MULTIPLE PUNISHMENTS FOR THE SAME OFFENSE: THE ANALYSIS AFTER *MISSOURI v. HUNTER* OR *DON QUIXOTE, THE SARGASSO SEA, AND THE GORDIAN KNOT**

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* The subtitle is suggested by the rather numerous and colorful metaphors used by the courts in dealing with this issue. A dissenting judge of the Missouri Supreme Court accused the majority of appearing like Don Quixote in its effort to avoid the mandate of the United States Supreme Court. State v. Haggard, 619 S.W.2d 44, 55 (Mo. 1981) (Rendlen, J., concurring in part and dissenting in part), *vacated,* 103 S.Ct. 1171 (1983).

One of the key cases on the multiple punishment issue is *Albernaz v. United States,* 450 U.S. 333 (1981). In the *Albernaz* majority opinion, Justice Rehnquist refers to the decisional law in the area of double jeopardy as "a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator." *Id.* at 343. The Delaware Supreme Court went so far as to define the Sargasso Sea in a case that had been vacated and remanded for reconsideration in light of *Albernaz*:

> The Sargasso Sea is a large oval-shaped area of the North Atlantic Ocean set apart by the presence of marine plants, or seaweed, which float on its surface—a region of slow ocean currents surrounded by a boundry of rapidly-moving currents such as the Gulf Stream and the North Equatorial Current. "The early navigators who sailed their small ships to North America saw the Sargasso Sea as patches of gulfweed that seemed to form wide-spreading meadows. Soon there were legends and myths about the region which told of large islands of thickly matted seaweed inhabited by huge monsters of the deep . . . . They pictured a blanket of netted seaweed from which no ship could escape, once it became entangled in the weed . . . ."

Hunter v. State, 430 A.2d 476, 480 n.2 (Del. 1981) (quoting 17 WORLD BOOK ENCYCLOPEDIA 111 (1976)). *See also* State v. Haggard, 619 S.W.2d 44, 49-50 n.3 (Mo. 1981) (quoting the *Hunter v. State* definition of the Sargasso Sea), *vacated,* 103 S.Ct. 1171 (1983).

Justice Rehnquist argued in dissent in another multiple punishment case that three categories of "same offense" cases exist and that an earlier case "tied together three separate strands of cases in what may prove to be a true Gordian knot." Whalen v. United States, 445 U.S. 684, 702 (1980) (Rehnquist, J., dissenting).

Other colorful metaphors appear in the relevant opinions, and a few will be mentioned in passing.

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I. INTRODUCTION

Substantial confusion exists over the proper role of the double jeopardy clause of the federal constitution[1] when multiple convictions based on the same conduct are sought in a single proceeding. The United States Supreme Court has said several times that the double jeopardy clause protects against "multiple punishments for the same offense,"[2] but the Court has provided uncertain guidance for determin-

1. "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . . ." U.S. CONST. amend. V.

2. *E.g.,* Albernaz v. United States, 450 U.S. 333, 343 (1981); United States v. DiFrancesco, 449 U.S. 117, 129 (1980); Illinois v. Vitale, 447 U.S. 410, 415 (1980); Whalen v. United States, 445 U.S. 684, 688 (1980); Simpson v. United States, 435 U.S. 6, 11 n.5 (1978); Brown v. Ohio, 432 U.S. 161, 165 (1977); United States v. Wilson, 420 U.S. 332, 343 (1975); North Carolina v. Pearce, 395

ing when convictions under different statutes constitute multiple punishment.[3]

This lack of clear guidance[4] led the Missouri Supreme Court into a rather unusual conflict with the United States Supreme Court. The

U.S. 711, 717 (1969). *See* Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences,* 78 MICH. L. REV. 1001, 1062 n.211 (1980) (stating that the Court in *Pearce* was relying on the analysis in Note, *Twice in Jeopardy,* 75 YALE L.J. 262, 265-66 (1965), when it adopted this statement as part of its "favorite saying about double jeopardy").

3. The issue of when convictions under different statutes constitute multiple punishment is conceptually distinct from the issue of when convictions under a single statute constitute multiple punishment. The latter issue is a "unit of prosecution" issue and the Supreme Court has resolved it by seeking to ascertain what the legislative body intended to define as the "unit" of conduct that would give rise to a violation. *See* Whalen v. United States, 445 U.S. 684, 703-04 (1980) (Rehnquist, J., dissenting). *See also* Ladner v. United States, 358 U.S. 169 (1958); Bell v. United States, 349 U.S. 81 (1955); United States v. Universal C.I.T. Credit Corp., 344 U.S. 218 (1952).

The analysis in Blockburger v. United States, 284 U.S. 299 (1932), is instructive on this matter. Two multiple punishment issues were presented in *Blockburger*. The first was whether convictions and consecutive sentences for two sales of narcotics to the same person, as part of the same agreement, constituted multiple punishment. The Court held that no multiple punishment had occurred because the statute in question defined each sale as a distinct offense. *Id.* at 302.

The second issue was whether convictions and consecutive sentences for violation of two different statutes by the same sale constituted multiple punishment. The Court again held that no multiple punishment had occurred, but the analysis is markedly different with respect to this issue. The Court focused on the elements of the statutes and did not refer explicitly to legislative intent. The rule, the Court wrote, "is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Id.* at 304. This, of course, is the *Blockburger* test. It bears noting that, by definition, it applies only when two statutes are involved.

4. *See, e.g.,* Schwartz, *Multiple Punishment For the "Same Offense": Michigan Grapples With the Definitional Problem,* 25 WAYNE L. REV. 825, 856 (1979) ("The history of the fifth amendment's prohibition against multiple punishment for the same offense has been marked by uncertainty and inconsistency"). *See also* Westen, *supra* note 2, at 1063:

> Every member of the Court appears to agree that the double jeopardy clause prohibits multiple punishment. But because they have never collectively focused on the values that inform the prohibition, they have no common idea as to what the prohibition itself means; and not knowing what they mean by it, they disagree on its application. So it is, too, for individual justices. Thus, after announcing three years ago that double punishment meant one thing, Justice Blackmun now admits that it means something quite different. He has changed his position, not because he believes double punishment should no longer be prohibited, but because he now understands what double punishment has really meant all along.

Id. (footnotes omitted).

The reference to Justice Blackmun's change of position compares Whalen v. United States, 445 U.S. 684, 697-98 (1980) (Blackmun, J., concurring in the judgment), with Jeffers v. United States, 432 U.S. 132, 155 (1977). In *Jeffers*, Justice Blackmun wrote for the plurality: "If some possibility exists that the two statutory offenses are the 'same offense' for double jeopardy purposes, however, it is necessary to examine the problem closely, in order to avoid constitutional multiple-punishment difficulties." 432 U.S. at 155. After concluding that Congress did not intend cumulative

conflict escalated into a war of wills, won, of course, by the United States Supreme Court.[5] The final battle in the war was *Missouri v. Hunter*,[6] a decision that removed some of the confusion surrounding the multiple punishment doctrine.

The conflict began in 1980 with *Sours v. State*.[7] William Scott Sours was accused of using a gun to hold up a fast food store. He subsequently pleaded guilty to the offenses of first degree armed robbery and using a firearm to commit a felony.[8] The trial judge imposed concurrent sentences of five years for the robbery and three years for the

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penalties, Blackmun noted that "this again makes it unnecessary to reach the lesser-included-offense issue." *Id.*

In *Whalen*, Blackmun stated, "dicta in recent opinions of this Court at least have suggested, and I *now* think wrongly, that the Double Jeopardy Clause may prevent the imposition of cumulative punishments in situations in which the Legislative Branch *clearly intended* that multiple penalties be imposed for a single criminal transaction." 445 U.S. at 697 (Blackmun, J., concurring in the judgment) (citing, *inter alia*, his own plurality opinion in *Jeffers*, 432 U.S. at 155) (first emphasis added).

5. The "victory" was not absolute. The Missouri Supreme Court subsequently held that the action of the United States Supreme Court in vacating some of the state court's decisions did not change the result in other cases based on that erroneous position. In State v. Thompson, 659 S.W.2d 766 (Mo. 1983), the court ruled that a mandate in a particular case that was based on its earlier position "cannot and should not be recalled." *Id.* at 769 (plurality opinion). The state had not petitioned for certiorari in *Thompson* even though the United States Supreme Court had already vacated and remanded other cases raising that issue. *Id.* at 770 (Blackmar, J., concurring in the judgment). This fact was important to the judge who cast the deciding vote in *Thompson*; in his view the state "acquiesced in the final disposition of the case" and "[i]t is not necessary to discuss other possibilities." *Id.* (Blackmar, J., concurring in the judgment).

6. 103 S. Ct. 673 (1983).

7. 593 S.W.2d 208 (Mo.) (*Sours I*), *vacated sub nom.* Missouri v. Sours, 446 U.S. 962 (1980).

8. *Id.* at 210. Sours was convicted of robbery in the first degree by means of a dangerous and deadly weapon under MO. REV. STAT. § 560.120 (1969) (current version at MO. REV. STAT. § 569.020 (1978)) and armed criminal action under MO. REV. STAT. § 559.225(1) (Supp. 1976) (current version at MO. REV. STAT. § 571.015(1) (1978)). 593 S.W.2d at 209.

Section 560.120 provided, in pertinent part:

> Every person who shall be convicted of feloniously taking the property of another from his person, or in his presence, or by putting him in fear of some immediate injury to his person . . . shall be adjudged guilty of robbery in the first degree.

MO. REV. STAT. § 560.120 (1969) (current version at MO. REV. STAT. § 569.020 (1978)).

Section 559.225(1) provided, in pertinent part:

> [A]ny person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous or deadly weapon is also guilty of the crime of armed criminal action and, upon conviction, shall be punished by imprisonment . . . for a term of not less than three years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous weapon . . . .

MO. REV. STAT. § 559.225(1) (Supp. 1976) (current version at MO. REV. STAT. § 571.015(1) (1978)).

armed criminal action.[9] On appeal, the Missouri Supreme Court held that armed criminal action and first degree armed robbery are the same offense for purposes of the fifth amendment double jeopardy clause when both offenses "aris[e] out of the same incident."[10] Because the double jeopardy clause prohibits multiple punishment for the same offense,[11] the court vacated one of the convictions.[12]

The United States Supreme Court, however, vacated *Sours* and remanded it for reconsideration.[13] Upon reconsideration, the Missouri Supreme Court reached the same result for the same reasons.[14] Thereafter, the United States Supreme Court denied certiorari.[15]

Over one hundred Missouri cases were subsequently based on the *Sours* interpretation of the double jeopardy clause,[16] and the United States Supreme Court routinely vacated and remanded each of these cases when the state petitioned for certiorari.[17] This forced the Mis-

9. 593 S.W.2d at 210. The trial court initially sentenced Sours to consecutive terms, apparently because of the judge's view that the statute required consecutive sentences. But the court later granted the defendant's motion to vacate the sentences and resentenced him to concurrent terms. *Id.*

10. *Id.* Two dissents were filed in *Sours I*. Judge Rendlen argued that the majority had misapplied the *Blockburger* test. 593 S.W.2d at 223. Judge Donnelly's rather unusual dissent is reprinted here in its entirety:

> The principal opinion treats the *Per Curiam* in *Harris v. Oklahoma* . . . as decisive here.
>
> In my view, we are not bound by general declarations of law made by the United States Supreme Court. *See State v. Clark*, 592 S.W.2d 709, 719 (Mo. banc 1979) (Donnelly, J., dissenting).
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> Of course, in a given factual setting, when the United States Supreme Court takes jurisdiction over the subject matter and the parties, its adjudication is the law of the case and its judgment is binding on this Court. But this is not the situation here.
>
> I respectfully dissent.

593 S.W.2d at 223-24 (Donnelly, J., dissenting) (citation omitted).

11. *See* cases cited *supra* note 2.

12. The question of which conviction to vacate is an interesting one, albeit moot given the ultimate resolution of the issue. *Sours* decided that the conviction for the more general offense (armed criminal action) must be vacated even though that offense would typically be considered the "greater" offense (it "includes all of the elements of the underlying felony"). 593 S.W.2d at 223. This conclusion was later criticized as an "ad hoc choice . . . without citation of authority or explication of rationale." State v. Haggard, 619 S.W.2d 44, 54 n.3 (Mo. 1981) (Rendlen, J., dissenting), *vacated,* 103 S. Ct. 1171 (1983).

13. Missouri v. Sours, 446 U.S. 962 (1980). The court ordered reconsideration in light of Whalen v. United States, 445 U.S. 684 (1980). For a discussion of *Whalen*, see *infra* text accompanying notes 81-89.

14. Sours v. State, 603 S.W.2d 592 (Mo. 1980) (*Sours II*), *cert. denied,* 449 U.S. 1131 (1981).

15. Missouri v. Sours, 449 U.S. 1131 (1981).

16. Missouri v. Thompson, 659 S.W.2d 766, 774 (Mo. 1983) (Rendlen, C.J., dissenting).

17. Missouri v. Crews, 452 U.S. 957 (1981); Missouri v. Lowery, 452 U.S. 912 (1981); Mis-

souri Supreme Court once again to consider the *Sours* issue.[18] But when it did, the Missouri Supreme Court reached the same conclusion it had reached twice before.[19]

Finally, on January 19, 1983, the United States Supreme Court went a step further and vacated a *Sours* case in an opinion that clearly repudiated the Missouri Supreme Court's position. Writing for the majority in *Missouri v. Hunter*,[20] Chief Justice Burger stated that the view of the Missouri court in *Sours* and its progeny "manifests a misreading of our cases on the meaning of the Double Jeopardy Clause of the Fifth Amendment."[21] The Chief Justice went on to say that "it is clear that the Missouri Supreme Court has misperceived the nature of the Double Jeopardy Clause's protection against multiple punishments."[22]

The issue that divided the two courts can be stated as follows: Does clear legislative authorization of multiple convictions satisfy the prohibition against multiple punishment in a single proceeding? The state court held that legislative authorization is irrelevant to multiple punishment analysis. The Supreme Court held that legislative intent is the key to the analysis.

