DOUBLE JEOPARDY CONSEQUENCES OF DISMISSALS

INTRODUCTION

The Constitution prohibits placing a defendant twice in jeopardy for the same offense.[1] The double jepoardy doctrine is ancient,[2] and in Anglo-American law has its roots in early common-law pleas.[3] A fundamental principle of the doctrine is the inability of the government to appeal a judgment of acquittal in criminal cases.[4] Whether a trial judge's disposition of a case is indeed an acquittal, however, creates problems of interpretation. A trial judge's dismissal of charges against a criminal defendant presents this issue squarely. For purposes of double jeopardy, it is necessary to determine if a dismissal operates like an acquittal to bar government appeal. In *United States v. Scott*[5] the Supreme Court faced this issue and overruled a decision rendered only three terms earlier in *United States v. Jenkins*.[6]

Section I of this Note briefly examines case law principles of double jeopardy developed before the 1971 revision of the Criminal Appeals Act.[7] Section II analyzes the case law arising under the revised Act in

1. The fifth amendment provides in pertinent 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. The provision applies to both felonies and misdemeanors. *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873). It applies to the states through the 14th amendment. Benton v. Maryland, 395 U.S. 784 (1969).

2. The writings of Demosthenes and Justinian show that the general principle of double jeopardy found expression in the laws of ancient Greece and Rome. *See* 11 S. SCOTT, THE CIVIL LAW 17 (1932). Early Canon law also evidences roots of the doctrine, in the notion that God does not punish twice for the same offense. *See* Bartkus v. Illinois, 359 U.S. 121, 152 (1959); J. SIGLER, DOUBLE JEOPARDY 1-3 (1969).

3. At common law, a plea of *autrefois acquit* prevented reprosecution of a defendant who could prove prior acquittal of the same offense. Similarly, a plea of *autrefois convict* prevented a trial if the defendant could show a former conviction for the same crime. *See* J. SIGLER, *supra* note 2, at 16, 18-20. *See also* United States v. Wilson, 420 U.S. 332 (1975); Green v. United States, 355 U.S. 184 (1957); United States v. Jenkins, 490 F.2d 868 (2d Cir. 1973), *aff'd*, 420 U.S. 358 (1975); Note, *Government Appeals of "Dismissals" in Criminal Cases*, 87 HARV. L. REV. 1822, 1823 n.4 (1974); Comment, *Twice in Jeopardy*, 75 YALE L.J. 262, 262 n.1 (1965).

4. *See, e.g.*, Sanabria v. United States, 437 U.S. 54 (1978); United States v. Martin Linen Supply Co., 430 U.S. 564 (1977); United States v. Wilson, 420 U.S. 332 (1975); Fong Foo v. United States, 369 U.S. 141 (1962); Kepner v. United States, 195 U.S. 100 (1904); United States v. Ball, 163 U.S. 662 (1896) (dictum).

5. 437 U.S. 82 (1978).

6. 420 U.S. 358 (1975).

7. 18 U.S.C. § 3731 (1976).

light of these pre-1971 principles. Section III details the Court's reasoning in *Scott*. Section IV then evaluates the latest evolution in the Court's changing double jeopardy doctrine.

I.

Statutory restrictions on both the government's and defendants' rights of appeal in federal criminal cases precluded extensive judicial gloss on the double jeopardy clause before 1971.[8] Defendants in federal criminal trials first gained the right to appeal in 1889, but only in capital cases.[9] Three years later, the Supreme Court, relying on common-law restrictions on government appeals, held that the federal government could not appeal without specific statutory authority.[10] Wholly apart from any double jeopardy restrictions, therefore, the federal government was unable to appeal from trial court dispositions of criminal cases until passage of the 1907 Criminal Appeals Act.[11] That Act allowed appeal when the underlying statute had been found invalid or when the trial court termination was either an arrest of judgment or the sustaining of a plea in bar.[12] Most of the litigation under this

8. "At the time the Fifth Amendment was adopted, its principles were easily applied, since most criminal prosecutions proceeded to final judgment, and neither the United States nor the defendant had any right to appeal an adverse verdict. See Act of Sept. 24, 1789, ch. 20, § 22, 1 Stat. 84." United States v. Scott, 437 U.S. 82, 88 (1978). Before Congress revised the Criminal Appeals Act in 1971, the Court had little opportunity or occasion to examine the double jeopardy clause and its implications for government appeals. The former Criminal Appeals Act controlled government appeals with little reference to the double jeopardy clause. United States v. Scott, 437 U.S. 82, 85 (1978). As a result, only unusual fact patterns prompted consideration of the clause. *Id.* at 89. In addition, the double jeopardy clause did not apply to state criminal cases until 1969. Benton v. Maryland, 395 U.S. 784, 793-96 (1969).

9. 437 U.S. at 88 (citing Act of Feb. 6, 1889, ch. 113, § 6, 25 Stat. 656). "Two years later, review was provided for all 'infamous' crimes. Act of Mar. 3, 1891, ch. 517, § 5, 26 Stat. 827." 437 U.S. at 88 n.4.

10. United States v. Sanges, 144 U.S. 310 (1892). The trial court dismissed Sanges' indictment for murder as insufficient to support a conviction. *Id.* at 311. The Court held that the absence of a federal statute authorizing government appeals precluded review of the dismissal. *Id.* at 321-23.

11. Criminal Appeals Act, ch. 2564, 34 Stat. 1246 (1907).

12. *Id.* The relevant portion of the Act reads as follows:

> That a writ of error may be taken by and on behalf of the United States from the district or circuit courts direct to the Supreme Court of the United States in all criminal cases, in the following instances, to wit:
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> From a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded.
>
> From a decision arresting a judgment of conviction for insufficiency of the indictment,

statute focused on the meaning of the two terms "arrest of judgment"[13] and "plea in bar."[14] As a consequence, constitutional restrictions imposed by the double jeopardy clause played a relatively unimportant role.[15]

Thus, it is unsurprising that only three cases constitute the relevant, pre-1971 case law concerning the constitutional limits on the government's right to appeal in criminal cases. The seminal case, *United States v. Ball*,[16] established two principles. First, the double jeopardy clause does not prevent retrial of defendants who have won reversals of their convictions on appeal.[17] Second, the double jeopardy clause prevents retrial of a defendant acquitted by the trial court.[18] Relying on dicta in *Ball*,[19] the Supreme Court in *Kepner v. United States*[20] held that the double jeopardy clause bars government appeal from a judg-

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where such decision is based upon the invalidity or construction of the statute upon which the indictment is founded.

From the decision or judgment sustaining a special plea in bar when the defendant has not been in jeopardy.

13. An arrest of judgment in a criminal trial is the refusal of the court to render judgment because of a defect appearing on the face of the record. United States v. McCreery, 473 F.2d 1381 (7th Cir. 1973). Dispute over the term "arrest of judgment" focuses on what is meant by the "face of the record." *See, e.g.*, United States v. Brewster, 408 U.S. 501 (1972); United States v. Clay, 481 F.2d 133 (7th Cir. 1973); United States v. Hill, 473 F.2d 759 (9th Cir. 1972). *See generally* Note, *supra* note 3.

14. A plea in bar set forth matters that per se destroyed the plaintiff's right of action and barred its prosecution absolutely. United States v. Brodson, 234 F.2d 97, 99 (7th Cir. 1956). The content of the plea and its effect determined whether it was a plea in bar within the meaning of the Criminal Appeals Act. *Id.* Cases finding pleas to be pleas in bar include United States v. Murdock, 284 U.S. 141, 147 (1931) (plea raised constitutional guarantee against self-incrimination); United States v. Goldman, 277 U.S. 299 (1928) (statute of limitations plea). Litigation over this term centered on whether a particular plea was a plea in bar or a plea in abatement, which did not bar reprosecution. *See, e.g.*, United States v. Barber, 219 U.S. 72 (1911); United States v. Brodson, 234 F.2d 97 (7th Cir. 1953).

15. *See* United States v. Sisson, 399 U.S. 267 (1970); United States v. Jenkins, 490 F.2d 868 (2d Cir. 1973), *aff'd*, 420 U.S. 358 (1975).

