tion in the trial process.[68] Others have expressed the view that the clause not only protects the integrity of final judgments but, more important, that it protects the accused against the strain and burden of multiple trials, which would also enhance the ability of government to convict.[69] Still other Justices have engaged in a form of balancing of defendants' rights with society's rights to determine when reprosecution should be permitted when a trial ends prior to a final judgment not hinged on the defendant's culpability.[70] Thus, the basic area of disagreement, though far from the only one, centers on the trial from the attachment of jeopardy to the final judgment.

Reprosecution Following Mistrial

The common law generally required that the previous trial must have ended in a judgment, of conviction or acquittal, but the constitutional rule is that jeopardy attaches much earlier, in jury trials when the jury is sworn, and in trials before a judge without a jury, when the first evidence is presented.[71] Therefore, if after jeopardy attaches the trial is terminated for some reason, it may be that a

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[68] *See* Crist v. Bretz, 437 U.S. 28, 40 (1978) (dissenting opinion). Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, argued that, with the Double Jeopardy Clause so interpreted, the Due Process Clause could be relied on to prevent prosecutorial abuse during the trial designed to abort the trial and obtain a second one. Id. at 50. All three have joined, indeed, in some instances, have authored, opinions adverting to the role of the double jeopardy clause in protecting against such prosecutorial abuse. *E.g.*, United States v. Scott, 437 U.S. 82, 92–94 (1978); Oregon v. Kennedy, 456 U.S. 667 (1982) (but narrowing scope of concept).

[69] United States v. Scott, 437 U.S. 82, 101 (1978) (dissenting opinion) (Justices Brennan, White, Marshall, and Stevens).

[70] Thus, Justice Blackmun has enunciated positions recognizing a broad right of defendants much like the position of the latter three Justices, Crist v. Bretz, 437 U.S. 28, 38 (1978) (concurring), and he joined Justice Stevens' concurrence in Oregon v. Kennedy, 456 U.S. 667, 681 (1982), but he also joined the opinions in United States v. Scott, 437 U.S. 82 (1978), and Arizona v. Washington, 434 U.S. 497 (1978) (Justice Blackmun concurring only in the result).

[71] The rule traces back to United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824). *See also* Kepner v. United States, 195 U.S. 100 (1904); Downum v. United States, 372 U.S. 734 (1963) (trial terminated just after jury sworn but before any testimony taken). In Crist v. Bretz, 437 U.S. 28 (1978), the Court held this standard of the attachment of jeopardy was "at the core" of the clause and it therefore binds the States. *But see* id. at 40 (Justice Powell dissenting). An accused is not put in jeopardy by preliminary examination and discharge by the examining magistrate, Collins v. Loisel, 262 U.S. 426 (1923), by an indictment which is quashed, Taylor v. United States, 207 U.S. 120, 127 (1907), or by arraignment and pleading to the indictment. Bassing v. Cady, 208 U.S. 386, 391–92 (1908). A defendant may be tried after preliminary proceedings that present no risk of final conviction. *E.g.*, Ludwig v. Massachusetts, 427 U.S. 618, 630–32 (1976) (conviction in prior summary proceeding does not foreclose trial in a court of general jurisdiction, where defendant has absolute right to demand a trial *de novo* and thus set aside the first conviction); Swisher v. Brady, 438 U.S. 204 (1978) (double jeopardy not violated by procedure under which masters hear evidence and make preliminary recommendations to juvenile court judge, who may confirm, modify, or remand).