Sentencing Problems under the Multiple Punishment Doctrine

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INTRODUCTION

Over a century ago, the Supreme Court concluded that "the Consti-

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(1351)
tution was designed as much to prevent the criminal from being twice punish
ed for the same offence as from being twice tried for it."1 On its face, this application of the double jeopardy clause2 to prohibit multiple punishment in a single trial seems unremarkable enough. One may ask why a judge should be able to impose two penalties at the end of a trial if a prosecutor is forbidden to seek those same penalties in successive jeopardies.3 The easy answer is, of course, that the double jeopardy clause limits the judge in precisely the same manner in which it limits the prosecutor.4

The difficulty with this conclusion, however, is that its very simplicity masks two substantial differences between multiple punishment theory and the successive jeopardy doctrine from which it derives.5 One

1. Ex parte Lange, 85 U.S. (18 Wall.) 163, 173 (1873). In Lange, the defendant was convicted for "stealing, purloining, embezzling, and appropriating to his own use certain mail-bags belonging to the Post-office Department." Id. at 164 (citing 17 Stat. 392 § 290 (1872)). The judge sentenced the defendant to "one year's imprisonment, and to pay two hundred dollars fine." Id. (emphasis in original). The statute, however, provided for "imprisonment for not more than one year or a fine of not less than ten dollars nor more than two hundred dollars." Id. (emphasis in original). The defendant had already paid the fine and spent five days in jail when the former judgment was vacated and the defendant resentenced to one year in jail without fine. Id. From a petition for writ of habeas corpus, the Supreme Court concluded that vacating a judgment after the defendant had fully executed one of the alternative penalties authorized by statute and then imposing a new judgment based on the same conviction "punish[es] him twice for the same offence." Id. at 175 (emphasis in original). In light of this conclusion, the Court ordered the defendant's release. Id. at 178. For a more detailed analysis of Lange, see Thomas, Multiple Punishments for the Same Offense: The Analysis After Missouri v. Hunter, 62 WASH. U.L.Q. 79, 88-93 (1984); Westen & Drubel, Toward A General Theory of Double Jeopardy, 1978 SUP. CT. REV. 81, 107-11.

2. The fifth amendment provides in relevant part: "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . . ." U.S. CONST. amend. V.

3. See Brown v. Ohio, 432 U.S. 161, 166 (1977) ("Where the judge is forbidden to impose cumulative punishment for two crimes at the end of a single proceeding, the prosecutor is forbidden to strive for the same result in successive proceedings.").

4. See id. at 165 ("[C]ourts may not impose more than one punishment for the same offense and prosecutors ordinarily may not attempt to secure that punishment in more than one trial.").

5. In the first multiple punishment case, Ex parte Lange, 85 U.S. (18 Wall.) 163, 173 (1873), the Court held that the double jeopardy clause necessarily creates a protection against multiple punishment, stating: "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? . . . It is the punishment that would legally follow the second conviction which is the real danger guarded against by the Constitution." For a discussion of the rather unusual facts of Lange, see supra note 1.

Later Supreme Court cases explicitly acknowledged that the multiple punishment doctrine derives from the double jeopardy clause. See, e.g., North Carolina v. Pearce, 395 U.S. 711, 717 (1969) (fifth amendment guarantee against double jeopardy "protects against multiple punishments for the same offense.").
The difference, already explored elsewhere, is in the way the two doctrines impact the legislature. Although both doctrines apply equally to judges and prosecutors, only the successive jeopardy doctrine limits legislatures. Thus, a legislature can authorize multiple penalties to be imposed in a single proceeding because it is the appropriate body to "define crimes and fix punishments." If the legislature can authorize a sentence of ten years for robbery with a firearm, why could it not authorize a conviction and sentence of five years for robbery and five years for using a firearm to commit a felony? Simply put, express legislative authorization of multiple penalties for the same conduct makes the penalties singular in a constitutional sense.

The Court has quoted this language from *Pearce* in numerous cases. See *Ohio v. Johnson*, 467 U.S. 493, 498 (1984); *Albernaz v. United States*, 450 U.S. 333, 343 (1981); *United States v. DiFrancesco*, 449 U.S. 117, 129 (1980); *Illinois v. Vitale*, 447 U.S. 410, 415 (1980); *Whalen v. United States*, 445 U.S. 684, 688 (1980); *Simpson v. United States*, 435 U.S. 6, 11 n.5 (1978); *Brown v. Ohio*, 432 U.S. 161, 165 (1977); *United States v. Wilson*, 420 U.S. 332, 343 (1975). To suggest that the multiple punishment doctrine derives from the double jeopardy clause protection against successive jeopardies is not, however, to suggest that the two doctrines are precisely congruous. For a comparison of the two doctrines, see *infra* notes 6-12 and accompanying text; see also *Thomas*, supra note 1, at 124 (concluding that the multiple punishment doctrine exists simply to "keep judges and prosecutors from circumventing the protection of the double jeopardy clause.").


8. *Brown v. Ohio*, 432 U.S. 161, 165 (1977). In *Brown*, the Court declared: "Because it was designed originally to embody the protection of the common-law pleas of former jeopardy ... the Fifth Amendment double jeopardy guarantee serves principally as a restraint on courts and prosecutors. The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments ... ." *Id.* (citation omitted); see also *Missouri v. Hunter*, 459 U.S. 259, 368 (1983) ("Legislatures, not courts, prescribe the scope of punishments.").

9. See Note, *Twice in Jeopardy*, 75 Yale L.J. 262, 302-03 (1965) (double jeopardy clause intended to prevent prosecutor from seeking or court from imposing more than one conviction for single offense, but not to limit legislature's power to define and punish offenses). But see *Schwartz*, *Multiple Punishment for the "Same Offense": Michigan Grapples with the Definitional Problem*, 25 Wayne L. Rev. 825, 845-46 (1979) ("[T]he legislature's intention to impose multiple punishment in a particular instance is a consideration distinct from the question of whether two convictions constitute multiple punishment for the same offense under the double jeopardy clause.").

10. See *Missouri v. Hunter*, 459 U.S. 359, 368-69 (1983). The *Hunter* Court noted that when a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the 'same' conduct . . . , a court's task of statutory construction is at an end and the
The second difference between the multiple punishment and successive jeopardy doctrines is in defining an appropriate remedy for a violation of each doctrine. Because a second trial is always a second jeopardy, the appropriate remedy for a violation of the successive jeopardy doctrine is to forbid the second trial. On the other hand, determining that the multiple punishment doctrine forbids multiple penalties requires an additional determination of what penalties are “multiple.” For example, suppose a defendant is convicted of two offenses, and the maximum fine under either statute is $100,000. If the judge imposes a $75,000 fine for the more serious offense and a $25,000 fine for the other offense, has the defendant suffered “multiple” penalties?

Prior to 1985, the Supreme Court failed to clearly address the issue of what penalties are “multiple,” although the Court had implicitly resolved it in a number of cases. In Ball v. United States, the Court squarely addressed this issue and held that multiple convictions are always multiple penalties if Congress did not intend two criminal statutes to apply to the same conduct. Noting that it makes no difference what punishment attaches to the convictions, the Court held that: “the second conviction, even if it results in no greater sentence, is an impermissible punishment.” Thus, the Court ordered the district court to

prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial.

11. See Abney v. United States, 431 U.S. 651, 661 (1977) (denial of motion to dismiss on double jeopardy grounds can be appealed as interlocutory because double jeopardy guarantee protects “against being twice put to trial for the same offense”) (emphasis in original).

12. See Jeffers v. United States, 432 U.S. 137 (1977). In Jeffers, the defendant received fines totaling $125,000 although the maximum fine under either conviction alone was only $100,000. Id. at 143-45. The Court determined that Congress did not intend cumulative penalties under these statutes and held that the defendant was entitled to relief, but did not specify the nature of such relief. Id. at 157. The Court noted, however, that the defendant was “entitled to have the fine imposed [for the second conviction] reduced so that the two fines together do not exceed $100,000.” Id. at 158. This language leaves open the possibility that two convictions for the same offense would have been permissible so long as the fines imposed did not exceed the maximum for a single offense. See id. at 154-58. For a more complete discussion of Jeffers, see infra notes 71-80 and 151-54 and accompanying text.

13. For a discussion of Supreme Court cases which implicitly address the issue of whether multiple convictions are multiple penalties, see infra notes 45-87 and accompanying text.


15. Id. at 864. For a discussion of Ball, see infra notes 166-86 and accompanying text.

16. 470 U.S. at 865. The Court stated the rationale for this conclusion as follows: “The second conviction, whose concomitant sentence is served concurrently, does not evaporate simply because of the concurrence of the sentence. The separate conviction, apart from the concurrent sentence, has potential adverse collateral consequences that may not be ignored.” Id. at 864-65 (emphasis in original). These potential collateral consequences of the second conviction include: delay of parole, increased sentences for future offenses in states with
vacate one of the convictions even though the sentences were concurrent.\textsuperscript{17}

Although this is a sensible enough conclusion, and indeed had been predicted by commentators,\textsuperscript{18} \textit{Ball} is not quite as simple as it appears. \textit{Ball}’s holding is based on statutory construction with no mention of the fifth amendment. Therefore, it is unclear what impact the \textit{Ball} decision will have on the disparate state court approaches to the multiple penalty problem.\textsuperscript{19} Further, the \textit{Ball} Court decided the issue without acknowledging the confusion that exists in earlier Supreme Court opinions and made no attempt to reconcile \textit{Ball}’s result with these earlier cases.\textsuperscript{20}

This article attempts to fill in the gaps left by the Court’s resolution of the multiple penalty issue in \textit{Ball}. It explores the possible solutions to the problem, the history of the issue in the Supreme Court, and the conflicting approaches of the lower courts. The article then examines the \textit{Ball} solution in detail and attempts to reconcile it with earlier Supreme Court multiple penalty cases. Finally, the article considers the likely impact of \textit{Ball} on federal and state courts. This article concludes, first, that \textit{Ball} implicitly overruled at least one earlier Supreme Court holding; second, that \textit{Ball} requires almost all of the federal circuits to change their sentencing procedures and, third, that \textit{Ball} is binding on state courts because it is implicitly based on the fifth amendment double jeopardy clause.

\section*{II. A Framework For Analysis}

As a basic proposition, a defendant is protected against multiple punishment only when multiple penalties are imposed pursuant to statutes that define the same offense.\textsuperscript{21} This same-offense definitional issue

\begin{itemize}
\item recidivist statutes, impeachment of credibility and the “societal stigma” a criminal conviction carries with it. \textit{Id.} at 865.
\item 17. \textit{Id.} The Court noted that both counts may go to the jury provided that there is sufficient evidence to sustain both. \textit{Id.} However, if the jury finds the defendant guilty on both counts, judgment should only be entered for one of the counts. \textit{Id.}
\item 18. See Thomas, \textit{supra} note 1, at 121 (Supreme Court “appears to have reached” conclusion that multiple convictions are multiple penalties); Remington & Joseph, \textit{Charging, Convicting, and Sentencing the Multiple Criminal Offender}, 1961 Wis. L. Rev. 528, 551 (“When a person is improperly convicted of more than one offense, one of the offenses of which he stands convicted will be set aside.”).
\item 19. For a discussion of the solutions applied by state courts and lower federal courts, see infra notes 89-165 and accompanying text.
\item 20. For a discussion of the confusion existing in earlier Supreme Court cases, see infra notes 45-88 and accompanying text.
\item 21. See, \textit{e.g.}, Whalen v. United States, 445 U.S. 684 (1980) (rape and felony murder statutes defined same offense); Bell v. United States, 349 U.S. 81 (1955) (Mann Act defined single offense when two women were transported simultaneously across state line).
\end{itemize}
has been addressed at length by many commentators, including the

22. See, e.g., Carroway, Pervasive Multiple Offense Problems—A Policy Analysis, 1971 Utah L. Rev. 105, 107 (1971) ("Before the double jeopardy clause comes into operation, the jeopardy must be for the 'same offense' within the meaning of the Constitution."); Schwartz, supra note 9, at 825 (double jeopardy provision of fifth amendment protects against multiple punishment for same offense); Westen & Drubel, supra note 1, at 122 (double jeopardy clause operates as rebuttable presumption against multiple punishment); Note, Criminal Law—Multiple Punishment Resulting from a Single Course of Criminal Conduct, 25 Ark. L. Rev. 181, 181 (1971) (basic sense of fairness indicates "no man should be twice prosecuted or twice punished for 'the same offense'"); Note, A Look at the Tennessee Multiples Offender and the Fonder and Severance of Criminal Offenses for Trial, 7 Mem. St. U. L. Rev. 457, 461 (1977) (courts have construed double jeopardy clause to prevent multiple punishment for same offense as well as to preclude second trial once defendant already placed in jeopardy); Comment, Sentences for Convictions under the Federal Bank Robbery Act—A Problem in Statutory Construction, 24 Mo. L. Rev. 540, 542-43 (1959) ("robbery, entry and larceny offenses ... constitute only one offense for which only one sentence may be imposed"); Note, Multiple Prosecutions and Punishments under RICO: A Chip Off the Old "Blockburger", 52 U. Cin. L. Rev. 467, 473 (1983) (application of Blockburger test is primary method of statutory construction utilized by courts in determining whether defendant is being punished for same offense); Note, Commonwealth v. Hermankevich, Section (B) of the Pennsylvania Deadly Weapons Act, and Multiple Punishment, 31 U. Pitt. L. Rev. 476, 484-86 (1970) (offenses are same if "same evidence" is used to convict for each offense); Note, Criminal Law—Multiple Punishment and the Same Evidence Rule, 8 Wake Forest L. Rev. 243, 246 (1972) (to determine the meaning of "lesser included offense" or "same offense" courts resort to different tests with numerous variations); Note, Federal Multiple Offense Prosecutions: The Same Evidence Test and Cumulative Punishment, 1960 Wash. U. L. Q. 98, 113-14 (when properly used, "same evidence test" provides federal courts with convenient and logical tool for demonstrating distinctions between separate offenses involved in course of criminal conduct, thus satisfying double jeopardy clause); Note, The Federal Bank Robbery Act—The Problem of Separately Punishable Offenses, 18 Wm. & Mary L. Rev. 101, 104-05 (1976) (majority of jurisdictions follow "same evidence test" holding that two statutory provisions define different offenses if each provision requires proof of one fact that other does not) [hereinafter cited as Note, The Federal Bank Robbery Act]; Note, Twice in Jeopardy, supra note 9, at 269-77 (examining most popular offense-defining tests); Note, Consecutive Sentences in Single Prosecutions: Judicial Multiplication of Statutory Penalties, 67 Yale L.J. 916, 921-23 (1958) (criticizing "same evidence" test as being too mechanical); Note, Statutory Implementation of Double Jeopardy Clauses: New Life for a Moribund Constitutional Guarantee, 65 Yale L.J. 339, 347 (1956) (most tests employed by courts to determine number of offenses for which accused may be tried and punished are variations of "same evidence" test); Note, Double Jeopardy and the Multiple-Count Indictment, 57 Yale L.J. 132, 134 (1947) (discussing determination of "sameness" required for upholding multiple punishment challenge under "Same Evidence" and "Same Transaction" tests); Comment, Cumulative Sentences for One Criminal Transaction Under the Double Jeopardy Clause: Whalen v. United States, 66 Cornell L. Rev. 819 (1981) (discussing judicial struggle to define "same offense" in multiple punishment cases); Comment, Consecutive Sentences in Narcotics and Liquor Cases, 22 J. Criminology & Crim. L. 902 (1992) (discussing joinder of counts); Comment, Multiple Offenses and Multiple Penalties under the Federal Narcotics Laws, 28 U. Chi. L. Rev. 308, 316 (1961) (concluding that "same transaction" test is preferable to "same evidence" test in defining same offense); Comment, Double Jeopardy and the Virginia Supreme Court: Three Approaches to Multiple Punishment, 16 U. Rich. L. Rev. 885, 887 (1982) (multiple punishment test for same offense focuses on elements of offenses rather than facts of particular case); Comment,
author of this article, and thus will not be discussed here. The only issue that this article will analyze is the "puzzling problem" of how to decide which penalties are "multiple" and thus forbidden when based on the same offense.

This issue can arise in three very different contexts. First, it may arise when both noncriminal and criminal penalties are imposed for the same conduct. Second, it may arise when a single criminal conviction


23. See Thomas, The Prohibition of Successive Prosecutions for the Same Offense: In Search of a Definition, 71 IOWA L. REV. 323, 369-85 (1986) (concluding that double jeopardy clause prohibits second trial if it requires proof of same conduct as first trial) [hereinafter cited as Thomas, Successive Prosecutions]; Thomas, A Unified Theory of Multiple Punishment, 47 U. Pitt. L. REV. 1, 54-90 (1985) (concluding that protection against multiple punishment prohibits only punishments not authorized by legislature; developing rules to ascertain legislative intent) [hereinafter cited as Thomas, Multiple Punishment].

24. Mead, Double Jeopardy Protection—Illusion or Reality?, 13 IND. L. REV. 863, 884 (1980) (although cumulative punishment issue has been raised, it has not been decided).

25. The Supreme Court for many years has referred to the penalties at issue in multiple punishment cases as "multiple" penalties or punishments. See North Carolina v. Pearce, 395 U.S. 711, 717 (1969) (double jeopardy clause "protects against multiple punishments"). For cases quoting Pearce, see supra note 5. Cf. Iannelli v. United States, 420 U.S. 770, 785 n.17 (1975) (protection is against "separate sanctions" or "separate punishment").

Sometimes, the Court has used the terminology "cumulative punishment" to describe penalties that are forbidden by the multiple punishment doctrine. See Ohio v. Johnson, 467 U.S. 493, 499 (1984) ("the final component of double jeopardy—protection against cumulative punishments"); Albernaz v. United States, 450 U.S. 333, 345 (1981) (Stewart, J., concurring) ("Congress could not constitutionally provide for cumulative punishments unless each statutory offense required proof of a fact that the other did not"); Whalen v. United States, 445 U.S. 684, 685-86 (1980) (characterizing issue as whether "imposition of cumulative punishments ... [is] contrary to federal statutory and constitutional law"); Brown v. Ohio, 432 U.S. 161, 166 (1977) (determining whether "cumulative punishment" is permissible); Jeffers v. United States, 432 U.S. 137, 154-58 (1977) (plurality opinion) (consistently referring to "cumulative punishment" or the "cumulative-punishment" issue).

The terms "cumulative" and "multiple" are, therefore, synonymous. They both identify penalties that require consideration of whether the offenses are the "same" offense. See Johnson, 467 U.S. at 499; Albernaz, 450 U.S. at 343-44; Whalen, 445 U.S. at 686, 688; Brown, 432 U.S. at 165-66 (cases interchangeably using terms "cumulative" and "multiple" to describe impermissible penalties). Of course, some "cumulative" punishments are permissible. See, e.g., Missouri v. Hunter, 459 U.S. 359, 368-69 (1983) (holding that when the "legislature specifically authorizes cumulative punishment ... the trial court or jury may impose cumulative punishment ... in a single trial"). The term "multiple penalties" will be used in this article to indicate penalties that trigger a multiple punishment analysis.

26. Compare Haddad & Mulock, Double Jeopardy Problems in the Definition of the Same Offense: State Discretion to Invoke the Criminal Process Twice, 22 U. FLA. L. REV. 515, 528-29, & 529 n.61 (1970) (suggesting that "penal fine[s] duplicating the corresponding criminal penalty" imposed by an administrative agency should
results in both a traditional criminal penalty and a less restrictive sanction such as pretrial confinement, probation or parole.\textsuperscript{27} Third, it can arise when multiple criminal convictions result from the same conduct.\textsuperscript{28}

This article addresses only the third context. The Supreme Court has resolved the first context by holding that a noncriminal penalty can be imposed in addition to a criminal penalty.\textsuperscript{29} Although the Court has not considered the second multiple penalty issue, the \textit{Ball} analysis implies that any number of penalties can attach to a single conviction as long as they are authorized by the legislature.\textsuperscript{30}

Even when limited to the context of multiple criminal convictions, the problem of when a penalty is multiple has numerous manifestations. Defendants can receive a sentence under one conviction only; concurrent sentences of equal length; concurrent sentences of unequal length; concurrent sentences of equal length but probationary periods of unequal length; consecutive sentences totaling more, or less, than could have been imposed for the more serious offense; and fines totaling more, or less, than the maximum permissible fine for either offense. Which of these penalties should be defined as “multiple” penalties?\textsuperscript{31} A
A. Possible Solutions

At least five theories can be used to define "multiple" penalties in the context of multiple convictions. Although the Ball Court adopted one of these solutions for addressing the problem in federal court, it is far from clear that Ball applies to state courts. Therefore, this article will consider all five theories in light of state and lower federal court cases that have explicitly recognized and decided the multiple penalty issue. The theories may be illustrated by a hypothetical case: Assume a defendant is convicted under two statutes that are considered the same offense under the multiple punishment doctrine. The maximum sentence for the greater offense is ten years and the judge sentences the defendant to consecutive sentences of five years and three years.

At one end of the spectrum is the single conviction theory, holding that multiple convictions are always multiple penalties. Under this theory, the hypothetical defendant has suffered multiple punishment, and therefore one of the convictions and sentences must be vacated. This

It has been argued that even the imposition of a single penalty for a single conviction might constitute multiple punishment under a "revitalized double jeopardy clause." McKay, Double Jeopardy: Are the Pieces the Puzzle?, 23 WASHBURN L.J. 1, 19-20 & 20 n.125 (1983). As Judge McKay correctly noted, however, "[u]nder present double jeopardy theory, this result is not considered multiple punishment." Id. at 20 n.125.

For a discussion of five definitional solutions to the definition of multiple penalties in the context of multiple convictions, see infra notes 33-44 and accompanying text.

Although a sixth solution was recently proposed by the Second Circuit in United States v. Osorio Estrada, 751 F.2d 128 (2d Cir. 1984), cert. denied, 106 S. Ct. 97 (1985), it is probably merely a different manner of expressing one of the five solutions identified in this section. For a discussion of Osorio Estrada, see infra notes 159-65 and accompanying text.

For a discussion of whether Ball is constitutional in scope, see infra notes 296-326 and accompanying text.

Courts applying this theory typically vacate the lesser conviction. It is not always clear, however, which is the "lesser" offense. If "lesser" is defined as the offense which is included in the other, vacating the conviction and sentence for the "lesser" offense can lead to an "anomalous" result in some situations. Note, The Federal Bank Robbery Act, supra note 22, at 111-12 (pointing out that entry under the Federal Bank Robbery Act (18 U.S.C. § 2113 (1976)) is a "lesser" offense of larceny in a bank but that the "lesser" offense in that case has a maximum punishment twice that of the "greater").

Other courts have attempted to define which is the "lesser" offense by referring to the statutory language in the penalty section. See, e.g., Sours v. State, 593 S.W.2d 208 (Mo.) (holding that included offense of robbery with firearms must be affirmed while conviction for "greater" offense of armed criminal action must be vacated due to language of armed criminal action statute), vacated on other grounds, 446 U.S. 962 (1980); cf. State v. Haggard, 619 S.W.2d 444, 53-54 n.3 (Mo. 1981) (Rendlen, J., dissenting) (concluding that majority's decision to vacate "greater" conviction was an "ad hoc choice . . . without citation of authority or explication of rationale"), vacated, 459 U.S. 1192 (1983).
is the theory the Court applied in Ball, and many state courts have also adopted it. Among the virtues of the single conviction theory is its simplicity.

At the other extreme is the position that a defendant does not suffer multiple penalties unless the aggregate punishment exceeds the maxi-

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36. See, e.g., Wilkerson v. State, 41 Ala. App. 265, 130 So. 2d 348, cert. denied, 272 Ala. 710, 130 So. 2d 350 (1961) (state cannot split single offense into two or more parts and convict offender for each); Tuckfield v. State, 621 P.2d 1350 (Alaska 1981) (remanded with instructions to vacate conviction for lesser included offense); People v. Raymer, 626 P.2d 705 (Colo. App. 1980), aff'd, 662 P.2d 1066 (Colo. 1983); State v. Pinder, 375 So. 2d 836 (Fla. 1979) (reversing conviction for lesser included offense and remanding greater offense for additional findings of fact); Burke v. State, 234 Ga. 512, 216 S.E.2d 812 (1975) (vacating conviction on lesser included offense); Rogers v. State, 272 Ind. 65, 396 N.E.2d 348 (1979) (vacating conviction for one count of robbery, even though defendant robbed two employees, on grounds that defendant's action constituted single criminal act for which only one conviction is permissible); State v. Dorsev, 224 Kan. 152, 578 P.2d 261 (1978) (vacating convictions of lesser included offenses; affirming convictions of greater offenses); State v. Doughty, 379 So. 2d 1088, 1089 (La. 1980) (vacating "the less severely punishable offense"); Newton v. State, 280 Md. 260, 373 A.2d 262 (1977); Commonwealth v. Jones, 382 Mass. 387, 416 N.E.2d 502 (1981) (vacating conviction for lesser included offense); State v. Morgan, 612 S.W.2d 1 (Mo. 1981) (vacating separate conviction for underlying felony and affirming conviction for felony murder); State v. Price, 60 Ohio St. 2d 136, 398 N.E.2d 772 (1979) (reversing one of two convictions arising from same action based on identical evidence), cert. denied, 446 U.S. 943 (1980); State v. Villani, 491 A.2d 976 (R.I. 1985) (vacating conviction for robbery because of possibility that murder conviction was based on felony-murder theory, thus making two offenses same offense); State v. Henderson, 620 S.W.2d 484 (Tenn. 1981) (reversing one count of robbery conviction on grounds that forcible taking of two people's property from single individual cannot constitute two separate offenses); State v. Carlson, 5 Wis. 2d 595, 95 N.W.2d 354 (1958) (reversing conviction for arson, but affirming conviction of third degree murder for fire homicide); see also Remington & Joseph, supra note 18, at 551 ("[W]hen a person is convicted of both felony-murder and arson, the conviction of arson will be reversed, and the person will be sentenced only for the felony-murder."); Thomas, supra note 1, at 120-23 (concluding that concurrent sentences are multiple penalties); Comment, Double Jeopardy, Multiple Prosecution and Multiple Punishment: A Comparative Analysis, 50 CALIF. L. REV. 853, 860 (1962) ("When the trial court erroneously convicts the defendant of two offenses arising out of one act, the most common appellate practice is to reverse the conviction for the lesser offense.") [hereinafter cited as Comment, A Comparative Analysis]; Note, The Federal Bank Robbery Act, supra note 22, at 144 (concluding the Act "required expunging . . . multiple convictions."). But see, e.g., United States v. Boylan, 620 F.2d 359, 360 n.3 (2d Cir.) (concluding that multiple punishment doctrine would, if applicable, have no effect on concurrent prison sentences, but would require $10,000 fine for one offense to be credited against $25,000 maximum fine imposed for other offense) (dictum), cert. denied, 449 U.S. 833 (1980); Comment, Double Punishment Under § 654, 42 CALIF. L. REV. 139, 149 (1954) ("[S]ome action, other than the reversal of convictions ought to be taken to avoid double punishment. . . .")
MULTIPLE PUNISHMENT DOCTRINE

maximum penalty authorized by statute for one of the convictions. Under this "total quantum of punishment" theory, the penalties imposed on the hypothetical defendant would not be considered multiple, because they total less than the ten year maximum sentence authorized for the greater offense.

