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Resentencing on Surviving Valid Counts After a Successful Appeal: A Double Jeopardy and Due Process Analysis

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NOTES

RESENTENCING ON SURVIVING VALID COUNTS AFTER A SUCCESSFUL APPEAL: A DOUBLE JEOPARDY AND DUE PROCESS ANALYSIS

Recent federal circuit court decisions[1] have permitted resentencing on surviving counts after a defendant has shortened his overall sentence by successfully appealing some but not all of the counts in a multicount judgment against him. Arguably, these decisions have violated constitutional double jeopardy[2] and due process[3] standards. These standards require that the government interest in the detection and punishment of crime be greater than the defendant's interest in repose[4] and that there be no likelihood of vindictiveness[5] in a resentencing proceeding. This Note argues that resentencing on surviving counts is permissible when the court has overturned a conviction because that conviction improperly enhanced the defendant's sentence on an underlying felony count that remains undisturbed. This type of appeal challenges only the form of the sentence imposed on the defendant. However, in cases in which the defendant challenges the substance of his initial conviction, both

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1 Resentencing has occurred in the Second, Third, Fifth, and D.C. Circuits. *See infra* notes 6, 26, 37.

2 "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ." U.S. CONST. amend. V.

3 "[Nor shall any person] be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V.

4 The double jeopardy test requires a balance between "the right of an accused to be given a fair trial" and "the societal interest in punishing one whose guilt is clear after he has obtained such a trial." United States v. Tateo, 377 U.S. 463, 466 (1964); *see also* Spence, *The Federal Criminal Code Reform Act of 1977 and Prosecutorial Appeal of Sentences: Justice or Double Jeopardy?*, 37 MD. L. REV. 739, 743 (1978) ("Often the government's interests in the enforcement of criminal law and the proper administration of justice require the subordination of the countervailing interest of the individual to be free from multiple prosecutions."); Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 MICH. L. REV. 1001, 1002-03 (1980) (balancing integrity of jury verdicts of not guilty, lawful administration of prescribed sentences, and interest in repose); *cf.* J. SIGLER, DOUBLE JEOPARDY 186 (1969) ("In a complicated society, our goals may have shifted from the protection of the innocent to the administrative goal of insuring the proper treatment of the guilty.").

5 Due process "requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." North Carolina v. Pearce, 395 U.S. 711, 725 (1969). The Court further declared that "to assure the absence of such a motivation . . . whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear" and "be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." *Id.* at 726.

double jeopardy and due process principles preclude resentencing on the remaining counts.

I
HISTORY

Until recently, a successful defendant was unlikely to receive an increased sentence on the counts that survived his appeal.[6] Courts considering resentencing had to balance opposing concerns. On the one hand, a judge's broad authority to increase sentences could foster substantial abuse and an opportunity for vindictiveness. On the other hand, a defendant who avoided resentencing on surviving counts could benefit from a windfall when conduct properly punished in the original sentencing proceeding became immune to a new sentence. For years, courts tipped the policy balance against the potential for abuse and disfavored resentencing.[7]

Courts considered *Ex parte Lange,*[8] as interpreted through dictum in *United States v. Benz,*[9] as support for the no-resentencing policy, and few

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6 We would open the door wide to an invasion of the rights of defendants if an attack by a defendant on an illegal sentence could be employed for reconsideration of the sentences on other counts which are valid and which he has not attacked, in order to award the government the same ultimate punishment as that originally imposed on all the counts.

United States v. Welty, 426 F.2d 615, 618 (3d Cir. 1970); *see, e.g.,* United States v. Fredenburgh, 602 F.2d 1143 (3d Cir. 1979) (due process and double jeopardy clauses violated when district court resentenced defendant on surviving counts after successful appeal based on insufficient evidence on other counts); Chandler v. United States, 468 F.2d 834, 837 (5th Cir. 1972) (subjecting defendant to contingency of having unchallenged sentence increased would be inviting him "to play 'Russian Roulette' "); *see also* United States v. Ivy, 644 F.2d 479 (5th Cir. 1981) (requiring that district court vacate one of two firearms convictions in its discretion, but directing court not to increase either sentence); United States v. Larson, 625 F.2d 67 (5th Cir. 1980) (not ordering district court to vacate judgment carrying most severe punishment but declaring that trial judge could not increase sentence that remained intact); Virgin Islands v. Henry, 533 F.2d 876 (3d Cir. 1976) (court could not justify increased sentence on valid count merely because sentencing judge would have imposed higher penalty had he been aware of invalidity of sentence imposed on other counts).

7 "The possibility of abuses inherent in broad judicial power to increase sentences outweighs the possibility of windfalls to a few prisoners." United States v. Sacco, 367 F.2d 368, 370 (2d Cir. 1966).

8 85 U.S. (18 Wall.) 163 (1874). Lange was convicted of stealing mail bags, which was then punishable by incarceration for not more than one year *or* a fine of not less than ten or more than two hundred dollars. The trial judge sentenced Lange to one year in prison *and* a two hundred dollar fine. Lange paid the fine and the court committed him to prison. Upon writ of habeas corpus, the sentencing judge modified Lange's sentence to one year in prison. The Supreme Court declared the new sentence void and ordered Lange released, noting: "We are of opinion that when the prisoner, as in this case, by reason of a valid judgment, had fully suffered one of the alternative punishments to which alone the law subjected him, the power of the court to punish further was gone." *Id.* at 176.

9 The Supreme Court's dictum in United States v. Benz, 282 U.S. 304 (1931), established *Lange* as a leading case hindering prosecutorial appeal of sentences:

> 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

decisions[10] strayed from the path. In *Lange,* the Supreme Court held that lower courts could not resentence a defendant after they had "rendered and carried into execution" his first sentence.[11] Interpreting this language to mean rendered and *partly* executed,[12] courts closed the government's avenues of appeal on valid sentences, reasoning that resentencing in those cases would constitute impermissible multiple punishment.[13]

In *Bozza v. United States,*[14] the Supreme Court retreated from its *Lange-Benz* no-increased-sentence position.[15] The Court held that a judge did not violate double jeopardy by increasing a sentence to reach the statutory minimum.[16] The opinion stated that "[t]he Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner."[17] The Court further reduced the defendant's right to repose in *North Carolina v. Pearce,*[18] holding that increasing a defendant's sentence upon reconviction after a

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> 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. . . . This is the basis of the decision in *Ex Parte Lange* . . . .

Id. at 307; *see* Note, *Twice in Jeopardy: Prosecutorial Appeals of Sentences,* 63 VA. L. REV. 325, 334-35 (1977); *see also* Spence, *supra* note 4, at 767-68 (noting that no authority has repudiated *Benz* and *Lange* decisions' "substantial support for double jeopardy arguments against statutory procedures for appellate review of sentences on the government's initiative").

10 *See, e.g.,* Kitt v. United States, 138 F.2d 842 (4th Cir. 1943) (Fourth Circuit first remanded case to district court because that court had previously imposed excessive sentences; on defendant's appeal of his resentencing, Fourth Circuit held that district judge had power to impose any sentence within statutory limits, whether for shorter or longer term than previous sentences); *see also* Rollins v. United States, 543 F.2d 574 (5th Cir. 1976) (court vacated sentences resulting from multiple convictions on one firearms violation and remanded for resentencing); Phillips v. Biddle, 15 F.2d 40, 41 (8th Cir. 1926):

> It is wrong . . . where there is statutory authority for the total sentence which the court clearly intended to impose, and where the case can be returned for resentence, that the prisoner should escape part of the just punishment due him through a mistake in the form of the sentence.

cert. denied, 274 U.S. 735 (1927).

11 85 U.S. (18 Wall.) at 168.

12 "It is a well settled general rule that increasing a sentence after the defendant has commenced to serve it is a violation of the constitutional guaranty against double jeopardy." United States v. Sacco, 367 F.2d 368, 369 (2d Cir. 1966) (citing *Ex parte Lange).*

13 The Supreme Court attacked loose interpretations of *Ex parte Lange* in United States v. DiFrancesco, 449 U.S. 117, 138-39 (1980); *see infra* notes 20-25 and accompanying text.

