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THE FEDERAL CRIMINAL CODE REFORM ACT OF 1977 AND PROSECUTORIAL APPEAL OF SENTENCES: JUSTICE OR DOUBLE JEOPARDY?

PAUL W. SPENCE*

INTRODUCTION

The double jeopardy provision of the fifth amendment provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." Although primarily intended to protect individuals against the threat of a second prosecution for the same offense after acquittal or conviction, the prohibition against double jeopardy also shields the accused "from attempts to secure additional punishment after a prior conviction and sentence."[1] This constitutional principle is seriously undermined by the proposed Criminal Code Reform Act of 1977[2] which, amidst a thorough revamping of the federal sentencing system, provides for increases in sentences as a result of appellate review initiated by the government. While the constitutional validity of such a procedure has never been addressed by the Supreme Court, the probable resolution of the conflict between the double jeopardy clause and the proposed procedure may be foreshadowed by the Court's application of traditional double jeopardy principles to the sentencing context. The conclusion of this article is that respect for the policies of finality and protection against governmental harassment which underlie the double jeopardy clause compels the determination that the provision in S. 1437 for prosecutorial appeal of sentences is unconstitutional.

THE STATUTE

The proposed Criminal Code Reform Act of 1977 is an ambitious attempt "to reorganize and streamline the administration of Federal criminal justice."[3] Perceiving the present statutory scheme of federal

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1. Brown v. Ohio, 432 U.S. 161, 166 (1977). *See Ex parte* Lange, 85 U.S. (18 Wall.) 163, 173 (1874).

2. S. 1437, 95th Cong., 1st Sess. (1977) [hereinafter cited as S. 1437]. As of the end of the second session of the 95th Congress, S. 1437 had been passed by the Senate, 124 CONG. REC. S860 (daily ed. Jan. 30, 1978), and the companion bill, H.R. 6869, 95th Cong., 1st Sess., 123 CONG. REC. H3979 (daily ed. May 3, 1977) (reintroduced after markup by the Subcommittee on Criminal Procedure as H.R. 13,959, 95th Cong., 2d Sess., 124 CONG. REC. H8970 (daily ed. Aug. 17, 1978)), was referred to the House Judiciary Committee but was never considered by the full House.

3. 123 CONG. REC. S6838 (daily ed. May 2, 1977) (remarks of Sen. Kennedy).

criminal statutes as "a hodgepodge of conflicting, contradictory, and imprecise laws,"[4] the drafters of S. 1437 set out to create a comprehensive system with a consistency and rationality lacking in the federal criminal law.[5] In addition to addressing such issues as federal jurisdiction, substantive law, and criminal behavior, the drafters sought to establish a practical and coherent framework for sentencing, replacing "existing anomalies with a rational system for distinguishing the degree of criminal behavior while yet insuring uniformity."[6]

One of the most notable innovations of the proposed Act concerns sentencing reform. It prescribes the use of sentencing guidelines promulgated by a newly created United States Sentencing Commission.[7] These guidelines would provide direction for the trial court in determining whether a term of imprisonment, a sentence of probation, or a fine should be imposed;[8] what the appropriate amount of a fine or length of imprisonment or probation would be;[9] and whether a portion of a prison term should be designated as subject to a defendant's early release and, if so, the length of that portion.[10] Regarding the form of punishment and, if applicable, what prison term should be imposed upon a convicted defendant, it is the court's duty under the proposed legislation to consider these guidelines which include "the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines that are issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1) and that are in effect on the date the defendant is sentenced."[11] The judge is also required to state in open court the reasons for imposing a particular sentence.[12] It is important to note that the Sentencing Commission's guidelines would be recommendations and not requirements. The sentencing court may, within the lawful limits set by proposed 18 U.S.C. § 2301,[13] deviate from the sentencing range and impose a

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4. S. REP. No. 605, 95th Cong., 1st Sess. 3 (1977).
5. *See id.* at 4-7.
6. *Id.* at 9.
7. S. 1437, *supra* note 2, § 124 (to be codified in 28 U.S.C. § 994).
8. *Id.* (to be codified in 28 U.S.C. § 994(a)(1)(A)).
9. *Id.* (to be codified in 28 U.S.C. § 994(a)(1)(B)).
10. *Id.* (to be codified in 28 U.S.C. § 994(a)(1)(C)). Parole (early release) would be abolished except in those rare instances in which the court finds no other way to provide a needed program.
11. *Id.* § 101 (to be codified in 18 U.S.C. § 2003(a)(4)).
12. *Id.* (to be codified in 18 U.S.C. § 2003(b)).
13. Section 2301 delineates authorized terms of imprisonment for specific classes of felonies and misdemeanors. In effect, this section establishes the maximum lawful

longer or shorter term of imprisonment than that provided for in the Commission's guidelines.[14] The consequences of this are twofold. Not only must the court state in open court the *specific* reason for imposing a sentence outside the recommended range,[15] but more importantly, its action is subject to appellate review.

Proposed 18 U.S.C. § 3725 of the Act provides for limited appellate review of sentences. This provision deals only with sentences imposed for felonies and excludes those based upon plea bargaining as well as sentences within the applicable range recommended by the Commission. Such review may be sought either by the defendant, if the final sentence imposed is higher than the maximum established by the guidelines, or by the government, if the sentence is lower than the minimum prescribed. Section 3725(b), entitled "Appeal by the Government," states in pertinent part:

> The government may, with the approval of the Attorney General or his designee, file a notice of appeal in the district court for review of a final sentence imposed for a felony if the sentence includes a lesser fine or term of imprisonment than the minimum established in the guidelines, or a greater portion of a term of imprisonment subject to the defendant's early release than the maximum established in the guidelines that are issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1), and that are found by the sentencing court to be applicable to the case . . . .[16]

The government initiates the sentence review process by filing a notice of appeal with the clerk of the district court who then certifies designated portions of the record, the presentence report, and information submitted during the sentencing proceedings, to the court of appeals.[17] Section 3725(d) directs the court of appeals to consider both the factors appropriate to the imposition of sentence under section 2003 and the reasons for the sentence stated by the trial court. If the appellate court concludes that the sentence imposed was not unreasonable, it must affirm.[18] If the appellate court finds that the sentence was unreasonable, however, it is authorized to impose a greater sentence, to remand for imposition of a greater

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term of imprisonment that a sentencing court may impose for a particular category of offense.

14. S. 1437, *supra* note 2, § 101 (to be codified in 18 U.S.C. § 2003(b)).

15. *Id.*

16. *Id.* (to be codified in 18 U.S.C. § 3725(b)).

17. *Id.* (to be codified in 18 U.S.C. § 3725(c)).

18. *Id.* (to be codified in 18 U.S.C. § 3725(e)(2)).

sentence, or to remand for further sentencing proceedings.[19] In effect, section 3725(b) authorizes the prosecutor to seek an increase of the trial court's sentence on appeal. This provision raises a serious constitutional issue in light of the double jeopardy clause and invites an assessment of its validity.[20]

TWICE IN JEOPARDY: A BACKGROUND

Although the double jeopardy prohibition originated during ancient Greek and Roman times,[21] its contemporary meaning remains unsettled. At common law, the doctrine was relatively narrow and dependent upon the highly technical formalities of criminal proceedings.[22] Its incorporation into the Bill of Rights, however, firmly established this prohibition as a basic right of American citizens and a fundamental tenet of American jurispru-

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19. *Id.* (to be codified in 18 U.S.C. § 3725(e)(1)(B)).

20. During the course of the Senate Subcommittee on Criminal Laws and Procedures hearings on S. 1437, in general, and governmental appeal of sentences, in particular, the following exchange took place:

> Senator HATCH. Do you anticipate any difficulties with double jeopardy problems concerning government appeal of sentences?
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> Judge WEBSTER. In terms of H.R. 7245, we were sufficiently concerned about our ability to handle that by the rulemaking process, but we asked that the Congress consider dealing with it.
>
> As far as double jeopardy is concerned, I do not think that is a problem. There is ample case authority for enhancement of sentences.
>
> Senator HATCH. Do you both agree on that?
>
> Judge TJOFLAT. Yes.

Reform of the Federal Criminal Laws: Hearing on S. 1437 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary, 95th Cong., 1st Sess. 8954 (1977). Judges Webster (currently director of the Federal Bureau of Investigation) and Tjoflat were the official spokesmen for the Judicial Conference of the United States at the Senate hearings. In contrast, Roger A. Lowenstein, Federal Public Defender for the District of New Jersey on behalf of the National Legal Aid and Defender Association, concluded in a prepared statement presented before the subcommittee, "[C]onsiderations of both a constitutional and public policy nature require that the government not be permitted to appeal sentences which are below the suggested guidelines." *Id.* at 9148.

21. *See* Bartkus v. Illinois, 359 U.S. 121, 151-52 & n.3 (1959) (Black, J., dissenting).

22. *See* 4 W. BLACKSTONE, COMMENTARIES *335-36; J. SIGLER, DOUBLE JEOPARDY 16-21 (1969). For example, this "universal maxim of the common law" did not preclude subsequent proceedings if the verdict or acquittal was rendered upon a faulty indictment, by a court technically lacking jurisdiction, or where no judgment had been reached due to a premature termination. Furthermore, the plea of former jeopardy was no bar to multiple prosecutions for noncapital felonies or misdemeanors. Schulhofer, *Jeopardy and Mistrials,* 125 U. PA. L. REV. 449, 452-53 (1977).

dence,[23] but because the limits of the double jeopardy clause were left undefined, the courts became the arbiters of its meaning.

Speaking for the Court in *Green v. United States,*[24] Mr. Justice Black cogently expressed the policies underlying the double jeopardy clause:

> The constitutional prohibition against "double jeopardy" was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. . . . The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[25]

Thus, the fundamental guarantee of the double jeopardy clause shields criminal defendants from the power of the government to subject them to multiple prosecutions for the same criminal offense[26] and "represents a constitutional policy of finality for the defendant's benefit in federal criminal proceedings."[27]

The protection afforded criminal defendants by the double jeopardy clause, however, is not absolute. Often the government's interests in the enforcement of criminal law and the proper administration of justice require the subordination of the countervailing interest of the individual to be free from multiple prosecutions. The resultant conflict of these competing values plays a major role in the Supreme Court's decisions regarding double jeopardy. The ultimate constitutionality of prosecutorial appeal of sentences may best be evaluated by examining the manner in which the Court has subtly balanced these countervailing interests in a variety of double jeopardy contexts — reprosecution after mistrial, multiple proceed-

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23. As one commentator observed, "[t]he most important event in the development of double jeopardy was the occasion of its incorporation into the federal constitution. This occurrence represents the transformation of a general maxim into a general rule of public policy." J. SIGLER, *supra* note 22, at 34.

24 . 355 U.S. 184 (1957).

25. *Id.* at 187-88.

26. Schulhofer, *supra* note 22, at 454.

27. United States v. Jorn, 400 U.S. 470, 479 (1971) (plurality opinion).

ings at the defendant's behest, reprosecution after acquittal, reprosecution after conviction, and cases involving multiple punishment.

Reprosecution after Mistrial

The resolution of issues involving the fifth amendment prohibition against double jeopardy ultimately depends upon balancing the defendant's interest in freedom from multiple prosecutions or punishments against the government's interest in maintaining and enforcing the criminal law. When a criminal defendant has received a final verdict of acquittal or conviction, this balancing process invariably favors the accused, hence the absolute bar against subsequent proceedings following final judgments.[28] When the first trial terminates prematurely, however, the defendant's interest in limiting the government to a single proceeding may often be subordinated to the legitimate ends of criminal justice.