Three intermediate theories can be constructed. Multiple sentences might be considered multiple penalties even though multiple convictions by themselves would not be. This "single sentence" theory would require one of the sentences to be vacated while leaving the underlying convictions intact.

A related theory is that multiple sentences become multiple penalties only if consecutively imposed. Under this theory, concurrent sentences are never multiple penalties. The sentences imposed on the hypothetical defendant would be deemed multiple punishment under this theory because they are consecutive. However, a reviewing court could easily remedy this violation by ordering the sentences to be served concurrently.

37. Comment, Sentences for Convictions Under the Federal Bank Robbery Act—A Problem in Statutory Construction, 24 Mo. L. Rev. 540, 545 (1959) (concluding that one who violates two provisions of Federal Bank Robbery Act can be convicted and sentenced for both as long as total sentence does "not exceed the maximum which could be imposed for one of the offenses standing alone") (emphasis in original).

38. The multiple punishment doctrine is, under this theory, a limitation on the sentence imposed and not on the number of convictions. See Jeffers v. United States, 452 U.S. 137, 157-58 (1977) (plurality opinion) (courts have "no power" to impose larger fine than permitted under greater of two offenses that violate multiple punishment doctrine; thus, defendant was "entitled to have the fine imposed at the second trial reduced so that the two fines together do not exceed" maximum fine permissible under greater offense).

39. A variation of this approach was advocated in United States v. Corson, 449 F.2d 544, 551 (3d Cir. 1971) (concluding that multiple punishment doctrine is satisfied if general sentence is imposed on all counts for term not exceeding the penalty permissible for greater offense), Cf. Johnson, Multiple Punishment and Consecutive Sentences: Reflections on the Neal Doctrine, 58 CALIF. L. REV. 357, 367 n.36 (1970) (under California statute prohibiting multiple punishment for same act, "judge may sentence the defendant on all counts, and stay execution of the unlawful sentences, the stay to become permanent when the defendant completes serving the lawful sentence. By so doing he makes unnecessary a remand for resentencing in the event an appellate court reverses the conviction on the primary count."); Note, Double Jeopardy v. Double Punishment—Confusion in California, 2 SAN DIEGO L. REV. 86, 97 (1965) (proper appellate procedure "appears to be" reversing lesser sentence, but allowing both convictions to stand).

40. Johnson, supra note 39, at 378-79. Some courts have followed this procedure. See Comment, A Comparative Analysis, supra note 36, at 860 (courts sometimes solve multiple punishment problem by ordering sentences to run concurrently); Note, The Federal Bank Robbery Act, supra note 22, at 139-40 (approving concurrent sentences until final disposition of appeal); Note, Twice in Jeopardy, supra note 9, at 300 n.161 (1965) (concurrent sentences permissible as long as they do not exceed maximum punishment permissible under statute for any one of multiple convictions); Note, 3 N.Y.L. Forum 220, 223-24 (1957) (same). Indeed, one commentator has even argued that Ex parte Lange "expressed the notion that double punishment was only a question of consecutive
A final intermediate theory would define multiple penalties in terms of the effect of multiple convictions and sentences on the defendant's future. If the convictions and sentences create the possibility of adverse collateral consequences, such as delayed parole eligibility or habitual offender status, they would constitute multiple penalties. This "adverse collateral consequences" theory requires sentencing and reviewing courts to canvass the relevant laws dealing with the collateral consequences of multiple convictions and sentences. Therefore, whether a particular punishment scheme is considered multiple would depend on the facts of each case. Not enough is known about the facts of the hypothetical case to apply this theory.

All of the solutions identified in this section have been adopted by state and lower federal courts at one time or another. Indeed, some courts have decided this issue one way only to reverse themselves.

sentences." See Note, The Protection From Multiple Trials, 11 Stan. L. Rev. 735, 735 n.3 (citing Ex parte Lange, 85 U.S. (18 Wall.) 163, 173 (1873)). For a discussion of Lange, see supra note 1 and accompanying text.

41. Cf. Note, Double Jeopardy v. Double Punishment—Confusion In California, 2 San Diego L. Rev. 86, 97 (1965) (concurrent sentences "might prejudice the defendant" when parole board sets minimum term); Comment, Double Punishment Under § 654, 42 Calif. L. Rev. 139, 149 (1954) (same). Often, the possibility of adverse collateral consequences is used as a rationale for adopting the rule that only a single conviction may be imposed for the same offense. See, e.g., Comment, A Comparative Analysis, supra note 36, at 860 (concurrent sentences may "prejudice the defendant both as to the fixing of his term by the Adult Authority and as to the application of the California habitual criminal statute"); Note, The Federal Bank Robbery Act, supra note 22, at 144 ("Adverse collateral consequences... require expunging not only multiple sentences but also multiple convictions.").

42. One commentator has divided this issue into three categories, stating that

Courts agree that multiple sentencing constitutes error and that such error is correctible, rendering the judgment not void but merely voidable. Courts have not developed a uniform method of curing the erroneous sentences. Rather, they have developed three general theories to govern appellate treatment of sentences invalidated under [the multiple punishment doctrine]: the exhaustion theory, by which only the sentence on the first count is retained; the merger theory, by which only the sentence imposed on the aggravated offense count is retained; and the judge's intent theory, which indorses the right of courts to declare either of the sentences valid.

Note, The Federal Bank Robbery Act, supra note 22, at 128-29 (footnotes omitted). All three categories imply that more than one sentence always constitutes multiple penalties, and the appropriate inquiry, therefore, is deciding which sentences to affirm.

The exhaustion and merger theories offered by this commentator further suggest (although less strongly) that only a single conviction is permissible. If the court's power to sentence is exhausted after sentencing on the first count, it logically follows that its power to enter an additional conviction should also be exhausted. Under the merger theory, the lesser offense arguably loses its identity as an offense and, therefore, no conviction for it would be permissible.

43. For a discussion of lower court applications, see infra notes 89-165 and accompanying text.
shortly thereafter.\textsuperscript{44} This confusion mirrors the confusion in the Supreme Court's multiple penalty cases decided prior to \textit{Ball}.

\section*{B. Supreme Court Confusion}

The Supreme Court decided a series of cases in the 1950's that found multiple punishment violations,\textsuperscript{45} but the rationale of these cases was that Congress did not intend to pyramid penalties.\textsuperscript{46} The Court did not discuss whether multiple convictions were authorized. Thus, a split of authority quickly developed among the lower courts in applying these precedents: some courts held that they permitted concurrent (and, sometimes, consecutive) sentences,\textsuperscript{47} while others held that the offending sentences must be merged into a single sentence.\textsuperscript{48} Interestingly, it

\begin{itemize}
\item \textsuperscript{44} For a discussion of cases which have reversed their own prior decisions and adopted a new solution, see infra notes 108-16 & 131-32 and accompanying text.
\item \textsuperscript{46} See, e.g., Heflin v. United States, 358 U.S. 415, 419 (1959) ("We find no purpose of Congress to pyramid penalties for lesser offenses following the robbery."); Prince v. United States, 352 U.S. 322, 327 (1957) (noting "no indication that Congress intended . . . to pyramid the penalties").
\item \textsuperscript{47} See, e.g., United States v. Chester, 407 F.2d 53, 55 (3d Cir.) (consecutive sentences under Federal Bank Robbery Act constituted pyramiding of penalties), \textit{cert. denied}, 394 U.S. 1020 (1969); Brunjes v. United States, 329 F.2d 339, 341 (7th Cir.) (no pyramiding of sentences occurred where defendant given concurrent sentences of equal length for larceny and for entering bank with intent to commit felony, both offenses arising under Federal Bank Robbery Act), \textit{cert. denied}, 377 U.S. 983 (1964); Counts v. United States, 263 F.2d 603, 604 (5th Cir.) (same), \textit{cert. denied}, 360 U.S. 290 (1959); Kitts v. United States, 243 F.2d 883, 885 (8th Cir. 1957) (vacating sentence for larceny of bank property because it was ordered to run consecutively with maximum sentence for entry offense). For a discussion of more recent cases espousing this approach, see infra notes 107-12 & 18 and accompanying text.
\item \textsuperscript{48} See, e.g., United States v. Welty, 426 F.2d 615, 619 (3d Cir. 1970) (convictions for lesser offenses under Federal Bank Robbery Act merged into conviction for most aggravated offense for purposes of sentencing); United States v. Conway, 415 F.2d 158, 166 (3d Cir. 1969) (convictions on both counts of two count indictment under Federal Bank Robbery Act merged into more aggravated offense for purposes of sentencing), \textit{cert. denied}, 397 U.S. 994 (1970); United States v. McKenzie, 414 F.2d 808, 811 (3d Cir.) (conviction for violations of subsections (a) and (d) of Federal Bank Robbery Act constituted one punishable offense), \textit{cert. denied}, 393 U.S. 1117 (1969); Smith v. United States, 356 F.2d 868, 872 (8th Cir.) (no pyramiding of sentences occurred where defendant given
\end{itemize}
was not until 1969 that a federal circuit applied the single conviction remedy that Ball would ultimately mandate. 49  
Later Supreme Court multiple punishment cases failed to clarify and sometimes further confused the issue of what penalties are forbidden by the multiple punishment doctrine. 50 This section briefly examines the evolution of this issue in the Supreme Court's cases prior to 1985 in order to place Ball in perspective and to understand the lack of a clear rationale in the lower court cases.  
In 1961 the Court, in Milanovich v. United States, 51 first addressed the problem of what remedy to apply when multiple convictions violate the single sentence for convictions for both entry with intent to commit felony and completed crime under Federal Bank Robbery Act, cert. denied, 385 U.S. 820 (1966); Sawyer v. United States, 312 F.2d 24, 26 (8th Cir.) (where defendant is convicted of more than one offense under Federal Bank Robbery Act, defendant can only be sentenced under one conviction), cert. denied, 374 U.S. 837 (1963); United States v. Lawrenson, 298 F.2d 880, 889 (4th Cir.) (affirming multiple convictions because defendant sentenced only for conviction under count one of indictment), cert. denied, 370 U.S. 947 (1962); Hardy v. United States, 292 F.2d 192, 193-94 (8th Cir. 1961) (where defendant convicted of having entered bank with intent to commit larceny as well as larceny under Federal Bank Robbery Act, sentence may be meted out on only one); United States v. Leather, 271 F.2d 80, 86-87 (7th Cir. 1959) (only one sentence can be imposed for multiple convictions under subsections of Federal Bank Robbery Act), cert. denied, 363 U.S. 851 (1960); United States v. Williamson, 255 F.2d 512, 513-14 (5th Cir. 1958) (convictions for entry and larceny or robbery under Federal Bank Robbery Act do not merge, but sentence can be imposed on only one conviction), cert. denied, 358 U.S. 941 (1959); Bayless v. United States, 347 F.2d 354, 356 (9th Cir. 1965) (for sentencing purposes, offense under subsection (a) of Federal Bank Robbery Act merges with more aggravated offense under subsection (d) and only one sentence may be imposed) (dictum); United States v. Machibroda, 338 F.2d 947, 948-49 (6th Cir. 1964) (under Federal Bank Robbery Act, entering bank with intent to steal was merged into robbing bank by force and could not be subject of separate sentence); United States v. Di Canio, 245 F.2d 713, 717 (2d Cir.) (conviction of bank robbery became merged into more aggravated offense of putting others lives in jeopardy during a bank robbery, and concurrent sentence under the former must be vacated), cert. denied, 355 U.S. 874 (1957); United States v. Nirenberg, 242 F.2d 632, 634 (2d Cir.) (same), cert. denied, 354 U.S. 941 (1957); United States v. Tarricone, 242 F.2d 555, 558 (2d Cir. 1957) (same).  
49. See Bryant v. United States, 417 F.2d 555, 558 (D.C. Cir. 1969) (vacating convictions for entry with intent to rob under Bank Robbery Act because they merged into convictions for robbery under same Act), cert. denied, 402 U.S. 992 (1971). For a listing of later cases applying the single conviction remedy, see infra note 142.  
50. For example, the Ball Court noted that four different approaches had been followed with respect to multiple convictions under the statutes at issue in that case. Ball, 470 U.S. at 858. The Tenth Circuit allowed consecutive sentences; the Fourth Circuit allowed multiple convictions but required that the sentences be concurrent; the Third and Seventh Circuits allowed but a single conviction; and the Fifth, Ninth, and District of Columbia Circuits required the government to prosecute under only one of the statutes. Id. at 858-9, n.5. This confusion was, in part, attributable to substantial uncertainty in the Supreme Court multiple penalty cases. For a discussion of these cases, see infra notes 51-88 and accompanying text.  
multiple punishment doctrine. The defendant in Milanovich was given concurrent sentences for larceny and receiving stolen property. The Court held that "a defendant charged with offenses under statutes of this character may not be convicted and punished for stealing and also for receiving the same goods." The Court also decided that the remedy of "setting aside of the shorter concurrent sentence" did not suffice to cure the multiple punishment problem. Thus, Milanovich held, at least with respect to the offenses of larceny and receiving the same stolen goods, that multiple convictions are impermissible even when the sentences are concurrent.

United States v. Gaddis illustrates, however, that Milanovich was based on a narrow principle that has no significance for the vast majority of multiple penalty cases. The defendants in Gaddis committed a single bank robbery and were convicted of four offenses defined by the Federal Bank Robbery Act: assault with a dangerous weapon during a bank robbery, robbery of the bank, possession of the proceeds of the robbery, and entering the bank with the intent to rob it. The sentences for all four convictions were concurrent. Gaddis held that Congress did not intend multiple penalties for a single bank robbery under the Act. The opinion was not, however, altogether clear about the appropriate remedy.

On the one hand, Gaddis clearly reaffirmed the principle underlying Milanovich—simultaneous convictions for both robbery and possession of the proceeds of that robbery are multiple penalties if both are based...
on proof of the robbery. The Court found that the proper remedy in this situation is to vacate the conviction and sentence for the lesser offense of possession of the proceeds. The Court explained in Gaddis that multiple convictions for these offenses are impermissible because the offense of possession of the proceeds of the robbery was designed to reach "a different 'group of wrongdoers,' i.e., 'those who receive the loot from the robber.'" The Court reasoned that since bank robbers do not receive loot from themselves, proving bank robbery fails to prove possession of the proceeds by the robbers.

Whether the same remedy would be required with respect to the other lesser convictions is unclear from the Gaddis opinion. Three convictions remained after the Court vacated the possession conviction: assault during a bank robbery, bank robbery, and entry with intent to rob. The Court stated that these offenses, unlike robbery and possession of the proceeds, are not designed to reach a "different group of wrongdoers." Rather, the Gaddis Court found that there was a

61. "The Court of Appeals was correct in holding that a person convicted of robbing a bank in violation of 18 U.S.C. § 2113(a), (b), and (d), cannot also be convicted of receiving or possessing the proceeds of that robbery in violation of 18 U.S.C. § 2113(c)." Id. at 547. Subsection (c), according to the Court, was designed only to provide punishment for those who "receive the loot from the robber" and not to increase the punishment for a bank robber. Id.

62. Id. at 549. The Court distinguished the remedy ordered in Milanovich, by stressing that there was sufficient independent evidence in the Gaddis case to convict on either count. Id. at 548-49. However, because the robbery and receiving offenses in Gaddis were proven solely by evidence of the robbery, the Court held that "the trial judge should have dismissed [the receiving count] of the indictment. His error in not doing so can be fully corrected now by the simple expedient of vacating the convictions and sentences under that count." Id. at 549.

63. Id. at 548 (quoting Heflin v. United States, 358 U.S. 415, 419-20 (1959)).

64. See Gaddis, 424 U.S. at 549. This conclusion is as much a matter of logic and semantics as it is a product of multiple punishment analysis. If Congress intends two statutes to apply as alternatives to each other, a conviction under one dictates lack of liability under the other. See, e.g., Ohio v. Johnson, 467 U.S. 493, 497 n.6 (1984) (mental states of Ohio crimes of murder and manslaughter might be "mutually exclusive, which would suggest that conviction on one is inconsistent with conviction on the other").

Kirchheimer describes this principle as one of "alternativity" which he defined as "the mutually exclusive quality of certain offenses—the application of one logically excludes the application of another to the same factual situation." Kirchheimer, The Act, The Offense and Double Jeopardy, 58 Yale L.J. 513, 516-17 (1949); see also Milanovich, 365 U.S. at 558 (Frankfurter, J., dissenting) (larceny and receiving stolen property are inconsistent offenses "for the commonsensical, if not obvious, reason that a man who takes property does not at the same time give himself the property he has taken"); Bigelow, Former Conviction and Former Acquittal, 11 Rutgers L. Rev. 487, 503 (1957) ("Larceny and receiving are inconsistent offenses, since the receiver must be someone other than the thief.").

65. See 424 U.S. at 546-49.

66. Id. at 547-48.
"merger" of the robbery and entry offenses into the offense of assault with a dangerous weapon during a robbery.\textsuperscript{67} The Court accordingly vacated the concurrent sentences for the lesser offenses without mentioning the underlying convictions.\textsuperscript{68}

Although the \textit{Gaddis} opinion is consistent with the conclusion that all three lesser convictions must be vacated,\textsuperscript{69} it did not explicitly reach

\textsuperscript{67} The concept of merger discussed in \textit{Gaddis} is different from, though related to, the common law doctrine of merger. Common law merger has been described as follows:

Under early common law procedure where a misdemeanor is an ingredient (constituent part) of a felony there can be no conviction of the misdemeanor under any circumstances. This rule resulted from the basic procedural differences between trials of misdemeanors and trials of felonies, so that it was impossible to try a person at one trial for both a felony and a misdemeanor. As a result the misdemeanor was absolutely extinguished on the trial of the felony. Today, however, no such procedural impediments exist, and therefore the doctrine of merger is no longer the law. In such case there may be an acquittal of the felony and a conviction of the misdemeanor, under certain circumstances, in the same trial.

\textit{Cortese, Former Jeopardy and the Special Pleas in Bar, 25 TEMP. L.Q. 170, 171 (1951)} (footnotes omitted); \textit{see also Callanan v. United States, 364 U.S. 587, 589 (1961)} (at common law, conspiracy, a misdemeanor, "was said to merge with the completed felony which was its object . . . . [and] no conviction was permitted of a constituent misdemeanor upon an indictment for the felony"). The \textit{Callanan} Court concluded, however, that common law merger "has been abandoned." \textit{Id.} at 590; \textit{see also Pinkerton v. United States, 328 U.S. 640, 643 (1946)} (merger "has little vitality in this country").

The \textit{Gaddis} Court was obviously not referring to this type of merger. To begin with, all the offenses in \textit{Gaddis} were felonies. \textit{See} 424 U.S. at 545-46 n.1-3. More importantly, the \textit{Gaddis} merger of offenses allows multiple charges to be brought and is only a limitation on the punishment to be inflicted. \textit{See Ball v. United States, 470 U.S. 856, 860 (1985)} (multiple punishment doctrine is "no bar to the Government's proceeding with prosecution simultaneously under the two statutes"); \textit{Ohio v. Johnson, 467 U.S. 493, 500 (1984)} (multiple punishment doctrine "does not prohibit the State from prosecuting respondent for such multiple offenses in a single prosecution").

Furthermore, the multiple punishment merger is different in that it does not absolutely bar a second prosecution for an offense that merges. \textit{In Johnson}, the Court held that the multiple punishment doctrine allows two prosecutions for the same offense as long as no cumulative punishment results. \textit{Id.} Thus, the "merger" terminology in \textit{Gaddis} appears to be the Court's shorthand expression for holding that offenses are not cumulatively punishable.

68. \textit{See Gaddis, 424 U.S. at 549 n.12.}

69. Three factors in \textit{Gaddis} support the conclusion that the Court meant to vacate the convictions as well as the sentences for all the lesser offenses. First, the Court did not explicitly order a different remedy with respect to the "merged" lesser offenses of robbery and entry than it had applied to the offense for which there had been a failure of proof. A distinction of that significance should have prompted specific mention rather than implicit resolution. Second, the Court's reference to vacating the sentences for robbery and for entry appeared in a footnote to its statement that the sentence \textit{and} the conviction for possession of proceeds must be reversed, and the Court directed that the sentences for the other offenses should "also be vacated." \textit{Id.} (emphasis added). The "also" implies that the same action was being ordered with respect to all of
this result. The Court’s subsequent plurality opinion in *Jeffers v. United States*, can be read as either affirming or rejecting this reading of *Gaddis*. In *Jeffers*, concurrent sentences and cumulative fines were imposed on the defendant Jeffers, and the Court analyzed whether either the sentences or the fines constituted multiple punishment. One sentence was a life sentence without possibility of parole, and the total fines

the offending convictions in *Gaddis*. Third, the Court’s “merger” terminology in *Gaddis* strongly suggests that the convictions, as well as the sentences for the lesser offenses, should be vacated. See 424 U.S. at 547-48 (concluding that “there was in the present case a ‘merger’ of the convictions under §§ 2113(a) and (d)”). If the convictions “merge,” it follows logically that only one conviction remains. Although the *Gaddis* merger is different from common law merger, it is a related concept, and only a single conviction was permissible under the common law doctrine of merger. See also *Note, The Federal Bank Robbery Act*, supra note 22, at 147 (concluding that *Gaddis* “apparently” requires “vacation of convictions for all but the greater inclusive offense”).

Indeed, it can be argued that the *Gaddis* Court meant only to vacate the sentences for the lesser offenses while vacating both the conviction and the sentence for the inconsistent offense of receiving the proceeds of the robbery. See 424 U.S. at 549 n.12. If offenses merge, it follows that proof of one establishes some or all of the elements of the others. Thus, there would not be a failure of proof as is the case when possession of the proceeds is proven solely by proof of robbery. See supra notes 61-64 and accompanying text. Therefore, multiple convictions for the Bank Robbery Act offenses that merge would not be inconsistent with the proof in *Gaddis*. Thus, it could be argued that multiple convictions are permissible as long as the resulting sentences do not constitute multiple penalties.

*Gaddis* can be read to support this conclusion. For instance, after determining that the conviction and sentence for the possession offense must be vacated, the Court stated in a footnote: “In light of *Prince v. United States*, the concurrent sentences under Counts 1 and 2 [entry and robbery] should also be vacated, leaving the respondents under single 25-year prison sentences for [assault with a dangerous weapon during a robbery].” 424 U.S. at 549 n.12 (citation omitted) (emphasis added). This passage does not mention vacating the underlying convictions, and it is possible that the Court was drawing a distinction between the proper remedy with respect to the conviction for possession of the proceeds of a robbery and the convictions for robbery and entry with intent to rob. See id. Under this view, *Gaddis* limits the number of sentences that may be imposed, rather than the number of convictions, when a defendant is charged with assault with a dangerous weapon during a robbery, robbery, and entry with intent to rob. For cases based on single sentence theory, see supra note 48.

*Ball v. United States* 470 U.S. 856 (1985) has, of course, rejected the theory that multiple convictions are permissible, and the contrary inferences from the earlier cases are of merely historical interest. For a discussion of *Ball*, see infra notes 166-86 and accompanying text.

1. 432 U.S. 137 (1977) (plurality opinion).
2. Id. at 143-45, 150-51.
3. See id. at 154-58.

