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Statutory Multiple Punishment and Multiple Prosecution Protection: An Analysis of Minnesota Statute Section 609.035

In 1963, the Minnesota legislature enacted a statute prohibiting multiple prosecution and punishment where a person's conduct constitutes more than one statutory offense. This statute was designed largely to reverse the course of decisions under constitutional double jeopardy provisions and a predecessor statute which afforded inadequate protection to defendants. The author of this Note first considers the policies underlying double jeopardy protection and the inadequacies of earlier judicial decisions. He then analyzes the Minnesota statute and suggests guidelines for resolving issues yet to be faced by the Minnesota courts. In conclusion, he suggests that the Minnesota Supreme Court should assume a strong role in assuring strict compliance with the statute, and proposes further legislation.

I. INTRODUCTION

The doctrine prohibiting double jeopardy is intended to protect defendants against multiple punishment as well as multiple prosecution for the same offense. Originating in the common law, the doctrine is incorporated in the fifth amendment to the federal constitution and in most state constitutions. The con-


3. "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." In Palko v. Connecticut, 302 U.S. 319 (1937), the Supreme Court refused to extend federal double jeopardy standards to the states by incorporation within the fourteenth amendment. The Court indicated, however, that a flagrant violation of the double jeopardy guarantee
stitutional protection against double jeopardy has, however, proved largely illusory. First, courts have tended to ignore the different policies underlying multiple prosecution and multiple punishment protection, thereby producing an illogical and inconsistent body of case law. Second, in determining what is the same "offense," courts have focussed on the statutory provisions allegedly violated and the evidence necessary to a conviction under each provision rather than on the defendant's behavior. With the proliferation of statutory offenses, this approach makes it possible for a defendant to be prosecuted and punished several times for a single behavioral incident. Finally, a number of exceptions to the general rule permit multiple prosecution and punishment for what is conceded the same offense.

Legislation designed to implement the policies underlying constitutional double jeopardy provisions has been enacted in some states. Such a statute was adopted in Minnesota in the 1963
revision of the Criminal Code. This Note will analyze section 609.035 and suggest guidelines for its interpretation and solutions for some of the problems arising under the new statutory approach.

II. CONSTITUTIONAL DOUBLE JEOPARDY

Separate policies underlie the constitutional prohibitions against multiple prosecution and multiple punishment for the “same offense.” The restriction on multiple punishment has a substantive goal of insuring that defendant’s punishment is commensurate with his criminal culpability. The bar on multiple prosecution is designed to accomplish the procedural objectives of relieving defendants from the threat of repeated prosecutions, establishing the finality of one prosecution, and protecting both defendants and the public from the waste of both money and time through consolidation of prosecutions.

Because of the difference in the policies underlying the two protections, it has often been suggested that different tests should be used to determine their availability. But courts have ignored this distinction and have applied identical definitional tests to determine whether the “same offense” was made the basis for reprosecution or multiple punishment. The resulting body of case law is wholly irreconcilable.

In attempting to solve the key problem of what is the “same offense,” courts have employed two distinct analytical methods: the “same evidence” approach and the “same transaction” approach. The federal courts and a majority of state courts rely on

14. See Kirchheimer, supra note 8; Note, 11 Stan. L. Rev. 735 (1959); Note, 75 Yale L.J. 262 (1965); Note, 65 Yale L.J. 339 (1956).
17. See ALI, Administration of the Criminal Law: Double Jeopardy 27–33 (same offense), 39–61 (same transaction) (Official Draft 1935); Kirchheimer, supra note 8; Lugar, supra note 13.
some variation of the former,\textsuperscript{18} which originated in \textit{The King v. Vandercomb},\textsuperscript{19} and was adopted by the United States Supreme Court in \textit{Gaviere v. United States}:\textsuperscript{20} "A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt defendant from prosecution and punishment under the other."\textsuperscript{21}

With the ever-expanding number of statutory offenses which can be charged on the basis of essentially unitary behavior,\textsuperscript{22} this approach makes it possible for the resourceful prosecutor to subject a defendant to multiple prosecutions for various statutory violations arising out of a single unit of conduct, and to obtain separate consecutive sentences for each infraction.\textsuperscript{23} The approach

\begin{enumerate}
\item Typical formulations of this test include the following: (1) offenses are not the same unless defendant could have been convicted at the first trial by proof of facts necessary to convict at the second, see State v. Midgett, 214 N.C. 107, 198 S.E. 618 (1938); State v. Labato, 7 N.J. 157, 80 A.2d 617 (1951); The King v. Vandercomb, 2 Leach 708, 168 Eng. Rep. 455 (1796); (2) offenses are not the same unless evidence of either offense would be sufficient for conviction of the other, see Morey v. Commonwealth, 108 Mass. 483 (1871); State v. Shoopman, 11 N.J. 333, 24 A.2d 493 (1938); State v. Empey, 65 Utah 609, 239 Pac. 25 (1925); (3) offenses are not the same unless defendant could have been convicted of the same offense on the evidence required at the first trial, see State v. Brownrigg, 87 Me. 500, 88 Atl. 11 (1895); and (4) offenses are not the same unless they are identical in law and fact, see Burton v. United States, 202 U.S. 344 (1906). Further variations under the same evidence approach may occur depending upon the level at which the courts require the evidentiary similarities to exist—in the proof at the trials, in the allegations of the indictments, or in the statutory definitions of the crimes. See Note, 49 Minn. L. Rev. 738, 799 n.7 (1965); Note, 75 Yale L.J. 262, 268-70 (1965).
\item The rule of this case appears to have been dictated at least in part by a desire to compensate for the strict common law pleading rules under which the slightest variance between the allegation and proof was fatal to the prosecution. Note, 75 Yale L.J. 262, 270 (1965). This variance problem has largely vanished. See, e.g., State v. Healy, 136 Minn. 264, 161 N.W. 590 (1917). At any rate, it cannot be relied upon to justify the same evidence test in a former conviction case, since variance is a harmful technicality only when it results in an acquittal. See Note, 75 Yale L.J. 262, 274 & n.55 (1965).
\item See authorities cited note 8, supra.
\item See Lugar, supra note 13, at 819 n.10; Note, 7 Brooklyn L. Rev. 79, 82 (1937).
is therefore inadequate to implement the policies underlying double jeopardy provisions.

Some state courts have been persuaded to depart from this restrictive treatment of double jeopardy by employing a "same transaction" approach.\(^{24}\) Focussing on the defendant's conduct rather than upon evidence or statutes, these courts prohibit separate prosecution and punishment for violations arising out of a single unit of conduct. Tests for determining whether conduct is unitary are based upon acts, transactions, or the actor's intent and objective.\(^{25}\)

Strict application of the same evidence test frequently has led to absurd results. In Hoag v. New Jersey, 356 U.S. 464 (1958), the defendant was tried on three counts for robbing A, B, and C in a single transaction. His acquittal was held no bar to a subsequent prosecution for robbing D in the same transaction. In Ciucci v. Illinois, 8 Ill. 2d 619, 137 N.E.2d 40 (1956), aff'd per curiam, 356 U.S. 571 (1958), the defendant was charged with murdering his wife and three children by setting fire to their home. He was separately tried three times, each time for the murder of a different member of his family, and in each trial all four murders were introduced into evidence. The prosecutor, dissatisfied with the penalties imposed by the first two juries, was finally able to get a death sentence on the third conviction. Cases not involving multiple victims have also reached ridiculous results. In Johnson v. Commonwealth, 201 Ky. 314, 256 S.W. 888 (1923), the court held that defendant could be prosecuted separately for each of 75 hands of poker played at one sitting. In Ebeling v. Morgan, 237 U.S. 625 (1915), the Supreme Court upheld separate and consecutive sentences for robbing each of six mail bags.

