ARTICLE

CRIMINAL REPEATER STATUTES: OCCASIONS, CONVICTIONS, AND ABSURD RESULTS

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INTRODUCTION

Criminal statutes often carry severe penalties upon conviction. On top of that, legislatures can raise the stakes even higher by enacting a dizzying array of so-called repeater statutes. These statutes may increase the classification of a crime, increase its maximum penalty, or impose mandatory minimum penalties whenever the defendant is classified as a repeater, habitual offender, career criminal, or similar label.[1]

Many of these repeater statutes are far from clear-cut with regard to their application and constitutionality, and their meanings have been disputed from coast to coast. For example, with regard to California's infamous law: "Three Strikes is, by many accounts, a poorly drafted and confusing piece of legislation with serious functional and constitutional problems . . . ."[2] Similarly, in Florida, extensive litigation has centered on whether the "career criminal and domestic violence provisions" of a habitual offender law violate "the single subject matter rule" of the state's constitution.[3]

With other statutes, the disputes often hinge on the definition of *occasion*. For example, a Texas fraud statute increases the crime's classification and penalty if the defendant has "previously been convicted under this section *on two or more occasions*."[4] Similarly, a federal statute brands the defendant a career criminal, thus imposing a mandatory minimum penalty, if the defendant has certain prior convictions that were "'committed *on occasions different from one another*.'"[5]

The problem is that the word occasion is imprecise. This provides creative judges and prosecutors with opportunities to split hairs and create different "occasions" out of what is really a single criminal event or incident.[6] This Article, however, goes beyond

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1. In many cases, repeater enhancements can even be stacked. *See* State v. Maxey, 663 N.W.2d 811, 816 (Wis. Ct. App. 2003) ("[T]he repeat drug offender provisions . . . and the habitual criminal repeater provisions . . . may be applied against Maxey. We reverse the order requiring the State to elect one of the enhancer provisions.").

2. Mark W. Owens, *California's Three Strike's Law: Desperate Times Require Desperate Measures—But Will It Work?*, 26 PACIFIC L.J. 881, 883 (1995).

3. Ivan J. Kopas, *Thompson v. State: Does Chapter 95-182 of the Laws of Florida Violate Florida's Single Subject Matter Rule?—The Recent Conflict Between the Second and Third District Courts of Appeal of Florida*, 24 NOVA L. REV. 883, 886 (2000).

4. TEX. PENAL CODE ANN. § 37.101(b) (2019) (emphasis added).

5. Jenny W.L. Osborne, *One Day Criminal Careers: The Armed Career Criminal Act's Different Occasions Provision*, 44 J. MARSHALL L. REV. 963, 963 (2011) (quoting United States v. Hudspeth, 42 F.3d 1015, 1020 (7th Cir. 1994) (emphasis added)).

6. *See id.* at 963-65 (discussing dramatically different outcomes in cases with substantially identical facts).

prosecutorial and judicial creativity to address a government tactic that is better described as blatant and transparent abuse.

The focus of this Article is a Wisconsin statute that brands a defendant a domestic abuse repeater if he or she was previously convicted of domestic abuse crimes "on 2 or more *separate occasions*."[7] Part I of this Article explains that, if a prosecutor is successful in branding the defendant a repeater, this label will increase the classification and penalty of any subsequent domestic abuse allegations. And to accomplish this goal, prosecutors and judges have tortured the plain language of the statute.[8]

More specifically, Part II explains how, exactly, prosecutors and judges use wordplay to expand the statute's reach. In order to brand more defendants as domestic abuse repeaters, judges, through analogy to a similarly-worded general repeater statute, declare the definition of "separate occasions" to be ambiguous.[9] This declaration allows judges to break-free of the statute's plain language and then rewrite it to achieve the government's objective.[10]

Part III provides the criminal defense lawyer with two avenues for challenging this prosecutorial and judicial abuse. First, when courts twist the meaning of "separate occasions" beyond recognition, they are violating several canons of statutory construction.[11] Second, in their quest to expand the statute's reach, prosecutors and judges have also created an absurd result: in some situations, minor offenders are branded repeaters while more serious offenders are not.[12] This violates the absurdity doctrine—an important legal principle adopted in all fifty states which prohibits courts from interpreting statutes in ways that lead to absurd outcomes.[13]

Finally, Part IV explains that some judges may be unwilling to change their erroneous practices. Therefore, this Part provides two different statutory amendments that the legislature could adopt to ensure the statute's original meaning and protect defendants from excessive convictions and penalties.[14]

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7. WIS. STAT. § 939.621(1)(b) (2020) (emphasis added).
8. *See* Part I.
9. *See* Part II.
10. *See id.*
11. *See* Section III.A.
12. *See* Section III.B.
13. *See id.*
14. *See* Part IV.

