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THE MULTIPLE CONSEQUENCES OF A SINGLE CRIMINAL ACT†

By FRANK E. HORACK, JR.*

W HATEVER may be the intended social objectives of criminal law enforcement, it is inevitable that in the application of "the law" to cases, there must be certain determinations as to the nature of the offense charged, the number of offenses committed, and the responsibility of the defendant to answer the charges. Thus, if in a particular situation, D with intent to kill fires a single shot and kills X and Y it is clear that D is guilty of murder. But this does not answer the further question, is D guilty of one or two murders. However obvious the result of two deaths may appear, it is not at all clear "in law" that D has committed more than one murder.

In deciding cases involving this question, courts have announced as significant, the following elements: (1) the act, (2) the intention, (3) the consequences, and (4) the law. Uncomplicated by rules of practice and procedure, the question resolves itself to this: If one of the above elements exists singly, while the other elements are multiple, does the singularity of the one element restrict the legal significance of the situation to a single offense or crime?

So practical a question would require, apparently, a practical, that is, a certain answer. But sadness must be the lot of the rule-seeker. Even the blackletter-Bishop could do no better than:

"In authority and in reason there is a limit to the right of multiplying indictments, though the cases are not in distinct accord as to what it is."²

†An article on double jeopardy and the multiple consequences of a criminal act, by Professor James J. Robinson of the Indiana University School of Law, will appear in the next (December) issue of the LAW REVIEW. It would have been published in this issue had it not been held to permit analysis of the decision in the case of State v. Fredlund, (Minn. May 21, 1937). [ED.]

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†The majority of the cases cited in this article arose under a claim of double jeopardy; consequently much of the discussion relates to questions of procedure raised by the prosecution's errors or the attempt to pursue the defendant on a second nisi trial because of the inability of the state to appeal an original adverse decision. Thus, the language of the cases is not always directed toward the analysis of the characteristics of the offense, but more frequently refers only to the fairness of trying the defendant a second time.

This conclusion seems discouragingly accurate. Indeed, there is little consistency even in a single jurisdiction. And consistent results are usually founded on sifting sands of reasoning.

In escaping the judicial quicksands there is temptation to rescue the cart before the horse, and rationalize cases on the procedural basis of double jeopardy rather than on the substantive nature of the offense. Double jeopardy, although it may effectively determine the ability to prosecute a defendant a second time, does not necessarily support the conclusion that the second prosecution is barred because no second offense has been committed. Other considerations, such as speed, fairness and orderly criminal law administration may protect the defendant against a second trial. Unfortunately, the analysis of the double offense question is found chiefly in the jeopardy cases, so that procedural considerations have bulked large in the development of substantive law.

I

Some consistency appears in the cases when classified according to the type of offense and consequence, and according to the progressive complexity of the problem as time and action proceed from diversity and multiplicity to unity and singularity.

THE PHYSICAL INJURY CASES

The physical injury cases may be divided into two fairly distinct groups—those in which the defendant injures one or more persons through intended action, and those where injury is produced through the defendant's unintended but negligent action.

Very little difficulty exists in homicide prosecutions where the defendant, at different times and by different acts, produces injurious consequences to several persons in a manner which constitutes either the same or different offenses. Thus, if D assaults X today and either assaults or kills Y tomorrow, no one would suggest that D has committed only one offense, even though the testimony is clear that his volition was stimulated by the same general criminal intent. However, if the fact situation is changed

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4It must be admitted that all classifications are arbitrary and that arrangements of the cases for other purposes or according to other elements might produce different classes. “The real trouble begins when . . . classes gradually become so familiar . . . that [persons] believe in the ‘existence’ of the classes.” Bell, The Search for Truth 78.
only to the extent that the time differential is removed, the problem becomes one of great nicety. Thus, if D, by several acts, in rapid succession shoots X and assaults Y, it may be held that he has committed only one offense, but a majority of the cases would still find dual liability, and procedurally would refuse to permit the prosecution for the one consequence to be a bar to the prosecution for the second consequence. The same is true if the offenses are similar rather than dissimilar.

The problem becomes more difficult when D by a single act injures several persons in a fashion which if produced individually would constitute separate crimes. Thus, if D fires one shot at X intending to kill him, but kills Y, the court may be called on to decide whether the "single" act accompanied by the single intention amounts to an assault with intent to kill and a murder. In this situation most courts will not permit the prosecution for one offense to be a bar to the other. This seems correct, for if the original action is for the assault, no reason appears why the possibility of a murder indictment should bar the assault action.