The prosecutor's discretion as to how many violations to charge is largely immune from judicial review. See Remington & Joseph, Charging, Convicting, and Sentencing the Multiple Criminal Offender, 1961 Wis. L. Rev. 528, 530 n.6. The following states have been listed as applying the same transaction test: Alabama, Georgia, Indiana, Michigan, New Jersey, Oklahoma, Tennessee, Texas, Vermont, and West Virginia. Lugar, supra note 13, at 323 n.26.


Commentators generally agree the same transaction approach provides needed protection against the harassment and cost of multiple trials. However, it has been criticized as inappropriate for determining the substantive question of multiple punishment. In addition, the vagueness of the standard—"same transaction"—could conceivably encompass any span of conduct—has led to sporadic and inconsistent application of the test in jurisdictions which purport to follow it.

The problem of determining which violations constitute the same offense is further complicated by a number of recognized exceptions which allow otherwise prohibited multiple prosecution and multiple punishment. Additional prosecution and punishment have been allowed where: (1) the act is an offense against two or more persons; (2) the victim of defendant's wrongdoing dies after the first prosecution; (3) the act violates the criminal laws of different jurisdictions; and (4) the first court had no jurisdiction to prosecute for the offense charged in the subsequent prosecution.

26. See authorities cited note 14 supra.
27. See Note, 75 YALE L.J. 282, 276 (1965).
28. See, e.g., Holder v. Fraser, 215 Ark. 67, 219 S.W.2d 625 (1949); People v. Majors, 65 Cal. 138, 3 Pac. 597 (1884); People v. Ciucci, 8 Ill. 2d 619, 137 N.E.2d 40 (1956). Contra, e.g., LaDner v. United States, 358 U.S. 169 (1958); Bell v. United States, 349 U.S. 81 (1955); State v. Wheelock, 216 Iowa 1428, 250 N.W. 617 (1933); Crocker v. State, 204 Tenn. 615, 325 S.W.2d 234 (1959).
30. See generally Note, 24 MINN. L. REV. 522, 540-43 (1940). This exception is most often applied with respect to successive prosecutions for state and federal offenses. See, e.g., Abbate v. United States, 359 U.S. 187 (1959); Bartkus v. Illinois, 359 U.S. 121 (1959). Occasionally the exception has been applied to conduct that violates both a municipal ordinance and a state law. See, e.g., State v. Garner, 360 Mo. 59, 226 S.W.2d 604 (1950); State v. Hauser, 187 Neb. 183, 288 N.W. 518 (1939). And, even less frequently, the exception is applied to concurrent state jurisdiction. See, e.g., Nielsen v. Oregon, 212 U.S. 315 (1909); Strobhar v. State, 55 Fla. 167, 47 So. 4 (1908).

With respect to the federal-state overlap, it should be noted that since Bartkus and Abbate the Justice Department has established a policy of not bringing a subsequent prosecution where there has been a previous trial on the state level. Memorandum to the United States Attorneys, Department of Justice Press Release, April 6, 1959 as cited in Note, 75 YALE L.J. 282, 294 n.10 (1966). Cf., Petite v. United States, 312 U.S. 529 (1960).

A few states have enacted statutes which prohibit prosecution after conviction or acquittal in another jurisdiction. See, e.g., MINN. STAT. ANN. § 609.035 (1964); MODEL PENAL CODE § 111, comment at 62 (Tent. Draft No. 5, 1950).

31. See, e.g., Diaz v. United States, 223 U.S. 442 (1912); State v. Barnette,
III. MINNESOTA'S STATUTORY APPROACH TO DOUBLE JEOPARDY: SECTION 609.085

In 1963, the legislature enacted section 609.085 which provides:

Except as provided in section 609.585, if a person's conduct constitutes more than one offense under the laws of this state he may be punished for only one of such offenses and a conviction or acquittal of any one of them is a bar to prosecution for any other of them. All such offenses may be included in one prosecution which shall be stated in separate courts.

This section, like traditional double jeopardy doctrines, offers two distinct protections. The first clause prohibits multiple punishment for statutory violations arising out of a defendant's single unit of conduct, and the second clause bars reprosecution for any violation subsequent to an acquittal or conviction on another such violation. The last sentence allows joinder of all such violations in one prosecution.

A. GUIDELINES FOR INTERPRETATION OF SECTION 609.085

It is clear that section 609.085 was intended to expand double jeopardy protection. Former section 610.21, which spoke in

158 Me. 117, 179 A.2d 800 (1962); People v. Townsend, 214 Mich. 267, 183 N.W. 177 (1921); State v. Shoopman, 11 N.J. 383, 94 A.2d 493 (1953). The rationale of these decisions is that the defendant was not in jeopardy of conviction of the larger offense prior to the second trial. Other authorities point out that while defendant was not in jeopardy of conviction or punishment for the greater offense at both prosecutions, he was in jeopardy of conviction or punishment for the lesser offense at both prosecutions when the larger offense included the smaller. State v. Sampson, 157 Iowa 257, 138 N.W. 473 (1912); see Note, 24 Minn. L. Rev. 522, 544-45 (1940).

32. Minn. Stat. Ann. § 609.035 (1964), provides, "A prosecution for or conviction of the crime of burglary is not a bar to conviction of any other crime committed on entering or while in the building entered." The constitutionality of the exception created by the predecessor to this statute was sustained in State v. Robinson, 262 Minn. 79, 114 N.W.2d 737 (1962); State v. Hackett, 47 Minn. 425, 50 N.W. 472 (1891).


34. "Any act or omission declared criminal and punishable in different ways by different provisions of law shall be punished under only one of such provisions, and a conviction or acquittal under any one shall bar a prosecution for the same act or omission under any other provision." Minn. Rev. Laws 1905, § 4765, as amended.

Although the term "conduct" replaced the term "act or omission," it seems unlikely the new statute was intended to be inapplicable to multiple crimes of omission.
terms of a defendant's "act or omission," could have been read to provide the same protection; according to the drafters of the new statute, that statute was intended to govern when "a single behavioral incident resulted in the violation of more than one criminal statute." Except for some early cases, however, Minnesota decisions tended to defeat this alleged purpose.

Initially the Minnesota Supreme Court appeared committed to the same transaction approach, although its decisions were not based upon the former statute. Thus, in State v. Moore, the court held that conviction for uttering a forged mortgage barred prosecution for uttering a forged note to secure the mortgage at the same time. In State v. Klugherz, acquittal for making a forged note was held to bar prosecution for uttering the note as a part of the same transaction. Both opinions emphasized that under the constitutional provision, a single act or transaction could constitute but one offense.

In State v. Oberman, the court's emphasis shifted from transactions to offenses. Although it found keeping liquor for sale and selling the liquor to be separate and distinct acts subject to separate prosecution, the decision appears to rest on the fact that separately defined violations were involved.

Subsequent decisions expressly rejected the same transaction approach. In State v. Fredlund, successive prosecutions were permitted for causing each of two deaths in an auto collision. The court found no constitutional prohibition against successive prosecutions where "the wrongful act is the cause of separate and distinct offenses," and reasoned that "proof of the death of [one victim] . . . cannot possibly acquit or convict defendant of the killing of the [other]."

