

1965

In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant

William W. Van Alstyne
William & Mary Law School

Repository Citation

Van Alstyne, William W., "In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant" (1965). *Faculty Publications*.
781.
<https://scholarship.law.wm.edu/facpubs/781>

IN GIDEON'S WAKE: HARSHER PENALTIES AND THE "SUCCESSFUL" CRIMINAL APPELLANT

WILLIAM W. VAN ALSTYNE*

More striking is a field in which the law is still in a wholly rudimentary state; due process of law in post-conviction procedures, in sentencing and treatment, where we continue to live in a jungle of total discretion.¹

DURING his brief moment before the Supreme Court of the United States it appeared that Clarence Gideon might establish the constitutional principle of right to counsel only to lose a chance to secure his own freedom. The State of Florida argued that whether or not the Supreme Court were to overrule *Betts v. Brady*,² and henceforth to require appointment of counsel in all felony trials of indigent defendants, such a decision should not be applied to Gideon himself.³ The state maintained that Gideon had received full due process as defined by the Supreme Court as of the time of his trial, and emphasized that Gideon's assault on *Betts v. Brady* was by way of collateral attack rather than direct appeal: "a decision reversing the ruling of the court below would necessarily be retroactive in effect."⁴ Such a decision might result in the release of 5,093 convicts in Florida, and countless thousands of others serving prison terms in the twelve other states which did not provide for appointed counsel absent special circumstances.⁵ While many of these prisoners might

*Professor of Law, Duke University; Senior Fellow, Yale Law School, 1964-65.

1. Address by Paul M. Bator, *Arthur Garfield Hays Conference*, March 7, 1963, printed in 10 WAYNE L. REV. 462-63 (1964).

2. 316 U.S. 455 (1942), holding that the due process clause of the fourteenth amendment does not require appointment of counsel upon request by an indigent, at the trial stage of a felony proceeding, absent any special circumstances. Following *Betts*, and prior to *Gideon*, the "special circumstances" qualification had been enlarged to erode *Betts*. See, e.g., *Chewning v. Cunningham*, 368 U.S. 443 (1962); *Hudson v. North Carolina*, 363 U.S. 697 (1960); *Kamisar, Betts v. Brady Twenty Years Later: The Right to Counsel and Due Process Values*, 61 MICH. L. REV. 219, 278-80 (1962).

3. Brief for Respondent, pp. 53-56, *Gideon v. Wainwright*, 372 U.S. 335 (1963).

4. *Id.* at 55. It has been reported that by October, 1963, 3,000 prisoners in Florida alone had filed petitions seeking review of their convictions on the authority of *Gideon*. *Krash, The Right to a Lawyer: The Implications of Gideon v. Wainwright*, 39 NOTRE DAME LAW. 150, 154 (1964); *Time*, Oct. 18, 1963, p. 53.

5. *Kamisar, The Right to Counsel and the Fourteenth Amendment: A Dialogue on "The Most Pervasive Right" of an Accused*, 30 U. CHI. L. REV. 1, 274-75, App. I, 67-74 (1962). While only five states (Alabama, Florida, Mississippi, and North and South Carolina), refused counsel even when requested, *Gideon* has subsequently been regarded as requiring appointed counsel even when not requested. See, e.g., *Doughty v. Maxwell*, 376 U.S. 202 (1964), reversing 175 Ohio St. 46, 191 N.E.2d 727, in which the Ohio Supreme Court refused to apply *Gideon* because the defendant had not originally requested counsel; *Palumbo v. New Jersey*, 334 F.2d 524, 528, 530 (3d Cir. 1964). Thus, the then current practice of thirteen states was substantially affected by the decision in *Gideon v. Wainwright*. Other states were also affected, since some convicts in these states had been convicted before the state provided for appointed counsel.

be subject to conviction a second time upon retrial, it was clear that a new trial would not be possible in every case; a number of convictions depended upon evidence no longer available. Thus, it was argued, to avoid the release of the guilty, any decision to overrule *Betts* should be written prospectively without interfering with Gideon's incarceration or that of others who were imprisoned following proceedings which afforded them due process as it was understood at the time.

Though the Court in *Gideon* did not respond to Florida's importunity beyond providing for Gideon himself,⁶ full retroactivity has since been accorded the *Gideon* decision, with the approval of the Supreme Court.⁷ Retroactive application of *Gideon* follows the consistent holding of the Court that "men incarcerated in flagrant violation of their constitutional rights have a remedy"⁸

6. Characteristically, the case was simply remanded for further action not inconsistent with the Court's opinion — an order which might reasonably have left the Florida courts wondering whether a new trial was required. 372 U.S. 335 (1963). For useful discussions of the case, see LEWIS, *GIDEON'S TRUMPET* (1964); Tuckor, *The Supreme Court and the Indigent Defendant*, 37 So. CAL. L. REV. 151, 162-71 (1964); Krash, *supra* note 4; Israel, *Gideon v. Wainwright: The "Art" of Overruling*, 1963 SUP. CT. REV. 211; Allison & Seymour, *The Supreme Court and the Doctrine of the Right of Counsel*, 46 J. AM. JUD. SOC'Y 259 (1963); Kamisar, *supra* note 5; Kamisar, *supra* note 2; Comment, *The Right to Counsel: Evolution or Revolution in the Criminal Law*, 12 KAN. L. REV. 525 (1964); Note, *The Supreme Court, 1962 Term*, 77 HARV. L. REV. 61, 103-05 (1963).

7. *Doughty v. Maxwell*, 376 U.S. 202 (1964); *Pickelsimer v. Wainwright*, 375 U.S. 2 (1963); *United States v. LaVallee*, 330 F.2d 303 (2d Cir. 1964), *cert. denied sub nom. LaVallee v. Durocher*, 84 S. Ct. 1921 (1964); *Craig v. Myers*, 329 F.2d 856 (3d Cir. 1964); *Palumbo v. New Jersey*, 334 F.2d 524 (3d Cir. 1964). See also *Striker v. Pancher*, 317 F.2d 780, 783-84 (6th Cir. 1963); *Nolan v. Nash*, 316 F.2d 776, 777 (8th Cir. 1963); *Commonwealth v. Rundle*, 415 Pa. 515, 204 A.2d 439 (1964); *Goodfellow v. Rundle*, 415 Pa. 528, 204 A.2d 446 (1964); Note, *The Supreme Court, 1963 Term*, 78 HARV. L. REV. 177, 181-87 (1964).

8. *Herman v. Claudy*, 350 U.S. 116, 123 (1956). See also *Jackson v. Denno*, 378 U.S. 368, 406 (1964) (Black, J., dissenting).

[I]f I thought that submitting the issue of voluntariness (of a confession) to the jury really denied the kind of trial commanded by the Constitution, I would not hesitate to reverse on that ground even if it meant overturning convictions in every State, instead of in just about one-third of them.

To be sure, the Court has never forthrightly addressed itself in any majority opinion to the constitutional necessity of applying an overruling constitutional decision retroactively. See *Jackson v. Denno*, *supra* at 406 (dissenting opinion); *Pickelsimer v. Wainwright*, 375 U.S. 2, 4 (1964) (dissenting opinion). On the other hand, it has uniformly granted or otherwise approved retroactive application each time an occasion has arisen. See, e.g., *Fahy v. Connecticut*, 375 U.S. 85 (1963) [applying *Mapp v. Ohio*, 367 U.S. 643 (1961), to facts and a trial which occurred prior to the decision in *Mapp*, the case being on appeal when *Mapp* was decided]; *Novell v. Illinois*, 373 U.S. 420, 424-25 (1963), *Reck v. Ragen*, 367 U.S. 433 (1961), *Burns v. Ohio*, 360 U.S. 252 (1959), and *Eskridge v. Washington State Prison Bd.*, 357 U.S. 214 (1958) [applying *Griffin v. Illinois*, 351 U.S. 12 (1956) retroactively]; *Smith v. Crouse*, 378 U.S. 584 (1964), [applying *Douglas v. California*, 372 U.S. 353 (1963) retroactively]; *Walker v. Johnston*, 312 U.S. 275 (1941) [applying *Johnson v. Zerbst*, 304 U.S. 458 (1938) retroactively].

For discussions regarding the constitutional necessity and appropriateness of applying overruling constitutional decisions retroactively, see Meador, *Habeas Corpus and the*

regardless of when the incarceration occurred. Because of state practices in retrying and re-prosecuting, however, the anomalous situation has arisen that the principal beneficiaries of retroactive overruling constitutional decisions are those who may be guilty even according to a determination by current due process standards, but who cannot be effectively prosecuted again. And those more recently convicted or otherwise convicted under circumstances where reprosecution is feasible are frequently disabled from securing a determination of their constitutional complaints.

A demonstration of this paradox lies in the wake of *Gideon v. Wainwright*. In urging that an overruling of *Betts v. Brady* could be made retroactive for Gideon's benefit, without "releasing indeterminate numbers of prisoners in some states," Gideon's Supreme Court brief opened with the following highly practical observation:

First, it must be noted that a defendant who obtains a reversal of his conviction may be retried for the offense of which he was convicted. . . . Moreover, it is possible that an even more severe sentence than that originally levied may be imposed at the conclusion of the second trial.⁹

The implication was that the Supreme Court need not be troubled by a retroactive decision in Gideon's case, for many persons held in prison under convictions obtained without benefit of defense counsel would be deterred from seeking any relief from fear of even harsher sentences upon retrial and conviction.

Prisoners in North Carolina, one of the five states which did not appoint counsel in all felony cases even when requested, quickly learned just what this meant. One of those prisoners was Sam Williams, an indigent convicted of larceny on February 19, 1963, without benefit of appointed counsel. He was sentenced to two years in prison and immediately began to serve that term. Following the decision in *Gideon*, Williams secured a new trial, held on July 29, 1963. He was again convicted. This time, however, he was sentenced to the maximum of ten years and denied credit for time previously served, and he necessarily lost "good time" points which he had accumulated toward secur-

Retroactivity Illusion, 50 VA. L. REV. 1115 (1964); Tucker, *The Supreme Court and the Indigent Defendant*, 37 So. CAL. L. REV. 151, 177-78 (1964); Torcia & King, *The Mirage of Retroactivity and Changing Constitutional Concepts*, 66 DICK. L. REV. 269 (1962); Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L.J. 319, 340-41 (1962); Bender, *Retroactive Effect of an Overruling Constitutional Decision: Mapp v. Ohio*, 110 U. PA. L. REV. 650, 668 (1962); Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 YALE L.J. 907, 942-43 (1962); Morris, *The End of an Experiment in Federalism — A Note on Mapp v. Ohio*, 36 WASH. L. REV. 407, 432 (1961); Note, *The Effect of Overruling Prior Judgments on Constitutional Issues*, 43 VA. L. REV. 1279 (1957); Note, *The Effect of Griffin v. Illinois on the States' Administration of the Criminal Law*, 25 U. CHI. L. REV. 161 (1957); Note, *Collateral Attack of Pre-Mapp v. Ohio Conviction Based on Illegally Obtained Evidence in State Courts*, 16 RUTGERS L. REV. 587, 593-94 (1952); Snyder, *Retrospective Operation of Overruling Decisions*, 35 ILL. L. REV. 121 (1940).

9. Brief for Petitioner, p. 44, *Gideon v. Wainwright*, 372 U.S. 335 (1963).

ing early parole. The North Carolina Supreme Court affirmed *per curiam*.¹⁰ Had Williams done nothing about his original unconstitutional conviction, he would have been imprisoned no more than two years. Retrial and resentencing at the instance of the state, or even a modification of the original sentence upon expiration of the trial court's term could not have followed.¹¹ For foolishly insisting upon his right to counsel and foolishly utilizing postconviction remedies, however, Williams now may languish in prison up to ten and one-half years. The point will surely not be lost on other North Carolina prisoners. The grimness of the joke will be most enjoyed, however, by those prisoners for whom re-prosecution presents no real danger because of the dissipation of the state's evidence against them; they, of course, will be undeterred from securing their unconditional release under the retroactive application of *Gideon v. Wainwright*.

The *Williams* sequel to *Gideon* is a near duplicate of the sequel to *Johnson v. Zerbst*,¹² which nominally established an indigent's right to appointed counsel in all felony cases originating in the federal courts. The year after *Johnson v. Zerbst* was decided, a federal prisoner named Thomas H. Robinson applied for habeas corpus because his original plea of guilty, entered two years before the *Zerbst* decision, had been made without benefit of appointed counsel. His

10. *State v. Williams*, 261 N.C. 172, 134 S.E.2d 163 (1964). See also *State v. White*, 262 N.C. 52, 136 S.E.2d 205 (1964), *cert. denied*, 33 U.S.L. WEEK 3266 (Feb. 2, 1965). In dicta, in *Williams*, the court said there was no error even if Williams was convicted the second time of a graver offense for which he originally had been tried but not convicted. Compare *Green v. United States*, 355 U.S. 184 (1957) (similar situation, Court held double jeopardy); *In re Hess*, 45 Cal. 2d 171, 288 P.2d 5 (1955); *Gomez v. Superior Ct.*, 50 Cal. 2d 640, 328 P.2d 976 (1958).

