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Criminal Law—Multiple Punishment under the Organized Crime Control Act—A Need for Reexamination of Wharton's Rule and Double Jeopardy—Iannelli v. United States, 420 U.S. 770 (1975)

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CRIMINAL LAW—MULTIPLE PUNISHMENT UNDER THE ORGANIZED CRIME CONTROL ACT—A NEED FOR REEXAMINATION OF WHARTON'S RULE AND DOUBLE JEOPARDY—*Iannelli v. United States*, 420 U.S. 770 (1975).

Robert Iannelli and seven other petitioners were charged with conspiring[1] to violate and violating 18 U.S.C. § 1955, a federal gambling statute which makes it a crime for five or more persons to conduct, finance, manage, supervise, direct, or own a gambling business prohibited by state law. Each petitioner was convicted of both offenses, and each was sentenced under both counts. On appeal the petitioners argued that conviction of both conspiracy and the substantive offense was precluded by Wharton's Rule, a common law exception to the principle that a substantive offense and a conspiracy to commit the offense are distinct and separately punishable. The Court of Appeals for the Third Circuit affirmed the convictions, finding that a recognized exception to Wharton's Rule permitted prosecution and punishment for both offenses.[2] The United States Supreme Court, in a 5–4 decision, affirmed on different grounds. It held that Wharton's Rule is only a judicial presumption which was rendered inapplicable by a congressional intent to permit punishment for both the conspiracy and the substantive offense. *Iannelli v. United States*, 420 U.S. 770 (1975).[3]

This note analyzes the Court's finding of a legislative intent to overcome the presumption of Wharton's Rule. It will further analyze Wharton's Rule and its justifications, and the principles of double jeopardy as applied to the multiple convictions in *Iannelli*. It will be

1. The general conspiracy statute under which this action was brought, and under which petitioners were convicted, 18 U.S.C. § 371 (1970), provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10.000 or imprisoned not more than five years, or both.

2. United States v. Iannelli, 477 F.2d 999 (3d Cir. 1973).

3. After the Supreme Court's affirmance of his conviction, Robert Iannelli tried unsuccessfully to move for a new trial on the grounds that newly discovered evidence showed that a court-ordered electronic surveillance had been conducted without authorization by the Attorney General of the United States. The Court of Appeals for the Third Circuit affirmed the lower court's denial of the motion on the grounds that such evidence could have been discovered at the time of trial, and that there was no excuse for the lack of diligence in pursuing such an avenue of inquiry. United States v. Iannelli, 528 F.2d 1290 (3d Cir. 1976).

argued that the Court failed to weigh carefully (a) the doctrinal justifications for the law of conspiracy, and (b) the principle of prohibiting multiple punishment for the same offense, which underlies both Wharton's Rule and the double jeopardy concept. The note concludes that the Court erred in finding a congressional intent to overcome this presumptive rule of statutory construction and that the multiple convictions should have been held invalid as violative of double jeopardy principles.

I. BACKGROUND

A. Purpose and Scope of 18 U.S.C. § 1955 (1970)

In 1970 Congress enacted the Organized Crime Control Act[4] for the purpose of striking at large syndicated gambling operations. Title VIII of the Act contains two provisions. The first makes it a federal felony to obstruct enforcement of local laws against gambling by means of bribery and corruption of government officials.[5] The second provision, section 1955, provides:[6]

> a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years or both.
> b) As used in this section—
> 1) "illegal gambling business" means a gambling business which
> (i) is a violation of the law of a State or political subdivision in which it is conducted;
> (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and
> (iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

The purpose of this section was to diminish substantially the flow of revenue from large scale gambling operations to organized crime.[7]

4. Act of Oct. 15, 1970, Pub. L. No. 91–452, 84 Stat. 922.
5. 18 U.S.C. § 1511 (1970). *See* note 36 *infra*.
6. 18 U.S.C. § 1955 (1970).
7. *See* S. REP. No. 91–617, 91st Cong., 1st Sess. 71 (1969). The Senate Report estimated that such illegal wagering resulted in an annual profit of approximately $6 to $7 billion for organized crime. *Id.* Congress found that this supply of money was a major source of organized crime's power. H.R. REP. No. 91–1549, 91st Cong., 2d Sess. 1 (1970).

Through subsection (b), Congress assumed jurisdiction to legislate in an area which traditionally belonged to the states. The legislation, aimed only at operations large enough to affect the national interest,[8] makes the gambling operation a federal crime when there are five or more participants. This requirement of multiple participants led prosecutors to bring two-count indictments against defendants, charging violation of both section 1955 and 18 U.S.C. § 371, the general conspiracy statute. Prior to the *Iannelli* decision, the various federal courts disagreed as to whether a defendant could be convicted of both the conspiracy to violate the act and the substantive offense itself. The pivotal question in these cases and in *Iannelli* was whether Wharton's Rule prohibited the use of conspiracy charges to enhance punishment for violation of section 1955.[9]

B. The Relation of Wharton's Rule to the Law of Conspiracy

An understanding of the proper application of Wharton's Rule requires an initial recognition that the law of conspiracy[10] serves two separate doctrinal functions. "In the first place, it is an inchoate crime, complementing the provisions dealing with attempt and solicitation in reaching preparatory conduct before it has matured into commission of a substantive offense."[11] Secondly, conspiracy law "is a means of striking against the special danger incident to group activity. . . ."[12] The underlying rationale of the latter is that a conspiracy to commit an offense presents a danger to society which is greater than commis-

8. *See* S. REP. No. 91-617, 91st Cong., 1st Sess. 73-74 (1969).

9. *E.g.*, the Rule does not apply: United States v. Pacheco, 489 F.2d 554 (5th Cir. 1974); United States v. Bobo, 477 F.2d 974 (4th Cir. 1973); United States v. Becker, 461 F.2d 230 (2d Cir. 1972).

The Rule does apply: United States v. Hunter, 478 F.2d 1019 (7th Cir.), *cert. denied*, 414 U.S. 857 (1973); United States v. Whitaker, 372 F. Supp. 154 (M.D. Pa. 1974); United States v. Greenberg, 334 F. Supp. 1092 (N.D. Ohio 1971); United States v. Figueredo, 350 F. Supp. 1031 (M.D. Fla. 1972), *rev'd sub nom.* United States v. Vaglica, 490 F.2d 799 (5th Cir. 1974).

10.

> [C]onspiracy is a combination between two or more persons formed for the purpose of doing either an unlawful act or a lawful act by unlawful means. . . . Although a more precise definition of conspiracy may be difficult, it is useful to keep in mind that conspiracy, like most other offenses, requires both an act and an accompanying mental state. The agreement constitutes the act, while the intention to thereby achieve the objective is the mental state.

W. LAFAVE & A. SCOTT, CRIMINAL LAW 454-55 (1972) (footnotes omitted).

11. MODEL PENAL CODE § 5.03, Comment at 96 (Tent. Draft No. 10, 1960).

12. *Id.* at 96.

sion of the substantive offense itself.[13] Collective action toward an antisocial end is thus considered a greater risk to society than individual action toward the same end. In this regard, a commonly advanced justification for conspiracy is its importance as a prosecutorial weapon in combating organized crime.[14]

Under certain circumstances, however, a conspiracy conviction will not serve any of these functions, and therefore cannot be justified. First, certain crimes cannot be committed in the absence of a concert of action.[15] In this situation the requisite conspiracy poses no greater threat than commission of the substantive offense. Secondly, if an individual is convicted of the substantive offense which was the object of the conspiracy, there obviously is no opportunity for preventative intervention or application of the inchoate offense rationale. Moreover, the substantive conviction serves to control organized crime.

Accordingly, Wharton's Rule[16] forbids separation of the substantive offense and the conspiracy to commit that offense where concert of

13. This rationale was expressed by Justice Frankfurter in the following manner:

> [C]ollective criminal agreement—partnership in crime—presents a greater potential threat to the public than individual delicts. Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality. Group association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish. Nor is the danger of a conspiratorial group limited to the particular end toward which it has embarked. Combination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed. In sum, the danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise.

Callanan v. United States, 364 U.S. 587, 593–94 (1961) (footnote omitted). *See also* Pereira v. United States, 347 U.S. 1, 11 (1954); Pinkerton v. United States, 328 U.S. 640, 644 (1946); Note, *The Conspiracy Dilemma: Prosecution of Group Crime of Protection of Individual Defendants,* 62 HARV. L. REV. 276, 283 (1948).

14. *See, e.g., Developments in the Law—Criminal Conspiracy,* 72 HARV. L. REV. 920, 922 (1959), where it is stated that in the setting of organized criminal activity, conspiracy

> serves to nullify the opportunities for escaping punishment that the defendant might otherwise obtain from the anonymity of his position within a group or from the difficulty of tracing his precise contribution to any given substantive offense. In other cases it facilitates the intervention of the law at a stage when antisocial consequences can still be prevented.

