

NOTES

DOUBLE JEOPARDY: WHEN IS AN ACQUITTAL AN ACQUITTAL?

A fundamental principle of double jeopardy jurisprudence cautions prosecutors that an acquittal in a criminal case, once received, will bar forever a second prosecution for the same offense.¹ The notion that underlies this fifth amendment,² post-acquittal protection is rudimentary to the American criminal justice system. It is that the power to prosecute, if improperly exercised, represents so significant a threat to individual rights that the state must be limited to one bite at the prosecutorial apple lest the individual, innocent in the eyes of the law, be exposed to the possibility of oppressive repeated prosecutions for the same offense.³

The relative simplicity of the concept, however, belies the complexity associated with its application in day-to-day criminal prosecutions. In reality, defendants often are discharged from prosecution following judgments that resemble in effect but not in timing or legal significance the post-trial verdict of innocence one commonly associates with the term "acquittal."⁴ As a result, the availability of a post-acquittal double jeopardy defense has come to turn on subtle and often confusing distinctions in the manner in which the initial

¹ See *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977).

There are several different facets to the double jeopardy clause. At one time the Supreme Court observed that it offers three related protections: "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717 (1968). In fact, the number of different protections is greater than three. The clause also protects under certain circumstances against reprosecution following mistrial, see generally Note, *Mistrials and Double Jeopardy*, 15 AM. CRIM. L. REV. 169 (1977); it offers a certain amount of protection against prosecution for multiple offenses arising out of the same transaction, see generally Note, *Multiple Prosecutions Arising From the Same Transaction*, 15 AM. CRIM. L. REV. 259 (1978); and it lends constitutional status to the doctrine of collateral estoppel in criminal cases, see generally Note, *Expanding Double Jeopardy: Collateral Estoppel and the Evidentiary Use of Prior Crimes of Which the Defendant Has Been Acquitted*, 2 FLA. ST. U.L. REV. 511 (1974).

² The fifth amendment provides in part: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . ." U.S. CONST. amend. V.

³ See *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977), where the Court stated: "[a]t the heart of this policy is the concern that permitting the sovereign freely to subject the citizen to a second trial for the same offense would arm Government with a potential instrument of oppression."

⁴ For example, a defendant might be discharged by the trial court in response to a mid-trial defense motion alleging the statute in question to be unconstitutional. The immediate effect of the judgment would be to release the defendant from prosecution in the same practical manner as a jury verdict of innocence. The timing of the judgment, however, is obviously different from that of a jury verdict, and the legal significance of a determination that a statute cannot constitutionally be applied is very different from that of a factual finding that the acts or conduct alleged have not occurred.

prosecution was terminated. Consider the following: A trial judge may discharge a criminal defendant by way of a pre-, mid-, or post-trial judgment, irrespective of the decision or the potential decision of the trier of fact. Such judgment might be characterized either as an acquittal or a dismissal.⁵ In addition, and perhaps most significantly, such judgment might be granted on one or several of many substantive grounds. Keeping in mind that protection against double jeopardy represents an absolute bar to reprosecution of an individual who may have committed a serious offense, should these procedural and substantive variations in criminal discharges influence the availability of a post-discharge double jeopardy defense? And if there should be an influence, what should that influence be?

Answers to these questions may be found through a growing list of United States Supreme Court cases. In particular, two cases decided on the same day during the Supreme Court's 1977-78 term add significantly to the law of post-acquittal double jeopardy. In *United States v. Scott*,⁶ the Supreme Court discarded precedent and confined the availability of a double jeopardy defense following dismissal to cases where the dismissal represents a finding of factual innocence, and not merely a favorable resolution of a legal defense to prosecution.⁷ In *Burks v. United States*,⁸ the Court again overruled precedent, this time to extend protection against reprosecution to defendants whose convictions are overturned on appeal on grounds of evidentiary insufficiency.⁹ Together, these decisions offer a sorely needed definition of the term "acquittal," a term often misunderstood, and, heretofore, effectively undefined for double jeopardy purposes. The definition should reduce the confusion in this area of criminal law.

This note will examine and explain the availability of a federal,¹⁰ post-acquittal double jeopardy defense as modified by these decisions. The note

⁵ As with most questions in double jeopardy, even the distinction between acquittals and dismissals is hazy. Trial court acquittals are factual determinations that the prosecution's evidence is insufficient as a matter of law to convict. FED. R. CRIM. P. 29(a), quoted in part at note 35 *infra*. Dismissals, by contrast, may be granted for numerous legal and factual reasons, ranging from unconstitutionality of the underlying statute, to governmental misbehavior, to the trial court's approval of an affirmative defense that implies actual innocence. Compare, e.g., *United States v. Zisblatt*, 172 F.2d 740, 741 (2d Cir. 1949) (dismissal based on statute of limitations defense), with *United States v. Hill*, 473 F.2d 759, 760 (9th Cir. 1972) (dismissal on grounds literature not obscene as a matter of law). There is no realistic way to explain the term "dismissal" via a single definition. Rather, dismissals must be viewed as a tool used by trial courts to supervise and administer criminal prosecutions; they may address substantive or procedural issues or both. Unfortunately there is no centralized treatment of dismissals in the Federal Rules of Criminal Procedure, although certain dismissals for specific reasons are discussed or generally alluded to. See FED. R. CRIM. P. 48, 12, 6(b)(2).

⁶ 437 U.S. 82 (1978).

⁷ *Id.* at 97-99, 101. This distinction between innocence and legal immunity is developed in text and notes at notes 71-84 *infra*.

⁸ 437 U.S. 1 (1978).

⁹ *Id.* at 16-18.

¹⁰ This note examines double jeopardy protection as applied against the federal government rather than as against the states. Nevertheless, recent cases incorporate fifth amendment double jeopardy protection word for word into fourteenth amend-

begins by outlining the circumstances under which a criminal defendant who has been favorably discharged may use the discharge to bar government appeals¹¹ and possible reprosecution. Next, the note will review the recent decisions individually in an effort to highlight the most significant facets of each and to make note of their support of or departure from precedent. Finally, the note will attempt to develop the theme common to these latest decisions, to compare this theme with the theoretical pronouncements of earlier decisions, and to assess the apparent shift in judicial orientation. Because the recent decisions represent a rational approach to the realities of criminal prosecutions, this note offers a favorable assessment of these cases.¹²

I. FINAL JUDGMENTS THAT INVOKE DOUBLE JEOPARDY

There are three sources of determinations that lead to favorable final discharges of criminal defendants. These sources are: (1) the trier of fact, whether judge or jury, which makes solely factual determinations; (2) the trial court, represented by the trial judge sitting other than as the trier of fact, which makes legal determinations that may or may not involve serious factual inquiry;¹³ and (3) an appellate court which makes determinations parallel to those of the trial court. The application of double jeopardy protection to final judgments differs depending upon the source of such judgments. These sources, therefore, are treated separately in the following discussion.

A. *Acquittal by Decision of the Trier of Fact*

The foremost example of post-acquittal double jeopardy protection occurs where a defendant is acquitted by decision of the trier of fact, and it is in this context that all double jeopardy protection has its beginnings. In such cases, the acquittal may never be reviewed "on error or otherwise."¹⁴ The

ment due process, thereby making the rules stated herein applicable as against the states. *See, e.g.*, *Crist v. Bretz*, 437 U.S. 28, 32, 37-38 (1978); *Greene v. Massey*, 437 U.S. 19, 24 (1978); *Benton v. Maryland*, 395 U.S. 784, 795-96 (1969) (overruling *Palko v. Connecticut*, 302 U.S. 319 (1937)).

¹¹ An appellate court is without jurisdiction to hear an appeal where the appeal would violate the double jeopardy clause. *See text and authorities cited at note 20 infra.*

¹² A caveat about the scope of this note should be stated. The note discusses double jeopardy following final judgments favorable to the accused. Non-final judgments such as mistrial declarations are not directly covered, nor are other aspects of double jeopardy protection such as limitations placed upon the number of separate offenses chargeable to a single wrongful act. As to these double jeopardy matters and others, *see Annot., Supreme Court's Views of Fifth Amendment's Double Jeopardy Clause Pertinent to or Applied in Federal Criminal Cases*, 50 L. Ed. 2d 830 (1977); 1B MOORE'S FEDERAL PRACTICE ¶ 0.418[2] (1974 & Supp. 1978-79). *See also* authorities cited in note 1 *supra*.

¹³ A determination of the first sort occurs where the trial court assesses the legal sufficiency of the evidence against the accused; an example of the second type of determination occurs when the court passes on the merits of a claimed violation of due process.

¹⁴ *United States v. Ball*, 163 U.S. 662, 671 (1896) (discussed at note 15 *infra*).

leading case in this area is *United States v. Ball*.¹⁵ The position taken in *Ball* is unequivocal; where a defendant is acquitted by jury verdict, the government may not appeal the verdict and may not reprosecute the defendant for the same offense.¹⁶ This rule permits no exception.¹⁷

The holding in *Ball* has been extended as a matter of course to bench trials where a judge replaces the jury as sole trier of fact.¹⁸ An acquittal by the trial judge in his capacity as the trier of fact is not appealable, and, *a fortiori*, will bar reprosecution.¹⁹ Naturally, a defendant's interest in preserving an acquittal would not vary depending on the character of the trier of fact he has chosen. It is accepted doctrine, then, that all findings of innocence by the ultimate trier of fact are accorded absolute finality.

B. Acquittal by Decision of the Trial Court

In contrast to a discharge by decision of the trier of fact, a discharge by the trial court without benefit of a fact-finder's verdict will not necessarily foreclose government attempts to appeal the discharge²⁰ and, pending the

¹⁵ 163 U.S. 662 (1896). In *Ball*, three defendants had been charged with murder. At their first trial, two defendants were found guilty by a jury and the third was acquitted. The two convicted defendants successfully appealed their convictions. All three defendants were then re-indicted and convicted. *Id.* at 663-64. The defendant who had been acquitted at the earlier trial appealed on grounds of double jeopardy. In upholding his claim, the Supreme Court stated:

As to the defendant who had been acquitted by the verdict duly returned and received, the court could take no other action than to order his discharge. . . . [I]n this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offense.

Id. at 671.

