

Picking up the Pieces of the Gordian Knot: Towards a Sensible Merger
Methodology

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In an apparent attempt to demonstrate that “succinct” is an art form, Justice John Flaherty of the Pennsylvania Supreme Court summed up the relevant criminal wrongdoings of Steven Keith Anderson in this way: “On October 31, 1987 Anderson shot Norma DeBooth in the neck as she stood at the kitchen sink preparing dinner. She is now a quadriplegic.”²

Struck as the reader may be with the pathos of this horrible circumstance, they will learn nothing more of about the whys and wherefores of its occurrence. The reader will not be told who Anderson was in relation to Ms. DeBooth, whether it was passion or greed or sheer malevolence over what she was cooking that motivated his pulling the trigger, or whether the future may bring her hope of recovery. Rather, all we will learn is that Anderson was convicted under the laws of Pennsylvania of both attempted murder and aggravated assault and, more importantly, that he was sentenced consecutively for each crime.³ For the legacy of this tragic and fateful encounter is that in its brief retelling, the Pennsylvania Supreme Court set the legal stage for the announcement of Pennsylvania’s seminal opinion on the law of merger.

Of all the things to talk about in Anderson’s case, or anyone else’s for that matter, why talk about merger? More to the point for those who have read this far and are morbidly fascinated about continuing, why is merger a topic worth the time it will take

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2. Commonwealth v. Anderson, 650 A.2d 20, 21 (Pa. 1994).

3. *Anderson*, 650 A.2d at 21.

you to reach the conclusion? There are two very good reasons for this effort that students of law, particularly those who practice and adjudicate it, will appreciate. There is also one more I will save for the end that may help remind us of the deeper and nobler business we are about every day in the criminal courts of the nation.

The first reason is that once enough people who have the responsibility to address the jurisprudence of the Double Jeopardy Clause read Professor Anne Poulin's recent article, *Double Jeopardy and Multiple Punishment: Cutting the Gordian Knot*,⁴ the law regarding merger will change. While I will discuss more details of Professor Poulin's work later, suffice it to say here that it compels Double Jeopardy Clause analysis to henceforth proceed along a path solely concerned with successive prosecution situations. Merger is left on an island, an issue of non-constitutional dimension, an issue where the "only question is whether the punishment exceeds that intended by the legislature."⁵ Merger is about to be permanently uprooted from its perceived foundation in Double Jeopardy, and dealing with that displacement is an issue that must be addressed.

Second, merger analysis has been, to be charitable, a mess. In this context, I will use the law of Pennsylvania as an illustration of the severe problems courts have encountered in dealing with it, but the problem runs deep, in Pennsylvania and elsewhere.

Demonstrating an unusual gift for understatement, the Pennsylvania Supreme Court has characterized merger as "not an easy problem" that readily devolves into the kind of policy debate (rehabilitation versus incapacitation) that judges should rightly avoid.⁶ A distinguished member of the Superior Court of Pennsylvania has observed that

4. Anne B. Poulin, *Double Jeopardy and Multiple Punishment: Cutting the Gordian Knot*, 77 U. Colo. L. Rev. 595 (2006).

5. Poulin, *supra* note 3 at 597.

6. *Anderson*, 650 A.2d at 21.

there have “not been many issues that have received from the courts more uneven treatment than claims that offenses have merged for the purposes of sentencing.”⁷ Merger approaches announced in one case are often repudiated not long after,⁸ and garnering a majority approach on even one aspect of the doctrine is difficult.⁹

Merger is a doctrine in search of a methodology. For years, courts have recognized their inability to establish a coherent approach to the matter. Merger has little of a true identity in the law, and the law is not sure what to do with it. In short, it is a mess.

Looking for its historical origins will not help clean up the mess. The doctrine of merger is rooted in English common law¹⁰ principles that provided that a misdemeanor would *merge* into a felony, if one act resulted in both a felony and a misdemeanor.¹¹ At common law felonies were not merged into felonies and misdemeanors were not merged into misdemeanors.¹²

There have been multiple theories advanced as to the underlying purpose of the common law merger doctrine. Some commentators argue that the rule reflected the

7. Commonwealth v. Campbell, 505 A.2d 262, 269 (Pa. Super. Ct. 1986).

8. See Commonwealth v. Leon Williams, 559 A.2d 25 (Pa. 1989)

At step two a court has to determine exactly how the Commonwealth has been injured (how many “evils” are present) based on the court’s understanding of the Commonwealth’s interests and the facts of the case. Although we ourselves promulgated this analysis in Michael Williams, we now feel the analysis is flawed and must be abandoned.

Leon Williams, 559 A.2d at 27.

9. Commonwealth v. Gatling, 807 A.2d 890, 901 (Pa. 2002). The *Gatling* opinion was but a plurality, as later courts were quick to point out. See Commonwealth v. Shank, 883 A.2d 658, 669 (Pa. Super. Ct. 2005).

10. See Nolan, Mark E., *Comment: Diverging Views on the Merger of Criminal Offenses: Colorado Has Veered Off Course*, 66 U. COLO. L. REV. 523, 525 (1995).

11. United States v. Walker, 514 F. Supp. 294, 307 (E.D. La 1981) (citing W. La Fave & A. Scott, Handbook of Criminal Law § 60, at 452 (1972); 1 C. Torcia, Wharton’s Criminal Law § 24, at 111 (1978 & Supp.1981).

12. Nolan, *supra* note 2, at 525.

procedural differences between misdemeanor and felony trials at common law, with misdemeanor trials affording the accused many rights that were not similarly granted in felony proceedings.¹³ Another justification for merger is that it was intended to prevent defendant harassment by reprosecution for the same conduct.¹⁴ The merger rule may have also developed based on the notion that the defendant's mens rea and the social harm resulting from his conduct are the same, and therefore to divide the defendant's conduct is illogical.¹⁵

The passage of time took its toll on these theories justifying the common law merger doctrine. Felony defendants were eventually afforded the same procedural protections as misdemeanor defendants.¹⁶ Also passing was the era of common law crimes where courts were integral in setting elements that determined degrees of guilt and potential punishments. Pennsylvania, for example, explicitly abolished common law crimes, and proclaimed that something is a crime if, and only if, the legislature has so designated it in the Pennsylvania Crimes Code.¹⁷ Common law merger was abandoned by the English courts in 1851¹⁸ and most American courts have repudiated it as well.¹⁹

But old habits die hard. The courts sometimes cannot help themselves thinking that they still dictate the societal judgment of what a crime is and what its maximum penalty should be. Whether using the common law or the Constitution, they try to find

13. At trial for a misdemeanor the defendant was entitled to a copy of the charges against him, to be granted bail, to compulsory process to obtain witnesses in his favor, to examine his witnesses under oath, to a special jury, and to be assisted by counsel. *Walker*, 514 F. Supp. at 308 (citing 1 C. Torcia, § 24, at 111; Glazerbrook, *The Merging of Misdemeanors*, 78 L.Q.REV. 560, 572-73 (1962)).

14. *Id.* (citing Glazerbrook, 78 L.Q.REV. at 567, 570; 1962 CAMBRIDGE L.J. 8).

