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# Dividing Crime, Multiplying Punishments

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*When the government wants to impose exceptionally harsh punishment on a criminal defendant, one of the ways it accomplishes this goal is to divide the defendant's single course of conduct into multiple offenses that give rise to multiple punishments. The Supreme Court has rendered the Double Jeopardy Clause, the Cruel and Unusual Punishments Clause, and the rule of lenity incapable of handling this problem by emptying them of substantive content and transforming them into mere instruments for effectuation of legislative will.*

*This Article demonstrates that all three doctrines originally reflected a substantive legal preference for life and liberty, and a systemic bias against overpunishment. A punishment was deemed excessive under the Cruel and Unusual Punishments Clause if it was greater than an offender's retributive desert, as measured against longstanding punishment practice. Prior to the twentieth century, if prosecutors proposed a novel unit of prosecution for a given crime, judges asked two questions: (1) Does this unit of prosecution give the government the opportunity to bring multiple charges based on a single course of conduct?; and (2) If so, would the bringing of multiple charges create an arbitrary relationship between the offender's culpability and his cumulative punishment, measured in light of prior punishment practice? If the answer to both questions was yes, judges would declare the punishment invalid under the Cruel and Unusual Punishments Clause, the Double Jeopardy Clause, or the rule of strict construction of penal statutes (the forerunner to today's rule of lenity). By recovering this methodology for addressing prosecutorial efforts to divide crime and multiply*

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*punishments, we can ameliorate our current mass incarceration crisis and make the American criminal justice system more just.*

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This notion of rendering crimes . . . infinitely divisible, is repugnant to the spirit and policy of the law and ought not to be countenanced.<sup>1</sup>

#### INTRODUCTION

In criminal cases, the power to divide the unit of prosecution often entails the power to impose excessive punishment. When the federal government wanted to suppress Mormon polygamy, prosecutors developed a practice of indicting, convicting, and punishing a given defendant multiple times for a single cohabitation. They accomplished this by dividing a single cohabitation period into distinct time units and bringing a separate charge relating to each time unit.<sup>2</sup> Similarly, when state government wanted to control the liquor industry, it charged unlicensed retailers conducting business in the jurisdiction with a separate violation for each individual sale, obtaining a life sentence for multiple misdemeanor convictions.<sup>3</sup> Today, when prosecutors want to force a guilty plea from a drug dealer who possesses a gun during the time period in which he deals drugs, they use 18 U.S.C. § 924(c) to charge him with a separate illegal gun possession for each drug transaction.<sup>4</sup> Because § 924(c) calls for a mandatory consecutive sentence of twenty-five years imprisonment for each count of conviction beyond the first, they can threaten even small-time drug dealers with multiple life sentences.<sup>5</sup>

Current doctrines of constitutional and statutory interpretation are ill-equipped to handle this problem. Although the Supreme Court has interpreted the Cruel and Unusual Punishments Clause to prohibit excessive punishments, it has also held that legislatures are free to define the meaning of the term “excessive” for themselves, and that claims of excessive punishment should be resolved through the

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<sup>1</sup> *State v. Comm’rs of Fayetteville*, 2 N.C. (1 Mur.) 371, 371-72 (1818).

<sup>2</sup> *See, e.g., Ex parte Nielsen*, 131 U.S. 176, 176 (1889); *Ex parte Snow*, 120 U.S. 274, 276-77 (1887).

<sup>3</sup> *See, e.g., O’Neil v. Vermont*, 144 U.S. 323, 326-37 (1892).

<sup>4</sup> *See, e.g., United States v. Angelos*, 345 F. Supp. 2d 1227, 1231-32, 1263 (D. Utah 2004) (Cassell, J.) (sentencing defendant to mandatory minimum sentence of fifty-five years in prison for possessing a firearm during several marijuana sales arranged by the government). The case is discussed more extensively below. *See* discussion *infra* Part I.A.

<sup>5</sup> *See, e.g., Deal v. United States*, 508 U.S. 129, 131, 137 (1993) (holding that the mandatory escalation of a defendant’s sentence to twenty-five years per count for a “second or subsequent offense” under § 924(c) applied to cases where prosecutors brought multiple charges in a single case against a defendant who had never before been convicted of violating the statute).

political process rather than constitutional adjudication.<sup>6</sup> Although the Court has interpreted the Double Jeopardy Clause to prohibit multiple punishments for the same offense, it has also held that the Clause does not restrict the freedom of legislatures to authorize multiple punishments if they wish.<sup>7</sup> Finally, although the Court recognizes the rule of lenity, which holds that ambiguous criminal statutory provisions should be narrowly construed, it utilizes this rule rarely, inconsistently, and only as a doctrine of last resort.<sup>8</sup> Where even the slightest evidence indicates a legislative preference for a broad construction of a criminal statute, the Supreme Court leaves the rule of lenity by the wayside.<sup>9</sup> In sum, far from constraining the government, all three doctrines are interpreted as ways of effectuating legislative will. There is little to prevent prosecutors from dividing crimes and obtaining multiple punishments unless the statute upon which the prosecution is based clearly forbids it.

This Article demonstrates that prior to the twentieth century, judges used the Cruel and Unusual Punishments Clause, the Double Jeopardy Clause, and the rule of strict construction of penal statutes to prevent the government from dividing the unit of prosecution in order to impose excessive punishments.<sup>10</sup> A punishment was deemed excessive if it was greater than an offender deserved as a matter of retributive

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<sup>6</sup> See *Ewing v. California*, 538 U.S. 11, 27-28 (2003) (plurality opinion) (stating that the question of whether a punishment is excessive in relation to its justification is “appropriately directed at the legislature,” not the Court); see also, e.g., *Harmelin v. Michigan*, 501 U.S. 957, 1003-04 (1991) (Kennedy, J., concurring in part and concurring in the judgment) (using the “rational basis” test to uphold mandatory life sentence for narcotics offender with no prior record). The Supreme Court takes a more protective approach to a small class of excessive punishment cases involving the death penalty or juvenile offenders subjected to life sentences with no possibility of parole. See, e.g., *Miller v. Alabama*, 132 S. Ct. 2455, 2460 (2012) (holding it unconstitutional to impose mandatory sentences of life without possibility of parole on juvenile offenders); *Kennedy v. Louisiana*, 554 U.S. 407, 413 (2008) (holding it unconstitutional to impose the death penalty on an offender who commits a non-homicide offense against an individual). The Court’s current approach to excessive punishments is discussed more fully *infra* Part I.B.

<sup>7</sup> See, e.g., *Garrett v. United States*, 471 U.S. 773, 793 (1985); *Missouri v. Hunter*, 459 U.S. 359, 368 (1983); *Brown v. Ohio*, 432 U.S. 161, 169 n.8 (1977).

<sup>8</sup> See *infra* Part I.C (discussing the rule of lenity); see, e.g., *Deal*, 508 U.S. at 135-37 (refusing to use the rule of lenity to limit the scope of Section 924(c) repeat offense provisions); *Smith v. United States*, 508 U.S. 223, 239-41 (1993) (refusing to use the rule of lenity to restrict § 924(c)’s prohibition of the “use” of a gun to further a narcotics trafficking crime to those who use a gun as a weapon rather than as barter).

<sup>9</sup> See *Deal*, 508 U.S. at 135; see also *Smith*, 508 U.S. at 239.

<sup>10</sup> See *infra* Part II.B.

justice.<sup>11</sup> Common law thinkers considered “long usage” to be the most reliable measure of a legal practice’s reasonableness<sup>12</sup> and, therefore, they measured excessiveness in relation to longstanding prior practice.<sup>13</sup> A new punishment practice that was significantly harsher than the punishments previously given for the same or similar crimes was considered excessive.<sup>14</sup>

When prosecutors proposed a novel unit of prosecution for a given crime, judges protected against the risk of excessive punishment by asking two questions: (1) Does this unit of prosecution give the government the opportunity to bring multiple charges based on a single course of conduct?; and (2) If so, would the bringing of multiple charges create an arbitrary relationship between the offender’s culpability and his cumulative punishment?<sup>15</sup> These questions were posed against the backdrop of longstanding prior punishment practice. A cumulative punishment’s relationship to an offender’s culpability could be deemed arbitrary if it departed too significantly from the punishment practices that had prevailed up to that point.<sup>16</sup>

Judges employed this analysis regardless of whether a punishment was being challenged under the Cruel and Unusual Punishments Clause, the Double Jeopardy Clause, or the rule of strict construction of penal statutes (the forerunner to today’s rule of lenity). If prosecutors actually stacked up an unreasonably harsh cumulative punishment for a given course of conduct, this was deemed cruel and unusual.<sup>17</sup> If the proposed unit of prosecution divided up a course of conduct so as to create a significant risk of excessive punishment, judges sometimes deemed this practice to violate the Double Jeopardy Clause.<sup>18</sup> Finally, judges used this analysis most frequently when

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<sup>11</sup> See John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899, 916-17 (2011) [hereinafter *Rethinking Proportionality*].

<sup>12</sup> See *id.* at 935; John F. Stinneford, *The Original Meaning of “Unusual”: The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1774-75 (2008) [hereinafter *The Original Meaning of “Unusual”*].

<sup>13</sup> See Stinneford, *Rethinking Proportionality*, *supra* note 11, at 935; Stinneford, *The Original Meaning of “Unusual,” supra* note 12, at 1783-84.

<sup>14</sup> See Stinneford, *Rethinking Proportionality*, *supra* note 11, at 935; Stinneford, *The Original Meaning of “Unusual,” supra* note 12, at 1791-92.

<sup>15</sup> See *infra* Part II.B.

<sup>16</sup> See *infra* Part II.B.

<sup>17</sup> See *infra* Part II.B.1.

<sup>18</sup> See *infra* Part II.B.2.

deciding how to construe criminal statutes.<sup>19</sup> The rule of strict construction of penal statutes directed judges to presume, in the absence of clear evidence to the contrary, that the legislature did not intend to authorize an unduly harsh punishment.<sup>20</sup> Therefore, where possible, judges interpreted criminal statutes not to authorize a unit of prosecution that would permit numerous charges based on a single course of conduct, particularly where the cumulative punishment resulting from such charges would be arbitrarily harsh in relation to the offender's culpability.<sup>21</sup>

Part I discusses the Supreme Court's current approach to division and excess as reflected in its cruel and unusual punishments, double jeopardy, and rule of lenity jurisprudence. This Part uses a single case — the prosecution of Weldon Angelos for multiple violations of 18 U.S.C. § 924(c) — as a lens for viewing the current emptiness of all three doctrines.<sup>22</sup> Part II contrasts the Court's current approach to division and excess to English and American jurisprudence of the seventeenth through the nineteenth centuries. Part II.A demonstrates that the Cruel and Unusual Punishments Clause, the Double Jeopardy Clause, and the rule of strict construction of penal statutes were originally directed, in large part, toward the prevention of excessive punishments. Unlike today, these areas of doctrine were not treated as value-free tools for the effectuation of legislative will. Part II.B shows how eighteenth and nineteenth century judges used all three areas of doctrine — but especially the rule of strict construction of penal statutes — to negate prosecutorial efforts to divide crime and obtain multiple punishments. Part III provides a tentative sketch of how the protective moral realism of the seventeenth through nineteenth centuries transformed into the empty positivism of the late twentieth

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<sup>19</sup> See *infra* Part II.B.3.

<sup>20</sup> See *infra* Part II.B.3.

<sup>21</sup> See *infra* Part II.B.3.

<sup>22</sup> The sentencing of Weldon Angelos gave rise to an extraordinary opinion by then-Federal District Judge Paul Cassell. *United States v. Angelos*, 345 F. Supp. 2d 1227, 1231 (D. Utah 2004). This opinion, which is discussed more fully below, does an excellent job illustrating the arbitrariness and excess permitted by § 924(c), as well as the inadequacy of current Eighth Amendment doctrine to deal with this problem. See *infra* Part I.A. The opinion led to further scholarship by Judge Cassell and many others discussing the need to reform mandatory minimum sentences. See generally Paul G. Cassell & Erik Luna, *Sense and Sensibility in Mandatory Minimum Sentencing*, 23 FED. SENT'G REP. 219 (2011) (advocating reform of mandatory minimum sentencing laws); Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1 (2010) (proposing "political minimalism" as a justification that may make legislative sentencing reform feasible).

and early twenty-first centuries. This Part also discusses how to recover the courts' prior focus on the prevention of excessive punishments and to rein in the increasingly prevalent practice of division and stacking. Like Part I, Part III focuses on the case of Weldon Angelos.

### I. THREE EMPTY DOCTRINES

Title 18 United States Code § 924(c), as interpreted by the Supreme Court, just may be the most oppressive criminal statute in the federal code. This statute makes possession of a firearm in furtherance of a drug trafficking offense a federal crime, and provides escalating punishment for each conviction. The first § 924(c) conviction calls for a mandatory minimum sentence of five years imprisonment to be served consecutively to any other sentence.<sup>23</sup> Each additional conviction calls for a mandatory minimum sentence of twenty-five years, once again consecutive to any other sentence.<sup>24</sup> The Supreme Court has interpreted § 924(c) to require escalating punishments even when multiple charges are brought in a single case.<sup>25</sup> Thus, prosecutors can often impose extraordinarily long sentences on street-level drug dealers simply by manipulating the number of controlled buys performed by an informant or undercover agent prior to the offender's arrest. As discussed below, such prosecutions arguably violate the Cruel and Unusual Punishments Clause's prohibition of excessive punishments, the Double Jeopardy Clause's prohibition of multiple punishments for the same offense, and the rule of strict construction of penal statutes (now generally called the rule of lenity). Because these doctrines are currently empty of substance, however, a defendant is highly unlikely to win a claim under any of them. Witness the case of Weldon Angelos:

#### A. *The Angelos Case*

In May and June of 2002, a government informant made three controlled buys of marijuana from Weldon Angelos, a twenty-four year old aspiring musician and father of two with no criminal record.<sup>26</sup> In each buy, the informant paid Angelos \$350 for eight ounces of

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<sup>23</sup> 18 U.S.C. § 924(c)(1)(A)(i) (2012).

<sup>24</sup> 18 U.S.C. § 924(c)(1)(C)(i).

<sup>25</sup> *See Deal v. United States*, 508 U.S. 129, 136-37 (1993).

<sup>26</sup> *Angelos*, 345 F. Supp. 2d at 1231.

marijuana.<sup>27</sup> During the first two buys, Angelos had a Glock pistol in his car or on his person, but he did not hold or brandish the firearm.<sup>28</sup> In November 2003, police obtained an arrest warrant and arrested Angelos in his apartment.<sup>29</sup> With Angelos's consent, they searched his apartment and discovered three pounds of marijuana, two opiate suckers, and three firearms — two of which were locked inside a safe.<sup>30</sup>

Angelos was charged with three counts of distributing marijuana in violation of 21 U.S.C. § 841, one count of possessing a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c), and two other minor offenses.<sup>31</sup> Because the quantity of marijuana was relatively small, 21 U.S.C. § 841 did not require any mandatory minimum sentence for the marijuana distribution.<sup>32</sup> The United States Sentencing Guidelines called for a sentence of seventy-eight to ninety-seven months, or six and a half to eight years, for this crime.<sup>33</sup> The gun possession statute under which Angelos was also charged, 18 U.S.C. § 924(c), required a mandatory minimum sentence of five years for the first conviction<sup>34</sup> and a mandatory minimum sentence of twenty-five years for a “second or subsequent conviction.”<sup>35</sup> No term of imprisonment under § 924(c) may run concurrently with any other term of imprisonment, therefore the five-plus year sentence would, upon Angelos's conviction, be tacked onto the end of his narcotics distribution sentence.<sup>36</sup>

Prosecutors informed Angelos that if he pled guilty to the marijuana distribution and gun possession counts they would drop the lesser charges, and recommend a total sentence of fifteen years imprisonment.<sup>37</sup> They also threatened that if he chose to go to trial, they would file a superseding indictment containing several additional § 924(c) counts, subjecting him to a mandatory minimum sentence of

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> In order to qualify for a mandatory minimum sentence for marijuana possession or trafficking, a person must possess at least 100 kilograms of “a mixture or substance containing a detectable amount of marihuana.” 21 U.S.C. § 841(b)(1)(B)(vii)–(D) (2012). Angelos was found to have possessed a little over 1.25 kilograms (three pounds) of marijuana. *See Angelos*, 345 F. Supp. 2d at 1331.

<sup>33</sup> *See Angelos*, 345 F. Supp. 2d. at 1232.

<sup>34</sup> 18 U.S.C. § 924(c)(1)(A)(i) (2012).

<sup>35</sup> *Id.* § 924(c)(1)(C)(i).

<sup>36</sup> *See id.* § 924(c)(1)(D)(ii).

<sup>37</sup> *See Angelos*, 345 F. Supp. 2d at 1231.



more than one hundred years imprisonment.<sup>38</sup> When Angelos elected to go to trial, prosecutors followed through on this threat.<sup>39</sup> Angelos tried to reopen plea negotiations and even offered to accept a harsher deal than the government initially offered, but the prosecutors refused.<sup>40</sup> At trial, Angelos was convicted of the marijuana distribution charges and three of five counts brought under § 924(c).<sup>41</sup> Judge Paul Cassell sentenced Angelos to imprisonment for fifty-five years and one day, which was the minimum sentence permissible under the law.<sup>42</sup>

Traditionally, an offender like Angelos could have raised at least three arguments that his punishment was illegal. First, he could have argued that his fifty-five year sentence violated the Eighth Amendment's prohibition of cruel and unusual punishments because it was an excessive punishment for gun possession.<sup>43</sup> Second, he could have argued that allowing the government to obtain multiple punishments for a single continuing gun possession violated the Double Jeopardy Clause.<sup>44</sup> Finally, he could have argued that the rule of strict construction of penal statutes (now generally called the rule of

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<sup>38</sup> *Id.* Professor Sara Sun Beale has suggested that the extremely harsh sentences available under Section 924(c) have led federal prosecutors to “mak[e] § 924(c) the most frequently prosecuted federal firearms offense” and have given them incentive to “aggressively seek[] to broaden its reach through expansive interpretations of its terms.” Sara Sun Beale, *The Unintended Consequences of Enhancing Gun Penalties: Shooting Down the Commerce Clause and Arming Federal Prosecutors*, 51 DUKE L.J. 1641, 1675 (2002). The most important effect of these sentences may be the “terrific leverage in plea bargaining” they give prosecutors, as exemplified by the *Angelos* case. *See id.* at 1677.

<sup>39</sup> *Angelos*, 345 F. Supp. 2d at 1232.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 1230.

<sup>43</sup> *See infra* Parts II.A.2, II.B.1.

<sup>44</sup> *See infra* Parts II.A.3, II.B.2. Although the Supreme Court held in *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873), that the Double Jeopardy Clause prohibits multiple punishments for the same offense even where all of the punishments are imposed in a single case, there is controversy as to whether this is a correct reading of the Clause. Compare GEORGE C. THOMAS III, DOUBLE JEOPARDY: THE HISTORY, THE LAW 109-10 (1998) (arguing that *Ex parte Lange* was a correct interpretation of the Double Jeopardy Clause), with Susan R. Klein, *Double Jeopardy's Demise*, 88 CALIF. L. REV. 1001, 1008 n.22 (2000) (reviewing Thomas III, *supra*, at 109) (arguing that *Ex parte Lange's* prohibition of multiple punishments in a single case was based upon statutory construction, and that its true constitutional basis was the Due Process Clause). Resolution of this controversy is beyond the scope of the present Article. The article proceeds on the assumption that *Ex parte Lange* was a correct double jeopardy decision. If this assumption turns out to be incorrect, Angelos's arguments under the Cruel and Unusual Punishments Clause and the rule of strict construction of penal statutes would not be undermined in any way. *See Angelos*, 345 F. Supp. 2d at 1232.

lenity) required the court to interpret § 924(c) to prevent the dividing and stacking of gun possession counts in a single case.<sup>45</sup> Because all three doctrines were traditionally directed against excessive punishments,<sup>46</sup> Angelos might once have been able to obtain relief from his sentence under any one of them. As is shown below, such hopes are unrealistic today because the Supreme Court has emptied all three doctrines of substance.<sup>47</sup>

B. *Excessive Punishments Under the Cruel and Unusual Punishments Clause*

At sentencing, Angelos argued that his punishment violated the Cruel and Unusual Punishments Clause because it was excessive in relation to his offense.<sup>48</sup> In order to determine whether a punishment is excessive in relation to a given offense, a court needs two things: (1) a definition of “excessive;”<sup>49</sup> and (2) a method of measuring whether the punishment meets the definition.<sup>50</sup> The current Supreme Court has failed on both fronts.<sup>51</sup>

Several possible definitions of the term “excessive” are available. The Court might hold that a punishment is excessive if it is more than the offender deserves as a matter of retributive justice.<sup>52</sup> Alternatively, the Court might hold that it is excessive if it is more than necessary to obtain a utilitarian goal such as optimal deterrence, incapacitation, or rehabilitation.<sup>53</sup> The choice of definition affects which punishments will be considered excessive and which will not. A punishment that is clearly excessive as a retributive matter, for example, may sometimes satisfy a utilitarian rationale such as incapacitation or deterrence.<sup>54</sup>

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<sup>45</sup> See *infra* Parts II.A.4, II.B.3.

<sup>46</sup> See *infra* Part II.A.

<sup>47</sup> See *infra* Part I.B–C.

<sup>48</sup> See *Angelos*, 345 F. Supp. 2d at 1256.

<sup>49</sup> See, e.g., NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828), available at <http://webstersdictionary1828.com/> (defining the term “excessive” as “[b]eyond the established laws of morality and religion, or beyond the bounds of justice, fitness, propriety, expedience or utility; as excessive indulgence of any kind”).

<sup>50</sup> For a rich discussion of punishment, proportionality, and retributive schemes, see Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: “Proportionality” Relative to What?*, 89 MINN. L. REV. 571, 588-97 (2005).

<sup>51</sup> See *Angelos*, 345 F. Supp. 2d at 1263.

<sup>52</sup> See Frase, *supra* note 50, at 590-92.

<sup>53</sup> See *id.*

<sup>54</sup> See Stinneford, *Rethinking Proportionality*, *supra* note 11, at 916-17.

Because the prohibition of excessive punishments comes from the Constitution itself, the Supreme Court is obligated to choose the definition of “excessive” that comports with constitutional meaning. Phrased differently, the Court must determine what sort of justification makes punishment permissible under the Constitution, so that it can determine whether a given punishment is excessive in relation to that justification. As discussed below, the traditional justification for punishment under the Constitution has been retribution: An offender can only be punished if he deserves it, and only to the extent that he deserves it.<sup>55</sup> A punishment is excessive under the Cruel and Unusual Punishments Clause if it is harsher than the offender deserves.<sup>56</sup>

Unfortunately for Angelos, the Supreme Court no longer follows the traditional definition of excessive.<sup>57</sup> In fact, it no longer defines “excessive” at all.<sup>58</sup> Rather, it has held that legislatures are free to choose their own justification for punishment, whether it be retribution, deterrence, incapacitation, rehabilitation, or a mere regulatory purpose.<sup>59</sup> The Court has also held that the relationship between the punishment and the legislature’s chosen justification is a matter of legislative prerogative. So long as there is some conceivable rational relationship between the punishment and its justification, courts must uphold it.<sup>60</sup> The only recourse for those who believe the punishment is excessive is through the political process.<sup>61</sup>

Because the Supreme Court’s definition of “excessive” is empty, it now uses presumptions rather than analysis to decide excessiveness cases under the Cruel and Unusual Punishments Clause.<sup>62</sup> In a small class of cases involving life sentences for juvenile offenders or the

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<sup>55</sup> See *id.* at 962-68.

<sup>56</sup> *Id.*

<sup>57</sup> See, e.g., *Graham v. Florida*, 560 U.S. 48, 71 (2010); *Ewing v. California*, 538 U.S. 11, 25 (2003) (plurality opinion).

<sup>58</sup> See cases cited *supra* note 57.

<sup>59</sup> See, e.g., *Graham*, 560 U.S. at 71 (examining whether a sentence of life without parole furthers goals of “retribution, deterrence, incapacitation, and rehabilitation”); *Ewing*, 538 U.S. at 25 (“Selecting the sentencing rationales is generally a policy choice to be made by state legislatures, not federal courts.”).

<sup>60</sup> See *Ewing*, 538 U.S. at 25-30; *Harmelin v. Michigan*, 501 U.S. 957, 1000, 1004 (1991) (Kennedy, J., concurring).

