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Double Jeopardy and Due Process

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when such inspection will not interfere with Department use.

D. Arrest reports, arrest records, supplementary reports and photographs will not be open for inspection to representatives of the press or other news media.

E. *From the time a person is arrested until the proceeding has been terminated by trial or otherwise, the following types of information will not be made available to the press or news media:*

1. Observations about an arrestee's character or prior criminal record.
2. Statements, admissions, confessions, or alibis attributable to an arrestee.
3. Results of investigative procedures such as fingerprints, polygraph examinations, ballistics tests, laboratory tests, or showups.
4. Statements concerning the identity, credibility, or testimony of prospective witnesses.
5. Statements concerning evidence or argument in the case, whether or not it is anticipated that such evidence or argument will be used at trial.

F. Members of the Department, subject to the limitations imposed in paragraph II-E, may release the following information to the press or news media:

1. The arrestee's name, age, residence, employment, marital status, and similar background information.
2. The substance or text of the charge, such as a complaint or indictment.
3. The identity of the investigating and arresting unit and the length of the investigation.
4. The circumstances immediately surrounding an arrest, including the time and place of arrest, resistance, pursuit, possession and use of weapons, and a description of items seized at the time of arrest.

G. The officer in charge of an investigation or other incident involving the police will impose restrictions on access to the crime scene, or the release or information by subordinates when he believes it necessary for the success of the investigation. Members of the Department will seek the cooperation of news media representatives in such matters.

H. Arrest records and photographs in the Inquiry and Identification Section files may be released only by order of the Superintendent or his delegated representative.

I. Members of the Department will take no action to encourage or assist news media in photographing or filming a person being held or transported in police custody.

J. The provisions of this order are not intended to restrict the release of information which may be helpful in effecting the arrest of a person who is a fugitive from justice.

DOUBLE JEOPARDY AND DUE PROCESS

BARRY SIEGAL

Assume that a defendant is tried and convicted of murder in the second degree, but on appeal his conviction is reversed on the basis of a prosecution induced procedural error at trial. Can he be retried for the same offense, consistent with his Fifth Amendment right against being twice put in jeopardy? According to a longstanding rule the state has the power to retry a defendant under these circumstances. But has this always been the law, and what was the rationale in establishing it?

Under the common law *autrefois acquit* and *autrefois convict*, or what we now know as former jeopardy, were pleas available to defendants, reflecting a policy of finality as to cases already decided on their merits. In England the courts held that this policy required that a defendant convicted of a felony could not request a writ of error and also ask for a new trail.[1] In other words, if the error was substantial enough the verdict was reversed and the prosecution could not retry the defendant. Otherwise, the verdict stood.

[1] Mayers and Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 HARV. L. REV. 1, 4 (1960).

The framers of the United States Constitution quickly realized the importance of the maxim: "no man is to be brought into jeopardy of his life more than once for the same offense," [2] and incorporated it into their final draft.[3] They were struck, on the other hand, by the harshness, both from the point of view of the state and the defense, of the rule forbidding a retrial after reversal.[4] That is, the state is clearly prejudiced if it is foreclosed from seeking a new trial where a conviction has been reversed because of a procedural error. The defendant may also be hurt where the appellate court is reluctant to overturn a verdict, knowing if they do the defendant will go free.

The first time the Supreme Court considered the question of whether the Constitution was intended to accord with the English rule barring retrial was in *United States* v. *Gilbert*.[5] There the Court felt compelled to follow English precedent since the Constitution gave no indication of a contrary intent. Most American courts have since rejected this construction of the Fifth Amendment, and in *United States v. Ball*,[6] the Supreme Court overruled *Gilbert*, holding that when a defendant has a conviction set aside he may be retried for the same offense.

