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COUNTING OFFENSES

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ABSTRACT

Is a criminal defendant who discharges a weapon five times in rapid succession guilty of one crime or several crimes? This question of how to divide charges has vexed legal philosophers and Supreme Court Justices. It is a question of profound importance, but one that legal scholarship has seldom addressed. The answer has an impact on each stage of a criminal justice prosecution. The difference between one charge and multiple charges can affect the likelihood of a plea bargain, the strategy for trial, and, if the defendant is convicted, the length of a prison sentence. This Note, citing numerous examples of these cases, shows that the decision to charge a defendant with multiple offenses is often arbitrary and inconsistent. This Note first categorizes the overlapping and confusing methods courts use in determining the number of offenses to allow. This Note then describes the implications of these decisions and why their inconsistencies undermine principles of fairness in some criminal justice trials. Finally, this Note proposes that courts should apply three existing legal doctrines when making these choices to promote fairer and more consistent decisions.

INTRODUCTION

Does a person who punches another person four times commit one crime or four? Does it matter if seconds, minutes, or hours separated the offensive contacts or if they took place in the same location or different locations? Should a man who forcibly penetrates

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a woman three times be charged with one count of rape or three? Is a person who fires six shots at a patrol car guilty of one act of wanton endangerment or six? What standards should guide these determinations? As Chief Justice Warren acknowledged in a case addressing how to divide drug charges, "[t]he problem of multiple punishment is a vexing and recurring one."[1]

Although this issue arises frequently, few scholars have devoted attention to it.[2] The law is unclear in this area, forcing prosecutors to determine on a case-by-case basis whether to charge a series of unlawful actions as a single, continuing course of conduct or as multiple separate offenses. How a prosecutor charges the unlawful conduct affects each stage of a criminal prosecution, from plea bargaining through sentencing. Charging a defendant with multiple counts can enhance the pressure to plead guilty and may unduly influence the offense to which a defendant pleads. Whether a defendant is convicted of one count or three counts can dramatically affect the sentence, both in terms of the statutory maximum and in terms of enhanced penalties under repeat-offender statutes. Widespread variation among prosecutions charging the same conduct as one or multiple offenses raises issues of fundamental fairness.

This Note discusses how courts determine whether to treat a course of unlawful conduct as a single crime or as multiple criminal acts, presents problems with the existing approaches, and proposes a solution for courts addressing this problem in the future. Part I categorizes relevant cases and outlines the four different tests courts use to determine whether a defendant's actions constitute a single offense or multiple offenses. Part II discusses how this charging discretion, unbounded by any clear rules, may undermine the fairness of criminal trials. Part III suggests using three established legal

1. Gore v. United States, 357 U.S. 386, 393 (1958) (Warren, J., dissenting).

2. Scholars have addressed a related but distinct subject of when a single act can lead to multiple offenses under different statutory provisions, as, for example, when an illegal entry into a home can be charged both as a trespass and a burglary. *See, e.g.*, Kyden Creekpaum, Note, *What's Wrong with a Little More Double Jeopardy? A 21st Century Recalibration of an Ancient Individual Right*, 44 AM. CRIM. L. REV. 1179, 1185 (2007) ("With a few sensible exceptions, a convicted person cannot be re-prosecuted for any lesser—or greater—included offenses. The general rule protects individuals from multiple government prosecutions on substantially similar issues that would allow the government to . . . obtain additional punishment for conduct that has been already, if only partially, punished." (footnote omitted)). This Note addresses whether the same incident could be charged as multiple offenses under the same statute, for example, as if the defendant went in and out of the window several times carrying multiple loads of stolen property.

doctrines to address significant problems of fairness and justice: First, courts should adhere to the rule of lenity and presume that—in cases of ambiguity—crimes are single offenses unless the legislature clearly indicates otherwise. Second, in cases in which multiple charges for a single occurrence are deemed appropriate, courts should ensure that the resulting sentences do not violate the Eighth Amendment's prohibition on cruel and unusual punishment. Third, and finally, multiple offenses from the same conduct should not trigger habitual offender statutes. Courts applying these doctrines will ultimately reach more consistent and fair results.

These tests will not provide courts with perfect answers on how many charges are appropriate. Such tests do not and cannot exist. The application of these three tests will, however, substantially alleviate the harms caused by the ambiguity in how to charge and punish these crimes.

I. ONE CRIME OR MANY CRIMES?: COURTS' INCONSISTENT AND UNSATISFYING APPROACHES

Describing the legal rule for when a particular act should be charged as one or multiple offenses proves difficult because the courts have not consistently approached this issue. Courts have employed four approaches for determining the unit of prosecution: (1) examining legislative intent, (2) looking to criminal impulse, (3) applying an "act"-based approach, and (4) analyzing the crime based on time units. These approaches overlap significantly, and few cases fit nicely in a single box—a court may consider the legislative intent behind the statute, and, additionally, try to determine if the conduct was motivated by separate impulses. Nonetheless it is useful to consider the four main methods courts employ.

A. A Legislative Intent–Based Approach

1. *The Legislative-Intent Approach Defined.* In the vast majority of cases, the statute does not specify the unit of prosecution.[3] Without

3. In some rare instances, the legislature specifically lays out the unit of prosecution. These statutes are not the topic of this Note. When the legislature spells out the unit of prosecution, the answer is settled; this Note addresses ambiguous cases that force courts to resolve whether the defendant is appropriately charged with one crime or several. For example, in *Byrd v. State*, 162 S.W. 363 (Tex. Crim. App. 1913), the court applied a statute that made each day of practicing medicine without a license its own crime, *id.* at 363. Byrd was prosecuted for two counts of this offense for practicing on two days, and the court upheld the conviction,

an explicit statutory provision, courts often infer the desired unit from other sources, including the findings of the legislature that passed the statute and individual legislators' statements in enacting the statute. As one court acknowledged, "[t]he unit of prosecution of a statutory offense is generally a question of what the legislature intended to be the act or course of conduct prohibited by the statute for purposes of a single conviction and sentence."[4]

The Supreme Court endorsed this approach in the first case considering the appropriate unit of prosecution for multiple acts. In the case of *In re Snow*,[5] the Supreme Court considered whether defendant Lorenzo Snow could be prosecuted for multiple counts of unlawful cohabitation when he continuously lived with seven women over a thirty-five month period.[6] Snow was charged with violating a federal law that prohibited any male from residing with more than one woman. Each violation of the statute was punishable by six months in prison and a $300 fine.[7] The trial court split Snow's illegal conduct into three offenses, each comprising around one year, and Snow was convicted of three counts of illegal cohabitation for the thirty-five-month-long cohabitation.[8] Later, Snow filed a writ of habeas corpus to overturn his conviction and reduce his sentence, claiming his actions constituted a single, continuous violation.[9]

The Supreme Court overturned two of Snow's three separate convictions, holding that, based on the legislative intent of the statute, Snow committed a single offense.[10] In support of its reasoning in

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finding that "[n]either [charge] is a bar to the other, and the conviction in the other does not put him in jeopardy in this—they are not the same offenses, but entirely separate and distinct offenses." *Id.* The *Byrd* case is an example of a statute that simply asks courts to apply a defined unit of prosecution.

4. Brown v. State, 535 A.2d 485, 489 (Md. 1988).

5. *In re* Snow, 120 U.S. 274 (1887).

6. *Id.* at 276, 282.

7. *Id.* at 281–82. The Court explained,

> The offence of cohabiting with more than one woman, in the sense of the . . . statute . . . may be committed by a man by living in the same house with two women whom he had theretofore acknowledged as his wives, and eating at their respective tables, and holding them out to the world by his language or conduct, or both, as his wives, though he may not occupy the same bed or sleep in the same room with them, or either of them, or have sexual intercourse with either of them.

Id. at 281.

8. *Id.* at 277.

9. *Id.* at 279–80.

10. *Id.* at 282.

Snow, the Supreme Court relied[11] on a British case, *Crepps v. Durden*,[12] which involved the violation of a statute dictating "that no tradesman or other person shall do or exercise any worldly labour, business, or work of their ordinary calling on the Lord's Day, works of necessity or charity only excepted" and prescribed a penalty of five shillings for violating the law.[13] In *Crepps*, the defendant was initially charged with—and convicted of—four violations of the statute for "selling [four] small hot loaves of bread" on a single Sunday.[14] Upon review, the appellate court reversed the trial court's decision, finding that the defendant could only be charged with one offense and not four.[15] The court reasoned that by enacting the statute, Parliament intended to punish working on Sundays, and, thus, it should not matter whether the person worked for days, hours, or minutes.[16] The court inferred that "the object which the legislature had in view in making the statute . . . was to punish a man for exercising his ordinary trade and calling on a Sunday."[17] Thus, the court determined that there "can be but one entire offence on one and the same day"[18] and that even if the defendant "had continued baking from morning till night, it would still be but one offence."[19] The court ruled that whether a defendant is charged with multiple offenses "does not turn upon niceties; upon a computation how many hours distant the several bakings happened . . . but it goes upon the ground that the offence itself can be committed only once in the same day."[20]

In embracing the principles of *Crepps*, "th[e] Court [in *Snow*] expressly adopted the reasoning of *Crepps* that the proper unit of prosecution was completely dependent upon the legislature's intent."[21] Since *Snow*, numerous courts, including the Supreme Court,

