A Proposal for Legislative Effectuation of Double Jeopardy Protection

Kevin A. Hicks
"[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb."¹

In *North Carolina v. Pearce*² the United States Supreme Court held that the double jeopardy clause provides three distinct constitutional protections. First, it prohibits a second prosecution for the same crime after acquittal. Second, it prohibits a second prosecution for the same crime after conviction. Third, it prohibits multiple punishment for the same offense.³ The most vexatious aspect of the double jeopardy clause is the task of defining "the same offense." Frequently, a single criminal act can result in numerous statutory violations. To introduce the scope of the problem, suppose a woman uses a firebomb to destroy her own property in attempting an insurance fraud and in the process causes two adjacent buildings to burn. At the outset it is not entirely clear whether she should be tried and punished separately for the insurance fraud and each of three arsons. Using an abstract notion of "offense," one might argue that if only one arson were the means of the insurance fraud, and the others were unintended consequences, then they are all simply aspects of the same offense. The fraud and the unintended arsons should merge with the original arson for double jeopardy purposes. One might suppose further that the woman could be tried three more times for possessing, transporting, and using an illegal incendiary device.⁴ Even if the insurance fraud and the unintended arsons do not merge with the original

---

¹ A.B. 1986, University of California, Berkeley; Member, Third Year Class.
2. U.S. CONST. amend. V.
4. Id. at 717 (footnotes omitted).
4. It should also be noted that notions of sovereignty might allow punishment in both federal and state jurisdictions. *See United States v. Wheeler*, 435 U.S. 313, 329-30 (1978) ("[P]rosecutions ... brought by separate sovereigns ... are not 'for the same offence,' and the Double Jeopardy Clause thus does not bar one when the other has occurred." (quoting U.S. CONST. amend. V)).
arson, should the offenses involving incendiary devices merge with the arson? Should the offense of possessing the firebomb merge with the offense of transporting it?

This Note first examines the existing state of the double jeopardy protection against multiple punishment for the same offense and finds the protection lost in an abyss between Congress and the courts.\(^5\) The United States Supreme Court, perhaps justifiably, has relegated double jeopardy responsibility to Congress—but Congress has not responded. Section I of this Note reviews the Court's struggle vis-a-vis its role in double jeopardy protection, pointing out the dilemmas that have led to, and perhaps forced, the Court's present stance. Section II argues that there is no simple judicial test for affording adequate protection against double jeopardy. Section III suggests that the best prospect for success in achieving this goal lies in an intensive legislative re-examination of criminal statutes. For each situation in which contemporaneous "same offense" double jeopardy problems may occur, Congress and state legislators must confront specifically the question as to which crimes will merge under what circumstances. Finally, the Note examines different theoretical approaches to the problem, arguing that the primary factor in making these judgments should be the intent of the offender.

I. Evolution of the Supreme Court's Analysis: Early Choices and Ultimate Abdication

When the United States Supreme Court first accepted the opportunity to set forth the meaning of "same offense," the result was an attractively simple test comparing the elements of the offenses charged. The Court did not expressly give the "Blockburger test" constitutional import, but for many years the Court seemed to consider it tightly linked to the double jeopardy clause. In the end, however, the Court came face to face with a latent weakness in the Blockburger test and definitively declared it to be merely a tool of statutory construction, to be implemented only in the absence of evidence or contrary legislative intent.

A. The Blockburger Test

In Blockburger v. United States\(^6\) the United States Supreme Court for the first time addressed the dilemma faced by courts in deciding what constitutes "the same offense" for double jeopardy purposes. A jury found that the defendant had sold morphine illegally on two occasions

---

5. For simplicity of analysis, this discussion focuses on federal jurisdiction. Some states provide statutory protections against double jeopardy that may go beyond what the United States Constitution requires. See infra note 114. To the extent that states do not provide such protections, the discussion herein applies equally to the states.

and that on the second occasion he had done so in violation of two statutes. Specifically, not only had he sold the contraband without a stamped package, but he also had sold it without a written prescription. Having been sentenced consecutively for the violations, the defendant argued that the sentences violated his constitutional protection against double jeopardy.

The Court could have dealt with this issue using a number of different conceptual approaches. First, the Court could have attempted to decipher the legislative intent. Were the statutes designed such that anyone who sells morphine unlawfully should be sentenced to five years, and anyone brazen enough to sell it unwrapped was to serve an additional five years? Or was the statute designed to give law enforcement officials multiple means to detect and stem illegal narcotics traffic? The Court did not explore legislative intent, but only stated cryptically that "[t]he statute is not aimed at sales of the forbidden drugs qua sales, a matter entirely beyond the authority of Congress, but at sales of such drugs in violation of [the written order and stamped package requirements]."

Second, the Court could have attempted to define "the same offense" in physical terms. That is, it could have held that the act defines the offense and that when the same conduct violates two or more prohibitions, the offender may be convicted and punished only once, presumably according to the terms of the most severe proscription. This approach has been called the "same transaction test."

Third, the Court could have tested double jeopardy against the mind of the offender, asking whether he consciously attempted two illegal objectives at once, or only one.

The Court, however, applied simple evidentiary analysis, holding 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 an additional fact which the other does not." Thus, the Court upheld the imposition of consecutive sentences, citing Morey v. Common-
wealth, a Massachusetts Supreme Court decision. Neither decision, however, provided an articulated rationale for the same-evidence test.

B. Subsequent Application of Blockburger

As simple as the Blockburger rule may appear, the Court faced difficulties in applying the test. One problem involved the "unit-of-offense" issue. Multiple unit violations, as distinct from multiple statute violations, arise when the same statute is violated more than once, but the conduct arguably constitutes only one offense. For example, the cultivation of fifteen marijuana plants probably constitutes one offense, not fifteen.

(1) The Court's Apparent Withdrawal

In United States v. Universal C.I.T. Credit Corp., the Court encountered a unit-of-offense problem in which the government sought thirty-two 10,000 dollar fines against an employer for violations of the Fair Labor Standards Act. The government alleged that certain violations had occurred weekly. For instance, counts seven through twenty-six of the information charged one overtime violation per week for twenty weeks. A strict application of Blockburger would permit the twenty counts because each count required proof that a given employee worked more than forty hours in a given week.

Rather than applying the Blockburger analysis, however, the Court examined the legislative history of the Act and determined that the unit of offense was "a course of conduct," and that "the statute . . . treats as one offense all violations that arise from that singleness of thought, purpose or action, which may be deemed a single 'impulse.'" The Court reached this result despite the fact that, as Justice Douglas noted in dissent, "[t]he Act does not speak of 'course of conduct.' That is the Court’s terminology, not the Act’s."

