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Criminal Law - Conspiracy - Wharton's Rule - Organized Crime Control Act of 1970

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as a remedial measure and would inhibit courts from making state policy in the form of permanent legislative apportionments.

David R. Johnson

CRIMINAL LAW—CONSPIRACY—WHARTON'S RULE—ORGANIZED CRIME CONTROL ACT OF 1970—The Supreme Court of the United States has held that separate convictions for conspiracy to commit and completion of a federal gambling offense are not subject to the presumption of merger created by Wharton's Rule because Congress intended to retain each offense as an independent weapon in combating organized crime.

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

In the fall of 1970, United States Attorney General Mitchell authorized wiretaps on the telephones at the Robert E. Iannelli residence in suburban Pittsburgh, Pennsylvania.¹ The evidence gathered was used to indict Iannelli and several others on charges of conspiring to violate and violating § 1955 of Title 18,² a federal gambling statute which outlaws combinations of five or more persons to conduct, finance, manage, supervise, direct or own a gambling business prohibited by state law. One of defendants' pretrial motions urged dismissal of the conspiracy count brought under §

1. *United States v. Iannelli*, 339 F. Supp. 171, 174 (W.D. Pa. 1972).

2. 18 U.S.C. § 1955 (1970). This section of the Organized Crime Control Act of 1970 imposes upon violators a fine not in excess of \$20,000 and/or imprisonment for not more than five years. As used in § 1955, an "illegal gambling business"

(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 \$20,000 in any single day.

Id.

Title 18 of the United States Code defines an illegal gambling business in § 1955 as meaning, *inter alia*, one which has a gross revenue of \$20,000 in any single day. This is a misprint, as the Statutes at Large report the requirement for gross revenue in any single day at \$2,000. Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 803, 84 Stat. 937. In 18 U.S.C.A. § 1955 (Supp. 1976), the figure reported is \$2,000. The Supreme Court listed the requirement at \$2,000 but inaccurately cited the United States Code for this purpose. *Iannelli v. United States*, 420 U.S. 770, 772 n.2 (1975).

371 of Title 18³ because it duplicated the charge under § 1955. Acknowledging commission of a substantive offense is generally separate and distinct from a conspiracy to commit the offense,⁴ the defendants claimed Wharton's Rule should be applied to merge the two in this case;⁵ the motion was denied. Iannelli was convicted and sentenced under both counts.⁶ The Court of Appeals for the Third Circuit affirmed, finding no merger on the basis of a recognized exception to Wharton's Rule pertaining to the number of participants involved in the crime;⁷ there was no possible application of Wharton's Rule, because a § 1955 violation required a minimum of five participants and more than five were charged in the indictment.⁸ The Supreme Court granted certiorari⁹ to resolve conflicting

3. 18 U.S.C. § 371 (1970). This statute provides in pertinent part: "If two or more persons conspire . . . to commit any offense against the United States . . . 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." *Id.*

4. *Pinkerton v. United States*, 328 U.S. 640, 643 (1946) (convictions for conspiracy to violate and several substantive violations of the Internal Revenue Code).

5. *United States v. Iannelli*, 339 F. Supp. 171, 181 (W.D. Pa. 1972). For a discussion of Wharton's Rule see text accompanying notes 31-49 *infra*.

6. Iannelli was also convicted under 18 U.S.C. § 1302 (1970) for mailing gambling paraphernalia, and under 18 U.S.C. § 1342 (1970) for using a fictitious name for the purpose of conducting unlawful bookmaking activities by means of the Postal Service. Each petitioner was fined and sentenced to imprisonment and a subsequent term of probation on the § 1955 charge, and an additional probationary period for the conspiracy conviction. Iannelli's second probationary sentence was as long as that imposed for the substantive violation and was to be served concurrently. Petitioner's Brief for Certiorari at 4-5, *Iannelli v. United States*, 420 U.S. 770 (1975).

