Double Jeopardy Reappraised

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When is an accused placed in double jeopardy? Once jeopardy attaches, when and how does he waive his constitutional protection so as to permit a subsequent prosecution for the same crime? Does the defendant waive all his rights or does he, in specific situations, benefit from only a limited waiver? Such problems have faced the courts throughout the historical development of the double jeopardy doctrine. And, although the judiciaries of the various states have struggled to reach some degree of mutual agreement, this writer does not know of one major issue involving double jeopardy where unanimity exists.

CONSTITUTIONAL PROSCRIPTION

Although the protection against being twice placed in jeopardy is obscure in its origin, legal historians have traced its basic formulation back to the common law of Great Britain. The English courts conceived such a doctrine in an effort to balance the equities of justice during a period when prisoners at the bar were faced with more than one hundred offenses punishable by death. Thereafter, the prohibition against double jeopardy was adopted by our forefathers and written into the Fifth Amendment to the United States Constitution. But what was the extent of its effect? The courts began to wrestle with the problem whether the Fifth Amendment could be incorporated into the due process clause of the Fourteenth Amendment so as to be enforceable upon the states. Unfortunately, the answer was in the negative. However, most states have included double jeopardy clauses within their respective constitutions, although this has not, in itself, induced any uniformity of opinion as to its scope or application. In fact, the reverse is true. There has been a consistent flow of conflicting state interpretations and modifications of the doctrine.

One result of such a 'states rights' theory respecting double jeopardy is that an accused may be prosecuted for the same criminal act in separate sovereign jurisdictions. For instance, if a single act has violated both federal law and state law, a prosecution in one jurisdiction will not bar an indictment for

2. Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.
Although in England the courts have been permitted to sometimes disregard the common law doctrine depending upon the circumstances involved, such protection is a constitutional safeguard in this country and has become more vital and fundamental to our society. See 1 Bishop's Criminal Law 728 (9th ed. 1923).
3. Palko v. Connecticut, 302 U. S. 319, (1937). Although broad generalities have been drawn from this decision, it is somewhat limited in scope. The opinion specifically excluded any decision as to whether the state would violate the 14th Amendment if it attempted to wear the accused out by a multitude of accumulated trials. 302 U. S. at 328.
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the same act in the other. However, it is often found by the courts that in particular situations strict application of this concept violates their sense of justice and fairness, and as a matter of discretion a second prosecution will be dismissed. If, on the other hand, two courts existing under the auspices of one sovereign government should have concurrent jurisdiction over the same criminal act, an acquittal or conviction in one court will bar a subsequent prosecution in the other. This has been evinced in situations where a particular geographical-political subdivision will be governed by federal law. Thus, if a soldier should commit a criminal act in a jurisdiction governed by federal law and he is exonerated of the offense in a court martial proceeding, he can not be prosecuted again in any other federal court.

There was much discussion in early American law whether the constitutional protection against double jeopardy applied to misdemeanors. No doubt existed as to its applicability to treason and felonies. Eventually, as the judiciary

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(1894). See also, 22 U.CIN.L.REV. 463, 469 (1953). Those states not having such protection expressed in constitutional form (Connecticut, Maryland, Massachusetts, North Carolina and Vermont) have incorporated the principle into their common law.

5. The reason most often given is illustrated in Moore v. Illinois, 55 U.S. 13, 20 (1852) where the Court found that, "it cannot be truly averred that the offender has been twice punished for the same offense, but only that by one act he has committed two offenses, for each of which he is punishable." See, Re Chapman, 166 U.S. 661, (1897)Crossley v. California, 168 U.S. 640, (1893)See Also Philips v. People, 55 Ill. 429 (1879) and Marshall v. State, 6 Neb. 120. (1877) (between states); State v. Stevens, 114 N.C. 873 19 S.E. 861 (1894) and People ex rel. Liss v. Superintendent of Women's Prison, 282 N.Y. 115, 25 N.E.2d 869 (1940) (between state and federal government); State v. Moore, 143 Iowa 240, 121 N.W. 1052 (1909) and Fortner v. Duncan, 91 Ky. 171, 15 S.W. 55 (1891) (state law and city ordinance); See generally, FRAENKEL, OUR CIVIL LIBERTIES, ch. XII (1944).

6. E.g., New York has prohibited a second prosecution by statute. See N.Y. CODE CRIMINAL PROC. §139. As to an interpretation of the statute, see People v. Parker, 175 Misc. 776, 25 N.Y.S.2d. 247 (County Ct. 1941) where a federal conviction for conspiracy to violate the Lindbergh Kidnapping Law was held to bar a New York prosecution for kidnapping and assault. See also, People ex rel. Liss v. Superintendent of Women's Prison, note 5 supra. It should also be noted that specific sections of the Federal Criminal Code prohibit prosecution for certain offenses if the defendant has been indicted elsewhere for the same criminal act. See e.g., 18 U.S.C. §659. See Negro Hammond v. State, 14 Md. 149, n. 152 (1859) wherein Chief Justice Taney, although recognizing the general principle involved, was quoted from the case of United States v. Amy as stating: "In all civilized countries is it recognized as a fundamental principle of justice that a man ought not be punished twice for the same offense."

