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## WEIGHT VERSUS SUFFICIENCY OF EVIDENCE: *TIBBS v. FLORIDA*

### INTRODUCTION

The double jeopardy clause provides that no person shall be twice brought into danger of prosecution for one and the same offense.[1] This constitutional provision protects an accused from being subjected to a second punishment[2] as well as from being tried again for the same crime.[3]

The protection against retrial for the same offense is not applicable, however, when an appellate court reverses a defendant's conviction because of an error in the trial proceedings.[4] Retrial is allowed in this case on the rationale that the reversal of the conviction implies neither the accused's guilt or innocence, nor the government's failure to prove its case.[5]

On the other hand, the double jeopardy protection against retrial for the same offense will apply when an appellate court reverses the defendant's conviction based on insufficiency of the evidence.[6] In this case, unlike that of trial error, reversal means that the government's case was so lacking that it never should have been brought before a jury. Since the defendant should have been

1. "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . . ." U.S. CONST. amend. V. The double jeopardy clause was made applicable to the states through the due process clause of the fourteenth amendment in Benton v. Maryland, 395 U.S. 784 (1969).

2. Whalen v. United States, 445 U.S. 684, 688 (1980); North Carolina v. Pearce, 395 U.S. 711, 717 (1969); *Ex parte* Lange, 85 U.S. (18 Wall.) 163, 168 (1873); United States v. Benz, 282 U.S. 304, 307 (1931).

3. Stroud v. United States, 251 U.S. 15, 18 (1919); Abney v. United States, 431 U.S. 651, 660-61 (1977); Serfass v. United States, 420 U.S. 377, 387-88 (1975); United States v. Ewell, 383 U.S. 116, 124 (1966); United States v. Ball, 163 U.S. 662, 669-70 (1896); Green v. United States, 355 U.S. 184, 187 (1957). For the scope of the constitutional protections afforded by the double jeopardy clause see generally, 3 F. WHARTON, CRIMINAL EVIDENCE §§ 655-661 (C. Tortia 13th ed. 1972); Meyers and Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions,* 74 HARV. L. REV. 1 (1960); Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences,* 78 MICH. L. REV. 1001 (1980); Note, *Twice in Jeopardy,* 75 YALE L.J. 262 (1965).

4. United States v. Tateo, 377 U.S. 463, 465 (1964); Burks v. United States, 437 U.S. 1, 14-16 (1978).

5. *Burks,* 437 U.S. at 15.

6. *Id.* at 15-17.

acquitted at the trial level, retrial would give the government an unwarranted second opportunity to prove its case.[7]

In *Tibbs v. Florida*,[8] however, the Supreme Court considered the double jeopardy issue as it arose when an appellate court reversed a conviction, not on the ground of trial error or insufficient evidence, but because the record showed a lack of evidentiary weight. The Court ruled that when an appellate court reverses a conviction on this basis the double jeopardy clause will not protect the defendant against retrial.[9] The Court held that, in contrast to a conviction reversed because of insufficiency of evidence, a reversal based on lack of evidentiary weight does not imply that acquittal was the only proper verdict, or that the government failed to prove its case. Rather, a reversal based on the weight of the evidence means only that the appellate court, sitting as a "thirteenth juror," disagrees with the jury's evaluation of the conflicting testimony.[10]

This Comment will discuss the reasons for the *Tibbs* Court ruling that a retrial is not prohibited by the double jeopardy clause if it is the result of an appellate court reversal based on inadequate evidentiary weight.[11] This Comment will attempt to demonstrate, through an analysis of *Tibbs*, the paradoxical relationship between weight and sufficiency in cases where the evidence has been judged inadequate to sustain a conviction.[12]

In *Tibbs*, the use of the weight/sufficiency dichotomy may be

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7. *Id.* at 16.
8. 457 U.S. 31 (1982).
9. *Id.* at 39-40.
10. *Id.* at 40-41.
11. For a discussion of the impact of the *Tibbs* decision see generally Note, *A Retreat in Double Jeopardy Policy: Tibbs v. Florida*, 24 B.C.L. REV. 771 (1983); Note, *Double Jeopardy: Retrial After Reversal of a Conviction on Evidentiary Grounds*, 43 LA. L. REV. 1061 (1983); Note, *Fifth Amendment—Twice Jeopardizing The Rights of The Accused: The Supreme Court's Tibbs and Kennedy Decisions*, 73 J. CRIM. L. & CRIMINOLOGY 1474 (1982).
12. In distinguishing weight from sufficiency it has been held that sufficient evidence is "such evidence as in amount is adequate to justify the court or jury in adopting the conclusion in support of which it was adduced. Evidence is sufficient if it is such as to satisfy an unprejudiced mind." 32A C.J.S. *Evidence* § 1016 (1964). Weight of the evidence, on the other hand,

> has been said to signify that the parol proof on one side of a cause is greater than the other; that the party having the burden of proof will be entitled to a verdict, if, on weighing the evidence, it is found that the greater amount of creditable evidence sustains the issue which is to be established.

*Id. See generally* 9 WIGMORE ON EVIDENCE §§ 2494-96 (rev. ed. 1981); 30 AM. JUR. 2D *Evidence* § 1080. *See, e.g.*, United States v. Agurs, 427 U.S. 97 (1976); Johnson v. Louisiana, 406 U.S. 356 (1972). *See infra* note 30.

viewed in two ways, one specious, the other arguably valid. From an evidentiary point of view, the concepts of weight and sufficiency by themselves do not explain adequately why retrial is allowed when the evidence as a whole is inadequate to sustain a conviction. When an appellate court reviews evidence and finds it to be inadequate, any distinction made on either weight or sufficiency may indeed be specious. However, by scrutinizing the weight of evidence presented below, as well as its sufficiency, the appellate court may in fact be assuming a role independent of its function as a reviewer of evidence. Consideration of the weight of the evidence allows an appellate court to possess some dominion over the jury and also to consider the discretionary factors incident to a decision to retry. This second role of the appellate court is what validates the weight/sufficiency distinction.

## I. THE FACTS: *Tibbs v. Florida*

In *Tibbs v. Florida*, the state charged the petitioner with rape and with the murder of the rape victim's companion. Tibbs was convicted in a Florida jury trial. On appeal, the Florida Supreme Court noted certain infirmities in the evidence at trial which cast doubt on the credibility of the victim's testimony and on the substantiality of the state's evidence in placing Tibbs at the scene of the crime.[13] These evidentiary weaknesses, coupled with the fact that Tibbs received the death sentence, persuaded the Florida Supreme Court to reverse his conviction and remand the case for a new trial.[14]

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13. Tibbs v. State, 337 So. 2d 789, 790-91 (Fla. 1976). The Florida Supreme Court found the State's case weak in six areas: First, except for the victim's testimony, the State introduced no evidence placing Tibbs in or near Fort Myers on the day of the crimes. Second, although the rape victim gave a detailed description of the assailant's truck, police never found the vehicle. Third, police discovered neither a gun nor car keys in Tibbs' possession. Fourth, Tibbs cooperated fully with the police when he was stopped and arrested. Fifth, the State introduced no evidence casting doubt on Tibbs' veracity. Tibbs, on the other hand, produced witnesses who attested to his good reputation. Sixth, the rape victim's testimony was suspect since she smoked marijuana shortly before the crimes and because her assertion that the crimes took place during the daylight conflicted with other evidence suggesting the events occured after nightfall. 457 U.S. at 36-37.

14. The Florida Supreme Court reversed pursuant to FLA. APP. R. 6.16(b) (1962), *recodified* as FLA. APP. R. 9.140(f), which states in relevant part: "Upon an appeal from the judgment by a defendant who has been sentenced to death the appellate court shall review the evidence to determine if the *interests of justice* require a new trial, whether the insufficiency of the evidence is a ground of appeal or not." (emphasis added).

