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A CRIMINAL ANTITRUST PROSECUTION OF BOTH PARTNER AND PARTNERSHIP—THE ENTITY THEORY AND DOUBLE JEOPARDY

The fifth amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb."1 Despite the exalted position of this mandate in the Bill of Rights, the federal courts have not always given it the fullest possible effect2 in cases where an unincorporated business enterprise and its individual officers are simultaneously prosecuted for violation of federal regulatory statutes. Even though the activities of the defendant enterprise and the defendant officers may have been essentially "unitary" in nature, the individual defendants may still face multiple prosecution, multiple punishment, or both.3 In such cases, the courts have made short work of the double jeopardy defense and have advanced the following argument in justification: Congress intends federal regulatory statutes to have the broadest possible coverage.4 To this end, Congress expressly makes such statutes applicable to partnerships and other unincorporated associations, as well as to individuals and corporations. The fact that a particular statute is made applicable to both individuals and unincorporated associations, so the argument concludes, is clearly indicative of a congressional intent to punish both an association and its individual members; the double jeopardy defense is consequently foreclosed, even though the net result could well be characterized as judicial imposition of multiple punishment on the individual members.

The courts achieve the twofold objective of insuring broad coverage of regulatory statutes and foreclosing double jeopardy objections by interpreting the statutes as a legislative imprimatur for the "enterprise entity" theory.5 Under this theory, corporations and unincorporated

1. U.S. Const. amend. V. In Ex parte Lange, the Court stated that the prohibition against double jeopardy requires that no man shall "more than once be placed in peril of legal penalties upon the same accusation." 85 U.S. (18 Wall.) 163, 173 (1873). This quotation was paraphrased from Chitty's work on criminal law and indicates that from a historical perspective the purpose of the prohibition was prevention of double punishment. 1 J. Chitty, Criminal Law 452-62 (1894).
3. Id. at 304. The Supreme Court recently recognized the proportions of the problem in Ashe v. Swenson, 397 U.S. 436, 452 (1970) (concurring opinion), where the Court stated: "Given the tendency of modern criminal legislation to divide the phrases of a criminal transaction into numerous separate crimes, the opportunities for multiple prosecutions for an essentially unitary criminal episode are frightening."
4. See text accompanying note 53 infra.
5. For a fuller discussion of the nature of the theory, see Berle, The Theory of Enterprise Entity, 47 Colum. L. Rev. 343 (1947).
associations are deemed to possess a legal personality altogether separate and distinct from that of their individual shareholders, officers and members. Utilization of the entity theory, it is commonly assumed, minimizes the likelihood that individual transgressors or combinations of transgressors will escape a particular statute's regulatory net. For this reason, the courts have from time to time invoked the enterprise entity concept in prosecutions under the Sherman Act.

Section 1 of the Sherman Act provides that

> [E]very person who shall make any contract or engage in any combination or conspiracy [declared by sections 1-7 to be illegal] shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year or by both. . . .

Section 7 of the act provides that: "the word ‘person,’ or ‘persons,’ wherever used [in sections 1-7] shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States [or] the laws of any State. . . .” The general Rules of Construction statute provides that

> [i]n determining the meaning of any Act of Congress, unless the context indicates otherwise, . . . the words ‘person’ and ‘whoever’ include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.

In order to insure complete enforcement of the above provisions, the courts have uniformly held corporations, labor unions, and other unincorporated associations to be separate entities. Such a result is desirable insofar as it insures that violators of the Sherman Act do not go unpunished. Recently, however, the Court of Appeals for the Ninth Circuit has used the entity theory to justify a questionable result in Western Laundry & Linen Rental Co. v. United States.

In Western, five corporations, one partnership and five individuals were charged with a "conspiracy to raise, stabilize, and maintain prices of linen supplies in the Las Vegas, Nevada area; to refrain from soliciting one another's customers; and to allocate business." Among the defendants named in the indictment was Morris Hazan, an indivi-

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8. Id. § 1 (emphasis added).
9. Id. § 7.
11. See text accompanying notes 52-53 infra.
12. See text accompanying note 53 infra.
14. Record, vol. 1, at 58, Western Laundry & Linen Rental Co. v. United States, 424 F.2d 441 (9th Cir. 1970).
dual, and Western Laundry & Linen Rental Co., a partnership of which Hazan was a partner. Both of these defendants were convicted on pleas of nolo contendere. Subsequent to conviction and sentence, defendant Hazan filed a "Motion to Eliminate and Reduce Sentences." The motion was denied. Both on the motion and on the appeal from its denial, the defendant challenged the constitutionality of the Government's attempt to punish him first as a partner and next as an individual. The defendant urged that either the $1000 fine assessed against him or the $25,000 fine assessed against the partnership be eliminated in order to prevent double punishment for the same offense.

In his appellate brief the defendant cited no cases holding that double jeopardy results from a conspiracy conviction of both a defendant partnership as a separate entity and a defendant partner as an individual. He did attempt to argue by analogy from a case involving the self-incrimination clause of the fifth amendment. United States v. Linen Service Council of New Jersey was a proceeding upon motion in the district court to quash subpoenas duces tecum which had been served on two partnerships. The Government had sought to require production of partnership records by serving the subpoenas on the partnerships' principal places of business. The defendant partners contended that their privilege against self-incrimination should not be denied by the simple expedient of declaring a partnership a separate entity and serving a subpoena at its place of business. The court agreed, and accordingly held that for the purposes of the self-incrimination clause a partnership was not a separate entity, and that "[i]f the government requires the production of the documents referred to in the subpoenas directed to the partnerships, the individual partners will be granted immunity. . . ." Relying on Linen Service, the defendant in Western contended that since the prohibition of double jeopardy and privilege against self-incrimination occur in sequence in the text of

