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Criminal Procedure--Constitutional Limitations on Imposition of More Severe Sentence After Conviction Upon Retrial

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Comments

CRIMINAL PROCEDURE—CONSTITUTIONAL LIMITATIONS ON IMPOSITION OF MORE SEVERE SENTENCE AFTER CONVICTION UPON RETRIAL.—Defendant Pearce was convicted under North Carolina law for assault with attempt to rape and sentenced to twelve to fifteen years in prison. This conviction was reversed several years later by the North Carolina Supreme Court because the prosecution's evidence included an involuntary confession.[1] He was convicted upon retrial and given an eight year sentence with credit for time served on the previous sentence. The second sentence increased Pearce's prison time by almost three years.[2] No reason or justification for the more severe sentence appeared in the record. Pearce, after futilely appealing to the North Carolina Supreme Court,[3] appealed the sentence to the United States District Court by writ of habeas corpus. The district court, citing *Patton v. North Carolina*,[4] held that the harsher sentence was void and unconstitutional. The state failed to resentence Pearce within sixty days; therefore, the district court ordered his release. The order was affirmed by the United States Court of Appeals[5] and certiorari was granted.[6] *Held*: Affirmed. The due process clause of the fourteenth amendment requires that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his decisions must affirmatively appear. *North Carolina v. Pearce* 395 U.S. 711 (1969).[7]

The Court in its consideration of what constitutional limitations there

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[1] State v. Pearce, 266 N.C. 234, 145 S.E.2d 918 (1966).

[2] Pearce would have been released under the first sentence (with all allowances for good behavior) on November 13, 1969. His release date under the second sentence would be (with all allowances for good behavior) October 10, 1972. *North Carolina v. Pearce*, 395 U.S. 711, 713, n. 1 (1969).

[3] State v. Pearce, 268 N.C. 707, 151 S.E.2d 571 (1966).

[4] 381 F.2d 636 (4th Cir. 1967). This case held that a defendant may not be resentenced to a longer term of imprisonment at his second trial than he received at his first (where he pleaded nolo contendere) even though the first conviction was vacated on constitutional grounds. The court's rationale was that a harsher sentence would violate the due process, equal protection and double jeopardy clauses of the Constitution.

As recently stated by a student writer:

> The effect of the *Patton* decision is, thus to intensify the disagreement which exists among the circuits on the harsher punishment issue. It appears certain that this conflict will be resolved only when the Supreme Court has spoken on the issue. Note, *Retrial of the Successful Criminal Appellant: Harsher Punishment and Denial of Credit for Time Served*, 28 MD. L. REV. 64 (1968).

[5] Pearce v. North Carolina, 397 F.2d 253 (4th Cir. 1968).

[6] North Carolina v. Pearce, 393 U.S. 922 (1968).

[7] The Court's opinion written by Justice Stewart represents the view of only four justices. Four others agreed only that Pearce should be released.

may be upon the imposition of a more severe sentence after reconviction, had three alternatives from which to choose. Historically, courts faced with this issue have either unqualifiedly upheld the harsher sentence,[8] absolutely overruled the harsher sentence,[9] or limited the power to impose such a sentence.[10] An apparent majority of courts have held or indicated that it is permissible to impose a harsher sentence after a new trial.[11] Four arguments have been used to justify increased sentences: (1) the possibility that a harsher sentence could act as a deterrent to frivolous appeals;[12] (2) the need for individualized sentencing based on the current case history of the criminal appellant;[13] (3) the tendency to discourage appellate review of sentencing;[14] (4) the fact that the first trial is a nullity and by appealing, the defendant has waived the consequences of that trial.[15]

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[8] Stroud v. United States, 251 U.S. 15 (1919); Murphy v. Massachusetts, 177 U.S. 155 (1900); King v. United States, 98 F.2d 291 (D.C. Cir. 1938); United States v. Sanders, 272 F. Supp. 245 (E.D. Calif. 1967).