5Estep v. State, (1914) 11 Okla. Crim. Rep. 103, 143 Pac. 64; Williams v. State, (1910) 58 Tex. Crim. App. 193, 125 S. W. 42. Of course, the question of second indictments for different offenses arising out of one consequence to one individual is not raised. The cases are generally in accord that the prosecutor cannot "carve."


8Winn v. State, (1892) 82 Wis. 571, 52 N. W. 775; Alathe v. Thomas, (1881) 26 Kan. 233.
The converse is likewise true. Whatever the question may be so far as the procedural problem of double jeopardy is concerned, the existence of two offenses appears to be beyond dispute.

Where the consequences of the single act are similar, the courts apparently have great difficulty. That is, if D's one shot kills both X and Y, there is a temptation to say that only a single murder has been committed. This conclusion, however, seems without justification. If the death of X is made the basis of action, no defense would exist because Y was also killed. Nevertheless, numerous jeopardy cases speak as though only one crime of murder exists in this situation. This is particularly anomalous when contrasted with the fact situation immediately preceding, for if the conclusion of some courts is correct, then the defendant receives greater protection when his act results in two deaths than he does when his act amounts only to an assault and a homicide. This anomaly illustrates with particular vigor the error of rationalizing jeopardy cases on the basis of the substantive content of the crimes involved. Indeed, most of the cases even in this situation find that D may be prosecuted for a second offense.

A harder case exists when D's action results in several consequences to the same person. Thus, where D strikes X several times in rapid succession, the cases are in accord that only one assault has been made; but when D in the same transaction strikes X several times with different weapons, the cases have said that each striking is a separate assault.

If by a single act D produces several consequences to a single person in a fashion which would constitute separate offenses if done singly, most courts find D guilty of separate offenses. Thus,

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10 Where the same act of unlawful shooting results in the death of two persons, an acquittal or conviction on the trial of one would be a good defense on a second trial for the alleged murder of the other for the reason that the killing constituted but one crime, which could not be subdivided and made the basis of two prosecutions. . . . Gunter v. State, (1895) 111 Ala. 23, 20 So. 623.

11 Although the act is singular and the offenses are the same if the consequences are multiple, a second prosecution is permitted; Commonwealth v. Browning, (1912) 146 Ky. 770, 143 S. W. 407; Keeton v. Commonwealth, (1892) 92 Ky. 522, 18 S. W. 359; Vaughan v. Commonwealth, (1821) W. Va. Cas. 273; State v. Robinson, (1895) 12 Wash. 491, 41 Pac. 884.


if D shoots at X, he may be prosecuted for the assault and if subsequently X dies, D may be prosecuted for murder in spite of the prior prosecution.\textsuperscript{14} If, however, the assault prosecution occurs after his death many courts will bar a subsequent prosecution for murder, but this apparently as much upon the principle of jeopardy as upon the principle of singularity of offense.\textsuperscript{15}

In the negligent homicide cases a different rule has been consistently followed. Thus, where D by the negligent operation of an automobile runs down and kills more than one person, only a single prosecution is usually permitted and the dictum of the cases is that D has committed a single offense only.\textsuperscript{16} These cases seem contrary to cases where death results to two persons as a result of a single intended act, as where D by one shot kills X and Y. The apparent difference in the criminality of D's conduct may provide the explanation.\textsuperscript{17}

Similar considerations concerning the heinousness of the offense dictate contrary results in the sex cases. Thus, when a prosecution for abortion is followed by a prosecution for murder there is no bar,\textsuperscript{18} and the same is true if the murder prosecution is followed by a prosecution for abortion.\textsuperscript{19} The rule also has been followed in assault prosecutions after an acquittal for rape.\textsuperscript{20}


\textsuperscript{17}See, infra, pp. 819-822.

\textsuperscript{18}Lohman v. People, (1848) 1 N. Y. 379, 4 How. Prac. 445.

\textsuperscript{19}State v. Elder, (1879) 65 Ind. 282; and the same is true if in separate counts abortion and murder are charged in the same indictment. People v. Coltrin, (1935) 5 Cal. (2d) 649, 48 P. (2d) 973.

on the theory that the elements of the one offense are not necessary for conviction of the other. Where the offense, however, is similar, a second prosecution is not permitted unless there is an appreciable lapse of time between the acts specified.