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11. *Id.* at 283 (citing Crepps v. Durden, (1777) 98 Eng. Rep. 1283 (K.B.)).
12. Crepps v. Durden, (1777) 98 Eng. Rep. 1283 (K.B.).
13. *In re* Snow, 120 U.S. at 283 (quoting *Crepps*, 98 Eng. Rep. at 1285).
14. *Id.* (quoting *Crepps*, 98 Eng. Rep. at 1284).
15. *Id.* at 284 (citing *Crepps*, 98 Eng. Rep. at 1287).
16. *Id.* (citing *Crepps*, 98 Eng. Rep. at 1287).
17. *Id.* (quoting *Crepps*, 98 Eng. Rep. at 1287).
18. *Id.* (quoting *Crepps*, 98 Eng. Rep. at 1287).
19. *Id.* (quoting *Crepps*, 98 Eng. Rep. at 1285).
20. *Id.* at 285 (quoting *Crepps*, 98 Eng. Rep. at 1287).
21. Whalen v. United States, 445 U.S. 684, 704 (1980) (Rehnquist, J., dissenting). The court in *Williams v. Commonwealth*, 178 S.W.3d 491 (Ky. 2005), came to a similar conclusion, *id.* at 495. The court found that "[t]he singular form of 'photograph,' read in conjunction with the term 'any,' clearly indicates that the Legislature intended prosecution for each differing photograph." *Id.* Thus separate counts were appropriate when the defendant shot multiple

have tried to ascertain whether an act constituted one or multiple counts by considering the legislative intent behind the criminal statute. In *Ebeling v. Morgan*,[22] for example, the Supreme Court considered whether the defendant should be charged with one offense or separate offenses for unlawfully tearing into successive mailbags with the intent to steal the mail.[23] Assessing whether the defendant could be charged with a separate count for each bag, the Court first turned to the language of the statute and the intent of the drafters.[24] The Court emphasized that the legislative intent was clear: "Congress evidently intended to protect the mail in each sack, and to make an attack thereon in the manner described a distinct and separate offense."[25] After reviewing the legislative history of the statute, the Court held that the words of the statute "plainly indicate that it was the intention of the lawmakers to protect each and every mail bag from felonious injury and mutilation. Whenever any one mail bag is thus torn, cut, or injured, the offense is complete."[26] Although the conduct at issue arguably arose from a single transaction, "the complete statutory offense was committed every time a mail bag was cut in the manner described, with the intent charged."[27] Thus the Court held that the defendant could be convicted of a separate crime for every mailbag he damaged.[28]

2. *The Flaws in the Legislative Intent Approach*. The legislative-intent approach is deeply problematic. Generally legislative intent

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photographs of a minor in a sexual performance, even though each photograph involved the same minor captured in "a narrow timeframe." *Id.*

22. Ebeling v. Morgan, 237 U.S. 625 (1915).

23. *Id.* at 628.

24. *Id.* at 629.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 631. A defendant who cut into a single piece of mail seven times, however, would only have committed a single offense. *See id.* ("[P]roof of cutting and opening one sack completed the offense . . . ."). In a similar case, *Badders v. United States*, 240 U.S. 391 (1916), the Supreme Court considered how many offenses could be charged to a defendant who mailed seven letters as part of a scheme to defraud, *id.* at 393. The defendant was convicted of seven counts, one for each letter he mailed. *Id.* He appealed, arguing that the statute should be construed to allow only a single charge for the entire scheme and that, if it were construed otherwise, it would violate the Eighth Amendment prohibition on cruel and unusual punishment. *Id.* The Court rejected the constitutional argument and upheld the seven convictions, remarking the defendant's "contentions need no extended answer." *Id.* The Court, relying on the *Ebeling* decision, stated simply that Congress had the ability to "make each putting of a letter into the postoffice a separate offense." *Id.* at 394.

approaches have been criticized for a number of shortcomings. For example, opponents have criticized the approach as "undemocratic (committee reports are not enacted), unreliable (history is often conflicting, and may even be planted to influence judges in the future), and incoherent (the record does not represent the views of all members of the legislature, so it cannot be evidence of 'legislative intent')."[29] As Justice Scalia has written, "opinions using legislative history are often curiously casual, sometimes even careless, in their analysis . . . . [I]t is simply hard to maintain a rigorously analytical attitude, when the point of . . . inquiry is the fairyland in which legislative history reflects what was in 'the Congress's mind.'"[30]

Beyond the usual difficulties determining legislative intent, courts especially struggle to decipher legislatures' intentions regarding how to charge offenses based on criminal statutes. Legislative findings and individual legislators' statements often do not exist on the topic of the appropriate unit of prosecution: legislative history almost always is silent on how to define the unit of prosecution, and courts are left to invent, rather than discover, the legislative intent that they rely on. As Chief Justice Warren wrote, "[i]n every instance the problem is to ascertain what the legislature intended. Often the inquiry produces few if any enlightening results. Normally these are not problems that receive explicit legislative consideration."[31]

Even when legislative statements do exist, they may not provide reliable direction for courts because they may only provide abstract principles and not reliable guidance on how to construe the statute relative to the facts of a particular case. Legislative intent is often multifaceted—legislatures may intend for a crime to be treated as a single crime in some instances and multiple crimes in others—thus providing minimal guidance to courts interpreting the statute. When a legislature has several intentions or goals in mind, a court can choose whichever best fits its own preferences rather than truly conducting an analysis based on legislative intent.[32]

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29. Lawrence M. Solan, *Private Language, Public Laws: The Central Role of Legislative Intent in Statutory Interpretation*, 93 GEO. L.J. 427, 427 (2005) (footnotes omitted).

30. Bank One Chi., N.A. v. Midwest Bank & Trust Co., 516 U.S. 264, 280–81 (1996) (Scalia, J., concurring).

31. Gore v. United States, 357 U.S. 386, 394 (1958) (Warren, J., dissenting).

32. *See supra* text accompanying note 30.

The failings of the approach are illustrated by the seminal Supreme Court case, *Snow*, which held that cohabitation over many years constituted one offense.[33] Although the *Snow* Court claimed that it was basing its decision on legislative intent,[34] a careful reading of the case reveals no discussion of the legislative intent nor any quotes from the legislature.[35] Rather, the Court devoted the bulk of its analysis to drawing an analogy to *Crepps*, the case involving the sale of bread on Sundays.[36] The analogy is inherently flawed, however, as the Court failed to explain why cohabiting over thirty-five months was indistinguishable from selling four loaves of bread on a single day.[37] If the baker opened his store every Sunday for ten years, the reasoning of the *Crepps* court suggested that the baker could be punished for every Sunday on which the statute was violated.[38] The reasoning from *Crepps* may have transferred to *Snow* better if the issue in *Snow* had been whether Snow could be charged based on his number of wives; the number of wives with whom Snow cohabited appears analogous to the number of loaves of bread the *Crepps* defendant sold on a given Sunday. But *Snow* was not about that issue; *Snow* was about the time period of the cohabitation and whether it was an ongoing offense.[39] *Snow* claimed to be, and has been read as, an endorsement of the importance of examining legislative intent,[40] when in fact there are no cites to legislative history or proceedings in the case.[41] It was an inadequately reasoned analysis of the indivisibility of certain kinds of conduct, which Part I.C discusses as the "act approach."[42]

The weakness in the Court's analysis of the legislative intent in *Snow* is not simply a failure of that Court; rather it exemplifies the larger difficulty with this approach: courts lack precise standards for assessing whether the legislature intended to make a series of acts a

33. *In re* Snow, 120 U.S. 274, 285 (1887).

34. *See supra* text accompanying note 17.

35. *In re Snow*, 120 U.S. at 285.

36. *Id.*

37. *Id.*

38. *Id.* (citing Crepps v. Durden, (1777) 98 Eng. Rep. 1283 (K.B.)).

39. For a discussion of how the *Snow* court focused on the time period of the cohabitation to hold that a "continu[ous] offence of the character of the one in this case can be committed but once," *id.* at 282, see *infra* notes 88–93.

40. *See supra* note 21 and accompanying text.

41. *In re Snow*, 120 U.S. at 274–86.

42. *See infra* notes 88–93 and accompanying text.

single crime or several. In many cases, the legislature failed to consider the unit of prosecution at all or failed to consider most of the almost-unlimited number of situations that could arise. For example, in criminalizing the act of rape, any legislature intends as a matter of sheer logic that raping the same woman on two separate nights merits two separate counts of rape. The legislature, however, is unlikely to fully articulate the reasoning or engage in the difficult line drawing that is necessary. For example, is rape on two different nights distinguishable from circumstances in which a man penetrates a woman twice within a one hour period because she was able to get away briefly? Would the latter situation constitute two counts of rape as well? A legislature likely did not anticipate this kind of situation when enacting the rape law. Even when legislatures anticipate these issues, they likely avoid such questions for fear of creating too narrow a rule that punishes someone for only one offense when punishment for multiple offense is appropriate. As a result, courts traditionally offer little beyond conclusory language, like that employed in *Ebeling*,[43] simply suggesting that the legislature clearly intended to punish each act separately.

B. A Criminal Impulse–Based Approach

1. *The Criminal-Impulse Approach Defined.* The Supreme Court's decision in *Blockburger v. United States*[44] epitomizes the impulse test. The defendant was charged with five counts of violating the Harrison Narcotics Act.[45] The jury returned a verdict of guilty as to the second, third, and fifth counts, each of which involved a sale of morphine hydrochloride to the same purchaser.[46] The second count

43. *See supra* notes 22–28 and accompanying text.

44. Blockburger v. United States, 284 U.S. 299, 302 (1932).

45. *Id.* at 300.

46. *Id.* at 301. The other issue was whether one incident constituted multiple, different offenses for double jeopardy purposes. *Id.* Counts two and three alleged that the drugs were not in or from the original stamped package, and count five charged that the sale alleged in count three was not made by a written order of the purchaser as required by the law. *Id.* Thus the question in the case was, when the defendant completed one act—one sale—and it violated two sections of the statute, did the accused commit two offenses or only one? *Id.* The Court held that the defendant committed two offenses. *Id.* at 304. The Court noted that the statute was aimed at the sale of drugs in violation of the requirements set forth in sections one and two. *Id.* The Court then established the standard it continues to use as the test for double jeopardy:

> 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

charged a sale on a certain day of ten grains of the drug, and the third count charged a sale on the following day of eight grains to the same person.[47] The defendant argued that two of the sales, "having been made to the same purchaser and following each other, with no substantial interval of time between the delivery of the drug in the first transaction and the payment for the second quantity sold, constitute[d] a single continuing offense."[48] The Court rejected this argument, noting that the Harrison Narcotic Act "does not create the offense of engaging in the business of selling . . . drugs, but penalizes any sale" and "[e]ach of several successive sales constitutes a distinct offense, however closely they may follow each other."[49] The Court determined that "[t]he distinction . . . is that, 'when the impulse is single, but one indictment lies, no matter how long the action may continue. If successive impulses are separately given, even though all unite in swelling a common stream of action, separate indictments lie.'"[50] On this reasoning, the Court found that the defendant's first transaction resulted in a sale and the act came to an end when the sale was complete.[51] The next sale "was not the result of the original impulse, but of a fresh one—that is to say, of a new bargain."[52]

Subsequently, the Supreme Court both applied impulse analysis and considered legislative intent in *United States v. Universal C.I.T. Credit Corp.*[53] Universal C.I.T. Credit Corporation was charged with thirty-two separate counts of violating the minimum wage, overtime, and record-keeping provisions of the Fair Labor Standards Act.[54] Counts one through six charged the employer with violating the minimum wage provisions in six separate weeks.[55] Counts seven through twenty-six charged the employer with overtime violations in twenty separate weeks, amounting to one violation each week.[56] The

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offenses or only one is whether each provision requires proof of an additional fact which the other does not.

