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into one of the seven subsections of Penal Code section 1487. Since the California Constitution\(^2\) prohibits the suspension of the writ except in times of public emergency, it seems clear that the courts, and not the legislature,\(^3\) must assume the burden of containing the writ within its proper bounds.

**DOUBLE JEOPARDY IN CALIFORNIA**

"No person shall be twice put in jeopardy for the same offense . . . ."
—Article I, Section 13, California Constitution.

I

When does the discharge of the jury without a verdict in a California criminal trial entitle the defendant to the plea "once in jeopardy" as a bar to a second prosecution?\(^1\) Since 1880, Penal Code section 1016\(^2\) has authorized this plea, but no other section has ever attempted either to define "jeopardy" or state when the plea is available. This plea was not known, either by name\(^3\) or in principle,\(^4\) to the common law, which recognized only a former conviction or acquittal as a bar. Blackstone stated the common law rule: "... the plea of *autrefois acquit*, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for the same offense."\(^5\) Following the American Revolution, this maxim was incorporated in the United States Constitution\(^6\) and, in one form or

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\(^1\) The doctrine of "double jeopardy" involves many other problems, not discussed in this comment. The most important is: when is a second prosecution for the "same offense"? See People v. Greer (1947) 30 A. C. 593, 184 P. (2d) 512; People v. Puppilo (1929) 100 Cal. App. 559, 280 Pac. 545, (1929) 18 Calif. L. Rev. 171.

\(^2\) As amended in Code Amdts. (Pen. pt.) 1880, 44.

\(^3\) The term "jeopardy" occurs in the Year Books, but not in the present day sense.


\(^4\) That a criminal jury cannot be discharged without a verdict was laid down by Coke (Co. Litt. *227b, 3 Inst. *110) and repeated in 1698 by a resolution of the Judges of England (Carthew 465, 90 Eng. Rep. 868). Blackstone stated the rule: "When the evidence on both sides is closed, and indeed when any evidence has been given, the jury cannot be discharged (unless in cases of evident necessity) till they have given in their verdict . . . ." (4 Br. Co.Mm. *360). (Italics added. The italicized words first appeared in the 9th edition (1793), first to be published after his death.) But no sanction enforced this rule, as a wrongful discharge did not bar a new trial. Winsor v. The Queen (1866) L. R. 1 Q. B. 289, reviews many cases and finds this the rule, with but one case contra. This is the law in England today. 9 Halsbury's *Laws of England* (2d Ed. 1933) 173, 19 id. 312.

\(^5\) 4 Br. Co.Mm. *335.

\(^6\) In the Fifth Amendment.
another, in most of the state constitutions. It seems probable that such provisions were intended only to express the common law principle; but by judicial construction an additional principle was read into this language. The virtually unanimous interpretation arrived at is well stated in the early California case of People v. Webb:

... that when a party is once placed upon his trial for a public offense, on a valid indictment, before a competent Court, with a competent jury, duly impanelled, sworn and charged with the case, he has then reached and is placed in the jeopardy, from a repetition of which... this constitutional shield forever protects him, and after the jeopardy has once so attached, a discharge of the jury, without the consent of the defendant, for any cause within the control of the Court, before they have rendered a verdict, is equivalent to a verdict of acquittal.

The court, in People v. Webb, was construing Article I, Section 8, of the State Constitution of 1849 ("... no person shall be subject to be twice put in jeopardy for the same offense;"); it based its result on the principle of legislative adoption, citing eighteen pre-

7In 1935, 35 state constitutions had such a provision, in varying forms; 8 others provided only that no person should again be prosecuted for the same offense "after acquittal"; 5 had no constitutional provision on the subject. None defines "jeopardy" but several expressly except mistrials and hung juries. Of the states having no jeopardy provision, several nonetheless treat an improper discharge of the jury before verdict as an "acquittal" barring retrial. ADMINISTRATION OF THE CRIMINAL LAW: OFFICIAL DRAFT: DOUBLE JEOPARDY (1935) pp. 61-65. This book, hereafter referred to in this comment as OFFICIAL DRAFT, contains the American Law Institute's "official draft" on the subject, and much valuable information in addition.

8 There were conflicting decisions for a while. E.g., U. S. v. Haskell (C. C. E. D. Pa. 1823) 26 Fed. Cas. 207, No. 15, 321, where Washington, J., held the "jeopardy" provision of the Fifth Amendment referred only to conviction or acquittal. Otherwise, he argued, exceptions were necessary—but the Constitution did not provide for exceptions. The Federal courts now follow the general rule. Cornero v. U. S. (C. C. A. 9th 1931) 48 F. (2d) 69, and cases there cited.

9 This will be called in this comment the "orthodox doctrine" of double jeopardy, as distinguished from two others. (1) The common law rule only barred a new trial by the State after an acquittal. (2) The orthodox doctrine includes this rule, and in addition bars a new prosecution after a discharge of the jury without verdict "without necessity." (3) A new and growing doctrine permits the State to appeal from an acquittal for error, and secure a new trial. It is argued that there is no "double" jeopardy, as the defendant is in but one "continuing" jeopardy until a final judgment, free from error, is arrived at. This last doctrine will be discussed in text at note 103 infra.

10 (1869) 38 Cal. 467, 477.

11 The first courts to work out this construction stressed the literal meaning of the word "jeopardy"; e.g., Comm. v. Cook (Pa. 1822) 6 Serg. & R. 577, 596, where the court rejected the contention that "jeopardy" referred only to a conviction or acquittal, saying: "There is a wide difference between a verdict given and the jeopardy of a verdict. Hazard, peril, danger, jeopardy of a verdict, cannot mean a verdict given."

Clearly the courts in effect read the meaning of one of Blackstone's principles (supra note 4) into the language of another, although only the latter had been placed in the Constitutions.
1849 cases from other jurisdictions. The inclusion of this same provision, in its present form, in the Constitution of 1879 set an unquestionable seal of approval on this interpretation, and it has since been repeatedly followed by the California courts. The following year Penal Code section 1016 was amended to formally make available to defendants the plea of "once in jeopardy"; as the pleas of former conviction and former acquittal were already expressly provided for by this section, the addition must be taken as embodying the constitutional doctrine laid down in People v. Webb.

At what stage of the trial is the defendant first "in jeopardy"? In California, in accord with the universal rule, jeopardy is said to "attach" when the jury is sworn. This rule has recently been reaffirmed by square holdings in People v. Young and Jackson v. Superior Court. In each case the jury had been discharged—though

In fact, so far as the effect of a discharge of a jury without verdict is concerned, this construction was dictum, as the issue before the court concerned the validity of a statute purporting to give the State the right to appeal from an acquittal. The court, however, went out of its way to elaborately consider and define the full meaning of the clause. A square holding to the same effect followed in People v. Cage (1874) 48 Cal. 323. A contrary argument might have been founded upon the contemporaneous interpretation of the constitution by the legislature, reflected in CREM. PRAc. ACT §§ 481-490, Stats. 1851, pp. 263-266 (which granted the State the right of appeal); CREM. PRAc. ACT § 298, Stats. 1851, p. 244 (which provided only for "former acquittal" and "former conviction" as pleas in bar); and CREM. PRAc. ACT, § 307, Stats. 1851, 245 (which provided only that a former conviction or acquittal would bar a new prosecution).