15. *Id.* (citing 1962 CAMBRIDGE L.J. at 9-10).

16. Nolan, *supra* note 2, at 525.

17. 18 Pa.C.S. §107(b); *Commonwealth v. Aponte*, 855 A.2d 800, 808 (Pa. 2004).

18. Nolan, *supra* note 2, at 525.

19. *Walker*, 514 F. Supp. at 308.

devices to indulge their desire to resist surrendering this sacred ground to the legislature. That resistance may be at the root of the mess that surrounds merger.

But with the evolution of the jurisprudence in this area, coherence in a merger methodology is within reach. Forced to explicitly let go of the common law legacy in this area, the courts must now accept that this evolution has revealed a major premise that permeates all aspects of a reasoned analysis of any merger problem. That premise is where we begin.

A. The Major Premise: A Gordian Knot Broken

The major premise is this: **merger is not a constitutional issue. It is, from beginning to end and in all particulars, an issue of statutory construction.** The court's sole task is to discern the intent of the legislature about whether the defendant is eligible for consecutive sentences for violating two or more sections of the Crimes Code. To answer merger questions, no part of the Constitution, not even the Double Jeopardy Clause that we are so fond of raising when we speak of merger, need be consulted.

While courts have sometimes divorced double jeopardy principles from merger,²⁰ more often they have seen them as complimentary or even symbiotic doctrines. The Pennsylvania Supreme Court has held, for example, that “there is no difference between a double jeopardy analysis and a merger analysis: double jeopardy and merger are identical and the operative consideration in both is whether the elements of the offenses are the same or different.”²¹

20. *Commonwealth v. Sayko*, 515 A.2d 894 (Pa. 1986). “Double jeopardy prohibits the imposition of more than one punishment for the same offense; the defendant here was sentenced for separate, different criminal acts.” *Sayko*, 515 A.2d at 895 (quoting *Abney v. United States*, 431 U.S. 651 (1977)).

21. *Anderson*, 650 A.2d at 24. *See also* *Commonwealth v. Comer*, 716 A.2d 593,598 (Pa. 1998). *See also* *Commonwealth v. McCoy*, 895 A.2d 18 (Pa. Super. Ct. 2006) @***13

But as Professor Poulin argues, the doctrines do not equate.²² In an extensive and thoughtful rendering of the matter, she demonstrates that while the test from *Blockburger v. United States*²³ is used for both successive prosecution and multiple punishment (merger) analysis, it is truly a test for legislative intent only, and is ill suited to the core double jeopardy concerns arising in the successive prosecution cases.²⁴ By tying the merger analysis to the successive prosecution strand, she argues, the courts have created a Gordian knot which weakens the constitutional protections true double jeopardy analysis should hold out.²⁵ Breaking that knot, she hopes, will focus double jeopardy analysis on the successive prosecution strand only, and give it its core meaning.²⁶

Professor Poulin's analysis will enhance merger theory as well. First, eliminating constitutional overtones from it will focus the inquiry on the pure issue at hand: what punishments did the legislature intend for this defendant. But more important, it will shift the constitutional inquiry out of merger and on to where it belongs -- in sentencing once the merger question has been answered. Lurking in the mist in the post-merger world are issues not of double jeopardy, but of whether the legislature's intent to impose that level of punishment amounts to something cruel and unusual (disproportionately or otherwise) and/or whether the prosecutor's choice to charge multiple counts to enhance the potential sentence amounts to some form of due process violation.

To be sure, the state of the law regarding cruel and unusual punishment/disproportionality analysis and abuse of prosecutorial discretion may open

22. Poulin, *supra* note 3, at 595.

23. 284 U.S. 299 (1932).

24. Poulin, *supra* note 7, at 602-03.

25. *Id.* at 596-98, 645-46.

26. *Id.* at 645-46.

few doors for a defendant given their current state of relative uncertainty.²⁷ But when merger is fused with double jeopardy, we tend to put a constitutional imprimatur on merger decisions they do not merit. As merger is a non-constitutional issue in itself, the case where a prosecutor has opted to charge as many counts as the legislature has “intended” (and the sentencing court has opted to run each of those sentences consecutively) will frame whatever true constitutional issues actually exist in the case.

B. Merger as Legislative Intent: A Matter of Mischief

The major premise is not exactly one that has never appeared in print. Indeed, it has become a mantra in merger cases to recite that, of course, the fundamental task of the court is one of statutory construction.²⁸ The trick is how to go about it.

27. As to Eight Amendment arguments, United States Supreme Court opinions have permitted such consideration in only the most exceptional of situations. *See Solem v. Helm*, 463 U.S. 277 (1983), *Harmelin v. Michigan*, 501 U.S. 957 (1991), *Ewing v. California*, 538 U.S. 11 (2003) and *Lockyer v. Andrade*, 538 U.S. 63 (2003). Pennsylvania Courts are generally in accord, *see Commonwealth v. Parker*, 718 A.2d 1266 (Pa. Super. Ct. 1998) and *Commonwealth v. Spells*, 612 A.2d 458 (Pa. Super. Ct. 1992). However, review of sentences under an abuse of discretion standard divorced from the constitutional claim is at least possible. *See Commonwealth v. Dodge* 859 A.2d 771 (Pa. Super. Ct. 2004). As to prosecutorial misconduct issues, the issue is even more opaque and unlikely to result in relief for a defendant. *See Georgetown Law Journal* 2006 p. 208-16. And a concurring justice of the Pennsylvania Supreme Court has expressed the hope that prosecutors will use good judgment in such cases. *See Commonwealth v. Frisbie*, 485 A.2d 1098, 1101 (Pa. Super. Ct. 1984).

28. “Generally, the doctrine of merger is a rule of statutory construction designed to determine whether the legislature intended for the punishment of one offense to encompass that for another offense arising from the same criminal act or transaction.” *Anderson*, 650 A.2d at 21; *see also Gatling*, 807 A.2d at 895 (quoting *Commonwealth v. Collins*, 764 A.2d 1056, 1057 (Pa. 2001).

The Superior Court in *Commonwealth v. Campbell* also stated that statutory construction was part of merger analysis:

Instead of looking solely to the elements of the offenses charged, the court must look to the underlying facts. Also, an examination of the statutes under which appellant has been convicted is essential. It is important to determine whether the facts reveal that the offenses charged caused more than one injury to the Commonwealth. In doing so, we must attempt to ascertain the legislative intent.

Campbell, 505 A.2d at 265-66 (quoting *Commonwealth v. Williams*, 496 A.2d 31, 40 (Pa. Super. Ct. 1985). *See also Commonwealth v. Evans*, 901 A.2d 528 (Pa. Super. Ct. 2006). In *Commonwealth v. Williams*, 871 A.2d 254 (Pa. Super. Ct. 2005), the Court observed that “[i]f the legislature were to tell us that crime A merges with crime B, the problem would not arise, for the legislative intent would be manifest”. The Court did express chagrin at the fact that when no such explicit instruction is given, the court must devise its own consistent rule of merger, a task the court admitted proves to be “difficult.” *Williams*, 871 A.2d at 262.