15. Justice Powell, writing for the majority in *Iannelli,* listed the classic Wharton's Rule offenses which require concert of action as adultery, incest, bigamy, and dueling. 420 U.S. at 782.

16. The Rule is named after Francis Wharton, who first identified and developed the principle from American case law. In *Iannelli,* 420 U.S. at 780, n.12, Justice Powell noted that the origin of the Rule is based in a Pennsylvania decision, Shannon v. Commonwealth, 14 Pa. 226 (1850), which Wharton first reported in the sixth edition of his treatise in 1868 as based on principles of double jeopardy.

action, essential to conspiracy liability, is a necessary element of the substantive offense. The Rule has been defined as providing:[17]

> When to the idea of an offense plurality of agents is logically necessary, conspiracy which assumes the voluntary accession of a person to a crime of such a character that it is aggravated by a plurality of agents, cannot be maintained.

The justifying rationale of the Rule is three-fold. The principal justification is based on legislative intent: where cooperative action is a prerequisite to commission of the substantive offense, it is presumed that the legislature necessarily considered that element in establishing the maximum punishment for the offense.[18] Secondly, where legislation seeks to prevent the very evil which conspiracy law addresses, more than one conviction for the same offense is unnecessary and arbitrary.[19] Finally, if the conspiracy involves no more than the planned commission of the single substantive offense, the "increased danger" rationale of conspiracy is rendered unpersuasive and no longer justifies the added sanction of a conspiracy prosecution.[20]

In applying the Rule to the circumstances of a particular case, certain inherent limitations confine the range of its use. First, the crime must have been committed.[21] Secondly, concerted action must be logically necessary, *i.e.*, the substantive offense must not have been ca-

17. 2 F. WHARTON, CRIMINAL LAW § 1604, at 1862 (12th ed. 1932). The most recent edition of Wharton's treatise states the Rule in simplistic terms: "An agreement by two persons to commit a particular crime cannot be prosecuted as a conspiracy when the crime is of such a nature as to necessarily require the participation of two persons for its commission." 1 R. ANDERSON, WHARTON'S CRIMINAL LAW AND PROCEDURE § 89, at 191 (1957).

18. *See* 1 R. ANDERSON, WHARTON'S CRIMINAL LAW AND PROCEDURE § 89, at 194 (1957), stating: "By this view it is contended that when punishment is provided for all necessary participants in the substantive crime, a legislative intent is shown that no further punishment by way of conspiracy is intended." *See also* 1 WORKING PAPERS OF THE NAT'L COMM'N ON REFORM OF FEDERAL CRIMINAL LAWS 334 (July 1970); Note, *Gambling Under the Organized Crime Control Act: Wharton's Rule and the Odds on Conspiracy*, 59 IOWA L. REV. 452, 457 (1973).

19. The second justifying rationale advanced is derived from the first, focusing upon the evil which the law seeks to prevent, rather than the punishment imposed. It is stated by Justice Douglas in the following manner: "Wharton's Rule teaches that where the substantive crime itself is aimed at the evils traditionally addressed by the law of conspiracy, separability should not be found unless the clearest legislative statement demands it." Iannelli v. United States, 420 U.S. at 793 (Douglas, J., dissenting) (footnote omitted).

20. *See* text accompanying notes 88–91 *infra*.

21. 2 F. WHARTON, CRIMINAL LAW § 1604 (12th ed. 1932). *See, e.g.*, United States v. Zeuli, 137 F.2d 845 (2d Cir. 1943) (L. Hand, J.). This limitation on the Rule avoids the result of immunizing conspiratorial preparation and overlooking the function of conspiracy as an inchoate crime.

pable of commission by one of the conspirators alone.[22] Finally, a "third party" exception renders the Rule inapplicable where the conspiracy involves more persons than are required for commission of the substantive offense.[23]

II. APPLICATION OF WHARTON'S RULE TO SECTION 1955

Section 1955's definition of "illegal gambling business" requires that five or more persons "conduct, finance, manage, supervise, direct, or own" such a business.[24] Therefore, concert of action is clearly a necessary element of the crime,[25] and Wharton's Rule should apply unless precluded by one of its exceptions or overridden by a clear

22. *See, e.g.*, 1 R. ANDERSON, WHARTON'S CRIMINAL LAW AND PROCEDURE § 89, at 192–93 (1957). It has also been said that the Rule does not apply where the law defining the substantive offense does not specify any punishment for one of the participants. *Id.* The reasoning advanced for this exception is that if the statute creating the substantive offense provides a punishment for only one of the actors the offense is capable of commission by only one of the parties and no longer requires concert of action. *See* Vannata v. United States, 289 F. 424 (2d Cir. 1923). This reasoning is faulty because concert of action is a necessary fact which cannot be made less necessary by making it nonculpable on the part of one of the actors. Furthermore, the original Wharton's Rule case, Shannon v. Commonwealth, 14 Pa. 226 (1850), involved such a statute; the act prohibiting adultery provided punishment only for the party who was married. *See* Helfrich v. Commonwealth, 33 Pa. 68 (1859).

23. A defendant in such a case may be convicted of both the conspiracy and the offense. For example, two persons who commit adultery cannot be convicted for both adultery and conspiracy to commit adultery. However, when a third person, *e.g.*, a "matchmaker," conspires with a man and a woman for the commission of adultery by the latter two, the exception applies and all three are guilty of conspiracy. *See* 1 R. ANDERSON, WHARTON'S CRIMINAL LAW AND PROCEDURE § 89, at 193 (1957); State v. Clemenson, 123 Iowa 524, 99 N.W. 139 (1904).

24. *See* text accompanying note 6 *supra*.

25. The Government's argument in *Iannelli* was based primarily upon the position that § 1955 did not require conspiracy for its commission, making Wharton's Rule inapplicable:

> The defendant himself, of course, must be shown to have guilty knowledge or criminal intent, but it is no part of the proof required by Section 1955 that the other participants in the business also had criminal intent or that they were party to a corrupt agreement with the defendant.

Brief for Respondent at 28, Iannelli v. United States, 420 U.S. 770 (1975).

This argument created some division of opinion in the lower federal courts. But even those courts which applied the "third party" exception to Wharton's Rule, *see* notes 45–49 *infra*, accepted the fact that conspiratorial concert of action was a requisite element of the offense. *See, e.g.*, United States v. Becker, 461 F.2d 230, 234 (2d Cir. 1972). Those courts which held the Rule to be applicable clearly found the conspiracy to be a necessary element. For example, the court in United States v. Greenberg, 334 F. Supp. 1092, 1095 (N.D. Ohio 1971) stated: "[T]he offense is one involving the element of *concursus necessarius*. That is, it is absolutely necessary that there be a

manifestation of congressional intent to authorize separate punishments.[26] The following discussion establishes that the *Iannelli* Court's finding of a clear congressional intent to authorize multiple punishments is unwarranted; that section 1955 does not fall within one of the traditional exceptions to the Rule's application; and that Wharton's Rule should be modified so as to accommodate the doctrinal justifications of the law of conspiracy.

A. Legislative Intent

The *Iannelli* majority held Wharton's Rule inapplicable because Congress had manifested "a clear and unmistakable legislative judgment that more than outweighs any presumption of merger between the conspiracy to violate § 1955 and the consummation of that sub-

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plurality of parties and it is necessary that there be concerted action among them."

Concert of action seems to be necessary because the five or more persons involved must "conduct, finance, manage, supervise, direct, or own" the gambling business. The conspiratorial agreement need not be explicit but may be implicit in the fact of collaboration or the existence of other circumstances. *See* W. LAFAVE & A. SCOTT, CRIMINAL LAW § 61, at 457–58 (1972). Under a normal reading of the statute, five or more persons could not "conduct" a gambling business without mutual cooperation. Thus, the statute reaches only those persons who conduct the operation without knowledge of and in conjunction with other persons involved. *Accord,* United States v. Guzek, 527 F.2d 552, 557 (8th Cir. 1975).

The original language of the act provided that the offense involve "five or more persons who *participate* in the gambling activity." S. REP. No. 91–617, 91st Cong., 1st Sess. 17 (1969) (emphasis added). Whether a requirement of "participation" would require concerted action is not clear, but the more explicit definition in the final version of § 1955 does. As Judge (now Justice) Stevens stated in United States v. Hunter, 478 F.2d 1019, 1025–26 (7th Cir. 1973):

> [B]oth alleged offenses require "the mutual cooperation" or the "reciprocal action" of a plurality of persons. . . . [T]he conspiracy covers nothing more than the substantive crime committed by the conspirators. There is no suggestion that the proof of intent required for the violation of § 1955 is any different from the evidence required to sustain the charge of conspiracy.

See also United States v. Whitaker, 372 F. Supp. 154 (M.D. Pa. 1974). For two court decisions which accepted the proposition that § 1955 does not require conspiratorial activity of five or more persons, see United States v. Pacheco, 489 F.2d 554 (5th Cir. 1974); United States v. Bobo, 477 F.2d 974, 987 (4th Cir. 1973).