The problem of reprosecution after a mistrial has been declared was first raised in *United States v. Perez*.[29] There the trial judge, without the consent of the defendant, discharged a jury which had been unable to agree on a verdict. Finding no legal bar to retrial, Mr. Justice Story enunciated principles that are still recognized today:

> We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a *manifest necessity* for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes . . . .[30]

This passage implies that a determination of "manifest necessity" involves the balancing of individual interests against those of the government. Although this weighing process is rarely explicit, it is hypothesized that the consideration of individual versus government

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28. *See* text accompanying notes 81 to 105 *infra*.
29. 22 U.S. (9 Wheat.) 579 (1824).
30. *Id.* at 580 (emphasis added). *See, e.g.*, United States v. Sanford, 429 U.S. 14 (1976); Bretz v. Crist, 546 F.2d 1336 (9th Cir. 1976); United States v. Gunther, 546 F.2d 861 (10th Cir. 1976).

interests forms the substratum of all reprosecution after mistrial decisions whether or not they expressly invoke the "manifest necessity" doctrine.[31]

In *Wade v. Hunter*[32] a court-martial,[33] after hearing evidence and arguments of counsel, continued the case in order to procure the attendance of two witnesses. Due to the tactical situation in the field (the court-martial took place in Germany at the close of World War II), the commanding officer withdrew the charges. Although emphasizing the defendant's strong interest in having the verdict of the initial jury, the Court held that the double jeopardy clause did not bar the subsequent reinstitution of the charges and, ultimately, the conviction:

> The double-jeopardy provision of the Fifth Amendment . . . does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. . . . What has been said is enough to show that a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments.[34]

The Court addressed the issue of double jeopardy in this context by explicitly balancing the defendant's right to a single proceeding before a particular tribunal against the government's interest in conducting full and fair trials.

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31. *See* Arizona v. Washington, 434 U.S. 497, 505–10 (1978). The evolution of the "manifest necessity" doctrine strongly suggests that the degree of necessity required to justify the declaration of a mistrial over the defendant's objection, thereby permitting reprosecution, varies according to the particular circumstances of the case. A strict scrutiny standard will be applied when the basis of the mistrial is the absence of an important prosecution witness or where there is reason to believe that the prosecutor is merely seeking to gain a tactical advantage. Downum v. United States, 372 U.S. 734, 737–38 (1963). On the other hand, appellate courts will defer to the discretion of the trial judge in deciding whether or not "manifest necessity" justifies the discharge of a deadlocked jury, the classic ground for mistrial. United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824). Although the "manifest necessity" doctrine is basically a restrictive concept designed to limit the possibility of unfair reprosecution, in practice it is a flexible standard. Illinois v. Somerville, 410 U.S. 458, 462 (1973).

32. 336 U.S. 684 (1949).

33. Albeit a military trial, *Wade* and the principles enunciated therein have frequently been discussed in later cases analyzing the effect of the double jeopardy clause in the more traditional criminal context. *See, e.g.*, United States v. Jorn, 400 U.S. 470 (1971); Downum v. United States, 372 U.S. 734 (1963).

34. 336 U.S. at 688–89.

In *United States v. Jorn*[35] the "manifest necessity" doctrine was invoked by the Supreme Court where the trial judge terminated the proceedings after the jury had been sworn to allow non-party prosecution witnesses to consult with their attorneys regarding the possibility of self-incrimination. The plurality rejected "bright-line rules" for declaring mistrials formulated in terms of specific categories of circumstances[36] or the intended beneficiary of the ruling[37] because such rules "would only disserve the vital competing interests of the Government and the defendant."[38] Emphasizing these competing interests in cases where reprosecution is sought after a sua sponte judicial mistrial declaration, the plurality opinion observed:

> [I]n the final analysis, the judge must always temper the decision whether or not to abort the trial by considering the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate.[39]

Thus, the Court acknowledged the interest of the defendant in the decision of whether to proceed to verdict and stressed the different considerations that apply when the defendant requests the mistrial. The *Jorn* plurality concluded that the trial judge abused his discretion in discharging the jury because the mistrial was declared so abruptly that neither party had an opportunity to object, and the prosecution was precluded from suggesting the possibility of a continuance.[40] Thus, the judge failed to exercise sound discretion to assure that there was a manifest necessity for the sua sponte declaration of the mistrial, and consequently, the defendant's reprosecution would violate the double jeopardy provision of the fifth amendment.[41]

The trial court in *Illinois v. Somerville*[42] dismissed a defective indictment subsequent to the swearing of the jury and over the defendant's objection. The defendant was later convicted at a second trial. While recognizing the trial court's discretion in terminating a

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35. 400 U.S. 470 (1971) (plurality opinion).
36. *See* United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824).
37. *See* Gori v. United States, 367 U.S. 364 (1961).
38. 400 U.S. at 486 (Harlan, J., writing for plurality).
39. *Id.*
40. *Id.* at 486-87.
41. *Id.*
42. 410 U.S. 458 (1973).

criminal proceeding once jeopardy has attached, the Supreme Court nevertheless emphasized the important interest of the defendant in receiving the verdict of the jury first impaneled. Because further proceedings in the first trial would have been virtually moot, the Court found that this mistrial declaration served a "competing and equally legitimate demand for public justice"[43] that outweighed the defendant's interest in proceeding to verdict and met the standard of "manifest necessity."

The issue of whether the double jeopardy clause is violated by the retrial of defendants after a mistrial declaration at their request was squarely presented in *United States v. Dinitz.*[44] In *Dinitz,* improper opening arguments by a defense counsel resulted in his exclusion, and a motion for mistrial by the remaining defense counsel was granted. Acknowledging that the *Perez* doctrine was inapplicable because the mistrial was declared at the defendant's request, the Court emphasized that "[d]ifferent considerations obtain . . . when the mistrial has been declared at the defendant's request"[45] and that the defendant must "retain primary control over the course to be followed in the event of such [prejudicial or prosecutorial] error."[46] The Court observed that "a defendant's mistrial request has objectives not unlike the interests served by the Double Jeopardy Clause — the avoidance of the anxiety, expense, and delay occasioned by multiple prosecutions."[47] Without resolving the "manifest necessity" issue, the Court held that the double jeopardy clause did not preclude further proceedings. A later case summarized *Dinitz's* holding as follows:

> Where the defendant, by requesting a mistrial, exercised his choice in favor of terminating the trial, the Double Jeopardy Clause generally would not stand in the way of reprosecution. Only if the underlying error was "motivated by bad faith or

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43. *Id.* at 471.

44. 424 U.S. 600 (1976).

45. *Id.* at 607. *Cf.* Gori v. United States, 367 U.S. 364 (1961) (trial judge declared mistrial sua sponte, purporting to protect defendant against possible prejudice; noting that this action was taken for sole benefit of accused, Court held that retrial was not barred). The *Gori* ruling was seriously questioned in *Jorn,* which cast doubt on the relevance of such a motivation for declaring a mistrial. 400 U.S. at 483. Nevertheless, *Gori* demonstrates that the Court will apply the double jeopardy clause less rigorously when it perceives the problem of reprosecution as arising from action taken by, or in the interest of, the accused.

46. 424 U.S. at 609.

47. *Id.* at 608.

undertaken to harass or prejudice," . . . would there be any barrier to retrial.[48]

These decisions reflect the balancing approach adopted by the Court and the tensions between the government's interest in furthering the administration of justice and the accused's interest in freedom from double jeopardy. Their major significance is the impact of the reasoned choice of the individual and the absence of governmental initiative upon the Court's balancing analysis.[49] The rationale for limiting the government to a single proceeding in which to vindicate its interest in the enforcement of the criminal laws may be outweighed by the defendant's interest in exercising a choice in the course to be followed at trial. For example, the defendant may seek an immediate new trial via a motion for mistrial. According to *Dinitz,* the fact that such an option rests with the defendant is not inconsistent with the policies of the double jeopardy clause.[50] If this fundamental principle — according great weight to the defendant's freedom to determine the course of the proceedings — is applicable to other double jeopardy contexts, government power to seek appellate review of sentences may be unconstitutional.

Multiple Proceedings at the Behest of the Defendant Following Conviction

The double jeopardy clause does not constitute an absolute bar to retrial when the policy objectives of the prohibition are not

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48. Lee v. United States, 432 U.S. 23, 32-33 (1977) (quoting United States v. Dinitz, 424 U.S. 600, 611 (1976)). *See also* Jeffers v. United States, 432 U.S. 137, 152 (1977).

49. When subsequent proceedings are the result of the defendant's efforts, the policy objectives of the double jeopardy clause may not be applicable. In United States v. Scott, 98 S. Ct. 2187 (1978) (5-4 decision), the district court granted the defendant's motion for dismissal on the grounds of preindictment delay, and the government appealed. The court of appeals, relying on Jenkins v. United States, 420 U.S. 358 (1975), concluded that the fifth amendment barred further prosecution, 544 F.2d 903, 903-04 (1977) (per curiam), because "'further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged, would have been required upon reversal and remand.'" 98 S. Ct. at 2191 (quoting Jenkins v. United States, 420 U.S. 358, 370 (1975)). *See also* note 96 *infra.* The Supreme Court, drawing on the *Dinitz* rationale, concluded that "the Double Jeopardy Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice." 98 S. Ct. at 2198. Explicitly overruling *Jenkins,* the *Scott* Court held that when a defendant deliberately chooses to seek termination of the proceedings against him on a basis unrelated to factual guilt or innocence of the offense of which he is accused, he suffers no injury cognizable under the double jeopardy clause. *Id.* at 2197-98.

50. *See* text accompanying note 48 *supra.*

applicable to the circumstances of the case or "some important countervailing interest of proper judicial administration"[51] is present. A defendant may not only be subjected to retrial for the same offense when a mistrial has been declared because of "manifest necessity" or at his request, but also when a conviction has been set aside on appeal at the defendant's behest.

The double jeopardy clause does not preclude retrial of a defendant whose conviction is set aside because of an error in the proceedings leading to conviction.[52] First enunciated in *United States v. Ball*,[53] this doctrine is a well-established part of our constitutional jurisprudence. In *Ball* three defendants were charged with murder under a defective indictment, and two of them were convicted. Upon a writ of error to the Supreme Court, the convictions were reversed. Subsequently, all three defendants were reindicted, and convicted. The trial court had instructed the jury to find against the defendants' pleas of former jeopardy. On a second appeal to the Supreme Court, the plea of former jeopardy was discussed in two contexts. With regard to the defendant who had initially been acquitted, the Court declared that "a general verdict of acquittal upon the issue of not guilty to an indictment undertaking to charge murder, and not objected to before the verdict as insufficient in that respect, is a bar to a second indictment for the same killing."[54] The Court also recognized the principle that "the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial."[55] Without revealing its underlying rationale, the Court summarily dispensed with the issue raised by the two remaining appellants: "[I]t 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, or upon another indictment, for the same offense of which he had been convicted."[56] *Ball* is considered to have

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51. Illinois v. Somerville, 410 U.S. 458, 471 (1973).

52. United States v. Tateo, 377 U.S. 463, 465 (1964).

53. 163 U.S. 662 (1896).

