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Double Jeopardy and Prosecutorial Appeal of Sentences: Di Francesco, Bullington, and the Criminal Code Reform Act of 1981

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RECENT DEVELOPMENTS

Double Jeopardy and Prosecutorial Appeal of Sentences: *DiFrancesco, Bullington,* and the Criminal Code Reform Act of 1981

The mood and temper of the public with regard to the treatment of crime and criminals is one of the most unfailing tests of the civilization of any country.[1]

Winston Churchill

I. INTRODUCTION

The fifth amendment provides that no person shall be "subject for the same offence to be twice put in jeopardy of life or limb."[2] The double jeopardy clause protects the criminal defendant by limiting the number of proceedings in which the government can subject him to the risk of penal sanctions. This protection, as recognized by both federal and state courts in their application of the double jeopardy principle, takes on two distinct forms. The first form protects the defendant against successive prosecutions. This aspect of double jeopardy provides a procedural restraint, requiring the government to assert all similar charges relating to one offense in a single proceeding. This procedural bar prevents judicial harassment of the accused and ensures that conviction results from a single judgment of the evidence, rather than from the increased probabilities of success because of multiple

1. H. BLOCH & G. GEIS, MAN, CRIME, AND SOCIETY 557 (1962) (quoting Winston Churchill).

2. U.S. CONST. amend. V.

The fifth amendment double jeopardy clause is applicable to the states through the fourteenth amendment. Benton v. Maryland, 395 U.S. 784, 793-96 (1969). In addition, all states except Connecticut, Maryland, Massachusetts, North Carolina, and Vermont have constitutional double jeopardy provisions. The five states that do not have a constitutional prohibition consider protection from double jeopardy a part of their common law. AMERICAN LAW INSTITUTE, ADMINISTRATION OF THE CRIMINAL LAW: DOUBLE JEOPARDY 56-59 (Tent. Draft No. 2, 1932).

prosecutions.[3] The second form of protection prohibits multiple punishment, which precludes augmentation of an accused's sentence by conviction and punishment for several offenses when only one was committed. This multiple punishment bar is a substantive prohibition since it imposes a limitation on judicial interpretation of substantive criminal law.[4] The primary concern underlying this bar is to prevent the arbitrary judicial imposition of multiple penalties when the legislature intended that such an act constitute a single offense.[5]

The proposed Criminal Code Reform Act of 1981[6] would thoroughly revamp the federal sentencing system and provide for increases in sentences through government-initiated appellate review. This proposal raises the question whether sentence appeal by the government violates the double jeopardy clause's prohibition of multiple punishment.[7] The Supreme Court recently addressed this issue[8] and held that the fifth amendment does not bar

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3. In conjunction with the policy of avoiding harassment and the consequential stigma it imposes on an accused, the procedural bar seeks also to achieve economy of time and money and to further the psychological security of the individual who has once been prosecuted. *See* Sigler, *Federal Double Jeopardy Policy*, 19 VAND. L. REV. 375, 376 (1966); Note, *Twice in Jeopardy*, 75 YALE L.J. 262, 266-67 (1965); 32 VAND. L. REV. 609, 613 (1979); 65 YALE L.J. 339, 340-41 (1956). *See generally* J. SIGLER, DOUBLE JEOPARDY (1969).

4. *See* M. FRIEDLAND, DOUBLE JEOPARDY 198 (1969); Westen & Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81, 111-13.

5. J. SIGLER, *supra* note 3, at 63-69; Kirchheimer, *The Act, The Offense and Double Jeopardy*, 58 YALE L.J. 513, 516 (1949).

6. S. 1630, 97th Cong., 1st Sess., 127 CONG. REC. S9769-76 (daily ed. Sept. 17, 1981) [hereinafter cited as S. 1630].

7. Until recently, no state authorized the government to seek an increase in a valid original sentence. *See* Note, *Double Jeopardy Limits on Prosecutorial Appeal of Sentence*, 1980 DUKE L.J. 847, 847 n.5 [hereinafter cited as Note, *Double Jeopardy Limits*]; Note, *Twice in Jeopardy: Prosecutorial Appeals of Sentences*, 63 VA. L. REV. 325, 325-26 n.4 (1977). Maryland has recently enacted a statute that permits the government to appeal a legally imposed sentence. MD. CTS. & JUD. PROC. CODE ANN. § 12-302(c) (1980).

8. The question whether the government may appeal sentences has not arisen with any frequency until now. The government has no right to appeal in the absence of express statutory authority. United States v. Sanges, 144 U.S. 310, 318 (1892). Since 1970, statutes have authorized the federal government to initiate an appeal of sentence, but only with respect to the prosecution of dangerous special offenders. *See* 18 U.S.C. § 3576 (1976). Recently, Congress authorized the government to take expanded appeals of any kind in criminal cases. *See* Note, *Double Jeopardy Limits, supra* note 7, at 853-54. For a statutory history of the federal government's authority to take appeals in criminal cases, see United States v. Wilson, 420 U.S. 332, 336-39 (1975) (describing the history of Title III of the Omnibus Crime Control Act of 1970, now in effect as 18 U.S.C. § 3731 (1976)); United States v. Sisson, 399 U.S. 267, 307-08 (1970) (describing the history of the predecessor statutes to § 3731). As a result, the problem of government-initiated requests for increases in sentence could not arise before 1970 except in the context of a government request to the trial court (as opposed to the appellate court) for a reconsideration of sentence, *e.g.*, Bozza v. United

prosecutorial sentence appeals authorized by statute.[9] The Court, however, has subsequently ruled that a term of life imprisonment for murder imposed in the sentencing stage of a bifurcated proceeding is final, and that a court may not increase the sentence to death upon retrial.[10]

This Recent Development first traces the evolution of the double jeopardy doctrine. The Recent Development then focuses on the recent sentence modification cases as well as the proposed revisions to the Federal Criminal Code. Finally, this Recent Development attempts to develop a coherent double jeopardy rationale and concludes that, under this proposed rationale, unilateral government appeal of sentences is unconstitutional.

II. TWICE IN JEOPARDY: LEGAL BACKGROUND

A. *Historical Background of Double Jeopardy*

The early history of double jeopardy provides little assistance in determining when the government should be allowed to appeal in a criminal case.[11] American colonies as early as 1641 began legislating some type of double jeopardy protection.[12] James Madison,

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States, 330 U.S. 160 (1947), or a government petition to an appellate court for writ of mandamus (as opposed to an appeal) for the correction of an illegal sentence, *e.g.*, United States v. Denson, 603 F.2d 1143 (5th Cir. 1979).

9. United States v. DiFrancesco, 449 U.S. 117 (1980).

10. Bullington v. Missouri, 451 U.S. 430 (1981).

11. The roots of double jeopardy can be traced to ancient Greece and Rome in the writings of Demosthenes, DEMOSTHENES 589 (J. Vince trans. 1930) (Speech Against Leptines), and in the *Digest or Pandects of Justinian*, in 11 S. SCOTT, THE CIVIL LAW 17 (1932). Double jeopardy appeared in Spanish law by 1255. *See* Kepner v. United States, 195 U.S. 100, 120-21 (1904). Early canonical law held that "God judges not twice for the offence." *See* M. FRIEDLAND, *supra* note 4, at 5. The doctrine was firmly a part of the civil law by the time of the Napoleonic Code. *See* Wilfley, *Trial by Jury and "Double Jeopardy" in the Philippines*, 13 YALE L.J. 421, 423-24 (1904).

Development of the double jeopardy concept in England was a slow process. The Magna Carta does not mention double jeopardy; whatever protection against repeated prosecution might have been available before the fifteenth century was probably more to guard against repeated private prosecutions than to protect against the power of the state. *See* J. SIGLER, *supra* note 3, at 3, 14-15. Only as prosecutions for criminal violations became a function of the state could the modern concept of double jeopardy develop. By the time of Coke, the concept of double jeopardy had matured into protection against the state through the common-law pleas of *autrefois acquit* and *autrefois convict*, which became available even for relatively minor crimes. *See id.* at 19. *Autrefois acquit* allowed the defendant to block a second trial by proving that he had previously been acquitted of the same offense, and *autrefois convict* allowed a plea of former conviction to bar a second indictment for the same crime. *See* United States v. Jenkins, 490 F.2d 868, 871 (2d Cir. 1973), *rev'd*, 420 U.S. 358 (1975).

12. Massachusetts' passage of a statutory double jeopardy bar in 1641 initiated a trend

who first suggested the inclusion of a double jeopardy provision in the Bill of Rights, originally proposed to the House of Representatives a version that read, "No person shall be subject . . . to more than one punishment or one trial for the same offence . . . ."[13] Opponents in the House argued unsuccessfully that Madison's proposal, as worded, actually might restrict a criminal defendant's right to a retrial after vacation of an erroneous conviction.[14] Agreeing with Madison's opposition, the Senate elected to prohibit a second "jeopardy of life or limb" rather than a second trial for the same offense.[15] The Senate debates, however, provide little insight into the intended breadth of this version, which ultimately was adopted. The legislators undoubtedly believed they were incorporating the existing common-law protection.[16] But this English notion of double jeopardy actually provided little guidance, since it consisted of a generalized policy against repeated prosecutions and punishment rather than a fundamental privilege that defined the concept of finality in a criminal prosecution.[17] The Framers' failure to define the boundaries contributed to later confusion about the permissible limits of government-initiated appellate review.