[9] Patton v. North Carolina, 381 F.2d 636 (4th Cir. 1967); Whalley v. North Carolina, 379 F.2d 221 (4th Cir. 1967); People v. Ali, 424 P.2d 932, 57 Cal. Rptr. 348 (1967); People v. Henderson, 386 P.2d 677, 35 Cal. Rptr. 77 (1963); State v. Wolf, 46 N.J. 301, 216 A.2d 586 (1966); State v. Turner, 429 P.2d 565 (Ore. 1967).

[10] United States v. Coke, 404 F.2d 836 (2d Cir. 1968); United States v. White, 382 F.2d 445 (7th Cir. 1967); Starner v. Russell, 378 F.2d 808 (3d Cir. 1967); Marano v. United States, 374 F.2d 583 (1st Cir. 1967).

[11] Annot., 12 A.L.R.3d 987 (1967); *accord*, Van Alstyne, *In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant*, 74 YALE L.J. 606, 610 (1965); Comment, 25 WASH. & LEE L. REV. 60, 62 (1968).

[12] The argument is that the possibility of harsher sentence upon retrial discourages criminal defendants from making frivolous appeals. The courts otherwise would be flooded with petitions for retrial from prisoners with nothing to lose and everything to gain. Society's interest in better judicial administration and interest of the defendant with a legitimate appeal are better protected if court time is not wasted on such appeals. For a discussion of this view see *Fay v. Noia*, 372 U.S. 391, 445 (1963) (dissenting opinion); People v. Henderson 386 P.2d 677, 691, 35 Cal. Reptr. 77,—, (1963) (dissenting opinion); *see also* Comment, 80 HARV. L. REV. 891, 893 (1967).

[13] This view assumes that the sentencing process at retrial is refined enough to individually assess the years needed to punish and rehabilitate each defendant. The resentencing judge, with the latest information, can take a "fresh look" at the defendant which will, theoretically, give a truer picture of the defendant's character at retrial. The state has an important interest in the imposition of a sentence that appears just in light of the latest and best information. Williams v. New York, 337 U.S. 241 (1949); United States v. Coke, 404 F.2d 836, 843 (2d Cir. 1968); Starner v. Russell, 378 F.2d 808, 811 (3rd Cir. 1967); Note, *Retrial of Successful Criminal Appellant: Harsher Punishment and Denial of Credit for Time Served*, 28 MD. L. REV. 64 (1968). Also, most of the criminal convictions are the result of guilty pleas and the original sentence in these cases is very arbitrary.

> . . . [I]t is widely known that unduly lenient sentences may frequently be imposed following a plea of guilty, or following some bargaining with the prosecutor. . . . [T]he interests of society in exacting fair punishment or effective rehabilitation may not have been properly vindicated through the original sentence. Van Alstyne, *supra* note 11, at 620.

[14] Appellate courts are reluctant to interfere with the trial judge's sentencing decision because they feel that he has been in the best position to determine the

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The more recent decisions in the federal courts and the majority of law review commentators absolutely deny the permissibility of a harsher sentence.[16] Some authorities base their objections on the doctrine of unconstitutional conditions.[17] Others cite the constitutional grounds that to allow harsher sentences upon retrial puts the defendant in double jeopardy[18] and/or denies him equal protection of the laws[19] and/or deprives him of due process of law.[20]

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appropriate sentence. This should be especially true when federal courts are reviewing the actions of state courts. It is argued that the appellate courts should show faith and trust in the judicial discretion of the trial courts. Starner v. Russell, 378 F.2d 808, 812 (3d Cir. 1967); Shear v. Boles, 263 F. Supp. 855, 863 (N.D. W. Va. 1967) *rev'd per curiam*, 391 F.2d 609 (4th Cir. 1967); Comment, 25 WASH. & LEE L. REV. 60, 63 (1968).