The Court also has difficulty being consistent about whether merger is a constitutional or a statutory problem, creating more confusion. Another Superior Court panel has observed that merger is *not*

Sometimes, legislative intent with respect to merger is easy. Where a Pennsylvania defendant is charged with burglary, for example,²⁹ the statute itself bars conviction for burglary and the object crime “unless the additional offense constitutes a felony of the first or second degree.”³⁰ In most cases, however, it is not that easy.

The search for legislative intent must logically begin with the idea of what the legislature was trying to do when it passed the criminal statute in question. Courts are supposed to read that intention from the clear words of the statute but, when things are more inscrutable, courts are to look to the “*mischief* to be remedied” by the law.³¹

That “mischief” has a particular form in criminal statutes. In §104 of the Crimes Code, the legislature announces that its principal substantive purpose for passing the Code was to “forbid and prevent conduct that unjustifiably inflicts or threatens substantial harm to individual or public interest.”³² In other places in the Code, the object of the legislature’s actions is phrased more colorfully as the “harm or evil” the statute is to prevent.

The phrase “harm or evil” is adopted from the Model Penal Code.³³ It appears often in the Pennsylvania Crimes Code in circumstances where it is juxtaposed with a consideration of the elements of the criminal offenses. For example, in §103, the legislature writes:

governed by statute but that it is wholly “grounded in double jeopardy safeguards afforded” by the US Constitution. *Commonwealth v. Newton*, 875 A.2d 1088 (Pa. Super. Ct. 2005) @ ****8.

29. 18 Pa.C.S. §3502.

30. 18 Pa.C.S. §3502(d). Another example of the plain speaking by the Legislature in this regard is the statute dealing with invasion of privacy, 18 Pa. C.S 7507.1. Section A.1 of that statute specifies that multiple victims of one incident shall be treated in separate counts as well as multiple incidents to one victim.

31. 1Pa.C.S. §1921(c)(3).

32. 18 Pa.C.S. §103(1).

33. MPC §2.02(6).

MATERIAL ELEMENT OF AN OFFENSE. An element that does not relate exclusively to the statute of limitations, jurisdiction, venue or to any other matter similarly unconnected with:

(1) the **harm or evil** incident to conduct, sought to be prevented by the law defining the offense; or

(2) the existence of a justification or excuse for such conduct.³⁴

By this juxtaposition, we see that while the harm or evil is not an element of an offense itself, and elements can relate to things other than the harm or evil sought to be prevented, a material element serves, in part, to identify the legislative purpose in eradicating that particular harm or evil.

Similarly, where the legislature addressed the issue of successive prosecutions of a defendant, either within the state³⁵ or in Pennsylvania after a prosecution in another jurisdiction,³⁶ one of the tests for determining whether the second prosecution will be allowed is whether the law defining the offense is intended to prevent a substantially different harm or evil.³⁷

If merger is all about legislative intent, then determining legislative intent is all about identifying the harm, evil and or mischief the statute is supposed to remedy. For a number of years, Pennsylvania Courts conducted a merger inquiry by openly seeking out the harm or evil in each statute. Unfortunately, they did so in a manner so confusing that

34. 18 Pa.C.S. §103.

35. 18 Pa.C.S. §110.

36. 18 Pa.C.S. §111.

37. A court is also called upon to consider the harm or evil a statute identifies when determining if conditional intent may satisfy the *mens rea* element, §302 and when considering if consent is a proper defense to the particular charge. §311. Moreover, a court asked to dismiss a charge as de minimis must inquire whether, although the facts fit the technical elements of an offense, the conduct did not “actually cause or threaten the harm or evil” the legislature was going after. §312. And finally, a court determining a matter of self defense must weigh if a person was justified in using force to avoid a “harm or evil” to himself or others greater than the harm or evil sought to be prevented by the law proscribing his conduct. §503.

they ultimately abandoned that analysis when all that should have been abandoned was the confusing approach taken to reaching it.

1. Early Attempts at Finding the Evil.

The Superior Court characterized the older form of inquiry this way in 1986:

Common law merger requires us to consider whether, as a practical matter, appellant committed a single criminal act . . . Instead of looking solely to the elements of the offenses charged, the court must look to the underlying facts. Also, an examination of the statutes under which appellant has been convicted is essential. It is important to determine whether the facts reveal that the offenses charged caused more than one injury to the Commonwealth. . . In doing so, we must attempt to ascertain the legislative intent.³⁸

Instead of finding what the legislature wanted by reading what the legislature wrote or pondering the elements of the offense, this approach asked the courts to look at some undefined conglomerate of facts and injuries disembodied from the statutes defining the offense.

In *Commonwealth v. Leon Williams* in 1989, the Supreme Court of Pennsylvania found that the common law test that had emerged was almost incomprehensible.³⁹ As a

38. *Campbell*, 505 A.2d at 266.

39 [M]erger is required only when two prerequisites are met. First, the crimes must "necessarily involve" one another. Second, even if the two crimes necessarily involve one another, they do not merge if there are substantially different interests of the Commonwealth at stake and the defendant's act has injured each interest. To determine whether multiple offenses involve substantially different interests, or how many evils are present in a given criminal act, the sentencing court must examine both the language of the particular statutes and the context in which each statute appears in the Crimes Code.

... Crimes "necessarily involve" each other, therefore, if one of two possible scenarios occurs: (1) the crimes have the same elements n1 (i.e., lesser included offenses), n2 or (2) the facts of the case are such that although the elements of the crimes differ, the facts which establish one criminal charge also serve as the basis for an additional criminal charge.

... If it is determined that the elements of the crimes charged are the same, or that the same operative facts underlie the crimes charged, the court must then, under the analysis set out in *[the prior case]*, determine whether the Commonwealth has substantially different interests in prosecuting the defendant for two or more

result, the Court abandoned this test, finding the interests of the Commonwealth in enacting any criminal statute were “difficult to define with any precise degree of certainty” and that the prior approach provided no guidance as to how a court might determine “how many evils” are present in any one act.⁴⁰ The so-called “common law” rule was nothing more than “a mask for the reality that there is no cohesive, complete set of rules for determining when merger should occur.”⁴¹

Into the breach left by the abandonment of this old rule, the Court in 1989 offered a formula as simple as one could seemingly be:

[W]e now hold that *except for lesser included offenses*, the doctrine of merger based on whether the Commonwealth has an interest in prosecuting a criminal defendant for more than one crime is hereby abrogated and abolished.⁴²

At first blush, this formulation seemed to do away with harm or evil analysis. In truth, it served that analysis quite well, although in an incomplete manner.

2. Seeing Harm or Evil in Elements

In the first instance, the harm or evil a statute attacks is easy to discern. Even before the abandonment of the language of harm or evil in merger analysis, the courts had a profound insight: the best way to understand the harm or evil in any statute is to gaze upon it using the clarity provided by the elements of that offense. Criminal statutes

separate crimes. What the court is really asked to do at the second stage of the analysis is make two determinations: (1) what interests of the Commonwealth are at stake in the offenses charged; and (2) how the facts of the case bear on the Commonwealth's interests. The latter point is expressed in [the prior] opinion as "how many evils are present in a given criminal act... *In other words, at step two a court has to determine exactly how the Commonwealth has been injured (how many "evils" are present) based on the court's understanding of the Commonwealth's interests and the facts of the case.* [Emphasis Added].