I. THE DOMESTIC ABUSE REPEATER

A Wisconsin statute provides that if a person is a domestic abuse repeater and is charged with a subsequent misdemeanor crime of domestic abuse, then: (1) the newly charged misdemeanor is transformed into a felony; and (2) the maximum penalty for this new misdemeanor-turned-felony is increased by two years.[15]

This can be illustrated with a simple and common example. When a defendant is accused of yelling at his or her roommate, the prosecutor would normally charge a single count of misdemeanor disorderly conduct,[16] as a domestic abuse crime,[17] which carries a maximum penalty of ninety days of incarceration.[18] However, if the defendant is a domestic abuse repeater, then the prosecutor may charge a *felony* disorderly conduct, as a domestic abuse crime, which carries a maximum possible penalty of *two years* and ninety days of incarceration.[19]

Given the dramatic increase in both the classification and the maximum penalty of this newly charged crime—along with a change in the place of imprisonment from the county jail to state prison[20]—it is, of course, very important to clearly define the term domestic abuse repeater. The statute reads:

> [D]omestic abuse repeater means . . . [a] person who, during the 10-year period immediately prior to the commission of the crime for which the person is presently being sentenced . . . was convicted *on 2 or more separate occasions* of a felony or a misdemeanor for which a court imposed a domestic abuse surcharge . . . .[21]

Despite the language that the defendant must have prior convictions from "2 or more separate occasions," Wisconsin prosecutors are charging defendants as domestic abuse repeaters whenever their criminal history consists of two such convictions that stem from a single incident (or even a single act), were charged in

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15. WIS. STAT. § 939.621(2) (2020).

16. WIS. STAT. § 947.01(1) (2020). The statute is incredibly broad; it even criminalizes conduct that merely "tends to cause or provoke a disturbance," without any actual disturbance. *Id.*

17. Crimes are transformed into "domestic abuse" crimes if they meet the statutory requirements. These include both a qualifying relationship, e.g., "an adult with whom the person resides or formerly resided," and a qualifying "physical act." WIS. STAT. § 968.075(1)(a) (2020). This statute, too, is incredibly broad, as a crime can be classified as "domestic abuse" even when it does *not* cause pain or injury. *Id.*

18. *See supra* note 16; WIS. STAT. § 939.51(3)(b) (2020).

19. WIS. STAT. § 939.621(2) (2020).

20. WIS. STAT. § 973.02 (2020) (Typically, "a sentence of less than one year shall be to the county jail, a sentence of more than one year shall be to the Wisconsin state prisons").

21. WIS. STAT. § 939.621(1)(b) (2020) (emphasis added).

a single complaint, and were entered at a single court hearing[22]—in other words, two convictions from a *single occasion*, no matter how occasion is defined. This is the reverse of a two-for-one. It's a one-for-two: one prior occasion somehow counts as "2 or more separate occasions." And trial judges routinely permit this to happen.

For example, suppose a defendant's criminal history in the last ten years is limited to one case consisting of three counts stemming from a single incident (and act): the defendant grabbed a roommate's arm during an argument which caused a disturbance (disorderly conduct), caused pain (battery), and momentarily prevented the roommate from leaving the room (false imprisonment). Further suppose the case settled for a plea to the two misdemeanors (disorderly conduct and battery) as domestic abuse crimes. At the sentencing hearing, the defendant entered his guilty pleas in exchange for dismissal of the felony false imprisonment. The defendant therefore has two domestic abuse misdemeanor convictions on his record.

This two-crime history should not subject the defendant to domestic abuse repeater status for subsequent cases. While the defendant does have two convictions, that is not what the statute requires. To be a domestic abuse repeater, the defendant must have been "convicted on 2 or more separate occasions." And in the above example, there is no conceivable way that is the case.

How is it, then, that such a defendant *is* branded a domestic abuse repeater? The next Part succinctly explains the sequence of events that brought us to this point. Our journey begins with a similarly-worded general repeater statute.

