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Note

"Single vs. Multiple" Criminal Conspiracies: A Uniform Method of Inquiry for Due Process and Double Jeopardy Purposes

I. INTRODUCTION

Whether a given course of conduct constitutes a single criminal conspiracy or several separate conspiracies presents important issues under the due process and double jeopardy clauses¹ of the Constitution—the two contexts in which the question arises.² Although due process and double jeopardy considerations are different in most respects, on this question the threshold factual inquiry is essentially the same: whether the defendants' conduct constituted one or several conspiracies. Courts have taken an ad hoc approach to this inquiry and have developed several different tests, each of which tends to

1. Both clauses are lodged in the fifth amendment of the Constitution. The due process clause states: "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. Due process protections are applicable to the states by virtue of the Constitution's fourteenth amendment. U.S. CONST. amend. XIV. The due process provision "is essentially a recognition of the requirement of fundamental fairness and fair play under a given set of circumstances." *United States v. American Honda Motor Co.*, 273 F. Supp. 810, 819 (N.D. Ill. 1967) (citing *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 162-63 (1951) (Frankfurter, J., concurring)).

The double jeopardy clause states: "No person shall be . . . subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. This clause is also applicable to the states. *Benton v. Maryland*, 395 U.S. 784, 794 (1969), *rev'g*, *Palko v. Connecticut*, 302 U.S. 319 (1937). *See also* *Brown v. Ohio*, 432 U.S. 161, 164 (1977); Comment, *Double Jeopardy—Defining the Same Offense*, 32 LA. L. REV. 87, 88 (1971). Defendants are protected from multiple prosecutions brought by states and municipalities that are based on the same conduct, *Waller v. Florida*, 397 U.S. 387, 394-95 (1970), but separate prosecutions for a single course of conduct are permitted in state and federal courts. *Abbate v. United States*, 359 U.S. 187, 194-95 (1959); *United States v. Lanza*, 260 U.S. 377, 382 (1922). The general practice, however, is that prosecution in one court precludes prosecution in the other. *See* Note, *Double Jeopardy: Multiple Prosecutions Arising from the Same Transaction*, 15 AM. CRIM. L. REV. 259, 277-78 (1978). Indeed, a number of states have enacted statutes barring state prosecution subsequent to federal prosecution "for an offense arising from the same set of facts." Note, *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 968 (1959) [hereinafter cited as *Developments*].

2. *See* text accompanying notes 17-27 *infra*.

be unfair in at least some factual settings. Courts have not been consistent in selecting from among the various tests currently in use, and as a result judicial outcomes crucial to defendants' rights have often been determined by the test employed rather than the facts in a given case. This Note examines each of the tests that have been applied in the due process and double jeopardy contexts. It concludes by proposing a systematic series of factual inquiries that could be uniformly applied in such contexts to provide fair and consistent treatment of similarly situated defendants.

II. THE CRIME OF CONSPIRACY

A. RATIONALE AND ELEMENTS OF THE CRIME

Conspiracy is usually defined as an agreement between two or more individuals to accomplish an unlawful purpose.³ Thus, although courts will often not convict absent proof of some overt act in furtherance of the conspiracy,⁴ it is the mere agreement that is punishable.⁵ Conspiracy law is designed to address the dangers to society that are inherent in group activity: groups can achieve illegal ends of larger scope and com-

3. *Pettibone v. United States*, 148 U.S. 197, 203 (1893); *United States v. Sanchez-Meza*, 547 F.2d 461, 463 (9th Cir. 1976) (quoting *Callan v. Wilson*, 127 U.S. 540, 555 (1888)); *Commonwealth v. Hunt*, 45 Mass. (4 Met.) 111, 123 (1842); *King v. Jones*, 4 B. & Ad. 345, 349, 110 Eng. Rep. 485, 487 (K.B. 1832).

4. *See, e.g., Braverman v. United States*, 317 U.S. 49, 53 (1942); *Pierce v. United States*, 252 U.S. 239, 244 (1920).

5. *See, e.g., United States v. Feda*, 420 U.S. 671, 694 (1974); *United States v. Bayer*, 331 U.S. 532, 542 (1947). The Poulterer's Case, 77 Eng. Rep. 813 (1611), originated the doctrine that agreement is the gist of conspiracy and is thus punishable even when its purpose is not achieved. This doctrine has been adopted in the United States. *See, e.g., United States v. Feola*, 420 U.S. 671, 694 (1974); *United States v. Bayer*, 331 U.S. 532, 542 (1947); *Braverman v. United States*, 317 U.S. 49 (1942). If the existence of an agreement can be proven, a conspiracy in which success was factually impossible may still be punishable. *See generally Bedow v. United States*, 70 F.2d 674 (8th Cir. 1934); *State v. Moretti*, 52 N.H. 182, 244 A.2d 499 (1968); *Developments, supra* note 1, at 944-45.

Unlike at common law, *see Developments, supra* note 1, at 968, once a substantive crime has been consummated, the conspiracy does not merge with the substantive offense but continues to be separately punishable. *See, e.g., American Tobacco Co. v. United States*, 328 U.S. 781, 789 (1945). The rationale for such treatment is that the law of conspiracy serves ends different from and complementary to criminal prohibitions of the substantive offense. *See Kurlewitch v. United States*, 336 U.S. 440, 445 (1949) (Jackson, J., concurring) ("basic rationale of the law of conspiracy is that a conspiracy may be an evil in itself, independently of any other evil it seeks to accomplish"). One commentator has stated that defendants are rarely convicted of both the substantive offense and conspiracy. *See Marcus, Conspiracy: The Criminal Agreement in Theory and in Practice*, 65 GEO. L.J. 925, 938 (1977). Nevertheless, the ability to prosecute a defendant for both is a powerful prosecutorial tool.

plexity than can individuals;⁶ group support dynamics make actual execution of plans more likely;⁷ and such concerted efforts prepare participants for "habitual criminal practices."⁸ Defining the mere agreement as a crime allows "preventive intervention" before the substantive offense is committed.⁹

Three elements must be proved to establish the existence of a conspiracy and each defendant's involvement in it:¹⁰ 1) knowledge of the main object of the conspiracy;¹¹ 2) knowledge

6. *Callanan v. United States*, 364 U.S. 587, 593-94 (1961). *See generally Developments, supra* note 1, at 924.

7. *See Developments, supra* note 1, at 924.

8. *United States v. Rabinowich*, 238 U.S. 78, 88 (1915). *See also Callanan v. United States*, 364 U.S. 587, 593 (1961).

9. Model Penal Code § 5.03, Comment (Tent. Draft No. 10, 1960). *See generally Marcus, supra* note 5, at 937-38; *Developments, supra* note 1, at 968-71.

10. The general rule is that there must be proof of the agreement itself to obtain a conviction. *See W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW*, § 62, at 460 (1972). Because of the secretive nature of most conspiracies, however, there is rarely direct evidence of an agreement. *See United States v. Rabinowich*, 238 U.S. 78, 88 (1915). The Supreme Court has acknowledged this difficulty: "No formal agreement is necessary to constitute an unlawful conspiracy. Often crimes are a matter of inference deduced from the acts of the person accused and done in pursuance of a criminal purpose." *American Tobacco Co. v. United States*, 328 U.S. 781, 809 (1946). Not every person involved with the conspirators, however, will be considered part of the conspiracy, for "[t]hose having no knowledge of the conspiracy are not conspirators." *United States v. Falcone*, 311 U.S. 205, 210 (1940).

11. *See United States v. Thomas*, 586 F.2d 123, 132 (9th Cir. 1978); *Marino v. United States*, 91 F.2d 691, 696 (9th Cir. 1937); *United States v. American Honda Motor Co.*, 271 F. Supp. 979, 986, (N.D. Cal. 1967) (a "common design . . . is the essence of [a] conspiracy," and is sufficiently established by a showing that the parties steadily pursued the same objective). To be convicted of conspiracy, a defendant need not have been aware of all the various activities of the other members; it is enough that he or she knew of the conspiracy's general purpose. *Blumenthal v. United States*, 332 U.S. 539, 557 (1947) (evidence of knowledge of the details of the conspiracy not required).

In some cases defendants have been acquitted of conspiracy charges because they were not aware of facts which made their actions violations of federal law. A leading example is *United States v. Crimmins*, 123 F.2d 271 (2d Cir. 1941), where the defendant was convicted both of conspiring to receive stolen bonds which had been transported in interstate commerce and of the substantive crime of receiving such bonds. Since the defendant was unaware that the bonds had crossed state lines, the court affirmed the substantive conviction but reversed the conspiracy conviction. *Id.* at 273. Justice Hand explained the court's reasoning by using his famous "traffic light" analogy:

While one may, for instance, be guilty of running past a traffic light of whose existence one is ignorant, one cannot be guilty of conspiring to run past such a light, for one cannot agree to run past a light unless one supposes that there is a light to run past.

