St. Mary's Law Journal

Volume 8 | Number 1 Article 11

3-1-1976

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THE TEXAS PENAL CODE'S SAVING CLAUSE

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Generally, laws are enacted to operate prospectively: they will not apply to conduct occurring before the date of their enactment.[1] At common law, when a penal statute was repealed, all prosecutions which had not been brought to a final judgment were abated and further prosecutions of that particular offense were barred.[2] This so-called "doctrine of abatement" reflects a legislative and judicial bias against retroactive legislation, a bias which dates back to Roman law.[3] The common law rule, however, was reversed by the enactment of saving clauses due to a basic deficiency in the abatement doctrine. Under the common law, if an individual was charged with an offense and the statute providing for such offense was repealed before final judgment, the individual might be discharged.[4] A saving clause would have preserved the cause of action in spite of the repeal.[5] The most common provision in many saving clauses provides that changes in the law will not extinguish penalties, rights, or liabilities incurred under the original law in certain instances.[6] Such a provision has been applied to civil and

1. *E.g.*, Brewster v. Gage, 280 U.S. 327, 337 (1930); United States v. Magnolia Petroleum Co., 276 U.S. 160, 162 (1928); United States v. St. Louis, S.F. & T. Ry., 270 U.S. 1, 3 (1926); Waugh v. Board of Trustees, 237 U.S. 589, 595 (1915).

2. Bell v. Maryland, 378 U.S. 226, 230 (1964); United States v. Jackson, 468 F.2d 1388, 1390 (8th Cir. 1972), *cert. denied*, 410 U.S. 935 (1973).

3. Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 MINN. L. REV. 775 (1936). *See also* TEX. REV. CIV. STAT. ANN. art. 5429b-2, § 3.02 (Supp. 1976).

4. *See, e.g.*, State v. Daley, 29 Conn. 272, 277 (1860) (defendant discharged due to repeal of manslaughter statute); Jones v. State, 1 Iowa 395, 398 (1855) (defendant discharged due to failure of legislature to enact saving clause); Commonwealth v. Kimball, 38 Mass. 373, 377 (1838) (defendant discharged due to repeal of liquor license statute).

5. It should be noted that although the cause of action is preserved by the saving clause, the procedure as applied to such cause of action is not preserved. Instead, the procedure promulgated by the new law governs. State v. Brady, 102 Tex. 408, 415, 118 S.W. 128, 129 (1909); *accord*, Warden v. Marrero, 417 U.S. 653, 661-62 (1974) (ineligibility for parole treated as punishment, not procedure); United States v. Obermeier, 186 F.2d 243, 253 (2d Cir. 1950), *cert. denied*, 340 U.S. 951 (1951) (statute of limitations treated as procedural); Lindgren v. School Dist. of Bridgeport, 102 N.W.2d 599, 604 (Neb. 1960) (bill of exceptions treated as procedural). The *Model Penal Code* also provides that in any case pending after the effective date of the Code for an offense committed prior to the Code, procedural provisions of the Code shall apply. MODEL PENAL CODE § 1.01(3)(a) (1962).

6. *See, e.g.*, 1 U.S.C. § 109 (1971); ALAS. STAT. § 01.10.100 (1972); COLO. REV. STAT. ANN. § 2-4-303 (1973); CONN. GEN. STAT. REV. §§ 1-1, 54-194 (1958); ILL. REV. STAT. ch. 131, § 4 (1969); IOWA CODE ANN. § 4.13 (Supp. 1976).

criminal cases.[7] The 63rd Texas Legislature, upon the adoption of the present Penal Code, enacted a saving clause which, in effect, preserved the laws under the old Penal Code after the present Code had taken effect.[8] The clause benefits the defendant charged with an offense under the old Penal Code in that he may elect to be punished under the applicable provisions of the new Code.[9] The recent Texas decisions that have interpreted the clause, however, have burdened the defendant as they have infringed on his due process rights by utilizing a constitutionally suspect procedure in determining what penalties provided in the new Penal Code are applicable to the defendant.[10] In analyzing the new saving clause, no comparison with other jurisdictions will be made in order to arrive at a constitutional procedure since the Texas decisions are unique in their approach to the procedural problems presented by saving clauses. Moreover, because of the sparcity of cases, hypothetical examples will be used to illustrate how such procedural problems might arise.

SAVING CLAUSES IN GENERAL

Saving clauses may be either specific or general in nature.[11] The instances of specific saving clauses vary; for example, the legislature might enact a specific clause where there is no general saving clause, or to give an

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7. For cases applying saving clauses to civil actions see Colorado Fuel & Iron Corp. v. Industrial Comm'n, 367 P.2d 597 (Colo. 1961) (workmen's compensation claim); Merlo v. Johnston City & Big Muddy Coal & Mining Co., 101 N.E. 525 (Ill. 1938) (wrongful death action); Young v. Barker, 342 P.2d 150 (Kan. 1959) (interest rates). The United States Supreme Court has said that saving clauses apply to all forms of punishment in criminal cases. Warden v. Marrero, 417 U.S. 653, 661 (1974).