11. The North Carolina Constitution does not contain an express double jeopardy clause, but the North Carolina courts have inferred the usual protection from art. 1, § 17 of the state constitution. See *State v. Birkhead*, 256 N.C. 494, 124 S.E.2d 838 (1962); *State v. Crocker*, 239 N.C. 446, 80 S.E.2d 243 (1954); *State v. Mansfield*, 207 N.C. 233, 176 S.E. 761 (1934); *State v. Clemmons*, 207 N.C. 276, 176 S.E. 760 (1934). The full import of the double jeopardy clause of the fifth amendment is not yet a feature of procedural due process equally applicable to the states under the fourteenth amendment. See *Bartkus v. Illinois*, 359 U.S. 121 (1959); *Hoag v. New Jersey*, 356 U.S. 464 (1958); *Ciucci v. Illinois*, 356 U.S. 571 (1958); *Brock v. North Carolina*, 344 U.S. 424 (1953); *Palko v. Connecticut*, 302 U.S. 319 (1937); *United States v. Lanza*, 260 U.S. 377 (1922); *Fox v. Ohio*, 46 U.S. (5 How.) 410 (1847). Nevertheless, many of the same cases make it perfectly plain that double jeopardy considerations play a substantial role in the determination of due process. *Palko v. Connecticut*, *supra* at 323; *Brock v. North Carolina*, *supra* at 428-29, 435, 438; *Hoag v. New Jersey*, *supra* at 467; *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 457, 462 (1947), *rehearing denied*, 330 U.S. 853. If he uses appropriate sentencing standards, a trial judge in North Carolina may modify and increase a sentence during the same term of court, *State v. Godwin*, 210 N.C. 447, 187 S.E. 560 (1937); *In re Brittain*, 93 N.C. 587 (1885). He may not do so, however, merely because the defendant attempted to appeal his conviction. *State v. Patton*, 221 N.C. 117, 19 S.E.2d 142 (1942). Compare *State v. Bostic*, 242 N.C. 639, 89 S.E.2d 261 (1955). See also *United States v. Ball*, 163 U.S. 662 (1896); *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873); *United States v. Rosenstreich*, 204 F.2d 321 (2d Cir. 1953).

12. 304 U.S. 458 (1938).

original sentence had been life imprisonment. Upon retrial and conviction for the same offense, he was sentenced to death.¹³

The *Williams* and *Robinson* cases are not isolated occurrences. Harsher sentences following reconviction of successful appellants are permissible throughout the federal courts¹⁴ and in the vast majority of the states.¹⁵ The rationales which support the practice are several. In some jurisdictions it is asserted that the prior sentence has no legal existence whatever because it was imposed pursuant to a "void" conviction.¹⁶ More typically, it is said that by utilizing a postconviction remedy the defendant waived any benefit he may have had from the prior sentence.¹⁷ In other jurisdictions it is said that the appellate court has no authority to revise a sentence imposed by a trial court within statutory limits,¹⁸ and that the defendant should look to the executive

13. *Robinson v. United States*, 144 F.2d 392 (6th Cir. 1944), *aff'd*, 324 U.S. 282 (1945). In affirming, the Supreme Court did not consider any objection directed to the harsher sentence.

14. See, e.g., *Stroud v. United States*, 251 U.S. 15, *rehearing denied*, 251 U.S. 380 (1920); *Robinson v. United States*, *supra* note 13; *King v. United States*, 98 F.2d 291 (D.C. Cir. 1938); *Bryant v. United States*, 214 Fed. 51 (8th Cir. 1914). *But see* *Buhler v. Hill*, 7 F. Supp. 857 (M.D. Pa. 1934); and dicta in *United States v. Benz*, 282 U.S. 304, 307 (1931); *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 167-74 (1873).

15. *Murphy v. Massachusetts*, 177 U.S. 155 (1900); *Fay v. Noia*, 372 U.S. 391, 471-72 (1963) (dictum, dissenting opinion); *Kring v. Missouri*, 107 U.S. 221, 225 (1882) (dictum). A catalogue of state cases is presented in Agata, *Time Served under a Reversed Sentence or Conviction — A Proposal and a Basis for Decision*, 25 MONT. L. REV. 3 (1963); Whalen, *Resentence Without Credit For Time Served: Unequal Protection of the Laws*, 35 MINN. L. REV. 239 (1951); Annot., 35 A.L.R.2d 1283 (1954); Note, 50 VA. L. REV. 562-63 nn.11, 12 (1964); Note, 77 HARV. L. REV. 1272 (1964); Note, 45 MICH. L. REV. 912 (1947). Typical cases are *In re De Meerleer*, 323 Mich. 287, 35 N.W.2d 255 (1948), *cert. denied*, 336 U.S. 946 (1949); *McDowell v. State*, 225 Ind. 495, 76 N.E.2d 249 (1947); *People v. Starks*, 395 Ill. 567, 71 N.E.2d 23 (1947), *cert. denied*, 334 U.S. 821 (1948); *Ex parte Wilkerson*, 76 Okla. Crim. 204, 135 P.2d 507 (1943); *Drankovich v. Murphy*, 248 Wis. 433, 22 N.W.2d 540 (1946). *But see* *People v. Henderson*, 60 Cal. 2d 482, 386 P.2d 677 (1963); *Stonebreaker v. Smyth*, 187 Va. 250, 46 S.E.2d 406 (1948).

16. See, e.g., *Ex parte Wilkerson*, *supra* note 15; *Minto v. State*, 9 Ala. App. 95, 64 So. 369 (1913). Whalen, *supra* note 15, at 240-43, cuts through the fatuous claim that because a sentence is "void" for some purposes, e.g., to permit collateral attack, the time the defendant has spent confined in prison simply doesn't exist in the eye of the law.

The Government's brief suggests, in the vein of *The Mikado*, that because the first sentence was void appellant "has served no sentence but has merely spent time in the penitentiary;" that since he should not have been imprisoned as he was, he was not imprisoned at all. The brief deduces the corollary that his non-existent punishment cannot possibly be "increased." As other corollaries it might be suggested that he is liable in quasi-contract for the value of his board and lodging, and criminally liable for obtaining them by false pretenses.

King v. United States, 98 F.2d 291, 293-94 (D.C. Cir. 1938).

17. See the federal cases cited in note 14 *supra*; *Kohlfluss v. Warden*, 149 Conn. 692, 183 A.2d 626, *cert. denied*, 371 U.S. 928 (1962); 15 AM. JUR. 89, *Criminal Law* § 427 (1938).

18. See, e.g., *In re De Meerleer*, 323 Mich. 287, 35 N.W.2d 255 (1948); *People v. Judd*, 396 Ill. 211, 71 N.E.2d (1947); *In re Doelle*, 323 Mich. 241, 35 N.W.2d 251

department for an exercise of clemency power. Elsewhere, in rejecting double jeopardy claims, courts have held with Justice Holmes that a new trial and sentence is simply a continuation of the same case, and thus the previous sentence of the defendant does not foreclose independent consideration of an appropriate sentence at a second trial in that case.¹⁹

It is the burden of this article, however, that harsher sentences of the type imposed in the *Williams* and *Robinson* cases are unconstitutional whether imposed by federal or state courts, and that support for this conclusion lies in three constitutional provisions or principles.

The rule contended for will operate to prevent an increase in the original sentence whether that increase would be accomplished directly by raising the sentence, or indirectly by imposing a sentence which is harsher because it denies credit for time previously served, or because it denies good conduct points accumulated under the previous sentence.²⁰ Similarly, it will make no difference under the rule whether the original or subsequent sentence is imposed by a jury, a judge, or some other sentencing authority. The contention is, rather, that in all cases an original operative sentence within statutory limits and free of error prejudicial to the government must be regarded as a ceiling in any subsequent proceeding on the same offense, where the second trial is occasioned by a successful challenge to the original proceeding on constitutional grounds.

The original sentence, it will be argued, operates as a ceiling under these circumstances whether or not the second sentencing authority can be shown to have augmented the original sentence solely *because* the defendant insisted upon a fair trial. If such a showing could be made, the task of setting aside

(1948), *leave to file original petition for habeas corpus denied*, 336 U.S. 942 (1949). See also cases and discussion in Note, 109 U. P.A. L. Rev. 422 (1961). Compare *Short v. United States*, United States v. Wiley, 278 F.2d 500 (7th Cir. 1960); *Euziere v. United States*, 249 F.2d 293 (10th Cir. 1957).

19. The contention ordinarily appears with the "waiver" cases previously cited, and is built on Holmes' dissent in *Kepner v. United States*, 195 U.S. 100, 134-37 (1904), substantially adopted for fourteenth amendment purposes in *Palko v. Connecticut*, 302 U.S. 319 (1937).

20. It would not accomplish our purpose to argue only that credit for "good time" and all time previously served must be allowed, but that the second sentence is not otherwise limited by the first sentence. Unless the original sentence within statutory limits operates as a maximum from which credit for time already served is also deducted, the clog on defendant's right to a fair trial resulting from the risk of a harsher sentence remains for all those originally sentenced below the maximum.

The unacceptable compromise is nicely illustrated by the Florida practice. Credit for "gain time" and time already served must be allowed by the second sentence. *Vellucci v. Cochran*, 138 So. 2d 510 (1962); *Tilghman v. Mayo*, 82 So. 2d 136 (1955); *Harvey v. Mayo*, 72 So. 2d 385 (1954), *cert. denied*, 349 U.S. 965 (1955). On the other hand, the second sentence can be increased beyond the first sentence. *Rhoden v. Chapman*, 127 Fla. 9, 172 So. 56 (1937). The net result is that the allowance of credit may be a complete illusion; the second judge imposing sentence simply increases the sentence by an amount greater than he then deducts as an allowance for time previously served. An elegant study in this type of judicial cynicism is *Little v. Wainwright*, 161 So. 2d 213 (1964).

the excess of the second sentence would of course be simpler; the most orthodox teachings of equal protection would hold that harsher treatment of persons solely because they successfully pursued available postconviction remedies to test constitutional claims bears no rational connection with any legitimate governmental interest.²¹ Such cases, however, are understandably few in number²² and their easy resolution would not represent any significant amelioration of the main problem. After all, even when the suspicion is well founded that such a consideration was consciously employed, it will ordinarily be impossible to prove the point; the judge, jury, or other sentencing authority is unlikely to announce that it has added to the defendant's term solely from a sense of antagonism to those who insist upon a fundamentally fair trial.

The limitation against harsher resentencing will apply regardless of the manner in which the defendant secured a new trial. It will make no difference for our purposes whether the error was successfully raised by direct appeal, by collateral attack in the state courts made available by such devices as *coram nobis* or state habeas corpus, or by collateral attack in any appropriate federal court.

Finally, while the original sentence is to be regarded as a *ceiling* under the circumstances described, we shall not argue that defendant's interest in a constitutionally fair trial and an untrammelled testing of his constitutional claim should carry so far as to require his unconditional release should he be successful on appeal of his original conviction. What we say here will not prevent society from trying and convicting him again in an error-free proceeding. Self-evident as this qualification might seem, it nonetheless distinguishes a number of cases in which the essential merit of defendant's position was ob-

21. *Dowd v. United States ex rel. Cook*, 340 U.S. 206 (1951); *Cochran v. Kansas*, 316 U.S. 255 (1942); *United States v. Wiley*, 278 F.2d 500 (7th Cir. 1960), properly noted as an equal protection case in Note, 109 U. PA. L. REV. 422, 425-26 (1961). The fact that the sentence is within statutory limits makes absolutely no difference, of course, if it is manifest that the harshness of the sentence actually imposed was due solely to invidious or arbitrary considerations:

Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand . . . the denial of equal justice is still within the prohibition of the Constitution.

Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886). See also *People v. Harris*, 182 Cal. App. 2d Supp. 837, 5 Cal. Rptr. 852 (App. Dept., L.A. County Ct. 1960); *Bargain City U.S.A., Inc. v. Dilworth*, 407 Pa. 129, 179 A.2d 439 (1962); *Wade v. City and County of San Francisco*, 82 Cal. App. 2d 337, 186 P.2d 181 (1947); *People v. Oreck*, 74 Cal. App. 2d 215, 168 P.2d 186 (1946).