Id. Accord, United States v. Vilhotti, 452 F.2d 1186, 1190 (2d Cir. 1971), *cert. denied*, 406 U.S. 947 (1972); *United States v. Sherman*, 171 F.2d 619, 623-24 (2d Cir. 1948), *cert. denied sub nom. Grimaldi v. United States*, 337 U.S. 931 (1949). *Contra, United States v. Feola*, 420 U.S. 671, 689-92 (1975); *United States v. Polesti*, 489 F.2d 822, 824 (9th Cir. 1970).

of the scope of the conspiracy, or at least an awareness of the involvement of others;¹² and 3) specific intent to join the conspiracy,¹³ although such intent can often be inferred.¹⁴ Prosecutors are afforded significant procedural advantages in conspiracy cases, primarily in the admissibility of evidence¹⁵

12. See *United States v. Sisca*, 503 F.2d 1337, 1345 (2d Cir.), *cert. denied*, 419 U.S. 1008 (1974). See also *United States v. Armedo-Sarmiento*, 545 F.2d 785, 790 (2d Cir. 1976), *cert. denied*, 430 U.S. 917 (1977); *United States v. Mallah*, 503 F.2d 971, 983 (2d Cir. 1974), *cert. denied*, 420 U.S. 995 (1975).

13. See *United States v. Prince*, 515 F.2d 564, 567 (5th Cir.), *cert. denied sub nom.* *Craft v. United States*, 423 U.S. 1032 (1975); *Causey v. United States*, 352 F.2d 203, 207 (5th Cir. 1965). Specific intent is important because mere knowledge of a conspiratorial act may not be sufficient to support the inference of active participation in the conspiracy. See, e.g., *United States v. Sisca*, 503 F.2d 1337, 1343 (2d Cir.), *cert. denied*, 419 U.S. 1008 (1974); *Causey v. United States*, 352 F.2d 203, 207 (5th Cir. 1965). This issue often arises when an individual supplies raw materials that are appropriate for legal use but that the supplier knows will be used for an illegal purpose by members of the conspiracy. In *United States v. Falcone*, 109 F.2d 579 (2d Cir. 1940), the defendant knowingly sold sugar to a group that was operating illicit stills. The court concluded that the defendant had not been part of the agreement to promote the "moonshine" conspiracy because he had no interest in the end result of the effort. *Id.* at 581. See generally Marcus, *Criminal Conspiracy: The State of Mind Crime—Intent, Proving Intent, and Anti-Federal Intent*, 1976 U. ILL. L.F. 627.

14. See cases cited in note 13 *supra*. See also *United States v. Johnson*, 513 F.2d 819, 823 (2d Cir. 1975); *United States v. Steele*, 469 F.2d 165, 169 (10th Cir. 1972); *United States v. Chamley*, 376 F.2d 57, 59 (7th Cir. 1967); *United States v. Borelli*, 336 F.2d 376, 385 (2d Cir. 1964). Having a "vital stake" in concealing the conspiracy has also been considered evidence of a defendant's conspiratorial intent. See, e.g., *United States v. Dyar*, 574 F.2d 1385, 1389 (5th Cir. 1978). Such a "stake-in-the-venture" rule may help determine whether the defendant had an interest in the objective of the conspiracy and thus the intent to aid it.

Conspiratorial intent is likely to be inferred when a defendant has supplied goods or services that have no lawful use, or when the goods are legally restricted and the quantity supplied is greater than that required for legitimate purposes. See, e.g., *Direct Sales Co. v. United States*, 319 U.S. 703, 711-12 (1943) (amounts of morphine sulphate sold by defendant to rural physician so large that defendant was charged with knowledge that the drug was being dispensed illegally); *People v. Lauria*, 251 Cal. App. 2d 471, 478-79, 59 Cal. Rptr. 628, 632-33 (1967).

15. See *Glasser v. United States*, 315 U.S. 60, 80 (1942) (quoting *United States v. Manton*, 107 F.2d 834, 839 (2d Cir. 1938)) ("Participation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a 'development and a collocation of circumstances.'"); *United States v. Westover*, 511 F.2d 1154, 1156 (9th Cir.), *cert. denied*, 422 U.S. 1009 (1975); *United States v. Garelle*, 438 F.2d 366, 369-70 (2d Cir. 1970) (quoting *United States v. Bennett*, 409 F.2d 888, 895 n.6 (2d Cir.), *cert. denied sub nom.* *Haywood v. United States*, 396 U.S. 852 (1969)) ("when a member of a conspiracy is arrested, even after termination of the conspiracy, names and addresses found upon him or in his premises are admissible as circumstantial evidence of an agreement among the conspirators thus linked"). See generally Johnson, *The Unnecessary Crime of Conspiracy*, 61 CAL. L. REV. 1137, 1142 n.17 (1973); Marcus, *supra* note 5, at 925-56 (1977). "Most conspiracy convictions are based on circumstantial evidence, and this evidence is often admitted under rather loose standards of relevance." W. LAFAYE & A. SCOTT, *supra* note 10, § 61, at

and the selection of venue and jurisdiction.¹⁶

B. THE DUE PROCESS CONTEXT

The "single versus multiple conspiracy" question often arises as a due process issue.¹⁷ A defendant indicted for participation in a large conspiracy, who actually participated in only a small part of the operation and lacked knowledge of the existence or purpose of the larger operation, will seek to avoid being tried along with those accused of the larger conspiracy.¹⁸ The defendant's factual claim is that more than one conspiracy, if any, was operating, and that he or she was not involved in the larger conspiracy.¹⁹ Procedurally, the defendant can assert due

457. In addition, the co-conspirator exception to the hearsay rule is available in conspiracy cases. See Johnson, *supra*, at 1183-88. Under this exception "any act or declaration by one co-conspirator committed during and in furtherance of the conspiracy is admissible against each co-conspirator." W. LAFAVE & A. SCOTT, *supra* note 10, § 61, at 457; see 4 WIGMORE, EVIDENCE § 1079 (Chadbourne rev. ed. 1972). See also Krulewitch v. United States, 336 U.S. 440, 442-43 (1949); Fiswick v. United States, 329 U.S. 211, 217 (1946). This hearsay exception is circumscribed by the requirement that "independent nonhearsay evidence must establish the participation in the conspiracy of the person against whom" the hearsay is to be admitted. United States v. DeFillipo, 590 F.2d 1228, 1234 (2d Cir. 1979). See also Glasser v. United States, 315 U.S. 60, 74-75 (1942); United States v. Geaney, 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. denied sub nom.* Lynch v. United States, 397 U.S. 1028 (1970).

16. Rules governing venue and jurisdiction allow a conspiracy case to be tried either where the agreement occurred or where any overt act in furtherance of the conspiracy was committed by any conspirator. W. LAFAVE & A. SCOTT, *supra* note 10, § 61, at 456. This allows the government to hold the trial where the evidence and witnesses are located, but also permits selection of a district inconvenient for a defendant or one in which the jury may be more likely to convict. *Id.* The court does, however, retain discretion to transfer the case. See FED. R. CRIM. P. 21(b).

17. See note 1 *supra* and accompanying text.

18. A co-conspirator is held liable for acts committed by the other members because any act in furtherance of the conspiracy becomes an act of each individual conspirator, at least in the absence of a new agreement. Pinkerton v. United States, 328 U.S. 640, 646-47 (1946); Blue v. United States, 138 F.2d 351, 359 (6th Cir. 1943). Because of the harshness of this rule, juries are instructed to assess the varying degrees of participation by different members and to acquit any whom the jury believes were not part of the agreement. See, e.g., United States v. Borelli, 336 F.2d 376, 386 n.4 (2d Cir. 1964). The use of special verdict interrogatories to compel an assessment of each defendant's degree of participation may improve the chances that juries will carefully consider these elements. See, e.g., United States v. Arroyo, 494 F.2d 1316, 1318 (2d Cir.), *cert. denied*, 419 U.S. 827 (1974). However, in a large trial—common to most conspiracy cases—it may be difficult for an individual defendant to rebut the jury's intuitive inference of his guilt by association. See Marcus, *supra* note 5, at 943-46.