¹⁶ *Id.*

¹⁷ There is no exception, for example, where the acquittal is implied. See *Green v. United States*, 355 U.S. 184, 190-91 (1957). In *Green* the defendant was charged with first degree murder. The judge instructed the jury that it could find the defendant guilty of either first or second degree murder, and the jury convicted the defendant of the lesser offense. This conviction was overturned on appeal and the defendant was awarded a new trial. At the second trial the defendant was again charged with first degree murder and this time was convicted of the greater offense. *Id.* at 190. The defendant objected to the first degree charge on grounds of double jeopardy, and the Supreme Court upheld this claim. *Id.* Although the first jury had not returned an express verdict of acquittal as to the first degree charge, the Supreme Court held, as one basis for reversal, that the jury's conviction of the lesser offense amounted to an implicit acquittal of the greater charge. Adhering to the premise that verdicts of acquittal are final, the Court concluded that the implicit acquittal absolutely barred a second trial for first degree murder, thus giving effect to the implicit acquittal as if it has been an express verdict. *Id.* at 190-91.

¹⁸ See *United States v. Morrison*, 429 U.S. 1, 3 (1976). In *Morrison*, the Court stated: "[s]ince the Double Jeopardy Clause of the Fifth Amendment nowhere distinguishes between bench and jury trials, the principles given expression through that Clause apply to cases tried to a judge." *Id.* (quoting *United States v. Jenkins*, 420 U.S. 358, 365 (1975)). See also *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 573 n.12 (1977).

¹⁹ 429 U.S. at 3.

²⁰ The federal government's authority to appeal adverse rulings in criminal cases is entirely statutory. See *United States v. Sanges*, 144 U.S. 310, 312 (1892). In

outcome of the appeal, to re prosecute. In these cases, the appealability of a defendant's discharge and the possibility of re prosecution depend on two factors: (1) the procedural timing of the discharge, and (2) the substantive reason for the discharge.

1. Procedural Timing: Pre-Trial and Post-Conviction Discharges.

The procedural timing of trial court discharges is a threshold determinant of the availability of a post-discharge double jeopardy defense. Where a defendant is discharged before trial, neither appeal of the discharge nor renewed prosecution in the event that the appeal is successful will violate the double jeopardy clause.²¹ And where the defendant is discharged in a post-verdict judgment despite having been convicted by the trier of fact, a government appeal seeking reinstatement of the guilty verdict will be permitted.²²

Pre-trial discharge poses no barrier to appeal and re prosecution under the rationale that such a defendant has never suffered first jeopardy. The leading case in this area is *Serfass v. United States*.²³ In *Serfass* the Supreme Court held that a pre-trial dismissal occurs prior to the time when first jeopardy attaches,²⁴ and that a defendant who has not yet been put in

1971, Congress amended the previous Criminal Appeals Act, 18 U.S.C. § 3731 (1964), to make the constitutional prohibition against double jeopardy the sole limit on government appeals in criminal cases. Omnibus Crime Control Act of 1970, Pub. L. No. 91-644, Title III, 84 Stat. 1890. The present version of the Criminal Appeals Act, 18 U.S.C. § 3731 (1976), now provides in part:

In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

In one of the first cases construing the amended Act, the Supreme Court concluded that, "Congress intended to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit." *United States v. Wilson*, 420 U.S. 332, 337 (1975).

²¹ See *Serfass v. United States*, 420 U.S. 377, 391-92 (1975). See generally Note, *Double Jeopardy and Government Appeals in Criminal Cases*, 12 COLUM. J.L. & SOC. PROB. 295, 319 (1976).

²² See *United States v. Wilson*, 420 U.S. 332, 352-53 (1975). See generally Note, *Double Jeopardy and Government Appeals in Criminal Cases*, 12 COLUM. J.L. & SOC. PROB. 295, 300 (1976).

²³ 420 U.S. 377 (1975). In *Serfass*, the defendant had been indicted for draft evasion. The indictment was dismissed upon the defendant's pre-trial motion claiming that he had been denied full consideration of his conscientious objector status. *Id.* at 380-81. The government appealed this dismissal, and the defendant opposed the appeal on grounds of double jeopardy. The court of appeals rejected this claim. *United States v. Serfass*, 492 F.2d 388, 391 (3d Cir. 1974), and the Supreme Court affirmed, saying that "an accused must suffer jeopardy before he can suffer double jeopardy." 420 U.S. at 393. The Court held that "[w]ithout risk of a determination of guilt, jeopardy does not attach, and neither an appeal nor further prosecution constitutes double jeopardy." *Id.* at 391-92.

²⁴ Attachment of jeopardy is a mechanical concept that provides a uniform rule for determining the point at which the defendant's double jeopardy rights will be recognized. In a jury trial, jeopardy is said to attach when a jury is impaneled and

jeopardy is not, therefore, exposed to second jeopardy if the government appeals and later resumes prosecution.²⁵ The pre-trial rule serves the important function of facilitating an early, favorable resolution of affirmative defenses, motions to suppress and the like, while preserving an opportunity for the government to appeal. Although it is not entirely clear from the case law, the non-barring effect of pre-trial discharges appears to apply without regard to the grounds for the discharge.²⁶

sworn. See *Crist v. Bretz*, 437 U.S. 28, 35-36 (1978); *Downum v. United States*, 372 U.S. 734, 735-38 (1963). In a bench trial, attachment occurs when the judge begins to hear the evidence. See *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977); *McCarthy v. Zerbst*, 85 F.2d 640, 642 (10th Cir. 1936). The premise of these rules is that "the 'constitutional policies underpinning the Fifth Amendment's guarantee' are not implicated before that point in the proceedings at which 'jeopardy attaches.'" *Serfass v. United States*, 420 U.S. at 390-91 (quoting *United States v. Jorn*, 400 U.S. 470, 480 (1971)).

²⁵ 420 U.S. 390-91.

²⁶ See *id.* Presumably, the grounds for discharge are irrelevant if indeed first jeopardy has never occurred.

A complete understanding of why the reason for discharge is a relevant consideration requires familiarity with the Supreme Court's recent decisions in *United States v. Scott* and *Burks v. United States*, discussed *infra*. These cases draw a distinction between factual and legal grounds for discharge, granting double jeopardy protection in the former context and withholding it in the latter. If the rationale of the recent cases is applicable in the pre-trial area (which it has every reason to be), then the *Serfass* pre-trial rule is not as notable as it used to be, since only factual discharges can invoke double jeopardy protection, and factual discharges ordinarily do not occur before trial. Such factual discharges usually await the formal presentation of at least some evidence at trial. Nevertheless, it is still conceivable that a pre-trial acquittal or factual dismissal may occur. See, e.g., *United States v. Pecora*, 484 F.2d 1289, 1292-93 (3d Cir. 1973) (facts stipulated prior to trial—appeal allowed—court held jeopardy had not attached); *United States v. Lasater*, 535 F.2d 1041, 1047 (8th Cir. 1976) (pre-trial acquittal after pre-trial hearing—acquittal treated as dismissal—appeal allowed—court held jeopardy had not attached because case was to be tried to jury). See also *United States v. Sanford*, 429 U.S. 14, 16 (1976) (per curiam). In *Sanford*, defendants were indicted for illegal game hunting. The district court agreed with the defendant's pre-trial motion alleging that the government had consented to the claimed illegal activity, and hence dismissed the charge. The Supreme Court found the dismissal to be appealable under *Serfass*, without discussing and despite the fact that the dismissal appears to have been addressed essentially to factual matters. *Id.*

There are other cases in which a pre-trial acquittal or factual dismissal has occurred and in which government appeals and reprosecution have been barred on double jeopardy grounds. See, e.g., *United States v. Patrick*, 532 F.2d 142, 145-46 (9th Cir. 1976) (facts stipulated prior to trial—appeal barred—court found jeopardy had attached); *United States v. Hill*, 473 F.2d 759, 762-63 (9th Cir. 1972) (pre-trial hearing on general issue in case—appeal barred—decided prior to *Serfass*). In particular, see *Finch v. United States*, 433 U.S. 676 (1973) (per curiam). In *Finch* the Supreme Court denied a government appeal from a dismissal of a case submitted on an agreed statement of facts. The Court apparently accepted the finding of the court of appeals that jeopardy had attached, although this issue was not directly presented. The actual decision was based on the fact that other case law had been misapplied. *Id.* at 677. As pointed out by Justice Rehnquist in his dissent, the Supreme Court had never decided when jeopardy attaches in a case of this type. *Id.* at 681. Despite *Finch*, this question still does not appear to have been decided directly by the Supreme Court. The central issue in determining whether double jeopardy protection should attach to pre-trial

A defendant also may be discharged by the trial judge after a conviction by the trier of fact (the criminal equivalent of a civil judgment *non obstante verdicto*).²⁷ Because a successful government appeal of this post-conviction judgment would be followed by reinstatement of the guilty verdict without threat of actual reprosecution, an appeal in this context does not constitute second jeopardy. The leading case taking this position is *United States v. Wilson*.²⁸ In *Wilson* the Supreme Court held that while the double jeopardy clause forbids reprosecution after trial terminations favorable to the defendant, it does not preclude government appeals per se where a successful appeal would not result in reprosecution.²⁹ Hence, provided the guilty verdict may be reinstated,³⁰ the government is permitted to challenge the legal basis

factual discharges, as distinguished from pre-trial legal discharges, appears to be whether a defendant actually is exposed to jeopardy due to pre-trial consideration of facts, or whether, instead, only an actual trial constitutes jeopardy. The recent cases, discussed *infra*, are at least relevant to this inquiry due to the distinction they draw between factual and legal matters. For a discussion of whether double jeopardy protection should extend to pre-trial factual discharges, see generally Comment, *Double Jeopardy and Government Appeals of Criminal Dismissals*, 52 TEX. L.R. 303, 337-38 (1974).

²⁷ See FED. R. CRIM. P. 29(c). A post-verdict acquittal might even occur in a bench trial where the judge renders both the guilty verdict and the post-verdict acquittal. See, e.g., *United States v. Ceccolini*, 435 U.S. 268, 271 (1978).