Leon Williams, 559 A.2d at 27-29 (quoting *Commonwealth v. Michael Williams*, 522 A.2d 1095 (Pa. 1987)).

40. *Leon Williams*, 559 A.2d at 28-29.

41. *Id.* at 29.

42. *Id.*

“contain different elements designed to protect different interests,”⁴³ and it is in the elements that the core of legislative intent may be seen.

There is no need in the first stage of a merger analysis to look at amorphous “facts” or “injuries” that exist, if at all, somewhere outside the language of the statute. The elements of the offense are the best and surest means of letting the legislature speak to the court about what it intends insofar as the potential of consecutive sentences is concerned.⁴⁴ Where each offense has at least one element distinct from the other, a different harm or evil is involved and consecutive punishments are authorized.⁴⁵

The principal Pennsylvania merger statute, enacted in 2002, speaks to this concept. The statute provides:

No crimes shall merge for sentencing purposes unless the crimes arise from a single criminal act and all of the statutory elements of one offense are included in the statutory elements of the other offense. Where crimes merge for sentencing purposes, the court may sentence the defendant only on the higher graded offense.⁴⁶

43. *Sayko*, 515 A.2d at 897. The “elemental” analysis of merger is adopted quite expressly in Ohio, *see* R.C. §2941.25, *State v. Barnette*, 2004 Ohio App. LEXIS 6691, 6713-14 (Ct. App. 2004), Colorado, *State v. Petschow*, 2004 Colo. App. LEXIS 1743, 1762 (Ct. App. 2004). New Mexico, *State v. Campos*, 921 P.2d 1266, 1273 (N.M. 1996) (citing *State v. Meadors*, 908 P.2d 731, 734-37 (N.M. 1995)).and, to a significant degree, in Illinois. *See Illinois v. Davis*, 821 N.E.2d 1154, 1177 (Ill. 2004) (citing *People v. Novak*, 643 N.E.2d 762, 775-83 (Ill. 1994); *People v. Hamilton*, 688 N.E.2d 1166, 1171 (Ill. 1997)), and the United States Military. Young, Colonel James A., *Article: Multiplicity and Lesser-Included Offenses*, 39 A.F.L. REV. 159, 160-61 (1996).

44. Note that the *Blockburger* test is not conclusive on the issue of legislative intent, but only provides an *indication* of intent, Nolan, *supra* note 2, at 527, as legislatures have the sole responsibility for defining criminal offenses. *The Lesser Included Offense Doctrine and the Constitution*, *supra* note 13, at 123-24 (citing *Garrett v. United States*, 471 U.S. 773, 779 (1985) (there are no constitutional constraints on the legislature’s power to define offenses) (citing *Albrecht v. United States*, 273 U.S. 1, 11 (1927)); *Brown v. Ohio*, 432 U.S. 161, 165 (1977) (“The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments; but once the legislature has acted courts may not impose more than one punishment for the same offense and prosecutors ordinarily may not attempt to secure the punishment in more than one trial.”) (citation omitted). The *Blockburger* test is a statutory construction tool used to aid in the determination of legislative intent. *Id.* at 123 However, in the absence of clear legislative intent, the courts are forced to combine some offenses in order to comply with the Double Jeopardy Clause; thus the Clause serves as a check on the judiciary. Nolan, *supra* note 2, at 529.

45. This test, derived from *Blockburger* is, as Professor Poulin illustrates, a test for legislative intent, nor double jeopardy. *See* Poulin, *supra* note 7.

46. 42 Pa.C.S §9765. New York also governs much of its merger analysis by statutes far more detailed than those of Pennsylvania. New York uses a detailed statute to describe when two prosecutions may proceed from the same act or transaction, N.Y. Crim. Proc. Law § 40.20, another to help

While this statute covered the ground the Pennsylvania Courts had surveyed by 2002 already, and embodies *Blockburger*, it simplified the first phase of merger analysis considerably. By the use of the term “and” connecting the “crimes arising from a single criminal act” and the “elements included” components, the legislature allowed the court to end the merger analysis if either is not satisfied. Starting with the simplest component, then, unless the crimes are under the same section of the Code or are otherwise included within each other, merger is impossible and consideration of whether the offenses arose from a “single criminal act” is unnecessary.

By setting crimes out in different sections and giving each an element the other does not, the legislature sends a clear message that a different “mischief,” a distinct “harm or evil,” is the target of each statute, and separate and consecutive sentences are authorized.⁴⁷

As simple an idea as this may seem, the courts struggled with it for some time.

Five years after announcing what the Court surely hoped was the definitive resolution of the matter in *Leon Williams*, the simple rule had to be revisited. In *Commonwealth v. Anderson* in 1994, the Court recalled that in the period since *Leon*

define when a “separate and distinct” offense occurs. N.Y. Crim. Proc. Law § 40.10, and yet another to specify the term “lesser included offense.” N.Y. Crim. Proc. Law § 1.20.

47. *Evans*, 901 A.2d at 528 (crimes of unlawful contact with a minor for the purpose of engaging in an indecent assault and subsequent indecent assault do not merge for sentencing); *Commonwealth v. Payne*, 868 A.2d 1257 (Pa. Super. Ct. 2005) (crimes of aggravated assault and robbery do not merge because each contains elements that the other does not); *Gatling*, 807 A.2d at 900-01 (crimes of statutory sexual assault and corruption of a minor do not merge); *Collins*, 764 A.2d at 1059 (homicide by vehicle and homicide by vehicle DUI do not merge because the legislature specifically crafted the statutory elements as mutually exclusive: homicide by vehicle requires a non-DUI Vehicle Code conviction, while homicide by vehicle DUI requires DUI conviction); *Commonwealth v. Dobbs*, 682 A.2d 388 (Pa. Super. Ct. 1996) (reckless endangerment merges into aggravated assault); *Commonwealth v. Rosario-Hernandez*, 666 A.2d 292 (Pa. Super. Ct. 1995) (aggravated assault merged into voluntary manslaughter).

Williams, it decided *Commonwealth v. Weakland*,⁴⁸ in which a defendant assaulted a bystander to a robbery and then kidnapped him. To resolve the merger question there, the *Weakland* Court asked whether the act of force necessary to kidnapping was greater than that needed for the assault, an analysis wandering away from a strict consideration of the elements of the crimes charged.

In *Anderson*, however, the court reasserted the primacy of the elements analysis in merger. Looking first at amounts of force necessary to commit crimes was a flawed first step; the first step is always whether the elements are contained within each other.

The Court held:

Whether the criminals in these cases committed one act or many is of no import. In either event, so long as the crimes are not greater and lesser included offenses, they are liable for as many crimes as they are convicted of and may be sentenced for each such crime.