19. An individual who may have participated in only one small part of a large operation cannot, consistent with the constitutional right to due process, be held liable for the actions of other conspirators whose existence and goals were unknown to him or her. See Iannelli v. United States, 420 U.S. 770, 784 (1975); United States v. Prince, 515 F.2d 564, 567 (5th Cir.), *cert. denied sub nom.*

process rights in two ways: he or she can move for a severance before trial²⁰ or establish an error of variance after trial.²¹ The severance issue is generally determined by the degree of prejudice that would be generated toward the defendant as a result of the defendant being tried with the core members of the conspiracy.²² Undue prejudice also underlies the variance doctrine.²³ Under this doctrine, if a defendant convicted for participation in one large conspiracy can show that the evidence proved the existence of multiple conspiracies (in some of which the defendant did not participate), the conviction will often be reversed because of the tendency of juries to transfer the guilt of core conspirators to all of the defendants.²⁴ The "single versus multiple conspiracy" determination is thus central to the disposition of a variance claim and may form the basis of a severance request.

C. THE DOUBLE JEOPARDY CONTEXT

The "single versus multiple conspiracy" question may also arise under the double jeopardy clause.²⁵ In this situation, the defendant seeks to show that he or she has already stood trial for the same conspiracy, while the prosecution generally attempts to show that separate conspiracies are at issue.²⁶ The underlying factual inquiry is often the same here as in the due

Craft v. United States, 423 U.S. 1032 (1975). The due process concern is the prejudice arising from "the transference of guilt to an individual defendant involved in one conspiracy from evidence incriminating defendants in a conspiracy in which the particular defendant was not involved." United States v. Levine, 569 F.2d 1175, 1177 (1st Cir. 1978).

20. FED. R. CRIM. P. 14. See generally Geer, *Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Attorney*, 62 MINN. L. REV. 119, 143 (1978); *Developments, supra* note 1, at 982-83.

21. See generally Note, *Resolution of the Multiple Conspiracies Issue Via a "Nature of the Enterprise" Analysis: The Resurrection of Agreement*, 42 BROOKLYN L. REV. 243, 243 (1975).

22. See Ashe v. Swenson, 397 U.S. 436, 469 (1970) (Burger, C.J., dissenting); Geer, *supra* note 20, at 143; *Developments, supra* note 1, at 982; note 19 *supra*.

23. See Kotteakos v. United States, 328 U.S. 750, 752, 756 (1946); United States v. Levine, 569 F.2d 1175, 1176-77 (1st Cir. 1978); United States v. Bertolotti, 529 F.2d 149, 155 (2d Cir. 1975); Note, *Federal Treatment of Multiple Conspiracies*, 57 COLUM. L. REV. 387, 396-97 (1957).

24. See Kotteakos v. United States, 328 U.S. 750, 766-67 (1946); United States v. Levine, 569 F.2d 1175, 1176-77 (1st Cir. 1978). See generally Note, *supra* note 23, at 402. The defendant's burden is not easily met because the "harmless error" rule provides that "any error . . . or variance which does not affect substantial rights shall be disregarded." FED. R. CRIM. P. 52(a). See generally Note, *supra* note 23, at 396-405.

25. See note 1 *supra* and accompanying text.

26. Ironically, this is the opposite of the due process setting where a de-

process context: whether one or several conspiracies existed. The framework in which the double jeopardy inquiry is made, however, is substantially different. The double jeopardy clause protects defendants against multiple punishments for the same offense, prosecution for the same offense after acquittal, and prosecution for the same offense after conviction.²⁷ Because these double jeopardy protections usually are triggered only upon the commencement of a second prosecution, courts have developed a variety of tests that compare the statutes and evidence involved in two prosecutions. The issue of "single versus multiple conspiracy" must therefore be resolved within this body of comparative tests.

III. TRADITIONAL METHODS OF INQUIRY

This section analyzes the conventional approaches that courts have taken to determine whether a given course of conduct constitutes one or several conspiracies.

A. "NATURE OF THE ENTERPRISE" TEST

Criminal conspiracies are often considered to take one of two structural forms: the "hub of the wheel"²⁸ or the "chain."²⁹

defendant usually tries to show that what a court had considered as one conspiracy was in fact several separate conspiracies.

27. Protection from multiple punishments is afforded to prevent the imposition of more than one punishment for a single crime. *Brown v. Ohio*, 432 U.S. 161, 165 (1977). See also *Abbate v. United States*, 359 U.S. 187, 200 (1959) (Brennan, J., concurring); *Ciucci v. Illinois*, 356 U.S. 571, 575 (1958) (Douglas, J., dissenting); *O'Clair v. United States*, 470 F.2d 1199, 1203 (1st Cir. 1972). See generally Note, *supra* note 1, at 259. Protection from re prosecution after acquittal is based on the fundamental unfairness of allowing the government to reargue its case, adding new evidence and refining its arguments each time in search of a conviction. See, e.g., Comment, *supra* note 1, at 88; Comment, *Twice in Jeopardy*, 75 YALE L.J. 262, 267 (1965). Without this protection, the state would be able to use its superior resources to make repeated attempts to convict a defendant, each time subjecting the defendant to the ordeal of trial and increasing the possibility that, though innocent, he or she may eventually be convicted. *Green v. United States*, 355 U.S. 184, 187-88 (1957). See *United States v. Ball*, 163 U.S. 662, 669 (1896); *United States v. Engle*, 458 F.2d 1021, 1025 (6th Cir.), cert. denied, 409 U.S. 863 (1972); *United States v. American Honda Motor Co.*, 271 F. Supp. 979, 987 (N.D. Cal. 1967). The third guarantee, protection from re prosecution after conviction, incorporates both of the major interests served by the first two guarantees of the double jeopardy clause: protection from punishment in excess of that mandated by a legislature and protection from the inherent unfairness of vexatious retrial. See Comment, *supra* note 1, at 88.

28. See, e.g., *Kotteakos v. United States*, 328 U.S. 750 (1946). In *Kotteakos*, a central figure acted as a broker to fraudulently obtain government loans. *Id.* at 753. Several "middlemen" with whom he dealt participated only in their separate transactions and were not aware of the full scope of the operation. *Id.* at 754-55. The Supreme Court determined that a number of smaller conspiracies

In the former, the peripheral members—the “spokes”—have no dealings with or awareness of each other. They individually deal with one central figure—the “hub”—and thus together represent a collection of smaller, separate conspiracies rather than a single, large conspiracy.³⁰ In the “chain” conspiracy, each actor may play but a small role in the totality of criminal activity, but all are presumed to know the scope of the conspiracy because of their interdependence.³¹ Such conspiracies typically involve a “chain” of persons involved in the illegal manufacture, importation, or distribution of goods.³²

To distinguish between “hub” and “chain” conspiracies, courts generally inquire into the “nature of the enterprise.”³³ Factual elements such as the type of operation and the goods involved are examined to determine whether the participants knew that their own success was dependent on others in the “chain.” If it is determined that the participants had knowledge of the “chain,” then their knowledge of and intent to join the larger conspiracy can be inferred, and each defendant can be held liable for acts done in furtherance of the conspiracy.³⁴

were involved rather than a single, large one. *Id.* at 755. *Cf.* *Blumenthal v. United States*, 332 U.S. 539, 557-59 (1947) (one general conspiracy found because only two agreements were involved and participants “knew or must have known” of the “overriding scheme”).

29. *See, e.g., United States v. Bruno*, 105 F.2d 921, 922 (2d Cir.), *rev'd on other grounds*, 308 U.S. 287 (1939).

30. *See Kotteakos v. United States*, 328 U.S. 750, 752-55 (1946).

31. *See, e.g., United States v. Bruno*, 105 F.2d 921, 922 (2d Cir.), *rev'd on other grounds*, 308 U.S. 287 (1939). Courts infer that the participants understand that others are working with them although they may not have direct, demonstrable knowledge. This method of analysis is discussed in detail in Note, *supra* note 21, at 250-308.

32. *See, e.g., United States v. Leong*, 536 F.2d 993, 994-95 (2d Cir. 1976) (importation and distribution of narcotics); *United States v. Bruno*, 105 F.2d 921, 922 (2d Cir.), *rev'd on other grounds*, 308 U.S. 287 (1939) (same). *But see United States v. La Vecchia*, 513 F.2d 1210, 1218 (2d Cir. 1975) (counterfeiting operation).

33. The distinction between “hub” and “chain” conspiracies is limited to the question of whether defendants had knowledge of the purpose and scope of the conspiracy, an important issue in many due process cases. For a detailed discussion of “nature of the enterprise” analysis, see generally Note, *supra* note 21.