16. 163 U.S. 662 (1896).

17. *Id.* at 672.

18. *Id.* at 671.

19. *Id.* at 670 ("If the judgment is upon an acquittal, the defendant, indeed, will not seek to have it reversed; and the government cannot.") (citing United States v. Sanges, 144 U.S. 310 (1892)).

20. 195 U.S. 100 (1904). Congress had incorporated the double jeopardy clause into provisions enacted for rule of the Phillipines, where defendant was tried for embezzlement. Although defendant was acquitted at trial, Phillipine appellate procedure called for a trial de novo. Technically, the ruling in this case is not binding as constitutional interpretation, but is binding only on later cases involving construction of the same provision of the code imposed on the Philippines.

ment of acquittal, regardless of statutory authorization.[21] *Fong Foo v. United States*[22] reaffirmed and expanded *Kepner*. The Court was unable to determine the basis for Fong Foo's directed verdict of acquittal;[23] nevertheless, it held that a verdict of acquittal was final even if the trial court was powerless to direct acquittal or was egregiously erroneous.[24]

All three cases are consistent with what has been labeled the original or primary[25] purpose of the double jeopardy clause—preservation of the integrity of a final judgment.[26] This rationale provides a theoretical

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In United States v. Wilson, 420 U.S. 332 (1975), however, the Court accepted *Kepner* as having correctly stated the relevant double jeopardy principles. *Id.* at 346 n.15.

One of the arguments explicitly rejected by the *Kepner* Court was the concept of "continuing jeopardy." United States v. Kepner, 195 U.S. 100, 132-33 (1904). Articulated by Mr. Justice Holmes in his dissenting opinion, *id.* at 134-37 (1904) (Holmes, J., dissenting), this notion views the term "trial" broadly to include all proceedings against the defendant arising out of his initial indictment. Thus, a government appeal and any resulting proceedings simply would be a continuation of the first trial. The double jeopardy clause presumably would bar retrial only after a final determination from a court of last resort. *Id.* The Court again expressly rejected continuing jeopardy in United States v. Jenkins, 420 U.S. 358, 369 (1975).

21. 195 U.S. 100, 133 (1904).

22. 369 U.S. 141 (1962). On the seventh day of what showed every indication of being a long and complicated trial, the trial judge interrupted testimony by a government witness and directed a verdict of acquittal. This witness had stated that he was unsure of the date of a certain conference. During a recess one of the prosecuting attorneys apparently refreshed the witness' memory, for the witness gave the date on resuming the stand. On cross-examination, the witness admitted that the government's attorney had called his attention to the date. The trial judge excused the jury, reprimanded the prosecutor, called the jury back, and directed a verdict of acquittal. *Id.* at 144-46 (Clark, J., dissenting).

23. *Id.* at 142. The Court was uncertain whether the trial court based its action on prosecutorial misconduct, lack of credibility of the government's witnesses, or both. *Id.*

24. *Id.* at 143. This holding becomes problematic in light of the emphasis later opinions put on the nature of an acquittal as a resolution of facts meaningfully demonstrating the innocence of the accused. *See, e.g.,* United States v. Scott, 437 U.S. 82 (1978); United States v. Martin Linen Supply Co., 430 U.S. 564 (1977). Obviously, an acquittal such as the one in *Fong Foo* does not mean that the accused has been found factually innocent in any meaningful sense of the word. *See* Note, *Double Jeopardy Consequences of Mistrial, Dismissal and Reversal of Conviction on Appeal*, 16 AM. CRIM. L. REV. 235 (1979).

Mr. Justice Clark dissented in *Fong Foo*, arguing that the double jeopardy clause posed no bar to appeal because the court below had no power to direct an acquittal. 369 U.S. at 144 (Clark, J., dissenting). This approach, too, is problematic. Some review would be necessary to determine if the court below had indeed been without power to direct the acquittal, or to determine if the acquittal was "egregiously erroneous." *Id.*

25. *See* United States v. Scott, 437 U.S. 82, 92 (1978); Crist v. Bretz, 437 U.S. 28, 33 (1978). *See also* Mayers & Yarbrough, *Bix Vexari: New Trials and Successive Prosecutions*, 74 HARV. L. REV. 1 (1960).

26. Fong Foo v. United States, 369 U.S. 141 (1962); United States v. Kepner, 195 U.S. 100 (1904); United States v. Ball, 163 U.S. 662 (1896). *See* notes 16-24 *supra* and accompanying text.

basis for barring reprosecution of a defendant for the same offense following a judgment of acquittal.[27] Because the inevitable result of a successful government appeal from a judgment of acquittal would be reprosecution, this view of the clause's underlying purpose would also bar appeals of acquittals. Repeated prosecution of a defendant for the same offense allows the government to shop around for a sympathetic factfinder[28] and increases the likelihood that an innocent defendant may be found guilty.[29] Finality of a judgment of acquittal, ensured by the double jeopardy clause, prevents the government from capitalizing on this increased probability. One commentator has noted that repeated prosecutions would lower the government's high burden of persuasion in criminal cases.[30] Thus, the double jeopardy clause is an integral part of a criminal justice system structured to minimize the possibility that an innocent defendant might be found guilty.[31]

A second view regards prevention of government harassment of de-

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27. *Ball*'s other holding, that the double jeopardy clause does not bar retrial of one who has gained reversal of a conviction on appeal, is also consistent with the finality purpose because of the absence of a judgment of acquittal by the original factfinder. *See* note 17 *supra* and accompanying text.

28. *See* Comment, *supra* note 3, at 267.

29. There are a number of reasons a retrial enhances the risk that "even though innocent, [the criminal defendant] may be found guilty." . . . A retrial affords the Government the opportunity to reexamine the weaknesses of its first presentation in order to strengthen the second. And, as would any litigant, the Government has been known to take advantage of this opportunity. It is not uncommon to find that prosecution witnesses change their testimony, not always subtly, at second trials.

United States v. Scott, 437 U.S. 82, 105 n.4 (1978) (Brennan, J., dissenting). *See generally* Note, *supra* note 3, at 1837-39; Comment, *supra* note 3, at 278 n.74; *see also* Schectman v. Foster, 172 F.2d 339, 341 (2d Cir. 1949) ("Due process of law does not mean infallible process of law.") (L. Hand, J.).

30. Note, *supra* note 3, at 1838.

31. American public law is deliberately weighted in favor of defendants accused of crime. . . . Indeed, our law is generally described as a defendant's law, in contrast with other legal systems which emphasize the necessities of the prosecution and give priority to the interests of society in the apprehension and conviction of criminals.

D. FELLMAN, THE DEFENDANT'S RIGHTS TODAY 3 (2d ed. 1976). *See generally* Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964). Packer sets up two different model criminal justice systems, the due process model and the crime control model. The due process model stresses the possibility of error in the factfinding process and views the criminal process as an appropriate forum for correcting its own abuses; thus, the possibility of legal innocence is expanded enormously. The crime control model, on the other hand, is less concerned with the possibility of error and will allow conviction much more readily. According to Packer, courts tend to give deference to the due process model when confronted by issues evidencing tension between the two models. *Accord,* D. FELLMAN, *supra*, at 22-23. Packer also lists a number of principles to which he refers as guilt-defeating doctrines, *i.e.*, doctrines of the due process model that allow a person who is factually guilty to go free. Double jeopardy is one of these doctrines. *See also*

fendants as the double jeopardy clause's primary purpose.[32] The principles established by *Ball, Kepner*, and *Fong Foo* are also consistent with this view.[33] Reprosecution subjects a defendant to harassment in the form of increased expense, continuing distress, and increased damage to reputation.[34] Under this second view, the double jeopardy clause mitigates the imbalance of adversary capability between grossly unequal litigants.[35] The possibility of harassment also perverts the presumption of innocence; a judgment of acquittal would be of small comfort to one repeatedly forced to prove innocence.[36]

These two perceptions of the underlying purpose, though distinct, are related.[37] When a judgment is final, a defendant is free from the threat of harassment. When appeal or reprosecution is barred to prevent harassment, the trial court's disposition of a case is final. The issue of whether the double jeopardy clause bars government appeals of dismissals, however, reveals differences between the two purposes that affect application of the clause. If prevention of harassment is the primary purpose, it is relatively unimportant that a dismissal is not a final determination of guilt or innocence.[38] Further proceedings following a dismissal would expose defendant to the evils condemned in *Green v. United States*:[39] continuing embarrassment, expense, ordeal, anxiety,

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Wheeler v. Goodman, 306 F. Supp. 58, 65 (W.D.N.C. 1969) ("Crime prevention is not an absolute value."), *vacated*, 401 U.S. 987 (1971).