II. A SHAKY FOUNDATION: THE GENERAL REPEATER

Judges bypass the "2 or more separate occasions" language in the *domestic abuse* repeater statute by analogizing to a *general* repeater statute. The general statute provides that, if a person is charged with a crime, the penalty may be increased (in varying amounts) if the person is a repeater.[23] Further, "[t]he actor is a repeater if the actor was convicted of a felony during the 5-year period immediately preceding the commission of the crime for which the actor presently is being sentenced, or if the actor was

22. *See, e.g.*, Crim. Compl., State v. Kraft, No. 19-CF-171 (Wis. Cir. Ct. Jul. 8, 2019) (defendant charged as domestic abuse repeater for two prior convictions stemming from a single incident and entered at a single court hearing) (on file with author).

23. WIS. STAT. § 939.62(1) (2020).

convicted of a misdemeanor *on 3 separate occasions* during that same period."[24]

One defendant challenged his conviction under this general statute based on the following: "the defendant asserts that [because] his [three] prior convictions occurred in only two separate court appearances, or on two separate occasions, the trial court erroneously imposed the enhanced sentences on the defendant."[25] The court, however, knew the defendant had three convictions stemming from three underlying incidents.[26] It probably did not want him escaping justice (the enhanced penalty) merely because two of those convictions were entered at a single, consolidated court hearing. The court therefore rejected his argument.[27]

But how did the court sidestep the statutory requirement that, to be a general repeater, the defendant must have previously been convicted "on 3 separate occasions"?[28] It simply declared the statute to be ambiguous: "it is not clear whether occasion refers to the time of conviction or the time of the crime's commission."[29]

Actually, the statute is clear. Linguistically, "convicted of a misdemeanor on 3 separate occasions" refers to the time of conviction, not the time of the crime's commission. Conversely, if the legislature was concerned with the time of commission,[30] it would have written something like this: "the actor is a repeater if . . . the actor was convicted of misdemeanors *arising out of 3 separate occasions*."[31]

Nonetheless, contrary to the plain language of the statute as written, the court's rejection of the defendant's argument seems to imply that the number of underlying incidents from which the prior convictions stem, rather than the number of court hearings required to enter those convictions, is what counts as an occasion.[32]

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24. WIS. STAT. § 939.62(2) (2020) (emphasis added).

25. State v. Wittrock, 350 N.W.2d 647, 649 (Wis. 1984).

26. *Id.* at 648.

27. *Id.* at 653.

28. *Id.* at 649.

29. *Id.* at 651.

30. As Part IV explains, there are good reasons in support of both approaches, but for this particular statute, the legislature selected the number of court hearings rather than the number of underlying incidents.

31. This is how statutes are worded when they are concerned with the number of underlying incidents rather than the number of court hearings. *See, e.g.,* Osborn, *supra* note 5, at 971 (discussing the ACCA's mandatory minimum penalty which is triggered when the defendant has convictions "*committed on* occasions different form one another") (emphasis added).

32. *Wittrock*, 350 N.W.2d at 652–53.

In light of that court decision and its implication, a different defendant subsequently challenged his repeater status because his three convictions all stemmed from a single, underlying incident.[33] Therefore, in line with the court's reasoning, he argued that "misdemeanor convictions that arise out of a single course of conduct are not committed on 'separate occasions,' and accordingly, constitute one prior conviction for purposes of the repeater statute."[34]

The court, however, rejected that argument as well. The court admitted that it previously wrote: "it is not clear whether *occasion* refers to the time of conviction *or* the time of the crime's commission."[35] It further acknowledged its previous holding that occasion does *not* refer to "the time of conviction."[36] This would seem to bring us to the correct answer by process of elimination. However, the court disingenuously conjured up this gem: "merely stating that it is unclear whether 'occasion' refers to the time of conviction or the time of commission *does not mean that it in fact refers to either*."[37]

To what, then, does the language "convicted of a misdemeanor *on 3 separate occasions"* refer, if not to the number of underlying criminal events *or* the number of court hearings at which the convictions were entered?[38] Brazenly, the court held: "we have concluded that *each entry of conviction* against a defendant constitutes a separate occasion for purposes of the repeat offender statute."[39]

Such disingenuous wordplay renders the statutory language meaningless, thus making it difficult even to formulate a criticism of this judicial rewrite. But from the temporal perspective of "separate occasions," one problem is that entries of conviction occur simultaneously—not only in a single hearing but also in a single judicial utterance. A judge will typically say: "I accept your pleas, find you guilty, and enter judgments of conviction accordingly." But even if a judge were to elevate hyper-technical form over substance by entering the judgments of conviction in three successive utterances, who cares? Aside from the wasted breath, it would be a distinction without a difference.