22. In none of the many cases cited in notes 12-16 *supra* was it contended that the harsher sentence was deliberately imposed solely as punishment for successfully appealing the original conviction. For illustrations of the difficulty in establishing such a contention, see *Nichols v. United States*, 106 Fed. 672, 678-79 (8th Cir. 1901). The difficulty of applying *Yick Wo v. Hopkins* to discretionary functions, in the absence of a clear discriminatory pattern or an express disclosure of discriminatory purpose, is fully treated in Comment, *The Right to Nondiscriminatory Enforcement of State Penal Laws*, 61 COLUM. L. REV. 1103 (1961). See also Note, *Appellate Review of Sentencing Procedure*, 74 YALE L.J. 379 (1964).

scured by his unavailing effort to take advantage of a more doubtful and farther-reaching double jeopardy argument. Nor will the considerations which require that the original sentence operate as a ceiling apply when the second trial is occasioned by successful appeal of a *state*, rather than by the defendant. *Palko v. Connecticut*²³ is not necessarily affected by anything to be said here.

UNREASONABLE CONDITIONS AND THE RIGHT OF FAIR TRIAL

The initial argument we shall consider applies only to the situation of the *Gideon*-type defendant who has successfully challenged his conviction on constitutional grounds. The essential persuasion itself is easily stated: the subjection of the defendant to the risk of a harsher penalty upon retrial and conviction for the same offense, as a condition of receiving a fundamentally fair trial, is an unconstitutional condition on his right to a fair trial. It forces him to surrender his constitutional rights, and it does not serve any countervailing, legitimate public policy.²⁴ In order to protect the right to a fair trial, an original sentence which the state may no longer challenge of its own accord, must operate as a ceiling for any sentence subsequently imposed, following the successful appeal and retrial of the accused for the same offense.²⁵

23. 302 U.S. 319 (1937).

24. See *Fay v. Noia*, 372 U.S. 391 (1963); *Green v. United States*, 355 U.S. 184 (1957); *Short v. United States*, *People v. Henderson*, 35 Cal. Rptr. 77, 386 P.2d 677 (1963). Regarding the *Henderson* case, see Note, 50 VA. L. REV. 559 (1964); Note, 1964 DUKE L.J. 915; Note, 9 VILL. L. REV. 517 (1964); Note, 16 STAN. L. REV. 1103 (1964).

25. The right to a fundamentally fair trial is, of course, a function of the fourteenth amendment and of the fifth, sixth and seventh amendments. Whether one also has a constitutional right to *appeal* certain issues in a criminal case has never been decided.

For reasons of a historical nature, the Supreme Court has repeatedly denied that the fourteenth amendment guarantees any appeal. *Douglas v. California*, 372 U.S. 353, 365 (1963) (dictum, dissenting opinion); *Griffin v. Illinois*, 351 U.S. 12, 18, 21, (concurring opinion), 27 (dissenting opinion) (1956) (dicta); *McKane v. Durston*, 153 U.S. 684, 687-88 (1894) (dicta). It is arguable, however, that due process of law requires an adequate opportunity for at least one impartial hearing of a claim that one is being held in prison in violation of his constitutional rights, whether that hearing be supplied by appeal, some other postconviction remedy within the state, or federal habeas corpus. See Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963); Reitz, *Federal Habeas Corpus: Postconviction Remedy for State Prisoners*, 103 U. PA. L. REV. 461 (1960). The Supreme Court has suggested that failure of a state to provide any adequate postconviction means of testing substantial federal questions may constitute a denial of due process. *Young v. Ragen*, 337 U.S. 235, 236-39 (1949); *New York ex rel. Whitman v. Wilson*, 318 U.S. 688, 689, 692 (1943); *Mooney v. Holohan*, 294 U.S. 103, 110-13 (1935); *Moore v. Dempsey*, 261 U.S. 86, 90-91 (1923). See also *Smith v. Bennett*, 365 U.S. 708, 713 (1961). On this basis, it is arguable that no post-conviction remedy is "adequate" if its availability is conditioned upon the willingness of the applicant to forego whatever protection would otherwise be provided by his sentence. The fact that history is against the determination of such a constitutional right, other than what is implied in Art. I, § 9 regarding habeas corpus, is not conclusive. Compare *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); and see Pedrick, *Freedom of The Press and the Law of Libel: The Modern Revised Translation*, 49 CORNELL L.Q. 581, 586

The doctrine of unconstitutional conditions generally holds that enjoyment of governmental benefits may not be conditioned upon the waiver or relinquishment of constitutional rights, at least in the absence of compelling societal interests which justify the subordination of such rights under the circumstances.²⁶ It has been held, for example, that a state cannot compel a person to surrender fourteenth amendment rights of belief, speech and association, in order to enjoy special privileges of property tax exemption available to others.²⁷ In this and similar cases the state was admittedly free wholly to withhold a benefit it had no constitutional obligation affirmatively to provide.

n. 20 (1964). Compare *Brown v. Board of Educ.* 347 U.S. 483 (1954); and see Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955). See also Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 U. CHI. L. REV. 502 (1964).

There is another alternative as well. Conceding that no state is required to provide a postconviction remedy even to test constitutional claims, the accused still has a number of federal postconviction opportunities, e.g., direct appeal or *certiorari* to the Supreme Court under certain circumstances, and habeas corpus in an appropriate federal district court. Since the successful pursuit of these federal remedies would still confront the accused with a state rule subjecting him to the risk of harsher resentencing following a second conviction for the same offense, he may be substantially deterred from pursuing remedies which Congress intended to provide for him. To the extent that the state's rule therefore operates to frustrate federally established postconviction remedies, it may be vulnerable to challenge under the Supremacy Clause.

In what follows in this article, however, we assume only that the defendant has constitutional immunity from serious criminal punishment inflicted without the observance of procedural due process, i.e., that he has a constitutional right to a fair trial. For the sake of argument, we shall assume that any right of appeal is of a statutory nature only.

26. See *Cramp v. Bd. of Pub. Instruction*, 368 U.S. 278, 288 (1961); *Torcaso v. Watkins*, 367 U.S. 488, 495-96 (1961); *Wieman v. Updegraff*, 344 U.S. 183, 192 (1952); *Speiser v. Randall*, 357 U.S. 513, 519-20 (1958); *Slochower v. Bd. of Higher Educ.*, 350 U.S. 551 (1956); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Hague v. CIO*, 307 U.S. 496 (1939); *Frost Trucking Co. v. Railroad Comm.*, 271 U.S. 583, 593-94 (1926); *Terral v. Burke Const. Co.*, 257 U.S. 529 (1922); *Western Union Tel. Co. v. Kansas*, 216 U.S. 1 (1910); *Dixon v. Alabama Bd. of Educ.*, 294 F.2d 150, 156, *cert. denied*, 368 U.S. 930 (1961); *Heilberg v. Fixa*, 236 F. Supp. 405 (N.D. Cal. 1964), *cert. granted*, 33 U.S.L. WEEK 3262 (1965); *Danskin v. San Diego Unified School Dist.*, 28 Cal. 2d 536, 171 P.2d 885 (1946). In each of these cases, a state unsuccessfully attempted to withhold a privilege unless the party interested in that privilege submitted to some restriction of a constitutional right which the state was powerless to impose directly. The cases involving the unconstitutionally convicted are far more flagrant. For in these cases, the state has by hypothesis already deprived a person of a constitutional right, viz., the right to a fair trial, but it refuses to undo the harm unless the man in prison is willing to relinquish still another right, viz., a statutory right against having his punishment increased, as a condition of correcting its original unconstitutional misconduct.

For other cases and discussions of unconstitutional conditions, see *Greene v. McElroy*, 360 U.S. 474 (1959); *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 155-56 (1946); *Goldsmith v. Bd. of Tax Apprs.*, 270 U.S. 117 (1926); Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960); Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321 (1935); Merrill, *Unconstitutional Conditions*, 77 U. PA. L. REV. 879 (1929).

27. *Speiser v. Randall*, 357 U.S. 513 (1958).

In electing to provide that benefit, however, the state was not free to do so in a manner which practically operated to abridge constitutional rights. In each case, the invalid abridgment resulted not from a direct prohibition of the right, but from subjecting the adversely affected party to an unreasonable dilemma — a choice free in law but not free in fact — to suffer a loss of constitutional freedom or forego benefits which those with fewer scruples might enjoy. Understandably, the Supreme Court has taken the position that government may not use its wealth and power ineluctably to erode constitutional rights of those too weak to resist temptation, too indifferent to their own welfare, or too cynical to care. It has maintained, rather, that restrictions on the availability of governmental benefits must be independently justified by compelling societal interests substantially connected with such limitations.

The doctrine of unconstitutional conditions is applicable to the rights of the unconstitutionally convicted in the following fashion: although the state and federal governments possess authority, as an original proposition, to revise and to increase sentences of the criminally convicted,²⁸ it is currently the law in every jurisdiction that no sentence may in fact be reopened for revision once the term of the trial court has expired, service of sentence has commenced, and the time for an appeal by the state (where such is allowed at all) has elapsed. Thus, immunity from an increased sentence is currently a protective feature of every state's criminal law. Defendants who passively remain in jail are assured at least that their sentences will not be increased; their original sentences describe the maximum period they must serve in prison, time actually served is necessarily credited against their sentences, and good conduct points earned are accumulated toward securing early parole. The right to a fundamentally fair trial is itself a constitutional right based on the due process clauses of the fifth and fourteenth amendments. Meaningful protection of that right forbids government, in the absence of important public interests, from conditioning its exercise upon the waiver — express or implied — of the protection against harsher sentencing to which one would be entitled if he did not insist upon that right.

It is true, of course, that the risk of harsher resentencing which is borne by those who appeal on constitutional grounds is no greater than the risk which is borne by those who appeal on nonconstitutional grounds. These other appellants include a larger number of persons whose convictions may suffer from error reversible only because state law so provides, and not because the error is of constitutional magnitude — for example, misrulings on hearsay or erroneous jury instructions, which offend the state's law of criminal procedure or evidence, but which are not so fundamental as to constitute a denial of fifth or fourteenth amendment procedural due process. Since these appellants were not denied a fair trial in the constitutional sense, it cannot be said that to require them to waive the protection provided by their original

28. Subject only to certain double jeopardy restrictions against multiple punishment and harassing procedures, discussed in text accompanying notes 46-47 *infra*.

sentences as a condition of appeal is to restrict, abridge, or discourage their constitutional right to a fundamentally fair trial. By hypothesis, they have had the benefit of that right. As to them, implied waiver operates only to abridge a nonconstitutional, state-provided right to a trial more circumspect than that required by the fourteenth amendment. Constitutional protection against harsher resentencing of these persons thus cannot be located in the right to a fundamentally fair trial (although it may arise separately from the double jeopardy or equal protection clauses, which are discussed hereafter). Similarly, in the one state where all convicts may apply for a sentence revision without impugning their conviction on any basis,²⁹ and where that application may result in an increased sentence, the risk of the increased sentence has no deterrent effect on the right to a fundamentally fair trial.

As to those originally denied a constitutionally fair trial, however, the requirement of waiver of protection otherwise provided by their original sentences operates to discourage the exercise of a constitutional right. The cases involving the unconstitutionally convicted are simultaneously more subtle and more flagrant than the usual cases in which the doctrine of unconstitutional conditions has been applied. They are more subtle because they reverse the technique of waiver. In the more usual case, the individual is required to surrender a constitutional right as a condition of holding onto some non-constitutional privilege. In *Wieman v. Updegraff*,³⁰ for instance, the individual was required to surrender his constitutional right to political association as a condition of holding onto the nonconstitutional privilege of public employment. In the cases we are to consider, however, the individual is required to surrender a nonconstitutional privilege as a condition of securing a constitutional right, i.e., he is forced to give up whatever immunity is provided by his original sentence as a condition of securing a fair trial.

In fact, however, these cases are more flagrant. For at the time the issue of waiver arises, the state has by hypothesis *already* deprived the accused of his constitutional right to a fair trial, and it attempts to condition his immunity from the risk of having his sentence increased upon his willingness not to assert that right. If such a requirement or condition is not to be unconstitutional under the circumstances, it can only be because it is justified through some substantial connection with compelling public interests which cannot otherwise be adequately protected.

Possible offsetting societal interests which could not be adequately served unless unlimited waiver were conclusively presumed, must, according to the cases, be "compelling" rather than merely "legitimate." Moreover, the connection of these compelling interests with the requirement of waiver must be "substantial" rather than merely "rational." Whatever the ultimate wisdom of

29. Connecticut. See Note, *Appellate Review of Primary Sentencing Decisions: A Connecticut Case Study*, 69 YALE L.J. 1453 (1960).

30. 344 U.S. 183 (1952).

the distinction, the Supreme Court has steadfastly required more by way of justification and nexus to sustain abridgments of personal liberty than it has in the regulation of economic prerogatives.³¹ The right to a fundamentally fair trial is, of course, at the very core of civil liberties. It is a right without which even the most jealous protection of preferred liberties, such as speech or privacy, would be undercut. Thus, it can only be subordinated, if at all, to the most compelling and necessary public regulations.