MULTIPLE PUNISHMENT DOCTRINE

exceeded the maximum fine permissible for the greater offense.\textsuperscript{75}

While eight members of the Court in \textit{Jeffers} held the opinion that "Congress did not intend to impose cumulative penalties"\textsuperscript{76} under the statutes in question, the plurality found no multiple punishment violation in the imposition of concurrent sentences.\textsuperscript{77} Writing for the plurality, Justice Blackmun stated: "For present purposes, since petitioner is not eligible for parole at any time, there is no need to examine the Government's argument that the prison sentences do not present any possibility of cumulative punishment."\textsuperscript{78} Thus, the Court did not decide whether concurrent sentences would normally be multiple penalties because, under the facts of \textit{Jeffers}, the lesser conviction could not affect the length of the defendant's incarceration.\textsuperscript{79} The concurrent prison sentences were, therefore, affirmed.\textsuperscript{80}

Although the Court avoided the concurrent sentence issue in \textit{Jeffers}, its language in deciding the multiple fines issue implied that concurrent (and, in some cases, even consecutive) sentences might not be considered multiple penalties. After concluding that "Congress did not intend to impose cumulative penalties under §§ 846 and 848," the Court stated:

Since the Government had the right to try petitioner on the § 848 indictment, the court had the power to sentence him to whatever penalty was authorized by that statute. It had no power, however, to impose on him a fine greater than the maximum permitted by § 848. Thus, if petitioner received a total of $125,000 in fines on the two convictions, as the record indicates, he is entitled to have the fine imposed at the second trial reduced so that the two fines together do not exceed $100,000.\textsuperscript{81}

\textsuperscript{75} Id. The defendant's fines totalled $125,000. \textit{Id.} The maximum fine provided for by the statute for a first offender was $100,000. \textit{Id.}

\textsuperscript{76} Id. at 157 (plurality opinion) (Blackmun, J., joined by Burger, C.J., and Powell and Rehnquist, JJ.); see also \textit{id.} at 160 (Stevens, J., concurring in the judgment on this issue) (joined by Brennan, Stewart, and Marshall, JJ.).

\textsuperscript{77} See \textit{id.} at 155 n.24 (plurality opinion).

\textsuperscript{78} \textit{Id.}

\textsuperscript{79} Other adverse collateral consequences of multiple convictions with concurrent sentences include an increased sentence under a recidivist statute for a future offense and use of the additional conviction to impeach the defendant's credibility in a later prosecution. \textit{See} \textit{Ball} v. \textit{United States}, 470 U.S. 856, 865 (1985). Presumably, the \textit{Jeffers} Court recognized that these potential consequence might cause a different result when it noted that the lack of parole eligibility made it unnecessary to resolve the concurrent sentences argument. \textit{See} \textit{Jeffers}, 432 U.S. at 155 n.24.

\textsuperscript{80} \textit{See id.} at 155 n.24, 157-58 (by implication). \textit{Jeffers} does not reject the theory that multiple convictions are normally multiple penalties, because the existence of the multiple convictions in \textit{Jeffers} did not create any potential for adverse collateral consequences.

\textsuperscript{81} 432 U.S. at 157-58.
This passage suggests that, at least under the facts of *Jeffers*, the multiple punishment doctrine limits only the total quantum of punishment imposed rather than the number of convictions or punishments. Presumably, an alternative available to the lower court in *Jeffers*, on remand, was to leave both convictions intact and merely reduce the fines so that they totaled $100,000. Given the implicit concern in *Jeffers* about potential adverse collateral consequences, however, it is doubtful that the Court meant its analysis to have any significance beyond the rather unusual facts of that case.

Another factor makes it particularly unlikely that the *Jeffers* Court intended to adopt a total quantum of punishment theory for multiple penalty analysis. The majority opinion cited *Gaddis* with approval in a footnote, and characterized *Gaddis* as a case that vacated the convictions as well as the sentences for the lesser offenses. Thus, the holdings of *Jeffers* and *Gaddis* are consistent with the theory that multiple convictions are multiple penalties except in the unusual situation in which no potential for adverse collateral consequences is created by the existence of the multiple convictions. *Jeffers*, viewed alone, however, is

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82. For a discussion of the adverse collateral consequences analysis in *Jeffers*, see supra notes 78-79 and accompanying text.


The Court also reached the merits of a multiple punishment claim in two cases in which the sentence would have been permitted under the total quantum of punishment theory, thus implicitly concluding that those penalties were multiple. See, e.g., *Callanan v. United States*, 364 U.S. 587 (1961); *Pinkerton v. United States*, 328 U.S. 640 (1946). But see *Green v. United States*, 365 U.S. 301, 306 (1961) (holding that trial judge’s error in imposing concurrent sentences for same offense was merely a “formal defect” that did not justify reversal).

84. *See Jeffers*, 432 U.S. at 155 n.25. The *Jeffers* Court noted that *Gaddis* vacated “convictions and sentences under 18 U.S.C. § 2113(a) in light of conviction under § 2113(d).” *Id.* For a discussion of *Gaddis*, see supra notes 57-70 and accompanying text.

85. 432 U.S. at 155 n.25.

86. Under this reading of *Jeffers*, the “total quantum of punishment” rule is limited to fines and to concurrent sentences when the defendant cannot be adversely affected by the multiple convictions. However, Westen and Drubel reached the opposite conclusion by reading *Jeffers* to create a general rule that a defendant who suffers multiple punishment is only “entitled to credit on the greater offense for the sentence he had already received for the lesser.” Westen
arguably consistent with all five of the theories discussed earlier.\textsuperscript{87} Thus, it is not surprising that lower courts had applied all of these theories before the Supreme Court clarified the issue in \textit{Ball v. United States}.\textsuperscript{88}

\section*{C. Lower Court Confusion}

Although the five definitions of multiple penalties present very different practical implications to reviewing courts, all share a common theoretical core. Each is premised on a basic tenet of our legal system that an injured party should be placed, as nearly as possible, in the position occupied prior to suffering a legal wrong.\textsuperscript{89} Because the imposition of multiple penalties in contravention of legislative intent is a legal wrong, the question becomes how to return a wronged defendant to an uninjured status. Each theory makes somewhat different assumptions about the nature of the injury. This section discusses and compares these assumptions while reviewing the lower court applications of these five theories.

\subsection*{1. The Total Quantum of Punishment Theory}

This theory is premised on the assumption that the nature of the injury is embodied in the length of a sentence or the total amount of a fine. It contends that as long as the defendant faces a punishment that is no greater than could have been imposed under one of the convictions, no injury has occurred. Implicit in this theory is the assumption that a judge would have imposed a sentence under one conviction equivalent to the duration of the combined sentences if he or she had recognized that a multiple punishment problem would be triggered by multiple

\textsuperscript{87} It is possible to read \textit{Jeffers} as endorsing the "total quantum of punishment" theory and permitting multiple convictions and consecutive sentences to the maximum extent allowed under one conviction. For a discussion of this inference created by the Court's language, see \textit{supra} notes 81-82 and accompanying text.

\textsuperscript{88} 470 U.S. 856 (1985). For a discussion of \textit{Ball}, see \textit{infra} notes 166-86 and accompanying text.

\textsuperscript{89} See, e.g., 74 AM. JUR. 2D Tortes § 56 (1974) ("It has been declared to be a plain and natural remedy for every species of wrong to put the injured party in possession of the right of which he was deprived by the wrong. . . .").
sentences. Following this reasoning, a defendant is not injured by concurrent or consecutive sentences imposed under two convictions as long as the combined length of these sentences is within the limit of what the judge could have imposed under a single count.

Applying this theory to the hypothetical discussed earlier, the judge could have sentenced the defendant to eight years for the more serious offense alone. Thus, since the injury is presumed to be the total sentence, subjecting the defendant to the same total sentence under both convictions is not a multiple penalty.

This theory has not found favor with the courts. The greatest support for it appears in a narrow category of cases arising under the National Firearms Act. For example, in United States v. Kaplan, the Fourth Circuit held that "one convicted of both possessing and manufacturing under the Act may not receive a total sentence exceeding the maximum sentence provided for one violation (i.e., ten years)." Thus, the Fourth Circuit determined that the proper remedy was to remand to the district court for a "correction of sentences," and both convictions were affirmed. The Fifth, Seventh, Eighth and Ninth Circuits have also followed this approach in cases involving the National Firearms Act. However, the Ninth Circuit recently reinterpreted its precedents to forbid consecutive sentences regardless of whether they exceed the

90. See, e.g., Green v. United States, 365 U.S. 301, 306 (1961) (upholding maximum 25-year sentence imposed on one count because “[p]lainly enough, the intention of the district judge was to impose the maximum sentence”).

91. For the text of the hypothetical used in this article, see supra text accompanying notes 34-35.

92. 26 U.S.C. §§ 5801-5873 (1982). The National Firearms Act places an occupational tax, transfer tax, and manufacturing tax on firearms. Id. §§ 5801-5822. The Act further provides that, “[a]ny person who violates or fails to comply with any provision of this chapter shall, upon conviction, be fined not more than $10,000, or be imprisoned not more than ten years, or both....” Id. § 5871.

93. 588 F.2d 71 (4th Cir. 1978).

94. Id. at 75 (footnote omitted). In Kaplan, the defendant was convicted of "making, receiving and possessing an illegal firearm" and "conspiracy to violate the National Firearms Act and of making and transferring a pipe bomb." Id. at 73. The charges stemmed from the defendant's unsuccessful murder attempt using a car bomb. Id. The Fourth Circuit affirmed these convictions, but remanded the case to the district court for a correction of sentence. Id. at 75.

95. Id.

96. See United States v. Kalama, 549 F.2d 594 (9th Cir. 1976) (remanded for resentencing not to exceed maximum sentence for one count), cert. denied, 429 U.S. 1110 (1977); Rollins v. United States, 543 F.2d 574 (5th Cir. 1976) (same); United States v. Ackerson, 502 F.2d 300 (8th Cir. 1974) (same), vacated on other grounds, 419 U.S. 1099 (1975); United States v. Tankersley, 492 F.2d 962 (7th Cir. 1974) (affirming concurrent convictions on grounds that total sentence did not exceed maximum which could be imposed on single count); United States v. Clements, 471 F.2d 1253 (9th Cir. 1972) (remanded to district court for resentencing not to exceed maximum sentence for one count). Cf. United States v. Hodges, 628 F.2d 350 (5th Cir. 1980) (utilizing total quantum of punishment analysis, but apparently requiring single sentence on remand).
maximum permissible sentence.97

2. The Concurrent Sentence Theory

This theory postulates that *consecutive* sentences are multiple penalties because they result in a combined sentence longer than would be the case if one of the convictions did not exist. *Concurrent* sentences, on the other hand, are not multiple penalties under this theory because the existence of the lesser sentence does not increase the length of the other sentence.98 A multiple punishment violation can thus be cured by simply modifying the consecutive sentences to make them concurrent.99

Like the total quantum of punishment theory, the concurrent sentence theory is based on the notion that the multiple punishment doctrine should remedy only sentences that exceed a permissible total length. It is different from the total quantum of punishment theory in how it computes when the total length is excessive. The total quantum of punishment theory assumes that the combined length of the sentences is excessive only when they exceed what could have been imposed for the more serious offense. The concurrent sentence theory, on the other hand, concludes that any increase in sentence is excessive when it results from the existence of the wrongful second conviction, and thus it does not matter that the judge could have sentenced the defendant to the same total sentence for one conviction. As long as the sentences are concurrent, however, there is no increase in sentence and the penalties are not multiple.

97. See United States v. Edick, 603 F.2d 772 (9th Cir. 1979). Defendant Edick was convicted for violating two separate but closely related provisions of the National Firearms Act. *Id.* at 773 (citing 26 U.S.C. § 5861(d)(i) (1982)). The district court imposed consecutive sentences for the two convictions. *Id.* The *Edick* court phrased the issue as whether United States v. Clements, 471 F.2d 1253 (9th Cir. 1972), prohibited consecutive sentences or merely total sentences that exceed the statutory maximum for a single conviction. 603 F.2d at 773. Acknowledging that "[t]here is language in the *Clements* opinion to support each contention," the *Edick* court adopted the broader view that *Clements* prohibited consecutive sentences, and accordingly, vacated one sentence because Edick had already satisfied the other sentence. *Id.* at 773, 778. In dictum, the court stated that concurrent sentences would have been permissible. *Id.* at 777.

98. See Nishimoto v. Nagle, 44 F.2d 304, 305 (9th Cir. 1930) (imposing concurrent sentences "merely means that the convict is given the privilege of serving each day a portion of each sentence, so that in practical effect as far as he is concerned if he serves the sentence and nothing occurs subsequent to the judgment to alter the situation he is discharged at the expiration of the maximum term imposed upon any one of the counts"). Concurrent sentences do not directly increase the length of the sentence the defendant faces. However, as the Ball Court noted, "the presence of two convictions on the record may delay the defendant's eligibility for parole or result in an increased sentence under a recidivist statute for a future offense." *Ball*, 470 U.S. at 865.

Because this theory holds that concurrent sentences can never be multiple penalties, it bears a striking resemblance to a doctrine of appellate review known as the "concurrent sentence doctrine."100 Under this doctrine, appellate courts are not required to review challenges to multiple convictions as long as one of the convictions is valid and the sentences are concurrent.101 The underlying theory of the appellate concurrent sentence doctrine seems identical to that justifying the concurrent sentence theory presented in this article, i.e., that defendants are not injured by multiple concurrent sentences and thus no reason exists to review more than one of the underlying convictions.102


101. See, e.g., Benton v. Maryland, 395 U.S. 784, 789 (1969). In Benton, the Court described the doctrine as follows:

The language used in a number of this Court’s opinions might be read to indicate that the existence of a valid concurrent sentence removes the necessary elements of a justiciable controversy . . . . In [Hirabayashi v. United States,] the defendant had been found guilty of two different offenses and had received concurrent three-month sentences. He challenged the constitutionality of both convictions, but this Court affirmed the lower court’s judgment after considering and rejecting only one of his challenges. Since the conviction on the second count was valid, the Court found it “unnecessary” to consider the challenge to the first count.

Id. at 788-89 (citing Hirabayashi v. United States, 320 U.S. 81, 85, 105 (1943)).

102. See, e.g., Green v. United States, 365 U.S. 301 (1961) (upholding concurrent sentences for offenses that the government conceded were not separate). In Green, the Court stated that

[although petitioner is technically correct that sentences should not have been imposed on both counts, the remedy which he seeks does not follow. This is not a case where sentence was passed on two counts stating alternative means of committing one offense. . . . Plainly enough, the intention of the district judge was to impose the maximum sentence of twenty-five years . . . and the formal defect in his procedure should not vitiate his considered judgment.

Id. at 306.

Although the effect of Green was to uphold both convictions, it did not resolve the issue of multiple convictions for the same offense, because the defendant argued only that the court’s power to impose another sentence no longer existed when it had imposed the lesser sentence first. Id. at 305. Thus, while the defendant argued that the longer sentence was invalid, he did not challenge the multiple convictions. As the First Circuit has noted, “[t]he only issue considered and decided was the propriety of the two sentences. We do not believe that Green can properly be read to have passed on the propriety under the statute of two convictions for this one offense.” O’Clair v. United States, 470 F.2d 1199,
If the appellate concurrent sentence doctrine were an absolute bar to the review of multiple convictions, it could be argued by analogy that the concurrent sentence theory must be the appropriate test of multiple penalties at the trial court level. The Supreme Court in 1969, however, rejected the appellate concurrent sentence doctrine as a jurisdictional bar to appellate review, holding in *Benton v. Maryland* that the doctrine is at most a "rule of judicial convenience" which does not bar review of other counts. This rejection presaged the Court's 

103. See *Benton v. Maryland*, 395 U.S. 784 (1969). In *Benton*, the Court described the history of the concurrent sentence doctrine as follows:

The concurrent sentence doctrine has been widely, if somewhat haphazardly, applied in this Court's decisions. At times the Court has seemed to say that the doctrine raises a jurisdictional bar to the consideration of counts under concurrent sentences. Some opinions have baldly declared that judgments of conviction "must be upheld" if any one count was good. In other cases the Court has chosen somewhat weaker language, indicating only that a judgment "may be affirmed if the conviction on either count is valid." And on at least one occasion, the Court has ignored the rule entirely and decided an issue that affected only one count, even though there were concurrent sentences.


105. *Id.* at 789-90. The *Benton* Court wrote:

The concurrent sentence rule may have some continuing validity as a rule of judicial convenience. That is not a subject we must canvass today, however. It is sufficient for present purposes to hold that there is no jurisdictional bar to consideration of challenges to multiple convictions, even though concurrent sentences were imposed.

Id. at 791.

Moreover, the *Benton* Court openly questioned the justification for the concurrent sentence doctrine, stating:

One can search through these cases, and related ones, without finding any satisfactory explanation for the concurrent sentence doctrine. But whatever the underlying justifications for the doctrine, it seems clear to us that it cannot be taken to state a jurisdictional rule. Moreover, whatever may have been the approach in the past, our recent decisions on the question of mootness in criminal cases make it perfectly clear that the existence of concurrent sentences does not remove the elements necessary to create a justiciable case or controversy.

Id. at 789-90 (citations omitted).

Thus, the *Benton* Court reached the merits of the defendant's challenge to his larceny conviction despite the existence of a valid burglary conviction for which he received a concurrent sentence. *Id.* at 796-97. Although the Court stopped short of abolishing the concurrent sentence doctrine, it clearly reduced its importance.

The effect of *Benton* on the appellate concurrent sentence doctrine is not yet altogether clear. "Some courts have suggested that the impact of *Benton* is that the appellant must demonstrate some undesirable collateral consequences to avoid application of the doctrine, or conversely, that prejudice is presumed to exist unless the government clearly proves otherwise." Note, *The Federal Bank Robbery Act*, supra note 22, at 142-43 (footnotes omitted). Arguing that *Benton* "undermined the concurrent sentence doctrine," the commentator concluded that "the latter interpretation seems the more reasonable." *Id.* at 141, 143 (foot-
ultimate rejection of the theory that concurrent sentences are not multiple penalties in *Ball v. United States*.106

Several state and lower federal courts had adopted the concurrent sentence theory prior to *Ball*,107 often in opinions which did not fully analyze the issue. The Massachusetts Supreme Judicial Court, for example, accepted the theory only to reverse itself shortly afterwards. The acceptance of the theory was implicit at first. In *Kuklis v. Commonwealth*108 the state court reversed both the convictions and consecutive sentences of the defendant's lesser offenses.109 The court reasoned that the defendant had been harmed by the multiple sentences "because the several sentences were not merely concurrent in their operation."110

The state court later turned this dictum into holding when it refused to disturb convictions of a greater and lesser offense because the sentences were concurrent and thus "the duplication did not prejudice the defendant."111 Similarly, the court corrected a multiple punishment

notes omitted). The same conclusion was reached by another commentator who stated: "the presumption of prejudice is arguably justifiable on the basis of . . . the probability that the presumed result will occur." Note, *The Federal Concurrent Sentence Doctrine, supra* note 100, at 1110.

A third commentator reached essentially the same conclusion, noting that the *Benton* Court refused to apply the concurrent sentence doctrine based on a "remote" possibility of potential adverse collateral consequences occurring. *See Note, Limits of the Concurrent Sentence Doctrine, supra* note 100, at 126-27. That the Court was willing to eschew the concurrent sentence doctrine in *Benton* based on remote potential collateral consequences argues in favor of the conclusion generally held by the commentators, that the doctrine should be unavailable unless the government proves that no prejudice could ever occur. *See Note, The Federal Bank Robbery Act, supra* note 22, at 143; *see also* United States v. Johnson, 709 F.2d 639, 642 n.9 (11th Cir.) (disclaiming reliance on concurrent sentence doctrine despite finding no specific adverse collateral consequences), *cert. denied*, 464 U.S. 1010 (1983); United States v. Tanner, 471 F.2d 128 (7th Cir.) (rejecting concurrent sentence doctrine in light of potential adverse collateral consequences), *cert. denied*, 409 U.S. 949 (1972); *cf* United States v. Heredia-Fernandez, 756 F.2d 1412, 1418 (9th Cir.) (upholding district court's vacating of shorter of two sentences and finding that this action "removed whatever adverse collateral consequences may have existed"), *cert. denied*, 106 S. Ct. 110 (1985). For a discussion of potential adverse collateral consequences and the multiple penalty issue, see *infra* notes 145-54 and accompanying text.


107. For a discussion of courts which have used this doctrine to determine when multiple convictions are multiple, see *infra* notes 108-18 and accompanying text.


109. *Id.* at 309, 280 N.E.2d at 160. In *Kuklis*, the defendant was convicted of possession of drugs with intent to sell, and the two lesser offenses of being present where drugs were kept and possession of drugs. *Id.* at 308, 280 N.E.2d at 157. The defendant received concurrent one-year sentences for the lesser offenses along with a five-year suspended sentence (including probation) starting after the one-year concurrent sentences were served. *Id.* at 304, 280 N.E.2d at 157.

110. *Id.* at 307, 280 N.E.2d at 159.

violation in another case by vacating the consecutive sentence for the lesser offense and imposing a concurrent sentence instead. Thus, Massachusetts had, by 1980, clearly adopted the concurrent sentence theory.

Only a year later, however, the Massachusetts high court reversed itself in Commonwealth v. Jones.113 Conceding that it had earlier adopted the concurrent sentence theory, the court nonetheless vacated the conviction and concurrent sentence for a lesser offense.114 In explaining this change in approach, the court redefined its perception of the relevant injury that the multiple punishment doctrine was designed to prevent. The court stated:

To continue to distinguish between consecutive and concurrent sentences is to assume that only the fact of imprisonment, and not the fact of conviction, is the harm resulting from the erroneous allowance of duplicitous convictions. Yet, adverse collateral consequences of convictions do exist, even when only concurrent sentences are involved. Among the collateral consequences acknowledged by the Supreme Court and other courts in various double jeopardy contexts are the harsher treatment that may be accorded the defendant under the

112. See Commonwealth v. Wilson, 381 Mass. 90, 407 N.E.2d 1229 (1980). In Wilson, defendants were convicted on three counts of murder in the first degree, three counts of armed assault in a dwelling house and one count of unlawful possession of a firearm. Id. at 91, 407 N.E.2d at 1232. Each defendant was sentenced to three consecutive life terms for the murders, three concurrent life terms for the assault to run consecutively to the murder sentence, and a sentence of two and one-half to five years for possession of a firearm. Id. at 91 n.2, 407 N.E.2d at 1232 n.2. On appeal, the defendants challenged the imposition of the sentences for armed assault to run consecutively to the sentences for murder. Id. at 123, 470 N.E.2d at 1249. The court agreed with the defendants' contention that "the possibility exists that [the] jury might have reached a verdict of murder in the first degree on the basis of a felony-murder theory," and thus vacated the sentences and remanded in order that the lower court could impose concurrent sentences. Id. at 126, 407 N.E.2d at 1251.

113. 382 Mass. 387, 416 N.E.2d 502 (1981). In Jones, the defendant was convicted of manslaughter, homicide by motor vehicle, and operating to endanger. Id. at 388, 416 N.E.2d at 502. Defendant received a sentence of two and one-half years each for manslaughter and homicide by motor vehicle, and a sentence of two years for operating to endanger. Id. at 389 n.2, 416 N.E.2d at 504 n.2. The sentences were imposed to run concurrently. Id. The Massachusetts Supreme Judicial Court vacated the convictions and sentences for offenses held to be impermissible under the multiple punishment doctrine. Id. at 396-97, 416 N.E.2d at 508.

114. Id.
habitual offender statutes of some States; the possible impeachment by prior convictions, if the defendant ever becomes a witness in future cases; and, in some jurisdictions, less favorable parole opportunities. Moreover, as the Court of Appeals for the First Circuit recognized, "even if no other disabilities were incurred, there is always the extra stigma imposed upon one's reputation" by the fact of an additional conviction.\textsuperscript{115}

This concern with the harmful collateral consequences of a second conviction necessitates the conclusion that the proper remedy for a multiple punishment violation is to "vacate the convictions and sentences on the less serious offenses."\textsuperscript{116}

The Massachusetts experience illustrates that, in deciding whether to adopt the concurrent sentence theory, courts must define the injury that they believe the multiple punishment doctrine is intended to prohibit. If the nature of the protection is against the "fact of imprisonment," the concurrent sentence theory offers sufficient protection against multiple punishment. If, on the other hand, a defendant should be protected against other negative consequences of multiple convictions, the protection offered by the concurrent sentence theory is inadequate.\textsuperscript{117} While initially accepting the "fact of imprisonment" argument, the Massachusetts Supreme Judicial Court eventually concluded that the injury caused by multiple penalties is more extensive than the imprisonment itself.

Among the federal circuits, the First, Fourth, Sixth, Seventh and Ninth Circuits have applied the concurrent sentence theory.\textsuperscript{118} None of the decisions, however, has articulated a rationale explaining why multiple sentences are not multiple punishment.

\textsuperscript{115} Id. at 396, 416 N.E.2d at 508 (quoting O'Clair v. United States, 470 F.2d 1199, 1203 (1st Cir. 1972), cert. denied, 412 U.S. 921 (1973)) (citations omitted). In O'Clair, the court noted that some states permit the use of convictions to impeach subsequent testimony even though no judgment may have been entered on the conviction. 470 F.2d at 1203; see also Wright v. United States, 519 F.2d 13, 19 (7th Cir.) (noting convictions might be used to impeach character or delay parole), cert. denied, 423 U.S. 932 (1975).

\textsuperscript{116} Jones, 382 Mass. at 396, 416 N.E.2d at 508.

\textsuperscript{117} For a discussion of other injuries potentially inflicted as a result of multiple convictions, see infra notes 174-76 and accompanying text.

\textsuperscript{118} United States v. Jones, 712 F.2d 1316 (9th Cir.) (prison sentence and concurrent probationary term upheld), cert. denied, 464 U.S. 986 (1983); United States v. Burton, 629 F.2d 975 (4th Cir. 1980) (vacating consecutive sentences and remanding with instructions to modify sentences to run concurrently), cert. denied, 450 U.S. 968 (1981); United States v. Shepard, 538 F.2d 107 (6th Cir. 1976) (upholding three-year sentence to be followed by two-year probation); United States v. Hite, 461 F.2d 646 (6th Cir. 1972) (affirming concurrent sentences); Green v. United States, 274 F.2d 59 (1st Cir. 1960), aff'd, 365 U.S. 301 (affirming concurrent sentences); see also United States v. Oliver, 683 F.2d 224, 233 (7th Cir. 1982) (refusing to reach multiple punishment argument on two counts involving concurrent sentences because same sentence "would stand regardless of our decision").
3. The Single Sentence Theory

This theory is premised on the assumption that a criminal sentence is itself a penalty. The injury which the multiple punishment doctrine seeks to avoid, therefore, is the existence of multiple sentences, and it makes no difference whether the sentences are concurrent or consecutive. An example of this theory is found in United States v. Corson. In Corson, the trial court had imposed multiple sentences for offenses that were the same offense under the multiple punishment doctrine. The Third Circuit reversed all sentences, but not the convictions, and remanded for resentencing. The court noted that the district court could impose a single general sentence for all convictions as long as it did not exceed the maximum sentence already imposed under one of the counts. Thus, under the single sentence theory, multiple convictions are permissible if accompanied by a single sentence under one count or a general sentence for all counts.