8. TEX. PENAL CODE ANN. ch. 399, § 6 (1974).

9. *Id.* § 6(c). A defendant would make this election when the new Code provisions reduce the penalty charged under the old Code.

10. It should be noted that the penalties, per se, are not unconstitutional, rather the procedure used to arrive at those penalties is questionable in light of constitutional demands such as due process. *See, e.g.*, Dockery v. State, — S.W.2d — (Tex. Crim. App. 1975) (defendant convicted of negligent homicide under old Penal Code, punished under new Code); Shaw v. State, 529 S.W.2d 75, 76 (Tex. Crim. App. 1975) (defendant punished as second offender under new Penal Code); Grandham v. State, 528 S.W.2d 220, 222 (Tex. Crim. App. 1975) (defendant convicted of rape under old Penal Code, punished under new Code); Casey v. State, 527 S.W.2d 882, 884 (Tex. Crim. App. 1975) (defendant convicted under old Penal Code for robbery by firearms, punished under new Code); Ambers v. State, 527 S.W.2d 855, 857 (Tex. Crim. App. 1975) (defendant convicted of rape under old Penal Code, punished under new Code); Rockwood v. State, 524 S.W.2d 292, 294 (Tex. Crim. App. 1975) (defendant convicted of sodomy under old Penal Code, punished under new Code).

11. A general saving clause establishes a legislative policy as to all repeals and amendments avoiding the necessity of a specific saving clause in each act in order to carry out that policy. Specific saving clauses, on the other hand, apply only to a particular statute or act and are included in the act itself. Ruud, *The Saving Clause—Some Problems in Construction and Drafting*, 33 TEXAS L. REV. 285, 296-300 (1955). *See also* LaPorte v. State, 132 P. 563, 564 (Ariz. 1913).

amendment or a repeal a different effect from that of the general saving clause. The purpose is to preserve a particular right or expectation.[12]

Saving clauses of either type are interpreted by the courts in light of legislative intent which is not always apparent.[13] For example, in *People v. Harmon*,[14] the defendant was convicted of assault by force while serving time in the state penitentiary. The mandatory sentence was death, but while appeal was pending a statutory amendment, passed by the California Legislature, ameliorated the sentence at the discretion of the trial judge or jury. The defendant's guilt, however, was not affected. The California Supreme Court held that the defendant could not benefit from the amendment since the state legislature had not specifically provided for retroactive application as it had done in the past with other laws. The defendant, therefore, was guilty under the old law.[15] Relying upon prior cases that interpreted the California general saving clause, the court concluded that the state legislature was aware of those decisions concerning the saving clause and certainly formed the new amendment in light of those decisions.[16] Since the amending statute did not specifically state that it would be retroactive or prospective in application, the general saving clause prevented the new punishment from applying to the defendant.[17] A lengthy dissent, however, noted that if there had been no saving clause, then the defendant would have been punished under the new law.[18] The dissent reasoned that the presence

12. Ruud, *The Saving Clause—Some Problems in Construction and Drafting*, 33 TEXAS L. REV. 285, 296-300 (1955); *see* Tex. Laws 1975, ch. 341, § (7)(C); Tex. Laws 1975, ch. 342, § 17(c). *Compare* TEX. PENAL CODE ANN. ch. 399 (1974) *with* TEX. REV. CIV. STAT. ANN. art. 4476-15, § 6.01 (Supp. 1976). The latter provision is the saving provision that applies to the Texas Controlled Substances Act and differs in some respects from the specific saving clause found in the new Penal Code in that it applies to convictions that are on appeal. TEX. REV. CIV. STAT. ANN. art. 4476-15, § 6.01(c) (Supp. 1976).

13. United States v. American Trucking Ass'ns, 310 U.S. 534, 543 (1940); Quirk v. United States, 161 F.2d 138, 143 (8th Cir. 1947); Eastman v. United States, 153 F.2d 80, 83 (8th Cir. 1946); Professional & Business Men's Life Ins. Co. v. Banker's Life Co., 163 F. Supp. 274, 295 (D. Mont. 1958); State v. Zornes, 475 P.2d 109, 113 (Wash. 1970). Some courts, however, have been skeptical as to saving clauses evincing legislative intent. *See, e.g., In re* Estrada, 48 Cal. Rptr. 172 (1965); People v. Bilderback, 137 N.E.2d 389 (Ill. 1956); People v. Oliver, 151 N.Y.S.2d 367 (1956).

