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Multiple Convictions Statute in Ohio: Has It Achieved Its Intended Result

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I. INTRODUCTION

MODERN CRIMINAL PROCEDURE HAS WITNESSED A MOVEMENT AWAY from harsh, merciless justice, where prisons were for debtors and all other criminals received some pitiful end, to a system where a criminal is punished in proportion to his wrong. The concepts of double jeopardy, due process and cruel and unusual punishment were developed to protect criminal defendants from unjust and unduly multiplied punishment. In time, the doctrine of merger arose to prevent multiple punishment where only a single course of criminal conduct was involved.

In terms of modern penal law, protection from legislatively unintend-

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ed judicial division of a single continuing offense has been the result of a focus upon federal constitutional guarantees. These guarantees arise from the double jeopardy clause, the due process clause of both the fifth and fourteenth amendments, as well as the constitutional prohibition against cruel and unusual punishment.[1] Each of the above protections encompasses its own unique focus and logic. All are available as a shield from undue multiplication of convictions. The Ohio Allied Offense Statute[2] is a codification of the common law doctrine of merger and is the Ohio legislature's attempt to insulate criminal defendants from harsh and absurd punishment. This Article discusses the relationship of certain constitutional guarantees against multiple punishments to the Allied Offense Statute and the multiple punishment controversy in Ohio.

II. DOUBLE JEOPARDY PROTECTION AGAINST MULTIPLE PUNISHMENT

In general terms, the double jeopardy clause of the United States Constitution[3] consists of three main protections: 1) it protects against a second prosecution for the "same offense" after acquittal, 2) it protects against a second prosecution for the "same offense" after conviction,[4] and 3) it protects against the imposition of multiple punishments for the "same offense."[5] The federal double jeopardy clause serves principally

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[1] It would seem that the eighth amendment prohibition against cruel and unusual punishment would impose an upward limitation on the amount or type of punishment which might be imposed for a single criminal episode or transaction. Schwartz, *Multiple Punishment for the "Same Offense": Michigan Grapples With The Definitional Problem*, 25 WAYNE L. REV. 825, 844 n.120 (1979) [hereinafter cited as Schwartz].

[2] OHIO REV. CODE ANN. § 2941.25 (Page 1982).

[3] The fifth amendment to the United States Constitution provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ," U.S. CONST. amend. V. Avoidance of multiple punishment was foremost in the minds of the Constitution's draftsmen. Note, *Twice in Jeopardy*, 75 YALE L.J. 262, 266 (1965) [hereinafter cited as *Twice in Jeopardy*].

Section 10 of article I of the Constitution of Ohio provides: "No person shall be twice put in jeopardy for the same offense." All states provide at least some protection against double jeopardy as a matter of state constitutional or common law. Bartkus v. Illinois, 359 U.S. 121, 154 n.9, *reh'g denied*, 360 U.S. 907 (1959) (Black, J., dissenting).

[4] Perhaps two of the most recognized exceptions to the general rule barring reprosecution involve: 1) the retrial of a defendant following appellate reversal of a conviction for the same offense, and 2) the right of both federal and state authorities to try the defendant for the same crime. *See* United States v. Ball, 163 U.S. 662 (1896); Bartkus v. Illinois, 359 U.S. 121 (1959); Abbate v. United States, 359 U.S. 187 (1959).

[5] Under early common law criminal procedure, each indictment resulted in a separate trial and charges were not joined. It was only after the rules of criminal procedure permitted joinder of charges in a single trial that multiple punishment questions arose in the course of a single prosecution. *See Twice in Jeopardy*,

as a restraint on courts[6] and prosecutors, and proceeds on the premise that the legislature alone is vested with the power to define crimes and fix punishments.

A. *The Same Offense*

The concept of double jeopardy is deeply rooted in our cultural history. The belief that a person should not be punished twice for the same transgression has been traced by legal historians to the civilizations of the Greeks and Romans, and to early Canon law.[7] Although traceable to ancient times, the history of the double jeopardy doctrine indicates that at different times the concept has had different and unsettled meanings. It has served different functions in the context of developing and changing civilizations.[8]

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supra note 3, at 266 n.13; Koch, *Criminal Law—Multiple Punishment Under the Organized Crime Control Act—A Need for Reexamination of Wharton's Rule and Double Jeopardy*, 52 WASH. L. REV. 142, 157 n.58 (1976). In Brown v. Ohio, 432 U.S. 161 (1977), the Supreme Court stated that "[w]here consecutive sentences are imposed at a single criminal trial, the role of the constitutional gurantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense." *Id.* at 165.

[6] Because the fifth amendment double jeopardy guarantee protects against multiple punishment and reprosecution for the "same offense," the fifth amendment necessarily operates as a limitation on judicial interpretation of what constitutes separate criminal offenses. *See* Note, *Statutory Implementation of Double Jeopardy Clauses: New Life for a Moribund Constitutional Guarantee*, 65 YALE L.J. 339, 340 (1956) [hereinafter cited as *Statutory Implementation*]. It prohibits the imposition of punishment which was not authorized by the legislature through the arbitrary practice of dividing one and the same offense into more than one violation of the law. *Id.* Schwartz, *supra* note 1, at 826 n.3.

[7] Double jeopardy principles found some expression in the DIGEST OF JUSTINIAN. *See generally* Sigler, *A History of Double Jeopardy*, 7 AM. J. LEGAL HIST. 283 (1963) [hereinafter cited as Sigler]; Batchelder, *Former Jeopardy*, 17 AM. L. REV. 735 (1883). Canon law disfavored placing a person twice in jeopardy, relying upon the maxim that God does not punish twice. *See* Bartkus v. Illinois, 359 U.S. 121, 152 n.4 (1959) (Black, J., dissenting).

The idea that there are limitations on the number of times a person can be punished for a single criminal episode or course of conduct transcends cultures and is evidenced in the criminal systems of France, Germany, Switzerland and Italy. *See* Kirchheimer, *The Act, The Offense and Double Jeopardy*, 58 YALE L.J. 513, 538-41 (1949) [hereinafter cited as Kirchheimer].

[8] United States v. Wilson, 420 U.S. 332, 339-42 (1975); Sigler, *supra* note 7, at 284.

One respected author has concluded that in England, prior to the 15th century, the double jeopardy principle served mainly as a guard against abusive *private* quasi-civil reprosecutions, not as a protection against actions by the state. Sigler, *supra* note 7, at 293. The criminal law grew in part out of the right and duty of private vengeance. M. RADIN, ANGLO-AMERICAN LEGAL HISTORY, 219-20, 237 (1936) [hereinafter cited as M. RADIN].

The relationship between the civil law doctrine of *res judicata* and the criminal law doctrine of double jeopardy has long been recognized. Jay v. State,

In more recent centuries, the protection against undue multiplication of convictions has principally been afforded via the double jeopardy concept. The protection involves a weighing and balancing of the substantial interest of the state in obtaining punishment for every crime, against the interest of the relatively powerless individual to be free from undue threat and harassment at the hands of the state.[9] The vestiges of modern double jeopardy precepts were developed by English courts in state criminal prosecutions in recognition of the considerable trial advantages enjoyed by the state and the severe punishment imposed for conviction.[10] The courts, out of compassion for individuals who had already been acquitted, regularly rejected attempts to reprosecute criminal defendants for the *same offense*.

Since the late 18th century, the development of the double jeopardy doctrine has been marked by a relatively constant struggle between criminal defendants, prosecutors, courts and legislatures concerning the parameters of what constitutes a separately triable and punishable offense. As death became the punishment for fewer and fewer crimes, and as the number of statutory offenses grew, prosecutors were given some incentive to divide a single criminal episode into several separately punishable offenses.[11] Consequently, many difficult double jeopardy questions arose in two categories of cases: 1) cases where it was charged that the defendant's conduct during a single criminal episode constituted more than one violation of the same statute,[12] and 2) cases

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15 Ala. App. 255, 258, 73 So. 137, 138 (1916); Note, *Consecutive Sentences in Single Prosecutions: Judicial Multiplication of Statutory Penalties*, 67 YALE L.J. 916, 919 n.16 (1958) [hereinafter cited as *Consecutive Sentences*]; *Twice in Jeopardy*, *supra* note 3, at 296-99. Each doctrine involves the finality of judgments and the proper and efficient use of judicial resources. The doctrine of *res judicata* is not, however, within the scope of this Article.

[9] Double jeopardy principles attempt to equalize the adversary process by permitting the state only one fair opportunity to convict an accused of a particular offense. Klafter & Henderson, *Criminal Procedure*, 1978 ANN. SURV. AM. L. 17, 38-39.

[10] Under early common law practice, the accused never saw the indictment, could call no witnesses and was not permitted counsel. Acquittals were very rare. M. RADIN, *supra* note 8, at 228-29. Note, *Double Jeopardy and the Multiple Count-Indictment*, 57 YALE L.J. 132, 133 n.1 (1947) [hereinafter cited as *Double Jeopardy*]. All serious crimes were punishable by death. Lesser offenses were often punishable by amputation or disfigurement. *See generally* M. RADIN, *supra* note 8, at 236-37.

[11] *See Statutory Implementation*, *supra* note 6, at 342-43.

[12] In determining whether a criminal transaction constituted more than one offense, some writers and courts distinguished between "an offense continuous in character" and "an offense that can be committed *uno ictu*." *In re* Snow, 120 U.S. 274, 286 (1887). Wharton commented that "[q]uestions frequently arise whether a particular offence is divisible . . . , whether it is susceptible of being divided into two or more offences, each to be open to a separate prosecution. . . . No matter how long a time an offence may take in its perpetration, it continues but one

where it was charged that the defendant's criminal act or transaction constituted separate violations of more than one statute.[13]

In cases where the same statute was allegedly violated more than once during a single criminal episode, early courts quite regularly resolved the double jeopardy issue by deferring to the legislative power to define crimes and prescribe punishments. Upon determination of the *unit of prosecution*, *i.e.*, conduct which the legislature proscribed as a single punishable offense, courts rejected attempts by prosecutors to subdivide what were deemed to be single but continuing offenses. Where it appeared that the prosecution was relying upon the *same evidence* to support more than one conviction, the courts determined

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offence." 1 F. WHARTON, CRIMINAL LAW § 27, at 34-36 (Lewis ed. 1896). Elaborating on this analysis, Wharton further explained that "[t]he test is whether the individual acts are prohibited, or the course of action which they constitute. If the former, then each act is punishable separately." *Id.* at 36 n.3.

[13] Ohio's Allied Offense Statute on its face distinguishes between cases where two or more statutes are simultaneously violated and cases where the statute or statutes are successively violated. Subsection A of the Allied Offense Statute applies where the "same conduct" of the defendant gives rise to the charges, whereas subsection B applies in other instances where the "conduct" of the defendant gives rise to multiple charges. The origins of this analytical dichotomy can be traced to theories of "formal" and "material" concurrence summarized long ago by Wharton:

> *Formal concurrence*, which exists when a particular act has several criminal aspects. A particular sexual transaction, for instance, may be both rape or incest. A stealing may be both larceny and an attempt.
>
> *Material concurrence*, where several successive acts form part of the same apparently continuous transaction.
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> In cases of formal concurrence, the rule, as has been seen, is, that there should be a conviction only of the crime to which the higher penalty is attached, though the minor crime may be taken into consideration in adjusting punishment.
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> In cases of *material concurrence* the following theories have been propounded:—
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> 1. *Absorption or Merger.*—By this view the lesser offence is lost sight of in the greater. Poena major absorbent minorem. Only the most heinous of the concurrent crimes is to be punished, and the others are only to be considered as affording grounds for the adjustment of the sentence. Against this view it is argued that it violates the public sense of justice that any crime, proved in a court of justice, should go unpunished, and that the commission of a greater crime should not be a free pass to the commission of a lesser crime.
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> 2. *Cumulation.*—Each distinct offence, though these follow each other in rapid succession as part of the same transaction, is to be punished separately, and for this is invoked the maxim, Quot delicta, tot poenae. To this the objection is made that public justice is sufficiently satisfied if the criminal has applied to him in his sentence such an increase of punishment as the aggravation of the transaction requires, and that this is one of the objects of giving to the judges discretion in the dispensing of punishment.

F. WHARTON, CRIMINAL PLEADING AND PRACTICE, § 475, at 332 n.6 (8th ed. 1880) (emphasis added).

that multiple punishment was forbidden. In some cases it was not clear whether the court's decision was founded upon principles of statutory construction, principles of double jeopardy or both.[14]

The seminal case of *Crepps v. Durden*[15] was one of the first cases that squarely confronted the multiple punishment issue in the context of a continuing crime. In *Crepps*, a baker received four convictions for selling four loaves of bread on a Sunday.[16] Lord Mansfield, concluding that the legislature did not intend to create an offense which could be committed more than once on the same day, reversed the sentencing court for exceeding its province reasoning that:

> If the Act of Parliament gives authority to levy but one penalty, there is an end of the question, for there is no penalty at common law. On the construction of the Act of Parliament, the offence is, exercising his ordinary "trade upon the Lord's Day;" and that without any fractions of a day, hours, or minutes. It is but one entire offence, whether longer or shorter in point of duration; so, whether it consist of one, or of a number of particular acts.[17]

In 1887, the United States Supreme Court discussed the multiple punishment issue in a cohabitation case finding that the federal double jeopardy clause precluded the prosecution from subdividing an in-

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[14] Some writers have criticized courts for failing to distinguish adequately between the question of statutory construction and the question of constitutional law, but recognize that the questions are really the same. *See, e.g.*, Hardin, *Criminal Law—Multiple Punishment Resulting From a Single Course of Criminal Conduct*, 25 ARK. L. REV. 181, 182 (1971). Where possible, courts will generally avoid constitutional questions where some other legal theory is dispositive of the case. Simpson v. United States, 435 U.S. 6, 12 (1978).

[15] 98 Eng. Rep. 1283 (K.B. 1777).

[16] *Id.* at 1284.

[17] *Id.* at 1287. In the famous case of Rex v. Vandercomb, 168 Eng. Rep. 455 (Crown 1796), the defendants were charged with burglary and were acquitted of the charge on the technicality that the evidence showed that the burglary did not actually take place on the exact date alleged in the indictment. The defendants were reindicted and convicted for burglary, and their plea of former jeopardy was rejected. The court determined that the acquittal on the first alleged offense did not bar the prosecution for the second offense, which was properly alleged and proven by the evidence. The court reasoned that "[i]f crimes are so distinct *that evidence of the one will not support the other*, it is . . . inconsistent with reason . . . to say that they are so far the same that an acquittal of the one shall be a bar to a prosecution for the other." *Id.* at 460 (emphasis added).

