

Temporal Units of Prosecution and Continuous Acts: Judicial and Constitutional Limitations*

I. INTRODUCTION

On a warm weekday afternoon on campus, I was sitting outside studying and enjoying the balmy San Diego weather. I observed a student park his car in a faculty parking spot and place the all-too-familiar yellow parking citation under his windshield wiper.¹ As I thought about this citation-avoidance strategy, I tried to recreate this student's thought process. He must have been thinking the following: parking enforcement will come around eventually and notice that I do not have a faculty parking permit but, seeing that this car's driver has already been cited, will not cite me again. Admittedly, this strategy seems intuitively logical. However, assuming parking enforcement was fooled by this strategy—that is to say, assuming they were successfully tricked into thinking that they had placed a citation under the windshield wiper—I pondered whether parking enforcement could nonetheless cite the vehicle's driver again. If so, then how often? Once a day? Every time rounds are made? As often as citations can be drafted?

Suppose a legislature passes a statute which states that it shall be

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1. Considering the student parking availability to would-be parked vehicles ratio, this student's behavior, while perhaps not justifiable, is not totally devoid of empathy.

unlawful for an individual to park her motor vehicle in front of a fire hydrant. The penalty for a violation of the statute is, say, a \$200 fine, or three days in the county jail, or both. While the punishment may seem a bit much, it is defensible, one might argue, because the offending party creates a risk that property damage and personal injuries might increase by hampering the fire department's efforts to control a possible fire. Suppose finally, however, that the statute provides that it shall be a separate offense for each hour a vehicle remains parked in front of a fire hydrant.² Thus, an individual who unlawfully parks her motor vehicle in front of a fire hydrant and leaves it there for twenty-four hours is guilty of twenty-four violations of the statute. If a defendant is found guilty on all twenty-four counts and her sentences are to run consecutively, then she would be exposed to a maximum of \$4800 in fines, or seventy-two days in jail, or both. This punishment must seem extreme, even for staunch law-and-order proponents, but what limitations, if any, are there on the passage of such a statute?³

This Comment will explore this issue. Part II will examine the historical development and the Supreme Court's application of the so-called rule of lenity when adjudicating cases involving statutes with unclear units of prosecution.⁴ Part II will also examine the manner in which unclear draftsmanship has been treated in other areas of law and

2. This temporal definition of a crime shall be referred to in this Comment as a unit of prosecution.

3. One would hope that common sense, as well as a sense of fairness, would preclude the passage of such a statute. In any event, a judge (or jury) probably would not sentence a defendant to the fullest extent of the law and probably would run her sentences concurrently, as opposed to consecutively. Indeed, the hypothetical is perhaps unrealistic enough to warrant such a response. However, keep this hypothetical in mind while pondering the less ridiculous hypotheticals, as well as the actual—and, in some cases, equally ridiculous—statutes discussed.

4. Noticeably absent in this Comment is a discussion of conspiracy, RICO, and other complex criminal law, which has been omitted for a couple of reasons. First, there is already a fair amount of literature on the subject. See, e.g., Susan W. Brenner, *S.C.A.R.F.A.C.E.: A Speculation on Double Jeopardy and Compound Criminal Liability*, 27 NEW. ENG. L. REV. 915 (1993); William H. Theis, *The Double Jeopardy Defense and Multiple Prosecutions for Conspiracy*, 49 SMU L. REV. 269 (1996); Anne Bowen Poulin, *Double Jeopardy Protection Against Successive Prosecutions in Complex Criminal Cases: A Model*, 25 CONN. L. REV. 95 (1992).

Second, complex criminal activity does not provide a clear model. True, a conspiracy can be individuated into temporal units for unit of prosecution purposes. For example, if *A* and *B* conspire to commit a continuing offense over the course of a year, then a legislature would have near plenary power (subject to limitations to be addressed in this Comment) to individuate the conspiracy into days, weeks, or months for unit of prosecution purposes. However, conspiracy normally has concomitant acts. For example, *A* and *B* may do act *C* on day *X* in furtherance of their conspiracy. On day *Y*, *A* and *B* do act *D* in furtherance of the same conspiracy. Hence, *A* and *B* have done two different acts in furtherance of the same conspiracy, which detracts from the continuing offense analysis.

will compare those areas of law with the rationale behind the rule of lenity. Finally, Part II will conclude by arguing that the rule of lenity creates a presumption opposing multiple prosecutions for the continuing violation of a statute, unless there is clear legislative intent to the contrary.

Part III will examine the double jeopardy implications raised by unit of prosecution cases. After a review of the Double Jeopardy Clause of the Fifth Amendment, Part III will conclude that, save for one exception, the Double Jeopardy Clause should not be implicated in unit of prosecution cases. Part IV will examine the history of the Cruel and Unusual Punishment Clause of the Eighth Amendment, including its origin and historical application by the Supreme Court. It will also examine some recent contradictory Supreme Court cases involving the application of the Cruel and Unusual Punishment Clause. Part IV will conclude by arguing that the Cruel and Unusual Punishment Clause should be read to encompass a limited proportionality requirement in criminal punishment and, as a protection of last resort, should be exercised to invalidate punishment that is grossly excessive when compared to the sum total of culpable behavior exhibited by a criminal defendant.

Part V will look at a few recent cases that have addressed the issue of individuating continuous acts into temporal units of prosecution. The model proposed in this Comment will then be applied to these cases in order to analyze the extent to which various courts are recognizing the judicial and constitutional issues implicated in these cases.

II. THE RULE OF LENITY

A. *Its History*

Lenity is the quality or state of being lenient.⁵ The rule of lenity provides that “where there is ambiguity in the language of a statute concerning multiple punishment, ambiguity should be resolved in favor of lenity in sentencing.”⁶ The concept of strict statutory construction, the precursor to the modern rule of lenity, was identified in *Crepps v.*

5. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 684 (1989).

6. BLACK'S LAW DICTIONARY 902 (6th ed. 1990).

Durden,⁷ an early English case. Crepps was charged with and convicted of four violations of a statute which mandated that

noe Tradesman, Artificer Workeman Labourer or other Person whatsoever shall doe or exercise any worldly Labour, Busines or Worke of their ordinary Callings upon the Lords day or any part thereof (Workes of Necessity and Charity onely excepted) And that every person . . . shall for every such Offence forfeit the summe of five shillings

Crepps was found to have sold four small hot loaves of bread.⁹ Crepps sued in trespass in the King's Bench and a unanimous court held that Crepps could violate the statute only once per day, irrespective of the number of loaves sold or the number of customers to whom they were sold.¹⁰ According to Lord Mansfield, "repeated offences are not the object which the Legislature had in view in making the statute: but singly, to punish a man for exercising his ordinary trade and calling on a Sunday."¹¹ Hence, so held the Court, "[t]here can be but one entire offence on one and the same day"¹² Note that Lord Mansfield analyzed the statute not in terms of whether the Legislature *possessed* the requisite authority to punish each discrete act of selling, but in terms of whether the Legislature had in fact *exercised* this power in the words of the statute.

American courts have approached the unit of prosecution issue in a manner remarkably similar to the approach utilized in *Crepps v. Durden*.¹³ The case of *In re Snow*¹⁴ is an early American case wherein strict statutory construction was invoked. Congress passed a statute which declared "[t]hat if any male person . . . cohabits with more than one woman, he shall be deemed guilty of a misdemeanor"¹⁵ Snow was charged with and convicted of three counts of cohabiting with more than one woman.¹⁶ The three indictments alleged the same proscribed conduct and differed only in their time periods, which roughly corresponded to calendar years.¹⁷

7. 98 Eng. Rep. 1283 (K.B. 1777).

8. Sunday Observance Act, 29 Car. 2, ch. 7 (1677) (Eng.).

9. See *Crepps*, 98 Eng. Rep. at 1284.

10. See *id.* at 1287.

11. *Id.*

12. *Id.* The reasoning in *Crepps* has been ratified by subsequent English cases. See, e.g., *B & Q (Retail) Ltd. v. Dudley Metro. Bor. Council*, 86 L.G.R. 137 (D.C. 1987).

13. 98 Eng. Rep. 1283 (K.B. 1777).

14. 120 U.S. 274 (1887).

15. Act of March 22, 1882, ch. 47, 22 Stat. 31.

16. See *Snow*, 120 U.S. at 276-77. Snow was cohabiting with seven women during the relevant time period. See *id.* at 276.

17. One indictment covered January 1 through December 31, 1883; the second covered January 1 through December 31, 1884; and the third covered January 1 through

As an initial premise, it is worth noting that Snow violated the statute the instant he cohabited with more than one woman. The statute is silent with respect to what act or acts one must commit in order to cohabit with another. However, assuming one must "live with" another (definitional issues aside) in order to cohabit, the statute is also silent with respect to how long one must live with another in order to constitute cohabitation.¹⁸ In other words, there is no temporal definition of cohabitation.

According to the Court, "[t]he offence of cohabitation, in the sense of this statute, is committed if there is a living or dwelling together as husband and wife. It is, inherently, a continuous offence, having duration; and not an offence consisting of an isolated act."¹⁹ Thus, "in each indictment, the offence is laid as a continuing one, and a single one, for all the time covered by the indictment; and, taking the three indictments together, there is charged a continuing offence for the entire time covered by all three of the indictments."²⁰ Because neither the prosecutor nor the grand jury had the authority to "divide a single continuous offence . . . into such parts as it may please, and call each part a separate offence,"²¹ the Court held that only one conviction could be sustained.²² The *Snow* Court, like the *Crepps* Court, looked not to whether the Legislature *possessed* the authority to divide continuous acts into discrete segments, but to whether it had *exercised* such power.

B. Current Application

The rule of lenity was given its name and applied by the Supreme Court in *Bell v. United States*.²³ In *Bell*, the defendant pleaded guilty to violations of the Mann Act²⁴ alleged in two counts. The Mann Act, at the time of the alleged violation(s), read as follows: "Whoever

December 1, 1885. The grand jury was presented with these allegations on December 2, 1885 and returned three true bills on December 5, 1885. *See id.* at 276-77.

18. Notice further that the statute proscribes living with *more than one* woman. Hence, a male could live with two women or a 100-woman harem and violate the statute an equal number of times—once. Thus, the rule of lenity could have been applied had the government attempted to prosecute Snow for each cohabitant, as opposed to the arbitrary time periods chosen.

19. *Snow*, 120 U.S. at 281.

20. *Id.* at 281-82.

21. *Id.* at 286.

22. *See id.* at 282.

23. 349 U.S. 81 (1955).

24. 18 U.S.C. § 2421 (1949), amended by 18 U.S.C. § 2421 (1986) (current version at 18 U.S.C. § 2421 (1994)).

knowingly transports in interstate or foreign commerce . . . any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose . . . [s]hall be fined not more than \$5,000 or imprisoned not more than five years, or both.”²⁵

Bell argued that although he had transported two women, they were transported during the same trip. Since the statute proscribed transporting any woman (as opposed to, say, a, one, or each woman), he could violate the statute only once per trip, irrespective of the number of women transported.²⁶ The Supreme Court agreed with Bell, at least to the extent that his interpretation was plausible. Because the statute was open to more than one plausible interpretation, the Court held that the statute’s unit of prosecution was unclear. Indeed, “[t]he punishment appropriate for the diverse federal offenses is a matter for the discretion of Congress, subject only to constitutional limitations, more particularly the Eighth Amendment.”²⁷ However, “[w]hen Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity.”²⁸ According to the Court, “[i]t 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.”²⁹ Hence, the rule of lenity, as articulated in *Bell*, may be stated as follows: “[I]f Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses”³⁰ Stated differently, a court will presume that a legislature meant for a single continuing transaction to be punished only once unless there is clear and unambiguous legislative intent to the contrary.³¹

25. *Id.* The Mann Act has since been amended to read as follows: “Whoever knowingly transports any individual in interstate or foreign commerce . . . with intent that such individual engage in prostitution . . . shall be fined under this title or imprisoned not more than five years, or both.” 18 U.S.C. § 2421 (1994).

26. *See Bell*, 349 U.S. at 82.

27. *Id.* See *infra* Parts IV-V for a discussion of the Eighth Amendment’s relevance in unit of prosecution cases.

28. *Bell*, 349 U.S. at 83.

29. *Id.*

30. *Id.* at 84; see also *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952) (“[W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.”).

31. There are built-in assumptions which need to be recognized. Strictly speaking, the rule of lenity is generally regarded as a canon of construction. Whether it is also a constitutional guarantee is the subject of debate. Compare Comment, *Twice in Jeopardy*, 75 YALE L.J. 262, 316 (1965) (“The rule of lenity is not a casual presumption about legislative intent, but a constitutionally compelled canon of construction.”), with Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 348

The rule of lenity has been invoked by the Supreme Court on numerous occasions after *Bell*³² and, given the fact that it has now

("It is much easier to understand the current lenity debate once the rule is conceived of as a nondelegation doctrine."). There is authority to the effect that it is a Double Jeopardy protection disguised in canonical clothing. *See, e.g., Whalen v. United States*, 445 U.S. 684, 688-89, 695 and n.10 (1980). For reasons that will be discussed in Part III, however, this is a potentially confusing, as well as a constitutionally tenuous, conclusion to draw.

Alternatively, the rule might fit within the Due Process framework. The Court has itself hinted at this proposition. For example, the Court has stated that the practice of resolving ambiguous criminal statutes in favor of lenity "reflects not merely a convenient maxim of statutory construction. Rather, it is rooted in fundamental principles of due process which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited." *Dunn v. United States*, 442 U.S. 100, 112 (1979).

Lastly, the rule of lenity has been defended on separation of powers principles. *See, e.g., Whalen*, 445 U.S. at 689 ("If a federal court exceeds its own authority by imposing multiple punishments not authorized by Congress, it violates not only the specific guarantee against double jeopardy, but also the constitutional principle of separation of powers in a manner that trenches particularly harshly on individual liberty."); *see also United States v. Lanier*, 520 U.S. 259, 265 n.5 (1997); *Busic v. United States*, 446 U.S. 398, 410 (1980) ("[I]n our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with common sense and the public weal.").

Whatever the case may be, the rule is not constitutionally binding on state courts unless it is tethered to a constitutional principle. The whole issue may be academic, however, because state courts, as a general matter, appear eager to invoke the rule. *See, e.g., Livingston Hall, Strict or Liberal Construction of Penal Statutes*, 48 HARV. L. REV. 748, 751-52 (1935); *cf. Kahan, supra*, at 384 (advocating that, even more so than federal courts, state courts, at least traditionally, have applied the rule of lenity).

With the following assumptions recognized, this Comment will assume that the rule of lenity is applied in a roughly parallel manner in both federal and state courts.

32. *See, e.g., United States v. Bass*, 404 U.S. 336 (1971); *Bifulco v. United States*, 447 U.S. 381 (1980); *Crandon v. United States*, 494 U.S. 152 (1990); *Hughey v. United States*, 495 U.S. 411 (1990); *Moskal v. United States*, 498 U.S. 103 (1990); *United States v. R.L.C.*, 503 U.S. 291 (1992); *United States v. Wells*, 519 U.S. 482 (1997). Because there is no occasion to invoke the rule of lenity unless a statute is ambiguous, there has been debate concerning how a court should decide whether a statute is ambiguous. Some have advocated a plain meaning approach, whereby courts should look only to the words of the statute itself. Others have advocated resorting to legislative history prior to deeming a statute ambiguous. *Compare, e.g., R.L.C.*, 503 U.S. at 307-12 (Scalia, J., Kennedy, J., and Thomas, J., concurring in part and concurring in the judgment) (advocating a plain meaning approach), and Sarah Newland, *The Mercy of Scalia: Statutory Construction and the Rule of Lenity*, 29 HARV. C.R.-C.L. L. REV. 197 (applauding the plain meaning approach), with *R.L.C.*, 503 U.S. at 298-306 (Souter, J., Rehnquist, J., White, J., and Stevens, J., plurality) (advocating an examination of a statute's legislative history prior to deciding that a statute is ambiguous for rule of lenity purposes).