[15] Simply stated the waiver theory holds that since the original conviction has, at the defendant's behest, been reversed, all consequences of the first trial are nullified and upon retrial the slate is wiped clean. The second sentence therefore cannot be compared to the first because the defendant has waived the benefit of it Green v. United States, 355 U.S. 184, 198 (1957) (dissenting opinion); Stroud v. United States, 251 U.S. 15 (1919); Starner v. Russell, 378 F.2d 808, 811 (3d Cir. 1967); United States v. Walker, 346 F.2d 428, 431 (4th Cir. 1965); King v. United States, 98 F.2d 291, 295 (D.C. Cir. 1938); Note, *Constitutional Law: Increased Sentence and Denial of Credit under the Traditional Waiver Theory*, 1965 DUKE L.J. 395 (1965); Annot., 12 A.L.R.3d 978 (1967). A similar theory is that the defendant assumes the risk of a harsher sentence upon retrial and therefore he is precluded from double jeopardy protection. Trono v. United States, 199 U.S. 521 (1905); Bohannon v. District of Columbia, 99 A.2d 647 (Mun. Ct. App. D.C. 1953); Annot., 12 A.L.R.3d 978 (1967).

[16] *See* note 18, *infra*.

[17] The doctrine of unconstitutional conditions has been stated as follows:

> . . . [The] enjoyment of governmental benefits may not be conditioned upon the waiver or relinquishment of constitutional rights, at least in the absence of compelling societal interests which justify the subordination of such rights under the circumstances. Van Alstyne, *supra* note 11, at 614.

The governmental benefits involved here are the right to appellate review and access to laws which prohibit the changing of sentence within a statutory time after it is imposed if the defendant does not appeal. The government should not be able to withhold or revoke the benefit because the defendant refuses to surrender his constitutional rights. The fact that the original conviction was obtained through unconstitutional means should not mean that the defendant who chooses to have the constitutional errors corrected will be denied the governmental benefits. The proponents of the doctrine recognize only two sufficiently compelling interests to justify any restrictions on the governmental benefits: (1) to insure that the benefit is maintained for its intended purpose and protect its effectiveness; and (2) the social interest must be protected against those whose capacity for inflicting harm is increased by the possession of this benefit. See United States v. Walker, 346 F.2d 428, 430 (4th Cir. 1965); Van Alstyne, *supra* note 11, at 614; Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960).

[18] . . . "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. This clause was made applicable to the states through the fourteenth amendment in *Benton v. Maryland*, 395 U.S. 784 (1969).

Two arguments have been made in applying the double jeopardy clause to the sentencing upon retrial. The first is that a defendant is impliedly acquitted of any harsher penalty by the judge or jury's selection of the penalty at the first trial. The second and more modern approach is that the double jeopardy clause

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Some courts have not found the practice of increasing sentences upon retrial absolutely barred by the Constitution, but they have recognized that the practice was subject to abuse.[21] These courts, in order to protect the successful appellants from the possibility of being punished for appealing, have stipulated that a resentencing judge must have legitimate reasons for increasing the sentence upon retrial, but they differ in the requirements and guidelines for the resentencing