7. This doctrine applies to different countries within a single state. See e.g., People v. Riggi, 152 Misc. 444, 273 N.Y. Supp. 561 (County Ct. 1934) (accused cannot be tried in more than one county for criminally receiving stolen property).

8. Grafton v. United States, 206 U.S. 333, (1907). See United States v. Block, 262 Fed. 205 (7th Cir. 1920). However, the usual situation involving military and civil jurisdiction over the same criminal act is where the wrongful act violates both federal military rules and the law of a politically independent jurisdiction, thereby permitting separate prosecutions. See COOLEY'S CONSTITUTIONAL LIMITATIONS 466, n. 1 (7th ed. 1903).

began to place greater significance on the doctrine it became operative upon all crimes, including misdemeanors. However, a vestige of this gradual evolution continues to affect the law since there appears to be a tendency in most jurisdictions to construe the doctrine more favorably for one accused of a serious crime, especially if punishable by death, than is applied to a lesser offense.

WHEN DOES JEOPARDY ATTACH?

A person is in legal jeopardy when he is put upon trial, before a court of competent jurisdiction, upon an indictment or information which is sufficient in form and substance to sustain a conviction, and a jury has been charged with his deliverance.

It must first be understood that jeopardy will never attach if the preliminary proceedings to the trial are so defective in form or substance that the jury could not render a valid verdict. This is true even if a convicted prisoner had served his sentence without ever addressing a motion or writ to the defect. He could not object to another prosecution by claiming double jeopardy, although other principles of justice would, undoubtedly, prevent the issuance of a new indictment or information. If the defendant was acquitted, and the preliminary proceedings were materially defective, he could be retried for the same offense.

As an illustration, it has been held that when a grand jury is imperfectly organized so as not to constitute a lawful body, there is no valid indictment and no attachment of jeopardy. Or if the indictment is insufficient in its aver-


11. BIsnop's CRIMINAL LAW 734 (9th ed. 1923).


13. People v. Murray, 89 Mich. 276, 50 N.W. 995 (1891). See McGinn v. State, 46 Neb. 427, 65 N.W. 46 (1895). But see, Commonwealth v. Green, 17 Mass. 515 (1822). In many states, common law rules governing the validity of preliminary proceedings are supplemented by statute. See e.g., N. Y. CODE CRIM. PROC. §402. To note, it appears that when a demurrer to an indictment is sustained in New York, the court must immediately order a resubmission to the Grand Jury else jeopardy will become fixed and bar subsequent prosecution. Id., §327.

14. See note 11 supra, at 756. However, it has been suggested that one who has served only a part of his sentence, and upon his own prayer obtains a reversal of his conviction, will be prosecuted a second time. See Jeffries v. State, 40 Ala. 381 (1867). Certainly, if this pronouncement is to be accepted, the court should take cognizance of the term served if and when it should sentence the prisoner after the second trial.

15. E.g., Kohlheimer v. State, 39 Miss. 548 (1860); Finley v. State, 61 Ala. 201 (1878); Ogle v. State, 43 Tex. Cr. 219, 63 S.W. 1009 (1901).
ments to the extent that a conviction thereupon would be subject to reversible error, the defendant may be indicted anew or the information amended. So too, if the court has no jurisdiction over the offense charged; if the statute creating such jurisdiction is unconstitutional or the presiding judge is disqualified; if the court's term is unauthorized or for any other reason it lacks power over the criminal charge, jeopardy will never have become attached. In addition, since a plea to the charge (guilty or not guilty) is an essential part of the preliminary proceedings, the accused is not, at any time, in jeopardy until such a requirement is satisfied.

Once it is established that the preliminary proceedings were properly instituted and legally sustainable, at what precise moment does jeopardy attach? The general rule appears to be that attachment occurs when the petit jury is impaneled and duly sworn. (New York requires the additional element that evidence must be given.) This view is commonly accepted on the ground that once the case has developed to the trial stage, the defendant may be entitled to a directed verdict which would thereafter bar any subsequent prosecution for the same offense. And it is commonly understood, that such a bar cannot be nullified by a nolle prosequi (declaration not to further prosecute) entered by the prosecuting attorney during the trial without the defendant's consent.

17. E.g., Marston v. Jenness, 11 N.H. 156 (1840); Flournoy v. State, 16 Tex. 30 (1858).  
19. E.g., Ex parte Graham, 43 Tex. Cr. 463, 66 S.W. 840 (1902).  
20. E.g., Dunn v. State, 2 Ark 229 (1840).  
22. E.g., Link v. State, 50 Tenn. 252 (1871).  
23. E.g., McFadden v. Commonwealth, 23 Pa. St. 12 (1853); Keppner v. United States, 195 U.S. 100, 128 (1904); Cornero v United States, 48 F.2d. (9th Cir. 1931); McCarthy v. Zerbst, 85 F.2nd. 640 (10th Cir. 1936); McGill v. State, 209 Ark. 95, 189 S.W.2d. 646 (1945); Barbour v. State, 66 Ga. App. 498, 18 S.E.2d. 40 (1941); State v. Charles, 183 S.C. 188, 190 S.E. 466 (1939). See note, 24 MINN. L. Rev. 522, 524 (1940). If there is no jury, jeopardy will become absolute at the equivalent in time to the swearing of a jury. See note, 2 VAND. L. Rev. 701 (1949).