32. *See* United States v. Scott, 437 U.S. 82, 104-05 (1978) (Brennan, J., dissenting); United States v. Jenkins, 420 U.S. 358, 370 (1975); Green v. United States, 355 U.S. 184, 187 (1957); Note, *Double Jeopardy: Multiple Prosecutions Arising from the Same Transaction*, 15 AM. CRIM. L. REV. 259 (1978); Comment, *supra* note 3, at 277.

This view is best expressed in Green v. United States, 355 U.S. 184 (1957).

> 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.

Id. at 187-88. *But see* Note, *supra* note 3, at 1837 (concluding that this view is inappropriate).

33. *See* notes 16-24 *supra* and accompanying text. Although reprosecution of a defendant who has won reversal of a conviction on appeal is not harassment per se, it leaves open the possibility of harassment. Thus, the harassment purpose does not fully explain this aspect of *Ball*. *See* note 17 *supra* and accompanying text; *cf.* Burks v. United States, 437 U.S. 1 (1978) (reversal of conviction on appeal on grounds of insufficient evidence bars retrial).

34. Comment, *supra* note 3, at 277-79.

35. *See id.* at 277-78.

36. *Id.* at 278.

37. *See* Green v. United States, 355 U.S. 184, 187-88 (1957).

38. *See* notes 24-36 *supra* and accompanying text.

39. 355 U.S. 184, 187-88 (1957).

and confusion.[40] In contrast, a judgment of acquittal is central to the finality purpose.[41] On the surface, therefore, a double jeopardy bar to government appeal of dismissals would arise only if prevention of harassment is deemed the clause's primary purpose. Congress' complete revision[42] of the Criminal Appeals Act in 1971[43] rendered this issue of more than merely academic interest. Particularly concerned with the government's inability to appeal certain kinds of dismissals and suppressions,[44] Congress clarified confusing portions[45] of the existing Act and removed seemingly arbitrary statutory bars to government appeals.[46] The legislative history of the revision reveals that Congress

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40. *Id.*

41. *See* note 27 *supra.*

42. Congress had amended the Act slightly four times before this complete revision. In 1928 Congress replaced the outdated term "writ of error" with the term "right of appeal." In 1942 Congress brought cases involving informations under the Act, which formerly had included only cases brought up on indictment. In 1948 Congress made a few technical changes in the wording of the Act so that it conformed to the language used in rule 12 of the Federal Rules of Criminal Procedure. In 1968 Congress allowed appeals in some cases from adverse rulings on motions to suppress. None of these changes affected, in practice, the substantive provisions of the Act. *See* S. REP. No. 1296, 91st Cong., 2d Sess. 4 (1970).

43. 18 U.S.C. § 3731 (1976). The relevant portion of the Act now reads:

> 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.

44. *Id.* "The first major problem that has arisen under the present statute concerns the total lack of appealability of certain kinds of dismissals and suppressions." S. REP. No. 1296, 91st Cong., 2d Sess. 4 (1970). *See* United States v. Martin Linen Supply Co., 430 U.S. 564, 578-80 (1977) (Stevens, J., concurring); 116 CONG. REC. 35658 (1970).

45. "[One] problem is the ambiguity and absence of settled meaning surrounding many of the statute's existing provisions, which result in a considerable and needless expenditure of prosecutive and judicial resources." S. REP. No. 1296, 91st Cong., 2d Sess. 3 (1970). *See* 116 CONG. REC. 35658 (1970).

46. "S. 3132 will afford the Government the right of appeal from the dismissal of a criminal prosecution in all cases where the decision rendered by the district judge does not result in an acquittal after jeopardy." S. REP. No. 1296, 91st Cong., 2d Sess. 18 (1970). The bill will allow an appeal from any dismissal except one amounting to a judgment of acquittal. 116 CONG. REC. 35659 (1970).

In discussing the arbitrariness of the old act in allowing government appeals, Congress gave the following example:

> [T]he present law prohibits an appeal by the Government from a wide range of adverse determinations if those determinations are made after jeopardy has attached . . . even though the court's ruling has nothing to do with the factual issues in the case, and even though the ruling terminating the trial is entered at the defendant's request, so that a governmental appeal would in no way affect the defendant's right not to be placed in double jeopardy, or his right to proceed to verdict before the original jury.

116 CONG. REC. 35659 (1970). The committee seemed to be anticipating the fact pattern that arose in United States v. Scott, 437 U.S. 82 (1978). *See* notes 131-33 *infra* and accompanying text.

intended the double jeopardy clause as the sole restriction on government appeals.[47] Although courts eagerly anticipated the new statute[48] and met it with enthusiasm,[49] the constitutional questions inevitably raised by the new Act quickly proved to be no less difficult than construction of the previous statutory restrictions.

II.

Two cases, *United States v. Wilson*[50] and *United States v. Jenkins*,[51] afforded the Supreme Court its first opportunity to decide double jeopardy issues arising under the revised Act. Decided the same day,[52] both cases concerned government appeals from dismissals.[53] *Wilson*[54] held that government appeal of a dismissal entered after a jury returns a verdict of guilty is consistent with the double jeopardy clause.[55] *Jenkins*,[56] however, held[57] that the double jeopardy clause bars appeal

47. "As a result [of adoption of the amendment], review of a lower court dismissal will be precluded only where the double jeopardy clause of the Constitution mandates it." S. REP. NO. 1296, 91st Cong., 2d Sess. 18 (1970). Read together with the legislative history cited in notes 43-46 *supra*, this language indicates Congress' belief that allowing appeals except when the defendant has been acquitted is the equivalent of allowing appeals in every constitutionally permissible situation.

48. *See* United States v. Sisson, 399 U.S. 267, 308-09 (1970).

49. *See* United States v. Weller, 401 U.S. 254, 255 n.1 (1971). ("The end of our problems with this Act is finally in sight.").

50. 420 U.S. 332 (1975).

51. 420 U.S. 358 (1975).

52. *Id.* at 360.

53. *Id.* at 359; United States v. Wilson, 420 U.S. 332, 333 (1975).

54. Wilson was accused of converting union funds for personal use. The treasurer and president of the union had endorsed the check at issue. More than five years passed before the matter came to trial. By that time the union treasurer had died and a terminal illness prevented the union president from testifying. Wilson made a pretrial motion to dismiss the indictment on grounds that preindictment delay had so prejudiced him that a fair trial was impossible. The motion was tentatively denied and a jury found Wilson guilty. Subsequently, the trial court reversed its earlier ruling and dismissed the indictment on grounds of preindictment delay and resulting prejudice. 420 U.S. at 334-35.

55. *Id.* at 336.

56. Jenkins was ordered to report for induction and his draft board refused his request for postponement to allow him to claim conscientious objector classification. He refused to report for induction and was indicted. 420 U.S. at 360.