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36. See ibid.
87. 86 Minn. 422, 60 N.W. 787 (1903).
38. 91 Minn. 406, 98 N.W. 99 (1904).
39. 152 Minn. 431, 189 N.W. 444 (1922).
40. "It may be necessary or desirable to show sales in order to prove that the liquor was kept for sale, but it does not follow from that fact that the offenses are identical. They clearly are not." 152 Minn. at 438, 189 N.W. at 445.
41. 200 Minn. 44, 273 N.W. 353 (1937).
42. Id. at 50, 273 N.W. at 356.
43. Ibid. The court dismissed the Moore and Klugherz decisions in a sentence: "We think a careful reading of the cases mentioned leads to the view that the question here presented has not heretofore been decided by this court." Id. at 54, 273 N.W. at 358.
In *State v. Winger*, acqittal of rape was held no bar to prosecution for carnally knowing and abusing a minor by the same act. The court reasoned that upon the first prosecution there could be no conviction of the crime charged in the second, and, without referring to section 610.21, stated "the words 'same offense' mean same offense, not the same transaction, not the same acts, not the same circumstances or same situation." Implicit in all these cases was a view of section 610.21 first stated in *State v. Thompson*. There, after holding constitutional double jeopardy protection was not a bar to successive prosecutions of a public official for refusing to turn over public funds to his successor and for misappropriation of the same funds, the court considered the effect of section 610.21:

This statute implements the constitutional provision against double jeopardy, Minn. Const. art. 1, § 7, but adds nothing to the scope of the prohibition therein contained. It is apparent that, in using the words *act* and *omission*, the legislature was using them in the restricted and consequential sense of a single and separate offense.

Thus, the Minnesota court read the same evidence approach into section 610.21, ignoring a clear legislative intention to expand double jeopardy protection.

Since the enactment of section 609.035, the Minnesota Supreme Court has indicated a willingness to apply it more broadly than its predecessor. Recognizing that most prior decisions were inconsistent with the policy expressed by section 610.21, the court has accepted a legislative intention to change the effect of the statutory prohibition.

A number of factors support this result. First, the term "conduct" suggests a factual rather than an evidentiary test. Second, the whole tenor of the *Fredlund* opinion seems to be that an obviously guilty defendant should not escape punishment. It should be noted that although the question was not before the court, the state had submitted a supplemental record and brief on the point that an acquittal obtained fraudulently, here assertedly by the testimony of witnesses who had pleaded guilty to perjury, should not bar another trial. Note, 24 Minn. L. Rev. 522, 555 & n.197 (1940).

44. 204 Minn. 164, 282 N.W. 819 (1938).
45. Id. at 167, 282 N.W. at 821.
46. 241 Minn. 59, 62 N.W.2d 512 (1954).
47. Id. at 66, 62 N.W.2d at 518.
48. See State v. Reiland, 142 N.W.2d 635 (Minn. 1966); State v. Johnson, 141 N.W.2d 517 (Minn. 1966); City of Bloomington v. Kossow, 269 Minn. 467, 131 N.W.2d 206 (1964).
50. Id. at 521–24.
the Advisory Committee's comment,\textsuperscript{51} strongly suggesting a broader test, is indicative of legislative intent.\textsuperscript{52} Finally, section \textsection{609.04}\textsuperscript{53} confers fully as much protection as the prior case law by prohibiting additional prosecution or punishment for a crime necessarily proved if another crime charged is proved. Given this provision, the only utility of section \textsection{609.035} is to provide protection from multiple prosecution and punishment in situations where the defendant's conduct constitutes multiple offenses, none of which is necessarily proved by proof of another.\textsuperscript{54}

B. \textbf{What Is a "Person's Conduct"?}

The Minnesota court has already addressed itself to the threshold question: should the term "conduct" receive identical definition whether protection is sought against multiple prosecution or against multiple punishment. Although, because of the different policies underlying the two protections, it would be reasonable to utilize different tests,\textsuperscript{55} the court was persuaded from the wording of the statute that the legislature intended a single standard.\textsuperscript{56}

\begin{itemize}
\item \textsuperscript{51} 40 MINN. STAT. ANN. 57-58 (1964).
\item \textsuperscript{52} See State v. Johnson, 141 N.W.2d 517, 521-22 (Minn. 1966).
\item \textsuperscript{53} Subdivision 1. Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included crime, but not both. An included crime may be any of the following:
\begin{enumerate}
\item A lesser degree of the same crime; or
\item An attempt to commit the crime charged; or
\item An attempt to commit a lesser degree of the same crime; or
\item A crime necessarily proved if the crime charged was proved.
\end{enumerate}
\item Subd. 2. A conviction or acquittal of a crime is a bar to further prosecution of any included crime, or other degree of the same crime.
\end{itemize}

\textbf{MINN. STAT. ANN. § 609.04 (1964).}

\begin{itemize}
\item \textsuperscript{54} See State v. Johnson, 141 N.W.2d 517, 521 (Minn. 1966). For comparisons of the language and scope of protection of California provisions comparable to §§ 609.04 and 609.035, see Note, 50 CALIF. L. REV. 853 (1962); Note, 2 SAN DIEGO L. REV. 86 (1965). It is important to note that California's counterpart to § 609.04 does not purport to prevent multiple punishment and its protection against multiple prosecution attaches earlier than that of § 609.04. See CAL. PEN. CODE § 1023.
\item \textsuperscript{55} See authorities cited note 14, supra; Note, 50 CALIF. L. REV. 853, 862 (1962).
\item \textsuperscript{56} [T]he application of the prohibitions [multiple prosecution and multiple punishment] turns on the same determination — whether the "person's conduct constitutes more than one offense." Stated another way, a defendant can neither be punished nor prosecuted more than once where
Recognizing the imprecision of the term "conduct," the Advisory Committee drew the section with a view to incorporating California and New York decisions interpreting similar statutes. These states have developed a body of law providing significantly broader protection than that afforded by the Minnesota decisions under section 610.21.

New York and California courts have usually utilized a test focussing upon the intent and objective of the actor. Little weight

his "conduct constitutes more than one offense". . . . [I]t seems logically inescapable that the test for applying protection from multiple prosecutions and protection from double punishment is the same . . . . State v. Johnson, 141 N.W.2d 517, 521, 523 (Minn. 1966).

The court nevertheless recognized that because the clauses are based upon different policies, defendant's waiver of protection against multiple prosecutions does not necessarily constitute a waiver of protection against multiple punishment. Id. at 525-26.

Despite dictum in Neal v. State, 55 Cal. 2d 11, 21, 357 P.2d 889, 844-45, 9 Cal. Rptr. 607, 612-13 (1960), leaving open the possibility of different tests for multiple prosecution and multiple punishment under California's similar statute, commentators feel the same test will be applied to both protections under that statute. See Note, 17 Hastings L.J. 53, 69 (1965); Note, 11 Stan. L. Rev. 735, 747 & n.50 (1959).


An argument can be made that the term "conduct" should be interpreted more broadly than the term "act or omission" used in the California and New York statutes. See Cal. Pen. Code § 654; N.Y. Pen. Law § 1938. However, courts in those states appear to equate "act or omission" with a course of conduct, see, e.g., Neal v. State, 55 Cal. 2d 11, 357 P.2d 889, 9 Cal. Rptr. 607 (1960). It is clear the Advisory Committee intended to go no further than the incorporation of such decisions.


In Neal, the California Supreme Court established this guideline: Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.