It has been pointed out that the "same evidence" test developed in *Vandercomb's* case might not have come into existence but for the absurdity of strict rules of common law pleading which required acquittal upon even a slight variation between the indictment and the proof. Note, *Twice in Jeopardy*, *supra* note 3, at 270.

herently single and continuous offense by alleging that it was committed at different points in time.[18] The defendant in *In re Snow*[19] received three convictions for criminal cohabitation[20] which occurred during a continuous thirty-five month period. Finding that the division of the period into three offenses was "wholly arbitrary," the Supreme Court reversed the second and third convictions. In the course of its opinion, the Court stated that "[t]he offence of cohabitation . . . is, inherently, a continuous offence, having duration; and not an offence consisting of an isolated act. . . . [T]he rule has obtained that a continuing offence of the character of the one in this case can be committed but once, for the purposes of indictment or prosecution. . . ."[21]

In apparent contrast to *Snow*, the Supreme Court in *Ebeling v. Morgan*[22] affirmed six individual convictions arising out of a continuous criminal episode. The Court held that a defendant who cut open six federal mailbags on the same day could constitutionally be convicted and sentenced to consecutive terms of imprisonment for cutting each bag.[23] Since the case did not involve an offense of an inherently continuous nature, the Supreme Court rejected, on double jeopardy grounds, the defendant's argument that the continuous nature of his conduct, *i.e.*, the sequential cutting of one bag after another, permitted only one conviction.[24]

The Court in *Ebeling* employed a *same evidence* test reasoning that the prosecution offered different proof to support each conviction. *Snow*, although reversing multiple convictions in a continuous conduct context, is consistent with *Ebeling* as both cases turned on an examination of the legislatively intended unit of conviction. The statute in *Snow* was framed as a *single* ongoing offense without temporal divisions whereas the statute in *Ebeling* directed its force expressly against tampering with individual items of federal property.

In the renowned case of *Blockburger v. United States*,[25] the defendant received three narcotics convictions arising out of two individual sales of morphine. The Supreme Court, eventually affirming all three convic-

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[18] *In re* Snow, 120 U.S. 274, 286 (1887).

[19] 120 U.S. 274 (1887).

[20] Snow was prosecuted under a statute which provided "[t]hat if any male person . . . cohabits with more than one woman, he shall be deemed guilty of a misdemeanor . . . ." *Id.* at 275-76.

[21] *Id.* at 281-82.

[22] 237 U.S. 625 (1915).

[23] Ebeling was convicted of violating a statute which made it a federal offense to "tear, cut, or otherwise injure any mail bag . . . with intent to rob or steal . . . mail . . . ." *Id.* at 629.

[24] *Id.* at 631.

[25] 284 U.S. 299 (1932).

tions, determined that the two convictions for selling morphine, not in its original package, did not violate double jeopardy because each conviction involved a separate sale on a separate day.[26] The *Blockburger* Court, later said to have been keenly aware of a legislative purpose to crackdown on illegal narcotics trade,[27] rejected the defendant's reliance on *Snow* and his contention that the two sales were but a single continuous offense because the payment for the second sale was made shortly after consummation of the first sale. Citing Wharton,[28] the Supreme Court analyzed the unit of prosecution prescribed by the Narcotic Act and determined that the statute prohibited *any sale* rather than the *business of selling* illegal drugs.[29] The *Blockburger* analysis is in harmony with both *Snow* and *Ebeling*.

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[26] The Harrison Narcotic Act made it "unlawful for any person to purchase, sell, dispense, or distribute . . . drugs . . . except in the original stamped package or from the original stamped package . . . ." *Id.* at 300 n.1.

[27] Gore v. United States, 357 U.S. 386, 388-90 (1958).

[28] *See supra* note 12 and accompanying text.

[29] 284 U.S. at 302-03. In prescribing the punishment for a criminal episode the politically responsible legislature is in the best position to evaluate the relative importance which should attach to the legitimate goals of deterrence, retribution, restraint and rehabilitation. Most double jeopardy controversies involve questions of legislative intent, not legislative power. In Albrecht v. United States, 273 U.S. 1 (1927), the Supreme Court stated that "[t]here is nothing in the Constitution which prevents Congress from punishing separately each step leading to the consummation of a transaction which it has power to prohibit and punishing also the completed transaction." *Id.* at 11.

In United States v. Universal CIT Credit Corp., 344 U.S. 218 (1952), the defendant and several of its supervisory personnel were charged with thirty-two criminal violations of the Fair Labor Standards Act. Although the government asserted that an employer could be separately prosecuted for the violation of the rights of each employee, the district court dismissed all but three charges finding that it was "a course of conduct rather than the separate items in such course" that constituted a violation of the statute. *Id.* at 220. The Supreme Court affirmed the decision of the district court, stating:

> What Congress has made the allowable unit of prosecution—the only issue before us—cannot be answered merely by a literal reading of the penalizing sections. Generalities about statutory construction help us little. They are not rules of law but merely axioms of experience. . . . They do not solve the special difficulties in construing a particular statute. The variables render every problem of statutory construction unique. . . . For that reason we may utilize, in construing a statute not unambiguous, all the light relevantly shed upon the words and the clause and the statute that express the purpose of Congress. . . . [W]e are asked here . . . to infer that an employer's failure to perform his obligations as to each employee creates a separate criminal offense . . . .
>
> . . . .
>
> It would be self deceptive to claim that only one answer is possible to our problem. But the history of this legislation and the inexplicitness of its language weigh against the Government's construction of a statute that cannot be said to be decisively clear on its face one way or the other.

Id. at 221-24.

In the early cases involving alleged violations of the same statute, the courts resolved the double jeopardy-multiple punishment issue through application of a legislative intent analysis. This analytical approach recognized that the legislative power to define offenses includes the power to prescribe the unit of prosecution.[30] However, in cases involving alleged violations of more than one statute, a different type of legislative intent analysis was developed to resolve double jeopardy questions. This analytical approach sought to establish legislative intent to create separately punishable offenses by comparing the elements of the statutes to determine whether the statutes in fact created theoretically different offenses. Where courts concluded from the elements of the different statutory crimes that the legislature had proscribed the *same offense* in different ways, double jeopardy principles prohibited more than one prosecution and punishment.

In *Morey v. Commonwealth*,[31] the defendant was convicted of criminal cohabitation during a continuous ten month period, and was subsequently convicted of criminal adultery on three separate days during such period. Although proof of the same sexual conduct was admitted in evidence at both trials, the Supreme Court of Massachusetts rejected the defendant's contention that he had been prosecuted and punished twice for the *same offense*. The *Morey* court stated that "[a] single act may be an offence against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other."[32] Upon consideration of the evidence, the court concluded that cohabitation and adultery were "distinct offences growing out of the same act,"[33] because the conviction for

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[30] Other early courts also deferred to legislative judgment in determining whether the defendant violated the same statute more than once in the course of a single criminal transaction. *See* Connecticut v. Benham, 7 Conn. 414 (1829) (where separate convictions for the simultaneous possession of each of several forged banknotes were disallowed); Commonwealth v. Andrews, 2 Mass. 408 (1807) (where two separate convictions for receiving, at the same time and during the same transaction, stolen goods owned by two different people were affirmed).

While the opinion has been expressed that strict adherence to the "legislative intent" approach under double jeopardy law might lead to legislative abuse in the creation of separately punishable offenses, the legislature is without authority to prescribe cruel and unusual punishment. Schwartz, *supra* note 1, at 844. *Compare* Kenimer v. State, 81 Ga. App. 437, 59 S.E.2d 296 (1950) (finding the sentence imposed for 238 contempt convictions arising out of violation of a divorce decree to constitute cruel and unusual punishment) *with* State *ex rel.* Garvey v. Whitaker, 48 La. Ann. 527, 19 So. 457 (1896) (finding the sentence imposed for violating a municipal ordinance 72 times within less than two hours to be cruel and unusual punishment).

[31] 108 Mass. 433 (1871).

[32] *Id.* at 434.

[33] *Id.* at 436.

adultery required evidence that the defendant was married and had sexual relations with another woman while proof of cohabitation required evidence that the defendant simply dwelt or lived with any woman to whom he was not married.[34]

In a factually similar setting, the defendant in the case of *In re Nielsen*[35] was convicted in a federal court of criminally cohabitating with two women during a continuous thirty-two month period. He was also convicted of criminal adultery committed with one of the two women on the date immediately following the period of cohabitation specified in the first indictment.[36] Relying on the *Morey* decision, the district court rejected the defendant's application for habeas corpus and concluded that the convictions did not violate double jeopardy. On appeal to the Supreme Court, the judgment of the district court was reversed. At the outset the Court determined, as a matter of federal law, that adultery was an offense included within the statutory offense of cohabitation. As a result, the Court held that the convictions violated the fifth amendment because cohabitation and adultery were the *same offense* for double jeopardy purposes,[37] and because the cohabitation charged in the first indictment in fact continued up to and through the date of the adultery.[38] The *Nielsen* Court approved but distinguished the *Morey* decision on the ground that under Massachusetts law adultery was not an offense included within the offense of cohabitation.[39]

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[34] *Id.* at 435-36.

[35] 131 U.S. 176 (1889). Like the defendant in *Snow*, Nielsen was convicted of violating a statute which made it a misdemeanor for a man to cohabit with more than one woman. *Id.* at 176.

[36] The adultery statute provided that "whoever commits adultery shall be punished by imprisonment . . . not exceeding three years . . . ." *Id.* at 177.

[37] *Id.* at 187.

[38] In making its determination that the act of adultery was included within the offense of cohabitation, the Supreme Court reasoned that the conviction for cohabitation

> was in law a conviction of a crime which was continuous, extending over the whole period, including the time when the adultery was alleged to have been committed. The petitioner's sentence, and the punishment he underwent on the first indictment, was for that entire, continuous crime. It included the adultery charged. To convict and punish him for that also was a second conviction and punishment for the same offense.

Id. at 187.

Thus *Nielsen* established the rule that double jeopardy precludes separate prosecutions for greater and lesser included offenses, whether the conviction for the greater precedes the conviction for the lesser, or vice versa. *See* Brown v. Ohio, 432 U.S. 161, 168 (1977).

[39] 131 U.S. at 188. In Gavieres v. United States, 220 U.S. 338 (1911), the Supreme Court carried the *Nielsen* logic one step further by determining that where application of the *Morey* test revealed that the defendant was not prosecuted for both a greater and lesser included offense, neither prosecution violated double jeopardy.

Through its decision in *Nielsen*, the Court demonstrated the relationship between the principles followed in *Snow* and those announced in *Morey*. In *Snow* the Court held that a single offense could not be subdivided into multiple violations of the same statute. The *Nielsen* Court held that the "same offense" could not be subdivided into separate violations of separate statutes, where application of the rule announced in *Morey* revealed that the defendant was prosecuted for both greater and lesser included statutory offenses arising from the same conduct.[40]

The defendant in *Blockburger*[41] was convicted of two narcotics offenses arising out of one of the two sales he had made. Both convictions were affirmed by the Supreme Court and the defendant's contention that he was being punished twice for the *same offense* was rejected.[42] The Court noted that one statute made it a crime to sell morphine not in its original package, while the other statute made it a different crime to sell morphine other than pursuant to a written order.[43] Setting forth what later became known as the *Blockburger test*, the Court explained:

> Each of the offenses created requires proof of a different element. The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.[44]

Thus, courts established early two different types of double jeopardy analyses for multiple offense cases. In cases involving a single statute, such as *Snow* and *Ebeling*, the courts employed a relatively flexible analysis that explicitly recognized that the resolution of *same offense* and multiple punishment issues depended on resolution of questions of legislative intent. In cases such as *Morey* and *Blockburger*, the courts employed a relatively rigid type of analysis that implicitly measured legislative intent to impose multiple punishment through comparison of the elements of the different statutory crimes. In the years following their adoption by the United States Supreme Court, these two types of

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[40] 131 U.S. at 188-90.

[41] 284 U.S. 299 (1932).

[42] *Id.* at 303-04.

[43] *Id.*

[44] *Id.* at 304. In 1975, the Supreme Court characterized the *Blockburger* test as one which serves the "function of identifying congressional intent to impose separate sanctions for multiple offenses arising in the course of a single act or transaction." Iannelli v. United States, 420 U.S. 770, 785 n.17 (1975).

In addition to the constitutional arguments, the defendant in *Blockburger* asserted that as a matter of statutory law the legislature did not intend to punish separately the violation of each section of the statute because both violations arose out of the same sale. This argument was given short shrift by the Court. 284 U.S. at 304-05.

double jeopardy analyses became a mainstay in federal courts and in most state courts.[45] This occurred notwithstanding the fact that each of the two analyses presented the potential for successive trials and harsh treatment of unpopular defendants when the theories were pressed to

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[45] *See generally Statutory Implementation, supra* note 6, at 341-43.

Historically, Ohio courts are not unfamiliar with the double jeopardy-multiple punishment controversy. Ohio courts have long employed a "same evidence" analysis in resolving state double jeopardy issues. State v. Rose, 89 Ohio St. 383, 106 N.E. 50 (1914) ("If the defendant upon the first charge could have been convicted of the offense in the second, then he has been in jeopardy." *Id.* at 387, 106 N.E. at 51). In Duvall v. State, 111 Ohio St. 657, 146 N.E. 90 (1924), the test was expressed as follows:

> A conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other. A single act may be an offense against two statutes; and if either statute requires proof of an additional fact, an acquittal of the offense requiring proof of the additional fact does not exempt the defendant from prosecution and punishment under the statute which does not require proof of such additional fact.

Id. at 657, 146 N.E. at 90.