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

8. In *United States v. Becker*, 461 F.2d 230 (2d Cir. 1972), *remanded on other grounds*, 417 U.S. 903 (1974), the Second Circuit viewed Wharton's Rule as a problem of numbers. Section 1955 required involvement of five persons; Wharton's Rule was limited to cases involving only the exact number of parties necessary to the commission of the substantive offense. Since seven persons were involved in the conspiracy, the third person exception prevented application of the Rule. Citing *Becker*, the Third Circuit held in *Iannelli* that Wharton's Rule could not be applied to § 1955 violations where more than five persons were charged in the indictment. 477 F.2d at 1002. The Fourth Circuit faced a similar issue in *United States v. Bobo*, 477 F.2d 974 (4th Cir. 1973), *cert. denied*, 421 U.S. 909 (1975), where there were eleven indictees. The court did not dwell on the "numbers" aspect, but held Wharton's Rule inapplicable because the substantive offense of gambling involved persons such as bettors who were not participants. Since a gambling business might be operated without the agreement of the required five persons, the conspiracy and operation of the business were not so closely connected as to be inseparable. 477 F.2d at 985-87. In *United States v. Pacheco*, 489 F.2d 554 (5th Cir. 1974), *cert. denied*, 421 U.S. 909 (1975), the Fifth Circuit held that Wharton's Rule prevented prosecution for conspiracy only where more than one party was necessary to perform the basic crime. The court concluded the operation of an illegal gambling business did not require concert of action; the requirement of five or more persons was purely jurisdictional. 489 F.2d at 558-59.

views among the circuits as to whether the Rule applied to violations of § 1955.¹⁰

Justice Powell, speaking for five members of the Court, felt Iannelli and the other petitioners were properly convicted for conspir-

While the Second, Third, Fourth and Fifth Circuits found Wharton's Rule inapplicable in § 1955 cases, other courts drew the opposite conclusion on similar facts. In *United States v. Hunter*, 478 F.2d 1019 (7th Cir.), *cert. denied*, 414 U.S. 857 (1973), the court reversed the conspiracy convictions of two defendants found guilty of conspiring to violate and violating § 1955. Fourteen defendants were initially indicted as joint participants in the gambling operation; after commencement of the trial, charges against one defendant were dismissed and eleven others pleaded guilty. Thus only two were tried and found guilty on both charges. The court stated that the two offenses could not be adequately distinguished on the basis of the number of persons charged in the indictment. The charge of conspiracy to violate § 1955 encompassed nothing more than a necessary agreement among those committing the substantive offense; a fair interpretation of congressional intent indicated the two crimes merged. The court believed this decision was consistent with the general rule that conspiracy is a crime separate from the individual substantive offense, since under the facts the two charges were identical. 478 F.2d at 1026.

The Supreme Court could have based its conclusion in *Iannelli* on the third person "numbers" exception to Wharton's Rule. This would have permitted separate punishment even if § 1955 had been construed to require proof of guilty knowledge and design among each of at least five participants so their conspiracy would necessarily be within the substantive crime. The indictment charged that 25 persons had conspired to conduct an illegal gambling business, and the jury found eight of those persons guilty of the conspiracy and of its substantive aim. *United States v. Iannelli*, 339 F. Supp. 171 (W.D. Pa. 1972). Even if § 1955 were read as necessarily including a five-person conspiracy, it would not necessarily include an eight-person conspiracy; since the larger combination presents a greater danger to society, separate punishment for the conspiracy could be justified. *See, e.g., United States v. Becker*, 461 F.2d 230 (2d Cir. 1972). However, the fact that an arbitrary number of participants is required for jurisdictional purposes should not be the basis for a superficial identification of § 1955 offenses with traditional Wharton's Rule crimes. The proper application of Wharton's Rule should depend on the terms of the statute itself and the policy justifications underlying the Rule, not upon whether 5, 8 or 25 persons were charged in the initial indictment for the substantive offense.

9. *Iannelli v. United States*, 417 U.S. 907 (1974).

10. *See note 8 supra*. There was also confusion as to whether the prosecution might charge both offenses if the jury was instructed that a conviction for the substantive crime precluded conviction for conspiracy. The classic formulation of the Rule required dismissal of the conspiracy indictment before trial. 2 F. WHARTON, CRIMINAL LAW § 1604, at 1862 (12th ed. 1932). One district court faced with dual charges of conspiracy to violate and violation of § 1955 dismissed the indictment. *United States v. Greenberg*, 334 F. Supp. 1092 (N.D. Ohio 1971). Under similar circumstances, the district court in *United States v. Whitaker*, 372 F. Supp. 154 (M.D. Pa. 1974) applied Wharton's Rule and granted acquittal on the conspiracy count. Since that court was bound by the Third Circuit's reliance on *Becker* in the *Iannelli* decision, *see note 8 supra*, it utilized the "numbers" rationale; however, the opinion clearly followed the Seventh Circuit in *Hunter* when it concluded the conspiracy contained the same elements as the completed crime. The court distinguished *Iannelli* and *Becker*, where the indicted participants numbered more than the five required by § 1955; since only five participants were involved in the gambling business in *Whitaker*, Wharton's Rule barred a conspiracy

