STATE OF CONNECTICUT *v.* DOUGLAS C., JR.*
(SC 20456)

Robinson, C. J., and McDonald, D'Auria,
Mullins, Ecker and Keller, Js.

Syllabus

A criminal information is duplicitous when it charges a defendant in a single count with two or more distinct and separate criminal offenses, thereby implicating the defendant's constitutional right to a unanimous jury verdict.

Convicted of five counts of the crime of risk of injury to a child in connection with the sexual abuse of five victims, including N, S, and T, the defendant appealed to the Appellate Court. The defendant allegedly had sexual and indecent contact with the intimate parts of the victims, all of whom were under sixteen years of age at the time, on multiple occasions over the course of several years, while at the defendant's home. Each of the five risk of injury counts pertained to a different child. At the defendant's trial, N and T testified regarding the defendant's frequent touching of their breasts, and S testified about a single evening during which the

* In accordance with our policy of protecting the privacy interests of victims of the crime of risk of injury to a child, we decline to use the defendant's full name or to identify the victims or others through whom the victims' identities may be ascertained. See General Statutes § 54-86e.

Moreover, in accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2018), as amended by the Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, § 106, 136 Stat. 49, 851; we decline to identify any person protected or sought to be protected under a protection order, protective order, or a restraining order that was issued or applied for, or others through whom that person's identity may be ascertained.

defendant touched her vagina multiple times and made contact with her breasts. During the defendant's trial, defense counsel requested that the court provide a specific unanimity jury instruction on each of the risk of injury counts, claiming that the evidence demonstrated that there were discrete incidents of abuse and not a continuing course of conduct, which could cause the jurors to reach a guilty verdict on a particular count on the basis of findings as to different incidents of abuse. The trial court nevertheless denied the request for a unanimity instruction with respect to the counts pertaining to N, S, and T. On appeal to the Appellate Court from the judgment of conviction, the defendant claimed, inter alia, that the risk of injury counts pertaining to N, S, and T were duplicitous insofar as each count charged him with a single violation of the risk of injury to a child statute (§ 53-21 (a) (2)), even though there was evidence that he had engaged in multiple, separate instances of unlawful conduct, and that the trial court, therefore, improperly had declined defense counsel's request for a specific unanimity instruction as to those counts, in violation of his right to a unanimous jury verdict on each count. The Appellate Court affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court. *Held*:

1. This court's review of federal case law concerning the scope of the unanimity requirement led it to clarify that a duplicitous information may raise two distinct and separate kinds of unanimity issues, that is, unanimity as to the elements of a crime and unanimity as to instances of conduct, the defendant's claims in the present case related to unanimity as to instances of conduct, and this court adopted the approach utilized by a majority of the federal courts of appeals for determining whether a criminal information gives rise to unanimity claims based on instances of unlawful conduct:

   The issue of unanimity as to the elements of a crime arises when a defendant is charged in a single count with having violated multiple statutory provisions, subsections, or clauses, and, when such an issue is presented, a court must determine whether the statutory language creates multiple elements, each of which the government must charge as a separate offense, or alternative means of committing the element at issue.

   The issue of unanimity as to instances of conduct arises when a defendant is charged in a single count with having violated a single statutory provision, subsection, or clause on multiple, separate occasions, and the dispute centers on whether, in light of the statutory language, the defendant could be convicted of a single count of violating a statute based on evidence of multiple, separate occurrences of the prohibited act or acts.

In the present case, the defendant claimed that the counts of the information pertaining to N, S, and T violated his right to unanimity as to instances of conduct, insofar as each count was premised on multiple, separate instances of conduct and the trial court had declined to provide a specific unanimity instruction as to those counts.

This court adopted the following multipart test, employed by federal courts, for claims of unanimity as to instances of conduct, to determine whether a defendant's constitutional right to jury unanimity was violated by the trial court's failure to give a specific unanimity instruction.

First, considering the allegations in the information and the evidence admitted at trial, does a single count charge the defendant with violating a single statute in multiple, separate instances?

Second, if so, does each instance of conduct establish a separate violation of the statute? If the statute contemplates criminalizing a continuing course of conduct, then each instance of conduct is not a separate violation of the statute but a single, continuing violation. To determine whether the statute contemplates criminalizing a continuing course of conduct, well established principles of statutory interpretation should be employed. Only if each instance of conduct constitutes a separate violation of the statute is a count duplicitous.

Third, if the count is duplicitous, was the duplicity cured by a bill of particulars or a specific unanimity instruction? If yes, then there is no unanimity issue. If not, then a duplicitous count violates a defendant's right to jury unanimity but reversal of the defendant's conviction is required only if the defendant establishes prejudice.

In light of this court's adoption of the foregoing test for claims of unanimity as to instances of conduct, to the extent that this court and the Appellate Court in previous cases have failed to heed the relevant federal precedent and to distinguish between unanimity as to the elements of a crime and unanimity as to instances of conduct, this court overruled those prior cases.

2. Applying the newly adopted test for unanimity as to instances of conduct, this court concluded that the counts of the information pertaining to N, S, and T were not duplicitous and that the trial court's failure to grant defense counsel's request for a specific unanimity instruction as to those counts, therefore, did not violate the defendant's constitutional right to jury unanimity, and, accordingly, affirmed the Appellate Court's judgment:

a. The counts of risk of injury to a child pertaining to N and T, which were based on similar testimony about the defendant's touching of N's and T's intimate parts, were not duplicitous:

Under the first prong of the multipart test, this court concluded that the counts pertaining to N and T were premised on multiple, separate incidents of conduct and not a single incident, insofar as there was testimony that the defendant frequently touched N's and T's breasts in a sexual and indecent manner during N's weekly visits to the defendant's residence and whenever T was at the residence.

Under the second prong, regarding whether each incident could establish an independent violation of § 53-21 (a) (2), this court concluded that the state had the discretion to charge the defendant with having violated § 53-21 (a) (2) as to each incident of conduct or to present those incidents to the jury as a continuing course of conduct, because, although the plain language of the statute was ambiguous as to whether the multiple, separate instances of conduct at issue were separate and distinct violations of § 53-21 (a) (2), nothing in that statute's legislative history suggested that the legislature intended to abrogate this court's prior case law interpreting § 53-21 to allow a defendant to be charged under a continuing course of conduct theory.

Moreover, not only does § 53-21 (a) (2) contemplate criminalizing a continuing course of conduct, but, in the present case, the state charged the defendant under such a theory, alleging in the counts pertaining to N and T that the defendant had contact with their intimate parts in a sexual and indecent manner over a period of time, rather than charging the defendant with a single instance of contact as to each child on a single date, and the jury reasonably could have found that the multiple, separate incidents of conduct constituted a continuing course of conduct on the basis of the evidence presented at trial, especially the testimony of N, T, and the other victims.

b. The count of risk of injury to a child pertaining to S, which was premised on multiple acts of sexual and indecent contact with S's vagina and breasts during a single evening, was not duplicitous:

Although it may be difficult to determine whether a single count is premised on multiple acts, each of which is committed in the course of a single criminal episode of relatively brief, temporal duration, and thus constitutes alternative means of committing the elements at issue, or whether the count is premised on multiple, separate and distinct acts, each of which could constitute a separate statutory violation, in the present case, the jury reasonably could have interpreted the evidence as demonstrating that the defendant's acts toward S constituted either a single criminal episode of relatively brief, temporal duration or a continuing course of conduct in that the acts occurred multiple times during a single evening, involved a single victim and furthered a single, continuing objective to touch S in a sexual and indecent manner.

(*Two justices concurring separately*)

Argued November 15, 2021—officially released December 13, 2022**

** December 13, 2022, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Procedural History

Substitute information charging the defendant with five counts of the crime of risk of injury to a child and one count of the crime of sexual assault in the second degree, brought to the Superior Court in the judicial district of New London and tried to the jury before *Jongbloed*, *J.*; thereafter, the court granted the defendant's motion for a judgment of acquittal as to the charge of sexual assault in the second degree; verdict and judgment of guilty of five counts of risk of injury to a child, from which the defendant appealed to the Appellate Court, *Alvord*, *Prescott* and *Sullivan*, *Js.*, which affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

Dina S. Fisher, assigned counsel, for the appellant (defendant).

Michele C. Lukban, senior assistant state's attorney, with whom, on the brief, were *Michael L. Regan*, former state's attorney, and *Theresa Ferryman*, senior assistant state's attorney, for the appellee (state).

Opinion

D'AURIA, J. It is well established that a criminal information is duplicitous[1] when it charges the defendant in a single count with two or more distinct and separate criminal offenses, thereby implicating the defendant's constitutional right to jury unanimity. What is not clear, and what we must decide in this certified appeal, is whether a defendant charged in a single count with a

[1] We note that the word "duplicitous" has a unique legal definition that differs from its common dictionary definition. Compare Black's Law Dictionary (11th Ed. 2019) p. 635 ("alleging two or more matters in one plea"; and "characterized by double pleading"), with Merriam-Webster's Collegiate Dictionary (11th Ed. 2014) p. 387 (defining "duplicitous" as "marked by duplicity" and "deceptive in words or action").

single statutory violation faces a duplicitous information when the evidence at trial supports multiple, separate incidents of conduct, each of which could independently establish a violation of the charged statute. We conclude as a matter of federal law that such a count is duplicitous and, if not cured by a bill of particulars or a specific unanimity instruction, violates the defendant's constitutional right to jury unanimity, thereby requiring reversal of the defendant's conviction if this duplicity creates the risk that the conviction will result from different jurors concluding that the defendant committed different criminal acts.

The defendant, Douglas C., Jr., appeals from the Appellate Court's judgment upholding his conviction, after a jury trial, of five counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (2).[2] The defendant claims that counts one, five, and six were duplicitous because each count charged him with a single violation of § 53-21 (a) (2), despite evidence at trial of multiple, separate incidents of conduct. As a result, he argues that the trial court improperly declined to give the jury a specific unanimity instruction as to these counts. We disagree and, accordingly, affirm the judgment of the Appellate Court.

The jury reasonably could have found the following facts. The defendant had sexual and indecent contact with the intimate parts of five female children—N, C, O, S and T—on various dates while they were under the age of sixteen. *State* v. *Douglas C.*, 195 Conn. App. 728, 731, 227 A.3d 532 (2020). The five children would often be in the defendant's presence at the numerous

[2] Although § 53-21 has been amended numerous times since the defendant's commission of the crimes that formed the basis of his conviction; see, e.g., Public Acts 2015, No. 15-205, § 11; Public Acts 2013, No. 13-297, § 1; and Public Acts 2007, No. 07-143, § 4; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of § 53-21.

gatherings he had at his home in Lisbon. Id. At these gatherings, the defendant would serve them alcohol, although they were under the legal age to consume alcoholic beverages. Id., 731–32. The children also would be in the defendant's presence when babysitting his own children at his home or on other occasions. Id. When the defendant was in the company of the children, he had contact with their intimate parts on multiple occasions. Id.

Relevant to this appeal, on multiple occasions between 2005 and January 8, 2007, the defendant touched N's breasts. This occurred with frequency when N was at the defendant's residence, which occurred every weekend for years. Because of the frequency of this contact, N could not recall specific dates or incidents, with the exception of the first time the defendant ever touched her breasts—in a car after getting fast food—and the one and only time that the defendant touched her vagina—when he performed oral sex on her—although she could not recall the dates with any specificity. Additionally, during a single evening on a date between 2005 and September 15, 2008, the defendant touched S's vagina multiple times and made contact with her breasts. Specifically, after the defendant provided her with alcohol, S was running up and down a hill in the defendant's backyard. She fell twice, and, each time, as the defendant helped S to her feet, he touched her intimate parts—the first time he helped her up, he touched her vagina, and the second time he helped her up, he grabbed her breasts. After the defendant's wife called S and the defendant to come inside, the defendant provided S with more alcohol and sent her to bed. A few minutes later, the defendant entered the room where S was sleeping, lied down in bed with her, and touched her vagina twice. Finally, on multiple occasions between 2005 through October 23, 2007, the defendant touched T's breasts. This occurred

with such regularity that T could not recall specific dates or incidents, with the exception of one specific incident. Specifically, she was present when the defendant performed oral sex on N, and, during this incident, the defendant touched her breasts, but she could not recall the date of that incident.

The five minor victims did not disclose the defendant's inappropriate contact with their intimate parts until years later. The defendant subsequently was arrested and charged with five separate counts of risk of injury to a child in violation of § 53-21 (a) (2), with each count involving a different child. In addition, he was charged with one count of sexual assault in the second degree in violation of General Statutes § 53a-71 (a) (3), in relation to N, but the trial court granted the defendant's motion for a judgment of acquittal as to this count.[3]

[3] The defendant was charged with five counts of risk of injury to a child, with each count pertaining to each different child. Specifically, count one charged the defendant with violating § 53-21 (a) (2) as to N. Count three charged the defendant with violating § 53-21 (a) (2) as to C. Count four charged the defendant with violating § 53-21 (a) (2) as to O. Count five charged the defendant with violating § 53-21 (a) (2) as to S. Count six charged the defendant with violating § 53-21 (a) (2) as to T.

Counts one, five, and six charged the defendant with having violated a single statutory subdivision: subdivision (2) of subsection (a) of § 53-21. Specifically, as to count one, the information charged that, at the defendant's residence in Lisbon, "in or about 2005 through January 8, 2007, the said [defendant] did commit the crime of injury or risk of injury to or impairing the morals of a child in that he had contact with the intimate parts of a child under the age of sixteen years, the minor female [N], in a sexual and indecent manner likely to impair the health and morals of said child, in violation of § 53-21 (a) (2) of the . . . General Statutes."

Similarly, as to count five, the information charged that, at the defendant's residence in Lisbon, "in or about 2005 through September 15, 2008, the said [defendant] did commit the crime of injury or risk of injury to or impairing the morals of a child in that he had contact with the intimate parts of a child under the age of sixteen years, the minor female [S], in a sexual and indecent manner likely to impair the health and morals of said child, in violation of § 53-21 (a) (2) of the . . . General Statutes."

As to count six, the information charged that, at the defendant's residence in Lisbon, "in or about 2005 through October 23, 2007, the said [defendant]

At trial, the state offered the testimony of N, S and T, as detailed previously, to establish that, on multiple occasions, the defendant had contact with their intimate parts. As a result, defense counsel requested that the court provide a specific unanimity instruction to the jury on counts one, three, four, five, and six. He argued that the evidence showed there were discrete incidents, not a continuing course of conduct, and thus "the danger that arises if the jury isn't instructed that [it has] to be unanimous on at least one of those events for each of the complainants with respect to each count is that we could imagine, easily imagine, a situation in which a certain number of jurors may believe beyond a reasonable doubt that, you know, one of those described events happened, and other jurors may not believe that that particular event happened, whereas another set of jurors may believe that a second event, as described by the complaining witnesses, happened beyond a reasonable doubt but doesn't agree with the first, you know, three jurors as to one of the other events." The prosecutor agreed that a specific unanimity instruction should be given as to count four, which charged the defendant with both having had contact with the intimate parts of O and subjecting O to contact with his intimate parts but objected to the court's giving a specific unanimity instruction on the other counts because there was testimony that "this happened all the time," every time the five children saw the defendant. The court agreed that it would provide a specific

did commit the crime of injury or risk of injury to or impairing the morals of a child in that he had contact with the intimate parts of a child under the age of sixteen years, the minor female [T], in a sexual and indecent manner likely to impair the morals of said child, in violation of § 53-21 (a) (2) of the . . . General Statutes."

On appeal, the defendant challenges the judgment of conviction only as to counts one, five, and six. He concedes that, because his request for a specific unanimity instruction as to count four was granted, he has no claim as to that count. Additionally, in his reply brief, he concedes that he has no claim as to count three.

unanimity instruction as to count four but not as to the other counts because they did not involve multiple statutory subsections.

During closing argument, regarding multiple incidents of the defendant's having touched each child's intimate parts, the prosecutor argued that, "[b]ecause of the nature of the allegations here—the state is permitted to charge in this fashion—it is impossible for the state, the state contends, to prove individual episodes through the course of this period of time—so that, if you were to consider the evidence and decide that an incident of sexual contact occurred within this time period, and you're convinced beyond a reasonable doubt that at least one episode occurred, you would find the defendant guilty. . . . This is not a case that involves an episode that happened one evening with crime tape around it. It's about a period of time in which the defendant had access to these young women and in which he had sexual contact with them. That's the state's contention." More specifically, the prosecutor argued that the children had testified that this touching occurred regularly any time they were with the defendant.

In response, defense counsel, in closing, argued that the children had fabricated their testimony and focused also on whether there was reasonable doubt that the children were under the age of sixteen at the time of the alleged incidents, as required by § 53-21 (a) (2). In rebuttal, the prosecutor again emphasized that this conduct did not occur on a single occasion but that the defendant continuously engaged in this inappropriate touching "weekend after weekend . . . ."

When instructing the jury, the trial court included only a general unanimity charge.[4] The jury returned a

[4] The trial court instructed the jury: "As to each count, if you unanimously find that the state has proved beyond a reasonable doubt each of the elements of the crime of risk of injury to a minor, then you shall find the defendant guilty. On the other hand, if you unanimously find that the state has failed to prove beyond a reasonable doubt any of the elements, you shall then

guilty verdict on counts one, three, four, five, and six. The court imposed a total effective sentence of eighteen years of incarceration, execution suspended after ten years, followed by ten years of probation.

The defendant appealed to the Appellate Court, claiming that he was deprived of his constitutional right to a unanimous jury verdict because the trial court improperly denied his request for a specific unanimity instruction as to counts one, three, five, and six.[5] *State* v. *Douglas C.*, supra, 195 Conn. App. 745. Addressing this claim, the Appellate Court held that, under governing case law from this state, a specific unanimity instruction was not required because unanimity concerns arise only when the state charges the defendant in a single count with having violated multiple statutes, statutory subsections, or statutory clauses. Id., 752. The Appellate Court stated that unanimity issues do not arise when a defendant is charged in a single count with violating a single statute, statutory subsection, or statutory clause on multiple occasions. Id., 754. As a result, the Appellate Court held that, because the state charged the defendant under each count with having violated only a single statutory subsection, the defendant's right to jury unanimity was not violated. The defendant sought certification to appeal to this court, which we granted.

The defendant claims that counts one, five, and six were duplicitous because each count charged him with a single violation of § 53-21 (a) (2) but that there was evidence presented of multiple, distinct acts. According

find the defendant not guilty. . . . When you reach a verdict, it must be unanimous."

[5] The defendant also stated in his brief to the Appellate Court that his right to a unanimous jury verdict was protected under article first, § 8, of the Connecticut constitution, but he failed to analyze this claim separately under the state constitution, and thus the Appellate Court did not address the state constitutional claim. On appeal to this court, the defendant has not raised a separate state constitutional claim.

to the defendant, because the counts at issue were premised on these multiple acts, only the conceptual distinction portion of the test for unanimity announced in *State* v. *Famiglietti*, 219 Conn. 605, 619–20, 595 A.2d 306 (1991), which followed the test detailed in *United States* v. *Gipson*, 553 F.2d 453 (5th Cir. 1977), applies to his claim.[6] Under this modified version of the *Gipson* test, the defendant argues, counts one, five, and six are duplicitous. Although we agree with the defendant that claims of unanimity as to multiple, separate instances of conduct, which the defendant refers to as multiple acts, are analyzed under a different test than claims of unanimity as to elements, we disagree with both the test he urges this court to apply and the outcome under the proper test.

I

The defendant argues that his right to jury unanimity was violated because each risk of injury count was premised on multiple, separate incidents of criminal conduct. In making this argument, he asserts that a different standard applies to his claim than to unanimity claims that involve a single count alleging the violation of multiple statutes or statutory subsections. We thus begin by determining whether there are different kinds of unanimity claims and, if so, the legal test applicable to the defendant's unanimity claim. We conclude that there are two distinct kinds of unanimity claims—una-

[6] We have described the *Gipson* test as follows: "We first review the instruction that was given to determine whether the trial court has sanctioned a nonunanimous verdict. If such an instruction has not been given, that ends the matter. Even if the instructions at trial can be read to have sanctioned such a nonunanimous verdict, however, we will remand for a new trial only if (1) there is a conceptual distinction between the alternative acts with which the defendant has been charged, and (2) the state has presented evidence to support each alternative act with which the defendant has been charged." (Internal quotation marks omitted.) *State* v. *Reddick*, 224 Conn. 445, 453, 619 A.2d 453 (1993).

nimity as to elements and unanimity as to instances of conduct—and that different tests apply to these claims.

In determining the proper test for analyzing the defendant's claim, it is useful to begin with a review of the definition of a "duplicitous" count and the principles underpinning the federal right to a unanimous jury verdict. From there, we synthesize the case law from the federal courts of appeals, which recognizes that duplicitous indictments may implicate unanimity principles in two distinct ways: unanimity as to elements and unanimity as to instances of conduct. Because of the unique nature of these two unanimity issues, federal courts have applied different tests to these distinct circumstances to determine whether a defendant's right to jury unanimity has been violated. Until today, courts of this state have not recognized this distinction. We now conform our case law to this well established federal jurisprudence.

A

"Duplicity occurs when two or more offenses are charged in a single count of the accusatory instrument. . . . [A] single count is not duplicitous merely because it contains several allegations that could have been stated as separate offenses. . . . Rather, such a count is . . . duplicitous [only when] the policy considerations underlying the doctrine are implicated. . . . These [considerations] include avoiding the uncertainty of whether a general verdict of guilty conceals a finding of guilty as to one crime and a finding of not guilty as to another, avoiding the risk that the jurors may not have been unanimous as to any one of the crimes charged, assuring the defendant adequate notice, providing the basis for appropriate sentencing, and protecting against double jeopardy in a subsequent prosecution." (Citations omitted; internal quotation marks omitted.) *State* v. *Saraceno*, 15 Conn. App. 222,

228–29, 545 A.2d 1116, cert. denied, 209 Conn. 823, 552 A.2d 431 (1988), and cert. denied, 209 Conn. 824, 552 A.2d 432 (1988); see also *United States* v. *Jaynes*, 75 F.3d 1493, 1502 n.7 (10th Cir. 1996); *United States* v. *Browning, Inc.*, 572 F.2d 720, 725 (10th Cir.), cert. denied, 439 U.S. 822, 99 S. Ct. 88, 58 L. Ed. 2d 114 (1978). In the present case, the defendant argues only that the allegedly duplicitous counts implicate his right to a unanimous jury verdict. A duplicitous information, however, may be cured either by a bill of particulars or a specific unanimity instruction. See, e.g., *State* v. *Conley*, 31 Conn. App. 548, 558, 627 A.2d 436 (when count of information is duplicitous, "defendant's recourse is to file a motion for a bill of particulars"), cert. denied, 227 Conn. 907, 632 A.2d 696 (1993); *State* v. *Markham*, 12 Conn. App. 306, 311, 530 A.2d 660 (1987) (same); see also *United States* v. *Newson*, 534 Fed. Appx. 604, 604–605 (9th Cir. 2013) (specific unanimity instruction can cure juror confusion as to which crime defendant is alleged to have committed); *United States* v. *White*, 766 F. Supp. 873, 893 (E.D. Wn. 1991) (bill of particulars rendered moot defendant's claim that count of indictment was duplicitous). Only in the absence of such remedies does a duplicitous count violate a defendant's right to jury unanimity.[7] See part I B of this opinion. The defendant argues that, because the information was duplicitous, the trial court erroneously denied his request for both a bill of particulars and a specific unanimity

[7] The concurrence is correct that the issues of duplicity and unanimity are "different—albeit related—matters. The cure for a violation of the rules against duplicitous pleading is, typically, reformulation of the indictment, a bill of particulars, and/or appropriate jury instructions, not reversal of the conviction." (Footnote omitted.) In the present case, the issue of duplicity was raised and evaluated at the pretrial phase of the criminal proceedings. The trial court, however, declined to cure any alleged duplicity. This court must now determine whether the counts were duplicitous and thus violated the defendant's right to jury unanimity, posttrial, based on all the evidence admitted at trial. See *United States* v. *Correa-Ventura*, 6 F.3d 1070, 1086–87 (5th Cir. 1993).

instruction and that this error resulted in a verdict that violated his right to jury unanimity. Although we generally review the denial of a motion for a bill of particulars for abuse of discretion; see, e.g., *State* v. *Vumback*, 263 Conn. 215, 221, 819 A.2d 250 (2003); because this claim is premised on an alleged infringement of the defendant's constitutional rights, our review is plenary. See, e.g., *State* v. *Jodi D.*, 340 Conn. 463, 476, 264 A.3d 509 (2021) (constitutional issue presents legal question subject to de novo review); see also *United States* v. *Newell*, 658 F.3d 1, 20 (1st Cir.), cert. denied, 565 U.S. 955, 132 S. Ct. 430, 181 L. Ed. 2d 280 (2011), and cert. denied sub nom. *Parisi* v. *United States*, 565 U.S. 1137, 132 S. Ct. 1069, 181 L. Ed. 2d 783 (2012).

The United States Supreme Court recently detailed the history of the federal constitutional right to jury unanimity: "The [s]ixth [a]mendment promises that '[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the [s]tate and district wherein the crime shall have been committed, which district shall have been previously ascertained by law.' The [a]mendment goes on to preserve other rights for criminal defendants but says nothing else about what a 'trial by an impartial jury' entails." *Ramos* v. *Louisiana*, U.S. , 140 S. Ct. 1390, 1395, 206 L. Ed. 2d 583 (2020). Although the sixth amendment says nothing about the need for a unanimous verdict, the court has noted that "[t]he text and structure of the [c]onstitution clearly suggest that the term 'trial by an impartial jury' carried with it some meaning about the content and requirements of a jury trial." (Emphasis omitted.) Id. "One of these requirements was unanimity. Wherever we might look to determine what the term 'trial by an impartial jury trial' meant at the time of the [s]ixth [a]mendment's adoption—whether it's the common law, state practices in the founding era, or opinions and treatises written soon

afterward—the answer is unmistakable. A jury must reach a unanimous verdict in order to convict." Id.[8]

This constitutional requirement has come to apply equally to state and federal criminal trials. See id., 1397. Specifically, in *Duncan* v. *Louisiana*, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968), the United States Supreme Court held that the right to a trial by jury guaranteed by the sixth amendment applies to "serious criminal cases" tried in state court.[9] Id., 156. Subsequently, in *Burch* v. *Louisiana*, 441 U.S. 130, 99 S. Ct. 1623, 60 L. Ed. 2d 96 (1979), the court held that the sixth amendment requires a six person jury in state court to be unanimous before finding a defendant guilty of a "nonpetty offense . . . ." Id., 134. Most recently, in *Ramos*, the court clarified that the sixth amendment requires a jury in a state court to be unanimous before finding a criminal defendant guilty of a "serious offense."[10] *Ramos* v. *Louisiana*, supra, 140 S. Ct. 1394;

[8] "The requirement of juror unanimity emerged in [fourteenth] century England and was soon accepted as a vital right protected by the common law. . . . This [c]ourt has, repeatedly and over many years, recognized that the [s]ixth [a]mendment requires unanimity. As early as 1898, the [c]ourt said that a defendant enjoys a 'constitutional right to demand that his liberty should not be taken from him except by the joint action of the court and the unanimous verdict of a jury of twelve persons.' A few decades later, the [c]ourt elaborated that the [s]ixth [a]mendment affords a right to 'a trial by jury as understood and applied at common law . . . includ[ing] all the essential elements as they were recognized in this country and England when the [c]onstitution was adopted.' And, the [c]ourt observed, this includes a requirement 'that the verdict should be unanimous.' " (Footnotes omitted.) *Ramos* v. *Louisiana*, supra, 140 S. Ct. 1395–97.

[9] In *Apodaca* v. *Oregon*, 406 U.S. 404, 411, 92 S. Ct. 1628, 32 L. Ed. 2d 184 (1972), however, the court upheld criminal convictions under Oregon law that required the agreement of only ten members of a twelve person jury in certain noncapital cases. The court explicitly had acknowledged in *Ramos* that its decision in *Apodaca* was mistaken. See *Ramos* v. *Louisiana*, supra, 140 S. Ct. 1405; see also id., 1410 (Sotomayor, J., concurring as to all but part IV A); id., 1416 (Kavanaugh, J., concurring in part).

[10] We note that, although the United States Supreme Court has classified the right to unanimity as a sixth amendment right, there has been some confusion regarding whether the right to jury consensus as to a defendant's course of action is protected under the sixth amendment or under the

see *Edwards* v. *Vannoy*, U.S , 141 S. Ct. 1547, 1551, 209 L. Ed. 2d 651 (2021). Although there has been a good deal of litigation involving what constitutes a "serious criminal case," a "nonpetty offense" and a "serious offense," it is not disputed that this case qualifies and that the right to jury unanimity applies.

due process clauses of the fifth and fourteenth amendments. See *Schad* v. *Arizona*, 501 U.S. 624, 634 n.5, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991) (opinion announcing judgment). Prior to *Ramos*, the defendant in *Schad* claimed that Arizona's first degree murder statute violated his sixth amendment right to jury unanimity because it did not require the jurors to be unanimous as to one of the alternative theories of premeditated and felony murder. Id., 630 (opinion announcing judgment). The court in *Schad*, however, reframed the defendant's claim as a due process challenge, explaining: "Even assuming a requirement of jury unanimity arguendo, that assumption would fail to address the issue of what the jury must be unanimous about. [The] jury was unanimous in deciding that the [s]tate had proved what, under state law, it had to prove: that [the defendant] murdered either with premeditation or in the course of committing a robbery. The question still remains whether it was constitutionally acceptable to permit the jurors to reach one verdict based on any combination of the alternative findings. . . . In other words, [the defendant's] real challenge is to Arizona's characterization of [first degree] murder as a single crime as to which a verdict need not be limited to any one statutory alternative, as against which he argues that premeditated murder and felony murder are separate crimes as to which the jury must return separate verdicts." Id., 630–31 (opinion announcing judgment). The court noted, however, that characterizing the right at issue as a sixth amendment right or as a due process right was "immaterial to the problem of how to go about deciding what level of verdict specificity is constitutionally necessary." Id., 634 n.5 (opinion announcing judgment).

The United States Court of Appeals for the Third Circuit, however, has reconciled the confusion in the case law in a way we find persuasive: "[R]ead as a whole, we think that [*Schad*'s] emphasis on the [d]ue [p]rocess [c]lause does not mean that the [s]ixth [a]mendment is irrelevant here. Rather, we conclude that the [s]ixth [a]mendment does require unanimity, in federal [and state] criminal trials, on all elements of the offense. However, because what constitutes an 'element' is purely a matter of legislative intent, the [s]ixth [a]mendment places no limit on the legislature's power to make alternative facts 'means' not subject to a unanimity requirement. The limit on the legislature's definitional power, then, comes from the [d]ue [p]rocess [c]lause. . . . As [*Schad*] pointed out, 'this difference in characterization . . . is immaterial to the problem of how to go about deciding what level of verdict specificity is constitutionally necessary.' " *United States* v. *Edmonds*, 80 F.3d 810, 823 n.17 (3d Cir.), cert. denied, 519 U.S. 927, 117 S. Ct. 295, 136 L. Ed. 2d 214 (1996).

B

Although the federal constitutional right to jury unanimity clearly applies in both state and federal courts, what is less clear is precisely *what* the jury must be unanimous about. Detailing the scope of the unanimity requirement, the United States Supreme Court has explained that a jury "cannot convict unless it unanimously finds that the [g]overnment has proved each element" of the offense charged. *Richardson* v. *United States*, 526 U.S. 813, 817, 119 S. Ct. 1707, 143 L. Ed. 2d 985 (1999). Nevertheless, the court has recognized that "different jurors may be persuaded by different pieces of evidence, even when they agree [on] the bottom line. Plainly there is no general requirement that the jury reach agreement on the preliminary factual issues [that] underlie the verdict." (Internal quotation marks omitted.) *Schad* v. *Arizona*, 501 U.S. 624, 631–32, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991) (opinion announcing judgment). In other words, a jury must agree "on the principal facts underlying its verdict—what courts have tended to call the elements of the offense. But that requirement does not extend to subsidiary facts—what the [Supreme] Court has called 'brute facts.' " *United States* v. *Lee*, 317 F.3d 26, 36 (1st Cir.), cert. denied, 538 U.S. 1048, 123 S. Ct. 2112, 155 L. Ed. 2d 1089 (2003). "[I]n the routine case, a general unanimity instruction will ensure that the jury is unanimous on the factual basis for a conviction, even [when] an indictment alleges numerous factual bases for criminal liability." (Internal quotation marks omitted.) *United States* v. *Holley*, 942 F.2d 916, 925–26 (5th Cir. 1991), quoting *United States* v. *Beros*, 833 F.2d 455, 460 (3d Cir. 1987).

The court has clarified that alternative means of committing a crime constitute underlying brute facts: "[F]or example, [the court has] sustained a murder conviction against the challenge that the indictment on which the verdict was returned was duplicitous in charging that

death occurred through both shooting and drowning. In holding that the [g]overnment was not required to make the charge in the alternative . . . [the court] explained that it was immaterial whether death was caused by one means or the other. . . . This fundamental proposition is [also] embodied in Federal Rule of Criminal Procedure 7 (c) (1), which provides that [i]t may be alleged in a single count that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means." (Citations omitted; internal quotation marks omitted.) *Schad* v. *Arizona*, supra, 501 U.S. 631 (opinion announcing judgment).

A majority of unanimity cases involve this "crucial distinction . . . between a fact that is an element of the crime and one that is 'but the means' to the commission of an element." *United States* v. *Verrecchia*, 196 F.3d 294, 299 (1st Cir. 1999). The line between means and element may be unclear at times, and courts have divided over the appropriate test to apply to distinguish between means and elements. See *Schad* v. *Arizona*, supra, 501 U.S. 641–42 (opinion announcing judgment). Indeed, *Ramos*, *Schad* and *Richardson* all involved indictments that charged a defendant in a single count with violating multiple statutory provisions, subsections, or clauses, and thus the court had to determine whether the statutory provisions, subsections, or clauses constituted elements or alternative means. As a result, those cases raised unanimity as to elements claims—unlike the present case, which involves unanimity as to instances of conduct. Although those cases did not raise claims of unanimity as to instances of conduct, the court implicitly acknowledged that, if an indictment charged a defendant in a single count with violating a single statutory provision, subsection, or clause on multiple occasions, the jury must agree unanimously as to which instance of conduct the defendant committed.

For example, in *Schad*, the Supreme Court rejected a challenge to Arizona's first degree murder statute, which permitted conviction on a theory of either premeditation or felony murder. See id., 627 (opinion announcing judgment). In his concurrence, which was necessary to the court's judgment, Justice Scalia warned that "[w]e would not permit . . . an indictment charging that the defendant assaulted either X on Tuesday or Y on Wednesday . . . ." Id., 651 (Scalia, J., concurring in part and concurring in the judgment). Subsequently, the majority in *Richardson* specifically cited Justice Scalia's warning in *Schad* in support of the proposition that "the [c]onstitution itself limits a [s]tate's power to define crimes in ways that would permit juries to convict while disagreeing about means, at least [when] that definition risks serious unfairness and lacks support in history or tradition." *Richardson* v. *United States*, supra, 526 U.S. 820.

Relying on these admonitions, a majority of federal courts of appeals have recognized that a duplicitous indictment may raise two distinct and separate kinds of unanimity issues: (1) unanimity as to a crime's elements, which was the kind of unanimity claim raised in *Ramos*, *Schad* and *Richardson*; and (2) unanimity as to instances of conduct, also known as a multiple acts or multiple offense claim, which was the kind of claim the court implicitly acknowledged in *Schad* and *Richardson*. These courts have explained that this first kind of unanimity claim involves the question of "when is a disputed fact—e.g., whether the crime occurred on a Monday or a Tuesday, with a knife or a gun, against this or that victim—one that the jury must unanimously agree [on], and when is it merely dispensable detail [i.e., element vs. means]? And the second [involves the question]: when is a defendant's conduct one violation of a statute, and when is it many?" *United States* v. *Newell*, supra, 658 F.3d 20.

The federal courts of appeals not only have recognized that a duplicitous indictment may raise these two distinct unanimity issues, but they also have recognized that a claim of unanimity as to elements implicates different concerns than a claim of unanimity as to instances of conduct. Specifically, for claims of unanimity as to elements, unanimity concerns arise from the statutory language or scheme at issue. See *Schad* v. *Arizona*, supra, 501 U.S. 631–32 (opinion announcing judgment). The concern in those cases is whether the statutory language creates multiple elements, each of which the government must charge as a separate offense, or alternative means of committing an element. In contrast, for claims of unanimity as to instances, unanimity concerns arise from the evidence of the defendant's conduct, viewed in light of the statutory language. In the latter situation, there is no dispute over whether the defendant violated multiple subsections of a statute, each of which constitutes a separate offense; rather, the dispute is over whether the defendant may be convicted of a single count of violating a statute based on evidence of multiple, separate occurrences of the prohibited act or acts. See *United States* v. *Correa-Ventura*, 6 F.3d 1070, 1080 (5th Cir. 1993) (discussing difference between unanimity as to elements cases and unanimity as to instances cases). For example, a claim of unanimity as to instances of conduct may arise in a case in which the defendant is charged with a single count of assault but there was evidence presented to the jury that the defendant assaulted the victim three separate times on three separate dates. In such a case, the concern arises that the jury may have agreed that the defendant committed assault but may not have agreed which assault the defendant committed. Because of the distinct nature of these two unanimity claims, federal courts have applied a different test to claims of unanimity as to elements than to claims of unanimity as to instances.

In the present case, the defendant argues that counts one, five, and six were duplicitous because each was premised on multiple, separate instances of conduct, and thus the lack of a bill of particulars or a specific unanimity instruction led to a verdict that violated his right to jury unanimity. In other words, he claims that these counts violated his right to unanimity as to instances of conduct, not his right to unanimity as to elements. As we will discuss in detail, federal courts apply a multipart test to claims of unanimity as to instances of conduct to determine whether the defendant's constitutional right to jury unanimity was violated.

First, a court must determine whether a single count is premised on multiple, separate instances of conduct. If the answer is yes, then the court next must determine if each instance could establish a separate violation of the statute at issue. At times, it may be easy to make this second determination. That is because, "[i]n some cases the standard for individuating crimes is obvious—we count murders, for instance, by counting bodies. But in other cases, determining how many crimes were committed is much less clear." *United States* v. *Newell*, supra, 658 F.3d 23–24. For example, it may be difficult to determine whether a single count is premised on multiple acts, each of which is committed in the course of a single criminal episode of relatively brief, temporal duration, and thus constitutes alternative means of committing the elements at issue, or whether it is premised on multiple, separate and distinct acts, each of which could constitute a separate statutory violation. In these more difficult cases, courts have examined the statute's language, its legislative history, and case law regarding similar statutes to help determine whether the charge is duplicitous. See id.; *United States* v. *Correa-Ventura*, supra, 6 F.3d 1082.

In examining the statutory language at issue, a majority of federal courts of appeals have explained that, if

the underlying criminal statute contemplates criminalizing a continuing course of conduct and the defendant has been charged with violating the statute by a continuing course of conduct, a single count premised on multiple, separate instances of conduct is not duplicitous when the multiple instances of conduct constitute "a continuing course of conduct, during a discrete period of time . . . ." (Internal quotation marks omitted.) *United States* v. *Davis*, 471 F.3d 783, 790 (7th Cir. 2006); see also *United States* v. *O'Brien*, 953 F.3d 449, 455 (7th Cir. 2020), cert. denied, U.S. , 141 S. Ct. 1128, 208 L. Ed. 2d 565 (2021); *United States* v. *Prieto*, 812 F.3d 6, 12 (1st Cir.), cert. denied, U.S. , 137 S. Ct. 127, 196 L. Ed. 2d 100 (2016); *United States* v. *Mancuso*, 718 F.3d 780, 792 (9th Cir. 2013); *United States* v. *Moyer*, 674 F.3d 192, 205 (3d Cir.), cert. denied, 568 U.S. 846, 133 S. Ct. 165, 184 L. Ed. 2d 82 (2012), and cert. denied sub nom. *Nestor* v. *United States*, 568 U.S. 1143, 133 S. Ct. 979, 184 L. Ed. 2d 760 (2013); *United States* v. *Kamalu*, 298 Fed. Appx. 251, 254 (4th Cir. 2008); *United States* v. *Wiles*, 102 F.3d 1043, 1062 (10th Cir. 1996), cert. denied, 522 U.S. 947, 118 S. Ct. 363, 139 L. Ed. 2d 283 (1997), and vacated sub nom. *United States* v. *Schleibaum*, 522 U.S. 945, 118 S. Ct. 361, 139 L. Ed. 2d 282 (1997); *United States* v. *Berardi*, 675 F.2d 894, 898 (7th Cir. 1982); *United States* v. *Alsobrook*, 620 F.2d 139, 142–43 (6th Cir.), cert. denied, 449 U.S. 843, 101 S. Ct. 124, 66 L. Ed. 2d 51 (1980).[11] To determine if a statute criminalizes only a

[11] Additionally, some federal courts have noted that some state courts have relied on their own common law to hold that a statute encompasses a continuing course of conduct. See *Dyer* v. *Farris*, 787 Fed. Appx. 485, 495 (10th Cir. 2019) (Under Oklahoma law, "the general rule requiring the [s]tate to elect which offense it will prosecute is not in force when separate acts are treated as one transaction. . . . [W]hen a child of tender years is under the exclusive domination of one parent for a definite and certain period of time and submits to sexual acts at that parent's demand, the separate acts of abuse become one transaction within the meaning of this rule." (Citation omitted; internal quotation marks omitted.)), cert. denied, U.S. , 140 S. Ct. 1157, 206 L. Ed. 2d 207 (2020); id. (citing *Gilson* v.

single act, a continuous course of conduct, or both, courts must interpret the statute's language in the manner directed by General Statutes § 1-2z.[12] See, e.g., *State* v. *Cody M.*, 337 Conn. 92, 102–103, 259 A.3d 576 (2020); id., 106 (holding, based on interpretation of language of General Statutes § 53a-223a as required by § 1-2z, that legislature intended to criminalize each separate offense under § 53a-223a, not continuous course of conduct).[13] If a statute does criminalize a continuing course

State, 8 P.3d 883, 899 (Okla. Crim. App. 2000), cert. denied, 532 U.S. 962, 121 S. Ct. 1496, 149 L. Ed. 2d 381 (2001), which stated that, generally, under Oklahoma law, rape was not considered continuing offense, but that, under Oklahoma's common law, court had recognized exception for ongoing sexual abuse of minors under certain circumstances). Because neither party argues that any common-law exception applies, we need not decide today whether creating or applying common-law exceptions in interpreting statutes is proper.