At retrial, Tibbs successfully moved for dismissal on the ground that a new trial would violate the double jeopardy clause of the fifth amendment.[15] However, the intermediate appellate court reversed, stating that the original reversal of Tibbs' conviction by the Florida Supreme Court was not "on the basis of pure insufficiency of the evidence but rather was premised upon the majority's view that the evidence was inherently weak and seriously contradicted . . . ."[16] The Florida Supreme Court affirmed this decision, stating that when it had reversed and remanded the case almost five years earlier, the reason for doing so had indeed been that the weight of the state's evidence was tenuous and insubstantial.[17] Consequently, since reversal was not based on insufficiency of the evidence but rather on its insubstantial weight, the arguments used by Tibbs to bar retrial after a reversal of conviction were inapplicable.[18]

The United States Supreme Court granted certiorari and addressed the question of whether retrying a defendant violated the double jeopardy clause if the conviction was reversed based upon the weight of the evidence.[19] In affirming the decision of the Florida Supreme Court, the Court refused to extend the rule enunciated in *Burks v. United States*[20] which states that retrial is barred when a court reverses a decision due to the insufficiency of the evidence.[21]

## II. The Supreme Court's Holding and Rationale

By a vote of five to four, the Supreme Court held that when a conviction is reversed and remanded, based on the weight of the evidence, it falls within the rule that a defendant who successfully

15. *See supra* note 1.
16. State v. Tibbs, 370 So. 2d 386, 388 (Fla. Dist. Ct. App. 1979).
17. Tibbs v. State, 397 So. 2d 1120, 1127 (Fla. 1981).
18. In arguing that retrial would violate the double jeopardy clause, the petitioner cited Burks v. United States, 437 U.S. 1 (1978), and Greene v. Massey, 437 U.S. 19 (1978). In *Burks*, the United States Supreme Court ruled that in cases where a conviction is reversed due to the insufficiency of the evidence the state has failed to prove guilt beyond reasonable doubt. Since a new trial would provide the prosecution with a second opportunity to furnish evidence sufficient to sustain a conviction, retrial is barred by the double jeopardy clause. *Greene* applied the ruling in *Burks* to the states. *See infra* notes 52-59 and accompanying text.
19. 457 U.S. at 39-47.
20. 437 U.S. 1 (1978).
21. *Id.* at 18.

appeals is subject to retrial.[22] Justice O'Connor, writing for the Court, reviewed the rationale behind this well-established rule, and found that society would pay too high a price "were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction."[23] Additionally, the Court stated that a retrial after a reversal of a conviction is not the type of governmental oppression meant to be precluded by the double jeopardy clause.[24]

An exception to this rule allowing retrial after a defendant's successful appeal was created by the Court in the companion cases of *Burks v. United States* and *Greene v. Massey*.[25] In these cases, the Supreme Court held that the double jeopardy clause precludes retrial when a reversal of a conviction is based on the insufficiency of the evidence presented by the state. The Court found that in cases where evidence is not sufficient to sustain a conviction, acquittal is the only proper verdict, and that this was a necessary conclusion regardless of whether the case was reviewed by an appellate or trial court.[26]

The "insufficiency" exception is premised on two considerations. The first is that the double jeopardy clause attaches more importance to judgments of acquittal than judgments of conviction. Second, the double jeopardy clause forbids a second trial for the purpose of giving the prosecution a second chance to present new evidence in order to win a conviction.[27]

In *Tibbs*, however, the Court held that the petitioner's case did not fall within the realm of this "insufficiency" exception. The Court stated instead that when an appellate court reverses a conviction, and bases that decision on the weight of the evidence, the court is sitting as a "thirteenth juror" and disagrees with the jury's resolution of conflicting testimony. In contrast, if an appellate

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22. 457 U.S. at 39-40 (citing United States v. Ball, 163 U.S. 662, 672 (1896)).

23. 457 U.S. at 40 (quoting Justice Harlan in *Tateo*, 377 U.S. 463, 466 (1964)). In *Burks*, Chief Justice Burger asserts that this is the most reasonable justification. 437 U.S. at 15.

24. 457 U.S. at 40.

25. *See supra* note 18. In *Burks*, Chief Justice Burger held that in insufficiency of evidence cases there must be an exception because "such an appellate reversal means that the government's case was so lacking that it should not have even been *submitted* to the jury." 437 U.S. at 16 (emphasis original).

26. 457 U.S. at 40-42.

27. *Id.* at 41.

court rules that the evidence is insufficient, it is also ruling, in effect, that the evidence should never have been submitted to the jury, and that a directed verdict of acquittal would have been proper.[28] The Court held that in the former case, the double jeopardy clause is not violated by retrial, since such a disagreement between judge and jury does not imply that acquittal was the only proper verdict. Consequently, the deference accorded verdicts of acquittal is not present. Furthermore, the Court noted, a new trial would not be permitting the government a second chance to "wear the defendant down," since the prosecution has already met its burden.[29] Therefore, a second trial would not amount to the governmental oppression prohibited by the double jeopardy clause.

For these reasons, the *Tibbs* Court held that when a defendant's conviction is reversed and remanded, because of inadequate evidentiary weight, the accused will fall within the rule that a defendant who successfully appeals a conviction is subject to retrial. The Court distinguished between "weight" and "sufficiency" cases, thus justifying the exclusion from the established exception to the general rule.

In his dissenting opinion, Justice White argued that in order to convict, the prosecution must satisfy both the federal standard of sufficiency of evidence[30] and a state standard based on weight of the evidence. In *Tibbs*, since no procedural error at trial prevented the state from presenting its best case, the reversal meant that the state simply failed to present evidence adequate to sustain a conviction. Morever, retrial, barred under federal law, should also be barred under state law; in both "the interests of the State in overcoming the evidentiary insufficiency of its case would seem to be exactly the same . . . the interests of the defendant in avoiding a second trial would also seem to be exactly the same . . . .[31]

28. *Id.* at 42.

29. *Id.* at 44.

30. In Jackson v. Virginia, 443 U.S. 307 (1979), *reh'g denied* 444 U.S. 890 (1979), the Supreme Court ruled upon a challenge to a state conviction brought under 28 U.S.C. § 2254 (1977). The Court held that a federal habeas corpus court must consider not whether there was any evidence to support a state conviction, but whether there was sufficient evidence to justify a rational trier of fact's finding of guilt beyond a reasonable doubt. The Court applied the standard of *In re* Winship, 397 U.S. 358 (1970), formulated in Davis v. United States, 160 U.S. 469, 493 (1895), where it was held that the due process clause protects the accused against conviction except upon proof beyond reasonable doubt of every fact necessary to constitute the crime with which he is charged.

31. 457 U.S. at 49.

In responding to the majority's contention that the double jeopardy clause "attaches special weight to judgments of acquittal,"[32] Justice White maintained that in neither insufficiency nor inadequate weight cases has there been an actual acquittal by the initial factfinder. Therefore, it is not essential that "acquittal be the only proper verdict."[33] However, regardless of whether acquittal is the only proper verdict, the fact remains that at trial the state failed to meet the evidentiary requirements of state law in order to win a conviction. Allowing retrial in this case would counter the policy considerations in *Burks* and *Greene* and "would unfairly burden the defendant and create a risk of conviction through sheer governmental perseverance."[34]

Justice White asserted that given these considerations the only proper distinction to be made is that between procedure and evidence. Where the former is fraught with error, retrial would be permitted. If the latter is deemed inadequate to win a conviction, retrial would be barred.[35] In light of Justice White's dissent, the material issue presented by *Tibbs*, then, is whether the weight of the evidence should be treated differently from its sufficiency. Under both "weight" and "sufficiency" analyses, evidence may not be adequate to win a conviction. That the Supreme Court uses the classification of weight to permit retrial raises the question of whether the failure of evidence due to its lack of weight is materially different from a failure due to insufficiency.[36] Also, because the question of weight necessarily involves the participation of the jury in evaluating the evidence, the jury and the judge—the thirteenth juror—become the focal point in studying the possible distinction between weight and sufficiency in the area of appellate review.

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32. *Id.* (quoting the majority opinion at 41).

33. *Id.* (quoting the majority opinion at 42).

34. *Id.* at 50 (quoting the majority opinion at 41).

35. *Id.* at 50-51.

36. This is precisely the dilemma that plagued the Florida Supreme Court. The Florida Supreme Court "resolved" the issue by holding that "weight" cases would be left exclusively to the trial judge and jury and would no longer be open to appellate review. Tibbs v. State, 397 So. 2d at 1125.

## III. Double Jeopardy Background in the Appellate Review Area

### A. *Early Disorder*

In the preface to his dissent in *Tibbs*, Justice White noted that the meaning of the double jeopardy clause as applied to appellate review has not always been readily apparent.[37] The general meaning and intent of the double jeopardy clause may be revealed through a cursory examination of its historical development, as presented by a variety of sources "ranging from legal maxims to casual references in contemporary commentary."[38]

The implications of the double jeopardy clause are clear when the defendant has been acquitted at trial.[39] Retrial would put the

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37. 457 U.S. at 47. The cases cited by Justice White support this contention. In Bryan v. United States, 338 U.S. 552 (1950), it was held that a United States Court of Appeals could give directions upon remand where the evidence was insufficient under the authority of section 2106 of the New Judicial Code, 28 U.S.C. § 2106 (1977), rather than being bound by FED. R. CRIM. P. 29 requiring a judgment of acquittal. The ruling in Sapir v. United States, 348 U.S. 373 (1955), disallowed a Court of Appeals' judgment directing a new trial when new evidence had been discovered after it made a prior judgment dismissing the indictment. Forman v. United States, 361 U.S. 416 (1960), held that a United States Court of Appeals could modify its original order of dismissal and enter one requiring a new trial since the original order was interlocutory and not final, and the appellate court was acting within its power in directing such "appropriate" order as it thought was "just under the circumstances." 361 U.S. at 424. In each of these cases the Supreme Court considered the remedy sought by the defendant, i.e., whether or not a new trial was sought on appeal. In overruling the lower court decision in *Burks*, Chief Justice Burger noted that these holdings could hardly be characterized as models of consistency:

> *Bryan* seemingly stood for the proposition that an appellate court could order whatever relief was "appropriate" or "equitable" regardless of what considerations prompted reversal. A somewhat different course was taken by the concurrence in *Sapir*, where it was suggested that a reversal for evidentiary insufficiency would require a judgment of acquittal *unless* the defendant had requested a new trial. . . . While not completely resolving these ambiguities, *Forman* suggested that a reviewing court could go beyond the relief requested by a defendant and order a new trial under some circumstances.