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33. State v. Hopkins, 484 N.W.2d 549, 550 (Wis. 1992).
34. *Id.*
35. *Id.* at 553 (emphasis added).
36. *Id.*
37. *Id.* (emphasis added).
38. *Id.* at 550.
39. *Id.* at 554 (emphasis added).

What the court essentially did, then, is to delete the phrase "on 3 separate occasions" from the law, thereby transforming the statute into a mere counting statute. In other words, if a defendant merely has three prior convictions—even if all three stem from a single criminal incident and were entered at the same court hearing—the defendant is a repeater.

But that is not what the legislature wrote. If the legislature simply wanted to count prior convictions as the basis for determining repeater status, it would have used language similar to its evidence statute for impeachment, which *is* a counting statute. It reads: "[A] witness may be asked whether the witness has ever been convicted of a crime or adjudicated delinquent and *the number of such convictions or adjudications.*"[40] Similarly, if the legislature intended its repeater statute to be a counting statute, it would have written, much more succinctly than it actually did: "The actor is a repeater if the actor was convicted of a felony *or 3 misdemeanors* during the 5-year period immediately preceding the commission of the crime."[41]

Coming full circle back to the *domestic abuse* repeater statute, prosecutors cite the twisted conclusion from the *general* repeater cases discussed above—that is, being convicted "on 3 separate occasions" merely means having three prior convictions—and apply it to the domestic abuse repeater statute.[42] They argue that when the domestic abuse repeater statute reads "convicted on 2 or more separate occasions" it really means two or more convictions—even when those convictions arise from a single incident (and even a single act), were charged in a single complaint, and were entered at a single court hearing by a single judicial utterance.

This is an amazingly blatant, even transparent, rewriting of the statute, and defense counsel should be prepared to challenge it. The next Part provides some possible ammunition for the job.

III. THE DEFENSE STRIKES BACK

When a prosecutor charges a defendant as a domestic abuse repeater and, further, tortures the language "on 2 or more separate occasions," defense counsel should consider at least two

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40. WIS. STAT. § 906.09 (1) (2020) (emphasis added).

41. This is also how other repeater statutes are worded when they are intended merely to count convictions. *See, e.g.,* Osborn, *supra* note 5, at 964, n. 7 (quoting two federal repeater statutes that use the language "two or more prior convictions for a felony drug offense" and "convicted . . . of two or more serious violent felonies" to trigger the increased penalties).

42. *See supra* note 22 and accompanying text.

potential challenges.[43] First, such a rewrite would violate several canons of statutory construction. And second, such a twisted reading would produce absurd outcomes in violation of the absurdity doctrine.

A. Lessons in Statutory Construction

The previous Part demonstrated the deep flaws in the court's rewrite of the general repeater statute. When courts apply this rewrite tactic to the different, but similarly worded, domestic abuse repeater statute, they are starting anew, and defense counsel should try to prevent them from committing the same errors of statutory construction.

First, the court began its general repeater analysis by creating ambiguity where none existed. It wrote: "it is not clear whether occasion refers to the time of conviction or the time of the crime's commission."[44] It then used the opening it just created to wreak havoc on the statute.

Creating such faux ambiguity is a tried-and-true judicial tactic.[45] Defense counsel must head this tactic off at the pass and explain that the language of the domestic abuse enhancer statute is, in fact, clear. And when statutory language is clear, it must be applied as written. "Courts must presume that a legislature says in a statue what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, the first canon of judicial construction is also the last: the judicial inquiry is complete."[46]

Second, as explained earlier, when analyzing the general repeater statute the court also violated this basic rule of statutory construction: "Statues should be construed so that effect is given to each word."[47] Therefore, even if the court finds that the

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43. Both challenges relate to the requirement of separate occasions. There are many other potential challenges to this domestic abuse repeater statute that are *not* addressed in this Article.

44. State v. Hopkins, 484 N.W.2d 549, 553 (Wis. 1992).

45. *See* Brakke v. Iowa Dep't Nat. Res., 897 N.W.2d 522, 538 (Iowa 2017) (admitting to using the judicial trick of creating ambiguity to avoid applying the plain language of the statute); *see also* Laura R. Dove, *Absurdity in Disguise: How Courts Create Statutory Ambiguity to Conceal Their Application of the Absurdity Doctrine*, 19 NEV. L.J. 741, 751 (2019).