In several jurisdictions jeopardy attaches only after a verdict has been rendered. Such reasoning is based upon the claim that the Constitution means that no man shall twice be tried for the same offense. (Emphasis added) E.g., United States v. Perez, 22 U.S. 579 (9 Wheat) (1824). See A.L.I. Adm. Crim. Law: Double Jeopardy, 66-68 (1933) (collecting cases). See same at 62-63 for collection of state constitutions which provide that jeopardy does not attach until after an acquittal.


Other jurisdictions have similar variations to the general rule. See e.g., State v. Yokum, 155 La. 846, 99 So. 621 (1923); Rosser v. Commonwealth, 159 Va. 1028, 167 S.E. 257 (1933).  

464
nor by an unwarranted discharge of the jury. This brings us to another problem faced by the courts. When is the discharge of a jury properly warranted so as to avoid any defense of double jeopardy claimed in a second trial? These questions were decided relatively early in American law and have since reached a considerable degree of unanimity. The courts have held that the accused cannot plead double jeopardy if the jury is discharged after it was unable to reach a verdict. Sickness of a juror or of a juror's near relative as well as illness of the presiding judge or the prisoner constitute proper grounds to discharge the jury and any subsequent defense of being twice placed in jeopardy will not be sustained. The same result will logically follow upon the death, sudden mental incapacity or similar incompetency of judge or juror. And, any improper conduct by a juror, or his disqualification because he was a member of the grand jury which found the indictment, or his dismissal if he had been placed on the jury by the prisoner's fraud, are examples when a discharge of the jury may be warranted and thus avoid the attachment of jeopardy. On the other hand, if the judge or prosecuting attorney discovers the evidence is not sufficient to convict the accused, or that a material witness for the prosecution cannot be found, or that such witness has suddenly become too ill to testify, the judge will commit a decisive error if he discharges the jury. The majority of cases hold that jeopardy would attach under such circumstances and the prisoner would be free from further prosecution. It is important to note however, that if the defendant's counsel should unwittingly consent to an unwarranted discharge of the jury, the accused may be prosecuted again without being able to benefit from a plea of double jeopardy.

26. See Cooley's, op. cit. supra note 8, at 468.
27. Wade v. Hunter, 336 U.S. 684, 689 (1949). Questions have arisen concerning the length of time a jury must deliberate before the judge can dismiss them for failure to agree and thereby subject the defendant to a second trial. Reasonable time for discussion and reflection is the elusive test applied. E.g., State v. Harris, 119 La. 297, 44 So. 22 (1907) (two hours held a reasonable time.) But see, People v. Stabile, 202 N.Y. 138, 95 N.E. 729 (1911) where the discharge of a jury deliberating approximately five hours held, under the circumstances, to be arbitrary and improper.
28. See note 11 supra at 762.
29. Id. at 763.
32. State v. Durall, 135 La. 710, 65 So. 904 (1914).
33. It has been suggested that once the jury is sworn, the defendant is prima facie put in jeopardy on the record, and unless the nullifying matter is included in the record the defendant will be exempt from further prosecution for the same crime. See note 11, supra, at 767.
34. Id. at 768.
36. Note 11, supra, at 768.
37. See id. 771. But when is the defendant not being tried again for the same crime? (Emphasis added). It is accepted that the prosecution can not avoid double jeopardy by varying the form of the charge in any new indictment if the first indictment or information was sufficient to sustain a verdict based on the same facts. See note 64 infra.
Aside from the problem of determining when the preliminary proceedings may be materially defective or when the discharge of a jury may be unwarranted, a third issue involving double jeopardy must be herein discussed. Oftentimes, the prosecuting attorney is placed in a frustrating position if the presiding judge or jury should commit a gross error harmful to the people's case. Although a few decisions can be found holding that an error from the bench will prevent jeopardy from attaching, the overwhelming majority of jurisdictions (including New York) hold to the contra upon the rationale that; since the constitutional protection of double jeopardy is a restraint placed upon the courts rather than an individual privilege granted the accused, any error by the court or jury acting as agents of the prosecution is imputed to the latter and the defendant may not be retried. If the judge mistakenly orders a mistrial, or if he neglects to properly instruct the jury on a vital question of law and fails to recognize his error until after a verdict of acquittal is rendered, the accused has received an unexpected windfall which, under the general rule, forever sets him free from further prosecution for the same crime. The same result is true when the jury refuses to obey instructions and they improperly exonerate the defendant. Although few cases can be found discussing the issue, it could be argued that if the defendant moves for a mistrial and the judge sustains the motion, when in fact it should not lie, the accused is deemed to have consented to an unwarranted discharge of the jury and he could be prosecuted again.

