may not be considered punitive for purposes of double jeopardy analysis.[63] and the same is true of civil commitment following expiration of a prison term.[64]

Because a prime purpose of the clause is to protect against the burden of multiple trials, a defendant who raises and loses a double jeopardy claim during pretrial or trial may immediately appeal the ruling; this is a rare exception to the general rule prohibiting appeals from nonfinal orders.[65]

During the 1970s, the Court decided an uncommonly large number of cases raising double jeopardy claims.[66] Instead of the clarity that often emerges from intense consideration of a particular issue, however, double jeopardy doctrine has descended into a state of "confusion," with the Court acknowledging that its decisions "can hardly be characterized as models of consistency and clarity."[67] In large part, the re-evaluation of doctrine and principle has not resulted in the development of clear and consistent guidelines because of the differing emphases of the Justices upon the purposes of the clause and the consequent shifting coalition of majorities based on highly technical distinctions and individualistic fact patterns. Thus, some Justices have expressed the belief that the purpose of the clause is only to protect final judgments relating to culpability, either of acquittal or conviction, and that English common law rules designed to protect the defendant's right to go to the first jury picked had early in our jurisprudence become confused with the Double Jeopardy Clause. Although they accept the present understanding, they do so as part of the Court's superintending of the federal courts and not because the understanding is part and parcel of the clause; in so doing, of course, they are likely to find more prosecutorial discre-

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[63] United States v. Ursery, 518 U.S. 267 (1996) (forfeitures, pursuant to 19 U.S.C. § 981 and 21 U.S.C. § 881, of property used in drug and money laundering offenses, are not punitive). The Court in *Ursery* applied principles that had been set forth in Various Items of Personal Property v. United States, 282 U.S. 577 (1931) (forfeiture of distillery used in defrauding government of tax on spirits), and United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984) (forfeiture, pursuant to 18 U.S.C. § 924(d), of firearms "used or intended to be used in" firearms offenses). A two-part inquiry is followed. First, the Court inquires whether Congress intended the forfeiture proceeding to be civil or criminal. Then, if Congress intended that the proceeding be civil, the court determines whether there is nonetheless the "clearest proof" that the sanction is "so punitive" as to transform it into a criminal penalty. *89 Firearms*, 465 U.S. at 366.

[64] Kansas v. Hendricks, 521 U.S. 346, 369–70 (1997) (commitment under state's Sexually Violent Predator Act).

[65] Abney v. United States, 431 U.S. 651 (1977).

[66] *See* United States v. DiFrancesco, 449 U.S. 117, 126–27 (1980) (citing cases).

[67] Burks v. United States, 437 U.S. 1, 9, 15 (1978). One result is instability in the law. Thus, *Burks* overruled, to the extent inconsistent, four cases decided between 1950 and 1960, and United States v. Scott, 437 U.S. 82 (1978), overruled a case decided just three years earlier, United States v. Jenkins, 420 U.S. 358 (1975).