CRIMINAL PROCEDURE — DOUBLE JEOPARDY — GOVERNMENT MAY APPEAL FROM SUCCESSFUL DEFENSE MOTION FOR MIDTRIAL DISMISSAL UNRELATED TO GUILT OR INNOCENCE — *United States v. Scott*, 437 U.S. 82 (1978).

John Arthur Scott, a member of the narcotics unit of the Muskegon, Michigan police force, was indicted on three counts of distributing various controlled substances.[1] Before his trial in the United States District Court for the Western District of Michigan, the defendant filed a motion to dismiss two counts of the indictment[2] on the ground of preindictment delay.[3] The motion, which was denied without prejudice,[4] was renewed at the close of the government's case[5] and again denied without prejudice.[6] After the defense had

[1] United States v. Scott, 437 U.S. 82, 84 (1978). The three counts of the March 5, 1975 indictment related to three separate occurrences. Count I was based on an alleged distribution of cocaine on September 20, 1974. Brief for the United States at 3, United States v. Scott, 437 U.S. 82 (1978) [hereinafter cited as Brief for United States]. The second count charged respondent with the distribution of codeine on September 24, 1974. *Id.* An alleged distribution of heroin on January 22, 1975 formed the basis of Count III. *Id.* The three transactions were alleged violations of 21 U.S.C. § 841(a)(1) (1970), which makes it unlawful for any person to knowingly or intentionally distribute, or possess with intent to distribute, a controlled substance.

[2] United States v. Scott, 544 F.2d 903, 903 (6th Cir. 1976), *rev'd and remanded*, 437 U.S. 82 (1978). Respondent's motion to dismiss was presented pursuant to Rule 12 of the Federal Rules of Criminal Procedure, which provides that "[a]ny defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion." FED. R. CRIM. P. 12(b).

[3] United States v. Scott, 544 F.2d 903, 903 (6th Cir. 1976), *rev'd and remanded*, 437 U.S. 82 (1978). Respondent contended that the delay between the alleged commission of the offenses charged in Counts I and II and his indictment for those offenses violated the due process clause of the fifth amendment, Brief for United States, *supra* note 1, at 3–4, which provides in relevant part that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. For a discussion of the due process analysis to be applied to motions to dismiss on the grounds of preindictment delay, see notes 145–55 *infra* and accompanying text.

[4] United States v. Scott, 544 F.2d 903, 903 (6th Cir. 1976), *rev'd and remanded*, 437 U.S. 82 (1978). The district court's decision to deny respondent's motion to dismiss came after a pretrial hearing on the motion. Brief for United States, *supra* note 1, at 4. The trial judge determined that the respondent had not sufficiently shown that the delay by the government was intentional, nor that it had prejudiced his defense. Brief for the Respondent at 23–24, United States v. Scott, 437 U.S. 82 (1978) [hereinafter cited as Brief for Respondent]. The trial judge apparently needed to hear more evidence on the question of whether the resultant prejudice to respondent's defense warranted dismissal, indicating that it would be reconsidered upon renewal after the presentation of evidence. *Id.* at 23 & n.11.

[5] United States v. Scott, 544 F.2d 903, 903 (6th Cir. 1976), *rev'd and remanded*, 437 U.S. 82 (1978). The government presented evidence attempting to prove that respondent, a narcotics officer, "had gone into the drug business for himself" and had, on the dates charged in the indictment, distributed drugs to a government informant. Brief for United States, *supra* note 1, at 4.

[6] United States v. Scott, 544 F.2d 903, 903 (6th Cir. 1976), *rev'd and remanded*, 437 U.S. 82 (1978). The court also denied respondent's motion for a judgment of acquittal, deciding

presented its case and all the evidence had been received,[7] the motion to dismiss was renewed and subsequently granted on the basis of preindictment delay.[8] The court submitted the third count to the jury, which returned a verdict of not guilty.[9]

The government sought to appeal the dismissal of the two counts of the indictment to the Court of Appeals for the Sixth Circuit.[10] In a per curiam opinion, the court of appeals dismissed the appeal for lack of jurisdiction,[11] concluding that further prosecution of the respondent was barred by the double jeopardy clause of the fifth amendment.[12] The United States Supreme Court granted certiorari to review the appealability of the dismissal of the first count.[13] In *United States v. Scott*,[14] a sharply divided Supreme Court reversed the decision of the court of appeals, concluding that reprosecution of

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instead to continue the jury trial. Brief for United States, *supra* note 1, at 4.

[7] United States v. Scott, 544 F.2d 903, 903 (6th Cir. 1976), *rev'd and remanded*, 437 U.S. 82 (1978). Respondent's defense was that he had been "'set up'" by the informant, who was himself a drug trafficker. Brief for United States, *supra* note 1, at 5.

[8] United States v. Scott, 544 F.2d 903, 903 (6th Cir. 1976), *rev'd and remanded*, 437 U.S. 82 (1978). The district court concluded that respondent's inability to recall the events of September 20, 1974 "had 'presented sufficient proof of prejudice with respect to count I.'" 437 U.S. 82, 84 (1978). In granting the motion to dismiss for preindictment delay after the evidence had been presented, the judge ruled that respondent had sustained his burden of showing intentional delay and resulting prejudice. Brief for Respondent, *supra* note 4, at 24.

[9] United States v. Scott, 544 F.2d 903, 903 (6th Cir. 1976), *rev'd and remanded*, 437 U.S. 82 (1978).

[10] United States v. Scott, 544 F.2d 903 (6th Cir. 1976), *rev'd and remanded*, 437 U.S. 82 (1978). Recognizing that the acquittal by the jury on the third count clearly barred reprosecution, the government did not seek appeal on Count III. Brief for United States, *supra* note 1, at 6 n.5.

[11] United States v. Scott, 544 F.2d 903 (6th Cir. 1976), *rev'd and remanded*, 437 U.S. 82 (1978). Jurisdiction for government appeals of criminal cases is controlled by 18 U.S.C. § 3731 (1976), which in its 1971 amended form provides in pertinent 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.

Id. The court of appeals found the government's appeal in this case to lie "squarely within" the double jeopardy prohibition. 544 F.2d at 903. For a discussion of the historical development of the government's statutory right of appeal in criminal cases, see notes 27–36 *infra* and accompanying text.

[12] United States v. Scott, 544 F.2d 903, 903 (6th Cir. 1976), *rev'd and remanded*, 437 U.S. 82 (1978). Among its fundamental protections, the fifth amendment provides that "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V.

[13] 434 U.S. 889 (1977). The government indicated that their reason for not appealing the dismissal of Count II was the absence of any discernible reason for the district court's decision, rather than a concession of its finality. Brief for United States, *supra* note 1, at 5–6 n.4.

[14] 437 U.S. 82 (1978).

the respondent was not barred by double jeopardy principles.[15] The Court, in an opinion by Justice Rehnquist, overruled *United States v. Jenkins*[16] and held that the government may appeal from a defendant's successful effort to terminate his trial "without any submission to either judge or jury as to his guilt or innocence."[17] Recognizing the fundamental double jeopardy principle that verdicts of acquittal are final and may not be reprosecuted,[18] the *Scott* majority concluded that there was no true acquittal where the termination of the proceedings against the defendant was not based upon his factual innocence.[19] In a vigorous dissent, Justice Brennan, joined by three other Justices, argued that the rule announced in *Jenkins* "is vital to the implementation of the values protected by the Double Jeopardy Clause," and should not be overruled.[20] Instead of restricting the ranks of unappealable trial court judgments to actual determinations of factual innocence, the dissent would have affirmed the judgment of the court of appeals.[21]

Consideration of the government's right of appeal in criminal cases requires a searching inquiry into double jeopardy principles extending well beyond the language of the clause itself.[22] While the precise origin of the principle of double jeopardy is unclear, it is recognized as "one of the oldest ideas found in western civilization."[23]

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[15] *Id.* at 84.

[16] 420 U.S. 358 (1975). In *Jenkins*, the Supreme Court, also in an opinion by Justice Rehnquist, had held that regardless of whether a dismissal of an indictment amounted to an acquittal on the merits, where "further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged, would have been required upon reversal and remand," government appeal was barred by the double jeopardy clause. *Id.* at 369–70.

[17] 437 U.S. at 101.

[18] *Id.* at 91; *see* notes 37–41 *infra* and accompanying text.

[19] 437 U.S. at 97–98.

[20] *Id.* at 103 (Brennan, J., dissenting). Justices White, Marshall and Stevens joined in the dissent, finding the majority's "attempt to draw a distinction between 'true acquittals' and other final judgments favorable to the accused, quite simply, . . . unsupportable in either logic or policy." *Id.*

[21] *Id.* at 115–16.

[22] In recognizing the need for this inquiry in double jeopardy questions, it has been stated that "we must look not merely to the familiar but unilluminating words of the Double Jeopardy clause, 'nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb,' but also to its historical background, the proceedings leading to its adoption as part of the Fifth Amendment, and the course of decisions thereunder." United States v. Jenkins, 490 F.2d 868, 870 (2d Cir. 1973), *aff'd*, 420 U.S. 358 (1975); *see* United States v. Wilson, 420 U.S. 332, 339 (1975); Comment, *Double Jeopardy Limitations on Appeals by the Government in Criminal Cases*, 80 DICK. L. REV. 525, 530 (1976).