The majority view appears to be objectionable to the very social basis upon which our criminal law is founded. The public's objective is to provide the accused with a fair trial as propounded in the constitutions of our state and federal governments. Although the constitution is drafted in such a manner as to emphasize protection afforded the accused, there is no reason to deny a fair trial in all respects, albeit, to the people as well as the prisoner. Of course, the prosecution should not be permitted to harass the accused with further proceedings if it intentionally induces the error by judge or jury, or if the judge proclaims a mistrial solely for the purpose of granting the prosecution more time to strengthen its case. But, a rule of reason should apply in respect to genuine errors of law not attributable to

38. See note 26 supra.
39. E.g., People v. Mather, 4 Wend. 229 (N.Y. 1830). See People v. Goldfarb, 213 N.Y. 664, 107 N.E. 1083 (1914) which held that direction of acquittal by the court, however erroneous, bars a subsequent prosecution on the same charge. The prior trial need not result in a valid judgment to entitle a person to avail himself of double jeopardy, it being sufficient if the prisoner was actually placed in danger of having a valid judgment pronounced as a result of the trial. People ex rel Meyer v. Warden of Nassau County Jail, note 24 supra.
the prosecuting attorney. In the view of this writer, the analogy of agency to such situations is without merit and appears to lack a sensible approach to the problem.

Whatever one's reason for objection may be, the minority view has been supplemented by statutes in several states, granting the prosecution a broader right to appeal than allowed under the common law. However, the courts have carefully scrutinized these statutes so as to avoid encroachment upon the prisoner's constitutional safeguards. Discussion of the prosecution's right to appeal is reserved for a subsequent section in this comment. But, it should be recognized that due to the sensitivity of the issue, few statutes exist which give adequate relief from errors committed by judge or jury. Yet, such acts would seem to be within the purview of the legislatures.

**WAIVER OF DOUBLE JEOPARDY**

After it had been firmly established by the American courts that one may waive a constitutional right, instances of such waiver became very much evident in cases involving double jeopardy issues. The rule of waiver applies when the defendant appeals and upsets his own conviction. He cannot plead double jeopardy when he is tried the second time. The reason is aptly expressed in the case of *People v. Murray*.

A defendant cannot have a conviction set aside and at the same time rely on it. He cannot blow hot and cold.

But, most courts find this rule to have a limited application if the defendant was expressly found innocent of certain counts in the indictment and guilty of others. He cannot be prosecuted again for the former if he should appeal the counts of which he was found guilty.

As previously indicated, another phase of the waiver rule concerns the defendant's consent to an improper discharge of the jury. He thereby waives his constitutional protection against being retried.

42. *E.g.*, *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 174 (1873); *State v. Clark*, 69 Iowa 196, 28 N.W. 537 (1886); *See Wharton, Crim. Law* 566 (12th ed. 1932).
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43. 89 Mich. 276, 50 N.W. 995 (1891).
44. *E.g.*, *Guenther v. People*, 24 N.Y. 100 (1861); *People v. Dowling*, 84 N.Y. 478 (1881).
45. See note 37 *supra*. 

467
The remaining issue concerns the extent of the defendant's waiver, after he successfully gained a reversal of his conviction, when the crime is one which is divisible into various degrees of guilt. To use an example, assume that the accused, before his appeal, had been convicted of second degree arson. No quarrel is made that he may certainly be indicted anew for the same degree of which he was originally convicted, to wit, arson in the second degree, or any lesser degree of arson which may be codified by statute; providing, of course, that the facts of the case fall within the scope of such statutes. But, there is much dispute as to whether he may be prosecuted in the second trial for the greater degree of the crime charged, albeit, arson in the first degree. The following discussion will be devoted to this problem.

**WAIVER IN CASES INVOLVING LESSER INCLUDABLE OFFENSES**

Perhaps the greatest conflict of opinion today concerning double jeopardy involves crimes such as murder, robbery, or arson, which have embraced therein lesser includable degrees of guilt. When the particular offense charged contains lesser degrees and the judge includes them in his instructions to the jury which in turn finds the accused guilty of a lesser degree, may he thereafter be indicted for the greater degree if his conviction is reversed on appeal? Under the general rule of waiver he would absolutely forfeit any right to plead double jeopardy. But in this particular situation some courts differ as to how much he forfeits. Many jurisdictions take the position that there is a limited waiver. That is, he may be indicted again only for the degree of which he was found guilty or of a lesser degree—the reason being that the jury has impliedly found the accused innocent of the greater degree and therefore, to prosecute him again for it would be to place him twice in jeopardy. However, slightly more than fifty per cent of the state jurisdictions which have ruled on this matter permit retrial for the greater offense. Such states continue to apply the general rule, and hold that a successful appeal by the prisoner constitutes an absolute waiver of any protection afforded him by the double jeopardy doctrine.