46. State v. Matthews, 933 N.W.2d 152, 159 (Wis. Ct. App. 2019) (quoting Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992) (internal punctuation omitted)). *See also* Commonwealth v. Raban, 85 A.3d 467, 469 (Pa. 2014) ("The best indication of [legislative] intent is the plain language of the statute"); Braine v. State, 255 So. 3d 470, 471 (Fla. Dist. Ct. App. 2018) ("The first place we look when construing a statute is to its plain language—if the statute is clear . . . we look no further.").

47. *Hopkins*, 484 N.W.2d at 554.

domestic abuse repeater statute is ambiguous, that does not give it a free pass to ignore the words it does not like.

Specifically, the statute reads "convicted on 2 or more separate occasions," and that language must be given some effect.[48] To treat the statute as one that merely tallies prior convictions—or prior entries of judgment of conviction, *which is the same thing in both form and substance*—would violate the above canon of construction. It would eliminate the words "separate occasions," effectively writing them out of the statute. This chaos cannot be repeated again. We cannot have a redo of the court's general repeater blunder, particularly now that the stakes are even higher: the domestic abuse repeater not only increases penalties, it transforms misdemeanors into felonies.

Third, the court must not once again ignore this canon of statutory construction: "Criminal Statutes should be strictly construed against the State."[49] This canon means that if a statute could arguably brand the defendant a repeater based on (a) two prior convictions, (b) two separate court hearings at which convictions were entered, or (c) two underlying events giving rise to two or more convictions, then the statute must be construed against the state and in the defendant's favor.

In other words, "no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed."[50] Instead, criminal statutes "shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused."[51] This is the price the government must pay when it is incapable of drafting clear laws (or, if the fault lies with the judiciary and not the legislature, of comprehending clear laws).

Despite the strength of these arguments, however, the courts have already made the above blunders with the general repeater statute. That is, the above arguments have already been rejected in a closely analogous, but not identical, situation. Given this, the judiciary may not be very eager to admit wrongdoing and correct its gaffs.[52] And some judges will simply be lazy, content to apply

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48. WIS. STAT. § 939.62(2)(b) (2020).

49. *Hopkins*, 484 N.W.2d at 554.

50. State v. Kremmin, 889 N.W.2d 318, 321 (Minn. Ct. App. 2017).

51. FLA. STAT. § 775.021(1) (2014).

52. Further, when a new statute is created after the courts' interpretive blunders regarding the analogous statute, a court may "presume that the legislature acts with full knowledge of existing statutes *and how the courts have interpreted these statutes*." State v. Victory Fireworks, Inc., 602 N.W.2d 128 (Wis. Ct. App. 1999) (emphasis added).

the canned reasoning from the general repeater cases—if only to avoid the discomfort of having to think through the issue.

Fortunately, as the next section demonstrates, defense counsel's most powerful argument may be this: applying the flawed reasoning of the general repeater cases to the domestic abuse repeater statute actually creates an absurd, and legally unacceptable, result that was not produced in the general repeater context.

B. The Absurdity (Doctrine) of It All

When the court changed the plain language of the general repeater statute, it did not create an absurd result in the process. In other words, it would have been perfectly reasonable for the legislature to have originally defined repeater as the court redefined it: a person who "was convicted of a felony or 3 misdemeanors" during the specified timeframe. Again, that is not what the legislature did, but neither would it have been absurd to have drafted the statute that way.

But that conclusion does not hold true when the courts rewrite the domestic abuse repeater statute in this same word-defying manner. When the courts essentially replace "convicted on 2 or more separate occasions" with two or more prior convictions, thus turning it into a simple counting statute, they create an absurdity.

This absurdity is revealed by returning to our hypothetical example where a defendant's criminal history consisted of a single case that charged three domestic abuse crimes: misdemeanor disorderly conduct, misdemeanor battery, and felony false imprisonment. All three charges stemmed from the single act of grabbing a roommate's arm during an argument. Because of the mitigated nature of the crime—some would even argue it should be a non-criminal ordinance case or a civil restraining order action—our hypothetical prosecutor resolved the matter for two misdemeanors, as the defendant's arm-grab did not warrant a felony conviction let alone prison time.

Now imagine another hypothetical defendant facing the identical counts but for a very different underlying incident. Suppose this defendant held his roommate against her will for hours (false imprisonment). During this incident, the defendant terrorized and even struck the roommate, causing serious pain and visible bruising (disorderly conduct and battery). In light of these aggravating factors, the prosecutor makes a very different offer to this defendant: plead to felony false imprisonment and the state will dismiss and read-in the two misdemeanors and will request prison

time. The defendant accepts this offer and now has a felony conviction.