14. 108 Mass. 433 (1871). Morey was convicted of "lewd and lascivious cohabitation" with a woman not his wife and was sentenced to two years at hard labor. Since he was married to Mrs. Morey at the time of the events in question, he was subsequently convicted of adultery as well, and was sentenced to an additional three years at hard labor. The court permitted the consecutive sentences to stand, finding that the difference between the two crimes is that the former required proof of cohabitation and the latter required proof that the defendant was married to someone other than his accomplice. Id. at 433-34.
15. 344 U.S. 218 (1952).
17. See Universal C.I.T. Credit Corp., 344 U.S. at 220 n.3.
18. Id. at 224.
19. Id.
20. Id. at 226 (Douglas, J., dissenting).
Another apparent break with *Blockburger* occurred in *Bell v. United States*, in which the defendant pleaded guilty to two violations of the Mann Act. The Act forbade the transportation of any female across state lines for immoral purposes, and Bell was charged with violating it twice by transporting two women at once in the same vehicle. The Court readily admitted that Congress could have provided for consecutive punishment for each woman transported, but found that the statute was ambiguous as to the unit of prosecution. The Court reached this conclusion despite the fact that the Act prohibited the transport of "any woman or girl" when it could have been written to forbid the transport of "women or girls."

Applying the *Blockburger* test to the facts of *Bell*, one would find two offenses: In count (1) the government would have to prove that Bell transported Ms. A; in count (2) that he transported Ms. B. Thus, each count would require proof of a fact (the particular woman transported) that the other count would not. Faced with the "ambiguity," however, the Court reasoned that it should be "resolved in favor of lenity," and applied the interpretation most favorable to the defendant. The Court did not mention why it did not apply the *Blockburger* analysis, nor that application of that test would have forced an opposite holding.

(2) *Blockburger* Reaffirmed

Against this apparent slide away from *Blockburger*, the Court decided to hear *Gore v. United States* for the express purpose of determining whether *Blockburger*’s authority had been "impaired." The government charged Gore with essentially the same violations that Blockburger had faced, as well as a third. In one transaction, the defendant sold narcotics without written authorization and not in the original stamped package. He also violated a third statute by facilitating the concealment and sale of the narcotics knowing that they had been illegally imported.

Justice Frankfurter wrote the five-to-four decision reaffirming *Blockburger* and approving its application against Gore. He first at-

---

23. *Bell*, 349 U.S. at 82-83.
27. *Id.* at 388.
tempted to excuse the *Blockburger* Court for not incorporating legislative history into its opinion by observing that the *Blockburger* Court was familiar with the history of narcotics legislation, and that at the time of the *Blockburger* decision it simply “was not customary to make the whole legislative history . . . part of the conventional apparatus of an opinion.”

Justice Frankfurter then made the jurisprudentially suspect argument that *Blockburger* is all the more valid because Justices Brandeis, Butler, and Roberts, noted for their ardent in protecting defendants from unlawful actions of the state, did not dissent from it. Finally, the majority reached the legislative intent question and simply inferred that Congress must have intended cumulative punishment because it enacted the statutes at different times and therefore were attempting to “turn the screw of the criminal machinery—detection, prosecution and punishment—tighter and tighter.” While this inference is plausible, it does not seem necessarily more probable than an alternate conclusion that Congress enacted the later laws merely to close loopholes and further circumscribe the real evil: the unlawful sale of narcotics.

Frankfurter’s reasoning logically leads to the opposite conclusion in yet another way. Because the statutes were passed at different times, it could be argued that the drafters did not recognize the multiple-violation possibilities. As Professor Kirchheimer has noted, “[Legislators’] work is transmitted from one generation to another in piecemeal fashion . . . quite often without bothering to weed out obsolete [statutes] or to harmonize the old with the new.”

Justice Frankfurter did not explain why the unit-of-offense cases such as *Bell* did not weaken *Blockburger*, but merely restated their holdings without noting the conceptual similarity between the multiple unit violation and the multiple statute violation. In both situations, all counts alleged usually satisfy the *Blockburger* test because each “count” or “crime” requires proof of a fact that the others do not. The majority did not explain why, when faced with legislative ambiguity, the rule of lenity should apply to the former (the Mann Act) and the stricter *Blockburger* result to the latter. As Chief Justice Warren observed in dissent:

Normally these are not problems that receive explicit legislative consideration. But this fact should not lead the judiciary, charged with the obligation of construing these statutes, to settle such questions by

31. *Gore*, 357 U.S. at 388. One is hard-put, however, to find an era in which the Court customarily described the *whole* legislative history of statutes. Indeed, the statement is particularly curious since *Blockburger* itself, in declaring the purpose of the legislation in question, cited *Nigro v. United States*, 276 U.S. at 332 (1928), a case in which the Court made extensive reference and speculation as to Congressional intent.


33. *Id.* at 390.

the easy application of stereotyped formulae. It is... too easy and too
arbitrary to apply a presumption for or against multiple punishment in
all cases or even to do so one way in one class of cases and the other
way in another. Placing a case in the category of unit-of-offense
problems or the category of overlapping-statute problems may point
up the issue, but it does not resolve it.35

In sum, the Blockburger doctrine, originally propounded without
substantial analysis, was reaffirmed in Gore without significantly more
analysis. Probably the most reasoned and prophetic aspect of the opin-
on is its final paragraph in which the majority notes that “these are pe-
culiarly questions of legislative policy”36 and that the Court did not have
the power to revise sentences.37 Apparently the Court anticipated that
absent legislative guidance, future judicial determinations applying the
Blockburger test would be fraught with difficulties.

C. Defining the Role of the Blockburger Test

Neither Blockburger nor Gore clearly defined the role of the Block-
burger test. The question remained whether the test is merely a rule of
statutory construction for resolving ambiguity or whether it is the em-
bodyment of the double jeopardy clause's protection against unconstitu-
tional multiple punishment. For illustration, suppose that Congress
passes two statutes. Statute A reads, “Whoever deliberately does X shall
be guilty of crime A and shall be imprisoned not more than five years.”
Statute B reads, “Whoever violates statute A shall be guilty of crime B
and shall be imprisoned not more than five years.” Facial, this pair of
statutes appears to authorize up to ten years’ imprisonment for doing X.
They would violate the Blockburger test, however, because crime B does
not require proof of anything not already required for proof of crime A.