Both approaches are based on sound public policy principles. On the one hand, the plain meaning approach comports with the notion that statutes are to give notice of what is proscribed. Indeed, it is a legal fiction to assume that citizens read statute books to

achieved the status of “venerable,”³³ it is worth taking a brief look at the post-*Bell* development of the rule. For example, in *United States v. Bass*,³⁴ the Supreme Court took a rather mechanical approach in deeming a federal statute to be ambiguous. Title VII of the Omnibus Crime Control and Safe Streets Act of 1968 provided, *inter alia*, that

[a]ny person who (1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony . . . and who receives, possesses, or transports in commerce or affecting commerce . . . any firearm shall be fined not more than \$10,000 or imprisoned for not more than two years, or both.³⁵

Bass, who had previously been convicted of a felony in New York, was charged with and convicted of possessing two firearms in violation of the statute.³⁶ The state, in convicting Bass, did not show that the firearms had been possessed in commerce or in such a manner so as to affect commerce.³⁷ The dispositive issue, therefore, was whether the phrase “in commerce or affecting commerce” applied to “receives” and “possesses,” in addition to applying to “transports.”³⁸ After reiterating

discern what constitutes permissible behavior. This legal fiction, however, is necessary in order to preclude citizens from claiming ignorance of the law as a legally recognized excuse for violating it. However, “necessary fiction descends to needless farce when the public is charged even with knowledge of Committee Reports.” *R.L.C.*, 503 U.S. at 309 (Scalia, J., concurring in part and concurring in the judgment). In other words, if it is a stretch to assume that citizens read the statute books prior to acting, then it is preposterous to assume that citizens read, absorb, and interpret “correctly” all of the legislative history behind all of the statutes they are assumed to have read.

On the other hand, reviewing the legislative history prior to deciding that a statute is ambiguous allows a court to determine the purpose of the statute. Discerning legislative purpose, in turn, prevents courts from taking an unduly restrictive view of criminal statutes. This broader construction “may be permissible on the basis of nontextual factors that make clear the legislative intent where it is within the fair meaning of the statutory language.” *R.L.C.*, 503 U.S. at 306 n.6 (Souter, J., plurality) (citing *Dixson v. United States*, 465 U.S. 482, 500-501 n.19 (1984)).

In any event, the practical impact is probably minimal because “the need for fair warning will make it ‘rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text.’” *R.L.C.*, 503 U.S. at 306 n.6 (Souter, J., plurality) (quoting *Crandon v. United States*, 494 U.S. 152, 160 (1990)). It suffices for present analysis to be cognizant of the competing schools of thought.

33. *R.L.C.*, 503 U.S. at 305 (Souter, J., plurality).

34. 404 U.S. 336 (1971).

35. 18 U.S.C. app. § 1202(a) (1968), *recodified as amended by* 18 U.S.C. 922(g) (1994).

36. *See Bass*, 404 U.S. at 337-38.

37. *See id.* at 338.

38. *See id.* at 339. One wonders whether the federal Legislature would have the constitutional authority to pass a statute which proscribed mere possession without an interstate commerce hook, especially in light of *United States v. Lopez*, 514 U.S. 549, 567 (1995), where the Court held that the possession of a gun is in no sense an economic activity that might affect any sort of interstate commerce. In any event, the Court never addressed this constitutional issue because it deemed the clause “in commerce or

the rule that ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity,³⁹ the Court declared that the statute was ambiguous because Congress had not “plainly and unmistakably” made it a federal crime for a convicted felon simply to possess a gun absent some demonstrated nexus with interstate commerce.⁴⁰

In *Bifulco v. United States*,⁴¹ the Court reiterated its “clear” precedent that the rule of lenity applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose.⁴² As such, the Court articulated its unwillingness to “interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended.”⁴³

Thus, the *Bell-Bass-Bifulco* line of cases refines the rule of lenity such that its current status may be articulated as follows. First, legislatures must “plainly and unmistakably” define what is proscribed.⁴⁴ Second, legislatures must “clearly and without ambiguity” intend to turn a single transaction into multiple offenses: otherwise, a court will resolve the unit of prosecution question in favor of one offense.⁴⁵ Third, because the rule of lenity applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose, courts will not increase the penalty a statute visits upon an individual if it must guess as to what a legislature intended.⁴⁶ This is the conceptual scheme upon which subsequent analysis will be based.⁴⁷

affecting commerce” to modify all three activities—receives, possesses, and transports. Thus, the Court treated the clause as a constitutionally benign grouping of words.

39. See *Bass*, 404 U.S. at 347 (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)).

40. See *id.* at 348-49.

41. 447 U.S. 381 (1980).

42. See *id.* at 387 (citing *United States v. Batchelder*, 442 U.S. 114, 121 (1979); *Simpson v. United States*, 435 U.S. 6, 14-15 (1978)).

43. *Bifulco*, 447 U.S. at 387 (quoting *Ladner v. United States*, 358 U.S. 169, 178 (1958)).

44. *Bass*, 404 U.S. at 348-49.

45. *Bell v. United States*, 349 U.S. 81, 83-84 (1955).

46. See *Bifulco*, 447 U.S. at 387.

47. The rule of lenity intuitively seems fair, perhaps because its rationale is consistent with other facets of American law. For example, the RESTATEMENT OF CONTRACTS provides that “[i]n choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates *against the party who supplies the words* or from whom a writing otherwise proceeds.” RESTATEMENT (SECOND) OF CONTRACTS § 206 (1979) (emphasis added). The rationale for such a rule is as follows:

Where one party chooses the terms of a contract, he is likely to provide more carefully for the protection of his own interests than for those of the other party. He is also more likely than the other party to have reason to know of uncertainties of meaning. Indeed, he may leave meaning deliberately obscure, intending to decide at a later date what meaning to assert. In cases of doubt, therefore, so long as other factors are not decisive, there is substantial reason for preferring the meaning of the other party. The rule is often invoked in cases of standardized contracts and in cases where *the* drafting party has the stronger bargaining position, but it is not limited to such cases. It is in strictness a rule of legal effect, sometimes called construction, as well as interpretation: its operation depends on the positions of the parties as they appear in litigation

Id. cmt. a (emphasis added).

Likewise, The Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law" U.S. CONST. amend. V. The Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law" U.S. CONST. amend. XIV. Collectively, these two Due Process clauses guarantee that neither the federal nor a state government, respectively, may constitutionally require citizens to "answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions." *Connally v. General Const. Co.*, 269 U.S. 385, 393 (1926).

In *Connally*, Oklahoma law provided that a contractor pay his employees "not less than the current rate of per diem wages in the locality where the work is performed" *Id.* at 388. The Court held the statute was unconstitutionally vague in two respects. First, the words "current rate of wages" did not denote a specific or definite sum. *Id.* at 393-94. Second, while the term "locality" might be definite enough in certain circumstances, it is not so "in a statute such as that under review imposing criminal penalties." *Id.* at 394-95.

The void-for-vagueness doctrine articulated in *Connally* was affirmed in *Kolender v. Lawson*, 461 U.S. 352 (1983), where the Court was asked to determine whether a California anti-loitering statute was unconstitutionally indefinite. The statute required a person who loitered or wandered about without apparent reason to identify himself and to account for his presence when requested to do so by a peace officer. *See* CAL. PENAL CODE § 647(e) (West 1977). A California Court of Appeal, in *People v. Solomon*, 108 Cal. Rptr. 867 (1973), had interpreted the statute to mean that an individual must provide "credible and reliable" identification when requested by a police officer who has reasonable suspicion of criminal activity sufficient to justify a detention authorized by *Terry v. Ohio*, 392 U.S. 1 (1968). "Credible and reliable" identification, so said the California court, is identification "carrying reasonable assurance that the identification is authentic and providing means for later getting in touch with the person who has identified himself." *Solomon*, 108 Cal. Rptr. at 867.

The Supreme Court struck down the statute, holding that the statute "encourages arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do in order to satisfy the statute." *Kolender*, 461 U.S. at 361. The state had argued that the need for strengthened law enforcement tools was necessary to combat the crime epidemic that was plaguing our Nation. The Court poignantly replied that the compelling societal interest in curbing criminal activity "cannot justify legislation that would otherwise fail to meet constitutional standards for definiteness and clarity." *Id.* (citing *Lanzetta v. New Jersey*, 306 U.S. 451 (1939)).

The canon of construction which favors interpreting contracts against the drafter and the void-for-vagueness doctrine have been discussed in conjunction with the rule of lenity in order to illustrate a common theme in American law. It is assumed that drafters, whether drafting a contract or a statute, will take care to effectuate their own interests, perhaps even at the expense of the other party. In other words, the drafting party will not "short-change" itself. Hence, an ambiguous contractual term should not be interpreted in

III. THE DOUBLE JEOPARDY CLAUSE AND UNIT OF PROSECUTION ANALYSIS

A. *The History of Double Jeopardy Jurisprudence*

The concept of putting an individual in jeopardy only once for one offense is rooted in ancient common law.⁴⁸ Indeed, the principle of double jeopardy existed in Greek and Roman law and it found expression in the *Digest of Justinian*.⁴⁹ Double jeopardy in its modern form, however, was influenced most heavily by Coke and Blackstone.⁵⁰ The clause, unlike the Eighth Amendment, has neither a Magna Carta nor an English Bill of Rights ancestor.⁵¹ Nevertheless, Coke's *First Institute*, which might fairly be classified as the beginning of modern double jeopardy jurisprudence, states:

the draftsman's favor because the drafter had an opportunity to draft the contract as later desired and, so the argument goes, would have drafted it as later desired if that was his original intent. This argument applies with equal force with respect to legislatures because a legislature presumably takes care to effectuate its (or, perhaps more accurately, its constituents') interests.

There is a second, and somewhat related, reason for construing both contracts and statutes against the drafter. Even if the "looking-out-for-one's-own-interest" argument is less than convincing, there is yet a more intuitive reason for reaching the same conclusion. Contracts are normally drafted and agreed to by private parties. Statutes, on the other hand, are drafted by legislators, many of whom are attorneys. If private, and sometimes unsophisticated, parties are responsible for drafting unambiguous contracts, then legislatures should be held to a higher standard than the private party drafting a contract, considering the resources available to them and the fact that they are "predominantly a lawyer's body." *Albernaz v. United States*, 450 U.S. 333, 341 (1981) (quoting *Callanan v. United States*, 364 U.S. 587, 594 (1961)).

Finally, one must consider the consequences of interpreting ambiguity in favor of the drafter. Within the contract realm, an incorrect interpretation may lead to an unjust allocation of resources (i.e., one party may unfairly be required to pay another party money damages). An incorrect interpretation of a criminal statute, however, can have dire consequences. Within the void-for-vagueness realm, an individual may be held criminally liable for the violation of a statute that a reasonable person could not interpret. As for the rule of lenity, a defendant may be convicted of numerous violations of a statute which she reasonably thought she had violated only once. Indeed, "[t]he standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement." *Winters v. New York*, 333 U.S. 507, 515 (1948).

48. See Comment, *supra* note 31, at 262 & n.1.

49. See JAY A. SIGLER, DOUBLE JEOPARDY: THE DEVELOPMENT OF A LEGAL AND SOCIAL POLICY 2 (1980) (citation omitted).

50. See *id.* at 16.

51. See *id.* at 4.

Fine, *finis*, signifieth a pecuniary punishment for an offence or contempt committed against the king, and regularly to it imprisonment appertaineth. And it is called *finis*, because it is an end for that offence. And in this case a man is said *facere finem de transgressionē, &c. cum rege*, to make an end or fine with the king for such a transgression.

Likewise, Blackstone observed that the plea of former acquittal is grounded in the universal maxim of the common law of England, “that no man is to be brought into jeopardy of his life, more than once, for the same offence.”⁵³ Therefore, “when a man is once fairly found not guilty upon any indictment, or other prosecution, he may plead such acquittal in bar of any subsequent accusation for the same crime.”⁵⁴ Similarly, a plea of former conviction “for the same identical crime . . . is a good plea in bar to an indictment” and is based on the same principle “that no man ought to be twice brought in danger of his life for one and the same crime.”⁵⁵ However, Blackstone carefully included the caveat that the pleas of “a former acquittal, and former conviction, must be upon a prosecution for *the same identical act and crime*.”⁵⁶

B. The Adoption of the Fifth Amendment

Although double jeopardy had been a part of English common law for centuries, the principle evolved dramatically with the adoption of the federal Constitution.⁵⁷ On June 8, 1789, almost two years after ratification of the Constitution, James Madison presented to the First House of Representatives a series of proposed amendments to the Constitution. Among these proposals was a provision that “[n]o person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence.”⁵⁸ After minor alteration within the House, the House Resolution stated that “[n]o person shall be subject, except in case of impeachment, to more than one trial, or one

52. 3 J.H. THOMAS, A SYSTEMATIC ARRANGEMENT OF LORD COKE’S FIRST INSTITUTE OF THE LAWS OF ENGLAND, ON THE PLAN OF SIR MATTHEW HALE’S ANALYSIS 443 (1836).

53. 4 WILLIAM BLACKSTONE, COMMENTARIES *329.

54. *Id.*

55. *Id.* at *330.

56. *Id.* (emphasis added). At common law, the double jeopardy pleas were prior acquittal and prior conviction, or *autrefois* (on a prior occasion) *acquit de meme felonie* (the exact same crime) and *autrefois convict de meme felonie*, respectively. See *id.* at 329-30; see also Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 YALE L.J. 1807, 1813-14 (1997); Comment, *supra* note 31, at 262 n.1.

57. See SIGLER, *supra* note 49, at 28.

58. 1 ANNALS OF CONG. 427-28 (Joseph Gales ed., 1789).

punishment for the same offence”⁵⁹ The Senate Resolution, after making substantial alterations to the House version, provided: “nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb”⁶⁰ The provision which was submitted to and ratified by the state conventions tracked verbatim the Senate Resolution.⁶¹ Thus, the Fifth Amendment, in its final state, provides: “nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb”⁶² The Double Jeopardy Clause has since been made applicable to the states via the Due Process Clause of the Fourteenth Amendment.⁶³

C. Application of the Double Jeopardy Clause

The language of the Double Jeopardy Clause that raises unit of prosecution issues is the scope of the phrase “same offence.”⁶⁴ In the interest of clarity, however, it is perhaps helpful to address briefly the Double Jeopardy Clause issues that do not have unit of prosecution implications. First, there has been considerable debate concerning when a person is “put in jeopardy.” The current school of thought seems to be that jeopardy attaches when a jury has been impaneled and sworn.⁶⁵

59. Legislative Journal, House Pamphlet, Record Group 46 (Aug. 24, 1789), reprinted in *THE COMPLETE BILL OF RIGHTS* 300 (Neil H. Cogan ed., 1997) [hereinafter *BILL OF RIGHTS*].

60. Legislative Journal, Senate Pamphlet, Record Group 46 (Sept. 9, 1789), reprinted in *BILL OF RIGHTS*, *supra* note 59, at 303.

61. See 1 Stat. 21 (1789), reprinted in *BILL OF RIGHTS*, *supra* note 59, at 308.

62. U.S. CONST. amend. V.

63. See *Benton v. Maryland*, 395 U.S. 784, 787 (1969).

64. The vast majority of criminal offenses have been codified. However, the state of Michigan, for example, in its crusade to convict Dr. Jack Kevorkian, the so-called “Dr. Death,” attempted to try him under a common law ban on assisted suicide. See, e.g., Kevin Lynch, *Marlinga Asks Ruling from Court on Assisted Suicide*, DET. NEWS, Dec. 18, 1997, at D5. If ignorance of the law is no excuse for violating it, then requiring individuals to know not only the provisions of their state and federal penal codes, but also the provisions of common law offenses would seem to be a lofty ambition for the average layperson. In the words of Justice Holmes, “a fair warning should be given to the world in language that the *common world* will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be *clear*.” *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (emphasis added). However, rather than dwell on the wisdom of such a practice, this Comment will assume that the word “offense” refers to a statutory offense.