For other Ohio cases treating the multiple punishment issue, see State v. Martin, 154 Ohio St. 539, 96 N.E.2d 776 (1951) ("[w]hen a single unlawful act results in the killing of more than one person, each homicide constitutes a separate offense for which the defendant may be tried without being twice put in jeopardy." *Id.* at 539, 96 N.E. 2d at 777); Dodge v. State, 124 Ohio St. 580, 180 N.E. 45 (1932) ("[t]he fact that a defendant has been put in jeopardy upon a trial for one criminal act is no bar to a prosecution for a separate and distinct criminal act merely because they are closely connected in point of time, place and circumstance." *Id.* at 580, 180 N.E.2d at 46); State v. Billotto, 104 Ohio St. 13, 135 N.E. 285 (1922) (killing two people in the course of the same quarrel constitutes two separately triable and punishable offenses); Patterson v. State, 96 Ohio St. 90, 117 N.E. 169 (1917) (theft of different automobiles from different owners at "divers times and places" constitutes separately punishable offenses under principles of double jeopardy); Weaver v. State, 74 Ohio St. 53, 77 N.E. 273 (1906) (where in substance and effect but one offense has been committed, a verdict of guilty by the jury under more than one count does not require a retrial but only requires that the court not impose more than one sentence); Woodford v. State, 1 Ohio St. 427 (1853) ("where an offense forms but one transaction (and the jury finds the defendant guilty on several counts) it is error in the court to sentence on each count separately." *Id.* at 427).

In State v. Shimman, 122 Ohio St. 522, 172 N.E. 367 (1930), the defendants illegally transported the same intoxicating liquor from one county to another. Following conviction in one county for illegal transportation of liquor, the defendants were indicted on the same charge in the other county. The trial court sustained the defendants' plea of former jeopardy and the supreme court affirmed. In the course of its opinion, the court stated:

> The fact that continuous transportation through several states may be punishable in each state furnishes no persuasive argument that a like transportation through several counties is punishable as a distinct and separate offense in each county. The argument is fallacious and its conclusion not legally tenable. . . . Here there is a violation of but one law,

their limits.[46] The courts' continued reliance on these analyses as a means of obtaining sensible and fair double jeopardy results was due in large part both to the prudence of prosecutors who did not abuse defendants by subdividing and repeatedly relitigating the same criminal episode and to the relatively rare occurrence of harsh treatment. With changing times, such judicial reliance came under increasing attack.

B. *Changing Times*

As the United States moved into the mid-twentieth century, the battle against domestic crime grew more intense. The rapid growth of organized crime and the development of criminal syndicates created greater challenges for law enforcement agencies in their attempts to deal with the situation effectively. These problems were compounded by the legislative allocation of societal resources to other seemingly more important and pressing needs. However, legislatures did respond with specialized and complex criminal legislation to better equip prosecutors dealing with specialized and complex law enforcement problems. As a consequence, the number of statutory offenses grew rapidly.

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and defendants have already been sentenced for violating that law. The offense is one against the state, and not against the county—one of its subdivisions. . . .

While the offender may be punished for transporting in either county through which he transports, he cannot be placed in jeopardy in a second county for the same act of continuous transportation. The crossing of a county line creates no new offense; the line constitutes no part of the offense; nor does it possess a single element characterizing it as such. . . . We have in Ohio many laws penalizing single continuous offenses of this character . . . . If a county line be crossed in a single continuous assault, where the first blow is delivered upon one side and a second delivered on the other side of the boundary line, or, if in his uninterrupted process of hunting, a hunter should cross a county line, a single, not separate, offense has been committed . . . . No court has ever held, nor, by the utmost stretch of judicial reasoning, could a court convert these "continuous and uninterrupted" acts into separate offenses against the state, whereby the offender could be subjected to successive prosecutions for the violation of but one law. . . .

. . . .

It is a well-known principle of law that an offense may not be split for the purpose of prosecution.

Id. at 524-29, 172 N.E. at 368-69.

[46] *E.g.*, in Johnson v. Commonwealth, 201 Ky. 314, 256 S.W. 388 (1923), the defendant was dealt approximately seventy-five hands in an illegal game of stud poker. The court held that gambling on each hand was a separate offense, and that a conviction for playing one hand could not constitute a bar to a subsequent prosecution on another hand. *Id.* at 315, 256 S.W. at 389. In *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873), the Court recognized that, historically, "state trials have been employed as a formidable engine in the hands of a dominant administration." *Id.* at 171.

Statutory offenses were relatively broad in scope and few in number when the *Ebeling*[47] and *Blockburger*[48] analyses were developed.[49] With the subsequent proliferation of complex and overlapping statutory offenses, however, prosecutors were able to satisfy these offense-discovering analyses and cull numerous offenses from the same criminal episode. The courts continued reliance on these *same evidence* analyses made successive prosecutions against the same defendant for theoretically distinct offenses an increasingly more frequent occurrence. The perceived erosion of the protection thought to have been afforded by double jeopardy doctrine was not limited to prosecutions in federal courts because most states had adopted the federal approach to resolving state double jeopardy questions.[50] Prosecutors were able to capitalize on the increase probabilities of obtaining a conviction by pleading theoretically different crimes.[51] Prosecutors sought agreeable sentences by trying the cases before different judges and seeking consecutive sentences.[52] Perhaps most significantly, continued strict reliance on the *same evidence* analyses enabled prosecutors to badger some defendants by subjecting them to successive prosecutions.[53]

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[47] *See supra* notes 22-24 and accompanying text.

[48] *See supra* notes 25-30 and accompanying text.

[49] *See generally Statutory Implementation*, *supra* note 6, at 341-43.

[50] *Double Jeopardy*, *supra* note 10, at 134.

[51] *Id.* at 133.

[52] English, *Double Jeopardy—Defining the Same Offense*, 32 LA. L. REV. 87, 88 (1971) [hereinafter cited as English].

[53] Apart from the expense in time and resources, repeated prosecutions subject an accused to a heavy and continuing psychological burden of embarrassment, insecurity and general anxiety. Green v. United States, 355 U.S. 184, 187 (1957).

Some prosecutors are able to better their positions in plea bargain negotiations by carefully dividing a single episode into separate counts, thus making the maximum potential sentence for conviction on all counts quite intimidating. Such practices increase the potential that an innocent man might plead guilty on one charge to avoid the risk of conviction on all. *See Twice in Jeopardy*, *supra* note 3, at 305.

In Heideman v. United States, 281 F.2d 805 (8th Cir. 1960), the prosecutor announced in open court there would be "no deals," and indicated he would seek a maximum sixty-year sentence for six counts of illegal interstate transportation of forged money orders. At a subsequent conference, the prosecutor allegedly promised to seek and obtain shorter sentences if the defendants pled guilty. After they retracted their pleas of not guilty, the defendants were sentenced to consecutive terms of imprisonment totalling a minimum of twenty years. When the defendants subsequently moved to withdraw the guilty pleas the trial court overruled the motion without a hearing. The court of appeals determined that the defendants' factual allegations, if substantiated, were sufficient to give rise to the inference that "pressure by threat and enticement was improperly brought to bear by the prosecutor in securing the guilty pleas." *Id.* at 808. Remanding the case for further proceedings, the court of appeals went on to remark in *dicta*, that

The abuse suffered by some defendants[54] at the hands of prosecutors lead jurists and commentators to entertain grave doubts concerning the continued validity of the *same evidence* tests.[55] As the clamor for change grew, some states abandoned the relatively permissive *same offense* analyses and adopted a *same transaction* test as the state double jeopardy standard.[56] Through use of the *same transaction* test, courts effectively compelled prosecutors to join all charges arising from a single criminal transaction in a single trial. Thus, at least for some, the *same transaction* test represented a workable means of ending the potentially abusive reprosecutions permitted by both the *Ebeling* and *Blockburger* analyses.[57]

Although keenly aware of the criticism of the *same evidence* analyses, the United States Supreme Court resisted defendants' attempts to

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although the transportation of the six securities in one automobile at the same time did constitute six separate offenses, "the use of multiple counts in a case like the present one should not cause the actual degree of criminality in the act charged to be exaggerated and magnified beyond reason." *Id.* at 809-10.

[54] Justice Black, in his dissenting opinion in Bartkus v. Illinois, 359 U.S. 121 (1959), described the "victims" of multiple prosecutions in the following terms:

> Inevitably, the victims of such double prosecutions will most often be the poor and the weak in our society, individuals without friends in high places who can influence prosecutors not to try them again. The power to try a second time will be used, as have all similar procedures, to make scapegoats of helpless, political, religious, or racial minorities . . . .

Id. at 163.

[55] Commentators have pointed to conflicting decisions and confusing judicial precedent in support of charges that the courts have failed to "confront the underlying policies which the double jeopardy concept was intended to implement." *Statutory Implementation, supra* note 6, at 344-45. In his dissenting opinion in Gore v. United States, 357 U.S. 386 (1958), Chief Justice Warren expressed his dissatisfaction with existing offense-discovering tests:

> The problem of multiple punishment is a vexing and recurring one. . . .
>
> In every instance the problem is to ascertain what the legislature intended. . . . Normally these are not problems that receive explicit legislative consideration. . . . Placing a case in a category of unit-of-offense problems or the category of overlapping-statute problems may point up the issue, but it does not resolve it.
>
> Where the legislature has failed to make its intention manifest, courts should proceed cautiously, remaining sensitive to the interests of defendant and society alike. All relevant criteria must be considered and the most useful aid will often be common sense.

Id. at 393-94. In a separate dissenting opinion in *Gore*, Justices Douglas and Black expressed a willingness to overrule the *Blockburger* decision. *Id.* at 395.

[56] *See Double Jeopardy, supra* note 10, at 134.

[57] The *same transaction* test operates more as a rule of compulsory joinder than it does as a test which measures the number of separately punishable offenses. Because the *same transaction* test operates to bar successive reprosecutions, the test does not resolve questions of multiple punishment which might linger after a single trial involving multiple counts. Theoretically, the *Ebeling* and *Blockburger* analyses could be retained to resolve the multiple punishment issue in such cases.

employ the *same transaction* test in federal courts.[58] While the Court refused to abandon its rigid reliance on the analyses of *Ebeling* and *Blockburger*, the Court was not completely unmindful of the plight of those suffering abusive reprosecution in state and federal courts. Increasingly, the Supreme Court began to abandon its relatively conservative and narrow view of the protection afforded by the federal double jeopardy clause. Directly and indirectly, the Court extended and refined other aspects of double jeopardy protection.[59]

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[58] *See* Ashe v. Swenson, 397 U.S. 436 (1970); Gore v. United States, 357 U.S. 386, 388-90 (1958).

The *same transaction* test was advocated as a replacement for the *same evidence* test by Justices Brennan, Douglas and Marshall in a separate concurring opinion in *Ashe*, 397 U.S. at 454-55. The *same transaction* test is said to be more in line with a layman's conception of fair play. English, *supra* note 52, at 92. But it has been criticized as no real improvement over the *same evidence* test because it is arguably subject to great manipulation. Horack, *The Multiple Consequences of a Single Criminal Act*, 21 MINN. L. REV. 805, 818 (1937); *see also infra* note 62 and accompanying text.

[59] In Bell v. United States, 349 U.S. 81 (1955), the Court indirectly extended the reach of the double jeopardy clause in federal cases involving alleged multiple violations of the same statutory provision. Building upon concepts employed in *Snow* and *Ebeling*, the Court adopted a "rule of lenity" for use in federal cases where the statute and legislative history failed to unambiguously define the proper unit of prosecution for an offense. The *Bell* Court stated:

> When Congress has the will it has no difficulty in expressing it—when it has the will, that is, of defining what it desires to make the unit of prosecution . . . . When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. And this not out of any sentimental consideration, or for want of sympathy with the purpose of Congress in proscribing evil or antisocial conduct. It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment. This in no way implies that language used in criminal statutes should not be read with the saving grace of common sense with which other enactments, not cast in technical language, are to be read. Nor does it assume that offenders against the law carefully read the penal code before they embark on crime. It merely means that if Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses . . . .

Id. at 83-84.

After *Bell*, the "rule of lenity" became a fixture in federal law and came to be applied regularly by the courts as a last resort rule of construction to resolve questions of legislative intent. In cases which withstood the constitutional scrutiny of the *Ebeling* and *Blockburger same evidence* tests, the "rule of lenity" was on occasion employed to resolve the question of whether Congress intended to impose concurrent or consecutive terms of imprisonment for convictions arising out of a single criminal episode. *See Consecutive Sentences*, *supra* note 8, at 925-26.

But the "rule of lenity" is not a talisman which requires reversal in every case. As pointed out by the Court in Callanan v. United States, 364 U.S. 587 (1961), the "rule of lenity" is applied only in those instances where careful scrutiny of all the

Some legal scholars, who were dissatisfied with the Supreme Court's slow but deliberate response to the growing multiple prosecution problem, proposed statutory solutions to resolve the multiple punishment controversy.[60] Commentators maintained that general legislative direc-

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circumstances fails to reveal a clear legislative intent with respect to the question at hand, whether it concerns the unit of prosecution or the mode of punishment. *Id.* at 596-97. In Gore v. United States, 357 U.S. 386 (1958), the defendant was convicted of six narcotics violations arising out of two different sales of heroin. With respect to each sale, it was charged that the drugs had been illegally imported, that the sales were not legally made "in pursuance of a written order," and that the drugs were not legally sold "in the original stamped package or from the original stamped package." *Id.* at 387. Rejecting the application of the "rule of lenity" and affirming the convictions, the Supreme Court pointed out that "[b]oth in the unfolding of the substantive provisions of law and in the scale of punishments, Congress has manifested an attitude not of lenity but of severity toward violation of the narcotics laws." *Id.* at 391.

Apart from the development of the "rule of lenity," the Supreme Court in other ways extended the reach of the protection afforded by the fifth amendment. In perhaps its boldest move, the Court in Benton v. Maryland, 395 U.S. 784 (1969), held that the federal double jeopardy clause was applicable to state court prosecutions through the due process clause of the fourteenth amendment because it "represents a fundamental ideal in our constitutional heritage." *Id.* at 794. In so ruling, the Court abandoned its thirty-two year old decision in Palko v. Connecticut, 302 U.S. 319 (1937). The *Benton* decision was accorded full "retroactive" effect in North Carolina v. Pearce, 395 U.S. 711, 717 (1969).

Although the *Benton* and *Pearce* decisions went far in bringing double jeopardy protections in state courts up to federal constitutional standards, defendants in both state and federal courts were still being subjected to vexing reprosecutions for single criminal episodes. The call for change reached a crescendo in 1970, when the Court ruled for the first time that the doctrine of collateral estoppel was a part of the double jeopardy protection afforded by the fifth amendment. In Ashe v. Swenson, 397 U.S. 436 (1970), the Supreme Court held that once an issue of ultimate fact has been properly determined between the parties to a criminal prosecution, such issue cannot again be litigated in any future lawsuit between such parties.