The majority in *Iannelli* touched on this issue only tangentially when it stated that agreement was "not contained in the statutory definition of the § 1955 offense." 420 U.S. at 785 n.17. But the absence of agreement from the statutory definition of the crime does not remove it as a necessary element in the commission of the crime. As the dissent pointed out: "The enterprises to which Congress was referring in § 1955 cannot, as a practical matter, be created and perpetuated without the agreement and coordination that characterize conspiracy." *Id.* at 795 (Douglas, J., dissenting).

26. As the Rule is primarily based on a presumption of legislative intent, it may be rebutted where the legislature clearly expresses an intent to permit both prosecutions and convictions. *See* note 18 and accompanying text *supra.*

stantive offense."[27] Wharton's Rule was found to have validity "only as a judicial presumption to be applied in the absence of legislative intent to the contrary."[28] This statement indicates that the Rule should apply unless it is shown that the legislature intended otherwise.[29]

The Court did not consistently adhere to this standard, however. After analyzing the Act's legislative history, the Court departed from its earlier declaration of the Rule's presumptive validity, and stated: "Had Congress intended to foreclose the possibility of prosecuting conspiracy offenses under § 371 . . . we think *it would have so indicated explicitly*."[30] This position completely shifts the burden from requiring the prosecution to show clear legislative intent to rebut the Rule's presumptive applicability, to presuming that the Rule does *not apply* unless the legislature "explicitly" indicated that it should. This standard, if extended beyond the instant case, could effectively abolish Wharton's Rule as a viable doctrine in criminal law.

The Court did not make explicit which of its two enunciated standards was the basis for its decision. It stated, however, that the legislative intent to permit multiple convictions "more than outweighs any presumption of merger,"[31] thus acknowledging the Rule's continued viability but leaving undefined its weight and scope. It is assumed for the purposes of this discussion that the Court used the former standard, requiring legislative intent to overcome the presumptive applicability of the Rule.[32]

27. 420 U.S. at 791. It is interesting to note that the Government's brief conceded that Wharton's Rule would apply to § 1955 if concert of action were a necessary element of the § 1955 offense. Indeed, no lower federal court which considered the question prior to *Iannelli* used the majority's analysis of legislative intent to rebut the presumption of Wharton's Rule. *But cf.* United States v. Pacheco, 489 F.2d 554 (5th Cir. 1974) (stating that the jurisdictional requirement of § 1955 was unrelated to the criminal character of the conduct involved). *See* notes 40–42 and accompanying text *infra*.

28. 420 U.S. at 782.

29. No legislature has ever enacted legislation to alter or abolish the Rule. The majority statement here indicates that, at the minimum, the Rule still operates as a rebuttable presumption. The dissent's position was that the Rule should not be overcome "unless the clearest legislative statement demands it." *Id.* at 793 (Douglas, J., dissenting). Yet, the relative weight to be given the presumption does not seem to be the determinative factor in distinguishing the two opinions. Rather, the dissent simply found *no* congressional intent to nullify the Rule.

30. 420 U.S. at 789 (emphasis added).

31. *Id.* at 791.

32. After enunciating the two completely different standards, the Court stated that "there simply is no basis for relying on a presumption to reach a result so plainly at odds with congressional intent." *Id.* at 790–91. It thus appears that the Court did use, at least in name, the presumption of the Rule's applicability. The result of the case is

There is no indication that Congress, in enacting Title VIII, ever considered the precise question of whether both a conspiracy conviction and a conviction for violation of section 1955 could be maintained. Thus, a judicial finding of legislative intent to permit multiple punishment must be by implication. In this regard, the applicable principle of statutory construction states that courts must strictly construe penal statutes against the state and may not enlarge their scope by implication.[33]

An analysis of the Act and its history reveals little to help determine whether Congress intended to authorize multiple punishment. The Court's finding of a clear intent to rebut the Rule was based on three factors. First, from a congressional purpose to strike strongly at syndicated gambling,[34] the Court inferred a clear intent to permit conviction for both conspiracy and violation of section 1955. Convicting the defendants for violation of the substantive offense, however, adequately fulfills the purpose of prohibiting the gambling enterprises of organized crime. The addition of a conspiracy conviction based on the same conduct that results in the section 1955 conviction does not serve to promote the elimination of illegal gambling; it merely affords an additional form of punishment to be administered according to the discretion of the prosecutor or the judge.[35] Secondly, the Court fur-

easier to explain, however, if the opinion is analyzed in terms of the standard which requires explicit intent for the Rule to apply.

33. Where there is doubt as to what the legislature meant, the least severe construction should be applied. For Supreme Court decisions applying this rule of construction so as to avoid multiple convictions, see note 74 *infra*. *See generally* E. CRAWFORD, THE CONSTRUCTION OF STATUTES 453–66 (1940); H. BLACK, CONSTRUCTION AND INTERPRETATION OF THE LAWS 451–56 (2d ed. 1911).

34. Congressional intent to expand the attack against organized crime is apparent from the Senate Report on the bill:

> A more effective effort must be mounted to eliminate illegal gambling. In that effort the Federal Government must be able not only to deny the use and facilities of interstate commerce to the day-to-day operations of illegal gamblers—as it can do under existing statutes—but also to prohibit directly substantial business enterprises of gambling, and the attendant corruption of State law-enforcement officials.

S. REP. No. 91-617, 91st Cong., 1st Sess. 73 (1969).

35. Under such circumstances it would be preferable to create a strong inference that the multiple statutes are only to allow alternative means of prosecution.

Double punishment is not the only problem facing defendants charged with violating § 1955 and the conspiracy statutes. The addition of the conspiracy count may place a defendant at a distinct procedural disadvantage, and gives the prosecutor an advantage he would not normally have.

> By means of evidence inadmissable under usual rules the prosecutor can implicate the defendant not only in the conspiracy itself but also in the substantive crimes of his alleged coconspirators. In a large conspiracy trial the effect produced upon the jury by the introduction of evidence against some defendants may result in conviction for all of them, so that the fate of each may depend not on the

ther maintained that a conspiracy count could be added to the substantive offense because Congress, aware of the conspiracy-substantive offense distinction, chose to use "conspiracy" to define a section 1511 violation but not a section 1955 offense.[36] This emphasis on the statutory language overlooks the action prohibited by section 1955: any group of five or more persons which "conducts, finances, manages, supervises, directs or owns" an illegal gambling business, must have conspired to do so.[37] Thus, although not explicitly defined as such, conspiracy is a necessary element of the substantive offense,[38] and Wharton's Rule should apply.[39]

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merits of his own case but rather on his success in disassociating himself from his codefendants in the minds of the jury.

Developments in the Law—Criminal Conspiracy, 72 HARV. L. REV. 920, 922 (1959) (footnotes omitted). *See also* Wechsler, Jones & Korn, *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy, Part Two*, 61 COLUM. L. REV. 957, 959 (1961).

36. 18 U.S.C. § 1511 (1970). This section accompanied § 1955 in the Organized Crime Control Act of 1970 as Title VIII—Syndicated Gambling. It provides in part:

> (a) It shall be unlawful for two or more persons to conspire to obstruct the enforcement of the criminal laws of a State or political subdivision thereof, with the intent to facilitate an illegal gambling business if—
>
> (1) one or more of such persons does any act to effect the object of such a conspiracy;
>
> (2) one or more of such persons is an official or employee, elected, appointed, or otherwise, of such State or political subdivision; and
>
> (3) one or more of such persons conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business.

Subsection (b) provides the same definition of "illegal gambling business" as used in § 1955. *See* note 6 and accompanying text *supra*.

37. *See* note 25 *supra*.

38. The presumption should therefore exist that the legislature considered the conspiratorial element of the offense in fixing the punishment. The maximum sentence for violation of § 1955 is a $20,000 fine and five years imprisonment. *Iannelli* permits the additional sentencing for conspiracy under the general conspiracy statute, 18 U.S.C. § 371 (1970), which carries a maximum sentence of a $10,000 fine or five years imprisonment, or both. Thus, a person who violates § 1955 faces the possibility of receiving a $30,000 fine and 10 years in prison.

The fact that the defendant's activity falls within the prohibition of two statutes does not indicate intent on the part of the legislature to provide multiple convictions. As one commentator has stated:

> The mere existence of two statutory offenses does not establish that the legislature intended each to be independently convictable and punishable when both are committed in a single course of conduct. It is just as likely that the legislature intended only to provide two avenues of prosecution or create alternative classes of wrongdoers differentiated by gradations in punishment.

Note, *Twice in Jeopardy*, 75 YALE L.J. 262, 312 (1965).

39. The Court's own definition of the Rule would indicate its applicability here:

> Wharton's Rule applies only to offenses that *require* concerted criminal activity, a plurality of criminal agents. In such cases, a closer relationship exists between the conspiracy and the substantive offense because *both* require collective criminal activity. . . . [T]he Rule supports a presumption that the two merge when the substantive offense is proved.