14 330 U.S. 160 (1947). The defendant was convicted under a statute carrying the mandatory penalty of a fine *and* imprisonment. The Supreme Court held that the lower court did not violate the double jeopardy clause by first imposing only a prison sentence and then resummoning the defendant five hours later to impose a fine in conformity with the statutory minimum. *Id.* at 166-67.

15 *But see* Spence, *supra* note 4, at 768 (arguing that Bozza v. United States, 330 U.S. 160 (1947), did not limit *Benz* but instead established standard for treatment of *defective sentences*).

16 330 U.S. at 167.

17 *Id.* at 166-67.

18 395 U.S. 711 (1969). The court resentenced Pearce on the actual count that an earlier appeal had overturned. *See infra* note 88.

successful appeal did not inherently violate double jeopardy.[19]

The Supreme Court abandoned the *Lange-Benz* standard in *United States v. DiFrancesco,*[20] which upheld a resentencing provision in the Organized Crime Control Act of 1970[21] authorizing the government to appeal the sentences of dangerous special offenders.[22] Justice Blackmun wrote for the majority that "[t]he Double Jeopardy Clause does not provide the defendant with the right to know at any specific moment in time what the exact limit of his punishment will turn out to be."[23] Courts viewed *DiFrancesco* as severely restricting a defendant's finality interest[24] in his sentence and freely reassessed their attitudes toward resentencing after appeal.[25]

As the balance of concerns shifted in the cases, the mere potential for judicial abuse no longer entitled defendants to claim finality in all sentences. The balance of the defendant's interest in finality and the government interest in punishing crime continues under current due process and double jeopardy standards but without clear articulation or sensitive application to varying procedural settings. Courts should resolve the resentencing issue by considering the different bases for conviction and appeal.

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19 *Id.* at 723.

20 449 U.S. 117 (1980). DiFrancesco was convicted of federal racketeering offenses and sentenced as a dangerous special offender to two ten-year prison terms, to be served concurrently with each other and with an unrelated nine-year sentence. The government appealed the dangerous special offender sentences as an abuse of discretion because they added only one year to DiFrancesco's nine year sentence. The Supreme Court held that increasing DiFrancesco's sentence due to this government initiated appeal would not violate double jeopardy principles. *Id.* at 136-37.

21 18 U.S.C. § 3575(e), (f) (1982).

22 449 U.S. at 136-37.

23 *Id.* at 137.

24 *See* United States v. Busic, 639 F.2d 940, 950 (3d Cir.) (noting that *DiFrancesco* "recognized the limited nature of the holdings in *Ex Parte Lange* and *Benz*" concerning the question of multiple punishment) (discussed *infra* notes 27-34 and accompanying text), *cert. denied,* 452 U.S. 918 (1981).

25 *See, e.g.,* United States v. Pinto, 646 F.2d 833 (3d Cir.), *cert. denied,* 454 U.S. 816 (1981); United States v. Busic, 639 F.2d 940 (3d Cir.), *cert. denied,* 452 U.S. 918 (1981). *But see* United States v. Henry, 709 F.2d 298, 317 (5th Cir. 1983)(holding that Federal Rule of Criminal Procedure 35 is subject to *Lange* standard; despite possible broadening of double jeopardy standard by *DiFrancesco*, rule 35, interpreted in light of *Lange* stands as procedural barrier to resentencing).

Resentencing on valid counts after a successful appeal clearly expands *DiFrancesco* because that case involved a quite narrow issue. In *DiFrancesco,* the government directly appealed the sentence on a specific count under a statute authorizing such an appeal, charging that the sentence itself was too lenient and therefore an abuse of discretion. 449 U.S. at 125-26; *see infra* note 61.

II
TWO TYPICAL CASES: A DISTINCTION BETWEEN FORM AND SUBSTANCE

A. *Busic,* an Appeal of Form

Two recent cases frame the parameters for discussing double jeopardy and due process in the resentencing context. The first, *United States v. Busic,*[26] involved a successful appeal of counts enhancing the defendant's sentence on felony charges; Busic thus appealed only the form of his sentence rather than questions regarding its substance.

Resentencing has generally occurred after a successful appeal of improper enhancement counts.[27] In *Busic,* for example, the defendant was convicted of aiding and abetting an armed assault on a federal officer, in violation of section 111 of title 18,[28] and carrying a firearm in the commission of a federal felony, in violation of section 924(c)(2) of title 18.[29] The court sentenced Busic to thirty years in prison: five for the assault, twenty for carrying a firearm in the commission of a felony, and five on related drug charges.[30] On appeal, the Supreme Court vacated Busic's conviction under section 924(c),[31] holding that "prosecution and enhanced sentencing under § 924(c) is simply not permissible where the predicate felony statute contains its own enhancement provision."[32]

On remand, the Court of Appeals for the Third Circuit also va-

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26 639 F.2d 940 (3d Cir.), *cert. denied,* 452 U.S. 918 (1981).

27 *See, e.g.,* United States v. Marino, 682 F.2d 449 (3d Cir. 1982) (where defendant was erroneously convicted of multiple counts charging violations of statute proscribing receipt, possession, or transportation of firearms by felon, appropriate disposition was remand for resentencing, rather than order vacating sentence on two of three counts); United States v. Leek, 665 F.2d 383 (D.C. Cir. 1981) (defendant improperly sentenced under both federal and District of Columbia bank robbery statutes); McClain v. United States, 643 F.2d 911 (2d Cir.), *cert. denied,* 452 U.S. 919 (1981)(defendant incorrectly convicted of armed bank robbery and commission of felony while armed); United States v. Edmonson, 659 F.2d 549 (5th Cir. 1981) (defendants improperly sentenced to eight counts of stealing mail could only be sentenced to three); *see also* Johnson v. United States, 619 F.2d 366 (5th Cir. 1980) (remand for resentencing where sentence originally imposed was arguably too harsh).

28 18 U.S.C. § 111 (1982). Busic was liable as a principal in the assault under 18 U.S.C. § 2 (1976).

29 18 U.S.C. § 924(c)(2) (1982).

30 639 F.2d at 943 (quoting Busic v. United States, 446 U.S. 398, 399 (1980)). In May 1976, Busic and his codefendant arranged a drug buy with an undercover agent of the Drug Enforcement Administration. When the agent arrived with the money, the other defendant attempted to rob him at gunpoint. The agent signaled for assistance, and Busic's codefendant fired several shots at the reinforcements. The officers arrested Busic and seized a gun that he was carrying. As a partner in the crime, Busic was liable as a principal in the assault. 639 F.2d at 942.

31 The government argued that if the Court found § 924(c) inapplicable to Busic, it should also vacate the § 111 sentence for armed assault to enable the lower court to apply the enhancement provision. The Supreme Court, however, declined to decide this issue because the court of appeals had not addressed it. *Busic,* 446 U.S. at 412 n.19.

32 446 U.S. 398, 404 (1980).

cated the sentence under the assault conviction to allow the district court to consider enhancement of Busic's surviving sentence:

> [W]hen a defendant has been convicted after trial and sentenced under a multi-count indictment and on appeal his conviction and sentence as to certain counts is set aside because such counts enhanced the sentence for the predicate felony which contained its own enhancement provision, the constitutional guarantee against double jeopardy does not preclude vacating the sentence on the predicate felony counts and the imposition of a new sentence by the trial judge on the remaining counts, which may be greater than, less than, or the same as the original sentence.[33]

Although the district court on final remand left Busic's section 111 sentence at five years,[34] the case established precedent for resentencing on surviving counts after a successful appeal.

The Supreme Court decision vacating Busic's sentence under section 924(c) reasoned that the district court could not properly allocate his sentence under two statutes because the defendant had only committed *one crime.*[35] After his successful appeal of the enhancement count, Busic had avoided almost all of the punishment imposed for his conviction for possessing a weapon.[36] If the court of appeals had not authorized the district court to augment the sentence on the surviving valid count, Busic would not have been punished under section 924(c) for carrying a weapon during the assault, a confirmed aspect of his "one crime."

B. *Pinto,* a Substantive Appeal

The Third Circuit broadened the ambit of the *Busic* decision in *United States v. Pinto.*[37] Unlike *Busic,* the challenged conviction in *Pinto* was not an enhancement count, but instead involved a substantive matter; the invalid counts charged the defendant with violating a statute inapplicable to his crime.