This theory is similar to the two theories already considered in that it contends that multiple convictions do not violate the multiple punishment prohibition. It is, however, different from the other two theories in that it never allows more than one sentence. When the second sentence is viewed as the injury, it does not make any difference for purposes of multiple punishment analysis that the judge could have imposed a longer sentence for a single conviction in the first instance.

California courts have adopted this approach in applying the California statutory prohibition against multiple punishment for the same act. It is therefore permissible for a California trial judge to “sentence the defendant on all counts, and stay execution of the unlawful

119. 449 F.2d 544 (3d Cir. 1971), overruled in part, United States v. Busic, 639 F.2d 940 (3d Cir.), cert. denied, 452 U.S. 918 (1981). Busic overruled Corson only to the extent that it limited resentencing to the length of the sentence initially imposed. 639 F.2d at 953 n.14, 943.
120. 449 F.2d at 545. The offenses were:
1. Entering a bank with intent to commit a felony therein, in violation of 18 U.S.C. § 2113(a);
2. Robbery of the bank, in violation of 18 U.S.C. § 2113(a);
Id. The court noted that it was not Congress’ intent that multiple penalties be imposed for violations of these provisions arising out of the same conduct. Id. at 546 (citing Prince v. United States, 352 U.S. 322 (1957)).
121. Id. at 551-52.
122. Id. at 551.
An act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions, but in no case can it be punished under more than one; an acquittal or conviction and sentence under either one bars a prosecution for the same act or omission under any other.
Id.
sentences, the stay to become permanent when the defendant completes serving the lawful sentence. By so doing he makes unnecessary a remand for resentencing in the event an appellate court reverses the conviction on the primary count." 124 Or, alternatively, if the trial judge erroneously imposes multiple sentences based on the same offense, an appellate court can correct the error by simply vacating all but one of the sentences.

The Minnesota courts have interpreted a similar statutory prohibition against multiple punishment in the same manner, holding that multiple convictions, but not multiple sentences, are permissible. 125 The remedy for a multiple punishment violation under the Minnesota statute is to vacate all but one of the sentences, leaving the convictions intact. The Maryland Supreme Court reached a similar result by applying common law double jeopardy concepts to affirm a general sentence imposed for two convictions. 126 The single sentence theory has also been accepted explicitly or implicitly by federal courts of appeal in the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth and Ninth Circuits. 127

124. Johnson, supra note 39, at 367 n.36. The California courts do not equate multiple convictions with multiple punishment. Id. at 367.

125. See, e.g., State v. Scott, 298 N.W.2d 67 (Minn. 1980); State v. Spaulding, 296 N.W.2d 870 (Minn. 1980) (construing MINN. STAT. ANN. § 609.035 (West Supp. 1986)). Section 609.035 provides:

[I]f a person's conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses and a conviction or acquittal of any one of them is a bar to prosecution for any other of them. All the offenses, if prosecuted, shall be included in one prosecution which shall be stated in separate counts. MINN. STAT. ANN. § 609.035 (Supp. 1987).

126. See Bell v. State, 220 Md. 75, 150 A.2d 908 (1959) (convictions for larceny and receiving stolen property were inconsistent, but single sentence imposed for both convictions).

4. *The Single Conviction Theory*

The most popular theory among the lower courts was the one ultimately adopted in *Ball*: that multiple convictions are multiple penalties without regard to the sentences imposed.128 As noted earlier, Massachusetts adopted this theory after some initial hesitation,129 and at least fourteen other states have explicitly reached the same conclusion.130 Two Maryland Supreme Court cases adopted the single conviction theory,131 apparently overruling the case mentioned in the discussion of the single sentence theory.132

The single conviction theory has two advantages. First, it is the simplest solution to the problem. Trial judges in these states will know that only one conviction can be entered, and appellate courts can correct violations of the multiple punishment doctrine by simply ordering one of the offending convictions and sentences to be vacated without considering the nature of the sentences or the total quantum of punishment.

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128. For a discussion of *Ball*, see infra notes 166-86 and accompanying text.
129. For a discussion of the single conviction theory in Massachusetts, see supra notes 108-16 and accompanying text.
130. For a general discussion of states adopting the single conviction theory, see supra note 36.
that was available to the sentencing judge.\textsuperscript{133}

The second advantage is that it is the only theory that truly puts the injured party back in the position he or she would have occupied if no multiple punishment violation had occurred. A defendant who faces a second prosecution for the same offense can move to dismiss that prosecution prior to trial and thereby avoid having to undergo the trial that the Constitution prohibits.\textsuperscript{134} Thus, the defendant is subjected to only one conviction and the penalty that attends the single conviction. Further, the offense that cannot be prosecuted due to the bar against successive jeopardies can never be used to increase the defendant's punishment.

All theories leaving multiple convictions intact thus place the defendant who is prosecuted in a single trial at a disadvantage compared to the defendant who is prosecuted in successive trials because the latter can never suffer any disadvantage due to the unprosecuted offense. Accordingly, it should not matter in the single prosecution context that the judge could have imposed a greater sentence for one of the offenses. The sentence imposed for each offense is based on the defendant's culpability and would, presumably, have been the same if the offenses had been prosecuted separately, thus triggering the bar against successive jeopardies.

An example helps illustrate this point. Assume a defendant is charged with auto theft and joyriding in a jurisdiction where joyriding is a lesser included offense of auto theft.\textsuperscript{135} If the state prosecutes for auto theft, the defendant can never be prosecuted (and thus never punished) for joyriding.\textsuperscript{136} The sentence imposed on this defendant for auto theft stands independently of his culpability for joyriding (except, of course, to the extent that joyriding is subsumed within auto theft).

If the defendant is convicted of both offenses in the same trial, it must be presumed that the sentence imposed for auto theft reflects the defendant's culpability for that offense, just as it would if auto theft had been prosecuted separately. Therefore, it should not matter after an appellate reversal of the joyriding conviction that the judge could have initially imposed a greater sentence for auto theft. This culpability analysis demonstrates that, regardless of sentence, allowing a conviction for

\textsuperscript{133} Although the federal circuits have found it difficult to apply the single conviction theory, the solution adopted by \textit{Ball}, requiring the circuit courts to reverse and remand with instructions for the district court to vacate one of the convictions, is quite simple. \textit{See} \textit{Ball v. United States}, 470 U.S. 856, 864 (1985). For a discussion of the complex nature of the single conviction remedies applied by some lower federal courts, see \textit{infra} notes 202-54 and accompanying text.

\textsuperscript{134} For a discussion of motions to dismiss on double jeopardy grounds, see \textit{supra} note 11 and accompanying text.

\textsuperscript{135} \textit{See} \textit{Brown v. Ohio}, 432 U.S. 161, 163-64 (1977) (Ohio court construed joyriding as a necessarily included offense of auto theft).

\textsuperscript{136} \textit{See id.} at 169 ("Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser included offense.").
joyriding to stand in addition to the conviction for auto theft penalizes the single proceeding defendant more severely than the successive prosecution defendant. The multiple punishment doctrine derives directly from the double jeopardy clause, however, and no reason exists in the history or policy of the doctrine to apply a remedy for a multiple punishment violation that offers less protection than the remedy for a successive jeopardy violation.\footnote{137}

The commentators generally agree that the single conviction theory is the preferred approach.\footnote{138} This theory has no real disadvantage. If

\footnote{137. There are, to be sure, differences in the protections offered by the multiple punishment doctrine and the successive prosecution doctrine. \textit{See} Missouri v. Hunter, 459 U.S. 359 (1983) (holding that legislatures can constitutionally authorize multiple punishments in a single trial under different statutes, regardless of whether those statutes define the same offense under the traditional double jeopardy test); Thomas, \textit{supra} note 1, at 86 ("[T]he double jeopardy clause applies in a fundamentally different manner when multiple convictions are sought in a single proceeding."). However, these differences relate to the scope of the protection and not to the appropriate remedy. \textit{See} Thomas, \textit{Successive Prosecutions, supra} note 23, at 342 ("protection against successive prosecutions is more fundamental than the prohibition of multiple convictions in a single trial," thus requiring broader standard to measure its scope). Nothing in the history of the double jeopardy clause or the policies underlying the multiple punishment doctrine suggests that the remedy for a multiple punishment violation should allow more than one conviction when the government is barred from seeking a second conviction by means of a second jeopardy.

Indeed, the original version of the fifth amendment submitted by James Madison to the House of Representatives prohibited "more than one punishment or trial for the same offense." J. SIGLER, \textit{DOUBLE JEOPARDY, THE DEVELOPMENT OF A LEGAL AND SOCIAL POLICY} 28 (1969). This terminology certainly implied that the same remedy should be applied regardless of whether the violation arose in single or multiple trials. The change of wording to the familiar "twice in jeopardy" language was "[i]n all probability . . . intended to alter Madison's proposal only with a view to its clarification." \textit{Id}. at 32. The Supreme Court has agreed with this reading of the history of the double jeopardy clause. \textit{See} United States v. Wilson, 420 U.S. 332, 341 (1975) ("Several members of the House challenged Madison's wording on the ground that it might be misconstrued to prevent a defendant from seeking a new trial on appeal of his conviction."); \textit{see also} United States v. Sperling, 560 F.2d 1050, 1054 (2d Cir. 1977) ("The wording was changed in the Senate to employ the more traditional term 'jeopardy' in order to prevent a misconstruction of the clause that would have prohibited a defendant from seeking a new trial . . . .").

Furthermore, the Court concluded in \textit{Ex parte Lange} that the evil prohibited by the double jeopardy clause 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." 85 U.S. (18 Wall.) 163, 173 (1875).

Thus, a defendant seeking redress for multiple convictions imposed in violation of the multiple punishment doctrine should not be placed in an inferior position when compared to a defendant raising a claim that a second trial violated double jeopardy.

the judge imposes but a single conviction, and the appellate courts reverse that conviction for a trial error, the defendant does not escape liability for the criminal activity because the government is permitted to reprosecute after an appellate reversal for trial error.\textsuperscript{139} Allowing multiple convictions for the same offense to stand in case some of the convictions are reversed on appeal, as California does,\textsuperscript{140} permits the state to hedge its bets in a way that violates the underlying purpose of the multiple punishment doctrine. As the First Circuit noted, rejecting this approach, "administrative convenience cannot justify infringement of constitutional rights."\textsuperscript{141}

Prior to Ball, several of the federal circuits had already adopted the single conviction theory.\textsuperscript{142} The decisions differed slightly in how to ...
apply the theory to a post-conviction challenge, but they recognized that, as Ball later held, a second conviction is itself an “impermissible punishment” if based on the same offense.

5. The Adverse Collateral Consequences Theory

In reality, the adverse collateral consequences theory is an exception to the single conviction theory for certain unusual cases. As the Massachusetts Supreme Judicial Court noted, the chief reason to vacate underlying convictions as well as sentences is the possibility that the very existence of the convictions could penalize the defendant in the future by triggering adverse collateral consequences. If no possibility of these consequences exists, however, a major rationale for invoking the single conviction theory would be absent, and one could argue that multiple convictions would not penalize a particular defendant.

In United States v. Johnson, the Eleventh Circuit applied this theory to affirm convictions for offenses that were the same offense under the

690 F.2d 748, 750 (9th Cir. 1982) (same), cert. denied, 460 U.S. 1041 (1983); United States v. Rust, 650 F.2d 927, 928 (8th Cir. 1981) (vacating conviction of attempted entry because defendant may not be convicted of both attempted entry and entry under Federal Bank Robbery Act); United States v. Garber, 626 F.2d 1144, 1153 (3d Cir. 1980) (vacating conviction for possession of stolen goods because it is lesser included offense of theft from interstate shipment for which defendant also convicted), cert. denied, 449 U.S. 1079 (1981); Grimes v. United States, 607 F.2d 6, 15 (2d Cir. 1979) (vacating convictions for bank robbery and use of firearm to commit felony, under § 2113(a) and § 924(c)(1), respectively, in light of convictions for armed bank robbery under § 2113(d)); United States v. Michel, 588 F.2d 986, 1001 (5th Cir.) (vacating conviction for lesser offense of failure to file tax returns where defendant also convicted of greater offense of attempted tax evasion), cert. denied, 440 U.S. 982 (1979); Wright v. United States, 519 F.2d 13, 20 (7th Cir.) (vacating convictions of bank robbery and larceny from bank, under § 2113(a) and (b), respectively, where defendant also convicted of greater offense of robbing bank with dangerous weapon under § 2113(d)), cert. denied, 423 U.S. 932 (1975); United States v. Falafine, 492 F.2d 18, 26 (9th Cir. 1974) (reversing conviction of bank robbery where defendant also convicted of kidnaping during bank robbery); United States v. Slutsky, 487 F.2d 832, 835 (2d Cir. 1973) (reversing convictions for filing false tax returns where defendant also convicted of greater offenses of attempted tax evasion), cert. denied, 416 U.S. 937 (1974); United States v. Rosenthal, 454 F.2d 1252, 1256 (2d Cir.) (vacating conviction of failure to file tax returns where defendant also convicted of greater offense of attempted tax evasion), cert. denied, 406 U.S. 931 (1972).

143. For a discussion of these varying appellate applications of the single conviction remedy, see infra notes 187-206 and accompanying text.

144. See Ball v. United States, 470 U.S. 856, 865 (1985).

145. For a discussion of the potential adverse collateral consequences of multiple convictions as set forth by the Massachusetts court, see supra text accompanying note 115.

multiple punishment doctrine. Acknowledging the possibility that negative collateral consequences might flow from multiple convictions for the same offense even though only one sentence was imposed, the court held that no multiple punishment violation existed until these consequences arose in a "concrete situation." Noting that the defendant Johnson "is not now being punished by these collateral consequences," the court rejected his multiple punishment claim. Although the Supreme Court in Jeffers v. United States, refused to vacate concurrent sentences when no adverse collateral consequences were possible, the Johnson court's application of the Jeffers principle is questionable. In Jeffers, the existence of a life sentence without possibility of parole meant that the defendant could never suffer any adverse collateral consequences flowing from the second conviction. The Eleventh Circuit in Johnson, however, based its decision on the lack of adverse collateral consequences at the time of sentencing. Because this approach leaves the defendant open to potential adverse collateral consequences that could not adequately be addressed at a later time, it is a much broader exception to the single conviction theory than the exception permitted in Jeffers.

147. Id. at 643. In Johnson, the defendant was convicted of two bank robbery offenses and the offense of committing a felony with a firearm. Id. at 641 (citing 18 U.S.C. §§ 2113(a), (d), 924(c)(2) (1982)). For the relevant text of § 2113(a), see infra note 196. For the relevant text of § 2113(d), see infra note 197. For the relevant text of § 924(c), see infra note 208.

The court in Johnson assumed, arguendo, that the three statutes in question proscribed the same offense. 709 F.2d at 642. There is, in fact, no doubt that 18 U.S.C. §§ 2113(a), 2113(d), and 924(c)(1) were not cumulatively punishable. See Simpson v. United States, 435 U.S. 6 (1978); Gaddis, 424 U.S. 544 (1976).

148. Johnson, 709 F.2d at 642.

149. Id. The Eleventh Circuit dealt with the ever-present problem of "[a]dditional stigma or damage to reputation" by dismissing this concern as not "comport[ing] with multiple punishments interdicted by the double jeopardy clause." Id. But see Ball, 470 U.S. 856, 865 (1985) (identifying "societal stigma accompanying any criminal conviction" as one potential adverse collateral consequence that "may not be ignored").

150. 709 F.2d at 642.

151. 432 U.S. 137 (1977) (plurality opinion). For a discussion of Jeffers, see supra notes 71-87 and accompanying text.

152. The Eleventh Circuit's rationale is also questionable, because most of the adverse collateral consequences identified by courts are not susceptible to "concrete" realization. For example, how would a defendant who had suffered two convictions for the same offense be able to prevent the introduction of both convictions to impeach his testimony in those states that permit impeachment from convictions that do not carry sentences? For a discussion of the typical adverse collateral consequences identified by courts, see supra text accompanying note 115.

153. See 709 F.2d at 642.

154. For a discussion of whether Ball overruled Jeffers to the extent that it affirmed two convictions for the same offense, see infra notes 181-85 and accompanying text.
6. Other Theories

The theories developed to this point may be combined to create additional approaches. The Seventh Circuit recently applied different theories to remedy what it perceived to be different types of multiple punishment violations arising in a single case.\(^\text{155}\) The court invoked the single sentence remedy when the determination of multiple punishment was based on congressional intent not to impose cumulative punishment.\(^\text{156}\) However, the court invoked the single conviction remedy when one offense was necessarily included in the other.\(^\text{157}\) Presumably, the court decided that a violation of congressional intent not to cumulate punishment is cured by rendering the punishment noncumulative, and that a single sentence would be noncumulative punishment regardless of the number of convictions. On the other hand, the relationship of greater and lesser offenses implies that, for purposes of the multiple punishment doctrine, only a single offense has been committed, and therefore only a single conviction is permitted. Although superficially appealing, this distinction is no longer viable in light of the Supreme Court's analysis in \textit{Ball}.\(^\text{158}\)

A more unusual combination of theories is presented in \textit{United States v. Osorio Estrada}.\(^\text{159}\) Noting the split of authority on the issue of whether


\(^{156}\) Id. at 700-03. This determination was made with respect to the offense of continuing criminal enterprise and the predicate offenses needed to prove this violation. \textit{Id.} (citing 21 U.S.C. § 848 (1982)). The Seventh Circuit's conclusion on this issue has since been overruled by the Supreme Court. See Garrett v. United States, 471 U.S. 773, 782-84 (1985) (Congress intended to permit separate prosecutions for violations of § 848 and its predicate offenses). Indeed, the Court recently vacated \textit{Jefferson} for further consideration in light of Garrett. See Jefferson v. United States, 106 S. Ct. 41 (1985).

\(^{157}\) The court held that conspiracy was a lesser included offense of a continuing criminal enterprise. \textit{Jefferson}, 714 F.2d at 705 (citing 21 U.S.C. § 846 (1982)). The Supreme Court had occasion to address the double jeopardy implications of these offenses in \textit{Jeffers v. United States}, 432 U.S. 157 (1977). The Seventh Circuit's conclusion in \textit{Jefferson} is not technically compelled by \textit{Jeffers}, because \textit{Jeffers} specifically refused to reach the issue. \textit{Id.} at 155 (plurality opinion). However, it is compatible with the \textit{Jeffers} Court's determination that Congress did not intend to authorize multiple punishments for these offenses. See \textit{id.} at 156-58 (plurality opinion); \textit{id.} at 160 (Stevens, J., concurring in this part of the judgment, joined by Brennan, Stewart, and Marshall, JJ.). This theoretical compatibility between the lesser-included offense issue and the congressional intent issue did not, however, restrain the Seventh Circuit from adopting different remedies based on a perceived difference in multiple punishment violations. See 714 F.2d at 700-07.

\(^{158}\) The Court's discussion of the multiple punishment violation in \textit{Ball} makes clear that the lesser included offense analysis is simply another way of ascertaining legislative intent. See 470 U.S. at 857. Thus, there are not two categories of multiple punishment violations, as \textit{Jefferson} implies, but only one. See Thomas, supra note 1, at 112-14.

\(^{159}\) 751 F.2d 128 (2d Cir. 1984), cert. denied, 106 S. Ct. 97 (1985).
to apply the single sentence or single conviction remedy, the Second Circuit developed a compromise theory which "takes account of the concerns expressed in the two lines of cases." The Osorio Estrada compromise "combined" the convictions so that the lesser convictions "would not be merged out of existence," but would cease to "exist as separate convictions so long as the [greater] conviction remained in place." If, however, the conviction on the greater offense is invalidated, the "part of the conviction on the lesser offense [is] unaffected." 162

It is not clear just what is meant by "combining" convictions. Judge Kearse wrote in a concurring opinion in Osorio Estrada:

I do not know what this means ontologically, but I concur in the judgment in the hope that its import is that the convictions on the lesser-included offenses have ceased, in light of the conviction on the greater offense, to be a basis upon which collateral consequences, such as more severe parole treatment, may follow. 164

If this analysis is correct, the Osorio Estrada approach is simply a more sophisticated version of the single conviction theory that Ball adopted. 165 The lesser convictions would, in a sense, not exist as long as the greater conviction exists. Creating quasi-convictions capable of springing into existence in the future is, however, a rather unusual solution to the multiple penalty problem.

This section has demonstrated that lower court decisions on the multiple penalty issue were in disarray prior to Ball. At least seven theories had been applied to remedy multiple punishment violations. These theories ran the gamut from upholding multiple convictions and consecutive sentences to allowing but a single conviction and sentence. In between these extremes, courts applied theories as creative and unusual as the Osorio Estrada "springing lesser convictions" approach.

160. Id. at 134. For a discussion of the single sentence theory, see supra notes 119-27 and accompanying text. For a discussion of the single conviction theory, see supra notes 128-44 and accompanying text.


162. Osorio Estrada, 751 F.2d at 135 (emphasis in original).

163. Id.

164. Id. (Kearse, J., concurring).

165. The Second Circuit has since concluded that its practice of "combining" convictions is consistent with the spirit, and perhaps the letter, of the Ball single conviction rule. See United States v. Aiello, 771 F.2d 621, 632-35 (2d Cir. 1985).
A clear statement of remedy and rationale was needed. *Ball v. United States* was that statement.

### III. Ball v. United States and Federal Courts

#### A. The Supreme Court Speaks Clearly

The Supreme Court finally resolved the multiple penalty problem in *Ball v. United States.* The defendant in *Ball* was prosecuted simultaneously for violations of two distinct firearms prohibitions. He was convicted of both violations and given consecutive sentences. The Fourth Circuit held, on appeal, that Congress did not intend multiple penalties for these offenses and remanded the case to the district court with instructions to make the sentences concurrent.

The Supreme Court agreed with the Fourth Circuit that Congress did not intend to simultaneously punish the defendant's conduct under

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166. 470 U.S. 856 (1985).
167. Id. at 857. The offenses were “receiving a firearm shipped in interstate commerce, 18 U.S.C. § 922(h)(1) and 924(a), and possessing that [same] firearm, 18 U.S.C. app. § 1202(a)(1).” Id. Section 922(h) applied to Ball because he was a previously convicted felon. Id.
168. 470 U.S. at 857-58. Ball received a term of three years on the receipt count pursuant to § 922(h)(1) which provides in relevant part:

> It shall be unlawful for any person—
>
> (1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; . . . to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

*Id.* (citing 18 U.S.C. § 922(h)(1) (1982) (emphasis added)). Ball was also sentenced to a consecutive two year term on the possession count pursuant to Section 1202(a), which provides in relevant part:

> Any person who—
>
> (1) has been convicted by a court of the United States or of a state or any political subdivision thereof of a felony . . . and who receives, possesses, or transports in commerce or affecting commerce . . . any firearm shall be fined . . . or imprisoned for not more than two years . . .

470 U.S. at 866 (citing 18 U.S.C. app. § 1202(a)(1) (1982 & Supp. III 1985) (emphasis added)). The § 1202(a)(1) sentence was suspended with two years' probation. *Id.* at 858.

169. See 470 U.S. at 858, vacating United States v. Ball, 734 F.2d 965, 966 (4th Cir. 1984). The Fourth Circuit had stated:

> We determined in United States v. Burton, 629 F.2d 975, 978 (4th Cir. 1980), cert. denied, 450 U.S. 968 (1981) . . . that Congress did not intend to authorize cumulative punishment under 18 U.S.C. § 922(h)(1) and 18 U.S.C. App. § 1202(a) [(1982)] where unlawful possession of the firearm in question is incidental to unlawful receipt of the same gun . . . . Congress in these firearms statutes created separate offenses, but did not authorize pyramiding penalties.

734 F.2d at 966.
170. 470 U.S. at 857 (vacating United States v. Ball, 734 F.2d 965, 966 (4th Cir. 1984)).
both statutes, but the Court disagreed with the remedy ordered by the court of appeals. When deciding whether punishment is multiple, the Court held that punishment “must be [considered] the equivalent of a criminal conviction and not simply the imposition of sentence. Congress could not have intended to allow two convictions for the same conduct, even if sentenced under only one; Congress does not create criminal offenses having no sentencing component.”

The Ball opinion also made explicit the implicit concern in earlier opinions about the collateral consequences of multiple convictions. “The separate conviction, apart from the concurrent sentence, has potential adverse collateral consequences that may not be ignored.” The Court identified these potential consequences as delayed parole eligibility, recidivist sentencing, and use of the additional conviction to impeach the defendant’s credibility in a later prosecution. The Court also identified a consequence that exists in every case and thus is not merely a “potential” consequence: “[T]he second conviction . . . certainly carries the societal stigma accompanying any criminal conviction.”

The Court concluded that the consequences of multiple convictions cannot be squared with a finding that Congress did not intend multiple penalties, and it ordered the district court to vacate one of the convic-

171. 470 U.S. at 857. The Ball Court relied on a test of statutory construction first enunciated in Blockburger v. United States, 284 U.S. 299, 304 (1932). 470 U.S. at 861. The Ball Court applied this test to the federal firearms statutes and concluded that Congress did not intend to subject felons to simultaneous convictions under 18 U.S.C. § 922(h) and 18 U.S.C. app. § 1202(a) for receipt and possession of the same gun. Id. For a discussion of the Blockburger test, see infra note 186.

