DOUBLE JEOPARDY AND MULTIPLE PUNISHMENT: CUTTING THE GORDIAN KNOT*

ANNE BOWEN POULIN**

Courts treat as axiomatic that the Double Jeopardy Clause protects against both multiple punishment and successive prosecution. Unfortunately, applying the same rules to both multiple punishment and successive prosecution undermines double jeopardy protection. Instead, protection from multiple punishment should not be treated as a double jeopardy problem. This Article examines how multiple punishment analysis became entangled with successive prosecution protection. After considering the foundation of the axiom that double jeopardy protects against multiple punishment, it concludes that the axiom must be rejected. Multiple punishment analysis should be disentangled from double jeopardy rules governing successive prosecution and double jeopardy should play no role in evaluating sentences imposed after a single trial.

INTRODUCTION

It is treated as axiomatic that the Double Jeopardy Clause[3] protects against reprosecution after acquittal, reprosecution after conviction and multiple punishment.[4] Both courts and commentators have repeatedly

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* In *Whalen v. United States*, 445 U.S. 684, 702 (1980) (Rehnquist, J., dissenting), then-Justice Rehnquist remarked in his dissent that the majority had "tied together three separate strands of cases in what may prove to be a true Gordian knot."

** Professor of Law, Villanova University School of Law. I am grateful to all my colleagues for their helpful comments, particularly Louis Sirico. I am indebted to Adam Grandwetter and Dennis Lueck for their outstanding research assistance, and to Villanova University School of Law for its generous support.

3. The Double Jeopardy Clause is found in the Fifth Amendment to the United States Constitution, which provides, in pertinent part, that "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V.

4. *See, e.g.*, Dep't of Revenue v. Kurth Ranch, 511 U.S. 767, 769 n.1 (1994) (citing North Carolina v. Pearce, 395 U.S. 711, 717 (1969)); United States v. Dixon, 509 U.S. 688, 696 (1993) (citing *Pearce*, 395 U.S. 711); Ohio v. Johnson, 467 U.S. 493, 498 (1984) (citing *Pearce*, 395 U.S. 711); Justices of Boston Mun. Ct. v. Lydon, 466 U.S. 294, 306–07 (1984) (citing Illinois v. Vitale, 447 U.S. 410, 415 (1980), for the proposition that double jeopardy protects against three things, including multiple punishments for the same offense); United States v. DiFrancesco, 449 U.S. 117, 129 (1980) (citing *Pearce*, 395 U.S. 711); *Vitale*, 447 U.S. at 415 (citing *Pearce* for the same proposition); *Pearce*, 395 U.S. at 717. In *Whalen*, 445 U.S. at 700 (Rehnquist, J., dissenting), then-Justice Rehnquist, dissenting, included this assertion as one of the Court's statements of "black letter law." This often-repeated axiom fails to

asserted that double jeopardy protection extends to all three situations, wrestling with double jeopardy jurisprudence to establish legal doctrines that fit all three. Unfortunately, successive prosecutions—reprosecution after acquittal or conviction—pose markedly different issues from multiple punishment imposed in a single proceeding.[5] In this article, I argue that double jeopardy protection does not apply to multiple punishments imposed in a single proceeding except in very limited circumstances.[6] Eliminating, or at least clarifying and delimiting, the axiom that double jeopardy protects against multiple punishment will help the courts untangle unrelated strands of double jeopardy jurisprudence and may lead to more meaningful double jeopardy protection from successive prosecution.

Pure multiple punishment concerns arise in very limited circumstances.[7] They do not arise when a defendant is reprosecuted after an acquittal or mistrial—having received no punishment as a result of the prosecution's first effort, the defendant will not suffer *multiple* punishment if later convicted. Further, pure multiple punishment concerns are not present when a defendant who has been convicted and sentenced is prosecuted in a successive proceeding on related charges. True, the defendant faces a threat of multiple punishment, but reprosecution after conviction raises such serious double jeopardy concerns peculiar to successive prosecution that any concern with multiple punishment is incidental to the successive prosecution concerns.

Pure multiple punishment claims arise from single proceedings involving multiple related charges. Under the Double Jeopardy Clause, when the defendant complains only of multiple punishment, and not suc-

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acknowledge the strain of cases applying double jeopardy protection after mistrial, where the first proceeding ended in neither acquittal nor conviction. *See generally* WAYNE R. LAFAVE, JEROLD H. ISRAEL & NANCY J. KING, CRIMINAL PROCEDURE § 25.2 (4th ed. 2004).

5. *See generally* Anne Bowen Poulin, *Double Jeopardy Protection from Successive Prosecution: A Proposed Approach*, 92 GEO. L.J. 1183 (2004) [hereinafter Poulin, *Protection from Successive Prosecution*].

6. *See Kurth Ranch*, 511 U.S. at 804–05 (Scalia, J., dissenting) (arguing that double jeopardy does not prohibit multiple punishment); *Whalen*, 445 U.S. at 705 (1980) (Rehnquist, J., dissenting) (advocating this position).

7. In this article, I generally use the term "multiple punishment" to refer to punishments imposed in a single proceeding. I use the term "pure multiple punishment concerns" to refer to a punishment concern that is not intertwined with successive prosecution, that is, punishment concerns that arise when punishment for more than one charge or more than one punishment for a single charge is imposed in a single proceeding. Multiple punishment concerns are also sometimes mentioned in cases entailing successive prosecution, but successive prosecution cases do not raise pure multiple punishment issues and should therefore be distinguished. *See infra* Part IV.A.2–A.3. In addition, true multiple punishment concerns under the Double Jeopardy Clause—those that raise legitimate constitutional issues—arise in only a small number of circumstances. *See infra* Part III.B.3.

cessive prosecution, the defendant essentially complains that two convictions were obtained and two sentences were imposed where only one was permitted.[8] But the issue is one of legislative intent rather than constitutional limitation. The Double Jeopardy Clause does not limit legislative authority to define punishment. In the case of related convictions, a legislature can fix the sentence or sentencing range, provided only that it falls within the broad range permitted by the constitutional prohibition on cruel and unusual punishment and the due process requirement of fundamental fairness.[9] Therefore, in evaluating a defendant's multiple punishment claim, the focus is legitimately, inevitably, and almost exclusively on legislative intent.[10] The only question is whether the punishment exceeds that intended by the legislature.[11]

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8. *See* Ball v. United States, 470 U.S. 856, 861 (1985); Missouri v. Hunter, 459 U.S. 359, 366 (1983) ("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."). *See also* Peter Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 MICH. L. REV. 1001, 1048–49 (1979) (stating that double punishment can only be defined with reference to standards set by domestic law). *But see* Heald v. Perrin, 464 A.2d 275 (N.H. 1983) (declining to follow *Hunter* and holding under state constitution that multiple sentencing violated double jeopardy protection even though legislature intended to allow it). The sentences need not be consecutive to raise the issue; the courts have acknowledged that the imposition of the second sentence, even if it is concurrent, may have a negative impact on the defendant. *See* Rutledge v. United States, 517 U.S. 292 (1996) (holding that court could not impose even concurrent sentences for two convictions for the same offense); Ball v. United States, 470 U.S. 856, 864 (1985) (holding that where defendant was convicted and punished for counts representing the same offense, the remedy was to vacate one conviction and sentence).

The Supreme Court rejected the argument that prosecution for conduct already considered in setting the sentence in an earlier case represents multiple punishment in violation of double jeopardy. *See* Monge v. California, 524 U.S. 721, 728 (1998) (holding that the Double Jeopardy Clause does not prohibit retrial on a prior conviction allegation in a non-capital sentencing hearing); Witte v. United States, 515 U.S. 389, 399 (1995) (holding that use of evidence of criminal conduct to enhance a sentence for a separate crime does not represent punishment). This article does not revisit those arguments.

9. *See* Susan R. Klein, *Review Essay: Double Jeopardy's Demise: Double Jeopardy: The History, the Law. By George C. Thomas III*, 88 CAL. L. REV. 1001, 1006 (2000) (arguing that the Eighth Amendment sets outside limit on punishment). The Eighth Amendment protection from cruel and unusual punishment does not severely constrict the legislature's sentencing prerogative. *See* Ewing v. California, 538 U.S. 11 (2003) (rejecting challenge to a sentence of 25 years to life for grand theft under three strikes law); Lockyer v. Andrade, 538 U.S. 63 (2003) (rejecting challenge to consecutive terms of 25 years to life based on theft of videotapes worth approximately $150). In addition, of course, the legislature cannot base punishment on elements of the offense that are not established beyond a reasonable doubt. *See* Apprendi v. New Jersey, 530 U.S. 466 (2000).

10. *See* United States v. Dixon, 509 U.S. 688, 735 (1993) (White, J., concurring in part and dissenting in part) (emphasizing that tests to determine propriety of cumulative punishment focus only on legislative intent); *id.* at 745–46 (Souter, J., concurring in part and dissenting in part) (approach is consistent with the "general rule that government may punish as it pleases"); Gore v. United States, 357 U.S. 386, 392–93 (1958); Todd v. State, 917 P.2d 674, 677 (Alaska 1996) (concluding that role of Double Jeopardy Clause is "limited to protecting a

Treating multiple punishment as a double jeopardy question not only generates unwarranted confusion, but also dilutes double jeopardy protection from successive prosecution. Because of the dominant role of legislative intent in determining appropriate punishment, the protection from multiple punishment should simply not be treated as an aspect of double jeopardy protection, contrary to the suggestions of some commentators.[12] The legislature may fairly prescribe a higher sentence for a defendant who commits rape and larceny while committing burglary than for the defendant who commits only one of those offenses. Thus, when the defendant is convicted of all three crimes in a single trial and complains of multiple punishment, the pertinent question is whether the legislature intended the defendant to face a sentence for each of the proven crimes; the defendant suffers no double jeopardy injury if the sentence falls within the range permitted by the legislature.[13] On the other hand, if the prosecution fragments the charges and proceeds against the defendant in three different trials, core double jeopardy principles are implicated and legislative intent should not determine the outcome.[14]

Confusion in double jeopardy jurisprudence results from application of double jeopardy to limit sentences imposed in a single trial, as distinct from the protection the clause legitimately provides against successive

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defendant against receiving more punishment than the legislature intended"); People v. Leske, 957 P.2d 1030, 1035 (Colo. 1998) ("[D]efendant may be subjected to multiple punishments based upon the same criminal conduct as long as such punishments are 'specifically authorized' by the General Assembly."); Boler v. State, 678 So.2d 319, 321–22 (Fla. 1996); MICHAEL S. MOORE, ACT AND CRIME 309 (Clarendon Press 1993) (discussing difference between a double jeopardy question and an Eighth Amendment question); Klein, *supra* note 7, at 1005 (concluding that punishment must be legislatively defined); Note, *The Protection from Multiple Trials*, 11 STAN. L. REV. 735, 736–38 (1959) [hereinafter *The Protection from Multiple Trials*].

11. *See* Ohio v. Johnson, 467 U.S. 493, 499 (1984) (noting that the protection "is designed to ensure that the sentencing discretion of courts is confined to the limits established by the legislature"); Missouri v. Hunter, 459 U.S. 359, 367 (1983) (deferring to legislative intent); *Todd*, 917 P.2d at 677.

12. Westen & Drubel, for example, placed this interest second in their hierarchy of double jeopardy values. Peter Westen & Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81, 84 (1979). *See also* GEORGE C. THOMAS III, DOUBLE JEOPARDY: THE HISTORY, THE LAW 60–70 (N.Y.U. Press 1998) (emphasizing legislative intent and the legislative prerogative to define offenses that can be punished cumulatively as the elements that are key to developing coherent double jeopardy jurisprudence).

13. Professor Klein argues that multiple convictions in the same proceeding may violate a defendant's double jeopardy protection because of the collateral consequences the multiple convictions visit on the defendant. *See* Klein, *supra* note 7, at 1009–10. To the contrary, it may be assumed that the total package of convictions and consequences expresses and implements the legislature's view of the severity of the defendant's criminal conduct, leading to the conclusion that double jeopardy, focusing on legislative intent, does not preclude the sanctions.

14. Poulin, *supra* note 3, at 1208–11.

criminal prosecutions for the same offense. Sentencing limitations fall squarely within the legislature's prerogative, subject only to outside constitutional checks. The Double Jeopardy Clause simply does not have a role to play. Instead, limitations on sentences reside in the Eighth Amendment and the Due Process Clause.[15]

To apply the same rules to both multiple punishment and successive prosecution undermines core double jeopardy protection from successive prosecution. Analysis of multiple punishment focuses on legislative intent and accepts legislative freedom to define multiple punishable offenses arising from a single criminal transaction. That strain of analysis then becomes woven into discussion of successive prosecution claims. Because legislative will and fragmentation of offense are acceptable when the question is punishment, the courts have accepted similar governmental latitude to fragment charges and prosecute defendants in successive proceedings.

In Part I of this article, I explain the problem that the Supreme Court has created by entangling multiple punishment analysis with analysis of double jeopardy protection from successive prosecution, diluting core double jeopardy protection. In Section A of Part I, I discuss the central role of legislative intent in evaluating multiple punishment claims. In Section B, I discuss the separate concerns implicated by double jeopardy protection from successive prosecution. In Section C, I document the tangling of the two threads of analysis. In Section D, I identify and discuss the decisions, often overlooked, in which the Court keeps the strands separate, stating that double jeopardy protection does not extend to multiple punishments imposed in a single proceeding. In Part II, I examine the doctrinal foundation of the axiom that double jeopardy protects against multiple punishment. I discuss in detail the two decisions that serve as the cornerstones for this axiom and then discuss some procedural reasons why multiple punishment concerns became identified with double jeopardy protection from successive prosecution. In Part III, I show how the Supreme Court, as well as the lower federal courts and legal commentators, have intertwined separate strands of jurisprudence, creating a Gordian knot. Finally, in Part IV, I argue that the only solution is for the courts to separate the strands of jurisprudence, recognizing that multiple punishment rarely raises a double jeopardy concern but, instead, generally raises only a question of legislative intent. Cutting the

15. *See generally* Nancy J. King, *Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties*, 144 U. PA. L. REV. 101, 149–95 (1995) (advocating and discussing application of Eighth Amendment and Due Process Clause to control sentencing proportionality).

Gordian knot that binds these strands together will strengthen and clarify double jeopardy protection.

I. THE PROBLEM

Application of double jeopardy analysis to multiple punishment claims arising from a single proceeding has distorted double jeopardy jurisprudence.[16] Courts and commentators disagree over whether the context—multiple punishment or successive prosecution—affects double jeopardy analysis.[17] But a number of courts and commentators have concluded, I believe erroneously, that double jeopardy applies equally to multiple punishment and successive prosecution and that the analysis is the same in both contexts.[18] The resulting jurisprudence both compli-

16. *See, e.g.*, Poulin, *supra* note 3, at 1201–04 (commenting on relationship between the two tests); Comment, *Twice in Jeopardy*, 75 YALE. L.J. 262, 267, 299 et seq. (1965) [hereinafter *Twice in Jeopardy*] (noting that the tests for multiple punishment and successive prosecution have been treated as identical but arguing that the two situations are different and call for different rules); *The Protection from Multiple Trials*, *supra* note 8 (arguing that courts should distinguish between repeated prosecution and double punishment).

17. A fundamental point of disagreement is whether the Double Jeopardy Clause protects against successive prosecution itself with the attendant harm to the defendant, or whether the only concern is the additional sentence. *Compare* United States v. Dixon, 509 U.S. 688, 696 (1993) (stating that double jeopardy protection "applies both to successive punishments and to successive prosecutions for the same criminal offense"); Hudson v. United States, 522 U.S. 93, 106 (1997) (Scalia, J., concurring) (stating that "the Double Jeopardy Clause prohibits successive prosecution, not successive punishment"); Grady v. Corbin, 495 U.S. 508, 518–19 (1990) (stating the concerns raised by successive prosecutions go beyond merely the enhanced sentence), *with Dixon*, 509 U.S. at 734–35 (White, J., concurring in part and dissenting in part) ("[T]he central purpose of the Double Jeopardy Clause is to protect against vexatious multiple prosecution."). *See* JAY A. SIGLER, DOUBLE JEOPARDY: THE DEVELOPMENT OF A LEGAL AND SOCIAL POLICY 97–98 (Cornell University Press 1969) (noting the need to distinguish between multiple trials and multiple punishments); Westen, *supra* note 6, at 1003 (arguing that the meaning of double jeopardy protection varies with context); *The Protection from Multiple Trials*, *supra* note 8, at 736–38. *See also* Westen & Drubel, *supra* note 10, at 84 n.154. In their discussion of multiple punishment, Professor Westen and his co-author, Mr. Drubel, fail to distinguish between single and successive proceedings. They discuss the difficulty of defining the same offense focusing almost exclusively on multiple punishment problems. Not surprisingly, since they fail to consider the strong constitutional stance against successive prosecution, they conclude that only legislative intent (presumed or proven) matters. *Id.* Actually, as discussed below, legislative intent should only affect the propriety of punishment, whereas fragmentation of the charges into successive trials should be precluded by the Double Jeopardy Clause. *See infra* Part II.A.