55 Cal. 2d at 15, 357 P.2d at 848-49, 9 Cal. Rptr. at 611-12. This remains the test predominantly used by the California courts, see, e.g., People v. Quinn, 61 Cal. 2d 551, 333 P.2d 705, 39 Cal. Rptr. 805 (1964); People v. McFarland, 58 Cal. 2d 748, 376 P.2d 449, 26 Cal. Rptr. 478, (1963); Seiterle v. Superior Court, supra although numerous other tests have also been relied upon. See McKissack, Recent Developments in the Criminal Law: The Included Offense Doctrine in California, 10 U.C.L.A. L. Rev. 870, 885 (1963). A recent
is placed on his physical movements. The number of times a defendant may be prosecuted or punished is measured by the number of intentions or dominant purposes with which he has acted.

On its face, the "intent and objective" test has a number of defects. The criteria of intent and objective seem to have no foundation in statutory language, since the words "act" and "conduct" suggest a test that looks to defendant's physical movements. Moreover, it is difficult, both as an evidentiary and a psychological problem, to determine the number of a defendant's intents and objectives. In fact, the criminal often lacks a specific intent and objective when planning his criminal conduct and rarely considers "such matters as sudden interruptions by third parties and alternative means of perpetration, escape, or concealment." As a result, predictability and uniformity of punishment are compromised by the test. A related objection is that the test arbitrarily favors the defendant who developed a broad intent and objective prior to engaging in his course of criminal conduct, and penalizes the defendant who narrowly viewed the purposes of his criminal activity. Finally, while the test would seem to provide

decision by the New York Court of Appeals, however, appears to have rejected the intent and objective test formulated by an inferior court in People v. Savarese, supra. In holding that a prosecution for reckless driving did not bar a subsequent prosecution for vehicular homicide, the plurality opinion stated that § 1938 of the Penal Code goes no further than the constitutional standard of "same offense." Martinis v. Supreme Court, 15 N.Y.2d 240, 206 N.E.2d 165, 258 N.Y.S.2d 65 (1965), 79 Harv. L. Rev. 438. In view of the presently confused state of New York law and the varied tests applied by the California courts, it is significant that the Advisory Committee Comment cited Neal and Savarese as representative of the law intended to be incorporated. See 40 Minn. Stat. Ann. 68 (1964).

59. See 2 San Diego L. Rev. 86, 94 (1965).

60. In Neal, for example, the defendant attempted to kill his victims by igniting their bed after soaking it with gasoline. The defendant was charged with two counts of attempted murder and one count of arson. The court held California's statute barred punishment for both arson and attempted murder because the arson was incidental to the single dominant purpose of the actor—killing his victims.


proper protection from multiple prosecution, its criteria are unrelated to the question of whether the state intended cumulative punishment for separately defined offenses. The last objection, however, applies to any concept which looks to behavior rather than to substantive statutes to measure the scope of protection against consecutive punishment. Given the language of section 609.035, the wisdom of applying a behavior-oriented approach is no longer open to question.

The only remaining question is whether intent and objective are the proper criteria to effectuate this legislative decision. The language of section 609.035 provides support for a test emphasizing the equal importance of three behavioral factors — singleness of intended purpose, unity of time, and unity of place. The word "conduct" suggests a concept of physical action, bounded in time and space. Such an approach would explicitly recognize the technique adopted by courts purporting to use the intent and objective test exclusively. That is, time and place are viewed as objective criteria which enable the court to determine singleness of intent.

Use of these objective criteria would make the intent test less elusive and provide more certain guidelines. Similarly it would reduce the possibility of arbitrarily favoring the defendant with the broader criminal intent.

In State v. Johnson, the Minnesota court recognized that many offenses do not have intent as an element. Cases involving such offenses require a substitute for the factors of intent and objective, such as "the singleness of the conduct or behavioral incident" as manifested by "an indivisible state of mind or coincident errors of judgment." However, the test formulated in Johnson would rely heavily on intent and objective when intent is an essential element of the crime charged:

The cases from other jurisdictions and comments of the advisory committee suggest that, apart from the factors of time and place, the essential ingredient of any test is whether the segment of conduct involved was motivated by an effort to obtain a single criminal objective.

Although this language may be interpreted as placing undue emphasis upon the factor of intent, it should be noted that the court

66. See State v. Reiland, 142 N.W.2d 635 (Minn. 1966); note 56 supra and accompanying text.
68. See Horack, supra note 60, at 818–19.
69. 141 N.W.2d 517 (Minn. 1966).
70. Id. at 525.
71. Ibid.
referred with approval to the Advisory Committee comment citing cases which utilize additional factors. Thus, it appears reasonable to conclude that the Minnesota court will give equal consideration to time, place, and intent.

The application of this test may be illustrated by the following hypothetical situations: (1) Defendant breaks into a home while the family is on vacation and steals some goods. In this situation because the offense of breaking and entry was necessary to accomplish defendant's single purpose or plan to steal and both offenses occurred within a close relationship of time and place, he would initially appear entitled to assert the protection of section 609.035. However, the single exception to section 609.035 permits multiple prosecution and punishment for burglary and other crimes committed on entering or while in the building. (2) Upon entering the home, defendant encounters the maid and rapes her. In this instance, defendant’s three offenses — burglary, theft, and rape — were accomplished within the outer limits established by time and place, but the rape was not incident or necessary to defendant’s plan to rob. Thus, section 609.035 would not preclude separate trials and consecutive punishments. (3) Defendant and another man planned the theft three days in advance and executed it together. The three offenses committed — burglary, theft, and conspiracy — were motivated by a single purpose, to steal, and were incident or necessary to that end; however, the conspiracy lacked a close relationship of time and place to the burglary and theft. Thus, the defendants would not be entitled to the section’s protection.

IV. PROBLEMS CREATED BY SECTION 609.035

Some additional problems arising under section 609.035 may be illustrated by the use of the following hypothetical situation: While attempting to evade the police, defendant drove through a 30 mile per hour zone at 60 miles per hour in the left lane, ignor-

72. 141 N.W.2d at 521–23.
73. See note 32 supra and accompanying text.
74. Although several writers have questioned the propriety of treating conspiracy as a separately punishable offense, see, e.g., Note, 11 Stan. L. Rev. 785, 756–57 (1959), it does not appear reasonable to conclude that § 609.035 was intended to bar separate prosecution and punishment where the conspiracy cannot be said to constitute the same conduct as the substantive offense.

Several California cases have held under their similar statute that conspiracy is not a separate punishable offense. See, e.g., People v. Thomsen, 48 Cal. Rptr. 455 (Dist. Ct. App. 1965). This result is consistent with their test which focuses solely upon the intent and objective of the actor. See notes 58–60 supra and accompanying text.
ing the police car's red lights and siren. In the process of running a stop sign defendant struck and killed a pedestrian in the cross walk. Before finally being apprehended, defendant seriously injured a police officer while attempting to escape on foot. The defendant in this situation could be charged with speeding, refusing to obey a police officer's lawful order, failure to keep to the right of the road, going through a valid stop sign, reckless driving, aggravated assault, and homicide. It is assumed for purposes of discussion that all these offenses arose out of a single unit of conduct within the meaning of section 609.035.75

A. Conviction or Acquittal for Lesser Offense

If the defendant is charged in district court on a single count or on a number of counts other than homicide, and conviction or acquittal ensues, section 609.035 would bar a subsequent prosecution for the homicide. The prosecutor need not have chosen which crimes to prosecute, since the joinder provision of section 609.035 expressly allows the state to bring all offenses arising out of defendant's "conduct" within a single indictment.76 Defendant should not be made to bear the burden of repeated trials, even though the prosecutor's action permits him to escape prosecution for the most severe offense.77

B. Waiver of Section 609.035's Protection

If, in the hypothetical suggested, the prosecutor had charged all offenses, including homicide, in a single prosecution, and the defendant requested a separate prosecution on some or all of the less serious offenses, there is no sound reason why the statute should prevent a further prosecution for the homicide. Although

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75. This assumption appears reasonable since all the offenses were incidental or necessary to the accomplishment of a common purpose to evade the police and were closely related in time and space, therefore satisfying the three factors used to define "conduct."