**The Property Cases**

In the property cases dual liability has been imposed infrequently. Thus, where D at one time and with one muscular contraction takes two articles, as two rings, the cases are consistent in holding a single larceny. An exception seems general, however, when the rings are owned by two different persons. This exception seems indefensible if larceny is a crime against possession rather than against ownership.

Many factual distinctions might be drawn in these cases. Thus, if D takes with one muscular contraction a sack containing a dozen eggs, it is hard to imagine liability for twelve petty larcenies. When D, with a single intention, takes twelve eggs by twelve muscular contractions, twelve larcenies would be committed if some of the homicide cases were controlling. The decisions, however, do not sustain this position. But this seems to be a question of convenience in prosecution rather than a result of distinction in the character of the offense. Thus it might be advantageous to the defendant to allege several offenses, for by dividing the transaction according to its consequences he could produce several petty larcenies, and avoid the heavier sanctions of felony punishment.

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21"The offense of assault and battery was not an offense necessarily included in the information. . . . The offense of assault and battery was an entirely different offense, in that it lacked the essential element of an attempt to criminally know the prosecutrix under the age of nineteen years, which constitutes rape." State v. Holm, (1935) 55 Nev. 468, 37 P. (2d) 821.

22Ex parte Brown, (1934) 139 Kan. 614, 32 P. (2d) 507; People v. Lachek, (1935) 2 Cal. (2d) 693, 43 P. (2d) 539.


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When D's act constitutes different property offenses against the same possession, the tendency is to preserve the state's right of prosecution for each offense, the same as in the personal injury cases. This is particularly true when the offenses charged are "statutory crimes."

MISCELLANEOUS OFFENSES

Numerous statutory offenses involving the question of dual liability for a single act have received judicial interpretation. The courts either find that the statute specifically provides for the punishment of each consequence, or else that the defendant's act violates different statutes, so that the case does not come within the "same act and offense" rule. The liquor offenses consistently impose dual liability. Most of the cases involving tax evasions, criminal libel, forgery, and motor vehicle violations reach the same result.


26State v. Klughert, (1904) 91 Minn. 406, 98 N. W. 99 (making and uttering forged instrument); People v. Menne, (1935) 4 Cal. App. (2d) 91, 41 P. (2d) 383 (conspiracy and issuing bad checks; Estup v. State, (1914) 11 Okla. Cr. Rep. 103, 143 Pac. 64 (embezzlement of public funds); Curtis v. United States (C.C.A. 10th Cir. 1933) 67 F. (2d) 943 (false bank entries); People v. Bain, (1934) 358 Ill. 177, 193 N. E. 137 (conspiracy and receiving bank deposits while insolvent); State v. Coblentz, (1935) 169 Md. 159, 180 Atl. 266 (receiving deposits while insolvent).

27Welton v. Taneborne, (1908) 99 L. T. 668 (dangerous driving
The decisions give only partial warning of the conflict in the reasoning of the courts.

**The Single Intent Theory**

In general the courts have said that if the consequence of the defendant's action is referable to a single criminal intent, the defendant is answerable for only one offense. But this has not always been the law. Compensation both to the state and to the injured family made the earliest criminal law economic rather than moral—relate to consequences rather than intention. Only after the establishment of Christianity in England did the moral standard of "sin" become the measure of criminal responsibility. And even so, as late as 1487 it was said in a Yearbook case that "the intent of a man will not be tried, for the Devil himself knoweth not the intent of man." But the moral standard dominated, and intention became the measure of crime.

This test, of course, was not absolute. If intent alone was sufficient, then both action and consequence would have been unnecessary, but it is well understood that save for the law of attempts, both act and consequence must concur with intention.

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34 At first view, it appears as if there were two crimes distinctly, indictable and punishable. But our sense of justice is shocked by the idea, that a man shall be convicted and punished for the arson, with that measure of punishment which the law metes out to those guilty of that crime; and that afterwards for perfectly accidental and involuntary killing, he shall be liable to the same punishment of death which is inflicted on the wilful and malicious murderer. In the case before us, the killing was a simple consequence of the burning, and there is no pretense that it was, in point of fact, intentional. The law makes a man responsible for even the unexpected consequences of his crimes, and for this purpose, imputes the intention to produce the consequences, as well as the original act. But to constitute a crime there must be an act of the will, and imputed intent must have real intent as its basis; not to accomplish the precise result, but to do something." State v. Cooper, (1833) 13 N. J. L. 361.


36 See, Plucknett, A Concise History of the Common Law 220.

37 17 Edward IV 2.