14. 4 Cal. Rptr. 161 (1960).

15. *Id.* at 172.

16. *Id.* at 169. The court stated that the "legislative intent is confirmed by the fact that the legislature, when it desires to make an ameliorating amendment retrospective in effect, knows how to do so and does so expressly." *Id.* at 169.

17. *Id.* at 169. Retrospective legislation would apply to occurrences before its effective date.

18. *Id.* at 173; *see* Malloy v. South Carolina, 237 U.S. 180, 184 (1915). In Sekt v. Justice's Court, 159 P.2d 17, 23 (Cal. 1945) the court based its conclusion on the fact that the

> offender who commits an offense before the amendment of the statute imposing the lighter sentence gets the benefit of the lighter punishment, upon the ground that it must have been the intention of the legislature that the offender should be pun-

of a saving clause should not alter this rule.[19]

Harmon, however, was overruled by *In re Estrada*,[20] where the defendant under the law at the time of the offense, was faced with a minimum of one year imprisonment for the crime of escape without force or violence. An amending act reduced punishment to six months. In holding that the amending act should apply despite the saving clause, the court noted that since the legislature lessened the punishment, it must have intended the amending act to prevail.[21]

Although *Estrada* represents a more enlightened rationale, only one of 10 jurisdictions has adopted it in favor of the holding in the *Harmon* case.[22] The remaining jurisdictions adhere to *Harmon*, evincing that the majority of states do not subscribe to the belief that legislatures foresaw ameliorative sentences as applying to offenders charged under a former law.

TEXAS SAVING CLAUSES

The specific saving clause in the former Texas Penal Code contained a mitigatory provision that was common in only nine other states.[23] The provision stated that if the penalty was increased by a subsequent law, the defendant would be punished under the previous one.[24] But if the subsequent law mitigated the punishment for the particular offense, the second

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ished, and since he can be constitutionally punished under the new statute, that should be done.

Id. at 22.

19. People v. Harmon, 4 Cal. Rptr. 161, 174 (1960).

20. 48 Cal. Rptr. 172 (1965).

21. *Id.* at 176. The court also stated that *Estrada* was a stronger case than *Harmon* since the amending act became effective *before* trial, conviction, or sentence, whereas in *Harmon* the act did not become effective until *after* the defendant's conviction. *Id.* at 175. Holding in accordance with *Estrada*, the court in People v. Oliver, 151 N.Y.S.2d 367 (1956), stated that nothing could be gained by imposing the more severe penalty, hypothetically the excess in punishment could serve no other purpose than retribution. *Id.* at 375. *See generally* McKenna, *Criminal Law and Procedure*, 31 N.Y.U. L. REV. 1378, 1381-83 (1956); Mueller, *Criminal Law and Administration*, 36 N.Y.U. L. REV. 111, 117 (1961).

22. People v. Roper, 181 N.E. 88 (N.Y. 1932). *Contra*, State v. Vineyard, 392 P.2d 30, 33 (Ariz. 1964); *Ex parte* Brown, 111 So. 518, 519 (Fla. 1927); State v. Hardman, 45 N.E. 345, 346 (Ind. App. Ct. 1896); State v. Shaffer, 21 Iowa 486, 487 (1866); *In re* Schneck, 96 P. 43, 44 (Kan. 1908); State v. Dreaux, 17 So. 2d 559, 562 (La. 1944); Patrick v. Commissioner, 227 N.E.2d 348, 351 (Mass. 1967); Tellis v. State, 445 P.2d 938, 941 (Nev. 1968).

23. Tex. Penal Code art. 13 (1925); *see, e.g.*, ALA. CODE tit. 1, § 11 (1960); KY. REV. STAT. § 446.110 (1975); MISS. CODE ANN. § 1-2-23 (1972); MO. REV. STAT. § 1.160 (1959); OHIO REV. CODE ANN. § 1.58 (Supp. 1974); VT. STAT. ANN. tit. 1, § 214 (1972); VA. CODE ANN. § 1-16 (1973); W. VA. CODE ANN. § 2-2-8 (1971). *See generally*, Ruud, *The Saving Clause—Some Problems in Construction and Drafting*, 33 TEXAS L. REV. 285, 305-306 (1955).