The Ball Court also relied on the legislative history of the Federal firearms legislation suggesting that section 1202(a) was a “last minute Senate amendment” which overlapped section 922(h)(1) and which was intended to expand the class of people who are punishable, rather than to create “duplicative punishment.” See 470 U.S. at 863, 864.

172. See id. (where Congress did not intend simultaneous punishment under both 18 U.S.C. § 922(h)(1) and 18 U.S.C. app. § 1202(a), only remedy is for district court to exercise discretion to vacate one conviction and sentence). The Supreme Court noted the conflict in the circuits on the issue of the appropriate remedy for multiple convictions under §§ 922(h) and 1202(a):

The Fifth, Ninth, and District of Columbia Circuits have concluded that the government must elect to prosecute a convicted felon under one of the statutes . . . The Fourth Circuit has decided that a convicted felon may be convicted under both statutes, but the separate sentences must run concurrently . . . The Third and Seventh Circuits have remanded cases to the District Courts in order to vacate one of the convictions and sentences.

Id. at 858 n.4 (citations omitted). The Supreme Court thus granted certiorari to resolve the conflict among the circuits. Id. at 858.

173. Id. at 861.
174. Id. at 865 (emphasis in original).
175. Id.
176. See id.
The Court wrote, "the second conviction, even if it results in no greater sentence, is an impermissible punishment." Thus, Ball held what Gaddis strongly implied: it is the additional conviction itself that is the offending penalty and not the sentence imposed pursuant to the conviction. This solution to the multiple penalty problem is consistent with the multiple punishment doctrine policy of limiting punishment to that authorized by the legislature.

If Ball resolved the multiple conviction problem, however, it created three other problems. The first is whether Ball overruled the multiple penalty aspect of Jeffers. In Jeffers, the plurality held that concurrent sentences were permissible, even when Congress did not intend multiple penalties, as long as the defendant's sentence would not be affected by the additional sentence. But this holding conflicts with the Ball definition of punishment. Punishment, the Court said in Ball, "must be the equivalent of a criminal conviction and not simply the imposition of sentence."

Of course, the life sentence without parole in Jeffers made the second conviction less of an additional penalty than the second conviction in Ball, and this type of sentence may create an exception to the single conviction rule. The Court's failure in Ball to even mention Jeffers is, however, an interesting omission. Furthermore, although Jeffers could never face delayed parole eligibility or recidivist sentencing because of the second conviction, he did, of course, suffer the "societal stigma accompanying any criminal conviction." The Court's increased sensitivity to the multiple penalty problem evidenced by Ball may, therefore

177. See id.
178. Id.
179. For a discussion of Gaddis, see supra notes 57-70 and accompanying text. For a discussion of three factors which suggest that the Gaddis court meant to vacate convictions, as well as sentences, for lesser included offenses, see supra note 69.
180. See, e.g., Brown v. Ohio, 432 U.S. 161, 165 (1977) ("once the legislature has acted courts may not impose more than one punishment for the same offense").
182. See Jeffers, 432 U.S. at 154-58 (plurality opinion). Only four justices adhered to this view. The dissent argued that one of the convictions should be reversed. See id. at 158-60 (Stevens, J., dissenting in part and concurring in the judgment in part) (joined by Brennan, Stewart, and Marshall, JJ.). Justice White's critical fifth vote to affirm the convictions was based on the theory that the offenses were not the same offense, and thus his separate opinion did not shed any light on the concurrent sentence issue. See id. at 158 (White, J., concurring in the judgment in part and dissenting in part). For a discussion of the implicit concern in Jeffers regarding potential adverse collateral consequences, see supra notes 74-83 and accompanying text.
183. Ball, 470 U.S. at 861.
184. See id. at 865.
render the plurality's resolution of this issue in *Jeffers* obsolete.185

The second problem left in the wake of *Ball* is measuring its impact on state courts. *Ball* is explicitly based on statutory construction and contains no mention of either the fifth amendment double jeopardy clause or the multiple punishment doctrine.186 Thus, it is possible that the *Ball* multiple conviction rule is a rule of statutory construction that is directly binding only on federal courts. This problem will be considered in part four of this article.

The final problem remaining after *Ball* is how courts should apply its single conviction theory when a defendant challenges multiple convictions. The next section addresses this problem.

**B. Applying Ball In Federal Court**

1. The Problem

Although the impact of *Ball* on state courts is problematic,187 its impact on federal courts is immediate and substantial. The effect of *Ball*


186. See 470 U.S. at 861-63. *Ball* used the test enunciated in *Blockburger v. United States*, 284 U.S. 299, 304 (1932), to ascertain whether different federal statutory offenses are cumulatively punishable. The *Blockburger* Court described the test as follows:

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.

*Id.* The *Ball* opinion, however, makes clear that this test is nothing more than "a means of ascertaining congressional intent." 470 U.S. at 861; see also *Albernaez v. United States*, 450 U.S. 333, 340 (1981) ("rule should not be controlling where, for example, there is a clear indication of contrary legislative intent"); Missouri v. Hunter, 459 U.S. 359, 367 (1983) (quoting *Albernaez*). Failure to satisfy the *Blockburger* test thus raises a presumption that the legislature did not intend to impose multiple punishments for the same offense. See *Hunter*, 459 U.S. at 366. This presumption is overcome, however, by a clear showing of legislative intent to impose multiple punishment. See *id.* at 366-67; cf. *Brown v. Ohio*, 432 U.S. 161, 167 (1977) (suggesting that *Blockburger* test is minimum constitutional standard for deciding when successive jeopardies are permissible). For a discussion of the *Blockburger* test in multiple punishment analysis, see generally *Thomas, Multiple Punishment, supra* note 23, at 76-87. For a discussion of *Blockburger* as a rigid minimum standard in successive jeopardy analysis, see *Thomas, Successive Prosecutions, supra* note 23, at 347-54.

187. For an analysis of the potentially binding effect of the *Ball* decision on state courts, see *infra* notes 296-326 and accompanying text.
is to invalidate all theories that permit multiple convictions when Congress did not intend multiple penalties.\textsuperscript{188} Because at least nine of the federal circuits have applied one of these now-invalid theories,\textsuperscript{189} \textit{Ball} will require the majority of the federal courts to change their sentencing procedures in multiple punishment cases.\textsuperscript{190}

\textit{Ball} will also require a change in post-conviction review of multiple punishment challenges. The appellate concurrent sentence doctrine, permitting courts to decline review of multiple convictions if one conviction is valid and the sentences are concurrent, can no longer justify refusal to address a multiple punishment issue.\textsuperscript{191}

Unfortunately, \textit{Ball} did not resolve a lingering problem about how courts should remedy a multiple conviction violation. There are, it turns out, three different remedies that an appellate court can apply when it grants a post-conviction challenge to multiple convictions. Although the Supreme Court utilized one of these remedies in \textit{Ball},\textsuperscript{192} the Court did not indicate that it was the only permissible remedy. This section will discuss each potential remedy in the context of appellate review of multiple convictions.\textsuperscript{193}

\begin{footnotesize}
\begin{enumerate}
\item[188.] For a discussion of the theories permitting multiple convictions to stand, see \textit{supra} notes 90-127 & 145-54 and accompanying text.
\item[189.] For a discussion of circuits applying the "total quantum" theory, see \textit{supra} notes 92-97 and accompanying text. For a discussion at circuits applying the "concurrent sentence" theory, see \textit{supra} note 118 and accompanying text. For a discussion of circuits applying the "single sentence" theory, see \textit{supra} note 127 and accompanying text.
\item[190.] \textit{But see} Government of Virgin Islands v. Braithwaite, 782 F.2d 399, 407-08 (3d Cir. 1986) (leaving both convictions intact, without mentioning \textit{Ball}, but vacating concurrent sentences in favor of single general sentence).
\item[191.] Presumably, the appellate concurrent sentence doctrine, is no longer viable in any context. For a discussion of this doctrine, see \textit{supra} notes 100-05 and accompanying text. Even if a defendant/appellant does not raise a multiple punishment claim, the existence of an additional conviction that should not have been imposed penalizes him under the \textit{Ball} definition of punishment. \textit{See Ball}, 470 U.S. at 864. Thus, in order to make certain that a given punishment is commensurate with what Congress intended, appellate courts must reach the merits of the challenge to each conviction.
\item[192.] \textit{See} 470 U.S. at 865 (vacating court of appeals judgment and remanding "with instructions to have the District Court exercise its discretion to vacate one of the convictions").
\item[193.] It is, of course, possible for trial courts to remedy a multiple conviction violation in response to a motion under the rules of criminal procedure. \textit{See FED. R. CRIM. P. 34; FED. R. CRIM. P. 35.} If the district court entertains a motion to vacate a conviction, that court is subject to the same general restrictions that apply to the appellate courts. For a discussion of those restrictions, see \textit{infra} notes 269-326 and accompanying text. The sole distinction is that the trial court would decide in the first instance which conviction to vacate, thus obviating any differences between the first two solutions discussed in the text.
\end{enumerate}
\end{footnotesize}
2. Application One: Vacate the Lesser Offense Conviction and Sentence Without Remand

The simplest solution is for a reviewing court to vacate the conviction and sentence for the lesser offense without the necessity of a remand. This solution has been applied in several cases, and it is appropriate in the usual situation when the greater offense carries the greater penalty. In such cases, it can be assumed that the district court intended the defendant's sentence to be at least what the longer sentence was, and this first solution thus gives effect to the judge's presumed intent. This application also works well when several violations of a single statute create only one punishable offense. The appellate court can vacate all but one conviction and sentence in that situation because it makes no difference which convictions are reversed.

This solution is not as effective, however, when the sentence for the "lesser" offense is greater than the one for the "greater" offense. Mechanically vacating the "lesser" conviction in this situation results in a shorter sentence than the district court intended. On the other hand, automatically vacating the "greater" conviction because it has a lesser sentence leaves intact the conviction that reflects lesser culpability. Automatically vacating either conviction thus creates the possibility that the remaining conviction or sentence will not reflect the defendant's true culpability—either because a lesser sentence or a lesser conviction will remain.

Assume, for example, that a judge sentenced a bank robbery defendant to consecutive terms consisting of fifteen years for entry with intent to commit bank robbery and ten years for aggravated bank

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195. Cf. United States v. Edmonson, 659 F.2d 549 (5th Cir. 1981) (granting defendant's request to vacate all but one sentence imposed under six convictions based on possession of six articles of mail stolen from same mailbox at same time). Although the court in Edmonson affirmed the multiple convictions, it appears that the only relief requested was a reduction in sentence. See id. at 550-51.

196. See 18 U.S.C. § 2113(a) (1982), which provides:
   (a) Whoever, by force and violence, or by intimidation, takes, or
robbery. This would result in a total sentence of twenty-five years, a sentence that the judge could have imposed for the aggravated bank robbery offense alone. Because these provisions do not define cumulatively punishable offenses, however, only a single conviction can be upheld. But which conviction should be vacated? Perhaps the sentencing court should be allowed to choose.

3. Application Two: Remand with Instructions for the Sentencing Judge to Choose the Most Appropriate Conviction to Vacate

If given a choice on remand, the trial court in our example might prefer to leave intact the aggravated bank robbery conviction, despite its shorter sentence, because that offense more accurately reflects the defendant's culpability. Alternatively, the trial judge might prefer the defendant to face a fifteen-year sentence, rather than a ten-year sentence, because it more accurately punishes the defendant's culpability. In any event, this choice can better be made by the sentencing authority itself, and several cases simply remand with instructions that the lower court choose which conviction to vacate. This is the remedy the Supreme Court attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or

Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny—

Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

Id.

197. See 18 U.S.C. § 2113(d) (1982), which states:

(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both.

Id.

198. See id.

199. See Gaddis, 424 U.S. at 547-48 (1976) (holding entry with intent to rob, robbery and aggravated robbery under Federal Bank Robbery Act are not cumulatively punishable if committed in course of single criminal episode). For relevant provisions of the Federal Bank Robbery Act, see supra notes 196-97 and accompanying text; see also Johnson v. United States, 619 F.2d 366 (5th Cir. 1980) (concurrent sentencing under 18 U.S.C. § 2113(a) and (d) not authorized). For a discussion of Gaddis, see supra notes 57-70 and accompanying text.

200. See, e.g., United States v. Martin, 732 F.2d 591 (7th Cir. 1984); United States v. Stone, 702 F.2d 1333 (11th Cir. 1983); United States v. Wiga, 662 F.2d 1325 (9th Cir. 1981), cert. denied, 456 U.S. 918 (1982); United States v. Ivy, 644 F.2d 479 (5th Cir. 1981); United States v. Larson, 625 F.2d 67 (5th Cir. 1980);
Court ordered in Ball.\textsuperscript{201} The Ball application seems somewhat deficient in the bank robbery hypothetical, however, since the sentencing judge obviously meant the defendant to face a twenty-five year sentence. The longest sentence possible under either application described to this point would be fifteen years. Another solution will, therefore, be considered.

4. Application Three: Vacate All Sentences and Remand for New Sentencing

The hypothetical example is troublesome because the judge imposed a sentence that was less than the statutory maximum for the more serious offense but then ordered it to be served consecutively with the sentence for the less serious offense. Faced with a multiple punishment violation in this situation, some appellate courts have left the more serious conviction intact but vacated all sentences and remanded for a completely new sentencing.\textsuperscript{202} This method allows the judge to impose a new sentence up to the statutory maximum for the more serious offense (twenty-five years for aggravated bank robbery in the hypothetical)

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\textsuperscript{201} See Ball, 470 U.S. at 865.

\textsuperscript{202} See, \textit{e.g.}, Johnson v. United States, 619 F.2d 366 (5th Cir. 1980). In Johnson, the defendant received concurrent sentences for three violations of 18 U.S.C. \textsection 2113(a) and (c) based on a single bank robbery. Neither party requested a remand for sentencing, and both parties argued that the court could simply leave one conviction intact and vacate the invalid sentences. \textit{Id. at} 368 n.6. The Fifth Circuit nevertheless vacated all sentences and remanded for resentencing, noting that this might result in a lesser sentence under the valid count. \textit{Id. at} 368. "Perhaps, after realizing that the maximum sentence is only 25 years, the District Court may conclude that a 20-year sentence is too harsh. The District Court should at least be able to reconsider the matter." \textit{Id.}

\textsuperscript{203} See, \textit{e.g.}, McClain v. United States, 676 F.2d 915 (2d Cir. 1982) (after appellate court vacated entire consecutive sentence of 25 years under 18 U.S.C. \textsection 2113(d) and 924(c) (1982), district court's resentencing only under \textsection 2113(d) for 20 years was proper even though original sentence for this conviction was 15 years; \textit{cert. denied}, 459 U.S. 879 (1982); United States v. Busic, 639 F.2d 940 (3d Cir. 1980) (where consecutive sentences vacated on double punishment grounds, double jeopardy clause does not prevent lower court from imposing new sentence on remaining valid conviction that exceeds original sentence under that count); \textit{cert. denied}, 452 U.S. 918 (1981); United States v. Hodges, 628 F.2d 350, 353 (5th Cir. 1980) ("[R]esentencing to the maximum penalty authorized by law is permitted when the aggregate of the illegally imposed consecutive sentences equals or exceeds the maximum [sentence under the remaining valid conviction]. . . ."). None of these cases decided the issue of whether the sentence on remand can exceed the total sentence imposed on the valid and invalid convictions in the first instance. See, \textit{e.g.}, Busic, 639 F.2d 940, 953 n.14 (expressly reserving this issue); McClain, 676 F.2d 915 (sentencing issue not reached by district court); Hodges, 628 F.2d at 353 n.3 ("[R]esentencing at issue here . . . must necessarily do no more than reduce the punishment appellant would otherwise be subjected to . . . "). A greater total sentence on remand would necessarily raise due process problems under North Carolina v. Pearce, 395 U.S. 711 (1969), as well as multiple punishment problems. For a discussion of this issue, see \textit{infra} notes 274-92 and accompanying text.
\end{flushleft}
Although this solution arguably gives effect to the judge's presumed intent and leaves only a single conviction intact, it too creates problems. These problems led to a lengthy analysis of a complicated sentencing pattern in *United States v. Henry*, a sharply divided en banc Fifth Circuit decision.

*Henry* is a useful case to discuss not only because it demonstrates the conceptual difficulty of the third potential solution, but also because it involves a subtly different kind of multiple punishment violation than the one the Court remedied in *Ball*. The multiple punishment problem in *Henry* flowed from the Supreme Court's decision in *Busic v. United States* that the enhanced sentencing provisions of 18 U.S.C. §924(c) for using a firearm to commit a felony were unavailable in certain situations. Specifically, *Busic* held that Congress did not intend prosecution under the felony firearm provisions of section 924(c) if a defendant


205. See United States v. Corson, 449 F.2d 544, 547-51 (3d Cir. 1971) (discussing judge's intention and merger of convictions theories and concluding that best approach is to vacate all sentences and remand for resentencing up to maximum term of any valid convictions). For an analysis concluding that the judge's intention theory should be rejected in most situations, but accepted in at least one category of cases, see infra notes 274-92 and accompanying text. It appeared prior to *Ball* that the Supreme Court had endorsed the judge's intention theory in *Green v. United States*, 365 U.S. 301 (1961). In *Green*, the defendant was found guilty under a three-count indictment for three offenses proscribed by 18 U.S.C. §2113: 1) entering a bank with intent to commit a felony; 2) robbing the bank and 3) assaulting people in the bank. 365 U.S. at 302. The trial judge pronounced sentence as follows: "On Count 1 of the indictment 20 years, on Count 2 . . . 20 years, and on Count 3 of the indictment that you be imprisoned for . . . 25 years, said prison sentence to run concurrent." *Id.*

On appeal, the defendant argued that the 20-year sentence imposed under Count 1 exhausted the judge's power to impose any additional sentence for the same bank robbery. *See id.* at 305. The Supreme Court, however, rejected this argument and stated, "Plainly enough, the intention of the district judge was to impose the maximum sentence of twenty-five years for aggravated bank robbery, and the formal defect in his procedure should not vitiate his considered judgment." *Id.* at 306 (footnote omitted). *Ball* clearly discredits the holding of *Green*, and its underlying rationale is questionable.

206. 709 F.2d 298 (5th Cir. 1983) (en banc) (plurality opinion). The plurality opinion was fully joined by only five judges. Two judges filed separate opinions. *See id.* at 317 (Reavley, J., specially concurring); *id.* at 318 (Jolly, J., specially concurring). Six judges joined the dissent. *See id.* at 318 (Gee, J., dissenting).

207. 446 U.S. 398 (1980).

208. *See Henry*, 709 F.2d at 301. Section 924(c)(1) provided in relevant part:

(c) Whoever—

(1) uses a firearm to commit any felony for which he may be prosecuted in a court of the United States . . . shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years.
was also prosecuted for another offense that provided enhanced sentencing for use of a firearm.209

Busic was based on statutory construction,210 tempered by the rule of lenity,211 and Congress has since changed the language of section 924(c) to avoid the Busic result.212 Under the version of the statute in


Although the above quoted text of § 924(c) as applied in Henry appears to create a "pure" sentencing provision that exists without necessity for an underlying conviction, the next sentence of subsection (c) refers to "conviction under this subsection," thus manifesting an intent that the violation of § 924(c) result in a conviction as well as an enhanced sentence. 18 U.S.C. § 924(c) (1982). For an example of a similar enhanced sentencing provision that was construed to create additional punishment attached to the underlying felony rather than a separate offense, see State v. Hudson, 562 S.W.2d 416, 419 (Tenn. 1978). In Hudson, the state court reached that result to avoid what it perceived to be a constitutional double jeopardy problem. See id. at 418. In actuality, no potential double jeopardy problem was posed by the state statute. See Thomas, supra note 1, at 96-112.

209. See Busic, 446 U.S. at 404. Addressing the propriety of enhanced sentencing under § 924(c), the Busic Court concluded that "prosecution and enhanced sentencing under § 924(c) is simply not permissible where the predicate felony statute contains its own enhancement provision." Id. at 404 (emphasis added). The Court's decision necessarily means, even absent its subsequent holding in Ball, that no conviction could be entered for a § 924(c) violation under circumstances similar to those in Busic.

210. See 446 U.S. at 405 ("[A]nalysis begins, as indeed it must, with the text and legislative history of § 924(c)."); see also id. at 407 ("Our task here . . . is to ascertain as best we can which approach Congress had in mind.").

211. See id. at 406-08 (discussing rule of lenity). The Busic Court described the rule of lenity as a tool of statutory construction that the Court uses to construe "ambiguity concerning the ambit of criminal statutes . . . in favor of lenity." Id. at 406 (quoting United States v. Bass, 404 U.S. 336, 347 (1971) (quoting Rewis v. United States, 401 U.S. 808, 812 (1971)); see also Bell v. United States, 349 U.S. 81, 83 (1955) ("When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity."); Westen, The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences, 78 Mich. L. Rev. 1001, at 1029 n.84 (1980) (characterizing Bell as the first Supreme Court rule of lenity case); Thomas, Multiple Punishment, supra note 23, at 15-25, 41-44, & 62-76 (discussing application of rule of lenity in different contexts).

212. For the relevant text of § 924(c) central to the Court's decision in Busic, see supra note 208. In 1984, Congress amended § 924(c) to specifically authorize its application in addition to any other enhanced sentencing that may be available. Amended § 924(c) provides:

Whoever, during and in relation to any crime of violence, including a crime of violence which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device, for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence, be sentenced to imprisonment for five years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for ten years. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of
effect in 1980, however, Busic was an application of multiple punishment theory because, just as in Ball, the Court found that a conviction was entered that was not intended by Congress. Busic and Ball differ, however, in the specific expression of congressional intent. Ball held that Congress did not intend both statutes to apply to the same conduct;\footnote{\textit{Ball}, 470 U.S. at 862 ("It is clear that Congress did not intend to subject felons to two convictions [under the offenses in question].")}. 

New section 924(c) was a response to the Court's determination in both Busic and Simpson v. United States, 435 U.S. 6 (1978), that Congress did not intend to authorize the application of § 924(c) under the facts of those cases. See H.R. Rep. No. 98-1030, 98th Cong., 2d Sess., \textit{reprinted in} 1984 U.S. Code Cong. & Ad. News 3490 (concluding that \textit{Busic} and \textit{Simpson} "negated the section's use . . . in precisely the type of extremely dangerous offenses for which a mandatory punishment for the use of a firearm is the most appropriate"). Thus, the legislative history of section 924(c) reveals a congressional intent to overrule Busic and Simpson v. United States, 435 U.S. 6 (1978). In Simpson, the Court held that Congress did not intend to authorize courts to simultaneously convict and sentence under both the old § 924(c) and under 18 U.S.C. § 2113(d) (aggravated bank robbery), and that concurrent application of the two statutes was unconstitutional. Simpson, 435 U.S. at 16. However, new § 924(c) does permit simultaneous sentencing and conviction by its own terms under itself and § 2113(d), since a violation of § 2113(d) is necessarily a "crime of violence" under 18 U.S.C. § 16. Therefore, the Simpson Court's interpretation of the legislative intent with respect to § 924(c) is no longer viable. For the relevant text of original § 924(c), see \textit{supra} note 208. For the relevant text of new § 924(c), see \textit{supra} this note. For the relevant text of § 2113(d), see \textit{supra} note 197.

It should be noted that because this article is concerned with the constitutional limitations on resentencing, the textual analysis is based on the "old" (pre-1984) version of § 924(c). Moreover, its conclusions with respect to the original statute are still meaningful in situations where Congress may have intended enhanced sentencing provision only in certain situations. For example, 18 U.S.C. § 924(b) (1982) proscribes transporting a firearm in interstate commerce with intent to commit a felony and provides a penalty of up to ten years imprisonment. The intended felony does not have to be a "crime of violence" that triggers application of § 924(c) in addition to the underlying predicate offense. One could, however, carry a firearm with intent to commit a nonviolent felony and simultaneously carry a firearm "during and in relation to [a] crime of violence." Compare 18 U.S.C. § 924(b) (1982) with id. § 924(c). Should the government seek a conviction for both of these firearm-related provisions, the Busic multiple punishment doctrine would likely apply. The congressional intent behind original § 924(c), as reflected in the language of its sponsor, suggested that it should not apply to other firearm felonies in chapter 44. See Busic, 446 U.S. at 405. Nothing in the legislative history of new section 924(c) contradicts this intent with respect to nonviolent firearm felonies. See H.R. Rep. No. 98-1030, 98th Cong., 2d Sess., \textit{reprinted in} 1984 U.S. Code Cong. & Ad. News 3491 (intent was "to ensure that all persons who commit Federal crimes of violence . . . receive a mandatory sentence"). Thus, the sentencing under § 924(c) in the hypothetical case would be improper for the very same reason it was improper in Busic: Congress did not intend to subject our hypothetical offender to § 924(c).

213. See Ball, 470 U.S. at 862 ("It is clear that Congress did not intend to subject felons to two convictions [under the offenses in question].").
it made no difference under which statute the government prosecuted. In Busic, on the other hand, the Court held that Congress did not intend section 924(c) to apply at all when the defendant was simultaneously convicted of another offense that provided enhanced sentencing for using a firearm.\textsuperscript{214} The difference, then, is that the violation in Ball was the existence of convictions under both statutes, and the violation in Busic was the existence of a conviction under the \textit{wrong} statute. The implications of this difference for resentencing will be explored in this section.\textsuperscript{215}

In Henry,\textsuperscript{216} the defendant was sentenced to five years for conspiracy under 18 U.S.C. § 371,\textsuperscript{217} seven years for interfering with federal officers under 18 U.S.C. § 111,\textsuperscript{218} and five years for using a firearm to commit a felony under section 924(c).\textsuperscript{219} The district court initially ordered the sentences under sections 371 and 111 to run concurrently, and the sentence under section 924(c) to run consecutively, for a total term of twelve years. This prompted Henry to file a rule 35 motion\textsuperscript{220}

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\textsuperscript{214.} See Busic, 446 U.S. at 404 ("prosecution and enhanced sentencing under § 924(c) is simply not permissible where the predicate felony statute contains its own enhancement provision").