34. *See, e.g., United States v. Magnano*, 543 F.2d 431, 434 (2d Cir. 1976) (“nature of the enterprise determines whether this presumption or inference of knowledge of broader scope and participation in a single conspiracy is justified”); *United States v. Leong*, 536 F.2d 993, 995-96 (2d Cir. 1976) (knowledge of scope inferred from large amount of heroin distributed); *United States v. La Vecchia*, 513 F.2d 1210, 1218 (2d Cir. 1975) (knowledge of scope and object inferred from the large amount of counterfeit currency printed); *United States v. Ortega-Alvarez*, 506 F.2d 455, 457 (2d Cir. 1974), *cert. denied*, 421 U.S. 910 (1975)

Although this inference of knowledge and intent may seem warranted by the secret nature of most conspiracies,³⁵ it can violate a defendant's constitutional right to due process of law.³⁶ Many courts have held that once a conspiracy is shown to exist, only slight evidence is required to connect a particular defendant with the conspiracy.³⁷ Thus, an individual who had contact with a conspiracy could be convicted as a co-conspirator even though he or she lacked demonstrable knowledge of the conspiracy's scope and did not intend to further its objectives. In many cases, however, it is unreasonable to infer that an individual who was involved in a large operation dependent upon the participation of others for its success had knowledge of the operation's scope. A defendant who might have had some knowledge of a conspiracy's purpose might not have shared in decisionmaking or agreed to the plans of operation. In addition, other conspirators might have performed acts of which the defendant was unaware or in which the defendant had not acquiesced. The Supreme Court has recognized, for example, that "an endeavor as complex as a large-scale gambling enterprise might involve persons who have played appreciably

(scope and purpose inferred from the large amount of heroin distributed); *United States v. Agueci*, 310 F.2d 817, 827 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963) (presumption of knowledge of scope of and participation in narcotics conspiracy); *United States v. Bruno*, 105 F.2d 921, 922 (2d Cir.), *rev'd on other grounds*, 308 U.S. 287 (1939) (smugglers knew middlemen must sell to retailers, and retailers knew middlemen must buy from importers; therefore conspirators at one end of the chain knew unlawful business did not stop with their buyers and those at other end knew that it had not begun with their sellers); *People v. Lauria*, 251 Cal. App. 2d 471, 478-79, 59 Cal. Rptr. 628, 632-33, (1967) (intent can be inferred when goods or services have no lawful use or when volume of business is disproportionate to any legitimate demand). *See generally* Note, *supra* note 21, at 250-69.

35. Secrecy and concealment are essential features of successful conspiracy. The more completely they are achieved, the more successful the crime. Hence the law rightly gives room for allowing the conviction of those discovered upon showing sufficiently the essential nature of the plan and their connections with it, without requiring evidence of knowledge of all its details or of the participation of others. Otherwise the difficulties, not only of discovery, but of certainty in proof and of correlating proof with pleading would become insuperable, and conspirators would go free by their very ingenuity.

Blumenthal v. United States, 332 U.S. 539, 557 (1947) (footnote omitted).

36. *See, e.g., Berger v. United States*, 295 U.S. 78, 81-82 (1935); *United States v. Mallah*, 503 F.2d 971, 975-76 (2d Cir. 1974), *cert. denied*, 420 U.S. 995 (1975).

37. *United States v. Prince*, 515 F.2d 564, 567 (5th Cir.), *cert. denied sub nom. Craft v. United States*, 423 U.S. 1032 (1975); *United States v. Reynolds*, 511 F.2d 603, 607 (5th Cir. 1975); *United States v. Westover*, 511 F.2d 1154, 1157 (9th Cir.), *cert. denied*, 422 U.S. 1009 (1975); *United States v. Warner*, 441 F.2d 821, 830 (5th Cir.), *cert. denied*, 404 U.S. 829 (1971); *Lopez v. United States*, 414 F.2d 909, 911 (5th Cir. 1969); *United States v. Knight*, 416 F.2d 1181, 1184 (9th Cir. 1969).

different roles, and whose level of culpability varies significantly."³⁸ Despite this risk of "wrongful" convictions, some courts have continued mechanically to apply the "nature of the enterprise" test.³⁹

B. "SAME OFFENSE" TESTS

A number of tests have been developed to determine whether a given prosecution is barred by the double jeopardy clause. The double jeopardy inquiry usually arises when the prosecutor alleges that a single conspiracy violated several statutes or that a single course of conduct furthered several distinct conspiracies. For the purpose of this Note, the inquiry is relevant when a defendant attempts to bar a conspiracy prosecution by showing that the conspiracy presently alleged is the same conspiracy for which the defendant was previously convicted or acquitted.⁴⁰ The "single versus multiple conspiracy" question is thus resolved by comparing the two prosecutions to determine whether they involve the same offense. The judicial tests used in this context are analyzed below.

1. "Same Evidence" Test

The traditional test for determining whether offenses are the same for double jeopardy purposes has been formulated as follows: "A conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other."⁴¹ This "same evidence" test focuses on the statutes

38. *Iannelli v. United States*, 420 U.S. 770, 784 (1975).

39. Such application is common in narcotics cases, but has increasingly occurred in other situations as well. For example, in *United States v. LaVecchia*, 513 F.2d 1210 (2d Cir. 1975), defendants clearly were involved in only one part of a counterfeiting conspiracy and were unaware of the larger scope of the operation. Nonetheless, defendants were deemed culpable for the larger conspiracy because the court found each dependent upon the others for personal gain. *Id.* at 1218. As one commentator neatly summarized, "La Vecchia is an apt illustration of the narcotics conspiracy body of precedent. Not only has it been painted with too broad a brush, but subsequent courts have brushed it upon unsuitable canvases." Note, *supra* note 21, at 271.

40. See notes 25-27 *supra* and accompanying text.

41. *Morey v. Commonwealth*, 108 Mass. 433, 434 (1871). *Accord*, *Brown v. Ohio*, 432 U.S. 161, 166 (1977).

Although this formulation of the test is the majority rule, three variations of the test also have currency. See *generally* Comment, *supra* note 1, at 89-91. Under the first of these, offenses are considered the same if they are identical in law and fact. *Burton v. United States*, 202 U.S. 344, 380 (1906); *United States v. Arnedo-Sarmiento*, 545 F.2d 785, 792 (2d Cir. 1976), *cert. denied*, 430 U.S. 917

allegedly violated.⁴² The test is rarely of foremost importance in conspiracy cases, however, probably because prosecutors can easily vary their factual allegations in order to carve sev-

(1977); *Kowalski v. Parratt*, 533 F.2d 1071, 1074 (8th Cir.), *cert. denied*, 429 U.S. 844 (1976); *United States v. McCall*, 489 F.2d 359, 362 (2d Cir. 1973); *United States v. Pacelli*, 470 F.2d 67, 72 (2d Cir. 1972), *cert. denied*, 410 U.S. 983 (1973); *Dryden v. United States*, 403 F.2d 1008, 1009 (5th Cir. 1968). This "identity" test requires that the facts alleged in the indictments be the same and that the offenses be equal. *See United States v. Pacelli*, 470 F.2d 67, 72 (1972), *cert. denied*, 410 U.S. 983 (1973). Thus, alleging slightly different facts in a second indictment may allow a second prosecution of what is actually the same offense. Under this test, a defendant could be indicted for a lesser included offense after being acquitted of the greater offense, *see Comment, supra* note 1, at 90, but such a practice is now precluded by the Supreme Court's decision in *Brown v. Ohio*, 432 U.S. 161 (1977), which held that greater and lesser included offenses are the same for double jeopardy purposes. *Id.* at 168.

The second variation of the "same evidence" test is usually expressed as follows: "[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304 (1932). *Accord, Brown v. Ohio*, 432 U.S. 161, 166 (1977); *Gavieres v. United States*, 220 U.S. 338, 342 (1911); *United States v. Garner*, 529 F.2d 962, 971 (6th Cir.), *cert. denied*, 429 U.S. 850 (1976).

The third variation of the "same evidence" test puts emphasis on the facts rather than on the statutes involved. Under this "backwards" standard, offenses are considered the same if the defendant could have been convicted of the second offense based on the evidence that might properly have been offered at the first trial. *Wilson v. State*, 24 Conn. 57, 64 (1855); *State v. Ingalls*, 98 Iowa 728, 729, 68 N.W. 445, 445 (1896); *In re Gano*, 90 Kan. 134, 136, 132 P. 999, 1000 (1913); *State v. Brownrigg*, 87 Me. 500, 502-03, 33 A. 11, 12 (1895); *Sharp v. State*, 61 Neb. 187, 190, 85 N.W. 38, 39 (1901). While the other versions compare evidence required by statute or alleged in the indictments, the "backwards" test is much more permissive: "The test is not what facts were offered in evidence in the trial upon the first indictment, but from the record what facts might have been proved under that indictment and whether the same facts if proved under this indictment would warrant a conviction." *State v. Brownrigg*, 87 Me. 500, 502-03, 33 A. 11, 12 (1895). Some commentators support this test as a means of preventing arbitrary re prosecution, *see Note, supra* note 21, at 274; *Comment, supra* note 1, at 90, but it has not been adopted by the federal courts and does not appear to be actively in use among the states.