At least a few justices apparently assumed that cumulative punish-
ment in this situation would be prohibited by the double jeopardy clause
because the offenses would not pass the Blockburger test and an offender
would receive multiple punishments for the same offense. In Brown v.
Ohio,38 Justice Powell, writing for a four-justice plurality, stated that the
purpose of the Blockburger test was to determine “whether two offenses
are sufficiently distinguishable to permit the imposition of cumulative
punishment.”39 In Simpson v. United States,40 the Court considered
whether the defendant could be punished cumulatively for aggravated
robbery “by the use of a dangerous weapon or device”41 and committing

36. Id. at 393.
37. Id.
39. Id. at 166.
a federal felony using a firearm. Justice Brennan, writing for an eight-justice majority reversing such a sentence, repeated the language from Brown v. Ohio and added:

The Blockburger test has its primary relevance in the double jeopardy context, where it is a guide for determining when two separately-defined crimes constitute the "same offense" for double jeopardy purposes. Cases in which the government is able to prove violations of two separate criminal statutes with precisely the same factual showing, as here, raise the prospect of double jeopardy and the possible need to evaluate the statutes in light of the Blockburger test.

After Simpson it seemed probable, if not conclusive, that a majority thought the Blockburger test to have constitutional import.

Justice Rehnquist, the lone dissenter in Simpson, insisted that the Blockburger test did not arise from the Constitution, but is only a principle of statutory construction. In critiquing the majority’s reasoning, he stated:

Certainly the language of the Double Jeopardy provision of the Fifth Amendment, which prohibits a person from being twice put in jeopardy of life or limb, has not the slightest application to this sort of criminal prosecution. It is only by an overly refined analysis, which first suggests that the double jeopardy prohibition encompasses enhancement of penalty for an offense for which there has been but one trial, and then concludes that the plain language of Congress providing for such enhancement shall not be read in that way in order to avoid this highly theoretical problem, that the Court is able to reach the result it does.

Only two terms later the Court’s alignment in Whalen v. United States suggested that at least three justices had moved to adopt the view articulated by Justice Rehnquist in his Simpson dissent. In Whalen, the trial court imposed consecutive sentences on the defendant for felony murder and for the underlying felony of rape. The felony-murder statute was violated if a killing occurred in the course of any of six listed felonies. In a rather curious decision on the merits, the majority

42. 18 U.S.C. § 924(c) (1968).
43. Simpson, 435 U.S. at 11.
44. Id. at 18 (Rehnquist, J., dissenting).
45. Id. at 19.
47. Id. at 685.
49. A District of Columbia statute appeared on its face to reject specifically the Blockburger rule in favor of one leaving cumulative punishment entirely to the trial court’s discretion. D.C. CODE ANN. § 23-112 (1973) provided in part, “A sentence . . . shall, unless the court imposing such sentence expressly provides otherwise, run consecutively to any other sentence . . . whether or not the offense . . . arises out of the same transaction and requires proof of a fact which the other does not” (emphasis added). The majority escaped an explicit determination of whether a legislature could constitutionally reject the Blockburger test by deciding
seemed ultimately to accept the notion that, notwithstanding a contrary result suggested by an application of the Blockburger test, Congress has the last word on whether consecutive punishment is permitted. Thus, the opinion assumed that the dispositive question was whether Congress authorized consecutive punishment. Also, significantly, the opinion cited Blockburger as a rule of statutory construction, making no mention of any relationship between the Blockburger test and the double jeopardy clause. Thus, the Court inched toward disconnecting the double jeopardy clause from the question of cumulative punishment to the extent such punishment is legislatively authorized. Nevertheless, the Court seemed to reserve a double jeopardy trump card by instructing, “[t]he Double Jeopardy Clause at the very least precludes federal courts from imposing consecutive sentences unless authorized by Congress to do so.”

If the majority was not entirely forthcoming regarding the full power of Congress to define offenses and prescribe cumulative punishment, Justice Blackmun’s concurrence and Justice Rehnquist’s dissent hastened to dispel any ambivalence. As Justice Blackmun stated, “I believe that the Court should take the opportunity . . . to hold clearly that the question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed.” Justice Rehnquist, joined by Chief Justice Burger, would have gone even further: “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.” Justice White, concurring, agreed with Justice Rehnquist that “the question is one of statutory construction and does not implicate the Double Jeopardy Clause. Had Congress authorized cumulative punishment, . . . imposition of such sentences would not violate the Constitution.”

that in enacting section 23-112, Congress really meant to adopt Blockburger. See Whalen, 445 U.S. at 691.

50. 445 U.S. at 691.

51. Id. at 689; see also id. at 701 (Rehnquist, J., dissenting) (“[W]e have just as often hedged our bets with veiled hints that a legislature might offend the Double Jeopardy Clause by authorizing too many separate punishments for any single ‘act.’ ”); id. at 697 (Blackmun, J., concurring) (“Dicta in recent opinions of this Court at least have suggested, and I now think wrongly, that the Double Jeopardy Clause may prevent the imposition of cumulative punishments in situations in which the Legislative Branch clearly intended that multiple penalties be imposed for a single criminal transaction.”).

52. Whalen, 445 U.S. at 698 (Blackmun, J., concurring).

53. Id. at 705 (Rehnquist, J., dissenting). To this extent one must consider whether Justice Rehnquist might overrule or interpret differently the portion of North Carolina v. Pearce holding that the double jeopardy clause “protects against multiple punishments for the same offense.” North Carolina v. Pearce, 395 U.S. 711, 717 (1969).

54. Whalen, 445 U.S. at 696 (White, J., concurring).
The apparent ambiguity of the Court's reasoning in *Whalen* was resolved conclusively by *Albernaz v. United States* and *Missouri v. Hunter*. In *Albernaz*, the Court upheld consecutive sentences when the defendants were found to have conspired at once both to import and distribute marijuana in violation of two separate statutory provisions. Justice Rehnquist, writing for a six-justice majority, incorporated provisions from the *Whalen* concurrences that rejected squarely any limitations the double jeopardy clause might place on legislatively authorized consecutive sentencing. The Court concluded with propositions seemingly drawn from the *Whalen* concurrences of Justices Blackmun and White: "Thus, the question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed. Where Congress intended . . . to impose multiple punishments, imposition of such sentences does not violate the Constitution." 

In *Missouri v. Hunter*, such statements left the realm of dicta and anchored the Court's holding. The *Hunter* Court held that consecutive sentences under Missouri law for first-degree robbery and for armed criminal action did not violate the double jeopardy clause since the Missouri Legislature clearly intended cumulative punishment and the Missouri Supreme Court, applying *Blockburger*, found that the two statutes proscribed "the same offense." Thus, its previous pronouncement in *North Carolina v. Pearce* notwithstanding, the Court seems to have reached the conclusion that the double jeopardy clause does not preclude multiple punishment for the same offense, at least to the extent a legislature has prescribed such punishment.