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prohibits multiple punishments (any beyond the first sentence). The implied acquittal theory is the antithesis of the waiver theory (discussed at note 15 *supra*). Like the waiver theory it is a corollary of a more accepted axiom (that the defendant is impliedly acquitted of any higher degree of an offense when the jury finds him guilty of the lesser one). The multiple punishment argument is that the double jeopardy clause prevents (1) reprosecution for the same offense following acquittal or (2) reprosecution for the same offense or (3) multiple punishment for the same offense. The multiple punishment application to harsher sentencing upon reconviction is an extension of the double jeopardy prohibition against arbitrarily increasing a sentence after service has begun. This argument is not applied when sentences are increased to bring them up to the statutory minimum. *See* Green v. United States, 355 U.S. 184 (1957); Ex parte Lange, 85 U.S. (18 Wall.) 163 (1873); Patton v. North Carolina, 381 F.2d 636 (4th Cir. 1967); Whaley v. North Carolina, 379 F.2d 221 (4th Cir. 1967); People v. Henderson, 386 P.2d 677, 35 Cal. Rptr. 77 (1963); State v. Wolf, 46 N.J. 301, 216 A.2d 586 (1966); Honigsberg, *Limitations Upon Increasing a Defendant's Sentence Following a Successful Appeal and Reconviction*, 4 CRIM. L. BULL. 329 (1968); Van Alstyne, *supra* note 11, at 630-36; Note, *Retrial of the Successful Criminal Appellant: Harsher Punishment and Denial of Credit for Time Served*, 28 MD. L. REV. 64 (1968); Comment, 80 HARV. L. REV. 891 (1967); Comment, 32 ST. JOHNS L. REV. 324 (1958); Comment, 9 VILL. L. REV. 517 (1964); Comment, 50 VA. L. REV. 559 (1964); Annot., 12 A.L.R. 3d 978 (1967).

[19] "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV § 1. The argument here is that equal protection is denied because successful appellants are the only defendants whose sentence could be increased. This is true because:

> . . . [I]t is currently the law in every jurisdiction that no sentence may in fact be reopened for revision once the term of the trial court has expired, service of sentence has commenced, and the time for an appeal by the state (where such is allowed) has elapsed. . . . Defendants who passively remain in jail are assured at least that their sentences will not be increased, . . . Van Alstyne, *supra* note 11, at 615.

The successful appellants, therefore are invidiously classified. The argument continues with other examples of preferred defendants (*i.e.* those who have little or nothing to be added to their sentences in line with the statutory maximum, versus those who might be sentenced to death or retrial). The arbitrary classification has no merit as there is no evidence whatever to suggest that those able to successfully appeal their original conviction are more likely than others to have been the beneficiaries of excessively lenient sentences. In fact, it is argued that this class should get preferred treatment instead of being discriminated against because their appeals have been found meritorious, not frivolous. It is submitted that either all sentences should be subject to reevaluation or none should be. Patton v. North Carolina, 381 F.2d 636, 642-45 (4th Cir. 1967); Whaley v. North Carolina, 379 F.2d 221 (4th Cir. 1967); Honigsberg, *supra* note 18, at 335; Van Alstyne, *supra* note 11, at 637; Annot., 12 A.L.R.3d 978 (1967).

[20] "No person shall be . . . deprived of life, liberty, or property without due process of law." U.S. CONST. amend. V and XIV. The due process clause has been held to guarantee fundamental fairness to all criminal defendants at trial. The defendant sometimes has to appeal and be retried to assure his right to an "error-

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judge. Some require that the reasons appear in the record of the retrial proceedings[22] while others do not impose this affirmative duty on the judge.[23] Some of the acceptable reasons are: more damaging evidence at new trial, substantial change in the presentence report, different judge did the resentencing, or defendant was convicted at retrial on different charges.[24]

The Court's opinion, delivered by Justice Stewart, dealt solely with the constitutionality of Pearce's harsher sentence. It considered whether he had been placed in double jeopardy, denied equal protection of the laws or deprived of liberty without due process of law.

Justice Stewart cursorily dismissed the double jeopardy issue. He endorsed the *Stroud v. United States*[25] corollary to *United States v. Ball*[26] and held that the double jeopardy clause does not restrict the length of sentence upon reconviction.[27] It seemed a simple matter for the Court to say that because of Pearce's successful appeal, the first conviction and consequent sentence were nullities and therefore, the subsequent retrial procedure constituted a lawful single punishment. This perfunctory acceptance of the waiver theory and "the unbroken