76. It should be noted that § 609.035 permits joinder only of offenses arising out of the same unit of conduct. This seems to have been overlooked in the court's dictum in State v. Reiland, supra, note 56. There, after holding that the two offenses did not arise out of a single behavioral incident, the court stated: "... the problem presented in the case before us could not arise if both the offenses were included in one prosecution stating each as separate counts, a procedure expressly authorized by the statute."

77. See Note, 24 Minn. L. Rev. 522, 545-46 (1940). Once § 609.035 is applied rigorously, prosecutors will avoid its effects by properly joining offenses.
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a literal reading of the statute would seem to compel this result, the Minnesota court has held that the protection of the section is waived by "requesting a special kind of serialized prosecution." This result appears reasonable since it leaves the defendant with an option of defending all charges individually or together. 

C. Guilty Plea to Lesser Offenses Charged in One Prosecution

If the hypothetical defendant facing all seven charges elected to plead guilty on one or more counts, he might argue that this conviction should bar the state from proceeding further against him. However, section 609.035 should be construed to bar only subsequent prosecutions, not continuation of a single prosecution on multiple counts. The Johnson result could have rested upon this broader principle. The court could simply have held that these actions did not sever the prosecution since the "waiver" in that case was found to consist merely in defendant's making "no plea" to the larger offense, requesting permission to plead on the smaller one, and pleading guilty thereto.

D. Waiver and Guilty Plea to Lesser Offenses Charged in One Prosecution-Multiple Punishment

If the defendant charged with all seven violations procures a separate prosecution on a lesser offense upon request and is convicted, or if he pleads guilty to a lesser offense, he may request

78. State v. Johnson, 141 N.W.2d 517, 525-26 (Minn. 1966).
79. The Johnson court emphasized that the defendant's conduct was "an obvious attempt" to "become immune from further prosecution on the more serious charge." Id. at 525. See generally Note, 24 Minn. L. Rev. 522, 531-34 (1940). However, it would seem a defendant's request for serial prosecution need not be motivated by bad faith before he can be found to have waived his statutory protection.
82. Citing Tideman and Goldman, supra note 81, the court in Johnson stated that in a single prosecution on multiple counts, "no plea or dismissal of any offense charged will prevent the prosecution from continuing until all offenses charged are disposed of." 141 N.W.2d at 526.
immediate sentencing on that offense.\textsuperscript{83} It might be argued, however, that such sentencing would bar the court from imposing additional punishment on any remaining charges.\textsuperscript{84} On the other hand, if the court defers sentencing until all the offenses have been determined,\textsuperscript{85} there is no punishment within the meaning of the statute to bar subsequent sentencing on the remaining offenses.\textsuperscript{86}

A strong argument can be made that application of the multiple punishment clause should not be based on whether the court imposed a sentence on the lesser offense which would be equating the sentence with the punishment. This appears to be unreasonable, at least if the sentence is vacated before defendant serves any of it, since it does not seem he is punished. If the sentence is not vacated before he serves some or all of it, crediting punishment actually served under one sentence to that imposed under another may be sufficient to qualify as punishment “for only one of such offenses.” It has been asserted, “The intent of the section is to . . . [limit] the sentence to the maximum permitted for the most serious crime committed.”\textsuperscript{87} Credit for punishment served accomplishes this objective.\textsuperscript{88}

E. \textbf{Change in Circumstances Giving Rise to an Additional Offense}

Another problem is the effect section 609.035 should have in the hypothetical situation if the victim of defendant's reckless driving were to die only after defendant's conviction or acquittal on a lesser offense. A number of courts, faced with similar situations, have held constitutional double jeopardy does not bar a second prosecution for the greater crime.\textsuperscript{89} The rationale is that, at the time of the earlier prosecution “the offence now prosecuted

\textsuperscript{83} It is within the court's discretion to determine when a sentence is to be imposed. See Minn. Stat. Ann. §§ 609.095–16 (1964).

\textsuperscript{84} The court in \textsc{Johnson} recognized that a waiver of statutory protection against multiple prosecution need not constitute a waiver of multiple punishment protection. 141 N.W.2d at 526.

\textsuperscript{85} This was done by the trial judge in \textsc{Johnson}. Id. at 520.

\textsuperscript{86} See People v. Tideman, 57 Cal. 2d 574, 370 P.2d 1007, 21 Cal. Rptr. 207 (1962).


\textsuperscript{88} If mere sentencing were held to bar further punishment, the prosecutor still might have an incentive to obtain convictions on remaining counts. See generally Note, 17 Hastings L.J. 55, 66–67 (1965). For example, additional convictions might enhance the penalty if defendant is later convicted under a multiple offender statute, see notes 145–46 infra and accompanying text, and convictions on traffic counts might result in suspension or revocation of a driver’s license. See Minn. Stat. §§ 171.71–.18 (1961).

\textsuperscript{89} See authorities cited in note 29 supra.
was not . . . complete and was not capable of judicial determination.” The literal language of the Minnesota statute does not provide an exception in this instance to its bar against multiple prosecution. However, such an exception can reasonably be read into the statute. The effect of the clauses barring multiple prosecutions and authorizing joinder of offenses is to establish a rule of compulsory joinder for offenses arising out of the same conduct. It would be unreasonable to conclude that such a rule may be invoked for failure to join offenses which are not complete at the time of prosecution.

It might also be argued that the state should not be penalized for accommodating the defendant with a speedy trial on other offenses before it is clear whether the victim will live or die; by asserting his right to a speedy trial on lesser offenses, the defendant can be said to have waived his protection from subsequent prosecution for the homicide. This approach has certain difficulties, however. First, it involves circular reasoning. If the statute were held to be a bar to a second prosecution after the victim’s death, pre-trial delay to determine the fate of the victim would probably be considered justified and, in the absence of actual prejudice to the accused, not an infringement of his speedy trial right. Second, it might lead to inconsistent results. General waiver principles appear to apply only to the defendant who actually requested an immediate trial on lesser offenses, even though the prosecutor likely would give all defendants an immediate trial rather than risk infringing speedy trial rights. Because of these difficulties, the direct approach of reading an exception into the statute seems preferable.

Under either approach, the defendant still should be able to rely upon the statutory protection against multiple punishment. Such protection should require that any punishment served under the earlier convictions be credited against that imposed for the homicide.