<sup>61</sup> See *Ewing*, 538 U.S. at 28 (holding that the question of whether a sentence of twenty-five years to life for shoplifting by a recidivist was excessive was “appropriately directed at the legislature,” not the Court).

<sup>62</sup> See John F. Stinneford, *The Illusory Eighth Amendment*, 63 AM. U. L. REV. 437, 482-83 (2013) [hereinafter *Illusory Eighth Amendment*].

death penalty, the Court uses a strong presumption of unconstitutionality to invalidate punishments for an entire class of offense or offender.<sup>63</sup> In cases involving imprisonment of adult offenders, on the other hand, the Court uses a strong presumption of constitutionality.<sup>64</sup> It is virtually impossible for an offender like Angelos to win a claim of excessive punishment under the Cruel and Unusual Punishments Clause.

The formal test for determining whether an adult offender's prison term is cruelly excessive has three prongs. First, the court makes a threshold inquiry about the gravity of the offense and the severity of the punishment.<sup>65</sup> If the court determines that the offense is relatively serious, this ends the inquiry and the court upholds the punishment.<sup>66</sup> If the court determines that the crime does not seem serious enough to warrant a major punishment, it moves on to prongs two and three.<sup>67</sup> Under prong two, the court asks whether the punishment is harsher than punishments for similar or more serious crimes within the same jurisdiction.<sup>68</sup> Under prong three, the court asks whether the punishment is harsher than punishments for the same crime in other jurisdictions.<sup>69</sup> Because of the strong presumption of constitutionality, the court virtually never gets beyond prong one.

Starting with prong one, Judge Cassell noted that Angelos had no criminal history<sup>70</sup> and that his gun-related criminal conduct was "modest."<sup>71</sup> The guidelines promulgated by the United States Sentencing Commission recommended a mere two-year enhancement

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<sup>63</sup> *Id.* at 484-89; *see, e.g.*, *Miller v. Alabama*, 132 S. Ct. 2455, 2460 (2012) (holding it unconstitutional to impose life sentence with no possibility of parole on those who commit crimes as minors); *Kennedy v. Louisiana*, 554 U.S. 407, 412 (2008) (holding it unconstitutional to impose the death penalty for commission of a non-homicide offense against an individual). Unfortunately, this class of cases only covers one-thousandth of one percent of felony offenders. *See* Stinneford, *Rethinking Proportionality*, *supra* note 11, at 902-03.

<sup>64</sup> *See* Stinneford, *Illusory Eighth Amendment*, *supra* note 62, at 482-84.

<sup>65</sup> *See Harmelin*, 501 U.S. at 1004-05 (Kennedy, J., concurring) (evaluating the continuing vitality of *Solem's* three prongs, and applying the first gravity of the harm versus severity of punishment); *Solem v. Helm*, 463 U.S. 277, 290-92 (1983).

<sup>66</sup> *See Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring) (noting that prongs two and three of the analysis are appropriate "only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality").

<sup>67</sup> *See id.*

<sup>68</sup> *Solem*, 463 U.S. at 291.

<sup>69</sup> *Id.* at 291-92.

<sup>70</sup> *United States v. Angelos*, 345 F. Supp. 2d 1227, 1257-58 (D. Utah 2004).

<sup>71</sup> *Id.* at 1258.

to Angelos' drug sentence based on his possession of a firearm,<sup>72</sup> a recommendation that was, according to Judge Cassell, "entitled to special weight" because the Commission "is a congressionally-established expert agency which can draw on significant data and other resources in determining appropriate sentences."<sup>73</sup> Judge Cassell concluded that "[c]omparing a recommended sentence of two years to the 55-year enhancement the court must impose strongly suggests not merely disproportionality, but gross disproportionality."<sup>74</sup>

Judge Cassell then moved on to prong two and compared Angelos' punishment to the punishment for other crimes in the federal system. The judge noted that:

Mr. Angelos will receive a far longer sentence than those imposed in the federal system for such major crimes as aircraft hijacking, second-degree murder, racial beating inflicting life-threatening injuries, kidnapping, and rape. Indeed, Mr. Angelos will receive a far longer sentence than those imposed for three aircraft hijackings, three second-degree murders, three racial beatings inflicting life-threatening injuries, three kidnappings, and three rapes.<sup>75</sup>

Because Angelos' punishment was harsher than the federal system gives for "far more serious crimes,"<sup>76</sup> Judge Cassell noted that prong two appeared to be satisfied.<sup>77</sup>

Judge Cassell then went to prong three, comparing Angelos' punishment to that given for the same offense in other jurisdictions.<sup>78</sup> The judge determined that Angelos' sentence was "longer than he would receive in any of the fifty states" for the same crime, a fact that the government itself conceded.<sup>79</sup>

Judge Cassell then noted, however, that "[t]he court is keenly aware of its obligation to follow precedent from superior courts," particularly the Supreme Court.<sup>80</sup> The judge observed that in *Hutto v. Davis*,<sup>81</sup> the Supreme Court upheld two consecutive twenty-year sentences for a

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<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* (quoting *Solem v. Helm*, 463 U.S. 277, 299 (1983)).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 1259.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Hutto v. Davis*, 454 U.S. 370 (1982).

defendant who was convicted of possessing nine ounces of marijuana.<sup>82</sup> If Davis' sentence was not cruel and unusual under the governing case law, Judge Cassell could not rule that Angelos' sentence violated the Eighth Amendment.<sup>83</sup> Although the judge believed Angelos' statutorily mandated sentence to be "unjust, cruel, and irrational,"<sup>84</sup> he felt bound to uphold the constitutionality of the statute and to impose the fifty-five year sentence it required.

Although Judge Cassell's discussion of precedent occurred after his discussion of the three-prong excessiveness test, the precedent discussion was actually a commentary on prong one of this test. The Supreme Court has repeatedly held that it does not violate the Constitution to impose extraordinarily harsh sentences for minor offenses and for first-time offenders. It not only affirmed Davis's forty year sentence for marijuana possession,<sup>85</sup> but also sentences of twenty-five-plus<sup>86</sup> and fifty-plus years<sup>87</sup> for recidivists who shoplifted; a life sentence with possibility of parole for a recidivist who obtained \$120.75 by false pretenses;<sup>88</sup> and a life sentence with no possibility of parole for a first-time offender convicted of possessing 650 grams of cocaine.<sup>89</sup> In assessing whether a comparison of the crime's gravity to the harshness of the punishment creates an inference of gross disproportionality, lower courts are required to follow these precedents.<sup>90</sup> Courts are also required, as discussed above, to allow legislatures to define for themselves what "excessiveness" means and to determine for themselves whether the punishment meets that standard.<sup>91</sup> Given these precedents, and given the emptiness of the Supreme Court's excessiveness jurisprudence, there is nothing left for lower courts to do but protest the injustice of the sentences they are

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<sup>82</sup> *Id.* at 372; *Angelos*, 345 F. Supp. 2d at 1259.

<sup>83</sup> *Angelos*, 345 F. Supp. 2d at 1259.

<sup>84</sup> *Id.* at 1263.

<sup>85</sup> *Hutto*, 454 U.S. at 372.

<sup>86</sup> *Ewing v. California*, 538 U.S. 11, 20 (2003).

<sup>87</sup> *Lockyer v. Andrade*, 538 U.S. 63, 77 (2003).

<sup>88</sup> *Rummel v. Estelle*, 445 U.S. 263, 285 (1980).

<sup>89</sup> *Harmelin v. Michigan*, 501 U.S. 957, 996 (1991).

<sup>90</sup> The Supreme Court in *Solem v. Helm* held that a sentence of life imprisonment for an adult offender was excessive under the Cruel and Unusual Punishments Clause. See *Solem v. Helm*, 463 U.S. 277, 290-92 (1983). As the numerous cases cited above indicate, this decision is treated by the Supreme Court as having almost no precedential value.

<sup>91</sup> See *Ewing*, 538 U.S. at 23, 25; *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring).

required to impose,<sup>92</sup> and to make futile pleas for the President to commute the sentence and for Congress to reform the statute.<sup>93</sup>

### C. Double Jeopardy/Rule of Lenity

An offender like Angelos might also argue that the multiple punishments he received under 18 U.S.C. § 924(c) violated the Double Jeopardy Clause.<sup>94</sup> The Fifth Amendment to the United States Constitution provides that “No person shall be . . . subject for the same offense to be twice put in jeopardy of life or limb.”<sup>95</sup> This prohibition applies not only to successive trials for the same offense, but also to multiple punishments for the same offense, even where those punishments are imposed as part of a single proceeding.<sup>96</sup> Angelos could argue that he committed only one § 924(c) violation, not three, and that therefore he could lawfully be punished only once.

#### 1. Double Jeopardy and Statutory Construction

Under the Supreme Court’s current jurisprudence, any “multiple punishments” argument under the Double Jeopardy Clause is largely an argument about statutory construction. According to the Supreme Court, the main point of the Double Jeopardy Clause is to prevent governmental harassment of criminal defendants through the “embarrassment, expense and ordeal” of successive trials.<sup>97</sup> The Clause also has a secondary purpose of reducing the risk of excessive punishment that arises when the government seeks a new trial after an acquittal<sup>98</sup> or seeks multiple punishments for the same offense.<sup>99</sup>

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<sup>92</sup> See *United States v. Angelos*, 345 F. Supp. 2d 1227, 1263 (D. Utah 2004) (calling Angelos’s sentence “unjust, cruel, and irrational”).

<sup>93</sup> *Id.* at 1261-63 (calling on Congress to amend § 924(c) and the President to commute Angelos’ sentence).

<sup>94</sup> Angelos does not appear to have raised a double jeopardy argument at sentencing.

<sup>95</sup> U.S. CONST. amend. V.

<sup>96</sup> See, e.g., *North Carolina v. Pearce*, 395 U.S. 711, 718-19 (1969) (holding that the Double Jeopardy Clause “protects against multiple punishments for the same offense”), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794 (1989); *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 168-73 (1873) (holding that imposition of both a fine and a prison sentence for a single offense violated the Double Jeopardy Clause where the statute defining the offense listed these as alternative punishments).

<sup>97</sup> *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977) (quoting *Green v. United States*, 355 U.S. 184, 187-88 (1957)).

<sup>98</sup> See *id.* (noting that the Double Jeopardy Clause protects against the risk of punishing the innocent).

Multiple punishments for the same offense are “numerically excessive” in that the offender is given a greater number of punishments than is lawful. Not all numerically excessive punishments are actually excessive under the Cruel and Unusual Punishments Clause, although numerical excessiveness tends toward actual excessiveness. For example, if an offender is punished twice for the same burglary offense under a statute calling for a maximum sentence of ten years imprisonment and is given two four-year sentences as a result, the punishment is probably not actually excessive under the Cruel and Unusual Punishments Clause. Where an offender is punished multiple times under a statute that, like § 924(c), requires long and consecutive mandatory minimum sentences for each violation, numerical excess leads quickly to actual excess.<sup>100</sup>

As noted in Part I.B, above, the Supreme Court has held that the Cruel and Unusual Punishments Clause permits legislatures to define for themselves what “excessive” means and to determine for themselves whether a given punishment meets that standard. Similarly, it has held that the Double Jeopardy Clause permits legislatures to create multiple offenses covering the same course of conduct<sup>101</sup> and to authorize multiple punishments for the same offense.<sup>102</sup> Thus, under the Supreme Court’s current double jeopardy

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<sup>99</sup> See, e.g., *Brown v. Ohio*, 432 U.S. 161, 165 (1977) (holding that the Double Jeopardy Clause prohibits prosecutors from seeking multiple punishments for the same offense).

<sup>100</sup> See, e.g., Phillip E. Johnson, *Multiple Punishment and Consecutive Sentences: Reflections on the Neal Doctrine*, 58 CALIF. L. REV. 357, 357 (1970) (arguing that the availability of consecutive sentencing poses a greater threat of excessive punishments than the availability of multiple convictions for the same course of conduct); Nancy J. King, *Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties*, 144 U. PA. L. REV. 101, 104 (1995) (arguing that the availability of multiple punishments for the same offense creates a risk of excessive punishment, so that “constitutional limits on the amount of punishment that can be inflicted for a particular wrong, traditionally a part of Eighth Amendment and due process law, are inseparable from the constitutional limitations on the frequency with which an offender can be punished for that wrong, typically rooted in double jeopardy doctrine. The two forms of regulation operate in tandem to regulate the totality of punishment”).

<sup>101</sup> See, e.g., *Missouri v. Hunter*, 459 U.S. 359, 368 (1983) (holding that the Double Jeopardy Clause does not prohibit multiple convictions and punishments for a single course of conduct where such convictions and punishments are authorized by the legislature).

<sup>102</sup> See *id.* at 366 (“With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.”); *Brown*, 432 U.S. at 169 n.8.



jurisprudence, Angelos could only show that he had been subjected to double jeopardy if he could show that his prosecution was based on an incorrect reading of § 924(c).

Angelos was convicted of three violations of a provision of § 924(c) that punishes anyone who “possesses a firearm” “in furtherance of” a “drug trafficking crime.”<sup>103</sup> Section 924(c) is a hybrid statute, punishing neither gun possession alone nor drug trafficking alone, but only the two in relation to each other. The hybrid nature of the statute is further enhanced by the fact that it defines “drug trafficking crime” to include essentially the entire range of federal narcotics offenses, some of which overlap with each other.<sup>104</sup>

Whether Angelos was subjected to multiple punishments for the same offense depends on the appropriate unit of prosecution for a § 924(c) violation. The district court treated each individual drug transaction as the unit of prosecution for Angelos’ § 924(c) offense, but this result is not clearly commanded by the text of the statute.<sup>105</sup> It is at least arguable that the firearms possession, not the individual drug transaction, should provide the unit of prosecution. The primary focus of § 924(c) appears to be improper firearms-related conduct, not drug trafficking, which is punished under other statutory provisions.<sup>106</sup>

Angelos might argue that he engaged in a single, continuous gun possession and that prosecutors violated the Double Jeopardy Clause by dividing this possession into separate § 924(c) counts and obtaining multiple punishments.<sup>107</sup> Federal courts have held that

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<sup>103</sup> 18 U.S.C. § 924(c)(1)(A) (2012).

<sup>104</sup> 18 U.S.C. § 924(c)(2) (“For purposes of this subsection, the term ‘drug trafficking crime’ means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.”).

<sup>105</sup> See 18 U.S.C. § 924(c) (authorizing punishment of “any person who . . . in furtherance of [a crime of violence or a drug trafficking crime], possesses a firearm . . .”).

<sup>106</sup> See, e.g., 21 U.S.C. § 841 (2012) (setting forth penalties for narcotics manufacturing, possession, and distribution).

<sup>107</sup> There is precedent for the argument that gun possession is a continuing offense and that multiple prosecutions for such offense violate the prohibition of double jeopardy. See, e.g., *Smith v. State*, 79 Ala. 257, 259 (1885) (interpreting statute prohibiting individuals from carrying concealed firearms as creating a continuing offense because “[a]ny other interpretation would furnish no rule for determining into how many indictable offenses one act of continuous carrying could be subdivided”); *Simmons v. State*, 899 P.2d 931, 936 (Alaska Ct. App. 1995) (holding defendant who was seen possessing the same firearm twice in a four month period could not be convicted twice under state felon-in-possession statute: “It appears to be a well-settled

“possession” under § 924(c) includes both actual and constructive possession. So long as the firearm remains under the defendant’s “dominion and control,” it remains within his possession.<sup>108</sup> Thus, defendants have been found to possess firearms under § 924(c) when the guns were found in the defendant’s house,<sup>109</sup> in a locked safe,<sup>110</sup> in a locked convenience store bathroom,<sup>111</sup> and even in the engine compartment of a friend’s rental car.<sup>112</sup> From the evidence presented in the case, it appears that Angelos’ gun remained continuously under his “dominion and control” throughout the time period during which the controlled buys occurred. Sometimes it was in his car, sometimes it was on his person, and sometimes it was in his house. But it was always in his possession.<sup>113</sup>

Treating the firearms possession as the unit of prosecution for § 924(c) violations avoids some of the arbitrariness that results from tying the unit of prosecution to the individual drug transaction.<sup>114</sup> As

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proposition in felon-in-possession cases that the element of possession implies continuity: ‘Possession is a course of conduct, not an act; by prohibiting possession Congress intended to punish as one offense all of the acts of dominion which demonstrate a continuing possessory interest in a firearm’ (quoting *United States v. Jones*, 533 F.2d 1387, 1391 (6th Cir. 1976)); *Webb v. State*, 311 Md. 610, 619 (1988) (finding defendant seen twice in a three hour period with a gun in his possession could not be convicted of two violations of statute prohibiting illegal wearing, carrying, or transporting of firearm); *Johnson v. Morgenthau*, 505 N.E.2d 240, 242-43 (N.Y. App. Div. 1987) (holding that defendant could not be prosecuted twice for unlawful possession of same weapon at different times and places over a six-day period); *State v. Morejon*, 675 A.2d 410, 412 (R.I. 1996) (stating possession of pistol without a license was a continuing offense that could not be punished more than once); *cf. United States v. White*, 222 F.3d 363, 363-73 (7th Cir. 2000) (finding that it violated double jeopardy to convict defendant of two violations of § 924(c) on ground that he simultaneously possessed two firearms).

<sup>108</sup> See, e.g., *United States v. Isnadin*, 742 F.3d 1278, 1307 (11th Cir. 2014) (sustaining conviction for conspiracy to constructively possess firearm during and in relation to a drug trafficking crime).

<sup>109</sup> See, e.g., *United States v. Castillo*, 406 F.3d 806, 812 (7th Cir. 2005) (affirming conviction under § 924(c) for constructive possession of firearm found in basement apartment); *United States v. Wahl*, 290 F.3d 370, 376 (D.C. Cir. 2002) (affirming conviction under Section 924(c) for constructive possession of firearm found on top of entertainment center in defendant’s home).

<sup>110</sup> *United States v. Volkman*, 736 F.3d 1013, 1025-26 (6th Cir. 2013).

<sup>111</sup> *United States v. Brightwell*, 104 F. App’x 823, 824 (3d Cir. 2004), *rev’d on other grounds by Brightwell v. United States*, 543 U.S. 1114 (2005).

<sup>112</sup> *United States v. Robinson*, 473 F.3d 387, 399 (1st Cir. 2007).

<sup>113</sup> Government witnesses saw the gun in Angelos’s car, on his person and in his home. See *United States v. Angelos*, 345 F. Supp. 2d 1227, 1231 (D. Utah 2004). There was no evidence that the gun ever left his dominion and control.

<sup>114</sup> This interpretation would not eliminate all arbitrariness from § 924(c)

the *Angelos* case demonstrates, if the individual drug transaction is the unit of prosecution, prosecutors and police will have the power to procure virtually any prison sentence they wish simply by manipulating the number of controlled buys.<sup>115</sup> Had the informant in *Angelos* purchased twenty-four ounces of marijuana in a single buy, the government could only have obtained a five-year sentence for gun possession.<sup>116</sup> By spreading the purchase over three eight-ounce transactions and convincing *Angelos* to let police search his apartment, the government was able to procure an astounding fifty-year increase in his sentence.<sup>117</sup> Had the government chosen to do six,

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prosecutions because the statute also punishes the use or carrying of a firearm in relation to a drug trafficking crime. Neither using nor carrying a firearm seems to imply the same continuity and duration as the crime of possession. Therefore, even under the reading I am proposing, prosecutors could often tie the unit of prosecution for § 924(c) violations to the individual drug transaction by charging the defendant with using or carrying a firearm in relation to a drug trafficking offense. *Angelos* seems to have “carried” a firearm within the meaning of § 924(c) on at least two occasions. *See id.*; *see also* *Muscarello v. United States*, 524 U.S. 125, 126-27 (1998) (broadly defining “carries” under § 924(c) to include driving a car that contains a gun inside it). A better way to eliminate arbitrariness might be to reinterpret the unit of prosecution for drug trafficking offenses under 21 U.S.C. § 841 (2012). *See infra* Part III for more discussion of this point.

<sup>115</sup> Law enforcement manipulation of a defendant’s sentence has sometimes been called “sentencing entrapment.” *See* Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 STAN. L. REV. 85, 112 (2005); Eric P. Berlin, *The Federal Sentencing Guidelines’ Failure to Eliminate Sentencing Disparity: Governmental Manipulations Before Arrest*, 1993 WIS. L. REV. 187, 215; Andrew G. Deiss, *Making the Crime Fit the Punishment: Prearrest Sentence Manipulation by Investigators Under the Sentencing Guidelines*, 1994 U. CHI. LEGAL F. 419, 421; Jeffrey L. Fisher, *When Discretion Leads to Distortion: Recognizing Pre-Arrest Sentence-Manipulation Claims Under the Federal Sentencing Guidelines*, 94 MICH. L. REV. 2385, 2389 (1996); Sandra Guerra, *The New Sentencing Entrapment and Sentence Manipulation Defenses*, 7 FED. SENT’G REP. 181, 181 (1995).

The judicial response to the “sentencing entrapment” defense has been mixed. *See, e.g.,* *Oliver v. State*, No. 38115, 2011 WL 11047664, at \*3 (Idaho Ct. App. Nov. 9, 2011) (reviewing case law and determining that this defense had “been adopted by only a minority of federal jurisdictions and by appellate courts of only three states”). For a particularly egregious example of what appears to be a widespread federal practice of sentencing entrapment, *see* *United States v. Mayfield*, 771 F.3d 417 (7th Cir. 2014). Now that this practice has come to the attention of the public, it is being abandoned in at least some federal districts. *See* Annie Sweeney & Jason Meisner, *Drug Sting Cases Dropped in Rare Reversal by Feds: Undercover Tactic Criticized as a Way to Entrap Minorities*, CHI. TRIB., January 30, 2015, at 1, available at 2015 WLNR 2954527 (on Westlaw).

<sup>116</sup> *See* 18 U.S.C. § 924(c)(1)(A) (2012).

<sup>117</sup> *See* *Angelos*, 345 F. Supp. 2d at 1231. This drastic increase occurred despite the fact that *Angelos* was acquitted on two of the four additional 924(c) counts. *See id.* Had the government won conviction on all five counts, *Angelos*’s mandatory

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four-ounce transactions, it could have obtained a mandatory 130 year sentence. Had it chosen twenty-four, one-ounce transactions, it could have obtained a mandatory sentence of 580 years. And so on, ad infinitum.<sup>118</sup> Treating the firearms possession as the unit of prosecution avoids this danger.

Treating the firearms possession as the unit of prosecution also makes it less likely that small-time drug dealers will receive sentences that are excessive in relation to those given to more serious drug offenders. For example, the Continuing Criminal Enterprise statute provides a mandatory minimum sentence of twenty years for major drug offenders who “obtain[] substantial income or resources” by engaging in a “continuing series” of drug offenses “in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management . . . .”<sup>119</sup> Such offenders often cannot be shown to possess a firearm in relation to the drug offense because they are high enough in the narcotics organization that they never engage in street-level drug transactions. If each individual drug transaction provides the unit of prosecution for a § 924(c) violation, the lowest level members of a drug organization may face a mandatory minimum sentence that is many multiples of the minimum sentence facing their supervisors, because they are most exposed to the risk that the government will send an informant or undercover agent to engage in multiple controlled buys.

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minimum sentence would have been 105 years. *See* 18 U.S.C. § 924(c)(1)(C).

<sup>118</sup> Because § 924(c) defines “drug trafficking crime” to include virtually all federal narcotics offenses, treating the individual drug transaction as the unit of prosecution may create even more arbitrary results than those apparent in *Angelos*. For example, 21 U.S.C. § 843(b) (2012) creates a separate crime for “[e]ach separate use of a communication facility” in furtherance of a drug trafficking offense. Imagine that Weldon Angelos had one or more telephone conversations with the undercover agent to set up the first marijuana sale, and that during these conversations Angelos kept the gun and the marijuana with him so that he could do the sale at a moment’s notice. If the drug trafficking offense provided the unit of prosecution, the first phone call would add five years to Angelos’s sentence and each additional call would add twenty-five years. If Angelos and the agent had five telephone conversations to set up the first marijuana sale, prosecutors could charge five § 924(c) violations and send Angelos to jail for a minimum of 105 years even though Angelos never left his apartment and neither the gun nor the drugs came anywhere near another human being.

<sup>119</sup> 21 U.S.C. § 848 (2012).