65. See, e.g., *Crist v. Bretz*, 437 U.S. 28, 38 (1978); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977). For an interesting discussion concerning how to improve upon this rule, see Amar, *supra* note 56, at 1840-48. The general rule of when jeopardy attaches is subject to certain exceptions caused by “manifest necessity.” These

Second, there has been some discussion concerning what exactly is meant by being placed in jeopardy of “life or limb.” Indeed, this now metaphoric phrase was historically a much more literal protection. In fact, historically, England generally punished those who committed serious crimes with capital punishment or loss of appendage.⁶⁶ However, the phrase “life or limb” now encompasses all criminal cases, irrespective of whether the criminal defendant’s life or limbs are at stake.⁶⁷

Having addressed when an individual is “put in jeopardy” and what is meant by “life or limb,” the following question remains unanswered: What is “the same offense”?⁶⁸ One might assume truistically and,

exceptions include, *inter alia*, a hung jury, absence of witnesses for certain reasons, and various other emergencies or unusual circumstances. See SIGLER, *supra* note 49, at 43-44.

66. See generally 4 BLACKSTONE, *supra* note 53.

67. See *Ex parte Lange*, 85 U.S. 163, 173 (1873). One might wonder precisely what constitutes a crime for Double Jeopardy purposes. This issue arises when, for example, a corporation is forced to pay punitive fines labeled “civil.” Cf. Sanford N. Greenberg, *Who Says it's a Crime?: Chevron Deference to Agency Interpretations of Regulatory Statutes that Create Criminal Liability*, 58 U. PITT. L. REV. 1 (1996). It is assumed that all of the cases discussed in this Comment involve criminal, as opposed to civil, liability.

68. For purposes of discussion, the term “transaction” shall be used to describe the various behaviors performed by an actor, wholly divorced from legal implications. The term “offense,” by contrast, shall be used to describe the various behaviors and attendant circumstances which, when combined in a given transaction, constitute a legally punishable quorum of acts. The immense confusion surrounding Double Jeopardy jurisprudence, it is submitted, is due in no small part to this often unrecognized distinction.

In a similar vein, confusion seems to stem from the fact that some, but not all, crimes are intuitive (*mala in se*, if you will), and some parts of a crime are intuitive while other parts are not. For example, the unjustified taking of a human being’s life by another human being, at least at an abstract level, is intuitively objectionable to most persons. The transaction includes the premature ending of another’s life. The problem in translating this amorphous intuition into a legally recognized quorum of behaviors, however, is that as abstract thought is crystallized into an applicable offense, the intuitiveness of what is morally objectionable lessens. Divorced from legal elements and in the lay parlance, one might ask, “What other variables should go with the dead body in order to constitute a crime?” Put another way, “Which behaviors and attendant circumstances in a given transaction should be included in the definition of the offense?”

Suppose, for example, that person X, a Glauconian, is a state law enforcement agent. Person Z, a Sophist, unjustifiably kills X not only because he dislikes him personally, but also because Z is a bigoted, Glauconian-hating, law enforcement-hating individual. Most would agree that the unjustified and premature ending of X’s life by Z is morally objectionable. Perhaps a sizable group would also deem it worthy of additional condemnation that Z killed X because of his Glauconian ethnicity. Of that group, perhaps a few find it worthy of yet greater scorn that Z killed X because the latter was a law enforcement officer. Notice, however, that consensus weakens as each factor is added.

Indeed, most people would agree that Z did at least one thing wrong. Others would agree that Z did two things wrong, while still others would agree that Z did three (or perhaps more) things wrong. When an offense, as legislatively defined, and a “thing”

perhaps, logically that "the same offense" means the same offense.⁶⁹ One would be wrong, however, to assume as much, at least according to the Supreme Court's definition of the same offense. Indeed, the phrase "the same offense" is "deceptively simple in appearance but virtually kaleidoscopic in application."⁷⁰ Simply put, "the same offense" generally means the same offense, as well as some similar offenses.⁷¹

1. Blockburger v. United States

*Blockburger v. United States*⁷² is the landmark decision with respect to the notion that the definition of the same offense is not necessarily self-evident. Blockburger was charged with and convicted of two counts of selling morphine hydrochloride to an individual on consecutive days.⁷³ The statute proscribed the sale, *inter alia*, of morphine not in its original stamped package.⁷⁴ Blockburger was additionally charged with and convicted of one count of selling morphine to an individual not in pursuance of a written order of the purchaser.⁷⁵ Blockburger raised two Double Jeopardy claims. First, the two sales of the unstamped morphine on consecutive days were to the same person and were temporally proximate. Therefore, the sales should be considered a single continuing

are roughly parallel, as they were in English common law, few are tempted to invoke the Double Jeopardy Clause. However, when there are two or three offenses, as defined legislatively, and only one bad thing, the temptation to invoke the Double Jeopardy clause becomes difficult, if not impossible, to resist.

69. Professor Amar has advocated this approach persuasively and in no uncertain terms. "When we consider the entire text of the Double Jeopardy Clause, and its history, a same-means-same approach makes perfect sense." Amar, *supra* note 56, at 1814.

70. *Whalen v. United States*, 445 U.S. 684, 700 (1980) (Rehnquist, J., dissenting).

71. These similar offenses that are deemed to be the same offense for Double Jeopardy purposes do not include offenses between two sovereigns. This is true in all of the following scenarios: (1) a state trial followed by a federal trial (i.e., the Stacey Koon and Laurence Powell trials for the April 17, 1993 beating of Rodney King); (2) a federal trial followed by a state trial (i.e., Timothy McVeigh and Terry Nichols, should Oklahoma decide to prosecute under state law); and (3) a trial in state X for the violation of an X statute followed by a trial in state Y for the violation of a Y statute. *See, e.g.*, *Heath v. Alabama*, 474 U.S. 82 (1985) (upholding convictions in two different states for the same murder); *United States v. Lanza*, 260 U.S. 377 (upholding both state and federal prosecutions for the same "act"). This is the so-called dual sovereignty doctrine. *See generally* Akhil Reed Amar & Jonathon L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1 (1995).

72. 284 U.S. 299 (1932).

73. *See id.* at 300-01.

74. *See* 26 U.S.C. § 692 (1926), *recodified as amended* by 21 U.S.C. § 825 (1970).

75. *See Blockburger*, 284 U.S. at 300-01. The written order requirement was a product of 26 U.S.C. § 696 (1914), *recodified as amended* by 21 U.S.C. § 828 (1970).

offense.⁷⁶ Second, the latter sale of unstamped morphine was the same act upon which his conviction for selling morphine without a written order was based. Because there was but one act, so goes the argument, there can be but one offense.⁷⁷

The Court rejected both of these claims. As for the temporally proximate sales, the Court stated that “although made to the same person, [the sales] were distinct and separate sales made at different times.”⁷⁸ In distinguishing between a continuing offense and separate offenses, the Court pointed out that “[t]he Narcotic Act does not create the offense of engaging in the business of selling the forbidden drugs [which presumably would be a continuing offense], but penalizes any sale made in the absence of [a stamp].”⁷⁹ Thus, there was no Double Jeopardy problem with two convictions based on two acts, however temporally proximate, when the statute proscribed each act.⁸⁰

The Court likewise rejected the “same act equals one offense” argument.⁸¹ If the Court had merely held that violating two statutes with one act does not offend Double Jeopardy, then the quip that “the same offense” means “the same offense” might currently be a valid interpretation of Double Jeopardy jurisprudence. However, the Court went on to articulate a rule which will perhaps forever haunt Double Jeopardy law. “The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.”⁸² Thus, lesser-included offenses are “the same offense” as the greater offense for Double Jeopardy purposes.⁸³ For example, if statute

76. See *Blockburger*, 284 U.S. at 301-02.

77. See *id.* at 303-04.

78. *Id.* at 301.

79. *Id.* at 302.

80. This seems intuitively correct and is simple enough to conceptualize. The case of *State v. Rambert*, 459 S.E.2d 510 (N.C. 1995), though not a Supreme Court case, is an excellent example of discrete acts in temporal proximity to one another. In *Rambert*, the defendant, who was a passenger in a vehicle, pulled into a parking space next to an individual who was sitting in the driver’s seat of his own vehicle. Rambert produced a gun and fired a shot at the individual. As the individual started to drive forward, Rambert fired a second shot at him. Rambert then pursued the individual and fired a third shot at him. Rambert was convicted of three counts of unlawfully discharging a firearm. See *id.* at 512-13.

The Supreme Court of North Carolina held that Rambert’s firearm discharges in rapid succession, while in a sense a continuous transaction, were nonetheless separate and distinct acts. See *id.* at 512. Because these distinct acts were separate statutory violations, Rambert was never put in jeopardy twice for “the same offense” and, hence, there was no Double Jeopardy violation. See *id.* at 513.

81. See *Blockburger*, 284 U.S. at 304.

82. *Id.* (citing *Gavieres v. United States*, 220 U.S. 338, 342 (1911)).

83. To make matters worse, the Court has held that the doctrine of collateral

X requires proving elements A, B, and C, and statute Y requires proving elements A, B, C, and D, then an individual who violates both of these statutes could only be tried for one of the violations because these statutes are "the same offense." This is so because each provision does not require proof of an additional fact which the other does not require.

2. Brown v. Ohio

Indeed, this hypothetical was borne out in *Brown v. Ohio*.⁸⁴ Nathaniel Brown stole an automobile from a parking lot and was caught driving the automobile some nine days later.⁸⁵ Brown was charged with and pleaded guilty to the offense of joyriding, which was defined as the taking or operating of another's automobile without his or her consent.⁸⁶ After Brown's release from jail, he was indicted in another county for motor vehicle theft, a charge to which he pleaded guilty.⁸⁷ Since the only difference between the two statutes was the duration of time which the offender intended to deprive the owner of possession,⁸⁸ the issue before the Court was whether these two violations were "the same offense" for Double Jeopardy purposes.⁸⁹

The Court, applying the *Blockburger* test, held that the Double

estoppel, at least within the criminal context, is grounded in the Double Jeopardy Clause of the Fifth Amendment. See *Ashe v. Swensen*, 397 U.S. 436, 437-47 (1970). Collateral estoppel, however, would seem to fit nicely under a Due Process protection, especially if it is intended to "protect[] a man who has been acquitted from having to 'run the gantlet' a second time." *Id.* at 446 (quoting *Green v. United States*, 355 U.S. 184, 190 (1957)). See Amar, *supra* note 56, at 1829 ("[A]s a matter of due process, once a defendant has prevailed in a criminal case on a certain factual issue, he need not prove it all over again in a subsequent criminal case."). The correct doctrinal underpinnings of the concept of collateral estoppel need not be sorted out for present purposes, however, because it is assumed that neither collateral estoppel nor mandatory joinder principles will interfere with the analysis. In other words, it is assumed for analytical purposes that all possible charges are being tried at the same time.

84. 432 U.S. 161 (1977).

85. See *id.* at 162.

86. The statute provided: "No person shall purposely take, operate, or keep any motor vehicle without the consent of its owner." OHIO REV. CODE ANN. § 4549.04(D) (Anderson 1973) (repealed 1974).

87. See *Brown*, 432 U.S. at 162-63. The theft statute provided: "No person shall steal any motor vehicle." OHIO REV. CODE ANN. § 4549.04(A) (Baldwin 1973), recodified as amended by OHIO REV. CODE ANN. § 2918.03 (Baldwin 1974). Two counties, unlike a state government and the federal government, are not considered dual sovereigns for Double Jeopardy purposes because the two counties are both creatures of the same state.

88. See *Brown*, 432 U.S. at 163-64.

89. See *id.* at 164.

Jeopardy Clause “forbids successive prosecution and cumulative punishment for a greater and lesser included offense.”⁹⁰ Additionally, the Court provided language which is relevant for temporal unit of prosecution analysis. An Ohio court of appeals had held that, although joyriding and auto theft were the same offense for Double Jeopardy purposes, the two offenses were nonetheless different because the two counties had alleged violations on different dates—the joyriding allegation on the date of apprehension and the auto theft allegation on the date of the theft.⁹¹ The Court stated that “[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.”⁹² Since the statutorily proscribed conduct was the unauthorized taking of the vehicle, and not the daily deprivation of the owner’s possession, the continuous offense could not be individuated temporally by a prosecutor. Indeed, without protection from arbitrary units of prosecution defined solely by the prosecutor’s office,

[a] prosecutor, by carving up what is essentially one criminal transaction into a great number of offenses, may prosecute a person until the statute of limitations has run its course. This is true even though each trial may result in an acquittal and the only reason for the cumulative prosecutions is the prosecutor’s subjective evaluation of the guilt of the individual. This possibility leaves the door open to vexatious litigation with its consequential nervous strain upon the mind and body of the individual as well as the inevitable drain upon his finances.

However, the situation in *Brown* would have been quite different “if the Ohio Legislature had provided that joyriding is a separate offense for each day in which a motor vehicle is operated without the owner’s consent.”⁹⁴ This is so because “the Double Jeopardy Clause imposes no limits on how the legislature may carve up conduct into discrete legal offense units.”⁹⁵ In sum, legislatures, and not prosecutors, establish and define temporal units of prosecution and the issue of whether a particular course of conduct (i.e., transaction) involves one or more distinct offenses under a statute depends solely upon legislative, and not prosecutorial, choice.⁹⁶

90. *Id.* at 169.

91. *See id.*

92. *Id.* (citation omitted).

93. SIGLER, *supra* note 49, at 163 (quoting Robert E. Knowlton, *Criminal Law and Procedure*, 11 *RUTGERS L. REV.* 71, 94 (1957)).

94. SIGLER, *supra* note 49, at 169 n.8 (citation omitted).

95. Amar, *supra* note 56, at 1818 (footnote omitted).

96. *See Sanabria v. United States*, 437 U.S. 54, 69-70 (1978).

D. The Double Jeopardy Clause and Temporal Units of Prosecution

Double Jeopardy jurisprudence is fraught with confusion and no attempt will be made to disentangle the "Gordian knot."⁹⁷ Suffice it to say for present purposes that the Court, for better or for worse, still adheres to the basic tenet articulated in *Blockburger*: two offenses are the same offense for Double Jeopardy purposes if each offense does not require proof of an additional fact which the other offense does not require.⁹⁸ However, irrespective of whether "the same offense" means the same offense, the analysis for temporal units of prosecution is the same.

For example, assume statute *X* provides that it shall be a separate offense for each day⁹⁹ the statute is violated and person *Y* violates the statute on days *A* and *B* through some continuous act. Can the continuous act of person *Y* be individuated temporally when the temporal unit of prosecution bears no logical relationship to the act? This question highlights the distinction between a criminal offense and intuitively objectionable behavior.¹⁰⁰ For reasons which will be explained momentarily, there are two offenses for Double Jeopardy purposes, even though our amorphous intuition may be telling us that *Y* did only one thing wrong. And herein lies the root of the tension between an offense and our own intuitive notions of what is morally objectionable. The problem, however, with attempting to invoke the Double Jeopardy Clause in this context is that "[w]ith respect to unit-of-prosecution cases, the argument assumes that the Double Jeopardy Clause is capable of reducing the concept of a criminal offense to its

97. *Whalen v. United States*, 445 U.S. 684, 702 (1980) (Rehnquist, J., dissenting). Historically, the Court has struggled immensely with the proper scope and application of the Double Jeopardy Clause. In fact, the Court has changed course a couple of times within recent years and a broad generalization is difficult to articulate. See *United States v. Dixon*, 509 U.S. 688 (1993); *United States v. Felix*, 503 U.S. 378 (1992); *Grady v. Corbin*, 495 U.S. 508 (1990).

98. See *Blockburger v. United States*, 284 U.S. 299, 304 (1932). For recent favorable treatment of the *Blockburger* test, see *Lewis v. United States*, 523 U.S. 155 (1998) (Scalia, J., concurring in the judgment); *Hudson v. United States*, 522 U.S. 93, 107-12 (1998) (Stevens, J., concurring in the judgment); *Kansas v. Hendricks*, 521 U.S. 346, 370 (1997); *Rutledge v. United States*, 517 U.S. 292, 297 (1996) (unanimous Court).

99. A daily unit of prosecution has been chosen for no particular reason. The units of prosecution, for analytical purposes, could be consecutive hours, days, weeks, months, years, or any other arbitrarily-defined time periods.