15. Id. The single count indictment named "Western Laundry & Linen Rental Co., a partnership" and Morris A. Hazan, "associated with the company." Id. at 3.
16. Id. at 66. The motion was based on Fed. R. Crim. P. 35 which permits the court to reduce sentence within 120 days after sentence is imposed.
17. Record, vol. 1, at 72, Western Laundry & Linen Rental Co. v. United States, 424 F.2d 441 (9th Cir. 1970).
18. Brief for Appellant at 5, Western Laundry & Linen Rental Co. v. United States, 424 F.2d 441 (9th Cir. 1970).
20. Id. at 511. A subpoena for the production of books, papers, or documents may be quashed if compliance would be unreasonable or oppressive. Fed. R. Crim. P. 17(c).
21. 141 F. Supp. at 511. The opinion is abbreviated and a detailed description of the facts was not given.
22. Id. at 513.
the fifth amendment, there must be a relationship between the application of both guarantees to partnerships. Since the subpoena of a partnership was held tantamount to a subpoena of the partner, the defendant reasoned, jeopardy of the partnership is likewise tantamount to jeopardy of the partner.

The Ninth Circuit affirmed the trial court's ruling and thus implicitly rejected the defendant's analogy. A partnership, the court held, is a separate entity for the purposes of prosecution under the Sherman Act. Judge Madden, writing for the majority, first considered whether a partnership is subject to indictment for violation of the Sherman Act. The express provisions of both the Sherman Act and the Rules of Construction led the court to conclude that there is "no justification for reading partnership out of the coverage of the Sherman Act." The court then proceeded to consider the principal issue presented by the defendant: "Does the U.S. Constitutional proscription against double jeopardy and double punishment require that the sentence against [the defendant] be eliminated?"

Starting from the premise that no problem of double jeopardy could have arisen had Western been a corporation, the majority acknowledged that there is not the same clear distinction, between the interest of the partner qua partner, i.e., his interest in the partnership, and his individual interest, that exists in the corporation-stockholder situation. If, under the applicable law, there was any possibility that the defendant might have to pay Western's $25,000 fine, then the court thought that a double jeopardy problem would arise. It would make no difference whether Western actually failed to pay its fine. But the court determined that in no event would defendant Hazan have to pay the fine assessed against Western, for the reason that a conviction of the partnership entity could only lead to a fine levied on the partnership assets, as distinguished from the personal assets of an individual partner. Therefore, the court concluded, no problem of double jeopardy existed. To support its decision, the majority relied heavily on United

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24. Id. at 16.
25. Western Laundry & Linen Rental Co. v. United States, 424 F.2d 441, 444 (9th Cir.), cert. denied, 400 U.S. 849 (1970).
26. Id. at 443.
27. Id. at 443-44.
28. Id. at 444.
29. Id.
30. Id. The court apparently concluded that there was no way a partner would be obligated to pay the claims of the partnership if it were an entity.
States v. A & P Trucking Co., a case decided by the Supreme Court in 1958.

Judge Hufstedler specially concurred in the portion of the majority opinion holding that a partnership is subject to indictment for violations of the Sherman Act, but she dissented from that portion dealing with double jeopardy. Not only did she question whether A & P Trucking Co. could "bear the burden the majority places on it," but she also thought that the defendants' pleas of nolo contendere were equivalent to guilty pleas for waiver purposes, and that therefore the defendant had waived any possible defense of double jeopardy. The third judge on the panel, Judge Ely, concurred in both Judge Madden's principal opinion and in Judge Hufstedler's concurring opinion concerning the defendant's waiver of the double jeopardy defense.

Prior Case Authority Discussed in Western

A careful analysis of Western and A & P Trucking Co. reveals that a judicial desire to insure the broadest possible coverage of the regulatory enactments of Congress is at the heart of both decisions. The defendants in A & P Trucking Co., two partnerships, were charged, as entities, in separate indictments with violations of the Motor Carrier Act, which makes it a criminal offense to violate Interstate Commerce Commission regulations for the safe transportation in interstate commerce of "explosives and other dangerous articles." The A & P Trucking Company was alleged to have broken the regulations by transporting chromic acid without the prescribed markings. The district court dismissed the indictments on the ground that a partnership entity could not be found guilty of violating the act. The Supreme Court reversed.

Section 835 of the act imposes criminal liability on "whoever knowingly" violates the regulations. It does not define the word "whoever." The general Rules of Construction provide that in determining the meaning of any act of Congress, the words "person" and "whoever" include partnerships unless the context of a particular act indi-

32. 424 F.2d at 445.
33. Id. at 445-46. The fact that waiver was an adequate ground to uphold the result may be the reason why certiorari was denied.
34. 424 F.2d at 446.
36. Id. § 832.
38. Id.
39. Sections 831-37 are all similar in this respect.
The majority in *A & P Trucking Co.* decided that the Rules of Construction should guide judicial interpretation of section 835. Accordingly, they held that a partnership is a legal entity, distinct from the individual partners, for the purpose of criminal liability under the act. The court duly noted the common law theory that a partnership is an aggregate rather than an entity, but dismissed it with the remark that Congress has power to change the common law. In light of the Rules of Construction, the court felt compelled to view Motor Carrier Act as an express departure from the common law in this respect. Justice Black dissented, pointing out that at common law a partnership as an entity could not have scienter. Therefore, he argued, the explicit inclusion of the word "knowingly" coupled with the absence of an express definition of "whoever" as embracing partnerships was a "context" indicating a congressional intent that the general Rules of Construction should not apply.

