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# Fifth Amendment--Double Jeopardy: Legislative Intent Controls in Crimes and Punishments

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# FIFTH AMENDMENT—DOUBLE JEOPARDY: LEGISLATIVE INTENT CONTROLS IN CRIMES AND PUNISHMENTS

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

### I. INTRODUCTION

The United States Supreme Court has long held that the Double Jeopardy Clause[1] prohibits punishing a defendant twice for the same offense.[2] The Court held in *Missouri v. Hunter*,[3] however, that once the legislature has clearly declared its intent to impose more than one penalty for any given criminal act, the guarantee against double jeopardy cannot protect a convicted person from the imposition of multiple punishments. When all charges are brought at a single trial, the issue is merely one of statutory construction: the Double Jeopardy Clause places no restraint on the power of a legislative body to define crimes and prescribe punishments.

### II. BACKGROUND: *MISSOURI V. HUNTER*

Danny Hunter and two accomplices robbed an A & P store in Kansas City, Missouri. While the robbery was in progress, a store employee alerted the police. An officer arrived at the store and ordered the three to stop. Hunter fired at the officer, who returned the fire. Hunter then escaped with his accomplices. The three were later apprehended and positively identified by both the officer and the store manager. Hunter made an oral and written confession which was admitted into evidence at trial, but offered no direct evidence in his own defense.[4] He was convicted of robbery in the first degree,[5] armed criminal action,[6] and as-

[1] The fifth amendment to the United States Constitution provides in pertinent part: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . . ." U.S. Const. amend. V. The double jeopardy clause of the fifth amendment was made applicable to the states through the due process clause of the fourteenth amendment in Benton v. Maryland, 395 U.S. 784 (1969).

[2] Brown v. Ohio, 432 U.S. 161 (1977); Ex parte Lange, 85 U.S. (18 Wall.) 163 (1873).

[3] 103 S. Ct. 673 (1983).

[4] *Id.* at 675.

[5] At the time of Hunter's trial, Missouri's armed robbery statute provided:

Every person who shall be convicted of feloniously taking the property of another from

sault with malice.[7] Hunter was sentenced to concurrent terms of ten years imprisonment for the robbery and fifteen years for the armed criminal action, and to a consecutive term of five years for the assault. Thus, Hunter's total sentence was twenty years.[8]

Hunter appealed his sentence to the Missouri Court of Appeals, claiming that his sentence for both robbery in the first degree and armed criminal action violated the Double Jeopardy Clause of the fifth amendment of the United States Constitution.[9] The Missouri Court of Appeals agreed and reversed both the conviction and the fifteen year sentence for armed criminal action.[10] The state's alternative motion for rehearing or transfer to the Missouri Supreme Court was denied by the appellate court,[11] and the Missouri Supreme Court itself denied review two months later.[12] The United States Supreme Court granted certiorari,[13] and in a six to two decision[14] vacated and remanded, holding:

> 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

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his person, or in his presence, and against his will, by violence to his person, or by putting him in fear of some immediate injury to his person; or who shall be convicted of feloniously taking the property of another from the person of his wife, servant, clerk or agent, in charge thereof, and against the will of such wife, servant, clerk or agent by violence to the person of such wife, servant, clerk or agent, or by putting him or her in fear of some immediate injury to his or her person, shall be adjudged guilty of robbery in the first degree.

MO. ANN. STAT. § 560.120 (Vernon 1979). This section has since been recodified without substantial modification at MO. ANN. STAT. § 569.020 (Vernon 1979).

6 Missouri's armed criminal action statute provides:

> [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 by the division of corrections 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 or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of three calendar years.

MO. ANN. STAT. § 559.225 (Vernon 1979)(recodification without revision at MO. ANN. STAT. § 571.015, in effect at the time of Hunter's trial).

7 MO. ANN. STAT. § 565.050 (Vernon 1979).

8 103 S. Ct. at 676.

9 State v. Hunter, 622 S.W.2d 374 (1981).

10 *Id.* at 375. The Missouri Court of Appeals relied entirely on the Missouri Supreme Court's holdings in State v. Haggard, 619 S.W.2d 44 (Mo. 1981); Sours v. State, 593 S.W.2d 208 (Mo.), *vacated*, 446 U.S. 962 (1980)(Sours I); and Sours v. State, 603 S.W.2d 592 (Mo. 1980), *cert. denied*, 449 U.S. 1131 (1981)(Sours II).

11 *Id.*

12 *Id.*

13 102 S. Ct. 1767 (1982).

14 Chief Justice Burger wrote the Court's opinion, which was joined by all the Justices except Justices Marshall and Stevens, who dissented.

impose cumulative punishment under such statutes in a single trial.[15]

## III. THE MAJORITY OPINION: LEGISLATIVE INTENT CONTROLS

The *Hunter* case is the product of a long tug-of-war between the Missouri Supreme Court and the United States Supreme Court.[16] In 1980, in *Sours v. State*[17] (*Sours I*), the Missouri Supreme Court held that under the test of *Blockburger v. United States*[18] armed criminal action and

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[15] 103 S. Ct. at 679. See *infra* note 18 for a discussion of Blockburger v. United States, 284 U.S. 299 (1932).

[16] The armed criminal action statute was first enacted in Missouri in 1927. When the Missouri Supreme Court first addressed the question, it held that the Double Jeopardy Clause did not prohibit conviction and sentencing for both armed criminal action and the underlying felony. State v. Treadway, 558 S.W.2d 646 (Mo. 1977), *cert. denied*, 439 U.S. 838 (1978); *see* State v. Valentine, 584 S.W.2d 92 (Mo. 1979).

