Double Jeopardy and Multiple Punishment: An Historical and Constitutional Analysis

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LEAD ARTICLES

DOUBLE JEOPARDY AND MULTIPLE PUNISHMENT: AN HISTORICAL AND CONSTITUTIONAL ANALYSIS

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I. INTRODUCTION

Throughout the past two decades, a dramatic increase in legislative activity has taken place at the state and federal levels of government. Much of this activity has concerned the revitalization of the several criminal codes existing in this country. Recent legislative efforts have focused upon the adoption of specialized criminal statutes that reflect the changing mores and expectations of society. The redefinition of sexual assault as contrasted with the common law notions of rape is an example of this legislative effort. Other reforms have included the update of narcotics laws, consolidation of theft offenses, revisions of the death penalty, experiments with determinate sentencing programs and an increase in the number of strict liability crimes. Indeed, to many observers, it seems that the entire fabric of the traditional substantive criminal law has been rewoven to cover a multitude of modern societal problems.

One of the major developments in this area has been the proliferation of comprehensive penal code provisions that frequently relate to a selected area of criminal law. The issues inherent in the activities of driving motor vehicles, narcotics regulation and environmental protection are examples of areas that have prompted specialized legislative treatments and codes. The multiplication of possible statutory violations has caused an individual charged under any number of these separate statutes to undergo the risk of multiple punishments.

One aspect of this problem is whether a person convicted under several separate statutes can be subjected to multiple punishments in a single proceeding when his conduct amounts to only a single criminal transaction. Until recently, it had been assumed that the double jeopardy clause of the fifth amendment¹ of the Constitution would be available as

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¹ U.S. Const. amend. V. "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ."

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a protective shield against these multiple punishments. However, the opposite conclusion was reached in a recent United States Supreme Court decision. The case was the culmination of a series of decisions by the Court which has resulted in a complete reversal of the judicial role in cases concerning multiple punishments imposed at a single trial.

This article will first attempt to demonstrate that the double jeopardy clause must be understood and judicially interpreted according to its proper historical context. Interpreted in this context, the protection against double jeopardy must be viewed as premised upon a fundamental principle which would provide constitutional protection in cases of multiple punishments arising out of a single criminal transaction. The review of the proper context of interpretation includes an initial section which reviews the pertinent Supreme Court decisions leading to the Court's present position. The following two sections describe the historical and legal contexts present during the origin and development of double jeopardy protection in England and the American colonies. Finally, a critique of the misguided thrust of interpretation is made and an alternative methodology is proposed. The alternative presented would serve similar constitutional purposes, but would result in an active role of review for the judicial branch.

II. HISTORICAL BACKGROUND IN AMERICAN CONSTITUTIONAL LAW

The first decision of the Supreme Court that provided a substantive definition of the double jeopardy clause was Ex Parte Lange. The defendant in Lange was convicted by a jury for a violation of a federal statute that prohibited the theft of mail bags. The statute carried a penalty of imprisonment for not more than one year or a fine of not more than $200. However, the trial judge sentenced the convicted defendant to one year in prison and a $200 fine. The defendant began his prison term immediately and paid the fine the next day. Upon the expiration of five days, the defendant was returned to the trial court for the purpose of vacating the prior judgment. The first judgment was vacated and the trial court sentenced the defendant to a one year term of imprisonment. The court did not seek to give the defendant credit for the fine paid, nor did the court attempt to provide reimbursement for the money paid.

The Supreme Court held that the resentencing of the defendant vio-
lated the double jeopardy clause. The Court’s definition of the clause has remained one of the most often quoted passages in the constitutional jurisprudence of double jeopardy:

If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence. And though there have been nice questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offence, or to bring the party within the jurisdiction of more than one court, there has never been any doubt of its entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offence.6

Justice Miller, writing for the Court, explored the scope of the double jeopardy clause and concluded that the protection was not limited to the misguided historical notion of successive prosecutions,6 but would properly include a protection against double punishment:

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

The argument seems to us irresistible, and we do not doubt 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.7

Despite its auspicious beginnings in Lange, the Court struggled with the task of identifying and clarifying the substantive values of double

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5. Id. at 168.

6. Sources that support a narrow interpretation of the founders’ intent to merely restrict successive prosecutions may be found at 1 J. Bishop, New Commentaries of the Criminal Law Upon a New System of Legal Exposition §§ 978-1070a (8th ed. 1892); 3 J. Story, Commentaries on the Constitution of the United States 659 (1833).

7. Lange, 85 U.S. (18 Wall.) at 173. The defendant in Lange was actually the victim of two separate violations of his right of protection against double jeopardy. The first violation was because of the trial court’s imposition of both the fine and prison term when the penalty provisions were in the alternative. The second violation occurred when the defendant was returned to the trial court and re-sentenced to a term of one year in prison when he had already satisfied the penalty provision by paying the $200 fine. In addition, the total prison sentence amounted to a year and five days because he was not given credit for time served. Id. at 175.
jeopardy. Few, if any, areas of constitutional law have been subjected to as many speculative statements over its proper interpretation and meaning as the double jeopardy clause. In the one hundred year period subsequent to Lange, the Court ranged from opinions that double jeopardy was not implicated in multiple punishment cases* to a strong indication that the clause operated as an affirmative restraint upon congressional power to impose multiple punishments for different violations arising out of a single transaction. Other cases concerning the Court's proper role in reviewing multiple punishment questions focused on the proper degree of deference to be extended to the legislature which authored the pertinent criminal law. The degree of deference varied to such an extent that the Court eventually developed the so-called "rule of lenity," a canon of statutory construction, that barred multiple punishments when the intent of Congress was unclear. A related but distinct principle of interpretation was the "unit-of-prosecution" analysis. This approach did not focus on punishment per se, but rather resolved the double jeopardy claim by divining the intent of the legislature through the descriptive terms of the statute. Perhaps the most valuable, but erratic analysis involved was the "same transaction" test. The same transaction test functioned as a fac-

8. See, e.g., Holiday v. Johnston, 313 U.S. 342 (1941). "The erroneous imposition of two sentences for a single offense of which the accused has been convicted, or as to which he had pleaded guilty, does not constitute double jeopardy." Id. at 349 (dictum); see also Ladner v. United States, 358 U.S. 169, 178 (1958).
10. Iannelli v. United States, 420 U.S. 770, 785-86 n.17 (1975) (applying the Blockburger test to a conspiracy and completed offense).
11. Bell v. United States, 349 U.S. 81 (1955). Justice Frankfurter articulated the rule of lenity as follows:

   When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. And this not out of any sentimental consideration, or for want of sympathy with the purpose of Congress in proscribing evil or antisocial conduct. It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment . . . . It merely means that if Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses, when we have no more to go on than the present case furnishes.
   Id. at 83-84.
12. The "unit-of-prosecution" case is typically one where a court draws a conclusive inference of legislative intent by reference to the statute defining the criminal act. If the act described by statute is considered "continuing," the statutory offense is amenable to only one violation and punishment. Alternatively, if the act proscribed by the statute is forbidden on a temporal or harm basis, the violator may be subject to multiple prosecutions and punishments depending upon the number of days committed or number of victims affected by the criminal act. See generally Brown v. Ohio, 432 U.S. 161 (1977) (holding that a joyriding statute was to be construed as a continuing offense and not an offense capable of being fractionated into multiple prosecutions).
13. The central aim of the "same transaction" test is to determine whether a number of
tual savings technique that was utilized to ban multiple punishment in cases of multiple statutory violations occurring during one criminal transaction.\(^{14}\)

The case of *Blockburger v. United States*\(^{15}\) has proved to be the most influential and lasting decision in the area of double jeopardy. In *Blockburger*, the Supreme Court articulated the "same evidence" test which has served as the interpretive polestar of "same offense." In determining whether a defendant may be convicted or punished when two or more statutory violations occur during a single criminal transaction, the

acts committed during a single transaction should be considered the "same" offense for double jeopardy purposes. The test is mercurial in that the focus may shift from the motivational intent of the defendant to the number of physical acts or the number of injuries suffered by society. See *Landers v. State*, 26 Ala. App. 506, 162 So. 550 (Ala. Crim. App. 1935) (violations of reckless driving and drunken driving); *Petty v. State*, 129 Tex. Crim. 20, 83 S.W.2d 995 (1935) (stolen flock of sheep owned by various individuals). *See generally 51 Harv. L. Rev. 925 (1938); Comment, Criminal Law — Double Jeopardy — Multiple Punishments — Defendant Convicted of Housebreaking and Robbery Not Entitled to Post-conviction Relief from Consecutive Sentences Where the Offenses are Found to Be Separate 43 Notre Dame Law. 1017, 1020-21 (1968); Lugar, Criminal Law, Double Jeopardy and Res Judicata, 39 Iowa L. Rev. 317 (1954).

14. The following hypothetical set of facts demonstrates the shortcomings of the test:

A person may break into a house with the intent to steal some money. He has committed the crime of burglary. As he enters he is confronted by the owner, and within seconds he shoots the owner with intent to kill him, leaves him for dead, takes the money he came after, and departs. Some of the crimes with which he could be charged are burglary, assault with a dangerous weapon, assault with intent to kill and robbery. In one sense there was a single criminal transaction, because the separate criminal acts, in the brief time in which they were committed, were unitary events since they merge one into the other. On the other hand, this general criminal act or transaction may not really be characterized as single or one, because four distinct and separate acts were committed, with distinguishing characteristics, which the legislature had the right to denominate as entirely different crimes. The same-transaction test, therefore, will not always provide a solution to the problem of when separate violations of the law constitute the same offense.


15. 284 U.S. 299 (1932). The test in *Blockburger* was derived from *Morey v. Commonwealth*, 108 Mass. 433 (1871) in which the following test was applied:

A conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other. The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.

*Id.* at 434. Ultimately, the *Morey* rule was further refined by the Supreme Court in *Gaveries v. Unites States*, 220 U.S. 338 (1911). For a discussion of the historical development of the tests for the "same offense," see *Schwartz, Multiple Punishment for the "Same Offense": Michigan Grapples With the Definitional Problem*, 25 Wayne L. Rev. 825, 828-33 (1979).
crucial inquiry is whether each offense requires proof of an element of a crime that the other does not.

Each of the offenses created requires proof of a different element. The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.¹⁶

Thus, the sole purpose of the Blockburger test was to discover whether Congress created two or more distinct statutory offenses, in law. The test was not articulated as a constitutional norm in any sense, but merely served as a canon of statutory interpretation. If the two statutes did not each contain an additional element of proof the Court would find that Congress did not “intend” for there to be double punishment for the violations.