It must be emphasized that double jeopardy was not an issue in *A & P Trucking Co.* The only question there concerned the proper construction of the Motor Carrier Act. The issue was framed in terms of strict construction versus broad construction. Under the strict construction approach adopted by the dissenters, doubts as to the proper construction of the act should be resolved in favor of the defendants. Criminal liability should not be imposed, the dissenters thought, unless Congress expresses a clear and unequivocal intention that a partnership be prosecuted as an entity. Under the broad construction approach, the Court construed the statute to avoid technicalities and maintain consistency in the legislative scheme. Although the former approach may sacrifice uniformity in the law, the latter may encroach upon a defendant's constitutional rights. The Court chose the broad approach because it would give full effect to the manifest legislative intent of Congress to provide uniform coverage.

The *A & P Trucking Co.* decision is probably correct insofar as it holds that partnerships can be liable as separate entities for violations of the Motor Carrier Act. The conclusion that Congress intended to bring partnerships within the purview of the Motor Carrier Act is strengthened by the definition clause of the code, by the prior application of the entity theory to other forms of business, and by the urgent

40. See text accompanying note 10 supra.
42. *Id.* at 126-27.
43. *Id.* at 124.
44. *Id.*
45. *Id.* at 127-28.
46. *Id.* at 124, 126.
policy reasons for extending the coverage of regulations concerning transportation of explosives.

The question whether a partnership can be liable as a separate entity for violations of the Sherman Act has been directly discussed in very few cases, one of which, *United States v. Brookman Co.*, 47 was cited in *Western*. In that case the federal district court held that the inclusion of "corporations and associations" within the Sherman Act definition of "person" brought partnerships within the scope of the act. 48

Central to the decision in *Brookman*, and hence to *Western*, was the earlier case of *United Mine Workers v. Coronado Coal Co.* 49 There the United Mine Workers of America, some of its local officers and other individuals were charged with a conspiracy to restrain and monopolize interstate commerce in violation of sections 1 and 2 of the Sherman Act. 50 The plaintiffs, as receivers for nine other coal companies, brought the action alleging that the defendant union had stifled competition by increasing the cost of production of union coal through unreasonable restrictions and regulations imposed on organized mines. 51 The central issue was whether the union could be sued in tort as a separate entity without joining all the individual union officers. Chief Justice Taft, writing for the majority, declared that sections 7 and 8 of the Sherman Act were intended to allow a labor union with 400,000 members to be sued as a separate entity: "[the] language [of the act] is very broad, and the words given their natural signification certainly include labor unions like these." 52 In a much-quoted passage, the Court continued:

Congress was passing drastic legislation to remedy a threatening danger to the public welfare, and did not intend that any persons or combinations of persons should escape [the Sherman Act's] application. Their thought was especially directed against business associations and combinations that were unincorporated [who did] the things forbidden by the act, but they used language broad enough to include all associations which might violate its provisions recognized by the statutes of the United States or the States or the Territories, or foreign countries as lawfully existing. ... 53

Relying in part on this language from *Coronado Coal*, the federal district court in *Brookman* held that a partnership, like a labor union, should be considered a separate entity for the purposes of pro-

47. 229 F. Supp. 862 (N.D. Cal. 1964).
48. Id. at 864.
49. 259 U.S. 344 (1922).
50. Id. at 346-47.
51. Id. at 348-49.
52. Id. at 392.
53. Id.
secution or suit under the Sherman Act.\textsuperscript{54} The decision was probably correct; the language of the Sherman Act is sufficiently broad to warrant such an interpretation.\textsuperscript{55} However, in neither Brookman nor A & P Trucking Co. was double jeopardy in issue as it was in Western. Although prior decisions have utilized the entity concept to support the conclusion that a partnership is subject to prosecution or suit, it does not necessarily follow that the same concept is equally applicable and equally dispositive in a double jeopardy situation where both the partnership and a partner are prosecuted and punished for what is essentially the same offense. The nature of the entity concept does not require such a result.\textsuperscript{56} The entity concept has been used for various purposes to achieve the desired results, but it must be kept in mind that the concept is a fiction and overextension may be unwarranted. Before demonstrating the point in the context of Western, a closer analysis of the nature of the entity-aggregate distinction is needed.

### Partnership and the Entity Theory

Many problems of partnership liability stem from conflicting legal theories concerning the nature of a partnership. Under the so-called entity theory, the partnership itself is a legal person, separate and distinct from its individual members. Once this theory is adopted, many of the principles of corporation law become applicable to partnerships.\textsuperscript{57} Under the aggregate theory, by contrast, a partnership

\begin{itemize}
  \item \textsuperscript{54} United States v. Brookman Co., 229 F. Supp. 862, 863 (N.D. Cal. 1964).
  \item \textsuperscript{55} For a detailed review of the legislative history of the Sherman Act, see Letwin, \textit{Congress and the Sherman Antitrust Law: 1887-1890}, 23 U. Chi. L. Rev. 221 (1956). In one passage the author suggests that no express intent to include partnerships within the scope of the legislation can be found within the legislative history. "[The Act did] not announce a new principle of law, but [applied] old and well-recognized principles of the common law to the complicated jurisdiction of our State and Federal Government. . . ."
  \item \textsuperscript{56} On the one hand, it satisfied the public demand for an antitrust law. It prohibited trusts in so many words [and] declared illegal 'every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations. . . .'
  \item \textsuperscript{57} "On the other hand, the Act did not go farther than Congress thought it should. . . . Sherman, in his great address, had emphasized that many combinations were desirable. He was sure that they had been an important cause of America's wealth, and he had no intention of prohibiting them. It was only 'the unlawful combination, tested by rules of common law and human experience, that is aimed at by the bill, and not the lawful and useful combination.'" \textit{Id.} at 256. As the author points out, these statements indicate that Congress did not expressly intend to include or exclude partnerships as separate entities. \textit{Id.} at 257. However, decisions such as Brookman have interpolated and fill the gaps left by the legislators.
  \item \textsuperscript{55} See text accompanying notes 59-63 infra.
  \item \textsuperscript{57} \textit{See A. Bromberg, Crane and Bromberg on Partnerships} § 3, at 18-29 (1968).
\end{itemize}
is deemed to be a legal relationship rather than a legal person; the individual partners are legal persons, but the partnership itself is not. The individual partners are considered joint owners of partnership property, and joint obligors and obligees with respect to claims on behalf of or against the partnership.