A jury found Pinto guilty of embezzling bank funds and burglary.[38]

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33 United States v. Busic, 639 F.2d 940, 953 (3rd Cir. 1981) (footnotes omitted).

34 Telephone interview with Susan Huth, Deputy Clerk, Criminal Division, Western District Court of Pennsylvania (Aug. 25, 1983).

35 446 U.S. at 410-11.

36 The sentencing judge in *Busic* must have imposed at least some of the punishment for possession of a weapon under § 111 because Busic's sentence exceeded the three year maximum allowed under § 111 for an unarmed assault. Busic and his codefendant were convicted of two violations of § 111, and received two concurrent five year sentences. The additional two years on each sentence were necessarily enhancements for possession of a weapon. 639 F.2d at 943. *But cf. id.* at 943 n.2 (had defendants received consecutive sentences on two counts, each could have received six year sentences without consideration of use of deadly weapon during assault).

37 646 F.2d 833 (3d Cir.), *cert. denied,* 454 U.S. 816 (1981).

38 Pinto had instrncted his bank to remit $193.51 to satisfy a business debt. Due to a clerical error the bank sent him $193,511.00. The defendant did not inform the bank of the

The district court sentenced Pinto to five years probation for embezzling and five years in prison for burglary.[39] The court of appeals reversed his conviction under the burglary statute because "[t]he actions of defendant were fraud-type offenses not contemplated by the [statutory] language."[40] Citing *Busic,* the Third Circuit also vacated the sentence on the surviving embezzlement count and remanded "for resentencing on that count, in light of the reversal of the conviction and sentence on [the invalid count]."[41]

The appellate court in *Pinto* had concluded that the trial court had improperly convicted the defendant of burglary because he had not committed that crime.[42] Without resentencing, Pinto, unlike Busic, would not remain guilty but unpunished for any specific criminal conduct. The court had already convicted Pinto for his actual conduct, and the district court had sentenced him under the embezzlement statute, leaving *no crime* to justify increasing his sentence.

III
DOUBLE JEOPARDY RESTRICTIONS ON RESENTENCING

Criminal proceedings are high-pressure situations filled with great risks to a defendant's emotional and physical security.[43] Thus, the government's interest in punishing crime often contrasts sharply with an accused's desire to bring both prosecution and punishment to a swift conclusion.[44] The double jeopardy clause balances these opposing inter-

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error and drew on the account to pay off business creditors. The district court convicted the defendant of violating both 18 U.S.C. § 2113(b) (1982) ("Whoever takes and carries away, with intent to steal or purloin, any property or money . . . belonging to, or in the care . . . of any bank . . . shall be fined not more than $5,000 or imprisoned not more than ten years, or both.") and 18 U.S.C. § 1014 (1982) ("Whoever knowingly makes any false statement . . . for the purpose of influencing in any way the action of . . . any bank . . . shall be fined not more than $5,000 or imprisoned not more than two years, or both."). 646 F.2d at 834. The appellate court reversed the part of Pinto's conviction based on § 2113(b) because that statute dealt with appropriating funds in a "trespassory way"; Pinto's conduct was not within the scope of that proscription. The court held "that defendant's dissipation of funds credited to his bank account wholly because of another bank's unilateral error is not conduct punishable under 18 U.S.C. § 2113(b) under the circumstances presented by this record." *Id.* at 837.

39 646 F.2d at 834.

40 *Id.* at 836.

41 *Id.* at 838.

42 *Id.* at 836.

43 *See* Price v. Georgia, 398 U.S. 323 (1970) (retrial of second degree murder charge is not ordcal to be taken lightly); Green v. United States, 355 U.S. 184, 187-88 (1957) (retrial subjects defendant "to embarrassment, expense and ordeal and [compels] him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty"); *see also* J. SIGLER, *supra* note 4, at 156 (double jeopardy clause of fourteenth amendment protects defendant from "unnecessary harassment" and "social stigma" and preserves his "psychological security").

44 " '[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.' " Illinois v. Somerville, 410 U.S. 458, 470 (1973) (quoting Wade v. Hunter,

ests. Moreover, by selectively defining double jeopardy, the courts have used the clause to work compromises.[45]

A. The Constitutional Standard

Double jeopardy protections amount to guarantees against the needless repetition of history.[46] The courts shield the defendant from two forms of governmental action: unjustified prosecutions[47] and repeated punishments.[48] In the case of multiple punishment, jeopardy from the prior punishment wholly extinguishes the government's interest. In the case of multiple prosecution, the defendant's interest in ending his jeopardy overwhelms the government's interest in detecting

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336 U.S. 684, 688-89 (1949)) (emphasis omitted) (where first action results in mistrial, double jeopardy clause of fourteenth amendment does not bar retrial); *see* Note, *Double Jeopardy—Sentencing—Government Appeal of Dangerous Special Offender Sentence Violates Double Jeopardy Clause,* 65 CORNELL L. REV. 715, 718-22 (1980).

45 In North Carolina v. Pearce, 395 U.S. 711 (1969), the Supreme Court noted that the guarantee against double jeopardy "has been said to consist of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *Id.* at 717 (footnotes omitted).

These protections against further jeopardy are not absolutes but are only effective when the government interest in a criminal proceeding is relatively small and the defendant's countervailing interests are proportionately large. *See, e.g.,* Burks v. United States, 437 U.S. 1 (1978) (double jeopardy clause precludes second trial after appellate finding of insufficient evidence to convict); Price v. Georgia, 398 U.S. 323 (1970) (retrial for second degree murder barred after implicit acquittal when jury returned guilty verdict on lesser included offense); *see supra* note 4; *infra* note 66. The government interest will generally justify further action where a guilty defendant is likely to escape punishment. *See, e.g.,* United States v. Tateo, 377 U.S. 463 (1964) (double jeopardy clause does not bar retrial after conviction was overturned in collateral proceedings); Murphy v. Massachusetts, 177 U.S. 155 (1900) (reimposition of sentence does not violate double jeopardy clause where first sentence reversed as unconstitutional); Ball v. United States, 163 U.S. 662 (1896) (retrial permissible after indictment set aside). The government interest will also prevail when the defendant has little expectation of repose from the resolution of the earlier proceeding. *See, e.g.,* United States v. Scott, 437 U.S. 82 (1977) (where defendant's motion for mistrial results in no determination of guilt or innocence, second prosecution); Illinois v. Somerville, 410 U.S. 458 (1973) (where "manifest necessity" and "ends of public justice" require declaration of mistrial, double jeopardy clause does not bar retrial); North Carolina v. Pearce, 395 U.S. 711 (1969) (no double jeopardy bar to imposing more severe sentence upon reconviction). *But see* Freeman & Earley, United States v. DeFrancesco: *Government Appeal of Sentences,* 18 AM. CRIM. L. REV. 91, 109 (1980) (underlying principles other than balancing test distinguished application of double jeopardy clause in both government and defendant initiated appeals).

46 Roberts v. United States, 320 U.S. 264, 276 (1943) (Frankfurter, J., dissenting).

47 *See* Green v. United States, 355 U.S. 184, 187-88 (1957) (limiting right of state to repeatedly attempt to convict individual for alleged offense). *But see* United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824) (government may retry defendant where judge terminated earlier trial by discharging jury because there was manifest necessity for dismissal or because ends of public justice otherwise would have been defeated).

48 *See, e.g.,* North Carolina v. Pearce, 395 U.S. 711, 721 (Douglas, J., concurring); *Ex parte* Lange, 85 U.S. (18 Wall.) 163, 173 (1874); *see also* Spence, *supra* note 4, at 758 (noting that "the risk of punishment . . . must be the paramount concern of the prohibition against double jeopardy").

crime.[49] Although the protections against multiple punishment and prosecution both fall under the heading of double jeopardy, they present separate issues,[50] requiring separate analyses.

1. *Multiple Punishment*

Resentencing per se does not constitute multiple punishment[51] because the double jeopardy protection against multiple punishment focuses on the amount of punishment inflicted[52] and not the number of proceedings involved in imposing punishment.[53] The limits on the amount of punishment imposed, however, do necessitate[54] a two-prong analysis of resentencing proceedings. First, at resentencing, a defendant

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49 *See supra* notes 43-45 and accompanying text.