Since harsher resentencing of the unconstitutionally convicted has never been attacked as an instance of an unconstitutional condition which unreasonably impairs the right to a fair trial, the courts have had no occasion to defend state practices condoning the principle of implied waiver against this specific objection.³² We can only speculate, therefore, as to the possible offsetting societal interests which the states might bring forward in arguing that implied waiver is a necessary concept even though it may operate to discourage the right to a fair trial. Even with the benefit of considerable conjecture it will be seen that none of these interests is sufficiently compelling or so incapable of accomplishment by alternative means which do not affect the right to a fair trial as to justify the intimidating effect of the practice which they seek to rationalize.

31. Compare *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955), and *Day-Brite Lighting Co. v. Missouri*, 342 U.S. 421 (1952), and *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), and *Nebbia v. New York*, 291 U.S. 502 (1934), with *Shelton v. Tucker*, 364 U.S. 479 (1960), and *Speiser v. Randall*, 357 U.S. 513 (1958), and *Slochower v. Board of Higher Educ.*, 350 U.S. 551 (1956), and *Wieman v. Updegraff*, 344 U.S. 183 (1952), and *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). See also *McLaughlin v. Florida*, 85 Sup. Ct. 283, 288-89, 291 (1964); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n. 4 (1938).

32. There are several plausible explanations other than the possibility of oversight to account for the failure of counsel to have presented a challenge against harsher second sentences in terms of the doctrine of unconstitutional conditions. First, only a few of the cases in which a harsher second sentence was challenged resulted from a successful appeal based on a claim of constitutional right, and it is only these cases to which the doctrine is relevant. See cases cited in notes 14 and 15 *supra*. Second, because the technique of waiver employed in these cases reverses the two items to which it applies, the fact that the doctrine of unconstitutional condition may still be relevant is not as readily apparent as it ordinarily would be. See text following note 27 *supra*. Third, a number of state courts defended the permissibility of harsher second sentences without reference to waiver — *e.g.*, they indiscriminately relied upon a mistaken notion that the first sentence was altogether “void” and not merely void in the sense of being subject to collateral attack. The history and illegitimacy of the void sentence doctrine is adequately reviewed in Whalen, *Resentence without Credit for Time Served: Unequal Protection of the Laws*, 35 MINN. L. REV. 239, 240-43 (1951). See also note 24 *supra*. To the extent that this basis, rather than waiver, is employed as a defense for the permissibility of harsher resentencing, the following discussion in the text of this article may appropriately be recast in terms of the void sentence doctrine imposing an unconstitutional burden, rather than an unconstitutional condition on the appellant. It is, in addition, subject to the cogent objections which Whalen raises in his article.

Certainly it would not be persuasive for a state to maintain, for instance, that the monetary or personnel cost of entertaining postconviction constitutional claims in the state and federal courts will justify such an eccentric means of effecting economies by discouraging appeals. There is no evidence that costs have been high in those few jurisdictions which currently forbid harsher resentencing,³³ and surely the review of *constitutional* complaints of convicts, and their opportunity to have a fair trial are as important as the run-of-the-mill diversity suits in the federal courts, and the legions of ordinary civil cases contending for attention on state court dockets — cases in which personal liberty and due process claims are not at stake.

Neither is it maintainable that the rule operates as a fair and sensible means of limiting the retroactive effect of overruling constitutional decisions. This, it would seem, is not a legitimate goal for the state in the light of consistent constitutional doctrine that such constitutional decisions shall be applied retroactively. As the circuit court reasoned in *Craig v. Myer*, affirming the grant of a habeas petition to a *Gideon*-type defendant originally convicted in 1931:

In actuality, all criminal convictions, all appellate judgments reversing convictions and, most notably, all judgments sustaining collateral attacks on convictions impose legal consequences upon the basis of the court's present legal evaluation of past conduct. It is irrelevant that the judge's views of what constitutes a denial of due process may have changed since the occurrence of the events in suit, or that he or some other judge might have rendered a different decision had the same matter reached his court years earlier. The petitioner is entitled to the most competent and informed decision the judge can now make whether there was fundamental unfairness in his past conviction. Our system is not so unenlightened as to require that in attaching *present* consequences to 1931 occurrences, a judge must ignore all the insight that men learned in the law and observant of human behavior have acquired concerning the essentials of tolerable criminal procedure during the past 30 years.³⁴

In all of these cases — where the constitutional defect goes to the fundamental fairness of the trial as it bears upon the guilt or innocence of the accused — it would appear unreasonable not to give retroactive effect to overruling constitutional decisions. If lack of counsel, a financially interested judge, or an overreaching prosecutor, for instance, are deemed to make the risk of conviction greater than due process requires the defendant to assume, surely persons held in prison as a result of such defective procedures should generally

33. It is significant that harsher resentencing and the denial of credit for time previously served are forbidden in the military. See UNIFORM CODE OF MILITARY JUSTICE, Art. 63(b), 60 Stat. 127, 50 U.S.C.A. § 650(b), (1951). It is similarly forbidden in Germany. GERMAN CODE OF CRIMINAL PROCEDURE § 331 (para. 1) and § 358 (para. 2). So far as the author has been able to determine, the fact that defendants have nothing to lose by appealing under these circumstances has not proved unduly burdensome to the courts. The practice of harsher resentencing is also forbidden in California and Virginia. *People v. Henderson*, 60 Cal. 2d 482, 386 P.2d 677 (1963); *Stonebreaker v. Smyth*, 187 Va. 250, 70 F.2d 406 (1948).

34. 329 F.2d 856, 859 (3d Cir. 1964).

find relief.³⁵ The soundness of this proposition is not based on the myth of "discovered" law — the fiction that a new standard of due process is really the standard that always existed but which earlier judges simply failed to see.³⁶ It is based, rather, on the belief that the disabilities of imprisonment and the ignominy of a criminal conviction ought not depend upon the fortuity of time³⁷ *so long as the damage occasioned by the passage of time is not beyond recall*. The critical word in this proposition, of course, is "damage." Properly, it takes into account not only damage to the defendant but damage to society as well. Thus, there may be room for argument that retroactivity of overruling decisions should be stopped short of those cases where there currently exists no feasible opportunity for a successful reprosecution of the beneficiary of that retroactive decision, at least where the unconstitutional taint did not affect the fairness of the original trial—cases such as *Mapp v. Ohio*. On the other hand, there seems little room for disagreement that society has no interest in cutting off postconviction remedies for those who could be effectively tried again according to the most contemporary standard of due process.

As previously noted, however, the practice of denying retroactive effect indirectly by imposing a risk of harsher penalties has no rational connection with the one group of cases where retroactive effect might properly be denied — those cases in which the defendant is indubitably guilty but in which his guilt cannot be established in a second trial without crucial evidence which must be excluded only to deter certain pretrial police practices. In these cases ready access to postconviction remedies is unaffected by risk of a harsher penalty; the theoretical risk of a harsher sentence amounts to no risk at all because the prosecution will be unable to retry the defendant once it has been deprived of the crucial evidence. Knowing this to be so, the defendant will be undeterred from seeking to secure his unconditional release. Thus, the deterrent effect of the risk of harsher sentencing applies least to those for whom

35. The most telling reason for collateral attack on judgments of conviction is that it operates to eliminate the risk of convicting the innocent. Such a risk attends any conviction ensuing from the witting use of perjured testimony, the suppression of evidence, an involuntary confession, the denial of an opportunity to present a defense, and the denial of the right to counsel.

Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L.J. 319, 340-41.

36. See 1 BLACKSTONE, COMMENTARIES 69 (1769); GRAY, THE NATURE AND SOURCES OF THE LAW 93 (2d ed. 1921); Levy, *Realist Jurisprudence and Prospective Overruling*, 109 U. PA. L. REV. 1 (1960).

37. Of course, we are past the splendid myth of 'discovered law.' . . . We do not deal here, however, with considerations of *res judicata* and vested rights, but with the question whether, consonant with our society's conceptions of due process and general constitutional law, we could deny the constitutional right enunciated in *Gideon* to those who happened to be tried before the decision was handed down. Thus to hold would be to assign a lower constitutional status to pre-*Gideon* prisoners who were denied the right to counsel, a right so 'fundamental and essential to a fair trial' that it is made obligatory upon the States by the Fourteenth Amendment to the United States Constitution. . . .

United States v. LaVallee, 330 F.2d 303, 312 (2d Cir. 1964).

it might be properly intended, and most to those for whom it is least justified. Finally, whatever the merit of any rule designed to limit the retroactive effect of an overruling constitutional decision, one would suppose that it must properly be addressed to the Supreme Court. To the extent that state practices are maintained deliberately to deny a retroactive effect which has already been approved by the Court in a constitutional case, such practices are in conflict with the supremacy of the Court's law.

It may be said, however, that the general rule which permits harsher sentencing upon retrial and conviction needs no special defense, in that it simply recognizes that a different judge or jury may regard the offense or the offender more seriously. According to this view, the defendant ought not benefit from an original sentence which was — on hindsight — insufficiently severe; after all, there is certainly no reason to suppose that the first sentence was necessarily the only correct one. As a matter of fact, it is widely known that unduly lenient sentences may frequently be imposed following a plea of guilty, or following some bargain with the prosecutor.³⁸ Even absent tell-tale signs such as these, surely many prisoners are serving light sentences simply from their undeserved good luck of having come before a soft-hearted or careless judge the first time around. Since the interests of society in exacting fair punishment or effective rehabilitation may not have been properly vindicated through the original sentence, it may be argued, the discretion of the second sentencing authority ought not be fettered by the rule proposed here. Least of all should such a rule obtain when the second trial was occasioned by the defendant's own successful petition for a new trial, followed by a trial and sentence which are independent and free from error.

The argument is plausible, but it must be rejected. It is doubtful in the first place whether the state's interest in this type of sentence revision is compelling. For it is to be remembered that we are dealing with original convictions and sentences which are already free from legal error *so far as the state is concerned*. If an original sentence were prejudicial to the state because it was more generous than that prescribed by statute, or because it was imposed by a judge who failed to consider evidence he was legally obliged to consider, the state can, under the federal Constitution, perfect its own appeal.³⁹ Grave

38. See RUBIN, *THE LAW OF CRIMINAL CORRECTION* 116-18 (1963); Ohlin and Remington, *Sentencing Structure: Its Effect Upon Systems for the Administration of Criminal Justice*, 23 *LAW & CONTEMP. PROB.* 495 (1958); Newman, *Pleading Guilty for Considerations: A Study of Bargain Justice*, 46 *J. CRIM. L., C. & P.S.* 780 (1956); Note, *Guilty Plea Bargaining*, 112 *U. PA. L. REV.* 865 (1963); Note, *Prosecutor's Discretion*, 103 *U. PA. L. REV.* 1057 (1955); Note, *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 *YALE L.J.* 204 (1956).

39. *Palko v. Connecticut*, 302 U.S. 319 (1937). Because of the decision in *Kepner v. United States*, 195 U.S. 100 (1904), the federal government cannot appeal from an erroneous acquittal and then retry the accused. Nevertheless, erroneous sentences can be corrected without running afoul of the double jeopardy clause. See 28 U.S.C. § 2106 (1958); CONNECTICUT GOVERNOR'S PRISON STUDY COMMITTEE, *FIRST INTERIM REPORT*, App. (1956); Note, *Appellate Review of Sentencing Procedure*, 74 *YALE L.J.* 379 (1964).

errors in sentencing, as defined by a state's law enabling the state to appeal, are thus already guarded against to the exact extent the state legislature has has determined to be generally necessary to protect society. To the extent that subliminal sentencing leniency, against which the legislature has not seen fit to protect society by establishing a sentence review board with wide latitude to revise sentences, may exist in practice, the state itself has indicated that protection against lenient sentences generally is not regarded as a compelling interest.