100. For a more thorough explanation of this distinction, see discussion *supra* note 68.

smallest rational unit, or atom, beyond which further fragmentation cannot occur without creating a ‘doubling effect.’”¹⁰¹ However, “[t]he difficulty with this assumption is that the size of any unit of prosecution depends on the legislature’s purpose in making it an offense, and purposes of punishment are notoriously diverse.”¹⁰²

Hence, the Double Jeopardy Clause poses no obstacle to individuating temporally a criminal unit of prosecution, and this is true irrespective of how “the same offense” is defined. For starters, *Blockburger* would pose no Double Jeopardy obstacle. This is true because each offense would require proof of a fact which the other offense would not require. Specifically, one offense would require proof that person *Y* violated statute *X* on day *A*: the other offense would require proof that person *Y* violated statute *X* on day *B*.¹⁰³ Similarly, a “same offense means same offense” approach would treat the two violations as separate offenses. Thus, the Double Jeopardy Clause of the Fifth Amendment should impose no limitation on a legislature’s definition of an offense, regardless of whether the Court incorporates “by reference whatever the legislature defines as an ‘offense’ for punishment purposes”¹⁰⁴ or, more likely, applies the traditional *Blockburger* analysis.

IV. THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE AND UNIT OF PROSECUTION ANALYSIS

Experience shows that in countries remarkable for the lenity of their laws the spirit of the inhabitants is as much affected by slight penalties as in other countries by severer punishments.

....

It is an essential point that there should be a certain proportion in punishments, because it is essential that a great crime should be avoided rather than a smaller, and that which is more pernicious to society rather than that which is less.

101. Peter Westen & Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81, 113.

102. *Id.* (footnote omitted).

103. In a purely technical sense, it is not entirely clear whether the Court would extend the *Blockburger* test to multiple violations of the same statute. The exact language of the test states that it applies when the same act violates “two distinct statutory provisions.” *Blockburger*, 284 U.S. at 304 (emphasis added). However, because the test was designed to discern when legislatures intend to create separately punishable offenses, and because it is self-evident that a legislature intends separate offenses when it creates separate units of prosecution, it seems highly unlikely that *Blockburger* would, pardon the pun, block treating the offenses as separate.

104. Westen & Drubel, *supra* note 101, at 112 (footnote omitted).

....

It is a great abuse amongst us to condemn to the same punishment a person that only robs on the highway and another who robs and murders. Surely, for the public security, some difference should be made in the punishment.

— Montesquieu¹⁰⁵

Part II of this Comment discussed the rule of lenity, concluding that the rule prevents multiple prosecutions for the continuing violation of a statute when legislative intent to provide for multiple prosecutions is reasonably unclear. Part III explored the Double Jeopardy Clause of the Fifth Amendment, concluding that, within the temporal unit of prosecution realm, it precludes only multiple prosecutions for the continuing violation of a statute when the continuing violation is the proscribed act. These two conclusions leave the following question unanswered: What, if any, constitutional limits are there on a legislature's power to punish a defendant by creating multiple units of prosecution for the continuing violation of a criminal statute? The primary thrust of this part focuses on whether the Eighth Amendment merely proscribes certain methods of punishment, as suggested in *Harmelin v. Michigan*,¹⁰⁶ or whether it also proscribes punishment disproportionate to the culpable conduct, as articulated in *Weems v. United States*¹⁰⁷ and reiterated in *Solem v. Helm*.¹⁰⁸

A. *The History of the Eighth Amendment*

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted,"¹⁰⁹ and has been made applicable to the states via the Fourteenth Amendment.¹¹⁰ The Eighth Amendment was lifted directly from a similar Virginia state guarantee.¹¹¹ George Mason, the author of the Virginia provision, had, in turn, previously adopted the

105. 1 BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS*, bk. 6, chs. 12, 16, at 83, 89-90 (Thomas Nugent trans., Colonial Press 1900).

106. 501 U.S. 957 (1991).

107. 217 U.S. 349 (1910).

108. 463 U.S. 277 (1983).

109. U.S. CONST. amend. VIII.

110. See *Robinson v. California*, 370 U.S. 660 (1962).

111. See VIRGINIA DECLARATION OF RIGHTS, art. I, § 9 (1776).

language of the English Bill of Rights.¹¹² This raises the following issues: (1) whether the English Bill of Rights' Cruel and Unusual Clause encompassed a proportionality limitation; and (2) whether the Framers drafted the Eighth Amendment intending for it to have a scope similar to its English predecessor.

1. Proportional Punishment Under English Law

The practice of proscribing physical punishment proportionate to the culpable conduct has existed in England for centuries.¹¹³ English law, as it existed during the reign of Edward the Confessor, who ruled England from 1042 through 1066, included the following maxim:

We do forbid that a person shall be condemned to death for a trifling offence. But for the correction of the multitude, extreme punishment shall be inflicted according to the nature and extent of the offence. For that ought not for a trifling matter to be destroyed which God has made after His own image, and has redeemed with the price of His own blood.

In 1100, Henry I assumed the throne of England and declared that the just laws of Edward the Confessor would once again be the laws of England.¹¹⁵ Moreover, Henry I declared that "if any one shall be convicted of treason or other crime, his punishment shall be according to his fault."¹¹⁶ Additionally, all murders "committed shall be justly punished according to the law of King Edward."¹¹⁷

The Magna Carta, signed by King John in 1215, states, *inter alia*, that "[a] freeman shall be amerced"¹¹⁸ for a small offence only according to the degree of the offence; and for a grave offence he shall be amerced¹¹⁹ according to the gravity of the offence¹²⁰ Additionally, "[e]arls and

112. 1 W. & M., ch. 2 (1689) (Eng.). The English Bill of Rights was preceded, of course, by the venerable Magna Carta of 1215.

113. See Anthony F. Granucci, "Nor Cruel and Unusual Punishments Inflicted:" *The Original Meaning*, 57 CAL. L. REV. 839, 846-47 (1969).

114. LAWS OF EDWARD THE CONFESSOR, reprinted in BOYD C. BARRINGTON, THE MAGNA CHARTA AND OTHER GREAT CHARTERS OF ENGLAND 181, 199 (2d ed. 1900). It is unclear whether Edward enacted these laws or simply agreed to enforce existing custom. It is also unknown who wrote the document which purports to be the LAWS OF EDWARD THE CONFESSOR. See *id.* at 22-25, 181-82.

115. See *id.* at 77-78.

116. CHARTER OF KING HENRY I, reprinted in BARRINGTON, *supra* note 114, at 204, 207.

117. *Id.*

118. An amercement, which is similar in nature to a fine, was assessed by a delinquent's peers or imposed arbitrarily at the discretion of the court. See BLACK'S LAW DICTIONARY 81 (6th ed. 1990).

119. Other translations provide that free men were to be punished for great delinquencies according to the magnitude of the delinquency. See, e.g., BARRINGTON, *supra* note 114, at 235.

120. MAGNA CARTA ch. 20 (1215), reprinted in CARL STEPHENSON & FREDERICK

barons shall be amerced only by their peers, and only according to the degree of the misdeed.”¹²¹ Thus, the concept of proportionality existed and was fairly entrenched in English law as early as the thirteenth century. Put differently, “by the year 1400, we have the expression of ‘the long standing principle of English law that the punishment should fit the crime. That is, the punishment should not be, by reason of its excessive length or severity, greatly disproportionate to the offense charged.’”¹²²

The English Bill of Rights of 1689¹²³ is the direct ancestor of many rights contained in the Constitution of the United States, including the Eighth Amendment.¹²⁴ If “prior to adoption of the Bill of Rights in 1689 England had developed a common law prohibition against excessive punishments in any form,”¹²⁵ then it remains to be explored what, if any, impact the English Bill of Rights had on this common law protection. In William Blackstone’s venerable *Commentaries on the Laws of England*, written some sixty years after the English Bill of Rights, Blackstone observed that “whenever any laws direct [the] destruction [of life or limbs] for light and trivial causes, such laws are . . . tyrannical,” notwithstanding the fact that “the subject is aware of the danger he is exposed to, and may by prudent caution provide against it.”¹²⁶ Thus, even with notice sufficient to warn those who break the law, English law provided that life or limb could not “be wantonly destroyed or disabled without a *manifest* breach of civil liberty.”¹²⁷ Put differently, “[t]he statute law of England d[id] therefore very seldom, and the common law

GEORGE MARCHAM, SOURCES OF ENGLISH CONSTITUTIONAL HISTORY 115, 119 (1937).

121. *Id.* ch. 21. The Magna Carta survived great political unrest. King John, after being forced to sign the document, immediately attempted to repudiate its validity. It was subsequently reissued by Henry III in 1216 and 1217 after revision. The Magna Carta was again reissued by Henry III in 1225 after he had reached adulthood. The 1225 version was the document which subsequent rulers endorsed and ratified. The relevant language for punishment purposes remained the same. See STEPHENSON & MARCHAM, *supra* note 120, at 115 n.1; see generally BARRINGTON, *supra* note 114.

122. Granucci, *supra* note 113, at 846 (1969) (quoting RICHARD L. PERRY, SOURCES OF OUR LIBERTIES 236 (1959)).

123. 1 W. & M., ch. 2 (1689) (Eng.).

124. The exact language, as it reads in the English Bill of Rights, is as follows: “[t]hat excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted.” *Id.*; see *Solem v. Helm*, 463 U.S. 277, 285 & n.10 (1983); Granucci, *supra* note 113, at 840-42.

125. Granucci, *supra* note 113, at 847.

126. 1 BLACKSTONE, *supra* note 53, at *129 (emphasis omitted).

127. *Id.* at *126 (emphasis added).

d[id] never, inflict any punishment extending to life or limb, unless upon the *highest* necessity”¹²⁸ Citing Sir Matthew Hale, Blackstone observed that

when offences grow enormous, frequent, and dangerous to a kingdom or state, destructive or highly pernicious to civil societies, and to the great insecurity and danger of the kingdom or it’s [sic] inhabitants, severe punishment and even death itself¹²⁹ is necessary to be annexed to laws in many cases by the prudence of lawgivers.

Hence, it is “the enormity, or dangerous tendency, of the crime, that *alone* can warrant any earthly legislature in putting him to death that commits it”¹³⁰ because

[i]t is *not* it’s [sic] *frequency* only, or the *difficulty* of otherwise preventing it, that will excuse our attempting to prevent it by a wanton effusion of human blood. For, though the end of punishment is to deter men from offending, *it never can follow from thence, that it is lawful to deter them at any rate and by any means*; since there may be unlawful methods of enforcing obedience even to the justest laws.¹³¹

Moreover, as a matter of public policy, “punishments of unreasonable severity, especially when indiscriminately inflicted, have less effect in preventing crimes, and amending the manners of a people, than such as are more merciful in general, yet properly intermixed with due distinctions of severity.”¹³² Otherwise, “[t]he injured, through compassion, will often forbear to prosecute: juries, through compassion, will sometimes forget their oaths, and either acquit the guilty or mitigate the nature of the offence: and judges, through compassion, will respite one half of the convicts, and recommend them to the royal mercy.”¹³³

Based on this historical review, there is ample evidence to suggest that proportionality in criminal sentencing had been a part of English law for hundreds of years prior to the Magna Carta. The Magna Carta encompassed proportionality in explicit terms. The English Bill of Rights likewise enveloped proportionality, as did English law subsequent to the passage of the English Bill of Rights. Against this historical backdrop, let us now turn to the United States Constitution and analyze whether it likewise offers protection from disproportionately severe punishment.

128. *Id.* at *129 (emphasis added).

129. 4 BLACKSTONE, *supra* note 53, at *9 (citation omitted).

130. *Id.* at *9-10 (emphasis added).

131. *Id.* at *10 (emphasis added).

132. *Id.* at *16-17.

133. *Id.* at *19.

2. *The Adoption of the Eighth Amendment*

As previously mentioned, James Madison presented to the First House of Representatives a series of proposed amendments to the Constitution.¹³⁴ Among the proposals was a provision declaring that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”¹³⁵ There is little doubt that this provision, at a minimum, was to provide protection from barbarous forms of punishment.¹³⁶ However, there is also evidence to support the conclusion that the Eighth Amendment was intended to provide protection from disproportionately severe punishment.

In mid-September of 1787, at the height of the ratification debate, George Mason authored his *Objections to This Constitution of Government*,¹³⁷ wherein he lambasted the Constitution’s lack of restraint over the Congress vis-à-vis the states and their citizenry.

Under their own construction of the general clause, at the end of the enumerated powers, the Congress may grant monopolies in trade and commerce, constitute new crimes, *inflict unusual and severe punishments*, and extend their powers as far as they shall think proper; so that the State legislatures have no security¹³⁸ for the powers now presumed to remain to them, or the people for their rights.

Not allowing the Antifederalist to go unanswered, James Iredell, an ardent Federalist, responded to Mason’s criticisms thusly:

The expressions “unusual and severe” or “cruel and unusual” surely would have been too vague to have been of any consequence, since they admit of no clear and precise signification. If to guard against punishments being too *severe*, the Convention had enumerated a vast variety of *cruel* punishments, and prohibited the use of any of them, let the number have been ever so great, an inexhaustible fund must have been unmentioned, and if our government had been disposed to be cruel their invention would only have been put to a little more trouble.¹³⁹

134. See BILL OF RIGHTS, *supra* note 59.

135. 1 ANNALS OF CONG. 433 (Joseph Gales ed., 1789).

136. See Granucci, *supra* note 113, at 842.

137. See 3 THE PAPERS OF GEORGE MASON, 1725-1792, at 992 (Robert A. Rutland ed., 1970) [hereinafter THE PAPERS]; PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787-1788, at 331 (Paul L. Ford ed., Da Capo Press 1968) (1888) [hereinafter PAMPHLETS].

138. 3 THE PAPERS, *supra* note 137, at 992-93 (emphasis added).

139. JAMES IREDELL, ANSWERS TO MR. MASON’S OBJECTIONS TO THE NEW CONSTITUTION (1788), *reprinted in* PAMPHLETS, *supra* note 137, at 360 (emphasis added).

Iredell also reminded us “that as those who are to make those laws must themselves be subject to them, their own interest and feelings will dictate to them not to make them unnecessarily *severe*”¹⁴⁰

This exchange between Mason and Iredell wherein the terms “severe” and “cruel” were used interchangeably was no fluke. In June of 1787, a few months prior to Mason’s *Objections*, James Madison recorded a Mason speech concerning the federal government’s power to tax and its potential enforcement through its military power. “To punish the non-payment of taxes with death, was a *severity* not yet adopted by despotism itself: yet this unexampled *cruelty* would be mercy compared to a military collection of revenue, in which the bayonet could make no discrimination between the innocent and the guilty.”¹⁴¹ Hence, it is clear that at least some, if not all, individuals, whether Federalist or Antifederalist, used the terms “severe” and “cruel” interchangeably. Contemporaneous definitions and usage of the words sustain this contention.¹⁴² Indeed, the *Oxford English Dictionary* defines cruel, *inter alia*, as painful, severe, strict, or rigorous and defines cruel circumstances as those which are painful, distressing, severe, or hard.¹⁴³

In June of 1788, after the Constitution had been ratified *sans* a Bill of Rights, Mason sent a copy of proposed constitutional amendments to Congress for consideration.¹⁴⁴ Among these provisions was a clause declaring “[t]hat excessive Bail ought not to be required, nor excessive Fines imposed, nor cruel and unusual Punishments inflicted.”¹⁴⁵ Noticeably absent from this list of proposed amendments is a separate provision assailing the infliction of disproportionately severe punishment.¹⁴⁶ Which way does this fact cut? It has been observed recently that “[p]roportionality provisions had been included in several

140. *Id.* (emphasis added).

141. 3 THE PAPERS, *supra* note 137, at 907 (emphasis added). There are two things about this passage worth noting. First, Mason used the terms “severe” and “cruel” synonymously. Second, Mason was troubled by the fact that the military would be unable to differentiate between those who had paid their taxes and those who had not. This passage underscores the principle of proportionality because Mason is implicitly stating that use of “the bayonet” is acceptable against those who are guilty. If, however, the terms “severe” and “cruel” are only intended to proscribe certain *modes* of punishment, then presumably this behavior would have been either objectionable or acceptable irrespective of the culpability of the taxpayer. See *infra* Part IV.C for a detailed discussion of this issue.