57. The trial court ruled that under the law as it stood at the time of trial, the board was not required to consider conscientious objector claims arising between the notice of induction and the induction date. *Id.* at 362. *See* Ehlert v. United States, 402 U.S. 99 (1971). Nevertheless, because *Ehlert* had not been decided when Jenkins refused to report, the trial court said that it would be unfair to apply *Ehlert* to Jenkins. 420 U.S. at 362. The Supreme Court found it unclear whether the district court had found that Jenkins lacked the proper *mens rea*—the law required that one

from a dismissal entered after a bench trial that did not result in a factual finding of guilt or innocence.[58] Together the cases establish prevention of multiple prosecutions of a defendant for the same offense as the underlying purpose of the double jeopardy clause.[59] Successful government appeal in *Wilson* would require only reinstatement of the jury's verdict, not reprosecution.[60] Consequently, the double jeopardy clause did not bar government appeal. In contrast, no such reinstatement was possible in *Jenkins*.[61] The Court found that reversal of the dismissal would require further resolution "of factual issues going to the elements of the offense charged."[62] Even if this resolution did not require the receipt of additional evidence on remand, the necessary "supplemental findings" would violate double jeopardy.[63]

The double jeopardy limits on government appeals established in *Jenkins* were destined to be short-lived. *United States v. Martin Linen Supply Co.*[64] and *Lee v. United States*[65] laid the foundation for the reversal of *Jenkins* just three terms after it was decided.[66] In *Martin Linen* the Court held that the double jeopardy clause barred government appeal of a rule 29(c) judgment of acquittal[67] entered after a mis-

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knowingly refuse to submit—or whether the decision not to apply *Ehlert* was simply a decision on what law was applicable. *Id.* at 363 n.3.

58. United States v. Jenkins, 420 U.S. 358, 370 (1975).

59. United States v. Jenkins, 420 U.S. 358, 366-70 (1975); United States v. Wilson, 420 U.S. 332, 336, 343-53 (1975).

In *Wilson* the Court concluded that the original understanding of the double jeopardy clause's underlying purpose was that it operated to prevent multiple prosecutions. *Id.* at 343-44. The Court read *Ball, Kepner*, and *Fong Foo* as reaching the same conclusion, *id.* at 345-48, rejecting defendant's argument that the cases "stand for the proposition that the key to invoking double jeopardy protection is not whether defendant might be subjected to multiple trials, but whether he can point to a prior verdict or judgment of acquittal." *Id.* at 346-47. *See* notes 16-24 *supra* and accompanying text.

60. 420 U.S. at 345, 352-53.

61. 420 U.S. at 368.

62. *Id.* at 370.

63. *Id.*

64. 430 U.S. 564 (1977).

65. 432 U.S. 23 (1977).

66. *See* United States v. Scott, 437 U.S. 82, 86-87 (1978).

67. This rule provides:

> If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned, the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury.

trial resulting from a hopelessly deadlocked jury.[68] To reach this conclusion, the Court first established that the acquittal, not the mistrial, terminated proceedings in the trial court.[69] The Court was thus able to avoid the distinction between mistrials and terminations "in the defendant's favor" that *Jenkins* found to be of "critical importance" in application of the double jeopardy clause.[70] With the mistrial issue resolved, *Martin Linen* presented a situation essentially identical to *Jenkins*—a trial court termination in defendant's favor without a factual resolution of guilt or innocence.[71] Yet, the Court did not regard *Jenkins* as dispositive, despite the inevitable necessity of reprosecution should the government prevail on appeal.[72] Instead, the Court felt compelled to consider whether the rule 29(c) acquittal "represent[ed] a resolution, correct or not, of some or all of the factual elements of the offense charged."[73] If the trial court's judgment of acquittal fulfilled this definition, the fundamental rule established in *Ball, Kepner*, and *Fong Foo* would apply and would bar government appeal.[74] Satisfied that the trial court's dispostion was an acquittal in substance as well as

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FED. R. CRIM. P. 29(c). Rule 29 replaces the directed verdict of acquittal mechanism employed in *Fong Foo*. United States v. Martin Linen Supply Co., 430 U.S. 564, 573 (1977). *See* notes 22-24 *supra* and accompanying text.

68. 430 U.S. at 575.

69. *Id.* at 570; *cf.* Comment, *supra* note 3, at 286 n.115, 287 (retrial following hung jury is one of two most frequently occurring classes of permissible reprosecutions).

70. United States v. Jenkins, 420 U.S. 358, 365 n.7 (1975). In its summary treatment of this issue, the majority in *Martin Linen* did not even allude to the *Jenkins* distinction. 430 U.S. at 570. Chief Justice Burger, dissenting in *Martin Linen* on this precise question, also ignored the *Jenkins* distinction. *Id.* at 581-83 (Burger, C.J., dissenting). Not participating in *Martin Linen*, Justice Rehnquist, author of *Jenkins*, later commented that *Martin Linen*'s circumvention of his "bright line" distinction between mistrials and dismissals undercut *Jenkins* so substantially that he felt free to completely reevaluate his views on the double jeopardy limits on government appeals from dismissals. Lee v. United States, 432 U.S. 23, 36-37 (1977) (Rehnquist, J., concurring). *See* notes 108-12 *infra* and accompanying text.

71. *See* notes 56-57 *supra* and accompanying text.

72. 430 U.S. at 570-71.

73. *Id.* at 571. The Court in *Lee* and *United States v. Scott* accepted this language as a complete definition of acquittal. *See* United States v. Scott, 437 U.S. 82, 97 (1978); Lee v. United States, 432 U.S. 23, 30 n.8 (1977). Dissenting in *Scott*, Justice Brennan, author of the majority opinion in *Martin Linen*, contended that this language was never intended as a definition embracing all situations. 437 U.S. at 111-12 (Brennan, J., dissenting). *See* note 75 *infra*. *See also* Note, *supra* note 3, at 1825 n.21. "An acquittal is generally defined as a ruling on the merits by which the defendant is discharged from prosecution. . . . An acquittal does not necessarily have to result from a judgment after a full trial." *Id.*

74. 430 U.S. at 571.

form, and thus within the definition,[75] the Court affirmed the court of appeals' dismissal of the government's appeal.[76]

In *Lee v. United States*[77] the Court reanalyzed its holding in *Jenkins*. This reexamination shifted the focus of the double jeopardy inquiry from the consequence of a successful government appeal[78] to the nature of the trial court's termination of proceedings against defendant.[79] The critical question in applying *Jenkins*, according to the *Lee* majority, was whether the trial court's disposition "contemplate[d] an end to all prosecution of the defendant for the offense charged."[80] If so, the trial court proceedings would have terminated in defendant's favor and would bar government appeal.[81] Further, any "midtrial dismissal . . . granted on the ground, correct or not, that the defendant simply cannot be convicted of the offense charged" would be a termination in defendant's favor.[82] The label attached by the trial court to its action, however, was not controlling.[83] On the facts of *Lee*, the Court found the trial court's dismissal of the indictment functionally indistinguishable from a mistrial.[84] In contrast to dismissals, which may or may not terminate trial court proceedings in defendant's favor, a manifestly neces-

75. *Id.* at 572. It is difficult to reconcile the plain meaning of the Court's "definition" with its application in *Martin Linen*. First, the discharge of the " 'hopelessly deadlocked' " jury precluded any resolution of factual elements of the offense charged by the factfinder. *Id.* at 565. Second, the Court concluded "that the District Court . . . evaluated the Government's evidence and determined that it was legally insufficient to sustain a conviction." *Id.* at 572. That is a conclusion of law, not a resolution of facts. Finally, the Court found that a rule 29 acquittal was " 'a legal determination on the basis of facts adduced at the trial relating to the general issue of the case.' " *Id.* at 575 (quoting United States v. Sisson, 399 U.S. 267, 290 n.19 (1970)). In *Scott* Justice Brennan asserted that this last formulation was the traditional and intended definition of "acquittal." 437 U.S. at 111-12 (Brennan, J., dissenting).

76. 430 U.S. at 576.

77. 432 U.S. 23 (1977). Lee was charged with theft. The information did not allege that Lee intended to deprive the victim of his property permanently. After jeopardy had attached defendant moved for dismissal of the information because of the omission. *Id.* at 25-26. The trial judge tentatively denied the motion, but said he would reconsider the matter at the first opportunity. After all the evidence was in, the judge called a recess, researched the matter, and returned to dismiss the information because of the defect. *Id.* at 26.

78. *See* notes 60-62 *supra* and accompanying text.

79. The Court's new approach is similar to that argued by defendant in *Wilson* and rejected by the Court. *See* United States v. Wilson, 420 U.S. 332, 346-47 (1975); note 59 *supra*.