²⁸ 420 U.S. 332 (1975). In *Wilson*, the defendant was charged with unlawful conversion of union funds. The jury returned a verdict of guilty, but the trial judge granted the defendant's post-verdict motion to dismiss on grounds of pre-indictment delay. *Id.* at 334-35. The government appealed the dismissal and the court of appeals, treating the trial judge's dismissal as an unreviewable acquittal, held that the double jeopardy clause foreclosed review. 492 F.2d 1345, 1348 (3d Cir. 1973). The Supreme Court, making no distinction between dismissals and acquittals, reversed the court of appeals and authorized the government's appeal. 420 U.S. at 353. The Court stated: "The development of the Double Jeopardy Clause from its common-law origins thus suggests that it was directed at the threat of multiple prosecutions, not at Government appeals, at least where those appeals would not require a new trial." *Id.* at 342. Normally, a new trial is not required for reinstatement of the guilty verdict. The Court went on to say that "a defendant has no legitimate claim to benefit from an error of law when that error could be corrected without subjecting him to a second trial before a second trier of fact." *Id.* at 345. This language does not mean that all government appeals will be permitted by the double jeopardy clause. To the contrary, the clause continues to offer significant ancillary protection against government appeals. It does so, however, with a view toward the consequences of the appeal, rather than toward the appeal itself. Where the inevitable result of a successful government appeal would be a second trial that would be barred by the double jeopardy clause, the appeal—a meaningless exercise under these circumstances—is barred as well. By definition, however, a government appeal is not a separate prosecution and does not by itself constitute second jeopardy.

²⁹ 420 U.S. at 352-53.

³⁰ The verdict might not be able to be reinstated if, for example, after the post-conviction acquittal, the defendant were to succeed in having the original conviction declared invalid due to trial error. For a case foreshadowing this question, see *United States v. Rojas*, 554 F.2d 938, 944 (9th Cir. 1978), and supplemental order at 574 F.2d 476 (1978) (defendant authorized to raise new-trial motions following a post-conviction discharge that was reversed on appeal). In *United States v. Donahue*, 539 F.2d 1131 (8th Cir. 1976), the court pointed out:

of a post-conviction discharge before an appellate court. Post-conviction judgments are useful as a tool which permits trial courts to resolve complex legal questions in the defendant's favor (thus shifting the initial burden of appeal to the government), without foreclosing appellate review of these rulings. As appears to be the case concerning pre-trial discharges, the post-conviction rule applies without regard to the grounds for the discharge.³¹

2. Reason for Discharge: The Requirement of an Acquittal.

Criminal defendants may be favorably discharged for a variety of substantive reasons, ranging from procedural irregularity to the trial judge's belief that the defendant is innocent as a matter of law. Where the timing of the

It does not necessarily follow from the fact that a verdict of guilty erroneously set aside is reinstated that a defendant's conviction is validated. He may still move for a new trial or he may appeal from an ultimate judgment of conviction on the basis of errors occurring in the course of the trial.

Id. at 1134.

³¹ See, e.g., *United States v. Ceccolini*, 435 U.S. 268, 270-71 (1978); *United States v. Blasco*, 581 F.2d 681, 683 & n.2 (7th Cir. 1978). The reason for the judgment however, would become important if the guilty verdict were somehow unable to be reinstated. See note 30 *supra*. In that event, a post-conviction discharge granted by reason of a purely legal defense would not bar a new trial, while a post-conviction discharge on factual grounds arguably would. An understanding of this problem requires a familiarity with the recent Supreme Court cases, *United States v. Scott* and *Burks v. United States*, discussed *infra*. The rationale of these decisions withholds immediate double jeopardy protection from discharges pursuant to purely legal defenses, but grants this protection to factual discharges. Thus, if a purely legal post-conviction discharge were overturned on appeal and if the conviction could not be reinstated, a second trial would nevertheless be permissible since factual issues were never resolved in the defendant's favor. Conversely, if a factual post-conviction discharge were overturned on appeal and if the conviction could not be reinstated, a second trial would arguably be prohibited since the discharge was based on factual matters within the protective scope of the double jeopardy clause. In either case, a second trial would be desirable in order to correct the trial error that prevents reinstatement of the conviction; nevertheless, adherence to the fact/law distinction in the recent cases would prevent reprosecution in the circumstance of a factual discharge. If the trial error thus could not be corrected, the defendant would have to be released from prosecution.

Whether this result is necessary is problematic. Language in *Wilson* suggests that a defendant may never be reprosecuted after a post-conviction acquittal, even though a government appeal will lie. Since trial error can only be corrected by a second trial, *Wilson* would technically prohibit a second trial for this purpose. The defendant would, in effect, be finally discharged merely because of trial error, coupled with the fortuity of the erroneous post-conviction acquittal. Normally, by contrast, new trials are permitted following reversal for trial error. See *Burks v. United States*, 437 U.S. 1, 15 (1978); *United States v. Tateo*, 337 U.S. 463, 466 (1964). One hesitates to insulate defendants from otherwise permissible second trials merely because an erroneous post-conviction judgment happened to be granted. On the other hand, the Supreme Court is clearly willing to give effect to even egregiously erroneous acquittals when necessary to protect legitimate double jeopardy rights. See *Sanabria v. United States*, 437 U.S. 54, 75 (1978). The question is whether legitimate double jeopardy rights are implicated in the case posed where the defendant has already been convicted by the trier of fact, but where the conviction cannot be reinstated due merely to trial error. Such facts present a complex conceptual issue that may eventually face the Supreme Court.

discharge does not establish the government's right to appeal—when the discharge occurs after jeopardy has attached but before the case has been decided by the trier of fact—the inquiry determining the availability of a double jeopardy defense shifts to an assessment of the substantive reason for discharge. In broad terms, the discharge must represent a judgment as to the defendant's factual innocence, rather than legal immunity, before double jeopardy protection will be invoked.³² The distinction between innocence and immunity to some extent parallels the distinction between trial court acquittals and dismissals.³³ The parallels are not perfect, however, because the label used by the trial court may not necessarily describe accurately the judgment in question, and because certain dismissals may involve factual determinations tantamount to acquittal. In this regard, when necessary, a reviewing court will look beyond the label to the substance of a given defendant's discharge to establish the true character of the judgment.³⁴

The standard to be applied in the case of a correctly labelled trial court acquittal—a judgment that does invoke double jeopardy—appears in Rule 29 of the Federal Rules of Criminal Procedure. Rule 29 expressly provides for trial court acquittal as a matter of law, either before or after jury verdict, where the prosecution has failed to satisfy its burden of proof.³⁵ In *Sanabria v. United States*,³⁶ now the leading case on the issue of bona fide acquittals, the

³² See text and notes at notes 71-84 *infra*.

³³ For a discussion of the distinction between trial court acquittal and trial court dismissal, see note 5 *supra*.

³⁴ See, e.g., *United States v. Kehoe*, 516 F.2d 78, 82-83 (5th Cir. 1975), *cert. denied*, 424 U.S. 909 (1976), *rehearing denied*, 425 U.S. 945 (1976). In *United States v. Jorn*, 400 U.S. 470, 478 n.7 (1970), the plurality opinion noted: "[T]he trial judge's characterization of his own action cannot control the classification of the action for the purposes of our appellate jurisdiction." In *Serfass v. United States*, 420 U.S. at 392 (1975), the Court said: "The word [acquittal] itself has no talismanic quality for the purposes of the Double Jeopardy Clause." For an example of judicial mislabelling, if not misbehavior, see *United States v. Appawoo*, 553 F.2d 1242, 1244-47 (10th Cir. 1977) (judge deliberately attempted to foreclose government appeal).

³⁵ FED. R. CRIM. P. 29(a) provides in part:

Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses.

See generally 2 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 462 (1969).

It should be noted that the trial court is not permitted to bypass the jury in a criminal case in order to enter a judgment of conviction. This is so no matter how overwhelming the evidence. Obvious jury trial rights would otherwise be infringed. See *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-73 (1977); *United Brotherhood of Carpenters and Joiners of America v. United States*, 330 U.S. 395, 408 (1947); *Sparf and Hansen v. United States*, 156 U.S. 51, 105 (1895).

³⁶ 437 U.S. 54 (1978). In *Sanabria*, the trial judge acquitted the defendant after jeopardy had attached, but before verdict. The judge based his judgment on a clearly erroneous interpretation of the statute in question and on the insufficiency of evidence created by his erroneous exclusion of certain prosecution evidence. *Id.* at 59, 68. The government appealed claiming that the judgment of acquittal, while unreviewable as to one basis of liability, was reviewable as to a second, discrete basis of

Supreme Court held that when a trial court enters a judgment of acquittal as a matter of law after trial has commenced but before a verdict has been received, both appellate review and any prospect of further prosecution are absolutely barred.³⁷ Such judgment will have this barring effect even if it is egregiously erroneous under the circumstances.³⁸ Therefore, when a trial court enters a mid-trial³⁹ judgment of acquittal pursuant to Rule 29, and where the discharge actually represents a judgment on the question of the sufficiency of the evidence as required by Rule 29, such judgment may not be reviewed on appeal, and obviously no further prosecution can occur.

Unlike the barring effect of bona fide judgments of acquittal, the role for double jeopardy purposes of mid-trial judgments of dismissal has not always been clear.⁴⁰ Part of the ambiguity in the area of dismissals arises from the fact that there is no comprehensive statutory standard for dismissal as exists in the case of a Rule 29 acquittal. Dismissals can be granted for a host of reasons, and serve primarily as a tool for the exercise of trial court discretion.⁴¹ Prior to *United States v. Scott*⁴² (one of the recent cases forming the basis of this note), all mid-trial judgments of dismissal had been held to bar

liability. The court of appeals agreed and remanded the case for a new trial of the claimed reviewable charge. *United States v. Sanabria*, 548 F.2d 1, 8 (1st Cir. 1976). The Supreme Court reversed. After rejecting the theory that the single-count indictment contained two discrete bases of liability, the Court stated firmly that "there is no exception permitting retrial once the defendant has been acquitted, no matter how 'egregiously erroneous' . . . the legal rulings leading to that judgment might be." 437 U.S. at 75 (citations omitted).

³⁷ 437 U.S. at 77-78. See also *Kepner v. United States*, 195 U.S. 100, 133-34 (1904).

³⁸ 437 U.S. at 75, quoted at note 36 *supra*. See also *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977); *Fong Foo v. United States*, 369 U.S. 141, 143 (1962) (per curiam).

³⁹ The term "mid-trial" as used herein is shorthand for judgments that occur after jeopardy has attached, but before a final determination by the trier of fact has been received. In *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977), the jury had been discharged due to its failure to reach a verdict; then, sometime thereafter, the trial judge ordered an acquittal. *Id.* at 566. Despite the fact that the acquittal in *Martin Linen* technically did not occur during trial, it would nevertheless be considered "mid-trial" herein, since no verdict had been rendered by the trier of fact at the time the acquittal was granted.

