action contemplated in the act stand in contrast to this alternative proposition.

In short, the inescapable result of the interpretation that a party with the same interest as the employee would always be present, is that it would seem to apply to any case where the employee alleges that he is dissatisfied with the sufficiency of the "adverse interest" shown by his employer or the insurer thereof. The court must then in each case examine the handling of the cause of action by the said employer or his insurer as to their diligence in pursuing the employee's rights. And it could hardly have been the purpose of the act to come to be a method of forcing or financing lawsuits against third parties in compensated injury cases.

—JAMES E. WHITE

THE POSTURE OF FORMER JEOPARDY ON RETRIAL

The fifth amendment to the Constitution of the United States enunciates the proposition that no man shall ". . . be subject for the same offense to be twice put in jeopardy of life or limb . . ." The application of this monumental tenet of Anglo-American jurisprudence is hardly considered open to other than academic question. However, occasionally legal procedures so array themselves that the question of former jeopardy is anything but settled. The most notable instance in which the character of former jeopardy is open to debate is upon retrial following the appeal of the accused.

I. HISTORICAL CONCEPT OF FORMER JEOPARDY

The roots of the prohibition against bringing a person in jeopardy twice for the same offense are embedded in the common law pleas of *autrefois acquit* (former acquittal) and *autrefois convict* (former conviction).[1] To try again one who had been previously convicted or acquitted of the same offense was "abhorrent to the law of England."[2] The underlying philosophy is that the state with all its power and resources should not be allowed to make repeated attempts to convict an individual of an alleged offense and thereby increase the

1. Vaux's Case, 4 Co. Rep. 44a, 76 Eng. Rep. 992 (K.B. 1603); 4 BLACKSTONE, COMMENTARIES § 335.
2. Regina v. Tancock, 13 Cox, C.C. 217, 34 L.T. 455 (1876).

possibility that even though innocent he may be found guilty. It was inevitable that such a precedent should find its way into the colonial laws,[3] the Federal Constitution,[4] and later, into the vast majority of the state constitutions.[5]

The sentiment of the constitutional prohibition is succinctly expressed in *United States v. Ball*[6] wherein it is stated that the prohibition 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. To further guarantee an accused immunity from being twice put in jeopardy, the government, in most jurisdictions, is not allowed an appeal even though acquittal may appear to be erroneous.[7]

II. Federal Status

At common law a convicted person could not obtain a new trial by appeal except in certain narrow instances. It was held[8] that the court has no power whatever to grant a new trial whether the defendant was convicted or acquitted. However, this stringent view, adopted from the English rule, has generally been rejected. The passing of time has seen the evolution of a more non-literal view of the constitutional prohibition against double jeopardy and the power to grant a new trial has been exercised in certain well-recognized instances.[9]

Various grounds have been assigned for allowing retrial. It is well settled that there can be a retrial where a conviction has been set aside upon appeal by the accused.[10] A person may also be retried for the same offense where unforeseeable circumstances arise making completion of the first trial impossible, e.g., failure of the jury to agree on a verdict;[11] where no verdict is reached;[12] and where the

3. Colonial Laws of Massachusetts, 43.
4. U. S. Const. amend. V.
5. *E.g.*, Ga. Const. art. 1 § 108; Ga. Code Ann., § 2-108.
6. 163 U.S. 662, 16 S.Ct. 1192, 41 L.Ed. 300 (1896).
7. Peters v. Hobby, 349 U.S. 331, 75 S.Ct. 790, 99 L.Ed. 1129 (1955).
8. United States v. Gilbert, 25 Fed. Cas. 1287, No. 15204 (C.C. Mass. 1834), where defendants had been found guilty of robbery on the high seas, a capital offense, and moved for a new trial.
9. United States v. Fries, 3 U.S. (3 Dall.) 515 (1799), treason; United States v. Keen, 26 Fed. Cas. 686, No. 15510 (C.C. Ind. 1839); Hopt. v. Utah, 104 U.S. 631, 26 L.Ed. 873 (1881); 110 U.S. 574, 28 L.Ed. 262 (1884); 114 U.S. 488, 5 S.Ct. 972, 29 L.Ed. 183 (1885); 120 U.S. 430, 7 S.Ct. 614, 30 L.Ed. 708 (1887), wherein defendant was retried three times following reversals of his convictions.
10. United States v. Ball, 163 U.S. 662, 16 S.Ct. 1192, 41 L.Ed. 300 (1896).
11. Wade v. Hunter, 336 U.S. 684, 69 S.Ct. 834, 93 L.Ed. 974 (1949).
12. United States v. Perez, 22 U.S. (9 Wheat.) 579, 6 L.Ed. 165 (1824).

judgment rendered was erroneous.[13] It would seem that the courts are amenable to allow a retrial where substantial justice and the interests of society will thereby be served.

