kennedy* standard or the broader state standards more successfully protect a defendant's double jeopardy interests while accommodating the interests of society in preventing crime.

The seven states that have adopted broader standards than *Kennedy* correctly note that the *Kennedy* standard does not protect defendants' interests in any case in which the prosecutor's misconduct was not directed at provoking the mistrial because it allows for the successive prosecution of the defendant in those cases.[201] Consider, for example, the case of *State v. Moore* from Alabama, which applies the *Kennedy* standard.[202] The prosecution in that case had not only failed to turn over exculpatory witness evidence to the defense in violation of *Brady*[203] but had also lied to the court about the existence of the evidence altogether.[204] The appellate court found, however, that the prosecutor's actions were not directed at provoking a mistrial and that "[i]ndeed, it is apparent that the opposite is

198. Cf. United States v. Wallach, 979 F.2d 912, 915–16 (2d Cir. 1992) (quoting Wade v. Hunter, 336 U.S. 684, 689 (1949)) (recognizing the distinction between the mistrial and reversed conviction contexts because of the defendant's right to have his or her case decided by the first tribunal empaneled to hear his or her case).

199. See supra note 51 and accompanying text.

200. See *Wallach*, 979 F.2d at 916–17 (discussing the difference between the mistrial and reversed conviction contexts and considering whether to extend the *Kennedy* standard to also cover reversed convictions).

201. See supra section II.B.2; see also Botsford & Schneider, supra note 48, at 730 ("The *Kennedy* decision provides an incentive for prosecutors to hide evidence, condone perjury, and coerce witnesses, so long as their activities do not result in a mistrial.").

202. State v. Moore, 969 So. 2d 169 (Ala. Crim. App. 2006).

203. See Brady v. Maryland, 373 U.S. 83, 87 (1963) ("[T]he 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.").

204. *Moore*, 969 So. 2d at 171–76.

true" because "'[t]he prosecutor's withholding of exculpatory evidence from the defendant may only be characterized as an overzealous effort to gain a conviction from the first jury.'"[205] Basing its reasoning on *Kennedy*, the appellate court found that the Double Jeopardy Clause did not bar the reprosecution of Moore.[206] Thus, Moore was subjected to the "embarrassment, expense and ordeal" of a second trial,[207] even though the first trial was tainted by the state's blatant denial of the existence of exculpatory evidence. The burden of enduring a second trial was made worse in Moore's case because, prior to the defense's motion for a mistrial, the circuit court had sentenced him to death (Moore moved for a mistrial after the trial had concluded when the prosecutor disclosed to the court that he had knowingly failed to turn over documents to Moore's counsel, despite the defendant's repeated requests for such documents).[208] Similarly, the *Kennedy* standard did not adequately guard Moore's interest in having his case decided by the first tribunal to hear his case because the appellate court found that it was proper to retry him.[209] Despite the argument that Moore permitted this outcome because he requested the mistrial,[210] the seven states with broader standards aptly recognize that this "Hobson's Choice" cannot truly be seen as Moore's consent to waive his double jeopardy interests when the alternative is proceeding with a trial in which he did not have the chance to introduce key exculpatory evidence.[211]

The *Kennedy* standard may accidentally provide defendants some protection from the prosecution's use of successive trials to try out different theories of guilt or test certain presentations of evidence. After all, the *Kennedy* test prevents retrial in cases in which the explicit motivation of the prosecutor is to throw the first case, which implies that the state thinks it can put up a better case in a second trial.[212] But a prosecutor's case could still benefit from having the chance to retry a defendant after a mistrial even if the prosecutor did not intend to provoke the defendant into moving for the mistrial. For example, if the prosecutor introduced inadmissible evidence, hoping to get away with it and secure a conviction, and a mistrial was granted to the defendant, the prosecutor's second case could still benefit from the chance to test out the state's theory of the case in the

205. Id. at 180–81 (quoting United States v. Coleman, 862 F.2d 455, 458 (3d Cir. 1988)).

206. Id. at 181.

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

208. *Moore*, 969 So. 2d at 170.

209. See id. at 185.

210. *Kennedy I*, 456 U.S. 667, 672–73 (1982) ("But in the case of a mistrial declared at the behest of the defendant, quite different principles come into play. Here the defendant himself has elected to terminate the proceedings against him, and the "manifest necessity" standard has no place in the application of the Double Jeopardy Clause.").