24. Tex. Penal Code art. 13 (1925). The purpose of the mitigatory provision was for the benefit and advantage of the accused. Herber v. State, 7 Tex. 72, 73 (1851).

law would automatically apply unless the defendant elected to receive the penalty prescribed by the old law.[25] In accordance with the common law doctrine of abatement, it was also provided that if a statute was repealed and no other penalty was substituted, all offenders of the repealed law were exempt from punishment except those with finalized convictions.[26]

The specific saving clause of the old Penal Code, however, has been repealed by two recent saving clauses, one general and the other specific. In 1967 the 60th Texas Legislature passed the Code Construction Act[27] to provide guidelines for the Texas Statutory Revision Program.[28] The Act contains a general saving clause that applies to reenactments, revisions, amendments, and repeals in all Texas Codes.[29] The clause would apply to the new Penal Code unless a different saving clause is required by the context of the particular code.[30] A different construction, however, is required due to the 64th Legislature's enactment of a specific saving clause for the new Penal Code. The specific clause for the new Penal Code,[31] therefore, controls over the general saving clause of the Code Construction Act.[32]

The new clause applies only to those offenses, or any element thereof, committed on or before January 1, 1974.[33] Furthermore, any criminal prosecution pending on January 1, 1974, which had constituted an offense under the old Code but not as an offense under the new Code would be dismissed automatically.[34] The clause had no effect, however, upon convictions received under the old Code prior to January 1, 1974, even though the conduct constituting the offense was no longer considered criminal under the new Code.[35] If a defendant is adjudged guilty in a criminal action pending or commenced on or after January 1, 1974, he may elect, by written motion

25. Tex. Penal Code art. 13 (1925); *see, e.g.*, Donald v. State, 171 Tex. Crim. 60, 345 S.W.2d 538 (Tex. Crim. App. 1961); Sheppard v. State, 145 Tex. Crim. 99, 166 S.W.2d 346 (1942); Capehart v. State, 143 Tex. Crim. 496, 158 S.W.2d 782 (1942); Fulton v. State, 116 Tex. Crim. 73, 34 S.W.2d 281 (1931).

26. Tex. Penal Code art. 14 (1925); *see* Franklin v. State, 119 Tex. Crim. 131, 44 S.W.2d 996 (Tex. Crim. App. 1932); Hubbard v. State, 109 Tex. Crim. 320, 4 S.W.2d 971 (1928).

27. TEX. REV. CIV. STAT. ANN. art. 5429b-2 (Supp. 1976).

28. *See* TEX. REV. CIV. STAT. ANN. art. 5429b-1 (Supp. 1976).

29. TEX. REV. CIV. STAT. ANN. art. 5429b-2, §§ 1.02, 3.11 (Supp. 1976).

30. TEX. PENAL CODE ANN. § 1.05(b) (1974).

31. TEX. PENAL CODE ANN. ch. 399, § 6 (1974).

32. The only major difference between the two clauses in their application to a criminal defendant who, under proper circumstances, seeks a lesser penalty is that the specific clause requires the defendant to file a written motion with the trial court whereas under the general clause the defendant would automatically receive the lesser penalty. *Compare id. with* TEX. REV. CIV. STAT. ANN. art. 5429b-2, § 3.11(b) (Supp. 1976).

33. TEX. PENAL CODE ANN. ch. 399, § (6)(c) (1974).

34. *Id.* § 6(b).

35. *Id.* § 6(b).

filed with the trial court, before the sentencing hearing begins, to be punished under the provisions of the new Penal Code.[36]

TEXAS DECISIONS

The Texas decisions dealing with the specific saving clause of the new Penal Code have taken a pragmatic approach to the application of the clause to criminal offenders who choose to be punished under the new Penal Code. The Texas Court of Criminal Appeals has stated that to take any other approach would render the saving provision virtually meaningless.[37] Their viewpoint, however, has raised questions as to due process rights afforded to criminal defendants. It is in this area that the Texas decisions are questionable in their approach taken to the application of the saving clause.

The present Texas criminal procedure utilizes a bifurcated trial system which provides for separate hearings on guilt and punishment.[38] Before adoption of this system, the jury determined guilt and punishment in one hearing based solely on evidence pertinent to the guilt issue.[39] The result was that the jury was prejudiced in their determination of guilt or innocence by evidence which was intended for consideration as to punishment such as evidence of prior convictions.[40] The present system, however, allows evidence of the defendant's prior convictions only at the punishment stage.[41]

The bifurcated system provides that in all criminal cases, except those involving a misdemeanor tried in the justice or municipal courts, the judge submits a jury charge on the issue of guilt or innocence of the defendant.[42] If a finding of guilt is returned, the judge determines the punishment applicable to the offense at a separate hearing unless the defendant elects to have the jury determine his punishment at such hearing.[43] Upon election, the judge informs the jury of the authorized punishment for the particular offense which the defendant has committed.