[23] Bartkus v. Illinois, 359 U.S. 121, 151 (1959) (Black, J., dissenting). In a revelatory and thoroughly documented synopsis of the historical background of the double jeopardy doctrine,

Modern historical analysis of the doctrine usually begins with Blackstone, who described it as a "universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offense."[24] Blackstone's "universal maxim" was imported into the United States Constitution by the drafters of the Bill of Rights,[25] and has since become firmly embedded as a fundamental protection.[26]

It is a settled principle of modern American jurisprudence that there is no government right of appeal in criminal cases in the absence of express statutory authority.[27] No such statutory authority existed prior to 1907, when Congress enacted the original Criminal Appeals Act,[28] allowing the government a limited right to appeal cer-

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Justice Black traced its roots to the Greeks and Romans, who forbade reprosecution after an acquittal. *Id.* at 151–52 & n.3; Comment, *Double Jeopardy and Government Appeals of Criminal Dismissals*, 52 TEX. L. REV. 303, 305 n.7 (1974). *See also* J. SIGLER, DOUBLE JEOPARDY 2–3 (1969).

[24] 4 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 335 (Jones ed. 1916). The three common law pleas of *autrefois acquit* (former acquittal), *autrefois convict* (former conviction) and pardon were based on the same principle, *id.* at *335–36, and "prevented the retrial of a person who had previously been acquitted, convicted, or pardoned for the same offense." United States v. Scott, 437 U.S. at 87. For further discussion of the English common law origins of double jeopardy, see J. SIGLER, *supra* note 23, at 16–21; Kirk, *"Jeopardy" During the Period of the Year Books*, 32 U. PA. L. REV. 602 (1934); Comment, *supra* note 23, at 305–07.

[25] United States v. Jenkins, 490 F.2d 868, 873 (2d Cir. 1973), *aff'd*, 420 U.S. 358 (1975). While the absence of any meaningful reported debate on the clause precludes definitive analysis of intent, Congress' choice of the "twice in jeopardy" language "strongly suggests" that the intention was to provide the same protection that had developed at common law. 490 F.2d at 873; J. SIGLER, *supra* note 23, at 32.

[26] In applying the double jeopardy prohibition of the fifth amendment to the states through the fourteenth amendment, the Supreme Court in Benton v. Maryland, 395 U.S. 784 (1969), recognized it as "clearly 'fundamental to the American scheme of justice.'" *Id.* at 796. In what has become the classic statement of the interests at the heart of the double jeopardy clause, Justice Black stated in *Green v. United States:*

> 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.

355 U.S. 184, 187–88 (1957). "[S]ociety's awareness of the heavy personal strain which a criminal trial represents for the individual defendant," United States v. Jorn, 400 U.S. 470, 479 (1971), is reflected in the policy of the Bill of Rights which would "make rare indeed the occasions when the citizen can for the same offense be required to run the gantlet twice." Gori v. United States, 367 U.S. 364, 373 (1961) (Douglas, J., dissenting). For further discussion of the public policy interests opposing reprosecution, see Schulhofer, *Jeopardy and Mistrials*, 125 U. PA. L. REV. 449, 497–506 (1977); Note, *Government Appeals of "Dismissals" in Criminal Cases*, 87 HARV. L. REV. 1822, 1837–38 (1974); Comment, *Twice in Jeopardy*, 75 YALE L.J. 262, 278–79 (1965).

[27] United States v. Sanges, 144 U.S. 310, 312 (1892).

[28] 34 Stat. 1246 (1907); *see* United States v. Sisson, 399 U.S. 267, 292–96 (1970).

tain judgments.[29] The language of the statute, however, being couched in antiquated common law pleadings, posed difficulties in interpretation.[30] Despite several minor changes in the language of the Act over the years,[31] courts continued to struggle with the statutory restrictions upon appellate jurisdiction in criminal cases.[32] Judicial frustration culminated in 1970, when the Supreme Court in *United States v. Sisson*[33] assailed the Act as "a most unruly child that

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[29] The Criminal Appeals Act of 1907 gave the government the right to appeal from three particular common law judgments and vested appellate jurisdiction exclusively in the Supreme Court, providing in pertinent part:

> [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.
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> From a decision arresting a judgment of conviction for insufficiency of the indictment, where such decision is based upon the invalidity or construction of the statute upon which the indictment is founded.
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> From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy.

34 Stat. 1246 (1907), *quoted in* United States v. Sisson, 399 U.S. at 292 n.21; 9 MOORE'S FEDERAL PRACTICE ¶ 110.03[4], at 86 n.6 (2d ed. 1975).

[30] Judicial attempts to settle upon a general approach to the interpretation of the common law terms "arrest of judgment" and "special plea in bar" proved troublesome, and sixty years later there was still no settled approach to these provisions. United States v. Sisson, 399 U.S. 267, 300 & nn. 53–54 (1970); *Double Jeopardy and Government Appeals in Criminal Cases*, 12 COLUM. J.L. & SOC. PROB. 295, 297 (1976) [hereinafter cited as *Double Jeopardy*].

[31] The Criminal Appeals Act was amended in 1942, giving the courts of appeal jurisdiction over government appeals. 56 Stat. 271 (1942), cited in 9 MOORE'S FEDERAL PRACTICE, *supra* note 29, ¶ 110.03[4], at 88–89. The 1942 amendment also slightly modified the common law language by permitting a government appeal upon the dismissal of an indictment for deficiencies in pleading not involving the invalidity or construction of the underlying statute. *Id.*

In 1948, the amended provisions of the act were codified in 18 U.S.C. § 3731 (1948) (amended 1971), which, in essence, reflected only minor changes in the original language of the act. 9 MOORE'S FEDERAL PRACTICE, *supra* at ¶ 110.03[4], at 88–89; Comment, *Government Appeals of Pretrial Dismissals—The Implications of Double Jeopardy*, 21 LOYOLA L. REV. 942, 945 & n.26 (1975). One purpose of these modifications was to conform to Rule 12(a) of the Federal Rules of Criminal Procedure, which had abolished pleas in abatement and special pleas in bar, substituting a "motion to dismiss or to grant appropriate relief" as provided in the rules. FED. R. CRIM. P. 12(a); 9 MOORE'S FEDERAL PRACTICE, *supra* at ¶ 110.04[2], at 99–100.

[32] *See, e.g.*, United States v. Apex Distrib. Co., 270 F.2d 747 (9th Cir. 1959). The court of appeals in *Apex* interpreted the act as allowing government appeal from a "decision or judgment 'setting aside, or dismissing' an indictment only if such decision or judgment is based upon a defect in the indictment or in the institution of the prosecution." *Id.* at 755. Recognizing the strictness with which the statutory provisions were construed against government appeals, the *Apex* court invited Congress to enact remedial legislation if it wished to enlarge the government's right of appeal. *Id.* at 759.

[33] 399 U.S. 267 (1970). In *Sisson*, the district court had granted defendant's motion for what it termed an "arrest of judgment," after a jury verdict of guilty. United States v. Sisson, 297 F.

has not improved with age."[34] Prompted at least in part by this judicial disapprobation, Congress enacted the current statutory provisions controlling government appeals in criminal cases.[35] The effect of the 1971 amendment was to eliminate the antiquated and artificial statutory restrictions upon appealability, and to focus the relevant inquiry upon the constitutional principles underlying the double jeopardy clause.[36]

It is "[p]erhaps the most fundamental rule in the history of double jeopardy jurisprudence" that a verdict of acquittal in a criminal

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Supp. 902 (D. Mass. 1969), *appeal dismissed*, 399 U.S. 267 (1970). The court was convinced by the evidence adduced at trial that Sisson, who was charged with draft evasion, was a "sincerely conscientious man" to whom the Selective Service Act should not be applied. 297 F. Supp. at 908, 910; *Double Jeopardy*, *supra* note 30, at 298. The Supreme Court, however, in an opinion by Justice Harlan, held that the district court's ruling was not properly termed an "arrest of judgement," but rather having been based upon factual conclusions adduced at trial, the decision was actually an acquittal. 399 U.S. at 288. In its conclusion that the trial court's label of its decision is not controlling as to the question of appealability, *Sisson* stands for the principle that reviewing courts must look beyond the label used by the trial court in determining the true nature of the decision and its effect on reprosecution. *Id.* at 279 n.7.

[34] 399 U.S. at 307. The Court explained:

> Clarity is to be desired in any statute, but in matters of jurisdiction it is especially important. Otherwise the courts and the parties must expend great energy, not on the merits of dispute settlement, but on simply deciding whether a court has the power to hear a case. When judged in these terms, the Criminal Appeals Act is a failure.
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> . . . Nevertheless, until such time as Congress decides to amend the statute, this Court must abide by the limitations imposed by this awkward and ancient Act.

Id. at 307–08.

[35] 18 U.S.C. § 3731 (1976); *see* note 11 *supra*. As originally proposed, the bill would have allowed the government to appeal any decision or order terminating a prosecution, "except that no appeal shall lie from a judgment of acquittal." 116 CONG. REC. 35658 (1970). The conference committee redrafted the provision to read as it now does. [1970] U.S. CODE CONG. & AD. NEWS 5848–49. It has been noted that:

> While no reason is given for the change, it would appear that the Senate's [original] draft would have permitted appeals in cases where the double jeopardy clause would have prohibited them because double jeopardy often prohibits reprosecution after a trial begins and is terminated even though the defendant was not acquitted.

United States v. Pecora, 484 F.2d 1289, 1293–94 n.6 (3d Cir. 1973); *see* Comment, *supra* note 31, at 946.