211. See supra notes 176–177 and accompanying text.

212. See, e.g., Hagez v. State, 749 A.2d 206, 228–29 (Md. Ct. Spec. App. 2000) (noting that, to satisfy *Kennedy*, the prosecutor must commit misconduct "knowing it to be error, but desiring to 'sabotage' a probable loser").

first trial. Additionally, the prosecutor may have the opportunity to better prepare the state's witnesses or may have the chance to use evidence that was precluded from the first trial because it was not properly or timely disclosed.[213] Under *Kennedy*, this would be permissible even if the original trial was terminated because of the prosecutor's own misconduct, as long as the misconduct was not directed at causing the mistrial. Thus, the *Kennedy* standard protects the defendant from the increased chance of conviction under successive trials only in cases in which it was clear that the prosecutor threw the first trial in order to bring a more successful case in the second trial.

Broader standards provide more protection for defendants' double jeopardy interests because they bar reprosecution in any case of egregious prosecutorial error or misconduct. In doing so, these standards recognize that defendants' double jeopardy interests rely on their right to have their case heard by the first tribunal empaneled to hear the case and to be free from the burdens of successive prosecution.[214] They also recognize that these rights exist independent of the prosecution's intent.[215] Further, these standards provide protection against the state bringing a more successful second trial because they reduce the likelihood that a second trial will be permitted altogether. Generally, broader state standards better protect defendants' double jeopardy rights because they limit the chance of retrial in any case in which the state may abuse its power over the defendant.[216] The seven states that adopted broader standards were correct in noting the limitations of *Kennedy*'s protections of defendants' double jeopardy interests.

B. *Society's Double Jeopardy Interests Under* Kennedy *and Broader State Standards*

Courts must also consider the interests of society, however, when determining how double jeopardy applies in cases of prosecutorial misconduct.[217] The *Kennedy* test seemingly protects the interests of society by making it less likely that a defendant who did, in fact, commit a crime will

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213. See, e.g., People v. August, 375 P.3d 140, 142–43 (Colo. App. 2016) (noting several benefits that the prosecutor would secure from causing a mistrial, including better prepared witnesses, the opportunity to introduce evidence that was not properly admitted, and the chance to relitigate what evidence would be introduced at trial).

214. See supra section II.B.2.

215. See supra sections II.B.3; cf. Michael J. Klarman, Note, Mistrials Arising From Prosecutorial Error: Double Jeopardy Protection, 34 Stan. L. Rev. 1061, 1072–75 (1982) (arguing that, in cases of prosecutorial error, a mistrial should only be granted if consented to by the defendant because allowing a mistrial over the defendant's objections runs counter to the defendant's constitutional rights and may allow for the harassment of the defendant).

216. See, e.g., State v. Rogan, 984 P.2d 1231, 1243 (Haw. 1999) ("[W]e have . . . acknowledged the enormous imbalance of power between the prosecution and the criminal defendant.").

217. See supra note 53.

be able to avoid conviction because of broad double jeopardy protections. Under *Kennedy*, the prosecution will almost always be able to bring a second case because the specific intent standard that it requires is so difficult to prove.[218] Therefore, it is unlikely that a court will allow a perpetrator of crime to walk free because of double jeopardy protections under the *Kennedy* standard.[219]

Society also has an interest, however, in ensuring that innocent people are not convicted of crimes that they did not commit. After all, if a defendant is wrongfully convicted, the true perpetrator of crime is not penalized, which cuts against society's interest.[220] The wrongful conviction of a defendant also sends an innocent person to jail, harming not only that individual but likely their relations with others and with society as a whole.[221] Under the *Kennedy* standard, as previously discussed, prosecutors may be able to put together stronger cases by having the chance to retry defendants at successive trials, which could increase the likelihood of wrongful convictions.[222] Because the *Kennedy* standard fails to protect society from wrongful convictions, it inadequately serves society's double jeopardy interests.

Broader state standards, on the other hand, adequately protect society's interest in protecting the public from perpetrators of crime. While broader state standards bar the reprosecution of a defendant in more cases than *Kennedy*, they do not do so in every case of prosecutorial error. These standards seek to protect the defendant from enduring a trial tainted by egregious prosecutorial misconduct, but they do not bar reprosecution in cases of routine or minor error. For example, it is highly unlikely that the reprosecution of a defendant would be barred under any of these standards because of one inappropriate comment during closing statements or a misleading question during cross-examination from a prosecutor. In fact, each of the states employing a broader standard has chosen not to bar the reprosecution of a defendant in cases in which the misconduct was limited to an improper question or statement in the middle of trial.[223]

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218. See supra section II.B.1.