\textsuperscript{215.} For a discussion of these implications, see infra notes 272-94 and accompanying text.

\textsuperscript{216.} 709 F.2d 298 (5th Cir. 1983) (en banc) (plurality opinion).

\textsuperscript{217.} See id. at 301. Section 371 provides in relevant part:

\begin{quote}
 If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
\end{quote}


\textsuperscript{218.} See 709 F.2d at 301. Section 111 provides in relevant part:

\begin{quote}
 Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title [officers and employees of the United States] while engaged in or on account of the performance of his official duties, shall be fined not more than $5000 or imprisoned not more than three years, or both.
\end{quote}

Whoever, in the commission of any such acts uses a deadly or dangerous weapon, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.


\textsuperscript{219.} For the relevant text of § 924(c) applicable to Henry, see supra note 208. For the text of amended section 924(c), see supra note 212.

\textsuperscript{220.} See 709 F.2d at 301. Rule 35 of the Federal Rules of Criminal Procedure provided in relevant part:

\begin{enumerate}
\item[(a)] CORRECTION OF SENTENCE. The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence.
\item[(b)] REDUCTION OF SENTENCE. The court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of
to vacate the section 924(c) sentence, claiming it was illegal under Busic because section 111 already provided enhanced sentencing for use of a firearm in the course of committing that felony.\textsuperscript{221}

The district court granted the rule 35 motion but vacated the section 111 concurrent sentence, rather than the section 924(c) consecutive sentence, thus leaving two consecutive sentences totaling ten years.\textsuperscript{222} Henry appealed and the Fifth Circuit reversed and remanded with instructions to vacate the illegal 924(c) sentence as requested in the rule 35 motion.\textsuperscript{223} The district court complied, but then ordered the two remaining concurrent sentences to be served consecutively (after reducing the section 111 sentence to five years).\textsuperscript{224} Thus, Henry was faced with the same ten-year sentence that he had faced after the district court's initial (and erroneous) action under rule 35. Henry's second appeal argued that the district court could not, on remand, change the sentencing under the remaining valid convictions from concurrent to consecutive in order to create a sentence that was precisely the same length as the sentence being appealed.

A panel of the Fifth Circuit held that the action of the judge was any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction.


\textsuperscript{221} 709 F.2d at 301. Henry began serving his sentences in 1976 following an unsuccessful appeal in which all three convictions were affirmed. \textit{Id.; accord United States v. James}, 528 F.2d 999 (5th Cir.), \textit{cert. denied}, 429 U.S. 959 (1976). After serving part of his sentence, Henry filed a rule 35 motion to vacate the \S\ 924(c)(1) sentence in light of the Supreme Court's prohibition in \textit{Simpson v. United States}, 435 U.S. 6 (1978), against multiple punishment under \S\ 924(c)(1) and \S\ 111, "because both statutes proscribe essentially the same conduct and because, as a matter of statutory construction, Congress had not intended that both apply at the same time." \textit{Henry}, 709 F.2d at 301. For a discussion of \textit{Simpson}, see Thomas, \textit{Multiple Punishment, supra} note 23, at 62-66.

\textsuperscript{222} 709 F.2d at 301. The district court purported to act with the implied authority of \textit{United States v. Shillingford}, 586 F.2d 371 (5th Cir. 1978). \textit{See} 709 F.2d at 301. Specifically, the \textit{Henry} district court relied on the Fifth Circuit's interpretation of \textit{Simpson} as granting a district court the discretion, on remand "to vacate either the section 924(c)(1) or the section 111 sentence." \textit{Id.} (citing \textit{Shillingford}, 586 F.2d at 376 n.7) (emphasis in original).

\textsuperscript{223} \textit{See id.} at 302. Subsequent to Henry's resentencing, the Supreme Court held that when a defendant engages in conduct which violates both \S\ 111 and \S\ 924(c)(1), he may be sentenced only under section 111. \textit{Id.} (citing \textit{Busic}, 446 U.S. 398). Thus, the Fifth Circuit remanded the case to the district court for yet another resentencing, this time in accordance with \textit{Busic}. \textit{Henry}, 709 F.2d at 302.

\textsuperscript{224} \textit{Id.} at 301-02. Although \textit{Henry} does not disclose the basis for the reduction in sentence, the government argued on appeal that the net effect of the resentencing was that "Henry [had] been rewarded, not penalized, for bringing his motion under rule 35." \textit{Id.} at 303. Henry's reward was, presumably, that the total sentence after the first appeal and remand was two years less than the sentence initially imposed. \textit{See id.}
permissible,225 but the Fifth Circuit sitting en banc held that the rule 35 motion to correct an illegal sentence did not give the district court authority to change the sentencing on the valid convictions.226 The plurality opinion was premised on a reading of the prior resentencing mandate as failing to authorize the district court to alter the legal sentences.227 However, the plurality discussed at length the possibility that increasing the effective length of the sentence on the valid convictions after a multiple punishment appeal would be contrary to the double jeopardy clause,228 the due process clause,229 and the letter and spirit of rule 35 of the Federal Rules of Criminal Procedure.230

The double jeopardy discussion in Henry was based on a reading of Ex parte Lange231 that would forbid increasing a valid sentence after it

225. See United States v. Henry, 680 F.2d 403 (5th Cir. 1982), rev'd, 709 F.2d 298 (5th Cir. 1983) (en banc).
226. See 709 F.2d at 305 (plurality opinion); id. at 317 (Reavley, J., specially concurring); id. at 318 (Jolly, J., specially concurring).
227. See id. at 303-06. The Fifth Circuit's previous opinion ordered that "the sentence" be vacated and the case be remanded to the district court for further proceedings consistent with the decision of the United States Supreme Court in Busic. Id. at 304 (quoting United States v. Henry, 621 F.2d 763 (1980) (en banc)).

The plurality in Henry narrowly construed Busic as authorizing the district court to vacate only the § 924(c) sentence:

An analysis of the Supreme Court's decision in Busic compels this reading. Busic held that if a federal criminal statute provides its own use-of-a-weapon sentence enhancement provision, a sentence under the general enhancement provision, section 924(c), cannot be imposed. 446 U.S. at 404, 100 S. Ct. at 1751. Our vacation of Henry's "sentence" in light of Busic, as the district court expressly recognized, thus can only have mandated a vacation of that which was impermissible under that case, namely, the imposition of a sentence under section 924(c)(1). Our earlier remand for "proceedings consistent with" Busic thus directed the district court to reinstate (or acknowledge the continuing validity of) Henry's section 111 sentence.

We recognize that footnote nineteen of the Supreme Court's opinion in Busic adverted to the possibility of an increased sentence under section 111 on remand, but we do not think that this reference undermines our analysis here. If we had intended to do what the Supreme Court's opinion in Busic refused to address, we would have done so specifically.

709 F.2d at 304 (footnote omitted). For a further discussion of Busic, see supra notes 207-15 and accompanying text.

228. See 709 F.2d at 309-10. For a discussion of the possible prohibition against increasing valid sentences under the double jeopardy clause of the fifth amendment, see infra notes 231-41.
229. See 709 F.2d at 315-17. For a discussion of the due process problem inherent in increasing a valid sentence, see infra notes 242-49 and accompanying text.

230. See 709 F.2d at 310-15. For a discussion of the rule 35 argument against increasing a valid sentence, see infra notes 250-54 and accompanying text.

231. 85 U.S. (18 Wall.) 163 (1873). For a discussion of the facts of Lange, see supra note 1.
had been imposed. The plurality in Henry conceded that a recent decision of the Supreme Court, United States v. DiFrancesco, called into account Henry, 709 F.2d at 309-10. Lange held that a defendant could not be resentenced after fully executing a penalty that satisfied one of the alternative penalties authorized by statute. See 85 U.S. (18 Wall.) at 176-78. For a discussion of Lange in the context of the genesis of the multiple punishment doctrine, see Thomas, supra note 1, at 88-90. Lange has been interpreted by later Supreme Court cases as barring an increase in sentence after a defendant has begun serving a lawful sentence. See, e.g., United States v. Benz, 282 U.S. 304, 307 (1931) (dictum) (Lange prohibited courts from augmenting judgments, decrees and orders in criminal cases). But see United States v. DiFrancesco, 449 U.S. 117, 138-39 (1980) (suggesting that Benz interpretation of Lange was dictum and "confining] the dictum in Benz to Lange's specific context"). For a discussion of Di Francesco, see infra notes 234-40 and accompanying text.

234. 449 U.S. 117 (1980). In DiFrancesco, the defendant was convicted of five federal offenses in two separate jury trials. Id. at 122. He was first sentenced to a total of nine years imprisonment for damaging federal property, unlawfully storing explosives, and conspiracy. Id. He was later sentenced as a "dangerous special offender," to two 10-year terms following a conviction for racketeering. Id. (citing 18 U.S.C. § 3576 (1982)). These latter terms were imposed concurrently with the previous nine year sentence, for a total sentence of 10 years for all five offenses. Id. at 122-23. For the text of 18 U.S.C. § 3576, see infra this note.

The government appealed under 18 U.S.C. § 3576 (1982), contending that the district court had abused its discretion by imposing on the defendant only a net one year additional sentence in light of its findings on the "dangerous" special offender charges. DiFrancesco, 449 U.S. at 125. The statute which permitted the government's appeal, 18 U.S.C. § 3576 (1982), provides in relevant part:

With respect to the imposition, correction, or reduction of a sentence after proceedings under section 3575 of this chapter, a review of the sentence on the record of the sentencing court may be taken by the defendant or the United States to a court of appeals. The taking of a review of the sentence by the United States shall be deemed the taking of a review of the sentence and an appeal of the conviction by the defendant. Review of the sentence shall include review of whether the procedure employed was lawful, the findings made were clearly erroneous, or the sentencing court's discretion was abused. The court of appeals on review of the sentence may . . . affirm the sentence, impose or direct the imposition of any sentence which the sentencing court could originally have imposed, or remand for further sentencing proceedings and imposition of sentence, except that a sentence may be made more severe only on review of the sentence taken by the United States and after hearing. Failure of the United States to take a review of the imposition of the sentence shall, upon review taken by the United States of the correction or reduction of the sentence, foreclose imposition of a sentence more severe than that previously imposed. Any withdrawal or dismissal of review of the sentence taken by the United States shall foreclose imposition of a sentence more severe than that previously imposed. Any withdrawal or dismissal of review of the sentence taken by the United States shall foreclose imposition of a sentence more severe than that reviewed but shall not otherwise foreclose the review of the sentence or the appeal of the conviction. The court of appeals shall state in writing the reasons for its disposition of the review of the sentence. Any review of the sentence taken by the United States may be dismissed on a showing of abuse of the right of the United States to take such review.

Id. (emphasis added).

The Second Circuit affirmed the convictions, but dismissed the govern-
question whether this was the proper interpretation of *Lange*. In *DiFrancesco*, the Court first concluded that the double jeopardy clause does not absolutely forbid increasing a valid sentence after it has been imposed, and then held permissible the congressional authorization for appellate courts to increase sentences under the “dangerous special offender” statute. Indeed, dicta in *DiFrancesco* specifically confined *Lange* to its facts.

Following *DiFrancesco*, the Third Circuit held, prior to *Henry*, that *Lange* would not bar increasing the sentence on a valid conviction following a reversal of another conviction on multiple punishment grounds. Although *DiFrancesco* may signal future approval of the court's appeal for increased sentencing on double jeopardy grounds. 449 U.S. at 123. With respect to that issue, the Supreme Court held that the provision in § 3576 permitting increased severity of sentencing on appeal “violate[d] neither the guarantee against multiple punishment nor the guarantee against multiple trials” and remanded the case to the Second Circuit. Id. at 139, 143.

235. See id. at 137. Noting a “distinction between acquittals and sentences,” the Court concluded that “the Double Jeopardy Clause does not require that a sentence be given a degree of finality that prevents its later increase.” Id.; see also McClain v. United States, 676 F.2d 915, 918 (2d Cir.) (“*DiFrancesco* at the very least held that changing a sentence that is not final does not violate the Double Jeopardy Clause.”), cert. denied, 459 U.S. 879 (1982).

236. 449 U.S. at 143. For the relevant text of the “dangerous special offender” statute, see supra note 234.

237. See id. at 199. (“The holding in *Lange*, and thus the dictum in *Benz*, are not susceptible of general application.”).


In *Busic*, the government argued that if the Court decided to vacate the § 924(c) sentences, it should also vacate the valid § 111 sentences and to allow increased punishment on *de novo* resentencing by the district court. See 446 U.S. at 412 n.19. The Court, however, refused to express any opinion as to whether the valid sentences under § 111 could be increased to preserve the district judge's intention to impose a severe sentencing plan. Id. The Court thus granted the Third Circuit an opportunity to rule on this question. See id.

On remand, the Third Circuit ruled that the constitutional principles of double jeopardy and due process did not prevent the district judge from increasing the sentences under section 111, since the section 924(c) enhanced sentencing provisions were no longer available. *Busic*, 639 F.2d at 950-51. A similar position was taken by the dissent in United States v. Henry, 709 F.2d 298, 323-29 (5th Cir. 1983) (Gee, J., joined by Brown, Johnson, Garwood and Higgenbotham, J.J., and Clark, C.J., dissenting).

The Third Circuit's resolution of the double jeopardy claim in *Busic* was based principally on *DiFrancesco*, and overruled four earlier decisions, most notably, United States v. Fredenburgh, 602 F.2d 1143 (3d Cir. 1979). See *Busic*, 639 F.2d at 949 (“An examination of *Fredenburgh* and the cases relied upon by it persuades us that they were influenced by the now discredited decisions in *Ex Parte Lange* and United States v. *Benz* . . . .”) (citations omitted); see also id. at 953 n.14 (expressly overruling earlier precedent). For a discussion of the Third Circuit's rejection of Busic's due process claim, see infra note 249.

In a similar case, the Second Circuit agreed with the Third Circuit's conclu-
Third Circuit's rule permitting resentencing under an unreversed conviction, the Henry plurality correctly concluded that DiFrancesco only limited Lange in the context of an express congressional authorization of increased sentences on appeal. Allowing increased sentences on appeal in Busic that DiFrancesco altered double jeopardy doctrine to permit an increased sentence on a valid count after reversal of another count. See McClain v. United States, 676 F.2d 915, 918 (2d Cir.), cert. denied, 459 U.S. 879 (1982). In McClain, the defendant was sentenced to 15 years for bank robbery under 18 U.S.C. § 2113(a), (d) (1982), and 10 additional years for using a firearm in the robbery under 18 U.S.C. § 924(c) (1982), amended by 18 U.S.C. § 924(c) (Supp. III 1985). McClain, 676 F.2d at 916. For the relevant text of § 2113, see supra notes 196-97. For the relevant text of § 924(c), see supra note 208. Following an appeal and remand vacating the sentence on both counts, the district court increased the § 2113 sentence to 20 years. 676 F.2d at 917. The Second Circuit affirmed, stating: "DiFrancesco teaches that appellant had no legitimate expectation of receiving only a fifteen-year sentence, because of the lack of finality accorded to sentences and because he should have been aware that under section 2113(d) he could have been sentenced to twenty-five years." Id. at 918. For a discussion of the Second Circuit's treatment of the due process claim in McClain, see infra note 249.

239. See Henry, 709 F.2d at 309. The precise issue in DiFrancesco was whether the "dangerous special offender" provisions, 18 U.S.C. §§ 3575-3576 (1982), were constitutional to the extent that they specifically allowed the government to appeal a sentence to obtain an increased sentence. See DiFrancesco, 449 U.S. at 118-21. DiFrancesco did not, therefore, address the issue of whether the government could, in the absence of congressional authorization, obtain an increased sentence for a conviction that was not reversed on appeal, and three members of the Court subsequently concluded that DiFrancesco should be limited to express legislative authorization of increased sentences. See, e.g., Ralston v. Robinson, 454 U.S. 201, 224 n.3 (1981) (Stevens, J., joined by Brennan and O'Connor, JJ., dissenting) (arguing that Youth Corrections Act (YCA), 18 U.S.C. §§ 5005-5006, 5010-5026 (1982) (repealed 1984), should not be construed to permit increasing severity of YCA term by allowing transfer of defendant into adult incarceration for balance of term).

Whether the government can appeal a sentence presents a double jeopardy issue separate and distinct from deciding whether a defendant's appeal allows the trial judge to increase the sentence on a valid count following reversal of another count. An appeal by the defendant acts as a limited forfeiture of double jeopardy protection. See North Carolina v. Pearce, 395 U.S. 711, 721 (1969) (appellate reversal of single count conviction did not bar, on double jeopardy grounds, imposition of more severe sentence upon reconviction); Westen, supra note 211, at 1056-62 (arguing that Pearce is based on a forfeiture analysis). If the double jeopardy clause protection is forfeited to the extent that a more severe sentence can be imposed after reversal of a single conviction, then it is arguably forfeited as to the entire sentencing "package" that was initially imposed.

The Third Circuit in Busic accepted this interpretation of Pearce, arguing that Pearce would sanction increasing the sentences on the unreversed counts "when the totality of the sentence . . . is upset at [the defendant's] behest by [an] appeal" which resulted in reversal of some counts. 639 F.2d at 950-51.

The contrary argument, of course, is that a defendant's appeal of a multi-count conviction forfeits the double jeopardy clause protection only with respect to the convictions that are reversed. Under this interpretation of the double jeopardy clause, the trial court may not increase the sentence on convictions that were not erroneously imposed. See Henry, 709 F.2d at 310 (accepting this argument within context of a rule 35 motion to correct illegal sentence).
peal pursuant to congressional authorization is a very different issue from deciding that trial judges have inherent power to increase sentences on valid convictions affirmed on appeal. In the absence of congressional authorization of appellate review of sentences, the long-standing interpretation of *Lange* might still prevent a sentence from being increased after it is imposed and the defendant has begun to serve it.

The due process argument in *Henry* flows from the limitations in *North Carolina v. Pearce* concerning the permissible length of a sentence after a reconviction following a successful appeal. *Pearce* established that the due process clause forbids an increased sentence upon reconviction if there is a "realistic likelihood of 'vindictiveness.'" A longer sentence imposed by the same judge after reconviction is presumed to be vindictive unless the sentence is based on "objective information concerning identifiable conduct . . . occurring after the time of the original sentencing proceeding."

A trial judge whose sentencing pattern has been disrupted by an appellate court is certainly in a position to be vindictive. But is the judge being vindictive if, as in *Henry*, the sentence finally imposed is within the limit of the original total sentence? There was only a single

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240. Compare *DiFrancesco*, 449 U.S. at 139 (permitting increasing sentence on appeal pursuant to statute authorizing government-initiated review of sentences) with *North Carolina v. Pearce*, 395 U.S. 726 (1969) (forbidding trial judge from increasing sentence after appeal unless premised on conduct occurring after original sentencing); see also *Henry*, 709 F.2d at 306-10 (concluding that trial courts have no inherent power to increase sentence after it has been lawfully imposed and defendant has begun to serve it).

241. See *United States v. Benz*, 282 U.S. 304 (1931). In *Benz*, the Court noted that, under *Lange*, increasing a sentence after the defendant had begun serving it would constitute double punishment. *Id.* at 306-07. As the Supreme Court recently observed in *DiFrancesco*, however, this aspect of *Benz* was only dictum, because the "real and only issue in *Benz* . . . was whether the trial judge had the power to reduce a defendant's sentence after service had begun." *DiFrancesco*, 449 U.S. at 138 (emphasis in original); see also *United States v. Busic*, 639 F.2d 940, 948 n.11 (3d Cir.) ("*Benz* . . . erroneously predicated its dictum on *Ex parte Lange* . . . which involved a full satisfaction of the defendant's sentence, not merely a commencement of the service of his sentence.") (emphasis in original), cert. denied, 452 U.S. 918 (1981).

242. See 709 F.2d at 315-16.


244. See *Henry*, 709 F.2d at 315 (quoting Blackledge v. Perry, 417 U.S. 21, 27 (1974)). *Blackledge* held that a presumption of unconstitutional prosecutorial vindictiveness arose when a prosecutor filed felony charges after a defendant had been convicted of a misdemeanor and exercised his statutory right to a trial *de novo*. See also *Thigpen v. Roberts*, 468 U.S. 27, 30 (1984) (reaffirming *Blackledge* under "identical" relevant facts).

245. See *Pearce*, 395 U.S. at 726. For a more detailed discussion of the implication of *Pearce* on the resentencing issue in this article, see infra notes 268-71 and accompanying text.

246. For a discussion of the sentencing and resentencing of the defendant in *Henry*, see supra notes 216-30 and accompanying text.
conviction in *Pearce*, and the due process concerns about imposing a new sentence greater than the original sentence cannot be automatically transferred to a situation where the original judgment was composed of multiple convictions and consecutive sentences. A total sentence of a certain number of years could, for purposes of the *Pearce* vindictiveness analysis, be viewed as a single sentence. So viewed, resentencing within the limits of the original total sentence would not appear to be vindictive.\(^{247}\)

As the *Henry* plurality noted, however, ""'[a]ctual retaliatory motivation' need not exist so long as the situation produces a reasonable 'fear of such vindictiveness' that would deter defendants from pursuing post-conviction remedies.""\(^{248}\) Thus, the *Pearce* rule may not be limited to situations in which there is an actual inference of vindictiveness. Instead, the rule may be available to prevent judicial actions that would lead a defendant to reasonably perceive that no gain could result from

\(^{247}\) Cf. Paul v. United States, 734 F.2d 1064 (5th Cir. 1984). In *Paul*, the court stated that the "'potential for some degree of actual vindictiveness plainly exists'" when a district court's judgment is reversed, and the case is remanded for resentencing following a successful appeal by a defendant. *Id.* at 1067 n.3. Although the court did not specifically state so, the basis for such vindictiveness would presumably be the judge's displeasure at being reversed. Notwithstanding this potential for prejudice, it would be difficult to attribute a vindictive motive to a judge who, as in *Paul*, reduced a defendant's total sentence on remand.

\(^{248}\) 709 F.2d at 315-16 (quoting Blackledge v. Perry, 417 U.S. 21, 28 (1974)). But see Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978) (deterring exercise of legal right does not always lead to due process violation). In *Bordenkircher*, the defendant was charged with forgery punishable by a maximum term of ten years. *Id.* at 358. In the course of plea bargaining, the prosecutor offered to recommend a five year sentence in exchange for a guilty plea. *Id.* The prosecutor also threatened to press an indictment under the state's Habitual Criminal Act, (which imposed a mandatory life sentence) if the defendant pleaded not guilty. *Id.* at 358-59. The defendant did plead not guilty and the prosecutor carried out his threat, resulting in the imposition of a life sentence under the recidivist statute. *Id.* at 359. On appeal, the Supreme Court narrowly held that this particular prosecutor's course of conduct "'no more than openly presented the defendant with the unpleasant alternatives of forgoing trial or facing [more serious] charges on which he was plainly subject to prosecution [and thus] did not violate the Due Process Clause of the Fourteenth Amendment.'" *Id.* at 365.

The Court distinguished the anti-vindictiveness rule enunciated earlier in *Pearce* on the basis that the plea bargaining process affords a "'mutuality of advantage'" to the defendant and the state. *Id.* at 363 (quoting Brady v. United States, 397 U.S. 742, 752 (1970)). The Court further explained in dictum that the due process violation inherent in cases such as *Pearce* "'lay not in the possibility that a defendant might be deterred from the exercise of a legal right, . . . but rather in the danger that the State might be retaliating against the accused for lawfully attacking his conviction.'" *Id.* at 363 (citations omitted). This dictum is, however, subject to alternative interpretations in the resentencing context. Increasing the sentence on the valid conviction could be viewed as retaliation for exercising the right to appeal. So construed, the *Bordenkircher* dictum is consistent with the *Henry* analysis. On the other hand, a judicial resentencing within the limits of the original total sentence could be viewed not as retaliation at all, but rather as an exercise of the judge's sentencing discretion.
The third argument in Henry against allowing the trial court to increase the total sentence on the valid counts was based on an interpretation of a rule of procedure. Rule 35(a) provided, in relevant part, that a “court may correct an illegal sentence at any time.” The rule did not, however, give the trial court authority to “correct” legal sentences that were imposed, and section (b) of the rule supported this reading by negative implication.

The government argued in Henry that “sentence” as used in rule 35 included the entire sentencing pattern, thus permitting trial courts to vacate the unchallenged sentences and resentence as part of a rule 35 sentence correction. A majority of the Henry court rejected this argument, concluding that the plain meaning of the word “sentence” in rule 35 was to connote a “specific penalty imposed for a specific statutory offense.”