The *Ashe* decision provided prosecutors some incentive to simultaneously try all charges involving the same factual issues or risk losing the ability to prosecute unincluded charges in the event of an acquittal. But in cases where factual issues were resolved in favor of the prosecution, the *Ashe* decision did little to soften the potentially crushing blows of reprosecution permitted by the Supreme Court's refusal to abandon the *same evidence* analyses. Thus, there remained inherent in the *Ebeling* and *Blockburger* analyses the potential for abuse long criticized by laymen and lawyers.

[60] *See generally Statutory Implementation, supra* note 6, at 351-63; Note, *Double Jeopardy: Multiple Prosecutions Arising from the Same Transaction*, 15 AM. CRIM. L. REV. 259, 286-89 (1978); Kirchheimer, *supra* note 7, at 534-42; American Law Institute, *Administration of the Criminal Law: Double Jeopardy* 128-29 (1932); RESTATEMENT OF DOUBLE JEOPARDY, § 22 (Official Draft 1935); AMERICAN LAW INSTITUTE, DOUBLE JEOPARDY ACT (1935); MODEL PENAL CODE, §§ 1-4 (Tent. Draft 1953). However, courts have shown a tendency to disregard statutory solutions to double jeopardy controversies. Kirchheimer, *supra* note 7, at 531.

tives should be designed to guide the courts and provide answers to such questions as: 1) whether the conduct of the defendant constitutes a single but continuing offense, 2) whether the number of victims affects the seriousness of the offenses or requires multiple punishment, 3) whether one offense consumes another, and 4) whether and under what circumstances specific criminal statues displace the operation of general criminal statutes.[61] The proponents of statutory solutions recognized the delicate role played by the legislature in defining offenses for double jeopardy purposes, and offered their theories as a means of guiding courts in multiple punishment cases. While each statutory approach had its advocates, most were criticized for real or perceived shortcomings.[62] These shortcomings, and differences of opinion regarding the need for statutory solutions, prevented the clear emergence of one test or formulation as the preferred solution to all existing controversies.[63] In the context of these events, the Ohio General Assembly eventually enacted the Allied Offense Statute.

III. MULTIPLE CONVICTION STATUTE IN OHIO: IS IT CLEAR?

The legislatures of many states, including Ohio, have for some time been cognizant of the fact that the sovereign has demonstrated a tendency to over-indict and over-prosecute some defendants. In some states, statutes[64] have been enacted that foster the policy prohibiting multiple convictions or consecutive sentences for a single criminal episode. It is evident that these statutes are attempting to eliminate multiple punishment where only a single unit of conviction should exist.

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[61] *See Statutory Implementation, supra* note 6, at 367.

[62] In some states, statutes have codified the "same transaction" test as a solution to the multiple prosecution problem. *See, e.g.*, CAL. PENAL CODE § 654 (West 1980 & Supp. 1982). Yet the *same transaction* test has many critics. While the test might theoretically provide greater protection than the *same evidence* analyses, the *same transaction* test is very arguably subject to judicial manipulation.

> The principal shortcoming of this approach is that any sequence of conduct can be defined as an "act" or "transaction." An act or transaction test itself determines nothing. . . . Whether any span of conduct is an act depends entirely upon the verb in the question we ask. A man is shaving. How many acts is he doing? Is shaving an act? Yes. Is changing the blade in one's razor an act? Yes. Is applying the lather to one's face an act? . . . Yes, yes, yes.

Twice in Jeopardy, supra note 3, at 276. For additional criticism, see English, *supra* note 52, at 91-92.

[63] However, in those jurisdictions which adopted an "act" or "transaction" test, many courts moved to a "motivating intent" analysis to determine the scope of a criminal transaction. *See* Neal v. State, 55 Cal. 2d 11, 357 P.2d 839, 9 Cal. Rptr. 607 (1960); *Twice in Jeopardy, supra* note 3, at 275-76 n.62.

[64] *E.g.*, OHIO REV. CODE ANN. § 2941.25 (Page 1982); CAL. PENAL CODE § 654 (West 1980 & Supp. 1982); 9 CRIME & DELINQUENCY 339 (1969); N.Y. PENAL LAW § 70.25(2) (McKinney 1975).

The problem with such statutes is in describing precisely what constitutes a single criminal act or episode.

Ohio adopted its multiple conviction statute, the Allied Offense Statute, in 1974.[65] Within a relatively short time after its enactment, Ohio Revised Code section 2941.25 was frequently relied upon by defendants facing multiple convictions. Within an equally short period, section 2941.25 became a source of judicial conflict. Ohio courts differed fundamentally in their approach to the multiple punishment controversy. Section 2941.25 provides that a defendant can be convicted only once "[w]here the *same* conduct by defendant can be construed to constitute two or more allied offenses of similar import. . . ."[66] This section further provides that "[w]here defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed *separately or with a separate animus* as to each . . . the defendant may be convicted of all of them."[67]

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[65] 134 Ohio Laws 1994 (1972), codified at OHIO REV. CODE ANN. § 2941.25 (Page 1982).

[66] OHIO REV. CODE ANN. § 2941.25(A) (Page 1982) (emphasis added). The full text of subsection (A) provides that "[w]here the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one."

[67] *Id.* at § 2941.25(B) (Page 1982) (emphasis added). The full text of subsection (B) provides:

> Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of them all.

From a procedural perspective, allied offense issues theoretically arise at two different times in cases involving a single criminal episode. In cases where the defendant is simultaneously tried on multiple counts involving allied offenses, the allied offense issue does not arise until after guilty verdicts are returned by the trier of facts on allied counts. Prior to return of the verdict, the multiple punishment issue may be raised by motion challenging the sufficiency of the evidence. After return of the verdict, the allied offense statute operates as a "sentencing vehicle" to resolve the multiple punishment issue prior to determination of the sentence. State v. Kent, 68 Ohio App. 2d 151, 428 N.E.2d 453 (8th Dist. 1980) (Cuyahoga County). Where the defendant is simultaneously tried on multiple counts involving allied offenses, the trial court's disposition of the allied offense issue is appealable upon journalization of the sentence.

In other cases where the defendant is successively tried for allied offenses arising out of a single criminal episode, the allied offense issue arises, at the earliest, prior to trial in the second prosecution. At the latest, the issue arises prior to sentencing in the second prosecution. Where the defendant is successively tried for allied offenses, a pretrial disposition of the allied offense issue in the second prosecution is a final appealable order if the hearing upon the motion to dismiss constitutes a "special proceeding" within the meaning of § 2505.02 of the Ohio Revised Code. If the allied offense issue is not determined prior to trial in

Many cases decided under Ohio Revised Code section 2941.25 are distressingly inconsistent with each other, both in terms of their legal analysis[68] and the divergent results reached on similar facts. The following discussion focuses on whether the Allied Offense Statute can be the subject of conflicting judicial results without being so vague as to offend the due process clause[69] of the fourteenth amendment.

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the second proceeding, the issue is appealable upon journalization of the sentence in the second case.

Pursuant to § 3(B)(2) of article IV of the Ohio Constitution and § 2953.02 of the Ohio Revised Code, the Ohio Court of Appeals is vested with jurisdiction to review "judgments or final orders" of inferior courts within respective districts. Generally, what constitutes a final order is statutorily defined. Section 2505.02 of the Ohio Revised Code provides, in part, that "[a]n order affecting a substantial right in an action which in effect determines the action and prevents a judgment, [or] an order affecting a substantial right made in a *special proceeding* . . . is a final order which may be reviewed . . . ." (Emphasis added).

In State v. Thomas, 61 Ohio St. 2d 254, 400 N.E.2d 897, *cert. denied*, 449 U.S. 852 (1980), the court held that a pretrial hearing upon a claim of double jeopardy involved an issue entirely collateral to the guilt or innocence of the defendant, and should be considered a "special proceeding" within the meaning of § 2505.02. The *Thomas* court further held that the pretrial ruling on the double jeopardy issue was a final and appealable order. Although the analogy to the *Thomas* case is less than perfect, a pretrial ruling upon an allied offense claim raised in a second prosecution also involves an issue which is collateral to the guilt or innocence of the defendant upon the second charge. There are substantial reasons for treating such a pretrial ruling as a final appealable order. First, and foremost, it is unfair to try a defendant for an offense upon which he cannot be convicted pursuant to § 2941.25. Second, trying a defendant for an offense upon which he cannot be convicted wastes valuable judicial resources. Third, if the double jeopardy and allied offense issues are simultaneously raised before trial in the second proceeding, simultaneous appeal of both issues would permit the court of appeals to avoid resort to constitutional principles to resolve multiple punishment issues in some cases.

If the allied offense issue is not brought to the attention of the trial court, but is raised in the court of appeals, any error committed by the trial court in sentencing the defendant upon allied offenses is cognizable under the "plain error" doctrine. *See* State v. Kent, 68 Ohio App. 2d 151, 428 N.E.2d 453 (8th Dist. 1980) (Cuyahoga County); OHIO R. CRIM. P. 52.

[68] *Compare* State v. Mayfield, No. 40278 (Ohio 8th Dist. Ct. App. Nov. 23, 1978) (Cuyahoga County) (pursuant to § 2941.25, kidnapping and rape merge under the *Blockburger* test of double jeopardy) *with* State v. Keyes, No. 40328 (Ohio 8th Dist. Ct. App. May 1, 1980) (Cuyahoga County) (rape and kidnapping are committed separately if rape occurs during transport in van). *Compare* State v. Kent, 68 Ohio App. 2d 151, 428 N.E.2d 453 (8th Dist. 1980) (Cuyahoga County) (issue of whether offenses merge is one of law for the court) *with* State v. Flynn, No. 41208 (Ohio 8th Dist. Ct. App. July 31, 1980) (issue of whether offenses merge is one of fact for the jury). All of the above cases expressly *followed* the Allied Offense Statute.

[69] U.S. CONST. amend. XIV provides in pertinent part that no state shall "deprive any person of life, liberty, or property, without due process of law . . . ." The literal language of the due process clause of the fourteenth amendment has been given a substantial judicial gloss in ascertaining what process is due. For a

A. *Traditional Tests of Clarity*

Due process requires that criminal laws afford complete notice of what the state forbids or commands.[70] It is well accepted that no person can be expected to speculate as to the meaning of a law at the risk of his life, liberty or property. In criminal cases, one focus of due process is upon the personal right to not be held criminally liable for an act or conduct which no reasonable person would understand to have been proscribed.[71] This personal right is deeply engrained in our judicial system through the directive that criminal laws be written with reasonably ascertainable limits.[72]

The Supreme Court has stated that it can be exceedingly difficult at times to draw the line between permissible uncertainty in statutes and the unconstitutional vagueness that would leave open to speculation the conduct proscribed.[73] Though difficult to draw such a line, the Supreme Court has admonished that the "standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement."[74] Therefore, when a court is faced with a statute lacking full clarity, it must be mindful that its criminal proscription requires a concomitant higher level of definiteness.[75]

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discussion of the development of "due process," *see* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 385-410 (1978).

[70] Lanzetta v. New Jersey, 306 U.S. 451 (1939).

[71] United States v. Laûb, 385 U.S. 475 (1967).

[72] In United States v. Cohen Grocery Co., 255 U.S. 81 (1921), the statute in issue forbade willfully making any unjust or unreasonable rate or charge in dealing with any "necessaries." The Court found the statute impermissibly vague as it did not forbid any specific or definite act, but left open to speculation the type of conduct which would transgress the statute. *Id.* at 94-95.

The statute in *Cohen* was patently vague. However, not all vagueness problems need be so patent. Vagueness may become apparent only after repeated attempts to place a judicial gloss upon the statute. Such near latent ambiguity is equally as invidious and unfair as patent ambiguity. *Cf.* Bouie v. City of Columbia, 378 U.S. 347 (1964) ("[t]here can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language." *Id.* at 352).

[73] Winters v. New York, 333 U.S. 507 (1948).

[74] *Id.* at 515.

[75] *See* Connally v. General Constr. Co., 269 U.S. 385 (1926):

> [I]t will be enough for present purposes to say generally that the decisions of the court, upholding statutes as sufficiently certain, rested upon the conclusion that they employed words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them or a well-settled common-law meaning, notwithstanding an element of degree in the definition as to which estimates might differ . . . .

Id. at 391. *See also* Raley v. Ohio, 360 U.S. 423 (1959), in which the Court held that "[a] State may not issue commands to its citizens, under criminal sanctions,

The requirement of a higher level of certainty in criminal statutes is not so stringent as to require absolute certainty in its terms. Reasonable certainty is all that is required. Furthermore, a fundamental precept of the due process doctrine is that a court reviewing a criminal statute has a duty to give the statute a construction that would make the statute constitutionally certain in meaning.[76] It follows that if any reasonable and practical construction can be given to the language of a criminal statute, then the statute may not be held void for vagueness or uncertainty.[77] The Ohio Allied Statute may not be evaluated, however, upon the mere backdrop of a judicial duty to reasonably construe the statute. The statute must be inherently capable of a reasonable construction. This latter requirement can only be satisfied through adequate drafting of the penal law by the legislative body itself.

B. *Legislative Bodies Define Crimes and Establish Punishments*

The definition of a crime and determination of its punishment is within the sole purview of the legislative body. As stated in *United States v. Wiltburger*,[78] "[i]t is the legislature, not the Court, which is to define a crime, and ordain its punishment."[79] Punishment is, after all, the expression of society's disdain for certain acts or conduct. It represents a retributive sentiment enacted pursuant to the then current mores of society.[80] It is well established that the legislature is the only proper vehicle for expression of society's desire for deterrence, restraint, retribution and rehabilitation.[81]

The foregoing tenets of penal law apply with equal force in Ohio. The

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in language so vague and undefined as to afford no fair warning of what conduct might transgress them." *Id.* at 438.

[76] United States v. Harriss, 347 U.S. 612 (1954). The term "constitutionally certain" is used to denote the difference between absolute certainty and that degree of certainty which would place a reasonable person on notice of the statute's scope of proscriptions.

