1972

Multiple Prosecution and Punishement of Unitary Criminal Conduct--Minn. Stat. 609.035

Minn. L. Rev. Editorial Board

Note: Multiple Prosecution and Punishment of Unitary Criminal Conduct—Minn. Stat. § 609.035

As part of the criminal code revision of 1963, the Minnesota legislature enacted Section 609.035 of the Minnesota Statutes, which states:

> Except as provided in section 609.585,[1] 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 counts.

This statute constitutes an attempt to correct a long standing deficiency in the criminal law with respect to multiple prosecution and punishment of unitary criminal conduct. However, an examination of the problem and its treatment historically by the courts and legislatures, and the terms of the present Act and its interpretation by the courts indicates that the statute has not adequately corrected the deficiency and that therefore a new statutory solution is desirable.

I. THE MULTIPLE PUNISHMENT, MULTIPLE PROSECUTION PROBLEM

Because, in the strict sense, a criminal defendant is prosecuted and punished not for his past reprehensible conduct, but for a definite offense abstracted from the incriminating historical incident,[2] it is possible that a single criminal incident will give rise to more than one offense. Two factors have significantly increased the likelihood of this possibility. First, there has been a proliferation of the number of specialized offenses drawing on only limited aspects of an individual's behavior. Second, the enactment of criminal legislation often proceeds piecemeal; the legislature seemingly has been unaware of a particular statute's relation to offenses proscribing similar conduct.[3]

Within this act-offense dichotomy is the potential for two

---

1. MINN. STAT. § 609.585 (1969) provides: "A prosecution for or conviction of burglary is not a bar to conviction of any other crime committed on entering or while in the building entered." The validity of this exception to the principal statute is considered *infra* at note 82.

2. *See* Kirchheimer, *The Act, The Offense and Double Jeopardy*, 58 YALE L.J. 513, 528 (1949).

3. Ashe v. Swenson, 397 U.S. 436, 445 n.10 (1970).

distinct evils, each violative of separate policy objectives. First, by punishing each offense the culpability of the defendant's behavior may be exaggerated.[4] The underlying notion is that where different offenses proscribe essentially the same conduct, the legislative intent in enacting the statutes was to allow the prosecutor greater latitude, given the exigencies of proof, rather than to punish different aspects of the same behavior.[5] Second, when the offenses are separately prosecuted, a defendant encounters the inconvenience of multiple trials in addition to the dangers of multiple punishment,[6] while the state wastes judicial resources, risks inconsistent verdicts[7] and encourages inexact prosecution.[8] Both evils may not be present in the same case. When a prosecution follows a prior acquittal, issues of multiple punishment do not arise. On the other hand, if under modern procedural forms several offenses are joined in one prosecution, issues of multiple prosecution are absent.[9]

II. HISTORICAL TREATMENT OF THE PROBLEM

The situations in which these dangers have been realized have been determined in large part by the development of double jeopardy doctrine.[10] Prior to 1700 the plea of double jeopardy[11] protected criminal defendants from the dangers of both multiple prosecutions and multiple punishments. At that time the number of criminal offenses was small and each offense encompassed a broad range of behavior.[12] As a result there was

4. Advisory Committee Comment, 40 MINN. STAT. ANN. 58 (1964).
5. *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 876 (1952).
6. Green v. United States, 355 U.S. 184, 187 (1957).
7. This risk is diminished somewhat by the importation into the criminal law of collateral estoppel. *See* note 24 *infra* and accompanying text.
8. Lugar, *Criminal Law, Double Jeopardy and Res Judicata*, 39 IOWA L. REV. 317, 345 (1954).
9. State v. Johnson, 273 Minn. 394, 398, 141 N.W.2d 519, 521 (1966).
10. *See generally*, M. FRIEDLAND, DOUBLE JEOPARDY 3-16, 89-215 (1969); J. SIGLER, DOUBLE JEOPARDY 1-37 (1969).
11. The substance of this doctrine has not always been labeled "double jeopardy." At an earlier date, the doctrine was clothed in the maxims *nemo debet bis vexari pro una et eadem causa*, and *nemo debet bias puniri pro uno delicto*. M. FRIEDLAND, *supra* note 10, at 17. Coke identified three pleas: *auterfois acquitt, auterfois concivt*, and former pardon. COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 212-213 (4th ed. 1669).
12. M. FRIEDLAND, *supra* note 10, at 14; Comment, *Statutory Implementation of Double Jeopardy Clauses: New Life for a Moribund Constitutional Guarantee*, 65 YALE L.J. 339, 342 n.15 (1956).

usually only one offense with which a defendant could be charged for a given criminal episode. When at a subsequent prosecution a plea of double jeopardy was interposed, the prior and subsequent indictments were compared, and if both concerned the same factual transaction the plea was sustained.[13]

Eighteenth century developments narrowing the scope of criminal prosecutions are primarily responsible for contemporary multiple offense situations. Rigid pleading and proof requirements, and a rule prohibiting state appeal often resulted in acquittals unsupported by the merits.[14] Moreover, an increase in the number of offenses into which a defendant's conduct could be parceled,[15] coupled with a rule prohibiting trials for more than one offense at a time,[16] prevented a defendant's total criminal behavior from being considered in any one prosecution. This limitation on the factual content of a restricted procedure enabled prosecutors to avoid the impact of unwarranted acquittals. Following an acquittal a defendant's residual conduct was drawn upon to frame a new indictment charging a different offense.[17] By 1800, judicial acceptance of this technique was assured when the judiciary reinterpreted double jeopardy to prohibit reprosecution only if the same evidence was required to prove the offenses charged.[18] Employing the "same evidence" test, a subsequent prosecution would not be barred so long as each offense required proof of a fact which the other did not.[19]

The "same evidence" test flourished in Minnesota. Typical

13. However, the plea was seldom used because the high incidence of convictions and the severity of sentences left the state little incentive to reprosecute. Comment, *supra* note 12, at 342.

14. Kirchheimer, *supra* note 2, at 529; Mayers & Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 HARV. L. REV. 1, 9 (1960).