The *Ball* doctrine has received unanimous approval throughout the country, though there is a difference of opinion as to the rationale supporting it. The most predominant theory seems to be that the defendant, by successfully appealing his prior conviction, has "waived" the protection against being retried for the same offense.[7] This idea has been rejected by some authorities since it connotes a voluntary act, whereas, it is perfectly clear the defendant cannot exercise a free uncoerced choice in this situation.[8]

Mr. Justice Holmes, more logically but still in the realm of legal fiction, considered the problem to be one of continuing jeopardy. That is, jeopardy may be thought of as continuing until the "final" settlement of any one prosecution.[9] This notion has yet to be accepted by the Supreme Court since its position has been, at least in federal cases, that once an accused has been acquitted the government can not appeal, even though there has been substantial legal error at trial.[10]

The actual reason why double jeopardy does not attach where the defendant appeals a prior conviction because of an error at trial is that the policy behind the guarantee is not applicable in that situation. There seems to be no valid reason for unconditionally releasing the defendant simply because there was some error committed at the first trail, at least absent a showing that retrial would amount to unreasonable harassment of the defendant.[11] The purpose of the double jeopardy clause is not one of providing absolute immunity from reprosecution, but only unreasonable reprosecution.[12]

How Many Trials?

The courts have never determined whether the Fifth or Fourteenth Amendments are transgressed merely because a defendant is tried several times. In *Palko* v. *Connecticut*[13] the Supreme Court,

[2] BLACKSTONE, COMMENTARIES 335.

[3] U.S. CONST. amend. V. Protection against double jeopardy can also be found in 41 state constitutions. See Kneir, *Prosecutions Under State Law and Municipal Ordinances as Double Jeopardy*, 16 CORNELL L.Q. 201 (1931).

[4] Mayers and Yarbrough, *supra* note 1, at p. 4.

[5] 25 Fed. Cas. 1287 (C.C.D. Mass. 1834).

[6] 163 U.S. 662 (1896).

[7] *E.g.* MILLER, CRIMINAL LAW, 534 (1937).

[8] Green v. United States, 355 U.S. 184 (1957). *Cf.* VanAlstyne, *In Gideons Wake: Harsher Penalties And The "Successful" Criminal Appellant*, 74 YALE L.J. 606, 627 (1965). The author insists that to say that a successful criminal appellant must "waive" a former jeopardy plea "is either to deny that the protection is absolute or maintain that one can be required to forfeit a constitutional right to absolute protection for the privilege of appeal. (Holmes felt that it would be inconceivable to force a defendant to give up valuable rights expressly granted by the Constitution in order to enable him to correct a fatal error. Kepner v. United States, 195 U.S. 100 (1904) (dissenting opinion).)

[9] Kepner v. United States, *supra* note 8. Holmes, therefore, felt that the accused was not twice placed in jeopardy whether the error on trial was in favor of the accused or the government.

[10] Kepner v. United States, 195 U.S. 100 (1904).

[11] Van Alstyne, *supra* note 9, at 625. Even assuming that a retrial after reversal because of prosecution's error is not unreasonable, a question remains as to whether reprosecution after government appeal because of defense error violates this standard. The Court in *Palko v. Connecticut*, 302 U.S. 319 (1937), upheld such a practice, apparently acknowledging a deference to the state's determination of this question. A similar federal situation was held unconstitutional. See, Kepner v. United States, *supra* note 10.

[12] United States v. Tateo, 377 U.S. 463 (1964).

[13] 302 U.S. 319 (1937). The majority reasoned that the state was not trying to wear down the defendant with a multitude of trials, thereby implying that in some situations it may be constitutionally impermissible to retry a defendant if to do so would be unreasonable. This dicta does not seem to have been taken very seriously by other federal courts, however. For example, in *United States ex rel. Hentenyi v. Wilkens*, 348 F.2d. 844 (1965) the Second Circuit allowed the state to retry the defendant four times where the only reason for the retrials was the state's own errors. If this does

although upholding the practice of state appeal under the circumstances, did indicate that there may be some point where the number of trials could become unconstitutionally burdensome. In *Ciucci v. Illinois*,[14] the court was faced with a situation where the defendant was indicted four different times for four different murders, although all occurred at the same time and place and the same evidence was introduced at all four trials. The majority upheld the validity of this practice since the defendant—under the statute—had committed three distinct offenses notwithstanding the fact that the violations were compendiously committed in a single transaction. This decision has been criticized since it presented one of the most objectionable double jeopardy situations. That is, it appears that the subsequent trials were the result of the prosecutor's determination to secure a death sentence regardless of the effort necessary. This seems hardly a sufficient state interest to overcome the elements of harassment, inordinate vexation, and great expense to the defendant which were all present as a result of the number of trials.[15]