This Article will trace the development of the multiple punishment doctrine. It will examine the doctrine as it existed prior to *Sours v. State*, the conflict engendered by *Sours*, and three important Supreme Court multiple punishment cases decided after *Sours*. Although some areas of uncertainty remain, it is this author's position that the multiple punishment doctrine now has a coherent theoretical basis.

II. THE SUPREME COURT FRAMEWORK FOR MULTIPLE PUNISHMENT ANALYSIS

One principle that can be initially established is that successive prosecutions for the Missouri offenses of robbery in the first degree and armed criminal action are forbidden by the double jeopardy clause if based on the same conduct. This conclusion follows from *Harris v.*

souri v. Sinclair, 452 U.S. 912 (1981); Missouri v. Greer, 451 U.S. 1013 (1981); Missouri v. Brown, 450 U.S. 1027 (1981); Missouri v. Counselman, 450 U.S. 990 (1981).

18. In view of the number of cases involved, the Missouri Supreme Court consolidated them and heard all arguments in State v. Haggard, 619 S.W.2d 44 (Mo. 1981), *vacated,* 103 S. Ct. 1171 (1983).

19. 619 S.W.2d at 49 & n.2.

20. 103 S. Ct. 673 (1983).

21. *Id.* at 677.

22. *Id.* at 678.

Oklahoma.[23] In *Harris*, the state based a felony murder conviction on a death that had occurred during the commission of a robbery. Thereafter, the state prosecuted the defendant for the robbery with firearms that had been proven in the felony murder prosecution. The Supreme Court held, in a per curiam opinion, that the second prosecution was forbidden by the double jeopardy clause. The Court wrote: "When as here, conviction of a greater crime, murder, cannot be had without conviction of the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime after conviction of the greater one."[24]

The Missouri armed criminal action statute is a perfect analogue to the offense of felony murder in that both require proof of an underlying felony.[25] *Harris* said, however, that a person who "has been tried and convicted for a crime which has various incidents included in it . . . cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offence."[26] Armed criminal action and the underlying felony are, therefore, the same offense for purposes of the double jeopardy clause protection against successive prosecutions.[27]

To its credit, the Missouri Supreme Court recognized that this conclusion follows inevitably from *Harris*.[28] If armed criminal action and

23. 433 U.S. 682 (1977) (per curiam).

24. *Id.* at 682 (footnote omitted).

25. MO. REV. STAT. § 571.015(1) (1978) provides that "any person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid or a dangerous instrument or deadly weapon is also guilty of the crime of armed criminal action." Thus, the state must prove commission of the underlying felony before it can secure a conviction for armed criminal action.

26. 433 U.S. at 682, (quoting In re Nielsen, 131 U.S. 176, 188 (1889)).

27. Missouri v. Hunter, 103 S. Ct. 673, 679 (1983) (Marshall, J., dissenting).

28. *Sours I*, 593 S.W.2d at 218-20. The Michigan Supreme Court had concluded a year earlier that its felony-firearm statute was not the same offense as the underlying felony because the state could prove the felony-firearm violation by proving any of a number of underlying felonies. Wayne County Prosecutor v. Recorder's Court Judge, 406 Mich. 374, 376-77, 280 N.W.2d 793, 799 (1979) (4-3 decision) (alternative holding), *appeal dismissed*, 444 U.S. 948 (1980). Thus, in the view of the Michigan court, each offense requires proof of a fact not required by the other (use of a firearm and the particular felony) and they accordingly satisfy the "required evidence" test articulated by the Supreme Court in Blockburger v. United States, 284 U.S. 299, 304 (1932). *See supra* note 3 for a discussion of the *Blockburger* test.

Harris, however, repudiates this application of the *Blockburger* same offense test. A different felony could have been used to prove felony murder in *Harris*, but this theoretical difference was not sufficient to make felony murder a different offense from the underlying felony that was actually used to prove the felony murder. The state was forbidden by the double jeopardy clause to

the underlying felony are not the same offense for purposes of the protection against multiple punishment, as *Hunter* held, it must be because the double jeopardy clause applies in a fundamentally different manner when multiple convictions are sought in a single proceeding.

A. The Problem of Deciding When Punishments are Multiple

The multiple punishment doctrine protects against "multiple punishments for the same offense."[29] Thus, it requires two determinations: are the punishments multiple and are they being imposed for the same offense? Obviously, if the punishments are not multiple, it is not necessary to reach the sometimes difficult question of whether the offenses are the same.

At first it might appear that an imposition of separate punishments under different criminal statutes, as in *Sours*, constitutes multiple pun-

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prosecute both offenses in successive trials. The same result would obtain in a single proceeding if *Blockburger* is applied to felony murder and the underlying felony. *See infra* note 89. With respect, therefore, to the Missouri armed criminal action statute, "the Missouri courts have properly recognized that the theoretical possibility that the underlying felony could be some felony other than first-degree robbery is irrelevant for purposes of the Double Jeopardy Clause where no other underlying felony is in fact charged." Missouri v. Hunter, 103 S. Ct. 673, 680 n.2 (1983) (Marshall, J., dissenting).

Thus, the Missouri Supreme Court was correct in concluding that "[a]fter *Harris*, the application given the *Blockburger* test in *Wayne County* . . . cannot survive." *Sours I,* 593 S.W.2d at 220. *Accord* Schwartz, *supra* note 4, at 851 ("The analysis of *Harris* leads one to the conclusion that convictions for both the felony-firearm and the underlying felony constitute multiple punishment for the same offense under the *Blockburger* test.").

29. *See supra* note 2. It is abundantly clear that the drafters of the fifth amendment intended to proscribe multiple punishments. The wording of the double jeopardy prohibition proposed by James Madison in the House of Representatives was as follows: "No person shall be subject, except in cases of impeachment, to more than one punishment or trial for the same offense." J. SIGLER, DOUBLE JEOPARDY, THE DEVELOPMENT OF A LEGAL AND SOCIAL POLICY 28 (1969). This language was adopted by the House of Representatives but was changed in the Senate to the language that was submitted to and ratified by the states.

Although the actual reason behind the change in language is unknown, *id.* at 31-32, the primary opposition to Madison's language was that it could be construed to prevent a convicted person from appealing and setting aside an erroneous conviction. *Id.* at 30. Thus, Sigler concluded, "[i]n all probability, the drafters of the clause intended to alter Madison's proposal only with a view to its clarification." *Id.* at 32.

It may be concluded, therefore, that "preventing multiple punishment for the same offense was foremost in the minds of the framers of the double jeopardy clause." Note, *Twice in Jeopardy,* 75 YALE L.J. 262, 266 n.13 (1965) [hereinafter cited as *Twice in Jeopardy*]. *See* Note, *A Definition of Punishment for Implementing the Double Jeopardy Clause's Multiple-Punishment Prohibition,* 90 YALE L.J. 632, 635 n.16 (1981) [hereinafter cited as *A Definition of Punishment*]. "Until joinder became permissible and commonplace, however, multiple punishment could result only from multiple trials." *Twice in Jeopardy, supra*, at 266 n.13.

ishments. If so, the only remaining issue is whether the offenses in question are the same. Given the conclusion previously reached under the authority of *Harris* that armed criminal action is the same offense as the underlying felony, it would seem that the Missouri Supreme Court was correct in holding that one of the convictions must be vacated. However, the question of whether multiple penalties constitute multiple punishments is not as easy as it first seems when the legislative body has explicitly authorized both penalties. After all, what is punishment but what the legislature defines it to be? If the purpose of the legislature is to punish more severely the defendant who commits robbery with a weapon than the defendant who commits robbery without using a weapon, it may do so by providing an increased sentence for robbery committed with a weapon. That type of sentencing provision is unquestionably a proper exercise of the legislative power to "define crimes and fix punishments,"[30] and is not multiple punishment.[31]

30. Brown v. Ohio, 432 U.S. 161, 165 (1977).

31. *See, e.g.*, State v. Johnstone, 335 S.W.2d 199 (Mo.), *cert. denied,* 364 U.S. 842 (1960). See also the hypothetical statute offered for consideration by Justice Frankfurter in Gore v. United States, 357 U.S. 386, 392-93 (1958):

> Suppose Congress, instead of enacting the three provisions before us, had passed an enactment substantially in this form: "Anyone who sells drugs except from the original stamped package and who sells such drugs not in pursuance of a written order of the person to whom the drug is sold, and who does so by way of facilitating the concealment and sale of drugs knowing the same to have been unlawfully imported, shall be sentenced to not less than fifteen years' imprisonment: *Provided, however,* That if he makes such sale in pursuance of a written order of the person to whom the drug is sold he shall be sentenced to only ten years' imprisonment: *Provided further,* That if he sells such drugs in the original stamped package he shall also be sentenced to only ten years' imprisonment: *And provided further,* That if he sells such drugs in pursuance of a written order and from a stamped package, he shall be sentenced to only five years' imprisonment." Is it conceivable that such a statute would not be within the power of Congress? And is it rational to find such a statute constitutional but to strike down the *Blockburger* doctrine as violative of the double jeopardy clause?

Id. This power to fix punishments will even allow the legislature to prescribe more severe penalties for an offender who has previously been convicted of a crime. Habitual offender statutes have been explicitly upheld as constitutional by the Supreme Court despite challenges based on principles of double jeopardy, due process, cruel and unusual punishment, equal protection, and the privileges and immunities clause of the fourteenth amendment. *See* Gryger v. Burke, 334 U.S. 728 (1948); Graham v. West Virginia, 224 U.S. 616 (1912); McDonald v. Massachusetts, 180 U.S. 311 (1901); Moore v. Missouri, 159 U.S. 673 (1895). The rationale behind these decisions is that the increased penalty "is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one." Gryger v. Burke, 334 U.S. 728, 732 (1948). Thus, it is not an "additional punishment on crimes for which [the defendant] had already been convicted and punished." McDonald v. Massachusetts, 180 U.S. 311, 312 (1901). The Supreme Court implicitly affirmed the propriety of such increased sentence statutes in Rummel v. Estelle, 445 U.S. 263 (1980).

Last term, the Supreme Court held that the eighth amendment requires a criminal sentence to

The Missouri legislature sought to accomplish the same goal by authorizing two convictions and two penalties for a defendant who commits robbery with a firearm. The issue thus becomes whether there is any good reason why the Missouri approach constitutes multiple punishment while the sentence enhancement approach does not. Although there may be some reasons in support of this position,[32] the multiple penalties under the Missouri statutory scheme are not as obviously multiple punishments as they first seem.

B. The Genesis of the Multiple Punishment Doctrine

Ex parte Lange[33] was the first case to hold that the double jeopardy clause prohibits multiple punishments for the same offense.[34] The criminal statute in *Lange* prescribed a fine of not more than two hundred dollars *or* imprisonment for not more than one year.[35] Notwithstanding the disjunctive phrasing of the statute, the trial judge sentenced the defendant to the maximum fine and the maximum term of imprisonment. The defendant paid the fine and served five days of his sentence before his habeas corpus petition was heard. The sentencing judge entered an order vacating the prior judgment and resentenced the defendant to one year in jail from the date of the resentencing.[36] No provision was made to return the fine to the

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be "proportionate to the crime for which the defendant has been convicted." Solem v. Helm, 103 S. Ct. 3001, 3009 (1983). *Helm* does not, however, impair the conclusion that the double jeopardy clause is not offended by habitual offender statutes.

32. *See infra* text accompanying notes 151-60.

33. 85 U.S. (18 Wall.) 163 (1873).

34. Moore v. Illinois, 55 U.S. (14 How.) 13 (1852), seems to assume that multiple punishments are forbidden but does not state the nature of the protection involved. In deciding that Illinois could constitutionally punish a criminal act that also violated a federal criminal statute, the Supreme Court noted, "Yet it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences, for each of which he is justly punishable." *Id.* at 20. Because the next sentence refers to a plea in bar, the nature of the protection discussed may be the common law plea of *autrefois convict. See generally Twice in Jeopardy, supra* note 29, at 262 n.1.

The dissent in *Moore* is more specific, arguing that the state and federal constitutions "all provide against a second punishment for the same act." 55 U.S. (14 How.) at 22 (McLean, J., dissenting). In any event, however, the statements in *Moore* are dicta. There was but a single conviction at issue in *Moore*. Further, if there had been a conviction under state and federal law, the majority was apparently ready to invoke the dual sovereignty doctrine ultimately adopted in United States v. Lanza, 260 U.S. 377 (1922), and affirmed in Bartkus v. Illinois, 359 U.S. 121 (1959), and Abbate v. United States, 359 U.S. 187 (1959). *See* 55 U.S. (14 How.) at 19-20.

35. 85 U.S. (18 Wall.) at 175.

36. *Id.* at 164.

defendant.[37]

The judge in *Lange* thereby effectively sentenced the defendant to the maximum fine and a term of imprisonment of one year and five days under a statute that permitted either a fine or imprisonment for not more than one year. Thus, the defendant in *Lange* suffered multiple punishment under three theories of multiple punishment. First, his original sentence was greater than permitted by the disjunctive phrasing of the statute. Second, he was sentenced under the same judgment after he had already fully satisfied one of the alternative penalties provided for that offense. Third, the effect of both sentences was to impose a term of imprisonment that exceeded the maximum permitted by the statute.

Although the Court mentions that the first judgment was "in excess of the authority of the court,"[38] and that the defendant faced imprisonment for a period in excess of the one year permitted by the statute,[39] the thrust of *Lange* is clearly based on the second theory of multiple punishment. Noting that the second sentence was erroneous, the Court went on to state that "it was error because the power to render any further judgment did not exist."[40] Thus, the defendant having fully executed one of the penalties provided for in the statute, the trial judge was without authority to sentence him again under the same judgment.

Further, the second theory of multiple punishment underlies an oft-quoted and eloquent statement in *Lange* explaining the necessity for a protection against multiple punishment:

> For of what avail is the constitutional protection against more than one trial if there can be any number of sentences pronounced on the same verdict? Why is it that, having once been tried and found guilty, he can never be tried again for that offence? Manifestly it is not the danger or jeopardy of being a second time found guilty. It is the punishment that would legally follow the second conviction which is the real danger guarded against by the Constitution. But if, after judgment has been rendered on the conviction, and the sentence of that judgment executed on the criminal, he can be again sentenced on that conviction to another and different punishment, or to endure the same punishment a second time, is

37. The Court assumed the fine could not be paid back to the defendant because the money had "passed into the Treasury of the United States, and beyond the legal control of the court, or of anyone else but the Congress of the United States." *Id.* at 175.