The Blockburger test has provided the Court with the means to forego an interpretive analysis of the double jeopardy clause for over fifty years. This forbearance by the Court is due to the principle that the Court should not ordinarily pass upon a constitutional question, if there is an alternative ground upon which the case may be decided.¹⁷ However, Blockburger has been used repeatedly to conjure up legislative intent on multiple punishment where there was no evidence of expressed legislative intent.¹⁸

An example of adherence to the strictures of the Blockburger test is the case of Gore v. United States.¹⁹ The defendant in Gore was charged with six criminal counts concerning violations of certain narcotics laws as a result of two separate sales of narcotics that were two days apart. Each illegal transaction had three separate counts: 1) not “in pursuance of a written order”;²⁰ 2) not “in the original stamped package or from the original stamped package”;²¹ and, 3) the concealment and sale of the drugs with the knowledge that the drugs had been unlawfully imported.²²

Each of the three statutory violations in Gore had an additional ele-

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16. Blockburger, 284 U.S. at 304.
18. The validity of a court resorting to legislative intent in interpreting statutes is not being questioned here. However, methodology aside, the numerous references to legislative purpose or intent where a court is simply creating that intent by the developement of legal methods is spurious. In this regard, see the debate on the validity of using legislative intent as an interpretative tool at Radin, Statutory Interpretation, 43 HARV. L. REV. 863 (1930) and Landis, A Note on “Statutory Interpretation,” 43 HARV. L. REV. 886 (1930).
ment of proof that the others did not, thus, the requirements of
Blockburger were met. Although the technical portion of the "same evidence"
test was satisfied, the issue of congressional intent regarding punishment
remained for the Court to consider. The intent of Congress was ques-
tioned because conviction on three counts for one criminal act was con-
sidered to be an extremely harsh and illogical result. In light of this, the
defendant urged the Court to interpret the congressional enactments to
signify a unitary purpose to outlaw nonmedicinal sales of narcotics.43
Therefore, the defendant argued that the single purpose of Congress led
to the conclusion that an offender should be punished for only a single
offense. In rejecting this approach, Justice Frankfurter identified the con-
gressional intent:

Of course the various enactments by Congress extending over nearly half
a century constitute a network of provisions, steadily tightened and en-
larged, for grappling with a powerful, subtle and elusive enemy. If the
legislation reveals anything, it reveals the determination of Congress to
turn the screw of the criminal machinery—detection, prosecution and
punishment—tighter and tighter.44

One might agree that the passage of different criminal statutes concern-
ing the same activity evidenced an intent to severely punish those violat-
ing two or more provisions; however, the question remains as to why Con-
gress did not simply increase the possible punishment for a single
violation. Frankfurter's analysis seems even less plausible because a single
illegal narcotics transaction would probably result in multiple violations
of the criminal statutes.

The dissenting opinion of Chief Justice Warren may describe the leg-
islative intent more accurately:

Where the legislature has failed to make its intention manifest, courts
should proceed cautiously, remaining sensitive to the interests of defend-
ant and society alike. All relevant criteria must be considered and the
most useful aid will often be common sense. In this case I am persuaded,
on the basis of the origins of the three statutes involved, the text and
background of recent amendments to these statutes, the scale of punish-
ments prescribed for second and third offenders, and the evident legisla-
tive purpose to achieve uniformity in sentences, that the present purpose
of these statutes is to make sure that a prosecutor has three avenues by
which to prosecute one who traffics in narcotics, and not to authorize
three cumulative punishments for the defendant who consummates a sin-
gle sale.45

Warren's dissent appears to be the more logical and accurate approach,
but there really is no true and certain method to divine legislative intent

24. Id. (emphasis added).
25. Id. at 394 (Warren, C.J., dissenting) (emphasis added).
when it is not manifest. The Blockburger test, although essential to statutory construction in the past, has proved to be an inadequate guide for the Court in interpreting modern criminal codes that have been subject to repeated and piecemeal amendments.

In addition to the problem of statutory construction, the Supreme Court has addressed the issue of the proper role of the courts in reviewing multiple punishment cases. In three major decisions, Justice Rehnquist has repeatedly advocated an interpretation in which the double jeopardy guarantee would not be implicated if the legislature clearly intended to impose multiple punishments for multiple statutory violations occurring during one criminal transaction and tried at a single proceeding. The cases of Whalen v. United States, Albernaz v. United States and Missouri v. Hunter are the trilogy of double jeopardy cases that portend the metamorphosis of constitutional double jeopardy.

In Whalen the defendant raped and killed the victim and was convicted of the separate statutory offenses of rape and first-degree murder. The defendant was sentenced to two consecutive terms of imprisonment of twenty years to life for first degree murder, and fifteen years to life for rape. Justice Stewart, writing for a majority of the Court, held that the imposition of consecutive sentences was not authorized by Congress. The opinion stated that the defendant's claim under the double jeopardy clause could not be separated from the issue of statutory construction. Although the decision was technically based on the lack of congressional authorization to impose the sentences consecutively, Justice

29. D.C. CODE ANN. § 22-2081 (1981). "Whoever has carnal knowledge of a female forcibly and against her will . . . shall be imprisoned for any term of years or for life.” Id.
30. Id. § 22-2401. Whoever, being of sound memory and discretion, kills another purposely, either of deliberate and premeditated malice or by means of poison, or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do kills another in perpetrating or in attempting to perpetrate any arson, . . . rape, mayhem, robbery, or kidnapping, or in perpetrating or attempting to perpetrate any housebreaking while armed with or using a dangerous weapon, is guilty of murder in the first degree.

Id. 31. Whalen, 445 U.S. at 688.
32. Id. at 691. The Court interpreted section 2 of the following statute as conclusive proof that Congress did not authorize multiple punishments for two offenses arising from the same transaction unless each offense requires proof of a fact the other does not:

A sentence imposed on a person for conviction of an offense shall, unless the court imposing such sentence expressly provides otherwise, run consecutively to any other sentence imposed on such person for conviction of an offense, whether or not the offense 1) arises out of another transaction, or 2) arises out of the same transaction and requires proof of a fact which the other does not.

Id. (quoting D.C. CODE ANN. § 23-112 (1973) (emphasis added)).
tice Stewart strongly implied that such overreaching by the courts results in a violation of the double jeopardy clause.\textsuperscript{33}

Justice Stewart’s opinion reaffirmed the Court’s prior holding in \textit{North Carolina v. Pearce}\textsuperscript{34} that the fifth amendment’s guarantee against double jeopardy protects not only against a second trial for the same offense, but also “‘against multiple punishments for the same offense.’”\textsuperscript{35} According to \textit{Whalen}, the \textit{Blockburger} rule was premised upon the assumption that “Congress ordinarily does not intend to punish the same offense under two statutes.”\textsuperscript{36}

Judged by contemporary case law, the result in \textit{Whalen} is not remarkable, and could have been reached through the use of pure statutory interpretation principles. The apparent reaffirmance of \textit{constitutional} double jeopardy protection prompted Justice Rehnquist to dissent.\textsuperscript{37}

Unlike the Court, I believe that the Double Jeopardy Clause should play no role whatsoever in deciding whether cumulative punishments may be imposed under different statutes at a single criminal proceeding. I would analogize the present case to our unit-of-prosecution decisions and ask only whether Congress intended to allow a court to impose consecutive sentences on a person in petitioner’s position.\textsuperscript{38}

In stating his view that the double jeopardy clause does not restrain a legislature’s authority to provide for multiple punishments, Rehnquist wrote: “[I]t [is] clear that a legislature could, if it so desired, provide for separate punishments under two statutory provisions, even though those provisions define the ‘same offense’ within the meaning of \textit{Blockburger}.”\textsuperscript{39}

\textsuperscript{33} \textit{Whalen}, 445 U.S. at 689. The Double Jeopardy Clause at the very least precludes federal courts from imposing consecutive sentences unless authorized by Congress to do so. The Fifth Amendment guarantee against double jeopardy embodies in this respect simply one aspect of the basic principle that within our federal constitutional framework the legislative power, including the power to define criminal offenses and to prescribe the punishments to be imposed upon those found guilty of them, resides wholly with the Congress. If a federal court exceeds its own authority by imposing multiple punishments not authorized by Congress, it violates . . . . the specific guarantee against double jeopardy . . . .

\textit{Id.} (citations omitted).

\textsuperscript{34} 395 U.S. 711 (1969). In \textit{Pearce} the Court handed down a basic analysis of the protection afforded under the double jeopardy clause:

[T]he Fifth Amendment guarantee against double jeopardy . . . has been said to consist of three separate constitutional protections. [1] It protects against a second prosecution for the same offense after acquittal. [2] It protects against a second prosecution for the same offense after conviction. [3] And it protects against multiple punishment for the same offense.

\textit{Id.} at 717.

\textsuperscript{35} \textit{Whalen}, 445 U.S. at 688 (quoting \textit{Pearce}, 395 U.S. at 717).

\textsuperscript{36} \textit{Id.} at 692.

\textsuperscript{37} \textit{Id.} at 699 (Rehnquist, J., dissenting).

\textsuperscript{38} \textit{Id.} at 705-06.

\textsuperscript{39} \textit{Id.} at 708.
This view of inapplicability of the constitutional guarantee when the legislature intends to impose multiple punishments for a single act, cannot be charitably characterized as judicial deference. Rather it is more accurately regarded as a profound and unfortunate reinterpretation of a principle long accepted in this nation.\footnote{See infra notes 41-43 and accompanying text.}

Justice Rehnquist's immediate concern in \textit{Whalen} was the problems attendant to the application of the \textit{Blockburger} rule to statutes that have a predicate and compound relationship.\footnote{On the other hand, two statutes stand in the relationship of compound and predicate offenses when one statute incorporates several other offenses by reference and compounds those offenses if a certain additional element is present.} That concern is a valid one in view of the increasing number of comprehensive criminal codes of various jurisdictions. However, that concern is a weak justification for denial of all constitutional double jeopardy protection in multiple punishment cases.

An alternative approach would be to recognize the traditional legislative function in fixing the proper punishment for a statutory violation, but to limit the legislative license to the drafting of pertinent penalty provisions.\footnote{Because this Court has never been forced to apply \textit{Blockburger} in the context of compound and predicate offenses, we have not had to decide whether \textit{Blockburger} should be applied abstractly to the statutes in question or specifically to the indictment as framed in a particular case. \textit{Whalen}, 445 U.S. at 709-11.} By restricting the legislative prerogative in predicate-compound statutes, the Court could guarantee a single conviction for a single criminal transaction and thus avoid multiple punishments.\footnote{There should be no opposition to the notion that the legislature possesses a broad power to fix punishments for the variously defined criminal statutes. This power may be limited to the authoring of enhancement provisions that provide greater punishment for recidivists or those that cause a forbidden type of harm. The advantage of such a system would be the ordering of penal codes with sets of expected punishments instead of the present "search" for legislative intent by the use of questionable and unresponsive legal tests.}

\textit{Gore}, 357 U.S. at 392. Justice Frankfurter provided an excellent example of what such a statute would be in the \textit{Gore} case:

Suppose Congress, instead of enacting the three provisions before us, had passed an enactment substantially in this form: Anyone who sells such drugs except for the original stamped package and who sells such drugs not in pursuance of a written order of the person to whom the drug is sold, and who does so by way of facilitating the concealment and sale of drugs knowing the same to have been unlawfully imported, shall be sentenced to not less than fifteen years' imprisonment: \textit{Provided}, however, That if he makes such sale in pursuance of a written order of the person to whom the drug is sold he shall be sentenced to only ten years' imprisonment: \textit{Provided further}, that if he sells drugs in the original stamped package he shall also be sentenced to only ten years' imprisonment: \textit{And provided further}, that if he sells such drugs in pursuance of a written order and from a stamped package he shall be sentenced to only five years' imprisonment.

\textit{Id.}, at 392-93 (emphasis in original). The pertinent point is that while there are three possi-
Justice Rehnquist in his dissent was not searching for distinguishing characteristics of criminal statutes while maintaining adequate constitutional protection. Rather, he utilized his dissent as an introduction to his theory of judicial abstinence in multiple punishment cases.

One year later, Justice Rehnquist wrote for a majority of the Court in *Albernaz v. United States.* The defendants in *Albernaz* had been convicted of violating separate statutory provisions criminalizing conspiracies to import and to distribute marihuana. The defendants' first contention on appeal was that since congressional intent regarding multiple punishments was unclear the Court should invoke the rule of lenity in the defendants' favor. The defendants' second argument was that even if cumulative punishment was authorized by Congress, such punishment would be barred by the double jeopardy clause.