In the celebrated case of *Trono v. United States*, decided more than fifty years ago, the federal government was permitted to retry the appellant-defendants

46. See, *Green v. United States*, U.S. , 2 L. Ed.2d. 199 (1927) establishing the limited waiver rule in the federal court system. States adopting the same rule include: Alabama, Arkansas; California; Delaware; Florida; Illinois; Iowa; Louisiana; Michigan; New Mexico; Oregon; Pennsylvania; Tennessee; Texas; Virginia; West Virginia; and Wisconsin. (See *Green v. United States*, supra at 221 n. 4, collecting cases from the respective states.)

47. States supporting the absolute waiver rule include: Colorado; Connecticut; Georgia; Indiana; Kansas; Kentucky; Mississippi; Missouri; Nebraska; Nevada; New Jersey; New York; North Carolina; Ohio; Oklahoma; Utah; Vermont; Washington. (See *Green v. United States*, note 46 supra, at 220 n. 4, collecting cases from the respective states.)

48. 199 U.S. 521 (1905).
for the greater offense. The trial for murder in the first degree took place in the Philippine Islands. The jury's verdict was of the lesser included offense of assault. Upon appeal to the Supreme Court of the Philippines not only was the conviction set aside, but under the powers granted that tribunal the appellants were found guilty of murder in the second degree. In an appeal to the United States Supreme Court, the petitioners claimed that they had been twice put in jeopardy of punishment. The Supreme Court held that the defendants had absolutely waived their protection against double jeopardy.49

However, in 1957, a five-to-four decision by the Supreme Court (Green v. United States50) reversed the federal rule established in the Trono case to one supporting the limited waiver theory. Petitioner-Green had been indicted in the District of Columbia for murder in the first degree upon the allegation that a woman's death was perpetrated by the accused's act of arson. The trial judge incorrectly assumed that second degree murder was includable in the section which determined what facts constituted first degree murder, and he mistakenly charged the jury that they could find the accused guilty of either first or second degree. The statute expressly stipulated that second degree murder can be found when one kills another with malice aforethought except as provided in the section governing first degree murder.51 And, it was particularly specified in the first degree murder section that it was to include any death caused by arson.52 Thus, under the facts of the case, the accused could not be found guilty of second degree murder. He was guilty of either first degree or nothing. This was his argument on appeal after the jury returned a verdict of second degree murder. The Circuit Court of Appeals agreed with petitioner and reversed the conviction.53 However, the Court also remanded the case for another trial and the accused was subsequently found guilty of murder in the first degree and sentenced to death. Once more the defendant petitioned the Circuit Court alleging that he was twice placed in jeopardy. However, the Court rejected Green's plea on the basis of the Trono decision, supra, and affirmed his conviction.54 The Supreme Court reversed.55 Although the general rule of waiver was recognized by the high Court,56 it was said that the situation here encountered was different from the usual case involving waiver. This could only refer to the mere recognition that a refusal to reindict for the greater offense is considered by the many courts who apply the limited waiver

49. The Court based this view on the decision reached in United States v. Ball, 163 U.S. 662 (1896). See note 48 supra, at 534.
50. See note 46, supra. Justice Black wrote the majority opinion. Justice Frankfurter wrote the dissent, joined by Justices Burton, Clark and Harlan.
52. Whoever being of sound memory and discretion ... without purpose so to do kills another in perpetrating or in attempting to perpetrate any arson... is guilty of murder in the first degree. D. C. Code §22-2401 (1951).
53. 218 F.2d 856 (D.C. Cir. 1954).
54. 238 F.2d 705 (D.C. Cir. 1956).
55. See note 50 supra.
56. See note 46 supra, at 205.
rule as being separate and distinct from the usual waiver situation. The Supreme Court interpreted the jury's silence regarding the charge of first degree murder as an acquittal of that degree. To use the words of the Court:

Green was in direct peril of being convicted and punished for first degree murder at his first trial. He was forced to run the gantlet once on that charge and the jury refused to convict him. When given the choice between finding him guilty of either first or second degree murder it chose the latter.57

However, considering the facts of this case, it is difficult to perceive the Court's logic. Before the jury could return a guilty verdict to second degree murder, they must have been convinced that the defendant committed the arson and that a death resulted thereby. Thus, they were convinced of his guilt as to the criminal acts which constituted first degree murder. To assume that the jury's silence was an implied acquittal of first degree murder is to ignore the obvious. And yet, without such an assumption no valid reason exists for the application of the limited waiver rule.

It is also interesting to note that the Court incorrectly assumed that, "the great majority of cases in this country have regarded the jury's verdict (under the circumstances) as an implicit acquittal on the charge of first degree murder."58 (Emphasis added). Actually, as indicated infra, a slight majority of jurisdictions favor the opposite view.

The Court objected to and was undoubtedly concerned with any rule which placed the accused in a dilemma where he must barter his constitutional protection against double jeopardy as the cost incurred upon appealing an erroneous conviction. And, although the Court verbally restricted the Trono decision to its facts, any distinction in the law between the cases appears to be unfounded and in effect, the Trono rule is now overruled in the federal domain.