acy and for violating § 1955.¹¹ The Court closely scrutinized Wharton's Rule, including its origin and rationale, development, and current applicability.¹² Since it was presumed Congress had knowledge of common law principles existing at the time the legislation was passed, the Court concluded Congress intended to maintain the distinction between conspiracy and its target crime¹³ unless Wharton's Rule provided an exception. The Rule applied only as a judicial presumption in the absence of express contrary legislative intent.¹⁴ It emerged when conspiracy law was forming¹⁵ and applied to offenses such as adultery, incest, bigamy and dueling, which involved agreement among persons who were the only participants in the substantive offense and thereby directly realized all its consequences. The application of Wharton's Rule was justified in these classic cases on grounds that commission of the crime involved no danger to society beyond that inherent in the offense itself.¹⁶ These so-called "victimless crimes" did not primarily injure third parties and all required concert of action.¹⁷ The Rule did not apply, however, where the substantive crime could be committed without a conspiracy; in such case, a collective criminal agreement would enhance the danger to the community. The conduct proscribed by § 1955 did not fit the traditional mold for Wharton's Rule offenses, as large-scale gambling activities likely would generate additional criminal conduct and entice participation of others who were not parties to the conspiracy or the substantive

conviction. *Id.* at 159. These differences among the lower federal courts were understandable; they faced an ill-defined but firmly established common law rule and a recent statute of broad scope which had not yet been authoritatively construed.

11. *Iannelli v. United States*, 420 U.S. 770 (1975). Justice Powell delivered the opinion of the Court, in which Chief Justice Burger and Justices White, Blackmun and Rehnquist joined. Justice Douglas filed a dissenting opinion, in part II of which Justices Stewart and Marshall joined. Justice Brennan filed a separate dissent.

12. See text accompanying notes 31-49 *infra*.

13. *Callanan v. United States*, 364 U.S. 587, 594 (1961) (separate consecutive sentences may be imposed for obstructing interstate commerce by extortion and for conspiring to do so, because the two are separate crimes).

14. 420 U.S. at 785-86.

15. Wharton's Rule seems to be an American conception and is not applied in the English courts. Respondent's Brief for Certiorari at 16 n.9, *Iannelli v. United States*, 420 U.S. 770 (1975).

16. See, e.g., *People v. Purcell*, 304 Ill. App. 215, 26 N.E.2d 153 (1940) (Wharton's Rule used to discharge defendants indicted for conspiracy to play cards for money and for completion of same).

17. Comment, *Gambling Under the Organized Crime Control Act: Wharton's Rule and the Odds on Conspiracy*, 59 Iowa L. Rev. 452, 457 (1973) [hereinafter cited as *Gambling*].

offense. Those prosecuted for conspiracy need not also be prosecuted for the substantive offense.¹⁸

Since the Court viewed the Rule as an aid to determining legislative intent,¹⁹ Justice Powell examined the basic purpose of the Organized Crime Control Act of 1970.²⁰ The Act was designed to eliminate organized crime in the United States by establishing new penal prohibitions and providing additional methods of dealing with the unlawful activities of organized crime offenders.²¹ The majority felt the Act manifested Congress's clear awareness of the distinct nature of a conspiracy and the substantive offenses that might constitute its immediate end.²² For example, § 3575 specifically concerns persons who enter into conspiracies to engage in patterns of criminal conduct. The definition of "gambling activities" in § 1955, however, makes no mention of "conspiracy" or "agreement," but merely calls for "involvement."²³ The essence of conspiracy is agreement among participants. Wharton's Rule applies only to offenses that *require* concerted criminal activity; the conspiracy and substantive offense are closely related because both require collective criminal conduct. In view of the numerous references to conspiracy throughout the Act, the limited definition in § 1955 was significant; the Act was carefully drawn and would have indicated a merger of §§ 371 and 1955 had that been intended.

Petitioners had argued that since the participation of "five or more persons" was an element of the substantive offense under § 1955, Congress had meant to merge the conspiracy and substantive offense into a single crime. The Court rejected the argument; it saw the "numbers" requirement²⁴ as a restriction on federal intervention

18. 420 U.S. at 784.

19. Legislative intent was emphasized in the test applied by the Court in *Blockburger v. United States*, 284 U.S. 299 (1932), which focused on the statutory elements of an offense and whether each provision required proof of a fact which another did not. The Court felt the test would be satisfied in *Iannelli* since a violation of § 371 requires proof of a conspiracy, which is not essential for conviction under § 1955. 420 U.S. at 785 n.17.