50 *See* J. SIGLER, *supra* note 4, at 35-36 ("The public policy of terminating criminal litigation has been confused with the policy of preventing multiple punishment for the commission of a single criminal act. The failure to make this distinction still continues to hamper the formulation of double jeopardy policy.") (footnotes omitted); *see also* Bigelow, *Former Conviction and Former Acquittal,* 11 RUTGERS L. REV. 487 (1957).

51 United States v. DiFrancesco, 449 U.S. 117, 139 (1980) ("The guarantee against multiple punishment that has evolved in the holdings of this Court plainly is not involved [where the government has appealed for an increased sentence].").

In analogous situations, the Supreme Court has changed the sentence on valid convictions to correct errors in the sentence, unrestrained by the double jeopardy clause's multiple punishment protection. *See, e.g.,* Bozza v. United States, 330 U.S. 160 (1947) (discussed *supra* notes 14-17 and accompanying text); Murphy v. Massachusetts, 177 U.S. 155 (1900) (discussed *supra* note 45); *In re* Bonner, 151 U.S. 242 (1894) (prisoner incorrectly committed to state prison could be resentenced to federal prison without violation of double jeopardy); Reynolds v. United States, 98 U.S. 145, 168-69 (1878) (where defendant erroneously sentenced to prison at hard labor, correction of sentence allowed at rehearing); *see also* Dunsky, *The Constitutionality of Increasing Sentences on Appellate Review,* 69 J. CRIM. L. & CRIMINOLOGY 19, 27-32 (1978); Westen, *supra* note 4, at 1032-33. *But see* Freeman & Earley, *supra* note 45, at 93-96 (increased sentence resulting from government appeal constitutes multiple punishment).

52 Courts initially held that increasing a defendant's sentence through resentencing constituted multiple punishment. *See supra* notes 6-13 and accompanying text. The Supreme Court addressed this issue in Bozza v. United States, 330 U.S. 160 (1947) (discussed *supra* notes 14-17 and accompanying text), holding that a sentence increased to meet the statutory minimum did not put the defendant twice in jeopardy for the same offense. The Court distinguished *Ex parte Lange,* discussed *supra* note 8, because the defendant's sentence in that case had been "executed by full satisfaction of one of the alternative penalties of the law." 330 U.S. at 167 n.2 (citation omitted). The Court also noted that in *Bozza* "the petitioner had not suffered any lawful punishment until the court had announced the full mandatory sentence," *id.,* thus indicating a persistent reluctance to reject entirely the old *Benz-Lange* rationale, *see supra* note 9. *But see* United States v. DiFrancesco, 449 U.S. 117, 139 (1980) (noting that *Ex parte Lange*'s holding and *Benz*'s dictum "are not susceptible of general application").

53 In an extreme example of this principle, the Supreme Court held that it did not constitute double jeopardy to execute a convicted murderer upon a new death warrant after the electric chair had malfunctioned during the first attempt. Louisiana v. Resweber, 329 U.S. 459 (1947).

54 *See* North Carolina v. Pearce, 395 U.S. 711, 717 (1969) ("[The protection against multiple punishment] is . . . necessarily implieated in any consideration of the question whether, in the imposition of sentence for the same offense after retrial, the Constitution requires that credit must be given for punishment already endured."); *Ex parte* Lange, 85 U.S. (18 Wall.) 163, 173 (1874) ("[The multiple punishment principle] must be applied to all cases

must receive credit for time he has already served.[55] Second, after resentencing, a defendant must not face a total punishment any greater than the maximum authorized by the legislature.[56] Aside from these quantitative requirements, the double jeopardy guarantee against multiple punishment poses no barrier to resentencing defendants on the surviving counts of a successful appeal. If the resentencing court follows the above guidelines concerning the length of the sentence imposed, neither *Busic* nor *Pinto* violates this facet of the double jeopardy clause.

2. *Multiple Prosecution*

The Supreme Court has balanced the competing interests of the individual and the government in determining the scope of the guaran-

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where a second punishment is attempted to be inflicted for the same offence by a judicial sentence.").

55 *See* North Carolina v. Pearce, 395 U.S. 711, 718 (1969) ("We think it is clear that this basic constitutional guarantee is violated when punishment already exacted for an offense is not fully 'credited' in imposing sentence upon a new conviction for the same offense."); *see also* Westen, *supra* note 4, at 1024 ("[T]he state may not 'double up' on a defendant's sentence by punishing him 'again' after he has fully served the proper sentence prescribed by law for an offense."); *cf.* M. FRANKEL, CRIMINAL SENTENCES—LAW WITHOUT ORDER, 86-102 (1972) (arguing that when prison sentence is indeterminate, punishment is more retributive than rehabilitative).

Pearce outlines the method for crediting punishment: "If, upon a new trial, the defendant is acquitted, there is no way the years he spent in prison can be returned to him. But if he is reconvicted, those years can and must be returned by subtracting them from whatever new sentence is imposed." North Carolina v. Pearce, 395 U.S. at 719. The credit rule also covers time off for good behavior, *id.* n.13, and fines, *id.* at 718 n.12. It remains unclear whether credit for time served would completely bar resentencing when a defendant has served the entire term of the sentence originally imposed.

56 *See* Whalen v. United States, 445 U.S. 684 (1980). In *Whalen,* the Supreme Court vacated the defendant's consecutive sentences for rape and felony murder because the legislature had intended that rape be a lesser included offense to felony murder in furtherance of rape. The Court held that to allow the consecutive sentences would be multiple punishment in violation of the double jeopardy clause; the defendant's total sentence would be greater than the maximum sentence authorized for the predicate felony. The Court noted that "the question whether punishments imposed by a court after a defendant's conviction upon criminal charges are unconstitutionally multiple cannot be resolved without determining what punishment the Legislative Branch has authorized." *Id.* at 688; *see also* Missouri v. Hunter, 103 S.Ct. 673 (1983) (multiple punishment principle does not prohibit imposition of cumulative convictions pursuant to two statutes proscribing same conduct when multiple convictions are specifically intended by legislature); Blockburger v. United States, 284 U.S. 299, 304 (1932) ("[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, [and therefore multiple punishment,] is whether each provision requires proof of a fact which the other does not.") (citations omitted); Schwartz, *Multiple Punishment for the "Same Offense": Michigan Grapples with the Definitional Problem,* 25 WAYNE L. REV. 825, 826 (1979) (focusing on multiple punishment guarantee as "essentially a limitation upon judicial interpretation of the substantive criminal law"); Westen, *supra* note 4, at 1024 ("One cannot know whether a defendant is being punished *twice* without knowing whether he has yet been fully punished *once,* and one cannot know whether a defendant has been punished once without identifying the law that governs sentences for particular conduct.") (emphasis in original); Note, *Twice in Jeopardy,* 75 YALE L.J. 262, 299-321 (1965) (double jeopardy limits courts' power to accumulate convictions and punishment when legislature is not explicit).

tee against unjustified, repeated prosecution. With respect to the individual's interest in repose, the Court has stated:

> [T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[57]

The Court balances the individual interest in repose with the government's interest in just punishment stating:

> Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction.[58]

Generally courts do not invoke the double jeopardy protections against multiple prosecution unless the prosecution involves retrial.[59] Neither the *Busic* nor the *Pinto* resentencing decision required a retrial because the judge in each case merely imposed a new sentence on a standing conviction.[60] Thus, in a technical sense, the double jeopardy guarantee against repeated prosecution does not affect resentencing. Nevertheless, the interests that courts balance to determine the extent of the retrial protection are relevant to resentencing because the imposition of a sentence (like a decision at a trial) gives the defendant some assurance that his jeopardy may be ended.[61]

Occasionally, when a case involves both a defendant's finality inter-

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57 Green v. United States, 355 U.S. 184, 187-88 (1957).