142. See, e.g., WILLIAM SHAKESPEARE, THE LIFE OF KING HENRY THE FIFTH act V, sc. ii, lns. 196-97, reprinted in WILLIAM SHAKESPEARE: THE COMPLETE WORKS 776 (Alfred Harbage ed., Viking Press 1977) (1599) (“[B]ut, good Kate, mock me mercifully, the rather, gentle princess, because I love thee cruelly.”).

143. See 4 OXFORD ENGLISH DICTIONARY 78 (2d ed. 1989).

144. See 3 THE PAPERS, *supra* note 137, at 1068.

145. *Id.* at 1070.

146. See *id.* at 1068-71.

State Constitutions There is little doubt that those who framed, proposed, and ratified the Bill of Rights were aware of such [proportionality] provisions [in some States' constitutions], yet chose not to replicate them."¹⁴⁷ Thus, so runs the argument, the Federal Constitution does not encompass a proportionality requirement because the Framers had an opportunity to articulate such a principle explicitly and chose otherwise.

It must be conceded that there is a certain amount of intuitive force to this argument. However, the response is twofold. First, it seems unlikely that Mason, after complaining vehemently about a lack of federal protection from unusual and severe punishments, would have neglected to submit a proposed remedy to this problem. Thus, protection from unusual and severe punishments presumably can be found within the text of Mason's proposals. An examination of Mason's proposals, however, reveals that the "cruel and unusual punishments" clause is the only proposed provision with respect to punishment.¹⁴⁸ Hence, Mason must have intended that protection from cruel and unusual punishments provided protection from severe punishments.

Second, there were many State constitutional provisions of which the Framers were aware and yet declined to include explicitly. Does this mean that the omission of an explicit clause is tantamount to an absence of the omitted clause's principle? This is a doubtful proposition upon which to base a constitutional claim. For example, Mason's proposals included a provision that "the legislative executive and judiciary Powers of Government shou'd be separate & distinct"¹⁴⁹ The Framers, however, chose not to include such a provision. Is it to be assumed that there is no separation of powers principle implicit in the Federal Constitution? The answer to this rhetorical question—namely, that such an assumption is incorrect—is perhaps nothing short of self-evident. Indeed, the Federalists' main objection to a bill of rights was that it would be superfluous. "[A bill of rights] would contain various exceptions to powers not granted; and on this very account, would afford a colorable pretext to claim more than were granted."¹⁵⁰

Moreover, the body of the Constitution also contains arguably

147. *Harmelin v. Michigan*, 501 U.S. 957, 977 (1991) (Scalia, J., plurality) (citation omitted).

148. See 3 THE PAPERS, *supra* note 137, at 1068-71.

149. *Id.* at 1069.

150. THE FEDERALIST NO. 84, at 469 (Alexander Hamilton) (E.H. Scott ed., 1894).

superfluous protections. For example, the Constitution provides that “[n]o Title of Nobility shall be granted by the United States”¹⁵¹ This limitation would seem to be redundant, given the fact that the enumerated powers provide no such power in the first instance.¹⁵² Thus, there are constitutional principles that are properly derived from implication while other principles are expressly and, arguably, unnecessarily articulated explicitly. Likewise, given the synonymous use of the terms “cruel” and “severe” by Mason, Iredell, and others on both sides of the ratification fence, it is not unreasonable to assume that protection from severe punishment was understood to be implicit in protection from cruel and unusual punishment.

In any event, the Congressional debates surrounding the proposed adoption of a bill of rights were brief and only partially recorded.¹⁵³ In fact, the entire recorded discussion of the Eighth Amendment proceeded as follows:

Mr. Smith, of South Carolina, objected to the words “nor cruel and unusual punishments,” the import of them being too indefinite.

Mr. Livermore [of New Hampshire].—The clause seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary. What is meant by the terms excessive bail? Who are to be the judges? What is understood by excessive fines? It lies with the court to determine. No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we in future to be prevented from inflicting these punishments because they are cruel? If a more lenient mode of correcting vice and deterring others from the commission of it could be invented, it would be very prudent in the Legislature to adopt it, but until we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind.

The question was put on the clause, and it was agreed to by a considerable majority.

It is unclear what Smith thought the amendment was designed to achieve.¹⁵⁵ It is clear that Livermore thought, at a minimum, that the amendment would bar certain modes of punishment.¹⁵⁶ Since the amendment was agreed to by a “considerable majority,” however, it would be informative to know what the majority thought the amendment

151. U.S. CONST. art. I, § 9, cl. 8.

152. See U.S. CONST. art. I, § 8.

153. See 1 ANNALS OF CONG. 749-56 (Joseph Gales ed., 1789).

154. *Id.* at 753.

155. See *id.*

156. See *id.*

was designed to achieve.¹⁵⁷ Since there is no known recording of anyone else's contemporaneous statements or thoughts, however, the scope of the amendment's protection is not clarified by Congressional legislative history.¹⁵⁸ In fact, it is not even clear whether Smith or Livermore voted in favor of or against the amendment. In any event, the Bill of Rights was adopted soon thereafter. However, the Supreme Court had few opportunities to interpret the Eighth Amendment during the first 100 years or so after its adoption. When the Court was presented with an Eighth Amendment issue, the issue normally concerned not the scope of the Eighth Amendment's protections, but whether its protections applied to state governments.¹⁵⁹

B. Early Application of the Eighth Amendment

I. O'Neil v. Vermont

*O'Neil v. Vermont*¹⁶⁰ was the first case wherein a Supreme Court Justice acknowledged a proportionality principal in analyzing Eighth Amendment issues. John O'Neil was a wholesale and retail liquor distributor lawfully engaged in said business under the laws of New York.¹⁶¹ However, O'Neil also sold liquor to various individuals in Vermont, where such sales were prohibited.¹⁶² Specifically, a Vermont

157. Discerning legislative intent is a slippery concept and no attempt will be made to advocate one theory of constitutional interpretation over another. It suffices for present purposes to acknowledge that the difficulty in discerning legislative intent with respect to the Eighth Amendment is compounded by the absence of a substantial Congressional record.

158. There has been a tremendous amount of academic attention devoted to whether and how extraneous information should be used in determining what a written provision (i.e., a constitutional clause, a statute, etc.) means. See, e.g., Larry Alexander, *Originalism, or Who is Fred?*, 19 HARV. J.L. & PUB. POL'Y 321 (1996); Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581 (1990); Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263 (1982). No attempt will be made to advocate any particular method of interpretation other than to look to the words themselves and their common meanings.

159. See, e.g., *McElvaine v. Brush*, 142 U.S. 155 (1891); *In re Kemmler*, 136 U.S. 436 (1890); *Eilenbecker v. District Ct.*, 134 U.S. 31 (1890); *United States v. Cruikshank*, 92 U.S. 542 (1875); *Pervear v. Massachusetts*, 72 U.S. 475 (1866); *Fox v. Ohio*, 46 U.S. 410 (1847); *Barron v. Baltimore*, 32 U.S. 243 (1833).

160. 144 U.S. 323 (1892).

161. See *id.* at 327.

162. See *id.*

statute provided that “[n]o person shall . . . manufacture, sell, furnish, or give away . . . spirituous or intoxicating liquor”¹⁶³ Upon a second conviction, the convicted shall “forfeit for each offense twenty dollars and costs of prosecution”¹⁶⁴ Finally, another statutory provision provided that every distinct act of selling could be prosecuted and, if proven, the trial court was to impose a fine for each offense.¹⁶⁵ O’Neil was charged with and convicted of 307 violations of the statute.¹⁶⁶ He was subsequently assessed a fine of \$6140 (twenty dollars for each of 307 convictions) plus costs, for a total of \$6638. In default of payment, a separate statutory provision provided that the convicted could “work off” his fine at a rate of one dollar per three days in prison at hard labor, which equaled 19,914 days (or about 54 years).¹⁶⁷

After losing his appeal before the Supreme Court of Vermont, O’Neil appealed his case to the United States Supreme Court.¹⁶⁸ A majority of the Court flatly held that “the 8th Amendment to the Constitution of the United States does not apply to the States”¹⁶⁹ and consequently upheld O’Neil’s convictions. However, in a dissenting opinion, Justice Field declared that the “punishment imposed was one exceeding in severity, considering the offences of which the defendant was convicted, anything which I have been able to find in the records of our courts for the present century.”¹⁷⁰ In fact, this sentence was about six times as great as any court in Vermont could have imposed for manslaughter.¹⁷¹ Thus, according to Justice Field, O’Neil’s punishment “was one which, in its severity, *considering the offences of which he was convicted*, may justly be termed both unusual and cruel.”¹⁷²

Justice Field conceded that the Cruel and Unusual Punishment Clause is normally associated with punishment such as the rack, the thumbscrew, the iron boot, the stretching of limbs, and the like.¹⁷³

163. *Id.* at 325.

164. *Id.* at 326.

165. *See id.* Notice that the unit of prosecution is clear. Hence, as has been argued, neither the rule of lenity nor the Double Jeopardy Clause would preclude the prosecution from bringing multiple counts. Note also that this was an actual statute and not a fanciful parking hypothetical with little basis in reality.

166. Originally, O’Neil was convicted of 457 violations of the statute by a justice of the peace. His punishment was to be \$9140 and, in the event that he could not or would not pay the fine, a prison sentence of 28,836 days (or about 79 years) of hard labor. O’Neil appealed his conviction to a county court, which allowed the appeal. The case was subsequently tried *de novo* in front of a jury. *See id.* at 326-27.

167. *See id.* at 331.

168. *See id.* at 331-32.

169. *Id.* at 332 (citing *Pervear v. Massachusetts*, 72 U.S. 475 (1866)).

170. *Id.* at 338 (Field, J., dissenting).

171. *See id.* at 339.

172. *Id.* (emphasis added).

173. *See id.*

However, he was of the opinion that the clause prohibits not only barbarous punishment, but also "all punishments which by their excessive length or severity are greatly disproportioned to the offences charged."¹⁷⁴ In his opinion, the word "excessive" in the Cruel and Unusual Punishment Clause modifies every other provision.¹⁷⁵ In other words, the Eighth Amendment prohibits excessive bail, excessive fines, and excessive punishment.¹⁷⁶ In response to the individuation of the crime into separate offenses, Justice Field observed that "[i]t is no matter that by cumulative offences, for each of which imprisonment may be lawfully imposed for a short time, the period prescribed by the sentence was reached, the punishment was greatly beyond anything required by any humane law for the offences."¹⁷⁷

He then used an example wherein a state prosecuted the consumption of each drop of alcohol. While the state could lawfully proscribe such conduct, "it would be an unheard-of cruelty if [the state] should count the drops in a single glass and make thereby a thousand offences, and thus extend the punishment for drinking the single glass of liquor to an imprisonment of almost indefinite duration."¹⁷⁸ In another example, Justice Field opined that although repulsive to him personally, a criminal could receive twenty lashes for petty offenses.¹⁷⁹ O'Neil's crime, by most standards, was petty. However, 6140 lashes would be not only cruel and unusual, but would cause a "cry of horror" from "every civilized and Christian community of the country against it."¹⁸⁰

Justice Field's examples and the parking-in-front-of-the-fire-hydrant hypothetical discussed in Part I share a common characteristic. Each of the hypotheticals has a somewhat serious, yet arguably defensible, punishment for each unit of prosecution. However, when the counts are combined, the aggregate punishment that results is severe. Hence, "[i]t does not alter [the punishment's] character as cruel and unusual, that for each distinct offence there is a small punishment, if, when they are brought together and one punishment for the whole is inflicted, it becomes one of excessive severity."¹⁸¹ More recently, it has been

174. *Id.* at 339-40.

175. *See id.* at 340.

176. *See id.*

177. *Id.*

178. *Id.*

179. *See id.*

180. *Id.*

181. *Id.*

observed that “[t]o be sure, it may be possible to hypothesize units of prosecution that are so fragmented that to punish each separately would constitute excessive punishment.”¹⁸² In this case, “the fragmentation would be invalid because the Eighth Amendment . . . prohibits the State from subjecting the defendant to excessive punishment.”¹⁸³

2. Weems v. United States

Justice Field’s concept of a proportionality principle in Eighth Amendment jurisprudence was first recognized by a majority of the Supreme Court in *Weems v. United States*.¹⁸⁴ Weems appealed his case to the Supreme Court when the Supreme Court of the Philippine Islands affirmed his conviction for falsifying an official public document.¹⁸⁵ Specifically, Weems was convicted of falsifying an official document of the Bureau of Coast Guard and Transportation of the United States Government of the Philippine Islands when he entered as paid out certain wages on behalf of lighthouse employees.¹⁸⁶ His sentence was fifteen years of *cadena temporal* and a fine of 4000 pesetas.¹⁸⁷ Since the Philippine Islands were not treated as a “state” for selective incorporation purposes (and, hence, *O’Neil v. Vermont* did not preclude application of the Eighth Amendment), the issue of whether the Eighth Amendment encompasses a proportionality principle in sentencing was thus squarely before the Court. Justice McKenna, speaking for the majority, was, like Justice Field in *O’Neil*, plainly disturbed by the severity of punishment.

As an initial premise, Justice McKenna observed that the “function of the legislature is primary, its exercises fortified by presumptions of right and legality, and is not to be interfered with lightly, nor by any judicial

182. Westen & Drubel, *supra* note 101, at 114.

183. *Id.* (citation omitted).

184. 217 U.S. 349, 380-82 (1910).

185. *See id.* at 357.

186. Note that a “false entry is all that is necessary to constitute the offense. Whether an offender . . . injures any one by his act or intends to injure any one” is immaterial. *Id.* at 363.

187. The punishment of *cadena temporal* was from twelve years and one day to twenty years, to be served in a penal institution wherein the convicted labored at the benefit of the state. The convicted at all times carried a chain at the ankle which hung from the wrists. They were “employed” at hard and painful labor and received no outside assistance. Moreover, the convicted were stripped of parental authority, guardianship of persons and property, marital authority, and the right to conduct inter vivos transactions of property. They were also subject to government surveillance, which included a requirement that the convicted ask for government permission to change domiciles. Lastly, the convicted were absolutely disqualified from holding public office and voting and lost retirement pay. *See id.* at 364-65.

conception of [its] wisdom or propriety.”¹⁸⁸ With this deferential conceptual scheme in mind, Justice McKenna stated that legislatures “have no limitation[s] . . . but constitutional ones, and what those are the judiciary must judge.”¹⁸⁹ In other words, the Court’s scope of review had nothing to do with whether the punishment of *cadena temporal* was sound social policy, but whether it was cruel and unusual punishment and, thus, unconstitutional.¹⁹⁰

The Court held that the punishment was cruel and unusual.¹⁹¹ It is worth noting that the punishment was cruel and unusual, not in the abstract (like, say, the guillotine or the thumbscrew, which are presumably always cruel and unusual, irrespective of the gravity of the offense), but when compared to the offense committed.¹⁹² In the Philippines at the time in question, an individual convicted for the falsification of bank notes and securities of the United States was

188. *Id.* at 379.

189. *Id.*

190. This issue highlights somewhat of a paradox. On the one hand, if the clause is grounded in the moral judgment of a majority of American society, then the clause would appear to state a truism (do that which a majority of you would do anyway). Truisms, one could argue, exist in other areas of our Constitution (the Necessary and Proper Clause, the Tenth Amendment, etc.). Hence, “if the words ‘cruel and unusual’ indeed are defined in terms of society’s current mores and are subject to change only when society itself has evolved, then . . . the cruel and unusual punishment clause would appear to serve a merely rhetorical purpose.” Joseph L. Hoffmann, *The “Cruel and Unusual Punishment” Clause: A Limit on the Power to Punish or Constitutional Rhetoric?*, in *THE BILL OF RIGHTS IN MODERN AMERICA AFTER 200 YEARS* 140 (David J. Bodenhamer & James W. Ely, Jr. eds., 1993).