[77] State v. Lisbon Sales Book Co., 200 N.E.2d 587 (7th Dist. 1963) (Columbia County), *aff'd*, 176 Ohio St. 482, 200 N.E.2d 590 (1964), *cert. denied*, 379 U.S. 673 (1965). It must constantly be borne in mind, however, that the courts may not search beyond the true, narrow intention of the legislature while attempting to construe the statute with certainty. *See* United States v. Wiltberger, 18 U.S. (5 Wheat.) 76 (1820).

[78] *Wiltberger*, 18 U.S. (5 Wheat.) 76.

[79] *Id.* at 95.

[80] *See generally* Gerber & McAnny, *Punishment: Current Survey of Philosophy and Law*, 11 ST. LOUIS U.L.J. 491 (1967).

[81] *See generally* R. DONNELLY, J. GOLDSTEIN & R. SCHWARTZ, CRIMINAL LAW 320-510 (1963). "[P]unishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, on the part either of the punishing authority himself or of those 'in whose name' the punishment is inflicted." J. FEINBERG, DOING AND DESERVING 98 (1970).

General Assembly has been given the power to create law by the Constitution of Ohio;[82] no such power was given to the courts. If the Allied Offense Statute, as a "sentencing vehicle,"[83] does not indicate the proper circumstances under which two or more *crimes* are allied, and are as such merged for purposes of conviction, then the state courts have no power to create their own rules for levying the wrath of society.[84] The statutes must create the crime and its punishment. If a court were to create its own punishments, they would be void *ab initio*.[85] This inherent limitation upon a court's power to construe criminal law was established in the landmark decision of *Crepps v. Durden*.[86] The rule of

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[82] OHIO CONST. art. II, § 1.

[83] State v. Kent, 68 Ohio App. 2d 151, 428 N.E.2d 453 (8th Dist. 1980) (Cuyahoga County). "When we speak of the allied offense doctrine, we are speaking of offenses for which an individual may be sentenced. In reality, the allied offense statute is a sentencing vehicle." *Id.* at 154, 428 N.E.2d at 456.

[84] Exactly what constitutes "a crime" or "several crimes" is one aspect of the current Allied Offense Statute that often eludes reasonable ascertainment. Section 2941.25 of the Ohio Revised Code provides cumulative convictions for "offenses of dissimilar import" and for "same or similar kind [offenses] committed separately or with a separate animus as to each . . . ." OHIO REV. CODE ANN. § 2941.25(B) (Page 1982). Did the General Assembly intend the terms "separately" and "separate animus" to be distinct alternatives between which a court might arbitrarily choose, or did the General Assembly intend the term "separate animus" to modify and define the scope of the term "separately"? One would certainly hope that the latter was intended. To allow a court to exercise unbridled discretion to choose whether it would convict based upon how it viewed the time sequence for particular conduct or upon how it viewed the intent of the actor would be unreasonable. The Committee Comment to § 2941.25 of the Ohio Revised Code indicates that a narrow construction of the statute was intended, a construction which limits the units of conviction. "The basic thrust of the section is to prevent 'shotgun' convictions." *Id.* The Comment also states that the section permits convictions for offenses "committed at different times or with a separate 'ill will' as to each . . . ." *Id.* There is nothing in the statute or the Comment, however, that clearly demonstrates that the General Assembly believed several distinct, unassociated and insular "ill wills" could exist simultaneously where only a single victim is involved. Therefore, the General Assembly must have intended the terms "separately" and "separate animus" to be read in *pari materia*.

[85] *Cf.* United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812) (Legislative authority must first make an act criminal, and then attach a punishment.). Similarly, the Ohio Constitution vests the law-making power in the General Assembly.

[86] 98 Eng. Rep. 1283 (K.B. 1777). English common law was specifically incorporated into Ohio common law in Bloom v. Richards, 2 Ohio St. 387 (1853):

> The English common law, so far as it is reasonable in itself, suitable to the condition and business of our people, and consistent with the letter and spirit of our federal and state constitutions and statutes, has been and is followed by our courts, and may be said to constitute a part of the common law of Ohio.

Id. at 390. *See also* State v. McElhinney, 88 Ohio App. 431, 100 N.E.2d 273 (5th Dist. 1950) (Delaware County). In a world of complex, statutory penal law, the common law is heavily relied upon where,

Crepps is that no court may fashion multiple convictions apart from the legislative intent as to the proper unit of conviction. This is the rule in Ohio as well.[87] If the Ohio Allied Offense Statute was enacted to prevent *shotgun* convictions, then pursuant to *Crepps*, a court is duty bound to recognize this intent.

The United States Supreme Court, relying particularly upon *Crepps*, adopted the legislative intent test in construing the criminal cohabitation statute in *Snow*.[88] Judicial severance of a single course of criminal conduct into separate crimes, merely because the crime continues over a period of time, is "wholly arbitrary"[89] where there is an absence of specific legislative intent to so divide the continuous conduct. This rule, which requires adherence to legislative definitions to determine units of conviction, is a tenet of penal law well recognized by the Ohio Supreme Court: "The authority of the General Assembly to define crimes and offenses in this state and to determine what acts are essential to constitute a violation of the statute is so well established that citation of authority in support thereof is unnecessary."[90]

The Ohio Allied Offense Statute must be carefully construed in light of *Crepps* and *Snow*. The statute should command case law that is consistent and affords defendants fair notice of what conduct will result in multiple punishment. The statute's progeny should not be frought with irreconcilable divisions of conduct into separate convictions in some instances but not in other analogous instances based merely upon the court's arbitrary divisions into temporal units which provide a false hook upon which courts may hang the cloak of separateness.[91] The Ohio Supreme Court's treatment of the Allied Offense Statute must be explored to determine first whether the statute is adequately clear in its sentencing mandates, and secondly to determine whether the Ohio Supreme Court has been true to longstanding tenets of penal law in its application of the statute.

> as is frequently the case, a statute merely restates some part of the common law, [and] this is a matter of great importance because the words used in the statute may have a great body of common-law [*sic*] interpretation which does not appear in the enactment itself, but will be followed by the courts in deciding cases.

R. PERKINS, CRIMINAL LAW 25 (2d ed. 1969).

[87] State v. Healy, 156 Ohio St. 229, 239-40, 102 N.E.2d 233, 239 (1951).

[88] 120 U.S. 274 (1887).

[89] *Id.* at 282. The defendant had received three consecutive convictions upon a charge of cohabitation with seven women over a period of almost three years. The Court recognized that the legislature could never have intended to vest the judiciary with discretion to create its own units of conviction at will, even if the division was into tidy annual units. *Id.* at 283-86.

[90] *Healy*, 156 Ohio St. at 239-40, 102 N.E.2d at 239.

[91] *Compare* State v. Butts, No. 38836 (Ohio 8th Dist. Ct. App. June 21, 1979) (Cuyahoga County) (fondling, as gross sexual imposition, separate from rape due to consecutive sequence) *with* State v. Nash, No. 41450 (Ohio 8th Dist. Ct. App. Sept. 25, 1980) (Cuyahoga County) (Allied Offense Statute merges gross sexual imposition and rape into one continuous assaultive episode.).

C. *Ohio Multiple Conviction Cases: A Clear Statute Could Underlie the Inconsistency*

A clear statute could underlie inconsistent precedent, if *constitutionally clear* means reasonably clear, not absolutely clear. Although the Allied Offense Statute may have been somewhat inartfully drawn with respect to its phrase "separately or with a separate animus,"[92] the rule of *Crepps*[93] is that the legislature defines the unit of conviction. A unit of conviction under the Allied Offense Statute should encompass conduct committed with a single continuous objective or purpose or animus separate from other distinct purposes or objectives. This would constitute a strict construction of the statute against the state and liberally in favor of the defendant, a rule of construction properly recognized by the Ohio Supreme Court.[94] The Ohio Supreme Court is not, however, following this rule of construction in the present context. Instead, the court has taken a course which has deviated toward infinite division of continuous conduct into multiple units of conviction based solely on lapse of time. In *Snow*,[95] the United States Supreme Court warned that such judicial conduct can be arbitrary.

The first close examination and analysis of the Allied Offense Statute by the Ohio Supreme Court was in *State v. Logan*.[96] In *Logan*, the defendant had been convicted of kidnapping and rape for having forced the victim into an alley and down a stairwell, where he sexually assaulted her. The supreme court, basing its decision upon section 2941.25(B), reversed the kidnapping conviction reasoning that the defendant possessed a single animus during the asportation and assaultive episode.[97] The court read the Allied Offense Statute as requiring a two-tier analysis: 1) under subsection (A), the offenses are allied if the similarity of the elements of the crimes corresponds to "such a degree that commission of the one offense will result in the commission of the other";[98] and 2) "notwithstanding the fact that a defendant is charged with two or more offenses of the same or similar kind he may be convicted of all of them if he committed them separately, or if he possessed

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[92] OHIO REV. CODE ANN. § 2941.25(B) (Page 1982).

[93] 98 Eng. Rep. 1283 (K.B. 1777).

[94] State v. Merriweather, 64 Ohio St. 2d 57, 59, 413 N.E.2d 790, 791 (1980).

[95] 120 U.S. 274 (1887).

[96] 60 Ohio St. 2d 126, 397 N.E.2d 1345 (1979).

[97] *Id.* at 135-36, 397 N.E.2d at 1352.

[98] *Id.* at 128, 397 N.E.2d at 1348. The court went on to state that the protection of § 2941.25(A) of the Ohio Revised Code was available only if the prosecution relied upon the "same conduct" to support the multiple convictions. *Id.* It is not clear, however, what the court meant by "same conduct." Conduct is an amorphous term which courts cling to when they fail to accurately define unit of conviction. Conduct could, for example, be the slightest movement of a hand, or it could be an illegal drag race through seven counties.

a separate 'animus' as to each."[99] The court recognized that the Allied Offense Statute codified the common law doctrine of merger and attempted to limit the scope of section 2941.25(B) by holding that "[w]here an individual's immediate motive involves the commission of one offense, but in the course of committing that crime he must, *a priori*, commit another, then he may well possess but a single animus, and in that event may be convicted of only one crime."[100] The court in *Logan* disallowed the multiple conviction and reversed the kidnapping conviction because it recognized that the General Assembly required an examination of defendant's mental state, rather than a division of conduct into sequential moments of time, in determining the proper unit of conviction.

After *Logan*, the supreme court began to excise any consideration of separate animus and began to concentrate on ways to construe conduct to make it separate. In *State v. Ware*,[101] the court held that the defendant committed kidnapping separately from rape where the defendant enticed the victim to his house by letting her believe she could use his phone. The court did not discuss how this differed from *Logan* where the defendant, under the pretext of a drug sale, had coaxed the victim to an alley, where the victim was raped. The court in *Ware* merely concluded that the defendant's acts were separate because the episode took longer to complete.[102] The court did not engage in the *Snow* analysis of legislatively intended units of conviction.[103] The court did not attempt to apply its own rule of construction that criminal statutes be construed strictly against the state. Rather, it chose to ignore the requirement of a separate animus and latched upon the statutory term "separately" to justify multiple convictions notwithstanding the possibility that the defendant had engaged in an extended course of conduct with sexual assault as his only objective.

Once *Ware* had been decided, the Ohio Supreme Court apparently determined that it could further multiply convictions if it declared that "separate" meant any fractional moment of time between one bodily movement and another. *State v. Barnes*,[104] one of the court's most cryptic *per curiam* decisions, held that if any moment of time lapses between

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[99] *Id.* at 129, 397 N.E.2d at 1348.

[100] *Id.* at 131, 397 N.E.2d at 1349. The court was obviously following the spirit of *Crepps* and *Snow* as it stated: "[R]ecognizing that in many cases a single criminal act could constitute two or more similar crimes, the General Assembly attempted to remedy this problem by enacting R.C. § 2941.25 . . . ." *Id.* at 130, 397 N.E.2d at 1349.

[101] 63 Ohio St. 2d 84, 406 N.E.2d 1112 (1980).

[102] *Id.* at 87, 406 N.E.2d at 1114.

[103] Recall that in *Snow*, the defendant's several convictions had been based upon judicial slices of time into neat annual offenses. *See supra* text accompanying notes 18-21.

[104] 68 Ohio St. 2d 13, 427 N.E.2d 517 (1981).

the defendant's sexual assault upon more than one orifice, then the acts are *per se* separate and the defendant may be separately convicted.[105] The court in *Barnes* failed to examine, under the rape statute which defined the offense, the legislatively intended unit of conviction.[106] Yet, such analysis is clearly mandated by *Crepps* and *Snow* when the issue before the court is multiple convictions based upon a continuous assaultive episode. The court's sole focus was to construe the defendant's acts as separate under the Allied Offense Statute in apparent disregard for the rape statute itself. Just as in *Crepps*, where the Parliament intended *activity on Sunday* not *loaves of bread* to represent the unit of conviction, the General Assembly has made *sexual conduct*,[107] not different areas of the body during an uninterrupted episode, the unit of conviction.

The anomalous result in *Barnes* cannot be pinned on the failure of the General Assembly to draft a clearer Allied Offense Statute. Section 2941.25 is constitutionally clear if used, as in *Logan*, with a focus on the intent or animus of the actor. This interpretation would have the inherent effect of merging bits of conduct into criminal episodes which would constitute units of conviction pursuant to the underlying criminal offense statutes.

Notwithstanding the fact that the General Assembly's use of the phrase "separately or with a separate animus" seems to have caused judicial uncertainty as to the proper test to be employed in determining the number of convictions, the Allied Offense Statute is easily saved by employing the *rule of lenity*, also ignored in the present context by the Ohio Supreme Court. The *rule of lenity*, established by Ohio statute[108] and the United States Supreme Court in *Bell v. United States*,[109] requires all ambiguities in a criminal statute to be resolved against the judicial creation of multiple units of conviction. *Barnes* disregards this rule by multiplying convictions to the maximum extent possible without discussing the statutory language which created the offense.

Following the rule of lenity, the Supreme Court in *Ladner v. United States*[110] reversed multiple convictions even where the defendant's blast of a shotgun hit two officers. The Court admonished that:

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[105] *Id.* at 14, 427 N.E.2d at 519 (Celebrezze, C.J., concurring).

[106] The Ohio rape statute forbids "sexual conduct with another not the spouse of the offender . . . ." OHIO REV. CODE ANN. § 2907.02(A) (Page 1982).

[107] "Sexual conduct" is defined as "vaginal intercourse between a male and a female, and anal intercourse, fellatio, and cunnilingus between persons regardless of sex." OHIO REV. CODE ANN. § 2907.01(A) (Page 1982).