[12] Both the majority and the concurrence agree that, whether a statute criminalizes a single act, a continuous course of conduct, or both is a matter of legislative intent and that this court's first task is to interpret the statute at issue, as directed by § 1-2z. If the statute's clear language, its relationship to other statutes, its legislative history or other extrinsic sources make the legislature's intent clear, then that controls, and the prosecutor's discretion in charging is limited, as made clear by the statute. The concurrence, however, citing to case law from the United States Court of Appeals for the Second Circuit, argues that, in the event that the legislature is silent with respect to its intent, we should adopt and apply a presumption in favor of granting prosecutors discretion to charge crimes based on either a single act or a continuous course of conduct.

We have discovered no support for such a presumption in our case law or in the case law of a majority of the federal courts of appeals. We will discuss this in greater detail in part I C of this opinion. Nevertheless, we need not decide the issue of whether any presumption should apply in the event the legislature is silent with respect to its intent regarding whether a statute criminalizes a single act, a continuous course of conduct, or both because we hold that the legislature's intent under subsection (a) (2) of our risk of injury statute is clear based on the statutory language, case law defining that statute, and relevant legislative history. See part II of this opinion.

[13] In *State* v. *Cody M.*, supra, 337 Conn. 92, the defendant argued that his two convictions under § 53a-223a for violating a standing criminal protective order twice in one transaction violated the constitutional prohibition against double jeopardy because, in his view, violating a protective order is a continuing offense, and the two statements that formed the basis of his convictions—

of conduct, then the court must determine whether the multiple instances of conduct alleged in fact constitute a continuous course of conduct by examining, among other things, whether the acts occurred within a relatively short period of time, were committed by one defendant, involved a single victim, and furthered a single, continuing objective. See, e.g., *United States* v. *O'Brien*, supra, 455; *United States* v. *Davis*, supra, 790–91; *United States* v. *Berardi*, supra, 898.

When a single count does charge the defendant with having violated a single statute in multiple, separate instances, each of which could establish a separate violation of the statute, federal courts agree that such a count is duplicitous. See, e.g., *United States* v. *Mancuso*, supra, 718 F.3d 792; *United States* v. *Moyer*, supra, 674 F.3d 204–205; *United States* v. *Kamalu*, supra, 298 Fed. Appx. 254–55; *United States* v. *Sturdivant*, 244 F.3d 71, 75 (2d Cir. 2001); *United States* v. *Schlei*, 122 F.3d 944, 979 (11th Cir. 1997), cert. denied, 523 U.S. 1077, 118 S. Ct. 1523, 140 L. Ed. 2d 674 (1998); *United States* v. *Correa-Ventura*, supra, 6 F.3d 1081–82; *United States* v. *Holley*, supra, 942 F.2d 927–29; *United States* v. *Tanner*, 471 F.2d 128, 138–39 (7th Cir.), cert. denied, 409 U.S. 949, 93 S. Ct. 269, 34 L. Ed. 2d 220 (1972).

A determination of duplicity does not end the analysis, however. Contrary to the concurrence's dire warn-

one in which he simply contacted the victim, and the other in which he threatened her—were part of a single conversation that should be viewed as a single violation. Id., 98, 101. In deciding that claim, this court analyzed the language of § 53a-223a pursuant to § 1-2z and determined that the legislature intended to criminalize each separate offense, not a continuous course of conduct. Id., 102–103, 106. We did not apply any presumption or determine that the state had discretion in deciding whether to charge the defendant with multiple single counts or a single count premised on a continuous course of conduct. Thus, we have treated the question of whether a single count may be premised on a continuous course of conduct as a matter of statutory interpretation, requiring us "in the first instance" to follow the admonition of § 1-2z. Id., 104.

ing that we are stripping prosecutors of their "traditional authority" and placing "an unwarranted burden on young victims," a duplicitous count does not necessarily violate a defendant's right to jury unanimity. As explained, a duplicitous count may be cured by a bill of particulars or a specific unanimity instruction.[14] Thus, as long as one of these remedies is given, the state may continue to charge a defendant with a single count premised on multiple, separate incidents of conduct without violating his right to jury unanimity. In the absence of one of those remedies, however, a majority of federal courts of appeals have held that a duplicitous count violates a defendant's right to jury unanimity.[15] See, e.g., *United States* v. *Newell*, supra, 658 F.3d 28 (single count premised on multiple acts was duplicitous, and thus trial court's failure to give unanimity instruction violated defendant's right to jury unanimity); *United States* v. *Fawley*, 137 F.3d 458, 471 (7th Cir. 1998) (trial court's failure to give specific unanimity instruction violated

[14] For claims of unanimity as to instances of conduct, even if the precise, specific unanimity instruction the defendant requested was not given, no prejudice exists if the jury is instructed that it must be unanimous either as to which instance of conduct occurred or that all of the alleged instances of conduct occurred. See, e.g., *United States* v. *Sarihifard*, 155 F.3d 301, 310 (4th Cir. 1998).

[15] The United States Court of Appeals for the Second Circuit, along with a minority of other federal courts of appeals, has held that, although a single count premised on multiple, separate acts, each of which could constitute a violation of the same statute, statutory subsection, or statutory clause is duplicitous, the defendant's right to jury unanimity is violated only if his conviction on the basis of multiple acts prejudiced the defendant by creating the genuine possibility that the conviction occurred as the result of different jurors concluding that the defendant committed different acts. See, e.g., *United States* v. *Sturdivant*, supra, 244 F.3d 75; *United States* v. *Margiotta*, 646 F.2d 729, 733 (2d Cir. 1981). Thus, under this test, the trial court's failure to grant a defendant's request for a bill of particulars or a specific unanimity instruction to cure this duplicity does not mean that the duplicitous count necessarily violates the defendant's right to jury unanimity. A constitutional error arises only if the duplicitous count prejudices the defendant. As we will explain in part I C of this opinion, we do not adopt the Second Circuit's test for claims of unanimity as to instances of conduct.

defendant's right to jury unanimity when single count was premised on multiple, separate acts); *United States* v. *Schlei*, supra, 122 F.3d 979–80 (single count was duplicitous, and thus trial court's failure to cure with specific unanimity instruction violated defendant's right to jury unanimity); *United States* v. *Holley*, supra, 942 F.2d 928–29 (single count based on multiple, separate acts was duplicitous, and thus trial court's failure to give specific unanimity instruction violated defendant's right to jury unanimity); *United States* v. *Beros*, supra, 833 F.2d 460–63 (single count based on multiple, separate acts was duplicitous and implicated defendant's right to jury unanimity, and thus trial court's failure to give specific unanimity instruction was error and not harmless). But cf. *United States* v. *Sarihifard*, 155 F.3d 301, 310 (4th Cir. 1998) (although defendant was charged with single count of perjury premised on multiple, separate instances of conduct, right to jury unanimity was not violated because trial court gave specific unanimity instruction); *United States* v. *Alsobrook*, supra, 620 F.2d 142–43 (same).

But even then, reversal of the defendant's conviction is required only if the defendant establishes prejudice, namely, that the duplicity created the genuine possibility that the conviction resulted from different jurors concluding that the defendant committed different acts.[16] See *United States* v. *Sarihifard*, supra, 155 F.3d 310; *United States* v. *Correa-Ventura*, supra, 6 F.3d 1082; *United States* v. *Holley*, supra, 942 F.2d 926; *United States* v. *Beros*, supra, 833 F.2d 460–63. But see *United States* v. *Sturdivant*, supra, 244 F.3d 75; *United States*

[16] The defendant argues that a trial court's failure to give a specific unanimity instruction when a single count is premised on multiple, separate instances of conduct constitutes structural error, regardless of prejudice to the defendant. The defendant's position, however, conflicts with the test established by the federal courts of appeals for constitutional claims. Additionally, our appellate courts have never applied structural error to unanimity claims. Accordingly, we reject the defendant's argument.

v. *Margiotta*, 646 F.2d 729, 733 (2d Cir. 1981). In such cases, courts have invoked principles of fairness in requiring a specific unanimity instruction to avoid any potential for juror confusion.[17]

In sum, to determine if a defendant was entitled to a specific unanimity charge, we apply the following three-pronged test: (1) Considering the allegations in the information and the evidence admitted at trial, does a single count charge the defendant with violating a single statute in multiple, separate instances? (2) If so, then does each instance of conduct establish a separate violation of the statute? If the statute contemplates criminalizing a continuing course of conduct, then each instance of conduct is not a separate violation of the statute but a single, continuing violation. To determine whether the statute contemplates criminalizing a continuing course of conduct, we employ our well established principles of statutory interpretation. Only if each instance of conduct constitutes a separate violation of the statute is a count duplicitous. And (3) if duplicitous, was the duplicity cured by a bill of particulars or a specific unanimity instruction? If yes, then there is no unanimity issue. If not, then a duplicitous count violates a defendant's right to jury unanimity but reversal of the defendant's conviction is required only if the defendant establishes prejudice.

[17] As one federal court of appeals has stated: "The risks of serious unfairness presented by a duplicitous indictment are apparent. In conditions where jurors disagree among themselves as to just which offenses the evidence supports, the defendant may nevertheless wind up convicted because the jurors agree that the evidence showed that he had committed an offense, even if it was ambiguous as to which one. . . . In other words, although a jury may return a guilty verdict even if the jurors disagree about how a specific crime was committed, this is quite different from allowing a jury to return a guilty verdict when they disagree even as to which crime or crimes were committed. . . . [T]he lack of a unanimity instruction [under these circumstances] could cover up wide disagreement among the jurors about just what the defendant did, or did not, do." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *United States* v. *Newell*, supra, 658 F.3d 27.

C

The concurrence disagrees with the test we adopt, despite the fact that it is followed by a majority of federal courts of appeals, and would instead adopt the test applied by the United States Court of Appeals for the Second Circuit. See footnotes 12 and 15 of this opinion. Specifically, the concurrence contends that the test that court applies regarding unanimity as to instances of conduct differs from, and is superior to, the test the majority of federal courts of appeals apply because, in determining whether a statute contemplates criminalizing a continuing course of conduct under the second prong of the test the majority of federal courts apply, the Second Circuit relies on a presumption in favor of prosecutorial discretion when the statute at issue is silent—meaning that, when the legislature's intent regarding whether a statute criminalizes a single act, a continuous course of conduct, or both remains ambiguous after a full analysis pursuant to § 1-2z, including an examination of the relevant legislative history, we should apply a presumption in favor of the prosecutor's having discretion to charge a defendant with a single count of the crime at issue based on either a single act or a continuous course of conduct. The concurrence argues that adopting this presumption is the better approach because of its utility in sexual assault cases.

At the outset, we must immediately correct the concurrence's erroneous suggestion that we have adopted our own presumption that silence on this issue means that a prosecutor may charge the crime only as a single act and not as a continuing course of conduct. That is not it at all. Rather, our holding in the present case that the defendant properly could be charged with having engaged in a continuous course of conduct under § 53-21 (a) (2) is not based on any presumption but, rather, on our interpretation of the statute under § 1-2z, includ-

ing our review of the statute's legislative history. See part II of this opinion. Use of a presumption is neither necessary nor warranted in the present context.

At any rate, we decline to apply the concurrence's presumption for four reasons.[18] First, as we will explain in part II of this opinion, based on the language of § 53-21 (a) (2), case law interpreting this statute, and relevant legislative history, it is clear that our legislature specifically intended to criminalize both single acts and a continuous course of conduct under subsection (a) (2) of our risk of injury statute. Contrary to the concurrence's assertion, a full and complete analysis pursuant to § 1-2z does not end in silence on this issue, thereby requiring this court to resort to any kind of presumption. What the concurrence calls silence is not silence but the absence of explicit language specifically stating that the statute criminalizes only a continuous course of

[18] In declining to adopt the test used by the Second Circuit, we assume that the concurrence accurately has recited it. In arguing that the Second Circuit has adopted this presumption, the concurrence relies on *United States* v. *Margiotta*, supra, 646 F.2d 729. Contrary to the concurrence's assertion, in holding that a duplicitous count—a single count of mail fraud based on multiple, separate acts—created no risk of a nonunanimous verdict, the court explained that this "risk [was] slight in a case . . . [in which] the essence of the alleged wrong is the single *scheme* to defraud . . . ." (Emphasis added.) Id., 733. In other words, the court relied on the language of the federal mail fraud statute, which specifically criminalizes "any scheme . . . to defraud . . . ." 18 U.S.C. § 1341 (1976). Thus, the holding in *Margiotta* was premised on the fact that the statute specifically contemplated criminalizing a "scheme" of activity, rather than only a single act. Moreover, the court in *Margiotta* never mentions prosecutorial discretion or any kind of presumption.

Nevertheless, the concurrence is correct that the Second Circuit, in at least one case, has held that *Margiotta* created a " 'general rule' "; (emphasis omitted); that a single count may be premised on multiple acts if the acts constitute " 'a single scheme,' " regardless of whether the statute actually criminalizes a scheme or a continuing course of conduct, and thus no duplicity or unanimity issue arises. See *United States* v. *Moloney*, 287 F.3d 236, 240 (2d Cir.) (acknowledging "general rule" that, unless explicitly prohibited by legislature, "criminal charges may aggregate multiple individual actions that otherwise could be charged as discrete offenses as long as all of the actions are part of 'a single scheme' "), cert. denied, 537 U.S. 951, 123 S. Ct. 416, 154 L. Ed. 2d 297 (2002).

conduct or only single acts. Rather than conduct a full analysis pursuant to § 1-2z and come to a conclusion about the statute's meaning, as we are obliged to do, the concurrence's rule would hold that, if the statute is "facially silent"—in other words, if explicit language is not used, such as the phrase "course of conduct"—then a criminal statute is silent regarding whether it criminalizes a single act, a continuous course of conduct, or both, and a prosecutor can choose which charging method to apply. We decline to apply such a rule and instead follow the dictates of § 1-2z. Thus, we need not decide whether a presumption exists and should apply when the legislature is arguably silent as to its intent regarding whether a statute criminalizes a single act, a continuous course of conduct, or both.

Second, although, as the concurrence suggests, this court does at times "[give] decisions of the Second Circuit 'particularly persuasive weight in the resolution of issues of federal law,' " we are hesitant to adopt the case law of the Second Circuit when "the great weight" of federal jurisprudence conflicts with it. *Saunders* v. *Commissioner of Correction*, 343 Conn. 1, 17, 272 A.3d 169 (2022). As discussed previously, the majority of federal courts of appeals apply the test that we adopt today and do not adopt, apply, or even reference any presumption in the event of legislative silence on this issue.[19]

[19] The concurrence cites to cases from the United States Courts of Appeals for the Fourth, Sixth and Seventh Circuits in an attempt to show that the Second Circuit is not an outlier in adopting a presumption in favor of affording prosecutors discretion in charging a crime based on a single act or on a continuous course of conduct when the statutory language and legislative history are silent regarding whether a crime may be charged as a single act, a continuous course of conduct, or both. See footnotes 4 and 25 of the concurring opinion; see also *United States* v. *Kamalu*, supra, 298 Fed. Appx. 254; *United States* v. *Davis*, supra, 471 F.3d 790–91; *United States* v. *Alsobrook*, supra, 620 F.2d 142; *United States* v. *Tanner*, supra, 471 F.2d 138. In none of these cases, however, did the courts mention, let alone apply, a presumption affording prosecutors discretion in the event of legislative silence regarding whether the statute criminalized a continuous

Third, whether to apply a presumption in interpreting a criminal statute to determine if it criminalizes a continuous course of conduct is an issue of *state* law, even though this determination is necessary to the adjudication of the defendant's federal unanimity claim. In other words, under the second prong of the federal test for a unanimity claim regarding instances of conduct, the court must determine if the statute criminalizes a continuous course of conduct. However, whether the statute in fact criminalizes a continuous course of conduct is an issue of state law, as it involves the interpretation

course of conduct, a single act, or both. Rather, the holdings of most of these cases relied on the plain language of the statutes at issue.

The concurrence is correct, however, that the court in *Tanner* noted that the prosecutor had discretion in that case. But the concurrence takes this statement out of context. The court stated this only after noting the broad language of the statute at issue: "The prohibited conduct is described in 18 U.S.C. § 837 [1964] as the act of transporting explosives in interstate commerce for the purpose of destroying any building or other real or personal property. Differentiating single offenses under this section requires defining at what point the act of transporting explosives is completed." *United States* v. *Tanner*, supra, 471 F.2d 138. The Seventh Circuit held that prosecutors had discretion in making this determination because "[t]he act of transporting explosives" could be defined to include both a single incident and a continuous course of conduct. Id., 139. Thus, *Tanner* does not support the concurrence's argument that a presumption in favor of prosecutorial discretion should apply if the statute is silent in this regard.

Similarly, the concurrence is correct that the court in *Alsobrook* stated that "[t]he determination of whether a group of acts represents a single, continuing scheme or a set of separate and distinct offenses is a difficult one that must be left at least initially to the discretion of the prosecution." *United States* v. *Alsobrook*, supra, 620 F.2d 142. The court, however, immediately followed this statement by stating that "[t]his discretion . . . is not without limits"; id.; with a citation to *United States* v. *Tanner*, supra, 471 F.2d 128, which, as discussed, examined the statutory language in determining that the prosecutor could charge a crime as a continuing course of conduct.

Finally, we note that *United States* v. *Kamalu*, supra, 298 Fed. Appx. 254, does not support the concurrence's proposed test. Rather than apply the concurrence's test, the Fourth Circuit held that the government had improperly charged the defendant with a duplicitous single count "despite the allegation of a continuing scheme . . . ." Id. The court, however, held that this duplicity was not prejudicial. Id.

of our own statutes. The concurrence contends that there is "an ancient common-law pleading tradition, one that the legislature is well aware of and continues to implicitly approve," pursuant to which prosecutors have discretion to charge a crime based on a single act or a continuous course of conduct when a statute is silent on the issue. Although this "tradition" is not so well established that it is written anywhere, the concurrence derives this "tradition" from the fact that "prosecutors have been charging crimes as continuing offenses since the nineteenth century," and thus our state has a "long history of affording prosecutors broad discretion in the charging of crimes . . . ."

The presumption that the concurrence touts is not one that any of our state decisions supports and certainly not one that we would credit the legislature with being aware of at the time it enacted the statute at issue. Even if the charging practices of prosecutors, or the litigation positions of any parties, were the stuff of legislative acquiescence,[20] any history of the state's routinely charging in this fashion has more obvious explanations than legislative acceptance of an unarticulated presumption of prosecutorial discretion found

[20] This court has limited the scope of the legislative acquiescence doctrine. For example, this court has explained that the doctrine applies to decisions of the appellate courts but not to unofficially reported trial court decisions. See *Chestnut Point Realty, LLC* v. *East Windsor*, 324 Conn. 528, 544 n.9, 153 A.3d 636 (2017); see also *Mayer* v. *Historic District Commission*, 325 Conn. 765, 778, 160 A.3d 333 (2017) (under doctrine of legislative acquiescence, court "may infer that the failure of the legislature to take corrective action within a reasonable period of time following a definitive judicial interpretation of a statute signals legislative agreement with that interpretation" (internal quotation marks omitted)). Although this court has not been explicitly asked to determine if this doctrine applies to parties' litigation practices or the practices of constitutional officers, including prosecutors, we have held that this doctrine does not extend "to presume the legislature's awareness of municipal legislation that has not been subjected to judicial scrutiny and that may vary in form among municipalities," such as zoning regulations. *Kuchta* v. *Arisian*, 329 Conn. 530, 547, 187 A.3d 408 (2018).

nowhere in the decisions of this court, namely, that (1) defendants may not often have challenged this method of charging because, if successful, it would likely result in multiple charges and greater exposure, as the concurrence points out, and (2) only recently, since federal unanimity case law has developed to recognize claims of unanimity as to instances of conduct, has the proper interpretation of the statute had unanimity implications.

Thus, the fact that we have cases that merely state that a prosecutor charged a defendant under a single count based on a continuous course of conduct but the nature of the charging was not challenged on appeal does not support the concurrence's proposed presumption. See, e.g., *State* v. *Vumback*, supra, 263 Conn. 217, 219–20 (although defendant was charged with first and third degree sexual assault of child, as well as risk of injury to child "on divers dates between approximately June, 1990 through July, 1996," and challenged trial court's denial of request for bill of particulars, court did not address whether statutes criminalized continuous course of conduct or whether prosecutor had discretion in this regard (internal quotation marks omitted)); *State* v. *Snook*, 210 Conn. 244, 263, 265–66, 555 A.2d 390 (although state charged defendant with sexual assault in second degree and sexual assault in third degree for engaging in sexual intercourse with victim "on divers days between June, 1979, and January, 1984," defendant raised only double jeopardy claim, which did not require court to decide if statutes criminalized continuous course of conduct (internal quotation marks omitted)), cert. denied, 492 U.S. 924, 109 S. Ct. 3258, 106 L. Ed. 2d 603 (1989); *State* v. *Silver*, 139 Conn. 234, 247, 93 A.2d 154 (1952) (*O'Sullivan*, *J.*, concurring) (merely mentioning that state charged that, "at the [c]ity of Hartford on divers dates, the [defendant] did commit an indecent assault upon a minor" but not deciding if this was proper or analyzing statute to determine if it

criminalized course of conduct); *State* v. *William B.*, 76 Conn. App. 730, 735, 822 A.2d 265 (although state charged specifically that, "on divers dates between 1990 and 1994, as a continuing course of conduct, the defendant engaged in sexual intercourse with the victim, who was younger than thirteen, in violation of § 53a-70 (a) (2)," defendant did not challenge state's method of charging), cert. denied, 264 Conn. 918, 828 A.2d 618 (2003); *State* v. *Osborn*, 41 Conn. App. 287, 295, 676 A.2d 399 (1996) (although state charged defendant with attempt to commit sexual assault of child "on diverse dates between June 20, 1986, and June 20, 1991," defendant did not challenge state's method of charging); *State* v. *Mancinone*, 15 Conn. App. 251, 256 n.5, 545 A.2d 1131 (although state charged defendant with two counts of sexual assault in second degree by alleging that he engaged in sexual intercourse with minors "on divers dates between August 1983 and November 1984," because defendant was acquitted on those charges, appeal did not involve challenge to state's method of charging or require court to decide whether statute criminalized continuous course of conduct (internal quotation marks omitted)), cert. denied, 209 Conn. 818, 551 A.2d 757 (1988), cert. denied, 489 U.S. 1017, 109 S. Ct. 1132, 103 L. Ed. 2d 194 (1989). That is not the same as this court holding that such an interpretation is proper or that a presumption of prosecutorial discretion exists. Most important, for purposes of determining legislative intent, of course, the past practice of prosecutors is not a relevant factor under § 1-2z in ascertaining whether a statute criminalizes a continuing course of conduct.

Additionally, contrary to the concurrence's contention, there is no case law adopting and applying this presumption. For example, the concurrence cites to a nineteenth century case as proof that this court historically has afforded prosecutors discretion to charge crimes based

either on a single act or a continuous course of conduct when a statute is silent in this regard. See *State* v. *Bosworth*, 54 Conn. 1, 2, 4 A. 248 (1886) ("all offenses involving continuous action, and which may be continued from day to day, may be so alleged"). In *Bosworth*, the state charged the defendant with a single count of cruelly overworking animals, one count of neglecting animals, and one count of depriving animals of sustenance, with each count premised on multiple acts of cruelty to animals. Id. The court explained that the crime of cruelty to animals "may consist of overworking, [underfeeding], or depriving of proper protection, or all these elements may combine and constitute the offense." Id. In other words, the court examined the nature of what the statute criminalized and determined that it criminalized both each single act of cruelty, as well as a continuous course of these acts of cruelty. Thus, the offense at issue was one that may involve continuous action. An examination of the decision shows that, when the court stated that "all offenses involving continuous action, and which may be continued from day to day, may be so alleged," it did not mean that any crime involving continuous action may be charged as such but, rather, that any statutory offense that criminalizes continuous action may be charged as such. Id.

Similarly, the concurrence cites to *State* v. *Cook*, 75 Conn. 267, 53 A. 589 (1902), in support of its argument that, for decades, "Connecticut courts [have] recognized that not all crimes are either exclusively individual act or course of conduct crimes. Some crimes that were not inherently continuing offenses could be charged either as individual acts or with a continuando." *Cook*, however, does not support adopting a presumption in favor of prosecutorial discretion when a criminal statute is silent regarding whether it criminalizes each act individually or a continuing course of conduct. Although

the precise statute at issue is not cited or quoted in *Cook*, this court explained in that case that "[t]he statute under which the accused [was] prosecuted enumerates various acts of cruelty to animals for which a punishment is imposed, among which are the depriving [of] an animal of necessary sustenance, and the unnecessary failure, by one having the charge or custody of any animal, to provide it with proper food, drink, or protection from the weather." *State* v. *Cook*, supra, 268. This language is consistent with the language of our animal cruelty statute at that time; see General Statutes (1902 Rev.) § 1331;[21] which obviously could be interpreted as criminalizing both a course of conduct and a single act. Moreover, not only did the court's decision in *Cook* not refer to, adopt, or apply any presumption, it also did not involve a challenge to the state's method of charging or contain any statutory interpretation, which is critical to an analysis of a claim of unanimity as to instances of conduct.

It is true that a handful of Appellate Court cases have held that there is no unanimity violation when a defendant has been charged in a single count with violating the same statute based on multiple acts, especially in the context of ongoing sexual assault of children. See, e.g., *State* v. *Saraceno*, supra, 15 Conn. App. 225–27 and n.1 (decided prior to recognition of claims of unanimity as to instances of conduct, not deciding whether statute criminalized continuing course of conduct, and not applying any presumption in favor of

[21] General Statutes (1902 Rev.) § 1331 provides: "Every person who overdrives, drives when overloaded, overworks, tortures, deprives of necessary sustenance, mutilates, or cruelly beats, or kills, any animal, or causes it to be done; and every person who, having the charge or custody of any such animal, inflicts unnecessary cruelty upon it, or unnecessarily fails to provide it with proper food, drink, or protection from the weather, or who cruelly abandons it, or carries it in an unnecessarily cruel manner, shall be fined not more than two hundred and fifty dollars, or imprisoned not more than one year, or both."

prosecutorial discretion), cert. denied, 209 Conn. 823, 552 A.2d 431 (1988), and cert. denied, 209 Conn. 824, 552 A.2d 432 (1988); see also *State* v. *Romero*, 269 Conn. 481, 504, 849 A.2d 760 (2004) (same); *State* v. *Michael D.*, 153 Conn. App. 296, 322, 101 A.3d 298 (same), cert. denied, 314 Conn. 951, 103 A.3d 978 (2014); *State* v. *Vere C.*, 152 Conn. App. 486, 508–10, 98 A.3d 884 (same), cert. denied, 314 Conn. 944, 102 A.3d 1116 (2014); *State* v. *Jessie L. C.*, 148 Conn. App. 216, 227, 84 A.3d 936 (same), cert. denied, 311 Conn. 937, 88 A.3d 551 (2014). These cases do not support adopting the concurrence's proposed presumption, as they do not apply a presumption. Rather, these cases were decided under the test set forth in *Gipson* and before this court recognized claims of unanimity as to instances of conduct. As we explained, the *Gipson* test did not require that a court analyze whether the statute at issue criminalizes a continuous course of conduct and is not the proper test for determining claims of unanimity regarding instances of conduct.

Moreover, we disagree with the concurrence that its presumption is supported by "the fact that the legislature has, in certain instances, expressly provided either that a particular statute must be charged as a continuing offense; see, e.g., General Statutes § 53a-181d (b) (1) and (2); or that it must not be charged as a continuing offense; see, e.g., General Statutes § 15-173"; because this shows that, "when the legislature wishes to speak on the issue, one way or the other, it knows how to do so." These statutes do show that, when the legislature explicitly intends to allow a charge to be based only on a continuous course of conduct or a single act, it knows how to do so. This does not prove, however, that the legislature intended that other statutes would provide prosecutors with discretion. For example, under our second degree stalking statute, § 53a-181d, the legislature specifically proscribed certain continu-

ous courses of conduct; see General Statutes § 53a-181d (b) (1), as amended by Public Acts 2021, No. 21-56, § 2 ("knowingly engages in a *course of conduct* directed at or concerning a specific person that would cause a reasonable person to (A) fear for such specific person's physical safety or the physical safety of a third person; (B) suffer emotional distress; or (C) fear injury to or the death of an animal owned by or in possession and control of such specific person" (emphasis added)); as well as certain kinds of single acts. See General Statutes § 53a-181d (b) (3) ("[s]uch person, for no legitimate purpose and with intent to harass, terrorize or alarm, by means of electronic communication, including, but not limited to, electronic or social media, discloses a specific person's personally identifiable information without consent of the person"). Similarly, under subsection (a) (1) of our risk of injury statute, the legislature specifically criminalized both a single act and a continuous course of conduct through the use of the terms "act" and "situation," respectively. See General Statutes § 53-21 (a) (1) ("wilfully or unlawfully causes or permits any child under the age of sixteen years to be *placed in such a situation* that the life or limb of such child is endangered, the health of such child is likely to be injured or the morals of such child are likely to be impaired, or *does any act* likely to impair the health or morals of any such child" (emphasis added)). Thus, by the concurrence's own logic, these statutes show that, when the legislature intends to explicitly criminalize both an act and a continuous course of conduct, it knows how to do so. That does not mean that such explicit statutory language is required to interpret a statute as criminalizing both an act and a continuous course of conduct. As previously discussed, we by no means are adopting a presumption against such charging when the plain language of a statute is not explicit in this regard. Rather, courts must closely ana-

lyze the language of the statute, case law interpreting the statute, the statutory scheme and, if needed, the legislative history to determine if a statute criminalizes both an act and a continuous course of conduct.

Finally, the concurrence asserts that adopting this presumption is the superior approach based largely on how it believes the majority test will apply to sexual assault cases involving children. There are indeed unique challenges to proving charges involving child victims of sexual assault. Legislatures and courts can, should, and often have responded appropriately, including by extending statutes of limitations, or by modifying rules of evidence.[22] See General Statutes § 54-193; see also Conn. Code Evid. § 4-5 (b). However, the concurrence's proposed presumption would not apply only in child sexual abuse cases. For this reason alone, it is more prudent for us to defer to the legislature to address this specific issue than to adopt a general presumption that would apply to all criminal statutes.

[22] Adopting the concurrence's presumption that, in the event of the legislature's silence, prosecutors may choose to charge a course of conduct in their discretion might impact policies the legislature has already considered, including those involving sexual assault. For example, in 2019, the legislature extended the statute of limitations for sexual assault in which the victim was age twenty-one or older from five years to twenty years, and abolished the statute of limitations for sexual assault in which the victim was a minor at the time of the offense. See Public Acts 2019, No. 19-16, § 17, codified at General Statutes (Supp. 2020) § 54-193 (a) (1) (B) and (b). At the time the legislature made this policy decision, our case law was clear that sexual assault is a single act crime, not a continuous course of conduct crime. See *State* v. *Joseph V.*, 345 Conn. 516, 543–44 n.12, A.3d (2022). Allegations of a continuous course of conduct can operate to toll the statute of limitations or, as a practical matter, reach back and capture acts beyond the statute of limitations. See 1 C. Torcia, Wharton's Criminal Law (15th Ed. 1993) § 92, p. 631 ("A statutory period of limitation begins to run on the day after the offense is committed. An offense is deemed committed when every element thereof has occurred or, if the offense is based [on] a continuing course of conduct, when the course of conduct is terminated." (Footnote omitted.)). If the legislature had thought that the concurrence's proposed presumption would become the law, it might have considered that in establishing a statute of limitations.

As we discuss in the companion case we also decide today, *State* v. *Joseph V.*, 345 Conn. 516, A.3d (2022), the test we adopt today does not necessarily lead to the hypothetical parade of horribles the concurrence portends. In particular, the test we apply does not result in a prohibition on the state's charging a defendant with a single count of sexual assault premised on a continuous course of contact, as long as there is either a specific unanimity instruction or an instruction that the jury must be unanimous that all alleged acts occurred. Moreover, in *Joseph V.*, we leave open the possibility that "there [may exist] a common-law exception to the right to jury unanimity for a continuing course of conduct of sexual assault of children when there is only general testimony." Id., 555 n.20. We note that, in sexual assault cases involving only general testimony, a duplicitous count that is not cured by a specific unanimity instruction likely will not be harmful.

D

Before applying the foregoing federal law to the defendant's specific claims, we note that appellate courts in this state have not recognized or applied this case law to claims of unanimity as to instances of conduct. In particular, this court has not distinguished between unanimity of elements and unanimity of instances of conduct but, rather, has treated them similarly. Compare *State* v. *Niemeyer*, 258 Conn. 510, 525, 782 A.2d 658 (2001) (unanimity of elements case), *State* v. *Dyson*, 238 Conn. 784, 793, 680 A.2d 1306 (1996) (same), *State* v. *Tucker*, 226 Conn. 618, 646, 629 A.2d 1067 (1993) (same), *State* v. *Reddick*, 224 Conn. 445, 452–53, 619 A.2d 453 (1993) (same), *State* v. *Famiglietti*, supra, 219 Conn. 618 (same), *State* v. *Smith*, 212 Conn. 593, 606, 563 A.2d 671 (1989) (same), *State* v. *James*, 211 Conn. 555, 584–85, 560 A.2d 426 (1989) (same), and *State* v. *Suggs*, 209 Conn. 733, 760–61, 553 A.2d 1110 (1989) (same), with *State* v. *Sorabella*, 277 Conn. 155,

206–207, 891 A.2d 897 (multiple acts case), cert. denied, 549 U.S. 821, 127 S. Ct. 131, 166 L. Ed. 2d 36 (2006), *State* v. *Ceballos*, 266 Conn. 364, 368–69, 417–20 and n.55, 832 A.2d 14 (2003) (same),[23] *State* v. *Jennings*, 216 Conn. 647, 661–64, 583 A.2d 915 (1990) (same), and *State* v. *Spigarolo*, 210 Conn. 359, 388–92, 556 A.2d 112 (same), cert. denied, 493 U.S. 933, 110 S. Ct. 322, 107 L. Ed. 2d 312 (1989).[24]

These cases have failed to heed the relevant federal precedent discussed in part I B of this opinion, which clearly distinguishes between unanimity claims involving a single count premised on multiple, separate instances of conduct, and unanimity claims involving a single count premised on the violation of multiple statutes, statutory subsections, or statutory clauses. See *United States* v. *Correa-Ventura*, supra, 6 F.3d 1080 (noting that *Schad* test applies to cases involving single count premised on violation of multiple statutes, statu-

[23] In *Ceballos*, the defendant argued that we should follow case law from other states requiring the jury to agree on the underlying act when determining if the defendant was guilty of each count charged. *State* v. *Ceballos*, supra, 266 Conn. 420–21 n.55. We rejected this argument on the ground that these precedents conflicted with the federal test announced in *Gipson*, which this court had adopted without considering any federal precedent on this issue. Id., 421 n.55.

[24] The Appellate Court even has suggested that unanimity concerns arise only when a single count is premised on multiple statutes, statutory subsections, or statutory clauses, not when a single count is premised on multiple instances of conduct, each of which could establish a violation of a single statute, statutory subsection, or statutory clause. See *State* v. *Mancinone*, supra, 15 Conn. App. 276–77; see also *State* v. *Joseph V.*, 196 Conn. App. 712, 740, 230 A.3d 664 (2020) (requirement that court give jury specific unanimity charge "comes down to whether the defendant's criminal liability for each offense was premised on his having violated one of multiple statutory subsections"), rev'd in part, 345 Conn. 516, A.3d (2022); *State* v. *Douglas C.*, supra, 195 Conn. App. 747, 752 (unanimity instruction is necessary only if count of information at issue is based on multiple, factual allegations that amount to multiple statutory subsections or multiple statutory elements of offense). This court has not addressed this issue. See *State* v. *Spigarolo*, supra, 210 Conn. 391 ("[w]e need not determine whether *Mancinone*'s primary analysis of the unanimity requirement is correct")."

tory subsections, or statutory clauses but that different test applies in cases involving single count premised on multiple, separate instances of conduct). In light of the unique nature of these two different unanimity issues, we are persuaded by and agree with the distinction federal courts have drawn between claims of unanimity as to elements and claims of unanimity as to instances, with separate tests applying to each type of claim. As a result, we adopt the foregoing federal test for claims of unanimity as to instances of conduct. To the extent that our prior case law or that of the Appellate Court has ignored this distinction, we overrule those cases.

II

Applying the federal test articulated in part I B of this opinion to each count at issue in the present case, in turn, we disagree with the defendant that counts one, five, and six, which each alleged risk of injury to a child, were duplicitous. Because both counts one and six were premised on similar testimony about the frequent touching of N's and T's breasts in a sexual and indecent manner, we first analyze these two counts together. Under the first prong of the test, we determine that both of these counts were premised on multiple, separate incidents of conduct. As to count one, there was testimony that the defendant touched N's breasts in a sexual and indecent manner frequently during weekly visits to his residence, with this inappropriate touching ultimately escalating to oral sex. Therefore, clearly as to count one, evidence was presented to the jury of multiple, separate incidents of conduct, not a single incident. The same is true of count six, in support of which there was testimony that the defendant touched T's breasts in a sexual and indecent manner frequently whenever she was at his residence where she regularly attended gatherings and parties, and babysat. This evidence shows that, as the case was presented to the jury, each

count was premised on evidence of multiple, separate incidents of conduct, not a single incident.

Because counts one and six were premised on multiple, separate incidents of conduct, we must proceed to the second prong of the test and determine whether each incident could establish an independent violation of § 53-21 (a) (2). We hold that, although the state has discretion to charge the defendant with violating § 53-21 (a) (2) as to each incident of conduct that occurred, that statute also permits the state to properly charge and present to the jury these incidents as a continuing course of conduct.

Section 53-21 (a) prohibits "[a]ny person . . . (2) [from having] contact with the intimate parts, as defined in section 53a-65, of a child under the age of sixteen years or subject[ing] a child under sixteen years of age to contact with the intimate parts of such person, in a sexual and indecent manner likely to impair the health or morals of such child . . . ." General Statutes § 53a-65 (8) defines "intimate parts" as "the genital area or any substance emitted therefrom, groin, anus or any substance emitted therefrom, inner thighs, buttocks or breasts."[25]

It is not clear from the plain language of § 53-21 (a) (2) that the multiple, separate instances of conduct at issue in the present case were separate and distinct violations of that statute. At first blush, the phrase "contact with the intimate parts" in the risk of injury statute does not appear to clarify whether the statute criminalizes a continuing course of conduct or limits its scope to a single occurrence. Because of this, the concurrence

[25] Although § 53a-65 (8) has been amended since the defendant's commission of the crimes that formed the basis of his conviction; see Public Acts 2006, No. 06-11, § 1; that amendment has no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of § 53a-65 (8).

concludes that the statute is ambiguous or silent on this issue. The problem is that the statute is not silent. The fact that the legislature did not explicitly use the phrase "continuous course of conduct" or "each single act" does not end our analysis. Such talismanic phrases are not required. Rather, we must look to the definitions of the terms used. Although "contact" is not defined by the statute, the plain meaning of this term, as defined by a dictionary, includes a "union or junction of body surfaces . . . a touching or meeting . . . ." Webster's Third New International Dictionary (2002) p. 490. This definition suggests that the act of having "contact" is a singular incident—a single touching or meeting of body parts. This definition of "contact" as referring to each singular incident is consistent with this court's prior case law interpreting § 53-21, which this court must consider in determining under § 1-2z whether the statute is plain and unambiguous. See, e.g., *State* v. *Moreno-Hernandez*, 317 Conn. 292, 299, 118 A.3d 26 (2015) ("[i]n interpreting the [statutory] language . . . we do not write on a clean slate, but are bound by our previous judicial interpretations of the language and the purpose of the statute" (internal quotation marks omitted)). In case law prior to the 1995 amendment of § 53-21; see Public Acts 1995, No. 95-142, § 1 (P.A. 95-142); this court held that risk of injury to a child may be charged under a continuing course of conduct theory. See *State* v. *Spigarolo*, supra, 210 Conn. 390–92 (noting that state charged risk of injury count under "situation" prong of § 53-21 premised on multiple acts of sexual contact and presented it to jury as continuing course of conduct crime, and court cited to *State* v. *Hauck*, 172 Conn. 140, 150, 374 A.2d 150 (1976), which held that violation of situation prong of § 53-21 may be premised on continuing course of conduct).[26] Since the

[26] The concurrence asserts that, in *Hauck*, this court presumed that the prosecution had discretion in the absence of specific language permitting or prohibiting the charging of a crime as a continuing course of conduct because the court in that case did not rely on the statutory language but

enactment of P.A. 95-142, § 1, we never have held that the legislature no longer intended that risk of injury to a child would be a continuing course of conduct crime. Thus, the plain language of the statute is ambiguous.