Id. Applying that test, the Court concluded that although both sections were violated by one sale, two offenses were committed. *Id.*

47. *Id.* at 301.
48. *Id.* at 301–02.
49. *Id.* at 302.
50. *Id.* (quoting WHARTON'S CRIMINAL LAW § 34 (11th ed. 1912)).
51. *Id.* at 303.
52. *Id.*
53. United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 224–25 (1952).
54. *Id.* at 219.
55. *Id.*
56. *Id.*

remaining counts alleged in the complaint concerned miscellaneous record-keeping violations.[57] The trial court granted the defendant's motion to dismiss all but three counts of the complaint and rejected the prosecution's argument that the employer committed a separate offense each week it breached a statutory duty to each employee.[58] Holding that "it is a course of conduct rather than the separate items in such course that constitutes the punishable offense," the trial court "ordered consolidation of the separate acts set forth in the information into three counts"[59]—one each for the minimum wage, overtime, and record-keeping violations.[60]

The Supreme Court began by noting that the language of the Fair Labor Standards Act did not address the issue and then observed that the legislative intent was also unclear.[61] Candidly acknowledging that "[i]t would be self-deceptive to claim that only one answer is possible to our problem," the Court rejected the government's construction of the statute on the ground that "[t]he offense made punishable under the Fair Labor Standards Act is a course of conduct. . . . [Thus] the statute compendiously treats as one offense all violations that arise from that singleness of thought, purpose or action, which may be deemed a single 'impulse.'"[62]

As an illustration, the Court noted that a managerial decision that certain activity was not work and therefore did not require payment under the Fair Labor Standards Act could not become multiple offenses by considering underpayment in a single week or to a single employee as a separate offense.[63] By only precluding counting an ongoing violation stemming from a single decision as multiple violations of the same statute, the Court held open the possibility that the government could charge separate statutory offenses for separate courses of conduct.[64] Thus, the Court implied that the government could bring separate charges for different decisions. For example, employers might commit two offenses by deciding twice that certain

57. *Id.*

58. *Id.* at 220.

59. *Id.*

60. *Id.* at 220–21.

61. *Id.* at 221.

62. *Id.* at 224.

63. *Id.*

64. *Id.* at 225 ("Whether an aggregate of acts constitute a single course of conduct and therefore a single offense, or more than one, may not be capable of ascertainment merely from the bare allegations of an information and may have to await the trial on the facts.").

conduct does not constitute work. The Court did not precisely define what constitutes a decision to undertake a single course of conduct and how to determine if one is made; it simply held that the facts before it constituted only three: one minimum wage violation, one overtime violation, and one record-keeping violation.[65]

The District of Columbia Court of Appeals in *Sanchez-Rengifo v. United States*[66] also relied on the impulse test to support a conviction for four separate acts of rape over a span of two hours.[67] The court stated that "criminal acts are considered separate when there is an appreciable length of time 'between the acts that constitute the two offenses, or when a subsequent criminal act was not the result of the original impulse, but a fresh one.'"[68] The court held that the evidence could sustain four convictions because during the two hours of attack,[69] the defendant came to "a fork in the road" four times, each time giving the defendant a chance to stop and reconsider his actions.[70] The court reasoned that "[t]here was time during this two hour period for Sanchez-Rengifo to reflect as he ordered his victim into different positions after completing one form of sexual assault in order to undertake another to satisfy his new impulse."[71] The court concluded that when "the circumstances are such that the 'defendant can be said to have realized that he has come to a fork in the road, and nevertheless decides to invade a different interest, then his successive intentions make him subject to cumulative punishment.'"[72]

2. *The Flaws in the Impulse Approach.* Relying on impulses in these cases as the critical factor for determining the unit of prosecution presents two problems. First, impulse is ambiguously

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65. *Id.* at 220–21, 226 ("All we now decide is that the district judge correctly held that a single course of conduct does not constitute more than one offense under . . . the Fair Labor Standards Act.").

66. Sanchez-Rengifo v. United States, 815 A.2d 351 (D.C. 2002).

67. *Id.* at 352–53 (affirming a conviction for four separate counts of child sexual abuse stemming from a two-hour continuous assault of one victim).

68. *Id.* at 355 (quoting Hanna v. United States, 666 A.2d 845, 853 (D.C. 1995)).

69. *Id.* at 353.

70. *Id.* at 357, 359 (quoting Owens v. United States, 497 A.2d 1086, 1095 (D.C. 1985)).

71. *Id.* at 359.

72. *Id.* (quoting *Owens*, 497 A.2d at 1095); *accord* State v. Soonalole, 992 P.2d 541, 542, 544 (Wash. Ct. App. 2000) (holding that two separate acts of fondling during one car ride were two separate offenses); State v. Rummer, 432 S.E.2d 39, 47–48 (W. Va. 1993). In *State v. Williams*, 730 P.2d 1196, 1199 (N.M. Ct. App. 1986), the court held that fondling the victim's breasts and fondling the victim's genitalia within less than five minutes of each other constituted two separate offenses.

defined and thus not useful in deciding the number of crimes committed. Is an impulse synonymous with intent? If impulse and intent are different, precisely how are they different? For example, although the court in *Sanchez-Rengifo* broke the defendant's actions into four impulses, it is possible that throughout the entire course of conduct he only had a single intent—to conduct the rape. If "impulse" and "intent" are the same or interchangeable, it raises the question why the court would use the word "impulse" rather than "intent."

Second, how does one determine an "impulse"? Is it a function of time or opportunity to retreat from criminality? Determining impulse based on forks in the road seems inherently and inevitably subjective. Defendants in both types of cases—those in which a single crime is charged and those in which multiple crimes are charged—faced forks in the road. The defendant in *Sanchez-Rengifo* had many opportunities to stop but continued with the course of action: one could argue that every minute during which the assault continued—each an opportunity to stop his unlawful activity—was a fork in the road. The employer who violated the Fair Labor Standards Act had many opportunities—at least every time a paycheck was issued—to reevaluate its business practices. Each passing second presents an opportunity for a person engaged in criminal activity to assess the evils of the action and to choose a different course of conduct.

A great deal also depends on which "impulse" courts analyze because an action often has several different impulses or motivations.[73] As Professor H.L.A. Hart explained in his famous essay on criminal acts and intentions, "[t]he performance of a human action is a very complex affair involving the co-presence and the co-ordination of many different elements."[74] If in *Blockburger* the seller agreed to provide the buyer with a set amount of narcotics for a set price every week and then did so, would the arrangement be

73. The court held that

> the facts and circumstances of this case weigh[] in favor of finding that Soto's multiple drug sales constituted separate and distinct offenses . . . . Each of the four sales took place on a different day and at a different place, with the exception that two of the sales occurred in the same parking lot. The separate sales were not motivated by a desire to obtain a single criminal objective. While Soto and other defendants convicted of drug sales may be motivated by the single criminal objective of selling drugs to relieve financial hardship, this court has held that the criminal plan of obtaining as much money as possible is too broad an objective to constitute a single criminal goal . . . .

State v. Soto, 562 N.W.2d 299, 304 (Minn. 1997).

74. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 90 (rev. ed. 2008).

considered a single impulse because it was negotiated and agreed to only once, or would it be several impulses because of the multiple exchanges? If one analogizes the ongoing agreement to buy drugs to a commercial contract, one might think of it as a single contract or a single business decision, as the Supreme Court characterized the determination of pay practices in *Universal C.I.T Credit Corp*.[75] On the other hand, if one views it as a series of separate agreements, it becomes a series of frauds. Impulse is simply too imprecise a concept on which to decide cases.

C. An Act-Based Approach

1. *The Act-Based Approach Defined.* A third approach requires looking at the facts holistically to determine whether there was one continuous crime or several distinct crimes.[76] Some courts, for example, analyze whether the actions were one whole act or whether they comprised several discrete acts by considering whether the acts are "separated by an evidentiary factor such as time, place, or intervening circumstance."[77] A continuous offense has been defined as "a breach of the criminal law not terminated by a single act or fact, but which subsists for a definite period and is intended to cover or apply to successive similar obligations or occurrences."[78] Furthermore, as another court explained, "[s]ome crimes, by their very nature, tend to be committed in a single continuous episode rather than in a series of individually chargeable acts."[79]

The best example of this "acts" approach is the reasoning in *Johnson v. Commonwealth*,[80] which affirmed the defendant's multiple convictions for illegal gambling after playing poker for four consecutive hours.[81] The defendant played "[seventy-five] or more combined contributions, designated by the witnesses as 'pots'; that at the end of each deal of the cards the winner would take the pot, and

75. United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 224 (1952).

76. United States v. Prestenbach, 230 F.3d 780, 783 (5th Cir. 2000). This is sometimes called a fact-based approach. *See, e.g.*, Morris v. United States, 622 A.2d 1116, 1130 (D.C. 1993) ("[A] fact-based approach remains appropriate where a defendant is convicted of two violations of the same statute.").