II. There Is No Talisman

What considerations might have led the Court apparently to reduce the status of the *Blockburger* test? This section suggests that the test was destined to crumble when faced with its inherent flaws. This section also argues that no judicial test could successfully replace it. In fact, beyond discerning legislative intent, the Court was left with no means of review-

---

58. The Court did not attribute the source of these propositions.
60. *Id.* at 695 (White, J., concurring).
63. *Id.* at 363-64, 368. The Missouri Supreme Court therefore set aside the conviction for armed criminal action, believing it to violate the United States Constitution. The state appealed. *Id.*
64. *See supra* notes 3, 53 and accompanying text.
ing the multiple punishment question of what should be the appropriate
punishment for a given criminal activity.

From a practical standpoint, the Court's apparent deference to legis-
lators on the question of multiple punishment for crimes arising out of
the same transaction or occurrence seems reasonable and inevitable. At-
tempts to determine what constitutes "the same offense" under the
double jeopardy clause may be an inappropriate subject for substantive
judicial review in the consecutive punishment context.\(^6\) It may be
proper for appellate courts to determine whether an offender has been
punished according to the rule of law or, when needed, to settle a dispute
as to what the law is. It is another thing entirely, however, for courts to
second guess legislatively determined schemes of penology, except when
the eighth amendment's protection from cruel and unusual punishment
is at issue.\(^6\) Such attempts lead either to logically indefensible distinc-
tions or to unwarranted intrusions upon the legislative process.\(^6\)

The Blockburger rule seems to have been just such an ill-reasoned
foray, despite its later interpretations. For example, the statutes at issue
in Missouri v. Hunter\(^6\) illustrate well the problems presented by such a
judicial rule. The Missouri first-degree robbery statute provided for a
minimum sentence of five years\(^6\) and the armed criminal action statute
provided for a minimum of three years.\(^7\) Since the latter required proof
of nothing not proved by the former, the Blockburger test, if applied,
would prohibit cumulating the minimum sentence to eight years. If the
legislature simply had provided for an eight-year minimum sentence for
first degree robbery, however, no constitutional question would have
arisen. That is, although an eight-year sentence under a single statute
would present no constitutional problem, the same eight-year sentence,

65. This statement is not intended to suggest that the judiciary should not engage actively
in the protection of defendants from unwarranted successive prosecutions. Extensive discus-
sion of this aspect of the double jeopardy protection is outside the scope of this Note. At
present, it appears that when the Blockburger test reveals two offenses, a defendant is only
protected from subsequent action by collateral estoppel. See Ashe v. Swenson, 397 U.S. 436,
442-47 (1970). To the extent that Congress and state legislators undertake to define "the same
offense" as proposed by this Note, however, the double jeopardy protection against successive
prosecution may be enhanced.


67. Of course, the familiar counterargument to this justification of judicial deference as-
serts that the court should not back away from constitutional interpretation simply because it
would be complex or difficult. To the extent that this counterargument is persuasive in the
double jeopardy context, the judiciary should perhaps introduce and apply the principles out-
lined in section III(C). See infra notes 104-129 and accompanying text. Nevertheless, inter-
pretations of the "same offense" may uniquely warrant more judicial deference than should
other interpretive problems because Congress necessarily plays such a significant role in defin-
ing offenses. That is, an offense is what Congress says it is; otherwise it is not an offense.

68. 459 U.S. 359 (1983); see supra notes 63-64 and accompanying text.


as combined under two statutes, would violate the *Blockburger* rule and would be unconstitutional. Any distinction between the two schemes hardly would seem to be of constitutional consequence. And, of course, such distinctions presumably would result if the *Blockburger* "same-evidence" test operated with constitutional force.

Tests other than that laid out in *Blockburger*, however, do not appear to be significantly more helpful as constitutional distinctions between offenses. The "same-transaction" test as a constitutional standard leads to decisions based on value and policy judgments, since the "same-transaction" easily escapes precise definition. For example, consider a hypothetical mail fraud scheme in which the thief advertises nationally to sell special glasses guaranteed to increase immensely the ability of law students to "spot issues" on law school exams. Hundreds of first-year law students send 19.99 dollars each for the "Excell-lenses" and instead receive conventional theatre 3-D glasses. After scoring poorly on their exams, they find that the thief has cashed their checks and cannot be located. How many crimes have occurred? Rational application of the same-transaction test yields at least three reasonable results. First, the whole scheme could be considered a single transaction. Second, the false advertisement and the cashing of the checks could be considered two transactions. Third, each instrument cashed could be held to represent a separate transaction. In other words, the test only replaces one ambiguity with another.

Moreover, the same-transaction test may fail to handle logically problems similar to the problem in *Missouri v. Hunter*. An indefensible distinction arises between a jurisdiction that would impose a twenty-year sentence for robbery with a firearm and one that provides a ten-year sentence for robbery and in a separate statute imposes an additional ten years for committing a felony with a firearm. If the same-transaction test were imposed in the latter jurisdiction, the defendant would receive only a ten-year sentence for a crime that would receive a twenty-year sentence in the former jurisdiction. Further, the same-transaction test may compromise legitimate ends of criminal justice. For instance, if a criminal with full knowledge of the law deliberately intends, plans, and accomplishes two or more illegal objectives in a single transaction, he should

71. Nevertheless, the mere fact that the act leads to multiple convictions may achieve great significance to the offender who thereby triggers repeat offender, RICO, or other provisions that have sentence enhancement effects. The Federal Sentencing Guidelines presently operate to prevent inconsistent consequences in such cases by "grouping" past offenses for sentence enhancement purposes. The Guidelines, however, are not binding on the states, which might take a different view of how to treat prior federal offenses when sentencing an offender in a state court. See United States Sentencing Commission, *FEDERAL SENTENCING GUIDELINES MANUAL* pp. 221-33 (West rev. ed. 1990).

72. See Kirchheimer, supra note 12, at 534.
not be punished for only one crime simply because he was clever enough to be an efficient criminal.

Another possible basis for distinguishing offenses asks whether the two or more crimes alleged are intended to protect different societal interests. For instance, if one proscription protects property ownership and another protects life, then the two may be punished consecutively under this analysis. Ultimately, however, the test would return to legislative intent because definitions of a protected interest can reach any level of specificity. In *Blockburger* and *Gore*, for example, the Court could have reached a contrary result by finding that the offenses were merely different means of protecting society from dangerous narcotics.

The "same-intent" or "same-objective" ("same-objective") test as a constitutional standard would seem to approximate better common-sense notions of what crime and punishment entail. That is, the acts by which we seek to define criminality are only shadows of what we really wish to deter, punish, segregate, or rehabilitate—the *mens rea*. Without at least a minimal quantum of *mens rea*, the act is only unfortunate, not criminal. The true concern of a penal system is the criminal mind’s willingness to disrupt the social order by disregarding the rules that protect it. Thus, a perfectly omniscient judge or jury presumably would sentence according to culpability rather than according to unintended consequences of a criminal act.