The leading case in Texas dealing with the specific saving clause in the new Penal Code is *Wright v. State*.[44] The defendant in that case was indicted for statutory rape under the old Penal Code. The offense occurred on May 10, 1973, but the defendant did not go to trial until May 6, 1974, when the new Penal Code was in effect; consequently, the defendant elected to be punished under the new Code in accordance with the saving clause. As

36. *Id.* § 6(c).
37. Wright v. State, 527 S.W.2d 859, 865 (Tex. Crim. App. 1975).
38. TEX. CODE CRIM. PROC. ANN. art. 37.07 (Supp. 1976).
39. Tex. Code Crim. Proc. art. 693 (1925).
40. Baernstein, *Criminal Law and Procedure*, 21 Sw. L.J. 237, 238 (1967).
41. TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a) (Supp. 1976).
42. *Id.* § 2(a).
43. *Id.* § 2(b)(2).
44. 527 S.W.2d 859 (Tex. Crim. App. 1975).

a result of his written election, the trial court was faced with the problem of substituting the new Penal Code penalty provisions for the old Code offense of statutory rape at the penalty stage of the trial.[45] The court used the proof and evidence offered at the guilt stage and various provisions of the new Penal Code relating to the offense of rape in order to draft the jury charge at the penalty stage. In other words, the court decided what penalty provisions of the new Code would correspond to the old Code offense of statutory rape and submitted this to the jury so that they might determine the proper punishment. The Court of Criminal Appeals affirmed the method used in the lower court, holding that proof other than that required at the guilt stage, need not be shown in order to satisfy the new Code elements.[46] Admittedly, this is an expedient and practicable approach. Pragmatism, however, does not always coincide with a basic constitutional safeguard, such as due process, which demands that an individual be apprised of the nature of the crime against him, that his conviction and punishment be founded on proof beyond a reasonable doubt, and that he not be tried twice for the same offense.

Notice of the Particular Offense

A defendant in a criminal action has a constitutional right to be informed of the charge against him.[47] The ramifications of this principle are evident in the case of *Dunn v. State*,[48] where the defendant was convicted of assault with intent to murder and was sentenced to a term of two years. The indictment recited that the defendant had made an assault "with the intent . . . to murder" whereas the jury charge included that the defendant had acted with "malice aforethought."[49] In effect, the jury charge involved a different crime from that alleged in the indictment. More importantly, the crime alleged in the jury charge called for a greater penalty than that alleged in the indictment.[50] The Court of Criminal Appeals ruled that in cases where the State seeks to punish a defendant for an offense greater than that provided for under the indictment, the facts calling for such punishment must

45. The defendant had been convicted at the guilt stage of the trial for the old Code offense of statutory rape as this was the offense alleged in the indictment.

46. Wright v. State, 527 S.W.2d 859, 866 (Tex. Crim. App. 1975); *accord*, Dockery v. State, — S.W.2d —, — (Tex. Crim. App. 1975) (negligent homicide); Grandham v. State, 528 S.W.2d 220, 222 (Tex. Crim. App. 1975) (rape); Casey v. State, 527 S.W.2d 882, 884 (Tex. Crim. App. 1975) (robbery); Ambers v. State, 527 S.W.2d 855, 858 (Tex. Crim. App. 1975) (rape).

47. U.S. CONST. amend. VI; TEX. CONST. art. I, § 10.

48. 81 S.W.2d 87 (Tex. Crim. App. 1935).

49. *Id.* at 88.

50. Under the indictment the defendant's punishment would be one to three years, while his punishment under the jury charge might have been not less than two nor more than 15 years. *Id.* at 88.

be alleged in the indictment.[51] Obviously, if the circumstances which constitute the crime or increase the punishment are not set out in the indictment, the accused would not be informed of the offense or the penalty for which he is charged.[52] The result is that the State must be particular in pleading its case. The *Wright* decision, however, does not restrict the State to its pleading but instead allows the court to go outside the indictment at the punishment stage if the defendant files his motion to be punished under the new Code pursuant to the saving clause.

The defendant in *Wright* alleged that he was not indicted for the crime of aggravated rape but for statutory rape, therefore, the indictment did not allege the elements of aggravated rape and he was punished for a crime without being notified of its elements.[53] Specifically, the indictment did not set forth that the defendant had caused serious bodily injury in the same criminal episode as required by the offense of aggravated rape under the new Code.[54] In deciding that the indictment was not the controlling factor, the court ignored the well established rule that the indictment must set forth all the elements necessary to constitute the offense intended to be punished.[55] As noted by the dissent, the defendant's election has the purported effect of "releasing the State from the constitutional requirements of pleading, and authorizes submission of punishment upon any new code theory of aggravation supported by some evidence."[56] Nothing, however, can release the State from recognizing the constitutional rights of its citizenry as when it refuses to recognize the significance of the indictment as a safeguard of their procedural rights. By failing to recognize this requirement, the court in *Wright* is in direct conflict with recognized constitutional rights.