## 2. Statutory Construction and the Rule of Lenity

Although there are many advantages to treating firearm possession as the unit of prosecution under § 924(c), this reading is not clearly commanded by the text of the statute. Section 924(c) punishes anyone who “possesses a firearm” “in furtherance of” a “drug trafficking crime.”<sup>120</sup> It would be consistent with this text to treat either the firearms possession or the drug transaction as the unit of prosecution.

Because either reading is textually plausible, Angelos would likely win this argument only if the court applied the rule of lenity, which holds that “ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.”<sup>121</sup> Since it is possible to read § 924(c) to make either the firearm possession or the drug transaction the unit of prosecution, Angelos could argue, the court should apply the rule of lenity and read the statute as focusing on the firearm possession.

This argument is not likely to win under the Supreme Court’s current rule of lenity jurisprudence. In recent decades, the Court has treated the rule of lenity as a disfavored doctrine, holding that it “only applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute, such that the Court must simply guess as to what Congress intended.”<sup>122</sup> As this quote indicates, the Supreme Court is reluctant to apply the rule of lenity even where there is significant statutory ambiguity.<sup>123</sup>

The weakness of the rule of lenity has arisen, in large part, from the fact that we lack an adequate account of why we have the rule in the first place. The current rationale for the rule of lenity is that it advances procedural and structural values, but not any particular substantive values.<sup>124</sup> The primary procedural value underlying the rule of lenity is

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<sup>120</sup> 18 U.S.C. § 924(c)(1)(A).

<sup>121</sup> *Rewis v. United States*, 401 U.S. 808, 812 (1971).

<sup>122</sup> *Barber v. Thomas*, 560 U.S. 474, 488 (2010) (internal citations and quotation marks omitted).

<sup>123</sup> See, e.g., Francis A. Allen, *The Erosion of Legality in American Criminal Justice: Some Latter-Day Adventures of the Nulla Poena Principle*, 29 ARIZ. L. REV. 385, 397-98 (1987) (“[T]he idea of strict interpretation [of penal statutes] has suffered significant erosion in the present century.”); William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1083 (1989) (asserting that courts invoke the rule of lenity in a “random” and “bizarre” manner); Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 384 (“[T]he Court has never formally repudiated lenity. But it has done something nearly as effective, adopting a doctrinal formulation of the rule that poses no effective impediment to the exercise of delegated lawmaking power by courts.”).

<sup>124</sup> See, e.g., Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV. 57, 58 (1998) (“The motivating purpose of the rule is to provide adequate notice to

supposed to be “notice.”<sup>125</sup> The rule is said to reflect the idea that it is unfair to punish a person for conduct whose illegality is not reasonably apparent at the time the person engaged in it. In this sense, the rule of lenity is like the void for vagueness doctrine.<sup>126</sup> The structural value underlying the rule of lenity is said to be separation of powers.<sup>127</sup> The rule is thought to reflect the idea that legislatures, not courts, are supposed to write our criminal laws.<sup>128</sup> It is not appropriate for a court

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defendants (due process), and to reinforce the notion that only the legislature has the power to define what conduct is criminal and what conduct is not (separation of powers).”).

<sup>125</sup> See, e.g., *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (interpreting federal motor vehicle theft statute not to authorize prosecution for theft of aircraft: “Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that 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.”); Kahan, *supra* note 123, at 349 (noting that “notice” is a frequently cited justification for the rule of lenity); David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. Rev. 921, 935-36 (1992); see also Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 471 (1989).

<sup>126</sup> See, e.g., HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 95 (1968) (calling the rule of lenity a “junior version of the vagueness doctrine”).

<sup>127</sup> See, e.g., *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (“The rule that penal laws are to be construed strictly . . . is founded . . . on the plain principle that the power of punishment is vested in the legislative, not in the judicial department.”). This claim was probably not correct as an historical matter. As discussed *infra* Part II.A.4, the rule of strict construction of penal statutes derived from a time when most crimes were defined by the common law, not the legislature, and it served to limit legislative efforts to expand criminal punishment beyond the bounds set by the common law. As Dan Kahan has argued, the *Wiltberger* Court’s assertion about separation of powers may have had less to do with its understanding of the historical basis for the rule of strict construction, and more to do with the Supreme Court’s recent declaration in *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812), that federal criminal jurisdiction (unlike state criminal jurisdiction) was strictly limited to statutory offenses. See Kahan, *supra* note 123, at 360. The *Wiltberger* Court’s identification of separation of powers as a basis for the rule of strict construction of penal statutes does not seem to have weakened the rule prior to the instrumentalist revolution of the twentieth century because the Court recognized a second rationale for the rule: “the tenderness of the law for the rights of individuals.” As discussed *infra* Part II.A.4, the rule of strict construction of penal statutes reflected a systemic preference for life and liberty and a systemic bias against overpunishment. *Wiltberger*’s mention of the “rights of individuals” seems to refer to this preference. Instrumentalist critics of the rule of strict construction of penal statutes did not recognize the validity of this preference. See *infra* Part IV.A.2.

<sup>128</sup> Dan Kahan describes this principle as “the nondelegation conception of lenity” because it requires “Congress to shoulder the entire burden of criminal lawmaking even when it prefers to cede some part of that task to courts.” Kahan, *supra* note 123, at 350.

to convict a defendant of a crime that does not come within the terms of a criminal statute, merely because the court believes that the conviction will further the statute's purpose. As several commentators have noted, both of these rationales are rather weak.<sup>129</sup>

The rule of lenity is neither an effective nor a necessary means to ensure that defendants receive proper notice that their conduct is illegal in most cases. When an offender engages in seriously wrongful conduct, it does not seem unfair to punish him even when the wording of a statute is vague or ambiguous. This is why mistake of law is generally not a valid defense to prosecution.<sup>130</sup> Although lack of notice could be a good reason to invalidate prosecution under a public welfare statute for conduct that is not inherently wrongful,<sup>131</sup> it does not seem to be a strong reason for exonerating defendants who commit crimes that involve seriously wrongful conduct. Moreover, the notice requirement itself is so weak and artificial that it appears to be an inadequate basis for a strong rule of lenity.<sup>132</sup> The Supreme Court has held that the notice requirement is fulfilled if a statute is either reasonably clear on its face or has been subjected to a "judicial gloss" that clarifies any vague or ambiguous terms.<sup>133</sup> As has often been noted, criminals generally do not read the statute books to determine whether their conduct is prohibited.<sup>134</sup> The idea that they would read both the statute books and the case reports before deciding whether to engage in criminal conduct is even more far-fetched. Since criminal laws meet the "notice" requirement under circumstances that provide

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<sup>129</sup> See, e.g., John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 219-20 (1985) ("Separation of powers might be taken to mean that courts should make law only interstitially, but not that all change must move in one direction. Nor is strict construction required for fair warning."); Kahan, *supra* note 123, at 363 ("[L]enity cannot convincingly be understood as advancing 'rule of law' values such as fair notice.").

<sup>130</sup> See, e.g., Paul J. Larkin, Jr., *Regulation, Prohibition, and Overcriminalization: The Proper and Improper Uses of the Criminal Law*, 42 HOFSTRA L. REV. 745, 758 (2014) ("The criminal law generally does not recognize an exculpatory mistake of law doctrine today . . .").

<sup>131</sup> See *Lambert v. California*, 355 U.S. 225, 227 (1957).

<sup>132</sup> Professor Mila Sohoni has argued that the weakness and artificiality of the notice requirement is partially the product of New Deal-era jurisprudential changes, which "permit[ted] less clarity and predictability in the law" being challenged. Mila Sohoni, *Notice and the New Deal*, 62 DUKE L.J. 1169, 1172 (2013).

<sup>133</sup> *United States v. Lanier*, 520 U.S. 259, 266 (1997).

<sup>134</sup> See, e.g., Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885, 886 (2004) (arguing that the notice rationale is flawed because "criminals do not read statutes, and because even if they did it would not be clear that the legal system should reward their efforts to skirt the law's borders").

actual notice to almost none of the people whose conduct they govern, it seems unnecessary to use a strong rule of lenity to advance this requirement.

The rule of lenity does not consistently advance the separation of powers either. When a criminal statute contains an ambiguity, the Court must choose whether to adopt the broader or the narrower reading of the ambiguous provision. This choice inescapably involves a “rewriting” of the statute, because it reduces the provision’s range of possible meanings. Adoption of the narrower reading does not always comport with the meaning intended by the legislature.<sup>135</sup>

The weakness of the notice and separation of powers rationales for the rule of lenity is demonstrated in two cases in which the Supreme Court refused to apply the rule to ambiguous provisions of § 924(c): *Smith v. United States* and *Deal v. United States*.

In *Smith v. United States*, the Supreme Court affirmed the conviction of a man who was alleged to have “used” a firearm during and in relation to a drug trafficking crime by trying to sell a machine gun to an undercover officer in exchange for two ounces of cocaine.<sup>136</sup> Smith argued that the word “use” was ambiguous — it could mean “use as a weapon” or “use for any purpose” — and that the Court should therefore apply the rule of lenity and interpret it to mean “use as a weapon.”<sup>137</sup> The Court refused to apply the rule of lenity, noting that Smith’s conduct came within the dictionary definition of the word “use.”<sup>138</sup> The Court also believed that a narrower reading of the statute would frustrate the intent of Congress.<sup>139</sup> The Court noted that drugs and guns are a “dangerous combination” and asserted that Congress “was no doubt aware” of this fact.<sup>140</sup> Because “a firearm’s use as a

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<sup>135</sup> See Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2193 (2002) (“[I]f one had to make an educated estimate (and given the premise of ambiguity, one must), one might perhaps even conclude that in ambiguous cases the legislature would likely prefer a ‘rule of severity.’”). Elhauge proposes an alternative explanation for the rule of lenity, arguing that it is designed to enhance the clarity of criminal statutes by provoking the legislature to respond to judicial decisions that interpret criminal statutes more narrowly than the legislature prefers: “[T]he rule of lenity forces the legislature to define just how anti-criminal they wish to be, and how far to go with the interest in punishing crime when it runs up against other societal interests.” *Id.* at 2194; see also Price, *supra* note 134, at 886 (arguing that “narrow construction may in fact thwart legislative desires more than it advances them”).

<sup>136</sup> *Smith v. United States*, 508 U.S. 223, 226-27 (1993).

<sup>137</sup> See *id.* at 228.

<sup>138</sup> *Id.* at 228-29.

<sup>139</sup> *Id.* at 240.

<sup>140</sup> *Id.*



weapon and its use as an item of barter . . . create the very dangers and risks that Congress meant § 924(c)(1) to address,” the Court held, the term “use” should be interpreted to cover both activities.<sup>141</sup>

Similarly, in *Deal v. United States*, the Supreme Court gave a broad interpretation to the language in § 924(c) that escalates the mandatory punishment for a “second or subsequent conviction” from five to twenty-five years.<sup>142</sup> Deal argued that § 924(c) should be interpreted as a typical recidivism statute that only escalates punishment when an offender commits a crime after a prior conviction, thus demonstrating that he failed to learn from his earlier conviction.<sup>143</sup> The Supreme Court rejected this argument, parsing the statutory text in a manner that was both highly abstruse and highly questionable.<sup>144</sup> The Court also rejected

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<sup>141</sup> *Id.* at 240-41. These assertions about legislative purpose are questionable for two reasons. First, it seems implausible to say that using a gun for barter creates the very same level of risk as using a gun to fire upon or threaten someone. Both activities create risk, but probably not the same degree of risk. Second, the Court cited no evidence that Congress equated these two risks with each other. Although the Court cited some statistics indicating that gun crime is often drug-related, it cited no committee reports, floor debate, or other direct evidence that any member of Congress — much less the entire legislative body — wanted to use § 924(c) to address every possible situation involving drugs and guns. In other words, the Court’s assessment of the statute’s “purpose” appears to be nothing more than an assessment of what “must have been” the statute’s purpose, which itself appears to be nothing more than the Court’s own assessment about the risks associated with drugs and guns. The Supreme Court’s apparent beliefs about the strong association of guns, drugs and violence may have been overblown. See, e.g., Shima Baradaran, *Drugs and Violence*, 88 S. CAL. L. REV. (forthcoming 2015) (manuscript at 7, 33), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2414202](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2414202) (reviewing “independent empirical evidence, historical and arrest data, and a review of prior research,” and arguing that “it is unclear that people who carry a gun while transacting drug deals cause more violence than those who do not”).

<sup>142</sup> See 18 U.S.C. § 924(c)(1)(C) (2012) (“In the case of a second or subsequent conviction under this subsection, the person shall . . . be sentenced to a term of imprisonment of not less than 25 years.”); *Deal v. United States*, 508 U.S. 129, 134 (1993).

<sup>143</sup> See *Deal*, 508 U.S. at 131; see also *id.* at 137-46 (Stevens, J., dissenting) (arguing that Section 924(c) should be read as a traditional recidivism statute).

<sup>144</sup> Recidivism statutes are often worded to impose heightened punishment for a “second offense,” and so they raise the same question as the one that arose in *Deal*: Does “second offense” include a second charge brought in the same case as the first, or does it only cover a conviction for an offense committed after a previous conviction? Courts interpreting such statutes have held that “[i]t cannot legally be known that an offense has been committed until there has been a conviction” and therefore “[a] second offense . . . is one that has been committed after conviction for a first offense.” *Id.* at 139 (Stevens, J., dissenting) (quoting *Holst v. Owens*, 24 F.2d 100, 101 (5th Cir. 1928)). *Deal* argued that the phrase “second conviction” in § 924(c)(1)(C) should be read as a synonym for the phrase “second offense” in classic recidivism statutes. *Id.* Writing for the majority, Justice Scalia used hyper-textualist

the idea that Congress' evident purpose was to escalate punishment only for recidivists.<sup>145</sup> According to the Court, Congress may have believed that those who repeatedly use guns to commit crimes, even without a prior conviction, are more dangerous or blameworthy than other criminals and thus deserve more punishment.<sup>146</sup> Any effort to determine legislative purpose beyond what is shown in the text of the statute would be purely speculative: "Once text is abandoned," it asserted, judges have nothing to guide them other than intuition, and "one intuition will serve as well as the other."<sup>147</sup>

Taken together, *Smith* and *Deal* vastly increased the scope and severity of § 924(c). *Deal* in particular changed the nature of § 924(c) prosecutions by enabling prosecutors to impose extraordinarily long mandatory sentences even on first offenders. Weldon Angelos would not be serving a fifty-five year sentence were it not for *Deal*.

Although *Smith* and *Deal* gave broad readings to ambiguous statutory provisions, they cannot really be said to have violated the principles of notice and separation of powers that are supposed to justify the rule of lenity. Neither *Smith* nor *Deal* seems to have been harmed by any lack of notice. Both engaged in seriously wrongful

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reasoning to reject *Deal*'s argument, asserting that purely as a textual matter, a "conviction" is not precisely the same thing as an "offense": "The present statute . . . does not use the term 'offense,' so it cannot possibly be said that it requires a criminal act after the first conviction. What it requires is a conviction after the first conviction." *Id.* at 135 (majority opinion).

Justice Scalia's textual argument was flawed in at least two respects. First, the narrower reading offered by *Deal* took better account of the temporal implications of the words "second or subsequent" than the broader reading adopted by the Court. When multiple § 924(c) convictions are obtained in a single case, it seems counterintuitive to describe any of them as "second or subsequent" to the others. Although the jury may or may not vote on the charges in a certain order, the judge ultimately makes them all part of a single judgment of conviction, and all of the convictions become effective simultaneously. It strains the English language to treat one § 924(c) conviction as "subsequent" to the other when both are proven in the same trial, voted upon at the same time, and become legally effective as part of a single judicial order. Second, Justice Scalia's argument that on its face, "conviction" cannot be a synonym for "offense" is a curious one. If a prior conviction is the thing that allows a prior offense to be "legally known" for purposes of a recidivism statute, it does not seem unreasonable to conclude that legislators intended the word "conviction" as a synonym for "offense." As the *Deal* dissent pointed out, it appears that for the first twenty years of its existence every judge and prosecutor who handled a case under § 924(c)(1)(C) treated it as a traditional recidivism statute. *See id.* at 140-42 (Stevens, J., dissenting).

<sup>145</sup> *Id.* at 136 (majority opinion).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

conduct that they had every reason to know was unlawful. Neither claimed that § 924(c)'s ambiguous language led them to believe they were not violating the law or that they would not be punished as harshly as they were. Nor was the Supreme Court's broad reading of these provisions clearly less consistent with congressional intent than a narrower reading would have been. Because the rule of lenity contributes only marginally to the values of notice and separation of powers, and because the Supreme Court has not identified any other values it might serve, it has become a less and less important tool in the Court's interpretive arsenal over the past several decades.

As we will see below, the rule of strict construction of penal statutes (the proper name for the rule of lenity) was not originally based upon the positivist assumptions underlying the Supreme Court's current textualist and purposivist approaches to statutory construction.<sup>148</sup> It was based upon the presumption that the legislature would not wish to authorize a punishment that was arbitrary and excessive in relation to the offender's culpability, measured against longstanding prior practice.<sup>149</sup> For this reason, judges prior to the twentieth century did not merely use the rule as a tiebreaker when the text itself yielded a grievous ambiguity, but as an interpretive guide for determining whether there was an ambiguity in the first place.

The Supreme Court's failure to see that the rule of strict construction of penal statutes reflects a systemic bias against overpunishment, based on basic principles of justice, explains why it has adopted such broad readings of statutes like 18 U.S.C. § 924(c) and permitted such lengthy punishments.<sup>150</sup> When the Court remembers the basic function of the rule, it may start employing it more effectively.<sup>151</sup> But for now the rule of lenity is not effective, and

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<sup>148</sup> See *infra* Part II.A.4.

<sup>149</sup> See *infra* Part II.A.4.

<sup>150</sup> Justice Scalia's failure to recognize the prevention of excessive punishment as an interpretive guide is evident from his dismissive treatment of the excessiveness issue in *Deal*. Noting that a person who commits six armed bank robberies could theoretically receive a 105-year prison term even under the narrower reading of § 924(c)(1)(C), Scalia elected not to "tarry" over the question of whether the broader reading of § 924(c)(1)(C) permitted imposition of excessive punishments. As a result, Justice Scalia apparently failed to consider the effect the broader interpretation of § 924(c)(1)(C) would have on numerous defendants like Angelos, whose maximum possible sentence would be far shorter under the narrower reading.

<sup>151</sup> See *infra* CONCLUSION; see also Stephen F. Smith, *Proportionality and Federalization*, 91 VA. L. REV. 879, 934, 940 (2005) (arguing that the weakness of the rule of lenity in the federal system results from the fact that "federal courts are . . . often oblivious to the penal consequences of their interpretive decisions" and that "the rule of lenity remains necessary today as a mechanism for mitigating the severity of

an offender like Angelos is not likely to succeed in his argument that “gun possession” should provide the unit of prosecution. Although the text of the statute is ambiguous regarding the appropriate unit of prosecution, *Smith* and *Deal* demonstrate that the Court believes that Congress wants § 924(c) to be construed broadly to accomplish its purpose of incapacitating drug dealers who use guns.

## II. THE COMMON LAW AND EXCESS: THREE SUBSTANTIVE DOCTRINES

The preceding discussion showed the current state of three seemingly empty doctrines: The Cruel and Unusual Punishments Clause’s prohibition of excessive punishments, the Double Jeopardy Clause’s prohibition of multiple punishments, and the rule of lenity. This Part shows that these doctrines actually have a strong — but forgotten — normative basis. The foundational purpose of all three doctrines is the prevention of excessive punishment, measured against a baseline of longstanding common law practice.<sup>152</sup> Prior to the twentieth century, judges used all three doctrines as tools for constraining prosecutorial efforts to divide crimes and obtain multiple punishments.<sup>153</sup> Judges rejected the government’s proposed unit of prosecution when they found it would give the government the opportunity to bring numerous charges based upon a single course of conduct, and thus create an arbitrary relationship between the offender’s culpability and his punishment.<sup>154</sup>

### A. Preventing Excessive Punishments

The Cruel and Unusual Punishments Clause, the Double Jeopardy Clause, and the rule of strict construction of penal statutes are all based, in part, upon the common law prohibition of excessive punishments.<sup>155</sup> Each doctrine will be discussed in turn, but first we will discuss their common grounding in the common law.

#### 1. The Common Law Basis for the Three Doctrines

When we think about the common law today, we tend to have two competing images in our minds, both derived largely from the writings of Oliver Wendell Holmes. On the one hand, we think of it as judge-

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existing criminal sanctions”).

<sup>152</sup> See *infra* Part II.A.

<sup>153</sup> See *infra* Part II.B.

<sup>154</sup> See *infra* Part II.B.

<sup>155</sup> See *infra* Part II.A.2–4.

made law. In Holmes' words, common law judges exercise a "legislative function," making up rules as they go along based on their own views of what is best for society.<sup>156</sup> At the same time, we often think of the common law as a series of fixed, almost-transcendent rules shared among all common law countries — a kind of "brooding omnipresence in the sky."<sup>157</sup> Neither of these views is correct, at least as an historical matter.

Over the course of its long history prior to Holmes, the common law was neither regarded as judicial legislation nor as a Platonic ideal. No one argued that the common law was based upon a judicial power to make law; nor did they claim that the common law was revealed from on high. Instead, the common law was considered to be a kind of customary law, the law of "custom and long usage."<sup>158</sup> The basic idea was that if a legal practice were used throughout the jurisdiction for a very long time, it attained the force of law despite the fact that it had never been ordered by the sovereign. "Long usage" was thought to provide powerful evidence that the practice was just, that it fit the practical needs of society, and that it enjoyed the consent of the people.<sup>159</sup> If the legal practice lacked any of these qualities, it was argued, the practice would fall out of usage and cease to be part of the common law.<sup>160</sup>

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<sup>156</sup> OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 35-36 (Boston, Little, Brown & Co. 1881).

<sup>157</sup> *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

<sup>158</sup> See Stinneford, *The Original Meaning of "Unusual," supra* note 12, at 1775-76, 1790-92; see, e.g., 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*73 (noting that "the first ground and chief corner stone of the laws of England" was "general immemorial custom, or common law, from time to time declared in the decisions of the courts of justice"); EDWARD COKE, *THE COMPLEAT COPYHOLDER* (1630), *reprinted in* 2 *THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE* 563, 563 (Steve Sheppard ed., 2003) [hereinafter *COMPLEAT COPYHOLDER*] ("Customes are defined to be a Law, or Right not written, which being established by long use, and the consent of our Ancestors, hath been, and is daily practised."); JOHN DAVIES, *A Preface Dedicatory*, in *LE PRIMER REPORT DES CASES & MATTERS EN LEY RESOLUES & ADIUDGES EN LES COURTS DEL ROY EN IRELAND* \*2 (Dublin, 1615) ("For the Common lawe of England is nothing else but the Common custome of the Realme . . ."); JAMES WILSON, *LECTURES ON LAW: OF THE COMMON LAW*, *reprinted in* 1 *THE WORKS OF JAMES WILSON, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES* 423, 435-36 (James DeWitt Andrews ed., Chicago, Callaghan & Co. 1896) ("[L]ong customs, approved by the consent of those who use them, acquire the qualities of a law.").

<sup>159</sup> See, e.g., 1 BLACKSTONE, *supra* note 158, at \*63-64, \*68-69, \*79-80 (describing the normative power of long usage); COKE, *COMPLEAT COPYHOLDER*, *supra* note 158, at 563; WILSON, *supra* note 158, at 435-36.

<sup>160</sup> See, e.g., COKE, *THE FIRST PART OF THE INSTITUTES OF THE LAWE OF ENGLAND: OR A COMMENTARY UPON LITTLETON, NOT THE NAME OF THE AUTHOR ONLY, BUT OF THE LAW*

The idea of long usage carried great normative power. Common law thinkers often compared new statutes and edicts unfavorably with the common law because they lacked long usage.<sup>161</sup> Statutes and edicts became law before being used, common law thinkers argued, and therefore they often turned out to be unjust or unreasonable in application. Common law practices, on the other hand, did not become law until long usage had shown them to be just, effective, and agreeable to the people, and they fell out of usage if they no longer met the needs of society.<sup>162</sup> For these reasons, legal thinkers considered the common law normatively superior to laws that derived from the command of parliament or the king. The great common law jurist Edward Coke even suggested that the common law could “controul” unreasonable statutes and make them “void.”<sup>163</sup>

This view of the relationship between the common law and sovereign command was important because it gave rise to the idea of rights enforceable against the state.<sup>164</sup> If king or parliament issued a command that deviated from the common law in a manner that was

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IT SELFE (1628), *reprinted in* 2 THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE, *supra* note 158, at 577, 740 [hereinafter INSTITUTES] (describing legal practices that fall out of usage as the “drosse” of the law); DAVIES, *supra* note 158, at \*2 (asserting that unjust or ineffective legal practices eventually fall out of usage and cease to be part of the common law).