38 Beale, Criminal Attempts, (1903) 16 Harv. L. Rev. 491; Sayre, Criminal Attempts, (1928) 41 Harv. L. Rev. 821; Arnold, (1930) 40 Yale L. J. 53.
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Although intention usually refers to mens rea or to specific intent, in some cases it is used to mean "volition to act" and in others to mean the foreseeability of the consequences of action. These variations, while useful in "explaining" particular decisions, complicate and confuse the general structure of criminal liability. Thus, it is little more than conjecture that if D does one act he does it with one intent, while if he "simultaneously" does two acts, he acts with two intents. The "number of intents," both as an evidentiary and as a psychological problem, seems more for the conjurer than for the judges.

The denial of multiple liability in the criminal negligence cases apparently supports the validity of the "single intent" theory. But even in these cases, the defendant is "negligent" toward each person injured, even though there is in fact no "intent" to harm any one. Thus, irrespective of the intentional or unintentional character of the harm, there is no denying that any of the consequences can be made the basis of the prosecution. Consequently it is difficult to understand why the prosecution of one consequence amounts to a prosecution for all the consequences.

One explanation is that "it is the character of the act, not the consequences which flow from it, which determines the question of the guilt or innocence of the person who does it." "Character" as used here (with consequences eliminated) means intention. Thus if intention is the dominant element, it is not inconsistent to say that "A series of shots may constitute one act, in the legal sense, where they are fired with one volition." To say this is merely to limit liability solely to the number of intentions with which the defendant acts.

But there has been no uniformity in the application of the single intention test. Where the act and intent is single, but the consequences amount to different offenses, two prosecutions are generally permitted because the "act and offense are not identical" or because "there is no identity of offense." The permission of

30See, supra, note 16.
42Offenses must be the same in law and in fact: People v. Helbing. (1882) 61 Cal. 620; Commonwealth v. Roby, (1832) 12 Pick. (Mass.) 496; State v. Magone, (1899) 33 Or. 570, 56 Pac. 648; People v. Saunders, (1859) 4 Park. Crim. (N.Y.) 196; Winn v. State, (1892) 82 Wis. 571, 52 N. W. 775; or the act and crime must be identical; People v. Majors. (1884) 65 Cal. 138, 133 Pac. 29; Taylor v. State, (1900) 109 Ga. 790, 35 S. E. 161; Smith v. Commonwealth, (1895) 98 Ky. 1, 32 S. W. 137.
43To constitute this [former conviction] a good defense, the offense must be identical or necessarily included the one within the other." State v. Parish, (1855) 8 Rich L. (S.C.) 322. Rex v. Emden, (1808) 9 East
the second prosecution in these cases denies significance to the
"single intention." If difference in consequences will permit sev-
eral actions because there are "several intentions," then if the
consequences are multiple but produce "similar offenses," it seems
only consistent to say that there are still "several intentions." Yet
a second prosecution is not permitted. Under these circumstances
it seems difficult to justify a distinction (except on a procedural
ground) between similar and dissimilar consequences of a single
act and intent. Thus, the reasoning of Regina v. Gray,\textsuperscript{4}
seems more accurate. There the court said,

"Suppose that there was only one shot ... the conclusion does
not follow that there was but one offense. There are two distinct
offenses. The pleader has changed the word 'act' into 'transaction,'
but the same act may contain a number of crimes against several
persons. . . . Here there was but one transaction, yet there were
two persons against whom the act was committed.\textsuperscript{5}

The real issue in the cases is the extent of and the manner in
which the defendant may be asked to respond to criminal liability.
In determining this question neither intention nor action are of
primary significance. Character of the consequence, the time lapse
between "several acts" and the more inchoate standards of the
social responsibility of the defendant to society play interacting
parts. An attempt to rationalize the cases on a single element of
the criminal offense leads to conflicting and inconsistent results.

\textbf{THE SINGLE ACT THEORY}

One of the delightfully delusive maxims of criminal law is the
necessity of act and intent for criminal responsibility. Used nega-
tively, it is supposed to defend the proposition that for a single
act there can be but singular criminal responsibility. Thus, it is
said that

"where the same act of unlawful shooting results in the death
of two persons, an acquittal or conviction on the trial of one would
be a good defense on a second trial for the alleged murder of the
other for the reason that the killing constituted but one crime,
which could not be subdivided and made the basis of two prose-
cuctions. . . ."\textsuperscript{45