Especially as substitution of the provision "No person shall, after acquittal, be tried for the same offense" was proposed at the Constitutional Convention, and rejected. DEBATES AND PROCEEDINGS, CONSTITUTIONAL CONVENTION OF 1878, pp. 78, 97, 179, 180, 1491.

The only departure found is a dictum in People v. Hinshaw (1924) 194 Cal. 1, 24, 227 Pac. 156, 166, that "a plea of once in jeopardy will not lie... unless there has been a former acquittal or conviction... before a competent court and a jury has been impaneled and sworn to try the charge." This is probably a misprint—"or a jury" being intended for "and a jury."

Although it is a constitutional privilege, the plea of "once in jeopardy" must be pleaded or it is waived. People v. Stoll (1904) 143 Cal. 689, 77 Pac. 818. The defendant must sustain the burden of proving its elements (jurisdiction of the previous court, validity of the prior indictment, fact of the discharge without verdict, etc.). People v. Newell (1923) 192 Cal. 659, 221 Pac. 622. The plea raises an issue of fact, which shall be determined by the jury. CALIF. PEN. CODE §§ 1041, 1042. Yet where there is a failure of evidence to support the plea the court may direct the jury, as a "matter of law," to find for the prosecution on the plea. People v. Greer, supra note 1; People v. Newell, supra this note (approved in People v. Warren (1940) 16 Cal. (2d) 103, 104 P. (2d) 1024); People v. Cummings (1899) 123 Cal. 269, 55 Pac. 898.

COOLEY, CONSTITUTIONAL LIMITATIONS 467 (7th ed., 1903); 1 BISHOP, CRIMINAL LAW 749-752 (9th ed. 1923).

17 (1929) 100 Cal. App. 18, 279 Pac. 824 (Hearing denied. Three judges voted to grant a hearing.)

18 (1937) 10 Cal. (2d) 350, 352, 74 P. (2d) 243, 244. "The authorities are in unison that jeopardy attaches to a defendant when he is placed on trial... before a jury duly impaneled and charged with his deliverance... [A] jury stands charged with the deliverance of a defendant when its members have been impaneled and sworn."

Why the courts have chosen this time is not clear. In a lay sense, the defendant is "in danger" when first suspected, his danger increasing during arrest, indictment, araign-
with no intent to discharge the defendant—after it had been sworn, but before any evidence had been presented; in each case, the plea of "once in jeopardy" was held available.

Does this mean that a defendant can never be put before a second jury—no matter what occurred during the trial before the first jury? This would be absurd, and the courts, just as they have read into the jeopardy clause the principle that the jury may not be discharged without verdict, have likewise always read in the exception, "except when required by legal necessity." This permits, in some circumstances, a second trial. These second trials are explained and reconciled in three ways. (1) If the trial was not upon a valid indictment, or not before a court of competent jurisdiction, it is said that the defendant was never really in any jeopardy of a valid conviction; his "jeopardy" was "apparent" rather than "real." (2) If the defendant has consented to the discharge of the jury without verdict, he is held to have waived his privilege and may not complain of a new trial. (Likewise, where a defendant on appeal has secured a reversal of a conviction, his appeal is said to be a "waiver of his constitutional right to object to being placed again in jeopardy," and he may be tried

ment, trial, etc., and culminating in conviction. The Introduction to the OFFICIAL DRAFT (at p. 8) suggests that the time the prosecution has proved a prima facie case would be a more reasonable time, for until then a conviction could not be sustained. (But cf. § 7, codifying the traditional view). This is verbally more consistent with the "jeopardy" phrasing, but ignores the purpose of the rule, prevention of oppression by many prosecutions on one charge. The need for a definite time, at once solemn and certain, probably influenced the courts. (The drama of a trial no doubt played its part in this determination; it is only at the swearing of the jury that the other actors in the judicial drama are determined. At that moment, the defendant for the first time is placed "in jeopardy" of the verdict of ascertained individuals.)

"... if the trial is by the court, it must be entered upon" before the defendant is in jeopardy. Ex parte Harron (1923) 191 Cal. 457, 466, 217 Pac. 728, 732.
19 People v. Larson (1885) 68 Cal. 18, 8 Pac. 517; People v. McNealy (1861) 17 Cal. 332.
20 People v. Hamberg (1890) 84 Cal. 468, 24 Pac. 298.
22 Per Sloss, J., concurring in People v. Tong (1909) 155 Cal. 579, 585, 102 Pac. 263, 266; People v. Travers (1887) 73 Cal. 580, 15 Pac. 293. Bishop concedes that this is the doctrine of the courts, and "not a wide departure from natural equity," but argues it is "utterly to disregard the implications in this provision of the Constitution . . . to say to a prisoner, 'Be hung contrary to law, or consent to be put in jeopardy a second time.'" 1 Bishop, CRIMINAL LAW 771 (9th ed. 1923).

The English law is in accord with Bishop. If the appellate court reverses the conviction, it must direct that a judgment of acquittal be entered. But a conviction will be reversed only if: (1) the verdict is unreasonable or not supported by the evidence; (2) to prevent a miscarriage of justice; or (3) the trial court has made an error of law in a matter of substance. Criminal Appeal Act of 1907, 7 Edw. 7, c. 23 (4). 9 HALSBURY'S LAWS OF ENGLAND 273 (2d ed. 1933).

(In an amazing opinion in U. S. v. Gibert (C. C. Mass. 1834) 25 Fed. Cas. 1287, No. 15,204, Story, J., once held that the "jeopardy" safeguard of the U. S. Constitution could not be waived—the conclusion being that the defendant could not appeal regard-
again.\textsuperscript{23} (3) If the discharge of the jury is for a cause "beyond the control of the court"—or, as it is more often put, due to "legal necessity"\textsuperscript{24}—the case falls within the exception, and the prohibition against a second trial does not apply.\textsuperscript{25} But if the jury is discharged without the defendant's consent, and without "legal necessity," then the discharge is as effective a bar to further prosecution as a conviction or acquittal.

What circumstances create a sufficient "legal necessity" to authorize the discharge\textsuperscript{26} of a jury? The United States Supreme Court, in the early leading case of \textit{U. S. v. Perez},\textsuperscript{27} said: "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 a verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would less of prejudicial error, the conviction stood, and the defendant's only remedy was executive clemency! "In this opinion" says the \textit{Official Draft} (at 116), "Mr. Justice Story stand alone.")

\textsuperscript{23} Not, however, for offenses of which he was acquitted. In California a conviction of a lesser included offense is held an acquittal of the greater offense (e.g., a conviction of manslaughter is an acquittal of murder). Insofar as \textit{Cal. Pen. Code} § 1180 ("The granting of a new trial places the parties in the same position as if no trial had been had . . .") is contra, it is unconstitutional. People \textit{v. McFarlane} (1903) 138 Cal. 481, 71 Pac. 568. Compare, however, \textit{People v. McNeer} (1936) 14 Cal. App. (2d) 22, 57 P. (2d) 1018. \textit{Contra:} \textit{Trono v. U. S.} (1905) 199 U. S. 521; \textit{People v. Palmer} (1888) 109 N. Y. 413, 17 N. E. 213, on the theory that a defendant appealing from a decision appeals from all of it.

\textsuperscript{24} People \textit{v. Webb}, \textit{supra} note 10 at 480.

