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Note

Double Jeopardy: Government Appeals of Sentences


I. INTRODUCTION

The fifth amendment provides that no person shall be "subject for the same offense to be twice put, in jeopardy of life or limb . . . ."1 Despite an ancient pedigree,2 the "familiar, but unilluminating"3 words of the double jeopardy clause have led to a body of case law that "can hardly be characterized as [a model] of consistency and clarity."4 Possibly as a result of this acknowledged state of confusion, the principles and applications of the double jeopardy guarantee present vital issues facing the American legal system.5 Any discussion of the double jeopardy clause is

1. U.S. Const. amend. V.
5. Justice Blackmun, writing the majority opinion in United States v. DiFrancesco, 449 U.S. 117 (1980) stated: "That the [double jeopardy] Clause is important and vital in this day is demonstrated by the host of recent cases. That its application has not proved to be facile or routine is demonstrated by acknowledged changes in direction or in emphasis." Id. at 127.

especially critical today because the clause is an integral part of the American criminal justice system that is presently the target of popular dissatisfaction growing out of a fear of increasing crime,\textsuperscript{6} and the subject of a wave of professional reforming zeal.\textsuperscript{7}

It was in this milieu that the United States Supreme Court faced, for the first time,\textsuperscript{8} the question of the constitutionality of a federal statute\textsuperscript{9} which granted government prosecutors the right to appeal the sentence of a criminal defendant because it was too lenient. In the landmark decision of \textit{United States v. DiFrancesco},\textsuperscript{10} the Supreme Court, in a five-to-four decision, reversed the Court of Appeals for the Second Circuit, and held that the appeal provision of 18 U.S.C. § 3576 (1976) did not violate the double jeopardy clause of the fifth amendment.\textsuperscript{11} Justice Blackmun, writing for the major-

\textsuperscript{6} See, e.g., Why the Justice System Fails, \textit{Time}, Mar. 23, 1981, at 24, quoting the Citizens Crime Commission of New York: “Unless we make the punishment for serious crime more certain and more appropriate, we cannot expect any respite from the violence now engulfing the city.”

\textsuperscript{7} See, e.g., Burger, W., \textit{Annual Report to the American Bar Association by the Chief Justice of the United States}, 67 A.B.A.J. 290 (1981). The Chief Justice in a speech aimed primarily at criminal justice reform, stated: “At every stage the [criminal justice] system cries out for change, and I do not exclude the adjudicatory stage. At each step in this process the primary goal, for both the individual and society, is protection and security. This theme runs throughout all history.” \textit{Id.} at 290. \textit{See also National Advisory Commission on Criminal Justice Standards and Goals}, \textbf{Courts} 116-17 (1973); \textit{President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts} 203 (1967) (Both supporting appellate review of sentences). The ABA has reversed course on several occasions on the issue of government appeals of sentences. However, the current ABA position opposes government appeals of sentences. \textit{ABA Standards Relating to the Administration of Criminal Justice, Appellate Review of Sentences}, Standard 20-1.1 (2d ed. rev. approved June 1980), \textit{cited in Freeman & Earley, supra} note 5, at 93. For history of the ABA's position prior to the 1980 resolution, see Freeman & Earley, \textit{supra} note 5, at 92-93; ABA Ad Hoc Committee, \textit{supra} note 5, at 617-19.

\textsuperscript{8} United States v. DiFrancesco, 449 U.S. 117, 125 n.9 (1980).


\textsuperscript{10} 449 U.S. 117 (1980).

\textsuperscript{11} \textit{Id.} at 143.
ity, concluded that section 3576, granting the government the right, under specified conditions, to appeal a sentence imposed upon a convicted dangerous special offender did not violate the guarantees against multiple trials and multiple punishments, which are inherent in the double jeopardy clause. The Court held that a review of an appeal does not, in itself, constitute a multiple trial in violation of the double jeopardy guarantee. Because a sentence is not accorded the same degree of finality as an acquittal, the majority concluded that a review of a sentence did not violate the double jeopardy protection against reprosecution after an acquittal.

By limiting the dicta and holdings in earlier cases, the majority was able to conclude that increasing the length of a defendant's sentence on appeal was not barred by the double jeopardy protection from multiple punishments. This result was strengthened by the majority's determination that a defendant could have no expectation in the finality of his original sentence where Congress had specifically provided in the dangerous special offender statute that the sentence is subject to appeal.