In upholding the convictions and allowing consecutive sentences, the Court, through Justice Rehnquist, held that the separate statutes prohibiting different types of conspiracies satisfied the Blockburger test despite the presence of only one conspiratorial agreement. Once again the Court reaffirmed the Whalen doctrine announced in the prior term. In stressing the limited nature of the constitutional guarantee, the Court quoted *Brown v. Ohio:* “[W]here consecutive sentences are imposed at a single criminal trial, the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishment for the same offense.”

Eschewing any constitutional relevance to multiple punishment cases and advocating judicial deference in the very strongest of terms, the Court stated: “Thus, the question of what punishments are constitutionally permissible is not different from the question of what punishment the Legislative Branch intended to be imposed. Where Congress intended, as it did here, to impose multiple punishment, imposition of such sentences does not violate the Constitution.”

The Court's deference to congressional intent brought a response from three justices who concurred in the application of the Blockburger

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47. *Albernaz*, 450 U.S. at 336.
48. *Id.*
51. *Id.* at 344.
rationale, but disagreed with the idea that Congress could provide for multiple punishments in situations where each statutory offense in question did not require the proof of an additional element.\textsuperscript{44} Implicit in the concurrence's rejection of the majority's position on congressional authorization of multiple punishment is the concept that the canon of statutory construction set forth in \textit{Blockburger} is of constitutional magnitude. Moreover, the concurring justices viewed \textit{Blockburger} as an affirmative restraint upon the legislative prerogative to define the criminal laws.

The case of \textit{Missouri v. Hunter}\textsuperscript{45} presented the Court with an opportunity to further clarify the role of the double jeopardy clause in cases where the clearly expressed legislative intent is to impose multiple penalties. In \textit{Hunter}, the defendant was convicted of the separate statutory offenses of first-degree robbery\textsuperscript{44} and armed criminal action.\textsuperscript{46} The latter violation arose from a state statute which provided that a person who committed a felony through the use of a dangerous or deadly weapon would be guilty of the crime of armed criminal action. A violation of the statute proscribing armed criminal action carried an enhanced penalty provision that required a term of at least three years in addition to the sentence incurred for the crime committed with the dangerous or deadly weapon.\textsuperscript{46}

Writing for the majority, Chief Justice Burger was obligated to follow the Missouri Supreme Court's determinations that the two statutes defined the same crime and that the state legislature intended for violators to be subjected to cumulative punishments.\textsuperscript{57} Thus, \textit{Hunter} was the ideal case to test the \textit{dictum} of Justice Rehnquist in \textit{Whalen}\textsuperscript{48} and \textit{Albernaz}.\textsuperscript{49} The facts of \textit{Hunter} presented the Court with a clear question of whether the double jeopardy clause offers any protection against multiple punishments in a single trial where the legislative intent is clearly expressed. The majority found that the clause was not implicated in cases where the punishments authorized were the result of clear legislative intent:

\begin{itemize}
\item \textit{id.} at 344-45.
\item 103 S. Ct. at 673.
\item \textit{id.} § 571.015 (originally enacted as Mo. Ann. Stat. § 559.225) provides as follows:
\begin{itemize}
\item any person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon is also guilty of the crime of armed criminal action and, upon conviction, shall be punished by imprisonment by the division of corrections for a term of not less than three years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon
\end{itemize}
\item \textit{id.}
\item \textit{Hunter}, 103 S. Ct. at 679.
\item \textit{Whalen}, 445 U.S. at 705.
\item \textit{Albernaz}, 450 U.S. at 333.
\end{itemize}
Our analysis and reasoning in Whalen and Albernaz lead inescapably to the conclusion that simply because two criminal statutes may be construed to proscribe the same conduct under the Blockburger test does not mean that the Double Jeopardy Clause precludes the imposition, in a single trial, of cumulative punishments pursuant to those statutes.

Where . . . a legislature specifically authorizes cumulative punishment under two statutes, regardless of [violating the Blockburger rule], a court's task of statutory construction is at an end . . . .60

Thus posited, the constitutional guarantee against double jeopardy is extinct in multiple punishment cases. The Supreme Court has, in its place, fashioned an interpretative rule of statutory construction with emphasis on legislative intent. Where the intent of the legislature is unclear, the Blockburger test will be utilized to invoke the rule of lenity which assumes that multiple punishments are not intended. Therefore, in cases where legislative intent is clear or unclear, the issue of multiple punishments does not raise a constitutional question.

The foregoing brief overview of recent Supreme Court decisions dealing with the double jeopardy clause in multiple punishment cases demonstrates the process of evisceration of the doctrine explicitly recognized by the court in Pearce.61 The Court has demonstrated justifiable concern over the problems associated with mushrooming criminal statutes and the modern predicate-compound statutes which function to enhance punishment. However, the result in Hunter was neither compelled by precedent or mandated by historical concerns. An understanding of the historical importance of the double jeopardy guarantee to the English common law and American colonial period is essential to a modern day interpretation of the double jeopardy clause of the fifth amendment.

III. HISTORICAL OVERVIEW

The concept of double jeopardy has an ancient heritage in the law.62 The exact origin of the idea is probably unknown, but comparative surveys of western legal thought demonstrate that the principle existed in the ancient precepts of Greece,63 Rome64 and the early Canon Law.65 The

60. Hunter, 103 S. Ct. at 679.
61. Pearce, 396 U.S. 717.
63. J. Jones, Law and Legal Theory of the Greeks 148 (1956); see also I Demosthenes 589 (J. Vince trans. 1962) wherein he stated: "Now the laws forbid the same man to be tried twice on the same issue, be it a civil action, a scrutiny, a contested claim, or anything else of the sort."
64. Dig. Just. 48.2.7, reprinted in I Corpus Juris Civilis 17 (A Scott trans. 1973). The Digest of Justinian provides that "[t]he governor should not permit the same person to be
contours of early double jeopardy theory are by no means exact, and the numerous substantive and procedural variations of western criminal law have produced several specialized roles concerning its applications. Regardless of the historical diversity, there exists a central underlying reason for the emergence of double jeopardy protection in western criminal jurisprudence. That fundamental principle is the belief that a person convicted of a criminal offense should be punished only once for his transgression. However, one must recognize this humanitarian instinct of limiting punishment prior to a consideration of the evolution or development of double jeopardy. Likewise, an examination of the purposes and uses of double jeopardy in English law is a necessary predicate to the appreciation of its development in American jurisprudence.

a. Early English Development

The indeterminate quality of double jeopardy jurisprudence present today can be traced back to the landmark dispute between Henry II and Archbishop Thomas Becket.69 Shortly after the murder of Becket, the King acknowledged the validity of an important clerical position and that the ecclesiastical courts retained jurisdiction over members of the clergy. Thus, the clergy were tried and punished solely by the ecclesiastical courts without the risk of a second trial and additional punishment from the King’s Courts.67 This historical incident is of particular importance

again accused of a crime of which he has been acquitted.” Id. Perhaps even more pertinent to this inquiry is the statement of the leading Roman jurist Paulus regarding the duties of the proconsul. “The Senate decreed that no one can be accused of the same crime under several laws.” DIGEST 482.14, reprinted in 11 CORPUS JURIS CIVILIS 20 (A. Scott trans. 1973); see also M. RADIN, HANDBOOK OF ROMAN LAW 475 n.28 (1927).

65. See Sigler, History, supra note 62, at 283-84 which quotes reading given by St. Jerome to I Nahum 9 in 391 A.D. which stated “there shall not rise up a double affliction.” The degree of influence exerted by the church in shaping the western European criminal law has always been uncertain. However, the fact of that influence is beyond question. This attitude of the early church was probably brought about by the western nations’ inability or refusal to deter the more sanguinary actions of their citizens. See also H. MAINE, ANCIENT LAW 383 (5th ed. 1874).

66. The controversy between Henry II and Becket arose from the issuance of the Constitutions of Clarendon wherein Henry submitted that ecclesiastical clerks charged with felonious offenses should initially be brought before the King’s courts. After the defendant established that he was an ecclesiastical clerk, he would be transferred to the ecclesiastical court for trial. If he were adjudged guilty, he would suffer the ecclesiastical penalty of degradation and then be transferred to the King’s Court for further punishment pursuant to the law of the crown. Becket objected to this procedure because it diminished the importance and independence of the ecclesiastical courts and clergy and violated the maxim Nemo bis in idipsum—man should not be punished twice for the same offense. See F. MAITLAND, ROMAN CANNON LAW IN THE CHURCH OF ENGLAND 132-47 (1898); Cheney, The Punishment of Felonious Clerks, 51 ENG. HIST. REV. 215, 222 (1936); 1 F. POLLOCK & F. MAITLAND, A HISTORY OF THE ENGLISH COMMON LAW 439 (2nd ed. 1899).

67. F. POLLOCK & F. MAITLAND, supra note 66, at 448; Cross, The English Criminal Law and Benefit of Clergy During the Eighteenth and Early Nineteenth Centuries, 22 AM.
for two reasons. First, it marks the initial recognition of double jeopardy at common law.68 Second, and more important, is the depth and understanding of underlying humanitarian values and jurisprudence of Becket's argument. However, the vast majority of historians consider Becket's argument against multiple punishments to be highly technical and weak because the punishments of the ecclesiastical courts were consistently less severe than the King's Courts. Because the insufficiency of the punishment was clear arguably additional punishment of the individual by the King's Courts should not be barred.69

However, research has indicated that several types of punishment assessed by the ecclesiastical courts were extremely harsh. These punishments ranged from abjuration from the realm70 to flogging.71 While these punishments may not be considered as exacting or onerous as death, it is clear that they were sufficient to accomplish the traditional purposes of punishment.72 Becket's argument is particularly important because it sets forth a jurisdictional premise previously unstated in England. The premise that when a court of competent jurisdiction had secured a conviction upon a defendant, an additional trial was forbidden because of the prior conviction. The extent or severity of the punishment was a matter for the initial tribunal's procedure, and was irrelevant for common law double jeopardy purposes.

It is instructive to recognize that even in medieval times, the parameters of double jeopardy were expanding with societal and jurisprudential changes. Considering the nature of the dual court system existing in early England, it seems obvious that the basic notions of fairness that underlie double jeopardy somehow take into account the procedural complexities of the era. Although the resulting chronicle is erratic because of political

68. M. FRIEDLAND, supra note 62, at 5. A discussion of how the principle of double jeopardy was derived from the continent and canon law may be found at Note, Double Jeopardy and Dual Sovereigns, 35 IND. L.J. 444, 446 (1960); see also F. POLLOCK & F. MAITLAND, supra note 66, at 454.

69. F. POLLOCK & F. MAITLAND, supra note 66, at 449, 454. Maitland wrote that: "The sole question is as to whether degradation—a punishment which can be inflicted only by the ecclesiastical court—is a sufficient penalty for such a crime as murder." MAITLAND, supra note 66, at 136.

70. A. POOLE, FROM DOMESDAY BOOK TO MAGNA CARTA 1082-1216, at 206 n.4 (2d ed. 1955) [hereinafter cited as A. POOLE]; Poole, Outlawry as a Punishment for Criminous Clerks, in HISTORICAL ESSAYS IN HONOUR OF JAMES TAIT 239 (1933).

71. A. POOLE, supra note 70, at 203.

72. Apparently, the emphasis upon the retributive aspects of punishment was greater at common law. At any rate, the severity of ecclesiastical punishment would obviously constitute a violation of the eighth amendment's proscription against cruel and unusual punishment. The more modern goals of punishment as rehabilitation, education and general deterrence were not foremost in the minds of common law writers. See generally W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 21-25 (1972); G. FLETCHER, RETHINKING CRIMINAL LAW 409-14 (1978); H. HART, PUNISHMENT AND RESPONSIBILITY (1968).
and legal turmoil, the importance of Becket's argument cannot be discounted. His argument was the first statement which maintained that the protection required in multiple punishment and multiple conviction cases be both flexible and evolutionary. The issues intrinsic in these matters are capable of resolution only through an appreciation of the procedural and substantive questions presented. Thus, the inception of common law double jeopardy was marked by the recognition that an individual's protection against the forces of government must be sufficient to respond to the dangers and realities of the existing legal system.