\textsuperscript{25} People \textit{v. Webb}, \textit{supra} note 10 at 480. When the discharge is due to "necessity," it is sometimes said (as in \textit{People v. Hunckeler} (1874) 48 Cal. 331) "the happening of the subsequent event which renders the discharge of the jury necessary, shows that the defendant has never been in actual jeopardy" since the event was bound to occur. This, of course, is meaningless as a basis for determining when a defendant is in jeopardy and when he is not. If the erroneous discharge of a jury be viewed with this determinist attitude, there too the event is "bound to occur," and the defendant was "never in jeopardy." This of course would abrogate the entire doctrine of double jeopardy. Yet it is hard to see how a distinction can be made between physical events and a court's errors, whereby the former are inevitable and pre-determined and the latter are not. Subjectively and objectively the defendant is equally "in jeopardy" in either case.

\textsuperscript{26} When is a jury or juror "discharged"? In \textit{People v. Williamson} (1933) 134 Cal. App. 775, 26 P. (2d) 681, the trial judge excused a juror, but recalled him before he left the building. On appeal, the court stated: "The weakness in appellant's argument is in . . . the assumption that the juror was 'discharged.' \textit{No doubt the court} in the stress of the moment \textit{intended to discharge} the juror. However, before the latter had reached the elevator he was recalled . . . We think the jurisdiction of the court over the proceedings before it gave it the power to do as it did; that its action in effect rescinded the order theretofore made . . ." (Emphasis added.)

In \textit{People v. McNeer} (1935) 8 Cal. App. (2d) 676, 47 P. (2d) 813 (\textit{rev'd on other grounds}) the trial judge told the jury, "I will now discharge you . . . You are now discharged." Before the jury left the box, the judge conferred with the attorneys and then revoked his order. On appeal the court said: "Under such circumstances to hold that the first order was irrevocable would be to place the form above the substance . . . If any error occurred it was simply one of procedure which did not affect the substantial rights of the appellant."

\textsuperscript{27} (U. S. 1924) 9 Wheat. 579.
otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere.” This seems a properly flexible rule for the application of a constitutional doctrine.

As the prohibition is constitutional, a statute authorizing discharge of the jury and retrial in cases of less than “legal necessity” is invalid. Thus, in *People v. Huncheler*, a prosecution for manslaughter, the trial judge felt that the evidence showed murder and, acting under statutory authority, discharged the jury and directed a prosecution for murder. On the second trial, the supreme court sustained the defendant’s plea of former jeopardy and reversed his conviction, stating (without mention of the statute, which had been called to its attention): “The mere opinion of the District Judge that the evidence showed the defendant to be guilty of a higher degree of crime was not such a necessity as required the discharge of the jury, or authorized a re-trial of the defendant for the same offense.”

By the same token, a discharge valid in the constitutional sense logically needs no statutory authority to make it so. In California, certain Penal Code sections specifically authorize the discharge of the jury on defined grounds. It might be argued from this that the grounds set forth were intended to be exclusive, and a discharge on other grounds should form a basis for a plea of “once in jeopardy.” This argument is unsound for several reasons. It must be based on one of two theories: either (1) that the constitutional provision contemplates statutory exceptions, and only statutory exceptions, or (2) that the legislature has itself set up a statutory prohibition of double jeopardy, with a second trial permitted only where expressly authorized. The first theory seems unsound on principle, as it would place a self-executing constitutional provision at the mercy of a legislative definition of “legal necessity,” and unsound historically, as the exceptions recognized in the other states from which the provision was borrowed did not depend on statute. The second theory is likewise unsound. The legislature might, of course, enact a statutory prohibi-

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28 *Supra* note 25.
29 Former Penal Code § 1112, enacted 1872 (based on CRIM. PRAC. ACT, Stats. 1851, 253), repealed by Code Amdts. 1880, p. 6. This section specifically authorized discharge of the jury in such a case and a new trial.
30 *Supra* note 25 at 334; followed in *People v. Ny Sam Chung* (1892) 94 Cal. 304, 29 Pac. 642. *Accord:* Ingram v. State (1905) 124 Ga. 448, 52 S. E. 759; State v. Yokum (1924) 155 La. 846, 99 So. 621; *People ex rel. Blue v. Kearney* (Sup. Ct. 1943) 181 Misc. 981, 44 N. Y. Supp. (2d) 691 (noted in 44 COL. L. REV. 87, which states that seven other states, all of them with constitutional jeopardy provisions, have such statutes. A trap for the unwary judge!).
31 § 1123 (illness of juror, before jury retires); § 1139 (illness of juror after jury has retired, or “any other accident or cause occur to prevent their being kept for deliberation”); § 1140 (consent of the parties, or inability of jury to agree); § 1147 (disappearance of juror).
tion of double jeopardy far more strict than the constitutional one, but it has not expressly done so. It would have to be argued that, by implication, the listed grounds were intended to be exclusive, and that an absolute bar to further prosecution was the intended sanction to enforce this rule. But the grounds could never reasonably have been intended to be exclusive; too many good grounds (e.g., corruption of a juror, death of the judge, disappearance of the defendant) are not listed. Nor could so drastic a sanction—an implied one, at that—have been intended. In fact, Penal Code Section 1141 provides: "In all cases where a jury is discharged or prevented from giving a verdict by reason of an accident or other cause, except where the defendant is discharged during the progress of the trial, or after the cause is submitted to them, the cause may be again tried." Thus it expressly authorizes—so far as a statute may—a retrial in all cases, with exceptions not here relevant.

It is clear, therefore, that only the constitutional test of "legal necessity," the limits of which are defined by the common sense of the courts, need be satisfied for a discharge of a jury and a new trial to be authorized. Occasional intimations in California opinions that a discharge is "improper" and a bar to retrial if not upon a statutory ground seem neither correct in theory nor practical. As the entire doctrine was originally evolved by judicial interpretation, which by reading it into the constitution placed it beyond the reach of the legislature, it seems fairly the responsibility of the courts to evolve the exceptions needed to make it workable.

California cases have recognized the following grounds as creating sufficient "legal necessity" to justify a discharge and retrial: the illness of a juror, the illness or death of the judge, the inability of the jury to agree, and the flight of the defendant. Some of the holdings as to what are insufficient grounds are, in view of their con-

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32 Penal Code § 1023 cannot be construed as such; the first mention of jeopardy in that section was added in Code Amdts. 1880, p. 45, as a recognition of the retention of the constitutional prohibition in the Constitution of 1879, and should have that effect only. The term "statutory jeopardy" has been used to describe the bar to prosecution set up by CAL. PEN. CODE § 1387; People v. Head (1930) 105 Cal. App. 331, 288 Pac. 106.

33 This and the above code sections (supra note 30) have existed in substantially their present form since the Criminal Practice Act of 1851.

34 As in People v. Young, supra note 17 at 23-24, and People v. Tong, supra note 22 at 595 (per Sloss, J. concurring).

35 People v. Ross (1890) 85 Cal. 383, 24 Pac. 789.

36 See People v. Hunckeler, supra note 25 at 334.

37 People v. Smalling (1892) 94 Cal. 112, 29 Pac. 421.

38 People v. Higgins (1881) 59 Cal. 357.
sequences, surprising. In *People v. Cage*, the jury deliberated four days, and were then discharged without being examined to determine whether there was any hope of their arriving at a verdict; the supreme court held this was not a sufficient showing of inability to agree, that the discharge was therefore "without necessity" and thus a bar to further prosecution. Granting the State a peremptory challenge after the jury was sworn, upon the discovery that a juror knew one of the defendant's witnesses, was held improper in *People v. Young*, and entitled the defendant to the plea of once in jeopardy.