On the other hand, if it is possible to find independent content in the words ‘cruel and unusual,’ that is, content or meaning independent of the current mores of American society, then the clause would be among the *most* essential in the Bill of Rights. This is because the clause would then confer rights upon perhaps the least valued, and hence most vulnerable, of all minority groups within society—the class of convicted criminals.

Id.

191. See *Weems*, 217 U.S. at 381-82.

192. Justice Scalia, however, has recently interpreted the *Weems* decision as lending support for both propositions. On the one hand, “portions of the [*Weems*] opinion . . . suggest that mere disproportionality, by itself, might make a punishment cruel and unusual: ‘Such penalties for such offenses amaze those who . . . believe that it is a precept of justice that punishment for crime should be graduated and proportioned to offence.’” *Harmelin v. Michigan*, 501 U.S. 957, 991 (1991) (quoting *Weems*, 217 U.S. at 366-67). On the other hand, the punishment of *cadena temporal* violates the Eighth Amendment because “[i]t has no fellow in American legislation. . . . It is cruel in its excess of imprisonment and that which accompanies and follows imprisonment. It is unusual in its character.” *Harmelin*, 501 U.S. at 991 (quoting *Weems*, 217 U.S. at 377). Justice Scalia’s point is well taken and will be discussed in more detail *infra* Part IV.C.3.

sentenced to a maximum of fifteen years.¹⁹³ In comparing this statute to the one under which Weems was convicted, Justice McKenna observed that “the highest punishment possible for a crime which may cause the loss of many thousand[s] of dollars, and to prevent which the duty of the State should be as eager as to prevent the perversion of truth in a public document,”¹⁹⁴ is no greater in degree than the punishment which may be imposed for falsifying a single item of a public account. This comparison of statutes and punishments is, if anything, a measure of a penalty’s proportionality.¹⁹⁵ Thus, the *Weems* decision is the first Supreme Court decision to recognize that the Eighth Amendment includes protection from punishment disproportionate to the culpable conduct for which an individual has been convicted.

C. Current Application of Eighth Amendment in Proportionality Analysis

1. Rummel v. Estelle

In *Rummel v. Estelle*,¹⁹⁶ William James Rummel was convicted of his third felony and, thus, fell under a recidivist enhancement statute.¹⁹⁷ The statute provided that “[w]hoever shall have been three times convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary.”¹⁹⁸ This case would have been unremarkable but for the fact that all three of Rummel’s offenses were relatively minor in nature.

Rummel was first convicted of fraudulent use of a credit card to obtain eighty dollars worth of goods and services.¹⁹⁹ Since the amount was greater than fifty dollars, Rummel’s conviction was a felony, for which he was sentenced to three years.²⁰⁰ Rummel’s second conviction was for passing a forged check in the amount of \$28.36, for which he was

193. The punishment was *cadena perpetua*, which provided for not more than fifteen years at hard and painful labor, as well as various trimmings similar to those included in *cadena temporal*. See *Weems*, 217 U.S. at 380-81.

194. *Id.* at 381.

195. The Court has recently extended this concept of comparing statutes and their punishments. A three-part objective test has been crafted and will be discussed in more detail *infra* Part IV.C.2. See *Solem v. Helm*, 463 U.S. 277, 290-92 (1983).

196. 445 U.S. 263 (1980).

197. See TEX. PENAL CODE ANN. art. 63 (West 1925), *recodified as amended by* TEX. PENAL CODE ANN. § 12.42(d) (West 1994).

198. *Id.* The revised statute now provides for a punishment of life, or for any term of not more than 99 years or less than 25 years. See TEX. PENAL CODE ANN. § 12.42(d) (West 1994).

199. See *Rummel*, 445 U.S. at 265.

200. See *id.*

sentenced to four years' imprisonment.²⁰¹ Some four years later, Rummel was charged with obtaining \$120.75 by false pretenses.²⁰² The state proceeded against Rummel under its recidivist statute. Rummel was convicted and subsequently given the statutory life sentence with the possibility of parole after twelve years.²⁰³ In short, Rummel was given a life sentence for three convictions based on crimes which netted a gain of \$229.11.²⁰⁴

The Court rejected Rummel's Eighth Amendment proportionality argument. Specifically, the Court held that a mandatory life sentence imposed upon an individual pursuant to a recidivist statute does not constitute cruel and unusual punishment under the Eighth Amendment.²⁰⁵ Justice Rehnquist opined that "the interest of the State of Texas here is not simply that of making criminal the unlawful acquisition of another person's property,"²⁰⁶ but is "in addition the interest, expressed in all recidivist statutes, in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law."²⁰⁷

Justice Rehnquist's opinion in this case, while perhaps appearing at first blush to be resistant to the concept of a proportionality principle, is not conceptually inconsistent with proportionality. Indeed, one of the primary goals of a recidivist statute is to deter repeat offenders, like most other criminal statutes. However, at some point the statute has another goal of segregating the repeat offender from the rest of society.²⁰⁸ This rationale of segregating repeat offenders from the general population carries little weight within the unit of prosecution analysis. Unlike a repeat offender, the parking-in-front-of-the-fire-hydrant defendant or the *Weems* defendant for that matter has not had an opportunity to go through the process and "learn her lesson." In fact, all of the charges are being brought in a single proceeding and not over a ten-year period as in *Rummel*. Thus, while *Rummel* may appear resistant to a proportionality principle in Eighth Amendment analysis, its rationale for saying "enough is enough" to repeat offenders is not inconsistent with

201. See *id.* at 265-66.

202. See *id.* at 266.

203. See *id.*

204. See *id.* at 265-66.

205. See *id.* at 284-85.

206. *Id.* at 276.

207. *Id.*

208. See *id.* at 284.

importing a limited proportionality requirement in temporal unit of prosecution cases. In any event, *Rummel* is significant insofar as it draws a line in the sand in declaring that “successful challenges to the proportionality of particular sentences have been,” and presumably will continue to be, “exceedingly rare.”²⁰⁹

2. Solem v. Helm

Three years after *Rummel*, the Court decided *Solem v. Helm*.²¹⁰ Jerry Helm had been convicted of six prior nonviolent felonies in the state of South Dakota.²¹¹ South Dakota had a recidivist statute, which provided that a fourth felony conviction carried an enhanced sentence of life imprisonment.²¹² Helm pleaded guilty to the charge of uttering a no account check for \$100 and was sentenced to life imprisonment without the possibility of parole.²¹³ After a federal district court denied habeas corpus relief, an appellate court reversed.²¹⁴ The Eighth Circuit held that Helm’s sentence of life without parole was unconstitutionally disproportionate and qualitatively different from *Rummel*’s life sentence, which carried the possibility of parole.²¹⁵ This difference, so said the court, thus made Helm’s case distinguishable from *Rummel v. Estelle*.²¹⁶

The Supreme Court agreed. In an opinion written by Justice Powell, the Court held that Helm’s “sentence [was] *significantly* disproportionate to his crime, and is therefore prohibited by the Eighth Amendment.”²¹⁷ The Cruel and Unusual Punishment Clause in the Eighth Amendment, Justice Powell observed, “prohibits not only barbaric punishments, but also sentences that are disproportionate to the

209. *Id.* at 272.

210. 463 U.S. 277 (1983).

211. *See id.* at 279-80. Helm’s six prior offenses included: (1) third degree burglary in 1964; (2) third degree burglary in 1966; (3) third degree burglary in 1969; (4) obtaining money under false pretenses in 1972; (5) grand larceny in 1973; and (6) a third conviction for driving while intoxicated in 1975. *See id.*

212. The actual statute read as follows: “When a defendant has been convicted of at least three prior convictions [sic] in addition to the principal felony, the sentence for the principal felony shall be enhanced to the sentence for a Class 1 felony.” S.D. CODIFIED LAWS § 22-7-8 (Michie 1979) (current version at S.D. CODIFIED LAWS § 22-7-8 (Michie 1998)). A separate statute provides that “[a] person sentenced to life imprisonment is not eligible for parole by the board of pardons and paroles.” S.D. CODIFIED LAWS § 22-6-1(3) (Michie Supp. 1982) (current version at S.D. CODIFIED LAWS § 22-7-8 (Michie 1998)). Helm’s seventh felony conviction was apparently the first committed after passage of the recidivist statute.

213. *See Solem*, 463 U.S. at 281-83.

214. *See Helm v. Solem*, 684 F.2d 582 (8th Cir. 1982).

215. *See Solem*, 463 U.S. at 283-84.

216. *See id.*

217. *Id.* at 303 (emphasis added).

crime committed.”²¹⁸ That being the case, reviewing courts “should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals.”²¹⁹ To aid future courts in determining disproportionate punishment for Eighth Amendment purposes, the Court articulated a three-part analysis based on objective factors.²²⁰ First, courts must “look to the gravity of the offense and the harshness of the penalty.”²²¹ Second, courts should “compare the sentences imposed on other criminals in the same jurisdiction” because “[i]f more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive.”²²² Third, “courts may find it useful to compare the sentences imposed for commission of the same crime in other jurisdictions.”²²³ These objective factors build upon the *Weems* concept of comparing various statutes and their punishments. Justice Powell adds to this concept by comparing not only intrajurisdictional statutes and their punishments, but also by comparing interjurisdictional statutes and their punishments.²²⁴

3. Harmelin v. Michigan

Eight years after *Solem v. Helm*,²²⁵ the Supreme Court decided *Harmelin v. Michigan*.²²⁶ Ronald Harmelin was convicted of possessing 672 grams of cocaine and was subsequently sentenced to life in prison without the possibility of parole.²²⁷ This may seem extreme in and of itself, but it is perhaps startling when it is revealed that Harmelin had no

218. *Id.* at 284.

219. *Id.* at 290.

220. *See id.* at 290-92.

221. *Id.* at 290-91 (citing *Enmund v. Florida*, 458 U.S. 782, 797-801 (1982)).

222. *Id.* at 291 (citing *Enmund*, 458 U.S. at 797-801; *Weems v. United States*, 217 U.S. 349, 380-81 (1910)).

223. *Id.* at 291-92 (citing *Enmund*, 458 U.S. at 797-801; *Coker v. Georgia*, 433 U.S. 584, 593-97 (1977)).

224. Note that the Court, in invalidating Helms' punishment, concluded that the sentence visited upon him was *significantly* disproportionate to the culpable conduct of which he was convicted. *See id.* at 303. The degree to which the punishment is disproportionate to the culpable conduct will become central to the discussion *infra* Part IV.D.

225. 463 U.S. 277 (1983).

226. 501 U.S. 957 (1991).

227. *See id.* at 961.

prior felony or misdemeanor convictions.²²⁸ The Court held, however, that this sentence did not violate the Cruel and Unusual Punishment Clause of the Eighth Amendment.²²⁹ Thus, after *Harmelin*, we are left with the following jurisprudential interpretation of the Eighth Amendment. A sentence of life in prison without parole based on seven “nonviolent” felony convictions—three burglaries, two convictions for, in essence, stealing money, one larceny, and a third conviction for driving while intoxicated—is cruel and unusual punishment. However, a sentence of life in prison without parole based on one felony conviction for possession of an illegal substance, and no criminal record, is not cruel and unusual punishment. At the risk of professing the obvious, *Solem* and *Harmelin* do not square.

Justice Scalia, in an opinion joined by Chief Justice Rehnquist, had the temerity to claim that “the Eighth Amendment contains no proportionality guarantee.”²³⁰ Justice Kennedy, joined by Justice O’Connor and Justice Souter, claimed that the Eighth Amendment encompasses a narrow proportionality principle, which applies to capital and noncapital sentences.²³¹ However, *Harmelin*’s sentence was affirmed because his crime threatened to cause “grave harm” to society.²³² One commentator has observed that “Ronald Harmelin should have picked a different crime. He should have mugged an old man and stolen his wallet, or kidnapped a child, or raped a woman at gunpoint, or maimed a pedestrian while driving drunk, or beaten someone to death in a quarrel.”²³³ Had he committed any of these crimes, as opposed to possessing a little over one pound of cocaine, “he would not be facing the certainty that he will never again set foot outside a Michigan state penitentiary.”²³⁴

In any event, while some may disagree with the premise that possessing cocaine threatens to cause grave harm to society, at least the constitutional focus is on the proportionality of punishment as it relates to the culpability of the offense. By contrast, a flat declaration that no proportionality principle is encompassed in the Eighth Amendment is much more troubling. For starters, Justice Scalia disagrees with the concept that English law included a proportionality requirement. “In

228. See *id.* at 994.

229. See *id.* at 994–96.

230. *Id.* at 965 (Scalia, J., plurality).

231. See *id.* at 997 (Kennedy, J., concurring in part and concurring in judgment).

232. *Id.* at 1002. For an interesting discussion calling into question the gravity of such harm, see Kelly A. Patch, Note, *Harmelin v. Michigan: Is Proportionate Sentencing Merely Legislative Grace?*, 1992 Wis. L. REV. 1697.

233. Patch, *supra* note 232, at 1697 (quoting Stephen Chapman, *Kilo for Kilo, Sentence Was Cruel, Unusual*, ST. LOUIS POST DISPATCH, July 7, 1991, at 3B).

234. Patch, *supra* note 232, at 1697 (quoting Chapman, *supra* note 233, at 3B).

sum, we think it most unlikely that the English Cruell and Unusuall Punishments Clause [in the English Bill of Rights] was meant to forbid 'disproportionate' punishments."²³⁵ He further opines that "[t]here is even less likelihood that proportionality of punishment was one of the traditional 'rights and privileges of Englishmen' apart from the Declaration of Rights, which happened to be included in the Eighth Amendment."²³⁶ These conclusions are troubling not only because there is ample evidence to the contrary,²³⁷ but also because the sources upon which Justice Scalia relies most heavily in forming his opinion are directly contrary to his conclusions.²³⁸

Justice Scalia further argues that the "excessive fines" clause is necessary because fines are a source of revenue.²³⁹ Thus, so runs the argument, the temptation will be greater to fine the convicted excessively than to punish excessively because fines raise money, while imprisoning the convicted costs money. However, this argument, while perhaps intuitively tempting, is not in accord with historical fact. Specifically, Blackstone observed that "it is never usual to assess a larger fine than a man is able to pay, without touching the implements of his livelyhood; but to inflict corporal punishment, or a stated imprisonment, which is better than an excessive fine, for that amounts to imprisonment for life."²⁴⁰ Implicit in this statement is the notion that an excessive fine is nefarious not because it unjustly enriches government,

235. *Harmelin*, 501 U.S. at 974.

236. *Id.*

237. See *supra* Part IV.A.1.

238. Justice Scalia relies heavily on Blackstone and Granucci. See *Harmelin*, 501 U.S. at 967-68, 970, 973 n.4, 974-75, 977, 979. Blackstone stated in no uncertain terms: The method however of inflicting punishment ought always to be proportioned to the particular purpose it is meant to serve, and by no means to exceed it: therefore the pains of death, and *perpetual disability by exile, slavery, or imprisonment*, ought never to be inflicted, but when the offender appears *incorrigible*: which may be collected either from a repetition of minuter offences; or from the perpetration of some one crime of deep malignity, which of itself demonstrates a disposition without hope or probability of amendment

4 BLACKSTONE, *supra* note 53, at *12 (first emphasis added).

As for Granucci, the centerpiece of his argument is that "prior to adoption of the Bill of Rights in 1689 England had developed a common law prohibition against excessive punishments in *any* form." Granucci, *supra* note 113, at 847 (emphasis added). Moreover, "the cruel and unusual punishments clause of the Bill of Rights of 1689 was . . . a reiteration of the English policy against disproportionate penalties." *Id.* at 860.

239. See *Harmelin*, 501 U.S. at 978 n.9.

240. 4 BLACKSTONE, *supra* note 53, at *373.

but because it excessively punishes the convicted. At any rate, the declaration by two Supreme Court Justices that the Eighth Amendment contains no proportionality requirement leaves the issue in a state of unrest.