77. Gray v. United States, 544 A.2d 1255, 1257 (D.C. 1988).

78. State v. Johnson, 194 S.E. 319, 322 (N.C. 1937).

79. Owens v. United States, 497 A.2d 1086, 1096 (D.C. 1985).

80. Johnson v. Commonwealth, 256 S.W. 388 (Ky. 1923).

81. *Id.* at 388 (defining the act of illegal gambling as "engaging in a game of hazard or chance at which money or other property was bet, won, or lost").

after that another or a new deal would be made with the same result."[82] The court ruled that each hand of cards and respective new wager accompanying it was a discrete act, and thus each could be charged as a separate offense.[83] The court held that each act is "complete upon the determination of the event upon which the stake is made, and that the determination of another one upon which an independent separate and different stake is made would constitute and be a separate and distinct hazard or game."[84] Thus with each new hand, those "participating therein would be guilty of another and independent offense."[85] The court ruled that because a single hand could be a violation of the law, "it would seem to necessarily follow that a conviction or acquittal for playing one hand . . . [which] is a complete offense, would not be a bar to a prosecution for playing another hand, although both may have occurred at the same sitting."[86]

The Supreme Court's decision in *Snow*, discussed above, provides another example. Although the Court couched its language in legislative intent when holding that there was only a single cohabitation,[87] in reality the Court rested its decision mostly on an act-based approach.[88] The Court emphasized that the indictment suggested that the nature of the offense was irreducible because the indictments plainly stated that "the defendant did on the day named and *thereafter and continuously*, for the time specified, live and cohabit with more than one woman."[89] The indictment emphasized that all of the offenses "were alike in all respects except that each covered a different period of time."[90]

The Court in *Snow* held that dividing the cohabitation into three separate offenses, as the lower court allowed, would be "wholly arbitrary."[91] The Court reasoned that once any divisions are made there is no clear place to stop and there could be any number of charges: "an indictment covering each of the thirty-five months, with

82. *Id.*
83. *Id.* at 389.
84. *Id.*
85. *Id.*
86. *Id.*
87. For a discussion of the legislative approach adopted by the *Snow* court, see *supra* Part I.A.
88. *In re* Snow, 120 U.S. 274, 282 (1887).
89. *Id.* at 281 (emphasis added) (internal quotation marks omitted).
90. *Id.* at 276.
91. *Id.* at 282.

imprisonment for seventeen years and a half and fines amounting to $10,500, or even an indictment covering every week, with imprisonment for seventy-four years and fines amounting to $44,400; and so on, *ad infinitum*, for smaller periods of time."[92] The Court concluded that the rule should be that a "continu[ous] offence of the character of the one in this case can be committed but once . . . . [I]t was the mere will of the grand jury which divided the time among three indictments, and stopped short of dividing it among thirty-five, or one hundred and fifty-two, or even more."[93]

The court in *Krueger v. Coplan*[94] also used an act-based approach when considering how to categorize a sexual offense in which, "[d]uring a twenty-five minute period, petitioner repeatedly . . . coaxed a two-year-old child to perform oral sex upon him."[95] The prosecution, by using videotape of the incident, split the twenty-five-minute period into ninety separate offenses: "eighty counts of aggravated felonious sexual assault, seven counts of attempted aggravated felonious sexual assault, two counts of felonious sexual assault, and one count of simple assault."[96] The court allowed all these charges to go forward, holding that "each separate act or attempted act of fellatio constituted a distinct offense, and could not be consolidated into one count alleging a general course of conduct involving several incidents of intentional touching."[97]

Similarly, in *State v. Shelton*,[98] the court considered whether a repetitive pattern of incest was a continuing offense or a single offense.[99] The statute stated that a "person commits the offense of

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92. *Id.*

93. *Id.*; *see also* State v. Grady, 524 S.E.2d 75, 79 (N.C. Ct. App. 2000) (determining that a man could only be prosecuted for one count of violating a statute that prohibited maintaining a dwelling for purposes of narcotics dealing, even though the man was caught making two drug sales from his house).

94. Krueger v. Coplan, 238 F. Supp. 2d 391 (D.N.H. 2002).

95. *Id.* at 392.

96. *Id.* at 394.

97. *Id.*; *cf.* Ratliff v. Commonwealth, 194 S.W.3d 258, 273 & n.7 (Ky. 2006) (holding that every act causing an injury was a separate criminal offense, and so the defendant committed seven assaults by burning the victim in seven places with a cigarette lighter).

98. State v. Shelton, 605 S.E.2d 228 (N.C. Ct. App. 2004).

99. *Id.* at 230. The Court also considered the legislative intent in a cursory manner and found it inconclusive. The Court evaluated the statute and found "[t]he statutory language does not reveal any legislative intent to prohibit prosecuting a defendant for more than one count of incest per victim." *Id.*; *see also* State v. Richard, 786 A.2d 876, 878–79 (N.H. 2001) (conducting the same analysis in the context of a repeating pattern of sexual assaults and finding that each was an individual crime).

incest if the person engages in carnal intercourse with the person's . . . child."[100] The defendant admitted to several acts of incest with two victims but challenged his multiple convictions on the ground that he could only be convicted of one count for each victim.[101] The court disagreed, holding that each time the defendant and the victim had intercourse was an independent crime.[102] Unlike the *Krueger* court, however, the *Shelton* court did not break up each incident of intercourse into several acts.[103]

In *Hennemeyer v. Commonwealth*,[104] the court again applied a fact-based, acts approach and held that a course of conduct constituted separate offenses.[105] In that case, the defendant[106] fired his gun four times at police officers "at irregular intervals, with a lapse of as much as two minutes to as little as seconds between the shots."[107] Hennemeyer managed to escape[108] and the next day got in another conflict with police. This time Hennemeyer fired five shots at a police car over a roughly fifteen-minute period.[109] The entire chase spanned over four miles and ended when the driver and Hennemeyer fled on foot.[110] While fleeing, Hennemeyer fired one more shot at the pursuing police.[111] Hennemeyer ran into an abandoned warehouse, where he soon was captured.

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100. *Shelton*, 605 S.E.2d at 230 (alteration in original) (quoting N.C. GEN. STAT. § 14-178 (2003)).

101. *Id.*

102. *Id.*

103. *See supra* notes 94–97 and accompanying text.

104. Hennemeyer v. Commonwealth, 580 S.W.2d 211 (Ky. 1979).

105. *Id.* at 215. Because the court in *Hennemeyer* claimed it was reaching its decision relying on legislative intent, *id.* at 214–15, this case also epitomizes the overlap between the different categories. This case belongs in this Section rather than Section A, which discusses legislative intent, however, because, although the court claimed it was looking at the intent, it never really explained how it determined what the intent was. Moreover, it never explained why the intent would justify treating the actions on day one different from day two. Thus, although this case could provide a dual function, it reinforces the weakness of both the legislative intent and act approach.

106. The court referred to Christopher Hennemeyer as a "nomad," and the incident started when he was "about to relieve himself in front of the Pic Pac Market . . . and the manager protested." *Id.* at 212.

107. *Id.* at 213.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

The trial judge ruled that the first four shots constituted a single course of conduct, whereas the six shots fired the next day were each considered discrete crimes.[112] Thus, Hennemeyer was charged with and convicted of seven counts of wanton endangerment.[113] Hennemeyer was sentenced to seven years total: one year for the first four shots—which the court had merged into one offense—and one year for each of the six single-shot charges.[114] Presumably his sentence was considerably greater than it would have been if the trial court had merged the six charges and run the sentences concurrently.[115] The court upheld his conviction, reasoning that the legislature intended to punish each "particular act."[116] Because the legislature intended to punish each "particular act," the court held that the defendant could be charged with one count for each shot fired rather than only one count for the entire continuing conduct of firing a gun.[117]

By contrast, and seemingly in contradiction, the court in *Smith v. United States*[118] held that a defendant committed a single assault when he beat the victim with a curling iron and hammer and then threw the victim down the stairs.[119] The court held that "[t]he fact that a criminal episode of assault involves several blows or wounds, and different methods of administration, does not convert it into a case of multiple crimes for purposes of sentencing."[120] The court said that the determination is made on a case-by-case basis, and "[w]hile cumulative punishments for these crimes may be imposed in an appropriate case[,] . . . . [i]t must be clear from the record . . . that the actions and intent of defendant constitute distinct successive criminal episodes, rather than two phases of a single assault."[121]

2. *The Flaws in the Act-Based Approach.* Courts' descriptions of acts as complete or continuing often (perhaps inevitably) lack articulated principles. These descriptions, which are based on

112. *Id.*
113. *Id.* at 212.
114. *Id.*
115. *Id.* at 214.
116. *Id.* at 215.
117. *Id.* The court did not object, though, to the trial court's combining of the first four shots into one charge. *Id.* at 214.
118. Smith v. United States, 418 F.2d 1120 (D.C. Cir. 1969).
119. *Id.* at 1121.
120. *Id.*
121. *Id.*

intuitions about the divisibility of certain conduct, appear either arbitrary or, perhaps, rest on the judges' own views about the wrongfulness of some acts as opposed to others. In *Snow*, for example, the Court insisted that any subdivision of the time of the cohabitation would be arbitrary,[122] but it failed to recognize as equally arbitrary its own decision to treat Snow's conduct as a single, continuous act. Without some account of the considerations that made three or thirty-five or one-hundred counts arbitrary, the Court ended up with just another number—one.

Moreover, the Court did not address other ends of justice, aside from the purely punitive aims of prosecution, that perhaps favored punishing the thirty-five-month-long cohabitation as multiple offenses.[123] For example, if cohabitation violates a community's sense of decency, then someone who cohabits for ten years would be more culpable than someone who cohabits for ten days and thus would deserve a more severe punishment.[124] From the perspective of the wives, it might have been that each day they woke up to the realization that they were in a plural marriage was a new insult and a new day of suffering. By depicting the crime as one continuing offense, the Court overlooked the fact that during the ongoing cohabitation the defendant faced numerous choices, each of which would have allowed him to change course and end the illegal conduct, but chose to continue his illegal conduct. But if the Court had adopted this perspective, should it have imagined the defendant to have made his choices daily, weekly, or monthly?

Perhaps most puzzling is the court's decision in *Hennemeyer*: if firing four shots on the first day was a single offense, why was firing six shots on the second day six separate crimes?[125] Did it matter that

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122. *In re* Snow, 120 U.S. 274, 282 (1887).

123. *Id.*

124. One court employed a culpability analysis, determining that a defendant who moved three times violated a registration statute each time. People v. Meeks, 20 Cal. Rptr. 3d 445, 452–53 (Ct. App. 2004). The court reasoned that

> every time defendant moves, this triggers a new registration requirement, each of which continues indefinitely and overlaps with the one before it. However, each is a separate offense. The purpose of [the statute] is to insure that a defendant's punishment will be commensurate with his culpability. Under the circumstances of this case, failure to punish defendant for each failure to register would violate this purpose. A defendant who repeatedly moves without notifying authorities . . . is surely more culpable than one who fails to register following only one triggering event.