420 U.S. at 785–86 (emphasis in original).

Finally, the majority argued that the definitional requirement of "five or more persons" was intended only as a jurisdictional element of the offense, and should not act to merge the conspiracy and the substantive offense into a single crime.[40] It is undoubtedly true that the definitional elements of "illegal gambling business" were intended to activate federal jurisdiction only with regard to large gambling enterprises.[41] It is also true, however, that there is no federal crime under the act unless five or more persons conspire to conduct an illegal gambling business. The "jurisdictional" argument may accurately reflect the purpose of the definitional requirement, but it does not indicate any congressional purpose to authorize multiple convictions. Thus, for the purposes of determining whether the Rule applies, it should make no difference that the requirement is "jurisdictional."[42]

It is submitted that the Court in *Iannelli* did not soundly demonstrate that Congress intended to provide for multiple convictions under section 1955.[43] Rather, it transformed the general purpose of

40. 420 U.S. at 789–90.

41. The Senate Report expressed concern with those enterprises which are "so substantial as to be a matter of national concern." S. REP. No. 91–617, 91st Cong., 1st Sess. 73 (1969).

42. This jurisdictional argument was resolutely rejected in United States v. Whitaker, 372 F. Supp. 154 (M.D. Pa. 1974). The Government argued that group activity is not part of the crime itself, but was only included in the statute as a ground for federal jurisdiction. The court disagreed:

> While the 5 person requirement may be jurisdictional, unless it is met no federal crime has been committed. . . . And the effect of the requirement of § 1955 that five or more persons engage in the gambling business is necessary to build into the crime a conspiracy by the five participants to conduct a gambling business. Without such an agreement, the intent of the defendants to engage in the gambling business could not be found.

Id. at 160. *See also* United States v. Hunter, 478 F.2d 1019, 1026 (7th Cir. 1973).

43. There are several other factors which the Court seemed to weigh. First, Congress provided for sentence enhancement in Title X of the Act, codified in 18 U.S.C. §§ 3575–78 (1970). This is not applicable to violators of § 1955, however, because enhancement of a sentence under § 3575 requires various procedural requirements including a judge's special finding that the defendant is dangerous.

Another reason Justice Powell advanced for not applying the Rule was that the parties prosecuted for the conspiracy need not be the same persons as those prosecuted for the substantive offense. 420 U.S. at 784. The opinion indicates that because gambling organizations are complex and participants' levels of culpability might vary significantly, prosecutors should have the discretion to bring both counts against some parties but only the substantive count against others. It seems a questionable policy for the Court to endorse the power of a prosecutor to effect multiple punishment against arbitrarily chosen parties to the same collective criminal activity. Although prosecutorial discretion is unavoidable in our criminal procedure, "the compelling reasons for letting the prosecutor allocate his limited resources and determine whether the evidence warrants prosecution do not support his discretion to seek multiple punishment. Nothing about the prosecutor's role makes him fit to pass sentence." Note, *Twice in Jeopardy, supra* note 38, at 305–06 (1965) (footnote omitted). The dissent

the Act—to strengthen the attack against organized crime—into a specific intent to authorize two convictions even though the Act was completely silent on the matter. Thus, the Court seems not only to have created the legislative intent itself, but to have departed from the principle of strictly construing criminal statutes.[44]

B. The Third Party Exception

The Court of Appeals for the Third Circuit had affirmed the multiple convictions in *Iannelli* on the ground that the third party exception to Wharton's Rule applies when more than five persons are indicted both for violation of section 1955 and for conspiracy.[45] Although some federal courts had reached the same conclusion,[46] the United States Supreme Court in *Iannelli*, and other federal courts considering the question, have shown this to be a misapplication of the "third party" exception:[47]

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in *Iannelli* strongly rejected the majority's suggestion of permitting the prosecutor to enhance punishment for a § 1955 offense. 420 U.S. at 795.

44. *See* note 33 and accompanying text *supra;* note 80 and accompanying text *infra.* The dissent maintained that "[t]o infer from silence an intention to permit multiple punishment is a departure from the 'presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsh punishment.'" 420 U.S. at 795 (Douglas, J., dissenting), *citing* Bell v. United States, 349 U.S. 81 (1955).

45. United States v. Iannelli, 477 F.2d 999, 1002 (3d Cir. 1973).

46. The major case in this line of reasoning was United States v. Becker, 461 F.2d 230 (2d Cir. 1972), in which seven defendants were indicted for both violation of § 1955 and conspiracy to violate § 1955. The Court of Appeals for the Second Circuit held that the "additional two persons" invoked the third party exception to the Rule, stating:

> [A]s long as the conspiratorial concert of action and the substantive offense underlying it are not coterminous and fewer participants are required for the commission of the substantive offense than are named as joining in a conspiracy to commit it, there is no infirmity in the conspiracy indictment.

461 F.2d at 234. *Becker* was followed in United States v. Iannelli, 477 F.2d 999 (2d Cir. 1973); United States v. Mainello, 345 F Supp. 863 (E.D.N.Y 1972); United States v. Best, 363 F Supp. 11 (S.D. Ga. 1973); United States v. Vigi, 363 F Supp. 314 (E.D. Mich. 1973).

47. Iannelli v. United States, 420 U.S. at 782–83 n.15. *See also* United States v. Greenberg, 334 F Supp. 1092 (N.D. Ohio 1971), where the court held that Wharton's Rule applies to § 1955 prosecutions and dismissed the third party exception, stating:

> [T]he number of parties involved is inconsequential provided that it was the concerted action of all that is involved. This is clearly the situation here, especially as the number fixed by the statute is expressed as a minimum, that is, five or more persons.

Id. at 1095 (citation omitted); *accord,* United States v. Kohne, 347 F Supp. 1178, 1186 (W.D. Pa. 1972).

For commentaries criticizing the *Becker* decision's reasoning *see* Note, *Wharton's Rule and Conspiracy to Operate an Illegal Gambling Business,* 30 WASH. & LEE L. REV.

> By its terms, § 1955 reaches gambling activities involving "five or more persons." Moreover, the legislative history of the statute indicates that Congress assumed that it would generally be applied in cases in which more than the statutory minimum number were involved. . . . It thus would seem anomalous to conclude that Congress intended the substantive offense to subsume the conspiracy in one case [with five persons] but not in the other [more than five].

The Court was correct in concluding that the third party exception does not apply to section 1955 prosecution. Under section 1955, unlike a "matchmaker" in an adultery case,[48] the added element of more than five participants in the agreement amounts to nothing that was not already present in the crime. The "matchmaker" case involves an element completely distinct from the crime of adultery, *i.e.*, concerted conspiratorial action with a third person to commit the offense. In contrast, the additional conspirators in *Iannelli* were not involved in a separate and distinct criminal offense; rather, they were acting in a capacity similar to the other five, as integral participants in a commission of a section 1955 offense. They too could be found guilty of the substantive offense, unlike the adultery "matchmaker." As one district court has stated, "It is not . . . the mere number charged, but rather the nature of the 'extra' defendants which determines the result . . . ."[49] The element of concerted group action is a logical and necessary prerequisite to the commission of the substantive offense by any of the defendants. That there were more than five in the group does not detract from the essential character of the activity as an element of the offense.

C. *Proper Application of the Rule*

Disallowing multiple convictions neither defeats congressional intent in the enactment of section 1955 nor renders the statute ineffective. A conviction under section 1955 alone serves the congressional

613, 621 (1973); Note, *Gambling Under the Organized Crime Control Act*, *supra* note 18, at 463.

48. *See* note 23 *supra*.

49. United States v. Figueredo, 350 F. Supp. 1031, 1035 (M.D. Fla. 1972). The court also stated that the *Becker* decision, discussed *supra* note 46, "rested on a mistaken use of the third party exception," as it implied "that the mere number charged in the indictment takes on a talismanic quality which obviates the application of the Rule." 350 F. Supp. at 1035.

purpose of eliminating a substantial business enterprise of gambling. As this subpart will illustrate, as long as the government is able to punish for the conspiracy where there is no violation of section 1955, disallowing the conspiracy conviction will not deprive law enforcement officials of any weapon needed to combat organized crime.

Prior to *Iannelli,* the federal courts were divided on *how* to apply Wharton's Rule to section 1955. Among those courts which held the Rule applicable,[50] there was a split as to whether the conspiracy indictment should be permitted. Several courts followed the classical formulation of the Rule which forbids the indictment.[51] Such an approach overlooks the inchoate function of the law of conspiracy, however, because it precludes punishment of conspiratorial conduct which does not constitute a substantive violation of the statute.[52] Accordingly, at least one federal court held that a defendant could be indicted for both conspiracy and the substantive offense, but not convicted for both.[53] Both the majority and the dissent in *Iannelli* agreed

50. *See* note 9 *supra.*

51. United States v. Figueredo, 350 F. Supp. 1031 (M.D. Fla. 1972); United States v. Greenberg, 334 F. Supp. 1092 (N.D. Ohio 1971). *See also* United States v. Hunter, 478 F.2d 1019, 1026 (7th Cir. 1973), where Judge Stevens stated: "[E]ven though five or more persons are named in the indictment, a charge of conspiracy to violate § 1955 may not be maintained if it comprehends nothing more than the agreement which those persons necessarily performed by the commission of the substantive offense itself."