18. *See, e.g., Dixon*, 509 U.S. at 704–05 (asserting that double jeopardy protection applies to both successive proceedings and successive punishment and that the protection must be the same in both contexts); State v. Kurzawa, 509 N.W.2d 712, 721–22 (Wis. 1994) ("Of course we recognize that the double jeopardy clause's prohibition against 'successive prosecutions' protects different interests than does its prohibition against 'multiple punishments.' Still, we do not believe that these different interests necessarily require or even recommend separate analyses."); THOMAS, *supra* note 10, at 58–60 (rejecting the argument that there

cates double jeopardy analysis and compromises double jeopardy protection.[19]

The issues raised by these two situations are different, but the Supreme Court generally treats them as raising identical concerns that turn on the same question—whether the separate charges are the same offense for double jeopardy purposes.[20]

When a defendant is subject to successive proceedings, courts implement double jeopardy protection by determining whether the successive trials were for the same offense and, if so, whether they were permitted under some exception to the double jeopardy bar.[21] The threshold question is whether the charged offenses are the same offense for purposes of double jeopardy.[22] If the offenses are not the same, double jeopardy does not apply; if they are the same, then the court must determine whether double jeopardy restricts the government action. The narrower the definition of "same offense," the greater the governmental freedom to fragment prosecutions into multiple successive proceedings.

When a defendant complains only of multiple punishment, based on sentences imposed in a single proceeding for multiple charges, the analysis inexorably leads to a narrow definition of "same offense" that is deferential to legislative intent. When the prosecution brings its charges in a single proceeding and the defendant argues that the resulting sentences

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should be greater protection against successive prosecution); Eli J. Richardson, *Eliminating Double-Talk from the Law of Double Jeopardy*, 22 FLA. ST. U. L. REV. 119, 147–48 (1994) (arguing that the definition of same offense must be constant).

19. *See Twice in Jeopardy*, *supra* note 14, at 275 n.59 (discussing this confusion); Susan R. Klein & Katherine P. Chiarello, *Successive Prosecutions and Compound Criminal Statutes: A Functional Test*, 77 TEX. L. REV. 333, 386–87 (1998) (discussing confusion and citing areas of constitutional jurisprudence in which Court applies different tests to similar questions). *See also* Witte v. United States, 515 U.S. 389, 407 (1995) (Scalia, J., concurring) (remarking that recognition of double jeopardy protection against multiple punishment required the Court "either to upset well-established penal practices, or else to perceive lines that do not really exist").

20. *See* Poulin, *supra* note 3, at 1213; *The Protection from Multiple Trials*, *supra* note 8, at 743–46.

21. *See, e.g.*, *Dixon*, 509 U.S. at 704–05 (determining the propriety of successive prosecution by identifying and applying the definition of same offense); Grady v. Corbin, 495 U.S. 508 (1990) (same). *See generally* LAFAVE ET AL, *supra* note 2, §§ 25.1(f)–(g); Poulin, *supra* note 3.

22. *See, e.g.*, Lissa Griffin, *Two Sides of a "Sargasso Sea": Successive Prosecution for the "Same Offence" in the United States and the United Kingdom*, 37 U. RICH. L. REV. 471, 472–74 (2003) (discussing centrality of definition of same offense); Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 YALE L.J. 1807, 1813–16 (1997) (advocating narrow definition of sameness); Anne Bowen Poulin, *Double Jeopardy:* Grady *and* Dowling *Stir the Muddy Waters*, 43 RUTGERS L. REV. 889, 900–01 (1991) (assuming that successive prosecution of same offense was barred unless the case fell within one of four exceptions: uncompleted offense, collusion, defendant's responsibility, and jurisdictional exception). *See generally* Klein & Chiarello, *supra* note 17, at 383 (noting the "all-or-nothing" approach adopted by courts and commentators).

represent multiple punishment, the guide to appropriate punishment is legislative intent. To determine the presumptive legislative intent, the court asks whether the two charges are the same offense. But even if the offenses appear to be the same, the defendant's protection from double jeopardy is not violated if the court imposes a sentence within that intended by the legislature.[23] If the sentence is within the range authorized by the legislature, the defendant has no constitutional complaint unless the sentence violates Eighth Amendment protection from cruel and unusual punishment, or either the sentence or procedure in some way violates due process.[24] As I explore more fully in Section A below, in multiple punishment cases, the "same offense" inquiry always turns on legislative intent. No matter how closely related the charges are, the defendant's double jeopardy rights are not violated if the legislature intended that the punishments be cumulative.

The Supreme Court has held that whether offenses are the same for double jeopardy purposes is to be determined by applying the same test, regardless of whether the question is one of successive prosecution or multiple punishment.[25] The Court has also held that the governing test is the same elements test established in *Blockburger v. United States*.[26] In *Blockburger*, the Court stated 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."[27] This test has long been employed both to assess the propriety of successive prosecutions and to address multiple punishment issues by determining presumptive legislative intent,[28] and is now the exclusive test for defining "same offense."[29]

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23. *See* Albrecht v. United States, 273 U.S. 1, 11 (1927) (recognizing congressional power to punish separate steps in a criminal transaction).

24. *See* Westen, *supra* note 6, at 1025. Professor Westen remarks on the risk that the principle of double punishment is:

> [B]oth superfluous and innocuous: superfluous, because it adds nothing to the protection already provided by the cruel and unusual punishment clause of the eighth amendment and the due process clauses of the fifth and fourteenth amendments; innocuous, because the limitations it prescribes are too lax and too general ever realistically to come into play.

Id.

25. *See* United States v. Dixon, 509 U.S. 688, 696 (1993) (holding that *Blockburger* is the exclusive test); Blockburger v. United States, 284 U.S. 299, 304 (1932) (defining test); *see also* Poulin, *supra* note 3, at 1213.

26. 284 U.S. at 304.

27. *Id.*

28. *See, e.g.*, Gore v. United States, 357 U.S. 386, 390–92 (1958) (applying same elements test to permit multiple sentences); Gavieres v. United States, 220 U.S. 338, 343 (1911) (allowing successive prosecution under same elements test); Burton v. United States, 202 U.S.

The *Blockburger* test is not a protective test. It has sometimes been described as simply a guide to statutory interpretation,[30] and, in multiple punishment cases, it gives way to a clear expression of contrary legislative intent.[31] Indeed, the *Blockburger* case itself concerned only the question of whether Congress intended to allow the multiple punishment of which the defendant complained and did not address double jeopardy at all. In *Blockburger*, the defendant challenged the sentences imposed for multiple convictions in a single trial—a multiple punishment claim. The Court applied the same elements test to determine the legislature's intent. Although the charges on which the defendant had been convicted arose from a single criminal transaction and were closely related, the Court noted that each contained an element the others did not, and therefore concluded that Congress intended that the offenses be punished separately.

Thus, the *Blockburger* test, developed for multiple punishment cases, allows the government substantial latitude. The government can generally argue successfully that charges are not the same because they have distinctive elements.[32] When used to determine whether offenses are the same for purposes of successive prosecution, the test allows the government to bring a series of related charges in successive trials.

Hence the problem. Reliance on the narrow *Blockburger* test severely circumscribes double jeopardy protection.[33] Because courts assume that double jeopardy applies to multiple punishment claims and apply identical double jeopardy analyses to both multiple punishment and successive prosecution claims, the inevitable limitation on protection from multiple punishment generates a similar limitation on protection

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344, 380–81 (1906) (concluding that successive prosecution was allowed because, looking only at fact of indictments, same evidence would not have sustained both convictions); Morey v. Commonwealth, 108 Mass. 433, 435 (1871) (comparing elements of offenses and concluding successive prosecution permitted).

29. *Dixon*, 509 U.S. at 703–04 (holding that the *Blockburger* is the exclusive test).

30. *See, e.g.*, Garrett v. United States, 471 U.S. 773, 778–79 (1985) (discussing *Blockburger*); Albernaz v. United States, 450 U.S. 333, 340 (1981) (describing test as rule of statutory construction); Whalen v. United States, 445 U.S. 684, 691 (1980) (referring to *Blockburger* as establishing a rule of statutory construction). In *Grady v. Corbin*, 495 U.S. 508, 516–17 (1990), the Court laid out the disagreement about whether *Blockburger* is merely a rule of statutory construction to assist courts in determining legislative intent or whether it is the exclusive definition of same offense. When *Grady* was overruled in *Dixon*, the Court adopted the latter view. *See Dixon*, 509 U.S. at 703–05.

31. *See, e.g.*, *Garrett*, 471 U.S. at 779 (stating that *Blockburger* is not controlling when the legislative intent is clear from the face of the statute or the legislative history).

32. Poulin, *supra* note 3, at 1213–18 (discussing lack of protection provided by *Blockburger*).

33. *See id.* at 1212–40 (criticizing reliance on *Blockburger* and advocating broader definition of same offense in protection against successive prosecution).

from successive prosecution. That is, because the legislature is largely free to define which crimes will be multiply punished, this approach to double jeopardy also cedes legislative control over successive prosecutions, allowing the legislature to authorize fragmentation of charges into successive prosecutions. The net result is to dilute double jeopardy protection from successive prosecution while providing no meaningful protection from multiple punishment.

A. The Role of Legislative Intent in Assessing Multiple Punishment Claims

The legislature has primary responsibility for defining crimes and setting sentencing parameters.[34] Therefore, when a defendant complains of multiple punishment, the court must turn to legislative intent to determine whether the defendant's punishment is within the intended range.[35] The Double Jeopardy Clause has virtually never been used to foreclose a legislative choice to punish related crimes cumulatively.[36] Instead, the Court has repeatedly found that legislative intent governs whether crimes are multiply punished and, in so doing, has upheld multiple punishments as legislatively intended.

In *Missouri v. Hunter*,[37] the Supreme Court directly confronted the question of double jeopardy's application to multiple punishment and established that legislative intent controls. In *Hunter*, the defendant had been convicted in a single trial in Missouri state court of both first degree

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34. *See* Ohio v. Johnson, 467 U.S. 493, 499 (1984) (finding that "substantive power to prescribe crimes and determine punishments is vested with the legislature"); Sanabria v. United States, 437 U.S. 54, 69 (1978) (noting that the double jeopardy imposes few, if any limitations on the legislature's power to define offenses); Gore v. United States, 357 U.S. 386, 393 (1958) (noting that questions of punishment are "peculiarly questions of legislative policy"); United States v. Wiltberger, 18 U.S. 76, 95 (1820) ("It is the legislature, not the Court, which is to define a crime, and ordain its punishment."). In *Brown v. Ohio*, 432 U.S. 161, 165 (1977), the Court noted that the Double Jeopardy Clause is primarily a restraint on courts and prosecutors, stating:

> 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.

Id. at 165.

35. *The Protection from Multiple Trials*, *supra* note 8, at 736–38.

36. *See* THOMAS, *supra* note 10, at 11–12 (noting that the Supreme Court has never applied double jeopardy protection to foreclose legislative choice); Dep't of Revenue v. Kurth Ranch, 511 U.S. 767, 800 (1994) (Scalia, J., dissenting) (noting that *United States v. Halper*, 490 U.S. 435 (1989), was the first case in which the Court held legislatively-authorized penalty violated protection against multiple punishments).

37. 459 U.S. 359 (1983).

robbery and armed criminal action.[38] The offenses were clearly the same under the *Blockburger* test, and the defendant argued that the Double Jeopardy Clause precluded the state court from sentencing him for two crimes that were the same offense.[39] But the Missouri legislature had expressed its intent that punishment for the two offenses be cumulative.[40] Thus, the case squarely raised the question whether double jeopardy provides protection from multiple punishment distinct from the obligation to comply with legislative intent. The state court had held that the imposition of both sentences violated the defendant's protection against double jeopardy; punishing him twice for the same offense violated his rights even though it conformed to the legislature's intent.[41] The Supreme Court rejected the state court's position as a misreading of its double jeopardy cases. Instead, the Court held that the punishment was properly imposed in light of the legislative intent and ascribed a limited role to the Double Jeopardy Clause as a shield against multiple punishment: "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."[42]

Thus, confronted with a pure multiple punishment issue, the Court held that double jeopardy protection was governed entirely by legislative intent and emphasized that, at least in this context, the *Blockburger* test of "same offense" was merely a guide to presumptive legislative intent.[43]

Similarly, in *Garrett v. United States*,[44] the defendant challenged successive prosecutions and punishments imposed for violations of different federal statutes arising from a single criminal course of conduct. The Court acknowledged that the offenses were the same under the *Blockburger* test, but concluded that Congress had expressed clear intent

38. *Id.* at 362.

39. *Id.* at 363.

40. *Id.* at 362–64.

41. *Id.* at 363–64.

42. *Id.* at 366. *See also* Grady v. Corbin, 495 U.S. 508, 516–17 (1990) (explaining that the *Blockburger* test was developed "in the context of multiple punishments imposed in a single prosecution" and that the only role of the Double Jeopardy Clause in that context is to limit the sentence to that intended by the legislature); Brown v. Ohio, 432 U.S. 161, 165 (1977) (noting that double jeopardy protection plays a limited role of confining the court to a sentence intended by the legislature when consecutive sentences are imposed in a single trial).

43. *Hunter*, 459 U.S. at 368–69. The dissenting justices argued that the Double Jeopardy Clause precludes multiple punishment for the same offense. In support of that argument, they cited *North Carolina v. Pearce*, 395 U.S. 711 (1969), *United States v. Benz*, 282 U.S. 304 (1931), and *Ex Parte Lange*, 85 U.S. (18 Wall.) 163 (1873), none of which support the application of double jeopardy to a case like *Hunter*. *Id.*at 369.

44. 471 U.S. 773 (1985).

that the offenses be separately punished.[45] As a result, the Court had to address the defendant's double jeopardy argument.[46] The Court ultimately upheld the successive prosecutions on the basis that the later charge was not a completed offense at the time of the first prosecution.[47] The Court then addressed the question of multiple punishment and held that the congressional intent to punish the crimes separately settled the question.[48]

The result in *Hunter* and *Garrett* is hardly surprising. Focusing double jeopardy analysis on multiple punishment concerns leads inexorably to deference to legislative intent. The appropriate punishment for criminal conduct is whatever the legislature determines.[49] Any interpretation of double jeopardy protection that did not give determinative weight to legislative intent would necessarily and improperly act as a substantive limitation on the power of the legislature to define crime and punishment.[50]

B. Protection from Successive Prosecution

The specific harm to defendants resulting from successive proceedings, not legislative intent, is the appropriate focus when assessing the propriety of successive prosecutions.[51] The courts should enforce double

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45. *Id.* at 784.

46. *Id.* at 786.

47. *Id.* at 791–92. *See also Protection from Successive Prosecution*, *supra* note 3, at 1259–64 (discussing uncompleted offense exception).

48. *Garrett*, 471 U.S. at 793–94.

49. *See* THOMAS, *supra* note 10, at 59 (arguing for legislative deference approach based on assumption that legislature can authorize multiple penalties); King, *supra* note 13, at 149 (concluding that same offense means only what the legislature says and recognizing the need "to protect defendants from legislative choices regarding punishment," but locating that protection in the Eighth Amendment and the Due Process Clause); Westen, *supra* note 6, at 1025–30 (concluding that protection from multiple punishment is simply a question of legislative intent); SIGLER, *supra* note 15, at 97–101 (advocating deference to legislative intent).

50. THOMAS, *supra* note 10, at 59; *Protection from Successive Prosecution*, *supra* note 3, at 1204–05 (discussing legislative prerogative to set punishment).

51. *See* Abney v. United States, 431 U.S. 651, 660–61 (1977) (concluding that defendant could bring interlocutory appeal of denial of double jeopardy claim because otherwise his right under the Double Jeopardy Clause not to be put to a second trial would be undermined); United States v. Ball, 163 U.S. 662, 669 (1896) ("The prohibition is not against being twice punished, but against being twice put in jeopardy . . . ."); Hughes v. State, 66 S.W.3d 645, 650 (Ark. 2002) (emphasizing that central principle of double jeopardy is protection from multiple proceedings). *See also* Klein, *supra* note 7, at 1006 ("A sensible interpretation [of the Double Jeopardy Clause] is that a defendant cannot be put at risk of a second criminal trial or conviction for the same offense . . . ."); Poulin, *supra* note 20, at 909–11 (discussing interest in freedom from successive prosecution); Richardson, *supra* note 16, at 128–29, 150 (discussing ways in which successive prosecution inflicts greater harm on defendant than multiple punishment); Westen & Drubel, *supra* note 10, at 161–62 (recognizing the defendant's interest in

jeopardy protection against this harm by limiting the authority of all three branches of government—legislative, judicial, and executive—to fragment charges.