437 U.S. at 9-10 (emphasis in original). *See infra* note 49.

38. United States v. Wilson, 420 U.S. 332, 339 (1975).

39. Perhaps one of the earliest references made to the idea that double punishment for the same offense is morally reprehensible, if not legally so, was by the Old Testament prophet, Nahum: "What do ye devise against the Lord? He will make an utter end; *there shall not rise a double affliction.*" *Nahum* 1:9 (emphasis added). St. Jerome continued the theme, saying: "Happy the man who is chastised in this life, *for the Lord will not punish twice for the same thing.*" 1 ST. JEROME, HOMILIES ON THE PSALMS 368 (emphasis added). *See also* 2 *id.* at 12. This principle was also accepted as a universal maxim of the common law of England. In using the term of "jeopardy" to characterize the two pleas of *autrefois*

defendant in the vulnerable position of possible conviction after it had already been determined that he or she was not criminally responsible.[40] Different concerns arise, however, when a defendant appeals a conviction.[41] It has been suggested that by appealing, a defendant actually waives the protection of the double jeopardy clause in an effort to secure a favorable judgment.[42] In his dissent in *Kepner v. United States*,[43] Justice Holmes rejected this "waiver theory" on the grounds that it could not "be imagined that the law would deny to a prisoner the correction of a fatal error unless he should waive other rights so important as to be saved by an express clause in the Constitution."[44] Perhaps the most viable explanation for the allowance of an appeal and retrial is the view that it is but a continuation of both the jeopardy and the proceeding from which the appeal arises.[45]

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*acquit* (former acquittal) and *autrefois convict* (former conviction), Blackstone wrote that "no man is to be brought into jeopardy of his life for more than once for the same offense." 4 W. BLACKSTONE, COMMENTARIES *335-36 [hereinafter cited as BLACKSTONE]. For a historical treatment of the development of the double jeopardy concept, see generally Sigler, *A History of Double Jeopardy*, 7 AM. J. LEGAL HIST. 283 (1963).

40. In United States v. Scott, 437 U.S. 82 (1978), *reh'g denied* 439 U.S. 883 (1979), Justice Rehnquist recognized that "in cases from *Ball* to Sanabria v. United States, a defendant once acquitted may not be again subjected to trial without violating the double jeopardy clause." 437 U.S. at 96. This was justified by

> [t]he underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence . . . 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. . . .

437 U.S. at 86 (quoting *Green*, 355 U.S. at 187 (1957)).

41. These concerns were evident during the debate over James Madison's early version of the double jeopardy clause at the First Session of Congress. Several members of the House objected to Madison's wording: "[N]o person shall be subject except in cases of impeachment, to more than one punishment or one trial for the same offense." These members of the House did not want this wording to be construed so as to foreclose a defendant from seeking a new trial on his appeal of his conviction. Despite the assurances of Madison's supporters, the Senate ultimately changed the wording to read simply "jeopardy." Both sides agreed that in cases where a defendant was acquitted at the first trial he or she should not be tried a second time. 1 ANNALS OF CONGRESS 753 (1789) (*noted in* United States v. Wilson, 420 U.S. at 340-42). *See also Tibbs*, 457 U.S. at 40 n.14; Bigelow, *Former Conviction and Former Acquittal*, 11 RUTGERS L. REV. 487 (1957).

42. Trono v. United States, 199 U.S. 521, 533 (1905).

43. 195 U.S. 100 (1904).

44. *Id.* at 135. *See also Green*, 355 U.S. at 219 (1957) (Frankfurter, J., dissenting).

45. 4 BLACKSTONE, *supra* note 39, at *393. Blackstone also suggested that in cases where a judgment was reversed on a writ of error, the accused was subject to being tried again on the theory that since the first prosecution had been erroneous, no jeopardy had ever at-

The reasoning behind appellate reversals in the double jeopardy area has been elusive, vague, and inconsistent.[46] Beginning with the landmark case of *United States v. Ball*,[47] and continuing through the decision in *United States v. Tateo*,[48] the Supreme Court decided appellate reversal cases in an *ad hoc* manner.[49] *Ball*

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tached. *Id. See also* Meyers and Yarbrough, *supra* note 3 at 7; Comment, *Appeals By the State in Criminal Proceedings*, 47 YALE L.J. 489, 492 (1938).

46. *See supra* note 37.

47. 163 U.S. 662 (1896). In ascertaining a "common ancestor" to the cases at issue, Chief Justice Burger said *Ball* would provide a logical starting point "since *Ball* appears to represent the first instance in which this Court considered in any detail the double jeopardy implications of an appellate reversal." 437 U.S. at 13. *See also* North Carolina v. Pearce, 395 U.S. 711, 719-20 (1969).

48. 377 U.S. 463 (1964).

49. In *Ball*, three men had been indicted on murder charges. Two were convicted while the third was acquitted by a jury in federal circuit court. The two defendants found guilty appealed on writ of error saying that the indictment was insufficient. Their conviction was reversed and, on remand, a new indictment charged all three with murder. The Supreme Court held that the two defendants whose convictions had been reversed could not plead double jeopardy to the reindictment. The Court rather intuitively stated that the former verdict and sentence need not be considered "because it is quite clear that a defendant who procures a judgment against him upon an indictment to be set aside, may be tried anew, upon the same indictment . . . for the same offense of which he had been convicted." 163 U.S. at 672. It should also be noted that with regard to the defendant who had originally been acquitted the Court strongly maintained that the double jeopardy clause barred his reindictment: "The 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. Regarding the finality of the acquittal, see Westen, *supra* note 3, at 1008.

In the case of Bryan v. United States, 338 U.S. 552 (1950), the petitioner was convicted by jury of an attempt to evade the income tax laws and moved for acquittal or, alternatively, for a new trial pursuant to Rule 29 of the Federal Rules of Criminal Procedure, still in effect, which states in relevant part:

> (a) *Motion before Submission to Jury*. . . . The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses . . . .
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> . . .
>
> (c) *Motion after Discharge of Jury*. 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 . . . .

The trial court denied the motion but the appellate court reversed and remanded, holding the evidence insufficient. The petitioner contended that under Rule 29, the Court of Appeals must acquit since the evidence was insufficient and the trial court would have had to acquit on proper motion. The Supreme Court held that Rule 29 applied only to the district courts. The appellate courts are empowered to "remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." 338 U.S. at 557 (quoting 28 U.S.C. § 2106). There-

and its progeny recognized that an appellate court's reversal of a

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fore, unlike *Ball*, where remand for trial was based on trial error, i.e., failure to dismiss a faulty indictment, the Court in *Bryan* reversed and remanded based on insufficient evidence. Without articulating this distinction, the *Bryan* Court affirmed the idea that in cases "where the accused successfully seeks review of a conviction, there is no double jeopardy upon a new trial." 338 U.S. at 560. This is essentially the thought espoused in *Ball* and adhered to in Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 462 (1947) and Trono v. United States, 199 U.S. 521, 533-34 (1905).

Sapir v. United States, 348 U.S. 373 (1955), was inconsistent with *Bryan*. In *Sapir*, the Supreme Court held that the Court of Appeals could not remand the case for trial since the reversal was based on insufficient evidence. This, however, had been allowed in *Bryan*. The double jeopardy waters were further muddied by the concurrence of Justice Douglas. In intimating that this case was different from *Bryan*, where the petitioner alternatively moved for a new trial, Justice Douglas said that "if petitioner [Sapir] had asked for a new trial, different considerations would come into play . . . ." *Id.* at 374.