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less" trial, but if he is deterred from appealing he cannot attain the fair trial which the due process clause guarantees. The deterrent is the fear that he might receive a harsher sentence, especially if the harsher sentence might be imposed solely because the defendant chose to appeal. The "incredible dilemma" is emphasized when the choice to appeal would subject the defendant to the death penalty. The defendant is confronted with the unhappy choice of either abandoning his constitutional right to fair trial and serving out his original sentence, or exercising that right under the hazard of having his sentence increased. Most recent cases tend to prefer this argument over the double jeopardy theory. It should be noted that the due process argument is closely related to the unconstitutional conditions doctrine discussed in note 17, *supra*. It has been argued that the due process clause prohibits harsher sentencing at retrial even though the reversal of the first trial was not on constitutional grounds. Fay v. Noia, 372 U.S. 391, 439 (1963); Patton v. North Carolina, 381 F.2d 636, 638-43 (4th Cir. 1967); Whaley v. North Carolina, 379 F.2d 221 (4th Cir. 1967); Honigsberg, *supra* note 18, at 335, 341; Van Alstyne, *supra* note 11, at 623-24; Annot., 12 A.L.R.3d 978 (1967).

[21] United States v. Coke, 404 F.2d 836 (2d Cir. 1968); United States v. White, 382 F.2d 445 (7th Cir. 1967); Starner v. Russell, 378 F.2d 808 (3d Cir. 1967); Marano v. United States, 374 F.2d 583 (1st Cir. 1967).

[22] United States v. Coke, 404 F.2d P36 (2d Cir. 1968); Marano v. United States, 374 F.2d 583 (1st Cir. 1967).

[23] *See* United States v. White, 382 F.2d 445 (7th Cir. 1967); Starner v. Russell, 378 F.2d 808 (3d Cir. 1967).

[24] United States v. Coke, 404 F.2d 836, 842-44 (2d Cir. 1968).

[25] 251 U.S. 14, 18 (1919).

[26] 163 U.S. 662 (1896).

[27] *Ball* held that the double jeopardy prohibition was not against being twice punished, but against being twice put in jeopardy; therefore, a retrial for the same offense did not put one in double jeopardy. *Stroud* extended *Ball* one step further in upholding the constitutionality of an increased sentence upon retrial, emphasizing the fact that the defendant sought the reversal of the first trial.

line of decisions that have followed [the *Ball*] principle"[28] will surely disappoint some legal scholars.[29]

Secondly, the Court held that the imposition of a more severe sentence upon retrial does not violate the equal protection clause since there is no "invidious classification" of those who are successful in getting new trials. It is notable that the Court was not persuaded by the invidious classification argument and its relevance to the equal protection clause. The Court, instead of dwelling on the fact that only the successful appellant is subject to having his sentence increased, responded that the harsher sentence is not inevitable. The "wholly new trial" can result in an acquittal, a lesser sentence, the same sentence, or a greater one.[30] The Court argued, whatever the result of the new trial, it is not the product of discrimination by invidious classifications; but, it may depend ". . . upon a particular combination of infinite variables peculiar to each individual trial.[31] These variables include: new evidence produced at the second trial, the defendant's record while imprisoned on the first sentence and the presentencing investigation report.[32] Finally, the Court weakly countered that if this were invidious discrimination, then successful appellants are also in a preferred position since only they may be acquitted.

The Court based its affirmance on the fact that Pearce might have been deprived of liberty without due process of law if vindictiveness against him for having successfully attacked his first conviction had played any part in rendering the sentence he received upon new trial.[33] It must be pointed out that there was no positive finding of any flagrant or compelling denial of due process of law. The potential in this case for resentencing abuse, however, was enough to hold that due process of law required extra assurance against unconstitutional deterrence of a defendant's exercise of the right to appeal or collaterally attack his first conviction.[34] The possibility of such deplorable judicial conduct would give rise to a legitimate fear that would serve to deter the defendant's right to appeal. The Court said that due process requires that:

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[28] 395 U.S. at 721.