Moreover, the availability of alternative means to protect the state against excessively lenient sentences, through establishment of a sentence review board to review and modify sentences generally,⁴⁰ gives rise to a telling argument against approving an *ad hoc* resentencing practice which, in operation, specially discourages defendants from seeking to secure a fundamentally fair trial. This is a device available even to those states which have constitutional scruples against state appeal. As the Supreme Court has properly recognized, even laws or state practices which serve legitimate objectives may be unconstitutional if they tend to abridge or discourage the exercise of constitutional rights, when alternative means are available which would equally fulfill those objectives without the same adverse effect on constitutional rights. Mr. Justice Frankfurter expressed the imperative of choosing the least repressive feasible means of promoting social ends as follows:

If the value to society of achieving the object . . . is demonstrably outweighed by the impediment to which the regulation subjects those whose [constitutionally protected interests] are curtailed by it, or if the object sought by the regulation could with equal effect be achieved by alternative means which do not substantially impede those [interests], the regulation cannot be sustained.⁴¹

Finally, doubt must frankly be expressed that the policy reviewed in this argument does in fact account for the prevailing permissibility of harsher resentencing. For if the states are really concerned that certain categories of sentences ought to be subject to revision in order more adequately to protect society, the current rule is a very strange way of expressing that concern. There is no evidence whatever to suggest that those able successfully to

40. *Palko v. Connecticut*, 302 U.S. 319 (1937). For a discussion of the unusual procedure for sentence review in Connecticut, see Note, 69 *YALE L.J.* 1453 (1960); CONNECTICUT GOVERNOR'S PRISON STUDY COMMITTEE, FIRST INTERIM REPORT (1956). So far as the author can determine, no state currently provides for an increase of a sentence within statutory limits unless the defendant makes the first move, and no state permits a trial judge to increase a sentence within statutory limits and not appealable by the state, once the trial court's term has expired and service of the sentence has begun.

41. *McGowan v. Maryland*, 366 U.S. 420, 462 (1961) (Frankfurter, J., concurring). See also *McLaughlin v. Florida*, 85 Sup. Ct. 283, 291 (1964). *School Dist. v. Schempp*, 374 U.S. 203, 265 (1963) (concurring opinion); *Shelton v. Tucker*, 364 U.S. 479, 487-88 (1960); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 163 (1951); *Heilberg v. Fixa*, 236 F. Supp. 405, 408 (N.D. Cal. 1964), *cert. granted*, 33 U.S.L. WEEK 3262 (1965).

appeal their original conviction or sentence are more likely than others to have been the beneficiaries of excessively lenient sentences. Viewed as an expression of policy to correct unduly lenient sentences, more harshly sentencing only those who are successful appellants appears to have no rational connection with the pattern, incidences, or causes of the whole group of sentences which may be objectionable. It appears far more likely, for instance, that those who plead guilty and who do not appeal (including the whole group of "guilty-plea bargainers"), are more frequently the beneficiaries of excessively lenient sentences. Yet none of these, and no others except successful appellants, are currently subject to the risk of harsher resentencing. This is not to argue that the current practice of permitting harsher resentencing only of successful appellants necessarily violates the equal protection clause *per se*, though such an argument may well have merit, but merely to say that as a policy which must be forthcoming to justify the practical abridgment of the right to fair trial which results from permitting harsher sentencing of the unconstitutionally convicted, this policy is neither compelling nor does it have a substantial connection with the condition of implied waiver which it seeks to justify.

Finally, however, it may be contended that the concern for those convicts held under unconstitutional convictions is a tempest in a teapot. For only those who are *successfully* retried run any risk of a harsher sentence or, for that matter, any sentence at all. Innocent convicts, serving time under defective judgments, will be undeterred from seeking post-conviction relief by any risk of being convicted — much less sentenced — a second time; secure in their knowledge of their own innocence, and justifiably confident that any new, fair trial will exonerate them, they have nothing to fear from the power of courts to deal more sharply with their guilty cellmates. Surely, it is not too much to discourage these latter from congesting the courts with motions for new trials, appeals, or habeas petitions, by reminding them that they ought to be content with whatever leniency has been shown them through the original sentence. The second verdict, delivered after a circumspect trial, demonstrates that the guilty defendant was trifling with the state and wasting its resources in seeking a new trial in the first place. A rule of practice, therefore, which merely commits independent sentencing discretion to the second tribunal is laudable, for it inhibits only those who are guilty, and who know that they would be convicted again, from wasting and abusing post-conviction remedies which ought not to be regarded as playthings of jailhouse lawyers.

This argument is easily penetrated. A second trial, consistent with procedural regularity, is not an ironclad guarantee of acquittal for the innocent. The studies by Borchard⁴² and Frank,⁴³ among others, provide vivid illustrations of regular trials reaching erroneous conclusions. Consequently, no sensible person in or out of prison should be inclined to confuse his personal certitude of his own innocence of a given offense with a misbegotten confidence

42. BORCHARD, *CONVICTING THE INNOCENT* (1932).

43. FRANK, *NOT GUILTY* (1957).

that a jury cannot be persuaded otherwise, even beyond a reasonable and irreversible doubt. In fact, the innocent convict was already once misjudged by a jury of his peers, and the constitutional defect present in that trial may not have been a contributing factor. Constitutionally correct procedure is the nearest approximation to omniscient decision-making which society's sense of *fundamental* decency, economy, and capacity currently affords. It would claim too much, however, to insist that it never errs. Innocent persons therefore may be persuaded to forego an opportunity for a fair trial, under the current permissibility of harsher sentences, from a justifiable apprehension that they will be convicted again.

Further, among "innocent" convicts who must gauge the likelihood of being convicted, the pressure to relinquish post-conviction remedies will be strongest, of course, for those who have already served substantial time under sentences open to collateral attack, and for whom even a small risk of being convicted again — with its concomitant risk of a substantial increase in the sentence, and the loss of credit for time previously served and of good conduct points — would appear unreasonable. There is no reason to suppose, however, that there are more guilty convicts within this group than among the categories of convicts having less, little, or nothing to lose by seeking a new trial.

Finally, aside from the falsity of the premise that only the guilty need fear conviction, and the unequal fashion in which harsher resentencing carries it out, it is important to reiterate that procedural due process is simply not based only on a concern to determine guilt or innocence. As a matter of fact, significant extensions of procedural due process have commonly been made in cases where the "guilty accused" were unconditionally released. Constitutional immunity from coerced confessions, unreasonable searches and seizures, self-incriminating disclosures, multiple and harassing prosecutions, and cruel and unusual punishments are not constitutionally forbidden solely because they might convict the innocent. Immunity from such practices is required, rather, because of considerations of decency which transcend the statutory guilt of any particular person. To confine the availability of constitutional appeal to those who are certain that they would be acquitted in a second trial, and to those who, while equally certain of their actual guilt, have no fear of being tried a second time is to ignore the basis of such constitutional standards.

Of the arguments which might support the prevailing practice, then, none seems sufficient to excuse the adverse effect on the rights of the unconstitutionally convicted which the practice currently produces. And for that reason, it is submitted that waiver of the benefits of an original sentence of the unconstitutionally convicted may well be a prohibited condition which unreasonably abridges fifth and fourteenth amendment rights to a fundamentally fair trial.

BEYOND THE UNCONSTITUTIONALLY CONVICTED

The argument from unconstitutional conditions applies only to those held in state and federal prisons under a conviction suffering from a federal con-

stitutional defect. The greater number of prisoners deterred from pursuing post-conviction remedies, however, are held under convictions which are subject to attack only on non-constitutional grounds: misrulings on hearsay evidence, erroneous instructions, or other mistakes sufficient for reversal according to state or federal law but not sufficient to affect that fundamental fairness implicit in procedural due process. These cases cannot readily be brought within the doctrine of unconstitutional condition, since relinquishment of the benefit of a prior sentence is not made a condition for the enjoyment of a constitutional right. Nevertheless, because the states have "no interest in preserving erroneous judgments," and "no interest in foreclosing appeals therefrom by imposing unreasonable conditions on the right to appeal,"⁴⁴ these defendants should also be freed of the risk of more severe sentencing upon retrial for the same offense. Hopefully the states will remedy the situation of their own accord by appropriate legislative or judicial action.⁴⁵ Beyond this, a failure of local responsibility in this field might arguably move the Supreme Court to take corrective action of its own through appropriate application of the double jeopardy clause of the fifth amendment, extended to the states via the due process clause of the fourteenth amendment. A double jeopardy argument has been repeatedly tried and denied in the federal courts in one aspect, but the argument may still have considerable promise in a new and different aspect.

Historically, the approach has been one of emphasizing that at common law, a trial placing an accused in jeopardy once was all that the state could justly insist upon in the enforcement of its criminal statutes. Whether the trial resulted in a conviction or an acquittal, the defendant was equally to be protected against any subsequent prosecution for the same offense. The primary purpose was allegedly to spare an accused from the ordeal of repeated prosecutions,⁴⁶ and not merely to protect him from multiple punishments.⁴⁷ It

44. *People v. Henderson*, 60 Cal. 2d 482, 497, 386 P.2d 677, 686 (1963).

45. See Agata, *Time Served Under a Reversed Sentence or Conviction — A Proposal and a Basis for Decision*, 25 MONT. L. REV. 3 (1963); Whalen, *supra* note 32.

46. The prohibition [of the fifth amendment] is not against being twice punished, but against being twice put in jeopardy; and the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial.

United States v. Ball, 163 U.S. 662, 669 (1896); see also discussion in *Downum v. United States*, 372 U.S. 734 (1963); *Green v. United States* 355 U.S. 184, 187, 200, 203 (1957); *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 169 (1873).

47. *Bartkus v. Illinois*, 359 U.S. 121, 159-60 (1959) (Black, J., dissenting); *Abbate v. United States*, 359 U.S. 187, 201 (1959) (Black, J., dissenting); *United States v. Benz*, 282 U.S. 304, 307 (1931); *Ex parte Lange*, *supra* note 46; *United States v. Rosenstreich*, 204 F.2d 321 (2d Cir. 1953).

Dicta in *Ex parte Lange*, *supra* note 46, and *United States v. Benz*, *supra*, have misled some federal district courts into believing that they could not correct a sentence which was more generous than that allowed by statute. See, e.g., *Buhler v. Hill*, 7 F. Supp. 857 (M.D. Pa. 1934). This is incorrect, i.e., the *Lange* case compels no such result. See CONNECTICUT GOVERNOR'S PRISON STUDY COMMITTEE, FIRST INTERIM REPORT, App. 4 (1956). The *Lange* case is good authority, however, that the double jeopardy clause of the fifth amendment protects against multiple punishment for the same offense by the same sovereign,

would appear to follow that one who has been convicted, and who successfully appeals that conviction, cannot be tried again for the same offense. Any second trial would necessarily twice place him in jeopardy and would seemingly violate an absolute constitutional prohibition against double jeopardy.

Were the double jeopardy clause to have been interpreted in this absolute fashion there would be no need to concern ourselves with a limited objection directed only to harsher *resentencing* after a second prosecution. An orthodox double jeopardy claim holds that a successful appellant must be unconditionally released, *i.e.*, that he cannot be retried (or resented) at all. And this, of course, is precisely what federal criminal appellants have repeatedly argued — that the double jeopardy clause of the fifth amendment, in conformity with the English practice (prior to 1964),⁴⁸ bars *any* subsequent prosecution or punishment for the same offense.

The practical reasons which account for the failure of this absolute view are not difficult to divine. Notwithstanding the unqualified language of the double jeopardy clause there is no interest of the criminally accused sufficient to warrant his unconditional release following successful appeal solely because there was some error committed in the first trial, at least absent a showing that the error was of such a kind that reprosecution would amount to unreasonable harassment. Conversely, there is a substantial societal interest closely related to an opportunity for retrial; the protection of society may fairly require that those who are guilty of grave offenses must not be insulated from the criminal process because of just any mis-step committed in their original trial. The purpose of double jeopardy protection is thus not one of providing absolute immunity from reprosecution per se, but from unreasonable reprosecution.⁴⁹

Another practical reason for our disinclination to follow the English rule⁵⁰

and that it is not merely protection against multiple and harassing trials as suggested in later dicta, note 46 *supra*. See *United States v. Ball*, *supra* note 46.

48. See notes 50, 52 *infra*.

49. *United States v. Tateo*, 377 U.S. 463 (1964), drawing the line after *Downum v. United States*, 372 U.S. 734 (1963), is a clear and contemporary affirmation of the principle at the federal level. *Palko v. Connecticut* 302 U.S. 319 (1937), refusing to apply the rule of *Kepner v. United States*, 195 U.S. 100 (1904), acknowledges an even greater deference to the states which have the primary responsibility in criminal law enforcement. For other indications that only "unreasonable" reprosecution is condemned by the double jeopardy clause, see *Green v. United States*, 355 U.S. 184, 189 (1957); *Wade v. Hunter*, 336 U.S. 684 (1949); *United States v. Ball*, 163 U.S. 662 (1896); *Hopt v. Utah*, 120 U.S. 430 (1887); *Hopt v. Utah*, 114 U.S. 488 (1885); *Hopt v. Utah*, 110 U.S. 574 (1884); *Hopt v. People*, 104 U.S. 631 (1881).

50. Criminal Appeal Act, 1907, 7 Edw. 7, c. 23, § 4(1)-(2); *Regina v. Connelly*, 3 WEEKLY L.R. 839, 847 (Crim. App. 1963) (dictum). See also ARCHBOLD, CRIMINAL PLEADING, EVIDENCE AND PRACTICE §§ 861, 912 (35th ed. 1962); PALMER & PALMER, HARRIS'S CRIMINAL LAW 505 (20th ed. 1960).