[36] United States v. Martin Linen Supply Co., 430 U.S. 564, 568 (1977); United States v. Wilson, 420 U.S. 332, 339 (1975). In *Wilson*, Justice Marshall noted that "[w]hile the language of the new Act is not dispositive, the legislative history makes it clear that Congress intended to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit." *Id.* at 337. It therefore becomes "necessary to take a closer look at the policies underlying the Clause in order to determine more precisely the boundaries of the Government's appeal rights in criminal cases." *Id.* at 339; United States v. Martin Linen Supply Co., 430 U.S. at 568; *see* Comment, *supra* note 22, at 528 & n.30; Comment, *supra* note 31, at 946.

trial is final and establishes a bar to reprosecution for the same offense.[37] The principle originally expressed in *United States v. Ball*[38] and recognized as "the settled law of this court" in *Kepner v. United States*[39] protects a defendant, found not guilty for an offense at trial, from a second trial for that offense.[40] Based upon the common law plea of *autrefois acquit*, this fundamental rule reflects the basic notion that " 'no one should be twice vexed for one and the same cause.' "[41] In applying this doctrine, the Court has often emphasized that an "acquittal" is not defined by its label but by its legal effect.[42] By itself the term has no talismanic effect for double jeopardy purposes, but must be viewed in its procedural context to determine if appeal by the government would be violative of the policies underlying the double jeopardy clause.[43]

Another fundamental principle of double jeopardy law is that the criminal defendant has a "valued right to have his trial completed by a particular tribunal."[44] This right, however, is by no means absolute, and at times must be "subordinated to the public's interest in fair trials designed to end in just judgments."[45] Recognizing that a

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[37] United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977).

[38] 163 U.S. 662 (1896). In *Ball*, the jury had found the defendant not guilty of murder. On appeal, the Supreme Court stated that "[t]he verdict of acquittal was final, and could not be reviewed, on error or otherwise, without putting him twice in jeopardy, and thereby violating the Constitution." *Id.* at 671.

[39] 195 U.S. 100, 130 (1904). *Kepner*, in relying squarely on the principle enunciated in *Ball*, recognized that the protection is not against the risk of being twice punished, but against a second trial for the same offense. *Id.* at 130. In a dissenting opinion, Justice Holmes espoused a "continuing jeopardy" theory, namely "that logically and rationally a man cannot be said to be more than once in jeopardy in the same cause, however often he may be tried," and that one jeopardy continues throughout one case. *Id.* at 134. This theory, however, has never found support in the Court. Green v. United States, 355 U.S. 184, 197 (1957).

[40] Fong Foo v. United States, 369 U.S. 141, 143 (1962). In a per curiam opinion, the Court held that since the trial in the district court had terminated with an acquittal, the double jeopardy clause barred reprosecution. *Id.* This is so even where "the acquittal was based upon an egregiously erroneous foundation." *Id.*

[41] Comment, *supra* note 26, at 265 n.11; *see* note 24 *supra* and accompanying text.

[42] United States v. Sisson, 399 U.S. 267, 279 n.7 (1970); *see* United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977); United States v. Wilson, 420 U.S. 332, 336 (1975).

[43] Serfass v. United States, 420 U.S. 377, 392 (1975); Schulhofer, *supra* note 26, at 454–55; Comment, *supra* note 22, at 538–39.

[44] Wade v. Hunter, 336 U.S. 684, 689 (1949). The Court in *Crist v. Bretz* stated that "[r]egardless of its historic origin, . . . the defendant's 'valued right to have his trial completed by a particular tribunal' is now within the protection of the constitutional guarantee against double jeopardy." 437 U.S. 28, 36 (1978); *see* Lee v. United States, 432 U.S. 23, 34 (1977) (Brennan, J., concurring) (describing this valued right as "cardinal principle of double jeopardy law").

[45] Wade v. Hunter, 336 U.S. 684, 689 (1949).

criminal trial is an inherently complex affair to manage, the Court allows the prosecution a full and reasonable opportunity to obtain a conviction.[46] The need for this flexible approach is evident in cases in which the first trial must be terminated prior to final judgment by a judicial declaration of mistrial.[47]

The rule announced by the Supreme Court in *United States v. Perez*[48] is the starting point for analysis of the constitutionality of reprosecution following mistrial.[49] In *Perez*, a mistrial was declared, without the defendant's consent, when the jury was unable to agree on a verdict.[50] The Court held that the trial judge's declaration of a mistrial posed no bar to reprosecution when there was a "manifest necessity" for declaring the mistrial, constrained by "the ends of public justice."[51]

While *Perez* emphasized that mistrials should be granted only "with the greatest caution, under urgent circumstances,"[52] the Court has not always closely scrutinized the trial judge's decision.[53] In *Gori v. United States*,[54] the Court refused to bar retrial, declining to substitute its own judgment for the exercise of the trial judge's discretion in hastily declaring a mistrial.[55] Less than two years later,

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[46] Arizona v. Washington, 434 U.S. 497, 505 & n.16 (1978); United States v. Jorn, 400 U.S. 470, 479–80 (1971); Schulhofer, *supra* note 26, at 494; Note, *Mistrials and Double Jeopardy*, 15 AM. CRIM. L. REV. 169, 172–73 (1977).

[47] It is generally recognized that when the trial judge terminates the proceedings by declaring a mistrial, he is contemplating reprosecution of the defendant after whatever necessary remedial actions are taken. United States v. Jorn, 400 U.S. 470, 478 n.7 (1971); Schulhofer, *supra* note 26, at 458.

[48] 22 U.S. (9 Wheat.) 579, 580 (1824).

[49] Gori v. United States, 367 U.S. 364, 368–69 (1961); Wade v. Hunter, 336 U.S. 684, 689–90 (1949).

[50] 22 U.S. (9 Wheat.) at 579.

[51] *Id.* at 580; *see* Gori v. United States, 367 U.S. 364, 368 (1961); Wade v. Hunter, 336 U.S. 684, 689–90 (1949). *But see* Schulhofer, *supra* note 26, at 490–91. Professor Schulhofer suggests that the traditional "manifest necessity" standard "provides no guidance for understanding mistrial decisions" in double jeopardy jurisprudence. *Id.*; *see* Comment, *Double Jeopardy and Reprosecution After Mistrial Is the Manifest Necessity Text Manifestly Necessary?*, 69 NW. U. L. REV. 887 (1975).

[52] 22 U.S. (9 Wheat.) at 580. This scrutiny is necessary because in certain circumstances a declaration of mistrial invokes the constitutional protections of the double jeopardy clause. Underlying double jeopardy principles protecting a defendant from government harassment and the anxiety and expense of multiple trials require that he not be harassed by successive aborted criminal proceedings. Note, *Double Jeopardy: The Reprosecution Problem*, 77 HARV. L. REV. 1272, 1274 (1964); *see* Schulhofer, *supra* note 26, at 463.

[53] *See* Schulhofer, *supra* note 26, at 459–62.

[54] 367 U.S. 364 (1961).

[55] *Id.* at 367–69. The presiding judge believed that the prosecutor was about to engage in a line of questioning calculated to bring out evidence of other crimes committed by the defendant. *Id.* at 366 & n.7. The "premature" mistrial declaration came from the bench sua sponte

Downum v. United States[56] resolved all doubts in these cases "in favor of the liberty of the citizen," indicating that the Court was willing to undertake a more searching review of judicial discretion.[57] In *United States v. Jorn*,[58] the Court effectively reaffirmed *Downum*, holding that where there was no "manifest necessity" for the trial court's declaration of a mistrial, reprosecution was barred by double jeopardy principles.[59] Declining to adhere to the *Gori* analysis of whether the mistrial was intended to benefit the defendant,[60] the Court recognized that the harm to the defendant inherent in reprosecution after a mistrial is the same "regardless of the motivation underlying the trial judge's action."[61] The straightforward approach which *Jorn* returned to the "manifest necessity" test did not long survive.[62] In *Illinois v. Somerville*,[63] the Court employed what it termed a general balancing approach, premised upon the "'ends of public justice,'"[64] emphasizing the preservation of the government's opportunity to convict.[65] While *Somerville* did not expressly over-

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before the prosecutor had asked any improper question, and before the defense had raised any objection. *Id.* at 365–66. In writing for the Court, Justice Frankfurter stated that a mistrial granted "in the sole interest of the defendant," even without his consent, does not bar retrial under double jeopardy principles. *Id.* at 369.

[56] 372 U.S. 734 (1963). A shift in Court personnel, with Justice Goldberg replacing Justice Frankfurter in 1963, enabled Justice Douglas and the *Gori* dissenters to enunciate their double jeopardy views as the majority in *Downum*. Schulhofer, *supra* note 66, at 463 n.62; Note, *supra* note 46, at 176 n.55.

[57] 372 U.S. at 738; *see* Schulhofer, *supra* note 26, at 463–64. The Court criticized the *Gori* approach of paying deference to "'arbitrary judicial discretion'" for failing to closely scrutinize the propriety of mistrials declared by the trial court. 372 U.S. at 738.

[58] 400 U.S. 470 (1971).

[59] *Id.* at 486–87. The Court utilized a flexible approach to the question of the "manifest necessity" of a mistrial declared without the defendant's consent. *Id.* To preserve the defendant's right to a potentially favorable judgment, the Court charged trial judges with the responsibility of considering possible alternatives before declaring a mistrial. *Id.*

[60] 367 U.S. at 369. The *Jorn* Court rejected this "benefit" test as "an exercise in pure speculation." 400 U.S. at 483; *see* Comment, *supra* note 51, at 902 & n.57.

[61] 400 U.S. at 483; *see* Schulhofer, *supra* note 26, at 465; Note, *supra* note 46, at 180.