The Supreme Court has frequently recognized that double jeopardy protects the defendant from the harms inflicted by successive prosecution.[52] In *Green v. United States*, Justice Black penned perhaps the

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finality and freedom from successive prosecution); *Twice in Jeopardy*, *supra* note 14, at 265–67 & 277 n.69 (discussing reasons for and scope of double jeopardy protection). In *United States v. Dixon*, Justice Souter expressed this concern, suggesting that under the narrow application of *Blockburger*:

> [T]he government could . . . bring a person to trial again and again for that same conduct, violating the principle of finality, subjecting him repeatedly to all the burdens of trial, rehearsing its prosecutions, and increasing the risk of erroneous conviction, all in contravention of the principles behind the protection from successive prosecution . . . .

509 U.S. 688, 760–61 (1993). Professor Klein also speaks to the burden of successive trials as follows:

> Defending a second or third trial will always be more burdensome. To suggest otherwise discounts the drain on resources and its effect on the willingness and ability of counsel to defend, to say nothing of the drain on the defendant's nerves and on his willingness and ability to undergo yet another trial.

Klein, *supra* note 7, at 1029.

52. *See, e.g.*, United States v. Scott, 437 U.S. 82, 94–96 (1978) (discussing protection from repeated attempts to convict); Crist v. Brest, 437 U.S. 28, 33–35 (1978) (noting that the origins of double jeopardy protection lie in rules designed to protect the finality of judgments, but emphasizing that the expanded reach of double jeopardy protection reflects concern with forcing the defendant through repeated criminal proceedings); Arizona v. Washington, 434 U.S. 497, 503–04 (1978) (listing reasons why a second prosecution may be unfairly burdensome); Abney v. United States, 431 U.S. 651, 660–61 (1977) (recognizing that defendant has a right under the Double Jeopardy Clause not to be put to a second trial); United States v. Martin Linen Supply Co., 430 U.S. 564, 569 (1977) (elaborating on the statement that Double Jeopardy Clause is "directed at threat of multiple prosecutions"); Downum v. United States, 372 U.S. 734, 735 (1963) (recognizing the defendant's double jeopardy interest in freedom from successive prosecution); Kepner v. United States, 195 U.S. 100, 130 (1904) ("The protection is not, as the court below held, against the peril of second punishment, but against being again tried for the same offense.").

See also Grady v. Corbin, 495 U.S. 508, 518–19 (1990) (discussing harms of successive prosecution); Dep't of Revenue v. Kurth Ranch, 511 U.S. 767, 798 (1994) (Scalia, J., dissenting) ("'To be put in jeopardy' does not remotely mean 'to be punished,' so by its terms this provision prohibits not multiple punishments, but only multiple prosecutions."); Ursery v. United States, 518 U.S. 267, 297 (1996) (Scalia, J., dissenting) (making same assertion); Harris v. Oklahoma, 433 U.S. 682 (1977) (*per curiam* opinion holding that double jeopardy protection precluded trial of robbery after felony-murder trial based on the robbery and not mentioning punishment concern). *See also The Protection from Multiple Trials*, *supra* note 8, at 740–41; SIGLER, *supra* note 15, at 75 (noting that the "dominant policy issue in double jeopardy" is the question of successive prosecution); Poulin, *supra* note 3, at 1201–08; Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 YALE L.J. 1807, 1822–23 (1997) (discussing interest in freedom from successive prosecution); Klein, *supra* note 7, at 1006, 1027–28 (arguing that protection from harassment is "the only sensible value"); Westen & Drubel, *supra* note 10, at 90 (recognizing defendant's interest in concluding the confrontation with society).

most-quoted explanation of the Double Jeopardy Clause's protection from successive prosecution:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State, with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[53]

Thus, independent of any sentence imposed, the second trial represents a discrete burden on the defendant and an opportunity for the prosecution to improve its position in relation either to conviction or to sentencing.[54]

C. *Tangling Double Jeopardy Analysis of Successive Prosecution and Multiple Punishment*

Problems arise in double jeopardy jurisprudence when deference to legislative intent, an inevitable aspect of multiple punishment analysis, threads into double jeopardy analysis of the propriety of successive protections. When courts and commentators treat multiple punishment as a double jeopardy question and, further, conclude that the definition of "same offense" must be identical for both successive prosecution and multiple punishment cases,[55] they devalue the role of the Double Jeop-

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53. 355 U.S. 184, 187–88 (1957). *See also* Arizona v. Washington, 434 U.S. 497, 503–04 (1978) (noting that a second prosecution may be "grossly unfair" because "[i]t increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing and may even enhance the risk that an innocent defendant may be convicted."); State v. Brown, 497 P.2d 1191, 1195–96 (Or. 1972) (criticizing *Blockburger* because it permits a prosecutor to bring successive prosecutions, and, as a result "a defendant is deprived of the assurance that an acquittal is the end of the matter or that a conviction and sentence is the final measure of his guilt and punishment," and "repeated prosecutions strain the resources of defendants and dissipate those of the courts and prosecutors and deprive judgments of their finality").

54. *See* Poulin, *supra* note 3, at 1190–95; Donald Eric Burton, Note, *A Closer Look at the Supreme Court and the Double Jeopardy Clause*, 49 OHIO ST. L.J. 799, 803–04 (1988) (discussing double jeopardy interest in freedom from successive prosecution); *Twice in Jeopardy*, *supra* note 14, at 266–67 (discussing harm inflicted by successive prosecution); *see also* Hudson v. United States, 522 U.S. 93, 99 (1997) ("The Clause protects only against the imposition of multiple *criminal* punishments for the same offense . . . [a]nd then only when such occurs in successive proceedings . . . .").

55. *See* THOMAS, *supra* note 10, at 7–45 (arguing that double jeopardy analysis for both situations should be based on the Court's approach to multiple punishment); *Twice in Jeopardy*, *supra* note 14, at 267, 299, 299 et seq. (noting that the tests for the two situations had

ardy Clause as it applies to the fragmentation of prosecutions and the protection from successive prosecution.

Because legislative intent controls in the multiple punishment context, some courts and commentators conclude that legislative intent also controls the limitations on successive prosecution. That is, they conclude that the legislature can decide to subject defendants to successive prosecutions for closely related offenses and avoid double jeopardy restrictions simply by expressing the intent to define the offenses as different.[56] This assertion, however, negates the role of the Double Jeopardy Clause, rendering it subservient to legislative intent.

Professor King, for example, argues that legislatures should be free to permit fragmentation of prosecutions as an aspect of their prerogative to define offenses. She states:

> [A]n interpretation of the Double Jeopardy Clause that allows a legislature to choose to cumulate offenses permits legislatures, not courts, to allocate finality depending upon legislators' conclusions concerning how much finality is deserved by a person who performs certain culpable acts.
>
> It does not seem intuitively wrong to allow legislatures, through their punitive choices, to set at least part of the finality "price" that must be paid for a given course of culpable conduct. There is no particular reason why the Double Jeopardy Clause must favor judicial rather than legislative choices about finality, at least when it comes to defining what constitutes an offense.[57]

Sadly, this approach leaves no meaningful role for double jeopardy protection. If the legislature is free to define fragmented offenses, the defendant loses what may be viewed as the central protection of the Double Jeopardy Clause.[58]

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been treated as identical but arguing that the two situations are different and calling for different rules).

56. *See, e.g.*, THOMAS, *supra* note 10, at 14 (starting from the premise that legislative intent defines the number of offenses committed by a particular defendant, concluding that the Double Jeopardy Clause therefore does not restrict legislative choices about charges and punishment in a single trial, and, finally, as a logical corollary, asserting that double jeopardy simply does not restrict the legislature).

57. King, *supra* note 13, at 135. As used here, "finality" denotes the protection from further prosecution.

58. *See* Poulin, *supra* note 3, at 1234–40 (discussing need for greater double jeopardy protection). Not all agree. Professor King takes the position that legislatures are free only to define the same offense, and not to define when jeopardy attaches or when civil penalties raise double jeopardy concerns. King, *supra* note 15, at 127 n.79. But the protection from successive prosecution is far more significant than either of those questions. *See infra* text accompanying notes 62–65 (discussing *Crist v. Brest*, 437 U.S. 28 (1978)).

The suggestion that double jeopardy protection from successive prosecution falls to intentional legislative action in all circumstances[59] does not withstand scrutiny. The legislature cannot override constitutional protection of other rights such as the right to confrontation[60] and the right to assistance of counsel.[61] There is no sound argument for treating double jeopardy protection as subject to legislative override in a way that other constitutional protections are not.

Moreover, the legislative deference approach to the definition of "same offense" is out of step with the Court's limitation of state prerogative in other areas of double jeopardy jurisprudence.[62] In *Crist v. Brest*,[63] for example, the Montana Supreme Court held that jeopardy did not attach in a jury trial until the first witness was sworn, thereby denying double jeopardy-based relief to the defendant, in whose first trial the jury had been dismissed after being empaneled and sworn, but before the first witness was sworn. The Supreme Court held that the Constitution fixes the point at which jeopardy attaches in a jury trial at the moment when the jury is empaneled and sworn. The Court rejected the argument that Montana could fix the point of attachment at the swearing of the first witness in a jury trial.[64] The Court concluded that the point of attachment was an integral aspect of the constitutional protection, necessary to protect the defendant's interest in the chosen jury.[65] Similarly, in *Smalis v. Pennsylvania*,[66] the Court rejected the state court's characterization of

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59. THOMAS, *supra* note 10, at 14–15 (advocating a legislative deference approach to double jeopardy). Justice Frankfurter also advocated a strongly deferential reading of the Double Jeopardy Clause:

> The short of it is that where two such proceedings merely carry out the remedies which Congress has prescribed in advance for a wrong, they do not twice put a man in jeopardy for the same offense. Congress thereby merely allows the comprehensive penalties which it has imposed to be enforced in separate suits instead of in a single proceeding. By doing this, Congress does not impose more than a single punishment. And the double jeopardy clause does not prevent Congress from prescribing such a procedure for the vindication of punitive remedies.

United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 555 (1943) (Frankfurter, J., concurring).

60. Crawford v. Washington, 541 U.S. 36 (2004) (recognizing that confrontation protection does not track and cannot be overcome by legislative determinations concerning admissibility of hearsay).

61. Argersinger v. Hamlin, 407 U.S. 25 (1972) (rejecting Florida's determination of when right to counsel attached); Gideon v. Wainwright, 372 U.S. 335 (1963) (requiring states to provide counsel to indigent defendants in all felony cases).

62. *See* King, *supra* note 13, at 101 (noting that the deferential approach defers to the legislature only on the definition of same offense).

63. 437 U.S. 28, 38 (1978).

64. *Id.* at 37.

65. *Id.* at 37–38 ("We agree with the Court of Appeals that the time when jeopardy attaches in a jury trial serves as the 'lynchpin for all double jeopardy jurisprudence.'").

66. 476 U.S. 140 (1986).

a demurrer under state law as a defense request for dismissal on grounds unrelated to guilt or innocence, holding that it was, in fact, a request for an acquittal on grounds of insufficient evidence. In these settings, the Court has read the Double Jeopardy Clause as defining specific inviolate protections. It makes little sense to assert that the moment at which jeopardy attaches, or what constitutes an acquittal, has constitutional meaning, yet the definition of "same offense" does not.

In sum, double jeopardy jurisprudence suffers when courts conclude that the Double Jeopardy Clause provides protection from multiple punishment and, further, that double jeopardy analysis is the same for both multiple punishment and successive prosecution questions. This approach removes focus from the discrete burdens of successive prosecution.[67] It undermines efforts to imbue the definition of "same offense" with constitutional significance independent of legislative intent and to provide greater protection from successive prosecution. When the focus is on protection from multiple punishment, efforts to enforce double jeopardy protection result in unreasonable encroachments on accepted legislative authority to prescribe sentences.[68] If the courts recognize, as they should, that double jeopardy does not protect against multiple punishment, they will no longer face apparent clashes between legislative intent and double jeopardy. Multiple punishment issues will be determined solely with reference to legislative intent, and successive prosecution claims will be governed by double jeopardy. With this narrower focus, the courts will be better able to define the parameters of double jeopardy protection from successive prosecution.

D. Overlooked Precedent

These strands of analysis have become entangled even though there is Supreme Court precedent that keeps the strands separate. A number of decisions signal that double jeopardy protection does not extend to multiple punishments imposed in a single proceeding.[69]

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67. Professor Thomas, for example, dismisses harassment as a double jeopardy concern and concludes instead that legislative intent is the sole standard for both multiple punishment and successive prosecution. THOMAS, *supra* note 10, at 64–65.

68. *See* THOMAS, *supra* note 10, at 12 (rejecting possible model of double jeopardy protection as an inappropriate substantive limitation on the power of the legislature to permit more than one conviction for the same offense in a single proceeding); King, *supra* note 13, at 116 (dismissing what she terms the "antimajoritarian" view as threatening to defeat "deliberate legislative efforts to create two separate crimes or two separate penalties for the same conduct"); Westen, *supra* note 6, at 1024–25 (noting lack of constitutional standards for defining crimes and setting sentences).

69. *See, e.g.*, Price v. Georgia, 398 U.S. 323, 326 (1970) (emphasizing that double jeopardy protects not against multiple punishment but against multiple proceedings in which the

In *Ball v. United States*,[70] for example, holding that double jeopardy protects against reprosecution after acquittal, the Court emphasized that the focus of the Double Jeopardy Clause is on successive prosecution rather than punishment: "The prohibition is not against being twice punished, but against being twice put in jeopardy; and the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial."

In *Holiday v. Johnston*,[71] the Court confronted a clear double jeopardy claim based on multiple punishment. The defendant had been charged in separate counts with bank robbery and with jeopardizing the lives of bank officials in the course of the robbery.[72] Pleading guilty to both, the defendant received consecutive sentences.[73] Before the Supreme Court, the government admitted that the crimes were not different offenses.[74] Nevertheless, the Court denied the petitioner's double jeopardy claim. The Court stated 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."[75] Similarly, in *Hudson v. United States*,[76] the Court, holding that a non-criminal administrative proceeding did not bar criminal prosecu-

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defendant is at risk of conviction); Downum v. United States, 372 U.S. 734, 736 (1963) (citing Ball v. United States, 163 U.S. 662 (1896) and noting that "the prohibition of the Double Jeopardy Clause is not against being twice punished, but against being twice put in jeopardy"); Stroud v. United States, 251 U.S. 15, 18 (1919) ("The protection afforded by the Constitution is against a second trial for the same offense."). *See also* Kepner v. United States, 195 U.S. 100 (1904). In *Kepner*, the Court made it clear that double jeopardy protection operated even in the absence of punishment, stating that "a person has been in jeopardy when he is regularly charged with a crime before a tribunal properly organized and competent to try him, certainly so after an acquittal" and describing the protection as "being against a second trial for the same offense." *Id.* at 128. The Court went on to say: "The protection is not, as the court below held, against the peril of second punishment, but against being again tried for the same offense." *Id.* at 130. The Court held that, as a result, the government could not appeal from an acquittal, and no statute could effectively authorize such an appeal. *Id.* The Court cited Bishop on Criminal Law and several state court decisions to support its conclusion. *Id.* at 131. In *Price*, 398 U.S. 323, the state argued that the double jeopardy violation was harmless because the defendant had received no greater punishment as a result of his second jeopardy. The Court emphatically disagreed: "We must reject this contention. The Double Jeopardy Clause, as we have noted, is cast in terms of the risk or hazard of trial and conviction, not of the ultimate legal consequences of the verdict." *Id.* at 331.

Interestingly, in *Kansas v. Hendricks*, 521 U.S. 346, 370 (1997), the Court seemed to get the law precisely backwards, stating in dictum: "The *Blockburger* test . . . simply does not apply outside of the successive prosecution context."

70. 163 U.S. at 669.
71. 313 U.S. 342 (1941).
72. *Id.* at 347.
73. *Id.*
74. *Id.* at 349.
75. *Id.* at 350.
76. 522 U.S. 93 (1997).

tion of the defendant, stated that the Double Jeopardy Clause "protects only against the imposition of multiple *criminal* punishments for the same offense and then only when such occurs in successive proceedings."[77]

Despite their apparently clear statements, these decisions have had little impact. Courts addressing multiple punishment arguments based on the Double Jeopardy Clause simply invoke the axiom that double jeopardy protects against multiple punishment, often citing inappropriate sources, bypassing these contrary statements of the Court. As a result, the knot remains tied.

II. THE FOUNDATION OF THE AXIOM

The axiom that double jeopardy protects against multiple punishment rests on a shaky foundation. That foundation is primarily composed of two cases—*Ex parte Lange*[78] and *North Carolina v. Pearce*[79]—and dicta in a number of other cases. In Section A, I demonstrate that *Lange* and *Pearce* lend only weak support to the broad axiom. In Section B, I explore three procedural reasons why courts historically mentioned multiple punishment in connection with double jeopardy protection, even in cases concerned with successive prosecution.