F. MULTIPLE VICTIMS: CONDUCT AS AN OFFENSE AGAINST TWO OR MORE PERSONS

If the hypothetical defendant had struck and killed two persons

91. The rule is compulsory insofar as failure to join offenses bars subsequent prosecutions.
92. See notes 78–79 supra and accompanying text; cf. Note, 24 Minn. L. Rev. 322, 346 (1940).
93. See generally Note, 64 Yale L.J. 1208 (1955).
94. See notes 87–88 supra and accompanying text.
in the cross walk, the problem would arise whether separate prosecution and punishment could be had for each death. The authorities are divided on the issue of constitutional double jeopardy in this area.\textsuperscript{95} Formerly, Minnesota took the position that the constitutional rule does not bar successive prosecutions.\textsuperscript{96}

Since the enactment of section 609.035, the Minnesota Supreme Court has not considered the effect of offenses against multiple victims. Under the construction given a similar statute in California, however, a defendant may be tried and punished consecutively for offenses against different victims arising from the same conduct.\textsuperscript{97} This result is consistent with the wording of the California statute, which applies when "an act ... is made punishable in different ways by different provisions of [the] Code."\textsuperscript{98} Several deaths or injuries caused, for example, by the explosion of a bomb placed on an airplane naturally are made punishable by the same code provision. The protection of section 609.035, on the other hand, is available "if a person's conduct constitutes more than one offense under the laws of this state."\textsuperscript{99} Therefore a literal application of the section would preclude multiple prosecution or punishment where a single unit of conduct produces either the same offense or different offenses against multiple victims.

The contrary result reached by the California courts seems based upon a notion that defendant's culpability should determine his protection from multiple prosecution and punishment. Explaining the California Supreme Court's position allowing cumulative punishment, Chief Justice Traynor stated:

\begin{quote}
The purpose of the protection against multiple punishment is to insure that the defendant's punishment will be commensurate with his criminal liability. A defendant who commits an act of violence with the intent to harm more than one person or by a means likely to cause harm to several persons is more culpable than a defendant who harms only one person.\textsuperscript{100}
\end{quote}

\textsuperscript{95} See authorities cited in note 28 \textit{supra}.

\textsuperscript{96} See State v. Fredlund, 200 Minn. 44, N.W. 353 (1937) (two deaths from auto collision).

\textsuperscript{97} See Neal v. State, 55 Cal. 2d 11, 357 P.2d 839, 9 Cal. Rptr. 607 (1960) (separate punishment for an attempt to murder two victims by arson); People v. Branon, 70 Cal. App. 225, 233 Pac. 88 (Dist. Ct. App. 1924) (acquittal for assault with intent to murder wife does not bar prosecution for killing bystander by same shot).

\textsuperscript{98} \textit{CAL. PEN. CODE} § 654. (Emphasis added.) The California Supreme Court declined to rest its result in \textit{Neal} on this language. 55 Cal. 2d at 18 n.1, 357 P.2d at 843 n.1, 9 Cal. Rptr. at 611 n.1.

\textsuperscript{99} \textit{MINN. STAT. ANN.} § 609.035 (1964). (Emphasis added.)

\textsuperscript{100} Neal v. State, 55 Cal.2d 11, 20, 357 P.2d 839, 844, 9 Cal. Rptr. 607,
This notion has also influenced decisions of the Minnesota Supreme Court.101 Preoccupation with defendant's culpability, however, tends to obscure the issues posed by a claim of statutory protection. With respect to multiple prosecution protection, the heinousness of the crimes allegedly committed has little relevance. The burden of defending repeated trials clearly is no less because the charges are grave and the state has no legitimate reason not to join offenses. Admittedly, different considerations bear on the question of punishment, which traditionally has been associated with culpability. However, section 609.035 makes no distinction between multiple prosecution and multiple punishment,102 and the gravity of the charges in itself provides no basis for making such a distinction. In support of this position is the theory that the objectives of the criminal law are deterrence and rehabilitation rather than punishment.103 The threat of additional punishment for victimizing more than one person is not likely to deter the criminal who risks punishment for victimizing a single person.104 Moreover, flexible sentencing procedures would still permit reservation of maximum punishments for the most heinous crimes, such as crimes against multiple victims.

G. Prosecution in State and Municipal Courts

Additional problems would arise if the hypothetical defendant were first tried in municipal (or justice) court on some of the lesser charges, and then prosecuted in district court for the homicide. First, since the municipal court lacks jurisdiction over felonies,105 it might be argued that its trial of statutory misdemeanors should

612 (1960). Although the Advisory Committee Comment cited Neal as representative of the law § 609.035 was intended to incorporate, 40 MINN. STAT. ANN. 58 (1964), it seems clear this incorporation was limited to the broadness of Neal's approach in defining a single unit of conduct and not as authority for creating an exception to § 609.035 where defendant's conduct is an offense against multiple victims.


102. See notes 55-56 supra and accompanying text.

103. Modern correctional theories assumedly have different objectives than those prevailing when the notorious traitor William Wallace was reportedly "drawn for treason, hanged for robbery and homicide and disembowelled for sacrilege, beheaded as an outlaw and quartered for divers depredations." See Note, 75 YALE L.J. 262, 300 (1965).

104. This is particularly true of multiple murders, since a single murder carries the maximum punishment of life imprisonment.

not bar a prosecution in district court for felonies arising out of the same conduct. Second, if the trial in municipal court was limited to ordinance violations, it might be argued that it should not bar a prosecution in district court for statutory offenses arising out of the same conduct, either because ordinance violations are not "offenses" within the meaning of section 609.085, or because defendant's conduct constitutes an offense against two sovereigns.

1. Limited Jurisdiction of Municipal Courts

A majority of courts have accepted the view that an accused is not placed in jeopardy for an offense until he is brought before a tribunal having the authority to determine his guilt or innocence of that offense. Thus, a second trial for offenses arising out of the same conduct involved in an earlier prosecution would not be barred by constitutional double jeopardy, provided the first court lacked jurisdiction over the offenses charged in the second prosecution. In jurisdictions following the same evidence test, this rule is easily justified. The first court's lack of jurisdiction simply establishes that defendant was not formerly placed in jeopardy for the same offense. Under section 609.085, on the other hand, the relevant question is whether defendant was formerly prosecuted for an offense arising out of the same conduct. Thus, reading an exception into the section for prosecutions in municipal court would involve an extension of the general rule.

Those who would favor such an extension point to the difficulties inherent in requiring coordination among state and local prosecuting authorities. A municipal court trial might be undertaken without an appreciation of its possible effect, and in some cases local authorities may be consciously unwilling to forego prosecution. Once prosecution in municipal court is initiated, the effect of section 609.085 could be avoided only by having the charges dismissed before conviction or acquittal. If local authorities fail to

106. See note 31 supra and accompanying text.
107. See notes 18-23 supra and accompanying text.
108. See 49 Minn. L. Rev. 738, 743 (1965).
109. Section 609.085 bars prosecution only after conviction or acquittal in an earlier action. However, it should be noted that constitutional double jeopardy protection may attach in the first action when a jury is empanelled, see, e.g., Cornero v. United States, 48 F.2d 69 (9th Cir. 1931), or, in court-tried cases, when the first evidence is presented, see, e.g., Markiewicz v. Black, 138 Colo. 128, 330 P.2d 539 (1958). Thus, a dismissal of the municipal court action may be deemed equivalent to an acquittal for purposes of barring subsequent prosecutions in district court for the same offense. See Boswell v.
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cooperate, the state prosecutor could attempt to secure an earlier conviction in district court, but with little prospect for success. Assuming the joinder provision of section 609.035 would not bar concurrent trials for offenses arising out of the same conduct, it seems likely the misdemeanor trial in municipal court would be completed long before a felony trial in district court. Moreover the defendant could bar prosecution in district court by pleading guilty to the lesser offenses in municipal court. Since he did not request separate prosecutions, his guilty plea should not be deemed a waiver of the statute's protection.

These difficulties, however, do not appear to be insurmountable. And it is more appropriate to place the burden of securing effective cooperation among prosecuting authorities on the state than to burden the defendant with multiple prosecutions for offenses arising out of the same conduct.