80. 432 U.S. at 30.

81. *Id. See* United States v. Jenkins, 420 U.S. 358, 365 n.7 (1975); note 70 *supra*.

82. 432 U.S. at 30.

83. *Id.*

84. *Id.* at 31.

sary mistrial[85] ruling invariably contemplates defendant's reprosecution.[86] Thus, neither *Jenkins*[87] nor the double jeopardy clause barred Lee's retrial despite the trial court's dismissal of the indictment before resolving the issue of guilt or innocence.[88]

In its development of the double jeopardy limits on government appeals from *Wilson* to *Lee*, the Court's emphasis on finality and elimination of harassment has varied.[89] Prevention of multiple prosecutions for the same offense—established in *Wilson* as the underlying purpose of the double jeopardy clause[90]—comprehends both finality and harassment concerns. The *Wilson* Court indicated its perception of the dual nature of the clause by negative inference in failing to find explicitly either harassment[91] or finality[92] concerns applicable to the circumstances of the case. Although *Wilson* appeared to weight finality and harassment equally, both *Jenkins* and *Martin Linen* seemed to assign

85. A mistrial is manifestly necessary when it results from compelling circumstances beyond the control of the court, such as bad faith conduct by a prosecutor. Retrial following a manifestly necessary mistrial does not violate the double jeopardy clause. *See* Arizona v. Washington, 434 U.S. 497 (1978); Lee v. United States, 432 U.S. 23 (1977); Illinois v. Somerville, 410 U.S. 458 (1973); United States v. Jorn, 400 U.S. 470 (1971); United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824); Note, *supra* note 3, at 1838-40.

86. 432 U.S. at 30.

87. *Id.* at 31.

88. *Id.* at 34.

> In *Illinois v. Somerville* . . . a state prosecutor made precisely the same mistake as was made in this case in drafting an indictment for theft. Discovery of the defect in the course of trial led the trial court to declare a mistrial over the defendant's objection. We held that termination of the trial was dictated by "manifest necessity" under the standard first articulated in *United States v. Perez*. . . . There is no reason to believe that *Somerville* would have been analyzed differently if the trial judge, like the District Court here, had labeled his action a "dismissal" rather than a mistrial. In *Jenkins* we referred specifically to *Somerville* in distinguishing proceedings that end in mistrials from those that end "in the defendant's favor."

Id. at 31 n.9. *See* note 85 *supra*.

89. *See* notes 25-36 *supra* and accompanying text.

90. *See* notes 59-63 *supra* and accompanying text.

91. United States v. Wilson, 420 U.S. 332, 352 (1975). "Correction of an error of law at that stage would not grant the prosecutor a new trial or subject the defendant to the harassment traditionally associated with multiple prosecutions." *Id.*

92. *Id.*

> Granting the Government such broad appeal rights would allow the prosecutor to seek to persuade a second trier of fact of defendant's guilt after having failed with the first; it would permit him to reexamine the weaknesses in his first presentation in order to strengthen the second; and it would disserve the defendant's legitimate interest in the finality of a verdict of acquittal. These interests, however, do not apply in the case of a postverdict ruling of law by a trial judge.

Id. (footnote omitted).

greater importance to the prevention of harassment. The Court erected a double jeopardy bar to government appeals in *Jenkins* simply because of the necessity for further proceedings should the government prevail on appeal.[93] In stressing the need to "limit the government to a single criminal proceeding," *Martin Linen* also emphasized the prevention of harassment.[94] Multiple prosecutions of a defendant for the same offense, according to the Court in *Martin Linen*, would afford the government a "potent instrument of oppression."[95]

The analytical shift in *Lee*[96] refocused the Court's attention on finality at the expense of harassment. Sanction of Lee's retrial and conviction, although consistent with traditional double jeopardy doctrine on mistrials,[97] is incompatible with the dismissals rule established in *Jenkins*[98] as well as a strict view of the prevention-of-harassment purpose.[99] If the *Lee* Court had focused solely on the harassment purpose, however, it would have accorded finality to a trial court termination distinguishable from a mistrial only by the trial court's label.[100] To avoid this result, the Court was forced to consider exactly what sort of dismissals were final for double jeopardy purposes.

In *Lee*'s reformulation of *Jenkins*, the idea of convictability is at the crux of finality. A mid-trial dismissal based on a determination that defendant is not convictable is final and defendant may not be subjected to further proceedings before a second factfinder.[101] Interestingly, this determination is final regardless of whether it is based on a resolution of facts, law, or mixed questions of fact and law.[102] In addition, this determinatin of non-convictability may be independent of the

93. *See* notes 38-40, 61-63 *supra* and accompanying text.

94. United States v. Martin Linen Supply Co., 430 U.S. 564, 569 (1977).

95. *Id.*

96. *See* notes 77-79 *supra* and accompanying text.

97. *See* note 85 *supra*.

98. *See* notes 61-63 *supra* and accompanying text.

99. *See* notes 32-36 *supra* and accompanying text.

100. 432 U.S. at 30-31.

101. *See* notes 80-82 *supra* and accompanying text.

102. 432 U.S. at 30. *See* Note, *supra* note 3, at 1839 n.125. A dismissal makes it difficult to determine:

> whether a ruling by the judge is a finding of fact or is entirely a ruling of law, since most dismissals involve mixed questions of fact and law. The purpose of not allowing appeal from dismissals based on favorable findings of disputed fact is primarily to preserve favorable inferences from the evidence. Thus the concept of favorable fact findings may extend beyond simple credibility resolutions to include intermediate inferences, even when the basic evidence is undisputed.

Id.

question whether defendant actually committed the offense charged.[103] Consequently, a factually guilty defendant could conceivably benefit from an erroneous conclusion of law that would be insulated from review by *Lee*'s double jeopardy limits on government appeals.[104]

Although *Lee* does not explicitly recognize this result, the conclusion derives directly from the Court's reading of *Jenkins*.[105] Even if the trial court's dismissal in *Jenkins* was grounded solely on an erroneous conception of the law, the *Jenkins* Court found a double jeopardy bar to government appeal.[106] Having failed to persuade the first trier of fact, the government was barred from capitalizing on the enhanced probability of conviction before a second trier of fact.[107] Despite its analytical shift, therefore, the Court's reasoning in *Lee* reached conclusions harmonious with results produced by the analysis in *Jenkins*.

Concurring in *Lee*, Justice Rehnquist, author of the *Jenkins* decision, signaled that the Court's development of the limits on government appeals of dismissals remained unfinished.[108] He found the reformulation in *Lee* acceptable because his assumptions, "made when writing Jenkins and voting in Wilson," did not survive *Martin Linen*, a decision in which he did not participate.[109] In his view, the *Martin Linen* Court's decision to ignore the mistrial in analyzing the constitutional significance of a rule 29(c) acquittal circumvented a "bright line" that *Jenkins* drew between mistrials and dismissals.[110] Consequently, he

103. *See* notes 106-07 *infra* and accompanying text.

104. This result is contrary to the congressional understanding of the double jeopardy clause. The legislative history of the revised Criminal Appeals Act reveals Congress' belief that any termination of trial at defendant's request, not based on a resolution of factual issues, would be appealable under the new Act. *See* note 46 *supra*.

105. Lee v. United States, 432 U.S. 23, 30 (1977).

106. United States v. Jenkins, 420 U.S. 358, 370 (1975).

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

108. Lee v. United States, 432 U.S. 23, 36-37 (1977) (Rehnquist, J., concurring).

109. *Id.*

110. *Id.* Justice Rehnquist maintained that *Jenkins* barred government appeal and reprosecution of defendant if the dismissal occurred during the fact finding stage of trial, but that government appeal and reprosecution were permissible if the dismissal occurred after the factfinding stage. Because in *Martin Linen* the acquittal—which Rehnquist would not treat differently from a dismissal—came after the factfinding stage was completed, *Jenkins* would have allowed appeal. The Court in *Martin Linen*, however, held a rule 29 acquittal barred appeal whenever it was declared. *Id.*

There are two problems with Rehnquist's analysis. First, he implies that the dismissal in *Jenkins* occurred during the factfinding stage. *Id.* The dismissal, however, was entered after the close of the evidence, after the parties submitted proposed findings, and after the court filed written findings of fact. United States v. Jenkins, 420 U.S. 358, 362 (1975). Second, Rehnquist offers no

felt no compulsion to adhere any longer to *Jenkins* and felt free to reexamine the Court's newly established doctrine.[111] In *United States v. Scott*[112] Justice Rehnquist's reevaluation carried a majority of the Court, resulting in a reversal of *Jenkins* and a substantial revision of *Lee*.