38. *Id.*

39. *Id.*

40. *Id.* at 176.

> the constitutional restriction of any value? Is not its intent and its spirit in such a case as much violated as if a new trial had been had, and on a second conviction a second punishment inflicted?
>
> The argument seems to us irresistible, and we do not doubt that the Constitution was designed as much to prevent the criminal from being twice punished for the same offence as from being twice tried for it.[41]

Moreover, the facts of *Lange* implicate the first and third theories of multiple punishment only if the second sentencing is valid. If the second sentence is void, the defendant had executed a sentence of a fine and five days in jail. No remedy could return the five days in jail to the defendant, and thus there would be no reason to consider whether, under the first theory, a defendant could be sentenced to both a fine and imprisonment. Further, since the resulting sentence in that situation would obviously be less than the maximum term of imprisonment permitted by the statute, no issue under the third theory is presented. Thus, a conclusion that the actions of the trial judge constitute multiple punishment under the second theory of multiple punishment renders unnecessary a resolution of the other two theories.[42] The narrow holding of *Lange* is that a judge may not, under the same judgment, resentence a defendant who has fully satisfied a penalty under a statute that permits only a single penalty.[43]

Lange is a particularly appropriate case with which to begin consideration of the multiple punishments aspect of the multiple punishment doctrine. No same offense question existed in *Lange* because the defendant was sentenced twice under the same judgment. *Lange*, therefore, is based solely on whether the defendant suffered multiple punishments.

North Carolina v. Pearce,[44] the next Supreme Court case to consider explicitly the question of when punishments are multiple, was decided ninety-six years later and represents a rather subtle extension of *Lange*. In the companion case to *Pearce, Simpson v. Rice*, the defendant was

41. *Id.* at 173.

42. The Court reached the third theory by way of dictum, however, assuming that a sentence for a greater term of imprisonment than permitted by the statute could be corrected during the term of court in which it was imposed. *Id.* at 174.

43. "[I]f the legislature provides for alternative and exclusive punishments and the defendant has completely satisfied one of those penalties, the sentencing court may not require the defendant to suffer the alternative penalty." *A Definition of Punishment, supra* note 29, at 639-40 (citing *Ex parte Lange*).

44. 395 U.S. 711 (1969) (heard and reported with *Simpson v. Rice*).

originally sentenced to prison terms that totalled ten years.[45] He succeeded in obtaining a reversal of his convictions and, upon retrial, was sentenced to prison terms totalling twenty-five years.[46] No credit was given for the two and one-half years already served.[47]

Unlike *Lange*, Rice's second sentencing did not result in a combined sentence in excess of that permitted by the criminal statute because state law allowed a total sentence of thirty years.[48] Nor had the defendant already executed a judgment that was a full satisfaction of the penalty permitted by the statute.

Thus, the issue presented by *Rice* was whether the double jeopardy clause requires that credit "be given for that part of the original sentence already served."[49] The Court held that it did, contending that in some situations failure to give credit would produce a total sentence longer than the maximum penalty permitted by the criminal statute. The Court reasoned further that, "the same principle obviously holds true whenever punishment already endured is not fully subtracted from any new sentence imposed."[50]

It is questionable whether that conclusion is quite as obvious as the Court tells us it is. One could construct a theory of multiple punishment that would require credit be given for time served only to the extent necessary to limit the total sentence to the maximum permitted for the offense.[51] The Court's view of the multiple punishment doctrine in *Pearce* was more expansive, however, and it is necessary to identify the rationale for the conclusion that credit for time served must always be given when a defendant is resentenced for the same offense.

The rationale cannot be that the defendant has a vested interest in the first sentence which operates as a limitation on the second sentence. The Court clearly held that the double jeopardy clause did not prohibit a longer sentence upon reconviction if the defendant is given credit for

45. The defendant pleaded guilty to four counts of second-degree burglary and received consecutive sentences that totalled ten years. *Id.* at 714 & n.3.

46. *Id.* at 714 n.4.

47. *Id.* at 716.

48. At the retrial, Rice was convicted of three counts of second-degree burglary, and a sentence of ten years could have been imposed on each count. *Id.* at 719 n.14.

49. *Id.* at 716.

50. *Id.* at 718 (footnote omitted).

51. That was the law in Alabama when Rice was resentenced. *Id.* at 716 n.7 (citing Goolsby v. State, 283 Ala. 269, 215 So. 2d 602 (1968)).

the time already served.[52]

Nor can the rationale be that the defendant in *Rice* was sentenced in excess of what the legislature intended. The maximum sentence allowed by state law was thirty years; the judge could have imposed a sentence of thirty years and given credit for the two and one-half years served.[53] That sentence would have required Rice to serve twenty-seven and one-half years in addition to his original imprisonment rather than an additional twenty-five years. Yet the lesser sentence was found to be in violation of the multiple punishment doctrine.

The only rationale that explains the result in *Rice* is that serving two and one-half years of the first sentence entitles Rice to start at that point in his new sentence. Otherwise, it appears as if he is serving part of the sentence twice.[54] It follows by analogy from *Lange* that a judge cannot explicitly require a defendant to serve part of his sentence twice. *Rice* merely holds that what a judge is forbidden to accomplish explicitly may not be accomplished indirectly by denying credit for the time served.

In summary, the multiple punishments aspect of the multiple punishment doctrine, after *Lange* and *Pearce*, may be stated as follows: the trial judge may not impose a sentence greater than that authorized by the legislative body nor may the judge directly or indirectly require part of the sentence to be served twice.

The *Lange-Pearce* rule is thus a limitation on the power of trial judges to sentence defendants. Neither case dealt with the power of

52. "We hold, therefore that neither the double jeopardy provision nor the Equal Protection Clause imposes an absolute bar to a more severe sentence upon reconviction." 395 U.S. at 723. For a critical view of this holding with respect to the double jeopardy clause, see *A Definition of Punishment, supra* note 29, at 636 n.17. The Court in *Pearce* went on to hold, of course, that the due process clause bars a more severe sentence upon reconviction unless the trial judge bases the sentence "upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding" and "the factual data upon which the increased sentence is based [is] made part of the record." 395 U.S. at 726.

53. The Court discussed this possibility after noting that "[i]n most situations, even when time served under the original sentence is fully taken into account, a judge can still sentence a defendant to a longer term in prison than was originally imposed." *Id.* at 719 n.14.

54. This is what the Court meant when it said "if he is reconvicted, those years can and must be returned—by subtracting them from whatever new sentence is imposed." *Id.* at 719.

Westen and Drubel have reached the same conclusion: "The resulting sentence violated double jeopardy because, by denying the defendant credit for time already served for the same offense, the trial judge required him to serve two and a half years of his lawful twenty-five-year sentence twice." Westen & Drubel, *Toward A General Theory Of Double Jeopardy,* 1978 SUP. CT. REV. 81, 109.

legislatures to define punishment. As Justice Stewart noted in a recent case, if the statute in *Lange* had allowed a fine *and* imprisonment, "it could not be seriously argued that the imposition of both a fine and a prison sentence in accordance with such a provision constituted an impermissible punishment."[55]

It follows from *Lange* and *Pearce* that the issue of when punishments are multiple is initially decided by reference to what punishment has been authorized by the legislature. The issue left undecided by *Lange* and *Pearce* is the issue presented by *Missouri v. Hunter*: Does the multiple punishment doctrine impose a limitation on the power of the legislature to authorize multiple penalties in a single proceeding? The Court discussed this issue without deciding it in four cases decided between 1975 and 1978.

C. *Legislative Authorization of Multiple Penalties for the Same Offense: The View Prior to* Sours v. State

In 1975 the United States Supreme Court began to imply that punishments are multiple in a constitutional sense only when they exceed the punishment authorized by the legislature.[56] Under this view, the question of when punishments are multiple is essentially one of statutory construction.

In *Iannelli v. United States*,[57] the Court stated in dictum that the function of the *Blockburger* same offense test, when applied to punishment imposed in a single proceeding, was to "identif[y] congressional intent to impose separate sanctions for multiple offenses arising in the course of a single act or transaction."[58] The Court also compared the same offense test to Wharton's Rule,[59] characterizing Wharton's Rule as a "judicial presumption, to be applied in the absence of legislative intent to the contrary."[60]

55. Whalen v. United States, 445 U.S. 684, 688 (1980).

56. *See* Iannelli v. United States, 420 U.S. 770 (1975). This implication is subject, of course, to the *Rice* exception that the sentencing judge may not directly or indirectly require a defendant to serve part of a presumptively valid sentence twice. *See supra* notes 44-54 and accompanying text.

57. 420 U.S. 770 (1975).

58. *Id.* at 785 n.17. The *Blockburger* test is discussed in more detail *supra* note 3 and *infra* text accompanying notes 110-11.

59. Wharton's Rule precludes prosecution of conspiracy to commit certain substantive offenses when those substantive offenses require concerted criminal activity (*e.g.*, adultery). *See id.* at 782-87.

60. *Id.* at 782.

The rather clear inference of the *Iannelli* dicta is that it is unnecessary to apply the same offense test if a clear legislative authorization of multiple penalties exists. In that situation, the punishments would presumably not be multiple and thus no multiple punishment for the same offense could occur.

In 1977 the Court again addressed this issue by way of dicta. The case before the Court, *Brown v. Ohio*,[61] involved an application of the double jeopardy clause in the context of successive prosecutions for the same offense and thus did not present a question of when punishments imposed in a single proceeding might be multiple. The Court discussed the issue in general terms, however, concluding that "[w]here consecutive sentences are imposed at a single criminal trial, the role of the [double jeopardy clause] is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense."[62] According to the Court, the double jeopardy clause does not limit legislative power to authorize punishment that would otherwise be multiple because

> the Fifth Amendment double jeopardy guarantee serves principally as a restraint on courts and prosecutors. The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments; but once the legislature has acted courts may not impose more than one punishment for the same offense and prosecutors ordinarily may not attempt to secure that punishment in more than one trial.[63]

Jeffers v. United States[64] gave the Court the opportunity to address directly the issue of whether a defendant had suffered multiple punishments in violation of the fifth amendment. The Court resolved the question, however, by deciding that Congress did not intend to authorize separate penalties when a single criminal transaction violated the statutes in question. "The critical inquiry," the Court wrote, "is whether Congress intended to punish each statutory violation separately."[65] Having decided that Congress did not intend that result, it was therefore "unnecessary to reach" the same offense definitional problem.[66]

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61. 432 U.S. 161 (1977).

62. *Id.* at 165.

63. *Id.* (footnote omitted).

64. 432 U.S. 137 (1977).

65. *Id.* at 155.

66. *Id.* The Court stated it was also unnecessary to reach the issue of whether the concurrent sentences in *Jeffers* constituted multiple punishments. *See infra* note 192.

The following year, in *Simpson v. United States*[67] the Court implied that it had not yet decided the issue of whether the double jeopardy clause prohibits the imposition of more than one penalty when the legislative body has authorized multiple penalties for a single criminal action. The Court addressed the multiple punishment question in *Simpson* by stating,

> We need not reach the [*Blockburger*] issue. Before an examination is made to determine whether cumulative punishments for the two offenses are constitutionally permissible, it is necessary, following our practice of avoiding constitutional decisions where possible, to determine whether Congress intended to subject the defendant to multiple penalties for the single criminal transaction in which he engaged.[68]

Deciding that Congress did not intend consecutive sentences for aggravated bank robbery and for using firearms to commit the robbery,[69] the Court again found it unnecessary to decide whether the double jeopardy clause imposed any limitation on legislatively authorized multiple penalties. The Court's language indicated, however, that this question was being reserved.

Thus, by 1978, the Court had separated the multiple punishment inquiry into two steps. The first step was to ascertain whether Congress intended to authorize separate penalties when a single criminal transaction violated the criminal statutes in question. If Congress had authorized multiple penalties, the next inquiry was whether the offenses were the same offense. All of the Court's multiple punishment cases to that point, however, fit neatly into two categories: (1) those in which Congress did not intend to authorize multiple penalites;[70] and (2) those in which the two offenses were not the same offense.[71] As a result, the

67. 435 U.S. 6 (1978).

68. *Id.* at 11-12.

69. The Court construed 18 U.S.C. § 924(c) and § 2113(d) (1976). *Id.*

70. *E.g.*, Simpson v. United States, 435 U.S. 6 (1978); Jeffers v. United States, 432 U.S. 137 (1977); United States v. Gaddis, 424 U.S. 544 (1976); Milanovich v. United States, 365 U.S. 551 (1961); Heflin v. United States, 358 U.S. 415 (1959); Prince v. United States, 352 U.S. 322 (1957).

71. *E.g.*, Callanan v. United States, 364 U.S. 587 (1961); Harris v. United States, 359 U.S. 19 (1959); Gore v. United States, 357 U.S. 386 (1957); Pereira v. United States, 347 U.S. 1 (1954); United States v. Michener, 331 U.S. 789 (1947) (per curiam); American Tobacco Company v. United States, 328 U.S. 781 (1946); Pinkerton v. United States, 328 U.S. 640 (1946); Blockburger v. United States, 284 U.S. 299 (1932); Albrecht v. United States, 273 U.S. 1 (1927); Morgan v. Devine, 237 U.S. 632 (1915); Carter v. McClaughry, 183 U.S. 365 (1902). *Cf.* Holiday v. Johnston, 313 U.S. 342, 349 (1941) (stating, in dictum, that "[t]he erroneous imposition of two sentences for a single offense of which the accused has been convicted, or as to which he has pleaded guilty, does not constitute double jeopardy").

Court had not yet faced the question of whether the legislature could, if it wished, authorize multiple penalties for the same offense. It was this variation on the multiple punishment theme that was raised by *Sours v. State*.