The use of double jeopardy at common law has not been documented by any historian in a manner that would indicate the theory enjoyed a widespread acceptance. Rather the historical narrative is replete with incidents that could be interpreted to indicate that double jeopardy was not accepted as a fundamental right nor even an important right in early English history. However, this is a simplification of a series of unrelated and complex events.

The first peculiarity of early common law that must be recognized is that the civil and criminal laws were not segregated. There was a sufficient amount of disorganization between the substantive doctrines and procedures of civil and criminal practice to warrant a belief that the law existed in a state of confusion. Additionally, early common law did not permit an individual victim to bring an action against a felony defendant even if he were able to demonstrate a special harm, because the accused may have suffered a type of double punishment with a probable damage payment to the victim and a sentence from the King's Courts. It proved difficult, if not impossible, to accurately draw the contours between the civil and criminal doctrines existing in the hybrid system.

Perhaps even these problems did not diminish the natural growth of double jeopardy doctrine as much as the acts of the individual reigning monarch. Henry VII's reign witnessed the emergence of a statute which provided that an immediate prosecution by the crown was proper in homicide. The statute further provided that the defendant could be bound over for a second trial by a private accuser at common law. At

73. *See infra* notes 76-83 and accompanying text.

74. J. Sigler, *supra* note 62, at 7, 11; *see also infra* notes 96-98 and accompanying text.

75. It appears that there existed an early common law rule which forbade a victim from suing in tort if the complained interference amounted to a felony. The rationale given was that the tort was considered to be subsumed in the felony. However, the more practical reasons were that the King confiscated the property (including any stolen goods) of the defendant, and the defendant-felon was executed. This "rule" has been termed illogical and should have been construed as merely suspending the right to sue in tort, rather than absolutely abrogating the civil right. The suspension would be effective until the defendant was prosecuted for the felony. The English courts have continued and compounded this error for over three hundred years. *See* 3 W. Holdsworth, *A History of English Law* 331-36 (3d ed. 1923).

76. 3 Hen. VII c.1.
common law an appeal of this nature would have been barred upon a plea of autrefois acquit.\textsuperscript{77} Whether it was by statute, or by simply ignoring the law,\textsuperscript{78} it is clear that some English rulers were not imbued with the requisite humanitarian qualities that would result in the expeditious maturation of double jeopardy theory.

Therefore, the apparent lack of a cogent approach to the double jeopardy doctrine for over three hundred years at early common law can be explained on grounds other than the assertion that it was unimportant or nonfundamental. The absence of early development is directly traced to a hybrid and confused system of archaic justice and a series of royal acts that exhibited both an arrogance and disdain for its principle.\textsuperscript{79} This type of action by the crown may have contributed to the idea that double jeop-

\textsuperscript{77} 4 W. BLACKSTONE, COMMENTARIES *335. Blackstone described the plea of autrefois acquit as being
grounded on this universal maxim of the common law of England, that no man is
to be brought into jeopardy of his life more than once for the same offence. And
hence it is allowed as a consequence that when a man is once fairly found not
guilty upon any indictment or other prosecution, before any court having com-
petent jurisdiction of the offense, he may plead such acquittal in bar of any subse-
quent accusation for the same crime.


\textsuperscript{78} In addition to the murder of Becket, Henry II committed abuses of the contempt power against Becket. \textit{See A. POOLE, supra note} 70, \textit{at} 207. For a particularly interesting account of Henry's use of extortion \textit{see} N. PAIN, \textit{THE KING AND BECKET} 119-22 (1966).

The documented transgressions of various English monarchs and their disdain for certain legal principles have been amply documented. However, research tends to support a view that they were particularly truculent towards the early church and its position that secular courts could not pass sentence upon clerics. This early position of the church was one of the basic foundations of double jeopardy, and received a mere modicum of respect from the monarchs when the occasion demanded.

Henry IV ordered Sir William Gascoigne, Chief Justice of the King's Bench, to pass a sentence of death on Archbishop Scope for his activities in support of a minor rebellion. The Chief Justice resigned rather than violate the clear precept of the law, but to little avail. The Archbishop was executed after the newly appointed Chief Justice ordered the sentence. E. JACOB, \textit{THE FIFTEENTH CENTURY} 1399-1485, \textit{at} 59-61 (1961).

\textsuperscript{79} M. RADIN, \textit{ANGLO-AMERICAN LEGAL HISTORY} (1936). The King was empowered to operate in two distinct methods in prosecuting individuals accused of offenses against the crown. The first was through a prosecution wherein the defendant "never saw the indictment until it was read to him. He could call no witnesses on his behalf. He was not permitted to have counsel. It is small wonder that in England, just as on the Continent, accusation was practical conviction. Acquittals were extremely rare." \textit{Id.} \textit{at} 228-29; \textit{see also} 9 W. HOLDsworth, \textit{supra note} 75, \textit{at} 229.

The second method of proceeding against an accused was through the inquisitory process employed in the Star Chamber. The statute of "Authority of Court of Star Chamber" banned the use of the plea of autrefois acquit and the proceedings were prosecuted with the suspension of the few available safeguards of the common law. A more detailed description of the process employed in the Star Chamber may be found at 5 W. HOLDsworth, \textit{supra note} 75, \textit{at} 178-97.
ardy originally existed to reduce the danger of governmental tyranny in whatever form it would appear.\textsuperscript{60}

Following the early development of double jeopardy in England came a period of approximately four hundred years where the common law pleas of double jeopardy\textsuperscript{61} were raised and considered by the English courts in a variety of contexts.\textsuperscript{62} However, no remarkable evolutionary surge of the doctrine occurred which demonstrated widespread use of the pleas in the criminal system of England.\textsuperscript{63} This historical omission has led some authorities to conclude that a wider concept of double jeopardy protection\textsuperscript{64} is clearly non-fundamental in the American scheme of criminal justice.\textsuperscript{65} However, obvious reasons exist that explain why double jeop-

\textsuperscript{80} The use of the term "fundamental" as used herein should be interpreted to mean the basic or primary motivation for having this type of protective shield from governmental power. It cannot be said the "fundamental" aspect of the plea is grounded in a particular type of procedural guarantee. If one understands the primary purpose of double jeopardy protection to be based on the concept of variable procedures, the underlying idea of protection can become largely metaphysical when an improved procedure is utilized. Some commentators have suggested that "improved trial procedure and diminished danger of governmental tyranny have obviated the danger of repeated prosecutions for the same crime, [therefore] the original basis for the doctrine no longer exists." Note, Double Jeopardy and the Multiple-Count Indictment, 57 Yale L.J. 132, 133 (1947) (emphasis added). See generally Comley, Former Jeopardy, 35 Yale L.J. 674 (1926).

The more correct definition of "fundamental" would include the erection of protective safeguards against any type of governmental procedural or substantive device which would threaten to punish an individual twice for the same offense. For example, the greater procedural advantages enjoyed by criminal defendants in modern times really has no relevance to the proliferation of different offenses in penal codes which can be utilized against a defendant to inflict multiple punishments for one basic act of misconduct. At the very least, these statutorily distinct offenses provide the prosecution with an unconscionable degree of leverage in plea bargaining.

\textsuperscript{81} This period of history is traced in Sigler, History, supra note 62, at 290-95.

\textsuperscript{82} Sigler relates that the plea of former acquittal was used in a civil case that involved the prior accord and satisfaction of a sum of money owed because of a wrongful assault. Although the judicial proceeding had criminal overtones, it technically constituted a civil case. Moreover, there exists some authority that the early commentators of English law, such as Bracton and Britton, were aware of the principle of double jeopardy. Id. at 290.

\textsuperscript{83} See id. at 291. At least one commentator has disagreed and stated: "By the thirteenth century England recognized double jeopardy as a universal maxim of the common law." Note, Double Jeopardy: Its History, Rationale and Future, 70 Dick. L. Rev. 377, 380-81 (1966). Depending upon one's definition of "universal maxim," one could vigorously disagree with such a broad statement. It would be difficult to believe that such a "universal" maxim would not have been employed more often by defendants or even chronicled by writers during this period.

Again, the preferred view is that the underlying concept of some type of freedom from governmental tyranny through repeated prosecutions and multiple punishments existed. To maintain that this amorphous concept had formed into a maxim of the common law is both unnecessary and limiting. Fashioning, with the benefit of hindsight, a maxim of the common law which dealt with archaic procedures only invites a myopic and narrow construction of the underlying concept by modern courts. See Gore, 357 U.S. at 386.

\textsuperscript{84} See generally M. RADIN, supra note 64.

\textsuperscript{85} In Whalen, 445 U.S. 684, Justice Blackmun emphasized, in a concurring opinion,
ardy pleas were not utilized to a greater degree.

The criminal procedure of England during the period in question was premised upon a complicated system of jurisdiction. 66 Several courts of the Middle Ages exercised criminal jurisdiction upon an alleged delegation of authority from the King. 67 These courts are probably unknown to the vast majority of American jurists, but were an integral part of the English system of justice. 68 Written reports from these courts are extremely rare, and scholars customarily rely on the writings of Bracton, a noted English jurist to gain an insight to these courts. However, an au-

that he interpreted the double jeopardy clause in an extremely narrow fashion and would accordingly be guided by the intent of the legislature in assessing the constitutionality of multiple sentences. "The only function the Double Jeopardy Clause serves in cases challenging multiple punishments is to prevent the prosecutor from bringing more charges, and the sentencing court from imposing greater punishments, than the Legislative Branch intended. It serves, in my considered view, nothing more." Id. at 697 (emphasis in original).

The role of the double jeopardy clause foreseen by Justice Blackmun is such a reduced and impotent constitutional safeguard that it is of dubious value. One can not discern any additional protection advanced by that clause of the fifth amendment. The same result would lie in any conceivable fact situation if reliance were placed on the ordinary canons of statutory construction or the principles of common law.

86. The Middle Ages brought a communitas jurisdiction to England. The concept of jurisdiction was centered upon the notion of proprietary rights and customarily served the dual functions of identifying the tenure of lands with the appropriate social caste, and of reinforcing the societal bonds that joined the community together in a series of legal expectations. 3 F. Pollock & F. Maitland, supra note 66, at 527.

A succinct description of the relationship between the court systems follows:

- For the purposes of temporal justice England is divided into counties; the county is divided into hundreds; the hundred is divided into villas or townships. The county has a court, the hundred has a court, the vill or township as such, has no court; but the vill is an important unit in the administration of the law. Again, the vill is very often coincident with a manor and the manor has a court.

Id. at 529.

The criminal jurisdiction of the county court was nominally limited. However, it did possess the power to hear some of the "initial proceedings" in criminal cases. Id. at 530.

The hundred court had a bit more power to entertain criminal matters. The sheriff would make his semi-yearly pilgrimage through the hundreds and gather information or "presentments" against various accused persons. Minor offenses were adjudged immediately, and the more serious offenses were referred to the King's justices. Id. at 530. For a list of the more common crimes, see id. at 559.

The seignioral courts comprised a scattered system of local courts that consisted of both the feudal and franchise courts. The franchise courts were directly empowered from a grant of the King. These courts usually exercised wide criminal jurisdiction with the lord having the right to inflict capital punishment in appropriate felonies. Id. at 530, 577.