The issue of double jeopardy in the Green case would probably never have reached the appellate courts if the trial judge had not erred in his charge to the jury. But accepting that such an error was committed, the Supreme Court's change of the federal rule has freed Green from further prosecution for the homicide. Public indignation to such a result is understandable. Many proposals have been offered to obviate such situations where the accused cannot be retried for the lesser degree because of statutory restrictions. One such proposal is, of course, the absolute waiver rule. However, those favoring the principle of limited waiver believe that exceptional circumstances of this nature should not cause a complete

57. Id. at 206.
58. Ibid. To support such an allegation, the majority cited cases collected in 59 A.L.R. 1160 (1929) and 114 A.L.R. 1406 (1938).
abandonment of the limited waiver rule. To alleviate the dilemma it has been suggested that the limited waiver rule should generally apply, but when the prosecution cannot retry the defendant for the lesser degree under the statute (as in the Green case) then, and only then, should he be exposed to a subsequent conviction of the greater offense. This proposition should merit serious consideration in limited waiver jurisdictions.

The states which continue to apply the absolute waiver doctrine express the opinion that when a verdict of the lesser degree is returned, the jury is merely expressing its desire to temper justice with mercy. And therefore, no reason exists for permitting the defendant to take advantage of the law by appealing a verdict wherein he has nothing to lose but everything to gain. This view is based upon a broad assumption which is not, in logic, always true. But, it does realistically express what oftentimes will influence a jury’s verdict.

This writer does not propose to endorse one rule as being superior to the other. However, it is submitted that the peculiar situation as demonstrated by the Green case should be promptly resolved by either the courts or the legislatures.

The development of the waiver rule applied in New York deserves some individual attention. In the eighteen hundreds, section 36 of the Penal Code (now §32 Penal Law) was enacted, which provided that “where a prisoner is acquitted or convicted upon an indictment for a crime consisting of different degrees, he cannot thereafter be indicted or tried for the same crime in any other degree....” It would appear that the intent of the legislature was to accept the limited waiver theory of double jeopardy. However, in the case of People v. Palmer, the Court of Appeals held otherwise. The defendant had appealed and obtained a reversal of a third degree assault conviction. He was retried and subsequently found guilty of first degree assault. The Court refused to sustain his plea that the former conviction of third degree amounted to an acquittal of the greater degree. Thus, the rule of absolute waiver was adopted. It has been alleged by numerous sources that New York adopts the limited waiver rule. Such confusion was created by a decision handed down by the same court, on the same day as that of People v. Palmer, supra, note 60. In dictum, the Court cited two New York cases which were said to apply the limited waiver rule to inferior offenses. Actually the cases cited did not involve different degrees of the same crime. Instead, they concerned different crimes. See note 64 infra. Justice Andrews, writing for the majority, stated: “The question has not arisen in this state, so far as we know, on an indictment for murder, but a fortiori, if the doctrine contended for (limited waiver rule), is applicable in cases of minor offenses, it is to those of the higher grade.” People v. Cignavale,

60. 109 N.Y. 413, 17 N.E. 213 (1888).
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section 36 had reference only to cases where the prior judgment of conviction remained unreversed. If this interpretation was true, then the section merely reiterated the common law. However, the Court was of the belief that their view was made evident by sections 464 and 544 of the Code of Criminal Procedure. In essence, these sections provided that the granting of a new trial places the parties in the same position as if no trial had been had. Justice Gray supported the Court's interpretation of the Code with the proposition that:

It would be a grievous miscarriage of justice, and the intent of the law would be thwarted, if it should be held that a reversal, upon a previous appeal, for errors of law upon his trial, had the effect of putting it out of the power of the people to further try him under the indictment, when his guilt might be completely established. 62

When reviewing the law of waiver it should be reiterated that the Green case, supra, is limited in its scope to the federal courts since each state has been granted the privilege of interpreting its own common law as well as constitutional provisions regarding double jeopardy. Therefore, although the Green decision may be influential in this area of the law, there is no present indication that the states adopting the absolute waiver doctrine will abandon their positions. The Palmer case has been followed in New York without question to the present day, 63 and it is unlikely that the state would now accept the new federal rule.

It is also to be noted that the absolute waiver rule as herein discussed concerns retrial for greater degree of the same offense. It should not be confused with the situation where one is prosecuted a second time for a different substantive offense arising out of the same criminal act. In that situation the test is whether all of the facts necessary for a conviction in the first trial would have been enough for a conviction under the second prosecution. 64 If so, the substantive elements of the crimes overlap and the accused should not be subjected to another trial.

(Footnote continued from preceding page.)

110 N.Y. 23, 30, 17 N.E. 135, 142 (1888). However, the Court did not find it necessary to apply any rule of waiver since the case was disposed of on other grounds. As to the forementioned dictum, the case does not represent accepted New York law.

62. See note 60 supra at 215.

It should be noted that the N.Y. Codex Crim. Proc. §§9, 341, and 444 appear to permit retrial for the greater degree only if such degree was included in the indictment presented at the first trial.