⁴⁰ See Note, *Double Jeopardy and Government Appeals in Criminal Cases*, 12 COLUM. J.L. & SOC. PROB. 295, 296-99 (1976).

At one time, government appeals from criminal dismissals were limited by statute, and not merely by constitutional double jeopardy as is now the case. See note 20 *supra*. Cases decided prior to 1971, under the previous version of the Criminal Appeals Act, 18 U.S.C. § 3731 (1964), offer little insight into constitutional double jeopardy, since review of dismissals was often completely barred by that statute. See, e.g., *United States v. Heath*, 260 F.2d 623, 626-28 (9th Cir. 1958); *United States v. Nardolillo*, 252 F.2d 755, 757-58 (1st Cir. 1958). Furthermore, such cases are of little aid in understanding the double jeopardy clause, since they were usually confined to interpreting the criminal appeals statute, rather than the constitutional prohibition against double jeopardy. See, e.g., *United States v. Sisson*, 399 U.S. 267, 279-80 (1970); *United States v. Mersky*, 361 U.S. 431, 434-38 (1960).

⁴¹ See note 5 *supra*.

⁴² 437 U.S. 82 (1978) (discussed at notes 51-100 *infra*).

government appeals and reprosecution without regard to the underlying reason for the dismissal.⁴³ This unqualified rule was, however, discarded in *Scott*,⁴⁴ and now double jeopardy following dismissal depends on subtle distinctions in the reason for the judgment. The new approach to dismissals is developed in this note in the upcoming discussion of the *Scott* case.

C. Acquittal by Decision of an Appellate Court

The standard for double jeopardy following appellate court judgments favorable to the accused was markedly changed by the other case forming the basis of this note, *Burks v. United States*.⁴⁵ Prior to *Burks*, appellate courts were free to order whatever proceedings justice seemed to require when reversing a defendant's conviction.⁴⁶ Even a finding by an appellate court that the prosecution had failed as a matter of law to meet its burden of proof would not have prevented a second trial. After *Burks*, by contrast, certain "appellate acquittals" will invoke double jeopardy protection. Because *Burks* is the watershed case in this area, and thus discussion here of the relevant principles would be repetitious with this note's later discussion of *Burks*, development of these issues will be deferred until the discussion of *Burks*. For the sake of organization, however, it is important at this point to appreciate that appellate courts represent an independent source of double jeopardy-invoking discharges.

II. THE RECENT CASES

In recent years the Supreme Court has made repeated efforts to spell out the scope of the protection the double jeopardy clause provides.⁴⁷ These efforts continued in the Supreme Court's 1977-78 term, in which the Court decided a total of eight cases involving double jeopardy.⁴⁸ Two of these latest cases, *United States v. Scott*⁴⁹ and *Burks v. United States*,⁵⁰ represent notable

⁴³ See *United States v. Jenkins*, 420 U.S. 358, 370 (1975).

⁴⁴ 437 U.S. at 86-87.

⁴⁵ 437 U.S. 1 (1978).

⁴⁶ See *Yates v. United States*, 354 U.S. 298, 327-28 (1957); *Bryan v. United States*, 338 U.S. 552, 560 (1950).

⁴⁷ See, e.g., *Finch v. United States*, 433 U.S. 676 (1977); *Brown v. Ohio*, 432 U.S. 161 (1977); *Jeffers v. United States*, 432 U.S. 137 (1977); *Lee v. United States*, 432 U.S. 23 (1977); *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977); *United States v. Morrison*, 429 U.S. 1 (1976); *Serfass v. United States*, 420 U.S. 377 (1975); *United States v. Jenkins*, 420 U.S. 358 (1975); *United States v. Wilson*, 420 U.S. 332 (1975).

⁴⁸ In addition to *Scott* and *Burks*, the Court decided the following double jeopardy cases: *Swisher v. Brady*, 438 U.S. 204 (1978) (two-tier juvenile procedure constitutes single proceeding); *Sanabria v. United States*, 437 U.S. 54 (1978) (discussed at note 36 *supra*); *Crist v. Bretz*, 437 U.S. 28 (1978) (state rule governing attachment of jeopardy same as federal rule); *Greene v. Massey*, 437 U.S. 19 (1978) (*Burks* appellate acquittal rule applied to states); *United States v. Wheeler*, 435 U.S. 313 (1978) (United States and Navajo Tribe are separate sovereigns for purposes of separate prosecutions); *Arizona v. Washington*, 434 U.S. 497 (1978) (sufficient finding of "manifest necessity" was made in declaring mistrial).

⁴⁹ 437 U.S. 82 (1978).

⁵⁰ 437 U.S. 1 (1978).

departures from recent and not so recent precedent in the area of post-acquittal double jeopardy protection.

A. *United States v. Scott: Factual Versus Legal Dismissals*

In *Scott* the Supreme Court authorized the government to appeal from a mid-trial dismissal of charges entered by the trial court in response to the defendant's motion alleging unfair pre-indictment delay.⁵¹ Before *Scott* was decided, mid-trial dismissal of charges on the basis of any affirmative defense to prosecution would have been final and unreviewable.⁵²

The prior rule was established in *United States v. Jenkins*⁵³ where the Supreme Court decided that any mid-trial discharge of a defendant would bar further proceedings if a resolution of factual issues would be required on reversal and remand.⁵⁴ As a result, review of mid-trial dismissals would be virtually impossible since almost all such dismissals require further fact-finding on remand. In *Scott*, the Supreme Court rejected this broad prohibition.⁵⁵

⁵¹ 437 U.S. at 95, 101.

⁵² See *United States v. Jenkins*, 420 U.S. 358, 370 (1975). What seemed to be, but actually was not, an exception to the *Jenkins* rule occurred in *Lee v. United States*, 432 U.S. 23 (1977). In that case, a mid-trial dismissal on the basis of a technical flaw in the indictment was held not to bar appeal and reprosecution. *Id.* at 34. This technical objection to the indictment falls short of constituting the affirmative defense meant in the text. In *Lee*, the defendant moved before trial to dismiss the indictment on grounds that it failed to allege all of the required elements of the offense. Ruling on the motion was deferred, and, after hearing the evidence, the judge dismissed the indictment due to its technical flaw. The defendant subsequently was charged with and convicted of the same offense upon a proper indictment, and he appealed. *Id.* at 24-27. The court of appeals rejected the defendant's claim of double jeopardy. *United States v. Lee*, 539 F.2d 612, 614 (7th Cir. 1976) (per curiam). The Supreme Court affirmed. It reasoned that, under the particular circumstances in *Lee*, the proceedings could not be said to have terminated in the defendant's favor. Instead, the Court concluded, the dismissal was "functionally indistinguishable from a declaration of mistrial." 432 U.S. at 31. Applying the general rule that mistrials do not bar reprosecution, see text and note at 140 *infra*, the Court concluded that reprosecution was proper. 432 U.S. at 34.

⁵³ 420 U.S. 358 (1975). Defendant *Jenkins* had been charged with draft evasion. After a bench trial, but before a general finding of guilt or innocence, the trial judge dismissed the indictment on the grounds that the defendant's claimed conscientious objector status had not been given proper consideration under the law applicable at that time. *Id.* at 359-62. The government appealed, but the appeals court viewed the trial court's dismissal as an unappealable acquittal. It therefore dismissed the appeal for want of jurisdiction. 490 F.2d 868, 880 (2d Cir. 1973). The Supreme Court affirmed. The Court's broad language suggested that a mid-trial discharge of a defendant, whether in the form of an acquittal or a dismissal, bars government appeal and reprosecution as long as "further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged, would [be] required upon reversal and remand." 420 U.S. at 370.

⁵⁴ 420 U.S. at 370.

⁵⁵ 437 U.S. at 86-87.

1. The Case.

The defendant in *Scott* was charged with three counts of distribution of narcotics. He moved prior to trial for a judgment of dismissal on grounds that his defense had been prejudiced by pre-indictment delay.⁵⁶ The trial judge denied the motion, but after hearing all the evidence and before submitting the case to the jury, the judge granted the defendant's renewed motion to dismiss the first two counts of indictment.⁵⁷ Thereafter the jury returned a verdict of not guilty as to the third count. The government appealed from the two trial court dismissals, but the court of appeals, relying in part on *Jenkins*, dismissed the appeal for want of jurisdiction.⁵⁸ The Supreme Court granted review to consider the applicability of the double jeopardy clause to government appeals from orders granting defense motions to terminate trial before a verdict is rendered.⁵⁹

The Supreme Court held in favor of the government, reversed the court of appeals, and remanded the case to that court for consideration of the merits of the government's appeal.⁶⁰ After noting that the government was "quite willing" to submit its proof to the jury, the *Scott* Court said:

This is scarcely a picture of an all-powerful state relentlessly pursuing a defendant who had either been found not guilty or who had at least insisted on having the issue of guilt submitted to the first trier of fact. It is instead a picture of a defendant who chooses to avoid conviction and imprisonment, not because of his assertion that the Government has failed to make out a case against him, but because of a legal claim that the Government's case against him must fail even though it might satisfy the trier of fact that he was guilty beyond a reasonable doubt.⁶¹

Thus, believing that the mid-trial motion had deprived the government of its entitled opportunity to take its proof to the jury,⁶² the Court concluded that the defendant should not be relieved of the possibility of a second trial.⁶³

Both the *Scott* Court's language and the posture of the case leave no doubt as to the Court's rejection of *Jenkins*. If prosecution were to resume in *Scott*, further fact-finding would be necessary in order to present evidence before a second trier of fact; thus even the loosest reading of *Jenkins* would require dismissal of the government's appeal.⁶⁴ The *Scott* Court disapproved of this result, and concluded that *Jenkins* was wrongly decided.⁶⁵ The Court

⁵⁶ *Id.* at 84.

⁵⁷ *Id.*

⁵⁸ 544 F.2d 903 (6th Cir. 1976) (per curiam).

⁵⁹ 437 U.S. at 84.

⁶⁰ *Id.* at 101. The court of appeals held against the government on remand. 579 F.2d 1013, 1014 (6th Cir. 1978).

⁶¹ 437 U.S. at 96.

⁶² *Id.* at 98-99.

⁶³ *Id.* at 100 (citing *Arizona v. Washington*, 434 U.S. 497, 509 (1978)).

⁶⁴ 437 U.S. at 95.