A survey of the cases reveals that generally two theories obtain in allowing a retrial. The weight of authority actually regards the retrial as a second jeopardy, but justify it on the grounds that the appellant had "waived" the plea of former jeopardy by asking that the conviction be set aside. This view has been expressed both in the federal courts[14] and state courts.[15] Mr. Justice Grier alluded to a waiver in *United States v. Harding*[16] wherein he used language to the effect that the appellants must choose to abide by their convictions or to open the entire question of their guilt to re-examination by obtaining a new trial. The *Harding* case, it must be pointed out, involved a more complex problem which will be considered later.

In a landmark case arising in the Philippine Islands,[17] the Supreme Court affirmed the decision of the Supreme Court of the Philippines which, because of peculiar Spanish precedents, was tantamount to a retrial. Relying primarily on *United States v. Ball,* the court not only applied the waiver theory, but went further to say that the constitutional provision against double jeopardy, properly construed, did not extend to cases where the judgment had been annuled by the court at the request of the accused.

Other jurists consider the second trial as continuing the same jeopardy that had arisen at the original trial. The underlying motif is that jeopardy does not end until the acquittal or conviction had become final.[18] However, both federal and state courts are more impressed by the theory of waiver and are committed thereto.

The question of whether the plea of former jeopardy is available on retrial becomes more mutable where the retrial has been obtained by a defendant who was convicted of a lesser offense than that charged in the indictment and the government seeks to try him again for the greater offense. Mr. Justice Holmes concurred in this result, again

13. *Ex parte* Lange, 85 U.S. (18 Wall.) 163, 21 L.Ed. 872 (1873), on the theory that an erroneous judgment amounted to no judgment at all.
14. Brewster v. Swope, 180 F.2d 984 (9th Cr. 1950).
15. State v. McCord, 8 Kan. 232, 12 Am. Rep. 469 (1871); Cross v. Commonwealth, 195 Va. 62, 77 S.E.2d 447 (1953); Smith v. State, 196 Wis. 102, 219 N.W. 270 (1928).
16. 26 Fed. Cas. 131, No. 15301 (C.C. Pa. 1846).
17. Trono v. United States, 199 U.S. 521, 26 S.Ct. 121, 50 L.Ed. 292 (1905).
18. Kepner v. United States, 195 U.S. 100, 24 S.Ct. 797, 49 L.Ed. 114 (1904); see Mr. Justice Holmes' dissent at 134; see also Note, 18 HARV. L. REV. 216 (1905).

expressing his belief that there was one continuing jeopardy until the case was disposed of, appeal and all. The majority, however, still clung to the view that by having the conviction set aside, the defendants had waived their plea of former jeopardy. Holmes still found this approach untenable, as he had in the *Kepner* case earlier.[19]

The second time this question reached the Supreme Court,[20] it denied retrial for the greater offense, also by a 5-4 decision. The majority reasoned that the silence of the jury as to the greater offense amounted to a tacit acquittal, but the minority felt that the silence could only mean that the jury was silent and nothing more.

The identical problem had arisen earlier,[21] but there the case was continued to allow the defendants to decide whether to abide by their conviction of manslaughter or take a new trial for murder.

The weight of opinion, as well as authority, indicates that the decision in the *Green* case was contrary to precedent. While it is true that *Trono* is the only instance in which the question was firmly decided, it cannot be denied that the persuasive logic of Mr. Justice Grier in the *Harding* case, as well as *Trono,* has been rejected. There is even further authority[22] which the majority rejected in reaching the *Green* decision. Although the case concerned the due process clause, the court gratuitously stated that this "was not a case of twice in jeopardy under any view of the Constitution of the United States."[23]

III. In the States

Generally, the same problems obtain with regard to double jeopardy in the state courts as are encountered in the federal courts and the results are similar. Again, the great weight of authority allows retrial by applying the theory of waiver where a verdict against the defendant is set aside and a new trial is granted on his motion in the trial court or a conviction is reversed on appeal or error proceedings instituted by him.