42. If a single act violates several statutory provisions, such violation may be punished with consecutive sentences. *See Gore v. United States*, 357 U.S. 386, 390-91 (1958); *Bell v. United States*, 349 U.S. 81, 82-84 (1955). *See generally Note, Consecutive Sentences in Single Prosecutions: Judicial Multiplication of Statutory Penalties*, 67 YALE L.J. 916, 918-20 (1958). In *Gavieres v. United States*, 220 U.S. 338 (1911), the defendant was convicted twice under different statutes for the same act. One statute prohibited acting in a "drunken, boisterous, rude, or indecent manner in any public place . . . to the annoyance of another person." *Id.* at 341. The second punished "those who outrage, insult, or threaten, by deed or word, public officials or agents of the authorities, in their presence . . ." *Id.* Since the defendant had insulted a police officer when he was also inebriated in a public place, convictions under both statutes were upheld because the offenses were different under the "same evidence" test. *Id.* at 343.

eral conspiracies out of one.⁴³ Prosecutors have been warned that such action constitutes impermissible harassment of the defendant,⁴⁴ but a strict application of the "same evidence" test would enable the government to change the list of participants, dates, and overt acts in successive counts or indictments—thereby obtaining several convictions for what is ostensibly one conspiracy.⁴⁵

2. "Same Transactions," Legislative Intent, and the Braverman Rule

Alternatives to the "same evidence" test seek to avoid the inequities that can result when the prosecutor alleges that a single conspiracy violates more than one statute.⁴⁶ The Supreme Court recently noted:

[A]t common law, and under early federal criminal statute[s] . . . [a] single course of criminal conduct was likely to yield but a single offense. In more recent times, with the advent of specificity in draftsmanship and the extraordinary proliferation of overlapping and related statutory offenses, it became possible for prosecutors to spin out a startlingly numerous series of offenses from a single alleged criminal transaction. As the number of statutory offenses multiplied, the potential for unfair and abusive reprosecutions became far more pronounced.⁴⁷

The danger of abusive reprosecution is particularly great when conspiracy is involved. In addition to statutes addressing specific types of conspiracies,⁴⁸ there is a general statute that makes it a crime to "conspire . . . to commit any offense against the United States."⁴⁹ Sometimes it is alleged that a conspiracy has violated this general statute as well as other closely related, specific conspiracy statutes.⁵⁰ Again, of course, a prosecutor might attempt to manipulate factual allegations to

43. See *United States v. Papa*, 533 F.2d 815, 820 (2d Cir.), *cert. denied*, 429 U.S. 961 (1976).

44. See, e.g., *United States v. American Honda Motor Co.*, 271 F. Supp. 979, 987-88 (N.D. Cal. 1967) ("harassment in violation of the Due Process provision of the Fifth Amendment").

45. See, e.g., *Braverman v. United States*, 317 U.S. 49, 54 (1942); *United States v. Bommarito*, 524 F.2d 140, 146 (2d Cir. 1975); *United States v. Mallah*, 503 F.2d 971, 985 (2d Cir. 1974), *cert. denied*, 420 U.S. 995 (1975).

46. See, e.g., *United States v. Houlton*, 525 F.2d 943, 950 (5th Cir.), *vacated on other grounds sub nom. Croucher v. United States*, 429 U.S. 1034 (1976); *United States v. Marotta*, 518 F.2d 681, 684-85 (9th Cir. 1975).

47. *Ashe v. Swenson*, 397 U.S. 436, 445 n.10 (1970) (citations omitted).

48. See, e.g., 15 U.S.C. § 2 (1976) (conspiracy to monopolize trade); 18 U.S.C. § 894 (1976) (conspiracy to collect extensions of credit by extortion); 18 U.S.C. § 2385 (1976) (conspiracy to commit treason, sedition, or subversive activities to overthrow the government); 21 U.S.C. § 846 (1976) (conspiracy to possess drugs with intent to distribute).

49. 18 U.S.C. § 371 (1976).

50. See, e.g., *American Tobacco Co. v. United States*, 328 U.S. 781, 788

charge several separate conspiracies under one or more of these statutes.⁵¹

A partial solution to the problem of abusive reprosecution might be the "same transaction" test, which bars a second prosecution for crimes arising out of the same transaction for which a defendant has already stood trial.⁵² This test, however, has not been incorporated into the constitutional protection against double jeopardy.⁵³ Moreover, a "same transaction" restriction can only function as a compulsory joinder rule⁵⁴—it will not restrict multiple indictments arising out of the same transaction when all of the indictments are brought at one trial.

Many courts address the problem of abusive reprosecution by determining whether the legislative intent underlying the relevant statutes was to allow a single conspiracy to be treated as a violation of several statutes. Stated simply, the issue becomes whether Congress intended that punishment under the applicable conspiracy statutes be cumulative, or whether the punishment dictated by one of the statutes be viewed as adequate for "all" offenses.⁵⁵ For example, in *United States v. Marotta*⁵⁶ a jury had found the appellant guilty of conspiring to "possess with intent to distribute"⁵⁷ and conspiring to "import"⁵⁸ marijuana.⁵⁹ The court determined that Congress had

(1946); *United States v. Mori*, 444 F.2d 240, 241-42 (5th Cir.), *cert. denied*, 404 U.S. 913 (1971).

51. See notes 43-45 *supra* and accompanying text.

52. See *Ashe v. Swenson*, 397 U.S. 436, 453-54 (1970) (Brennan, J., concurring). Under this text, all charges arising out of the same transaction must be disposed of in a single proceeding. *Id.* See Comment, *supra* note 1, at 91; Comment, *Criminal Law—Double Jeopardy—Should "Offense" be Defined in Terms of Substantive Law?*, 38 Mo. L. Rev. 528, 529 (1973). See also *United States v. DeFillipo*, 590 F.2d 1228, 1235 (2d Cir. 1979).

53. See *United States v. Nathan*, 476 F.2d 456, 459 (2d Cir.), *cert. denied*, 414 U.S. 823 (1973). See also *United States v. Jones*, 334 F.2d 809, 812 (7th Cir. 1964), *cert. denied*, 379 U.S. 993 (1965); Comment, *supra* note 52, at 529.

54. "In my view, the Double Jeopardy Clause requires the prosecution, except in the most limited circumstances, to join at one trial all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction." *Ashe v. Swenson*, 397 U.S. 436, 453-54 (1970) (Brennan, J., concurring) (footnote omitted). Brennan listed three exceptions to such a compulsory joinder rule: "where a crime is not completed or discovered, despite due diligence . . . , until after the commencement of a prosecution for other crimes arising from the same transaction," *id.* at 453 n.7; where "no single court had jurisdiction of all the alleged crimes," *id.*; and "where joinder would be prejudicial to either the prosecution or the defense." *Id.* at 455 n.11.

55. See, e.g., *Jeffers v. United States*, 432 U.S. 137, 155-57 (1977).

56. 518 F.2d 681 (9th Cir. 1975).

57. *Id.* at 682 (guilty under 21 U.S.C. § 846 (1970)).

58. 518 F.2d at 685 (guilty under 21 U.S.C. § 963 (1970)).

59. 518 F.2d at 685.

"fully intended" to punish those who import marijuana with intent to distribute "twice as severely" as those who import marijuana solely for their own use,⁶⁰ and held that this cumulative punishment was not disproportionate to the crime.⁶¹

While some courts look to the legislative history underlying questions of severity of punishment, others focus on the number of conspiracies involved.⁶² Proponents of the former approach argue that the members of one conspiracy can commit more than one crime and that each, therefore, can be punished without offending the double jeopardy clause.⁶³ Supporters of the latter approach argue that because the agreement is the gist of conspiracy, all acts performed in furtherance of the agreement are part of a single crime of conspiracy.⁶⁴ For example, in *United States v. Honneus*⁶⁵ the defendant appealed three convictions under separate statutes for "importing," "distributing and possessing . . . with intent to distribute," and "smuggling" marijuana.⁶⁶ The *Honneus* court reached a conclusion contrary to that in *Marotta*:

While undoubtedly Congress meant to attack the drug trade with severity, . . . we doubt that it meant to authorize, or could authorize, a court to impose three punishments for one conspiracy. Congress may treat different aspects of the same conduct as separate crimes only if there is a meaningful distinction between the elements constituting each offense.⁶⁷

The *Honneus* approach seems more faithful to the basic rationale of conspiracy law: that a conspiracy is an evil independent of the substantive crimes involved.⁶⁸ Thus, in addition to the cumulative punishment given conspirators for the substantive crimes committed in the course of their conspiracy,⁶⁹ the *Honneus* approach would also punish conspirators for the conspiratorial aspect of the operation, unless the agreement in-

60. *Id.*

61. *Id.*

62. *See, e.g.,* *United States v. Honneus*, 508 F.2d 566, 569-70 (1st Cir. 1974), *cert. denied*, 421 U.S. 948 (1975); *United States v. Adcock*, 487 F.2d 637, 639 (6th Cir. 1973).