In Yates v. United States, 354 U.S. 298 (1957) the Supreme Court reversed the convictions of fourteen defendants who were charged with conspiracy. The Court remanded the case to the district court with directions to enter judgments of acquittal for some of the defendants on the ground that the evidence would be "palpably insufficient" to justify a new trial. The evidence would not be insufficient as to the other defendants and therefore a new trial would be in order. *Id.* at 328-29. In making the latter determination the Court considered the petitioners' request, in the alternative, for a new trial. *Id. Yates*, therefore, implicitly applied both Justice Douglas' accounting of a request for a new trial by petitioner in *Sapir and* the Supreme Court's discretionary powers under 28 U.S.C. § 2106, as stated in *Bryan*. Using both reasons, the *Yates* Court could either grant a new trial or acquit.

The boundary lines of double jeopardy and appellate reversal were further obscured in Forman v. United States, 361 U.S. 416 (1960) and United States v. Tateo, 377 U.S. 463 (1964). In *Forman*, the Court affirmed a Court of Appeals order directing a new trial in the case of trial error. Dismissing the petitioner's argument that because he had not requested a new trial one should not be meted out, the Court maintained that 28 U.S.C. § 2106 gives the Court of Appeals "full power to go beyond the particular relief sought." 361 U.S. at 425. The Court rejected the notion that, like *Sapir*, petitioner's case was one of insufficient evidence. Rather, the jury was simply not properly instructed and "when petitioner opened up the case by appealing from his conviction, he subjected himself to the power of the appellate court to direct such 'appropriate' order as it thought 'just' under the circumstances." *Id.* at 426. This "*Ball*-§ 2106" reasoning would allow for a new trial.

In *Tateo*, the defendant's plea of guilty had been instigated through remarks made by the trial judge. In later proceedings in the same federal district court, it was found that this plea could not have been made voluntarily and that reindictment of the charges would violate the double jeopardy clause. 377 U.S. at 464-66. The Supreme Court, speaking through Justice Harlan, recognized that the remark made by the trial judge spurring the guilty plea foreclosed any exercise of the jury and amounted to procedural error. Although this procedural error denied the defendant a jury verdict, the Court said such denial did not differ from a jury's finding of guilt in an unfair trial. If procedural error was the cause in both instances, then "the distinction between the two kinds of wrongs affords no sensible basis for differentiation with regard to retrial." *Id.* at 467. In contrasting *Bryan*, the Court intimated that insufficiency of evidence was a stronger argument for acquittal, as opposed to retrial:

> [Tateo's] argument is considerably less strong than a similar one rejected in Bryan v. United States. . . . In that case, the Court held that despite the Court

defendant's conviction with directions for retrial is a concept born of the common law, and supported by the policy consideration that any reversible error should not irrevocably bar society from punishing the guilty.[50] These cases, however, did not delineate specifically which types of cases warranted reversal and retrial. Depending on the particular case, considerations were given to several factors or combinations of factors, such as whether the defendant requested retrial in his relief; whether the reversal was based on insufficient evidence; or whether the reversal was based on trial error. In any event, application of and justification for an appellate court's decision to reverse a conviction and direct a new trial had been performed in a somewhat unpredictable fashion.

### B. *Line Drawing Between Procedural and Evidentiary Errors: Burks v. United States*

The Supreme Court attempted to clarify these issues through its decision in *Burks v. United States*.[51] In that case, the trial court denied the defendant's motion for acquittal before the evidence was submitted to the jury. The court also denied his subsequent motion for acquittal after the jury rendered a verdict of guilty. The Court of Appeals for the Sixth Circuit later reversed the conviction with direction for retrial.[52] The Supreme Court reversed, holding that when a conviction is reversed due to the insufficiency of the evidence, retrial would violate the double jeopardy clause.[53]

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> of Appeals' determination that defendant had been entitled — because of insufficiency of the evidence — to a directed verdict of acquittal, reversal of the conviction with a direction for a new trial was a permissible disposition.

*Id.* In permitting retrial, the Court explained the policy considerations implicated by *Ball*, and stated that the "right of an accused to be given a fair trial" corresponded to "the societal interest in punishing one whose guilt is clear after he obtained such a trial." *Id.* at 466. *See supra* text accompanying note 23.

50. It had been suggested that *Ball* had merely paraphrased Blackstone's rationale that the defendant "remains liable to another prosecution for the same offense; for the first being erroneous he never was in jeopardy thereby." Thompson, *Reversals for Insufficient Evidence: The Emerging Doctrine of Appellate Acquittal*, 8 IND. L. REV. 497, 503-04 (1975). Justice Harlan's policy justification is the generally recognized reason for allowing retrial. *Burks*, 437 U.S. at 15.

51. 437 U.S. 1 (1978).

52. *Id.* at 2-4.

53. *Id.* at 17-18. For a discussion of this case see Case Comment, *Double Jeopardy Implications of Appellate Reversal for Insufficient Evidence; Burks v. United States*, 25 N.Y.L. SCH. L. REV. 119 (1979).

In resolving *Burks* and the confusion created by the prior decisions in this area, the Court first distinguished between cases where the conviction was reversed because of procedural error and those reversed because of insufficient evidence.[54] The Court held that a reversal based on procedural error at trial should not be barred because the government is not being given a second chance to prove its case and, as a policy matter, "the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished."[55]

The Court found that the considerations differ when the evidence is insufficient, as in *Burks*. In such a case, the trial court actually errs in allowing the evidence to be presented to the jury. Consequently, the appellate court is performing the task the trial court should have performed, *i.e.*, rendering a judgment of acquittal.[56] Unlike trial error, where the prosecution has been denied a fair opportunity to offer whatever proof it could assemble, a case of insufficient evidence recognizes that the government was given a fair opportunity but failed to submit the evidence needed for conviction.[57] Society could not have a greater interest than the defendant when, as here, "it is decided as a matter of law, that the jury could not properly have returned a verdict of guilty."[58]

Since insufficient evidence cases properly require an acquittal, it became immaterial whether or not the defendant requested a new trial. Simply put, such a request no longer had any import since it could not meaningfully be said that a defendant could waive his right to a judgment of acquittal by moving for a new trial.[59]

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54. 437 U.S. at 13-17.

55. *Id.* at 15. *But see Thompson, supra* note 50, at 506 n.24, where it is argued that in prosecuting the defendant, the government assumes all risks of prosecutorial error, including trial error and insufficiency of evidence. If the double jeopardy clause is to preclude multiple prosecutions without regard to the question of guilt, then the grounds for reversal would be immaterial.

56. 437 U.S. at 10-11. *See also* Justice Douglas' concurring opinion in *Sapir*, 348 U.S. at 374.

57. *Burks*, 437 U.S. at 16.

58. *Id.* An interesting problem may arise in cases where trial error has rendered evidence insufficient. In such overlapping cases, the Court has intimated that they will be treated in the context of trial error, thereby permitting retrial. *See* Case Comment, *supra* note 53, at 130.

59. *Burks*, 437 U.S. at 17.

### C. *The Tibbs Exception*

*Burks* created this distinction between trial error and insufficient evidence in appellate review cases. The Florida District Court of Appeals decision in *State v. Tibbs* allowing retrial after a reversal of a conviction based on the *weight* of the evidence, carved out a third category of appellate reversals.[60] The Florida Supreme Court and the United States Supreme Court were subsequently faced with the question of how this third category—evidentiary weight—was to be treated. The *Burks* rationale of not allowing a retrial could not be applied in this type of case, where the defendant has been convicted on sufficient evidence in an error-free jury trial. This was not a case where the evidence should never have been submitted to the jury. Nor was it a case where the government would be prosecuting an "acquitted" defendant. Therefore, unlike insufficient evidence cases where the defendant is constructively acquitted, the reasons posed for prohibiting retrial were not applicable here.[61]

The justifications given for allowing retrial in procedural error cases similarly failed to provide any guidance for the resolution of the issue posed in *Tibbs*. Unlike trial error cases, where the defendant has been denied a fair trial and is interested in obtaining one,

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60. In *Tibbs*, the petitioner's original conviction was reversed for a new trial by the Florida Supreme Court on the grounds that the evidence was unsatisfactory. Tibbs v. State, 337 So. 2d 789 (1976). On remand, the petitioner argued that the 1976 reversal was based on insufficient evidence and according to the then newly decided *Burks* and *Greene* cases, he could not be reindicted. The trial court agreed and granted his motion to dismiss the indictment against him. On certiorari, the Second District Court of Appeal reversed, not on insufficiency of evidence, but on inadequate weight. State v. Tibbs, 370 So. 2d 386 (1979). The Florida Supreme Court was thus faced with the problem of deciding what the specific grounds were for its reversal in 1976, and whether this third category of appellate reversals would be recognized. Tibbs v. State, 397 So. 2d 1120 (1981).