While the DiFrancesco decision's value as an instrument of clarity or as an effective tool of reform may be in doubt, the majority holding will undoubtedly have an impact not only on federal and state law, but also on the fundamental tenets of the

12. Justice Blackmun was joined by Chief Justice Burger, and by Justices Rehnquist, Stewart, and Powell. There were two dissenting opinions. The principal dissent, written by Justice Brennan, was joined by Justices White, Marshall, and Stevens. Id. at 143. Justice Stevens filed a separate dissenting opinion. Id. at 152.
13. Id. at 131.
14. Id. at 137.
15. Id. at 138.
16. Id. at 134-35.
17. See notes 113-32 & accompanying text infra.
18. One of the most controversial issues Congress faced in its attempt to recodify the Federal Criminal Code has been government appeal of sentences. The present House bill does not provide for government appeal of sentences. H.R. 6915, 96th Cong., 2nd Sess. § 4101 (1980). However, the present Senate bill does allow for such appeals. S. 1722, 96th Cong., 1st Sess. § 3725 (1979). The possible impact of the Supreme Court's decision in DiFrancesco was noted by the government in its petition for certiorari, where it argued that certiorari should be granted because the second circuit's decision in United States v. DiFrancesco, 604 F.2d 709 (2d Cir. 1979) "would appear to cast substantial doubt on the validity of a key section of the revised criminal code that is now pending in Congress. This section permits appellate review, at the government's behest, of sentences that are not within specific guidelines." Government's Petition for Certiorari at 9-10, United States v. DiFrancesco, 449 U.S. 117 (1980), quoted in Freeman & Earley, supra note 5, at 93-94 n.16. See also ABA Ad Hoc Committee, supra note 5, at 619.
19. "[T]he Double Jeopardy Clause of the Fifth Amendment has application to
double jeopardy as a whole.\textsuperscript{20}

This note will analyze the \textit{DiFrancesco} decision in the context of double jeopardy law and discuss the decision's effect on double jeopardy principles. This note will also suggest that the majority opinion in \textit{DiFrancesco}, ignoring as it does the tradition of double jeopardy protection, was not a completely satisfactory response to the issues facing the Court and will have a restrictive effect on the American system of individualized sentencing.

II. THE FACTS OF \textit{UNITED STATES v. DIFRANCESCO}\textsuperscript{21}

Eugene DiFrancesco was convicted of racketeering activities and conspiracy in a 1977 jury trial in the United States District Court for the Western District of New York.\textsuperscript{22} The next year in another jury trial in the same district, DiFrancesco was convicted of damaging federal property,\textsuperscript{23} unlawfully storing explosives,\textsuperscript{24} and conspiracy.\textsuperscript{25} DiFrancesco was sentenced to a total of nine years on his convictions in the second trial.

Prior to the first trial, the government had filed a notice\textsuperscript{26} indi-
cating its intent to invoke the dangerous offender sentencing provi-
dition of Title X of the Organized Crime Control Act of 1970.27 Under
the dangerous special offender statute, the prosecutor can secure
enhanced sentences upon conviction if it is established at a post-
conviction hearing that the defendant falls within one of three
"dangerous special offender" categories.28 A hearing was held af-
after DiFrancesco's conviction in the first trial but before the sen-
tencing in the second trial, and the district court ruled that DiFrancesco was a dangerous special offender within the meaning
of the statute.29 The court thereupon sentenced DiFrancesco
under section 3575(b) to two 10-year sentences on the racketeering
counts, upon which he was convicted at the first trial, to be served
concurrently with each other and with the nine-year sentence im-
posed after conviction at the second trial.30 Thus, the dangerous
special offender hearing resulted, in effect, in additional punish-
ment of one year. The government was dissatisfied with this result
and petitioned for a review under section 3576 of the sentences im-
posed upon DiFrancesco as a dangerous special offender.31 By a

28. Id. § 3575. Under section 3575, the prosecuting attorney must first file a notice
with the court alleging that a defendant is a "dangerous special offender" and
setting out the reasons for such allegation. Id. § 3575(a). The court then holds
a post-trial hearing to determine if the defendant is a "dangerous special of-
fender." Id. § 3575(b). If it appears by a "preponderance of the information"
that the defendant is a "dangerous special offender," the court can sentence
the defendant "to imprisonment for an appropriate term not to exceed
twenty-five years and not disproportionate in severity to the maximum term
otherwise authorized by law for such felony. Otherwise it shall sentence the
defendant in accordance with the law prescribing penalties for such felony." Id.
Finally, section 3575 contains definitions of "dangerous special offender." Id.
§ 3575(e)-(d).
29. 449 U.S. at 124. The district court concluded that DiFrancesco's criminal his-
tory "reveals a pattern of habitual and knowing criminal conduct of the most
violent and dangerous nature against the lives and property of the citizens of
this community. It further shows the defendant's complete and utter disre-
gard for the public safety. The defendant, by virtue of his own criminal rec-
ord, has shown himself to be a hardened habitual criminal from whom the
public must be protected for as long a period as possible." Id. (citing App. 27-
28 at 43).
30. 449 U.S. at 124.
31. 18 U.S.C. § 3576 (1976) provides:
With respect to the imposition, correction, or reduction of a sentence
after proceedings under section 3575 of this chapter, a review of the sentence
on the record of the sentencing court may be taken by the defendant or the United States to a court of appeals. . . . Review of
the sentence shall include review of whether the procedure em-
ployed was lawful, the findings made were clearly erroneous, or the
sentencing court's discretion was abused. The court of appeals on
review of the sentence may, after considering the record, including
the entire presentence report, information submitted during the trial
of such felony and the sentencing hearing, and the findings and rea-
divided vote, the Court of Appeals for the Second Circuit dismissed the government appeal on double jeopardy grounds. In reaching this decision, the court noted that the government's action was the first time the government had attempted to exercise a statutory power to seek an increase in sentence on appeal on the ground that the sentence imposed was too lenient. Strictly construing the language of section 3576, the Second Circuit determined that the district court's sentence was "final" rather than "tentative," and that any appeal which could lead to an increase in the sentence would place the defendant twice in jeopardy. After examining the dicta in previous cases, and determining that the increase of a valid sentence on appeal constituted "multiple punishment," the court concluded: "To subject Eugene DiFrancesco for a second time to the risk of the entire range of penalties that the law provides for his crimes would violate the [double jeopardy] constitutional policy."