The absurdity is this: by replacing the language "convicted on 2 or more separate occasions of a felony or a misdemeanor" with the mere requirement of two or more prior convictions—which is what prosecutors and judges are currently doing—the far more dangerous felon is *not* a domestic abuse repeater, but the much less dangerous misdemeanant *is* a domestic abuse repeater.

To illustrate the effect of this absurdity, assume that several years after each defendant was convicted, each is arrested for a second incident: this time, disorderly conduct, domestic abuse. The more dangerous defendant, who was convicted of a very serious crime (a felony) for a very aggravated incident, is *not* a domestic abuse repeater. Why not? Because he has *one* prior conviction. The state can therefore only charge him with a misdemeanor disorderly conduct and he will face only a short jail sentence.

That is fair enough, given that the statute requires convictions "on 2 or more separate occasions." Rather absurdly, however, the original defendant, who rightly received a much better resolution for a far less aggravated incident (the arm grab), *is* a domestic abuse repeater and will be treated more harshly. Why? Because he has *two* prior convictions—even though the convictions are not, in combination or by any measure, nearly as severe as the other defendant's felony conviction. Nonetheless, the state will charge this less culpable and less dangerous defendant with a felony disorderly conduct and he will face two-plus years in the state prison system.

Such an irrational outcome runs afoul of the "absurd results principle," also known as the "absurdity doctrine."[53] The absurdity doctrine was adopted by the United States Supreme Court in the mid-1800s.[54] Today it is widely recognized, as "the highest courts of all 50 states and the District of Columbia have endorsed this principle."[55] The absurdity doctrine is short and simple: "It is a well-settled proposition that statutory language be read in context

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53. *See* Linda D. Jellum, *But That is Absurd!: Why Specific Absurdity Undermines Textualism*, 76 BROOK. L. REV. 917, 921 (2011); Andrew S. Gold, *Absurd Results, Scrivener's Errors, and Statutory Interpretation*, 75 U. CIN. L. REV. 25, 53 (2006); John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2393–94 (2003).

54. *See* United States v. Kirby, 74 U.S. 482 (1868) (finding it absurd to charge a sheriff's deputy for interference with mail for arresting a mail carrier pursuant to an outstanding arrest warrant for murder).

55. Veronica M. Dougherty, *Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation*, 44 AM. U. L. REV. 127, 129, n. 9 (1994) (providing case cites for all states).

and in a reasonable manner so as *to avoid absurd or unreasonable results*."[56]

To illustrate the absurdity doctrine in a different context, consider this example: a Georgia statutory scheme prohibits sexual acts "perpetrated on any child under the age of 16" with "child" being defined as a "legitimate descendant" of the defendant.[57] Given such language, one defendant appealed his conviction because the child-victim in his case was not his "legitimate descendant."[58] The defendant was correct, of course, so the court had to deploy the absurdity doctrine to rewrite the statute and avoid an absurd outcome:

> It is the duty of the court to consider the results and consequences of any proposed construction and not so construe a statute as will result in *unreasonable or absurd consequences* . . . .
>
> From this perspective, it is obvious that the most reasonable interpretation of the statute, and the only one that does not result in *unreasonable or absurd consequences*, is that these statutes criminalize the acts . . . when perpetrated on *any* child under the age of 16, not just the legitimate descendants of the offender . . . .[59]

With regard to our domestic abuse repeater statute, it would be even easier to apply the absurdity doctrine. In our situation, the doctrine does not require a court to rewrite the statute (as the court did in the Georgia case) in order to avoid an absurd result. Rather, in our situation, the court merely has to apply the domestic abuse repeater statute *as written*, rather than going out of its way to eliminate the language "separate occasions" from the statute.

Further, because an appellate court has already ruled, in the context of the general repeater, that occasion does *not* refer to the number of court appearances at which the convictions were entered—and further, because that ruling, though incorrect, does not create an absurd outcome with regard to the domestic abuse repeater—then occasion must refer to the number of criminal events that underlie the convictions.

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56. State v. Matthews, 933 N.W.2d 152, 156 (Wis. Ct. App. 2019) (emphasis added) (internal quotation marks omitted) (quoting State *ex rel.* Kalal v. Circuit Court for Dane Cty., 681 N.W.2d 110 (Wis. 2004)).

57. Staley v. State, 672 S.E.2d 615, 616 (Ga. 2009).

58. *Id.* at 615.