D. *A Solem Reprise*

The current state of Eighth Amendment jurisprudence may be summarized as follows. The Eighth Amendment precludes the infliction of barbaric forms of punishment, without regard to the offense committed.²⁴¹ It also precludes the infliction of "humane" forms of the death penalty when the penalty is disproportionate to the offense.²⁴² It further precludes the imposition of life imprisonment without the possibility of parole if the sentence is disproportionate, taking into account the offense and attendant circumstances such as prior convictions.²⁴³ The Eighth Amendment also bars a disproportionate prison sentence if the nature of imprisonment is foreign to Anglo-American standards.²⁴⁴ Finally, the Eighth Amendment bars a disproportionate prison sentence if the defendant has committed a status offense.²⁴⁵ This brings the discussion full circle and begs the following question: Under what circumstances, other than those previously cited, will a prison sentence be so disproportionate to the sum total of morally objectionable conduct that it will violate the Eighth Amendment? Based on the previous analysis, it would seem less than forthright to say never. If not never, however, then when?

There is no doubt that it will be a difficult task determining when a criminal sentence, whether for one offense or an aggregate of offenses,²⁴⁶

241. See *Weems v. United States*, 217 U.S. 349, 368 (1910); *Coker v. Georgia*, 433 U.S. 584, 592 (1977); *Harmelin v. Michigan*, 501 U.S. 957, 979 (1991); Granucci, *supra* note 113, at 842.

242. See *Coker*, 433 U.S. at 599.

243. See *Solem v. Helm*, 463 U.S. 277, 289-303 (1983).

244. See *Harmelin*, 501 U.S. at 991; *Weems*, 217 U.S. at 377.

245. See *Robinson v. United States*, 370 U.S. 660, 677-78 (1962).

246. It was urged in Part III that the Double Jeopardy clause should not be invoked to prevent multiple prosecutions for the same act. It was also suggested that this temptation is, in part, due to the intuitive notion that someone is being punished to an excessive degree. It is urged that this feeling of too much punishment be channeled into the Eighth Amendment such that, no matter how many pieces into which a legislature carves the act, there can only be a certain amount of punishment. This is the idea Justice Field was punctuating when he declared that "[t]he [Eighth Amendment] inhibition is directed against cruel and unusual punishments, whether inflicted for one or many offenses." *O'Neil v. Vermont*, 144 U.S. 323, 364 (Field, J., dissenting). Consider the following:

To be sure, it may be possible to hypothesize units of prosecution that are so fragmented that to punish each separately would constitute excessive punishment. But in that event, the fragmentation would be

is so disproportionate to the culpable conduct that it crosses the Cruel and Unusual Punishment threshold of constitutionality. However, it seems more genuine to admit the difficulty of applying such a rule and thus exercise its power in rare cases, rather than to proclaim no proportionality principle exists while simultaneously carving out exceptions on an *ad hoc* basis, as justice may require. Indeed, the fact that "such scrutiny requires sensitivity to federalism concerns and involves analysis that may at times be difficult affords no justification for [the Supreme] Court's abrogation of its responsibility to uphold constitutional principles."²⁴⁷ The practical difference between no proportionality and a limited proportionality requirement is minimal. The holding in *Rummel* is arguably defensible under either approach. In fact, the *Solem* Court arguably could have held that the punishment was not disproportionate, given Helm's recidivist tendencies. *Harmelin*, however, is one of those rare cases where the outcome depends upon the extent to which the Court deems proportionality to be required in criminal punishment.

Having argued in favor of a limited proportionality component within the Eighth Amendment, it is necessary to put forth a model in order to determine when aggregated punishment is unconstitutionally disproportionate to the culpable conduct. However, some preliminary matters should be kept in mind. "Reviewing courts, of course, should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments

invalid because the Eighth Amendment already prohibits the State from subjecting a defendant to excessive punishment. In other words, once it is determined that a defendant can constitutionally be punished for his conduct as a whole, the manner in which his conduct is divided into separate units for purposes of calculating his total sentence is of no constitutional significance except for deciding whether the total sentence is excessive; and that is a subject for decision under [the] Eighth Amendment and not the Double Jeopardy Clause.

Westen & Drubel, *supra* note 101, at 114 (footnotes omitted). Thus, if a defendant is convicted of stealing ten dollars, "there is no functional difference between punishing the entire theft by sixty days, or the theft of each separate dollar by six days, or the theft of each penny by six minutes." *Id.* at 114 n.156. This is true because "the constitutional question is whether the total penalty the defendant receives is excessive in light of his conduct. And that is an Eighth Amendment question . . ." *Id.*; see *Bell v. United States*, 349 U.S. 81, 82 (1955) (arguing that "[t]he punishment appropriate for the diverse federal offenses is a matter for the discretion of Congress, subject only to constitutional limitations, more particularly the Eighth Amendment.").

247. *Harmelin v. Michigan*, 501 U.S. 957, 1017-18 (1991) (White, J., dissenting).

for crimes”²⁴⁸ This deference is required in all federal cases, as well as most state cases, by separation of powers principles.²⁴⁹ Just as courts would be making law in guessing at the “correct” unit of prosecution for statutes with ambiguous units of prosecution,²⁵⁰ so too would they be making law in substituting their own values for those of the legislature. Thus, “in applying the Eighth Amendment the appellate court decides only whether the sentence under review is within constitutional limits.”²⁵¹ Given this deference, “a reviewing court rarely will be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate.”²⁵²

Hence, in order for an appellate court to invalidate a criminal sentence, it should be *grossly* disproportionate when compared to the culpable conduct. “[S]ome State will always bear the distinction of treating particular offenders more severely than any other State.”²⁵³ Thus, “[t]he inherent nature of our federal system and the need for individualized sentencing decisions result in a wide range of constitutional sentences.”²⁵⁴ Indeed, to allow courts to invalidate punishments which are not grossly disproportionate might very well have the effect, as Justice Scalia has warned, of creating “a ratchet whereby a temporary consensus on leniency for a particular crime fixes a permanent constitutional maximum, disabling the States from giving effect to altered beliefs and responding to changed social conditions.”²⁵⁵

248. *Solem v. Helm*, 463 U.S. 277, 290 (1983).

249. As a technical matter, the Federal Constitution does not require states to maintain a government whose separation of power models the federal government. In fact, the Constitution only provides that “[t]he United States shall guarantee to every State in this Union a Republican Form of Government” U.S. CONST. art. IV, § 4. As a practical matter, however, most states adhere to the concept of separation of powers. Moreover, none of the example cases used in this Comment point to the absence of a separation of powers requirement in order to encroach upon the province of a legislature.

250. *See supra* Part II.

251. *Solem*, 463 U.S. at 290 n.16.

252. *Id.*

253. *Rummel v. Estelle*, 445 U.S. 263, 282 (1980).

254. *Solem*, 463 U.S. at 290 n.17.

255. *Harmelin v. Michigan*, 501 U.S. 957, 990 (1991). However, consider the scenario that a no-proportionality approach creates. Just as overly-eager courts could create a one-way downward ratcheting effect, the more probable result, given the democratic process and overly-cautious courts, is a one-way upward ratcheting effect. It would no doubt be political suicide for a political candidate to take the stump while advocating a desire to get soft on crime. In fact, lessening criminal punishment after a temporary consensus of harshness would, perhaps, be just as politically damaging. One need only recall the speed with which Jocelyn Elders was relieved of her Surgeon General duties after having the audacity to suggest that the country should consider and study the effect of legalizing some drugs. If, as has been argued, the Eighth Amendment is not a purely majoritarian principle, then the Eighth Amendment is the last check on the potential tyranny of the political process.

With these warnings in mind, it is asserted that a *Solem*-type model based on objective criteria would best serve the purpose of invalidating grossly disproportionate punishment while maintaining fidelity to separation of powers principles. First, courts should look to the gravity of the offense and the harshness of the penalty.²⁵⁶ This gravity of the offense analysis requires recognition of the fact that legislatures' purposes are diverse and should be presumed legitimate and constitutional. Second, courts should compare the sentences imposed on other criminals in the same jurisdiction.²⁵⁷ Because legislatures have various legitimate reasons for enacting punishment which does not seem strictly graduated, a punishment scheme which punishes, say, armed robbery more severely than, say, kidnapping (or vice versa) is not problematic. However, legislative enactments that punish parking offenses or a first offense of drug possession more harshly than second degree murder or rape—as in *Harmelin*—require a more critical review.²⁵⁸ Third, courts should compare the sentences imposed for commission of the same crime in other jurisdictions.²⁵⁹ This analysis does not require strict—or, for that matter, even substantial—conformity with other jurisdictions. Indeed, one jurisdiction will always punish an act more severely than another jurisdiction. However, a look at other jurisdictions will provide insight regarding whether a state has fallen victim to the one-way “get tough on crime” ratcheting effect. If, as has been argued, the Eighth Amendment has a counter-majoritarian component,²⁶⁰ then complete deference to, like excessive judicial encroachment upon, a legislature's punishment determination is constitutionally impermissible.

V. APPLICATION AND ANALYSIS

Having addressed the most relevant constitutional and judicial issues concerning temporally individuated units of prosecution, it is time to apply these concepts to actual cases. The first case, *State v. Grayson*,²⁶¹ a Wisconsin Supreme Court case, provides an excellent example of how not to resolve rule of lenity issues. The second case, *Johnson v.*

256. See *Solem*, 463 U.S. at 290-91.

257. See *id.* at 291.

258. See *Harmelin*, 501 U.S. at 1026 (White, J., dissenting).

259. See *Solem*, 463 U.S. at 291-92.

260. See *supra* note 190.

261. 493 N.W.2d 23 (Wis. 1992).

Morgenthau,²⁶² a case from the Court of Appeals of New York, provides an excellent example of a legislature's near plenary power to define crimes, while still recognizing the importance of providing individuals with notice of what is proscribed. The last case, *People v. Djekich*,²⁶³ a California appellate case, ties together all of the concepts discussed in this Comment and provides an excellent model for how temporal unit of prosecution cases should be analyzed conceptually.

A. State v. Grayson

In *State v. Grayson*,²⁶⁴ the issue was whether the prosecutor could charge an individual who had continuously failed to pay court-ordered child support for the years 1986, 1987, 1988, and 1989, with four counts of felony nonsupport.²⁶⁵ The child support statute read as follows: "Any person who intentionally fails for 120 or more consecutive days to provide . . . child support which the person knows or reasonably should know the person is legally obligated to provide is guilty of a class E felony."²⁶⁶ A class E felony was punishable by a \$10,000 fine, or two years in prison, or both.²⁶⁷ Grayson pleaded guilty to four felony counts, one count for each year, and received four two-year sentences, to run consecutively. Grayson appealed his case to the Wisconsin Supreme Court, arguing that the statute could only be violated once with one continuous act, irrespective of the number of days he failed to pay child support.²⁶⁸

The parallels between this case and the *Snow*²⁶⁹ case are uncanny. In both cases the prosecutor, and not the legislature, defined the unit of prosecution, which both prosecutors decided *sua sponte* to be one year.²⁷⁰ In both cases the language of the statute itself did not provide multiple units of prosecution.²⁷¹ Likewise, neither of the statutes in these two

262. 505 N.E.2d 240 (N.Y. 1987).

263. 280 Cal. Rptr. 824 (Ct. App. 1991).

264. 493 N.W.2d 23 (Wis. 1992).

265. See *id.* at 24.

266. WIS. STAT. ANN. § 948.22(2) (West 1989), amended by WIS. STAT. ANN. § 948.22(2) (West 1994).

267. See WIS. STAT. ANN. § 939.50(3) (West 1989).

268. See *Grayson*, 493 N.W.2d at 25.

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

270. See *Grayson*, 493 N.W.2d at 24 n.1; *Snow*, 120 U.S. at 276-77.

271. See *Grayson*, 493 N.W.2d at 26; *Snow*, 120 U.S. at 284-86. In fact, the *Grayson* court admitted that the statute provided no express unit of prosecution. In both cases, the statutes proscribed the doing of something, whether living with women or failing to pay child support, in excess of some legislatively defined number. See *Grayson*, 493 N.W.2d at 25 (where it was a crime to fail to do something for more than a certain number of days); *Snow*, 120 U.S. at 275-76 (where it was a crime to do something with more than a certain number of women).

cases had clarifying legislative history.²⁷² Despite all of these similarities, the Wisconsin Supreme Court held that the prosecutor could charge one count of felony nonsupport for each 120-day term a person fails to pay child support, even if that person failed to pay over one continuous period.²⁷³ In side-stepping the rule of lenity argument put forth by Grayson, the Court stated that the rule was inapplicable because Grayson must have formed a new "*mens rea*" for each count of his continuous act and because it was "appropriate" to allow multiple punishment.²⁷⁴ The "*mens rea*" argument cannot seriously be treated as anything but a makeweight argument, particularly in light of the fact that Grayson was continuously *failing* to do something.

Thus, the difference between Grayson spending eight years in jail (for four convictions) and two years (for one conviction) is the Court's subjective opinion that it is "appropriate." This case is not a silly parking hypothetical. This was an actual case wherein the determination of whether Mr. Grayson spent an additional six years in prison depended entirely upon the Court's disposition of this case. This case, quite simply, is bad law.²⁷⁵ "*Grayson* was wrongly decided and . . . continuous failure to support constitutes only one violation of the statute."²⁷⁶

The Court had, and consequently missed, two opportunities to decide

272. See *Grayson*, 493 N.W.2d at 26; *Snow*, 120 U.S. at 274-86. The *Grayson* court additionally agreed with the government's concession that the legislative history did not advance the temporal unit of prosecution analysis. Note the rule of lenity may be invoked without reference to the competing schools of thought concerning when a court should decide that a statute is ambiguous. This is true because the statutes' permissible units of prosecution are unclear after an examination of both the statutes themselves and their respective legislative histories. See *supra* note 32.

273. See *Grayson*, 493 N.W.2d at 24.

274. *Id.* at 28.

275. Note that one might be tempted to raise a separation of powers argument, or the lack thereof, at this point. However, Wisconsin is one of the many states which adheres to the concept of separation of governmental powers, even though not explicitly stated in its constitution. See, e.g., *State v. Holmes*, 315 N.W.2d 703 (1982); see also *State ex. rel. McCormack v. Foley*, 118 N.W.2d 211, 213 (1962) ("The framers of the Wisconsin Constitution vested the legislative power of the state in a senate and assembly. The exercise of such power is subject only to the limitation and restraints imposed by the Wisconsin Constitution and the Constitution and laws of the United States."). Thus, "the power of the state legislature, unlike that of the federal congress, is plenary in nature . . ." *Id.* Given this, the Court in *Grayson* could not seriously argue that it had any legislative power in this context. Hence, it was put in the unenviable position either of letting Grayson "get off on a technicality" or of declaring what the legislature meant to say (as opposed to what it did say).

276. Michelle A. Leslie, Note, *State v. Grayson: Clouding the Already Murky Waters of Unit of Prosecution Analysis in Wisconsin*, 1993 WIS. L. REV. 811, 813.

this case correctly. First, an argument can be made that the statute clearly did *not* provide for multiple units of prosecution. The statute proscribed the failure to pay child support for 120 or more consecutive days. Grayson violated the statute once, and only once, because he failed to pay child support for more than 120 consecutive days. A second count, whether brought at the same time as the first count or subsequent to a conviction or acquittal, would therefore be prohibited by the Double Jeopardy clause. If the Double Jeopardy Clause bars prosecuting an individual twice for the same offense and if the offense is defined as failing to pay child support for 120 or more consecutive days, then Grayson can be tried only once.

Second, a compelling argument can be made that the statute's unit of prosecution was unclear. If a legislature must clearly and unambiguously intend to turn a single transaction into multiple offenses,²⁷⁷ then Wisconsin may only try Grayson once because "[w]hen [a legislature] leaves to the Judiciary the task of imputing to [a legislature] an undeclared will, the ambiguity should be resolved in favor of lenity."²⁷⁸ A second prosecution would thus be barred by the rule of lenity.