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

59 *See* United States v. Martin Linen Supply Co., 430 U.S. 564, 569 (1977) ("[T]he 'controlling constitutional principle' focuses on prohibitions against multiple trials.") (quoting United States v. Wilson, 420 U.S. 332, 346 (1975)); United States v. Wilson, 420 U.S. 332, 342 (1975) ("The development of the Double Jeopardy Clause from its common law origins suggests that it was directed at the threat of multiple prosecutions, not at Government appeals, at least where those appeals would not require a new trial."); Dunsky, *supra* note 51, at 36-37; *see also supra* note 41; *cf.* United States v. DiFrancesco, 449 U.S. 117, 132 (1980) (court's review of respondent's sentence does not offend double jeopardy principles even though it might deprive respondent of more lenient sentence).

60 *See supra* notes 33-41 and accompanying text.

61 The interests of the accused in a fair trial and in ending the ordeal of criminal proceedings, *see supra* notes 4, 43, are present in resentencing decisions (although possibly to a lesser degree) as well as in retrial situations. Courts must still balance these interests against the government's desire to punish crime. *See* United States v. Busic, 639 F.2d at 952 n.13 (balancing in favor of government in resentencing context); *supra* notes 4, 44; *see also* McClain v. United States, 676 F.2d 915, 918 (2d Cir. 1982) (holding double jeopardy not violated when resentencing followed defendant initiated appeal because defendant lacked finality interest; implicitly acknowledging need to balance interests). *But cf.* United States v. Hodges, 628 F.2d 350, 353 n.3 (5th Cir. 1980) (in resentencing, courts limit double jeopardy guarantee

est and the government's desire to detect and punish crime but does not involve a retrial, the Supreme Court ignores the semantic limits of the retrial language and subjects the decision to double jeopardy analysis.[62] In *Bullington v. Missouri*,[63] for example, the court analyzed a sentence imposed after a successful appeal in light of the double jeopardy protections against retrial. The jury in *Bullington* found the defendant guilty of murder but, pursuant to Missouri law,[64] elected against capital punishment in a subsequent punishment proceeding. Bullington successfully appealed his conviction on procedural grounds. The Supreme Court held that upon retrial the prosecutor could not seek capital punishment because the first punishment proceeding was tantamount to an acquittal.[65] Although the earlier sentencing proceeding was not a trial, the

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to protection against "multiple punishment for the same offense," without considering defendant's separate finality interest).

Although the Supreme Court restricted a convicted defendant's expectations of finality in his sentence in United States v. DiFrancesco, 449 U.S. 117 (1980), *see supra* notes 20-25 and accompanying text, the impact of that case is arguably exaggerated. The Court noted: "Respondent was similarly aware that a dangerous special offender sentence is subject to increase on appeal. His legitimate expectations are not defeated if his sentence is increased on appeal any more than are the expectations of the defendant who is placed on parole or probation that is later revoked." 449 U.S. at 137; *see* Spence, *supra* note 4, at 743 ("The ultimate constitutionality of prosecutorial appeal of sentences may best be evaluated by examining the manner in which the Court has subtly balanced [the interest in the proper administration of justice against the interest of the individual to be free from multiple prosecution] in a variety of double jeopardy contexts . . . ."); Note, *supra* note 44, at 731 (recommending that courts use more relaxed standard to balance provisions regarding sentencing than standards used in guilt-determination); *see also* Westen, *supra* note 4 (resentencing court should balance three values: integrity of jury verdicts of not guilty, lawful administration of prescribed sentences, and interest in repose). *But see* P. O'DONNELL, M. CHURGIN & D. CURTIS, TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM: AGENDA FOR LEGISLATIVE REFORM 63 (1977) ("While defendants might argue that the appellate review provision violates the first double jeopardy protection because the initial sentencing decision reflects an 'implied acquittal' of any harsher sentence, the likely claim will be that the increased sentence constitutes multiple punishment for the same offense.") (footnote omitted); Freeman & Earley, *supra* note 45, at 109 (underlying values in double jeopardy distinguish government initiated appeals from those initiated by defendant).

62 *See* Bullington v. Missouri, 451 U.S. 430 (1981) (separate sentencing hearing); United States v. DiFrancesco, 449 U.S. 117, 132-38 (1980) (implicitly noting that resentencing is not retrial, *see supra* note 59, but elaborating on "fundamental distinctions between a sentence and an acquittal," *id.* at 133, thereby implying need to balance interests despite lack of retrial); North Carolina v. Pearce, 395 U.S. 711 (1969) (resentencing after second conviction analyzed using double jeopardy principles); *see also supra* note 61 (examples of balancing by lower courts despite lack of retrial).

63 451 U.S. 430 (1981).

64 MO. REV. STAT. § 565.006(2) (Supp. 1980). Under Missouri law, after a verdict of guilty in a first degree murder trial the jury must hear further evidence to decide, based on the presence or absence of aggravating factors, whether the defendant should receive capital punishment or a life sentence.

65 Justice Blackmun wrote for the majority:

> In the usual sentencing proceeding . . . it is impossible to conclude that a sentence less than the statutory maximum "constitute[s] a decision to the effect that the government has failed to prove its case." In the normal process of sentencing, "there are virtually no rules or tests or standards and thus no

Court decided that it sufficiently resembled a trial to invoke the finality interests that a defendant has after an acquittal.[66] The Court therefore limited the scope of the resentencing using double jeopardy analysis.

B. The *Bullington* Analysis and Its Application to *Busic* and *Pinto*

In light of *Bullington,* the distinction between the *Busic* and *Pinto* resentencing decisions[67] becomes determinative. The defendant's interest in repose in *Pinto*[68] is analogous to the finality interest in a *Bullington*-type acquittal.[69] In a criminal proceeding a defendant is effectively "acquitted" when the government fails to prove its case against him.[70] In *Bullington* the government failed to justify the imposition of capital punishment. In *Pinto,* the government could not justify a burglary conviction because the defendant had not committed that crime. Just as the

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> issues to resolve. . . ." By enacting a capital sentencing procedure that resembles a trial on the issue of guilt or innocence, however, Missouri explicitly requires the jury to determine whether the prosecution has "proved its case."

451 U.S. at 443-44 (footnote and emphasis omitted) (quoting M. FRANKEL, *supra* note 55, at 38).

66 The Supreme Court has held that the only complete barriers to further prosecution of a defendant are an acquittal or an appellate holding that there was insufficient evidence at trial to support a conviction. Once the factfinder has acquitted a defendant, retrial poses an unacceptable risk of convicting the innocent. *See, e.g.,* United States v. Martin Linen Supply Co., 430 U.S. 564 (1977) (state could not retry defendant after acquittal by judge when jury failed to reach verdict); Price v. Georgia, 398 U.S. 323 (1970) (state could not retry defendant for murder after implicit acquittal when jury returned guilty verdict on lesser included offense); Fong Foo v. United States, 369 U.S. 141 (1962) (no appeal of directed verdict of acquittal); Green v. United States, 355 U.S. 184 (1957) (defendant's jeopardy for first degree murder ended when jury returned only second degree murder conviction); *see also* Trono v. United States, 199 U.S. 521 (1905) (government, of its own initiative cannot attack verdict of acquittal without waiver by defendant) (dictum); Kepner v. United States, 195 U.S. 100 (1904) (former jeopardy includes verdict duly rendered although no judgment is entered on verdict). *But cf.* United States v. Scott, 437 U.S. 82 (1978) (emphasizing that term "acquittal" must receive narrow definition; resolution of factual elements of offense charged in favor of defendant).

A holding of insufficient evidence is tantamount to an acquittal. *See* Burks v. United States, 437 U.S. 1 (1978) (once reviewing court has found evidence insufficient to sustain jury's verdict of guilty, only just remedy is acquittal); *see also* Greene v. Massey, 437 U.S. 19 (1978) (extending *Burks* protection to state proceedings).

In *DiFrancesco,* the Court related these rules to the general double jeopardy balancing test:

> This is justified on the ground that, however mistaken the acquittal may have been [or however much evidence remains ungathered], there would be an unacceptably high risk that the Government, with its superior resources, would wear down a defendant, thereby "enhancing the possibility that even though innocent he may be found guilty."

449 U.S. at 130 (quoting Green v. United States, 355 U.S. 184, 188 (1957)); *see supra* note 45. *But see* Westen, *supra* note 4, at 1004-23 (postulating that strong power accorded to acquittal is due to jury's prerogative to acquit against evidence).

67 *See supra* text accompanying note 37.