[62] Comment, *supra* note 51, at 902. A significant reorganization of Court personnel followed the decision in *Jorn*, in which Justices Harlan and Black were replaced by Justices Powell and Rehnquist. *Id.* at 902 & n.60. At least one commentator, however, has asserted that the confused state of the Court's mistrial decisions cannot be completely explained by noting personnel changes on the Court, but rather that the decisions "reflect a genuine uncertainty among the Justices concerning the nature of the competing interests and the appropriate way to reconcile them." Schulhofer, *supra* note 26, at 472.

[63] 410 U.S. 458 (1973).

[64] *Id.* at 459, 463. Writing for a five-man majority, Justice Rehnquist interpreted this phrase from *Perez*, as requiring the protection of the public's interest "in seeing that a criminal prosecution proceed to verdict." *Id.* at 463.

[65] *Id.* at 464. In *Somerville*, the jury was impanelled and sworn before the prosecutor realized that the indictment was fatally defective. *Id.* at 459. Under state law the defect could

rule *Downum* and *Jorn*,[66] its "totally unstructured analysis" has been criticized as a retreat from the clear articulation of the "manifest necessity" test as developed in these cases.[67]

An exception to the "manifest necessity" test has been applied in situations where the mistrial was granted at the request of the defendant.[68] The Supreme Court has generally recognized that a defense motion for mistrial ordinarily removes the double jeopardy bar to reprosecution.[69] It is felt that the reason the defendant's right to remain before a particular tribunal is so valued is because he "has a significant interest in the decision whether or not to take the case from the jury when circumstances occur which might be thought to warrant a declaration of mistrial."[70] In *United States v. Dinitz*,[71] the Court concluded that "[t]he important consideration for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of such error."[72]

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not be cured by amendment nor waived by defendant, but could later be asserted by defendant to defeat any conviction based upon the indictment. *Id.* at 459–60. The trial court granted the state's motion for a mistrial, and the defendant was convicted under a corrected second indictment. *Id.* at 460. The Supreme Court upheld the conviction despite the defendant's double jeopardy claim. *Id.* at 460–61. The court stated:

> If an error would make reversal [of a conviction] on appeal a certainty, it would not serve "the ends of public justice" to require that the Government proceed with its proof when, if it succeeded before the jury, it would automatically be stripped of that success by an appellate court.

Id. at 464.

[66] *Id.* at 477 (Marshall, J., dissenting). *Downum* was distinguished as involving an error "lend[ing] itself to prosecutorial manipulation." *Id.* at 464. *Jorn* was distinguished as involving "erratic" action by the trial judge in a case in which there were "less drastic alternatives" readily available. *Id.* at 469–70.

[67] *Id.* at 477 (Marshall, J., dissenting). Justice Marshall, one of four dissenters in *Somerville*, wrote a separate opinion condemning the obfuscation of the *Jorn* and *Downum* rationale. *Id.*; *see* Note, *supra* note 46, at 183; Comment, *supra* note 51, at 904–09. The majority opinion has also been criticized for failing to sufficiently preserve the defendant's "valued right" to have his trial continue before the initial jury, 410 U.S. at 472–73 (White, J., dissenting), 478 (Marshall, J., dissenting), and failing to protect him from the underlying harms the double jeopardy clause aspires to prevent. *Id.* at 472 (White, J., dissenting).

[68] United States v. Dinitz, 424 U.S. 600, 607 (1976); United States v. Tateo, 377 U.S. 463, 467 (1964); Note, *supra* note 46, at 184 & n.126.

[69] United States v. Dinitz, 424 U.S. 600, 607–08 (1976); United States v. Jorn, 400 U.S. 470, 485 (1971); United States v. Tateo, 377 U.S. 463, 467 (1964).

[70] United States v. Jorn, 400 U.S. at 485. It is reasoned that by requesting or consenting to a mistrial, the defendant is, in effect, consenting to the dismissal of the particular tribunal, taking the case from the jury prior to verdict, and consenting to later proceedings. Note, 42 MO. L. REV. 485, 487–88 (1977).

[71] 424 U.S. 600 (1976).

[72] *Id.* at 609. In *Dinitz*, the defendant's motion for a mistrial was granted and the jury discharged after the judge had expelled the defense attorney from the courtroom for improper behavior during the trial. *Id.* at 604–05. Prior to his second trial, the defendant moved to

While the Court recognized that there may be cases in which the defendant is faced with a "Hobson's choice" between relinquishing his valued right to proceed before the first jury and continuing a trial tainted by prejudicial error, it held that he was entitled only to participate in the decision concerning which course to follow.[73] The Court noted that an exception to the rule could be found in cases involving "prosecutorial or judicial overreaching,"[74] but that mere error does not invoke that exception.[75] These principles were explained by the Court one Term later when it held that in the absence of an error arising from a prosecutorial tactic designed to harass or prejudice the defendant, the successful defense motion for mistrial does not bar reprosecution.[76]

The Supreme Court has recognized, however, that the reasoning developed in the *Somerville* line of cases should not be applied outside of the mistrial context.[77] The validity of the mistrial analysis is diluted when attempts are made to apply it to other types of decisions favorable to the defendant, which usually contemplate an end to

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dismiss the indictment on double jeopardy grounds. *Id.* at 605. The motion was denied and the defendant was subsequently convicted. *Id.* A divided panel of the Fifth Circuit court of appeals reversed the conviction, holding that "the trial judge's response to the conduct of defense counsel deprived [the defendant's] motion for a mistrial of its necessary consensual character." 492 F.2d 53, 59 n.9 (5th Cir. 1974), *rev'd*, 424 U.S. 600 (1976). The court of appeals determined that the actions of the trial judge had rendered the defendant unable to continue his defense, leaving him with "no choice but to move for or accept a mistrial." 492 F.2d at 59. The Supreme Court reversed and upheld defendant's reprosecution. United States v. Dinitz, 424 U.S. 600, 612 (1976).

[73] 424 U.S. at 609; *see* Schulhofer, *supra* note 26, at 535; Note, *supra* note 46, at 185–86.

[74] 424 U.S. at 607 (quoting United States v. Jorn, 400 U.S. 470, 485 (1971)). In United States v. Kessler, 530 F.2d 1246 (5th Cir. 1976), the Fifth Circuit court of appeals interpreted *Jorn* and *Dinitz* as barring reprosecution in cases where prosecutorial overreaching is found, regardless of the defendant's request for mistrial. *Id.* at 1255–56. The court of appeals extracted from *Dinitz* the standards for finding prosecutorial overreaching as "'gross negligence or intentional misconduct' caus[ing] aggravated circumstances to develop which 'seriously prejudice[d] a defendant' causing him to 'reasonably conclude that a continuation of the tainted proceeding would result in a conviction.'" *Id.* at 1256 (footnote omitted).

[75] 424 U.S. at 608–09. It has been suggested, however, that this exception should be more sensitive to cases involving prosecutorial or judicial error, where the defendant's decision to abandon the first trial cannot truly be considered a voluntary choice. *See* Schulhofer, *supra* note 26, at 533, 537–38; Note, *supra* note 46, at 190 & n.178; Note, *supra* note 51, at 912. The law does not place the defendant in the "incredible dilemma" of being forced to choose between the exercise of his right to a fair trial and the preservation of his double jeopardy protections. *See* United States v. Dinitz, 424 U.S. at 609; Green v. United States, 355 U.S. 184, 193–94 (1957); Kepner v. United States, 195 U.S. at 135 (Holmes, J., dissenting); Commonwealth v. Myers, 422 Pa. 180, 189, 220 A.2d 859, 864, *cert. denied*, 385 U.S. 963 (1966).

[76] Lee v. United States, 432 U.S. 23, 33–34 (1978); *see* Note, *supra* note 46, at 187.

[77] *See* United States v. Jenkins, 420 U.S. at 365 n.7.

the prosecution.[78] Rejecting the analogy to mistrials in a case involving the dismissal of an indictment after trial, the *Jenkins* Court noted that whether the trial proceedings end in a mistrial or in favor of the defendant "is of critical importance" for double jeopardy purposes.[79] Prior to *Jenkins*, in determining appealability under the *Ball* and *Kepner* doctrine,[80] reviewing courts had struggled to categorize various types of trial court decisions in terms of whether or not they constituted "acquittals."[81] The Supreme Court adopted a different approach in *Jenkins*, developing a standard for determining appealability that did not require the struggle to find an "acquittal" in the trial proceedings below.[82] Focusing not on the form of the trial court ruling, but upon the detrimental effects of reprosecution,[83] the Court concluded that "it is enough for purposes of the Double Jeopardy Clause . . . that further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged, would have been required upon reversal and remand."[84]

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[78] *See* 9 MOORE'S FEDERAL PRACTICE, *supra* note 29, ¶110.04[3], at 102.9; Note, *supra* note 46, at 188.

[79] *Jenkins*, 420 U.S. at 365 n.7. Two Terms later, this distinction in *Jenkins* was recognized as pivotal in focusing upon the proper analysis for that decision. Lee v. United States, 432 U.S. 23, 29–30 (1977); *see* notes 98–100 *infra* and accompanying text.

[80] *See* notes 37–40 *supra* and accompanying text.