The borough courts also exercised the basic type of criminal jurisdiction. This power was that of infangthief and utfangthief which allowed these courts to punish criminals caught in the act. Id. at 644. It is obvious that this jurisdiction would not normally implicate any question of double jeopardy because of the requirement of being caught in the act. One could surmise that the only possible way for a double jeopardy issue to arise would be the intentional double infliction of punishment upon an individual once convicted.

87. 1 F. Pollock & F. Maitland, supra note 66, at 528.
88. See generally 3 F. Pollock & F. Maitland, supra note 66; see also note 86.
authority on English law notes that interpreters and historians of this period should be extremely cautious in relying on the sparse records available:

The most important of all customs is the custom of the kings court. The custom may be extended by analogical reasoning; we may argue from one case to another case which is similar though not precisely similar. On the other hand we should be assigning far too early a date for our modern ideas, if we supposed that the law of the thirteenth century was already "case law," or that a previous judgment was regarded as "a binding authority," it would but be an illustration of the custom of the court. Bracton achieved the marvellous feat of citing some five hundred cases from the judicial rolls. But Bracton stands quite alone; his successors Fleta and Britton abbreviate his work by omitting citations. By some piece of good fortune Bracton, a royal justice, obtained possession of a large number of rolls . . . . Those who know what these records are like will feel safe in saying that even the king's justices can not have made a habit of searching them for principles of law. Again, we may see that Bracton had not our modern notions of authority. 89

The "fundamental" concept of modern double jeopardy embraces four distinct common law pleas in bar, the pleas of auterfoits acquit, 90 auterfoits convict, 91 auterfoits attain 92 and pardon. 93 Each of these pleas

89. 1 F. Pollock & F. Maitland, supra note 66, at 183.
90. 2 W. Hawkins, supra note 77, at 368. The plea of auterfoits acquit (former acquittal) constituted the first plea of the four that combined to form the modern concept of double jeopardy. Hawkins described the plea as being "grounded on this Maxim, That a Man shall not be brought into Danger of his Life for one and the same Offence, more than once." Id.

Blackstone adopted this wording and added the notation that the maxim to which Hawkins referred was universally accepted at common law. "[T]he plea of auterfoits acquit . . . is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence." 4 W. Blackstone, supra note 77, at 335. Blackstone was also the first legal commentator to begin the use of the term "jeopardy."

91. 2 W. Hawkins, supra note 77, at 377. The plea of auterfoits convict (former conviction) was based upon the premise that multiple punishment for the same act was unjust. "The Plea of Auterfoits convict, seems chiefly to depend on this Reason, That the Party ought not to be brought twice into Danger of his Life for the same Crime." Id.

This bar to subsequent prosecution remained valid even though the crimes were different, but the act was the same. Blackstone's example is that a conviction of manslaughter would be a successful bar to a subsequent indictment on murder. In addition to the plea focusing increased attention upon the facts surrounding the criminal conduct, it was also utilized where the first sentence had been suspended. 4 W. Blackstone, supra note 77, at *336.

92. The plea of auterfoits attain has long since lapsed into disuse in England. However at the time in question, the plea was used whenever a defendant had been previously found guilty of a felony and sentenced to death. The convicted defendant was thus referred to as having been "attainted" of a felony by judgment of death. Since it would be absurd to sentence him to death again, the common law provided for this peculiar plea in bar. 2 W. Hawkins, supra note 77, at 375; 4 W. Blackstone, supra note 77, at *336.

93. The plea of a pardon at common law was the most complicated and abused of the
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constituted a part of the common law procedure in the courts having criminal jurisdiction. The hybrid nature of the legal process, coupled with official abuse of settled doctrines and the lack of judicial records have contributed to the misunderstanding of the practice and procedure of double jeopardy in the Middle Ages. Moreover, the procedural division of the early concept into four technical pleas has hampered the realization that the basic principle of double jeopardy protection is to afford protection from the risk of being tried or punished twice for the “same offense.”

If one looks past the technical aspects of the pleas, and focus upon the policies upon which they were based, it is apparent that there existed a flexible theory of jurisprudence underlying the procedures. No historian has been able to chart the parameters of the underlying theory due to the interest in documenting the technical quirks of early English law.

Moreover, it is difficult to believe that the criminal court system of early England was concerned with the disclosure of the pleas available to an accused. The early common law criminal courts were characterized by an inquisitorial type of procedure. The defendant was not entitled to counsel and the court functioned as both the grand inquisitor and the defendant’s counsel. The central thrust of the several local courts’ exercise of criminal jurisdiction was the resolution of the accusation against the accused and an involvement of the local community in the trial of the case. Given these overriding purposes in the context of an embryonic, but stagnated procedural system, it is small wonder that scant demonstrable documentation exists revealing that the pleas of double jeopardy were being used in volume.

One must not be overly impressed by the absence of these pleas in the available records. Until the late Middle Ages development of English criminal law was stagnant. There were political and social factors that inhibited the growth and development of criminal law. The absence of

pleas in bar. The legal effect of the pardon was to nullify the purpose of the indictment by remitting any possible punishment in the case. For a thorough survey of the procedure of granting pardons see 2 W. HAWKINS, supra note 77, at 380-99; 4 W. BLACKSTONE, supra note 77, at *337-38.

94. The early common law practice of pleading was characterized by the victim orally pleading his case by accusing the defendant in open court. This was termed an “appeal.” If the defendant were a man of power or prestige, the criminal action was typically begun by an indictment. This entire system was an inquisitorial foray into the facts of the case.

The pleadings of the parties led up to some one of many modes of proof which might be either selected by the parties or adjudged by the court. How those modes of proof worked it was impossible to enquire. All the legal interest of the case was centered in the questions which led up to the award of proof.

3 W. HOLDSWORTH, supra note 75, at 612. See generally M. KNAPPEN, CONSTITUTIONAL AND LEGAL HISTORY OF ENGLAND 184-86 (1942); J. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 67-71 (2nd ed. 1979).

95. M. RADIN, supra note 79, at 228-29, 236-38; 3 W. HOLDSWORTH, supra note 75, at 616, 618; 9 W. HOLDSWORTH, supra note 75, at 223-36.
statutes or codes combined with the adherence to many antiquated legal concepts produced an impediment to a thoughtful and progressive ripening of legal doctrine in general, and double jeopardy in particular. The weak central government failed to accomplish any notable liberalization of the procedures. Unfortunately, the English government appeared to be more interested in the "king's rights to escheats and forfeitures and the chattels of felons . . . almost as much as the due maintenance of law and order." [97]

Double jeopardy in the Middle Ages can best be characterized as a principle of profound justice and fairness that had not yet assumed the position of a fundamental principium of law with widespread acceptance and use. It remained in this position until the reform and categorization of common law and case law in the mid-Seventeenth Century.

The leader of this reform movement was Sir Edward Coke. Lord Coke's famous Institutes remains the singular most impressive attempt to unify the existing laws of England. The writings of Coke have been harshly criticized by modern English jurists trained in analytical jurisprudence. Much of Coke's legal analysis is thought to be historically bound to the outmoded Middle Ages legal concept that placed no emphasis upon reason and utility. [98]

Despite the criticism of a lack of analysis and structured reasoning, the Institutes reflect Coke's gifted literary style of strong advocacy. Once he had set his mind on a particular subject, he would combine his own enormous energies and opinions with a collection of historical anecdotes and questionable authorities. While his writings were accepted without question as the most definitive statement of English law at the time of publication, historians and critics have clearly demonstrated

96. 3 W. Holdsworth, supra note 75, at 276-77. Two particular concepts that influenced the English common law were Benefit of Clergy and the institution of Sanctuary and Abjuration. These protections were derived from ecclesiastical law and may be profitably examined for comparisons. Id. at 293-306.

97. Id. at 277-78. Holdsworth carefully describes the problems encountered at common law as being peculiar to the jurisprudence of crimes. The law of torts showed greater development by the growth of the writ practice. More importantly, the jurisprudence of torts demonstrated an increased judicial accessibility and sympathy toward suitors. The judicial response was largely the result of the institutional jealousy of the newly emergent powers of the Chancellor and the courts.


99. See 5 W. Holdsworth, supra note 75, at 481 for a summary of some of the criticisms of Thomas Hobbes toward the reasoning of Lord Coke. For an interesting statement of support for Coke's works as a more legitimate authority than Blackstone, see E. Jenks, A Short History of English Law 196 (2nd ed. 1922). For further criticisms see C. Bowen, The Lion and the Throne 514-15 (1957).

100. 5 W. Holdsworth, supra note 75, at 474; J. Baker, supra note 94, at 165; C. Bowen, supra note 99, at 510-13.

101. 5 W. Holdsworth, supra note 75, at 472; H. Lyon & H. Block, Edward Coke, Oracle of the Law 345 (1929); E. Jenks, supra note 99, at 196.
that his writings were plagued with inconsistencies and statements based on insubstantial authorities.\textsuperscript{102}

These shortcomings have prompted one commentator to state that "[t]o a considerable degree, Coke improvised the law of double jeopardy."\textsuperscript{103} Such a harsh condemnation appears unwarranted considering the available facts.\textsuperscript{104} Coke was accurate in his narrative of the available pleas to bar a double prosecution. The peculiar inconsistency in his statements on double jeopardy concern the plea of _auterfoitz acquit_\textsuperscript{105} or former acquittal.

And albeit at this day in an appeal of Death, _auterfoitz acquite_ upon an indictment of the same death is no bar, yet in an indictment of Death, _auterfoitz attaint de mesle le mort_ in an Appeal is a good bar.

In an Indictment or Appeal of Death, if it be found that he killed him in his own Defence, he is acquitted of the felony for ever.\textsuperscript{106}

Reconciliation of this statement with the idea that a plea of former acquittal was a bar to a subsequent conviction is facially difficult. However, if one considers that Lord Coke believed that technically accurate pleading was the "touchstone of the true sense of the law,"\textsuperscript{107} his preoccupation and insistence on the use of the proper plea in bar makes the statement more understandable. While this may be thought to be evidence of an inconsistency, the more probable reference is to Henry's Stat-

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\textsuperscript{102} 5 W. Holdsworth, _supra_ note 75, at 475.
\textsuperscript{103} In the first place, the many causes which he advocated in the course of his long life were not always consistent with one another . . . . His work therefore is disfigured by inconsistent statements; and it is for this reason that it is difficult . . . to pin him down to any particular theory.
\textsuperscript{104} [T]his mental defect tended to make him very uncritical in the use of his authorities, and even led him to misrepresent their effect. He always seems to be arguing a case . . . .
\textsuperscript{105} Sigler, _History_, _supra_ note 62, at 296.
\textsuperscript{106} Holdsworth points out that Coke was extremely accurate in his account of non-political matters, but he was responsible for incorporating his political opinions into his works. Coke's career traveled to the extreme ends of the jurisprudential world. His initial strict view of criminal law led to a deserved reputation for being a vigilant champion of the King's justice. After his appointment to the Court of Common Pleas and King's Bench, he began to espouse the cause of the common law and Parliament. This position was responsible for his ultimate removal and imprisonment for seven months. His views on double jeopardy were published posthumously because he feared further imprisonment by the King. Whether his views on double jeopardy were influenced by his politics may never be accurately established. However, his writings on double jeopardy do not indicate that they were subject to his politics. See generally 5 W. Holdsworth, _supra_ note 75, at 471, 477; J. Baker, _supra_ note 94, at 455.
\textsuperscript{107} For a description of the plea of former acquittal, see _supra_ text accompanying note 90.
\textsuperscript{106} E. Coke, _supra_ note 98, at 213-14.
\textsuperscript{107} 5 W. Holdsworth, _supra_ note 75, at 461 citing Coke's statement in the preface of his _Book of Entries._
\end{flushright}
ute and an exception in an appeal of death.\textsuperscript{108} Without questioning Coke's motives or his unchallenged account, double jeopardy law in England was in a state of acceptance and refinement, yet remained hampered by the technical requirements of common law pleading.