The conflict between the aggregate and entity theories of partnership has been a source of considerable confusion. Many cases involving partnerships will turn on which of the two theories is applied. Some judicial decisions have rested on the entity theory and others on the aggregate theory. The chameleonic character of legal theorizing concerning the nature of a partnership is well illustrated by cases on workmen's compensation and partners' torts. In most states, a partner is considered not to be an "employee" of the partnership and, therefore, ineligible for workmen's compensation. The reason is that, under the aggregate theory, the partner is an employer and therefore cannot double as an employee. He does not, it is held, belong to the working class for whose benefit the compensation acts were passed. Other states disagree and invoke the entity theory in order to make the partner eligible for workmen's compensation benefits.

What is more, the same courts do not always adhere to the same theory of partnership even in cases arising out of similar fact situations. If, for example, an injured worker is employed by a partnership but is not a partner, the court may be content to apply the entity theory if it

58. The confusion was particularly apparent during the drafting of the Uniform Partnership Act. In Mazzuchelli v. Silberberg, 29 N.J. 15, 148 A.2d 8 (1959), it is reported that: "An early draft by Dean Ames for the Commissioners was based on the entity theory and accordingly defined a partnership as 'a legal person formed by the association of two or more individuals for the purpose of carrying on a business with a view to profits . . . .' Dean Lewis, however, advocated the view 'that with certain modifications the aggregate or common law theory should be adopted.' As . . . revealed, [in the Commissioner's Note] the recommendation of Dean Lewis led to the adoption of a resolution rescinding any prior actions which might limit the committee to 'what is known as the entity theory.' In 1910 the committee and a group of experts recommended that the act 'be drawn on the aggregate or common law theory with the modification that the partners be treated as owners of the partnership property holding by a special tenancy which should be called tenancy in partnership . . . .' In harmony with the decision thus reached, a partnership was defined to be 'an association of two or more persons to carry on as co-owners a business for profit,' as constrained with the Ames proposal of 'a legal person formed by the association of two or more individuals for the purpose of carrying on a business with a view towards the profits.'" Id. at 20, 148 A.2d at 10-11.

59. See A. Bromberg, supra note 57, at 24 for a more thorough analysis.


will help him recover full damages. On the other hand, the same court may apply the aggregate theory if that will give the injured worker access to compensation insurance not otherwise available—as in a case where each member of a partnership or joint venture has coverage, but the firm does not.

From the foregoing examples three general conclusions may be drawn. First, the choice between theories depends for the most part on the desired result: The aggregate theory may be suitable for workmen's compensation cases, but not for partner's tort cases. Second, in order to achieve a desired result, one theory may be used in place of another in successive cases, even though the court has consistently applied the other theory in similar factual situations. Third, as has been said in another context:

[It is not too important whether a specific result . . . is dressed in the garb of the entity concept, provided the fictional personification is confined to the specific result and not used as a premise for syllogistic thrusts elsewhere.]

Western's Reliance on the Entity Theory

In Western the majority started from the premise that if the defendant Western Laundry had been a corporation, in which the individual defendant was a stockholder, the corporation and the individual would have been distinct legal entities. If both the stockholder and the corporation had been prosecuted for a single conspiracy in violation of the Sherman Act, no problem of double jeopardy would have arisen. As its minor premise, the court relied on the decision in A & P Trucking Co., where the Supreme Court treated the defendant partnership as an entity analogous to a corporation, and allowed prosecution of the partnership under the provisions of the Motor Carrier Act "quite apart from the participation and knowledge of the partners as individuals."

To complete the syllogism, the court concluded that in light of the authoritative statement by the Supreme Court in A & P Trucking Co., in which the issue was "closely comparable," the defendant in Western had not been put in double jeopardy. The Supreme Court had, "for the purpose at hand," adopted the entity theory.

The flaw in the courts' reasoning is this: Application of the entity theory in a case like A & P Trucking Co., where the issue was the

65. Western Laundry & Linen Rental Co. v. United States, 424 F.2d 441, 444 (9th Cir.), cert. denied, 400 U.S. 849 (1970).
66. Id. at 445.
67. Id.
scope of a regulatory statute, does not compel its application in Western, where the issue is double jeopardy. The only principle for which A & P Trucking Co. stands is that a partnership can "knowingly" violate the Motor Carrier Act even if the individual partners did not participate in or have knowledge of the violations. Since no individuals were indicted nor was the issue of double jeopardy raised, the A & P Trucking Co. opinion cannot stand for the broad reading given it by the majority in Western.

Even assuming that the A & P Trucking Co. decision does lend some inferential support to the Ninth Circuit's holding in Western, it is far from conclusive on the double jeopardy issue. The double jeopardy doctrine has its own concepts and rules which the court should have taken into account in order to arrive at a balanced result. The court did not discuss the double jeopardy rules in any detail, but instead dismissed the entire issue with the dictum that "the conviction of the entity can lead only to a fine levied on the firm's assets." The rationale behind this dictum is that the entity theory is a double-edged sword. While it treats a defendant partnership as separate from individual partners for prosecution purposes, it protects the co-defendant partners by limiting fines against the partnership to the assets of the firm. Reasoning that a fine assessed against the partnership could not affect a partner's personal assets, the Ninth Circuit concluded that there was no overlap of punishment and hence no double jeopardy was involved.