[108] OHIO REV. CODE ANN. § 2901.04(A) (Page 1982).

[109] 349 U.S. 81 (1955). *Accord* State v. Merriweather, 64 Ohio St. 2d 57, 413 N.E.2d 790 (1980).

[110] 358 U.S. 169 (1958).

> When choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication.[111]

The objectionable part of *Barnes* is that it creates multiple units of conviction out of "sexual conduct" where the General Assembly never clearly evidenced an intent to so divide the conduct. The Allied Offense Statute cannot be cured of any vagueness problem by using it to leverage multiple convictions out of criminal offense statutes by mechanically using the term "separately" to focus upon infinitely smaller and smaller sequences of muscular contractions, each of which repeatedly violates the law.[112] The Allied Offense Statute, as a sentencing vehicle, must be used with the statute defining the underlying offense to discern the totality of conduct which constitutes a singular violation of the law. Then, the court may consider whether there are several, distinct *totalities of conduct* which could justify multiple convictions.

IV. A CONSTITUTIONALLY IMPLICATED THREE-TIER ALLIED OFFENSE ANALYSIS

A. Brown v. Ohio

Since 1974, Ohio courts have looked both to the Allied Offense Statute and the statute or statutes defining the substantive offenses in attempting to determine the unit of convictions in multiple-punishment cases. However, as the cases demonstrate, the application of the Allied Offense Statute by Ohio courts has been inconsistent and has produced some seemingly harsh and contradictory results.[113] Moreover, the

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[111] *Id.* at 177-78, *quoting* United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221-22 (1952).

[112] *Cf.* Bouie v. Columbia, 378 U.S. 347 (1964) ("judicial enlargement of a criminal act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness.") *Id.* at 352, *quoting* Pierce v. United States, 314 U.S. 306, 311 (1941).

[113] *Compare* State v. Nash, No. 41450 (Ohio 8th Dist. Ct. App. Sept. 25, 1980) (Cuyahoga County), *and* State v. Davis, No. 42610 (Ohio 8th Dist. Ct. App. Sept. 24, 1981) (Cuyahoga County) (fondling immediately preceding or following rape not committed with a separate animus), *with* State v. Moralevitz, 70 Ohio App. 2d 20, 433 N.E.2d 1280 (8th Dist. 1980) (Cuyahoga County) (three acts of fondling committed separately). *And compare* State v. Torres, No. 34102 (Ohio 8th Dist. Ct. App. Oct. 23, 1975) (Cuyahoga County) (three penetrations of same victim during ten to fifteen minute episode of sexual conduct constitutes three separately punishable rapes), *with* State v. Cartellone, No. 43711 (Ohio 8th Dist. Ct. App. Dec. 3, 1981) (Cuyahoga County) (three shots fired at one intended victim constitutes one punishable assault).

judicial gloss placed upon the statute by some courts has arguably turned it into a prosecutorial sword. This gloss has also arguably thwarted the avowed legislative purpose to prevent "shotgun" convictions. As construed, the statute has compounded, rather than alleviated, the potential for injustice inherent in the traditional *same evidence* double jeopardy offense-discovering analyses.

It appears that Ohio courts may continue to give varying interpretations to the Allied Offense Statute. A consitutional remedy may be available, however, for some defendants who are multiply convicted at one trial, or repeatedly prosecuted for crimes committed *separately* pursuant to section 2941.25(B). In one Ohio case involving a single and continuing offense, the United States Supreme Court reversed a conviction on federal double jeopardy grounds notwithstanding the Ohio Court of Appeals' conclusion that the defendant committed two offenses *separately*.[114]

In *Brown v. Ohio*,[115] the defendant stole a car and was caught nine days later driving the vehicle in an adjoining county.[116] He thereafter pled guilty in the Willoughby Municipal Court to the charge of *joyriding* in the City of Wickliffe on December 8, 1973, the date of his apprehension by Wickliffe police.[117] The next day, he was formally charged in East Cleveland with auto theft.[118] Brown was indicted by the Cuyahoga County Grand Jury for the theft,[119] and for joyriding,[120] in the city of East Cleveland on November 29, 1973, the date the car was stolen. Thereafter, Brown pled guilty in the court of common pleas to auto theft with the understanding that the trial court would entertain a motion to withdraw the guilty plea prior to sentencing on double jeopardy grounds.[121] The charge of joyriding was nolled and dismissed. In support of his motion to withdraw the plea, Brown asserted that his conduct with respect to the same stolen car constituted but one essentially con-

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[114] Brown v. Ohio, 432 U.S. 161 (1977).

[115] *Id.*

[116] Brown was apprehended in the City of Wickliffe, Ohio, located in Lake County. East Cleveland, Ohio, is located in Cuyahoga County, which is west of Lake County.

[117] Journal entry, City of Wickliffe v. Brown, Case No. S-13799 (Willoughby, Ohio Mun. Ct. Dec. 10, 1973).

[118] Complaint, City of East Cleveland v. Brown, Case No. 158984 (East Cleveland, Ohio Mun. Ct. Dec. 11, 1973).

[119] The theft statute, former OHIO REV. CODE ANN. § 4549.04(A) (Page 1973), provided that "[n]o person shall steal any motor vehicle." *Id.* (*repealed* Jan. 1, 1974).

[120] The joyriding statute, former OHIO REV. CODE ANN. § 4549.04(D) (Page 1973), provided that "[n]o person shall purposely take, operate, or keep any motor vehicle without the consent of its owner." *Id.* (*repealed* Jan. 1, 1974).

[121] Brief for Defendant in Support of Motion to Withdraw Plea at 1, State v. Brown, No. CR-12062 (Ohio Cuyahoga County Ct. C.P., filed April 12, 1974).

tinuous offense.[122] Further urging the adoption of a *same transaction* test, he pled the conviction for joyriding as former jeopardy.[123] In its brief in opposition, the prosecution argued that Brown committed two offenses and that jeopardy never attached with respect to the theft offense because the municipal court was without jurisdiction over such offense.[124] In addition, the prosecution urged that the same act could constitute separate offenses under Ohio law.[125] In reply, Brown asserted, *inter alia*, that newly enacted section 2941.25(A) required that his motion to withdraw the guilty plea be granted.[126] The common pleas court overruled the motion to withdraw the guilty plea, and Brown was convicted.[127]

On direct appeal to the Ohio Eighth District Court of Appeals, Brown asserted that he was unconstitutionally prosecuted twice for the *same offense*.[128] Preserving his allied offense argument, Brown further asserted that both the statute and Ohio case law required that the two crimes be *merged*.[129] In response to these contentions, the state argued that Brown was not formerly placed in jeopardy for the theft offenses,[130] and that the two convictions were not precluded as a matter of state law by the doctrine of *merger*.[131] In its brief, the state did not attempt to contradict Brown's contention that he was entitled to the benefit of the Allied Offense Statute.[132]

The court of appeals determined from the statutes creating the two offenses that joyriding was a lesser offense included within the offense

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[122] *Id.* at 1-3.

[123] *Id.* at 2.

[124] Brief for State of Ohio in Opposition to Motion to Change Plea and Dismiss Indictment at 2, State v. Brown, No. CR-12062 (Ohio Cuyahoga County Ct. C.P., filed June 10, 1974).

[125] *Id.*

[126] Reply of Defendant to Brief Opposing Motion to Change Plea and Dismiss Indictment at 3-4, State v. Brown, No. CR-12062 (Ohio Cuyahoga County Ct. C.P., filed June 23, 1974).

[127] Brown was sentenced to six months in jail for auto theft, a felony offense. The sentence was suspended, Brown was ordered to pay court costs and was placed on probation for one year. The sentence was journalized on December 18, 1974, almost twelve months after the Allied Offense Statute went into effect.

[128] Brief of Defendant-Appellant at 3-9, State v. Brown, No. 34316 (Ohio 8th Dist. Ct. App., filed March 4, 1975) [hereinafter "Brief of Appellant"].

[129] *Id.* at 12.

[130] Brief of Plaintiff-Appellee at 3, State v. Brown, No. 34316 (Ohio 8th Dist. Ct. App., filed May 8, 1975).

[131] *Id.* at 7.

[132] In footnote six of his appellate brief Brown argued he was entitled to the benefit of the Allied Offense Statute because it sounded in procedure, and was in effect when he was indicted by the Grand Jury. Brief of Appellant, *supra* note 128, at 12.

of auto theft.[133] It also concluded that the municipal court had jurisdiction over the joyriding charge, and that joyriding and auto theft were the *same offense* for purposes of double jeopardy.[134] Nevertheless, the court of appeals affirmed the judgment of the trial court.[135] Citing *Blockburger's same evidence* test, the court unanimously concluded that the convictions for joyriding and auto theft did not offend double jeopardy because the convictions were not "premised on the same operative act."[136] In the course of its opinion, the court of appeals emphasized that the charges arose out of *two separate acts* nine days apart.[137] The court never mentioned Brown's allied offense argument and was convinced that joyriding and auto theft were not parts of a single episode. The court reasoned that "[t]he doctrine of *merger* precludes separate sentences on multiple convictions when the convictions are based upon the same act . . . . [Here] the two convictions were based on two distinct acts and not the same act; therefore, the doctrine of merger is inapplicable."[138] In effect, the court of appeals sanctioned the division of Brown's criminal episode into temporal units in much the same manner as the Ohio Supreme Court later did in *Barnes*. A notice of appeal to the Ohio Supreme Court was filed, but the court dismissed the appeal *sua sponte* on the ground that the case failed to present a substantial constitutional question.[139] The United States Supreme Court granted certiorari.

In his brief to the Supreme Court, Brown asserted that he was twice

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[133] State v. Brown, No. 34316, slip op. at 4 (Ohio 8th Dist. Ct. App. Dec. 31, 1975).

[134] *Id.*

[135] *Id.* at 5.

[136] *Id.* at 3, 5.

[137] *Id.* at 5.

[138] *Id.* In his Motion for Reconsideration, State v. Brown, No. 34316 (Ohio 8th Dist. Ct. App., filed Dec. 19, 1975), Brown assailed the court of appeals analysis, stating:

> [B]oth charges do grow out of the same act. Both the charge of theft and operating continued from November 29th to December 8th, 1973 and constituted one continuous act. It is impossible for either offense to have ceased sometime in between those two dates and then subsequently resume and thereby constitute a separate offense(s) . . . .
>
> Under the Court's reasoning each infinitesimal instant between November 29th to December 8th, 1973 could constitute a separate offense of either auto theft or operating or both. Surely the Fifth Amendment bar to twice in jeopardy [sic] does not permit such a result.

Id. at 1-2. The motion for reconsideration was overruled.

[139] State v. Brown, No. 76-224 (Ohio Sup. Ct. March 19, 1976). In both the trial court and court of appeals, Brown asserted that his second conviction violated both state and federal double jeopardy principles. Presumably, the Ohio Supreme Court's determination that Brown's appeal presented no substantial constitutional issue encompassed both the state and federal constitutions.

prosecuted and convicted for the *same offense* in violation of the federal double jeopardy clause.[140] Brown further asserted that under the court of appeals' strained *same evidence* analysis a single course of conduct could be improperly split into both greater and lesser offenses so long as neither charge covered the same period of time as the other.[141] In the course of his argument, Brown twice emphasized the court of appeals failure to expressly treat the allied offense issue raised by section 2941.25.[142] In an attempt to refute Brown's arguments, the state asserted that the offenses, committed nine days apart, were not the *same* for double jeopardy purposes because each required "proof of a fact which the other does not."[143] The state attempted to undermine Brown's reliance on the Allied Offense Statute by arguing that the statute constituted "an allowance for permissive joinder" which did not require the state to join all counts arising out of the same transaction in a single trial.[144]

The United States Supreme Court reversed the judgment of the court of appeals. Emphasizing that the fifth amendment forbids successive prosecution and cumulative punishment for both a greater and lesser included offense, the Supreme Court treated as conclusive the court of appeals finding that joyriding was an offense included within the offense of auto theft as a matter of state law.[145] But the Court went on to reject the court of appeals conclusion that Brown's conduct was punishable as two separate and distinct crimes committed nine days apart:

> The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units.... The applicable Ohio statutes, as written and as construed in this case, make the theft and operation of a single car a single offense. . . . [T]he specification of different dates in the two charges on which Brown was convicted cannot alter the fact that he was placed twice in jeopardy for the same offense in violation of the Fifth and Fourteenth Amendments.[146]

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[140] Brief for Petitioner at 6-7, Brown v. Ohio, 432 U.S. 161 (1977).

[141] *Id.* at 11.

[142] *Id.* at 6-7 n.3, 20 n.20.

[143] Brief for Respondent State of Ohio at 14, Brown v. Ohio, 432 U.S. 161 (1977).

[144] *Id.* at 26-27 n.16.

[145] 432 U.S. at 167.

[146] *Id.* at 169-70 (footnote and citations omitted).

Both *Brown* and *In re* Nielsen preclude the imposition of multiple punishment for lesser and greater included continuing offenses through the device of indicting the defendant for committing the offenses at different points in time. The Court has in other cases reversed convictions for lesser included offenses on non-constitutional grounds.

In Heflin v. United States, 358 U.S. 415 (1959), the defendant was convicted of

In a revealing footnote, the Supreme Court indicated that the unit of prosecution issue was at the heart of the double jeopardy question:

> We would have a different case if the Ohio Legislature had provided that joyriding is a separate offense for each day in which a motor vehicle is operated without the owner's consent . . . . We also would have a different case if in sustaining Brown's second conviction the Ohio courts had construed the joyriding statute to have that effect. We then would have to decide whether the state courts' construction, applied retroactively in this case, was such "an unforeseeable judicial enlargement of a criminal statute" as to violate due process. See Bouie v. City of Columbia, . . . *cf. In re* Snow . . . Crepps v. Durden . . . .[147]

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bank robbery and of illegally receiving, possessing and disposing of the stolen money in violation of two separate statutory provisions. On appeal to the Supreme Court the conviction for receiving and disposing of the money was reversed on statutory grounds because the Court found no congressional intent "to pyramid penalties for lesser offenses following the robbery." *Id.* at 419. In Milanovich v. United States, 365 U.S. 551 (1961), the defendant, her husband and others conspired to break into a federal commissary. On the night of the break-in, the defendant waited outside the commissary in an automobile as the others broke into the building. While the others were still inside, the defendant drove away. When the others observed that the defendant was no longer outside, they buried the stolen money and departed. Seventeen days later the defendant returned to the commissary to get some of the stolen money. She was later convicted as an accomplice to the theft and was convicted of illegally receiving, concealing or retaining the money with the intent to convert it to her own use. On appeal, the Supreme Court determined that the defendant was improperly convicted of both stealing and receiving the same stolen property. Relying upon its decision in *Heflin*, the Court was unable to conclude that Congress intended to punish each offense separately. *Id.* at 554-55. In a dissent joined by three other members of the Court, Justice Frankfurter concluded that the defendant could have properly been convicted of both charges. Distinguishing the *Heflin* case on its facts, Justice Frankfurter stated:

> The case before us presents a totally different situation—not a coincidental or even a contemporaneous transaction, in the loosest conception of contemporaneity. Here we have two clearly severed transactions. The case against the defendant—and the only case—presented two behaviors or transactions by defendant clearly and decisively separated in time and in will. . . .
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> It surely is fair to say that in the common understanding of men such disjointed and discontinuous behaviors by Mrs. Milanovich . . . cannot be regarded as a single, merged transaction in any intelligible use of English.