219. See State v. Michael J., 875 A.2d 510, 534 (Conn. 2005) (noting that the *Kennedy* rule properly takes into account "society's interest in enforcing its criminal laws . . . in those cases in which the prosecutorial misconduct was not sufficiently egregious to implicate truly the defendant's double jeopardy rights").

220. See Kurin, supra note 54, at 164–65 (arguing that denying a double jeopardy exception in cases of prosecutorial misconduct is burdensome to the public because it results in the wrongful conviction of individuals).

221. Cf. Wade v. Hunter, 336 U.S. 684, 689 (1949) (noting that the public's interest lies "in fair trials designed to end in just judgements"); Harris, supra note 197, at 952 (noting that the balance of society's interest must also consider "the 'imperative of judicial integrity'" (quoting Mapp v. Ohio, 367 U.S. 643, 659 (1961))).

222. See supra notes 212–213 and accompanying text.

223. See Miller v. Superior Ct., 938 P.2d 1128, 1132 (Ariz. Ct. App. 1997) (finding that a comment from the prosecutor regarding a matter not in evidence was improper but did not bar a new trial); People v. Malone, No. A140747, 2015 WL 9271777, at *9–11 (Cal. Ct.

In Hawaii, for instance, which has the broadest standard and bars the reprosecution of a defendant in any situation where prosecutorial misconduct results in "prejudicial error," the state supreme court found that the reprosecution of a defendant was not barred when the prosecutor improperly characterized an expert witness during his closing statement.[224] The prosecutor had suggested that the defendant's expert witness had previously "t[aken] the word of the accused murderer without any independent corroboration to support his version of the events" and that his purpose of testifying in a prior case had been "to say that the defendant 'couldn't be guilty of murder.'"[225] Though the court found that these statements were improper and deprived the defendant of her right to a fair trial, the court did not bar the retrial of the defendant because the prosecutor's conduct was not "so egregious" as to implicate double jeopardy concerns.[226] Similarly, broader state standards are unlikely to bar retrial when the prosecutor forgot to instruct a witness not to mention certain information in response to a motion in limine[227] or when the prosecutor negligently failed to make necessary redactions to the evidence before presenting it to the jury.[228] While these acts could, of course, prejudice the defendant, the judge would still be able to make the determination, based on the maliciousness or egregiousness of the error, not to bar retrial if the circumstances did not seem to call for it. Society's interests are therefore still protected because defendants will not be able to avoid being subjected to a full trial because of commonplace or routine errors by the state.[229] The misconduct must rise to a more "egregious" level for double jeopardy

App. Dec. 18, 2015) (holding that the reprosecution of a defendant was not barred even though the prosecutor had asked a question during recross-examination about the defendant's first trial and conviction, against the court's instructions); State v. Mainaaupo, 178 P.3d 1, 21 (Haw. 2008) (finding that the prosecutor's comments implying that the defendant's post-arrest silence was evidence of guilt did not bar retrial); Smith v. Eighth Jud. Dist. Ct., No. 77123-COA, 2019 WL 3854981, at *2 (Nev. Ct. App. Aug. 14, 2019) (holding that the prosecutor's reference to a prior bad act in her opening statement was improper but did not trigger double jeopardy); State v. Soto, No. A-1-CA-37022, 2019 WL 6728960, at *1–3 (N.M. Ct. App. Nov. 20, 2019) (holding that, while improper, a prosecutor's question that elicited information from a witness that was prohibited by the court did not bar retrial of the defendant); State v. Criswell, 386 P.3d 58, 63–67 (Or. Ct. App. 2016) (finding that reprosecution was not barred when the original trial resulted in a mistrial because the prosecutor's line of questioning elicited prohibited testimony from an expert witness); Commonwealth v. Chandler, 721 A.2d 1040, 1043 (Pa. 1998) (holding that a defendant could be retried despite the first trial ending in a mistrial because the prosecutor asked three questions during cross-examination that were not based on evidence of record).