III. THE MISSOURI SUPREME COURT AND THE *SOURS* DOCTRINE

A. Sours I

As noted earlier in this Article,[72] the defendant in *Sours* pleaded guilty to first degree armed robbery and armed criminal action based on the same robbery.[73] The legislative intent to authorize penalties under both statutes was abundantly clear.[74] Noting that the provision of the Missouri Constitution governing double jeopardy was not applicable in a single prosecution,[75] the Missouri Supreme Court proceeded to resolve the issue under the federal constitution.[76] The court framed the *Sours* issue as follows: "[W]hether it constitutes double jeopardy to charge and convict a defendant in a single prosecution with both first degree robbery by means of a dangerous and deadly weapon and armed criminal action arising out of the same incident."[77]

Relying principally on *Harris*, as well as on negative inferences from *Simpson* and *Jeffers*, the state court concluded that the two offenses were the same offense for purposes of the double jeopardy clause. Noting that the clause "prohibits double punishments for the same of-

72. *See supra* note 8 and accompanying text.

73. *Sours I*, 593 S.W.2d at 210.

74. The relevant language of the armed criminal action statute is as follows: "The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous or deadly weapon." MO. REV. STAT. § 571.015(1) (1978).

75. The Missouri Constitution prohibits the state from placing a person "again in jeopardy of life or liberty for the same offense, after being once acquitted by a jury." MO. CONST. art. I, § 19. It was the court's opinion that "[s]ince the convictions from which appellant seeks relief were obtained in a single prosecution, MO. CONST. art. I, § 19 does not apply in this case." *Sours I*, 593 S.W.2d at 211. The court also noted that it was not free to construe the armed criminal action statute as a sentence enhancement statute. *Id.* at 221-22 n.10. The Tennessee Supreme Court construed its felony firearm statute in that manner in order to avoid what it perceived to be a double jeopardy violation. State v. Hudson, 562 S.W.2d 416 (Tenn. 1978). *See also* Schwartz, *supra* note 4, at 853.

76. *See supra* note 1. Benton v. Maryland, 395 U.S. 784 (1969), held the fifth amendment double jeopardy clause applicable to the states as a part of the fourteenth amendment due process clause.

77. *Sours I*, 593 S.W.2d at 210.

fense,"[78] the court assumed that the same offense determination resolved the issue and set aside one of the convictions.[79] The court did not consider whether clear legislative authorization for both penalties might negate the conclusion that the punishments are multiple.[80]

The United States Supreme Court was obviously dissatisfied with the *Sours* analysis. The Court vacated *Sours* and remanded it for reconsideration in light of *Whalen v. United States*,[81] a case that was decided after the state court had decided *Sours*.[82]

B. Whalen v. United States

The issue in *Whalen* was whether the double jeopardy clause prohibited the imposition of consecutive sentences in a single proceeding for rape and for felony murder based on the death of the rape victim. As in *Harris*, the Court was faced with convictions for felony murder and for the underlying felony. It would seem that if the double jeopardy clause prohibits multiple punishment for the same offense in the same manner as it prohibits successive prosecutions, the Court could simply have cited *Harris* and reversed the lower courts.

The Court, however, "eschew[ed] reliance upon *Harris v.*

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78. *Id.* at 211.

79. *See supra* note 12.

80. *Cf.* Wayne County Prosecutor v. Recorder's Court Judge, 406 Mich. 374, 280 N.W.2d 793 (1979) (holding the multiple punishment doctrine, as amplified by *Brown* and *Iannelli*, only prohibits imposition of a greater punishment than the legislature intended and that separate convictions and consecutive sentences under the Michigan felony firearm statute were therefore permissible) (4-3 decision) (alternative holding), *appeal dismissed,* 444 U.S. 948 (1980). See *supra* note 28 for a discussion of the other basis for *Wayne County*.

At least one commentator shared the view of the Missouri Supreme Court that legislative authorization of multiple penalties does not change the constitutional analysis.

> The legislative deference approach cannot be reconciled with the opinions in *Jeffers* and the analytical framework set forth in *Simpson*. Although not dealing directly with the question under consideration here [application of Michigan's felony firearm statute], these cases illustrate the proper manner for approaching the felony-firearm statute's double jeopardy problem. As *Simpson* illustrates, the double jeopardy question may be avoided when there is no legislative intent to cumulate punishment. When the legislature intended double punishment, however, as under the Michigan felony-firearm statute, the double jeopardy issue cannot be avoided. In that case, as *Jeffers* illustrates, the *Blockburger* test, not the legislative intent, determines whether the two convictions constitute multiple punishment for the same offense.

Schwartz, *supra* note 4, at 847-48.

81. 445 U.S. 684 (1980).

82. *Sours I* was decided January 15, 1980, and a rehearing was denied on February 18, 1980. *Whalen* was decided April 16, 1980.

Oklahoma,"[83] instead devoting most of its analysis to the issue of whether Congress intended to authorize cumulative punishments for rape and for felony murder based upon the rape. The constitutional claim, the Court noted, "cannot be separated entirely from a resolution of the question of statutory construction."[84]

The Court acknowledged that the double jeopardy clause protects "against multiple punishments for the same offense,"[85] but stated that "the question whether punishments imposed by a court after a defendant's conviction upon criminal charges are unconstitutionally multiple cannot be resolved without determining what punishments the Legislative Branch has authorized."[86] Although this language is ambiguous, one inference that may be drawn from it is that punishments are not multiple if they are authorized by the legislature.[87] Indeed, four members of the *Whalen* Court made it clear, in separate opinions, that they viewed the multiple punishments issue purely as a function of legislative intent.[88]

Seven members of the *Whalen* Court, however, found that the legislature did not intend to authorize consecutive sentences for rape and for felony murder based upon the rape.[89] Thus, the Court was again

83. 445 U.S. at 701 (Rehnquist, J., dissenting).

84. *Id.* at 688.

85. *Id.* (quoting North Carolina v. Pearce, 395 U.S. 711, 717 (1969)). *See* cases cited *supra* at note 2.

86. 445 U.S. at 688.

87. The author of the *Whalen* majority opinion, Justice Stewart, later rejected this inference in his separate opinion in Albernaz v. United States, 450 U.S. 333 (1981): "No matter how clearly it spoke, Congress could not constitutionally provide for cumulative punishments unless each statutory offense required proof of a fact that the other did not, under the criterion of *Blockburger v. United States*." 450 U.S. at 345. (Citation omitted).

Apparently, Justice Stewart intended the quoted language in *Whalen* to mean that a court must first resolve the issue of legislative intent and would reach the constitutional same offense issue only if the legislature had authorized cumulative penalties.

88. *See* 445 U.S. at 696 (White, J., concurring in part and concurring in the judgment) ("the question is one of statutory construction and does not implicate the Double Jeopardy Clause"); *id.* at 697 (Blackmun, J., concurring in the judgment) ("[t]he *only* function the Double Jeopardy Clause serves in cases challenging multiple punishments is to prevent the prosecutor from bringing more charges, and the sentencing court from imposing greater punishments, than the Legislative Branch intended") (emphasis in original); *id.* at 707 (Rehnquist, J., dissenting, joined by Burger, C.J.) ("the question before us is purely one of statutory interpretation").

89. Five members joined the majority opinion. Justices White and Blackmun agreed in separate opinions that Congress did not intend to authorize cumulative penalties. This conclusion was based on an application of the *Blockburger* test. Although the government argued that felony murder and the underlying felony are not the same offense under the *Blockburger* test, the Court disagreed: "In the present case . . . proof of rape is a necessary element of proof of the felony

not faced with the issue of whether the legislative body could, if it wished, authorize multiple punishments for the same offense.

C. Sours II

The holding of *Whalen* was not dispositive on the *Sours* issue.[90] *Whalen*, after all, held that Congress did not intend consecutive sentences for the offenses in question. But the Missouri legislature had made very clear its intent to authorize multiple penalties in the context of armed criminal action convictions.[91] Thus, the Missouri Supreme Court seemed somewhat perplexed by the remand for reconsideration in light of *Whalen*. "Clearly," the state court wrote, "the five justices who joined in the opinion of the Court in *Whalen* . . . declined Justice Blackmun's invitation [in his separate opinion] to hold that the question of what punishments are constitutionally permissible can be reduced to the question of what punishment the legislature intended to be imposed."[92]

Because the Missouri Supreme Court explicitly refused to "collapse the constitutional question into the question of legislative intent,"[93] the court was forced to "bite the bullet and meet the federal constitutional

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murder, and we are unpersuaded that this case should be treated differently from other cases in which one criminal offense requires proof of every element of another offense." *Id.* at 694. Justices White and Blackmun agreed with this conclusion. *Id.* at 696 & 698.

90. *But see* State v. Thompson, 659 S.W.2d 766, 773 (Mo. 1983) (Rendlen, C.J., dissenting) (concluding that *Whalen* was sufficiently clear so that the defendant could have expected his armed criminal action sentence to be altered "only in the first four months of 1980 (between *Sours I* and *Whalen*)").

91. *See supra* note 74.

92. *Sours II*, 603 S.W.2d at 595 (Mo. 1980), *cert. denied,* 449 U.S. 1131 (1981). The reference to "Justice Blackmun's invitation" is to his concurring opinion in *Whalen*. He argued that the multiple punishment doctrine serves only to prohibit greater punishments "than the Legislative Branch intended." 445 U.S. at 697 (Blackmun, J., concurring in the judgment).

93. *Sours II*, 603 S.W.2d at 595 n.3. Another unusual metaphor can be found in this footnote:

> Our refusal to collapse the constitutional question into the question of legislative intent does not commit us to the assumption, criticized by Mr. Justice Rehnquist, "that any particular criminal transaction is made up of a determinable number of constitutional atoms that the legislature cannot further subdivide into separate offenses." *See Whalen*, 445 U.S. at 701, 100 S. Ct. at 1443 (Mr. Justice Rehnquist, dissenting). On the contrary, we recognize that the legislature may divide the criminal transaction into its subatomic particles, into protons and neutrons and electrons, into particles of different electrical charges and weights and spins. We hold only that, once the definition of a crime is fixed as a configuration of such elements, the state may not, consistently with the due process clause and the double jeopardy clause, impose separate punishments both for the neutron and for the atom of which it is a part.

Id.

issue."[94] The court began by reiterating its view that the two offenses in question are the same offense for purposes of successive prosecutions.[95] Reasoning that the protection offered by the double jeopardy clause is against "punishing a person twice for the same offense,"[96] the court concluded that it does not matter whether the punishments are obtained in one proceeding or in successive trials. If the punishments are for the same offense, only one is permissible under the fifth amendment.

Still obviously troubled by the remand for reconsideration in light of *Whalen*, the Missouri Supreme Court appeared somewhat defiant when, near the end of the *Sours II* majority opinion, it stated:

> If the vacation of our prior judgment and the remand of the case for reconsideration in light of *Whalen* was intended to lead this Court to adopt the view that the General Assembly is free to impose separate punishments for two crimes that constitute the same offense under the traditional same evidence test, we are unable to so read *Whalen* and we are not prepared to take that step. We believe that the United States Supreme Court has heretofore reserved that question as noted above. We believe that such a ruling would abolish the traditional double jeopardy protection against multiple punishments for the same offense. It would require bifurcation of the meaning of "same offense" under the double jeopardy clause. It would grant to the state legislature the power to define the meaning of "same offense" as used in the double jeopardy clause of the Constitution, a traditional judicial function. The implicit effect of such a holding would be that the double jeopardy clause would hereafter be only a limitation on the executive and judicial branches, but not on the legislative branch of government. We do not believe that it is appropriate for this Court to make such a ruling. If such a ruling is to be made, it is the responsibility of the United States Supreme Court to make it.[97]

Judge Rendlen's dissent in *Sours II* presented the contrary argument in clear, forceful terms.[98] He argued that the original purpose of the double jeopardy clause was to prevent reprosecutions[99] and that the

94. *Id.* at 603 (footnote omitted).

95. *Id.* at 604-06.

96. *Id.* at 603.

97. *Id.* at 606.

98. *Id.* at 607 (Rendlen, J., dissenting). Judge Donnelly also dissented, *id.* at 606 (Donnelly, J., dissenting), on essentially the same grounds, and he joined Judge Rendlen's dissent.

99. Judge Rendlen's dissent quotes, but does not comment on, the original wording of the double jeopardy clause as submitted by James Madison. *Id.* at 608 n.4 (Rendlen, J., dissenting). *See supra* note 29 for a discussion of the history of the ratification of the double jeopardy clause,

only conceivable function of a double punishment doctrine is to prevent punishment in excess of what the legislature intended. Judge Rendlen reasoned that inasmuch as the legislature could punish a robber armed with a firearm more severely by a sentence enhancement provision, it should be allowed to accomplish the same result by authorizing a conviction for the use of the firearm in addition to the conviction for the robbery. To argue otherwise "employs an intellectual artifice providing the criminal defendant little or no additional protection."[100]

The dissent reasoned further that the multiple punishment doctrine is not designed to guard against legislative excesses, but rather to guard against "prosecutorial and judicial arbitrariness."[101] Under the armed criminal action statute, however, virtually no chance exists for prosecutorial and judicial arbitrariness because the legislative intent is clear. The dissent thus concluded that "no issue of constitutional dimension arises under the Fifth Amendment by the operation of our Missouri armed criminal action statute."[102] Without a constitutional basis for its action, the majority decision abridged the legislature's power to define crimes and dictate punishment, conferring "upon courts a role neither contemplated by those who ratified the Fifth Amendment nor supported by subsequent Supreme Court decisions interpreting it."[103]

By a vote of five to two, however, the Missouri Supreme Court refused to change the position it had taken in *Sours I*, and the state peti-

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concluding that its primary purpose was to prevent multiple punishment for the same offense. This conclusion does not, unfortunately, shed any light on how to define "punishment" for the purpose of implementing the prohibition against multiple punishment.

The problem of multiple penalties based on overlapping criminal statutes violated by the same conduct probably did not occur to those who drafted and ratified the double jeopardy clause. As Judge Rendlen pointed out in his dissent, only a "limited number of common law felonies" existed at the time of the adoption of the fifth amendment. 603 S.W.2d at 608 (Rendlen, J., dissenting). The "proliferation of complex statutory crimes" is responsible for the imposition of multiple penalties based on the same act and thus is responsible for the challenges to these penalties under the double jeopardy clause. *Id.* (Rendlen, J., dissenting).

100. *Id.* at 609 (Rendlen, J., dissenting).

101. *Id.* at 611 (Rendlen, J., dissenting).

102. *Id.* (Rendlen, J., dissenting).