Lord Coke's \textit{Institutes} and related writings\textsuperscript{109} are important not only as a statement of the existing status of English double jeopardy law, but also because they were a significant departure from the desultory narration of the law through case reports in Year Books. Coke's writings symbolize the modern technique of a "restatement" of the law citing cases as authority. That Coke's opinions occasionally blend with the black letter of the restated law should be no surprise to any scholar of the era.

The compilation and analysis of common law remained in a state of development for the next one hundred years with sporadic improvements upon the commentaries of Coke. Subsequent common law authors utilized a more refined legal reasoning process. Sir William Hawkins published his \textit{Treatise on the Pleas of the Crown}\textsuperscript{110} in 1724 which included an analysis of double jeopardy that placed less emphasis on the erratic case method of common law jurisprudence. Hawkins' use of legal reasoning and criticism demonstrates that early English authors of jurisprudence had the capability and duty to exercise a rhetorical dialectic in search of the purpose and scope of the law.

Exemplary of the search for the purpose and scope of the law is Hawkins' examination of the plea of \textit{auperfois acquit}:

But if a Man steal Goods in one County, and then carry them into another, in which Case it is certain that he may be indicted and found guilty in either, it seems very reasonable, that an Acquittal in one County for such Stealing may be pleaded in Bar of a subsequent Prosecution for the same Stealing in another County . . . and therefore if he could not bar the second Prosecution by the Acquittal on the first, his Life would be twice in Danger from that which is in Truth but one and the same Offence, and only considered as a new one by a mere Fiction or Construction of Law, which shall hardly take Place against a Maxim in Favor of Life.\textsuperscript{111}

This simple statement marks a significant attitudinal change in double jeopardy. Hawkins typically provides a reasoned analysis of a legal proposition and effectively balances the corresponding interests in a manner which requires recognition of a foundational basis for double jeopardy. This methodology is superior to the procedural emphasis of Coke's treatise.

Moreover, Hawkins clearly explains the basis of Coke's questionable

\textsuperscript{108} See supra note 76 and accompanying text.
\textsuperscript{109} A concise summary of Coke's writings may be found at H. Lyon & H. Block, supra note 101, at 335-55.
\textsuperscript{110} See supra note 76 and accompanying text.
\textsuperscript{111} 2 W. Hawkins, supra note 77, at 370.
statement regarding the ineffectiveness of a plea of former acquittal is an appeal of death. The research of Hawkins reveals that Coke was undoubtedly referring to Henry VII's special statute that did not provide for double jeopardy protection in homicide cases. Hawkins' commentary states that Henry's Statute was a product of the Crown's power and constituted a derogation from the common law rule.

The most publicized of all English writers was Sir William Blackstone. His Commentaries constitute a thorough compilation of the English law at the time of publication in 1765. However, Blackstone made no significant contribution to the law of double jeopardy. In fact, Hawkins' treatment of double jeopardy appears to be a more thorough and extensive commentary.

Blackstone's Commentaries, written in a concise style, is easier to read and analyze. Consequently, citations to his work are incredibly voluminous especially by authors who have written on the subject of double jeopardy. There is a tendency to regard the work of Blackstone as the indispensable element of cohesion in the attempt to understand early double jeopardy theory. In reality, the criminal law and procedure of Blackstone's era remained plagued by the identical problems of the Middle Ages. The evolution of common law rules was particularly difficult because no attempt was made to integrate them with the statutory additions to the penal laws.

112. Id. at 373.
113. Id. at 373-74.

It seems agreed, That by the Common Law an Acquittal on an Indictment might be pleaded in Bar of an Appeal of Death, in the same Manner as an Acquittal of any other Felony might be pleaded in Bar of a subsequent Prosecution, and therefore in Favour of Appeals a general Practice was introduced, not to try any Person on an Indictment of Death, till after the Year and Day has been passed . . .

114. W. BLACKSTONE, COMMENTARIES.

117. 11 W. HOLDsworth, supra note 75, at 581.

[T]he English criminal law and procedure . . . were gravely defective. The law was chaotic; the procedure . . . was in many respects very faulty; the punishments were sometimes barbarous . . . These grave defects were due mainly to two . . . features of the eighteenth-century government—first its constitutional character, and . . . its administrative weakness.

Id. at 583.

No change in or addition to the criminal law would be made except by statute. The result was that to the common law principles . . . there was added a mass of statutes . . . [A] branch of the law which ought to be especially clear was both confused and unsystematic. It was difficult to know and difficult to apply . . .
Prior to consideration of double jeopardy in America, it must be understood that Blackstone’s brief summary\textsuperscript{118} of practice is not dispositive of the underlying theory of double jeopardy. The “fundamental” character of double jeopardy in England was extremely straightforward. Its primary purpose was to safeguard against governmental tyranny and the threat of multiple prosecutions and punishments. Unfortunately, full development of that ideal was not realized because of the Crown’s ability to pass a statute excepting homicide cases from the common law rule. When the very instrumentality targeted by the common law rule as dangerous and tyrannical possessed the power to modify legal rules, it is clear that the concept of double jeopardy did not experience a fair or logical test of its fundamental character.

The common law of England recognized the maxim that a person should not be doubly punished for the same offense. The procedural technicalities existing in early English jurisprudence hampered the refinement of the concept, however the protection did exist.\textsuperscript{119} The slow evolution of double jeopardy was the result of both the Crown’s power, and the inertia of the early English legal system.

\textit{b. American Colonial Development—Colonial Charters}

The evolution of double jeopardy in the United States starts during the period in which the American colonies were formed. The early settlers that had emigrated from England were privileged when compared with the immigrants from France or Spain. The English colonists possessed a heritage in which individual liberty was cherished, thus they expected a balanced allocation of governmental power in a free society.

Unlike settlers from other colonial powers in Europe, the Englishmen had a prior historical experience with the abuse of governmental power. Magna Charta, signed by King John, guaranteed a form of “due process”

\textsuperscript{118} W. Blackstone, Commentaries. Moreover, Blackstone’s brevity may have been the result of his recalcitrant attitude toward the slowly expanding field of individual rights. One noted historian has described Blackstone’s lack of concern for civil liberties and true allegiance as follows:

Blackstone by his famous treatise confirmed the ruling classes of England in their overweening conceit of power and flattered them by expressing entire content with the law and constitution of England, as they then existed. He was an opponent of every suggested reform and, as a critic puts it, “toadied to the sinister interests and mischievous prejudices of the party in control.” He represented what Jefferson has finely called the “honeyed Mansfieldism of Blackstone,” which “turned the old lawyers from Whigs into Tories.”


In reality, the concept of double jeopardy with which this article is mainly concerned has been shown to be much more widely recognized than other rights which have been recognized as “fundamental” in the constitutional sense. See 11 W. Holdsworth, supra note 75, at 528 for examples of Eighteenth Century criminal procedure that required a jury to be without food, drink or heat until a unanimous verdict was returned, and another example of refusing to allow counsel to persons accused of felonies.
to all freemen. Thus, the concept of individual liberty had been a central component of the English colonists' lives for almost four hundred years.

In addition to this libertarian heritage of the colonists, the colonial charters contained specific grants of equality and included the rights of Englishmen. More importantly the colonial grants provided for self-government in the American settlements. These early charters were the constitutive component of the American experiment of self democracy.

It is doubtful whether the grants were ever intended to be more than a convenient method to maintain British rule. The charters were not considered to be superior in the hierarchy of British law. Rather, the colonial charters were subject to the whims of the original British grantor and the legal process in Britain. The true import of these grants can only be understood when considered in the context of colonial interpretation.

The colonial charters were viewed by the colonists to be the written source of both governmental authority and their individual liberty. The grants were factually a revocable grant of privileges and rights, but more importantly, they were the prototypical models for the various state constitutions. It is in these pre-revolutionary state constitutions that the first mention of double jeopardy is made in the American colonies.

120. "No freeman shall be captured or imprisoned or disseised or outlawed or exiled or in any way destroyed, nor will we go against him or send against him, except by the lawful judgment of his peers or by the law of the land." Magna Carta § 38 (1215) reprinted in 1 B. SCHWARTZ, THE BILL OF RIGHTS, A DOCUMENTARY HISTORY 12 (1971).

121. The First Charter of Virginia in 1606 contained the following grant:

Also we do . . . declare, by these Presents, that all and every the Persons being our Subjects, which shall dwell and inhabit . . . the said several Colonies and Plantations . . . shall have and enjoy all Liberties, Franchises, and immunities . . . to all Intents and Purposes, as if they had been abiding and born, within this our Realm of England . . .

Reprinted in 1 B. SCHWARTZ, supra note 120, at 59-60.

122. Another instance of Sir William Blackstone's penchant for broad statements that may have been shown to be based upon a misunderstanding of Lord Coke was his statement regarding the applicability of common law in the American colonies:

Our American plantations [were] principally . . . obtained in the last century either by right of conquest and driving out the natives (with what natural justice I shall not at present enquire) or by treaties. And therefore the common law of England, as such, has no allowance or authority there; they being no part of the mothercountry, but distinct (though dependent) dominions. They are subject, however, to the control of the parliament, though . . . not bound by any acts of parliament, unless particularly named.


Other works concerning the historical foundations of the British Empire and attendant constitutional issues may be reviewed in D. KEIR, THE CONSTITUTIONAL HISTORY OF MODERN BRITAIN SINCE 1485, at 293-364 (9th ed. 1969); A. KEITH, CONSTITUTIONAL HISTORY OF THE FIRST BRITISH EMPIRE, 3-58 (1930); Temperly, Inner and Outer Cabinet and Privy Council, 1679-1783, 27 ENG. Hist. Rev. 682 (1912).

123. 1 B. SCHWARTZ, supra note 120, at 50.
Any analysis of the concept of double jeopardy in this pre-revolutionary era must consider the general contours of the colonial experiences and attitudes. The colonists initially formed semi-independent states, each committed to experimentation in self-governing democracy. Colonial constitutions were not concerned with double jeopardy or unreasonable searches. Indeed, they did not contain any specific guarantee of individual freedoms. Rather, the colonists were more interested in the guarantee of the global freedoms denied to them by the charters. The principle of double jeopardy present in the common law of Britain at the time of the granting of the colonial charters was transmitted to all Englishmen who had migrated to America.

It was in this pre-revolutionary period that American individualism combined with the tenets of natural law to form the cornerstone of the American justice system and, ultimately, the idea of specific guarantees of individual liberty. The pre-revolutionary American colonists did not consider themselves to be legally or morally bound to the existing British legal order. The theory of natural law, with its concept of individual protections against governmental tyranny, was accepted in America as the basic premise governing the relationship between colonial Americans and Britain. Double jeopardy, like other embryonic rights, began its evolution at the highest point of common law development but was shaped in America by the natural law rather than the outmoded common law pleading and practice.

c. Synthesis of Natural Law and Colonial Law

The British common law and its related institutions have been regarded as the progenitor of the jurisprudence of the American colonies. That simple truth, like other broad assertions of historical fact, has not encouraged an analysis of whether other factors contributed sufficiently to justify an interpretation that would consider these variables in a meaningful manner.

124. Schwartz recounts two instances in Massachusetts’ colonial history when the British commissioners interfered and restricted the rights guaranteed through the charter. The immediate responses of the colonists were to petition the King to let their “laws and liberties live” and a later assertion that it was their “duty to abide by what rights and privileges the Lord our God in his merciful providence hath bestowed upon us.” Id. at 51.