54. *Id.* at 669. *See* Kepner v. United States, 195 U.S. 100 (1904) and text accompanying notes 83 to 89 *infra.*

55. 163 U.S. at 669.

56. *Id.* at 672. The Court cited its prior series of decisions in Hopt v. Utah, 104 U.S. 631 (1882), 110 U.S. 574 (1884), 114 U.S. 488 (1885), 120 U.S. 430 (1887). Although the *Hopt* decisions do not discuss the double jeopardy implications of retrial after the defendant has had the conviction set aside on appeal, they demonstrate the validity of that principle. The defendant was convicted of murder in the first degree. Pursuing appellate remedies to the Supreme Court, he succeeded in having his conviction set aside but was subsequently retried. This pattern was repeated twice, and it was not until after the defendant's fourth trial that his conviction was finally affirmed by the Supreme Court.

established the principle "that this constitutional guarantee [of freedom from double jeopardy] imposes no limitations whatever upon the power to *retry* a defendant who has succeeded in getting his first conviction set aside,"[57] despite the fact that the Court's opinion is devoid of any analysis justifying its interpretation of double jeopardy principles.

Two principal theories, one based on "waiver" and the other on the concept of "continuing jeopardy," have emerged to justify retrial under the circumstances present in *Ball.* The "waiver" theory was first discussed in *Trono v. United States.*[58] There the defendants were acquitted of murder but convicted of assault. On appeal, the Philippine Supreme Court, which was empowered to determine the guilt or innocence of defendants and to impose sentence on appeal,[59] reversed the assault conviction but convicted the defendants of homicide.[60] In the Supreme Court, the appellants contended that their acquittal of murder by the trial court barred the later conviction of homicide. In effect, the appellants argued that the assault conviction, in conjunction with the acquittal of murder, operated to restrict a conviction upon retrial to assault.[61] The Court found *Kepner v. United States,*[62] which had held that government appeal of an acquittal was barred by the double jeopardy clause, inapplicable:

> [*The defendants*] *appealed from the judgment of the court of first instance and the Government had no voice in the matter of the appeal,* it simply followed them to the court to which they appealed. *We regard that fact as material and controlling.* The difference is vital between an attempt by the Government to review the verdict or decision of acquittal in the court of first instance and the action of the accused person in himself appealing from the judgment and asking for its reversal . . . .[63]

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57. North Carolina v. Pearce, 395 U.S. 711, 720 (1969) (emphasis added) (footnote omitted).

58. 199 U.S. 521 (1905).

59. *See* note 84 *infra.*

60. Under the applicable criminal code, the crime of homicide was equivalent to second degree murder. *Id.* at 522. The crime charged in the complaint, murder, actually encompassed three degrees of crime, first degree murder, second degree murder or homicide, and assault.

61. This argument was founded on double jeopardy principles. The Court applied the pertinent language of the act of Congress then in force in the Philippine Islands as it would the fifth amendment prohibition. *See* Ch. 1369, § 5, 32 Stat. 691 (1902). *See also* note 85 *infra.*

62. 195 U.S. 100 (1904). *See* text accompanying notes 83 to 89 *infra.*

63. 199 U.S. at 529–30 (emphasis added).

Acknowledging that the accused had been placed in jeopardy of conviction of a crime for which he had been acquitted, the Court reasoned that by appealing his conviction he waived the right to invoke the plea of former jeopardy. By seeking a potentially greater benefit, the accused forfeited the protection of the double jeopardy provision and reopened the entire controversy upon retrial in the Philippine Supreme Court. The Court held that retrial was permissible in this case, and stressed the crucial distinction between proceedings initiated by the government and those initiated by the defendant in concluding:

> As the judgment stands before he appeals, it is a complete bar to any further prosecution for the offense set forth in the indictment, or of any lesser degree thereof. No power can wrest from him the right to so use that judgment, but if he chooses to appeal from it and to ask for its reversal he thereby waives, if successful, his right to avail himself of the former acquittal of the greater offense, contained in the judgment which he has himself procured to be reversed.[64]

The waiver doctrine has been applied in a number of cases in which sentences were increased following conviction upon retrial at the accused's behest.[65]

The theory that the defendant actually waives his plea of former jeopardy by appealing his conviction rests on questionable constitutional grounds. Waiver in this context has been distinguished from the principles governing the waiver of recognized constitutional rights.[66] In *United States v. Dinitz*[67] the Supreme Court explicitly rejected the contention that "the permissibility of a retrial following

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64. *Id.* at 533.

65. *E.g.,* Stroud v. United States, 251 U.S. 15 (1919); Ocampo v. United States, 234 U.S. 91 (1914); Flemister v. United States, 207 U.S. 372 (1907). In *Stroud* the defendant, popularly known as the "Birdman of Alcatraz," appealed and had his original conviction and death sentence reversed. A year after the first trial, he was retried and again convicted, but the sentence precluded capital punishment. Stroud was again successful on appeal and was tried for a third time. This last conviction resulted in the reimposition of the death sentence. Relying on *Trono,* the Court upheld the verdict and sentence, observing, "thus the plaintiff in error himself invoked the action of the court which resulted in a further trial. In such cases he is not placed in second jeopardy within the meaning of the Constitution." 251 U.S. at 18.

66. *See* Johnson v. Zerbst, 304 U.S. 458 (1938). *Johnson* delineated the standards governing the determination whether defendants have competently waived their constitutional right to counsel, stating that a "waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." *Id.* at 464.

67. 424 U.S. 600 (1976).

a mistrial or a reversal of a conviction on appeal depends on a knowing, voluntary, and intelligent waiver of a constitutional right."[68] The notion that a defendant has waived, in any sense, a significant constitutional right to ensure the correction of erroneous proceedings is by no means well-settled.[69] The dubious constitutional underpinnings of the waiver theory have not gone unnoticed, and at least one Supreme Court decision has denounced that theory as "totally unsound and indefensible."[70]

The "continuing jeopardy" theory, a second justification for the *Ball* principle, is that the defendant's appeal merely perpetuates the first jeopardy. Therefore, subsequent proceedings do not constitute a "second" jeopardy. This notion of continuing jeopardy was introduced, albeit in a different context, by Mr. Justice Holmes in his dissent in *Kepner v. United States*.[71] In support of the proposition that the government could appeal an acquittal, Mr. Justice Holmes argued that an accused is in jeopardy for the duration of each cause of action and that jeopardy continues throughout the proceedings related to that action.[72] This broad characterization of double jeopardy, however, has never been adopted by a majority of the Court,[73] even though it has been advocated in the context of a defendant's appeal of a conviction and subsequent retrial.[74]

The continuing jeopardy concept was further elaborated in *Price v. Georgia*[75] in which the Court held that retrial after appeal was confined to a lesser included offense when the original conviction had been limited to that offense to the exclusion of a greater one. Conceding that it had "consistently refused to rule that jeopardy for an offense continues after an acquittal,"[76] the Court nevertheless accepted "the concept of continuing jeopardy implicit in the *Ball* case"[77] which permitted retrial after the conviction had been set

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68. *Id.* at 609-10 n.11.

69. *See* Kepner v. United States, 195 U.S. 100, 135-36 (1904) (Holmes, J., dissenting).

70. Green v. United States, 355 U.S. 184, 197 (1957) (limiting *Trono* to its facts). *See* text accompanying notes 117 to 123 *infra*.

71. 195 U.S. 100, 134-37 (1904) (Holmes, J., dissenting). *See* text accompanying notes 83 to 89 *infra*.

72. 195 U.S. at 134-36.

73. United States v. Jenkins, 420 U.S. 358, 369 (1975).

74. Green v. United States, 355 U.S. 184, 193 (1957). In *Green* the Court categorically rejected Holmes' expansive theory but did indicate that the continuing jeopardy doctrine was more palatable than the waiver theory. *Id.* at 196-97. *See* text accompanying notes 117 to 123 *infra*.

75. 398 U.S. 323 (1970).

76. *Id.* at 329.

77. *Id.*

aside at the defendant's request.[78] The Court admitted, however, that the concept of continuing jeopardy rested on "an amalgam of interests — *e.g.,* fairness to society, lack of finality, and limited waiver, among others."[79]

Despite these efforts to rationalize *Ball,* it appears that the power to retry defendants who succeed in having their first conviction set aside is ultimately grounded in an accommodation of competing interests. As the foregoing analysis suggests, the central objective of the double jeopardy clause is not satisfied by dogmatic adherence to any particular doctrine, but by the delicate balancing of countervailing interests:

> While different theories have been advanced to support the permissibility of retrial, of greater importance than the conceptual abstractions employed to explain the *Ball* principle are the implications of that principle for the sound administration of justice. Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. . . . In reality, therefore, the practice of retrial serves defendants' rights as well as society's interests.[80]

A determination of the constitutionality of prosecutorial appeal of sentences entails a similar balancing process — one that is sensitive to both the traditional double jeopardy protections against governmental harassment and multiple prosecutions and to the legitimate goals of the criminal justice system.

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78. The availability of double jeopardy protection to defendants who succeed in having their first conviction set aside was significantly broadened in Burks v. United States, 98 S. Ct. 2141 (1978). There the appellate court reversed the defendant's conviction, finding the prosecution's evidence regarding his mental condition insufficient to sustain the jury's verdict. Distinguishing *Ball* and its progeny as reversals predicated on trial error rather than insufficiency of the evidence, the Supreme Court concluded that reversal on the latter grounds barred further prosecution because "[t]he Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." *Id.* at 2147. Consequently, a second trial is precluded "once the reviewing court has found the evidence legally insufficient, [and] the only 'just' remedy available for that court is the direction of a judgment of acquittal." *Id.* at 2150.

79. 398 U.S. at 329 n.4.

80. United States v. Tateo, 377 U.S. 463, 466 (1964).

Reprosecution After Acquittal

In the United States the constitutional protection against double jeopardy has developed into a doctrine broader than its common law predecessor.[81] Even in its narrowest sense, however, the prohibition against being placed "twice in jeopardy" for the same offense shields the accused from government-initiated proceedings based upon the same offense following a final acquittal. Reprosecution of individuals after a final judgment of acquittal is the most salient example of double jeopardy, clearly contravening the policies of finality and freedom from governmental harassment embodied in the fifth amendment.[82]

In the landmark decision of *Kepner v. United States,*[83] the Supreme Court acknowledged and reaffirmed this fundamental tenet of double jeopardy jurisprudence. Kepner, an attorney practicing in the Philippine Islands, was charged with embezzling a client's funds. He was tried for that offense, and the trial court, sitting without jury, acquitted him. Subsequently, an appeal was initiated by the United States. The defendant's acquittal was reversed by the Supreme Court of the Philippine Islands, which found him guilty and sentenced him to a term of imprisonment of nearly two years.[84] On certiorari, the United States Supreme Court decided the case as if the fifth amendment's prohibition were fully applicable.[85] Analyzing the history of the double jeopardy clause in this country and its common law origins, the Court had little difficulty concluding that Kepner's conviction was a violation of the double jeopardy clause, notwithstanding Mr. Justice Holmes' vigorous dissent.[86] Finding that "[a]t the common law, protection from second jeopardy for the same offense clearly included immunity from second prosecution where the court having jurisdiction had acquitted the accused of the

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81. *See* note 22 and accompanying text *supra.*

82. This principle was most recently discussed in United States v. Scott, 98 S. Ct. 2187 (1978). While limiting the protection afforded defendants by the double jeopardy clause with respect to midtrial dismissals, the Court reaffirmed the finality of an "acquittal," albeit narrowly defined, and reiterated that any governmental initiative towards overturning an acquittal is precluded. *Id.* at 2193.