Accordingly, we reaffirm our holding in *Williams* and abrogate the holding in *Weakland*. We now hold that in all criminal cases, the same facts may support multiple convictions and separate sentences for each conviction except in cases where the offenses are greater and lesser included offenses. "The same facts" means any act or acts which the accused has performed and any intent which the accused has manifested, regardless of whether these acts and intents are part of one criminal plan, scheme, transaction or encounter, or multiple criminal plans, schemes transactions or encounters. In other words, it does not matter for purposes of merger whether one regards *Weakland*'s striking the customer and kidnapping him as one encounter or as two encounters, for the same facts, i.e., striking the victim with a gun, may be used to satisfy the force requirements of at least two crimes, kidnapping and aggravated assault, and the sentences for each crime will not merge because these crimes are not greater and lesser included offenses.⁴⁹

To be sure, this new resolution helped focus the matter a good deal. It teaches later courts that the key in any merger analysis is to first look at the relation between the two crimes of conviction. If they are not the same charge, or one is not lesser included with

48. 555 A.2d 1228 (Pa. 1989).

49. *Anderson*, 650 A.2d at 22.

the other, they do not merge. Discussions about how many criminal acts there were are superfluous unless the elements of each crime can be fit into the other.

In *Anderson*, the crimes of aggravated assault and attempted murder fit into each other where they arose from the defendant firing a single gunshot at the victim.⁵⁰ It was an easy solution: the crimes merged.

But overall, *Anderson* is an incomplete answer to merger. The *Anderson/Blockburger/§9765* test is simple but not symmetrical: while crimes that *are not* contained within each other do not merge, crimes that *are* contained within each only merge *some of the time*. They merge only when they arise from “a single criminal act,” something undefined in the statute and difficult to capture.

3. The Single Criminal Act

There are two, distinct scenarios in which a court may face a merger problem where the crimes of conviction are contained within each other. In the first, two or more victims are created by one criminal act and, in the second, one victim suffers what are arguably two or more crimes at the hand of the defendant. The harm or evil in these contexts cannot be seen through the simple device of the elements but may be viewed by a careful reading of the statutes *from the view point of the victim*. The overall issue is still the same: what did the Legislature intend.

a. Two or More Victims

The first scenario is where a defendant commits an act that does harm to more than one person. If *Anderson*'s single gun shot struck two people, the merger analysis would call for a single sentence only if we presumed that the legislature wanted to give

50. *Id.* at 23-24.

the offender a “volume discount” for assaulting two people at once. This absurd result has been regularly rejected,⁵¹ because it contradicts the plain words of the statutes.

Criminal homicide is causing the death of “another human being;”⁵² assault and aggravated assault are causing or attempting to cause some form of bodily injury “to another;”⁵³ reckless conduct may place “another person” in danger of death or serious bodily injury.⁵⁴ Conversely, where the crime makes a group the victim (like Risking a Catastrophe §3302, in which causing or risking “potentially widespread injury or damage” is the essence of the offense), a different result should logically follow.

The “two victims” cases are relatively easy. The far more difficult situation arises in the second scenario where there is only one victim who potentially suffered multiple harms. Where, for example, a defendant strikes a victim nine times, is it a continuous assault yielding one aggravated assault or is it nine simple assaults, each of which should be punished separately? Here, the harm or evil the legislature intended is more difficult to see but a thoughtful approach to it is still possible.

b. Same Victim: Two Harms

The approaches taken by courts to date have focused a court on finding facts about the defendant’s conduct and/or his change in intent during the conduct. These attempts have been less than satisfying.

51. *Comer*, 716 A.2d at 599 (offenses of homicide by vehicle and involuntary manslaughter merged when the defendant crashed into a bus stop killing a person); *Sayko*, 515 A.2d at 896 (defendant’s acts of inducing a child to sit on his lap, touching her, exposing his genitals and ejaculating on her hands led to convictions for indecent assault, indecent exposure and corrupting the morals of a minor, which did not merge for sentencing); *Frisbie*, 485 A.2d at 1101 (defendant’s act of reckless driving placed nine pedestrians in danger of serious bodily injury; nine counts of REAP were sustained and consecutive sentences for each authorized); *Commonwealth v. Yates*, 562 A.2d 908 (Pa. Super. Ct. 1989) (two aggravated assault convictions for seriously injuring two people by firing a single gunshot did not merge); *McCoy*, 895 A.2 at 18 (defendant’s convictions for driving under general impairment and driving under the highest rate of alcohol led to concurrent sentences).

52. 18 Pa.C.S. §2501.

53. 18 Pa.C.S. §2701; 18 Pa.C.S. §2702.

54. 18 Pa.C.S. §2705.

In *Commonwealth v. Gatling*, two of the Justices tried to form a test for determining whether a “single criminal act” occurred. It would be a single act, they said, unless there was a “break in [the] chain” of events.⁵⁵ Three things would be necessary for a “break.” First, “the acts constituting commission of the first crime were completed before the defendant began committing the second crime;” second, “proof of the second crime did not in any way rely on the facts necessary to prove the first crime;” and third, there was either “a significant temporal lapse” or “a change in the criminal intent of the defendant at some point during the sequence.”⁵⁶

Justice Saylor concurred in *Gatling* but rejected the test, finding it both too narrow and too confusing. The factors listed by the plurality were “open to subjective interpretation and may be difficult to definitively resolve,” he wrote, and the “issue of distinctness is best assessed according to the totality of the circumstances.”⁵⁷

Unfortunately, his opinion did not identify which “circumstances” form the “totality” the court should assess. Indeed, while acknowledging that the key inquiry is “whether or not the General Assembly intended for the crimes to be deemed greater and lesser included offenses,” Justice Saylor left his analysis asking for a further development in the law to clarify what role the trial evidence should play in discerning that intent.⁵⁸

The dissenters argued that it was virtually impossible to determine whether a lapse in a defendant’s conduct signaled a newly formed intent or was just a pause in one

55. *Gatling*, 807 A.2d at 900.

56. *Id.*

57. *Id.* at 901 (Saylor, J., concurring).

58. *Id.* (Saylor, J., concurring).

formed earlier; basing a merger analysis on that inscrutable issue would leave the merger doctrine hopelessly adrift.⁵⁹

While cases after *Gatling* have recognized that it lacks precedential authority,⁶⁰ they, too, focus on either time gaps *per se* or try to intuit the intent shift they think such gaps might signify. But how long a time gap lasts or what occasioned it put the issue out of focus. The issue, as always, is what did the legislature intend to make of the actions that occur on either side of the time gap, however long it is.

One bullet, fired in a split second with the intent to kill but one victim may kill the victim and an innocent bystander. The two counts of homicide will not merge as the legislature intended to protect each victim separately. Conversely, the driver who drives while inebriated to the point he is incapable of safe driving and whose blood alcohol is above the legal limit at the same moment may receive only one sentence for DUI.⁶¹ His violations of the same statute occur as simultaneously as did the killings in the prior

59. *Gatling*, 807 A.2d at 903 (Cappy, J., dissenting). The District of Columbia has some version of this intent approach. The Courts there refer to the doctrine of “fresh impulse”, under which if a defendant has completed one crime and then stops to consider whether to commit another crime and then proceeds, the two acts are separate. *Stevenson v. United States*, 760 A.2d 1034 (D.C. 2000); *Baker v. United States*, 205 D.C. App. LEXIS 28 (D.C. 2005).