The legislative history demonstrates that, when what is now subsection (a) (2) was established in 1995 by P.A. 95-142, § 1, the purpose of the amendment was to "[divide] the risk of injury . . . [statute] into two parts . . . ." 38 H.R. Proc., Pt. 7, 1995 Sess., p. 2590, remarks of Representative James A. Amann. The purpose of the statute was manifestly *not* to alter the state's ability to charge risk of injury as a continuing course of conduct crime when the facts involved sexual contact. Specifically, prior to the amendment, the statute had been used to charge both sexual and nonsexual offenses. The statute generally criminalized conduct by one who

on only policy rationales in holding that risk of injury may be charged as a continuing course of conduct crime. It is true that the analysis in *Hauck* is very short and does not specifically address the language of the risk of injury statute. Neither does the court in *Hauck* refer to a presumption in favor of prosecutorial discretion, however. All that this court said in that case was that "[t]he offenses charged here were obviously of a continuing nature and it would have been virtually impossible to provide the many specific dates [on] which the acts constituting the offenses occurred." *State* v. *Hauck*, supra, 172 Conn. 150.

It is important to note that, in *Hauck*, the applicable risk of injury statute criminalized sexual contact as both an act and a situation. See General Statutes (Rev. to 1972) § 53-21. A situation can certainly involve a continuing course of conduct. This is supported by case law that followed *Hauck*, in which this court held that a single count of risk of injury to a child under the situation prong premised on ongoing sexual contact could be charged as a continuing course of conduct. See *State* v. *Spigarolo*, supra, 210 Conn. 383–84, 391–92. Thus, to the extent *Hauck* was ambiguous regarding its reliance on the language of the statute, subsequent case law clarifies that a continuing course of conduct is contemplated by the statutory term "situation." See, e.g., id.; see also *State* v. *Payne*, 240 Conn. 766, 775, 695 A.2d 525 (1997) (citing *State* v. *Velez*, 17 Conn. App. 186, 198–99, 551 A.2d 421 (1988), cert. denied, 210 Conn. 810, 556 A.2d 610, cert. denied, 491 U.S. 906, 109 S. Ct. 3190, 105 L. Ed. 2d 698 (1989), in which court determined that sexual activity with children created situation that was likely to be harmful to their physical, moral, and emotional well-being).

wilfully or unlawfully placed a child "in such a situation that its life or limb is endangered, or its health is likely to be injured, or its morals likely to be impaired, or does any act likely to impair the health or morals of any such child . . . ." General Statutes (Rev. to 1993) § 53-21. Prior to the enactment of P.A. 95-142, § 1, this court had interpreted § 53-21 as criminalizing a continuing course of sexual contact in which a child was placed in a situation that was likely to be harmful to the child's health and morals. See *State* v. *Payne*, 240 Conn. 766, 774–75, 695 A.2d 525 (1997) (citing *State* v. *Velez*, 17 Conn. App. 186, 199, 551 A.2d 421 (1988), cert. denied, 210 Conn. 810, 556 A.2d 610, cert. denied, 491 U.S. 906, 109 S. Ct. 3190, 105 L. Ed. 2d 698 (1989), which stated that sexual activity with children, prior to enactment of P.A. 95-142, § 1, created situation likely to be harmful to their physical, moral, and emotional well-being), overruled in part on other grounds by *State* v. *Romero*, 269 Conn. 481, 849 A.2d 760 (2004).

Prior to 1995, § 53-21 criminalized both sexual contact and nonsexual contact without distinction, and thus it was not clear from the conviction itself whether the defendant had been convicted of a crime that was sexual in nature. This made it difficult to place defendants, who were convicted of risk of injury to a child because of sexual contact, on the sex offender registry. For ease of identifying sex offenders, P.A. 95-142, § 1, divided the statute into sexual contact offenses under what is now subsection (a) (2) and nonsexual contact offenses under what is now subsection (a) (1), allowing for the classification of sex offenders. See 38 S. Proc., Pt. 5, 1995 Sess., pp. 1769–70, remarks of Senator Martin M. Looney ("what the first part of the bill deals with [is] the change in the definition of risk of injury to a minor, and we have a, separating into sections that deal with a, a sexual component, and a [nonsexual] component, so that the offense can be more carefully

delineated"); 38 H.R. Proc., Pt. 7, 1995 Sess., p. 2590, remarks of Representative Amann ("Section one divides the risk of injury to a minor into two parts, which by the way, is not on the list of current sex offender crimes. One [risk of injury] crime is going to be classified as a sex offender crime and one is not.").[27]

By dividing sexual and nonsexual contact offenses with the enactment of P.A. 95-142, § 1, the legislature maintained in subsection (a) (1), for nonsexual contact, the distinction between the creation of a "situation" and the commission of an act. See General Statutes § 53-21 (a) (1) ("wilfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that the life or limb of such child is endangered, the health of such child is likely to be

[27] This statement does not show that the legislature intended to alter the substance of the statute but, rather, that it intended to separate sexual and nonsexual contact. The fact that this amendment allows the new subdivision pertaining to sexual contact to be classified as a sex offender crime does not indicate that the substance of the crime itself was altered.

Nevertheless, the concurrence contends that the legislature intended to create a " 'new' " risk of injury statute regarding sexual contact, and thus our prior case law should not apply, because, in two instances in the legislative history, Senator Thomas F. Upson referred to the risk of injury statute as "new . . . ." See 38 S. Proc., Pt. 5, 1995 Sess., p. 1766, remarks of Senator Upson ("[b]ecause while the original bill talks about a new risk-of-injury statute, risk of injury by having contact with the intimate parts of a child under sixteen, becomes a [c]lass C felony"); id., p. 1777, remarks of Senator Upson ("[f]irst of all, it creates a new crime, risk of injury, explained a little earlier, by having contact with the intimate parts of a child under sixteen, in a sexual and indecent manner, likely to impair the health or morals of the child"). The concurrence cherry-picks the term "new" out of these quotations without reference to the broader context. As explained, the legislative history makes clear that a "new" crime was created solely to distinguish sexual contact and nonsexual contact. Nothing in the legislative history manifested a legislative intent to otherwise alter the substance of the crime itself. The "change in the definition of risk of injury" was limited to the distinction between sexual and nonsexual contact, as Senator Looney immediately clarified. See 38 S. Proc., supra, p. 1769, remarks of Senator Looney ("what the first part of the bill deals with [is] the change in the definition of risk of injury to a minor, and we have a, separating into sections that deal with a, a sexual component, and a [nonsexual] component").

injured or the morals of such child are likely to be impaired, or does any act likely to impair the health or morals of any such child"); see also *State* v. *Payne*, supra, 240 Conn. 774 ("[a]lthough both parts of the statute are intended to protect children from predatory and potentially harmful conduct of adults, the two parts nonetheless are directed at different kinds of harm to children"). The legislature did not draw this distinction in criminalizing sexual contact under subsection (a) (2). Nothing in this legislative history suggests that the legislature intended to distinguish between the creation of a situation and the performance of a single act under subsection (a) (2) or that the legislature intended to no longer criminalize a continuing course of conduct of sexual and indecent touching of intimate parts. There is no indication that the legislature sought to alter the substance of the crime. Rather, the legislative history shows that the legislature intended only to separate sexual and nonsexual contact. By not explicitly making the distinction between an act and a situation, and in the absence of any evidence that the legislature intended to alter the scope of the crime of risk of injury to a child in sexual contact cases to only acts and not situations, it is clear that the legislature, in P.A. 95-142, § 1, intended to criminalize both situations and acts without treating them as separate elements. Thus, this legislative history shows that, in enacting § 53-21 (a) (2), the legislature intended to continue to criminalize both a single instance of contact as well as an ongoing course of conduct.

Not only does § 53-21 (a) (2) contemplate criminalizing a continuing course of conduct, but, in the present case, the state charged the defendant under such a theory in counts one, five, and six. Specifically, in count one, the state charged the defendant with committing risk of injury to a child by having "contact with the intimate parts" of N "in or about 2005 through January 8,

2007," and, in count six, the state charged the defendant with committing risk of injury to a child "in or about 2005 through October 23, 2007," by having "contact with the intimate parts" of T. This language put the defendant on notice that he was charged with touching the intimate parts of N and T in a sexual and indecent manner over a period of time, rather than being charged with a single instance of contact as to each child on a single date. This is consistent with how the prosecutor presented and argued these counts to the jury. The prosecutor argued that, although the jury needed to find that only a single incident of sexual contact occurred to find the defendant guilty under each count, the state's theory was that the defendant continuously engaged in this inappropriate touching during the alleged time period.

Moreover, based on the evidence admitted at trial, as to counts one and six, the jury reasonably could have found that the multiple, separate incidents of conduct did indeed constitute a continuing course of conduct. As to count one, the testimony of N and other victims showed that, although the multiple incidents of sexual and indecent touching of N's intimate parts occurred for a prolonged period of time—approximately two years—there was only a relatively short period of time between the occurrence of each incident, as this conduct happened on a weekly basis. See *United States* v. *Berardi*, supra, 675 F.2d 898 (concluding that "three alleged acts of obstruction occurred within a relatively short period of time" despite each act having occurred months apart); see also *United States* v. *Root*, 585 F.3d 145, 155 (3d Cir. 2009) (multiple acts may be considered part of continuous course of conduct even if conduct spanned years). Additionally, these incidents were committed by a single defendant, involved a single victim (N), and furthered a single, continuing objective to touch N in a sexual and indecent manner.

Similarly, as to count six, the testimony of T and other victims showed that the multiple incidents of sexual and indecent touching of T's intimate parts occurred frequently during a relatively short period of time (on a regular basis when T was at the defendant's residence during the span of two years), were committed by a single defendant, involved a single victim (T), and furthered a single, continuing objective to touch T in a sexual and indecent manner whenever other adults were unaware. Accordingly, counts one and six were premised on a continuing course of conduct. As a result, these counts were not duplicitous, and thus the trial court's failure to grant the defendant's requests for a bill of particulars or a specific unanimity instruction did not violate his right to jury unanimity.

Count five, however, differs from counts one and six in that it is premised on multiple acts of sexual and indecent contact with S's vagina and breasts during a single evening. As noted previously in this opinion, at times, "it may be difficult to determine whether a single count is premised on multiple acts, each of which is committed in the course of a single criminal episode of relatively brief, temporal duration, and thus constitutes alternative means of committing the elements at issue, or whether it is premised on multiple, separate and distinct acts, each of which could constitute a separate statutory violation." Part I B of this opinion; see *United States* v. *Newell*, supra, 658 F.3d 23–24. In the present case, the jury reasonably could have interpreted the evidence admitted in only one of two ways. Although the length of time is unclear, the testimony of S shows that this touching occurred during the course of a single evening. From this evidence, the jury reasonably could have found that these acts constituted a single criminal episode of relatively brief, temporal duration and thus did not constitute multiple, separate incidents of conduct under the first prong of the applicable test. Alterna-

tively, from this evidence, even if the jury found under prong one of the applicable test that there was enough time between each act for the acts to constitute multiple, separate incidents of conduct, the jury reasonably could have found under prong two of the applicable test that these acts constituted a continuing course of conduct, not separate violations of § 53-21 (a) (2), because this touching occurred during a relatively short period of time (multiple times during a single evening), was committed by a single defendant, involved a single victim (S), and furthered a single, continuing objective to touch S in a sexual and indecent manner. Additionally, as it did with counts one and six, the state charged and argued count five under a continuing course of conduct theory. As a result, count five was not duplicitous and thus did not violate the defendant's right to jury unanimity.

The judgment of the Appellate Court is affirmed.

In this opinion ROBINSON, C. J., and McDONALD and ECKER, Js., concurred.

MULLINS, J., with whom KELLER, J., joins, concurring in the judgment. I agree with the majority that we should formally recognize a distinction between two types of duplicitous charging: (1) the charging of distinct crimes that violate multiple statutory provisions or subsections within a single count (which implicates what the majority terms "unanimity as to elements"), and (2) the charging of multiple instances of the same crime within a single count (which implicates what the majority terms "unanimity as to instances"). See part I B of the majority opinion. I also agree with the majority's ultimate conclusion that the charges in this case were not impermissibly duplicitous and, therefore, that the conviction of the defendant, Douglas C., Jr., on

multiple counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (2)[1] should be affirmed.

I part ways with the majority with respect to its statement of the law that governs duplicity/unanimity as to multiple instances of the same offense; see id.; and its application of that law to the present case. See part II of the majority opinion. Specifically, I believe that this court should adopt the more flexible, case-by-case framework used by the United States Court of Appeals for the Second Circuit, among other courts. We typically defer to that court's interpretations of federal law, and there are compelling reasons—both principled and practical—to do so with respect to the law of duplicity and unanimity. I believe that the majority's approach will lead to the needless repetitive charging of criminal defendants and make it virtually impossible to prosecute some of the most heinous crimes, especially those involving the sexual abuse of young children.

I

As I understand it, the majority adopts a two part test, with one significant exception, to assess challenges to a criminal prosecution in which a single count charges the defendant with violating a single statute in multiple, separate instances. First, we look to see whether there are multiple instances of conduct charged in one count, where each instance could establish a separate violation of the same statute based on the evidence submitted at trial. If so, the count is presumptively duplicitous. There is an exception, however, "when the multiple instances of conduct constitute 'a continuing course of conduct, during a discrete period of time . . . .' " Part

[1] Although § 53-21 has been amended several times since the events underlying the present appeal; see Public Acts 2015, No. 15-205, § 11; Public Acts 2013, No. 13-297, § 1; Public Acts 2007, No. 07-143, § 4; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, unless otherwise noted, I refer to the current revision of the statute.

I B of the majority opinion. Course of conduct charging is not duplicitous, but only so long as the legislature specifically contemplated that the statute at issue could be charged as a course of conduct crime. Second, in the absence of a bill of particulars or a specific unanimity instruction, all duplicitous charges violate a defendant's constitutional right to jury unanimity, but the court then must consider whether that constitutional violation is harmless.

I readily acknowledge that this is *one* permissible approach to the issue of duplicitous charging. As I will discuss, a few of the federal courts of appeals, as well as a handful of our sister state courts, have adopted similar frameworks. And it is not without its merits, primary among them that it purports to be relatively simple and straightforward to apply. But see part II of this opinion.

I disagree, however, with the majority's contention that the "federal courts agree" with its per se ban on duplicitous charging. Part I B of the majority opinion. The very cases on which the majority relies expressly acknowledge that other courts of appeals apply a different framework,[2] and the majority concedes that the Second Circuit approach, among others, differs. See footnotes 15 and 18 of the majority opinion.

Much of the difference between my view and the majority's view centers on how to treat course of conduct charging. The framework I would have us adopt when assessing whether charging multiple instances in a single count is permissible or impermissible is the following four step approach: First, pursuant to General

[2] See, e.g., *United States* v. *Schlei*, 122 F.3d 944, 979 (11th Cir. 1997) ("[s]everal [federal courts of appeals] have rejected the [Fifth Circuit's] analysis"), cert. denied, 523 U.S. 1077, 118 S. Ct. 1523, 140 L. Ed. 2d 674 (1998). As I discuss hereinafter, the duplicity framework that the majority has adopted largely tracks the approach followed by the Fifth Circuit.

Statutes § 1-2z, if the statute at issue either expressly permits or expressly bars course of conduct charging, or if there are other *clear* indicia of legislative intent, then courts must defer to the legislative will. Second, if the statute at issue is silent as to course of conduct charging, and there are no other clear indicia of legislative intent, as will most often be the case, then the prosecutor has the discretion to charge repeated violations of the statute as individual incidents or as a single course of conduct. Third, notwithstanding the prosecutor's charging decision, the trial court should determine whether such charging (1) would be unreasonable or unfair under the circumstances or (2) would otherwise violate the defendant's fifth and sixth amendment (and corresponding state constitutional) rights to notice, to present a defense, to a unanimous jury verdict, and to not twice be placed in jeopardy for the same offense, among others. Such determinations must be made on a case-by-case basis. If, at trial, the judge concludes that there is potential for unfairness or a constitutional violation, then the judge should not permit course of conduct charging and should either order that the charges be separated or give an instruction to the jury that it must be unanimous as to at least one specific incident.[3] Fourth, if an appellate court, on review, con-

[3] Under the Second Circuit approach, specific unanimity instructions generally are not required; see, e.g., *United States* v. *Natelli*, 527 F.2d 311, 325 (2d Cir. 1975), cert. denied, 425 U.S. 934, 96 S. Ct. 1663, 48 L. Ed. 2d 175 (1976); especially when multiple instances are properly charged as a course of conduct. See, e.g., *United States* v. *Walker*, 254 Fed. Appx. 60, 62–63 (2d Cir. 2007). This court has followed a similar approach. See, e.g., *State* v. *Sorabella*, 277 Conn. 155, 206–207, 891 A.2d 897 (instruction not required when state charged promotion of obscene materials as course of conduct), cert. denied, 549 U.S. 821, 127 S. Ct. 131, 166 L. Ed. 2d 36 (2006); *State* v. *Spigarolo*, 210 Conn. 359, 383, 391, 556 A.2d 112 (risk of injury), cert. denied, 493 U.S. 933, 110 S. Ct. 322, 107 L. Ed. 2d 312 (1989).

Nevertheless, in the vast majority of cases, specific unanimity instructions will be advisable when the prosecutor charges multiple instances. Stated more directly, when the prosecutor opts to charge multiple instances, it would be "sound practice" for the trial court to give a specific unanimity instruction so as to protect the defendant's right to jury unanimity. *United*

cludes that the trial court should not have permitted course of conduct charging, either because the defendant's conduct cannot fairly be characterized as a single scheme or pattern under the statute at issue, or because the constitutional rights that underlie the rule against duplicity were not adequately secured, then the trial court's determination is subject to harmless error analysis.

In other words, then, the two primary differences between my approach and the majority's approach are these. First, the majority agrees with those courts that have concluded that only the *legislature* can sanction course of conduct charging, and it must indicate its intent to do so. Otherwise, course of conduct charging is constitutionally impermissible. By contrast, I agree with those courts that have held that, unless otherwise specified, the legislature presumptively leaves to the *prosecutor* the decision of whether course of conduct charging is appropriate in a given case. This prosecutorial discretion is not unbridled. It is subject to the discretionary judgment of the trial court as to whether course of conduct charging is fair and reasonable on the facts of a particular case.[4] The discretion of the

States v. *Natelli*, supra, 527 F.2d 325 (although specific unanimity instruction is not always required, charging multiple instances in one count without instruction runs risk of violating jury unanimity requirement). When the prosecutor has charged a course of conduct crime, the trial court may tailor the instruction so as to ensure jury unanimity under the facts and circumstances of the case. See, e.g., *United States* v. *Prieto*, 812 F.3d 6, 11–12 (1st Cir.), cert. denied, U.S. , 137 S. Ct. 127, 196 L. Ed. 2d 100 (2016); *United States* v. *Margiotta*, 646 F.2d 729, 733 (2d Cir. 1981). Ultimately, though, I agree with the majority that the trial court's failure to give such an instruction in the present case did not run afoul of the sixth amendment.

[4] Compare, e.g., *United States* v. *Girard*, 601 F.2d 69, 72 (2d Cir.) (acts could reasonably be understood as part of single scheme), cert. denied, 444 U.S. 871, 100 S. Ct. 148, 62 L. Ed. 2d 96 (1979), with *United States* v. *Tanner*, 471 F.2d 128, 139 (7th Cir.) (acts could not be so charged), cert. denied, 409 U.S. 949, 93 S. Ct. 269, 34 L. Ed. 2d 220 (1972). *Tanner*, on which the majority relies, is an excellent example of a decision in which the prosecutors were deemed to have abused their discretion in charging a single course

prosecutor is cabined not only by the defendant's right to a unanimous jury, but also by the other constitutional considerations, such as due process concerns, that underlie the prohibition against duplicity.

At the same time, it is important to point out that prosecutorial discretion in charging is deeply entrenched in our state's jurisprudence. Connecticut has a long history of permitting prosecutors, who are constitutional officers with broad discretionary authority over charging,[5] to make these sorts of decisions.[6] The discretion *not* to charge multiple, substantially similar offenses as separate crimes, thereby exposing the defendant to

of conduct. Although the United States Court of Appeals for the Seventh Circuit emphasized the scope and importance of prosecutorial discretion in this area; see *United States* v. *Tanner*, supra, 138–39; the court held that it was an abuse of that discretion to charge, in a single count, multiple illegal acts of transporting explosives, when those acts were committed by different defendants over the course of four months. See id., 139. Although the majority is correct that the court in *Tanner* considered the breadth of the statutory language, it ultimately resolved the case by indicating that, as the Ninth Circuit held in *Cohen* v. *United States*, 378 F.2d 751, 754 (9th Cir.), cert. denied, 389 U.S. 897, 88 S. Ct. 217, 19 L. Ed. 2d 215 (1967), which was not a statutory interpretation case, the government has discretion—albeit cabined discretion—in determining whether to charge a series of violations as a single scheme. See *United States* v. *Tanner*, supra, 138–39.

[5] See, e.g., Conn. Const., amend. XXIII; General Statutes § 51-277 (a); *Massameno* v. *Statewide Grievance Committee*, 234 Conn. 539, 563, 574–76, 663 A.2d 317 (1995).

[6] As I explain in part I B of this opinion, Connecticut prosecutors have been charging crimes as continuing offenses since the nineteenth century, long before the adoption of the state constitution in 1965, and they have been exercising their discretion to charge crimes such as sexual assault, which are not inherently or even primarily ongoing crimes, as course of conduct crimes for more than seventy years. I agree with the majority that prosecutors' authority to charge in this manner is not *expressly* conferred by any constitutional or statutory provision, and I do not mean to imply that it is the result of a constitutional grant of authority. It is, in my view, an ancient common-law pleading tradition, one that the legislature is well aware of and continues to implicitly approve. Nevertheless, I noted the authority conferred on Connecticut prosecutors by statute and the constitution because I believe that their discretion over course of conduct charging decisions is fully consistent with that broad authority.

multifold punishment, often redounds to the benefit of criminal defendants: their potential sentencing exposure is not as great, and the jury sees only one charged crime, rather than multiple, separate charges repeatedly alleging the same violation and thus suggesting that the defendant must be guilty if there are so many charges. Under the majority's new rule, in the vast majority of cases, when the legislature has neither sanctioned nor prohibited course of conduct charging, prosecutors would be stripped of this traditional authority.

This leads to the second primary difference between the majority's approach and the Second Circuit approach that I would adopt. Under the majority's approach, once it is determined that the state has charged the defendant with violating a single statute on multiple occasions and that each violation could have been charged separately, then the charge is duplicitous and, necessarily, a violation of the defendant's constitutional rights. That is, unless the legislature has signaled its assent to charging violations of a criminal statute as a course of conduct, such charging, in the absence of a bill of particulars or a specific unanimity instruction, necessarily offends the sixth amendment to the federal constitution and/or the corresponding provision of the state constitution. The majority then would conduct a harmless error analysis to determine whether the constitutional violation was harmless beyond a reasonable doubt. By contrast, if the legislature *has* sanctioned course of conduct charging, then the prosecutor can permissibly so charge, and the majority's approach appears to stop there—because there is no constitutional violation to such a charge—and there is no further evaluation of whether the defendant's right to a unanimous jury might nevertheless be infringed by charging multiple violations of a single statute in one count. Put differently, application of the majority's adopted test not only would prohibit course of conduct charging in cases in which it may be war-

ranted, but also may permit it in cases in which it could be unconstitutional.

The approach I favor does not reach a constitutional violation—or discount the possibility of one—as quickly. The approach I favor recognizes, as I discuss in part I A of this opinion, that there is an important distinction between a duplicitous *charge*, which potentially violates the rules of criminal procedure, and a *conviction* that violates the defendant's rights to due process or to a unanimous jury verdict. As many of the federal courts and our sister state courts have recognized, not all duplicitous charges run afoul of the constitution. The duplicity determination is the beginning of the determination of whether a criminal defendant's constitutional rights have been violated, not the end.

In the present case, I would affirm the defendant's conviction because charging each alleged crime as an ongoing course of conduct involved a reasonable exercise of prosecutorial discretion that did not infringe on the defendant's constitutional rights, and not because the legislature specifically identified § 53-21 (a) (2) as a course of conduct crime. It did not. See part II of this opinion.

A

There is one point that I should make clear at the outset because it is key to understanding all of the varied case law about these issues. That is, there is an important conceptual distinction between (1) duplicitous charging in an indictment or information and (2) the constitutional right to a unanimous jury verdict. The prohibition against duplicitous charging, which arose in the civil context at common law; see part I B of this opinion; rests in the rules of criminal procedure: Practice Book § 36-21 in Connecticut,[7] rule 8 (a) of

[7] Practice Book § 36-21 provides: "Two or more offenses may be charged in the same information *in a separate count for each offense* for any defendant." (Emphasis added.)

the Federal Rules of Criminal Procedure in the federal courts,[8] and other rules in other states.[9] These rules of practice differ from one jurisdiction to the next, which means that cases construing and applying one jurisdiction's rules are not necessarily directly applicable to another jurisdiction.

The prohibition embodied in these rules, however, *is* grounded in several constitutional protections, one of which is the defendant's right to a unanimous jury verdict. This right is principally secured by the sixth amendment to the federal constitution, as well as by article first, §§ 8 and 19, of the Connecticut constitution.[10] As I will discuss, different federal courts treat differently the relationship between the rule against duplicitous charging and the sixth (and other) amendment rights that underlie that rule. Some deem any violation of the procedural rules against duplicitous charging also to be a per se constitutional violation but then hold that violation harmless if, in fact, the violation was cured by the trial court's giving a specific unanimity instruction or if such an instruction is deemed unnecessary.

Other courts, though, follow the conceptually distinct approach that I favor. They treat violations of the rules

[8] Rule 8 (a) of the Federal Rules of Criminal Procedure provides: "The indictment or information may charge a defendant *in separate counts* with 2 or more offenses if the offenses charged—whether felonies or misdemeanors or both—are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan." (Emphasis added.) It has been broadly accepted, however, that charging a course of conduct crime in a single count does not violate the rule. See, e.g., *United States* v. *Conlon*, 661 F.2d 235, 239 (D.C. Cir. 1981) ("[p]erusal of many cases in which error was predicated on the duplicity of an indictment reveals that an exception [to rule 8 (a)] exists for a continuing scheme or a course of conduct [that] violates but one criminal statutory provision"), cert. denied, 454 U.S. 1149, 102 S. Ct. 1015, 71 L. Ed. 2d 304 (1982).

[9] See, e.g., N.Y. Crim. Proc. Law § 200.30 (1) (McKinney 2007).

[10] As the majority points out, the defendant has not separately briefed a state constitutional claim before this court. See footnote 5 of the majority opinion.

of practice and of the constitution as different—albeit related—matters.[11] The cure for a violation of the rules against duplicitous pleading is, typically, reformulation of the indictment, a bill of particulars, and/or appropriate jury instructions, not reversal of the conviction.[12] A sixth amendment violation, by contrast, will warrant reversal if it is not deemed harmless.

B

Before I discuss the Second Circuit approach, which I would adopt, a brief history of these issues may be instructive. The rules against duplicity (pleading multi-

[11] See, e.g., *United States* v. *Jaynes*, 75 F.3d 1493, 1502 n.7 (10th Cir. 1996); see also, e.g., *United States* v. *Correa-Ventura*, 6 F.3d 1070, 1081 (5th Cir. 1993) ("[T]he issues of duplicity and unanimity are evaluated at different procedural stages of the criminal proceedings—duplicity is generally reviewed during the pretrial phase, whereas unanimity must be determined after all the evidence has been introduced at trial. For this reason, the inquiry as to whether offenses are distinct for purposes of duplicity is not identical to the analysis employed in determining whether the actions charged are so dissimilar that unanimity is required."); *Lane* v. *Graham*, Docket No. 9:14-cv-01261-JKS, 2016 WL 154111, *10 (N.D.N.Y. January 12, 2016) ("[T]he [United States] Supreme Court has never held that an indictment containing duplicitous counts violates the [d]ue [p]rocess [c]lause. . . . The Second Circuit has further indicated that duplicitous pleadings are not even presumptively invalid in and of themselves." (Citation omitted.)); *Jones* v. *Lee*, Docket No. 10 Civ. 7915 (SAS), 2013 WL 3514436, *7 (S.D.N.Y. July 12, 2013) ("Procedural rules create the prohibition of duplicitous counts—there is no constitutional right against duplicity per se. . . . However, a duplicitous count may violate a defendant's constitutional rights . . . if it violates the [s]ixth [amendment] . . . ." (Footnotes omitted; internal quotation marks omitted.)), appeal dismissed, United States Court of Appeals for the Second Circuit, Docket No. 13-2970 (October 26, 2013).

[12] See, e.g., *United States* v. *Ramirez-Martinez*, 273 F.3d 903, 915 (9th Cir. 2001) ("[t]he rules about . . . duplicity are pleading rules, the violation of which is not fatal to an indictment" (internal quotation marks omitted)) (overruled on other grounds by *United States* v. *Lopez*, 484 F.3d 1186 (9th Cir. 2007)), cert. denied, 537 U.S. 930, 123 S. Ct. 330, 154 L. Ed. 2d 226 (2002); *United States* v. *Droms*, 566 F.2d 361, 363 n.1 (2d Cir. 1977) ("[d]uplicity, of course, is only a pleading rule and would in no event be fatal to the count"); *Reno* v. *United States*, 317 F.2d 499, 502 (5th Cir.) ("[d]uplicity is not a fatal defect" (internal quotation marks omitted)), cert. denied, 375 U.S. 828, 84 S. Ct. 72, 11 L. Ed. 2d 60 (1963).

ple grounds or offenses in the same count) and multiplicity (pleading the same ground or offense in multiple counts) originated at English common law, in the civil pleading context. See E. Coke, First Part of the Institutes of the Lawes of England (1628) p. 304. An exception to Coke's rule against duplicity came to be recognized for continuing torts, such as ongoing trespass; for those claims, the plaintiff could "[lay] the action with a continuando" (another way of saying continuous course), alleging in a single count that, for example, the defendant had trespassed continually—on a particular date and on "divers days" thereafter. 3 W. Blackstone, Commentaries on the Laws of England (1768) p. 212. In the nineteenth century, the new American states were divided over how to apply these common-law civil rules to criminal prosecutions. Some, including Connecticut, allowed the state to lay a broad range of vice-type and scheme-type crimes with a continuando, charging repeated violations as one continuing offense or continuing course of conduct, whereas other states rejected the practice.[13]

Early on, Connecticut courts recognized that not all crimes are either exclusively individual act or course of conduct crimes. Some crimes that were not inherently continuing offenses could be charged either as individual acts or with a continuando. See, e.g., *State* v. *Cook*, 75 Conn. 267, 268, 53 A. 589 (1902) (prosecutor charged

[13] Compare *State* v. *Bosworth*, 54 Conn. 1, 2, 4 A. 248 (1886) ("all offenses involving continuous action, and which may be continued from day to day, may be so alleged"), and *Commonwealth* v. *Pray*, 30 Mass. 359, 362 (1833) ("[whenever] the crime consists of a series of acts, they need not be specially described, for it is not each or all the acts of themselves, but the practice or habit which produces the principal evil and constitutes the crime" (emphasis omitted)), with *State* v. *Munger*, 15 Vt. 290, 296–97 (1843) (continuando must be disregarded as "surplusage").

I do not suggest that *Bosworth* stood for the proposition that any crime can be charged by continuando, only that Connecticut has long taken a more expansive approach than have some other states to course of conduct charging.

cruelty to animals both as individual infraction and with continuando covering three month period). Child sexual assault is one common example of a crime the charging of which traditionally has been subject to prosecutorial discretion, both before and after the enactment of § 1-2z. In fact, Connecticut prosecutors have consistently charged child sexual assault, along with risk of injury to a child, as a continuing offense. This has been equally true when the victims provided only generic testimony as to an ongoing, undifferentiated pattern of abuse, when they testified in detail as to a number of specific assaults that were jointly charged in a single count, and when the testimony included a blend of the specific and the generic.[14]

[14] See, e.g., *State* v. *Silver*, 139 Conn. 234, 247, 93 A.2d 154 (1952) (*O'Sullivan*, *J.*, concurring) (state charged that, " 'at the [c]ity of Hartford on divers dates, the [defendant] did commit an indecent assault [on] a minor' "); *State* v. *Saraceno*, 15 Conn. App. 222, 225 n.1, 229, 545 A.2d 1116 (finding no constitutional violation when state charged defendant with committing second degree sexual assault against minor by intercourse " 'on divers uncertain dates, primarily on weekends, between August 1980 and August 1983,' " because "[e]ach count, although alleging repeated commissions of a crime, charged only a single set of essential elements comprising the offense"), cert. denied, 209 Conn. 823, 552 A.2d 431 (1988), and cert. denied, 209 Conn. 824, 552 A.2d 432 (1988); *State* v. *Mancinone*, 15 Conn. App. 251, 256 n.5, 545 A.2d 1131 (state charged second degree sexual assault, by intercourse with minors, " 'on divers dates between August 1983 and November 1984' "), cert. denied, 209 Conn. 818, 551 A.2d 757 (1988), cert. denied, 489 U.S. 1017, 109 S. Ct. 1132, 103 L. Ed. 2d 194 (1989); *State* v. *Snook*, 210 Conn. 244, 265, 555 A.2d 390 (state charged second and third degree sexual assault when defendant engaged in sexual intercourse with victim "on 'divers days between June, 1979, and January, 1984' "), cert. denied, 492 U.S. 924, 109 S. Ct. 3258, 106 L. Ed. 2d 603 (1989); *State* v. *Osborn*, 41 Conn. App. 287, 295, 676 A.2d 399 (1996) (charging attempted first degree sexual assault of child "on diverse dates between June 20, 1986, and June 20, 1991"); *State* v. *Vumback*, 263 Conn. 215, 217, 219, 819 A.2d 250 (2003) (charging first and third degree sexual assault of child, as well as risk of injury to child, "on divers dates between approximately June, 1990 through July, 1996" (internal quotation marks omitted)); *State* v. *William B.*, 76 Conn. App. 730, 735, 822 A.2d 265 (in addition to risk of injury, state charged defendant with first degree sexual assault, specifically alleging that, "on divers dates between 1990 and 1994, *as a continuing course of conduct*, the defendant engaged in sexual intercourse with the victim, who was younger than thir-

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With this history in mind, I turn to the law of the Second Circuit on duplicity and course of conduct charging. Although the groundwork was laid in earlier

teen" (emphasis added)), cert. denied, 264 Conn. 918, 828 A.2d 618 (2003); *State* v. *Romero*, 269 Conn. 481, 483–84, 504, 849 A.2d 760 (2004) (state charged that first degree sexual assaults of ten year old boy took place " 'on diverse dates between October, 1999 [and] March, 2000' "); *State* v. *Marcelino S.*, 118 Conn. App. 589, 593, 984 A.2d 1148 (2009) (state charged fourth degree sexual assault of child and risk of injury to child "on divers dates, between August 2003 and April 2005" (emphasis omitted; internal quotation marks omitted)), cert. denied, 295 Conn. 904, 988 A.2d 879 (2010); *State* v. *Jessie L. C.*, 148 Conn. App. 216, 218–19, 227, 231, 84 A.3d 936 (state charged defendant with second and fourth degree sexual assault " 'on diverse dates between' " 2002 and July of 2009, after complainant "gave a detailed account of several specific incidents of sexual assault" and, in addition, alleged that defendant assaulted her two to three times per week at ages eleven and twelve, and at least daily between ages of thirteen and sixteen, under at least eleven different factual scenarios, encompassing approximately 7575 distinct incidents of abuse), cert. denied, 311 Conn. 937, 88 A.3d 551 (2014); *State* v. *Vere C.*, 152 Conn. App. 486, 508–10, 98 A.3d 884 (charging first degree sexual assault, as well as risk of injury to child, " 'on diverse dates between' " 2005 and 2010 based on allegations that defendant assaulted victim approximately ten times, in different residences and different physical positions), cert. denied, 314 Conn. 944, 102 A.3d 1116 (2014); *State* v. *Michael D.*, 153 Conn. App. 296, 303, 322, 101 A.3d 298 (state charged first degree sexual assault and risk of injury to child, basing each charge on three different assaults of child, over three year period, each of which was factually distinct), cert. denied, 314 Conn. 951, 103 A.3d 978 (2014); *State* v. *Joseph V.*, 196 Conn. App. 712, 733, 230 A.3d 644 (2020) (see companion case, *State* v. *Joseph V.*, 345 Conn. 516, 534, 539, A.3d (2022)).

The majority's view, apparently, is that this practice, which is founded in ancient common law and has been memorialized in our state's published appellate decisions for more than seventy years, has always been impermissible under (unstated) Connecticut law, but that the legislature has simply never addressed the rogue charging practice. The majority places it in the same category as unpublished trial court decisions and municipal zoning regulations, which fly below the legislature's radar. The more reasonable explanation, I would submit, is that the legislature, which is presumed to be aware of the published decisions of this court and the Appellate Court, is well aware of the practice and has opted not to abrogate the common law and to undermine the state's ability to prosecute resident child molesters. Cf. *Pacific Ins. Co., Ltd.* v. *Champion Steel, LLC*, 323 Conn. 254, 264, 146 A.3d 975 (2016) ("if the legislature wishes to abrogate the common law, it must do so expressly").

cases, the Second Circuit's approach to duplicitous charging generally is traced to Judge Jon O. Newman's majority opinion in *United States* v. *Margiotta*, 646 F.2d 729 (2d Cir. 1981). In *Margiotta*, the government charged the defendant with sending " 'countless' " mailings, each in violation of the federal mail fraud statute, 18 U.S.C. § 1341 (1976), over a ten year period. Id., 730–31. The trial court declined to allow the government to charge multiple violations in a single count, and the Second Circuit permitted an interlocutory appeal. See id., 731. The Second Circuit agreed with the defendant that each mailing would have provided a "discrete basis for the imposition of criminal liability"; (internal quotation marks omitted) id., 732; but saw nothing improper with the government instead charging the mailings as one course of conduct when "the essence of the alleged wrong [was] the single scheme to defraud . . . ." Id., 733. In reaching this conclusion, the court never quoted the language of the statute; nor did it suggest that Congress intended the statute to be charged as a course of conduct crime. Rather, it relied on the general principle that, "[i]f the doctrine of duplicity is to be more than an exercise in mere formalism, it must be invoked only when an indictment affects the policy considerations that underlie that doctrine." (Internal quotation marks omitted.) Id., 732–33.[15]

The Second Circuit acknowledged that some courts, such as the United States Court of Appeals for the Fifth Circuit, follow the approach that any acts that qualify as

[15] Contrary to the majority's suggestion, I am fully aware that 18 U.S.C. § 1341 (1976) prohibits the use of the mailings in connection with a "scheme or artifice to defraud," and, therefore, it might be argued that the language of the statute itself contemplates course of conduct charging. As I discuss hereinafter, the Second Circuit and other courts following *Margiotta* have subsequently applied the same framework in the absence of any clear manifestation of legislative approval or intent, even in cases in which the statutory language does not prohibit or envision a course of conduct. See footnotes 18 and 25 of this opinion.

separate offenses must be charged in separate counts, unless the legislature has authorized otherwise. See id., 733. This is the approach that the majority has adopted in the present case. The Second Circuit rejected that approach, however, concluding that "a single count of an indictment should not be found impermissibly duplicitous whenever it contains several allegations that could have been stated as separate offenses . . . but only when the failure to do so risks unfairness to the defendant." (Citation omitted.) Id.

The Second Circuit court in *Margiotta* further concluded that there was no risk of unfairness to the defendant in that case; quite the contrary. Charging all of the illegal mailings in one count, rather than in dozens of separate counts, benefitted the defendant by "limiting the maximum penalties [the] defendant [could] face if convicted of mail fraud and also [by] avoid[ing] the unfairness of portraying the defendant to the jury as the perpetrator of [fifty] crimes." Id.; see also, e.g., *United States* v. *Walker*, 254 Fed. Appx. 60, 62 (2d Cir. 2007) ("[t]he law does not . . . absolutely proscribe duplicitous pleading because it recognizes that such an inflexible rule could inure to defendants' detriment by requir[ing] exposure to cumulative punishments" (internal quotation marks omitted)); *State* v. *Stanley*, 161 Conn. App. 10, 12–14, 125 A.3d 1078 (2015) (defendant was convicted of 100 counts of criminal violation of protective order and, accordingly, sentenced to eighteen years of imprisonment for making repeated phone calls to former romantic partner), cert. denied, 320 Conn. 918, 131 A.3d 1154 (2016). Finally, the court suggested that it would not be error to give the jury an instruction charging only that the jury must unanimously find that the defendant mailed at least one item in furtherance of his scheme to defraud, although the Second Circuit observed that it would not be improper for the trial court to submit a special interrogatory to identify one or

more specific mailings. See *United States* v. *Margiotta*, supra, 646 F.2d 733.