Id. at 559. The *Milanovich* dissent illustrates that the division of a criminal episode into temporal units for purposes of separate prosecutions continues to fuel the multiple punishment controversy at all judicial levels.

The *Nielsen*, *Brown*, *Heflin* and *Milanovich* cases demonstrate the interrelatedness of the constitutional "same offense" analysis and the nonconstitutional legislative intent analysis.

[147] 432 U.S. at 169 n.8 (citations omitted).

The significance of the Supreme Court's holding in *Brown* takes on a clearer dimension in light of the dissent's analysis.

Justice Blackmun and two other members of the Court dissented, sharply criticizing the majority for "taking advantage of the opportunity to pronounce some acceptable but hitherto unenunciated (at this level) double jeopardy law."[148] Emphasizing that the court of appeals' decision turned on the fact that the two prosecutions arose out of two incidents nine days apart, Justice Blackmun refused "to ignore as easily as the Court does . . . the specific finding of the Ohio Court of Appeals that the two prosecutions . . . were based on (Brown's) separate and distinct acts committed, respectively, on November 29 and December 8, 1973."[149] In the course of the dissent, Justice Blackmun stated:

> It strains credulity to believe that petitioner was operating the vehicle every minute of those nine days. A time must have come when he stopped driving the car. . . . Only if the (double jeopardy clause) requires the Ohio courts to hold that the allowable unit of prosecution is the course of conduct would the Court's result be correct.[150]

The majority in *Brown* determined that for purposes of double jeopardy the offenses had a continuing duration and the evidence was insufficient to permit more than one conviction. The dissent maintained that there was sufficient evidence to warrant two prosecutions primarily because it held a relatively more narrow view of the duration of the respective crimes.

Although it seems that the *Brown* Court felt constitutionally compelled to reject the Ohio courts conclusion that there were two separately triable and punishable offenses demonstrated by the evidence, it is unclear whether the *Brown* Court considered the Allied Offense Statute in arriving at its conclusion. However, it is clear that the United States Supreme Court was of the opinion that the Ohio courts had failed to give sufficient consideration to the unit of prosecution established by the Ohio legislature for each crime and that such failure had constitutional ramifications. Had the Ohio courts adequately considered the units of prosecution prescribed by the statutes, the fifth amendment issue in *Brown* might have been avoided entirely through the non-constitutional device of statutory construction.

B. *A Proposed Three-Tier Allied Offense Analysis*

Although *State v. Logan*,[151] *State v. Barnes*,[152] and other cases,[153]

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[148] *Id.* at 170-71 (Blackmun, J., dissenting).

[149] *Id.* at 171.

[150] *Id.* at 171-72.

[151] 60 Ohio St. 2d 126, 397 N.E.2d 1345 (1979).

[152] 68 Ohio St. 2d 13, 427 N.E.2d 517 (1981).

[153] In State v. Moralevitz, 70 Ohio App. 2d 20, 433 N.E.2d 1280 (1980), the court

establish a two-tier analysis for the resolution of allied offense issues, the *Brown* decision points to the need to add an intermediate tier to the analysis, either as a matter of state law or constitutional necessity. Such an intermediate step in the analysis would force courts to consider the evidence in light of the units of prosecution prescribed by the pertinent statutes before determining whether allied offenses were committed separately or with a separate animus as to each. Use of such a three-tier analysis to resolve allied offense issues would not only eliminate much of the confusion now associated with the statute, but would also produce more predictable and consistent results.

On its face, the two-tier analysis does not force the courts to consider the various units of prosecution established by the statute or statutes

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explained the two-tier analysis in the following manner:

> [T]he determination of an allied offense question is a two-step process. The first step is a statutory analysis whereby the elements of the applicable statutes are reviewed and a determination made as to whether the offenses are allied offenses of similar import. Offenses of similar import are those which have similar elements, common elements or offenses whose elements correspond to such a degree that the commission of one offense will result in the commission of the other. If the offenses are not allied offenses of similar import, the inquiry is concluded. If the offenses are found to be allied offenses of similar import, then the second step of the inquiry must be undertaken and this constitutes a review of the evidence and a determination made as to whether the offenses were committed separately or with a separate animus as to each. If the offenses were so committed, they cannot be allied offenses and the defendant may be convicted of all of them. If, however, the offenses were committed together with a single animus, they are allied offenses and only one conviction can result.

Id. at ____, 433 N.E.2d at 1284.

In *Moralevitz*, the defendant was indicted for three counts of gross sexual imposition for putting his hand on the victim's chest, for putting his finger between her legs and for putting his tongue between her legs. At trial, the evidence failed to demonstrate how much time elapsed during the commission of these offenses, but did demonstrate that the victim was kidnapped less than two hours. Finding the acts to have been committed "separately," within the meaning of Ohio Revised Code § 2941.25(B), the appellate court rejected the defendant's allied offense argument and affirmed all three convictions. The court did not analyze the unit of prosecution prescribed by the gross sexual imposition statutes, § 2907.06 and § 2907.01(B) of the Ohio Revised Code. Section 2907.06 provides, in part:

> (A) No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons, to have sexual contact when any of the following apply:
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> . . . .
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> (3) The other person, or one of the other persons, is less than thirteen years of age, whether or not the offender knows the age of such person.

Section 2907.01(B) of the Ohio Revised Code defines "sexual contact" as "any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttocks, pubic region, or if such person is female, a breast, for the purpose of sexually arousing or gratifying either person."

defining the respective crimes. As a consequence, courts following the two-tier analysis too often find themselves seizing upon evidence of temporally separate conduct to sustain separate convictions. Where this occurs without regard to the units of prosecution established for the offenses by the legislature, the two-tier analysis raises the spector of constitutional infirmity. At a minimum, the two-tier analysis increases the possibility that a *shotgun* conviction will result in the imposition of more than one punishment for the *same offense*, in violation of the federal, if not the state, double jeopardy clause.

Under the proposed three-tier analysis, if a court concludes from the elements of the various crimes that the case involves "allied offenses of similar import" or "offenses of the same or similar kind," the court should next consider the nature and duration of the criminal "animus" incident to each unit of prosecution prescribed by the statutes defining the offenses. In determining whether it is an act or a course of conduct which is forbidden by a particular statute, the courts should be guided by the rule of lenity established by Ohio Revised Code section 2901.04(A) in resolving unit of prosecution questions where legislative intent is unclear.[154] Only after the court determines whether it is a single act or a course of conduct proscribed by the legislature should it proceed under the third step of the analysis to determine whether the evidence demonstrates that the offenses were committed separately or with a separate animus as to each.

The allied offense decisions that produce results more consistent with the legislative purpose to avoid *shotgun* convictions reflect an implicit, or even unknowing, consideration of the unit of prosecution issue. In *State v. Cartellone*[155] the defendant fired three shots at a single victim from a moving car and was convicted on three counts of felonious assault. Two of the three convictions were reversed on appeal pursuant to the Allied Offense Statute. The appellate court determined that although the shots were fired separately, there existed only a single animus for all the shots.[156] The rapid firing of three separate shots at a single victim in *Cartellone* did not constitute three separately convict-

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[154] OHIO REV. CODE ANN. § 2901.04(A) (Page 1982) provides that "[s]ections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused." *Id.*

[155] No. 43711 (Ohio 8th Dist. Ct. App. Dec. 3, 1981) (Cuyahoga County) (currently being published).

[156] The state in *Cartellone* argued that the mere fact that the defendant's shots might have injured other persons behind the defendant's intended victim was sufficient to support all three convictions pursuant to Ohio Revised Code § 2941.25. Rejecting this contention, the *Cartellone* court stated:

> [The defendant] argues that under § 2941.25 the state failed to demonstrate that he had a separate animus necessary to support convictions for all three charges of felonious assault. We agree. R.C. § 2941.25(B) states that when defendant's conduct "results in two or more offenses of the same . . . kind *committed separately or with a*

able offenses for the same reason that the baking of four loaves of bread on the same Sunday did not constitute four separately punishable offenses in *Crepps v. Durden*.[157] The result in *Cartellone* is correct because all three shots were clearly fired in the course of a single assaultive episode, and because it was less than clear that the legislature intended to convict and punish the defendant separately for each shot under the circumstances.[158]

In one recent case, *State v. Woods*, the court implicitly recognized the critical nature of the relationship between double jeopardy issues, allied offense issues and unit of prosecution issues.[159] In *Woods*,[160] the police stopped an automobile in which the defendants were riding and discovered three loaded revolvers concealed beneath the front seat of the car. Upon conviction for three counts of illegally carrying a concealed weapon, each defendant was sentenced to three consecutive terms of imprisonment. In disposing of the defendants' double jeopardy argument,

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separate animus as to each, . . . the defendant may be convicted of all of them . . . ."

"Animus" has been defined as "purpose, or more properly, immediate motive . . . ."

Where no "separate animus" for multiple counts of the same crime can be shown, it must still be determined under the statute that the offenses were not committed "separately." In our case, [the defendant] fired three successive gunshots . . . . We hold under these facts that [the defendant's] conduct constituted one continuous sequence of acts and that in the absence of a showing of a separate animus, multiple convictions would be a violation of § 2941.25 . . . .

[T]here is no evidence that, [the defendant] had any purpose or motive to harm anyone beside [his victim]. Nor is there any evidence that he had any knowledge of the presence of [bystanders] in the doorway. Since there was no consequential harm resulting to these two innocent bystanders, we cannot transfer the animus to harm [the victim] to [the bystanders], as we would have been called upon to decide had either [of the bystanders] been struck, in view of the well-established legal doctrine that a defendant is responsible for the natural and probable sequence of his acts.

Accordingly, we find the "in substances and effect" [sic] [the defendant] committed only one offense of felonious assault.

Id., slip op. at 8-10 (emphasis in original, citations omitted).

Had the *Cartellone* court failed to implicitly examine the legislatively intended unit of conviction, it might have fallen prey to the misguided analysis of *Barnes* and, without reference to animus, mechanically divided the defendant's conduct by reasoning that each shot exposed the victim to a "separate" risk of harm. *Cf.* State v. Barnes, 68 Ohio St. 2d 13, 427 N.E.2d 517 (1981).

[157] 98 Eng. Rep. 1283 (K.B. 1777).

[158] OHIO REV. CODE ANN. § 2903.11(A)(2) (Page 1982) provides that "[n]o person shall knowingly . . . [c]ause or attempt to cause physical harm to another by means of a deadly weapon or dangerous ordnance . . . ."

[159] State v. Woods, No. 44286, slip op. at 8 (Ohio 8th Dist. Ct. App. Feb. 18, 1982) (Cuyahoga County).

[160] *Id.*

the court of appeals immediately proceeded to inspect the language and committee comment of the pertinent statute to determine the unit of prosecution for illegal possession of deadly weapons. Construing the weapons statute strictly against the state and liberally in favor of the defendants, the court vacated two of the weapons convictions and concluded that the simultaneous, undifferentiated possession of multiple firearms constituted but a single offense.[161] In the course of its treatment of the double jeopardy and unit of prosecution issues, the court fortified its decision by noting that dividing "singular conduct into multiple offenses is prohibited by R.C. 2941.25(A) . . . . When a defendant conceals several weapons in one location at one time, his conduct is essentially one continuous, indivisible act . . . . Therefore, defendants' convictions for three separate counts of carrying concealed weapons conflicts with the provisions of R.C. 2941.45(A)."[162] Although the *Woods* court discussed the unit of prosecution issue in the context of the defendants' double jeopardy argument, it is apparent that the court was aware of the relationship between the unit of prosecution and allied offense issues. As a consequence, the decision in *Woods* enhanced the legislative intent to avoid *shotgun* convictions.

The intended protection of the Allied Offense Statute was recognized in three Ohio Court of Appeals decisions. In *State v. Nash*,[163] *State v. Davis*[164] and *State v. Stewart*,[165] the court reversed convictions for gross sexual imposition committed without a *separate animus* immediately before or after the commission of rape. In each case, the court recognized the significance of the fact that the separate acts of the defendant offered as proof of the greater and lesser offenses occurred within the context of a single uninterrupted assaultive episode.[166] Implicit in these

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[161] *Id.* at 12.

[162] *Id.* at 11-12 (footnote and citations omitted).

[163] No. 41450 (Ohio 8th Dist. Ct. App. Sept. 25, 1980) (Cuyahoga County).

[164] No. 42610 (Ohio 8th Dist. Ct. App. Sept. 24, 1981) (Cuyahoga County).

[165] No. 44331 (Ohio 8th Dist. Ct. App. Sept. 24, 1981) (Cuyahoga County).

[166] In the course of its opinion, the Nash court stated:

> [The defendant-appellant] was apparently charged with the one count of violating R.C. 2907.02 for engaging in vaginal intercourse . . . , and one count of violating R.C. 2907.05 for fondling her vagina with his fingers. *The facts indicate one uninterrupted assaultive episode consisting of three separate and distinct sexual acts.* Appellant argues that these acts are allied offenses of similar import for which he may receive only one conviction. Appellee, [the state] argues that appellant had a separate animus for each offense, that is, he thrice sought sexual gratification through three separate unlawful acts. Appellee contends that since the fondling occurred subsequent to, rather than in furtherance of, the vaginal intercourse, that the allied offenses rule does not apply.
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> . . . .
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> R.C. 2941.25 is designed to prevent multiple convictions for a single criminal offense. However, it does not prevent multiple convictions for

decisions is the recognition that the statutory offenses by definition had duration. These three decisions are in harmony with the Supreme Court's decisions in *Nielsen*[167] and *Brown*. Each decision recognizes that lesser offenses may be incident to greater continuing offenses, and that it is unfair to repeatedly prosecute or punish a defendant for both by temporally subdividing a single criminal episode.