The government's petition for certiorari was granted by the Supreme Court, and the case was decided on December 9, 1980.

34. 604 F.2d at 782.
35. Id.
36. Id. at 783.
37. See note 95 infra.
38. 604 F.2d at 785.
39. Id. at 787.
III. ANALYSIS

Generally, the United States "has no right of appeal in a criminal case absent explicit statutory authority."42 Under the statute involved in DiFrancesco, the government is permitted to appeal in any criminal case except "where the double jeopardy clause of the United States Constitution prohibits further prosecution."43 Thus, the only barriers to an appeal under the statute at issue in the DiFrancesco case are the general constitutional principles enumerated in the cases.

Although DiFrancesco was a case of first impression,44 the Supreme Court was not traveling in completely unexplored territory. Thus, it is necessary to analyze the decision within the general framework of double jeopardy principles and applications so as to discern the diffuse and often paradoxical state of "conceptual confusion"45 upon which the Supreme Court had to draw to reach a decision.

Although no single principle unifies the double jeopardy guarantee,46 Justice Black's discussion in Green v. United States47 is often cited to illustrate the general design of the fifth amendment clause:

The underlying idea, [of double jeopardy protection], one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.48

Within this general design, the Court has, over the years, expressed numerous purposes for the double jeopardy clause's pro-

44. 449 U.S. at 125-26 n.9. The Court of Appeals for the Second Circuit noted:

The government has not rushed to make use of its new power to seek review of sentences. Whether this has resulted from doubts about the constitutionality of the procedure, an extraordinary degree of satisfaction with the sentences imposed under the dangerous special offender provision, a decision to allocate prosecutorial resources to other tasks, or other factors is of course only a matter of speculation, but this case is apparently the government's first attempt to obtain review of a sentence on appeal.

604 F.2d 769, 781 (2d Cir. 1979) (footnotes omitted).
46. Comment, supra note 5, at 719.
47. 355 U.S. 184 (1957).
48. Id. at 187-88.
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tections. Both preservation of "the finality of judgments" and protection of the "integrity of a final judgment" have been suggested as primary purposes for the clause. The double jeopardy guarantee has also been said to serve as a barrier to "affording the prosecutor another opportunity to supply evidence which it failed to muster in the first proceedings." In *Ex parte Lange*, the Court stressed another purpose: "It is the punishment that would legally follow the second conviction which is the real danger guarded against by the Constitution."

The double jeopardy guarantee generally provides protection in the following situations: "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."

All of these situations were implicated in the DiFrancesco case. First, the Supreme Court resolved whether the review of a sentence on appeal involved a multiple trial constituting a second prosecution for the same offense after acquittal or a conviction. Second, the Court decided whether the increase of a sentence on appeal constituted a multiple punishment for the same offense.

A. Multiple Trials

In *Kepner v. United States*, the Supreme Court established that the double jeopardy clause clearly prohibits retrial after a final judgment of acquittal. According to the Court, the public

52. *85 U.S. (18 Wall.) 163, 173 (1874).*
54. *195 U.S. 100 (1904).*
55. Id. at 130. An exception to the bar against retrial after acquittal exists, however, where a mistrial is declared on the defendant's initiative (absent any bad faith conduct by judge or prosecutor). United States v. Dinitz, 424 U.S. 600, 607 (1976). Similarly, further proceedings are not precluded where a mistrial is declared for "manifest necessity." United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824) (retrial allowed where trial judge, without the consent of the defendant, discharged a jury which had been unable to reach a verdict). See *Illinois v. Somerville, 410 U.S. 458 (1973)* (retrial allowed where defective indictment dismissed after jury sworn in); *Wade v. Hunter, 336 U.S. 684 (1949)* (retrial allowed where combat field conditions necessitated withdrawal of court martial charges). *But see United States v. Jorn, 400 U.S. 470 (1971)* (plurality opinion) (retrial not allowed where judge abused discretion in declaring a mistrial). And where a defendant obtains dismissal prior to a jury verdict on grounds unrelated to factual guilt or innocence, the double jeopardy clause does not prevent retrial. United States v. Scott, 437 U.S. 82,
interest in the finality of criminal judgments so outweighs the government's interest in retrial that an acquittal will stand even where it was based on egregious error.\textsuperscript{56}