In 1980, after the Supreme Court held in Harris v. Oklahoma, 433 U.S. 682 (1977)(per curiam), that the underlying felony is the same offense as felony murder under the *Blockburger* test, *see infra* note 18, the Missouri Supreme Court reversed itself. The Missouri Supreme Court held in Sours v. State, 593 S.W.2d 208 (Mo.), *vacated*, 447 U.S. 962 (1980), that conviction and sentencing under both the armed robbery statute and the armed criminal action statute violated the Double Jeopardy Clause. The United States Supreme Court vacated and remanded with directions to reconsider the decision in light of Whalen v. United States, 445 U.S. 684 (1980). *Sours*, 447 U.S. at 962; *see infra* note 29 and accompanying text. On remand, the Missouri Supreme Court adhered to its previous position and the United States Supreme Court denied certiorari. *See* 603 S.W.2d 592 (Mo. 1980), *cert. denied*, 444 U.S. 1131 (1981) (*Sours II*).

The Missouri Supreme Court and the three districts of the Missouri Court of Appeals then began reversing many armed criminal action convictions on double jeopardy grounds. The Missouri Supreme Court held in 1982 that, for the sake of uniformity, all armed criminal action sentences should be reversed. *See* State v. Kane, 629 S.W.2d 372, 377 (Mo. 1982). The state sought and the United States Supreme Court granted certiorari in a number of these cases, then vacated and remanded for further consideration in light of Albernaz v. United States, 450 U.S. 333 (1981). Throughout this period, the Missouri courts continued to hold that conviction and sentencing under both statutes violated the Double Jeopardy Clause. *See* Missouri v. Counselman, 450 U.S. 990 (1981)(certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Albernaz*) (five cases); Missouri v. Brown, 450 U.S. 1027 (1981)(same) (five cases); Missouri v. Sinclair, 452 U.S. 912 (1981) (same)(two cases); Missouri v. Crews, 452 U.S. 957 (1981) (same)(three cases); Missouri v. Greer, 451 U.S. 1013 (1981)(same)(three cases); State v. Haggard, 619 S.W.2d 44, 49 n.2 (Mo. 1981).

[17] 593 S.W.2d 208 (Mo.), *vacated*, 447 U.S. 962 (1980)(*Sours I*). Sours, like Hunter, was convicted of and sentenced for both armed robbery and armed criminal action.

[18] 284 U.S. 299 (1932). The *Blockburger* test has been used for many years to determine whether two statutory violations constitute the same offense for double jeopardy purposes. *Blockburger* involved a five count indictment charging federal narcotics violations. The defendant was convicted on three of the five counts, all of which charged sales to the same purchaser. Counts two and three charged sales on consecutive days to the same purchaser, count three charged the sale of a drug not in the original package, and count five charged the same sale as having been made not in pursuance of the purchaser's written order as required by the statute. *Id.* at 301. The petitioner argued that the sales charged in counts two and three were the same offense because they were made to the same purchaser, and that counts three and five referred to the same sale and thus also constituted a single offense. *Id.* at 301-02. The Court disagreed, stating: "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to deter-

the underlying felony of robbery first degree are the "same offense."[19] The Missouri court therefore held that even though the Missouri Legislature had manifested its clear intent that a defendant should be subject to conviction and sentencing under both statutes for a single offense, the Double Jeopardy Clause "prohibits imposing punishment for both armed criminal action and for the underlying felony."[20]

The Missouri Supreme Court adhered to this position when *Sours I* was vacated and remanded[21] for reconsideration in light of the United States Supreme Court's decision in *Whalen v. United States*.[22] Finally, in

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mine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not." *Id.* at 304.

The Court reasoned that, even though counts three and five involved the same sale, that sale violated two distinct statutory provisions. *Id.* at 303. The first was § 1 of the Harrison Narcotic Act, 26 U.S.C. § 692 (1917), which created the offense of selling certain drugs except from the original package. The second was § 2 of the same act, 26 U.S.C. § 696, prohibiting the sale of those drugs except on written order. Two distinct offenses were created and the defendant committed both of them in a single act. Each offense required proof of an element that the other did not. *Id.* at 304. Thus, they could not be the same offense for double jeopardy purposes. *See also* Pandelli v. United States, 635 F.2d 533 (6th Cir. 1980); *supra* note 26.

The *Blockburger* test was first set out in Gavieres v. United States, 220 U.S. 338, 343-44 (1911). The test has been repeatedly used and reaffirmed. *See, e.g.*, Simpson v. United States, 435 U.S. 6 (1978); Brown v. Ohio, 432 U.S. 161 (1977); Jeffers v. United States, 432 U.S. 137 (1977); Gore v. United States, 357 U.S. 386 (1958).

[19] *Sours*, 593 S.W.2d at 210. Because the armed criminal action elements are present whenever a dangerous weapon is used to commit a felony, the armed criminal action statute will always apply when any armed felony is charged. *See supra* notes 5-6. The Missouri Supreme Court considered only the United States Constitution because the Double Jeopardy Clause of the Missouri constitution has been interpreted to apply only to an attempt to retry a defendant after a jury's acquittal. *See* Murray v. State, 475 S.W.2d 67, 70 (Mo. 1972); Kansas City v. Henderson, 468 S.W.2d 48, 52 (Mo.), *cert. denied*, 404 U.S. 1004 (1971); Ward v. State, 451 S.W.2d 79, 81 (1970). Since the convictions in *Hunter* were obtained in a single trial, the Missouri constitution, art. I, § 19, does not apply. *Sours*, 593 S.W.2d at 211.