20. Pub. L. No. 91-452, 84 Stat. 922 (codified in scattered sections of 7, 11, 12, 15, 16, 18, 21, 28, 29, 33, 42, 45, 46, 47, 49, & 50 U.S.C.).

21. See 1970 U.S. CODE CONG. & AD. NEWS 1073 (stating the purpose of the Act).

22. 420 U.S. at 788.

23. See note 2 *supra*.

24. See note 8 *supra*.

into areas which were normally matters of state concern by limiting federal criminal jurisdiction to those engaged in illicit gambling of major proportions.²⁵ Thus the majority concluded §§ 1955 and 371 were intended to impose separate sanctions for multiple offenses arising from the commission of a single act.²⁶

Justice Douglas, dissenting on statutory and constitutional²⁷ grounds, argued simultaneous convictions under §§ 371 and 1955 could not stand. He was joined in part by Justices Stewart and Marshall, who felt Wharton's Rule should apply because there was no express justification for the inference that Congress intended to permit simultaneous convictions. Section 1955 was aimed at "syndicated gambling," which raised the same social concerns as conspiracy; as a practical matter, § 1955 could not be violated without the type of coordination which characterizes conspiracy.²⁸ Justice Douglas disputed the Court's suggestion that the conspiracy statute could be used to enhance punishment under § 1955. Congress addressed sentence enhancement in § 3575 of the Act, which authorized augmented punishment for felonies committed by a "dangerous special offender."²⁹ As this section was included to improve the rationality, consistency and effectiveness of sentencing by limiting and guiding sentencing discretion, Justice Douglas felt it improper to infer that § 371 could be used to enhance punishment by authorizing additional conspiracy charges. A scheme to differentiate offenders should be promulgated by Congress, not the courts.³⁰

25. 420 U.S. at 790 n.22, quoting S. REP. NO. 617, 91st Cong., 1st Sess. 73 (1969). Congress was aware of the practical effect of the number limitation: "[Section 1955] will reach only those who prey systematically upon our citizens and whose syndicated operations are so continuous and so substantial as to be a matter of national concern." *Id.*

26. 420 U.S. at 791. The Court added that the decision was not a green light allowing separate convictions in all § 1955 cases. Each was to turn on its own particular facts. *Iannelli* held only that Congress meant to retain the traditional options available to prosecutors and courts. *Id.*

27. U.S. CONST. amend. V was the basis of Justice Douglas' protest on constitutional grounds. It provides in pertinent part: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." *Id.* Justice Douglas felt the double jeopardy clause forbade simultaneous prosecutions under §§ 1955 and 371, because the same evidence was relied upon to establish liability under both statutes. He believed multiple prosecution would give the Government power to increase criminal punishment at its option. 420 U.S. at 792-93 (Douglas, J., dissenting).

28. 420 U.S. at 795.

29. Organized Crime Control Act of 1970 § 1001(a), 18 U.S.C. § 3575 (1970).

30. 420 U.S. at 797 (Douglas, J., dissenting). Justice Douglas suggested the jury might be instructed to defer consideration of the conspiracy charge until after deliberation on the § 1955 charge. This had been done at *Iannelli's* trial, but the instruction had also permitted multiple convictions which the dissenters felt should be reversed. *Id.* at 798. Justice Douglas

Francis Wharton first formulated what has since become known as Wharton's Rule in the second edition of his treatise on criminal law. He reported that in *Shannon v. Commonwealth*,³¹ the Pennsylvania Supreme Court ordered dismissal of an indictment alleging conspiracy to commit adultery brought after the state had failed to obtain conviction for the substantive offense. Wharton indicated the case was limited to principles of double jeopardy.³² The sixth edition of Wharton's treatise stated there was no conspiracy where concert was essential to the substantive offense, but emphasized that the Rule should not be used beyond that class of cases.³³ The current edition states simply that 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.³⁴

The confusion as to application of Wharton's Rule by courts³⁵ suggests a poor understanding of the Rule's relationship to the general theory of conspiracy. The essence of conspiracy is agreement to commit an unlawful act;³⁶ traditionally, it has been considered a crime separate from the completed substantive offense.³⁷ This distinction follows from a belief that criminal combinations pose a

further suggested that in a § 1955 prosecution conspiracy should be charged as a preparatory offense that merges with the completed crime, and should be considered by the jury only if it first acquits the defendant of the substantive crime. *Id.* at 797.