Suppose sufficient error has been committed by the prosecution that the defendant will be able to secure a reversal if convicted. Has the trial court the right to anticipate this, declare a mistrial and order a new trial? Is there sufficient "legal necessity" to justify the discharge of the jury? There are dicta in California cases that there is not. In the recent (1937) case of *Jackson v. Superior Court*, the supreme court by dictum praised the rule permitting retrials in such cases, but added: "This seems to be the rule in some states, if not in California." This ambiguous comment leaves the question open. As it seems reasonable to compel the defendant to elect either to waive the error or consent to a new trial, it seems likely that the old dicta will never be applied.

39 (1874) 48 Cal. 323.
40 *Supra* note 17. "The juror stated that he did not believe their friendly relations would alter his attitude, but that 'those things always have a bearing.'" (at page 19). The court stated this was not even a sufficient basis for a challenge for cause before impaneling, and therefore held the excusing of the juror improper. (Three judges in the supreme court voted to grant a hearing.)

The court's analogy is plausible but unsound. The rules governing the challenge of veniremen should not be mechanically applied to the discharge of sworn jurors, for the consequences of their application are different. The granting of a challenge for cause, however erroneously, is never grounds for reversal (for where is the prejudice?), but the erroneous excusing of a juror already sworn is all important under the double jeopardy doctrine. Common sense alone, balancing the consequences, should govern this latter case.

41 It is interesting that though the term "mistrial" is repeatedly used in the cases, it is nowhere used nor defined in California statutes.

42 *People v. Ny Sam Chung*, *supra* note 30 at 307 (a trial court "could not deprive them [i.e., defendants] of any benefit to be derived from that jeopardy by refusing to allow the case to go to judgment, even though it was aware that by reason of an error of law committed during the progress of the trial, or by reason of the insufficiency of the evidence to support the charge a mistrial would be the necessary result."); *People v. Young*, *supra* note 17 at 23-24 ("If deprived of a verdict because an error of law would result in a mistrial, except as provided by statute thereon, the discharge is equivalent to an acquittal and is a bar to a subsequent trial. *People v. Tong, supra."") *People v. Tong*, *supra* note 22, in no way supports this. Did the court mean *People v. Ny Sam Chung*?

43 *Supra* note 18.

44 On this question, the comment of the Arkansas supreme court, in *Martin v. State* (1924) 163 Ark. 103, 259 S. W. 6, seems just: "Is the defendant entitled to speculate on the prospect of an acquittal when it is known in advance that he stands no chance
II

In the past when just one juror was excused, it was necessary, due to the constitutional guaranty of a jury of twelve, either to discharge the whole jury and impanel a new one or to swear in a new juror and begin the trial de novo. The courts, arguing that the defendant was being tried by a new and different jury (because a different group of twelve, even though eleven were the same) judged the replacement of one juror by the same standards of "necessity" as that of the whole jury; the wrongful discharge of one juror was as fatal to the prosecution as that of an entire jury. To obviate the inconvenience of having to re-commence the trial on the illness of just one juror, California in 1895 enacted an alternate juror law, Penal Code section 1089. This section provides (in part):

... immediately after the jury is impaneled and sworn, the court may direct the calling of one or more additional jurors, in its discretion, to be known as 'alternate jurors'.

Such jurors must be drawn from the same source, and in the same manner, and have the same qualifications as the jurors already sworn, and be subject to the same examination and challenges. Such alternate jurors shall be seated near, with equal power and facilities for seeing and hearing the proceedings in the case, and shall take the same oath as the jurors already selected, and must attend at all times upon the trial of the cause in company with the other jurors; if at any time, whether before or after the final submission of the case to the jury, a juror die or become ill, so as to be unable to perform his duty, the court may order him to be discharged, and draw the name of an alternate, who shall then take his place in the jury box, and be subject to the same rules and regulations as

of conviction? the framers of our Constitution did not intend to guarantee an accused any such right."

People v. O'Neil (1874) 48 Cal. 257 reversed a conviction where the defendant had consented to be tried by 11 jurors, holding the full number could not be waived. This has been changed by the 1928 amendment to Article I, Section 7 of the California Constitution, permitting a defendant to waive trial by jury. People v. Clark (1938) 24 Cal. App. (2d) 302, 74 P. (2d) 1070.

40 So provided in Penal Code § 1123, enacted 1872 (based on CRIM. PRAC. ACT, Stats. 1851, p. 255).

49 It was so much considered a "new" jury, that the defendant was entitled again to all his peremptory challenges, exercisable against even the jurors retained. People v. Stewart (1883) 64 Cal. 60, 28 Pac. 112.

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49 Cal. Stats. and Amdts. 1895, p. 279. This was the first alternate juror law. Its obvious merits led other jurisdictions to adopt it virtually verbatim. See (1931) 70 A.L.R. 188, (1935) 96 A.L.R. 793, (1937) 109 A.L.R. 1495; see (1937) 85 U. of PA. L. REV. 539, 540, listing 13 states and the United States as having such a statute. The American Law Institute's CODE OF CRIMINAL PROCEDURE (1930) has such a provision, § 285, p. 112.
though he had been selected as one of the original jurors. (The bracketed portions were added by amendment, Stats. 1933, p. 1342.)

A court may now, under this statute, discharge a juror for specified cause, substitute an alternate, and proceed with the trial without delay or inconvenience. In the leading cases of People v. Peete and People v. Howard it was settled that this does not constitute a denial of the right to "trial by jury." But does it place the defendant "twice in jeopardy" because before a "different" jury? It is clear that the point may not be raised, if the discharge and substitution are consented to or are for "legal necessity." But if a juror is discharged without "legal necessity" and an alternate substituted, may the defendant then plead "once in jeopardy"?

This question has now been passed upon, for what is believed to be the first time in the United States, in the recent California case of People v. Burns. A jury of twelve was impaneled and sworn; an alternate was then selected and "seated" but not sworn. The trial judge then informed counsel that he had learned that a hit-run felony information was pending against one of the jurors, and told that juror: "I do not feel, in view of the fact that you have been informed against by the district attorney, who is also presenting this

50 (1921) 54 Cal. App. 333, 202 Pac. 51 (hearing denied). This is the leading case in the nation on the subject.
51 (1930) 211 Cal. 322, 295 Pac. 333. Here the court laid down as the essentials of a common law jury trial: "a jury of twelve citizens, no more nor less, drawn from the locality, duly examined and sworn to try the cause... the jurors must be impartial... the verdict shall be unanimous..." It found none of them violated by the substitution of an alternate juror.


52 The point was not raised in any of the cases cited in notes 50 or 51, because not available under their facts. State v. Dalton, State v. Dolbow (N. C. and N. J. have no "jeopardy" provisions in their constitutions); State v. Breedlove, People v. Mitchell, Commonwealth v. Spallone (an alternate was selected and served, but was never substituted); Robinson v. U. S., People v. Peete (substitution was for "legal necessity," due to illness of regular juror). In People v. Howard, the juror was discharged for prejudice, but at the request of defendant's counsel.

In three prior California cases (People v. Lanigan (1943) 22 Cal. (2d) 569, 140 P. (2d) 24; People v. Von Badenthal (1935) 8 Cal. App. (2d) 404, 48 P. (2d) 82; People v. Timmin (1934) 136 Cal. App. 301, 28 P. (2d) 951) defendants have sought to raise the question; in each, the defendant contended that an alternate had been wrongfully substituted, and that this had placed him twice in jeopardy. In each, the court considered the grounds for the substitution and found them justified under section 1089, thus avoiding the main question. The grounds specified by 1089, of course, lie well within the scope of "legal necessity."