[20] *Sours*, 593 S.W.2d at 223. Rhode Island and Tennessee courts also have found convictions under similar armed violence statutes to violate double jeopardy. The defendant in State v. Boudreau, 113 R.I. 497, 322 A.2d 626 (1974), was convicted of eight counts of assault with a deadly weapon and one court of armed violence. On appeal, the armed violence conviction was reversed because the court held it was the same offense as the assault under the *Blockburger* test and the defendant could not be punished under both statutes. *Id.* at 503, 322 A.2d at 629. In State v. Hudson, 562 S.W.2d 416 (Tenn. 1978), the defendant was convicted in one trial of four offenses, including armed robbery and a firearms felony, arising out of an armed bank robbery. The court held that the separate convictions for armed robbery and the firearms felony could not stand without violating the Double Jeopardy Clause. The court construed the firearms felony statute to provide for additional punishment, not for a separate conviction. *Id.* at 419.

[21] Missouri v. Sours, 446 U.S. 962 (1980).

[22] 445 U.S. 684 (1980); *see infra* note 29. In reconsidering *Sours*, the Missouri Supreme Court held that, notwithstanding the acknowledged intent of the legislature to impose two separate punishments for the two offenses, armed criminal action and the underlying felony are the same offense for which double punishment violated the Double Jeopardy Clause. Sours v. State, 603 S.W.2d 592 (Mo. 1980), *cert. denied*, 449 U.S. 1131 (1981)(*Sours II*).

*State v. Haggard*,[23] the Missouri Supreme Court again affirmed its belief that concurrent sentencing for both armed criminal action and the underlying felony constituted a violation of the Double Jeopardy Clause:

> Until such time as the Supreme Court of the United States declares clearly and unequivocally that the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution does not apply to the legislative branch of government, we cannot do other than what we perceive to be our duty to refuse to enforce multiple punishments for the same offense arising out of a single transaction.[24]

Chief Justice Burger's opinion for the majority in *Missouri v. Hunter* gives the Missouri Supreme Court the clear statement it requested: after *Hunter*, legislative intent controls whether cumulative punishments can be applied for violations of multiple statutes by a single criminal transaction. Chief Justice Burger reasoned that although the double jeopardy clause does prohibit multiple punishments for the same offense, this prohibition is applicable only where separate trials are held. When cumulative sentences are imposed in a single trial for conduct arising out of a single criminal transaction, "the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended."[25] Thus, where legislative intent is clear, double jeopardy does not bar multiple sentences for convictions arising out of the same offense.[26]

In reaching this conclusion, Chief Justice Burger relied principally on two recent cases, *Whalen v. United States*[27] and *Albernaz v. United States*.[28] The earlier case, *Whalen*, involved cumulative punishments for rape and felony murder, rape being the underlying felony. The Court held that the offenses were the same under the *Blockburger* test, since the

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[23] 619 S.W.2d 44 (Mo. 1981). Haggard was also appealing his sentence for both armed robbery and armed criminal action.

[24] *Id.* at 51.

[25] *Hunter*, 103 S. Ct. at 678.

[26] The Double Jeopardy Clause operates as a presumption against a finding that the legislature intends to define multiple offenses and to prescribe multiple punishments, a presumption that can be overcome only by "clear and unmistakeable" evidence. Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 MICH. L. REV. 1101, 1126-27 (1980). This presumption frees the legislature to define offenses and sentences as it desires by requiring the courts to adhere to legislative schemes of punishment that are "clear and unmistakeable." Yet, it also permits the courts to reject judicial interpretations of the law, by authorizing the courts to subject multiple punishment to constitutional review, and to invalidate such punishment wherever the evidence for its intended existence is less than clear. The presumption is the only formulation that can give constitutional content to the clause without intruding upon the legislature's authority to define offenses and penalties because other constructions inevitably render the double jeopardy clause either unduly intrusive or entirely meaningless. *Id.*

[27] 445 U.S. 684 (1980).

[28] 450 U.S. 333 (1981).

felony murder could not have been proved without proof of the rape.[29] Because the Court in *Whalen* did not find a clear legislative intent to authorize cumulative punishment for the same offense, and, in fact, did find some indication that Congress had not intended punishment to be cumulative under the two statutes unless they satisfied the *Blockburger* test and were not the "same offense,"[30] the Court held that the appellant could not be punished under both statutes. In *Hunter*, Chief Justice Burger explained that the *Whalen* result "turned on the fact that the Court saw no 'clear indication of contrary legislative intent.' "[31]

Chief Justice Burger also relied heavily on *Albernaz v. United States*.[32] There the Court found that the defendants' convictions for conspiracy to import and conspiracy to distribute marijuana did not constitute the same offense under the *Blockburger* test.[33] The *Hunter* majority found it significant that once the Court held the convictions in *Albernaz* to constitute separate offenses, the Court "might well have stopped at that point and upheld the petitioners' cumulative punishments under the challenged statutes since cumulative punishments can presumptively be assessed after conviction for two offenses that are not the 'same' under *Blockburger*."[34] In *Albernaz* the Court instead went on to state: "[T]he question of what punishments are constitutionally permissible is no different from the question of what punishment the Legislative Branch intended to be imposed. *Where Congress intended, as it did here, to impose multiple punishments, imposition of such sentences does not violate the Constitution*."[35] Chief Justice Burger reasoned in *Hunter* that the *Whalen* and *Albernaz* decisions "lead inescapably to the conclusion [that] simply because two criminal statutes may be construed to proscribe the same conduct under the *Blockburger* test does not mean that the Double Jeopardy

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29 445 U.S. at 693-94. The defendant appealed the consecutive sentences imposed on double jeopardy grounds. The Supreme Court held that rape and felony murder were the same offense under the *Blockburger* test because the conviction for felony murder could not be had without proving all the elements of the offense of rape. *Id.* at 694. The sentences were overturned because the Court found that Congress, legislating for the District of Columbia, had not intended punishment to be imposed for two offenses arising out of the same transaction unless one required proof of a fact which the other did not, i.e., were two separate offenses under the *Blockburger* test. *Id.* at 693. Although felony murder required proof of a fact (death) not required to prove rape, the rape did not require proof of any fact that was not required to prove the felony murder. The *Blockburger* test requires that each offense include a fact that the other does not in order to constitute separate offenses. *Blockburger*, 284 U.S. at 304.