224. State v. Udo, 454 P.3d 460, 482 (Haw. 2019).

225. Id. at 476–78.

226. Id. at 482.

227. See, e.g., People v. Bell, 260 Cal. Rptr. 3d 592, 614–15, 629 (Ct. App. 2020).

228. See, e.g., State v. Smith, 34 P.3d 1065, 1066–67 (Haw. Ct. App. 2001).

229. See Harris, supra note 197, at 949 (noting the difference between an "improper question" and the "suppression of evidence" in terms of the "maliciousness and intent of the act, as well as in the risk that the prosecutor's misconduct will subject the defendant to multiple trials, or possibly even to wrongful conviction").

concerns to be implicated.[230] Some of these state courts have even explicitly noted that they must continue to balance the interests of society against those of the defendant, demonstrating that courts with the ability to apply broader double jeopardy protections do not choose to bar reprosecution in every case.[231]

Ultimately, broader state standards adequately protect society's interests because they allow for defendants to be retried in almost any case in which the court thinks that is the appropriate outcome. Meanwhile, the *Kennedy* standard does not protect society's interests because it is more likely to result in wrongful convictions. Thus, because broader standards also sufficiently protect defendants' interests, these standards better uphold the purpose of double jeopardy protections[232] and better balance the implicated double jeopardy interests as required by the Court.[233]

C. *Implementing* Kennedy *and Broader State Standards: Analyzing the Supreme Court's Concern With Creating a "Manageable" Standard*

In its *Kennedy* decision, the Supreme Court spent significant time discussing the practical limitations of a broader standard and seemed to place more weight on these concerns than on fully balancing the defendant's and society's double jeopardy interests.[234] This section addresses the Supreme Court's concerns and argues that broader standards not only better balance defendants' and society's double jeopardy interests but also are "manageable" standards that lower courts have not struggled to implement.

In its *Kennedy* decision, the Supreme Court wrote that "more general standards which would permit a broader exception than one merely based on intent . . . offer virtually no standards for their application."[235] Yet, the Court's reasoning seemed to be based on a hypothetical "more general" standard under which double jeopardy would bar reprosecution in any case in which the misconduct was "designed to 'prejudice' the defendant

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230. See, e.g., State v. Rogan, 984 P.2d 1231, 1249 (Haw. 1999).

231. See, e.g., State v. Cortez, 159 P.3d 1108, 1117 (N.M. Ct. App. 2007) ("We must be careful that the citizens of New Mexico are not, without exceptionally good reason, 'deprive[d] . . . of their case' against a defendant, particularly when the prejudice to the defendant can be rectified by a new trial that will be free from the prejudice." (quoting State v. Day, 617 P.2d 142, 146 (N.M. 1980))); Commonwealth v. Johnson, 231 A.3d 807, 826 (Pa. 2020) ("[W]e bear in mind the countervailing societal interests . . . regarding the need for effective law enforcement.").

232. See Green v. United States, 355 U.S. 184, 187 (1957) ("The underlying idea [of the 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 . . . .").

233. See supra section I.A (discussing the balance of interests and their legal underpinnings).

234. See supra section II.A.1.

235. *Kennedy I*, 456 U.S. 667, 674 (1982).

. . . leading to a finding of his guilt."[236] A standard this broad would indeed be problematic because the prosecutor's job is to introduce evidence that will "prejudice" the defendant in the eyes of the jury. Thus, lower courts likely would have had difficulty implementing a standard this broad because it would be virtually impossible to have a case in which the prosecutor's actions did not in some way prejudice the defendant. The broader standards that were adopted by seven states in the wake of *Kennedy*, though, show that it is possible to provide greater protection to defendants without adopting a standard that would bar reprosecution in any case in which the prosecutor's misconduct introduced some form of "prejudice." By requiring the misconduct to create a certain level of prejudice in order for the double jeopardy protections to be invoked, these states have created standards that are manageable to apply.[237]

Furthermore, trial courts—which are expert fact-finders—ought to be able to make the factual conclusions necessary to implement these broader state standards. If a trial court is considered competent to determine whether a prosecutor had the intent to "'goad' the defendant into moving for a mistrial,"[238] it ought to be able to determine whether the prosecutor committed misconduct that the prosecutor "knows to be improper and prejudicial"[239] (using the Arizona standard as an example). In making a determination under the *Kennedy* standard, courts look to facts such as whether the prosecutor argued against the motion for a mistrial[240] or whether the prosecutor seemed satisfied with the court's rulings on what evidence could be introduced at trial.[241] Some courts consider whether the first trial could be seen as a "lost cause."[242] These inferential determinations,[243] though, are no less "amorphous"[244] than the findings of fact that are made under the broader standards. In fact, the only noninferential evidence that the trial judge may have on the prosecutor's specific intent is the prosecutor's own testimony regarding his or her motivation for committing misconduct,[245] which likely should not be relied on too heavily in any case.