⁶⁵ *Id.* at 86-87.

determined that *Jenkins* placed too great an emphasis on the defendant's right to have his guilt decided by the first jury impaneled to try him, and thereby improperly included in the double jeopardy prohibition cases in which the defendant himself seeks to terminate the trial before verdict on grounds unrelated to factual guilt or innocence.⁶⁶

The *Scott* opinion attaches binding importance to the defendant's voluntarily choosing to seek a mid-trial dismissal for allegedly prejudicial delay. The defendant originally raised this claim in a pre-trial motion to dismiss.⁶⁷ After the pre-trial motion had been denied without prejudice,⁶⁸ the defendant's alternatives were to renew the motion after the evidence but before verdict (as he did), or to await verdict and, in the event he was found guilty, to enter a post-verdict motion for dismissal.⁶⁹ It is obvious that this latter choice would run counter to the instincts of most defendants, particularly those who believe they are likely to be found guilty. Nevertheless, because the defendant in *Scott* rejected this latter choice out of hand, and thereby terminated the trial prior to a finding of factual guilt or innocence, the Court in effect charged the defendant with strict responsibility for the possibility of his reprosecution.⁷⁰ Accordingly, under the rule in *Scott*, defendants who follow instinct or

⁶⁶ *Id.* at 87.

⁶⁷ Raising this defense in a pre-trial motion was the proper course to be followed. In *Serfass v. United States*, 420 U.S. 377 (1975), the Court left open the question whether a defendant who is afforded an opportunity to obtain a determination of a legal defense prior to trial, but who knowingly allows himself to be placed in jeopardy, later may be denied a double jeopardy defense. *Id.* at 394. The pre-trial motion in *Scott* was, therefore, advisable in order for the defendant to preserve this defense. For a case where a double jeopardy defense was denied on these grounds, see *United States v. Kehoe*, 516 F.2d 78, 86 (5th Cir.1975), *cert. denied*, 424 U.S. 909 (1976), *rehearing denied*, 425 U.S. 945 (1976); for subsequent developments in this case, see *United States v. Kehoe*, 573 F.2d 335, 344-45 (5th Cir. 1978) and *United States v. Kehoe*, 579 F.2d 971 (5th Cir. 1978) (*per curiam*), first reversing and then affirming the result, but not necessarily the reasoning, in the first case.

⁶⁸ Denial without prejudice of the pre-indictment delay claim, coupled with the trial court's later reconsideration of the motion, permitted the trial court to decide the motion after an evaluation of the evidence presented at trial through which actual prejudice could more accurately be detected. See 437 U.S. at 111 (Brennan, J., dissenting).

Incidentally, if the government had not been permitted to appeal the adverse mid-trial ruling, deferral of the pre-trial motion would have violated Rule 12(e) of the Federal Rules of Criminal Procedure, which provides:

A motion made before trial shall be determined before trial unless the court, for good cause, orders that it be deferred for determination at the trial of the general issue or until after verdict, *but no such determination shall be deferred if a party's right to appeal is adversely affected.*

(emphasis added). See Brief for Petitioner at 25-26, *United States v. Scott*, 437 U.S. 82 (1978). Cf. *United States v. Fay*, 553 F.2d 1247, 1248-49 (10th Cir. 1977) (trial judge improperly deferred ruling on pre-trial motions to suppress, and then, after jeopardy had attached, suppressed evidence and acquitted the defendants; the court of appeals refused to permit the government to appeal, despite the procedural irregularity).

⁶⁹ The latter is the practice addressed in *United States v. Wilson*, 420 U.S. 332, 352-53 (1975), and discussed in text at notes 27-31 *supra*.

⁷⁰ See 437 U.S. at 96-99.

strategy and raise purely legal defenses such as pre-indictment delay after trial has commenced but before verdict must endure the possibility of a second trial.

2. The New Definition of Acquittal.

In the process of reaching its decision, the *Scott* Court endorsed a relatively new⁷¹ definition of the acquittal required to invoke a double jeopardy defense. The Court held that a defendant is acquitted for double jeopardy purposes only where the ruling of the trial judge, whatever its label,⁷² actually represents a resolution in the defendant's favor, correct or not,⁷³ of some or all of the factual elements of the offense charged.⁷⁴ This definition of an acquittal permitted the Court to distinguish between dismissals granted pursuant to legal defenses and dismissals granted pursuant to factual defenses. Under this definition, a factual dismissal would qualify as an acquittal for double jeopardy purposes, but a legal dismissal would not. As viewed by the Court, a legal defense, such as that of pre-indictment delay, represents a legal judgment that a defendant, even if criminally culpable, may not be punished because of a supposed constitutional violation.⁷⁵ The effect of a valid legal defense, the Court noted, is to terminate the proceedings against the defendant on a basis unrelated to factual guilt or innocence.⁷⁶ Without a prior finding of innocence, post-acquittal double jeopardy protection is not invoked.⁷⁷

On the other hand, the *Scott* Court would view a dismissal pursuant to a factual defense very differently. The Court offered as examples of factual defenses the defenses of insanity and entrapment, and equated dismissal based on such defenses with trial court acquittal, at least as far as double

⁷¹ The definition is "relatively new" because prior to *Scott* it had never been endorsed directly. The "definition" appeared for the first time as general language in a majority opinion by Justice Brennan in *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977). *Martin Linen*, however, also acknowledged the *Jenkins* approach prohibiting second trials whenever further fact-finding would be required, *id.* at 570, an approach inconsistent with the *Scott* definition. Thus, it cannot be said that the *Scott* definition enjoyed direct support prior to *Scott*. In *Scott*, Justice Brennan disagreed with the majority's use of his earlier language to distinguish between factual and legal discharges, 437 U.S. at 111-12 (Brennan, J., dissenting). Another pre-*Scott* case examining the meaning of acquittal is *United States v. Sisson*, 399 U.S. 267, 288-89 and n.19 (1970), in which the concept of acquittal is linked to factual questions, but in which no general fact/law distinction is developed.

⁷² Appellate courts will look beyond the trial court's label to determine the true character of the judgment in question. See authorities cited at note 34 *supra*.

⁷³ A true acquittal will bar prosecution even if egregiously erroneous. See text and authorities cited at note 38 *supra*.

⁷⁴ 437 U.S. at 97-98.

⁷⁵ *Id.* at 98. For further support of the proposition that pre-indictment delay is a legal rather than factual defense, see *United States v. Marion*, 404 U.S. 307, 312 (1971).

⁷⁶ 437 U.S. at 98-99.

⁷⁷ *Id.* Note that other facets of general double jeopardy protection may not require a prior finding of innocence. See discussion at note 1 *supra*.

jeopardy is concerned.⁷⁸ The *Scott* opinion explained that when the government does not submit enough evidence to rebut the essentially factual defense of insanity, a failure of proof requiring an acquittal necessarily has taken place.⁷⁹ The Court said that the defense of insanity, like the defense of entrapment,⁸⁰ arises from the notion that Congress could not have intended punishment for a defendant who, although having committed all the elements of an offense, is able to establish a legally adequate justification or excuse.⁸¹ Such a factual finding, the Court reasoned, establishes the defendant's lack of criminal culpability.⁸²

The distinction between factual and legal defenses separates those affirmative defenses which determine a defendant's culpability from those which determine whether, even if culpable, the defendant legally may be tried.⁸³ Its ultimate effect is to narrow the list of judgments that bar government appeal. Henceforth, in order to bar appeal the trial court's judgment must be one that indicates that the government's factual case has failed either as to the statutory elements of the offense charged, or as to the burden shifted to the government when a defendant raises a *prima facie* defense that, unrebutted, would justify a finding of innocence.⁸⁴

3. Dissent.

The majority opinion in *Scott* is accompanied by a strong dissent in which four justices join. The dissent flatly rejects the majority's definition of acquittal and contends that the majority's distinction between "true acquittals" and other final judgments favorable to the accused is "insupportable in either logic or policy."⁸⁵ The dissent's basic objection to the majority's distinction re-

⁷⁸ 437 U.S. at 97-98.

⁷⁹ *Id.* The Court cited *Burks v. United States*, 437 U.S. 1, 16 (1978), to support the proposition that an insanity defense relates to factual rather than legal issues. *Scott v. United States*, 437 U.S. at 97.

⁸⁰ Regarding the nature of an entrapment defense, see *United States v. Russell*, 411 U.S. 423, 435 (1973).

⁸¹ 437 U.S. at 97-98.

⁸² *Id.* at 98.

⁸³ In practice, distinctions between legal and factual defenses are probably destined to be made on an *ad hoc* basis. One factor that may be useful in drawing such distinctions is whether the defense in question is of the sort ordinarily submitted to the jury.

⁸⁴ See 437 U.S. at 97-98. The *Scott* decision rests in part on the finding that the defendant voluntarily exposed himself to the possibility of a second trial (see text at notes 67-70 *supra*) and in part on the distinction between factual and legal defenses. One might therefore question whether the fact/law distinction alone would have supported the result in the eyes of the majority. It is relevant here that *Scott* is a 5 to 4 decision.

⁸⁵ 437 U.S. at 103 (Brennan, J., dissenting). On this point it is curious to note that Justice Brennan joined in Justice Marshall's opinion for the majority in *Sanabria v. United States*, 437 U.S. 54 (1978) (another double jeopardy decision decided at the same time as *Scott*), which seems to acknowledge a fact/law distinction:

Unlike questions of whether an indictment states an offense, a statute is unconstitutional, or conduct set forth in an indictment violates the statute, what proof may be presented in support of a valid indictment and the

volves around its more rigid adherence to the notion that all second trials infringe the interests sought to be protected by the double jeopardy clause.⁸⁶ As seen by the dissent, it is the retrial itself that threatens constitutionally protected interests, regardless of the procedural events leading to premature termination of the first trial.⁸⁷

The dissent also questions the practicality of the majority's distinction between factual and legal defenses, calling it "purely formal"⁸⁸ and "incapable of principled application."⁸⁹ Lower courts, the dissent predicts, will have difficulty applying the distinction in light of the majority's minimal guidance on the point.⁹⁰ The dissent concludes by suggesting that in the long run there will be few defenses which can be deemed unrelated to factual innocence, and, thus, that the effect of the decision will be limited.⁹¹ Obviously, the practical utility of the distinction can be determined only through experience.