249. See 709 F.2d at 316 (“Because the government’s proposed reading of rule 35 . . . may be used to thwart defendants who successfully use the rule to challenge some illegal sentences, Henry’s Pearce argument is not frivolous.”); Paul v. United States, 734 F.2d 1064, 1067 n.3 (5th Cir. 1984) (“Pearce . . . is aimed at preventing actual vindictiveness as well as ending deterrence of appeals.”) (emphasis omitted). Some courts do not share this expansive view of Pearce. See, e.g., United States v. Busic, 639 F.2d 940 (3d Cir.), cert. denied, 452 U.S. 918 (1981). In Busic, the Third Circuit stated that the Pearce due process limitation applied only when the total sentence on remand was greater than the original sentence. Id. at 951 n.12 (“[B]ecause the appeal could not result in a higher sentence than that originally imposed, there could be no deterrent to an appeal. Even if there were, the possibility that a defendant might be deterred from the exercise of a legal right to appeal does not violate the due process clause . . . ”). Cf. United States v. Henry, 709 F.2d 298, 325-26 (5th Cir. 1983) (en banc) (Gee, J., dissenting) (arguing that judge’s statement in resentencing opinion about gravity of offense ruled out vindictiveness and thus satisfied Pearce); McClain v. United States, 676 F.2d 915, 918 (2d Cir.) (Pearce satisfied by judge’s comments that defendant had violated prison rules since original sentencing, even though violations were minor and defendant had not been subjected to any serious sanction), cert. denied, 459 U.S. 879 (1982). For a discussion of the possible impact of Bordenkircher v. Hayes, 434 U.S. 357 (1978), on the Pearce due process rule, see supra note 248.


251. Fed. R. Crim. P. 35(a). For the complete text of former rule 35, see supra note 220. For the text of new rule 35, effective November 1, 1986, see infra note 287.

252. See Fed. R. Crim. P. 35(b). Rule 35(b) allowed the judge to reduce a sentence “within 120 days after the sentence is imposed.” Id. The plurality observed in Henry that “the negative pregnant inherent in Rule 35(b)” prohibits an increase in sentence after 120 days. 709 F.2d at 312. The court further stated: “It would be fundamentally inconsistent to say that a sentence may be reduced only within the first 120 days but that it can be increased at any time.” Id. (emphasis in original).

253. See 709 F.2d at 310.

254. Id. See also id. at 317 (Reavley, J., specially concurring) (concurrence based on “plain language” of rule 35).
After concluding its analysis, the *Henry* plurality held that the trial court could not change concurrent sentences on the valid counts to consecutive sentences in order to preserve its original sentencing pattern.\(^\text{255}\) *Henry* does not, however, completely settle the resentencing issue even for its own circuit. The plurality opinion specifically found, as an independent ground for its decision, that the district court had exceeded the appellate court's initial mandate to vacate only the section 924(c) sentence.\(^\text{256}\) The resentencing issue might have come out differently, the plurality conceded, if the appellate judgment had vacated all sentences and remanded for resentencing as the Third Circuit did in *United States v. Busic*,\(^\text{257}\) a case factually similar case to *Henry*.

In addition, the necessary seventh vote to reverse the district court in *Henry* was cast by Judge Reavley who wrote: "I have no qualms about fairness or double jeopardy; these cases are resolved by the plain language of Rule 35."\(^\text{258}\) Without Judge Reavley's vote, there were only six votes (and perhaps only five)\(^\text{259}\) in favor of the double jeopardy and due process arguments, and there were six votes against these arguments.\(^\text{260}\) If *Henry* is thus limited to the rule 35 context, resentencing would be permissible in direct appeals when the defendant challenges the legality of the entire judgment.\(^\text{261}\) The *Henry* plurality, indeed, distinguished the Third Circuit's contrary holding in *Busic* on just this ground.\(^\text{262}\)

The future of the resentencing issue is unclear. Although the Supreme Court's judgment in *Ball* contemplated no action beyond vacating one of the offending convictions, nothing in the Court's analysis suggests that resentencing is constitutionally forbidden in every situa-

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\(^{255}\) *Id.* at 317.

\(^{256}\) See *id.* at 303-06. In light of *Busic*, the order to vacate the section 924(c) sentence necessitated vacating the underlying conviction as well. For a discussion of sentencing under § 924(c) in *Busic*, see supra note 209 and accompanying text.


\(^{258}\) 709 F.2d at 317 (Reavley, J., specially concurring).

\(^{259}\) Judge Jolly also filed an opinion specially concurring in the judgment. See 709 F.2d at 318 (Jolly, J., specially concurring). Judge Jolly's opinion, however, seems to agree in principle with the plurality that both double jeopardy and due process concerns forbid resentencing when one of the original sentences is illegal. See *id.* (Jolly, J., specially concurring). However, he would not have identified the same constitutional problems if the initial illegality had been created by the combined effect of two sentences, rather than by imposing the sentence on one count alone. See *id.* (Jolly, J., specially concurring) (distinguishing *United States v. Hodges*, 628 F.2d 350 (5th Cir. 1980) (individual sentences illegal only when considered together)).

\(^{260}\) See generally 709 F.2d at 318-35 (Gee, J., joined by Brown, Johnson, Garwood & Higginbotham, JJ., and Clark, C.J., dissenting).

\(^{261}\) See 709 F.2d at 305 n.12, 317 (limiting scope of decision to rule 35).

\(^{262}\) *Id.* at 305 n.12. The Fifth Circuit further stated: "We . . . express no opinion about whether we would follow the Third Circuit should the question ever be squarely presented to us." *Id.*
tion that might arise following an appellate reversal. For example, only one conviction would remain after the remand in *Ball*, and the Court’s remedy there has no direct bearing on the *Henry* problem of whether sentences on more than one valid conviction can be changed from concurrent to consecutive. Moreover, in *Busic*, the Supreme Court explicitly left open the possibility that the defendant could be resented under the valid conviction to effectuate the district court’s original intent to “deal severely” with the offenses in question.\(^{263}\)

It may be, therefore, that the subtle difference in the multiple punishment violations in *Ball* and *Busic* permits a different remedy on remand. As noted earlier,\(^{264}\) the *Busic* violation was not based on cumulative punishment from different statutes reflecting separate culpability but, rather, on the existence of duplicative enhanced sentencing provisions under section 924(c) and certain other statutes.\(^{265}\) Thus, a *Busic* multiple punishment violation (but not a *Ball* violation) presupposes duplicative sentencing provisions and a singular judgment about culpability.

To decide whether this difference in multiple punishment violations permits a difference in remedy, we must first consider the constitutional limitations on resentencing. Traditional notions of double jeopardy and due process doctrine do not, however, provide a clear answer to the resentencing question. *DiFrancesco* concluded that the double jeopardy clause is no absolute bar to an increased sentence after an appeal,\(^{266}\) but the specific holding in *DiFrancesco* is limited to a government appeal of sentences based on express congressional authorization.\(^{267}\) Although *Pearce* applied the due process clause to resentencing, the application depends on a finding of presumed vindictiveness or deterrence of appeal, and thus varies by case and by context.\(^{268}\)

\(^{263}\) See *Busic*, 446 U.S. 398, 412 n.19 (stating that because the Court of Appeals had not considered the issue, “we express no opinion as to whether in the particular circumstances of this case such a disposition would be permissible”).

\(^{264}\) For a discussion of the multiple punishment violation in *Busic*, see supra notes 207-15 and accompanying text.

\(^{265}\) See *Busic*, 446 U.S. 398, 405 (quoting observation made by congressional sponsor of § 924(c) that statute was not designed to apply to other firearm felonies in chapter 44 of title 18 or to the following sections of title 18: 111, 112, 113, 2113, 2114, 2331).

\(^{266}\) See *DiFrancesco*, 449 U.S. at 132.

\(^{267}\) See id. at 138-39; United States v. Henry, 709 F.2d 298, 309 (5th Cir. 1983) (en banc) (plurality opinion) (*DiFrancesco* “did nothing more than uphold against a double jeopardy attack the new ‘dangerous special offender’ statute, which gives the government the right to take a direct appeal in order to increase a dangerous defendant’s sentence”). For the text of the dangerous special offender statute permitting review of the sentence by the government, see supra note 234.

\(^{268}\) For a discussion of the due process clause applied to resentencing under *Pearce*, see supra notes 244-45 and accompanying text.
MULTIPLE PUNISHMENT DOCTRINE

This article, accordingly, suggests a new line of analysis, embodying both the Pearce due process concerns and the principle of finality that inheres in the double jeopardy clause.269 The basic premise is that a trial court determination of culpability reflected in a sentence for a particular offense cannot be redetermined unless it is somehow reversed by an appellate court.270 To allow a trial court to change its mind concerning the culpability expressed in a sentence for an unreversed conviction creates the potential for vindictiveness and disrupts the defendant's justifiable expectation of finality in unreversed sentences.271

Making the analysis hinge on the finality of the initial culpability assessment suggests that there is a constitutional distinction between Ball and Busic that permits a different remedy. In Ball, the appellate reversal is based on a finding that the multiple convictions constitute cumulative punishment.272 Thus, resentencing under a single valid conviction should be impermissible—not because the double jeopardy clause automatically forbids resentencing after an appeal, but because nothing has changed during the appeal to justify reassessing the culpability underlying the sentence on the valid conviction.273 If more than one valid conviction remains in this situation, it should be equally impermissible to increase the total sentence by ordering the sentences to be served consecutively rather than concurrently.

In Busic, however, the appellate reversal was not based on an incorrect finding of culpability under more than one criminal statute. Instead, a Busic reversal is dictated by the application of the wrong enhanced sentencing provision to punish singular culpability. If the judge determined a particular degree of culpability, and merely picked the wrong vehicle as a means of imposing appropriate punishment, re-

269. See generally DiFrancesco, 449 U.S. at 134 (1980) (discussing finality aspect of double jeopardy clause and concluding a sentence does not have sufficient finality to "prevent a legislative body from authorizing its appeal by the prosecution"); Westen, supra note 211, at 1003-44 (discussing interest in finality as one of three "double jeopardy values").

270. Appellate reversal of the trial court's culpability determination can take the form of a direct reevaluation of the sentence, see, e.g., DiFrancesco, or a reversal of the underlying convictions, see supra note 139 and accompanying text.

271. Cf. DiFrancesco, 449 U.S. at 137 (an appeal does not defeat legitimate expectations of finality when defendant was "aware that a dangerous special offender sentence is subject to increase on appeal"). There is, however, no statutory authority allowing a sentencing court to resentence a defendant under valid, unreversed counts. See Bryant v. United States, 417 F.2d 555, 558 (D.C. Cir. 1969). Thus, the Court's dismissal of the finality argument in DiFrancesco would not foreclose utilizing finality principles in the context of resentencing outside the scope of the dangerous special offender statute.

272. See Ball, 470 U.S. at 864 (concluding that "Congress had no intention of creating duplicative punishment for one limited class of persons falling within the overlap between the two [offenses]").

273. Cf. id. (concluding that "the only remedy consistent with the congressional intent [not to punish conduct under both statutes] is for the district court . . . to exercise its discretion to vacate one of the underlying convictions").
sentencing under another statute would not involve a reassessment of culpability.

Policy considerations underlying the multiple punishment doctrine support this conclusion. The only rationale that would permit resentencing under valid convictions after an appellate reversal is to give effect to the presumed intent of the judge who initially sentenced the defendant. The intention behind a sentencing pattern is, however, ultimately ambiguous when some of the convictions are reversed on the ground that Congress did not intend cumulative punishment under these statutes. In that situation, the judge's initial sentencing was based on a misunderstanding of the defendant's true culpability.

If, as in United States v. Welty, the judge imposed sentences totaling twelve years for five offenses, and only two of those offenses turn out to be punishable under the multiple punishment doctrine, the judge's expression of intent was made in the belief that the defendant was guilty of five separate offenses under which the judge could have imposed sentences of imprisonment totaling 80 years. It is therefore impossible . . . to determine whether the judge would have decided on sentences totaling 12 years if he had known that the defendant was guilty on counts for which the combined maximum sentence was [only] 30 years of imprisonment.275

Thus, the Third Circuit concluded in Welty that it was "undesirable" to attempt "to reconstruct the intention of the sentencing judge from indications, however unambiguous, of his intention at the time he acted under a misapprehension of the law."276

On the other hand, if the multiple punishment violation consisted of applying one enhanced sentencing provision when Congress intended a different enhanced sentencing provision to apply, it is certainly reasonable to presume that the sentencing judge meant to impose enhanced sentencing as the measure of the defendant's culpability, and a remand to allow such sentencing would at least give effect to this presumed intention. In that situation, the only policy reason not to allow resentencing is that resentencing would be "a kind of compensating remedy" which could be obtained by the government to "preserve the

274. 287 F. Supp. 580 (E.D. Pa. 1968), rev'd, 426 F.2d 615 (3d Cir. 1970). The Third Circuit panel decision in Welty was overruled by Busic to the extent that it was inconsistent with the Busic panel decision. It is the position of this article, however, that the general concerns underlying Welty are not at all inconsistent with Busic. For a discussion of Welty, see infra notes 275-76 and accompanying text.

275. Welty, 426 F.2d at 618.

276. Id.; cf. Bryant v. United States, 417 F.2d 555, 558 (D.C. Cir. 1969) (vacating convictions for merged offenses and remanding for resentencing on valid convictions "since we cannot say that the sentences for the affirmed convictions . . . were not influenced by the impermissible convictions").
effect of the invalid sentences." It is insufficient to justify ignoring the judge's culpability assessment when the only error was the application of the wrong enhanced sentencing provision.

It is, therefore, possible to reconcile the resentencing implications of the Supreme Court's decisions in Ball, Busic, Pearce, and DiFrancesco, as well as the Henry plurality opinion and the Third Circuit's opinion on remand in Busic. The reconciliation assumes that the principles underlying double jeopardy and due process doctrine forbid a trial court from reassessing the culpability reflected in a conviction and sentence that remains unimpaired by appellate action. The reconciliation can be most conveniently expressed in the form of the following six rules:

**Rule One:** If no conviction remains after an appellate reversal, the double jeopardy clause does not bar resentencing upon reconviction, but the due process clause bars a greater sentence than originally imposed unless the new sentence is based on conduct occurring after the first sentencing or is otherwise presumed to be "nonvindictive." 280

**Rule Two:** If the appellate court, acting pursuant to legislative authorization, reviews and increases the sentence for an unreversed conviction, neither double jeopardy nor due process concerns will prevent the imposition of this new and greater sentence. 281

277. See Welty, 426 F.2d at 618.

278. See Pearce, 395 U.S. at 723 (holding that double jeopardy clause does not "impose[] an absolute bar to a more severe sentence upon reconviction").

279. See id. at 726 (holding that "whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear [and] must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding").

280. United States v. Godwin, 457 U.S. 368 (1982) (no presumption of prosecutorial vindictiveness when prosecutor charged misdemeanor after demand for jury trial); Bordenkircher v. Hayes, 434 U.S. 357 (1978) (no presumption of prosecutorial vindictiveness when prosecutor carried out threat made during plea negotiations to bring additional charges if defendant refused to plead guilty); Chaffin v. Stynchcombe, 412 U.S. 17 (1973) (no presumption of vindictiveness when jury imposes higher sentence on retrial as long as jury is not informed of original sentence); Colten v. Kentucky, 407 U.S. 104 (1972) (no presumption of vindictiveness when judge in second tier of two-tier system imposes increased penalty after defendant exercised right to appeal first-tier conviction, thus resulting in trial de novo in second tier before different judge).

281. See DiFrancesco, 449 U.S. at 132-43 (1980) (upholding as constitutional appellate review of criminal sentences as permitted by dangerous special offender statute). For the relevant text of the dangerous special offender statute, see supra note 234.
Rules one and two are based on *Pearce* and *DiFrancesco*, respectively. They are consistent with the proposed theory that a trial court may not change its mind about culpability in the absence of appellate court action that impairs the finality of the conviction and sentence. In cases contemplated by rule two, of course, the appellate court has directly changed the original assessment of culpability, thus justifying a new sentence.

Rule one presents an interesting contrast to rule two that supports the proposed theory. In *Pearce*, the Court effectively held that, for purposes of the due process clause, the initial sentence and underlying culpability assessment is a limit on a new sentencing proceeding. The only way the same sentencing authority can sentence a defendant to a longer sentence upon reconviction is for the new sentence to be based on conduct occurring after the initial sentencing.\(^{282}\)

Although the Court did not phrase its rationale specifically in terms of culpability assessment, it is impossible to avoid the conclusion that the *Pearce* rule is, in fact, an absolute bar to the reassessment of pre-existing culpability by the sentencing authority that imposed the first sentence. That reading of *Pearce* explains why it is permissible for the same authority to impose a greater sentence in a subsequent proceeding if it is based on conduct occurring after the first sentencing. Moreover, it satisfactorily explains why the *Pearce* rule does not apply when the new sentence is imposed by a jury\(^{283}\) or by a different judge in a second-tier trial after a de novo appeal of a first-tier conviction.\(^{284}\) In all of these situations, the original sentencing authority is not reassessing the culpability underlying the first sentence. This is precisely the same reason why, in *DiFrancesco*, the appellate review of the trial court's sentence is not a prohibited reassessment of culpability.

Viewing *Pearce* as an absolute bar to reassessment of preexisting culpability by the initial sentencing authority justifies the statement of the next three rules.

**Rule Three:** If at least one valid conviction remains after a multiple punishment challenge, the trial judge may not resentence the defendant under any conviction unless rule five applies.

**Rule Four:** If more than one valid conviction remains after a multiple punishment challenge, the trial judge cannot resentence indirectly by ordering concurrent sentences to be served consecutively.

**Rule Five:** If the defendant challenges the entire judg-

\(^{282}\) See *Pearce*, 395 U.S. at 726.

\(^{283}\) See *Chaffin v. Stynchcombe*, 412 U.S. 17 (1973) (no presumption of vindictiveness when jury imposes greater sentence on retrial as long as jury not informed of original sentence).

A sixth rule, nonconstitutional in origin and scope, is necessary to implement the language of rule 35. Rule six allows a relatively easy solution to some of the resentencing problems, but many of these cases would also be covered by rules three and four.

**Rule Six:** If the defendant challenges only the illegal sen-

285. For a discussion of why the rule is limited to challenges of the entire judgment, see *infra* note 288.

286. Although this rule creates an exception to the *Busic* § 924(c) multiple punishment doctrine, applying the rule under the new version of that section allows dual convictions and, thus, renders the *Busic* analysis irrelevant. For the relevant text of amended § 924(c) and an analysis concluding that *Busic*-type multiple punishment problems can still arise, see *supra* note 212.

287. For the relevant text of the original rule 35, see *supra* note 220 and accompanying text. The text of rule 35(a) has been changed, effective November 1, 1986. See Pub. L. 98-473, Title II, § 215(b), 98 Stat. 2015, 2031 (1984). Although substantially more complex, amended rule 35(a) still withholds authority from sentencing courts to “correct” sentences which were legal when imposed, and which have not been appealed. Indeed, new rule 35(a) allows a sentence correction in three circumstances, but only when there is a remand from an appellate court ordering a correction. The text of the amended rule 35(a) provides:

(a) Correction of a Sentence on Remand. The court shall correct a sentence that is determined on appeal under 18 U.S.C. § 3742 [1] to have been imposed in violation of law, [2] to have been imposed as a result of an incorrect application of the sentencing guidelines, or [3] to be unreasonable, upon remand of the case to the court—

(1) for imposition of a sentence in accord with the findings of the court of appeals; or

(2) for further sentencing proceedings if, after such proceedings, the court determines that the original sentence was incorrect.

288. If, for example, a defendant moved under Rule 35(a) to vacate a sentence imposed for a lesser included offense that was in addition to another sentence (and conviction) for the greater offense, the trial court could not resentence the defendant for the greater charge after granting the motion. The same result would obtain under rule three if the defendant appealed the lesser conviction and the appellate court vacated the conviction. Similarly, a motion to correct an illegal sentence would prohibit the trial court from altering the sentences under the valid convictions from concurrent to consecutive. Rule four would have the same effect.

The single area in which rule six operates independently of rules three and four involves potential resentencing under rule five. If, as in *Henry*, the multiple punishment violation was the enhanced sentencing under section 924(c), rather than under the predicate felony, rule five postulates that the judge should be able to resentence under the conviction for the predicate felony. This result cannot be reached, however, under the language of rule 35(a), and the *Henry* plurality was correct in forbidding the judge from resentencing. This difference in permissible remedy between making a rule 35(a) motion and appealing the judgment thus explains why rule five applies only in the latter situation. For a discussion of rule five, see *supra* note 286 and accompanying text.
tence under Rule 35 and the challenge is upheld, no resentencing or changing of sentences from concurrent to consecutive is permissible because both are forbidden by the language of Rule 35.

Both rule three and rule four bar resentencing under valid convictions because the judge's original sentencing is a presumptively correct assessment of the defendant's culpability reflected in each conviction. Reversal of one or more convictions does nothing to change this offense-by-offense assessment. Action of the judge to increase the sentence after appeal is a forbidden reassessment of the defendant's culpability.

Rule five is simply a narrow exception to rules three and four, even more narrow today in light of the new version of section 924(c) than it was when Busic was decided. Rule five, like rules three and four, is based on a presumption about culpability drawn from the initial sentencing. The difference in the rule five presumption is that the judge's error causing reversal is not based on an erroneous assessment of the defendant's culpability as much as it is based on an erroneous assumption about the proper vehicle for punishing that culpability. In a rule five case, the clear intent to punish the already-assessed culpability should be given effect if doing so does not contravene the rules of procedure or the Constitution.

As long as the defendant appeals the entire judgment, rather than making a motion to correct a sentence under rule 35, the rules of procedure would permit resentencing. Under the constitutional theory proposed in this section, there is no bar to resentencing when the new sentence simply reflects the trial court's initial judgment about culpability for that offense. Because the enhanced sentencing provisions of section 924(c) require proof of a predicate felony, a sentence under section 924(c) reflects a judgment about culpability that applies with equal force

289. For the text of amended § 924(c), see supra note 212. Under the original version of § 924(c), the Third Circuit reserved the issue of whether new sentencing under § 111 can exceed the original enhanced sentencing. See Busic, 639 F.2d at 952, 953, n.14 (because "resentencing ... will necessarily not exceed the punishment previously meted out to defendants" as enhanced sentencing, "we need not express any opinion whether the new aggregate sentence may be greater than the original sentence."). cert. denied, 452 U.S. 918 (1981). The Pearce due process rule, however, forecloses this issue in favor of the defendant. A new sentence greater than the one being appealed would be the clearest kind of "retaliatory motivation on the part of the sentencing judge" and thus a violation of due process. See Pearce, 995 U.S. 711, 725. Moreover, a greater sentence would necessarily reflect a change in the trial court's determination of culpability and thus violates the proposed theory limiting the resentencing to the original determination of culpability.

290. 28 U.S.C. § 2106 (1982) (conferring authority on appellate courts to "affirm, modify, vacate, set aside or reverse any judgment ... and direct entry of the appropriate judgment, decree or order such, or require such proceedings to be had as may be just under the circumstances").
to any predicate felony that also provides enhanced sentencing for use of a firearm. This situation, then, can be viewed as an exception to the normal rule that reversal of one conviction does not allow resentencing under a remaining valid conviction.

The proposed theory also justifies the rule for prohibition of changing the sentences on valid convictions from concurrent to consecutive. If the judge sentenced the defendant to concurrent terms of ten and fifteen years for separately punishable offenses, and a consecutive term of ten years for an offense that is not separately punishable, rule four prohibits the judge from changing the concurrent sentences to consecutive after an appellate reversal of the conviction carrying the consecutive sentence. It might be thought that the assessment of culpability that justified the initial sentence package of twenty-five years is the relevant limit on resentencing, but a moment's reflection dispels that notion.

The existence of the sentence package of twenty-five years depends on a determination that the defendant committed three separately punishable offenses. If Congress did not intend the defendant's conduct to result in three convictions, however, the judge's culpability assessment was erroneous. The relevant culpability assessment, under a proper application of the statutes, is the imposition of concurrent sentences of ten and fifteen years for the separately punishable offenses.

The six rules, therefore, allow us to reconcile the plurality opinion in Henry and the Third Circuit's ultimate resolution of Busic. Henry reached the correct result because the defendant there had filed a Rule 35 motion to correct an illegal sentence, and rule six prohibits a "correction" of the legal sentences. In addition, rule four prohibits a judge from rearranging concurrent sentences as consecutive to preserve a sentencing package.291

But the Third Circuit's decision in Busic allowing a new sentencing under section 111 is also correct since the trial court's decision about culpability under section 924(c) could be transferred to section 111. Today, of course, the plain language of section 924(c) permits the imposition of its enhanced sentencing in addition to that provided by section 111.292

Stating this issue in six rules makes it easier to see the subtleties of the various resentencing issues that can arise, but the thrust of the re-

291. Because Henry involved applying the wrong enhanced sentencing provision, rule five would have applied if the defendant had appealed the entire judgment and the appellate court had vacated all sentences and remanded for resentencing. See 709 F.2d at 302. Cf. id. at 305 n.12 (reserving judgment on this question). Under rule five, the district court could have achieved the desired ten-year sentence with a section 111 sentence. See 18 U.S.C. § 111 (1982) (permitting maximum sentence of ten years for offenses committed with a deadly or dangerous weapon). However, since the defendant in Henry challenged only the sentencing under section 924(c), rule six prevented resentencing. Thus, rules five and six are mutually exclusive.

292. For the text of amended § 924(c), see supra note 212.
sentencing analysis can be summarized in a single sentence. Resentencing following reversal of a conviction on multiple punishment grounds is permitted only when the defendant appeals the entire judgment and the error is the existence of a conviction and sentence under the wrong enhanced sentencing provision. In all other cases, lower courts must vacate improper convictions and sentences without disturbing the sentences on valid convictions.293

Whether one grounds this conclusion in principles of due process or double jeopardy, a trial court should not be permitted to routinely resentence a defendant to the same sentence that existed prior to an appellate reversal of one of the convictions on the ground of multiple punishment. In the words of Judge Jolly, specially concurring in Henry: “This result, while not vindictiveness in my opinion, certainly impinges on the image of fairness.”294

Thus, except in the unusual circumstance of overlapping enhanced sentencing provisions, the preferred method of applying the Ball single conviction remedy is that already practiced by the Seventh, Eighth, and Ninth Circuits (as well as at least two panels of the Fifth Circuit):295 remand with instructions for the district court to vacate the improper convictions while leaving the valid convictions and sentences undisturbed.