The majority in \textit{DiFrancesco} was able to conclude that section 3576 did not violate the prohibition against a second trial after acquittal by concentrating on "fundamental distinctions" between acquittals and sentences.\textsuperscript{57} The majority found: "Appeal of a sentence . . . would seem to be a violation of double jeopardy only if the original sentence, as pronounced, is to be treated in the same way as an acquittal is treated, and the appeal is to be treated in the same way as a retrial."\textsuperscript{58}

The Court's mention of the way "an acquittal is treated" is apparently a reference to the theory of "implied acquittal" first expressed in \textit{Green v. United States}.\textsuperscript{59} In \textit{Green}, the Supreme Court held that a jury's verdict that a defendant was guilty of second-degree murder, where the charge to the jury permitted it to find defendant guilty of first-degree murder, represented the jury's "implied" finding that the facts did not warrant a first-degree murder

\textsuperscript{56} Arizona v. Washington, 434 U.S. 497, 503 (1978) (citing Fong Foo v. United States, 369 U.S. 141, 143 (1962)). An additional rationale for the prohibition against retrials after acquittals is the jury's "prerogative to acquit against the evidence." Westen, \textit{supra} note 5, at 1012. However, the prohibition against retrials after acquittals does not apply to less formal counterparts of acquittals. \textit{See} Serfass v. United States, 420 U.S. 377 (1975). In \textit{Serfass}, the Court held that the government was not barred from appealing a pretrial order dismissing an indictment because jeopardy had not "attached" in the earlier proceedings. \textit{Id.} at 390-92. This result was justified, so the Court felt, because the pretrial determination spared the defendant from the ordeal of a full trial and because the prosecutor was not being given a second chance to argue before a trier of fact. \textit{Id.} at 391. \textit{But see} United States v. Martin Linen Supply Co., 430 U.S. 594 (1977), in which the Court held the government's appeal impermissible where the trial court had granted defendant's motion for acquittal after a deadlocked jury had been discharged. Although the trial court's action was based on a declaration of mistrial before the entry of the formal judgment of acquittal, the Court ignored "artificial distinctions" and found the action to be an acquittal in substance as well as in form. \textit{Id.} at 572, 574.

\textsuperscript{57} 449 U.S. at 133. The majority did not address the due process or equal protection arguments that have been leveled at government appeals of sentences. Such theories, which are beyond the scope of this Note, are discussed in ABA Ad Hoc Committee, \textit{supra} note 5 at 628-39; Freeman & Earley, \textit{supra} note 5 at 118-21.

\textsuperscript{58} 449 U.S. at 133.

\textsuperscript{59} 355 U.S. 184 (1957).
conviction. Thus, since there was an "implied acquittal" of the greater charges, a retrial on the first-degree murder charge would be a violation of the double jeopardy protection from multiple trials after an acquittal.

By analogy, if sentences are to be treated in the same manner as acquittals, then the imposition of a five-year sentence where a ten-year sentence would be permissible under the sentencing statute, would constitute a factfinder determination that the greater sentence was unwarranted. In effect, the defendant would be "impliedly acquitted" of the extra five-year sentence which he did not receive. However, the majority of the Court in DiFrancesco

60. Id. at 190. The "implied acquittal" doctrine was reaffirmed by the Court in Price v. Georgia, 395 U.S. 323, 329 (1970). In Price, the defendant was charged with murder, but was only convicted of voluntary manslaughter and sentenced to from 10 to 15 years imprisonment. The defendant successfully appealed his conviction and was subsequently retried for murder but once again was convicted of voluntary manslaughter and sentenced to 10 years imprisonment. The Supreme Court held that the defendant was placed twice in jeopardy at the retrial: "Although the petitioner was not convicted of the greater charge on retrial, whereas Green was, the risk of conviction on the greater charge was the same in both cases, and the double jeopardy clause of the Fifth Amendment is written in terms of potential or risk of trial and conviction, not punishment." Id. at 329. See also United States v. Basket, 530 F.2d 161, 186 (8th Cir. 1975), cert. denied, 429 U.S. 917 (1976); United States v. Lansdown, 460 F.2d 164, 171 (4th Cir. 1972).

61. 355 U.S. at 190.

62. Justice Stevens based his dissent in DiFrancesco almost completely on the similarity of "implicit acquittal" status of offenses and sentences. 449 U.S. at 182-54. Justice Stevens felt that the Court had never really replied to the argument put forth by Justice Harlan in his separate opinion in North Carolina v. Pearce: And the concept or fiction of an 'implicit acquittal' of the greater offense, ibid., applies equally to the greater sentence: in each case it was determined at the former trial that the defendant or his offense was of a certain limited degree of 'badness' or gravity only, and therefore merited only a certain limited punishment. 395 U.S. 711, 746-47 (1969) (Harlan, J., concurring in part, dissenting in part), quoted in United States v. DiFrancesco, 449 U.S. at 153 (Stevens, J., dissenting). Apparently, Justice Stevens would disagree with the holding in Pearce, but the majority in DiFrancesco made it clear that they were "not inclined to overrule Pearce." 449 U.S. at 135-36 n.14.