15. Comment, *supra* note 12, at 343.

16. M. FRIEDLAND, *supra* note 10, at 170-83.

17. Kirchheimer, *supra* note 2.

18. *See* The King v. Vandercomb & Abbot, 2 Leach 708, 168 Eng. Rep. 455 (Ex. 1796). It was at approximately this time that double jeopardy was elevated to a constitutional protection by U.S. CONST. amend. V. Aside from the obvious advantages of this development, it had the disadvantageous effect of crystalizing the doctrine at its 18th century dimensions. *See* Green v. United States, 355 U.S. 184, 215 (1957) (Frankfurter, J., dissenting).

19. Blockburger v. United States, 284 U.S. 299, 304 (1932). This is but one of many formulations of the "same evidence" test. *See generally* M. FRIEDLAND, *supra* note 10, at 97-101. For purposes of this discussion the significant fact is that all formulations of the test emphasized the offenses charged as opposed to the conduct upon which the offenses were predicated.

is *State v. Thompson*,[20] in which the conviction of the defendant, a former county treasurer, for appropriating public money to his own use was upheld despite a previous acquittal for receiving and refusing to pay the same money to his successor. That each offense was predicated on the identical factual transaction did not interest the court. Instead, their attention was focused on the requisite elements of the separate offenses and the evidentiary inferences necessary to prove these elements. The effect of the "same evidence" test was therefore to subordinate the considerations involved in multiple prosecution of defendants to the interest of the state in punishing violations of the criminal law.

Two principal approaches ameliorate the harshness of the "same evidence" test. First, the necessarily-included offense doctrine bars prosecution for an offense the commission of which is included in the commission of an offense charged in a previous prosecution.[21] For example, a charge of rape necessarily includes a charge of assault. This definition of included offenses has been expanded by legislative enactments, now consolidated in Section 609.04,[22] to comprehend not only crimes necessarily proved if the crime charged were proved, but also a lesser degree of the same crime, an attempt to commit the crime charged and an attempt to commit a lesser degree of the same crime. However, even as expanded, this definition offers defendants no more protection than the "same evidence" test since the evidence required to prove any inclusive offense would necessarily prove its included offenses. The significance of Section 609.04 is in its procedural aspects. By providing that "upon prosecution for a crime, the actor may be convicted of either the crime charged or an included crime, but not both," the

20. 241 Minn. 59, 63, 62 N.W.2d 512, 517 (1954).

> [W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test whether they are two separate offenses or only one is whether one of the statutory provisions requires an additional essential fact which the other does not.

21. Kellett v. Superior Court, 63 Cal. 2d 822, 825 n.2, 409 P.2d 206, 208, 48 Cal. Rptr. 366, 368 (1966).

22. 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:

(1) a lesser degree of the same crime; or

(2) an attempt to commit the crime charged; or

(3) an attempt to commit a lesser degree of the same crime; or

(4) a crime necessarily proved if the crime charged were proved.

Subd. 2. A conviction or acquittal of a crime is a bar to

statute de facto joins in one prosecution all offenses included in the offense charged and eliminates the possibility of multiply punishing the several offenses. Furthermore, since upon prosecution for an inclusive offense the defendant is put in jeopardy for included offenses, reprosecution for an offense included in an offense previously charged is foreclosed because the subsequent prosecution would place the defendant twice in jeopardy for the included offense. Conversely, prosecution for an inclusive offense is barred by an antecedent prosecution for an included offense, since upon prosecution for the inclusive offense the defendant would again be in jeopardy for the included offense. The former half of this principal is codified in Subdivision 2, of Section 609.04; its converse has been supplied by judicial embellishment of the necessarily-included offense doctrine.[23] Thus when the several offenses are included offenses, what is in effect compulsory joinder of charges eliminates the dangers of multiple punishments and prosecutions, and at the same time allows the prosecutor access to the entirety of the defendant's criminal behavior.

Second, the application of the "same evidence" test has been narrowed by two aspects of res judicata: collateral estoppel and the rule against unreasonably splitting a cause of action. In the criminal law, collateral estoppel prevents relitigation of issues previously litigated in favor of defendants.[24] However, its effectiveness is limited by the difficulty of determining what issues have actually been litigated in a previous prosecution since most criminal verdicts are general.

Some states, either by judicial decision or legislative enactment, have applied to their criminal law the rule against unreasonably splitting a cause of action.[25] In these states prosecution of an offense is barred if in a previous prosecution the defendant was charged with an offense grounded in the same factual transaction.[26] As stated, this "same transaction" test would eliminate the danger of multiple prosecutions. However, because its development proceeded apart from an effort to give the state a

---

further prosecution of an included crime, or other degree of the same crime.

23. State v. Wondra, 114 Minn. 457, 131 N.W. 496 (1911); State v. Wiles, 26 Minn. 381, 4 N.W. 615 (1880).

24. Ashe v. Swenson, 397 U.S. 436, 445 (1970); United States v. Oppenheimer, 242 U.S. 85, 87 (1916); State v. Robinson, 262 Minn. 79, 80, 114 N.W.2d 737, 740 (1962).

25. *E.g.*, CAL. PENAL CODE § 654 (West 1970); N.Y. PENAL LAW § 1938 (McKinney 1967).

26. Comment, *supra* note 12, at 348-49.

full and fair opportunity to present its case, the courts in applying the test have expanded or contracted the notion of the transaction to produce a result in keeping with their view of the merits of the case. Oftentimes this has resulted in identifying a separate transaction for each offense committed.[27] The result in such cases has been precisely what would have obtained under the "same evidence" test.

Minnesota is among those states which sanctioned legislatively the "same transaction" test. Now repealed, Minnesota Statute, Section 610.21 stated:

> Any act or omission declared criminal and punishable in different ways by different provisions of law shall be punished under only one such provision, and a conviction or acquittal under any one shall bar a prosecution for the same act or omission under any other provision.

For the most part opinions written while the statute was current fail to mention it. In one case, *State v. Thompson*,[28] the court did discuss the statute but concluded:

> This statute implements the constitutional provision against double jeopardy but adds nothing to the scope of the prohibition contained therein. It is apparent that, in using the words *act* or *omission* the legislature was using them in the restricted and consequential sense of a single and separate offense.[29]

Such language merely restates the "same evidence" test.