\textsuperscript{437; United States v. Nickerson (1854) 17 How. (U.S.) 204, 15 L. Ed.
219; Freeman v. State, (1899) 119 Ind. 501, 21 N. E. 1101; Wilson v.
State, (1855) 24 Conn. 57.}

\textsuperscript{44(1843) 5 Ir. L. Rep. 524.}

\textsuperscript{45Gunter v. State, (1895) 111 Ala. 23, 20 So. 632; Womack v. State,
(1870) 7 Cold. (Tenn.) 508; but the exceptions are numerous: (1).
Thus if one act violates the criminal laws of different sovereigns the
responsibility is multiple. Grafton v. United States, (1907) 206 U. S.
The term "act," however, is ambiguous, and is often used in a dual sense. The most frequent confusion is between the "physical act," or muscular contraction of the defendant and the "consequence" which results. All too frequently "act" is a conclusion as to the multiplicity or singularity of responsibility, and the discussions of the cases shed little light on the significance of the act itself.

As a constant factor in the determination of criminal responsibility "act" should mean that the defendant has produced with one volition the muscular contraction which may or may not result in a consequence alleged to be criminal. Narrowed to this point, the significance of the act is primarily factual, and we cannot now include in the concept of act the idea of intention or the reasonableness or unreasonableness of foreseeing multiple consequence. With this restricted meaning, it is difficult to understand why a different responsibility should attach to the same consequences merely because they were produced by two acts instead of one. Indeed it was asserted in Gunter v. State, that it is difficult "to say that two shots fired in quick succession by the same hand, with the same intention, impelled by the same motive, but resulting in the death of two persons, constitute two crimes; whereas one single shot fired with the same single intention impelled by the same single motive, and accomplishing the same result constitutes but one crime. . . ."40

Such a distinction is, indeed, indefensible. But it is not obvious that only one crime resulted. The legal significance of "the same hand" should not be great. The significance of singleness of intent "and/or" motive can hardly be greater! And the importance of one rather than two muscular contractions is impossible to understand. Divorced from the objective of criminal law, no reason appears for saying that liability, single or multiple, could be existent.

The single act theory is in reality a single result or single consequence theory. When stated thus, it becomes not a test of the defendant's action but of the foreseeability of the consequence of the action. At least in the intended crimes this is an anomaly. Where D intends a particular act, he is held for the single con-

(U.S.) 13, 14 L. Ed. 306; (2) or if the consequences of the act constitute several different offenses, supra nn. 42, 43; (3) or, in some jurisdictions, if the same offense is committed against different persons. State v. Nash, (1852) 86 N. C. 650; People v. Brannon, (1925) 70 Cal. App. 225, 233 Pac. 88; Reg. v. Gray, (1843) 5 Ir. L. Rep. 524.

40(1895) 111 Ala. 23, 20 So. 632.
sequences of his action even though it was not foreseeable. But if the consequences are multiple, his liability apparently is tested singly on the theory that he could foresee but one harm from one act, or that he "intended but one consequence." There appears to be no reason why absolute liability for single consequences should exist, but not for multiple consequences.

There is even less reason in the case of unintended criminal action. If it is assumable that the rules of criminal negligence pattern after tort rules—then several similar consequences are as foreseeable as a single consequence and probably more foreseeable than several different consequences. Yet liability attaches in the last two situations, but not in the first. There is some intimation that if the unintended consequence results from an act which is itself criminal, the liability is greater than if the consequence is produced by an act which is criminal only because of the character of the action. If foreseeability is an element of criminal responsibility, this is a justifiable distinction, for in the first situation the probability of unsocial consequences is the basis for treating the act itself as criminal.

The larceny cases frequently have been cited in support of the single act theory. Their applicability, however, may be questioned. Save for a few cases, the taking has been from the possession of a single individual. Thus if the crime of larceny is a crime "against possession," in these situations there has been not only one act, but also only one consequence. And the cases which impose dual liability when the property is in single possession but has dual ownership seem erroneous, on the ground that the law against larceny is not a protection of ownership but of possession.