The English practice has not been entirely more favorable to defendants than has the American practice. For instance, errors not resulting in a "miscarriage of justice" will result in dismissal of the appeal in England, while certain constitutional errors (*e.g.*, denial of appointed counsel) result in reversal in America, regardless of the lack of demonstrated

may be that appellate courts might not so generously overturn criminal convictions if the double jeopardy clause required them to order the unconditional release of the successful appellant and forbade them to remand for a new trial.⁵¹ Thus, the permissibility of a new trial and conviction may be of benefit to appellants as well as to the government.⁵²

In rejecting an all-or-nothing double jeopardy argument, however, the Supreme Court has not always employed a straightforward analysis. To avoid the unqualified language of the double jeopardy clause which appears flatly to prohibit placing the accused in jeopardy more than once, the Court has had recourse to a tangled variety of legal fictions, making the clause an extraordinary technical jungle. The Court has, for instance, declined to hold simply that the double jeopardy clause does not always forbid subjecting an accused to more than one trial, as when he successfully appeals his original

prejudice. The English Court of Criminal Appeal may dismiss an appeal under section five of the Criminal Appeal Act of 1907, if the record supports a conviction on some other ground in the indictment, without remission of sentence for the erroneous conviction. *Regina v. Lovelock*, 1 WEEKLY L.R. 1217, 40 Cr. App. R. 137 (1956). Section Three of the Criminal Appeal Act also authorizes the Court of Criminal Appeal to "pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as they think ought to have been passed"

51. From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendants' rights as well as society's interest.

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

52. Whether or not its reasons are equally persuasive to all, the Supreme Court has consistently maintained that a successful appeal need not require the unconditional release of the appellant, unless reprosecution would otherwise involve unreasonable harassment:

[I]f a defendant appeals his conviction and obtains a reversal, all agree, certainly in this country, that he may be retried for the same offense. The reason is, obviously, not that the defendant has consented to the second trial — he would much prefer that the conviction be set aside and no further proceedings had — but that the continuation of the proceedings by an appeal, together with the reversal of the conviction, are sufficient to permit a re-examination of the issue of the defendant's guilt without doing violence to the purposes behind the Double Jeopardy Clause.

Green v. United States, 355 U.S. 184, 219 (1957) (dissenting opinion).

See also *United States v. Tateo*, *supra* note 51; *Forman v. United States*, 361 U.S. 416 (1960); *Bryan v. United States*, 338 U.S. 552 (1950); *Stroud v. United States*, 251 U.S. 15 (1919); *United States v. Ball*, 163 U.S. 662, 671-72 (1896); *United States v. Sanges*, 144 U.S. 310 (1892).

Critics who may be impressed by the different practice which obtained in England until 1964 should bear in mind the countervailing disadvantages which were equally a feature of that practice. See discussion in note 50 *supra*. Moreover, the Criminal Appeal Act of 1964 now authorizes a new trial under certain circumstances although, significantly, "upon reconviction the accused may not be given a sentence of greater severity than that imposed at the original trial, and the new sentence is dated back to the commencement of the former sentence, excluding any time spent on bail meanwhile." Samuels, *Criminal Appeal Act, 1964*, 27 MODERN L. REV. 568, 572 (1964).

conviction. Rather, it has written as though it assumed that reprosecution is generally forbidden but that reprosecution somehow is not forbidden in this class of cases because:

In prosecuting his former writ of error plaintiff in error voluntarily accepted the result, and it is well settled that a convicted person cannot by his own act avoid the jeopardy in which he stands, and then assert it as a bar to subsequent jeopardy.⁵³

* * *

The accused by his own action has obtained a reversal of the whole judgment, and we see no reason why he should not, upon a new trial, be proceeded against as if no trial had previously taken place. We do not agree to the view that the accused has the right to limit his waiver as to jeopardy, when he appeals from a judgment against him. As the judgment stands before the appeals, it is a complete bar to any further prosecution for the offense set forth in the indictment, or of any lesser degree thereof. No power can wrest from him the right to so use that judgment, but if he chooses to appeal from it and to ask for its reversal he thereby waives, if successful, his right to avail himself of the former acquittal of the greater offense, contained in the judgment which he has himself procured to be reversed.⁵⁴

Even though this waiver theory was probably adopted (and can only be justified) to avoid *excessive* protection which might otherwise flow from the double jeopardy clause, it is basically unsatisfactory in theory because regardless of whether the second trial is occasioned by the defendant's appeal or by the government's appeal, the defendant is placed in jeopardy a second time and subjected to the ordeal of a second trial. If one takes the point of view that the double jeopardy clause is an absolute prohibition against multiple prosecutions per se, rather than a general restriction operative against *unreasonable* reprosecution — when, for example, the government muffed a fair chance to secure a conviction, or when it seeks to wear down the defendant by repeated prosecution — then there can be no waiver by the defendant. To say that he can waive protection, or to insist that he *must* so waive as a condition for appealing his conviction, is either to deny that the protection is absolute or to maintain that one can be required to forfeit a constitutional right to absolute protection as a condition for securing the privilege of appeal. The latter proposition classically describes an unconstitutional condition. Mr. Justice Holmes made the point very well when he observed:

In a capital case . . . a man cannot waive, and certainly will not be taken to waive without meaning it, fundamental constitutional rights. . . . Usually no such waiver is expressed or thought of. Moreover, it cannot be imagined that the law would deny to a prisoner the correction of a fatal

53. *Murphy v. Massachusetts*, 177 U.S. 155, 158 (1900).

54. *Trono v. United States*, 199 U.S. 521, 533 (1905). See also *Stroud v. United States*, 251 U.S. 15, 18 (1919), *rehearing denied*, 251 U.S. 380 (1920); *United States v. Ball*, 163 U.S. 662, 672 (1896); *Robinson v. United States*, 144 F.2d 392, 397 (6th Cir. 1944), *aff'd*, 324 U.S. 282 (1945).

error, unless he should waive other rights so important as to be saved by an express clause in the Constitution of the United States.⁵⁵

The waiver theory, moreover, is unsatisfactory in fact because it infers a voluntary, freely made decision to relinquish a purportedly absolute constitutional right even when it is perfectly clear that the defendant was not exercising a free and uncoerced choice. The "waiver" inferred in *Trono v. United States*, where the defendant was deemed to waive double jeopardy protection against reprosecution for one offense of which he was not convicted, when he appealed his conviction of a lesser offense, drew the following dissent from Mr. Justice McKenna:

I repeat again, that constitutional guarantees and statutory remedies should not be put in such barter; that a defendant should not be required to give up the protection of a just . . . acquittal of one crime as the price of obtaining a review of an unjust conviction of another crime.⁵⁶

Further, the standard of waiver in the double jeopardy cases is wholly unreconcilable with the test of free and uncoerced consent which the Supreme Court has since required in analogous situations. A leading illustration is *Fay v. Noia*.⁵⁷ Charles Noia and two companions were indicted, tried and convicted for felony murder in New York in 1942. Of the three men, only Noia was not sentenced to death. Because of his dread that he might be convicted again and then sentenced to death, and on the advice of competent counsel, Noia did not appeal his conviction. His companions — who had nothing to lose — successfully attacked their conviction on due process ground that confessions admitted at the trial had been coerced. Both men were unconditionally released in 1955; without the tainted confessions, the state was unable successfully to prosecute them again. Understandably, these developments influenced Noia to reconsider his original decision not to appeal. Rebuffed in the state courts, he filed a petition for habeas corpus in the federal district court. That court's denial was reversed on appeal, and the reversal was affirmed by the Supreme Court. On the critical issues — whether Noia waived the alleged constitutional defect by his failure to pursue available state remedies in a timely fashion, and whether his failure to appeal otherwise constituted an independent and adequate state grounds rendering federal habeas unavailable as a matter of statutory law or judicial discretion — the Court held for Noia because:

For Noia to have appealed in 1942 would have been to run a substantial risk of electrocution. His was the grisly choice whether to sit content with life imprisonment or to travel the uncertain avenue of appeal which, if successful, might well have led to a retrial and death sentence. See, e.g., *Palko v. Connecticut* . . . He declined to play Russian roulette in this fashion. This was a choice by Noia not to appeal, but under the circum-

55. *Kepner v. United States*, 195 U.S. 100, 135 (1904).

56. 199 U.S. at 539 (1905).

57. 372 U.S. 391 (1963).

stances it cannot realistically be deemed a merely tactical or strategic litigation step, or in any way a deliberate circumvention of state procedures.⁵⁸

Nevertheless, even cases like *Fay v. Noia*⁵⁹ ought not be read as suggesting that the Court should now resolve the deterrent effect of the risk of harsher sentencing upon one's right to appeal by flatly prohibiting all reprosecutions on an absolute reading of the double jeopardy clause. Indeed, the double jeopardy cases are better understood as striking a balance between societal needs of self-protection and the individual's right to be protected from *unreasonable* reprosecution and multiple punishments. They need not be regarded as doctrinally so foolish as to hold that reprosecution is absolutely forbidden, but that a defendant can be compelled to surrender that protection as a condition of appealing his conviction.

For these reasons, the double jeopardy clause would not appear to represent much of a prospect for protecting successful criminal appellants from the harsher sentence which may follow a second trial. In 1957, however, the Supreme Court decided *Green v. United States*,⁶⁰ which substantially incorporated into the double jeopardy clause a concern for protecting the right of appeal. This case lends itself to a direct attack upon the permissibility of harsher resentencing after a second trial for the same offense.

Green had been indicted and tried in the District of Columbia for arson and felony murder, the latter charge arising from the death of an occupant of the premises which were burned. The trial judge charged the jury that they could find Green guilty of arson and first degree murder or of second degree murder. The second degree murder charge was in error, since the indictment and the government's case for homicide depended entirely upon the felony murder statute which authorized only a verdict of first degree murder. The jury returned a verdict of guilty of arson and of second degree murder. Green was sentenced from one to three years for arson, and from five to twenty years for second degree murder. He successfully appealed his conviction for second degree murder, following which he was again tried and convicted under the original indictment for first degree murder and sentenced to death. This time, he carried an appeal to the Supreme Court, contending that the second trial for first degree murder violated the double jeopardy clause of the fifth amendment. Technically, his argument was that he had been impliedly acquitted of first degree murder at his first trial, he had not appealed from that acquittal, and his appeal from the conviction of second degree murder could not be regarded as a waiver of the double jeopardy protection arising from his acquittal of first degree murder provided. At most, his appeal from the second degree murder conviction would enable the government to prose-

58. *Id.* at 439-40.

59. See also *United States ex rel. Goldsby v. Harpole*, 263 F.2d 71 (5th Cir.), *cert. denied*, 361 U.S. 850 (1959).

60. 355 U.S. 184 (1957).

cute him again for that offense.⁶¹ A majority of the Supreme Court accepted Green's argument, specifically holding only that an appeal from a conviction for a lesser included offense does not waive protection from reprosecution for a greater offense of which the defendant was impliedly acquitted.

On its face, *Green v. United States* appears to be an orthodox double jeopardy case which merely carries out a traditional double jeopardy policy of restricting the government to a single error-free trial for a given offense, followed by an *acquittal*. Viewed this way, the case would appear to have little utility for our consideration of harsher resentencing at the end of a second trial occasioned by a successful appeal from an erroneous *conviction* for the *same* offense. The traditional rationale of *Stroud v. United States*⁶² — that the defendant waives whatever benefit he got from a conviction by appealing *that* conviction on non-constitutional grounds — is still intact.

Nevertheless, the *Green* case permits a different view — that the Court employed the double jeopardy clause principally as a means of protecting Green's *statutory right to appeal* rather than his constitutional right to be safe from repeated prosecution. While the majority employed a double jeopardy technique to reach its result, its opinion principally bears down on the effect of the risk of reprosecution in deterring access to postconviction remedies, and not on the alleged ordeal which a second trial might portend. Thus, explaining why it would not infer any waiver by Green in appealing his second degree conviction, the Court said:

Reduced to plain terms, the Government contends that in order to secure a reversal of an erroneous conviction of one offense, a defendant must surrender his valid defense of former jeopardy not only on that offense but also on a different offense for which he was not convicted and which was not involved in his appeal. Or stated in the terms of this case, he must be willing to barter his constitutional protection against a second prosecution for an offense punishable by death as the price of a successful appeal from an erroneous conviction of another offense for which he had been sentenced to five to twenty years' imprisonment. As the Court of Appeals said in its first opinion in this case, a defendant faced with such a "choice" takes a "desperate chance" in securing the reversal of the erroneous conviction. The law should not, and in our judgment does not, place the defendant in such an incredible dilemma.⁶³

In his dissent in *Green*, Mr. Justice Frankfurter recognized that the majority's use of the double jeopardy clause was based on its concern with unfettered access to postconviction remedies, rather than on a concern to protect Green from any further prosecution, and he noted that that concern would apply equally to cases (such as *Stroud*) where an appeal might be taken from a *con-*

61. In fact, however, the government's case for murder could not be proved other than through the felony murder statute, and Green had no reason to fear a second prosecution for second degree murder. True enough, Green was not prosecuted again.