III. THE TERMS AND INTERPRETATIONS OF MINN. STAT. § 609.035

The inadequacy of Section 610.21, as is manifest by decisions such as *State v. Thompson*, was directly responsible for the enactment of Section 609.035.[30] To implement its primary purpose of eliminating the dangers of multiple prosecutions and punishments, while at the same time permitting the state to adequately punish violations of the criminal law,[31] this statute alters the approach of its predecessor in two significant ways. First, the applicable unit behavior has been changed from an "act or omission" to "a person's conduct." It follows that any test for applying the statute was clearly intended "to

27. *Id.*
28. 241 Minn. 59, 62 N.W.2d 512 (1954).
29. *Id.* at 66, 62 N.W.2d at 518.
30. Advisory Committee Comment, 40 MINN. STAT. ANN. 57-58 (1964).
31. State v. Johnson, 273 Minn. 394, 398, 141 N.W.2d 519, 521 (1966).

emphasize the [underlying factual transaction] rather than the offenses committed."[32]

More significantly, the statute contemplates a method of prosecuting the multiple offender by which his total criminal behavior is considered in one proceeding, with punishment being limited to a single sentence of up to the maximum permitted for the most serious crime for which there is a conviction.[33] This is to be accomplished by broad joinder of factually related offenses, which are to be charged as separate counts in a single indictment.[34] Such joinder is compulsory in the sense that prosecution for offenses not joined in the original indictment is barred.

However, as a device for effecting such a method the statute is defective in two respects. First, by making the application of both the protection against multiple punishments and prosecutions turn on the same test, *i.e.*, whether the "person's conduct constitutes more than one offense,"[35] that statute has failed to separate the analysis of two protections which are based on different policy considerations. As noted above,[36] the rule against multiple prosecutions protects defendants from harrassment and saves the state time and money.[37] The protection from multiple punishments is designed to insure that punishment will be commensurate with culpability.[38] Thus conduct which is divisible for purposes of punishment is often unitary for purposes of prosecution.[39] For example, "[a] defendant who blows

32. *Id.* at 400, 141 N.W.2d at 522.
33. *Id.*; Advisory Committee Comment, *supra* note 30, at 59.
34. State v. Johnson, 273 Minn. 394, 406, 141 N.W.2d 519, 526 (1966).
35. MINN. STAT. § 609.035 (1969).
36. *See* notes 4-8 *supra* and accompanying text.
37. Kellett v. Superior Court, 63 Cal. 2d 822, 825, 409 P.2d 206, 209, 48 Cal. Rptr. 366, 369 (1966).
38. *Id.*
39. A good deal of confusion surrounds the relationship between these protections. While the application of each must be determined with reference to a defendant's conduct, the point of reference with respect to each is a different aspect of that conduct. There are at least two senses in which we can use the notion of conduct in this context. First, conduct may be thought of as episodic, *i.e.*, an identifiable instance of behavior the constituent parts of which are clustered about some unifying element. The aspect of a defendant's behavior which corresponds to this sense is legally significant with respect to multiple prosecutions. The question of the number of prosecutions to which a defendant should be subjected is basically the procedural question of the optimum scope of the criminal prosecution. A major thrust of modern procedure, both civil and criminal, is that the scope of the proceeding should be determined with reference to the operative facts, and not the substantive theories of civil or criminal liability. Furthermore, it is usually agreed that all issues generated by a set of unified facts

up an airplane killing all on board . . . is properly subject to greater punishment than a defendant who kills or harms only a single person. However, it does not follow that such a defendant should be liable to successive prosecutions."[40] By creating an equivalency between the dimensions of conduct necessary to activate both protections, the statute has obfuscated this distinction, with the result that no suspect can be punished for more than one offense if those offenses must be joined under Section 609.035, even though—as in the airplane hypothetical—multiple punishments resulting from a single prosecution would frequently be desirable.[41]

The statute also fails to deal adequately with the problems generated when the several offenses resulting from an instance of indivisible conduct are within the prosecutive responsibility of different authorities. In Minnesota this problem may arise (1) if the actor violates a municipal ordinance and a state statute,[42] or (2) if the offenses, though transgressions against the

(whether that unity is supplied by a transaction, intent, objective, plan, or other factor about which the facts can be grouped) should be determined in a single proceeding. Thus the rational way to determine the divisibility of a defendant's behavior for purposes of prosecution is to focus on its episodic qualities, disregarding the offenses to which it gives rise. A minor qualification to this is that there is a point of intersection between the offenses charged and the permissible number of prosecutions defined by severance from prejudicial joinder. *See* notes 76-77 *infra* and accompanying text.

Second, conduct may be thought of in the abstract and consequential sense of an offense, *e.g.*, larceny, assault, rape, etc. The aspect of a defendant's conduct which corresponds to this sense is legally significant with respect to multiple punishments. Every offense has a corresponding punishment keyed to the social blameworthiness of the proscribed behavior. The issue when several offenses are present is whether that fact is indicative of compound culpability, or whether the several offenses are merely different formulations of the same quantum of blameworthiness. This determination should be made by focusing on the offenses charged and the social interest they seek to protect. *See* notes 85-89 *infra* and accompanying text.

40. Kellett v. Superior Court, 63 Cal. 2d 822, 825, 409 P.2d 206, 209, 48 Cal. Rptr. 366, 369 (1966).

41. *See* note 93 *infra*.

42. The statute addresses itself to this situation. The advisory committee comment accompanying the statute indicates that "'Offense' is used in the section in the sense of a crime as defined in § 609.02, subd. 1. Hence, municipal ordinance violations are not included." Advisory Committee Comment, 40 MINN. STAT. ANN. 58 (1964). In two cases, State v. Clark, 189 N.W.2d 167 (Minn. 1971), and City of Bloomington v. Kossow, 269 Minn. 467, 131 N.W.2d 206 (1964), this aspect of the statute was invoked to permit prosecution and punishment on both the municipal and state level. This is an unsatisfactory approach, based, at least in part, on a rule of law which no longer obtains. When the statute was enacted it was the law that

same sovereign, are prosecuted by different offices in different courts. In turn each of these possibilities might arise in two ways. The offenses might be within the subject matter jurisdiction of different courts,[43] or might have been committed within different territorial jurisdictions.[44] This problem is par-

---

the federal constitution's prohibition of a double jeopardy did not prohibit municipal and state governments from prosecuting and punishing the same *offense*. State v. Cavett, 171 Minn. 505, 214 N.W. 479 (1927); State v. Holm, 139 Minn. 267, 166 N.W. 181 (1918); State v. Lee, 29 Minn. 445, 13 N.W. 913 (1882); *cf.* State v. Oleson, 26 Minn. 507, 5 N.W. 959 (1880). The rule was based on an analogy to the rule of concurrent or dual sovereignties, which permits punishment by both the state and federal governments when an act is an *offense* against each. Abbate v. United States, 359 U.S. 187 (1959); Bartkus v. Illinois, 359 U.S. 121 (1959); United States v. Lanza, 260 U.S. 377 (1922). Since that time the United States Supreme Court, in Waller v. Florida, 398 U.S. 387 (1970), has abrogated the distinction between a state and its political subdivisions for purposes of reprosecution of the same *offense*, holding such reprosecution unlawful. Therefore, since MINN. STAT. § 609.035 (1969) is a legislative declaration that the considerations which prohibit multiple prosecution of the same offense also prohibit multiple prosecutions based on the same factual transaction, equal protection of the law requires that municipal ordinance violators be afforded the same protection as state statute violators.