59. *Id.* at 616 (emphasis added). For a similar case where the court rewrote, and expanded, a statute to prevent the defendant from escaping conviction, *see* State v. Bariteau, 884 N.W.2d 169 (S.D. 2016).

Consequently, when a defendant has two prior domestic abuse convictions stemming from a single act or incident, such a criminal history does *not* qualify as having been "convicted on 2 or more separate occasions of a felony or a misdemeanor." Therefore, such a defendant is not a domestic abuse repeater. To interpret the statute otherwise would create the absurd results discussed above.

Some courts warn that the absurdity doctrine should be used sparingly and cautiously. Therefore, irrational disparities in sentences, such as those discussed above, may not qualify as being quite absurd enough to invoke the aptly-named doctrine.[60] However, when courts urge restraint in the use of the absurdity doctrine, they do so for two specific reasons, neither of which is applicable to the domestic abuse repeater situation.

First, "the [absurdity] doctrine is one of last resort" because, when they apply it, judges are typically using it "to override unambiguous legislation."[61] This is what the court did in the Georgia case discussed earlier. Doing this raises concerns about the separation of powers and rule of law principles—both of which are good reasons to limit the use of the doctrine in some circumstances.

However, in the case of the domestic abuse repeater statute, the absurdity doctrine would *not* be invoked to "override unambiguous legislation." Rather, it is the *court's* "overrid[ing]" of the "unambiguous legislation" that created the absurd result and invoked the doctrine in the first place. The doctrine merely dictates that the court do what it should have done to begin with: respect the plain language of the statute. Consequently, this policy reason for limiting the use of the absurdity doctrine is not implicated.

Second, another reason to limit the use of the absurdity doctrine is that, when a court uses it to override the plain language of a statue, such judicial rewrites may violate a defendant's constitutional right to notice. As an Indiana court explained when refusing to apply the absurdity doctrine for the government's benefit against a defendant:

> [C]riminal statutes . . . should give fair warning . . . . This . . . requires us to interpret ambiguous criminal statutes in the

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60. *See, e.g.*, People v. Munoz, 252 Cal. Rptr. 3d 456, 473 (Ct. App. 2019) (denying defendant relief despite the absurdity that under the statutes "an attempted murderer could be punished with a sentence lengthier than that conceivably imposed on a murderer"); Braine v. State, 255 So. 3d 470, 472 (Fla. Dist. Ct. App. 2018) (denying defendant relief despite the absurdity that the statute "rewards an escalation in felonious conduct and punishes those demonstrating improved behavior").

61. Jellum, *supra* note 53, at 926–27 (citing Barnhart v. Sigmon Coal Co., 534 U.S. 438, 441 (2002)) (internal quotations and modification to text omitted).

> defendant's favor as far as the language can reasonably support. And it weighs even more heavily when the plain meaning is in the defendant's favor. How can a defendant have fair warning about criminal liability [or punishment] that has no basis in the law's plain meaning? Such a result would raise serious due-process concerns.[62]

Once again, this policy concern is not implicated when invoking the absurdity doctrine in the context of the domestic abuse repeater statute. In fact, the absurdity doctrine is being invoked to protect defendants: it is the judicial rewrite of the plain language of the statute, not the invocation of the absurdity doctrine, that deprives defendants of notice, fair warning, and due process.

IV. LEGISLATIVE REWRITES

Because the domestic abuse repeater statute is already clearly written, a legislative rewrite should not be necessary. Nonetheless, judges cannot be relied upon to correct the errors of their ways. The legislature should therefore rewrite, or at least amend, its domestic abuse repeater statute to properly define the word occasion. This is a simple task. Once again, and for ease of reference, the existing statute reads:

> [D]omestic abuse repeater means . . . [a] person who, during the 10-year period immediately prior to the commission of the crime for which the person is presently being sentenced . . . was convicted on 2 or more separate occasions of a felony or a misdemeanor for which a court imposed a domestic abuse surcharge . . . .[63]

It makes sense to define occasion as the time of conviction, as the legislature has already done clearly but implicitly. This approach allows a defendant two "separate opportunities to reflect and learn his or her lesson"[64]—opportunities in a formal setting, facing the wrath of a sentencing judge—before being subjected to a felony charge for what is only misdemeanor conduct. The legislature could therefore add the following language to clarify the above statute:

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62. Calvin v. State, 87 N.E.3d 474, 478–79 (Ind. 2017) (internal punctuation and citation omitted). *See also* State v. Kremmin, 889 N.W.2d 318, 321 (Minn. Ct. App. 2017) ("[N]o citizen should be . . . subjected to punishment that is not clearly prescribed."); FLA. STAT § 775.021(1) (2014) (The criminal statutes "shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.").