<sup>161</sup> See 1 BLACKSTONE, *supra* note 158, at \*69 (asserting that when a statute is enacted to change a common law rule, the typical result is that “the wisdom of the rule hath in the end appeared from the inconveniences that have followed the innovation”); COKE, INSTITUTES, *supra* note 160, at 740 (“[W]hen any innovation or new invention starts up . . . trie it with the Rules of the common Law . . . for these be true Touchstones to sever the pure gold from the drosse and sophistications of novelties and new inventions. And by this example you may perceive, That the rule of the old common Law being soundly . . . applied to such novelties, it doth utterly crush them and bring them to nothing . . .”); WILSON, *supra* note 158, at 453 (“It is the characteristic of a system of common law that it be accommodated to the circumstances, the exigencies, and the conveniences of the people, by whom it is appointed.”).

<sup>162</sup> See, e.g., DAVIES, *supra* note 158, at \*2 (“And this Custumary lawe is the most perfect, & most excellent, and without comparison the best, to make & preserve a commonwealth, for the written lawes which are made either by the edicts of Princes, or by Counselles of estate, are imposed uppon the subject before any Triall or Probation made, whether the same bee fitt & agreeable to the nature & disposition of the people, or whether they will breed any inconvenience or no. But a Custome doth never become a lawe to binde the people, untill it hath bin tried & approved time out of minde.”).

<sup>163</sup> See 1 EDWARD COKE, REPORTS: DR. BONHAM’S CASE, *reprinted in* 1 THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE, *supra* note 158, at 264, 264 [hereinafter DR. BONHAM’S CASE].

<sup>164</sup> See Stinneford, *The Original Meaning of “Unusual,” supra* note 12, at 1771-1810.

fundamentally unjust, subjects argued that this command was illegal because it was “unusual,” that is, contrary to long usage.<sup>165</sup> This way of thinking motivated both the American Revolution<sup>166</sup> and the decision to adopt the Bill of Rights after ratification of the United States Constitution.<sup>167</sup> Many of the rights listed in the Bill of Rights derived from the common law, including the prohibitions of cruel and unusual punishments and double jeopardy. These provisions were written into the Constitution to ensure that no branch of government exceeded the bounds of justice established by longstanding prior practice.<sup>168</sup> Similarly, the rule of strict construction of penal statutes was a common law doctrine that reflected a systemic bias against overpunishment.<sup>169</sup> The rule required courts to narrowly construe penal statutes that were harsher than prior common law practice.

## 2. Excessive Punishments and the Cruel and Unusual Punishments Clause

The Cruel and Unusual Punishments Clause was originally meant, in large part, to prohibit punishments that are harsher than the offender deserves as a retributive matter.<sup>170</sup> Courts are able to determine whether a punishment is excessive by comparing it to punishment practices that enjoy long usage, and that are thus presumptively reasonable under the common law ideology described above.<sup>171</sup>

The very text of the Cruel and Unusual Punishments Clause references the common law.<sup>172</sup> The word “unusual” is a legal term of art that means “contrary to long usage,” or “contrary to longstanding common law practice.”<sup>173</sup> The phrase “cruel and unusual” means

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<sup>165</sup> See *id.* at 1784-85.

<sup>166</sup> See *id.* at 1792-1800.

<sup>167</sup> See *id.* at 1800-10.

<sup>168</sup> See *id.*

<sup>169</sup> See *infra* Part II.A.4.

<sup>170</sup> See Stinneford, *Rethinking Proportionality*, *supra* note 11, at 926-27.

<sup>171</sup> See *id.* at 961-73.

<sup>172</sup> In prior articles, I have demonstrated that the word “unusual” in the Cruel and Unusual Punishments Clause originally meant “contrary to the long usage of the common law;” that the Clause was originally meant to prohibit new punishment practices that are unduly harsh in light prior practice; and that this prohibition included not only barbaric punishment methods, but also excessive or disproportionate punishments. See Stinneford, *Rethinking Proportionality*, *supra* note 11, at 907; Stinneford, *The Original Meaning of “Unusual,” supra* note 12, at 1814-17. I will not rehearse the proof for these conclusions here, but will simply describe what the Clause originally meant and how it operated in practice.

<sup>173</sup> See Stinneford, *The Original Meaning of “Unusual,” supra* note 12, at 1764.

“cruel and new,” or “cruel in light of longstanding common law practice.”<sup>174</sup> A punishment is cruel and unusual if it is new and significantly harsher than the punishments that came before it.

A traditional punishment can become cruel and unusual if it falls out of usage for a long period of time and is then reintroduced by a legislature.<sup>175</sup> For example, the death penalty for theft was once permissible at common law, but would now almost certainly be cruel and unusual if a legislature tried to bring it back.<sup>176</sup> The key question is whether the once-traditional punishment is significantly harsher than the practices that replaced it after it fell out of usage.

One kind of cruel and unusual punishment is a punishment that utilizes barbaric methods. For example, when English monarchs started using the rack to torture those accused of crime, common lawyers argued that this practice was illegal because it was contrary to the long usage of the common law.<sup>177</sup> Similarly, during the debates over ratification of the United States Constitution, Antifederalists argued that unless the Constitution were amended to recognize common law rights like the prohibition of cruel and unusual punishments, Congress might adopt barbaric methods of punishment such as “racks” and “gibbets.”<sup>178</sup>

Another kind of cruel and unusual punishment is an excessive punishment. Excessive punishments do not necessarily involve impermissible methods; rather, they are cruel and unusual because they are unreasonably harsh in relation to the justification for punishing a given offense.<sup>179</sup> For example, a life sentence for a parking violation is cruel and unusual because it is much harsher than the offender deserves for this offense.<sup>180</sup>

As described above, the Supreme Court currently takes the position that legislatures are not bound to recognize any particular justification for punishment, nor the limitations this justification would imply. Criminal statutes may be based on retributive justice, deterrence,

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<sup>174</sup> See John F. Stinneford, *Death, Desuetude, and Original Meaning*, 56 WM. & MARY L. REV. 531, 558 (2014) [hereinafter *Death*]; Stinneford, *Rethinking Proportionality*, *supra* note 11, at 907-09.

<sup>175</sup> See Stinneford, *Death*, *supra* note 174, at 590.

<sup>176</sup> *Id.* at 592-93.

<sup>177</sup> See, e.g., COKE, INSTITUTES, *supra* note 160, at 1025 (asserting that the use of rack was unlawful because contrary to long usage).

<sup>178</sup> See, e.g., Debates in the Convention of the Commonwealth of Massachusetts (statement of Abraham Holmes), in 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 1, 111 (Jonathan Elliot ed., 2d ed. 1881).

<sup>179</sup> See Stinneford, *Rethinking Proportionality*, *supra* note 11, at 962, 968.

<sup>180</sup> See *Rummel v. Estelle*, 445 U.S. 263, 274 n.11 (1980).



incapacitation, rehabilitation, or even a purely regulatory purpose.<sup>181</sup> This position is contrary to the original meaning of the Cruel and Unusual Punishments Clause. Writers from Bracton to Blackstone declared that punishment is unjustified unless it is based upon an offender's moral culpability.<sup>182</sup> The entire fabric of common law crimes and defenses reflects the culpability requirement.<sup>183</sup> The same is also true of the various criminal procedural protections built into the constitutional text itself.<sup>184</sup>

Early cases decided under the Cruel and Unusual Punishments Clause or a state analogue held punishments unconstitutional if they exceeded the offender's moral desert. In *Ely v. Thompson*,<sup>185</sup> for example, the Kentucky Court of Appeals invalidated a statute making it a crime for a person of color to lift his hand to a white person, even in self-defense. The common law recognized a natural right to self-defense: Persons who used proportionate force to defend themselves against a wrongful attack could not be criminally punished because they lacked moral culpability.<sup>186</sup> Because the statute's withdrawal of the right to self-defense allowed the punishment of people who lacked moral culpability, the Kentucky Court of Appeals held that it was "cruel indeed" and therefore invalid.<sup>187</sup> Similarly, in *Weems v. United States* — the first case in which the Supreme Court of the United States declared a punishment to be cruel and unusual — the Court found that twelve years imprisonment at hard labor was excessive for a crime that required a showing of neither harm nor intent to harm.<sup>188</sup> Because an offender could be convicted with only a minimal showing of moral culpability, the punishment "amaze[d] those who have formed their conception of the relation of a state to even its offending citizens from the practice of the American commonwealths, and believe that it is a precept of justice that punishment for crime should be graduated and proportioned to offense."<sup>189</sup>

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<sup>181</sup> See Stinneford, *Rethinking Proportionality*, *supra* note 11, at 914-17.

<sup>182</sup> See *id.* at 927-28, 963; see also 4 WILLIAM BLACKSTONE, COMMENTARIES \*17 ("It is . . . absurd and impolitic to apply the same punishment to crimes of different malignity."); 2 HENRY DE BRACON, ON THE LAWS AND CUSTOMS OF ENGLAND 299 (Samuel E. Thorne trans., 1968).

<sup>183</sup> See Stinneford, *Rethinking Proportionality*, *supra* note 11, at 963-64.

<sup>184</sup> See *id.* at 964-66.

<sup>185</sup> *Ely v. Thompson*, 10 Ky. (3 A.K. Marsh.) 70 (1820).

<sup>186</sup> See 4 BLACKSTONE, *supra* note 182, at \*183-85.

<sup>187</sup> *Ely*, 10 Ky. (3 A.K. Marsh.) at 74.

<sup>188</sup> *Weems v. United States*, 217 U.S. 349, 363 (1910).

<sup>189</sup> *Id.* at 366-67.

The method for determining whether a punishment practice is excessive under the Cruel and Unusual Punishments Clause is relatively simple and straightforward. First, the Court should ask whether the practice is “unusual.”<sup>190</sup> If the practice is new, or is a once-traditional practice that fell out of usage long ago, the answer to this question is yes. Second, the court should compare this punishment to those that came before it for the same or similar crimes.<sup>191</sup> If it is significantly harsher, it is presumptively cruel and unusual.

As demonstrated below, the practice of dividing crimes and multiplying punishments is contrary to longstanding prior practice and leads to much harsher results. Many of the punishments resulting from this practice are cruel and unusual.

### 3. Multiple Punishments and Double Jeopardy

The Double Jeopardy Clause states: “No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb.”<sup>192</sup> The Supreme Court has recognized that the Clause protects against the risk of unjust punishment that arises when the government brings multiple charges against an offender for the same offense.<sup>193</sup> At the same time, the Court has held that legislatures are free to authorize multiple punishments for the same offense and to create multiple statutory offenses that cover exactly the same conduct.<sup>194</sup> If this is correct, the Double Jeopardy Clause constrains prosecutors, but not legislatures.<sup>195</sup>

The historical record supports the conclusion that the Double Jeopardy Clause was originally meant, at least in part, to prohibit multiple punishments. It is less clear whether the Clause was originally meant to constrain legislatures as well as prosecutors, because the Clause was drafted in an era when statutory offenses were few and tended not to overlap.<sup>196</sup> Early double jeopardy claims were based on

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<sup>190</sup> See Stinneford, *Rethinking Proportionality*, *supra* note 11, at 968.

<sup>191</sup> See *id.* at 971-72.

<sup>192</sup> U.S. CONST. amend. V.

<sup>193</sup> See *supra* Part I.C.1.

<sup>194</sup> See *supra* Part I.C.1.

<sup>195</sup> See, e.g., Note, *Twice in Jeopardy*, 75 YALE L.J. 262, 267 (1965) (arguing that the “core policy” of the Double Jeopardy Clause is to “prevent prosecutors and courts from prosecuting and punishing arbitrarily, without legitimate justification”).

<sup>196</sup> See, e.g., THOMAS III, *supra* note 44, at 71 (“Much evidence exists of a double jeopardy bar on prosecutors and judges, but there is almost no evidence that the bar extended to the lawgiver.”); Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 YALE L.J. 1807, 1818 (1997) (“[T]he Double Jeopardy Clause imposes no limits on how the legislature may carve up conduct into discrete legal offense units.”). There is

improper prosecutorial or judicial conduct, not improper legislation. Nonetheless, there are good reasons to believe that the Clause was meant to restrain the legislature as well as prosecutors and judges.

The principle that a person should not be punished twice for the same offense has been recognized, at least to some degree, in multiple legal systems throughout recorded history. The Digest of Justinian, for example, states that under Roman law “the governor must not allow a man to be charged with the offenses of which he has already been acquitted.”<sup>197</sup> In the fourth century, St. Jerome interpreted a passage in the Book of Nahum to mean that God would not inflict punishment twice for the same offense, an interpretation that was later incorporated into canon law.<sup>198</sup> The same principle has also been found in ancient Hebrew and Greek law.<sup>199</sup>

The principle seems to have already been a part of English common law as early as the thirteenth century.<sup>200</sup> At that time, a criminal case

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little direct evidence as to whether the double jeopardy bar was or was not intended to constrain the legislative as well as the judicial and executive branches. Because criminal law was largely the product of common law adjudication prior to the nineteenth century, there would have been few early occasions for the double jeopardy bar to come into conflict with legislative prerogative. Thomas interprets this lack of evidence as support for his claim that the legislature was not bound by double jeopardy rules: “Legislative prerogative regarding offense and jeopardy is so pervasive that direct evidence of it is hard to uncover.” THOMAS III, *supra* note 44, at 71.

<sup>197</sup> JAY A. SIGLER, *DOUBLE JEOPARDY: THE DEVELOPMENT OF A LEGAL AND SOCIAL POLICY* 2 (1969) (quoting DIGEST OF JUSTINIAN). For discussion of the Roman treatment of the multiple trial/multiple punishment problem, see *id.* 2-3; David S. Rudstein, *A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy*, 14 WM. & MARY BILL RTS. J. 193, 199-200 (2005).

<sup>198</sup> See, e.g., SIGLER, *supra* note 197, at 3 (citing FREDERICK POLLOCK & FREDERICK WILLIAM MAITLAND, *A HISTORY OF ENGLISH LAW* 448-49 (Cambridge, Univ. Press 1899)) (discussing St. Jerome’s reading of the Book of Nahum); Rudstein, *supra* note 197, at 200-01. The Book of Nahum (as presented in the Douay translation of the Bible) says: “There shall not rise up a double affliction.” *Nahum* 1:9 (Douay-Rheims).

<sup>199</sup> See Rudstein, *supra* note 197, at 197-99; see also Carissa Byrne Hessick & F. Andrew Hessick, *Double Jeopardy as a Limit on Punishment*, 97 CORNELL L. REV. 45, 51 & n.20 (2011).

<sup>200</sup> Although the principle that no one should face the risk of more than one punishment for the same offense has been recognized more or less continuously throughout English and American history, there have always been a variety of exceptions and limitations to this rule. Because it is not the purpose of this article to set forth a comprehensive history or theory of double jeopardy, the article does not discuss many of these exceptions and limitations. For a more complete discussion of the history and scope of the double jeopardy principle in English and American Law, see generally SIGLER, *supra* note 197, at 1-38; THOMAS III, *supra* note 44, at 27-32, 71-86; Rudstein, *supra* note 197, at 194-241.

could be brought by the King or by a private party.<sup>201</sup> A criminal case brought by a private party was called an “appeal.”<sup>202</sup> This two-track system of prosecution created a risk that the King and the private party would bring separate actions against the defendant, potentially subjecting him to multiple punishments, or to punishment for a crime of which he had been acquitted. Common law rules developed to prevent this from happening. For example, Bracton wrote that if a defendant “has been appealed by several of one deed and one wound, and successfully makes his defence against one, he will depart quit against all [the other appellors], also as regards the king’s suit, because he thereby proves his innocence against all, as though he had put himself on the country and it had exonerated him completely.”<sup>203</sup>

The great seventeenth century common law thinker Edward Coke asserted that the common law forbade multiple punishments for a single offense, stating in *Dr. Bonham’s Case* that “the Law saith, Nemo debet bis puniri pro uno delicto.”<sup>204</sup> This maxim translates into English as: “No one ought to be punished twice for one offence.”<sup>205</sup> This principle was embodied in four common law “pleas in bar” that seem to have been the direct predecessors of the Double Jeopardy Clause.<sup>206</sup> The two most important were the pleas of *auterfois acquit* and *auterfois convict*.<sup>207</sup> These pleas permitted a defendant to avoid prosecution if he had previously been acquitted or convicted of the same offense.

The rules governing these pleas indicate that their purpose was to negate the risk of overpunishment arising from multiple trials, not the emotional or financial impact of the trials themselves. For example, a prior acquittal was not considered a bar to a subsequent prosecution if the first trial occurred in a court that lacked jurisdiction,<sup>208</sup> or if the

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<sup>201</sup> THOMAS III, *supra* note 44, at 77.

<sup>202</sup> *See id.*

<sup>203</sup> *See* BRACTON, *supra* note 182, at 391.

<sup>204</sup> COKE, DR. BONHAM’S CASE, *supra* note 163, at 277.

<sup>205</sup> *Id.* at 277 n.55 (editor’s translation). Coke has been credited as one of the most important figures in the development of modern double jeopardy because he clarified that the principle applied to criminal actions imposing a threat of punishment, even where the punishment is relatively minor. *See, e.g.,* SIGLER, *supra* note 197, at 19-20 (discussing Coke’s importance to double jeopardy law).

<sup>206</sup> These were the pleas of *auterfois acquit*, *auterfois convict*, *auterfois attain*, and *pardon*. *See* 4 BLACKSTONE, *supra* note 182, at \*335-37 (describing these pleas).

<sup>207</sup> *See id.* at \*335-36.

<sup>208</sup> 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN: OR, A SYSTEM OF THE PRINCIPAL MATTERS RELATING TO THAT SUBJECT, DIGESTED UNDER PROPER HEADS 370 (1972).

first indictment was so faulty that it could not properly support a conviction<sup>209</sup> because the first court theoretically lacked the authority to impose punishment.<sup>210</sup> On the other hand, a prior acquittal could sometimes be a bar to a second trial even where the first trial was technically for a separate offense. For example, eighteenth century treatise writer William Hawkins wrote that if a man stole goods in one county and brought those goods into another county, he committed two separate theft crimes “by a meer fiction or construction of the law.”<sup>211</sup> Nonetheless, a defendant who had been acquitted of theft in the county from which the goods were taken could raise a plea of *auterfoits acquit* if he were subsequently prosecuted in the county to which he took the goods, for a legal fiction could not prevail against “a Maxim made in favour of Life.”<sup>212</sup> Because these two crimes were the same in substance, the mere fact that the law defined them as separate crimes was not sufficient to justify putting the defendant at risk of punishment a second time.

There is limited evidence as to how the framers and ratifiers of the Bill of Rights viewed the purpose and scope of the Double Jeopardy Clause.<sup>213</sup> As Carissa Hessick and Andrew Hessick have shown, this evidence tends to support the conclusion that the Double Jeopardy Clause was intended to prevent multiple punishments for the same offense.<sup>214</sup> When James Madison proposed the amendment to the First Congress, he used the following language: “No person shall be subject, except in case of impeachment, to more than one punishment or one trial for the same offence.”<sup>215</sup> In the debate over the amendment in the House of Representatives, Representative Egbert Benson objected to

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<sup>209</sup> *Id.* at 372.

<sup>210</sup> These rules were rejected by the Supreme Court of the United States in *Ball v. United States*, 163 U.S. 662, 669-70 (1896), on the ground that they were too artificial. In reality, people get convicted and punished all the time on the basis of faulty indictments.

<sup>211</sup> 2 HAWKINS, *supra* note 208, at 370.

<sup>212</sup> *Id.*

<sup>213</sup> David Rudstein has given a nice summary of the available evidence. See Rudstein, *supra* note 197, at 226-32; see, e.g., Donald Eric Burton, *A Closer Look at the Supreme Court and the Double Jeopardy Clause*, 49 OHIO ST. L. J. 799, 801 (1988); Charles L. Cantrell, *Double Jeopardy and Multiple Punishment: An Historical and Constitutional Analysis*, 24 S. TEX L. REV. 735, 796 (1983) (discussing historical evidence).

<sup>214</sup> See Hessick & Hessick, *supra* note 199, at 51-52. For further discussions of the debates in the First Congress concerning the Double Jeopardy Clause, see SIGLER, *supra* note 197, at 30-33.

<sup>215</sup> 1 ANNALS OF CONG. 451-52 (1789) (Joseph Gales ed., 1834); DAVID S. RUDSTEIN, *DOUBLE JEOPARDY: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION* 14 (2004).

the phrase “or one trial” because this language might be interpreted to deny defendants the right to seek a new trial due to error in the first trial. Benson “presumed [Madison’s proposed language] was intended to express what was secured by our former constitution, that no man’s life should be more than once put in jeopardy for the same offence. . . . The humane intention of the clause was to prevent more than one punishment.”<sup>216</sup> Benson’s objection failed to carry the day in the House, but the Senate ultimately changed the language of the proposed amendment to language that reflected Benson’s description of the Clause’s purpose: “No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb.”<sup>217</sup> In sum, the limited evidence indicates that the First Congress believed that it was adopting a double jeopardy right that was closely analogous to the one that existed under the English Constitution, as expressed in Coke’s “nemo debet bis puniri” maxim and the pleas of *auterfoits acquit* and *convict*.<sup>218</sup> It also appears that the First Congress understood a major purpose of this right to be the prevention of multiple punishments.

The Supreme Court of the United States decided very few double jeopardy cases in the first century after adoption of the Fifth Amendment. The “multiple punishments” issue was first presented in *Ex parte Lange*.<sup>219</sup> In that case, the defendant was convicted of stealing a mailbag belonging to the United States Postal Service, the value of

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<sup>216</sup> 1 ANNALS OF CONG. 781-82. Benson’s reference to being “twice put in jeopardy” closely tracks the language used by Blackstone and Coke to describe the pleas of *auterfoits acquit* and *convict*. See 4 BLACKSTONE, *supra* note 182, at \*335 (noting that both pleas were based on the principle that “no man is to be brought into jeopardy more than once for the same offence”); EDWARD COKE, REPORTS: VAUX’S CASE (1591), reprinted in 1 THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE, *supra* note 158, at 112-115 (“[T]he Maxim of Common Law is, that the life of a man shall not be twice put in jeopardy for one and the same offence, and that is the reason and cause that *Auterfoits* acquitted or convicted of the same offence is a good plea.”). Representatives Sherman and Sedgwick vocally supported Benson’s motion to remove the “or one trial” language for the reasons stated by Benson. Representative Livermore spoke against removing the language on the ground that he did not believe it would be interpreted in the way that Benson feared. See 1 ANNALS OF CONG. 782. Benson’s motion to change the language of the proposed amendment lost, but no one expressed disagreement with his assertion that the purpose of Madison’s proposed amendment was to prevent multiple punishments.

<sup>217</sup> U.S. CONST. amend. V.

<sup>218</sup> The American version of the right likely differed from its eighteenth century English counterpart in that the American constitutional order was designed to constrain the power of the legislature, whereas late eighteenth century England was a system of parliamentary supremacy. See *infra* notes 225-30 and accompanying text.

<sup>219</sup> 85 U.S. (18 Wall.) 163 (1873).

which was less than \$25.<sup>220</sup> The statute stated that the punishment for this offense was “imprisonment for not more than one year or a fine of not less than ten dollars nor more than two hundred dollars.”<sup>221</sup> At sentencing, however, the judge ordered him to serve “one year’s imprisonment, and to pay two hundred dollars fine.”<sup>222</sup> The Supreme Court held that this punishment violated the Double Jeopardy Clause, asserting that “[i]f there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence.”<sup>223</sup>

The fact that the Double Jeopardy Clause was originally directed against the risk of multiple punishments for the same offense does not necessarily mean that it was intended to constrain the legislature in the definition of crimes and authorization of punishments. The history of the Clause does not directly contradict the idea that it was meant to constrain prosecutors and judges, but not legislatures. For example, the multiple punishment issue in *Lange* arose from the fact that the judge imposed two punishments where the statute only authorized one.<sup>224</sup> Had the legislature authorized both punishments, *Lange* would likely not have been able to raise a successful double jeopardy claim.