4. Assessment.

Although there may be a tendency on the part of some to see the *Scott* decision as part of a contemporary trend to diminish the rights of criminal defendants, the result should not be seen simply as an attempt to expose defendants to greater burdens. In the final analysis, the merits of the defendant's case, be they factual or legal, will determine whether or not he or she is punished. This new rationale should instead be viewed as an attempt to reallocate the risks of trial court error. The defendant with a valid legal defense ultimately will receive the benefit of his or her defense. Under the *Scott* rule, however, the defendant will be forced to defend before an appellate court the legal basis of his or her discharge once it has been approved by the trial court. The alternative to the new rule is to place absolute responsibility on the prosecution for all mid-trial errors that the trial court may make.⁹² This is so because mid-trial errors otherwise could not be challenged on appeal by the

sufficiency of that proof are not "legal defenses" required to be or even capable of being resolved before trial.

437 U.S. at 77.

⁸⁶ See 437 U.S. at 104-05 (Brennan, J., dissenting). As regards the notion that all second trials, per se, offend the double jeopardy clause, see text accompanying notes 131-43 *infra*.

⁸⁷ 437 U.S. at 104-05 (Brennan, J., dissenting).

⁸⁸ *Id.* at 109 (Brennan, J., dissenting).

⁸⁹ *Id.* at 103, 111 (Brennan, J., dissenting).

⁹⁰ *Id.* at 114-15 (Brennan, J., dissenting). The majority responded in a footnote by saying:

In other circumstances, this Court has had no difficulty in distinguishing between those rulings which relate to "the ultimate question of guilt or innocence" and those which serve other purposes. *Stone v. Powell*, 428 U.S. 465, 490 (1976). We reject the contrary implication of the dissent that this Court or other courts are incapable of distinguishing between the latter and the former.

Id. at 98 n.11.

⁹¹ *Id.* at 115 (Brennan, J., dissenting).

⁹² See *id.* at 107 (Brennan, J., dissenting).

government, and could not be corrected with a second trial. While to place the entire burden on the prosecution would not be unthinkable,⁹³ it may not be necessary to protect the legitimate rights of the accused. The Supreme Court has held and continues to hold that absolute responsibility is to be borne by the government with respect to its factual case.⁹⁴ However, in a complex procedural environment it seems a proper trade that appellate courts have the chance to supervise defenses that do not bear directly on the innocence of the accused.⁹⁵ Only defendants who raise mid-trial legal defenses and whose dismissals are overturned on appeal will suffer a second proceeding they would not have suffered before. This cost may not be especially high in relation to the price society would have to pay if guilty defendants were able to avoid punishment by virtue of undeserved legal defenses.

One facet of *Scott* may even be considered favorable to defendants. Henceforth it will be possible to resolve legal defenses after the attachment of jeopardy⁹⁶ but prior to verdict without immunizing the defendant from a second trial if the judgment is found to be in error. Consequently, trial courts may be more willing seriously to consider such defenses, thereby sparing some defendants the unnecessary completion of a trial when entitlement to a legal defense, although still questionable, seems apparent.⁹⁷ At the margin, one might expect trial courts to be somewhat more receptive to these defenses.

On the other hand, there might be some legitimate fears that after *Scott* prosecutors will be lax in presenting the government's best case against legal defenses at trial due to an added sense of security associated with their new-found right to appeal.⁹⁸ Worse yet, it is even possible to imagine an unscrupulous prosecutor deliberately sacrificing the first trial in an effort to improve the government's presentation at a second.⁹⁹ In the extreme, this kind of prosecutorial neglect or malfeasance would result in unnecessary and unfair reprosecutions. If this occurred, one would expect appellate courts to respond by refusing review on double jeopardy grounds. In this regard, an analogy might be drawn to double jeopardy rules in the mistrial situation.

⁹³ Placing this burden on the prosecution was tacitly endorsed by the dissent, but the government's adversarial posture at trial was viewed as a sufficient counterweight. The dissent said that recent cases teach that "the Government's means of protecting its vital interest in convicting the guilty is its participation as an adversary at the criminal trial where it has every opportunity to dissuade the trial court from committing erroneous rulings favorable to the accused." *Id.* at 107 (Brennan, J., dissenting). Whether the prosecution can carry this burden and still adequately protect the public interest is, of course, open to question.

⁹⁴ See *Sanabria v. United States*, 437 U.S. 54, 75-77 (1978); see also text accompanying notes 35-39 *supra*.

⁹⁵ See Comment, *Double Jeopardy and Government Appeals of Criminal Dismissals*, 52 TEX. L. REV. 303, 349 (1974).

⁹⁶ As to attachment of jeopardy, see note 24 *supra*.

⁹⁷ See 2 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 461 (1969).

⁹⁸ Since prosecutorial interests normally are ill-served by delay, and since prosecutors are unlikely to concede defenses, such behavior is likely to be rare.

⁹⁹ This is precisely the sort of activity against which it is agreed the double jeopardy clause protects. See text accompanying note 138 *infra*.

There, the usual rule that necessary mistrials do not bar reprosecution is negated by prosecutorial abuse or overreaching.¹⁰⁰ In general, then, assuming courts exercise their discretion on a case-by-case basis to protect defendants from abnormal reprosecutions, and acknowledging the public cost of placing the entire burden of mid-trial judicial error on the prosecution, as well as the hypothetical benefit to the defendant in certain cases, it is difficult to accept a rigid view that *Scott* represents a deliberate, unbalanced shrinking of the rights of the accused.

It is also difficult to predict the overall impact of *Scott*. To be sure, trial courts will feel freer to make mid-trial legal determinations as a result of the fact/law distinction in *Scott*. On the other hand, routine interruption of trials to grant legal defenses would seem unsound simply from the standpoint of judicial economy, irrespective of constitutional considerations. It does not ordinarily make good sense to waste a trial by granting a legal discharge when all that remains to be done is to submit the case to the jury. Unless one presumes there to be an unfairly prejudicial influence on the trial judge or a reviewing court resulting from the stigma of a conviction, it seems that legal defenses which require development at trial can and will continue to be fairly and most economically resolved by way of post-conviction rulings. Another factor that may limit the frequency of use of the *Scott* rule is the practical reality that defendants will have less reason to seek mid-trial dismissal in the absence of the strategic "bonus" of unreviewability. In any event, what is clear is that *Scott* does away with the previous boon available to defendants who were fortunate enough to secure favorable mid-trial discharges for purely legal reasons. The important issue now, it seems, is to insure that defendants recognize the risk of reprosecution they assume when invoking such mid-trial legal defenses.

B. *Burks v. United States: Appellate Acquittals*

The fact/law distinction found in *Scott* is augmented by the Supreme Court's decision in *Burks v. United States*.¹⁰¹ In *Burks* the Court extended protection against a second trial to a defendant who was acquitted by an appellate court when it overturned his conviction on grounds of evidentiary insufficiency.¹⁰² Prior to *Burks*, the Supreme Court's construction of the double jeopardy clause had permitted appellate courts to order new trials when reversing criminal convictions, even after finding that the prosecution's evidence was insufficient to convict.¹⁰³ The principal cases taking this position were

¹⁰⁰ See *United States v. Dinitz*, 424 U.S. 600, 610-11 (1976); see generally Note, *Mistrials and Double Jeopardy*, 15 AM. CRIM. L. REV. 169 (1977); Schulhofer, *Jeopardy and Mistrials*, 125 U. PA. L. REV. 449 (1977).

¹⁰¹ 437 U.S. 1 (1978).

¹⁰² *Id.* at 18.

¹⁰³ See generally Note, *Double Jeopardy: A New Trial After Appellate Reversal for Insufficient Evidence*, 31 U. CHI. L. REV. 365 (1964); Thompson, *Reversals for Insufficient Evidence: The Emerging Doctrine of Appellate Acquittal*, 8 IND. L. REV. 497 (1975) (discussing state application).

*Bryan v. United States*¹⁰⁴ and *Yates v. United States*.¹⁰⁵ In *Bryan* the Supreme Court had allowed a new trial under these circumstances, but unfortunately had finessed the constitutional question by relying on its broad statutory authority as an appellate court to order such further proceedings "as may be just."¹⁰⁶ In *Yates* the Court supplemented the *Bryan* reliance on statutory authority by suggesting that a new trial is particularly proper when the defendant requests a new trial as one avenue of appellate relief and assertedly waives his or her right to object to the second trial.¹⁰⁷ The propositions presented in both *Bryan* and *Yates* were rejected by the Court in *Burks*.¹⁰⁸

1. The Case.

Defendant Burks was convicted by a jury of using a dangerous weapon in the commission of a bank robbery.¹⁰⁹ His principal defense was insanity. The

¹⁰⁴ 338 U.S. 552 (1950). In *Bryan* the defendant's conviction was set aside by the court of appeals because the prosecution's evidence was insufficient. That court refused to order a judgment of acquittal as requested by the defendant and instead remanded for a new trial. 175 F.2d 223, 227 (5th Cir. 1949). The Supreme Court affirmed. It held, first, that the court of appeals was within its statutory authority in ordering a new trial, 338 U.S. at 560, and then summarily dismissed the defendant's double jeopardy claim saying, "where the accused successfully seeks review of a conviction, there is no double jeopardy upon a new trial." *Id.* (quoting *Francis v. Resweber*, 329 U.S. 459, 462 (1947)). The authority cited by the *Bryan* Court offered no real support for its position, *Burks v. United States*, 437 U.S. at 12, but this view, with minor modification, remained the law until 1978. The modification occurred shortly after *Bryan* in *Sapir v. United States*, 348 U.S. 373 (1955) (*per curiam*). In *Sapir* the Court, without explanation, ordered acquittal of a defendant who had prevailed in his first appeal from denial of his trial motion for acquittal. Contrary to the defendant's request, the court of appeals had ordered a new trial after reversing the trial court. 216 F.2d 722, 724 (10th Cir. 1954). The Supreme Court's opinion was accompanied by a concurring opinion by Justice Douglas who sought to distinguish *Bryan* where the rest of the Court had failed to do so. Justice Douglas focused on the fact that while the defendant in *Sapir* had only requested an acquittal on appeal, the defendant in *Bryan* had requested a new trial, thus opening the whole record for disposition as might be just, and inviting a second trial if one appeared to be necessary. 348 U.S. at 374. This implied waiver by the defendant of his double jeopardy rights seemed to be endorsed, although not expressly, in *Yates v. United States*, 354 U.S. 298, 327-28 (1957).

¹⁰⁵ 354 U.S. 298 (1957). In *Yates* the Supreme Court ordered acquittals for some defendants but new trials for others. One contention raised by the defendants on appeal concerned the insufficiency of the evidence. As justification for remanding for a new trial, the Court drew on its statutory authority, and emphasized the fact that the defendants had asked for a new trial. *Id.* at 327-28.