The Reasonable Doubt Standard of Proof

Proper notice of the offense is not the only requirement of due process of law regarding the individual charged with an offense. The requirement that

51. *Id.* at 88.

52. *Id.* at 88; *see, e.g.*, Schmeideberg v. State, 415 S.W.2d 425, 426 (Tex. Crim. App. 1968) (State sought enhancement on basis of prior non-capital felony); Colvin v. State, 357 S.W.2d 390 (Tex. Crim. App. 1962) (State sought enhancement on basis of prior misdemeanors); Rogers v. State, 325 S.W.2d 697, 698 (Tex. Crim. App. 1959) (State sought enhancement on two prior non-capital felonies); Whittle v. State, 179 S.W. 2d 569, 571 (Tex. Crim. App. 1958) (State sought enhancement on basis of prior capital felony).

53. Wright v. State, 527 S.W.2d 859, 864 (Tex. Crim. App. 1975).

54. TEX. PENAL CODE ANN. § 21.03(a)(1) (1974). Practically speaking, this was impossible since the new Penal Code was not in existence when the indictment was drafted.

55. United States v. Carll, 105 U.S. 611, 612 (1881); United States v. Romensko, 398 F. Supp. 416, 418 (E.D. Wis. 1975); McLean v. State, 527 S.W.2d 76, 82 (Tenn. 1975). This rule is also recognized in Texas. *See* Dunn v. State, 128 Tex. Crim. 229, 230-31, 81 S.W.2d 87, 88 (1935); Garcia v. State, 19 Tex. Crim. 289, 392 (1885).

56. Wright v. State, 527 S.W.2d 859, 875 (Tex. Crim. App. 1975).

guilt of a criminal charge be established by proof beyond a reasonable doubt is constitutionally required before a person may be convicted and punished for a crime.[57] The leading case on this protected right is *In re Winship*,[58] which required this standard of proof during the adjudicatory stage when a juvenile is charged with an act which would constitute a crime if committed by an adult. The defendant, a 12 year old boy, had stolen a woman's pocketbook and was charged with larceny. The trial judge realized that the proof might not be established beyond a reasonable doubt, but rejected the defendant's contention that such proof was required and instead convicted the defendant on a "preponderance of the evidence."[59] In reversing the lower court for failing to apply a proper standard, the United States Supreme Court rejected the argument that there was only a "tenuous difference" between the preponderance and reasonable doubt standards.[60] The Court also noted that a free society demands such proof before it will deprive a man of his liberty. Furthermore, it is also necessary to command respect and confidence in the community in applications of the criminal law since people must not be left in doubt as to whether innocent men are condemned.[61]

The current Texas procedure as expounded in *Wright* and other related cases does not provide for this essential requirement. The following typical example may be used to illustrate the ramifications of the Texas procedure. Suppose that a defendant was indicted and convicted of sodomy under the old Penal Code, the punishment for such offense being two to 15 years. The indictment, drafted in the language of the old statute, charges four circumstances necessary to prove the offense.[62] The defendant is found guilty and elects to be punished under the new Penal Code; under the current procedure the judge would have the discretion to determine which of the new Code provisions are applicable to the defendant.[63] Under the new Code four different offenses might apply to the defendant upon his election to be punished under the new Code: homosexual conduct, public lewdness, sexual abuse, and aggravated sexual abuse.[64] These offenses range from misdemeanor to non-capital felony. In this hypothetical the judge decides that the

57. *In re* Winship, 397 U.S. 358, 361 (1970); *see* Speiser v. Randall, 357 U.S. 513, 525-26 (1958); Holland v. Randall, 348 U.S. 121, 138 (1954); Leland v. Oregon, 343 U.S. 790, 795 (1952); Brinegar v. United States, 338 U.S. 160, 174 (1949); Wilson v. United States, 232 U.S. 563, 569-70 (1914); Holt v. United States, 218 U.S. 245, 253 (1910); Davis v. United States, 160 U.S. 469, 488 (1895); Miles v. United States, 103 U.S. 304, 312 (1881).

58. 397 U.S. 358 (1970).

59. *Id.* at 360.

60. *Id.* at 367.

61. *Id.* at 363-64.

62. Tex. Penal Code art. 524 (1925).

63. *See* cases cited note 46 *supra.*

64. Tex. Penal Code Ann. §§ 21.04, 21.05, 21.06, 21.07 (1974).

defendant is guilty of aggravated sexual abuse which in addition to the sexual act requires the use of force.[65] Immediately, the problem arises that the force aspect of the new Penal Code provision was not an element of the offense of sodomy under the old Code. Although evidence might have been offered at the guilt stage showing force to justify the judge's choice of aggravated sexual abuse, the submission of this fact issue was not required at the punishment stage so as to negate the reasonable doubt standard of proof. As the United States Supreme Court stated in *Davis v. United States*:[66]

> No man should be deprived of his life or liberty . . . unless the jurors who try him are able . . . to say that the evidence before them . . . is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged.[67]

It can be said, then, that the Texas procedure espoused in *Wright* fails to provide another constitutional right to the defendant who elects to be punished under the new Penal Code. Until the courts face this question other defendants will also be deprived of the safeguard of proof beyond a reasonable doubt.