On the other hand, the idea that the Double Jeopardy Clause gives legislatures total freedom to create overlapping offenses and authorize multiple punishments puts the Clause in tension with the prohibition of excessive punishments under the Cruel and Unusual Punishments Clause. As discussed above, the Cruel and Unusual Punishments Clause was originally meant to forbid legislatures from authorizing new punishments that are significantly harsher than those that came before for the same or similar offenses.<sup>225</sup> It seems strange to say that the Constitution prohibits the legislature from making drastic departures from prior punishment practice but simultaneously permits legislatures total freedom to create overlapping offenses and to authorize multiple punishments for the same offense.

The founding generation was very much concerned about the need to constrain legislatures, and associated legislative freedom to create new offenses with the risk of excessive punishment. For example, during the run-up to the American Revolution, John Adams

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<sup>220</sup> *Id.* at 164.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at 168.

<sup>224</sup> *Id.* at 164.

<sup>225</sup> See *supra* Part II.A.2; see also Stinneford, *Rethinking Proportionality*, *supra* note 11, at 926-27.

complained that Parliament had abused its power by creating multiple offenses and authorizing harsh punishments under the Stamp Act: “[T]he Stamp Act has opened a vast number of sources of new crimes, which may be committed by any man . . . and prodigious penalties are annexed.”<sup>226</sup> Similarly, during the debate over ratification of the United States Constitution, George Mason argued that without a Bill of Rights “Congress may . . . constitute new crimes, inflict unusual and severe punishments, and extend their powers . . . as far as they shall think proper; so that . . . the people [have no security for] for their rights.”<sup>227</sup>

Given the complementary nature of the Cruel and Unusual Punishments Clause and the Double Jeopardy Clause, as well as the founding generation’s concern that legislative freedom to create new crimes and authorize new punishments could lead to abuse, it seems fair to conclude that the Double Jeopardy Clause was originally meant to impose some kind of constraint on the legislature.<sup>228</sup> The Supreme Court made a valiant but short-lived effort to enforce such a constraint in *Grady v. Corbin*.<sup>229</sup> It is beyond the scope of this article to work out the full nature and scope of such a constraint<sup>230</sup> — but the fact that such a constraint exists can at least guide courts in the interpretation of penal statutes that create a risk of multiple punishment for the same offense. This process of interpretation is discussed immediately below, and again in Part II.B.3.

#### 4. The Rule of Strict Construction of Penal Statutes

The Supreme Court recognizes a canon of statutory construction that requires ambiguous criminal statutes to be narrowly construed — a canon it generally calls the rule of lenity — but applies the canon rarely, inconsistently, and as a matter of last resort.<sup>231</sup> Because the

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<sup>226</sup> See John Adams, *Instructions of the Town of Braintree to Their Representative, 1765*, BOS. GAZETTE, Oct. 14, 1765, reprinted in 3 CHARLES FRANCIS ADAMS, *THE WORK OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES: WITH A LIFE OF THE AUTHOR, NOTES AND ILLUSTRATIONS* 465, 466-67 (Boston, Little & Brown 1851).

<sup>227</sup> 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 640 (Max Farrand ed., 1911).

<sup>228</sup> See Klein, *supra* note 44, at 1023 (“An interpretation of double jeopardy that allows Congress or state legislatures to determine its meaning is anomalous at a deep structural level — so anomalous that the proponent of this position assumes an extraordinary burden of proof.”).

<sup>229</sup> 495 U.S. 508, 510 (1990), *overruled by* United States v. Dixon, 509 U.S. 688 (1993).

<sup>230</sup> See *infra* Part III.B (containing a preliminary and tentative sketch of what such constraints might look like).

<sup>231</sup> See *supra* Part I.C.2.



Court believes that the rule of lenity was intended primarily to advance the values of notice and separation of powers, it refuses to apply the rule in the many cases where it does not seem to advance those values.<sup>232</sup>

The name “rule of lenity” is an historical misnomer. This phrase seems to have first appeared in 1958, in a case denigrating the rule and denying its applicability.<sup>233</sup> Prior to the 1950s, the rule of lenity was called the rule of strict construction of penal statutes.<sup>234</sup> This rule was not primarily about notice or separation of powers; nor was it about giving criminals undeserved “lenience.” Rather, it reflected the common law’s systemic bias in favor of life and liberty, and against overpunishment.<sup>235</sup>

Common law thinkers argued that the common law was normatively superior to statutory law because the common law was

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<sup>232</sup> See *supra* Part I.C.2.

<sup>233</sup> See *Gore v. United States*, 357 U.S. 386, 391 (1958) (“It is one thing for a single transaction to include several units relating to proscribed conduct under a single provision of a statute. It is a wholly different thing to evolve a rule of lenity for three violations of three separate offenses created by Congress at three different times, all to the end of dealing more and more strictly with, and seeking to throttle more and more by different legal devices, the traffic in narcotics.”). A search of Westlaw ALLFEDS and ALLSTATES databases reveals no cases in which this phrase was used prior to *Gore*. The word “lenity” appears to have first been used in place of “strict construction” in *Bell v. United States*, 349 U.S. 81, 83 (1955), stating: “When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity.” Justice Frankfurter was the author of both opinions, a fact that led Lawrence Solan to quip: “Frankfurter may not have invented the rule [of lenity], but he apparently did name it.” See Solan, *supra* note 124, at 103.

<sup>234</sup> See, e.g., *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 77 (1820) (discussing rule of strict construction of penal statutes).

<sup>235</sup> Several scholars have defended the modern rule of lenity based on the idea that it promotes liberty. See, e.g., HENRY J. FRIENDLY, MR. JUSTICE FRANKFURTER AND THE READING OF STATUTES, reprinted in BENCHMARKS 196, 209-10 (1967) (defending the rule of lenity as a source of protection for liberty); Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes to You?*, 45 VAND. L. REV. 561, 570-71 (1992).

On the other hand, Dan Kahan (among others) has harshly criticized the liberty-based rationale for the rule of lenity. See Kahan, *supra* note 123, at 415 (“[A] generic bias in favor of individual liberty has little to recommend it as a strategy for construing criminal statutes. The class of persons who benefit from narrow readings of federal criminal statutes includes a great many individuals who have deliberately engaged in socially undesirable conduct but who hope to avoid punishment on the basis of an unanticipated gap in the law. A rule that systematically sought to protect these individuals through narrow construction would systematically disadvantage the persons whose rights these individuals have violated.”).

the product of long usage.<sup>236</sup> The fact that common law practices did not become law until they had been used within the jurisdiction for a long time was thought to show that the practices were just, reasonable, and enjoyed the consent of the people.<sup>237</sup> Statutory law, by contrast, became law before it had ever been used, and was thus likely to create inconvenience or even injustice.<sup>238</sup> This mode of reasoning gave rise to the concept of customary rights that constrained the power of the sovereign, including the right not to be subjected to cruel and unusual punishments.<sup>239</sup>

The rule of strict construction of penal statutes arose directly from this mode of reasoning, as did the more general rule that statutes in derogation of the common law should be strictly construed.<sup>240</sup> Since the common law was thought to comport with basic principles of justice, judges read criminal statutes that changed common law rules narrowly so as to minimize the potential inconvenience and injustice the new statutes otherwise might cause.<sup>241</sup> Strict construction of penal statutes was not focused on actual legislative intent, but it was not thought to be inconsistent with legislative intent either. Instead, the rule of strict construction of penal statutes was based on the presumption that the legislature would want the new penal statute to be interpreted consistently with basic principles of justice as revealed through the long usage of the common law.<sup>242</sup> Thus, R.H. Helmholz characterized Coke's famous statement in *Bonham's Case* that the common law could "controul" an unreasonable statute and make it "void" as an example of strict construction of statutes in derogation of the common law: "[I]f one assumed that the legislator wished to have statutes read in light of natural law, and that the legislator had not in fact intended to stray from its paths, then a decision in the case could

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<sup>236</sup> See *supra* Part II.A.1.

<sup>237</sup> See *supra* Part II.A.1.

<sup>238</sup> See *supra* Part II.A.1.

<sup>239</sup> See *supra* Part II.A.1.

<sup>240</sup> See, e.g., Nathan S. Chapman & Michael W. McConnell, *Due Process As Separation of Powers*, 121 YALE L.J. 1672, 1690 (2012) (discussing rule of strict construction of statutes in derogation of the common law).

<sup>241</sup> See Solan, *supra* note 124, at 88-89 ("[T]he strict construction of penal statutes came into play when a judiciary disapproved of legislative harshness it regarded as cruel. Thus, it used lenity to thwart, not promote, the will of the legislature.")

<sup>242</sup> A similar idea was expressed in Chief Justice Marshall's famous dictum in *United States v. Fisher*: "Where rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with irresistible clearness to induce a court of justice to suppose a design to effect such objects." 6 U.S. (2 Cranch) 358, 390 (1805).

be made in accordance with a reading of the statute that allowed natural justice to be done.”<sup>243</sup>

The rule of strict construction of penal statutes was not value-free. Rather, it reflected a systemic preference for life and liberty and a systemic bias against overpunishment. Although the rule is an old one — “perhaps not much less old than construction itself,” as Chief Justice Marshall suggested<sup>244</sup> — it came to prominence during the seventeenth through nineteenth centuries, as courts responded to Parliament’s efforts to increase the severity of criminal punishment.<sup>245</sup> One of the ways Parliament made criminal punishment more severe was by transforming numerous crimes into capital offenses, including minor crimes like cutting down a tree in an orchard.<sup>246</sup> The severity of these new laws was mitigated, however, by the longstanding doctrine of benefit of clergy. This doctrine originally precluded the state from trying members of the clergy in secular courts, but was transformed over the years to preclude capital punishment for clergy members, then for all first offenders who could read (or pretend to read) a particular passage of scripture,<sup>247</sup> then for all first offenders convicted

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<sup>243</sup> R.H. Helmholz, *Bonham’s Case, Judicial Review, and the Law of Nature*, 1 J. LEGAL ANALYSIS 325, 339 (2009). Justice Story expressed a similar idea when explaining his reason for applying the rule of strict construction of penal statutes in *United States v. Shackford*, 27 F. Cas. 1038 (C.C.D. Me. 1830) (“[I]f one construction be exceedingly inconvenient, and the other safe and convenient, a fortiori ought the latter to be deemed the true exposition of the legislative intention; for it can never be presumed that the government means to impose irksome regulations, unless for some known object, or from some express declaration.”).

<sup>244</sup> *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820).

<sup>245</sup> See, e.g., Ross E. Davies, *A Public Trust Exception to the Rule of Lenity*, 63 U. CHI. L. REV. 1175, 1178 (1996) (“The Rule flowered in the eighteenth century in response to the rapid expansion of the category of capital offenses.”).

<sup>246</sup> See 4 BLACKSTONE, *supra* note 182, at \*4 (describing parliament’s authorization of capital punishment for numerous minor offenses, including the crime of cutting down “a cherry-tree in an orchard.”); see, e.g., JEROME HALL, *THEFT, LAW AND SOCIETY* 114-18 (Bobbs-Merrill 2d ed., 1952) (discussing expansion of capital punishment in eighteenth and nineteenth century England); Erik Luna, *Spoiled Rotten Social Background*, 2 ALA. C.R. & C.L. L. REV. 23, 34 (2011) (arguing that “England’s ‘Bloody Code’ attempted to manage the lower classes through the threat of capital punishment, with the number of executable offenses increasing dramatically during the eighteenth and nineteenth centuries, predominantly for property crimes committed by the British poor”).

<sup>247</sup> The history of the “neck verse” — the passage of scripture that was invariably used to determine literacy (and thus eligibility for benefit of scripture) — is discussed by various scholars, including J.S. COCKBURN, *A HISTORY OF ENGLISH ASSIZES 1558–1714*, at 128 (1972).

of “clergyable” offenses.<sup>248</sup> Early on, some of the most serious crimes were excluded from benefit of clergy because of the obvious injustice of allowing murderers, robbers, and arsonists to escape punishment merely because they had memorized a few lines of scripture.<sup>249</sup> But as Parliament expanded the list of capital offenses in the seventeenth through nineteenth centuries, it also started withdrawing benefit of clergy from many less serious capital crimes.<sup>250</sup>

As Parliament increasingly withdrew benefit of clergy, courts used the rule of strict construction of penal statutes to limit the effect of Parliament’s actions.<sup>251</sup> Seventeenth century jurist Matthew Hale explained why courts did this. He wrote that statutes withdrawing benefit of clergy should be strictly construed “*in favorem vitae & privilegii clericalis.*”<sup>252</sup> Because the law favors life and disfavors the death penalty, statutes that move the balance in favor of death should be read narrowly. For the same reason, Hale explained, statutes restoring benefit of clergy should be liberally construed, for such statutes “are *in materia favorabili*, in case of life, and in case of a privilege, which hath been ever favoured in law . . . .”<sup>253</sup>

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<sup>248</sup> For a concise discussion of the history of benefit of clergy, see John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 37-41 (1983).

<sup>249</sup> See, e.g., 2 HAWKINS, *supra* note 208, at 343 (discussing statute enacted during the reign of Henry the Eighth, withdrawing benefit of clergy from those who commit murder and various kinds of burglary, robbery and arson); see also Langbein, *supra* note 248, at 38 (noting that the effect of these early exclusions was to limit benefit of clergy to crimes relating to larceny).

<sup>250</sup> For a description of parliamentary efforts to withdraw benefit of clergy for many offenses, and the judicial response thereto, see Livingston Hall, *Strict or Liberal Construction of Penal Statutes*, 48 HARV. L. REV. 748, 751 (1935) (asserting that “from 1691 to 1765 benefit of clergy was ousted in various forms of fraud, embezzlement, and aggravated larceny” and that judges “tempered this severity with strict construction carried to its most absurd limits”); see, e.g., Price, *supra* note 134, 897 (2004) (discussing how Parliament passed statutes to limit the benefit of the clergy).

<sup>251</sup> See Price, *supra* note 134, at 897.

<sup>252</sup> 2 MATTHEW HALE, *HISTORIA PLACITORUM CORONAE: THE HISTORY OF THE PLEAS OF THE CROWN* 335 (London, E. and R. Nutt & R. Gosling 1736).

<sup>253</sup> *Id.* at 371; see, e.g., JOEL PRENTISS BISHOP, *COMMENTARIES ON THE LAW OF STATUTORY CRIMES; INCLUDING THE WRITTEN LAWS AND THEIR INTERPRETATION IN GENERAL. WHAT IS SPECIAL TO THE CRIMINAL LAW, AND THE SPECIFIC STATUTORY OFFENCES AS TO BOTH LAW AND PROCEDURE* 189 (Boston, Little, Brown & Co. 2d ed. 1883) (“While the parts of a penal statute which subject to punishment or a penalty are, from their odious nature, to be construed strictly, those which exempt from penal consequences will, because of their opposite character, receive a liberal interpretation.” (internal footnotes omitted)).

Writing a century later, William Blackstone demonstrated how far courts would go to limit the effect of statutes withdrawing benefit of clergy. In one case discussed by Blackstone, the court construed a statute withdrawing benefit of clergy from those “convicted of stealing horses” not to cover a defendant who stole only one horse.<sup>254</sup> Another statute withdrew benefit of clergy from those convicted of stealing sheep “or other cattle.”<sup>255</sup> The court concluded that the words “other cattle” were “much too loose to create a capital offence,” and therefore “the act was held to extend to nothing but mere sheep.”<sup>256</sup> As these examples show, English judges did not apply the rule of strict construction of penal statutes in a value-neutral manner. Because “the law” favored life and disfavored capital punishment, judges restricted statutes withdrawing benefit of clergy to the narrowest scope that could reasonably be inferred from the text.

The rule of strict construction of penal statutes was not restricted to capital punishment, and it was not restricted to England. The Supreme Court of the United States first applied the rule in 1820, in a non-capital manslaughter case.<sup>257</sup> In America, as in England, the rule of strict construction of penal statutes was intended primarily to limit the effect of statutes that expanded the scope or harshness of criminal punishment. Joel Prentiss Bishop explained that “[t]he law delights in the life, liberty, and happiness of the subject; consequently it deems statutes which deprive him of these, or his property, however necessary they may be, in a sense odious.”<sup>258</sup> Such statutes were to be strictly construed. Statutes that reduced the scope or severity of criminal laws, on the other hand, were a “delight” to the law and were to be liberally construed.<sup>259</sup> Because the key purpose of the rule of strict construction of penal statutes was to limit the harshness of new penal statutes, the “degree of strictness” a judge should employ “will depend somewhat on the severity of the punishment” it inflicts.<sup>260</sup>

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<sup>254</sup> 1 BLACKSTONE, *supra* note 158, at \*88.

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> See *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820).

<sup>258</sup> BISHOP, *supra* note 253, at 185 (internal footnotes omitted).

<sup>259</sup> See *id.* at 184 (“To things odious, is applied the strict interpretation; to things favored, the liberal: as a father, in chastising his child, would keep within the necessity of the case to the letter; while, in bestowing a merited reward, he would cast in something also from affection.”).

<sup>260</sup> *Id.* at 186; see, e.g., J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION INCLUDING A DISCUSSION OF LEGISLATIVE POWERS, CONSTITUTIONAL REGULATIONS RELATIVE TO THE FORMS OF LEGISLATION AND TO LEGISLATIVE PROCEDURE TOGETHER WITH AN EXPOSITION AT LENGTH OF THE PRINCIPLES OF INTERPRETATION AND COGNATE TOPICS

Neither Hale nor Bishop saw the rule of strict construction of penal statutes as a form of judicial activism or defiance of legislative will. Bishop described the rule as flowing from the judge's duty to follow the preferences of "the law" in situations where a penal statute threatened to deviate from those preferences. For example, he asserted that "the courts should and do give a strict construction to statutes which inflict capital punishments" because "[t]he law . . . is watchful over human life, and careful to avoid the taking of it away."<sup>261</sup> Bishop stressed that judges are under a duty to follow this rule even where they personally prefer a broad interpretation of a death penalty statute: "A judge, as a man, may be of the same mind with the law, or he may not; but, in his judicial capacity, he is required to preserve, as far as he may, the lives of the people."<sup>262</sup>

When treatise writers of the seventeenth through nineteenth centuries talked about "the law's" preference for life and liberty, they were talking about fundamental principles of the common law. Hale asserted that the rule of strict construction of penal statutes was supported by the common law maxim "in favorem vitae."<sup>263</sup> Hawkins described the "nemo debet bis puniri" principle as "a Maxim made in favour of Life."<sup>264</sup> Bishop supported his claim that the law delights in the "life, liberty and happiness of the subject" with citations to common law precedents and treatises.<sup>265</sup> When Hale, Bishop, and other legal thinkers of the seventeenth through nineteenth centuries talked about the preferences of "the law," they were talking about the common law.

The common law connected the rule of strict construction of penal statutes to basic principles of justice. Since the common law's preference for life and liberty reflected the natural law, and since the legislature could be presumed to intend that its penal statutes comport with that preference, a judge could appropriately use strict construction to limit the scope and harshness of a new penal statute,

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436 (Chicago, Callaghan & Co. 1891) ("Strict construction is not a precise but a relative expression; it varies in degree of strictness according to the character of the law under construction. The construction will be more or less strict according to the gravity of the consequences flowing from the operation of the statute or its infraction; if penal, the severity of the penalty; if in derogation of common right, or capable of being employed oppressively, the extent and nature of the innovation and the consequences." (internal footnotes omitted)).

<sup>261</sup> BISHOP, *supra* note 253, at 179.

<sup>262</sup> *Id.*

<sup>263</sup> 2 HALE, *supra* note 252, at 335.

<sup>264</sup> 2 HAWKINS, *supra* note 208, at 370.

<sup>265</sup> BISHOP, *supra* note 253, at 185.

particularly when it tended toward authorization of punishment that was excessive in light of prior usage.<sup>266</sup> In the United States, the idea that “the law” preferred life, liberty, and happiness was further supported by the references to these concepts in the Declaration of Independence<sup>267</sup> and the Fifth and Fourteenth Amendments’ Due Process Clauses.<sup>268</sup>

### B. *Preventing Division and Excess*

In the eighteenth and nineteenth centuries, defendants challenged prosecutorial efforts to divide crime and impose multiple punishments under the Cruel and Unusual Punishments Clause, the Double Jeopardy Clause, and especially the rule of strict construction of penal statutes. Across all three areas of doctrine, judges responded to these challenges by asking: (1) Does this unit of prosecution give the government the opportunity to bring multiple charges based on a single course of conduct?; and (2) If so, would the bringing of multiple charges create an arbitrary relationship between the offender’s culpability and his cumulative punishment? If the proposed unit of prosecution differed from prior practice in a manner that permitted multiple charges and arbitrary and excessive punishments, judges declared the unit of prosecution unlawful.

#### 1. Stacking and the Cruel and Unusual Punishments Clause

In the nineteenth century, laws regulating the sale of alcoholic beverages were a repeated source of controversy relating to division and excess. Although these cases were often resolved using statutory construction,<sup>269</sup> two cases that reached the Supreme Court of the United States shed an interesting light on the relationship between

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<sup>266</sup> See Helmholz, *supra* note 243, at 339.

<sup>267</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”).

<sup>268</sup> U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law.”); U.S. CONST. amend. XIV (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law.”).

<sup>269</sup> See, e.g., Washburn v. M’Inroy, 7 Johns. 134, 136-37 (N.Y. Sup. Ct. 1810) (interpreting statute to permit imposition of only one penalty for unlawful liquor sales, despite fact that defendant had sold liquor on numerous occasions); State v. Nutt, 28 Vt. 598, 602 (1856) (construing statute to prohibit government from using defendant’s unlawful liquor sales to obtain separate convictions against defendant for being a “common seller” of alcohol and for engaging in multiple unlawful liquor sales).

division, stacking, and the Cruel and Unusual Punishments Clause. These cases were *Pervear v. Massachusetts*<sup>270</sup> and *O'Neil v. Vermont*.<sup>271</sup>

Pervear was convicted of violating a statute that prohibited maintenance of an unlicensed “tenement for the illegal sale and illegal keeping of intoxicating liquors.” He was fined \$50 and sentenced to three months’ imprisonment at hard labor.<sup>272</sup> Pervear argued that his punishment violated the Eighth Amendment’s Cruel and Unusual Punishments Clause.<sup>273</sup> The Supreme Court refused to decide this issue on the ground that the Amendment did not apply to the states. Nonetheless, the Court opined in dicta that the punishment did not raise serious Eighth Amendment concerns. It was within the state’s police power “to protect the community against the manifold evils of intemperance” by “prohibiting under penalties the sale and keeping for sale of intoxicating liquors [] without license.”<sup>274</sup> Since the penalties imposed in this case were relatively light, the Court concluded that “[w]e perceive nothing excessive, or cruel, or unusual” in the sentence.<sup>275</sup>

Twenty-six years later the Supreme Court heard *O'Neil v. Vermont*,<sup>276</sup> another case involving unlicensed liquor sales. Whereas Pervear was convicted of maintaining an illegal “tenement” for the sale of liquor, O’Neil was charged under a statute that made it a crime to “sell, furnish, and give away intoxicating liquor, without authority.”<sup>277</sup> The difference in statutory wording led prosecutors to use a different unit of prosecution. Whereas Pervear had been convicted of a single count of operating an illegal business, O’Neil was convicted of three hundred and seven counts of illegal liquor sales.<sup>278</sup> The difference in unit of prosecution made an enormous difference in the sentence imposed. Pervear was fined \$50 and sentenced to three months imprisonment. O’Neil was fined \$6,140,<sup>279</sup> and because he could not pay he was ultimately sentenced to fifty-four and one-half years imprisonment.<sup>280</sup> Even though O’Neil’s conduct appears to have been

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<sup>270</sup> *Pervear v. Massachusetts*, 72 U.S. (5 Wall.) 475 (1866).

<sup>271</sup> *O'Neil v. Vermont*, 144 U.S. 323 (1892).

<sup>272</sup> *Pervear*, 72 U.S. (5 Wall.) at 480.

<sup>273</sup> *Id.* at 479.

<sup>274</sup> *Id.* at 480.

<sup>275</sup> *Id.*

<sup>276</sup> *O'Neil*, 144 U.S. 323.

<sup>277</sup> *Id.* at 325.

<sup>278</sup> *Id.* at 327.

<sup>279</sup> *Id.* at 330.

<sup>280</sup> *Id.* at 330-31. The prison sentence was imposed pursuant to a Vermont statute



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virtually identical to *Pervear's*, his fine was more than one hundred and twenty-two times the size of *Pervear's*, and his prison sentence was two hundred and eighteen times as long.