63. *United States v. Marotta*, 518 F.2d 681, 685 (9th Cir. 1975).

64. *See* *United States v. Honneus*, 508 F.2d 566, 569-70 (1st Cir. 1974), *cert. denied*, 421 U.S. 948 (1975); *United States v. Adcock*, 487 F.2d 637, 639 (6th Cir. 1973).

65. 508 F.2d 566 (1st Cir. 1974), *cert. denied*, 421 U.S. 948 (1975).

66. *Id.* at 569 (statutory citations omitted). The conspiracy statutes involved in *Honneus* were those involved in *Marotta*, *see* notes 57-58 *supra* and accompanying text, and the "general federal conspiracy statute," 18 U.S.C. § 371 (1976). *See* *United States v. Honneus*, 508 F.2d at 569.

67. 508 F.2d at 569 (citation omitted).

68. *See* notes 3-9 *supra* and accompanying text.

69. *See* *Short v. United States*, 91 F.2d 614, 622-23 (4th Cir. 1937).

volved such unrelated activities as to suggest the operation of distinct conspiracies. A conspiracy to distribute narcotics and extend credit by extortion, for example, would be punishable under both the applicable conspiracy statutes.⁷⁰ The *Honneus* approach avoids the legal fiction that may result when a court merely speculates on whether a legislature intended to allow cumulative punishment.⁷¹

The more recurrent double jeopardy issue arises when multiple conspiracies, arguably based upon a single pattern of conduct, are alleged under one statute.⁷² In principle, the Supreme Court resolved this problem in *Braverman v. United States*,⁷³ which involved seven substantive offenses charged under a single conspiracy statute. The Court held that

[W]hen a single agreement to commit one or more substantive crimes is evidenced by an overt act, as the statute requires, the precise nature and extent of the conspiracy must be determined by reference to the agreement which embraces and defines its objects. Whether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which constitutes the conspiracy which the statute punishes. The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one.⁷⁴

The *Braverman* rule might be considered the "same intent" version of the "same transaction" test: all activities united by a common agreement are treated as part of the same transaction.⁷⁵ This approach is theoretically sound. It prevents the danger present under the "same evidence" test of manipulating evidence to make one conspiracy appear to be several, and it avoids the necessity of determining legislative intent. The *Braverman* rule poses a problem, however, in that it cannot be applied until it is clear that only one agreement—and thus one conspiracy—is involved. The rule therefore does not

70. See generally note 48 *supra* and accompanying text.

71. For example, had the legislative intent behind the statutes involved in *Marotta* and *Honneus* been clear, the results of the two cases would not be in direct conflict. See also *United States v. Houlton*, 525 F.2d 943, 951 (5th Cir. 1976) (in accord with *Marotta*); *United States v. Adcock*, 487 F.2d 637 (6th Cir. 1973) (holding similar to *Honneus*).

72. See, e.g., *United States v. Ruigomez*, 576 F.2d 1149, 1150 (5th Cir. 1978); *United States v. Martinez*, 562 F.2d 633, 634-35 (10th Cir. 1977); *United States v. Prince*, 515 F.2d 564, 565 (5th Cir. 1975), *cert. denied*, *United States v. Pacelli*, 470 F.2d 67, 68 (2d Cir. 1972), *cert. denied*, 410 U.S. 983 (1973); *Arnold v. United States*, 366 F.2d 347, 348-49 (9th Cir. 1964), *cert. denied*, 380 U.S. 982 (1965).

73. 317 U.S. 49 (1942).

74. *Id.* at 53.

75. This modified test has not been used in a conspiracy case absent consideration of other tests or factors. See, e.g., *United States v. DeFillipo*, 590 F.2d 1228, 1235 (2d Cir. 1979); *United States v. American Honda Motor Co.*, 271 F. Supp. 979, 986 (N.D. Cal. 1967).

dispose of the necessity of determining whether multiple objectives and diverse participants are indicative of a single agreement or several separate conspiracy agreements. Because the terms of such agreements must usually be inferred from evidence of the acts performed by the conspirators,⁷⁶ it is difficult to determine whether the acts were performed pursuant to a common intent based upon the agreement.⁷⁷ Thus, although the *Braverman* rule properly focuses inquiry on the number of agreements involved in a given case, it is not easily applied.

IV. "TOTALITY OF THE CIRCUMSTANCES" TEST

Because of the problems associated with the tests outlined above, many courts have adopted a "totality of the circumstances" approach to the determination of whether a given course of conduct constitutes one or several conspiracies. The factors most commonly considered in examining the "totality" are: 1) the number of alleged overt acts in common;⁷⁸ 2) the overlap in personnel;⁷⁹ 3) the time period during which the alleged acts took place;⁸⁰ 4) the similarity in the methods of oper-

76. See notes 33-34 *supra* and accompanying text.

77. In conspiracy cases, intent is generally proved by showing that the defendant was a party to the agreement. See notes 13-14 *supra* and accompanying text.

78. See *United States v. Parker*, 582 F.2d 953, 955 (5th Cir. 1978), *cert. denied*, 440 U.S. 946 (1979); *United States v. Tercero*, 580 F.2d 312, 315-16 (8th Cir. 1978); *United States v. Marable*, 578 F.2d 151, 154 (5th Cir. 1978); *United States v. Ingman*, 541 F.2d 1329, 1330-31 (9th Cir. 1976); *United States v. Bommarito*, 524 F.2d 140, 146 (2d Cir. 1975); *United States v. Pacelli*, 470 F.2d 67, 72 (2d Cir. 1972), *cert. denied*, 410 U.S. 983 (1973); *Arnold v. United States*, 336 F.2d 347, 350-51 (9th Cir. 1964), *cert. denied*, 380 U.S. 982 (1965).

79. See *United States v. DeFillipo*, 590 F.2d 1228, 1234 (2d Cir.), *cert. denied*, 442 U.S. 920 (1979); *United States v. Parker*, 582 F.2d 953, 955 (5th Cir. 1978), *cert. denied*, 440 U.S. 946 (1979); *United States v. Tercero*, 580 F.2d 312, 316 (8th Cir. 1978); *United States v. Marable*, 578 F.2d 151, 154 (5th Cir. 1978); *United States v. Ruigomez*, 576 F.2d 1149, 1151 (5th Cir. 1978); *United States v. Ingman*, 541 F.2d 1329, 1330-31 (9th Cir. 1976); *United States v. Papa*, 533 F.2d 815, 821-22 (2d Cir.), *cert. denied*, 429 U.S. 961 (1976); *United States v. Lawson*, 545 F.2d 557, 560 (7th Cir. 1975); *United States v. Bertolotti*, 529 F.2d 149, 155 (2d Cir. 1975); *United States v. Bommarito*, 524 F.2d 140, 146 (2d Cir. 1975); *United States v. Prince*, 515 F.2d 564, 567 (5th Cir.), *cert. denied sub nom. Craft v. United States*, 423 U.S. 1032 (1975); *United States v. Mallah*, 503 F.2d 971, 985-86 (2d Cir. 1974), *cert. denied*, 420 U.S. 995 (1975); *United States v. Pacelli*, 470 F.2d 67, 72 (2d Cir. 1972), *cert. denied*, 410 U.S. 983 (1973); *Arnold v. United States*, 336 F.2d 347, 351 (9th Cir. 1964), *cert. denied*, 380 U.S. 982 (1965).