[81] *See, e.g.*, United States v. Sisson, 399 U.S. at 288–90. Before *Jenkins* introduced the easily administered "further proceedings" approach, appellate courts struggled with a "process of searching the record [of the trial court] for an acquittal [which] was time-consuming and unpredictable." *Double Jeopardy*, *supra* note 30, at 309–10. This difficult search led to "disparate and often inconsistent" results. *Id.* at 310; *see* United States v. Southern Ry., 485 F.2d 309, 312 (4th Cir. 1973); United States v. Hill, 473 F.2d 759, 763 (9th Cir. 1972); United States v. Ponto, 454 F.2d 657, 663–64 (7th Cir. 1971); Note, *supra* note 26, at 1825 & n.21, 1835; Comment, *supra* note 31, at 947–49, 953–54 & n.73; *Double Jeopardy*, *supra* at 335–36. By creating uncertainty in the determination of the appealability of trial court decisions, this troublesome search for an "acquittal" below failed to draw the lines of appellate jurisdiction with clarity. *See* United States v. Sisson, 399 U.S. at 307–08; 9 MOORE'S FEDERAL PRACTICE, *supra* note 29, ¶ 110.04[3], at 102.15 & n.48.

[82] *See* 420 U.S. at 369–70. In *Jenkins*, the indictment against the defendant for draft evasion was dismissed and he was discharged when the trial judge, after considering the evidence developed at trial, decided that the defendant's conscientious objector claim was a valid defense to the charge, despite its lateness. 490 F.2d at 870. In refusing government appeal, the court of appeals concluded that since the trial court's decision was based on evidence adduced at the trial, which went to the general issue of the case, the decision was in fact an acquittal. *Id.* at 878.

[83] 420 U.S. at 370. The Court, in an opinion by Justice Rehnquist, emphasized the underlying double jeopardy principles when it concluded that "[t]he trial, which could have resulted in a judgment of conviction, has long since terminated in respondent's favor. To subject him to any further such proceedings at this stage would violate the Double Jeopardy Clause." *Id.*

[84] *Id.* The "further proceedings" test of *Jenkins* stands for the rule that "once jeopardy has attached, an order terminating the proceedings in favor of the defendant under circumstances that would require any continued prosecution if the order were reversed is not appealable since

The "further proceedings" test of *Jenkins* is consistent with the Court's decision in *United States v. Wilson*,[85] which made it clear that the prohibition against multiple trials is the main concern of the double jeopardy clause.[86] In *Wilson*, the trial court had dismissed an indictment on a postverdict defense motion following a jury verdict of guilty.[87] In reversing the Third Circuit decision barring government appeal,[88] the Supreme Court held that the defendant is not put twice in jeopardy if a successful government appeal would merely require a reinstatement of the guilty verdict already rendered.[89] The decision in *Wilson*, written by Justice Marshall, was the Court's first major interpretation of the 1971 statutory amendments setting the constitutional limitations on government appeal at the curbstone of double jeopardy principles.[90] While *Wilson* clearly established that a defendant is protected from being subjected to multiple trials for the same offense, some confusion remained as to exactly what proceedings prior to the trial court's decision constituted former jeopardy.[91] This problem of the "attachment of jeopardy" was dealt with in *Serfass v. United States*,[92] where the Court considered the appealability of a pretrial order dismissing an indictment based on the trial judge's examination of defendant's affidavit and records.[93] The Court con-

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retrial would put the defendant twice in jeopardy." 9 MOORE'S FEDERAL PRACTICE, *supra* note 29, ¶ 110.04[3], at 102.9; *see* Comment, *supra* note 22, at 539–41.

[85] 420 U.S. 332 (1975).

[86] *Id.* at 342–46. The Court isolated the "prohibition against multiple trials as the controlling constitutional principle" in double jeopardy jurisprudence. *Id.* at 346; *see Double Jeopardy*, *supra* note 30, at 302–03; Comment, *supra* note 22, at 533–34.

[87] 420 U.S. at 333. After the jury had found the defendant guilty of embezzling union funds, motions were filed for arrest of judgment, judgment of acquittal and a new trial. *Id.* at 334. The district court dismissed the indictment pursuant to defendant's *Marion* motion, concluding after hearing all the evidence that the defendant's due process rights to a fair trial had been substantially prejudiced by preindictment delay. *Id.* For a discussion of *Marion* motions, see notes 145–49 *infra* and accompanying text. Because of the amount of time that had elapsed between the date of the alleged offense and the indictment, by trial date the two witnesses with the most substantial knowledge of the facts and circumstances surrounding the prosecution's allegations were no longer available to the court. 420 U.S. at 334.

[88] 492 F.2d 1345 (3d Cir. 1973). The court of appeals, noting that the district court had based its dismissal of the indictment on facts adduced at trial relating to the general issue of the case, found the dismissal to be functionally indistinguishable from an acquittal. *Id.* at 1348.

[89] 420 U.S. at 344–45.

[90] *See Double Jeopardy*, *supra* note 30, at 302–06.

[91] *See* Comment, *supra* note 31, at 955–56. The problem centers around the courts' struggle "to define a point in criminal proceedings at which the constitutional purposes and policies [of double jeopardy] are implicated." Serfass v. United States, 420 U.S. 377, 388 (1975). Until this point when jeopardy attaches, the fifth amendment's guarantee has no application, since it is fundamental that the defendant "must suffer jeopardy before he can suffer double jeopardy." *Id.* at 393.

[92] 420 U.S. 377 (1975).

[93] *Id.* at 379–80.

cluded that since the initial proceedings were not tantamount to a trial, jeopardy had not attached,[94] and the constitutional prohibition against multiple trials had no application.[95]

The policies enunciated in the double jeopardy trilogy of *Jenkins*, *Wilson* and *Serfass* established a simple test to determine the issue of appealability.[96] If the order terminating the trial proceedings favorably to defendant was made after the attachment of jeopardy, and government appeal would require further proceedings and supplemental fact finding, the prohibition against multiple trials barred the appeal.[97] Recognizing the "critical importance," for double jeopardy purposes, of distinguishing a mistrial ruling from an "order contemplat[ing] an end to all prosecution of the defendant for the offense charged," the Court in *Lee v. United States*[98] lent credence to the *Jenkins* approach while distinguishing its own case on the facts.[99] The *Lee* Court interpreted *Jenkins* as a bar to reprosecution from any "midtrial dismissal . . . granted on the ground, correct or not, that the defendant simply cannot be convicted of the offense charged."[100]

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[94] *Id.* at 389. The Court noted its own established view "that jeopardy does not attach until a defendant is 'put to trial before the trier of the facts, whether the trier be a jury or a judge.'" *Id.* at 391 (citing United States v. Jorn, 400 U.S. 470, 479 (1971)). In a bench trial, jeopardy attaches when the judge begins to hear evidence, and in a jury trial when the jury is empaneled and sworn. 420 U.S. at 388. As Chief Justice Burger explained in writing for the *Serfass* Court, these rules are not mere technicalities, nor rigid and mechanical rules, *id.* at 391, but a judicial "attempt to impart content to an abstraction." *Id.* Recently, the Court has held that the rule regarding the attachment of jeopardy in a jury trial "is an integral part of the constitutional guarantee against double jeopardy" made applicable to the states through the fourteenth amendment. Crist v. Bretz, 437 U.S. 28, 38 (1978).

[95] 420 U.S. at 388–89.

[96] *See* 9 MOORE'S FEDERAL PRACTICE, *supra* note 29, ¶ 110.04 [3], at 102.10–.11; *Double Jeopardy*, *supra* note 30, at 309–10.

[97] *See* 9 MOORE'S FEDERAL PRACTICE, *supra* note 29, ¶ 110.04 [3], at 102.10–.11; *Double Jeopardy*, *supra* note 30, at 325; Comment, *supra* note 23, at 349–50.

[98] 432 U.S. 23, 29–31 (1977).

[99] *Id.* In *Lee*, at the close of all the evidence, the trial judge reluctantly granted defendant's motion to dismiss the information. *Id.* at 26–27. Under state law the information was fatally defective in that it failed to charge the requisite knowledge or intent. *Id.* Lee was subsequently reprosecuted under a corrected indictment and convicted. *Id.* at 27. The Court of Appeals for the Seventh Circuit upheld the conviction despite Lee's double jeopardy claim, 539 F.2d 612 (7th Cir. 1976), and the Supreme Court affirmed. 432 U.S. 23 (1977). The Court found the *Jenkins* approach to be inapplicable, as the error was easily corrected and the trial judge's decision did not contemplate that criminal proceedings against the defendant were to be terminated, but merely suspended. *Id.* at 30–31. It was concluded that the trial court's order "was functionally indistinguishable from a declaration of mistrial," as opposed to a judgment ending the case "'in the defendant's favor.'" *Id.* at 30–31 & n.9.