2. Ordinance Violations

(a) As Offenses

Section 609.035 applies "if a person's conduct constitutes more than one offense under the laws of this state." There are strong indications that "offense" is intended to mean statutory crimes, and does not include ordinance violations. This view was adopted in City of Bloomington v. Kossow, although the holding of the case was expressly limited to non-traffic ordinances which do not proscribe conduct for which a penalty is provided by state law.

State v. Hoben, strongly suggests that the protection of section 609.035 should be available if the earlier prosecution was for violation of traffic ordinances subject to the uniformity provision of section 169.03:

State, 111 Ind. 47, 49, 11 N.E. 788, 789-90 (1887). It might be argued further that when constitutional jeopardy has attached, the policy embodied in § 609.035 requires a behavior-oriented test for determining what is the "same offense."

110. See note 80 supra and accompanying text.
111. See notes 78-79 supra and accompanying text.
113. MINN. STAT. ANN. § 609.035 (1964).
114. See MINN. STAT. ANN. § 609.02(1) (1964); Pirsig, Comment to §§ 609.02, 609.035, 49 MINN. STAT. ANN. 42, 55 (1964).
115. 269 Minn. 467, 131 N.W.2d 206 (1964).
116. Id. at 470, 131 N.W.2d at 208.
117. 256 Minn. 486, 98 N.W.2d 813 (1959).
118. The provisions of this chapter shall be applicable and uniform
As we interpret § 169.03, it was the intention of the legislature that the application of its provisions should be uniform throughout the state both as to penalties and procedures, and requires a municipality to utilize state criminal procedure in the prosecution of the act covered by § 169.03. . . . When a municipality undertakes such prosecution, it must, therefore, to insure uniformity of treatment, do so in a criminal prosecution which affords the defendant all the protection of criminal procedure including the right of trial by jury and immunity from double punishment.119

On their facts, both Kossow and Hoben leave open the question whether violation of a non-traffic ordinance covering a subject for which a penalty is provided under state statute is an "offense" within section 609.035.120 Prior to the adoption of the section, the court held that in this situation prosecuting and punishing defendant under both the statute and the ordinance does not violate constitutional double jeopardy.121 This result was criticized in Hoben:

This apparent disregard of Minn. Const. art. 1, § 7, which is designed to protect the citizens from double punishment for the same offense, seems to find support in the doubtful theory that the municipality and the state are in a sense independent and sovereign units of government analogous to the state and Federal relationship.122

The court suggested that a more satisfactory approach would be to determine whether the municipal ordinance regulated subjects

throughout this state and in all political subdivisions and municipalities therein, and no local authority shall enact or enforce any rule or regulation in conflict with the provisions of this chapter unless expressly authorized herein. Local authorities may adopt traffic regulations which are not in conflict with the provisions of this chapter; provided, that when any local ordinance regulating traffic covers the same subject for which a penalty is provided for in this chapter, then the penalty provided for violation of said local ordinance shall be identical with the penalty provided for in this chapter for the same offense.


119. 256 Minn. at 444, 98 N.W.2d at 818–19. See also State v. Friswold, 263 Minn. 130, 116 N.W.2d 270 (1962); State v. Moosbrugger, 263 Minn. 56, 116 N.W.2d 68 (1962); State ex rel. Pidgeon v. Hall, 261 Minn. 56, 111 N.W.2d 472 (1961); City of St. Paul v. Ulmer, 261 Minn. 178, 111 N.W.2d 612 (1961).

120. In Kossow, the ordinance violation was being drunk in public. There is no similar statutory offense. In Hoben, the ordinance violation was driving while intoxicated.

121. See State v. Cavett, 171 Minn. 505, 214 N.W. 479 (1927); State v. Lee, 29 Minn. 445, 13 N.W. 913 (1883); State v. Oleson, 26 Minn. 507, 5 N.W. 959 (1880).

122. 256 Minn. at 439, 98 N.W.2d at 816.
of strictly local concern or subjects related to the protection of the state as a whole.\textsuperscript{123} Thus, the defendant who has been prosecuted for violation of any city ordinance regulating a subject of statewide concern would be entitled to the protection of former jeopardy and section 609.035.\textsuperscript{124}

California courts faced with this question have taken a broader view of the statutory protection. Despite statutory language referring to "different provisions of this Code,"\textsuperscript{125} they have held that prosecution under any ordinance bars prosecution under a statute for offenses based upon the same conduct.\textsuperscript{126} Such a conclusion could be reached more easily under section 609.035, which refers to "laws of this state."\textsuperscript{127}

(b) As Offenses Against the Law of a Different Jurisdiction

If a particular ordinance violation is deemed an "offense" within section 609.035, it still might be argued that separate prosecution and punishment for statutory offenses arising out of the same conduct should be allowed. The argument, based upon the fact that defendant's conduct offends the laws of more than one jurisdiction, has been adopted by several courts, including the Minnesota Supreme Court,\textsuperscript{128} as an exception to the constitutional double jeopardy rule.\textsuperscript{129} This exception has been criticized,\textsuperscript{130} and the criticism seems especially justified where defendant's single unit of conduct violates the laws of both a state and municipality:

\textsuperscript{123} Id. at 442-44, 98 N.W.2d at 817-19; see State v. Ketterer, 248 Minn. 173, 79 N.W.2d 186 (1956).

\textsuperscript{124} See Jones, Minnesota Criminal Procedure § 88 (2d ed. 1964): These safeguards [former jeopardy and proof beyond a reasonable doubt] are applicable whenever there is a prosecution relating to the dignity of the state as a whole, as distinguished from prosecutions on a local level for violations of regulatory, licensing, zoning, or other ordinances relating peculiarly to the local scene.

\textsuperscript{125} CAL. PEN. CODE § 654. (Emphasis added.)

\textsuperscript{126} See People v. Manago, 230 Cal. App. 2d 645, 41 Cal. Rptr. 260 (Dist. Ct. App. 1964); People v. Williams, 207 Cal. App. 2d Supp. 912, 24 Cal. Rptr. 922 (1962). In Manago, the court stated:

Although Section 654 ostensibly relates only to punishment or prosecution under two provisions of "this [i.e., Penal] Code," the rule also applies to an act made punishable by provisions of different codes . . . . An appellate department decision . . . has held that Section 654 applies also to a municipal ordinance. This rule seems consistent with the intent and purpose of the section, and we adopt it.

\textsuperscript{127} Id. at 647, 41 Cal. Rptr. at 262.

\textsuperscript{128} MINN. STAT. ANN. § 609.035 (1964).

\textsuperscript{129} See cases cited note 121 supra.