As in *Pervear*, the Supreme Court refused to decide the merits of O'Neil's Eighth Amendment claim on the ground that the Eighth Amendment did not apply to the states.<sup>281</sup> Three justices dissented, led by Justice Stephen Field. Justice Field argued that Vermont's decision to divide O'Neil's course of conduct into numerous discrete offenses and punish each separately was cruel and unusual. Although the state has the power to punish a person for "the drinking of one drop of liquor," he asserted, it would be an "unheard-of cruelty" to "count the drops in a single glass, and make thereby a thousand offences," thus imposing a life sentence "for drinking the single glass of liquor."<sup>282</sup>

This mode of punishing O'Neil's conduct was cruel and unusual because division and stacking created an arbitrary relationship between O'Neil's culpability and his punishment. Selling liquor without a license was a relatively minor offense, whether one focused on the overall retail operation or the various individual sales. By dividing O'Neil's course of conduct into numerous individual acts and then stacking them on top of each other at sentencing, the government was able to punish a misdemeanor as harshly as the most serious felony. This was impermissible, Justice Field argued. Although the government has the authority to punish a petty offense with twenty lashes, a judge could not lawfully order that a person who has committed one hundred petty offenses "be scourged until the flesh fall from his body."<sup>283</sup> Justice Field's conclusion was supported by the fact that the punishment was much harsher than prior practice would permit for similar conduct. In Justice Field's words, the punishment "exceed[s] in severity . . . anything which I have been able to find in the records of our courts for the present century."<sup>284</sup>

## 2. Division and Double Jeopardy

Another repeated source of controversy relating to division and stacking was the federal effort to suppress Mormon polygamy. The Supreme Court heard two cases arising from prosecutorial efforts to

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that called for three days of imprisonment for every dollar of a defaulted criminal fine.

<sup>281</sup> *Id.* at 331-32.

<sup>282</sup> *Id.* at 340 (Field, J., dissenting).

<sup>283</sup> *Id.* at 340, 364.

<sup>284</sup> *Id.* at 338.

prosecute a defendant multiple times for a single, ongoing polygamous cohabitation.

In the first case, *Ex parte Snow*,<sup>285</sup> the defendant was charged with three violations of the federal anti-polygamy statute, which stated that any man who “cohabits with more than one woman . . . shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than three hundred dollars, or by imprisonment for not more than six months, or by both said punishments, in the discretion of the court.”<sup>286</sup> One indictment charged that he lived with seven women throughout 1883.<sup>287</sup> Another charged that he lived with the same seven women throughout 1884.<sup>288</sup> A third charged that he lived with the same women throughout 1885.<sup>289</sup> The only difference between these indictments was that “each covered a different period of time.”<sup>290</sup> Snow was convicted of all three violations, and was given three consecutive sentences of six months imprisonment, and three fines of \$300 each.<sup>291</sup> Snow ultimately filed a petition for habeas corpus on the ground that “the [district] court had no jurisdiction to pass judgment’ against him ‘upon more than one of the indictments . . . [because] the offense therein set out is the same as that contained . . . in each of the other . . . indictments . . . .”<sup>292</sup> Therefore “the maximum punishment which the court had authority to impose was six months’ imprisonment and a fine of three hundred dollars . . . .”<sup>293</sup>

The Supreme Court ordered the district court to grant Snow’s writ of habeas corpus, holding that “[t]he offense of cohabitation, in the sense of this statute . . . is, inherently, a continuous offense, having duration; and not an offense consisting of an isolated act.”<sup>294</sup> Because cohabitation is inherently a continuing offense, prosecutors were not permitted to divide it up into distinct time units and obtain multiple punishments.

The result in *Snow* is defensible from a positivist and textualist viewpoint. The term “cohabit” does seem to imply some kind of

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<sup>285</sup> 120 U.S. 274 (1887).

<sup>286</sup> *Id.* at 275-76.

<sup>287</sup> *Id.* at 276.

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

<sup>291</sup> *Id.* at 278-79.

<sup>292</sup> *Id.* at 280.

<sup>293</sup> *Id.*

<sup>294</sup> *Id.* at 281.

duration, and it makes sense conceptually to treat this crime as an ongoing one. But the *Snow* court did not focus on the text of the statute. It focused, rather, on the fact that the government's proposed unit of prosecution would allow the government to bring a limitless number of charges against Snow and impose a cumulative punishment that was arbitrary and cruel. If the government were permitted to divide Snow's cohabitation into three one-year periods, then:

On the same principle there might have been an indictment covering each of the 35 months, with imprisonment for 17 1/2 years and fines amounting to \$10,500, or even an indictment covering every week, with imprisonment for 74 years and fines amounting to \$44,400; and so on, *ad infinitum*, for smaller periods of time.<sup>295</sup>

Any division of this course of conduct, which encompassed a lengthy time period and involved many individual acts that might be characterized as "cohabitation," would be arbitrary and would permit excessive punishment. For this reason, "a continuing offense of the character of the one in this case can be committed but once, for the purposes of indictment or prosecution, prior to the time the prosecution is instituted."<sup>296</sup>

The Supreme Court did not cite the Double Jeopardy Clause in *Ex parte Snow*. Although the Court said it was impermissible to punish the same offense twice, this opinion may have been based upon either the Double Jeopardy Clause or statutory construction. Two years later, in *Ex parte Nielsen*,<sup>297</sup> the Supreme Court made the connection between division and Double Jeopardy explicit. *Nielsen*, like *Snow*, arose from federal efforts to stamp out Mormon polygamy. Hans Nielsen lived with two women, Anna Lavinia Nielsen and Caroline Nielsen.<sup>298</sup> The first indictment charged Nielsen with unlawful cohabitation with both women October 15, 1885, to May 13, 1888.<sup>299</sup> The second indictment charged that Nielsen engaged in adultery with Caroline Nielsen on May 14, 1888.<sup>300</sup> Nielsen pled guilty to the first offense and was sentenced to three months imprisonment and a one hundred dollar fine.<sup>301</sup> After completing this sentence, Nielsen was

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<sup>295</sup> *Id.* at 282.

<sup>296</sup> *Id.*

<sup>297</sup> 131 U.S. 176 (1889).

<sup>298</sup> *Id.* at 177.

<sup>299</sup> *Id.*

<sup>300</sup> *Id.*

<sup>301</sup> *Id.*

brought to trial on the adultery charge. He attacked the indictment with a plea of prior conviction, arguing that adultery was a lesser-included offense of cohabitation.<sup>302</sup> The court denied his plea, convicted him of adultery, and sentenced him to an additional one hundred and twenty-five days in prison.<sup>303</sup>

Like Snow, Nielsen petitioned for habeas corpus and the Supreme Court ordered that the petition be granted.<sup>304</sup> The Court held that adultery was, indeed, a lesser-included offense to unlawful cohabitation, and therefore the effort to divide the time period in which Nielsen engaged in polygamy in order to obtain two punishments was unlawful.<sup>305</sup> The *Nielsen* court quoted *Snow*'s assertion that permitting division of the offense would unjustly allow prosecutors to pile up limitless punishments against the defendant.<sup>306</sup> Thus the prosecutors' efforts to divide Nielsen's crime into distinct time periods in order to obtain multiple punishments violated the Double Jeopardy Clause.<sup>307</sup>

### 3. Division, Stacking, and the Rule of Strict Construction of Penal Statutes

Most eighteenth and nineteenth century cases raising questions about division and stacking were resolved under the rule of strict construction of penal statutes. This rule was much stronger than the current rule of lenity because it reflected a systemic bias against overpunishment.<sup>308</sup> Common law writers from Hale to Bishop argued that the rule of strict construction was based upon "the law's" preference for life and liberty over death and imprisonment.<sup>309</sup> "The law" to which these writers referred was the natural law as reflected in longstanding common law practice.<sup>310</sup> Because the legislature could be presumed to wish that new penal statutes comply with basic principles of justice, it was the duty of courts to narrowly construe penal statutes that expanded the scope or severity of criminal law.<sup>311</sup> This was a

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<sup>302</sup> *Id.* at 177-78.

<sup>303</sup> *Id.* at 178.

<sup>304</sup> *Id.* at 176, 190-91.

<sup>305</sup> *Id.* at 187.

<sup>306</sup> *Id.* at 186.

<sup>307</sup> *Id.* at 188.

<sup>308</sup> *See supra* Part II.A.4.

<sup>309</sup> *See supra* Part II.A.4.

<sup>310</sup> *See supra* Part II.A.4.

<sup>311</sup> *See supra* Part II.A.4.

powerful justification for a rule of strict construction, and explains why the rule played a more important role in the eighteenth and nineteenth centuries than the rule of lenity does today.

Eighteenth and nineteenth century courts used the rule of strict construction of penal statutes to prevent division and stacking in situations where the government's proposed unit of prosecution created a substantial risk of excessive punishment. The two most important factors in this analysis were the likelihood that the proposed unit of prosecution would enable the government to seek numerous punishments for a single course of conduct, and the resulting arbitrary relationship between the offender's culpability and his cumulative punishment.

The oft-cited English case *Crepps v. Durden*<sup>312</sup> demonstrates the role arbitrariness played in courts' analysis of the division question. Crepps was a baker who was convicted of four violations of a statute prohibiting a person from "exercising his ordinary calling on a Sunday" because he sold four "small hot loaves of bread" on the prohibited day.<sup>313</sup> Lord Mansfield held that Crepps could only be punished once for working as a baker on a Sunday, however many individual acts of baking or selling he may have undertaken that day. He held that the "object" of the act was not to punish "repeated offenses," but to prohibit a unitary course of conduct.<sup>314</sup> Lord Mansfield reached this conclusion, in part, because the government's proposed unit of prosecution would make the relationship between the defendant's punishment and his culpability wholly arbitrary. It would be absurd to conclude that "if a taylor sews on the Lord's day, every stitch he takes is a separate offence; or, if a shoe-maker or carpenter work for different customers at different times on the same Sunday, that those are so many separate and distinct offences."<sup>315</sup> Because it could be presumed that the legislature did not intend this statute to authorize arbitrary units of prosecution, the narrower reading was required.

Nineteenth century courts recognized that division of the unit of prosecution created a risk of excessive as well as arbitrary punishment. For example, *Mayor v. Ordrenan*<sup>316</sup> involved a state statute that empowered the City of New York to make ordinances designed to encourage safe handling and storage of gunpowder, and to impose a

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<sup>312</sup> (1777) 98 Eng. Rep. 1283 (K.B.).

<sup>313</sup> *Id.* at 1283-84.

<sup>314</sup> *Id.* at 1287.

<sup>315</sup> *Id.*

<sup>316</sup> 12 Johns. 122 (N.Y. Sup. Ct. 1815).

penalty for violation of one of these ordinances “not exceeding 250 dollars.”<sup>317</sup> Pursuant to this statute, New York City passed an ordinance making it illegal to store more than twenty-eight pounds of gunpowder in one place, and imposing a fine of \$125 for every hundred weight of gunpowder stored in excess of the limit.<sup>318</sup> The city charged Ordrenan with keeping 1,100 pounds of gunpowder in one place at one time, and sought a fine of \$1,375 from him.<sup>319</sup> The city’s theory of the case was that each hundred weight over the limit constituted a separate offense and justified a separate fine.<sup>320</sup> The Supreme Court of New York held that the ordinance under which this prosecution was brought exceeded the city’s power under the relevant state statute. The court strictly construed the state statute to permit a maximum fine of \$250 for “any one transaction” involving gunpowder.<sup>321</sup> If the statute were construed to permit the city to define more than one offense per transaction, “the limitation in the amount of the penalty would be nugatory.”<sup>322</sup> In this case, the city chose to impose a penalty of \$125 for every hundred weight of gunpowder kept in violation of the ordinance, but “[t]here is no limit to the principle set up in the [ordinance]. With the same propriety, the penalty of \$125 might have been imposed on every pound of gunpowder, or even on every grain, kept contrary to the [ordinance].”<sup>323</sup> Because a broader construction of the state statute would authorize the City of New York to divide the underlying offense and impose arbitrary and excessive punishments, the court chose the narrower interpretation.

Similarly, in *State v. Commissioners of Fayetteville*,<sup>324</sup> the defendants were under a statutory duty to keep the streets of Fayetteville in good repair.<sup>325</sup> When the streets were inspected, “[t]hree or four streets” were found to be “out of repair at the same time.”<sup>326</sup> Prosecutors charged the defendants under a separate indictment for each street found to be out of repair.<sup>327</sup> The Supreme Court of North Carolina

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<sup>317</sup> *Id.* at 122.

<sup>318</sup> *Id.* at 122-23.

<sup>319</sup> *Id.* at 123.

<sup>320</sup> *See id.* at 124.

<sup>321</sup> *Id.*

<sup>322</sup> *Id.*

<sup>323</sup> *Id.*

<sup>324</sup> 6 N.C. (2 Mur.) 371 (1818).

<sup>325</sup> *Id.* at 371.

<sup>326</sup> *Id.*

<sup>327</sup> *Id.*

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strictly construed the statute under which the defendants were prosecuted to allow only one charge for neglect of duty, regardless of how many streets were out of repair.<sup>328</sup> The court did not engage in detailed textual analysis — in fact, it did not directly quote the statute at all. Instead, it focused on the fact that allowing multiple prosecutions in cases like this would lead to excessive punishments:

It would be monstrous to charge them with separate indictments for every street in the town, when the whole were out of repair at the same time; especially when upon one indictment a fine can be imposed adequate to the real estimate of the offence. Were such a doctrine tolerated, it is impossible to say where its consequences would end; for then an overseer whose road is out of repair might be charged in separate indictments, for every hundred yards, (why not every yard?) and be ruined by the costs, when perhaps a moderate fine would atone for the offence.<sup>329</sup>

The court concluded by noting that prosecutorial efforts to divide crime are inherently unjust: “This notion of rendering crimes, like matter infinitely divisible, is repugnant to the spirit and policy of the law and ought not to be countenanced.”<sup>330</sup>

Concerns about arbitrariness and excess led nineteenth century courts to interpret criminal statutes to prohibit prosecutors from bringing multiple charges and seeking multiple punishments even where the most plausible reading of the statutory text would seem to permit multiple charges and punishments. For example, in *United States v. New York Guaranty & Indemnity Co.*,<sup>331</sup> prosecutors charged the defendant, a bank, with numerous violations of a statute that required the bank to file a separate tax return every month and imposed a \$200 fine for “any refusal or neglect” to meet this requirement.<sup>332</sup> Because the bank had failed to file such a return between November 1865 and August 1872,<sup>333</sup> the government argued that it had “refused or neglected” its duty on more than ninety separate occasions and was subject to a fine of more than \$18,000. The court rejected the government’s reading of the statute. Instead, it read “any refusal or neglect” to mean “all refusals or neglects”: “The

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<sup>328</sup> *Id.*

<sup>329</sup> *Id.*

<sup>330</sup> *Id.* at 371-72.

<sup>331</sup> 27 F. Cas. 133 (S.D.N.Y. 1875).

<sup>332</sup> *Id.*

<sup>333</sup> *Id.*

penalty is not imposed for each and every refusal or neglect, but for any refusal or neglect.”<sup>334</sup> Thus the statute imposed “only one penalty of \$200 for all neglects or defaults prior to the commencement of the suit.”<sup>335</sup> Although the government reading of the statute was textually plausible — arguably more plausible than the reading adopted by the court — the court rejected it because it would lead to an arbitrary and excessive punishment.

### III. HOW DID WE GET HERE AND WHERE ARE WE HEADING?

This Part provides a tentative sketch of our movement from protective moral realism to empty positivism. It also discusses some ways in which we can recover protections against arbitrary and excessive punishment even if we do not share all of the metaphysical assumptions on which the older approach was based.

#### A. Instrumentalism and Division

The foregoing discussion shows that the Supreme Court’s approach to cruel and unusual punishments, double jeopardy, and the rule of strict construction of penal statutes has been dramatically transformed since the eighteenth and nineteenth centuries. The Cruel and Unusual Punishments Clause originally forbade new punishment practices that were excessive in relationship to the offender’s culpability as measured against longstanding punishment practice.<sup>336</sup> Today, the Court holds that legislatures are not required to base punishment on culpability, and are free to decide how much punishment is justified under their chosen rationale.<sup>337</sup> The Double Jeopardy Clause was originally supposed to prevent the risk of multiple punishments for the same offense.<sup>338</sup> The Court now holds that legislatures are utterly free to impose multiple punishments for the same offense if they wish to do so.<sup>339</sup> The rule of strict construction of penal statutes originally directed courts to limit the effect of criminal statutes that increased the scope or severity of criminal punishment, on the theory that the

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<sup>334</sup> *Id.*

<sup>335</sup> *Id.*

<sup>336</sup> See *supra* Part II.A.2; see also Stinneford, *Rethinking Proportionality*, *supra* note 11, at 961-78.

<sup>337</sup> See, e.g., *Ewing v. California*, 538 U.S. 11, 27-28 (2003) (plurality opinion); *Harmelin v. Michigan*, 501 U.S. 957, 1004 (1991); see also *supra* Part I.B.1.

<sup>338</sup> See *supra* Part II.A.3.

<sup>339</sup> See *Missouri v. Hunter*, 459 U.S. 359, 368 (1983); *Brown v. Ohio*, 432 U.S. 161, 169 n.8 (1977); see also *supra* Part II.C.



legislature would not intend the statute to impose punishments that were unjust in light of longstanding prior practice.<sup>340</sup> Over the past century, the rule of strict construction has been transformed into the rule of lenity, which is weak and has little theoretical justification.<sup>341</sup> The Supreme Court has emptied all three doctrines of substance and made them mere instruments for effectuating legislative will. Because of these changes, challenges to the division of crimes and multiplication of punishments are now almost certain to fail.

The transformation of these doctrines reflects at least two major changes in legal philosophy over the past century: The rejection of moral realism in favor of legal positivism, and the rejection of common law tradition in favor of legislative innovation.<sup>342</sup> Both changes were closely associated with a movement that is sometimes called instrumentalism.<sup>343</sup> Instrumentalism holds that law is nothing more than an instrument for effectuating whatever policies the dominant group in society considers preferable.<sup>344</sup> Constraints based on morality and tradition are, on this view, nothing more than impediments to progress. Instrumentalism was and is a powerful force in American jurisprudence, and is at least partly responsible for the changes in doctrine described above.<sup>345</sup> There were many other reasons for the change — history is complex and many factors contribute to its development.<sup>346</sup> But at a minimum, instrumentalism's success in breaking the bond between law, morality and tradition left courts with fewer tools for countering the legislative and prosecutorial tendency toward excessive punishment.<sup>347</sup> This Part describes some of the ways these tools were removed, but far more work needs to be done to paint a complete picture.<sup>348</sup>

### 1. The Instrumentalist Revolution

The movement from protective moral realism to empty positivism was caused, in large part, by the instrumentalist revolution of the first half of the twentieth century. Society changed quite a lot in the

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<sup>340</sup> See *supra* Part II.A.4.

<sup>341</sup> See *supra* Part I.C.

<sup>342</sup> See *supra* Part II.A.1.

<sup>343</sup> See *supra* Part II.A.1.

<sup>344</sup> See *supra* Part II.A.1.

<sup>345</sup> See *supra* Part II.A.1.

<sup>346</sup> See *supra* Part II.A.1.

<sup>347</sup> See *supra* Part II.A.1.

<sup>348</sup> See *supra* Part II.A.1.

decades between the Civil War<sup>349</sup> and the New Deal. The population exploded, science advanced, the economy grew, and people moved from country to city and often ended up working for large, impersonal industrial concerns.<sup>350</sup> At the same time, moral skepticism was on the rise, fueled by the writings of Charles Darwin and Herbert Spenser, among others.<sup>351</sup> Many legal thinkers in the early twentieth century considered the old common law system hopelessly antiquated, based upon outdated ideas of morality and social organization.<sup>352</sup>

The instrumentalist attack on the common law was presaged by Oliver Wendell Holmes, Jr.'s influential law review article, *The Path of the Law*.<sup>353</sup> In this article, Holmes famously announced that he wished to eliminate "every word of moral significance"<sup>354</sup> from the law and to make the role of history and tradition "very small."<sup>355</sup> Law itself was, in Holmes' view, simply "the preference of a given body in a given time and place,"<sup>356</sup> resulting from a "concealed, half conscious battle" among competing interests.<sup>357</sup> Since the law was simply the product of political struggle, it had no predetermined ends, no built-in "delight"<sup>358</sup> in life, liberty, and happiness. Instead, whoever controlled the law chose the "ends sought to be attained,"<sup>359</sup> and could use the

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<sup>349</sup> See ALBERT W. ALSCHULER, *LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES* 41-51 (2000) (discussing the possible effect of the Civil War in fostering Holmes' moral skepticism); LOUIS MENAND, *THE METAPHYSICAL CLUB* 69 (2001).

<sup>350</sup> See, e.g., *Morissette v. United States*, 342 U.S. 246, 253-54 (1952) (attributing the rise of strict liability offenses to the need for regulation arising from an increasingly complex society); Francis Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 68 (1933) ("[T]he growing complexities of twentieth century life have demanded an increasing social regulation; and for this purpose the existing machinery of the criminal law has been seized upon and utilized."); Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 11 (1936) ("Science, invention and industrial expansion have done more than all else to change the habits of life of the people of this continent, and the striking development in those fields has taken place since the Civil War.").

<sup>351</sup> See, e.g., ALSCHULER, *supra* note 349, at 9, 49 (describing the rise of moral skepticism); BRIAN Z. TAMANAHA, *LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW* 38-39 (2006).

<sup>352</sup> See, e.g., Harold Laski, *The Basis of Vicarious Liability*, 26 YALE L.J. 105 (1916) (discussing the perceived inadequacy of the common law to deal with the complex problems of modern society).

<sup>353</sup> Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

<sup>354</sup> *Id.* at 464.

<sup>355</sup> *Id.* at 474.

<sup>356</sup> See *id.* at 466.

<sup>357</sup> See *id.*

<sup>358</sup> See BISHOP, *supra* note 253, at 185.

<sup>359</sup> *Id.* at 474.

power of “statistics” and “economics” to determine the most efficient way to reach whatever ends those might be.<sup>360</sup>

The idea that the law is indistinguishable from politics and that the role of judges is to effectuate the will of the victor was greatly influential in the early decades of the twentieth century. John Dewey, for example, wrote that law is “coercion” whose only inherent value is “efficiency.”<sup>361</sup> Roscoe Pound described law as “social engineering.”<sup>362</sup> The basic idea underlying instrumentalist writing was that law should operate as a tool for solving social problems. Judges should not construe statutes narrowly in compliance with traditional common law doctrine, but should construe them broadly to effectuate legislative problem-solving.<sup>363</sup>

This new mode of reasoning was used to uphold the New Deal and the administrative state, and for this reason it is often celebrated in the legal academy today.<sup>364</sup> Instrumentalism’s legacy for criminal offenders is not discussed as often, perhaps because it is considerably darker.

One of the traditional moral ideas Holmes attacked in *The Path of the Law* was that criminal punishment should be based upon, and limited by, the offender’s moral culpability. Holmes argued that criminal law should focus on “the dangerousness of the criminal,” not his culpability.<sup>365</sup> According to Holmes, “well known men of science” believed that “the typical criminal is a degenerate, bound to swindle or to murder by as deep seated an organic necessity as that which makes the rattlesnake bite.”<sup>366</sup> If the scientists were right — and Holmes

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<sup>360</sup> *Id.* at 469.

<sup>361</sup> See John Dewey, *Force and Coercion*, 26 INT’L J. OF ETHICS 359, 366 (1916).

<sup>362</sup> See, e.g., ROSCOE POUND, *THE SPIRIT OF THE COMMON LAW* 195 (1921).

<sup>363</sup> See, e.g., Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 407 (1908) (“The public cannot be relied upon permanently to tolerate judicial obstruction or nullification of the social policies to which more and more it is compelled to be committed.”).

<sup>364</sup> See, e.g., JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 227 (1976) (discussing connection between instrumentalism and the New Deal–era); KERMIT L. HALL, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* 284 (1989) (“[L]iberal legalism is an inchoate and largely unarticulated concept, but in its essence it fused the social reformist impulse of Progressivism, the relativism and instrumentalism of legal realism and sociological jurisprudence, and the regulatory responsibility of the state associated with the New Deal.”); Daniel R. Williams, *After the Gold Rush — Part II: Hamdi, the Jury Trial, and Our Degraded Public Sphere*, 113 PENN ST. L. REV. 55, 90 n.149 (2008) (“New Deal liberals, in fact, are perfect exemplars of the instrumentalist orientation, committed as they are to the idea that reason can produce a form of social engineering that leads to greater social justice.”).