30 *Id.* at 691.

31 *Hunter*, 103 S. Ct. at 678.

32 450 U.S. 333 (1981).

33 *Id.* at 339.

34 *Hunter*, 103 S. Ct. at 678.

35 *Albernaz*, 450 U.S. at 344, *quoted in Hunter*, 103 S. Ct. at 679 (emphasis added by Chief Justice Burger) (footnote omitted).

Clause precludes the imposition, in a single trial, of cumulative punishments pursuant to those statutes."[36]

In *Whalen*, *Albernaz*, and *Hunter*, the Court has expressed a common theme: legislative intent controls in defining crimes and fixing punishments. The holdings in these cases are in harmony with the Court's position in the earliest case involving the issue. The Court first held in *Ex Parte Lange* that the Double Jeopardy Clause prohibits imposition of multiple punishments for a single offense.[37] On its facts, *Lange* did not limit legislative discretion; it only limited judicial power to impose a sentence more severe than the legislatively prescribed maximum.

More recently, in *North Carolina v. Pearce*, the Court held that the Double Jeopardy Clause "protects against multiple punishments for the same offense."[38] One commentator has interpreted *Pearce* as holding that the Double Jeopardy Clause also prohibits courts from imposing penalties that are excessive as defined by the sentencing authority.[39] The defendant's original conviction was reversed after he had spent two and one-half years in jail. At his second trial he was sentenced to twenty-five years in prison and given no credit for the time he had already served. Thus, his total prison time would have been twenty-seven and one-half years. The Supreme Court reversed the twenty-five year sentence, even though the total sentence of twenty-seven and one-half years was less than the legislatively prescribed maximum of thirty years.[40] Under the *Whalen* analysis, Pearce could have been sentenced to up to thirty years total prison time without a double jeopardy violation. If double jeopardy serves only to prohibit courts from imposing penalties greater than those prescribed by the legislature, then Pearce's sentence should have been affirmed.[41] Although *Pearce* does not limit legislative discretion per se, it does imply that the double jeopardy anal-

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[36] *Id.* at 679.

[37] 85 U.S. (18 Wall.) 163 (1873). Lange was convicted of an offense for which the penalty was a maximum of one year in prison or a $200 fine, but he was mistakenly sentenced to both. When the sentence was appealed, the trial judge set aside the original sentence and imposed another prison term without taking into account that Lange had already paid the fine. *Id.* at 164. The Supreme Court reversed the prison sentence, holding that even though the fine had been paid under an illegal sentence, Lange could not be punished further under the Double Jeopardy Clause. *Id.* at 175; *see also* Westen & Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81, 107.

[38] 395 U.S. 711, 717 (1969).

[39] Westen & Drubel, *supra* note 37, at 109.

[40] *Pearce*, 395 U.S. at 719. Another issue in *Pearce* was whether the Double Jeopardy Clause prohibited a court from imposing a more severe sentence upon reconviction than the defendant originally received. The Court held that this was not constitutionally impermissible. *Id.* at 723.

[41] *See* Westen & Drubel, *supra* note 37, at 109; *see also* North Carolina v. Pearce, 395 U.S. 711 (1969); Williams v. Wainwright, 650 F.2d 58 (5th Cir. 1981); United States v. Clayton, 588 F.2d 1288 (9th Cir. 1979); United States v. Best, 571 F.2d 484 (9th Cir. 1978)(heavier

ysis goes beyond a simple inquiry as to whether the court has sentenced in accord with the applicable statute.

In a number of cases after *Pearce* and before *Whalen*, the Court in dicta indicated that the Double Jeopardy Clause might limit a state's power to create distinct statutory offenses punishing the same criminal act. For example, in *Simpson v. United States*,[42] the Court said, "[C]ases in which the government is able to prove violations of two separate criminal statutes with precisely the same factual showing . . . raise the prospect of double jeopardy."[43] In *Jeffers v. United States*,[44] the Court added, "[I]f some possibility exists that the two statutory offenses are the 'same offense' for double jeopardy purposes . . . it is necessary to examine the problem more closely, in order to avoid Constitutional multiple punishment difficulties."[45]

Thus, the Court in *Whalen* and *Albernaz* was retreating from the logical implication of *Pearce* and the language of *Jeffers* and *Simpson*. The Court was instead focussing more on legislative intent, as it did in 1873 with *Lange*. The *Hunter* opinion finally makes clear that because the Missouri Supreme Court in *Sours II* construed the armed criminal action statute and armed robbery to constitute the same offense,[46] and because the court found that the legislature clearly intended that a convicted criminal be sentenced under both statutes,[47] double jeopardy considerations do not bar the imposition of penalties under both statutes.