A resumé of the cases suggests that the single act theory de-

47 Gores' Case, (1911) 9 Coke 81, 853; but see Regina v. Serne, (1887) 16 Cox C. C. 311.
48 "If by separate shots the defendant wounded two persons, the transaction would be single if the shooting was done in repelling a joint assault. . . The intent of the defendant determines the matter." Burnam v. State, (1907) 2 Ga. App. 295, 58 S. E. 683; see also, Fews v. State, (1907) 1 Ga. App. 122, 58 S. E. 64; Robbin v. State, (1922) 29 Ga. App. 214, 144 S. E. 581; State v. Elder, (1879) 65 Ind. 282.
49 See, supra n. 10 and 16, but see n. 11.
50 Turners Case, (1674) Kel. C. C. 30; Commonwealth v. Andrews, (1807) 2 Mass. 409; Commonwealth v. Wade, (1825) 17 Pick. (Mass.) 395; Phillips v. State, (1887) 85 Tenn. 551, 35 S. W. 434; Wright v. State, (1884) 17 Tex. App. 152; Morgan v. State, (1871) 34 Tex. 677; Riffe v. Commonwealth, (1900) 21 Ky. L. Rep. 1331, 56 S. W. 255. And note that in all of these cases where the possession of more than one person was violated a second prosecution was not barred.
51 But see, Morgan v. State, (1871) 34 Tex. 677.
52 See, Miller, Criminal Law 346-8.
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PENDS NOT ON THE ANALYSIS OF "THE ACT" BUT RATHER UPON THE FORESEEABILITY OF ITS CONSEQUENCES. FORESEEABILITY MAY BE A DEFENSIBLE LIMIT UPON CRIMINAL LIABILITY, AS IT IS IN TORT CASES, BUT THE NUMBER OF MUSCULAR CONTRACTIONS WHICH PRODUCE THE CONSEQUENCE SEEMS UNIMPORTANT. IN FORESEEABILITY THE QUALITY OF THE ACT WOULD APPEAR MORE SIGNIFICANT. ONE MUSCULAR CONTRACTION NECESSARY TO EXPLODE A BOMB WOULD NORMALLY CREATE A WIDER RESPONSIBILITY THAN SEVERAL MUSCULAR CONTRACTIONS NECESSARY TO STRIKE SEVERAL PERSONS. BUT THIS IS A SHIFT OF EMPHASIS FROM ACT TO CONSEQUENCE.

THE SINGLE ACT THEORY IS MOST FREQUENTLY USED IN THE CASES NOT AS A FACTUAL DESCRIPTION BUT AS A LEGAL CONCLUSION. COURTS FREQUENTLY SPEAK AS THOUGH THE DEFENDANT HAD DONE BUT A SINGLE "LEGAL ACT" WHEN IN FACT HE HAS PRODUCED SEVERAL MUSCULAR CONTRACTIONS. THE BASIS OF THESE DECISIONS IS THAT ONLY ONE BREACH OF THE PEACE HAS OCCURRED, AND FOR THAT BREACH THERE SHOULD BE ONLY ONE LIABILITY.53

THE SINGLE ACT THEORY IS ONLY AN EXPLANATION OF SINGLE LIABILITY. THESE MODERN CASES LOSE SIGHT OF THE HISTORICAL BACKGROUND OF CRIMINAL LAW, WHEREIN THE INTEREST IN THE LIFE OF EACH INDIVIDUAL EITHER AS A SOLDIER OR A MEMBER OF THE ECONOMIC UNIT ENTITLED THE STATE TO A CRIMINAL ACTION FOR EACH INDIVIDUAL INJURY. THIS CONCEPT HAS NOT BEEN ENTIRELY ABANDONED IN THE LAW TODAY.

WHERE A SINGLE ACT RESULTS IN WIDELY SEPARATED CONSEQUENCES, AS WHERE D'S FELONIOUS BURNING OF A BUILDING DESTROYED PROPERTY AND INJURED OR DESTROYED LIFE, DUAL PROSECUTIONS ARE PERMITTED.54 IN THIS SITUATION THE ACT IS OF LITTLE SIGNIFICANCE. IN SHORT, THE SINGLE ACT IS BUT AN INARTISTIC WAY OF GRANTING OR REFUSING SECOND LIABILITY. AND THAT LIABILITY DEPENDS UPON A JUDGMENT MORE EXTENSIVE THAN THE MUSCULAR CONTRACTION OF THE DEFENDANT.

WHERE IN ONE VIOLATION OF THE PEACE SEVERAL ACTS OCCUR THE COURTS ABANDON THE SINGLE ACT TEST FOR THE "SAME TRANSACTION TEST."55 THERE


55 WILCOX V. STATE, (1880) 6 LEA (Tenn.) 571; STATE V. COLGATE, (1884) 31 KAN. 511; HOLT V. STATE, (1868) 33 GA. 187; PEOPLE V. GRZESZAK, (1912) 77 MISC. REP. 202, 137 N. Y. S. 538. BUT SEE WOMACK V. STATE, (1890) 7
is but a different way of stating that liability is no more extensive than the number of violations of the peace which occur. The application of the same transaction test denies importance to the muscular contraction of the defendant. Thus, whether D kills X and Y with one or two shots is unimportant, if all occurred at approximately the same time. This test sub silentio shifts the test of offense from act to time.