In summary, it appears that the double jeopardy claim was rejected on two grounds. First, the court relied upon A & P Trucking Co.—a decision which does not deal with the double jeopardy issue. Second, the court invoked the entity theory—a theory which has been shown to be susceptible to overextension. Even though the foregoing discussion suggests weaknesses in Western, it does not demonstrate that the court's reliance on the entity theory was wholly unjustified. It merely points out that the court did not find strong support either in the decisions or in legal theory. It remains to be determined whether or not application of the entity theory was appropriate in Western.

Criticism of the Use of the Entity Theory in Western

Despite possible weaknesses in the court's authority, there are strong arguments which support its result. The arguments stem from three sources: the original broad language of the Sherman Act, the modern decisions which tend towards tighter enforcement of the act's

68. Id. at 445 (Hufstedler, J., concurring).
69. See note 85 infra.
70. 424 F.2d at 444.
provisions, and the growing judicial tendency to apply the entity concept to partnerships.

An initial argument might be derived from the legislative history surrounding adoption of the original language of the act. An in-depth study of congressional records just prior to adoption of the Sherman Act indicates that Congress rejected proposals to include or exclude specific combinations. Instead, the legislators chose broad language in order to make the act more inclusive. On the basis of such language, a court could reason that Congress intended to allow great latitude in the application of remedies. Once the court has made this inference, it may conclude that a partial or total incorporation of the entity concept into the act merely effects the intent of Congress.

A second argument might be based on the trend of decided cases since the act's adoption. The history indicates a steady case by case tightening of enforcement. Early decisions were concerned with the large corporate monopolies and cartels which developed at the end of the 19th century. Later cases involved labor unions, unincorporated associations, and other small business forms. Since the decisions indicate an increasing tendency to apply the Sherman Act to small businesses, a court could argue that a liberal application of remedies is merely coincident with that trend. Without a parallel broadening of the remedial provisions, much of the "bite" of the act would be lost.

A third possible argument is that the theory of partnership has undergone a shift from an aggregate to an entity analysis. At the time of the passage of the Sherman Act, partnerships were for the most part looked upon as an aggregate. There was probably little thought in the minds of the legislators that partnerships would come to be considered entities separate from the individual partners. However, the Uniform Partnership Act has produced a shift in theory; for many purposes a partnership is now treated as an entity. For instance, although the aggregate theory is spelled out for joint and several liability provisions, notions of an entity concept permeate the act in five other critical areas. From this shift in theory, a court could argue

71. See note 55 supra.
75. A. Bromberg, supra note 57, at 16.
76. 6 Uniform Laws Annotated 7.
77. Id. § 15.
78. Id. §§ 8, 10 (property); §§ 40(h), (i), 36(4) (creditors' rights); § 9 (responsibility); §§ 18, 38(1) (internal financial relations); §§ 21-22 (continuity).
that the modern view of partnership permits application of the entity
theory in Sherman Act prosecutions.

The above lines of argument, although persuasive, are not con-
clusive. Neither the legislative history nor the decisions indicate that
a partner should be subjected to a double penalty for having restrained
trade in the operation of his partnership business. Even assuming
double prosecution is justified, this does not mean that a court is war-
ranted in imposing penalties which force an individual to pay two fines.
Quite to the contrary, the decisions discussing the entity concept indi-
cate that the theory will only be applied when the facts indicate a sub-
stantial distinction between the interests of the individuals and those
of the business form. 79 Thus, in the case of a corporation, where the
financial interests of the officers are separate from those of the share-
holders, the courts are disposed to apply the entity theory to ensure that
the act is fully implemented. 80 Likewise, in the case of labor unions,
where financial assets come from union members and are separable
from the financial interests of the union leaders, the courts could also
apply the entity concept. But there appears to be no case, outside of
Western, where a court has applied the entity concept to punish both
the individuals and their business organization where there is a substan-
tial identity of interests. The absence of decisions applying the entity
concept to small businesses may not mean that its application in all
such cases is unwarranted, but it may be indicative of the circumstances
in which courts consider the entity concept appropriate.

It is submitted that the degree to which the interests of the in-
dividual and those of the business form are separate determines
whether the entity theory is appropriate within a particular context.
If the structural and functional organization of the particular business
form indicates that there is no substantial identity of interests, then the
use of the entity theory is appropriate. Conversely, if the court finds a
substantial identity of financial interests, application of the entity
theory is not appropriate.

The point is well illustrated in the case of a labor union. Struc-
turally and functionally a labor union is an institution which involves
more than private interests. It has been a developing institution, and
with its tremendous growth in importance and power, it has come to
be more akin to the corporation than to any other business form.
Partnerships, on the other hand, are not structurally and functionally
approximate to corporations in most instances. Where they are, the

79. Williams v. Hartshorn, 296 N.Y. 49, 69 N.E.2d 557 (1946) (two-man partner-
ship); Carr v. Northern Pac. Beneficial Ass'n, 128 Wash. 40, 221 P. 979 (1924) (un-
incorporated association).

entity theory may be appropriate. Thus in the case of a large partnership, it may be that the identity of financial interest is slight, that structurally and functionally the partnership is akin to the corporation, and that therefore the entity theory is appropriately applied.

In the *Western* decision there is no indication that the court examined the Western Laundry partnership to see if the entity theory was appropriate in light of the financial relationship between the defendant and the firm. Instead, the court categorically classified the partnership as an entity for the purposes of double jeopardy. This approach is not consonant with the entity theory as that theory has been used by the courts. It is suggested that use of the theory in this way prevents the court from critically examining the structural and functional organization of the firm, and the relationship between the financial interest of the partner and that of the partnership. Although sufficient facts cannot be gathered from the court record to completely discredit the entity analysis, the facts do indicate that assets involved did not exceed $50,000, that only a few partners were involved, and that there was probably a substantial identity of interests between the partners’ assets and those of the firm.81 For this reason it seems to follow that Western Laundry was inappropriately classified as a separate entity, and that application of the aggregate theory was in order. Under the assumption that the entity theory was incorrectly applied by the court in *Western*, the remainder of this Note will analyze the double jeopardy considerations which should have been applied to the *Western* situation.