103. *Id.* at 614 (Rendlen, J., dissenting). Judge Rendlen went on to quote Justice Frankfurter: "In effect, we are asked to enter the domain of penology, and more particularly that tantalizing aspect of it, the proper apportionment of punishment. Whatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or its futility, these are peculiarly questions of legislative policy." *Id.* (Rendlen, J., dissenting) (quoting Gore v. United States, 357 U.S. 386, 393 (1958) (citation omitted)).

tioned for certiorari in *Sours II*. The procedural machinations surrounding the *Sours* case were beginning to resemble a tennis match and, viewed in that light, *Sours II* returned the ball to the United States Supreme Court.

The United States Supreme Court denied certiorari.[104] On the surface, this action appears surprising, but it can be explained on grounds other than that the Court accepted the state court's interpretation of the double jeopardy clause.[105] Regardless of the reasons behind the denial of certiorari, the Court soon made it very clear that it intended to pursue the *Sours* issue. Between March 23 and June 22, 1981, the Court vacated and remanded nineteen Missouri cases[106] for "further consid-

104. Missouri v. Sours, 449 U.S. 1131 (1981).

105. Two of the strongest proponents of the "legislative intent" theory of multiple punishment voted to deny certiorari on the ground that the petition had become moot. Three of the remaining justices had expressed opposition to the "legislative intent" theory of multiple punishment. Albernaz v. United States, 450 U.S. 333, 345 (1981) (Stewart, J., concurring in the judgment, joined by Marshall and Stevens, J.J.) ("Congress could not constitutionally provide for cumulative punishments" for offenses that fail to meet the *Blockburger* test). The four remaining justices seemingly wanted to give the Missouri Supreme Court another chance to reach the "right" result before flatly reversing the state court.

106. *See supra* note 17. The following cases were vacated and remanded: State v. (Rollan Anthony) Williams, 606 S.W.2d 777 (Mo. 1980), *vacated sub nom.* Missouri v. Greer, 451 U.S. 1013 (1981); State v. Kendrick, 606 S.W.2d 643 (Mo. 1980), *vacated sub nom.* Missouri v. Greer, 451 U.S. 1013 (1981); State v. (Donald) Greer, 605 S.W.2d 93 (Mo. 1980), *vacated sub nom.* Missouri v. Greer, 451 U.S. 1013 (1981); State v. Sours, 593 S.W.2d 208 (Mo.) (*Sours I*), *vacated sub nom.* Missouri v. Sours, 446 U.S. 962 (1980); State v. White, 610 S.W.2d 646 (Mo. Ct. App. 1980), *vacated sub nom.* Missouri v. Counselman, 450 U.S. 990 (1981); State v. (Johnny) Williams, 610 S.W.2d 644 (Mo. Ct. App. 1980), *vacated sub nom.* Missouri v. Counselman, 450 U.S. 990 (1981); State v. Martin, 610 S.W.2d 18 (Mo. Ct. App. 1980), *vacated sub nom.* Missouri v. Brown, 450 U.S. 1027 (1981); State v. (Eddie) Greer, 609 S.W.2d 423 (Mo. Ct. App. 1980), *vacated sub nom.* Missouri v. Brown, 450 U.S. 1027 (1981); State v. Hawkins, 608 S.W.2d 496 (Mo. Ct. App. 1980), *vacated sub nom.* Missouri v. Brown, 450 U.S. 1027 (1981); State v. Lowery, 608 S.W.2d 445 (Mo. Ct. App. 1980), *vacated sub nom.* Missouri v. Lowery, 452 U.S. 912 (1981); State v. Payne, 607 S.W.2d 822 (Mo. Ct. App. 1980), *vacated sub nom.* Missouri v. Counselman, 450 U.S. 990 (1981); State v. Tunstall, 607 S.W.2d 809 (Mo. Ct. App. 1980), *vacated sub nom.* Missouri v. Crews, 452 U.S. 957 (1981); Brown v. State, 607 S.W.2d 801 (Mo. Ct. App. 1980), *vacated sub nom.* Missouri v. Brown, 450 U.S. 1027 (1981); State v. Collins, 607 S.W.2d 781 (Mo. Ct. App. 1980), *vacated sub nom.* Missouri v. Brown, 450 U.S. 1027 (1981); State v. Helton, 607 S.W.2d 772 (Mo. Ct. App. 1980), *vacated sub nom.* Missouri v. Crews, 452 U.S. 957 (1981); State v. (Timothy) Crews, 607 S.W.2d 759 (Mo. Ct. App. 1980), *vacated sub nom.* Missouri v. Crews, 452 U.S. 957 (1981); State v. (Terry) Crews, 607 S.W.2d 729 (Mo. Ct. App. 1980), *vacated sub nom.* Missouri v. Crews, 452 U.S. 957 (1981); State v. Sinclair, 606 S.W.2d 271 (Mo. Ct. App. 1980), *vacated sub nom.* Missouri v. Sinclair, 452 U.S. 912 (1981); State v. Counselman, 603 S.W.2d 3 (Mo. Ct. App. 1980), *vacated sub nom.* Missouri v. Counselman, 450 U.S. 990 (1981); State v. McGee, 602 S.W.2d 709 (Mo. Ct. App. 1980), *vacated sub nom.* Missouri v. Counselman, 450 U.S. 990 (1981).

eration in light of *Albernaz v. United States*."[107]

D. Albernaz v. United States

Although the holding in *Albernaz*, like the holding in *Whalen*, does not reach the issue presented by Missouri's armed criminal action statute, the dicta is clear and leaves little doubt about the view of a majority of the Court on the issue.

The issue directly presented by *Albernaz* was whether the double jeopardy clause was offended by convictions and consecutive sentences for conspiracy both to import and distribute marijuana when both violations are based on the same agreement.[108] The majority opinion, joined by six members of the Court, held that Congress "intended to permit the imposition of consecutive sentences for violations of both statutes."[109] In reaching this conclusion, the Court looked primarily to the test it had articulated half a century earlier in *Blockburger*: "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."[110]

The Court applied the *Blockburger* test to the statutes in question and found that they satisfied the test. Each offense required proof of a fact that the other did not (intent to distribute and intent to import). Significantly, however, that was not the end of the analysis in *Albernaz*. The Court noted that, in the context of multiple punishment analysis, the *Blockburger* test is a "means of discerning congressional purpose [and] the rule should not be controlling where, for example, there is a clear indication of contrary legislative intent."[111] No indication of contrary legislative intent appeared in the legislative history of the statutes under consideration, however, and the result of the *Blockburger* test was accepted as sufficient proof of congressional intent. Because the

107. 450 U.S. 333 (1981).

108. The defendant was convicted under 21 U.S.C. §§ 846, 963 (1976).

109. 450 U.S. at 343.

110. Blockburger v. United States, 284 U.S. 299, 304 (1932). *See supra* note 3 for a discussion of *Blockburger*.

111. 450 U.S. at 340. The *Blockburger* test is more than a tool of statutory construction in the context of successive prosecutions. Brown v. Ohio, 432 U.S. 161 (1977), held that the *Blockburger* test defined the minimum standard for evaluating whether successive prosecutions are for the same offense. *Accord* Missouri v. Hunter, 103 S. Ct. 673, 682 (1983) (Marshall, J., dissenting); Illinois v. Vitale, 447 U.S. 410, 419-20 (1980).

statutes satisfied *Blockburger*, consecutive sentences were therefore permissible.

It was clear by this point in the opinion, that legislative intent can override the *Blockburger* test. But the Court made its view even clearer in the last paragraph of the majority opinion: "the question of what punishments are constitutionally permissible is not different from the question of what punishment the Legislative Branch intended to be imposed. Where Congress intended, as it did here, to impose multiple punishment, imposition of such sentences does not violate the Constitution."[112]

Any uncertainty about the meaning of this dicta is dispelled by the separate concurring opinion of Justice Stewart, the author of *Whalen*. Stewart's opinion, joined by Justices Marshall and Stevens, forcefully takes issue with the way the majority read the *Whalen* dicta, and singled out the two sentences quoted in the previous paragraph for criticism: "These statements are supported by neither precedent nor reasoning and are unnecessary to reach the Court's conclusion."[113]

Justice Stewart's opinion explicitly rejected the majority's theory of the role of the double jeopardy clause in a multiple punishment context: "No matter how clearly it spoke, Congress could not constitutionally provide for cumulative punishments unless each statutory offense required proof of a fact that the other did not, under the criterion of *Blockburger v. United States*."[114]

Given the clarity of the battle lines drawn in *Albernaz*, the Court's action in remanding state court decisions in light of *Albernaz* gave lower courts a rather clear idea of the proper resolution of the issue. The Delaware Supreme Court, for example, in considering an *Albernaz* remand of one of its decisions, remarked that "[a]lthough *dicta*, the emergence of the evolving rule stands unmistakably clear by virtue of the vote of 6 to 3, cast in the face of the flat contradiction of the concurring Justices, including the author of *Whalen*."[115] The Delaware court reversed its earlier decision and followed, albeit "reluctantly," what it perceived to be the "evolving rule" as articulated in *Albernaz*.[116] The court held that where the legislature intended "to impose multiple pun-

112. 450 U.S. at 344.
113. *Id.* at 345 (Stewart, J., concurring in the judgment).
114. *Id.* (Stewart, J., concurring in the judgment) (citation omitted).
115. Hunter v. Delaware, 430 A.2d 476, 481 (1981) (*Hunter II*).
116. *Id.*

ishments for two offenses not satisfying the *Blockburger* test, imposition of two consecutive sentences by a court as a result of a single criminal trial does not violate the Double Jeopardy Clause of the Fifth Amendment."[117]

The Missouri Supreme Court did not give up that easily. In *State v. Haggard*,[118] the Court noted that *Albernaz* involved two offenses that were different under the *Blockburger* test. Thus, the precise issue presented by *Sours* and its progeny was not settled by *Albernaz*. Remarking that it understood the "seeming desperation" of The Delaware Supreme Court,[119] the Missouri court reaffirmed its *Sours* holding and stated that it would not follow *Albernaz* "[u]ntil such time as the Supreme Court of the United States declares clearly and unequivocally that the Double Jeopardy Clause . . . does not apply to the legislative branch of government."[120]

Seeking to bolster its conclusion, the Missouri court read the denial of certiorari in *Sours II* as evidence that "a large majority of the United States Supreme Court tacitly, if not in fact, sustained our position as stated in *Sours II*."[121] Not only is that reading of the denial of certiorari questionable as a factual matter,[122] but, as the dissent in *Haggard* correctly observed, "denial of review on certiorari neither imports a decision on the merits of the opinion below, nor forecloses subsequent consideration of the issues determined therein."[123]

The dissent in *Haggard* compared the majority's reliance on the denial of certiorari in *Sours II* with "Quixana's Don Quixote de la Mancha's search for giants that became a comic tilt with windmills."[124] The dissent urged that "we have reached the point where this court must honor the 'rule of supremacy' and gracefully accept the Supreme Court's interpretation of the organic law embodied in the Constitution of the United States."[125]

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117. *Id.*
118. 619 S.W.2d 44 (Mo. 1981), *vacated,* 103 S. Ct. 1171 (1983).
119. *Id.* at 50.
120. *Id.* at 51.
121. *Id.*
122. *See supra* note 105.
123. 619 S.W.2d at 56 (Rendlen, J., dissenting).
124. *Id.* at 55 (Rendlen, J., dissenting).
125. *Id.* at 56 (Rendlen, J., dissenting).

E. A New Theory

After a new Missouri Criminal Code became effective on January 1, 1979, a new element appeared in the *Sours* analysis. In *State ex rel. Westfall v. Ruddy*[126] the issue was whether the state could charge both armed criminal action and the underlying felony if the judge instructs the jury that it may convict for only one of the offenses. The state supreme court held this permissible after stating that the lesser included offense statute in the new criminal code acted to bar dual convictions for armed criminal action and the underlying felony.[127]

The court's statutory analysis was that the criminal code prohibits convictions for a greater and lesser included offense;[128] because armed criminal action requires proof of an underlying felony, the latter offense is a lesser included offense of the former. *Ruddy* thereby introduced a statutory basis for the Missouri Supreme Court's position on the *Sours* issue.

It is debatable whether the Missouri legislature meant the general language of the lesser included offense provision of the criminal code to prevail over very specific langauge authorizing separate penalties for armed criminal action and the underlying felony. In his *Ruddy* dissent, Chief Judge Donnelly termed the volunteered conclusion of the majority "extremely unfortunate."[129] Judge Rendlen, in a separate dissent, wrote, "in an attempt to evade the impact of *Albernaz v. United States* and to fortify their notion of double jeopardy, the majority have engrafted an erroneous statutory interpretation of Missouri's new Criminal Code as an issue in this cause."[130]

It makes little difference who was right in *Ruddy*. The Missouri legislature soon removed all doubt about its intent.

F. A New Player

The Missouri General Assembly entered the fray in 1982 to clarify further its intent concerning penalties for armed criminal action and the underlying felony. It enacted a provision prohibiting application of any law that prevents imposition of sentences for both armed criminal

126. 621 S.W.2d 42 (Mo. 1981).

127. *Id.* at 45.

128. MO. REV. STAT. § 556.041(1) (1978). Included offenses are defined in MO. REV. STAT. § 556.046 (1978).

129. 621 S.W.2d at 47 (Donnelly, C.J., dissenting).

130. *Id.* (Rendlen, J., dissenting) (citation omitted).

action and the underlying felony when both sentences are permitted by the armed criminal action statute.[131] This provision obviously prevents application of the lesser included offense statute to bar dual convictions for armed criminal actions and an underlying felony. Thus, the *Ruddy* analysis had a very short life.

IV. *MISSOURI V. HUNTER*: SOME CONFUSION CLEARS

After detailing the procedural history of the *Sours* issue, the United States Supreme Court began its analysis in *Missouri v. Hunter*[132] by responding to the way the Missouri Supreme Court characterized the issue in *Haggard*. The Court noted the state court's remark that it would hold firm to its *Sours* analysis until the United States Supreme Court "declares clearly and unequivocally" that the double jeopardy clause "does not apply to the legislative branch of government."[133] Commenting that " [t]his view manifests a misreading of our cases," the Supreme Court observed that "we need hardly go so far as suggested to decide that a legislature constitutionally can prescribe cumulative punishments for violation of its first degree robbery statute and its armed criminal action statute."[134]

The Court is clearly correct in its conclusion that the Missouri court was exaggerating the issue underlying *Hunter*. To state that the multiple punishments aspect of the double jeopardy protection is ultimately controlled by legislative intent is not to say that the double jeopardy clause does not apply to the legislative branch of government. The double jeopardy clause would still impose three important limitations on the legislature, two of which are related in a manner that is not yet completely clear.