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In decisions both prior and subsequent to *Margiotta*, the Second Circuit has clarified several aspects of its duplicitous charging jurisprudence. First, in *Margiotta*, the essence of the alleged crime was the defendant's insurance fraud scheme, and the multiple mailings were relevant mostly because they provided the basis for federal jurisdiction. See id. Subsequent decisions have made clear that *Margiotta* applies even when the distinct violations "are an inherent part of the alleged wrong" and not merely jurisdictional prerequisites. (Internal quotation marks omitted.) *United States* v. *Upton*, 856 F. Supp. 727, 741–42 (E.D.N.Y. 1994).

Second, it is now clear that, unless the legislature clearly directs otherwise, whether violations of a given criminal statute may be charged as a course of conduct in a given case is a matter of prosecutorial discretion.[16] The Second Circuit and the district courts in that circuit have permitted duplicitous charging under a broad array of federal criminal statutes that do not facially contemplate course of conduct charging, and, in some instances, they have done so without any discussion[17] of whether Congress intended to permit such charging under the statute.[18] These courts have emphasized that,

[16] Of course, if a statute expressly barred course of conduct charging, then that legislative determination would be binding. Rarely, however, is that the case.

[17] I underscored some federal cases that permit course of conduct charging without first analyzing the statutory language. The point of these cases is not that the statutory language is irrelevant, or that statutory analysis is not appropriate. The point is simply that a statute that is facially silent as to course of conduct charging presumptively permits it. In Connecticut, we still may need to go through the legislative history in order to ascertain legislative intent.

[18] See, e.g., *United States* v. *Anson*, 304 Fed. Appx. 1, 4 (2d Cir. 2008) (transportation and receipt of child pornography, in violation of 18 U.S.C. § 2252A), cert. denied, 556 U.S. 1160, 129 S. Ct. 1687, 173 L. Ed. 2d 1050 (2009); *United States* v. *Tutino*, 883 F.2d 1125, 1128, 1141 (2d Cir. 1989)

"under the law of [the Second] Circuit, acts that could be charged as separate counts of an indictment may instead be charged in a single count if those acts could be characterized as part of a single continuing scheme"; (internal quotation marks omitted) *United States* v. *Aracri*, 968 F.2d 1512, 1518 (2d Cir. 1992); and that the decision whether to so charge is a matter of prosecutorial discretion.[19] In *United States* v. *Moloney*, 287 F.3d 236 (2d Cir.), cert. denied, 537 U.S. 951, 123 S. Ct. 416, 154 L. Ed. 2d 297 (2002), the Second Circuit specifically rejected the view that an indictment that charges a continuing offense not expressly prohibited by Congress fails to charge a cognizable offense. See id., 240–

(distribution of heroin, in violation of 21 U.S.C. § 841), cert. denied, 493 U.S. 1081, 110 S. Ct. 1139, 107 L. Ed. 2d 1044 (1990), and cert. denied sub nom. *Guarino* v. *United States*, 493 U.S. 1082, 110 S. Ct. 1139, 107 L. Ed. 2d 1044 (1990); *United States* v. *Girard*, 601 F.2d 69, 70, 72 (2d Cir.) (unauthorized sale of government property, in violation of 18 U.S.C. § 641), cert. denied, 444 U.S. 871, 100 S. Ct. 148, 62 L. Ed. 2d 96 (1979); *United States* v. *Natelli*, 527 F.2d 311, 314, 325 (2d Cir. 1975) (making material false and misleading statements in Securities and Exchange Commission proxy statement, in violation of 15 U.S.C. § 78ff (a)), cert. denied, 425 U.S. 934, 96 S. Ct. 1663, 48 L. Ed. 2d 175 (1976); *Lindsey* v. *Heath*, Docket No. 12-CV-2150 (ERK), 2015 WL 3849939, *1, *3 (E.D.N.Y. June 22, 2015) (burglary, in violation of New York law); *United States* v. *Jordan*, Docket No. 08-CR-124 (DLC), 2009 WL 2999753, *6 (S.D.N.Y. August 21, 2009) (communicating kidnapping threats, in violation of 18 U.S.C. § 875 (c)); *United States* v. *Sattar*, 272 F. Supp. 2d 348, 353, 382 (S.D.N.Y. 2003) (providing support to foreign terrorist organization, in violation of 18 U.S.C. § 2339B); *United States* v. *Martino*, Docket No. S1-00-CR-389 (RCC), 2000 WL 1843233, *2, *4 (S.D.N.Y. December 14, 2000) (tax evasion and subscribing to false returns, in violation of 26 U.S.C. §§ 7201 and 7206); *United States* v. *Gordon*, 990 F. Supp. 171, 177–78 (E.D.N.Y. 1998) (money laundering, in violation of 18 U.S.C. § 1956); *United States* v. *Mango*, Docket No. 96-CR-327, 1997 WL 222367, *1, *6 (N.D.N.Y. May 1, 1997) (violation of permit requirements imposed by Clean Water Act, 33 U.S.C. § 1319); *United States* v. *Weissman*, Docket No. S2-94-CR-760 (CSH), 1996 WL 742844, *1, *25–26 (S.D.N.Y. December 20, 1996) (obstruction of justice, in violation of 18 U.S.C. § 1505).

[19] See, e.g., *United States* v. *Mango*, Docket No. 96-CR-327, 1997 WL 222367, *6 (N.D.N.Y. May 1, 1997) ("Certainly, each violation . . . could have been charged in a separate count. However, under the law of [the Second] Circuit, the United States need not do so if it chooses a reasonable method of aggregating the offenses charged.").

41. The court concluded, rather, that violations of *any* criminal statute can be charged as a course of conduct, in the prosecutor's discretion, so long as the conduct reasonably can be characterized as part of a common scheme. See id., 240 ("[i]n response to certain claims of duplicity, [the Second] [C]ircuit has adopted *a general rule* that criminal charges may aggregate multiple individual actions that otherwise could be charged as discrete offenses as long as all of the actions are part of a single scheme" (emphasis added; internal quotation marks omitted)); see also, e.g., S. Levy, Federal Money Laundering Regulation: Banking, Corporate & Securities Compliance (Supp. 2022) § 20.05, p. 20-16 (Second Circuit follows "[u]nified [s]cheme [r]ule"). For this reason, "courts in [the Second] Circuit have repeatedly denied motions to dismiss a count as duplicitous." *United States* v. *Ohle*, 678 F. Supp. 2d 215, 222 (S.D.N.Y. 2010).

Of particular relevance to the present appeal, district courts in the Second Circuit have applied these principles to indictments alleging the sexual abuse of minors, allowing prosecutors to charge a course of conduct even when there was no indication that Congress specifically intended the statutes at issue to be charged in that manner. For example, in *United States* v. *Vickers*, Docket No. 13-CR-128-A, 2014 WL 1838255 (W.D.N.Y. May 8, 2014), the court upheld the validity of a single count indictment charging the defendant, a truck driver, with having transported a minor across state lines to engage in illegal sexual activity on multiple dates between 2000 and 2004, in violation of 18 U.S.C. § 2423 (a). See id., *1–2, *7. The victim told investigators that the defendant had taken him on approximately fifty such trips, for only a few of which could he provide details of the dates, locations, and abuse involved. See id., *2, *4. Applying *Margiotta* and its progeny, the court in *Vickers* concluded that the indictment was not impermissibly duplicitous because the government alleged a

continuing scheme to transport the victim for illicit sexual purposes. Id., *7.

Third, the Second Circuit has elucidated the process by which courts should determine, on a case-by-case basis, whether duplicitous course of conduct charging represents an abuse of prosecutorial discretion. If a trial court determines that the series of offenses in question can fairly and reasonably be characterized as a cohesive scheme or single course of conduct; see footnote 4 and part I C 2 of this opinion; the court must then consider whether charging the offenses in a single count comports with due process. In *United States* v. *Olmeda*, 461 F.3d 271 (2d Cir. 2006), the Second Circuit explained that "[d]uplicitous pleading . . . is not presumptively invalid" but, rather, is objectionable "only when [the] challenged indictment affects [the] doctrine's underlying policy concerns . . . ." Id., 281. The constitutional/policy considerations that speak to whether course of conduct charging is appropriate include "(1) avoiding [the] uncertainty of [a] general guilty verdict by concealing [a] finding of guilty as to one crime and not guilty as to [an]other, (2) avoiding [the] risk that jurors may not have been unanimous as to any one of the crimes charged, (3) assuring [the] defendant adequate notice of charged crimes, (4) providing [a] basis for appropriate sentencing, and (5) providing adequate protection against double jeopardy in subsequent prosecution[s] . . . ." Id.

2

There is one ambiguity in the Second Circuit approach that warrants special attention. That court has, in different instances, given the seemingly paradoxical guidance that (1) course of conduct charging should be permitted by the trial court only when it would not offend the sixth amendment right to a unanimous jury verdict; see, e.g., id.; but (2) when the prosecutor

charges a course of conduct, jury unanimity is not a concern because the jury need only agree that the defendant has committed the charged crime, which is the course of conduct. See, e.g., *United States* v. *Walker*, supra, 254 Fed. Appx. 62–63. This raises the question of when and how a trial court is to determine whether course of conduct charging is proper in a particular case.

The solution to this enigma, the Second Circuit has suggested, is that multiple violations of a statute can reasonably and constitutionally be charged in a single count when the course of conduct forms the "essence" of the alleged criminality. See, e.g., id.; *United States* v. *Tutino*, 883 F.2d 1125, 1141 (2d Cir. 1989), cert. denied, 493 U.S. 1081, 110 S. Ct. 1139, 107 L. Ed. 2d 1044 (1990), and cert. denied sub nom. *Guarino* v. *United States*, 493 U.S. 1082, 110 S. Ct. 1139, 107 L. Ed. 2d 1044 (1990); see also, e.g., *United States* v. *Tawik*, 391 Fed. Appx. 94, 97 (2d Cir. 2010) ("[a]s long as the essence of the alleged crime is carrying out a single scheme . . . then aggregation is permissible" (internal quotation marks omitted)). When the statutory language is silent on the issue, courts that follow *Margiotta* consider the following nonexhaustive list of factors when evaluating the essence of the allegations against the defendant: whether the alleged instances of misconduct involved the same defendants, the same victims, the same (or similar) conduct, at the same location, inspired by the same motive or purpose; whether the misconduct took place over a relatively short period of time or occurred frequently and more or less regularly over a longer period of time; whether the individual instances of misconduct can properly and reasonably be characterized as part of a common scheme or plan; whether there is considerable generic trial testimony and other evidence that is focused on the overall course of misconduct rather than on specific instances; whether

the individual instances of misconduct were interrelated or interdependent; whether the individual instances were not subject to unique defenses or types of proof; whether charging each alleged violation as a separate count would unnecessarily cumulate charges and potential criminal liability or render prosecution impracticable; whether a juror reasonably could consider the individual instances alleged to be incidental as merely means of accomplishing the overarching criminal design; and whether the crime is one that frequently is committed as part of a repetitive pattern or scheme and that historically has been understood and charged as a course of conduct.

When most of these factors indicate that the essence of the charged crime is the pattern of misconduct, rather than a few individual instances thereof, then it will be reasonable to think of the course of conduct as the crime at issue, and the sixth amendment does not require juror unanimity as to any particular instance. See, e.g., *United States* v. *Davis*, 471 F.3d 783, 790–91 (7th Cir. 2006); *United States* v. *Moloney*, supra, 287 F.3d 241; *Commonwealth* v. *Casbohm*, 94 Mass. App. 613, 619–21, 116 N.E.3d 633 (2018), review denied, 484 Mass. 1101, 141 N.E.3d 910 (2020); *State* v. *Rucker*, 752 N.W.2d 538, 548 (Minn. App. 2008), review denied, 2008 Minn. LEXIS 508 (Minn. September 23, 2008).

D

The Second Circuit thus takes a flexible approach to duplicitous charging, affording the prosecutor the discretion to charge a course of conduct when that reasonably comports with the facts of the case and does not conflict with the stated intent of the legislature, and then addressing any potential constitutional concerns pragmatically, on a case-by-case basis. I agree with that approach. As I noted, to the extent that the law of duplicity encompasses federal constitutional

considerations, this court gives decisions of the Second Circuit "particularly persuasive weight in the resolution of issues of federal law . . . ."[20] (Internal quotation marks omitted.) *St. Juste* v. *Commissioner of Correction*, 328 Conn. 198, 210, 177 A.3d 1144 (2018). As I subsequently discuss, I disagree with the majority's contention that "the great weight of federal jurisprudence conflicts with [the views of the Second Circuit in this respect]." (Internal quotation marks omitted.) Part I C of the majority opinion.

I also believe that the Second Circuit approach is fully consistent with Connecticut law; the federal and state constitutions and rules of pleading have comparable provisions, and, although Connecticut has codified the plain meaning rule; see General Statutes § 1-2z; the federal courts of appeals—including the Second Circuit—follow essentially that same rule when they construe statutes. See, e.g., *Springfield Hospital, Inc.* v. *Guzman*, 28 F.4th 403, 422 (2d Cir. 2022). Indeed, they are bound to do so. See, e.g., *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 450, 122 S. Ct. 941, 151 L. Ed. 2d 908 (2002).

Of course, I agree that the legislature always, ultimately, has the authority to dictate how a criminal stat-

[20] Notably, the Appellate Court has, on at least one occasion, adopted the Second Circuit approach and permitted course of conduct charging in the context of a sexual assault charge. See *State* v. *Saraceno*, 15 Conn. App. 222, 228–32, 545 A.2d 1116, cert. denied, 209 Conn. 823, 552 A.2d 431 (1988), and cert. denied, 209 Conn. 824, 552 A.2d 432 (1988). I disagree with the majority's contention that *Saraceno* is not relevant authority merely because this court had not yet formally articulated a jurisprudence of unanimity as to instances. It seems clear to me that, in *Saraceno*, the Appellate Court adopted the Second Circuit's approach to duplicity because it relied on the same federal cases that I would follow, such as *United States* v. *Margiotta*, supra, 646 F.2d 733, and *United States* v. *Shorter*, 608 F. Supp. 871, 879–80 (D.D.C. 1985), aff'd, 809 F.2d 54 (D.C. Cir.), cert. denied, 484 U.S. 817, 108 S. Ct. 71, 98 L. Ed. 2d 35 (1987), as well as the decision of this court in *State* v. *Bosworth*, 54 Conn. 1, 2, 4 A. 248 (1886). See *State* v. *Saraceno*, supra, 228–31. Indeed, the majority quotes *Saraceno* at some length as an accurate statement of the governing law.

ute may be applied. Under § 1-2z, if the legislature expressly defines a course of conduct crime, or makes clear its intent in the legislative history, then there is no question that it may—or, more likely, must—be so charged.[21] If the legislature expressly prohibits such charging, then it is not permissible.[22] The legislature's authority to make that determination is not in dispute under the Second Circuit approach. See, e.g., *United States* v. *Moloney*, supra, 287 F.3d 240.

The issue before us is how to proceed in the vast majority of cases, when the legislature has left the question open, neither expressly permitting or requiring nor expressly prohibiting course of conduct charging on the face of the statute. I agree with the majority that the legislative history, if it manifests a clear intent one way or the other, also can be dispositive in this regard. In most instances, however, there is no reason to think that legislators even considered the question of course of conduct charging when enacting any particular statute, let alone decided to prohibit such charging. As we have recently observed, "[o]ften the inquiry [into the allowable unit of prosecution] produces few if any enlightening results. Normally these are not problems that receive explicit legislative consideration."[23] (Inter-

[21] See, e.g., General Statutes § 53a-181d (b) (1) and (2) (stalking in second degree); see also, e.g., General Statutes § 53-142k (b) (1) (organized retail theft).

[22] When courts and commentators provide examples of that type of law, they often point to statutes that impose a distinct penalty for each day that the statute is violated. A Connecticut statute of this kind would be General Statutes § 15-173, which, for docking violations, imposes a daily fine of up to $10,000 (or $25,000 for first violations committed wilfully or with criminal negligence, and $50,000 for subsequent criminal violations); see General Statutes § 15-173 (b) and (c); and provides expressly that "[e]ach violation shall be a separate and distinct offense, and, in the case of a continuing violation, each day's continuance thereof shall be deemed to be a separate and distinct offense." General Statutes § 15-173 (b). Another statute that uses essentially the same language is General Statutes § 22a-226 (a) (governing civil violations of solid waste management law).

[23] Contrary to the majority's suggestion, I would not require any "talismanic" use of language such as "continuous course of conduct" or "each

nal quotation marks omitted.) *State* v. *Ruiz-Pacheco*, 336 Conn. 219, 236 n.12, 244 A.3d 908 (2020).

The majority relies on cases such as *State* v. *Cody M.*, 337 Conn. 92, 102–103, 106, 259 A.3d 576 (2020), for the proposition that Connecticut does not apply a general presumption that a prosecutor has the discretion to charge a crime as a continuing course of conduct. Of course, until now, we have not had cause to discuss any such general presumption because, as the majority emphasizes, until today, this court did not recognize duplicity challenges based on unanimity of instances. There was no need or reason to clarify the scope of an exception to a rule that did not exist.

More important, though, cases such as *Ruiz-Pacheco* and *Cody M.* involved the issue of multiplicity, an entirely different legal question.[24] As noted, pleadings can be challenged both for duplicity (charging multiple offenses in one count) and for multiplicity (charging one offense in multiple counts). As I discuss in my concurring and dissenting opinion in *State* v. *Joseph V.*, 345 Conn. 516, 591–92, A.3d (2022) (*Mullins*, *J.*, concurring in part and dissenting in part), when, as in *State* v. *Cody M.*, supra, 337 Conn. 96–97, a defendant commits a series of acts against a victim on one occasion, and the state charges the series of acts as multiple, distinct crimes, the court must determine the permissi-

single act" by the legislature before concluding that it had spoken definitively to these issues. (Internal quotation marks omitted.) Part II of the majority opinion. The majority, however, goes to the opposite extreme, perceiving meanings and restrictions in the legislative language for which there is simply no textual support.

[24] Although the majority is correct that this court did not find that any presumption was applicable in *Cody M.*, in light of the clear statutory language, this court has applied a presumption in favor of continuous course of conduct charging in closely related cases, such as *Ruiz-Pacheco*. See *State* v. *Ruiz-Pacheco*, supra, 336 Conn. 237 ("[a]pplying the rule of lenity here means interpreting assault to be a [course of conduct] offense" (internal quotation marks omitted)).

ble minimum unit of prosecution. That is, we must determine whether the legislature intended to permit the state to charge each individual act as a distinct crime when the defendant contends that each act was merely part of one criminal episode. The answer to that question says nothing about the question before us in the present case and in *Joseph V.*, namely, whether the legislature intended to require that an ongoing series of violations, committed over many days, each be charged individually. That is a question that we have never addressed, and nothing in Connecticut law bars us from following the Second Circuit approach.

Contrary to the majority's approach, we must assume that legislators, when enacting a new criminal statute, are aware of our state's long history of affording prosecutors broad discretion in the charging of crimes such as child sexual assault as continuing courses of conduct; see footnote 14 of this opinion and accompanying text; and that they do not intend to intrude on or restrict that discretion, unless they clearly state so. Indeed, as I discuss in my concurring and dissenting opinion in *State* v. *Joseph V.*, supra, 345 Conn. 573–77 (*Mullins*, *J.*, concurring in part and dissenting in part), the fact that the legislature has, in certain instances, expressly provided either that a particular statute must be charged as a continuing offense; see, e.g., General Statutes § 53a-181d (b) (1) and (2); or that it must not be charged as a continuing offense; see, e.g., General Statutes § 15-173; strongly supports applying the Second Circuit presumption that other statutes, which are silent on the question, can be charged either way under appropriate circumstances. In short, when the legislature wishes to speak on the issue, one way or the other, it knows how to do so.

For all of these reasons, I would adopt the Second Circuit's approach to duplicity. It keeps the charging decision in the hands of the officers who are responsible

for that decision, the prosecutors, and preserves their authority to bring charges in the manner most consistent with the interests of justice and the facts and circumstances of the particular case. The rule that the majority adopts today, by contrast, would undermine prosecutors' well established role in the charging process in a manner that the federal constitution does not require and that our state legislature never mandated or anticipated.

E

It is not only the Second Circuit that has declined to follow the majority's approach. Although the majority repeatedly contends that most federal courts of appeals and " 'the great weight' " of federal authority support its proposed framework, the truth is that at least five other federal courts of appeals have relied on *Margiotta* and embraced the Second Circuit framework, at least in some instances. That is, they have permitted course of conduct charging in the absence of any clear manifestation of legislative intent, and they have recognized that the charging decision falls within the discretion of the prosecutor, so long as the charge is not unreasonable and the defendant's fundamental rights are respected.[25]

[25] See, e.g., *United States* v. *Davis*, supra, 471 F.3d 790–91 ("[When] the indictment fairly interpreted alleges a continuing course of conduct, during a discrete period of time, the indictment is not prejudicially duplicitous. . . . *The* [*charging*] *decision is left, at least initially, to the discretion of the prosecution.*" (Citation omitted; emphasis added; internal quotation marks omitted.)); *United States* v. *Denton*, 146 Fed. Appx. 888, 890 (9th Cir. 2005) (extortion indictment was not duplicitous, notwithstanding that defendant made threats over course of fifty-five days, because threats were made against single victim, pursuant to one plan, and dangers of duplicity were not present); see also, e.g., *United States* v. *Kamalu*, 298 Fed. Appx. 251, 252 (4th Cir. 2008) (government permissibly charged corruptly obstructing administration of Internal Revenue Code, on behalf of numerous clients over multiple years, as one single, continuing scheme); *United States* v. *Klat*, 156 F.3d 1258, 1266–67 (D.C. Cir. 1998) (single count charging threats against public official over six month period was not duplicitous and failure to give specific unanimity instruction was not plain error); *United States* v. *Saunders*, 641 F.2d 659, 661–62, 665 (9th Cir. 1980) (single count charging violation of Mann Act, 18 U.S.C. § 2421 et seq., prohibiting transportation

As has the Second Circuit, those courts of appeals have

of women in interstate commerce for purposes of prostitution, was not duplicitous as continuing course of conduct, without statutory analysis and despite fact that multiple interstate crossings over course of three months could have been charged as separate offenses), cert. denied, 452 U.S. 918, 101 S. Ct. 3055, 69 L. Ed. 2d 422 (1981); *United States* v. *Alsobrook*, 620 F.2d 139, 142 (6th Cir.) ("The determination of whether a group of acts represents a single, continuing scheme or a set of separate and distinct offenses is a difficult one that *must be left at least initially to the discretion of the prosecution*. This discretion, however, is not without limits. . . . Ultimately, the indictment must be measured in terms of whether it exposes the defendant to any of the inherent dangers of a duplicitous indictment." (Citation omitted; emphasis added.)), cert. denied, 449 U.S. 843, 101 S. Ct. 124, 66 L. Ed. 2d 51 (1980); *Cohen* v. *United States*, 378 F.2d 751, 754 (9th Cir.) (concluding, without analysis of statutory language, that, although each violation of 18 U.S.C. § 1084 (a) could have been charged as separate violation, prosecutor was free to charge series of violations as single infraction), cert. denied, 389 U.S. 897, 88 S. Ct. 217, 19 L. Ed. 2d 215 (1967); *United States* v. *Shorter*, 608 F. Supp. 871, 876 (D.D.C. 1985) ("[t]he grand jury, presumably under the guidance of the prosecutor, may charge few or many counts depending [on] a variety of factors, and, [in the absence of] oppression or impermissible duplicity, the decision with respect thereto is *within the realm of grand jury and prosecutorial discretion*" (emphasis added)), aff'd, 809 F.2d 54 (D.C. Cir.), cert. denied, 484 U.S. 817, 108 S. Ct. 71, 98 L. Ed. 2d 35 (1987).

The majority's efforts to distinguish these cases are unpersuasive. I do not dispute that the statutory language can be relevant. My point is simply that the prosecutor has charging discretion when the statute does not expressly prohibit it. Although the majority is correct that these decisions, unlike *Moloney*, do not expressly adopt a general rule regarding course of conduct charging, the fairest reading of these decisions is that they are, in fact, applying the Second Circuit approach. As to the majority's contention that none of these cases so much as mentions a presumption of prosecutorial discretion in these matters, the highlighted language plainly belies that claim.

In support of its contention that the Ninth Circuit follows a different approach than it did in *Cohen*, *Saunders*, and *Denton*, the majority relies on *United States* v. *Newson*, 534 Fed. Appx. 604 (9th Cir. 2013). But *Newson* is a one page, summary affirmance, in which the court merely stated, in dictum, that, "[o]f course, jurors cannot be instructed that a defendant can be convicted of an offense if he committed, for example, crime A or crime B, unless they are also instructed that there must be unanimous agreement on which crime it was." Id., 605. *Newson* says nothing about course of conduct charging, which was not at issue, and certainly does not purport to overturn more than forty years of the Ninth Circuit's duplicity jurisprudence. Likewise, the Seventh Circuit case on which the majority relies, *United States* v. *Fawley*, 137 F.3d 458, 471 (7th Cir. 1998), is readily distinguishable,

applied this approach across a broad range of statutory crimes, including those involving the sexual abuse of young children.[26]

Accordingly, I cannot agree with the majority's statement that, "[w]hen a single count does charge the defendant with having violated a single statute in multiple, separate instances, each of which could establish a separate violation of the statute, federal courts agree that such a count is duplicitous." Part I B of the majority opinion. I cited numerous federal appellate cases, across the circuits, that expressly say the exact opposite.[27]

insofar as the analysis in that case is specific to the law of perjury and relies on *United States* v. *Gipson*, 553 F.2d 453, 458–59 (5th Cir. 1977), which, the majority agrees, does not govern these types of cases.

[26] See, e.g., *Dyer* v. *Farris*, 787 Fed. Appx. 485, 494–95 (10th Cir. 2019) (applying Oklahoma law and holding that charging alleged acts of child sexual abuse committed during six month period as single transaction did not violate clearly established federal law), cert. denied, U.S. , 140 S. Ct. 1157, 206 L. Ed. 2d 207 (2020); *Ives* v. *Boone*, 101 Fed. Appx. 274, 294 (10th Cir.) (similar), cert. denied, 543 U.S. 1001, 125 S. Ct. 609, 160 L. Ed. 2d 460 (2004), and cert. denied, 543 U.S. 1026, 125 S. Ct. 669, 160 L. Ed. 2d 505 (2004); *United States* v. *Klade*, Docket No. 95-10213, 1996 WL 115291, *1 (9th Cir. March 14, 1996) (decision without published opinion, 79 F.3d 1155) (rejecting duplicity claim as to alleged violations of 18 U.S.C. § 2241 (c), which prohibits aggravated sexual abuse of children, and explaining that, "[i]n reviewing an indictment for duplicity, our task is not to review the evidence presented at trial to determine whether it would support charging several crimes rather than one, but rather solely to assess whether the indictment itself can be read to charge only one violation to each count" (internal quotation marks omitted)), cert. denied, 519 U.S. 850, 117 S. Ct. 141, 136 L. Ed. 2d 88 (1996).

[27] See, e.g., *United States* v. *Bowser*, Docket No. 96-50889, 1997 WL 802374, *1 (5th Cir. November 19, 1997) (decision without published opinion, 132 F.3d 1454) ("the indictment [was] not duplicitous even though each bad act alone could constitute an offense"); *United States* v. *Berardi*, 675 F.2d 894, 898 (7th Cir. 1982) ("two or more acts, each one of which would constitute an offense standing alone, may be joined in a single count without offending the rule against duplicity"); *United States* v. *Alsobrook*, 620 F.2d 139, 142–43 (6th Cir.) (concluding that indictment was not duplicitous, even though offenses could have been charged separately), cert. denied, 449 U.S. 843, 101 S. Ct. 124, 66 L. Ed. 2d 51 (1980); *Cohen* v. *United States*, 378 F.2d 751, 754 (9th Cir.) (count was not duplicitous, "even though each [infraction] might have been alleged as a separate violation"), cert. denied, 389 U.S. 897, 88 S. Ct. 217, 19 L. Ed. 2d 215 (1967).

Outside of the United States Courts of Appeals for the First, Third, Fifth, and Eleventh Circuits, the majority has not identified one case that broadly and unequivocally adopts its rule that, unless the legislature clearly permits it, a crime that could be charged as individual infractions cannot also be charged, in the alternative, as a continuing course of conduct. Indeed, even among those circuits, whose approach to duplicity most closely approximates that of the majority, some cases take a more flexible approach.[28]

I do not disagree that, as a general matter, duplicity is defined as charging multiple offenses in a single count. What I take issue with is the majority's repeated assertion that a majority of the federal courts of appeals have adopted a strict approach to course of conduct charging, making such charging a constitutional violation unless expressly authorized by statute or unless a bill of particulars was filed or the court gave a specific unanimity instruction.

[28] See, e.g., *United States* v. *Prieto*, 812 F.3d 6, 9, 11 (1st Cir.) (rejecting duplicity challenge, without considering statutory language, because government permissibly assumed burden of charging multiple violations of federal mail fraud statute as one unified scheme), cert. denied, U.S. , 137 S. Ct. 127, 196 L. Ed. 2d 100 (2016); *United States* v. *Moyer*, 674 F.3d 192, 204–205 (3d Cir.) (when statutory language was silent, count charging falsification of multiple police reports was not duplicitous because "*the government has discretion* to draw [t]he line between multiple offenses and multiple means to the commission of a single continuing offense" (emphasis added; internal quotation marks omitted)), cert. denied, 568 U.S. 846, 133 S. Ct. 165, 184 L. Ed. 2d 82 (2012), and cert. denied sub nom. *Nestor* v. *United States*, 568 U.S. 1143, 133 S. Ct. 979, 184 L. Ed. 2d 760 (2013); *United States* v. *Root*, 585 F.3d 145, 150–53 (3d Cir. 2009) (when statutory language was silent on issue, government has discretion to charge tax evasion covering several years as single course of conduct when underlying basis of indictment is consistent, long-term pattern of criminal conduct); *United States* v. *Baytank (Houston)*, *Inc.*, 934 F.2d 599, 609 (5th Cir. 1991) ("[n]otwithstanding that a defendant's actions, charged in a single count, could have been charged as separate violations, nevertheless a single count may be used [when] those actions represent a single, continuing scheme, provided the indictment (1) notifies the defendant adequately of the charges against him; (2) does not subject the defendant to double jeopardy; (3) does not permit prejudicial evidentiary rulings at trial; and (4) does not allow the defendant to be convicted by a nonunanimous jury verdict" (internal quotation marks omitted)).

The United States Court of Appeals for the Eleventh Circuit, although indicating that it might have followed a different approach as a matter of

F

The same is true of sister state courts. Although some states have adopted an approach similar to the majority's approach, allowing course of conduct charging for a particular statute only when it is clear that the legislature so intended,[29] others favor the more flexible approach that I have outlined. See, e.g., *Cooksey* v. *State*, 359 Md. 1, 18–19, 752 A.2d 606 (2000) (acknowledging "split of authority" in child sexual abuse context and citing cases).

There is a particular category of criminal cases in which I believe the approach I favor clearly demonstrates its superiority. Those cases involve sexual assault crimes and, more specifically, the repeated sexual abuse of children. Indeed, our sister state courts have been especially receptive to applying the Second Circuit approach when it comes to what the California Supreme Court has dubbed "resident child molester" cases.[30] (Internal quotation marks omitted.) *People* v. *Jones*, 51 Cal. 3d 294, 299, 792 P.2d 643, 270 Cal. Rptr. 611 (1990);[31]

first impression, thought that it was compelled to adhere to Fifth Circuit precedent because of the common lineage of those courts. See *United States* v. *Schlei*, 122 F.3d 944, 979 (11th Cir. 1997) ("Several [federal courts of appeals] have rejected the [Fifth Circuit's] analysis . . . . Although the rationale of [an alternative approach] may be tempting, we are bound by the decision of the former Fifth Circuit . . . ." (Citations omitted; internal quotation marks omitted.)), cert. denied, 523 U.S. 1077, 118 S. Ct. 1523, 140 L. Ed. 2d 674 (1998).

[29] See, e.g., *State* v. *Paulsen*, 143 N.H. 447, 449–51, 726 A.2d 902 (1999); *People* v. *Algarin*, 166 App. Div. 2d 287, 287–88, 560 N.Y.S.2d 771 (1990); *State* v. *Saluter*, 715 A.2d 1250, 1253–55 (R.I. 1998).

[30] The phrase "resident child molester" describes cases in which the perpetrator lives with or has regular access to the child and, thus, is able to repeatedly sexually abuse the victim in such a way that there are unlikely to be third-party witnesses and the child is unlikely to be able to recall the specific dates or details of individual assaults.

[31] In *State* v. *Stephen J. R.*, 309 Conn. 586, 595–601, 72 A.3d 379 (2013), this court cited *Jones* with approval, albeit in the converse context of determining when, and to what extent, generic child abuse testimony can support multiple, independent counts. Although recognizing the need to secure a defendant's due process rights; see id., 595–97; we have repeatedly emphasized

see footnote 32 of this opinion and accompanying text. Prosecutors face a unique challenge when charging a defendant in a case in which the statute at issue uses language that, on its face, envisions individual, discrete sexual violations, but, due to the victim's young age and the often recurring nature of such abuse, the victim can testify only (or primarily) that the defendant abused him or her in a particular way and in a particular location, during a particular span of time, but cannot provide sufficient detail to identify each separate instance of abuse. Although federal cases occasionally address the issue; see footnote 26 of this opinion; most cases alleging sexual abuse of children are prosecuted at the state level. It is to these decisions that we must look for guidance.

Sister state courts have afforded prosecutors broad latitude as to whether to charge the sexual abuse of children as discrete violations or as a course of conduct crime, recognizing the significant challenges involved in bringing resident child molesters to justice.[32] As these

the need for flexibility in light of the unique challenges involved in prosecuting cases of child sexual abuse.

[32] See, e.g., *Dell'Orfano* v. *State*, 616 So. 2d 33, 35 (Fla. 1993) (rejecting bright-line rule in light of state's strong interest in eliminating sexual abuse of children and children's frequent inability to recall details of abuse); *Geiser* v. *State*, 83 So. 3d 834, 835 (Fla. App. 2011) ("in a case of ongoing sexual abuse of a child, [in which] the child is unable to remember the specific dates on which he or she was abused, the allegation that the act occurred on one or more occasions is not, per se, duplicitous" (internal quotation marks omitted)); *State* v. *Generazio*, 691 So. 2d 609, 611 (Fla. App. 1997) ("[w]ith the notable exception of New York, the courts of [other] states have recognized that child molestation is, by its very nature, a continuous course of criminality"); *Commonwealth* v. *King*, 387 Mass. 464, 467–68, 441 N.E.2d 248 (1982) (rejecting duplicity challenge in child sexual abuse case because course of conduct charge was permissible); *Commonwealth* v. *Joyce*, Docket No. 16-P-1531, 2018 WL 3468447, *3 (Mass. App. July 19, 2018) (decision without published opinion, 93 Mass. App. 1120, 107 N.E.3d 1256) (applying *King*), review denied, 482 Mass. 1107, 130 N.E.3d 166 (2019); *State* v. *Altgilbers*, 109 N.M. 453, 465, 786 P.2d 680 (App. 1989) ("courts have deferred to the prosecutor's charging pattern in such circumstances"), cert. denied, 109 N.M. 419, 785 P.2d 1038 (1990); *State* v. *Cruz*, Docket No. A-1-CA-35877, 2019 WL 5095831, *3 (N.M. App. September 30, 2019) (applying

courts have recognized, the state, the victim, and society at large all share a compelling interest in prosecuting an insidious crime—the repeated sexual abuse of young children. It can be nearly impossible, however, to charge and prosecute each individual instance of abuse when a molester has repeatedly assaulted a child, whose account of the abuse may be the only evidence of the crimes. Sister state courts have cautioned, as have we, that a serial abuser should not benefit and escape justice by virtue of having repeatedly and secretly assaulted a young victim who, as the only witness to the abuse, is incapable of testifying as to dates, times, and other distinguishing details of each incident.[33] See, e.g., *State* v. *Stephen J. R.*, 309 Conn. 586, 601, 72 A.3d 379 (2013) ("[t]o require [the complainant], who was approxi-

Altgilbers), cert. denied, New Mexico Supreme Court, Docket No. S-1-SC-37991 (December 12, 2019); see also, e.g., *State* v. *Hoban*, 738 S.W.2d 536, 541 (Mo. App. 1987) ("[l]eeway is necessary in charging sexual abuse and sexual intercourse with minors because children who are the victims of abuse may find it difficult to recall precisely the dates of offenses against them months or even years after the offense has occurred"); *Huddleston* v. *State*, 695 P.2d 8, 10–11 (Okla. Crim. App. 1985) ("when a child of tender years is under the exclusive domination of one parent for a definite and certain period of time and submits to sexual acts at that parent's demand, the separate acts of abuse become one transaction"); *State* v. *Petrich*, 101 Wn. 2d 566, 572, 683 P.2d 173 (1984) (giving prosecutor discretion as to whether to charge individual instances or course of conduct in incest cases but requiring specific unanimity instruction), overruled in part on other grounds by *State* v. *Kitchen*, 110 Wn. 2d 403, 756 P.2d 105 (1988); *State* v. *Lomagro*, 113 Wis. 2d 582, 589, 335 N.W.2d 583 (1983) ("[w]e . . . adopt [the] flexible rule that it is initially up to the state to determine the appropriate charging unit for a particular criminal episode").

[33] See, e.g., *People* v. *Jones*, supra, 51 Cal. 3d 305 ("any constitutional principles or evidentiary standards we develop should attempt to [ensure] that the resident child molester is not immunized from substantial criminal liability merely because he has repeatedly molested his victim over an extended period of time"); *State* v. *Cruz*, Docket No. A-1-CA-35877, 2019 WL 5095831, *2 (N.M. App. September 30, 2019) ("[Y]oung children cannot be held to an adult's ability to comprehend and recall dates and other specifics. The predictable limitations of young witnesses should not be turned into a reason to prevent prosecution of their abusers." (Internal quotation marks omitted.)), cert. denied, New Mexico Supreme Court, Docket No. S-1-SC-37991 (December 12, 2019).

mately seven years old at the time of the abuse, to recall specific dates or additional distinguishing features of each incident would unfairly favor the defendant for the commission of repetitive crimes against a child victim"). These courts thus afford prosecutors broad discretion to decide whether course of conduct charging is appropriate.[34] I fear that the approach the majority takes today does exactly that which this court, and other state courts, has cautioned against, by requiring a child who has been repeatedly sexually assaulted to clearly delineate multiple instances of abuse and to recall each with specificity.

None of the state cases cited in footnote 32 of this opinion was decided on the basis of a close parsing of the statutory language, and none purported to permit course of conduct charging as a matter of express legislative intent. Rather, the courts simply considered, on a case-by-case basis, whether such charging comports with the constitutional and policy considerations that underlie the doctrine of duplicity.

In short, in my view, the rule that the majority adopts hamstrings prosecutors, potentially leaving victims, and, most especially, victims of resident child molesters, without recourse. It places additional, unnecessary burdens on the legislature, to amend each statute to

[34] See, e.g., *State* v. *Generazio*, 691 So. 2d 609, 611 (Fla. App. 1997) ("other state courts . . . have allowed the matter of how to charge these sensitive and [difficult to define] acts of sexual abuse to rest in the discretion of prosecutors"); *State* v. *Altgilbers*, 109 N.M. 453, 465, 786 P.2d 680 (App. 1989) ("[c]ourts almost uniformly grant prosecutors discretion in how they frame the charges [of sexual misconduct against children]"), cert. denied, 109 N.M. 419, 785 P.2d 1038 (1990).

Although the majority is correct that whatever rules we adopt will potentially apply to most crimes, the practical reality is that the scope of the continuing offense doctrine is most frequently implicated, and most hotly debated, in cases that involve child sexual abuse. As a practical matter, regardless of which approach we adopt, course of conduct charging will not be appropriate for the vast majority of criminal prosecutions.

expressly authorize course of conduct charging, and on our trial courts, to manage unnecessarily complex trials involving, potentially, dozens of similar charges against the same defendant. And it does as much to penalize as to protect criminal defendants, by requiring multicount charging in legitimate course of conduct cases.

II

An additional flaw in the majority's approach, I believe, is that it is deceptively difficult to apply. One might think the opposite would be true. A framework providing that course of conduct charging is always permissible when expressly approved by the legislature and always impermissible when not expressly approved by the legislature would seem to boast an enviable simplicity, if nothing else. In reality, however, except for the small number of statutes for which the legislature has clearly evidenced its intention one way or the other, parsing whether each of the countless facially silent statutes contemplates course of conduct charging proves to be an exercise in subjectivity, if not futility. The present appeal is a case in point.[35]

Section 53-21 (a) provides in relevant part: "Any person who . . . (2) has contact with the intimate parts, as defined in section 53a-65, of a child under the age of sixteen years or subjects a child under sixteen years of age to contact with the intimate parts of such person, in a sexual and indecent manner likely to impair the health or morals of such child . . . shall be guilty of . . . a class B felony . . . ." The majority readily acknowledges that there is nothing in the plain language of § 53-21 (a) (2) that addresses the issue of duplicity

[35] As I demonstrate in my concurring and dissenting opinion in the companion case, *State* v. *Joseph V.*, supra, 345 Conn. 581–89 (*Mullins*, *J.*, concurring in part and dissenting in part), the flaw latent in the majority's approach comes into sharper contrast when we compare the disparate treatment that fundamentally comparable statutes—such as child sexual assault and risk of injury—receive under that duplicity framework.

or course of conduct charging. Moreover, it is well established that each instance of improper intimate contact can be charged as a discrete crime under § 53-21.[36] The majority concedes as much.