**Disregard of Double Jeopardy Rules**

**Multiple Punishment**

Multiple punishment for the same offense was constitutionally prohibited because the framers feared that judges might otherwise be inclined to impose double punishment for a single legislatively defined offense.82 The apprehension is far from groundless even today, and the prohibition continues to prevent prosecutors and courts from

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82. That the framers were equally interested in preventing punishment is expressed in *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873). "[W]e do not doubt that the Constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it." *Id.* at 173. It has been suggested that substantive jeopardy is a limit on the discretion of the courts and prosecutors and was historically developed for that purpose. Comment, *Twice in Jeopardy*, 75 YALE L.J. 262, 302-08 (1965). This proposition seems well supported by the court's historical view of double jeopardy in *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 168, 170-71, 173 (1873). See also *Ashe v. Swenson*, 90 S. Ct. 1189, 1201 (1970).
imposing multiple punishments for the same offense. As is made clear by the case law on double jeopardy, the rules barring multiple punishment turn on what is meant by "the same offense." If this phrase meant two offenses identical in law and fact, double jeopardy would be a relatively simple matter. But most courts sense that the policy behind the prohibition of double jeopardy embraces closely related or overlapping offenses as well. This insight has led to the formulation of various offense-defining tests which determine, with more or less precision, the limits of multiple punishment.

In the federal system the offense-defining test applied to prevent multiple punishment in a single trial for several offenses is the "same evidence" or "distinct fact" test. Under this test, if each offense requires proof of an additional fact not required by any of the others, then the defendant may be convicted of all offenses charged. In Western the requirements of the distinct fact test would have been satisfied if the count against the partnership involved a different fact than the count against the partner. This does not mean, as might be suggested, that a mere naming of partnership would be a different fact so as to satisfy the test. The test requires different evidential facts, not fictions or conclusions of law created by the court. For instance, if at one time a partner had conspired not as an agent of the partnership but

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83. See, e.g., United States v. Universal CIT Credit Corp., 344 U.S. 218 (1952), where the defendant was charged on a 32 count indictment for violation of three statutory provisions of the Fair Labor Standards Act, but the court refused to find 32 distinct offenses.


85. Basically, two approaches have been used in defining the distinct offense: the evidentiary and the behavioral. The evidentiary approach has three variations. Required evidence tests hold that offenses are the same if elements of both offenses are sufficiently similar. See United States v. Brimsdon, 23 F. Supp. 510 (W.D. Mo. 1938). Alleged evidence tests hold that offenses are the same if there is sufficient similarity between the evidence presented. Columbia v. Buckley, 128 F.2d 17 (10th Cir. 1942). An examination of the above cases reveals that the alleged evidence test falls somewhere between the required and actual evidence tests discussed above. If the allegations are examined with a view to the essential facts it is much like the elements test. If, however, the evidential allegations are considered, it resembles the actual evidence test. The behavioral approach directs its attention to the defendant's conduct rather than the prosecutor's evidence. Likewise, it contains three variations: the act, transaction or intent tests. Compare Worley v. State, 42 Okla. Crim. 240, 275 P. 399 (1929), with Crumley v. City of Atlanta, 68 Ga. App. 69, 22 S.E.2d 181 (1922), and United States v. Adams, 281 U.S. 202 (1930).

86. From the decisions it superficially appears that there are three tests: the "distinct elements" test, the "same evidence" and the "distinct fact" test. However, a close analysis reveals that there is probably little difference among these tests. Compare Harris v. United States, 359 U.S. 19 (1959), with Blockburger v. United States, 284 U.S. 299 (1932), and Gravieres v. United States, 220 U.S. 338 (1911).

solely in his capacity as an individual, this itself would be a fact sufficiently distinct to allow prosecution and punishment of both the partnership and the individual. If, on the other hand, each and every act of conspiracy which the individual defendant committed was in fact committed in his capacity as an agent of his own partnership, then there would be no distinct fact and the double jeopardy claim should be sustained. Since the defendants pleaded *nolo contendere*, the record reflected no evidence on which to apply the distinct fact test. But from the similarity of the indictments alone, it seems fair to infer that *Western* presents a case within the ban of double jeopardy.  

Why did the court in *Western* disregard the distinct fact rule and reject the defendant's double jeopardy claim? The court apparently considered the double jeopardy rules inapplicable not only in cases where a governing statute clearly and unmistakably manifests a congressional intent to impose multiple punishment, but also in a case like *Western*, where the governing statute, though ambiguous, could arguably be interpreted by a court as manifesting such an intent. 

As one commentator has noted, the "primary purpose of Double Jeopardy is to limit the discretion of the courts and prosecutors and not the legislature." The double jeopardy clause does not limit the power of Congress to define offenses and the punishments which will attach. If the Sherman Act contained some such explicit statement as: "A partner shall be punished both in his capacity as an individual and in his capacity as an agent of the partnership," then unquestionably no double jeopardy problem would arise. Double jeopardy does not apply when the legislature explicitly permits multiple punishment, for then the court has no discretion to cumulate punishment; it merely applies the law as written. It is only in the gray area where the legislature's will is not explicit that the double jeopardy rules may operate to limit the courts' power to cumulate punishment. Unfortunately, the courts, fearing interference with the legislative will, have gone to great lengths to find a congressional intent to cumulate punishment. But once the court moves from the situation where an explicit intent to punish cumulatively is apparent on the face of the statute to a situation where the statute is either ambiguous or altogether silent on the point, then the court’s imposition of cumulative punishment may amount to that very exercise of discretionary

88. See notes 15-16 supra.
90. See the discussion written by Justice Frankfurter in the Court's opinion in United States v. Gore, 357 U.S. 386, 392-93 (1958). This statement is, of course, subject to qualification if other constitutional provisions, e.g., cruel and unusual punishment, are violated.
91. See Carlson v. United States, 274 F.2d 694 (8th Cir. 1960).
judicial judgment which the double jeopardy clause was designed to forbid.