The ultimate constitutionality of prosecutorial appeal of sentences may best be evaluated by examining the manner in which the Supreme Court has balanced the government's interest in the enforcement of criminal law with the individual's interest to be free from multiple prosecutions in a variety of double jeopardy contexts—reprosecution after acquittal, reprosecution after conviction, reprosecution after mistrial, reprosecution after conviction has been set aside, and cases concerning multiple punishment.

B. Reprosecution After Acquittal

In the United States the constitutional protection against double jeopardy has developed into a doctrine broader than its common-law predecessor.[18] Even in its narrowest sense, however, the prohibition against being placed "twice in jeopardy" for the

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toward adoption of a similar protection by other colonies, first by statute and eventually by inclusion in colonial constitutions. *See* J. SIGLER, *supra* note 3, at 21-27.

13. 1 ANNALS OF CONG. 451-52 (Gales & Seaton eds. 1789).

14. *Id.* at 753-54. *See* J. SIGLER, *supra* note 3, at 30.

15. J. SIGLER, *supra* note 3, at 31-32.

16. *See* Note, *Double Jeopardy: A Problem Under Dual Sovereignty*, 53 NW. U.L. REV. 521, 526-27 (1958).

17. For a discussion of the development of the English theory of double jeopardy, see *supra* note 11.

18. *Id.*

same offense shields the accused from government-initiated proceedings based upon the same offense following a final acquittal.[19] In *Kepner v. United States*[20] the Supreme Court acknowledged and reaffirmed this fundamental tenet of double jeopardy jurisprudence. Defendant was tried and acquitted of embezzlement, but the Government appealed and obtained a conviction in the Supreme Court of the Philippine Islands.[21] Because the Government's appeal would put defendant twice in jeopardy, the United States Supreme Court reversed,[22] notwithstanding Justice Holmes' vigorous dissent.[23] Finding that "[i]t is . . . the settled law of this court that former jeopardy includes one who has been acquitted by a verdict duly rendered,"[24] the Court concluded 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.' "[25]

The *Kepner* decision recognized the basic protections afforded by the double jeopardy clause and the policy that finality must attach to guard against multiple proceedings and their concomitant hazards. In *Arizona v. Washington*[26] the Court articulated the rationale against reprosecution after acquittal:

> 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. . . ." If the innocence of the accused has been confirmed by a final judgment, the Constitution conclusively presumes that a second trial would be unfair.[27]

This apparently unequivocal rule against retrial after acquittal has several qualifications. First, the court acquitting the defendant

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19. United States v. Ball, 163 U.S. 662 (1896). *See infra* notes 61-64 and accompanying text.

20. 195 U.S. 100 (1904).

21. *Id.* at 110-11. The military orders governing the administration of justice in the Philippine Islands at that time provided for appeal of a trial court's determination. *See id.* at 111-16.

22. *Id.* at 133-34. Congress had expressly extended the constitutional guarantee against double jeopardy to the Philippine Islands. *See infra* note 67.

23. Justice Holmes suggested the concept of "continuing jeopardy," arguing that the initial jeopardy started with indictment and continued through appeal and retrial. 195 U.S. at 134-37 (Holmes, J., dissenting); *see infra* text accompanying notes 72-73.

24. 195 U.S. at 130.

25. *Id.* at 128 (quoting United States v. Sanges, 144 U.S. 310, 312 (1892)).

26. 434 U.S. 497 (1978).

27. *Id.* at 503 (quoting Fong Foo v. United States, 369 U.S. 141, 143 (1962)) (citation omitted).

must have had jurisdiction over the case,[28] because a judgment of acquittal entered by a court without jurisdiction is void and, therefore, does not stand as a bar to the subsequent prosecution.[29] Arguably, the interest of the defendant in freedom from the anxiety and stress of repeated criminal proceedings would militate against this rule. The jurisdiction rule, however, is well settled on the grounds that the accused was not subject to the risk of conviction and punishment in the absence of proper jurisdiction, and that the interests of the government would be ignored if the void proceeding resulted in immunity for the accused.[30]

Second, double jeopardy does not forbid reinstatement of a gnilty verdict when a jury found the defendant guilty, but the judge granted the defendant's postverdict dismissal motion. In *United States v. Wilson*[31] 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,

> 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.[32]

Because reversal of the trial judge's postverdict action would merely reinstate the jury verdict and would not grant the prosecution a new trial or subject defendant to multiple prosecution, the government's appeal did not offend the purpose of the double jeopardy clause.[33]

Last, in some cases the judgment may be characterized as something other than a formal acquittal. In *United States v. Mar-*

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28. Kepner v. United States, 195 U.S. 100, 126-28 (1904).

29. *Id.* at 129-30.

30. *See* M. FRIEDLAND, *supra* note 4, at 77-86.

31. 420 U.S. 332 (1975).

32. *Id.* at 345. *Wilson* concerns retrial after dismissal rather than retrial after acquittal. The definition of "acquittal" for the purposes of double jeopardy analysis remains nebulous. *See* United States v. Southern Ry., 485 F.2d 309, 312 (4th Cir. 1973) (termination of proceedings after full hearing on motion to dismiss is an acquittal); United States v. Brown, 481 F.2d 1035, 1042 (8th Cir. 1973) (dismissal upon Government's failure to provide trial court with information needed to determine whether guilty plea should be accepted is not an acquittal); United States v. Ponto, 454 F.2d 657, 663 (7th Cir. 1971) (dismissal of indictment based upon questions raised by defense at pretrial hearing is an acquittal).

33. The Court stated, "[W]here there is no threat of either multiple punishment or successive prosecutions the Double Jeopardy Clause is not offended . . . . Since reversal on appeal would merely reinstate the jury's verdict, review of such an order does not offend the policy against multiple prosecution." 420 U.S. at 344-45.

tin Linen Supply Co.[34] the trial court granted defendant's motion for acquittal after it had discharged a deadlocked jury. Although the judge rather than the jury had acquitted defendant, the Supreme Court found that the acquittal was one in "substance as well as form,"[35] and held that an appeal by the Government was impermissible. The Court rejected the Government's effort to distinguish the case from *Kepner* strictly in terms of timing of the mistrial and acquittal decisions.[36] The Government's argument in *Martin Linen*, although unsuccessful, raises the question of the applicability of the *Kepner* principle when the judgment may be characterized as something other than a formal acquittal.[37]

C. Reprosecution After Conviction

The principle that double jeopardy prohibits reprosecution of the same offense after conviction is also well settled.[38] The Supreme Court in *United States v. Martin Linen Supply Co.*[39] 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."[40] In *United States v. Wilson*[41] the Court reiterated this basic tenet: "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."[42] These statements indicate the Court's concern about multiple punishment as well as multiple prosecutions. Indeed, these two considerations overlap to a great extent[43] because the government's underlying motivation for reprosecution after conviction is the desire to secure a more severe punishment than that originally imposed.[44]

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34. 430 U.S. 564 (1977).
35. *Id.* at 572.
36. *Id.*
37. *See supra* note 32. *See also* Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 MICH. L. REV. 1001, 1040-41 n.146 (1980); Westen & Drubel, *supra* note 4, at 151-54.
38. *See* M. FRIEDLAND, *supra* note 4, at 195-217.
39. 430 U.S. 564 (1977).
40. *Id.* at 569 n.6 (dictum).
41. 420 U.S. 332 (1975).
42. *Id.* at 343.
43. *See infra* notes 94-112 and accompanying text.
44. *See* Stern, *Government Appeals of Sentences: A Constitutional Response to Arbitrary and Unreasonable Sentences*, 18 AM. CRIM. L. REV. 51, 86-89 (1980); Weigel, *Appel-*

D. Reprosecution After Mistrial

The resolution of fifth amendment double jeopardy issues ultimately depends upon balancing the accused's interest in freedom from multiple prosecution or punishment against the government's interest in maintaining and enforcing the criminal law. When a defendant has received a final verdict of acquittal or conviction, this balancing process invariably favors the accused, hence the near absolute bar against subsequent proceedings initiated by the government following final judgment.[45] When the first trial terminates prematurely, however, the defendant's interest in limiting the government to a single proceeding may be subordinated to the legitimate ends of criminal justice. The double jeopardy protection bars reprosecution after the court declares a mistrial unless the trial was ended because of "manifest necessity."[46] The circumstances must be compelling and beyond the control of the court and the prosecution to remove any possibility of prosecutorial misconduct.[47] The inquiry is not prosecutorial carelessness; rather, courts focus on whether through misconduct the government actually might be seeking a different jury or judge. If courts were to grant a new trial each time the prosecutor's conduct compelled a mistrial, then prosecutors would be motivated to engage in misconduct whenever they perceived that the judge or jury was reacting unfavorably to the case. Such liberal allowance of reprosecution, of course, would increase the probability of the defendant's conviction.