61. At least the Florida Supreme Court found it problematic. The court first found it necessary to go over the evidentiary questions of past cases it ruled on to determine if the issue was one of weight or sufficiency. Tibbs v. State, 397 So. 2d at 1124-25. The cases treated by the court were: Williams v. State, 58 Fla. 138, 50 So. 749 (1909); McNeil v. State, 104 Fla. 360, 139 So. 791 (1932); Woodward v. State, 113 Fla. 301, 151 So. 509 (1933); Skiff v. State, 107 Fla. 90, 144 So. 323 (1932); Fuller v. State, 92 Fla. 873, 110 So. 528 (1926); Lowe v. State, 154 Fla. 730, 19 So. 106 (1944); Sosa v. Maxwell, 234 So. 2d 690 (Fla. Dist. Ct. App. 1970); and Smith v. State, 239 So. 2d 284 (Fla. Dist. Ct. App. 1970). Determining that *Tibbs* was indeed a "weight" case, the court opted to treat it as a pre-*Burks* appellate reversal and allow retrial. Tibbs v. State, 397 So. 2d at 1124-25. *Burks* made it clear that only those appellate reversals tantamount to an acquittal due to insufficient evidence would prohibit retrial. Since this rule was not applicable to the case at bar, no double jeopardy principles were implicated. 437 U.S. at 16.

weight-of-the-evidence cases presume a fair trial has transpired.[62] In a "weight" case, the state has presented sufficient evidence to support conviction and has persuaded the jury to convict. The trial judge or appellate court, sitting as a "thirteenth juror," disagrees with the jury verdict, thus creating a "hung" jury and a need for retrial.[63] Under the circumstances of this type of reversal, the Court's majority deemed that retrial simply affords the defendant a second opportunity to seek a favorable judgment.[64]

The impact of *Tibbs* is that distinctions between these three types of reversals will be determinative on the issue of whether double jeopardy protection will be extended in a certain case. The distinctions are subtle, however. Retrial *is* allowed in procedural error cases because it is in the defendant's interest to receive a fair trial and in society's interest not to acquit for reversible error. Retrial *is not* allowed in insufficiency-of-evidence cases because the defendant has been constructively acquitted and a new trial would be granting the state a "second bite of the apple," a notion repulsive to the double jeopardy clause. The *Tibbs* Court created a third rule: retrial *is* allowed when the evidentiary weight is insubstantial, because reweighing the evidence is neither tantamount to saying the trial was unfair nor equivalent to a constructive acquittal. The Supreme Court reasoned that, unlike the defendant who has an interest in correcting past trial error through retrial, or the defendant who has no interest in retrial if constructively acquitted, the defendant in a "weight" case has nothing to lose except his conviction.[65]

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62. 457 U.S. at 42-43.

63. As Justice Powell noted in Hudson v. Louisiana, 450 U.S. 40 (1981), the matter of whether or not a trial judge may sit as a "thirteenth juror" and assess the evidence in the same manner as the jury is a question of state law. *Id.* at 43-44 nn.4-5. Similarly, appellate review in the "interest of justice" is also a matter of state legislation. *See supra* note 14 and *infra* note 93. The federal counterpart can be interpreted to be Rule 33 of the Federal Rules of Criminal Procedure. *See* Amicus Curiae Brief on the Merits for the United States in *Tibbs*, Docket #81-5114.

In reviewing the weight of the evidence as the "thirteenth juror" the judge and appellate court constructively create a deadlocked jury. Although Rule 29(c) of the Federal Rules of Criminal Procedure allows for a judgment of acquittal when the jury has failed to reach a verdict, the Supreme Court has ruled that such a deadlock does not necessarily result in an acquittal barring retrial. 457 U.S. at 42 n.17.

64. *Id.* at 43.

65. *Id.* The Court implies that the good graces of the appellate court grant the defendant a second chance of avoiding conviction by saying: "The reversal simply affords the defendant a second opportunity to seek a favorable judgment. *An appellate court's decision*

Justice White's dissent and the Florida Supreme Court's opinion raise several interesting questions regarding the nature of these distinctions and the weight-of-the-evidence argument itself.

D. *Questions Raised by the Tibbs Exception*

Justice White intimated that if sufficient evidence under the *Jackson* standard[66] is proof beyond reasonable doubt of each element of the crime charged, the question posed by *Tibbs* should be whether the evidence presented proved guilt beyond reasonable doubt. Since the Florida Supreme Court ruled under the "weight" argument that the evidence was inadequate to sustain a conviction,[67] it necessarily follows that such evidence could not prove guilt beyond reasonable doubt, and consequently should be deemed insufficient as a matter of law. Therefore, the dissent maintained, *Burks* should apply and retrial would be barred.[68] Making a distinction of evidentiary weight would not appear to be helpful in resolving the retrial issue.

The weight distinction would also create problems if the case actually was retried. If the evidence is said to be already sufficient, no new evidence need be offered at retrial by the state.[69] If the defendant would again be found guilty on the same evidence, the appellate court would necessarily reverse and remand a second time. Theoretically, this could go on *ad infinitum*.[70]

The weight distinction would also have an adverse impact upon the criminal justice system. Appellate courts would elect to reverse on the grounds of inadequate weight, rather than insuffi-

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*to give the defendant this second chance* does not create 'an unacceptably high risk that the Government, with its superior resources, [will] wear down [the] defendant.' "*Id.* (emphasis added).

66. *See supra* note 30.

67. Tibbs v. State, 397 So. 2d at 1127.

68. 457 U.S. at 47-48.

69. On retrial, the state is left with the option of using the same evidence or adding new evidence. Although the uncovering of new evidence is a possibility, the more likely event is that the old evidence will have lost its admissibility or effectiveness, particularly in light of the fact that the retrial in *Tibbs* would transpire eight years after the occurrence of the alleged rape and murder. If the Florida Supreme Court ruled that the testimony at the first trial lacked credibility, it would seem somewhat difficult to believe that testimony could be more credible years later at retrial.

70. 457 U.S. at 50. The majority countered by stating that although infinite regression is a theoretical possibility, the "interests of justice" argument would preclude an appellate court from repeated reversals of the jury verdict. *Id.* at 43 n.18.

ciency, so that retrial would be imposed.[71] The anomalous notion would be lurking about that appellate courts may agree on the sufficiency of the evidence and yet be inclined to disagree with the trial judge and jury as to its weight.[72]

The Florida Supreme Court seemed to recognize similar paradoxes, although it allowed the weight argument. Chief Justice Sundberg, who concurred in part and dissented in part, foretold Justice White's concerns by stating that the weight distinction was not helpful. He argued that the real issue was whether the case should be categorized as trial error or evidentiary insufficiency. Sundberg asserted that the state's failure to identify Tibbs as the perpetrator of the murder and rape was most certainly a question of evidentiary insufficiency,[73] and that the Florida Supreme Court simply lacked the authority to reweigh the evidence; it could only pass upon its insufficiency.[74]

These complications prompted the Florida Supreme Court majority to rule that a Florida appellate court would no longer be allowed to review questions of evidentiary weight: "Elimination of the third category of reversal accords Florida appellate courts their proper role in examining the sufficiency of the evidence, while leaving questions of weight for resolution only before the trier of fact."[75]

The issues dealt with in *Tibbs* by the Florida courts and the United States Supreme Court centered exclusively on the adequacy of the evidence, and on an appellate court's duty, as a "thirteenth juror," to review this evidence. In this role as "thirteenth juror," the appellate court may disagree with the jury as to the adequacy of the evidence based on weight. But by stating that the evidentiary question is one of weight and not sufficiency, the appellate court merely begs the question of why retrial should be allowed. Instead, the court artificially constructs a "weight loophole," to be implemented in those difficult cases where the evidence may or may not be insufficient. In these difficult cases,

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71. *Id.* at 50-51.

72. *Id.*

73. Tibbs v. State, 397 So. 2d at 1127-30.

74. *Id.* at 1127.

75. *Id.* at 1125. Having reviewed its prior decisions, the Florida Supreme Court concluded that the "weight" argument "has a questionable historical foundation." *Id. See supra* note 61 and accompanying text.

the appellate court may choose weight over insufficiency as a way of resolving the uncertainty. Rather than allowing a possibly guilty defendant to go free, the court may opt for a retrial, believing that a replay of the case will result in a just verdict of either guilt or innocence.[76] However, the irrefutable determination in the difficult cases where retrial is selected is that the evidence is inadequate to sustain the conviction because it did not prove guilt beyond reasonable doubt.[77] Therefore, the role the appellate court assumes as a reviewer of evidence in the form of the "thirteenth juror" fails to fully explain the *Tibbs* decision.