63. This was the conclusion reached by Justice Brennan in the principal dissent in DiFrancesco:

The sentencing of a convicted criminal is sufficiently analogous to a determination of guilt or innocence that the Double Jeopardy Clause should preclude government appeals from sentencing decisions very much as it prevents appeals from judgments of acquittal. . . . In both acquittals and sentences, the trier of fact makes a factual adjudication that removes from defendant's burden of risk the charges of which he was acquitted and the potential sentences which he did not receive.

449 U.S. at 146 (Brennan, J., dissenting).
refused to extend the "implied acquittal" doctrine to sentences, based on the greater degree of finality that has been accorded to both explicit and implicit acquittals. According to the majority, legal history demonstrated that the common law never ascribed the finality to a sentence that would prevent a legislative body from authorizing its appeal by the prosecution.

The Court also found that its previous decisions "clearly establish that a sentence does not have the qualities of constitutional finality that attend an acquittal." The majority cited *Bozza v. United States,* as support for this contention. In *Bozza,* the Court held that the double jeopardy clause was not offended where the trial court changed, on the same day, the defendant's sentence of imprisonment, to both a fine and imprisonment, where the mandatory minimum was both a fine and imprisonment. However, in citing *Bozza,* the majority failed to give any weight to the fact that the original sentence in *Bozza* was illegal, i.e., below the statutory minimum, whereas DiFrancesco's original sentence as a dangerous special offender was within the range of statutory sentences.

Additionally, the Court found support for its determination of the lack of sentence finality in *North Carolina v. Pearce.* The majority cited *Pearce* for the proposition that the double jeopardy clause does not bar the imposition of a more severe sentence on reconviction after the defendant's successful appeal of the original conviction. The majority dismissed the difference between the

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64. *Id.* at 136.
65. *Id.* at 133. The majority also cited Canadian and New Zealand statutes as evidence that countries tracing their legal systems to the English common law permit appeals of sentences. *Id.* It is interesting to note, however, that in England, prosecutorial appeal of sentences is forbidden and an appellate court cannot increase, at its own insistence, sentences imposed by a trial judge. ABA Ad Hoc Committee, *supra* note 5, at 640-41.
66. 449 U.S. at 134.
68. 449 U.S. at 134.
69. 330 U.S. at 166-67.
70. 18 U.S.C. § 3575(b) (1976) provides: "[T]he court shall sentence the defendant to imprisonment for an appropriate term not to exceed twenty-five years and not disproportionate in severity to the maximum term otherwise authorized by law for such felony."
72. 449 U.S. at 135. Although the double jeopardy clause protects a defendant from reprosecution for the same offense after conviction, the Court has created a major exception allowing the state to retry a defendant who has succeeded in having his first conviction set aside on appeal because of error in the trial. *Id.* This doctrine was first enunciated in United States v. Ball, 163 U.S. 662 (1896): "[I]t is quite clear that a defendant, who procures a judgment against him upon an indictment to be set aside, may be tried anew upon the same indictment, or upon another indictment, for the same offense of which
imposition of a new sentence after retrial in Pearce, and the imposition of a new sentence on appeal in DiFrancesco as "no more than a conceptual nicety." In emphasizing the Pearce holding, the Court ignored the fact that the Pearce Court based its decision allowing more severe punishment after retrial "upon the premise that the original conviction has, at the defendant's behest, been wholly nullified." This is a significantly different situation from that in DiFrancesco, where the original sentence was nullified at the government prosecutor's behest, without any action by the defendant. But, perhaps most importantly, the majority failed to note that under Pearce, the imposition of greater sentences after reconviction without proof of new acts committed by the defendant since the first sentencing would violate due process. It would seem that similar due process concerns are implicated in the review and possible increase of sentences on appeal by judges who have had no access to the demeanor evidence presented at the trial or sentencing hearing.

Finally, the Court found that the double jeopardy policies which bar reprosecution after an acquittal do not prohibit the review of a sentence. According to the majority, a review of a sentence will not subject the defendant to the embarrassment,
anxiety, expense, insecurity, and possibility of being found guilty even though innocent, that can occur at a trial or retrial on the basic issue of guilt or innocence.\textsuperscript{79} Justice Brennan sharply disagreed with the majority’s characterization of the sentencing process, exclaiming: “[C]learly, the defendant does not breathe a sigh of relief once he has been found guilty. . . . Surely, the Court cannot believe then that the sentencing phase is merely incidental and that defendants do not suffer acute anxiety.”\textsuperscript{80}

Even though a review of a sentence may create less anxiety in the defendant, it still appears that the majority ignored reality by basing the impact of a sentence review on its own perception of the law,\textsuperscript{81} rather than on the mental state of the defendant who is actually undergoing the “ordeal” of possible sentence enhancement.