Legislative Mandate or Judicial Discretion—United States v. Gore

"Explicitness" of statutory language—and hence of legislative intent—is something that more often than not admits of varying degrees and occasions differences of opinion among reasonable interpreters. Thus in many cases where a court invokes statutory language and legislative intent to justify its imposition of more than one punishment for different offenses arising out of the same transaction, it is rather difficult to say whether the court has acted constitutionally in obedience to an explicit legislative command, or has unconstitutionally cumulated punishment in its own discretion.

The difficulty was well illustrated in United States v. Gore,92 a 1958 Supreme Court decision. In Gore the defendant was convicted on six counts for violating three different sections of federal narcotics law by a single sale of narcotics on each of two different days.93 He was sentenced to three consecutive 5-year terms for each day's sale. The evidence clearly showed that although the distinct fact test was met, each day's sale was a single transaction giving rise to the three offenses charged.94 The defendant had only made two sales, but was charged with two counts of a sale not "in pursuance of a written order" of a person to whom the drugs were sold,95 two counts of a sale not "in the original stamped package,"96 and two counts of concealment and sale of narcotics "knowing the same to have been imported or brought into the United States contrary to law."97 There was no question as to the legality of the multiple convictions, for the violations were defined by Congress as separate offenses. The crucial issue was the legality of the cumulative sentences. The defendant claimed that for all three counts only one sentence could be imposed and moved to eliminate and reduce sentences.98 The motion was denied by the trial court; the court of appeals affirmed.

In the Supreme Court, the defendant argued that Congress had enacted the three statutory provisions in furtherance of a single pur-

93. The first three counts were derived from a sale of 20 capsules of heroin and 3 of cocaine; the last three were derived from a sale of 35 capsules of heroin. Id. at 387.
94. Id.
95. INT. REV. CODE OF 1954, § 4705(a).
96. Id. § 4704(a).
98. 357 U.S. at 388.
pose—to outlaw the sale of narcotics.\textsuperscript{99} Since the defendant had made only one transaction on each of the days involved, he contended that there could be only one punishment for each day’s activities. A divided court held that Congress intended to impose three consecutive 5-year sentences in such a situation. Therefore such a result did not offend the constitutional prohibition against double jeopardy.\textsuperscript{100} Justice Frankfurter explained that Congress could have enacted the following single statute instead of the three provisions:


defendant who sold drugs except from the original stamped package and who sells such drugs not in pursuance of a written order of the person to whom the drug is sold, and who does so by way of facilitating the concealment and sale of drugs knowing the same to have been unlawfully imported, shall be sentenced to not less than fifteen years’ imprisonment. \textit{Provided, however,} That if he makes such sale in pursuance of a written order of the person to whom the drug is sold, he shall be sentenced to only ten years’ imprisonment: \textit{And Provided further,} That if he sells such drugs in pursuance of a written order and from a stamped package, he shall be sentenced to only five years’ imprisonment.\textsuperscript{101}

Justice Frankfurter then asked, “Is it conceivable that such a statute would not be within the power of Congress?”\textsuperscript{102} The obvious negative answer to this rhetorical question suggests that the Court considered a single 15-year sentence imposed under the hypothetical statute as substantially equivalent to the situation in \textit{Gore}, where three consecutive 5-year sentences were imposed for a single transaction in which the defendant violated all of the three existing provisions. And since the single sentence under the hypothetical statute would have been constitutionally permissible, the Court concluded, the three consecutive sentences were likewise permissible. Chief Justice Warren dissented, saying:

Where the legislature has failed to make its intention manifest [in relation to punishment], courts should proceed cautiously, remaining sensitive to the interests of defendant and society alike. All relevant criteria must be considered and the most useful aid will be often common sense. . . . [O]n the basis of . . . the statutes involved . . . the present purpose [of the narcotics laws] is to make sure the prosecutor has three avenues by which to prosecute, and not to authorize three cumulative punishments for the defendant who consumates a single sale.\textsuperscript{103}

The contrasting views of the majority and the dissenters on what intent may be attributed to Congress points up the difficulty in double

\textsuperscript{99} \textit{Id.} at 390.

\textsuperscript{100} \textit{Id.} at 391, 393. The decision was 5-4 with Justices Warren, Brennan, and Douglas dissenting. Justice Black concurred in Justice Douglas’s dissent.

\textsuperscript{101} \textit{Id.} at 392-93.

\textsuperscript{102} \textit{Id.} at 393.