## IV. Appellate Review and the Other Side of the Weight-of-the-Evidence Argument

### A. *The Role of the Jury, Trial Judges, and Appellate Court*

When the appellate court is viewed solely as a reviewer of evidence, the *Tibbs* decision appears to be nothing more than an evidentiary loophole fueling the criticism that appellate courts will now use the weight doctrine to permit retrials in cases where the uncertainty of the evidence may be tantamount to insufficiency. Perhaps the *Tibbs* decision is valid, however, when an additional role of the appellate court, inherent in the "weight" rubric, is explored. This other role involves the court's control over the jury and the necessary considerations used in exercising such control.

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76. *See* Note, *Double Jeopardy: Retrial After Reversal of a Conviction on Evidentiary Grounds*, *supra* note 11, at 1072 n.80; *see infra* text accompanying note 80; *see also* Tibbs v. State, 397 So. 2d at 1125-26, where the Supreme Court of Florida held that by precluding further appellate reversals based on weight of the evidence it would be eliminating "any temptation appellate tribunals might have to direct a retrial merely by styling reversals as based on 'weight' when in fact there is a lack of competent substantial evidence to support the verdict . . . ."

77. This is precisely Justice White's major point:

> The majority concedes . . . that if the State's evidence failed to meet the federal due process standard of evidentiary sufficiency, the Double Jeopardy Clause would bar reprosecution. The majority fails to explain why the State should be allowed another try where its proof has been held inadequate on state law grounds, when it could not do so were it inadequate on federal law grounds. In *both* cases the State has failed to present evidence adequate to sustain the conviction.

457 U.S. at 48-49 (White, J., dissenting) (emphasis added). The federal due process standard of evidentiary sufficiency is the reasonable doubt standard enunciated in *Jackson*. *See supra* note 30.

The Florida Supreme Court's decision to leave questions of weight for the trier of fact explicates the fact-finding roles of the jury, trial judge, and appellate court. In the *Tibbs* opinion, Justice O'Connor distinguished a reversal based on weight from one based on sufficiency by stating that in a weight case the "appellate court sits as a 'thirteenth juror' and disagrees with the jury's resolution of the conflicting testimony."[78] This statement implies that the trial judge and jury, as well as the review court, try the facts. A closer analysis of this statement helps to explain the conceptual difficulties encountered by the *Tibbs* courts in grappling with the weight/sufficiency distinction and the role of the "thirteenth juror."

As part of the jury's fact-finding mission, jurors must select between contrary inferences which may be drawn from the evidence, once the evidence has been found by the trial court to be sufficient as a matter of law.[79] This fact-finding process also includes a juror's responsibility to determine the credibility and weight of the testimony of witnesses.[80]

The function of the trial judge, on the other hand, is generally

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78. 457 U.S. at 42.

79. 23A C.J.S. *Criminal Law* § 1138(a) (1961). The question as to whether the evidence is legally sufficient to be submitted to the jury is a question of law for the court; but after it is determined by the court that evidence is admissible and is sufficient to go the the jury, the questions of its weight and of its sufficiency to establish the facts or issues are for the jury. *Id. See also* cases cited *supra* note 26.

The jury is well-suited for this function because of its "good sense." The Morris Committee, in recommending basic linguistic and mental requirements that jurors should meet, stated:

> We think that in any healthy community there will be a high sense of duty, a fundamental respect for law and order, and a wish that principles of honesty and decency should prevail. A jury should represent a cross-section drawn at random from the community, and should be the means of bringing to bear on the issues that face them the corporate good sense of that community. This cannot be in the keeping of the few, but is something to which all men and women of good will must contribute.

W. CORNISH, THE JURY 34-35 (1968) (quoting the Morris Report (Cmnd 2627) ¶¶ 53, 76-80). *See generally* Browder, *The Functions of the Jury*, 21 U. CHI. L. REV. 386 (1954).

80. 30 AM. JUR. 2D *Evidence* § 1080 (1981); 23A C.J.S. *Criminal Law* § 1138(b) (1961). In making such a determination the jury may take into account the demeanor of the witness while on the stand, the witness's inability to comprehend the question or recollect an answer, and the witness's opportunity to know the matter about which he is testifying. *See, e.g.*, Quock Ting v. United States, 140 U.S. 417 (1891); Shushan v. United States, 117 F.2d 110 (5th Cir. 1941). *See also* W. CORNISH, *supra* note 79, at 102-04, where the author exemplifies the jury's assessment of witness testimony under the legal constraints imposed by the court.

reserved to deciding questions of law, a province separate from that of the fact-finding jury.[81] In attempting to assure a fair presentation of the facts to the jury[82] the trial judge analyzes the evidence, including testimony, in the same way the jury would.[83] In short, the judge sits as a "thirteenth juror," and, depending upon the state statutory law, may disagree with the jury's resolution of the facts.[84] In New York, for example, "disagreeing" with the jury

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81. 23A C.J.S. *Criminal Law* § 1118 (1961). Once made, the judge's determination as to the law should be applied by the jury to the facts. A. VANDERBILT, JUDGES AND JURORS: THEIR FUNCTIONS, QUALIFICATIONS AND SELECTION 3-4 (1956). Although this may appear to be a separate-but-equal relationship between the judge and jury, the judge generally reserves extensive powers of supervision over the jury. W. CORNISH, *supra* note 79, at 101. This supervision is justified considering "the jury's lack of information as to the law and its lack of experience in weighing the probative force of testimony." A. VANDERBILT, *supra* at 62. By so guiding the jury, the judge is attempting to separate questions of law from questions of fact so that the jury will be limited to only those factual issues in dispute. *Id.* at 61. This attempt to demarcate questions of law and fact by the judge will generally create some overlap in the responsibilities between the judge and jury. Whether the jury will actually be deciding evidentiary questions of law or whether the judge will be deciding evidentiary questions of fact is dependent upon the discretion of the trial judge as he applies the rules of evidence. In England, for example, the crime of murder will be reduced to manslaughter if it can be proved that the victim provoked his attacker. The legal standard for provocation depends on whether the victim's acts were so gross that they would have "caused a *reasonable man* to use violence with fatal results." W. CORNISH, *supra* note 79, at 104 (emphasis original). Presumably, the gross acts of the victim would be a question of fact for the jury to determine. Displeased with the ability of the jury to decide within such a broad standard, the English judges enforced a strict rule that mere words could never constitute provocation. *Id.* Such an indoctrination by the English judges would seem to indicate the inclination to make "reasonableness" a less factual standard and a more legal one in these circumstances.

Therefore, the precise amount of guidance a judge should give a jury depends upon opposing principles. Should the jury be given wide discretion in arriving at a verdict because it is the "corporate good sense of the community" or would such wide discretion actually allow "jury-made" law, that is, decisions made without precedent and without regard to what will be done in similar cases in the future? A. VANDERBILT, *supra*, at 61-62. *See also* W. CORNISH, *supra* note 79, at 101-25. *See generally* Comment, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582 (1939).

82. For a discussion of the manner in which a trial judge may assess evidence in determining its sufficiency and submission to the jury see James, *Sufficiency of the Evidence and Jury-Control Devices Available Before Verdict*, 47 VA. L. REV. 218 (1961).

83. Note, *Judicial Intervention in Trials*, 1973 WASH. U.L.Q. 843, 844-45 (1973).

84. *Hudson*, 450 U.S. at 44 (1981). Although the jury in a criminal case has traditionally been permitted to enter an unassailable but unreasonable verdict of not guilty, this power of the fact finder to err upon the side of mercy has never been thought to include a power to enter an unreasonable verdict of guilty. *Jackson*, 443 U.S. at 317 n.10. *See, e.g., Hudson*, 450 U.S. at 41. In *Hudson*, the trial judge granted the defendant's motion for a new trial after the jury verdict of guilty. In granting the motion the judge stated: "I heard the same evidence the jury did . . . . I'm convinced that there was no evidence, certainly not

by setting aside a guilty verdict is allowed, given the proper set of circumstances:

> In a particular criminal case, the evidence may be sufficient to require submission to a jury and yet be so unsatisfactory that a verdict of guilty would be so against the weight of the evidence that it should be set aside. Where, on the coming in of a verdict of guilty, the trial court conscienciously concludes that the weight of the evidence does not support a finding of guilt beyond a reasonable doubt, the court should set aside a verdict of guilty and grant a new trial. . . . If, by reason of the demeanor of the witness, a lack of certainty or inconsistencies in her testimony or other factors affecting the reliability of her testimony, the trial judge was firmly persuaded that there was a reasonable and proper basis for discrediting the witness's testimony, then, he should have set aside the verdict of guilty and directed a new trial. . . .[85]

Similarly, in California, the defendant is given "the benefit of [the court's] *independent* conclusion as to the sufficiency of the credible evidence to support the verdict" after a jury verdict of guilty.[86]

The ability of a trial judge to retain discretionary control over the evidence thus indicates that the functions of the fact-finding jury and the law-resolving judge are not neatly demarcated. In *Tibbs*, the Supreme Court went a step further and referred to the *appellate* court as the "thirteenth juror," juxtaposing the function of the jury with the scope of appellate review.[87] Although the Su-

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evidence beyond a reasonable doubt, to sustain the verdict . . . ." *Id.*

85. People v. Ramos, 33 A.D.2d 344, 347, 308 N.Y.S.2d 195, 198 (1970). *But see* People v. Noga, 586 P.2d 1002, 1003 (Colo. 1978), where the Supreme Court of Colorado took a more restrictive view of the judge as "thirteenth juror," saying:

> Thus, if a determination of the defendant's guilt rests upon the credibility of witnesses or the weight to be accorded evidence, the case must be submitted to the jury, for these matters are solely within its province. . . . The jury apparently found the prosecution's witnesses to be more credible than the defendant's because it returned a verdict of guilty . . . . A trial judge may never upset a guilty verdict for the sole reason that if he were the finder of fact, he would have ruled differently.