Traffic ordinances have been held to be within the statute's operations, State v. Gladden, 274 Minn. 534, 144 N.W.2d 779 (1966), because MINN. STAT. § 169.03 (1969) stipulates that the provisions of the Highway Traffic Regulation Act, MINN. STAT. ch. 169 (1969), "shall be applicable and uniform throughout this state and in all political subdivisions and municipalities therein." This provision has been held to require a municipality to afford a defendant the same protections as he would be afforded by the state where the violations charged are also covered in Chapter 169. State v. Hoeben, 256 Minn. 436, 98 N.W.2d 816 (1959).

43. MINN. STAT. § 609.045 (1969) abrogates that portion of the dual sovereignty doctrine that would permit Minnesota to prosecute a defendant following a federal prosecution, by providing:

> 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.

It might be argued that "laws of another jurisdiction" includes municipal ordinances. However, the Advisory Committee Comment accompanying the statute makes it clear that this language is intended to reach only prosecutions in another country or state, or on the federal level. 40 MINN. STAT. ANN. 69 (1964). State v. Kooiman, 289 Minn. 439, 185 N.W.2d 534 (1971); City of Bloomington v. Kossow, 269 Minn. 467, 131 N.W.2d 206 (1964); State v. Wondra, 114 Minn. 457, 131 N.W. 496 (1911); State v. Wiles, 26 Minn. 381, 4 N.W. 615 (1880).

44. State v. Boucher, 286 Minn. 475, 176 N.W.2d 624 (1970); OPP. MINN. ATT'Y GEN., 989 a-8, Nov. 4, 1966. Or a defendant might commit a robbery in one county and travel to another county where he is arrested and charged with possession of stolen property, and subsequently be charged with robbery in the county where that crime took place. In such a case the Minnesota constitutional (MINN. CONST.

ticularly acute where one of the offenses is a misdemeanor and the other a felony.[45] In such a case there is risk that those in charge of prosecuting the minor offense will be unaware, or will choose to ignore the fact that a defendant is chargeable with a felony or risk that a well-advised defendant will plead guilty to the minor offense to bar prosecution for the more serious charge.[46] The difficulties of requiring coordination between the state's different levels of prosecutive authority suggests that the inconvenience of a second prosecution is outweighed by the possibility that a defendant guilty of a felony will escape proper punishment.[47] Nevertheless, symmetry, efficiency and

art. 1, § 6) and statutory (MINN. STAT. § 627.01 (1969)) venue provisions prohibit joinder of offenses and permit the state to maintain successive prosecutions. State v. Fleck, 281 Minn. 247, 156 N.W.2d 78 (1968).

45. In Minnesota the basic scheme of criminal jurisdiction is allocation of misdemeanors and ordinance violations to justice and municipal courts (MINN. STAT. §§ 633.02, 488.04(5)(a)(1) (1969)) and felonies to district courts, although lesser offenses are also cognizable therein (MINN. STAT. § 484.01 (1969)). Municipal courts may also conduct preliminary hearings. MINN. STAT. § 488.04(5)(2)(b) (1969).

46. A similar problem arose in State v. Johnson, 273 Minn. 394, 141 N.W.2d 519 (1966). In that case the defendant was charged at one trial with driving while under the influence of alcohol and driving over the center line. He maneuvered the court into disposing of the driving over the center line charge before the driving while under the influence charge, and then set up the statute as a bar to prosecution for driving while under the influence. The court held that by this maneuver the defendant had waived the protection from multiple prosecution. However, the protection from multiple punishment could not be waived (a fact which indicates the procedural nature of the prosecution protection as opposed to the substantive nature of the punishment protection) so that if convicted upon subsequent prosecution for driving while under the influence he could only be punished for one of the offenses. *Id.* at 404, 273 N.W.2d at 525; *accord,* State v. Gladden, 274 Minn. 533, 144 N.W.2d 779 (1966); *cf.* State v. Simpson, 28 Minn. 66, 9 N.W. 78 (1881).

While the waiver rule might be applied to the situation postulated in the text, that situation lacks the essential element of a waiver. In *Johnson* it was on the defendant's initiative that prosecution of the offenses was separated. Where jurisdictional lines separate the prosecutions in the first instance, the initiative upon which the waiver in *Johnson* was predicated is absent. It would be unfair to penalize a defendant for taking advantage of the situation as he finds it, since a similarly situated defendant who by happenstance is prosecuted for the lesser charge prior to the more serious one could not be held to have waived the statute's protection.

47. To permit an accused to escape prosecution and punishment for the serious offense by the happenstance of a procedural oversight which results in a prior conviction of a minor offense perverts the policy and objectives of the statute by foreclosing consideration of the total criminal behavior.

State v. Reiland, 274 Minn. 121, 125, 142 N.W.2d 635, 638 (1966).

probable economy would result from requiring a coordinated assessment of a defendant's conduct and the offenses to which it gives rise. Furthermore, since the act-offense dichotomy is at least within the penumbra of the federal constitution's interdiction of double jeopardy,[48] Mr. Justice Black's observation that "the state with all its resources and power would not be allowed to make repeated attempts to convict an individual . . . thereby subjecting him to embarrassment, expense, and ordeal and compelling him to live in a continuing state of anxiety and insecurity," is to some extent applicable.[49]

The statute's failure to separate considerations of multiple punishments and multiple prosecutions, and its failure to deal adequately with jurisdictional barriers to joinder has resulted in a body of case law applying the staute which, though reconcilable in terms of policy, is analytically confusing. The court has considered—to the neglect of multiple prosecution issues—that the primary policy underlying the statute is to ensure punishment that is commensurate with the criminality of the defendant's behavior.[50] Thus additional punishment,[51] or a subsequent prosecution anticipating such punishment,[52] has been permitted when it is necessary to achieve parity between the defendant's culpability and the punishment imposed. For example, prosecution for a misdemeanor will not foreclose a subse-

---

The American Law Institute's Model Penal Code avoids this problem by requiring, *inter alia*, that offenses be joined only when they are "within the jurisdiction of a single court." ALI MODEL PENAL CODE § 1.08 (Tent. Draft No. 5, 1956).