The majority again focused on its own perception of the impact of sentence review on a defendant in dealing with the defendant’s expectation in the finality of his sentence. The majority concluded that since a dangerous special offender sentence is always subject to an increase on appeal, the defendant, “who is charged with knowledge of the statute,” can have no “legitimate expectation” that his original sentence will be final.\textsuperscript{82} The principal dissent characterized this reasoning of the majority as a “circular notion” in which “the very statute which increases and prolongs the defendant's anxiety alleviates it by conditioning his expectations.”\textsuperscript{83}

Thus, through an examination of history, legal precedent, and policy considerations, the majority concluded that acquittals are given a greater degree of finality than are sentences.\textsuperscript{84} As a result, the Court found the line of acquittal cases\textsuperscript{85} to be inapplicable to a review of a sentence.\textsuperscript{86} Once sentences were distinguished from acquittals the Court had little trouble in holding that the application of section 3576 did not constitute multiple trials in violation of the double jeopardy clause.\textsuperscript{87}

The Supreme Court’s holding in \textit{DiFrancesco} limits the scope of the double jeopardy guarantee against multiple prosecutions. It is now clear that the “implied acquittal” rule of \textit{Greene} will not be

\textsuperscript{79} \textit{Id.}
\textsuperscript{80} \textit{Id.} at 149-50 (Brennan, J., dissenting).
\textsuperscript{81} The majority noted that a review of a sentence is “nonadversarial in nature,” and the period of the defendant’s anxiety is prolonged “only for the finite period provided by the statutes.” \textit{Id.} at 136.
\textsuperscript{82} \textit{Id.}
\textsuperscript{83} \textit{Id.} at 150 (Brennan, J., dissenting).
\textsuperscript{84} \textit{Id.}
\textsuperscript{85} \textit{E.g.,} Fong Foo v. United States, 369 U.S. 141 (1962); Kepner v. United States, 195 U.S. 100 (1904).
\textsuperscript{86} 449 U.S. at 137.
\textsuperscript{87} \textit{Id.} at 142.
extended to sentences despite many logical similarities between acquittals and sentences. In distinguishing between the "or-deals" of trial and sentence review, the majority seems to close its eyes to the possibility that the defendant could, in effect, undergo what amounts to a second trial.

B. Multiple Punishments

The protection against multiple punishments has been a part of the double jeopardy guarantee ever since the Court held in Ex parte Lange that the double jeopardy clause bars the imposition of an additional sentence upon a defendant who has completed the maximum authorized sentence.

The idea that increasing a sentence on appeal is unconstitutional was first suggested in United States v. Benz. Relying on Ex parte Lange, the Court, while upholding the reduction of a sentence, indicated in dicta that an increase would offend the fifth amendment:

The distinction that the court during the same term may amend a sentence so as to mitigate the punishment, but not so as to increase it, is not based upon the ground that the court has lost control of the judgment in the latter case, but upon the ground that to increase the penalty is to subject the defendant to double punishment for the same offense in violation of the Fifth Amendment to the Constitution. . .

88. See notes 59-63 & accompanying text supra.
89. "The court of appeals on review of a sentence may . . . remand for further sentencing proceedings and imposition of sentence. . ." 18 U.S.C. § 3576 (1976). Thus, a prosecutor may get another chance to present arguments that he failed to muster at the first sentencing. See also Note, VA. L. REV., supra note 5, at 342-46 ("allowing the prosecutor to test the sentencing decision before multiple sentencing authorities permits him to restructure his sentencing recommendations and enhances the likelihood that he can procure a more severe sentence at some point in the process.") Id. at 345 (footnote omitted).
90. 85 U.S. (18 Wall.) 163 (1873).
91. Id. at 175-78.
92. 282 U.S. 304 (1931).
93. Id. at 307. Dicta in a non-double jeopardy case, Reid v. Covert, 354 U.S. 1 (1957), also suggested the impermissibility of increasing sentences on appeal: "In Swaim v. United States, 165 U.S. 553, this Court held that the President or commanding officer had power to return a case to a court-martial for an increase in sentence. If the double jeopardy provisions of the Fifth Amendment were applicable such a practice would be unconstitutional." Id. at 37-38 n.68, (plurality opinion). See also Murphy v. Massachusetts, 177 U.S. 155, 160 (1900) (dicta).

The double jeopardy clause also requires that in sentencing a defendant convicted upon retrial where the initial conviction was reversed, the court must give credit for punishment already endured. Bozza v. United States, 330 U.S. 160, 165-67 (1947). However, "the guarantee against double jeopardy imposes no restriction upon the length of a sentence imposed upon reconviction." North Carolina v. Pearce, 395 U.S. 711, 719. Of course, the new sentence
Despite this language, the DiFrancesco majority gave relatively short shrift to the argument that an increase of a sentence on appeal under section 3576 constitutes multiple punishment in violation of the double jeopardy clause. First, the Court discounted the Benz dictum as a statement of constitutional principle. The majority determined that the Benz dictum, which had been followed by a majority of the lower courts, was not supported by Ex parte Lange. The majority stated that the Benz Court had erroneously interpreted Lange as authority for the proposition that a court could not increase a sentence once the defendant had begun to serve it. The Court then limited the Lange holding to a situation in which a court imposes both imprisonment and fine, but where only one or the other punishment is authorized by statute.