Unfortunately, a constitutionally based determination that a criminal cannot receive multiple punishment for multiple offenses committed pursuant to a single objective in the same act or transaction creates troublesome problems for the legal system. First, jurors would be expected to reach fine psychological distinctions based on inadequate facts. In essence, they would have to become mind readers. To some extent the jury already performs this task when it decides whether or not a defendant manifested the required criminal intent. Direct or circumstantial indicators of planning, motive, and volition, however, often aid the jury in this determination. Thus, distinguishing murder from manslaughter in

---


74. See H. PACKER, *The Limits of the Criminal Sanction* 76 (1968) ("The orthodox view is that culpability is primarily a matter of the actor’s mental state rather than the conduct in which he engages.").

75. Indeed, were such evidence entirely lacking, a defendant normally would be entitled to a directed verdict of acquittal. See FED. R. CRIM. P. 29.
a given case may entail speculation; but often the means of the death (for example, the weapon used) may provide a ready index of premeditation.

A same-objective test involves even more obtuse subtleties. For instance, the decision whether larceny, robbery, and assault may be punished cumulatively in a given case may turn largely upon indiscernible mental states of the defendant. Thus, if a criminal runs into a convenience store, grabs a fistful of cash from the register and knocks over a clerk in his hasty escape, a range of crimes is possible. If bumping into the clerk was accidental, only larceny may apply. If the criminal had decided beforehand that he would do whatever was necessary to get away with the money and, as expected, he had to run over the clerk, then robbery would seem more appropriate. If the criminal is even more malicious and, after taking the money, decides to assault the clerk unnecessarily, then the larceny and assault might be divided accordingly. A perceptive eyewitness might see no outward signs indicating a difference among these three scenarios. The difference is entirely in the mind of the criminal.

Another shortcoming of the same-objective test arises when one of the offenses involved is an "enforcement" offense. Blockburger provides an illustration. There, the defendant was convicted of selling regulated narcotics without authorization and in violation of packaging laws. Using the same-objective test, the defendant would have argued that he intended only to sell drugs in violation of the law and was unaware of the specific packaging laws. Therefore, because he intended to violate just one law, he should be punished only once. Of course, this rationale is similar to the argument that since the defendant did not know the law, he should not be punished for its violation.

Thus, with respect to common-law offenses, the same objective test probably represents a worthy ideal, but is too difficult to apply on an individualized basis and may be better reserved as a general principle of legislation. With respect to regulatory offenses, application of the same objective rule collides with what may be a necessary fiction of modern civilization—that all citizens know the law. Further, to declare that the same objective test is the embodiment of the double jeopardy clause in its protection against multiple punishment would entail a radical break from the rule of stare decisis, since the Court has never analyzed double jeopardy in this fashion.

76. In the context of this Note, an "enforcement offense" describes one seemingly innocuous act or omission with the true aim of preventing other more culpable acts that otherwise might be more difficult to detect or control. See infra notes 109-10 and accompanying text.


78. See infra notes 115-17 and accompanying text.

79. In contrast, Justice Brennan has argued repeatedly and ardently that the same-transaction test should be the basis for the successive prosecution protection of the double jeopardy
DOUBLE JEOPARDY PROTECTION

In summary, neither the same-evidence test, the same-transaction test, nor the same-objective test provides an adequate principle for universal application in resolving the multiple offense question. Each, when examined, leads to unfair, or at least undesirable, results. Deeper analysis, however, inevitably leads to the ultimate legislative questions regarding the appropriate punishment for a given offense or set of offenses. Faced with this situation, it was reasonable for the Court to shift these legislative questions to their proper forum.

III. Legislation Invited

Through its decisions in Whalen v. United States, Albernaz v. United States, and Missouri v. Hunter, the Court effectively has side-stepped the question of double jeopardy protection against multiple punishment for the same offense. When Congress has spoken on the matter, the question of multiple conviction and punishment is settled. When Congress has not spoken, or has not done so clearly, the mechanical Blockburger test nearly applies itself. Unfortunately for an accused, however, the Blockburger “test” does not determine validly what the Court has credited it with testing. The Court has described the test as discerning legislative intent in the absence of “a determination of contrary legislative intent.” On the other hand, the test might just as reasonably be interpreted as a talisman that allows the Court to avoid deciphering legislative intent when the intent is not clearly apparent.

The Court could reach its decisions in this area by looking at whatever evidence of legislative intent may exist; the societal interests apparently protected; and the historical context of the enactment of the statutes. Instead, the Court has been quick to apply the Blockburger test, indicating that legislative intent must be “clear” before the Court will dispense with the test. Thus, whatever the legislative intent truly may be, unless Congress has clearly expressed it, the Blockburger talisman will provide its own estimation.

Note a subtle shift in analysis occurred in Albernaz. The Court applied Blockburger, 450 U.S. at 337, even before it mentioned whether or not any legislative intent could be found. Albernaz, 450 U.S. at 340.

83. Albernaz, 450 U.S. at 340.
85. See Hunter, 459 U.S. at 368; see also Albernaz, 450 U.S. at 340; Whalen, 445 U.S. at 691.
86. The Court has suggested, oddly enough, that since “Congress is 'predominantly a lawyer's body,' and it is appropriate for us to assume that our elected representatives . . . know
Rightly or wrongly, then, the Court has determined that it will scratch only the surface in attempting to discover legislative intent. This position places upon Congress the task of determining and explicitly declaring the circumstances authorizing consecutive convictions and punishments.


Indirectly, Congress has begun to move toward legislative declaration of double jeopardy protection in passing the Comprehensive Crime Control Act of 1984. In an effort to regulate sentencing procedures under the federal criminal code, Congress created the United States Sentencing Commission and charged it with promulgating sentencing guidelines and general policy statements regarding their application for federal courts.

Congress specified certain parameters for the Sentencing Commission that provided guidance for the Commission in treating the question of consecutive terms of imprisonment. The sentencing guidelines were to reflect "the general inappropriateness of imposing consecutive terms of imprisonment" for a solicitation or conspiracy or both and the "offense that was the sole object of the conspiracy or solicitation." In addition, the guidelines were to limit consecutive terms of imprisonment for the violation of a general prohibition and a specific prohibition encompassed within it.