¹⁰⁶ 338 U.S. at 560 (1949). 28 U.S.C. § 2106 (1976) provides:

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had *as may be just* under the circumstances.

(emphasis added).

¹⁰⁷ 354 U.S. at 327-28 (1957). See also *Sapir v. United States*, 348 U.S. 373, 374 (1955) (Douglas, J., concurring); *Forman v. United States*, 361 U.S. 416, 425 (1959).

¹⁰⁸ 437 U.S. at 17-18.

¹⁰⁹ *Id.* at 2.

defendant's motions for acquittal and new trial had been denied by the trial court and he appealed from these denials.¹¹⁰ The court of appeals agreed with the defendant that the government's evidence was insufficient as a matter of law to refute the insanity plea, but rather than ordering an acquittal the court of appeals remanded to the district court for a determination of whether a directed verdict of acquittal should be entered or a new trial ordered.¹¹¹ The Supreme Court granted certiorari to consider whether a defendant may be tried a second time when a reviewing court has determined that in a prior trial the evidence was insufficient to sustain the verdict of the the jury.¹¹²

Recognizing its departure from precedent,¹¹³ the Court held that the double jeopardy clause barred further prosecution of the defendant.¹¹⁴ The Court stated concisely:

Since we necessarily afford absolute finality to a jury's *verdict* of acquittal—no matter how erroneous its decision—it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty.¹¹⁵

The *Burks* Court thus removed the illogical distinction that had previously existed between acquittals by the trier of fact and judicial determinations with the same import occurring at the appellate level. In so doing, the Court pointed out that there is little room for the prosecution to object to the elimination of this distinction since it necessarily has had its entitled opportunity to offer its proof despite its failure adequately to do so.¹¹⁶

The *Burks* Court's rejection of the contrary position taken in *Bryan* and *Yates* is unmistakable. The Court disposed of the notion that statutory authority permits second trials after appellate acquittals simply by acknowledging the overriding role of the constitutional prohibition against double jeopardy.¹¹⁷ In addition, the Court expressly rejected the *Yates* rationale which held that by requesting a new trial a defendant waives his right to assert double jeopardy, even if his conviction is reversed on evidentiary grounds.¹¹⁸ The Court stressed that it makes no difference that a defendant has sought a new trial as one of his remedies or even as the sole remedy, because it "cannot be meaningfully said that a person 'waives' his right to a judgment of acquittal by moving for a new trial."¹¹⁹ The Court thus ended its previous reliance on the rather unprincipled idea that a defendant possesses a realistic choice not to request a new trial on appeal—and thus not to "waive" his or her protec-

¹¹⁰ *Id.* at 3.

¹¹¹ *United States v. Burks*, 547 F.2d 968, 970 (6th Cir. 1976).

¹¹² 437 U.S. at 2.

¹¹³ *Id.* at 10.

¹¹⁴ *Id.* at 16-18.

¹¹⁵ *Id.* at 16.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 17-18.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 17.

tion against second trials—when confronted with a conviction based on evidence perceived to be insufficient. Henceforth, an appellate acquittal is to invoke double jeopardy protection presumably in the same manner as the post-conviction trial court acquittal discussed earlier.¹²⁰ Reprosecution absolutely will be barred following such a judgment, although a second appeal seeking to reverse the judgment of the court of appeals, and thus to reinstate the guilty verdict, would be allowed.¹²¹

2. Adding Symmetry to the *Scott* Definition of Acquittal.

In *Burks* the Supreme Court was careful in its analysis to draw a distinction between reversals for evidentiary insufficiency, as involved in *Burks*, and reversals for trial error which under well-established precedent do not bar reprosecution.¹²² As seen by the Supreme Court, a reversal for trial error, in contrast to a finding of evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case, and therefore implies nothing with respect to the guilt or innocence of the defendant.¹²³ Rather, it is a determination that a defendant has been convicted through a judicial process that was defective in some fundamental respect.¹²⁴ This rationale distinguishing evidentiary insufficiency from trial error closely parallels the distinction between factual and legal dismissals adopted in *Scott*.¹²⁵ In both cases a prior finding of factual innocence is the essential element of a double jeopardy defense to subsequent proceedings. And in both cases legally defective prosecution is distinguished from innocence. It is interesting to note that the *Burks* opinion, unlike that in *Scott*, is unanimous,¹²⁶ despite the apparent similarity in rationale.

3. Assessment.

The pre-*Burks* decisions which allowed retrial following a finding that the prosecution's case had failed warranted overruling. Once the prosecution truly has failed to prove its factual case, it should not be allowed to profit from the trial judge's error in sending the case to the jury. To allow this procedure is to grant the prosecution the proverbial "second bite at the apple," and to subject the defendant to the precise evils against which the double jeopardy clause protects.

¹²⁰ The analogy here is to *United States v. Wilson*, 420 U.S. 332 (1975) (see text and notes at notes 27-31 *supra*).

¹²¹ Note that here, as in the case of post-conviction acquittals by the trial courts, if the evidentiary finding were to be overturned on a subsequent appeal and the conviction could not be reinstated due to trial error, see note 30 *supra*, a difficult conceptual problem would arise as to use of the appellate acquittal to bar reprosecution. See note 31 *supra*.

¹²² 437 U.S. at 15-16. The precedent is: *United States v. Ball*, 163 U.S. 662, 672 (1896); and *United States v. Tateo*, 377 U.S. 463, 466 (1964).

¹²³ 437 U.S. at 15.

¹²⁴ *Id.*

¹²⁵ See text and notes at notes 71-84 *supra*. The *Burks* opinion recites the definition of acquittal used in *Scott*. 437 U.S. at 10.

¹²⁶ 437 U.S. at 2. Justice Blackmun took no part in the decision.

The *Burks* Court's logic that an appellate acquittal should be given weight similar to that of a verdict of innocence is particularly appealing. There is consistency in allowing acquittals at both the trial and appellate level to summon double jeopardy protection. An appellate acquittal represents a finding that the evidence is insufficient as a matter of law to prove guilt. If indeed evidence is insufficient, there is no need for a second trial, and a second trial can serve no purpose other than to permit the prosecution to correct its own errors at the first proceeding—an impermissible result.¹²⁷

The Court also is to be credited for recognizing that there can be no meaningful waiver of double jeopardy rights when the defendant's alternative to seeking a new trial on appeal is to remain (allegedly) illegally imprisoned. A request for a new trial accompanied by an objection to the sufficiency of the evidence should be viewed as a conditional request. It suggests not that a second trial is desired even though an acquittal is in order; rather it suggests that a second trial, if necessary, is an acceptable alternative to penal sanction. The fact that new-trial motions often are made as a matter of course also supports the *Burks* Court's rejection of the "waiver" theory.¹²⁸ Under the waiver theory, a defendant would have to refrain from making a new-trial motion when challenging evidentiary sufficiency on appeal if the defendant were to be sure of avoiding a second trial following a successful appeal. In contrast to this "all or nothing" approach, under normal circumstances one would expect a realistic defendant to seek any relief possible, including a new trial. It is doubtful that defendants should be penalized for being reasonably pragmatic and requesting a new trial on appeal. In addition, the "waiver" theory presumes an element of volition on the part of the defendant. This would appear to be shortsighted. Frankly, it is hard to imagine that, as a rule, defendants knowingly weigh the risks of reprosecution when new-trial motions are made in their behalf. From a practical standpoint alone, therefore, *Burks* was correct in overruling the prior, waiver theory.

As a result of *Burks*, one might expect a decline in appellate court willingness to reverse judgments on evidentiary grounds. Following this case, appellate reversal for evidentiary insufficiency takes on a constitutional significance it previously did not have. Quite obviously, appellate courts will be less likely to find the evidence insufficient in marginal cases when the consequence of such judgment is to immunize the defendant from any possibility of reprosecution.¹²⁹ Nevertheless, whatever the change in judicial behavior may

¹²⁷ See *United States v. Wilson*, 420 U.S. 332, 352 (1975) (see text at note 138 *infra*).

¹²⁸ See *United States v. Wiley*, 517 F.2d 1212, 1217 n.24 (D.C. Cir. 1975) ("A new trial waiver doctrine bases vital determinations affecting the rights of the accused on what are often routine post trial motions in the alternative for a new trial filed by appointed counsel.").

¹²⁹ In *Greene v. Massey*, 437 U.S. 19 (1978), which was decided with *Burks*, and which extended the *Burks* principle to state courts, it was implied at oral argument that appellate courts sometimes order new trials under the guise of insufficient evidence, not because proof has clearly failed, but rather "in the interests of justice." 22 CRIM. L. REP. (BNA) 4116-17 (1977).

be, the *Burks* Court did not seem wary of the result. The Court rested its lack of concern on the fact that an appellate court's role is "quite limited" with regard to factual matters, and that, presumably, appellate acquittals will be confined to cases where the prosecution's failure is clear.¹³⁰ In any event, a need for appellate courts to refine their approach to fact questions seems preferable to the conceptual inconsistency that preceded *Burks*.

III. FACT VERSUS LAW: SOMETHING NEW, OR JUST ANOTHER EXCEPTION?

Together, *Scott* and *Burks* denote a significant shift in the Supreme Court's construction of post-acquittal double jeopardy protection, a shift that seems to represent a rational and pragmatic approach to the realities of criminal prosecutions. By contrast, earlier decisions in this area, while often reaching rational results, were characterized by almost ritualistic emphasis on the notion that all second trials, per se, offend the double jeopardy clause, a rule honored as often in the breach as in the acceptance. The balance of this note seeks to highlight this shift in emphasis.

A. Background: The "Per Se" Rule

At common law, the protection against double jeopardy not only prohibited multiple punishments for the same offense, but also prohibited multiple trials without regard to the possibility of punishment.¹³¹ In other words, it was the second trial itself, regardless of its outcome, that violated the ancient form of protection against double jeopardy.¹³² So strong was this feeling against second trials that at one time a convicted defendant was unable even to appeal his conviction in an effort to seek a new trial.¹³³ This created an irony once described as guaranteeing the defendant the right to be hung to protect him from the danger of a second trial.¹³⁴

The concept of refusing all second trials even after an assertedly erroneous conviction was soon rejected in this country.¹³⁵ Nevertheless, the idea that all second trials, per se, offend double jeopardy protection has permeated most if not all Supreme Court double jeopardy decisions.¹³⁶ Based on the collection of cases in this area, the rationale against second trials, per se, ap-

¹³⁰ 437 U.S. at 17. The Court, in *Burks*, stated that, "[w]hile this is not the appropriate occasion to re-examine in detail the standards for appellate reversal on grounds of insufficient evidence, it is apparent that such a decision will be confined to cases where the prosecution's failure is clear." *Id.*

¹³¹ See *Green v. United States*, 355 U.S. 184, 189 (1957); *United States v. Gibert*, 25 F. Cas. 1287 (1834); see generally *Mayers & Yarbrough, Bis Vexari: New Trials and Successive Prosecutions*, 74 HARV. L. REV. 1, 5 (1960) [hereinafter cited as *Mayers & Yarbrough*].