68 The appellate court in *Pinto* held that there was insufficient evidence to convict Pinto of trespassory larceny; *see supra* notes 38-42 and accompanying text.

69 *See supra* note 65 and accompanying text.

70 *See supra* note 66.

jury "acquitted" Bullington regarding the ultimate punishment, the appellate court "acquitted" Pinto of the burglary count.

In comparison, Busic's finality interests were insignificant,[71] because his challenge to the form of his sentence relied on the validity of his conviction for armed assault. Under current double jeopardy doctrine a defendant who successfully appeals a conviction may be resentenced because the "slate [has been] wiped clean"[72] as to his former jeopardy. One can reasonably extend the "clean slate" rationale to *Busic* because the defendant initiated the appeal and the counts were sufficiently interdependent to make a successful appeal of the possession count tantamount to a partially successful appeal of the armed assault conviction.[73] By successfully challenging the allocation of his sentence for carrying a weapon, Busic did not qualify for the finality expectations of *Bullington* or *Pinto,* but rather erased that portion of his sentence to begin anew. Busic thus lost his right to demand repose and to plead the earlier sentencing as a former jeopardy.

Moreover, an important countervailing government interest existed in *Busic.* In *Busic,* the court did not base its reversal of the defendant's conviction for carrying a weapon on insufficient evidence. Busic clearly

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71 Under past double jeopardy doctrine, a court could have found that Busic "waived" the protection of the valid sentence in the earlier trial and therefore could be resentenced without double jeopardy ramifications. *See* Trono v. United States, 191 U.S. 521 (1905) (pre-appeal judgment completely bars any further prosecution for indictable offense, but defendant who appeals thereby waives his right to claim earlier dispensation or any part thereof as former jeopardy).

Courts no longer adhere to the waiver doctrine because "it cannot be imagined that the law would deny to a prisoner the correction of a fatal error, unless he should waive other rights so important as to be saved by an express clause in the Constitution . . . ." Green v. United States, 355 U.S. 184, 192 (1957) (adopting Holmes's dissent in Kepner v. United States, 195 U.S. 100, 135 (1904)).

72 North Carolina v. Pearce, 395 U.S. 711, 721 (1969). The basis for this clean-slate standard is that the government still has an interest in convicting the defendant that can overcome his desire for finality. Illinois v. Somerville, 410 U.S. 458, 470 (1973) (" '[A] defendant's . . . 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.' ") (emphasis omitted) (quoting Wade v. Hunter, 336 U.S. 684, 689 (1949)); United States v. Tateo, 377 U.S. 463, 466 (1964).

The clean-slate rule is limited because a court cannot retry a defendant for an offense greater than and including the offense for which he was previously convicted. The justification for this rule is that a conviction for a lesser included offense is an implicit acquittal as to any greater charges. Price v. Georgia, 398 U.S. 323 (1970); *see also supra* note 66.

73 639 F.2d at 947. The counts in *Pinto* for burglary and embezzlement were clearly not interdependent. Pinto did not have to rely on his embezzlement conviction to challenge the burglary conviction. Pinto simply did not commit burglary. Busic, on the other hand, challenged his conviction for possession of a weapon because it enhanced his sentence for armed assault. The nature of Busic's challenge necessarily acknowledged the interdependence of the two counts. Busic's appeal thwarted the court's sentencing plan, which was based on the aggregate conviction for the criminal assault with firearms on federal officers.

had carried a weapon.[74] The sole problem on appeal—given that the lower court had improperly convicted Busic under both a predicate felony and a separate enhancement statute—was the proper form of the sentence.[75] Because the Supreme Court had negated only the form of Busic's sentence in his successful appeal, the substance of his conviction, the possession of a weapon, remained to justify the government's strong interest in correctly reimposing the sentence.[76] Increasing Busic's sentence under the valid counts of the indictment would merely allocate the punishment for his conviction.[77]

In *Pinto* the countervailing government interest in further prosecution was less significant because no specific unpunished conduct justified reconsidering the defendant's sentence. Pinto had already been convicted and sentenced for embezzlement when the appellate court reversed his burglary conviction.[78] Thus, no justification[79] for resentencing Pinto existed; the court had fully sentenced him for all of his proven criminal conduct. Increasing Pinto's sentence because the court found him innocent of another crime defies logic.[80] Allowing such an increase would establish the assignment of punishment to specific statutory violations as an excuse to incarcerate "undesirable" individu-

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74 639 F.2d at 950 (court would resentence defendant on same record for very same offenses for which jury had found him guilty).

75 The Supreme Court held in *Busic* that the defendant could not be convicted under two separate statutes for carrying a firearm in one criminal scenario. Busic v. United States, 446 U.S. 398, 410 (1980); *see supra* text accompanying note 35.

76 *See supra* note 36 and accompanying text.

77 *Id.*

78 The district court sentenced Pinto to five years probation for his conviction for misrepresentation. 646 F.2d at 834. Pinto's interest in repose was particularly strong because he did not face merely the prospect of an increased sentence, but rather the prospect of incarceration as opposed to the relative freedom of probation.

79 The government arguably had an interest in increasing Pinto's sentence given the undisputed facts concerning Pinto's activities and the presiding judge's knowledge of those facts. Although the judge based part of Pinto's sentence on an inapplicable statute, the judge probably intended to punish Pinto for what he viewed to be the seriousness of Pinto's activities regardless of the particular statutory label placed on those activities.

The problem with this rationale, similar to the drawback of the holistic rationale, *see infra* notes 82-85, is that the appellate court acquitted Pinto of violating the burglary statute. Reimposing Pinto's sentence would punish him without proof of guilt. If the law accords a defendant the presumption of innocence until proven otherwise, increasing his sentence in response to an *acquittal* even on a related charge is unreasonable. *See generally* Patterson v. New York, 432 U.S. 197, 211 (1977) (prosecution must prove guilt beyond reasonable doubt before it can punish defendant for crime).

80 The district court on resentencing increased Pinto's sentence "in light of the reversal of the conviction and sentence on Count 1." United States v. Pinto, 646 F.2d 833, 838 (3d Cir.), *cert. denied,* 456 U.S. 816 (1981). This is a particularly dangerous rationale for increasing the sentence because it could also justify increasing a sentence where the government charged the defendant with two *unrelated* crimes, and an appellate court found insufficient evidence to support one of the convictions. This acquittal-like situation creates an unacceptably high risk of punishing an innocent defendant. *See supra* note 66.

als rather than as a deterrent of undesirable conduct.[81]

From a pragmatic view, which addresses only the amount of punishment imposed without accounting for double jeopardy concerns, little difference exists between the decisions allowing increases in the defendants' sentences in *Busic* and *Pinto.* The Supreme Court arguably adopted this pragmatic approach in *United States v. Grayson*[82] when it upheld an increased sentence because a guilty defendant had perjured himself during trial. The *Grayson* decision noted that judges sentence guilty individuals in light of their "whole person and personality."[83] This holistic approach to sentencing focuses on the entire conduct of the individual and makes the specific statutory allocation of punishment a secondary concern.

Apart, however, from any holistic justification for maintaining an imposed sentence, the double jeopardy clause requires a specific legal justification for reopening the question of a defendant's punishment.[84]

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81 See *supra* note 79 and *infra* notes 82-85 for a discussion of permissible and impermissible reasons for sentencing. The practice adopted in *Pinto* is also unacceptable on policy grounds. Despite the wide range of discretion that the law currently accords judges at sentencing, *see* M. FRANKEL, *supra* note 55; P. O'DONNELL, M. CHURGIN & D. CURTIS, *supra* note 61, the punishment accorded to each specific statutory violation at least gives the defendant some concrete indicia of the gravity of his offenses. Allowing judges to change sentences merely because a court has reduced the defendant's overall sentence, severely weakens any specific deterrent power in punishment. Rather than signaling society that specific conduct is undesirable, the courts will be establishing vague patterns guaranteeing no more than some punishment for "wrong action."

In criticizing the American system of allocating punishment, Professor Frankel concedes:

> Our system does tolerably well in following part of the Latin maxim—the part that says *nullum crimen* (no crime) except under law. With some exceptions—not necessarily insignificant ones, but still fairly called exceptions—we follow the precept that conduct may not be branded criminal unless it has been proscribed by a reasonably intelligible law in advance of its occurrence.