Justice Brennan, in the principal dissent, contended that the Lange holding did not purport to "exhaust the reach of the double jeopardy clause." Apparently, the dissenters would agree with the Court of Appeals for the Second Circuit that the frequency and strength of previous dicta was sufficient to indicate a constitutional policy barring increase of a sentence on appeal by the government.

The Court's holding that section 3576 does not constitute multiple punishments in violation of the double jeopardy clause in-
creases the permissible range of government appeals in criminal cases. No longer may Benz be relied upon as precedent for the unconstitutionality of sentence increases.102 By sharply restricting the scope of Lange, the Court appears to limit unconstitutional multiple punishments solely to cases where the original sentence exceeded the statutory maximum.103 It should be noted in this regard, that section 3576 provides for an increase in the defendant's sentence only where the government is appealing the original sentence.104 But it would appear that, without the support of previous dicta indicating the unconstitutionality of sentence increases, state and federal legislatures are free to write statutes allowing for an increase of a sentence on appeal by either the government or by the defendant.105 This result is also made possible by the Court's determination that a defendant's perception of the finality of his sentence is conditioned by the statute that creates the anxiety in the first place.106

Taking the majority's reasoning to its logical conclusion, one could envision a statute allowing government appeal of sentences imposed in response to guilty pleas,107 or even allowing government appeal of verdicts of acquittal.108 The latter possibility would, of course, be unconstitutional, and the Court has clearly indicated that verdicts of acquittal are to be treated differently and are not appealable.109 But on a purely theoretical level, such statutes would be possible because, in the face of a statute allowing for an appeal, say of an acquittal verdict, the defendant could have no "expectation" in the finality of his acquittal (or sentence on a guilty plea).110 Every sentence and acquittal could be styled as

102. See notes 92-98 & accompanying text supra.
103. An example of such an unconstitutional multiple punishment would be the imposition by a sentencing judge of both a fine and imprisonment where the maximum punishment allowable by statute is a fine or imprisonment.
104. 18 U.S.C. § 3576 (1976) ("except that a sentence may be made more severe only on review of the sentence taken by the United States").
105. E.g., while presently, in Alaska, an appellate court may increase a sentence only when both the state and the defendant appeal the sentence, ALASKA STAT. § 12.55.120 (1989), one commentator noted:
   It is likely that Alaska would allow for an increase of sentence on appeal by the government alone if it were clear that such an increase of sentence were constitutional. Moreover, it is likely that other states would follow suit if the question of the constitutionality of an increased sentence on appeal was decided in favor of such an increase.
   Dunsky, supra note 5, at 21.
106. 449 U.S. at 117-18.
107. Id. at 149, n.9 (Brennan, J., dissenting).
108. Id. at 150, (Brennan, J., dissenting).
109. Id. The principal dissent notes that, "[T]he court, of course, acknowledges that verdicts of acquittal are not appealable." Id. at 150 n.10.
110. Id. See note 82-83 & accompanying text supra.
merely "tentative." It is to be feared that the majority’s holding that section 3576 appeals of sentences are constitutional will allow legislators to combine the Court’s reasoning with statutory finesse to extend the reach of government appeals into areas that have heretofore been considered protected by the double jeopardy clause.

IV. CONCLUSION

In an area of law characterized by competing interests and devoid of clear precedent, the Supreme Court’s decision in DiFrancesco represents a plausible application of double jeopardy principles to government appeal of criminal sentences. By disregarding long followed dicta, and by selectively distinguishing sentences from constitutionally protected acquittals, the majority was able to uphold the constitutionality of section 3576. The DiFrancesco decision is especially understandable in light of the pressures for reform of the criminal justice system and the growing demands for equalizing the interest of society with the protections afforded criminals.

But is DiFrancesco a completely satisfactory, or proper, or even necessary, response to the issues facing the Court?

The majority noted that there were alternative statutes available to Congress whereby the double jeopardy clause’s bar could have been avoided through the use of mandatory sentence terms, or by styling lower court sentences as “tentative.” But

111. See 449 U.S. at 141. See also Note, VA. L REV., supra note 5, at 342-45, for proposition that Congress has the power to define the sentencing process so as to include the appellate review of sentences.

112. See, e.g., Lincoln Journal, Dec. 11, 1980, at 1, col. 1, where Paul Douglas, Attorney General for the State of Nebraska stated in reference to the DiFrancesco decision: “I want to study it... and if it says what I think it says, I intend to try and get some legislation drafted to give Nebraska prosecutors the kind of appeal authority their federal counterparts now have.” He further indicated the distinct possibility of drafting a state statute allowing a prosecutor to appeal a life sentence handed down in a murder trial and seek the death penalty instead. Id.

113. See note 44 & accompanying text supra.

114. While the dissenters were able to counter many of the specific arguments of the majority no independant justification was offered necessitating an opposite result. 449 U.S. at 149-53.