¹³² *Id.*

¹³³ See *United States v. Gibert*, 25 F. Cas. 1287 (1834). See also authorities cited at note 131 *supra*.

¹³⁴ See *United States v. Keen*, 26 F. Cas. 686, 690 (1839); *United States v. Scott*, 437 U.S. 82, 92 (1978).

¹³⁵ See *United States v. Ball*, 163 U.S. 662, 672 (1896).

¹³⁶ See, e.g., *United States v. Wilson*, 420 U.S. 332, 343 (1975).

pears to be threefold. First, the Court has suggested that the mere fact of a second trial exposes a defendant to unnecessary personal strain and ordeal.¹³⁷ Second, it is thought that a second trial would unfairly prejudice the defendant by wearing down his defense and by permitting the prosecution to re-examine the weaknesses in its first presentation in order to strengthen the second.¹³⁸ And third, the Court has mentioned that a second trial would disserve the defendant's legitimate interest in the finality of an acquittal or other discharge.¹³⁹

It is easy to appreciate the merit of these three justifications. What is more difficult, however, is to attempt to reconcile them with the reality of double jeopardy jurisprudence. Even prior to *Scott*, defendants were subjected to reprosecutions under several exceptions to the general principle that second trials, per se, will not be tolerated. For example, reprosecution has long been permitted when a mistrial is declared for "manifest necessity,"¹⁴⁰ and, as previously mentioned, when a defendant successfully appeals his conviction.¹⁴¹ One seeks in vain for an explanation of these results in terms of the threefold justification above.¹⁴² Rather, what seems to be at work is an almost unspoken effort to balance the elliptical dislike for second trials with practical necessity. What is unfortunate is that the Court has never officially acknowledged the general applicability of this balancing approach. And, as a result, for guidance practitioners are left with the general notion that second trials are prohibited, subject to the possibility that the next case may provide another exception. In this regard, commentators have called for official recognition of the balancing approach and less doctrinaire reliance on the ambiguous idea that second trials, per se, are what offend the double jeopardy clause.¹⁴³ It is interesting to note how the recent decisions appear against this background.

¹³⁷ See *Green v. United States*, 355 U.S. 184, 187-88 (1957). In *Green* the Court enunciated this interest in the following, frequently cited paragraph:

The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Id.

¹³⁸ See *United States v. Wilson*, 420 U.S. 332, 352 (1975).

¹³⁹ *Id.* See also *Crist v. Bretz*, 437 U.S. 28, 33 (1978); *United States v. Jorn*, 400 U.S. 470, 479 (1970) (plurality opinion). But see Justice Brennan's dissent in *United States v. Scott*, 437 U.S. 82, 104 (1978), where he said: "[w]hile the Double Jeopardy Clause often has the effect of protecting the accused's interest in the finality of particular favorable determinations, this is not its purpose."

¹⁴⁰ See *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824). See generally Note, *Mistrials and Double Jeopardy*, 15 AM. CRIM. L. REV. 169 (1977).

¹⁴¹ See text and note at note 122 *supra*.

¹⁴² See *Mayers & Yarbrough*, *supra* note 131, at 12.

¹⁴³ See, e.g., *Mayers & Yarbrough*, *supra* note 131, at 14; Comment, *Double Jeopardy and Government Appeals of Criminal Dismissals*, 52 TEX. L. REV. 303, 313 (1974).

B. Scott and Burks: *The Common Theme*

In both *Scott* and *Burks* the availability of a double jeopardy defense depends on the same substantive inquiry, namely, whether factual elements of the offense have been resolved in the defendant's favor. Thus, these cases have a common theme despite their outwardly opposite results from the viewpoints of the respective defendants.¹⁴⁴ Prior to these cases, the availability of a double jeopardy defense was relatively unaffected by any distinction between factual and legal issues. The availability of the defense turned more on the timing of the judgment in question than on its substantive import.¹⁴⁵ In the future, the substantive fact/law inquiry mandated by *Scott* and *Burks* will be an equally important, threshold consideration. Acquittal, factual dismissal, and reversal for insufficient evidence all indicate that the defendant has successfully confronted the prosecution's proof at least once. This success on the merits appears to have become a necessary antecedent to the raising of a valid double jeopardy defense following receipt of a favorable judgment.

The fact/law distinction that emerges from *Scott* and *Burks* does more than create another exception to the alleged rule that second trials, per se, are unconstitutional; it redefines the boundaries of post-acquittal double jeopardy protection. By casting emphasis on the substantive ground of discharge, emphasis necessarily is removed from the narrow issue of second trials, per se. To be sure, earlier decisions permitting exceptions to the general rule that second trials, per se, are illegal were sometimes characterized by recognition of the need in some cases for compromise between the defendant's right to avoid second trials and the public's interest in justice.¹⁴⁶ The recognized need for occasional compromise is a theme in *Scott* as well. Nevertheless, *Scott* reaches further, and suggests that defendants who raise legal defenses stand on an altogether different footing than do those who contest their factual guilt. The *Scott* court not only addresses the need to balance the public's right with respect to the individual's, but also questions the individual's entitlement, *ab initio*, to the right. Taken to its logical extreme, this differentiation between fact and law, while still imposing upon the prosecution the continuing burden of proof on questions related to guilt, causes strictly legal issues to become more or less neutral as between defense and prosecution. Both parties share the duty to produce a legally "right" decision, and, in the case of these purely legal questions, ultimate double jeopardy protection attaches only after final

¹⁴⁴ They have outwardly opposite results in the sense that one defendant, *Scott*, was disadvantaged by the fact/law distinction, while the other, *Burks*, had it used to his advantage.

¹⁴⁵ See discussion in text accompanying notes 21-31 *supra*.

¹⁴⁶ See, e.g., *United States v. Tateo*, 377 U.S. 463, 466 (1964) ("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."); *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.").

resolution of the legal issues.¹⁴⁷ One questions whether the idea that second trials are inherently evil can coexist with an exception of this scope.

As mentioned earlier, the *Scott* decision is likely to be controversial. It will indeed expose some new defendants to the possibility of a second trial; however, it is worth pondering whether this neutral treatment of legal issues necessarily is inconsistent with individual rights against *oppressive* re-prosecution. It is harder to fault the prosecutor's imperfection in regard to subtle legal questions than with respect to the primary issues of proof. It is harder still to equate such technical imperfection with the unchecked tyranny one assumes to be at the root of double jeopardy protection. Furthermore, as illustrated by *Burks*, the Supreme Court is willing to apply the fact/law distinction for the benefit of the defendant as well as the government. This fact tends to allay fears that the distinction is one-sided, benefiting only the government. There is an important, simply pragmatic side of the fact/law distinction and the corresponding neutral treatment of purely legal questions. As has been noted: "A criminal prosecution is more than a game in which the Government may be checkmated and the game lost merely because its officers have not played according to rule."¹⁴⁸ This may be a silent keynote in the fact/law distinction. With the recent decisions, the Court seems to come to grips with the fact that criminal prosecutions are not necessarily one-sided battles pitting the government against powerless individuals. On the contrary, to the credit of the American criminal justice system the government and the criminal defendant are often well-matched adversaries. It is proper that the rule against double jeopardy followed by the courts reflects this reality.

CONCLUSION

After *Scott* and *Burks*, the crucial inquiry in a post-acquittal double jeopardy case is whether factual elements of the offense have been resolved in the defendant's favor. These elements include factual defenses the non-existence of which is an element of every offense. No longer will once-successful claims to legal immunity suffice to invoke double jeopardy protection. As noted, there are several questions that remain to be answered empirically and

¹⁴⁷ One presumes, naturally, that once a legal question has been resolved by the highest authority available, or when an appeal is not sought, double jeopardy protection is invoked.

¹⁴⁸ *Fong Foo v. United States*, 369 U.S. 141, 146 (1962) (Clark, J., dissenting) (quoting *McGuire v. United States*, 273 U.S. 95, 99 (1927)). Consider also the dissenting opinion of Justice Holmes in *Kepner v. United States*, 195 U.S. 100, 134-39 (1940), in which he endorsed the concept of continuing jeopardy, which concept permits any proceedings necessary to achieve a final determination of either factual or legal matters, and after which final determination double jeopardy protection attaches. Of interest in relation to the point raised in the text is Justice Holmes' extremely pragmatic approach. He said: "At the present time in this country there is more danger that criminals will escape than that they will be subjected to tyranny." 195 U.S. at 134. The concept of continuing jeopardy has never received the endorsement of a majority of the Supreme Court. See *United States v. Scott*, 437 U.S. 82, 90 n.6 (1978).

judicially following these decisions.¹⁴⁹ What is clear is that with these cases the Supreme Court has confirmed an official departure from the notion that all second trials offend the double jeopardy clause, and is moving toward a commonsense evaluation of the shifting equities in criminal prosecutions, a movement which, through emphasis on substance over form, may in the long run profit public and individual interests alike.

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¹⁴⁹ The questions to be answered empirically are: (1) whether trial courts will be more receptive to legal defenses after *Scott* (see text accompanying notes 96-97 *supra*); (2) whether appellate courts will become less willing to reverse convictions on evidentiary grounds after *Burks* (see text accompanying notes 129-30 *supra*); and (3) whether it will become necessary to create rules to insure against prosecutorial neglect in opposing legal defenses at trial (see text at notes 98-99 *supra*). Questions to be answered judicially are, for example, whether post-conviction, trial court acquittals and appellate acquittals which are overturned on appeal bar further proceedings when convictions cannot be reinstated due to trial error (see notes 31 & 121 *supra*); and whether further proceedings should be barred in cases where pre-trial acquittals occur on the basis of stipulated facts or following pre-trial factual hearings (see note 26 *supra*).