A. The Cornerstone Decisions

Two decisions of the Court form the cornerstone of the rule that double jeopardy protection extends to multiple punishment. These decisions—*Ex parte Lange*[80] and *North Carolina v. Pearce*[81]—are discussed in the following sections. A close review reveals that these cases lend, at best, shaky support to the axiom that double jeopardy protects against multiple punishment, although both are cited repeatedly by courts and commentators to support that assertion. Neither decision involved a question of whether two charges were the same offense. In both cases, the challenged punishment was based on the exact same charges, and the actual or prospective punishment exceeded the punishment intended by the legislature.

77. *Id.* at 99 (citations omitted) (citing Missouri v. Hunter, 459 U.S. 359, 366 (1983)).
78. *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873).
79. North Carolina v. Pearce, 395 U.S. 711 (1969).
80. *Ex parte Lange*, 85 U.S. (18 Wall.) at 163.
81. *Pearce*, 395 U.S. 711.

1. *Ex parte Lange*

The decision most pervasively cited for the proposition that the Double Jeopardy Clause prohibits multiple punishments, even if imposed in a single proceeding, is *Ex parte Lange*.[82] In *Lange*, the defendant was convicted under a statute authorizing imposition of a fine *or* incarceration, but not both.[83] Despite this limitation, the trial court imposed *both* a fine *and* a period of incarceration.[84] The Court discussed the established proposition that "no man can be twice lawfully punished for the same offence" and considered the common law roots of the principle.[85] The Court characterized protection from successive prosecutions as an extension of the protection from multiple punishment:

> The common law not only prohibited a second punishment for the same offence, but it went further and forbid a second trial for the same offence, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted.
>
> Hence to every indictment or information charging a party with a known and defined crime or misdemeanor, whether at the common law or by statute, a plea of *autrefois acquit* or *autrefois convict* is a good defence.[86]

The Court's reasoning in *Lange* was grounded in the concern that defendants receive the intended protection and was expressed in expansive language:

> 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 the 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 the constitutional restriction of

82. *Ex parte Lange*, 85 U.S. (18 Wall.) at 163. *See also* Dep't of Revenue v. Kurth Ranch, 511 U.S. 767, 798–99 (1994) (Scalia, J., dissenting) (noting that the multiple punishments application of the Double Jeopardy Clause can be traced to *Lange* and discussing the case).

83. *Ex parte Lange*, 85 U.S (18 Wall.). at 164.

84. *Id.*

85. *Id.* at 168–69 (discussing common law rules).

86. *Id.* at 169.

> 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.[87]

Thus, some language in *Lange* supports the view that protection from multiple punishment is essential to give meaning to the protection from successive prosecution.[88]

But, as the Court pointed out in *United States v. DiFrancesco*,[89] *Lange* is "not susceptible of general application." The decision did not address the multiple punishment issue that arises most frequently and threatens the coherence of double jeopardy jurisprudence—the imposition of cumulative sentences for related charges tried in a single proceeding. Lange was convicted of only one offense, which carried a potential sentence of either a fine or a period of incarceration, but not both.[90] After he had fully served the sentence by paying the fine, he was subjected to a second sentencing proceeding and sentenced to a period of incarceration.[91] The challenged punishment thus went beyond the penalty intended by the legislature and was inescapably multiple punishment.[92]

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87. *Id.* at 173.

88. In *Lange*, the Court blurred the lines between successive prosecution and multiple punishment. The Court addressed the pleas of *autrefois acquit* and *autrefois convict*, which arise only in a second proceeding. It also cited *State v. Cooper*, 13 N.J.L. 361 (1833), a case involving successive prosecution. *Id.* at 171–73. In *Cooper*, the New Jersey Supreme Court took a strong stand specifically against successive prosecution, stating that without double jeopardy protection "every citizen would become liable, if guilty of an offense, to the unnecessary costs and vexations of repeated prosecutions, and if innocent, not only to those, but to the danger of an erroneous conviction from repeated trials." *Cooper*, 13 N.J.L. at 370–71. The *Cooper* court also stated: "If in civil cases, the law abhors a multiplicity of suits, it is yet more watchful in criminal cases, that the crown shall not oppress the subject, or the government the citizen, by unnecessary prosecutions." *Id.*

89. 449 U.S. 117, 139 (1980).

90. *Ex parte Lange*, 85 U.S. at 164.

91. *Id.*

92. Later cases distinguish *Lange* on various grounds. In *Bozza v. United States*, 330 U.S. 160 (1947), the Court rejected the defendant's argument that the court violated his protection from double jeopardy when it brought him back to court five hours after his initial sentencing to correct the sentence by adding a mandatory fine to the period of incarceration. The Court pointed out that in *Lange*, by paying the fine, the defendant had suffered the full punishment permitted under the statute, whereas Bozza had not yet suffered any lawful punishment. 330 U.S. at 167 n.2. The Court has also concluded that *Lange* does not preclude downward adjustment of a sentence after the defendant has begun to serve it. *See* United States v. Benz, 282 U.S. 304 (1931).

Furthermore, *Lange*'s holding does not rest exclusively on the Double Jeopardy Clause—it may not rest on it at all. In *Lange*, the Court pointedly invoked common law, citing both English and American sources. The Court emphasized that the common law provided protection from multiple punishment independent of any constitutional provision and that it need not rely on the Constitution to grant the defendant relief.[93] Given the Court's assertion that the trial court lacked power to impose the additional sentence,[94] it can also be argued fairly that the Due Process Clause provides adequate support for the decision.[95]

In addition, the precedent cited in *Lange* does not support a broad interpretation of the decision. In *Lange*, the Court cited several older cases. None of these cases dealt with multiple punishment in the absence of successive prosecution. In *Moore v. Illinois*,[96] for example, the Court rejected the argument that the State could not prosecute the defendant for conduct that also violated a federal law. The defendant thus sought protection from both successive prosecution and multiple punishment.[97] Similarly, the state court decisions invoked to support the Court's conclusion all addressed successive prosecution rather than multiple punishment.[98]

The bottom line in *Lange* is that the Court relieved the defendant of a sentence that exceeded that intended by the legislature. Had Congress authorized both a fine and a period of incarceration, Lange would have had no double jeopardy argument.[99]

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93. *Ex parte Lange*, 85 U.S. at 170–71. *See also id.* at 178 (common law, the Constitution and "the dearest principles of personal rights" all forbade the action of the trial court).

94. *Id.* at 176 ("[W]hen the prisoner, as in this case, by reason of a valid judgment, had fully suffered one of the alternative punishments to which alone the law subjected him, the power of the court to punish further was gone."). Much of the discussion in *Lange* and the dissent in particular focused on the power of the trial court to correct its error within the same court session and the jurisdiction of the appellate court over the question. *Id.* at 176–78.

95. Dept. of Revenue v. Kurth Ranch, 511 U.S. 767, 799 (1994) (Scalia, J., dissenting) (arguing that *Lange* rests on due process principles as well as double jeopardy principles).

96. 55 U.S. 13 (1852).

97. *Id.* at 16–17. In *Moore*, the Court accepted the argument that separate sovereigns can successively prosecute and punish a defendant without violating double jeopardy. *Id.* at 19–20.

98. *See* Commonwealth v. Olds, 15 Ky. (5 Litt.) 137 (1824) (rejecting defendant's attempt to invoke a double jeopardy bar to further prosecution after his first trial ended without a verdict); State v. Cooper, 13 N.J.L. 361 (1833) (condemning successive prosecution of the defendant); Crenshaw v. State, 8 Tenn. (Mart. & Yer.) 122 (1827) (considering whether prosecution and punishment on one felony barred prosecution for other felonies committed before the conviction).

99. *See* United States v. DiFrancesco, 449 U.S. 117, 139 (1980) (remarking that: "[n]o double jeopardy problem would have been presented in *Ex parte Lange* if Congress had provided that the offense there was punishable by both fine and imprisonment . . . .").

2. *North Carolina v. Pearce*

North Carolina v. Pearce[100] is also frequently cited, alone or with *Lange*, for the proposition that the Double Jeopardy Clause protects against multiple punishment.[101] In *Pearce*, the Court introduced its discussion of the defendant's double jeopardy argument with the following summary of double jeopardy jurisprudence:

> The Court has held today . . . that the Fifth Amendment guarantee against double jeopardy is enforceable against the States through the Fourteenth Amendment. That guarantee has been said to consist of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.[102]

The claim of protection from multiple punishment in the frequently-quoted passage rested on a citation to *Lange*[103] and went well beyond the facts of the case.

The defendant in *Pearce* faced punishment for a single charge beyond that authorized by the legislature, a factual situation more akin to that in *Lange* than the typical multiple punishment case. In *Pearce*, one of the defendants was convicted, sentenced and had served two and a half years before getting his conviction set aside.[104] He was then retried and again convicted.[105] Not only did the trial court impose a longer sentence, but it failed to grant him credit for time served.[106] The Court held that the Double Jeopardy Clause "requires that credit must be given for punishment already endured," citing *Lange*.[107] The Court pointed out that a defendant who served the full sentence before getting the conviction set aside and did not receive credit for time served could end up serving more than the maximum sentence, a clear instance of multiple punishment for a single offense, and a result that would not accord with legislative intent.[108]

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100. 395 U.S. 711(1969).

101. *See, e.g.*, *DiFranceso*, 449 U.S. at 144 (Brennan, J., dissenting) (citing *Pearce* and *Lange*). *See also* cases cited *supra* note 2.

102. 395 U.S. at 717 (internal footnotes omitted). The Court cited *Twice in Jeopardy, supra* note 14, to support this statement. *Pearce*, 395 U.S. at 717 n.8.

103. *Pearce*, 395 U.S. at 717 n.11.

104. *Id.* at 714.

105. *Id.*

106. *Id.*

107. *Id.* at 717.

108. *Id.* at 718.

Thus, like *Lange*, *Pearce* addressed a specific situation in which a defendant faced more than one punishment, and punishment beyond that authorized by the legislature, for conviction on a single charge. Reflecting this factual posture of the case, the Court emphasized that a court is without power to impose a sentence not authorized by the law.[109] Also like *Lange*, *Pearce* may rest on a ground independent of double jeopardy.

In *Pearce*, the Court cited only two Supreme Court decisions in support of the assertion that double jeopardy protects against multiple punishments: *Lange* and *United States v. Benz*.[110] *Lange* supports the specific relief in *Pearce*, but only weakly supports the broad proposition that double jeopardy protects against multiple punishment. *Benz* provides even less support. *Benz* simply did not involve a case of multiple punishment. In *Benz*, the Court addressed the government claim that the trial court could not *reduce* the defendant's sentence once the defendant had started serving that sentence.[111] In its decision, the Court merely cited *Lange* as standing for the proposition that the Double Jeopardy Clause protected against increasing the sentence once the defendant had started to serve it.[112] *Benz* adds nothing further to the understanding of double jeopardy.[113]

Both *Lange* and *Pearce* involved true multiple punishment. The defendants in these cases each had received a sentence for a single crime that exceeded or threatened to exceed the legislatively defined maximum. Neither case supports the broad proposition that the Double Jeopardy Clause protects against anything other than punishment beyond the statutory maximum.

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109. *Id.* at 720.

110. *Id.* at 717 n.11 (citing *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873), and United States v. Benz, 282 U.S. 304 (1931)).

111. *Benz*, 282 U.S. at 306. *See also* United States v. DiFrancesco, 449 U.S. 117, 138 (1980) (noting that *Benz* only addressed the power to reduce a sentence that defendant had begun to serve and that the dictum asserting that the trial court could not increase a sentence lacked foundation).

112. *Benz*, 282 U.S. at 307 (asserting that *Lange* held that to increase defendant's sentence is to multiply punishment in violation of double jeopardy).

113. The *Pearce* Court also cited several Circuit court decisions that precluded trial courts from increasing a sentence once it had been partly served and thus pertained more directly to the question before the Court in *Pearce* and fell more neatly within the four corners of *Lange*. North Carolina v. Pearce, 395 U.S. 711, 717 n.11 (1969) (citing United States v. Sacco, 367 F.2d 368 (2d Cir. 1966)); United States v. Adams, 362 F.2d 210 (6th Cir. 1966); Kennedy v. United States, 330 F.2d 26 (9th Cir. 1964)). In *Sacco*, the court expressed the import of *Lange* somewhat more accurately than many courts, stating "[i]t is a well settled general rule that increasing a sentence after the defendant has commenced to serve it is a violation of the constitutional guaranty against double jeopardy." *Sacco*, 367 F.2d at 369.

B. Procedural Explanations for the Development of the Axiom

Given this demonstrably weak foundation, why has protection from multiple punishment come to be viewed as a core aspect of double jeopardy protection? Three procedural aspects of the cases raising double jeopardy claims based on successive prosecution have contributed to the confusion. First, defendants complaining of successive prosecution often point to the threat of additional punishment as one of the harms they seek to avoid. Second, procedural rules sometimes force defendants to focus on improper punishment in order to obtain review of their double jeopardy claims. Third, procedurally, multiple punishment issues that implicate double jeopardy concerns should rarely arise, but defendants allege violations of double jeopardy and the courts do not clearly separate the double jeopardy concerns from the question of legislative intent. For these reasons, the courts have fostered the development of the unfounded axiom.

1. The Common Connection between Successive Prosecution and Multiple Punishment

Successive prosecution often goes hand-in-hand with the threat of additional punishment. In fact, double jeopardy analysis focuses solely on the risk of a second jeopardy independent of any concern about a second punishment only when the reprosecution follows an acquittal.[114] Consequently, discussion of successive prosecution often focuses not only on the successive trials, but also on the additional multiple punishment that would be imposed if each trial ended in conviction.

As a result of this inevitable connection between successive prosecution and multiple punishment, references to multiple punishment are sometimes ambiguous. For example, in establishing procedures for criminal cases brought in the Philippines, Congress provided that "no person for the same offence shall be twice put in jeopardy of punishment[ ]. . . ."[115] The use of the word punishment in the statute does not reflect an independent concern with protection from multiple punishment, but merely clarifies what constitutes being in jeopardy.[116]

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114. *See, e.g.*, Green v. United States, 355 U.S. 184, 187–88 (1957) (identifying the risk threatened by reprosecution after acquittal); Kepner v. United States, 195 U.S. 100, 111 (1904).

115. *See Kepner*, 195 U.S. at 117 (quoting Act of July 1,1902, ch. 1369, § 5, 32 Stat. 691, 692 (1902)).

116. *See id.* at 117, 130 (construing statute to apply even when the defendant is not exposed to multiple punishment); *see also* John O. Bigelow, *Former Conviction and Former Acquittal*, 11 RUTG. L. REV. 487 (1957) (noting that the Massachusetts law of 1641 provided

Courts have also blended concern with successive prosecutions and concern with multiple punishment. For instance, in *Wemyss v. Hopkins*,[117] an English case discussed in *Kepner*,[118] the court barred successive prosecutions. Although focusing on protection from successive prosecution, Justice Blackburn wrote of protection from punishment:

> [T]he well-established rule at common law, that where a person has been convicted and punished for an offence by a court of competent jurisdiction . . . the conviction shall be a bar to all further proceedings for the same offence, and he shall not be punished again for the same matter.[119]

In addition, there were short opinions by two other justices. Justice Lush emphasized that "no person shall be prosecuted twice for the same offence," whereas Justice Field wrote that "[a] person cannot be twice punished for the same cause."[120]

Similarly, in *Brown v. Ohio*,[121] the Supreme Court threaded the language of multiple punishment through a decision concerning successive prosecution by different counties within the state. The Court framed the question in the case as whether double jeopardy "bars prosecution and punishment for the crime of stealing an automobile following prosecution and punishment for the lesser included offense."[122] Later in the opinion, the Court noted that "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."[123] Thus, although resolving a double jeopardy claim of improper successive prosecution, the Court necessarily invokes multiple punishment language.

2. The Procedural Posture of the Cases

The procedural mechanism through which many defendants obtained review of their double jeopardy claims also drove courts to focus

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"[n]o man shall be twice sentenced by Civil Justice for one and the same Crime, offence, or trespass."). *But see id.* at 488 (discussing the unsuccessful proposal to strike the protection against more than one trial from the language of the Bill of Rights on the grounds that the protection should be against more than one punishment).