<sup>365</sup> See Holmes, *supra* note 353, at 470-71.

<sup>366</sup> See *id.* at 470.

seemed to think they were — then criminals must be treated like rattlesnakes and “got rid of.”<sup>367</sup>

Holmes’ idea that criminal law should focus on social control rather than culpability gained great currency in the first half of the twentieth century. For example, Sheldon Glueck wrote that in formulating criminal laws, “[s]ociety should utilize every scientific instrumentality for self-protection against destructive elements in its midst,” and that “[n]o thoughtful person today seriously holds th[e] theory” that punishment should be based on moral culpability.<sup>368</sup> Livingston Hall wrote: “Clearly retribution should have little part in determining present-day principles of criminal law.”<sup>369</sup> Justice Stone wrote that the legal system of the twentieth century was “founded upon the idea, new to English law, that the basis of liability is not the fault of a wrongdoer, but such method of distributing the burden of loss as accepted social policy dictates.”<sup>370</sup>

The move from a culpability-based idea of criminal law to a focus on social danger and social control implied that at least some common law rights could no longer be justified. John Dewey wrote that rights were justifiable only to the extent they promoted “efficiency.”<sup>371</sup> John Barker Waite wrote even more pointedly:

[I]f once the whole idea of punishment be discarded and the objective of every prosecution be recognized as the removal of a particular social danger . . . quibble, casuistry, technicality in the fabrication of ‘rights’, will no longer seem legitimate defenses in a contest, but must appear in their true character as obstacles to the progress of social prophylaxis.<sup>372</sup>

In sum, instrumentalists argued that traditional rights of criminal defendants that impeded governmental efforts at social control should be modified or eliminated.

A major example of the Supreme Court’s move toward instrumentalism was its acceptance of strict liability crimes starting in the 1920s. Traditionally, a person could not be convicted of crime without proof that he acted in a morally culpable manner.<sup>373</sup> The mens

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<sup>367</sup> See *id.*

<sup>368</sup> Sheldon Glueck, *Principles of a Rational Penal Code*, 41 HARV. L. REV. 453, 455, 456 (1928).

<sup>369</sup> Hall, *supra* note 250, at 759 n.56.

<sup>370</sup> Stone, *supra* note 350, at 4.

<sup>371</sup> See Dewey, *supra* note 361, at 366.

<sup>372</sup> JOHN BARKER WAITE, *CRIMINAL LAW IN ACTION* 320 (1934).

<sup>373</sup> See 4 BLACKSTONE, *supra* note 182, at \*28 (“[P]unishments are . . . only inflicted

rea requirement was a universally accepted part of criminal law, and was considered so fundamental that the Supreme Court asserted in 1877: “All punitive legislation contemplates some relation between guilt and punishment. To inflict the latter where the former does not exist would shock the sense of justice of every one.”<sup>374</sup> By 1922, however, the Court held that there was no need to prove mens rea where the “emphasis of the statute is . . . upon achievement of some social betterment.”<sup>375</sup> By 1943, the Court implied that a mens rea requirement was actually disfavored because it was an obstacle to making the criminal law “a working instrument of government.”<sup>376</sup>

Neither the rule of strict construction of penal statutes, nor the Double Jeopardy Clause’s prohibition of multiple punishments for the same offense, nor the Cruel and Unusual Punishment Clause’s prohibition of excessive punishments makes much sense in an instrumentalist legal universe. If the criminal law does not have any predetermined ends — if it does not “delight” in life and liberty and does not insist that punishment reflect an offender’s desert — the limitations imposed by these doctrines look like more like obstructions than protections. Phrased differently, if the point of criminal law is to enhance government’s power to eliminate social dangers, courts should look for ways to cooperate in this effort, not constrain it.

## 2. Instrumentalism and the Rule of Strict Construction of Penal Statutes

During the first half of the twentieth century, instrumentalists attacked the rule of strict construction of penal statutes on the ground that it impeded progress by tying new penal statutes to outmoded common law standards. John Barker Waite described the rule as a “policy . . . to utilize casuistic plausibility or any dubiety of the situation for the benefit of the accused rather than for the immediate safety of society.”<sup>377</sup> Roscoe Pound wrote that “the disinclination of courts and lawyers to give to penal statutes any wider application than the letter

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for the abuse of . . . free will . . . .”); *id.* at \*20 (“[A]n unwarrantable act without a vicious will is no crime at all.”).

<sup>374</sup> *Felton v. United States*, 96 U.S. 699, 703 (1877).

<sup>375</sup> *United States v. Balint*, 258 U.S. 250, 252 (1922).

<sup>376</sup> *United States v. Dotterweich*, 320 U.S. 277, 280 (1943).

<sup>377</sup> WAITE, *supra* note 372, at 16.

required” made it unduly difficult for legislatures “to make improvements in the definition of old crimes.”<sup>378</sup> Livingston Hall wrote:

Changing conditions of modern civilization, and the growth of scientific knowledge on criminology, render imperative a new approach to the problems of crime. New categories of crimes and criminals cannot always be accurately defined on the first attempt. Shall the new machinery be nullified from the start under the guise of ‘strict construction’, or shall it be carried out liberally in the spirit in which it is conceived? Merely to state the issue is to answer it. . . . [T]here is no sound reason for a general doctrine of strict construction of penal statutes, and *prima facie* all such should have as liberal a construction as statutes generally.<sup>379</sup>

The Supreme Court’s embrace of instrumentalism led it to deemphasize the rule of strict construction of penal statutes early in the twentieth century. This move caused a drastic change in the way the Supreme Court handled prosecutorial efforts to divide crime and impose multiple punishments. *Ebeling v. Morgan*,<sup>380</sup> for example, involved a defendant who entered a railway postal car and cut open six mail bags, apparently with the intent to steal some of their contents. Ebeling was convicted of six violations of Section 189 of the Federal Criminal Code, which provided: “Whoever shall tear, cut, or otherwise injure any mail bag . . . with intent to rob or steal any such mail, or to render the same insecure, shall be fined not more than five hundred dollars, or imprisoned not more than three years, or both.”<sup>381</sup> The district judge sentenced Ebeling to the maximum prison term on each count, and ordered that five of these terms should be served consecutively.<sup>382</sup> Thus, his total prison sentence was fifteen years.<sup>383</sup> Ebeling petitioned for habeas corpus on the ground that he had committed only one offense and therefore his maximum punishment should be three years imprisonment.<sup>384</sup>

Under the reasoning of the nineteenth century cases discussed in Part II.B, Ebeling had a strong argument that the unit of prosecution under this statute should be his single theft attempt, not the multiple

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<sup>378</sup> ROSCOE POUND, CRIMINAL JUSTICE IN AMERICA 143-44 (1930).

<sup>379</sup> Hall, *supra* note 250, at 761, 762.

<sup>380</sup> *Ebeling v. Morgan*, 237 U.S. 625 (1915).

<sup>381</sup> *Id.* at 629.

<sup>382</sup> *Id.* at 628.

<sup>383</sup> *Id.*

<sup>384</sup> *See id.*

acts of cutting he performed in the course of this attempt. Ebeling entered a single train car with the intent to steal mail from a single victim, and he opened six bags in furtherance of this intent. Under traditional standards, he was guilty of a single count of attempted theft. If the unit of prosecution were divided to make each act of cutting done in furtherance of this theft a separate offense, the relationship between Ebeling's culpability and his punishment would become arbitrary, and he would be subjected to a grave risk of excessive punishment. A would-be thief who cut open one bag in an unsuccessful effort to steal mail could be given no more than a three-year sentence. If the same person cut open five bags, he could get fifteen years. If he cut open ten bags, he could get thirty years. A person who cuts open ten mail bags on a single occasion without successfully stealing anything might be somewhat more culpable than a person who cuts open only one mail bag, but the difference between them would not be enough to justify a ten-fold increase in sentence under traditional standards. Under the rule of strict construction of penal statutes, the Court could presume that Congress would not have intended the statute to expand criminal liability in such a dramatically unjust manner.<sup>385</sup>

The Supreme Court in *Ebeling* did not consider the problems of arbitrariness and excess raised by the government's proposed unit of prosecution. Instead, the Court focused on the statutory language that prohibited the cutting of "any bag."<sup>386</sup> Based on this language, and this language alone, the Court held that "it was the intention of the lawmakers to protect each and every mail bag from felonious injury and mutilation. Whenever any one mail bag is thus torn, cut, or injured, the offense is complete."<sup>387</sup> The Court distinguished Ebeling's case from *Crepps v. Durden* and *Ex parte Snow* on the ground that

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<sup>385</sup> In fact, the statute's use of the phrase "any mail bag" was probably the result of Congress's need to include an element establishing the federal government's jurisdiction to punish attempted theft like Ebeling's. One of the curious features of federal criminal statutes is that they are often worded in such a way that the jurisdictional element misleadingly appears to be the heart of the offense. See, e.g., 18 U.S.C. § 1341 (2012) (penalizing anyone who "having devised or intending to devise any scheme or artifice to defraud . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service"); 18 U.S.C. § 1951 (2012) (penalizing anyone who "obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion").

<sup>386</sup> *Ebeling*, 237 U.S. at 629.

<sup>387</sup> *Id.*

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those cases involved “attempts to cut up a continuous offense into separate crimes in a manner unwarranted by the statute making the offense punishable.”<sup>388</sup>

The Supreme Court apparently considered the government’s effort to divide Ebeling’s attempted theft into six separate offenses to be warranted by the fact that the statute used the phrase “any bag,” whereas the statutes in *Crepps* and *Snow* did not use similarly atomistic language. The Court’s conclusion regarding the effect of the word “any” was far from inescapable, however. In fact, nineteenth century courts sometimes interpreted the word “any” in a statute to preclude division of crime, where division would lead to arbitrary and excessive punishment. For example, in *New York Guaranty & Indemnity*, discussed above, the court interpreted statutory language punishing “any refusal or neglect” to file a tax return as creating a single offense that covered *all* acts of refusal and neglect prior to the bringing of the indictment.<sup>389</sup> The contrast between *New York Guaranty & Indemnity* and *Ebeling* demonstrates that the assumptions the court brings to bear in interpreting a penal statute will often determine whether the court finds an ambiguity calling for application of the rule of strict construction. The *New York Guaranty & Indemnity* Court started with the assumption that penal statutes should be strictly construed to prevent overpunishment, and so it interpreted the word “any” to restrict the number of penalties the government could seek for a given course of conduct. The *Ebeling* court started with no apparent concern about the effect its ruling would have on the government’s ability to bring multiple charges and obtain multiple punishments for conduct that had traditionally been treated as a single offense. It therefore interpreted the word “any” to permit — and even encourage — division of crimes and multiplication of punishments.

As Mila Sohoni<sup>390</sup> and Lawrence Solan<sup>391</sup> have shown, the transformation of the rule of strict construction of criminal statutes into the weak rule of lenity was largely completed by the middle of the twentieth century. Led by Justice Frankfurter,<sup>392</sup> the Court used instrumentalist reasoning to take a canon of construction that was historically “hostile toward the legislative process itself” and designed “to restrict the operation of an act to its narrowest permissible

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<sup>388</sup> See *id.* at 629-30.

<sup>389</sup> See *United States v. N.Y. Guar. & Indem. Co.*, 27 F. Cas. 133, 133 (S.D.N.Y. 1875).

<sup>390</sup> See Sohoni, *supra* note 132, at 1203-06.

<sup>391</sup> See Solan, *supra* note 124, at 104.

<sup>392</sup> See *id.*



compass”<sup>393</sup> into a rule that gives broad compass to legislative efforts to use criminal law to solve social problems. Justice Frankfurter described the change in the following way: “The rule comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers. That is not the function of the judiciary.”<sup>394</sup>

### 3. Instrumentalism and Double Jeopardy

Instrumentalism also led the Supreme Court to strip the Double Jeopardy Clause of much of its capacity to prevent multiple punishments for a single course of conduct. As the twentieth century progressed, legislatures increasingly enacted penal statutes that overlapped with each other almost completely, giving the government the opportunity to prosecute a defendant under multiple statutes for the same criminal act.<sup>395</sup> Defendants now faced a significant risk of two different types of division and stacking: temporal and statutory. Prosecutors who wished to increase an offender’s punishment could not only divide a single course of conduct into multiple temporal units, but could also prosecute that conduct under multiple overlapping statutes.

Both types of threat became reality in the landmark case of *Blockburger v. United States*.<sup>396</sup> In *Blockburger*, a government informant working under the direction of a federal agent asked the defendant for two dollars’ worth of morphine.<sup>397</sup> Blockburger obtained the morphine and brought it to her.<sup>398</sup> She then asked for an additional eight dollars’ worth of morphine, and Blockburger obtained this for her as well.<sup>399</sup> She then asked for ten dollars’ worth of morphine, and Blockburger brought it to her.<sup>400</sup> When she requested still more morphine,

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<sup>393</sup> SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344, 350 (1943).

<sup>394</sup> See *Callanan v. United States*, 364 U.S. 587, 596 (1961); Solan, *supra* note 124, at 104.

<sup>395</sup> See, e.g., William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 507 (2001) (“[F]ederal and state codes alike are filled with overlapping crimes, such that a single criminal incident typically violates a half dozen or more prohibitions.”).

<sup>396</sup> 284 U.S. 299 (1932).

<sup>397</sup> *Blockburger v. United States*, 50 F.2d 795, 798 (7th Cir. 1931) (Alschuler, J., dissenting).

<sup>398</sup> *Id.*

<sup>399</sup> *Id.*

<sup>400</sup> *Id.*

Blockburger said he could not get any more.<sup>401</sup> These sales all occurred within a single twenty-four hour period.<sup>402</sup>

Prosecutors brought a five-count indictment against Blockburger<sup>403</sup> that arguably contained both temporal and statutory divisions. First, it temporally divided Blockburger's course of conduct in selling morphine to the informant into a separate offense for each drug transaction. Second, it statutorily divided Blockburger's conduct by charging some of his transactions under two separate provisions of the Harrison Narcotic Act, one of which forbade the sale of morphine not in the original stamped package, and the other of which forbade the sale of morphine without an express written order.<sup>404</sup> Blockburger was ultimately convicted on three of these counts, relating to the second and third drug sales.<sup>405</sup> With respect to the second drug sale, he was convicted of selling morphine not in the original stamped package.<sup>406</sup> With respect to the third drug sale, he was convicted of selling morphine not in the original stamped package, and not pursuant to an express written order.<sup>407</sup> The judge imposed the maximum sentence on each count,<sup>408</sup> ordering that Blockburger serve three consecutive five-year sentences and pay three fines of \$2,000 each.<sup>409</sup>

Blockburger appealed his sentence to the U.S. Court of Appeals for the Seventh Circuit, and then to the Supreme Court.<sup>410</sup> He raised two double jeopardy arguments in his Supreme Court petition. First, he argued that his three drug transactions with the informant constituted a single offense that could only be punished once. Second, he argued that the third drug transaction could not be punished twice, even though it was covered by two different statutes with slightly different elements.<sup>411</sup>

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<sup>401</sup> *See id.*

<sup>402</sup> *See id.*

<sup>403</sup> *Blockburger v. United States*, 284 U.S. 299, 300-01 (1932).

<sup>404</sup> *See id.*

<sup>405</sup> *See id.* at 301.

<sup>406</sup> *Id.*

<sup>407</sup> *See id.*

<sup>408</sup> The penalty provision of the Harrison Narcotics Act provided, as quoted by the appellate court: "Any person who violates or fails to comply with any of the requirements of sections 211 and 691 to 707 of this title shall, on conviction, be fined not more than \$2,000 or be imprisoned not more than five years, or both, in the discretion of the court." (*Blockburger v. United States*, 50 F.2d 795, 799 (7th Cir. 1931) (Alschuler, J., dissenting) (quoting 26 U.S.C. § 705)).

<sup>409</sup> *Blockburger*, 284 U.S. at 301.

<sup>410</sup> *See id.* at 299-301.

<sup>411</sup> *See id.* at 301.

The Supreme Court quickly disposed of Blockburger's first argument. It held that "[t]he Narcotic Act does not create the offense of engaging in the business of selling the forbidden drugs, but penalizes any sale made in the absence of either of the qualifying requirements set forth."<sup>412</sup> Thus Blockburger's crime was not "continuous in its character" like the cohabitation at issue in *Snow* and *Nielsen*.<sup>413</sup> Just as the mailbag cutting offense discussed in *Ebeling* was completed every time the defendant cut a new bag, Blockburger's narcotics offense was complete every time he completed a new transaction.<sup>414</sup>

Interestingly, the *Blockburger* court never analyzed the text of the Harrison Narcotics Act to determine whether it punished an ongoing pattern of drug trafficking as a single continuous offense, or punished each transaction separately. The Court said that the statute penalized "any sale," but the statute did not actually use this language. One of the provisions under which Blockburger was prosecuted made it a crime to "sell, dispense, or distribute any of the aforesaid drugs [opium and other narcotics] except in the original stamped package."<sup>415</sup> The other provision made it a crime "to sell, barter, exchange, or give away any of the drugs specified in section 691 of this title, except in pursuance of a written order."<sup>416</sup> The statute made it a crime to "sell any drugs," but it did not explicitly authorize a separate punishment for "any sale," much less "each and every sale." As discussed above, nineteenth century courts read language like this to preclude division of a course of conduct into numerous offenses where such division created a risk of arbitrary and excessive punishment.<sup>417</sup> The *Blockburger* court, like the *Ebeling* court before it, seemed unconcerned about this risk.

The *Blockburger* court's decision to ignore the fact that its ruling would permit arbitrary and excessive stacking of punishments was all the more remarkable because the issue was raised by one of the Seventh Circuit judges who considered Blockburger's case before it went to the Supreme Court. Although the Seventh Circuit affirmed Blockburger's sentence, one judge dissented on the ground that the division of Blockburger's crime into a separate count for each drug transaction would give prosecutors too much power to dictate Blockburger's

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<sup>412</sup> *Id.* at 302.

<sup>413</sup> *See id.*

<sup>414</sup> *Id.* at 303.

<sup>415</sup> *Id.* at 301 n.1.

<sup>416</sup> *Id.* at 301 n.2.

<sup>417</sup> *See supra* Part II.A.4.

ultimate sentence.<sup>418</sup> The dissenting judge noted that the drug transactions at issue in this case were instigated by the informant, not Blockburger, and occurred in a more or less continuous series.<sup>419</sup> The fact that there were several transactions “was a device of the agent, not of appellant, who would no doubt have been quite as willing to sell the entire quantity at once.”<sup>420</sup> It was permissible for the government to use an informant to purchase drugs from the defendant, “but if . . . the government sees fit to make an installment affair of it, I do not think the government is in position to say that each installment of such a general operation constitutes a separate crime.”<sup>421</sup>

The Supreme Court also rejected Blockburger’s second argument, that the same drug transaction could not be punished twice even though two separate statutory provisions covered it. The Court employed what is now known as the “*Blockburger* test,” which holds 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.”<sup>422</sup> Because each of the two provisions under which Blockburger was convicted contained an element the other did not, it did not violate the Double Jeopardy Clause to punish him under both. If the legislature chose to write numerous penal statutes covering the same criminal conduct, and to allow that conduct to be punished over and over again, the *Blockburger* Court did not wish to stop it.

The “same elements” test did not originate with *Blockburger*. In fact, the *Blockburger* Court cited three cases that had previously applied the rule.<sup>423</sup> But it is worth remembering that the same elements test was first adopted in an era when there were relatively few criminal offenses, such offenses usually did not overlap, and when they did overlap a difference in statutory elements often signaled a significant difference in statutory object. By the time *Blockburger* was decided, our current era of statutory proliferation of crimes was already underway. In this new era, multiple statutes often cover the same conduct and often for essentially the same reason — a fact that makes

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<sup>418</sup> See *Blockburger v. United States*, 50 F.2d 795, 799 (7th Cir. 1931) (Alschuler, J., dissenting).

<sup>419</sup> *Id.*

<sup>420</sup> *Id.*

<sup>421</sup> *Id.* This analysis also fits well into modern discussions of “sentencing entrapment.” See sources cited *supra* note 114 and accompanying text.

<sup>422</sup> *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

<sup>423</sup> See *id.*

the “same elements” test an inadequate method of accomplishing the Double Jeopardy Clause’s purpose of preventing overpunishment. Just as the government can impose arbitrary and excessive punishments by dividing a single course of conduct into numerous smaller offenses, it can achieve the same effect by punishing a single course of conduct over and over under different overlapping statutory provisions.<sup>424</sup> This danger was not a matter of concern for the *Blockburger* Court.

#### 4. Instrumentalism and Cruel and Unusual Punishments

The Supreme Court decided one case in the first half of the twentieth century in which the defendant claimed that the division of his crime imposed a cruel and unusual punishment. *Badders v. United States*<sup>425</sup> involved a defendant who used the mail to further a fraudulent scheme. Badders was prosecuted under the federal mail fraud statute, which provided:

Whoever, having devised or intending to devise any scheme or artifice to defraud . . . shall, for the purpose of executing such scheme . . . place . . . any letter . . . in any post-office . . . to be sent or delivered by the post-office establishment of the United States . . . shall be fined not more than one thousand dollars, or imprisoned not more than five years, or both.<sup>426</sup>

Although Badders apparently engaged in a single fraud scheme, he was convicted of seven violations of the mail fraud statute on the ground that he sent seven letters in furtherance of this scheme.<sup>427</sup> The judge gave Badders the maximum sentence of five years imprisonment

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<sup>424</sup> An additional source of potentially arbitrary and excessive punishment is the near-total overlap of state and federal criminal law. The Supreme Court has held that it does not violate the Double Jeopardy Clause for a state government and the federal government to try and punish a defendant twice for the same offense because they are semi-independent sovereigns. *Heath v. Alabama*, 474 U.S. 82, 88 (1985); *Abbate v. United States*, 359 U.S. 187, 195 (1959); see *Bartkus v. Illinois*, 359 U.S. 121, 138-39 (1959). The idea that federal and state law enforcement are “independent” of each other appears increasingly unrealistic in light of the extensive cooperation and coordination currently undertaken by federal and state law enforcement, exemplified by increasingly prevalent federal-state task forces. See, e.g., Sara Sun Beale, *Federalizing Hate Crimes: Symbolic Politics, Expressive Law, or Tool for Criminal Enforcement?*, 80 B.U. L. REV. 1227, 1275 (2000) (discussing cooperation and coordination between state and federal law enforcement).

<sup>425</sup> *Badders v. United States*, 240 U.S. 391 (1916).

<sup>426</sup> Act of March 4, 1909, ch. 321, § 215, 35 Stat. 1130, 1130.

<sup>427</sup> *Badders*, 240 U.S. at 393.

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and a one thousand dollar fine for each count of conviction.<sup>428</sup> The judge ordered that the sentences of imprisonment be served concurrently, so that Badders's total sentence was five years imprisonment and a \$7,000 fine.<sup>429</sup>

Badders appealed his sentence to the Supreme Court, arguing that the district court imposed a cruel and unusual punishment and an excessive fine under the Eighth Amendment. The Supreme Court rejected this argument.<sup>430</sup> Citing *Ebeling*, it held that “there is no doubt that the law may make each putting of a letter into the post office a separate offense. And there is no ground for declaring the punishment unconstitutional.”<sup>431</sup> The Court provided no analysis beyond this, and so it is difficult to determine how it reasoned its way to this conclusion. It may have been significant that Badders' prison terms were concurrent, so that the only aspect of his punishment that appeared excessive was his \$7,000 fine — but the Court never actually said this. Thus *Badders* opened the door to the idea that it was not cruel and unusual to punish an offender over and over again for the same course of conduct, so long as such repeated punishment appeared authorized by the text of the statute. This holding stood in stark contrast to Justice Field's statement in *O'Neil v. Vermont* that although the government could forbid the drinking of a glass of liquor, it would be an “unheard-of cruelty” to divide the glass into a thousand drops and punish the drinking of each drop separately.<sup>432</sup> Letters sent in furtherance of a fraud scheme are, in some ways, like those drops of liquor. A defendant might send one, or seven, or a hundred letters to a single victim in furtherance of a relatively small fraud scheme. Under the reasoning of *Badders*, the government is permitted to seek an additional five-year sentence for each letter. Perhaps the *Badders* court did not consider the possibility that the government would seek to stack up punishments in this way, although its citation of *Eberling* indicates that it must have been aware of the possibility. In any event, the permissive language of *Badders* is a forerunner of the Supreme Court's current Eighth Amendment jurisprudence, which holds that there are virtually no limits to the prison sentence that may be imposed upon an adult offender.<sup>433</sup>

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<sup>428</sup> *See id.*

<sup>429</sup> *See id.*

<sup>430</sup> *Id.* at 393-94.