In *Illinois v. Somerville*[48] the prosecutor discovered that defendant's indictment was fatally defective immediately after the selection of the jury. The trial court granted a mistrial, since this was the only means to cure a defective indictment under Illinois law.[49] Notwithstanding that the defect was due to careless error, the Supreme Court held that a second prosecution would serve the "ends of public justice."[50] *Somerville* represents a conclusion that the government's interest in convicting the guilty outweighs the

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late Revision of Sentences: To Make the Punishment Fit the Crime, 20 STAN. L. REV. 405, 405-10 (1968).

45. *See supra* notes 19-27 & 38-44 and accompanying text.

46. United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824).

47. *See, e.g.*, Wade v. Hunter, 336 U.S. 684 (1949) (military necessity required relocation of trial); Freeman v. United States, 237 F. 815 (2d Cir. 1916) (illness of judge).

48. 410 U.S. 458 (1973).

49. *Id.* at 460.

50. *Id.* at 459.

need to deter prosecutorial carelessness. In *Downum v. United States*[51] the possibility that prosecutorial abuse had occurred was greater. After the jury was sworn, the prosecutor discovered the absence of a key witness, and the judge discharged the jury over defendant's objection.[52] The Supreme Court held that former jeopardy prevented a new trial.[53]

Retrial of defendants after declaration of a mistrial at the accused's request requires a different analysis. In *United States v. Dinitz*[54] improper opening arguments by a defense counsel resulted in his exclusion, and the trial court granted the remaining defense counsel's motion for mistrial. Acknowledging that the "manifest necessity" doctrine was inapposite because defendant had requested the mistrial, the Supreme Court emphasized that "[d]ifferent considerations obtain . . . when the mistrial has been declared at the defendant's request."[55] 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"[56]—and concluded that retrial was permissible. A later case summarized *Dinitz* 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 undertaken to harass or prejudice," . . . would there be any barrier to retrial . . . .[57]

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51. 372 U.S. 734 (1963).

52. *Id.* at 741 (Clark, J., dissenting).

53. *Id.* at 734-38.

Conceivably, a prosecutor could deliberately make an error at trial if he became convinced that the judge or jury was not receptive to his case, and he thought that a mistrial would not bar reprosecution. On the other hand, a prosecutor would probably not deliberately bring a defective indictment, as in Illinois v. Somerville, 410 U.S. 458 (1973), to have his case dismissed as a matter of law. *See* Note, *Double Jeopardy: The Reprosecution Problem*, 77 HARV. L. REV. 1272, 1275 (1964).

54. 424 U.S. 600 (1976).

55. *Id.* at 607; *cf.* Gori v. United States, 367 U.S. 364 (1961). In *Gori* the trial judge declared a mistrial sua sponte, purporting to protect defendant against possible prejudice and noting that this action was taken for the sole benefit of accused. The Supreme Court held that retrial was not barred. Ten years later the Court seriously questioned the *Gori* ruling in United States v. Jorn, 400 U.S. 470 (1971) (plurality opinion). *Jorn*, therefore, casts doubt on the relevance of such a motivation for declaring a mistrial. *See id.* 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.

56. 424 U.S. at 608.

57. Lee v. United States, 432 U.S. 23, 32-33 (1977) (quoting United States v. Dinitz,

These decisions reflect the Supreme Court's efforts at balancing the government's interest in furthering the administration of justice and the accused's interest in freedom from double jeopardy. These opinions demonstrate the significant impact that the reasoned choice of the defendant and the absence of governmental initiative have upon the Court's balancing analysis.[58] The defendant's interest in exercising a choice in the course to be followed at trial may outweigh the rationale for limiting the government to a single proceeding. According to *Dinitz*, the defendant's right to seek an immediate new trial via a motion for mistrial is not inconsistent with the policies of the double jeopardy clause.[59] This Recent Development next addresses the question whether this principle of according great weight to the defendant's freedom to determine the course of the proceedings is applicable to other double jeopardy contexts.

E. Reprosecution After Conviction Has Been Set Aside

The double jeopardy clause does not preclude retrial of a defendant whose conviction has been set aside because of error in the proceedings.[60] The leading case of *United States v. Ball*[61] simultaneously presented two aspects of the double jeopardy problem: reprosecution after acquittal[62] and retrial after appellate reversal of a conviction. In *Ball* three defendants were charged with murder under a defective indictment, and two of them were convicted. Upon writ of error, the Supreme Court reversed the convictions. Subsequently, all three defendants were reindicted and convicted. On a second appeal the Court, discussing the case of the defendant who had been acquitted initially, declared that "a general verdict of acquittal upon the issue of not guilty to an indictment under-

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424 U.S. 600, 611 (1976)); *accord* Jeffers v. United States, 432 U.S. 137, 152 (1977).

58. When subsequent proceedings are the result of the defendant's efforts, the policy objectives of the double jeopardy clause may be inapplicable. In United States v. Scott, 437 U.S. 82 (1978), the district court granted the defendant's motion for dismissal on the grounds of preindictment delay. 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." *Id.* at 99. The Court held that when a defendant deliberately chooses to seek termination of the proceedings against him on a basis unrelated to the factual guilt or innocence of the offense of which he is accused, he suffers no injury cognizable under the double jeopardy clause if he is later tried for that offense. *Id.* at 100-01.

59. *See supra* text accompanying note 57.

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

61. 163 U.S. 662 (1896).

62. *See supra* notes 18-37 and accompanying text.

taking 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."[63] Without revealing its underlying rationale, the Court summarily dispensed with the issue raised by the two remaining appellants, holding that a defendant who was wrongfully convicted at his original trial because of prejudicial error on the part of the state may nonetheless be retried following the setting aside of his conviction on appeal.[64]

Two different theories may explain the constitutional basis for the second holding in *Ball*. Nine years after *Ball*, in *Trono v. United States*,[65] the Court first introduced the "waiver" theory as a justification for allowing exceptions to the literal language of the fifth amendment. Defendants in *Trono* had been tried for murder, but were acquitted of that charge and convicted only of assault.[66] Defendants appealed the assault conviction to the Philippine Supreme Court, which had the statutory power to make a de novo determination of the facts and to impose a new sentence on appeal.[67] The court reversed the assault conviction but convicted defendants of homicide.[68] The United States Supreme Court held that when a defendant appeals his conviction he waives the right to invoke the plea of former jeopardy upon retrial.[69] Stressing the important distinction between appeals by the defendant and those initiated by the government, the Court stated,

> 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

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63. 163 U.S. at 669. The Court rejected the English rule that defective indictments could not legally place a defendant in jeopardy. *See* Vaux's Case, 76 Eng. Rep. 992 (K.B. 1591). Justice Gray, writing for the Court, discarded the rule as unjust because it would expose criminal defendants to a second prosecution and give a prosecutor dissatisfied with the verdict or sentence a second opportunity to convict whenever he could discover a defect in the original indictment. 163 U.S. at 669.

64. 163 U.S. at 672.

65. 199 U.S. 521 (1905).

66. *Id.* at 522.

67. *Id.* at 526. Congress, however, had expressly made the principles of the double jeopardy clause applicable to criminal prosecutions in the Philippine Islands, a territory of the United States. *See* Act of July 1, 1902, ch. 1369, § 5, 32 Stat. 691, 692.

68. United States v. Trono, 3 Phil. 213 (1904). Under Philippine law, homicide, in effect second degree murder, was a lesser included offense of the original murder charge, but a higher degree offense than the assault of which defendants were convicted. 199 U.S. at 522.

69. 199 U.S. at 531-32.

reversed.[70]

Subsequent Courts applied the waiver doctrine to affirm a number of cases in which sentences were increased following retrials conducted at the accused's behest.[71]

The other possible basis for the *Ball* holding is the "continuing jeopardy" theory. The adoption of the waiver theory in *Trono*, however, followed by one year the Court's rejection of Justice Holmes' rationale of continuing jeopardy enunciated in his dissent in *Kepner v. United States*.[72] Holmes had argued that jeopardy started with indictment and continued through appeal and a retrial subsequent to a successful appeal.[73] This broad characterization of double jeopardy has never been adopted by a majority of the Court.[74]

The waiver doctrine survived for fifty years; the Court formally abandoned the theory in *Green v. United States*.[75] In *Green* a jury found defendant guilty of second degree murder after being instructed that it could find him guilty of either first or second degree murder.[76] The appellate court reversed the conviction and remanded for a new trial.[77] At the new trial defendant was once again tried for first degree murder despite his plea of former jeopardy.[78] Defendant was convicted of first degree murder, and, on appeal, the Supreme Court confronted again the problem of rationalizing the principle that allows a second trial after the defendant has successfully appealed a conviction. The Court concluded that

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70. *Id.* at 533.

71. *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. He was retried and 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 the 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.

72. 195 U.S. 100, 134-37 (1904) (Holmes, J., dissenting).

73. *Id.* at 136.