Because the statute does not facially authorize course of conduct charging, I turn to the statutory history for insight into legislative intent on whether such charging is permissible. I do not read the majority's opinion to have identified any statements in the legislative history that specifically indicate that the legislature intended § 53-21 (a) (2) to be chargeable as a continuing course of conduct crime. My own review of the history also has not revealed any statements directed to the course of conduct issue. Rather, I understand the majority simply to be stating that *this court* already had interpreted an earlier version of the risk of injury statute to permit charging a continuing course of conduct, and that there is no indication that the legislature, when it amended the statute in 1995 to add the language that now appears in subsection (a) (2); see Public Acts 1995, No. 95-142, § 1 (P.A. 95-142); intended to change that interpretation. The majority states that, although "[i]t is not clear from the plain language of § 53-21 (a) (2) [whether] multiple, separate instances of conduct" can be charged as a continuing offense, "[i]n case law prior to the 1995 amendment . . . this court held that risk of injury to a child may be charged under a continuing course of conduct theory." (Citation omitted.) Part II of the majority opinion. The majority then states that the 1995 amendment "maintained" and "manifestly [did not] alter"

[36] See, e.g., *State* v. *Kulmac*, 230 Conn. 43, 68–69, 644 A.2d 887 (1994) ("Each separate act of . . . risk of injury constituted a separate offense. . . . Each act can constitutionally support a separate conviction for risk of injury." (Citations omitted; footnote omitted.)); *State* v. *Snook*, 210 Conn. 244, 261–62, 555 A.2d 390 (rejecting argument that § 53-21, as charged, proscribed continuing course of conduct such that each separate act could not be charged as separate violation), cert. denied, 492 U.S. 924, 109 S. Ct. 3258, 106 L. Ed. 2d 603 (1989).

our prior interpretations of the statute—when subsection (a) (2) did not exist—and that "[t]here is no indication that the legislature sought to alter the substance of the crime." Id. So, the issue, ultimately, is one of legislative acquiescence.

In this case, however, there are two reasons why the legislative acquiescence argument is particularly unpersuasive. First, if there was legislative acquiescence in this case, it ratified my approach to the law of duplicity, rather than that of the majority. When we initially held that risk of injury can be charged as a course of conduct, we did not reach that conclusion as a matter of statutory interpretation; nor did we purport to divine the intent of the legislature. This is a key point.

The case in which this court first recognized that a version of the risk of injury statute prior to the 1995 amendment could be charged as a continuing course of conduct crime was *State* v. *Hauck*, 172 Conn. 140, 374 A.2d 150 (1976). The defendant in that case, a middle school teacher, challenged the trial court's denial of his motion for a supplemental bill of particulars when the state charged him with violating General Statutes (Rev. to 1972) § 53-21 by forcing a student to pose nude for him on a regular, sometimes weekly, basis "on or about divers dates" between November 11, 1971, and June, 1972. (Internal quotation marks omitted.) Id., 150; see also id., 141–42. This court concluded, in affirming the conviction, that "[t]he offenses charged . . . were obviously of a continuing nature"; id., 150; and its analysis made no reference whatsoever to the statutory language, the legislative history of the statute, or any other indicia of legislative intent. Rather, in deferring to the trial court's discretion in allowing course of conduct charging, this court relied on purely practical considerations: that the charges were "clearly reasonable" in light of the trial testimony and that "it would have been virtually impossible to provide the many specific dates

[on] which the acts constituting the offenses occurred."[37] Id., 150–51; see also *State* v. *Spigarolo*, 210 Conn. 359, 391, 556 A.2d 112 (reiterating pragmatic holding of *Hauck*), cert. denied, 493 U.S. 933, 110 S. Ct. 322, 107 L. Ed. 2d 312 (1989). If the legislature has, in the intervening years, placed its imprimatur on *Hauck*, as the majority suggests, then it has endorsed not a statutory analysis of the meaning of § 53-21—*Hauck* and the other appellate cases that were decided prior to the 1995 amendment offered no such analysis[38]—but, rather, the very framework that I am supporting, under which the state has the discretion to charge a course of conduct when appropriate.

Second, because legislators emphasized, in 1995, that the new language of P.A. 95-142, § 1, which now appears in subsection (a) (2) of § 53-21, defined a "new" crime; 38 S. Proc., Pt. 5, 1995 Sess., pp. 1766, 1777, remarks of Senator Thomas F. Upson; the legislative history

[37] The court also cited the general principle that, when "time is not of the essence or gist of the offense, the precise time at which it is charged to have been committed is not material." *State* v. *Hauck*, supra, 172 Conn. 150.

[38] The majority addresses *Hauck* in a footnote, contending that, "to the extent *Hauck* was ambiguous regarding its reliance on the language of the statute," cases decided decades later clarified that, in *Hauck*, we were really relying on the "situation" language in the statute. (Internal quotation marks omitted.) Footnote 26 of the majority opinion. I disagree. First, we were not "ambiguous" in *Hauck*; surely, the fact that we never mentioned the language of the statute, and instead provided policy rationales in support of our decision, is good evidence that *Hauck* was not a statutory interpretation case. Second, there is no suggestion in *Hauck* that the defendant was prosecuted for placing the victim in a dangerous situation, rather than for subjecting her to sexual acts likely to impair her morals. Indeed, the word "situation" appears nowhere in the decision. Third, the majority's suggestion that *Hauck*'s successor cases, such as *Spigarolo*, approved course of conduct charging on the basis of the "situation" language in § 53-21 is misleading. As in *Hauck*, this court relied not on that statutory language but on practical considerations; see, e.g., *State* v. *Spigarolo*, supra, 210 Conn. 391 ("[b]ecause the state was unable to specify with greater precision the times of the alleged incidents, it necessarily proceeded under a theory that the defendant's conduct was in the nature of a continuing offense"); as well on the conceptual distinctness principles that the majority repudiates. See, e.g., id., 391–92.

itself contradicts the majority's position. Prior to the 1995 amendment, General Statutes (Rev. to 1995) § 53-21 provided: "Any person who wilfully or unlawfully causes or permits any child under the age of sixteen years to be *placed in such a situation* that its life or limb is endangered, or its health is likely to be injured, or its morals likely to be impaired, *or does any act* likely to impair the health or morals of any such child, shall be fined not more than five hundred dollars or imprisoned not more than ten years or both." (Emphasis added.) In the legislative history of the 1995 amendment, one of the bill's authors stated that the new language prohibiting intimate contact with a child under the age of sixteen years defined a "new" risk of injury crime. 38 S. Proc., supra, pp. 1766, 1777, remarks of Senator Upson. So, there is no reason to think that the legislature intended prior judicial interpretations of the old § 53-21, the first part of which (the situation portion) may have authorized course of conduct charging, to apply to the newly added provision.[39] For these reasons,

[39] The majority relies on language in the legislative history reflecting the fact that, prior to the 1995 amendment of § 53-21, that statute, which prohibited both *acts* likely to impair the health or morals of children and the placing of children in dangerous or unwholesome *situations*, did not distinguish between sexual and nonsexual risk of injury. Legislators divided the statute into sexual and nonsexual parts at that time, so that individuals convicted of inappropriate sexual contact with children could be subjected to mandatory minimum sentences and sex offender registration requirements. All this is true. But it provides little support for the majority's position. The bill's sponsor indicated that the legislature was not merely separating out sexual from nonsexual harms to children but was making a "change in the definition of risk of injury . . . so that the offense can be more carefully delineated." 38 S. Proc., supra, pp. 1769–70, remarks of Senator Martin M. Looney. In addition, unlike the original statute, which is now subsection (a) (1), the sexual misconduct component of the statute, subsection (a) (2), makes no mention of situations, only of specific acts. The fact that the legislature expressly prohibited both dangerous situations and inappropriate acts in subsection (a) (1), but only inappropriate sexual acts in subsection (a) (2), cannot have been accidental. See, e.g., *Rutter* v. *Janis*, 334 Conn. 722, 739, 224 A.3d 525 (2020).

To be clear, I agree with the majority that course of conduct charging is permissible under § 53-21 (a) (2). I just do not perceive anything in the plain

I do not find the majority's duplicity analysis to be persuasive.

III

In the present case, the application of the approach that I favor reaches the same result as does the application of the majority's approach but, I think, in a way that more directly considers and accounts for the various practical and constitutional interests at stake. To review, in multiple instances cases, I would adopt a framework for evaluating duplicity related challenges by which (1) unless the legislature specifies otherwise, the prosecutor has the discretion to charge a pattern of many similar infractions as a single scheme or as a course of criminal conduct, (2) the trial court should not permit course of conduct charging if such charging would be unreasonable or unfair under the circumstances or would violate the defendant's fifth or sixth amendment (or other constitutional) rights, and (3) if an appellate court, on review, concludes that the trial court should not have permitted course of conduct charging, either because the defendant's conduct cannot fairly be characterized as a single scheme or pattern, or because the constitutional considerations that underlie the rule against duplicity are implicated, then the trial court's determination is subject to harmless error analysis.[40]

language of the statute or the legislative history that resolves, or even contemplates, the issue, one way or the other. I conclude that, as with most criminal statutes that are silent on this issue, the legislature has left the charging of these crimes to the discretion of the prosecutor, subject always to judicial supervision.

[40] See, e.g., *United States* v. *Webster*, 231 Fed. Appx. 606, 607 (9th Cir. 2007) (even if it was assumed, arguendo, that failure to give specific unanimity instruction was error in view of specific facts of case, error was harmless because evidence of guilt was overwhelming).

Note that, even when course of conduct charging is unsuitable, I would conclude that duplicitous charging represents a violation of the rules of criminal procedure and not a per se constitutional violation. In practice, however, in most cases in which the multiple violations charged in one count cannot reasonably be characterized as part of a single scheme or plan, the defendant's sixth amendment rights will be violated in the absence

Application of this framework to the present case is a relatively straightforward matter. First, with respect to the plain language of the statute, I agree with the majority that the plain language of § 53-21 (a) (2) "does not appear to clarify whether the statute criminalizes a continuing course of conduct or limits its scope to a single occurrence."[41] Part II of the majority opinion. In addition, as I discussed in part II of this opinion, nothing in the legislative history suggests that the legislature resolved—or considered—the course of conduct question one way or the other when drafting the statute. Course of conduct charging is, therefore, left to the discretion of the prosecutor.

Second, I have little trouble concluding that the victims' allegations in the present case reasonably can be characterized as an ongoing pattern or scheme of misconduct, such that course of conduct charging was a reasonable and proper exercise of prosecutorial discretion. Both N and T, for example, alleged that the defendant touched their breasts on a regular basis, between 2005 and 2007, at his residence in Lisbon. They did not report the abuse until years later, though, and, with a few notable exceptions, they could not recall the specific dates or other details of the abuse.

Third, and most important for present purposes, is the question of whether charging the defendant's various abuses of each victim as a course of conduct violated his sixth amendment right to a unanimous jury verdict. The defendant contends that, insofar as the victims

of a specific unanimity instruction or election by the state to proceed only on one allegation.

[41] Compare statutes in which a legislature *expressly* authorizes course of conduct charging, such as § 53a-181d (b), which provides in relevant part: "A person is guilty of stalking in the second degree when:

"(1) Such person knowingly engages in a course of conduct directed at or concerning a specific person . . . ."

Section 53a-181d (a) (1) provides in relevant part that " '[c]ourse of conduct' means two or more acts . . . ."

identified in counts one (N) and six (T) offered both generic testimony as to repeated improper contact, such as breast touching, as well as more detailed accounts of some specific incidents of abuse, it is impossible to know whether the jury unanimously agreed that he committed any one particular act of risk of injury against each victim.[42]

As I previously discussed, the Second Circuit has long held that the sixth amendment right to a unanimous jury verdict is not implicated when a crime is properly charged as a course of conduct. The principal rationale for this rule is that the crime with which the defendant is being charged in these cases is, in essence, the course of conduct itself. See, e.g., *State* v. *Hauck*, supra, 172 Conn. 151 (series of acts committed during seven month period, considered "in toto," constituted risk of injury).

As I noted, however, this principle applies only when the essence of the charged wrongdoing can fairly be said to be a scheme or course of criminal conduct. In the present case, I have no difficulty concluding that the misconduct alleged in counts one and six was well suited to course of conduct charging. Each count charged that a single individual, the defendant, abused a single victim. Both victims primarily testified to a pattern of undifferentiated conduct—unwanted touching of their breasts—which they said occurred numerous times and on a regular basis, over the course of years, when they were visiting the defendant's home in Lisbon. There is no suggestion in the record that any

[42] S, the victim of the charges in count five, claimed only that the defendant touched her inappropriately in a series of interactions on one summer evening after her eighth grade year. I agree with the majority that there is no unanimity problem with respect to count five because, among other things, the jury reasonably could have found that the testimony related to one ongoing incident of abuse. See, e.g., *Steele* v. *State*, 523 S.W.2d 685, 687 (Tex. Crim. App. 1975); *State* v. *Lomagro*, 113 Wis. 2d 582, 594–95, 598, 335 N.W.2d 583 (1983).

of the individual assaults were inspired by anything other than the lecherous motives that one might expect, and the victims' testimony that the defendant and his wife expressed regular appreciation for their breasts suggests that the misconduct reasonably can be characterized as part of an ongoing pattern or scheme. The primary evidence for both the specific incidents and the general course of conduct alleged was simply the victims' own testimony, and the defenses offered were equally generic. Although defense counsel cross-examined the victims regarding some of the specific details of the incidents that they described, the defense as to each of those incidents—as well as to all of the generic abuse testimony—was the same: a blanket denial of the accusations, an attack on the victims' credibility, and a theory that the victims had fabricated their stories to retaliate, after a family squabble.

In addition, the sexual abuse of children is a crime that is commonly understood to occur on an ongoing, repetitive basis, and there is compelling reason to afford prosecutors discretion to charge such offenses as courses of conduct. Cases that involve the sexual abuse of children, regardless of whether the complainants in those cases give only generic testimony or also describe a few particular incidents in addition to a generic pattern of abuse, typically turn on the general credibility of the complainants, any other witnesses, and, if they choose to testify, the defendants. To apply strict specific unanimity requirements in such cases would place an unwarranted burden on young victims of sexual assault, essentially penalizing them for providing whatever limited, specific details they might be able to recall to corroborate their stories. For this reason, as the United States Supreme Court explained in *Richardson* v. *United States*, 526 U.S. 813, 119 S. Ct. 1707, 143 L. Ed. 2d 985 (1999), "[s]tate courts interpreting [sexual abuse of a minor] statutes have sometimes permitted jury

disagreement about a specific underlying criminal incident insisting only [on] proof of a continuous course of conduct in violation of the law. . . . The state practice may well respond to special difficulties of proving individual underlying criminal acts . . . .”[43] (Citations omitted; internal quotation marks omitted.) Id., 821. That is to say, courts have been loath to force young victims of sexual abuse to choose between either (1) testifying as to each individual incident of abuse with sufficient precision to allow the state to prove it beyond a reasonable doubt or (2) confining their testimony entirely to generic assertions and suppressing any supporting details that they are able to recall. For these reasons, I do not believe that the trial court abused its discretion in permitting the state to charge all of the alleged incidents of inappropriate conduct against N and T in counts one and six, respectively.

Fourth, there is no plausible claim—and the defendant does not contend—that the defendant's due process rights were violated when the state charged his alleged assaults on each victim as one course of conduct. The defendant received adequate notice of the crimes charged, as the state's long form substitute information identified each victim by her initials and her date of birth and accused the defendant of violating § 53-21 (a) (2), at his home in Lisbon, beginning “in or about 2005” and continuing through various dates between 2006 and 2010, depending on when each victim reached the age of sixteen. Nothing more was required. Nor did the charges compromise the defendant's ability to present a defense, as in cases in which a defendant claims to have a partial alibi or when the charged conduct would not have constituted a crime during some

[43] Although the sixth amendment right to a unanimous jury was not yet fully incorporated when *Richardson* was decided, the federal courts have not questioned this analysis in the wake of *Ramos* v. *Louisiana*, U.S. , 140 S. Ct. 1390, 1397, 206 L. Ed. 2d 583 (2020).

portion of the alleged course of conduct. In the present case, the defendant readily conceded that he was regularly present with the victims at his Lisbon home during the years in question; his defense was that the victims' accusations were simply false. Finally, there is no double jeopardy problem with course of conduct charging because the defendant cannot subsequently be retried for any similar conduct that occurred during the time period at issue. Accordingly, I agree with the majority's ultimate conclusion that the defendant's conviction should be upheld.

IV

For all of the foregoing reasons, I believe that the present case is a quintessential example of why prosecutors must be given the discretion to charge the ongoing sexual abuse of young children as a single course of conduct. Permitting such charging, when fair and appropriate, respects the broad authority traditionally conferred on prosecutors to levy the appropriate charges, according to the circumstances of each case. It ensures that young, repeat victims of these heinous crimes can have their day in court and not be shut out because they cannot recall, with specificity, particular incidents from among an ongoing pattern of repeated abuse. But, importantly, my view considers the interests of defendants as well, avoiding needless repetitive charging, limiting the maximum jail time and criminal jeopardy to which defendants are exposed, and recognizing that defendants' sixth amendment rights must be considered even when course of conduct charging is appropriate. For these reasons, I respectfully concur in the judgment.

STATE OF CONNECTICUT *v.* JOSEPH V.* (SC 20504)

McDonald, D'Auria, Mullins, Kahn and Ecker, Js.

Syllabus

A criminal information is duplicitous when it charges a defendant in a single count with two or more distinct and separate criminal offenses, thereby implicating the defendant's constitutional right to a unanimous jury verdict.

In the companion case of *State* v. *Douglas C.* (345 Conn. 421), this court recognized that a duplicitous information may raise two distinct and separate kinds of issues regarding a defendant's right to jury unanimity: unanimity as to the elements of a crime, which arises when a defendant is charged in a single count with having violated multiple statutory provisions, subsections, or clauses, requiring the court to determine whether the statutory provisions, subsections, or clauses constitute separate elements of the statute, thereby requiring jury unanimity, or alternative means of committing a single element, which do not require jury unanimity; and unanimity as to instances of conduct, which arises when a defendant is charged in a single count with having violated a single statutory provision, subsection, or clause on multiple, separate occasions.

Convicted of the crimes of sexual assault in the first degree, risk of injury to a child, and conspiracy to commit risk of injury to a child in connection with his sexual abuse of the victim, the defendant appealed to the Appellate Court. T, the victim's half brother, began sexually abusing the victim when the victim was four or five years old. In 2006, T moved to a new residence with his and the victim's father, where the victim would periodically have overnight visits. T's sexual abuse of the victim continued at the father's residence. The defendant, who is a first cousin of the victim and T, also began to sexually abuse the victim at that time. The defendant and T often abused the victim simultaneously, and the

* In accordance with our policy of protecting the privacy interests of victims of the crime of risk of injury to a child, we decline to use the defendant's full name or to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

Moreover, in accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2018), as amended by the Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, § 106, 136 Stat. 49, 851; we decline to identify any person protected or sought to be protected under a protection order, protective order, or a restraining order that was issued or applied for, or others through whom that person's identity may be ascertained.

abuse occurred until 2010, when the victim was ten years old. In the risk of injury count, the state alleged that, on "diverse dates" between 2006 and 2010, at the residence of the victim's father, the defendant had contact with the victim's intimate parts and subjected the victim to contact with the defendant's intimate parts, in violation of the risk of injury to a child statute (§ 53-21 (a) (2)). In the sexual assault count, the state alleged that the defendant had violated the first degree sexual assault statute (§ 53a-70 (a) (2)) by engaging in fellatio and anal intercourse with the victim, also on diverse dates between 2006 and 2010 at the father's residence. Prior to trial, defense counsel sought a bill of particulars, claiming that the information was duplicitous in that the evidence at trial would show multiple, separate incidents of abuse, each of which could constitute a separate violation of the statutes at issue, giving rise to the risk that the defendant would not be afforded a unanimous verdict because the jurors could reach a guilty verdict on the same count on the basis of findings as to different incidents of sexual abuse. The trial court denied counsel's motion for a bill of particulars, and, at trial, the state offered testimony from the victim and T about four separate incidents of abuse that occurred on distinct dates, as well as the victim's testimony that additional incidents of abuse had occurred but had "blurred together" in his memory. Thereafter, the trial court denied defense counsel's request that the jury be given a specific unanimity instruction as to each count. The Appellate Court affirmed the judgment of conviction, and the defendant, on the granting of certification, appealed to this court, claiming that the trial court had violated his constitutional right to jury unanimity as to instances of conduct by denying defense counsel's requests for a bill of particulars and a specific unanimity instruction insofar as each count was premised on multiple, separate incidents of unlawful conduct, each of which could establish a separate violation of the same statute. In the alternative, the defendant claimed that the counts pertaining to risk of injury and conspiracy to commit risk of injury violated his right to jury unanimity as to the elements of those crimes because each count was premised on multiple violations of the alternative types of conduct prohibited by § 53-21 (a) (2), namely, the defendant's having contact with the victim's intimate parts, on the one hand, or the defendant's subjecting the victim to contact with the defendant's intimate parts, on the other. *Held*:

1. Applying the three-pronged test that this court adopted in *Douglas C.* for claims of jury unanimity as to instances of conduct, this court concluded that, although the risk of injury to a child and conspiracy to commit risk of injury counts were not duplicitous and did not violate the defendant's right to unanimity, the first degree sexual assault count was duplicitous, the trial court's denial of counsel's request for a specific unanimity instruction or a bill of particulars with respect to that count violated the defendant's right to unanimity, the defendant suffered prejudice as a result of that violation, and, accordingly, this court reversed the

Appellate Court's judgment insofar as that court affirmed the defendant's conviction of sexual assault in the first degree and remanded the case for a new trial with respect to that offense only:

a. The count of the information charging the defendant with risk of injury to a child was not duplicitous because, although the state had the discretion to charge him with violating § 53-21 (a) (2) for each incident of conduct that had occurred, the state properly charged and presented the case to the jury as a continuing course of conduct:

Although the risk of injury count was premised on multiple, separate incidents of conduct, insofar as it alleged that the sexual abuse occurred on diverse dates over the span of four years and as the testimony at trial concerned four separate instances of sexual intercourse on distinct dates, the defendant's claim failed under the second prong of the test applicable to unanimity as to instances of conduct for the reasons set forth in the companion case of *Douglas C.*, in which this court held that § 53-21 (a) (2) criminalizes both a single incident of conduct and an ongoing course of conduct such that, when a defendant commits multiple, separate acts of having contact with the intimate parts of the same alleged victim as part of a continuing course of conduct, the state has discretion to charge the defendant either with multiple counts of having violated § 53- 21 (a) (2), with each count premised on a single incident, or with a single count of having violated § 53-21 (a) (2) premised on a continuing course of conduct.

In the present case, the trial court's denial of defense counsel's requests for a bill of particulars and a specific unanimity instruction did not violate the defendant's constitutional right to jury unanimity, as the risk of injury count contemplated an ongoing course of conduct, the state charged the defendant with a continuing course of conduct and argued to the jury that multiple incidents of unlawful conduct had occurred, and the jury reasonably could have found that the incidents at issue involved a single victim and furthered a single, continuing objective to touch the victim in a sexual and indecent manner.

b. The count of the information charging the defendant with sexual assault in the first degree, in which multiple, separate instances of assault were alleged, was duplicitous, and the trial court's failure to provide the jury with the requested specific unanimity instruction on that count violated his right to jury unanimity by creating the possibility that the jury found him guilty of that offense without having agreed on which of the multiple instances of conduct he committed:

In view of the allegations in the sexual assault count, as well as the evidence admitted at trial in support of that charge, including the testimony concerning the four specific instances of sexual intercourse, each of which occurred on different dates, at different times, and in different locations in the father's residence, this court concluded that the present

case, as presented to the jury, did not involve multiple acts of sexual intercourse committed in the course of a single incident of brief temporal duration but, rather, involved multiple, separate incidents.

The language of § 53a-70 (a) (2), as well as this court's case law interpreting that language, indicated that the legislature intended to criminalize only single acts of sexual intercourse and not a continuous course of conduct, this court has not recognized a common-law exception for a continuing course of sexual assault, even in cases involving children, and, accordingly, in the absence of a unanimity instruction to the jury, the information charging the defendant with one count of sexual assault premised on multiple, separate instances of conduct, each of which could have supported a separate offense, was duplicitous and violated the defendant's constitutional right to jury unanimity.

Moreover, the duplicitous nature of the sexual assault count prejudiced the defendant, as it created the potential for the jury to be confused or to disagree about which of the various, alleged acts of sexual intercourse the defendant committed, as the jury reasonably could have interpreted the trial court's instruction that it must unanimously agree that at least one violation of § 53a-70 (a) (2) occurred by either fellatio or anal intercourse to mean that it had to agree that an instance of sexual intercourse had occurred but not which specific instance had occurred.

c. The count of the information charging the defendant with conspiracy to commit risk of injury to a child was not duplicitous:

Although there was testimony that the defendant and T gave each other a look before the first, specific instance of sexual assault occurred and that T was present when the defendant sexually assaulted the victim during the third specific instance, it is well established that a conspiracy may be alleged as a continuing course of conduct, and, therefore, a single count of conspiracy premised on a continuous course of conduct is not duplicitous.

In the present case, the information and the prosecutor's closing argument to the jury clearly showed that the conspiracy count was premised not on two separate conspiracies but, rather, on a single, ongoing conspiracy, with the evidence of the look that T and the defendant exchanged and T's presence during the third incident merely constituting separate proof of their ongoing agreement to commit the crime of risk of injury against the victim through contact with intimate parts.

2. The defendant could not prevail on his claim that the risk of injury to a child and conspiracy to commit risk of injury counts were duplicitous on the ground that they violated his right to jury unanimity as to the elements of the crime, as the language in § 53-21 (a) (2) created two ways to satisfy the element of contact with intimate parts, that is, the defendant's having contact with the victim's intimate parts and the

defendant's forcing the victim to have contact with the defendant's intimate parts:

Upon review of this state's precedent and federal case law, this court concluded that the appellate courts of this state have been applying the wrong test to claims regarding jury unanimity as to the elements and adopted the test applied by the majority of federal courts of appeals to determine whether multiple statutes, statutory provisions, or statutory clauses constitute separate elements or alternative means of committing a single element, pursuant to which courts consider the statutory language, relevant legal traditions and practices, the overall structure of the statute at issue, its legislative history, moral and practical equivalence between the alternative actus rei or mentes reae, and any other implications for unfairness associated with the absence of a specific unanimity instruction.

This court's case law suggested that the language in § 53-21 (a) (2) prohibiting any person from "[having] contact with the intimate parts . . . of a child under the age of sixteen years or subject[ing] a child under sixteen years of age to contact with the intimate parts of such person" established alternative means of violating the statute rather than separate elements, and, to the extent the statutory language was ambiguous, the legislative history indicated that subsection (a) (2) of § 53-21 was created to distinguish sexual contact from the nonsexual contact prohibited under subsection (a) (1), and this court was not aware of any moral or practical distinction between a defendant's having contact with a child's intimate parts and a defendant's forcing of a child to have contact with the defendant's intimate parts.

(*Two justices concurring in part and dissenting in part*)

Argued November 15, 2021—officially released December 13, 2022**

Procedural History

Substitute information charging the defendant with the crimes of sexual assault in the first degree, risk of injury to a child and conspiracy to commit risk of injury to a child, brought to the Superior Court in the judicial district of Waterbury, where the court, *K. Murphy*, *J.*, denied the defendant's motions for a bill of particulars and to preclude certain evidence; thereafter, the case was tried to the jury; verdict and judgment of guilty, from which the defendant appealed to the Appellate

** December 13, 2022, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Court, *Keller*, *Bright* and *Flynn*, *Js.*, which affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court. *Reversed in part*; *new trial.*

Megan L. Wade, assigned counsel, with whom was *James P. Sexton*, assigned counsel, for the appellant (defendant).

Timothy F. Costello, senior assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, *Amy L. Sedensky* and *Don E. Therkildsen, Jr.*, senior assistant state's attorneys, and *Jennifer F. Miller*, former assistant state's attorney, for the appellee (state).

Opinion

D'AURIA, J. Today, in *State* v. *Douglas C.*, 345 Conn. 421, A.3d (2022), we held that a single count of an information that charges a defendant with a single statutory violation is duplicitous when evidence at trial supports multiple, separate incidents of conduct, each of which could independently establish a violation of the charged statute. In the absence of a specific unanimity instruction to the jury or a bill of particulars, such a count violates a defendant's constitutional right to jury unanimity and requires the reversal of the judgment of conviction if it creates the risk that the defendant's conviction occurred as the result of different jurors concluding that the defendant committed different criminal acts.

We now must apply our holding in *Douglas C.* to the present case in which the defendant, Joseph V., appeals from the judgment of the Appellate Court, which affirmed the trial court's judgment of conviction, rendered following a jury trial, of sexual assault in the first

degree in violation of General Statutes § 53a-70 (a) (2),[1] risk of injury to a child in violation of General Statutes § 53-21 (a) (2),[2] and conspiracy to commit risk of injury to a child in violation of § 53-21 (a) (2) and General Statutes § 53a-48 (a). The defendant claims that each count was duplicitous because each count charged him with a single violation of the underlying statute despite evidence at trial of multiple, separate incidents of conduct, each of which could establish a violation of the statute, thus creating the possibility that the jury found him guilty without having unanimously agreed on which incident occurred. As a result, he argues that the trial court's failure to either grant his request for a bill of particulars or a specific unanimity instruction violated his federal constitutional right to jury unanimity. We agree with the defendant as to the sexual assault count but disagree with him as to the risk of injury and conspiracy counts. Accordingly, we reverse in part the Appellate Court's judgment and remand the case to that court with direction to remand the case to the trial court for a new trial on the sexual assault count.

The Appellate Court's opinion contains a detailed discussion of the facts that the jury reasonably could have found, along with the procedural history of this case, which we summarize briefly. When the victim was four or five years of age, his half brother, T, began frequently abusing him in a sexual manner. *State* v. *Joseph V.*, 196 Conn. App. 712, 716, 230 A.3d 644 (2020). In 2006, after the abuse by T had begun, T and the

[1] Although § 53a-70 has been amended since the events at issue in this appeal; see Public Acts 2015, No. 15-211, § 16; that amendment has no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of § 53a-70.

[2] Although § 53-21 has been amended several times since the events at issue in this appeal; see, e.g., Public Acts 2015, No. 15-205, § 11; Public Acts 2013, No. 13-297, § 1; and Public Acts 2007, No. 07-143, § 4; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of § 53-21.

victim's father moved to a new residence, while the victim and his mother continued to reside together, although the victim would have overnight visits at his father's new residence. Id. T's abuse of the victim continued at the father's new residence. Id. Both prior to and following the time that the victim's father and T moved to the new residence, the defendant, a first cousin of both T and the victim, had a close relationship with T, including an ongoing sexual relationship. Id., 715, 717. After the victim's father and T moved to the new residence, the defendant, when he was fifteen years old, began to sexually assault the victim. Id., 717. This abuse often involved simultaneous sexual abuse of the victim by T and occurred until the victim was ten years old. Id.

When the victim was thirteen, he revealed the sexual abuse in digital correspondence to The Trevor Project, a California based organization. Id., 719. After he did not receive an immediate response, the victim used an instant messaging feature on The Trevor Project's website to speak with a counselor. Id. During this instant messaging conversation, the victim again revealed the sexual abuse by T and the defendant. Id.

The counselor at The Trevor Project, as required by law, reported the victim's allegations of sexual assault to the Los Angeles County Department of Children and Family Services, which, in turn, contacted the police in the Connecticut municipality in which the victim resided. Id., 720. In response, the police visited the residence of the victim and his mother. Id. The victim told the police about the alleged sexual assault by T and the defendant, and the defendant was then arrested.[3] Id.

[3] T also was arrested, but, prior to his criminal trial, he entered into a written plea deal with the state in which he agreed to cooperate fully and truthfully with respect to the investigation and the charges brought against the defendant. *State* v. *Joseph V.*, supra, 196 Conn. App. 716 n.2. In exchange for T's testimony and cooperation, the state agreed to limit the charges against him to risk of injury to a child in violation of § 53-21 (a) (1) and sexual assault in the fourth degree in violation of General Statutes § 53a-

The state initially charged the defendant with two counts of sexual assault in the first degree, one count of risk of injury to a child, and one count of conspiracy to commit risk of injury to a child. Id., 721 and n.9. The defendant's criminal trial on these four counts ended in a mistrial. See id., 721 n.8. After the mistrial, the defendant filed a motion for a bill of particulars, seeking to compel the state to allege within the charging instrument additional information with respect to each charge. Id., 721–22. In response, the state filed a substitute information (the operative information at the time of the defendant's second trial), limited to one count of sexual assault in the first degree, one count of risk of injury to a child, and one count of conspiracy to commit risk of injury to a child. Id., 722 and n.12.

The trial court then heard argument on the defendant's motion for a bill of particulars. Id., 722. Defense counsel argued that, based on the evidence offered at the prior trial, the defense anticipated that there would be testimony regarding multiple, separate incidents of abuse, each of which could constitute a separate violation of the statutes at issue. Id., 722–23. As a result, she asserted, there was the potential "risk that one or more jurors could reach a guilty verdict with respect to a count on the basis of their findings with respect to an incident of abuse proven by the state, and one or more jurors could reach a guilty verdict on the same count, but on the basis of their findings with respect to a different incident of abuse proven by the state." (Emphasis omitted.) Id., 723. Defense counsel stated that, if the trial court denied the motion for a bill of particulars, she would request that the court give the jury a specific unanimity instruction. Id., 724. The prosecutor responded that no concern about unanimity existed because he

73a (a) (1) (A), and to recommend a total effective sentence of five years of incarceration, execution suspended after eighteen months, followed by five years of probation, including sex offender registration. Id.

expected the defense to argue generally that the victim was not credible and, therefore, that the state had not met its burden of proof. Id. The trial court agreed with the prosecutor and denied the defendant's motion, ruling that, before returning a guilty verdict, the jury was required only to unanimously agree on whether the defendant had engaged in the type of conduct proscribed by the statutes during the time frame alleged. Id., 724–25.

At trial, the victim testified about three distinct incidents of abuse by the defendant. See id., 717 n.3. T testified about an additional distinct incident of abuse of the victim by the defendant during which T was present but did not participate. Id., 718 and n.5. "The victim also testified that, beyond the incidents he described, many other incidents of sexual abuse involving the defendant and T had 'blurred together because there [were] too many to count and distinguish between.' These incidents, which always occurred at the home of the victim's father, involved the touching of intimate parts, oral sex, and anal sex. The victim recalled that the defendant and T abused him simultaneously and would frequently take turns or 'trade off' in terms of the sexual acts that they committed against him."[4] Id., 717 n.3.

[4] Both the victim and T testified as to the first incident of abuse, although their testimony conflicted regarding who initiated the abuse. *State* v. *Joseph V.*, supra, 196 Conn. App. 717 and n.4. From this testimony, the jury reasonably could have found that "[t]he first time that the defendant sexually abused the victim occurred in T's bedroom after the defendant, T, and the victim had been playing video games. . . . The defendant and T exchanged a knowing glance just before the defendant put his hand on the victim's hand and made the victim stroke his penis. Thereafter, T and the defendant took turns rubbing their penises between the victim's legs, near his buttocks. At one point during this incident, T attempted to anally penetrate the victim with his penis while the defendant made the victim perform oral sex on him." (Footnote omitted.) Id.

The victim also testified regarding "[a]nother incident involving the defendant [that] occurred when he and the victim were watching television in the bedroom of the victim's father. While the defendant and the victim were lying in bed, the defendant took the victim's hand and made the victim stroke his penis. Then, the defendant made the victim, who was fully clothed, perform oral sex on him." Id., 718.

As a result of this testimony, defense counsel requested that the trial court give the jury a specific unanimity instruction as to the charge of sexual assault in the first degree, arguing that, without this instruction, the count was duplicitous and, thus, infringed on the defendant's right to jury unanimity. Id., 724–25. Relying on the rationale set forth in its prior ruling, the trial court declined defense counsel's request. Id., 726–27. The following day, outside the presence of the jury, defense counsel renewed her request for a specific unanimity instruction, clarifying that the request applied to all three counts. Id., 727. The trial court declined to give the requested charge. Id., 728.

The jury returned a guilty verdict on all three counts. Id., 715. The trial court sentenced the defendant to a total effective term of twenty years of incarceration, execution suspended after ten years, followed by ten years of probation with special conditions, including lifetime inclusion on the state's sex offender registry. Id., 715 n.1.

The defendant appealed to the Appellate Court, claiming that the trial court improperly had denied his request for a bill of particulars and/or a specific unanimity jury instruction because the three counts were

As to the third incident, T alone testified that "[t]he defendant sexually abused the victim during another incident that occurred in T's presence, although T did not participate. This incident occurred at night . . . in the living room, which was downstairs at the residence of the victim's father. The defendant partially undressed himself and partially undressed the victim before making the victim perform oral sex on him. The defendant also rubbed his penis between the victim's legs." (Footnote omitted.) Id.

As to the fourth incident, the victim testified that, "when [he] was ten years of age, [he and] the defendant . . . were alone together at the residence of the victim's father after other family members had left to purchase food. The defendant, who was on the couch in the living room with the victim, partially removed his pants and the victim's pants and anally penetrated the victim with his penis. Thereafter, the defendant made the victim perform oral sex on him." Id.

duplicitous, thereby violating his federal constitutional right to jury unanimity. Id., 730–31. The Appellate Court affirmed the trial court's judgment; id., 763; explaining that "whether the state's substitute information posed a risk that the jurors may not have been unanimous . . . comes down to whether the defendant's criminal liability for each offense was premised on his having violated one of multiple statutory subsections or elements." Id., 740. The court then examined the statutory language underlying each count to determine whether multiple statutory subsections or elements were at issue. Id., 744–47. As to count one, which charged the defendant with sexual assault in the first degree, the Appellate Court held that there were no unanimity concerns because the defendant was charged with violating only one statutory subsection, which prohibited only a single type of conduct. See id., 744–45. As to counts two and three, which charged the defendant with risk of injury to a child and conspiracy to commit risk of injury to a child, respectively, the court held that, because § 53-21 (a) (2) contemplates a violation premised on two alternative types of conduct—namely, the defendant's making contact with the victim's intimate parts or, in the alternative, the defendant's subjecting the victim to contact with his intimate parts—these counts rested on alternative bases of criminal liability, and, thus, it was possible that the jury was not unanimous with respect to the specific type of statutorily prohibited conduct that occurred. See id., 746. The court held, however, that, because the trial court did not expressly sanction a nonunanimous verdict, no specific unanimity instruction was required. Id., 747–48. We granted certification to appeal.[5] Additional facts and procedural history will be provided as necessary.

[5] We granted the defendant certification to appeal, limited to the following issues: (1) "Did the Appellate Court properly uphold the trial court's denial of the defendant's request for a specific unanimity charge and correctly conclude that, under *State* v. *Mancinone*, 15 Conn. App. 251, 274, 545 A.2d 1131, cert. denied, 209 Conn. 818, 551 A.2d 757 (1988), cert. denied, 489 U.S.

I

As he did in the trial court, the defendant claims that all three counts that the state charged—sexual assault, risk of injury, and conspiracy to commit risk of injury—were improperly duplicitous, creating the possibility that the jury was not unanimous as to the specific incident of criminal conduct he committed. Thus, he contends that the trial court's denial of his requests for a bill of particulars or a specific unanimity instruction deprived him of his constitutionally guaranteed right to a unanimous verdict. Specifically, he argues that the information charged him with only one count each of sexual assault, risk of injury to a child, and conspiracy to commit risk of injury to a child but that testimony at trial described multiple, separate incidents of conduct, each of which could constitute a separate violation of the statutes at issue. As a result, he maintains that either a bill of particulars or a specific unanimity instruction was required because of the potential that the jury could find him guilty without agreeing on which criminal act he committed.

Applying the test detailed in *Douglas C.*, we agree with the defendant that count one alleging first degree sexual assault was duplicitous, and thus the trial court's denial of his request for a specific unanimity instruction or a bill of particulars violated his constitutional right to jury unanimity. Finding as we do that the defendant suffered prejudice as a result of this violation, we must

1017, 109 S. Ct. 1132, 103 L. Ed. 2d 194 (1989), a specific unanimity charge is required only when the defendant has been charged with violating multiple subsections or multiple 'statutory elements' of a statute?" And (2) "[i]f a specific unanimity charge is required when there is evidence presented at trial of more than one separate and distinct criminal act that could serve as the basis for a single count, did the Appellate Court correctly conclude that the state's information was not duplicitous where the state presented evidence of more than one separate and distinct incident that could have served as the basis of conviction on each of the three counts?" *State* v. *Joseph V.*, 335 Conn. 945, 945–46, 238 A.3d 17 (2020).

reverse the judgment of conviction in part and remand the case for a new trial on that count. We disagree, however, with the defendant's claim that counts two and three were duplicitous, thereby violating his right to unanimity as to instances of conduct and, thus, affirm his conviction of risk of injury to a child and conspiracy to commit risk of injury to a child.