Id. at 453.

125. *See supra* text accompanying notes 112–16.

the defendant fired the shots on the second day in different locations—over the course of a several-mile chase—whereas the defendant fired all shots on the first day from basically the same spot? It is unclear how much time mattered—the shots on the second day took place over a fifteen-minute span, whereas the shots on the first day all occurred within a few minutes. The court never discussed which facts led it to consolidate the first four shots into a single charge but to treat the next six shots as distinct acts.

The rationale provided in *Johnson*—that the first poker hand was sufficient for prosecution and therefore each hand should constitute a separate offense[126]—is most unsatisfying. Many crimes could be split into several acts according to this justification. By this logic, the Court in *Snow* could have ruled that each night of cohabitation was illegal and therefore prosecution for one night of cohabitation should not bar prosecution for the other nights because one night by itself would have been enough for a criminal prosecution.

The reasoning of the court in *Krueger* is suspect for the same reason. Was there really a separate crime committed by the defendant each time the child paused while being forced to perform oral sex? Was there not, as the Supreme Court has considered determinative in other situations,[127] a singleness of thought, purpose, or action, that may be deemed a single impulse? How could this ever be determined in the typical case of sexual assault that is not recorded?[128] Under the Court's reasoning in *Krueger*, a single sexual assault would be virtually impossible to commit, given that nearly all such assaults would involve a series of stops and starts. The reasoning of both *Krueger* and *Johnson* would almost always favor splitting the offense into several crimes.

D. A Time-Based Approach

1. *A Time-Based Approach Defined.* When assessing the number of crimes comitted, many courts examine the time period during which the acts took place. After all, if one were to consider why

126. Johnson v. Commonwealth, 256 S.W. 388, 389 (Ky. 1923).

127. *See, e.g.*, United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 224 (1952) (consolidating multiple weeks of minimum wage and other violations into single counts because the violations arose from single impulses). For a discussion on the impulse approach, see *supra* Part I.B.

128. *See supra* note 96 and accompanying text.

charging a suspect who fires five shots in fairly rapid succession with five separate counts is troubling, the issue of time instinctively comes to mind. The compressed time period, many would argue, indicates one criminal act. Some statutes specifically mention time. For example, Indiana's criminal code defines a single episode of criminal conduct as "offenses or a connected series of offenses that are closely related in time, place, and circumstance."[129]

Courts often examine time in their analysis. In *Hennemeyer*, the court likely intuitively based its view that shooting at patrol cars on separate and consecutive days constituted two separate offenses in part on the passage of time.[130] On the other hand, many courts have considered the time factor and rejected it as not determinative or insufficient. In *State v. Soonalole*,[131] the court allowed a prosecutor to charge separate acts of fondling within one car ride as separate crimes.[132] In *State v. Rummer*,[133] the court upheld as separate offenses acts of fondling that consisted of touching breasts and genitals, respectively, during a brief attack.[134] And, in *Sanchez-Rengifo v. United States*, the court held four sex acts committed over two hours to be separate offenses, but only considered time in the context of determining that the acts reflected separate impulses.[135] On the other hand, time appeared to be the determining factor in allowing separate counts for injuries inflicted in *Ratliff v. Commonwealth*,[136] when the trial court instructed the jury that there would be one count of criminal abuse related to "older" bruises on the victim's body and another count for the "newer" bruises.[137]

2. *Flaws in the Time-Based Approach.* Although a rule based on time may seem straightforward and easy to administer, it would create several problems. Setting a standard based solely on a set time period would lead to unfair and arbitrary results. Why should the court choose fifteen minutes as opposed to ten hours; what measure would the court use to determine the appropriate amount of time?

129. IND. CODE § 35-50-1-2(b) (2004).
130. *See supra* note 112 and accompanying text.
131. State v. Soonalole, 992 P.2d 541 (Wash. Ct. App. 2000).
132. *Id.* at 543–44.
133. State v. Rummer, 432 S.E.2d 39 (W. Va. 1993).
134. *Id.* at 50.
135. *See* Sanchez-Rengifo v. United States, 815 A.2d 351, 359 (D.C. 2002).
136. Ratliff v. Commonwealth, 194 S.W.3d 258, 273 (Ky. 2006).
137. *Id.*

Rules would have to be tailored to set a different temporal limitation to each offense, as crimes such as rape or a payroll violation require different standards. Legislatures would struggle to define the time period fairly and courts would struggle to determine the time period during which the offense occured. If a statute presumed that acts committed within fifteen minutes were continuous, it would produce absurd results when defendants miss the time cutoff by seconds. For example, is a defendant who plays poker for sixteen minutes any more morally culpable than someone who plays for fifteen minutes? Would a different charge make sense solely on the basis of the one-minute difference?

Finally, any time standard would be flawed according to deterrence and retributive rationales of punishment. A rule that treats acts within a set time period as presumptively one crime would do nothing to deter someone from throwing an additional punch or illegally opening an additional piece of mail within that time frame.[138] A set-time-period rule would encourage, or at least not discourage, a person who has already committed one illegal act to repeat that or similar acts as often as possible within the set time period. Moreover, retributive theories of punishment would often be thwarted by punishment tied solely to a time period. If punishments are supposed to reflect the moral wrong committed, someone who threw ten punches against one victim in five minutes might be more morally culpable than someone who threw only one. Focusing exclusively on time would prevent considering moral culpability.

II. WHY THE LACK OF CLEAR STANDARDS IS TROUBLING

This Part outlines three major reasons why determining when an act is a single crime or multiple criminal acts is important to criminal law. First, deciding whether conduct should be split into many acts or punished as one raises questions of fundamental fairness in the criminal justice system. Second, the ambiguity in the charging and punishing of these offenses increases the chances of prosecutorial misconduct. Finally, charging an offense as multiple crimes raises double jeopardy concerns.

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138. *Cf.* People v. Fielder, 65 Cal. Rptr. 3d 12, 16 (Ct. App. 2007) (depublished) (punishing a person only once for failing to report a change of address would give him an incentive to move multiple times without informing the police, with each move compounding the difficulty of surveilling him).

A. Issues of Fairness

Dividing certain conduct into several distinct acts of criminality raises four questions of fundamental fairness. First, without the guidance of legislative intent in many of these cases there is no reliable metric to determine whether a punishment is just. Second, the division of one incident into dozens or scores of separate felonies may constitute cruel and unusual punishment under the Eighth Amendment. Third, dividing a single incident into multiple offenses allows the application of recidivist statutes in ways that raise due process concerns or at least raise serious questions of fairness. Finally, inconsistency in the law risks unfairness in the criminal process simply because defendants in similar positions are treated differently.

1. *Ambiguity in Legislative Intent Can Lead to Ambiguity in Determining Fair Punishments.* First, a fair process can easily be thwarted given the lack of clear legislative standards. Courts have long struggled to find an external source for determining whether a sentence is just. Ultimately, though, courts have not come up with a valid measure for "what type of punishment is the 'right' amount or type for any particular offense. History [has not been of] assist[ance] . . . as penalties for common law crimes have changed over time, and most of today's crime[s] did not exist at common law. Precedent will not help . . . ."[139]

Because no real external source can determine in most cases how much or what type of punishment is appropriate, "the Court has regularly deferred to the legislative selection of the 'right' punishment."[140] Legislative intent, however, as discussed in Part I.A, is unclear in the vast majority of these crimes.[141] Given the ambiguity in legislative intent, courts lack a basis for determining whether a sentence is fair. Although legislative intent may be clear about the sentence per offense, the lack of clarity as to what constitutes an offense renders legislative intent almost useless as a guide in deciding how many offenses should be charged. Thus, although legislative

139. Susan R. Klein, *Double Jeopardy's Demise*, 88 CAL. L. REV. 1001, 1005 (2000) (book review).

140. *Id.* In some ways, the question of a fair sentence is like the question of how many crimes to charge. In both situations, extremes—that is, sentences that are obviously too light or too heavy—are easily identifiable. But a great number of cases are bound to be questionable or borderline.

141. *See supra* Part I.A.

intent is the most common and traditional method for determining if a punishment fits a crime, it is of little or no use in determining if multiple charges and the resulting punishment are fair.

2. *The Potential for Disproportionate Sentencing.* A second and related fairness issue concerns whether the defendant receives a punishment proportionate to the crime committed within constitutional limitations.[142] The law on disproportional sentences is a murky area[143] and "[o]utside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare."[144] Nonetheless, courts have at times concluded that certain sentences, even if intended by the legislature, are disproportionate and thus constitute cruel and unusual punishment.[145] The Supreme Court dealt with disproportionate sentencing in two key cases. First, in *Coker v. Georgia*,[146] the Court held that imposing the death penalty was disproportionate for the

142. For a general discussion of the Eighth Amendment, see *Furman v. Georgia*, 408 U.S. 238 (1972). In *Furman*, the Court explained,

> If a punishment is unusually severe, if there is a strong probability that it is inflicted arbitrarily, if it is substantially rejected by contemporary society, and if there is no reason to believe that it serves any penal purpose more effectively than some less severe punishment, then the continued infliction of that punishment violates the command of the Clause that the State may not inflict inhuman and uncivilized punishments upon those convicted of crimes.

Id. at 282.

143. *See* Robert Batey, *The Cost of Judicial Restraint: Forgone Opportunities to Limit America's Imprisonment Binge*, 33 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 29, 56 (2007) ("Indeed, a majority of the justices seems determined to limit the number of constitutionally disproportionate sentences of imprisonment to an infinitesimal few.").

144. Rummel v. Estelle, 445 U.S. 263, 272 (1980).

145. Kennedy v. Louisiana, No. 07-343, slip op. at 25 (U.S. Oct. 1, 2008) ("The constitutional prohibition against excessive or cruel and unusual punishments mandates that the State's power to punish 'be exercised within the limits of civilized standards.' Evolving standards of decency that mark the progress of a maturing society counsel us to be most hesitant before interpreting the Eighth Amendment to allow the extension of the death penalty, a hesitation that has special force where no life was taken in the commission of the crime." (quoting Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion))); Ramirez v. Castro, 365 F.3d 755, 773 (9th Cir. 2004) (holding that a sentence of twenty-five years to life under California's three strikes law for stealing a $199 VCR after two previous shoplifting convictions was cruel and unusual punishment); Banyard v. Duncan, 342 F. Supp. 2d 865, 871 (C.D. Cal. 2004) (holding that a sentence of twenty-five years to life for possession of less than a gram of rock cocaine under California Three Strikes Law was cruel and unusual); State v. Davis, 79 P.3d 64, 75 (Ariz. 2003) (en banc) (ruling a sentence of fifty-two years without possibility of parole for four counts of sexual misconduct with a minor cruel and unusual).