117. 10 L.R.Q.B. 378 (1875).
118. 195 U.S. at 126–27.
119. *Wemyss*, 10 L.R.Q.B. at 381.
120. *Id.* at 382.
121. 432 U.S. 161 (1977)
122. *Id.* at 161
123. *Id.* at 193-94

on multiple punishment when addressing successive prosecution claims. Many of the early cases reached the Supreme Court through habeas corpus petitions, so to get review, the defendant had to challenge the punishment. This was because the writ of habeas corpus offered the party a procedural vehicle only if the party was unlawfully imprisoned.[124]

Moreover, in cases raising double jeopardy claims, a defendant could not file a habeas petition complaining of a double jeopardy violation before the second trial. Instead, the defendant would enter a plea in bar of the second prosecution arguing that the second proceeding would violate the Double Jeopardy Clause. At that stage, however, the defendant's imprisonment would be based on the first, lawful conviction and therefore, would not be subject to a habeas corpus challenge. Traditionally, the defendant could not receive review of an adverse ruling on double jeopardy until after the second trial and conviction.[125] Even after the defendant was convicted for the second time, the double jeopardy issue was not ripe until the defendant began serving the additional sentence. The defendant could petition only after the sentence began, seeking habeas corpus relief from the continued imprisonment on the ground that it represented additional punishment for the same offense.[126] Thus, even though the gravamen of the complaint was successive prosecution, the procedural rules required the defendant to allege unconstitutional punishment rather than merely unconstitutional successive prosecutions.

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124. *See Ex parte* Milligan, 71 U.S. 2, 113 (1866) (quoting Chief Justice Taney in *Cohens v. Virginia*, 19 U.S. 264 (1821) ("[I]f a party is unlawfully imprisoned, the writ of *habeas corpus* is his appropriate legal remedy. It is his suit in court to recover his liberty."). *See also Ex parte* Parks, 93 U.S. 18, 21–22 (1876) (citing English authorities who stated that *habeas corpus* should lie where it appeared that the party was "wrongfully committed" or where the commitment was "for a matter for which by law no man ought to be punished") (quoting Lord Hale in 2 SIR MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 144 (London, Emlyn 1778)).

125. Only in 1977 did the Court hold the denial of defendant's motion to dismiss on double jeopardy grounds was appealable before trial. *See* Abney v. United States, 431 U.S. 651, 662 (1977).

126. *See, e.g., Ex Parte* Nielsen, 131 U.S. 176, 178–79 (1889) (describing how defendant brought petition for habeas corpus immediately after he was delivered into custody to serve the sentence on the second conviction; he argued both that the court lacked jurisdiction in the second case and that he was being punished twice for a single offense, basing both arguments on the premise that cohabitation and adultery were the same offense); *In re* Henry, 123 U.S. 372, 374 (1887) (describing how defendant brought habeas corpus petition after serving his first sentence and beginning his confinement under the second). *See also* Heflin v. United States, 358 U.S. 415, 417–18 (1959) (concluding that historical restriction making habeas available "only to attack a sentence under which the petitioner is in custody" is continued in federal statute); Holiday v. Johnston, 313 U.S. 342, 349 (1941) (noting that the defendant had not yet served the sentence imposed on the basis of the first conviction and therefore was not entitled to be discharged).

Restrictions on the Court's jurisdiction also imposed a procedural barrier for defendants, thereby limiting double jeopardy cases to those in which the defendant could allege improper punishment. In *Ex parte Wilson*,[127] the Court stated:

> It is well settled by a series of decisions that this court, having no jurisdiction of criminal cases by writ of error or appeal, cannot discharge on *habeas corpus* a person imprisoned under the sentence of a Circuit or District Court in a criminal case, unless the sentence exceeds the jurisdiction of that court, or there is no authority to hold him under the sentence.[128]

Thus, in *Ex parte Bigelow*,[129] the Court held that it had no authority to entertain a petition for habeas corpus based on an alleged double jeopardy violation because all the actions taken by the lower court were within its jurisdiction.[130] In *Bigelow*, the defendant had been subjected to two proceedings; the first ended mid-trial when the judge decided that the charges against the defendant could not be tried in a single proceeding, and the second ended in conviction. The Court distinguished *Ex parte Lange*, noting that once the defendant in *Lange* had been tried, convicted, sentenced and "having performed the sentence as to the fine, the authority of the Circuit Court over the case was at an end."[131] Consequently, in *Lange*, the Court could entertain the petition for habeas corpus whereas it could not in *Bigelow*. Defendants needed to couch their habeas petitions in terms of impermissible punishment.

Similarly, in *Ex parte Snow*,[132] the procedural posture of the case led the court to focus on the illegality of the sentence even though the crux of the complaint was improper successive prosecution. Lorenzo Snow was charged in three indictments with three violations of the statute prohibiting cohabitation, each committed over a different period of time. Snow was tried, convicted and sentenced on the first indict-

127. 114 U.S. 417 (1885).

128. *Id.* at 420–21. The Court concluded that it must address the petitioner's claim that his trial without indictment by a grand jury violated his rights under the Fifth Amendment, stating, "[b]ut if the crime of which the petitioner was accused was an infamous crime, within the meaning of the fifth amendment of the constitution, no court of the United States had jurisdiction to try or punish him, except upon presentment or indictment by a grand jury." *Id.* at 422. The Court discharged the defendant because the district court had "exceeded its jurisdiction." *Id.* at 429.

129. 113 U.S. 328 (1885).

130. *Id.* at 329–30.

131. *Id.* at 331.

132. 120 U.S. 274 (1887).

ment.[133] When prosecution proceeded on each of the other two indictments, Snow pleaded his prior conviction as a bar, arguing that he was being prosecuted again for the same offense.[134] Each time, the trial court rejected Snow's argument and permitted the trial to proceed; Snow was convicted of all the charges.[135] The trial court imposed three consecutive six-month sentences.[136] At the end of his first six months of imprisonment, Snow petitioned for a writ of habeas corpus.[137]

He argued that the trial court did not have authority to impose a sentence over six months and that he was therefore being held unlawfully and was "being punished twice for one and the same offence."[138] In this context, the multiple punishment complaint was merely a surrogate for a successive prosecution challenge. The Court's evaluation of Snow's double jeopardy claim demonstrates how confusion arose concerning the relationship between multiple punishment and successive prosecution claims. The Court assessed the challenge as a multiple punishment issue, citing authority which dealt only with multiple punishment and, therefore, turned on a determination of legislative intent.[139] The Court, focusing on the punishment issue over which it had jurisdiction, based its holding on the conclusion that the legislature intended to make cohabitation with any one group of women a single continuing offense.

Procedural rules thus required defendants to couch their successive prosecution claims in terms of improper multiple punishment. The underlying issue in these cases, however, was clearly the constitutionality of the successive prosecutions.

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133. *Id.* at 277.
134. *Id.*
135. *Id.*
136. *Id.* at 278–79.
137. *Id.* at 279.
138. *Id.* at 280.
139. The Court discussed the English case, *Crepps v. Durden*, (1777) 98 Eng. Rep. 1283 (K.B.), in which the defendant was convicted of four violations of the statute prohibiting work on Sunday in a single proceeding based on his sale of four loaves of bread on a single day. The court in *Crepps* evaluated the intent of Parliament and concluded that the offense was a single continuing offense as to each day. *Id.* at 1287. The *Crepps* court noted that multiple acts in violation of the statute on the same day would not "multiply the offence, or the penalty imposed." *Ex parte* Snow, 120 U.S. 274, 284 (1887) (quoting *Crepps*, 98 Eng. Rep. at 1287). Lord Mansfield noted, "[t]hat because the plaintiff had been convicted of one offense on that day, therefore the justice had convicted him in three other offenses for the same act." *Id.* at 285 (quoting *Crepps*, 98 Eng. Rep. at 1287). *See also Ex parte* Nielsen, 131 U.S. 176, 187 (1889) (upholding double jeopardy challenge, stating that, "[t]o convict and punish him for [the second offense] also was a second conviction and punishment for the same offence").

3. Limitations on Cases Raising Multiple Punishment Questions

Although courts often mention multiple punishment as a concern, multiple punishment issues rarely arise without being entangled with other issues. In federal cases, the asserted double jeopardy question is always bundled with a question of congressional intent. State cases should rarely raise a federal multiple punishment question at all. Like federal cases, state multiple punishment claims should normally be resolved simply by construing legislative intent. However, because defendants often join their legislative intent argument with a double jeopardy argument, the line between the two legal arguments gets blurred.

a. Federal Cases

In cases arising in the federal system, the multiple punishment question is generally intertwined with the court's determination of congressional intent.[140] If Congress intended the defendant to receive the entire sentence imposed in the single proceeding, the court will conclude that it does not violate the Double Jeopardy Clause.[141] Conversely, if the court determines that Congress did not intend that defendants receive the sentence imposed, the court need not reach the constitutional question.[142] The case can, and should, be resolved on the basis of statutory construction and legislative intent.

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140. A handful of cases raise pure multiple punishment questions like that in *Lange* and *Pearce*. *See, e.g.*, United States v. Pettus, 303 F.3d 480, 486–87 (2d Cir. 2002) (concluding that Double Jeopardy Clause permits government to deny defendant credit for time served on supervised release); United States v. Lominac, 144 F.3d 308, 317–18 (4th Cir. 1998) (noting that double jeopardy required government to give defendant credit for time served when he was resentenced); Yavorsky v. United States, 1 F.2d 169, 170–71 (3d Cir. 1924) (granting defendant relief from prison sentence where statute provided for either fine or imprisonment, court sentenced defendant to both, and defendant paid fine before court sought to correct sentence to continue only the prison sentence; basing decision on trial court's lack of power rather than double jeopardy); Blackman v. United States, 250 F. 449 (5th Cir. 1918) (holding that defendant was unconstitutionally punished twice when, after serving part of his initial sentence in a county jail, he was resentenced for the same conviction to a federal penitentiary).

141. In *Garrett v. United States*, the Court stated that the first step in evaluating a double jeopardy claim is to assess congressional intent:

> If Congress intended that there be only one offense—that is, a defendant could be convicted under either statutory provision for a single act, but not under both—there would be no statutory authorization for a subsequent prosecution after conviction of one of the two provisions, and that would end the double jeopardy analysis.

471 U.S. 773, 778 (1985).

142. *See, e.g.*, Ball v. United States, 470 U.S. 856 (1985).

In *Ball v. United States*,[143] for example, the Supreme Court held that Congress did not intend a convicted felon in possession of a firearm to be convicted and punished for violations of two federal statutes that covered the conduct.[144] As a result, the Court held that one of the two convictions obtained in the single trial of the defendant must be set aside along with the sentence for that offense.[145] Resolving the case as one of statutory construction, the Court did not reach the double jeopardy question.

Even in a case involving the same issue as that in *Lange*, the courts need not rely on constitutional principles. In *In re Bradley*,[146] as in *Lange*, the trial court imposed a sentence of fine and imprisonment where the statute authorized only one or the other.[147] After the fine had been paid, the trial court amended the sentence to omit the fine and retain only the imprisonment. Even though the clerk sought to return the fine to the defendant's attorney, the Court held that the trial court had lacked the power to amend the sentence once the defendant had fully satisfied one of the two alternative penalties.[148] The Court granted the relief without invoking the Constitution. Thus, the federal courts should be able to resolve any claim of multiple punishment in a federal case as a matter of statutory interpretation rather than constitutional law.

b. State Cases

Only the rare state case will raise a federal multiple punishment issue. The question should not come to the federal courts until the state court has considered the case and upheld the imposition of multiple sentences for the related crimes. Thus, the state court will normally have determined that the state legislature intended the crimes to be separately punishable, and, of course, the state court's determination of that issue cannot be revisited by the federal courts.[149] But if the state court con-

143. *Id.* at 865.

144. *Id.* at 861–65. The possession violated 18 U.S.C. APP. § 1202(a), and receiving the firearm violated 18 U.S.C. § 922(h). *Id.* at 865.

145. *Id.* at 865.

146. 318 U.S. 50 (1943).

147. *Id.* at 51.

148. *Id.* at 52. The defendant's attorney declined to accept the return of the fine. *Id.*

149. *See* Ohio v. Johnson, 467 U.S. 493, 499 (1984) (acknowledging that state determination of legislative intent ends the inquiry); Brown v. Ohio, 432 U.S. 161, 167 (1977) (acknowledging that the state courts have the final authority on interpretation of state legislation). *Compare* Jones v. Thomas, 491 U.S. 376 (1989) (evaluating defendant's remedy in light of state legislature's intent that separate punishments not be imposed for attempted robbery and felony-murder), *with* Missouri v. Hunter, 459 U.S. 359 (1983) (deferring to intent of state legislature to permit cumulative sentences for first degree robbery and armed criminal action,

cludes that the punishment is within the range intended by the legislature and there is no additional double jeopardy issue of successive prosecution, the punishment should pass constitutional muster.[150] If the state courts fail to address the question of state legislative intent, then the federal courts will apply the *Blockburger* test to determine the presumptive legislative intent and resolve the case accordingly.

Jones v. Thomas[151] illustrates the role of legislative intent in a case arising from a state prosecution. In *Jones,* the defendant was convicted of both attempted robbery and felony murder in a single trial in Missouri and sentenced to consecutive terms. After the defendant's conviction, the Missouri Supreme Court held in an unrelated case that the state legislature did not intend to permit separate punishment for both felony murder and the underlying felony.[152] As a result, the state court vacated the attempted robbery conviction and the 15-year sentence imposed on that conviction. However, the defendant did not receive this remedy until he had already served the entire sentence on the attempted robbery charge, the shorter of the two sentences.[153] Although the Missouri court gave the defendant credit for the time he had served on the now-vacated sentence, he filed a habeas petition in federal court. Citing *Lange*, he argued that his continued confinement violated the Double Jeopardy Clause because he had completed one entire sentence and was therefore entitled to be released.[154] The Supreme Court rejected his argument, holding that the remedy he had received "fully vindicated" his double jeopardy rights because it left the defendant convicted of only one offense and serving only one sentence.[155] The Court did not read *Lange* broadly enough to require immediate release of a prisoner once the prisoner completes the

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even though they were the same offense under the *Blockburger* test). *See also* Whalen v. United States, 445 U.S. 684, 687 (1980) (stating that, as a matter of policy, the Court generally defers to the courts of the District of Columbia on interpretation of statutes that apply only to the District). In his dissent in *Whalen*, then-Justice Rehnquist argued that the Court's application of double jeopardy limitations to questions of multiple punishment could conflict with the control of state courts over interpretation of state law. *Id.* at 706–07 (Rehnquist, J., dissenting).

150. *Hunter*, 459 U.S. at 368–69 (holding that determination of Missouri court that state legislature intended to punish offense cumulatively ended inquiry as to constitutionality of punishment).

151. 491 U.S. 376 (1989).

152. *Id.* at 378.

153. *Id.*

154. *Id.* at 379–80.

155. *Id.* at 381–82. *See also* Morris v. Mathews, 475 U.S. 237, 246–47 (1986) (holding that reform of conviction and sentence to offense that was not barred by double jeopardy adequately protected defendant). *But see* Jones v. Thomas, 491 U.S. 376, 394–95 (1989) (Scalia, J., dissenting) (stressing the defendant's legitimate expectation of finality in the sentence and discussing double jeopardy and the sentencing cases at some length).

shorter of two illegal cumulative sentences.[156] Instead, the Court emphasized that Lange's fine had been paid and could not be returned, so if the courts enforced the sentence of incarceration, Lange would have suffered punishment beyond what the legislature intended.[157]

In *Jones*, the Court also discussed and distinguished *In re Bradley*.[158] The Court noted that both *Lange* and *Bradley* "involved alternative punishments that were prescribed by the legislature for a single criminal act" and contrasted that to the situation before it, which involved sentences imposed for what the trial court believed to be two offenses within the state's legislative scheme—one more serious than the other.[159] Moreover, in both *Lange* and *Bradley*, the defendant had paid a fine, which could not be offset by his sentence of incarceration.[160] In contrast, the lesser sentence for the attempted robbery could be credited against the longer sentence for the more serious offense.[161] Focusing on the question of legislative intent, the Court confidently stated that the Missouri legislature had not intended a sentence for attempted robbery to be a sufficient sentence for felony murder. *Jones* demonstrates that state cases, like federal cases, can generally be resolved on the basis of legislative intent and will rarely require the courts to apply the Double Jeopardy Clause.

IV. TYING THE KNOT: DEVELOPING THE AXIOM THAT DOUBLE JEOPARDY PROTECTS AGAINST MULTIPLE PUNISHMENT

The assertion that double jeopardy protects against multiple punishment imposed in a single proceeding also rests on a long history of tangled reasoning. Double jeopardy decisions addressing both successive prosecution and multiple punishment contain many instances of casual cross-citation, fostering confusion. The courts have cited decisions concerned only with legislative intent to rebuff double jeopardy claims. The careless use of precedent has led to the tangling of two distinct lines of precedent—that protecting against improper punishment, and that applying double jeopardy principles to protect against successive prosecution. The result of this entanglement is the axiom that double jeopardy

156. *Jones*, 491 U.S. at 382 (acknowledging that some language in the opinion supports that reading but nonetheless declining to hold that the defendant was entitled to release).