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236. Id.

237. See supra section I.C.4 (describing the elements required by each broader state standard).

238. *Kennedy I*, 456 U.S. at 676.

239. Pool v. Superior Ct., 677 P.2d 261, 271 (Ariz. 1984) (en banc).

240. See, e.g., McClendon v. State, 523 S.W.3d 374, 377 (Ark. Ct. App. 2017).

241. See, e.g., State v. Miller, 264 P.3d 461, 471 (Kan. 2011).

242. See, e.g., West v. State, 451 A.2d 1228, 1235 (Md. Ct. Spec. App. 1982).

243. See, e.g., State v. Muhannad, 837 N.W.2d 792, 802 (Neb. 2013) ("A trial court makes its findings of subjective intent by '[i]nferring the existence or nonexistence of intent from objective facts and circumstances . . . .'" (quoting *Kennedy I*, 456 U.S. at 675)).

244. *Kennedy I*, 456 U.S. at 676.

245. See, e.g., Butler v. State, 95 A.3d 21, 25 (Del. 2014) ("[A] trial judge or prosecutor is unlikely to ever confess to having the intent to deprive a defendant of his right to trial before the empaneled jury."); Giddins v. State, 878 A.2d 687, 707 (Md. Ct. Spec. App. 2005) (noting that the prosecutor's testimony, "of course, may be taken with a grain of salt," but

Broader standards, meanwhile, may be easier for a trial court to apply because they do not require the court to make a finding about specific intent.[246] The broader standards that do require a showing of the prosecutor's mental state allow for more general showings that the prosecutor engaged in conduct he or she "knows to be improper,"[247] "knows . . . is improper and prejudicial,"[248] or "knows . . . is improper and prejudicial and either intends or is indifferent to the resulting mistrial or reversal."[249] To meet these standards, the defense likely needs only to show that the prosecutor was aware of the duties of his or her position and acted contrary to these duties.[250] This showing ought not be difficult in cases of egregious prosecutorial misconduct—which, as discussed previously, are the kinds of cases that these broader standards are designed to protect against.[251] Thus, the court may have an easier time determining whether the required scienter was established under broader standards than under *Kennedy*.[252] Furthermore, if state supreme courts are concerned that broader state standards than *Kennedy* may, in fact, be difficult for the lower courts in their states to apply, they could adopt clear multifactored tests such as Arizona's[253] or Nevada's[254] to guide the courts' fact-finding.

Ultimately, both the *Kennedy* standard and broader standards require the trial court to draw inferences from circumstances of the particular case, and so there is room for error under either standard. There is no clear reason, though, why a trial court would find it "manageable" to make the required findings of fact under the *Kennedy* standard but find such a

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that its relevance as evidence "should not be doubted"); see also Shreder, supra note 76, at 707 (noting that forcing a prosecutor to testify about his or her intent during the course of the trial might force him or her to admit to a violation of the Model Code of Professional Responsibility, a serious breach of ethics).

246. California, which does require the court to make a finding of specific intent, is the exception. See supra notes 120–122 and accompanying text. However, California's standard merely adds one other specific situation in which prosecution is barred in addition to *Kennedy*, making it no more difficult to apply.

247. Pool v. Superior Ct., 677 P.2d 261, 271 (Ariz. 1984) (en banc).

248. State v. Breit, 930 P.2d 792, 803 (N.M. 1996).

249. *Kennedy II*, 666 P.2d 1316, 1326 (Or. 1983).

250. See *Pool*, 677 P.2d at 270 ("[T]here must be a point at which lawyers are conclusively presumed to know what is proper and what is not."); *Breit*, 930 P.2d at 803 ("Rare are the instances of misconduct that are not violations of rules that every legal professional, no matter how inexperienced, is charged with knowing."); see also State v. McClaugherty, 188 P.3d 1234, 1247–49 (N.M. 2008) (finding that prosecutors must be presumed to know that they cannot inject inadmissible evidence into trial through cross-examination).

251. See supra notes 223–228 and accompanying text.

252. This is, of course, what the seven states that adopted broader standards argued as well. See supra section II.B.1.

253. *Pool*, 677 P.2d at 272 (en banc).