62. 251 U.S. 15 (1919), *rehearing denied*, 251 U.S. 380 (1920).

63. 355 U.S. at 193-94.

viction of the *same* offense for which the original sentence was less than the maximum.⁶⁴

Furthermore, the double jeopardy technique of *Green* critically depended upon the accuracy of the majority's assumption that Green had been *acquitted* of first degree murder, following a trial in which the government had a fair opportunity to secure a conviction and a sentence adequately protecting society's interest.⁶⁵ As a number of commentators have pointed out, however, this assumption was not necessarily accurate.⁶⁶ It was equally consistent with the facts that the jury was motivated by sympathy for the accused and preferred to find him guilty of second degree murder to avoid subjecting him to the mandatory death penalty, though they honestly believed him guilty of first degree murder. Under this hypothesis, Green actually profited from the judge's erroneous instructions, and the government was deprived of a fair trial; for had the jury been given the option of acquitting or convicting only of first degree murder (without the alternative of second degree murder) it might well have convicted. Equally consistent with the facts is the possibility that the jury divided among themselves between first and second degree murder, or even acquittal, and simply compromised their differences. Under either view, the error of the trial court was to the prejudice of the government, rather than of the defendant, and but for the disputable decision in *Kepner v. United States*,⁶⁷ the government would have been able to appeal with every right to continue the case — to retry Green with the prospect of having him sentenced to death. *Green* should have gone the other way, in this view, if only to limit the basically unsound effect of *Kepner*.⁶⁸

64. Of special relevance is *Stroud v. United States*, 251 U.S. 15, 17-18. In that case the defendant was indicted for murder, and the jury returned a verdict of "guilty as charged in the indictment without capital punishment." The judgment was reversed and a new trial had on which the defendant was again found guilty of murder, but without a recommendation against capital punishment. He was then sentenced to death. This Court expressly relied on *Trono* in affirming the judgment and rejecting the contention that the imposition of a greater punishment had placed the defendant twice in jeopardy. As a practical matter, and on any basis of human values, it is scarcely possible to distinguish a case in which the defendant is convicted of a greater offense from one in which he was previously convicted but carries a significantly different punishment, namely death rather than imprisonment.

Whatever formal disclaimers may be made, neither *Trono* nor the reliance placed upon it for more than half a century permits any other conclusion than that the Court today overrules that decision.

355 U.S. at 213 (dissenting opinion).

65. *Stroud v. United States* was expressly distinguished by the majority on this basis. *Id.* at 195 n.14.

66. See, e.g., Note, 56 MICH. L. REV. 1192 (1958); Note, 6 U.C.L.A. L. REV. 321, 322-23 (1959).

67. 195 U.S. 100 (1904) (holding that the double jeopardy clause forbids the federal government from appealing from an acquittal and from retrying the accused).

68. As Mr. Justice Cardozo remarked: "[T]he dissenting opinions [in *Kepner*] show how much was to be said in favor of a different ruling." *Palko v. Connecticut*, 302 U.S.

It is further arguable that Green benefited in still another way from the trial court's error. The jury, it will be recalled, convicted Green of arson as well as of second degree murder. The judge sentenced Green from one to three years for arson, even though the arson statute authorized imprisonment up to ten years. The sentence appears to be comparatively lenient, considering that Green's arson resulted in the death of an innocent occupant of the fired premises. And it may have been lenient solely because the judge felt free to reserve a more appropriately severe sentence for the second degree murder count, a sentence of from five to twenty years. Had the judge not had that additional ground for more severely sentencing Green, he might well have imposed a harsher sentence on the arson count. The results of the trial court's error may therefore have been to secure Green an implied acquittal of first degree murder which he would not otherwise have had, and to secure him a lighter sentence for arson than he otherwise deserved. And yet, the judge's oversight was not due to any fault of the government.

As an orthodox double jeopardy case, the decision is therefore objectionable because the majority's reliance on "implied acquittal" may have been mistaken and because the Court's expansive reading of the double jeopardy clause unreasonably subordinated societal interests in punishing the guilty to excessive protection of an accused from a second trial. On the other hand, the case is much more tractable if it is viewed in terms of the Court's additional concern more adequately to protect access to post-conviction remedies, and not merely to protect the accused from reprosecution per se. While there may be a compelling public interest in reprosecution, there is probably no substantial public interest served by a broad rule of waiver which operates to foreclose legislatively prescribed rights for testing the legality (and even the constitutionality) of convictions which may have been unfairly obtained.

It may still appear to be a difficult task to force the more ordinary harsher resentencing case into the double jeopardy clause, even assuming that the clause does offer (since *Green*) some protection from threats to significant statutory rights of appeal. The difficulties are these: first, relief under the double jeopardy clause generally bars any reprosecution and not merely any harsher sentence. In doing so, it goes too far; *i.e.*, it releases the guilty even when reprosecution would not be an act of harassment, and even though protection from harsher resentencing alone would be sufficient to protect the right of appeal. Second, successful use of the double jeopardy argument, even after *Green*, depends upon the fiction of implied acquittal. In the typical case where the defendant is retried (and sentenced more harshly) for the same offense of which he was convicted, it may be difficult to imagine such an implied acquittal.

319, 323 (1937). The fact that Green could be tried again, albeit only for second degree rather than first degree murder, tends to undercut the double jeopardy rationale of the majority which was grounded in a policy barring repeated prosecution.

Nevertheless, both of these difficulties can be overcome, and, in fact, were overcome in the case of *People v. Henderson*,⁶⁹ recently decided by the California Supreme Court.⁷⁰ In the *Henderson* case, defendant had pleaded guilty to first degree murder and had been sentenced to life imprisonment. On defendant's appeal, the district court of appeal reversed the judgment and remanded for new trial. As a result of the second trial for the same offense, defendant again was convicted and the jury fixed the penalty at death. On automatic appeal to the California Supreme Court, the conviction was again reversed due to the trial judge's error in failing on his own motion to instruct the jury on the legal significance of the evidence of defendant's alleged mental illness. The question then arose whether defendant could be sentenced to death in the event that he was convicted again. Off-hand, even noting that the California double jeopardy provision had been interpreted in line with the *Green* case, a negative answer would appear self evident:

a. Defendant had been twice *convicted* before of the *same* degree of the *same* offense. It was manifestly impossible therefore, to infer an "implied acquittal" as in *Green*.

b. The original, more lenient sentence was secured on a plea of guilty, while the sentence of death was imposed by a jury after a complete and independent exposure to the whole case. Not only was it likely that the harsher sentence was as warranted as the earlier, more lenient, one, but it was entirely likely that the first sentence may have been unreasonably influenced by the guilty plea, or that the judge failed to canvass all aspects of the case properly bearing on sentencing.

c. The error in the first trial from which defendant sought relief, while serious enough to prejudice him under California law, was not of such enormous importance to fundamental fair play that deterrence of defendant's appeal represented by the risk of a harsher sentence upon retrial would itself represent great hardship, *i.e.*, it was not a question of due process.

d. State and federal decisions other than *Green* would have allowed harsher sentencing on a principle of waiver.⁷¹

Nevertheless, by forthrightly construing the California double jeopardy analogue of the fifth amendment in keeping with the policy demand of *Green* to protect postconviction remedies, Mr. Justice Traynor held that the original life sentence would automatically bar a *more severe sentence* upon retrial and conviction:

Since the *Green* and *Gomez* cases have now established that a reversed conviction of a lesser degree of a crime precludes convictions of a higher degree on retrial, the rationale of the *Stroud* and *Grill* cases has been vitiated. It is immaterial to the basic purpose of the constitutional pro-

69. 60 Cal. 2d 482, 386 P.2d 677 (1963).

70. Recently appointed Chief Justice.

71. *E.g.*, *People v. Grill*, 151 Cal. 592, 91 Pac. 515 (1907); *Stroud v. United States*, 251 U.S. 15 (1919), *rehearing denied*, 251 U.S. 380 (1920); *Murphy v. Massachusetts*, 177 U.S. 155 (1900). See notes 14 and 15 *supra*.

vision against double jeopardy whether the Legislature divides a crime into different degrees carrying different punishments or allows the court or jury to fix different punishments for the same crime.

* * *

A defendant's right to appeal from an erroneous judgment is unreasonably impaired when he is required to risk his life to invoke that right. Since the state has no interest in preserving erroneous judgments, it has no interest in foreclosing appeals therefrom by imposing unreasonable conditions on the right to appeal.⁷²

The *Henderson* case was, to be sure, decided exclusively on the basis of a state constitutional double jeopardy provision and not on the basis of the fourteenth amendment. The necessity for forcing the case into a state constitution double jeopardy rationale, rather than treating it as an illustration of a federal unconstitutional condition, under our earlier discussion, is not difficult to explain. Henderson's appeal was not based on a claim that he had been denied a fourteenth amendment right. The trial judge's error was error only according to California law; it was not sufficiently fundamental to run afoul of the fourteenth amendment. Because no federal constitutional right to due process would have been abridged by the risk of harsher punishment upon retrial, Justice Traynor may have thought it necessary to find some other means of reaching the desired result. Given the United States Supreme Court's example of forcing such a result under the double jeopardy clause in *Green*, and the nearly identical wording of the California double jeopardy provision,⁷³ it was perfectly reasonable for Mr. Justice Traynor to proceed as he did. The fact that a double jeopardy rationale was employed, however, should not obscure the point that the result was actually dictated by the effect of the risk of more severe punishment upon the adequacy of defendant's postconviction remedy:

The fact remains that, in certain cases, a defendant who has good ground for appeal will be dissuaded from appeal because of the possibility of receiving a greater sentence, especially if that greater sentence is the ultimate punishment.

* * *

In view of these considerations, the problem may be approached not as involving the extent of double jeopardy, but rather the extent of the limitations that can be placed on the right to appeal. This analysis makes it apparent that the practical effect of allowing a greater sentence to be imposed on retrial is exactly the same as the effect of allowing a conviction for a greater crime on retrial.⁷⁴

With the benefit of *Green v. United States* and *People v. Henderson*, there is support emerging in favor of a broad double jeopardy rule which would protect all federal and state convicts held in prison under erroneous convictions

72. *People v. Henderson*, 60 Cal. 2d 482, 497, 386 P.2d 677, 686 (1963).

73. "No person shall be twice put in jeopardy for the same offense." Calif. Const. art. I § 13. "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V.

74. Note, 50 VA. L. REV. 559, 564 (1964). But see Note, 13 KAN. L. REV. 155 (1964).

or sentences from harsher resentencing following retrial. Employing the analysis implicit in the California court's treatment of the *Henderson* case, the technical argument applying that rule would be as follows: When a particular penalty is selected from a range of penalties prescribed for a given offense, and when that penalty is imposed upon the defendant, the judge or jury is impliedly "acquitting" the defendant of a greater penalty, just as the jury in *Green* impliedly acquitted him of a higher offense and just as other juries have impliedly acquitted the accused of a greater degree of the same offense. Thus, the range of penalties applicable to a given offense would be treated for double jeopardy purposes just the same as the range of degrees for a given offense. Failure to impose a higher penalty, like a failure to find guilt of a higher degree, would amount to an acquittal of that degree of punishment. At that point, double jeopardy protection from retrial for the same offense (or for the same degree of punishment) of which one has previously been acquitted would take hold: the defendant could still be retried and punished for the offense *and up to the degree of punishment* of which he was originally convicted, of course, because he "waived" his double jeopardy protection by appealing his conviction. He could not be retried for a greater offense *or a greater punishment*, however, for he obviously had not appealed from his implied acquittal of such offense *or punishment* and consequently cannot be said to have waived the protection provided by that acquittal.⁷⁵

To complete this double jeopardy argument, the Supreme Court would have to be persuaded to impose the fifth amendment's double jeopardy clause on the states, through the due process clause of the fourteenth amendment, a fact of incorporation not yet accomplished. Such incorporation, however, is not unlikely in view of Mr. Justice Frankfurter's retirement, the Court's trend increasingly to absorb the first eight amendments into the fourteenth in all their fullness,⁷⁶ and the announced position of at least two members of the

75. It has doubtless been noted that the principal supporting cases for this argument (*Green*, *Henderson*, and to a lesser extent *Noia*) involved the risk of death as the possible punishment following re prosecution. It appears most unlikely, however, that the Supreme Court would limit either a double jeopardy or an "unconstitutional condition" ban on harsher resentencing only to capital cases. The distinction between capital and noncapital offenses for determining the scope of a constitutional right has faded. See *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960). The dissent in *Henderson* assumed that the majority's double jeopardy rule would apply equally to noncapital cases. *People v. Henderson*, 60 Cal. 2d 482, 505, 386 P.2d 677, 691 (1963).