So far as theory is concerned, the same transaction test is no improvement over the tests of act or intention, for what constitutes the same transaction now depends upon act, intention, and time. It has one advantage, however, in that it tends to force a consideration simultaneously of all the factors which are necessary for criminal liability. Its weakness is that it makes liability a question primarily of time rather than of the purpose of law enforcement. It assumes, as the intent and act theory assumes, that the interest of the state is only in keeping the peace. If the interest of the state is in placing criminal sanctions against particular activities which injure the constituent members of the state, then the same transaction theory is not useful. Thus, it appears that all of the standard substantive determinations of the characteristics of a criminal offense depend upon a prior assumption concerning the nature of criminal law enforcement.

TIME AND CONSEQUENCE

Although seldom mentioned by the cases, the number of consequences which result from single or closely related activity is perhaps most significant. In one sense every act produces multiple consequences. That is, the consequence which affects the particular individual, the relation between the individual and other individuals, and the consequence which affects the peace and order of society. It is on this theory that the act which violates several protected interests is said to give rise to several consequences and several offenses.

Closely associated with dual consequence is the question of time, for there appears to be no case where there has been a denial of second liability if an appreciable time elapsed between several muscular contractions. When the time lapse is small or relatively

Cold. (Tenn.) 508. "In order the two acts of felonius killing may constitute a single offense of murder, something more is necessary than that they should have been committed upon the same occasion, or in the progress of the same affray." See also, Moss v. State, (1917) 16 Ala. App. 34, 75 So. 179.

6 See Regina v. Gray, (1843) 5 Ir. L. Rep. 524 and cases cited supra notes 6, 7, 11.
non-existent, its significance is primarily evidentiary, i.e., there is evidence of only one act and one intent, and thus, ex hypothesis one offense.

This denial of dual responsibility on the basis of time is unsound. It bases prosecution on breach of the peace rather than upon the result of the criminal activity. If this is true, then when one “breach of the peace” results in the invasion of several different interests, there should be one liability. Numerous cases, however, deny this result.\(^7\) This is particularly true in the statutory offenses.\(^8\) The same result should be reached in the “common law crimes.” Not only do they have a statutory basis today, but the requirement of specific intent should impose a higher responsibility than that required in the more recent enactments where specific intent is seldom an element.

**Policy**

However useful the theories of offense may be in relieving a defendant from a second prosecution, these theories do not aid in deciding what an offense is or should be. The character of an offense depends upon the philosophy or theory of the purpose of criminal responsibility. Thus, although an act, an intention, and a consequence are said to be necessary for criminal liability, they are not necessarily so. That is, liability could be imposed if there was a consequence even though there was neither an intention nor an act (as in the case of an omission); or liability could be imposed without intention or consequence. The only reason that all three elements have been required is because of the belief that they are useful in determining the ambit of criminal responsibility.

It is time that inquiry be made into the assumption that these elements are of the same importance in determining single or multiple responsibility, as they are in determining the existence of a single offense. The addition of the time element in the multiple offense problem appears important, but it has not been discussed, as such, by the cases. Its importance depends upon the general objectives of criminal liability, and our demands for fairness in criminal prosecution.

These objectives have not remained at all times the same. Numerous considerations which gave rise to the jeopardy rule no longer exist in our society. Originally the interest of the state

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\(^7\)Regina v. Gray, (1843) 5 Ir. L. Rep. 524 and cases cited supra notes 6, 7 and 11.

\(^8\)Supra nn. 27-33.
was in the life or security of each individual and the number of harms resulting from a defendant's act was a measure of his liability. The abandonment of this theory for the breach of the peace rule gave emphasis to the singularity of individual responsibility.

The severity of criminal punishment in England when offenses were chiefly capital placed pressure on the courts to restrict liability. Thus, if a defendant was convicted, unless he was protected by his clergy, the problem of a second trial did not exist—the defendant was hanged. If the defendant was acquitted, the court's reluctance for a second risk on the defendant's life gave rise to the jeopardy rule, which was easily confusable with the proposition that the defendant had committed but one offense.