125. See generally supra notes 122-23 and accompanying text.

126. The writings of Sydney, Hooker, Locke and Selden had a profound effect upon the development of colonial law and pre-revolutionary attitudes in America. These writings, which were rooted in natural law, provided the impetus to the unique colonial perspective of government. See B. BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 84 (1967); C. HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS, 4 HARVARD STUDIES IN JURISPRUDENCE 52-59 (1930); C. ANDREWS, supra note 118, at 119-20. The second major factor influencing colonial law and differentiating it from the common law was the nonconformist reading and interpretation of the historical precedents and founding charter documents. See B. BAILYN, supra at 83; 1 B. SCHWARTZ, supra note 120, at 50. A third modifying element of
One of the most obvious, but difficult values to consider is the desire of the colonists to structure a government modeled after the traditional British state, but at the same time effect some substantive reforms. The colonists' early attempts at structured government were a mirror image of the local governments in small English communities.\textsuperscript{127} These governmental models are well known and have been the subject of extensive critical examination and analysis.\textsuperscript{128} However, the structural foundations of local rule in the colonial period must be separated from the general and gradual evolution of American substantive law.

The Bay Colony of Massachusetts is particularly significant to the development of colonial jurisprudence and to the evolution of the concept of double jeopardy. The Bay Colony was settled by the Puritans, who were dedicated to the formation of a new society without governmental or religious persecution.\textsuperscript{129} Subsequent to their arrival in colonial America, the Puritans began to develop a set of ordered expectations which gradually matured into a broad codification of Bay Colony laws. This reformative movement ultimately resulted in the publication of the Massachusetts Body of Liberties\textsuperscript{130} in 1641.

The Body of Liberties was drafted to modify the English common law.\textsuperscript{131} While some provisions were identical to English counterparts, significant changes were implemented to reflect the aspirations and problems of the settlers. One important provision of the Body of Liberties

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  \item the inheritance of pure English common law in the colonies was the vigilant attitude of the colonists toward centralized authority and tyranny. The English historical experience provided the obvious background for the colonists, but the recent enslavement of the Swedes and Dutch were also important examples of the consequences of insufficient vigilance. B. Bailyn, supra, at 64-67. A final component of the modification process might better be described as part of the functional environment in which the law was to function. The common law worked well in England because there were no federalistic constraints operating the country. There were many other problems such as ignorance and poor communication, but these handicaps were non-organic in origin. The genesis of the federalistic constraints in America resulted from the structural or organic nature of the new republic. The adoption of a federal common law at that time could be practical only if the "state" were to be ignored. Cf. 1 H. Taylor, The Origin and Growth of the English Constitution 1-79 (1889).


129. See Eusden, supra note 127, at 13. For a complete and scholarly discussion of the Puritan perception of America as "utopia" and the contrast between that view and other colonists' visions see S. Bercovitz, The Puritan Origins of the American Self 136-86 (1975).

130. For a reprint of the entire code see 1 B. Schwartz, supra note 120, at 71-84.

131. Interesting discussions of the evolution and content of the Body of Liberties may be found at 2 C. Andrews, Colonial Period, supra note 128, at 455-58; B. Bailyn, supra note 128, at 194; and 1 B. Schwartz, supra note 120, at 69-71.
\end{itemize}
greatly expanded the protection of double jeopardy in the Bay Colony. This guarantee of protection was extended to civil trespasses in addition to the common law's language of "crime or offense." 132

This expanded statement of double jeopardy protection is significant for two reasons: 1) it indicates that double jeopardy was recognized and highly valued as a broad and fundamental doctrine by at least some colonists; and, 2) since the Body of Liberties more closely resembled a constitution than a code 133 it probably influenced the structure and content of rights guaranteed in later state and federal constitutions. 134

The adoption of the Body of Liberties by the Massachusetts Bay Colony was significant, but constituted only the first step in the establishment of the first codification of American law. Seven years after the publication of the Body of Liberties, the Massachusetts Code of 1648 135 was adopted. The Code was the product of a prolonged effort to reduce the laws of the Colony to a written form. The Code was a comprehensive and authoritative codification of the Bay Colony's constitutional provisions and "regulations for the conduct of administration, courts and their jurisdiction, trade, military affairs, and the relation between church and state [and also included] the substantive law of crime, of property, and of domestic relations." 136 This codification was of importance because it signaled a dissatisfaction with the English system of reliance upon the unwritten common law.

This break with English history and tradition was the result of several factors. The first and most obvious component was the inapplicability of English law in the new American civilization. 137 The second factor was the mistrust of centralized governmental power in any form. The cen-

132. Section 42 provides that "No man shall be twice sentenced by Civil Justice for one and the same Crime, offence, or Trespass." *Massachusetts Body of Liberties, 1641: A Copie of the Liberties of the Massachusetts Coloni in New England*, reprinted in 1 B. Schwartz, supra note 120, at 76.


134. The Body of Liberties shows how American concepts of individual liberties were shaped during the early colonial period . . . . The result was thus a combination of diverse elements and shows many distinctly American trends in constitutional thought. We find in the Body of Liberties the ideas that the fundamental law of the land should be embodied in a written instrument to which the people have assented; that this law should constitute a limitation upon the powers and discretion of administrators and judges; and that the liberties of the individual should be stated in the form of a bill of rights serving the same purpose as Magna Carta was thought to serve in England.


136. Haskins, supra note 133, at 3.

137. Id. at 5.
tral power brokers in the colonies were the governor and his magis-
trates.\textsuperscript{138} Their authority was autocratic in nature, and it was assumed by the first governor that this authority flowed from the divine providence of God.\textsuperscript{139} Colonial American governments closely paralleled the governmental and legal system of England in the Middle Ages where no guarantee existed that the unwritten precepts and notions of basic justice would be applied in any case heard by a magistrate.

The fact that the Bay Colony reduced double jeopardy protection to a written form and expanded it beyond the common law guarantee demonstrates that the colonists regarded the concept to be fundamental. To accomplish their purposes, the Puritan founders had no difficulty in expanding the common law protection existing in England. Moreover, the English concept of double jeopardy afforded protection only against the King and his Court, whereas in Massachusetts, the targeted body was the magisterial system.\textsuperscript{140} Both the King’s Court and the colonial magistrates could be considered executive officers, engaged in functional duties. However, the application of double jeopardy to prosecution by colonial magistrates is significant because it demonstrates that double jeopardy was regarded by the colonists as a flexible concept capable of adaptation in a new country with new and different threats of tyranny.

The idea that colonial magistrates were guided by divine inspiration is an indication of the early settlers’ reliance on natural law principles. The colonists faced substantial problems in the formation of a new society and its attendant units. Attempting to solve these problems, colonial Americans placed a great deal of emphasis upon individual self-reliance.\textsuperscript{141} This current of individualism was evident in every aspect of colonial life. Thus, it was the theories of natural law\textsuperscript{142} and inalienable rights\textsuperscript{143} that shaped the developing religious\textsuperscript{144} and political doctrines

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139. 1 C. Andrews, Colonial Period, supra note 128, at 944-45.
140. Haskins, supra note 133, at 6.

Although the basic aims of these leaders were generally accepted, the absolute authority wielded by this small oligarchic group provided an immediate source of dissatisfaction to the great bulk of the colonists, and a movement was soon under way aimed not only at broadening the basis of government but at obtaining security against the arbitrary power of the magistrates.

141. C. Haines, supra note 128, at 52-53; C. Andrews, supra note 118, at 199.
142. For chronicles of the development of natural law in the American colonies see generally P. Conkin, Self-Evident Truths 102-18 (1964); C. Haines, supra note 126, at 52-59. More detailed discussions may be found in the following works: B. Wright, American Interpretation of Natural Law (1931); E. Corwin, The “Higher Law” Background of American Constitutional Law (1955).

143. The American concept of inalienable rights was separate, but related, to the doctrine of natural law. These “rights” were the product of the frontier settlements and religious dogma that provided the fertile basis for the assertion and elevation of individual rights. See C. Haines, supra note 126, at 52-59.
\end{center}
that were influential in colonial life.

The early stages of colonial jurisprudence combined the positivist structure of the English experience, with the colonial American perception of natural law and religion. These factors shaped the contours of the subsequent jurisprudential evolution in the colonies. The early Massachusetts experience is an example of the role of these factors in the formation of early American law. The double jeopardy doctrine of England in the Middle Ages was not accepted by the colonists in Massachusetts. The expansion of the doctrine of double jeopardy by the American colonists reflected the English commoners' fear of an authoritarian government in any form. Indeed, the Bay Colony's inclusion of "civil trespasses" to the doctrine may arguably be construed to protect against judicial tyranny rather than executive abuse.\textsuperscript{146}

d. State Constitutions

The adoption of the revolutionary state constitutions was the final evolutionary stage that culminated in the inclusion of double jeopardy protection in the United States Constitution. These early state constitutions were the formative instruments of the various state governmental structures. They were particularly significant because they contained explicit guarantees of several individual rights and liberties. This guarantee of individual rights is indicative of the American belief in a set of fundamental laws that would restrain governmental power.\textsuperscript{147}

Prior to the ratification of the United States Constitution, protection against double jeopardy appeared only in the New Hampshire Bill of Rights.\textsuperscript{148} At least one authority has expressed confusion over the exclusion of double jeopardy protection from most of the revolutionary constitutions.\textsuperscript{149} This lack of specific double jeopardy protection may have contributed to the idea that such protection was less than "fundamental," or that it was not in a "preferred position" with respect to other rights such as trial by jury, bail, and prohibitions against cruel and unusual punishments.\textsuperscript{150}

\textsuperscript{144} Descriptions of various events concerning the effect of natural law upon the developing religious doctrine may be found at 1 C. Andrews, Colonial Period, supra note 128, at 462-95 and Eusden, supra note 127, at 1-13.

\textsuperscript{145} See supra notes 110-19 and accompanying text.

\textsuperscript{146} Contrast this principle with the modern Supreme Court's position. See supra notes 26-61 and accompanying text.

\textsuperscript{147} See 1 B. Schwartz, supra note 120, at 181.

\textsuperscript{148} The New Hampshire Bill of Rights is reproduced in 1 B. Schwartz, supra note 120, at 374-79. Article XVI provides in part that "No subject shall be liable to be tried, after an acquittal, for the same crime or offence." Id. at 377.

\textsuperscript{149} See Sigler, History, supra note 62, at 300.

\textsuperscript{150} The revolutionary constitutions of Pennsylvania, North Carolina, Vermont, Georgia and Massachusetts, and the Declaration or Bill of Rights of Virginia and Maryland contained prohibitions against excessive bail and cruel and unusual punishments and did not
MULTIPLE PUNISHMENT

The exclusion of double jeopardy protection from these early state constitutions may be explained by a review of the colonists' attitude toward basic criminal guarantees. It is logical to assume that several revolutionary constitutional guarantees were included to address the actual grievances suffered by the colonists. An actual list of grievances against the Crown would indicate which liberties were violated and thus needing specific protection.

Samuel Adams' "The Rights of the Colonists and a List of Infringements and Violations of Rights, 1772," discloses the unreasonable searches, trial by jury and removal to England for trial were the most significant procedural grievances in colonial America. The Declaration of Independence lists the deprivation of trial by jury and the transporting Americans to England "to be tried for pretended offences" as primary grievances. These lists of known grievances demonstrate that the Crown did not actively violate the common law rule of double jeopardy in the colonies. Rather, colonists were more concerned with the infringement of other liberties. Thus, it is not surprising that the revolutionary constitutions did not contain specific double jeopardy provisions. These early state constitutions were written at the same time as the Declaration of Independence, and although specific guarantees were included, these constitutions should be viewed as the first legal and moral check on unrestrained governmental power.