53 (February 25, 1948) 84 A. C. A. 28, 189 P. (2d) 868. (Hearing denied.)
54 Id. at 30, 189 P. (2d) at 869.
case, that it would be fair to you or fair to anyone concerned to have you serve upon this case, and therefore you are discharged.'\textsuperscript{55}

The defendants, who had offered timely objection to this discharge, then offered a plea of once in jeopardy, which the court denied. The defendants were convicted and appealed, contending: that they had been placed ‘in jeopardy’ when the jury of twelve had been sworn, on the basis of the formula of the \textit{Jackson} case;\textsuperscript{56} that the defendants had been placed in jeopardy of a second jury on the actual trial, which entitled them to the plea of ‘once in jeopardy,’ unless the discharge of the juror had been for sufficient ‘legal necessity’; that the discharge had not been for sufficient ‘legal necessity’ as it was neither authorized by section 1089 (the juror not having ‘requested’ discharge) nor—in any event—for a ‘sufficient reason’ (as facing a felony charge is not even grounds for a challenge for cause,\textsuperscript{57} in selecting the jury); that the plea of ‘once in jeopardy’ should therefore have been allowed and the defendants permitted to go free.\textsuperscript{58}

The district court of appeal rejected this contention and affirmed the conviction. Accepting the formula of the \textit{Jackson} case,\textsuperscript{59} the court

\textsuperscript{55}Id. at 31, 189 P. (2d) at 870.

\textsuperscript{56}Supra note 18.

\textsuperscript{57}Defendants’ contention here is quite convincing. There are three bases for a challenge for cause: “general grounds,” “implied bias,” and “actual bias.” Penal Code § 1072 makes a felony conviction a general ground of challenge; by implication, a mere indictment is excluded. § 1074 states that a challenge for implied bias (implied by law from the existence of certain relations) may be made for the grounds it lists “and for no other”; it does not mention felony-indictments. “Actual bias” under § 1073 (“. . . a state of mind on the part of the juror . . . which will prevent him from acting with entire impartiality.”) would seem easy to make out on these facts; but the court, instead of making such a finding, excused the juror without questioning him. The court clearly seems to have excused on the grounds of “implied bias” for a non-authorized reason.

But, as pointed out in note 40 supra, this bears on the issue only by analogy, and the analogy is unsound. A rigid system of exclusive grounds is workable in the case of challenges, for it is supplemented by peremptory challenges, and a granting of a challenge for a non-authorized reason is never reversible error. A similar rigid system would be unworkable where the consequence of error is to bar further prosecution. The facts of the Burns case are an excellent illustration of this.

\textsuperscript{58}The State argued, among other contentions, that what had occurred was at most an “error of procedure” which could not justify reversal in the absence of a “miscarriage of justice.” Its brief implied that the double jeopardy doctrine had been repealed by the enactment of Article VI, Section 4/5, of the California Constitution. Respondent’s brief (pp. 57-75) in \textit{People v. Burns}, supra note 52. This seems clearly unsound as that amendment does not purport to change substantive law as to what constitutes “error,” but only lays down at what point it justifies reversal. The error complained of in double jeopardy cases is not the wrongful discharge, but the denial of the plea “once in jeopardy,” based on such discharge. The defendant is given the plea both by statute and by the constitution; if he is entitled to it, it can hardly be argued that its denial does not change the result. The denial of a “technical” right, such as a valid defense under the Statute of Limitations, is of course a “miscarriage of justice.” See \textit{People v. O’Bryan} (1913) 165 Cal. 55, 65, 130 Pac. 1042, 1046, for language squarely in point.

\textsuperscript{59}“That formula, although invented long before alternate jurors were thought of, applies of course to cases where there are alternates as well as to cases where there are not.” \textit{People v. Burns}, supra note 53 at 34, 189 P. (2d) at 871.
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quoted from section 1089 and stated that the defendants’ argument that jeopardy attached when the jury of twelve was sworn was “answered in the negative by the language of section 1089 itself.” The court reasoned that section 1089, by referring to the alternates as “additional jurors” and by requiring the same standards as to their selection, opportunity for observation, and attendance, made the alternates part of the “jury.” Pointing out that evidence should not be heard until the alternate jurors have been sworn, the court continued: “If, therefore, the jury cannot function until the alternates have qualified, the jury cannot be said to be complete or impaneled until that time. For these reasons we... must hold that it [i.e., jeopardy] attached only after the alternate juror was sworn, hence that the appellants faced but one jury.” The defendants thus not having been formerly in jeopardy, it was proper to deny that plea.

The court thus performed the curious feat of proving that “the jury” was not impaneled and sworn until after the alternate was called, selected, and sworn, by reasoning from the words of a statute which in terms provides that the alternate shall be called “immediately after the jury is impaneled and sworn.” As the court’s reasoning is based on defining the term “jury” to include alternates, it follows under this theory that a “jury” in California, when alternates are used, consists of 13 or 14 jurors or even more, despite the supreme court’s pronouncement in People v. Howard that an essential of a common law jury is “twelve citizens, no more nor less.” The number of jurors, moreover, is to vary in the discretion of the trial court. A further consequence of this theory would be the anomaly that a discharge to substitute an alternate already duly selected and sworn might be bad, where a discharge to substitute someone not yet even identified would be good. It is not surprising, therefore, that although this holding was sufficient to dispose of the case, the court went on to state what is in effect an alternate ground of decision, even more significant to the doctrine of double jeopardy because it tacitly assumes that jeopardy had already attached at the time of the discharge of the juror.

60 “... immediately after the jury is impaneled and sworn, the court may direct the calling of one or more additional jurors, in its discretion, to be known as ‘alternate jurors’....”

61 People v. Burns, supra note 53 at 35, 189 P. (2d) at 872.

62 Supra note 51. Compare also People v. Bruneman (1935) 4 Cal. App. (2d) 75, 40 P. (2d) 891, where a conviction was reversed when two alternate jurors, with the consent of defendant’s counsel, retired with the jury, under instructions to listen but not to speak, on the ground that it was reversible error for two “outsiders” to be with the jury while they deliberated.

63 The court did not expressly set this forth as an alternate ground of decision—nor did it expressly assume, even by way of argument, that jeopardy had attached. Its logic applies, though, on that assumption.
The court discussed the cases of *People v. Peete*\(^6\) and *People v. Howard*,\(^5\) quoted the Peete decision that a trial where an alternate is substituted is "by a jury of twelve in every essential particular," and commented: "To have reached that conclusion the court must have reasoned that there was but one jury from the very beginning." The court then continued:

It is implicit in the Howard and Peete cases that a verdict by 12 jurors, one of whom was originally an alternate juror, is the verdict of the jury originally sworn to try the case. If the substitution of the alternate for one of the regular jurors is in accordance with the provisions of the Penal Code, section 1089, no question of double jeopardy would arise. *This can only be true if the substitution of the alternate for the regular juror does not destroy the unity of the jury.* It does not destroy the unity of the jury because the jury is not complete until the alternate is accepted and sworn and the alternate is at all times a potential member of the regular jury. The requirement of trial by one jury is satisfied, where a jury composed of 12 regular jurors and one or more alternates has been impaneled, if the verdict is returned by 12 jurors sworn to try the case although one or more alternates may be included in the jury which renders the verdict. If this is true when the substitution has been made in the manner provided by the Penal Code section 1089 it must be true where it has been made in an irregular manner. The same number of jurors sworn to try the case in the same way are involved in either instance. *Either the substitution of an alternate for a regular juror destroys the unity of the jury or it does not.* If it does not destroy the unity of the jury as is settled by the Peete and Howard cases, then the substitution of an alternate for a regular juror in an unauthorized manner does not place the defendant twice in jeopardy but is merely an error of law which should not lead to a reversal in the absence of a showing that it has resulted in a miscarriage of justice under article VI, section 4\(\frac{1}{2}\) of the Constitution.\(^6\) (Emphasis added.)