III.

Indicted on a three-count narcotics violation, Scott moved to dismiss the indictment on grounds of preindictment delay.[113] After all the evidence had been presented, the trial court granted defendant's motion on two counts, but submitted the third count to the jury, which returned a verdict of not guilty.[114] The court of appeals, relying on *Jenkins*, ruled that the double jeopardy clause barred government appeal of the two dismissals.[115] The Supreme Court reversed and held that the government may appeal a defendant's successful effort to have his trial terminated on grounds unrelated to factual guilt or innocence when this termination occurs before the factfinder's resolution of defendant's guilt or innocence.[116]

Overruling *Jenkins*,[117] the Court reexamined the roles of finality and prevention of harrassment in necessitating application of the double jeopardy clause. By misperceiving those roles, *Jenkins*, according to the Court, overemphasized defendant's right to have the issue of guilt decided by the first factfinder impaneled to try him. Consequently, the double jeopardy clause was applied overbroadly to bar government appeal in those cases in which defendant sought to terminate the trial before a verdict on grounds unrelated to factual guilt or innocence.[118]

Scott's reconstruction of the double jeopardy limits on government appeals rests on two conclusions about the proper roles for finality and the prevention of harassment: (1) the concern for the prevention of harassment of defendants is irrelevant when it is defendant's own mo-

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rationale for equating the judgment of acquittal with a dismissal. *See* Lee v. United States, 432 U.S. 23, 36-37 (1977) (Rehnquist, J., concurring).

111. 432 U.S. at 37.
112. 437 U.S. 82 (1978).
113. *Id.* at 84.
114. *Id.*
115. *Id.*
116. *Id.* at 98-99, 101.
117. *Id.* at 87.
118. *Id.*

tion that terminates the first proceeding before a factfinder after jeopardy has attached;[119] and (2) only those terminations representing a resolution, correct or not, of some or all of the factual elements of the offense charged are final and, thus, preclude government appeal.[120]

The Court's conclusion concerning harassment was imported from double jeopardy doctrine concerning mistrials.[121] Although a mistrial generally must be manifestly necessary to permit retrial,[122] " 'a motion by the defendant for a mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by a prosecutorial or judicial error.' "[123] Because the defendant retains primary control over the consequences of any error necessitating a mistrial, his deliberate choice to seek a mistrial ruling obviates any possibility of government harassment.[124] The Court saw no reason not to apply this reasoning to a defendant's successful motion for a dismissal[125] and read *Lee* to hold "that, at least in some cases, the dismissal of an indictment may be treated on the same basis as the declaration of a mistrial."[126] Quite simply, the Court held the defendant responsible for the second prosecution that would inevitably follow a successful government appeal of a dismissal.[127] Because it failed to account adequately for defendant's choice, control, and responsibility, *Jenkins* sacrificed the public's "valued right to 'one complete opportunity to convict those who have violated its laws.' "[128]

To the *Scott* majority, *Jenkins* not only overemphasized concern about harassment, but also "pressed too far . . . the concept of the 'defendant's valued right to have his trial completed by a particular tribu-

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119. *See* notes 121-28 *infra* and accompanying text.

120. *See* notes 129-33 *infra* and accompanying text.

121. 437 U.S. at 92-94.

122. *Id.* at 92-93. *See* note 85 *supra*.

123. 437 U.S. at 93 (quoting United States v. Jorn, 400 U.S. 470, 485 (1971)).

124. *Id.* (quoting United States v. Dinitz, 424 U.S. 600, 609 (1976)).

125. *Id.* at 94-96, 98-99.

126. *Id.* at 94.

127. *Id.* at 96.

> 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.

Id.

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

nal.' "[129] As a result, *Jenkins* exceeded the mandate of the double jeopardy clause and accorded finality to cases in which there had been no resolution, correct or not, of factual elements of the offense charged.[130] The majority explicitly repudiated the "convictability" concept of *Lee*.[131] Instead, the Court accepted *Martin Linen*'s "definition of acquittal" as the correct characterization of cases that are final for double jeopardy purposes.[132] Therefore, defendant's decision to move for dismissal before the factfinder's resolution of guilt was a choice to forego the chance for a final judgment that would erect a barrier to government appeal.[133]

Like the Court in *Martin Linen*,[134] the *Scott* majority did not precisely define the meaning of "a resolution, correct or not, of some or all of the factual elements of the offense charged."[135] The Court did find that evidence insufficient to support a conviction, as a basis for resolution, would come within the definition.[136] Further, a defendant who successfully established an entrapment or insanity defense would have factual elements of the offense resolved in his favor because these affirmative defenses negate implicit elements of the offense.[137] A finding that defendant's rights of due process had been violated by preindictment delay does not, however, comply with the definition. The Court held a dismissal on this basis to be merely a judgment that defendant

129. *Id.* (quoting Wade v. Hunter, 336 U.S. 684, 689 (1949)).

130. *Id.* at 99-100.

131. *Id.* at 96-97. *See* notes 82, 101-07 *supra* and accompanying text.

132. 437 U.S. at 97. *See* notes 73-76 *supra* and accompanying text.

133. 437 U.S. at 98-99.

> We think that in a case such as this the defendant, by deliberately choosing to seek termination of the proceedings against him on a basis unrelated to factual guilt or innocence of the offense of which he is accused, suffers no injury cognizable under the Double Jeopardy Clause if the Government is permitted to appeal from such a ruling of the trial court in favor of the defendant. . . . [W]e conclude that the Double Jeopardy Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice.

Id.

134. *See* note 75 *supra*.

135. United States v. Scott, 437 U.S. 82, 97 (1978) (quoting United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977)).

136. *Id.* The majority implied that a rule 29(c) acquittal would be appealable if based on a determination other than insufficiency of evidence. "Where the court, before the jury returns a verdict, enters a judgment of acquittal pursuant to Fed. Rule Crim. Proc. 29, appeal will be barred *only* when 'it is plain that the District Court . . . evaluated the Government's evidence and determined that it was legally insufficient to sustain a conviction.' " *Id.* (emphasis added) (quoting United States v. Martin Linen Supply Co., 430 U.S. 564, 572 (1977)).

137. *Id.* at 97-98.

was constitutionally insulated from punishment, not that defendant did not commit the offense charged.[138] On the facts of *Scott*, therefore, defendant's successful motion for dismissal on grounds of preindictment delay erected no double jeopardy barrier to government appeal.[139]

Four members of the Court dissented in an opinion written by Justice Brennan.[140] The dissenters argued that implicit in the *Wilson* view of the underlying purpose of the double jeopardy clause—prevention of multiple prosecutions of a defendant for the same offense—was the rule that the government has only "one complete opportunity to convict an accused."[141] In contrast to the majority, the dissent believed that a termination in defendant's favor terminates the prosecution's "one complete opportunity" as well, barring both retrial and government appeal.[142] Borrowing from *Lee*, the dissenters equated a termination in defendant's favor with a decision that defendant "simply cannot be convicted of the offense charged."[143] Thus, they contended, a mid-trial dismissal based on a determination that defendant was not convictable—a termination the dissent would not treat differently from an acquittal—bars government appeal.[144] Allowing the government more than one complete opportunity to convict, the dissenters argued, subjects a defendant to harassment[145] and the possibility of an unjust con-

138. *Id.* at 98.

139. *Id.* at 98-99.

140. Joining Justice Brennan were Justices White, Marshall, and Stevens. *Id.* at 101 (Brennan, J., dissenting).

141. *Id.* at 104-05.