## IV. JUSTICES MARSHALL AND STEVENS IN DISSENT

The majority's reliance on *Whalen* and *Albernaz* as compelling precedent in deciding *Hunter* was misplaced. Justice Marshall, who joined the *Whalen* opinion, pointed out in his dissent in *Hunter* that the Court in *Whalen* "had no occasion to decide and did not decide, whether multiple punishments . . . *can* be imposed if clearly authorized by the legislature."[48] He quoted other language from the *Whalen* opinion, ignored by the majority: "The Double Jeopardy Clause *at the very least* precludes federal courts from imposing consecutive sentences unless authorized by

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sentence on retrial after appellate reversal, absent vindictiveness, does not violate double jeopardy).

42 435 U.S. 6 (1978).

43 *Id.* at 11.

44 432 U.S. 137 (1977)(plurality opinion).

45 *Id.* at 155.

46 603 S.W.2d at 598.

47 *Id.*

48 103 S. Ct. at 681 n.3 (Marshall J., dissenting) (emphasis in original).

Congress to do so,"[49] implying that when the issue was faced in a later case the Court might just as easily have held that the double jeopardy clause prohibits such statutes. Thus, the result in *Hunter*, in Justice Marshall's view, is not compelled by the *Whalen* holding, as the majority argues.

The language of *Albernaz* that the Chief Justice found so compelling is clearly dicta, as Justice Marshall also pointed out.[50] *Albernaz* involved separate punishments for different crimes under the *Blockburger* test.[51] The Constitution does not prohibit imposing separate punishments for such separate crimes.[52] Thus, *Albernaz* was unrelated to the issue of multiple punishments for the same offense presented in *Hunter*. In *Albernaz*, the only issue was whether the convictions arose out of the same offense under the *Blockburger* test. Once the Court found that the conspiracies charged were really two distinct offenses it should simply have confirmed the convictions.

Justices Marshall and Stevens, in dissent, also criticized the majority's overall view of double jeopardy.[53] First, they explained that it is well-settled that Hunter's prosecution under these two statutes in separate trials for the same offense would plainly have violated the double jeopardy clause.[54] The Court in *Harris v. Oklahoma*[55] and *Brown v. Ohio*[56]

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[49] *Whalen*, 445 U.S. at 689, *quoted in Hunter*, 103 S. Ct. at 681 n.3 (emphasis added by Justice Marshall).

[50] *Hunter*, 103 S. Ct. at 680 (Marshall, J., dissenting).

[51] *Albernaz*, 450 U.S. at 339.

[52] *See id.* at 344 (the imposition of consecutive sentences for violations of separate statutes does not violate the double jeopardy clause); United States v. Bangert, 645 F.2d 1297, 1307 (8th Cir. 1981) (if act is punishable under two separate statutes and requires proof of two sets of facts, cumulative sentencing is appropriate); United States v. Caston, 615 F.2d 1111, 1117 (5th Cir.), *cert. denied*, 449 U.S. 831 (1980)(cumulative punishment may be imposed for acts constituting violations of two separate statutory provisions); United States v. Ortiz-Martinez, 557 F.2d 214, 216 (9th Cir. 1977) (Congress may authorize cumulative sentences for a single act that violates more than one statute when the offenses are not identical).

[53] 103 S. Ct. at 679 (Marshall, J., dissenting).

[54] *Id.*

[55] 433 U.S. 682 (1977)(per curiam). In *Harris*, the Court held that "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." *Id.* at 682.

[56] 432 U.S. 161 (1977). The Court held that the Double Jeopardy Clause barred prosecution and punishment for auto theft after the defendant had already been tried, convicted, and punished for the lesser included offense of operating the vehicle without the owner's consent. The Court found that, under the *Blockburger* test, the crimes of "joyriding" (operating a vehicle without the owner's consent) and auto theft (joyriding with intent permanently to deprive the owner of possession) constituted the same statutory offense because the former was a lesser included offense of the latter. *Id.* at 168. Even though the charges had focused on different parts of a nine-day interval between the time of the theft and the defendant's apprehension, there was still only one offense, for which the defendant could not be prosecuted a second time.

clearly held that under most circumstances, a defendant may not be retried for the same elements once the initial trial has been concluded.[57] Justices Marshall and Stevens argue that the majority opinion bypasses this prohibition, and allows prosecutors to achieve the result forbidden by *Harris* and *Brown* by bringing all charges in a single trial. They do not believe that "the same offense should 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."[58]

Double jeopardy theory holds that the ordeal of multiple trials is the primary evil to be guarded against.[59] The defendant is entitled to have his entire case finally decided by the jury first sworn to hear it.[60] A state should not be allowed to use its superior resources in multiple attempts to convict the defendant.[61] The policy that all charges arising

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[57] That is, one may not be retried for the same elements following acquittal, United States v. Ball, 163 U.S. 662 (1892), following conviction and punishment, Brown v. Ohio, 432 U.S. 161 (1977), or following appellate reversal for insufficient evidence. Burks v. United States, 437 U.S. 1 (1977). A defendant may be retried following appellate reversal based on the weight of the evidence, Tibbs v. Florida, 457 U.S. 31 (1982), or if a mistrial is declared, unless the defendant can prove that prosecutorial misconduct was intended to and did force the defendant to move for mistrial. Oregon v. Kennedy, 102 S. Ct. 2083 (1982); *see* Note, *Fifth Amendment—Twice Jeopardizing the Rights of the Accused: The Supreme Court's* Tibbs *and* Kennedy *Decisions*, 73 J. CRIM. L. & CRIMINOLOGY 1474 (1982).

[58] *Hunter*, 103 S. Ct. at 680; *see, e.g.*, O'Clair v. United States, 470 F.2d 1199 (1st Cir. 1972)(if state cannot constitutionally obtain two separate convictions for the same act at separate trials, it cannot do so at the same trial).