Illinois, however, is one state which has realized the harshness of the *Ciucci* decision and has modified it somewhat by statute. Its Criminal Code provides: a) when the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense and b) if the several offenses are known to the proper prosecuting officer at the time of commencing prosecution and are within the jurisdiction of a single court, they must be prosecuted in a single prosecution, except that the court may in the interest of justice order that one or more charges shall be tried separately. Further, a subsequent trial will be barred if for an offense with which the defendant should have been charged in a former prosecution under b).[16]

In one case, where the Illinois Supreme Court interpreted these provisions, it was held that a defendant could not be separately indicted for two different murders occurring in the same transaction, where his participation was as co-conspirator and the second trial was admittedly for the purpose of obtaining greater punishment.[17]

People v. *Piatt*[18] presented another opportunity for the Illinois courts to liberalize the rights of a defendant. There, the defendant was indicted on a charge of drag racing in violation of a state statute. Prior to trial the prosecution voluntarily dismissed the information and subsequently filed another charging the defendant with reckless driving. The court of appeals affirmed a dismissal of the charge, holding that enactment of the statute was not merely a prohibition against double jeopardy already found in state and Federal constitutions. Rather, it is "concerned with the situation in which more than one offense is found to arise out of the same conduct or the same act and the defense of double jeopardy is unavailable. Clearly, therefore, it is immaterial whether jeopardy has attached to the first charge."[19]

Reprosecution for a Higher Offense After Reversal

Suppose again that our hypothetical defendant was indicated for first and second degree murder. The jury convicts him of second degree murder but is silent as to the first degree murder charge. If the defendant's conviction is reversed on appeal, may he be retried on the first degree murder charge? What if both crimes involved completely different elements of proof?

The states are in disagreement regarding reprosecution for a greater offense following reversal of a conviction of a lesser offense. Most courts which allow the practice, and the Supreme Court until 1957, when applying the Fifth Amendment to federal cases, have adopted a theory of "complete waiver." The term has been taken to mean that the defendant's conviction of the lesser offense and the jury's silence as to the greater implies an acquittal of the greater. The defendant upon appealing his prior conviction then relinquishes his constitutional right not to be retried for the greater offense of which he was impliedly acquitted.[20] Aside from those arguments advanced in opposition to the "waiver" theory as a rationale

not violate due process it is difficult to conceive of a multiple trial situation that does.

[14] 356 U.S. 571 (1958).

[15] *Comment*, 70 DICK. L. REV. 377, 389 (1966).

[16] ILL. REV. STAT. ch 38, Sec. 3-3 and 3-4 (1961).

[17] People v. Golson, 32 Ill. 2d 398, 207 N.E.2d 68 (1965). The court here distinguished the facts before it from *Ciucci* because there the defendant had engaged in four distinct acts, whereas the defendant's crime in this case was the same at both trials; i.e. conspiring to murder two men.

[18] 56 Ill. App. 254, 206 N.E.2d 124 (1965).

[19] *Id.* at 127.

[20] Trono v. United States, 199 U.S. 521 (1905). *Accord*, Murphy v. Massachusetts, 177 U.S. 155, 158 (1900), where the Court viewed the doctrine in this way:

> As the judgement stands before appeal, it is a complete bar to any further prosecution for the offense set forth in the indictment, or of any lesser offense thereof . . . . but if he chooses to appeal from it and

for retrial, per se,[21] it might also be said that the verdict at the first trial is not a single entity, as this theory seems to assume, but serves in a dual capacity; i.e. both as a conviction of the lesser offense, and, according to traditional double jeopardy principles, as a bar to a new prosecution for the greater offense.[22] That is to say, there seems no logical reason for saying that a defendant can't appeal a lesser offense without losing his protection against being convicted for the greater. The two crimes are completely separable.