> Accordingly, the policies of the Double Jeopardy Clause mandate that the Government be afforded but one complete opportunity to convict an accused and that when the first proceeding terminates in a final judgment favorable to the defendant any retrial be barred. The rule as to acquittals can only be understood as simply an application of this larger principle.

Id. at 105 (Brennan, J., dissenting) (footnote omitted).

142. *Id.* at 104-05. *See* note 128 *supra* and accompanying text.

143. 437 U.S. at 105 & n.5 (Brennan, J., dissenting). *See* notes 82, 101-07 *supra* and accompanying text.

144. 437 U.S. at 102, 106-07 (Brennan, J., dissenting).

145. *Id.* at 105-07. The dissent's "one complete opportunity" rule attaches no significance to defendant's choice to move for dismissal. *See* notes 121-28 *supra* and accompanying text. Like the Court in *Lee*, the dissent would focus solely on the nature of the termination. 437 U.S. at 105 & n.5, 109 n.7 (Brennan, J., dissenting). Mistrials, whether the result of defendant's successful motion or not, have distinguishable double jeopardy consequences because they are not terminations in defendant's favor. Thus, according to the dissent, "the Government could not be said to have had a complete opportunity to convict the accused." *Id.* at 109 n.6.

viction, the basis of the finality concern.[146] Therefore, the dissent would have reaffirmed *Jenkins* and *Lee*.[147]

The dissent focused its attack on the majority's conclusion that only resolutions, correct or not, of some or all of the factual elements of the offense charged were to be accorded finality for double jeopardy purposes.[148] Justice Brennan characterized this conclusion as an attempt to distinguish between " 'true acquittals' " and other terminations in defendant's favor.[149] This conclusion, according to the dissent, also implicitly assumes that the rule barring appeal of acquittals rested on a determination that defendant was factually innocent.[150] Arguing that this assumption is untenable,[151] Justice Brennan simply rejected[152] the majority's assertion that defendant suffers no injury cognizable under the double jeopardy clause when the government is allowed to appeal a midtrial dismissal granted on "a basis unrelated to factual guilt or innocence."[153] He contended that defendant's injury would be threefold: (1) the government would be permitted a second chance to persuade a trier of fact of defendant's guilt; (2) the government would be able to strengthen any weaknesses in its case; and (3) the government would subject defendant to the expense and anxiety of a second trial.[154] The first two facets of this injury relate to the finality principle; the third relates to prevention of harassment.[155] To the dissent, therefore, the absence of a resolution of defendant's factual guilt could alter neither the fact nor the nature of the injury to defendant's rights under the double jeopardy clause.

Apart from objections to the majority's constitutional theory, Justice Brennan argued that the majority's revised concept of finality defied principled application.[156] In his view, the majority's distinction between defenses that provide legal justification for otherwise criminal acts, such as insanity and entrapment, and those that arise from unlaw-

146. 437 U.S. at 105 n.4, 106 (Brennan, J., dissenting). *See* notes 25-31 *supra* and accompanying text.

147. 437 U.S. at 103 (Brennan, J., dissenting).

148. *See* note 132 *supra* and accompanying text.

149. 437 U.S. at 103 (Brennan, J., dissenting).

150. *Id.* at 108-10.

151. *Id.* at 108.

152. *Id.* at 103-10.

153. *Id.* at 99.

154. *Id.* at 106 (Brennan, J., dissenting).

155. *See* notes 25-36 *supra* and accompanying text.

156. 437 U.S. at 110-11 (Brennan, J., dissenting).

ful or unconstitutional government behavior, such as preindictment delay and statutes of limitation, is a matter of semantics.[157] These defenses, he maintained, require the application of legal standards to evidence, not merely factual resolutions.[158] More importantly, all of these defenses generally require evaluation of evidence adduced at trial. Retrial of a defendant after a successful government appeal had overcome one of these defenses would allow the government to capitalize on the increased probability of conviction afforded by multiple prosecutions as well as subject defendant to possible harassment.[159]

IV.

The Court's increased exposure to double jeopardy convinced the *Scott* majority that *Jenkins* sacrificed the public's interest "in insuring that justice is meted out to offenders" to an overbroad reading of the constitutional limits on government appeals.[160] This conclusion is consistent with the reasoning employed in a line of cases concerning the double jeopardy consequences of mistrials.[161] In these cases the Court weighed the public's interest in conviction against defendants' rights.[162] Yet, the Court's reasoning in *Scott* cannot fairly be characterized as a balancing analysis. The majority held that the balance necessarily tipped in the government's favor because defendant jumped off the scale by successfully moving for a midtrial dismissal on grounds unrelated to factual guilt or innocence.[163] The insubstantiality of defendants' rights, in the majority's analysis, derives from its revised perception of the roles of finality and prevention of harassment.[164] Thus, the validity of the Court's policy judgment that *Jenkins* disserved the public interest rests on the soundness of its two conclusions concerning proper roles for finality and harassment.

Scott's conclusion that defendant's successful motion for dismissal rendered irrelevant any concern for prevention of harassment was

157. *Id.* at 110-16.

158. *Id.* at 113-14.

159. *Id.* at 110-16.

160. *Id.* at 86-87.

161. *See* Arizona v. Washington, 434 U.S. 497 (1978); United States v. Dinitz, 424 U.S. 600 (1976); Illinois v. Somerville, 410 U.S. 458 (1973); United States v. Jorn, 400 U.S. 470 (1971); Note, *Mistrials and Double Jeopardy*, 15 AM. CRIM. L. REV. 169 (1977).

162. *See, e.g.*, Illinois v. Somerville, 410 U.S. 458, 470-71 (1973).

163. *See* notes 121-28 *supra* and accompanying text.

164. *See* 437 U.S. at 87-101; notes 119-20 *supra* and accompanying text.

based on its determination that defendant is responsible for any possible reprosecution.[165] The Court imported this notion of responsibility from the double jeopardy doctrine concerning mistrials,[166] but failed to support its reasoning through any comparison of the nature of a motion for mistrial with that of a motion for dismissal. It can hardly be said that *Lee* permits the conclusion that the motions are essentially the same.[167] *Lee*'s holding that the dismissal of the indictment was functionally indistinguishable from a mistrial ruling was intimately tied to the facts of that case.[168] Indeed, the *Lee* Court's recasting of the trial court's dismissal as a functional mistrial recognized the distinctions between mistrials and dismissals, at least for double jeopardy purposes.[169]

In general, a mistrial ruling is a recognition of a defect in the trial court proceeding itself.[170] Protected by the double jeopardy clause at least to the extent that clearly intentional actions by the judge or prosecutor will bar retrial,[171] a defendant must weigh the increased probability of conviction resulting from the defect in the first proceeding against that resulting from the government's second chance before another trier of fact. A motion to dismiss, however, is generally grounded on a defect in the government's case, not the particular proceeding.[172] The ability of a defendant to move for dismissal before trial[173] emphasizes this distinction. In addition, this distinction is manifested, as the dissent points out, by the frequent necessity for consideration of facts and evidence adduced at trial before a ruling or a motion to dismiss.[174] Dependence on trial evidence seems especially apparent when a defendant asserts that the government's prejudicial preindictment delay makes a fair trial impossible.[175] If, as in *Scott*, the trial

165. *See* notes 119, 121-28 *supra* and accompanying text.

166. *See* notes 121-24 *supra* and accompanying text.

167. *See* note 126 *supra* and accompanying text.

168. *See* notes 83-88 *supra* and accompanying text. "In *Lee*, we treated the dismissal as the equivalent of a mistrial because both the trial judge and the parties had so regarded it." United States v. Scott, 437 U.S. at 109 n.7 (Brennan, J., dissenting).

169. *See* note 84 *supra* and accompanying text.

170. *See* notes 85-86 *supra* and accompanying text. *See generally* Note, *supra* note 161, at 172; Note, *supra* note 3, at 1838.

171. *See* United States v. Scott, 437 U.S. 82, 94 (1978); United States v. Dinitz, 424 U.S. 600, 611 (1976).