[29] There is no tenable justification for the waiver theory. It impairs the exercise of constitutional rights instead of protecting and insuring them. Note, *Constitutional Law: Increased Sentence and Denial of Credit on Retrial Sustained under Traditional Waiver Theory*, 1965 DUKE L.J. 395, 402 (1965).*See also* Van Alstyne, *supra* note 11, at 610.

[30] 395 U.S. at 722.

[31] *Id.* at 723.

[32] *Id.* at 724-25.

[33] *Id.* at 724.

[34] *Id.* at 724.

> . . . objective information concerning identifiable conduct on the part of the defendant occurring after the time of original sentencing proceeding . . . [a]nd the factual data upon which the sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal.[35]

Since the state gave no reason or justification for Pearce's increased sentence "beyond the naked power to impose it,"[36] the Court ruled that vindictiveness, alien to due process of law, was a possible motive and therefore, the second sentence was unconstitutional. It is important to emphasize that the Court did not rule that the practice of harsher resentencing upon reconviction is unconstitutional. The holding was that harsher resentencing merely because the defendant appealed is a violation of due process of law and must be affirmatively guarded against.

The Supreme Court's recent decisions liberalizing the constitutional protections available to the criminal defendant have been criticized for opening the floodgates to appeals from criminal convictions. One method of offsetting the potential for an unprecedented increase in appeals would be to institute a harsher resentencing policy to deter such appeals.[37] The risk that a defendant who is successful in overturning his first conviction may upon reconviction receive a harsher sentence conceivably has this deterrent effect. In fact, resentencing can easily be used for punishing the defendant for merely seeking his fundamental right to have a trial free from error. The main inquiry in evaluating the *Pearce* decision is, does it guarantee the defendant the right to "unfettered" exercise of his right to appeal?

The Court, in rejecting the double jeopardy and equal protection arguments, did little more than cite the authorities which have previously adopted these arguments. Little time was spent analyzing the merits of these propositions even though they had become law in some federal and state jurisdictions.[38] It is unfortunate that these constitutional issues were not given more in-depth treatment. The Court, however, basically agreed with the policy behind these arguments.

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[35] *Id.* at 726.
[36] *Id.*
[37] In the Brief for Petitioner in *Gideon v. Wainwright*, 372 U.S. 335 (1963), . . . [t]he implication was that the Supreme Court need not be troubled by a retroactive decision in Gideon's case, for many persons held in prison under convictions obtained without benefit of defense counsel would be deterred from seeking any relief from fear of even harsher sentences upon retrial and conviction. Van Alstyne, *supra* note 11, at 607.
[38] See note 9, *supra.*

The opinion acknowledged the threat to a defendant's right to appeal in order to secure the fundamental right of a fair trial. However, the double jeopardy and the equal protection arguments require absolute denial of any power to impose a harsher sentence on retrial, and the Court declined to go this far, in view of the majority's belief that there are some legitimate reasons for harsher sentencing on retrial. The Court, therefore, used the due process argument to develop a more flexible procedure which could eliminate any possibility of abuse and still safeguard the power to resentence when necessary.[39]

Thus the Court sought to eliminate potential abuse, but still allow justifiable harsher resentencing. This approach assumes two uncertain facts: first, that any judicial abuse of the resentencing power will be eliminated by requiring the judge to disclose his reason for the harsher sentence; and second, that there are valid sentencing policies which would outweigh the individual's interest in unfettered exercise of his right to appeal.[40]

The Court, by its imposition of an affirmative duty on the sentencing judge, apparently relies on an accountability system to prevent judicial abuse. However, the duty is spelled out in broad terms, and given the reluctance of appellate courts to overrule lower courts on questions of fact, especially on questions of pure judicial discretion, abuse is not impossible.[41]

The only valid reason for continuing to permit the imposition of a harsher sentence on retrial is based on modern sentencing policies.[42] Sentencing practices and policy in general are in great need of reform and re-examination. The best way to insure that each criminal defendant is treated fairly, both with respect to his own interest and

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[39] The danger of adopting an inflexible rule is that:
The court in which the successful appellant is being retried will be unable to compensate for undue leniency which may have been shown by the first sentencing judge or to adjust a sentence on the basis of a rational evaluation of factors which were not available to the first judge. Note, *Retrial of the Successful Criminal Appellant: Harsher Punishment and Denial of Credit for Time Served*, 28 MD. L. REV. 64, 74 (1968).