157. *Id.* at 383 ("*Lange* therefore stands for the uncontested proposition that the Double Jeopardy Clause prohibits punishment in excess of that authorized by the legislature . . . .").

158. *Id.* (citing *In re* Bradley, 318 U.S. 50 (1943)).

159. *Id.* at 384.

160. *Id.*

161. *Id.*

protects against multiple punishment and the dilution of double jeopardy protection.

A. The United States Supreme Court

The Supreme Court is principally responsible for promulgating the axiom that double jeopardy protects against multiple punishment. The Court's decisions send mixed messages, use language without precision and entangle double jeopardy precedent with non-double jeopardy issues. *Pearce* and *Lange*, in which the Court granted double jeopardy relief against multiple punishment, do not support a broad principle that double jeopardy protects against multiple punishment imposed for multiple convictions obtained in a single proceeding. Moreover, although repeatedly advanced, the principle appears to have little actual weight. While asserting that double jeopardy protects against multiple punishment, the Court has never struck down as a violation of double jeopardy any legislatively-authorized criminal penalty imposed in a single proceeding.[162] In this section, I survey the Court's decisions addressing legislative intent in relation to punishment, and those addressing multiple punishment when the defendant invokes double jeopardy to challenge a sentence, as well as those considering multiple punishment when the defendant is also complaining of successive prosecution. In addition, I look at the Court's careless citation of authority, which has supported the axiom that double jeopardy protects against multiple punishment while confusing double jeopardy jurisprudence.

1. Decisions Discussing Legislative Intent

In many cases where defendants complain of consecutive sentences imposed in a single proceeding for closely related offenses, the question of double jeopardy protection never arises. Instead, the Court addresses the question as one of merger and statutory interpretation, seeking to divine the legislative intent.[163]

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162. *See* Dep't of Revenue v. Kurth Ranch, 511 U.S. 767, 800 (1994) (Scalia, J., dissenting) (noting that *United States v. Halper*, 490 U.S. 435 (1989), was first case in which the Court held that legislatively-authorized penalties violated protection against multiple punishments). In fact, *Halper*, like the other civil sanction cases, involved successive proceedings, not merely multiple punishment.

163. *See, e.g.*, Rutledge v. United States, 517 U.S. 292, 307 (1996) (holding that Congress did not intend to authorize punishment for both crimes); United States v. Woodward, 469 U.S. 105 (1985) (concluding that Congress intended to permit cumulative punishment for both currency reporting offense and false statement offense); United States v. Gaddis, 424 U.S. 544 (1976) (holding that Congress did not intend to permit convictions of both robbing a bank and

Blockburger v. United States[164] may best illustrate this category of decisions, given its current position in double jeopardy jurisprudence. In *Blockburger*, the Court merely determined the presumptive legislative intent regarding punishment of the defendant for multiple convictions in a single trial, concluding that the punishment was allowed. The Court did not invoke the Double Jeopardy Clause. Nevertheless, although addressing only legislative intent, the Court cited decisions that addressed double jeopardy arguments.[165]

Similarly, in *Bell v. United States*,[166] the Court considered only legislative intent. The defendant had been convicted of two violations of the Mann Act, which prohibits interstate transportation of women for purposes of prostitution, based on a single incident in which he transported two women on the same trip in the same vehicle.[167] The trial court had imposed consecutive sentences for the two violations of the Act. The Court reversed, concluding that Congress had not intended to treat two violations accomplished in a single trip as separate offenses to be punished separately.[168]

Decisions like these, focused solely on legislative intent, are then cited in discussions addressing double jeopardy claims.[169] Not all the citations are improper; some invoke the decisions for their position on legislative intent.[170] But even though neither *Blockburger* nor *Bell* rests on double jeopardy grounds, they are woven into double jeopardy jurisprudence.

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receiving the proceeds of the robbery); Callanan v. United States, 364 U.S. 587 (1961) (holding that Congress intended cumulative sentences); Heflin v. United States, 358 U.S. 415, 417–18 (1959) (same); Prince v. United States, 352 U.S. 322 (1957) (concluding that Congress intended entry into a bank with intent to rob to be a separate offense from the robbery itself); Bell v. United States, 349 U.S. 81 (1955) (concluding that Congress did not intend cumulative punishment for different violations of the Mann Act, which prohibits interstate transportation of women for purposes of prostitution); *In re* Henry, 123 U.S. 372 (1887) (upholding multiple sentences based on assessment of statutory intent). *See also* Braverman v. United States, 317 U.S. 49, 53–54 (1942) (holding that defendants could not be convicted of multiple conspiracies where evidence established one conspiracy only; no mention of double jeopardy).

164. 284 U.S. 299 (1932).

165. *Id.* at 302, 304 (citing *In re* Snow, 120 U.S. 174 (1887) and *Gavieres v. United States*, 220 U.S. 338, 342 (1911), both of which involved successive prosecution).

166. 349 U.S. 81 (1955).

167. *Id.* at 82.

168. *Id.* at 83. The Court noted that "[t]he 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." *Id.* at 82.

169. *See, e.g.*, Whalen v. United States, 445 U.S. 684, 688 (1980) (citing *Bell* in discussion of defendant's double jeopardy argument).

170. *See Ex parte* DeBara, 179 U.S. 316, 320–21 (1900) (citing *In re* Henry, 123 U.S. 372 (1887), upholding consecutive sentences for separate mail fraud charges tried in a single proceeding, and not focusing on double jeopardy whatsoever).

2. Decisions Considering Double Jeopardy Challenges to Multiple Punishment

In some cases, defendants raise double jeopardy challenges along with their claims that consecutive or cumulative sentences are unlawful as a matter of statutory interpretation. The Court generally gives short shrift to these double jeopardy claims.[171] The Court treats them as resolved by the determination of legislative intent and employs the *Blockburger* test for that purpose.[172] These decisions are then threaded into double jeopardy jurisprudence.

For example, in *Gore v. United States*,[173] the defendant sought relief from cumulative sentences imposed in a single proceeding for violations of the drug laws effected through a single criminal episode. The Court concluded that Congress had intended cumulative punishments for the violations and that *Blockburger* and a long line of cases support congressional power to define crimes and punishment.[174] The Court then rejected the defendant's double jeopardy argument, noting that a long line of cases would have to be overruled if the Double Jeopardy Clause precluded multiple punishments for offenses that were different offenses under the *Blockburger* test.

Carter v. McClaughry[175] provides yet another example. In *Carter*, a prisoner who had been convicted on multiple charges in a single court martial argued that the punishment violated his double jeopardy protec-

171. *See, e.g.*, Gore v. United States, 357 U.S. 386, 392–93 (1958) (discussing double jeopardy in the context of multiple punishment). In *Gore*, the Court also cited a number of cases that would "have to be overruled" if the Court accepted the defendants' double jeopardy argument. *Id.* at 392. *See also* Pereira v. United States, 347 U.S. 1 (1954) (rejecting defendants' argument that convictions of conspiracy and substantive offense in same trial constituted double jeopardy); Am. Tobacco Co. v. United States, 328 U.S. 781, 787–88 (1946) (rejecting defendants' argument that convictions under separate counts of indictment "amount to double jeopardy, or to a multiplicity of punishment in a single proceeding, and therefore violate the Fifth Amendment"); Pinkerton v. United States, 328 U.S. 640, 643 (1946) (rejecting defendants' argument that substantive offense merges into conspiracy).

172. *See, e.g.*, Ball v. United States, 470 U.S. 856 (1985) (applying *Blockburger* and concluding that Congress did not intend cumulative convictions and sentences); *Gore*, 357 U.S. at 388. The Court has also concluded that, when the legislature did not intend multiple punishment, it did not intend multiple convictions to coexist; the remedy for the defendant is both to reduce the sentence and to set aside one or more conviction. *See Ball*, 470 U.S. at 865 (remanding with directions to trial court to set aside one conviction and the corresponding sentence). *See also* Rutledge v. United States, 517 U.S. 292 (1996) (remanding for trial court to set aside one conviction and the corresponding concurrent sentence).

173. 357 U.S. 386.

174. *Id.* at 392.

175. 183 U.S. 365 (1902).

tion. The Court recognized legislative authority to prescribe sentences[176] and concluded that the offenses charged "were not one and the same offence [sic]," applying the same elements test.[177] Although the Court applied the prevailing test for determining when two offenses are the same offense for double jeopardy purposes, the Court focused almost entirely on construction of the articles under which the defendant was convicted and on the governing rules of military usage. The Court did not consider whether the prisoner's double jeopardy claim based on alleged multiple punishment was even a colorable constitutional claim. But the presentation of both a legislative intent argument and a double jeopardy claim, combined with the Court's reliance on a double jeopardy standard, tangled the two issues.

Similarly, in *Morgan v. Devine*,[178] the petitioner complained that he had received separate sentences for each count of the two-count indictment to which he had pleaded guilty, arguing in part that it violated his double jeopardy protection. The Court first assessed congressional intent and concluded that the offenses were separate and distinct and, therefore, were intended to be punished separately.[179] As to petitioner's double jeopardy argument, the Court quickly concluded that the charges were not the same under the same evidence test.[180] The Court appeared to assume, but did not address, the question of whether the Double Jeopardy Clause would shield against punishment for offenses that fit the definition of the same offense if imposed in a single proceeding.

Whalen v. United States[181] also illustrates how the different threads of analysis become entangled. In *Whalen*, the Court held that the defendant could not properly receive consecutive sentences in the District of Columbia for rape and felony murder, even though they were imposed in a single trial.[182] The Court stated that the Double Jeopardy Clause protects against multiple punishments, citing only *Pearce*. The Court then

176. *Id.* at 393. The Court considered the relationship among the charges at length to determine whether the sentences could be imposed by a court martial and expressed its understanding that, when the defendant is convicted of multiple offenses, "the sentence is warranted to the extent that such offences [sic] are punishable." *Id.*

177. *Id.* at 394–95. The Court cited *Morey v. Commonwealth*, 108 Mass. 433 (1871), a decision that laid the groundwork for *Blockburger*.

178. 237 U.S. 632 (1915).

179. The Court emphasized the role of legislative intent by stating: "[T]he intention of the legislature must govern in the interpretation of a statute. 'It is the legislature, not the court, which is to define a crime, and ordain its punishment.'" *Id.* at 641 (quoting Burton v. United States, 202 U.S. 344, 377–78 (1906), which quotes United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820)).

180. *Morgan*, 237 U.S. at 641.

181. 445 U.S. 684 (1980).

182. *Id.* at 695.

observed that the constitutionality of multiple sentences can only be resolved by determining legislative intent, so congressional intent was dispositive of the defendant's claim.[183] The Court also stated: "The Double Jeopardy Clause at the very least precludes federal courts from imposing consecutive sentences unless authorized by Congress to do so."[184] It is telling that the cases cited by the Court to support this claim about the role of double jeopardy addressed only limitations on judicial authority and did not address double jeopardy.[185] The Court also asserted that a sentence not authorized by Congress would violate the separation of powers as well as double jeopardy.[186] In the end, however, the decision rested on the Court's determination that Congress did not intend to authorize the consecutive sentences.[187] Thus, like *Lange*, *Whalen* wove together strands of double jeopardy, due process, and statutory construction analysis.

Each of these cases brought together different strands of analysis pertinent to the question of multiple punishment. Even though none of the decisions rested on forthright double jeopardy analysis, each may appear to support the axiom that double jeopardy protects against multiple punishment.

3. Decisions Discussing Multiple Punishment in the Context of Successive Prosecution

Other decisions support the axiom only if one misconstrues their language. In a number of instances, punishment is used as a surrogate for successive prosecution, so the references to protection from punishment simply express the protection from successive prosecution.[188]

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183. *Id.* at 689 (holding that the resolution of a federal case challenging consecutive sentences would be the same regardless of the existence of double jeopardy protection: the Court would invalidate the sentence if it went beyond that intended by Congress).

184. *Id.*

185. *See id.* (citing United States v. Wiltberger, 18 U.S. 76 (1820); United States v. Hudson & Goodwin, 11 U.S. 32 (1812)) (both holding that the federal courts lacked jurisdiction over specific crimes).

186. *Whalen*, 445 U.S. at 686.

187. *Id.* at 690–93. *See also id.* at 698 (Blackmun, J., concurring) (inviting the Court to hold that the question of what punishment can be imposed is not different from the question of legislative intent).

188. *See* Heath v. Alabama, 474 U.S. 82, 88 (1985) (stating that the crucial question under the dual sovereignty doctrine is whether each entity's power to punish derives from a distinct source); *In re* Snow, 120 U.S. 274 (1887) (addressing successive prosecution but referring to protection from multiple punishment); *In re* Chapman, 166 U.S. 661, 671 (1897) (considering challenge to federal legislation making it a misdemeanor to refuse to provide testimony before Congress, and reasoning that a defendant could be punished for the act as both a misdemeanor and also as a contempt of Congress because the two were not the same offense, using the ref-

In *Grafton v. United States*,[189] the Court concluded that the defendant's acquittal in a court martial precluded prosecution for homicide in a civil court in the Philippines. The Court stated that

> the guaranty of exemption from being twice put in jeopardy of punishment for the same offense would be of no value to the accused, if on trial for assassination, arising out of the same acts, he could be again punished for the identical offense of which he had been previously acquitted.[190]

The Court's reference to punishment here is interesting. Of course, having been acquitted, the defendant had experienced no punishment and therefore was not at risk of a multiple punishment. Instead, the Court appears simply to have been referencing the language of the statute establishing rules for the administration of justice in the Philippines, which provided that "no person, for the same offense, shall be twice put in jeopardy of punishment."[191]

Similarly, in *United States v. Ursery*,[192] the Court stated that double jeopardy protects against both successive punishments and successive prosecutions, citing *Dixon* citing *Pearce*. The Court also stated that "[t]he protection against multiple punishments prohibits the Government from 'punishing twice, or attempting a second time to punish criminally

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erence to punishment as a surrogate for the permissibility of successive criminal and contempt proceedings). In double jeopardy challenges involving non-criminal penalties, the Court has focused on the question of whether the penalty is punishment in order to determine whether it triggers double jeopardy protection, but the cases involve successive proceedings, not multiple punishments imposed in a single proceeding. *See, e.g.*, Hudson v. United States, 522 U.S. 93 (1997) (concluding that double jeopardy did not bar criminal prosecution after civil sanction because the civil sanctions were not punishment); United States v. Ursery, 518 U.S. 267, 292 (1996) (concluding that double jeopardy did not bar civil forfeiture after criminal prosecution because the forfeiture was not "punishment"); Dep't of Revenue v. Kurth Ranch, 511 U.S. 767, 780–83 (1994) (discussing whether tax imposed in successive proceeding represented punishment). *See also Kurth Ranch*, 511 U.S. at 801–02 (Scalia, J., dissenting) (noting that civil sanction cases turn on protection from successive prosecutions, not multiple punishment).

189. 206 U.S. 333 (1907).

190. *Id.* at 350.

191. *Id.* at 345 (quoting the statute). *See also* United States v. Lanza, 260 U.S. 377, 379 (1922). In *Lanza*, the defendants invoked a prior state court conviction in an attempt to bar federal prosecution for illegal liquor violations. The Court stated: "The defendants insist that two punishments for the same act . . . constitute[s] double jeopardy under the Fifth Amendment." *Id.* In this context, the reference to punishment appears to be a surrogate for successive prosecution rather than an independent concern with multiple punishment—the punishment was to be imposed in a separate proceeding, which the defendants sought to preclude, and does not speak to true multiple punishment. The case was resolved against the defendants under the dual sovereignty doctrine, which permits successive federal and state prosecutions.

192. 518 U.S. at 273.

for the same offense.'"[193] The latter statement represents an instance of using multiple punishment as a surrogate for successive proceedings. The crux of the defendant's complaint was that the civil forfeiture proceeding was barred under double jeopardy principles by his prior criminal trial. Thus, he complained of the separate proceeding, arguing that it would impose punishment on him, and did not complain simply of the punishment itself. The Court's discussion, leading to the conclusion that the forfeiture was not punishment, focused on cases of successive proceedings, the forfeiture generally following after, and often triggered by, the criminal prosecution.[194] Again, while not deciding that the Constitution precludes multiple punishment, if not read closely, these decisions can be read as support for the axiom that double jeopardy prohibits multiple punishment.

4. Careless Citation of Authority

Careless citation has also contributed to confusion in this area. Given these different threads of multiple punishment and double jeopardy analysis, it has been easy for the Court to use authority in a manner that blurs the line between determinations based on legislative intent and those based on constitutional analysis. The Court has cited decisions construing the Double Jeopardy Clause when addressing only legislative intent and has cited legislative intent decisions when discussing double jeopardy.