Protection Against Double Jeopardy

The Texas Constitution and the Code of Criminal Procedure declare that no person shall twice be put in jeopardy of life or liberty for the same offense.[68] The ramifications of this important concept are nebulous in that it raises several important issues such as whether or not jeopardy has attached or been waived and the interplay between double jeopardy and the doctrines of res judicata and collateral estoppel.[69] But the most important question relevant to the scope of this discussion is the limitations that double jeopardy places on reprosecutions.[70] It is the only aspect of double

65. *Id.* § 21.05 (1974).
66. 160 U.S. 469 (1895).
67. *Id.* at 493.
68. TEX. CONST. art. I, § 14; TEX. CODE CRIM. PROC. ANN. art. 1.10 (1966).
69. *See, e.g.*, Kroman v. Ciccone, 273 F. Supp. 201 (W.D. Mo. 1967) (jeopardy had not attached after the swearing of the jury and commencement of trial); Sawyer v. Hauck, 245 F. Supp. 55 (W.D. Tex. 1965) (juvenile proceeding held to be a "criminal" case so jeopardy attached). *See generally* Comment, *Statutory Implementation of Double Jeopardy Clauses: New Life for a Moribund Constitutional Guarantee*, 65 YALE L.J. 339, 357 (1956). Generally, jeopardy may be waived by the defendant. *See, e.g.*, Hamilton v. State, 115 Tex. Crim. 243, 29 S.W.2d 393, 394 (1930); Dunn v. State, 92 Tex. Crim. 126, 242 S.W. 1049, 1051 (1922); Simco v. State, 9 Tex. Crim. 338, 348 (1880); *cf.* Abbate v. United States, 359 U.S. 187, 190 n.4 (1959) (collateral estoppel); Hoag v. New Jersey, 356 U.S. 464, 467 (1958) (res judicata).
70. Wade v. Hunter, 336 U.S. 684, 688-90 (1949) (retrial not barred where military court martial discharged due to tactical necessity in the field); Thompson v. United States, 155 U.S. 271, 274 (1894) (reprosecution not barred where jury discharged because one juror had served on grand jury indicting defendant); Logan v. United States, 144 U.S. 263, 297-98 (1892) (reprosecution not barred where jury discharged after 40 hours of deliberation for inability to reach verdict); Simmons v. United States, 142 U.S.

jeopardy that applies to the defendant who seeks the lesser penalty under the new Penal Code.

The most obvious example of a limitation on reprosecution is that a conviction of a greater offense is barred. In *Green v. United States*,[71] the jury was authorized to find the defendant guilty of either first degree murder or, alternatively, of second degree murder. The jury found him guilty of the latter. The defendant was tried again for first degree murder and he appealed, claiming double jeopardy based on the original jury's refusal to convict him of first degree murder. The court held that the second trial for first degree murder placed the defendant in jeopardy twice for the same offense in violation of the Constitution.[72]

Although a conviction for a greater offense is barred upon a second trial, an imposition of a harsher punishment is not. In *North Carolina v. Pearce*,[73] the defendant was convicted of assault with intent to commit rape. He was sentenced to a term of 12 to 15 years. Later, he was successful in overturning his conviction on the ground that an involuntary confession had been admitted. He was retried, convicted and sentenced by the trial judge to an eight year term, which, when added to the time he had already served, amounted to a longer sentence than that originally imposed. The Supreme Court held that neither double jeopardy nor equal protection imposed an absolute bar to a more severe sentence upon reconviction.[74] The Court reasoned that due process would only prevent imposition of a harsher penalty when "vindictiveness" on the part of the court was apparent.[75]

To illustrate the application of double jeopardy to the Texas decisions, suppose that on December 31, 1973, the defendant is convicted of the crime of statutory rape as defined by the old Penal Code.[76] The jury found that the defendant committed the crime by fraudulent means, but without the use of force.[77] On January 2, 1974, before the sentencing hearing begins, the defendant elects to be punished under the new Penal Code, the punishment being either rape or aggravated rape.[78] At the punishment stage, however, the defendant recalls the prosecutrix in hopes that she will admit to the jury

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148, 155 (1891) (reprosecution not barred where mistrial declared because letter published in newspaper renders juror's impartiality doubtful); *see* Note, *Double Jeopardy: The Reprosecution Problem*, 77 HARV. L. REV. 1272 (1964).