74. *See, e.g.*, United States v. Scott, 437 U.S. 82, 90 n.6 (1978); United States v. Jenkins, 420 U.S. 358, 369 (1975); Green v. United States, 355 U.S. 184, 196 (1957). *But see* Swisher v. Brady, 438 U.S. 204 (1978) (state may provide a system of bench trials before a trial magistrate who lacks authority to acquit against the evidence or to make final rulings of law or fact until affirmed on appeal by a higher tribunal).

75. 355 U.S. 184 (1957).

76. *Id.* at 185-86.

77. Green v. United States, 218 F.2d 856, 859 (D.C. Cir. 1955), *rev'd*, 355 U.S. 184 (1957).

78. 355 U.S. at 186.

an appeal from a conviction for a lesser included offense does not waive protection from reprosecution for a greater offense of which the defendant was implicitly acquitted.[79] Rejecting the *Trono* waiver doctrine, the Court said,

> Reduced to plain terms, the Government contends that in order to secure the reversal of an erroneous conviction of one offense, a defendant must surrender his valid defense of former jeopardy not only on that offense but also on a different offense for which he was not convicted and which was not involved in his appeal. Or stated in the terms of this case, he must be willing to barter his constitutional protection against a second prosecution for an offense punishable by death as the price of a successful appeal from an erroneous conviction of another offense for which he has been sentenced to five to twenty years' imprisonment. As the Court of Appeals said in its first opinion in this case, a defendant faced with such a "choice" takes a "desperate chance" in securing the reversal of the erroneous conviction. The law should not, and in our judgment does not, place the defendant in such an incredible dilemma.[80]

Twenty-one years after *Green*, the Court again wrestled with the problem of justifying a "second jeopardy" in a closely analogous situation in *United States v. Scott*.[81] The Court held that when a trial court grants a defendant's request to terminate a trial before submission of the case to the judge or jury for a verdict, the government has the right to appeal the dismissal and, if successful, to reprosecute the case without violating the double jeopardy clause.[82] One of the key issues in *Scott* concerned the precise effect of *defendant's* action to terminate the proceedings. Although the Court stated that it did not intend to revive the waiver rationale rejected in *Green*, the reasoning that it used seems practically indistinguishable. *Scott* at least adopts a new balance for determining when defendant's waiver will or will not be implied: "[W]e conclude that the Double Jeopardy Clause, which guards against Government oppression, *does not relieve a defendant* from the consequences of his voluntary choice."[83] Thus, *Green*'s rejection of the implied waiver theory apparently suffered the same fate in *Scott* that the waiver theory of *Trono* suffered in *Green*: the Court did not expressly overrule either theory but limited each to its particular facts. The net result appears to have been the rehabilitation of the waiver theory, albeit in a limited form.

The Supreme Court attempted to resolve this lack of clarity in

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79. *Id.* at 190-91.
80. *Id.* at 193.
81. 437 U.S. 82 (1978).
82. *Id.* at 98-99.
83. *Id.* at 99 (emphasis added).

Burks v. United States.[84] In *Burks* the jury rejected the defendant's insanity defense and found him guilty of bank robbery, and defendant's motion for a new trial on the ground that the evidence was insufficient to support the verdict was denied. Holding that the government had failed to rebut the defendant's proof of insanity, the Sixth Circuit reversed and remanded the case for a determination of whether the trial court should direct a verdict of acquittal or order a new trial.[85] The Supreme Court reversed, finding that because the "Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient, the only 'just' remedy available for that court is the direction of a judgment of acquittal."[86] The *Burks* Court distinguished a reversal for trial error from a reversal for evidentiary insufficiency. Retrial to correct trial error is justified because "[i]t 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."[87] Because a reversal for trial error does not indicate that the government failed to prove its case, the reversal does not imply that the defendant is innocent; rather, it simply indicates that the defendant was convicted in a defective judicial proceeding.[88] The Court reasoned that retrial following trial error satisfies two important interests: the accused's interest in obtaining a fair adjudication of his guilt free from error and society's interest in ensuring that the guilty are punished.[89]

By contrast, when a court has set aside a conviction because of insufficient evidence, as in *Burks*, the prosecution has been given a fair opportunity to offer whatever proof it could muster.[90] The double jeopardy clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence that it failed to produce in the first proceeding. Under *Burks* if the

84. 437 U.S. 1 (1978).

85. United States v. Burks, 547 F.2d 968, 970 (6th Cir. 1976), *rev'd*, 437 U.S. 1 (1978).

86. 437 U.S. at 18.

87. *Id.* at 15 (quoting United States v. Tateo, 377 U.S. 463, 466 (1964)); *see also* United States v. Wilson, 420 U.S. 332, 343-44 n.11 (1975) (retrials justified on basis of fairness to both defendant and government); Wade v. Hunter, 336 U.S. 684, 689 (1949) ("[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.").

88. 437 U.S. at 15.

89. *Id.*; *see* Note, *Double Jeopardy: A New Trial After Appellate Reversal for Insufficient Evidence*, 31 U. CHI. L. REV. 365, 370 (1964).

90. 437 U.S. at 16.

government's case is so lacking that the court should not have submitted it to the jury, the defendant should receive the same double jeopardy protections that are afforded to a defendant receiving a verdict of acquittal.[91] Thus, a defendant's voluntary choice to seek a new trial does not always preclude the application of double jeopardy principles.[92] Reversal of the defendant's conviction because the evidence was insufficient operates as an acquittal that bars a second prosecution. Only when the reversal of a conviction is due to trial error is a defendant subject to a new trial.[93]

F. Multiple Punishment

The second protection of the double jeopardy clause is the bar against multiple punishment,[94] that is, "the principle that no man shall more than once be placed in peril of legal penalties upon the same accusation."[95] The Supreme Court established in *Ex parte Lange*[96] that a court may not add a new sentence to one already completed. In *Lange* the trial court had chosen to fine defendant rather than to impose the alternative penalty of imprisonment authorized by statute. The Supreme Court ruled that the double jeopardy clause protected the defendant from subsequent imposi-

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91. *See id.*

92. *See id.* at 18.

93. *See* United States v. Jaramillo, 510 F.2d 808, 811 (8th Cir. 1975); United States v. Rothfelder, 474 F.2d 606, 608 (6th Cir.), *cert. denied,* 413 U.S. 922 (1973).

94. At the time the fifth amendment was adopted, imprisonment had emerged only recently as an alternative to the death penalty, whippings, and confinement in public stocks. *See* United States v. Grayson, 438 U.S. 41, 45 (1978). In most instances the legislature prescribed the period of incarceration with specificity. *Id.* Legislatures, however, soon replaced mandatory sentences with schemes permitting the sentencing judge or jury to consider aggravating and mitigating circumstances and to select a sentence within a range defined by the legislature. *Id.* at 45-46; *see* Tappan, *Sentencing Under the Model Penal Code,* 23 LAW & CONTEMP. PROBS. 528, 529 (1958); Note, *Procedural Due Process at Judicial Sentencing for Felony,* 81 HARV. L. REV. 821, 822-23 (1968) [hereinafter cited as Note, *Judicial Sentencing*]. Although the original purposes of incarceration had been retrihution and punishment, rehabilitation later became an additional element making the system of punishment more flexible. *See* S. RUBIN, THE LAW OF CRIMINAL CORRECTION 132-33 (2d ed. 1973); Note, *Judicial Sentencing, supra,* at 823; *see also* Williams v. New York, 337 U.S. 241, 247-48 (1949) ("prevalent modern philosophy of penology [is] that the punishment should fit the offender and not merely the crime" and that, accordingly, sentences should be determined with an eye toward the "[r]eformation and rehabilitation of offenders.").

Today the length of a federal prisoner's confinement is determined initially by the sentencing judge, who selects a term within an often broad, congressionally prescribed range. The United States Parole Board may, as a general rule, conditionally release a prisoner at any time after he serves one-third of the judicially fixed term. 18 U.S.C. § 4205 (1976).

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

96. 85 U.S. (18 Wall.) 163 (1874).

tion of a prison sentence.[97] *Lange* presented a relatively narrow factual situation—the multiple punishment was an additional sentence imposed after the completion of the maximum authorized punishment—and the Court's holding may be limited to that situation.

The later decision of *United States v. Benz* provides some insight into the multiple punishment question.[98] At issue in *Benz* was whether the district court could shorten a defendant's sentence after he had begun serving the term. The Supreme Court permitted the modification, distinguishing between the trial court's power to decrease and to increase a sentence:

> 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 . . . .[99]

Without analyzing why increasing a sentence always would constitute double punishment, the Court, in dictum, cited *Lange* as authority for the proposition that multiple punishment violates the double jeopardy clause. The Court, however, failed to consider that *Lange* dealt with imposing a new sentence on a defendant who already had suffered fully the maximum penalty authorized by statute.[100]

The Supreme Court in *Bozza v. United States*[101] authorized correction of a sentence to conform to the specified statutory minimum. Although the statute under which defendant was convicted mandated a sentence of both fine *and* imprisonment, the judge imposed only imprisonment at the initial sentencing. Hours later,

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97. *Id.* at 173.

98. 282 U.S. 304 (1931).

99. *Id.* at 307.