"Although we generally review the denial of a motion for a bill of particulars for abuse of discretion . . . because this claim is premised on an alleged infringement of the defendant's constitutional rights, our review is plenary." (Citation omitted.) *State* v. *Douglas C.*, supra, 345 Conn. 435. "Duplicity occurs when two or more offenses are charged in a single count of the accusatory instrument. . . . [A] single count is not duplicitous merely because it contains several allegations that could have been stated as separate offenses. . . . Rather, such a count is . . . duplicitous [only when] the policy considerations underlying the doctrine are implicated. . . . These [considerations] include avoiding the uncertainty of whether a general verdict of guilty conceals a finding of guilty as to one crime and a finding of not guilty as to another, avoiding the risk that the jurors may not have been unanimous as to any one of the crimes charged, assuring the defendant adequate notice, providing the basis for appropriate sentencing, and protecting against double jeopardy in a subsequent prosecution. . . . A duplicitous information [implicating a defendant's right to jury unanimity], however, may be cured either by a bill of particulars or a specific unanimity instruction." (Citations omitted; internal quotation marks omitted.) Id., 433–34.

The defendant argues only that the allegedly duplicitous counts implicated his right to a unanimous verdict, and thus we limit our analysis to that issue. The defendant's right to jury unanimity under the sixth amendment to the United States constitution ensures that a jury

"cannot convict unless it unanimously finds that the [g]overnment has proved each element" of the charged crime. *Richardson* v. *United States*, 526 U.S. 813, 817, 119 S. Ct. 1707, 143 L. Ed. 2d 985 (1999). Nevertheless, "different jurors may be persuaded by different pieces of evidence, even when they agree [on] the bottom line. Plainly there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict." (Internal quotation marks omitted.) *Schad* v. *Arizona*, 501 U.S. 624, 631–32, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991) (opinion announcing judgment). In other words, "a jury must come to agreement on the principal facts underlying its verdict—what courts have tended to call the elements of the offense. But that requirement does not extend to subsidiary facts—what the [Supreme] Court has called 'brute facts.' " *United States* v. *Lee*, 317 F.3d 26, 36 (1st Cir.), cert. denied, 538 U.S. 1048, 123 S. Ct. 2112, 155 L. Ed. 2d 1089 (2003). "In the routine case, a general unanimity instruction will ensure that the jury is unanimous on the factual basis for a conviction, even where an [information] alleges numerous factual bases for criminal liability." (Internal quotation marks omitted.) *United States* v. *Holley*, 942 F.2d 916, 925–26 (5th Cir. 1991), quoting *United States* v. *Beros*, 833 F.2d 455, 460 (3d Cir. 1987).

In *Douglas C.*, this court for the first time recognized that a duplicitous information may raise two distinct and separate kinds of unanimity claims: (1) unanimity as to a crime's elements, which occurs when a defendant is charged in a single count with having violated multiple statutory provisions, subsections, or clauses, and thus the court must determine whether the statutory provisions, subsections, or clauses constitute separate elements of the statute, thereby requiring jury unanimity, or alternative means of committing a single element, which do not require jury unanimity; and (2)

unanimity as to instances of conduct, also known as a multiple acts or multiple offense claim, which occurs when a defendant is charged in a single count with having violated a single statutory provision, subsection, or clause on multiple, separate occasions. See *State* v. *Douglas C.*, supra, 345 Conn. 432–33, 441. Previously, our appellate courts have not distinguished between these two distinct unanimity claims. In *Douglas C.*, however, we explained that different tests apply to a claim of unanimity as to elements and a claim of unanimity as to instances of conduct. Id., 441.

In the present case, the defendant argues that all three counts were duplicitous because each was premised on multiple, separate instances of conduct, each of which could establish a separate violation of the same statute. In other words, he claims that his right to unanimity as to instances of conduct was violated, not his right to unanimity as to elements. As to a claim of unanimity as to instances of conduct, in *Douglas C.*, we adopted and applied the three-pronged test applied by a majority of federal courts of appeals:[6] "(1) Considering the allegations in the information and the evidence admitted at trial, does a single count charge the defendant with

[6] For the same reasons stated in the majority opinion in *Douglas C.*, we reject the argument of the concurring and dissenting justice (hereinafter, the dissent) that this court should adopt the test used by the United States Court of Appeals for the Second Circuit for determining if a single count of an information violates a defendant's right to jury unanimity as to instances of conduct. Specifically, we reject the dissent's argument that, like the Second Circuit, we should adopt and apply a presumption that our legislature intends that prosecutors have discretion to charge a defendant with either a single crime or an ongoing course of conduct crime if the legislature has not made its intent clear in this regard, as determined by the statute's plain language, related statutes, and relevant legislative history. See *State* v. *Douglas C.*, supra, 345 Conn. 448–60. As explained at length in *Douglas C.*, not only do we disagree with the dissent that our case law supports this presumption, but we also need not reach this issue, as we determine that the legislature's intent regarding the various statutes at issue is clear based on the statutory language, relevant case law, and/or legislative history. See id., 444 n.12.

violating a single statute in multiple, separate instances? (2) If so, then does each instance of conduct establish a separate violation of the statute? If the statute contemplates criminalizing a continuing course of conduct, then each instance of conduct is not a separate violation of the statute but a single, continuing violation. To determine whether the statute contemplates criminalizing a continuing course of conduct, we employ our well established principles of statutory interpretation. Only if each instance of conduct constitutes a separate violation of the statute is a count duplicitous. And (3) if duplicitous, was the duplicity cured by a bill of particulars or a specific unanimity instruction? If yes, then there is no unanimity issue. If not, then a duplicitous count violates a defendant's right to jury unanimity but reversal of the defendant's conviction is required only if the defendant establishes prejudice [namely, that the duplicity created the genuine possibility that the conviction occurred as the result of different jurors concluding that the defendant committed different acts]." Id., 448. As to the second prong, to the extent we must interpret applicable statutes, well established principles directed by General Statutes § 1-2z guide our inquiry. See, e.g., *State* v. *Bischoff*, 337 Conn. 739, 746, 258 A.3d 14 (2021). In interpreting the statutes at issue to determine if the legislature criminalized a continuous course of conduct, we have explained that, "[a]t times, it may be easy to make this second determination. That is because, [i]n some cases the standard for individuating crimes is obvious—we count murders, for instance, by counting bodies. But in other cases, determining how many crimes were committed is much less clear. . . . In these more difficult cases, courts have examined the statute's language, its legislative history, and [other] case law regarding similar statutes . . . ." (Citation omitted; internal quotation marks omitted.) *State* v. *Douglas C.*, supra, 345 Conn. 442.

"In examining the statutory language at issue . . . if the underlying criminal statute contemplates criminalizing a continuing course of conduct and the defendant has been charged with violating the statute by a continuing course of conduct, a single count premised on multiple, separate instances of conduct is not duplicitous when the multiple instances of conduct constitute 'a continuing course of conduct, during a discrete period of time[7] . . . .' To determine if a statute criminalizes only a single act, a continuous course of conduct, or both, courts must interpret the statute's language in the manner directed by . . . § 1-2z. . . . If a statute does criminalize a continuing course of conduct, then the court must determine whether the multiple instances of conduct alleged in fact constitute a continuous course of conduct by examining, among other things, whether the acts occurred within a relatively short period of time, were committed by one defendant, involved a single victim, and furthered a single, continuing objective." (Citations omitted; footnote added; footnotes omitted.) Id., 442–45.

[7] In *Douglas C.*, we recognized that "some federal courts have noted that some state courts have relied on their own common law to hold that a statute encompasses a continuing course of conduct. See *Dyer* v. *Farris*, 787 Fed. Appx. 485, 495 (10th Cir. 2019) (Under Oklahoma law, the general rule requiring the [s]tate to elect which offense it will prosecute is not in force when separate acts are treated as one transaction. . . . [W]hen a child of tender years is under the exclusive domination of one parent for a definite and certain period of time and submits to sexual acts at that parent's demand, the separate acts of abuse become one transaction within the meaning of this rule. (Citation omitted; internal quotation marks omitted.)), cert. denied, U.S. , 140 S. Ct. 1157, 206 L. Ed. 2d 207 (2020); id. (citing *Gilson* v. *State*, 8 P.3d 883, 899 (Okla. Crim. App. 2000), cert. denied, 532 U.S. 962, 121 S. Ct. 1496, 149 L. Ed. 2d 381 (2001), which stated that, generally, under Oklahoma law, rape was not considered continuing offense, but that, under Oklahoma's common law, court had recognized exception for ongoing sexual abuse of minors under certain circumstances). Because neither party [in *Douglas C.*] argue[d] that any common-law exception applie[d], we [did] not decide . . . whether creating or applying common-law exceptions in interpreting statutes is proper." (Internal quotation marks omitted.) *State* v. *Douglas C.*, supra, 345 Conn. 443–44 n.11.

A

We begin by addressing count two of the information, which charged the defendant with risk of injury to a child in violation of § 53-21 (a) (2), because we already have addressed a similar claim in relation to this statute in *Douglas C*. We conclude that the defendant's claim fails under the second prong of the test applicable to claims of unanimity as to instances of conduct and, therefore, that count two did not violate his constitutional right to jury unanimity.

Count two of the information charged the defendant with committing risk of injury to a child "in that on or about diverse dates between August 23, 2006, and December 25, 2010," at the residence of the victim's father, the defendant had contact with the victim's intimate parts and subjected the victim to "contact with [the defendant's] intimate parts . . . ." (Internal quotation marks omitted.) *State* v. *Joseph V.*, supra, 196 Conn. App. 722 n.12. At trial, as evidence of this unlawful contact, the state relied on testimony from the victim and T about the four specific, separate incidents of conduct discussed in footnote 4 of this opinion. As we previously noted, defense counsel cross-examined both the victim and T about these four incidents.

In closing argument to the jury, as to the element of contact with intimate parts, the prosecutor argued that the state had "to prove the defendant had contact with the intimate parts of the minor, [the victim], or the defendant—or the defendant subjected [the victim] to contact with the defendant's intimate parts; either way. . . . So, any of the sexual assaults that I just talked about, that counts; any one of those incidents counts—the oral sex, the anal sex—any of that counts for the sexual contact." In response, as previously discussed, defense counsel challenged the credibility of the victim

and T both generally and specifically as to each of the four separate incidents.

After closing arguments, with regard to the element of intimate contact in the risk of injury charge in count two, the trial court instructed the jury: "The state must prove either that the defendant had contact with the child's intimate parts, [or] the defendant subjected the child to contact with the defendant's intimate parts. There need not be a touching of all the intimate parts. It is sufficient if any one of the intimate parts is touched." Similar to the instruction on sexual assault, the court concluded: "In order to convict the defendant on this count, you must be unanimous that at least one violation of this statute occurred between the defendant and [the victim] during the time frame indicated."

Section 53-21 (a) prohibits "[a]ny person . . . (2) [from having] contact with the intimate parts, as defined in section 53a-65, of a child under the age of sixteen years or subject[ing] a child under sixteen years of age to contact with the intimate parts of such person, in a sexual and indecent manner likely to impair the health or morals of such child . . . ." General Statutes § 53a-65 (8) defines "intimate parts" as "the genital area or any substance emitted therefrom, groin, anus or any substance emitted therefrom, inner thighs, buttocks or breasts."[8]

First, we must determine whether count two was premised on multiple, separate incidents of conduct. Count two of the information alleged that the defendant committed risk of injury to a child on "diverse dates" over the course of more than four years, and this allega-

[8] Although § 53a-65 (8) has been amended since the defendant's commission of the crimes that formed the basis of his conviction; see Public Acts 2006, No. 06-11, § 1; that amendment has no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of § 53a-65 (8).

tion was supported by testimony concerning four specific, separate instances of conduct. This evidence shows that, as the case was presented to the jury, there was evidence of multiple, separate incidents of conduct, not a single incident.

Because count two was premised on multiple, separate incidents of conduct, we next must determine under prong two of the applicable test whether each incident could establish an independent violation of § 53-21 (a) (2). We hold that, although the state had discretion to charge the defendant with violating § 53-21 (a) (2) for each incident of conduct that occurred, the state properly charged and presented these incidents to the jury as a continuing course of conduct.

In *Douglas C.*, we held that § 53-21 (a) (2) criminalizes both a single incident of conduct and an ongoing course of conduct. See *State* v. *Douglas C.*, supra, 345 Conn. 464. Specifically, we explained that, under our prior case law interpreting this statute, risk of injury to a child may be charged under a continuing course of conduct theory. Id., 465. We explained that both the structure of the statute as a whole and its legislative history support this interpretation of § 53-21 (a) (2). See id., 466–69. Thus, when a defendant commits multiple, separate acts of having contact with the intimate parts of the same alleged victim as part of a continuing course of conduct, the state has discretion to charge the defendant either with multiple counts of having violated § 53-21 (a) (2), with each count premised on a single incident, or with a single count of having violated § 53-21 (a) (2) premised on a continuing course of conduct.

In the present case, the language of count two shows that the state charged the defendant with a continuing course of conduct in that, "on or about diverse dates between August 23, 2006, and December 25, 2010," he had contact with the victim's intimate parts and that

the victim had contact with the defendant's intimate parts. *State* v. *Joseph V.*, supra, 196 Conn. App. 722 n.12. This language clearly contemplates more than a single instance of contact; it contemplates an ongoing course of conduct during this time period. Additionally, although the trial court noted that only one violation of the statute had to occur and the state argued that proof of only one alleged act was necessary to find the defendant guilty under count two, the state argued that multiple instances of contact occurred continuously between August 23, 2006, and December 25, 2010. Thus, § 53-21 (a) (2) criminalizes a continuing course of conduct, and the state charged the defendant with a continuing course of conduct.

Moreover, as to count two, the jury reasonably could have found that the multiple, separate incidents of conduct constituted a continuing course of conduct. The testimony regarding the four specific instances of conduct showed that, although the multiple incidents of sexual and indecent touching of intimate parts occurred over a prolonged period of time, these acts occurred with sufficient frequency to be considered a continuous course of conduct. See, e.g., *United States* v. *Root*, 585 F.3d 145, 154–55 (3d Cir. 2009) (multiple acts may be considered part of continuous course of conduct, even if conduct spanned years). Additionally, these incidents were committed by the same perpetrators—the defendant and T—involved a single victim, and furthered a single, continuing objective to touch the victim in a sexual and indecent manner.

As a result, although count two was premised on multiple, separate instances of conduct, these instances were properly alleged and presented to the jury as a continuous course of conduct, and not as independent violations of § 53-21 (a) (2). Accordingly, we conclude that count two, charging the defendant with a single violation of § 53-21 (a) (2), was not duplicitous, and

thus the trial court's failure to grant the defendant's request for a specific unanimity instruction or a bill of particulars as to that count did not violate his constitutional right to jury unanimity.

B

Count one of the information charged the defendant with sexual assault in the first degree in violation of § 53a-70 (a) (2). Because there was trial testimony regarding four separate, specific instances of conduct, each of which could have constituted a violation of the statute, the defendant argues that this count was duplicitous. In turn, he argues that, because the trial court did not provide the jury with a specific unanimity instruction as defense counsel requested,[9] the jury verdict violated his right to jury unanimity and created the possibility that the jury found him guilty without having

[9] Defense counsel requested that the trial court instruct the jury as follows: "The state has alleged that the defendant . . . has committed the offense of sexual assault in the first degree. The state alleges in the first count the act of sexual assault in the first degree by way of fellatio and anal intercourse.

"You may find the defendant guilty of the offense of sexual assault in the first degree only if you all unanimously agree on the manner in which the state alleges the defendant committed the offense and that it occurred during the time and place alleged by the state.

"This means you may not find the defendant guilty on the first count of sexual assault in the first degree unless you all agree that the state has proved beyond a reasonable doubt that the [defendant] did engage in sexual intercourse by fellatio and anal intercourse with [the victim] and [the victim] was under [thirteen] years of age and [the defendant] was more than [two] years older than [the victim]. The state alleges these crimes were committed between August 23, 2006, and December 25, 2010, at or near [the new residence of the victim's father]. If the state has not met its burden of proving sexual assault in the first degree by way of fellatio and anal intercourse at said time and place, you must return a verdict of not guilty. As I have instructed you, when you reach a verdict, it must be unanimous on all elements of the offense."

We note that, in the proposed instruction, it is not clear whether defense counsel was asking the court to instruct the jury that it must be unanimous that a single, specific act occurred, or that that it must be unanimous that all alleged acts occurred.

agreed on which instance of conduct he committed. We agree with the defendant.

The following additional procedural history is relevant to our consideration of the defendant's claim with respect to this count. Count one of the operative information charged the defendant with committing sexual assault in the first degree "on or about diverse dates between August 23, 2006, and December 25, 2010," by engaging in sexual intercourse (fellatio and anal intercourse) with the victim at the residence of the victim's father. *State* v. *Joseph V.*, supra, 196 Conn. App. 722 n.12. At trial, as evidence that the defendant had engaged in sexual intercourse with the victim, the state offered the testimony of both the victim and T regarding four distinct incidents of abuse, as well as the victim's general testimony that he recalled that other incidents of sexual abuse had occurred but that they had " 'blurred together' " in his memory. Id., 717 n.3. Defense counsel cross-examined both the victim and T about the specific details regarding each of the four specific incidents of sexual abuse.

In closing argument, the prosecutor argued that "a plethora of evidence" supported the element of sexual intercourse, summarizing the four specific instances of sexual abuse and noting that "these same types of acts happened between [the victim] and the defendant alone, and [the victim] and the defendant and [T] . . . too many times to count." The prosecutor then argued that the jury only had "to believe it happened once. Any one time is enough to satisfy the element of sexual intercourse."

In response, defense counsel argued generally that the state's witnesses, including the victim and T, lacked credibility. Counsel walked the jury through the three alleged incidents about which the victim had testified, discussing inconsistencies in his testimony as to each

particular incident. Defense counsel specifically challenged T's testimony regarding these incidents, arguing that T had admitted to having tailored his testimony to the victim's allegations.

After closing arguments, the trial court's jury charge included a general instruction regarding unanimity: "Remember that your verdict as to each count must be unanimous; all six jurors must agree as to the verdict as to each separate count." As to count one, charging sexual assault, the trial court instructed in relevant part: "In order to convict the defendant on this count you must be *unanimous that at least one violation of this statute by one of the methods alleged occurred* between the defendant and [the victim] during the time frame indicated. . . . [T]he state must prove each element of each offense, including identification of the defendant, beyond a reasonable doubt. If you unanimously find that the state has proved beyond a reasonable doubt each of the elements of the crime of sexual assault in the first degree, then you shall find the defendant guilty." (Emphasis added.)

Addressing the defendant's unanimity claim in the present case, we must first determine if count one was premised on multiple, separate acts and, if so, whether each act established a separate violation of the sexual assault statute.[10] We recognize that this may be a diffi-

[10] The defendant does not claim that count one violated his constitutional right to jury unanimity as to elements but only as to instances of conduct. This is because it is clear that count one alleges only a single violation of a single statute, statutory provision, or statutory clause. Specifically, § 53a-70 (a) (2) provides only a single actus reus: engaging in sexual intercourse. See General Statutes § 53a-70 (a) ("[a] person is guilty of sexual assault in the first degree when such person . . . (2) engages in sexual intercourse with another person and such other person is under thirteen years of age and the actor is more than two years older than such person").

"Sexual intercourse" is defined as "vaginal intercourse, anal intercourse, fellatio or cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal intercourse, anal intercourse or fellatio and does not require emission of semen. Penetration may be committed by an object manipulated by the actor into the genital or anal opening of the victim's body." General Statutes § 53a-65 (2).

cult task, as "[t]he line between multiple offenses and multiple means to the commission of a single continuing offense is often a difficult one to draw." (Internal quotation marks omitted.) *United States* v. *Davis*, 471 F.3d 783, 791 (7th Cir. 2006). One example of a multiple means case (i.e., claim of unanimity as to elements) is *State* v. *Anderson*, 211 Conn. 18, 557 A.2d 917 (1989), in which the state charged the defendant with two counts of sexual assault in the first degree premised on multiple kinds of sexual intercourse—four instances of vaginal intercourse and two instances of fellatio—alleged to have been committed during a single criminal episode of relatively brief, temporal duration (approximately one hour). Id., 20–23. This court held that the multiple acts of sexual intercourse constituted alternative means of committing the element of sexual intercourse, and, thus, the jury did not have to unanimously agree as to which means occurred. Id., 34–35; see id., 35 ("[t]he several ways in which sexual intercourse may be committed under . . . § 53a-65 (2) are only one conceptual offense"); see also *United States* v. *Gordon*, 713 Fed. Appx. 424, 430 (6th Cir. 2017) (types of prohibited sexual conduct constitute alternative means of committing that conduct and do not constitute elements about which jury must be unanimous). Thus, in *Anderson*, the jury could, consistent with constitutional principles, find the defendant guilty of sexual assault in the first degree if the jurors were unanimous in finding, beyond a reasonable doubt, that some form of sexual intercourse occurred during the alleged incident.

Anderson did not address whether unanimity issues arise when the state charges only one count of sexual assault, but the record contains evidence of multiple, separate incidents of sexual intercourse. The line between a single incident comprised of various alternative means

Count one, therefore, does not allege the violation of multiple statutes, statutory provisions, or statutory clauses.

of committing sexual intercourse, on the one hand, and multiple, separate incidents of sexual intercourse, on the other, may be unclear at times and must be decided on a case-by-case basis based on the language of the count at issue, the evidence admitted in support of that count, and the kind of conduct the legislature intended to criminalize (single instance of conduct or continuing course of conduct).

In the present case, under the first prong of the test adopted in *Douglas C.*, we must first look at the allegations in the charge and the evidence admitted in support thereof to determine if count one was premised on multiple, separate incidents of conduct. See *State* v. *Douglas C.*, supra, 345 Conn. 448. Unlike the situation in *Anderson*, the information in the present case alleged that the defendant committed sexual assault on "diverse dates" over the course of more than four years. There was testimony concerning four specific instances of sexual intercourse, each of which occurred on different dates, at different times, and in different locations within the residence of the victim's father. From this testimony, it is clear that the present case does not involve multiple acts of sexual intercourse committed in the course of a single incident of brief, temporal duration. Rather, this evidence shows that, as the case was presented to the jury, there were multiple, separate incidents.

Additionally, unlike our risk of injury statute, under the second prong of the test announced in *Douglas C.*, the language of § 53a-70 (a) (2) and our case law interpreting that language show that the legislature intended for each of these separate, specific incidents to be charged as separate violations of § 53a-70 (a) (2). Specifically, under § 53a-70 (a) (2), the state was required to establish that the defendant "engage[d] in

sexual intercourse . . . .”[11] The statutory scheme does not define the term “engages,” and thus we turn to the common dictionary definition of this term. See Black’s Law Dictionary (11th Ed. 2019) p. 669 (defining “engage” as “[t]o employ or involve oneself; to take part in; to embark on”); Webster’s Third New International Dictionary (2002) p. 751 (defining “engage” as “to employ or involve oneself . . . to take part . . . participate”). These definitions of “engage” do not provide any clarification as to whether the statute criminalizes a continuing course of conduct.[12] The concurring and dissenting

[11] The concurring and dissenting justice (dissent) argues that, because the plain language of the statute does not specifically prohibit charging sexual assault as a continuing course of conduct crime, the proposed presumption in favor of prosecutorial discretion applies. See footnote 6 of this opinion. The problem with this analysis, however, is twofold. First, as we stated in *Douglas C.*, there is no support in our case law for this presumption. *State* v. *Douglas C.*, supra, 345 Conn. 453. Second, even if such a presumption existed, it would not apply in the present case because, as we explain, the language of the statute is plain and unambiguous. As we explained in *Douglas C.*, “[c]ontrary to the [dissent’s] assertion, a full and complete analysis pursuant to § 1-2z does not end in silence on this issue, thereby requiring this court to resort to any kind of presumption. What the [dissent] calls silence is not silence but the absence of explicit language specifically stating that the statute criminalizes only a continuous course of conduct or only single acts. Rather than conduct a full analysis pursuant to § 1-2z and come to a conclusion about the statute’s meaning, as we are obliged to do, the [dissent’s] rule would hold that, if the statute is ‘facially silent’—in other words, if explicit language is not used, such as the phrase ‘course of conduct’—then a criminal statute is silent regarding whether it criminalizes a single act, a continuous course of conduct, or both, and a prosecutor can choose which charging method to apply.” Id., 451. However, “[t]he fact that the legislature did not explicitly use the phrase ‘continuous course of conduct’ or ‘each single act’ does not end our analysis. Such talismanic phrases are not required. Rather, we must look to the definitions of the terms used.” Id., 465.

[12] As the dissent observes, the language of § 53a-70 (a) (2) does not significantly differ from the language § 53-21 (a) (2), the risk of injury statute. One might be tempted to contend, although the state does not, that the two statutes should be interpreted similarly—either as both permitting the state to charge a continuing course of conduct, in addition to a singular act, or as neither permitting a continuing course of conduct. We note, however, that it is not only the statutory language that distinguishes § 53-21 (a) (2) from § 53a-70 (a) (2). As discussed at length in *Douglas C.*, our interpretation

justice (dissent) contends that, under these definitions of "engage," this term is "suggestive of ongoing conduct . . . ." This is true, but this merely creates ambiguity because the definitions also are suggestive of singular conduct. This ambiguity, however, is clarified when the term "engaged" is interpreted in its context, specifically, in relation to the phrase "sexual intercourse." The statutory scheme defines "sexual intercourse" as "vaginal intercourse, anal intercourse, fellatio or cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal intercourse, anal intercourse or fellatio and does not require emission of semen." General Statutes § 53a-65 (2). This definition suggests that the statute intended to criminalize each single act of sexual intercourse, which is defined in singular terms. This kind of language consistently has been interpreted as criminalizing only single acts. See *Cooksey* v. *State*, 359 Md. 1, 19–21, 752 A.2d 606 (2000) (reviewing case law from various states with similarly worded sexual assault statutes, all of which have been interpreted as not criminalizing continuous course of conduct). Thus, this language does not contemplate an ongoing, continuous course of conduct but, rather, penalizes a single instanceof sexual intercourse.

of the language in § 53-21 (a) (2) is premised in no small part on our prior interpretation of this statute and its legislative history—specifically, that prior to an amendment to § 53-21 in 1995, this court interpreted the language of the statute, which criminalized both acts and "situations," as criminalizing both single acts and continuing courses of conduct. See *State* v. *Douglas C.*, supra, 345 Conn. 468–69. The legislative history demonstrates that, when it amended § 53-21, the legislature did not intend to create a new crime or to alter the substance of the preexisting crime but, rather, intended merely to distinguish between crimes involving sexual contact and nonsexual contact. In contrast to § 53-21, § 53a-70 (a) (2) has no such legislative history; rather, this court consistently has interpreted the language at issue as criminalizing only single acts and not a continuing course of conduct. In fact, a stronger argument could be made under the plain language of both statutes that *neither* the risk of injury statute nor the sexual assault statute contemplates a continuing course of conduct. As in *Douglas C.*, the defendant in the present case does not make this argument either, although in *Douglas C.*, we already have rejected it.

Interpreting § 53a-70 to criminalize each separate act of sexual intercourse and not a continuous course of conduct is also supported by our "well settled principle of statutory construction that the legislature knows how to convey its intent expressly . . . or to use broader or limiting terms when it chooses to do so." (Internal quotation marks omitted.) *State* v. *Ruiz-Pacheco*, 336 Conn. 219, 235, 244 A.3d 908 (2020). Specifically, we can infer from the legislature's use in other statutes of the phrase "course of conduct,"[13] as well as other phrases that connote more than one act,[14] that the legis-

[13] For example, as we explained in *Douglas C.*, "under our second degree stalking statute, [General Statutes] § 53a-181d, the legislature specifically proscribed certain continuous courses of conduct; see General Statutes § 53a-181d (b) (1), as amended by Public Acts 2021, No. 21-56, § 2 ('knowingly engages in a *course of conduct* directed at or concerning a specific person that would cause a reasonable person to (A) fear for such specific person's physical safety or the physical safety of a third person; (B) suffer emotional distress; or (C) fear injury to or the death of an animal owned by or in possession and control of such specific person' . . .); as well as certain kinds of single acts. See General Statutes § 53a-181d (b) (3) ('[s]uch person, for no legitimate purpose and with intent to harass, terrorize or alarm, by means of electronic communication, including, but not limited to, electronic or social media, discloses a specific person's personally identifiable information without consent of the person'). Similarly, under subsection (a) (1) of our risk of injury statute, the legislature specifically criminalized both a single act and a continuous course of conduct through the use of the terms 'act' and 'situation,' respectively. See General Statutes § 53-21 (a) (1) ('wilfully or unlawfully causes or permits any child under the age of sixteen years to be *placed in such a situation* that the life or limb of such child is endangered, the health of such child is likely to be injured or the morals of such child are likely to be impaired, or *does any act* likely to impair the health or morals of any such child' . . .). Thus . . . these statutes show that, when the legislature intends to explicitly criminalize both an act and a continuous course of conduct, it knows how to do so. That does not mean that such explicit statutory language is required to interpret a statute as criminalizing both an act and a continuous course of conduct. . . . [W]e by no means are adopting a presumption against such charging when the plain language of a statute is not explicit in this regard. Rather, courts must closely analyze the language of the statute, case law interpreting the statute, the statutory scheme and, if needed, the legislative history to determine if a statute criminalizes both an act and a continuous course of conduct." (Emphasis in original.) *State* v. *Douglas C.*, supra, 345 Conn. 458–60.

[14] See, e.g., General Statutes § 53-21 (a) ("[a]ny person who (1) wilfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that the life or limb of such child is endangered,

lature knows how to criminalize a course of conduct when it wants to do so. From the fact that the legislature did not do so in § 53a-70, we may infer that it did not intend to criminalize a continuous course of conduct.

Our long-standing precedent interpreting § 53a-70 lends further support to this interpretation. It is well established that, in determining the plain meaning of a statute, we look to prior case law defining the statute. See, e.g., *Redding Life Care, LLC* v. *Redding*, 331 Conn. 711, 719, 207 A.3d 493 (2019) ("we must construe the statute in conformity with prior case law interpreting it"); *State* v. *Moreno-Hernandez*, 317 Conn. 292, 299, 118 A.3d 26 (2015) ("[i]n interpreting the [statutory] language . . . [we] are bound by our previous judicial interpretations of the language and the purpose of the statute" (internal quotation marks omitted)). General Statutes (Rev. to 1975) § 53a-72 (a), which was repealed in 1975; see Public Acts 1975, No. 75-619, § 7; criminalized rape, and was a precursor to our current sexual assault statute, used the same phrase at issue in the present case: "A male is guilty of rape in the first degree when he *engages in sexual intercourse* with a female . . . ." (Emphasis added.) In *State* v. *Frazier*, 185 Conn.

the health of such child is likely to be injured or the morals of such child are likely to be impaired, or does any act likely to impair the health or morals of any such child"); General Statutes § 53-142k (b) (1) (larceny by shoplifting of retail property, the value of which exceeds $2000, during 180 day period constitutes organized retail theft); General Statutes § 53a-119 (3) ("[a] person obtains property by false promise . . . pursuant to a scheme to defraud"); General Statutes § 53a-196e (a) ("[a] person is guilty of possessing child pornography in the second degree when such person knowingly possesses (1) twenty or more but fewer than fifty visual depictions of child pornography, or (2) a series of images in electronic, digital or other format, which is intended to be displayed continuously, consisting of twenty or more frames, or a film or videotape, consisting of twenty or more frames, that depicts a single act of sexually explicit conduct by one child"); General Statutes § 53a-215 (a) ("[a] person is guilty of insurance fraud when the person, with the intent to injure, defraud or deceive any insurance company . . . (2) assists, abets, solicits, or conspires with another to prepare or make any written or oral statement that is intended to be presented to any insurance company").

211, 440 A.2d 916 (1981), cert. denied, 458 U.S. 1112, 102 S. Ct. 3496, 73 L. Ed. 2d 1375 (1982), this court, in interpreting General Statutes (Rev. to 1972) § 53a-72, followed the lead of the Oklahoma courts and explained that "rape is not a continuous offense. . . . There is ample authority holding that each separate act of forcible sexual intercourse constitutes a separate crime. . . . A different view would allow a person who has committed one sexual assault [on] a victim to commit with impunity many other such acts during the same encounter. The classic test of multiplicity is whether the legislative intent is to punish individual acts separately or to punish only the course of action which they constitute. . . . [W]e believe the legislative intention was that each assault should be deemed an additional offense." (Citations omitted.) Id., 229–30. Since *Frazier*, and after the repeal of General Statutes (Rev. to 1975) § 53a-72, this interpretation of the phrase "engages in sexual intercourse" has been applied to § 53a-70. See *State* v. *Anderson*, supra, 211 Conn. 26 (The court quoted *Frazier* in explaining that, "[i]n addressing legislative intent with regard to multiple punishments for sexual assaults, we have stated that each separate act of forcible sexual intercourse constitutes a separate crime. . . . Thus, each act of sexual assault is punishable separately." (Citations omitted; internal quotation marks omitted.)); see also *State* v. *Snook*, 210 Conn. 244, 262, 555 A.2d 390 (same), cert. denied, 492 U.S. 924, 109 S. Ct. 3258, 106 L. Ed. 2d 603 (1989);[15] *State* v. *Ayala*, 154 Conn. App. 631, 654, 106 A.3d 941 (2015) (same), aff'd, 324 Conn. 571, 153 A.3d 588 (2017); *State*

[15] The dissent's contrary take on *Snook* is mistaken. Although the state in *Snook* charged the defendant with sexual assault in the second degree as a continuing course of conduct crime, the defendant never challenged this method of charging as improper. Instead, he raised a double jeopardy claim, challenging his conviction of both sexual assault in the second degree and sexual assault in the third degree. See *State* v. *Snook*, supra, 210 Conn. 260.

v. *Giannotti*, 7 Conn. App. 701, 709, 510 A.2d 451 (citing *Frazier* in holding that each individual act or attempted act of forcible sexual intercourse constitutes separate crime), cert. denied, 201 Conn. 804, 513 A.2d 700 (1986).

For approximately forty years, the Appellate Court has rejected the dissent's interpretation of § 53a-70.[16] Specifically, in *State* v. *Cassidy*, 3 Conn. App. 374, 489 A.2d 386 (*Borden*, *J.*), cert. denied, 196 Conn. 803, 492 A.2d 1239 (1985), the defendant, who had been charged with and convicted of multiple counts of sexual assault under § 53a-70, argued "that he should . . . have been tried on [only] one count of sexual assault, on the theory that only one act of sexual assault was alleged, albeit one involving several acts of sexual intercourse." Id., 388. In rejecting this argument, the Appellate Court cited to *Frazier* and noted that "[t]his argument was

[16] Nevertheless, the dissent contends that this state has a history of prosecutors charging sexual assault as a continuing course of conduct offense for almost one century and that this court has "approved prosecutors' decisions to charge repeated sexual assaults as a single course of conduct." As we explained in *Douglas C.*, however, "the fact that we have cases that merely state that a prosecutor charged a defendant under a single count based on a continuous course of conduct but the nature of the charging was not challenged on appeal does not support the [dissent's] proposed presumption. . . . That is not the same as this court holding that such an interpretation is proper or that a presumption of prosecutorial discretion exists. Most important, for purposes of determining legislative intent, of course, the past practice of prosecutors is not a relevant factor under § 1-2z in ascertaining whether a statute criminalizes a continuing course of conduct." (Citations omitted.) *State* v. *Douglas C.*, supra, 345 Conn. 454–55. Moreover, although "[i]t is true that a handful of Appellate Court cases have held that there is no unanimity violation when a defendant has been charged in a single count with violating the same statute based on multiple acts, especially in the context of ongoing sexual assault of children. . . . These cases do not support adopting the [dissent's] proposed presumption, as they do not apply a presumption. Rather, these cases were decided under the test set forth in [*United States* v. *Gipson*, 553 F.2d 453 (5th Cir. 1977)] and before this court recognized claims of unanimity as to instances of conduct. As we explained, the *Gipson* test did not require that a court analyze whether the statute at issue criminalizes a continuous course of conduct and is not the proper test for determining claims of unanimity regarding instances of conduct." (Citations omitted.) *State* v. *Douglas C.*, supra, 457–58.

rejected under the predecessor to . . . § 53a-70. . . . We reject it under . . . § 53a-70 as well." (Citation omitted.) Id. In so holding, the court was not persuaded by the defendant's contention that, "while the legislative intent of the repealed statute [§ 53a-72] was to punish each individual act of assault separately, the legislature, by enacting the current statute, intended only to punish the total course of conduct as one offense. As under the prior statute, however, each assault [on] the victim involved a separate act of will on the part of the defendant and a separate indignity [on] the victim. . . . [T]he legislative intention was that each assault should be deemed an additional offense. . . . To interpret the statute otherwise would be to strip it of all its sense. [T]he application of common sense to the language of a penal law is not to be excluded in a way which would involve absurdity or frustrate the evident design of the lawgiver. . . . There is ample authority holding that each separate act of forcible sexual intercourse constitutes a separate crime. . . . A different view would allow a person who has committed one sexual assault [on] a victim to commit with impunity many other such acts during the same encounter." (Citations omitted; footnote omitted; internal quotation marks omitted.) Id., 388–89.

The dissent argues that our reliance on *Frazier* and *Cassidy* is misplaced because they involved multiplicity, not duplicity, which, in his view, "present[s] a fundamentally different question." But it does not. Not for these purposes. Both the test for multiplicity in the double jeopardy context and the test for duplicity in the unanimity context require that we construe the language of our sexual assault statute to arrive at the legislature's intent in enacting it. How we interpret statutory language does not change based on the claim at issue. We reject the dissent's conclusion that the most reasonable reading of our sexual assault statute and

cases interpreting its language is that prosecutors, in their discretion, can choose to charge crimes either way—as a course of conduct or as a single act—based on a tradition of prosecutorial discretion that is not supported by our criminal statutes and in which the legislature has not acquiesced. If acquiescence were important to determining a statute's meaning, the legislature's acquiescence in how our appellate courts have interpreted the statute is a more compelling case.[17]

Accordingly, guided by § 1-2z and our prior case law interpreting § 53a-70, we conclude that the plain and unambiguous language of § 53a-70 shows that the legislature intended to criminalize only single acts of sexual intercourse and not a continuing course of conduct. This court, therefore, should not consider legislative history.[18] As a result, when we apply the well established

[17] In response to the defendant's assertion in the present case that a different test should apply to claims of unanimity regarding multiple incidents of conduct, the state has not argued that there should be a continuing course of conduct exception that includes and relies on the dissent's proposed presumption. In fact, as recently as this court's decision in *State* v. *Cody M.*, 337 Conn. 92, 259 A.3d 576 (2020), in arguing that each incident of violation of a standing criminal protective order constituted a separate offense and thus could not be charged in one count under a continuous course of conduct theory, the state specifically asserted that "a violation of a protective order is more analogous to sexual assault, which is a separate act crime, than kidnapping, which is a continuous act crime." Id., 101. We make this observation not because we question whether the argument has been preserved in these cases. Rather, we find it illuminating that the constitutional officer whose discretion the dissent suggests the law presumes and the legislature necessarily acknowledges, has not made the argument the dissent makes.

[18] Even if we were to go on to examine the applicable legislative history, we disagree with the dissent that it shows that the legislature intended to criminalize a continuing course of conduct. Specifically, the dissent argues that the legislative history shows that "the intent was to allow the prosecution not only of individual sexual assaults but also of ongoing sexual relationships between adults and minors, which at least implies a continuing course of conduct." (Emphasis omitted.) Text accompanying footnote 13 of the concurring and dissenting opinion. The use of the terms "relationship" and "relations" by one legislator in the legislative history does not show that the legislature intended to criminalize a continuing course of conduct. First,

legal principles regarding statutory construction, we find that our sexual assault statute does not criminalize a continuing course of conduct.

Moreover, even if this court were allowed to create and apply common-law exceptions in determining the meaning of a statute; see footnote 7 of this opinion; this court has not recognized a common-law exception for a continuing course of sexual assault, even in cases involving children. Cf. *Gilson* v. *State*, 8 P.3d 883, 899 (Okla. Crim. App. 2000), cert. denied, 532 U.S. 962, 121 S. Ct. 1496, 149 L. Ed. 2d 381 (2001). Accordingly, we conclude that the information charging the defendant with a single count of sexual assault premised on multiple, separate instances of conduct, each of which could have supported a separate offense, was duplicitous and violated the defendant's right to jury unanimity. This is consistent with decisions of other state courts that have applied the majority test to this issue. See, e.g., *State* v. *Arceo*, 84 Haw. 1, 30, 928 P.2d 843 (1996); *Cooksey* v. *State*, supra, 359 Md. 19–21.

As a result, in the absence of a unanimity instruction, the state was required to either charge the defendant with multiple counts of sexual assault in the first degree, each premised on a separate instance of conduct, or limit the single count it did charge to a single instance of conduct. Alternatively, the state could have charged as it did, as long as a specific unanimity instruction was given. The state, however, using similar language as contained in count two, attempted to charge count one under a continuing course of conduct theory, and the trial court did not give a specific unanimity instruc-

nowhere in the legislative history is the issue of criminalizing a single act or an ongoing course of conduct explicitly mentioned. Second, in context, it is just as reasonable to construe that legislator's use of the terms "relationship" and "relations" as euphemisms for sexual intercourse, as it is to construe them as referring to criminalizing a continuing course of conduct. Thus, at most, this legislative history creates ambiguity and is of little use.

tion.[19] The state was not permitted to do so under the plain language of § 53a-70, and thus the state's manner of charging under count one does not cure the count's duplicity.