The Commission responded with a procedure whereby counts are "grouped" for sentencing when the counts involve "substantially the same harm." This "same harm" condition can be satisfied four ways: (1) when the counts involve the same victim and the same act or transaction; (2) when they involve the same victim and two or more acts connected by a common scheme (including solicitation, conspiracy, and

the law," Congress must know Blockburger and that Congress intends its application. Albernaz, 450 U.S. at 341-42 (citations omitted). This rationale is not persuasive, of course, because its application and relation to the double jeopardy clause were unclear until Whalen or Albernaz. This proposition also tends to discredit the idea that the Blockburger test at its origin discerned, or was designed to discern, legislative intent.

90. 28 U.S.C. § 994(a)(1), (2) (Supp. V 1987). In Mistretta v. United States, 109 S. Ct. 647 (1989), the Court upheld the constitutionality of the guidelines against the challenge that the Commission was constituted in violation of the separation of powers principle.
92. See id. § 994(l)(2).
93. See id. § 994(v).
94. See FEDERAL SENTENCING GUIDELINES MANUAL, supra note 71, § 3D1.2.
attempt when two counts stem from a general-offense/specific-offense re-
lationship); (3) when one count represents a factor that the guidelines
already include in another count; and (4) when counts involve the “same
general type of offense” and the guidelines for that type of offense assess
its gravity in quantitative terms (for example, narcotic offenses that are
considered more severe according to the amount involved).95

To make the procedure more clear in its intended application, the
Commission provided illustrations of the operation of the guidelines for
multiple counts.96 The examples illuminate what the Commission means
by “substantially the same harm.” For instance, when a defendant is
convicted of forging and cashing the same check, the counts are
grouped.97 When the defendant is convicted of kidnapping and assault-
ing the victim during the course of the kidnapping, the counts also are
grouped.98 When a defendant rapes the same victim on different days,
however, the counts are not grouped.99

In general, the guidelines go far to ensure protection against multi-
ple punishments for the same offense and to preempt the application of
the Blockburger test. They take a realistic view of criminal transactions
and place motive and intent at the forefront of determinations of consec-
tutive imprisonment.100

B. The Commission and “The Same Offense”

Although the sentencing guidelines in certain respects provide sig-
nificant double jeopardy protection, it is not because they were designed
specifically to do so. As indicated by the Commission, Congress in-
tended the guidelines to achieve honesty, uniformity, and proportionality
in sentencing.101 The double jeopardy protections appear to be only de-
rivative. Since the Commission was not charged with the articulation of
double jeopardy standards, it is not surprising that gaps remain.

The Commission’s steps in providing double jeopardy protection,
however, suggest a very interesting possibility: perhaps the Sentencing
Commission should be authorized to propose double jeopardy protec-

95. See id. § 3D1.2 (a)-(d).
96. See generally id. ch. 3 (D) (containing extensive commentary in the form of
examples).
97. Id. at 3.14.
98. Id.
99. Id. at 3.15.
100. The guidelines do not reduce the length of sentences of imprisonment in any absolute
sense. While they reduce the possibility of consecutive imprisonment when multiple violations
of a statute occur, they reflect a clear intent to ensure, for instance, that “career offenders”
serve imprisonment terms “at or near the maximum term authorized.” 28 U.S.C. § 994(h)
(1984), implemented in FEDERAL SENTENCING GUIDELINES MANUAL, supra note 71, ch. 4
(B). The guidelines also operate effectively to lengthen actual time served because they abolish
parole. See FEDERAL SENTENCING GUIDELINES MANUAL, supra note 71, at 2.
101. Id.
tions in the same manner in which it promulgates the guidelines. Since
the Commission already implicitly approximates definition of the "same
offense" for cumulative imprisonment purposes, it seems well-suited to
do so expressly for double jeopardy purposes. Further, with at least
three of its seven voting members selected from the federal judiciary, the
statutory membership of the Commission reflects expertise in criminal
jurisprudence.\textsuperscript{102}

If Congress delegates its double jeopardy responsibilities to the
Commission, it must address two important matters. First, the present
arrangement between Congress and the Commission provides that
amendments to the guidelines will take effect automatically 180 days af-
after submission to Congress unless a law is enacted to the contrary.\textsuperscript{103}
The articulation of protections of constitutional import, however, should
not be left to passive legislation, but should occur pursuant only to af-
firmative enactment. A study by the Commission should be merely a
starting point.

Second, the process by which the Commission defines "same of-
fense" requires closer scrutiny. The approach presently used by the
Commission, while achieving results far superior to the previous state of
affairs, fails in certain respects to focus adequately on the mind of the
offender in identifying "offenses." Of course, the guidelines were not
designed to identify "offenses" any more than they were designed to ar-
ticulate double jeopardy protections. The principles used by the Com-
mission to address the consecutive imprisonment question, however,
parallel closely this Note's proposal for identifying "offenses" for double
jeopardy purposes.

C. A Same Offense Standard for Double Jeopardy

Given that a clear expression of legislative intent has been implicitly
invited by the Court and is desirable to further the goals of double jeop-
ardy protection, the question turns to the substance of this legislation.
This section discusses various possibilities and ends with a recommended
analysis examining scenarios under which multiple offenses can be ex-
pected to occur, focusing primarily on the intent of the offender.

\textit{(1) The Same Evidence Test}

Before proposing an alternative analysis, however, one should ask
whether Congress would desire a different analysis than the same-evi-
dence test outlined in \textit{Blockburger}. No expression of legislative intent in
the criminal statutes would be necessary if Congress only would enact its
own same-evidence test, duplicating the test already "enacted" by the

\begin{itemize}
  \item \textsuperscript{102} See 28 U.S.C. § 991(a) (Supp. V 1987).
  \item \textsuperscript{103} \textit{Id.} § 994(p).
\end{itemize}
Court. In view of the sentencing uniformity and proportionality goals that Congress has given the Commission, the answer seems clear. Considering the probable policy objectives of equitable distribution of punishment according to culpability, the results that the same-evidence approach would yield probably would not comport fairly with these goals.

Two broad categories of offenses, preparatory offenses and enforcement offenses, help to illustrate this point. Preparatory offenses include attempts, solicitations, and conspiracies. The guidelines “group” preparatory offenses with substantive offenses for sentencing purposes. Assuming that Congress approves of the approach taken by the Commission guidelines, it seems reasonable to infer congressional intent to provide double jeopardy protection against aggregated punishment for both preparatory offenses and corresponding substantive offenses.

Enforcement offenses, as defined for this analysis, are those created not so much to protect against literal violations of their terms as to provide the government the means to monitor and to prevent or detect, and successfully prosecute, substantive crimes, or to allow the government to prosecute a “second-best” offense when firm evidence of a substantive crime is out of the government’s reach. Such provisions arguably include, for example, the federal mail fraud and wire fraud statutes.