The "complete waiver" theory has received some support under circumstances where the lesser offense is not included within the greater; that is, where there are different elements of proof for each. In that case reversal without the right to retry for the greater offense may be tantamount to acquittal where the prosecution's theory couldn't support conviction of the lesser offense.[23] This is true, for example, where the jury convicts the defendant of the lesser offense out of sympathy for the prosecution where the facts did not allow for such conviction. This argument, however, does not seem to be supporting the fiction of waiver, but rather the necessity of allowing the prosecution to retry the defendant for the greater offense. The answer, therefore, does not seem to be in this judicially created rationalization, but in a determination of the situations in which society's interest in convicting a criminal of a greater offense than that of which he was originally convicted outweighs his interest in being free from retrial of the greater offense. Such a situation exists where the court has erred in allowing the jury to convict of the lesser crime.

The courts which don't allow reprosecution for a greater offense have utilized a "partial waiver" theory.[24] The idea, here, is that conviction of a crime of a lesser degree than the greater crime, and which is silent as to the other crimes included in the indictment is "an equally forceful and effective acquittal of the higher offense. The defendant then waives his double jeopardy rights only as to the crime he appeals.[25]

Until 1957 the Supreme Court, when applying the Fifth Amendment to federal reprosecutions, advocated the "complete waiver" approach to the problem.[26] In *Green* v. *United States*[27] the Court's position was suddenly reversed. In that case the accused was indicted in a federal court of first-degree murder and arson. At trial the jury was instructed as to first and second-degree murder and arson, although second-degree murder is not a lesser-included offense since it requires the element of malice whereas first-degree murder does not.[28] The jury returned a verdict of guilty on the counts of second-degree murder and arson, but was silent as to the first-degree murder charge. The court of appeals reversed the second-degree murder conviction on the basis of insufficiency of the evidence and remanded. At the second trial the defendant was convicted of first-degree murder.

The Supreme Court reversed on the basis of double jeopardy. First, it decided that under the circumstances presented here most courts would regard the first jury verdict as an implied acquittal of the first-degree murder charge. It followed, then, that in order to protect an individual from being subjected to the hazards of trial and possible conviction twice for the same offense, the prosecution must be denied the right to retry for first-degree murder.[29] Further, the "waiver" argument is illogical since it implies a rational choice. No such choice could be made here, the court concluded, since it would be saying that a defendant, in order to appeal an erroneous conviction of a lesser offense, would be required to barter away his constitutional right not to be reprosecuted of a crime punishable by death, of which he was impliedly acquitted. The law should not place him in such an "incredible dilemma."[30] It has also been submitted that the court in *Green* em-

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 judgement which he has himself procurred to be reversed.

[21] See, *supra* note 9 and accompanying text.

[22] *Note*, 66 YALE L.J. 592 (1957). *Accord*, Johnson v. State 27 Fla. 245, 9 So. 208 (1891), where the court analogized the situation to one where there are a number of defendants, some who are acquitted and others who are convicted. According to traditional waiver theory those who are acquitted would have to stand trial again if the conviction of the others was reversed and remanded.

[23] *Note*, *supra* note 18, at 597.

[24] *See* 61 A.L.R.2d 1146, where it is stated that 15 states adhere to the doctrine that the accused can, in no case, be retried for the greater offense.

[25] *See* e.g., Johnson v. State, 27 Fla. 245, 9 So. 208 (1891). *Accord*, People v. Dowling, 84 N.Y. 478, 484 (1881), where the court declared, "His application for a correction of the verdict is not to be taken as more extensive than his needs. . . . The waiver is construed to extend only to the precise thing concerning which the relief is sought."

[26] *Supra* note 16.

[27] 355 U.S. 184 (1957).

[28] D.C. Code, 1951, sections 22-401 and 22-2401 which provides that he who, without purpose to kill, does so while perpetrating an arson is guilty of murder.

[29] Green v. United States, 355 U.S. 184, 188 (1957).

[30] *Id.* at 193.

ployed the double jeopardy clause principally as a means of protecting Green's statutory right of appeal rather than his right to be free from repeated prosecutions.[31]

The result in *Green* has been criticized principally on its assumption that the jury in the first trial acquitted the defendant of first-degree murder when, in fact, all the elements of that crime were present.[32] It is evident then that the second-degree murder conviction was an instance of jury leniency and not under the circumstances, a sign of innocence of the greater offense. If this is correct then the trial judge, by erroneously instructing on second-degree murder committed an error prejudicial to the government, since, had it not been so instructed, the jury may very well have returned a verdict of guilty as to first-degree murder. The conclusion to be reached is that under these circumstances, i.e., where the mistake of the trial court affected, to the government's prejudice, the jury's determination of innocence of the higher offense, society's interest in determining the defendant's guilt or innocence heavily outweighs his interest in being unconditionally set free. Therefore, on remand the government should not be precluded from reprosecuting the defendant for first-degree murder.