The particular fact situation before the court did not require this discussion for its solution. According to the principles previously established,\(^6\) lack of statutory authorization for the discharge of the juror is immaterial in so far as double jeopardy is concerned, if there was "legal necessity" for it. It can hardly be argued that sec-

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\(^6\) *Supra* note 50.

\(^5\) *Supra* note 51. The court states that the consent of defendant's counsel in the Howard case has no significance, as the Howard court found the dismissal "irregular," and did not rely on the consent in its opinion. But the irregularity was as to "trial by jury," and lay in the fact that the statute (Penal Code § 1089) was not followed; not that the defendant was twice in jeopardy. The court did not mention consent, as the issue of double jeopardy was not raised; and it undoubtedly was not raised because of this consent.

\(^6\) *Supra* note 52 at 41, 189 P. (2d) at 876.

\(^6\) See text at notes 30-33 *supra.*
tion 1089 contains a legislative mandate that the grounds it specifically lists for authorizing the substitution of a juror shall be exclusive. To make a ground for discharge valid or invalid, depending on whether the juror requests discharge, would be unreasonable. Would a judge be helpless to discharge a juror for corruption if the juror did not request it? The discharge in the Burns case thus violated no statutory mandate, since there was none; nor did it violate the constitutional mandate, since “legal necessity” existed. In a felony trial, a juror himself under a felony indictment could scarcely avoid being influenced in some way by that fact. He might prove sympathetic to fellow defendants; on the other hand, he would have a powerful motive for returning a verdict pleasing to the district attorney. Either the defendant or the district attorney might reasonably object. Under such circumstances common sense indicates that the substitution of the juror was proper and due to “legal necessity,” and thus involved no double jeopardy.

It seems clear that the court was thinking beyond the immediate fact situation before it and was seeking a general solution of the jeopardy problem in the alternate juror situation sufficient to cover a substitution without “legal necessity.” The jeopardy doctrine aims at relieving a defendant from the burden of a second trial caused by an erroneous discharge. But the alternate juror law itself does that now; when a juror is substituted—whether for good reason or bad, with or without “legal necessity”—the trial simply proceeds without delay, and there is no prejudice in fact to the defendant. A distinction based on the presence or absence of “legal necessity” for the substitution seems irrelevant and unsatisfactory. The court’s ingenious attempt to avoid this distinction assumes that the jeopardy doctrine is a “requirement of trial by one jury,” which in turn requires that the “unity of the jury” be undisturbed; the court then finds that substitution of alternates did not destroy this “unity of the jury” in the Peete and Howard cases, and concludes that if an authorized substitution does not destroy it, then neither can an unauthorized one. The court has thus transformed the jeopardy doctrine into a requirement of “unity of the jury,” and in the process abandoned “legal necessity” distinctions. But the court’s ingenious doctrine is based on a theory devised to explain a difficulty that does not exist. The jeopardy

68 “Due process” would guard against substitution aimed at specifically affecting the result (such as attempting to resolve a hung jury by substituting an alternate for an obdurate juror), since this would be a denial of a fair trial. But section 1089, insofar as it authorizes substitution for a proper purpose after the jury retires, is valid. People v. Lanigan, People v. Von Badenthal, both supra note 52.

69 A phrase, and a concept, this writer has not found in any other decision. It seems based on the court’s 13-man jury theories. Text at note 60 supra.
doctrine is not a "requirement of trial by one jury"; it permits two juries—when "necessary." That does not mean the two juries are one jury; it means that when necessary, subjection to two juries is permissible. It is therefore not at all implicit in the Peete and Howard cases that there was but one jury70 or that the "unity of the jury" was not destroyed. The "unity of the jury" is destroyed by the substitution of an alternate for a regular juror. The usual question—"Is the second jury permissible?"—remains; the court's reasoning has not explained it away.

If the court's solution is conceptually unsatisfactory, is there an alternative solution by which the same result may be reached? It is believed that analysis reveals a solution that is practical, consistent with the rationale of the jeopardy doctrine, and supported by prior California holdings. It consists of the re-formulation of the doctrine in new but sound terms, namely: that it prohibits subjecting a defendant to two trials without legal necessity. It must be conceded that virtually all previous decisions phrase the doctrine as a prohibition against two juries,71 but this is easily explained. When the doctrine was formulated, there were no alternate juror laws. When a juror was discharged, it was necessary to re-commence the trial; a second jury and a second trial were the same things. To forbid the one was to forbid the other.72 But the underlying rationale was to prevent the burden of a second trial. It seems only sound to re-phrase the jeopardy doctrine more directly in terms of its object; to do so does no violence to its spirit, and renders its application more practical. That this is the true meaning of the doctrine seems necessarily implied in the California decisions holding that the trial of the issue of insanity by a separate jury in a criminal trial—so that there are two juries, but only one trial of each issue—does not violate the double jeopardy prohibition.73 If this statement of the rule be accepted, so that only a second trial is forbidden, it is clear that even the substitution of an alternate without "legal necessity" would not violate it, and therefore would not justify a "once in jeopardy" plea.

70 To say there was but one jury again leads inevitably to the result that it was a 13-man jury. Compare text, notes 61-62. The court's result is similar to that provided by statute in New Jersey. There 14 jurors are selected; at the close of the court's instructions, 12 are chosen by lot to be the jury which votes. State v. Dolbow, supra note 51.

71 Almost mystic language is used, such as "a jury being charged with the deliverance of a defendant," etc., in Jackson v. Superior Court, supra note 18.

72 The fact that phrasing the doctrine in terms of "juries" produced automatically, without need of further elaboration, a convenient "critical time" (i.e., the swearing of the jury) at which jeopardy was to attach, was probably also a factor. But the choice of a critical time is but an arbitrary detail, and should not shape the principle.

73 See text at notes 82, 83 infra.
III

Some special "double jeopardy" problems arise in California as a result of the method provided by statute for trying the defense of insanity. In 1927, section 1026 of the Penal Code was added to provide:

When a defendant pleads not guilty by reason of insanity, and also joins with it another plea or pleas, he shall first be tried as if he had entered such other plea or pleas only, and in such trial he shall be conclusively presumed to have been sane at the time the offense is alleged to have been committed. If the jury shall find the defendant guilty, or if the defendant pleads only not guilty by reason of insanity, then the question whether the defendant was sane or insane at the time the offense was committed shall be promptly tried, either before the same jury or before a new jury, in the discretion of the court . . . . (Emphasis added.)