M. FRANKEL, *supra* note 55, at 4-5. Despite this specific branding of what constitutes criminal conduct, sentencing on a general level will change criminal statutes from signals to society to government tools used to justify sentencing of undesirable individuals. *Cf.* Waelder, *Psychiatry and the Problem of Criminal Responsibility,* 101 U. PA. L. REV. 378, 379 (1952) ("[U]nless it is implemented in the case of any actual infringement of the law, the threat of punishment will soon lose its deterring power.").

82 438 U.S. 41 (1978). Grayson was convicted of escaping from prison. The judge who passed sentence considered Grayson's false testimony as justification for an increased punishment. *Id.* at 44. The Supreme Court upheld the sentence, stating that a sentencing judge may consider all relevant factors in imposing a sentence. *Id.* at 50, 53, 55; *see* M. FRANKEL, *supra* note 55, at 24-25 ("The sentencing power is so far unregulated that even matters of a relatively technical, seemingly 'legal' nature are left for the individual judge, and thus for whimsical handling, at least in the sense that no two judges need be the same.").

83 438 U.S. at 53.

84 The Court's analysis of the defendant's argument in *Grayson* implicitly accepted his premise concerning permissible and impermissible practices of sentencing. *Id.* at 53-54. The permissible-impermissible dichotomy apparently rests on whether the court uses the holistic approach to justify a larger sentence or whether the court uses the approach to impose a sentence without any legal justification. A permissible sentencing practice may properly consider a defendant's act of perjury because it may indicate less likelihood for rehabilitation than for a defendant who admits his crime. An impermissible practice would impose a

Whereas the holistic sentencing rationale in *Grayson* granted sentencing discretion to a "sentencing judge,"[85] the double jeopardy clause requires the balancing of governmental interests in punishment with the defendant's legitimate expectations of repose before resentencing is even considered. *Pinto* exhibits a strong individual finality interest, and a weak governmental interest; *Busic* exhibits the reverse. Thus, the double jeopardy guarantee against retrials would pose no barrier to reopening the sentence in *Busic,*[86] but would prohibit further governmental action in *Pinto.*

IV
DUE PROCESS RESTRICTIONS ON RESENTENCING

The due process clause imposes further requirements on the act of resentencing.[87] These requirements, however, result in conclusions similar to those reached under the double jeopardy analysis of *Busic* and *Pinto.* Increasing a defendant's sentence, after an appeal based on form, as in *Busic,* remains valid under due process scrutiny, while similar action after a substantive appeal, as in *Pinto,* remains invalid.

A. The Due Process Standard

The due process clause prohibits vindictiveness as a motive for resentencing. In *North Carolina v. Pearce,*[88] the Court held:

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greater sentence to punish a defendant for perjury without a trial of that issue or to punish a defendant for suspected crimes when no conviction has occurred. *Id.*

In resentencing cases such as *Busic* and *Pinto,* the focus is not upon justifying the larger sentence but upon justifying the invasion of the defendant's repose in order to increase his sentence. Increasing a successful appellant's final sentence solely on the basis of the judge's broad sentencing discretion extends the holistic rationale into the impermissible realm. *See supra* notes 6, 79.

85 438 U.S. at 46-50, 53-55.

86 One unadopted theory argues that any imposition of sentence is an implied acquittal of any greater sentence, resulting in all the double jeopardy guarantees that extend to an acquittal. *See supra* note 66. Justice Douglas's concurrence in North Carolina v. Pearce, advances the implicit acquittal rationale noting that a defendant should "not be 'forced to run the gantlet' twice." 395 U.S. 711, 727 (1969) (Douglas, J., concurring) (quoting Green v. United States, 355 U.S. 184, 190 (1957)).

87 "To say that there exists no absolute constitutional bar to the imposition of a more severe sentence upon retrial is not, however, to end the inquiry. There remains for consideration the impact of the Due Process Clause of the Fourteenth Amendment." North Carolina v. Pearce, 395 U.S. 711, 723 (1969); *see* Goldman, *Does Resentencing After Appeal Pose a Threat to Due Process?,* Nat'l L.J., Aug. 2, 1982, at 19, col. 1.

88 395 U.S. 711 (1969). In Pearce, two defendants who had successfully appealed convictions on felony charges were retried and received greater sentences on their second conviction. The Supreme Court held that neither the double jeopardy clause nor the equal protection clause barred imposition of a more severe sentence upon reconviction after a successful defendant-initiated appeal. *Id.* at 668; *see supra* note 72. The Court, however, held that a court would violate due process if it increased a sentence to punish a defendant for appealing his original conviction. 395 U.S. at 668. To ensure against such vindictiveness, the Court formulated the *Pearce* prophylactic rule. *See infra* notes 89-91 and accompanying text.

> Due process of law . . . requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. . . .
>
> In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.[89]

The *Pearce* rule is a prophylactic rule guarding against vindictiveness; it is not an end in itself.[90] Moreover, the Supreme Court has restricted the expansion of *Pearce* into areas not involving the "possibility of vindictiveness" against a successful appellant.[91] Although a resentencing case appears to provide a prime opportunity for a vindictive judge to vent his aggression,[92] this potential wanes after a court has applied double jeopardy analysis to the factual setting.

B. Application of Due Process Principles to *Busic* and *Pinto*

Notwithstanding the absence of the *Pearce* requirement of "identifiable conduct on the part of the defendant occurring after . . . the original sentencing proceeding"[93] to justify resentencing, the Third Circuit did not violate Busic's right to due process by granting the district court the discretion to increase his sentence on the surviving count. If the district court had increased the sentence, it would not have imposed a

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The *Pearce* rule individualized the double jeopardy balancing test by requiring objective justification for an increase in a defendant's sentence. *See The Supreme Court, 1968 Term,* 83 HARV. L. REV. 7, 187 (1969) [hereinafter cited as *1968 Term*]; *infra* text accompanying note 89.

89 395 U.S. at 725-26 (footnote omitted).

90 *See* Dunsky, *supra* note 51, at 37-38 (discussing whether courts should apply *Pearce* rule to determine appropriateness of increase of sentences on appellate review).

91 *See, e.g.,* Chaffin v. Stynchcombe, 412 U.S. 17, 29 (1973) (if court withholds improper and prejudicial information regarding former sentence, jury resentencing will pose no likely threat of vindictiveness); Colten v. Kentucky, 407 U.S. 104, 116 (1972) (in Kentucky's two-tier system of administering certain criminal cases, hazard of being penalized for seeking new trial, which underlay *Pearce,* does not exist in de novo trial); Moon v. Maryland, 398 U.S. 319 (1970) (court declined to apply *Pearce* retroactively where affidavit from resentencing judge and statements of defense counsel at oral argument indicated no actual vindictiveness by judge); *cf.* Blacklege v. Perry, 417 U.S. 21, 28 (1974) (prosecutor has enough opportunities for vindictiveness in charging defendant to justify rule analogous to *Pearce*).

92 *See* Goldman, *supra* note 87, at 22 n.22 (Although no need existed for retrial after Busic's appeal, judge still had personal stake in discouraging appeals challenging his original judgment).

93 North Carolina v. Pearce, 395 U.S. 711, 726 (1969). A successful appeal is not within the ambit of conduct considered in *Pearce. Id.* at 723-24. One commentator criticized the Court's requirement for "objective information concerning identifiable conduct" as not providing adjudicable standards. *1968 Term, supra* note 88, at 190-91. Prior sentencing standards based on a judge's subjective evaluation of the defendant furnish no precedent concerning the relative weight a court accords specific instances of conduct. *Id.* Thus, after *Pearce* judges will be forced to justify sentences without a ready standard to use in examining their justifications.

"more severe sentence" per se, rather it would have simply reimposed the same substantially valid sentence.[94] In this context, no risk of vindictiveness exists, and the *Pearce* rule does not apply.[95]

Busic's appeal of the possession count was successful because the trial court failed to properly impose his sentence for carrying a weapon under 18 U.S.C. § 111.[96] Assuming that the trial judge had tailored Busic's original sentence to reflect an appropriate penalty for his conduct,[97] reimposing that sentence under section 111 would not be vindictive or violative of due process rights. The substance of Busic's sentence would not change; the court would merely correct its form to ensure that criminal conduct would not go unpunished. To assure that this reimposition of sentence is proper, the appellate court must limit the resentencing judge's discretion by directing that any new sentence not exceed the sum of the sentence on the surviving valid count plus the relocated penalty for the vacated enhancement counts.[98] With the preceding limit on the amount of punishment allowed at resentencing, the *Busic* decision satisfies the *Pearce* due process requirements.