The Rule previously had been accepted by the federal courts in its classical form. *See, e.g.,* Gebardi v. United States, 287 U.S. 112, 122 (1932), where the Court stated:

> [W]here it is impossible under any circumstances to commit the substantive offense without cooperative action, the preliminary agreement between the same parties to commit the offense is not an indictable conspiracy either at common law . . . or under the federal statute.

See also United States v. Center Veal & Beef Co., 162 F.2d 766, 770 (2d Cir. 1947) (L. Hand, J.); Pinkerton v. United States, 328 U.S. 640, 643 (1946); United States v. Sager, 49 F.2d 725 (2d Cir. 1931); United States v. New York Cent. & H.R.R. Co., 146 F.298 (S.D.N.Y. 1906).

52. MODEL PENAL CODE § 5.04, Comment at 173 (Tent. Draft No. 10, 1960).

53. United States v. Kohne, 347 F. Supp. 1178 (W.D. Pa. 1972), articulated this modification clearly:

> [I]f a substantive violation of § 1955 is proved, the same concerted action proving this violation cannot be used to automatically convict the defendants of conspiracy under 18 U.S.C. § 371 . . . .
>
> But . . . this does not mean that defendants are entitled to have the conspiracy count dismissed. The general conspiracy statute, 18 U.S.C. § 371, can punish conspiratorial conduct which does not amount to a substantive violation of 18 U.S.C. § 1955.

Id. at 1186. *Cf.* United States v. Iannelli, 339 F. Supp. 171 (W.D. Pa. 1972), where the district court on pretrial motion held that Wharton's Rule applies "only when the wrongdoing is actually committed," and thus the decision on whether the indictment may stand should be determined at the conclusion of the prosecutor's case. *Id.* at 181–82.

upon such a modification of the classic Rule.[54]

This latter approach seems more appropriate, because it satisfies the justifying rationale of the Rule,[55] but does not allow a conspirator to escape all punishment when not convicted for the substantive offense. A conviction for the substantive offense, which requires conspiratorial agreement, should satisfy the social concerns justifying punishment for the conspiracy. It fulfills the group criminality aspect of conspiracy as section 1955 itself is directed to "the special danger incident to group activity."[56] Because the substantive offense has been committed, the inchoate aspect of conspiracy is irrelevant. On the other hand, where no conviction for section 1955 is procured, these social concerns are not satisfied and the inchoate aspect of conspiracy survives to justify the conviction.

III. THE DOUBLE JEOPARDY ISSUE

The *Iannelli* Court stated that Wharton's Rule is not based on principles of double jeopardy.[57] Yet, the Rule is designed to protect

54. The majority opinion stated:

> We do not consider initial dismissal of the conspiracy charge to be required in such a case. When both charges are considered at a single trial, the real problem is the avoidance of dual punishment. This problem is analogous to that presented by the threat of conviction for a greater and lesser-included offense, and should be treated in a similar manner.

420 U.S. at 786 n.18. Justice Douglas stated that the conspiracy "should be charged as a preparatory offense that merges with the completed crime, and considered by the jury only if it first acquits the defendant of the § 1955 charge." *Id.* at 797.

55. *See* notes 18–20 and accompanying text *supra*. The only aspect of this approach which may be criticized is that it gives the prosecution the procedural advantage of introducing evidence that would not be admissible at a trial for the substantive offense alone. *See* note 35 *supra*.

56. *See* text accompanying note 12 *supra*.

57. 420 U.S. at 782. This statement is somewhat puzzling because Wharton's Rule, as first developed, was based specifically on and limited to principles of double jeopardy. *See* F. WHARTON, CRIMINAL LAW 198 (2d ed. 1852) and the case which was the basis of the Rule, Shannon v. Commonwealth, 14 Pa. 226, 227 (1850). Later editions of Wharton's treatise expanded the proposition to its present form. *See* note 17 and accompanying text *supra*. Although the precise foundation of the Rule has never been fully explained by the Court, *Iannelli* is the first case where the Court has said that the Rule is not based at all on double jeopardy principles. The statement is a total reversal of the Rule's original justification.

In fact, even the Government contended that Wharton's Rule is rooted in double jeopardy protection:

> Wharton's Rule . . . properly understood, is simply a specific application to conspiracy prosecutions of the more general rule, rooted in the Fifth Amendment-ment's protection against double jeopardy, that forbids cumulative punishment for any two offenses arising out of the same conduct, where one offense is necessarily included within the other. In such circumstances, it is presumed that Congress in-

against multiple punishment for the same offense, which is one of three constitutional protections guaranteed by the double jeopardy clause.[58] Therefore, because *Iannelli's* conspiracy conviction required proof of no fact which was not also essential to proof of the gambling violation under section 1955,[59] there would seem to be a prima facie case of multiple punishment for the same offense.[60] Confronted with similar situations, several lower courts prior to *Iannelli* used Wharton's Rule to invalidate the conspiracy count.[61] In *United States v Schaefer*,[62] the Court of Appeals for the Eighth Circuit avoided the growing conflict over reliance on the Rule by holding that convictions

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tended the punishment for the greater offense to include punishment for any necessarily included offense.

Brief for Respondent at 9–10, Iannelli v. United States, 420 U.S. 770 (1975).

58. U.S. CONST. amend. V: "[N]or shall any person be subject to the same offense to be put twice in jeopardy of life or limb." The double jeopardy guarantee consists of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal, it protects against a second prosecution for the same offense after conviction, and it protects against multiple punishments for the same offense.

North Carolina v. Pearce, 395 U.S. 711, 717 (1969); Note, *Twice in Jeopardy, supra* note 43, at 265–66. It was not until joinder became a permissible and widespread practice that multiple punishment at the same trial became an issue. Until that time multiple punishment could only result from multiple trials. Nevertheless, the intent to prevent multiple punishment for the same offense is apparent from early constitutional history. James Madison's first proposal of a double jeopardy provision for the fifth amendment stated: "No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offense." 1 ANNALS OF CONG. 433 (1789–91) [1789–1824].

Justice Douglas was the only member of the Court in *Iannelli* who stated that the defendants' conspiracy convictions were violative of double jeopardy principles. 420 U.S. at 792–93.

59. *See* note 25 *supra.*

60. Unlike Wharton's Rule, which is a judicial canon of construction, double jeopardy protection against multiple punishment is a *constitutional* limitation upon the courts. This aspect of double jeopardy is not, however, a constitutional restriction upon the legislature; a clear legislative intent to provide for multiple punishment under § 1955 and the general conspiracy statute would have overcome double jeopardy protections as well as the presumptive application of Wharton's Rule. *See* note 68 and accompanying text *infra.* In such circumstances, the due process clause and the prohibition against cruel and unusual punishments would seem to be the only limitations on legislative power.

61. *See* note 9 *supra.* The reasoning in several of these cases was at times based on double jeopardy considerations as much as on Wharton's Rule. *See* United States v. Kohne, 347 F Supp. 1178, 1186 (W.D. Pa. 1972), holding that because concerted action was a prerequisite to a § 1955 conviction, the same concerted action could not be used to convict the defendants under § 371. In invoking Wharton's Rule, the court stated that the conspiracy violation did not involve proof of a fact which was not also essential to the substantive violation—a double jeopardy test. *See also* United States v. Hunter, 478 F.2d 1019 (7th Cir. 1973), where the court quoted the *Blockburger* test of conspiracy in its Wharton's Rule analysis. *See* notes 69 & 70 and accompanying text *infra.*

62. 510 F.2d 1307 (8th Cir.), *cert. denied,* 421 U.S. 978 (1975) (Douglas, J., dissenting).

for conspiracy to commit a section 1955 offense are in violation of the fifth amendment's double jeopardy prohibition of multiple punishment. The majority opinion in *Iannelli,* however, discusses the double jeopardy issue only by way of footnote.[63] Without discussing the *Schaefer* decision,[64] Justice Powell in dicta indicated adherence to the theoretical "same evidence" test of double jeopardy, which would allow multiple punishment under section 1955. This part discusses the double jeopardy issues raised by the *Iannelli* decision, and concludes that the Court failed to consider adequately the multiple punishment issue. Additionally, two alternative tests are offered to correct the inadequacy of applying the same evidence test to inchoate offenses.