100. In Murphy v. Massachusetts, 177 U.S. 155 (1900), the defendant was convicted and sentenced; on appeal, the appellate court reversed the sentence on constitutional grounds. Upon remand the lower court resentenced him to a longer term of imprisonment. Although it rejected defendant's pleas of former jeopardy, the Supreme Court 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.

Id. at 160 (dictum).

101. 330 U.S. 160 (1947).

however, defendant was returned to the court and fined. The Supreme Court held that this procedure did not put petitioner twice in jeopardy for the same offense because the original sentence was an invalid punishment; before the correction the court had not imposed a legal sentence.[102] The Court rejected petitioner's argument, based on the *Benz* dictum, that correcting his sentence to conform to the statutory minimum increased the sentence and subjected him to multiple punishment.[103]

The Court squarely faced the resentencing issue in *North Carolina v. Pearce*.[104] Defendant in *Pearce* had been convicted and sentenced. Several years later his conviction was reversed in a postconviction proceeding and he was retried.[105] The second trial resulted in a conviction and a sentence that, when added to the time already served, amounted to a longer total sentence than that imposed after the original trial.[106] The Court held that the double jeopardy clause offered no protection from a harsher sentence upon reconviction.[107] The Court stated that it was merely affirming the principle of *Stroud v. United States*[108] in which the Court upheld imposition of the death penalty after retrial even though defendant's first trial for the same offense had resulted in a life sentence.[109] *Pearce*, thereafter, seemed to revive the expansive waiver concept of *Trono v. United States*[110] despite its apparent rejection

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102. *Id.* at 167; *cf.* FED. R. CRIM. P. 35(a) ("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.").

103. 330 U.S. at 166. Whether the Court rejected the *Benz* dictum in its entirety or whether *Bozza* was confined to situations in which the sentence originally imposed was invalid is not clear from the Court's opinion. In a footnote, the Court distinguished *Lange* stating, "[T]he petitioner [in *Bozza*] had not suffered any lawful punishment until the court had announced the full mandatory sentence of imprisonment *and* fine." *Id.* at 167 n.2 (emphasis in original).

104. 395 U.S. 711 (1969).

105. *Id.* at 713.

106. *Id.*

107. *Id.* at 719-20. The Court emphasized the goal of individualized sentencing:

> The freedom of a sentencing judge to consider the defendant's conduct subsequent to the first conviction in imposing a new sentence is no more than consonant with the principle . . . that a State may adopt the "prevalent modern philosophy of penology that a punishment should fit the offender and not merely the crime."

Id. at 723 (quoting Williams v. New York, 337 U.S. 241, 247 (1949)) (citation omitted).

108. 251 U.S. 15 (1919); *see supra* note 71.

109. 395 U.S. at 720 n.16. The Court added, "we deal here, not with increases in existing sentences, but with the imposition of wholly new sentences after wholly new trials." *Id.* at 722.

110. 199 U.S. 521 (1905); *see supra* notes 65-70 and accompanying text.

in *Green v. United States*.[111]

Thus, according to *Pearce*, if the original sentence was overturned at the "behest of the defendant,"[112] a court does not violate the double jeopardy clause when it increases the sentence after a retrial. *Pearce*, however, did not answer the question whether the courts could review a legally imposed sentence upon unilateral appeal of the government.

III. Recent Developments

During the 1980 Term, the Supreme Court, in two different double jeopardy cases, addressed the validity of the imposition of an increased sentence at the behest of the prosecution,[113] and reached divergent results. In addition, the Senate version of the proposed recodification of the Federal Criminal Code provides for government appeal of sentences.[114] These inconsistent developments illustrate the current uncertainty regarding the finality of sentences.

A. Recent Decisions

1. *United States v. DiFrancesco*

In 1970 Congress enacted the Organized Crime Control Act (Act), which authorizes the government to request that the trial judge make a finding that the defendant meets the statutory definition of a "dangerous special offender" and, if that finding is made, to seek enhanced sentencing at the trial level.[115] The Act also authorizes the prosecutor to appeal sentences imposed by the trial judge under the dangerous special offender provision.[116]

In *DiFrancesco* defendant was convicted of federal racketeering offenses.[117] The trial court then held a hearing at which it ruled that defendant was a dangerous special offender within the meaning of the Act.[118] The court sentenced defendant to two concurrent

111. 355 U.S. 184 (1957); *see supra* text accompanying notes 75-80.

112. 395 U.S. at 721.

113. Bullington v. Missouri, 451 U.S. 430 (1981); United States v. DiFrancesco, 449 U.S. 117 (1980).

114. S. 1630, *supra* note 6, at § 3725.

115. 18 U.S.C. §§ 3575-3576 (1976).

116. 18 U.S.C. § 3576 (1976).

117. United States v. DiFrancesco, 449 U.S. 117, 122 (1980). Defendant was convicted for violations of 18 U.S.C. § 1361 (1976) (damaging federal property), 18 U.S.C. § 842(j) (1976) (unlawfully storing explosives), and 18 U.S.C. § 371 (1976) (conspiracy). 449 U.S. at 122.

118. 449 U.S. at 122.

ten-year terms on the racketeering counts, to be served concurrently with a nine-year term imposed earlier in an unrelated trial.[119] Exercising its right of appeal for the first time,[120] the Government sought review of those sentences in the Court of Appeals for the Second Circuit. The Government contended that the trial court had abused its discretion by imposing only one year of additional punishment under the dangerous special offender provision.[121] The Second Circuit dismissed the Government's appeal on double jeopardy grounds.[122]

Upon grant of certiorari,[123] the Supreme Court reversed the decision of the Second Circuit.[124] Writing for the Court, Justice Blackmun observed that the double jeopardy clause does not ban completely government-initiated appeals in a criminal case; the clause bars only those appeals that present a threat of reprosecution after acquittal.[125] "Appeal of a sentence . . . would seem to be a violation of double jeopardy only if the original sentence . . . is to be treated in the same way as an acquittal is treated, and the appeal is to be treated in the same way as a retrial."[126] The Court looked to *North Carolina v. Pearce*[127] and determined that *Pearce* had rejected by implication the notion that the first sentence constitutes an implied acquittal of any greater sentence and therefore cannot be increased.[128] Justice Blackmun found the distinction between the case at bar, in which the trial court imposed the greater sentence after a state-initiated appeal, and *Pearce*, in which the

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119. *Id.* At the earlier trial defendant was convicted for violation of 18 U.S.C. § 1962(c) and (d) (1976) (racketeering and conspiracy). 449 U.S. at 122.

120. 449 U.S. at 125 n.9.

121. United States v. DiFrancesco, 604 F.2d 769, 780 (2d Cir. 1979), *rev'd*, 449 U.S. 117 (1980).

122. *Id.* at 787.

123. 444 U.S. 1070 (1980).

124. 449 U.S. 117 (1980). Chief Justice Burger and Justices Stewart, Powell, and Rehnquist joined in Justice Blackmun's majority opinion. Justice Brennan wrote a dissenting opinion in which Justices White, Marshall, and Stevens joined. Justice Stevens wrote a separate dissenting opinion.

125. *Id.* at 132. The Court relied on United States v. Martin Linen Supply Co., 430 U.S. 564 (1977), United States v. Wilson, 420 U.S. 332 (1975), and United States v. Scott, 437 U.S. 82 (1978), to support the proposition that the double jeopardy clause does not bar sentence appeals. 449 U.S. at 132. In all three of these cases, the Government brought its appeals pursuant to statutes authorizing appeals by the state from judgments dismissing indictments. For a discussion of these cases, see *supra* notes 31-37 & 58 and accompanying text and text accompanying notes 81-83.

126. 449 U.S. at 133.

127. 395 U.S. 711 (1969).

128. 449 U.S. at 135 n.14; *see supra* notes 104-12 and accompanying text.

greater sentence followed retrial, to be "no more than a 'conceptual nicety.' "[129]

The Court found the analogy between appeals and retrials also to be unpersuasive in light of the "basic design" of the double jeopardy clause as "a bar against repeated attempts to convict, with consequent subjection of the defendant to embarassment, expense, anxiety, and insecurity and the possibility that he may be found guilty even though innocent."[130] Because a defendant is charged with notice of the government's authority to appeal, an appeal would not defeat any legitimate expectation of finality in his sentence.[131] Furthermore, the Court stated that a defendant has no right to know, at any given time, the maximum limit of his sentence.[132] "The defendant's primary concern and anxiety obviously relate to the determination of innocence or guilt . . . ."[133] The Court concluded, therefore, that the considerations which bar reprosecution following acquittal do not bar sentencing appeals by the government.

Justice Blackmun then turned to the question of whether government-initiated appeals offend the double jeopardy clause's prohibition against multiple punishment. The Court refused to be persuaded by the dictum in *United States v. Benz*,[134] which had suggested that an increased single sentence is in effect a second sentence barred by the double jeopardy clause, and held that language not susceptible to general application.[135] Analogizing the instant decision to its prior holdings on the constitutionality of two-stage criminal trials,[136] the Court reasoned that Congress could have avoided the issue by providing a mandatory sentence for a dangerous special offender and allowing the trial judge to recommend a lesser sentence to the court of appeals. "No double jeopardy policy is advanced by approving one of these procedures and declaring the other unconstitutional."[137]

Justice Brennan, in dissent, argued that the *Benz* language

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129. 449 U.S. at 136 (quoting North Carolina v. Pearce, 395 U.S. 711, 722 (1969)).