In Minnesota's Hennepin and Ramsey counties it is the practice to deal with this situation by staying prosecution of the misdemeanor on the municipal level, pending prosectuion of a criminal negligence charge by the county attorney's office. If the county attorney decides not to prosecute the felony, municipal authorities are then free to resume prosecution of the misdemeanor. Interview with assistant Hennepin County Attorney Tom Bambury, April 7, 1972; interview with assistant Ramsey County Attorney Suzanne Flinsch, April 3, 1972.

48. U.S. CONST. amend. V.

Mr. Justice Brennan maintains that compulsory joinder of related criminal charges is a constitutional imperative. Ashe v. Swenson, 397 U.S. 436, 453 (1970) (separate opinion); Abbate v. United States, 359 U.S. 187, 200 (1959) (concurring opinion).

49. Green v. United States, 355 U.S. 184, 187 (1957).

50. State v. Reiland, 274 Minn. 121, 125, 142 N.W.2d 635, 638 (1966); State v. Johnson, 273 Minn. 394, 399, 141 N.W.2d 519, 522 (1966).

51. State v. Shevchuk, 282 Minn. 182, 163 N.W.2d 772 (1968); State *ex rel.* Stangvik v. Tahash, 281 Minn. 353, 161 N.W.2d 667 (1968).

52. State v. Kooiman, 289 Minn. 439, 185 N.W.2d 534 (1971); State v. Murphy, 277 Minn. 355, 152 N.W.2d 507 (1967); State v. Rieland, 274 Minn. 121, 142 N.W.2d 635 (1966).

quent prosecution for a felony;[53] if the crime has several victims multiple punishment may be imposed;[54] and when both offenses are misdemeanors, punishment can be imposed for only one of the offenses and a conviction or acquittal of one will bar prosecution for the other.[55]

The analytic technique used to justify these results when the crimes are unintentional is best illustrated by a series of cases in which the operation of an automobile resulted in two or more traffic, or traffic-related, offenses.[56] In each the issue was whether the defendant's conduct constituted a single behavioral incident, thereby activating the protections of the statute. The seminal case applying the statute, *State v. Johnson*,[57] articulated the test by which this determination is to be made:

> [I]t would seem that violations of two or more traffic statutes result from a single behavioral incident where they occur at substantially the same time and place and rise out of a continuous and uninterrupted course of conduct, manifesting an indivisible state of mind or coincident errors of judgment. Under these circumstances, there exists a substantial relationship between the conduct constituting the violations[58] and the statute prohib-

53. *See* cases cited in note 52 *supra*. "Neither would conviction of petitioner . . . result in punishment disproportionate to the culpability of defendant . . . ." State v. Kooiman, 289 Minn. 439, 443, 185 N.W.2d 534, 537 (1971).

54. State *ex rel.* Stangvik v. Tahash, 281 Minn. 353, 161 N.W.2d 667 (1968). *Compare* State v. Shevchuk, 282 Minn. 182, 188, 163 N.W.2d 772, 776 (1968) ("We think, moreover, that the punishment was not disproportionate to the culpability of defendants in the aggregate of their crime."); State v. Fredlund, 200 Minn. 44, 273 N.W. 353 (1937).

55. State v. Corning, 289 Minn. 382, 184 N.W.2d 603 (1971); State v. Boucher, 286 Minn. 475, 176 N.W.2d 624 (1970); State v. Gladden, 274 Minn. 533, 144 N.W.2d 779 (1966); State v. Johnson, 273 Minn. 394, 141 N.W.2d 519 (1966).

56. State v. Corning, 289 Minn. 382, 184 N.W.2d 603 (1971); State v. Kooiman, 289 Minn. 439, 185 N.W.2d 534 (1971); State v. Boucher, 286 Minn. 475, 176 N.W.2d 624 (1970); State v. Gladden, 274 Minn. 533, 144 N.W.2d 779 (1966); State v. Reiland, 274 Minn. 121, 142 N.W.2d 635 (1966); State v. Johnson, 273 Minn. 394, 141 N.W.2d 519 (1966).

57. 241 Minn. 59, 62 N.W.2d 512 (1954).

58. In terms of the conduct constituting each offense there are at least five generic relationships between offenses. The following are paradigmatic:

A. Possession of narcotics and reckless driving,
B. Unauthorized use of a motor vehicle and reckless driving,
C. Driving after revocation of one's driver's license and reckless driving,
D. Driving while under the influence of alcohol and reckless driving,
E. Speeding and reckless driving.

To the extent that the relationship between the conduct constituting the violations is determinative, *E* presents the strongest case since the conduct used to establish each offense is identical. *D* also presents a strong case: not only is the operation of an automobile an essential ele-

its both double punishment and serialized prosecutions.[59]

Confusion arises because the test has been applied in two distinct ways depending on the punishment requirements of the case at bar. When the culpability of the defendant's conduct is such that the court feels that the statute's protection should be granted the court has focused on the physical quality[60] of his behavior in applying the test, describing his action in such a way that the singleness of the behavior is apparent. Typical is *State v. Johnson*,[61] in which the defendant was charged with two misdemeanors—driving while under the influence of alcohol and driving over the center line. The court stated:

> The defendant's infractions occurred during a continuous and uninterrupted operation of his automobile, which took place within a period of a few minutes and a distance of two blocks. . . . While in the restricted sense there was more than one "act," there can be little doubt that this was a "single behavioral incident." The defendant's goal was to drive his car from one point to another, and in so doing, both his condition and the manner in which he drove were traffic offenses.[62]

On the other hand, when the protection of the statute is to be withheld, the court has compared the offenses charged, em-

---

ment of each offense, but there is a cause and effect relationship between intoxication and reckless driving. Other than the common element of operation of an automobile, the only relationship between the conduct constituting each offense in *C* is the fact that drivers' licenses are usually revoked for offenses such as reckless driving. As to situations *B* and *A* the relationship is less strong, a fortiori from *C*.