The sole basis for Justice Brennan's separate dissent was his agreement with the other dissenters that ambiguities should be resolved in favor of lenity for the defendant in criminal statutes where Congress has left the task of imputing its undeclared will to the judiciary. As § 1955 was silent on whether punishment for both the substantive crime and conspiracy was intended, doubt should have been resolved in the petitioner's favor. *Id.* at 798 (Brennan, J., dissenting).

31. 14 Pa. 226 (1850).

32. F. WHARTON, CRIMINAL LAW 198 (2d ed. 1852).

33. 3 F. WHARTON, CRIMINAL LAW § 2321, at 78 (6th ed. 1868).

34. 1 R. ANDERSON, WHARTON'S CRIMINAL LAW AND PROCEDURE § 89, at 191 (1957).

35. In *United States v. Bobo*, 477 F.2d 974 (4th Cir. 1973) the court observed that "rather than being a rule, [it] is a concept, the confines of which have been delineated in widely diverse fashion by the courts." *Id.* at 986. In *Iannelli*, Justice Powell admitted that this observation is supported by a study of the history of the Rule's application. 420 U.S. at 776. See note 8 *supra*.

36. W. LAFAYE & A. SCOTT, CRIMINAL LAW § 62, at 471 (1972).

37. See, e.g., *Pinkerton v. United States*, 328 U.S. 640 (1946). Under the early common law, a conspiracy was a misdemeanor which merged into the completed felony. That rule was based on the significant procedural differences between felony and misdemeanor trials. As the procedural distinctions diminished, the merger concept lost its force and eventually disappeared. See generally *Callanan v. United States*, 364 U.S. 587, 589-90 (1961), and sources cited therein.

greater potential threat to the public welfare than individual acts. Concert increases the likelihood that the criminal object will be successfully attained and decreases the probability that the planners will abandon their goal. In addition, concerted action often makes possible the completion of crimes more numerous and complex than those which a criminal could accomplish if working alone.³⁸ For these reasons, Congress has adopted the common law theory and usually imposes independent penalties for the commission of a substantive offense and a conspiracy to commit it.³⁹ This policy has distinct practical consequences for the criminal. A conviction for conspiracy may carry a heavier penalty than the substantive offense at which the conspiracy was aimed.⁴⁰ Moreover, the conspiracy is a completed offense as soon as the parties agree to pursue an unlawful end and one commits an overt act in furtherance of that end.⁴¹ The conspirators may be indicted and punished separately for the conspiracy whether or not the substantive offense has been consummated.⁴² Conviction on both charges gives the criminal a record of two felony convictions.

Wharton's Rule provides a narrow exception to the general principles of conspiracy. In certain offenses an element of the substantive crime is an agreement or conspiracy to commit the act.⁴³ Since the elements of conspiracy—agreement to pursue an unlawful objective plus an overt act—are integral to the substantive crime, it would be impossible to commit the substantive crime without also conspiring to do so. In these instances and in the absence of an indication of contrary legislative intent, Wharton's Rule forbids cumulative punishment for the substantive crime and the conspiracy, as well as prosecution for the conspiracy once the defendant has been acquitted of the substantive crime.⁴⁴

38. *Callanan v. United States*, 364 U.S. 587, 593 (1961).

39. *Clune v. United States*, 159 U.S. 590, 595 (1895) (Congress may separate the conspiracy from the act itself and affix distinct penalties to each).

40. *Id.* This was not the case in *Iannelli*, because the maximum punishment for a violation of § 371 is less severe than for a violation of § 1955. See notes 2 & 3 *supra*.

41. *Gebardi v. United States*, 287 U.S. 112, 121 (1932) (conspiracy to violate the Mann Act).

42. *Callanan v. United States*, 364 U.S. 587, 590 (1961); *Pinkerton v. United States*, 328 U.S. 640, 643 (1946).

43. For example, the crime of dueling is defined as "a combat with deadly weapons engaged in by two persons pursuant to an agreement to do so." 2 R. ANDERSON, WHARTON'S CRIMINAL LAW AND PROCEDURE § 848, at 719 (1957).

44. *Shannon v. Commonwealth*, 14 Pa. 226 (1850).