[59] In Abney v. United States, 431 U.S. 651, 661 (1977), the Court said that the guarantee against double jeopardy assures an individual that among other things, he will not be forced, with certain exceptions, to endure the personal strain, public embarassment, and expense of a criminal trial more than once for the same offense. *See also* United States v. Jorn, 400 U.S. 470, 479 (1971); North Carolina v. Pearce, 395 U.S. 711 (1969); Green v. United States, 355 U.S. 184, 187-88 (1957); United States v. Ball, 163 U.S. 662, 669 (1896); United States *ex rel.* Stewart v. Redman, 470 F. Supp. 50, 56 (D.C. Del. 1979).

Justice Brennan has always believed that the Double Jeopardy Clause requires that the prosecution bring all charges arising out of one criminal act or transaction in a single proceeding, except in very limited circumstances. If that is done, then double jeopardy requirements are satisfied. *See, e.g.*, Harris v. Oklahoma, 433 U.S. 682, 683 (1976)(per curiam)(Brennan, J., concurring); Ashe v. Swenson, 397 U.S. 436, 453-54 (1970)(Brennan, J., concurring); Thompson v. Oklahoma, 429 U.S. 1053 (1977) (Brennan, J., dissenting from denial of certiorari), and cases cited therein. Justice Brennan's view has not been adopted by the Court. *See, e.g.*, Ashe v. Swenson, 397 U.S. 436, 443-45 (1970); Hardwick v. Doolittle, 558 F.2d 292, 298 (5th Cir.), *cert. denied*, 434 U.S. 1049 (1977)(Double Jeopardy Clause does not require a state to join in a single proceeding all charges arising from one criminal episode or transaction).

[60] The deprivation of the defendant's right to have a verdict rendered by the first jury sworn to hear his case is what distinguishes the possibly impermissible retrial after a mistrial is declared over the defendant's objection from a permissible retrial after the defendant's successful appeal. The defendant has a "valued right to have his trial completed by a particular tribunal." United States v. Jorn, 400 U.S. 470, 484 (1970) (quoting Wade v. Hunter, 336 U.S. 684, 689 (1949)).

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

out of a single criminal transaction should be brought in a single trial is so strong that a number of states require this by statute.[62] The majority opinion follows this traditional view of double jeopardy. Chief Justice Burger does not see that appellate courts have a role beyond ensuring that all charges are brought in a single proceeding, and that trial courts respect legislatively prescribed maximum sentences. Since the interests of the defendant in avoiding multiple trials and in having his case heard by the first jury sworn are met when multiple charges are brought in a single trial, there may be justification for allowing in a single trial what would be prohibited in multiple trials. Under the traditional view of double jeopardy, the majority is correct, but it fails to consider other important rights of defendants.

While Justice Marshall does not disagree that multiple trials for the same criminal act are a major concern of double jeopardy analysis, he also believes that there is a strong interest against multiple convictions for the same criminal act. He admits that the "[S]tate has wide latitude to define crimes and to prescribe the punishment for a given crime," and that the "[S]tate is free to prescribe two different punishments (e.g., a fine and a prison term) for a single offense."[63] Justice Marshall argues, however, that the Constitution does not permit a State to punish as two crimes conduct that constitutes a single offense.[64] Thus, while the majority emphasizes the sentence, Justice Marshall's concern is the extra conviction.[65]

The government in its amicus brief argued that because the legislature could simply have prescribed a harsher sentence for a single crime, the same sentence imposed for two convictions was functionally equivalent.[66] Because additional stigma results from each conviction, however, a statutory scheme that permits the prosecution to obtain two convictions and two sentences is not equivalent to a statute that permits

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62 *See, e.g.*, ILL. REV. STAT. ch. 38, §§ 3-3, 3-4(b)(1) (1981) (compulsory joinder statute).

63 *Hunter*, 103 S. Ct. at 680 (Marshall, J., dissenting).

64 *Id.* A number of states prohibit double punishment for a single criminal offense by statute. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-116 (1982); CAL. PENAL CODE § 654 (West 1982); IDAHO CODE § 18-301 (1983); ILL. REV. STAT. ch. 38, § 1005-8-4 (1982); MINN. STAT. § 609.035 (1983); OHIO REV. CODE ANN. § 2941.25(A)(1979); OKLA. STAT., tit. 21, § 11 (1971).

Other state courts have interpreted their state constitutions to prohibit double punishment for the same offense. *See, e.g.*, State v. Vincent, 387 So. 2d 1097, 1101 (La. 1980); People v. Jankowski, 408 Mich. 79, 289 N.W.2d 674, 678 (1980); Conner v. Griffith, 238 S.E.2d 529 (1977); ALASKA CONST. art. I, § 9; IOWA CONST. art. I, § 12; LA. CONST. art. I, § 15; MICH. CONST. art. I, § 15; N.M. CONST. art. II, § 15; W. VA. CONST. art. III, § 5.

65 The extra conviction was also the concern of the Michigan Supreme Court when, in People v. Jankowski, 408 Mich. 79, 289 N.W.2d 674, 680 (1980), it held that the double punishment problem could not be solved by the vacation of the multiple sentences leaving the convictions standing.