Perhaps more than any of the others, the recent decision in *State v. Wallace*[168] furthers the legislative purpose of the Allied Offense Statute. In *Wallace*, the court determined that a single shot fired at two police officers did not constitute more than one punishable offense. Although the appellate court was seemingly aware that under Ohio law a single unlawful act that kills or injures two persons constitutes two separately triable offenses,[169] it went on to conclude that there was insufficient evidence "that the appellant possessed a separate animus to injure each of the two officers involved . . . ."[170] Although two victims were involved, the result in *Wallace* is a natural and logical extension of *Logan's animus* analysis. The court in *Wallace* not only considered the unit of prosecution prescribed by the legislature, but also considered the nature and duration of the single animus common to each of the units of prosecution. Of all the cases, *Wallace* probably goes the furthest to alleviate the potential for injustice inherent in the *same evidence* analyses of *Ebeling v. Morgan*[171] and *Blockburger v. United States*.[172] From this perspective, if from no other, the result in *Wallace* is quite correct.

Like the analysis of the Ohio Court of Appeals in *Brown*, the two-tier allied offense analysis fails to confront explicitly the unit of prosecution issues which arise in many multiple punishment cases. Carried to logical limits, the *Barnes* analysis[173] presents the potential for the carving up of nearly any criminal episode into a plethora of separately convictable offenses. Because the unit of prosecution issue is not squarely confronted, the two-tier analysis only tends to defeat the legislative purpose to avoid *shotgun* convictions. Further, such analysis is arguably

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> multiple offenses merely because they are similar in nature or proximate in time. . . . In the present case, all three acts occurred within 15 to 20 minutes, during which time appellant was continuously engaged in his attack upon his victim. *There is insufficient evidence of a separate animus.* On this record, these acts are allied offenses of similar import, which may only sustain one conviction and sentence.

No. 41450, slip op. at 5-6 (emphasis added).

[167] *In re* Nielsen, 131 U.S. 176 (1889).

[168] No. 44333 (Ohio 8th Dist. Ct. App. Sept. 30, 1982) (Cuyahoga County).

[169] *Id.* slip op. at 12-13 n.12.

[170] *Id.* at 15.

[171] 237 U.S. 625 (1915).

[172] 284 U.S. 299 (1932).

[173] *See supra* notes 104-06 and accompanying text.

subject to judicial manipulation and can easily produce harsh and inconsistent results with only slight and relatively insignificant variations in the evidence.

The addition of an intermediate step to the two-tier allied offense analysis is not only logical but necessary. The adoption of a three-tier analysis in allied offense cases would in time produce better reasoned decisions and more consistent results. It would afford a defendant greater due process protection by putting him on better notice of the consequences of his criminal conduct, and it would give the legislature a more informed control over the criminal justice system. Such an analysis would lessen the potential for abuse of unpopular defendants.[174] By producing more predictable results, a three-tier analysis would enable both defendants and prosecutors to weigh and balance more accurately the relative risks during plea bargain negotiations. Lastly, and perhaps most importantly, a three-tier analysis would decrease the risk of multiple punishment in violation of the double jeopardy guarantee.

The courts' continuing failure to address unit of prosecution issues in allied offense cases will continue to leave unanswered many questions implicating constitutional rights under both the Ohio and federal double jeopardy clauses. Such failure may also result in the multiplication of convictions not intended by the legislature which, conceivably, might constitute cruel and unusual punishment through the disproportional punishment of a single crime as several offenses.

V. JUDICIAL MULTIPLICATION OF CONVICTIONS COULD CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT

The Allied Offense Statute should not be viewed as a vehicle which, by its terms alone, results in punishment repugnant to the eighth amendment.[175] It was enacted to prevent multiplication of convictions when only a single continuous crime was committed. However, if a court were to misapply the Allied Offense Statute, that is, apply it in a way that resulted in multiplication of convictions not intended by the legislature, then misapplication of Ohio Revised Code section 2941.25 could easily constitute cruel and unusual punishment.

Apart from cases involving the death penalty, the jurisprudence developed under the eighth amendment is meager when compared to

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[174] *Cf.* Bartkus v. Illinois, 359 U.S. 121, 163 (1959) (Court upheld state conviction of defendant for same robbery of which he was acquitted in federal court, Black, J., in dissent, argued that victims of double prosecutions will be the poor, weak, and religious, political, or racial minorities); *Ex parte* Lange, 85 U.S. (18 Wall.) 163, 171 (1873) (where the Court quotes with approval Commonwealth v. Olds, 15 Ky. 104, 106, 5 Litt. 137, 139 (Ky. Ct. App. 1824) to the effect that the policy behind the double jeopardy provision is protecting the liberty of the citizen from changes in popular feeling).

[175] The federal constitutional prohibition against "cruel and unusual" punish-

the jurisprudence under other provisions of the Constitution. The general test for cruel and unusual punishment under the eighth amendment is that, although legislatures have wide discretion in ordaining punishment, a punishment so excessive or disproportionate to the offense as to shock the conscience of a reasonable person is prohibited.[176]

The intent to punish is an element to be considered in determining whether there is a violation of the eighth amendment. The reasoning behind this is that the purpose of the legislature bears on the question of whether imposition of the punishment is a necessary or rational means to a permissible end.[177] Thus, a court should carefully consider the legislative intent behind sentencing statutes when attempting to fashion a sentence. The sentence must be within the bound of what the legislature has provided. If the sentence exceeds the severity outlined by the legislature, then the punishment is cruel and unusual. This must be so if the power to ordain punishment is a legislative function. For example, if the legislature were to establish a sentence of three years and court imposed five, then two years of the sentence would be void as a violation of the eighth amendment.

In *Roberts v. Collins*,[178] the defendant brough a writ of habeas corpus challenging consecutive twenty-year sentences on two counts of common law simple assault. The state legislature had not established a punishment for defendant's crime. It had, however, established a max-

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ment is contained in the eighth amendment. U.S. CONST. amend. VIII. The eighth amendment is applicable to the states through the fourteenth amendment. Robinson v. California, 370 U.S. 660 (1962); Guss v. Bomar, 337 F.2d 341 (6th Cir. 1964). The Ohio Constitution also prohibits the imposition of cruel and unusual punishment. OHIO CONST. art. I, § 9.

[176] *Cf.* Trop v. Dulles, 356 U.S. 86 (1958) (plurality opinion). The punishment must also be "proportional" to the offense. The court in Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973), *citing Trop*, states that "the proportionality concept is not static, but is a 'progressive' one which 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society,' . . . . Trop v. Dulles, 356 U.S. 86, 101, 78 S.Ct. 590, 598, 2 L.Ed.2d 630 (1958)." *Id.* at 140 (footnote omitted).

The Supreme Court held in Weems v. United States, 217 U.S. 349 (1910), that:

> [T]he highest punishment possible for a crime which may cause the loss of many thousand of dollars . . . is not greater [under Philippine law] than that which may be imposed for falsifying a single item of a public account. And this contrast shows more than different exercises of legislative judgment. It is greater than that. It condemns the sentence in this case as cruel and unusual.

Id. at 381.

[177] Spain v. Procunier, 600 F.2d 189, 197 (9th Cir. 1979). Furthermore, the nature of the offense involved and the danger the offender poses to society are key factors in determining whether a particular sentence constitutes cruel and unusual punishment. State v. Freitas, 61 Hawaii 262, 268, 602 P.2d 914, 920 (1979).

[178] 404 F. Supp. 119 (D. Md. 1975), *aff'd*, 544 F.2d 168 (4th Cir. 1976), *cert. denied*, 430 U.S. 973 (1977).

imum penalty of fifteen years for the more aggravated offense of assault with intent to murder. The district court held that although the legislature had not established a punishment for simple assault, it certainly could not have intended a more severe punishment than that ordained for the more aggravated offense of assault with intent to murder.[179] Thus, that part of the sentence which exceeded the maximum penalty for the more aggravated offense violated the eighth amendment as cruel and unusual punishment.[180]

According to *Roberts*, the sentence imposed cannot exceed that intended by the legislature without being cruel and unusual punishment. The *Roberts* decision does not stand alone, although cases in this area are scant. In *Willoughby v. Phend*,[181] the defendant, on petition for a writ of habeas corpus, challenged his sentence for robbery as exceeding that prescribed for the more aggravated offense of armed robbery.[182] The district court agreed that it would offend the eighth amendment for someone to be sentenced more severely for a lesser offense than the more aggravated offense. The court stated that "if a legislature may not create a greater maximum punishment for a lesser included offense, then neither may a trial court impose such a sentence."[183] The *Willoughby* court stressed proportionality of the offense to the punishment in assessing the sentence in the context of the eighth amendment. Carrying *Willoughby* and *Roberts* one step further, if the number of offenses were to be improperly multiplied, then it follows that the concomitant sentence would be grossly disproportional to the actual unit of criminal conduct.

If the Allied Offense Statute were to become a vehicle of non-legislatively intended multiplication of convictions, then those extra convictions, which violated the spirit of section 2941.25, would be excessive and disproportional to the legislatively intended units of conviction and hence cruel and unusual. This line of reasoning has not yet been broached by the courts in Ohio (perhaps advocates have failed to present the argument). In any event, the eighth amendment deserves consideration

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[179] *Id.* at 123.

[180] *Id.* at 124.

[181] 301 F. Supp. 644 (N.D. Ind. 1969). It should be noted that although a sentence may be successfully attacked as being cruel and unusual, the underlying convictions are usually left intact. *Id.* at 646. The situation in which improper multiplication of conviction results in cruel and unusual punishment has not yet reached the reported decisions; such a factual setting lends itself easily to double jeopardy arguments.

[182] The maximum statutory sentence for armed robbery was twenty years. The maximum statutory sentence for robbery was twenty-five years. *Id.* at 647. In *Willoughby* it was the legislature, rather than a court, which had levied a cruel and unusual punishment, but only to the extent of the five years by which the robbery sentence exceeded the armed robbery sentence. *Id.* at 648.

[183] *Id.* at 647.

in multiple punishment cases. The Allied Offense Statute was, after all, promulgated as a codification of the common law doctrine of merger,[184] a doctrine which sought to avoid excessive multiplication of convictions where only a single criminal transaction was involved.[185]

The Allied Offense Statute may be considered an attempt to avoid the imposition of disproportional punishment that violates the eighth amendment. If the Ohio Supreme Court continues to divide criminal conduct into temporal units without reference to the units of conviction outlined in the underlying penal code, as it did in *Barnes*,[186] without reference to *Brown*,[187] Ohio courts will continue to run the risk of imposing cruel and unusual punishment by judicial fiat, in violation of the Ohio and federal Constitutions.

VI. CONCLUSION

The multiple punishment controversy is ages old and is constantly evolving. Although the Allied Offense Statute was designed to resolve multiple punishment issues, Ohio courts have generally failed to adequately address the issue since the statute's enactment. In light of decisions including *Crepps*,[188] *Snow*,[189] *Brown*[190] and *Logan*,[191] the statute can receive a proper construction by the courts only if the terms *separately* and *separate animus* are read in *pari materia*, each explaining the scope of the other. It seems unreasonable to believe that the General Assembly drafted section 2941.25(B) intending to give courts plenary discretion in determining whether to focus upon the animus of the defendant or upon temporal division of essentially continuous conduct.

The failure of Ohio courts to *squarely* confront the multiple punishment issue as it relates to legislatively intended units of conviction has in some cases resulted in the imposition of relatively severe punishments for single episodes of criminal conduct. This failure to face the issue has also resulted in confusing precedent and conflicting results. The two-tier allied offense analysis developed by Ohio courts is

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[184] State v. Logan, 60 Ohio St. 2d 126, 131, 397 N.E.2d 1345, 1349 (1979).

[185] In Prince v. United States, 352 U.S. 322 (1957), the defendant was consecutively sentenced under two criminal statutes for entering a bank with the intention of robbing it and robbery. The Supreme Court held that consecutive sentencing was inappropriate where the legislature had not clearly indicated an intent to sever the criminal transaction; the "separate" criminal acts merged into the more aggravated offense of robbery. *Id.* at 329.

[186] 68 Ohio St. 2d 13, 427 N.E.2d 517 (1981).

[187] 432 U.S. 161 (1977).

[188] 98 Eng. Rep. 1283 (K.B. 1777).

[189] 120 U.S. 274 (1887).

[190] 432 U.S. 161 (1977).

[191] 60 Ohio St. 2d 126, 397 N.E.2d 1345 (1979).

the core of the problem because it omits consideration of what constitutes a separately punishable offense.

When the two-tier analysis was developed in *Logan*, the court was concentrating on the criminal animus of the accused under the second tier of the allied offense analysis. A legislatively intended result would be reached in most cases if *separately or with separate animus* were read in *pari materia*, with focus upon animus. Cases decided subsequent to *Logan*, however, failed to fully appreciate *Logan's* precedential value. *Brown* specifically condemned arbitrary division of conduct into temporal units, yet the court in *Barnes* found it expedient to latch upon the word *separately* to give *Logan's* emphasis on the animus of the accused unctuous treatment, and to divide the continuous criminal episode into temporal units vis-a-vis the two-tier analysis.

It is necessary to implement the three-tier analysis suggested in Section IV of this Article to resurrect the intended protection of the Allied Offense Statute. The three-tier analysis, which incorporates specific consideration of legislatively intended units of conviction, is necessary to insure that the Allied Offense Statute is applied within its intended context. Without consideration of the units of conviction, the phrase *separately or with separate animus* has little meaning. Any judicial tendency to impose multiple sentences, where only one is appropriate due to the continuity of the conduct, could only be lessened by requiring close scrutiny of the conduct condemned by the legislature in defining the substantive crimes.

Whether the initiative for change will come from the courts or the legislature remains to be seen. If Ohio courts continue to employ the two-tier allied offense analysis, convictions permitted under such analysis will remain suspect in view of the constitutional guarantees of the fifth, eighth and fourteenth amendments.