The Minnesota Supreme Court has held that the statute is operative in situations of type *D*. State v. Johnson, 273 Minn. 394, 141 N.W.2d 519 (1966); State v. Gladden, 274 Minn. 533, 144 N.W.2d 779 (1966). But it has refused to grant its protection to defendants in situations of type *C*. State v. Reiland, 274 Minn. 121, 142 N.W.2d 635 (1966). Therefore, it is fair to conclude that the relationship between the conduct constituting each offense will be denominated "substantial" where either the conduct used to establish each offense is the same, or the offenses possess significantly common elements and are such that they often occur together.

59. 273 Minn. at 404, 141 N.W.2d at 525.

60. *See* note 40 *supra*.

61. 273 Minn. 394, 141 N.W.2d 519 (1966).

62. *Id.* at 404, 141 N.W.2d at 525. *Accord*, State v. Boucher, 286 Minn. 475, 480, 176 N.W.2d 624, 627 (1970) ("It appears . . . that he was driving continuously during this time at high and excessive rates of speed heedless of traffic control devices in a continuous intensive effort to evade police . . . . [A]t no stage was there an interruption or surcease in the reckless operation of the vehicle"); State v. Corning, 289 Minn. 382, 387, 185 N.W.2d 603, 607 (1971) ("[T]he most logical explanation of the sequence of events and circumstances would seem to be that the influence of alcohol was an important factor which could have caused relator to leave the scene of the accident . . . to confusedly circle the block, and to exhibit signs of erratic driving behavior . . . .").

phasizing their disparate elements in an analysis divorced from the factual context out of which the offenses arose. For example, in *State v. Reiland*,[63] in which the tenability of a criminal negligence prosecution (a felony) following conviction for driving after revocation of one's driver's license (a misdemeanor) was in issue, the court stated:

> But even assuming that the offense of driving after revocation occurred at the same time and place as his alleged negligent driving, since the former offense by its nature is continuous . . . and recognizing that negligent driving obviously requires driving a vehicle, we hold that both violations, under the circumstances, do not "manifest an indivisible state of mind or coincident errors of judgment." There is no substantial relationship between the conduct constituting each offense. Since it is quite possible, and perhaps very probable, for one to drive carefully despite revocation of his driver's license, that misconduct—unlike, for example, reckless driving—need have no relationship to driving in a grossly negligent manner . . . . The conduct constituting each offense is not the result of a single motivation directed toward a single goal but is essentially dissimilar in both respects.[64]

For crimes in which intent is an essential element of the offenses charged, the test for determining the singleness of the behavorial incident is "whether the segment of conduct involved was motivated by an effort to obtain a single criminal objective."[65] This notion can be particularized so as to find a "single criminal objective" for each offense charged. In *State ex rel. Stangvik v. Tahash*,[66] in which a defendant killed his wife and two children in the course of a few minutes, the court upheld sentences on one count of first degree murder and two counts of second degree murder, stating:

> [M]uch would depend on the harm inflicted and whether multiple sentences would result in punishment grossly out of proportion to the gravity of the offense . . . . The fact that the crimes occurred at substantially the same time and place . . . does not in itself require the application of the statute. These were three separate murders intentionally inflicted on three

63. 274 Minn. 121, 142 N.W.2d 635 (1966).

64. *Id.* at 124, 142 N.W.2d at 638. *Accord*, State v. Kooiman, 289 Minn. 439, 442, 185 N.W.2d 534, 536 (1971) ("[P]etitioner here was convicted of drunkenness, a continuous and intentional crime, and thereafter charged with the nonintentional crime of criminal negligence . . . . Driving a vehicle is in no way necessary to the offense of drunkenness . . . ."); State v. Murphy, 277 Minn. 355, 356, 152 N.W.2d 507, 509 (1967) ("In considering whether defendant's conduct constituted more than one offense so as to make conviction or acquittal of one a bar to prosecution of the other, the elements of both offenses with which the defendant was charged should be considered").

65. State v. Johnson, 273 Minn. 394, 404, 141 N.W.2d 519, 525 (1966).

66. 281 Minn. 353, 161 N.W.2d 667 (1968).

> separate victims. From a legal point of view they were totally unrelated.[67]

This pattern—emphasizing the offense as opposed to the act in order to impose additional punishment and emphasizing the act rather than the offense when additional punishment is not desired—demonstrates the continuity of legal doctrine and technique. The analytic precursor of the former approach is the "same evidence" test. The latter approach antedates the eighteenth century when analytically the main signpost of double jeopardy was the underlying factual transaction.[68]

IV. SUGGESTED SOLUTIONS TO THE MULTIPLE PUNISHMENT, MULTIPLE PROSECUTION PROBLEM

A preferable approach to the multiple offense problem entails separate consideration of the prosecution and punishment issues in a two-step analysis. First, the number of prosecutions the state may bring should be determined by focusing on the physical quality of the defendant's behavior. Second, the offenses for which the defendant may be separately punished should be determined by considering the substantive relationship between them.[69]

The need for a separate analysis of the prosecution could be satisfied by importing into the criminal law that portion of the civil doctrine of res judicata that requires joinder of factually related claims.[70] The notion is similar to that which has gained widespread acceptance in the civil law, namely, that inconvenience to defendants is minimized and public economy encouraged where all matters logically related to a coherent set of operative facts are determined in a single proceeding.

The scope of conduct contemplated by a single prosecution should differ quantitatively and qualitatively from that contemplated by a single punishment. Proximity in time and space will necessarily enter into considerations of trial convenience. However, conduct which is spatially and temporally disparate may still be sufficiently framed by the intent or objective of

---

67. *Id.* at 361, 161 N.W.2d at 673.

68. *See* note 13 *supra* and accompanying text.