<sup>431</sup> *Id.* (citing *Ebeling v. Morgan*, 237 U.S. 625 (1915)).

<sup>432</sup> *O'Neil v. Vermont*, 144 U.S. 323, 340 (1892) (Field, J., dissenting).

<sup>433</sup> *See Ewing v. California*, 538 U.S. 11, 27-28 (2003) (plurality opinion); *Harmelin v. Michigan*, 501 U.S. 957, 1003-04 (1991) (Kennedy, J., concurring in part

### 5. Concerning Instrumentalism and Overpunishment

The instrumentalist revolution attacked the idea that legislative power should be constrained by morality or tradition. According to the instrumentalists, the law held no inherent preferences or purposes, no “delight” in life and liberty. The only relevant preferences and purposes were those displayed in the statutes enacted by the legislature. Therefore, it was not the job of judges to restrain legislators from expanding the scope or severity of criminal law beyond common law limits. Rather, judges should cooperate with governmental efforts to use the criminal law as a tool of social control, even where the government’s plan would result in much harsher treatment than longstanding prior practice would permit. Cases decided during the first half of the twentieth century, from *Eberling*, to *Blockburger*, to *Badders*, showed a remarkable lack of concern about the fact that the government was employing novel units of prosecution enabling it to obtain multiple convictions for a single course of conduct and impose cumulative punishments that were arbitrary and excessive in light of prior practice. That lack of concern survives to this day.

#### B. Where Do We Go from Here?

We live in a world of excessive punishments. The Weldon Angelos case was a troubling example of one of the ways in which prosecutors can impose excessive punishments on defendants whom they disfavor — but it was far from the only example. The number of incarcerated people in the United States has grown from around 300,000 in 1970 to 2.25 million today.<sup>434</sup> Nearly 160,000 prisoners are currently serving life sentences,<sup>435</sup> many of which are for nonviolent offenses.<sup>436</sup> Over 500,000 prisoners are serving sentences of twenty years or more.<sup>437</sup>

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and concurring in the judgment).

<sup>434</sup> See Douglas A. Berman, *Re-Balancing Fitness, Fairness, and Finality for Sentences*, 4 WAKE FOREST J.L. & POL’Y 151, 163 (2014) (citing LAUREN E. GLAZE & ERIKA PARKS, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES 2011 (2012), available at <http://www.bjs.gov/content/pub/pdf/cpus11.pdf>).

<sup>435</sup> *Id.* at 164 (citing ASHLEY NELLIS, THE SENTENCING PROJECT, LIFE GOES ON: THE HISTORIC RISE IN LIFE SENTENCES IN AMERICA 2, 5 (2013), available at [http://sentencingproject.org/doc/publications/inc\\_Life%20Goes%20On%202013.pdf](http://sentencingproject.org/doc/publications/inc_Life%20Goes%20On%202013.pdf)).

<sup>436</sup> See AM. CIVIL LIBERTIES UNION, A LIVING DEATH: LIFE WITHOUT PAROLE FOR NONVIOLENT OFFENSES 2, 22 (Nov. 2013), available at <https://www.aclu.org/files/assets/111813-lwop-complete-report.pdf> (finding 3,278 prisoners serving life imprisonment for drug, property or other nonviolent crimes in the United States as of 2012).

<sup>437</sup> See Berman, *supra* note 434, at 164 (citing MARC MAUER ET AL., THE SENTENCING PROJECT, THE MEANING OF “LIFE”: LONG PRISON SENTENCES IN CONTEXT 11 (2004)).

Hundreds of thousands of these sentences are so long that the offender is very likely to die in prison.<sup>438</sup> The instrumentalist dream of using criminal law as an instrument of social control has been fulfilled with a vengeance.<sup>439</sup>

Starting in the 1950s, the Supreme Court made sporadic efforts to step back from the brink by imposing moral limitations on the government's power to punish.<sup>440</sup> These efforts have generally foundered because the Court could not find a judicially administrable standard for imposing such limits.<sup>441</sup> The Court announced in 1958 that the state's power to punish was limited by "the evolving standards of decency that mark the progress of a maturing society."<sup>442</sup> The Court held in 1983 that it was cruel and unusual to impose a life sentence on a recidivist convicted of passing a \$100 no-account check.<sup>443</sup> Just a few years later, however, the Court reversed course and held that questions about the justification and duration of imprisonment of adult offenders are almost completely a matter of legislative prerogative.<sup>444</sup> In 1990, the Supreme Court replaced the *Blockburger*

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<sup>438</sup> See *id.*

<sup>439</sup> This is not to say that all (or even most) instrumentalists approve our current state of mass incarceration. But as the preceding discussion shows, instrumentalism has been (for lack of a better word) instrumental in removing traditional moral limitations on government's power to punish. See generally *Ewing v. California*, 538 U.S. 11, 17-18, 25 (2003) (upholding sentence of twenty-five years to life for recidivist convicted of shoplifting under California's three strikes law, on the ground that the legislature could rationally conclude that the sentence furthered goals of deterrence and incapacitation).

<sup>440</sup> Many of these efforts focused on reviving the culpability principle in the wake of the Supreme Court's previous endorsement of strict liability offenses. See John F. Stinneford, *Punishment Without Culpability*, 102 J. CRIM. L. & CRIMINOLOGY 653, 658, 687 (2012) [hereinafter *Punishment Without Culpability*]; see, e.g., *Robinson v. California*, 370 U.S. 660 (1962) (holding it unconstitutional to punish individual for status of being addicted to narcotics); *Smith v. California*, 361 U.S. 147 (1959) (reading statute to impose mens rea requirement where strict liability reading of statute would threaten First Amendment values); *Lambert v. California*, 355 U.S. 225 (1957) (holding it unconstitutional to punish defendant for omission she neither knew nor had reason to know was illegal); *Morissette v. United States*, 342 U.S. 246 (1952) (interpreting federal criminal statute as containing mens rea requirement).

<sup>441</sup> See Stinneford, *Punishment Without Culpability*, *supra* note 440, at 694-97; see, e.g., *Powell v. Texas*, 392 U.S. 514, 514, 534-37 (1968) (refusing to extend *Robinson v. California* to prohibit criminal punishment of chronic alcoholic convicted of public intoxication).

<sup>442</sup> See *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

<sup>443</sup> *Solem v. Helm*, 463 U.S. 277, 281, 303 (1983).

<sup>444</sup> See *Harmelin v. Michigan*, 501 U.S. 957, 1002-04 (1991) (Kennedy, J., concurring in part and concurring in the judgment) (plurality opinion) (citing *Solem*, 463 U.S. at 296-97) (upholding conviction of life imprisonment without parole for



“same elements” test for double jeopardy with an “essential elements” test designed to reduce the likelihood that the government would repeatedly seek to punish the same course of conduct under multiple overlapping criminal statutes.<sup>445</sup> It abandoned this test a mere three years later, partly on the ground that it was not judicially administrable.<sup>446</sup> The Court’s use of the rule of lenity as a serious limitation on the imposition of multiple punishments for the same offense was also very short-lived.<sup>447</sup>

We cannot turn back the clock and ask courts simply to adopt a nineteenth century worldview. The idea that there is such a thing as natural law, and that such law should inform the meaning and application of positive law, no longer enjoys anything like universal consensus. Moreover, any effort to bring substance back to the Cruel and Unusual Punishments Clause, the Double Jeopardy Clause, and the rule of strict construction of penal statutes must, if it is to be successful, provide judicially administrable standards for adjudicating claims. These are difficult problems, but we have sufficient resources in the Constitution itself to start moving things in the right direction.

First, as argued in Part II.A above (and more extensively elsewhere)<sup>448</sup> we can recover a robust and judicially enforceable definition of “excessive punishments.” Under the original meaning of the Cruel and Unusual Punishments Clause, a punishment is excessive if it is significantly harsher than the punishments previously imposed

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possessing 672 grams of cocaine, distinguishing *Solem*’s facts as in a “different category” from “any standpoint”)

<sup>445</sup> See *Grady v. Corbin*, 495 U.S. 508, 521 (1990), *overruled by* *United States v. Dixon*, 509 U.S. 688 (1993).

<sup>446</sup> See *United States v. Dixon*, 509 U.S. 688, 709, 711 (1993) (“*Grady* was not only wrong in principle; it has already proved unstable in application.”).

<sup>447</sup> Compare *Bell v. United States*, 349 U.S. 81, 83-84 (1955) (interpreting the Mann Act to permit only one punishment for a defendant who transported two women across state lines in a single trip and stating that “if Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses . . .”), with *Gore v. United States*, 357 U.S. 386, 391 (1958) (interpreting three overlapping provisions of federal narcotics law to permit multiple punishments for a single transaction based on the Court’s belief that these provision had the purpose “of dealing more and more strictly with, and seeking to throttle more and more by different legal devices, the traffic in narcotics”). The *Gore* Court distinguished *Bell* because *Bell* discussed a single provision, not three provisions as in *Gore*. *Id.* Chief Justice Warren dissented in *Gore*, arguing that “the present purpose of these statutes is to make sure that a prosecutor has three avenues by which to prosecute one who traffics in narcotics, and not to authorize three cumulative punishments for the defendant who consummates a single sale.” *Id.* at 394 (Warren, C.J., dissenting).

<sup>448</sup> See Stinneford, *Rethinking Proportionality*, *supra* note 11, at 961-78.

over a long period of time for the same or similar offenses. This standard is based upon the common law ideology that predominated at the time the Constitution was adopted and throughout the nineteenth century. That ideology considered “long usage” the best standard for determining the goodness of a governmental practice. Long usage showed that the practice enjoyed the consent of the people over a period of multiple generations, that it fit the needs of society, and that it was consistent with basic principles of justice. A new practice that undermined rights established through long usage, on the other hand, was presumptively unjust.

The “long usage” conception may also permit development of a more protective approach to the Double Jeopardy Clause.<sup>449</sup> As discussed above, the Supreme Court currently holds that the Double Jeopardy Clause permits legislatures to create multiple offenses that cover the same conduct and to authorize multiple punishments for the same offense.<sup>450</sup> The Clause would be far more protective if courts continued to ask, as they did prior to the twentieth century, the following questions: (1) Does the government’s proposed mode of prosecution give it the power to bring multiple charges based on a single course of conduct?; (2) If so, would such charges permit the imposition of a cumulative punishment that is arbitrary and excessive in relation to the offender’s culpability, measured in light of prior punishment practice?<sup>451</sup> This analysis would apply whether the

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<sup>449</sup> The approach gestured at here is far from a full-fledged theory of Double Jeopardy. A full articulation of such a theory would need to grapple with numerous complicated problems — for example, the relation of double jeopardy to compound-complex statutes that include predicate offenses as elements, as well as the parallel existence of criminal and civil sanctions covering many areas of crime. *See, e.g., King, supra* note 100, at 103 (discussing problems posed by the “remarkable increase . . . in the imposition of overlapping civil, administrative, and criminal sanctions for the same misconduct”); Susan R. Klein & Katherine P. Chiarello, *Successive Prosecutions and Compound Criminal Statutes: A Functional Test*, 77 TEX. L. REV. 333, 334-40 (1998) (proposing a test for determining when prosecutions for violation of both compound-complex statutes and the predicate offenses upon which such violations are based violates the prohibition of double jeopardy). Such articulation is far beyond the scope of the present article.

<sup>450</sup> *See, e.g., Missouri v. Hunter*, 459 U.S. 359, 368 (1983) (“[W]e have utilized [statutory construction] only to limit a federal court’s power to impose convictions and punishments *when the will of Congress is not clear*.” (emphasis added)); *Brown v. Ohio*, 432 U.S. 161, 169 n.8 (1977) (recognizing that Ohio’s dual prosecution on a single provision would not have violated double jeopardy if Ohio segmented the provision temporally (i.e., daily) or if Ohio’s courts gave the statute a temporal interpretation (conditioned on due process requirements)).

<sup>451</sup> One concern that arises from any effort to use prior practice as a measure of the goodness of current punishment practice is that much of what we do today is different

government was proposing a novel unit of prosecution for an offense, or was seeking to punish a single course of conduct under multiple criminal statutes.<sup>452</sup>

Finally, courts can and should transform the weak and theoretically bankrupt rule of lenity back into the strong, normatively robust rule of strict construction of penal statutes. The rule of strict construction of penal statutes is based upon the premise that the law “delights” in life and liberty, and that it is the duty of the judiciary to narrowly construe penal statutes that expand the scope or severity of the criminal law. The basis for this rule in the modern American legal system is not the natural law as revealed through the common law, but the preference for life and liberty reflected in Declaration of Independence,<sup>453</sup> the

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from what was done at common law. *See, e.g.*, Klein, *supra* note 44, at 1005 (“History will not assist us [in determining the correct amount of punishment for a given course of conduct], as penalties for common law crimes have changed over time, and most of today’s crime did not exist at common law.”).

This obstacle is not as daunting as it first appears, however, for two reasons. First, prior practice does not mean “what we used to do” but “what we have done up until now.” Phrased differently, the standard I propose has the capacity to adapt to changes in the culture, and blocks only abrupt and significant deviations from prior practice. *See, e.g.*, Stinneford, *Death, supra* note 174, at 590 (“[T]he Court must compare [new punishments] with the punishment practices that have prevailed until now. If it is significantly harsher than those practices, it is cruel and unusual.”); Stinneford, *Rethinking Proportionality, supra* note 11, at 899 (“[P]roportionality should be measured primarily in relation to prior punishment practice.”).

Second, many “new” crimes are sufficiently analogous to traditional common law crimes that the punishment imposed can fruitfully compared to prior practice. Bribery is bribery, whether it is punished under the mail fraud statute (18 U.S.C. § 1341), the Hobbs Act (18 U.S.C. § 1951), the federal bribery statute (18 U.S.C. § 201), or the federal program bribery statute (18 U.S.C. § 666). Although there are sometimes differences between overlapping statutory offenses that are significant enough to justify some difference in degree of punishment, the core similarities should be sufficient to allow a court to determine whether treating them as separate offenses subject to multiple punishments would permit arbitrariness and excess.

<sup>452</sup> Michael L. Seigel and Christopher Slobogin have proposed that judges use their common law power to create a “law of counts” that would operate in a similar manner to the standard I am proposing, although it would not be based directly on the Double Jeopardy Clause. The “law of counts” would authorize courts to “conduct a pre-trial review of an indictment to determine if the charges in it were duplicative” and “merge” all counts that “deal with the same conduct or transaction.” Michael L. Seigel & Christopher Slobogin, *Prosecuting Martha: Federal Prosecutorial Power and the Need for a Law of Counts*, 109 PENN ST. L. REV. 1107, 1128-29 (2005).

<sup>453</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”).

Fifth and Fourteenth Amendment's Due Process Clauses,<sup>454</sup> and the numerous protections the Constitution provides criminal defendants.<sup>455</sup> A court may appropriately conclude that the legislature would not wish to enact a statute that authorized arbitrary and excessive punishments, and may use this principle in determining whether a penal statute contains an ambiguity to which the rule of strict construction of penal statutes may fruitfully be applied.

Recovery of the original meaning and purpose of the Cruel and Unusual Punishments Clause, the Double Jeopardy Clause, and the rule of strict construction of penal statutes would provide Weldon Angelos three plausible bases for invalidating his punishment.

First, Angelos's fifty-five year sentence for gun possession was almost certainly excessive under the original meaning of the Cruel and Unusual Punishments Clause. A punishment is cruel and unusual if it is significantly harsher than longstanding punishment practice would permit for the same or similar crimes. As the district court noted at

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<sup>454</sup> U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."); U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .").

<sup>455</sup> See U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed."); U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any Bill of Attainder [or] ex post facto Law . . ."); U.S. CONST. art. III, § 2, cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the trial shall be at such Place or Places as the Congress may by Law have directed."); U.S. CONST. art. III, § 3, cl. 1 ("No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court."); U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . ."); U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."). U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."); see also John F. Manning, *Lessons from a Nondelegation Canon*, 83 NOTRE DAME L. REV. 1541, 1541-42 (2008) (arguing that courts can use canons of statutory construction to address situations in which "official action does not squarely offend an express constitutional guarantee" but still "intrude[s] upon widely shared background constitutional values").

sentencing, Angelos' punishment was harsher than punishments for more serious crimes in the federal system and for the same crime in every state system.<sup>456</sup> There is no evidence that gun possession — whether in relation to a drug crime or not — has ever previously been punished as harshly as § 924(c) authorizes. Section 924(c) itself originally called for a punishment of one to ten years for a first offense, and five to twenty-five years for a second or subsequent conviction.<sup>457</sup> It did not require that these punishments be served consecutively to any other punishment.<sup>458</sup> The current penalty provisions of § 924(c) are, on their face, five times as harsh as the original provisions.<sup>459</sup> Because these provisions require that each sentence imposed under § 924(c) be served consecutively to any other punishment,<sup>460</sup> the actual sentence imposed under them will often be far more than five times as harsh as they originally would have been.<sup>461</sup> This exponential increase in punishment severity is part of the criminal justice system's general march toward ever-greater harshness over the past forty years,<sup>462</sup> and is part of the reason hundreds of thousands of offenders are currently serving effective life sentences in prison. The punishments authorized under § 924(c), like many of the new punishments authorized over the last forty years, are unprecedented in their harshness and are therefore cruel and unusual.

Second, Angelos could make a strong argument that his sentence ran contrary to the original meaning and purpose of the Double Jeopardy Clause because he was subjected to multiple punishments for a single gun possession. Angelos's argument would be similar to the argument Blockburger raised unsuccessfully back in the 1930s.<sup>463</sup> The unit of prosecution under § 924(c) should be the firearm possession rather than the individual drug transaction because this is the only reading that prevents the government from imposing punishments that are arbitrary and excessive in relation to the offender's culpability.

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<sup>456</sup> See *United States v. Angelos*, 345 F. Supp. 2d 1227, 1258-59 (D. Utah 2004).

<sup>457</sup> See Gun Control Act of 1968, Pub. L. No. 90-618, § 102, 82 Stat. 1213, 1224.

<sup>458</sup> *Id.*

<sup>459</sup> See 18 U.S.C. § 924(c)(1)(A)(i)–(C)(i) (2012).

<sup>460</sup> 18 U.S.C. § 924(c)(1)(D)(ii).

<sup>461</sup> For example, if Weldon Angelos had been convicted of three violations of the original version of § 924(c), his mandatory minimum sentence would have been five years imprisonment. Today his mandatory minimum sentence is fifty-five years, an eleven-fold increase.

<sup>462</sup> See, e.g., Sara Sun Beale, *Still Tough on Crime? Prospects for Restorative Justice in the United States*, 2003 UTAH L. REV. 413, 414-18 (describing the increasing harshness of criminal punishment during the final decades of the twentieth century).

<sup>463</sup> *Blockburger v. United States*, 284 U.S. 299, 299-301 (1932).

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Because the government often has the power to determine how many “controlled buys” an informant or undercover agent will make from the offender, a unit of prosecution based on the individual drug transaction would enable prosecutors to decide for themselves whether a small-time offender like Angelos will serve five, or fifty-five, or five hundred and fifty-five years in prison.

In fact, Angelos could argue that *Blockburger* itself was wrongly decided, and that the narcotics trafficking statute under which Angelos was also prosecuted, 21 U.S.C. § 841(a)(1), should be interpreted as creating a continuing offense. § 841(a)(1) makes it a crime for anyone “knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.”<sup>464</sup> This language does not clearly indicate that each sale of narcotics should be considered a separate offense. It does not, for example, say that the offender should be punished for “each and every act of distribution.” Moreover, at least some of the conduct listed in the statute — particularly manufacturing — seems to imply some sort of duration. Given this ambiguity about the intended unit of prosecution, Angelos could argue that § 841(a)(1) creates a continuing offense, and that punishing him several times under this statute violates the Double Jeopardy Clause.

Because penalties under § 841(a)(1) are driven by drug weight rather than the number of transactions, interpreting this statute as a continuous offense would not dramatically change the punishments available for narcotics trafficking. What such a reading would do, however, is moderate the effect of 18 U.S.C. § 924(c) even if the court finds that the unit of prosecution under § 924(c) should be the drug offense rather than the gun possession. Under such a reading of § 841(a)(1), the defendant would get an extra five years in prison the first time he was convicted of using, carrying or possessing a firearm in relation to his ongoing narcotics offense. If he persisted in using guns to further his narcotics trafficking efforts after the first conviction, he would get an extra twenty-five years in prison. In short, interpreting 21 U.S.C. § 841(a)(1) as a continuing offense would transform 18 U.S.C. § 924(c) into a much more traditional recidivism statute that creates far less risk of arbitrary and excessive punishments. The government would still have some ability to increase the defendant’s punishment by obtaining a larger quantity of drugs through controlled buys, but it would not be able to obtain automatic twenty-five year escalations for every single controlled buy.

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<sup>464</sup> 21 U.S.C. § 841(a)(1) (2012).

Finally, application of the rule of strict construction of penal statutes would likely have a dramatic effect upon Angelos's potential sentence irrespective of the division and stacking issue. Recall that in *Deal v. United States*,<sup>465</sup> the Supreme Court interpreted § 924(c) to require the escalation of mandatory minimum sentence from five to twenty-five years for a second count of conviction, even where the second count is brought in the same case as the first. Similarly, in *Smith v. United States*,<sup>466</sup> the Court interpreted the word "use" in § 924(c) to cover efforts to sell one's firearm in exchange for drugs. In both cases, the Supreme Court adopted a broad reading of the statutory provision despite an apparent textual ambiguity, because the Court did not think the legislature had expressed the intent that the provision be interpreted narrowly. If the Supreme Court started with the premise that the law delights in liberty and finds confinement odious, it could appropriately presume that the legislature would not want § 924(c) to be interpreted to authorize arbitrary and excessive punishments. Since excessiveness is measured in relation to prior practice, one of the main questions would be whether a given reading of the statute would cause it to depart from prior punishment practice in the direction of greater harshness.

The Supreme Court's readings of § 924(c) in *Deal* and *Smith* both caused § 924(c) to diverge from prior punishment practice in the direction of arbitrariness and excess. *Deal* made § 924(c) depart from prior recidivism statutes by requiring an escalation of punishment without showing that the offender continued his illegal conduct after a prior conviction. *Smith* made § 924(c) diverge from prior statutes punishing gun use by allowing a conviction even where the gun is not used as a weapon, but as barter. Under the rule of strict construction of penal statutes, both cases were decided incorrectly. Overturning *Smith* would not directly benefit Angelos because he was convicted under the "possession" prong of § 924(c), not the "use" prong. Overturning *Deal*, on the other hand, would reduce Angelos's sentence under § 924(c) from fifty-five years to fifteen years. Angelos would still spend an awfully long time in prison, but he would at least have the chance to know his children and grandchildren at some point.

#### CONCLUSION

The power to divide the unit of prosecution entails the power to impose excessive punishments. Where the government arbitrarily

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<sup>465</sup> 508 U.S. 129 (1993).

<sup>466</sup> 508 U.S. 223 (1993).

carves up a single course of conduct into multiple offenses in order to obtain multiple punishments, criminal offenders are often punished well beyond their desert. The Supreme Court's current approach to the Cruel and Unusual Punishments Clause, the Double Jeopardy Clause, and the rule of lenity is inadequate to deal with this problem because the Court focuses on deference to the legislature rather than the prevention of excessive punishments. This problem can be solved if the Court returns to the original meaning and purpose of these doctrines. The Cruel and Unusual Punishments Clause prohibits punishments that are excessive in light of prior practice. The Double Jeopardy Clause prohibits multiple prosecutions for the same offense, even where those prosecutions occur as part of the same case, as a means of reducing the risk of excessive punishment. The rule of strict construction of penal statutes reflects the fact that the law loves life and liberty, and finds arbitrary and excessive punishment odious. Courts may appropriately read criminal statutes narrowly based on the presumption that lawmakers would not intend to enact a statute that authorizes arbitrary and excessive punishment.