146. Coker v. Georgia, 433 U.S. 584 (1977).

crime of raping an adult woman.[147] Second, in *Solem v. Helm*,[148] the Supreme Court held that a life sentence without the possibility of parole under a South Dakota recidivist statute was disproportionate to the offense of passing a bad check for $100 after several previous convictions.[149] In both cases, the courts used a three-prong test to determine disproportionality: (1) the gravity of the offense and the harshness of the penalty, (2) the sentences imposed on other criminals in the same jurisdiction, and (3) the sentences imposed for the same crime in other jurisdictions.[150] In *Harmelin v. Michigan*,[151] the Court ruled that a life sentence for 650 grams of cocaine did not constitute cruel and unusual punishment.[152] In a fractured opinion, Justice Scalia, joined by Chief Justice Rehnquist, wrote that there is no proportionality requirement under the Eighth Amendment,[153] directly criticized *Solem*,[154] and voted to uphold the conviction.[155] Justice White, joined by Justices Stevens and Blackmun, dissented from the opinion, advocated for a robust proportionality requirement, and voted to strike down the life sentence.[156] Justice Kennedy, joined by Justices O'Connor and Souter, wrote that there is a narrow proportionality requirement but that the life sentence for Harmelin did not violate the requirement.[157]

Ewing v. California[158] clarified the law when the Supreme Court upheld the application of the California three-strikes law[159] against a defendant who had stolen three golf clubs, each worth $399, and was sentenced to twenty-five years in prison.[160] In doing so, the Court

147. *Id.* at 597. Similarly, on Oct. 1, 2008, the Supreme Court held in *Kennedy* that imposition of the death penalty was likewise disproportionate for rape of a child. *Kennedy*, slip op. at 36. This ruling purportedly invalidates the Louisiana law along with the five other similar capital provisions then existing in Georgia, Montana, Oklahoma, South Carolina, and Texas. *Id.*, slip op. at 12.

148. Solem v. Helm, 463 U.S. 277 (1983).

149. *Id.* at 303.

150. *Id.* at 292.

151. Harmelin v. Michigan, 501 U.S. 957 (1991).

152. *Id.* at 994.

153. *Id.* at 965 (opinion of Scalia, J.).

154. *See id.* at 967 ("The error of *Solem*'s assumption is confirmed by the historical context and contemporaneous understanding of the English guarantee.").

155. *Id.* at 996 (majority opinion).

156. *Id.* at 1014 (White, J., dissenting).

157. *Id.* at 996–97 (Kennedy, J., concurring).

158. Ewing v. California, 538 U.S. 11 (2003).

159. *See infra* notes 162–63 and accompanying text.

160. *Ewing*, 538 U.S. at 17–18.

endorsed the "narrow" interpretation of the proportionality requirement.[161] Although the Court's Eighth Amendment jurisprudence has defined the proportionality requirement narrowly, at some point the charging of separate crimes can be so extreme as to be cruel and unusual punishment.

The Eighth Amendment and the Due Process Clause (which has never been applied in these cases) are the sole constitutional restrictions on excessive sentencing. Part III.B discusses how courts should apply the Eighth Amendment in multiple units of prosecution cases to achieve more consistent and just results.

3. *The Danger in Applying Recidivist Statutes.* The dangers of an unfair sentence are magnified by the proliferation of habitual-offender statutes. Many states have laws in place that allow harsher punishment for an offender who commits multiple crimes on the ground that the offender is a recidivist and therefore more incorrigible and deserving of harsher treatment.[162] Additionally, these laws provide longer sentences to protect society by keeping these criminals off the street and deterring criminal activity.[163]

The problem is that a person could be charged under a habitual-offender statute for a single incident that is treated as multiple units of prosecution. The prosecutor's decision in *People v. Haskell*[164] exemplifies this risk: the prosecutor charged Craig Haskell with four counts of criminal sexual conduct in the first degree for penetrating

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161. *Id.* at 20–22.

162. *Id.* at 15 ("Between 1993 and 1995, [twenty-four] states and the Federal Government enacted three strikes laws. Though the three strikes laws vary from State to State, they share a common goal of protecting the public safety by providing lengthy prison terms for habitual felons." (citation omitted)).

163. *See id.* at 31 (Scalia, J., concurring) ("[T]he purpose of California's three strikes law [is]: incapacitation."). The California legislature initially adopted the three-strikes law as a statute, and voters then approved it as an initiative. Joy M. Donham, *Third Strike or Merely a Foul Tip?: The Gross Disproportionality of* Lockyer v. Andrade, 38 AKRON L. REV. 369, 373 (2005). Mike Reynolds, the father of a murdered child, first proposed the law. *Id.* But the well-publicized murder of young Polly Klaas ultimately guaranteed the law's passage. *See id.* ("Three Strikes' ultimate passage was most importantly influenced by the murder of Polly Klaas."). Klaas, a twelve-year-old, was taken from her home in Petuluma, California, in October 1993 by an offender who had been convicted twice previously and had recently been paroled from state prison. *Id.* at 373 n.32. For an excellent discussion and critique of the California three-strikes law, see generally Linda S. Beres & Thomas D. Griffith, *Habitual Offender Statutes and Criminal Deterrence*, 34 CONN. L. REV. 55 (2001).

164. People v. Haskell, No. 251929, 2005 WL 1489480 (Mich. Ct. App. June 23, 2005) (per curiam).

the victim four times over a few minutes.[165] The prosecutor accordingly sought and received an enhancement for Haskell under a habitual offender statute even though his only crimes occurred in those few minutes.[166] The court held that "[e]ach forcible sexual penetration of the victim resulted in a separate conviction pursuant to the plain language of the statute and relevant case law."[167] Moreover, the judge, following Michigan state law, found these four convictions sufficient to constitute a continuing pattern of criminal behavior.[168] The court held that "the evidence clearly indicated that the defendant committed three or more crimes against the victim within a five year period,"[169] so the court was entitled to impose a heightened sentence under the recidivist statute.[170] Thus, for conduct that other courts may have treated as one act of rape, the Michigan court found several acts of rape as well as a continuing pattern of behavior that made him a habitual offender.[171]

Decisions whether an act or series of acts can be charged as multiple offenses or as a single act presents significant ramifications if recidivist statutes apply in these situations. A prosecutor's decision to charge an offense as multiple counts not only risks greater punishment based on the statutory penalty for each crime, but it also could dramatically change the penalty if the person is then charged as a habitual offender. Such a possibility significantly raises the stakes in the type of cases discussed in this Note and presents questions about the fundamental fairness of the process. Part III.C of this Note suggests that courts should consider decisions to charge offenses as multiple counts when deciding whether to apply recidivist statutes.

4. *The Danger of Inconsistency.* Finally, ambiguity regarding how many crimes to charge for a single act injects inconsistency into how crimes are punished. Even if a sentence does not violate the Eighth Amendment under either traditional-sentencing or enhanced-sentencing statutes, concerns still remain about the fairness of the practice. Deciding how to charge these offenses can lead to inconsistent punishment and sentencing, inconsistencies which

165. *Id.* at *8.
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.*

threaten the appearance of fairness, if not actual fairness, of the system. Congress passed the Federal Sentencing Guidelines to specifically address the problems of disparate and inconsistent sentencing.[172] The system of punishment and imprisonment is based on "a corresponding scale of penalties. Trivial offenses causing little harm must not be punished as severely as offences causing great harm . . . ."[173] Inconsistent sentencing of two similar acts threatens the very foundation of what is considered fairness in punishment.[174]

The potential for tremendously disparate sentences for similar acts also raises legitimacy concerns. Charging two defendants who committed similar acts with substantially different offenses and giving them significantly different sentences could weaken confidence in the justice system. For example, serious questions of the legitimacy of the criminal justice system are presented, if, in one case, a man who forces a child to perform oral sex on him during a twenty-five-minute period is charged with one count of felony sexual abuse and, in another case, a different man is charged with ninety counts because the prosecutor believed the act stopped and started ninety times in that twenty-five minutes. The public, the victims, and the accused might reasonably conclude that crimes are defined and sentences are imposed not by the legislature, or even by judges obligated to treat like cases alike, but at the whim of prosecutors.

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172. Rita v. United States, 127 S. Ct. 2456, 2486 (2007) (Souter, J., dissenting) ("The general object of Guidelines sentencing was the eminently laudable one of promoting substantial consistency in exercising judicial discretion to sentence within the range set by statute for a given crime.").

173. HART, *supra* note 74, at 162.

174. By allowing judges to take a real-offense approach to sentencing, the Sentencing Guidelines attempt to remedy charging abuses. U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 (2004); *see also* David Yellen, *Illusion, Illogic, and Injustice: Real-Offense Sentencing and the Federal Sentencing Guidelines*, 78 MINN. L. REV. 403, 408 (1993) ("[A] 'real-offense element' is any sentencing factor not included in the definition of the offense of conviction and either established at trial or admitted by the defendant as part of a guilty plea.").

Real-offense sentencing counterbalances prosecutorial discretion:

> Linking the sentence imposed more closely to the offense of conviction, as all sentencing guidelines systems do, increases the prosecutor's influence on sentences because prosecutors have broad authority to select or reject the charges that might be brought against the offender. In theory, then, a charge-based guidelines system shifts a great deal of sentencing authority to prosecutors. Sentencing commissions have considered whether it is possible and appropriate to counter this enhanced prosecutorial influence by utilizing some version of real-offense sentencing.

David Yellen, *Reforming the Federal Sentencing Guidelines' Misguided Approach to Real-Offense Sentencing*, 58 STAN. L. REV. 267, 270 (2005).