An alternative approach to the problem was used in one case, where, under similar facts, it was held that since the defendant was not prejudiced by the instruction as to second-degree murder he has no right to appeal and the original verdict must stand.[33] The difficulty with that argument is that we can not be sure what the jury would have done had it not been instructed on second-degree murder. It may very well have acquitted the defendant. If so, then there is clearly a substantial error prejudicial to the defendant's rights from which he can appeal, and the basis for *Green*, the protection of the accused's right to appeal, has some validity.[34]

In any case, when applied to the normal situation of a lesser-included offense, (where an error is committed, clearly prejudicial to the defendant), the doctrine espoused in *Green* is a desirable one. Here society's interest in convicting the accused is met, since, if the requisite elements of the lesser offense are present at the second trial, he will be convicted, while the defendant's access to post-conviction remedies is in no way deterred.

Even though the Supreme Court has found it it be a violation of the double jeopardy protection to retry an accused for a greater offense in a federal court, it has yet to extend such a ruling to state reprosecutions.

The most recent case applying the Fourteenth Amendment to a state reprosecution was *United States ex rel Hentenyi* v. *Wilkins*.[35] The defendant was indicted for first-degree murder. The jury, instructed on first- and second-degree murder and manslaughter, found the defendant guilty of second-degree murder. On appeal the Appellate Division of New York reversed and remanded for a new trial on the basis that error had been committed in the trial court's charge relating to venue and because of certain prejudicial comments by the District Attorney. On retrial the accused was charged with and convicted of first-degree murder, but again the judgment was reversed on the basis of the District Attorney's prejudicial conduct, and a third trial was ordered. At this trial, as in the other two, the defendant was indicted on first-degree murder and the jury found him guilty of second-degree murder. After seeking writs of habeas corpus in both state and federal courts, defendant's request was finally granted by the Court of Appeals for the Second Circuit.

Judge Marshall, speaking for the majority, held, first, that the due process clause of the Fourteenth Amendment imposes some limitations on a state's power to reprosecute an individual for the same crime. This conclusion was obtained

[31] Van Alstyne, *supra* note 8, at 630 ". . . . while a majority used a double jeopardy technique to reach its result, its opinion principally bears down on the risk of reprosecution in deterring access to post-conviction remedies and not the alleged ordeal which a second trial might portend."

[32] *Note*, *supra* note 18, at 598. The jury found the essential elements of first-degree murder when it convicted the defendant of arson and second-degree murder. The court of appeals concluded that the deceased's death was caused by fire set by the defendant. *Green v. United States*, 218 F.2d 856, 859 (D.C. Circ. 1955). The second-degree murder verdict was apparently an instance of jury leniency and not, under the circumstances, a sign of innocence of the greater offense. Since "the jury does not . . . have the right to find a fact and then refuse to render the verdict which such a finding necessarily requires," [People v. Mussendin, 308 N.Y. 558, 563, 127 N.E.2d 551, 554 (1955)], it could be argued that the jury's silence should be interpreted as an implied conviction rather than an implied acquittal.

[33] State v. Gordon, 87 Ohio App. 8, 92 N.E.2d 305 (1948).

[34] Also, the argument that "such a reprosecution was cruel and inhuman imposing on the accused a 'hardship so acute and shocking that our policy will not endure it' " seems more realistic under this assumption. United States ex rel Hentenyi v. Wilkins, 348 F.2d 844 (2d Cir. 1965).