83. 195 U.S. 100 (1904).

84. The Supreme Court of the Philippine Islands was empowered to determine guilt or innocence of defendants and to impose sentences upon appeal. *Id.* at 110-11.

85. The Philippine Islands had only recently become a United States territory, and there was some conflict between existing Spanish law and temporary legislation passed by Congress on July 1, 1902. The act provided for the administration of the government and guaranteed, *inter alia,* that "no person for the same offense shall be twice put in jeopardy of punishment." Ch. 1369, § 5, 32 Stat. 691 (1902).

86. *See* text accompanying notes 71 to 72 *supra.*

offense,"[87] the Court later concluded: "It is, then, the settled law of this court that former jeopardy includes one who has been acquitted by a verdict duly rendered . . . ."[88] Writing for the Court, Mr. Justice Day noted the impact of this principle upon the government's right to appeal on acquittal, stating that "'the defendant (or his representative) is the only party who can have either a new trial or a writ of error in a criminal case; and that a judgment in his favor is final and conclusive.'"[89]

The *Kepner* decision recognized the basic protections afforded by the double jeopardy clause and the policy of finality that must attach to guard against multiple proceedings and their concomitant hazards. Although the process is not clearly evident in *Kepner,* the Court has tacitly balanced the legitimate interests of the defendant against those of the government in such situations and, in the case of acquittal, has determined that the accused's interests outweigh those of the government in reprosecution. The rationale of this approach was articulated in a passage from the Supreme Court's recent decision in *Arizona v. Washington.*[90] Writing for the Court, Mr. Justice Stevens observed:

> The constitutional protection against double jeopardy unequivocally prohibits a second trial following an acquittal. The public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though "the acquittal was based upon an egregiously erroneous foundation." See *Fong Foo v. United States,* 369 U.S. 141, 143. If the innocence of the accused has been confirmed by a final judgment, the Constitution conclusively presumes that a second trial would be unfair.[91]

There are several qualifications of this apparently unequivocal rule against retrial after acquittal. First, the court acquitting the accused must have had jurisdiction over the case,[92] because a judgment of acquittal entered by a court without jurisdiction is absolutely void and does not, therefore, stand as a bar to the subsequent prosecution.[93] Arguably, the interest of the defendant in

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87. 195 U.S. at 126.
88. *Id.* at 130.
89. *Id.* at 128 (quoting United States v. Sanges, 144 U.S. 310, 312 (1892)).
90. 434 U.S. 497 (1978).
91. *Id.* at 503.
92. Kepner v. United States, 195 U.S. 100, 126-28 (1904).
93. *Id.* at 129-30. *See* United States v. Ball, 163 U.S. 662, 669-70 (1896).

freedom from the anxiety and stress of a criminal proceeding would also have some bearing on this situation, but the jurisdiction rule is well-settled, ostensibly on the grounds that the accused was not subject to the risk of conviction and punishment in the absence of proper jurisdiction, and the interests of the government would be ignored if the void proceeding resulted in immunity for the accused.

Second, doubly jeopardy does not forbid reinstatement of a guilty verdict when a jury found the defendant guilty but the judge granted the defendant's post-verdict dismissal motion. In *United States v. Wilson*[94] the Court emphasized that the protection against governmental appeal did not attach because the threat of a second trial was not present. The Court concluded that:

> Although review of any ruling of law discharging a defendant obviously enhances the likelihood of conviction and subjects him to continuing expense and anxiety, a defendant has no legitimate claim to benefit from an error of law when that error could be corrected without subjecting him to a second trial before a second trier of fact.[95]

Because reversal on appeal would entail, at most, the reinstatement of the jury's verdict of guilty, review of the order of dismissal does not offend the purposes of the double jeopardy clause.[96]

United States v. Martin Linen Supply Co.,[97] raises a third issue complicating the application of the *Kepner* rule: in some cases the

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94. 420 U.S. 332 (1975).

95. *Id.* at 345. Although *Wilson* concerns retrial after a dismissal rather than an acquittal, the former does bear some resemblance to the latter. The definition of "acquittal" for the purposes of double jeopardy analysis remains nebulous. *See* United States v. Scott, 98 S. Ct. 2187, 2204-06 (1978) (5-4 decision) (Brennan, J., dissenting).

96. The *Wilson* doctrine was limited by United States v. Jenkins, 420 U.S. 358 (1975), issued on the same day. There the trial court had dismissed the indictment following a nonjury trial, in effect acquitting the defendant. Its resolution of the issue of guilt was ambiguous. The Supreme Court interpreted *Wilson* narrowly, limiting that decision's intrusion on the policy of finality incorporated in the double jeopardy clause, and held that the government's appeal was barred:

> [I]t is enough for purposes of the Double Jeopardy Clause . . . that further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged, would have been required upon reversal and remand. Even if the District Court were to receive no additional evidence, it would still be necessary for it to make supplemental findings. The trial, which could have resulted in a judgment of conviction, has long since terminated in respondent's favor. To subject him to any further such proceedings at this stage would violate the Double Jeopardy Clause.

Id. at 370. *Jenkins*, however, was recently overruled in United States v. Scott, 98 S. Ct. 2187 (1978) (5-4 decision). *See* note 49 *supra*.

97. 430 U.S. 564 (1977).

judgment may be characterized as something other than a formal acquittal. In *Martin Linen,* the trial court had granted a motion for acquittal by the defendant after a deadlocked jury had been discharged. The Supreme Court rejected the government's effort to distinguish this case from *Kepner* strictly in terms of the timing of the mistrial and acquittal decisions. Because a mistrial was declared *before* the entry of a formal judgment of acquittal, the government contended that *Kepner*'s prohibition against double jeopardy, insofar as it concerned governmental appeal of *acquittals,* was inapplicable.[98] Eschewing "artificial distinctions"[99] and finding that the acquittal was one in substance as well as in form,[100] the Court held that the government's appeal was impermissible. The government's argument in *Martin Linen,* although unsuccessful, raises an important question as to the application of the *Kepner* principle when the judgment may be characterized as something other than a formal acquittal.[101]

Reprosecution after Conviction

It is also well-settled that double jeopardy principles prohibit reprosecution for the same offense after conviction. For example, the Court in *Martin Linen* observed that "[t]he Double Jeopardy Clause also accords nonappealable finality to a verdict of guilty entered by judge or jury, disabling the Government from seeking to punish a defendant more than once for the same offense."[102] In *Wilson,* the Court reiterated this basic principle: "When a defendant has been once convicted and punished for a particular crime, principles of fairness and finality require that he not be subjected to the possibility of further punishment by being again tried or sentenced for the same offense."[103] These statements not only indicate the Court's concern about multiple prosecutions but also multiple punishment. Indeed, these two considerations overlap to a great extent,[104] for whenever the Court describes the double jeopardy clause as a shield against reprosecutions for the same offense after conviction,[105] it is relying, in part, upon the policy against subjecting the accused to the psychological, physical, and financial burdens of

98. *Id.* at 572.
99. *Id.* at 574.
100. *Id.* at 572.
101. *See* note 95 *supra.*
102. 430 U.S. at 569 n.6.
103. 420 U.S. 332, 343 (1975).
104. *See* text accompanying notes 106 to 191 *infra.*
105. *E.g.,* North Carolina v. Pearce, 395 U.S. 711, 717 (1969).

a criminal proceeding. However, the underlying motivation of the government's reprosecution for the same offense after conviction is the desire to secure a satisfactory punishment, that is, a more severe punishment than that originally imposed. Thus, the protection against reprosecution after conviction is designed to prevent what would amount to multiple punishments for the same offense at the behest of the government.

As *Martin Linen* and *Wilson* suggest, governmental interest in the administration of justice may limit the constitutional policy of finality embodied in the double jeopardy clause under certain circumstances. The constitutional policy does, however, insulate the accused from further proceedings once a final judgment of acquittal or conviction has been rendered, and this should be borne in mind when the impact of the double jeopardy clause in the area of sentencing is examined.

MULTIPLE PUNISHMENT

The threshold question in evaluating the constitutionality of prosecutorial appeal of sentences is the applicability of the double jeopardy clause to punishment, that is, to sentencing. Although many decisions focus only upon the risk of conviction and the hazards of subjecting the individual to multiple proceedings,[106] it is well settled that the double jeopardy clause incorporates "the principle that no man shall more than once be placed in peril of legal penalties upon the same accusation."[107] While significant liabilities attach to conviction alone, the risk of punishment — "jeopardy of life or limb" — must be the paramount concern of the prohibition against double jeopardy. As the Supreme Court in *North Carolina v. Pearce*[108] observed, "[t]he theory of double jeopardy is that a person need run the gantlet only once. The gantlet is the risk of the range of punishment which the . . . Government imposes for that particular conduct."[109] It is primarily the risk of the penal sanctions connected

106. *See* text accompanying notes 24 to 27 *supra*.

107. *Ex parte* Lange, 85 U.S. (18 Wall.) 163, 173 (1874).

108. 395 U.S. 711 (1969).

109. *Id.* at 727 (Douglas, J., concurring). In the proposed version of the Bill of Rights that he presented to the House of Representatives in June 1789, James Madison included a ban against double jeopardy. Madison's provision read: "No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence." 1 ANNALS OF CONG. 451-52 (1789). This provision was replaced by the present language in order to clarify the law that allows a defendant to seek a new trial on appeal of his conviction. The change was not intended to alter the ban against double punishment. Sigler, *A History of Double Jeopardy,* 7 AM. J. LEGAL HIST. 283, 304-06 (1963).

with criminal convictions that actuate the policies of the double jeopardy clause.

From an early date, the Supreme Court has recognized that certain forms of double punishment were prohibited by the fifth amendment.[110] In *Pearce* the Court stated that the guarantee against double jeopardy "has been said to consist of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. *And it protects against multiple punishments for the same offense.*"[111] The constitutionality of S. 1437's proposal to permit the government to petition the court of appeals for an increase in the sentence imposed by the trial court[112] must therefore be viewed as contingent upon the scope of the fifth amendment's prohibition against multiple punishments for the same offense.

Sentencing after Retrial

Pearce is one of the few Supreme Court decisions that applies double jeopardy principles in the sentencing context. In that case the Court declared that when a criminal conviction has been set aside at the behest of the defendant and a new trial ordered, imposition of a more severe sentence upon reconviction does not constitute "multiple punishment" within the ambit of the double jeopardy clause.[113] Although the *Pearce* Court did not explicitly rely on the waiver doctrine, first enunciated in *Trono*[114] and later adopted in *Stroud v. United States*,[115] it nevertheless invoked a similar rationale. The Court observed that the power of the government to retry the accused and to impose a greater sentence upon reconviction after the defendant's successful appeal "rests ultimately on the premise that

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110. North Carolina v. Pearce, 395 U.S. 711, 728–29 (1969) (Douglas, J., concurring).

111. *Id.* at 717 (emphasis added) (footnotes omitted).

112. *See* text accompanying notes 16 to 19 *supra*.

113. 395 U.S. at 721. Relying heavily upon Stroud v. United States, 251 U.S. 15 (1919), *see* note 65 *supra*, the *Pearce* Court concluded that "a corollary of the power to retry a defendant is the power, upon the defendant's reconviction, to impose whatever sentence may be legally authorized, whether or not it is greater than the sentence imposed after the first conviction." 395 U.S. at 720 (footnote omitted). The Court further held, however, that the due process clause of the fourteenth amendment bars increased sentences upon reconviction absent an affirmative showing by the court of reasons "based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." *Id.* at 726.