B. Concerns about Prosecutorial Misconduct

The decision to charge a person with one offense or many is a matter of prosecutorial discretion.[175] Although prosecutorial discretion is a critical part of the criminal justice system, it also can be abused. For example, some argue that prosecutors manipulate the system of plea-bargaining by overcharging and thus increasing pressure on defendants to plead guilty.[176] The ability to charge multiple acts instead of one act gives prosecutors enormous power.[177] A prosecutor who can make at least a colorable argument that an act is divisible then has a powerful weapon to use during plea bargaining even if the prosecutor thinks that the decision to file multiple charges might not withstand the scrutiny of a trial or appellate court. Many defendants facing lengthy sentences may be reluctant to test the prosecutor's willingness to charge multiple offenses, and there is very little oversight of a prosecutor's charging decisions.[178] The Louisiana Supreme Court recognized this discretion when it upheld twenty theft charges for an ongoing theft that lasted eight months, noting that it was purely a matter of prosecutorial discretion whether to charge the defendant with twenty crimes of theft or just one for the aggregate total amount stolen.[179]

Moreover, even if prosecutors do not wield it as a sword in plea bargaining, broad prosecutorial discretion in sentencing is

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175. United States v. Armstrong, 517 U.S. 456, 464 (1996).

176. *See* Susan R. Klein & Jordan M. Steiker, *The Search for Equality in Criminal Sentencing*, 2002 SUP. CT. REV. 223, 234 ("[F]ederal prosecutors can circumvent equality by manipulating offense levels through charge bargaining . . . .").

177. *See* James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1525 (1981) ("Decisions whether and what to charge, and whether and on what terms to bargain, have been left in prosecutors' hands with very few limitations.").

178. *See generally* Abby L. Dennis, Note, *Reining in the Minister of Justice: Prosecutorial Oversight and the Superseder Power*, 57 DUKE L.J. 131, 136 (2007) ("This vast discretionary authority is accompanied by little or no transparency. Indeed, prosecutors determine whom to charge, what charges to file, and how to obtain convictions for those charges in secret. This situation breeds potential for impropriety, as it vests in one official the power to invoke society's harshest sanctions on the basis of ad hoc personal judgments, which can often be capricious or politically induced." (footnotes omitted) (internal quotation marks omitted)).

179. State v. Joles, 492 So. 2d 490, 490 (La. 1986) ("[W]hen a person has been accused of committing a series of distinct thefts which are properly joinable in a single bill of information, the person may *either* be charged with one offense and sentenced upon conviction within the sentencing range for the grade of the offense determined by the aggregate amount of all of the thefts *or* may be charged with each separate offense and sentenced upon conviction within the sentencing range for the grade of each particular offense determined by the amount of that theft.").

disquieting.[180] Providing the prosecutor with the ability to decide whether to charge one count or fifty is unsettling because it vests so much unchecked power in a single person. The possibility of prosecutorial overzealousness in such a situation is not remote. Indeed, the New Hampshire Supreme Court recognized just this possibility in *State v. Krueger*,[181] discussed in Part I.C.1, involving the ninety separate offenses arising from a twenty-five-minute period in which a child was sexually abused.[182] Although ultimately upholding the right of the prosecutor to charge these separate offenses, the court was "decidedly critical of the prosecution's decision."[183] As the New Hampshire Supreme Court concluded, "it is important to exercise discretion with more circumspection when charging crimes under these circumstances."[184] The court continued to emphasize the discretion and responsibility required from prosecutors because courts "place a great deal of responsibility upon prosecutors to exercise discretion without vengeance when charging a particular defendant. *Unfortunately, the manner in which the indictments were charged in this case raises the specter of prosecutorial over-zealousness*."[185]

C. Double Jeopardy Problems

Finally, filing multiple charges for the same conduct violates the prohibition on double jeopardy. The Double Jeopardy Clause of the Fifth Amendment states that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb."[186] The Double Jeopardy Clause prohibits multiple punishments for the same

180. *See* Vorenberg, *supra* note 177, at 1554 (listing reasons why "[t]he existence and exercise of prosecutorial discretion are inconsistent with the most fundamental principles of our system of justice and our basic notions of fair play and efficient criminal administration").

181. State v. Krueger, 776 A.2d 720, 721 (N.H. 2001).

182. *Id.*

183. Krueger v. Coplan, 238 F. Supp. 2d 391, 394 n.1 (D.N.H. 2002).

184. *Krueger*, 776 A.2d at 722.

185. *Id.* (emphasis added).

186. U.S. CONST. amend V. Although the Amendment by its terms applies to life and limb, the Court has expanded the protection to apply to prison sentences and criminal fines. Jeffers v. United States, 432 U.S. 137, 155 (1977); *see also* Arizona v. Washington, 434 U.S. 497, 503–04 (1978) (discussing why a second prosecution may be unfairly burdensome to the defendant). There is less explicit discussion of the double jeopardy issue in relation to the multiple counts versus single offense issue that arises in the cases like *Snow* and *Ebeling*. *See supra* Part I.A.

offense;[187] however it is unclear whether or how double jeopardy constrains prosecutors in defining an offense.

Fear of violating the Double Jeopardy Clause has caused many courts to closely examine decisions concerning the units of prosecution. For example, in *Foley v. Commonwealth*,[188] the court held that multiple convictions for fleeing and evading law enforcement violated the prohibition on double jeopardy.[189] The defendant was accused of violating a statute that made it a crime for a person to "knowingly or wantonly disobey[] a direction to stop his or her motor vehicle, given by a person recognized to be a police officer."[190] The defendant disobeyed orders from several police officers while being chased and was prosecuted and convicted for two violations of the statute, including one violation after he crossed into a second county.[191] The court "conclude[d] that fleeing or evading, under circumstances as occurred in this case, is a single continuous act, regardless of how many police officers may be considered to have given an order to stop."[192] Finding that the defendant's conduct constituted a single crime, the court vacated the second conviction because it constituted multiple punishments as prohibited by the Double Jeopardy Clause.[193]

Thus, when a defendant is convicted of multiple counts for an event that should have been deemed a single criminal act, it violates the prohibition on double jeopardy. Using the facts in *Snow* as an example, if the prosecutor had charged Snow with only a single count

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187. Brown v. Ohio, 432 U.S. 161, 165 (1977).

188. Foley v. Commonwealth, 233 S.W.3d 734 (Ky. Ct. App. 2007).

189. *Id.* at 738; *see also* State v. Grady, 524 S.E.2d 75, 79 (N.C. Ct. App. 2000) (holding that multiple convictions for the continuing offense of maintaining a dwelling for narcotics dealings violated double jeopardy).

190. *Foley*, 233 S.W.3d at 736 (quoting KY. REV. STAT. ANN. § 520.095(1)(a) (West 2007)).

191. *Id.*

192. *Id.* The court applied a combination of the impulse and complete act analyses, stating:

> the intent to disregard a police officer's order to stop and then to flee or evade is made when the initial officer gives the direction to stop. That intent does not change simply because other officers become involved. Appellant herein failed to obey a lawful directive of the Commonwealth. His continued disregard constituted a single event without any sufficient break in conduct and time, and thus cannot be parsed into separate and distinct offenses.

Id. at 737–38.

193. *Id.* at 738; *see also* People v. Batterman, 824 N.E.2d 314, 317 (Ill. App. Ct. 2005) (considering the same issue and deciding "that the acts of his offense carried him [through two counties] does not allow both counties to prosecute him without violating the constitutional prohibitions against double jeopardy"). *But see* State v. Mitchell, 719 So. 2d 1245, 1248 (Fla. Dist. Ct. App. 1998) (considering the same issue and reaching the opposite conclusion).

for the first year of cohabitation, the prosecutor, according to the prohibition on double jeopardy, could not then charge Snow with a second or third count for the remaining time of his cohabitation. As the Supreme Court wrote in *Brown v. Ohio*,[194] "[t]he 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."[195]

III. A THREE-PART SOLUTION

Given these serious threats to the criminal justice system, this Part presents a three-part solution to the problem of sectioning multiple charges from a course of conduct: first, courts should apply the rule of lenity; second, courts should evaluate the charges under the Eighth Amendment; and third, courts should enforce a presumption against the application of repeat offender statutes. Although prosecutors cannot always make totally consistent charging decisions, courts adopting these standards could provide greater coherence and consistency in rulings and promote more just results. At a minimum, these three approaches would compel courts to scrutinize prosecutors' charging decisions. And they would encourage courts to use different analytical methods rather than relying on standard approaches, described in Part I, that do not satisfy the requirements of logic, clarity, and determinacy.

These suggested approaches are not meant to determine the correct number or numbers of charges or offenses. Rather, these tests aim to cure the symptoms—unfair, inconsistent, and cruel punishments—that result from the immutable problem of being unable to properly define an offense. Courts will always be left with the four flawed tests presented in Part I; the three suggested approaches, however, attempt to ensure that the system cannot be abused to punish defendants multiple times for conduct which should be considered a single crime.

A. Apply the Rule of Lenity

First, courts should adopt a consistent and strict application of the rule of lenity. The rule of lenity provides that when courts interpret criminal laws, "ambiguity should be resolved in favor of

194. Brown v. Ohio, 432 U.S. 161 (1977).

195. *Id.* at 169.

lenity . . . . 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."[196] Thus, when ambiguities exist regarding whether the legislature intended multiple punishments for the same act or transgression, "the court should apply the rule of lenity to presume that the legislature did not intend multiple punishment."[197]

The rule of lenity would be helpful in these cases for three reasons. First, the rule of lenity provides important protection for defendants to ensure that they are not wrongly punished. The rule of lenity does not ensure one particular interpretation over another; rather it merely provides that when the statute is ambiguous and there is no clear indication of what Congress intended as the unit of prosecution, the court must choose the interpretation that is most favorable toward the criminal defendant.[198] This interpretation matches general criminal law principles: a person's behavior should not be criminalized unless the legislature clearly and precisely proscribes the behavior in a criminal code.[199] In *United States v.*

196. Bell v. United States, 349 U.S. 81, 83 (1955); *see also In re* Carleisha P., 50 Cal. Rptr. 3d 777, 785 (Ct. App. 2006) ("Even if we were not confident in this conclusion, we would hold the statute was at least ambiguous on this point and apply the rule of lenity in Carleisha's favor."). The rule of lenity has "become the target of substantial criticism." Note, *The New Rule of Lenity*, 119 HARV. L. REV. 2420, 2420 (2006).