130. 449 U.S. at 136.

131. *Id.* at 137.

132. *Id.* The Court cited a line of probation and parole revocation cases to buttress this proposition. *Id.*

133. *Id.* at 136.

134. 282 U.S. 304 (1931); *see supra* text accompanying notes 98-100.

135. 449 U.S. at 138-39.

136. *Id.* at 140-41. The Court referred to the two-tiered juvenile trial system approved in Swisher v. Brady, 438 U.S. 204 (1978). *See supra* note 74.

137. 449 U.S. at 142.

articulated a consistent assumption of the Court.[138] The dissent opined that an "analytic similarity" exists between sentences and acquittals to the extent that the imposition of a sentence constitutes a finding that the facts do not warrant a greater sentence.[139] Justice Brennan submitted that the majority's argument that the embarrassment and anxiety were behind a defendant once his guilt was determined was "startling." The dissent further maintained that the amount of time to be served concerned defendants more than whether their record showed a conviction.[140] The dissent criticized the majority's reliance on *Pearce* because *Pearce* stood only for the proposition that a court may increase a sentence upon retrial.[141] Finally, the dissent argued that the instant case was not analogous to a two-stage criminal trial because the trial judge, unlike the special master at the first tier of a two-tier proceeding, had the authority to impose a final sentence.[142]

Justice Stevens, in a separate dissent, distinguished *Pearce* on other grounds. The *Pearce* Court had explained its decision as a corollary of the premise that " 'the original conviction has, at the defendant's behest, been wholly nullified.' "[143] Thus, Justice Stevens concluded that *Pearce* did not apply because the prosecution in the case at bar sought a more severe sentence for a valid conviction.

2. *Bullington v. Missouri*

Missouri statutes provide that an accused found guilty of capital murder may be sentenced to death only if, at a separate post-conviction hearing, the jury unanimously finds beyond a reasona-

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138. *Id.* at 144-45 (Brennan, J., dissenting).

139. *Id.* at 146. The dissent argued that the probation and parole cases used as support for sentence appeals by the majority were inapposite because in those cases the defendant knew from the outset the maximum time he could be forced to serve. *Id.* at 148.

140. *Id.* at 149-50. The dissent also criticized as "circular" the Court's reliance upon the expectations of the defendant since "the very statute which increases and prolongs the defendant's anxiety alleviates it by conditioning his expectations." *Id.* at 150. Justice Brennan reasoned that the same argument would validate a statute authorizing government appeals from verdicts of acquittal. *Id.*; *see supra* text accompanying notes 18-27.

141. 449 U.S. at 151. The dissent suggested that *Pearce* rested on the notion that a trial court cannot be denied the power to sentence a defendant. *Id.*; *see supra* note 107.

142. 449 U.S. at 151-52. In response to the argument that Congress, by altering the proceedings, could have created a system that would have had the same effect without raising the double jeopardy issue, the dissent stated that courts should review statutes in the form in which they are written. *Id.* at 148.

143. *Id.* at 153 (Stevens, J., dissenting) (quoting North Carolina v. Pearce, 395 U.S. 711, 721 (1969)).

ble doubt that the accused committed the crime under at least one of ten specific aggravating circumstances.[144] In *Bullington* the jury sentenced defendant to life imprisonment.[145] The court then granted defendant's motion for a new trial because of constitutional defects in Missouri's jury selection process.[146] The State again indicated its intention to seek the death penalty, and defendant moved to strike.[147] The trial court announced that it would grant defendant's motion, and, in response, the prosecution obtained a writ of prohibition from the Supreme Court of Missouri.[148]

Upon grant of certiorari,[149] the United States Supreme Court reversed the Supreme Court of Missouri.[150] Justice Blackmun, again writing for the Court, qualified the broad language in *DiFrancesco* concerning the finality of sentences. He stated, "The imposition of a particular sentence usually is not regarded as an 'acquittal' of any more severe sentence that could have been imposed."[151] In this situation, however, since defendant's life sentence was imposed after a postconviction hearing that had the procedural "hallmarks of the trial on guilt or innocence," the Court reasoned that the jury had acquitted defendant of the death penalty.[152] Justice Blackmun opined that normally, the sentencer's discretion is "essentially unfettered."[153] He noted, however, that the *Bullington* situation did not follow the norm, since the Missouri statute limited the jury's discretion to impose the death penalty to cases in which the jury could find specific aggravating circumstances. The Court, relying on *Burks v. United States*,[154] found that the imposition of the life imprisonment sentence represented a finding that the evidence was insufficient to justify capital

144. Mo. Rev. Stat. §§ 565.006, .008.1, .012 (1978).

145. Bullington v. Missouri, 451 U.S. 430, 435-36 (1981).

146. *Id.* at 436. While defendant's motions for judgment of acquittal and, in the alternative, for a new trial were pending, the Supreme Court struck down Missouri constitutional and statutory provisions allowing women automatic exemption from jury service. Duren v. Missouri, 439 U.S. 357 (1979).

147. 451 U.S. at 436.

148. State *ex rel.* Westfall v. Mason, 594 S.W.2d 908 (Mo. 1980) (en banc).

149. 449 U.S. 819 (1980).

150. 451 U.S. 430 (1981). Justices Brennan, Stewart, Marshall, and Stevens joined in Justice Blackmun's majority opinion. Justice Powell wrote a dissenting opinion in which Chief Justice Burger and Justices White and Rehnquist joined.

151. *Id.* at 438.

152. *Id.* at 439.

153. *Id.*

154. 437 U.S. 1 (1978); *see supra* text accompanying notes 84-93.

punishment.[155] Since *Burks* held that a defendant may not be retried if he obtains a reversal of the conviction for evidentiary insufficiency, the Court concluded that, similarly, this defendant's punishment could not be increased upon reconviction since the evidence had already been deemed insufficient to justify the harsher penalty.[156]

Justice Powell, in dissent, contended that *DiFrancesco* and *Pearce* had recognized an "unqualified" and "fundamental difference" between acquittals and sentences.[157] The dissent charged the majority with failing to consider the reasons why retrials are barred in the sentencing context.[158] Because a sentence cannot "be deemed correct or erroneous if it is duly made within the authority conferred by the legislature,"[159] the dissent concluded that no basis exists for barring the prosecution from attempting to impose the death penalty upon retrial.[160]

B. Proposed Revisions to the Federal Criminal Code

The Criminal Code Reform Act of 1981[161] is an ambitious attempt by the Senate to recodify and revise the Federal Criminal Code. This recodification would be the first in the history of the United States.[162] In addition to addressing issues such as federal jurisdiction,[163] substantive law,[164] and criminal behavior,[165] the proposal contains sweeping reforms of the sentencing process. The Senate bill prescribes the use of sentencing guidelines to be

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155. 451 U.S. at 441-46. The Court noted that *DiFrancesco* also involved a bifurcated proceeding at which the government was required to prove additional facts, including that the accused was a dangerous special offender. Justice Blackmun contrasted the "preponderance of the evidence" standard in *DiFrancesco* to the requirement in the instant case of "beyond a reasonable doubt" and concluded that the Missouri standard, unlike that in *DiFrancesco*, was " 'designed to exclude as nearly as possible the likelihood of an erroneous judgment.' " *Id.* (quoting Addington v. Texas, 441 U.S. 418, 423 (1979)).

156. *Id.* at 444-45.

157. *Id.* at 448-49.

158. *Id.* at 450-51.

159. *Id.*

160. *Id.*

161. S. 1630, *supra* note 6; *see also* H.R. 4711, 97th Cong., 1st Sess., 127 CONG. REC. H7195 (daily ed. Oct. 7, 1981) (referred to the Committee on the Judiciary) (Criminal Code Revision Act of 1981); H.R. 1647, 97th Cong., 1st Sess., 127 CONG. REC. H372 (daily ed. Feb. 4, 1981) (same).

162. *See* Freeman & Earley, United States v. DiFrancesco: *Government Appeal of Sentences*, 18 AM. CRIM. L. REV. 91, 91 (1980).

163. S. 1630, *supra* note 6, § 201.

164. *E.g., id.* § 1853.

165. *Id.* § 301.

promulgated by a new agency—the United States Sentencing Commission.[166] The guidelines would direct the trial court's determination of what type and length of imprisonment or probation to impose.[167] The proposed legislation would require the court to consider these guidelines, including "the sentencing range established for the applicable category of offense committed by the applicable category of defendant."[168] The proposal also would require the judge to state in open court the reasons for imposing a particular sentence.[169] The Sentencing Commission's guidelines would be recommendations and not requirements. The sentencing court may, within the lawful limits set by proposed section 2301,[170] deviate from the sentencing range and impose a longer or shorter term of imprisonment than that provided for in the Commission's guidelines.[171] Two important consequences would result from the adoption of these proposals. Not only must the court state the *specific* reason for imposing a sentence outside the recommended range,[172] but, more importantly, its action is subject to appellate review.[173]

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166. *Id.* § 2003(a)(4).