254. Thomas v. Eighth Jud. Dist. Ct., 402 P.3d 619, 626 (Nev. 2017).

task unmanageable under the standards established by Arizona, California, Hawaii, Nevada, New Mexico, Oregon, and Pennsylvania.[255] The Supreme Court's concerns that the broader state standards are unmanageable and "amorphous"[256] have not been borne out by experience. Seven state supreme courts have successively adopted these broader standards and have provided enough guidance for lower courts to successfully apply them.

The Court also expressed concern that, under a broader standard, judges in criminal cases may be less likely to grant a defendant's motion for a mistrial if they knew that the defendant could not be retried. Though the states that have adopted broader standards have not addressed this argument head-on, three observations mitigate this concern. First, as section III.B discusses, the broader state standards are not intended to bar the reprosecution of a defendant in any case of prosecutorial misconduct but only in cases of egregious prosecutorial misconduct that display a certain level of either intentionality or carelessness.[257] It is unlikely that a judge, then, will need to decide to bar the reprosecution of a defendant in very many cases. Thus, in the cases in which the defendant's rights are truly jeopardized, the judge likely will not feel hindered by the sense that he or she is letting too many defendants walk free without a final verdict. Second, the courts in several of the states that have adopted a broader standard have found without issue that a prosecutor's conduct violated these standards.[258] This suggests that judges applying broader standards are able to decide to bar the reprosecution of a defendant when the situation calls for it. And, finally, adopting a broader standard than *Kennedy* does not limit courts' ability to grant a mistrial without barring the reprosecution of a defendant in any case in which the requirements of the broader standard are not met. The court need only find that the misconduct causing the mistrial was not done knowingly—or that any of the other required factors was not established—and it would still be able to

255. See supra section I.C.4 (describing how these seven states have adopted broader standards). But see Cynthia C. Person, Note, Prosecutorial Misconduct and Double Jeopardy: Should States Broaden Double Jeopardy Protection in Light of *Oregon v. Kennedy*?, 37 Wayne L. Rev. 1699, 1716–18 (1991) (arguing that the *Kennedy* standard is easier to apply than the Arizona or Oregon standards).

256. See *Kennedy II*, 456 U.S. 667, 674–76 (1982) ("The difficulty with the more general standards which would permit a broader exception than one merely based on intent is that they offer virtually no standards for their application . . . . By contrast, a standard that examines the intent of the prosecutor . . . is a manageable standard to apply.").

257. See notes 223–228 and accompanying text.

258. Cf. State v. Pasene, 439 P.3d 864, 890 (Haw. 2019); State v. McClaugherty, 188 P.3d 1234, 1253 (N.M. 2008). Admittedly, in both cases, the court applied the broader standard to reverse the defendant's case on appeal. Despite the distinction between reversals on appeals and mistrials, however, these cases demonstrate that judges are able to determine that some defendants cannot be retried when the facts call for it, despite the fact that it will allow potential perpetrators of crime to walk free.

grant a mistrial while also ordering a retrial.[259] The broader state standards preserve that option while also allowing judges to bar the reprosecution of cases in which the egregious facts call for such a remedy.

The Supreme Court's practical concerns with broader state standards have been unfounded. Broader state standards are not more difficult for lower courts to apply than *Kennedy*—in fact, some courts have noted that they are easier to apply.[260] When considering, then, that broader state standards better uphold the purpose of double jeopardy by providing more protection for defendants' interests while balancing society's interests, it is clear that more states ought to adopt broader standards under their state constitutions.

CONCLUSION

Thirty-four states continue to apply the *Kennedy* standard to determine when cases of prosecutorial misconduct that result in a mistrial implicate double jeopardy protections—yet, twenty-four of these states never engaged in a meaningful analysis to determine whether *Kennedy* is the proper standard to apply under their state constitutions. By broadening their standards to bar the reprosecution of defendants in any case of egregious prosecutorial misconduct, states would better balance defendants' double jeopardy rights against the public's interest in maintaining a safe society. Our society has recently experienced a movement for increased transparency and accountability in the criminal justice system. By adopting broader standards than *Kennedy*, state courts would have one more tool to fight against prosecutorial misconduct in criminal trials. All states should adopt standards broader than *Kennedy* at the next opportunity.

259. See, e.g., State v. Mays, 346 P.3d 535, 549 (Or. Ct. App. 2015) (affirming the trial court's granting of a mistrial but dismissing a motion to bar retrial on double jeopardy grounds).

260. See supra section II.B.1.