The point is not that a legislature *could not* punish these separate temporal units—quite to the contrary, legislatures can create temporal units of prosecution—but, rather, the Wisconsin Legislature *did not* choose to punish these separate temporal units. It is submitted that the Court was doing little more than saving the Legislature from its own clumsy draftsmanship.²⁷⁹ While the Court's intentions may have been admirable, the result does violence both to the concept that legislatures—not courts—make law, and to the basic precept of criminal law that individuals should be given adequate notice of what is proscribed.

B. Johnson v. Morgenthau

In *Johnson v. Morgenthau*,²⁸⁰ by contrast, the Court of Appeals of New York recognized the delicate balance between legislative power and notice to individuals of what is proscribed. Emanuel Johnson, while in

277. See *Bell v. United States*, 349 U.S. 81, 83-84 (1955).

278. *Id.* at 83.

279. To be fair, the state legislature, taking its cue from this case, immediately remedied this unit of prosecution problem by amending the statute. The statute now contains the following amendment: "A prosecutor may charge a person with multiple counts for a violation under this subsection if each count covers a period of at least 120 consecutive days and there is no overlap between periods." WIS. STAT. ANN. § 948.22(2) (West 1996).

280. 505 N.E.2d 240 (N.Y. 1987).

Bronx county, fired shots from a handgun at his sister after an altercation.²⁸¹ He fled the scene, but was arrested six days later in New York county.²⁸² Bronx county charged Johnson, *inter alia*, with violating a statute which proscribed possessing a loaded firearm outside one's home or place of business.²⁸³ Johnson agreed to a plea bargain and was sentenced to a prison term of two and one-half to five years.²⁸⁴ New York County brought an indictment under the same statute for the same continuous act of possession.²⁸⁵ Johnson appealed this second action to the Court of Appeals of New York.²⁸⁶

The court concluded that Johnson "was engaged in an offense which was continuous in nature, and for which he may be prosecuted only once."²⁸⁷ In addition, the court recognized that "[t]he question is essentially one of statutory construction. The Legislature is free to define criminal conduct in terms of 'temporal units' if it so desires. Since "[t]he double jeopardy clauses of the State and Federal Constitutions protect an accused against a second prosecution for the same offense after acquittal or conviction and against multiple punishments for the same offense,"²⁸⁸ the second claim was barred because Johnson "continuously 'possessed' the pistol for the six-day period in question"²⁸⁹ This reasoning reiterates the principle that the question is not whether a legislature *can* define an offense by some arbitrary unit of time, but whether it *has* so defined a crime.²⁹¹

281. *See id.* at 241.

282. *See id.*

283. *See id.*; N.Y. PENAL LAW § 265.02(4) (McKinney 1974).

284. *See Johnson*, 505 N.E.2d at 241.

285. *See id.*

286. *See id.*

287. *Id.* at 243.

288. *Id.* (citations omitted).

289. *Id.* at 241 (citations omitted).

290. *Id.* at 242.

291. The case of *Webb v. State*, 536 A.2d 1161 (Md. 1988), a Maryland case, is another possession-type case with equally cogent reasoning. In *Webb*, the defendant was spotted at two different times carrying a handgun. *See id.* at 1162. A statute made it a misdemeanor for any person to wear, carry, or transport any handgun, on or about his person. *See* MD. ANN. CODE art. 27, § 36B(b) (1996). The court held that when "mere possession of a prohibited article is a crime, the offense is a continuing one because the crime is committed each day the article remains in possession, as there is a continuing course of conduct." *Webb*, 536 A.2d at 1164 (citation omitted).

"The unit of prosecution of that continuing crime is the wearing, carrying or transporting of any handgun There is no requirement as to time, use, person at risk or incident." *Id.* at 1165. Therefore, the court concluded that it could not "read into the

Lastly, in *People v. Djekich*,²⁹² the Defendant pleaded *nolo contendere* to ten counts of violating a zone ordinance.²⁹³ Djekich purchased two buildings and subsequently converted both of them into duplexes.²⁹⁴ After numerous warnings from the San Diego County Department of Planning and Land Use, the County began citing Djekich for renting duplexes on land zoned for single-family residential units.²⁹⁵ A separate ordinance provided that “[e]ach day or portion of a day that any person violates or continues to violate this ordinance constitutes a separate offense and may be charged and punished separately without awaiting conviction on any prior offense.”²⁹⁶ The punishment for each offense was a fine not exceeding \$1000 or jail time not to exceed six months, or both.²⁹⁷ Thus, Djekich was exposed to a maximum of a \$10,000 fine, or five years in prison, or both. Pursuant to a plea agreement, Djekich was fined \$10,000—\$1000 for each of ten violations—and placed on probation.²⁹⁸

The Court began its analysis by noting that absent “express legislative direction to the contrary, where the commission of a crime involves continuous conduct which may range over a substantial length of time and defendant conducts himself in such a fashion with but a single intent and objective, that defendant can be convicted of only a single offense.”²⁹⁹ Thus, “where legislatively defined offenses involve continuous conduct unseparated in any fashion artificially by the legislature, ‘[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.’”³⁰⁰ Conversely, “the Double Jeopardy Clause [or the rule of lenity, for that matter] is not violated by prosecution under a statute *clearly* designed by the legislature to permit severability of otherwise continuous criminal

plain language of the section the intent that a lapse of time or more than one person put at risk or multiple incidents would initiate separate offenses.” *Id.* “To construe the statute as the State would have us do would require us to doff our judicial robes and don a legislative hat. We cannot indulge in such judicial legislation; we must take the statute as it reads, not rewrite it.” *Id.* Indeed, this case points up the weakness of the Wisconsin Supreme Court’s reasoning in *Grayson*.

292. 280 Cal. Rptr. 824 (Ct. App. 1991).

293. *See id.* at 826. Djekich was originally charged with 28 violations, 18 of which were dismissed as part of his plea agreement. *See id.*

294. *See id.* at 825.

295. *See id.* at 825-26.

296. *Id.* at 825 n.3.

297. *See id.* at 826 n.6.

298. *See id.* at 825-26.

299. *Id.* at 828.

300. *Id.* at 830 (quoting *Brown v. Ohio*, 432 U.S. 161, 169 (1977)).

conduct and thus accumulation of convictions and multiple punishment."³⁰¹ Justice Work encapsulates the central theme of this Comment in declaring that

a penal provision reflecting a clear legislative intent to permit pyramiding of punishment through cumulative convictions by providing for a separate offense for each day a defendant continues his/her criminal conduct is valid, providing the fine imposed is not unconstitutionally excessive,³⁰² or the sentence imposed does not constitute cruel and/or unusual punishment.³⁰³

In other words, a legislature has broad discretion in enacting penal provisions and specifying punishment for criminal offenses, and the only check on this near plenary power is a judicial determination that the punishment exceeds constitutional limits.³⁰³ According to Justice Work, "[a] fine or punishment may be held unconstitutional if it is so excessive or unusual by being so disproportionate to the offense committed that it shocks public sentiment and conscience while offending fundamental notions of human dignity."³⁰⁴ Thus, the zoning ordinance's temporal unit of prosecution survives scrutiny and Djekich's punishment is constitutionally permissible, so long as it does not run afoul of the Eighth Amendment.³⁰⁵

1. *Solem's First Prong: Compare the Gravity of the Offense to the Harshness of the Punishment*

Under the *Solem* analysis articulated in Part IV, the first step in determining whether punishment violates the Eighth Amendment is to compare the gravity of the offense with the harshness of the penalty.³⁰⁶ In making this determination, one must simultaneously keep in mind the fact that legislatures' purposes are diverse and should be presumed legitimate and constitutional.³⁰⁷ It hardly seems controversial to state that violations of zoning regulations, while perhaps annoying to some, do not threaten the stability of society. Accordingly, it is likewise

301. *Id.* (emphasis added) (citations omitted).

302. *Id.* (citations omitted).

303. *See id.* at 830 n.12.

304. *Id.* at 831 n.12 (citations omitted).

305. Justice Work determined that Djekich waived his right to object to the proportionality of the sentence by failing to raise an Eighth Amendment claim. *See id.* at 831. However, this Comment will assume, for pedagogical and illustrative purposes, that Djekich did adequately raise an Eighth Amendment claim.

306. *See Solem v. Helm*, 463 U.S. 277, 290-91 (1983).

307. *See supra* Part IV.D.

uncontroversial to state that the gravity of the offenses is relatively slight. The penalty in this case was a fine of \$10,000. In determining whether this fine is grossly excessive, a few matters must be kept in mind.

First, Djekich had been informed that he was violating zoning regulations around March of 1987.³⁰⁸ He was reminded on May 13, 1987 that he was violating zoning regulations.³⁰⁹ He was again reminded on October 8, 1987 that he was violating zoning regulations and was informed that he would be cited if he did not remedy the situation.³¹⁰ Thus, Djekich violated the applicable zoning regulations for about seven months with actual knowledge that what he was doing was unlawful. Second, Djekich was shown a fair amount of restraint, as he was not prosecuted until after he had been warned three times. Third, Djekich did not receive any jail time. Lastly, the zoning regulation must be presumed to be legitimate and constitutional. In weighing all of these factors, one should have little trouble determining that Djekich's punishment, while not insignificant, is not grossly disproportionate when compared to his conduct.

2. *Solem's Second Prong: Compare the Punishment at Issue With Punishment Imposed Upon Individuals who Commit Different Offenses in the Same Jurisdiction*

The second step is to compare the punishment imposed upon Djekich with punishments imposed upon individuals in California for different offenses—an intrajurisdictional comparison, if you will.³¹¹ One must remind oneself that legislatures have various legitimate reasons for enacting punishment that is not strictly graduated.³¹² Hence, this comparison is necessary only to determine whether a jurisdiction has become blinded by *Harmelin*-caliber myopia in punishing a particular offense.³¹³ As previously noted, zoning violations are relatively minor offenses. Thus, violators should be punished similarly to violators of other relatively minor offenses.

In California, the zoning violations for which Djekich was convicted are punished identically to violations of statutes that proscribe interfering with personnel working an emergency scene,³¹⁴ using terra

308. See *Djekich*, 280 Cal. Rptr. at 825.

309. See *id.*

310. See *id.* at 825-26.

311. See *Solem*, 463 U.S. at 291.

312. See *supra* Part IV.D.

313. See *supra* Part IV.D.

314. See CAL. PENAL CODE § 402 (West 1988 & Supp. 1999).

alba in the manufacture of candy,³¹⁵ discarding a washing machine without removing the door,³¹⁶ obstructing a person from accessing public land,³¹⁷ knowingly using a slug in a video arcade game³¹⁸ or a pay phone,³¹⁹ conducting oneself in a disorderly fashion,³²⁰ and knowingly misdirecting a prospective guest of any hotel by a taxicab driver.³²¹ Though some of the offenses provide levity, the point is sufficiently clear that zoning violators have not been singled out in California. In other words, the intrajurisdictional comparison shows that zoning violators are punished similarly to those who commit other minor offenses. Accordingly, the second prong of the *Solem* test is satisfied.

3. *Solem's Third Prong: Compare the Punishment at Issue with Punishment Imposed Upon Individuals who Commit the Same Offense in Different Jurisdictions*

The final step in the proportionality analysis is to compare the sentence imposed upon Djekich with sentences imposed upon similarly situated individuals—that is, convicted violators of zoning regulations in other jurisdictions.³²² Such comparison does not require substantial conformity with other jurisdictions. Rather, the critical inquiry is whether a jurisdiction has ratcheted up its punishment for a particular offense to a degree that is grossly in excess of other jurisdictions.³²³

Recall that each violation of the zoning regulation at issue in *Djekich* was punishable by a fine of up to \$1000 and/or imprisonment of up to six months, and each day the individual violates the regulation is a separate offense.³²⁴ This enforcement scheme is in accord with other jurisdictions. For example, Kansas law provides that a violation of a zoning regulation is punishable by a fine of up to \$500 and/or imprisonment for up to six months and each day the individual violates

315. See CAL. PENAL CODE § 402a (West 1988).

316. See *id.* § 402b.

317. See *id.* § 420.

318. See *id.* § 640a.

319. See *id.* § 640b.

320. See *id.* § 647.

321. See *id.* § 649. All of the offenses cited *supra* notes 315 through 322 are misdemeanors, which are punishable by imprisonment for a term of up to six months and/or a fine not exceeding \$1000. See *id.* § 19.

322. See *Solem v. Helm*, 463 U.S. 277, 291-92 (1983).

323. See *supra* Part IV.D.

324. See *People v. Djekich*, 280 Cal Rptr. 824, 825 n.3, 826 n.6 (Ct. App. 1991).

the regulation is a separate offense.³²⁵ Likewise, New Hampshire law provides that a violation of a zoning regulation is punishable by a fine of up to \$2000 and/or imprisonment for up to one year.³²⁶ Colorado law provides that a violation of a zoning regulation is punishable by a fine of up to \$100 and/or imprisonment for not more than ten days, and each day the individual violates the regulation is a separate offense.³²⁷

Lastly, New York law provides that a violation of a zoning regulation is punishable by a fine of up to \$350 and/or imprisonment for up to six months for a first offense.³²⁸ A second offense within five years of the first offense is punishable by a fine of up to \$750 and/or imprisonment for up to six months.³²⁹ The third and subsequent offenses within a five-year period are punishable by a fine of up to \$1000 and/or imprisonment for up to six months.³³⁰ New York law further provides that it is a separate offense for each week the regulation is violated.³³¹

Based on this interjurisdictional comparison, it is apparent that all of these jurisdictions are located fairly close to one another on the punishment continuum. This finding warrants the conclusion that California does not punish zoning regulation violators in a grossly excessive manner. Indeed, California's punishment scheme is in substantial conformity to the punishment schemes in other jurisdictions. Substantial conformity, while not constitutionally necessary, is sufficient to enable one to conclude that the punishment at issue does not violate the Eighth Amendment.

4. Djekich's Punishment was not Barred by the Rule of Lenity, it did not Violate the Double Jeopardy Clause of the Fifth Amendment, and it did not Violate the Eighth Amendment

Having run Djekich's punishment through the conceptual framework proposed by this Comment, it is clear that his punishment was proper. First, the regulation at issue unambiguously provided for separate temporal units of prosecution. Thus, the rule of lenity has no application. Second, the fact that the regulation provided for separate units of prosecution nullifies the claim that Djekich's prosecution violated the Double Jeopardy Clause; indeed, he was prosecuted for different offenses—not "the same offense." Third, the punishment was

325. See KAN. STAT. ANN. § 12-761(a) (1991).

326. See N.H. REV. STAT. ANN. §§ 676:17, 625:9, 651:2 (1996).

327. See COLO. REV. STAT. ANN. § 30-28-124(1) (West 1990).

328. See N.Y. TOWN LAW § 268 (McKinney 1987).

329. See *id.*

330. See *id.*

331. See *id.*

not grossly disproportionate to the culpable conduct for which he was punished: the gravity of the offense merited the gravity of the punishment, the intrajurisdictional comparison shows that other offenses of similar gravity are punished similarly, and the interjurisdictional comparison shows that Djekich would have received substantially the same punishment in all of the jurisdictions sampled.

VI. CONCLUSION

Legislatures—not prosecutors or judges—are given the power to proscribe certain human behaviors and to provide for the manner in which those behaviors will be punished. So long as a legislature is sufficiently clear, it may provide that a continuous act is divisible temporally for prosecution purposes. If a legislature clearly does *not* provide for temporal units of prosecution, then the Double Jeopardy Clause prevents more than one prosecution for the continuous violation of a statute. If a legislature drafts a statute such that it is unclear what temporal unit of prosecution was intended, then the rule of lenity provides that an individual may be prosecuted only once for a continuing violation of a continuous offense.

However, a legislature that speaks with sufficient clarity regarding a statute's temporal unit of prosecution has near plenary power to define the unit of prosecution with whatever temporal unit it deems desirable. This power is subject only to a limited proportionality requirement. The Eighth Amendment mandates that punishment, whether for a single offense or an aggregate of offenses, not be grossly disproportionate to the culpable conduct. A requirement of gross disproportionality grants substantial deference to a legislature's inherent power to regulate behavior, while simultaneously protecting the least desired segment of society, convicted criminals, from the tyranny of the majority.

JACK BALDERSON, JR.