[35] *Ibid.*

from a close scrutiny of Supreme Court decisions which, although never holding such reprosecutions unconstitutional, have shown some indication that the Court would so hold if presented with the problem. Assuming some limits, then, the Court felt that this case transgressed them. The reason for so holding is that no matter what Fourteenth Amendment standard the Supreme Court will eventually adopt, the facts presented fall within such standard. If the validity of state reprosecution procedures were determined by a federal standard (which tests a conviction by the Fifth Amendment directly) or the basic core standard (where only the essential aspects of the Fifth are applied) the decision in *Green* would make the procedure in this case unconstitutional. Even if a "fundamental fairness" approach were adopted,[36] this prosecution goes beyond the bounds of such a test. This determination is based on the "insecurity and anxiety, the opportunity for harassment, and the marginal increase in the probability of convicting the accused of a crime he did not commit by simply trying him again . . ." [37] The court decided, finally, that even though the accused was convicted only of second-degree murder, of which he was originally indicted, his conviction was still a violation of due process because: (1) there was a reasonable probability that the conduct of the trial and the jury verdict were affected by the defendant's conviction of first-degree murder and the fact that he was presently charged with the crime; and (2) the state was constitutionally forbidden from *prosecuting* defendant for first-degree murder following completion of the first trial.

This decision obviously goes farther than any previous case regarding state reprosecution for a greater offense, and, if accepted by the Supreme Court, would result in the overruling of contrary decisions and statutes in nearly half the states. The viewpoint expressed by the court has, however, received considerable support as being consistent with the Supreme Court's concern in giving the accused a fair trial.[38] Furthermore, such a promulgation by a federal court is clearly in line with the policy behind the double jeopardy prohibition in disallowing unreasonable reprosecutions,[39] or as was stated in one case, we should not allow the state, "to do better a second time" [40] unless there is some overriding societal interest.

Even assuming the validity of this decision, there is still a question of how the Supreme Court will extend the double jeopardy protection to the States. According to the doctrine of selective incorporation the Supreme Court selects those provisions of the Bill of Rights which it deems fundamental and absorbs them whole and intact into the Fourteenth Amendment. In the last few years this theory has become increasingly popular with the Court,[41] and it is likely to be extended to the double jeopardy freedom. Also, administration of this standard would be the easiest of any method since the States would be obliged to follow the federal court's interpretation of the protection, whereas under a "fundamental fairness" approach the courts will have to look at the facts in each case to determine whether they violate those "fundamental principles of liberty and justice which are at the base of all our civil and political institutions." [42] The advantage of the "fundamental fairness" test is that it allows for a degree of flexibility because the court can judge the facts in light of changing concepts as to minimum standards of fairness.[43] In any case, the court in *Wilkins* recognized that under any standard a similar practice as that employed here would be unconstitutional.[44]

[36] This test seems to be required by the decision in *Palko v. Connecticut*, 302 U.S. 319 (1937). See Henkin, *Selective Incorporation in the Fourteenth Amendment*, 73 YALE L.J. 74. The author contends that Cardozo, "expressly reserved the possibility that some parts of the federal protection against double jeopardy might-if you will-be incorporated in due process . . . ", when the abuse of defendant's rights is so flagrant as to require recognition by the court.

[37] United States ex rel Hentenyi v. Wilkins, 348 F.2d 844, 858 (1965).

[38] *Note*, 18 S. CAR. L.REV. 328, 330 (1966). The viewpoint is here expressed that if the rationale for *Green* is that reprosecution for a greater offense "was found to place an unconscionable limitation on a 'vital societal interest', assuring the accused a fair trial, free from legal error prejudicing his substantive rights," then the dilemma in which the defendant finds himself is no less incredible because it occurred in a state court.

[39] *But see*, Abstract, 57 J. CRIM. L., C. & P.S. 60, 62 (1966), where the author puts forth the argument that if it is fundamentally unfair to retry the defendant here for first-degree murder and if it is cruel and inhuman to do so, then it is equally unfair to retry him for the fourth time for any offense. "Why must he endure four trials for murder only because the errors of the state voided three previous trials?"

[40] Brock v. State, 344 U.S. 424 (1953).

[41] *See, e.g.*, Pointer v. Texas, 380 U.S., 400 (1965), Escobedo v. Illinois, 378 U.S. 478 (1964), Malloy v. Hogan 378 U.S. 1 (1964).

[42] Palko v. Connecticut, 302 U.S. 319, 328 (1937).

[43] Note, WAYNE LAW REVIEW, 685, 691 (1966).