\textsuperscript{103} \textit{Id.} at 394.
jeopardy situations. If Justice Frankfurter's hypothetical single statute were indeed the equivalent of the three statutes involved in Gore, then the congressional intent to impose multiple punishment is explicit and double jeopardy cannot operate. But where such a legislative intent is not explicit, as Chief Justice Warren contended it was not in Gore, it would appear that the Court and not Congress is commanding cumulative punishment. In the former situation the Court is merely obeying the will of Congress; in the latter the Court is exercising its own arbitrary discretion to cumulate punishment. Such an exercise of judicial discretion is precisely what the framers of the Constitution intended the double jeopardy clause to prevent. In a case like Gore, where no explicit congressional intent to cumulate punishment appears either on the face of the statutes or in the legislative history, one is inclined to conclude that sheer judicial timidity—a fear of "limiting the penological power of [Congress]"—impels the court to discover an explicit intent and thereby escape double jeopardy problems.\textsuperscript{104}

Even if we assume the majority was correct in Gore, the case may be distinguishable from Western. First of all, in Gore the defendant was convicted under three separate statutes. It seems reasonable to infer that Congress would have said something had it intended that a person who in one transaction violates all three statutes should receive a unitary noncumulative punishment. Secondly, the three acts of Congress involved in Gore, enacted at different times during the last 50 years, "constitute a network of provisions, steadily tightened and enlarged, for grappling with a powerful, subtle, elusive enemy"\textsuperscript{105}—that is, the narcotics trade. Neither of these factors was present in Western. Western involved only one statute, the Sherman Act. Although a partnership may definitely be convicted as an entity for violations of that act, it is by no means clear that Congress intended punishment of both the partnership entity and its individual members for the same acts committed at the same time. There is nothing in the language or legislative history that clearly mandates such a result. And the Gore decision shows by negative implication that the double jeopardy rules should apply in a case where congressional intent to impose multiple punishment is unclear.

From the foregoing is derived the second major criticism of Western. This criticism is that the court failed to face squarely the double jeopardy issue. Had the Ninth Circuit properly focused on this issue, two factors would have determined its result.

The first factor is the congressional intent to punish cumulatively. If the intent is explicit, then double jeopardy may not operate. If

\textsuperscript{104} Comment, Twice in Jeopardy, 75 Yale L.J. 262, 303 (1965).
\textsuperscript{105} 357 U.S. at 390.
there is no such explicit intent to impose multiple punishment on the defendant, then the double jeopardy issue may arise. The Supreme Court has never spoken directly to this point in antitrust prosecutions of partnerships. The Court has held, however, that where certain forms of businesses are subject to criminal sanctions, the individuals who comprise them may also be punished in order to effectuate the broad coverage intended by Congress. However, as the size of the business involved decreases, the courts will undoubtedly be less disposed to discover a congressional intent to impose multiple punishment. In the case of a small partnership, there is a serious question of whether multiple punishment was intended at all. It is submitted that criminal prosecutions of partnerships are one class of cases where a congressional intent to impose multiple punishment is not explicit, and that the court in *Western* was therefore cumulating punishment. It is just this type of arbitrary judicial action that the double jeopardy guarantee prohibits, and the Ninth Circuit should have employed it to protect the defendant’s constitutional right.

The second factor which the court would have considered would be the “distinct fact” test. If the case had fallen within this offense-defining test, double jeopardy would not have been an issue.

In summary, *Western* may be criticized for two important reasons. First, it was unjustifiable for the Court to rely solely on the entity theory and its application in *A & P Trucking Co.* to reach the conclusion that there was no validity to the double jeopardy claim. Secondly, the failure to focus on the double jeopardy issue introduced imbalance into the delicate relationship between legislative intent and the double jeopardy bar to multiple punishment.

**The Rule of Lenity**

It is apparent that double jeopardy has been insufficient to prevent courts from rendering harsh and arbitrary decisions when legislative enactments do not explicitly provide for multiple punishment in a given situation. *Gore* and *Western* both illustrate that a court can easily justify a result by hiding behind this legislative inexactness. To help control such arbitrary judicial discretion, the Supreme Court has devised a “rule of lenity” to be applied in the single statute case. Under this rule, doubts as to legislative intent should be resolved against the creation of multiple units of conviction. The rule was first applied in *Bell v. United States*, which construed the Mann Act to


create only one unit of conviction even when more than one woman is transported in interstate commerce. Later, in Ladner v. United States, the Court used the rule of lenity to prohibit multiple punishment of a defendant who had injured two officers with one blast from a shotgun. The Court observed that the statute could be read to mean that "there [were] as many "assaults" committed as there [were] officers affected." Neither the wording of the statute nor its legislative history pointed clearly to a definite meaning. Under these circumstances the Court applied the rule of lenity and adopted the more lenient meaning. The Court said:

When choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication.

It would seem that the rule of lenity is in complete accord with enforcement of the double jeopardy limitation. Nevertheless, the lower federal courts have refused to apply the rule when the Supreme Court has not already applied it to the particular statute in question, or when the Supreme Court has implied the opposite result in a case under that statute. The use of the rule of lenity for double prosecution and punishment of corporations and other large business forms is probably precluded by decisions such as Coronado Coal which implemented the Sherman Act's broad coverage. In the case of partnerships and other small forms of businesses, where the congressional intent to punish both the individuals is not so clear, such a rule should be employed to counterbalance the rapidly increasing probability of multiple punishment arising from overlapping or closely related offenses. The rule would merely require that all doubts be resolved in favor of the defendant, and would thus sufficiently individualize prosecutions under the Sherman Act to reach just results. It would require the courts to distinguish carefully between manifest legislative intent and the exercise of arbitrary judicial discretion. In the majority of cases, both the defendant entity and the defendant individual could be prosecuted and punished; thus the broad coverage of the Sherman Act would be preserved. In those unusual cases such as Western where it is not clear that Congress intended that both the partnership and partner be punished, and where there is a substantial identity of the financial interests of the partner and those of the partnership, the court would

110. Id. at 177.
111. Id. at 177-78, quoting United States v. Universal CIT Credit Corp., 344 U.S. 218, 221-22 (1952) (emphasis added).
112. See, e.g., Carlson v. United States, 274 F.2d 694 (8th Cir. 1960).
uphold the defendant's double jeopardy claim. Although this would limit the broad coverage of the Sherman Act slightly, it would preserve the individual defendant's constitutional rights. This solution would also place the entity concept in proper perspective as a fictional concept. As in the case of workmen's compensation, the courts would look through the entity veil whenever multiple punishment seems unwarranted.

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