Nevertheless, the dissent relies on prior case law from the Appellate Court to argue that our courts have recognized a policy in favor of affording the prosecutor discretion in charging in cases involving sexual assault of a child. Although this court has not recognized a common-law exception for a continuing course of sexual assault, we are aware that this state's case law regarding unanimity and ongoing sexual assault of children has created some confusion on this issue, likely owing both to our belated recognition of persuasive federal case law, as well as to an understandable motivation to accommodate the difficulties inherent in prosecuting such cases involving children, particularly traumatized children. For example, the Appellate Court has distinguished between sexual assault cases in which there is specific testimony regarding multiple, separate incidents of sexual assault, and cases in which there is only general testimony that multiple incidents of sexual assault occurred but precise details regarding time and location are unknown. This occurs commonly in cases involving the ongoing sexual assault of children. This line of cases has caused confusion in the Appellate Court, including in the present case, over whether an information is duplicitous or whether any duplicity creates a risk of a nonunanimous verdict when a sexual assault case involves only general testimony about multiple incidents of sexual assault. See *State* v. *Joseph V.*, supra, 196 Conn. App. 737–38 (citing cases). To the

[19] Specifically, count one alleged in relevant part: "[T]he . . . [defendant] did commit the crime of sexual assault in the first degree in violation of [§] 53a-70 (a) (2) in that on or about diverse dates between August 23, 2006, and December 25, 2010 . . . [he] did engage in sexual intercourse (fellatio and anal intercourse) with . . . [the victim] . . . ." (Internal quotation marks omitted.) *State* v. *Joseph V.*, supra, 196 Conn. App. 722 n.12.

extent the defendant relies on this case law to argue that the Appellate Court has held that a single count of sexual assault premised on specific testimony of multiple, separate incidents of conduct may be alleged under a continuing course of conduct theory, we disagree. Rather, these cases show that, when there is only general testimony regarding the ongoing sexual assault of a child, a defendant more likely than not will not be prejudiced by a single count of sexual assault premised on multiple incidents of conduct.

This issue first arose in *State* v. *Saraceno*, 15 Conn. App. 222, 229, 545 A.2d 1116, cert. denied, 209 Conn. 823, 552 A.2d 431 (1988), and cert. denied, 209 Conn. 824, 552 A.2d 432 (1988), in which the defendant claimed that the information was duplicitous because the two counts of sexual assault of which he was convicted each alleged the commission of a single crime based on multiple, separate incidents of sexual intercourse. Id., 227–28. In resolving this claim, the court addressed the five policy considerations underlying the doctrine of duplicity. See id., 229–32. As to the possible lack of jury unanimity, the Appellate Court concluded "that with regard to the evidence adduced . . . it was not possible for the jury to return a verdict [that] was not unanimous. Given the complainant's age and her relative inability to recall with specificity the details of separate assaults, the jury was not presented with the type of detail laden evidence [that] would engender differences of opinion on fragments of her testimony. In other words, the bulk of the state's case rested on the credibility of the young complainant. When she testified . . . that on many occasions the defendant forced her to engage in fellatio while in a motor vehicle parked on the banks of the Connecticut River, the jury was left, primarily, only with the decision of whether she should be believed. With such general testimony, the spectre of lack of unanimity cannot arise. . . . Under

the specific circumstances . . . [the court] conclude[d] that the defendant was not prejudiced by the potential lack of jury unanimity." Id., 230–31.

In so holding, the court clearly focused on whether the defendant was prejudiced by the potential lack of unanimity, specifically, whether the jury possibly was confused. See id., 229–31. The court concluded that, in light of the nature of the general testimony, there was no possibility that the jury had a difference of opinion as to which acts the defendant had committed because the nature of the testimony did not allow the jury to be divided as to which instance of conduct occurred but, rather, required the jury to credit all or none of the victim's testimony. See id., 230. In other words, the court determined that any potential duplicity, assuming it existed, was not harmful. *Saraceno* did not hold that a single count of sexual assault premised on specific testimony of multiple separate instances of conduct may be alleged under a continuing course of conduct theory. Thus, under neither the statutory scheme at issue nor our state's common law may first degree sexual assault be charged as a continuing course of conduct crime when premised on specific testimony of multiple, separate incidents of conduct.[20] As a result, in the absence

[20] We are sympathetic "to the plight of both the young victims, often unable to state except in the most general terms when the acts were committed, and of prosecutors, either hampered by the lack of specific information or, when it is reported that the conduct occurred dozens or hundreds of times over a significant period, faced with the practical problem of how to deal with such a multitude of offenses." *Cooksey* v. *State*, supra, 359 Md. 18. Sympathies aside, however, we have only the words of our sexual assault statute to interpret and apply to the federal case law.

We note the observation of *Saraceno* and its progeny that a defendant is not prejudiced when a single count of sexual assault is premised on only general testimony that the defendant continuously sexually assaulted the minor victim over a period of time if this general testimony did not allow the jury to be divided as to which instance of conduct occurred but, rather, required the jury to credit all or none of the victim's testimony. This is consistent with how other state courts have treated general testimony regarding multiple instances of sexual assault of a child when applying federal law. See *State* v. *Voyles*, 284 Kan. 239, 253–55, 160 P.3d 794 (2007) (consider-

of a unanimity instruction, the state was required either

ing general nature of victims' testimony and general nature of defendant's defense challenging victims' credibility in determining harm of duplicitous indictment in multiple acts case); *State* v. *Ashkins*, 357 Or. 642, 654, 357 P.3d 490 (2015) (in addressing harm, explaining that, "in the context of nonspecific and undifferentiated evidence of multiple occurrences of a single charged offense, a jury concurrence instruction may have been unnecessary because there would have been no basis for the jurors to choose any particular occurrence as the one proven"); *State* v. *Fitzgerald*, Docket No. 38347-7-I, 1997 WL 327421, *2 (Wn. App. June 16, 1997) (decision without published opinion, 86 Wn. App. 1059) (in multiple acts case in which defendant entered only general denial and proof of crime was solely dependent on victim's credibility versus that of defendant, court's failure to give jury unanimity instruction may be harmless when rational trier of fact would have no reasonable doubt about other indistinguishable incidents).

The state may argue that, if these kind of general testimony cases do not prejudice a defendant, it might be that there exists a common-law exception to the right to jury unanimity for a continuing course of conduct of sexual assault of children when there is only general testimony. Because the state has not raised this issue, however, and because the present case does not involve only general testimony, we do not address it. We do note, however, that federal courts have held that a defendant is not prejudiced, even if a single count of an information is premised on multiple, separate incidents of conduct if the jury is charged with having to agree that all alleged acts occurred. See *State* v. *Douglas C.*, supra, 345 Conn. 446 n.14. Some state courts have followed suit in sexual assault cases involving children. See *People* v. *Jones*, 51 Cal. 3d 294, 322, 792 P.2d 643, 270 Cal. Rptr. 611 (1990) (modified August 15, 1990); *Baker* v. *State*, 948 N.E.2d 1169, 1177 (Ind. 2011).

We also note that several state legislatures have amended their sexual assault statutes to criminalize a continuing course of sexual assault against children. See *Cooksey* v. *State*, supra, 359 Md. 27. Our legislature might wish to consider similar legislation. Cf. Cal. Penal Code § 288.5 (Deering 2008) (prohibiting continuous sexual abuse of children); N.Y. Penal Law § 130.75 (McKinney 2020) ("[1] [a] person is guilty of a course of sexual conduct against a child . . . when, over a period of time not less than three months in duration: (a) he or she engages in two or more acts of sexual conduct, which includes at least one act of sexual intercourse, oral sexual conduct, anal sexual conduct or aggravated sexual contact, with a child less than eleven years old"). This is a more prudent course of action than adopting the dissent's proposed presumption, which would apply not only to sexual assault cases involving children but to all criminal statutes.

Finally, we recognize that sexual assault prosecutions are most often played out in state courts, not federal courts, and, thus, in defining the test applicable to claims of unanimity as to instances of conduct, federal courts perhaps did not consider the unique problems associated with charges of ongoing sexual assault of children. We do not believe, however, that we are

to charge the defendant with four counts of sexual assault in the first degree, each premised on a separate instance of conduct, or to limit the single count it did charge to a single instance of conduct. Alternatively, the state could have charged as it did without offending the defendant's right to jury unanimity if the trial court had given a specific unanimity instruction. Accordingly, because count one is premised on multiple, separate incidents of conduct, each of which could independently establish a violation of § 53a-70 (a) (2), that count was rendered duplicitous.

Because we hold that a single count of sexual assault premised on specific testimony of multiple separate acts, committed other than in the course of a single criminal episode of relatively brief, temporal duration, is duplicitous and violates a defendant's right to jury unanimity when no specific unanimity instruction is given, we must determine whether this duplicity prejudiced the defendant. In light of the evidence of multiple, separate instances of sexual intercourse, we conclude that the jury reasonably could have interpreted the trial court's instruction that it "must be unanimous that at least one violation of this statute by one of the methods alleged occurred between the defendant and [the victim] during the time frame indicated" to require it to be unanimous as to whether *an* instance of sexual intercourse occurred but not to require it to be unanimous as to *which* instance of sexual intercourse occurred. This is especially so in light of the specific nature of the testimony and defense counsel's extensive cross-examination and closing argument directed at unique credibility concerns related to each incident, as well as the prosecutor's closing argument that any of the alleged incidents would establish the element of sexual

at liberty to adopt a different constitutional test for different statutes or different kinds of crimes. Rather, we apply a single test and leave it to the legislature to craft or amend statutes as it sees fit in light of this test.

intercourse.[21] As a result, the state's concession of harm if we find any error is prudent. The duplicitous nature of count one created the potential for the jury to be confused or to disagree about which of the various acts of sexual intercourse the defendant committed, thereby prejudicing him. Accordingly, we reverse the defendant's conviction of sexual assault in the first degree and remand the case for a new trial as to that count.

C

We next apply the *Douglas C.* test to count three, which charged the defendant with conspiracy to commit risk of injury to a child in violation of §§ 53-21 (a) (2) and 53a-48 (a). The defendant argues that he was charged only with a single violation of § 53a-48 (a) but that there was testimony showing that he and T had agreed to commit two separate conspiracies: (1) when the defendant and T exchanged a "look" before the first

[21] Even if we were to agree with the dissent that § 53a-70 (a) (2) is ambiguous and that this court should adopt and apply the dissent's proposed presumption; see footnote 6 of this opinion; the application of this presumption to the facts and circumstances of this case still would establish a violation of the defendant's right to jury unanimity as to instances of conduct. The dissent argues that it is not impossible to know whether the jury unanimously agreed that the defendant committed any one particular assault because, although there was a mixture of both general testimony and specific testimony, "the defense as to each of those incidents—as well as to all of the generic continuous/repeated sexual abuse testimony—was the same"; text accompanying footnote 4 of the concurring and dissenting opinion; namely, that the witnesses, the victim and T lacked credibility. Although defense counsel did attack the credibility of these witnesses, the dissent overlooks the fact that defense counsel also cross-examined the victim and T extensively regarding the specifics of each of the three specific incidents of conduct and then argued in closing why the jury should not credit each particular incident. The primary focus of the trial was on these specific incidents of conduct. The present case is distinguishable from prior Appellate Court cases in which that court held that any duplicity or unanimity problem was not prejudicial because there was only generic testimony regarding ongoing abuse. See, e.g., *State* v. *Saraceno*, supra, 15 Conn. App. 230. Thus, it was very possible that the jury did not agree unanimously on which instance of conduct the defendant committed.

incident; and (2) when the defendant touched the victim in the living room while T watched. See footnote 4 of this opinion. We disagree.

Count three of the information alleged "[t]hat the said [defendant] did commit the crime of conspiracy to commit risk of injury to a child in violation of [§§] 53a-48 (a) and 53-21 (a) (2) in that on or about diverse dates between August 23, 2006, and December 25, 2010, at or near [the new residence of the victim's father], the said [defendant], with intent that conduct constituting the crime of risk of injury to a child be performed, did agree with one or more persons, namely, [T], to engage in and cause the performance of such conduct, and any one of them committed an overt act in pursuance of such conspiracy." (Internal quotation marks omitted.) *State* v. *Joseph V.*, supra, 196 Conn. App. 722 n.12.

At trial, to show that the defendant and T had agreed to enter into a conspiracy, the state presented testimony that, immediately prior to the first specific incident of abuse, the defendant and T shared a "look." Additionally, there was testimony that, during the third specific incident of abuse, the defendant sexually abused the victim while T was in the room and watched the abuse occur. See footnote 4 of this opinion.

In closing argument as to this count, the prosecutor discussed the first specific incident of abuse. As evidence of an agreement, he pointed to T's testimony that T and the defendant, who were best friends, first cousins, and in a sexual relationship, shared a look before the defendant began touching the victim. The prosecutor also argued that "[t]here's other incidents where [T] and [the] defendant would do this to [the victim]. [The victim] can't remember all of them and the details because it happened too many times." He then referred to the incident in which T watched the defendant sexually assault the victim: "I submit to you

there's an agreement if there's—if one person's sexually assaulting a child and the other person, the defendant, is awaiting his turn, or vice-versa, the defendant's sexually assaulting a child and the other person is awaiting their turn, that's evidence of an agreement. . . . [T]he ongoing course of conduct and sexual assaults done together [show] they entered into a conspiracy to sexually assault [the victim], not on an infrequent basis; they kept sexually assaulting him; that's all those times of the conspiracy."

A person is guilty of conspiracy under § 53a-48 "when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them commits an overt act in pursuance of such conspiracy." General Statutes § 53a-48 (a); see *State* v. *Pond*, 315 Conn. 451, 467, 108 A.3d 1083 (2015). The defendant argues that a single count of conspiracy may be premised on only an agreement to commit a single conspiracy but that there was evidence of two separate agreements to commit two separate conspiracies to commit risk of injury to a child. To determine whether count three was premised on multiple, separate acts requires that we review our case law interpreting § 53a-48 (a). This court continuously has interpreted the plain language of § 53a-48 (a) as criminalizing an agreement to commit a single conspiracy: "Whether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which constitutes the conspiracy which the statute punishes. The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one. . . . The single agreement is the prohibited conspiracy, and however diverse its objects it violates but a single statute . . . ." (Internal quotation marks omitted.) *State* v. *Ortiz*, 252 Conn. 533, 559, 747 A.2d 487 (2000). As a

result, for double jeopardy purposes, "[a] single agreement to commit several crimes constitutes one conspiracy. . . . [M]ultiple agreements to commit separate crimes constitute multiple conspiracies. . . . We consider several factors in determining whether multiple prosecutions are permitted for [multiple] conspiracies, including . . . the participants, the time period, similarity of the crimes, and the existence of common acts, objectives and a common location." (Citations omitted; internal quotation marks omitted.) *State* v. *Guerrera*, 167 Conn. App. 74, 110, 142 A.3d 447 (2016), aff'd, 331 Conn. 628, 206 A.3d 160 (2019).

As a result, a single count of conspiracy may be premised on an agreement to commit only a single conspiracy. Only if the evidence offered at trial shows the existence of two separate conspiracies is a single count of conspiracy duplicitous. See *United States* v. *Lapier*, 796 F.3d 1090, 1096 (9th Cir. 2015) ("[J]urors must still unanimously agree that the defendant is guilty of participating in a particular conspiracy . . . . [T]he evidence at trial tended to show at least two separate conspiracies—one between [the defendant] and his first [drug] supplier . . . and a later one between [the defendant] and his second [drug] supplier . . . but not a single overarching conspiracy." (Citations omitted.)).

In support of his argument of two separate conspiracies, the defendant contends that the testimony regarding the "look" that he and T shared was evidence of an agreement to commit the first, and only the first, incident of abuse. He further argues that the testimony regarding T's presence during the third specific incident showed an agreement to commit that, and only that, particular incident of abuse. It is well established, however, that a conspiracy may be alleged as a continuing offense. See, e.g., *State* v. *Hayes*, 127 Conn. 543, 605–606, 18 A.2d 895 (1941); see also id., 606 (" '[b]ut when the plot contemplates bringing to pass a continuous

result which will not continue without continuous cooperation of the conspirators to keep it up, and there is such continuous cooperation, it is a perversion of natural thought and of natural language to call such continuous cooperation a cinematographic series of distinct conspiracies, rather than to call it a single one' "). This is consistent with precedent from other states holding that a conspiracy may be alleged as a continuous course of conduct crime, and thus a single count of conspiracy premised on a continuous course of conduct is not duplicitous. See, e.g., *Commonwealth* v. *Albert*, 51 Mass. App. 377, 385, 745 N.E.2d 990 ("[n]o unanimity instruction was required because a conspiracy refers to a continuing course of conduct, rather than a succession of clearly detached incidents"), appeal denied, 434 Mass. 1104, 752 N.E.2d 240 (2001); see also *People* v. *Davis*, 488 P.3d 186, 192 (Colo. App. 2017) ("A single crime of conspiracy can be defined this broadly. . . . No unanimity instruction was required because a conspiracy refers to a continuing course of conduct, rather than a succession of clearly detached incidents." (Citation omitted; internal quotation marks omitted.)), cert. denied, Colorado Supreme Court, Docket No. 17SC386 (April 9, 2018).

The defendant's claim then comes down to whether count three was premised on an agreement between the defendant and T to commit two separate conspiracies or a single, ongoing conspiracy. The information and the prosecutor's closing argument clearly show that count three was premised on a single, ongoing conspiracy, not on two separate conspiracies. Evidence that the defendant and T shared a "look" and later, during a separate incident, that T was present for the defendant's abuse of the victim merely constituted separate proof of their ongoing agreement to commit the crime of risk of injury against the victim through contact with

intimate parts. As charged, argued and proven, this was not evidence of two separate conspiracies.

Our conclusion that count three was premised on a single, ongoing conspiracy is supported by the fact that these two incidents involved the same participants and similar conduct (contact with intimate parts), occurred in various areas of a single location (the residence of the victim's father), and had the same objective (contact with intimate parts between the defendant and the victim). Accordingly, we conclude that count three was not premised on multiple, separate acts and, thus, was not duplicitous.

II

Alternatively, the defendant claims that, if the second and third counts alleging risk of injury and conspiracy did not violate his right to jury unanimity as to instances of conduct, these counts nonetheless violate his right to jury unanimity as to elements because, as the Appellate Court held, each count was premised on multiple violations of the alternative types of conduct prohibited by § 53-21 (a) (2). Specifically, the defendant argues that the statutory requirement that the state prove that either he had contact with the victim's intimate parts or subjected the victim to contact with his intimate parts are historically separate offenses constituting separate elements, and thus are facially duplicitous. Because the trial court denied his request for a bill of particulars or a specific unanimity instruction, the defendant argues, this duplicity violated his right to a unanimous jury verdict. He argues that the Appellate Court properly held that counts two and three created a risk of a nonunanimous verdict but committed error by applying the wrong test, and thus improperly held that his constitutional right to jury unanimity was not violated. We agree with the defendant that this court and the Appellate Court have been applying the wrong test to claims of

unanimity as to elements, but we disagree that, under the proper test, the statutory language at issue created two separate elements, thereby violating the defendant's right to jury unanimity.

Initially, we must determine what test to apply to claims of unanimity as to elements. As discussed in part I of this opinion, these claims require a court to determine whether the statutory language at issue creates alternative means of committing a single element or, instead, creates separate elements, thereby constituting separate crimes that must be charged in separate counts. Understandably, as to the defendant's claim of unanimity as to elements, the Appellate Court applied the test this court announced in *State* v. *Famiglietti*, 219 Conn. 605, 619–20, 595 A.2d 306 (1991), and held that, under this test, because counts two and three were premised on the violation of multiple statutory clauses, counts two and three were duplicitous but that, because the trial court did not specifically sanction a nonunanimous verdict, this error was harmless. See *State* v. *Joseph V.*, supra, 196 Conn. App. 745–48.

In *Famiglietti*, this court applied a multifactor test to determine whether alternative statutes, statutory subsections, or statutory clauses constituted separate elements or alternative means: "We first review the instruction that was given to determine whether the trial court has sanctioned a nonunanimous verdict. If such an instruction has not been given, that ends the matter. Even if the instructions at trial can be read to have sanctioned such a nonunanimous verdict, however, we will remand for a new trial only if (1) there is a conceptual distinction between the alternative acts with which the defendant has been charged, and (2) the state has presented evidence to support each alternative act with which the defendant has been charged." (Internal quotation marks omitted.) *State* v. *Reddick*, 224 Conn. 445, 453, 619 A.2d 453 (1993), quoting *State* v.

Famiglietti, supra, 219 Conn. 619–20. This test, at times referred to as the *Famiglietti* test, is consistent with the test the United States Court of Appeals for the Fifth Circuit applied in *United States* v. *Gipson*, 553 F.2d 453 (5th Cir. 1977), which this court consistently has applied in unanimity cases both prior to and after deciding *Famiglietti*. See, e.g., *State* v. *Tucker*, 226 Conn. 618, 644–48, 629 A.2d 1067 (1993); *State* v. *Anderson*, supra, 211 Conn. 34–35.

Approximately one month before this court issued its decision in *Famiglietti*, however, the United States Supreme Court rejected the *Gipson* test for determining whether alternative statutes, statutory subsections, or statutory clauses constitute alternative elements, requiring jury unanimity, or alternative means of committing a single element, not requiring jury unanimity. Specifically, in *Schad*, the defendant claimed that Arizona's first degree murder statute violated his sixth amendment right to unanimity because it did not require the jury to be unanimous as to one of the statute's two alternative theories of committing first degree murder —premeditated murder or felony murder. *Schad* v. *Arizona*, supra, 501 U.S. 630 (opinion announcing judgment). The court reframed the defendant's claim as a due process challenge "to Arizona's characterization of [first degree] murder as a single crime as to which a verdict need not be limited to any one statutory alternative, as against which he argue[d] that premeditated murder and felony murder are separate crimes as to which the jury must return separate verdicts." Id., 630–31 (opinion announcing judgment); see *State* v. *Douglas C.*, supra, 345 Conn. 437 n.10. In other words, the court was tasked with deciding whether the two mental states—"the one being premeditation, the other the intent required for murder combined with the commission of an independently culpable felony"—constituted either alternative means of satisfying the mens

rea element, or separate elements, requiring separate verdicts or a specific unanimity instruction. *Schad* v. *Arizona*, supra, 632 (opinion announcing judgment); see *State* v. *Douglas C.*, supra, 437 n.10.

The court in *Schad* acknowledged that it is difficult to discern when alternative mentes reae or actus rei constitute alternative means of committing the element at issue, and when the "differences between means become so important that they may not reasonably be viewed as alternatives to a common end, but must be treated as differentiating what the [c]onstitution requires to be treated as separate offenses." *Schad* v. *Arizona*, supra, 501 U.S. 633 (opinion announcing judgment). The court noted that the Fifth Circuit in *Gipson* had "attempted to define what constitutes an immaterial difference as to mere means and what constitutes a material difference requiring separate theories of crime to be treated as separate offenses subject to separate jury findings . . . ." Id., 633–34 (opinion announcing judgment).

In *Gipson*, the defendant was charged with and convicted of a single count of violating 18 U.S.C. § 2313 (1976), which prohibited knowingly "receiv[ing], conceal[ing], stor[ing], barter[ing], sell[ing] or dispos[ing] of" any stolen motor vehicle or aircraft moving in interstate commerce. (Internal quotation marks omitted.) *United States* v. *Gipson*, supra, 553 F.2d 455 n.1. The District Court instructed the jury that it did not have to agree on which of the enumerated acts the defendant had committed. Id., 455–56. Applying the two-pronged test discussed previously, the Fifth Circuit reversed the District Court's judgment, reasoning that the defendant's right to jury unanimity was violated by the joinder, in a single count, of "two distinct conceptual groupings," receiving, concealing, and storing forming the first grouping (referred to by the court as "housing"), and bartering, selling, and disposing ("market-

ing") constituting the second grouping. Id., 458–59. Specifically, the court in *Gipson* held that the alternative acts of selling and receiving a stolen vehicle were conceptually distinct such that they constituted alternative elements, not alternative means of committing a single element. See id., 458.

In reviewing *Gipson*, the court in *Schad* stated that it was "not persuaded that the *Gipson* approach really answers the question, however. Although the classification of alternatives into 'distinct conceptual groupings' is a way to express a judgment about the limits of permissible alternatives, the notion is too indeterminate to provide concrete guidance to courts faced with verdict specificity questions. . . . This is so because conceptual groupings may be identified at various levels of generality, and we have no a priori standard to determine what level of generality is appropriate." (Citations omitted.) *Schad* v. *Arizona*, supra, 501 U.S. 635 (opinion announcing judgment).

Rather than follow *Gipson*, the court in *Schad* held that, to determine whether the legislature intended either to enumerate alternative means of satisfying a single element or to define separate elements, "our sense of appropriate specificity is a distillate of the concept of due process with its demands for fundamental fairness . . . and for the rationality that is an essential component of that fairness. In translating these demands for fairness and rationality into concrete judgments about the adequacy of legislative determinations, we look both to history and wide practice as guides to fundamental values, as well as to narrower analytical methods of testing the moral and practical equivalence of the different mental states that may satisfy the mens rea element of a single offense. The [i]nquiry is undertaken with a threshold presumption of legislative competence to determine the appropriate relationship between means and ends in defining the elements of a crime."

(Citation omitted.) Id., 637–38 (opinion announcing judgment).

Federal courts of appeals have explained that, "[e]ven though this rule [under *Schad*] speaks in terms of a mens rea analysis, it rejects the *Gipson* model for analyzing unanimity problems. Thus the *Schad* rule should apply equally to analysis of multiple [actus reus] elements as well as analysis of multiple mens rea elements." *United States* v. *Sanderson*, 966 F.2d 184, 188 (6th Cir. 1992). As a result, in analyzing both multiple actus reus elements and multiple mens rea elements, federal courts of appeals have taken their cues from *Schad* and considered the statutory language, relevant legal traditions and practices, the overall structure of the statute at issue, its legislative history, moral and practical equivalence between the alternative actus rei or mentes reae, and any other implications for unfairness associated with the absence of a specific unanimity instruction. See, e.g., *United States* v. *Lee*, supra, 317 F.3d 37; *United States* v. *Sanderson*, supra, 188.

This court never has addressed the effect of the Supreme Court's analytical framework in *Schad* on our adoption of the *Gipson* test as applied in *Famiglietti*.[22] Federal appellate courts, however, including the Fifth Circuit, specifically have held that *Schad* overruled and replaced the *Gipson* test. See, e.g., *Maxwell* v. *Thaler*, 350 Fed. Appx. 854, 857 (5th Cir. 2009) (applying *Schad*, not *Gipson*), cert. denied, 559 U.S. 978, 130 S. Ct. 1698, 176 L. Ed. 2d 191 (2010); *Reed* v. *Quarterman*, 504 F.3d 465, 481–82 (5th Cir. 2007) (referring to *Gipson* test as "former test" and applying *Schad* test); *United States* v. *Verbitskaya*, 406 F.3d 1324, 1334 (11th Cir. 2005) (*Schad* rejected *Gipson* analysis), cert. denied, 546 U.S. 1096, 126 S. Ct. 1095, 163 L. Ed. 2d 864 (2006); see also *United*

[22] This court cited to *Schad* in *Famiglietti* but did not address the effect of *Schad* on the applicable test. See *State* v. *Famiglietti*, supra, 219 Conn. 620.

States v. *Sanderson*, supra, 966 F.2d 188 ("we interpret *Schad* to hold that there must be a commonsense determination of a subject statute's application and purpose in light of traditional notions of due process and fundamental fairness").

Since *Schad*, a majority of federal courts of appeals, including the United States Court of Appeals for the Second Circuit, have applied the *Schad* test to determine whether multiple statutes, statutory provisions, or statutory clauses constitute separate elements or alternative means of committing a single element. See, e.g., *United States* v. *Gonzalez*, 905 F.3d 165, 185 (3d Cir. 2018), cert. denied, U.S. , 139 S. Ct. 2727, 204 L. Ed. 2d 1120 (2019); *United States* v. *Mickey*, 897 F.3d 1173, 1181 (9th Cir. 2018); *United States* v. *McIntosh*, 753 F.3d 388, 392–93 (2d Cir. 2014); *United States* v. *Allen*, 603 F.3d 1202, 1213 (10th Cir.), cert. denied, 562 U.S. 1076, 131 S. Ct. 680, 178 L. Ed. 2d 505 (2010); *United States* v. *Hurt*, 527 F.3d 1347, 1355 (D.C. Cir. 2008); *Reed* v. *Quarterman*, supra, 504 F.3d 481; *United States* v. *Verbitskaya*, supra, 406 F.3d 1334; *United States* v. *Lee*, supra, 317 F.3d 37; *United States* v. *Sanderson*, supra, 966 F.2d 188. In light of the court's holding in *Schad* and its progeny, we agree with the defendant that the *Gipson* test, as adopted in *Famiglietti*, has been replaced by the *Schad* test,[23] and thus we apply the latter in the present case to analyze the defendant's claim.

[23] The state argues that the *Gipson* and *Schad* tests merely use different language to express the same legal test. This argument is undermined by *Schad*'s explicit rejection of the test applied in *Gipson*. Even if the *Gipson* rule were still considered good law, the defendant's claim would fail both because the trial court did not explicitly sanction a nonunanimous verdict and because, even if we assume that the trial court did sanction a nonunanimous verdict, this court already has held that, under the *Gipson* test, active or passive participation in sexual activity as proscribed under § 53-21 (a) (2) constitutes alternative means, not elements, and does not require a specific unanimity instruction. See *State* v. *Spigarolo*, 210 Conn. 359, 391–92, 556 A.2d 112, cert. denied, 493 U.S. 933, 110 S. Ct. 322, 107 L. Ed. 2d 312 (1989).

We begin with the text of § 53-21 (a): "Any person who . . . (2) has contact with the intimate parts, as defined in section 53a-65, of a child under the age of sixteen years or subjects a child under sixteen years of age to contact with the intimate parts of such person, in a sexual and indecent manner likely to impair the health or morals of such child . . . shall be guilty of . . . a class B felony for a violation of subdivision (2) of this subsection, except that, if the violation is of subdivision (2) of this subsection and the victim of the offense is under thirteen years of age, such person shall be sentenced to a term of imprisonment of which five years of the sentence imposed may not be suspended or reduced by the court."[24] It is not clear from the plain language of § 53-21 (a) (2) whether the phrase, "has contact with the intimate parts . . . of a child under the age of sixteen years or subjects a child under sixteen years of age to contact with the intimate parts of such person," creates two separate elements or alternative means of having contact with intimate parts. Our case law regarding § 53-21 (a) (2),[25] however, suggests that

[24] General Statutes § 53a-48 (a) provides: "A person is guilty of conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them commits an overt act in pursuance of such conspiracy."

The defendant argues that because, in the present case, the state could have based the charge of risk of injury to a child on alternative types of statutorily prohibited conduct, the conspiracy count likewise rested on alternative bases of criminal liability. Thus, the defendant's claim as it relates to count three is premised on the success or demise of his claim regarding count two. Because we hold that the statutory language at issue in § 53-21 (a) (2) created alternative means of committing a single element, and not separate elements, thereby not violating the defendant's right to jury unanimity, the defendant's claims as it relates to count three likewise fails.

[25] The defendant argues that case law regarding double jeopardy and risk of injury to a child establishes that the two alternatives create separate offenses that the state must charge as such. The defendant, however, misconstrues our double jeopardy case law. For example, in *State* v. *Snook*, supra, 210 Conn. 244, this court held that the state may charge a defendant with two counts of risk of injury to a child: one count premised on the defendant's contact with the victim's intimate parts; the other count premised on the

this statutory language creates alternative means, not elements. Specifically, under *Gipson*, we previously have held that these two statutory requirements are not conceptually distinct; rather, the only distinction between the two forms of contact is whether the defendant subjects the victim "to either active or passive participation in sexual activity . . . ." *State* v. *Spigarolo*, 210 Conn. 359, 391–92, 556 A.2d 112, cert. denied, 493 U.S. 933, 110 S. Ct. 322, 107 L. Ed. 2d 312 (1989). Although we hold today that the *Gipson* test is no longer applicable to claims of unanimity as to elements, our analysis in *Spigarolo* is relevant to our analysis under the *Schad* test to the extent it shows our legal traditions and practices regarding our interpretation of this statutory language. See *United States* v. *Lee*, supra, 317 F.3d 37. Additionally, to the extent the statutory language is ambiguous, the legislative history shows that subsection (a) (2) was created to distinguish sexual contact from the nonsexual conduct prohibited under subsection (a) (1). Thus, the purpose of subsection (a) (2) is to criminalize sexual contact with a child that would likely impair the health or morals of that child. The statutory language merely establishes two alternative ways of having sexual contact with a child. This construction is supported by the fact that this court is unaware of any moral or practical distinction between subjecting a child to passive participation in sexual activity (the defendant's having contact with the child's intimate parts) and active participation in sexual activity (the defendant's forcing the child to have contact with the defendant's intimate parts). Accordingly, we conclude that the language of § 53-21 (a) (2) creates

defendant's having subjected the victim to contact with the defendant's intimate parts. See id., 262. We did not hold, however, that, when alleging that a defendant has violated § 53-21 multiple times, the state must charge the defendant under separate counts for each violation. Rather, for double jeopardy purposes, the state may, but is not required to, charge each violation in a separate count.

two alternative ways of satisfying the element of contact with intimate parts, and thus counts two and three were not duplicitous.

The judgment of the Appellate Court is reversed insofar as that court affirmed the defendant's conviction of sexual assault in the first degree and the case is remanded to that court with direction to reverse the defendant's conviction of that offense and to remand the case to the trial court for a new trial with respect to that offense only; the judgment of the Appellate Court is affirmed insofar as that court affirmed the defendant's conviction of risk of injury to a child and conspiracy to commit risk of injury to a child.

In this opinion McDONALD and ECKER, Js., concurred.

MULLINS, J., with whom KAHN, J., joins, concurring in part and dissenting in part. In my concurring opinion in *State* v. *Douglas C.*, 345 Conn. 421, A.3d (2022), I explained why I declined to follow the majority in adopting a new rule whereby (1) duplicitous charging of multiple alleged violations of a criminal statute in a single count *necessarily* violates the sixth amendment right to a unanimous jury verdict in the absence of a bill of particulars or specific unanimity instruction, and (2) there is an exception for course of conduct charging, but such charging is constitutionally permissible only when the legislature has expressly authorized it for the specific statute at issue. Id., 472 (*Mullins*, *J.*, concurring). I believe that this court should instead adopt the more flexible, case-by-case framework used by the United States Court of Appeals for the Second Circuit, among various other federal and sister state courts. That approach makes more sense as a general matter, and, in particular, it better comports with how the state

historically has charged repeated sexual assaults on a child.

Because I discussed these matters fully in *Douglas C.*, in this opinion, I will confine my discussion of the governing legal principles to a brief recapitulation. See part I of this opinion. Unlike in *Douglas C.*, however, in the present case, I cannot fully agree with the result of the majority's analysis. Specifically, as I discuss in part II of this opinion, I would affirm the conviction of the defendant, Joseph V., for sexual assault in the first degree, in violation of General Statutes § 53a-70 (a) (2) (child sexual assault).

In addition, as I discuss in part III of this opinion, I believe that juxtaposing our analyses of § 53a-70 (a) (2) and General Statutes § 53-21 (a) (2), the risk of injury to a child provision based on sexual assault, highlights what I see as one important flaw in the majority's approach, namely, its inability to convincingly distinguish between those statutes that purportedly allow for course of conduct charging under General Statutes § 1-2z and those that do not. In my view, child sexual assault and risk of injury to a child, which have been charged hand in hand as continuing offenses for the better part of one century in Connecticut, are indistinguishable with respect to duplicity and the unanimity requirement. For these reasons, I respectfully dissent from part I B of the majority opinion. I concur in the results reached by the majority in part I A and C and part II of its opinion, in which it upholds the defendant's conviction of risk of injury to a child in violation of § 53-21 (a) (2) and conspiracy to commit risk of injury to a child in violation of § 53-21 (a) (2) and General Statutes § 53a-48 (a).

I

In *Douglas C.*, I discussed at some length my disagreement with the majority as to the law that governs claims

of duplicity and related constitutional issues with respect to cases in which the state charges in one count multiple violations of a single statutory provision. See *State* v. *Douglas C.*, supra, 345 Conn. 478–500 (*Mullins*, *J.*, concurring); see also id., 448 (outlining majority's three step test but also noting exception for permissibly charged course of conduct). As I noted in *Douglas C.*, "[m]uch of the difference between my view and that of the majority centers on how to treat course of conduct charging. The framework I would have us adopt when assessing whether charging multiple instances in a single count is permissible or impermissible is the following four step approach: First, pursuant to . . . § 1-2z, if the statute at issue either expressly permits or expressly bars course of conduct charging, or if there are other *clear* indicia of legislative intent, then courts must defer to the legislative will. Second, if the statute at issue is silent as to course of conduct charging, and there are no other clear indicia of legislative intent, as will most often be the case, then the prosecutor has the discretion to charge repeated violations of the statute as individual incidents or as a single course of conduct. Third, notwithstanding the prosecutor's charging decision, the trial court should determine whether such charging (1) would be unreasonable or unfair under the circumstances or (2) would otherwise violate the defendant's fifth and sixth amendment (and corresponding state constitutional) rights to notice, to present a defense, to a unanimous jury verdict, and to not twice be placed in jeopardy for the same offense, among others. Such determinations must be made on a case-by-case basis. If, at trial, the judge concludes that there is potential for unfairness or a constitutional violation, then the judge should not permit course of conduct charging and should either order that the charges be separated or give an instruction to the jury that it must be unanimous as to at least one specific incident. Fourth, if an

appellate court, on review, concludes that the trial court should not have permitted course of conduct charging, either because the defendant's conduct cannot fairly be characterized as a single scheme or pattern under the statute at issue, or because the constitutional rights that underlie the rule against duplicity were not adequately secured, then the trial court's determination is subject to harmless error analysis." (Emphasis in original; footnote omitted.) Id., 474–76 (*Mullins*, *J.*, concurring).

As I further detailed in *Douglas C.*, there are numerous reasons why I believe that the more flexible Second Circuit approach to charging multiple instances cases is to be preferred over the more formulaic approach that the majority adopts, particularly in cases such as this. See id., 484–97 (*Mullins*, *J.*, concurring). Rather than rehash all those reasons here, I highlight one, which is that following the approach I favor, in my view, more appropriately serves the interests both of the child victim (who may be unable to testify as to the dates and details of particular assaults with sufficient precision to differentiate them) and of the defendant (by avoiding the needless cumulation of charges and potential sentences). The majority's approach, in contrast, will do as much to penalize as to protect criminal defendants and will make it virtually impossible to prosecute many child molestation cases, among other heinous crimes, contrary to the clearly stated intent of the legislature to protect young children. That is an unfortunate reality of the majority's position and one I do not think is warranted, either practically or under the law. I decline to follow it.[1]

[1] Although the majority is correct that whatever rules we adopt will potentially apply to most crimes; see footnote 20 of the majority opinion; the practical reality is that the scope of the continuing offense doctrine is most frequently and most hotly debated in cases that involve the sexual abuse of children. As a practical matter, regardless of which approach we adopt, course of conduct charging will not be appropriate for the vast majority of criminal prosecutions.

II

Applying the framework I propose to the defendant's sexual assault conviction under count one, I conclude, contrary to the majority, that the charge was not impermissibly duplicitous and that his constitutional rights were not infringed. Accordingly, I would affirm the conviction.

The first step in the analysis is to consider the language of the statute, pursuant to § 1-2z, to ascertain whether the legislature has directly addressed the question of whether repeated violations of § 53a-70 may be charged as one continuing offense. Section 53a-70 (a) (2), the first degree sexual assault statute, provides in relevant part: "A person is guilty of sexual assault in the first degree when such person . . . engages in sexual intercourse with another person and such other person is under thirteen years of age and the actor is more than two years older than such person . . . ." The statute neither expressly authorizes nor expressly prohibits course of conduct charging.[2]

The majority states that "we can infer from the legislature's use in other statutes of the phrase 'course of conduct,' as well as other phrases that connote more than one act, that the legislature knows how to criminalize a course of conduct when it wants to do so. From the fact that the legislature did not do so in § 53a-70, we may infer that it did not intend to criminalize a

[2] The majority contends that, although the phrase "engages in sexual intercourse" may be ambiguous, insofar as one can *engage* in intercourse on a single occasion or on a regular basis, the statute is nevertheless unambiguous because intercourse itself happens on a onetime basis. See part I B of the majority opinion. I disagree. In my view, the text of the statute is facially ambiguous, in that "engages in sexual intercourse"—the actual conduct prohibited by the statute—could refer to one act or several. General Statutes § 53a-70 (a) (2). Thus, we may consider the legislative history pursuant to § 1-2z. I consider the statutory text in greater detail, as well as the legislative history, in part III of this opinion.

continuous course of conduct." (Footnotes omitted.) Part I B of the majority opinion. To support this point, the majority cites to General Statutes § 53a-181d, the second degree stalking statute, as an example of a statute in which the legislature did expressly authorize course of conduct charging. See footnote 13 of the majority opinion.

But stalking, by definition, *has to be* a course of conduct crime. The legislature included the terms "course of conduct" in the second degree stalking statute; General Statutes § 53a-181d (b) (1) and (2); and "repeatedly" in the third degree stalking statute; General Statutes § 53a-181e (a) (2); to make clear that an individual cannot stalk someone by following or harassing them just once. There is no reason to expect that the legislature would include language imposing that same requirement in every statute that, like § 53a-70, merely can be a continuing offense.