63. E.g., People v. McGrath, 202 N.Y. 445, 96 N.E. 92 (1911).

64. See e.g., People v. Skarzewski, 287 N.Y. 826, 41 N.E.2d 99 (1942). However, it is often difficult to determine whether a second trial is, in fact, an indictment for the same offense. This is a problem concerning interpretation of statutory substantive law. See People v. Guenther, 24 N.Y. 100 (1861) where a second prosecution for larceny was not permitted after defendant successfully appealed a conviction of embezzlement. The case of Sealfrom v. United States, 332 U.S. 575 (1948) held that after the accused was acquitted on a charge of

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NOTES AND COMMENTS

LEGISLATIVE ATTEMPTS TO MODIFY THE DOUBLE JEOPARDY DOCTRINE

Numerous statutes can be found which may either change the common law rule as to such problems as when jeopardy attaches, or provide the prosecution a right to appeal in criminal cases. Some statutes however, are not as successful as others in satisfying the tests of constitutionality.

Section 400 of the New York Code of Criminal Procedure provides just such an example:

If it appear by the testimony, that the facts constitute a crime of a higher nature than that charged in the indictment, the court may direct the jury to be discharged .... (and the defendant) to answer any new indictment which may be found against him for the higher offense.

The case of People ex rel. Blue v. Karney held that the legislature exceeded its permissive boundaries in an attempt to avoid the constitutional protection of double jeopardy. In the midst of a trial on an indictment charging the defendant with manslaughter in the first degree, the county judge, under the powers granted in the above statute, suspended the proceedings and ordered the district attorney to resubmit the case to the Grand Jury because the facts showed that he should have been indicted for at least murder in the second degree rather than manslaughter. The state Supreme Court ordered the defendant's discharge because jeopardy had attached when the first witness for the prosecution testified. He could not be reindicted.

If the legislature had changed the rule as to when jeopardy would attach, conceivably, there would have been no violation of the state constitution. But since the rule is that jeopardy still attaches when evidence is submitted at the trial the legislature can not give a judge the arbitrary power to ignore the rule whenever he deems fit.

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conspiracy, he could not thereafter be indicted for the substantive offense. And in People v. Trenkle, 169 Misc. 687, 9 N.Y.S.2d. 661 (County Ct. 1938), when the state accepted defendant's plea of guilty to misdemeanor of corrupting a child's morals, a subsequent prosecution for attempted rape based on the same facts, was barred. But see, People v. Saunders, 4 Park Crim. 196 (N.Y. 1859) (acquittal on an indictment for a felony held not to bar an indictment for a misdemeanor). It should be noted that a conviction for (e.g.) assault would not bar a subsequent prosecution for manslaughter or murder if, afterwards, the person assaulted dies from the injuries sustained by said assault. People v. Santoro, 229 N.Y. 277, 128 N.W. 234 (1920). It is questionable whether one can be prosecuted for perjury by swearing under oath that he did not commit the crime charged, after an acquittal of such crime. Cooper v. Commonwealth, 106 Ky. 999, 51 S.W. 789 (1899) (held he could not); contra, Commonwealth v. Vaughn, 101 Ky. 603, 42 S.W. 117 (1897) (held he could); accord, People v. Berger, 199 Misc. 543, 106 N.Y.S.2d 361 (County Ct. 1950).

A question often asked is, what can be done when the trial judge commits an error prejudicial to the prosecution? Can the people appeal? Any answer must be determined by the statutory law and public policy of each sovereign government. It should be recognized that the development of such a privilege is relatively new to Anglo-American law. At common law, the prosecution had no right to appeal. However, the English Criminal Appeals Act of 1907 offered a definite pronouncement of a concept that had arisen rather obscurely and which granted the crown a privilege of appeal if a question of great public importance was involved. Most states in this country have permitted their respective prosecuting agencies to appeal certain matters in criminal cases. Some are more liberal than others. Yet, once again the question becomes one of how far the legislators may go before treading upon the protection against double jeopardy.

In America, the states tend to fall into three general categories. The first prohibits the prosecution of any such privilege and reserves an appeal for the sole benefit of the defendant. It is claimed by other states that an appeal is permitted the prosecution which is just as broad as that of the accused. However, many statutes limit this privilege to questions of law and, in addition, require the permission of the trial judge. The third category, which has been supported by the American Law Institute, appears to limit the prosecution's right to appeal to: Orders quashing an indictment or information or the granting of a new trial; an order arresting judgment; an adverse ruling of law when the defendant has appealed; or in instances when the sentence of the court is contrary to law. In essence, this view does not change or modify the common law rules concerning the attachment and waiver of jeopardy.