[40] *See* note 13, *supra*.

[41] This possibility for abuse is succinctly pointed out by the following example:
Thus even the compromise offered by Marano v. United States, and to a lesser extent by United States v. White, is not satisfactory. For in either case, an unsympathetic judge, given discretion in sentencing need only refer to certain probation records or to alleged reports of accused's bad conduct during the period between the first and second sentences to justify the upgrading of the second sentence. Honigsberg, *supra* note 18, at 342.

[42] ". . . [D]espite contrary *ipse dixits*, the state may have an important interest in the imposition of a sentence that appears just in light of the latest and best information." United States v. Coke, 404 F.2d 836, 843 (2d Cir. 1968). *But see* Van Alstyne, *supra* note 11, at 616. The state's interest must be compelling, not just important.

society's, is to improve or change the initial sentencing mechanism so its sentences are adequate.

The individual's right to appeal is most effectively protected by imposing a ceiling on resentencing which would eliminate an undesirable aspect of retrial—the threat of greater punishment.[43] The Court in *Pearce* unfortunately chose not to protect absolutely the defendant's right to appeal.

W. Stokes Harris, Jr.

CONSTITUTIONAL LAW—FREEDOM OF EXPRESSION—SYMBOLIC FREE SPEECH.—On June 6, 1966, a Brooklyn patrolman approached a crowd of people standing around a black man burning a flag. The man, Sidney Street, was telling them, "If they let that happen to Meredith, we don't need an American flag." Street explained to the officer that upon hearing the news that James Meredith had been shot, he set fire to his flag. The policeman arrested Street and charged him with "publicly mutilating the United States flag."[1] A New York court convicted him of malicious mischief and gave him a suspended sentence. The New York Court of Appeals unanimously affirmed.[2] The Supreme Court of the United States noted jurisdiction.[3] *Held:* Reversed. It was possible that Street might have been convicted not only for physically mutilating the flag, but also for defying it with words, such words being constitutionally protected. Since the New York statute did not separate the words from the act, the Supreme Court declared the statute unconstitutional. Chief Justice Warren,

[43] This ceiling could easily be imposed by statute. Indeed, Justice Black deems this to be a legislative problem. 395 U.S. at 738. In most states, the permissibility of harsher resentencing of successful appellants is strictly a judicial creation without statutory support. Two states, California and Virginia, forbid harsher resentencing as does the Uniform Code of Military Justice. 10 U.S.C. § 863 (b) (1964). The American Bar Association's Project on Minimum Standards for Criminal Justice has a draft which reads:

> Where prosecution is initiated or resumed against a defendant who has successfully sought post conviction relief and a conviction is obtained, or where a sentence has been set aside as the result of a successful application for post conviction relief and the defendant is to be resentenced, the sentencing court should not be empowered to impose a more severe penalty than that originally imposed. ABA STANDARDS RELATING TO POST CONVICTION REMEDIES 96 (1967).

[1] "Any person who . . . shall publicly mutilate, deface, defile or defy, trample on, or cast contempt upon either by word or act [any flag] shall be deemed guilty of a misdemeanor." N.Y. PENAL LAWS § 1425(16)(b) (McKinney 1944).

In 1967, this statute was superceded by § 126 of the N.Y. GENERAL BUSINESS LAW which defines the crime in similar language.

[2] People v. Street, 20 N.Y.2d 231, 229 N.E.2d 187, 282 N.Y.S.2d 491 (1967).

[3] Street v. City of New York, 392 U.S. 923 (1968).