*Id.* at 1003.

86. Veitch v. Superior Court, 89 Cal. App. 3d 722, 731, 152 Cal. Rptr. 822, 827-28 (1979).

87. In *Burks*, the Court reaffirmed Justice Douglas' concurrence in *Sapir* by stating that it makes "no difference that the *reviewing* court, rather than the trial court, determined the evidence to be insufficient." 437 U.S. at 11 (emphasis in *Burks*) (noting *Sapir*, 348 U.S. at 374). In *Tibbs*, the Court intimated that it made no difference because in cases of insufficiency, acquittal is the only proper verdict. 457 U.S. at 43-44. Although the Court did not address it, an interesting question arises in inadequate weight cases as to whether or not it should make a difference if the trial court or reviewing court makes the determination since acquittal would not be the only proper verdict.

The general maxim is that the appellate court should have nothing to do with the weight

preme Court has at times expressed almost complete deference to the jury in cases involving weight-of-the-evidence questions,[88] the appellate courts have reserved the right to review the weight of the evidence on grounds of due process of law.[89] The fact-finding

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of the evidence, which is considered to be within the province of the jury. 24A C.J.S. *Criminal Law* § 1880 (1961); L. ORFIELD, CRIMINAL APPEALS IN AMERICA 87 (1939).

88. "The alleged fact that the verdict was against the weight of the evidence we are precluded from considering, if there was any evidence proper to go to the jury in support of the verdict." Humes v. United States, 170 U.S. 210, 212-13 (1898); "[T]hat there was no credible evidence to sustain the verdict . . . was for the jury, not for this court." Southwestern Brewery & Ice Co. v. Schmidt, 226 U.S. 162, 169 (1912); "It is not for us to weigh the evidence or to determine the credibility of witnesses. The verdict of the jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." Glasser v. United States, 315 U.S. 60, 80 (1942). *See also* Hamling v. United States, 418 U.S. 87, 124 (1974); Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 700-01 (1962); Tennant v. Peoria & Pekin Union Ry. Co., 321 U.S. 29, 35 (1944); The Grace Girdler, 74 U.S. (7 Wall.) 196, 204 (1868); Mills v. Smith, 75 U.S.(8 Wall.) 27, 32 (1868). *But see* Baumgartner v. United States, 322 U.S. 665, 670-71 (1944) (stating that ultimate facts implicitly requiring application of law by nature are not immune from court consideration).

Appellate review of the facts and weight of the evidence has been objected to on grounds that the appellate court is ill-suited to assess witnesses' testimony, its already crowded docket makes factual review inefficacious, and the jury is no longer left as the final arbiter of the facts. L. ORFIELD, *supra* note 87, at 85-87. The fact that the jury may not be left as the final arbiter is considered to be less troublesome due to the modern trend of more jury control by the courts. *Id.* at 87.

As with the case of the trial judge and jury, much of the uneasiness with appellate review of weight of the evidence is rooted in the uncertainty as to whether the issues being reviewed are actually those of fact or of law. Parker, *Jury Reversal and the Appellate Court View of Law and Fact,* 14 OSGOODE HALL L.J. 287, 288, 302 (1976). Professor Parker raises the question that "if the appeal court is examining the fact finding of the trial judge, is it simply questioning that judge's competence in the purely discretionary area of fact? Alternatively, is the very difficult question of deciding what is fact and what is law of its very nature a question of law?" *Id.* at 302.

89. Thompson, *supra* note 50, at 499 n.2. Since *In re Winship* requires that each element of a crime be proved beyond a reasonable doubt as a matter of due process of law, consideration of the weight in meeting the reasonable doubt standard is given by the appellate court.

But reviewing the weight of the evidence creates problems in terms of law and fact. In exemplifying this difficulty, Professor Graham Parker refers to J. WELLS, A TREATISE ON QUESTIONS OF LAW AND FACT: INSTRUCTIONS TO JURIES AND BILLS OF EXCEPTIONS (1876), where Wells stated simply that the jury tries the facts and the judge tries the law. Tongue-in-cheek, Parker comments that Wells spends the next 750 pages clarifying his seemingly simple thesis. Parker, *supra* note 88, at 302. *See also* J. AUSTIN, 1 LECTURES IN JURISPRUDENCE 236 (1869), where the philosopher's statements, if applied to the determination of whether a jury verdict is reasonable, present neither questions of fact nor law to the appellate court:

> What can be more indefinite, for instance, than the expressions of *reasonable* time, *reasonable* notice, *reasonable* diligence? . . . The truth is that they are

power of federal appellate courts has been advocated by John C. Godbold, Chief Judge of the United States Court of Appeals for the Eleventh Circuit:

> Modern appellate courts engage in finding facts and accepting evidence. At times this is done without discussion and with the feeling that the court is acting solely out of the exigencies of the situation and not on a principled basis. Actually, appellate fact finding is an established and proper device that is available for discretionary use by the federal courts of appeal to the benefit of all directly concerned and of society in general, and without injury to courts or to the body of law.[90]

When used with discretion, the fact-finding power of an appellate court will not undermine the integrity of the trial court.[91] Not surprisingly then, statutory authority may grant the appellate court the status of "thirteenth juror,"[92] and enable the appellate court to examine the evidence with the same scrutiny as the original trier of fact.[93]

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> questions neither of law or of fact. The fact may be perfectly ascertained, and so may the law, as far as it is capable of being ascertained . . . . The difficulty is . . . in determining not what the law is, or what the fact is, but whether the given law is applicable to the given fact.

An appellate reversal in the interests of justice, then, raises the question of whether the weight of the evidence considered, i.e., the reasónableness of the jury's verdict, is really a question of fact. Or is the issue simply applying the interests of justice (the law) to the circumstances of the case (the facts)?

90. Godbold, *Fact Finding By Appellate Courts—An Available and Appropriate Power*, 12 CUM. L. REV. 365, 389 (1982).

91. *Id.* at 383. *See, e.g.*, Note, *Appeal and Error: Fact Finding Power of Appellate Courts in California: Cal. Code Civ. Proc. § 956a*, 20 CALIF. L. REV. 171 (1932). This study of the California appellate courts' fact-finding activities under a then-recently enacted section 956a, of the State Code of Civil Procedure revealed that the appellate courts had not converted themselves to finders of fact but rather, used the power sparingly. *See also* Note, *Fact Finding Power of Appellate Courts in California*, 16 CALIF. L. REV. 500 (1928).

92. In New York, for example, the intermediate appellate court retains such power through § 470.15 of the Criminal Procedure Law, which provides, in part:

> 3. A reversal or a modification of a judgment, sentence or order must be based upon a determination made:
> (a) Upon the law; or
> (b) Upon the facts; or
> (c) As a matter of discretion in the interest of justice;
> . . .
> 5. The kinds of determinations of reversal or modification deemed to be on the facts include, but are not limited to, a determination that a verdict of conviction resulting in a judgment was, in whole or in part, against the weight of the evidence.

N.Y. CRIM. PROC. LAW § 470.15(3), (5) (McKinney 1971).

93. Godbold, *supra* note 90, at 374.

When the appellate court does examine the evidence, and renders a determination contrary to that of the jury, it does not merely disagree with the jury, it overrules the jury. The use of such power by the appellate court is premised not on its ability to review evidence, but rather on its authority as an adjunct of the state. By looking at the appellate court in this capacity, the weight-of-the-evidence argument in *Tibbs* can indeed be supported.