114. *See* text accompanying notes 58 to 65 *supra*.

115. 251 U.S. 15 (1919). *See* note 65 *supra*.

the original conviction has, *at the defendant's behest,* been wholly nullified and the slate wiped clean."[116]

The Court's reliance upon a concept resembling the waiver doctrine promulgated in *Trono* is at odds with an earlier decision, *Green v. United States.*[117] In *Green* the defendant was tried under an indictment which included one count of arson and one count of murder in the first degree. On the latter count, the jury was instructed as to both first and second degree murder and returned a verdict finding the defendant guilty of arson and of second degree murder; but it was silent on the first degree murder charge. The judge accepted the verdict and discharged the jury. On appeal, the defendant succeeded in overturning the second degree murder conviction. On remand, however, he was tried for first degree murder under the original indictment, found guilty of that charge, and sentenced to death. Following an affirmance by the circuit court, Green appealed to the Supreme Court which, in a five to four decision, reversed, holding that the conviction of first degree murder placed the defendant twice in jeopardy for the same offense. The Court based its decision on two independent grounds. First, the jury's verdict was an "implied acquittal" of the charge of first degree murder and therefore served as a bar to subsequent prosecution. Rejecting the *Trono* waiver doctrine,[118] the Court ruled that contesting a conviction for a lesser degree offense does not waive the defense which the acquittal affords: "[I]t is wholly fictional to say that [the defendant] 'chooses' to forego his constitutional defense of former jeopardy on a charge of murder in the first degree in order to secure reversal of an erroneous conviction of the lesser offense. In short, he has no meaningful choice."[119] Second, the Court decided that regardless of the implied acquittal rationale, the jury had been dismissed prior to returning an express verdict on the charge and without the defendant's consent. Thus, under established principles of double jeopardy, a second prosecution was precluded.[120]

The significance of the *Green* decision is twofold. First, it virtually overrules *Trono.* Despite the Court's efforts to distinguish that case as a decision construing a statutory provision in the Philippine Islands,[121] the Court undermined the conceptual basis of

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116. 395 U.S. at 721 (emphasis added).
117. 355 U.S. 184 (1957) (5-4 decision).
118. *See* text accompanying notes 58 to 70 *supra.*
119. 355 U.S. at 192.
120. *Id.* at 191.
121. *Id.* at 194-97. *But see id.* at 205-14 (Frankfurter, J., dissenting).

the *Trono* opinion. The position adopted by the Court in *Green* thus brings into question cases such as *Stroud,*[122] which rest entirely on *Trono.* Moreover, the erosion of *Trono's* waiver theory significantly diminishes, if it does not destroy, the precedential force of the earlier decisions permitting increased sentences on retrial which were invoked by the Supreme Court in *Pearce.* Second, *Green* advances a theory of "implied acquittal"[123] which appears to embody the established principles of finality and freedom from reprosecution following an acquittal or conviction. Under this doctrine if the accused is found guilty of a lesser included offense, the verdict operates as an implied acquittal for all greater offenses. In effect, the original conviction serves as a ceiling, and defendants may not be reprosecuted for a greater offense even though they appeal their conviction for the lesser offense. Under *Green* the defendant is not deemed to have waived the benefit of the former jeopardy plea that an acquittal provides.

The implied acquittal theory may also be extended to the sentencing context. The defendant's original sentence is presumably chosen from a range of penalties prescribed by statute for the offense and the imposition of a particular sentence by a judge, or in rare instances a jury, coupled with the failure to impose a more severe penalty, should immunize the defendant from the threat of a harsher sentence in a manner analogous to *Green.* Upon reconviction double jeopardy principles would only permit resentencing to a punishment equal to, or less severe than, that originally imposed.[124] One problem with this approach is that it requires the concept of acquittal, express or implied, to be applied to sentencing without the concomitant element of the prior reversal of a conviction of a lesser degree of offense than that charged.[125] Arguments that the application of the implied acquittal theory is incongruous in the sentencing context were addressed by the Supreme Court of California in *People v. Henderson.*[126] The *Henderson* court held that the prohibition against double jeopardy precluded the imposition of the death penalty upon retrial after the reversal of a prior conviction for which the defendant had received a sentence of life imprison-

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122. *See* note 65 *supra.*
123. 355 U.S. at 190.
124. *See* Van Alstyne, *In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant,* 74 YALE L.J. 606, 632-35 (1965).
125. *See, e.g.,* United States v. Coke, 404 F.2d 836 (2d Cir. 1968).
126. 60 Cal. 2d 482, 386 P.2d 677, 35 Cal. Rptr. 77 (1963).

ment. Writing for the court, Justice Traynor explicitly relied upon the *Green* analysis:

> Since the *Green* and *Gomez* cases have now established that a reversed conviction of a lesser degree of a crime precludes conviction of a higher degree on retrial, the rationale of the *Stroud* and *Grill* cases has been vitiated. It is immaterial to the basic purpose of the constitutional provision against double jeopardy whether the Legislature divides a crime into different degrees carrying different punishments or allows the court or jury to fix different punishments for the same crime.[127]

Thus, the *Henderson* court found the sentencing and trial contexts sufficiently analogous to justify applying the implied acquittal rationale to sentencing.

While it appears that the Supreme Court effectively rejected the application of the implied acquittal doctrine in a sentencing context in *Pearce,* that decision does not support the constitutionality of the government's appeal of sentences. That issue was simply not before the Court.[128] The essence of the *Pearce* decision is revealed in the first few words of the majority opinion: "When at the behest of the defendant . . . ."[129] The Court's analysis, its invocation of precedent, and its application of the principles of the double jeopardy clause support the conclusion that it was focusing only on the propriety of additional proceedings *initiated by the defendant,* not by the government. In the context of traditional double jeopardy analysis, the fundamental nature of the distinction between voluntary actions by defendants which subject them to multiple proceedings and actions by the government which subject defendants to repeated attempts to convict and to punish, is apparent.[130] In contrast to the stringent limitations placed on the power of the government, "[a] very different situation is presented, with considerations persuasive

127. *Id.* at 497, 386 P.2d at 686, 35 Cal. Rptr. at 86.

128. The Court stated, "we deal here, not with increases in existing sentences, but with the imposition of wholly new sentences after wholly new trials." 395 U.S. at 722. The justification offered in support of proposed 28 U.S.C. § 3725, *see* text accompanying notes 16 to 19 *supra,* by the Senate Committee on the Judiciary relies primarily on *Pearce* for the proposition that the appellate review system is "not objectionable on constitutional grounds." S. REP. NO. 605, 95th Cong., 1st Sess. 1057 (1977). Although there is no indication that it was aware of the fundamental distinction that renders *Pearce* inapposite, the Committee does strenghten its argument by referring to United States v. Wilson, 420 U.S. 332 (1975), which upheld a government appeal from a dismissal of an indictment. *See* text accompanying notes 94 to 96 *supra.*

129. 395 U.S. at 713.

130. *E.g.,* United States v. Scott, 98 S. Ct. 2187 (1978). *See* note 49 *supra.*

of a different legal result, when the defendant is not content with his conviction, but appeals and obtains a reversal."[131] Arguments relying on *Pearce* to support appellate review of sentences initiated by the government are, at best, unpersuasive; they ignore a fundamental distinction in the case law interpreting the double jeopardy clause.[132]

Prosecutorial Appeal of Sentences

Should S. 1437 be enacted, litigation challenging the constitutionality of section 3725(b)[133] will undoubtedly follow. Although the constitutionality of a statute authorizing the government to seek increased sentences through appellate review has never been addressed by the Supreme Court,[134] there is federal case law which suggests serious constitutional objections to such a policy. Dictum in at least one Supreme Court decision, *Reid v. Covert,*[135] indicates a predisposition to rule against prosecutorial appeals. Discussing the applicability of the Bill of Rights to military trials, Mr. Justice Black, writing for a plurality, stated "[i]n *Swaim v. United States,* 165 U.S. 553, this Court held that the President or commanding officer had power to return a case to a court-martial for an increase in sentence. *If the double jeopardy provisions of the Fifth Amendment were applicable such a practice would be unconstitutional.*"[136] Analysis of other cases tends to support this position.

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131. Green v. United States, 355 U.S. 184, 214 (1957) (5-4 decision) (Frankfurter, J., dissenting).

132. *See* S. REP. NO. 617, 91st Cong., 1st Sess. 93 (1969).

133. Section 3725(b) is quoted at text accompanying note 16 *supra.*

134. Although never decided by the Supreme Court, this issue has been presented for its consideration. In Roberts v. United States, 320 U.S. 264 (1943), two issues were raised: (1) whether the Probation Act (formerly 18 U.S.C. §§ 724-728 (1940) (current version at scattered sections of 18, 28 U.S.C.)) permitted revoking probation, setting aside a two-year suspended sentence, and resentencing to a three-year term, and if so, (2) whether the fifth amendment protection against double jeopardy prohibited such an increase. Since the Court answered the first question in the negative, it did not reach the second issue. Notably, Mr. Justice Frankfurter in his dissent found no double jeopardy bar to such a power. 320 U.S. at 276. In Swisher v. Brady, 98 S. Ct. 2699 (1978), a section of Maryland's Juvenile Causes statute, MD. CTS. & JUD. PROC. CODE ANN. § 3-813 (Cum. Supp. 1977), which provided for prosecutorial appeal from a juvenile court master's finding of non-delinquency ultimately leading to a second trial before a juvenile court judge, was challenged as violative of the double jeopardy clause. With regard to eight of the nine juvenile parties, the state sought to overturn the master's finding of non-delinquency. The constitutionality of prosecutorial appeal of sentences could have been in issue when the state sought, subsequent to the conviction of the one remaining appellee, a second sentencing proceeding; however, this question was neither briefed, argued, nor even mentioned in the Court's opinion.

135. 354 U.S. 1 (1957) (plurality opinion).

136. *Id.* at 37 n.68 (Black, J., concurring) (emphasis added).

In holding that "multiple punishment" violative of the double jeopardy clause does not exist when a conviction is set aside at the defendant's behest, a retrial is ordered, and a greater sentence is imposed upon reconviction, *Pearce* marks one end of the double jeopardy continuum.[137] At the other extreme is the principle established in the landmark decision *Ex parte Lange.*[138] In that case the defendant was tried and convicted of appropriating mailbags for his own use. The applicable statute provided for imprisonment for not more than one year *or* a fine of not less than $10 or more than $200. Lange was subsequently sentenced to one year's imprisonment *and* fined $200. He began serving the jail term immediately, and on the following day paid the fine. Five days after the original sentence was imposed the defendant was brought before the circuit court on a writ of habeas corpus. Realizing the sentencing error, the judge vacated the former judgment and imposed a one year jail term. The problem was that one legitimate punishment, the fine, had already been fully suffered. Recognizing that there must be limits on the power exercised by a court over its own judgments, orders, and decrees during the term at which they are first made,[139] the Supreme Court addressed the issue of whether a court can, after execution of one of the alternative punishments available, vacate that judgment and enter another. Writing for the majority, Mr. Justice Miller observed that the protection of former jeopardy is primarily protection against twice being punished for the same offense.[140] Focusing on the fact that the defendant had already paid the fine, the Court found that he had fully suffered the requisite punishment and could not be subjected to an additional penalty for the same offense. It took the position that although the principles of double jeopardy guard against the risks inherent in a second trial after final judgment, the core protection afforded by a plea of former jeopardy is aimed at multiple punishment.[141] *Ex parte Lange* involved a

137. 395 U.S. at 719-21. *See* text accompanying notes 113 to 116 *supra.*

138. 85 U.S. (18 Wall.) 163 (1874).