71. 355 U.S. 184 (1957).

72. *Id.* at 186.

73. 395 U.S. 711 (1969).

74. *Id.* at 723.

75. *Id.* at 725.

76. Tex. Penal Code art. 1183 (1925). The penalty ranges from five years to death. Tex. Penal Code art. 1189 (1925).

77. *See* Tex. Penal Code art. 1184 (1925) (force as applied to assault and battery also applies to rape).

78. TEX. PENAL CODE ANN. §§ 21.02, 21.03 (Supp. 1976).

that by nature she is promiscuous.[79] Instead, the prosecutrix testifies that the defendant threatened her with a gun before he raped her. This testimony introduces the element of force again, an element which was dismissed at the guilt stage. Under the majority opinion in *Wright*, the court could use this testimony at the punishment stage to arrive at its decision in choosing the applicable penalty provision under the new Penal Code.[80] The effect of this is that the defendant is put in jeopardy for an offense of which he was acquitted at the guilt stage.

CONCLUSION

The written election provision of the Texas Penal Code saving clause is unique, and thus precludes useful comparison with other jurisdictions.[81] Basic concepts of due process, however, are available as guidelines for insuring that any new procedure will meet the constitutional requirements.

First, when a defendant elects to be punished under the new Penal Code he should be re-indicted so that the charge against him will comply with the notice requirement of due process. As the dissent in *Wright* pointed out, the trial judge at the punishment stage could be confronted with four different situations:

> (1) a verdict of guilty as charged in the indictment, with no further facts bearing on punishment alleged in the indictment; (2) a verdict of guilty for a lesser included offense, with no further facts bearing on punishment alleged in the indictment; (3) a verdict of guilty as charged in the indictment, with additional facts bearing on punishment alleged in the indictment; or (4) a verdict of guilty for a lesser included

79. This very tactic was attempted in *Wright* and the prosecutrix did admit that she had sexual intercourse with her boyfriend less than a year prior to the offense. Wright v. State, 527 S.W.2d 859, 863 (Tex. Crim. App. 1975).

80. *Id.* at 865-66. Justice Roberts, in a concurring opinion, noted that TEX. CODE CRIM. PROC. ANN. art. 37.07(3) (1965) only allowed evidence at the punishment stage concerning the defendant's prior criminal record, his general reputation, and his character. By recalling the prosecutrix at the punishment stage, the majority was complicating the punishment hearings by "aimless searches for 'more applicable' offenses." Wright v. State, 527 S.W.2d 859, 863 (Tex. Crim. App. 1975).

81. The cases from other jurisdictions that are even remotely similar to *Wright* have dealt with an amending statute that caused a change in procedure, not a change in elements of the offense; therefore, the saving clause did not preserve the old procedure. *See* cases cited note 4 *supra*. Missouri cases have held that the re-enacted provisions of the Missouri Habitual Offender Act applied to offenses occurring before its effective date. *See also* State v. Williams, 343 S.W.2d 58, 61 (Mo. 1961); State v. Wolfe, 343 S.W.2d 10, 16 (Mo. 1961); State v. Griffin, 339 S.W.2d 803, 806 (Mo. 1960), *cert. denied*, 366 U.S. 938 (1961); State v. Morton, 338 S.W.2d 858, 861-62 (Mo. 1960). Illinois cases have stated that failure of the court to advise the defendant of his right to elect to be punished under the new law is a denial of due process. People v. Hollins, 280 N.E.2d 710, 712 (Ill. 1972); People v. Wyckoff, 245 N.E.2d 316, 318 (Ill. Ct. App. 1969). *But see* People v. James, 263 N.E.2d 5 (Ill. 1970), where the defendant was unaware that he could have been sentenced by the jury. The court held that this was not a denial of due process since he did not raise the issue on appeal. *Id.* at 6-7.

offense, with additional facts bearing on punishment alleged in the indictment.[82]

In all of these situations the State should be required to replead its case and grant the defendant a completely new trial. This procedure would provide the defendant with notice of the charge against him. It would also satisfy the reasonable doubt standard of proof since under the revised pleadings all of the relevant fact issues would be submitted to the jury. To prevent double jeopardy, the State, in its revised pleading, must not be allowed to charge any element of any offense of which the defendant was acquitted at the guilty stage.

This procedure may burden the criminal process, but for vital reasons. In a balancing test of speedy trial versus due process rights, the latter must prevail on public policy grounds. The saving clause was enacted by the Texas Legislature, and it is now incumbent on the courts to use the correct procedure in applying that clause in order to protect the rights of the criminal defendant.

82. Wright v. State, 527 S.W.2d 859, 876 (Tex. Crim. App. 1975).