The first limitation which can be inferred from the Supreme Court same offense cases is that the double jeopardy clause applies rigidly to successive prosecutions. No decision has even hinted that this protection could be impaired by legislative action. In fact, recent cases have

131. MO. REV. STAT. § 571.017 (Supp. 1982).

132. 103 S. Ct. 673 (1983).

133. *Id.* at 677 (quoting State v. Haggard, 619 S.W.2d 44, 51 (Mo. 1981), *vacated,* 103 S. Ct. 1171 (1983)). The same argument has been made by one commentator. *See* Schwartz, *supra* note 4, at 844 n.120 ("The only limitations upon the legislature under this [legislative deference] approach would be the prohibition against cruel and unusual punishment and the due process clauses of the fifth and fourteenth amendment to the United States Constitution.") (citations to Constitution omitted).

134. 103 S. Ct. at 677.

expanded the definition of same offense in the context of successive prosecutions,[135] making it highly unlikely that the Court will subject this aspect of the double jeopardy clause to legislative veto.

The second legislative limitation which still operates after *Hunter* is somewhat more nebulous. It is the rule of lenity.[136] When it applies, the rule of lenity raises a presumption against turning a "single transaction into multiple offenses."[137] It is triggered by manifestations of congressional intent to punish a certain course of conduct rather than each component of that conduct.[138] When faced with the possibility that Congress did not intend separate penalties to attach to a course of con-

135. *See, e.g.,* Illinois v. Vitale, 447 U.S. 410 (1980) (dictum) (suggesting that a second prosecution is barred by the double jeopardy clause in some situations even if the *Blockburger* test is met); Brown v. Ohio, 432 U.S. 161, 166-67 n.6 (1977) ("[e]ven if two offenses are sufficiently different to permit the imposition of consecutive sentences, successive prosecutions will be barred in some circumstances where the second prosecution requires the relitigation of factual issues already resolved by the first") (dictum).

136. "It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment." Bell v. United States, 349 U.S. 81, 83 (1955).

137. *Id.* at 84.

138. *See, e.g.,* Simpson v. United States, 435 U.S. 6 (1978) (intent to be lenient demonstrated by a statement offered on the floor of the House of Representatives); Milanovich v. United States, 365 U.S. 551 (1961) (offenses came into law at different times and the offenses—receiving stolen property and larceny—had long been considered mutually exclusive); Heflin v. United States, 358 U.S. 415 (1959) (language in Senate and House Reports raised an inference that Congress intended to broaden coverage of the Federal Bank Robbery Act to include offenders who receive stolen property from the robbers rather than to authorize cumulative punishments for the bank robbers themselves); Prince v. United States, 352 U.S. 322 (1957) (letter from Attorney General asking Congress to broaden the coverage of the bank robbery statute held sufficient to find lack of congressional intent to authorize cumulative penalties for robbery and for entering a bank with the intent to rob).

Simpson v. United States, 435 U.S. 6 (1978) is illustrative of how the Court has applied the rule of lenity. The defendant's conduct in *Simpson* constituted both armed robbery, under 18 U.S.C. § 2113(d) (1982), and a violation of 18 U.S.C. § 924(c) (1982), prohibiting the use of a firearm to commit a felony. A multiple punishment issue was created by the imposition of consecutive sentences for these two offenses. The Court applied the rule of lenity and thus did not have to deal with any constitutional questions that might be raised by the *Blockburger* test. The rule of lenity was appropriate, according to the Court, because (1) a statement on the floor of the House by the sponsor of § 924(c) indicated that it did not apply to the armed robbery statute, 435 U.S. at 13-14; and (2) the House version of the felony firearm bill was adopted by the Congress instead of the Senate version that would have permitted such cumulative penalties, *id.* at 14.

The Court admitted that the legislative history of § 924(c) was "sparse" but argued that "what there is . . . points in the direction of a congressional view that the section was intended to be unavailable in prosecutions for violations of § 2113(d)." 435 U.S. at 15. Thus, the existence of slight indications of congressional intent not to impose cumulative penalties will trigger the rule of lenity, at least where, as in *Simpson*, "the Government is able to prove violations of two separate criminal statutes with precisely the same factual showing. . . ." *Id.* at 11.

duct, the Court's view has been that "the ambiguity should be resolved in favor of lenity,"[139] thereby permitting only a single penalty.[140]

The rule of lenity would obviously not apply when legislative intent to authorize multiple penalties is clearly stated; thus, the rule is unaffected by *Hunter* and remains a limitation on the legislature. But the scope of the rule of lenity is unclear at present. It has been applied by the Court only in federal cases,[141] allowing an inference that the rule may be one of statutory construction rather than an integral part of the double jeopardy clause.[142] Thus, although the rule of lenity survives *Hunter*, it may not be accurate to say that it is a double jeopardy limitation.

The third limitation, although conceptually related to the rule of lenity, is more clearly a function of the double jeopardy clause. The Court has stated or implied in several cases that multiple penalties for the same conduct must be authorized by the legislature before they can be constitutionally imposed.[143] The imposition of a penalty that is not authorized by the legislature would violate the multiple punishment doctrine as articulated by *Ex parte Lange*[144] and *North Carolina v. Pearce*.[145] It therefore follows that the requirement of legislative au-

139. Bell v. United States, 349 U.S. 81, 83 (1955).

140 The issue of what constitutes a single penalty is deceptively complex. It has not been resolved by the Supreme Court. *See infra* notes 190-97 and accompanying text.

141. *See, e.g.*, Simpson v. United States, 435 U.S. 6 (1978); United States v. Gaddis, 424 U.S. 544 (1976); Milanovich v. United States, 365 U.S. 551 (1961); Heflin v. United States, 358 U.S. 415 (1959); Ladner v. United States, 358 U.S. 169 (1958); Prince v. United States, 352 U.S. 322 (1957); Bell v. United States, 349 U.S. 81 (1955); United States v. Universal C.I.T. Credit Corp., 344 U.S. 218 (1952). *Cf.* Missouri v. Hunter, 103 S. Ct. 673, 679 (1983) ("Thus far, we have utilized that rule [of statutory construction] only to limit a federal court's power to impose convictions and punishments when the will of Congress is not clear.").

142. *Cf.* Westen, *supra* note 2, at 1029 n.84 (arguing that there is authority that the rule of lenity "also operates as a constitutional canon of construction"). The difficulty with Professor Westen's argument is that it is premised on questionable assumptions. *See infra* text accompanying notes 166-89.

143. *Hunter*, 103 S.Ct. at 678 (the double jeopardy clause "prevent[s] the sentencing court from prescribing greater punishment than the legislature intended"); *Albernaz*, 450 U.S. at 344 ("[w]here Congress intended . . . to impose multiple punishments, imposition of such sentences does not violate the Constitution") (footnote omitted); *Whalen*, 445 U.S. at 689 ("imposing multiple punishments not authorized by Congress . . . violates not only the specific guarantee against double jeopardy, but also the constitutional principle of separation of powers"); *Brown*, 432 U.S. at 165 ("once the legislature has acted courts may not impose more than one punishment for the same offense").

144. *See supra* text accompanying notes 33-43.

145 *See supra* text accompanying notes 44-55.

thorization is a function of the multiple punishment doctrine and thus of the double jeopardy clause itself.

It might appear that the third limitation is coextensive with the rule of lenity. The two are, indeed, substantially congruous. Both require authorization of multiple penalties. Beyond that, though, the rule of lenity operates as a presumption that resolves ambiguity against the imposition of multiple penalties. It is not known whether the constitutional requirement of legislative authorization would operate in that manner. Moreover, the constitutional requirement might be satisfied with less clear indications of legislative authorization.

Whalen, for example, suggests in a footnote that "[t]he Due Process Clause of the Fourteenth Amendment . . . would presumably prohibit state courts from depriving persons of liberty or property as punishment for criminal conduct except to the extent authorized by state law."[146] *Hunter* indicates that this limitation on the legislature is rooted in the double jeopardy clause rather than the due process clause: "With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended."[147] This standard appears different from the rule of lenity presumption that the Court has applied in federal cases.

Although the scope of the limitations imposed by the double jeopardy clause on the legislature after *Hunter* is somewhat unclear, it is evident that limitations still exist, and the state court was incorrect in suggesting that a ruling contrary to its *Sours* holding would make the clause inapplicable to the legislative branch of government. Having made clear that it was not immunizing legislative action from the limitations of the double jeopardy clause, the Court in *Hunter* went on to hold that it meant what it said in *Whalen* and *Albernaz*. The *Blockburger* same offense test operates in the context of a single proceeding as a rule of statutory construction. A "clear indication of contrary legislative intent"[148] would therefore make reference to the *Blockburger* test unnecessary.

Thus, the double jeopardy clause would not preclude multiple penalties for two offenses that are the same offense if the legislature has specifically authorized the penalties. In that situation, the punishments

146. Whalen v. United States, 445 U.S. 684, 690 n.4 (1980).

147. 103 S. Ct. at 678.

148. *Id.* (emphasis deleted) (quoting *Albernaz*, 450 U.S. at 340).

imposed for the offenses are not multiple. At least in the context of the double jeopardy clause, "[l]egislatures, not courts, prescribe the scope of punishments."[149]

The conclusion in *Hunter* is very clear.

> Where, as here, a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the "same" conduct under *Blockburger*, a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial.[150]

Justice Marshall, joined by Justice Stevens, offered an interesting theory in dissent. Declaring that the phrase "same offense" should not "be interpreted to mean one thing for purposes of the prohibition against multiple prosecutions and something else for purposes of the prohibition against multiple punishment,"[151] Marshall argued that a defendant facing multiple charges "is 'put in jeopardy' as to each charge."[152] In the dissent's view, double jeopardy exists if a defendant is charged in a single trial with two offenses that are the same offense under the *Blockburger* test.[153] Double jeopardy is not, therefore, synonymous with "repeated attempts to convict an individual for an alleged offense,"[154] but is, rather, a protection against repetitious and overlapping charges, regardless of whether they are brought in one proceeding or in successive trials.[155]

Justice Marshall stated three arguments in support of his position. First, he argued that otherwise "there would be no limit to the number of convictions that a State could obtain on the basis of the same act, state of mind, and result."[156] Second, bringing multiple charges "increases the risk that the defendant will be convicted on one or more of those charges."[157] Third, multiple criminal convictions have consequences beyond the sentence that is imposed. For instance, "[t]he

149. *Id.* at 679.

150. *Id.*

151. *Id.* at 680 (Marshall, J., dissenting).

152. *Id.* at 681 (Marshall, J., dissenting).

153. *Id.* at 682 (Marshall, J., dissenting).

154. Green v. United States, 355 U.S. 184, 187 (1957) (holding repeated attempts to convict for a single offense double jeopardy).

155. 103 S. Ct. at 680 (Marshall, J., dissenting).

156. *Id.* at 680 (Marshall, J., dissenting).

157. *Id.* at 681 (Marshall, J., dissenting).

number of convictions is often critical to the collateral consequences that an individual faces."[158] Each criminal conviction "constitutes a formal judgment of condemnation by the community" that "imposes an additional stigma and causes additional damage to the defendant's reputation."[159] Thus, the dissent concluded, "[t]he greater the number of possible convictions, the greater the risk that the defendant faces. The defendant is 'put in jeopardy' with respect to each charge against him."[160]

The conflict between the dissent and the majority opinion in *Hunter* mirrors the conflict between the Missouri Supreme Court and a majority of the United States Supreme Court. One view is that punishments imposed in a single proceeding can never be multiple if the legislature has authorized them, and thus clearly authorized multiple penalties cannot be multiple punishment for the same offense. The other view is that the double jeopardy clause will not permit the legislature to authorize more than a single conviction for the same offense.

Under the view of the dissent in *Hunter*, only one type of same offense analysis is necessary because the analysis is the same whether it arises in the context of a single proceeding or of successive prosecutions. Under the view of the *Hunter* majority, a different type of analysis must be applied in multiple punishment cases.

V. MULTIPLE PUNISHMENT ANALYSIS AFTER *HUNTER*

The Supreme Court multiple punishment cases, read in light of *Hunter*, offer a coherent, workable framework for analyzing multiple punishment cases in federal court. It is less clear how the framework applies to state multiple punishment cases because *Hunter* is the first Supreme Court multiple punishment case that arose in state court. The framework for resolving the issue at the federal level will be presented, and its application to state cases will be discussed. The issue of what penalties trigger the multiple punishment doctrine will then be considered.

A. The Issue in Federal Court

When a defendant claims that penalties imposed under different fed-

158. *Id.* (Marshall, J., dissenting).
159. *Id.* at 681-82 (Marshall, J., dissenting).
160. *Id.* at 682 (Marshall, J., dissenting).

eral statutes constitute multiple punishment, a court must first ascertain whether Congress has clearly expressed its intent regarding the imposition of separate penalties for violations arising out of the same conduct. This expression of intent could be either to authorize multiple penalties or to prohibit them, but in either situation the clear expression of congressional intent controls the constitutional multiple punishment question. *Hunter* has settled this much.

If no clear statement of legislative intent exists, three possibilities present themselves. First, there might be implicit indications of congressional intent that only a single penalty is authorized. Because of the established rule that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity,"[161] implicit indications of congressional intent to authorize only one penalty should be sufficient to resolve the issue in favor of the defendant.[162]

Second, there might exist implicit indications of an intent to authorize multiple penalties. The *Hunter* rule should be inapplicable in this situation because it is based on explicit legislative intent to authorize multiple penalties. If the intent is less than explicit, the possibility exists that Congress did not, in fact, intend that result. Thus, when the congressional intention to authorize multiple penalties is not explicit, some other tool of statutory construction should be utilized to reduce the likelihood that unauthorized multiple penalties are being imposed.[163]

The final possibility is that no indication of congressional intent exists with respect to the issue of multiple versus single penalties for conduct that violates the criminal statutes in question. In this situation, it is obvious that another analytical tool is necessary.