California has another. Section 654 of the California Penal Code generally informs the issue. Under Section 654, again the initial inquiry is whether there is an indivisible transaction. *People v. Coleman*, 108 Cal. Rptr. 573 (1973). In determining whether a course of conduct is indivisible, the actor’s intent and objective control. *Id.* This inquiry is one of fact for the court to decide whether the defendant’s criminal intent and objective were single or multiple. *People v. Liu*, 46 Cal. App. 4th 1119 (Ct. App. 1996). For example, if a defendant entertained multiple independent criminal objectives, that were not merely incidental to one another, then the defendant may be punished for the independent violations, even though the violations were part of an otherwise indivisible course of conduct. *People v. Butler*, 184 Cal. App.3d 469 (Ct. App. 1986). In this type of situation the temporal proximity of the offenses is not controlling and does not preclude multiple punishment. *People v. McCoy*, 9 Cal. App. 4th 1578 (Ct. App. 1992); *People v. Butler*, 184 Cal. App. 3d 469 (Ct. App. 1986).

60. *See Shank*, 883 A.2d at 669-70; *Commonwealth v. Healey*, 836 A.2d 156, 158-59 (Pa. Super. Ct. 2003).

61. *McCoy*, 895 A.2d at 18.

example but his convictions do merge because the legislature intended to punish only one harm or evil, the increased risk of danger on the highways.⁶²

It is not that time gaps are wholly unimportant to this phase of merger analysis. But they must be seen from the perspective of the victim, not the defendant. Gaps may indicate that, given the language the legislature used, a second harm or evil has occurred during a criminal event that the legislature intended to punish separately. The problem with focusing on time generally is that it diverts the court's attention away from the central issue of what the legislature intended. That intention is best seen in *the language of the statutes*.

i. The Human Victim and the Assault Statutes

The language in assault statutes best reveals legislative intent when we identify the subject, object and verb of each section. The subject is the defendant who acts upon the object (the victim). In homicide statutes, the verb is some variation of "to kill" and the legislative intent is clear. In assault crimes, the verb is different in ways important to the analysis of whether the legislature intends the conduct to be one assault or two.

In assault offenses, the defendant either *causes* bodily injury (serious or otherwise) or *attempts* to cause it. Each verb defines a particular criminal event in which the victim is subjected to assaultive behavior that, at some point, comes to an end and allows for an assessment by society of what damage was done or intended.

Attempts are, by their very nature, incidents that terminate after a substantial step was taken but before the actual harm the statute sought to prevent was actually brought about. They end because the attacker falsely believes he has accomplished his object, has a change of heart, the police or a good Samaritan intervene, or for any other reason.

62. *Id.*

Looked at from the victim's perspective, an attempt is over when the victim has again regained some measure of control over their own circumstances and society is left with the capacity to assess what has or may have happened to them had the attack not ceased. At that point, they are no longer experiencing the event of assault the legislature sought to prevent.

When the legislature punishes the form of assault that amounts to "causing" some form of injury, the analysis is the same. To assess the degree of damage done and fix the proper grade of the assault, the court (society) needs to be able to look back on a completed event in which the victim was subjected to assaultive behavior at the hands of the defendant. From the victim's perspective, that event cannot be over until the victim has regained some measure of control and when society could intervene and assess the damage done for charging purposes.

While we specify the *type* of assault based upon the injury caused or portended, we demarcate an event of assault as the harm or evil covered by the statute. Because of how the legislature defines the crime, the event begins when the victim is subjected to the defendant's assaultive behavior and ends when a reasonable person in the victim's shoes has regained or been afforded sufficient control over his situation that society can assess the damage done to him.⁶³ If the event of assault has ended, any new event is a fresh crime that does not merge.⁶⁴

There is an effective and familiar formulation I submit the court may use to assess the end of the event of assault. The line of demarcation between assaults occurs *when a*

63. Contrast with kidnapping 18 Pa.C.S. §2901: Crime is either "unlawfully remove" or "unlawfully confine," implying a broader, ongoing type of harm or evil to which the victim is subjected.

64. Assaults on two different days do not merge. *See Commonwealth v. Thomas*, 879 A.2d 246 (Pa. Super. Ct. 2005).

reasonable person, objectively viewing the circumstances from the perspective of the victim, would believe the assault had ended. At that point, society could affix the proper nature and degree of assault that had occurred by assessing the damage done or attempted.

Making the formulation objective is effective when compared with the other possible subjective perspectives. Assessing the endpoint from the perspective of the defendant by trying to determine his intent is too inscrutable and provides too little protection for victims. Asking a victim if he subjectively believed the event was over also unnecessarily complicates this determination, as either the excessively timid victim or the one filled with unusual bravado will skew the outcome in a way the legislature surely did not intend. Moreover, some victims in these cases would subjectively be unconscious, so the question is better phrased whether an objective person who was able to assess all the attendant circumstances *from the perspective of the victim* would reasonably believe the assault was over.

Viewing the situation objectively, with the primary focus of concern being with the victim, allows the court to render this judgment as a matter of law, defining the event of assault that the legislature so evidently did intend when it defined the crime as it did.

The proposed formulation is also familiar because it evokes language the courts have used to determine when a suspect is in custody for *Miranda* purposes. The Supreme Court of the United States has repeatedly held that *Miranda* warnings are required only when police questioning occurs in a circumstance where “a reasonable person in the suspect's situation would perceive” he was in custody.⁶⁵ This test is objective and, because of that objectivity, it gives a sense of certainty, stability and “clarity” to these

65. *Yarborough v. Alvarado*, 541 U.S. 652, 662 (2004).

assessments.⁶⁶ It is a formulation unconcerned with the complicating factors of the subjective perceptions of the actual defendant or the subjective intent of the officers to take him into custody.⁶⁷

The formulation I propose to carry out the merger analysis when assault crimes are at issue also seeks the stability objectivity can bring. It requires no specific fact finding with respect to the defendant's intent and allows for a sensible appraisal of when the actions which constitute an event of assault have so subsided that society can now assess it under the terms the legislature has dictated. Importantly, this formulation never loses sight of the fact that the legislature put the victim's interests first. This approach thus requires a sentencing court to assess gaps of time from the viewpoint of the victim the legislature aspired to protect.⁶⁸ The legislature afforded protection based upon the harm the event caused or portended, a measure fixed when the event is over, when the victim could have or did regain control and when the damage done could be calculated.

While the reasoning of neither the majority nor the dissent would be fully consonant with the above, the analysis of the Supreme Court in *Commonwealth v.*

66. *Yarborough*, 541 U.S. at 667, quoting *Berkemer v. McCarty*, 468 U.S. 420, 430 (1984). The Pennsylvania Supreme Court has held that “[t]he test for custodial interrogation does not depend upon the subjective intent of the law enforcement officer, but rather, focuses on whether the individual being interrogated reasonably believes his freedom of action is being restricted.” *Commonwealth v. Sepulveda*, 855 A.2d 783, 790 (Pa. 2004).

67. *Stansbury v. California*, 511 U.S. 318, 323-24 (1994), citing *Berkemer*, 468 U.S. at 442 (“the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation.”)