In *Ebeling v. Morgan*,[195] for example, the defendant argued that his consecutive sentences based on cutting open a series of mail bags in a single transaction went beyond the sentence that could legally be imposed. The decision did not turn on, nor did the Court discuss, double jeopardy. The Court merely had to determine what Congress intended when it defined the crime. The Court concluded that Congress had intended "to protect each and every mail bag from felonious injury and mutilation," making each attack on a mail bag a separate, and separately punishable, offense.[196] However, to support its interpretation of the statute, the Court cited two double jeopardy decisions addressing successive prosecutions: *Gavieres v. United States*[197] and *Morey v. Commonwealth*.[198] In *Gavieres*, the defendant complained that successive prose-

193. *Id.*
194. *Id.* at 275–76.
195. 237 U.S. 625 (1915).
196. *Id.* at 629.
197. 220 U.S. 338 (1911).
198. 108 Mass. 433 (1871).

cutions placed him twice in jeopardy,[199] and the Court held that the crimes with which he had been charged in the separate proceedings were not the same offense. No question of multiple punishment was raised or discussed in the case. In *Morey*, the defendant argued that the second prosecution after a first conviction for cohabitation placed him twice in jeopardy. The Supreme Judicial Court of Massachusetts concluded that the two offenses were not the same, allowing successive prosecution.[200] These decisions provided useful guidance to the likely legislative intent, but the Court in *Ebeling* should have avoided blurring the line between double jeopardy and excessive punishment claims by acknowledging that *Gavieres* and *Morey* both evaluated whether successive prosecution violated double jeopardy.

Like *Ebeling* and *Lange*, *In re Bradley*[201] involved a defendant who was relieved of improper punishment in a situation very similar to that in *Lange*. Bradley had improperly been sentenced to both a fine and a period of incarceration where only one or the other was authorized. He paid the fine and petitioned for a writ of habeas corpus, complaining that the continued incarceration was unlawful. The Court agreed that the case was governed by *Lange*, but it did not mention the Double Jeopardy Clause, further blurring the precedential significance of *Lange*.[202]

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199. The case arose in the Philippines where protection from double jeopardy was provided by statute as well as by the Constitution.

200. *Morey*, 108 Mass. at 435–36. The Court also expressed the view that the double jeopardy concern does not extend to punishment:

> The question of the justice of punishing the offender for two distinct offences growing out of the same act was a matter for the consideration of the grand jury and the attorney for the Commonwealth in the presentment and prosecution, of the court below in imposing sentence, or of the executive in the exercise of the pardoning power.

Id. at 436.

201. 318 U.S. 50 (1943).

202. *Id.* at 52. The Court merely stated: "As the judgment of the court was thus [through the payment of the fine] executed so as to be a full satisfaction of one of the alternative penalties of the law, the power of the court was at an end." *Id.* In *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 462 (1947), the Court stated: "Our minds rebel against permitting the same sovereignty to punish an accused twice for the same offense." The facts of the case, however, did not raise the issue. Rather, the prisoner sought protection from a second attempt to execute him after the first electrocution failed; the State sought to carry out a single sentence imposed for a single conviction. *Id.* at 461. To further confuse the issue, the Court supported its assertion by citing only *Ex parte Lange*, a double jeopardy decision, and *In re Bradley*, a decision dealing only with the statutory propriety of two sentences imposed on the defendant, and not even addressing double jeopardy concerns. *Id.* at 462. The Court also directed the reader to compare the current case with *United States v. Lanza*, 260 U.S. 377 (1922). *Id.* In *Lanza*, the defendants complained of successive prosecution by state and federal authorities, and the Court held that the Double Jeopardy Clause did not protect the defendants. 260 U.S. at 385. *Lanza* demonstrated that minds do not rebel at successive prosecutions by different sovereigns. Finally, the Court also relied on *Palko v. Connecticut*, 302 U.S. 319 (1937), which

The fact that *Blockburger v. United States*[203] is pervasively applied in double jeopardy jurisprudence illustrates the impact of citing non-double jeopardy decisions in resolving double jeopardy claims. *Blockburger*, strictly a legislative intent decision, is now read as defining "same offense" for the purpose of determining the scope of double jeopardy protection from successive prosecution as well as multiple punishment. Moreover, although the question before the Court was solely one of legislative intent and the opinion contains no reference to the Double Jeopardy Clause, the Court in *Blockburger* cited decisions that rest on double jeopardy grounds.[204] By enshrining the *Blockburger* test as the exclusive definition of "same offense" to be used in double jeopardy analysis, the Court intertwines disparate analyses and inextricably ties double jeopardy analysis to determinations of legislative intent. Further confusing the issue, the Court has characterized *Blockburger* as protecting against multiple punishment in violation of the Double Jeopardy Clause[205]—a protection it clearly did not address.

United States v. Wilson[206] illustrates how entrenched the confusion about the role of double jeopardy in limiting multiple punishments had become by 1975, as well as the way in which careless citation contributed to the misperception that double jeopardy protects against multiple punishment. In *Wilson*, the Court discussed the parameters of double jeopardy protection in order to determine the constitutionality of a government appeal from the dismissal of an indictment. Even though Wilson sought protection from successive prosecution, the Court repeatedly alluded to double jeopardy protection from multiple punishment. Citing

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held that double jeopardy protection was not incorporated in the Due Process Clause of the Fourteenth Amendment and that the state could therefore constitutionally appeal and obtain a new trial based on an error of law in a criminal case. *Id.* at 462. *Palko*, however, is no longer good law. *See* Benton v. Maryland, 395 U.S. 784 (1969) (holding protection from double jeopardy incorporated in due process clause).

203. 284 U.S. 299 (1932).

204. The *Blockburger* Court cited *Gavieres*, *Morey*, and *Albrecht v. United States*, 273 U.S. 1 (1927). *Id.* at 304. In *Albrecht*, the defendant argued that his sentence for both possessing and selling illegal liquor imposed unconstitutional "double punishment." 273 U.S. at 11. The Court merely pointed out that the crimes were distinct and stated that "there is nothing in the Constitution which prevents Congress from punishing separately each step leading to the consummation of a transaction which it has power to prohibit and punishing also the completed transaction." *Id.*

205. *See* Am. Tobacco Co. v. United States, 328 U.S. 781, 787–88 (1946) (responding to the claim that the separate convictions "amounted to double jeopardy, or to a multiplicity of punishment in a single proceeding and therefore violated the Fifth Amendment," and later characterizing the defendants' argument as suggesting that convictions on related charges in a single trial "may lead to multiple punishment, contrary to the principle of the *Blockburger* case").

206. 420 U.S. 332 (1975).

a treatise, the Court stated: "Although the form and breadth of the prohibition [on double jeopardy] varied widely, the underlying premise was generally that a defendant should not be twice tried or punished for the same offense."[207]

The Court also cited *Pearce* for the proposition that "the Double Jeopardy Clause provides three related protections," the third of which is the protection from multiple punishment.[208] The Court further supported its assertion that a defendant cannot "be subjected to the possibility of further punishment by being again tried or sentenced for the same offense" by citing *Lange* and *Nielsen*.[209] Of course, none of these sources supports the broad claim that double jeopardy protects against multiple punishment.

Continuing, the *Wilson* Court stated, "where there is no threat of either multiple punishment or successive prosecutions, the Double Jeopardy Clause is not offended."[210] In the supporting footnote the Court stated: "On a number of occasions, the Court has observed that the Double Jeopardy Clause 'prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense.'"[211] In support of this statement, the Court quoted *Helvering v. Mitchell*.[212] *Mitchell* turned on the question of whether a tax assessment represented punishment[213] and held that double jeopardy did not pose a bar because the penalty was not intended as punishment and the proceeding was not a criminal proceeding.[214] In the course of its discussion in *Mitchell*, the Court stated: "Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the Double Jeopardy Clause prohibits merely punishing twice, or attempting to punish criminally, for

207. *Id.* at 339 (citing SIGLER, *supra* note 15). The Court cited pages 2–16 of Sigler's treatise, which track the English development of protection from successive prosecution and do not identify any protection from multiple punishment. *See* SIGLER, *supra* note 15, at 2–16.

208. *Wilson*, 420 U.S. at 343 (citing *Pearce* for the proposition that the Double Jeopardy Clause protects against three harms: a second prosecution after acquittal, a second prosecution after conviction, and multiple punishment).

209. *Id.* The Court then further explained its understanding: "The interests underlying these three protections are quite similar. When a defendant has been once convicted and punished for a particular crime, principles of fairness and finality require that he not be subjected to the possibility of further punishment by being again tried or sentenced for the same offense." *Id.*

210. *Id.* at 344.

211. *Id.* at 344 n.13.

212. 303 U.S. 391 (1938).

213. *Id.* at 397 (in *Mitchell*, the taxpayer argued that his acquittal on criminal charges barred the Commissioner of Internal Revenue from levying a fifty percent penalty on his tax deficiency).

214. *Id.* at 401–04.

the same offense."[215] The context of this discussion makes it clear that this reference to punishment merely described the method for determining when a successive proceeding warrants double jeopardy protection.[216] Nothing the Court said related to protection from multiple punishment in a single proceeding. However, the Court in *Wilson* took part of the above-mentioned quote out of context and used it to suggest that double jeopardy protection targets primarily multiple punishment.[217]

In *Justices of Boston Municipal Court v. Lydon*,[218] the Court amplified the impact of this careless citation. In *Wilson*, the Court pointed to multiple punishment as a concern, but linked that concern to protection from successive proceedings and did not treat punishments imposed in a single proceeding as an independent double jeopardy concern. Nevertheless, in *Lydon*, the Court cited *Wilson* for the proposition that "[t]he primary purpose of foreclosing a second prosecution after conviction . . . is to prevent a defendant from being subjected to multiple punishment for the same offense."[219] *Lydon* thus built on the casual statements and citations in *Wilson* and further tangled the strands of double jeopardy jurisprudence.

Brown v. Ohio[220] also fostered confusion. Brown complained of successive prosecutions by two counties arising from the same car

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215. *Id.* at 399. To determine whether the sanction was criminal in nature, the Court evaluated legislative intent. *Id.* at 402-04. Addressing the petitioner's res judicata claim, the Court also noted: "Where the objective of the subsequent action likewise is punishment, the acquittal is a bar, because to entertain the second proceeding for punishment would subject the defendant to double jeopardy; and double jeopardy is precluded by the Fifth Amendment whether the verdict was an acquittal or a conviction." *Id.* at 398.

216. Taken in context, it is clear that in *Mitchell* the Court was distinguishing between prohibited successive criminal and punitive civil proceedings and permitted successive criminal and non-punitive civil proceedings.

217. United States v. Wilson, 420 U.S. 332, 344 n.13 (1975). In the same footnote, the *Wilson* Court further supported its multiple punishment statement by directing the reader to "[s]ee also" two cases: *One Lot Emerald Cut Stones and One Ring v. United States,* 409 U.S. 232 (1972), and *Stroud v. United States*, 251 U.S. 15 (1919). Like *Mitchell*, *Emerald Cut Stones* turned on the question of whether the forfeiture action was punitive and therefore barred by an earlier acquittal. In *Emerald Cut Stones* the Court stated: "If for no other reason, the forfeiture is not barred by the Double Jeopardy Clause of the Fifth Amendment because it involves neither two criminal trials nor two criminal punishments." 409 U.S. at 235. The reference to two punishments clearly referred to punishments imposed in successive proceedings. In *Stroud*, the defendant complained only of successive trials, not multiple punishments, and the Court expressly stated that the Constitution protected against a second trial. 251 U.S. at 18. Neither decision supports the multiple punishment axiom.

218. 466 U.S. 294 (1984).

219. *Id.* at 307. In *Lydon*, the Court pointed out that the Commonwealth was not seeking to impose multiple punishments. Instead, the Commonwealth had chosen to permit appeal from municipal court convictions only through trial de novo, and the defendant was complaining of having to go through the second proceeding.

220. 432 U.S. 161 (1977).

theft.[221] In *Brown*, the Court held that double jeopardy barred the second prosecution. In its opinion, the Court quoted *Pearce* for the proposition that double jeopardy protects against multiple punishment.[222] Even though the case involved successive prosecutions, the Court emphasized the protection from multiple punishment rather than the protection from successive prosecutions. The Court described *Blockburger* as the test for determining whether two offenses may be punished cumulatively and then reasoned that if consecutive sentences are barred, then successive prosecutions must likewise be barred.[223] To support its reasoning that the limitation on successive prosecution flows from the protection against multiple punishment, the Court cited *Nielsen*,[224] a successive prosecution case.[225] In closing, the Court stated that prosecutors could not avoid double jeopardy protection simply by breaking a crime into separate temporal or spatial units, but then noted that it would be a different case if the state legislature had provided that each was a separate offense.[226]

Chief Justice Rehnquist later castigated the Court for its carelessness in *Brown*.[227] He criticized the majority for citing three cases in support of its holding that the defendant could not be successively prosecuted and punished for car theft and joy riding—*Lange*, *Bell v. United States*,[228] and *Gore*—and thereby tangling three separate threads of double jeopardy jurisprudence.[229] He argued that *Lange* stands for the proposition that a court is not permitted to increase a defendant's sentence, even if the increased sentence falls within the statutory limits; that *Bell* turned entirely upon legislative intent and did not mention double jeopardy;[230] and that *Gore* examined the related question of whether

221. *Id.* at 162.

222. *Id.* at 165. *See also id.* at 166 (citing Green v. United States, 355 U.S. 184 (1957), as standing for protection "from attempts to secure additional punishment after a prior conviction and sentence").

223. *Id.* at 166.

224. *Id.*

225. *Id.* at 166 n.6 (discussing *Nielsen* and *Ashe*). Interestingly, the Court in *Brown* noted that in *Nielsen* consecutive sentences could have been imposed if the charges were tried in a single proceeding.

226. *Id.* at 169–70.

227. Whalen v. United States, 445 U.S. 684, 702 (1980) (Rehnquist, J., dissenting).

228. 349 U.S. 81 (1955).

229. *Whalen*, 445 U.S. at 702. He also noted that in some decisions, the Court simply determined legislative intent while in others it borrowed a test from successive prosecution cases. *Id.* at 705.

230. In *Bell*, the Court considered whether simultaneous violations of the Mann Act were the same offense, but did not mention double jeopardy. The Court observed that: "The punishment appropriate for the diverse federal offenses is a matter for the discretion of Congress,

Congress intended to multiply punish violations of different statutes effected through a single criminal act.[231]

Albernaz v. United States[232] further demonstrates this confusion even as it illustrates the proper resolution of a multiple punishment claim. In *Albernaz*, the defendants challenged consecutive sentences imposed in a federal case for convictions on related charges in a single proceeding.[233] The Court first assessed congressional intent, applying *Blockburger*, which it referred to as a rule of statutory construction, and concluded that Congress intended to permit consecutive sentences for the two crimes.[234] As a result, the Court reached the defendants' double jeopardy claim. Citing *Pearce*, the Court stated that some precedent supports applying double jeopardy to protect against multiple punishment, but the Court held that the Double Jeopardy Clause has only the very limited role of assuring that the sentencing court does not exceed the punishment intended by the legislature.[235] Since the Court had already determined that Congress intended the offenses to be punished cumulatively, the defendants' double jeopardy protection was not violated.[236] While the outcome of the case was correct, by treating the defendants' argument as raising a legitimate double jeopardy issue, the

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subject only to constitutional limitations, more particularly the Eighth Amendment." 349 U.S. at 82.

231. 445 U.S. at 702–04.

232. 450 U.S. 333, 340 (1981).

233. *Id.* at 335.

234. *Id.* at 343.

235. *Id.* at 344 (citing *Brown*).

236. *Id.* (citing *Whalen* and *Brown* for proposition that congressional intent to multiply punish does not violate the Constitution). *See also* Garrett v. United States, 471 U.S. 773, 793–94 (1985) (holding that congressional intent to punish crimes separately settled the question); Ohio v. Johnson, 467 U.S. 493 (1984). In *Johnson*, the Court confronted an unusual situation and sent mixed messages about the role and scope of the Double Jeopardy Clause. The trial court had accepted the defendant's plea of guilty to some of the counts with which he was charged, despite the prosecution's objection. *Id.* at 494. The defendant then persuaded the trial court to dismiss the remaining charges on the basis that further prosecution would violate his double jeopardy protection. *Id.* The Ohio Supreme Court, citing *Pearce*, agreed and affirmed the dismissal. *Id.* at 494, 498 n.7. The United States Supreme Court viewed the multiple punishment question somewhat differently. The Court accepted the determination of the Ohio courts that the state legislature had not intended cumulative punishments but concluded that the defendant's unilateral action could not foreclose state prosecution of the offenses they had sought to pursue in a single prosecution. *Id.* at 499–500. The Court noted that the trial court would have to address the question of cumulative sentences if, and when, the defendant was convicted. *Id.* at 500. In the course of its discussion, the Court accurately stated the role of the *Pearce* holding. Although legislative intent governs whether punishments are multiple, *Pearce* "ensures that after a subsequent conviction a defendant receives credit for time already served." *Id.* at 499. Rather than suggesting that the double jeopardy analysis would guide the determination of the appropriate sentence, the Court should have recognized that the defendant's sentence would be limited only by legislative intent and due process concerns.