172. *See* United States v. Scott, 437 U.S. 82, 94 (1978); Lee v. United States, 432 U.S. 23, 29-30 (1977); Note, *supra* note 3.

173. *See* United States v. Scott, 437 U.S. 82, 84, 95 (1978).

174. *See id.* at 111-16 (Brennan, J., dissenting).

175. *Id.*

court grants, on grounds of preindictment delay, a midtrial dismissal motion that was raised in timely fashion pretrial,[176] then the dependence of the ruling on evidence adduced at trial is plain.

The essential distinction between mistrials and dismissals would appear to make the majority's application of mistrial doctrine to the double jeopardy consequences of a midtrial dismissal, at best, inappropriate. Yet, the majority's willingness to gloss over the distinction is one facet of the Court's profound revision of the role of harassment as an underlying purpose of the double jeopardy clause. Finality, not harassment, is the primary focus of the majority's concern.[177] The difference between a mistrial and dismissal is irrelevant because neither termination is inevitably a final judgment under *Scott*'s reconstructed concept of finality. *Scott* holds that defendant's choice to seek a midtrial termination that is not a final judgment obviates any need to consider harassment, whether or not the termination is a mistrial, a functional mistrial, or a dismissal that qualifies as a termination in defendant's favor.[178] Thus, the Court's conclusion that government appeal and possible reprosecution inflict no injury on Scott cognizable under the double jeopardy clause[179]—such as the type of harassment condemned in *Green*,[180] *Jenkins*,[181] and *Martin Linen*[182]—stems principally from its revised view of finality.[183]

By allowing government appeal of dismissals, the Court's new concept of finality is consistent with congressional understandings of the double jeopardy limits on government appeals.[184] The *Scott* majority, however, did not rely at all on the legislative history of the 1971 Criminal Appeals Act.[185] Instead, the majority lifted *Martin Linen*'s puzzling "definition" of acquittal out of the context of that case and simply asserted that it accurately characterized final judgments for the purpose

176. *Id.* at 84.

177. By directing their attack primarily against the majority's new concept of finality, the dissent seems to have recognized the key role that finality played in the majority's analysis. *See* text accompanying note 148 *supra*; note 132 *supra* and accompanying text.

178. *See* notes 119-29 *supra* and accompanying text.

179. United States v. Scott, 437 U.S. 82, 99 (1978).

180. *See* note 33 *supra*.

181. *See* note 93 *supra* and accompanying text.

182. *See* note 95 *supra* and accompanying text.

183. *See* notes 129-33 *supra* and accompanying text.

184. *See* notes 46-47 *supra* and accompanying text.

185. *Id.*

of double jeopardy.[186] Like the Court in *Martin Linen*, the *Scott* majority included within this definition those terminations which, arguably, are not resolutions of factual elements of the offense charged.[187]

Scott explicitly found that a ruling that the evidence is insufficient to convict is a final judgment.[188] Yet, this determination could be based solely on the government's failure to sustain its burden of proof rather than on a finding that defendant did not, in fact, commit the act alleged. Defendant may indeed be factually guilty and, in addition, convictable, if the burden of proof were lowered to a preponderance of the evidence. When a court relies on stipulated facts to rule that the evidence is insufficient to convict, it is especially difficult to regard this determination as a resolution of factual elements in defendant's favor.[189] The talismanic quality of the majority's definition of finality is also indicated by its inclusion of egregiously erroneous acquittals.[190] A trial court might reach the legal conclusion that evidence is insufficient to convict after first erroneously excluding most of the government's evidence.[191] To label a judgment of acquittal entered on this basis a resolution of factual elements of the offense charged seems primarily a matter of formalistic terminology. To be sure, the majority allows for the possibility of incorrect, yet final resolutions.[192] Still, it strains even imagination to label *Fong Foo* as a resolution of factual elements of the offense charged, except as a matter of definition.[193] Finally, the majority's assertion that an acquittal based on a finding of

186. 437 U.S. at 97.

187. *See* note 75 *supra* and accompanying text.

188. 437 U.S. at 97-98; *see* notes 134-37 *supra* and accompanying text.

189. *See* 437 U.S. at 102 n.1 (Brennan, J., dissenting); Finch v. United States, 433 U.S. 676 (1977); *cf.* Note, *supra* note 3, at 1836 ("Any ruling which assumes the prosecutor's factual allegations to be true or which is based on undisputed facts would be treated as a ruling of law . . . .").

190. 437 U.S. at 90-91, 97-98.

191. *See* United States v. Sanabria, 437 U.S. 54 (1978).

> In *Sanabria*, the District Court, acting on the defendant's motions, made a series of erroneous legal rulings which began with an erroneous construction of the indictment and culminated in the exclusion of most of the evidence of defendant's guilt. The trial court then granted defendant's motion for a judgment of acquittal on the ground that the remaining evidence was insufficient. *Sanabria* held that the midtrial termination of the prosecution erected an absolute bar to any further proceedings against the defendant, and we reached that result even though the rulings which led to the acquittal were purely legal determinations, unrelated to any question of defendant's factual guilt, and had been precipitated entirely by the defendant's "voluntary choice" to seek a narrow construction of his indictment.

United States v. Scott, 437 U.S. 82, 110 (1978) (Brennan, J., dissenting).

192. *See* 437 U.S. at 97.

193. *See* notes 22-23 *supra* and accompanying text.

entrapment would be final for double jeopardy purposes[194] reveals the artificial nature of the requisite factual resolution for finality. Although the prevailing view is that a defendant successfully demonstrating entrapment has proved the absence of an implicit element of the offense charged,[195] this view is but one legal theory. The split in the Supreme Court over the conceptual nature of entrapment[196] and the number of jurisdictions that regard entrapment as a check on government behavior rather than as a measure of defendants' predisposition[197] demonstrate that a finding of entrapment is only theoretically a resolution of factual elements of the offense charged.

Neither exact nor precise, *Scott*'s new principle of finality manifests the substantial overlap between *Lee*'s concept of convictability and the concept of factual innocence.[198] At the very least, this overlap is roughly congruent with the grey area between questions of fact and questions of law.[199] Principled separation of non-convictability and factual innocence for double jeopardy purposes, therefore, seems especially difficult—as the Court in *Jenkins* and *Lee* appeared to recognize.[200] Whether or not a termination in defendant's favor is based on a finding of factual innocence or non-convictability, government appeal, as the *Scott* dissent demonstrates, subjects defendants to possible harassment and enhanced probability of conviction.[201] The majority has simply drawn a line. In retrospect, the line drawing in *Jenkins*, by comparison, seems very bright indeed.

CONCLUSION

Combined with the policy conclusion that *Jenkins* disserved the public's interest in convicting alleged offenders, *Scott*'s reconstructed no-

194. *See* 437 U.S. at 97-99.

195. *See* United States v. Russell, 411 U.S. 423 (1973). *See also* Sherman v. United States, 356 U.S. 369 (1958); Sorrells v. United States, 287 U.S. 435 (1932).

196. Interestingly, the Justices divided in the *Scott* case very similarly to the way they split in *Russell*, the leading entrapment case. In *Scott* Justices Rehnquist, Burger, Powell, Stewart, and Blackmun formed the majority. Justices Brennan, Marshall, White, and Stevens dissented. In *Russell* Justices Rehnquist, Burger, Powell, White, and Blackmun formed the majority. Justices Brennan, Marshall, Stewart, and Douglas dissented. *See* note 195 *supra*.

197. This is the position of the dissent in *Russell* and is the state of the law in several jurisdictions. *See* Park, *The Entrapment Controversy*, 60 MINN. L. REV. 163 (1976).

198. *See* notes 101-07 *supra* and accompanying text.

199. *Id.*

200. *Id. See also* notes 77-81 *supra* and accompanying text.

201. *See* notes 154-55 *supra* and accompanying text.

tions of finality and harassment significantly restrict the applicability of the double jeopardy clause. The extent to which lower courts will look to this policy conclusion in grappling with *Scott*'s uncertain concept of finality is an open question, but one that in large measure will determine just how narrowly the Court has circumscribed defendants' double jeopardy rights.

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