An example of the restrictive view is found in the federal system where appeals by the government are not only rare and unusual, but are looked upon by the courts with much disfavor. The right to appeal, as set out in the Federal Criminal Appeals Act, is proper only when taken from a decision setting aside or dismissing an indictment or information or any count thereof, or from a decision sustaining a motion in bar when the defendant has not been put in jeopardy. In contrast, New York permits the prosecution to appeal in any instance where the defendant could do likewise. But, this rule is expressly restricted so as not to allow an appeal if the accused had been acquitted of the crime charged. However, the state may appeal from a judgment for the defendant

66. See, United States v. Sanges, 144 U.S. 310 (1892); United States v. Rosenwasser, 145 F.2d 1015 (9th Cir. 1944); United States v. Janitz, 161 F.2d 19 (3d Cir. 1947); People v. Reed, 276 N.Y.5, 11 N.E.2d 330 (1938).
67. See ORFIELD, CRIMINAL APPEALS IN AMERICA, 57 (1939).
68. E.g., CONN. GEN. STAT. §8812.
71. 18 U.S.C. §3731.
72 N.Y. CODE CRIM. PROC. §518.
on a demurrer to the indictment, or from an order arresting a judgment of conviction. And, an appeal can be taken from an order made during the trial setting aside the indictment as long as the ground for dismissal was not based upon insufficiency of the evidence.\textsuperscript{73} (It should be emphasized that such an appeal is restricted to dismissal of the indictment.) Even under such a statute, many errors made by the trial judge are not appealable and will, thus, escape correction because of the defendant's protection from being twice placed in jeopardy. For instance, if during the trial the judge should unilaterally order a mistrial, which is improper and unwarranted, the accused will be free from further prosecution.

A few states have enacted laws which would conceivably allow the prosecution to appeal from almost every material error committed by judge or jury during the trial proceedings. For example, a Wisconsin statute permitted the prosecution to appeal from an adverse finding to all questions of law.\textsuperscript{74} The statute was tested in \textit{State v. Witte}, where the trial judge set aside the conviction because he was of the opinion that the evidence was insufficient in law to convict the accused. When the defendant contested the right of the prosecution to appeal, the Appellate Court held\textsuperscript{75} that double jeopardy was not violated. The Court was of the opinion that the first trial was not according to law and hence there was, in fact, no trial. Although under the facts the same result would have been reached under the New York statute, the decision becomes important because it holds constitutional a statute which permits the prosecution to appeal from a verdict of acquittal. The Supreme Court of Errors in Connecticut held that a similar statute, giving the state a right to appeal questions of law, did not abrogate the state's constitution.\textsuperscript{76} But the reasons expressed in the opinion were somewhat different. The Court was of the belief that real jeopardy continues through all stages of the proceedings, and that procedural laws may more definitely define the constitutional provision by determining when, during all of the proceedings, jeopardy will attach and when it will not.\textsuperscript{77}

No matter how the courts may vary in their opinions, it seems apparent that most of the statutes granting governmental appeals have been upheld by the states as not violating their respective constitutions.\textsuperscript{78} Therefore, it can be

\textsuperscript{73} See note 78 infra. See also, \textit{People v. Tallman}, 193 Misc. 563, 84 N.Y.S.2d 359 (1948). Compare, \textit{People v. Lee}, 308 N.Y. 302, 125 N.E.2d 580 (1955) (Even though evidence at first trial was insufficient a new trial was held to be properly ordered.) See also, N.Y. CODE CRIM. PROC. §543.

\textsuperscript{74} \textit{Wis. STAT. §358.12 (8)}.\textsuperscript{75} \textit{243 Wis. 423, 10 N.W.2d 117 (1943)}.\textsuperscript{76} \textit{State v. Lee}, 65 Conn. 265, 30 Atl. 1110 (1894).


\textsuperscript{78} See \textit{Miller}, 36 YALE L.J. 486, (1927); \textit{A.L.I., Adm. Crim. Law}, §13 (1935). But see, note 11 supra at 738: "If jeopardy has once attached, there can be no (Footnote continued on following page.)
generally stated that the right of the prosecution to appeal is resolved upon policy considerations.

CONCLUSION

When the United States Supreme Court handed down the decision that the right not to be "twice put in jeopardy of life or limb guaranteed in the Fifth Amendment was not so fundamental as to be embodied in the concept of due process found in the Fourteenth Amendment, a piecemeal disposition of the rights arising out of the doctrine began to flow from the states. It has become evident that not only have the jurisdictions varied in their common law approach to the problem, but further differences of opinion have been buttressed by statutory qualifications and modifications. Assuming the concept retains some of its historical importance, it deserves a more uniform application by the states. The time has come to reappraise the doctrine of double jeopardy and what it means to modern-day society.

Donald North Roberts

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second jeopardy without the consent of the defendant, whatever the statute may direct. . . " See also, Ex Parte Bornee, 76 W.Va. 360, 85 S.E. 529 (1915) which held that a statute providing for an appeal from a verdict of not guilty rendered by a proper jury in a court which has jurisdiction is unconstitutional and void. It has also been suggested that when a trial judge dismisses a case for insufficiency of evidence, a statute permitting the prosecution to appeal such dismissal may be unconstitutional. See 47 YALE L.J. 489, 492 (1938).