63. WIS. STAT. § 939.621(1)(b) (2020).

64. State v. Hopkins, 484 N.W.2d 549, 553 (Wis. 1992).

> Occasion refers to the time of conviction, regardless of the number of convictions or the number of criminal events from which the convictions arise.
>
> For purposes of this domestic abuse repeater statute, a trial court may not enter convictions arising from a single criminal event or charged in a single complaint on different occasions. If the court does so, all such occasions shall count as one occasion for purposes of determining the defendant's repeater status.

As discussed earlier, it would also make sense to define occasion as the time of the crime's commission, thus providing two real-life opportunities for the defendant to demonstrate that he or she is incapable of abiding by the law without the deterrent effect of increased crime classifications and enhanced penalties.[65] If the legislature wanted to take this definitional approach, it could instead add different language to the original statute in order to tie occasions to the underlying criminal episodes:

> Occasion refers to the time of the criminal event, regardless of the number of convictions arising from the criminal event.
>
> Criminal events are considered to be separate occasions when they are sufficiently distinct in time, place, or circumstances.[66]

Either one of those alternatives would restore some meaning to the language "on 2 or more separate occasions." And both would prevent the prosecutor and the judge from branding a defendant a domestic abuse repeater merely because he or she was convicted of two criminal counts arising out of a single incident, charged in a single complaint, and entered at a single court hearing.

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65. This, too, is a theoretically sound approach. *See* United States v. Balascsak, 873 F.2d 673, 683 (3rd Cir. 1989) (rejecting repeater status for someone "who, for example, committed several separate felonies during a single drunken spree, with no time to sober up and reconsider between the separate incidents.").

66. In the hypothetical arm-grab case discussed in this Article, the battery and disorderly conduct charges obviously stem from a single occasion (and even a single act). Sometimes, however, it is not clear whether two criminal convictions are sufficiently separated in time, place, or circumstances to constitute separate occasions. *See* Aliza Hochman Bloom, *Time and Punishment: How the ACCA Unjustly Creates a "One-Day Career Criminal"*, 57 AM. CRIM. L. REV. 1, 14 (discussing various tests used to determine whether "prior offenses occurred on different occasions," including consideration of "the passage of time between the offenses, and whether the locations and victims were the same or different.") (citing numerous cases); Osborne, *supra* note 5, at 977 (discussing "factors incorporated into the analysis of separate and distinct episodes" including "the geographic location, number of victims, nature of the offenses, method of completion, motive, and time interval between offenses.") (citing numerous cases).

CONCLUSION

When the label domestic abuse repeater is defined as a person "convicted on 2 or more separate occasions" of a domestic abuse crime, this is entirely different than merely having two prior convictions for domestic abuse crimes arising out of a single occasion.[67] And when prosecutors and judges attempt to change the definition in order to expand the statute's reach, defense counsel should consider objecting in at least two different ways.[68]

First, changing the language of the statute and transforming it into a mere counting statute violates several rules of statutory construction, including (a) unambiguous langue must be applied as written, (b) all words in a statute must be given effect, and (c) criminal statutes must be construed strictly and against the sate.[69]

Second and perhaps more importantly, changing the definition of a domestic abuse repeater from a person who has been convicted "on 2 or more separate occasions" to a person who merely has two prior convictions creates absurd outcomes. Specifically, defendants who are convicted of a more serious crime (a felony) for a more aggravated criminal incident will *not* be considered repeaters while defendants who have been convicted of less serious crimes (two misdemeanors) for a single and far less aggravated incident *will* be considered repeaters. [70]

The absurdity doctrine prohibits courts from reading a statute in a way that produces such an absurd outcome. Consequently, courts must simply read the domestic abuse repeater statute as written, without rewriting the words "convicted on 2 or more separate occasions" as merely "two prior convictions."[71]

Finally, because the judiciary has already blundered when interpreting the closely-related general repeater statute, the legislature cannot trust courts to change course at this point. Therefore, the legislature should amend the statute to add an appropriate definition of occasion in order to restore the original and intended meaning—or at least *some* meaning—to the statute.[72]

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67. *See* Parts I and II.
68. *See* Part III.
69. *See* Section III.A.
70. *See* Section III.B.
71. *See id.*
72. *See* Part IV.