But the question assumes a greater complexity where a new trial has been obtained by a defendant who was convicted of a lesser offense than that charged in the indictment. Unlike the federal courts,

19. Trono v. United States, 199 U.S. 521, 26 S.Ct. 121, 150 L.Ed. 292 (1905).
20. Green v. United States, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed. 2d 199 (1957).
21. United States v. Harding, 26 Fed. Cas. 131, No. 15301 (C.C. Pa. 1846).
22. Brantley v. Georgia, 217 U.S. 284, 30 S.Ct. 514, 54 L.Ed. 768 (1910).
23. *Id.* at 285.

the state courts seem to consider more incisively the extent of the waiver. One body of opinion denies retrial for the greater offense[24] because the "waiver, unless it be expressly of the benefit of the verdict of acquittal, goes no further than the accused himself extends it. His application for a correction of the verdict is not to be taken more extensive than his needs. . . . The waiver is construed to extend only to the precise thing concerning which relief is sought."[25] This is substantially the view adopted by the Supreme Court in the *Green* case.

Another school allows retrial for the greater offense[26] on the ground that the defendant necessarily appeals from the whole of the judgment, as well that which acquits as that which condemns, for the judgment is one entire thing and cannot be divided.

Of the 36 jurisdictions that have considered the question, 19[27] permit retrial for the greater offense. Indiana,[28] Kansas,[29] Kentucky[30], Nevada,[31] New York,[32] Ohio,[33] Oklahoma,[34] and Utah[35] base the result to some extent on statutes defining the effect of granting a new trial. Colorado,[36] Georgia,[37] Mississippi,[38] and Missouri[39] allow retrial for the greater offense on the strength of constitutional provisions. Although Connecticut, North Carolina and Vermont have no constitutional provisions as to double jeopardy, the common-law pro-

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24. Hearn v. State, 212 Ark. 360, 205 S.W.2d 477 (1947); McLeod v. State, 128 Fla. 35, 174 So. 466 (1937); Reagan v. State, 155 Tenn. 397, 293 S.W. 755 (1927).
25. People v. Dowling, 84 N.Y. 478, 484 (1881).
26. Perdue v. State, 134 Ga. 300, 67 S.E. 810 (1910); Macomber v. State, 137 Neb. 882, 291 N.W. 674 (1940); Butler v. State, 177 Miss. 91, 170 So. 148 (1936).
27. Colorado, Connecticut, Georgia, Indiana, Kansas, Kentucky, Mississippi, Missouri, Nebraska, Nevada, New Jersey, New York, North Carolina, Ohio, Oklahoma, South Carolina, Utah, Vermont and Washington.
28. *Ex parte* Bradley, 48 Ind. 548 (1874); State *ex rel.* Lopez v. Killigrew, 202 Ind. 397, 174 N.E. 808 (1931).
29. State v. McCord, 8 Kan. 232, 12 Am. Rep. 469 (1871).
30. Hoskins v. Commonwealth, 152 Ky. 805, 154 S.W. 919 (1913).
31. Gibson v. Somers, 31 Nev. 531, 103 P. 1073 (1909).
32. People v. Palmer, 109 N.Y. 413, 17 N.E. 213 (1888); People v. McGrath, 202 N.Y. 445, 96 N.E. 92 (1911).
33. State v. Behimer, 20 Ohio St. 572 (1870).
34. Watson v. State, 26 Okla. Crim. 377, 224 P. 368 (1924).
35. State v. Kessler, 15 Utah 142, 49 p. 293 (1897).
36. Young v. People, 54 Colo. 293, 130 P. 1011 (1913).
37. Brantley v. State, 132 Ga. 573, 64 S.E. 676 (1909) *aff'd* 217 U.S. 284, 30 S.Ct. 514, 54 L.Ed. 768 (1910); Perdue v. State, 134 Ga. 300, 67 S.E. 810 (1910).
38. Jones v. State, 144 Miss. 52, 109 So. 265 (1926); Butler v. State, 177 Miss. 91, 170 So. 148 (1936).
39. State v. Simms, 71 Mo. 538 (1880); State v. Stallings, 334 Mo. 1, 64 S.W.2d 643 (1933).

hibition is recognized in those jurisdictions. Even so, retrial for the greater offense is permitted.[40]

In 17 states[41] the defendant cannot be retried for the greater offense. Virginia[42] and Texas[43] base the result on statutes prohibiting retrial for the greater offense and New Mexico[44] on a constitutional provision to the same effect.