### B. *The Appellate Court's Dominion Over the Jury in Tibbs*

The province of the "original trier of fact" is certainly not free from impingement by the trier of law.[94] Yet, the idea of popular sovereignty warrants a trial by jury in order to secure protection of the defendant.[95] An expression of the premium placed on the role of the jury can be found in the Supreme Court's holding that a defendant initially is in jeopardy only after the *jury* is empanelled and sworn.[96] Choosing this particular time in the trial proceedings to attach jeopardy "lies in the need to protect the accused in retaining a chosen jury."[97] Despite this confidence in the jury by the defendant, it has been stated that juries can make mistakes which favor the state, and should be open to correction.[98] The fact that the defendant requests an appeal to question the findings of the jury should give little cause to argue that the defendant's right to a jury trial is being impaired by the review of the appellate court.[99]

The modern means of correcting the jury—by granting a new trial if the verdict is clearly contrary to the weight of the evidence—is rooted in English common law.[100] Originally, jurors were

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94. *Tibbs* and its ensuing discussion centers on the appellate court's role in its trial-review capacity, i.e. being bound by the record of the trial court. The penetration of the trier of law is certainly all-encompassing on a review by trial *de novo* where "the appellate court will try the case, and determine the issues and the rights of all parties involved, as though the suit had been filed originally in the appellate court; and such an appeal removes the case in its entirety from the lower court to the appellate court." 5 C.J.S. *Appeal & Error* § 1528(a) (1958) (citations omitted). *See also* 5 AM. JUR. 2D *Appeal and Error* § 703 (1962).

95. L. ORFIELD, *supra* note 87, at 87; *See* U.S. CONST. amend. VI.

96. Crist v. Bretz, 437 U.S. 28, 35-36 (1978).

97. *Id.* at 35. *See also* Downum v. United States, 372 U.S. 734 (1963); Serfass v. United States, 420 U.S. 377 (1975); Wade v. Hunter, 336 U.S. 684 (1949); 1 F. WHARTON, WHARTON'S CRIMINAL LAW § 56 (14th ed. 1978).

98. L. ORFIELD, *supra* note 87, at 87.

99. *Id.*

100. 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 346-47 (7th ed. 1956); A. VANDER-

summoned to the court as witnesses to the event in question, using only their personal knowledge in rendering a verdict.[101] Eventually the jury assumed a more judicial function as it was informed of the facts in issue by other witnesses.[102] When jurors were still characterized as witnesses they would be found guilty of perjury if they rendered a verdict contrary to the court's belief.[103] In such a case the remedy imposed by the court was a writ of attaint, whereby the jury verdict was overturned, the jurors were subjected to severe penalties, and a second jury of twenty-four members was empanelled.[104] As the jury assumed the role of trier of fact, the writ of attaint was deemed to be a harsh control since the jury was actually acting upon the evidence of other witnesses.[105] Although after *Bushell's Case*[106] a judge could no longer "order the jury on pain of punishment to take his view of the facts,"[107] the courts *still retained the power to grant new trials in cases of jury "misconduct."*[108] In the case of new trials, however, the court was not left without balancing considerations:

> As regards criminal cases, the doctrine of new trials had to pay regard to the *pleasure and interests of the crown,* on the one side, and, on the other, to *considerations of mercy for the accused,* and especially to the ancient maxim that saved a man from being put a second time in jeopardy of life or limb.[109]

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BILT, *supra* note 81, at 54.

101. 1 W. HOLDSWORTH, *supra* note 100 at 317; 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 622 (2d ed. 1898); THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND COMMONLY CALLED GLANVILL 34-36 (Hall ed. 1965). The author states, "Each juror summoned for this purpose must swear that he will not declare falsely, nor knowingly suppress the truth. The knowledge required from the jurors is that they shall know about the matter from what they have personally seen and heard . . . ."

102. 1 W. HOLDSWORTH, *supra* note 100, at 334; J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 132-33 (1898).

103. 1 W. HOLDSWORTH, *supra* note 100, at 337.

104. A. VANDERBILT, *supra* note 81, at 53. The court would punish the jurors for such forms of misconduct as the rendering of a not guilty verdict, by fines or imprisonment. The Star Chamber considered any verdict of acquittal against the weight of the evidence as a corrupt verdict. 1 W. HOLDSWORTH, *supra* note 100, at 337-39, 343.

105. J. THAYER, *supra* note 102, at 162.

106. Vaug. Rep. 135, 124 Eng. Rep. 1006 (C.P. 1670).

107. 1 W. HOLDSWORTH, *supra* note 100, at 345. In *Bushell's Case,* Chief Justice Vaughan ruled that a jury could not be fined and imprisoned for acquitting two Quakers because the members of the jury are the judges of facts and may have private knowledge of the facts, parties, or witnesss above and beyond that of the judge. *Id.* at 344-47; *see also* A. VANDERBILT, *supra* note 81, at 53-54.

108. J. THAYER, *supra* note 102, at 169.

109. *Id.* at 175 (emphasis added).

### C. *Discretionary Considerations Made by the Appellate Court in Tibbs*

The weight/sufficiency dichotomy employed by the Court in *Tibbs* describes more than a subtle distinction in the inadequacy of trial evidence. The foregoing analysis of the "thirteenth juror" under the "weight" rubric suggests that the fact-finding province of the jury is not free from the supervisory controls of the trial judge and appellate court. The rules of evidence and motions made by the parties give the trial judge opportunities to expand or contract the fact-finding province. Similarly, an appellate court exerts control over the jury through its right to grant a new jury trial if it deems the original jury has rendered an erroneous guilty verdict.[110] The granting of a new trial may be viewed as a vestige of the form of jury reprimand practiced before *Bushell's Case*.[111] In granting a new trial the court looks at both the interests of the state and the exigencies of the defendant's situation.

In *Tibbs*, the Court seemed to implicitly consider "the pleasure and interests of the crown" in determining that "society should not exact the price of immunity for every defendant who persuades an appellate panel to overturn an error-free conviction . . . ."[112] The Court also bestowed "considerations of mercy" upon the accused by recognizing that although the defendant's conviction was error-free, the appellate court's own disagreement with the jury verdict should be ample reason to at least grant "the defendant a second opportunity to seek a favorable judgment."[113]

Therefore, in addition to being the reviewer of evidence, an appellate court may also be assuming a more dominant and active role. As the "thirteenth juror," the appellate court is more than an

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110. In New York, for example, exerting such control of the jury by the intermediate appellate court is not allowed. Perhaps as a response to the inability to differentiate weight and sufficiency when, under both, the evidence did not prove guilt beyond reasonable doubt, § 470.20 of the Criminal Procedure Law provides, in relevant part, that a new trial will not be allowed:

> 5. Upon a reversal or modification of a judgment after trial upon the ground that the verdict, either in its entirety or with respect to a particular count or counts, is against the weight of the trial evidence, *the court must dismiss the accusatory instrument or any reversed count.*

N.Y. CRIM. PROC. LAW § 470.20(5) (McKinney 1971) (emphasis added).

111. *See supra* notes 100-08 and accompanying text.

112. 457 U.S. at 44.

113. *Id.* at 43.

"equal partner" in the creation of a "hung" jury. In reversing the jury verdict, the appellate court may be taking into consideration factors *other than* mere disagreement with the jury about the adequacy of the evidence. The granting of a new trial by an appellate court may be directed at correcting and controlling the petit jury by giving a second jury the opportunity to render a verdict consonant with the appellate court's view of the evidence. With this decision to retry, the court will consider the state's interest and the defendant's particular situation. Given these considerations, the Court in *Tibbs* may have deemed a retrial to be not so much a second jeopardy, but rather a second opportunity for a jury to find the defendant innocent.

## CONCLUSION

If *Tibbs* is viewed solely in the light of the first role of the appellate court, the decision to retry the defendant is troublesome; evidence which is inadequate to prove guilt beyond reasonable doubt implies finality and termination of the defendant's jeopardy. Practically speaking, the state has failed to convict and the double jeopardy clause should preclude any further prosecution. Having the applicability of double jeopardy protection hinge upon the *label* given to the inadequate evidence appears to be unduly entrapping. Here, the weight/sufficiency dichotomy is perhaps a distinction without a difference, employed mainly to avoid the impact of the rule in *Burks*.

If, however, *Tibbs* is viewed according to the second possible role of the appellate court, the decision to retry in cases where the conviction is questionable is not surprising and may even be preferred. Viewed from this perspective, the weight argument allows an appellate court to exercise discretionary considerations that have sprouted out of the appellate court's longstanding dominion over juries and jury verdicts. The appellate court could not have this liberty if evidentiary sufficiency was its only avenue of pursuit. Under the yoke of the sufficiency argument, the appellate court is limited to options at the extremes: to affirm the conviction and keep a possibly innocent defendant incarcerated, or to dismiss the

conviction and release a possibly guilty defendant. *Tibbs* has given courts an additional option, one which lies between these two extremes.

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