68. Focusing on the matter from the perspective of the defendant's acts also runs a risk. While no court has held that merger analysis may run afoul of the *Apprendi* doctrine – *Santana-Madera v. United States*, 260 F.3d 133 (2d Cir. 2001); *Washington v. Kinney*, 106 P.3d 274 (Wash. App. 2005); *Collins v. State*, 717 N.E.2d 108 (Ind. 1999); *New Hampshire v. Higgins*, 821 A.2d 964 (N.H. 2003) - Q,R,T, – JJ, and LL, none of those cases have applied a test wherein the court must determine factually whether the defendant shifted his intent at mid-act or whether he subjective sought to break off the attack and then resume it. The approach posited in this article disdains any factual determination of the defendant's intent in favor of accepting the facts in the light most favorable to the Commonwealth and examining the language of the statute to discern whether the victim reasonably perceived the event described in the statute had ended.

*Belsar*⁶⁹ is a good illustration of the point. The victim was ambushed by Belsar who shot him five times. Leaving the victim for dead, Belsar and a co-defendant searched for the victim's car keys in another location while the victim attempted to crawl away.⁷⁰ Belsar realized the victim was still alive and set upon him a second time with a volley of kicks. The court held that aggravated assault and attempted murder in this circumstance did not merge as “[w]hen a criminal act has been committed, broken off, and then resumed, at least two crimes have occurred and sentences may be imposed for each. To hold that multiple assaults constitute only one crime is to invite criminals like Belsar to brutalize their victims with impunity.”⁷¹

The victim in *Belsar* was subjected to an attack that a reasonable person would perceive had ended when the assailants, thinking the victim was incapacitated, abandoned him to search for his keys. A second attack resumed when Belsar returned and subjected the victim to a new event of assault. Whether separated by a minute or an hour, two events of assault were present here.

A result difficult to square with this analysis or any other is the one reached in *Commonwealth v. Wesley*,⁷² a case that misunderstands the “broken off” concept of *Belsar*.

The defendant first shot his victim in the back while the victim bent over to pick up his son.⁷³ The victim then tried to grab the weapon, resulting in the defendant firing again, blowing off the victim's finger. The defendant then fired several more rounds into the victim's stomach and leg. Miraculously, the victim survived.

69. 676 A.2d 632 (Pa. 1996)

70. *Belsar*, 676 A.2d at 633.

71. *Id.* at 634.

72. 860 A.2d 585 (Pa.Super. Ct. 2004).

73. *Wesley*, 860 A.2d at 587.

Here, unlike *Commonwealth v. Anderson*, where the same offenses merged, Wesley was sentenced consecutively to terms accumulating to 32 1/2 to 65 years on counts of aggravated assault and attempted murder. There was no merger, the Superior Court said, because the attack was “broken off” after the first shot and resumed with the shots to the hand and torso of the victim.⁷⁴

Disgust at the wanton nature of the defendant’s conduct does not justify a result that cannot withstand careful scrutiny. Using the Court’s reasoning, the shot to the hand and each shot to the torso could be separate counts. But unless an assault is comprised of one blow or one round fired, some time lapse will always exist between successive actions that could sustain the capricious attribution of a “broken off” attack. No reasonable person could have concluded otherwise. If the legislature intended each shot fired to be a crime, they surely could have said so, but they most surely did not.

Wesley’s victim was subjected to one event of assault that began with the first shot and ended when Wesley quit pulling the trigger after firing multiple rounds. The victim never regained any measure of control of the situation and there was no chance for a societal intervention of the continuous event. What the court’s opinion illustrates is that the “broken off” analysis invites the same kind of arbitrariness that is “a mask for the reality that there is no cohesive, complete set of rules for determining when merger should occur.”⁷⁵ That a court thinks conduct is so callous that it merits more of a sentence than the law of merger allows is not an excuse to render the analysis incoherent.

If merger analysis is to be coherent, it must require a more faithful search for legislative intent than the “broken off” argument provides. Torturing the merger doctrine

74.. *Id.* at 592-93.

75. *Id.* at 29.

is not the way to expose a legislative sentencing scheme that is too lenient in a given case.

ii. Society as the Victim: the Possession Crimes

Sometimes the only victim is society. The matter commonly arises in possession cases, but there as well the language of the statute is the first and best clue to the underlying harm or evil each separate offense is supposed to prevent.

A trilogy of cases illustrates the methodology.⁷⁶

In *Commonwealth v. Woods*, the Superior Court ruled that where a defendant possessed an unlicensed firearm during the course of two assaults occurring on the same day, only one sentence for possessing an unlicensed firearm “upon the public streets” was permitted.⁷⁷

The court noted that Woods’ possession of the firearm that day was for an “uninterrupted period” of time including the assaults and an “indeterminate period of time before and after” them.⁷⁸ As the possession would have occurred regardless of whether he committed the assaults, the question of statutory construction was joined:

In the context of an uninterrupted or continuous carrying of a weapon at what point does one stop "carrying" a firearm on the street and start anew? Does one commit a violation of the Act with every step he takes while carrying a firearm? Or does one commit a violation based upon a certain passage of time? If so, how much time must pass before a new offense begins? Is it a separate offense for every hour one carries a weapon? Or every ten minutes?⁷⁹

76. *Commonwealth v. Andrews*, 768 A.2d 309, (Pa. 2001); *Commonwealth v. Stenhouse*, 788 A.2d 383 (Pa. Super. Ct. 2001). *Commonwealth v. Woods*, 710 A.2d 626 (Pa. Super. Ct. 1998).

77. 18 Pa.C.S. §6108.

78. *Woods*, 710 A.2d at 632.

79. *Id.* at 631.

As the verb “carry” connotes continuous action, and as the statute “is not predicated upon the commission of a crime with the weapon,” the court concluded that the statute could only be violated once in this context.⁸⁰

One could only assume, however, that if Woods decided to carry his weapon on Day One and then ventured out again on Day Two, the result would be different. The unlicensed person who carries a firearm upon a public street presents a certain kind of danger that recurs each time he ventures out into that venue. If mere possession of a firearm without a license was the object harm or evil, the legislature would not have used the verb “carry” nor the clauses dealing with the specific venues in which such carrying would be a crime.

In *Commonwealth v. Andrews*, the defendant also possessed a firearm, this time during three robberies over two days. The charge in *Andrews* was different than in *Woods*, however, as Andrews was charged with possessing an instrument of a crime:

(a) Criminal instruments generally.-- A person commits a misdemeanor of the first degree if he possesses any instrument of crime with intent to employ it criminally.⁸¹

Here, the court said, while “to possess” is less specific than to “carry”, mere possession of a firearm does not make out the crime; rather, in Model Penal Code terms, the defendant’s “criminal purpose” was the “touchstone of his liability.”⁸² Andrews violated the possession statute each time he possessed his firearm *with the intent to commit a separate robbery*, and three separate sentences could be imposed.

Again, discerning legislative intent here is not difficult. Society fears the event of an individual possessing an instrument with the intent to perpetrate a crime with it. Each

80. *Id.*

81. 18 Pa.C.S. §907(a).