139. *Id.* at 167-68. This aspect of the case is no longer significant because terms of district courts were abolished by 28 U.S.C. § 138 (1976).

140. 85 U.S. (18 Wall.) at 168. The Court further stated: "The common law not only prohibited a second punishment for the same offence, but it went further and forbid [*sic*] a second trial for the same offence, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted." *Id.* at 169.

141. The Court observed:

> For of what avail is the constitutional protection against more than one trial if there can be any number of sentences pronounced on the same verdict? Why is it that, having once been tried and found guilty, he can never be tried again for that offence? Manifestly it is not the danger or jeopardy of being a second time found guilty. It is the punishment that would legally follow the

blatant example of double punishment that was properly condemned as violative of the double jeopardy clause. *Lange* presented a relatively narrow factual situation, however, and significant problems remain in determining the scope of its holding. The "multiple punishment" was an additional sentence imposed after the completion of the maximum authorized punishment, and the Court's holding may arguably be limited to that fact situation.

The underlying rationale of *Lange* may also be logically extended to cases in which a second sentence is added to one still being served. This argument appears to have been accepted in *Murphy v. Massachusetts*,[142] where the issue was the constitutionality of imposing a greater sentence after the original sentence had been reversed on appeal by the defendant. Murphy had been convicted of embezzlement and sentenced to a term of imprisonment of ten to fifteen years. Approximately two and one-half years later, on a writ of error by the defendant, the appellate court reversed the sentence on constitutional grounds and resentenced him to another term of imprisonment which was arguably longer given the terms of the original sentence.[143] The Court held that the plea of former jeopardy was unavailable when a sentence was reversed or vacated at the request of the accused.

> second conviction which is the real danger guarded against by the Constitution. But if, after judgment has been rendered on the conviction, and the sentence of that judgment executed on the criminal, he can be again sentenced on that conviction to another and different punishment, or to endure the same punishment a second time, is the constitutional restriction of any value? Is not its intent and its spirit in such a case as much violated as if a new trial had been had, and on a second conviction a second punishment inflicted?

Id. at 173. The *Lange* doctrine was applied to resolve a secondary issue in *Pearce*. Invoking the prohibition against multiple punishment discussed in *Lange*, the *Pearce* Court held that the Constitution required that "credit" be given for punishment already suffered whenever a sentence for the same offense was imposed upon retrial. 395 U.S. at 717-18.

142. 177 U.S. 155 (1900).

143. The Supreme Judicial Court of Massachusetts agreed with Murphy's contention that the statute under which he had originally been sentenced "was unconstitutional so far as it related to past offenses." *Id.* at 156. The court therefore remanded the case to the trial court for resentencing in accordance with the proper statute. The trial court, "being manifestly of [the] opinion that imprisonment for twelve years and six months was the punishment demanded under the circumstances," *id.* at 161, made allowance for the time Murphy had previously served and imposed a sentence of 9 years, 10 months, and 21 days. The *total* time Murphy would have to serve under the second sentence was arguably greater than the time he would have had to serve under the first sentence because the statute relied upon in the first proceeding provided for "liberty at the expiration of the minimum term" under certain conditions. *Id.* at 160-61. The minimum term under the first sentence was 10 years.

The decision of the Court in *Murphy* is important in two respects. First, it highlights the fundamental double jeopardy distinction between appeals sought by the government and those at the behest of the accused: "In prosecuting his former writ of error plaintiff in error voluntarily accepted the result, and it is well settled that a convicted person cannot by his own act avoid the jeopardy in which he stands, and then assert it as a bar to subsequent jeopardy."[144] The emphasis upon the defendant's efforts to bring about the subsequent proceedings is consistent with the later *Trono, Stroud,* and *Pearce* decisions. It is important to note that *Murphy* applies this concept directly to a defendant's appeal of *sentence* as opposed to proceedings concerned primarily with the underlying conviction. To that extent, there appears to be no distinction between verdicts and sentences in the application of double jeopardy principles. Second, the Court's opinion apparently adopted *Lange's* "multiple punishment" analysis and accepted the broader position, suggested in *Lange,* that increasing the sentence while the original one is being served is also prohibited:

> We repeat that this is not a case in which the court undertook to impose *in invitum* a second or additional sentence for the same offense, or *to substitute one sentence for another.* On the contrary, plaintiff in error availed himself of his right to have the first sentence annulled so that another sentence might be rendered.[145]

It appears that Mr. Chief Justice Fuller in the first phrase was referring to the imposition of a second sentence after full execution of the first. If the words "to substitute one sentence for another" carry any independent meaning, however, they must refer to increasing an existing sentence, which would occur on appellate review when the court of appeals substitutes its greater sentence for that imposed by the trial court. Thus, dictum in *Murphy* strongly implies that the Court is willing to recognize a definition of "multiple

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Under the second sentence, Murphy would have to have served 12 years and 6 months.

The defendant also raised a second double jeopardy issue. Originally, he had been sentenced to one day of solitary confinement. Upon resentencing, he was sentenced to an additional day of solitary confinement despite service of the original term. The Supreme Court summarily rejected Murphy's contention that the sentence of the additional day constituted double jeopardy.

144. *Id.* at 158.

145. *Id.* at 160 (dictum) (emphasis added).

punishment" broader than that expressed in the narrow holding of *Lange.*

Further insight into the Court's attitude toward this issue is afforded by a later decision, *United States v. Benz.*[146] There the defendant pled guilty to a charge of violating the National Prohibition Act and was sentenced to a ten-month prison term. While serving his sentence, the defendant petitioned the federal district court for modification of his punishment, and that court entered an order reducing the term of imprisonment to six months. On appeal by the government, the Circuit Court of Appeals for the Third Circuit certified to the Supreme Court the issue whether a federal court had the power to reduce the term of imprisonment under these circumstances. The Supreme Court explained that "[t]he general rule is that judgments, decrees and orders are within the control of the court during the term at which they were made"[147] and that this rule applied equally to criminal and civil matters "provided the punishment be not augmented."[148] The Court held the reduction permissible and in dictum observed:

> The distinction that the court during the same term may amend a sentence so as to mitigate the punishment, but not so as to increase it, is not based upon the ground that the court has lost control of the judgment in the latter case, but upon the ground that to increase the penalty is to subject the defendant to double punishment for the same offense in violation of the Fifth Amendment to the Constitution, which provides that no person shall "be subject for the same offense [*sic*] to be twice put in jeopardy of life or limb."[149]

Although Mr. Justice Sutherland, writing for a unanimous Court, cited *Lange,* he did not attempt to rationalize the (distinguishing) fact that *Lange* considered only the problem of imposing additional punishment on a defendant who had already completed the lawful sentence.

The *Benz* and *Lange* decisions offer substantial support for double jeopardy arguments against statutory procedures for appellate review of sentences on the government's initiative. While this conclusion is founded primarily on dicta, there is no persuasive

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146. 282 U.S. 304 (1931).
147. *Id.* at 306. *See* note 139 *supra.*
148. 282 U.S. at 307.
149. *Id.*

authority to the contrary. *Bozza v. United States*[150] is frequently cited, albeit erroneously, as a conflicting precedent. The defendant in *Bozza* was convicted of violating certain Internal Revenue laws which carried a minimum statutory penalty of imprisonment *and* a fine of one hundred dollars, but was sentenced to imprisonment only. After realizing the omission, the judge had the defendant returned to the court five hours later and imposed the mandatory minimum sentence. Invoking *Benz,* the defendant contended that the increased punishment placed him twice in jeopardy. The Supreme Court rejected this argument as inimical to the legitimate goal of punishing the guilty but did so in terms that intimated no dissatisfaction with the rationales of either *Lange* or *Benz.* The Court concluded that the original sentence, defective because of an inadvertent error by the trial court, was invalid and unenforceable, and it expressed a reluctance to grant immunity to a prisoner whose guilt was established by a regular verdict in such circumstances.[151] The *Bozza* Court thus held that the defendant was not twice placed in jeopardy for the same offense by the substitution of a valid punishment for an invalid punishment, despite its increased severity, and its decision stands only for the proposition that the correction of an illegal or invalid sentence does not violate double jeopardy even if the correction augments the punishment.[152]

There is no indication in *Bozza* that the Court intended to abandon the principles of *Lange, Murphy,* and *Benz.* In fact, tacit acceptance of those principles may have been responsible for the particular care with which the Court created the *Bozza* exception. Assuming the familiar role of accommodating competing interests, the *Bozza* Court concluded that "[t]he Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner."[153] On the facts before the Court, the legitimate sentencing goals of the government outweighed any interest of the defendant in freedom from punishment due to an error in sentencing. Once a valid and enforceable sentence has been imposed, however, the government's interests have been vindicated, and they must then yield to the defendant's interests in finality and

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150. 330 U.S. 160 (1947).

151. *Id.* at 166.

152. *Cf.* FED. R. CRIM. P. 35 ("The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence.").

153. 330 U.S. at 166-67.

freedom from multiple punishments as protected by the double jeopardy clause.[154]

Because S. 1437 proposes the first comprehensive federal system of appellate sentence review, and no state, has as yet passed laws authorizing prosecutorial appeal of sentences,[155] there is no case law that addresses the constitutionality of this concept directly. Nevertheless, the federal courts of appeals' interpretations of the crucial Supreme Court precedents in this area offer further support for the broad interpretation of *Lange* and *Benz* and for the application of traditional double jeopardy principles in the sentencing context.

First, the courts of appeals agree that for the purposes of double jeopardy analysis, there is a fundamental distinction between appeals initiated by the defendant and those initiated by the

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154. Note, *Twice in Jeopardy: Prosecutorial Appeals of Sentences*, 63 VA. L. REV. 325, 336 (1977). *Bozza* is also significant in another respect. To a large extent, arguments against prosecutorial appeal of sentences derive their support from traditional double jeopardy principles which are commonly applied in the areas of conviction or acquittal, but have not been specifically applied to the sentencing context. Arguably, *Bozza* indicates that these two contexts are not completely analogous in that the decision permits subsequent proceedings following a final, albeit an illegal, judgment. Therefore, it is likely that the Court does not favor the unrestricted application of traditional double jeopardy principles in a sentencing context. It is more plausible, however, to view the *Bozza* holding as entirely consistent with traditional concepts. First, it is analogous to the situation in which the acquittal of a defendant by a court with no jurisdiction permits subsequent retrial. Second, if the correction of the illegal sentence is mechanical, *Bozza* is analogous to *Wilson* which allows appeal by the government if the subsequent proceedings would merely involve the reinstatement of a guilty verdict. *See* text accompanying notes 94 to 96 *supra*.