80. See *United States v. DeFillipo*, 590 F.2d 1228, 1234 (2d Cir.), *cert. denied*, 442 U.S. 920 (1979); *United States v. Parker*, 582 F.2d 953, 955 (5th Cir. 1978), *cert. denied*, 440 U.S. 946 (1979); *United States v. Tercero*, 580 F.2d 312, 316 (8th Cir. 1978); *United States v. Marable*, 578 F.2d 151, 154 (5th Cir. 1978); *United States v. Ruigomez*, 576 F.2d 1149, 1151 (5th Cir. 1978); *United States v. Martinez*, 562 F.2d 633, 638 (10th Cir. 1977); *United States v. Papa*, 533 F.2d 815, 821-22 (2d Cir.), *cert.*

ation;⁸¹ 5) the locations in which the alleged acts took place;⁸² 6) the extent to which purported conspiracies share a common objective;⁸³ and 7) the degree of interdependence needed for the overall operation to succeed.⁸⁴

*United States v. Tercero*⁸⁵ illustrates how a result under the "totality" analysis might differ from that under the "same evidence" test. In *Tercero*, defendants were indicted in both Arizona and Minnesota for similar but separate conspiracies "to import into the United States and distribute marihuana."⁸⁶ Trial on the Arizona indictment resulted in a verdict of acquittal.⁸⁷ Defendants subsequently filed a motion to dismiss the Minnesota indictment, alleging that the Arizona and Minnesota conspiracies were actually one conspiracy and that prosecution in Minnesota would therefore violate the double jeopardy clause.⁸⁸ The government argued that because some operations were centered in Arizona and others in Minnesota, there were

denied, 429 U.S. 961 (1976); *United States v. Mallah*, 503 F.2d 971, 985 (2d Cir. 1974), *cert. denied*, 420 U.S. 995 (1975); *United States v. Pacelli*, 470 F.2d 67, 72 (2d Cir. 1972), *cert. denied*, 410 U.S. 983 (1973); *Arnold v. United States*, 336 F.2d 347, 351 (9th Cir. 1964), *cert. denied*, 380 U.S. 982 (1965).

81. See *United States v. Tercero*, 580 F.2d 312, 316 (8th Cir. 1978); *United States v. Taylor*, 562 F.2d 1345, 1351 (2d Cir.), *cert. denied*, 434 U.S. 853 (1977); *United States v. Ingman*, 541 F.2d 1329, 1331 (9th Cir. 1976); *United States v. Lawson*, 545 F.2d 557, 560 (7th Cir. 1975); *United States v. Bertolotti*, 529 F.2d 149, 155 (2d Cir. 1975).

82. See *United States v. DeFillipo*, 590 F.2d 1228, 1234 (2d Cir.), *cert. denied*, 442 U.S. 920 (1979); *United States v. Tercero*, 580 F.2d 312, 316 (8th Cir. 1978); *United States v. Marable*, 578 F.2d 151, 154 (5th Cir. 1978); *United States v. Taylor*, 562 F.2d 1345, 1351 (2d Cir.), *cert. denied*, 434 U.S. 853 (1977); *United States v. Papa*, 533 F.2d 815, 821 (2d Cir.), *cert. denied*, 429 U.S. 961 (1976); *United States v. Bommarito*, 524 F.2d 140, 146 (2d Cir. 1975); *United States v. Mallah*, 503 F.2d 971, 985 (2d Cir. 1974), *cert. denied*, 420 U.S. 995 (1975); *Arnold v. United States*, 336 F.2d 347, 351 (9th Cir. 1964), *cert. denied*, 380 U.S. 982 (1965).

83. See *United States v. DeFillipo*, 590 F.2d 1228, 1234 (2d Cir.), *cert. denied*, 442 U.S. 920 (1979); *United States v. Parker*, 582 F.2d 953, 955 (5th Cir. 1978), *cert. denied*, 440 U.S. 946 (1979); *United States v. Marable*, 578 F.2d 151, 153 (5th Cir. 1978); *United States v. Ruigomez*, 576 F.2d 1149, 1151 (5th Cir. 1978); *United States v. Bertolotti*, 529 F.2d 149, 154 (2d Cir. 1975); *United States v. American Honda Motor Co.*, 271 F. Supp. 979, 983 (N.D. Cal. 1967).

84. See *United States v. Tercero*, 580 F.2d 312, 316 n.16 (8th Cir. 1978); *United States v. Taylor*, 562 F.2d 1345, 1351 (2d Cir.), *cert. denied*, 434 U.S. 853 (1977); *United States v. Papa*, 533 F.2d 815, 822 (2d Cir.), *cert. denied*, 429 U.S. 961 (1976); *United States v. Prince*, 515 F.2d 564, 567 (5th Cir.), *cert. denied sub nom. Craft v. United States*, 423 U.S. 1032 (1975); *United States v. Mallah*, 503 F.2d 971, 986 (2d Cir. 1974), *cert. denied*, 420 U.S. 995 (1975); *United States v. American Honda Motor Co.*, 271 F. Supp. 979, 985 (N.D. Cal. 1967).

85. 580 F.2d 312 (8th Cir. 1978).

86. *Id.* at 313.

87. *Id.*

88. *Id.*

two separate conspiracies.⁸⁹ The court agreed that under the traditional "same evidence" test there were two conspiracies because the two indictments varied in their facts as to the locations of the activities and the dates on which they occurred.⁹⁰ The court went on to note, however, that the same personnel were involved in both operations; there were similar methods of operation; the time frame was approximately the same; there was "mutual dependence and support" between the two operations constituting the conspiracy; and the Arizona grand jury had heard testimony concerning events that had taken place beyond the Arizona location and that had overlapped with the purportedly separate conspiracy in Minnesota.⁹¹ Thus, while technically the two indictments covered different specific facts, the court held that they were so closely related as to indicate one, rather than two, conspiracies.⁹²

As the *Tercero* decision demonstrates, the "totality of the circumstances" test requires a comprehensive review of the relevant facts. This approach should be recognized as superior to the traditional tests in determining whether a given course of conduct constitutes one or several conspiracies. The analysis required avoids the overly formal and mechanical aspects of the traditional tests and most importantly, it focuses on the gravamen of the conspiracy charge: the existence and scope of the alleged agreement.⁹³ Analyzed below are the factors that courts have considered in applying a "totality" analysis. Although all of these factors may not be relevant to a particular conspiratorial fact pattern, each should be scrutinized to avoid oversight and to ensure a proper weighing of the factual evidence.

A. OVERLAP IN OVERT ACTS: A THRESHOLD CRITERION

As noted earlier, most conspiracy indictments allege one or more overt acts that purport to evidence the conspiracy.⁹⁴ When separate conspiracies are alleged, the amount of overlap in overt acts should be examined because such commonality is strong evidence that only one conspiracy exists. A single act can further two conspiracies,⁹⁵ but such an occurrence is rare.

89. *See id.*

90. *Id.* at 314.

91. *Id.* at 316 & n.15.

92. *Id.* at 316.

93. *See Braverman v. United States*, 317 U.S. 49, 53 (1942).

94. *See* note 4 *supra* and accompanying text.

95. *See, e.g., United States v. Ingman*, 541 F.2d 1329, 1330-31 (9th Cir. 1976).

If a defendant can show that one or more significant overt acts are common to the alleged multiple conspiracies, a presumption should arise that only one conspiracy is involved, rebuttable only by strong evidence tending to prove that the act was in furtherance of two distinct conspiracies. Similarly, it should be difficult for a defendant to establish the existence of two separate conspiracies when the defendant's common acts have aided both operations. Decisive as this factor might be, it is unusual for a significant overlap to occur in double jeopardy cases because prosecutors are careful to avoid duplicating allegations.⁹⁶ More commonly, the government tries to make one conspiracy appear to be two or more conspiracies by alleging different overt acts⁹⁷—in which case there is no potential overlap for the court to examine.

B. OVERLAP IN PERSONNEL

Overlap in personnel is the factor most consistently considered by courts,⁹⁸ and is probably the most important in determining whether a single or multiple conspiracies exist. If the same persons are involved in two operations, it is likely that they are united by one agreement and thus part of one conspiracy. The actual number of overlapping actors is not as important as their role in the operation: an overlap among pivotal members increases the likelihood that both operations were part of one conspiracy.⁹⁹ In the due process context, a defendant would likely assert the existence of separate conspiracies to minimize the connection between the defendant's acts and the larger conspiracy; overlap in personnel, however, would seriously undermine such an argument. A defendant in the double jeopardy context would presumably concede involvement in both alleged conspiracies, but such overlap would be insignificant unless the defendant was the principal organizer or other conspirators were also common to both operations. Evidence of communication and other links between members of a multifaceted operation, without a clear overlap in person-

96. If the prosecution did duplicate the factual allegations, the "totality of the circumstances" analysis would be superfluous—the "same evidence" test alone would be sufficient.

97. See, e.g., *United States v. Marable*, 578 F.2d 151, 154-55 (5th Cir. 1978).

98. See cases cited in note 79 *supra*.

99. See, e.g., *United States v. Mallah*, 503 F.2d 971, 986 (2d Cir. 1974), *cert. denied*, 420 U.S. 995 (1975) ("core member of the large-scale operation participated in both transactions").

nel, would still point toward a single conspiracy—albeit not as persuasively.

C. TIME SEQUENCE OF OVERT ACTS

Another significant factor is the time sequence of overt acts. Operations carried on concurrently are perhaps more likely to be part of the same conspiracy, but a finding of concurrence alone would carry little weight.¹⁰⁰ The time sequence is most important when there is a chronological gap between two operations. In *United States v. Pacelli*,¹⁰¹ for example, a three month time gap between the overt acts which were alleged to evidence a single conspiracy was instrumental in the court's finding of two agreements.¹⁰² The longer the interim period between operations, the greater the likelihood that the conspirators made a separate agreement to carry on the second operation.