\textsuperscript{130} See note 30 supra and accompanying text.
The principle objection to the rule, even were it to be conceded that prosecutions by two sovereigns such as a state and the federal government do not violate double jeopardy principles, is that a municipality is not a sovereign power at all but is merely an instrumentality of the state.\footnote{131}

Limited to situations in which each unit of government has a distinct reason for prosecuting the offense against its laws, the rule would have some justification. However, an exception to the operation of section 609.035 should not be made for all ordinance violations.\footnote{132}

If all prosecutions for ordinance violations were excluded from the coverage of section 609.035, it might be argued that subsequent prosecutions for statutory offenses should be barred by section 609.045 which states: “If an act or omission constitutes a crime under both the laws of this state and the laws of another jurisdiction, a conviction or acquittal of such crime in the other jurisdiction bars prosecution for the crime in this state.”\footnote{133} The legislative history of this provision indicates that municipalities were not intended to be included in “other jurisdictions.”\footnote{134} However, a contrary argument could be based upon early cases which asserted that, for purposes of constitutional double jeopardy, municipalities and the state are separate jurisdictions analogous to states and the federal government.\footnote{135} Taken together, sections 609.035 and 609.045 appear to reflect a state policy against prosecuting a defendant who has been tried anywhere for the same offense.\footnote{136}

H. Appropriate Sentence or Judgment

Section 609.035 expressly prohibits multiple or cumulative punishment,\footnote{137} but it does not determine what the ultimate judg-
ment or sentence should be if defendant is convicted of several offenses in a single prosecution. Three different approaches have been followed under California's similar statute. A few cases allowed the convictions to stand and the sentences were imposed to run concurrently. This method of sentencing, it was argued, was tantamount to cumulative punishment because it increased the penalty by delaying eligibility for parole. In response to this argument, lesser convictions were vacated in some cases. This sentencing procedure, however, created a new problem:  

If [the trial court] dismisses the count carrying the lesser penalty, and the conviction on the remaining count should be reversed on appeal, the defendant would stand with no conviction at all. . . . [This method] incurs the risk of letting a defendant escape altogether.

Apparently the present method of sentencing in California is to

Minn. Stat. Ann. § 609.15 (1964), which provides:

Subdivision 1. When separate sentences of imprisonment are imposed on a defendant for two or more crimes, whether charged in a single indictment or information or separately, or when a person who is under sentence of imprisonment in this state is being sentenced to imprisonment for another crime committed prior to or while subject to such former sentence, the court in the later sentences shall specify whether the sentences shall run concurrently or consecutively. If the court does not so specify, the sentences shall run concurrently.

Subd. 2. If the court specifies that the sentence shall run consecutively, the total of the terms of imprisonment imposed, other than a term of imprisonment for life, shall not exceed 40 years. If all of the sentences are for misdemeanors the total of such terms shall not exceed one year; if for gross misdemeanors the total of such terms shall not exceed three years.


139. People v. Quinn, 61 Cal. 2d 551, 393 P.2d 706, 39 Cal. Rptr. 398 (1964); People v. Brown, 49 Cal. 2d 577, 593, 220 P.2d 5, 15 (1955); People v. Branch, 119 Cal. App. 2d 490, 496, 260 P.2d 27, 31 (1955). In the Quinn Case the California Supreme Court stated, “Section 654 of the Penal Code proscribes double punishment of a criminal act that constitutes more than one crime, and concurrent sentences are double punishment.” 61 Cal. 2d at 555, 393 P.2d at 703, 39 Cal. Rptr. at 396. (Emphasis added.)


sustain all convictions and vacate the sentences of the lesser offenses.\textsuperscript{142}

The Minnesota Advisory Committee's comment and dictum in \textit{State v. Johnson},\textsuperscript{143} provide support for a method similar to that presently used by the California courts. The Advisory Committee comment states:

\begin{quote}
As drawn, the recommended section will not prevent a single indictment from charging several offenses arising out of the same conduct and obtaining convictions for any or all of them, but a sentence may be imposed for only one of them which may be for the highest sentence which any one of them carries.\textsuperscript{144}
\end{quote}

Although the comment refers to only one sentence being imposed, rather than all sentences being imposed and all but the highest vacated, it is doubtful the drafters intended to dispose of such a technical distinction in this general comment.

Allowing the convictions to stand on the record may adversely affect defendant both as to the fixing of his term by the Adult Corrections Commission\textsuperscript{145} and as to the application of the multi-

\begin{footnotes}
\item[143] 141 N.W.2d 517 (Minn. 1966). Although not concerned with the problem of the appropriate sentence under § 609.035, the court indicated its agreement with an approach allowing convictions on all violations resulting from defendant's conduct but limiting punishment to a single sentence:
\begin{quote}
[The Statute] necessarily contemplates multiple convictions. . . . As stated in the comments of the committee, the purpose of the statute prior to and after revision is "to limit punishment to a single sentence when a single behavioral incident resulted in the violation of more than one criminal statute." The policy underlying this objective appears to be that, where the statute is applicable and defendant is convicted of multiple offenses, as a practical matter a single sentence will necessarily take into account all violations, and imposing up to the maximum punishment for the most serious offense will include punishment for all offenses.
\end{quote}
\item[144] 40 MINN. STAT. ANN. 58 (1964). (Emphasis added.)
\item[145] See MINN. STAT. ANN. § 609.12 (1964), which provides that the Adult Corrections Commission is to determine when "the granting of parole
ple offender statute by the court. This is as it should be, insofar as these bodies consider the additional convictions solely as indicia of the gravity of the offense for which defendant is incarcerated. For these authorities to consider the mere number of convictions arising out of a single unit of conduct would be inconsistent with modern correctional theories as well as the policy underlying section 609.035. As a practical matter, however, both the Adult Corrections Commission and the court would be able to learn about defendant's convictions regardless of the fact they were dismissed by the trial court. Therefore it seems preferable to let the convictions stand on the record and openly rely on the good judgment of the authorities rather than to adopt a less sound technique which requires the same reliance.

CONCLUSION

Section 609.035 represents an attempt to implement the policies underlying constitutional double jeopardy provisions. Its dominant purpose is to reverse the course of decisions equating acts or omissions with the substantive offenses committed. The behavior-oriented approach embodied in the new statute will have the salutary effect of expanding protection against multiple prosecution and punishment.

This Note has considered a number of problems in the application of the statute yet to be resolved by Minnesota courts. While some of these problems—for example, the effect of municipal prosecutions—are not without difficulty, the policy expressed in the statute provides some guidance for their determination. Other problems, however, deserve further consideration by the legislature. For example, now that an accused may be prosecuted only once for offenses arising out of his conduct, it may be appropriate

or discharge would be most conducive to his rehabilitation and would be in the public interest.”

146. Minn. Stat. Ann. § 609.155 (1964). In determining when § 609.155 is applicable to extend the term of imprisonment of a defendant who has previously been convicted of one or more felonies, findings are made by the court as required by Minn. Stat. Ann. § 609.16 (1964). The court in making its findings under the latter section is required thereby to determine whether “an extended term of imprisonment is required for his rehabilitation or for the public safety.”

147. Minn. Stat. Ann. § 609.16 (1964) expressly allows the courts, in determining the appropriate term of punishment for the multiple offender, to consider among other things “the evidence at the trial and the presentence report.”
to authorize retrial after a successful state appeal from a judgment of acquittal. The policy of section 609.035 would not appear to be offended by a single trial free from error. While such a result might be read into the statute — conviction or acquittal literally bars prosecution only for "any other" offense — there is no indication that the legislature intended to make this significant change in the law.

Another problem deserving further consideration is the distinction between multiple prosecution and multiple punishment. While distinct policies underlie the two protections, the statute applies the same standard of unitary conduct to each. Thus, a court is not left free to extend one protection and not the other where policy seems to dictate that result. In such situations a court may be inclined to deny both protections.

Finally, the importance of coordinated efforts to implement the statute at the trial level should be emphasized. To appellate courts it often appears that double jeopardy protection is being invoked by guilty defendants who would escape punishment commensurate with their crimes simply because of innocent mistakes at the trial level. In the past, courts have strained to avoid this result, at the expense of consistency. It is clear, however, that the statute can be implemented by following proper procedures in prosecuting and sentencing, without sacrificing any legitimate state interest. Thus, it is to be hoped that the effects of the statute will be appreciated by trial judges and prosecuting authorities as well as defense attorneys. The long-range role of the Minnesota Supreme Court in implementing the statute should be to enforce strict adherence to its terms.