66 *Hunter*, 103 S. Ct. at 681; Brief for the United States as amicus curiae at 18-19.

only a single conviction, but imposes a similar or even a harsher sentence.[67] Moreover, because the State could impose the longer sentence upon conviction for a single crime, there is no legitimate purpose in seeking multiple convictions and multiple punishments.[68]

Justice Marshall pointed out that "[i]f the Double Jeopardy Clause imposed no restrictions on a legislature's power to authorize multiple punishment, 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."[69] He believes that the power of the State to bring multiple charges increases the risk that the defendant will be convicted. The defendant must defend against and obtain acquittal on each charge; the prosecutor need obtain only a single conviction. There is more opportunity for a compromise verdict if all the jurors are not convinced by the State's case.[70] The jury may believe that with so many charges, the defendant must be guilty of something.[71] There is a real danger here, because courts generally will uphold an adequately supported conviction despite apparent inconsistency in the findings of guilty and not guilty on different counts of a two-count indictment. Great deference is accorded jury verdicts even when they are apparently based on compromise.[72]

In further support of his argument that the extra conviction violates double jeopardy, Justice Marshall pointed out that each separate criminal conviction may have collateral consequences.[73] The convictions on multiple charges arising out of a single act may subject an of-

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67 103 S. Ct. at 681.

68 *Id*; *see infra* notes 81-83 and accompanying text.

69 103 S. Ct. at 680. For example, in Ashe v. Swenson, 397 U.S. 436 (1970), a defendant was tried for robbing one of six poker players. When the jury acquitted him because the prosecution's evidence was weak, the state re-indicted the defendant for the robbery of a second of the six. The Court stated that this effort by the prosecutor to hone his trial strategy and identify and cure weaknesses in his case through successive trials was impermissible. *Id.* at 447, 448 (Brennan, J., concurring).

70 103 S. Ct. at 681; *see also* Cichos v. Indiana, 385 U.S. 76 (1966)(Fortas, J., dissenting from denial of certiorari). As Justice Marshall explains, although the risk of a compromise verdict is also present when the lesser included offense as well as the greater offense is submitted to the jury, the risk is reduced by the rule that the lesser included offense will not be submitted to the jury if the distinguishing element is not in dispute. *Hunter*, 103 S. Ct. at 681 n.4; *see also* Sansone v. United States, 380 U.S. 343 (1965); United States v. Tsana, 572 F.2d 340 (2d Cir.), *cert. denied*, 435 U.S. 995 (1978).

71 103 S. Ct. at 681 (Marshall, J., dissenting).

72 *See* United States v. Lichtenstein, 610 F.2d 1272, 1279-80 (5th Cir.), *cert. denied*, 447 U.S. 907 (1980)(juries in criminal cases are free to render verdicts that are inconsistent, or even the result of mistake or compromise); Watts v. United States, 362 A.2d 706 (D.C. App. 1976) (law permits a jury to acquit in disregard of the evidence; such an acquittal is unreviewable). *But see* Cross v. State, 374 A.2d 620, 623, *rev'd on other grounds*, 386 A.2d 747 (Md. 1977)(legally inconsistent verdict could not stand).

73 103 S. Ct. at 681; *see, e.g.*, O'Clair v. United States, 470 F.2d 1199 (1st Cir. 1972)(adverse consequences of conviction include habitual offender status, use to impeach testimony, extra stigma); *see also* Benton v. Maryland, 395 U.S. 784 (1969); Sibron v. New York, 392 U.S.

fender to sentencing under a habitual offender statute.[74] Each conviction itself, moreover, represents a moral condemnation by the community—a pronouncement that a wrong has been committed.[75] Each conviction increases the stigma and damage to the defendant's reputation resulting from this moral condemnation. Thus, the dissenters are correct in arguing that the extra conviction is as much a double jeopardy concern as is the number of trials the defendant may be forced to endure.

Justice Marshall's concerns are legitimate ones, but may be answered in the future by the eighth amendment[76] or the Due Process Clause,[77] rather than by the Double Jeopardy Clause. The Court has recognized in a number of cases that sentence length, where not rationally related to the type of crime, may violate the eighth amendment prohibition against cruel and unusual punishment.[78] The eighth amendment in this context clearly limits the discretion of the legislature in prescribing punishments for various crimes.[79] Although the eighth amendment has never been tested in the context of an unduly harsh

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40, 53-58 (1967); Grant, LeCorner, Pickens, Rivkin & Vinson, *Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929 (1970).

74 Missouri defines a persistent offender as "one who has . . . been found guilty of two or more felonies committed at different times." MO. STAT. ANN. § 558.016 (Vernon 1982). Thus, Justice Marshall's concern does not appear to be a problem in Missouri. *See also* Indiana Habitual Offender Statute, IND. CODE § 35-50-2-8 (Supp. 1983)(habitual offender status requires two prior unrelated felony convictions).

75 Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 404 (1958).

76 The eighth amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

77 The fifth amendment provides in pertinent part: "[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. V.

78 *See* Ingraham v. Wright, 430 U.S. 651, 667 (1977); Trop v. Dulles, 356 U.S. 86, 100 (1958); Bell v. United States, 349 U.S. 81, 82 (1955)(punishment appropriate for the diverse federal offenses is a matter for the discretion of Congress, subject only to constitutional limitations, more particularly the eighth amendment); Weems v. United States, 217 U.S. 349, 367 (1910). The Court in Rummel v. Estelle, 445 U.S. 263 (1979), noted in discussing these cases, however, that "[i]n recent years this proposition has appeared most frequently in opinions dealing with the death penalty." *Id.* at 272.