In contrast, if resentencing in *Pinto* had survived double jeopardy analysis, it would have faltered under due process scrutiny. By finding Pinto's burglarly conviction substantively improper, the court eliminated all legal justification[99] for reinstating the punishment accompanying the invalid count. Any sentencing change on the remaining valid

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94 This distinction resulted because the trial judge chose "to spread his sentence over each of the counts upon which [the defendant] had been convicted, allocating the heavier period of imprisonment to the convictions under section 924(c)(2)," which the court of appeals subsequently vacated. United States v. Busic, 639 F.2d 940, 950 (3d Cir.), *cert. denied,* 452 U.S. 918 (1981); *see supra* notes 26, 28-34, 74-77 and accompanying text.

95 The *Pearce* court defined vindictiveness as "imposing a *heavier sentence* upon [a] reconvicted defendant for the explicit purpose of punishing the defendant for his having succeeded in getting his original conviction set aside." North Carolina v. Pearce, 395 U.S. 711, 723-24 (1969) (emphasis added). Therefore, under the Court's definition, absent imposition of a heavier sentence no basis exists on which to find "vindictiveness."

96 *See supra* notes 28-34, 74-77 and accompanying text.

97 In his article condemning the *Busic* and *Pinto* resentencing cases in light of the due process guarantee against vindictiveness, Gerald Goldman writes:

> The 3d Circuit suggested in *Busic* that increased sentences must be allowed to remedy unavoidable errors arising from the District Court's mistaken view on the validity of the defendant's convictions. However, trial judges at the outset can and should tailor the sentences they impose to reflect separately an appropriate penalty for each crime being punished.

Goldman, *supra* note 87, at 22, cols. 2-3 (footnote omitted). If courts follow Goldman's suggestion and tailor sentences at the initial proceedings to reflect appropriate penalties, resentencing (limited by double jeopardy analysis to *Busic*-type enhancement situations in which an appeal has resulted in unpunished criminal conduct) will not expose a defendant to vindictiveness because the judge merely will be replacing a proper sentence.

98 The Third Circuit reserved this question in *Busic:* "On the record before us, we need not express any opinion whether the new aggregate sentence may be greater than the original sentence." 639 F.2d at 953 n.14.

99 *See supra* notes 79, 82-85 and accompanying text.

counts, therefore, would constitute a "more severe sentence."[100] Imposition of the more severe sentence in *Pinto* would violate the *Pearce* standard because the sentence would not be based on subsequent conduct of the defendant.[101]

Due process analysis, as well as double jeopardy analysis, can distinguish *Busic* and *Pinto.* The same factors that preclude a finding of double jeopardy in Busic's resentencing permit *Busic,* unlike *Pinto,* to survive due process review. Busic's finality interests did not prevent resentencing under double jeopardy analysis because his appeal challenged only the form of his conviction, leaving the substance intact.[102] Clearly, failure to allow Busic's resentencing would have resulted in a windfall for the defendant. This continued validity of the substantive basis of Busic's conviction created a strong governmental interest in resentencing to accord just punishment.[103] Under due process analysis, Busic's unpunished liability provides legal justification for reimposing his sentence on the enhancement counts, thereby disposing of the issue of a "more severe sentence." The lack of a "more severe sentence" relaxes concerns over vindictiveness as long as the resentencing judge limits his discretion to impose no more than the defendant's original punishment.[104]

CONCLUSION

Criminal appeals likely to invoke the governmental interest in resentencing on surviving counts take one of two forms. A defendant may challenge the form of his conviction and sentence, as in *Busic,* or the substance of his conviction, as in *Pinto.* In *Busic,* the defendant claimed that he was improperly sentenced under two statutes because they both covered the same crime. In *Pinto,* the defendant argued that he was improperly convicted under two statutes because one of them did not apply to his conduct.

The double jeopardy clause protects a defendant's repose based on legitimate expectations of finality unless the government offers a significant legal justification to disturb that repose. In *Busic,* the Supreme Court provided that significant justification by vacating the defendant's sentence on one count of the charges against him, thus requiring resentencing to assure that criminal conduct not go unpunished. Busic's expectations of finality were unfounded because his appeal reaffirmed the validity of the criminal conduct on which the trial judge could properly have based the initial sentencing. Thus, Busic's appeal merely chal-

100 *See supra* text accompanying note 89.
101 *See id.*
102 *See supra* notes 71-73 and accompanying text.
103 *See supra* notes 74-77 and accompanying text.
104 *See supra* notes 93-98 and accompanying text.

lenged the structure of his sentencing, and there was no double jeopardy barrier to reimposing his sentence.

In contrast, Pinto's appeal did not raise a strong governmental interest to justify replacing the punishment on the count that the court held substantively invalid. Resentencing would merely have granted the judge a second opportunity to exercise subjective sentencing discretion, an impermissible activity absent legal justification.[105]

The due process clause requires that a court justify a "more severe sentence" imposed after an appeal by considering subsequent conduct of the defendant. By limiting acceptable resentencing cases to *Busic*-type appeals based on form, the double jeopardy clause assures that these cases survive due process analysis—correcting the allocation of the form of a sentence does not involve applying a more severe sentence. *Pinto*-type appeals, however, violate due process by imposing a more severe sentence without the justification of subsequent conduct. Resentencing judges who maintain this distinction will assure the double jeopardy and due process protections owed all defendants.

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105 *See supra* notes 79, 82-85 and accompanying text; *see also* McClain v. United States, 676 F.2d 915 (2d Cir. 1982), *cert. denied,* 103 S. Ct. 174-75 (1982). A jury found McClain guilty of bank robbery, 18 U.S.C. § 2113(a) (1982), armed bank robbery, 18 U.S.C. § 2113(d) (1982), and using a firearm during the commission of a felony, 18 U.S.C. § 924(c) (1982). The trial court imposed a 15-year sentence for the bank robbery counts and, under § 924(c), a consecutive 10-year sentence. 478 F. Supp. 732, 734 (S.D.N.Y. 1979). After McClain's conviction, Simpson v. United States, 435 U.S. 6 (1978), and Grimes v. United States, 607 F.2d 6 (2d Cir. 1979), both held that sentencing under the enhancement provisions of § 2113 precluded sentencing under § 924(c). The district court denied McClain's pro se petition challenging the § 924(c) sentence in light of *Simpson* and *Grimes.* On appeal, the Second Circuit vacated the sentence and remanded the case for resentencing under the valid § 2113 counts. 643 F.2d 911, 914 (2d Cir.), *cert. denied,* 452 U.S. 919 (1981).

On remand, the district court increased McClain's § 2113 sentence to 20 years. McClain v. United States, 527 F. Supp. 209, 223 (S.D.N.Y. 1981), *cert. denied,* 103 S. Ct. 174 (1982). The court did not claim that it had relocated a valid sentenee, but rather justified the increase by considering "appellant's life in crime, of which [subsequent fights and possession of intoxicants] in the prison were but a small part, and his apparcnt lack of remorse about the bank robbery." 676 F.2d at 919.

The Second Circuit approved the lower court's resentencing procedure, holding that "[i]n deciding what sentenee to impose, 'a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come.' " *Id.* at 918 (quoting United States v. Tucker, 404 U.S. 443, 446 (1972)). By basing the defendant's new sentence upon the subjective factors presumably considered in his first sentence, the district court arguably violated double jeopardy and due process protections, although this was unnccessary considering the facts of the case. The court could have resentenced McClain to correct the errors in the form of McClain's original sentence, but it is doubtful that McClain's appeal invoked a governmental interest sufficient to satisfy double jeopardy analysis and justify the district court's extended reanalysis of McClain's past and present character. *See supra* notes 4, 45. This extended reanalysis is precisely the form of resentencing that should lead to suspicions of vindictiveness violative of McClain's due process rights.