The application of Wharton's Rule has several limitations. The "third person exception" provides that a conspiracy to commit a Wharton's Rule offense may be punished separately if it contemplated the cooperation of a greater number of parties than was necessary to the commission of the principal offense.⁴⁵ When a criminal combination includes more persons than are required to commit the substantive offense, the dangers of the conspiracy to society may be increased.⁴⁶ Another limitation is the requirement that the substantive crime must have been committed; otherwise conspirators would go unpunished.⁴⁷ Additionally, the Rule will not apply where the substantive offense could have been committed by one person alone,⁴⁸ or where the law defining the substantive crime does not specify punishment for a necessary participant.⁴⁹

Legislatures have acquiesced in the judgments of courts applying Wharton's Rule. Since it has remained unchanged over a considerable period of time, the Rule has become firmly imbedded in both state and federal law.⁵⁰ Unless there is a clear expression to the contrary, it is presumed Congress knew of the existing common law when it drafted legislation. Thus when Congress outlawed certain gambling activities in § 1955, it presumably considered whether the activities proscribed in the substantive offense posed the same threats that the law of conspiracy is normally thought to guard against; if so, Wharton's Rule would merge the two offenses upon consummation of the substantive offense absent contrary legislative intent.⁵¹ Thus the threshold question in *Iannelli* was whether the

45. *Gambling*, *supra* note 17, at 460.

46. *See, e.g., Callanan v. United States*, 364 U.S. 587, 593 (1961).

47. *Gambling*, *supra* note 17, at 458.

48. Courts have frequently refused to apply Wharton's Rule where the substantive offense could be committed by one person alone and conviction does not depend upon proof of a corrupt agreement among the participants. *E.g., United States v. Parzow*, 391 F.2d 240 (4th Cir. 1968) (bribery of a public official); *United States v. Klock*, 210 F.2d 217 (2d Cir. 1954) (misappropriation of bank funds); *United States v. Cordo*, 186 F.2d 144 (2d Cir.), *cert. denied*, 340 U.S. 952 (1951) (receiving stolen goods).

49. For example, a conspiracy conviction for the illegal sale of intoxicating liquor would be sustained when the statute penalizes only the seller and not the buyer. *See also* 1 R. ANDERSON, *WHARTON'S CRIMINAL LAW AND PROCEDURE* § 89, at 193 (1957); *Gambling*, *supra* note 17, at 459-60.

50. *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 955 (1959).

51. *Iannelli* contended that the statutory minimum of five persons must be intentional participants, for if a minimum of five persons wilfully cooperate there must be some agreement. Whatever the nature of the agreement, it was in essence a conspiracy; and Wharton's Rule prevented duplicate convictions for the same act. Under this theory, it was error to submit the conspiracy count to the jury because merger had occurred. Petitioner's Brief for Certiorari at 6-7.

activities defined in § 1955 invoke the same concerns underlying the law of conspiracy. If read literally, the language of § 1955 rebuts the merger presumption because it does not mention collective agreement.⁵² Although the statute requires involvement of five persons, it does not provide that each be an intentional participant in the illegal enterprise. It is sufficient to prove the criminal intent of one person and some involvement by at least four others, however guilty or innocent.⁵³ A conspiracy conviction would require proof of a corrupt agreement, a fact not essential for conviction of the substantive gambling offense; this should preclude applicability of Wharton's Rule.⁵⁴ On the other hand, it might be argued that the language of § 1955 is ambiguous. As a practical matter the activities enumerated in most cases could not be perpetrated without the agreement which characterizes conspiracy. Hence, Wharton's Rule should be applied absent contrary legislative intent.⁵⁵

To either of these arguments, legislative intent was an important factor. As a clear statement of congressional intent was not available, the majority inferred legislative intent to maintain separate punishment for the two offenses from the basic purposes of the Organized Crime Control Act of 1970 and from references to conspiracy in other sections. The Court concluded that if Congress had intended to include the elements of conspiracy in § 1955, it could easily have done so.⁵⁶ Although the Act does use conspiracy convictions as a weapon against large-scale organized gambling,⁵⁷ the dis-

52. See note 2 *supra*.

53. For example, a bookmaker may employ ten students to answer his phones, telling them they are participating in market research assignments and must record each caller's name and the precise number he reports. None of the students is aware the operation entails bookmaking. Assuming the operation violates state law and has sufficient daily gross revenue to come under § 1955, the bookmaker can be convicted of a § 1955 violation because his business "involves five or more persons who conduct . . . part of such business," 18 U.S.C. § 1955 (b)(1)(ii) (1970), without any need for proof of a conspiracy. Respondent's Brief for Certiorari at 28-29.

54. This was the opinion of the majority in *Iannelli*. 420 U.S. at 785 n.17.

55. This was argued by the dissenters. *Id.* at 795 (Douglas, J., dissenting).

56. *Id.* at 789.