[100] 432 U.S. at 30; *see* Wurzburg, *Double Jeopardy: Dismissal and Government Appeal*, 13 GONZ. L. REV. 337, 349–50 (1978). The same analysis was followed that same term in a per curiam opinion in Finch v. United States, 433 U.S. 676, 677 (1977). In *Finch*, however, Justice Rehnquist's dissent foreshadowed his analysis in *Scott*. Desiring to go beyond "the sort of

Recognizing that reprosecution would most likely be barred by application of the double jeopardy standards developed in *Jenkins* and *Lee*, the Court in *United States v. Scott*[101] overruled *Jenkins* as "wrongly decided."[102] Writing for the majority, Justice Rehnquist viewed the *Jenkins* approach as placing too much emphasis upon the defendant's right to have his guilt decided by the first empaneled jury.[103] It was concluded that defendant's valued right to have his case remain before a particular tribunal should not include cases where he himself has successfully sought termination of the trial prior to verdict without a resolution of factual guilt or innocence.[104]

The Court emphasized the classic principle of double jeopardy jurisprudence that an acquittal "terminates the prosecution when a second trial would be necessitated by a reversal."[105] The discussion of this fundamental principle, however, was followed by a resurrection of the type of difficult search for an acquittal that *Jenkins* had found unnecessary.[106] Noting that "the law attaches particular significance to an acquittal," the Court determined that a defendant is acquitted only when the trial judge has determined his factual innocence after considering the elements of the alleged offense.[107] Thus, a "true acquittal" was distinguished from a "legal judgment" not bearing on the guilt or innocence of the accused.[108]

The Court recognized that the type of dismissal granted by the trial judge in this case, as opposed to the typical mistrial, obviously

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'bright line' distinction set forth in *Wilson* and *Jenkins*," Justice Rehnquist viewed *Martin Linen* and *Lee* as "read[ing] more in terms of balancing" double jeopardy principles. 433 U.S. at 680 (Rehnquist, J., dissenting). Justice Rehnquist suggested that the double jeopardy protections should not be mechanically extended to the defendant who has not previously been subjected to the ordeal of a criminal trial prior to a determination of his guilt or innocence. *Id.* (Rehnquist, J., dissenting).

[101] 437 U.S. 82 (1978).

[102] *Id.* at 86–87. Although only three terms had elapsed since the announcement of the *Jenkins* standard, the *Scott* majority credited the Court's "vastly increased exposure to the various facets of the Double Jeopardy Clause" with providing the inspiration to recognize *Jenkins* as "wrongly decided." *Id.*

[103] *Id.* at 87.

[104] *Id.*

[105] *Id.* at 91; *see* notes 37–41 *supra* and accompanying text.

[106] 437 U.S. at 97–98; *see* note 81 *supra* and accompanying text.

[107] 437 U.S. at 91, 96–99. The Court defined an "acquittal," at least for double jeopardy purposes, as "'a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged.'" *Id.* at 97 (quoting United States v. Martin Linen Supply Co., 430 U.S. at 571); *accord*, Lee v. United States, 432 U.S. at 30 n.8; *see* Note, *supra* note 46, at 171; Note, *supra* note 26, at 1836–37.

[108] 437 U.S. at 98. The Court noted that a dismissal based upon an infringement of a constitutional right of the defendant cannot operate as an acquittal for double jeopardy purposes, since it does not establish his innocence. *Id.* at 98 & n.11.

contemplated a termination of the proceedings in defendant's favor.[109] Language was drawn from *Lee*, however, which the Court viewed as sufficient justification for treating dismissals the same as mistrials in certain cases.[110] Since the dismissal here was not a true acquittal on the merits, the *Scott* majority analogized it to a declaration of a mistrial, and proceeded to employ mistrial analysis.[111] In this manner, the Court applied the general principle that a defendant's successful request for a mistrial removed any double jeopardy barrier to reprosecution.[112] The defendant had been afforded his sole right under the circumstances of a tainted trial when he deliberately elected to take the case from the first empaneled jury.[113] The Court held that when the defendant exercises his choice to remove the case from the particular judge or jury, the double jeopardy clause does not insulate him "from the consequences of his voluntary choice."[114] The defendant was viewed as suffering no deprivation of his right to proceed before the first empaneled jury when he has successfully avoided the submission of the issue of guilt or innocence to that jury.[115] Under these circumstances, the Court allowed the government to appeal for the purpose of protecting the public's "right to 'one complete opportunity to convict those who have violated its laws.'"[116]

The dissent in *Scott* recognized that under prior double jeopardy law, the district court's dismissal with prejudice may fairly have been termed an "acquittal," so as to bar government appeal.[117] Moreover, as Justice Brennan stated, the *Jenkins* approach obviated the search for an acquittal in cases where further proceedings relating to a determination of the defendant's guilt or innocence would be required

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[109] *Id.* at 94.

[110] *Id.* The Court read *Lee* as part of its "growing experience with Government appeals," demanding a reevaluation of the rationale underlying *Jenkins*. *Id.* at 95.

[111] *Id.* at 92, 99–100.

[112] *Id.* at 98–100. By avoiding submission to the judge or jury of his guilt or innocence, the defendant is held to have consented to a discontinuance of the initial trial proceedings. *Id.*; *see* notes 68–70 *supra* and accompanying text.

[113] 437 U.S. at 95–96; *see* notes 72–73 *supra* and accompanying text.

[114] 437 U.S. at 99.

[115] *Id.* at 98–99.

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

[117] 437 U.S. at 102 (Brennan, J., dissenting). Following the approach drawn largely from United States v. Sisson, 399 U.S. 267 (1970), the dissent would have looked beyond the label of the trial judge's action to find it to be " 'a legal determination on the basis of facts adduced at trial relating to the general issue of the case.'" *Id.* (quoting United States v. Martin Linen Supply Co., 430 U.S. 564, 575 (1977)).

upon remand.[118] The dissenting Justices opposed allowing appealability in criminal cases to revolve around the pre-*Jenkins* struggle to pigeonhole the trial court's decision as an acquittal.[119] Rather, they would have applied the "further proceedings" approach of *Jenkins*, strengthened in *Lee*, to bar reprosecution under these circumstances.[120]

Even more disturbing to the dissent was the restrictive nature of the majority's definition of "acquittal".[121] By limiting true acquittals to those trial court decisions that actually establish the defendant's factual innocence, the premise underlying the majority's definition was viewed as "creat[ing] precisely the evils that the Double Jeopardy Clause was designed to prevent."[122] Justice Brennan noted that the clause was not merely intended to preserve rulings of factual innocence, for it is well settled that even erroneous acquittals preclude reprosecution.[123] Rather, double jeopardy principles are designed to prevent multiple prosecutions.[124] Recognizing the heavy personal strain a second trial imposes upon a defendant,[125] and the tactical advantages accruing to the prosecution,[126] the dissent would not have allowed the government more than one opportunity to con-

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[118] 437 U.S. at 102 (Brennan, J., dissenting). Justice Brennan lamented the passing of the "crystal clear" *Jenkins* approach, which simply barred reprosecution of a criminal defendant after "[a]ny midtrial order contemplating an end to all prosecution." *Id.* at 114–15.

[119] *Id.* at 110–12 (Brennan, J., dissenting); *see* note 81 *supra*.

[120] 437 U.S. at 102–03 (Brennan, J., dissenting).

[121] *Id.* at 110–11 (Brennan, J., dissenting).

[122] *Id.* at 116 (Brennan, J., dissenting). The premise advanced by the majority that a defendant who has successfully "avoid[ed] conviction on a 'ground unrelated to factual innocence' somehow stands on a different constitutional footing" than an acquitted defendant was "simply untenable" to the dissent. *Id.* at 108 (Brennan, J., dissenting).

[123] *Id.* (Brennan, J., dissenting). This fundamental rule, solidified by the Court's opinion in Fong Foo v. United States, 369 U.S. 141, 143 (1962), was reaffirmed in Sanabria v. United States, 437 U.S. 54, 75–78 (1978), where the Court held that once "a defendant has been acquitted at trial he may not be retried on the same offense, even if the legal rulings underlying the acquittal were erroneous." *Sanabria*, 431 U.S. at 64. "The question is not . . . whether a defendant is 'to receive absolution for his crime,'" but whether the underlying double jeopardy policies protect him from having to "run the gantlet twice." Gori v. United States, 367 U.S. at 373 (Douglas, J., dissenting); *see* Green v. United States, 355 U.S. 184, 188 (1957).

[124] 437 U.S. at 104 (Brennan, J., dissenting).

[125] *Id.* at 108 (Brennan, J., dissenting); *see* Green v. United States, 355 U.S. 184, 187–88 (1957); note 26 *supra*. The heavy strain, embarrassment and expense of repeated criminal trials subject the defendant to burdens not unlike criminal punishment itself, even where he is not incarcerated between trials. *See* Schulhofer, *supra* note 26, at 498–500.

[126] 437 U.S. at 108 (Brennan, J., dissenting). By having viewed all of the defendant's evidence at the first trial, the government will gain the advantage upon retrial of being able "to shore up any . . . weak points of its case and obtain all the other advantages at the second trial that the Double Jeopardy Clause was designed to forbid." *Id.*

vince a court to convict.[127] Since the basis for the dismissal granted by the trial judge was viewed as a "complete defense" to the criminal charges alleged in the indictment,[128] the dissenting justices likened it to favorable rulings based on certain affirmative defenses that "preclude the imposition of criminal liability on defendants."[129] The majority's definition of "acquittal" was criticized as being too narrow to encompass even the most common affirmative defenses, most of which often require a full factual and evidentiary development at trial.[130] Lastly, as a practical consideration, the dissent forewarned of the confusion and uncertainty likely to cloud future judicial attempts at determining the double jeopardy implications of similar judgments.[131]

The substantial disparity evident in the Supreme Court's analysis in *Scott* is attributable at least in part to the confusion inherent in recent double jeopardy jurisprudence. While the 1971 amendment to the government's statutory right to appeal in criminal cases established the clause itself as the heart of double jeopardy analysis, the need for judicial guidance remained.[132] The midtrial dismissal

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[127] *Id.* at 108–09 (Brennan, J., dissenting). The dissent viewed the majority's "suggestion that final judgments not based on innocence" infringe upon the public's right to have one full and fair opportunity to convict as "plainly erroneous." *Id.* What is important is that the government has had "every opportunity to dissuade the trial court from committing erroneous rulings favorable to the accused" and has failed. *Id.* at 107 (Brennan, J., dissenting).