A. Conspiracy and Double Jeopardy

The general rule, as set forth in an established line of Supreme Court cases, is that conspiracy and the substantive offense are distinct and separately punishable crimes.[65] Nevertheless the conspiracy conviction in *Iannelli* does not properly fall within those cases because conspiracy is a necessarily included element of a section 1955 violation.[66] But even when regarded solely as a preparatory offense, the

63. The Court stated:

> The test articulated in *Blockburger v. United States,* 284 U.S. 299 (1932), serves a generally similar function of identifying congressional intent to impose separate sanctions for multiple offenses arising in the course of a single act or transaction. . . . [T]he Court's application of the [*Blockburger*] test focuses on the statutory elements of the offense. If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes. . . . We think the *Blockburger* test would be satisfied in this case. The essence of the crime of conspiracy is agreement. . . . an element not contained in the statutory definition of the § 1955 offense. In a similar fashion, proof of violation of § 1955 requires establishment of a fact not required for conviction for conspiracy to violate that statute. To establish violation of § 1955 the prosecution must prove that the defendants actually did "conduct, finance, manage, supervise, direct, or own all or part of an illegal gambling business." . . .

420 U.S. at 785 n.17 (citations omitted).

64. Certiorari in the *Schaefer* case was denied *after* the *Iannelli* decision. *See* note 62 *supra.*

65. *See, e.g.,* Pereira v. United States, 347 U.S. 1, 11 (1954) (defendants convicted of violation of mail fraud statute, violation of National Stolen Property Act, and conspiracy to commit such offenses); Pinkerton v. United States, 328 U.S. 640, 643 (1946) (defendants convicted of violations of the Internal Revenue Code and conspiracy); United States v. Rabinowich, 238 U.S. 78 (1915) (defendants convicted of violation of bankruptcy act and conspiracy).

66. *But see* American Tobacco Co. v. United States, 328 U.S. 781 (1946), which upheld convictions for monopolization and conspiracy to monopolize. The conspiracy

better view is that a conspiracy to commit an offense is not punishable if the offense has been consummated.[67]

In regard to multiple punishment, the significance of the double jeopardy guarantee is that it serves as a check on the power of the courts and prosecutors to multiply punishment for a single act.[68] It is therefore necessary to examine the most relevant of several tests which have been developed to determine whether multiple convictions such as those which the section 1955 defendants received are in violation of double jeopardy principles.

B. The Same Evidence Test

The test for multiple punishment cited most often is the "same evidence" test of *Blockburger v. United States*.[69] It provides that where conduct constitutes a violation of two separate statutory provisions, the test to determine whether there are one or two offenses is "whether each provision requires proof of an additional fact which the other does not."[70] The application of this test is broad, permitting both convictions if one offense is hypothetically provable by different facts.[71] The same evidence test is based upon theoretical rather than factual distinctions. Any time different statutory provisions are pleaded, it may be argued that different evidence is necessary to prove the separate charges. But where two or more statutes apply to the *same con-*

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to monopolize was a necessary prerequisite to the actual monopolization conviction, but was nevertheless held to be separately punishable.

67. *See* notes 86 & 87 and accompanying text *infra*.

68.

> There is no doubt that the legislature can define offenses to provide explicitly the penalty which will attach to a given kind of conduct. Double jeopardy does not limit the legislature's power in this respect. Rather, it limits the courts' power to cumulate convictions and punishment when the legislature's will is not explicit.

Note, *Twice in Jeopardy*, *supra* note 38, at 302. This limitation on the courts is particularly important in light of the fact that appellate courts have virtually no power to review sentences.

69. Blockburger v. United States, 284 U.S. 299 (1932).

70. *Id.* at 304. *Blockburger* held that one sale of morphine not in or from the original stamped package, and without written order constitutes two separately punishable offenses. In Gore v. United States, 357 U.S. 386 (1958) (5–4 decision), reaffirming the *Blockburger* decision, the Court held that it was not a violation of double jeopardy for a person to be convicted of three crimes, and consecutively sentenced on each count, for a single sale of narcotics. The fact that three statutory provisions covered the transaction was sufficient for the majority.

71. In Iannelli v. United States, 420 U.S. at 785 n.17, Justice Powell's opinion stated that "The Court's application of the test focuses on the statutory elements of the offense," rather than the actual course of conduct or proof used.

duct, and the evidence used to prove one count is also used to prove an additional count, it is not meaningful for a court to say the offenses are separable because they require different evidence.

As applied to conspiracy, the same evidence test would *never* prohibit a conspiracy conviction because the substantive offense requires proof of the completed criminal act whereas the conspiracy does not. Accordingly, use of the narrowly defined test, as recognized in *Iannelli,* would result in a finding that the simultaneous convictions are valid.[72]

The extreme formalism of such an approach is unwarranted.[73] First, as *United States v. Schaefer* noted, there is "no element in the conspiracy which is not present in the completed crime."[74] Thus, while the statutes do not by definition require the same evidence, the evidence used to procure a conviction under section 1955 will always provide sufficient evidence to establish a conspiracy under section 371. In this regard, there is an "identity of offenses"[75] because the same evidence is used to convict and punish the defendants twice for the same offensive conduct.

Secondly, the *Blockburger* case, which established the same evidence test, is not similar to cases of conviction for conspiracy and violation of section 1955 for the following reasons: (a) the statutory

72. Under the *Blockburger* standard, it is apparent that § 1955 "requires proof of an additional fact which the other [§ 271] does not." 284 U.S. at 304. To violate § 1955 the defendants must have conducted, financed, managed, supervised, directed or owned all or part of an illegal gambling business. Only the conspiracy to partake in such action is necessary for a violation of § 371.

This footnote 17 in *Iannelli* is additionally troublesome because it states that the same evidence test serves to identify "congressional *intent* to impose separate sanctions for multiple offenses arising in the course of a single act or transaction" (emphasis added). It is completely unreasonable to attribute to a legislature a conscious decision or intent that each and every statute it passes should be independently and equally applicable to a course of criminal conduct, merely because the requisite statutory elements of an offense can be hypothetically distinguished from other statutes touching upon the same prohibited subject matter. A consistent application of such an approach would require, among other things, that one who has committed an offense also be convicted of attempt, for the same evidence test can distinguish attempt as easily as conspiracy.

73. The theory behind the same evidence test "belongs to the heritage of extreme formalism transmitted to its heirs by 18th century criminal procedure." It was a tortuous attempt to escape the formalism of procedural devices favoring the defendant—devices which no longer pose a threat to the prosecution. Kirchheimer, *The Act, The Offense and Double Jeopardy,* 58 YALE L.J. 513, 528–29 (1940). *See also* Note, *Twice in Jeopardy, supra* note 38, at 270–74 (1965). It should thus be a liberally construed test that is used, if at all, to focus on the evidence presented in a particular case, not hypothetical evidence.

74. 510 F.2d 1307, 1313 (8th Cir.), *cert. denied,* 421 U.S. 978 (1975).

75. Pinkerton v. United States, 328 U.S. 640, 644 (1946).

offenses in *Blockburger* were strict liability crimes[76]—conviction did not depend on the existence of *mens rea,* intent, or agreement; (b) neither offense in *Blockburger* was necessarily included in the other; and (c) *Blockburger* did not involve an inchoate offense committed pursuant to the commission of the substantive offense. Thus, the test, when taken out of its original context and applied to section 1955, proves to be inadequate, because as applied to inchoate offenses, it will always permit multiple convictions.[77] In addition, a necessarily included offense has been a proper exception to the test's applicability.[78]

Furthermore, under the Court's "rule of lenity,"[79] which is the same as the common law rule requiring that penal statutes be strictly construed, doubts concerning legislative intent should be resolved against the creation of multiple units of conviction.[80] The underlying rationale is that the legislature can clearly prescribe the punishment it sees fit for any particular crime, and a person's liberty should be "forfeited only if the legislature has clearly indicated that it should and only to the extent that it has plainly authorized."[81] Absent such a legislative mandate authorizing multiple convictions, the rule restrains courts from multiplying punishment where the harm results from the same physical action.[82] By using this rule of statutory construction, the Su-

76. *See* United States v. Balint, 258 U.S. 250 (1922), which held that the narcotic act involved in the *Blockburger* decision did not require scienter as an element of the offense.

77. The United States Supreme Court has never applied the *Blockburger* test to any case to find that the multiple convictions were impermissible. *See, e.g.,* note 66 *supra. But see* Pereira v. United States, 347 U.S. 1 (1954). Convictions on both the substantive and general conspiracy counts were upheld, but the Court was careful to point out that (1) "Pereira's conviction on the substantive counts does not depend on any agreement," *id.* at 11, and (2) "the charge of conspiracy requires proof not essential to the convictions on the substantive offenses," *id.* at 11–12.

78. *See* Kirchheimer, *supra* note 73, at 529–31; notes 97–100 *infra.*

79. 420 U.S. at 798 (Brennan, J., dissenting).