This provision for two verdicts, and the possible substitution of a second jury, was at once attacked on constitutional grounds as a denial of trial by jury, but was sustained in People v. Hickman and People v. Troche. In People v. Leong Fook the defendant objected to the fact that for the trial of the issue of insanity the same jury was retained but not resworn. The supreme court held that there had been but "one cause and one trial," and that the initial oath "expressly covered the cause or matter at issue between the People and the defendant, and hence necessarily covered each and all of the various issues. . . . The cause being single, the administration of no further oath during its progress was required." For the same reasons, the supreme court has consistently upheld the refusal, when the same jury is retained, to allow any new voir dire examination or challenges of the jurors. Although holding that the whole transaction is but "one cause and one trial," the supreme court has held that where error occurred on the trial of the insanity issue, the case might be re-tried as to this issue only. It was for a while felt that that part of

74 By Stats. 1927, p. 1148.
75 Paradoxically, it was attacked on two theories: (1) that the issue of insanity was inseparable from the other issues, and should be tried with them before one jury at one time; (2) that a jury which had already found a defendant "guilty," was too biased and partial to try the issue of his sanity! (1931) 19 Cal. L. Rev. 174, 176, 178-180.
76 (1928) 204 Cal. 470, 268 Pac. 909.
77 (1928) 206 Cal. 35, 273 Pac. 767.
78 (1928) 206 Cal. 64, 273 Pac. 779.
79 Id. at 77, 273 Pac. at 785.
80 People v. Coen (1928) 205 Cal. 596, 271 Pac. 1074; People v. Pokrajac (1929) 206 Cal. 259, 274 Pac. 63.
81 People v. Marshall (1930) 209 Cal. 540, 289 Pac. 629; People v. Dawa (1940) 15 Cal. (2d) 393, 101 P. (2d) 498; People v. Messerly (1941) 46 Cal. App. (2d) 718, 116 P. (2d) 781 (criticized in 15 So. Cal. L. Rev. 254 (1942) as a denial of "trial by jury").
section 1026 authorizing the impaneling of a new jury to try the issue of insanity might be held unconstitutional, as a "double jeopardy." It was soon held, without much discussion however, that it was valid; it seems implicit in this holding that the jeopardy doctrine prohibits only second trials (of issues already tried) and not second juries.

Although both the statute and the courts speak of a defendant who has pleaded both "not guilty" and "not guilty by reason of insanity" as being found "guilty" on the first trial, it seems clear that this is not accurate. Insanity is not an excuse for crime; rather, it prevents an act from being criminal. A verdict of "guilty" actually is only a conditional finding, a finding of "guilty—if sane." Until a defendant has been found by a jury to be sane he has not been found guilty of all the elements that constitute a crime.

This question is suggested: if, having pleaded not guilty and not guilty by reason of insanity, the defendant is found "guilty" and a second jury is impaneled and sworn to try the issue of insanity, what is the consequence of a wrongful discharge of this second jury? If the first jury had been wrongfully discharged, the defendant would go free, the wrongful discharge being the "equivalent of an acquittal." In the case supposed, however, the defendant has already been found "guilty." The analogous interpretation of a wrongful discharge here would call this the "equivalent of a finding of insanity." These are, of course, fictions or figures of speech, but in both cases the defendant's real objection is the same: that the jury has been discharged before he has been found guilty of all the elements of the crime charged, and that a second trial would impose the burden of relitigating issues already once tried. The State has had one chance to convict him of all the elements of a crime and has let it lapse. If it be said that it is outrageous to permit a defendant already found guilty to escape, it may be replied that the case law of double jeopardy has been built up almost wholly by decisions setting free convicted defendants on the basis of a fictitious former acquittal. If it be said that at the time

82 Comment (1931) 19 Calif. L. Rev. 174, 177.
83 People v. Marshall, People v. Dawa, People v. Messerly, all supra note 81. In all these cases, however, there was excellent reason to impanel a new jury.
85 Query: Should the fact that in the first case there is a "presumption of innocence" in favor of the defendant, while in the second case there is a "presumption of sanity" against him, make any difference? (For a discussion of this latter presumption, see 21 Calif. L. Rev. 65, 25 Calif. L. Rev. 101.) This writer has found no case intimating that the existence at the time of the wrongful discharge of either a preponderance of adverse evidence or unrebutted presumptions adverse to the defendant (such as Cal. Pen. Code § 1103) had any relevance to the decision of "jeopardy" issues.
of the wrongful discharge in the former case the defendant had not yet been found guilty, it may be replied that neither has he in the latter case, for sanity is a necessary element to crime.\(^8\)

In the case supposed, a second jury was used, and the time of its swearing presumably would mark the commencement of the trial of the second issue and the attachment of that "jeopardy." What is the equivalent critical time if the first jury is retained? Since no second oath is required, that test is not available. The order of the court retaining the jury seems the convenient and logical time; the trial of the second issue may be said to begin at that point, for surely the trial of the first is then over.

The above problems were suggested by the facts of the recent case of People v. Eggers.\(^8\) The defendant was tried for murder. He pleaded not guilty and not guilty by reason of insanity; the jury found him guilty. The trial court then made an order retaining this jury for the trial of the issue of insanity. Then (in the words of the opinion):\(^8\) "But before the sanity hearing commenced, the trial judge was informed by one of the jurors that she 'had a closed mind' upon the question. And the jury foreman 'practically served notice' upon him 'that if the same jury were retained it would be a hung jury.' The jury was then dismissed and another jury impaneled to hear the sanity issue because, in the judge's opinion, 'the members of the jury have disregarded the instructions we gave them about discussing the sanity of the defendant on the first issue.' " The second jury found the defendant sane. He appealed, arguing that he had been placed "in jeopardy" of the first jury, that their discharge was wrongful (as the trial court had no sufficient reason or right to disregard the presumption that the jury had obeyed their instructions), and that therefore the discharge was the equivalent of an acquittal.

The supreme court affirmed the conviction. Conceding that the trial court was not justified in concluding that the jury had disobeyed their instructions, the court stated:

> The direction to retain the first jury is denominated an order (Code Civ. Proc., § 1003) and every court has power to amend and control its orders so as to make them conformable to law and justice. (Code Civ. Proc., § 128, subd. 8). Unquestionably, the trial court was invested with jurisdiction to make an order retaining the jury, and it must be conceded that it has jurisdiction to modify, revoke, or set

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86 It might be argued that it is not, that the State could abolish the defense of insanity, and that the California split-trial method has partially done so. The only statute known that tried to abolish the insanity defense was held unconstitutional as a denial of due process in State v. Strasburg (1910) 60 Wash. 106, 110 Pac. 1050. Phyle v. Duffy (1948) 68 Sup. Ct. 1131 (implying that the execution of an insane criminal is a denial of due process), indicates that the Supreme Court might likewise so hold.

87 (October 21, 1947) 30 A. C. 681, 185 P. (2d) 1.

88 Id. at 689, 185 P. (2d) at 5.
its orders aside. [citations] ... 'It is a most common occurrence for a trial court to change its rulings during the progress of a trial, upon questions of law, and no one would contend that it is not within its power to do so, or that it should not do so when satisfied that the former ruling was erroneous.' The ruling that the same jury be retained to try the insanity issue occupied no better position in this regard than any other determination and, under the circumstances shown by the present record, the court was fully justified in revoking it. 89

If section 128 is taken to authorize a discharge of the jury in situations beyond the "legal necessity" exception of the constitutional provision, then this argument proves too much—for a statute cannot avoid a constitutional bar. If section 128 can only validly authorize discharges already provided for by the "legal necessity" exception, then this argument does not directly meet the issues presented, which are: (1) Was this a "wrongful discharge"? (2) What is the consequence of a wrongful discharge of the jury trying the issue of insanity? 90 The declaration of the juror at the beginning of the trial, that she had a "closed mind" on the issue, would clearly appear sufficient "legal necessity" to justify a discharge of the jury in any case, 91 and it is surprising that the court did not place the decision on this ground. But the effect of a wrongful discharge of the insanity jury remains open. Application of formal concepts apparently would compel the freeing of the defendant, for the State has had the one trial permitted and the defendant has not yet been found guilty. Rather like Bishop Berkeley's philosophy, this argument seems impossible to refute and difficult to believe. It may be predicted that courts will strive to avoid such a result; how, should prove interesting.