155. Many states have enacted some form of sentence review legislation. Generally, these statutes allow the defendant to seek review of an excessive sentence, and in some instances, the state is permitted to appeal from an illegal sentence. No state statute presently authorizes the government to appeal and to augment a valid original sentence. *See, e.g.*, ARIZ. REV. STAT. § 13-4037 (1978); CAL. PENAL CODE §§ 1259 to 1260 (West Compact ed. 1978); COLO. REV. STAT. § 18-1.409 (1973); CONN. GEN. STAT. ANN. §§ 51-195 to -196 (West. Supp. 1978); FLA. STAT. ANN. §§ 924.06 to .07 (West 1972 & Supp. 1978); GA. CODE ANN. § 27-2511.1 (1978); HAW. REV. STAT. §§ 641-11 to -13 (1976); ILL. ANN. STAT. ch. 110-A, § 615(b) (Smith-Hurd 1976); IOWA CODE ANN. §§ 814.5 to .6 (West Supp. 1978); KAN. STAT. ANN. §§ 22-3602, -3605 (Supp. 1977); ME. REV. STAT. tit. 15, §§ 2142 to 2144 (Supp. 1978); MD. ANN. CODE art. 27, §§ 645JA to 645JG (1976); MASS. GEN. LAWS ANN. ch. 278, §§ 28A to 28C (West 1972); MONT. REV. CODES ANN. §§ 95-2501 to -2504 (1969); NEB. REV. STAT. § 29-2308 (1975); N.Y. CRIM. PROC. LAW §§ 450.10 to .30 (McKinney 1971); OKLA. STAT. ANN. tit. 22, § 1066 (1958); OR. REV. STAT. § 138.050 (1977); TENN. CODE ANN. § 40-2711 (1975); WYO. R. CRIM. PROC. 33, 36, 38.

ALASKA STAT. § 12.55.120(a) (Supp. 1972) permits the defendant to appeal an excessive sentence and subsection (b) allows the state to appeal a lenient sentence. The reviewing court may not increase sentences on a state-initiated appeal; it is only empowered to express its approval or disapproval of the sentence.

government.[156] Two court of appeals cases, *Walsh v. Picard*[157] and *Robinson v. Warden*,[158] are illustrative. Both cases arose when the defendants challenged, upon writs of habeas corpus, the constitutionality of state sentence review acts which permitted the reviewing panel to increase prisoners' sentences if they appealed. The statutes conferred the right to sentence review on the defendant alone; the state was not authorized to seek review.[159] The issue raised by these cases — increased punishment upon review *initiated by the defendant* — is reminiscent of the traditional notions of waiver enunciated in *Murphy* and elaborated in *Pearce*.[160] The *Walsh* court acknowledged the conclusion in *Pearce* that the double jeopardy clause did not afford absolute immunity in all circumstances and held that an increase in sentence under the Massachusetts act at issue was constitutionally permissible.[161] Finding no bar to increases in sentences upon review sought by the defendant, the *Walsh* court emphasized the purposes underlying sentence review — the promotion of more accurate and uniform sentencing as well as the reduction of unfair sentencing disparities. Referring to *Benz*, the court stated that "the Massachusetts procedure does not permit the State to reopen the question of sentence on its own initiative. Were it to do so, it would of course violate the proscription against double jeopardy."[162] *Walsh* thus clearly interpreted *Benz* as precluding any sentence review at the behest of the government,[163] thereby upholding the traditional distinction between government and individual initiative which is fundamental in double jeopardy analysis.

The *Robinson* court held that *Pearce* foreclosed the defendant's double jeopardy claim.[164] Relying solely on that decision, the court concluded that petition under the Maryland act "fully reopens the propriety of the sentence at the behest of the defendant who seeks

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156. *See, e.g.*, Tipton v. Baker, 432 F.2d 245 (10th Cir. 1970).

157. 446 F.2d 1209 (1st Cir. 1971), *cert. denied*, 407 U.S. (1972).

158. 455 F.2d 1172 (4th Cir. 1972).

159. The statute at issue in *Robinson* was MD. ANN. CODE art. 26, §§ 132 to 138 (1966) (current version at MD. ANN. CODE art. 27, §§ 645JA to 645JG (1976 & Cum. Supp. 1978)). The statute involved in *Walsh* was MASS. GEN. LAWS ANN. ch. 278, §§ 28A to 28D (West 1968) (current version at (West 1972)).

160. *See* text accompanying notes 113 to 116 and 142 to 145 *supra*.

161. 446 F.2d at 1211.

162. *Id.*

163. In reaffirming the notion that the state cannot initiate review, the court explained: "[W]e find it constitutionally permissible to condition the grant of a defendant's appeal of the appropriateness of his sentence on the state's having a right to cross-appeal on the same matter." *Id.* at 1212.

164. 455 F.2d at 1174.

review. When a prisoner initiates review, the state has an interest in assuring that punishment for similar criminal conduct is uniformly imposed."[165] The court found unpersuasive the defendant's reliance upon *Lange* and *Benz* for the proposition that increases in sentences were barred. It noted that the increase in Robinson's sentence differed from the situation in *Lange* where the original sentence had been fully served.[166] The court invoked the traditional notion that double jeopardy principles permit a different result when review is initiated by the accused rather than by the government.[167] Distinguishing *Lange* on these grounds, the court concluded that the *Benz* dictum,[168] which relied upon *Lange,* had to be limited to the facts of that case: "We find no suggestion that by dictum the *Benz* Court intended to broaden *Ex parte Lange's* interpretation of the double jeopardy clause."[169] The court's view that *Lange* can be satisfactorily distinguished on the basis of the serving of the original sentence may be unduly restrictive in light of the factual context of the *Benz* decision. In *Benz* the defendant sought modification of his sentence while serving that sentence. Moreover, the passage quoted above follows the *Robinson* court's second point that distinct double jeopardy implications arise as a result of actions by the defendant rather than the prosecution, and might be related to that point alone. If this is the case, it is clear that the *Benz* dictum was not intended to cite *Lange* as rejecting the traditional principles governing the consequences of action taken by the defendant. At most, *Robinson* can be said only to reject the contention that *Benz* bars increased sentences upon review sought by the defendant. Thus, *Robinson* may be more accurately viewed as not having addressed the issue of prosecutorial appeal of sentences, as *Walsh* had done.[170] The significance of the *Walsh* and *Robinson* opinions is the extent to which the courts recognized and addressed the double jeopardy issue in terms of the distinction between individual and governmental action.[171] It is this critical distinction that forms the basis of most

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165. *Id.*

166. 455 F.2d at 1176.

167. *Id.* at 1174.

168. *See* text accompanying note 149 *supra.*

169. 455 F.2d at 1176.

170. The Fourth Circuit indicated in United States v. Walker, 346 F.2d 428 (4th Cir. 1965), that a sentence was "not alterable by the prosecution save to reduce or correct it as illegal under Rule 35 F.R. Crim. P., for the Government could not appeal or by any other process augment it. . . . Its integrity was unimpeachable except by the defendant." *Id.* at 430. *See also* Kennedy v. United States, 330 F.2d 26 (4th Cir. 1964).

171. *E.g.,* Tipton v. Baker, 432 F.2d 245 (10th Cir. 1970). In *Tipton* the defendant's post-conviction attack on the judgment and sentence resulted in a remand for

double jeopardy analysis by the Supreme Court. While it is not certain that the power to seek appellate review of sentences under S. 1437 will ultimately turn on the individual versus government distinction, the lower courts tend to invoke this rationale in evaluating the constitutionality of analogous state sentencing review acts.

Second, the courts of appeals have consistently interpreted *Lange* and *Benz* as supporting the proposition that a sentence partly suffered cannot be increased because such an increase would subject the defendant to double punishment for the same offense in violation of the fifth amendment.[172] In *Chandler v. United States,*[173] for example, the trial court was requested by the defendant to reduce an excessive sentence which had been imposed erroneously when the court transposed count numbers. On the defendant's motion, the court reduced the excessive sentence on one count but also increased the unchallenged sentence on the other count. The court of appeals found that the double jeopardy clause "is not limited to the retrial of the question of guilt, but also protects against resentencing for the same offense,"[174] explaining that a sentence greater than that originally imposed is permissible only when the defendant has sought modification, thereby assuming the risk of increase. Other cases have reached this conclusion in similar circumstances,[175]

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resentencing only. The defendant then challenged the subsequent increase in sentence. Relying on *Murphy, see* text accompanying notes 142 to 145 *supra,* the court found the prohibition against multiple punishment inapplicable because "[h]ere there is no such barrier to an increased sentence, because the prior sentence had been set aside, at the defendant's behest." 432 F.2d at 248 n.5. Articulating a concept often repeated in double jeopardy adjudication, the court concluded: "While it is not free from doubt, we nevertheless believe that the prohibition against a sentence being augmented does not apply where invalidation of the prior sentence occurred at the defendant's behest." *Id.* at 249. *Cf.* King v. United States, 98 F.2d 291, 295 (D.C. Cir. 1938) (applied in habeas corpus context). *But cf.* United States v. Durbin, 542 F.2d 486, 488 (8th Cir. 1976) (sentence limited to original length where defendant requested post-conviction sentence review).

172. *See, e.g.,* United States v. Bynoe, 562 F.2d 126 (1st Cir. 1977); Virgin Islands v. Henry, 533 F.2d 876 (3d Cir. 1976); United States v. Turner, 518 F.2d 14 (7th Cir. 1975); Barnes v. United States, 419 F.2d 753 (D.C. Cir. 1969); United States v. Sacco, 367 F.2d 368 (2d Cir. 1966); United States v. Adams, 362 F.2d 210 (6th Cir. 1966); United States v. Walker, 346 F.2d 428 (4th Cir. 1965). It must be borne in mind that the great majority of these cases do not arise in the context of sentence review procedures, but in the analogous situation when the sentencing court is requested to modify its sentence.

173. 468 F.2d 834 (5th Cir. 1972).

174. *Id.* at 835.

175. *See, e.g.,* Sullens v. United States, 409 F.2d 545 (5th Cir. 1969); United States v. Sacco, 367 F.2d 368 (2d Cir. 1966); United States v. Adams, 362 F.2d 210 (6th Cir.

indicating the courts' adoption of a broad, rather than restrictive, interpretation of *Lange* and *Benz*.

Third, there is agreement among the circuits on the current vitality of the *Bozza* doctrine.[176] It is well settled that the double jeopardy protection prohibiting the increase of sentence once execution has begun applies only to cases in which the first sentence is valid.[177]

To summarize, the federal court of appeals' decisions are notable in three respects. First, the courts recognize, and frequently emphasize, that a prior sentence invalidated at the insistence of the accused cannot be asserted as precluding a subsequent increase in that punishment.[178] Second, the circuits interpret *Lange* and *Benz* to mean that the double jeopardy clause stands as a bar to any increase in a valid sentence once the defendant has commenced service. Finally, the decisions agree, as they must in light of Federal Rule of Criminal Procedure 35,[179] with the *Bozza* doctrine which permits correction of an illegal sentence at any time.

1966). *Cf.* Vincent v. United States, 337 F.2d 891 (8th Cir. 1964), *cert. denied,* 380 U.S. 988 (1965) (sentence can be increased when defendant has not yet begun to serve and resentencing occurs on same day).