80. Heflin v. United States, 358 U.S. 415 (1959) (defendant bank robber could not be convicted of both robbery and receiving stolen money); Ladner v. United States, 358 U.S. 169 (1958) (defendant liable for one assault where single discharge from a shotgun wounded two officers); Prince v. United States, 352 U.S. 322 (1957) (crime of entry with intent to rob not cumulatively convictable with the consummated robberty); Bell v. United States, 349 U.S. 81 (1955) (transporting more than one woman at one time in interstate commerce constitutes one violation of the Mann Act). This rule, however, has not always been followed. *See* Gore v. United States, 357 U.S. 386 (1958), *discussed* note 70 *supra.*

81. Note, *Twice in Jeopardy, supra* note 43, at 316.

82. One commentator has gone so far as to characterize the rule as a "constitutionally compelled canon of construction" based on double jeopardy principles, which requires "that in determining the unit of punishment for related offenses, doubts should be resolved against punishing twice for what may be a single offense." *Id.* at 316–17.

preme Court has been able to prevent multiple punishment for the same conduct and thus avoid the presumptive separability inherent in the *Blockburger* test.[83] This practice, however, has also allowed the Court to avoid a thorough analysis of double jeopardy principles as a restraint on the courts' power to impose multiple punishment. The following tests, though not fully embraced by a majority of the Court, serve as a viable alternative to the same evidence test. They serve the dual function of protecting those interests the law is intended to safeguard, and protecting an offender from multiple punishment.

C. *The Preparatory Offense Test*

Where one offense consists only of preparation to commit another offense, the former is not punishable if there is conviction for the latter. This principle is generally recognized for the crime of attempt[84] but has not been embraced by the United States Supreme Court in regard to conspiracy.[85] It has been adopted, however, by several state statutes[86] and the Model Penal Code[87] in order to limit conspiracy convictions.

Application of the preparatory offense test to actions under section

83. *See* note 80 *supra*. In *Prince*, the Court avoided application of the *Blockburger* test by saying that it was not "particularly helpful to us because we are dealing with a unique statute of limited purpose and an inconclusive legislative history." 352 U.S. at 325.

84. *See, e.g.*, R. PERKINS, CRIMINAL LAW 553 (2d ed. 1969).

85. *See, e.g.*, Pinkerton v. United States, 328 U.S. 640 (1946). The lack of recognition of conspiracy as a nonpunishable preparatory offense has been long criticized. For example, in 1949 Kirchheimer stated:

> In logic, there is no reason why conspiracy should not merge into the consummated crime as under the old doctrine of merger. But, for some time, the conspiracy category has been the prosecutor's most cherished device. . . .
>
> None of the legalistic reasons advanced to prove the distinction between conspiracy and consummated crime seem to withstand critical analysis.

Kirchheimer, *supra* note 73, at 518–19.

86. *See, e.g.*, ILL. REV. STAT. ch. 38 § 8–5 (1962); OHIO REV. CODE ANN. § 2923.01(G) (eff. 7–1–76); ORE. REV. STAT. § 161.485(3) (1971); UTAH CODE ANN. § 76–4–302 (1974); WIS. STAT. ANN. § 939.72(2) (1955). These statutes prohibit all multiple convictions for conspiracy and the substantive offense, *irrespective of the conspiracy's scope*. Several other states have similar legislation pending. *See* Note, *Conspiracy: Statutory Reform Since the Model Penal Code*, 75 COLUM. L. REV. 1122, 1181 n.338 (1975).

87. The MODEL PENAL CODE § 1.07(1)(b) (Proposed Official Draft, 1962), states that a defendant may not "be convicted of more than one offense if: One offense consists only of a conspiracy or other form of preparation to commit the other." This approach has been adopted in three states: ARK. STAT. ANN. § 41–105(1)(b) (1976); HAWAII REV. STAT. § 37–109 (Spec. Pamphlet 1972); KY. REV. STAT. ANN. § 506.110 (1975).

1955 would serve to prevent unjustified conspiracy convictions. As previously discussed,[88] a conspiracy charge should only be maintained when it serves one of the recognized functions of conspiracy law. Once the substantive offense has been consummated, additional punishment for conspiracy can only be justified by the existence of a clearly identifiable[89] social threat greater than that posed by the consummated crime.[90] Therefore, where the substantive offense encompasses and protects the same concerns that are threatened by the conspiracy, a conviction for the latter has no purpose other than increasing punishment beyond that prescribed by the legislature. This reasoning illustrates that the addition of a conspiracy charge to a section 1955 conviction is an example of unjustified multiple punishment.

In order to accommodate the argument that a conspiracy with an objective broader than the commission of a specific offense presents an additional danger, the Model Penal Code does not provide for an absolute prohibition of a conspiracy conviction in the event the crime is consummated:[91]

> [T]he limitation of the draft is confined to the situation where the completed offense was the sole criminal objective of the conspiracy. Therefore, there may be conviction of both a conspiracy and a completed offense committed pursuant to that conspiracy if the prosecution shows that the objective of the conspiracy was the commission of additional offenses.

88. *See* notes 11–15 and accompanying text *supra.*

89. The burden of proving this additional distinct threat of the conspiracy must be placed on the prosecution. It is far too easy to invoke the traditional rationale that the danger of conspiracy is not "limited to the particular end toward which it has embarked," but rather "makes more likely the commission of crimes unrelated to the original purpose." Callanan v. United States, 364 U.S. 587, 593–94 (1961). Unless the prosecution demonstrates to the satisfaction of a court that the objective of the particular conspiracy was the commission of additional offenses, the conspiracy should not be punished if the crime has been completed.

90. The inchoate function of conspiracy law cannot be served when the substantive offense, which is the criminal object of the concerted action, has been committed. *See* note 11 and accompanying text *supra.* Assuming conviction for the substantive offense, the rationale for allowing punishment for both conspiracy and the offense that is the objective of the conspiracy is that each is aimed at a separate evil. *See, e.g.,* Callanan v. United States, 364 U.S. 587, 593–94 (1961); United States v. Rabinowich, 238 U.S. 78 (1915). This reasoning is incorporated into the MODEL PENAL CODE's rule on when conspiracy convictions will be allowed, despite conviction for the substantive offense. *See* note 91 and accompanying text *infra.*

91. MODEL PENAL CODE § 1.08, Comment at 32 (Tent. Draft No. 5, 1956).

The Court in *Iannelli,* drawing from conclusions of the Senate Report on the Act, found that "[l]arge-scale gambling enterprises were seen to be both a substantive evil and a source of funds for other criminal conduct."[92] This finding may be true as a general proposition, but it is insufficient to prove that the objectives of any particular conspiracy include the commission of additional offenses.[93] Thus, in the absence of other evidence to show such an objective, a conspiracy charge should be dismissed upon conviction for violation of section 1955.[94] The preparatory offense rationale is gaining increased acceptance among a number of states,[95] and its logic is influencing the development of a new federal criminal code.[96] It is submitted that adoption of this rule by the Supreme Court would prevent unjustified convictions that ensue from *Blockburger* doctrine, including the conspiracy convictions allowed in *Iannelli.*

92. 420 U.S. at 787.

93. The opinion of Justice Powell in *Iannelli* found that large scale gambling activities, which are the object of § 1955, are "likely to generate additional agreements to engage in other criminal endeavors." 420 U.S. at 784. However, this general observation falls far short of establishing that *every* conspiracy to violate § 1955 has objectives beyond the scope of the planned § 1955 offense.

94. Justice Douglas, dissenting in *Iannelli,* stated: "Conspiracy if charged in a § 1955 prosecution should be charged as a preparatory offense that merges with the completed crime, and considered by the jury only if it first acquits the defendant of the § 1955 charge." 420 U.S. at 797. He was not entirely at ease, however, with the Government's ability to charge conspiracy in the § 1955 prosecution. While seeming to accept such a tactic in the above quotation, he further stated: "I would require the prosecutor to choose between § 371 and § 1955 as the instrument for criminal punishment." *Id.* at 792. Whether both counts can be brought simultaneously depends on balancing the procedural disadvantage placed on the defendant by permitting the concurrent conspiracy charge, *see* note 35 *supra,* against the value of the conspiracy sanction in reaching such conduct, *see* notes 51–53 *supra.*

95. *See* notes 86 & 87 *supra.*

96. The Brown Commission's proposed new federal criminal code seemed to fall short of the acceptance of the included offense and preparatory offense rationale of the MODEL PENAL CODE, *see* notes 68 & 70 *supra.* The FINAL REPORT OF THE NAT'L COMM'N ON REFORM OF FEDERAL CRIMINAL LAWS (Proposed Code 1971) (18 U.S.C. § 3204(2)) provides:

> Multiple Sentences. A defendant may not be sentenced consecutively for more than one offense to the extent:
>
> (a) one offense is an included offense of the other;
>
> (b) one offense consists only of a conspiracy, attempt, solicitation or other form of preparation to commit, or facilitation of, the other; or
>
> (c) the offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct.