Looking at the mail and wire provisions, one plainly sees that they are designed to prevent fraud. While society has a clear interest in protecting the orderly function of the means of communication, whether a letter or wire communication contains an attempted fraud has no more effect on this function than does an innocent advertisement. The general federal fraud prohibition requires proof of a willful falsification or concealment of a material fact. The mail fraud section, however, requires only proof that the defendant devised or intended to devise a scheme to defraud and that he, for that purpose, placed or caused to be placed an item in the mails. No fraudulent statement need be proved.

In addition, the mail fraud provision operates to confer federal jurisdiction over crimes that may be only local in effect, so long as the mails are used. Consequently, when state or local prosecution is impossible for evidentiary reasons or is unsuccessful at trial, federal prosecution re-

---

104. See supra note 101.
105. The guidelines do not use the terms “preparatory” and “enforcement” in this context.
107. See supra note 95 and accompanying text.
109. Id. § 1343.
110. See id. § 1001.
main an option. Since fraud already is prohibited, the mail fraud statute seems targeted primarily at providing an alternate avenue of prosecution. In this vein, the guidelines manifest an intent that enforcement offenses should be "grouped" with substantive offenses to preclude consecutive terms of imprisonment. For instance, the guidelines require that when a defendant is convicted of two counts of mail fraud and one count of wire fraud in furtherance of a single scheme, the offenses are "grouped." To the extent that Congress would agree with the Commission's rejection of a same-evidence approach, one could not expect Congress to intend a same-evidence approach to define "the same offense."

(2) Alternatives

Assuming that Congress would not always intend the result reached by a same-evidence test, at least for preparatory and enforcement offenses, the question turns to how Congress should express an intent contrary to that which Blockburger's application would discover. This Note proposes that the Sentencing Commission be delegated the task of defining "the same offense" in much the same manner as it treats the multiple offense question in the guidelines and proposes a framework for the analysis. A preliminary question, however, is whether there are more appropriate means.

One alternative would be to enunciate in a separate statute a general principle of statutory interpretation. Under Minnesota's scheme, for example, when the conduct in question constitutes more than one offense, the defendant will be sentenced only according to the terms of one offense. The relevant factors in determining unity of conduct are "unity of time, place and criminal objective." While this hybrid of the same-transaction and same-objective tests probably better achieves the end of emphasizing culpability, it suffers from the infirmities of those tests as

---

112. The successive prosecutions in this case would not violate the double jeopardy clause as interpreted by the Court because Blockburger also applies to the multiple trial prohibition of the clause. See, e.g., Brown v. Ohio, 432 U.S. 161, 166 (1977). Moreover, even if they were the "same offense," the double jeopardy clause has been held to not preclude a state prosecution following a federal one and vice versa. See United States v. Wheeler, 435 U.S. 313, 316-22 (1978).

113. FEDERAL SENTENCING GUIDELINES MANUAL, supra note 72, at 3.15.

114. MINN. STAT. § 609.035 (1987) provides in part: "[I]f a person's conduct constitutes more than one offense . . . the person may be punished for only one of the offenses and a conviction or acquittal of any of them is a bar to prosecution for any other of them."

For discussion and criticism of this statute, see generally Note, Multiple Prosecution and Punishment of Unitary Criminal Conduct—Minn. Stat. § 609.035, 56 MINN. L. REV. 646 (1972).

For similar statutes, see NEW YORK PENAL LAW §§ 70.25(2), 80.15 (McKinney 1987) and CAL. PENAL CODE § 654 (West 1988).

standards for judicial review. That is, whether conduct should be divided into separate transactions may depend more on the offense in question than on unity of time and place. One would expect that a person who commits two deliberate murders at substantially the same time and place would be punished separately, while a person who is found driving a car that he stole one week earlier should not be punished for both stealing and driving the car. Moreover, the “same-objective” aspect of the test may require judges and juries to attempt mind reading.

(3) Sentencing Guidelines Approach

Perhaps the better approach would begin with a set of fundamental principles for identifying “the same offense” and examine each criminal provision in relation to every other criminal provision with an eye towards harmonizing the crimes with the principles. This analysis is the basic approach of the sentencing guidelines, directed toward a different purpose.

Many of the concepts fundamental to an application of this process in the double jeopardy context have been detailed in other texts and some have long been part of the scholarly discourse of criminal jurisprudence in the United States and elsewhere. Some of these tenets, as outlined in broad terms by Professor Kirchheimer, include “alternativity,” “specialty,” and “consumption or subsidiarity.” Alternativity addresses the inconsistent verdict problem, when a defendant cannot possibly be guilty of both crimes for which he is convicted. The “specialty” principle would preclude convictions for both a general offense and a specialized offense. This rule would apply to “necessarily-included” offenses and to predicate offenses. Thus, robbery is a necessarily-included offense of bank robbery and the underlying felony would be a predicate offense of felony-murder. In neither context is this principle uniformly accepted. Missouri v. Hunter authorized cumulative

116. See supra notes 73-80 and accompanying text.
117. See generally Kirchheimer, supra note 12 (summarizing various principles and approaches to the protection from double jeopardy).
118. Id.; Labatut Glena, DERECHO PENAL TOMO I 158-60 (7th ed. 1976) (discussing subjective and objective approaches to distinguishing between unitary offenses and multiple offenses); THE GERMAN DRAFT PENAL CODE E 1962, at 5-17, 49 (Fred B. Rothman & Co. 1966) (defending against American criticism the centrality of German notions of guilt in German criminal law; providing that multiple crimes arising from one act shall give rise to only one punishment); THE ITALIAN PENAL CODE 27-31 (Fred B. Rothman & Co. 1978) (prescribing rules for sentencing of multiple offenses).
120. See id. at 517 (manslaughter necessarily precludes murder and vice versa).
121. Id. at 517-18. A predicate offense is one of two or more possible underlying offenses. Compound offenses are those such as RICO violations that arise from two or more predicate offenses that are, themselves, completed offenses.
punishment in the context of a necessarily-included offense, while Chief Justice Rehnquist appeared to question a restraint against punishment for predicate offenses. The guidelines, for many offenses, operate to implement this principle in practice.

The consumption and subsidiarity principle is certainly the most ignored among those articulated by Professor Kirchheimer. This principle generally requires the merger of preparatory offenses with the completed offense and the merger of subsequent acts consequentially related to the primary offense. Professor Kirchheimer proffers, as an example of the latter situation, the case of a cattle thief who subsequently re-brands the stolen cattle. "[I]t does not seem fair to punish the thief twice: the first time he is punished for the act of usurping a right; if afterwards he acts as if he were the legitimate proprietor, he is apparently being punished for the exercise of a function the illegitimate usurpation of which has already been the basis for his prior punishment."