76. For recent illustrations, see *Malloy v. Hogan*, 378 U.S. 1 (1964); *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Ker v. California*, 374 U.S. 23 (1963); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Robinson v. California*, 370 U.S. 660 (1962); *Mapp v. Ohio*, 367 U.S. 643 (1961). In dicta, the Court has already established that certain features of the double jeopardy clause are recognized in the due process clause of the fourteenth amendment. See cases cited in note 11 *supra*. In view of the following statement by the majority in *Malloy v. Hogan*, 378 U.S. 1, 10-11 (1964), it might be no step at all fully to incorporate the double jeopardy clause and to overrule *Palko v. Connecticut*:

The court has thus rejected the notion that the Fourteenth Amendment applies to

present Court in favor of full incorporation of the double jeopardy clause itself.⁷⁷

This argument would remove existing deterrents to postconviction remedies across the board, not just for those who appeal from errors of constitutional significance. In relying upon implied acquittal of a higher penalty, rather than on an unconstitutional condition attached to the right of a fair trial, a double jeopardy rationale would have an original sentence operate as a ceiling whether or not the original error affected the fundamental fairness of the trial. Adoption of this double jeopardy rationale would involve only a slight extension of existing doctrine, *viz.*, an extension of *Green* to the facts of *Stroud* (as Mr. Justice Frankfurter foresaw and as Mr. Justice Traynor accomplished in *Henderson*), and an extension of the fifth amendment double jeopardy protection through the fourteenth amendment (as many observers already anticipate). Given the Court's present libertarian mood, it would not be surprising if the double jeopardy approach were adopted.⁷⁸

AN EPILOGUE ON EQUAL PROTECTION

Five years after its adoption, Mr. Justice Miller wrote of the equal protection clause:

We doubt very much whether any action of a State not directed by way of discrimination against the Negroes as a class, or on account of their race, will ever be held to come within the purview of this provision.⁷⁹

Nearly sixty years after its adoption, Mr. Justice Holmes could still similarly deride efforts to make a great deal of the vague promises of equal protection, observing that "it is the usual last resort of constitutional arguments."⁸⁰ But today resort to the equal protection clause is very frequently first among constitutional arguments.⁸¹ Since 1950, litigants have achieved remarkable success in invalidating governmental regulations on the strength of equal protection claims not only on racial issues, but on the regulation of business, travel, citi-

the states only a 'watered-down, subjective version of the individual guarantees of the Bill of Rights'

See Israel, *Gideon v. Wainwright: The "Art" of Overruling*, 1963 SUPREME CT. REV. 211. But see Henkin, "Selective Incorporation" in the Fourteenth Amendment, 63 YALE L.J. 74, 80-81 (1963).

77. Justices Douglas and Black, in *Bartkus v. Illinois*, 359 U.S. 121, 151 n.1 (1959); *Ciucci v. Illinois*, 356 U.S. 571, 575 (1958). See also *Malloy v. Hogan*, 378 U.S. 1, 4 n.2 (1963); *Gideon v. Wainwright*, 372 U.S. 335, 345-47 (1963); *Adamson v. California*, 332 U.S. 46, 70-123 (1947).

78. An incidental attraction of eliminating the risk of harsher resentencing is that it would take the pressure off *Fay v. Noia*, 372 U.S. 391 (1963). No longer could a defendant argue that he did not exhaust his state remedies in a timely fashion for fear that he would be sentenced more severely if convicted again of the same offense.

79. *The Slaughterhouse Cases*, 83 U.S. 36, 81 (1873).

80. *Buck v. Bell*, 274 U.S. 200, 308 (1927).

81. See Kurland, *Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government*, 78 HARV. L. REV. 143-49 (1964); Kellett, *The Expansion of Equality*, 37 SO. CAL. L. REV. 400 (1964).

zenship, voting, association, and, most portentously, the rights of the criminally accused respecting postconviction remedies.⁸²

An argument on the harsher sentencing question grounded in equal protection begins by conceding that no state is under a due process obligation to provide postconviction remedies if only a claim of non-constitutional error is involved in the original trial.⁸³ It also grants that each state could establish a general sentence review authority empowered to review, within a reasonable time, sentences of any group of convicts selected according to some rational basis.⁸⁴ In the classification of convicts whose sentences are to be subject to review, however, whether by such a board or whether by any other means including a different judge or jury, no state is free to make that classification on an arbitrary basis. Equal protection of the laws must mean that those subject to the risk of having their sentences increased cannot be described according to some standard which fails rationally to distinguish them as a class from others whose sentences ought equally to be reviewable.⁸⁵ Thus, while a state might establish a board to review *all* sentences, or while it might limit review only to the sentences of those who plead guilty (because of the special likelihood that such sentences reflect guilty plea bargaining and are, as a class, more likely than others to be irregular), it manifestly could not establish a board empowered only to review, say, the sentences of Negroes. The constitutional vice of such a practice would remain even assuming that each sentence actually reviewed by the board were judged only according to appropriate sentencing criteria in which the race of the Negro convict was not considered. The point under the equal protection clause is simply that whether or not the *particular* sentence revision may be fair by itself, the basis for classifying the group subject to revised sentences would still have no rational connection with any legitimate interest to be served in providing for revised sentences. Whether the state's interest is to revise sentences more uniformly according to the rehabilitative character of the convict, or the need to remove him from society while he remains a threat, or the need to deter others, or the tolerable felt needs of community vengeance or retribution, it is patently arbitrary to connect these interests to a class selected exclusively because of its race.

What is familiar and obvious respecting equal protection and imposing the risk of higher sentences on a group described by race or righthandedness, is arguably as obvious respecting the imposition of that risk on a group de-

82. See, e.g., *Griffin v. Maryland*, 378 U.S. 130 (1964); *Schneider v. Rusk*, 377 U.S. 163 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Lucas v. Colorado Gen. Assembly*, 377 U.S. 713 (1964); *Douglas v. California*, 372 U.S. 353 (1963); *Baker v. Carr*, 369 U.S. 186 (1962); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Morey v. Doud*, 354 U.S. 457 (1957); *Griffin v. Illinois*, 351 U.S. 12 (1956); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Bolling v. Sharpe*, 347 U.S. 497 (1954).

83. See note 25 *supra*.

84. See Note, 69 *YALE L.J.* 1453 (1960); *CONNECTICUT GOVERNOR'S PRISON STUDY COMMITTEE, FIRST INTERIM REPORT* (1956).

85. See Whalen, *Resentence Without Credit for Time Served: Unequal Protection of the Laws*, 35 *MINN. L. REV.* 239, 249-52 (1951).

scribed on any other arbitrary basis, including the group consisting solely of those convicted a second time after successful appeal of their original convictions. In none of the states permitting harsher sentences upon retrial, is there a procedure established to increase the sentence of any other convict originally sentenced in accordance with the appropriate statute. The risk of a harsher sentence is borne exclusively by those who pursue some postconviction remedy. Yet there is no reason to suppose that the original sentences of this group are any more likely to warrant review as a class than the sentences of other convicts who are not subject to the same risk. The vulnerable class appears to be quite equivalent to a class described by race, right-handedness, indigence, or some other factor equally irrelevant in any proper determination of those whose sentences might appropriately be reviewed.

One need not, in consequence, maintain that harsher resentencing is forbidden only for those who can make a showing that the risk of such a sentence effectively denies their right to a fundamentally fair trial, or more generally by extending the double jeopardy clause on the strength of *Green v. United States* and *People v. Henderson*. In retrospect, an equal protection analysis of the *Henderson* case itself may be more satisfactory than the double jeopardy analysis actually employed by the California Supreme Court. What makes it especially satisfactory is that an equal protection claim draws fairly solid support from the unexpressed considerations of the Supreme Court in reviewing equal protection claims. First, the current permissibility of harsher resentencing for successful appellants adversely affects a significant personal liberty,⁸⁶ the opportunity to appeal an allegedly erroneous criminal conviction. It does so, as we have previously observed, by denying the appellant the protection of his original sentence as a condition of appealing his conviction, and thereby discouraging him from appealing. *Griffin v. Illinois*⁸⁷ and *Douglas v. California*,⁸⁸ as equal protection cases, and as sensibly taken in combination with *Green* and *Noia*, may reasonably indicate that the Court will be especially vigilant in protecting access to postconviction remedies from substantial impediments. The dilemma confronting one who must risk a harsher penalty if he appeals his conviction appears to be a substantial impediment. Second, acceptance of an equal protection argument would not constitute a serious affront to an important public policy adopted after deliberate and representative legislative consideration. In most states, the permissibility of harsher resentencing of successful appellants is strictly a judicial creation, without statutory support. Where it may have such support, it can still scarcely be said to reflect a broad consensus which adequately considers the plight of an accused who is affected

86. In such cases, the Court requires a very high standard of equal protection. Compare *Allied Stores v. Bowers*, 358 U.S. 522 (1959), and *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955), and *Kotch v. Board of River Port Pilot Comm'rs*, 330 U.S. 552 (1947), with *McLaughlin v. Florida*, 85 Sup. Ct. 283 (1964), and *Schneider v. Rusk*, 377 U.S. 163 (1964), and *Reynolds v. Sims*, 377 U.S. 533 (1964), and *Griffin v. Illinois*, 351 U.S. 12 (1956), and *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

87. 351 U.S. 12 (1956).

88. 372 U.S. 353 (1963).

by the rule.⁸⁹ Nor would constitutional invalidation of the rule substantially injure state interests in punishing the guilty, since the states would remain free to establish more general means for revising sentences, means which would not similarly discourage defendants from pursuing their postconviction remedies. Third, merely in terms of ordinary equal protection parlance, the present classification of those subject to harsher resentencing does appear to be arbitrary, *i.e.*, both underinclusive and overinclusive of those whose sentences ought to be subject to revision,⁹⁰ or those whose original sentences may have been unduly lenient.⁹¹ This is not to say that the current practice permitting harsher resentencing of successful appellants is so easily resolved as an equal protection matter as it might be, say, under the extreme example where sentences could be increased only for Negroes; the classification to which we have objected is not so deliberately invidious.⁹² Nevertheless, it has generally not been a requirement for invoking the equal protection clause that one impugn the motives of those responsible for the law under attack, and it is not necessary here to undertake an argument that the current practice is continued deliberately to frustrate postconviction remedies. It is enough that the practice has that effect, and that it is not otherwise defensible as a necessary means for effectuating a legitimate public policy.⁹³

89. The equal protection clause has a special attraction under these circumstances. See Mr. Justice Jackson's concurring opinion in *Railway Express Co. v. New York*, 336 U.S. 106, 111-13 (1949); Note, 70 YALE L.J. 1192, 1197-1202 (1961). But see BICKEL, *THE LEAST DANGEROUS BRANCH* 222-28 (1962).

90. See Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

91. See note 38 *supra* and accompanying text.

92. See notes 21 & 22 *supra*; *Western Union Tel. Co. v. Foster*, 247 U.S. 105, 114 (1918).

93. In *Griffin v. Illinois*, 351 U.S. 12 (1956), there was no evidence that the requirement of a transcript for appeal was imposed for the purpose of disabling indigents. It was enough that the effect of the requirement was economically discriminatory, that it affected a significant (statutory) right of appeal, and that failure to provide free transcripts was not due to some compelling and legitimate public policy unsusceptible to satisfaction by less discriminatory alternative means. See also *Douglas v. California*, 372 U.S. 353 (1963).

In *Morey v. Doud*, 354 U.S. 457 (1957), the invalid discrimination in favor of American Express Co. was merely incidental to the state's purpose of limiting the class of sellers to those known to be responsible. It was enough for the Court, however, that "the effect of the discrimination is to create a closed class," and that less repressive alternative means were available to carry out the state's legitimate policies. *Id.* at 467 (emphasis added). The practical (though inexplicit) result of these cases is to oblige the states to carry out their aims in the least discriminatory means which are feasible, especially where important private interests are at stake. See *McLaughlin v. Florida*, 85 Sup. Ct. 283, 291 (1964); *McGowan v. Maryland*, 366 U.S. 420, 462 (1961); *School Dist. v. Schempp*, 374 U.S. 203, 265 (1963) (concurring opinion); *Shelton v. Tucker*, 364 U.S. 479, 487-88 (1960); *Heilberg v. Fixa*, 236 F. Supp. 405, 408 (N.D. Cal. 1964), *cert. granted*, 33 U.S.L. WEEK 3202 (1965). No more than that is asked here. The states have ample means for assuring appropriate sentences without affecting rights of appeal in the same distressing fashion as they are currently affected by the risk of harsher resentencing.