Thus, while a defendant might be convicted of both conspiracy to violate § 1955 and its violation, he could not be consecutively sentenced for the offenses. The proposal does not prohibit the concurrent prosecution that occurred in Robert Iannelli's case, but subsections (a), (b), and (c) would prevent multiplication of punishment in the context of § 1955. *See* 1 WORKING PAPERS OF THE NAT'L COMM'N ON REFORM OF FEDERAL CRIMINAL LAWS 336–41 (July 1970).

The Comments to this section of the proposed code repudiate the same evidence

D The Included Offense Test

The included offense test provides that one may not be convicted of two offenses when one of them is necessarily included in the other. The test for inclusion has been stated as whether "the proof necessary to establish the greater offense will of necessity establish every element of the lesser offense."[97] Normally this test would not bar a conspiracy conviction, because most substantive offenses do not require conspiratorial action as an element of the offense.[98] Section 1955 of the Organized Crime Control Act, however, does require criminal concert of action amongst five or more persons. Utilization of the included offense test to bar conspiracy convictions under section 1955 would be completely consistent with the theory and legal justification of conspiracy As previously shown, the inchoate function of conspiracy law is irrelevant where there has been conviction for the substantive offense.[99] As for the additional danger rationale, there is no special element of danger present in the conspiratorial activity which is not also necessarily included in the substantive offense itself. Application of the included offense test is not precluded by the rationale of the *Blockburger* decision.[100] Furthermore, if applied to the *Iannelli*-type conspiracy convictions, this test would avoid the unwarranted multi-

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test of *Blockburger* and *Gore* (*see* note 70 *supra*):

> It seems beyond argument that the appropriate sentence and the number of years for which a man shall be punished for an offense is not rationally a function of the number of statutory violations into which his conduct may be parsed by a clever pleader. The Draft, therefore, is careful not to use the *Blockburger* approach and to this extent changes existing Federal law.

Id. at 341. Section 2304(a) of the current version of Senate Bill 1 provides for such a prohibition against multiple punishment. *See* S. REP. No. 94–00, 94th Cong., 1st Sess. 925 (1975).

97 MODEL PENAL CODE § 1.08, Comment at 40 (Tent. Draft No. 5, 1956). The included offense exception to multiple punishment is codified by the MODEL PENAL CODE in § 1.07(1)(a) (Proposed Official Draft, 1962). *See also* DEL. CODE ANN. tit. 11, § 521(c) (1975), which states:

> No person may be convicted of conspiracy to commit an offense when an element of the offense is agreement with the person with whom he is alleged to have conspired, or when the person with whom he is alleged to have conspired is necessarily involved with him in the commission of the offense.

98. *See, e.g.,* Pereira v United States, 347 U.S. 1 (1954), where the defendant was convicted of conspiracy to violate and violation of the National Stolen Property Act, which prohibited transportation of stolen property in interstate commerce.

99. *See* note 11 and accompanying text *supra.*

100. Unlike *Ianelli, Blockburger* involved neither a conspiracy nor a necessarily included offense. *See* notes 76–78 and accompanying text *supra.*. Both the *Schaefer discussed* note 62 *supra,* and *Hunter* decisions, *discussed* note 25 *supra,* in utilizing the *Blockburger* test, incorporated the necessarily included offense rationale to disallow convictions for conspiring to violate § 1955. *Accord,* Thomas v. State, 353 A.2d 240 (Md. App. 1976).

ple convictions allowed by the same evidence test. Such a result would be in accordance with the double jeopardy principles.

The Court of Appeals for the Seventh Circuit, however, has held in *United States v. Jeffers,*[101] that *Iannelli* makes the necessarily included offense test inapplicable for "complex statutory crimes," and instead establishes a new double jeopardy approach toward such crimes. In *Jeffers* the defendant was convicted of both a continuing criminal enterprise under section 848 of the Comprehensive Drug Abuse Prevention and Control Act of 1970,[102] and a conspiracy to distribute narcotics. The substantive offense required the same concert of action that constituted the conspiracy and the court indeed found that conspiracy was a necessarily included offense.[103]

The court stated that prior to *Iannelli,* conviction for both the greater and lesser included offense was prohibited.[104] It then acknowledged that "[f]or offenses derived from the common law and for simple statutory crimes," this rule is still valid and important, because "[i]t would be totally improper for society after it had chosen the proper degree of censure and punishment for an individual" to obtain another conviction for the same conduct.[105] But for "complex statutory crimes," the court held that the included offense test was not applicable. Instead the court stated that *Iannelli* had transformed *Blockburger* into a test of legislative intent.[106] Such an analysis has several

101. 532 F.2d 1101 (7th Cir. 1976). *Iannelli* has also been followed in United States v. Pezzino, 535 F.2d 483 (9th Cir. 1976).

102. 21 U.S.C. § 848 (1972). Subsection (b) defines the offense in the following manner:

> (b) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if—
>
> (1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and
>
> (2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—
>
> (A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and
>
> (B) from which such person obtains substantial income or resources.

103. 532 F.2d at 1106.

104. *Id.* at 1109.

105. *Id.* at 1109–10.

106. *Id.* at 1109. The result of characterizing *Blockburger* "as a tool of statutory construction rather than a double jeopardy decision," *id.,* could mean either: (a) anytime Congress enacts two statutes that theoretically require different evidence, a court will infer an intent that each be separately punishable, or (b) the court abandoned the same evidence test and simply will look for legislative intent that there be multiple punishment.

The *Jeffers* court may have misconstrued the *Iannelli* footnote 17 dealing with

weaknesses. The court neither defined "complex statutory crimes," nor explained why it would not also be "totally improper for society after it had chosen the proper degree of censure and punishment for an individual" who commits a complex statutory crime to inflict multiple punishment. In addition, the court ignored *Schaefer,* the only decision which has squarely faced the double jeopardy issue.[107]

The court in *Jeffers* went on to find a congressional intent to authorize multiple punishment for both the substantive offense and conspiracy, because the offenses "are directed at quite different results."[108] The purpose of conspiracy law was found to be aimed at the evil of collective criminal agreement,[109] whereas the purpose of continuing criminal enterprise was found to be "to punish and take [offenders] out of circulation."[110] As illustrated earlier,[111] however, once the substantive offense has been committed, conviction solely under the collective criminal agreement statute will serve to punish for the requisite conspiratorial action and take offenders out of circulation. Congress intended a harsh sanction for such criminals, but it is provided by section 848 of the Act.[112] To infer a legislative intent to permit multiple punishment under two statutes solely from a legislature's desire to sentence criminals heavily for violation of one of the statutes is an abusive exercise of statutory construction. It is to be presumed that the legislature, in deciding upon the punishment for violating a particular statute, considered all the elements of the offense in setting the

Blockburger. The Supreme Court clearly adhered to a strict theoretical same evidence test which would allow both convictions even if one offense was necessarily included in the other. *Jeffers* indicates that *Blockburger* does not say this, but rather recognizes the included offense test. *Compare* 420 U.S. at 785 n.17 *with* 532 F.2d at 1109.

107. *See* notes 62–64 and accompanying text *supra*. Contrary to the implication of the court's statement in *Jeffers* that the *Iannelli* Court decided the double jeopardy issue, the petitioners in *Iannelli* did not challenge their convictions on the basis of the fifth amendment guarantee against double jeopardy, but only on the basis of Wharton's Rule. *See* Brief for Petitioner, Iannelli v. United States, 420 U.S. 770 (1975).

108. 532 F.2d at 1110.

109. *Id.* For a more complete discussion of the purpose of the law of conspiracy see notes 11–15 and accompanying text *supra*.

110. 532 F.2d at 1110.

111. *See* notes 11–15 and accompanying text *supra*.

112. 21 U.S.C. § 848(a) provides:

> (a) (1) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in paragraph (2); except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine of not more than $200,000, and to the forfeiture prescribed in paragraph (2).

allowable punishment. The fact that a statutory scheme is "complex" should not deprive a defendant of protection from multiple punishment.

IV. CONCLUSION

Study of Title VIII of the Organized Crime Control Act reveals that Congress intended to proscribe a particular course of conduct rather than its elements. The *Iannelli* Court erred in finding a congressional intent to separate the elements of the offense and authorize separate punishment for each, thereby rebutting the presumed applicability of Wharton's Rule. It further failed to address adequately the double jeopardy principles prohibiting multiple punishment for the same conduct. A closer examination by the Court of the doctrinal underpinnings of conspiracy and the prohibitions of multiple punishment should result in a judicial change of course. It is unfortunate that the only present movement to abolish the judicially created *Blockburger* rule is in Congress and in the state legislatures.

The soundest approach for the Court to follow would be a replacement of the same evidence test with the necessarily included offense and preparatory offense tests. This approach restricts the courts' ability to cumulate convictions for a single course of criminal conduct, while providing a workable standard that is not subject to the various interpretations and manipulations of the "same evidence" test. Furthermore, it preserves both the doctrinal justifications for conspiracy as a criminal offense and the objectives sought to be accomplished by the substantive offense.

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