57. There is strong national policy against organized gambling on a large scale, as it is reportedly the greatest source of profits for organized crime. PRESIDENT'S COMMITTEE ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: ORGANIZED CRIME 1-2 (1967) [hereinafter cited as ORGANIZED CRIME]. Congress was aware of the impact of illegal gambling on American society when it enacted § 1955. See Note, *Wharton's Rule and Conspiracy to Operate an Illegal Gambling Business*, 30 WASH. & LEE L. REV. 613, 626-27 (1973),

senting opinions pointed out an equally compelling policy consideration: when the will of Congress is to be imputed by the judiciary, ambiguity should be resolved in favor of lenity.⁵⁸ Since it was unclear whether § 1955 affected the ability to prosecute under the general conspiracy statute, the dissenters refused to impute a motivation which would penalize the criminal defendant.

The *Iannelli* decision illustrates the confusion which can result when common law concepts are left to overlap statutory law. Perhaps this confusion can be resolved by examination of the policy justification for Wharton's Rule and the adoption into Title 18 of a provision which will achieve identical objectives. Originally, the Rule was based on the double jeopardy principle that the prosecutor should not be allowed to carve out a necessary element of a crime and make that element another crime simply by calling it "conspiracy."⁵⁹ Punishment for both conspiracy and the consummated crime constituted unfair and unnecessary double punishment.⁶⁰ Currently, the Model Penal Code provides that one may not be *convicted* of both the substantive crime and a conspiracy to commit it.⁶¹ The Code permits prosecution on both offenses, however, so as not to disregard the function of conspiracy as an inchoate crime.⁶² Thus the

citing Hearings on S. 30 and Related Proposals Before Subcomm. No. 5 of the House Comm. on the Judiciary, 91st Cong., 2d Sess., ser. 27, at 87 (1970).

58. See *Bell v. United States*, 349 U.S. 81 (1955) (when Congress had not fixed the punishment for a federal offense clearly, doubt should be resolved against turning a single transaction into multiple offenses).

59. *Vannata v. United States*, 289 F. 424, 427 (2d Cir. 1923) presented this argument in a case involving conspiracy and the substantive offense of selling intoxicating liquor; however, defendant's conviction was affirmed. For a discussion of this idea see W. LAFAYE & A. SCOTT, *CRIMINAL LAW* § 62, at 493 (1972).

60. Cf. *Callanan v. United States*, 364 U.S. 587, 595 (1961). *But see United States v. Bobo*, 477 F.2d 974, 986 (4th Cir. 1973) (since prosecutions for conspiracy and commission of the substantive crime are permissible, double jeopardy can no longer be considered a valid basis for Wharton's Rule).

61. Section 1.07 provides in pertinent part:

When the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if: . . . (b) one offense consists only of a conspiracy or other form of preparation to commit the other

MODEL PENAL CODE § 1.07(1)(b) (Proposed Official Draft 1962).

62. Critics of Wharton's Rule feel it disregards the social function of the crime of conspiracy; the fact that an offense requires concert does not justify immunizing the criminal preparation to commit it. MODEL PENAL CODE § 5.04, Comment (Tent. Draft No. 10, 1960).

Code accomplishes the purposes behind Wharton's Rule and the law of conspiracy.⁶³ Where defendants face a two-count prosecution under §§ 1955 and 371, the purpose of the conspiracy charge would be frustrated if the prosecution were required to choose between the offenses at the outset, since Wharton's Rule only applies when the substantive crime has been consummated⁶⁴ and this will not be determined until the jury has reached a verdict at the conclusion of the case.⁶⁵ If the jury were instructed that it might return a verdict of guilty on only one of the two counts, there would be no double punishment and the underlying purpose of Wharton's Rule would be accomplished.⁶⁶

Experience has shown the most effective legal tool for dealing with organized crime is the prosecution for conspiracy.⁶⁷ This tool can be destroyed through the use of Wharton's Rule in its traditional form. The approach of the Model Penal Code accommodates the interests which engendered each of these concepts and eliminates the difficulties in interpreting or applying the Rule to the statutory offenses in question. Congress should consider the adoption of this approach, as *Iannelli's* narrow holding does little to straighten out the entanglement which has evolved around Wharton's Rule.

Rosemary Kirr

63. Some states have accomplished the same result by passing legislation which bars conviction of more than one offense for conduct designed to culminate in the commission of the same crime. See, e.g., PA. STAT. ANN. tit. 18, § 906 (1973).

64. 2 F. WHARTON, CRIMINAL LAW § 1604, at 1862 (12th ed. 1932).