Likewise, the demand for perfection in pleading encouraged the court to say that the state forfeited its right to a second trial if it made a mistake. Again the purpose was to protect the defendant's life.

Many of these considerations are now of little significance in our social order. Public violence, despite recent dramatic incidents, gives the state less concern than untoward practices destructive of the general economy of government and injurious to the economic integrity of its citizens. Today the body of criminal law constantly grows toward the protection of individual interests as an auxiliary of tort liability, and the physical harm cases become proportionately less significant.

The enforcement of liability has likewise undergone radical change. Although in the beginning death was the normal punishment for the common law felonies, today, few offenses are of a capital character. Indeed, even where long prison sentences are permissible under the statutes, the cry of every prosecutor is that punishment is inadequate. Thus, the demand for singularity of offense as a means of protecting the defendant against excessive punishment has lost much of its significance. Today, the possibility of a multiple prosecution as a means of obtaining an adequate punishment holds attractive possibilities.

59Borough & Halcraft's Case, (1579) 2 Leon. 160. "In cases of murder, a conviction of an inferior offense, as manslaughter, and the allowance of clergy, is, in one respect, more beneficial than a total acquittal, because it is a bar to any subsequent appeal." Stone's case, (1562) 2 Dyer 214.

60In the case of counterfeiting, for example, although the maximum possible imprisonment is fifteen years, the most usual sentence (during a two year period) was one year and a day; only one maximum sentence was imposed; and over eighty-five percent of the imprisonments were for less than three years.
Furthermore, the general economic inability of individuals to prosecute, through private action, claims for injury has stimulated the expansion of criminal offenses as a means of control where civil liability has become ineffective. Thus, the inclusion of criminal penalties as a sanction for such economic interests as arise under fair trade acts, blue sky laws, pure food and drug acts, reflect the government’s responsibility in the protection of individual interests. In these cases multiplicity of prosecution is generally accepted. Thus, it appears that our society is demanding of government many of the protections which are more referable to the feudal or pre-feudal English society than to the classic era of the nineteenth century.

Although the procedural demands of criminal prosecution originally were conceived as burdensome to the defendant, today the belief is that the “technicalities” of procedure provide ready opportunity for the defendant’s escape. Consequently, the denial of a second prosecution because of an error in the first trial seems today to have less validity than it once did, and the abrogation of common law procedure, particularly in regard to the indictment and state appeals, illustrates the shift in belief concerning the defendant’s need for protection. When the jeopardy rule is looked upon as a “technicality” by which guilty men frequently escape well merited punishment, it is to be expected that courts will be more willing to permit second prosecutions for multiple consequences as a means of promoting “the ends of justice.”

With a recession in the importance of the common law conceptions of criminal prosecution, it well may be considered whether or not our conception of an offense will not tend to develop in a fashion which will include “consequence” as an element of equal significance with act and intention. The lack of a time interval, by which it is now argued that as only a single breach of the peace has occurred there is only single responsibility, likewise may be abandoned for a definition of offense which will more definitely accord with the changing use of the criminal sanction in social control.

Such an increase of criminal responsibility necessarily involves the question of criminal procedure. The advantage of the single act system was not limited to the protection of the defendant, but also relieved the judicial system of repetitious litigation. The application of the indictment system used in statutory offenses to common law crimes would meet this difficulty. Thus, in a single
prosecution arising from a “single” transaction, by the inclusion of separate offenses in separate counts, the entire transaction might be adjudicated, and all criminal responsibility assessed against the defendant at one time. This method has proved useful in civil litigation, and is well understood in prosecutions for federal statutory offenses. Thus, procedurally there would appear to be no objection to the recognition in a single case of criminal offenses as extensive as the consequences of the action.

An extension of the procedural protection of double jeopardy has done much to confuse understanding concerning the exact character of an offense. To say that if D kills X and Y with one shot, then he has murdered X or Y but not X and Y, is difficult to understand. It is likewise hard to believe that the courts intend to grant the defendant a bonus by protecting him in case his second consequence is similar to his first. Thus, to say that if D assaults X and kills Y with one shot he may be tried twice, but that if his aim is more certain and he kills both X and Y with one shot he is guilty of but one murder, smacks of the grotesque. A more careful consideration of the problem suggests the validity of the statement that

“A battery is violence done to the person of another and though there be but a single act of violence committed, yet if its consequence affects two or more persons there must be a corresponding number of distinct offenses perpetrated.”

Carefully analyzed, there appears no obstacle, as a matter of substantive law, to the prosecution of each consequence of a criminal act.