IV

After a study of some of its applications, we may now try to evaluate the worth of the jeopardy doctrine. For a rule so widespread, we would expect to find a firm and convincing rationale. The early courts which worked out the doctrine stated its aim as preventing

89 Id. at 696, 185 P. (2d) at 10. CAL. CODE CIV. PROC. § 128 relates to the general powers of courts, and reads (in part): "Every court shall have power: ... (8) To amend and control its process and orders so as to make them conformable to law and justice." It is noteworthy that neither the State nor defendant mentioned this section in their briefs.

90 It might be argued that jeopardy in an insanity trial attaches, not when the order retaining the jury is made, but only when the trial actually begins, and therefore that this question is not presented in the Eggers case. This may be true, but it is clear that a real question still remains.

91 Cases collected in (1925) 38 A. L. R. 706. (While the foreman's statement may not be considered, yet there is no such bar to considering the woman's statement since it does not impeach the past conduct of the jury.)
the State from unfairly harassing an individual by bringing many prosecutions on a charge for which it is unable to secure a conviction. The anxiety that a prosecution subjects the defendant to was stressed, and some limit to it was sought. To prevent this unfair harassing the State was to be bound by the errors of its officials, the judges.

The aim seems praiseworthy, but the doctrine evolved to effect it seems inconsistent in theory and erratic and spotty in the protection which it in fact gives. The error of the court in dismissing jurors or juries binds the State irretrievably; but giving erroneous instructions resulting in conviction does not. In one case the defendant may not be retried; in the other he may. Where there are hung juries, the defendant may be tried repeatedly. To be consistent and hold the State bound by all errors of its officers would be intolerable; but the logic of singling out this one type of error, and granting special protection from it, may be questioned. The State also has rights in a criminal trial, rights which seem unduly disregarded by cases such as the Hunckeler, Young, and Jackson cases.

Comparison with a far more drastic change, granting the State the right of appeal, and the arguments advanced in its favor, throws added light on the worth of the jeopardy doctrine. The former universal rule was that a jury verdict of acquittal barred further pro-

92 Comm. v. Cook, supra note 11 at 598, said the purpose was to eliminate the danger that "... experiment after experiment be made on the lives of men."

93 "If the prisoner had been found guilty, he must have suffered the penalties of the law. He was placed upon his trial; his life was in the hands of the jury. His breast was occupied by a commixture of hope and fear; it throbbed alternately with both ... ." In re Spier (1828) 12 N. C. 329 at 333.

94 What is "fair"? After a wrongful discharge of the jury, English law permits a retrial; almost all American jurisdictions do not. When a defendant secures the reversal of a conviction, all American jurisdictions permit a retrial; English law requires that a judgment of acquittal be entered. Supra note 22. After a hung jury, both England and all American jurisdictions now permit a retrial; but some States for a long time (Pennsylvania as late as 1888, Commonwealth v. Fitzpatrick (1888) 121 Pa. 109, 15 Atl. 466) did not.

95 Similarly, under the picturesque maxim "Though the State may carve deep, it may carve but once," the State is bound by the election of its prosecuting officials as to the degree of offense for which the defendant should be tried. A prosecution for a lesser degree bars any later one for a greater. People v. Greer, supra note 1. Yet prejudicial misconduct by prosecutors will not bar a new trial upon reversal of the conviction.

96 For example, in the Burns case two previous juries had failed to agree. Compare the relative burden of standing three trials with that of an erroneous substitution of an alternate!

97 Supra note 25.
98 Supra note 17.
99 Supra note 18.
ceedings; the State had no right to appeal and secure a new trial. In 1886 a Connecticut statute granted the State the right to appeal from an acquittal, and in 1894 the famous case of State v. Lee held this statute valid. Although Connecticut has never had a constitutional "jeopardy" provision, the court discussed the meaning of the "jeopardy" maxim, analogized it to the principle of res judicata, and found that the statute complied with it. The defendant was said to be in but one "continuing jeopardy" until the cause was finally determined; thus there was no double jeopardy. Commentators have almost universally approved the doctrine of State v. Lee; the American Law Institute's Official Draft: Double Jeopardy adopts it, giving the State the right to a new trial after an acquittal where "a material error has been made to the prejudice of the State."

There seems an obvious progression down the scale of values from (a) a voluntary verdict of acquittal, (b) a directed verdict of acquittal, (c) a dismissal by the court, for want of evidence, to

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100 This was the original meaning of the jeopardy maxim. This was not an unmixed blessing to defendants. In view of the finality of the verdict, the State in self defense often forbids the trial court to direct an acquittal. Thus, in California under Pen. Code § 1118 the trial court may advise but not direct an acquittal; the People also have a right to go to the jury. People v. Stoll (1904) 143 Cal. 689, 77 Pac. 818. Hence, where the State does not make out a case, the defendant does not have the protection he would have in a civil suit, with a directed verdict protected by the principle of res judicata. (Yet where the trial court improperly purports to direct a verdict and discharges the jury, the defendant is protected because "once in jeopardy." People v. Roberts (1896) 114 Cal. 67, 45 Pac. 1016.) In People v. James (1893) 97 Cal. 400, 32 Pac. 317, the trial court advised the jury to acquit, and the supreme court conceded that under the evidence it was the duty of the jury to have acquitted, but held that when the jury disagreed the defendant might be tried again. A strange consequence of a doctrine designed to protect defendants!

101 Some jurisdictions had permitted appeals to "settle the law," but with no operation on acquitted defendants. Orfield, Criminal Appeals in America, 65-67 (1939).

102 Probably the first statute attempting to give the State the right of appeal and retrial was enacted in California, Stats. 1851, pp. 265, 266, §§ 481-490. It was this statute that People v. Webb, supra note 10, held unconstitutional.

103 (1894) 65 Conn. 265, 30 Atl. 1110.

104 Holmes, J., relied on this theory in his dissent in People v. Kepner (1904) 195 U.S. 100, where the majority held a Philippine statute giving the Territory a right of appeal invalid as contrary to the Federal constitutional "jeopardy" provision, made applicable to the Philippines by Act of Congress.

Vermont (without a constitutional jeopardy provision) enacted a similar statute, sustained in State v. Felch (1918) 92 Vt. 477, 105 Atl. 23. The Wisconsin Supreme Court sustained such a statute in the face of a constitutional provision prohibiting double jeopardy, by relying on the theory of one "continuing jeopardy." State v. Witte (1943) 243 Wis. 423, 10 N. W. (2d) 117.

The Connecticut statute is not a denial of due process. Palko v. Connecticut (1937) 302 U. S. 319. This might be changed, if the view of the four dissenting judges in Adamson v. California (1947) 332 U.S. 46 (that the prohibitions of the first 8 Amendments are incorporated in the Fourteenth Amendment) ever becomes law. Either such statutes must be held invalid, or the Kepner case, supra, over-ruled.