[44] United States v. Wilkins, 348 F.2d 844 (2d circ. 1966).

Reprosecution and Conviction with a Higher Penalty After Reversal

In a final situation assume that our defendant is indicted and convicted of first-degree murder but is only sentenced to life imprisonment. On appeal his conviction is reversed and remanded for a new trial. He is again found guilty of the same offense but this time is sentenced to death. What are the policy considerations under these circumstances? Are they the same as where he is convicted of a greater crime on retrial?

One authority has noted that the law is settled that, after a reversal of a prior conviction, a defendant may again be tried for the same offense, even if a more severe penalty is given.[45] This notion is based on the traditional doctrine expressed in *Stroud* v. *United States*.[46] There, the defendant, after having a murder conviction and life sentence reversed and a retrial granted, was found guilty of murder with no recommendation for dispensing with capital punishment. The Supreme Court upheld the conviction, stating that there was no double jeopardy problem since all the trials were for the same offense.

The vitality of the decision in *Stroud* has been greatly diminished since the Court relied on a prior decision, *Trono* v. *United States*,[47] which held that prosecution for a greater offense than that of which the defendant was originally tried is permissible after reversal of the theory of "waiver". The case has since been impliedly overruled by the Court in *Green*,[48] although it made a feeble attempt to distinguish *Trono* from the facts before it. It has also been argued that, since the Court in *Green* was concerned with the effect of reprosecution on deterring access to post-conviction remedies, this reasoning is similarly applicable to the facts in *Stroud* and that it should be expressly overruled.[49]

The modern trend in state resentencing cases is exemplified by *Poeple* v. *Henderson*.[50] In that case the defendant was tried and convicted of murder and sentenced to life imprisonment. The appellate court reversed and remanded and, on retrial, the defendant was found guilty and sentenced to death. The California Supreme Court reversed, holding that reasoning similar to that set forth in *Green* is applicable to a case of different punishments.[51] In his dissent Justice Sauer sharply criticized the majority for relying on *Green*, since there the decision was based on an implied acquittal of the greater offense, whereas the court in *Green* expressly distinguished the facts before it from those where a greater punishment is given on retrial. The dissent concluded by pointing out the fallacy in the majority's statement that there is no difference between the legislature's dividing a crime into degrees, each carrying a different punishment, and the court or jury dispensing different punishment for the same offense. This argument "overlooks the fundamental principle that even though different degrees of a crime refer to a common name, each of those degrees is in fact a different offense requiring proof of different elements for conviction." [52]

Granting the logic behind the dissent's arguments, the fact remains that, unless such a rule as laid down here is accepted, defendants will be dissuaded from appealing merely because of the threat of greater penalty. Further, if what we are seeking to prevent are unreasonable reprosecutions, then such a policy is inconsistent with stricter penalties on retrial, because, if allowed, it would be giving the prosecution a second chance to get a higher penalty just because of its own mistake.

Conclusion. The Supreme Court in double jeopardy situations has again relied on the familiar balancing of interest approach to the problem even though outwardly claiming certain fictions to be the basis for their decisions.

It has long been established in this country that once a verdict has been reversed the defendant may be retried for the same offense. The courts have attempted to rationalize this result by the erection of certain theories which in most cases have proved to be unworkable. In the final analysis

[45] 61 A.L.R.2d 1141, 1143.

[46] 251 U.S. 15 (1919). *Accord*, People v. Grill, 151 Cal. 592, 91 P. 515 (1907).

[47] 199 U.S. 521 (1905).

[48] The court attempted to distinguish *Trono* on the basis that the court there was viewing the problem simply as an interpretation of a statute, even though this was expressly denied by the *Trono* court.

[49] Van Alstyne, *supra* note 9, at 630.

[50] 60 Cal. 2d 486, 386 P.2d 677 (1963).

[51] *Id.* at 497, where the court stated that insofar as the basic purposes of double jeopardy are concerned, there doesn't seem to be any difference between a division of a crime into different degrees by the legislature or a selection among alternative punishments by the jury. In either case the jury is making a decision to convict of one crime with a specific penalty and not another.

[52] People v. Henderson, 60 Cal. 2d 486, 503, 386 P.2d 677, 684 (1963).