115. See notes 92-98 & accompanying text supra.

116. See notes 57-89 & accompanying text supra.

117. See note 7 & accompanying text supra.

118. See note 6 & accompanying text supra.


120. 449 U.S. at 141. (analogous to a juvenile court procedure as in Swisher v.
these approaches, like section 3576 as construed by DiFrancesco, could lead to a change in the relationship between trial and appellate courts.\textsuperscript{121} No longer would a trial court's sentence serve as a final judgment—such final judgment pronounced by a court that had the opportunity to hear all the evidence and observe the defendant before determining the proper sentence.

The majority suggested that appellate review of sentences will lead to a greater degree of "consistency in sentencing."\textsuperscript{122} But it has also been suggested that "nothing is more unequal than treating unequal things equally."\textsuperscript{123} Sentences are, by their very nature, individual. Just as each crime and each criminal is different, so too each sentence will vary depending on the degree of punishment deemed appropriate by the sentencer and the necessity to protect society.\textsuperscript{124} But even assuming that review of government appeals will lead to more uniformity, would such a result outweigh the harm done to the individualized sentencing meted out by a trial judge?\textsuperscript{125}

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\textsuperscript{121} Brady, 438 U.S. 204, 216 (1978)).
\textsuperscript{122} Id. at 143.
\textsuperscript{123} ABA Ad Hoc Committee, \textit{supra} note 5, at 605.
\textsuperscript{124} Id. at 635. "Rarely, if ever, in the real world can two separate and distinct acts by different individuals at different times and different places and under different circumstances be viewed as equally guilty or morally reprehensible even though they both constitute the same statutory offense." \textit{Id}.
\textsuperscript{125} Several alternatives designed to produce more "consistent" sentencing have been suggested. The ABA has proposed "separate sentencing hearings" where the defendant, prosecutor, and the deciding judge would have the "full benefits of live interrogation and demeanor evidence." ABA Ad Hoc Committee, \textit{supra} note 5, at 622. The ABA has also suggested the use of "sentencing guidelines" to avoid "anomalies in sentences, particularly those at the draconian extreme. . . ." \textit{Id}. However, the committee also noted the probable reaction if the government is allowed to appeal sentences not within the guidelines:

Given the basic facts of human nature—prosecutors normally prosecute, judges usually do not like to be reversed—providing the government a right to appeal sentences that are below the guidelines would be a form of subtle coercion of the sentencing judge that could turn the lower end of the guidelines into something akin to a statutory mandatory minimum sentence."


Judge Marvin Frankel, of the United States District Court for the Southern District of New York, has proposed a system in which statutory codification and assignment of relative weight to specific sentencing criteria are used.
The Court also noted that section 3576 is a legislative attack on too-lenient judges in organized crime cases. But should the occasional arbitrariness of a few judges in some cases be remedied by allowing government appeals of all sentences? 

It should be remembered that the double jeopardy clause was designed to provide individuals with protections against government oppression. The right of a defendant to appeal his sentence should not be equally balanced with a government right to seek such review.

Nevertheless, as a result of *DiFrancesco*, there is no longer any doubt as to the constitutionality of the appeals provisions of the proposed revision of the Federal Criminal Code. State legislatures are now free to write statutes along the lines of section 3576.

Perhaps the majority's treatment of appellate review of sentences becomes more understandable when viewed against the possible alternatives to such review. It is conceivable that a state legislature, when faced with the unavailability of appellate review of sentences, could provide for some form of automatic increase in sentences such as that provided by habitual offender statutes. It is possible then, that government sentence appeals provide an "out" whereby state appellate courts can judicially correct sentences which they feel are too low. It should also be recognized that there is growing support for presumptive, guideline, or mandatory sentencing procedures as alternatives to indeterminate sentencing.

126. 449 U.S. at 142.

127. "We should not try to remedy this minor deficiency in the constitutional safeguard of an independent judiciary by a general erosion of constitutional safeguards for individual liberty afforded by the bar against double jeopardy and the right to due process." ABA Ad Hoc Committee, *supra* note 5, at 638. The Committee goes on to suggest constitutional means to avoid biased judges: "(1) careful screening of potential appointments to the Federal bench, (2) motions for disqualification of judges before trial where reasonable grounds exist and (3) actions for impeachment in the rare egregious instances." *Id.* at 639.

128. *See* United States v. Martin Linen Supply Co., 430 U.S. 564, 569 (1977) ("At the heart of this policy is the concern that permitting the sovereign freely to subject the citizens to a second trial for the same offense would arm the government with a potent instrument of oppression.")

129. *See* Greene v. United States, 355 U.S. 184, 201-02 (1957) (Frankfurter, J., dissenting) (history of the evolution of the double jeopardy clause language indicates the intent of the drafters to bar governmental appeals, and yet allow defendants to have that right).

130. Prior to the *DiFrancesco* decision some commentators believed that allowing the "government to appeal sentences on the grounds that they are too lenient would violate both the letter and the spirit of the Bill of Rights." ABA Ad Hoc Committee, *supra* note 5, at 641. But see note 18 & accompanying text *supra*.

131. *See* notes 119, 125 & accompanying text *supra*.
If such systems were to be legislatively adopted they would probably require some form of appellate sentence review. In this regard, *DiFrancesco* may be viewed as a judicial forerunner of what soon will be a legislative reality.

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