D. METHODS OF OPERATION

The methods of operation factor is perhaps the most difficult to analyze because of the great variety of methods employed in conspiracy cases. Courts typically examine the type of goods involved and the means of transportation employed.¹⁰³ Although usually considered separately, the locations of meetings and the points of distribution¹⁰⁴ are also elements of the method of operation. Differences in methods of distribution or locations of meetings tend to suggest separate operations, but such differences could also be separate steps or processes within one conspiracy. Variations in the methods of operation can be explained in the light of personnel and other factors as well. In *United States v. Tercero*,¹⁰⁵ for example, marijuana was allegedly imported into Arizona and then transported to Minnesota. The government argued that these two aspects of the operation evidenced distinct conspiracies, but the court

100. If other factors tend to show two conspiracies, a common time frame is irrelevant. See, e.g., *United States v. Parker*, 582 F.2d 953, 955 (5th Cir. 1978), cert. denied, 440 U.S. 946 (1979); *United States v. Papa*, 533 F.2d 815, 821-22 (2d Cir.), cert. denied, 429 U.S. 961 (1976).

101. 470 F.2d 67 (2d Cir. 1972), cert. denied, 410 U.S. 983 (1973).

102. *Id.* at 72.

103. See, e.g., *United States v. Tercero*, 580 F.2d 312, 315-16 (8th Cir. 1978); *United States v. Moten*, 564 F.2d 620, 623-25 (2d Cir.), cert. denied, 434 U.S. 959 (1977); *United States v. Ingman*, 541 F.2d 1329, 1330-31 (9th Cir. 1976); *United States v. Bertolotti*, 529 F.2d 149, 152-54 (2d Cir. 1975).

104. See cases cited in note 82 *supra*.

105. 580 F.2d 312 (8th Cir. 1978).

concluded that this distinction was immaterial since the same individuals and goods were involved throughout the operation.¹⁰⁶ Thus, for dissimilarity in methods of operation to be pertinent, they must reflect fundamentally different objectives, participants, or time periods.

E. LOCATION OF OVERT ACTS

Differences in the location of alleged participants or overt acts may be important, but not where there is evidence of a relationship between the conspirators that transcends the differences in physical location. In *United States v. Moten*,¹⁰⁷ for example, conspirators were located in New York, Miami, Chicago, and Washington, D.C., but this did not persuade the court because all had met at one time or another with the principal of the conspiracy in New York. The court stated:

The point is that Brown [a defendant in the action] was obviously the kingpin of a single conspiracy regularly dealing with an established cast. His activity was central to the involvement of all and whether the drugs ultimately reached the consumer in some other city was not logically pertinent to the operation of the continuing relationship among the parties.¹⁰⁸

Generally, the locations involved in a course of conduct are not important standing alone, unless there is an absence of strong evidence showing an active relationship between alleged conspiracy members.

F. CONSPIRATORIAL OBJECTIVE

Evidence that members of an alleged conspiracy shared a common objective may be sufficient to link otherwise diverse activity into a single conspiracy. For example, in *United States v. American Honda Motor Co.*,¹⁰⁹ the court found that certain Honda dealers had participated in a single price-fixing conspiracy, because the dealers shared a common objective to maintain a nationwide pricing policy, "notwithstanding that the common objective was furthered in diverse ways by different co-conspirators in separate sections of the nation who may not have been in actual conspiratorial contact with one another."¹¹⁰ Since the objective of fixing prices could not be realized by any one dealer acting alone, only a common goal could explain the

106. *Id.* at 316.

107. 564 F.2d 620 (2d Cir.), *cert. denied*, 434 U.S. 959 (1977).

108. *Id.* at 625.

109. 271 F. Supp. 979 (N.D. Cal. 1967).

110. *Id.* at 983-84.

defendants' actions.¹¹¹

Thus, similarity in objective can be useful in determining whether one or several conspiracies exist. Certainly a defendant asserting multiple conspiracies should have some burden of showing that the conspiracies have distinctly separate goals. Excessive reliance on this "common objective" factor may beg the question, however, because a conspiracy is by definition an agreement to reach a common goal. Admittedly, the exact goal in most cases cannot be determined without knowing the terms of the agreement. Consequently, the conspiratorial objective will usually be no more evident than the agreement itself.

Analyzing the "nature of the enterprise" is often helpful in determining the existence of a common objective. As noted earlier, this form of analysis is usually employed in cases involving "chain"-type conspiracies, such as drug distributions, to create an inference of the requisite knowledge and agreement among participants in the operation.¹¹² In effect, the "chain" structure necessarily implies a common objective. Defendants in a "chain" conspiracy case who assert the existence of an independent subconspiracy must rebut the presumption that their actions furthered an agreement to aid the "chain" of distribution.¹¹³ Such defendants might successfully emphasize other objective factors, such as a gap in time or differing methods of operation. Accordingly, a common objective will not be the sole determining factor in most cases.

G. DEGREE OF INTERDEPENDENCE

The degree of interdependence between alleged co-conspirators is a subjective factor similar to the "common objective" element. Courts rarely reveal what type of evidence they rely on to determine the degree of interdependence¹¹⁴—conclusions on the matter tend to be stated without explanation.¹¹⁵ Communication between conspirators and comingling of assets appear to be treated as evidence of interdependence, but it is not clear how to assess systematically whether one part of a "conspiracy" was actually a separate operation. Perhaps because of this difficulty, the degree of interdependence is relied upon less often than other factors in double jeopardy cases.

111. *Id.* at 984-85.

112. *See* notes 33-34 *supra* and accompanying text.

113. *See* notes 37-39 *supra* and accompanying text.

114. For example, in the cases cited at note 84 *supra*, the term is not defined or analyzed.

115. *See* cases cited in note 84 *supra*.

The degree of interdependence has most frequently been considered in due process cases in which the defendant has attempted to obtain a severance by arguing the existence of two conspiracies.¹¹⁶ In such cases, the greater the degree of interdependence, the stronger the argument for considering the whole operation at one trial. Aside from this type of situation, the degree of interdependence is helpful only when examination of all other factors is inconclusive. In the *American Honda* price-fixing case,¹¹⁷ for example, the ultimate question was whether the alleged scheme could best be treated as one large conspiracy.¹¹⁸ Although other objective factors suggested the existence of many separate conspiracies, they alone were not determinative because it was clear from the facts that the success of the operation depended on the cooperation of all defendants. Thus, a correct resolution required the court to focus on the subjective criteria of interdependence and the commonality of objective. It would seem rare that such a focus would be required, however, since objective factors such as overlap in personnel, similarity in methods of operation, and the time sequence of overt acts are easier to evaluate and would probably be determinative in most cases.

VI. CONCLUSION

In determining whether a given course of conduct constitutes one or several conspiracies, courts have relied upon a variety of tests. Unfortunately, each test fails, in at least some factual situations, to address adequately the constitutional rights of defendants. In the due process context, the "nature of the enterprise" analysis speaks only to the defendant's knowledge and intent. The analysis is insufficient to determine the number of conspiracies involved, which is the crucial finding underlying severance rights and the avoidance of verdicts based on "guilt by association." In the double jeopardy context, the "same evidence" and "same transaction" tests, the traditional methods of analyzing the "single versus multiple conspiracy" question, are both inadequate. These tests are vul-

116. See, e.g., *United States v. Moten*, 564 F.2d 620, 624 (2d Cir.), cert. denied, 434 U.S. 959 (1977); *United States v. Taylor*, 562 F.2d 1345, 1351 (2d Cir.), cert. denied, 435 U.S. 853 (1977); *United States v. Leong*, 536 F.2d 993, 995 (2d Cir. 1976).

117. *United States v. American Honda Motor Co.*, 271 F. Supp. 979 (N.D. Cal. 1967).

118. *Id.* at 983-84.

nerable to manipulation by prosecutors, and simply fail to address fact issues that are highly relevant in conspiracy cases.

If the terms of a conspiracy agreement are known, the *Braverman* rule controls—the number of agreements determines the number of conspiracies. The scope of an agreement is rarely so easy to determine, however. Most often the objectives underlying each defendant's conduct must be examined to ascertain the scope and number of agreements and, hence, the number of conspiracies. This factual inquiry is best conducted through the "totality of the circumstances" analysis now employed by some courts. In both the due process and double jeopardy contexts, courts should methodologically evaluate the seven criteria of the "totality" approach to establish a sufficient factual basis to ensure a comprehensive, carefully reasoned decision. Only such an approach will give defendants a reasonable opportunity to assert their due process or double jeopardy rights.