79 Weems v. United States, 217 U.S. 349 (1910). *See generally*, Westen & Drubel, *supra* note 37, at 114-15; Note, *Constitutional Law—Cruel and Unusual Punishments—Eighth Amendment Prohibits Excessively Long Sentences*, 44 FORDHAM L. REV. 637 (1975); *see also* United States v. Johnson, 612 F.2d 843, 845, 847 (4th Cir. 1979)(eighth amendment may limit Congress' discretion to define units of prosecution; Double Jeopardy Clause does not) (quoting Bell v. United States, 349 U.S. 81, 82-83 (1955)). The cruel and unusual punishment provision forbids the imposition of certain types of punishment, proscribes punishment which is grossly disproportionate to the severity of the crime, and imposes some limits on what may be made criminal and punished. Bono v. Saxbe, 620 F.2d 609, 612 (7th Cir. 1980) (citing Ingraham v. Wright, 430 U.S. 651, 667 (1977)). North Carolina v. Pearce, 395 U.S. 711 (1969), may be interpreted to imply that the legislatively prescribed sentence of 30 years was excessive for the crime committed. Otherwise, Pearce's total sentence, including time served pending appeal, of 27 1/2 years should have been affirmed. *See supra* notes 38-41 and accompanying text.

sentence as the result of conviction of more than one statutory crime based on a single criminal act, the Court's past treatment of overly severe sentences seems to indicate that such unbridled discretion in the legislature might be limited by the prohibition against cruel and unusual punishment.[80]

The Due Process Clause might also be held to invalidate statutory schemes that define too many separate crimes based on single criminal acts, if such definitions could not be found to be rationally related to legitimate state objectives.[81] The Court has seldom applied the Due Process Clause to criminal statutes.[82] Since Missouri could have prescribed the sentence of twenty years which Hunter received for two convictions as the sentence for violation of a single statute, no legitimate state objective was achieved by convicting Hunter twice.[83] Because the

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80 In Solem v. Helm, 103 S. Ct. 3001 (1983), the Supreme Court reversed a sentence of life imprisonment without possibility of parole for passing a "no account" check under South Dakota's recidivist statute. The Court reaffirmed that the eighth amendment proscription against cruel and unusual punishment prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed. *Id.* at 3006. Justice Powell wrote for the Court, and Chief Justice Burger and Justices White, Rehnquist and O'Connor dissented. Justice Powell distinguished the case from Rummel v. Estelle, 445 U.S. 263 (1980), while the dissenters argued that *Rummel* directly controlled *Solem*. *Solem*, 103 S. Ct. at 3017.

In *Rummel*, the Court held that a life sentence imposed upon a conviction for a theft of $120.75 under the Texas recidivist statute was constitutional. 445 U.S. at 285. Justice Powell argued in *Solem* that Rummel's eligibility for parole was the distinguishing factor of the previous case. *Solem*, 103 S. Ct. at 3015-16. The defendant in *Solem*, however, could have appealed for executive clemency.

Both *Solem* and *Rummel* were five to four decisions. Justice Blackmun may simply have changed his mind. The issue quite clearly is still unsettled.

81 Blackledge v. Perry, 417 U.S. 21 (1974) (prosecutor's discretion to re-indict a defendant on a felony charge after his conviction and successful appeal on misdemeanor charge is circumscribed by the due process clause); Rummel v. Estelle, 587 F.2d 651 (5th Cir. 1978), *aff'd*, 445 U.S. 263 (1980), *on remand*, 498 F.Supp. 793 (5th Cir. 1978) (the legislature selects the punishment scheme for criminal statutes and the court is justified in striking down the legislature's choice only when it is demonstrated that that choice has no rational basis and is totally and utterly rejected in modern thought); Hardwick v. Doolittle, 558 F.2d 292, 297 (5th Cir. 1977)(due process clause may impose some as-yet undetermined limit on a state's constitutional power to classify and punish a course of conduct as several distinct offenses).

82 The Court is now most reluctant to strike down statutes on this ground, which necessitates passing judgment on the wisdom of the legislative scheme. W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 136-38 (1972).

83 Substantive due process might temper the legislature's power to prescribe criminal penalties by invalidating sentencing schemes that bear no substantial relationship to a legitimate public interest. The chance of substantive due process considerations arising, however, are remote. The Supreme Court has only employed this doctrine to strike down criminal statutes prohibiting specific activities. *See* W. LAFAVE & A. SCOTT, *supra* note 82, at 137, 137 n.6. The Court has never held that the severity of a sentence imposed under a valid statute violates due process. *Id.* Moreover, beginning with Nebbia v. New York, 291 U.S. 502 (1934), the Court generally has refrained from invalidating any statutes on substantive due process grounds. *But see* Griswold v. Connecticut, 381 U.S. 479, 481-82 (1975), and cases cited therein.

statutory scheme lacks justification, it might very well violate the Due Process Clause.[84]

## V. CONCLUSION

In *Missouri v. Hunter*, the Court has brought together the elements of *Whalen* and *Albernaz* in an unequivocal ruling that the Double Jeopardy Clause does not limit the discretion of Congress or state legislatures either in defining crimes or in prescribing punishments for those crimes once defined.[85] Thus, apparently legislatures can define many crimes based on the same elements, prescribe a different punishment for each, and provide that defendants convicted of multiple violations based on the same criminal act may be sentenced consecutively. Whether such practices, when carried to the extreme, will be found to violate either the eighth amendment prohibition against cruel and unusual punishment, or the fifth and fourteenth amendment guarantees of due process of law, remains to be seen.

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[84] In State v. Kaufman, 265 N.W.2d 610, 618 (Iowa 1978), the Iowa Supreme Court held that a conviction on the lesser included as well as the greater offense violated both double jeopardy and due process.

[85] It may be argued that the double jeopardy clause does indirectly limit legislatures in defining crimes and punishments because it demands a certain minimum clarity in drafting statutes. Unless legislative intent is crystal clear, the "rule of lenity" constitutionalized in *Whalen* mandates reversal of a cumulative sentence. *See* Westen & Drubel, *supra* note 37, at 118.