> Observers argue that courts apply the rule inconsistently, or even randomly. Many go further and claim that courts have stopped applying it altogether. These critics explain the routine invocations of the rule of lenity as mere lip service: courts may nominally acknowledge the rule, but they find statutes to be unambiguous and therefore decline to apply it unless they would have found for the defendant on other grounds anyway.

Id. (footnotes omitted).

197. State v. Landgraf, 913 P.2d 252, 262 (N.M. Ct. App. 1996) (quoting State v. Franklin, 865 P.2d 1209, 1213 (N.M. Ct. App. 1993)).

198. *See* Wilson v. State, 631 S.E.2d 391, 393–94 (Ga. Ct. App. 2006) ("The rule of lenity entitles the accused to the lesser of two penalties where the *same* conduct would support either a felony or misdemeanor conviction." (quoting Quaweay v. State, 618 S.E.2d 707, 709 (Ga. Ct. App. 2005))); *see also* United States v. Granderson, 511 U.S. 39, 54 (1994) ("In these circumstances—where text, structure, and history fail to establish that the Government's position is unambiguously correct—we apply the rule of lenity and resolve the ambiguity in [the defendant's] favor.").

199. *See* Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 345–46 ("More than a simple canon of construction, this principle—known as the 'rule of lenity'—is considered essential to securing a variety of values of near-constitutional stature. Narrow construction of criminal statutes, it is proclaimed, assures citizens fair notice of what the law proscribes; it constrains the discretion of law enforcement officials; and, most fundamentally, it embodies our legal system's 'instinctive distaste[] against men languishing in

Universal C.I.T. Credit Corp., the Supreme Court invoked the rule of lenity (in concept but not explicitly in name) when determining that the employer could not be charged with multiple violations of the Fair Labor Standards Act for the same pay practices over several weeks' time and involving multiple employees.[200] The Court explained that given the stakes involved, the defendant deserved the benefit of the doubt.[201] The Court found the statute was ambiguous and explained that when choosing 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."[202]

Second, the rule of lenity would limit prosecutorial discretion in these cases. Given the ambiguity in the statutory definition of offenses and the inevitable discretion that prosecutors must exercise, applying the rule of lenity helps protect defendants from abuse of this discretion. As one court said, applying the rule of lenity would "prevent zealous prosecutors and timorous judges from perceiving two offenses where the legislature intended only one."[203]

Third, applying the rule of lenity to the cases would provide greater predictability and coherence in results. In *Snow*, for example, the rule of lenity could have provided a principle for allowing only one count for a single cohabitation.[204]

B. Evaluate the Sentence under the Eighth Amendment

The Supreme Court has ruled that grossly excessive punishments violate the prohibition on cruel and unusual punishment.[205] Although "'successful challenges to the proportionality of particular sentences have been exceedingly rare. . . .' [the Court has found] that the proportionality principle 'would . . . come into play in the extreme example . . . [such as] if a legislature made overtime parking a felony

prison unless the lawmaker has clearly said they should.'" (quotation error in original) (quoting United States v. Bass, 404 U.S. 336, 348 (1971))).

200. United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 224 (1952).

201. *Id.* at 218–19.

202. *Id.* at 221–22.

203. State v. Landgraf, 913 P.2d 252, 261 (N.M. Ct. App. 1996) (quoting Peter Westen & Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81, 118).

204. *See In re* Snow, 120 U.S. 274, 282 (1887) (describing potentially unfair applications of criminal laws as grounds for imposing less severe penalties).

205. For a review of these cases, see discussion *supra* Part II.A.2.

punishable by life imprisonment.'"[206] The Supreme Court in *Ewing v. California* endorsed Justice Kennedy's test from *Harmelin v. Michigan* that "[t]he Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime."[207]

Despite the narrow proportionality requirement and courts' hesitancy to invalidate sentences, the sheer arbitrariness of many of these cases is a perfect example of why these requirements should apply.[208] To ensure fairness, courts should vigorously apply *Solem*'s three factors evaluating whether a punishment violates the Eighth Amendment: (1) the gravity of the offense relative to the harshness of the punishment, (2) the sentences imposed on other criminals in the same jurisdiction, and (3) the sentences imposed for the commission of the same crime in other jurisdictions.[209]

When a defendant receives a prolonged prison sentence on the basis of aggregated offenses, the court should consider the Eighth Amendment's narrow proportionality requirement. For example, prosecutors could charge a defendant who illegally possessed a gun for one year with fifty-two offenses. If illegal gun possession were punishable by five years in prison, the defendant could be sentenced to 260 years in prison. Even under the Supreme Court's narrow proportionality test, courts should hold that this sentence is disproportionate. Sentencing this defendant to 260 years in prison also would fail the three *Solem* factors. First, the gravity of the offense, as measured by the societal harm caused by the mere possession of a firearm for a one-year period, does not warrant a 260-year sentence when offenses that cause far greater societal harm—such as assaults, burglaries, and rapes—rarely if ever elicit equivalently harsh sentences. Second, other defendants charged with the same offense, including in other jurisdictions, do not receive similar sentences. Third, courts do not impose similarly harsh sentences for other, comparable crimes. Thus, by the Supreme Court's standards, splitting criminal conduct into several crimes could be disproportionate to the offense and hence constitute cruel and

206. Ewing v. California, 538 U.S. 11, 21 (2003) (omissions in original) (quoting Rummel v. Estelle, 445 U.S. 263, 272, 274 n.11 (1980)).

207. *Id.* at 23 (citing Harmelin v. Michigan, 501 U.S. 957, 1001 (1991)).

208. *See supra* Part II.A.2.

209. For a discussion of *Solem*, see *supra* notes 148–50 and accompanying text.

unusual punishment. Applying this standard consistently and rigorously would provide a vital protection.

C. Employ a Presumption against Applying Repeat-Offender Statutes

Perhaps most importantly, courts should enforce a strong presumption that if a defendant who commits an act that could be characterized as a single continuing offense is charged with multiple offenses, that person should not be sentenced under a recidivist statute. Unless the legislature clearly indicates a desire to punish a continuing act with multiple charges, multiple offenses should be presumptively excluded from the scope of recidivist statutes. In other words, even if a court determines that multiple charging is appropriate, the court still must assess separately whether enhanced sentencing as a habitual offender is appropriate. The questions are distinct, and an affirmative answer to the first question (that multiple charges are acceptable) should not necessarily lead to an affirmative answer to the second question (that a sentencing enhancement for recidivist offenders should apply). Rather, habitual-offender statutes should be reserved for offenders who truly exhibit a repeating pattern of criminality incapable of rehabilitation.

The instances described in this Note are ill suited for habitual-offender statutes because the two major rationales for these statutes—deterrence and inability to be rehabilitated—do not apply in these cases. First, the habitual offender statutes "are oriented towards deterring convicted criminals from again committing crime," and deterrence does not apply to offenses such as those committed by Haskell.[210] In *Haskell*, the defendant was charged as a habitual offender based on an episode of rape, occurring over a few minutes on a single night, that was divided into four counts based on four acts of penetration.[211] A deterrence rationale entirely fails here because the defendant committed his acts so quickly—in a matter of minutes—he had no chance to reconsider his actions and thus be deterred by the threat of multiple criminal charges. Furthermore, the threat of receiving higher sentences as a recidivist was unlikely to deter his criminal behavior because it likely never occurred to him that his actions—which lasted only a few minutes[212]—would be split

210. Note, *Court Treatment of General Recidivist Statutes*, 48 COLUM. L. REV. 238, 238 (1948).

211. *See supra* notes 164–71 and accompanying text.

212. *See supra* notes 164–71 and accompanying text.

into four offenses. The unpredictable nature of the multiple charges, as opposed to a single charge, likely negates any deterrence effect. The deterrence rationale of these habitual-offender statutes in general does not work when defendants do not have the opportunity to reflect on or change their behavior.

The second rationale of habitual-offender laws is the failure of previous opportunities of rehabilitation. These recidivist laws represent a "legislative judgment . . . that offenders who have committed serious or violent felonies and who continue to commit felonies must be incapacitated."[213] Recidivist statutes are predicated on an assumption that these offenders are those "unable to bring [their] conduct within the social norms prescribed by the criminal law of the State."[214] When habitual-offender statutes are applied to acts that occurred in a single transaction, like in *Haskell*,[215] offenders lack the opportunity to rehabilitate themselves. Nothing in Haskell's record would lead to the conclusion that he could not be rehabilitated. Conduct during a single transaction cannot show the failure of previous rehabilitation attempts or the impossibility of future ones.

Habitual-offender laws likely were not passed with these kinds of circumstances in mind, and yet they easily could be applied—and indeed have been applied—in these situations. If fidelity to legislative intent is the true test of a "fair sentence," the combination of recidivist statutes with the ability to charge multiple offenses for what could be described as one crime inherently risks unfairness. Applying the recidivist statutes to multiple counts in the circumstances this Note describes is contrary to the legislative intent in establishing habitual-offender statutes. Although a legislature can determine the given sentence for a crime, "if [a state] wishes to effectively transform its 'three strikes and you're out' sentencing scheme into a 'one strike and you're out' scheme by double or triple-counting 'same' offenses, it should have to state explicitly that it intends a life sentence for the commission of a single particular crime."[216]

213. Ewing v. California, 538 U.S. 11, 30 (2003).

214. *Id.* (citing Rummel v. Estelle, 445 U.S. 263, 284 (1980)).

215. *See supra* notes 164–71 and accompanying text.

216. Klein, *supra* note 139, at 1010.

CONCLUSION

The problem this Note addresses is one of fairness and justice. Deciding how many charges to bring in criminal cases profoundly affects the futures of many defendants. The lack of coherence in charging offenses serves no one's interest—judges are forced to write confused opinions, prosecutors are unsure of how to charge defendants, and defendants are often punished unfairly. This Note presents three solutions that bring this discussion away from existing arbitrary principles and inconsistent tests and toward greater coherence and fairness in the law. No solution can ever perfectly determine how courts and prosecutors should charge offenses, but the three presented in this Note, taken together, may offer the best opportunity for courts to achieve fairer results.