Court limited double jeopardy protection by making legislative deference central to the analysis.

Careless citation like that contained in these cases hopelessly entangled disparate threads of jurisprudence. Failing to maintain the distinction between successive prosecution and multiple punishment on one hand, and between issues of legislative intent and double jeopardy issues on the other, the Court wove together holdings and pronouncements from different strands. The result was a commitment to the axiom that double jeopardy provides broad protection against multiple punishment.

B. The Lower Federal Courts

The lower federal courts have also contributed to the belief that double jeopardy protects against multiple punishment. Like the Supreme Court itself, the lower federal courts fostered the multiple punishment axiom through citations to decisions that, closely read, do not support the axiom.[237]

In *Murphy v. United States*,[238] for example, the Court of Appeals for the Seventh Circuit asserted that the Fifth Amendment prevents double punishment for the same offense and modified the defendants' sentences to reflect the fact that two conspiracies of which they were convicted were actually a single conspiracy. The court discussed three Supreme Court decisions—*In re Snow*, *Gavieres*, and *Ebeling*—stating that these decisions "den[y] to the government the right to split up a single transaction into a plurality of separate indictable and punishable offenses."[239] Both *In re Snow*[240] and *Gavieres v. United States*[241] addressed successive prosecution claims and therefore provide limited

237. *See, e.g.*, Schroeder v. United States, 7 F.2d 60, 65 (2d Cir. 1925) (citing *Nielsen*, a successive prosecution case, to support the conclusion that the trial court improperly "inflict[ed] double punishment" when it sentenced the defendant on two related charges in a single trial); Murphy v. United States, 285 F. 801, 817 (7th Cir. 1923); Reynolds v. United States, 280 F. 1 (6th Cir. 1922). *See also* Matthews v. Swope, 111 F.2d 697 (9th Cir. 1940) (apparently assuming that double jeopardy protected against punishments imposed in a single proceeding, but concluding that the crimes were not the same offense and therefore rebuffing the defendant's claim). *But see* Levin v. United States, 5 F.2d 598, 600 (9th Cir. 1925) (noting in response to the defendants' double jeopardy multiple punishment argument that the protection "is not against double punishment for one offense, but against double jeopardy for the same offense").

238. 285 F. 801at 817.

239. *Id.* at 816

240. 120 U.S. 273 (1887).

241. 220 U.S. 338 (1911). Gavieres was prosecuted under a city ordinance and convicted for being drunk and intoxicated and was then prosecuted for insulting a public official, based on the same conduct. The Court rejected the defendant's double jeopardy claim because the offenses were not the same. *Id.* at 345.

support for the proposition that double jeopardy prevents multiple punishment. *Ebeling*, as a decision in which the Court assessed legislative intent to determine whether the defendant could properly be sentenced on multiple counts, was the only one of the three decisions that was on point.[242] The Seventh Circuit should have addressed only the legislative intent argument, recognizing that there is no double jeopardy protection against multiple punishment.

In *Reynolds v. United States*,[243] the Court of Appeals for the Sixth Circuit granted the defendant relief on the grounds that she had been twice punished for the same offense when she was convicted and sentenced on related charges in a single trial. The court reasoned that successive prosecution of the two offenses would have been barred and, therefore, that multiple punishment was not permitted.[244] The court cited five Supreme Court decisions, three of which addressed successive prosecution claims[245] and two of which addressed multiple punishment claims which were resolved on the basis of legislative intent.[246] None of the decisions supported the Sixth Circuit's conclusion that a bar to successive prosecution necessarily entailed a bar to multiple punishment in a single proceeding. The court's interweaving of authority on disparate issues contributed to the confusion in this area of double jeopardy jurisprudence.[247]

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242. *See* Ebeling v. Morgan, 237 U.S. 625, 629 (1915).

243. 280 F. 1 (6th Cir. 1922).

244. *Id.* at 3–4.

245. The court cited *Gavieres*, *Nielsen*, and *Burton v. United States*, 202 U.S. 344 (1906), all of which involved successive prosecution. In *Burton*, the defendant argued that double jeopardy barred his conviction following an acquittal on related charges in an earlier proceeding. The Court held that the two charges were not the same offense. 202 U.S. at 380–81.

246. The court cited *Ebeling* and *Carter v. McClaughry*, 183 U.S. 365 (1902). In *Carter*, the Court addressed a multiple punishment claim based on convictions obtained in a single proceeding. The Court resolved the case through its discussion of legislative intent, but tangled the issues of legislative prerogative and double jeopardy protection against multiple punishment.

247. *See, e.g.*, Michener v. United States, 157 F.2d 616, 619 (8th Cir. 1946) (citing *Reynolds* in resolving a double jeopardy multiple punishment claim); Krench v. United States, 42 F.2d 354, 356 (6th Cir. 1930) (citing *Reynolds* in support of the conclusion that the defendant's sentence represented "double punishment"); United States v. Hampden, 294 F. 345, 347 (E.D. Mich. 1923) (citing *Reynolds* in support of its discussion of multiple punishment).

Modern decisions perpetuate the confusion.[248] In *United States v. Morris*,[249] for example, the Tenth Circuit relied on the Double Jeopardy Clause to hold that the defendant could not properly be convicted of multiple firearms charges based on a single predicate offense. The court cited only one Supreme Court decision, *Ball v. United States*.[250] *Ball*, however, did not rest on double jeopardy; instead, *Ball* was decided solely on the basis of the Court's assessment of legislative intent.[251] The court also cited *United States v. Chalan*,[252] an earlier Tenth Circuit case, for the proposition that "multiplicitous sentences violate the Double Jeopardy Clause." In *Chalan*, the court had thoroughly entangled double jeopardy analysis with legislative intent analysis while addressing a challenge to multiple punishment.[253] Not only do these decisions perpetuate the misfounded principle that the Double Jeopardy Clause protects against multiple punishments imposed in a single trial, but they ultimately hold that legislative intent controls, thereby contributing to the dilution of double jeopardy protection.

C. Commentators

Commentators have also contributed to the confusion.[254] Like the courts, commentators have repeatedly asserted that double jeopardy protects against multiple punishment. They have cited authority that does not truly support the axiom, and have failed to evaluate its basis carefully. In doing so, commentators have played a part in establishing this axiom in double jeopardy jurisprudence.

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248. *See, e.g.*, United States v. Morris, 247 F.3d 1080 (10th Cir. 2001); United States v. Rivera-Martinez, 931 F.2d 148, 152 (1st Cir. 1991). *But see* United States v. Handford, 39 F.3d 731, 733–34 (7th Cir. 1994) (citing *Pearce* for the proposition that double jeopardy protects against multiple punishments but going on to state that "the Supreme Court has consistently held that the Double Jeopardy Clause is not implicated in instance in which a defendant is convicted under two distinct statutes in a single trial and punished with cumulative prison sentences where Congress specifically authorized cumulative sentences with respect to the two statutes").

249. 247 F.3d 1080.

250. *Id.* at 1084–85 (improperly citing *Ball*). *See also Rivera-Martinez*, 931 F.2d at 152. In *Rivera-Martinez*, the court addressed a claim that sentences imposed in a single trial violated double jeopardy, citing *Pearce* for the axiom that double jeopardy protects against multiple punishment. The court evaluated the propriety of the sentences under *Ball*, never noting that *Ball* did not rest on double jeopardy principles. *Id.* at 153. *Rivera-Martinez* has since been cited for the axiom that double jeopardy protects against multiple punishment. *See, e.g.*, United States v. Patel, 370 F.3d 108, 114 (1st Cir. 2004) (citing *Rivera-Matinez*).

251. 470 U.S. 856, 861–62 (1985).

252. 812 F.2d 1302 (10th Cir. 1987), cited at 247 F.3d at 1083 n.2.

253. *Id.* at 1315–17.

254. *See, e.g.*, Westen & Drubel, *supra* note 10; *Twice in Jeopardy*, *supra* note 14; THOMAS, *supra* note 10.

Probably the most influential commentary is a student comment published in the Yale Law Journal in 1965.[255] The comment tackled a broad range of double jeopardy questions, pulling together a wide range of authorities. This comment has proved both influential and helpful in the development of double jeopardy jurisprudence, and has been repeatedly cited since its publication.[256] With regard to multiple punishment, however, the author was guilty of careless citation. The author placed protection from multiple punishment among the central concerns of double jeopardy protection. Three rules are central to the double jeopardy prohibition: the rules which bar retrial for the same offense after acquittal, retrial for the same offense after conviction, and multiple punishment for the same offense at one trial.[257] In fact, the claim for double jeopardy protection from multiple punishment in a single proceeding was not well grounded. In support of this proposition, the author cited a number of cases that provided little support for the axiom. Some of the cases that the author cited as assuming that multiple punishment would violate double jeopardy addressed multiple punishment claims where the defendant asserted double jeopardy but the Court's resolution rested entirely on an assessment of legislative intent; others had even more tenuous connection to double jeopardy.[258] No cited case, other than *Lange*, contained an affirmative holding that the Double Jeopardy Clause protects against multiple punishment. Furthermore, *Holiday v. Johnston*,[259] which the author cites as a "but see" case, squarely raised the question of multiple punishment and stated that double jeopardy protection does not

255. *Twice in Jeopardy*, *supra* note 14.

256. *See* Westen, *supra* note 6, at 1062 ("The Supreme Court has a favorite saying about double jeopardy. The Court found the saying in a law review article, adopted it as its own in *Pearce*, and has repeated it ever since."). This article was cited in *Pearce* to support the statement that double jeopardy protects against three things, one of which is multiple punishment. North Carolina v. Pearce, 395 U.S. 711, 717 n.8 (1969). A WestLaw search reveals that the article has been cited at least eight times by the United States Supreme Court, fifty-three times in lower federal court opinions, 120 times in state court opinions, and eighty-two times in law review articles.

257. *Twice in Jeopardy*, *supra* note 14, at 265–66.

258. *Id.* (citing United States v. Benz, 282 U.S. 304 (1931) (deciding that defendant's sentence could be *reduced* even though defendant had begun to serve his sentence); Morgan v. Devine, 237 U.S. 632 (1915) (concluding the offenses were not the same based on legislative intent, but appearing to assume that multiple punishment could violate double jeopardy); Gavieres v. United States, 220 U.S. 338 (1911) (addressing a successive prosecution claim); Burton v. United States, 202 U.S. 344 (1906) (addressing a double jeopardy claim based on successive prosecution after acquittal); Carter v. McClaughry, 183 U.S. 365 (1902) (concluding offenses were not the same based on legislative intent)). The author also included a "see also" cite to *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947) (addressing a claim that attempting to electrocute the defendant a second time after the first attempt failed violated double jeopardy).

259. 313 U.S. 342 (1941).

extend to "[t]he erroneous imposition of two sentences for a single offense of which the accused has been convicted."[260]

Another influential article was co-authored by Professor Peter Westen.[261] The authors identify protection from double punishment as the reason for precluding reprosecution after conviction.[262] In support, they cite *Lange* and *Pearce*.[263] Having thus established the truth of the axiom that double jeopardy protects against multiple punishment, the authors focus on the definition of "same offense" to determine when that protection comes into play.[264] Like others, they assume that one definition of "same offense" applies to both multiple punishment and successive prosecution, an approach that dilutes double jeopardy protection from successive prosecution.

Finally, Professor George Thomas recently published a treatise on double jeopardy which can be expected to influence understanding of double jeopardy jurisprudence for years to come.[265] He too embraces the axiom that double jeopardy protects against multiple punishment.[266] Professor Thomas views double jeopardy protection as "provid[ing] legislative limits on how judges can sentence defendants."[267] Further, he argues that any double jeopardy protection from successive prosecution derives from protection against multiple punishment.[268] Indeed, Professor Thomas' whole framework of double jeopardy analysis flows from *Missouri v. Hunter*,[269] where the Court held that legislative intent governs the question of multiple punishment. Consequently, Professor Thomas advocates a double jeopardy jurisprudence based on deference to legislative intent,[270] thereby rendering protection against successive prosecution subject to the will of the legislature to fragment offenses.

Thus, commentators, like the courts, have failed to examine closely the axiom that double jeopardy protects against multiple punishments. Instead, they have treated it as an essential thread of double jeopardy ju-

260. *Id.* at 349. *See* Michener v. United States, 157 F.2d 616, 620 (8th Cir. 1946) (citing *Holiday*).

261. Westen & Drubel, *supra* note 10. A WestLaw search reveals that the article has been cited at least three times by the United States Supreme Court, twenty-one times in lower federal court opinions, thirty-seven times in state court opinions, and ninety-five times in law review articles.

262. *Id.* at 106.

263. *Id.* at 107–08.

264. *Id.* at 111–22.

265. THOMAS, *supra* note 10.

266. *Id.* at 12-16.

267. *Id.* at 15.

268. *Id.* at 16.

269. 459 U.S. 359 (1983).

270. THOMAS, *supra* note 10, at 12.

risprudence. By doing so, they have contributed to the weakening of double jeopardy protection.

CONCLUSION: THE SOLUTION

To preserve double jeopardy protection, the courts must repudiate the axiom that double jeopardy prohibits multiple punishment. Further, the courts must distinguish between the analysis appropriate for double jeopardy claims based on successive prosecution, and that appropriate for claims of multiple punishment. Although conflating the two types of analysis has not led to excessive protection against punishment, it has eroded double jeopardy protection against successive prosecution, making it vulnerable to legislative fragmentation of offenses.[271]

The Court should embrace its clear statements that double jeopardy does not protect against multiple punishment[272] and recognize that the support for the entrenched axiom that double jeopardy prohibits multiple punishment is an illusion. In part, it rests on dictum. *Lange* and *Pearce* both include language supporting the application of double jeopardy protection to punishments imposed in a single proceeding,[273] although each of the decisions addressed a far narrower question. But the axiom owes its existence to historical procedural requirements, careless citation, and imprecise language, as well as to the interweaving of decisions deferring to legislative intent to permit multiple punishment and decisions concerned with successive prosecution.

When a defendant complains of multiple punishment based on sentences imposed on related charges after a single proceeding, the courts should recognize that no double jeopardy issue arises. The key question is whether the sentence imposed comports with the legislature's intent. Thus, ordinarily, a court should address only two questions when a defendant challenges a combination of sentences imposed on charges arising from related criminal conduct. First, the court should discern whether the sentence falls within the range intended by the legislature. Second, if the defendant raises a constitutional challenge, the court may ask whether the legislatively-authorized sentence violates the prohibition on cruel and unusual punishment or due process. Ordinarily, double jeopardy protection is not implicated.

A defendant has a legitimate double jeopardy complaint of multiple punishment only when the defendant receives two punishments for the

271. *See generally* Poulin, *Protection from Successive Prosecution*, *supra* note 3.
272. *See* Section I.D., *supra*.
273. *See* Part III.A *infra*.

exact same charges, as in *Pearce*. Even the type of multiple punishment claim addressed in *Lange* should not raise a double jeopardy issue. If, as in *Lange*, the legislature authorizes either incarceration, or a fine, but not both, and the court sentences the defendant to both, the sentence does not comport with the legislative intent, and the case should be resolved on that basis, without resort to constitutional arguments. Only *Pearce* presents an example of multiple punishment arguably falling within the legislatively-authorized range yet raising double jeopardy concerns. The defendant who, having served part of the sentence, is re-sentenced and not given credit for time served, may receive a sentence within the range set by the legislature, yet ultimately serve the legislative maximum plus some additional amount when the total time served before the resentencing is added to the new sentence. That situation, which the Court held in *Pearce* would violate double jeopardy, is the only one that raises a double jeopardy issue of multiple punishment.

Once the courts refocus multiple punishment analysis in this way, their analysis of successive prosecution claims should be more robust. The first step of analysis may be the same for both, but successive prosecution claims require full constitutional evaluation. Assessment of a successive prosecution argument will often start with the same question as a multiple punishment claim, asking what the legislature intended. If the court concludes that the legislature intended the charges to be treated as the same offense, and, therefore, not to be separately prosecuted, then the court will resolve the claim by precluding successive prosecution without even reaching the constitutional issue. However, if the court concludes that the legislature intended the offenses to be separate offenses, as it generally will under the *Blockburger* test, the court should then reach the double jeopardy question and not merely defer to the legislature, as is proper when the sole question is one of punishment. Instead, understanding that successive prosecution implicates the full force of double jeopardy protection, the courts must then wrestle with the meaning of same offense. Once the courts understand that the propriety of successive prosecution is a question distinct from the question of multiple punishment and that, unlike punishment, successive prosecution threatens the core of double jeopardy protection, they will have taken a critical step toward cutting the Gordian knot of double jeopardy jurisprudence.