69. This step of the suggested approach is detailed at notes 82-94 and accompanying text.

70. *See* Schaefer, *Unresolved Issues in the Law of Double Jeopardy: Waller and Ashe*, 58 CALIF. L. REV. 391, 398 (1970).

the actor. One statutory formulation of these notions is Section 1.08(2) of the American Law Institute's Model Penal Code:

> (a) the offenses are based on the same conduct; or (b) the offenses are based on a series of acts or omissions motivated by a purpose to accomplish a single criminal objective, and necessary or incidental to the accomplishment of the objective; or (c) the offenses are based on a series of acts or omissions motivated by a common purpose or plan and which result in the repeated commission of the same offense or affect the same person or the same persons or the property thereof.[71]

The Federal Rules of Criminal Procedure also encourage joinder of certain offenses.[72] The cases and commentary applying and interpreting this rule,[73] as well as those applying and interpreting the similar civil notion of "same transaction or occurance" could profitably be studied.[74]

When several traffic charges result from a single instance of the operation of an automobile, the defendant's conduct should be within the scope of a single prosecution. For purposes of efficient prosecution it is sufficient that the defendant sought to drive from one place to another even though he committed several offenses in doing so. Typically the same evidence will be admissible on each charge, and often a single law enforcement officer will be the sole prosecution witness. While the operation of an automobile necessarily involves points in space

---

71. ALI MODEL PENAL CODE § 1.08(2) (Tent. Draft No. 5, 1956). *See* A.B.A., MINIMUM STANDARDS FOR CRIMINAL JUSTICE, JOINDER AND SEVERANCE, §§ 1.1, 1.3 (Approved Draft, 1968); ILL. REV. STAT. ch. 38, § 3-3 (1963) (requiring joinder of all known offenses based on the same act).

England now requires the prosecution to "bring forward their whole case, and will not . . . permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest." Conelly v. Director of Public Prosecutions [1964] A.C. 1254.

72. FED. R. CRIM. P., Rule 8(a) reads:

> Joinder of Offenses: Two or more offenses may be joined in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting a common scheme or plan.

73. *See generally* 1A W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 1931 (Wright ed. 1960) and cases cited therein; 8 J. MOORE, FEDERAL PRACTICE par. 8.05 (1968) and cases cited therein.

74. FED. R. CIV. P., Rule 13(a). *See generally* 1A W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 394 (Wright ed. 1960) and cases cited therein; 3 J. MOORE, FEDERAL PRACTICE ¶ 13.13 (1968) and cases cited therein.

and time which are removed from one another, these factors do not, for purposes of prosecution, deserve the strained analysis the court has given them.[75]

Admittedly, the outer limits of conduct for prosecution purposes can not be precisely defined. However, when the prosecution issue is divorced from considerations of punishment, a satisfactory result is more likely to be reached in an individual case.

Accompanying any joinder provision should be a provision for severance when joinder might prejudice the defendant.[76] Allowing limited severance is essential. As was stated in *Drew v. United States*:[77]

> The argument against joinder is that the defendant may be prejudiced for one or more of the following reasons: (1) he may become embarrassed or confounded in presenting separate defenses; (2) the jury may use the evidence of one of the crimes charged to infer a criminal disposition on the part of the defendant from which is found his guilt of the other crime or crime charged; or (3) the jury may cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find. A less tangible, but perhaps equally persuasive, element of prejudice may reside in a latent feeling of hostility engendered by the charging of several crimes as distinct from only one. Thus, in any given case the court must weigh prejudice to the defendant caused by the joinder against the obviously important considerations of economy and expedition in judicial administration.

While an approach which separates consideration of multiple prosecution from multiple punishment would effectively implement the multiple prosecution objectives of Section 609.035, it may be necessary to make other innovations so that the balance of advantage does not shift to criminal defendants. As previously stated, reprosecution for a technically different offense was a response to rigid pleading and proof requirements, and to limitations on state appeal.[78] Civil experience with joinder of causes of action and notice pleading would indicate a need for liberal amendment of indictments.[79] State appeal encounters substantial constitutional barriers derived principally from the constitutional prohibition of double jeopardy.[80]

---

75. *See* notes 61-62 *supra* and accompanying text.

76. *E.g.*, FED. R. CRIM. P., Rule 14; ALI MODEL PENAL CODE § 1.08 (3) (Tent. Draft no. 5, 1956). Rule 14 provides for severance where either the defendant or state is prejudiced. However, it is difficult to imagine a case in which joinder of offenses would prejudice the state.

77. 331 F.2d 85, 88 (D.C. Cir. 1964).

78. *See* text accompanying note 14 *supra*.

79. See Kirchheimer, *The Act, The Offense, and Double Jeopardy*, 58 YALE L.J. 513, 528 (1949).

80. *See* Mayers & Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 HARV. L. REV. 1 (1960).

It has been argued that restructure of the double jeopardy protection insofar as it relates to the multiple offense problem would permit revaluation of the limits on state appeal.[81] However, a principal argument against multiple prosecutions based on the same factual transaction is that they permit the state to achieve indirectly what the prohibition of state appeal forbids it to do directly. Nothing has been gained if the cost of protecting defendants from multiple prosecutions is to subject them to the same evil in the guise of state appeal.

Punishment is prescribed for certain behavior, denominated criminal, because society acting through the legislature has deemed it violative of an interest worthy of legal protection. In theory punishment should be commensurate with the invaded interest's position on the social hierarchy. Therefore, where more than one offense proscribes essentially the same conduct, only those offenses which subserve distinct social interests may be separately punished.[82] Viewed from this perspective, questions of multiple punishment become questions of multiple interests and the relations and demarcations between them.[83]

Extensive analysis of the principals involved in a social interest approach to multiple punishments is beyond the scope of this note.[84] However, in two types of factual situations, the approach is not difficult to apply.

The first is the case involving the commission of a felony and a misdemeanor simultaneously, in which most persons committing the greater crime also commit the lesser. For example, in *State v. Kooiman*,[85] the defendant was involved in an automobile accident which resulted in the death of a pedestrian. The defendant was charged with drunkenness and criminal negligence.

---

81. *See* Kepner v. United States, 195 U.S. 100, 134 (1904) (dissenting opinion of Holmes, J.); Mayers & Yarbrough, *supra* note 80, at 8-15.

82. This analysis suggests that where several offenses are committed during the course of a burglary, *see* note 1 *supra*, the several offenses charged should be joined in a single prosecution even though several punishments might be permissible.

83. This approach considers only the retributive objective of punishment to the exclusion of punishment's rehabilitative objective. Notwithstanding punishment's other objectives a separate social interests analysis is valid within the domain of retribution.