[128] *Id.* at 103 (Brennan, J., dissenting). Although the dismissal of the indictment with prejudice may be a distastefully severe remedy in that the prosecution is terminated without a determination of guilt or innocence, "such severe remedies are not unique in the application of constitutional standards." Strunk v. United States, 412 U.S. 434, 439–40 (1973).

[129] 437 U.S. at 111 (Brennan, J., dissenting). Among these legal principles that operate as affirmative defenses, the dissent cited "entrapment, insanity, right to speedy trial, [and] statute of limitations," as well as preindictment delay. *Id.*

[130] *Id.* The dissent noted that these legal principles "cannot ordinarily be considered apart from the factual development at trial." *Id.* The defense of the statute of limitations is suggested as an example of the mixed questions of law and fact now excluded from the majority's definition of acquittal. *Id.* at 115 & n.10 (Brennan, J., dissenting). Although a favorable resolution of one of these affirmative defenses for the defendant usually does not determine his factual innocence, it was "simply untenable" to the dissent to allow reprosecution in light of its status as a complete defense. *Id.* at 113–14 (Brennan, J., dissenting); *see* Comment, *supra* note 23, at 343–44.

[131] 437 U.S. at 103 (Brennan, J., dissenting).

[132] Because of its apparently simple approach, the 1971 amendment to the Criminal Appeals Act was greeted by the Court as the beginning of "[t]he end to our problems with this Act." United States v. Weller, 401 U.S. 254, 255 n.1 (1971). This optimism, however, was soon dispelled as it became increasingly apparent to the courts that "the amendment has by no means solved all [the] problems in this field." United States v. Jenkins, 490 F.2d at 869 n.1. Most recently, the Supreme Court noted in Crist v. Bretz, 437 U.S. 28 (1978), decided the same day as *Scott*, that the "deceptively plain language [of the double jeopardy clause] has given rise to problems both subtle and complex, problems illustrated by no less than eight cases argued here this very Term." *Id.* at 32 (footnote omitted).

granted by the district court in *Scott* "falls somewhere in between" an unappealable acquittal on the merits and an appealable mistrial.[133] Under the approach taken in *Jenkins* and *Lee*, the granting of this dismissal should not be analogized to a declaration of a mistrial, for "it is of critical importance whether the proceedings in the trial court terminate in a mistrial as they did in the *Somerville* line of cases, or in the defendant's favor, as they did here."[134] The fundamental distinction turns on whether the trial court intended a termination or merely a postponement of the prosecution.[135] Where, by a midtrial dismissal, the trial court determines that the defendant "simply cannot be convicted of the offense charged,"[136] the dismissal should stand as a termination of the criminal proceedings in his favor from which no government appeal may be taken.[137]

Instead of adhering to this unequivocal double jeopardy standard, the *Scott* majority engaged in an unnecessary struggle to define an "acquittal."[138] It is an exaltation of form over substance to labor needlessly over attaching the label of "acquittal" to the trial court disposition.[139] The *Ball* doctrine barring appeals from acquittals is not conclusive in resolving the double jeopardy implications of other trial court dismissals.[140] In amending the Criminal Appeals Act, Congress intended to bar any appeal, even from a dismissal, when further prosecution would violate the double jeopardy clause.[141] What is relevant to the issue of appealability is the effect of reprosecution upon underlying double jeopardy interests, not the label that may be attached to the dismissal.[142]

In *Scott*, the government sought reprosecution on a count of the indictment dismissed by the district court for impermissible prein-

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[133] Brief for United States, *supra* note 1, at 6. The government, in fact, conceded that the dismissal of the indictment by the district court was not "the functional equivalent of a mistrial." *Id.* at 6–7, 11–12.

[134] United States v. Jenkins, 420 U.S. at 365 n.7; Lee v. United States, 432 U.S. at 29–30; Wurzburg, *supra* note 100, at 360.

[135] Lee v. United States, 432 U.S. at 30; Sanabria v. United States, 437 U.S. 54, 75 (1978); *see* United States v. Jorn, 400 U.S. at 478 n.7; Comment, *supra* note 23, at 316 n.71.

[136] Lee v. United States, 432 U.S. at 30; Finch v. United States, 433 U.S. 676, 677 (1977).

[137] United States v. Scott, 437 U.S. at 102 (Brennan, J., dissenting).

[138] *See* note 81 *supra* and accompanying text.

[139] *See* Sanabria v. United States, 437 U.S. 54, 66 (1978); Serfass v. United States, 420 U.S. at 392–93.

[140] *See* Comment, *supra* note 23, at 330; notes 37–41 *supra* and accompanying text.

[141] *See* note 35 *supra*.

[142] United States v. Sisson, 399 U.S. at 279 n.7; United States v. Velazquez, 490 F.2d 29, 39–42 (2d Cir. 1973) (dissenting opinion); Comment, *supra* note 22, at 539; Comment, *supra* note 23, at 336; *see* 9 MOORE'S FEDERAL PRACTICE, *supra* note 29, ¶ 110.04[3], at 102.13–.14 & n.43.

dictment delay.[143] After hearing all the evidence at trial, the court determined that the intentional prosecutorial delay between the commission of the offense and the initiation of prosecution against the defendant had prejudiced his ability to defend himself.[144] *United States v. Marion*[145] established that when a defendant demonstrates actual prejudice to his defense as a result of this delay, the due process clause of the fifth amendment sanctions dismissal of the affected counts of the indictment.[146] A recent clarification of the *Marion* due process inquiry in *United States v. Lovasco*[147] requires courts to consider "the reasons for the delay as well as the prejudice to the accused."[148] Consistent with due process analysis, courts must determine whether prosecution of the defendant after the delay in the initiation of criminal proceedings against him violates "'the community's sense of fair play and decency.'"[149]

It is arguable that the district court may have erred in applying the *Marion* standard, as adopted by the Sixth Circuit, to the circumstances in *Scott*.[150] The relatively brief length of the delay,[151]

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[143] United States v. Scott, 544 F.2d at 903.

[144] *See* note 8 *supra* and accompanying text.

[145] 404 U.S. 307 (1971).

[146] *Id.* at 324. Although the sixth amendment guarantees that "[i]n all criminal prosecutions the accused shall enjoy the right to a speedy and public trial," U.S. CONST. amend. VI, *Marion* establishes that the "speedy trial provision has no application until the putative defendant . . . becomes an 'accused'" through the initiation of criminal proceedings against him. 404 U.S. at 313. Federal Rule of Criminal Procedure 48(b), which authorizes the dismissal of an indictment "[i]f there is unnecessary delay in presenting the charge to the grand jury," is also inapplicable to preaccusation delay. 404 U.S. at 319.

[147] 431 U.S. 783 (1977).

[148] *Id.* at 790.

[149] *Id.* (quoting Rochin v. California, 342 U.S. 165, 173 (1952)).

[150] The Sixth Circuit has recognized that a dismissal is authorized by *Marion* and the due process clause upon a showing by the defendant of actual prejudice to his defense and that the government's purpose for the delay was to gain an unfair tactical advantage. United States v. Swainson, 548 F.2d 657, 663 (6th Cir. 1977); United States v. Alred, 513 F.2d 330, 332 (6th Cir. 1975); United States v. Giacalone, 477 F.2d 1273, 1276–77 (6th Cir. 1973); United States v. Stewart, 426 F.Supp. 58, 59 (E.D. Mich. 1976); United States v. Alderman, 423 F. Supp. 847, 852 (D. Md. 1976); *accord*, United States v. Revada, 574 F.2d 1047, 1048 (10th Cir. 1978). Other circuits have adopted more of a balancing approach, weighing three factors —the length of the delay, actual prejudice to the defendant resulting from the delay and the government's reason for the delay. United States v. Titus, 576 F.2d 210, 211–12 (9th Cir. 1978); United States v. Medina-Arellano, 569 F.2d 349, 353 (5th Cir. 1978); United States v. Pallan, 571 F.2d 497, 500 (9th Cir.), *cert. denied*, 436 U.S. 911 (1978); United States v. Shaw, 555 F.2d 1295, 1299 (5th Cir. 1977); United States v. Mays, 549 F.2d 670, 677–78 (9th Cir. 1977).

[151] The delay of five and one-half months between the dates of the commission of the alleged offenses and the return of the indictment was described by the government as "not even long enough to justify judicial inquiry." Brief for United States, *supra* note 1, at 11 n.8. While it is clear that "[a]ctual prejudice to the defense of a criminal case may result from the shortest and most necessary delay," the length of the delay in *Scott* by itself does not seem so unreasonable

the tenuous nature of the claimed resultant prejudice,[152] and the justifications advanced by the government[153] suggest that this was not the strongest case for a dismissal for oppressive preindictment delay.[154] The trial judge's decision in these cases, however, involves a delicate discretionary judgment,[155] one that he is most suited to

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and prejudicial as to require the dismissal of the affected counts of the indictment. United States v. Marion, 404 U.S. at 324; *see* United States v. Cowsen, 530 F.2d 734, 737 (7th Cir. 1976).