A significant conclusion may be drawn from the inclusion of the specific grievance against being transported to England for trial "for pretended offences." This complaint is exemplary of the abuse which is remedied by a specific double jeopardy guarantee. The "pretended offences" of the colonial era are similar to the expanded modern criminal codes. The carving of a single criminal act or episode into multiple violations is a pretense which results in multiple punishments for one act.

The interests underlying revolutionary double jeopardy and the interests resulting in the specific prohibition of extradition to England are not identical. However, it is clear that colonial Americans sought to prevent the adoption of abusive criminal laws resulting in unjust procedures and penalties. Colonial concern reflects a distrust of governmental and lawmaking bodies in general. That concern is shared today due to the Blockburger Rule and the Supreme Court's deference to the legislative branch in the area of criminal law.

have provisions protecting double jeopardy.
151. 1 B. Schwartz, supra note 120, at 199-211.
152. Id. at 206.
153. Id. at 209.
154. Id. at 210.
155. Id. at 253.
156. Id.
157. See id. at 181.
158. See id. at 210, 253.
A majority of states did not include a double jeopardy provision in their revolutionary constitutions because the English Bill of Rights of 1689 did not include a double jeopardy provision. The English Bill of Rights served as a prototype and many states, particularly Virginia, patterned their procedural laws after the English model. Early case law is sketchy as to the extent of the use of jeopardy pleas in bar. With one notable exception, the cases in which jeopardy pleas in bar were utilized are all based upon the procedural technicalities of the common law writ system.

Double jeopardy protection was widely accepted in the colonies during the revolutionary war period. This acceptance is verified by the reported case law of the era and the inclusion of double jeopardy protection in the New Hampshire Constitution. Significantly, New Hampshire ratified its constitution immediately prior to the adoption of the United States Constitution. Each of these constitutions contain double jeopardy provisions and each should be considered a product, rather than an incident of the American revolutionary experience.

e. Summation

A factual accounting of the evolution of the doctrine of double jeopardy has been presented in the preceding two sections. The evidence demonstrates that in England, the double jeopardy doctrine developed as a response to abusive tactics by the King. The most feared tactic was a second prosecution which inevitably led to a second punishment for the same criminal act. Clearly, the fear of harsh common law punishment stimulated the development of the early double jeopardy guarantee. The "fear" of multiple punishments furnishes the foundational and substantive basis upon which protection against double jeopardy should be based.

An assumption that double jeopardy was non-existent or was

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159. A reproduction of the English Bill of Rights may be found at id. at 40.
160. An explanation for the omission of a double jeopardy clause in the English Bill of Rights is not terribly mysterious if one could conclude that by 1689 the Crown was actively involved in other means of suppression to the exclusion of the violation of common law double jeopardy. It should be noted that the document also did not include a guarantee against unreasonable search and seizure.
161. See Sigler, History, supra note 62, at 301.
162. Respublica v. Shaffer, 1 Dall. 236 (Pa. 1788).
   By the law it is declared that no man shall be twice put in jeopardy for the same offence; and, yet, it is certain that the enquiry, now proposed by the Grand Jury, would necessarily introduce the oppression of a double trial. Nor is it merely upon maxims of law, but I think, likewise, upon principles of humanity, that this innovation should be proposed.
Id. at 237.
163. See generally supra text accompanying notes 15-17.
“nonfundamental” during the American colonial era is unwarranted. The Bay Colony of Massachusetts greatly expanded the common law protection in its Body of Liberties. Expansion occurred only because of the pronounced difference between the unsatisfactory common law heritage and the revolutionary concept of American law. American jurisprudence evolved through a strand of natural law and was founded on the proposition that the colonists were entitled to fashion a more responsive and homogeneous legal order.

Prior to the Revolutionary War there is no evidence that double jeopardy protection was not substantively based on an accused's right to be free from multiple punishments. The question remains as to how the Supreme Court can utilize this historical limitation on governmental power in its interpretation of the double jeopardy clause.

IV. RECURRENT PROBLEMS OF CONSTITUTIONAL INTERPRETATION

The traditional judicial search for the original intent of the framers of the Constitution has always thwarted complete appreciation of historical circumstances surrounding the adoption of the double jeopardy clause of the fifth amendment. This search usually begins with consideration of the constitutional debates that preceded the adoption of the particular provision or amendment.

The search for an illuminating commentary on the protection against double jeopardy has proven to be one of the most fruitless excursions for constitutional historians. There are few references as to the founders' views on the meaning and application of the clause. The only statement supporting the thesis that the guarantee is grounded in an expansive principle of humanitarian protection against governmental tyranny was articulated by Representative Egbert Benson of New York. Commenting on the committee's disagreement as to the meaning of initial wording of the guarantee, he stated: "The humane intention of the clause was to prevent more than one punishment . . . ." The only evidence available that specifically applies to the clause's adoption is the original draft of the clause by Madison. Madison's draft, which was successfully passed by the House of Representatives provided that: "No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence . . . ." This phrase was ultimately omitted by the Senate and replaced with the

165. 1 B. SCHWARTZ, supra note 120, at 76.
166. Sigler's review of the constitutional background is the most comprehensive available and no conclusions were reached regarding the actual intent of the founders. See Sigler, History, supra note 62, at 304-07.
167. 1 ANNALS OF CONG. 753 (1789).
168. Id. (emphasis added).
169. Id. at 434.
common law terminology of "be twice put in jeopardy of life or limb . . . ." in the final draft.

The true intent of the framers may indeed be an exercise in speculation. Unfortunately, the amount of evidence regarding the intent of the founders will not increase in direct proportion to the amount of speculation by constitutional interpreters. Reviewing the statements and supplementary evidence, one must conclude that the founders possessed no clearly expressed intent. However, there are several clues as to the position of the founders. The first is the unchallenged statement of Representative Benson that the clause was included for the humane purpose of preventing multiple punishments. Secondly, the original draft of the double jeopardy clause contained a specific prohibition against more than one punishment or trial for the same offense.

Therefore, if viewed in the proper historical context, the founders' intent was to erect a "humane" or humanitarian shield against multiple punishments and prosecutions. Therefore, the Supreme Court's present perception of the true basis of double jeopardy protection is fundamentally flawed. Currently, the Court has refused to recognize any constitutional issue of multiple punishments in a single proceeding where the statutes do not meet the Blockburger test and are considered the "same offense" for double jeopardy purposes.

Assuming arguendo that Blockburger is a rule of statutory construction and does not rise to the level of constitutional status, the Court's holding that double punishments are not constitutionally suspect at a single proceeding is illogical. There is no evidence that the original draft of the clause, prohibiting "more than one punishment or one trial" did not accurately convey the intent of the founders. "Punishment" was placed before "trial," and the two terms were used in the alternative. Clearly, the framers were concerned about the possibility of multiple punishments, and therefore they distinguished a second trial from a second punishment for the same offense.

Two factors have caused the Supreme Court's move toward the re-definition of the double jeopardy clause. Some responsibility must be placed with the interpretative process in that it places great emphasis upon certain fragments of historical occurrences, including the articulated intent of the founders. When the Court, charged with the interpretation of a foundational safeguard of American jurisprudence, concludes that double jeopardy protection "is rooted in history and is not an evolving

170. 2 B. Schwartz, supra note 120, at 1149.
171. 1 Annals of Cong. 753.
172. Id.
173. One can only speculate as to the reason why the Senate decided to include the common law phraseology. Sigler opines that it was merely a clarification of the newer language. Sigler, History, supra note 62, at 307. If that is the case, then the reliance on the common law language should not be the controlling indicator of the founders' intent.
concept like that of due process,” it is clear that there has been a mis-
reading of historical circumstances.

The Court’s shift in interpretation is due in a large part to the Bur-
ger Court’s deferential posture toward legislative enactments. This in-
creased deference has been one of the distinguishing characteristics of the
present Court. This stance has engendered much comment, both
favorable and unfavorable. The problem appears to be the Court’s unre-
strained, across-the-board deference to the legislative branch. Noteworthy
attempts have been made by the Court in recent years to regain some
type of balance in the area of federalism. However, judicial deference to
the legislature when individual rights are at stake is a disturbing develop-
ment. The narrowing of judicial scrutiny in these cases must necessarily
result in a reduction of the protections and freedoms previously enjoyed.

The eighth amendment’s ban against cruel and unusual punish-
ment will not solve the problems of multiple punishment. In Hutto v.
Davis, the Court utilized the same technique of legislative deference to
narrow the doctrine of proportionality in punishment cases to such an
extent that it was emasculated.

V. CONCLUSION

Proper interpretation of the double jeopardy clause must consider
the historical context in which the guarantee originated. History, prior to
the adoption of the fifth amendment, suggests that the guarantee occu-
pied a position of fundamental importance in western civilization. Double
jeopardy protection is not accurately perceived as historical, procedural
protection, but rather as an evolutionary and flexible foundation. Prop-
erly construed, the constitutional protection should extend not only to
prosecutors and courts, but also to the legislative branch of government.

The shield against governmental tyranny is the basis upon which the

174. Gore, 357 U.S. at 392.
175. Fullilove v. Klutzinick, 448 U.S. 448 (1980) (rejecting equal protection claim that
federal law mandating that 10 per cent of federal grants be expended through designated
protection challenge to state law requiring citizenship for public school teacher); Massachu-
setta Board of Retirement v. Murgia, 427 U.S. 307 (1976) (rejected equal protection chal-
lenge to state law compelling retirement for state police officers at 50 years of age); Arnett v.
Kennedy, 416 U.S. 134 (1974) (state procedural law limited property interest cognizable
under due process clause).
176. U.S. Const. amend. VIII.
178. The per curiam opinion of the Court in Hutto quoted Rummel v. Estelle, 445 U.S.
263 (1980) for the proposition that federal courts should be “reluctant[1] to review legisla-
tively mandated terms of imprisonment” and that “successful challenges to the proportion-
ality of particular sentences should be exceedingly rare.” Hutto, 454 U.S. at 374 (quoting
Rummel, 445 U.S. at 272, 274). In addition, the Court expressly disapproved each element
of the comparative-objective test for proportionality established in Hart v. Cointer, 483 F.2d
clause rests. A primary fundamental right, guaranteed in the Bill of Rights, should not be interpreted so as to allow the possibility of legislative tyranny. Such an approach renders the guarantee worthless as a true protection for the individual. Legislative tyranny exists when an individual’s punishment is not limited by the moral precept of proportionality, but is dependent upon a legislature’s collective imagination. Punishment should always reflect the gravity of the criminal offense committed. If one offense has been committed, under the Blockburger standard, the legislature’s right to define punishment should be restricted under the double jeopardy clause by the doctrine of proportionality.

Utilizing this approach, the legislature would retain the constitutional duty to define crimes and assess punishments. The judicial branch would review multiple punishment cases through the proportionality doctrine; considering the relative gravity of the offense in terms of articulated legislative intent, historical precedent, and verifiable contemporaneous values. Deference would still be extended to considered legislative judgments. However, judicial deference would be based upon a respect for the separation of powers doctrine, and not total abdication of the judicial role. Such a reexamination of the fundamental protection extended by the double jeopardy clause can only be accomplished after a reordering of the judicial and legislative roles in multiple punishment cases. Recent cases from the Court have consistently ignored this essential premise. Once the Supreme Court recognizes its duty to safeguard individual freedoms, it will undoubtedly realize that deferential abdication to the legislative branch is a constitutional aberration and dangerously short-sighted.