84. *See generally* Horack, *The Multiple Consequences of a Single Criminal Act*, 21 MINN. L. REV. 805, 819 (1937); Kirchheimer, *supra* note 79.

85. 289 Minn. 439, 185 N.W.2d 534 (1971).

It was eventually determined that he could be punished for both offenses, not on the basis of a societal interests analysis, but because a division of prosecutive authority resulted in the misdemeanor being reduced to judgment before the felony was prosecuted.[86] Hence, punishment for the criminal negligence charge was also permitted lest the felon escape with only a small fine. If the approach suggested herein is adopted, both offenses would be tried in a single proceeding and only if both resulted in conviction would the question of whether each could be punished be reached. That question would be answered in the negative. At first it appears that these offenses are concerned with dissimilar objectives. The offense of drunkenness, then codified in the intoxicating liquors chapter,[87] promoted public decorum; criminal negligence, enacted as part of the criminal code, is designed to protect the physical integrity of persons properly upon the highway.[88] However, to charge the operator of an automobile with drunkenness is to prefer a general charge when a specific one is available—driving while under the influence of alcohol. Viewed in their factual context the two offenses do protect the same interest since it is the principal objective of the criminal negligence statute to criminalize the drunken driver who is responsible for a death. Thus punishment up to the maximum allowed for the more serious offense, *i.e.*, criminal negligence, would adequately vindicate the social interests invaded.[89]

---

86. *See* notes 44-49 *supra* and accompanying text.

87. Since the date of this case the crime of drunkenness has been repealed in Minnesota.

88. State v. Reiland, 274 Minn. 121, 124, 142 N.W.2d 635, 638 (1966).

89. In many multiple traffic offense situations the identity or disparity of the interests subserved by the several statutes is not so easily determined. For example, in State v. Corning, 289 Minn. 382, 184 N.W. 2d 603 (1971), the defendant was charged with driving while under the influence of alcohol and with leaving the scene of an accident without leaving the required information. While both of these offenses are included in the Highway Traffic Regulation Act (MINN. STAT. ch. 169 (1969)) and are designed to promote highway safety, an analysis at this level is not helpful. Punishment for driving while under the influence cannot adequately merge into punishment for leaving the scene since the former offense carries a mandatory license revocation of at least 30 days. Nor, since both offenses are misdemeanors, can the driving while under the influence violation encompass the leaving the scene violation on the same order as the felony encompassed the misdemeanor in *Kooiman*.

The information statute is designed to facilitate accident reporting and claim settlement, while the driving while under the influence statute is designed to prevent accidents in the first instance. If this is the correct level of particularization from which to conduct the search

In a case such as this there is also imbedded a distinction between misdemeanors and felonies which, though subordinate to considerations of the social interests involved, might operate as a presumption in disposing of cases in which the relationship between the interests invaded is difficult to determine.[90] Long prison terms and heavy fines are a benchmark of our criminal law. Often when one or more of the offenses committed is a felony the defendant can be adequately punished by sentencing him for only the most grievous offense committed. Particularly is this so when capital punishment or life imprisonment may be imposed for the offense.[91] Moreover, it is in the case of a felony that punishment's rehabilitative objective is most important so that any loss of parity between punishment and culpability is tolerable. When the offenses are misdemeanors it may be necessary to punish each, since misdemeanors carry light fines and sentences.[92]

On the other hand, a separate social interests approach to the multiple punishment question would offer a more plausible rationale for imposing multiple punishments when a defendant's intentional crime has more than one victim. In *State ex rel. Stangvik v. Tahash*,[93] noted earlier, the defendant was punished for each of three murders committed in the course of a few minutes. However, this result was predicated on the so-called legal autonomy of each crime, rather than a recognition of the fact that society's interest in protecting the life of each of its citizens is invaded at the taking of each life.[94] Yet such a rule

---

for separate interests, both violations should be punished, since distinct objectives are indicative of distinct interests. However, it seems unfair to allow the two offenses to reinforce one another, permitting punishment to be imposed up to the maximum allowed for each offense. This is particularly so when one offense is ancillary to the other, as in this case, where, had the defendant not been intoxicated, he might not have been involved in an accident, and once involved he might not have left the scene. This is not to suggest that intoxication exculpates leaving the scene of an accident, but neither does it aggravate that offense since one who leaves the scene of an accident while intoxicated has acted no more egregiously than one who does the same while sober.

90. *See* note 89 *supra*.

91. *See* note 94 *infra*.

92. *See* note 89 *supra*. However, MINN. STAT. § 609.15(2) (1969) limits the total imprisonment for multiple conviction of misdemeanors to one year.

93. 281 Minn. 353, 161 N.W.2d 667 (1968).

94. In such a case multiple punishments might be thought to be superfluous since first degree murder has a mandatory sentence of life imprisonment. However, the actual effect of multiple punishments

is not sufficiently articulate to dispose of all multiple victim cases since it glosses over a distinction between tort and criminal law. The tortfeasor is required to recompense the injured individual, or individuals, whereas the criminal is required to recompense society. In the latter case a convict's burden should not be multiplied if the number of his victims bears no rational relation to the culpability of his behavior. For example, an individual whose culpably negligent driving results in an accident which causes the death of several people should not be held accountable for several counts of criminal negligence. Perhaps the distinction to be taken is between those crimes where an intent to invade the protected interests of several individuals can be identified as opposed to those crimes where such a rigorous intent is lacking.

V. CONCLUSION

Section 609.035 is a blunt, confusing legislative solution to a complex problem of criminal justice administration. As future cases call for its application, the court will exercise its sense of justice by manipulating the "single behavioral incident" test and noting "with emphasis that any decision . . . depends upon the facts and circumstances of the case."[95] Yet confusion remains inevitable so long as the court is obliged to work with a statute that binds together issues of multiple prosecutions and issues of multiple punishments. A scheme which would require joinder of factually related charges[96] with punishment imposed according to the various social interests invaded would separate these issues, adequately protect defendants and give the state a full and fair opportunity to prosecute and punish violations of the criminal law.

in such a case is not penal overkill, but rather delay of eligibility for parole. MINN. STAT. § 243.05 (1969).

95. State v. Kooiman, 289 Minn. 439, 441, 185 N.W.2d 534, 536 (1971).

96. *See* note 39 *supra.*