176. *See* text accompanying notes 150 to 152 *supra.*

177. *See, e.g.,* Blankenship v. Parratt, 554 F.2d 850 (8th Cir. 1977); United States v. Stevens, 548 F2d 1360 (9th Cir.), *cert. denied,* 430 U.S. 975 (1977); Llerna v. United States, 508 F.2d 78 (5th Cir. 1975); United States v. Evans, 459 F.2d 1134 (D.C. Cir. 1972). The *Evans* court observed: "It is well settled that a sentence in all respects legal cannot be increased after the defendant has begun serving it. . . . A sentence plainly illegal, however, (*e.g.,* less than the statutory minimum) may be corrected even after the defendant has begun serving it." *Id.* at 1136 (citations omitted). *See* FED. R. CRIM. P. 35 and note 152 *supra.*

178. One federal district court analyzed this concept as follows:

> Not every increase in sentence or punishment is a violation of the constitutional ban on double jeopardy. Thus where a convicted prisoner demands a trial *de nova* . . . , or requests a review of his sentence by a sentence review board . . . , or successfully appeals and obtains a new trial . . . , it has been held that harsher sentences can be imposed. The rationale of such cases is that the re-trial or reconsideration of the sentence was the prisoner's own idea and was done at his instigation; he has called for and received a new hand and can't complain if in the new deal he drew a busted straight instead of a flush.
>
> On the other hand, where the harsher sentence was not the result of any move or initiative by the prisoner, or the exercise of any option by him, but was, instead, imposed upon him without any choice on his part at any stage of the proceeding, such harsher sentence is unconstitutional.

Holt v. Moore, 357 F. Supp. 1102, 1104 (W.D.N.C. 1973) (citations omitted).

179. *See* note 152 *supra.*

DOUBLE JEOPARDY IN THE SENTENCING CONTEXT

While the policies underlying the double jeopardy clause are revealed in the federal case law regarding multiple proceedings on the issue of guilt or innocence, the crucial question remains: Are these policies applicable to the sentencing context? At first glance, the answer appears evident. It is well settled that the double jeopardy clause affords protection against multiple punishment and not merely against multiple prosecutions.[180] Furthermore, the constitutional prohibition against double jeopardy is virtually meaningless if it only prevents successive trials and not repeated attempts to punish. *Bozza*[181] and *Pearce,*[182] however, suggest that the Court may be reluctant to apply traditional double jeopardy principles in the sentencing context without qualification. In *Bozza,* the Court stated that the correction of an illegal sentence was not violative of the double jeopardy clause even though that correction resulted in an increased sentence. This opinion may be characterized as an exception to the prohibition against increased sentences set out in *Lange* and *Benz.*[183] Arguably, *Bozza* limits *Benz.* Acknowledging that *Benz* represents an extension of accepted double jeopardy principles to sentencing, the Court in *Bozza* may nevertheless have balked at the suggestion that an inadvertent error should immunize a convicted defendant from a valid and enforceable sentence. *Bozza* is perhaps best viewed as a retreat from the *Benz* dictum that punishment cannot be augmented insofar as its opinion reflects the Court's reluctance to embrace wholeheartedly in the sentencing context double jeopardy concepts evolving under different circumstances.

It may be argued that *Pearce* is also a recent example of this reluctance and that the two cases foreshadow the Court's ultimate departure from established doctrine in the sentencing context. Prior to *Pearce,* the Court had held in *Green* that the double jeopardy clause prevented conviction on retrial of the greater offense when the defendant was originally convicted of only the lesser included offense.[184] In *Pearce,* it seemed appropriate to extend the "implied acquittal" of the defendant on the greater charge rationale, the theoretical basis for the Court's conclusion in *Green,* to sentenc-

180. *See* text accompanying notes 106 to 111 *supra.*
181. *See* text accompanying notes 150 to 154 *supra.*
182. *See* text accompanying notes 113 to 116 *supra.*
183. *See* text accompanying notes 138 to 141 and 146 to 149 *supra.*
184. *See* text accompanying notes 117 to 123 *supra.*

ing;[185] but the *Pearce* Court nevertheless found no double jeopardy bar to increased punishment upon reconviction. Mr. Justice Harlan, dissenting in part in *Pearce,* forcefully expressed the view that "the concept or fiction of an 'implicit acquittal' of the greater offense . . . applies equally to the greater sentence"[186] and that enhanced punishment on retrial is therefore precluded once the degree of severity has been specified. Labeling the majority's conclusion on the double jeopardy issue "incongruous," he added:

> If, as a matter of policy and practicality, the imposition of an increased sentence on retrial has the same consequences whether effected in the guise of an increase in the degree of offense or an augmentation of punishment, what other factors render one route forbidden and the other permissible under the Double Jeopardy Clause?[187]

Mr. Justice Harlan found no rational distinction for the disparate treatment of the prosecution and sentence situations under the double jeopardy clause. Although the *Pearce* Court distinguished *Green* on the ground that it dealt with retrial after acquittal, its decision may presage the Court's refusal to apply traditional double jeopardy principles to the sentencing context without significant modification.

While the Court's decisions in *Pearce* and *Bozza* suggest the Court's reluctance to accord a convicted defendant the same protection under the double jeopardy clause as an accused defendant, the ultimate direction of the Court remains uncertain. In the overwhelming majority of cases, the Court has acknowledged, at least implicitly, that the constitutional safeguard against multiple punishment is subject to the same double jeopardy principles that have traditionally protected defendants against multiple prosecutions. In several cases, the Court has regarded the avoidance of multiple punishments as the central purpose of the fifth amendment proscription.[188] It is inconsistent with the history and purposes of

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185. In his dissent in *Green,* Mr. Justice Frankfurter observed:

> As a practical matter, and on any basis of human values, it is scarcely possible to distinguish a case in which the defendant is convicted of a greater offense from one in which he is convicted of an offense that has the same name as that of which he was previously convicted but carries a significantly [increased] punishment.

355 U.S. 184, 213 (1957) (Frankfurter, J., dissenting).

186. 395 U.S. 711, 746 (1969) (Harlan, J., concurring in part, dissenting in part).

187. *Id.* at 746-47.

188. *See* text accompanying notes 106 to 111 *supra.*

the double jeopardy clause to accord a lesser degree of protection in a sentencing context, where the threat of punishment is most acute.

Conceptually, it is difficult to segregate the protections provided by the double jeopardy clause into discrete categories. Although the *Pearce* Court recognized three different aspects of this guarantee, the concepts overlap. For example, in *Breed v. Jones*[189] Mr. Chief Justice Burger, speaking for a unanimous Court, explained: "Jeopardy denotes risk. In the constitutional sense, jeopardy describes the risk that is traditionally associated with a criminal prosecution."[190] Holding that the protection against double jeopardy was applicable to juvenile proceedings, the Court emphasized the potential deprivation of liberty which attaches to juvenile delinquency proceedings and found them tantamount to criminal prosecutions. The *Breed* Court recognized and relied upon the fact that a criminal prosecution encompasses more than just the determination of innocence or guilt:

> [T]he risk to which the term jeopardy refers is that traditionally associated with "actions intended to authorize criminal punishment to vindicate public justice." . . . Because of its purpose and potential consequences, and the nature and resources of the State, such a proceeding imposes heavy pressures and burdens — psychological, physical and financial — on a person charged. The purpose of the Double Jeopardy Clause is to require that he be subject to the experience only once "for the same offense."[191]

Although *Bozza* and *Pearce* suggest that the Court may have different standards depending upon the nature of the case invoking the guarantee against double jeopardy, there is no persuasive evidence that the Court considers traditional double jeopardy principles inapplicable to the sentencing context.

Even if double jeopardy principles are fully applicable, it is necessary to define the governmental interests served by the system of appellate review of sentences advocated in S. 1437. The sentencing provisions of S. 1437, of which the sentencing guidelines promulgated by the Commission and the system of appellate review are a part,[192] represent a thorough reform of current federal criminal practice. The guidelines are intended to limit the trial judge's discretion while retaining a certain degree of flexibility to accommodate the peculiarities of individual cases.[193] Appellate review of

189. 421 U.S. 519 (1975).
190. *Id.* at 528.
191. *Id.* at 529-30 (citation omitted).
192. *See* text accompanying notes 7 to 19 *supra*.
193. *See* S. REP. No. 605, 95th Cong., 1st Sess. 1056 (1977).

sentences is designed to complement these guidelines by eliminating egregious sentence disparities and promoting rationality and fairness in sentencing decisions. Appellate review is also intended to provide a mechanism by which the sentencing guidelines may be gradually refined and to foster the development of sentencing policies and principles through case adjudication.[194] The provision that permits the government to seek increased sentences on appeal is a necessary part of this process, one which parallels the defendant's right to appeal an arguably excessive punishment. According to the Senate report, one important consideration was to provide an "effective opportunity for the reviewing courts to correct the injustice arising from a sentence that was patently too lenient."[195] The Senate Judiciary Committee observed that

> [t]he unequal availability of appellate review . . . would have a tendency to skew the system, since if appellate review were a one-way street, so that the tribunal could only reduce excessive sentences but not enhance inadequate ones, then the effort to achieve greater uniformity might well result in a gradual scaling down of sentences to the level of the most lenient ones.[196]

While these are plausible policy reasons for permitting the government to seek an increase in the prisoner's sentence through appellate review, the constitutional policies embodied in the double jeopardy clause require that the accused's interest in the finality of criminal proceedings and freedom from repeated efforts by the government to increase the sentence only be subordinated to a more substantial and compelling governmental interest. Although the aims of S. 1437's appellate review system are understandable, it must also be understood that these governmental interests clash with the criminal defendant's constitutional right to be free from double jeopardy. Furthermore, the government's interest in promoting prosecutorial appeal of sentences is substantially less persuasive than it is in other procedural contexts such as mistrials or the imposition of illegal sentences. The argument that the double jeopardy clause will immunize the guilty from prosecution is not appropriate here; punishment has been, and will be, imposed to some extent, albeit not to the government's satisfaction. Neither is society's interest in punishing the guilty denied by extending double jeopardy principles to the sentencing context. On the contrary, it is

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194. *Id.* at 1056-57.
195. *Id.* at 1057.
196. *Id.*

vindicated insofar as the defendant is sentenced to a valid punishment.

CONCLUSION

While balancing the defendant's and the government's interests is a subjective and unpredictable process, the synthesis of the case law from analogous contexts supports the conclusion that prosecutorial appeal of sentences is unconstitutional. The interests of the accused protected by the double jeopardy clause are not so insubstantial that they may be subordinated to just any governmental interest. The interest must be vital to the orderly administration of the criminal justice system. To the extent that the double jeopardy clause interferes with the fulfillment of governmental objectives in the sentencing context, it is the price the Constitution requires the government to bear.

A related consideration is the vital safeguard against abuses of governmental power provided by this fifth amendment guarantee. The central theme of double jeopardy case law is the fundamental distinction between individual and state action. While additional proceedings initiated by the defendant are ordinarily not prohibited by the double jeopardy clause, the Court has only reluctantly permitted governmental appeals and then only in extremely narrow circumstances in which society's need to protect itself from those guilty of criminal conduct is compelling. S. 1437 affords the government a "second bite at the apple" — it permits the prosecution to seek what it considers to be a satisfactory sentence by subjecting individuals to successive proceedings, and it is precisely this abuse of power that the double jeopardy clause is designed to forbid.

The foregoing analysis suggests that S. 1437's appellate sentence review system may be constitutionally unsound. Although the Supreme Court, in analyzing double jeopardy issues, balances the countervailing interests of the individual and the government, traditional principles of double jeopardy dictate that the balance should ultimately be struck to protect the individual from the further proceedings authorized by S. 1437 once a final verdict has been rendered. It is apparent that the Supreme Court has recognized, at least tacitly, the viability of extending this balancing approach to the imposition of sentences. To disclaim its relevance is to eviscerate the protection against double jeopardy afforded by the fifth amendment.