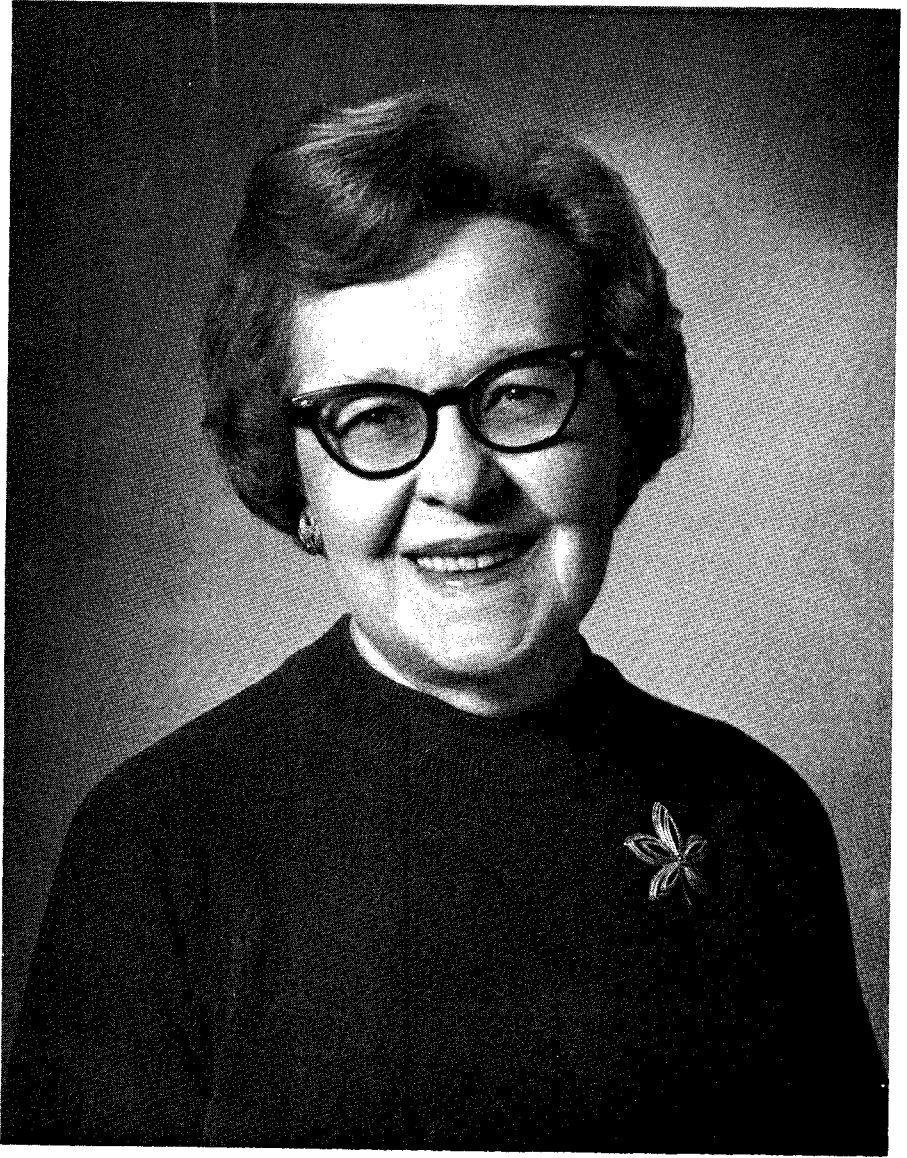
65. *Gambling*, *supra* note 17, at 467.

66. It has been suggested that the trial judge should have discretion to force an election by the prosecutor in the interest of fairness to the defendant. G. WILLIAMS, CRIMINAL LAW § 219, at 684 (1961).

Although *Iannelli* was convicted on both counts, he was not prejudiced by dual punishment because his sentences were concurrent and equal in length. This resulted, however, at the discretion of the trial judge. Under similar circumstances, a defendant's sentence could be greatly increased through the use of consecutive sentences unless the Model Penal Code approach applies. See note 61 *supra*.

However, the approach of the Model Penal Code—to allow indictment on both offenses and instructions to the jury to convict, if at all, on only one count—would not satisfy the argument that the addition of a conspiracy count places the defendant at a procedural disadvantage by giving the prosecutor more latitude in the introduction of evidence. See *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 922 (1959). By virtue of the conspiracy charge, the jury considers the acts and declarations of each as incriminating all, thus aiding conviction of every defendant. Perhaps this is justified by society's interest in controlling organized gambling, which is reportedly the greatest source of profits for organized crime. ORGANIZED CRIME, *supra* note 57, at 1-2.

67. ORGANIZED CRIME, *supra* note 57, at 81.



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