The District of Columbia Circuit, however, has developed a line of *Marion* cases applying a stricter judicial standard to delays in cases involving narcotics offenses where the government's case rests upon the work of undercover agents. United States v. Jones, 524 F.2d 834, 839–41 (D.C. Cir. 1975); Robinson v. United States, 459 F.2d 847, 851–54 (D.C. Cir. 1972); Ross v. United States, 349 F.2d 210, 212–13 (D.C. Cir. 1965). As a "'rough rule of thumb,'" these cases have established that delays of over four months between the undercover agent's detection of the crime and notice to the accused of criminal charges require a "detailed exploration of underlying reasons." 524 F.2d at 840–41; 459 F.2d at 851–52. In reconciling "the competing interests of effective enforcement of the narcotics laws and early notice to the accused-to-be of the impending accusation," 524 F.2d at 839–40, the District of Columbia Circuit approach requires the government to diligently attempt to notify the accused after this four month period, unless further delay was necessitated by the desirability of preserving the agent's cover. 459 F.2d at 851–52; *see* United States v. Williams, 352 F. Supp. 1387, 1389 (D.C. Cir. 1973).

[152] The district court found actual prejudice based upon the dimming of defendant's memory of the events surrounding the offenses charged. *See* Brief for Respondent, *supra* note 4, at 4. It has been cautioned, however, that "[i]f the limitation period for prosecution were measured by the length of the defendant's memory of routine events, few crimes could be prosecuted." United States v. Cowsen, 530 F.2d 734, 736 (7th Cir. 1976); *see* United States v. Jones, 524 F.2d 834, 844 (D.C. Cir. 1975). But when the defendant can convince the trial judge of his inability to recollect the events surrounding the alleged offenses as a result of preindictment delay, he is entitled to have that factor weighed toward a finding of actual prejudice. United States v. Mays, 549 F.2d 670, 680 (9th Cir. 1977).

[153] The government noted that there were several justifications for the delay in seeking the indictment, "including the need to protect the identity of an informant, the desirability of pursuing additional leads in the investigation to discover respondent's confederates and source of supply, and the fact that no grand jury was sitting for two months." Brief for United States, *supra* note 1, at 11 n.8. If the reasons for the delay were legitimately in furtherance of preserving an ongoing investigation or protecting the identity of the government informant, due process does not require the dismissal of the indictment. United States v. Lovasco, 431 U.S. at 791–92; United States v. Pallan, 571 F.2d 497, 500 (9th Cir. 1978); United States v. Cowsen, 530 F.2d 734, 737 (7th Cir. 1976); Amsterdam, *Speedy Criminal Trials: Rights and Remedies*, 27 STAN. L. REV. 525, 527–28 (1975). Where, however, the prejudicial delay was a prosecutorial tactic to gain an advantage over the accused, the indictment should be dismissed for the due process violation. United States v. Marion, 404 U.S. at 324; United States v. Revada, 574 F.2d 1047, 1048 (10th Cir. 1978).

[154] In *Lovasco*, Justice Marshall warned of the many harmful consequences of pressuring prosecutors into filing criminal charges prematurely to avoid the threat of dismissal for preindictment delay. 431 U.S. at 792–95. Prosecutors would be unable to complete ongoing investigations, defendants would be faced with charges that might not have been pursued after a complete investigation, and courts would be forced to spend valuable public resources on prosecutions not in the public interest. *Id.*

[155] Robinson v. United States, 459 F.2d 847, 853 (D.C. Cir. 1972); *see* United States v. Marion, 404 U.S. at 324–25.

make. Moreover, even if the dismissal was erroneous, the burden of judicial error should not fall upon the defendant.[156] Whether the dismissal was correct or not, the effects of reprosecution are the same for the defendant.[157] The dismissal, coming at the close of all the evidence at trial, obviously did not contemplate reprosecution,[158] but rather was a determination by the court "that the defendant simply cannot be convicted of the offense charged."[159] The trial judge's decision to grant the dismissal at that stage of the proceedings was a judgment that the defendant should not be exposed to the risk of conviction on the affected counts.[160]

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[156] In a vigorous dissent in *Gori*, in which three other justices joined, Justice Douglas concluded that the "risk of judicial arbitrariness" should properly rest on the government rather than on the defendant. 367 U.S. at 373 (Douglas, J., dissenting). The burden of this risk is properly placed on the government, for double jeopardy principles were "designed to help equalize the position of government and the individual," *id.* at 372, "redressing at least part of the potential imbalance of resources." Schulhofer, *supra* note 26, at 505.

[157] As noted by Justice Brennan in the dissenting opinion, "however egregious the error of the acquittal, the termination favorable to the accused has been regarded as no different from a factfinder's acquittal that resulted from errors of the trial judge." 437 U.S. at 107 (Brennan, J., dissenting).

[158] In granting the midtrial dismissal, "the District Judge concluded that the facts adduced at trial established that unjustifiable and prejudicial preindictment delay gave respondent a complete defense to the charges contained in count one." United States v. Scott, 437 U.S. at 103 (Brennan, J., dissenting). It is obvious that the actual prejudice found to have been suffered by the defense in this case—the dimming of memories—cannot be cured by the issuance of a second indictment. *See* United States v. Clay, 481 F.2d 133, 136 (7th Cir. 1973).

[159] Lee v. United States, 432 U.S. at 30; Finch v. United States, 433 U.S. 676, 677 (1977).

[160] *See* 437 U.S. at 111 (Brennan, J., dissenting). The government argued that the legal grounds for motions to dismiss that cannot be resolved prior to trial should not be ruled upon until after verdict. Brief for United States, *supra* note 1, at 8, 24–25. If the defendant is acquitted, there would be no need to rule upon the legal claim. If convicted, the defendant's legal objections could be determined in his favor and the verdict set aside. *See* FED. R. CRIM. P. 34. In this manner, the government's right of appeal would be preserved, since a successful challenge would merely require a reinstatement of the verdict, rather than a second prosecution. *See* United States v. Wilson, 420 U.S. at 345, 352–53; United States v. Ball, 163 U.S. at 672. This approach in essence has been supported by legal commentators. *See Double Jeopardy*, *supra* note 30, at 315–17; Comment, *supra* note 23, at 347–48. The problem with this approach is evident in cases where judicial or prosecutorial error or misconduct so seriously prejudices a defendant's case that conviction seems inevitable. Requiring a defendant to continue in these tainted proceedings toward an unjust conviction, followed by his motion to set aside the verdict, and, if successful, governmental appeal to reinstate it, spawns substantially the same "anxiety, expense, and delay occasioned by multiple prosecutions." United States v. Dinitz, 424 U.S. at 608; *see* United States v. Tateo, 377 U.S. 463, 466–67 (1964). Authority must remain with the trial judge to terminate the proceedings favorably to the defendant as soon as he becomes convinced that there has been a violation of due process. *See* United States v. Mays, 549 F.2d 670, 680 (9th Cir. 1977). Moreover, the effect of actual prejudice to the defense is most accurately assessed "in the context of the evidence adduced at trial," and the trial judge may prefer to "reserve judgment on defendant's motion until the close of all evidence in the trial." United States v. Wilford, 364 F. Supp. 738, 740 (D. Del. 1973).

Furthermore, the dismissal was granted well after jeopardy had attached, and after all of the defendant's evidence had been revealed. To allow reprosecution after the government has viewed the defendant's evidence would unfairly strengthen the already powerful prosecutorial arsenal. Having gained penetrating insight into defense tactics and substantive defenses, the government could strengthen its case upon retrial.[161] The prosecution, which failed to convince the trial court to convict in the first instance, would be given a second chance, thus enhancing the possibility of the unjust conviction of the innocent.[162] The resulting personal strain, anxiety and expense to the defendant is the very evil which the constitutional prohibition seeks to prevent.[163]

Through its decision in *Sisson*, the Supreme Court called upon Congress to clearly delineate the scope of appellate jurisdiction in criminal cases.[164] Weary of the uncertainty and confusion inherent in pigeonholing trial court dispositions into limited statutory categories, the Court sought "a clear, easily administered test."[165] Congress responded by making the double jeopardy clause itself the only barrier to the government's right of appeal.[166] Courts were presented with the task of determining the appealability of particular judgments by considering the effect of reprosecution upon underlying double jeopardy interests. Taken together, the 1975 trilogy of *Wilson*, *Jenkins* and *Serfass* represented a substantial step by the Supreme Court toward simplifying an issue that had been continually beset by confusion.[167] By fashioning a clear and practical approach to the issue of government appeal, the Court had met the challenge posed by the 1971 statutory amendment.[168] The clarity of this approach, however, has been abrogated by the Court's decision in *Scott*. By making appealability, for double jeopardy purposes, depend upon whether the trial judge's decision can fairly be labeled an "acquittal," *Scott* returns double jeopardy jurisprudence to the imbroglio com-

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[161] United States v. Wilson, 420 U.S. at 352; *see* Schulhofer, *supra* note 26, at 506 & n.239, 508–09; *Double Jeopardy*, *supra* note 30, at 332 n.196; Comment, *supra* note 23, at 341–42.

[162] *See* Green v. United States, 355 U.S. 184, 187–88 (1957); Note *supra* note 26, at 1837–39, 1841; Comment, *supra* note 23, at 340–41.

[163] Green v. United States, 355 U.S. 184, 187–88 (1957); *see* Schulhofer, *supra* note 26, at 498.

[164] United States v. Sisson, 399 U.S. at 307–08.

[165] *Id.* at 307.

[166] *See* notes 35–36 *supra* and accompanying text.

[167] *See* notes 96–97 *supra* and accompanying text.

[168] *See Double Jeopardy*, *supra* note 30, at 350; Comment, *supra* note 22, at 541.

plained of in *Sisson*.[169] Moreover, by restricting unappealable judgments to determinations of factual innocence, the *Scott* analysis fails to adequately appraise the full complement of interests protected by the double jeopardy clause.

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[169] *See* note 81 *supra* and accompanying text; *see* Wurzburg, *supra* note 100, at 362.