California adopts a rather unique, intermediate view in allowing a retrial for the greater offense. If the offense is divided into degrees, it is just one offense and the degree is merely to fix the punishment.[45]

At first impression this disparity of reasoning is confusing. But it must be remembered that the Fifth Amendment applies only to the federal government and the Fourteenth Amendment, applicable to the states, does not mention jeopardy. The Supreme Court determined that retrial for the greater offense was not a denial of due process under the fourteenth amendment[46] on the ground that the state's interest is to obtain a trial "free from the corrosion of substantial legal error."[47]

The states have been left free to determine the practice applicable to their own spheres and, in this particular, have been allowed fairly wide latitude under the fourteenth amendment. There seems to be no imminent danger that this position will be rejected. However, considering the *Brantley* case and the *Green* case in conjunction, it is conceivable that the due process clause of the fourteenth amendment might possibly be extended to cover state prohibitions against double jeopardy.

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40. Connecticut; State v. Lee, 65 Conn. 265, 30 A. 1110 (1894); State v. Palko, 122 Conn. 529, 191 A. 320 (1937) *aff'd* 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288 (1937). North Carolina: State v. Correll, 229 N.C. 640, 50 S.E.2d 717 (1948). Vermont: State v. Bradley, 67 Vt. 465, 32 A. 238 (1895).

41. Alabama, Arkansas, California, Delaware, Florida, Illinois, Iowa, Louisiana, Michigan, New Mexico, Oregon, Pennsylvania, Tennessee, Texas, Virginia, West Virginia and Wisconsin.

42. Stuart v. Commonwealth, 69 Va. (28 Gratt) 950 (1877); Taylor v. Commonwealth, 186 Va. 587, 43 S.E.2d 906 (1947).

43. Jones v. State, 13 Tex. 168, 62 Am. Dec. 550 (1954); Brown v. State, 99 Tex. Crim. 19, 267 S.W. 493 (1925).

44. State v. Welch, 37 N.M. 549, 25 P.2d 211 (1933); State v. White, 61 N.M. 109, 295 P.2d 1019 (1956).

45. People v. Keefer, 67 Cal. 232, 3 p. 818 (1884), Murder; *In re* Moore, 29 Cal. App. 56, 84 P.2d 57 (1938), burglary.

46. State v. Palko, 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288 (1937). See also Note, 51 HARV. L.R. 739 (1938).

47. *Id.* at 328, 58 S.Ct. at 153, 82 L.Ed. at 293.

IV. Conclusion

There is language in the *Trono* case to the effect that to properly ascertain the meaning of the prohibition against double jeopardy, one must look to the origin and significance of the prohibition at the time of its adoption. The provisions in the state constitutions are quite variegated. Some follow the federal example and forbid jeopardy of life.[48] Others employ a broader phrase.[49] As *jeopardy of life or limb* applied to all felonies at common law, it has been assumed to include all felonies as it is used in the Constitution. In spite of the language "life or limb" however, the doctrine is generally applied to all indictable offenses, including misdemeanors.[50]

The more logical view appears to be that the purpose of the prohibition is to forbid the state to make repeated attempts to convict a person accused of a crime. Thus, carried to its proper conclusion, it can hardly be considered a new, totally different attempt on behalf of the state to obtain a conviction where the accused himself has asked for a new trial. While the primary concern is to protect the defendant from oppression, and from efforts to secure, through the callousness of repeated prosecutions, convictions for whose justice no one could vouch, it cannot be denied that such interests are not absolute and must be balanced against the interests of society, against whose law he has transgressed.

Although the waiver theory has been most widely acclaimed in allowing a retrial, Mr. Justice Holmes quite accurately indicated, in his *Kepner* dissent, that the application of such a theory gives the defendant no meaningful choice. The choice between his life and a retrial for his life has little, if any, validity.

There can be no doubt that the *Green* case, for all practical purposes and despite the protestations of the majority, has overruled *Trono*. Nevertheless, it is submitted that the better view as regards double jeopardy upon a retrial—including retrial for a greater offense than that upon which there has been a conviction—is that there is one continuing jeopardy from the instance it first attaches until a disposition of the matter is finally and completely made. Where the propriety of the original proceedings has been called into

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48. *E.g.* Ga. Const. art. 1, § 108; Ga. Code Ann. § 2-108.
49. *E.g.* Cal. Const. art. 1 § 13 (twice in jeopardy for the same offense).
50. Clawens v. Rives, 104 F.2d 240 (D.C. Cir. 1934); People v. Matiasevich, 12 Cal. App. 759, 55 P.2d 942 (1936); State v. O'Brien, 106 Vt. 97, 170 A. 98 (1934).

question by the defendant, a complete re-examination of the guilt or innocence of the accused is appropriate and not unjust. Neither is it inappropriate nor unjust to allow a complete new trial since the interests of both parties demand a trial substantially free from prejudicial error.

—ALBERT SIDNEY JOHNSON