Albernaz teaches that this additional analytical tool is the *Blockburger* test—whether each statute requires proof of a fact not required by the other. Although *Albernaz* and *Hunter* reduce the *Blockburger*

161. Whalen v. United States, 445 U.S. 684, 695 n.10 (1980) (quoting United States v. Bass, 404 U.S. 336, 347 (1971)). *Bass*, in turn, quoted Rewis v. United States, 401 U.S. 808, 812 (1971). Neither *Bass* nor *Rewis* was a multiple punishment case; both were concerned, as the quotation indicates, with the ambit of a particular statute. Both adopted a narrow construction of the statute in question because of uncertainty about congressional intent. *See supra* text accompanying notes 136-42.

162. *See supra* note 138.

163. *See, e.g.*, Bell v. United States, 349 U.S. 81, 83 (1955) ("It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment.").

test to a rule of statutory construction in the context of multiple punishment analysis, it remains an important analytical tool.

The *Blockburger* test should, therefore, be applied when expressions of relevant congressional intent provide no answer or when they implicitly indicate an authorization of cumulative penalties. In all other situations, explicit legislative intent or implicit intent coupled with the rule of lenity should make the *Blockburger* test unnecessary.

When *Blockburger* is applied, *Albernaz* states that the result of the test creates a presumption concerning legislative intent.[164] Theoretically, this presumption can be overcome by a "clear indication of contrary legislative intent."[165] Practically, however, the analysis employed in *Hunter*, and most of the Court's other multiple punishment cases, makes this possibility unlikely. The Court first seeks a clear indication of legislative intent concerning cumulative penalties, and it is only when no such indication is found that it resorts to the *Blockburger* test. Thus, it is unlikely, given this approach, that "a clear indication of contrary legislative intent" will be found to rebut the *Blockburger* test. The *Blockburger* test is used as an alternative to a clear statement of legislative intent, and therefore its result would appear to end the multiple punishment inquiry.

B. The State Multiple Punishment Issue

Three of the multiple punishment categories surveyed in the last section are resolved by reference to legislative intent—explicit legislative intent to authorize multiple penalties, explicit legislative intent to forbid multiple penalties, and implicit intent to impose but a single penalty. In the first two categories, the express legislative intent solves the multiple punishment question; in the last category, the rule of lenity resolves the ambiguity in favor of the defendant.

When this framework is applied to cases arising in state court, two difficult issues present themselves. First, is the rule of lenity part of the multiple punishment doctrine and thus binding on the states through the double jeopardy clause? Second, to what extent, if any, is a state court determination of relevant legislative intent reviewable in federal court?

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164. 450 U.S. at 340.

165. Missouri v. Hunter, 103 S. Ct. 673, 678 (1983) (emphasis deleted) (quoting Albernaz v. United States, 450 U.S. 333, 340 (1981)).

The Supreme Court has never intimated that the rule of lenity is binding on the states, nor has it suggested that federal courts have the authority to review a state court's determination of legislative intent with respect to the multiple punishment issue. Professor Westen argues, however, that the rule of lenity is part of "the more general principle that no one should be criminally punished except for conduct clearly prohibited by the domestic law."[166] This general principle leads to the conclusion that "with respect to the interpretation of criminal statutes, the Constitution precludes a court from accepting a lower court's interpretation at face value and requires, instead, that the court proceed with caution lest it punish a person whom the legislature did not intend to punish."[167] Stated more specifically, "a federal court is not bound by a state court's determination as to the *clarity* of the state legislature's intention to impose multiple punishment."[168]

The difficulty with Professor Westen's argument is that it is premised on three weak inferences from *Whalen* and a questionable analogy to the void-for-vagueness doctrine. Westen's first inference from *Whalen* regards what the Court might have meant when it cited *Bell v. United States*[169] for the proposition that legislative intent plays an important role in multiple punishment analysis: "The citation to *Bell* may be significant because . . . it *was* the case in which the Court first announced the rule of 'lenity'."[170] *Whalen* cited seven other cases along with *Bell* for the same proposition, however.[171] Read in context, the *Bell* citation does not appear to be for the rule of lenity but simply for the general proposition that the first step in multiple punishment analysis is to as-

166. Westen, *supra* note 2, at 1029 (footnote omitted). *See also* Note, *The Void for Vagueness Doctrine in the Supreme Court,* 109 U. PA. L. REV. 67, 82-83 n.79 (1969); *Twice in Jeopardy, supra* note 29, at 318 n.273.

167. Westen, *supra* note 2, at 1029 n.84.

168. *Id.* at 1027 n.81 (emphasis in original).

169. 349 U.S. 81 (1955).

170. Westen, *supra* note 2, at 1029 n.84 (emphasis in original).

171. The citation appears in context as follows:

> But the question whether punishments imposed by a court after a defendant's conviction upon criminal charges are unconstitutionally multiple cannot be resolved without determining what punishments the Legislative Branch has authorized. See *Gore v. United States*, 357 U.S. 386, 390; *id.*, at 394 (Warren, C.J., dissenting on statutory grounds); *Bell v. United States*, 349 U.S. 81, 82; *Ex parte Lange*, 18 Wall. 163, 176; see also *Brown v. Ohio*, 432 U.S. 161, 165; *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218; *Blockburger v. United States*, 284 U.S. 299; *Ebeling v. Morgan*, 237 U.S. 625.

445 U.S. at 688.

certain relevant legislative intent.[172]

The other two parts of Westen's *Whalen* argument have at their core the *Whalen* Court's refusal to defer to the statutory construction of the District of Columbia Court of Appeals.[173] Westen reads this refusal to imply "that with respect to the interpretation of criminal statutes, the Constitution precludes a court from accepting a lower court's interpretation at face value."[174]

As the *Whalen* Court noted, however, the deference to the statutory construction of the District of Columbia courts is "a matter of judicial policy, not a matter of judicial power."[175] Whether federal courts should reinterpret state statutes that have been construed by state appellate courts is, on the other hand, a question of judicial power.[176] That the Court refused to defer to the statutory construction of the District of Columbia courts in *Whalen* does not answer the question whether it would refuse to defer to the interpretation of a state statute by a state court. Thus, it seems unjustified to read *Whalen* as implying that "a federal court is not bound by a state court's determination as to the *clarity* of the state legislature's intention to impose multiple punishment."[177]

Westen further seeks to justify federal review of state multiple punishment cases by arguing that the multiple punishment doctrine "corresponds with comparable values underlying the constitutional prohibition of vague criminal statutes."[178] He argues that the void-for-vagueness cases may be divided into two categories, with the second category being "cases in which notice is immaterial, but in which statutes are too vague to give executive officials guidance as to what the

172. Three of the cited cases actually upheld multiple penalties based on the same conduct (*Gore, Blockburger*, and *Ebeling*).

173. The District of Columbia Court of Appeals had held the offenses separate, finding "that 'nothing in th[e] legislation . . . suggest[s] that Congress intended' the two offenses to merge." 445 U.S. at 687 (quoting Whalen v. United States, 379 A.2d 1152, 1159 (D.C. 1977)).

174. Westen, *supra* note 2, at 1029 n.84.

175. 445 U.S. at 687.

176. "Acts of Congress affecting only the District, like other federal laws, certainly come within this Court's Art. III jurisdiction, and thus we are not prevented from reviewing the decisions of the District of Columbia Court of Appeals interpreting those Acts in the same jurisdictional sense that we are barred from reviewing a state court's interpretation of a state statute." *Id.* at 687-88.

177. Westen, *supra* note 2, at 1027 n.81 (emphasis in original).

178. *Id.* at 1027-28 (footnote omitted).

legislature intended."[179] Thus, the "real gravamen" of these cases is that "prosecutors and courts will punish persons whom the legislature may not have clearly intended to punish."[180] Westen concludes that "[t]his is the same constitutional principle that underlies the prohibition on multiple punishment."[181]

One problem with this analogy is that it is not easy to separate void-for-vagueness cases into those in which lack of notice of prohibited conduct is important and those in which it is not important. The Supreme Court has typically stated that an unconstitutionally vague statute is void not only because it allows too much discretion for police and prosecutors, but also because it fails to give citizens the requisite notice of the prohibited conduct.[182]

Further, a statute that is vague with respect to the prohibited conduct will, by definition, both fail to give notice and allow too much discretion.[183] These evils are necessarily intertwined when the parameters of

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179. *Id.* at 1028 n.83. The first category, of course, is composed of cases in which "statutes are too vague to give persons notice of the kinds of conduct that are prohibited." *Id.*

180. *Id.*

181. *Id.*

182. *See, e.g.*, Papachristou v. Jacksonville, 405 U.S. 156, 168 (1972) ("Another aspect of the ordinance's vagueness appears when we focus, not on the lack of notice given a potential offender, but on the effect of the unfettered discretion it places in the hands of the Jacksonville police.").

183. If the statute defines the prohibited conduct in an imprecise manner, it would allow too much discretion for police and prosecutors to apply it as they please. But the very imprecision of the definition of prohibited conduct would also create a constitutional lack of notice problem.

Nor is Kolender v. Lawson, 103 S. Ct. 1855 (1983), to the contrary. Although the Court's opinion in *Kolender* focuses on the arbitrary enforcement evil presented by the California stop-and-identify statute, *id.* at 1858, the statute also suffers from the defect of lack of notice of prohibited conduct. As construed by the California Court of Appeals, the statute applied to conduct that gave a police officer "reasonable suspicion of criminal activity sufficient to justify a *Terry* detention." *Id.* at 1857-58.

This limiting construction by the state court certainly provides very little notice to the average citizen as to what conduct is prohibited. The statutory language itself is equally vague as to the parameters of the prohibited conduct:

> Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor: . . . (e) Who loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when requested by any peace officer to do so, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification.

CAL. PENAL CODE § 647 (Deering 1984).

Thus, the statute struck down in *Kolender* is another example of a vague law in which the evils of lack of notice and arbitrary enforcement are intertwined. That the Court focused on the latter problem in its analysis by no means indicates that the former is not also present.

One commentator who shares Westen's view that "[t]he vagueness doctrine is analogous to the rule of strict construction," implies strongly that the vagueness doctrine has, at its theoretical core,

the prohibited conduct are unclear. A statute that provides the necessary notice will allow too much discretion only when the definition of the prohibited conduct is clear but the penalty provision is not. Westen cites one such case in support of his argument: *United States v. Evans*.[184] *Evans* is, however, a case that interprets federal law and thus can be explained by the general principle that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity."[185] As *Evans* is, in reality, a federal rule of lenity case, it does not require a separate category of void-for-vagueness cases to explain its result.

The conclusion that the vagueness issues of lack of notice and too much discretion are not easily separable is detrimental to Westen's determination that the multiple punishment doctrine is simply an extension of the void-for-vagueness principle. If lack of notice is an integral part of the vagueness doctrine, as it appears to be, the doctrine performs a function different from, and arguably more important than, the multiple punishment doctrine. The offense to the notion of fairness and due process is of a higher order when a person is subjected to criminal sanction for conduct not thought to be criminal than when a person is subjected to an additional, albeit unintended, penalty for conduct known to be criminal. In the former situation, the law is making a criminal out of a person who lacks knowledge that his conduct is wrongful.[186] In the latter situation, the law is simply imposing a harsher penalty than the legislature intended for conduct that is unquestionably wrongful.

Thus, the willingness of the Supreme Court to require federal judicial review of vagueness challenges to state laws can be justified by the higher degree of injury posed by vague laws. That the Court is willing to review state vagueness decisions does not, however, necessarily portend the same willingness to review state court determinations of legislative intent in the context of multiple punishment challenges.

A further difficulty with Westen's argument is the nature of the constitutional rights involved. The vagueness doctrine operates indepen-

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both the fair warning rationale and the "aim of preventing arbitrary governmental action." *Twice in Jeopardy, supra* note 29, at 318 n.273.

184. 333 U.S. 483 (1948).

185. *See supra* note 161. Indeed, *Evans* explicitly states that "[t]he case presents an unusual and difficult problem in statutory construction." 333 U.S. at 484.

186. *Cf.* Lambert v. California, 355 U.S. 225 (1957) (requiring proof that the defendant had actual knowledge of the registration ordinance in question before a conviction thereunder would comport with due process).

dently of, and perhaps contrary to, legislative intent; the analysis in no way depends on what the legislature intended. Multiple punishment, however, can occur only when the penalty in question is not authorized by the legislature.[187] Thus, the multiple punishment analysis is inevitably linked with legislative intent. It is more difficult to justify federal review of state cases based exclusively on state legislative intent than it is to justify review of state cases interpreting a doctrine, such as vagueness, that has significance wholly independent of legislative intent.

Stated another way, a vague law is unconstitutionally vague regardless of the intent of the state legislature and thus would be constitutionally infirm in any state. Application of multiple penalties under two statutes might be constitutional under the multiple punishment doctrine in one state—because of express legislative intent—and unconstitutional in another state—because of lack of express intent. Determining that the multiple punishment doctrine can theoretically produce a different result from state to state depending on the intent of the legislature is the best argument for allowing the state courts to be the final interpreters of state legislative intent.

Westen's position would require federal courts to reexamine the intent of the state legislature in any case questioning whether the defendant was being punished in excess of what the legislature intended. But how can a state supreme court misinterpret its own state law? As Justice Rehnquist wrote in his *Whalen* dissent,

> [t]o the extent that the Court implies that a state court can ever err in the interpretation of its own law and that such an error would create a federal question reviewable by this Court, I believe it clearly wrong. For the question in such cases is not whether the lower court "misread" the relevant statutes or its own common law, but rather who does the reading in the first place.[188]

Although it is certainly correct to conclude, as Westen does, that the double jeopardy clause forbids punishment in excess of what the legislature intended, it does not therefore follow that the federal courts should be the ultimate interpreters of state legislative intent. There is much to commend Justice Rehnquist's conclusion that state courts should have the final say in making that interpretation. First, it repre-

187 The issue of authorization of multiple penalties encompasses the rule of lenity and other tools of statutory construction (such as the *Blockburger* test). *See supra* text accompanying notes 161-65.