Professor Kirchheimer's consumption and subsidiarity principles suggest the same-objective test. This test, however, is not a viable judicial standard. Besides problems regarding codification of such a test and leaving the courts and juries to determine the specifics, this approach necessarily would invite considerable judicial legislating, perhaps with results wholly unintended by Congress. Instead, the better solution would make the same-intent or same-objective concept the guiding principle behind a broad evaluation of the double jeopardy implications of federal criminal provisions.

This proposal would serve two aims necessary to give fair meaning to the double jeopardy clause. First, the analysis would focus on the mens rea involved in a given provision and, using that guidepost, it would determine what constitutes "the same offense." Second, the evaluation would set forth these findings so that the courts are not forced to resort to circumstantial evidence of legislative intent or talismanic rules of construction. The evaluation would result, not in a "grouping" of offenses, but in a determination that, under given circumstances, multiple offenses merge to become one offense, thereby fulfilling the plain intent of the double jeopardy clause that a defendant not be placed twice in jeopardy for what, realistically viewed, is the "same offense."

123. See Whalen v. United States, 445 U.S. 684, 708-12 (1980) (Rehnquist, J., dissenting) (arguing that a predicate offense should be distinguished from a lesser-included offense for double jeopardy purposes).

124. See Kirchheimer, supra note 12, at 518-22.

125. Id. at 520 (drawing from People v. Kerrick, 144 Cal. 46, 77 P. 711 (1904)).

126. See supra notes 76-80 and accompanying text.
(4) The Structure of the Evaluation

The overall inquiry requires two predicate analyses: the societal interest question and the identity-of-objective question. The first step in the societal interest question examines a given provision and determines its general function. It looks to the substantive danger to society against which the statute principally protects. Legislators should be mindful at this juncture of the distinction between enforcement offenses and substantive offenses and should make this determination realistically, avoiding the temptation to create substantive interests for enforcement purposes. Next, one should ask whether there is a reasonably foreseeable scenario in which someone might, in the same act, transaction, or occurrence, violate both the statute in question and another statute. If so, the next issue is whether the second statute as applied in conjunction with the first is directed toward the same substantive danger or a different danger.

At this point the identity-of-objective question enters the analysis. Under the scenario being scrutinized, the legislative body should determine what objective factors might indicate that the offender intended to accomplish two or more criminal objectives by her act. One important factor may be the question of whether, according to the scheme intended in the scenario, both or all offenses are necessary to accomplish the scheme. When one offense is unnecessary, this factor indicates (though not conclusively) separate intents and separate crimes warranting separate punishment. This situation would occur, for example, when an unnecessary assault is committed in the course of a robbery.

Another circumstantial indicator of separate objectives might be when the offender is guilty of both an enforcement offense and its correspondent substantive offense, and the facts indicate that she attempted to conceal the enforcement offense. This conduct would indicate that the offender knew of both offenses and intended to commit both. Applying this rationale, for example, to the mail-fraud and substantive-offense combination (assuming mail fraud to be an enforcement offense, as the

127. One helpful measure would consolidate all offenses under one title. (Federal offenses are currently scattered across at least 19 separate titles of the United States Codes. See generally United States Codes Annotated, 1988 General Index, under “Crimes and Offenses.”) Provisions could be cross-referenced to other titles to avoid unwarranted duplication of definitions, schedules, procedures, etc. Not only would this modification simplify the re-evaluation process, but it would be very useful to lay people (and lawyers as well) who, if presumed to know the criminal law, should at least be able to find it.

128. This analysis is akin to a same-evidence test except that it applies against the indictment or information rather than against the offenses in the abstract. See Whalen, 445 U.S. at 694 n.8; id. at 708-12 (Rehnquist, J., dissenting).

129. Arguably, this factor raises an ignorance-of-the-law defense. As argued supra, however, in a close case the emphasis should lie in the mens rea. See supra note 73 and accompanying text. This point is particularly relevant with respect to regulatory offenses.
guidelines seem to suggest), indicators of dual intent may be available when the offender uses bogus addresses or mail drops or takes care to send mail from various zip codes in order to evade detection by postal inspectors. A related factor in finding dual intents may be the case when the offender has been charged previously with the offenses in question and possesses particular awareness of the multiplicity of crimes involved. This approach is more specific to the offender than that used in the guidelines. While the guidelines tend to "group" certain offenses regardless of the intent of the offender, this approach allows for multiple offenses when the offender so intended.

The overall analysis then proceeds as follows. If the identity-of-objective analysis yields two or more offenses, the determination is conclusive of separate offenses regardless of whether the offenses are designed to protect the same societal interests or different ones. When the identity-of-objective analysis reveals only one objective and the offenses guard a single societal interest, then only one offense results. When one objective is found and the provisions that have been violated protect distinct interests, the analysis must turn to a qualitative evaluation of the interests under the circumstances. The offenses in the usual case are both substantive wrongs, raising a presumption of compounded mens rea, thereby warranting consecutive conviction and punishment. When the question is close as to whether the societal interests are distinct, however, a legislative judgment might favor finding one offense. Thus, for instance, a legislature may face the question of whether a prohibition against making a false statement to a governmental agency protects a sufficiently distinct societal interest to warrant further punishment when the statement is given to effect a tax or welfare fraud.

Finally, of course, the findings must be articulated. To a large extent, the intent can be expressed directly in the statutes themselves, particularly when two offenses are either to be separated or merged under all circumstances. When the analysis is more complex, such as when an extensive listing and explanation of particular distinguishing factors is required, or when examples would be helpful, the legislative intent might be better left to advisory notes such as those provided in the Federal Rules of Evidence or the Federal Rules of Criminal Procedure. Alternatively, the entire analysis could be set forth, in the model of the sentencing guidelines, in a text of double jeopardy guidelines.

Conclusion

The review of the Supreme Court cases treating the double jeopardy clause's protection against multiple punishment dramatically reveals two facts. First, at this juncture the Court appears to have firmly declined to search far and wide for legislative intent in addressing the cumulative conviction and punishment issues. Instead, when in doubt, it will apply
the *Blockburger* same-evidence test. Second, given this judicial disposition, the responsibility for insuring that this constitutional protection has substantive meaning ultimately rests upon legislators.

Toward this end, Congress and the states must undertake an extensive analysis of the criminal provisions and clearly determine under what circumstances consecutive punishment is to be authorized for the various combinations of offenses that arise from unitary conduct. For the federal criminal statutes, the United States Sentencing Commission would be an appropriate body through which to initiate this process. The spirit of fairness behind the double jeopardy clause invites state legislatures to institute similar commissions for the study of how to best articulate legislative intent regarding criminal punishment. To comport with the fundamental aims of the clause and of the criminal law, the guidepost for these determinations must be the intent of the offender. Singularity of intent must translate to singularity of offense.