167. *Id.* § 2003(b).

168. *Id.* § 2003(a)(4).

169. *Id.* § 2003(c).

170. *Id.* § 2301. Section 2301 delineates authorized terms of imprisonment for specific classes of felonies and misdemeanors. In effect, this section establishes the maximum lawful term of imprisonment that a sentencing court may impose for a particular category of offense.

171. *Id.* § 2003(b).

172. *Id.* § 2003(c)(2).

173. *Id.* § 3725. Section 3725 provides in pertinent part:

> (b) APPEAL BY THE GOVERNMENT.—The government may, with the personal approval of the Attorney General or the Solicitor General, file a notice of appeal in the district court for review of an otherwise final sentence imposed for a felony or a Class A misdemeanor if the sentence includes a lesser fine or term of imprisonment or term of supervised release than the minimnm estahlished in the guidelines, or includes a less limiting condition of probation or supervised release under section 2103(b)(6) or (b)(11) than the minimum 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, unless—
>
> (1) the sentence is equal to or greater than the sentence recommended or not opposed by the attorney for the government pursuant to a plea agreement under Rule 11(e)(1)(B) of the Federal Rules of Criminal Procedure; or
>
> (2) the sentence is that provided in an accepted plea agreement pursuant to Rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure.
>
> (c) REVIEW.—If a notice of appeal is filed in the district court pursuant to subsection (a) or (b), the clerk shall certify to the court of appeals—
>
> (1) that portion of the record in the case that is designated as pertinent by either of the parties;
>
> (2) the presentence report; and
>
> (3) the information submitted during the sentencing proceeding.

Proposed section 3725 provides for limited appellate review of sentences.[174] The 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 Sentencing Commission. The defendant may seek this appellate review if the final sentence imposed is higher that the maximum estab-

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(d) CONSIDERATION.—Upon review of the record, the court of appeals shall determine whether the sentence imposed is unreasonable, having regard for—

(1) the factors to be considered in imposing a sentence, as set forth in part III of this title; and

(2) the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 2003(c).

(e) DECISION AND DISPOSITION.—If the court of appeals determines tbat the sentence is—

(1) unreasonable, it shall state specific reasons for its conclusions and—

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), shall set aside the sentence and—

(i) remand the case for imposition of a lesser sentence;

(ii) remand the case for further sentencing proceedings; or

(iii) impose a lesser sentence;

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), shall set aside the sentence and—

(i) remand the case for imposition of a greater sentence;

(ii) remand the case for further sentencing proceedings; or

(iii) impose a greater sentence; or

(2) not unreasonable, it shall affirm the sentence.

174. The Senate has included this provision in prior criminal code reform proposals. *See* S. 1722, 96th Cong., 1st Sess., 125 CONG. REC. S12203, § 3725 (daily ed. Sept. 7, 1979); S. 1437, 95th Cong., 1st Sess., 123 CONG. REC. 37655, § 3725 (1977); S. 1, 94th Cong., 1st Sess., 121 CONG. REC. 211, § 3725 (1975). The House consistently has opposed such a provision. *See* Drinan, Ward & Beier, *The Federal Criminal Code: The Houses are Divided,* 18 AM. CRIM. L. REV. 509, 511-14, 526-27 (1981). The two versions of the Criminal Code Reform Act presently before the House do not provide for government appeal of sentences. *See* H.R. 4711, 97th Cong., 1st Sess., 127 CONG. REC. H7195 (daily ed. Oct. 7, 1981); H.R. 1647, 97th Cong., 1st Sess., 127 CONG. REC. H372 (daily ed. Feb. 4, 1981). Another bill presently before the House expressly disallows modification of a term of imprisonment after the sentence has been imposed. *See* H.R. 4492, 97th Cong., 1st Sess., 127 CONG. REC. H6323, § 7703 (daily ed. Sept. 16, 1981).

The Justice Department is in favor of government appeal of sentences. *See Criminal Code Reform: Hearings on H.R. 1647 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary,* 97th Cong., 1st Sess. (Oct. 28, 1981) (statement of Attorney General William French Smith). At oral argument before the Supreme Court in *DiFrancesco,* the government was less concerned with saving the dangerous special offender statute than with "establish[ing] the right of Congress to authorize government appeals of sentences on a broad scale." Arguments Before the Court, 49 U.S.L.W. 3261, 3261 (U.S. Oct. 14, 1980).

After some vacillation, the ABA resolved recently to oppose government appeal of sentences. *See* Ad Hoc Committee on the Federal Criminal Code, ABA Section of Corporation, Banking and Business Law, *Report on Governmental Appeal of Sentences,* 35 BUS. LAW. 617, 624-28 (1980). *See also* Freeman & Earley, *supra* note 162, at 91-93 (background of ABA consideration).

lished by the guidelines, and the government may seek review if the sentence is lower than the minimum prescribed. If the government decides to appeal a sentence, it initiates the review process by filing a notice of appeal with the district court. The court then certifies to the court of appeals designated portions of the record, the presentence report, and the information submitted during the sentencing proceedings.[175] The court of appeals, in reviewing the record, considers both the circumstances in which the imposition of the sentence under section 2003 is appropriate and the reasons for the sentence stated by the trial court.[176] If the appellate court concludes that the sentence imposed was not unreasonable, it must affirm.[177] If the appellate court finds that the sentence imposed was unreasonable, however, section 3725 authorizes the court to impose a greater sentence, to remand for imposition of a greater sentence, or to remand for further sentence proceedings.[178] In effect, section 3725 authorizes the prosecution to seek an increase of the trial court's sentence on appeal.

IV. ANALYSIS

The Supreme Court's decision in *DiFrancesco* is a significant departure from precedent. The *DiFrancesco* Court found no difference between the government's appeal and a defendant's appeal.[179] The Court relied on its holding in *Pearce* that double jeopardy does not bar the imposition of a more severe sentence following retrial[180] for the proposition that the government may appeal a legally imposed sentence.[181] *Pearce*, however, does not support the constitutionality of government appeal of sentences. That issue simply was not before the *Pearce* Court.[182] The first few words of the majority opinion reveal the essence of the *Pearce* decision: "When *at the behest of a defendant. . . .*"[183] The *DiFrancesco*

175. S. 1630, *supra* note 6, § 3725(c).

176. *Id.* § 3725(d).

177. *Id.* § 3725(e)(2).

178. *Id.* § 3725(e)(1)(B). If the court of appeals determines that the sentence imposed was too high, section 3725(e) authorizes the court to impose a lesser sentence, to remand for imposition of a lesser sentence, or to remand for further sentence proceedings. *Id.* § 3725(e)(1)(A).

179. United States v. DiFrancesco, 449 U.S. 117, 136 (1980); *see supra* text accompanying note 129.

180. *See supra* text accompanying notes 104-12.

181. 449 U.S. at 136.

182. *See supra* text accompanying note 112.

183. North Carolina v. Pearce, 395 U.S. 711, 713 (1969) (emphasis added).

Court's analysis fails to consider that in *Pearce* and all prior cases the Court had focused only on the propriety of additional proceedings initiated by the defendant, not by the government.[184]

Traditional double jeopardy analysis has recognized a fundamental distinction between voluntary actions by defendants that subject them to multiple proceedings and actions by the government that subject defendants to repeated attempts to convict and to punish. In contrast to the stringent limitations placed on the power of the government, "[a] very different situation is presented, with considerations persuasive of a different legal result, when the defendant is not content with his conviction."[185] The rationale for allowing retrials after a defendant's successful appeal of a conviction,[186] a defendant's request for a mistrial,[187] or a defendant's motion to dismiss[188] is rooted in the history of the double jeopardy clause.[189] Such action by the defendant creates a situation that is outside the ambit of the fifth amendment's protection against excessive use of prosecutorial power. The distinction between appeals taken by the defendant and appeals taken by the government has figured prominently in the Court's opinions; it can hardly be dismissed as a "conceptual nicety."[190] *Pearce* and other decisions that upheld the imposition of a harsher sentence on an accused retried after proceedings initiated "at the behest of the defendant,"[191] are inapposite to the issue of prosecutorial appeal of sentences.

The divergent treatment of prosecutorial appeal of sentences by the Supreme Court in *DiFrancesco* and *Bullington* may be attributed to the Court's failure in *DiFrancesco* to acknowledge the trial judge's factfinding role in sentencing. In *Bullington* the sentencing jury's role as a factfinder was explicit; hence the Court afforded its sentence double jeopardy protection. In *DiFrancesco*, however, the Court failed to recognize that a judge, in meting out a sentence, makes a similar factual determination. A major implication of the Court's decision in *DiFrancesco* is that conviction alone

184. *See, e.g.*, United States v. Scott, 437 U.S. 82 (1978); United States v. Jenkins, 420 U.S. 358 (1975); North Carolina v. Pearce, 395 U.S. 711 (1969); Green v. United States, 355 U.S. 184 (1957); Stroud v. United States, 251 U.S. 380 (1919); *see also supra* notes 58 & 71 and text accompanying notes 79-83 & 104-12.