82. *Andrews*, 768 A.2d at 317.

time possession joins with such intent, a separate societal harm occurs, meriting separate sanction.⁸³

The third case in the trilogy is the most difficult. In *Commonwealth v. Stenhouse*, the defendant was convicted of two counts of possession and possession with intent to deliver controlled substances after the police found quantities of drugs at each of two residences he maintained.⁸⁴ The court first observed that there was no evidence that the drugs were originally obtained at one time or from one source of supply.⁸⁵ If they were bought separately, Stenhouse “must have combined them before they were again divided.”⁸⁶ But, ultimately, this was superfluous, the majority said, since “the propriety of multiple charges is determined by the facts at the time of the charge, not by history.”⁸⁷

Coming up with a methodology to resolve whether this was one, continuous possession of drugs or two independent acts was difficult, however, and the majority ultimately did not try.

Subdivision of a single quantity of drugs may not warrant separate charges in all cases. We must rely on trial courts to deal with the issue on a case-by-case basis, and cannot create a broad rule that covers every situation. We certainly cannot preclude multiple possessory crimes simply because drugs are fungible or sold from multiple outlets.⁸⁸

But what is it in each “case-by-case” analysis that will be dispositive?

83. In *Commonwealth v. Davidson*, 860 A.2d 575 (Pa. Super. Ct. 2004), the Court held that the offense of possessing child pornography (18 Pa.C.S. §6312), criminalized the possession of any “book, magazine, pamphlet, slide, photograph, film, videotape, computer depiction or other material depicting a child under the age of 18 years engaging in a prohibited sexual act or in the simulation of such act commits an offense.”

84. *Stenhouse*, 788 A.2d at 384.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

The dissent focused on the meaning of the act of possession. A crime charging possession is complete upon the defendant exercising dominion and control over the item possessed and the crime continues with respect to that item as long as dominion and control are maintained.⁸⁹ If the defendant acquired the item (drugs) at different times, then dominion and control would be separately exercised in each occasion.⁹⁰ In such a case, the new crime is complete upon acquisition; dividing it up after acquisition does not make a new instance of possession.⁹¹

But there were two crimes charged with respect to each drug location, possession and possession *with intent to deliver*. The latter offense is like possession of a criminal instrument where, beyond just the act of possessing, the legislature identifies a harm or evil associated specifically with the intent with which the possessing is done.⁹² The harm or evil in the “intent to deliver case” is the danger the possession of the drugs creates that some part of them will be distributed in the community. The criminal event the statute identifies is the act of a defendant exercising dominion and control over a quantity of drugs and simultaneously evidencing an intent to dispense them to others. Both aspects are needed with respect to any particular quantity of drugs specified.⁹³

89. *Stenhouse*, 788 A.2d at 385 (Brosky, J., dissenting).

90. *Id.* at 385-86 (Brosky, J., dissenting).

91. *Id.* at 385, 389-90 (Brosky, J., dissenting).

92. While not specifically arguing this additional aspect of legislative intent as inferred from the language of intent in the statute, the majority did observe :

Even accepting appellant's allegations as gospel, this was not merely repackaging and moving a portion of a larger mass to another bag or room. There are two locations here, in separate municipal jurisdictions, miles apart, and we can find no error in treating one stockpile as separate and distinct from the other. *If appellant chose to have branch offices for his business, the inventory at each office may form the basis for a separate possessory crime.* [emphasis supplied].

Id. at 384-85.

93. If a search of a defendant's house revealed two bags of cocaine with a detailed set of instructions to his subordinate to deliver them to each of two separate persons, two counts of PWID would arise. If but one large bag of drugs was found with a note to the subordinate to divide the drugs in half and distribute them to the two people, arguably only one count of PWID would arise since each count needs its

Thus, the majority in *Stenhouse* was right that dividing up drugs into piles coupled with evidence of intent to distribute each made out separate offenses for sentencing purposes. The dissent was right that where the crime is simply possession at a given place and time, all the cocaine possessed by a defendant is part of one count, one crime. Only where the Commonwealth could charge and prove that the defendant acquired drugs on distinct occasions of acquisition could two counts of possession be the subject of separate sentences.⁹⁴

C. Conclusion

Imperfections in this or any other legislative intent-based analysis is, in fact, a benefit courts will derive from treating the merger question as nothing more than an attempt to figure out what the legislature wanted. In fact, by treating merger in this way, benefits abound, even if the approach suggested proves less than satisfying in all cases.

First, bad legislation can be readily identified. Silk purses of merger analysis cannot be made out of the sow's ears of poorly drafted criminal statutes. Problems in fixing maximum penalties for certain crimes may be laid at the feet of those responsible in Harrisburg, Albany or Sacramento.

Second, courts can re-discover the Constitution in the context of sentencing. Rather than confusing the true Constitutional issues that arise in a sentencing with a Constitutional doctrine like Double Jeopardy that has no place there, courts can explore whether there is more content to aspects of Due Process or Cruel and Unusual

own act (a possession) and an intent. While two intents exist, only one act is present. *See also* Commonwealth v. Proietto 361 A.2d 712 (Pa. Super. Ct. 1976).

94. An interesting application of a court trying to discern legislative intent in this area is found in Commonwealth v. Gruber, 548 A.2d 617 (Pa. Super. Ct. 1988). The defendant's possession of marijuana and hashish in the same place and the same time were found to merge because the court determined that each was a derivative of the same plant and the legislature intended a common punishment as a result.

Punishment protections (under federal or state constitutions) than they have ever had occasion to explore. Perhaps these will turn out to be dry wells for civil liberties, but courts now have the freedom to find out. However they go about answering the strict merger question, they know they need not spend any Constitutional capital in doing so.

Finally, there is a potential third benefit that is also a third reason to contemplate the whole area of merger itself.

Merger is one of those portal issues than can take us to the center of our basic conceptions about the place criminal law has in our society. What we make criminal generally defines the frontier we establish between the individual and the state in any democratic society. What we designate as an individual unit of crime, worthy of a separate and unique punishment, is a key component of that whole inquiry.

Moreover, how does our treatment of merger reflect the indelicate balance we try to achieve among the traditional goals of sentencing: just desserts, deterrence, incapacitation, and rehabilitation?⁹⁵ Which of these goals, and any number of others, do we choose to serve when we decide whether a man should receive nine sentences for each of nine punches thrown, or just one sentence based on the net damage his blows inflicted? Whether we merge tells us, fundamentally, why we seek to punish at all.

These are thoughts worth thinking. And we should address them. We should address them, that is, right after we have helped the courts clean up the mess of merger.

95. RONALD J. PESTRITTO, *FOUNDING THE CRIMINAL LAW PUNISHMENT AND POLITICAL THOUGHT IN THE ORIGINS OF AMERICA*, (NORTHERN ILLINOIS UNIVERSITY PRESS, 2000). *See also* JACK M. KRESS, *PRESCRIPTION FOR JUSTICE: THE THEORY AND PRACTICE OF SENTENCING GUIDELINES*, (BALLINGER PUBLISHING COMPANY 1980), at 229-32. *See also* KITTRIE, ZENOFF AND ENG, *SENTENCING, SANCTION AND CORRECTIONS* (2ed FOUNDATION PRESS 2002), at 60-61. *See also* United States Sentencing Guidelines, Chapter 1, Part A(2), claiming that the Guidelines provide for standards to further the “basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation.”