IV. Ball v. United States and State Courts

A. Is Ball Part of the Fifth Amendment?

The Supreme Court made clear in Ball that a second conviction, regardless of sentence imposed, is multiple punishment in federal cases if Congress did not intend multiple penalties for the defendant’s conduct.296 This section considers whether the Ball rule should be explicitly applied to state courts as part of the fifth amendment multiple punishment doctrine.297 If Ball applies to state courts, their latitude in utilizing state law solutions to the problem is quite limited.

The issue here, of course, is whether the holding in Ball is necessarily based on the fifth amendment. Prior to Ball, the Court had summa-

293. The Ninth and Eleventh Circuits have recently acknowledged the possibility that increasing a sentence on valid counts after an appellate reversal constitutes double jeopardy, but have left the issue unresolved. See In re Olsen, 727 F.2d 1015, 1016 (11th Cir. 1984) (decided for defendant on grounds that district court exceeded its mandated authority on remand); United States v. Hagler, 708 F.2d 354 (9th Cir. 1982) (district court ordered to consider double jeopardy ramifications of increasing sentence on remand).

294. Henry, 709 F.2d at 918 (5th Cir. 1983) (Jolly, J., specially concurring).

295. For a discussion of cases which have utilized the Ball application of the single conviction remedy, see supra note 142 and accompanying text.

296. Ball, 470 U.S. at 861.

297. See Benton v. Maryland, 395 U.S. 784, 796 (1969) fifth amendment double jeopardy clause is incorporated into fourteenth amendment due process clause).
rized the rationale of the multiple punishment doctrine in *Albernaz v. United States:*298 "the question of what punishments are constitutionally permissible is not different from the question of what punishment the Legislative Branch intended to be imposed."299 Because this is so, the process of statutory construction is coextensive with multiple punishment analysis300 and must, therefore be constitutional in scope and purpose.301

As concluded elsewhere,302 however, federal courts cannot, under the guise of the fifth amendment multiple punishment doctrine, reinterpret a state court's finding of state legislative intent on the issue of whether multiple penalties are authorized.303 If a state court declared two offenses the same for purposes of the multiple punishment doctrine, this holding would necessarily imply that the state legislature did not authorize multiple penalties. One must still determine what penalties are "multiple" for purposes of the constitutional prohibition against multiple punishment. The conclusion reached in *Ball* by means of federal statutory construction that multiple convictions are always multiple

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299. *Albernaz*, 450 U.S. at 344.


301. Some of the language in Ohio v. Johnson, 467 U.S. 493 (1984), can be read to imply that the resolution of the multiple penalty issue in state court depends on state law considerations and thus, presumably, does not flow from the fifth amendment. See id. at 500 (on remand, trial court might "have to confront the question of cumulative punishments as a matter of state law"); id. at 502 n.10 (stating that cumulative punishment issue appears "to involve construction of state law and the jurisdiction of Ohio courts to fashion appropriate relief").

This reading of *Johnson* is unwarranted for two reasons, however. First, the *Johnson* decision preceded the Court's acknowledgement in *Ball* that multiple convictions always constitute multiple penalties. Dicta from *Johnson* should not, therefore, be read to limit application of a doctrine that had not yet been clearly stated. Second, the state law itself in *Johnson* prohibited more than one conviction for the same offense. See id. at 498 n.7 (discussing Ohio Rev. Code Ann. § 2941.25 (Page 1982)). Since an application of state law in *Johnson* would necessarily produce the same outcome that *Ball* held was required in federal cases, the *Johnson* Court's deferential attitude toward the "jurisdiction of Ohio courts to fashion appropriate relief," id. at 502 n.10, does not imply that state courts can decide this issue differently than *Ball* decided it.


penalties would not necessarily have to be accepted for purposes of defining the constitutional protection.

*Ex parte Lange*[^304] defined the constitutional protection as against being "twice punished."[^305] The various theories that have been discussed in this article can usefully be viewed as a spectrum and, so viewed, the opposite ends of the spectrum present easy answers to the "twice punished" question.[^306] If the "total quantum of punishment"[^307] theory is violated, a defendant has been "twice punished" under any theory of multiple penalties.[^308] On the other hand, if only one conviction is entered, as the single conviction theory requires, it is clear that no multiple punishment has occurred.[^309]

The difficult questions are, as always, those in the middle of the spectrum. It may be argued on behalf of allowing concurrent sentences, for example, that the net effect on a defendant is the same: a maximum sentence the length of the longer sentence.[^310] If it is argued that this defendant faces delayed parole eligibility because of the cumulative effect of the two concurrent terms, the reply is that the judge obviously intended this result and could have achieved it directly by imposing only a single sentence with an increased minimum term.[^311] Thus, the argument concludes, the judge meant to deal with this defendant harshly, and appellate courts should not lightly disregard this judgment.[^312]

Although this argument has surface appeal, it is seriously flawed for a very simple reason: a defendant who suffers two convictions is not in the same position as one who is convicted of only one, even if the parole eligibility and total sentence faced is the same. The former defendant’s


[^305]: 85 U.S. at 173.

[^306]: For a discussion of five theories that could be used to determine when penalties are multiple, see *supra* notes 89-165 and accompanying text.

[^307]: For a discussion of the "total quantum of punishment" theory, see *supra* notes 90-97 and accompanying text.

[^308]: *Cf. Jeffers*, at 157-58 (where Congress did not intend to impose cumulative penalties for conduct violating two statutes, total fine could not exceed maximum fine for greater offense).

[^309]: *Cf. Pearce*, 395 U.S. 711, 719-22 (imposition of more severe sentence on re-conviction did not violate constitutional double jeopardy guarantee). For a discussion of *Pearce*, see *supra* notes 244-45 and accompanying text. For a discussion of the "single conviction theory," see *supra*, notes 128-44 and accompanying text.

[^310]: For a discussion of the "concurrent sentence theory," see *supra* notes 98-118 and accompanying text.

[^311]: For a discussion of the "single sentence theory," see *supra* notes 119-27 and accompanying text.

[^312]: *See, e.g.*, Green v. United States, 365 U.S. 301, 306 (1961) ("[P]etitioner is technically correct that sentences should not have been imposed on both counts . . . [b]ut the intention of the district judge was to impose the maximum sentence . . . and the formal defect in his procedure should not vitiate his considered judgment.") (footnote omitted).
record contains two convictions, with all the attendant stigma and potential negative collateral consequences.\textsuperscript{313}

If a particular legislature intended two statutes to apply to a certain criminal transaction, then it intended multiple penalties.\textsuperscript{314} To conclude, on the other hand, that a particular legislature did not intend multiple penalties under two statutes necessarily implies that the legislature did not intend both statutes to apply to the same conduct.\textsuperscript{315} But this conclusion further implies that the legislature intended only one conviction for the conduct.\textsuperscript{316} Ball's judgment that "Congress does not create criminal offenses having no sentencing component"\textsuperscript{317} is, therefore, inevitably true with respect to state legislatures as well.

There is simply no other definition of multiple penalties that is true to the purposes of the fifth amendment prohibition of multiple punishment. The potential adverse collateral consequences that attend a conviction mean that a conviction, without more, is a penalty.\textsuperscript{318} If the legislature did not authorize multiple penalties, it did not authorize multiple convictions. Because the fifth amendment multiple punishment question is simply a "question of what punishment the Legislative


[Q]uite apart from any sentence that is imposed, each separate criminal conviction typically has collateral consequences, in both the jurisdiction in which the conviction is obtained and in other jurisdictions . . . . The number of convictions is often critical to the collateral consequences that an individual faces. For example, a defendant who has only one prior conviction will generally not be subject to sentencing under a habitual offender statute.

Furthermore, each criminal conviction itself represents a pronouncement by the State that the defendant has engaged in conduct warranting the moral condemnation of the community . . . . Because a criminal conviction constitutes a formal judgment of condemnation by the community, each additional conviction imposes an additional stigma and causes additional damage to the defendant's reputation.

\textit{Id.} (citations omitted). See also Ball, 470 U.S. at 865 (second conviction may be used to impeach credibility, increase sentence under recidivist statute, or delay parole).

\textsuperscript{314}. See Missouri v. Hunter, 459 U.S. 359 (1983) (penalties imposed under two statutes pursuant to legislative authorization were intended and multiple penalties thus constitutionally permissible).

\textsuperscript{315}. See, e.g., Prince v. United States, 352 U.S. 322, 327-29 (1957) (robbery and entry with intent to rob under the Federal Bank Robbery Act merge because Congress did not intend to "pyramid the penalties." \textit{Id.} at 327).

\textsuperscript{316}. See O'Clair v. United States, 470 F.2d 1199, 1202 (1st Cir. 1972) (construing Federal Bank Robbery Act as providing heavier penalties based on aggravating incidents, and concluding that "it necessarily follows that Congress did not intend that the existence of such incidents would double the convictions"), \textit{cert. denied}, 412 U.S. 921 (1973).

\textsuperscript{317}. See Ball, 470 U.S. at 861.

\textsuperscript{318}. See id. at 865.
Branch intended to be imposed,”

Applying the single conviction theory to state courts does not deny trial judges the discretion to impose maximum punishment with delayed parole eligibility. It does, however, prevent them from obtaining this result by entering more than one conviction if the legislature has failed to authorize multiple penalties. Logic, as well as fairness, dictates that this is the proper result under the fifth amendment as well as in federal statutory construction.

This conclusion was implicitly accepted by the Supreme Court in Missouri v. Hunter. There, the Court affirmed multiple penalties and multiple convictions based on a “crystal clear” state statute that was interpreted by the Missouri courts to authorize multiple penalties. Although the sentences in Hunter were concurrent, the Court continually referred to the issue before it as whether the “cumulative punishments” were permissible under the fifth amendment. The Court did not mention the possibility that the concurrent nature of the sentences might avoid the multiple punishment problem.

The Court’s method of analysis in Hunter therefore implied that concurrent sentences are multiple penalties which require legislative authorization in order to withstand a constitutional challenge under the fifth amendment multiple punishment doctrine. This reading of

321. 459 U.S. at 368. The statute in question provided in relevant part: “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 and of a dangerous or deadly weapon.” Mo. ANN. STAT. app. § 559.225 (Vernon 1979), repealed by Criminal Code, 1977 Mo. Laws 662 (current version at Mo. ANN. STAT. § 571.015 (Vernon 1979)).

The Supreme Court held in Hunter that explicit legislative authorization of penalties under two statutes made those penalties constitutionally permissible “regardless of whether the two statutes proscribed the 'same conduct.'” 459 U.S. at 368. Determining that a legislature has explicitly authorized multiple penalties thus means that “a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment ..., in a single trial.” Id. at 369.

322. Hunter, 459 U.S. at 362.
323. See id. at 366-69 (“cumulative punishments” and “cumulative sentences” appear numerous times in Hunter majority opinion).
324. Cf. Jeffers, 432 U.S. at 155 n.24 (refusing to reach government argument that concurrent sentences “do not present any possibility of cumulative punishment”).

325. Many other certiorari petitions raising the same issue under Missouri’s armed criminal action statute were pending when the Court decided Hunter. Some of these petitions involved cases in which consecutive sentences had been imposed. See, e.g., State v. Gaskin, 618 S.W.2d 620 (Mo. 1981) (conviction and additional consecutive sentence for armed criminal action set aside), vacated, Mis-
Hunter becomes even more plausible in light of the Court's use of Hunter as authority for the following statement in Ball: "The remedy of ordering one of the sentences to be served concurrently with the other cannot be squared with Congress' intention. One of the convictions, as well as its concurrent sentence, is unauthorized punishment for a separate offense."\(^{326}\)

The Court's citation to Hunter in this context lends weight to the argument that the single conviction remedy for a multiple punishment problem is constitutionally mandated. The rationale of the multiple punishment doctrine requires the single conviction remedy. It only remains for the Court to explicitly hold that this is the proper result.

**B. Applying Ball in State Court**

If the Ball result is compelled by the fifth amendment, state courts must apply its principles to state criminal prosecutions.\(^{327}\) States that have already adopted the single conviction theory need not change their analysis of multiple punishment issues.\(^{328}\) On the other hand, states that have utilized different solutions as a function of common law or constitutional precepts must change their analysis to conform to the Ball single conviction theory.\(^{329}\)

States that have adopted statutory bars against multiple punishment\(^{330}\) are in a somewhat different situation. These bars may provide, at the same time, more and less protection than the fifth amendment. A statutory bar against multiple punishment may apply in situations when the fifth amendment would not,\(^{331}\) but it might provide a less extensive remedy than Ball requires. When a state statute bars punishment that is

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327. See Benton v. Maryland, 395 U.S. 784, 794 (1969) ("[W]e today find that the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and that it should apply to the States through the Fourteenth Amendment.").

328. For a discussion of state cases which apply a single conviction theory of multiple punishment, see supra note 36 and accompanying text.

329. For a discussion of cases utilizing multiple punishment solutions that do not conform to the Ball single conviction theory, see supra notes 90-127 & 145-58 and accompanying text.

330. See, e.g., ALA. CODE § 15-3-8 (1982) (acts punishable in different ways by different provisions shall be punished under only one); ARIZ. REV. STAT. ANN. § 13-116 (1978) (act punishable in different ways under different provisions may be punished under both, but sentences must run concurrently); CAL. PENAL CODE § 654 (West Supp. 1986) (act punishable in different ways by different provisions may be punished under either, but in no case more than one); MINN. STAT. ANN. § 609.035 (West Supp. 1986) (if conduct constitutes more than one offense, defendant may be punished for only one offense).

331. For a discussion of differences in application of state statutory bars against multiple punishment and that of the fifth amendment, see infra notes 333-49 and accompanying text.
not barred by the fifth amendment, Ball would not dictate any particular remedy. If, however, the fifth amendment protection overlaps with the statutory protection, Ball establishes a minimum remedy that must be applied notwithstanding a less extensive statutory remedy.

For example, California forbids by statute multiple punishment based on the same act.\textsuperscript{332} The protection of the fifth amendment multiple punishment doctrine, however, does not focus on the underlying conduct.\textsuperscript{333} Instead, its protection is generally defined by means of a test that evaluates whether the statutory elements of offenses define the same "offense."\textsuperscript{334} Thus, California law would prohibit multiple punishment in a category of cases that does not trigger fifth amendment protection: when two statutes define different criminal offenses but are violated by a single act.\textsuperscript{335} In this category of cases, California courts can continue to apply the single sentence remedy they have applied in the past—\textsuperscript{336} or any other remedy they choose to apply. If, however, the statutes define the same offense under the fifth amendment and if Ball is part of the fifth amendment, the California courts must apply the Ball single conviction remedy.

Minnesota presents an approach to this problem that is particularly interesting in light of Ball's likely impact on state courts. There are two statutes in Minnesota that forbid multiple punishment: one prohibits

\textsuperscript{332.} See \textit{Cal. Penal Code} § 654 (West Supp. 1986). Section 654 provides in relevant part: "An act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions, but in no case can it be punished under more than one . . . ."

\textsuperscript{333.} See \textit{Harris v. United States}, 359 U.S. 19, 23 (1959) (multiple convictions permissible as long as "the violation, as distinguished from the direct evidence offered to prove that violation, was distinctly different under each of the respective statutes") (emphasis in original); \textit{Gore v. United States}, 357 U.S. 386, 391 (1958) (upholding three convictions based on single act violating three provisions of narcotics laws).

\textsuperscript{334.} See \textit{Ball}, 470 U.S. at 861. The Court stated: "This Court has consistently relied on the test of statutory construction stated in \textit{Blockburger v. United States}, [which turns on] 'whether each provision requires proof of a fact which the other does not.' " \textit{Id.} (citations omitted) (quoting \textit{Blockburger v. United States}, 284 U.S. 299, 304 (1932)). This test clearly focuses on the elements of the offenses themselves rather than on the underlying conduct. In \textit{Blockburger}, two convictions based on a single sale of narcotics were upheld because each offense required proof of a fact that the other did not. \textit{Blockburger}, 284 U.S. at 304; \textit{accord} \textit{Gore v. United States}, 357 U.S. 386 (1958) (three separate convictions and sentences upheld based on single sale of narcotics, applying \textit{Blockburger} test).

\textsuperscript{335.} \textit{See, e.g.}, \textit{People v. Diaz}, 66 Cal. 2d 801, 806, 58 Cal. Rptr. 729, 732-33, 427 P.2d 505, 508-09 (1967) (under \textit{Cal. Penal Code} § 654, defendant found guilty of three separate offenses of burglary, assault and sexual misconduct committed in course of single criminal episode may only be punished for most serious offense).

\textsuperscript{336.} For a discussion of the single sentence remedy California courts have utilized under the California statutory prohibition of multiple punishment, see \textit{supra} notes 123-24 and accompanying text.
multiple convictions for lesser included offenses, while the other prohibits multiple punishment for the same conduct. The Minnesota Supreme Court has construed these two statutes to provide different remedies. The lesser included offense statute, by its terminology, allows but a single conviction and thus requires the Ball single conviction remedy. The conduct-based statute, on the other hand, is phrased in terms of "punishment," and the Minnesota courts have applied it by vacating all but one of the sentences, leaving the underlying convictions intact.

The fifth amendment multiple punishment test essentially defines offenses as being the "same" if one offense is a lesser included offense of the other. Thus, it is congruent with the Minnesota statutory pro-

Subdivision 1. Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included offense, but not both. An included offense may be any of the following:
(1) A lesser degree of the same crime; or
(2) An attempt to commit the crime charged; or
(3) An attempt to commit a lesser degree of the same crime; or
(4) A crime necessarily proved if the crime charged were proved; or
(5) A petty misdemeanor necessarily proved if the misdemeanor charge were proved.

Subdivision 2. A conviction or acquittal of a crime is a bar to further prosecution of any included offense, or other degree of the same crime.

Id.

Except as provided in sections 609.251 [kidnapping] and 609.585 [burglary], if a person's conduct constitutes more than one offense under the laws of this state, he may be punished for only one of the offenses and a conviction or acquittal of any one of them is a bar to prosecution for any other of them. All the offenses, if prosecuted, shall be included in one prosecution which shall be stated in separate counts.

339. See State v. DeFoe, 280 N.W.2d 38, 41 (Minn. 1979) (noting that § 609.04 bars "convicting a defendant of both a greater and an included offense" while § 609.035 makes it improper "to punish a defendant twice for multiple intentional offenses arising from the same basic incident") (emphasis added).

340. See Minn. Stat. Ann. § 609.04 (West Supp. 1986). For the relevant language of this statute, see supra note 337. See also State v. DeFoe, 280 N.W.2d 38, 41 (Minn. 1979) (construing section 604.04 to prohibit multiple convictions).

341. See Minn. Stat. Ann. § 609.035 (West Supp. 1986). For the relevant language of this statute, see supra note 338. See also State v. Gladden, 274 Minn. 538, 144 N.W.2d 779, 783 (1966) (remanding case "so that one of the sentences can be vacated" under section 609.035).

342. See Brown v. Ohio, 432 U.S. 161, 168 (1977). Brown established that the Blockburger test is actually another way of defining greater and lesser included offenses: "As is invariably true of a greater and lesser included offense, the lesser offense ... requires no proof beyond that which is required for conviction of the greater ... The greater offense is therefore by definition the 'same' for purposes of double jeopardy as any lesser offense included in it." Id.; see also Illinois v. Vitale, 447 U.S. 410, 416-17 (1980) (holding that Brown-Blockburger test
hibition of multiple convictions for greater and lesser included offenses.\textsuperscript{343} This statute, moreover, expressly forbids multiple convictions and therefore creates its own \textit{Ball} remedy.\textsuperscript{344} The conduct-based prohibition,\textsuperscript{345} on the other hand, provides protection under state law not offered by the fifth amendment, and \textit{Ball} would not dictate any remedy in that category of cases.\textsuperscript{346}

By dividing its statutory prohibition of multiple punishment into two categories, the Minnesota legislature effectively created a framework that is automatically consistent with \textit{Ball}. In Minnesota, multiple punishments that violate both the state statute and the fifth amendment have a statutory remedy that is the same as that mandated in \textit{Ball}: a prohibition against multiple convictions for the same offense.\textsuperscript{347} All statutory violations that do not trigger the \textit{Ball} remedy are not fifth amendment viola-

defines offenses as the same offense only when proof of one offense necessarily proves the other).

\textsuperscript{343} See \textsc{Minn. Stat. Ann.} § 609.04 (West Supp. 1985). For relevant statutory language, see \textit{supra} note 337. Subsections (4) and (5) of section 609.04 define lesser offenses in a manner that fits precisely within the \textit{Brown-Blockburger} test, and the other three subsections would usually qualify as \textit{Brown-Blockburger} lesser offenses, as well. For example, proving murder in the first degree would always prove murder in the second degree and manslaughter. Similarly, proving a completed crime would prove an attempt to commit the crime or an attempt to commit a lesser degree of the same crime.

However, there may be instances in which § 609.04 would prevent multiple convictions in a broader category of crimes than does the \textit{Brown-Blockburger} test. For example, \textsc{Minn. Stat. Ann.} § 609.221 proscribes assault in the first degree and defines that crime as “assault with the infliction of great bodily harm.” Assault in the second degree, while a lesser degree of the same crime, is defined in § 609.222 as “assault with a dangerous weapon,” and applies regardless of bodily harm to the victim. Proving assault in the first degree would not, therefore, always include lesser offenses under the \textit{Brown-Blockburger} test. Multiple convictions would, however, be barred by § 609.04(1).

\textsuperscript{344} See \textsc{Minn. Stat. Ann.} § 609.04 (West Supp. 1986) (prohibiting multiple “convictions” for greater and lesser included offenses). \textit{Cf.} \textit{Ball}, 470 U.S. at 864 (second conviction with no greater sentence is still impermissible punishment where offenses are same under \textit{Blockburger} test). For the relevant text of § 609.04, see \textit{supra} note 337.

\textsuperscript{345} See \textsc{Minn. Stat. Ann.} § 609.035 (West Supp. 1986) (prohibiting multiple “punishment” for multiple offenses within same criminal episode). For the relevant language, see \textit{supra} note 338.

\textsuperscript{346} \textit{Cf.} Commonwealth v. Campana, 452 Pa. 233, 304 A.2d 432, \textit{vacated}, 414 U.S. 808 (1973). In \textit{Campana}, the Pennsylvania Supreme Court held that to avoid double jeopardy in Pennsylvania, the state must prosecute, in a single proceeding, “all known charges against a defendant arising from a ‘single criminal episode.’” 452 Pa. at 253, 304 A.2d at 441 (footnote omitted). The United States Supreme Court vacated and remanded for determination of whether the judgment was based on state or federal grounds. 414 U.S. at 808. On remand, the Pennsylvania Supreme Court held that its compulsory joinder rule was based on state grounds, pursuant to the court’s supervisory powers. Commonwealth v. Campana, 455 Pa. 622, 626, 314 A.2d 854, 856, \textit{cert. denied}, 417 U.S. 969 (1974).

\textsuperscript{347} For a discussion of the similar remedies under \textit{Ball} and \textsc{Minn. Stat. Ann.} § 609.04, see \textit{supra} notes 340, 342-44 and accompanying text.
The process of applying *Ball* to state statutes barring multiple punishment will not be as easy in some states as it will be in Minnesota. California courts, for example, must decide whether a violation of its multiple punishment statute is also a fifth amendment violation. If it is, the *Ball* remedy must be applied rather than the single sentence theory that has been applied under the state statute. In sum, a state court applying a state multiple punishment remedy other than the single conviction remedy must also find that there is no fifth amendment violation.

V. CONCLUSION

The Supreme Court advanced multiple punishment analysis in *Ball* by recognizing a truth that appeared to escape the plurality in *Jeffers*. *Ball* held that a "second conviction, even if it results in no greater sentence, is an impermissible punishment" when Congress did not intend multiple penalties. The reasoning of the *Jeffers* plurality opinion, which affirmed two convictions and two sentences despite finding that Congress did not intend multiple punishment, simply cannot stand in light of *Ball*’s analysis and holding.

Thus, *Ball* implicitly overrules this part of *Jeffers*, and federal courts can enter only a single conviction for the same offense under the multiple punishment doctrine. *Ball* reached this truth by the process of statutory construction and, thus, its single conviction remedy is not expressly binding on the states as part of the fifth and fourteenth amendments. Nevertheless, the wisdom of the *Ball* solution has been recognized by many state courts.

Moreover, the peculiar role played by statutory construction in delineating the contours of the constitutional multiple punishment doctrine leads inexorably to the conclusion that the *Ball* holding is a


349. For a reconciliation of California’s multiple punishment statute with the *Ball* single conviction rule, see supra notes 332-36 and accompanying text.


351. *Ball*, 470 U.S. at 865.


353. Id. at 157.

354. For a discussion of *Ball* as implicitly overruling *Jeffers*, see supra notes 181-85 and accompanying text.

355. See *Ball*, 470 U.S. 856. The Supreme Court did not mention the fifth amendment, the double jeopardy clause, or the multiple punishment doctrine in its opinion. Id.

356. For a discussion of the impact of *Ball* on state jurisprudence, see supra notes 296-349 and accompanying text.

357. For a discussion of state court decisions applying a single conviction remedy in multiple punishment cases, see supra note 36.
function of the fifth amendment. State courts must, therefore, abide by its mandate in the same manner as federal courts. Once the Supreme Court acknowledges this final truth, the multiple penalty aspect of the multiple punishment doctrine will have achieved stability after many years of uncertainty.

358. For a discussion of the constitutional basis for the Ball Court's statutory construction analysis, see supra notes 296-326 and accompanying text.