185. Green v. United States, 355 U.S. 184, 214 (1957) (Frankfurter, J., dissenting).

186. *See supra* notes 60-82 and accompanying text.

187. *See supra* notes 54-59 and accompanying text.

188. *See supra* notes 31-33 and accompanying text.

189. *See supra* text accompanying notes 14-17.

190. United States v. DiFrancesco, 449 U.S. 117, 136 (1980).

191. North Carolina v. Pearce, 395 U.S. 711, 713 (1969).

provides sufficient information for the determination of the socially optimum sentence. This implication is contrary to the concept of individualized sentencing emphasized in *Pearce*.[192]

As praiseworthy as the concept of uniform sentences may be as an abstract matter, the notion presupposes equal punishment for equal guilt.[193] Rarely, if ever, can a court view two separate and distinct acts by different individuals, at different times and places, and under different circumstances, as equally guilty or morally reprehensible, even though they both constitute the same offense.[194] Generalization, of course, is necessary in drafting criminal statutes, and fine distinctions must inevitably give way to rough justice. The same kind of generalization, oversimplification, and depersonalization, however, should not carry over to the imposition of sentences. If the criminal justice system is to fulfill its goals of rehabilitation, protection, and deterrence, then the sentencing judge must attempt to individualize sentences. To this end, sentencing judges engage in a factual determination similar to that undertaken by the sentencing jury, albeit less procedurally formal.[195] A disappointed prosecutor or an appellate judge should not be authorized to second-guess the trial judge who saw and heard the evidence at the trial and the sentencing hearing. Double jeopardy protection should attach to the decision of a trial judge at a *DiFrancesco* type sentencing hearing as it does to the decision of a jury in the *Bullington* type bifurcated proceeding. The Court reached the contrary result in *DiFrancesco* by focusing on the procedural distinctions rather than the substantive similarities.

By relying on *Burks v. United States*[196] and emphasizing that the defendant was acquitted of any harsher sentence when he was sentenced to life imprisonment, the Court in *Bullington* perhaps is

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192. *See supra* note 107; *see also supra* note 94.

193. *See Appellate Review of Sentences: A Symposium at the Judicial Conference of the United States Court of Appeals for the Second Circuit*, 32 F.R.D. 249, 273 (1962) (remarks of Judge Sobeloff) (goal of sentencing review is not uniformity of sentences but "a uniformly fair and equitable approach" to sentencing).

194. *Id.*

195. A conventional sentencing hearing is not unlike the separate proceeding in *Bullington*. The prosecutor has the opportunity to recommend a sentence and to present information relevant to sentencing. Most prosecutors actively participate in sentencing bearings, and their recommendations generally are persuasive to judges. *See* Teitelbaum, *The Prosecutor's Role in the Sentencing Process: A National Survey*, 1 AM. J. CRIM. L. 75 (1972); Comment, *The Prosecutor's Role in California Sentencing: Advocate or Informant?* 20 U.C.L.A. L. REV. 1379 (1973).

196. 437 U.S. 1 (1978); *see supra* text accompanying notes 84-93.

reviving the "implied acquittal" concept of *Green*.[197] *Bullington*, *Burks*, and *Green* support a broad double jeopardy rule that would protect all sentenced convicts from the imposition of a harsher sentence upon appeal by the government. Employing the analysis implicit in the Court's treatment of *Bullington*, the argument would be as follows: When a particular penalty is selected from a range of penalties prescribed for a given offense, the judge or jury is implicitly "acquitting" the defendant of a greater penalty, just as the jury in *Green* impliedly acquitted the defendant of a higher offense and just as the convicting juries in other cases have impliedly acquitted the accused of a greater degree of the same offense.[198] Thus, for double jeopardy purposes, the range of penalties applicable to a given offense would be treated the same as the range of degrees for a given offense. Failure to impose a higher penalty, like a failure to find guilty of a higher degree because of insufficient evidence, would amount to an acquittal of that degree of punishment and preclude appeal.[199]

The *Green* Court emphasized the unconstitutionality of giving the prosecutor this second opportunity in the form of a governmental appeal of a sentence previously imposed by the trial judge. The Court held that jeopardy on a charge ended when the opportunity of the government to convict a defendant expired at the time the jury found him guilty of only a lesser offense.[200] The emphasis on "the full opportunity to return a verdict"[201] reflects the Court's concern about allowing the government more than one occasion to prosecute the defendant. This rationale extends beyond the opportunity to obtain a conviction and encompasses the opportunity to obtain the prosecutor's preferred sentence. The prosecutor has had the opportunity to support his preferred sentence by presenting his evidence and his arguments both at trial and at a sentencing hearing. Once he has marshaled all his arguments and presented them to the sentencing judge, the *Green* and *Burks* rationales bar further prosecutorial attempts to gain a more severe sentence. This Recent Development submits that this analysis, along with the recognition of a sentencing judge's fact-finding role and the *Pearce* sentiment that the sentencing process is an integral

197. *See supra* text accompanying notes 75-80.

198. *See supra* text accompanying notes 79-80.

199. *See supra* text accompanying notes 84-93.

200. Green v. United States, 355 U.S. 184, 191 (1957); *see supra* text accompanying notes 79-80.

201. 355 U.S. at 191.

part of the trial process, require that double jeopardy protection attach at the imposition of a sentence and thereby preclude government-initiated appellate review of the sentence.

Because the proposed revisions to the Federal Criminal Code allow the government to appeal sentences that are less severe than the minimum sentence recommended in the guidelines,[202] a natural tendency would exist for courts to transform the lower end of those guidelines into the equivalent of a statutory minimum sentence.[203] Because prosecutors normally will oppose sentences of less than the minimum guidelines and because judges are usually adverse to having their decisions overturned, a statute providing the government a right to appeal sentences that are below the guidelines would place a form of subtle pressure on the sentencing judge. A sentencing code that provides for sentencing guidelines and yet permits the government to appeal sentences that are more lenient than those recommended in the guidelines threatens the same evils,[204] albeit in a milder and less direct form, as those that result from statutory minimum sentences.[205]

Finally, giving prosecutors a right to appeal sentences they regard as too lenient would unduly enhance prosecutorial powers in the most sensitive criminal cases—those in which the accused has not negotiated a plea bargain. Although these "unbargained" cases make up only five to ten percent of all criminal convictions,[206] these cases will often be the cases in which defendants are most offensive to the community, public emotions run the highest, and the pressure for subjective or political abuse of prosecutorial power

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202. *See supra* text accompanying notes 174-78.

203. *See* Labbe, *Appellate Review of Sentences: Penology on the Judicial Doorstep*, 68 J. CRIM. L. & CRIMINOLOGY 122, 132 (1977).

204. These evils are generally oversimplification, undermining of rehabilitation, deterring jury convictions, and long range erosion of respect for law because of perceived harshness of sentences. *See* ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, *Sentencing Alternatives and Procedures*, § 18-2.1(c), at 5; *id.* § 18-4.3(a), at 87 (2d ed. approved Aug. 1979).

205. The Government agreed in *DiFrancesco* that mandatory minimum sentences are undesirable. Brief for United States at 61, United States v. DiFrancesco, 449 U.S. 117 (1980). The Government, however, contended that the absence of a provision for government appeal of sentences below the minimum set in the guidelines would force Congress to enact statutory minimum sentences. *Id.* If minimum sentences are to be imposed legislatively, Congress should forthrightly address this important issue rather than have the equivalent to statutory minimum sentences enacted sub silentio through government appeals of sentences.

206. *See* Kaplan, *American Merchandising and the Guilty Plea: Replacing the Bazaar with the Department Store*, 5 AM. J. CRIM. L. 215, 217 (1977).

are the greatest.[207]

V. CONCLUSION

Appellate review of sentencing like that endorsed in *DiFrancesco* and the Criminal Code Reform Act is antagonistic to the interests and policies identified and protected by the Supreme Court in previous double jeopardy decisions. Admittedly, prosecutorial appeal of sentences may further a legitimate governmental interest in rationalizing sentencing decisions. Indeed every application of the double jeopardy clause impairs the efficient prosecution of alleged criminal offenders. The double jeopardy clause, however, *should* function as a limitation on the prosecutorial power. Once the prosecution has secured a legally enforceable sentence, finality should attach to that decision in favor of the defendant. The need to ensure that the defendant does not have to repeat his personal ordeal should limit the power of the government to expose the defendant to the full range of criminal punishment.

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207. Political pressure often builds up in some of these celebrated or notorious cases, cases involving homicide and rape and fraud and industrial disputes and other similarly sensitive matters, and it would be regrettable if the . . . prosecutor were subject to pressure to exercise the right to appeal. The public is frequently ill-informed when alleging that a sentence is wrong. Politicians and others pressing for things are not always over-endowed with wisdom or even scrupulousness. Sentencing is best left to the independent judiciary.

Samuels, *Should the Prosecutor Have the Right to Appeal?*, 130 NEW L.J. 104, 105 (1980).