188. 445 U.S. at 706-07 (Rehnquist, J., dissenting) (footnote omitted).

sents an allocation of judicial power between federal and state courts that is sensitive to the independent status of state courts. Second, state courts should be in a better position to interpret the intent of their own state legislature. Third, it is the most efficient allocation of judicial responsibility. To have federal courts sitting in judgment of the legislative intent of fifty state legislatures is a cumbersome method of implementing the multiple punishment doctrine.

Although *Missouri v. Hunter* does not resolve this scope of review issue, it does contain dictum that can be construed as accepting Rehnquist's position and repudiating Westen's position:

> Here, the Missouri Supreme court has construed the two statutes at issue as defining the same crime. In addition, the Missouri Supreme Court has recognized that the legislature intended that punishment for violations of the statutes be cumulative. *We are bound to accept the Missouri court's construction of that State's statutes*.[189]

C. *The Concurrent Sentence Issue*

Another unresolved multiple punishment issue is the determination of when the nature of the penalties renders them multiple. Clearly, consecutive sentences would constitute multiple punishments,[190] as would a fine that totals more than could be imposed under either statute.[191] But what about concurrent sentences? The Court has, on one occasion, refused to reach a multiple punishment claim when concurrent sentences were imposed and the defendant was "not eligible for parole at any time."[192]

It is open to question whether the same result would be reached if the existence of the second conviction and the concurrent sentences creates the possibility of adverse collateral consequences. As the purpose of the multiple punishment doctrine is to prevent a penalty beyond that

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189. 103 S. Ct. at 679 (emphasis added).

190. *See* Whalen v. United States, 445 U.S. 684, 685 (1980); Heflin v. United States, 358 U.S. 415, 416 (1959); Prince v. United States, 352 U.S. 322, 324 (1957).

191. Jeffers v. United States, 432 U.S. 137, 157-58 (1977).

192. *Id.* at 155 n.24. The defendant in *Jeffers* was sentenced to life in prison without possibility of parole on one of the convictions, *id.* at 145, and received a 15 year prison sentence for another offense, *id.* at 143. The Court held that Congress did not "intend to impose cumulative penalties" under the two statutes in question, *id.* at 157, but did not reach the issue of whether concurrent prison sentences were cumulative penalties. "For present purposes, since petitioner is not eligible for parole at any time, there is no need to examine the Government's argument that the prison sentences do not present any possibility of cumulative punishment." *Id.* at 155 n.24.

authorized by the legislature,[193] it would seem that any adverse consequences that attend the second conviction would be unauthorized if the legislature intended only one penalty for the conduct in question. If adverse collateral consequences are multiple punishment, then the potential for adverse collateral consequences must also be considered multiple punishment because there would be no mechanism to redress these consequences should they occur years later.

The whole problem of identifying when the nature of punishments is multiple would be avoided if the multiple punishment doctrine were held to bar multiple convictions for the same offense without regard to the type of penalty imposed. Many state courts have so held.[194] In *United States v. Gaddis*,[195] the United States Supreme Court appears to have reached the same conclusion.[196] Furthermore, it is interesting to

193. *See supra* notes 33-55 and accompanying text.

194. *See, e.g.*, Wilkerson v. State, 41 Ala. App. 265, 130 So. 2d 348, *cert. denied*, 272 Ala. 710, 130 So. 2d 350 (1961); Tuckfield v. State, 621 P.2d 1350 (Alaska 1981); People v. Raymer, 626 P.2d 705 (Colo. App. 1980), *aff'd*, 662 P.2d 1066 (Colo. 1983); State v. Pinder, 375 So. 2d 836 (Fla. 1979); Burke v. State, 234 Ga. 512, 216 S.E.2d 812 (1975); Rogers v. State, 272 Ind. 65, 396 N.E.2d 348 (1979); State v. Dorsey, 224 Kan. 152, 578 P.2d 261 (1978); State v. Doughty, 379 So. 2d 1088 (La. 1980); Newton v. State, 280 Md. 260, 373 A.2d 262 (1977); Commonwealth v. Jones, 416 N.E.2d 502 (Mass. 1981); People v. Wilder, 411 Mich. 328, 308 N.W.2d 112 (1981); State v. Henderson, 620 S.W.2d 484 (Tenn. 1981).

Cf. A Definition of Punishment, supra note 29, at 649-51 (concluding that probation and preconviction confinement should be defined as punishment for purposes of the prohibition against multiple punishment).

195. 424 U.S. 544 (1976).

196. The defendants in *Gaddis* were convicted of four different offenses based on a single bank robbery: entry with intent to rob, robbery, possession of the proceeds of a bank robbery, and assault with a dangerous weapon during a bank robbery. 18 U.S.C. § 2113 (1982). The Court determined that Congress did not intend multiple penalties for these offenses when they are committed in the course of a single bank robbery. 424 U.S. at 547-48. The Court ordered the convictions and sentences for the possession of proceeds offense vacated, *id.* at 549, and stated that the concurrent sentences for the offenses of entry and robbery "should also be vacated," *id.* at n.12, thus leaving a single sentence for assault with a dangerous weapon during a bank robbery. That the Court did not mention vacating the convictions for the offenses of entry and robbery might be significant because the Court had drawn a distinction of sorts between these offenses and possession of the proceeds of the robbery. The possession offense "is simply not a lesser included offense within the total framework of the bank robbery provisions of § 2113." *Id.* at 548. Instead, it "reaches a different 'group of wrongdoers, *i.e.*, 'those who receive loot from the robber.'" *Id.* (quoting Heflin v. United States, 358 U.S. 415, 419-20 (1959)).

Thus, with respect to the possession of proceeds offense, the Court seems to be saying that proof of robbery will never prove possession of the proceeds and vice versa. Convictions for these offenses are, therefore, mutually exclusive, and it would be illogical to permit convictions for both to stand, irrespective of any multiple penalty problem.

The other offenses are, however, a species of lesser included offense of the offense of assault with a dangerous weapon during a bank robbery. Proof of the assault offense inevitably proves

bank robbery, and thus the latter is a necessarily included offense of the former. *See* Illinois v. Vitale, 447 U.S. 410, 419 (1980) (if proof of one offense "is always a necessary element of" the other offense, the two offenses "are the 'same' under *Blockburger*"). Entry with intent to rob presents a somewhat more complicated problem. As one commentator correctly noted, "Inasmuch as a person may formulate the intent to commit robbery after entering a bank with felonious intent, entry with felonious intent is not necessarily included in robbery." Note, *The Federal Bank Robbery Act—The Problem Of Separately Punishable Offenses,* 18 WM. & MARY L. REV. 101, 111 (1976). Despite this "theoretical possibility" of non-inclusion, *see Hunter*, 103 S. Ct. at 680 n.2 (Marshall, J., dissenting), the Supreme Court has clearly held that entry with intent to rob is a lesser offense of the robbery offenses in the Bank Robbery Act. *Gaddis*, 424 U.S. at 547; Prince v. United States, 352 U.S. 322, 329 (1957). Thus, whether entry with intent to rob is a necessarily included offense under the *Vitale* test, it is a lesser offense for purposes of the double jeopardy clause when it is proved by proof of a robbery offense.

Given this conclusion, it would not be illogical to permit convictions for all offenses proven in a single trial (greater and lesser) in the same way that it is illogical to permit convictions for mutually exclusive offenses. The single problem in the greater-lesser context would be to prevent multiple punishment, and it may be argued that this may be accomplished without vacating the multiple convictions. Some courts, for example, have satisfied the multiple punishment prohibition by ordering consecutive sentences to be served concurrently. *See* Note, *Double Jeopardy, Multiple Prosecution, and Multiple Punishment: A Comparative Analysis,* 50 CAL. L. REV. 853, 860 (1962); Note, *Double Jeopardy v. Double Punishment—Confusion in California,* 2 SAN DIEGO L. REV. 86, 97 (1965); *Twice In Jeopardy*, *supra* note 29 at 299-300 n.161.

Another approach to the multiple punishment problem that would leave the convictions intact would be to vacate the sentences (but not the convictions) for the lesser sentences. A variation of this approach was advocated in United States v. Corson, 449 F.2d 544 (3d Cir. 1971). The Third Circuit decided that *Prince* would be satisfied if a general sentence for a term not exceeding the penalty for the greater offense were imposed for all counts under the Bank Robbery Act. *Id.* at 551. *But see, e.g.,* United States v. Vaughn, 598 F.2d 336, 337 (4th Cir. 1979) (holding that the conviction and sentence for one of the offenses must be vacated under the authority of *Simpson v. United States,*) 435 U.S. 6 (1978); United States v. Roach, 590 F.2d 181, 184 (5th Cir. 1979) (same); United States v. Stewart, 579 F.2d 356, 359-60 (5th Cir. 1978) (same); United States v. Nelson, 574 F.2d 277, 283 (5th Cir. 1978) (same).

The *Vaughn-Roach* approach seems consistent with the Supreme Court's own interpretation of what it did in *Gaddis*. In Jeffers v. United States, 432 U.S. 137, 155 n.25 (1977), the Court stated that *Gaddis* had vacated both the sentence and the conviction for the offense of entry with intent to rob.

Gaddis may indeed be read in this manner. The Court in *Gaddis* indicated at one point that there was "in the present case a 'merger' of the convictions" for robbery, entry with intent to rob, and assaulting victims during the robbery. 424 U.S. at 547. The doctrine of merger at common law "is ordinarily understood to have meant that if an act resulted in both a misdemeanor and a felony the former was so completely merged in the latter as to be unrecognizable for any legal purpose." R. PERKINS & R. BOYCE, CRIMINAL LAW 616 (3d ed. 1982).

The Court in *Gaddis* is clearly not referring to this type of merger. Rather, the Court seems to be saying that a conviction for a lesser included offense merges into the conviction for the greater offense. If two convictions merge into one, however, it would appear logical to vacate one of the convictions. Thus, *Gaddis* would seem to be authority for the proposition that the proper remedy in a multiple punishment case is to vacate the conviction as well as the sentence for the lesser offense.

The Supreme Court has not, however, explicitly analyzed the question. In fact, in a case decided after *Gaddis*, the Court acted as if it had reserved the question. *See* Jeffers v. United States,

note that *Hunter* itself involved concurrent sentences,[197] and the Court made no mention of this fact in its multiple punishment analysis. If the concurrent nature of the sentences somehow avoided the multiple punishment problem, the *Hunter* Court could have decided the case on that basis, or at least used that rationale as an additional basis for the decision. Thus, it may be inferred from *Gaddis* and *Hunter* that concurrent sentences are considered multiple punishments.

VI. CONCLUSION

Although *Missouri v. Hunter* leaves the concurrent sentence issue and the scope of federal review issue essentially undecided, it certainly performs a valuable service in clearly identifying the theoretical basis of the multiple punishment doctrine. One need no longer puzzle over why the double jeopardy clause applies at all in the context of single proceedings.[198] By telling us that the clause applies to prevent the imposition of a greater punishment than that authorized by the legislature, the Court has provided the key to the puzzle.

Ex parte Lange held that a judge may not impose a sentence if an earlier sentence under the same judgment of conviction has been fully executed because the double jeopardy clause would otherwise be of no avail. If the double jeopardy clause forbids two sentences based on a single conviction, it should likewise forbid two sentences for two convictions when the legislature intended only one sentence be imposed. In both situations, the judge is punishing the defendant in excess of the legislative authorization, and this is double jeopardy because "[i]t is the punishment that would legally follow the second conviction [for the same offense] which is the real danger guarded against by the Constitution."[199]

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432 U.S. 137 (1977). In *Jeffers*, the Court noted that the defendant was "not eligible for parole at any time," thus rendering it unnecessary to "examine the Government's argument that the prison sentences do not present any possibility of cumulative punishment." 432 U.S. at 155 n.24. In the very next footnote, however, the Court stated that it had, in *Gaddis*, vacated the "convictions *and* sentences under U.S.C. § 2113(a) in light of conviction under § 2113(d)." *Id.* at n.25 (emphasis added).

197. Missouri v. Hunter, 103 S. Ct. 673, 676 (1983).

198. *See, e.g.*, Craig, *Double Jeopardy and Cumulative Sentencing In the Military*, 48 GEO. L.J. 43, 63 (1959) ("From the point of view of semantics it is difficult to show a defendant to be twice in jeopardy from a multiple-count indictment or multiple charges, although in fact he may be exposed to double punishment when he receives a sentence twice as severe as was intended by Congress.").

199. *Ex parte* Lange, 85 U.S. (18 Wall.) 163, 173 (1873).

To suggest that the legislature can authorize multiple convictions and cumulative penalties in a single proceeding for what is the "same offense" under the *Blockburger* test seems, at first blush, an incredible proposition, and Justice Marshall's dissent in *Hunter* is therefore appealing. After all, no other constitutional guarantee is defined by legislative fiat. Upon reflection, however, it becomes apparent that the *Hunter* majority is correct.[200] This conclusion follows from the derivative nature of the multiple punishment doctrine. It is not a protection that is defined by the double jeopardy clause, but one that exists because it is necessary to keep judges and prosecutors from circumventing the protection of the double jeopardy clause.[201]

The multiple punishment doctrine, therefore, has served its purpose when it limits punishment to what is intended by the legislature. No reason exists, in logic or in the policies underlying the double jeopardy clause, to extend the doctrine further. *Hunter* recognized this and, accordingly, clarified the relationship between the protection against successive prosecutions and the protection against multiple punishment.

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200. *See* Craig, *supra* note 198, at 63 (the criteria for determining the identity of offenses in a multiple punishment situation may differ from multiple prosecution criteria "since it is the better view that the fifth amendment double jeopardy provision does not deal with the amount of punishment flowing from one trial.").

201. *A Definition of Punishment, supra* note 29, at 635 (stating that the "multiple punishment prohibition is a necessary corollary of the double jeopardy clause's retrial restrictions: the bar against retrying the defendant after conviction would be inadequate if, after a single trial, the court could impose any number of sentences on the defendant"); *see Sours II*, 603 S.W.2d at 610 ("the Double Jeopardy Clause's historical purpose [is] to protect the defendant from harassment, relitigation, and judicial usurpation of the legislative authority to punish").

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