Even more to the point, however, our legislature also has demonstrated expressly that it knows how to say, in no uncertain terms, when an ongoing crime has to be charged as discrete infractions. A good example of a Connecticut statute demonstrating this legislative knowledge is General Statutes § 15-173 (b), which, for docking violations, imposes a daily fine of up to $10,000 and expressly provides that "[e]ach violation shall be a separate and distinct offense, and, in the case of a continuing violation, each day's continuance thereof shall be deemed to be a separate and distinct offense." Another example is General Statutes § 22a-226 (a), which uses substantially the same language with respect to civil penalties for violations of solid waste management law. There is no language like that in our first degree sexual assault and child sexual assault statutes. Our legislature has thus clearly demonstrated that it knows the difference between a single violation of a statute and a continuing violation and that it knows how to

say so expressly when an ongoing crime has to be charged as discrete infractions. When, as in the case of child sexual assault, the legislature has not spoken specifically on the issue, course of conduct charging is, therefore, left to the discretion of the prosecutor, subject always to the oversight of the trial court and the restraints imposed by the federal and state constitutions.

The second step in the analysis is to consider whether the victim's allegations reasonably can be characterized as an ongoing pattern or scheme of misconduct such that course of conduct charging was a proper exercise of prosecutorial discretion. They clearly can. The victim's half brother, T, began regularly sexually abusing the victim when the victim was four or five years old. The defendant began to participate in the assaults, as part of an ongoing conspiracy, when the victim was six or seven years old, and continued to do so until the victim was ten. The victim was able to describe some details of three such incidents involving the defendant, but, for the most part, he was unable to say when the abuse occurred or to provide specific, distinguishing details. In particular, he testified that the assaults "blurred together because there [were] too many to count and distinguish between." He indicated that the assaults occurred "[m]ultiple times" and that they always occurred at his father's home, primarily in his father's or T's bedroom.

In addition, although he was unable to remember any specifics, he did testify that that the assaults typically involved T and the defendant performing the same sexual acts, namely, trying to anally penetrate him or prodding him to perform fellatio or to manually stimulate them. On facts such as these, I have no difficulty concluding that the alleged assaults, involving the same defendant committing the same crimes against the same victim at the same location, were alike enough in nature

and motive to constitute a pattern or scheme, such that course of conduct charging was permissible. I believe that our sister courts would agree.[3] The essence of the charged crime was, in short, the ongoing pattern of abuse.

The third step in the analysis is the critical question of whether charging the defendant's various assaults as a single course of conduct violated his sixth amendment right to a unanimous jury verdict. The defendant contends that, insofar as the victim and T offered detailed accounts of four specific sexual assaults, it is impossible to know whether the jury unanimously agreed that he committed any one particular assault. I disagree. Much of the testimony regarding the defendant's alleged sexual assaults of the victim was generic in nature, and the majority in *Douglas C.* concedes that, when generic testimony is at issue, the primary question for the jury is simply the credibility of the complainant and other key witnesses. See *State* v. *Douglas C.*, supra, 345 Conn. 513 (*Mullins*, *J.*, concurring). In addition, although defense counsel cross-examined the victim and T regarding some of the specific details of the assaults that they described, the defense as to each of those incidents—as well as to all of the generic continuous/repeated sexual abuse testimony—was the same.[4] In

[3] See, e.g., *State* v. *Generazio*, 691 So. 2d 609, 611 (Fla. App. 1997) ("[w]ith the notable exception of New York, the courts of our sister states have recognized that child molestation is, by its very nature, a continuous course of criminality"); *Commonwealth* v. *King*, 387 Mass. 464, 467, 441 N.E.2d 248 (1982) (rejecting argument that rape of child could not be continuing offense); *State* v. *Cruz*, Docket No. A-1-CA-35877, 2019 WL 5095831, *1, *3 (N.M. App. September 30, 2019) (allowing course of conduct charging of criminal sexual penetration of minor), cert. denied, New Mexico Supreme Court, Docket No. S-1-SC-37991 (December 12, 2019); see also *State* v. *Saraceno*, 15 Conn. App. 222, 229–30, 545 A.2d 1116, cert. denied, 209 Conn. 823, 552 A.2d 431 (1988), and cert. denied, 209 Conn. 824, 552 A.2d 432 (1988).

[4] The defense consistently argued that the two young men, the state's primary witnesses, simply lacked credibility. Defense counsel argued that T was testifying for the state and conforming his testimony to that of the victim, pursuant to a cooperation agreement that would limit his own potential jail time. With respect to the victim, defense counsel focused on his

such instances, the sixth amendment is not implicated because the crime that is being charged is, in essence, the course of conduct itself. See, e.g., *United States* v. *Tutino*, 883 F.2d 1125, 1141 (2d Cir. 1989), cert. denied, 493 U.S. 1081, 110 S. Ct. 1139, 107 L. Ed. 2d 1044 (1990), and cert. denied sub nom. *Guarino* v. *United States*, 493 U.S. 1082, 110 S. Ct. 1139, 107 L. Ed. 2d 1044 (1990); *United States* v. *Margiotta*, 646 F.2d 729, 733 (2d. Cir. 1981). So long as the state can prove that, then all of the essential elements of the statute at issue have been satisfied, and whether the defendant acted in a particular way on a particular day is immaterial; it is simply part of the means by which the criminal scheme was accomplished. In addition, the charge that the trial court gave the jury came very close to a specific unanimity instruction and is consistent with charges that we have approved as giving the jury adequate guidance.[5]

In many such cases, courts of this state and others, regardless of whether they deem course of conduct charging to be impermissibly duplicitous, have concluded that there was no reversible error because the primary question for the jury was the relative credibility of the complainant and the defendant, and the guilty verdict necessarily meant that the jury had resolved

unwillingness to review his prior statements to refresh his recollection and to clarify inconsistent testimony. Although defense counsel certainly pressed on the specifics of some of the alleged incidents as examples of both witnesses' lack of credibility, there was never any suggestion that one incident was especially unlikely or was subject to unique defenses, such as an alibi. Rather, the entire defense was predicated on the theory that T had a long history of abusing the victim and that the defendant had no motive to do so and had been wrongly implicated in the ongoing abuse. The prosecutor, as well as the trial court, concurred that the case came down to the credibility of these key witnesses.

[5] The court charged the jury in relevant part: "In order to convict the defendant on this count, you must be unanimous that at least one violation of this statute by one of the methods alleged occurred between the defendant and [the victim] during the time frame indicated."

those questions in favor of the complainant. See, e.g., *State* v. *Vumback*, 263 Conn. 215, 229–31, 819 A.2d 250 (2003); *State* v. *Saraceno*, 15 Conn. App. 222, 230–31, 545 A.2d 1116, cert. denied, 209 Conn. 823, 552 A.2d 431, and cert. denied, 209 Conn. 824, 552 A.2d 432 (1988); see also, e.g., *Arizona* v. *Alcantar*, Docket No. 2 CA-CR 2020-0105, 2022 WL 3919832, *8 (Ariz. App. August 31, 2022); *Commonwealth* v. *Sineiro*, 432 Mass. 735, 737–38, 740 N.E.2d 602 (2000); *State* v. *Altgilbers*, 109 N.M. 453, 467–68, 786 P.2d 680 (App. 1989), cert. denied, 109 N.M. 419, 785 P.2d 1038 (1990).

Finally, we must consider whether any of the defendant's fifth amendment rights were violated when the state charged his many alleged assaults on the victim as one course of conduct. As in *Douglas C.*, the substitute information afforded the defendant adequate notice of the charged crimes; there is no potential double jeopardy violation because the state would be precluded from charging the defendant with any additional sexual assaults of the victim during the years in question; and the defendant was not hampered in his ability to present an alibi or other defense, insofar as he indisputably was present at the residence of the victim's father with the victim between 2006 and 2010, when the charged crimes occurred.

Accordingly, applying the Second Circuit framework, I would conclude that, under the facts of the present case, the state did not violate any of the defendant's fifth or sixth amendment rights by charging count one as a continuing course of conduct. I would therefore affirm his conviction of sexual assault in the first degree, in violation of § 53a-70 (a) (2), rather than remand for a new trial.

III

I have explained in part II why I believe that course of conduct charging of sexual assault in the first degree

in count one was appropriate in this case and did not violate the defendant's fifth or sixth amendment rights. A similar analysis applies to the risk of injury to a child and conspiracy charges. To address each of those charges here is unnecessary because I ultimately agree with the majority that counts two and three were not impermissibly duplicitous. I concur in the result reached by the majority in part I A and C and part II of its opinion.

It is important for me to explain why I believe that sexual assault and risk of injury to a child should not be treated differently when it comes to duplicity and unanimity. These crimes are almost always charged together when the abuse is visited on a child, the state has charged them both as continuing offenses for the better part of one century; see part III C of this opinion; and, in the past, both this court and the Appellate Court have treated them alike for purposes of course of conduct charging. See, e.g., *State* v. *Snook*, 210 Conn. 244, 265, 555 A.2d 390, cert. denied, 492 U.S. 924, 109 S. Ct. 3258, 106 L. Ed. 2d 603 (1989); *State* v. *William B.*, 76 Conn. App. 730, 761, 822 A.2d 265, cert. denied, 264 Conn. 918, 828 A.2d 618 (2003); *State* v. *Saraceno*, supra, 15 Conn. App. 227–32. I am concerned that the majority's disparate treatment of these two extraordinarily similar statutes is without solid foundation, and I believe that it exposes an important shortcoming in the majority's approach.

The majority advances three possible bases for distinguishing between § 53-21 (a) (2) (risk of injury to a child) and § 53a-70 (a) (2) (first degree sexual assault of a child), such that the former can be a continuing course of conduct crime whereas the latter cannot: (1) the statutory text, (2) the legislative history, and (3) previous holdings of this court and the Appellate Court. I consider each theory in turn.

A

First, the majority suggests that the primary test, under § 1-2z, is whether the statutory language permits course of conduct charging. See part I of the majority opinion; see also *State* v. *Douglas C.*, supra, 345 Conn. 443–44 and n.12. I agree that, if the statutory language expressly permits course of conduct charging, then it is permissible to charge a crime as a continuing course. Similarly, when the statutory language expressly bars course of conduct charging, prosecutors lack the discretion to charge a crime in that manner. In this case, however, neither statute expressly recognizes or criminalizes a continuing course of conduct; nor does either statute expressly preclude course of conduct charging. The majority acknowledges that "the phrase 'contact with the intimate parts' in the risk of injury statute does not appear to clarify whether the statute criminalizes a continuing course of conduct or limits its scope to a single occurrence." *State* v. *Douglas C.*, supra, 464. The same is true of § 53a-70 (a) (2); nothing in the plain language of that statute speaks to course of conduct charging one way or the other.[6] One statute simply prohibits contact with the victim's intimate parts, whereas the other prohibits engaging in sexual intercourse with the victim. Either act of child abuse (or child sexual assault) can just as readily be performed as a single act or on an ongoing basis; the only difference

[6] General Statutes § 53-21 (a) provides in relevant part: "Any person who . . . (2) has contact with the intimate parts, as defined in section 53a-65, of a child under the age of sixteen years or subjects a child under sixteen years of age to contact with the intimate parts of such person, in a sexual and indecent manner likely to impair the health or morals of such child . . . shall be guilty of . . . a class B felony . . . ."

General Statutes § 53a-70 (a) provides in relevant part: "A person is guilty of sexual assault in the first degree when such person . . . (2) engages in sexual intercourse with another person and such other person is under thirteen years of age and the actor is more than two years older than such person . . . ."

is in the seriousness or intrusiveness of the violation. If anything, the verb "engages," which the legislature used in the child sexual assault statute, is more suggestive of ongoing conduct than is the "having contact" language that defines risk of injury to a child.[7]

The majority's suggestion to the contrary notwithstanding, other state statutes that, like § 53a-70, prohibit sexual intercourse with a child, or use substantially equivalent language, have been construed to permit course of conduct charging. See, e.g., *Commonwealth* v. *Sineiro*, supra, 432 Mass. 735, 737–38 (rape of child);[8] *State* v. *Altgilbers*, supra, 109 N.M. 455, 464–71 (criminal sexual penetration);[9] *Huddleston* v. *State*, 695 P.2d 8, 10–11 (Okla. Crim. App. 1985) (rape of child).[10] In fact, as I discuss more fully hereinafter, both this court and the Appellate Court have approved prosecutors' decisions to charge repeated sexual assaults as a single

[7] Dictionaries in print at the time a statute was enacted are considered "especially instructive" in ascertaining the common meaning of the statutory language. *State* v. *Menditto*, 315 Conn. 861, 866, 110 A.3d 410 (2015). Dictionaries in print in the late 1960s, when § 53a-70 originally was enacted, defined "engage," in its intransitive form, in a manner that suggests or encompasses a continuing course of conduct. See, e.g., Webster's Seventh New Collegiate Dictionary (1969) p. 275 ("to begin *and carry on* an enterprise" (emphasis added)).

[8] See Mass. Ann. Laws c. 265, § 23 (Law. Co-op. 1992) ("sexual intercourse or unnatural sexual intercourse, and [abuse of] a child under sixteen years of age").

[9] See N.M. Stat. Ann. § 30-9-11 (Michie 1984) ("the unlawful and intentional causing of a person to engage in sexual intercourse, cunnilingus, fellatio or anal intercourse").

[10] In my concurrence in *Douglas C.*, I identified numerous examples in which the Second Circuit and other federal courts had held that various federal statutes were amenable to course of conduct charging, even though nothing in the statutory language expressly or even implicitly authorized such charging. See *State* v. *Douglas C.*, supra, 345 Conn. 487–90 and n.18 (*Mullins*, *J.*, concurring). In *United States* v. *Moloney*, 287 F.3d 236, 240 (2d Cir.), cert. denied, 537 U.S. 951, 123 S. Ct. 416, 154 L. Ed. 2d 297 (2002), the Second Circuit explained why violations of any criminal statute presumptively can be charged as a course of conduct, so long as the conduct reasonably can be characterized as part of a common scheme.

course of conduct. See *State* v. *Snook*, supra, 210 Conn. 265–66 (finding no double jeopardy violation because, among other things, state charged second degree sexual assault as continuing course of conduct); *State* v. *William B.*, supra, 76 Conn. App. 761 ("[t]he state properly charged the defendant with a course of sexual conduct" in violation of § 53a-70 (a) (2)); *State* v. *Saraceno*, supra, 15 Conn. App. 227–32 (trial court's refusal to separate sexual assault charges into separate counts did not abridge defendant's right to fair trial).

Put simply, I see no basis in the actual statutory language for treating the two statutes differently. The only distinction is in the type of improper sexual conduct at issue; that is a distinction without a difference.[11]

B

Second, the majority contends that, insofar as the plain language of § 53-21 (a) (2) is ambiguous, the legislative history indicates that the legislature intended that risk of injury to a child could be charged as a continuing course of conduct. See *State* v. *Douglas C.*, 345 Conn. 466–69. Once again, however, the legislative histories fail to support a distinction between the two statutes and, if anything, support prosecutorial discretion to charge child sexual assault as a continuing offense.

Focusing first on § 53-21 (a) (2), I do not read the majority opinion to have identified any statements in the legislative history that specifically indicate that the legislature intended risk of injury to a child to be chargeable as a continuing course of conduct crime. Rather,

[11] The majority misstates my views by asserting that, "if explicit language is not used, such as the phrase course of conduct—then a criminal statute is silent regarding whether it criminalizes a single act, a continuous course of conduct, or both, and a prosecutor can choose which charging method to apply." (Internal quotation marks omitted.) Footnote 11 of the majority opinion, quoting *State* v. *Douglas C.*, supra, 345 Conn. 451. That is not my view; nor is it accurate. Indeed, in part III A and B of this opinion, I fully review the relevant statutory language and its legislative history.

I understand the majority simply to be stating that *this court* already had interpreted the prior version of the risk of injury statute to permit charging a continuing course of conduct; see part III C 3 of this opinion; and that there is no indication that the legislature, when it amended § 53-21 in 1995 to add what is now subsection (a) (2), intended to change that interpretation. See *State* v. *Douglas C.*, supra, 345 Conn. 469. So, the issue, ultimately, is one of legislative acquiescence.

As I explained in *Douglas C.*, however, there are two reasons why the legislative acquiescence argument as to § 53-21 is particularly unpersuasive. First, if there was legislative acquiescence in this case, it ratified my approach to the law of duplicity, rather than that of the majority. The pre-1995 decisions of this court that the legislature is alleged to have adopted in 1995, in which this court approved of the prosecutor's decision to charge a course of conduct in risk of injury matters, decided the course of conduct question primarily on the basis of practical considerations, not as a matter of statutory construction. See part III C 3 of this opinion. Second, because legislators emphasized in 1995 that subdivision (2) of what is now § 53-21 (a) defined a "new" crime, which was contacting a child's intimate parts in a sexual and indecent manner, the legislative history itself contradicts the majority's position. See 38 S. Proc., Pt. 5, 1995 Sess., p. 1766, remarks of Senator Thomas F. Upson. It is true that part of the motivation for the 1995 amendment was to divide the risk of injury statute into sexual and nonsexual parts at that time, so that individuals convicted of inappropriate sexual contact with children could be subjected to mandatory minimum sentences and sex offender registration requirements. See, e.g., 38 H.R. Proc., Pt. 7, 1995 Sess., pp. 2590–91, remarks of Representative James A. Amann. But the bill's sponsor indicated that the legislature was not merely separating out sexual from nonsexual harms

to children but was making a "change in the definition of risk of injury . . . so that the offense can be more carefully delineated." 38 S. Proc., supra, pp. 1769–70, remarks of Senator Martin M. Looney.

In addition, unlike the pre-1995 version of the statute, which is now subsection (a) (1), the new, sexual component of the statute, subsection (a) (2), makes no mention of dangerous situations, only of specific acts. The use of the term "situations" is important to the majority's argument as to why risk of injury to a child in general can be charged as a continuing course of conduct. "Situations," it suggests, invokes crimes of an ongoing nature. See footnote 12 of the majority opinion. But subsection (a) (2) is not directed at situations. It is directed solely at *acts* of sexual contact. The fact that the legislature expressly prohibited both dangerous situations and inappropriate acts in subsection (a) (1), but only inappropriate acts in subsection (a) (2), cannot have been accidental. See, e.g., *Rutter* v. *Janis*, 334 Conn. 722, 739, 224 A.3d 525 (2020). Thus, to the extent that the majority relies for its interpretation of § 53-21 on the fact that subsection (a) (1) of the statute prohibits the creation of dangerous situations, such as child neglect, as well as dangerous acts, such as child abuse, and, thus, necessarily envisions ongoing violations as well as individual infractions, the fact that the legislature chose *not to* include the situation language when it created the new subsection (a) (2) addressed to sexual misconduct, and instead used only contact language, would seem to support the opposite conclusion.

Also, it bears noting that the public act that enacted the new risk of injury to a child provision, No. 95-142, § 1, of the 1995 Public Acts (P.A. 95-142), also amended the sexual assault statute, § 53a-70, by increasing the mandatory minimum sentence for first degree sexual assaults perpetrated against victims under ten years of age. See P.A. 95-142, § 13. As I discussed, there is no

indication in the legislative history that the legislature gave any thought at that time to the question of which crimes could or could not be prosecuted as course of conduct crimes. What is clear, however, is that P.A. 95-142 was an integral part of then Governor John G. Rowland's tough on crime legislative package, the stated intent of which was to put more teeth into Connecticut's recently adopted version of Megan's Law and to better protect the public by stiffening the penalties for sex crimes against children. There are statements to that effect throughout the legislative history of the 1995 act.[12] I would thus hesitate to conclude, or to adopt any interpretation of these laws predicated on the view, that the legislature had intended the amended sexual assault statute to be interpreted so that it would be substantially more difficult to prosecute the ongoing sexual abuse of young children. Such a reading would be flatly incompatible with the stated purpose of the 1995 amendments to *both* statutes.

With respect to the legislative history of § 53a-70 (a) (2), that provision of the sexual assault statute was enacted in 1989. See Public Acts 1989, No. 89-359 (P.A. 89-359). The bill's sponsor, Representative Richard D. Tulisano, repeatedly suggested in his introduction of the bill that the intent was to allow the prosecution not only of individual sexual assaults but also of ongoing sexual *relationships* between adults and children,

[12] E.g., 38 S. Proc., Pt. 10, 1995 Sess., p. 3444–45, remarks of Senator Thomas F. Upson; Conn. Joint Standing Committee Hearings, Judiciary, Pt. 5, 1995 Sess., pp. 1554–57, 1613–17, remarks and written testimony of Governor Rowland; Conn. Joint Standing Committee Hearings, Judiciary, Pt. 3, 1995 Sess., pp. 932–33, remarks of Representative Robert M. Ward; Conn. Joint Standing Committee Hearings, Judiciary, Pt. 2, 1995 Sess., p. 682, remarks of Representative Ward; see also Conn. Joint Standing Committee Hearings, Judiciary, Pt. 11, 1995 Sess., p. 3762 (statistics on child sexual abuse from Adam Walsh Center); Conn. Joint Standing Committee Hearings, Judiciary, Pt. 11, 1995 Sess., p. 3760 (statement of Megan's Law regarding need to protect children from pedophiles).

which at least implies a continuing course of conduct.[13] I cannot agree with the majority that the statements of the bill's sponsor introducing the legislation for debate can be dismissed as merely the views of "one legislator," or that Representative Tulisano's references to the problems posed by consensual relationships with fourteen year old children in no way suggest ongoing conduct and are nothing more than "euphemisms for sexual intercourse . . . ." Footnote 18 of the majority opinion.

Accordingly, I see no basis in the history of the two statutes for discerning a clear legislative preference for charging § 53-21 (a) (2) as a course of conduct but not permitting prosecutors to charge § 53a-70 (a) (2) in the same manner, when appropriate. Indeed, that outcome would be bizarre insofar as the two statutes typically are charged together in cases involving the sexual abuse of children, a fact of which the legislature is well aware, and the legislative history is crystal clear that the legislature in both instances sought to do everything within its constitutional means to protect children from sexual abuse and to bring perpetrators to justice.[14] Certainly, nothing in the legislative histories points to any *rea-*

[13] See, e.g., 32 H.R. Proc., Pt. 17, 1989 Sess., p. 5750, remarks of Representative Tulisano ("we had indicated [that] we were going to expand our study of this during the summer and further that we do run a problem of dealing with consensual relationships at age fourteen"); 32 H.R. Proc., Pt. 8, 1989 Sess., p. 2583, remarks of Representative Tulisano ("[c]urrently, our legislation does not . . . contemplate that kind of sexual . . . relationships"); see also 32 H.R. Proc., Pt. 39, 1989 Sess., p. 14179, remarks of Representative Tulisano ("[t]his would allow that it be sexual assault in the first degree . . . for anybody who has sexual relations with anybody under the age of [thirteen]"). As was the case with P.A. 95-142, the senate sponsor of P.A. 89-359—in this instance, Senator Steven Spellman—indicated that the primary purpose of the bill was to protect children from sexual predation. See 32 S. Proc., Pt. 12, 1989 Sess., p. 4043.

[14] Indeed, the legislature has made it clear that the stated public policy of this state is to protect children from abuse and neglect. See General Statutes § 17a-101 (a), as amended by Public Acts 2022, No. 22-87, § 4 ("[t]he public policy of this state is . . . [t]o protect children whose health and welfare may be adversely affected through injury and neglect").

son—and the majority suggests none—why the legislature might have intended to treat the two similar statutes differently for purposes of due process.

C

To summarize, having reviewed the statutory text and the legislative histories of the two statutes at issue pursuant to § 1-2z, the majority fails to identify any clear manifestation of a legislative intent to distinguish between risk of injury to a child based on sexual contact and child sexual assault, such that prosecutors were to have discretion over how they charge the former statute but not the latter.[15] Ultimately, rather, the majority settles on a sort of legislative acquiescence theory, whereby it concludes that this court has distinguished between the two laws for purposes of course of conduct charging and the legislature has, in effect, ratified that distinction.[16] For various reasons, I am unpersuaded.

In support of its argument, the majority relies on two different lines of appellate cases, one addressing § 53a-70, discussed in part III C 1 of this opinion, and one addressing § 53-21, discussed in part III C 3. Neither line of cases justifies distinguishing between child sexual

[15] The majority acknowledges that the language of the two statutes is not meaningfully different with respect to course of conduct charging and that "our interpretation of the language in § 53-21 (a) (2) is premised in no small part on our prior interpretation of this statute . . . ." Footnote 12 of the majority opinion. As I explain herein, that prior interpretation was not based on the court's analyzing the statute's "situations" language to conclude that continuing course charging was permissible. Rather, we simply agreed with the prosecutor's decision, as a practical matter, to charge a continuing course of conduct under the circumstances.

[16] Specifically, the majority contends that, "under our prior case law interpreting this statute, risk of injury to a child may be charged under a continuing course of conduct theory"; part I A of the majority opinion; and there is no indication that the legislature intended to reject this interpretation when it amended the statute in 1995; see footnote 12 of the majority opinion; whereas "this court has not recognized a common-law exception for a continuing course of sexual assault, even in cases involving children." Part I B of the majority opinion.

assault and risk of injury to a child for purposes of charging a continuous offense.

1

With respect to § 53a-70, the majority looks to a line of appellate cases that addresses a fundamentally different legal question, essentially the opposite question, in fact. As I discussed in *Douglas C.*, at common law, pleadings could be improper for duplicity (pleading multiple causes of action in one count) or, conversely, for multiplicity (pleading one cause of action in multiple counts). See *State* v. *Douglas C.*, supra, 345 Conn. 481–82, 495 (*Mullins*, *J.*, concurring). In the criminal context, this means that defendants often will have at least a colorable appellate claim, regardless of which way a prosecutor chooses to charge the case, when multiple incidents are involved. If, as here, an ongoing series of sexual assaults of the same degree is charged as a single course of conduct, the defendant may claim that the charge was erroneous for duplicity and violated his right to a unanimous verdict. By contrast, in those cases in which the prosecutor charges each incident of child abuse as a separate offense, defendants often claim that the charge was erroneous for multiplicity, in effect, that the state improperly charged one ongoing crime in multiple counts, placing the defendant in double jeopardy and unfairly imposing multiple sentences.

What the majority relies on for its interpretation of the sexual assault statute, almost exclusively, is that latter category of cases, in which a defendant sexually abused a victim multiple times, was convicted of multiple crimes, and then complained that there should have been only one conviction, one sentence. See, e.g., *State* v. *Anderson*, 211 Conn. 18, 25, 557 A.2d 917 (1989); *State* v. *Frazier*, 185 Conn. 211, 228–30, 440 A.2d 916 (1981), cert. denied, 458 U.S. 1112, 102 S. Ct. 3496, 73

L. Ed. 2d 1375 (1982);[17] *State* v. *Ayala*, 154 Conn. App. 631, 654–55, 106 A.3d 941 (2015), aff'd, 324 Conn. 571, 153 A.3d 588 (2017); *State* v. *Giannotti*, 7 Conn. App. 701, 708–709, 510 A.2d 451, cert. denied, 201 Conn. 804, 513 A.2d 700 (1986); *State* v. *Cassidy*, 3 Conn. App. 374, 388–89, 489 A.2d 386, cert. denied, 196 Conn. 803, 492 A.2d 1239 (1985). To make that claim, the defendants in those cases had to argue that, under the unique circumstances of those cases,[18] rape, sexual assault, or the other crimes at issue could be charged only as course of conduct crimes. We have roundly rejected such claims, concluding that the minimal unit of prosecution for sexual assault is the individual infraction. To read the statute otherwise, we have explained, would lead to absurd results: if prosecutors do not have the option to charge each infraction separately, then an offender, having initially assaulted a victim, could "commit with impunity many other such acts during the same encounter." *State* v. *Frazier*, supra, 229.

None of this says anything about whether child sexual assault *can be* charged as a course of conduct when that makes the most sense, only that it does not *have to be* charged that way. Although the majority quotes

[17] *Frazier*, on which the majority relies most heavily, is also readily distinguishable. *Frazier* involved three alleged rapes of an adult woman committed in close succession on a Sunday morning. See *State* v. *Frazier*, supra, 185 Conn. 213–14. The state charged the defendant with seven separate violations of two now defunct statutes, one prohibiting rape in the first degree and one prohibiting deviate sexual intercourse in the first degree—not the child sexual assault statute at issue in the present case. See id., 212 and nn.1 and 2. This court merely held that the state was not obliged to charge the multiple acts of forced intercourse, "committed . . . in a short period of time," as one continuous act. (Internal quotation marks omitted.) Id., 228.

[18] In almost all of these cases, the multiple convictions were for different acts perpetrated on one occasion, so that the court was not confronted with the continuous course of conduct issue raised in this appeal but, rather, the question of whether the legislature intended that different infractions committed as part of one ongoing criminal episode can be treated as distinct crimes.

some language from those cases out of context, at no point does the majority explain why, as a matter of principle, the outcomes of our multiplicity cases should govern these duplicity cases, which present a fundamentally different question. The majority's response, that the meaning of the statutory language does not change with the nature of the claim, although of course true, misses the point. See part I B of the majority opinion. We are addressing two distinct legal questions. One goes to the minimal unit of prosecution permitted by the statute: is the state permitted to charge multiple assaults, committed in close proximity, as multiple crimes, or is it required to charge only one offense? The other goes to whether the state is permitted to charge a series of similar assaults, committed over time, as one offense, or whether it is required to charge them as separate offenses. Just as the minimum sentence imposed by a criminal statute says nothing about the maximum allowable sentence (that is a different question of statutory interpretation), the minimum unit of prosecution authorized by statute does not resolve the question of whether charging multiple acts by continuando is also permissible.

Indeed, numerous federal courts of appeals and sister state courts have considered and expressly rejected the very argument that the majority makes here, that the fact that a single infraction is the minimal unit of prosecution for purposes of a multiplicity/double jeopardy challenge means that a crime cannot also be charged, in the discretion of the state, as a course of conduct. See, e.g., *United States* v. *Root*, 585 F.3d 145, 153–55 and n.5 (3d Cir. 2009); *United States* v. *Anson*, 304 Fed. Appx. 1, 4 (2d Cir. 2008), cert. denied, 556 U.S. 1160, 129 S. Ct. 1687, 173 L. Ed. 2d 1050 (2009); *United States* v. *King*, 200 F.3d 1207, 1212–13 (9th Cir. 1999); *United States* v. *Bruce*, 89 F.3d 886, 889 (D.C. Cir. 1996); *State* v. *Lente*, 453 P.3d 416, 430 (N.M. 2019).

Notably, this court has quoted the exact same language from *Frazier* on which the majority relies for its interpretation of § 53a-70 in rejecting a multiplicity challenge to the risk of injury statute. See *State* v. *Snook*, supra, 210 Conn. 261–62 ("In [*Snook*], the separate counts alleging risk of injury to a [child] arose out of separate acts. . . . As we stated in an analogous context, 'each separate act of forcible sexual intercourse constitutes a separate crime. . . . A different view would allow a person who has committed one sexual assault [on] a victim to commit with impunity many other such acts during the same encounter.' " (Citations omitted.)). I fail to see why precisely the same language and legal analysis preclude course of conduct charging of sexual assault but not in the case of risk of injury to a child.

2

While quoting at length from these multiplicity cases, the majority largely disregards the line of appellate cases that are on point, namely, our duplicity cases. This court and the Appellate Court have directly or indirectly addressed the actual question presented here, whether child sexual assault can be charged as a course of conduct in the discretion of the state, in a series of decisions that approved prosecutors' decisions to charge the sexual assault of children as a course of conduct crime.

In *State* v. *Silver*, 139 Conn. 234, 93 A.2d 154 (1952), for example, this court relied on the fact that a predecessor statute had been charged as a continuing course of conduct in affirming the conviction. See id., 247 (*O'Sullivan, J.*, concurring); see also *State* v. *Snook*, supra, 210 Conn. 265 (relying on fact that state had charged sexual assault based on "a number of episodes in which the defendant engaged in sexual intercourse with the victim" to reject double jeopardy challenge). Accord-

ingly, we have, at least implicitly, deemed such charging to be proper.

Several panels of the Appellate Court also have concluded that sexual assault may be charged as a continuing course of conduct crime without offending a defendant's constitutional rights. For example, in *State* v. *Saraceno*, supra, 15 Conn. App. 222, a case involving multiple instances of sexual assault charged in one count, the Appellate Court adopted the rule articulated by the Second Circuit in *Margiotta*, stating that "[a] single count is not duplicitous merely because it contains several allegations that could have been stated as separate offenses. . . . Rather, such a count is . . . duplicitous [only when] the policy considerations underlying the doctrine are implicated. . . . These [considerations] include . . . avoiding the risk that the jurors may not have been unanimous as to any one of the crimes charged . . . ."[19] (Citations omitted; internal quotation marks omitted.) Id., 228–29.

With respect to the defendant's contention that, at the very least, he should have been provided with a bill of particulars, the Appellate Court in *Saraceno* explained that, "in a case involving the sexual abuse of a very young child, that child's capacity to recall specifics, and the state's concomitant ability to provide exactitude in an information, are very limited. The state can . . . provide [only] what it has. This court will not impose a degree of certitude as to date, time and place that will render prosecutions of those who sexually abuse

[19] I disagree with the majority's contention that *Saraceno* is not relevant authority because it relies on the *Gipson* test, which the majority repudiates. See part I B and footnote 16 of the majority opinion. At no point does *Saraceno* cite to, much less rely on, *Gipson* or its conceptual distinctness test. Rather, *Saraceno* relies entirely on the same federal cases that I would follow, such as *United States* v. *Margiotta*, supra, 646 F.2d 729, and *United States* v. *Shorter*, 608 F. Supp. 871 (D.D.C. 1985), aff'd, 809 F.2d 54 (D.C. Cir.), cert. denied, 484 U.S. 817, 108 S. Ct. 71, 98 L. Ed. 2d 35 (1987). See *State* v. *Saraceno*, supra, 15 Conn. App. 229–30.

children impossible. To do so would have us establish, by judicial fiat, a class of crimes committable with impunity." Id., 237. This court adopted that language in *State* v. *Stephen J. R.*, 309 Conn. 586, 72 A.3d 379 (2013), adding that "testimony from a child victim describing a series of indistinguishable acts by an abuser who has ongoing access to the child is often the only evidence that the child is able to provide." Id., 596.

Notably, the Appellate Court's conclusion in *Saraceno* was that there simply was no error in the state's duplicitous charging of sexual assault in the second degree—"the trial court did not err in its denial of the defendant's motion to separate"—and not that there was harmless, nonprejudicial error.[20] *State* v. *Saraceno*, supra, 15 Conn. App. 232; see *State* v. *Vere C.*, 152 Conn. App. 486, 508–13 and n.6, 98 A.3d 884, cert. denied, 314 Conn. 944, 102 A.3d 1116 (2014); *State* v. *Jessie L. C.*, 148 Conn. App. 216, 226–33, 84 A.3d 936, cert. denied, 311 Conn. 937, 88 A.3d 551 (2014); *State* v. *Marcelino S.*, 118 Conn. App. 589, 592–97, 984 A.2d 1148 (2009), cert. denied, 295 Conn. 904, 988 A.2d 879 (2010); see also *State* v. *William B.*, supra, 76 Conn. App. 761 ("[t]he state properly charged the defendant with a course of sexual conduct" in violation of § 53a-70 (a) (2)).

3

I also disagree with the majority's discussion of this court's risk of injury to a child jurisprudence and how

[20] Accordingly, I do not agree with the majority's contention that the Appellate Court in *Saraceno* concluded that any error was harmless, and not that there was no error. See part I B of the majority opinion. Likewise, in several subsequent cases, the Appellate Court proceeded on the assumption that the question of prejudice went to the issue of whether duplicitous charging of sexual assault created a constitutional violation, and not to whether any error was harmless, and, accordingly, held that the claim at issue foundered on the third prong, and not the fourth, of *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). See, e.g., *State* v. *Marcelino S.*, 118 Conn. App. 589, 594, 984 A.2d 1148 (2009), cert. denied, 295 Conn. 904, 988 A.2d 879 (2010); *State* v. *William B.*, supra, 76 Conn. App. 759–60.

our analysis of the course of conduct charging question as to § 53-21, over time, bears on the meaning of § 53a-70. Contrary to the majority's suggestion, when we initially determined that a series of violations of the risk of injury statute can be charged either as individual infractions or as a single course of conduct, it appears to me, given that this court never construed the language of the statute in the opinion, we reached that conclusion not as a matter of statutory interpretation but, rather, primarily as a policy matter. This is consistent with the history that I set forth in my concurrence in *Douglas C.*, which indicates that the law of duplicity originated at common law as a set of rules governing the pleading process; only more recently have constitutional and statutory concerns also emerged as important considerations. See *State* v. *Douglas C.*, supra, 345 Conn. 477 n.6, 480–83 and n.11 (*Mullins*, *J.*, concurring).

The case in which this court first recognized that a continuing course of conduct could be charged under a pre-1995 version of the risk of injury statute was *State* v. *Hauck*, 172 Conn. 140, 374 A.2d 150 (1976). The defendant in that case challenged the court's denial of his motion for a supplemental bill of particulars when the state charged him with violating § 53-21 " 'on or about divers dates' " between November 11, 1971, and June, 1972. Id., 150. This court's conclusion in that case, that "[t]he offenses charged . . . were obviously of a continuing nature," made no reference to the statutory language, the legislative history of § 53-21, or any other indicia of legislative intent. Id.

Rather, in deferring to the trial court's discretion in allowing course of conduct charging, this court relied on purely practical considerations—that the charges were "clearly reasonable" in light of the trial testimony; id., 151; and, importantly, that "it would have been virtually impossible to provide the many specific dates [on] which the acts constituting the offenses occurred"—as

well as the general principle that, when "time is not of the essence or gist of the offense, the precise time at which it is [alleged] to have been committed is not material." Id., 150. In other words, the considerations that first led this court to permit prosecutors to charge risk of injury to a child as a course of conduct crime, as a matter of judge made law, were exactly the same practical considerations that would support the same result with respect to sexual assault in cases such as this.

In subsequent cases, this court has continued to rely on *Hauck* and, specifically, on the pragmatic rationales that we articulated therein. See, e.g., *State* v. *Spigarolo*, 210 Conn. 359, 391, 556 A.2d 112 (citing *Hauck* for proposition that, "[b]ecause the state was unable to specify with greater precision the times of the alleged incidents, it necessarily proceeded under a theory that the defendant's conduct was in the nature of a continuing offense"), cert. denied, 493 U.S. 933, 110 S. Ct. 322, 107 L. Ed. 2d 312 (1989). If the legislature has, in the intervening years, placed its imprimatur on cases such as *Hauck* and *Spigarolo*, as the majority suggests, then it has endorsed not a statutory analysis of the meaning of § 53-21—our cases offered no such analysis—but, rather, the very framework that I am supporting and that I would apply to sexual assault, under which the state has the discretion to charge a course of conduct when appropriate.

4

Finally, as I explain in *Douglas C.*, if there is any legislative acquiescence argument to be made here, it is in favor of course of conduct charging under both statutes. See *State* v. *Douglas C.*, supra, 345 Conn. 507–509 (*Mullins*, *J.*, concurring). There is a long, consistent, well documented history of Connecticut prosecutors exercising their discretion to charge multiple instances

of child sexual assault occurring on divers dates in one count. In such cases, spanning the better part of one century, child sexual assault and risk of injury to a child frequently have been charged, hand in hand, as course of conduct crimes. In *Douglas C.*, I identify more than one dozen examples of such cases, beginning in 1952 and continuing through the present case, in which the state charged multiple instances of child sexual assault, or closely related crimes, in a single count. See id., 483–84 n.14 (*Mullins*, *J.*, concurring). Many of those cases, like the present one, involved a blend of generic testimony with testimony regarding specific incidents of abuse. No one ever suggested that there was a distinction to be drawn or that the two statutes should be treated differently with respect to course of conduct charging.

The legislature is presumed to be aware of this long-standing practice of charging child sexual assault, which has been memorialized in many appellate decisions and relied on in several of them. See, e.g., *State* v. *Snook*, supra, 210 Conn. 265; *State* v. *Silver*, supra, 139 Conn. 247 (*O'Sullivan*, *J.*, concurring). If the legislature was of the view that charging child sexual assault in this manner was an abuse of prosecutorial discretion or a misapplication of the statute, it could have made that clear during any of the many amendments to the statute over the years. In the absence of any clear manifestation of legislative intent, I fail to see what purpose will be served by suddenly prohibiting this long-standing charging practice.

For all of these reasons, I disagree with the conclusions reached by the majority, first, that there is any principled basis for permitting course of conduct charging under § 53a-21 (a) (2) but not § 53a-70 (a) (2), and, second, that the trial court committed reversible error

by failing to give a specific unanimity instruction on the sexual assault count.[21]

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[21] In several places, the majority highlights the fact that I have made arguments in this opinion regarding the scope of the course of conduct exception that the state itself does not make in its brief. See footnotes 12 and 17 of the majority opinion. That observation fails to tell the whole story. As the majority readily acknowledges, until today, this court had not formally recognized any prohibition against charging multiple instances of a single crime in one count of an information. We assessed duplicity challenges only for unanimity as to elements. In its brief, the state simply argues that we should continue to apply that precedent. The defendant invites this court to adopt a new rule requiring unanimity as to instances, but his proposed analytical framework for applying that rule does not include any exception for continuing offenses or course of conduct charging. In fact, the majority opinion is the first time the course of conduct exception is set out and explained. Thus, it is not nearly as telling to me as it is to the majority that the state did not make an argument in response to an exception that only was explicated for the first time in *Douglas C.*